
ARTICLES

THE ALASKA LANDS ACT'S INNOVATIONS IN THE LAW OF ACCESS ACROSS FEDERAL LANDS: YOU CAN GET THERE FROM HERE

STEVEN P. QUARLES*
AND THOMAS R. LUNDQUIST†

I. INTRODUCTION

The federal government owns vast amounts of land in Alaska and the western states. Development and use of private lands adjacent to federal lands often require access across federal lands. Where a road, transmission line, pipeline, or other right-of-way would cross federal land, the private developer must obtain permission from the federal agency responsible for managing such land. Historically, the federal land-managing agencies routinely granted such rights-of-way. Since the advent of the environmental movement in the 1960's, however, 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").¹

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* Partner, Crowell & Moring, Washington, D.C.; J.D., 1968, Yale Law School; former counsel, Senate Committee on Energy and Natural Resources (where he participated in drafting predecessors to ANILCA); Director, Office of Coal Leasing, Planning and Coordination, Department of the Interior; Deputy Undersecretary of the Interior.

† Associate, Crowell & Moring, Washington, D.C.; J.D., 1977, Harvard Law School; formerly served in the Office of the Solicitor, Department of the Interior (where he participated in drafting regulations implementing ANILCA).

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1. Alaska National Interest Lands Conservation Act ("ANILCA"), Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended in scattered sections of 16 U.S.C., 43 U.S.C., 48 U.S.C.).

This article explores federal land access issues and focuses on ANILCA's innovative access provisions. Part II provides a brief background on the general law of access across federal lands and explains why access issues came to the forefront in ANILCA. In Parts III-VI, this article describes in detail the Alaska Lands Act's access provisions and transportation and utility system ("TUS") routing procedures, as implemented in a 1986 Department of the Interior ("Interior") rulemaking.² Finally, Part VII addresses whether ANILCA's access provisions should be legislatively extended to federal lands in states other than Alaska. Thus, this article examines the extent to which the lament that "you can't get there from here" holds true on public lands in and outside Alaska.

II. BACKGROUND ON THE LAW OF ACCESS ACROSS FEDERAL LANDS

The federal lands are managed by several agencies and for a variety of purposes. In general, each federal land-managing agency has its own statute 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").³ The National Park Service ("NPS") manages those federal lands that have been reserved as part of the National Park System under several statutes.⁴ The Fish and Wildlife Service ("FWS") manages the National Wildlife Refuge System under the National Wildlife Refuge System Administration Act⁵ and related authorities.

The Forest Service, an agency within the Department of Agriculture, is the other major federal landowner. It administers the National Forest System under several statutes.⁶ Some NPS, FWS, BLM, and

2. See 51 Fed. Reg. 31,619 (1986). These ANILCA rules are now codified at 43 C.F.R. pt. 36 (1986). Portions of these rules recently have been challenged in a suit brought by environmental groups. See *Trustees for Alaska v. United States Dep't of the Interior*, No. A87-055 (D. Alaska filed Feb. 9, 1987).

3. 43 U.S.C. §§ 1701-1784 (1982 & Supp. III 1985). Title V of the FLPMA governs right-of-way issuance 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).

4. 16 U.S.C. §§ 1-460 (1982 & Supp. III 1985).

5. 16 U.S.C. § 668dd (1982).

6. See, e.g., 16 U.S.C. §§ 471a-583i (1982 & Supp. III 1985). Rights-of-way across Forest Service lands are generally governed by Title V of FLPMA, 43 U.S.C. §§ 1761-1771 (1982).

Forest Service lands also have been placed in other conservation-oriented land systems, such as the National Wilderness Preservation System⁷ and the National Wild and Scenic Rivers System,⁸ which can further constrain access opportunities.

In general, through the mid-1900's, entry to areas surrounded by federal lands ("inholdings") and rights-of-way across federal lands were routinely granted either because such access was necessary to meet development needs or because it was considered to be part of the public's implied license to use federal lands.⁹ Since the advent of the environmental movement in the 1960s, however, several factors have combined to increase the difficulties in obtaining desired access across federal lands.

First, the government has increasingly dedicated federal land to conservation-oriented purposes. Federal law often significantly restricts access and rights-of-way across lands in the National Park, National Wildlife Refuge, and National Wilderness Preservation Systems. For example, the Wilderness Act virtually precludes motorized access or rights-of-way across lands in the National Wilderness Preservation System ("Wilderness lands").¹⁰ The National Wildlife Refuge System 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.¹¹ Within the National Park System, the NPS may grant rights-of-way under a "public interest" standard only for specified purposes (for example, transmission lines), and authority for some types of rights-of-way (for example,

7. 16 U.S.C. §§ 1131-1136 (1982).

8. 16 U.S.C. §§ 1271-1287 (1982 & Supp. III 1985).

9. See *Buford v. Houtz*, 13 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, 589-93 (1982); Comment, *Gamesmanship on the Checkerboard: The Recurring Problem of Access to Interlocked Public and Private Lands Located Within the Pacific Railroad Land Grants*, 17 LAND & WATER L. REV. 429, 432-35 (1982).

10. The most significant access restriction in the Wilderness Act is section 4(c), which provides that, as a general matter:

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 [Wilderness] area.

16 U.S.C. § 1133(c) (1982). Other access restrictions in the Wilderness Act appear at 16 U.S.C. sections 1133(d), 1134 (1982).

11. 16 U.S.C. § 668dd(d)(1) (1982). The National Wildlife Refuge System Administration Act of 1966 authorizes the Secretary of the Interior to grant easements over Wildlife Refuge lands for:

powerlines, telephone lines, canals, ditches, pipelines, and roads . . . whenever he determines that such uses are compatible with the purposes for which these areas are established.

16 U.S.C. § 668dd(1)(B) (1982).

oil and gas pipelines) is lacking.¹² Other statutes that provide direction for the management of the federal conservation land systems also contain provisions that severely constrain access opportunities in order to protect conservation values.¹³

Second, even on multiple use lands — such as BLM and Forest Service lands — the issuance of rights-of-way has become more complicated. The obligation to maintain wilderness values in wilderness study lands until Congress has reviewed the lands for possible inclusion in the National Wilderness Preservation System may preclude access across federal roadless areas.¹⁴ In addition, several federal statutes mandate a more active role for the Forest Service and the BLM in granting of rights-of-way.¹⁵ These agencies now often impose environmental constraints, and they, rather than the private land developer, specify the appropriate access route. Finally, the granting of rights-of-way across BLM and Forest Service lands under Title V of FLPMA is discretionary; thus, there is no statutory assurance of access.¹⁶

Third, the 1979 Supreme Court decision in *Leo Sheep Co. v. United States*¹⁷ arguably suggests 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

12. See 16 U.S.C. §§ 5, 79 (1982 & Supp. III 1985).

13. For a general compilation of the access laws applicable on federal lands, see OFFICE OF TECHNOLOGY ASSESSMENT, ANALYSIS OF LAWS GOVERNING ACCESS ACROSS FEDERAL LANDS — OPTIONS FOR ACCESS IN ALASKA (1979).

14. 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).

Section 603(c) of FLPMA mandates a similar wilderness study review for BLM lands, and contains a corresponding directive "not to impair the suitability of such areas for preservation as wilderness" until the conclusion of the review. 43 U.S.C. § 1782 (1982).

15. See Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. §§ 1601-1610 (1982 & Supp. III 1985) (governing Forest Service land use planning); National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended in scattered sections of 16 U.S.C.) (governing Forest Service land use planning); National Environmental Policy Act of 1969 ("NEPA"), 43 U.S.C. §§ 4321-4370a (1982 & Supp. III 1985) (providing environmental responsibilities); FLPMA, 43 U.S.C. §§ 1701-1784 (1982 & Supp. III 1985) (governing BLM land use planning).

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

17. 440 U.S. 668 (1979).

in a "checkerboard" land ownership pattern that 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 plaintiff's property.¹⁸ 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. The Court viewed the issue solely as one of discerning congressional intent in enacting the original federal land grant statute.¹⁹ A unanimous Court held that the federal government had no statutorily implied right of recreational access across the private lands. While the "tea leaves" of *Leo Sheep* are somewhat uncertain concerning the access rights of a private party across federal lands, the case can be read to suggest that the doctrine of easements by necessity does not apply against the federal government and that access rights should be implied only to the extent consistent with congressional intent in enacting land grant legislation.²⁰

Fourth, the United States Attorney General has opined that holders 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.²¹ The lands discussed in the Civiletti opinion, like those in *Leo Sheep*, were held in a checkerboard ownership pattern of alternating federal and private lands as a result of a railroad land grant to Burlington Northern's predecessor in title. Relying in part on the exclusive congressional authority under the property clause²² 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

18. *Id.* at 677-79.

19. *Id.* at 681-82.

20. 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 Congress. *Id.* at 679, 681.

21. Rights-of-Way Across Nat'l Forests, 43 Op. Att'y Gen. 30 (1980).

22. 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 the Territory or other Property belonging to the United States

of easements by necessity does not operate on federal lands.²³ Instead, the Civiletti opinion stated that an inholder must base an access claim on statutory authority. The Attorney General suggested that, in particular circumstances, inholders may have access rights implied under federal land grant statutes. The opinion, however, provided conflicting rules of statutory interpretation for discerning the existence of such implied access rights.²⁴ The Attorney General suggested that, in the absence of an implied statutory access right, there is no true guarantee of access across federal lands; the inholder would be subject to agency discretion in authorizing access under Title V of FLPMA or other federal law. The opinion apparently still controls the federal litigating position.

Finally, the government has used its discretionary authority to grant or deny access to regulate indirectly the development of nonfederal lands. 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

23. "It is also my view that the common law doctrine of easement by necessity does not apply to congressional disposition of the public domain." Rights-of-Way Across Nat'l Forests, 43 Op. Att'y Gen. 30, 39 (1980).

The common law doctrine of easements by necessity seems to have 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. Compare 3 R. POWELL & P. ROHAN, *POWELL ON REAL PROPERTY* § 410 (1986) with 3 H. TIFFANY, *LAW OF REAL PROPERTY* § 793 (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.

24. See Rights-of-Way Across Nat'l Forests, 43 Op. Att'y Gen. 30, 41-42 (1980). The Attorney General stated:

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. . . ." In all cases, the intent of Congress must control.

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 a presumed intent of the parties.

Id. (citations and footnotes deleted).

surrounding federal land.²⁵ 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 landowners and users that they could become landlocked by federal lands without 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 including in ANILCA a variety of unique and revolutionary access-related provisions.²⁶

ANILCA became the focal point for innovations in access law for several reasons. In terms of acreage, ANILCA is the most significant federal conservation measure ever enacted. ANILCA added nearly 104 million acres of "conservation system units" ("CSUs")²⁷ in Alaska — thereby doubling the size of the National Park and National Wildlife Refuge Systems, and tripling the size of the National Wilderness Preservation System.²⁸ Congress recognized that existing law "allows only limited public access" across the massive CSUs, and enacted specific access guarantees to ensure "full rights of access" for CSU inholders.²⁹ Also recognizing that Alaska's "existing transportation and utility systems are in their embryonic stage of development,"

25. For example, 36 C.F.R. subpt. 9B (1986) controls the development of non-federally owned oil and gas rights within the National Park System based on access across federal lands.

26. 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, 96th Cong., 1st Sess., pt. 1, at 237-38 (1979).

27. 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.

16 U.S.C. § 3102(4) (1982).

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

29. S. REP. NO. 413, 96th Cong., 1st Sess. 248 (1979).

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."³⁰ 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."³¹

This article categorizes the ANILCA access-related provisions for analysis as follows: (1) access guarantees across CSUs (ANILCA sections 1110(a), 1110(b), 1111); (2) access guarantees across National Forest System and BLM-managed public lands (ANILCA sections 1323(a), 1323(b)); and (3) procedures and approval standards for transportation or utility systems (ANILCA sections 1101 through 1107). The sections below discuss the scope of these provisions and significant implementing actions.

III. ACCESS GUARANTEES ACROSS CONSERVATION SYSTEM UNITS

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

ANILCA section 1110(a) is the only ANILCA access provision that does not require a permit for access; it authorizes certain access methods in CSUs unless and until prohibited by administrative action.³² This provision allows the use of snowmachines, motorboats, airplanes, and nonmotorized surface transportation methods such as dog sleds and horses in CSUs and other named areas for "traditional

30. *Id.* at 245-46.

31. *Id.* at 310.

32. *See* 16 U.S.C. § 3170(a) (1983). ANILCA section 1110(a) provides that:

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 wilderness study, the use of snowmachines (during periods of adequate snow cover, or frozen river conditions in the case of wild and scenic rivers), motorboats, airplanes, and nonmotorized surface transportation methods for traditional activities (where such activities are permitted by this Act or other law) and for travel to and from villages and homesites. Such use shall be subject to reasonable regulations 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.

Id.

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, which require no permanent improvements on federal lands and cause little environmental injury.³³

In its 1986 rulemaking, Interior uniformly implemented and expanded upon ANILCA section 1110(a) access rights for all NPS and FWS lands and certain BLM lands (for example, wilderness study lands) in Alaska.³⁴ 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 section 1110(a).³⁵ No corresponding regulations have been issued for Forest Service lands that are subject to ANILCA section 1110(a). Consequently, the statutory limitation that access must be for "traditional activities" or "travel to and from villages and homesites" presently remains a potential hurdle with respect to the use of

33. 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 numbers of individuals.

S. REP. NO. 413, 96th Cong., 1st Sess. 248 (1979).

34. See 43 C.F.R. § 36.11 (1986). Prior to the uniform rulemaking in 43 C.F.R. section 36.11, the National Park Service (NPS) and the Fish and Wildlife Service (FWS) had adopted similar rules on an interim basis. See 36 C.F.R. §§ 13.11-13 (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 recodification of the uniform Interior rules, provides much useful information on how Interior construes ANILCA's access guarantees. See 51 Fed. Reg. 31,619, 31,626-28 (1986) (Interior's final uniform rulemaking); 48 Fed. Reg. 32,506 (1983) (Interior's proposed uniform rulemaking); 46 Fed. Reg. 31,827 (1981) (NPS and FWS interim rulemaking).

35. 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. 31,619, 31,626 (1986).

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

snowmachines on Interior lands,³⁶ and with respect to all ANILCA section 1110(a) access methods on Forest Service lands.³⁷

While ANILCA section 1110(a) provides a "floor" of guaranteed access in CSUs and related areas, two constraints render the section an incomplete access guarantee. First, ANILCA section 1110(a) does not appear to authorize the construction or maintenance of improvements such as landing strips, docking facilities, and roads, which may be necessary for use of the permissible access methods.³⁸ Second, the limited access methods authorized by ANILCA section 1110(a) do not include the 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 or after a general opening of an area to off-road vehicle use.³⁹

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

In ANILCA section 1110(b), Congress provided the major access guarantee for CSU inholders. This provision obligates the government to permit "adequate and feasible access" to qualified inholders.⁴⁰ The

36. The 1986 Interior rulemaking retains the limitation of ANILCA section 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 43 C.F.R. § 36.11(d)-(f) (1986).

37. As implemented, ANILCA section 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, see 36 C.F.R. §§ 2.17-18 (1986), and wildlife refuges, see 50 C.F.R. §§ 27.31, .34, 35.5 (1986), outside of Alaska. 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.

38. Legislative history arguably suggests that ANILCA section 1110(a) access rights do not include the right to construct permanent improvements. See *supra* note 33. Most permanent improvements, such as landing strips, appear to qualify as transportation or utility systems ("TUS") under ANILCA section 1102(4) (1982). See 16 U.S.C. § 3162(4) (1982). Consequently, persons probably may construct such improvements only by complying with the TUS procedures set out in 16 U.S.C. sections 3161-3167 (1982). See *infra* text accompanying notes 84-130.

39. Interior could not generally open its Alaska lands to off-road vehicle ("ORV") use due to the ORV restrictions contained in Executive Order No. 11,644. See Exec. Order No. 11,644, 3 C.F.R. 666 (1971-1975), reprinted in 42 U.S.C. § 4321 app. at 510-11 (1982). The regulations allow ORV use only: (1) on established roads or parking areas; (2) in additional areas designated in accordance with the procedures of Executive Order No. 11,644; and (3) in additional areas by a permit issued under 43 C.F.R. sections 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. See 43 C.F.R. § 36.11(g) (1986).

40. See 16 U.S.C. § 3170(b) (1982). ANILCA section 1110(b) provides:

scope of 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 section 1110(b), a person must hold: (1) title to a nonfederal land interest, including surface or subsurface rights; (2) a valid mining claim, whether patented or unpatented under the 1872 Mining Law⁴¹; or (3) a "valid occupancy" interest, such as a lease or permit from a federal or nonfederal landowner.⁴² In addition, 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."⁴³ ANILCA section 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.⁴⁴

Interior's 1986 rulemaking interpreted the level of access entitlement. According to Interior, the ANILCA section 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

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 is effectively surrounded by one or more conservation system units, national recreation areas, national conservation areas, or those public lands designated as wilderness 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.

Id. In contrast, CSU inholders outside of Alaska do not have this absolute assurance of access. *See supra* notes 10-24 and accompanying text.

41. Act of May 10, 1872, ch. 152, 17 Stat. 91 (current version codified in scattered sections of 30 U.S.C.).

42. *See* 43 C.F.R. § 36.10(a)(4) (1986). The rulemaking preamble makes it clear that the holder of a "valid leasehold" (e.g., an oil and gas lease) qualifies for access rights under ANILCA section 1110(b). 51 Fed. Reg. 31,619, 31,625 (1986).

43. *See* 43 C.F.R. § 36.10(a)(3), (4) (1986).

44. In 43 C.F.R. section 36.1(a), Interior arguably takes the position that ANILCA section 1110(b) applies only "within any conservation system unit." *See* 43 C.F.R. § 36.1(a) (1986). This issue could become significant. If ANILCA section 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. ANILCA section 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 section 1110(b) ensure access, and might require that the provision be read to encompass access rights across adjacent lands in appropriate cases.

costly alternative for achieving the use and development by the applicant on the applicant's nonfederal land or occupancy interest.⁴⁵

This regulatory definition has several interesting ramifications, which are discussed below.

First, as the rulemaking preamble clarifies, Interior has defined the nebulous ANILCA section 1110(b) concept of "access" in terms of any right-of-way necessary to permit development of the inholding, including rights-of-way for roads, pipelines, and transmission lines.⁴⁶ This interpretation represents a significant change from that of Interior's now rescinded, interim rulemaking, which defined access solely in terms of "pedestrian or vehicular transportation" and which thereby excluded a guarantee for pipelines and transmission lines.⁴⁷ Under Interior's current view, section 1110(b) becomes an all-encompassing guarantee that Interior will grant an inholder any type of right-of-way necessary for desired development.

Second, the regulatory definition seems to make the inholder virtually the sole arbiter of the desired type and level of development of his nonfederal land interest. The regulations obligate the federal government to permit "economically practicable" access commensurate with the "development [intended] by the applicant."⁴⁸ This result appears to flow from ANILCA section 103(c),⁴⁹ which arguably prohibits its direct federal regulation of inholdings, and ANILCA section

45. 43 C.F.R. § 36.10(a)(1) (1986).

46. Interior intends to apply ANILCA section 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. 31,619, 31,624 (1986). Several environmental groups have alleged that 43 C.F.R. section 36.10 is unlawful because it is not limited to personal ingress and egress. *See* Trustees for Alaska v. United States Dep't of the Interior, No. A87-055 (D. Alaska filed Feb. 9, 1987). This suit also challenges other aspects of the section 36.10 rule.

47. The prior and now rescinded definition of access as solely "pedestrian or vehicular transportation" appears at 36 C.F.R. section 13.1(a) (1982) (NPS) and 50 C.F.R. section 36.2(a) (1982) (FWS). In this superseded interim rulemaking, 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 section 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)(ii) (1982); 50 C.F.R. § 36.23(c)(2)(ii) (1982).

48. 43 C.F.R. § 36.10(a)(1) (1986).

49. 16 U.S.C. § 3103(c) (1982). ANILCA section 103(c) provides:

Only those lands within the boundaries of any conservation system unit which are [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.

1110(b), which arguably prohibits 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 ANILCA section 1110(b) likely ensures 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. If the appropriate agency makes certain findings, however, the agency may substitute another form or route of adequate and feasible access.⁵⁰

The 1986 Interior regulations also elucidate the relationship between the guarantee of inholder access in ANILCA section 1110(b) and the procedures for obtaining federal approval of a TUS in ANILCA sections 1101 through 1107. Congress did not clarify whether section 1110(b) or sections 1101 through 1107 should govern when the access route desired by a qualified section 1110(b) applicant also constitutes a TUS under section 1102(4). Under the regulations, an applicant for access under section 1110(b) must comply with the procedures of section 1104 by filing a consolidated application requesting access, and by submitting to expedited National Environmental Policy Act ("NEPA") compliance procedures and agency decisions to evaluate the access proposal.⁵¹ These regulations, however, do accord better treatment to the qualified ANILCA section 1110(b) applicant

Id.

50. The Interior regulations provide that the appropriate 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

(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 that Federal agency

43 C.F.R. § 36.10(e) (1986).

Thus, these regulations seem to assert the authority to change not only the route, but also the method (e.g., ORV to airplane), of desired access to protect federal resource values, so long as the access remains economically practicable and adequate.

51. See 43 C.F.R. § 36.10(c), (d) (1986).

than to the ordinary TUS applicant, who has no assurance that Interior will grant access.⁵² The rules relieve the qualified ANILCA section 1110(b) applicant from the obligation to comply with the remaining procedures in sections 1101 through 1107, and ensure that such an applicant will receive a permit for "adequate and feasible access" from the federal agency at the end of the administrative process.⁵³ Thus, as discussed below, the regulations appear to implement faithfully the guarantee of access in section 1110(b) and to interpret reasonably the disparate commands of sections 1101 through 1107 and section 1110(b).⁵⁴

C. ANILCA Section 1111 — Temporary Access

While ANILCA section 1110(b) accords inholders guaranteed access within CSUs, section 1111 provides a "private landowner" with temporary access across CSUs and related areas for "survey, geophysical, exploratory or other temporary uses" of nonfederal lands.⁵⁵ Unlike ANILCA section 1110(b), which provides absolute assurance of access to both "owners and occupiers," the regulations implementing section 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.⁵⁶ Section 1111 also does not expressly authorize access for lessees and permittees. Thus, the conclusion of the implementing Interior regulations that ANILCA section 1110(b) provides access rights superior to those provided by section 1111 when

52. See *infra* text accompanying notes 106-16.

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

54. See *infra* text accompanying notes 121-29.

55. See 16 U.S.C. § 3171 (1982). ANILCA section 1111 provides:

(a) Notwithstanding any other provision of the 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 wilderness study or managed to maintain the wilderness 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) 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.

Id.

56. 43 C.F.R. § 36.12(a), (d) (1986). Certain aspects of the section 36.12 rule implementing ANILCA section 1111 have been challenged in *Trustees for Alaska v. United States Department of the Interior*, No. A87-055 (D. Alaska filed Feb. 9, 1987).

both sections apply seems well founded.⁵⁷ This relationship may render section 1111 a relatively unimportant access provision that proves useful only when the applicant is not a CSU inholder and seeks access completely across a CSU.

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

In substantially identical language, subsections (a) and (b) of ANILCA section 1323 assure adequate access to inholdings located within the National Forest System and BLM-managed public lands, respectively.⁵⁸ Neither the Forest Service nor the BLM has promulgated regulations implementing section 1323.

A. The Level of Assured Access Under ANILCA Section 1323

ANILCA section 1323 obligates the relevant agency to provide access that is "adequate to secure . . . reasonable use" to an "owner" of land 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 agency likely can prescribe less environmentally deleterious access routes and methods, so long as it provides economically practicable access. Like the access rights provided by section 1110(b), the access rights provided by section 1323 presumably include the right to construct permanent access improvements (for example, roads, landing strips, and bridges) on federal lands in appropriate cases.

57. State and private landowners meeting the criteria of § 36.10(b) [the regulation implementing ANILCA § 1110(b)] are directed to use the procedures of § 36.10 to obtain temporary access.

43 C.F.R. § 36.12(b) (1986).

58. See 16 U.S.C. § 3210 (1982). ANILCA section 1323 provides:

(a) 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) Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Interior may prescribe, the Secretary shall provide such access to non-federally 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.

Id.

Compared with ANILCA section 1110(b), section 1323 is more ambiguous as to whether the inholder is the sole arbiter of his desired development. Because section 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 sufficient access for the proposed development. It remains to be seen whether the Forest Service or the BLM will assert this authority.

Additionally, ANILCA section 1323 employs the same inexact term "access" found in section 1110(b). Interior has interpreted access under section 1110(b) comprehensively to include all rights-of-way needed for development, such as rights-of-way for pipelines, transmission lines, and the like.⁵⁹ It remains unclear, however, whether the agencies will construe section 1323 similarly. The Forest Service might attempt to interpret section 1323(a) differently to include only personal transportation rights because the provision, unlike sections 1110(b) and 1323(b), refers to the landowner's access for "ingress and egress."⁶⁰

B. The Geographic Scope of Section 1323

The geographic scope of ANILCA section 1323 has received more attention than the nature of its access rights. In *Montana Wilderness Association v. United States Forest Service*,⁶¹ the Ninth Circuit held that ANILCA section 1323(a) assures access to inholdings within the National Forest System nationwide.

The *Montana Wilderness Association* litigation arose in 1979, when environmental groups challenged the Forest Service's grant of a permit to Burlington Northern, Inc. to construct a logging road across federal lands in the Gallatin National Forest in Montana to gain access to Burlington Northern's timberlands (originally received as a railroad land grant). The road would have defeated the wilderness study protection provided by the Montana Wilderness Study Act of 1977.⁶² After the plaintiffs obtained 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

59. See *supra* text accompanying notes 46-47.

60. See 16 U.S.C. § 3210(a) (1982).

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).

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

to the Attorney General.⁶³ 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 which found that Burlington Northern had no express statutory access rights.⁶⁴ The Forest Service then reinstated the access permit on the grounds that, in accordance with the implied statutory access rights theory of the Attorney General, an access right should be implied under the land grant.⁶⁵

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.⁶⁶ The parties then cross-appealed to the Ninth Circuit. In its first opinion, the court rejected the Forest Service's argument that section 1323(a) of the recently enacted ANILCA applies outside the State of Alaska and thus guarantees access to Burlington Northern.⁶⁷ The first Ninth Circuit opinion also reversed the district court's holding that Burlington Northern had implied statutory and easement by necessity access rights. Burlington Northern was left without its desired access.⁶⁸

Following a motion for reconsideration by the government, 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 section 1323(a) applies to the National Forest System "nation-wide" and provides a statutory guarantee of access.⁶⁹

63. *Montana Wilderness Ass'n*, 655 F.2d at 953.

64. *See supra* note 24 and accompanying text.

65. Former 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 Rights-of-Way Across Nat'l Forests*, 43 Op. Att'y Gen. 30, 31-39 (1980).

66. *See Montana Wilderness Ass'n v. United States Forest Serv.*, 496 F. Supp. 880 (D. Mont. 1980).

67. *Montana Wilderness Ass'n v. United States Forest Serv.*, No. 80-3374 (9th Cir. May 14, 1981), *withdrawn*, 655 F.2d 951 (9th Cir. 1981). 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.*

68. 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.* 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.*

69. *Montana Wilderness Ass'n*, 655 F.2d at 957. This conclusion that ANILCA section 1323(a) applies outside of Alaska may be called into question by the dictum in

Thus, at least with respect to the states within the Ninth Circuit, ANILCA section 1323(a) currently provides a minimum assurance of access that applies to National Forest System lands outside of Alaska. Although the question of the nationwide scope of section 1323(a) is clouded by conflicting legislative history, the Ninth Circuit's resolution seems correct, particularly given the Forest Service's endorsement of that position.⁷⁰

The court in *Montana Wilderness Association* did not address two significant issues. First, the second Ninth Circuit opinion expressly left open the issue of whether ANILCA section 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.⁷¹ Sections 4(c) and 5(a) of the Wilderness Act contain access restrictions that arguably are as controlling as ANILCA section 1323(a) purports to be.⁷² Although the issue of

a recent Supreme Court opinion that "provisions of ANILCA . . . need not be extended beyond the State of Alaska in order to effectuate their apparent purposes." See *Amoco Prod. Co. v. Village of Gambell*, 55 U.S.L.W. 4355, 4361 (March 24, 1987).

70. The legislative history of ANILCA section 1323(a) is developed at length in *Montana Wilderness Association*, 655 F.2d at 955-57. Senator John Melcher of Montana, the sponsor of ANILCA section 1323, and certain other Congressmen intimately involved in the development of ANILCA, thought that ANILCA section 1323 applied nationwide. Those who disagreed included Representative Morris Udall, Chairman of the House Committee on Interior and Insular Affairs which reported ANILCA, until he changed his mind in voting for the conference report quoted *infra* note 73. The Forest Service's interpretation that ANILCA section 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).

71. The court stated: "We recognize a facial problem or tension between 1323(a) and a portion of § 5(a) of the Wilderness Act, 16 U.S.C. § 1134(a). We need not decide in this case whether there is repeal by implication." *Montana Wilderness Ass'n*, 655 F.2d at 957 n.12.

72. 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 wilderness 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 wilderness, 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

the supremacy of either ANILCA section 1323(a) or the Wilderness Act is a difficult one, it nonetheless appears that the later enacted section 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 section 1323. The court relied on a conference committee decision on a post-ANILCA Wilderness bill that deleted an access provision from the bill on the grounds that ANILCA section 1323(a) already provided such access in Wilderness areas outside of Alaska.⁷³ Consequently, ANILCA section 1323(a) appears to provide an access guarantee applicable to Wilderness areas of national forests nationwide.

Second, the court in *Montana Wilderness Association* left the applicability of ANILCA section 1323(b) outside of Alaska somewhat in doubt because the court merely assumed *arguendo* that section 1323(b) applies only in Alaska.⁷⁴ The Interior Board of Land Appeals

16 U.S.C. § 1134(a) (1982). The Attorney General construed section 5(a) of the Wilderness Act not to contain an absolute assurance of access; rather, the “landowner has a right to access or exchange.” *Rights-of-Way Across Nat'l Forests*, 43 Op. Att’y Gen. 30, 50 (1980) (emphasis added).

73. See *Montana Wilderness Ass’n*, 655 F.2d at 957. The legislative history that the Ninth Circuit found “decisive” in *Montana Wilderness Association* for the proposition that ANILCA section 1323(a) applies nationwide also appears equally decisive for the proposition that ANILCA section 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 section 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 wilderness 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. 126 (1980).

At least one commentator, however, has expressed the view that ANILCA section 1323(a) does not guarantee access in national forest Wilderness areas. See Comment, *Wilderness Values and Access Rights: Troubling Statutory Construction Brings the Alaska Lands Act Into Play*, 54 U. COLO. L. REV. 593, 612-14 (1983). The authors believe that the commentator’s “repeal by implication” argument is incorrect, since ANILCA section 1323(a) repeals prior laws expressly (i.e., it applies “[n]otwithstanding any other provision of law”) and not by implication. See *In re Oswego Barge Corp.*, 664 F.2d 327, 340 (2d Cir. 1981).

74. 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(a) proceeds under the assumption that § 1323(b) is limited to Alaska.” *Montana Wilderness Ass’n*, 655 F.2d at 954.

("IBLA") has since held that section 1323(b) assures inholder access across BLM lands nationwide.⁷⁵ In *Utah Wilderness Association*, the IBLA considered the access rights of Shell Oil Company across a BLM-managed Wilderness study area in Utah to reach a landlocked parcel that Shell had leased from the State of Utah for oil development. The majority reasoned that, since the "legislative history [of section 1323] clearly supports the conclusion that these two subsections have the same [geographical] scope" and since *Montana Wilderness Association* held that section 1323(a) applies nationwide, section 1323(b) likewise applies to BLM lands nationwide.⁷⁶ The IBLA rejected the statutory argument that section 1323(b) applies only in Alaska because it provides access across "public lands" and ANILCA section 102(3) defines "public lands" as certain federal "land situated in Alaska." 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.⁷⁷

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*⁷⁸ requires access to state school trust lands.⁷⁹ The concurring opinion questioned whether the IBLA could ignore the "public lands" definition of ANILCA section 102(3), and hesitated to have the IBLA construe section 1323(b) expansively without judicial guidance, "particularly where such an interpretation requires that we ignore the plain meaning of the language used."⁸⁰

While *Utah Wilderness Association* was appealed to the District Court for the District of Utah, that court never issued an opinion regarding the nationwide applicability of ANILCA section 1323(b).⁸¹ The district court dismissed the case as moot after Shell relinquished the right-of-way. The BLM has taken the position that section

75. *Utah Wilderness Ass'n*, 91 Interior Dec. 165 (1984).

76. *Id.* at 172.

77. *Id.* at 169, 171-73. The IBLA's logic that ANILCA section 1323(b) supplies its own definition of public lands appears to be undercut by the Supreme Court's recent statement that the ANILCA section 102(3) definition of public lands applies to ANILCA section 810 and "applies as well to the rest of the statutes." *See Amoco Prod. Co. v. Village of Gambell*, 55 U.S.L.W. 4355, 4360, 4361 (March 24, 1987). If this statement applies to ANILCA section 1323(b), the provision is limited to BLM-managed public lands in Alaska since ANILCA section 102(3) defines public lands as "land situated in Alaska." *See* 16 U.S.C. § 3102(3) (1982).

78. 486 F. Supp. 995 (D. Utah 1979).

79. *Utah Wilderness Ass'n*, 91 Interior Dec. at 177-79.

80. *Id.* at 176-77.

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

1323(b) applies on BLM lands nationwide and requires "that the access necessary for the reasonable use and enjoyment of the non-Federal land [not] be denied."⁸²

V. TRANSPORTATION OR UTILITY SYSTEMS UNDER ANILCA

The absence of well-developed transportation and utility infrastructures in Alaska was one reason why Congress provided specific access guarantees in ANILCA. Congress also recognized that existing law was cumbersome and inadequate for the evaluation of proposed transportation or utility systems.⁸³ Consequently, in ANILCA sections 1101 through 1107,⁸⁴ Congress sought to establish mandatory procedures for the uniform and expedited consideration of TUS proposals. The paragraph below provides an overview of ANILCA sections 1101 through 1107 and is followed by a more detailed discussion of the provisions as implemented in the 1986 regulations.

ANILCA section 1102 broadly defines the key term "transportation or utility system" to include facilities such as pipelines, transmission lines, roads, and airports that would cross a CSU or similar conservation area in Alaska.⁸⁵ When an applicant proposes a qualifying TUS, ANILCA section 1104 requires that the applicant file a consolidated application form containing all the information required for TUS approval by all relevant federal agencies, and prescribes schedules for expedited agency decision-making and compliance with NEPA.⁸⁶ Substantive agency decision-making standards remain

82. BUREAU OF LAND MANAGEMENT, MANUAL pt. 2800.06 D (1985).

83. 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, 96th Cong., 1st Sess., pt. 1, at 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 wilderness areas, parks, wild and scenic rivers, and wildlife refuges (in descending order of difficulty). Specifically, in the case of parks and wilderness, 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, 96th Cong., 1st Sess. 298 (1979). 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.

84. 16 U.S.C. §§ 3161-3167 (1982). 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).

85. 16 U.S.C. § 3162(4) (1982).

86. *Id.* at § 3164.

largely intact. Agency decisions may be appealed under ANILCA section 1106 if: (1) an agency disapproves a given TUS in its discretion;⁸⁷ (2) an agency lacks authority to approve a particular TUS;⁸⁸ or (3) the TUS would cross a Wilderness area.⁸⁹ In the first situation, ANILCA section 1106(a) allows the applicant to appeal to the President, who has authority to approve the TUS.⁹⁰ In the latter two situations, the TUS may be approved under ANILCA section 1106(b) if the President recommends approval and the Congress adopts a joint resolution of approval.⁹¹

ANILCA section 1102(4)⁹² and the regulations⁹³ define the critical term "transportation or utility system" by type and location. The term includes seven categories of systems where some portion of the

87. *Id.* at § 3166(a)(1)(B).

88. *Id.* at § 3166(b). The sources for substantive legal authority for agency approval of specific TUSs are described in note 108, *infra*.

89. 16 U.S.C. § 3166(b) (1982).

90. *Id.* at § 3166(a)(1)(B), (a)(2).

91. *Id.* at § 3166(b), (c).

92. *See id.* at § 3162(4) (1982). ANILCA section 1102(4) provides:

(4)(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 communications.

(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 the 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.

Id.

93. 43 C.F.R. § 36.2(p) (1986). Certain aspects of the TUS rules have been challenged in *Trustees for Alaska v. United States Department of the Interior*, No. A87-055 (D. Alaska filed Feb. 9, 1987).

system would cross a CSU or related federal areas. Under this definition, a system built wholly on nonfederal lands or on certain Forest Service and BLM lands would not be subject to the TUS procedures. The broad categories of qualified systems encompass nearly every form of transportation, utility, and energy distribution methods, particularly because of the catch-all phrase that "other systems of general transportation"⁹⁴ are included. The congressional choice of the word "systems" to describe these rights-of-way implies that ANILCA Title XI applies only to large-scale transportation and utility networks. This may be misleading because a relatively small-scale facility (for example, a road or landing strip) also may constitute a TUS.

If a proposed system meets the section 1102(4) definition of a qualifying TUS, the TUS also includes related structures and facilities along the route of the system that are necessary for its construction and maintenance (for example, construction roads).⁹⁵ While the proposed rulemaking specifically excluded certain production and storage facilities from the definition of "related structures and facilities," Interior deleted these exceptions from 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," and the rule defines "related structures and facilities" as those that the applicant lists on the consolidated application form.⁹⁶

Proponents of a system or facility must accurately determine whether the system or facility constitutes a TUS under ANILCA Title XI and identify all components of the TUS. ANILCA section 1104(a) ominously provides that no federal authorization for a TUS "shall have any force or effect" unless the entire TUS complies with section 1104.⁹⁷ For example, if a person mistakenly obtains approval for a right-of-way under legal authority other than ANILCA sections 1101 through 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 punitive provision in a statutory scheme enacted for the benefit

94. 16 U.S.C. § 3162(4)(B)(vii) (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, 96th Cong., 1st Sess. 244 (1979).

95. 16 U.S.C. § 3162(4)(B) (1982).

96. 43 C.F.R. § 36.2(m) (1986); 51 Fed. Reg. 31,622, 31,630 (1986).

97. See 16 U.S.C. § 3164(2) (1982). 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.

Id.

of TUS applicants can be questioned. 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 TUS.⁹⁸

The unique Title XI procedures are triggered when an applicant proposes a qualifying TUS. Instead of having to complete a number of different agency forms and being subjected to a maze of federal processing schedules, the TUS proponent need submit only a single consolidated application form that the relevant agencies will consider under the expedited procedures contained in ANILCA section 1104.⁹⁹ ANILCA section 1104(e) requires that the relevant agency complete the NEPA environmental impact statement ("EIS") related to the TUS within one year from the date the application is filed.¹⁰⁰ These procedures govern not only the affected federal land managing agencies, but also every federal agency that "has jurisdiction to grant any

98. See 43 C.F.R. § 36.3 (1986); 46 Fed. Reg. 29,759-29,760 (1981).

99. See 16 U.S.C. § 3164(a)-(c) (1982). In pertinent part, ANILCA section 1104 provides:

(b)(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 such application form shall be designed to elicit such information as may be necessary to meet the requirements of this subchapter 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 3162(4)(B)(ii), (iii), or (vii) of this title; 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) 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) of this section for the type of transportation or utility system concerned.

Id.

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 TUSs. See 16 U.S.C. § 3164(b)(1) (1982) ("[the Secretaries] shall . . . publish a consolidated application form . . . for the approval of each type of transportation or utility system. Each application form shall be designed to elicit such information . . . with respect to the type of system concerned."); *id.* at § 3164(c) ("The applicant shall utilize the consolidated application form . . . for the type of transportation or utility system concerned.").

100. 16 U.S.C. § 3164(e) (1982).

authorization . . . without which a transportation or utility system cannot, in whole or in part, be established or operated.”¹⁰¹ For example, if a telecommunications facility on CSU lands requires the approval of the Federal Communications Commission (“FCC”), the TUS procedures likely apply to both Interior’s approval of the site of the facility and any FCC 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, however, may extend the one-year period for NEPA compliance or diminish the cost savings offered by the “one-stop shopping” approach. First, because ANILCA Title XI generally did not supersede existing agency informational requirements, the consolidated application form may not significantly reduce the TUS proponent’s reporting burden.¹⁰² Second, Title XI does not decrease meaningfully the TUS proponent’s information costs because the regulations require that the proponent pay the “costs to the United States of application processing” and the “reasonable administrative and other costs of EIS preparation.”¹⁰³ Third, by postponing the effective submission date of the consolidated application form, Interior’s regulations allow several extensions of the one-year NEPA compliance schedule.¹⁰⁴ Finally, ANILCA section 1104(e) creates a “good cause”

101. 16 U.S.C. § 3162(1) (1982).

102. Congress seems to have contemplated the retention of existing agency information requirements by providing in ANILCA section 1103 that “[e]xcept as specifically provided in this subchapter, 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 51 Fed. Reg. 31,619, 31,623 (1986) (“each Federal agency has regulations and informational material which specifies the type of information that must be included in an application”).

103. 43 C.F.R. § 36.6(c) (1986). ANILCA section 1104(e) obliquely requires EIS cost reimbursement by incorporating the provisions of section 304 of the FLPMA (codified at 43 U.S.C. § 1734 (1982)) on cost reimbursement. *See* 16 U.S.C. § 3164(e) (1982). The FLPMA cost recovery rules (codified at 43 C.F.R. 2803.1-1 (1986)) were invalidated in *Nevada Power Co. v. Watt*, 711 F.2d 913 (10th Cir. 1983). Interior has proposed new FLPMA cost recovery rules. *See* 51 Fed. Reg. 26,836 (1986). In the interim, “total costs will be presumed to be recoverable” for TUS EIS costs. 51 Fed. Reg. 31,619, 31,623 (1986).

Even persons with a statutory guarantee of access under ANILCA section 1110 are not exempted “from paying reasonable fees” for processing the access application. 51 Fed. Reg. 31,619, 31,625 (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).

104. 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 section 1104(c) requires the form to be filed with all affected federal agencies “on the same day,” *see* 16 U.S.C. § 3164(c) (1982), the regulations (1) allow a 15 calendar day grace period to file with all agencies

exception permitting federal agencies to extend the time period for NEPA compliance in certain situations.¹⁰⁵

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.¹⁰⁶

When the TUS would be located 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 section 1104(g) directs the agencies to make a final decision on the TUS within four months after publication of the final EIS.¹⁰⁷ In this situation, ANILCA section 1104(g) likely does not supersede the substantive 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 findings — findings that may provide grounds for litigation.¹⁰⁸

and provide that the clock starts only when the applicant makes the last federal agency filing; and (2) provide that, if the TUS applicant has not filed with all pertinent federal agencies, the government must return the application to the TUS "applicant without further action." 43 C.F.R. §§ 36.4(c), .5(b) (1986). Second, if the application is incomplete and the TUS proponent does not provide requested information within 30 days, the government will process the application only if the TUS proponent agrees that the official filing date becomes the "date of filing of the specific additional information." 43 C.F.R. § 36.5(d)(1) (1986). Thus, the ANILCA section 1104 schedule for federal decision-making 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.

105. 16 U.S.C. § 3164(e) (1982). ANILCA section 1104(e) allows time extensions for EIS preparation "for good cause," if the federal agency notifies the TUS applicant and publishes the reasons justifying the extension in the *Federal Register*. *Id.*

106. *See* 43 C.F.R. § 36.7 (1986).

107. *See* 16 U.S.C. § 3164(g) (1982).

108. In this situation, ANILCA section 1104(g) provides that "each Federal agency shall make a decision to approve or disapprove [the application], in accordance with applicable law." *See* 16 U.S.C. § 3164(g) (1982). ANILCA section 1102(1) defines "applicable law" as "any law of general applicability (other than this subchapter) under which" a federal agency has jurisdiction to authorize a portion of a TUS. *See id.* at § 3162(1). The rulemaking preamble identified the "applicable law" or substantive 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 & Supp. III 1985); 30 U.S.C. § 185 (1982 & Supp. III 1985); (2) for Fish and Wildlife Service lands, 16 U.S.C. § 668dd (1982); 50 C.F.R. §§ 29.21-.29 (1986); and (3) for National Park Service lands, 16 U.S.C. §§ 5, 79 (1982 & Supp. III 1985); 23 U.S.C. § 317 (1982); 36 C.F.R. pt. 14 (1986). *See* 51 Fed. Reg. 31,619, 31,620 (1986).

ANILCA section 1104(g)(2) appears only to supplement existing law by requiring each relevant agency to consider and make findings on the following:

When all relevant federal agencies agree on TUS approval, the government will issue the TUS right-of-way without further levels of review.¹⁰⁹ If an agency disapproves a TUS that it had the authority to approve, ANILCA section 1106(a) allows the TUS applicant to appeal to the President.¹¹⁰ This unusual presidential appeal provision 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.¹¹¹

A separate set of procedures for evaluating a proposed TUS are triggered when the agency lacks authority to approve a TUS or when the TUS traverses Wilderness lands.¹¹² These procedures require presidential and congressional approval of the TUS. First, each federal

(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.

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 section 1104(g)(2). See Sagalkin & Panitch, *supra* note 84, at 139-40.

109. See 16 U.S.C. § 3166(a)(1)(A) (1982).

110. *Id.* at § 3166(a)(1)(B).

111. *Id.* at § 3166(a)(2).

112. See *id.* at § 3166(b).

agency concerned must submit to the President a notification tentatively approving or disapproving the TUS and explaining the reasons for the agency's decision.¹¹³

Within four months of receiving the agency findings, the President must decide whether to recommend approval of the TUS to the Congress.¹¹⁴ If the President recommends TUS approval to the Congress, ANILCA section 1106(c)(1) provides that the TUS shall be considered approved only if the Congress passes a joint resolution of approval within 120 days of continuous session.¹¹⁵ 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 apparently lacks standards, his decision is virtually unreviewable.¹¹⁶

If an applicant obtains approval of the TUS, ANILCA sections 1106(c)(6) and 1107 direct the Secretaries of the Interior and Agriculture to issue necessary rights-of-way over the lands they manage and to strive to protect important natural resource values "to the maximum extent feasible."¹¹⁷ Approval of the TUS under any of these procedures apparently provides all necessary federal authorization for TUS construction and operation. The stated purpose of the Title XI provisions — to provide "a single comprehensive statutory authority

113. *See id.* at § 3166(b)(1). Additionally, ANILCA section 1105 requires an agency that lacks authority to approve a particular TUS to:

make recommendations . . . to grant such authorizations as may be necessary to establish such system, in whole or in part, within the conservation system unit concerned if [the agency] determines that —

- (1) such system would be compatible with the purposes for which the unit was established; and
- (2) there is no economically feasible and prudent alternative route for the system.

Id. at § 3165. Interior has defined an "economically feasible and prudent alternative" as a route that is "able to attract capital to finance its construction" and that is prudent from a cost-benefit perspective. 43 C.F.R. § 36.2(h) (1986). To be "compatible," the TUS must "not significantly interfere with . . . the purposes for which the area was established." 43 C.F.R. § 36.2(f) (1986).

114. 16 U.S.C. § 3166(b)(2) (1982).

115. *See id.* at § 3166(c)(1). If congressional approval is not received under this joint resolution process, the TUS approval may require an Act of Congress.

116. Unlike the presidential approval standards of ANILCA section 1106(a) and the agency recommendation standards of ANILCA section 1105, ANILCA section 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." *Id.* at § 3166(b)(2). Consequently, the absence of judicially discoverable standards may render the President's denial decision unreviewable. *See* 5 U.S.C. § 701(a)(2) (1982).

117. *See* 16 U.S.C. § 3167(a)(1) (1982).

for the approval or disapproval of applications for such systems"¹¹⁸ — supports this conclusion.

VI. THE CONFLICT BETWEEN THE TUS PROVISIONS AND THE ACCESS PROVISIONS OF SECTIONS 1110(b) AND 1111

In many situations, the ANILCA TUS provisions and the separate access provisions of ANILCA sections 1110(b) and 1111 may both apply. Neither the ANILCA Title XI statutory language nor its legislative history clarifies the intended relationship between the TUS and separate access provisions, although Interior's regulations offer a reasonable compromise. The uncertainty arises from conflicting clauses that make 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 a road to his inholding. Assuming that the inholder qualifies under section 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 Section 1110(b) Controls, and ANILCA Sections 1101 through 1107 Do Not Apply

Under one view, ANILCA section 1110(b) directs the relevant agency to permit this "adequate and feasible access," "[n]otwithstanding any other provisions of" ANILCA or other law.¹¹⁹ Even though the road also constitutes a TUS under the definition in ANILCA section 1102(4), compliance with the ANILCA section 1104 TUS procedures arguably is not required because ANILCA section 1104(a) supersedes only "applicable law" and ANILCA section 1110(b) is not "applicable law."¹²⁰ Thus, one could argue that ANILCA section 1110(b) is a self-contained provision for access, and

118. *Id.* at § 3161(c). The legislative history also reflects this purpose: the reported bill makes it clear that Title XI provides a single comprehensive statutory authority for all facets of such systems.

S. REP. NO. 413, 96th Cong., 1st Sess. 246 (1979).

119. 16 U.S.C. § 3170(b) (1982).

120. *See id.* at § 3162(1). ANILCA section 1102(1) provides that "'applicable law' means any law of general applicability (other than [Title XI of ANILCA]) under which any Federal department or agency has jurisdiction to grant any authorization . . . without which a transportation or utility system cannot, in whole or in part, be established or operated." *Id.* Since Congress excluded all of Title XI of ANILCA from the definition of "applicable law," and ANILCA sections 1104 and 1110(b) are both part of Title XI, arguably ANILCA section 1104 does not supersede ANILCA section 1110(b).

that a qualified inholder need not comply with the ANILCA section 1104 procedures.

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

Alternatively, Title XI might be interpreted to guarantee access to the ANILCA section 1110(b) inholder after procedural compliance with ANILCA section 1104. Interior has adopted this interpretation.¹²¹ Two legal bases support Interior's view that the applicant should comply with the procedures contained in ANILCA section 1104: (1) this view represents a proper exercise of agency discretion in implementing an application and permit system for ANILCA section 1110(b) access rights; and (2) this view ensures compliance with the section 1104(a) directive that no access authorization has "any force or effect unless the provisions of this section are complied with."¹²² Once the applicant complies with section 1104, however, the agency must then issue the ANILCA section 1110(b) access rather than submit the issue of Wilderness access to the President and Congress under ANILCA sections 1105 and 1106.¹²³ By directing the Secretary to issue such access "[n]otwithstanding any other provisions of this Act," section 1110(b) expressly supersedes sections 1105 and 1106.

C. ANILCA Sections 1104 through 1106 Control, and There is No ANILCA Section 1110(b) Access Guarantee

The third possible reading is that only the President and the Congress can approve a road in a Wilderness area. ANILCA section 1106(b), in fact, directs that, where "any application for the approval of a transportation or utility system . . . proposes to . . . traverse any area within the National Wilderness Preservation System," only the President and Congress, exercising their discretion under ANILCA section 1106, may approve the TUS.¹²⁴ Under this reading, ANILCA section 1104(g) allows a federal agency to approve the TUS only "in accordance with applicable law." If "applicable law" excludes ANILCA section 1110(b), the agency is not legally required to approve the construction of a road in a Wilderness area.¹²⁵

121. See 43 C.F.R. § 36.10 (1986).

122. 16 U.S.C. § 3164(a) (1982); see *supra* note 97 and accompanying text.

123. See 43 C.F.R. § 36.10 (1986).

124. 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.

125. ANILCA section 1104(g)(1) provides that "each Federal agency shall make a decision to approve or disapprove [the proposed TUS] in accordance with applicable law." *Id.* at § 3164(g)(1). The definition of "applicable law" precludes ANILCA section 1110(b) from being a source of authority to approve the TUS. See *supra* note 120.

Thus, three possible and conflicting interpretations exist. Resorting to legislative history to undo this Gordian knot of conflicting interpretations is of little avail because Congress drafted the TUS and access guarantee provisions at different times and desired each set of provisions to be comprehensive and controlling.¹²⁶

Interior's regulations adopt the second, seemingly reasonable interpretation.¹²⁷ In essence, if an applicant seeks an ANILCA section 1110(b) access method that also constitutes a TUS, the regulations require that the applicant comply with the procedural elements of section 1104, but obligate the federal agency to grant adequate access at the agency level once the applicant so complies.¹²⁸ This approach fulfills the congressional intent underlying ANILCA section 1110(b) to provide a statutory assurance of adequate and feasible access. It also fulfills the intent underlying ANILCA section 1104 that all TUS proponents comply with the section's procedures. Finally, this approach provides for NEPA analysis to identify access alternatives that would reduce environmental damage in federal CSUs.¹²⁹

The only potential source of "applicable law" to approve the TUS would be the Wilderness Act. But section 4(c) of that Act generally provides that there shall be "no permanent road within any wilderness area," see 16 U.S.C. § 1133(c) (1982), and section 5(a) of that Act, as interpreted in the Civiletti opinion, provides the agency with discretion to allow either access or a land exchange, see *supra* note 72. Accordingly, "applicable law" would not require the agency to allow the construction of a road in a wilderness area.

126. 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, 96th Cong., 1st Sess. 246 (1979). The same Senate report, however, states that ANILCA section 1110(b) "directs the Secretary to grant the owner of an inholding such rights as are necessary to assure adequate access to the inholding . . . [and the access right is not] limited by any right of access granted by . . . other statutory provisions." *Id.* at 248-49.

127. See 43 C.F.R. § 36.10 (1986).

128. The regulations require an applicant for an ANILCA section 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 decisionmaking procedures of 43 C.F.R. sections 36.5 and 36.6. 43 C.F.R. § 36.10(c), (d) (1986). As long as the applicant complies with ANILCA section 1104, however, the regulations direct the federal agency to grant adequate and feasible access to the ANILCA section 1110(b) inholder, without presidential and congressional reviews. See *id.* at § 36.10(e).

129. 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 Environmental Protection Agency*, 600 F.2d 844 (D.C. Cir. 1979).

VII. THE ANILCA ACCESS AND TUS PROVISIONS: MODELS FOR NATIONWIDE LEGISLATION?

Although the scope of most ANILCA provisions is limited to federal land in Alaska,¹³⁰ the need for access across federal lands exists in other states as well. 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 between 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 simply because conservation-oriented federal lands surround their property. They claim that the government must grant reasonable access and development rights. Conservation interests, on the other hand, contend that stewardship over natural resource values on federal lands must be paramount and that the government should constrain 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 broaden the scope of this accommodation of divergent interests by providing a guarantee for access to inholdings within the parks, wildlife refuges, and Wilderness areas outside Alaska. The equitable claim that inholders should not have their access restricted simply because the government has designated a CSU around their property seems too compelling to deny. In certain cases, this claim may even blossom into a right to access to prevent a deprivation of property.¹³¹

Legislative ratification of inholders' access rights appears desirable from a number of perspectives. From the private landowner's or lessee's viewpoint, legislation remains the only sure means of confirming the entitlement to access that is so integral to economic property rights. In the absence of legislation, the holding of the Civiletti opinion, that no absolute guarantee of access across federal lands exists,

130. 16 U.S.C. § 3101(a) (1982).

131. See *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 (D. Utah 1979); *Bydlon v. United States*, 175 F. Supp. 891, 899-901 (Ct. Cl. 1959).

may prevail. From the federal land management perspective, clarifying legislation could eliminate most troublesome property "taking" litigation and illwill among CSU neighbors by creating a workable and definite standard for access.

Admittedly, any statutory guarantee of inholder access may diminish the capability to protect the resource values of federal lands. If the access guarantee is to be meaningful, it must go beyond the minimum level of "sure you can walk 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 render more difficult 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 discretion to choose the access route that 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.

In sum, a statutory guarantee of inholder access across all categories of federal lands is appropriate. This nationwide guarantee of access across federal lands likely should: (1) apply to property right holders (for example, fee owners, lessees) 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 that the inholder 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 seem to be unique to Alaska. For instance, the need for the TUS procedures of ANILCA sections 1101 through 1107 is predicated on the extraordinary extent of CSU and other federal land holdings in Alaska and on the immature development of Alaska's transportation and utility networks. Though substantial federal land holdings and the need for future rights-of-way through them do exist in the western states, there does not appear to be a strong present justification for completely revamping procedures for obtaining permits for rights-of-way outside Alaska.

Although wholesale nationwide application of the Alaska Lands Act's TUS procedures is not recommended, this article suggests that Congress establish uniform standards for the consideration of all forms of rights-of-way. Disparate standards for approving rights-of-

way across CSUs and illogical gaps in authority to approve particular types of rights-of-way persist. For example, in most instances in the National Park System, the NPS may approve a right-of-way only if it finds that the right-of-way "is not incompatible with the public interest."¹³² In the National Wildlife Refuge System, the right-of-way must be "compatible with the major purposes"¹³³ 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."¹³⁴ 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),¹³⁵ approval authority appears to be totally lacking.¹³⁶

Objective reasons for these differing standards and gaps in authority are not discernible. Why should the National Park and Wilderness Preservation Systems suffer a lesser degree of protection from potentially damaging access under their more liberal public interest standards — which allow consideration of non-conservation, economic development interests¹³⁷ — than the National Wildlife Refuge System under its "compatible [with the refuge] purposes" test? Why should above-ground electrical transmission lines be aesthetically acceptable in national parks, while underground pipelines are not? Continuance 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, this article recommends the enactment of uniform procedures for the approval of any conceivable right-of-way. This general authorization could parallel the exhaustive lists of qualifying rights-of-way contained in ANILCA section 1102(4)(B)¹³⁸ and FLPMA section 501(a).¹³⁹

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 adopt the Alaska Lands Act's approach to TUSs by preserving the approval standards of current law and supplementing a generic standard only where no

132. 16 U.S.C. §§ 5, 79 (1982 & Supp. III 1985).

133. 16 U.S.C. § 668dd(d)(1)(B) (1982).

134. *Id.* at § 1133(d)(4) (1982).

135. 16 U.S.C. § 79 (Supp. III 1985).

136. *See, e.g.*, 16 U.S.C. § 5 (1982).

137. Interior construes the "public interest" standard for rights-of-way under 16 U.S.C. section 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, 410-13 (1908).

138. 16 U.S.C. § 3162(4)(B) (1982).

139. 43 U.S.C. § 1761(a) (1982).

other approval authority exists.¹⁴⁰ At the other end of the spectrum, a new generic approval standard superseding current law could be enacted for CSUs 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, which would overcome burden of proof and philosophical incompatibility problems.¹⁴¹

The final issue is whether general legislation similar to ANILCA section 1110(a) would be desirable outside of 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 (for example, airplanes, snowmachines, and horses) that should be authorized generally in CSUs 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 No. 11,644. Executive Order No. 11,644 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.¹⁴² Furthermore, while the argument that unregulated access would not cause significant environmental harm might hold true for the sparingly used and expansive CSUs in Alaska, such may not be the case for the more intensively used and smaller CSUs in states other than Alaska.¹⁴³

140. See 16 U.S.C. § 3166 (1982).

141. 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. Additionally, phrasing the standard in terms of practical management considerations, instead of the purposes of the CSU, could preclude *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).

142. Exec. Order No. 11,644, 3 C.F.R. 666 (1971-1975), *reprinted in* 42 U.S.C. § 4321 app. at 510-11 (1982). Section 3(a)(4) of Executive Order No. 11,644 provides:

Areas and trails [for ORV 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.

Id. at § 3(a)(4).

143. The conservation and access problems raised by ORV use in CSUs 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. Feb. 26, 1975), *aff'd*, 5 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,507 (4th Cir. July 7, 1975).

For the above reasons, a provision comparable to ANILCA section 1110(a) should not be part of any national legislation on access across federal lands. The better course of action outside of Alaska is to continue applying the mandate of Executive Order No. 11,644 to open or close areas to general off-road vehicle use depending on expected environmental consequences, and to add a statutory access guarantee for CSU inholders who have no other form of adequate ingress and egress.

VIII. 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 sections 1110(b) and 1323, ANILCA guarantees inholder access across CSUs 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.