Chapter 27
Axing Access: Emergent Limits on Public Lands Development

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§ 27.1 Introduction

Like so many federal land management issues, access is site-specific. The governing statutes, surface management agency, local ecosystem issues, environmental attitudes, and the type of development sought all play a role in whether – and with how much difficulty – access

[1] The authors would like to thank their colleagues, David Chung, Providence Spina, and Kathryn Taylor, for invaluable assistance in preparing this article. The views expressed in this article are solely those of the authors.

across federal lands will be granted. However, since the environmental movement of the 1960s and 1970s that saw the adoption of various conservation laws – most notably the Federal Land Policy and Management Act (FLPMA) – access has become more difficult to obtain. The last decade has been, with a few notable exceptions, no different, and current trends indicate that development interests seeking access across public lands will continue to encounter procedural and substantive challenges.

This article seeks to provide an overview of current trends related to access across federal public lands for resource development. Section 27.2 provides a brief overview of historic access policies and the substantial changes in the federal government's approach to access issues in the 1970s, before discussing the primary statutes and legal theories governing access issues. Section 27.2 concludes by summarizing some of the key access issues in the first decade of this century. Section 27.3 provides an overview of relevant access issues for each of the four major land management agencies: the U.S. Forest Service, the National Park Service, the U.S. Fish and Wildlife Service, and the Bureau of Land Management.[2] Section 27.4 explores access issues that cut across the agencies, including issues related to the National Environmental Policy Act (NEPA), species considerations, and public access. Finally, Section 27.5 highlights some emerging issues related to access.

§ 27.2 Background on Access Issues

The complex land disposition and conservation history of the United States is one of the primary causes of current access challenges. The checkerboard land grants to railroads are the most notable example, but others include designation of conservation lands around private or

[2] Access issues can also arise for lands managed by other federal agencies including the Bureau of Reclamation and military lands. This article focuses on issues related to these four agencies, which manage most of the federally held public land in the nation.

state land, which create "inholdings" of non-federal land within the federal conservation area.[3] In other cases geographical constraints may make access across federal lands the only practical way to reach a desired location. Regardless of the cause, access issues arise where a party seeks to cross federal land to reach private, state, or even federal land. Such access may be granted via special use permit, right-of-way (ROW), or easement, depending on the circumstances and the surface management agency.

[1] Primary Statutes and Theories Governing Access

[a] Theories of Access

Through the middle of the twentieth century, access over federal lands was generally granted and even encouraged to promote settlement and development.[4] This access was granted either on the theory that access was necessary to meet development needs or because access was viewed as part of the public's implied license to use federal lands.[5]

The primary question in the years since Congress began to restrict access to federal lands via statute is whether, and to what extent these common law theories of access survive. Some courts addressing the question of whether a common law right of access exists have appeared open to the theory of easement by necessity.[6] Others, however, have suggested that statutory

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[3] *See* Galen G.B. Schuler, "Easements by Necessity: A Threshold for Inholder Access Rights Under the Alaska National Interest Lands Conservation Act," 70 *Wash. L. Rev.* 307, 309 (1995).

[4] *See* Matthew L. Squires, "Federal Regulation of R.S. 2477 Rights-of-Way," 63 *N.Y.U. Annual Survey of American Law* 547, 556-558 (2007-2008) (describing the legal origins of 2477 ROWs and the general Congressional approach to access issues from the westward expansion of the United States through the adoption of FLPMA); Schuler, *supra* note 2 at 309.

[5] Stephen P. Quarles & Thomas R. Lundquist, "The Alaska Lands Act's Innovations in the Law of Access Across Federal Lands: You *Can* Get there From Here," 4 *Alaska L. Rev.* 1, 3 and n.9 (1987).

[6] *See* Schuler, *supra* note 2 at 309-310.

access provisions extinguished all common law rights to access across federal lands.[7] Indeed, because most surface management agencies have established regulations and review systems authorized by statute by which requests for access will be reviewed, the primary way in which access is currently granted is via statute. Nevertheless, common law theories have not been fully disavowed by courts[8] or Congress, leaving a potential avenue available to challenge a denial of access.

[b] Statutes Governing Access

Currently most access issues are determined on a statutory basis. FLPMA governs access issues over the majority of federal lands – most of those within the National Forest System and public lands administered by the Bureau of Land Management (BLM).[9] FLPMA authorizes – but does not require – the surface management agency to authorize rights-of-way (ROWs) "over, upon, under, or through" most federal public lands for purposes including roads, pipelines, water transmission, conveyors for solid minerals, powerlines, communication lines, and "such other necessary transportation or other systems or facilities which are in the public interest and which require rights-of-way."[10]

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[7] *See* Adams v. United States, 255 F.3d 787, 794 (9th Cir. 2001) (suggesting that the ANILCA and FLPMA preempt common law access rights in the National Forests); Adams v. United States, 3 F.3d 1254, 1255, 1258 (9th Cir. 1994) (same).

[8] *See infra* Section 27.2[2][d] for a discussion of the Ninth Circuit's continuing interpretation of the common law theory of easement by necessity in the context of ANILCA.

[9] The National Forest Management Act plays a limited role in determining access across National Forest System lands. *See infra* Section 27.3[1].

[10] 43 U.S.C. § 1761. This authorization applies to public lands administered by the Secretary of the Interior and lands within the National Forest System, except, for each agency, lands designated as wilderness.

Congress reconsidered the discretion FLPMA grants to federal land managers in the Alaska National Interest Conservation Lands Act (ANILCA). Although ANILCA deals primarily with Alaska lands, two of its provisions have, in certain circumstances, been interpreted to apply to public lands nationwide.[11] Those provisions *require* federal land managers to grant access across federal lands to holders of inholdings.

Federal lands for which access is not governed by FLPMA or ANILCA are generally governed by statues which mandate conservation for certain purposes including lands protected as part of the National Parks, the National Wildlife Refuge System, the Wild and Scenic River System, and wilderness. These protections and their implications for access are discussed in sections 27.3[2] and 27.3[3].

[2] Key Access Issues 2000-2011

In the first decade of this century federal land access constraints have continued as federal agencies have pursued board policy initiatives to limit access to and across public lands, although courts have sometimes checked agency efforts to limit access.

[a] Forest Service Roadless Rule

Perhaps the most contentious area of Forest Service regulation in recent years is the management of roadless areas. Two attempts by the Forest Service to issue broad regulations on this subject have been mired in litigation for the past decade. The first is the Roadless Area Conservation Rule (Roadless Rule), which prohibited "road" construction, reconstruction, and timber cutting in roadless areas with limited exceptions.[12] The other is the rule on State Petitions for Inventoried Roadless Area Management (State Petitions Rule), which replaced the provisions

[11] *See infra* Section 27.2[2][d].

[12] *See generally* 66 Fed. Reg. 3,244 (Jan. 12, 2001).

of the Roadless Rule with a process that would allow states to petition for state-specific roadless area protections.[13] Both rules have the potential to be used by federal land managers as impediments on access because of the restrictions they plans on the construction of new roads, and both rules have been the subject of considerable litigation that has led to inconsistent and confusing rulings. The Roadless Rule was enjoined on three separate occasions beginning in 2001. First, the District of Idaho preliminarily enjoined the rule before it even took effect on the ground that the Forest Service failed to comply with NEPA in issuing the rule.[14] Though the Ninth Circuit ultimately reversed that decision,[15] the District of Wyoming issued a permanent, nationwide injunction on the rule in 2003 and in 2008.[16] Both times, the District of Wyoming held that the Forest Service violated NEPA and the Wilderness Act in issuing the rule. Both rulings were appealed to the Tenth Circuit. The Tenth Circuit dismissed the 2003 appeal for lack of jurisdiction because the State Petitions Rule was issued during the pendency of the appeal.[17] The Tenth Circuit has not yet ruled on the 2008 appeal.[18]

[13] *See generally* 70 Fed. Reg. 25,654 (May 13, 2005).

[14] *See* Kootenai Tribe of Idaho v. Veneman, No. 01-10, 2001 WL 1141275 (D. Idaho May 10, 2001).

[15] Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094 (9th Cir. 2002).

[16] *See* Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197 (D. Wyo. 2003); Wyoming v. U.S. Dep't of Agric., 570 F. Supp. 2d 1309 (D. Wyo. 2008).

[17] *See* Wyoming v. U.S. Dep't of Agric., 414 F.3d 1207 (10th Cir. 2005).

[18] *See* Wyoming v. U.S. Dep't of Agric., No. 08-8601 (10th Cir.) (oral argument on the merits heard on March 10, 2010).

Similarly, the Northern District of California issued a nationwide permanent injunction on the State Petitions Rule in 2006, and it simultaneously reinstated the Roadless Rule.[19] The Ninth Circuit upheld the Northern District of California decision permanently enjoining the State Petitions Rule in August 2009.[20] During the time these cases were in litigation, a few courts issued decisions interpreting the scope of the Roadless Rule's prohibitions. In all cases, the courts deferred to the Forest Service's interpretation of its rule and affirmed the Agency's approval of land use projects within roadless areas. Two of the cases allowed the construction of natural gas pipelines to proceed in roadless areas,[21] and the third case allowed the expansion of a ski area to proceed in a roadless area.[22] Although the applicability of the Roadless Rule is unclear, these cases powerfully illustrate the high level of deference that the Forest Service will receive in interpreting the scope of its own rule.

The Forest Service under the current administration has not yet developed a long term policy on the management of roadless areas, and thus, the uncertainty resulting from the flurry of litigation over the rules issued by the previous two administrations remains. Secretary of Agriculture Thomas J. Vilsack did, however, issue a memorandum on May 28, 2009 reserving

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[19] *See* California ex rel. Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874 (N.D. Cal. 2006). This decision is what spurred the State of Wyoming's second lawsuit against the Roadless Rule.

[20] *See* California ex rel. Lockyer v. U.S. Dep't of Agric., 575 F.3d 999 (9th Cir. 2009).

[21] *See* Wilderness Workshop v. U.S. Bureau of Land Mgmt., 531 F.3d 1220, 1226-28 (10th Cir. 2008); Hammond v. Norton, 370 F. Supp. 2d 226, 262 (D.D.C. 2005). In both cases, the courts accepted the Forest Service's interpretation that the term "road" does not include construction zones on which motor vehicles will be present.

[22] Hogback Basin Pres. Ass'n v. U.S. Forest Serv., 577 F. Supp. 2d 1139, 1146-1155 (W.D. Wash. 2008) (accepting the Forest Service's distinction between a "road" and a parking lot and upholding the Agency's interpretation and determination that timber cutting was "incidental"). Interestingly, although the Court recognized that the District of Wyoming attempted to issue a nationwide injunction on the Roadless Rule, the Court declined to follow that injunction.

decision-making authority over road construction and reconstruction and timber harvesting.[23] To add to this uncertainty, two states, Idaho and Colorado, began working with the Department of Agriculture in 2005 to develop state-specific petitions for the protection of roadless areas. The Idaho Roadless Rule, issued in 2008, recently survived a challenge filed by environmental groups in the District of Idaho.[24] Development of the Colorado Roadless Rule has taken much longer. The Forest Service originally published a proposed rule in 2008.[25] After receiving public comments and a revised petition by the State of Colorado, the Forest Service published a revised proposed Colorado Roadless Rule on April 15, 2011.[26]

[b] Forest Service Split Estate Issues

Another area of Forest Service regulation that has been the subject of considerable litigation in recent years involves the regulation of split estates where the surface estate is part of the National Forest System but the mineral estate is owned by a private landowner. The United States acquired surface estates in numerous states pursuant to many different statutes. In doing so, it bought and paid for only the surface estate, recognizing that the retained private mineral

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[23] *See* Secretary's Memorandum 1042-154, entitled "Authority to Approve Road Construction and Timber Harvesting in Certain Lands Administered by the Forest Service." Secretary Vilsack renewed that memorandum in 2010. *See* Secretary's Memorandum 1042-155 (May 28, 2010).

[24] *See* Jayne v. Rey, No. 09-cv-015 (D. Idaho Jan. 29, 2011). The plaintiffs in that case alleged that the development and issuance of the Idaho Roadless Rule violated ESA and NEPA. The plaintiffs sought to reinstate the 2001 Roadless Rule. Although this decision was issued after the *Lockyer* decisions setting aside the State Petitions Rule, *see supra* notes 19-20, the decision does not address the impact of those decisions on the Idaho Roadless Rule. When issuing the Idaho Roadless Rule, the Forest Service noted the conflicting decisions from the Northern District of California and the District of Wyoming, but stated that "[f]or purposes of this rulemaking . . . nothing in the pending litigation limits the Secretary from conducting state-specific rulemaking regarding roadless area management or from evaluating the 2001 roadless rule as one alternative in the FEIS." 73 Fed. Reg. 61,456, 61, 457 (Oct. 16, 2008).

[25] *See* 73 Fed. Reg. 43,544 (July 25, 2008).

[26] *See* 76 Fed. Reg. 27,272 (Apr. 15, 2011).

estate is the dominant estate under state property law. Whether, and to what extent, the Forest Service can later exercise regulatory authority over private mineral development that infringes on state law-defined property rights in these split estate context is an evolving area of the law.

The Forest Service's authority over split estate lands has been a particularly controversial subject since the *Duncan Energy v. U.S. Forest Service* cases in the late 1990s.[27] In those cases, the Eighth Circuit held that the Forest Service had limited authority to regulate the surface of split estate lands even though the United States acquired the surface estate after the mineral estate had been already been severed. The Court agreed that the mineral estate owners had an absolute right of access. But, the United States acquired the surface estate at issue in that case pursuant to the Bankhead-Jones Farm Tenant Act, and that statute authorized the Forest Service to regulate as necessary the "use and occupancy" of the acquired lands and "to conserve and utilize" such lands. The Court emphasized that the Forest Service had only limited authority to regulate – it could not veto access to the surface by the mineral estate owner.[28]

In a recent case involving split estate lands in the Allegheny National Forest, *Minard Run Oil Co. v. U.S. Forest Service*, a federal district court preliminarily enjoined the Forest Service from: (i) requiring the preparation of a NEPA analysis prior to the exercise of private oil and gas rights; and (ii) enforcing a forest-wide drilling ban.[29] In that case, the United States had acquired

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[27] *See* Duncan Energy v. U.S. Forest Serv., 50 F.3d 584 (8th Cir. 1995); Duncan Energy v. U.S. Forest Serv., 109 F.3d 497 (8th Cir. 1997).

[28] After the first *Duncan Energy* decision, the district court, on remand, issued a permanent injunction ordering the Forest Service to process surface use plans within 2 months. After a second appeal was filed, the Eighth Circuit held that 2 months was too inflexible and that the reasonableness of the time it takes for the Forest Service to process surface use plans should be judged under a "totality of circumstances." *See Duncan Energy*, 109 F.3d at 499-500.

[29] *See* Minard Run Oil Co. v. U.S. Forest Serv., No. 09-125, 2009 WL 4937785 (W.D. Pa. Dec. 15, 2009).

the surface estates at issue under the Weeks Act. The Court distinguished the Weeks Act from the Bankhead-Jones Act and other statutes – and hence, was able to distinguish the *Duncan Energy* cases and other cases involving conveyances to the United States under different statutes – by emphasizing that the Forest Service's ability to burden the mineral estate under the Weeks Act was limited to those rules and regulations that were expressly referenced in the instrument of conveyance. The *Minard Run Oil* case and the authorities cited therein illustrate that the extent of the Forest Service's authority to regulate the surface in the split estate context will vary depending on which statute governed the United States' acquisition of the surface.

Similar issues can arise in the Forest Service's role as the surface management agency for federal minerals. The BLM administers public mineral resources under the Mineral Leasing Act of 1920 and has the authority over lease issuance and approval of various mineral development actions including the Application for Permit to Drill (APD), while the Forest Service has authority over surface management issues.[30] Pursuant to instruction in the Energy Policy Act of 2005, BLM and the Forest Service entered into a Memorandum of Understanding to streamline and coordinate oil and gas permitting efforts between the agencies.[31] These procedures provide some clarity in the process for a private development to seek approvals from the two agencies, but do not alleviate the requirement to obtain approval from both agencies for the project.

[c] Department of the Interior Wild Lands Initiative

The past six month have provided a great example of the tensions surrounding access issues and the Department of the Interior has introduced and then, under pressure, withdrawn a

[30] *See* Memorandum of Understanding between United States Department of the Interior Bureau of Land Management and United States Department of Agriculture Forest Service, BLM MOU W0300-2006-07, Forest Service Agreement No. 06-SU-11132428-052 (2006), http://www.blm.gov (seach "Energy Policy Act of 2005: Section by Section").

[31] *Id.*

"wild lands" policy. In December 2010, the Department announced a new "Wild Lands" policy in the form of Secretarial Order 3310 and new BLM Manuals implementing the policy.[32] As explained by BLM Director Robert Abbey before the House Natural Resources Committee, the Wild Lands policy was intended to comply FLPMA's requirement, as interpreted by the Ninth Circuit in *Oregon Natural Desert Association v. BLM*,[33] that BLM maintain an inventory of public lands and their resources includes a requirement to inventory their wilderness values and to "consider those values in its land use planning when they are present in the planning area."[34] Director Abbey testified that the Wild Lands policy would have consisted of two steps. First, BLM would have maintained an inventory of "Lands with Wilderness Characteristics" using guidance regarding the size, naturalness, and opportunities for solitude or a primitive and unconfined type of recreation available on the land. Second, "Lands with Wilderness Characteristics" would have been managed either to protect them as "Wild Lands" or to for other purposes as determined in BLM's land planning process.[35] Thus, the Department claimed that the Wild Lands policy would have created an administrative determination of "wildness" that would have been considered, but not necessarily determinative in land use decisions.

[32] "Remarks of Secretary Salazar and Director Abbey – Announcement of BLM Wild Lands Policy" (December 23, 2010), http://www.doi.gov (search "News/Speeches").

[33] Oregon Natural Desert Association v. BLM, 531 F.3d 1114 (9th Cir. 2008).

[34] "Statement of Robert Abbey, Director Bureau of Land Management, Department of the Interior, before the House Natural Resources Committee: Wild Lands Policy" at 3 (March 1, 2011).

[35] *Id.*

This policy prompted immediate criticism. States, counties, and interested stakeholders challenged the policy in court,[36] and members of Congress questioned it in hearings and the press.[37] Ultimately, Congress denied funding for the policy in the 2011 Continuing Resolution. On June 1, 2011, Secretary Salazar confirmed that, pursuant to the 2011 Continuing Resolution, BLM will not designate any "Wild Lands," but confirmed that, consistent with its FLPMA obligations, BLM will continue to maintain inventories of public lands and their resources, including wilderness characteristics.[38] In an accompanying memorandum to the Director of the BLM, Secretary Salazar stated that he had instructed Deputy Secretary David. J. Hayes to work with BLM and interested parties to identify BLM lands that may be appropriate for Congressional protection under the Wilderness Act.

The "Wild Lands" controversy does not appear to be fully resolved. Much will depend on the results of Deputy Secretary Hayes' report and how BLM makes land use decisions "taking into account" the wilderness characteristics of the land in question. Citing the continuing uncertainty regarding the Department's intentions, the State of Utah has indicated that it will continue to prosecute its action challenging the "Wild Lands" policy.[39]

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[36] Uintah County v. Salazar, No. 2:10-cv-00970-CW; State of Utah v. Salazar, No. 2:11-cv-00391-CW (D. Utah) (the States of Alaska and Wyoming have filed motions to participate as amicus curiae) (consolidated with *Uintah County* on June 1, 2011).

[37] *See*, "Hatch Comments on Utah Lawsuit Against Wild Lands Policy: Working on Legislation to Underscore Who Should Designate Wilderness" (April 29, 2011), http://www.hatch.senate.gov (search Press Releases); "Bishop Commends Utah State Lawsuit Against DOI Wild Lands Proposal" (April 29, 2011), http://www.robbishop.house/gov (search Press Releases).

[38] "Salazar Outlines Board Opportunities for Common Ground on Wilderness" (June 1, 2010), http://www.doi.gov (search "News/Speeches").

[39] "Utah plans to pursue wild lands lawsuit," Associated Press (June 7, 2011), http://www.abc4.com (search "wild lands").

[d] ANILCA Continuing Interpretation Issues

As discussed above in Section 27.2[1][a], ANILCA has been applied outside of Alaska. ANICLA primarily addresses public lands and conservation issues in Alaska. The statute set aside approximately 104 million of acres in Alaska for conservation purposes.[40] In doing so, however, Congress was aware of ambiguities and issues related to access under FLPMA and other land management statutes. Thus, Congress specifically mandated that access to inholdings in Alaska would be granted.[41] Almost immediately after it was passed, litigation ensued over whether the access guarantees in Section 1323 of ANILCA applied outside of Alaska, with the Ninth Circuit deciding in *Montana Wilderness Association v. United States Forest Service*, that they do – at least for lands within the National Forest system.[42] The Forest Service has also interpreted that provision to apply nationwide.[43]

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[40] *See* Quarles, *supra* note 5 at 7 (citing General Accounting Office, Status of Federal Agencies' Implementation of the Alaska National Interest Lands Conservation Act (1982)).

[41] 16 U.S.C. § 3170(b) (guaranteeing "adequate and feasible access" to qualified inholders); 16 U.S.C. §§ 3210(a), (b) (requiring the Forest Service or the BLM, as appropriate, to provide access to inholdings within the boundaries of National Forest land or public lands). *See generally* Quarles, supra note 5 (describing the passage and implications of ANILCA). Note that access to inholdings across ANILCA lands in Alaska is governed by a separate set of regulations. *See* 43 C.F.R. Part 36 ("Transportation and Utility Systems In and Across, and Access Into, Conservation System Units In Alaska").

[42] 655 F.2d 951 (9th Cir. 1981) *cert. denied*, 455 U.S. 989 (1982). *See also* United States v. Jenks, 129 F.3d 1348, 1353-54 (10th Cir. 1997); United States v. Jenks, 22 F.3d 1513, 1516 n.3 (10th Cir. 1994). Interestingly, the Fourth Circuit has suggested, in dicta, that ANICLA § 1323(a) applies only in Alaska. *See* United States v. Srnsky, 271 F.3d 595, 602-03 (4th Cir. 2001). But, that Court ultimately held that it "need not decide the geographic scope of ANILCA today, however, because, as we discuss below, even if we accepted the contention that ANILCA applies outside of Alaska, we would still hold that it does not apply[.]"

[43] 36 C.F.R. § 251.110(b); 53 Fed. Reg. 37,795 (Sept. 28, 1988) (proposed § 251.110(b) follow the "*Montana Wilderness*" view that ANILCA § 1323(a) applies "throughout the National Forest System").

Further, the Ninth Circuit has recently held that those rights may not exist solely as creatures of statute. The court had suggested that ANILCA preempted common law right of access claims within the National Forests.[44] However, in 2005 the court revisited this interpretation in light of Forest Service regulations that required consideration of a common law right of access.[45] The court held that the "Forest Service is free to interpret [ANILCA] as creating a means of access for those who do not own pre-existing easements at all or as requiring that pre-existing easements be taken into consideration in determining the scope of access granted."[46] This decision thus opens the door, not only to claims for access to National Forest lands based on ANICLA, but also claims based upon common law theories of access.

The Department of the Interior initially took the position that the guarantees of access across the public lands it manages similarly apply outside of Alaska.[47] However, in subsequent decisions, the Interior Board of Land Appeals (IBLA) has been more ambiguous. Most recently, IBLA said simply, "Suffice it to say that the Board has not reached a definitive conclusion on the point."[48]

[e] R.S. 2477 Litigation

Highways authorized by the Act of July 26, 1866, ch. 262, § 2477 (commonly called R.S. 2477) have been, and remain, a highly contentious issue. FLPMA repealed R.S. 2477, but

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[44] *See Adams*, 255 F.3d at 794; *Adams*, 3 F.3d at 1255, 1258).

[45] Skranak v. Castenada, 425 F.3d 1213 (9th Cir. 2005).

[46] 425 F.3d at 1220.

[47] *See* Quarles, supra note 5 at 19-21 (discussing *Utah Wilderness Association*, 91 I.D. 165 (1984)).

[48] *Wilderness Watch*, 168 IBLA 16, 43-44 (2006) (discussing the case law history of the Board's treatment of the claim that ANILCA's access guarantees for public land apply outside of Alaska).

specified that any "valid" R.S. 2477 rights existing on the date of passage (October 21, 1976) would continue in effect. The practical problem with Congress's instruction in FLPMA is that no documentation or any kind of official action was necessary to "perfect" a R.S. 2477 ROW. The Tenth Circuit described the problem well: "the definition of R.S. 2477 rights of way across federal land, which used to be a non-issue, has become a flash point, and litigants are driven to the historical archives for documentation of matters no one had reason to document at the time."[49]

In *Southern Utah Wilderness Association v. BLM* the Tenth Circuit took steps toward clarifying how a R.S. 2477 ROW should be determined. First, the court rejected BLM's claim that the agency itself should determine R.S. 2477 ROW validity.[50] Second, the court held that federal law would govern the validity determination, but that federal law "'borrows' from long-established principles of state law."[51] The court further established standards for determining a valid R.S. 2477 ROW, including the burden of proof (allocated to the party seeking to enforce a ROW), the continuous public use standard (the ROW must be used by the public, not a private individual), the mechanical construction standard (not required), and the definition of "highway" (a road that leads to an identifiable destination).[52]

The Tenth Circuit revisited this topic again in *Wilderness Society v. Kane County, Utah*, in which environmental groups challenged a county's actions removing BLM signs closing an area to off-road vehicle use and replacing them with county signs opening 63 routes in the same

[49] Southern Utah Wilderness Alliance v. BLM, 425 F.3d 735, 742 (10th Cir. 2005).

[50] *Id.* at 757.

[51] *Id.* at 708.

[52] *Id.* at 768-84.

area, relying on the claim that the routes were R.S. 2477 ROWs.[53] The court held that before the county could take action in support of its land use plans for a R.S. 2477 ROW, it must prove the validity of the ROWs in court.

In the right circumstances, a R.S. 2477 ROW could be useful in providing access to a development project. However, because R.S. 2477 ROWs are limited to those that were "valid" at the time FLPMA was passed, they are not flexible. Project applicants must take them as they exist and cannot alter the route for better access to projects. Moreover, because these ROWs incorporate a continuous public use requirement, they are most often asserted by local governments, and a project applicant could not close the access route to the public (for the safety of the public or the project). Thus, although an R.S. 2477 ROW, if it exists, could be a very useful part of an access route, is unlikely to provide the all of the access needed for any given project.

§ 27.3 Special Rules by Surface Management Agency

One of the critical factors in determining if, and with what restrictions, a project proponent may obtain access over federal land is the surface management agency from which access is sought. Four agencies have primary control over surface management: the Department of Agriculture's Forest Service, and the Department of the Interior's National Park Service, U.S. Fish & Wildlife Service, and BLM. These agencies have different mandates, and thus, approach access questions differently, applying different statutes and different regulations. This is the case even where the agencies have overlapping jurisdiction over the same project – for example,

[53] Wilderness Society v. Kane, 581 F.3d 1198 (10th Cir. 2009).

where BLM regulates oil and gas subsurface development and the Forest Service manages surface access to that land.[54]

[1] Forest Service

The Forest Service regulates access to National Forest System lands under a number of statutes.[55] Forest Service land use authorizations take the form of permits, leases, or easements. FLPMA is perhaps the broadest source of the Agency's authority to regulate land access. Under FLPMA, the Forest Service may issue rights-of-way and other special use authorizations.[56] According to the Forest Service's Special Uses Management Manual (FSM 2700), FLPMA is the "only authority" for a broad variety of land uses within the National Forest System. FLPMA does not, however, allow the Forest Service to issue authorizations for oil and gas pipelines and related facilities on National Forest System lands. The Forest Service's authority to issue such authorizations comes from Section 28 of the Mineral Leasing Act of 1920.[57] Another relevant source of the Forest Service's authority to authorize access to National Forest System lands comes from Section 1323 of ANILCA and its application as a guarantee of "adequate" access to inholders.[58]

Generally, the Forest Service regulations governing land use are codified at 36 C.F.R. Part 251. More specifically, Part 251, Subpart B includes provisions governing the special use

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[54] *See supra* notes 30-31 and accompanying text.

[55] *See, e.g.*, Forest Service Manual (FSM) 2700, § 2701.1 (listing twenty-four statutes that govern the issuance and administration of special use authorizations on National Forest System lands).

[56] *See* 43 U.S.C. §§ 1761-1771.

[57] 30 U.S.C. § 185.

[58] *See supra* Section 27.2[2][d].

authorization application process, terms and conditions of use, fees, termination, revocation, suspension and modification of existing use authorizations, and permit administration. Part 251, Subpart D contains provisions pursuant to which landowners may apply for access across National Forest System lands, terms and conditions for such access, and procedures for evaluating such applications.[59] The Forest Service regulations governing land use for oil and gas leasing and related activities are codified in 36 C.F.R. Part 228. The Forest Service must approve surface use plans of operations (SUPOs) submitted by lessees before permits to drill may be issued by the BLM. Should a lessee require access to National Forest System lands outside of the leasehold, it must obtain a special use authorization under 36 C.F.R. Part 251.

More generally, Forest Service land management policies will affect the availability of access. The Forest Service manages the National Forest System under the National Forest Management Act, which mandates that the Forest Service develop and periodically revise integrated land and resources management plans for the various units of the system.[60] These plans must provide for "multiple use and sustained yield of the products and services obtained" from the forest and include coordination among forest uses including recreation, range, timber, watershed, wildlife and fish, and wilderness.[61] In balancing these various uses, Forest Service may restrict development, including roadbuilding, in certain areas. Thus, prospective developers should engage with the local Forest Service office early in the process of route identification to ensure that the proposed route will be consistent with the forest plan.

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[59] Importantly, the regulations implementing ANILCA § 1323(a) set up several preconditions to the Forest Service's grant of access across national forest lands, including, but not limited to, subjecting landowners to an application and permitting process that involves NEPA analysis. *See* 36 C.F.R. §§ 251.112-.114; 56 Fed. Reg. 27,410-11 (June 14, 1991) (NEPA applies).

[60] 16 U.S.C. §§ 1604(a), (f).

[61] 16 U.S.C. § 1604(e)(1).

[2] National Park Service

While the National Park Service ("NPS") may grant access to national park lands pursuant to its general management authority, the conservation purpose of national parks and monuments restricts significantly the NPS's ability to do so. The NPS is charged with managing the parks "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."[62] Thus, the NPS manages each park consistent with the general purposes of the NPS and also with the specific conditions set forth in the park's enabling statute or order.[63] The enabling act establishing individual parks and monuments may have more stringent management restrictions than those generally applicable to all parks. Because both the general national park statutes and the statutes for each individual park require the NPS to manage the parks for conservation, public access across park land is more difficult than across other public lands or forest land.

NPS is authorized to grant access to park lands for certain park purposes. For instance, NPS is authorized to construct and maintain certain transportation systems, such as park approach roads and roads and trails within the park.[64] Motor vehicle operation is, however, restricted to park roads, parking areas, and specifically designated routes for off-road motor vehicles.[65] Commercial vehicles, which include those used in any business, may not use park

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[62] 16 U.S.C. § 1. The general park service statutes are at 16 U.S.C. §§ 1-460.

[63] 16 U.S.C. §§ 1a-1, 1c(b). While national parks are created through Congressional act, monuments are most often created through an Executive Order pursuant to the Antiquities Act, 16 U.S.C. §§ 431–433.

[64] 16 U.S.C. §§ 8, 8a.

[65] 36 C.F.R. § 4.10.

roads for purposes unconnected to the operation of the park area, except in emergencies.[66] The park Superintendant may issue permits for commercial vehicles when the use is necessary to access otherwise inaccessible private lands within or adjacent to the park.[67] Some access for grazing may be allowed when there is no interference with the primary purposes of the park.[68] NPS is also authorized to grant rights-of-way for the development of certain public utilities.[69] An applicant that accepts a ROW agrees to comply with terms and conditions set forth in the NPS regulations.[70]

National park lands are subject to further access restrictions if they are designated as part of the National Wilderness Preservation System or the National Wild and Scenic Rivers System.

[a] The National Wilderness Preservation System

The Wilderness Act of 1964 establishes a National Wilderness Preservation System that consists of federally owned "wilderness areas."[71] "Wilderness" is defined as an undeveloped Federal land "protected and managed so as to preserve its natural conditions" and which is generally untouched by humans, has opportunities for "solitude or a primitive and unconfined type of recreation," has at least 5,000 acres or sufficient size to makes its preservation practical,

[66] 36 C.F.R. § 5.6(b).

[67] 36 C.F.R. § 5.6(c).

[68] 16 U.S.C. § 3.

[69] 16 U.S.C. §§ 5, 79. NPS also has specific regulations for granting ROWs across park land. 36 C.F.R. Part 14.

[70] 36 C.F.R. § 14.9.

[71] 16 U.S.C. § 1131(a).

and contains "ecological, geological, or other features of scientific, educational, scenic, or historical value."[72]

The Wilderness Act[73] requires federal agencies to review the forest lands, lands within the national park system, and wildlife refuges and to recommend areas within those lands that are suitable for wilderness designation.[74] Wilderness designation becomes effective only upon Act of Congress.[75] FPLMA also requires BLM to recommend public land lands within its jurisdiction for designation as wilderness areas.[76] It is this requirement that prompted Interior cited in support of its "Wild Lands" policy.[77]

Lands included in the National Wilderness Preservation System are the most strictly managed public lands. They are managed "for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness . . . ."[78] Subject to "existing private rights," the Wilderness Act forbids any commercial enterprise or permanent road, the use of motorized vehicles, equipment, or boats, the landing of aircrafts

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[72] 16 U.S.C. § 1131(c).

[73] 16 U.S.C. §§1131-1136.

[74] 16 U.S.C. § 1332(b).

[75] *Id.*

[76] 43 U.S.C. §§ 1711(a), 1728.

[77] *See supra* Section 27.2[2][c].

[78] 16 U.S.C. § 1131(a).

and other forms of mechanical transport, and any structures or installations.[79] Oil and gas leasing is also restricted.[80]

There are exceptions however for:

- Aircraft or motorboat activities where such uses were already established and where necessary for the control of fire, insects, and diseases, all subject to conditions imposed by the Secretary of Agriculture.[81]
- Mineral activities, including prospecting, are not prohibited if "carried on in a manner compatible with the preservation of the wilderness environment."[82] But the Act has forbidden the issuance of mining patents after 1983.[83]
- Certain public projects within national forests authorized by the President, such as water development projects, if the use will "better serve the interests of the United States and the people thereof than will its denial."[84] Note that this exception does not apply to national park lands.
- Grazing of livestock established before September 3, 1964, subject to conditions established by the Secretary of Agriculture.[85]

[79] 16 U.S.C. § 1133(c).

[80] 16 U.S.C. § 1133(d).

[81] 16 U.S.C. § 1133(d)(1).

[82] 16 U.S.C. § 1133(d)(2).

[83] 16 U.S.C. § 133(d)(3).

[84] 16 U.S.C. § 1133(d)(4)(1).

[85] 16 U.S.C. § 1133(d)(4)(2).

- Commercial services "necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas."[86]

The Wilderness Act also provides for States and private owners of land completely surrounded by wilderness to have access to such lands.[87] Also, if there is a valid mining claim or land occupancy wholly within a designated national forest wilderness area, the Secretary of Agriculture must allow ingress or egress to it that is consistent with the preservation of the wilderness areas and "that have been or are being customarily enjoyed" with respect to those areas.[88]

Wilderness areas are managed by the agency that managed the land before its designation, and are subject to management for the "other purposes" for which it was established, but also to preserve its wilderness character.[89] The "other purposes" may provide grounds for allowing some access across wilderness lands, but even that access must be consistent with the area's wilderness character. Additionally, the BLM must manage potential wilderness so as to preserve their wilderness character, even if they have not been designated as such.[90]

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[86] 16 U.S.C. § 1133(d)(5).

[87] 16 U.S.C. § 1134(a).

[88] 16 U.S.C. § 1134(b).

[89] 16 U.S.C. § 1133(b).

[90] 43 U.S.C. § 1782(c); 43 C.F.R. § 19.6; Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 59 (2004); *see infra* Section 27.3[4].

[b] National Wild and Scenic Rivers System

The NPS is also required to identify rivers and river areas eligible to be included in the National Wild and Scenic Rivers System. The National Wild and Scenic River Act[91] preserves "selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, . . . in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations."[92] Rivers are generally added to the National Wild and Scenic River System by Congressional act or by application of a state to the Department of Interior.[93] But the Wild and Scenic Rivers Act also requires that all Federal agencies involved in the "planning for the use and development of water and related land resources" to consider "potential national wild, scenic and recreational river areas," and discuss the potential areas in "all river basin and project plan reports" submitted to Congress.[94] Thus, NPS has identified eligible rivers within national parks.

Because NPS manages all wild and scenic rivers on lands managed by the Department of the Interior, a significant portion of the rivers fall under NPS's jurisdiction. Wild and scenic rivers managed by the NPS are part of the national park system and are subject to the laws and regulations governing the national park system and the NPS may use its general statutory authority relating to the national park system to manage the rivers. In the case of a conflict between the national park laws and the wild and scenic rivers laws, the more restrictive laws

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[91] 16 U.S.C. §§ 1271-1287.

[92] 16 U.S.C. § 1271.

[93] 16 U.S.C. §§ 1273(i), (ii).

[94] 16 U.S.C. § 1276(d)(1).

apply.[95] If a wild and scenic river that is also part of the Wilderness System is managed pursuant to the Wilderness Act and the Wild and Scenic Rivers Act, but in a conflict, the more restrictive provisions apply.[96] Thus, designation as part of the Wild and Scenic Rivers System can result in a land area being subject to multiple levels of restrictions and indeed, subject to the most restrictive land management rules.

Wild and scenic rivers must be managed "in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values."[97] The managing agencies have limited authority to acquired land, interests, and scenic easements for the protection of the rivers.[98] Also, federal agencies, including the Federal Energy Regulatory Commission, may not pursue utility projects, such as dams, reservoirs, and water resources projects, on or directly affecting any wild and scenic rivers, or any rivers designated for potential addition to the rivers system.[99] Federal agencies may, however, license and assist development below or above a designated river area if the project will not "invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values" present on the river at the time of its designation as a river within the system or for potential addition to the system.[100]

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[95] 16 U.S.C. § 1281(c).

[96] 16 U.S.C. § 1281(b).

[97] 16 U.S.C. § 1281.

[98] 16 U.S.C. §§ 1277(a), (b).

[99] 16 U.S.C. §§ 1278(a), (b).

[100] 16 U.S.C. §§ 1278(a), (b).

The Wild and Scenic Rivers Act does allow the managing agency to grant easements and rights of way through the national wild and scenic rivers system pursuant to the laws of the managing agency if the easement or ROW is "related to the policy and purpose of the chapter."[101] Because all lands managed by the Department of Interior, including lands administered by the Fish and Wildlife Service and the BLM, are managed by the NPS, the NPS rules apply to all grants rights-of-way granted across wild and scenic river areas within the DOI's jurisdiction.

Depending on the classification of the river within the Wild and Scenic River System, some of the designated areas may be accessible by developed roads.[102] Also, the Wild and Scenic Rivers Act preserves the rights of a state, including the right of access, to the bed of a navigable stream, tributary, or river within the system.[103]

Public lands within the borders of a national wild and scenic river system and within a one-quarter mile of any river for potential addition to the system, are "withdrawn from entry, sale, or other disposition under the public land laws . . . ."[104] Although designation of land as part of the system generally does not affect valid pre-existing mineral rights on those lands, additional regulations may apply to any mining activities if the mineral rights are not perfected

[101] 16 U.S.C. § 1284(g).

[102] *See* 16 U.S.C. § 1273(b).

[103] 16 U.S.C. § 1284(f).

[104] 16 U.S.C. § 1279.

prior to the land's designation as part of the system.[105] Public lands in the system may be leased, however, subject to certain restrictive covenants.[106]

[3] Fish & Wildlife Service

The United States Fish and Wildlife Service (FWS) administers the National Wildlife Refuge System pursuant to the National Wildlife Refuge System Administration Act (NWRSAA). The NWRSAA provides basic authority for issuing rights-of-way permits or easements.[107] FWS has adopted regulations at 50 C.F.R. Part 29 to implement this authority. These regulations set out the application procedures, the nature of the interest granted, terms and conditions, payment, and special rules for electrical power transmission and oil and gas ROWs. The term ROW is not defined in FWS's regulations, but in guidance, FWS has defined ROW for these purposes as covering "uses that will encumber real property by granting a right to use and alter the landscape through construction of a facility such as a road, powerline, pipeline, or building (air navigation facility, radio tower, etc)."[108] The guidance further specifies that such uses are expected to span a "relatively long period of time" such as 10 years or longer.[109] Note that FWS authorizes temporary uses of existing roads and trails via special use authorizations that may be easier to obtain and for which there is generally no charge.[110]

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[105] 16 U.S.C. § 1280.

[106] 16 U.S.C. § 1285a(a).

[107] 16 U.S.C. § 668dd(d).

[108] 340 FW 3.5.A, Rights-of-Way and Road Closings.

[109] *Id.*

[110] *Id.* at 3.6.A.(1).

The key distinguishing feature of the FWS ROW regulation is the "compatibility determination" requirement. FWS may authorize an economic use "only when [it has] determined the use on a national wildlife refuge will be compatible."[111] A "compatible use" is "a proposed or existing wildlife-dependent recreational use or any other use of a national wildlife refuge that, based on sound professional judgment, will not materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purposes of the national wildlife refuge."[112] The compatibility determination can be the basis of rejecting a ROW application if the FWS determines that the proposed use is not compatible. In some cases, FWS has made preemptive findings that an entire field of activities is not compatible[113] – this can be especially problematic for resource development activities. Resource development can be particularly difficult where the refuge overlaps with critical habitat areas designated under the Endangered Species Act[114] or other land management restrictions designated to protect habitat.

[4] Bureau of Land Management

As with the Forest Service, BLM's access policies and regulations arise from several statutes.[115] It is BLM's stated policy to "[a]llow owners of non-Federal lands surrounded by public land managed under FLPMA, a degree of access which will provide for the reasonable use

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[111] 50 C.F.R. § 29.1.

[112] 40 C.F.R. § 29.21.

[113] *See, e.g.*, Revised Comprehensive Conservation Plan and Environmental Impact Statement for the Kenai National Wildlife Refuge, at 3-18 (compatibility determination).

[114] *See infra* Section 27.4[2].

[115] *See, e.g.*, BLM Manual Section 2801 – Rights-of-Way – General (MS 2801) § 2801.3 (listing eight statutes that govern the issuances of general ROWs on public lands); BLM Manual Section 2881 – Mineral Leasing Act – General (MS 2881), § 2881.11 (describing the additional authority and policies for issuing a ROW under the Mineral Leasing Act).

and enjoyment of the non-Federal land" provided that the access conform to rules and regulations governing the administration of the public land.[116]

BLM's general access policy is found in its regulations at 43 C.F.R. Part 2800. Those regulations set out the procedures by which BLM may issue a "grant" for use of public lands, including application procedures, terms and conditions, and rents. A "grant" is defined to mean "any authorization of instrument (e.g., easement, lease, license, or permit) BLM issues" under FLPMA or authorities preceding FLPMA.[117] A "right-of-way" means "the public lands BLM authorizes a holder to use or occupy under a grant."[118]

Thus, these regulations apply to a broad range of uses, as made clear in the list of activities for which a ROW must be sought, which mirrors the FLPMA authorization.[119] Although BLM has stated a preference to "make every effort to allow uses of public lands without a ROW grant, under the provisions for casual use," this policy is unlikely to allow significant resource development activities to take place in the absence of a ROW grant because uses "expected to cause appreciable disturbance or damage to public lands or resources" are not considered casual use.[120] In addition to casual use, R.S. 2477 highways, certain ditches and canals, access to mining claims over lands open to mineral entry, and third-party entry onto a railroad ROW do not require BLM authorization.[121]

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[116] *Id.* at § 2801.8.F ("Access.").

[117] 43 C.F.R. § 2801.5(b).

[118] *Id.*

[119] *Compare* 43 C.F.R. § 2801.9 ("When do I need a grant?") *with* 43 U.S.C. § 1761.

[120] MS 2801, § 2801.9.D ("ROW Uses not requiring a ROW Grant.").

[121] *Id.*

BLM Manual 2804 – Applying for FLPMA Grants, sets out the procedures for applying for and the review of ROW applications in great detail. Note that these procedures do not apply to oil and gas lease activities. The Manual clarifies that production facilities located on a lease "shall be approved by an [Authorization for Permit to Drill (APD)] or [Sundry Notice] authorized under the lease terms," and that to avoid redundant requirements ROW applications – including applications for off-lease activities, may be made by application for and APD or in the Sundry Notice.[122] As a further complication, oil and gas pipelines, under the Mineral Leasing Act, are subject to entirely separate permitting requirements at 43 C.F.R. Part 2880.

Access decision will also be evaluated for conformity with the applicable Resource Management Plan (RMP) pursuant to FLPMA.[123] The RMP is a land use plan adopted by BLM for a particular resource area. The RMP designates the types of uses that will be permitted in various parts of the resource area as well as certain areas subject to special protections, such as Areas of Critical Environmental Concern, lands with wilderness characteristics. A project proponent should engage with the local BLM office early in the planning process to ensure that a proposed access route will be compatible with BLM's land use plans.

Finally, pursuant to FLPMA, the Department of the Interior maintains a list of "wilderness study areas," which are defined as roadless lands of 5,000 acres or more that possess "wilderness characteristics." Unless and until Congress designates these lands as wilderness under the Wilderness Act, FLPMA requires that BLM manage these lands "so as not to impair the suitability of such areas for preservation as wilderness."[124] Land managers are granted

[122] BLM Manual 2804 – Applying for FLPMA Grants (MS 2804), § 2804.24B ("ROW Application is in conjunction with Oil and Gas Lease Activities.").

[123] 43 U.S.C. § 1732(a); 43 C.F.R. § 1610.5-3.

[124] 43 U.S.C. §§ 1782(a), (b).

discretion in compliance with the non-impairment standard,[125] and their decisions could limit the availability of access across wilderness study areas.

§ 27.4 General Access Issues

Regardless of the federal surface management agency making the access determination, certain factors will apply. The agency must comply with the environmental review provisions of the National Environmental Policy Act (NEPA) and must comply with the substantive and procedural protections for species imposed by federal law.

[1] NEPA

NEPA requires federal agencies to evaluate the environmental consequences of "major federal actions."[126] This procedural requirement mandates that agencies memorialize their decision-making in a formal document. If the proposed action is expected to "significantly affect[] the human environment," the agency must prepare an Environmental Impact Statement, which can be a lengthy and expensive process.[127] Where the impacts are not expected to be significant, the agency may prepare a less detailed Environmental Assessment. In either case, the agency must review the reasonably foreseeable impacts of the proposed action, including indirect impacts.[128]

The issuance of a ROW is a federal action which would generally trigger NEPA review.[129] In and of itself, a ROW may not present significant impacts. However, if the agency

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[125] *Southern Utah Wilderness Alliance*, 542 U.S. at 59.

[126] 42 U.S.C. § 4332(2)(C).

[127] *Id.*

[128] *See* 40 C.F.R. §§ 1502.16(a), 1508.8(b), 1508.9(b).

[129] *See, e.g.*, 50 C.F.R. § 29.21-2(a)(4) (FWS regulation requiring preparation of an EA or an EIS, as appropriate, for issuance of a ROW in a refuge).

expands the scope of review to include the impacts of the project to which the ROW would provide access as "indirect impacts" of the ROW, the impacts could be considered significant.[130] The phenomenon of a relatively small federal approval being the "hook" to review the impacts of a larger, non-Federal project is often referred to as a "small handle" issue.[131]

The U.S. Army Corps of Engineers has made efforts to clarify the scope of its NEPA review when issuing a permit that may "enable" a larger, private development. Its regulations instruct that NEPA review extends only to those portions of a project that are subject to the Corps' "control and responsibility."[132] Among the "typical factors" to be considered in determining whether "the environmental consequences of the large project are essentially products of the Corps permit" is the following: "Whether or not the regulated activity comprises 'merely a link' in a corridor type project (e.g., a transportation or utility transmission project)."[133] Such an approach, if applied to a ROW application by a surface management agency could limit the NEPA analysis of a ROW to the impacts of the ROW itself.

However, not all agencies concur with the Corps' narrow reading of NEPA. In *White Tanks Concerned Citizens v. Strock*, both the Environmental Protection Agency and the U.S. Fish and Wildlife Service disagreed with the Corps' determination that its issuance of a fill

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[130] This assumes that the project is on private or state land and does not have any other federal approvals. If the project is on federal land or requires other federal approvals, the likelihood of the impacts of the full project being included in the NEPA analysis increase.

[131] *See* Jeslyn Miller, "Note: Clarifying the Scope of NEPA Review and the Small Handles Problem," 37 *Ecology L.Q.* 735, 735 (2010); Patrick A. Parenteau, "Small Handles, Big Impacts: When Do Corps Permits Federalize Private Development," 20 *Envtl. L.* 747, 749 (1990)).

[132] 33 C.F.R. Part 325, Appendix B § 7(b)(1).

[133] 33 C.F.R. Part 325, Appendix B § 7(b)(2).

permit was insufficient to "federalize" a private development project.[134] This disagreement of these agencies was a factor in the Ninth Circuit overturning the Corps' determination.[135] Thus, in many situations the risk remains that, although the ROW sought may have limited impacts, the agency issuing the ROW will require extensive NEPA review of the project related to the ROW.

[2] Species Issues

Species protections arising from a variety of sources including the surface management agency's land use policies and statutes specific to the protection of certain species, such as the Endangered Species Act (ESA), can pose access challenges. Those restrictions can impose substantive or procedural limits. For example, the ESA imposes procedural requirements of federal approvals that may affect listed species and BLM policies may require substantive protections – such as safety zones for setbacks for certain species that may affect routing for a ROW.

The ESA aims to protect species listed as threatened or endangered under the Act. To this end, FWS and NMFS are responsible for designating critical habitat for listed species, enforcing against take of listed species, and consulting with agencies authorizing federal actions that may jeopardize listed species. These consultation requirements create the biggest potential ESA issue for access to federal lands. ESA Section 7 requires any federal agency planning to "authorize[], fund[] or carr[y] out" an action that may jeopardize a listed species or adversely modify its habitat to consult with the Services to ensure that the final action does not actually

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[134] White Tanks Concerned Citizens v. Strock, 563 F.3d 1033, 1042 (9th Cir. 2009).

[135] *Id.*; *but see* Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177 (4th Cir. 2009) (upholding the Corps' decision to limit its NEPA review to the impacts from the fill permit rather than the entire mining operation on the basis that a West Virginia state agency retained substantial regulatory control over the project).

jeopardize the continued existence of the listed species.[136] The implementing regulations list federal actions as including the "granting . . . leases, easements, rights-of-way, [and] permits."[137] Thus, agency actions associated with providing access to federal lands, such as granting easements or rights-of-way, will often trigger ESA's consultation requirements.

In 2003, the Services issued a joint guidance document (Joint Guidance) specifically clarifying the role of the ESA in requests for rights-of-way across federal land for the purpose of accessing private land.[138] For consultation purposes, the Joint Guidance differentiates between those instances where the agency has discretion and those where it does not.[139] Where an agency has no discretionary authority to deny or place conditions on a ROW, the ESA does not require Section 7 consultation.[140] In contrast, if an agency may either deny or limit a ROW, the agency must determine whether its proposed action may affect listed species.[141]

For instance, though ANILCA mandates access to National Forest lands, courts have held that Section 7 consultation is required for issuance of special use permits because the Forest Service has authority to modify or condition the means of access. Chinook salmon was the species of concern in *Mountain States Legal Foundation v. Espy*, and sedimentation from an

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[136] 16 U.S.C. § 1536(a)(2).

[137] 50 C.F.R. § 402.02(c).

[138] "Application of the Endangered Species Act to Proposals for Access to Non-Federal Lands Across Lands Administered by the Bureau of Land Management and the Forest Service," ("Joint Guidance") http://www.blm.gov/or/esa/procedure.htm (scroll to "Interagency ESA Access Policy" at bottom of page).

[139] *Id.* at 1.

[140] *Id.*

[141] *Id.*

access road was threatening its critical habitat.[142] Though plaintiffs argued that they had a right to year-round motorized access to the road under ANILCA, the court held that the Forest Service was authorized under ANILCA and the ESA to condition and limit access by requiring measures to protect listed species.[143]

The Forest Service did exactly that in *Cabinet Resource Group v. United States Forest Service* when it engaged in formal Section 7 consultation over issuance of a special use permit under ANILCA for a mining access road in grizzly bear habitat.[144] The Forest Service determined that issuing the access permits would not jeopardize the Cabinet Yaak Ecosystem grizzly bear population but did impose some conditions on the permit to minimize the potential for incidental take.[145] The court upheld the permit issuance against attack by the plaintiffs. Consistent with these cases, the Joint Guidance indicates that if consultation is required, the "proposed federal action" analyzed during consultation is only the "authorization of access across federal land" and does not include any private actions on private land.[146]

However, under the required consideration of indirect effects, an agency may consider effects that are reasonably certain to occur on private land if authorization of access is "essential" to causing the effect.[147] The Joint Guidance distinguishes these effects from impacts that are

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[142] Mountain States Legal Found. v. Espy, 833 F. Supp. 808, 811-13 (D. Idaho 1993).

[143] *Id.* at 819.

[144] Cabinet Res. Grp. v. U.S. Forest Serv., 2004 U.S. Dist. LEXIS 11449, at *21 (D. Mont. Mar. 30, 2004).

[145] *Id.*

[146] Joint Guidance, *supra* note 1, at 1.

[147] *Id.* at 2.

merely "facilitated" by the access authorization.[148] Thus, for the most part, ESA Section 7 consultation will apply only to actions taken, and any resulting effects, on federal land. But where a reasonably certain effect on private land could not occur without the ROW, that effect may be considered.

During both informal and formal consultation, the BLM or Forest Service may suggest modifications to or make conservation recommendations for the ROW application that would minimize any likelihood of adverse effects.[149] These modifications and recommendations must be limited to the federal action itself unless the applicant specifically requests that the consultation include effects on private land for purposes of an incidental take statement for activities on non-federal land.[150] The Joint Guidance ends with a reaffirmation that neither BLM nor the Forest Service may "deny or condition access across federal lands based on the implementation of measures or conditions related to the use of non-federal land."[151]

Notably, the Joint Guidance focuses specifically on access through or over federal land to *private* land. Where a party seeks access to *federal* land, the Services may be required to consider a broader range of effects during Section 7 consultation. For instance, in *Sierra Club v. United States Department of Energy*, the District of Colorado held that ESA consultation was required before granting an easement across federal land to access subsurface mining rights even though the species at issue was not listed when the easement was granted and any impacts were

[148] *Id.*

[149] *Id.*

[150] *Id.* at 2-3.

[151] *Id.* at 3.

primarily the result of the mining rather than the easement.[152] The court viewed the potential effects of both the easement and the mine and determined that the Department of Energy, as the surface owner, maintained a continuing responsibility to consider any effects on the endangered mouse.[153]

Similarly, though issuance of an oil and gas lease on its own rarely affects listed species such that Section 7 consultation is required, the Ninth Circuit has held that post-lease activities must be considered for consultation purposes. In *Conner v. Burford*, the oil and gas lease would have provided access to National Forest land that was habitat for many listed species.[154] In determining whether to grant the lease, the Forest Service initiated consultation but considered only the impacts from the lease itself.[155] On review, the court held that the agency action was not limited to the granting of the lease but included "post-leasing activities through production and abandonment."[156] Thus, the Forest Service had to engage in a new, more-expansive consultation process.[157]

Though Section 7 raises the most issues for access seekers, a party who has been granted access must remain cognizant of ESA take prohibitions regardless of any agency's consultation responsibilities. ESA Section 9 prohibits any take of listed species – on public or private land –

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[152] Sierra Club v. U.S. Dept. of Energy, 255 F. Supp. 2d 1177, 1188-89 (D. Colo. 2002).

[153] *Id.*; *but cf.* Sierra Club v. Babbitt, 65 F.3d 1502, 1512 (9th Cir. 1995) (holding that consultation for approval of a logging road through spotted owl habitat was not required because the reciprocal right-of-way agreement preceded passage of the ESA and thus the Forest Service had no discretion to modify it).

[154] Conner v. Burford, 848 F.2d 1441, 1452 (9th Cir. 1988).

[155] *Id.*

[156] *Id.* at 1453.

[157] *Id.* at 1454.

and Section 11 provides enforcement mechanisms, both criminal and civil.[158] Unless take is covered by an incidental take permit under Section 10 or an incidental take statement acquired during the consultation process, any take is prohibited.[159] In *Forest Conservation Council v. Rosboro Lumber*, BLM granted permission for Rosboro Lumber to build an access road over BLM land to log timber on private land.[160] Though BLM recommended that Rosboro obtain an incidental take permit because of the proximity to Northern Spotted Owl habitat, Rosboro failed to do so.[161] The Ninth Circuit held that Plaintiffs had an actionable claim under the ESA against Rosboro for taking the listed owls because his planned timber harvest would impair their essential behavioral patterns.[162] Thus, a party seeking access across federal lands must always be conscious of potential liability under the ESA.

Some species not listed as threatened or endangered by the ESA are nevertheless protected by special statutes, specific land management policies, or by state law. In addition to the ESA, project proponents should be aware of any restrictions posed by species-specific protective statutes such as the Marine Mammal Protection Act (which protects some species that spend some time on land), the Migratory Bird Treaty Act, and the Bald and Golden Eagle Protection Act. The two major surface management agencies, BLM and the Forest Service, also maintain supplemental "sensitive species" lists with the intent to structure land management

[158] 16 U.S.C. §§ 1538(a)(1)(B), 1540.

[159] *Id.*; 16 U.S.C. § 1539(a).

[160] Forest Conservation Council v. Rosboro Lumber, 50 F.3d 781, 782-83 (9th Cir. 1995).

[161] *Id.*

[162] *Id.* at 788.

decisions to avoid actions that would lead to the listing of the species.[163] Finally, some states provide protections under state endangered species programs. In certain circumstances, the protections provided by these other forms may affect access determinations. For example, BLM's sage grouse protection policies often include buffers around breeding leks, with could affect the preferred routing of a proposed ROW.

§ 27.5 Emerging Issues

[1] Public Access

One of the more interesting issues arising in access negotiations is public access. Federal agencies are looking closely at the potential for a private road constructed for a resource development to be used by the public to gain access to federal public lands. And, in many cases, the agency is seeking to prevent such access. For example, in the Kenai National Wildlife Refuge, the FWS has explicitly stated its concern that roads constructed to develop existing oil and gas rights could be used by the public to gain access to the refuge.[164] Private applications for ROWs may be able to resolve concerns of this nature by offering to use gates across roads and to remediate the road upon the completion of the project.

[2] Directional Drilling

Directional drilling is generally regarded as a way to minimize the surface impacts of oil and gas development. By using this technology, oil and gas companies can access reserves with less impact to the surface. In many cases, the developer will be conducting all drilling within

[163] *See* BLM Manual 6840 – Special Status Species Management (BLM will designate and manage "sensitive species" in cooperation with the applicable state fish and wildlife agency); Lands Council v. McNair, 537 F.3d 981, 989 (9th Cir. 2008) (en banc) (describing the Forest Service "Threatened, Endangered and Sensitive Species Program" under which the Forest Service maintains regional lists of sensitive species).

[164] Revised Comprehensive Conservation Plan and Environmental Impact Statement for the Kenai National Wildlife Refuge, at 3-18 (compatibility determination).

federal oil and gas leases or other subsurface to which it has rights. However, in some cases, it may be necessary to cross federal sub-surface to which the developer does not have the right to access. In such a case, the law is ready. FLPMA authorizes BLM to issue ROWs for access "under" public lands, as necessary.[165]

§ 27.6 Conclusion

Access issues are becoming increasingly complicated as diverse stakeholders seek to use the public lands for a variety of sometimes conflicting purposes. Further, given the patchwork nature of federal land use lands, no one access solution will work for every situation. Careful attention to applicable land use laws, as well as outreach to the federal land managers and interested stakeholders is always important to achieving best results.

[165] 43 U.S.C. § 1761.