

# RIGHTS-WAY AND ACCESS MATTERS IN ALASKA

## *Bureau of Land Management*

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### **I. Introduction**

This outline is intended to provide some exposure to the various authorities which provide for rights-of-way and other forms of ingress and egress in Alaska. This outline focuses on the main federal right-of-way authorities in Alaska and should not be considered an exhaustive summary.

Let's set the "access stage" by doing a comparison of Alaska to the lower-48 states. Alaska's 365 million acres (570,000 square miles) is equivalent in size to the states of Iowa, Missouri, Minnesota, North Dakota, South Dakota, Nebraska, Kansas, Arkansas, and Vermont. These states have highways totaling 711,468 miles. About 53 times as much as Alaska's 13,483 miles of road. As you can see, Alaska's existing transportation and utility systems are in their embryonic stage of development.

### **What is a right-of-way?**

It is an easement, a right or interest in the land of another which entitles the holder thereof to some use, privilege, of benefit (such as placing pole lines, pipelines, roads, etc.) over, upon, under, or through (public) lands. Rights-of-way may be exclusive to one user or non exclusive to benefit many users. Matters of this type which affect real estate should be written and recorded.

### **II. Federal Rights-of-Way Authorities in Alaska**

1. **Federal Land Policy and Management Act** (FLPMA) of October 21, 1976, as amended, 43 U.S.C. 1761-1771. Reference Code of Federal Regulations 43 CFR 2800 (BLM) or 36 CFR 212 and FSM 2733 (USFS). Title V of FLPMA authorizes both the Secretaries of the Interior and Agriculture to grant, issue, or renew rights-of-ways on public lands or national forest lands, except in the case of designated wilderness. This is BLM's current authority for issuing all non oil and gas related rights-of-way.
2. **Mineral Leasing Act** (MLA) of June 13, 1920, as amended, 30 U.S.C. 185. Reference Code of Federal Regulations 43 CFR 2880. Section 28 of MLA is BLM's authority for authorizing all pipelines and related facilities associated with the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product therefrom. NOTE: When two or more federal agencies are involved, even if BLM does not administer any of the Lands affected, the BLM is responsible for issuing the right-of-way in coordination with the other federal agencies.
3. **44 L.D. 513** – Federal appropriation to the United States. This citation is an old land decision (Chapter 44, pg. 513) and deals with the right of the U.S. to protect improvements made by the United States.

Prior to enactment of FLPMA there was no generally applicable statutory authority for setting aside rights-of-way for federal agencies on public lands. This instruction provides generally that where telephone lines, roads, trails, bridges, cabins, fences, and similar improvements have been constructed on national resource lands and are being maintained and operated by and for the United States, and where the office in charge of land records is furnished with appropriate maps or field notes so that the improvements may be located on the records, the lands needed for such improvements may be retained for the use of the U.S. through the insertion of a reservation in patents.

If the federal government's use and occupancy is terminated and it has effectively abandoned the right-of-way, the exception clause in any patent would not operate as an encumbrance on the title. This is because by its own terms the right-of-way is no longer "needed or used for or by the United States."

*Note: 44 L.D. 513 notations on lands conveyed to ANCSA corporations are ineffective since the intent of ANCSA was to convey all right title and interest of the United States. Only 17(b) easement rights may be reserved in an ANCSA conveyance.*

4. **ANCSA Section 17(b) Easement**- An easement reserved across lands conveyed to Alaska Native Corporations pursuant to Section 17(b) of the Alaska Native Claims Settlement Act of 1971 and under the criteria set forth in 43 CFR 2650. Generally, only public easements which are reasonably necessary to guarantee access to publicly owned lands or major waterways and other public uses contained in the regulations are to be reserved. It includes easements for use by the general public and by a specific governmental agency. Public easements may be reserved for transportation, communication and utility purposes, for air, light, or visibility purposes, or for guaranteeing international treaty obligations.
5. **Small Tract Act Rights-of-Way** – 43 CFR 2731.6-2 (Repealed Act). Public roadways and utilities. The small tract regulations provide that the classification order may provide for rights-of-way over each tract for street and road purposes and for public utilities. If the classification order does not so provide, the right-of-way will be 50 feet along the boundaries of the tract. NOTE: The earlier regulations provided for rights-of-way for 33 feet in width. Need to check classification order or regulations in effect at time of classification. Local planning and zoning authority, State DNR, and/or State DOT/PF succeed BLM in reservation.
6. **Alaska National Interest Lands Conservation Act** (ANILCA) of December 2, 1980. 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. It added nearly 104 million acres of conservation system units (CSU's) in Alaska. Congress recognized that existing law allowed only limited public access across the massive CSU's and enacted specific access guarantees to ensure "full rights of access" for CSU inholders. Title XI deals principally with transportation and utility systems within conservation system units. Title XI in general requires the Secretary to provide access with some limitations and requirements and, unlike other related legislation (NPS Act of 1916, Wilderness Act of 1964,

NWR Administration Act of 1966, and the DOT Act of 1966) is not designed primarily to limit access, with a few exceptions. In short, Congress established a variety of unique and revolutionary access related provisions. Title XI requires a judicious accommodation between the need to provide for greater access and the desire to protect the purposes and values of the CSU's.

Title XI requires the use of a consolidated form by the Departments of Agriculture, Interior, and Transportation in connection with applications of right-of-way. The agencies will determine the validity of uses proposed by private individuals and other qualified proponents from information provided by the proponent on the application form (SF-299).

7. **Omnibus Act**- Quit Claim deed issued to the State of Alaska from the U.S. Department of Commerce is equivalent to an easement for highway purposes. It transferred whatever interest the Public Road Commission held (in a few instances this included fee title). It is important to note that this QCD conveyed an easement interest in various highways, through roads, local roads, and feeder roads that *existed at the time of transfer*.
8. **Highways in Alaska** – Established by various Secretarial Orders and Public Land Orders. Established various classifications and widths of roads, i.e., through roads, local roads, feeder roads, highways, etc.

*See attachment – Alaska Public Land Orders Relating to Highway Rights-of-Way, prepared by John Bennett with the State DOT/PF.*

9. **Federal-Aid Highway Act** of August 27, 1958, 23 U.S.C. 107(d), 317. Prior to mid-1980's BLM issued right-of-way grants to the State Department of Transportation for federal aid highway projects. Since the mid-1980's when BLM entered into a national MOU with the Department of Transportation, the Federal Highway Administration issues highway easement deeds with the concurrence of the federal land managing agency. These grants/easements also include related mineral material sites associated with the construction, use, and maintenance of the highways.
10. **Revised Statute 2477**- “The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”

This law was passed in 1866 as part of a mining law, (43 U.S.C. 932); there is more awareness and controversy over this law 14 years after its repeal by FLPMA in 1976 than during the 110 years it was on the books. RS 2477 rights-of-way have been the subject of inconsistent state statutes and state court decisions, and handful of inconsistent federal court decisions during its existence. The BLM is currently under a moratorium from processing RS 2477 assertions. Only a court of competent jurisdiction can adjudicate rights claimed under an RS 2477. There is a lot of history on this subject matter.

11. **Section Line Easements** – This is a State Statute that does not apply to federal lands.

Alaska Statute 19.10.010 – “A tract 100 feet wide between each section of land owned by the State, or acquired from the State, and a tract four rods wide (66 feet) between all other sections in the State, is dedicated for use as public highways. The section line is the center of the dedicated right-of-way...” This authority ties into the R.S. 2477 authority cited above.

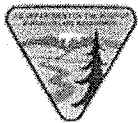
12. **Ditches or Canals** – Act of August 30, 1890, 43 U.S.C. 945. Reservation in patents of rights-of-way for ditches or canals. In all patents for lands taken up after August 30, 1890, under any of the land laws of the United States or on entries or claims validated by this Act, west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States
13. **Railroad, Telephone, and Telegraph Lines** – Act of March 12, 1914, as amended, 43 U.S.C. 975d. Note: This act was repealed by the Alaska Railroad Transfer Act.

*The Alaska Railroad Transfer Act:*

**TITLE 45 > CHAPTER 21 > Sec. 1203.**

*Reservations to United States in interim conveyances and patents*

*(1) Interim conveyances and patents issued to the State pursuant to subsection (b) of this section shall confirm, convey and vest in the State all reservations to the United States (whether or not expressed in a particular patent or document of title), except the unexercised reservations to the United States for future rights-of-way made or required by the first section of the Act of March 12, 1914 (43 U.S.C. 975d). The conveyance to the State of such reservations shall not be affected by the repeal of such Act under section 615 of this title. <sup>[1]</sup>*



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## OBTAINING A RIGHT-OF-WAY ON PUBLIC LANDS

### **Bureau of Land Management Right-Of-Way Program**

Each year, thousands of individuals and companies apply to the Bureau of Land Management (BLM) to obtain a right-of-way (ROW) on public lands. A ROW grant is an authorization to use a specific piece of public land for a certain project, such as roads, pipelines, transmission lines, and communication sites. The grant authorizes rights and privileges for a specific use of the land for a specific period of time. Generally, a BLM ROW is granted for a term commensurate with the life of the project. Typically, grants are issued with 30-year terms, and most can be renewed.

The BLM places a high priority on working with applicants on proposed ROW to provide for the protection of resource values and to process the application expeditiously. This brochure is designed to acquaint you with this process. A more complete explanation of the BLM ROW program is found in Title 43 of the Code of Federal Regulations, Parts 2800 and 2880. Copies of these regulations are available at all BLM offices. The BLM has also initiated efforts to streamline the application processing procedures (see Instruction Memorandum No. 96-27 and Instruction Memorandum No. 97-18)

Careful advance planning with BLM personnel who will be handling your application is the key to success. If they know about your plans early, they can work with you to tailor your project to avoid many problems and costly delays later on in the process.

If you are not familiar with local BLM jurisdictions, the best place to start is by contacting a BLM State Office listed in the back of this brochure. Each State Office oversees a number of Districts, which in turn oversee Resource Areas. Depending on your project, you may be working primarily with personnel at a BLM District Office or, more likely, at a BLM Area Office.

### **WHEN YOU DO--AND WHEN YOU DON'T--NEED A R/W**

As a general rule, you **do** need a ROW whenever you wish to build a project on the public lands. Some examples of land uses which require a ROW grant include: transmission lines, communication sites, roads, highways, trails, telephone lines, canals, flumes, pipelines, reservoirs, etc.

You **don't** need a ROW for so-called "casual use." What kinds of activities are considered "casual use"? Examples include driving vehicles over existing roads, sampling, surveying, marking routes, collecting data to prepare an application for a ROW, and performing certain activities that do not cause any appreciable disturbance or damage to the public lands, resources or improvements.

Depending on the specifics of your proposed activity, uses on the public lands can be either casual use or a use requiring a grant. It's a good idea to contact the BLM and discuss your plans before assuming your use is casual. The BLM can then make a judgment on the requirements in your particular case.

## **STEPS IN APPLYING FOR A ROW**

1. Contact the BLM office with management responsibility for the land where the ROW is needed.
2. Arrange a preapplication meeting with the Field Office Manager or appropriate staff member. Jointly review the application requirements and form to determine what information is needed,.

If you call ahead to set up the meeting, it can often be arranged and held at the site of your proposed use.

3. When you have all the information, bring or mail the application, along with the nonrefundable application processing fee, to the appropriate BLM office.

## **PREAPPLICATION MEETING**

The preapplication meeting provides the opportunity for you to fully discuss and describe your proposal in detail and provides an opportunity for BLM to fully explain processing requirements. The preapplication meeting will also cover fees, safety, work schedules, and other items. This meeting has the potential for saving both you and the BLM time and expense. For example, in FLPMA, Congress directed that ROW in common shall be required, to the extent practical, in order to minimize adverse environmental impacts and the proliferation of separate ROW. This is accomplished through a system of designated ROW corridors and co-locating communication uses on existing towers and within multi occupancy buildings when feasible. During the preapplication meeting, the staff may examine the proposed ROW to see if it would fit in an existing corridor or in an existing communication facility.

The BLM wants to make the application process as easy as possible. Accordingly, the application form requests a minimum amount of information. (A copy of the application follows the itemized instructions for filling out the application) Even so, incomplete information is often the reason application periods are unnecessarily prolonged.

To avoid problems, you should review the form prior to your preapplication meeting and, if possible, fill it out before or during the preapplication meeting with the BLM. Be sure to bring any information that may be useful during this session. For example, Item 8 requests a map of the project area. You may already have a survey or other adequate map that will satisfy this requirement and provide additional information in processing your application.

## **COMPLETING THE APPLICATION FORM**

Directions for completing the application are included on the form; however, the following supplemental instructions may also assist you. Incomplete information is often the reason application periods are unnecessarily delayed.

Item 6--This applies only to oil and gas pipelines, applicants must be citizens of the United States. Citizenship is required of all partners in a partnership. Aliens may own or control stock in corporations if the laws of their countries do not deny similar privileges to citizens of the United States.

Item 7--Requires addressing all the details of what you need and how you plan to accomplish it. Be as specific as possible in describing the project, its location, and dimensions. Include the legal description of the affected public land. Attach separate sheets as necessary, since the space in this block is limited. You may wish to follow the Plan of Development (POD) outline (following the application form) to complete this section. This outline should help you thoroughly describe your project and its associated impacts. You should also describe and apply for a Temporary Use Permit for any extra construction width you may need.

Item 8--Attach a map (BLM intermediate scale map, 1:100,000; U.S. Geological Survey quadrangle; aerial photo; or equivalent) showing the approximate location of the proposed ROW and facilities on public land and existing improvements adjacent to the proposal. Only improvements that may directly affect the proposal need to be shown on the map. Include the township, range, section, and a north arrow.

Item 9--It is not mandatory to submit documentation of other approvals at the time of application. However, the authorized officer may require other agency approvals prior to processing.

Item 10--The "initial cost reimbursement payment" is discussed in the Costs and fees section. You will be notified by formal decision letter of the fee category determination for your application.

Item 12--If you have no doubts about your capacity to complete the project, write in "[I am/We are] technically and financially capable of completing the project described in this application." The BLM Authorized Officer may require that you post a performance bond or that you hire a registered engineer, depending upon the scope and complexity of your project.

Item 13-18--It is generally not necessary to complete these items. However, if you have made studies that concern these questions, the information should be submitted to accelerate the processing of the application.

Item 19--It is mandatory to provide information related to the use or transportation of any hazardous materials. Simply writing in "N/A" in this block is not satisfactory.

Supplemental--The supplemental page is to be completed only when the application is for an oil and gas pipeline. In such cases, fill in only I(g) and either I(e) or III(c). If this information has been previously submitted with another BLM ROW application or grant, provide office and file identification numbers.

Signature block--If someone is acting as your authorized agent and you want them to sign the application or grant on your behalf, a resolution to that effect must be filed with application.

To sum up, the application form is considered complete when information has been provided for the following items:

Required - Items 1, 3, 4, 5, 7, 8, 10, 12, signature, and date.

Required if applicable - Items 2, 6, 11, 19, and supplemental page.

Optional - Item 9, 13, 14, 15, 16, 17, and 18.

A base application consists of a completed application form (Standard Form 299), map, and the nonrefundable cost reimbursement processing payment.

## **COSTS**

There are three different charges involved for a ROW grant:

Processing Fees associated with your application- The first charge will reimburse the United States in advance for the expected administrative and other costs incurred in processing the application. Processing fees must be paid when the written application is submitted. The BLM will use the information presented during the preapplication meeting to estimate the application processing fee. The BLM will first designate the project as either major or minor. Fees for minor category projects are charged according to a schedule available at BLM offices. Costs for major category projects depend on whether the project is one authorized under FLPMA or under the Mineral Leasing Act. Major category projects applied for under the authority of FLPMA require the payment of *reasonable* processing costs for ROW. The *actual* processing costs will be required for ROW applied for under the authority of the Mineral Leasing Act.

Monitoring fee -- The second charge is a one-time nonrefundable fee to reimburse the United States for the cost of monitoring compliance with the terms and conditions of the ROW grant, including requirements for protection and rehabilitation of the lands involved. The BLM will monitor your construction, operation, and maintenance of the ROW and, when the time comes, the shutdown of your activities and the termination of the ROW grant. The amount of this fee is also determined according to a schedule available at BLM offices. Again, if the estimated monitoring costs exceed a certain amount, the applicant will be required to reimburse the United States for the actual monitoring costs.

Rental -- The third charge is the annual rental. It is payable before the grant is issued and is based on the fair market rental value for the rights authorized. The rental for *linear and communication sites* on public lands is usually established via two separate administrative schedule (see Linear Schedule or Communication Uses Schedule). These schedules, which are based roughly on land values in the project area, are adjusted annually by an economic index. In some cases, the rental is established by an appraisal.



No application, monitoring, or rental is required for:

- State or local agencies or instrumentalities thereof (except municipal utilities and cooperatives whose principal source of revenue is customer charges) where the land will be used for governmental purposes and the land resources will continue to serve the public interest.
- Road use agreements or reciprocal road agreements.
- Federal agencies.

Other exemptions, waivers, or reductions in the application and/or rental may apply and can be explained by BLM officials during the preapplication meeting.

## REMEMBER TO PLAN AHEAD

You should arrange for your preapplication meeting well in advance of when you would like to start work on the project. Processing time for an average grant is 60 to 90 days. However, grants for complex projects can take much longer. Try to contact the BLM as soon as possible. The Area Manager and staff are ready to provide information, advice, and assistance to help you prepare an application.

You must use a STANDARD FORM 299 (mail or fax form to the appropriate office) to file an application.

## TEMPORARY USE PERMIT (TUP)

Keep in mind that all activities associated with the construction, operation and termination of your ROW must be within the specified limits of the authorization. Item 7 on the ROW application is where you would identify your need for the use of additional land during the construction phase of your project. This additional land may be necessary for construction, stock piling of excess materials, equipment parking, etc. If additional land is required during construction, you will need to apply for a TUP. This TUP can be granted for up to 3 years; granting a term of this length generally allows the holder of the ROW adequate time to any stipulated requirements for restoration of disturbed land. TUP needs should be discussed during the preapplication meeting.

You can apply for a TUP at the same time as you apply for a ROW by describing its dimensions, locations, and term needed in item 7 of the standard ROW application (SF-299), or by describing it in your Plan of Development. You may also apply for a TUP after your ROW has been granted; in this case, you would use a separate SF-299 form, and would pay additional processing/monitoring fees for BLM to process the TUP. This might require a separate environmental clearance and take additional processing time. The Bottom line: if there is a possibility that you may need extra construction width or space, it is best to identify this in your ROW application.

## ROW PLAN OF DEVELOPMENT (outline)

1. Description of the Facility (e.g., road, pipeline, utility line, etc.)

What is to be built?

What will it be used for?

Why is it necessary to use public lands?

When do you propose to construct? Specify duration and timing if known.

How long is the authorization needed?

## II. Design Criteria

The degree of design must be compatible with the proposed use and anticipated environmental impacts.

All disturbances must be within the boundary of the ROW.

### A. Road Specifications

- Length and width of ROW
- Width of road surface
- Maximum grade of road
- Minimum/maximum clearing width
- Cut/fill slope ratios
- Type and location of drainage structures
- Cattle guards, fences, gates
- Proposed surfacing (gravel) type and quantities
- Dust abatement
- Centerline survey plat
- Design drawings including:
  - Plan and Profile sheets
  - Typical roadway cross-sections
  - Culvert installation details
  - Grade dip detail (water bars, rolling dips, etc.)
  - Cattle guard, fence and gate details
- Construction specifications

- Materials specifications

#### B. Pipeline Specifications

- Length and width of ROW
- Diameter of pipe and type of material
- Depth of pipeline
- Size if trench
- Construction access requirements during and after construction
- Construction equipment requirements
- Survey plat
- Site specific engineering surveys for critical areas
- Cathodic protection site, valve stations, compressor stations

#### C. Power Line Specifications

- Length and width of ROW
- Size, number and type of conductors
- Height and size of tower/poles
- Vegetation clearance requirements
- Raptor proof design
- Construction access and equipment requirements
- Transformers, substations, anchor locations, pulling sites
- Marker ball installations

#### D. Communication Site Specifications (pertain to non-linear sites)

- Site dimensions
- Size of all structures (building, towers, guys)
- Site design plan
- Utility requirements (power, phone)
- Access requirements during and after construction

- Technical data report including specifications of equipment, frequency of transmissions
- FCC license
- Compatibility with other users

III. CONSTRUCTION OF THE ROW FACILITY. Most surface disturbing activities associated with ROW occur during this phase of the project. The following components have been found to be common to most ROW construction projects. These items, where relevant, should be carefully described in the plan of development.

#### A. Flagging and Staking the ROW.

- Stake centerline and/or the exterior limits of the ROW
- Construction staking, cut and fill areas, clearing limits

#### B. Clearing and Grading of the ROW.

- State how much topsoil will be saved, show where it will be stockpiled and how it will be spread
- Describe disposal of all woody vegetation (trees, stumps and brush) cut on the ROW

#### C. Earthwork

- Engineering and quality control
- Excavation and placement of embankment
- Borrow material sources
- Removal of structures and obstructions
- Disposal of unsuitable excavated materials (e.g. oversize rock, weak soils, etc.)
- Soil erosion and water pollution control measures

#### D. Structure Installation

Describe how improvements will be constructed ie., constructed on site, prefabricated and delivered to site, concrete cast-in-place, precast concrete, etc.

#### E. Stabilization, Rehabilitation and Revegetation

1. Soil replacement and stabilization. (Explain how soil will be stabilized in the project area).

- Recontouring all disturbed areas to restore original contours

- Placement of waterbars and/or other erosion control structures

## 2. Seeding Specifications

- Seed mixture (certified seed required)
- Rate, method, schedule for seed application
- Application of mulch (straw, burlap, hydromulch) and locations
- Application of fertilizer (type, location, rates)
- Criteria for determining success of revegetation

## IV. OPERATION AND MAINTENANCE OF THE FACILITY

- Describe what maintenance is required and anticipated level of use
- When will scheduled maintenance be performed
- Snow removal
- Pesticide Use Proposal-application to BLM describing plans for controlling noxious weeds

## V. TERMINATION AND ABANDONMENT

- Removal of facilities
- Reclamation of disturbed areas
- Written plan required

## VI. MISC. INFORMATION NEEDS

### A. Waste Disposal

- Trash, construction debris
- Solid waste disposal
- Hazardous waste

### B. Traffic Control Plan

- Barricades
- Construction signs
- Flagpersons

### C. Safety Plan for employees, contractors, general public

#### D. Fire Prevention Plan

#### E. Spill Prevention and Contingency Plan

- Preventive measures
- Notification of proper authorities
- Incident Response/Containment measures
- Testing and Cleanup measures

#### F. Temporary Use Permit (TUP)

- List needs for additional space outside ROW
- Proposed use
- Dimensions
- Specify duration of TUP (include time to rehabilitation site)

### PROCESSING A ROW APPLICATION

Once you have filed an application, the BLM will review it to make sure all necessary information has been included. The application is then evaluated to determine the probable impact of the activity on the social, economic, and physical environments. The BLM will also check to see if the proposed ROW is consistent with the existing land use plan, and will check to see what valid existing rights currently exist on the lands in question.

A ROW application may be denied for any one of the following reasons:

- The proposal is inconsistent with the purpose for which the public lands are managed.
- The proposal would not be in the public interest.
- The applicant is not qualified.
- The proposal is inconsistent with Federal, State, or local laws.
- The applicant is not technically or financially capable of accomplishing the project.
- Serious environmental consequences that cannot be mitigated would result.

A preapplication meeting will reduce the possibility of the application being denied.

### APPEAL RIGHTS

If the application is denied, the official written notice will give the reasons for the denial and information on how to file an appeal, should you so desire.

## LIABILITY

The holder of a right-of-way grant is responsible for damage or injuries to the United States Government in connection with the holder's use of the ROW.

The holder indemnifies or insures the United States Government harmless for third party liability, damages, or claims arising from the holder's use and occupancy of the ROW.

## APPLICANT CONTRIBUTIONS TO PROCESSING

ROW applications are generally processed in the order received, but a thorough, complete application will invariably be put ahead of a deficient, problem-riddled application. ROW applications often compete against other land use applications and other priority workloads. For this reason, applicants may have to wait for extended periods of time for the BLM specialist to complete required inventories. Other points to consider are weather and season of the year. Processing of an application may come to a standstill waiting for a clearance. For example, if you filed an application late in the fall and the BLM archaeologist already had other workloads committed for that year, the archaeologist may not be able to get to your clearance prior to snowfall and the application may be delayed until the next summer.

One option you may wish to consider is contracting with qualified individuals or firms to perform required inventories when the BLM has other competing workloads. The BLM does accept the work of certain qualified individuals and firms that hold permits to do cultural resources and T&E inventories on the public lands. These firms do the field inventory and write reports for BLM approval. This can often significantly reduce the processing time for you application and may also reduce the processing. These items should be discussed with the BLM at the pre-application meeting.

## YOUR ROW RESPONSIBILITIES

Once you have a ROW grant, you can proceed with your plans. However, there are a number of responsibilities you should keep in mind. The following questions and answers help explain these responsibilities.

Q. How do I handle removal of resources like timber?

A. If there are any marketable products (such as timber) that have to be removed before construction can begin, you may be required to purchase them under a separate contract.

Q. If I want to substantially change, improve, or add to my project once I have a ROW grant, do I have to get BLM's approval?

A. Yes. You must file an application to amend your ROW grant and receive prior written approval from the BLM for any substantial change in location or authorized use during construction, operation, or maintenance of the ROW. Contact the Area Manager to determine if your proposed changes are substantial.

Q. Will the BLM inspect my project?

A. Yes. The BLM may inspect your project for compliance with the terms and conditions of the grant. In addition, the BLM reserves the right of access onto the public lands covered by the ROW grant and, with reasonable notice to the holder, the right of access and entry to any facility constructed in connection with the project.

Q. If the BLM is not satisfied with the way I use my ROW, what can the agency do?

A. A ROW holder may use the ROW for only those purposes permitted in the grant. The BLM may suspend or terminate a ROW if the holder does not comply with the applicable laws, regulations, terms, or conditions. The BLM may require an immediate temporary suspension of activities within a ROW to protect the public health and safety or the environment.

Q. Can I transfer my ROW?

A. Yes, with BLM approval. A transfer of your ROW is called an assignment. You must submit, in writing, the proposed assignment of all or part of a ROW to the BLM, along with a nonrefundable payment of \$50. The assignment to the new owner is not legally recognized by the United States until it has been approved in writing by the BLM. If the new owner is qualified and agrees to be bound by all of the requirements of the ROW grant, the BLM will approve the assignment.

Q. Do I need a ROW if I use an existing authorized ROW facility for my communication site use?

A. The ROW regulations, 43 CFR Part 2800 et al., published November 13, 1995, reduced the administrative burden on the communications industry and the government by reducing paperwork, and eliminating the requirement that all communication site users have authorizations; the new regulations require that only building owners have authorizations.

Q. How does the BLM calculate rent for communication uses?

A. The BLM calculates rent on the number of actual uses in the facility. For a stand alone facility, the base rent is the schedule rent for the facility owner's use for the population served. For multiple use facilities the base rent is the highest schedule rent in the facility for the population served, plus 25% of the schedule rent for all other tenant uses, unless the agency waives or exempts those uses.

Q. Do all authorized communication site users pay rent?

A. No. Section 2803.1-2(b) (1) lists users who are not required to pay a fair market rent. Basically these users include Federal, State or local government agencies. Rent may be waived or reduced for applicants such as nonprofit organizations or those which provide, without charge, a valuable benefit to the public or to the programs of the Secretary of the Interior. Also, rent may be reduced if the authorized officer determines that the requirement to pay the full rental will cause undue hardship.

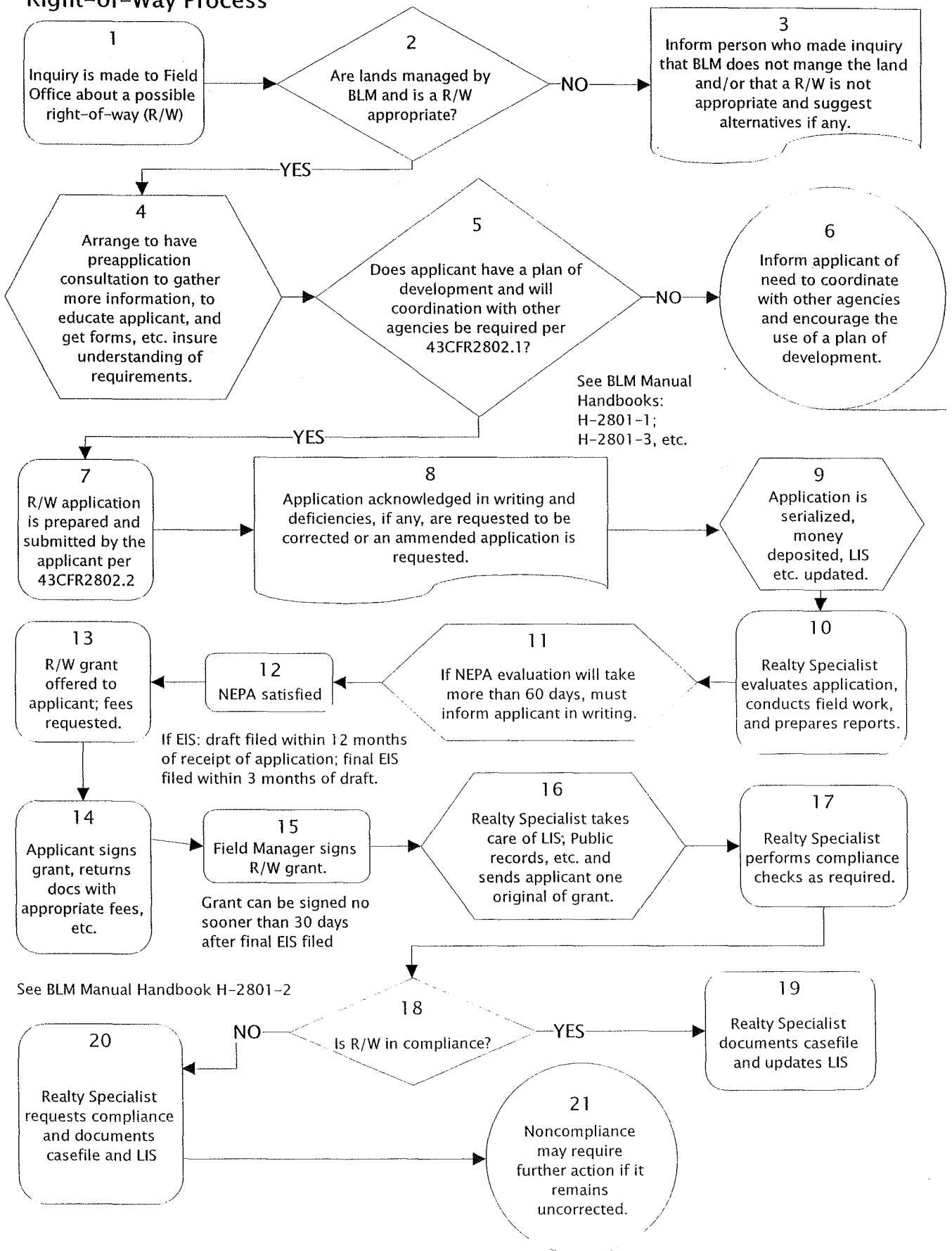
Q. Will my rental payment likely increase the following year?



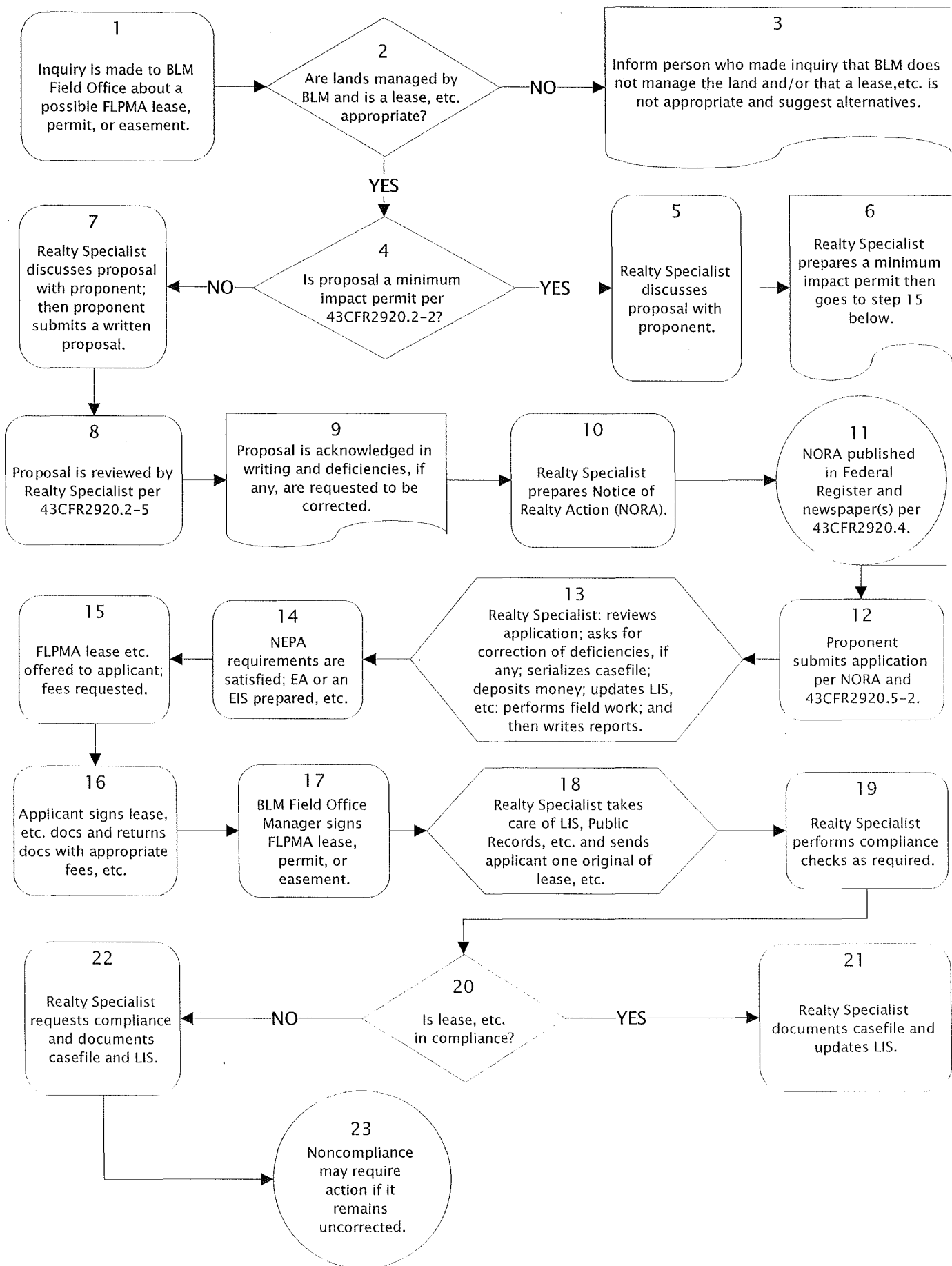
A. The rental schedule for communication uses is indexed to the Consumer Price Index-Urban. Increases/decreases in the CPI-U are capped at 5 percent. Rental fees can increase or decrease from the previous year depending upon the actual change in the CPI-U and any changes in the number of users of the facility.

The rental schedule for linear ROW's is adjusted annually by multiplying the current rent by the Gross National Product Implicit Price Deflator (IPD), second quarter to second quarter.

# Right-of-Way Process

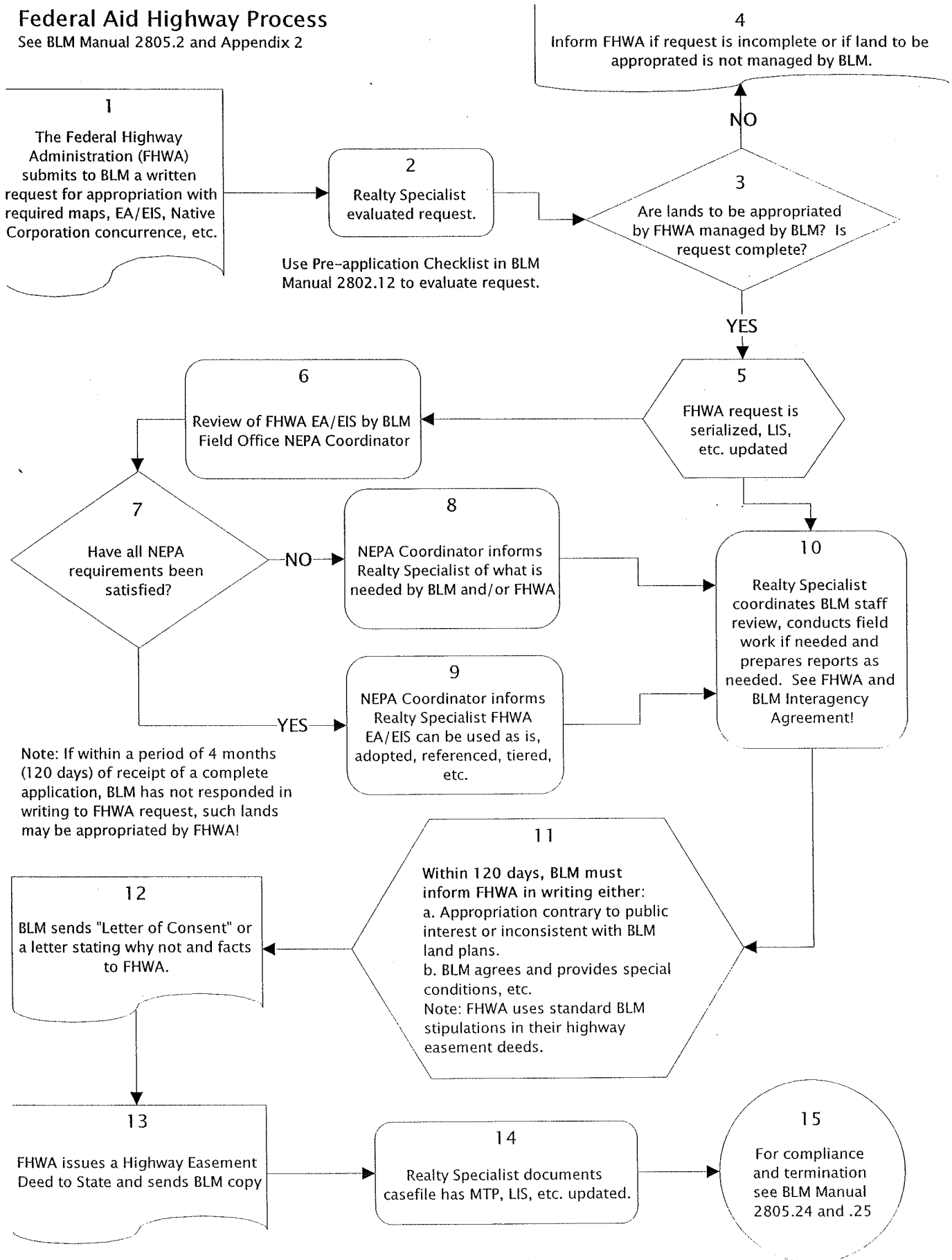


# FLPMA Lease, Permit, or Easement Process



# Federal Aid Highway Process

See BLM Manual 2805.2 and Appendix 2



# ANCSA Sec. 17(b) Easements



## Easement Identification and Reservation Process

Section 17(b) of the Alaska Native Claims Settlement Act of December 18, 1971, and 43 CFR 2650. 4-7 authorizes the identification and reservation of public easements across Native-selected lands which are reasonably necessary to guarantee access to publicly owned lands or major waterways, guarantee international treaty obligation, or to provide access to present existing Federal, State, or municipal corporation sites.

The first step in the easement identification process is for the Branch of Land Transfer Services, Easement Section, to review and identify any easements that are to be reserved to the United States in an easement memorandum (EM). No lands may be approved for conveyance to a Native corporation which has not been included in an EM; to do so would deprive interested parties of the opportunity for input in the easement process.

The Branch of Land Transfer Services, Easement Section, will conduct an appropriate review and identify any easements to be reserved. All affected parties (Native, State, Federal, or other individuals) will be provided the opportunity to review the proposed easement recommendations and, where possible, resolve any conflicts prior to issuing the EM.

The easements identified in the EM are included in an appealable decision issued by the Division of Conveyance Management that is published in the Federal Register and a local Newspaper. Upon conclusion of the appeal period, the conveyance document is issued with the reservation of any Sec. 17(b) easements that had been identified in the decision.

*What follows is the principal content of the easement regulations issued by the Secretary of the Interior on November 27, 1978. Although this may be useful to the reader in knowing what easements may or may not be reserved, this guide should not be considered a substitute for the regulations. Copies of the regulations may be obtained by letter or phone from any Bureau of Land Management Alaska Office, or on-line at:  
<http://www.gpoaccess.gov/cfr/index.html>*

## ROAD AND TRAIL EASEMENTS

### **For what purposes may BLM reserve road and trail easements on Native lands?**

The BLM may reserve easements on Native lands to allow public access to:

- publicly owned lands

- major waterways and marine coastline
- communities
- airports or docks
- groups of private holdings
- government installations (unless justified, access shall be limited to government use)

**What tests do road and trail easements have to meet to be reserved on Native lands?**

Road and trail easements must be “reasonably necessary” to serve one of the purposes described below:

- ✓ be reserved only if there is “no reasonable alternative route” across publicly owned lands
- ✓ must be limited and non-duplicative
- ✓ must be specific as to location use, and size
- ✓ must be based upon present existing use defined in the regulations as being used on or before December 18, 1976, unless:
  - the easement is necessary to guarantee international treaty obligations
  - the easement is for access to an isolated tract or area of publicly owned lands
  - a future railroad or road is specifically located and planned for construction within five years.
- ✓ if not determined by existing use, must be in topographically suitable locations
- ✓ if an adverse impact on Native culture, lifestyle, or subsistence needs, alternatives must be considered
- ✓ along marine coastline; may only be reserved for primary route of travel between coastal communities, publicly owned uplands, or communities and publicly owned uplands
- ✓ from publicly owned uplands to the marine coastline; only if significant present use has occurred on the public lands below the mean high tide; however, easements may be reserved to isolated public lands from the coastline if there is no other reasonable alternative route
- ✓ along major waterways; be reserved only for short portages around obstructions (but this doesn’t preclude a trail or road easement which happens to follow the waterway).

**Other Easements**

**For what other purposes may easements be reserved on Native lands?**

- for existing utility purposes, such as electricity, water, communications, oil, gas and sewage
- for future utility purposes only if site specific and actually planned for construction within 5 years of the conveyance
- for air, light, or visibility purposes (if required for safety, or to permit proper use of public improvements)

- to guarantee international treaty obligations
- to implement any agreement between the U.S. and Native corporation

### **Combined Easements**

#### **When should several purposes be combined into a single easement?**

- Transportation, communications, and utility easements shall be combined where the combination is reasonable considering the primary purposes of the easements.

### **Widths of Roads and Trail Easements**

#### **What are the maximum widths of transportation easements?**

- no more than 25 feet for foot travel, dogsleds, and small vehicles
- no more than 50 feet for large all-terrain vehicles
- no more than 60 feet unless the existing road is wider
- 100 feet, unless otherwise justified for a proposed road
- 100 feet on each side of the center line for a proposed railroad.

### **Site Easements**

#### **For what purposes may BLM reserve site easements on Native lands?**

Site easements may be reserved only at:

- a trail head
- along an access route, waterway, or marine coastline

Site easements may only be for the following purposes:

- aircraft landing
- boat or vehicle parking
- temporary camping (no more than 24 hours), and /or
- loading or unloading (no more than 24 hours)

#### **What tests do site easements have to meet to be reserved on Native lands?**

- ✓ if adverse impact on Native culture, lifestyle or subsistence needs, alternatives must be assessed
- ✓ must be limited and non-duplicative
- ✓ must be specific as to location, use, and size
- ✓ be located on existing sites unless a variance is otherwise justified
- ✓ if not determined by existing use, must be in topographically suitable locations
- ✓ be no larger than one acre in size unless a variance is otherwise justified

- ✓ on the marine coastline, be reserved only at periodic points necessary to facilitate travel on coastal waters or between coastal waters and publicly owned uplands
- ✓ on major waterways, be reserved only at periodic points related to travel on the waterway or travel between the waterway and publicly owned lands
- ✓ be for aircraft landing strips, only if they have “present significant use”, are a necessary part of a system of access to public lands, and are not suitable for inclusion as part of village conveyance. Only the area needed for takeoffs, landings, and public safety may be reserved.

### **Forbidden Easements**

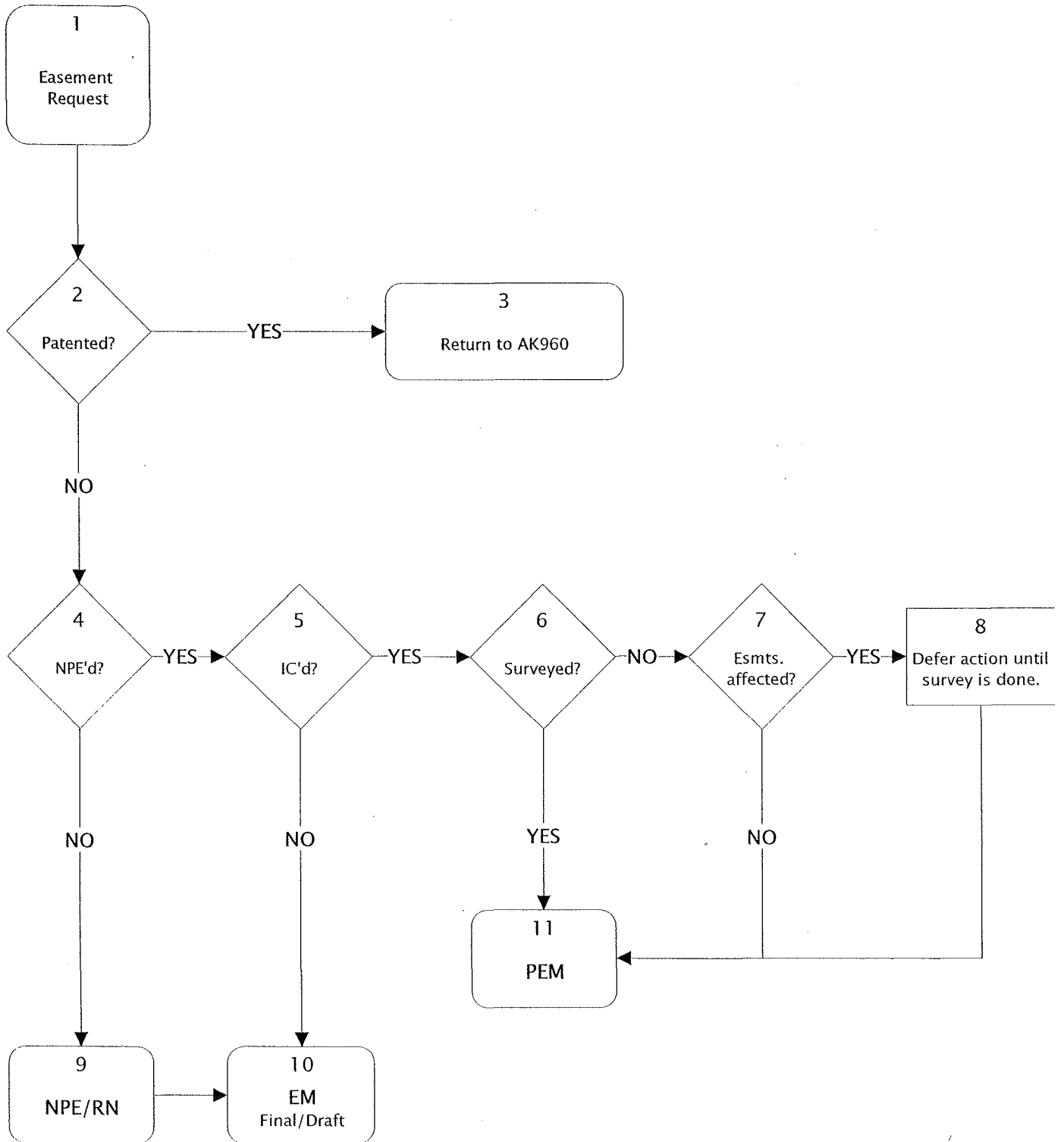
#### **What easements are forbidden?**

No easements shall be reserved:

- for hunting, fishing, or unlimited camping on Native lands
- for scenic or recreation purposes
- simply to reflect patterns of Native use on Native lands
- on the basis of subsistence use of the lands of one village by the residents of another
- for the purpose of protecting Native stockholders from their respective corporations
- for future logging sites or similar operations
- on the beds of major waterways, except where related to road or trail purposes, portaging or changing the mode of travel
- on the beds of non-major waterways, except when related to road or trail purposes.



# Easement Workflow, General



# ACCESS IN ALASKA

## *BRIEF OUTLINE*

### Overall Philosophy of ANILCA Relating to Access:

The Alaska National Interest Lands Conservation Act (ANILCA) OF December 2, 1980, 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. It added nearly 104 million acres of conservation system units (CSU) in Alaska.

Congress recognized that existing law, "allows only limited public access", across the massive CSU's and enacted specific access guarantees to ensure "full rights of access" for CSU in holders.

Also, recognizing that Alaska's, "existing transportation and utility systems are in their embryonic stage of development," Congress provided for Alaska's economic growth by adopting, "a procedure for future siting of transportation facilities when such systems cross CSU lands."

Finally, Congress enacted specific access guarantees across Bureau of Land Management (BLM) and Forest Service lands "to resolve any lingering questions by making it clear that non-Federal landowners have a right of access."

.....

The following provision serves as a few examples of the specific guarantees of access made by Congress. The most significant of which is found in Title XI. Keep in mind that the "Alaska Lands Bill" was debated nearly 9 years and spanned 3 administrations and 5 sessions of Congress.

### **Access for Ambler Mining District to Haul Road: Section 201(4) (b) of ANILCA**

- (b) Congress finds that there is a need for access for surface transportation purposes across the Western (Kobuk River) unit of the Gates of the Arctic National Preserve (from the Ambler Mining District to the Alaska Pipeline Haul Road) and the Secretary shall permit such access in accordance with the provisions of this subsection.

### **Access in Support of Commercial fishing (limited area): Section 205 of ANILCA**

With respect to the Cape Krusenstern National Monument, the Malaspina Glacier Forelands area of Wrangell-Saint Elias National Preserve . . . , the Secretary may take no action to restrict unreasonably the exercise of valid commercial fishing rights or privileges obtained pursuant to existing law, including the use of public lands for

campsites, cabins, motorized vehicles, and aircraft lands on existing airstrips, directly incident to the exercise of such rights or privileges, . . .

**Forty mile River Area/Access for Asbestos Development: Section 605(b) of ANILCA**

- (b) . . . The classification as wild river areas of certain segments of the Fortymile by this subsection shall not preclude such access across those river segments as the Secretary determines to be necessary to permit commercial development in an environmentally sound manner, of asbestos deposits in the North Fork drainage.

**Access for Subsistence uses: Section 811 of ANILCA**

- (a) The Secretary shall ensure that rural residents engaged in subsistence uses shall have reasonable access to subsistence resources on the public lands.
- (b) Notwithstanding any other provision of this Act or other law, the Secretary shall permit on the public lands appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents, subject to reasonable regulations.

**Title XI of ANILCA:**

Guarantees personal access to inholdings within ANILCA established units, in addition to other types of transportation and utility systems.

**CONGRESSIONAL DECLARATION OF FINDINGS: Section 1101**

- (a) Alaska's transportation and utility network is largely undeveloped and the future needs for transportation and utility systems in Alaska would best be identified and provided for through an orderly, continuous decisionmaking process involving the State and Federal Governments and the public;
- (b) the existing authorities to approve or disapprove applications for transportation and utility systems through public lands in Alaska are diverse, dissimilar, and, in some case, absent; and
- (c) to minimize the adverse impacts of siting transportation and utility systems within units established or expanded by this Act and to insure the effectiveness of the decisionmaking process, a single comprehensive statutory authority of the approval or disapproval of applications for such systems must be provided in this Act.

**SUMMARY:**

Title XI in general requires the Secretary to provide access with some limitations and requirements and, unlike other related legislation (NPS Act of 1916, Wilderness Act of 1964, NWRS Administration Act of 1966, and the DOT Act of 1966), is not designed primarily to limit

access, with a few exceptions. In short, Congress established a variety of unique and revolutionary access related provision. Title XI requires a judicious accommodation between the need to provide for greater access and the desire to protect the purposes and values of the CSU's.

#### **GENERAL TITLE XI – TRANSPORTATION AND UTILITY SYSTEMS PROCESS:**

1. Filing of a consolidated application or with each appropriate Federal agency;
2. Preparation of a final joint environmental impact statement by the Federal agencies within 1 year;
3. Decision to approve or disapprove relevant portions of the application by each Federal agency within 4 months of final Environmental Impact Statement;
4. Appeal to President if one or more agencies disapprove application;
5. Presidential decision with 4 months of appeal;
6. Judicial review of Presidential denial.

In cases involving wilderness areas or for which there is no applicable law –

7. President's recommendation for approval submitted to the Congress;
8. If Congress adopts a joint resolution of approval with 120 days under expedited procedures, the application is approved; if not, it is disapproved.

#### **HISTORY OF TITLE XI REGULATIONS:**

- In July 1983, proposed ANILCA Title XI regulations were published.
- In September 1986, final regulations were published. This version was considered less restrictive generally broader in some areas.
- In February 1987, Trustees for Alaska, et al. sued challenging the Department of the Interior's final rulemaking.
- In April 1991, after voluminous briefing, including a review by a Federal Magistrate Judge, the U.S. District Court upheld the regulations.
- This order was appealed to the U.S. Ninth Circuit Court of Appeals. It is currently pending; however the U.S. has initiated the process for revising the subject regulations. The Court is anxious to proceed with this matter pending some resolution by the parties. The current administration does not want to brief this case before the court and is confident the proposed changes in the regulations will compel the Trustee's for Alaska et al. to seek dismissal of the appeal.
- Revised regulations were developed with W.O oversight.
- October 8, 1997, final regulations were issued.

## H-1601-1 LAND USE PLANNING HANDBOOK

For lands where vehicle use designations have not been completed or the current designations are out-of-date because of use changes and/or resource impacts, and a new planning start or revision is not scheduled to begin within two years of the release date of this Handbook, an interim designation through a land use plan amendment may be completed and implemented until such time as permanent designations are made. These interim designations must, at a minimum, establish designations that are sufficient to initiate vehicle management in areas where limited-use restrictions (such as limited to existing or designated roads and/or trails) are warranted and/or identify areas that should be immediately designated as closed to all types of vehicle use. Where interim designations are implemented and vehicle use is limited to existing or designated roads and/or trails, as opposed to seasonal or other types of administrative limitations, a plan amendment to designate the specific roads and trails on which vehicle use is allowed must be initiated within 5 years of completion of the interim designation.

At a minimum, the OHV designations for wilderness study areas (WSAs) must be “limited” to ways and trails existing at the time of inventory, unless “open” is appropriate for a sand dune or snow area. This applies to both motorized and mechanized transport (see Wilderness Study Area Handbook H-8550-1, I.B.11, and refer to 43 CFR 8364.1 for mechanized transport). In addition, future designations may be made for a WSA if it is released from study. Except as otherwise provided by law (e.g, the Alaska National Interest Lands Conservation Act), congressionally designated wilderness areas are statutorily closed to motorized and mechanized use; this should be shown in the land use plan along with the acreage affected.

2. *Implementation Decisions*: Identify site-specific visitor services and facilities, such as interpretive exhibits, campgrounds, and signs. Identify methods to ensure that recreation programs and facilities are accessible to visitors with disabilities. Where appropriate, determine visitor capacity using accepted methodologies such as Limits of Acceptable Change (LAC). Determine type of use within the planning area using Recreation Opportunity Spectrum (ROS) classes and applicable techniques such as Benefits-Based Management (BBM) or Outcomes-Based Management. On-the-ground decisions such as road and trail maintenance, signing, and parking will be addressed in implementation planning or in a specific travel management plan, as appropriate. Any new area, road, or trail OHV designation or redesignation, however, requires a land use plan revision or amendment (see 43 CFR 8342.2).

3. *Notices, Consultations, and Hearings*: No additional specific requirements exist.

### D. Lands and Realty

1. *Land Use Plan Decisions*: Identify the following consistent with the goals, standards, and objectives for natural resources within the planning area:

- a. Lands that are available for disposal under a variety of disposal authorities, provided they meet the criteria provided in FLPMA (Section 203 and 206) or other statutes and regulations (see Handbook Section II.B.2).

**H-1601-1 LAND USE PLANNING HANDBOOK**

- b. Lands available for disposal under specific authorities and disposal criteria (e.g., disposal only through sale, through sale or exchange, or only through the Recreation and Public Purposes Act). Also see Section II.B.2.
- c. Criteria under which proposed Section 205 acquisitions of land, or interests in land, would occur as described in Handbook Section II.B.2.
- d. Proposed withdrawal areas (see 43 CFR 2300).
- e. Land Classifications under Section 7 of the Taylor Grazing Act of 1934, as amended (43 U.S.C. 315f). The procedures applicable to Section 7 outlined in 43 CFR 2400 must be followed. The following actions require classification: Recreation and Public Purposes Act sales (see 43 CFR 2740) and leases (see 43 CFR 2912); agricultural entries (see 43 CFR 2520, 2530, 2610); and State grants (see 43 CFR 2620). To the extent that the land use planning procedures pursuant to 43 CFR 1600 differ from applicable classification procedures under 43 CFR 2400, the latter procedures shall be followed and applied. The analysis that supports classification decisions is normally the same analysis utilized in the land use planning/NEPA process to make decisions concerning the disposal or retention of public lands. For any classification decision made through the land use plan, initiate the classification decision requirements (i.e., proposed and initial decisions required under 43 CFR 2400) at the time the decision document is issued for the land use plan.
- f. Where and under what circumstances land use authorizations such as major leases and land use permits may be granted (see 43 CFR 2920).
- g. Right-of-way corridors, avoidance areas, and exclusion areas, along with any general terms and conditions that may apply (see 43 CFR Part 2800).

2. *Implementation Decisions:* Identify exchange agreements, land sale plans, approvals of leases and permits, and all subsequent phases of case processing. Identify issuance of site-specific right-of-way grants and authorizations. Identify authorization notices for those actions that require classification or other notices, including sales, exchanges, State selections, Recreation and Public Purposes Act sales and leases, agricultural entries, and other land disposal actions.

3. *Notices, Consultations, and Hearings:* Consult with parties to Interagency Agreements or MOUs relating to corridor identification or use. The Western Utility Group must be consulted when developing decisions affecting utility use. Consult with Indian tribes and State and local governments having an interest in or jurisdiction over lands proposed for disposal or acquisition.

**BLM Alaska Links**

**Alaska State Office**

222 W. 7th Avenue #13  
Anchorage, Alaska 99513 (907) 271-5960

**Public Information Center**

**Anchorage Field Office**

6881 Abbott Loop Road  
Anchorage, Alaska 99507 (907) 267-1246

**Glennallen Field Office**

P.O. Box 147  
Glennallen, Alaska 99588 (907) 822-3217

**Juneau - John Rishel Mineral Information Center**

100 Savikko Road  
Douglas, Alaska 99824 (907) 364-1553

**Northern Field Office**

1150 University Avenue  
Fairbanks, Alaska 99709 (907) 474-2302

**Kotzebue Field Station**

P.O. Box 1049  
Kotzebue, Alaska 99752 (907) 442-3430

**Nome Field Station**

P.O. Box 925  
Nome, Alaska 99762 (907) 443-2177

**Tok Field Station**

P.O. Box 309  
Tok, Alaska 99780 (907) 883-5121

**Alaska Fire Service**

P.O. Box 35005  
Ft. Wainwright, Alaska 99703 (907) 356-5500

