CHAPTER 60 - ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT RIGHTS-OF-WAY

60 - ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT (ANILCA) RIGHTS-OF-WAY

The statutory authority for these grant is the Act of December 20, 1980 (94 Stat. 2371). Section 1323(a) of this Act has national application and provides that, subject to terms and conditions of the Secretary of Agriculture, the owners of non-Federal land within the National Forest System shall be provided adequate access to their land (regulations being prepared). Until the regulations and implementing direction are finalized, rely on the following discussion and guidelines in dealing with situations which might involve statutory rights of ingress or egress. Consult with the Regional Office, Special-Use Management Staff, Recreation, Wilderness and Lands, for directions on individual cases.

Statutory rights of access are discussed in FSM 2734.5 and 2734.6. This right has been redefined and clarified in Section 1323 (a) of the Alaska National Interest Lands Conservation Act of 1980 (P.L. 96-487, 16 U.S.C. 3210), hereafter referred to as Section 1323 (a), ANILCA, the Ninth Circuit Court of Appeals' August 19, 1981, Opinion, and an OGC Opinion dated May 31, 1983. Consequently, and EIS addressing only ingress and egress authority per se is not necessary.

Appropriate access to non-Federal land to use and manage that land constitutes entry for a lawful and proper purpose and must be allowed. (See FSM 2703, R-1.) The standard for appropriate and reasonable access is determined by the present or future use of the non-Federal land. Undue restrictions to access may affect the purpose for seeking access and violate the right established by Section 1323 (a), ANILCA, and ownership. Location, type and method of access can be reasonably limited considering the purposes for which the National Forest System was established and is administered.

Access rights to non-Federal land are not affected by land management planning considerations or procedures. However, exercising the right may involve land management planning. Statutory rights of access attach to the land, therefore application for access must be made by the landowner, and access authorization shall be issued only to the landowner. Application for access across National Forest System land will be evaluated through the NEPA process. The analysis will address such points as the type, location, and conditions of the access sought; whether other adequate access exists; and requirements of any grant.

Section 1323(a), ANILCA, states:

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

In its Opinion, the Ninth Circuit Court reversed its earlier (May 14, 1981) Opinion, and determined that:

(a) Section 1323(a) of ANILCA applies to all National Forest System lands including such lands outside Alaska; and

(b) Specifically, Bulington Northern Inc. has a right of access to its intermingled lands within the National Forest System.

The Ninth Circuit Court's Opinion was appealed ot the U.S. Supreme Court. The Supreme Court declined to hear the case. Accordingly, the Ninth Circuit Court's August 19, 1980, Opinion provides judicial direction in considering an application for acccess to non-Federal land.

To comply with the provisions of Section 1323(a), the Ninth Circuit Court's Opinion and Chief's direction, the following policies and procedures apply to processing all access applications:

1. Inholder and Non-Inholder Defined:

An inholder is a landowner whose property is completely surrounded by National Forest System land. A non-inholder is a landowner whose land is bordered by National Forest System land as well as land(s) in other ownership(s).

Section 1323(a) directs the Forest Service to provide appropriate access and does not distinguish between an inholder and non-inholder, even though the non-inholder may have an access right or opportunity across adjacent non-Federal land(s). Neither the Ninth Circuit Court's Opinion nor Section 1323(a) require the Forest Service to provide access across National Forest System land as a convenience or a lower cost alternative to a non-inholder who has recourse to another access option.

2. Northern Region Access Policy

a. While Section 1323(a) of ANILCA provides an inholder a right of access, that right is not unqualified. The access granted is that access, "as the Secretary of Agriculture deems adequate to secure to the owner the reasonable use and enjoyment thereof (of his/her land)...." Further, the Forest Service may regulate access. The kind of access granted an inholder is a discretionary decision based on individual facts and circumstances.

b. While access cannot be arbitrarily and capriciously denied, it should not be treated identically throughout the National Forest System. For example, the values of a Wilderness may be considered in assessing the access to be permitted. Likewise, requested motorized vehicular access over a road may not be granted if another form of access provides reasonable use and enjoyment of the non-Federal land.

c. In conformance with the Secretary's Rules and Regulations grant appropriate access to an inholder within the National Forest System land.

d. The authorized officer shall grant reasonable access to a non-inholder presenting conclusive evidence that access across involved non-Federal land(s) has been diligently pursued to a reasonable legal conclusion in accordance with the applicable State law, and that the needed non-Federal access is unavailable.

e. The method and manner of access shall be that access reasonable for the landowner's actual or planned use, enjoyment or management of his/her land.

f. Access authorization shall be issued only to the landowner of the non-Federal land to be accessed. Authorization will not be issued to renters, agents, contractors or other third parties, except public road agencies.

g. Access authorization shall contain provisions and limitations assuring land management plan, resource management, and environmental protection provisions and needs are met.

h. An application for access shall be in writing and include sufficient information on the use and management of the non-Federal land for which access is sought to enable the authorized officer to determine feasibility, location, standards and environmental protection measures applicable, in accordance with 36 CFR 251.54; and shall otherwise comply with the application requirements of that section appropriate to the proposal.

i. Non-Federal land for which access is sought is not subject to or limited by National Forest System administrative classification, designation, or management requirements unless access rights have been acquired by the United States.

j. "Adequate access" as in Section 1323(a) is not synonymous with road access; where appropriate, alternatives other than road access shall be considered in reaching a decision.

k. Section 1323(a) does not apply to mineral prospecting activity or unpatented claims. The access provisions of the General Mining Law of 1872 and 36 CFR 228 provide for access in these situations.

3. NEPA process. Each application for access will be considered through the NEPA process. In the analysis, a denial alternative regarding the provisions of Section 1323(a) should be considered.

4. Classified Wilderness. An owner of non-Federal land within an established Wilderness has the same access right as a landowner outside Wilderness.

In his June 23, 1980, Opinion interpreting section 5(a) of the Wilderness Act, the Attorney General advised that the Secretary of Wilderness only on the condition that the inholder had no other express or implied right of access. An OGC Opinion of May 31, 1983, holds that Section 1323(a) of ANILCA grants a right of access to all inholders, including those within Wilderness. Further, OGC advises that Section 1323(a), ANILCA, provides a clear statement of congressional intent that all owners of private lands within components of the National Forest System shall be granted reasonable access to their properties.

The Secretary's authority under section 5(a) of the Wilderness Act to deny access or require a land exchange is superseded by the broad grant of access in Section 1323(a), ANILCA. Although a land exchange can no longer be required of a Wilderness inholder, voluntary exchanges of Wilderness inholdings should continue to be pursued under existing authorities.

Access authorization involving road construction or reconstruction in Wilderness shall be by special-use permit. An easement is inappropriate. Authority to issue an access special-time permit in Wilderness is delegated to the Regional Forester, the same as the delegation for Wilderness mining claim access in FSM 2323.04c(19). This authority is not redelegable.

5. Land Other Than Classified Wilderness. Section 13239(a) provides that an owner of non-Federal land within the boundaries of the National Forest System System has a statutory right of access. This right is subject to compliance with applicable rules and regulations of the Secretary of Agriculture and is limited to that access deemed adequate to secure to the owner the reasonable use and enjoyment of the non-Federal land.

The landowner's right of access is not affected or diminished by administrative designations applicable to the National Forest System land involved in the access route or adjacent to the non-Federal land.

An application for access will be processed as provided in 36 CFR 251-54 and FSM 2730, and shall be scheduled so as not to unreasonably delay a decision. Scheduling should be discussed with the applicant during preapplication conferences, along with the applicant's responsibility to provide information necessary for a decision.

6. Non-Inholder. The preceding guidelines apply to a non-holder, as defined earlier.

A non-Federal landowner frequently seeks access across National Forest System land even though he/she may have a right of access across other non-Federal land which could meet his/her needs. A landowner is often reluctant to explore or pursue such right; various reasons may include time, cost, need to retain counsel, desire to prevent conflict with a neighbor(s), and possibility of litigation. Notwithstanding these concerns, it is Forest Service policy that a non-inholder shall be granted access pursuant to the provisions of Section 1323(a) only upon determination that the most reasonable route is across National Forest System land, or presentation of evidence satisfactory to the authorized officer that access across non-Federal land(s) is unavailable, or that the applicant has exhausted all reasonable legal avenues to gain the needed non-Federal access.

There are significant differences between non-Federal land surrounded by National Forest System land (inholding) and non-Federal land not surrounded (non-inholding). In the latter case, a non-Federal landowner may have an access right or opportunity across other adjacent non-Federal land(s). Recent legal opinions and Section 1323(a) do not obligate the Forest Service to provide access across National Forest System land as a convenience to a non-inholder.

A non-Federal landowner who is not an inholder is obligated to pursue required access over another non-Federal ownership(s). Legal and other expenses may be incurred, along with the time spent to reach legal determinations. The Forest Service does not determine a non-Federal landowner's access right across non-Federal land(s).

A letter from an adjacent non-Federal landowner stating he/she declines to grant access to the applicant does not constitute a legal determination of lack of access.

The Forest officers should require the non-inholder to include evidence acceptable to the Forest Service that access across involved non-Federal land(s) has been diligently pursued to a reasonable legal conclusion under applicable State law, and include the results in his/her application. RO Lands Group and OGC will review the information and furnish an opinion. Requirements for this information as part of the application should be discussed during preapplication contact(s) with the applicant, and requested in writing. When non-Federal land access information is necessary to enable the Forest officer to reach a decision, the application shall be considered incomplete until the information is received.

Information as to an applicant's right or opportunity for access across non-Federal land(s) may not be necessary in every case. An example is if access authorization on National Forest System land would result in obvious benefits to the public or National Forest System management and programs.

MONTANA

1. By written instrument.

2. Non-written license for less than 1 year.

3. Title by Prescription: MCA 70-19-405. A recent Montana case outlining more specifically the requirements of obtaining a title by prescription is Harland v. Anderson, 548 P.2d 613 (MT 1976), where the court stated that to establish the existence of an easement by prescription the parties so doing must show open, notorious, exclusive, adverse, continuous and uninterrupted use of the easement for 5 years. The court also held that any use which was permissive in its inception could not become a prescriptive right until there is a distinct and positive assertion by the claimant owner of a right hostile to the owner of the servient estate (the estate across which the right-of-way runs). A more recent case, Wiedman v. Trinity Evangelical Lutheran Church, 610 P.2d 1149 (MT 1980), reaffirmed the fact that a prescriptive use must be adverse at its inception.

4. Way of necessity. Since Thisted v. Country Club Tower Corp. 405 P.2d 432 (MT 1965), the doctrine of an implied reservation of an easement of necessity has become well established in Montana. The courts have been careful, however, to distinguish between implied easements in general and implied easements of necessity.

An implied easement in general arises when there is a use across a piece of property (a servient estate) which is not owned by the user, and a subsequent purchaser acquires the servient estate.

For there to be an implied reservation of easement, the easement use must be open and visible at the time of conveyance. (Godfrey v. Pilon), 529 P.2d 1372 (MT 1974). MCA 70-20-308 states that "the transfer of real property passes all easements attached thereto and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred for the benefit thereof at the time when the transfer was agreed upon or completed."

A way of necessity, on the other hand, is a type of implied reserved easement. In Peters v. Johnson, 661 P.2d 24 (MT1983), the court held that a way of necessity arose at the time the grantor conveyed a 6-acre plot of land and retained a 20-acre plot, which had no access other than an old road across the 6-acre parcel. In contrast to an implied reserved easement in general, a way of necessity need not have been existence at the time of conveyance (since the necessity does not arise until there is a conveyance). The court reiterated the prerequisites of a way of necessity, that the tracts over which the easement is claimed must have been held by one person at one time; and that "common ownership" or "unity of title" must have existed immediately prior to the severance giving rise to the necessity. (Schmid v. McDowell, 649 P.2d 431 (MT 1982).

5. Condemnation. MCA 70-30-102 enumerates public uses for which condemnation may be used. MCA 70-30-107 covers private roads, and states that they must be for access to a farm or private residence. This requirement has been strictly adhered to by the courts.

A plantiff must show that eminent domain is exercised to provide necessary access from a highway to a residence or farm. In Groundwater v. Wright, 508 P.2d 1003 (MT 1979), the court stated that while plaintiff owned 320 acres, to which he had no access, he did not reside on the property and his plans regarding future residence on the land were too indefinite. Therefore, no right-of-way could be condemned for a private road.

The court stated that the necessity requirement was to be determined by the facts of each case, but generally meant "reasonable, requisite and proper," and not just pure necessity alone.

Similar authorities, under which private landowners may establish rights of access across neighboring non-Federal lands, are available in the States of Idaho, North Dakota, and South Dakota.

The authorities for obtaining access in these other States are as follows:

IDAHO

1. By written instrument.

2. Non-written license or permit with a right-of-way for less than 1 year.

3. By prescription. A prescriptive right-of-way is acquired by open and continuous use for more than 5 years. Northwestern & Pacific Hypotheekbank v. Hobson, 59 IDAHO 119, 80 P.2d 793 (1983). Idaho Code 5-203.

4. Way of necessity. Access by way of necessity is recognized in Idaho. Burley Brick & Sand Co. v. Cofer, 629 P.2d 1166 (Idaho 1981) states that, "It is a universally established principle that where a tract of land is conveyed which is separated from the highway by other lands of the grantor or surrounded by his lands or by his and those of third persons, there arises, by implication, infavor of the grantee, a way of necessity across the premises of the grantor to the highway." The same prerequisites as required by Montana law would apply to establish a way of necessity in Idaho.

5. Condemnation. Idaho Code 7-702 allows private persons to exercise eminent domain to acquire roads for access from highways to fams and residences. Gibbens v. Weisshaupt, 98 Idaho 633, 570 P.2d 870 (1977).

SOUTH DAKOTA

1. By written instrument.

2. Non-written license or permit with a right for less than 1 year.

3. By prescription. A prescriptive right may be obtained after an adverse use for 20 years. A permissive use will not give rise to title by prescription. South Dakota Codified Laws 43-14-2 (1978).

4. Way of necessity. South Dakota case law has recognized easements implied from preexisting uses (similar to the implied easement in general of Montana law) Homes Development Co. v. Simmons, 75 SD 575, 70 NW 2d 527 (1955). However, no case law has been discovered which has recognized an implied easement of necessity. Regardless of this lack of case law, it can be assumed that such an implied easement of necessity would most likely exist in South Dakota. In such case, there would be similar prerequisites of unity easement of necessity.

5. Condemnation. S.D. Codified Laws Ann. 31-22-1 (1978) provides a method for the owner of an isolated tract of land, at least 10 acres in size and which is used or intended to be used in good faith in whole or in part for residential purposes, to obtain an easement or right-of-way across adjacent land to reach a public highway.

7. Right of Access Claimed Over Acquired Land. When the United States acquires land that has been in State or private ownership, State laws and common law doctrines creating a right of access stop. However, any right that was created when the land was not in Federal ownership continues without interruption but is limited to the right existing on the date of Federal acquisition and may not be enlarged without authorization. The right may be recognized in the title documents or be lying dormant, unrecognized by either the title company or the former owner. Often the existence of the right is unknown until an attempt is made to exercise it.

When a right is claimed across land the United States has acquired, it should be treated as a title claim (FSM 5450). A title claim report should be prepared, and the legal right of that party determined by the facts in the situation and applicable law.

If it is determined an access right exists across the acquired property, the right shall be evidenced through an appropriate right-of-way document. Even when a right exists, the United States still has authority to regulate the exercise of the right to minimize the impact on the National Forest land. A right-of-way permit or easement issued under Title V, FLPMA, is the proper documentation for the extent of the right and the conditions for exercising it.

If no outstanding right is specifically mentioned in the deed or established through operation of law or legal doctrine, the Forest Service is not obligated to grant access to a non-inholder until he/she has established that access is unavailable now and unlikely to granted under the provisions of Section 1323(a), ANILCA. When an inholder has no outstanding right of access on acquired land, appropriate access shall be granted in accordance with the provisions of Section 1323(a)a, ANILCA.

8. Cost-Share Agreement Area. Exercise of an access right afforded by Section 1323(a), ANILCA, within a Cost-Share Agreement area shall be consistent with the provisions of Section 1323a and the cost-share agreement, if the applicant is a party to that agreement. If not, access will be considered according to the provisions of this Supplement. If the applicant is a non-inholder, a party to the Cost-Share Agreement, has other viable access alternatives, and the access applied for would not benefit National Forest System programs, then consideration may be given to denying access and terminating or modifying the Cost-Share Agreement.

9. Grant of Access. ANILCA provides a statutory right of access. Such right is actually exercised through an appropriate grant under authority of the Act of October 13, 1964, or Title V, FLPMA, of October 21, 1976, as appropriate.

The Federal Land Policy and Management Act (FLPMA) deals with the type of instrument and the conditions applicable in granting a right-of-way not covered by the 1964 Act. While the Federal Land Policy Management Act repealed most earlier right-of-way authorities, it does not affect the right created by Section 1323a, ANILCA. If the Forest Service concludes that the only reasonable method of access is by road, and if the granting instrument for that road is not an easement under the 1964 Act, the provisions of Title V, FLPMA, must be complied with.

10. Terms and Conditions of Access Grant. Section 1323a, ANILCA, provides that access shall be adequate to secure reasonable use and enjoyment of the property to the owner, and that ingress and egress may be regulated.

Exhibit 1

Exhibit 1 can be viewed in the Directives