Rights-of-Way on Federally Owned Lands: A Journey through the Statutes by Way of the Federal Land Policy and Management Act of 1976*

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I. INTRODUCTION

Rights-of-way across federally owned lands are necessary for the development of transportation facilities in the United States, especially in the eleven contiguous western states[1] and Alaska. Roads, railroads, electrical power and communication facilities, water distribution facilities, and oil and gas pipelines constructed over any substantial distance cannot ordinarily avoid crossing federally owned lands in those states for several reasons. Natural resources related to such projects are found in abundance on federally owned lands. Minerals, oil and gas, hydroelectric power and timber produced on these lands require transportation facilities in order to reach their market. Federally owned lands are sometimes situated so that the only reasonable access to private or state owned lands is across the federal lands. The federal government owns approximately one-third of the nation's lands and nearly eighty percent of the land in the eleven contiguous western states and Alaska.[2] State[3] and Native[4] selection rights in Alaska will

1. As defined in 43 U.S.C.A. § 1702(o) (West Supp. 1977), the states are Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

2. BUREAU OF LAND MANAGEMENT, UNITED STATES DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 10 (1975) [hereinafter cited as STATISTICS]. The State of Alaska is especially dependent on the availability of rights-of-way across federally owned lands for transportation purposes. In 1974, 96% of the 365 million acres of land in Alaska was in federal ownership. By the terms of the Alaska Statehood Act, Pub. L. No. 85-508 § 6(a),(b), 72 Stat. 340 (1958), and the Alaska Native Claims Settlement Act (ANSCA), 43 U.S.C. §§ 1611, 1613(h) (Supp. IV 1974), this figure will eventually be reduced to approximately 57%. Section 17(d)(2) of ANSCA provides for the withdrawal of 80 million acres of public lands by the Secretary of the Interior (d-2 lands) for possible inclusion into the national parks, forest, wildlife refuge, and wild and scenic rivers systems (the four systems). The Secretary has made recommendations as to the disposition of those lands and Congress is required to act on these recommendations by 1978. 43 U.S.C. § 1616(d)(2) (Supp. IV 1974).

The final disposition of these federally owned lands is of critical importance to the future of surface transportation in Alaska. With the exception of the trans-Alaskan pipeline and haul road, present surface transportation systems are limited to the southcentral portion of Alaska. Proposals for future transportation systems into the remote areas of Alaska will inevitably involve d-2 lands. One function of this article is to set forth the current state of the law regarding rights-of-way across federally owned lands so that the effect of including an area into one of the four systems or the national wilderness preservation system will be known. The article also deals with other existing land classifications: public lands and military reservations.

3. The Alaska Statehood Act, Pub. L. No. 85-508 § 6(a),(b), 72 Stat. 340 (1958) grants 800,000 acres for community and recreational centers and an additional 102,550,000 acres with no restrictions on the use.

4. The Alaska Native Claims Settlement Act, §§ 12, 14(h), grants Alaskan Natives the

reduce this figure to approximately fifty percent during the next several years, but the area is still substantial.

The federal government has a long standing policy of granting rights-of-way across federal lands. Right-of-way statutes presently in force date as far back as 1891.[5] Congress, in establishing the Public Land Law Review Commission (PLLRC) in 1964, recognized that:

> The public land laws of the United States have developed over a long period of years through a series of Acts of Congress which are not fully correlated with each other . . . Those laws, or some of them, may be inadequate to meet current and future needs of the American people . . . Administration of the public lands and the laws relating thereto has been divided among several agencies of the Federal Government . . . .[6]

This statement was, and to some extent, still is indicative of the state of the public land laws dealing with rights-of-way. Grants of rights-of-way under the older statutes have recently been challenged as being beyond the scope of the authority granted by Congress to the land managing agencies.[7] One such challenge[8] resulted in a 1973 revision of the right-of-way section of the Mineral Leasing Act in order that the trans-Alaskan pipeline could be constructed.[9]

The Federal Land Policy and Management Act of 1976[10] (BLM Act) represents a major revision in public land law, including the law dealing with rights-of-way. The BLM Act grants to the Bureau of Land Management (BLM) comprehensive authority to manage the public lands pursuant to extensive policy guidelines. Public lands are to be retained in federal ownership unless disposal "will serve the national interest."[11] The BLM Act sets up a program of land and resource inventory in conjunction with a land use planning process.[12] Management is to be according to multiple use[13] sustained yield principles[14] with a strong emphasis on protection of environmental and wilderness values.[15] The right-of-way provisions of the BLM

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right to select, through village and regional corporations, a total of 40 million acres of federally owned land in Alaska, 43 U.S.C. §§ 1611, 1613(h) (Supp. IV 1974).

5. 43 U.S.C. § 946 (1970).

6. 43 U.S.C. § 1392 (1970).

7. *See, e.g.*, Wilderness Soc'y v. Morton, 479 F.2d 842 (D.C. Cir. 1973), *cert. denied*, 411 U.S. 917 (1973); Sierra Club v. Hickel, No. 51464 (D. Cal. July 23, 1969), *vacated for lack of standing*, 443 F.2d 24 (9th Cir. 1970), *aff'd sub nom,* Sierra Club v. Morton, 405 U.S. 727 (1972).

8. Wilderness Soc'y v. Morton, 479 F.2d 842 (9th Cir. 1973), *cert. denied* 411 U.S. 917 (1973).

9. 30 U.S.C. § 185 (Supp. IV 1974). The legislative history of the act indicates Congress' concern with the *Wilderness Society* decision. S. REP. No. 207, 93d Cong., 1st Sess. 11, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2417, 2417-2423.

10. Pub. L. No. 94-579, 90 Stat. 2743 (codified in scattered sections of 7, 16, 30, 40, 43 U.S.C.A.).

11. 43 U.S.C.A. § 1701(a)(1) (West Supp. 1977).

12. *Id.* §§ 1711-12.

13. *Id.* § 1702(c).

14. *Id.* § 1702(h).

15. *Id.* §§ 1701(a)(7,8), 1782.

Act[16] represent a comprehensive system for the grant and management of such rights-of-way. One purpose of this article is simply to identify the significant aspects of these right-of-way provisions. Another purpose is to compare the BLM Act provisions, which govern public lands and national forest system lands, with the statutes applicable to the national wildlife refuge and park systems, military reservations, and national wilderness preservation and wild and scenic rivers systems.

The inconsistent use of terminology has long been the bane of those practicing public land law. Unless otherwise noted, the term public lands will hereafter be defined in accordance with the BLM Act as "any land and interest in land owned by the United States within the several states . . ." administered by the BLM, excepting lands located on the outer continental shelf or lands held for the benefit of Indians, Aleuts, and Eskimos.[17] The term reserved lands or reservation will be defined as federal lands which have been set aside for a specific public purpose or program and are not generally subject to disposition under the public land laws.[18] This is a generally accepted meaning of the terms even though certain statutes provide other definitions. The term right-of-way is also to be defined according to the BLM Act. This definition is very broad and includes "an easement, lease, permit or license to occupy, use or traverse public lands granted for the purposes listed in . . . [the] Act."[19]

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16. *Id.* §§ 1761-71.

17. *Id* § 1702(e).

18. *See* United States v. Celestine, 215 U.S. 278, 285 (1909); United States v. Myers, 206 F. 387, 394 (8th Cir. 1913).

19. 43 U.S.C.A. § 1702(f) (West Supp. 1977). The purposes are listed in § 501(a) of the BLM Act, 43 U.S.C.A. § 1761(a) (West Supp. 1977), which states that rights-of-way may be granted for:

> (1) reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels and other facilities and systems for the impoundment, storage, transportation, or distribution of water;
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> (2) pipelines and other systems for the transportation or distribution of liquids and gases, other than water and other than oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom, and for storage and terminal facilities in connection therewith;
>
> (3) pipelines, slurry and emulsion systems, and conveyor belts for transportation and distribution of solid materials, and facilities for the storage of such materials in connection therewith;
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> (4) systems for generation, transmission, and distribution of electric energy, except that the applicant shall also comply with all applicable requirements of the Federal Power Commission under the Federal Power Act of 1935 (49 Stat. 847; 16 U.S.C. 791);
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> (5) systems for transmission or reception of radio, television, telephone, telegraph, and other electronic signals, and other means of communication;
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> (6) roads, trails, highways, railroads, canals, tunnels, tramways, airways, livestock driveways, or other means of transportation except where such facilities are constructed and maintained in connection with commercial recreational facilities on lands in the National Forest System; or
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> (7) such other necessary transportation or other systems or facilities which are in the public interest and which require rights-of-way over, upon, under, or through such lands.

II. Public Lands

Management of the public lands is primarily governed by one statute. The Federal Land Policy and Management Act of 1976[20] gives the Bureau of Land Management (BLM) comprehensive authority to administer the public lands. Some of the provisions of the BLM Act apply to the Forest Service administration of national forest system lands as well. The BLM Act repeals partially or totally thirty statutes[21] which previously authorized rights-of-way and replaces them with a single title, Title V. This title authorizes the Secretaries of the Interior and Agriculture to grant rights-of-way across public lands and forest system lands, respectively. This authority does not extend to areas designated as wilderness.[22] The BLM Act is not the only statute governing rights-of-way on public lands. Section 28 of the Mineral Leasing Act,[23] the acts relating to federally funded highways,[24] and the Federal Power Act[25] also authorize certain rights-of-way on public lands.

Section 302 of the BLM Act is closely related to, and may overlap with Title V. Section 302, which does not apply to national forest system lands, grants the Secretary of the Interior the authority to regulate the use, occupancy, and development of public lands by several means, including easements, permits, licenses and leases. Federal agencies may not acquire the right to use public lands by means of this section.[26]

The following discussion of rights-of-way on public lands is divided into two parts. Part A deals with the general provisions of the BLM Act which could be applied to any rights-of-way granted under the Act. Part B analyzes the various purposes for which rights-of-way may be obtained under the BLM Act and other applicable statutes.

A. General Right-of-Way Provisions of the BLM Act

1. Application

An applicant for the grant or renewal of a right-of-way is required to submit to the Secretary information reasonably related to the use or intended use of the right-of-way, including the effect on competition.[27] In addition, the Secretary may require the submittal of a plan of construction, operation, and rehabilitation by an applicant if the Secretary finds that the proposed use of the right-of-way may cause a significant impact on the environment.[28]

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20. Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified in scattered sections of 7,16,30,40,43 U.S.C.A.). *See* J. Carver and C. Carver, *Federal Land Policy and Management Act of 1976*, 9 Rocky Mtn. Min. L. Newsletter (1976), for a summary of the provisions of the Act.
21. Pub. L. No. 94-579, § 706, 90 Stat. 2793 (1976).
22. 43 U.S.C.A. § 1761(a) (West Supp. 1977).
23. 30 U.S.C. § 185 (Supp. IV 1974).
24. 23 U.S.C. §§ 101-322 (1970).
25. 16 U.S.C. §§ 791a-825r (1970).
26. 43 U.S.C.A. § 1732 (West Supp. 1977).
27. *Id.* § 1761(b).
28. *Id.* § 1764(d).

The Secretary may grant the right-of-way only when he is satisfied that the applicant has the technical and financial capability to construct the project in accordance with the requirements of the Act.[29]

2. Limits on Size and Duration

The BLM Act does not quantify the limits on size and duration, but instead, sets forth the factors the Secretary must take into account in specifying the limits for each right-of-way. The Act requires that each right-of-way be limited to the ground which will be occupied by the project for which the right-of-way was issued, is necessary for operation of the project, is necessary for public safety, and will do no unnecessary damage to the environment. The Secretary may also authorize the temporary use of additional lands for construction, operation, maintenance, termination of, and access to, the project.[30] A right-of-way is limited to a "reasonable term in light of all circumstances concerning the project."[31] Circumstances which are to be considered include the cost, useful life, and public purposes of the project.

3. Controls on Use and Occupancy

The Secretary has at his disposal several means by which he may exert control over the use and occupancy of rights-of-way. Environmental concerns are of great importance, but other conditions may serve as a basis for control as well. Section 505 requires each right-of-way to contain terms and conditions which will minimize damage to the environment, require compliance with applicable federal or state air or water quality standards, and require compliance with similar state standards for the use of rights-of-way if those standards are more stringent than federal standards.[32] Further conditions may be included if deemed necessary to protect federal interests, manage the surrounding lands, and protect the interests of subsistence users. In addition, location of a route that will cause the least damage to the environment, taking into consideration the feasibility of that route, may be required.[33] The Secretary may include a liability clause in the terms of the right-of-way[34] and may require the posting of security for obligations imposed upon the holder of the right-of-way.[35] The BLM Act permits the use or disposition of minerals or vegetative materials, including timber, located on or around rights-of-way, only if authorization has been obtained pursuant to other applicable laws.[36]

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29. *Id.* § 1764(j).
30. *Id.* § 1764(a).
31. *Id.* § 1764(b).
32. *Id.* § 1765(a).
33. *Id.* § 1765(b).
34. *Id.* § 1764(h).
35. *Id.* § 1764(i).
36. *Id.* § 1764(f).

The BLM Act deals separately with the granting of rights-of-way to federal agencies or departments. The Secretary may grant such rights-of-way, subject to "such terms and conditions as he may impose . . . ."[37] The section 302 use, occupancy and development provisions do not apply to federal agencies or departments.

4. Right-of-Way Corridors

The BLM Act encourages the consolidation of rights-of-way into transportation and/or utility corridors. "In order to minimize adverse environmental impacts and the proliferation of separate rights-of-way, the utilization of rights-of-way in common shall be required to the extent practical . . . ."[38] The Act requires the Secretary to reserve, in any right-of-way or permit, the right to grant additional rights-of-way or permits for compatible uses on or adjacent to the original right-of-way or permit. The Secretary is granted the authority to designate right-of-way corridors and to require that all rights-of-way in an area be confined to the corridor.

5. Payment for Use

Generally, the holder of a right-of-way granted under the BLM Act is required to pay annually the fair market value of the right-of-way, as determined by the Secretary. A right-of-way applicant may also be required to reimburse the United States for all reasonable costs incurred in the processing of the application. The rent may be waived where the United States has been granted reciprocal rights-of-way over the applicants' land pursuant to a cost share agreement and may be waived or reduced for federal, state, or local governments and non-profit organizations.[39]

6. Suspension or Termination

Abandonment or noncompliance with the Act, applicable regulations, or conditions of the right-of-way, may be grounds for suspension or termination of the right-of-way. The suspension or termination may take place after due notice to the holder of a right-of-way, or an appropriate proceeding under the Administrative Procedure Act[40] for a holder of an easement.[41] No

37. *Id.* § 1767.
38. *Id.* § 1763.
39. *Id.* § 1764(g).
40. 5 U.S.C. § 554 (1970).
41. Neither the BLM Act nor its legislative history shed any light on how an easement varies from a right-of-way. The language in 43 U.S.C.A. § 1764(a)(b) would indicate that there is a difference between a right-of-way and a permit (*contra* text accompanying note 19 *supra*) but not between a right-of-way and an easement. *But see* the BLM interim guidelines for issuance of rights-of-way, which require a right-of-way grant to contain language stating that it is an easement issued pursuant to the BLM Act. BLM Organic Act Directive No. 76-15 (December 14, 1976). Further confusion is created by § 302(c) of the BLM Act, 43 U.S.C.A. § 1732(c) (West Supp. 1977), which states: "[t]he Secretary [of the Interior] shall insert in *any* instrument providing for the use, occupancy, or development of the public lands a provision authorizing revocation or suspension, after notice *and hearing*, of such instrument upon a final

administrative proceeding is required if the right-of-way terminates by its own terms; and there may be an immediate temporary suspension, without hearing, in order to protect public health, safety, or the environment.[42] The Act does not terminate pre-existing rights-of-way but, with the consent of the holder, the Secretary may reissue the rights-of-way pursuant to the BLM Act.[43]

B. Specific Purposes for Rights-of-Way

1. Transportation

The basic statutory authority for the grant of rights-of-way across public lands for transportation is the BLM Act. Rights-of-way may be issued under the Act for such things as roads, railroads, canals, tunnels, tramways and airways.[44] The BLM Act also authorizes the construction of roads within and near public lands which will permit maximum economy in harvesting timber while at the same time meeting the requirements for managing other resources. Financing may be accomplished by use of any combination of appropriated funds, timber purchase contract requirements, or cooperative financing with public or private agencies.[45]

Where a right-of-way is sought under the BLM Act for the realignment of a railroad already on public lands, the Secretary has the option of granting the new right-of-way under the same terms and conditions as the portion of the old right-of-way relinquished to the United States. The Secretary may do so if the lands involved are not within a community and are of approximately equal value, and if he finds the action to be in the public interest.[46]

Rights-of-way across public lands for the purpose of constructing federally funded highways[47] may be obtained by the states.[48] The routes for federal-aid highways are designated by state or local officials[49] subject to approval by the Secretary of Transportation.[50] The Secretary of Transportation is required to cooperate with the Secretaries of the Interior, Housing and Urban Development, and Agriculture and with the states "in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed."[51] Once the Secretary of

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administrative finding of a violation of any term or condition of the instrument . . . ." (emphasis added).

42. 43 U.S.C.A. § 1766 (West Supp. 1977).
43. *Id.* § 1769(a).
44. *See* note 19 *supra*.
45. 43 U.S.C.A. § 1764(g) (West Supp. 1977).
46. *Id.* § 1769(b).
47. This term includes federal-aid highways, 23 U.S.C. §§ 101(a), 103, (1970), and other federally funded highways, 23 U.S.C. Ch. 2 (1970), including forest and public land highways, development roads and trails, parkways and defense access roads, as defined at 23 U.S.C. § 101(a) (1970).
48. 23 U.S.C.A. § 103 (West Supp. 1977); 23 U.S.C. § 317 (1970).
49. *Id.* § 103(b)(1), (c)(1), (d)(1), (e)(1).
50. 23 U.S.C. § 103(f) (1970).
51. *Id.* § 138 (also codified at 49 U.S.C. § 1653(f) (1970)).

Transportation determines that land owned by the United States is reasonably necessary for the highway right-of-way, he must file the required information and a request for the right-of-way with the Secretary of the department which administers the lands in question.[52]

2. Electric Energy, Communication, and Water Facilities

The BLM Act authorizes rights-of-way for "systems for generation, transmission, and distribution of electric energy,"[53] but requires that the applicant also comply with the Federal Power Act of 1935 (FPA).[54] The portion of the FPA which deals with rights-of-way on federally owned lands is intended to provide "a complete scheme of national regulation which would promote the comprehensive development of water resources of the Nation . . . ."[55] The FPA authorizes the Federal Power Commission (FPC) to grant licenses which, among other things, permit the use and occupancy of public lands. These licenses may be issued

> for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, powerhouses, transmission lines, or other project works necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction . . . or upon any of the public lands and reservations . . . or for the purpose of utilizing the surplus water or water power from any government dam . . . .[56]

No licenses may issue until the FPC determines that the project will be in conformance with a comprehensive plan for improving or developing waterways and improving or utilizing water-power development, and for other beneficial public uses including recreation.[57]

The FPC has no jurisdiction to license power lines crossing federal lands which are not a part of a hydroelectric project.[58] Furthermore, the FPC interprets its authority over powerlines which are a part of a hydroelectric

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52. If within a period of four months after such filing, the Secretary of such Department shall not have certified to the Secretary [of Transportation] that the proposed appropriation of such land . . . is contrary to the public interest or inconsistent with the purposes for which such land . . . [has] been reserved, or shall have agreed to the appropriation and transfer under conditions which he deems necessary for the adequate protection and utilization of the reserve, then such land . . . may be appropriated and transferred to the State highway department . . . .

23 U.S.C. § 317(b) (1970).

53. 43 U.S.C.A. § 1761(a)(4) (West Supp. 1977).

54. 16 U.S.C. §§ 791-825r (1970).

55. Pacific Power and Light Co. v. Federal Power Comm'n, 184 F.2d 272, 274 (D.C. Cir. 1950). *See* 1 DANIEL, MANN, JOHNSON, AND MENDENHALL, FEDERAL PUBLIC LAND LAWS AND POLICIES RELATING TO USE AND OCCUPANCY VII-54-73 (1970) (document prepared for PLLRC) [hereinafter referred to as DANIEL], for a complete discussion of the uses of public lands and reservations authorized by the Federal Power Act.

56. 16 U.S.C. § 797(e) (1970). The license issues for the "project works," as defined at 16 U.S.C. § 796(12) (1970), and not for the entire project. Lake Ontario Land Dev. and Beach Protection Ass'n v. Federal Power Comm'n, 212 F.2d 227, 232 (D.C. Cir. 1954), *cert. denied*, 347 U.S. 1015 (1954).

57. 16 U.S.C. § 803(a) (1970).

58. *Id.* § 797(e).

project as applying only to "primary lines transmitting power from the power house or appurtenant works of a project to the point of junction with the distribution system or with the interconnected primary transmission system . . . ."[59]

Regulations promulgated under prior law imposed special conditions on rights-of-way over lands administered by the Departments of Agriculture and the Interior for electrical transmission lines of thirty-three kilovolt (kV) capacity or greater.[60] Briefly, these conditions allow the Secretary to require an applicant for a right-of-way to make "surplus capacity"[61] of his "transmission or other facilities"[62] available to the federal government or to allow the federal government to add to the transmission facilities in order to create surplus capacity. This enables the federal government to transmit power over existing private power lines, a practice known as "wheeling", without being required to build its own lines.[63] The BLM Act makes no mention of wheeling but the legislative history indicates that there was no intent to abolish the practice.[64] The BLM has proposed a rule change, pursuant to the BLM Act's general grant of authority to issue rights-of-way, to make the wheeling regulations applicable to power lines of sixty-six kV capacity or greater.[65]

Rights-of-way for communications facilities are authorized by the BLM Act.[66] Similarly, the Act authorizes rights-of-way for facilities for the distribution and impoundment of water.[67] Presumably, any water facilities constructed for the purpose of hydroelectric generation of electric energy would be considered under section 501(a)(4) and be subject to the FPA.

3. Pipeline Systems

There are essentially two statutes which govern pipelines and associated facilities for materials other than water, on public and forest lands. The first statute is the BLM Act, which provides authority for the granting of rights-of-way for the transportation and storage of solid materials,[68] as well

59. 18 C.F.R. § 2.2 (1976).

60. 43 C.F.R. § 2851.1-1(a)(3) and (5) (1976); *see also* 1 DANIEL, *supra* note 55, at VII-32-45.

61. That is, capacity of the transmission system in excess of the requirements of the holder of the right-of-way, 43 C.F.R. § 2851.1-1(a)(5)(ii) (1976).

62. [T]he term "transmission facility" includes (a) all types of facilities for the transmission of electric power and energy and facilities for the interconnection of such facilities, and (b) the entire transmission line and associated facilities, from substation or interconnection point to substation or interconnection point, of which the segment crossing the lands of the United States forms a part.

43 C.F.R. § 2851.1-1(a)(5)(ii)(k) (1976).

63. 43 C.F.R. § 2851.1-1(a)(5)(ii) (1976). These regulations have been upheld by the courts. Utah Power and Light Co. v. Morton, 504 F.2d 728 (10th Cir. 1974).

64. H.R. REP. No. 1163, 94th Cong., 2d Sess. 19, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6175, 6193.

65. 43 U.S.C.A. § 1761(a) (West Supp. 1977); 42 Fed. Reg. 20,315 (1977).

66. *Id.* § 1761(a)(5).

67. *Id.* § 1761(a)(1); *see* note 19 *supra*.

68. *Id.* § 1761(a)(3); *see* note 19 *supra*.

as gases and liquids not covered by the Mineral Leasing Act.[69]

Section 28 of the Mineral Leasing Act (MLA) governs rights-of-way for pipelines for the transportation of natural gas and petroleum.[70] A right-of-way for a purpose associated with an oil or gas pipeline, such as communication facilities, may possibly be obtainable under either Act. Section 28 of the MLA generally applies to "Federal lands,"[71] a term which excludes lands in the national park system, but includes other types of reserved lands. Any agency head[72] has the authority to grant a right-of-way if the surface which is the subject of the right-of-way application falls entirely under that agency's jurisdiction.[73] Otherwise, the Secretary of the Interior is empowered to make the decision. In the event the lands covered by the right-of-way in question are controlled by more than one department of the federal government, the Secretary of the Interior must consult with the appropriate Secretaries before making a decision.[74] In contrast, the BLM Act requires a separate right-of-way grant from the Secretaries of Agriculture and the Interior, where the right-of-way crosses lands administered by both Departments.[75] In all cases, if a Secretary or agency head determines that a right-of-way through a federal reservation under his jurisdiction is inconsistent with the purposes of the reservation, a right-of-way will not be granted.[76]

a. Application. The requirements for making application for a right-of-way under the MLA are similar to those under the BLM Act. The MLA requires the applicant for a right-of-way to submit information regarding the use of the right-of-way. The MLA, in contrast to the BLM Act, lists specific types of information which may be required.[77] The MLA does not specifically require information regarding the effect of the use of the right-of-way on competition, but operators of pipelines are subject to various regulatory schemes.[78] The MLA, unlike the BLM Act, provides an opportunity for the public and governmental agencies to participate in right-of-way application determinations, including where appropriate, public hearings.[79] The Secre-

69. *Id.* § 1761(a)(2); *see* note 19 *supra*.

70. The Mineral Leasing Act covers rights-of-way for pipelines for the purpose of transporting "oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom . . ." 30 U.S.C. § 185(a) (Supp. IV 1974).

71. " 'Federal Lands' means all lands owned by the United States except lands in the National Park System, lands held in trust for an Indian or Indian tribe, and lands on the Outer Continental Shelf." 30 U.S.C. § 185(b)(1) (Supp. IV 1974).

72. " 'Agency head' means the head of any Federal department or independent Federal office or agency, other than the Secretary of the Interior, which has jurisdiction over Federal lands." This would include, therefore, the Secretary of Agriculture. 30 U.S.C. 185(b)(3) (Supp. IV 1974).

73. 30 U.S.C. § 185(c)(1) (Supp. IV 1974).

74. *Id.* § 185(c)(2).

75. 43 U.S.C.A. § 1761(a) (West Supp. 1977); *cf.* 43 U.S.C.A. § 1771 (West Supp. 1977).

76. 30 U.S.C. § 185(b)(1) (Supp. IV 1974).

77. *Id.* § 185(r)(6).

78. *Id.* § 185(r)(1)-(5).

79. *Id.* § 185(k).

tary, or agency head under the MLA, may require the submittal of a plan of construction, operation, and rehabilitation if the project will cause a significant impact on the environment.[80] The MLA requires the Secretary of the Interior or agency head to notify the House and Senate Interior and Insular Affairs Committees upon receipt of a right-of-way application for an oil or gas pipeline twenty-four inches in diameter or greater. In this situation, the right-of-way in question may not be granted for a period of sixty days after such notice unless the Committees waive the time requirement.[81] Both statutes provide that the right-of-way may be approved only if the applicant has the requisite technical and financial capabilities.[82]

b. Limits on Size and Duration. The Secretary has less discretion under the MLA than under the BLM Act to set the maximum size and duration of rights-of-way. The width is limited to fifty feet plus the ground occupied by the facilities, unless the Secretary of the Interior or an agency head makes a written determination that additional lands are necessary for the operation of the project and protection of the environment.[83] Both statutes authorize the temporary use of additional lands[84] and require the consideration of the same factors in determining the duration of the right-of-way,[85] but the MLA permits an absolute maximum term of thirty years.[86]

c. Controls on Use and Occupancy. The use and occupancy of rights-of-way may be controlled in much the same way under the Mineral Leasing and the BLM Acts. Each allows the Secretary to include a liability clause in the right-of-way[87] and require the posting of security.[88] Both Acts specify certain terms which must be imposed on rights-of-way, but the BLM Act also lists certain terms which may be imposed at the Secretary's discretion.[89] One major difference between the Acts is in the emphasis the BLM Act places on the compliance with state standards which are more stringent than the federal standards.[90] The MLA merely requires the Secretary or agency head to comply with state standards for right-of-way construction, operation and maintenance to the extent practical.[91]

d. Right-of-way Corridors. The provisions dealing with the joint use of rights-of-way are nearly identical in the two Acts. The BLM Act has an

80. *Id.* § 185(h)(2). There is a similar requirement under the BLM Act, *see* text accompanying note 28 *supra*.
81. 30 U.S.C. § 185(w)(2) (Supp. IV 1974).
82. *Id.* § 185(j); *see* text accompanying note 29 *supra*.
83. *Id.* § 185(d).
84. *Id.* § 185(e); *see* text accompanying note 30 *supra*.
85. *Id.* § 185(n); *see* text accompanying note 31 *supra*.
86. *Id.* § 185(n).
87. *Id.* § 185(x); *see* note 34 *supra*.
88. *Id.* § 185(m); *see* note 35 *supra*.
89. *Id.* § 185(h)(2); *see* text accompanying note 34 *supra*.
90. 43 U.S.C.A. § 1765(a)(IV) (West Supp. 1977).
91. 30 U.S.C. § 185(v) (Supp. IV 1974).

additional provision which sets forth the criteria to be used in designating transportation and utility corridors.[92]

e. Payment for Use. The MLA is consistent with the BLM Act in requiring payment of fair market rental value for the right-of-way plus the costs of processing the application and inspecting the facility.[93] However, there are no exceptions to this requirement in the MLA.

f. Suspension or Termination. The grounds as well as the administrative procedures for suspension or termination of a right-of-way are essentially the same under the MLA and the BLM Acts.[94] Where an administrative proceeding is appropriate, the BLM Act requires a hearing pursuant to the Administrative Procedure Act for easements only, but the MLA requires such a hearing for all rights-of-way.[95]

III. National Forest System

The sections of the BLM Act dealing with policies and planning do not apply to the national forest system lands. Instead, the policy guidelines and planning requirements for the Forest Service are set forth in a number of other statutes. Congress has authorized the Secretary of Agriculture to administer national forests.[96] The purposes of the national forests are "to improve and protect the forest," to secure "favorable conditions of waterflows . . . , to furnish a continuous supply of timber,"[97] and to provide for outdoor recreation, range, and wildlife and fish. Mining is also a generally accepted use.[98] Renewable resources of lands in the national forest system[99] are to be managed on a multiple use sustained yield basis.[100] To this end, the Forest and Rangeland Renewable Resource Act of 1974 requires an assessment of the renewable resources and the preparation of a renewable resource program.[101]

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92. *Id.* § 185(p); 43 U.S.C.A. § 1763 (West Supp. 1977).
93. 30 U.S.C. § 185(i) (Supp. IV 1974); *see* text accompanying note 39 *supra*.
94. 30 U.S.C. § 185(o) (Supp. IV 1974); *see* text accompanying notes 40-42 *supra*.
95. 30 U.S.C. § 185(o)(1)(C) (Supp. IV 1974); 43 U.S.C.A. § 1766 (West Supp. 1977).
96. 16 U.S.C. § 471 (1970).
97. *Id.* § 475.
98. *Id.* § 528.
99. The national forest system is defined as:

> all national forest lands reserved or withdrawn from the public domain of the United States, all national forest lands acquired through purchase, exchange, donation, or other means, the national grasslands and land utilization projects administered under title III of the Bankhead-Jones Farm Tenant Act [7 U.S.C. §§ 1010 et seq. (1970)], and other lands, waters, or interests therein which are administered by the Forest Service or are designated for administration through the Forest Service as a part of the system.

16 U.S.C. § 1609 (Supp. IV 1974).
100. The BLM Act requires public lands to be administered on a similar basis but the definitions of multiple use and sustained yield are not identical between the two statutes. 16 U.S.C. § 531 (1970); 43 U.S.C.A. § 1702(c),(h); Carver, *supra* at note 13.
101. 16 U.S.C. §§ 1601, 1610 (Supp. IV 1974).

Congress has specifically addressed policies relating to transportation in and around the national forest system and declared that the "installation of a proper system of transportation to service the National Forest System . . . shall be carried forward in time to meet anticipated needs on an economical and environmentally sound basis . . . ."[102]

Under the BLM Act, the Secretary of Agriculture has nearly identical authority to grant rights-of-way, with respect to national forest lands as does the Secretary of the Interior, with respect to the public lands.[103] One difference is that rights-of-way for transportation facilities are not authorized "where such facilities are constructed and maintained in connection with commercial recreation facilities on lands in the national forest system."[104] Another difference is that the Secretary of Agriculture is excluded from the BLM Act section authorizing roads for timber production.[105] This is so because he already has similar authority under section 4 of the Act of October 13, 1964,[106] which applies to national forest system lands.

The same provisions of the MLA which apply to public lands apply to national forest system lands.[107] However, the Secretary of Agriculture can disallow the issuance of an oil and gas pipeline if he determines that the right-of-way would be inconsistent with the purposes of the reservation.[108]

At least two statutes relating to rights-of-way on national forest lands were not repealed by the BLM Act. One of these, the 1964 Act, authorizes the Secretary of Agriculture to grant permanent or temporary easements for roads in the national forest system.[109] The other is the Forest Service Organic Act, a section of which permits settlers within the boundaries of national forests to construct wagon roads in order to reach their homes and utilize their property.[110]

IV. Other Reserved Lands

A. Statutes of General Applicability

There are several statutes which either establish the authority to grant rights-of-way or determine the conditions of such rights-of-way on reserved public lands. For organizational purposes, these statutes have been divided into two categories. The first category of statutes which also apply to national forest system lands and public lands will only be discussed insofar as they apply to each type of reserved land. These statutes include: the

102. *Id.* § 1608.
103. 43 U.S.C.A. § 1761(a) (West Supp. 1977).
104. *Id.* § 1761(a)(6).
105. *Id.* § 1762(a).
106. 16 U.S.C. § 535 (1970) [hereinafter the 1964 Act].
107. 30 U.S.C. § 185(a), (b)(1) (Supp. IV 1974).
108. *Id.* § 185(b)(3).
109. 16 U.S.C. § 533 (1970).
110. *Id.* § 478.

FPA,[111] the MLA,[112] and the acts applying to federally-funded highways.[113] The second category of statutes have been repealed insofar as they apply to national forest system lands and public lands, but remain applicable to some types of reserved lands. These statutes include a group of ditches and canals acts,[114] the 1901 Act,[115] and the 1911 Act.[116]

The canals and ditches acts grant to canal ditch companies or irrigation or drainage districts, rights-of-way for canals, laterals, and reservoirs,[117] and permit such rights-of-way to be used for water transportation, domestic purposes and development of power.[118] The statutes prescribe the maximum size of the right-of-way, but additional land may be used when the Secretary of the Interior deems it necessary for the operation and maintenance of the reservoirs, canals and laterals.[119] The Secretary may also grant permits for dwellings, buildings or corrals for the convenience of those engaged in the care and management of the water works.[120] Rights-of-way on reservations are to be located so that they do not "interfere with the proper occupation by the Government . . . ."[121]

The 1901 Act presently authorizes the Secretary of the Interior to grant rights-of-way through federal reservations and certain national parks[122] for structures used in the generation and distribution of electrical power and for telephone and telegraph purposes. The statute also authorizes structures for the transportation and storage of water.[123] The interest granted is denoted as a "right of way", but because the Secretary of the Interior can revoke the right-of-way at his discretion, the courts have construed the interest as a permit or license.[124] The maximum size is specified by the Act and no such right-of-way may be granted through a reservation without the approval of the chief officer of the supervising department. Such approval is contingent upon a finding by him that the proposed right-of-way is not incompatible with the public interest.[125]

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111. *See* text accompanying notes 53-59 *supra*.
112. *See* text accompanying notes 70-95 *supra*.
113. *See* text accompanying notes 47-52 *supra*.
114. 43 U.S.C. §§ 946-954 (1970).
115. Act of Feb. 15, 1901, 43 U.S.C. § 959 (1970) (also codified at 16 U.S.C. §§ 79, 522 (1970)).
116. Act of March 11, 1911, 43 U.S.C. § 961 (1970) (also codified at 16 U.S.C. §§ 5, 420, 523 (1970)).
117. 43 U.S.C. § 946 (1970).
118. *Id.* § 951.
119. *Id.* § 946.
120. *Id.* § 950.
121. *Id.* § 946.
122. Yosemite and Sequoia National Parks, and the General Grant Grove section of Kings Canyon National Park, 43 U.S.C. § 959 (1970).
123. 43 U.S.C. § 959 (1970).
124. United States v. Colorado Power Co., 240 F. 217, 220 (D. Colo. 1916); United States v. Lee, 15 N.M. 382, 110 P. 607, 610-611 (1910).
125. 43 U.S.C. § 959 (1970).

The 1911 Act empowers the head of the department with jurisdiction over the lands involved to grant "an easement for rights-of-way" across federal reservations if he finds that such use is not incompatible with the public interest. Such an easement may be granted for placement of poles and lines for electric power transmission, and for structures and facilities for communication purposes. The maximum term of the easement is fifty years and the interest is subject to forfeiture for abandonment or failure to use for two years. The maximum size of the right-of-way is also specified by the statute.[126]

A comparison of the ditches and canals acts, and the 1901 and 1911 Acts with the BLM Act is not particularly useful. The early statutes are much less detailed than the BLM Act. As a result, extensive regulations have been promulgated in order to create a total system of administration and management of rights-of-way. However, when promulgated these regulations applied to public lands and national forest system lands as well as reserved lands. It remains to be seen whether the regulations promulgated under the BLM Act will be applicable to reserved lands. The other complicating factor is that the reserved lands frequently have specific rights-of-way authorities outside of the early statutes. Thus, the practical applicability of the early statutes is somewhat in doubt.

B. Management Systems

1. National Wildlife Refuge System

The Secretary of the Interior has authority to administer the national wildlife refuge system (NWRS) through the Fish and Wildlife Service (F&WS). The NWRS includes "all lands, water, and interests therein administered by the Secretary [of the Interior] as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas . . . ."[127]

In contrast to the public lands, there is no unified statute which sets forth management policies and the purposes for the NWRS. Regulations for administering the NWRS[128] cite as management authority the National Wildlife Refuge System Administration Act[129] and seven other statutes which deal with administrative procedures, individual units of the NWRS, and game and fish management.[130]

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126. *Id.* § 961.

127. 16 U.S.C.A. § 668dd(a)(1) (West Supp. 1977).

128. 50 C.F.R. § 29.1-29.22 (1976).

129. 16 U.S.C.A. §§ 668dd, 715s (West 1974 & Supp. 1977) [hereinafter cited as Refuge Administration Act] .

130. The statutes cited include: 5 U.S.C. § 301 (1970) which provides general authority to promulgate regulations; 16 U.S.C. §§ 685, 725, 690d (1970) which are portions of acts establishing specific NWRS areas; 16 U.S.C. § 715(i) (1970) from the Migratory Bird Conservation Act; 16 U.S.C. § 664 (1970) from the Fish & Wildlife Coordination Act; 43 U.S.C. § 315a

Easements may be granted under the Refuge Administration Act for essentially the same purposes as rights-of-way under the BLM Act. These purposes include, but are not limited to, powerlines, telephone lines, pipelines, canals, ditches, and roads.[131] The Refuge Management Act is similar to the BLM Act, in that the right-of-way provisions require payment of fair market value for use of the rights-of-way and limit the size of rights-of-way to the land necessary for the construction, operation, and maintenance of the permitted activities.[132] The BLM Act provisions are much more extensive than the Refuge Administration Act, especially in the area of protection of the environment and public safety. However, the Refuge Administration Act requires a determination by the Secretary of the Interior that the permitted activity is "compatible with the purposes for which these areas are established."[133]

There are several statutes of broad applicability which may apply to the NWRS. The ditches and canals acts,[134] and the 1901[135] and 1911[136] Acts have not been repealed insofar as they apply to the NWRS, but the F&WS regulations no longer cite them as authority for granting rights-of-way.[137] In any case; project works subject to FPC jurisdiction must be licensed by the FPC.[138] This license may be granted only if the FPC finds that the licensing will not interfere with the purposes of the refuge, and any such license is subject to the conditions the Secretary of the Interior deems necessary to protect the reservation.[139] Rights-of-way for federally-funded highways may be acquired across NWRS lands,[140] but special protection is granted NWRS lands and other publicly owned lands of special significance. For example, the Secretary of Transportation

> shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife or refuge of national, state, or local significance . . . or any land from a historic site . . . unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.[141]

(1970) from the Taylor Grazing Act and 16 U.S.C. § 460 (1970) from the Act of Sept. 28, 1962, as amended by the Act of Oct. 15, 1966 which provides for recreational use of NWRS lands, fish hatcheries and other conservation areas administered for fish and wildlife purposes. Measures have been introduced in recent sessions of Congress to establish a governing agency and organic act for the NWRS. *E.g.*, S. 984, 95th Cong., 1st Sess.,123 CONG. REC. S4020 (daily ed. March 11, 1977); H.R. 2082, 95th Cong., 1st. Sess., 123 CONG. REC. H477 (daily ed. Jan. 19, 1977).

131. 16 U.S.C.A. § 668dd(d)(1)(B) (West Supp. 1977).
132. *Id.* § 668dd(d)(2).
133. *Id.* § 668dd(d)(1)(B).
134. 43 U.S.C. §§ 946-954 (1970); *see* text accompanying notes 117-21 *supra*.
135. 43 U.S.C. § 959 (1970); *see* text accompanying notes 122-25 *supra*.
136. 43 U.S.C. § 961 (1970); *see* text accompanying note 126 *supra*.
137. 50 C.F.R. § 29.21-.22 (1976).
138. *See* text accompanying notes 53-59 *supra*.
139. 16 U.S.C. § 797(e) (1970).
140. *See* text accompanying notes 47-52 *supra*.
141. 23 U.S.C. § 138 (1970) (also codified at 49 U.S.C. § 1653(f) (1970)).

There are also special provisions which apply to oil and gas pipeline rights-of-way in the NWRS. Under section 28 of the MLA, rights-of-way may be issued across a refuge[142] unless the Secretary or agency head determines that such a right-of-way is inconsistent with the purposes of the refuge.[143]

2. National Park System

The national park system is administered by the Secretary of the Interior through the National Park Service (NPS).[144] The NPS is charged with promoting and regulating the use of national park system[145] lands "by such means and measures as conform to the fundamental purpose of the said [lands] . . . , which purpose is 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 . . . ."[146] A statute which applies specifically to a particular area within the park system will control, in the event of a conflict, over a statute generally relating to the administration of the park system.[147]

There is no comprehensive right-of-way authority for the national park system. Instead, a patchwork system of outdated laws supplies the right-of-way authority. The ditches and canals acts[148] and the 1911 Act[149] are applicable to lands in the national park system. The 1901 Act specifically applies to Yosemite and Sequoia National Parks and other reservations.[150] Other reservations, in this context, probably would include national recreation areas and national monuments but not other national parks. The FPC has no authority to license project works within national parks or monuments. Instead, Congress must license projects located within parks or monuments.[151] The FPC can license projects on reservations, other than parks and monuments, if it finds that the licensing will not interfere or be inconsistent with the purposes of the reservation.[152]

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142. In its final version, the amendment to section 28 of the MLA excluded only national park system lands, lands held in trust for Indians or Indian tribes and outer continental shelf lands from the authority to grant rights-of-way. The Senate version of the bill also excluded wilderness areas and wildlife refuges. H.R. REP. No. 624, 93d Cong. 1st Sess. 21-22, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2523.

143. 30 U.S.C. § 185 (b)(1) (Supp. IV 1974).

144. 16 U.S.C. § 1 (1970).

145. The national park system includes national parks, monuments, memorials, parkways, and other lands administered through the NPS. 16 U.S.C. § 1c(a) (1970).

146. 16 U.S.C. § 1 (1970). This section is made applicable to national park system lands by 16 U.S.C. § 1c(b) (1970).

147. 16 U.S.C. § 1c(b) (1970).

148. 43 U.S.C. §§ 946-954 (1970); *see* text accompanying notes 117-21 *supra*.

149. 43 U.S.C. § 961; 16 U.S.C. § 5 (1970); *see* text accompanying note 126 *supra*.

150. 43 U.S.C. § 959 (1970); 16 U.S.C. § 79 (1970); *see* text accompanying notes 122-25 *supra*.

151. 16 U.S.C. § 797a (1970).

152. *Id*. § 797(e) (1970); *see* text accompanying notes 53-59, 138-39 *supra*.

Rights-of-way for surface vehicle transportation can be obtained in a number of ways. Rights-of-way for federally funded highways may be obtained for crossing national park system lands,[153] subject to a finding of a lack of feasible or prudent alternatives.[154] Recently, authorization was given for federal-local cooperative studies to determine "the most feasible Federal-aid routes for the movement of vehicular traffic through or around national parks so as to best serve the needs of the traveling public while preserving the natural beauty of these areas."[155] The Secretary of the Interior has special authority to construct and improve roads and trails in the national park system.[156] Rights-of-way for oil and gas pipelines cannot be obtained through national park system lands. Section 28 of the MLA specifically excludes those lands.[157]

3. Military Reservations

The secretary of a military department has broad authority to grant easements for rights-of-way over lands reserved for use by his department or otherwise under his control. However, there is nothing like the BLM Act's comprehensive guidelines for administering rights-of-way. The secretary makes such grants under his own conditions, but he may only grant the easement if he finds that it will not be against public interest.[158] The rights-of-way may be used for such purposes as railroads, oil pipelines, ditches and canals, and roads.[159] He may also grant rights-of-way for gas, water and sewer pipelines if he makes an additional finding that the right-of-way will not substantially injure the interest of the United States in the property affected.[160]

Military reservations are subject to some of the statutes of broad applicability. In particular, the 1911 Act[161] has specifically been recognized as applying to military reservations.[162] The ditches and canals acts[163] and the 1901 Act[164] apply to such lands, but the specific statute governing military reservations would take precedence in the event of a conflict. The FPC licensing authority applies to military reservations with the special condition that the FPC find that such a license is not inconsistent with the purposes of the reservation.[165] The MLA pipeline provisions allow the grant-

153. *See* text accompanying notes 47-52, 141 *supra*.
154. *See* text accompanying note 141 *supra*.
155. 23 U.S.C.A. § 138 (West Supp. 1977).
156. 16 U.S.C. § 8 (1970).
157. *See* text accompanying note 71 *supra*.
158. 10 U.S.C. § 2668(a) (1970).
159. *Id*.
160. 10 U.S.C. § 2669 (1970).
161. 43 U.S.C. § 961 (1970); 16 U.S.C. § 420 (1970); *see* text accompanying note 126 *supra*.
162. 10 U.S.C. § 2668(a)(10) (1970).
163. 43 U.S.C. §§ 946-54 (1970); *see* text accompanying notes 117-21 *supra*.
164. 43 U.S.C. § 959 (1970); *see* text accompanying notes 122-25 *supra*.
165. 16 U.S.C. § 797(e) (1970); *see* text accompanying notes 53-59, 138-39 *supra*.

ing of rights-of-way for oil and gas pipelines across military reservations.[166] There is a possible conflict between the MLA and the statute which applies specifically to military reservations.[167]

4. National Wilderness Preservation System

The national wilderness preservation system(NWPS) was established in 1964 by the Wilderness Act.[168] The basic policy of the Act is to secure "for the American people of present and future generations the benefits of an enduring resource of wilderness."[169] Congress may designate wilderness areas in national forests, the national park system, the national wildlife refuge system,[170] and on the public lands.[171] The agency or department holding management authority prior to the designation of lands as wilderness retains jurisdiction over those lands.[172] The effect of the Act is to provide a special set of rules which require the managing agency or department to administer wilderness areas within their jurisdiction—"for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness . . . ."[173]

As a general rule, the Act prohibits manmade structures within wilderness areas. The Act states that "except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area . . . and except as necessary . . . for the purpose of this chapter . . . there shall be . . . no structure or installation within any such area."[174] Rights-of-way through specific wilderness areas may be authorized by the President, in accordance with any regulations he may desire. This authority extends to:

> reservoirs, water conservation works, power projects, transmission lines, and other facilities needed in the public interest, including the road

166. 30 U.S.C. § 185(b)(1) (1970); *see* text accompanying notes 70-95, 143 *supra*.

167. 10 U.S.C. §§ 2668-2669 (1970) grant rights-of-way for oil and gas pipelines under much different standards than the MLA.

168. 16 U.S.C. §§ 1131-1136 (1970).

169. *Id.* § 1131(a).

170. *Id.* § 1133(a).

171. 16 U.S.C.A. § 1782(c) (West Supp. 1977).

172. 16 U.S.C. § 1131(b) (1970).

173. *Id.* § 1131(a). Congress has defined the term wilderness:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological or other features of scientific, educational, scenic, or historical value.

Id. § 1131(c).

174. *Id.* § 1133(c).

> construction and maintenance essential to development and use thereof, upon his determination that such use or uses in the specific area will better serve the interests of the United States and the people thereof than will its denial.[175]

This authority applies only to wilderness areas located on public lands or in national forests and does not include national park system or national wildlife refuge system wilderness areas. Access rights, of an unspecified type, are to be granted to owners of land surrounded by national forest or public land wilderness areas.[176] Similarly, the Secretaries of Agriculture and the Interior are required to permit "by reasonable regulations consistent with the preservation of the area as wilderness," ingress and egress to valid mining claims or other valid occupancies surrounded by national forest and public land wilderness areas.[177] In summary, the Wilderness Act authorizes no rights-of-way through national park or wildlife refuge system wilderness areas but does allow certain uses of national forest and public land wilderness lands.

The MLA authorizes, with the exception of national park system wilderness areas, oil and gas pipelines through wilderness areas. A right-of-way through any wilderness area could be denied by the appropriate department Secretary or agency head on the basis of incompatibility with the purposes for which such wilderness areas are established.[178]

Under the BLM Act special rules apply to public lands which have been identified as having wilderness characteristics and are awaiting congressional action. The Secretary of the Interior is required to administer such lands in a manner "so as not to impair the suitability of such areas for preservation as wilderness."[179] This standard apparently precludes rights-of-way in such study areas except to the extent those rights-of-way would be allowed in a wilderness area.[180]

5. *National Wild and Scenic Rivers System*

The national wild and scenic river system was created by Congress to preserve those rivers in a "free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations."[181] In general, the wild and scenic river system "shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as

175. *Id.* § 1133(d)(4).
176. *Id.* § 1134(a).
177. *Id.* § 1134(b).
178. 30 U.S.C. § 185(b)(1) (Supp. IV 1974). *See* text accompanying notes 70-95, 143 *supra*.
179. 43 U.S.C.A. § 1782(c) (West Supp. 1977); *c.f.* Parker v. United States, 448 F.2d 793 (10th Cir. 1971), *cert. denied* 405 U.S. 989 (1971), which involved addition of contiguous areas to a national forest primitive area.
180. *See* text accompanying notes 174-78 *supra*.
181. 16 U.S.C. § 1271 (1970).

is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values."[182]

The right-of-way provisions of the Wild and Scenic Rivers Act (WSRA) cannot be understood without information regarding the classification and designation. There are three possible classifications within the wild and scenic rivers system—wild, scenic and recreational. Wild river areas are free of impoundments, generally accessible only by trail, and essentially primitive and unpolluted. Scenic river areas are free of impoundments, largely primitive and undeveloped, but accessible in places by roads. Recreational river areas are readily accessible by road or railroad, may have some development, and may have undergone some impoundment in the past.[183] A river may be included in the wild and scenic rivers system either by Congressional designation, or by an act of a state legislature followed by approval by the Secretary of the Interior.[184]

Rivers within the system are subject to several jurisdictional authorities. Rivers designated by state action are administered by that state.[185] Congressionally designated rivers may be administered by either the Secretary of the Interior or Agriculture, through agencies within their departments. Any portion of the system which lies in the national wilderness preservation system "shall be subject to the provisions of both the Wilderness Act and this chapter with respect to preservation of such river and its immediate environment, and in case of conflict between the provisions of the Wilderness Act and this chapter the more restrictive provisions shall apply."[186]

The WSRA indicates the statutory authorities which dictate the management of rivers in the system.[187] Transportation functions are treated separately from management in general. The Act states that the Secretaries of the Interior and Agriculture "may grant easements and rights-of-way over . . . any component of the wild and scenic rivers system in accordance with the laws applicable . . ." to the national park and national forest systems respectively, but any conditions precedent to granting of rights-of-way must

182. *Id.* § 1281(a).
183. *Id.* § 1273(b).
184. 16 U.S.C.A. § 1273(a) (West Supp. 1977).
185. *Id.* § 1273(a)(ii).
186. 16 U.S.C. § 1281(b) (1970).
187. With respect to management generally, any component of the Wild and Scenic River System that falls within or is added to the national park system is subject to the statutory authority governing the parks. Similarly, wild and scenic rivers located within the national wildlife refuge system are subject to the statutory authority governing refuges. If there is conflict between the Wild and Scenic Rivers Act and the national park system acts or the act establishing the national wildlife refuge system, the more restrictive provisions shall apply. Under the Wild and Scenic Rivers Act, the Secretary of Agriculture "may utilize the general statutory authorities relating to the national forests in such manner as he deems appropriate to carry out the purposes of this chapter." 16 U.S.C. § 1281(d) (1970). Consequently, the Secretary of Agriculture is given more discretion to administer wild and scenic river areas that fall within his jurisdiction than is the Secretary of the Interior for parks and refuges.

be related to the policy and purpose of the Wild and Scenic Rivers Act.[188] This may seem to be of academic importance until one considers the effect on the MLA. Oil and gas pipeline rights-of-way are not authorized in national park system lands.[189] Therefore, any river designated under the WSRA, which is administered by the Interior, could not be crossed by oil and gas pipelines, even if the river is merely designated as "recreational".[190]

The WSRA has a significant impact on the water project licensing authority of the FPC.[191] The FPC is prohibited from licensing project works directly affecting any river designated as a component of the wild and scenic rivers system.[192] This prohibition also extends to rivers designated by Congress as potential additions to the system.[193]

V. Conclusion

A complete assessment of the legal authorities for obtaining rights-of-way across federally owned lands cannot be undertaken until regulations have been promulgated under the BLM Act. The amount of discretion left to the managing agency in promulgating regulations is much less than under other rights-of-way authorities, with the exception of the MLA, but actual operation of the BLM Act still depends in large measure upon agency interpretation and implementation. This article has set forth some of the areas where problems of interpretation and implementation of the BLM Act right-of-way provisions might arise, but the BLM Act does represent a significant effort by Congress to reform public land law by presenting a comprehensive system for the grant and management of rights-of-way on public lands and national forest system lands.

Reform is still needed for rights-of-way authorities governing federally owned lands not subject to the BLM Act. This article has detailed areas of confusion in and overlap between the various right-of-way statutes applicable to different types of reserved lands. One possible partial solution would be to apply the BLM Act right-of-way provisions to all types of federally owned lands, subject to additional provisions consistent with the special nature of each management system. The most critical provisions are those dealing with the threshold requirements for the grant of a right-of-way. For example, the secretary of the department charged with administering the lands in question, or in the case of wilderness areas, the President, can be required to make a written determination that the proposed right-of-way is not inconsistent with the purposes for the reservation or is in the public interest to grant the right-of-way. Such a determination can be made subject to public review and comment. A stricter test, similar to the test the Secretary

188. 16 U.S.C. § 1284(g) (1970).
189. 30 U.S.C. § 185(a)(b)(1) (Supp. IV 1974); *see* text accompanying note 71 *supra*.
190. *See* text accompanying note 183 *supra*.
191. *See* text accompanying notes 53-59, 138-39 *supra*.
192. 16 U.S.C.A. § 1278(a) (West Supp. 1977).
193. *Id.* § 1278(b).

of Transportation must apply to projects subject to his approval,[194] can be applied by requiring a finding that there is no feasible and prudent alternative to the proposed use of such land. Certain uses of rights-of-way which Congress finds particularly repugnant to the purposes of a particular management system can be prohibited entirely. Terms and conditions, in addition to those imposed by the BLM Act, can be imposed to minimize aesthetic and environmental impacts if a right-of-way application is granted.

The BLM Act is evidence that Congress has embarked on a strong program of public land law reform. It should be apparent from this article that more reform is in order, at least in regard to the laws governing rights-of-way.

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194. *See* text accompanying notes 140-41 *supra*.