

**A User's Guide
to Accessing Inholdings
in a National Park Service Area in Alaska**

DRAFT - February 2005

**Open for Public Comment
Until May 13, 2005**

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Access to Inholdings in a National Park Service Area in Alaska

As a property owner in a unit of the national park system in Alaska, you are entitled to adequate and feasible access your land. And, as the stewards of America's national parks, the National Park Service has responsibilities to manage public land in a way that protects the values Congress recognized in establishing the parks. Laws and regulations, consultation with the State of Alaska, and consideration of ideas and comments from Alaskans directed the development of these procedures and this guide.

An inholding is a parcel of nonfederally owned land, a valid mining claim or other valid occupancy that is in, or is effectively surrounded by, one or more national park areas, such as a national park, monument, or preserve. There are approximately 1,666,500 acres of private, state, borough and city, and Native corporation land within the boundaries of national park areas in Alaska that are considered inholdings.

The National Park Service wants you to have the access you need to use and enjoy your land. We want the process of obtaining access across park areas to be as straightforward as possible, while also assuring protection of park resources. This user's guide will help landowners and others understand the process that is required for the National Park Service to authorize access across park areas.

A short history may be helpful in understanding access to nonfederal property within national park areas. Some national park units in Alaska are quite old; for instance, the original Mount McKinley National Park was established in 1917, and Katmai National Monument was established in 1918. These old parks were generally established from federal public land and included few private parcels.

The majority of Alaska's national park areas were established in 1980 with passage of the Alaska National Interest Lands Conservation Act (ANILCA). Coming after years of staking homesteads, Native allotments, mining claims, and passage of laws such as the Alaska Statehood Act and the Alaska Native Claims Settlement Act, the boundaries of many of the new parks and park expansions included parcels of private and state land.

In 1980, access to those parcels varied greatly, and today people continue to use many different means to get to their property. In some cases, private property is along a state road or a park road. In other cases owners reach their property by air or water. There are also some cases where access across federal land was created at some time in the past, but never authorized by a permit or right of way. For people seeking legal access across federal land to private property, the specific history of the physical access route, if any, is

likely to make a difference in how they'll proceed, as will the type of access being sought. This guide is intended to steer you through the options and necessary steps.

For access across federal land that requires authorization by the National Park Service, planning ahead and working with the park superintendent is important to expedite your application. Processing time depends upon several factors, including the complexity of the access, availability of information, and staff availability. Authorization can take as little as a few months, but complex projects with substantial new construction can take a year or longer. If we know your plans early, we can work with you to plan your access proposal to avoid unnecessary delays later in the process.

National Park Service Authorizations and Categories of Access

Title XI of ANILCA addresses many types of access across federal lands in Alaska, including major systems, like pipelines, highways, and power transmission lines that cross national park areas, as well as other conservation units. This user's guide addresses access to your inholdings through National Park Service managed lands. The National Park Service is required to provide you with "adequate and feasible" access for your intended use of your land, and to issue you a right-of-way permit, unless you can access your property without such a permit as described below.

The sections of Title XI that are most applicable to access to inholdings are sections 1110(a) and 1110(b). Section 1120(a) addresses access by nonmotorized methods, as well as motorboats, airplanes, and snowmachines. Access pursuant to 1110(a) generally does not require authorization from the National Park Service. Section 1110(b) addresses access to inholdings that would require use of an access method not addressed by 1110(a) or construction or maintenance of a road, powerline, or landing strip, and so on. The National Park Service acknowledges the access, provided in both section 1110(a) and section 1110(b) is very important to inholders. Department of the Interior regulations (43 CFR 36.10) provide additional direction to land managers and landowners on how to secure access.

When is a permit not needed?

Generally you do not need a permit if 1) you will be using a nonmotorized means of travel, or a motorboat, airplane, or snowmachine to access your land, and 2) this access does not require construction or maintenance on national park areas. Also, a permit is not necessary if there is a valid, existing right-of-way (such as a state highway) to your land, or if there is a designated park road to your land that is open to use by the general public. Snowmachine access requires adequate snow cover and it may be further restricted by the superintendent to protect park resources.

When is a permit needed?

If access to an inholding is not included in the paragraph above, then you most likely will need a permit. Permits are usually necessary when construction or maintenance of a trail, road, powerline, or a landing strip would occur on national park areas, or if the mode of access needed is not otherwise already allowed. This authorization process allows the

National Park Service and other agencies that manage public resources – for example, salmon streams, wildlife habitat, and historical sites and other public uses, to protect those public assets while finding ways to meet your access needs.

Authorization Process

Step 1: Starting the Process

To apply for a right-of-way permit for access across national park areas to your property, you will need to identify what kind of physical access you need. As stated above, if access by snowmachine, motorboat, airplane, or by nonmotorized means is sufficient for you, it's likely no permit will be needed. However, if you need to construct or maintain a road or utility line, or if you need to use other modes of transportation, then a right-of-way permit is generally required. Consider what modes of access, as well as what routes of access would work best for you. Then contact the superintendent of the national park area to schedule a pre-application meeting. Park superintendents' names, addresses, phone numbers, and email addresses are included in this guide.

Step 2: Pre-Application Meeting

A pre-application meeting provides an opportunity for you to discuss your access needs in detail and for the park superintendent to further explain the authorization process. The pre-application meeting will also cover information needs, timelines, fees and other topics. This meeting has the potential for saving both you and the National Park Service time and expense. The meeting will help determine if you even need to obtain a right-of-way permit. Discussing your ideas about the types and routes of access with park staff can help everyone focus on practical and feasible options that will expedite the process. The meeting also can help identify other agencies that will need to consider your proposed project.

To get the most out of the pre-application meeting, we recommend prior to the meeting that you review the application form (SF 299). You can obtain the form either from the park superintendent or from the website:

http://www.nc.blm.gov/blmforms/forms/sf_forms/pdf/FormSF-299.pdf .

Be sure to bring any information that may be useful during this session. For example, Item #7 on the application (Project Description) requires specific information about your proposal, such as physical specifications (length, width, grading, etc.) or types of vehicles to be used. Having at least preliminary information on these topics will better explain your proposal at the meeting. Item #8 requires a map of the project area. You may already have a survey or other adequate map that will satisfy this requirement. Bring any other documents that may provide additional information to assist in explaining and illustrating your proposal. It's okay if you don't have all the required information for the pre-application meeting, although the more you have the easier it will be for the NPS to understand your needs.

Step 3: Applying for a Permit

Complete the application for a right-of-way permit (SF 299). Please provide all the information requested on the application form. An incomplete application or insufficient information can slow processing. Send the completed application to the park superintendent.

Step 4: Processing the Permit

The National Park Service will review the submitted application for completeness and has up to 60 days to inform you of the need for additional information. If additional information is needed you will be asked to provide it. The National Park Service will also determine what information it must gather to process the application. For example, a field study may be needed to determine whether an archaeological site would be affected by your request.

Any request for access across national park areas, unless entirely on an established right-of-way or designated trail or area, will require environmental analysis. Relatively simple proposals will generally be analyzed in an Environmental assessment (EA). Large and complex access proposals may require a more lengthy and detailed analysis, documented in an environmental impact statement (EIS). The National Environmental Policy Act (NEPA) requires the National Park Service to evaluate a range of reasonable alternatives and the impacts of each on park resources and values. The NEPA process includes preparing the document and making it available for public review. The review period is 30 days for an EA, and 60 days for an EIS. The National Park Service has up to nine months from receipt of a complete application to prepare the EA or draft EIS, and an additional three months to prepare the final EIS. The National Park Service then has four months to make a decision on the request. These are maximum periods established by regulation, and simple proposals should take much less time. These timeframes may be extended if warranted, for example at the applicant's request to consider new information. Normally, the National Park Service will conduct the analysis and prepare the document.

An important determination the National Park Service needs to make is what would be adequate and feasible access for achieving the land use objective on your inholding. It could be the specific route and method you request, or it could be access by another means or route. For example, if an inholding is on the shore of a large lake, and access is available by float or ski-equipped plane, then even though the request is for construction of a new road, it could be determined that air access is adequate and feasible, and road access is not needed. The National Park Service is responsible for determining the specific terms and conditions, including the route, in the right-of-way permit. Terms may, for example, specify the width of a road, types of vehicles, maintenance requirements, or other measures to protect park resources and values. Mitigation measures to avoid, reduce, or compensate for resource impacts may be required, such as wetlands restoration. NPS policies require a 1:1 replacement of wetlands lost.

Step 5: Other Agency Authorizations

Depending on the complexity of an access request and the issues involved, other agencies may be required by law to evaluate your request. For example, if stream crossings are involved, the State of Alaska has an interest in protecting fish populations and habitat, especially for anadromous species such as salmon. If gravel or other materials are discharged into a stream or connected wetlands, the U.S. Army Corps of Engineers must issue a Clean Water Act section 404 permit, and a state Department of Natural Resources permit may be required if the water body is navigable. The National Park Service can work with you to help identify other agency authorizations that may be necessary, but it is your responsibility to obtain the necessary permits and authorizations from these or other agencies.

Fees

Fees partially reimburse the National Park Service for the costs of processing the applications, issuing the right-of-way permits, mitigating impacts if necessary, and monitoring use of these permits. Land rental fees, where applicable, pay for the use of federal lands by the holder of a right-of-way permit. Land rental fees go to the U.S. Treasury. The fees presented below in this User's Guide are proposed to be used on an interim basis. At a later date fees for access to inholdings may be addressed in revisions to National Park Service regulations. Appendix A lists the laws, regulations and other directives and guidance on the subject of fees for rights-of-way permits for NPS units in Alaska.

Application and Processing Fee

This fee partially covers the National Park Service costs of processing an application, conducting the environmental analysis (but not an environmental impact statement), and issuing a right-of-way permit. The National Park Service proposes that the fee charged the applicant be based on the fee schedule in the Code of Federal Regulations, Title 43, Subpart 2808.2 and 2808.3-1(a). These are the current federal regulations of the Bureau of Land Management. The table below summarizes this fee schedule. The appropriate fee category is determined by whether the information needed to process the application is available to the National Park Service, and upon how field examinations may be required to process the application.

<u>Category</u>	<u>Information Available</u>	<u>Number of Field Examinations Required</u>	<u>Fee*</u>
I	Yes	0	\$125
II	Yes	1	\$300
III	Yes	2	\$550
IV	Some	2 or 3	\$925
V	No	3 or more	Amount to be determined

*one time application fee

For instance, the least costly category (Category I) applies if the data needed to process the application are available at the National Park Service office and no field examinations

are needed—the fee is \$125. Higher categories have higher costs. In Category IV, where some original data must be gathered and two or three field examinations are required, the cost is \$925. In the final category (V), where original data are required to be gathered and three or more field examinations are required, the actual National Park Service costs of processing the application and issuing the permit are estimated and presented to the applicant.

Upon request from an applicant, fees could be reduced or waived by the National Park Service for the following reasons: 1) financial hardship; 2) the studies undertaken in connection with the processing of the application would have a public benefit; or 3) the facility requiring the right-of-way permit would have a public benefit.

Environmental Impact Statement Preparation Fee

Requests for access to inholdings that would have potentially significant impacts on the environment would require an environmental impact statement. In such cases our regulations [43 CFR 36.6(c)(2)] require that fees be determined under the 43 CFR 2808 regulations. All access requests requiring an environmental impact statement would fall in Category V.

Monitoring Fee

The National Park Service proposes to use the 43 CFR 2808.4 regulations determining for monitoring fees. These fees partially cover the costs of National Park Service staff monitoring the construction, maintenance, operation, and termination of the authorized access. These one-time fees are based on the same categories as described above. For example, if the application is determined to be a Category I access request, the monitoring fee is \$50. A Category IV monitoring fee is \$200.

Annual Land Rental Fee

Land rental fees are for the use of federal lands once a by the right-of-way holder is issued. The National Park Service proposes to waive land rental fees for non-commercial access to inholdings, but to charge land rental fees for access for commercial use of inholdings. Land rental fee is to be the fair market rental value of the right of way permit. Rental fees are determined by a U.S. Government appraisal, a National Park Service cost estimate, or by a land rental fee schedule. The fee will be based on the land directly affected by and described in the right-of-way permit.

Example of fees for a right-of-way permit:

Under the fee rates listed above, and assuming some of the necessary information is already available to the National Park Service and three (3) field inspections would occur, the fees for obtaining a permit for construction of a 2-mile-long primitive road to an inholding that is used for residential (not commercial) purposes, is expected to consist of the following:

Application & Processing Fee	\$ 925
Monitoring Fee	<u>\$ 200</u>
Total	\$1125

If the inholding was used for commercial purposes, a land rental fee would also be charged. If the right-of-way is 12 feet wide and 2 miles long, it would occupy about 3 acres. If the fee value of the land is \$1000 an acre ($\$1000 \times 3 = \3000) then the annual rental fee would be:

$$\$3000 \times 8\% \text{ (rental rate)} = \$240$$

Conclusion

The owners of nonfederal lands in National Park Service units in Alaska are afforded adequate and feasible access by Congress in sections 1110(a) and 1110(b) of ANILCA. The National Park Service is committed to working with landowners to provide the access to their lands, while also managing these special places, the park areas, for the enjoyment of present and future generations. We look forward to working with you.

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Frequently Asked Questions
for
A User's Guide to Accessing Inholdings
in a National Park Service Area in Alaska

These questions came from the public, Park Service employees, and people living and working in Alaska's national parks. If we haven't adequately answered your specific questions, contact the appropriate park superintendent. Park superintendents' names, addresses, phone numbers, and email addresses are included in this guide.

NEED FOR A RIGHT-OF-WAY PERMIT

1) Why do I need a right-of-way permit?

A right-of-way permit allows you to do things in a park that otherwise would generally be prohibited, such as construct or maintain roads, install utilities, and drive motor vehicles across park areas.

2) What laws and regulations apply to right-of-way permits and access to inholdings?

Most of the national parks in Alaska were created or redesignated by the Alaska National Interest Lands Conservation Act (ANILCA) in 1980. Section 1110(b) of ANILCA affords adequate and feasible access to inholdings.

...the State or private owner or occupier shall be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned land by such State or private owner, or occupier and their successors in interest. Such rights shall be subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands.

The regulations implementing this section of ANILCA are at 43 CFR 36.10. The regulations say that the National Park Service will use right-of-way permits to authorize needed access to inholdings while protecting park values. [43CFR 36.10(e)(1)].

3) Do I need a right-of-way permit to travel across national park areas to reach my inholding?

You do not need a permit if you are traveling over an established public right of way such as a park road (An exception is the Denali Park Road). You **do not need** a right-of-way permit to use a state highway. Also you do not need a permit if you are walking or using nonmotorized means of surface transportation, such as sled dogs or a pack or saddle animal.

You **do not need** a right-of-way permit for access to inholdings by motorboat, snowmachine, or airplane [ANILCA 1110(a) and 43 CFR 36.11(a)]. Snowmachine use is dependent upon adequate snow cover. In Kenai Fjords National Park and Denali National Park and Preserve, the park superintendent announces when adequate snow cover exists.

National park areas may occasionally be closed to some access methods to protect park resource values. There will be public notice of these closures [43 CFR 36.11(h)]. Snowmachines are prohibited at all times within the former Mt. McKinley National Park [36 CFR 13.63(h)(2)].

You will need a right-of-way permit:

- To use other motorized surface transportation vehicles on park lands, off state highways and park roads to reach your inholding. If off-highway vehicle (OHV) use is determined through a finding by the park superintendent to be compatible with park values, the National Park Service can issue permits to use OHVs on existing OHV trails [43 CFR 36.11(g)(2)].
- To reroute roads or trails on park lands.
- To build new roads or trails on park lands.
- To install utilities such as telephone lines and repeaters, communication sites, powerlines, and waterlines.

4) My property predates the national park; do I need a right-of-way permit?

You may need a right-of-way permit, depending on your access needs. Traditional or historical use will be a factor in considering the terms of a right-of-way permit.

Most inholdings predate creation of the national park, when the lands were managed by the Bureau of Land Management (BLM). Until 1968, most lands were open to homesteaders, Native allottees, and miners. Until the mid-1970s many federal lands were open to selection by the state and Native corporations. Until the passage of the Federal Land Policy and Management Act (FLPMA) in 1976, BLM didn't have a mechanism to grant road rights of way to individuals. After FLPMA passed, individuals, state, and local governments had to get rights-of-way for pre-existing roads on public lands, including roads in use before FLPMA.

5) My neighbor won't let me cross his land. Therefore, I have to cross a national park to reach my property. Can I receive a right-of-way permit?

We encourage you to explore other routes across private land to your access inholding. However, it is not required that you to attempt to obtain access to your inholding across non-federal lands before applying for a right-of-way permit. The National Park Service will work with you to file an application and help you find adequate and feasible access to your land.

6) If an access route is used by more than one private property owner, does each owner need some kind of authorization from the National Park Service?

If the method of access is not already allowed and park lands must be crossed in order to reach separate properties, then each owner would need a separate authorization. There may be some circumstances where adjoining property owners join together to file an application. Joining with neighboring private landowners and agreeing on a single physical access route could lessen the collective cost of right-of-way permits.

ACCESS VIA OTHER LAWS AND LEGAL RIGHTS

1) What about State RS 2477 rights-of-way?

An RS 2477 is a right of way belonging to the State of Alaska that overlays lands owned or managed by others, including national park areas. Since neither the federal courts nor the Department of the Interior has confirmed the validity of any RS 2477 rights-of-way in Alaska national park areas, they remain unresolved. Consequently, before using or maintaining a claimed RS 2477 route to your inholding, prior authorization from both the State and the National Park Service must be obtained. Appendix B provides additional information about RS 2477 rights of way.

2) I'm on a state road; do I still need a right-of-way permit?

The State of Alaska Department of Transportation (DOT) administers state roads and state rights of way for highway purposes. For access to property that is adjacent to the roadway, DOT issues and requires driveway permits

(<http://www.dot.state.ak.us/permits/index.html>.)

If your access to a park area is confined to a state road right-of-way you will not need a National Park Service right-of-way permit. If you need to cross park areas once you leave the road right-of-way, you may need the permit, as explained in other sections of this User's Guide. If you have questions about whether a permit is needed, please contact the park superintendent.

3) Do I need a right-of-way permit to access my property on or across a navigable water body?

If you are using a motorboat, snowmachine, or airplane to access your property, then the navigability of the water body is not an issue because the National Park Service and the State already generally allow these uses without a right-of-way permit. If you want to use other motor vehicles or construct a facility such as a dock, other state and federal laws may apply and permits may be required. Check with both the State of Alaska Department of Natural Resources (DNR) and the park superintendent.

4) Can I use a section line easement?

A section line easement is a kind of RS 2477 right of way asserted by the State of Alaska under state law. Neither the federal courts nor the Department of the Interior has confirmed the validity of any section line easements across federal public-lands in Alaska's national park areas. Therefore, a right-of-way permit may be required to cross park lands.

5) Do I need a right-of-way permit to use an Alaska Native Claims Settlement Act 17(b) easement to reach my property?

No, because right-of-way permits only apply to national park lands and 17(b) easements only provide access across lands belonging to Alaska Native corporations. The easements were reserved to provide access from public lands and waters across Native corporation land to public lands and waters. Depending on your route and use, you may need a right-of-way permit once you reach the national park areas.

GENERAL ACCESS QUESTIONS

1) I do not actually own the land, but the owner gave me permission to drive out there this summer. Can I do that?

You will need to have permission from the landowner, to use the landowner's right-of-way permit. It is necessary for you to comply with the terms of the permit.

2) I tried to get to my inholding by snowmachine last winter, but some trappers told me that I can't use the trail because they have some wolf traps set and claim the trail as their own. Is that right?

Trapping trails do not confer rights of exclusive use. Misunderstandings can often be avoided by talking with the trappers and trying to identify a suitable compromise. Any conflicts may also be brought to the attention of the park superintendent or the State of Alaska Department of Fish and Game (ADF&G).

3) There is platted access in my subdivision, but it is in a terrible location. Can I get access through the park?

If it is prohibitively expensive or physically impossible to use the platted right of way, you may be able to obtain a National Park Service right-of-way permit.

AIRCRAFT AND AIRSTRIP ACCESS QUESTIONS

1) Why would the National Park Service consider that landing a plane on a lake, gravel bar, or dry ridge, and so on within walking distance of my land is feasible access, when chartering an aircraft is expensive?

The National Park Service may, depending on the circumstances consider it feasible because "adequate and feasible access" means a route and method of access shown to be necessary and economically practicable but not necessarily the least costly alternative way to fulfill the occupancy interests of the landowner [43 CFR 36.10(a)(1)].

Using an aircraft as described in the question may be a reasonable option to consider since the use of fixed wing aircraft is normally allowed without a right-of-way permit or other authorization [43 CFR 36.11(f)].

If landing and walking is not an adequate and feasible method of access for your situation, we will work with you to attempt to find a feasible method of access that also protects the park purposes and values.

2) Do I need a permit to maintain the airstrip in a park area that I use to access my property?

If you use nonmotorized hand tools to maintain an existing landing strip that is used to access your property, a right-of-way permit is not necessary. You need authorization from NPS to construct or maintain a landing strip in national park areas with motorized tools.

3) I need to get from my airstrip to my inholding. Do I need a permit to drive my OHV from the airstrip to the inholding?

You need an OHV permit and right-of-way permit to cross park lands, off state highways and park roads.

MINING ACCESS

1) I am going to lease a mining claim and mine for placer gold. I need access across the park and want to do it in the summer time. How do I do that?

Mining activities, on patented and unpatented mining claims filed under the General Mining Law of 1872 within the boundaries of a national park are regulated under a Plan of Operations approved by the park superintendent. The Plan of Operations may authorize access, or the National Park Service may issue a separate right-of-way permit under the Access to Inholdings regulations [43 CFR 36.10(c)]. Contact the park superintendent for more specific information about accessing your mining claim.

2) I'm thinking about leasing some unpatented placer claims and want to go in and check them out in the summer by OHV before deciding whether I want to enter into a formal agreement and work the ground. Can I do that?

First check to see if the claim holder has a right-of-way permit. If the holder does not, consult the park superintendent. Access of a limited or short-term nature (i.e., less than a year), depending on the methods proposed, may be simpler than getting a right-of-way permit, but will probably involve application using the same forms and process. Use of an OHV in a national park requires a specific authorization.

OBTAINING A RIGHT-OF-WAY

1) What laws and regulations govern access to inholdings and where can I look for further information regarding access?

The regulations dealing with access in or across national park areas in Alaska are found at Title 43 of the Code of Federal Regulations part 36 (43 CFR 36.10). These regulations are available at the park headquarters or online at:

http://www.access.gpo.gov/nara/cfr/waisidx_03/43cfr36_03.html .

2) Is getting a right-of-way permit going to be difficult?

Simple proposals with few potential environmental impacts take less time to process. Complex proposals, and those involving new uses require more time to process. The better the National Park Service understands your proposed right-of-way, the easier it will be process your application and issue the right-of-way permit.

A pre-application meeting with the park superintendent is highly recommended. The pre-application meeting allows you to explain your needs, proposed route, types of vehicles, and any construction or maintenance that is necessary. The park superintendent will advise you regarding park resources that need protection. The pre-application meeting is a good time to explore options on how to provide access while protecting park resources.

Once you have filed a complete application, the National Park Service will conduct an environmental analysis, generally prepare an environmental assessment (EA) or, in some cases an environmental impact statement (EIS). The environmental analysis will evaluate your proposal and reasonable alternatives, and most likely, recommend terms and conditions to protect park resources. These terms and conditions would then be included in your right-of-way permit. An EIS may be necessary if the proposal has the potential for significant environmental effects.

3) Who chooses the route and decides what I can drive?

Although your proposed route and method will be given preference, the final decision will be made by National Park Service. You will be granted adequate and feasible access, but it may be a negotiated solution.

4) How long will it take to get my right-of-way permit?

The length of time depends on the complexity of the proposal, how much fieldwork is needed and when park staff is available to do the work.

Once you have filed a complete application, the National Park Service has nine months to complete the environmental analysis. The National Park Service can extend the deadline for good reason, such as the need to do fieldwork, for example, having an archeologist survey the proposed route.

5) Is there a less complex process for low impact proposals?

The park superintendent may issue permits for access that involve no construction or maintenance. These permits still require an environmental analysis to document the decision process. The park superintendent also issues permit renewals where the access will remain the same as under the existing permit. The National Park Service Regional Director issues right-of-way permits for access that involves permanent routes, construction, or maintenance. These permits typically include additional discussion and stipulations.

6) What if the only possible access route to my inholding must cross wetlands?

If there are any potential impacts to wetlands, the National Park Service policy requires that measures are taken to: 1) avoid adverse wetland impacts; 2) minimize unavoidable adverse wetland impacts; and 3) compensate for adverse impacts by restoring degraded wetlands (NPS Director's Order 77-1, "Wetland Protection"). Compensation for wetland degradation or loss will be at a minimum 1:1 ratio, for example, for each acre lost an acre will be replaced.

7) Why does the National Park Service want to know why I want to access my land (land use objectives)? If I do not tell the National Park Service, how will this affect the approval of my application?

Knowing about your plans will allow the park superintendent to make sure that your access is adequate and feasible for your intended purposes while minimizing the impact on park resources.

8) How long is the term of the authorization?

The term for a right-of-way permit is for a maximum of 10 years (National Park Service Reference Manual 53, page A5-27). A right-of-way permit can also be issued for a one-time or short-term use. All right-of-way permits may be renewed. The permit may be revoked if its terms are violated or the route is no longer needed.

9) What is the next step if I am unhappy with the right-of-way permit decision?

You can request reconsideration from the NPS Alaska Regional Director. Alternatively or after reconsideration, you can ask the federal courts to review the final agency decision.

10) What costs are associated with an access authorization?

Applicants for right-of-way permits to inholdings are required to pay certain fees. These fees partially reimburse the National Park Service for the costs of processing the applications, issuing the right-of-way permits, and monitoring use of these permits. Land rental fees, where applicable, pay for the use of federal lands by the holder of a right-of-way permit. Contact the park superintendent for specific information about fees that you may be charged for processing your access application.

USE OF A RIGHT-OF-WAY

1) Can I transfer my right-of-way permit when I sell my property?

You may transfer your right-of-way permit to a new property owner. The new owner must agree in writing to abide by the terms and conditions of the existing right-of-way permit. The transfer must be approved by the park superintendent. Alternatively, the new owner can apply for a new permit.

2) Can the public also use my right-of-way?

Regulating motorized use of a right of way by others is a National Park Service responsibility. The right-of-way permit allows you and your guests to use a specified location on national park land for access. The use of a right of way will be addressed during the processing of the application and the permit will determine who is authorized to use the road or trail. Public access that is generally allowed on neighboring park lands will continue to be allowed on the right-of-way route.

3) When I have my right-of-way permit, what happens if my equipment breaks down and I have to abandon it in the park?

The right-of-way permit will cover this contingency. You will be given a reasonable period of time to recover the equipment in an appropriate manner; after that time, the National Park Service may remove it and then charge you for the costs incurred.

4) With a right-of-way permit, can I make route improvements along the access route to my inholding?

The terms and conditions in your right-of-way permit will specify what maintenance and improvements are authorized.

5) Once I receive a right-of-way permit, can the National Park Service later decide to place additional restrictions on how I use my access route?

After consultation with the permit holder, the National Park Service can add additional restrictions only if there are unforeseen circumstances or in response to changing needs.

6) When I get to my property I will need to go on national park areas to cut firewood or conduct other activities. Can I use my truck, car, or OHV?

Your right-of-way permit is only for access to your property. Consult the park superintendent regarding access needs for other activities on park areas.

7) When we are on our land, I may need to drive back to the highway for materials or emergencies. Can I do that?

For access routes across undisturbed land, where unlimited vehicle use may result in impacts to park resources, the number of trips could be limited by the right of way permit. The permit would be issued at a level of use commensurate with the land use objectives and reasonable regulation to protect park values. Permit conditions would adequately address the frequency of travel back and forth to fulfill the land use objectives of the applicant.

8) Would special restrictions for maintaining my access route apply to the right-of-way? The right-of-way permit will have a section on maintenance. Right-of-way permits may allow the permit holder to keep the route clear of snow and debris and may allow for specified levels of maintenance and improvement.

9) Under one right-of-way permit, can we take 3 or 4 vehicles along in case we break down?

Travel in remote locations often requires reasonable precautions and some level of back up for emergencies. The vehicle type, number of passes, and frequency of use would be described in your application. Discuss your strategy and reasoning with the park superintendent to reach an understanding that can be addressed in the permit conditions.

10) Once I have a right-of-way permit, does someone go along from the National Park Service, or how are you going to check up on me?

We will not be accompanying you to and from your inholding except under certain circumstances specified in your permit, such as involving particularly sensitive resources. The National Park Service will periodically monitor use of the right-of-way.

DRAFT
Definitions
for
A User’s Guide to Accessing Inholdings
in a National Park Service Area in Alaska

Access means how you, your family, clients, lessees, employees, business partners, friends, and guests get to your inholding. Access is also how utilities such as fuel, power, and communication are delivered to your property.

- **Physical access** refers to the land used and the improvements constructed such as roads, trails, poles, power and telephone lines or facilities.
- **Legal access** is the authorized right to use or occupy park areas for access. A right-of-way permit provides for legal access across park areas.

Adequate and feasible means a route and method of access that is shown to be reasonably necessary and economically practicable, but not necessarily the least costly alternative for achieving the use and development by the applicant on the applicant’s nonfederal land or occupancy interest [43 CFR 36.10 (a) (1)].

ANILCA Sec.1110 (b), says State and private owners “shall be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned land by such State or private owner or occupier and their successors in interest.”

Airstrip means visible, marked, or known aircraft landing areas in park areas. Airstrips may be marked with cones, lights, flagging, or windsocks, or be unmarked but recognizable because they have been cleared of vegetation or other obstructions [36 CFR 13.1].

Effectively surrounded by means that physical barriers prevent adequate and feasible access to state or private lands or interests except across a park area [43 CFR 36.10(a)(3)].

Environmental Assessment (CEQ Regulations 1508.9) is a public document in which a proposed agency action and any alternatives are described and evaluated. An EA is a useful planning tool that helps inform the public about a proposal and solicit their ideas and concerns, and that also helps the decision-maker understand the implications of an action before making a decision. Agencies also use EAs to determine whether potential environmental impacts are significant and an Environmental Impact Statement would be warranted.

Environmental Impact Statement (CEQ Regulations 1508.11) is a detailed study prepared when an agency knows the impacts of a proposed action would be significant. EISs require more extensive public involvement than EAs, including public scoping, a

60-day public comment period on the draft EIS, and a 30-day waiting period after the final EIS is published and before a decision is made.

Inholding means state owned or privately owned land, including subsurface rights, underlying park areas or a valid mining claim or other valid occupancy within or effectively surrounded by one or more park areas [43 CFR 36.10(a)(4)].

Examples of inholdings include state lands, private lands, homesteads, homesites, trade and manufacturing sites, lands belonging to Native corporations, Native allotments, life-term leases, perpetual easements, valid mining claims, and patented mining claims.

National park area means lands and waters administered by the National Park Service within the state of Alaska [36 CFR 13.1(n)].

Off-highway vehicle (OHV) means any motor vehicle designed for or capable of cross-country travel on or immediately over land, water, sand, snow, ice, marsh, wetland, or other natural terrain, except snowmachines or snowmobiles [36 CFR 13.1(m)].

Park road means the main-traveled surface of a roadway open to motor vehicles, owned, controlled or otherwise administered by the National Park Service (CFR 36 CFR 1.4).

Right-of-way permit (ROW permit) means a document signed by the applicant and the National Park Service (NPS), specifying the route(s) and method(s) of access across the park area(s). (43 CFR 36.10(e)(1)). ROW permits can be issued for a single use or for a period of up to 10 years and are renewable. ROW permits include conditions to protect other park users, park purposes, and resources such as plants, wildlife, and archeological sites [43 CFR 36.9(b)].

Appendix A
Title XI Right-of-Way Fees
Statutory, Regulatory and NPS Policy References

Statutory authorization - ANILCA 1110(b)

“... the State or private owner or occupier shall be given ... such rights as may be necessary to assure adequate and feasible access for economic and other purposes ...”

Department of the Interior regulations implementing ANILCA 1110(b)

■ 43 CFR 36.10(d):

“The application shall be filed in the same manner as under § 36.4 and shall be reviewed and processed in accordance with §§ 36.5 and 36.6.”

■ 43 CFR 36.4(a):

“Any filing fee required by the appropriate Federal agency pursuant to applicable law must be paid at the time of filing.”

■ 43 CFR 36.6(c)(1) and (2):

“(c) Cost reimbursement. (1) The costs to the United States of application processing, other than costs for EIS preparation and review as provided in Paragraph (c)(2) of this section, shall be reimbursed by the applicant, if such reimbursement is required pursuant to the applicable law and procedures of the appropriate Federal agency incurring the costs.

(2) The reasonable administrative and other costs of EIS preparation shall be reimbursed by the applicant, according to the BLM’s cost recovery procedures and regulations implementing section 304 of the FLPMA, 43 U.S.C. 1734.” (see 43 CFR 2808)

43 CFR 36: Title XI Regulations, Preamble

The preamble to this 1986 rule-making (48 F.R. 31619-31634, 9/4/86) addresses fees:

“Comments were specifically invited on proposed regulation Sec. 36.10(h) which would have excluded applicants for access to inholdings from paying reasonable fees, charges, or rent. About one-fourth of the comments received responded to this invitation, with a nearly equal split for or against the proposed rule.”

“Upon further review, we find it would be inappropriate to exclude applicants for access to inholdings from paying reasonable fees. Nearly all recent legislation authorizing the granting of a right-of-way access across Federal lands has required, at least, a payment for the use of Federal lands. Congress has also directed that, where identifiable, the user of public lands or resources pay a reasonable amount for such use. This policy is applicable to inholders. However, this policy should not result in unfair charges. Applicable law will apply to determine appropriate fees, which may include application processing, permit issuance, monitoring and land use.”

NPS right-of-way regulations

- **36 CFR 14.22(a)(1):**

“An applicant for a right-of-way or other permit incident to a right-of-way shall reimburse the United States for administrative and other costs incurred by the United States in processing the application, including the preparation of reports and statements pursuant to the National Environmental Policy Act ...”

- **36 CFR 14.26(a):**

“Except as provided in paragraphs (b) and (c) of this section, the charge for use and occupancy of lands under the regulations of this part will be the fair market value of the permit, right-of-way, or easement, as determined by appraisal.”

Statutory authorization - Public Law 103-138, 16 USC 3a

NPS is authorized to recover costs associated with special use permits. This provision adopted subsequent to ANILCA is applicable “notwithstanding any other provision of law”. This statutory provision is discretionary and has not been implemented in NPS regulations.

Statutory authorization – 31 USC 9701

This statute is a general authority for the federal government to impose user charges. It provides that such charges will be assessed against each identifiable recipient for special benefits derived from federally permitted activities beyond those received by the general public.

Office of Management and Budget (OMB) Circular on Fees—OMB Circular A-25

This circular provides direction on user fees for all federal agencies. A-25 requires that applicable users fees be based on market rates and be at full cost recovery.

Department of the Interior Departmental Manual (DM)—DM Part 36, Cost Recovery

This authority directs the NPS to impose a user charge for the value of the facilities or lands used or the services provided.

NPS Policy References

- NPS Management Policies state that “Due to the potentially high costs and values associated with rights of way, special attention will be paid to fees and the recovery of a fair market value for the use of the land.” [see Management Policies, 8.6.4.1]
- Director’s Order #53 (effective April 4, 2000, sunset date April 4, 2004) states that NPS will generally charge fees and recover costs for special use permits (and right-of-way permits) unless the use is protected by the First Amendment or involves a right rather than a privilege (DO-53, 3.6). A right is based on property ownership, legislative or treaty entitlement, or Constitutional guarantee (DO-53, 3.3).
- Director’s Order #53 references Title XI access in several sections (see 10.2, 16.1, and 16.3), but essentially points to 43 CFR 36.10 as the procedure for securing right-of-way permits to inholdings, and is silent on whether NPS cost recovery provisions apply.
- Reference Manual 53 states that the NPS shall charge a fee and recover costs for special park use permits (including right-of-way permits) unless prohibited by law or executive order, or when the proposed use is protected by the First Amendment or involves another right and not a privilege. (C5-1)
- Reference Manual 53 provides exemptions from charges for special uses. It states that “Exemptions from charges is (sic) appropriate when...The requested use involves exercise of a right pertaining to water, property, minerals, access, Native American religious practices, or the rights guaranteed by the First Amendment to the Constitution...” (C10-2)
- Reference Manual 53, Appendix 5, Exhibit 2, Pages A5-17 to A5-21, describes the four types of fees and costs associated with obtaining a right-of-way permit. These are an application charge, an administrative charge, a monitoring charge, and a land use and occupancy fee. It notes that the first three charges are on a “cost recovery basis” and the last fee is for the fair market value of the lands occupied.

1992 Legal Opinion by Office of the Solicitor, Department of the Interior

A 1992 legal opinion by the Office of the Solicitor, based largely on statements in the preamble to the 1986 Title XI regulations, concluded that “...the National Park Service should charge reasonable fees for the application processing, permit issuance, monitoring and land use necessarily associated with the grant of ‘adequate and feasible’ access to private land located within units of the National Park System in Alaska.”

Appendix B

Revised Statute (RS) 2477 and NPS in Alaska

Background: RS 2477 was a part of the 1866 Mining Law (43 U.S. C. 932) and reads, “The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.” This legislation was repealed in 1976, but rights of way in existence prior to that time were not affected by the repeal. For a federal agency to know whether an individual RS 2477 right of way exists, it can rely upon a federal administrative adjudication or upon a federal court decision.

In 1988 the Department of Interior issued a policy that provided for the administrative recognition of RS 2477 rights of way. It contained detailed procedures and decision criteria. No requests for administrative recognition of potential RS 2477s in NPS units in Alaska were submitted or processed under this policy.

In 1994 the Department developed draft regulations for accepting and processing requests for administrative recognition of potential RS 2477 rights of way (59 Fed. Reg. 39216, 39216 [Aug. 1, 1994]). Congress was concerned with this regulatory proposal, however, as it had been with some of the Department’s earlier approaches to adjudicating and validating R.S. 2477 rights-of-way, and responded by enacting temporary moratoria and, in 1996, enacted a permanent prohibition on certain R.S. 2477-related activity. The 1996 prohibition provided that “No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to [R.S. 2477] shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act” (§ 108, P.L. 104-208). The RS 2477 regulations were never finalized.

In 1997 the Department of Interior issued an interim policy on processing requests for administrative recognition of RS 2477s. Under that policy a party seeking a Departmental determination of the validity of an RS 2477 right of way must demonstrate a “compelling and immediate need” for the Department to make such a determination. The interim policy contained several criteria that must to be met for the adjudicating federal agency to recommend that an RS 2477 claim qualifies, including the requirements that construction had occurred, and the route had been used “...by the public for the passage of vehicles carrying people or good from place to place.” Under the policy the adjudicating federal agency is to make recommendations on the potential RS 2477 to the Secretary of the Interior. The Secretary is then to approve or disapprove those recommendations. No requests were made for RS 2477s in NPS units in Alaska under the 1997 policy.

The State of Alaska has asserted more than 160 RS 2477 rights of way within units of the National Park System in Alaska. In May 1998, the Alaska State Legislature passed a law (AS 19.20.400) entitled "An Act Relating to State Rights-of-Way," that declares that more than 600 routes have been accepted as RS 2477 rights-of-way by public use, and mandates that DNR record them in the respective recording districts. Some 100 of these asserted rights of way lie within NPS units. Most of these routes have little if any

contemporary use. Many were winter trails for dogsleds or pack animals, but some were roads for vehicular traffic. None of these asserted routes has been recognized by the federal government as a valid RS 2477 right of way.

In 2003 the Department of the Interior entered into a Memorandum of Understanding (MOU) with the State of Utah to process and potentially disclaim any federal interest in asserted RS 2477s in Utah. Under the MOU the State of Utah would apply to the Department for disclaimers of interest in specific asserted 2477s. The MOU specifically excludes potential RS 2477 rights of way in national parks, refuges and designated wilderness and wilderness study areas. The Department also expressed interest in developing MOUs with other states and counties, and stated that these future MOUs would have the same general terms as the MOU with Utah. At the same time the Department stated that any requests to the Department for acknowledgement of RS 2477 rights of way not covered by an MOU would be processed under the Department's 1997 policy on RS 2477s. The 2003 Departmental policy affects only administrative recognition of potential 2477 rights of way, and does not bar states or counties from seeking to affirm potential RS 2477s through court action. On February 6, 2004, the General Accounting Office published a legal opinion that concluded that the MOU with Utah was in violation of the 1996 Congressional prohibition.

The State of Alaska held discussions with Departmental officials in 2003 regarding development of an MOU for the State of Alaska, but no agreement was reached. State officials have stated that the Quiet Title Act will be employed to confirm its title to RS 2477 rights of way.

Current Status: The 2003 Departmental policy on acknowledgement of potential RS 2477 rights of way directs how all DOI bureaus, including the NPS, address this issue. The Department's MOU process excludes NPS units. The 2003 Departmental policy states that requests for administrative recognition of potential RS 2477s that are not encompassed by an MOU with the Department can be processed in accordance with the terms of the 1997 Departmental policy. No such requests have been made to date for RS 2477s in NPS units in Alaska, and no MOU has been developed between the Department and the State of Alaska.

Until such time as a potential RS 2477 may be administratively recognized as valid by the Secretary, or is affirmed by a federal court decision, the NPS will manage the subject lands as unencumbered federal parklands. Requests for access will be processed in accordance with Title XI of ANILCA and other applicable legislative authorities.