



May 3, 2023

Nathan Hawkaluk, Acting Arctic Refuge Manager
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Submitted via email to arctic_refuge@fws.gov

Acting Arctic Refuge Manager Hawkaluk:

The State of Alaska (State) has reviewed the Arctic National Wildlife Refuge (ANWR, Refuge) Compatibility Determination (CD) for a right-of-way (ROW) permit to Arctic Slope Telephone Association Cooperative (ASTAC) for the installation and maintenance of a proposed microwave tower. The following comments represent the consolidated views of state resource agencies.

The State believes that the Refuge has inappropriately used the CD process to deny the permit and must instead follow the procedures for transportation and utility system (TUS) applications as required by the Alaska Lands National Interest Conservation Act (ANILCA) Title XI and implementing Department of the Interior (DOI) regulations at 43 CFR Part 36. This process directs, among other requirements, the development of a National Environmental Policy Act (NEPA) document that considers alternative project designs and input from relevant agencies. Notably, the TUS process changes the compatibility standard for the TUS system such that it does not “significantly interfere with or detract from the purposes for which the area was established.”¹ The State requests that ANWR pause or withdraw the CD and initiate a full TUS process in accordance with ANILCA Title XI and 43 CFR Part 36.

In passing ANILCA, Congress sought to preserve unrivaled scenic values, wildlife populations and their habitat in vast undeveloped landscapes. Congress also sought to provide opportunity for rural residents to remain in their communities, and to balance the social and economic needs of the State of Alaska. Part of this balance was the inclusion of Title XI, a section designed in part to recognize the infrastructure needs of the young state and challenges that the conservation system units (CSUs) might pose to transportation and utility construction. Title XI allows for the construction of transportation and utility projects within CSUs, including within designated wilderness areas and wild and scenic river corridors.

ANILCA Title XI: Transportation and Utility Systems in and Across, and Access into, Conservation System Units in Alaska

ANILCA Title XI, and its implementing regulations at 43 CFR Part 36, outlines the process by which applications for TUS rights-of-way across CSUs in Alaska must be adjudicated. Adhering to Title XI² is not optional.

Proposed Project is a Transportation and Utility System

The proposed project meets definition of a transportation and utility system at ANILCA Section 1102(4) and at 43 CFR 36.2(p):

¹ 43 CFR 36.2(f)

² Attachment A, Title XI process notes

Transportation or utility system (TUS) means any of the systems listed in paragraphs (p) (1) through (7) of this section, if a portion of the route of the system will be within an area and the system is not one that the Department or agency having jurisdiction over the area is establishing incident to its management of the area. The systems shall include related structures and facilities.³

Subsections (5), (6), and (7) to the TUS definition are applicable to this project:

(5) **Systems for transmission or reception of radio, television, telephone, telegraph and other electronic signals and other means of communication** [emphasis added].

(6) **Improved rights-of-way for snowmachines, air cushion vehicles and other all-terrain vehicles** [emphasis added].

(7) **Roads, highways, railroads, tunnels, tramways, airports, landing strips, docks and other systems of general transportation** [emphasis added].⁴

Additionally, the applicant filed a SF 299 with the Refuge as required by ANILCA Title XI and 43 CFR 36.4.

The proposed project consists of a 360-foot-tall microwave tower, which will provide internet to the community of Kaktovik. It will be free-standing (i.e., no guy wires), with a base of approximately 53' by 53'. The total area for the tower base and two support structures will be 100' by 100'. During construction, an additional 100' by 100' area will be needed to stage equipment and camp trailers. All proposed construction areas are on an existing gravel pad that remains from a decommissioned DEW Line Site for radar equipment. Equipment will be transported to the site by barge and transported roughly 200' along an existing travel path to the tower site. The tower will have the minimum lighting required by the FAA for public safety purposes.

Title XI and 43 CFR Part 36 Procedures Take Precedence

Congress intended for Title XI procedures to be the only method of processing applications for transportation and utility system ROWs in Alaska CSUs such as ANWR. ANILCA Section 1101 recognized that Alaska's transportation and utility network were "largely undeveloped" and that future development needs would "best be identified and provided for through an orderly, continuous decision-making process involving the State and Federal Governments and the public" (ANILCA Section 1101(a)). Congress also acknowledged that "the existing authorities to approve or disapprove application for transportation and utility systems through public lands in Alaska are diverse, dissimilar, and, in some cases, absent," and that to both minimize any adverse impacts of TUS projects and also "insure the effectiveness of the decision making process," it was necessary to develop a "**single comprehensive statutory authority for the approval or disapproval** of applications for such systems" [emphasis added] (ANILCA Section 1101(b) – (c)).

ANILCA and DOI regulations are clear that the Title XI process codified at 43 CFR Part 36 shall be applied to all transportation and utility system applications and takes precedence over other laws or policy:

ANILCA Section 1104(a)	Notwithstanding any provision of applicable law, no action by any Federal agency under applicable law with respect to the approval or disapproval of the authorization, in whole or in part, of any transportation or utility system shall have any force or effect unless the provisions of this section are complied with. [emphasis added]
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43 CFR 36.1(a)	The regulations in this part apply to any application for access in the following forms within any conservation system unit (CSU)...within the State of Alaska which is administered by the...Fish and Wildlife Service (FWS)...
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³ 43 CFR 36.2(p)

⁴ 43 CFR 36.2(p)(5)-(p)(7)

43 CFR 36.1(a)	Except as specifically provided in this part, applicable law shall apply with respect to the authorization and administration of TUSs.
1986 preamble to Federal Register publication of 43 CFR Part 36 final regulations	Another commenter proposed an additional paragraph to expressly establish the precedence of these regulations over the general regulations of the Federal agencies insofar as transportation and access in Alaska CSUs are concerned. The requested statement is unnecessary. These regulations establish uniform procedures for the managing agencies to use in administering the body of applicable law pertaining to authorization and administration of TUSs. In other words, these regulations provide the procedural methodology regardless of an agency's existing regulations. ⁵ [Emphasis added.] This final rulemaking implements the provisions of Title XI of the Alaska National Interest Lands Conservation Act... These provisions detail the procedures that must be followed to obtain any Federal approval needed for a TUS [emphasis added]. ⁶

In Alaska, the Refuge does not have the option to apply a different authority or to process the application outside of ANILCA Title XI and 43 CFR Part 36 regulations, which require each agency with jurisdiction to use its own laws and regulations in deciding to approve or disapprove a TUS application after completion of the required process. The Refuge is required to apply the TUS process for ROWs as implemented in the 43 CFR 36 regulations prior to deciding whether to approve a TUS. ANILCA's TUS application process cannot be replaced using other Service approval processes.

Compatibility Standard

We recognize that Congress mandated a very high level of protection for fish and wildlife populations in ANWR and that the Refuge prioritizes fish and wildlife populations when making decisions regarding development. However, Congress provided Federal agencies through ANILCA Title XI with a method of allowing transportation and utility development in CSUs and the DOI promulgated regulations that allow for approval unless the system will significantly interfere with Refuge purposes (43 CFR 36.2(f)). The compatibility standard for a TUS project on the Refuge is different from that of a typical programmatic or project CD: the project is "compatible with the purposes for which the unit was established" if it "will not **significantly** interfere with or detract from the purposes for which the unit was established" [emphasis added] (43 CFR 36.2(f)). The 1986 preamble to the final DOI Title XI regulations discuss this standard specifically:

...commenters were concerned that most, if not all, proposals could be found to interfere with or detract from the purpose for which a unit was established. The majority of relevant comments suggested that the addition of "significantly" as a modifier in order to clarify that "**compatible with the purposes for which the unit was established**" means that the system will not significantly interfere with the purposes for which the unit was established. Interior agrees and this change was made.⁷ [emphasis added]

The Refuge Misapplies Policy and ANILCA

In their CD, the Refuge appropriately recognizes the applicability of ANILCA to this application but then pivots to rely on the U.S. Fish and Wildlife Service's (USFWS, Service) Compatibility Policy (603 FW 2) as justification for beginning (and ending) the application review with a CD rather than following the required TUS procedure in ANILCA Title XI and 43 CFR Part 36. It is the State's position that the Refuge has allowed policy to circumvent law that is clearly intended to take precedence.

⁵ Federal Register Vol 51, No. 171. Thursday, September 4, 1986. Page 31620.

⁶ 51 FR 31619; Summary of the preamble to the final rule notice for 43 CFR Part 36, 1986.

⁷ Federal Register Vol. 51, No. 171. Thursday, September 4, 1986. Page 31620.

It is the State's understanding that the Refuge relied upon 603 FW 2.18 for the flexibility to complete the CD before initiating NEPA as required by ANILCA Title XI and 43 CFR Part 36. The State holds that this is an inappropriate application of policy because, in Alaska, 43 CFR Part 36 Title XI procedures supersede USFWS policy. We also note that 603 FW 2.8(A) allows for the typical compatibility process to be altered when processing TUS applications:

The Refuge Administration Act establishes the same standard for compatibility for Alaska refuges as for other national wildlife refuges. The provisions of ANILCA are the primary guidance refuge managers should apply when examining issues regarding subsistence use. **We may alter the compatibility process, in some cases, for Alaska refuges to include additional procedural steps,** [emphasis added] such as when reviewing applications for oil and gas leasing on non-North Slope lands (ANILCA Sec. 1008) **and for applications for transportation and utility systems** (ANILCA Sec. 1104). [emphasis added.]

Additionally, the Refuge incorrectly applies 43 CFR 36.11(g)(1) regulations that prohibit public use of off-road vehicles (ORV) "in locations other than established roads, parking areas, and designated routes of travel" without a permit (CD p. 8). This leads to the mistaken claims that ORV use for construction and moving supplies approximately 200' from the barge landing site to the proposed tower location "violates the Service's regulations regarding use of vehicles" (CD p. 14). The usage of 43 CFR 36.11(g)(1) to evaluate the application is incorrect. This section, 43 CFR 36.11, applies only to the "special access" provisions of ANILCA 1110(a) which allow certain modes of transportation in and across CSUs for traditional activities, and travel to and from villages and homesites.

The application's proposed ORV use for moving equipment and supplies as part of construction and maintenance of a TUS project is allowed under Title XI and 43 CFR 36.2(m) and would be evaluated through the TUS process rather than separately:

Related structures and facilities means those structures, facilities, and right-of-ways [sic] which are reasonably and minimally necessary for the construction, operation and maintenance of a TUS, and which are listed as part of the TUS on the consolidated application form . . .

For these reasons, the State requests that ANWR pause or withdraw the CD and initiate a full TUS process in accordance with ANILCA Title XI and 43 CFR Part 36.

Proposed Project Impacts Must be Evaluated through NEPA

Notwithstanding our process concerns detailed above, we offer the following information for the Refuge's consideration of the project and suggest additional analysis for the NEPA document required by Title XI and 43 CFR 36.6. While we recognize the validity of the Refuge's stated resource concerns, the appropriate process to evaluate the project impacts is through a NEPA analysis required by Title XI review under ANILCA Section 1104(e) and 43 CFR 36.6. These sections require Federal agency to make detailed findings supported by substantial evidence with respect to:

- The need for and economic feasibility of the TUS;
- Alternative routes and modes of access, including a determination with respect to whether there is any economically feasible and prudent alternative to routing the system through or within an area and, if not, whether there are alternate routes or modes which would result in fewer or less severe adverse impacts upon the area;
- The feasibility and impacts of including different TUSs in the same area;

- Short and long term social, economic and environmental impacts of national, State or local significance, including impacts on fish and wildlife and their habitat and on rural, traditional lifestyles;
- The impacts, if any, on the national security interests of the United States, that may result from approval or denial of the application for the TUS;
- Any impacts that would affect the purposes for which the Federal unit or area concerned was established;
- Measures which should be instituted to avoid or minimize negative impacts;
- The short- and long-term public values which may be adversely affected by approval of the TUS versus the short- and long-term public benefits which may accrue from such approval; and
- Impacts, if any, on subsistence uses (43 CFR 36.7 (a)(2))

We request the Refuge analyze at least two alternatives in addition to the no action alternative: one of which looks at the potential impacts from the construction of the single 360' tower on a pre-disturbed site, as proposed by the applicant; and one that looks at the feasibility and potential impacts of multiple smaller towers (towers below 190' above ground surface), or other economically feasible options.

Wildlife Concerns

The State recognizes the proposed project will have impacts to migratory birds and polar bears and requests the Refuge more fully analyze those impacts in the required NEPA document. We agree the proposed 360' microwave tower exceeds the current USFWS recommended tower height of less than 199 feet detailed in its March 2021 guidance document "Recommended Best Practices for Communication Design, Siting, Construction, Operation, Maintenance, and Decommissioning." The additional height of the proposed tower reduces the mean free airspace between the top of the tower and average bird flight height, especially in weather conditions with reduced cloud ceiling. However, it appears the applicant has met the other best management practices recommended in the USFWS guidance, including the flashing lights criteria. The CD implies the best practices document prohibits the construction of the tower: "Towers should not be sited in or near wetlands, other known bird concentration areas..."; "Towers should avoid ridgelines, coastal areas, wetlands or other known bird concentration areas" (CD, page 9). However, the guidance clearly states that "All new towers should be sited to **minimize impacts to the maximum extent practicable**"⁸ [emphasis added]. We also recognize that the timing for the proposed project is not ideal for a polar bear population showing decline. But, polar bears are mobile and the proposed number of trips is limited. Again, impacts to wildlife should be analyzed for each alternative in the required NEPA document.

Wilderness Impacts are Inappropriately Applied

The State believes that the Service inappropriately finds the proposed tower incompatible with designated wilderness based on potential visual impacts. Neither the Wilderness Act nor ANILCA allows the USFWS to manage lands outside of wilderness to protect against impacts to designated wilderness. The USFWS describes the proposed project location as "proposed as designated wilderness" and "a remediated Distant Early Warning (DEW) Line site, and although the site is disturbed and a gravel pad remains, the site is managed as Refuge land in the same manner as lands and waters surrounding it" (p. 3). The State notes that the proposed tower location and the land surrounding it is not designated wilderness. While the area was proposed as wilderness in the Refuge's 2015 Comprehensive Conservation Plan (CCP), the 2017 Tax Cuts and Jobs Act (Pub. L. 115-97; Stat. 2236) nullified the Arctic Refuge CCP's wilderness and Wild and Scenic River recommendations for the Coastal Plain. Additionally, we are unaware of a viewshed study that reflects

⁸ Recommended Best Practices for communication Tower Design, Siting, Construction, Operation, Maintenance, and Decommissioning, Page 2.

the extent of visual impacts to designated wilderness and request such analysis in the NEPA evaluation of alternatives.

In designating wilderness in Alaska through ANILCA, Congress made provisions for numerous exceptions to usual wilderness management, including the ability to authorize transportation and utility systems, motorized use, and other development. Congress expressly rejected creating buffer zones around the CSUs, which would result in managing undesignated land as de facto designated Wilderness. ANILCA Section 1317(c) also does not allow the Service to manage non-designated areas of refuges as though they are designated Wilderness “*until Congress provides otherwise.*” Applying a wilderness area buffer that extends beyond an established boundary into the Coastal Plan and applying wilderness area protections beyond the wilderness area boundaries is inconsistent with ANILCA.

The State does not support the service’s use of the Wilderness Act as additional purposes for the refuge lands where the tower is located, because they violate provisions in ANILCA, listed below, that preclude the study or creation of new CSUs in Alaska, including new designated wilderness units which are CSUs, absent explicit direction from Congress.

ANILCA Section 101(d):

This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people... Congress believes that the need for future legislation designating new conservation system units... has been obviated thereby. [emphasis added]

ANILCA Section 1326(b):

No further studies of Federal lands in the State of Alaska for the single purpose of considering the establishment of a conservation system unit, national recreation area, national conservation area, or for related or similar purposes shall be conducted unless authorized by this Act or further Act of Congress. [emphasis added]

ANILCA’s legislative history also emphasized the importance of including Section 1326 in the Act.⁹

Contaminated Sites

The State encourages the Refuge to discuss necessary permits and compliance with State agencies. The proposed communications tower location is within the boundaries of the Collinson Point DEW Line contaminated site, The Alaska Department of Environmental Conservation (ADEC) file number 380.38.002. While this site has been issued a Cleanup Complete determination with no institutional controls, the Arctic Zone soil cleanup levels applied were selected to be protective of in-situ soils. As a part of the standard conditions identified in the site closure letter, “*Movement or use of contaminated material in a manner that results in a violation of 18 AAC 70 water quality standards is prohibited.*” The plan to spread 40 cubic yards of drill cuttings on the ground surface may or may not cause runoff to impact surface waters, and the ADEC Contaminated Sites Program should be consulted to ensure appropriate testing is completed and protective measures taken, if necessary.

⁹ Title XII – Administrative Provisions, Senate Report No. 96-413, pg. 446, Senator Gravel; and Congressional Record – Senate August 18, 1980, pg. S11047.

Refuge Purposes and National Policy Supported by Broadband

The 2017 Tax Cuts and Jobs Act modified the refuge purposes to add “to provide for an oil and gas program on the Coastal Plain.” The CD lists this as a purpose of the refuge but does not consider the impacts of the broadband project on those uses.

As a recipient of a U.S. Department of Agriculture Rural Development grant in 2020, the proposed project is to bring affordable and reliable broadband internet access to the underserved¹⁰ community of Kaktovik, which is an inholding in ANWR. Congress created a pathway to authorize these essential development needs on CSUs in Alaska while minimizing their impacts to resources.¹¹ Broadband projects support the goals outlined in DOI guidance, the Infrastructure Investment and Jobs Act (Pub. L. 177-58) and the American Rescue Plan, and the Consolidated Appropriations Act, 2021.

The 2021 Infrastructure Investment and Jobs Act (Pub. L. 117-58) built upon the funding for broadband deployment provided in the American Rescue Plan, Consolidated Appropriations Act of 2021, Federal Communications Commission’s Universal Service program, and Department of Agriculture’s Rural Utilities Service broadband programs. The intent of investment is to lay critical groundwork for widespread access and affordability of broadband, creating new jobs and economic opportunities, providing increased access to healthcare services, enriching educational experiences of students, and improving overall quality of life for all Americans. All Alaskans will hopefully gain access to reliable, high speed, and affordable broadband.

Executive Order 13821, Streamlining and Expediting Requests to Locate Broadband Facilities in Rural America, directs agency leadership “to use all viable tools to accelerate the deployment and adoption of affordable, reliable, modern high-speed broadband connectivity in rural America, including rural homes, farms, small businesses, manufacturing and production sites, tribal communities, transportation systems, and healthcare and education facilities.” The Service claims to be “complying with EO 13821 by identifying its current infrastructure assets and strategic access improvements and by providing recommendations **to reduce barriers in the permitting process.**” (Connectivity in Rural America, DOI 2018, p. 43) [Emphasis added]. However, the processing of this TUS application inconsistent with ANILCA’s requirements has a contrary result. The Service also supported broadband in the DOI Report in Response to the Presidential Memorandum for the Secretary of the Interior, January 8, 2018, that similarly contradict the Refuge’s response to this TUS application: “FWS is committed to providing for the safety of visitors and employees on its lands and facilities and supporting the needs of local communities;” and “The appropriate level of NEPA analysis will likely be an Environmental Assessment, if no categorical exclusion applies. Environmental Assessments will be completed in 6 months and be under 50 pages in compliance with SO 3355.”

The Draft CD appears to effectively block broadband access for the community of Kaktovik by not reasonably considering alternatives as part of using the required ANILCA application process. Broadband has been available in the U.S. for at least two generations of Americans, yet Kaktovik is considered an underserved rural community. In fact, applying the process, criteria, and lack of substantial evidence used to disapprove this TUS would likely result in disapproval of any TUS on any refuge in Alaska.

Conclusion

The State appreciates the Service’s response to our earlier concerns about the short duration of the comment period. Extending the comment period to a 30-day review is consistent with other recent CD’s, such as the Alaska Maritime Refuge CD regarding commercial filming in July to August of 2019, and the nine Yukon Flats CDs released for public review from November 28, 2022 to January 15, 2023. We also appreciate the

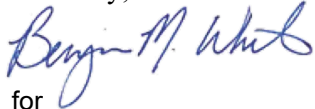
¹⁰ As defined in EO On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, January 2021.

¹¹ Connectivity in Rural America, Leveraging Public Lands for Broadband Infrastructure, July 2018.

additional outreach by the Service to publish advertisements of the proposed CD in the Arctic Sounder on April 13, 2023 and April 20, 2023.

Please contact me at 907-269-0880 or catherine.heroy@alaska.gov if you have any questions or to discuss any of these issues.

Sincerely,

A handwritten signature in blue ink that reads "Benjamin M. White". The signature is written in a cursive style.

for
Catherine Heroy
Acting State ANILCA Program Coordinator

Ecc: Thomas Lochner, Alaska Broadband Office, Director

Attachment A: Title XI Process Notes

Attachment A

For the benefit of our readers, we have created a summary of the Title XI process and where we note discrepancies between that process and this project review.

Application process steps required by ANILCA before any action to approve or disapprove a TUS:

1. ANILCA Title XI requires the agency to first determine if a TUS application is sufficient or contains the required information. The TUS includes related structures and facilities, temporary and permanent, necessary for the construction, operation, and maintenance of the TUS and shall be approved or not in accordance with the Title XI process (ANILCA 1102)
 - Applicant uses Standard Form 299 (43 CFR 36.4(a)) – (The Service is the only “*applicable*” agency to process this TUS application, so the requirements involving other agencies are not applicable)
 - Agency determines sufficiency of application within 60 days (43 CFR 36.5(c))
 - Applicant has 30 days to provide any requested information (43 CFR 36.5(d))
 - Agency has 30 days after added information to determine sufficiency, set filing date (43 CFR 36.5(e))
 - Agency grants more time if Applicant agrees; adjust filing date accordingly (43 CFR 36.5(d)(1))
 - If Applicant does not meet filing deadlines or Agency determines application deficient, Agency notifies Applicant the application is rejected (43 CFR 36.5(b); 43 CFR 36.5(d)(2); 43 CFR 36.5(e)(1))
 - Applicant may reinstate application by providing requested information later (43 CFR 36.5(e)(2)) or submit new application to restart

The Service did not complete this required 1st step of the application process – If the Service processed the application per ANILCA’s requirements, insufficiencies would have been identified and the Applicant given opportunities to add information in the sufficiency phase (43 CFR 36.5); see examples p. 4 of CD:

*“...placement of 40 cubic yards of drill spoils from pile installation would be spread across the existing gravel pad above the high-water mark. **The applicant did not specify the total area affected.**”*

*“...maintenance activities . . . to transport fuel from the barge landing site to the fuel tanks” and “may also require vehicles to travel overland or via shore-fast ice, by helicopter, small vessel or landing craft, or snow machine. **The applicant did not specify the total area potentially affected.**”*

*“The infrastructure associated with this proposed use would be present for the life of the tower, **which was not defined by the applicant . . .**” [Emphasis added]*

2. After the Agency determines an application is sufficient, the Agency is required to comply with the National Environmental Policy Act (NEPA) before deciding to approve or not (43 CFR 36.6(a))
 - Agency completes EA and FONSI (43 CFR 36.6(a)(3)) or Categorical Exclusion; or draft EIS within 9 months of filing date (43 CFR 36.6(a)(1)), including hearings in DC and Alaska (43 CFR 36.6(a)(4)), consultation and public notice (43 CFR 36.6(a)(5)) and final EIS within 3 months of Draft EIS or within 1 year of filing date, whichever is later; notice availability of Final in Federal Register (43 CFR 36.6(b))
 - Agency determines EA versus EIS per Council on Environmental Quality (40 CFR 1500)
 - NEPA contractors selected by Agency (40 CFR 1506.5)

- Applicant reimburses processing costs if Agency requires and reasonable administrative and preparation of EIS costs per BLM's procedures in FLPMA Sec 304 (ANILCA Sec 1104; 43 CFR 36.6(c)(1)-(2))
- Reasonable administrative and EIS preparation costs reimbursed per BLM's cost recovery procedures in FLPMA Sec 304 (43 CFR 36.6(c)(2))
- Agency may extend NEPA preparation (43 CFR 36.6(a)(2)); notifies applicant, sets new date, provides rationale, publishes notice of extension in Federal Register 30 days before end of 9-month deadline

The Service did not complete this 2nd required step of the application process – compliance with NEPA must be completed prior to making a decision to approve or not all or part of the TUS application.

3. Upon completion of NEPA, the Agency shall make detailed findings with supporting evidence for nine subjects listed in ANILCA Section 1104(g)(2) and 43 CFR 36.7(a)(2):
- Need for the TUS and its economic feasibility
 - Economically feasible and prudent alternatives (defined at 43 CFR 36.2(h))
 - Feasibility of consolidating routes
 - Social, economic, and environmental impacts
 - Impacts on national security interests
 - Impacts on ANILCA unit's purposes
 - Measures to avoid or minimize negative impacts
 - Comparison of adverse and beneficial affects to public values
 - Impacts, if any, on subsistence uses

The Service did not complete this 3rd required step of the application process – The CD contains opinion on some subjects but did not make detailed findings with supporting evidence on all nine.

4. If the Service has applicable authority to issue the ROW and the TUS is not in designated Wilderness:
- Agency shall consider the detailed findings for the nine subjects in Step 3 (43 CFR 36.7(a)(2)) in evaluating whether to approve or disapprove all or a part of the TUS application
 - Agency evaluates effects on subsistence uses and minimizes impacts in compliance with ANILCA Section 810 (43 CFR 36.6(a)(6))
 - Agency decides to approve or disapprove the TUS in accordance with the Agency's applicable law and notifies Applicant within 4 months of completing NEPA (ANILCA Section 1104(g); 43 CFR 36.7(a)(1))
 - If approved, Agency proceeds to issue permits or other authorizations (ANILCA Section 1106(a)(1)(A))

The Service did not and could not complete this 4th required step of the application process because the Service had not completed the steps required by law before making a decision.

5. If the Service disapproves the application, in whole or in part, the Applicant may file an administrative appeal to the President (ANILCA Section 1106(a)(2); 43 CFR 36.7(a)(4)) as follows:
- The President must decide to approve or disapprove the application within 4 months
 - The President shall consider the nine findings, NEPA compliance, public and agency comments, and Service's decision documents
 - President's decision to approve or deny, along with rationale, will be published in Federal Register
 - The President shall approve the application if he finds:

- The TUS is in the public interest
- The TUS is “*compatible with the purposes of the unit*” as defined in 43 CFR 36.2(f): “*will not significantly interfere with or detract from the purposes for which the area was established*”
- There is no economically feasible and prudent alternative
- The President’s approval is not discretionary if TUS meets all three criteria (ANILCA Section 1106(a)(2))
- If President approves the application, Agency shall promptly issue ROWs (ANILCA Section 1106(a)(4))
- If President disapproves, the Applicant may proceed to judicial review (ANILCA Section 1106(a)(4))

The Service deprived the Applicant of its statutory right to appeal the decision to the President by not completing the required Title XI process before disapproving a CD for the TUS.