



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Natural Resources

OFFICE OF PROJECT MANAGEMENT AND PERMITTING

550 West 7th Avenue, Suite 1430
Anchorage, AK 99501-3561
Main: 907.269-8690
Fax: 907-269-5673

August 23, 2023

Public Comments Processing
Attn: Docket No. FWS-HQ-NWRS-2019-0017
U.S. Fish and Wildlife Service
Mr. Ken Fowler
MS: PRB (JAO/3W)
5275 Leesburg Pike
Falls Church, VA 22041-3803

Submitted electronically via Federal e-Rulemaking Portal at: www.regulations.gov.

Re: RIN 1018-BD78, Streamlining U.S. Fish and Wildlife Service Permitting of Rights-of-Way Across National Wildlife Refuges and Other U.S. Fish and Wildlife Service-Administered Lands

Dear Mr. Fowler:

The State of Alaska (State) reviewed the revised proposed rule and revisions to the U.S. Fish and Wildlife Service (USFWS) regulations at 50 CFR 29 (Federal Register, Volume 88, Number 140, July 24, 2023), regarding streamlining the permitting of rights-of-way (ROWs). The following comments represent the consolidated views of State agencies.

General Comments

Alaska National Interest Lands Conservation Act (ANILCA) Considerations

The USFWS appropriately highlights the Alaska National Interest Lands Conservation Act (ANILCA) and the special access provisions governing Alaska refuges in the discussion of the proposed rule. This clarity is critical because, as the USFWS notes in the preamble to the revised proposed rule, 76.8 of the 89 million acres of terrestrial land principally managed by the USFWS nationwide are located in Alaska (88 FR 47442). We support the intent of these changes to modernize the ROW permitting process by allowing the use of electronic submissions of applications and make that process more efficient by requiring pre-application meetings and clearly identifying information needs.

Alaska Exemption

We request the USFWS exempt Alaska from the final national rule. The unique circumstances of Alaska's transportation and utility systems, such as the relatively undeveloped road system at the time of ANILCA passage, the need to develop roads and utilities across Alaska refuge lands to serve lands transferred to Native Corporations under the Alaska Native Claims Settlement Act (ANCSA), and pipeline right-of-way authorizations other than common carrier lines, provide sufficient reason to exempt Alaska from this nationwide proposal.

Additionally, lands located within Alaska National Wildlife Refuges that were conveyed under the authority of ANILCA Sections 103(c) and 906(o) are exempted from USFWS regulations.¹ Similarly, lands conveyed on an interim basis or patented under ANCSA are exempted from USFWS regulations, except the compatibility determination process for ANCSA 22(g) lands found at 50 CFR 25.21(b)(1). A full Alaska exemption from the regulations will cover all of these classes of lands located in Alaska refuges.

The preamble states the intent of this regulation change is to “streamline our process for permitting ... rights-of-way across the National Wildlife Refuge System lands and other Service administered lands [by] aligning Service process more closely with those of other Department of Interior (DOI) bureaus.”² In Alaska the intent of this regulation packet already occurs. Federal agency permitting for Transportation and Utility System (TUS) projects using or crossing USFWS lands is streamlined under the 43 CFR Part 36 DOI regulations. TUS applicants are required to use form SF-299 and to hold pre-application meetings with relevant agencies. These regulations apply to any application for access within Alaska refuges, as all Alaska Refuges meet the ANILCA definition of “conservation system unit.” Additionally, under Title XI and the 43 CFR Part 36 regulations, the term “compatible with the purposes for which the unit was established” “means that the system **will not significantly** [emphasis added] interfere or detract from the purposes for which the area was established”³ (see discussion later in this letter). ANILCA also requires agencies to determine “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.”⁴

Additionally, ANILCA Title XI provides for temporary access to CSUs, the National Petroleum Reserve-Alaska, national recreation areas, national conservation areas, and lands designated for wilderness study or managed to maintain wilderness character “for purposes of survey geophysical, exploratory, or other temporary uses thereof” (ANILCA Section 1111(a)).

We request that USFWS lands in Alaska be exempted from the final national rule because of the substantial differences ANILCA Title XI TUS regulations effectuate on the USFWS’s right-of-way management in Alaska. There is precedent for exempting Alaska from nationwide management regulations, in favor of Alaska-specific regulations. Exempting Alaska would be consistent with the manner the USFWS handled its revision of the regulations at 50 CFR Part 29 in 2016.⁵ That final rule exempted Alaska from the regulations at Subpart D, “after careful consideration” of the comments received on the proposed rule. In that proposed rule, as here, the USFWS deferred to the DOI regulations at 43 CFR part 36 to specifically address the access portion of oil and gas operations in Alaska. In the final regulation, responding to comments regarding oil and gas operations in Alaska, the USFWS stated:

After careful consideration of comments received on this issue, the Service has concluded that the rule does not need to include operations in refuges in Alaska as the existing

¹ Alaska National Wildlife Refuges; Interim Management Regulations, 46 FR 31818-31834 (June 17, 1981)

² 88 FR 47442

³ 43 CFR 36.1(f)

⁴ 43 CFR 36.7

⁵ 81 FR 79948, Subpart D, Management of Non-Federal Oil and Gas Rights, November 14, 2016

Departmental regulations implementing section 1110(a) of ANILCA, access to inholdings, provide sufficient protection of refuge resources and use. The Service has revised § 29.41 “When does this subpart apply to me?” to clarify that the rule does not apply to operators in Alaska. In addition to this revision, the Service has removed any reference to ANILCA in other provisions of this rule. The specific references in various parts of the proposed rule were more confusing than helpful.⁶

Refuges in Alaska will continue to be governed by [T]itle XI of the Alaska National Interest Lands Conservation Act (ANILCA); 16 U.S.C. 410hh-410hh-5, 16 U.S.C. 3101 et seq., 43 U.S.C. 1601 et seq., and the Department's implementing regulations and standards found at 43 CFR part 36..⁷

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 TUS ROWs in Alaska CSUs such as USFWS refuges, designated wilderness, and wild and scenic rivers. 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 decisionmaking [sic] 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 applications 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 decisionmaking [sic] 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)).

As shown by the references in the table below, ANILCA and DOI regulations are clear that the Title XI process codified at 43 CFR Part 36 shall be applied to all TUS 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]
43 CFR 36.1(a)	The regulations in this part apply to any application for access [emphasis added] 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)...

⁶ 81 FR 79971, Subpart D, Management of Non-Federal Oil and Gas Rights, November 14, 2016

⁷ 81 FR 79957, November 14, 2016

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	<p>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.⁸ [emphasis added]</p> <p>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.⁹ [emphasis added]</p>
1981 preamble to USFWS ANILCA Access regs. (Superseded in 1986 by the DOI regulations)	These Alaska-specific regulations supplement and modify national regulations promulgated for access on National Wildlife Refuge System as whole. ¹⁰
1997 National Wildlife Refuge System Improvement Act	If any conflict arises between any provision of this Act and any provision of the [ANILCA], then the provision in the [ANILCA] shall prevail. ¹¹

29.21-3 Compatibility-determination requirement

Compatibility has a different standard under the ANILCA Title XI regulations. Congress provided Federal agencies through ANILCA’s 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 compatibility determination: the project is “compatible with the purposes for which the unit was established” if it “will not **significantly** interfere with or detract

⁸ Federal Register. Vol. 51, No. 171. Thursday, September 4, 1986. Page 31620.

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

¹⁰ 46 FR 3181, June 17, 1981

¹¹ Section 9(b) of the Refuge Improvement Act

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 discusses 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.**¹² [emphasis added]

We also note that the USFWS Compatibility Policy, 603 FW 2.8(A), recognizes this difference and 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.]

Impacts to Alaska Highway ROWs

The proposed 50 CFR 29.21-3 incorporates the compatibility determination process in the existing 50 CFR 26.41 (located within the “Public Use and Recreation” subpart of Title 50, enacted in the 1970s), which establishes a presumption of denial of any compatibility determination and right-of-way maintenance request unless strict mitigation and habitat maintenance conditions can be satisfied.¹³ The proposed rule also specifically requires that maintenance activities, including “minor expansion or minor realignment to meet safety standards” (50 CFR 26.41(c)) will be subject to the new compatibility determination and the presumption of denial. Incorporating this highly restrictive regulation of personal uses of Refuge lands is inappropriate in the context of improving transportation and utility systems located in any ANILCA CSU as the regulation is contrary to ANILCA’s purpose “to provide adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people” (16 USC 3101(d)).

USFWS’s responses to comments from the 2021 public review period state that the “proposed rule has no impact on prior existing highway rights-of-way held by State and local units of government” (88 FR 47444). That simply cannot be a true statement unless the proposed rule provides an Alaska exemption.

¹² Federal Register. Vol. 51, No. 171. Thursday, September 4, 1986. Page 31621.

¹³ 50 CFR 26.41(c): “*Existing rights-of-ways.* We will not make a compatibility determination and will deny any request for maintenance of an existing right-of-way which will affect a unit of the national Wildlife Refuge System, unless: ...”

The USFWS's position on existing rights-of-way on Refuge lands in Alaska is better clarified in the preamble to its final rule in 2000 "Final Compatibility Regulations Pursuant to the National Wildlife Refuge System Improvement Act of 1997"¹⁴ which states:

We understand the Congressional intent regarding existing right-of-ways, which is stated in the House Report, "There are numerous existing rights-of-way on National Wildlife Refuge System lands for roads, oil and gas pipelines, electrical transmission, communication facilities, and other utilities. The Committee does not intend for this Act to in any way change, restrict, or eliminate these existing rights-of-way, whether established by easement or permit, or to grant the USFWS any authority that does not already exist to do so."

We have, therefore, amended and clarified our final policy and regulations to reflect the Committee's intent not to change, restrict, or eliminate existing right-of-ways. The policy and regulations also address the unique circumstance presented by existing public highway right-of-ways. In order to continue to serve the purpose for which a right-of-way was issued, public highways must, in certain circumstances, be expanded or realigned. We amended our policy and regulations to accommodate the reasonable need for the minor expansion or realignment of existing public highway right-of-ways. We note that while the Congressional intent is that the Act itself not change, restrict, or eliminate existing right-of-ways, it is also clear that Congress did not alter our authority to do so if warranted on compatibility or other grounds. (65 FR 62470)

We also note that ANILCA 1104(b)(2) requires decision-making for TUS¹⁵ applications to be a shared responsibility between the heads of all appropriate Federal agencies, including the Secretary of Transportation.

With regard to safety improvements and expanded capacity of existing highways (e.g., straightening curves or widening roads) the USFWS's incorporation of the highly restrictive compatibility determination and approval process in 50 CFR 26.41(c) would apply to "any requested maintenance of or modification to an existing right-of-way" (See, proposed 50 CFR 29.21-3).

Similarly, USFWS's responses to Alaska's 2021 comments on possible new or expanded utilities in existing highway rights-of-way say that the highly restrictive compatibility determination and approval process in 50 CFR 26.41(c) would apply to "activities not authorized by a prior existing highway right-of-way, as well as activities that fall outside the footprint of an existing right-of-way" (88 FR 47444). This proposed rule does not acknowledge the unique compatibility standard applicable to Alaska, and instead claims that "the Service may not authorize an expansion, rerouting, or additional use of a right-of-way that will encumber Refuge System lands unless the use is compatible with the purpose(s) for which those areas were established." (88 FR 47444). These newly proposed restrictions on Refuges created or expanded by ANILCA are contrary to the statutory purpose of ANILCA to provide for the needs of Alaska and its people, as the State, local and tribal governments' efforts to develop needed infrastructure for rural

¹⁴ <https://www.federalregister.gov/documents/2000/10/18/00-26389/final-compatibility-regulations-pursuant-to-the-national-wildlife-refuge-system-improvement-act-of>

¹⁵ Listed in 1102(4)(B)

Alaskans will be stymied by the proposed regulation's incorporation of the highly restrictive permitting and approval process of 50 CFR 26.41.

Additional Comments

Notwithstanding our request for exemption from this rule, we are also providing additional comments based on our analysis of the proposed rule with requests for changes and responses to some of the USFWS's requests for public comment.

BLM Manages the Oil and Gas Leasing Program in the ANWR Coastal Plain

Under the Tax Cuts and Jobs Act (Tax Act), Congress mandated establishment of an "oil and gas program for the leasing, development, production, and transportation of oil and gas in and from the Coastal Plain of the Arctic National Wildlife Refuge (ANWR)."¹⁶ Although the USFWS manages ANWR, management of the coastal plain oil and gas program is subject to the provisions of the Tax Act and the revised purpose of ANWR "to provide for an oil and gas program on the Coastal Plain."¹⁷ Congress delegated authority for management of the oil and gas program, including the issuance of ROWs, to the Bureau of Land Management. If an exemption for Alaska is not granted, we request the final rule recognize 50 CFR 29 regulations do not apply to the oil and gas program in the Coastal Plain of ANWR.

Page-Specific Comments

Section 29.21 Purpose and Need

(b) National Wildlife Refuge System lands in Alaska

Please provide clarity through a detailed discussion of the types of right-of-way applications for USFWS-administered land in Alaska that the USFWS believes are not covered by ANILCA Title XI or Interior Department regulations at 43 CFR Part 36. The proposed rule is written as if only **specific types** of ROWs are authorized by ANILCA, yet ANILCA and the DOI regulations at 43 CFR part 36 set out the **processes** by which all USFWS ROWs are authorized¹⁸.

It appears that the USFWS is misapplying language meant for the National Wildlife Refuge System in general to Refuge System Lands in Alaska. All transportation and utility systems in, across, and into refuges in Alaska follow the procedures in 43 CFR 36, including oil and gas pipelines. We request the below edits to both the preamble and the proposed rule text to avoid the above issues in the future.

Section 29.21-1 (b) National Wildlife Refuge System lands in Alaska. Applications for rights-of-way in Alaska are authorized under Title XI of ANILCA and must be submitted under authority of 16 U.S.C. 3101 et seq. and follow the procedures and requirements set forth in 43 CFR part 36 and other applicable Refuge laws and regulations where they do not conflict with ANILCA. ~~Applications for all other rights-of-way on or over lands in Alaska must be submitted under authority of 16 U.S.C. 668dd, as amended, or for oil and~~

¹⁶ Pub. L. No. 115-97, Sec. 20001(b)(2)(A), 131 Stat. 2054 (2017).

¹⁷ Pub. L. No. 115-97, Sec. 20001(b)(2)(B), 131 Stat. 2054 (2017).

¹⁸ 43 CFR 36.1 states: "The regulations in this part apply to **any application for access** [emphasis added] in the following forms within any conservation system unit ..."

"These provisions detail the procedures that must be followed to obtain **any Federal approval needed for a TUS.**"

~~gas pipelines under section 28 of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 181 et seq.), following the application procedures set out in § 29.21-4. (88 FR 47446)~~

Statutory Authority. ...If a right-of-way across Refuge System lands is proposed in Alaska specifically authorized by ANILCA, then the Service must follow the procedures in 43 CFR part 36 when permitting the right-of-way ~~and other applicable Refuge System laws and regulations where they do not conflict with ANILCA~~ (88 FR 47443).

If the USFWS chooses to retain the existing proposed language, we request the addition of a list of the types of TUS identified in ANILCA 1102(4)(B) and 43 CFR 36.2(p), provided below.

- Canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other systems for the transportation of water.
- Pipelines and other systems for the transportation of liquids other than water, including oil, natural gas, synthetic liquid and gaseous fuels, and any refined product produced therefrom.
- Pipelines, slurry and emulsion systems and conveyor belts for the transportation of solid materials.
- Systems for the transmission and distribution of electric energy.
- Systems for transmission or reception of radio, television telephone, telegraph, and other electronic signals, and other means of communication.
- Improved rights-of-way for snow machines, air cushion vehicles, and other all-terrain vehicles.
- Roads, highways, railroads, tunnels, tramways, airports, landing strips, docks, and other systems of general transportation.

Section 29.21-2 Preapplication Meeting

We support the use of a preapplication meeting as an opportunity to encourage communication about the application and right-of-way granting process. However, we recommend that the USFWS add a requirement to the rule that the meeting happen within a certain amount of time after the applicant makes the meeting request (e.g., within 45 days). This will help to ensure that the preapplication meetings are prioritized and that this requirement does not inadvertently become a barrier or delay for applicants.

29.21-13 Rights-of-way for pipelines for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced from these substances

Again, ANILCA Title XI prevails over this section of the proposed rule in Alaska. However, though this section cannot apply in Alaska, we offer the following example and suggest improvements to the proposed rule.

In addition to authorizing common carrier pipelines in the State of Alaska under the auspices of Alaska Statute (AS) 38.35, the Alaska State Pipeline Coordinator's Section (SPCS) has authorized three "contract carrier" pipeline right-of-way leases. Of the contract carrier pipelines, one has an issued lease, and two are conditional which may convert to active leases in the near future. We foresee the possibility that future pipelines authorized to transport oil, petroleum products, and gas within the state may be issued as contract carrier rather than common carrier

pipelines. In addition to these types of pipelines, there could be limited cases where it may be appropriate for the Regional Director to consider other types of pipelines such as gathering lines, moving products out of inholdings or subsurface interest holdings within a Refuge.

Given this, the SPCS recommends providing the Regional Director some flexibility to consider other types of pipelines, and requests that the proposed regulations be modified slightly to allow for this. Below we propose added language to subpart 29.21-13 [underlined additions]

29.21-13 ...

(j) Common carriers. Pipelines and related facilities used for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product made from these substances will be constructed, operated, and maintained as common carriers. Other pipelines, such as contract carrier pipelines, may be considered for authorization by the Regional Director.

and

(5) Other pipelines, such as contract carrier authorized by the Regional Director will comply with all applicable requirements within this sub-part.

Misleading wording in the preamble

The proposed rule misleads readers to believe ANILCA prohibits commercial enterprises and permanent roads by wrapping ANILCA into a sentence on the Wilderness Act.

Subject to existing private rights, and special provisions included in specific wilderness designation statutes and the Alaska National Interest Lands Conservation Act (ANILCA; Pub. L. 96-487; 16 U.S.C. 3101 *et seq.*), the Wilderness Act prohibits commercial enterprises and permanent roads.¹⁹

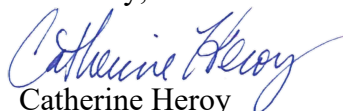
We propose the following revision:

Subject to existing private rights, and special provisions included in specific wilderness designation statutes ~~and the Alaska National Interest Lands Conservation Act (ANILCA; Pub. L. 96-487; 16 U.S.C. 3101 *et seq.*),~~ the Wilderness Act prohibits commercial enterprises and permanent roads. The Alaska National Interest Lands Conservation Act (ANILCA; Pub. L. 96-487; 16 U.S.C. 3101 *et seq.*) includes provisions that allow for transportation and utility systems within conservation system units, including designated wilderness.

Closing

Thank you for this opportunity to comment. Please contact me at 907-269-0880 or by email at Catherine.heroy@alaska.gov if you have any questions.

Sincerely,



Catherine Heroy
Acting ANILCA Program Coordinator

¹⁹ 88 Federal Register (FR) 47442, July 24, 2023