



March 18, 2021

Public Comments Processing
Attn: Docket No. FWS-HQ-NWRS-2019-0017
U.S. Fish and Wildlife Service
Mr. Ken Fowler
MS: PRB/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 United States Fish and Wildlife Service Permitting of Rights-of-Way

Dear Mr. Fowler:

The State of Alaska reviewed the proposed revisions to the United States Fish and Wildlife Service (FWS) regulations at 50 CFR 29 (Federal Register, Volume 86, Number 5120, January 19, 2021), regarding streamlining the permitting of rights-of-way (ROWs). The following comments represent the consolidated views of state agencies.

ANILCA and Title XI Implementing Regulations at 43 CFR 36 Apply to Alaska Refuges

Alaska contains a complex patchwork of land ownership affected by targeted legislation, including the Alaska Statehood Act, the Alaska National Interest Lands Conservation Act (ANILCA), and the Alaska Native Claims Settlement Act (ANCSA), which resulted in unique statutory provisions that apply to Refuges in Alaska. Several of these provisions were put in place to protect the property rights of inholders and accommodate the State's economic and infrastructure needs. Congress recognized the need to provide for access through and within the vast conservation system units (CSUs) it established, including National Wildlife Refuges, which in some areas fully surround (including effectively surround) state and private lands, including those of the newly created ANCSA Native corporations.

As recognized in the Federal Register Notice (Notice), 87% of the National Wildlife Refuge System is in Alaska; however, the Notice does not include ANILCA in the list of applicable authorities (Background, page 5120) that apply to the Refuge System in Alaska, including designated Wilderness, or fully recognize ANILCA implementing regulations.

In 1981, shortly after the passage of ANILCA, the FWS promulgated regulations at 50 CFR 36 to ensure Alaska's newly designated refuges would be managed consistent with ANILCA. These Alaska specific regulations supersede national regulations promulgated for the National Wildlife Refuge System as whole.

Similarly, to ensure provisions in ANILCA Title XI and other access provisions in ANILCA would be implemented consistently across all Department of Interior (DOI) agencies, in 1986, DOI promulgated implementing regulations at 43 CFR 36.¹ To ensure that ANILCA would prevail in the event of a conflict with the 1997 National Wildlife Refuge System Improvement Act (Refuge Improvement Act), Congress included the following savings clause: “If any conflict arises between any provision of this Act and any provision of the [ANILCA], then the provision in the [ANILCA] shall prevail” (Section 9(b) of the Refuge Improvement Act). Designated wilderness is also defined by ANILCA as a CSU so the provisions that apply to CSUs also apply to wilderness in Alaska. ANILCA expressly states that the provisions in ANILCA are exceptions to the Wilderness Act.²

Despite these glaring omissions, the Notice does accurately recognize one of ANILCA’s access provisions relative to its exemption from the compatibility standard in the Refuge Improvement Act (pages 5121 and 5124). Section 1110(b) of ANILCA grants inholders “such rights as may be necessary to assure adequate and feasible access for economic and other purposes.” This provision is the very basis for the Alaska exemption in the recently revised non-federal oil and gas regulations at 50 CFR 29.90.³ This exemption was further reinforced when in 2019 the Supreme Court issued its unanimous decision affirming ANILCA Section 103(c) prevents federal land management agencies from applying their regulations to non-federal lands and waters within CSUs.⁴

Two other critical access provisions in ANILCA not recognized in the Notice that apply to Alaska refuges and addressed in 43 CFR 36 are the transportation and utility system process (TUS process) and the allowance for temporary access across federal lands to state and private inholdings in Title XI. The TUS process applies to all proposed transportation and utility system projects in CSUs, national recreation areas and national conservation areas;⁵ the temporary access provision in ANILCA Section 1111 applies to all CSUs, the National Petroleum Reserve-Alaska, national recreation areas, national conservation areas, and lands designated for wilderness study or managed to maintain wilderness character. The regulations apply to all three DOI agencies that manage CSUs in Alaska, including national wildlife refuges, and clearly state the procedures identified in 43 CFR 36 must be followed in Alaska.⁶

¹ ANILCA also applies to CSUs in Alaska managed by the US Forest Service (USFS); however, the USFS has not promulgated implementing regulations and looks to the DOI regulations for specific guidance on implementing the statute.

² “**Except as otherwise expressly provided for in this Act** wilderness designated by this Act will be administered in accordance with the applicable provisions of the Wilderness Act.” (Emphasis added, ANILCA Section 707)

³ “...the Service has concluded that the rule does not need to include operations in refuges in Alaska as the existing Departmental regulations implementing section 1110(a) [*sic*] 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.” (81 FR 79957)

⁴ *Sturgeon v. Frost*, 587 U.S. ___, 139 S. Ct. 1066 (2019).

⁵ Transportation and utility systems are explicitly defined in ANILCA Section 1102(B) and implementing regulations at 43 CFR 36, and include a variety of transportation and utility systems, such as canals, pipelines, transmission lines, improved trails, transportation facilities, landing strips, docks, etc., and any related structures and facilities, both temporary and permanent.

⁶ Summary: This final rulemaking implements the provisions of Title XI of the Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2371, Pub. L. 96-487, concerning transportation and utility systems (TUS) in Alaska when any portion of the route of the system will be within any conservation system unit (CSU), national recreation area, or national

Regulations at 43 CFR 36 are therefore the principal regulations that address new access in Alaska refuges. To avoid further confusion and enhance this streamlining effort, 50 CFR 29 needs to recognize the full scope of the 43 CFR 36 regulations that apply in Alaska, including but not limited to the inholder access provision in ANILCA Section 1110(b). We request the final rule include ANILCA in the discussion of authorities that apply to Alaska (as applicable to Alaska Refuges and designated Wilderness) and revise the scope of 50 CFR 29 to add “applications for new rights-of-way in Alaska Refuges shall be submitted under the authority of Public Law 96-487 and shall follow the procedures and requirements set out in 43 CFR 36.”

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).”⁷ Although the FWS 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.”⁸ Congress delegated authority for management of the oil and gas program, including the issuance of ROWs, to the Bureau of Land Management. 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.

The FWS has No Authority Over ROWs Granted the State in the Alaska Omnibus Act

In 1959 the Alaska Omnibus Act (Omnibus Act) deeded to the State “all lands and interest in lands” to the roads and highways in Alaska. P.L. 86-70 sec 21. The State’s road and highway system (the former federal highway system) predates the Wilderness Act of 1964, the National Wildlife Refuge System Act of 1966, and Refuge Improvement Act of 1997. These State ROWs through the refuges, therefore, are state-controlled lands located adjacent to FWS-managed lands. Thus, USFWS has no authority to regulate the lands inside existing ROWs and the statements in the “background” section regarding USFWS’s authority to regulate maintenance activities in the ROW (citing 50 CFR 26.41) are not applicable to the State’s road and highway system.

Highway safety improvements in these existing State ROWs periodically require realignment of the highway (and ROW boundary adjustments) to meet modern road geometry and design standards. With rare exception, the safety improvements to the State’s road and highway system are designed and constructed as part of the State’s federal-aid to highways program (23 USC 101, et seq). Federal ROWs necessary to accommodate such highway realignments must be delivered by the federal land managing agency pursuant to 23 USC 317. The management of those federal-aid ROWs are governed by the provisions of 23 CFR 710 subpart D, amongst other 23 USC and 23 CFR authorities. The limitations throughout USFWS’s proposed regulations conflict with federal-aid ROW management requirements and,

conservation area. **These provisions detail the procedures that must be followed to obtain any federal approval needed for a TUS.** (Emphasis added) In addition, the regulations address special access, temporary access and access to inholdings. (51 FR 31619, 9/4/86)

⁷ Pub. L. No. 115-97, Sec. 20001(b)(2)(A), 131 Stat. 2054 (2017).

⁸ Pub. L. No. 115-97, Sec. 20001(b)(2)(B), 131 Stat. 2054 (2017).

thus, federal-aid ROW must be exempted from USFWS's proposed regulations. We request the final rule clarify 50 CFR 29 does not apply to State-controlled Omnibus Act ROWs.

Thank you for this opportunity to comment. Please contact me at 907-269-7529 or by email at susan.magee@alaska.gov if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Magee". The signature is fluid and cursive, with the first letter of the first name being a large, stylized 'S'.

Susan Magee
ANILCA Program Coordinator