



THE STATE
of **ALASKA**
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August 19, 2025

US Department of Commerce
National Telecommunications and Information Administration
1401 Constitution Ave, NW, Room 4878
Washington, DC 20230

Submitted via email to NEPAComments@ntia.gov

Re: NANA Regional Broadband Network Project

To Whom it May Concern,

The State of Alaska (State) reviewed the scoping information for the proposed NANA Regional Broadband Network Project. NANA Regional Corporation, Inc. (NANA), a regional Alaska Native Corporation, has proposed to construct a Regional Broadband Network Project (project), which would involve the installation of a fiber optic cable across federal, state, and privately-owned lands and waters in northwest Alaska. The project will be funded by the National Telecommunications and Information Administration (NTIA) and would deliver high-speed internet to seven rural communities in the NANA region of Alaska.

Federal lands in Alaska are subject to the provisions of the Alaska National Interest Lands Conservation Act (ANILCA). Included among these provisions is Title XI which specifically addresses the review of transportation and utility systems (TUS) in or across federal lands designated as conservation system units¹ (CSU) under ANILCA, such as the National Park and National Refuge lands currently identified as portions of the project. ANILCA Title VIII also requires a review of the impacts to subsistence uses and needs.²

The State appreciates the need for adequate internet connectivity in the region; as proposed the project has the potential to improve internet access for underserved Alaskans by connecting communities in northwest Alaska to regional and national telecommunications networks. The proposal aligns with the goals of improving regional infrastructure and addressing the digital divide.

Due to the mix of federal, state, native corporation, and other private property situated along each of the proposed routes, there are important considerations regarding state land ownership and management authorities that should be clearly addressed in any scoping documents and subsequent environmental assessments. As an impacted landholder and natural resource manager, the State requests the opportunity to review the draft Environmental Assessment (EA) documents. Additional State authorizations would be required during construction of the project.

¹ See ANILCA 102(4), definition of a conservation system unit.

² ANILCA 810

State agencies can provide valuable information during the EA development and should be consulted to inform the project proponents about those requirements. The following comments represent the consolidated views of state resource agencies, including the Departments of Natural Resources (DNR) and Fish and Game (ADF&G).

ANILCA Title XI Permitting

Title XI of ANILCA was created to address the unique social, environmental, and economic needs of Alaska by establishing a structured, balanced process for permitting transportation and utility systems in or across conservation lands such as Refuges and National Parks. The NTIA should reference the intent of ANILCA and the procedures of Title XI in future planning documents and the State recommends referring to 43 CFR 36 for permitting guidance.

A copy of “Understanding the TUS Process in Title XI of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA)” is attached to this letter to provide further information.

State Management Authority of Navigable Waters

Alaska DNR has management authority for state lands including navigable waters within the CSUs created under ANILCA, and requests explicit acknowledgement of this authority in any planning or EA documents. Along each of the proposed routes, installation of the fiber optic cable will require numerous crossings of waterbodies such lakes, rivers, streams, and tidally influenced waters using a combination of ground-laid, directional bored, trenched, or aerially supported methods. Even though trenches or boreholes may pass beneath the bed of navigable waterbodies, installation of a fiber optic cable is still considered a surface use and is therefore part of the surface estate. Any requests for input, scoping documents, and future EAs should disclose that State-owned submerged lands and navigable waters exist along the proposed route(s). Planning and environmental assessment documents should also provide tables, lists, or maps that clearly enumerate each of these water bodies and define their status as navigable waterbodies. The State requests that any future planning or EA documents add the brief description provided below:

The Alaska Department of Natural Resources (DNR) has management authority for state lands, including the submerged land, water, tidelands, and shorelands of navigable waters within the State. This authority includes management of navigable waters, tidelands, and shorelands within and adjacent to the boundaries of federal lands, including conservation system units created under ANILCA. A map of these waters can be found on the DNR website using the “Navigable Waters (Title Purposes)” layer: <https://mapper.dnr.alaska.gov/map#map=4/-16632245.12/8816587.34/0>.

Permitting of Fiber Optic Cable Infrastructure in State Managed Waters

With consideration given to the length of the broadband network and the number of rivers and other water bodies present along the proposed route, it is likely that trail developers will need to construct water crossing infrastructure on State-owned lands. Any bridges, bridge pilings, culverts, or other improvements within State-owned navigable waters will require prior authorization from DNR. Requests for input and scoping documents should acknowledge the requirement to obtain authorizations from the State for trail infrastructure on or across navigable waters. According to the project planning geodatabase, the following water crossings will need

appropriate permits from the State of Alaska due to their status as navigable waters (including those in conflict, title not resolved with the federal government): Kivalina Lagoon, Wulik River, Kuchoruk Creek, Noatak River, Little Noatak Slough, Hotham Straight (out to 3 mile limit on each side), Buckland River, Kiwalik River, Kugruk Lagoon, Mangoak River, Mile #633 – BLM determined navigable, crossing between Mile 631 & 632 BLM determined navigable, Mile #63 BLM determined navigable, Kungsugrug River, Selawik River (2 channels), Shogvik Lake inlet/outlet channels (between Selawik Airport and Mile #613), Amaouk Creek, Oksik Creek, unnamed stream and lake system tributary to Oksik Creek outside of USS 5166, unnamed (LKA, Duffy Slough) (Sec 10, T17N, R9W, KRM), Kobuk River, Kiana (2 channels), Ambler (1 channel), Shungnak (3 channels), Winter trail crossing #310 (unnamed stream/Shogvik Lake), Fish River, Ikagowak River, Kuchuk Creek, Ambler River at Kiana, Winter trail crossing #466 (Pittik Creek/Lake system), Shungnak River, Wesley Creek, Winter trail crossing #559 (unnamed stream), and the Black River.

Water Rights

Should the construction or maintenance of the broadband network require withdrawal or diversion of a significant volume of water, NANA and/or its contractors will need to obtain authorizations from the DNR's Water Section. A significant volume of water by State law is defined as *more than 5,000 gallons of water from a single source in a single day, more than 500 gallons of water per day from a single source for more than 10 days in a year, or more than 30,000 gallons per day from a single source.*³

Wildlife

At this stage, ADF&G finds the proposal lacks sufficient detail for a comprehensive wildlife review.

The ADF&G has primary responsibility for managing Alaska's fish and resident wildlife populations on all lands, including Federal public lands, and the Secretaries of the Interior and Agriculture have authority over the management of most Federal public lands in Alaska. While several Congressional Acts preempt ADF&G's primary management authority for certain species (e.g., endangered species); the State of Alaska continues to have stewardship and public trustee responsibilities for all wildlife (Alaska Constitution Article VIII, Section 4). In Alaska, Master Memorandum of Understandings establish cooperative management roles between ADF&G and each federal land management agency, providing the framework for collaboration and coordinated resource stewardship on fish and wildlife issues.

For the past several winters, caribou have been present along much of route on the Baldwin Peninsula, Selawik National Wildlife Refuge, and the areas surrounding the villages of Kobuk and Shungnak. Without a clear project timeline or duration, it is difficult to assess the potential impact on both wildlife and the subsistence users who depend on these resources.

The ADF&G Marine Mammal Program suggests the EA for this project include an evaluation of beluga presence timing windows in the project area and avoidance of summer subsea cable laying activities during those beluga presence timing windows to avoid disturbance.

³ 11 AAC 93.035

Finally, please note that ADF&G Fish Habitat Permits will be required for any work impacting anadromous fish streams or fish passage. For assistance with the permitting process, the project team should continue to work directly with the Fairbanks Habitat Office, dfg.hab.infofai@alaska.gov, to discuss the specific requirements of their applications.

ANILCA Title VIII

As the project progresses and a final route is selected, the federal agency having primary jurisdiction will need to evaluate the effects of this project on subsistence uses and needs, as required by Section 810 of ANILCA. This evaluation must consider the availability of other lands and alternatives that would reduce or eliminate the use of public lands needed for subsistence purposes. The use of the existing winter trail system aims to minimize new land disturbance, however, the 810 will need to consider if the proposed route(s) may significantly restrict subsistence activities. If the determination is made that the use, occupancy or disposition of such lands would significantly restrict such uses, the federal agency having primary jurisdiction over such lands shall:

- Give notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to Section 805;
- Give public notice and hold public hearings, in the vicinity of the area(s) involved;
- If a significant restriction of subsistence uses is necessary, consistent with sound management principles, the federal agency must ensure the minimal amount of public lands is used and reasonable steps are taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

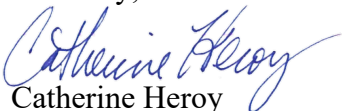
R.S. 2477 Trails

The public input request has proposed several alternative routes, each of which crosses multiple R.S. 2477 state rights-of-ways. DNR asserts the authority to manage these transportation easements in the best interest of Alaskans. R.S. 2477 trails have been used as historical transportation routes, and today these routes make up an essential network of trails by which Alaskans may access private property, mining claims, or inholdings within federally managed CSUs. Additionally, many of these routes are used to access subsistence opportunities and are expected to have higher frequency of use during hunting and fishing seasons. Future scoping or environmental assessment documents must acknowledge state management authority over R.S. 2477 and describe any anticipated impacts to R.S. 2477 trails or the use thereof.

Closing

Thank you for the opportunity to review and comment on this proposed project. Please contact me at (907)269-0880 or by email at catherine.heroy@alaska.gov to coordinate follow up discussions.

Sincerely,


Catherine Heroy
Federal Program Manager

Attachments: Understanding the TUS Process in Title XI of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA)

Understanding the TUS Process in Title XI of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA)

Updated April 1, 2025

Outline of the application and decision process for Transportation and Utility Systems in and across Conservation System Units and Areas

Prepared by: The ANILCA Training access team, which created and presents the access training portion of ANILCA Training for Department of the Interior University and Institute of the North <https://institutenorth.org/engage/events/anilca-training/>; Doug Campbell, retired US Fish and Wildlife Service, Chief of Realty Division; Tina Cuning, ANILCA Trainer; Sally Gibert, ANILCA Trainer; Chuck Gilbert, retired National Park Service, Alaska Region Manager of Land Resources Program.

INTRODUCTION

The purpose of this document is to supplement the Access & Transportation (A&T) presentation portion of the ANILCA Training, focusing on the Transportation and Utility Systems (TUS) provisions in ANILCA Title XI. This document is prepared for information only and is not legally binding.

During deliberations preceding final passage of ANILCA, Congress considered reserving specific corridors for future access. Because future demands for transportation were still largely unknown, Congress opted instead to establish an application and decision process to be used as TUS needs arose. The TUS process is contained in ANILCA Sections 1101-1108 and applies to any Congressionally-designated conservation system unit¹ (CSU) and designated national recreation and national conservation areas (Area) in Alaska. ANILCA Section 1104 preempts “any provision of applicable law” in approving or disapproving a TUS unless this section is complied with.

ANILCA Section 1101 contains the findings of Congress:

Congress finds that -

- (a) Alaska's transportation and utility network is largely undeveloped and the future needs for transportation and utility systems in Alaska would best be identified and provided for through an orderly, continuous decisionmaking process involving the State and Federal Governments and the public;*
- (b) 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*
- (c) to minimize the adverse impacts of siting transportation and utility systems within units established or expanded by this Act and to insure the effectiveness of the decisionmaking process, a single comprehensive statutory authority for the approval or disapproval of applications for such systems must be provided in this Act.*

ANILCA’s TUS provisions for Department of the Interior (DOI) are implemented through 1986 regulations at 43 CFR part 36. A 1987 lawsuit² resulted in the DOI regulations being upheld by the District Court, then the plaintiffs appealed. The regulations were amended in 1997 with a single

¹Section 102(4) defines CSUs as units of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers System, National Trails System, National Wilderness Preservation System, or National Forest Monument

²*Trustees for Alaska, et al., v. United States Department of the Interior, et. al.*, Case No. A87-055

change to a definition following negotiations to settle the lawsuit. The statutory ANILCA TUS provisions apply to both DOI and the Forest Service within Department of Agriculture (DA). In the absence of DA regulations, the DA Office of General Counsel advised³ that the DOI regulations provide instructive guidance to the Forest Service.

The source documents referenced in this Outline include:

- ANILCA Sections 1101-1108 – ANILCA’s TUS provisions
- DOI regulations at 43 CFR Part 36 – The TUS implementation regulations adopted in 1986, including the explanatory preamble and response to comments
- 1997 amendment to the 43 CFR Part 36 regulations – A single definition change.

See also the flow chart of TUS application, NEPA, and decision process and list of examples of TUS authorizations in Alaska national park and refuges (in the Curriculum Training Packet). Additional information by the authors of Title XI is in Alaska Law Review “You CAN get there from Here.”

MYTHS

Several myths about the TUS process interfere with understanding the law and its implementation:

- **Myth:** *The TUS process doesn’t work, and no TUSs have been authorized.*

FACT: The TUS process has been used successfully and rights of way issued dozens of times on a variety of TUS projects both large and small.

- **Myth:** *It’s easier to go directly to Congress for an authorization than use the TUS process.*

FACT: A likely origin of this myth is the 1985 Congressional authorization (P. L. 99-96) of a land exchange between NANA (an Alaska Native regional corporation) and National Park Service (NPS) for the Red Dog mine access road through Cape Krusenstern National Monument. DOI had no Title XI regulations at that time, and the TUS provisions had not been tried, so NANA pursued authorization directly through legislation.

CHALLENGES

The TUS provisions Congress crafted for ANILCA were innovative and untested, and some trends were not anticipated. For example, the length and complexity of environmental analysis documents produced under the National Environmental Policy Act of 1970 (NEPA) significantly increased over time, so the NEPA deadlines in Title XI are often not realistic without applying the provision for reasonable extensions. Another factor is the wide array of federal agencies, each with their own mandates that may conflict with the ANILCA TUS process. While the TUS process has been successfully used many times to authorize transportation and utility systems, compliance with portions of the Title XI TUS application and decision procedures has grown more complex.

TEXT NOTES

The following fonts and symbols are used to provide supplemental information to the text:

Italicized Arial font = This font is used to distinguish supplemental, consensus-based contextual explanations of the statutory and regulatory direction, based on insights of the ANILCA Training access team, representing decades of implementation experience, lessons learned, and recommended best practices

³Office of General Counsel, verbal instructions, ANILCA Training, Juneau 2016

[Bracketed citations] = applicable regulatory provisions in 43 CFR 36 unless otherwise noted

“Italicized quotes” = terms defined in 43 CFR 36.2 when first used, followed by the [regulation citation]

KEY DEFINITIONS

“appropriate federal agency” is any agency that has jurisdiction to grant an authorization required for a TUS to be constructed. ANILCA Section 1104 [43 CFR 36.2(d)].

The working determination of “appropriate federal agency” faces increasingly complex and independent permitting authorities. Initially, the TUS authorization process focused on route selection by the affected federal land managers plus, in some instances, the Department of Transportation. [See Federal Register page 31622 of the 43 CFR 36 Preamble.] In recent years, all federal agencies with applicable permitting authorities participate in the TUS application process, (e.g., Corps of Engineers (COE), Federal Energy Regulatory Commission (FERC), US Coast Guard (USCG)).

“applicable law” is “any law of general applicability (other than this title) under which any Federal department or agency has jurisdiction to grant any authorization (including but not limited to, any right-of-way, permit, license, lease, or certificate) without which a transportation or utility system cannot, in whole or part, be established or operated.” ANILCA Section 1102(a).

APPLICATION PROCESS

I. Pre-application meeting with the land manager(s) of the CSU or Area is strongly recommended but not required [43 CFR 36.3(a)] to discuss project scope, concerns, costs, constraints, and project timelines.

In practice, land management agencies stress the importance of pre-application meeting(s) so the applicant better understands the application steps and the agencies better understand the scope and objectives of the project. Complex projects may require multiple meetings.

A. Determine if the process described in ANILCA Sections 1101-1108 is applicable:

1) Does the proposed project qualify as a transportation system or utility? [43 CFR 36.2(p)]

The TUS process is not used or only partially used when other ANILCA authorities apply, such as ANILCA Section 1110(b)—Access to Inholdings or ANILCA Section 1111—temporary access to nonfederal land.

2) Would the proposed project be in or across a CSU or Area? [43 CFR Sec 36.1(a)]

If “no,” the project will not be located on federal land within the CSU or Area then the TUS process does not apply.

If “yes,” is there a route or site that is not on federal land in the CSU or Area that works for the TUS? Locating the proposed TUS so it is not on the CSU or Area may reduce costs, time, and controversies of crossing a CSU or Area. If the route or site is proposed to be located on the CSU or Area, the Secretaries may be possible to conduct a minor boundary

*adjustment under ANILCA Section 103(b)⁴ or a land exchange⁵ in order to facilitate location of a portion or all of a TUS outside of a CSU or Area. However, the Federal District Court in *Friends of Alaska Refuges v. Bernhardt and King Cove*, D 06/01/20, Case 3:19-cv-00216-JWS, found land exchanges cannot be used to avoid the procedural mandates of Title XI for a proposed TUS to be located within a CSU or Area. In 2022 the Ninth Circuit reversed the District Court's decision. Both decisions were vacated in 2022.*

- B. Identify “appropriate federal agency” [43 CFR 36.2(d)] and applicable permitting authorities. *There is often more than one such agency.*
- C. Identify pre-application data-gathering needs and activities; authorizations for necessary field work [43 CFR 36.3]
 - 1) Reasonable activities necessary to complete the application “shall be permitted” [43 CFR 36.3(b)] if they will not:
 - a. cause significant or permanent damage
 - b. unreasonably interfere with other authorized uses or activities
 - c. significantly restrict subsistence uses
 - 2) In an NPS or FWS unit, pre-application activities must be “compatible with the purposes for which the unit was established” [43 CFR 36.2(f)], defined as “will not significantly interfere with or detract from the purposes for which the area was established.”

Discuss NEPA compliance, deadline/extensions, realistic timeframes, and the two different decision pathways dependent on the presence or absence of agency authority and/or involvement of designated Wilderness. See TWO DECISION PATHWAYS below.

Alert applicant that part of the process is to determine if an alternative to the proposed TUS exists elsewhere within or outside of the CSU or Area with less impacts [43 CFR 36.7(a)(2)(ii)].

If there are one or more alternatives, a determination of economic feasibility and of reasonableness of such alternatives must be completed and the alternatives included in the NEPA analysis for agency(s) consideration.

If anticipate using a NEPA contractor, review with applicant the importance of contractor qualifications and experience to keep the project on track. Discuss pros and cons of having the agency prepare NEPA documents with funds provided by the applicant. Per NEPA, the agency selects the contractor (See 40 CFR 1506.5). FWS works with the applicant to determine the best NEPA contractor from a list of contractors provided by the applicant or may conduct NEPA in-house. NPS has similar practices.

II. Application of Standard Form 299 submitted to all appropriate federal agencies [43 CFR 36.4]

A. Simultaneous filing date if multiple agencies are involved [43 CFR 36.4(a)]

⁴Section 103(b): “Following reasonable notice in writing to the Congress of his intention to do so the Secretary and the Secretary of Agriculture may make minor adjustments in the boundaries of the areas added to or established by this Act as units of National Park, Wildlife Refuge, Wild and Scenic Rivers, National Wilderness Preservation, and National Forest Systems and as national conservation areas and national recreation areas. For the purposes of this subsection, a minor boundary adjustment shall not increase or decrease the amount of land within any such area by more than 23,000 acres.”

⁵Section 1302 authorizes land acquisition within or contiguous to CSUs through purchase, donation, or exchange under specified conditions, none of which require approval of Congress.

- 1) Filing with one Interior agency shall be considered as a filing with all of Interior's agencies [43 CFR 36.4(a)]
- 2) Any application filing fees are due at the time of filing [43 CFR 36.4(a)]
- 3) If single filing date not possible, applicant has up to 15 calendar days to file with all appropriate agencies [43 CFR 36.4(c)]
- 4) Identify a lead federal agency [43 CFR 36.5(a)]
 - a) Land management agency with longest lineal portion of applicable ROW
 - b) Different lead federal agency may be designated by agreement of the involved agencies
 - c) Lead agency coordinates the overall TUS application and NEPA processes, although there may be a different lead agency for NEPA compliance
- 5) The lead federal agency for the TUS application identifies the filing date as the date of the latest application submittal to the appropriate federal agencies [43 CFR 36.4(c)]

B. Application deadlines

- 1) 60 days for each agency to determine sufficiency of application [43 CFR 36.5(c)]
- 2) 30 days for applicant to respond to any requests for more information [43 CFR 36.5(d)]
- 3) 30 days from receipt of additional information for agencies to determine sufficiency and, if sufficient, update "filing date" to be the date the final supplemental information was received [43 CFR 36.5(e)]

C. Agencies may grant additional time to provide requested information if applicant agrees the official filing date of completed application will be adjusted accordingly [43 CFR 36.5(d)(1)]

D. If applicant does not meet the original or extended filing deadlines, or any agency determines the application is deficient, the lead agency notifies the applicant the application is rejected and notifies other agencies to return their applications without further action [43 CFR 36.5(b), 5(d)(2), 5(e)(1)]

There is no process to appeal rejection of an application; however, the applicant may reinstate the application by providing requested information later [43 CFR 36.5(e)(2)] or may restart the pre-application stage to refine project scope and submit a new application.

E. Applications determined to be sufficient proceed to NEPA compliance

NEPA COMPLIANCE

I. NEPA and implementing regulations apply to the evaluation of all TUS applications through an Environmental Assessment (EA), Environmental Impact Statement (EIS), or a categorical exclusion [43 CFR 36.6(a)]

A. Lead agency, in cooperation with all appropriate federal agencies, completes an EA or Draft EIS within 9 months of the official filing date [43 CFR 36.6(a)(1)]

Lead agency facilitates the determination of the appropriate NEPA document in cooperation with the other appropriate federal agencies, ideally in consultation with the applicant during the pre-application process. A Categorical Exclusion is rare, but has been applied in limited circumstances, e.g., when a fiber optic cable was buried in a previously-constructed drainage ditch of the George Parks Highway through Denali National Park.

B. Lead agency may extend the 9-month NEPA preparation time for good cause [43 CFR 36.6(a)(2)]

- 1) Lead agency specifies a new time period, with rationale, and notifies the applicant
- 2) Lead agency publishes a notice of extension in Federal Register at least 30 days before end of original 9-month period

C. The NEPA document [43 CFR 36.7(a)(2)]:

The regulations do not require the following nine subjects to be addressed in the NEPA document, but as a practical matter the NEPA process is the best place to do so to avoid a disconnected step after NEPA compliance. ANILCA Section 1104(g)(2) requires detailed findings for eight of these, and the regulations add the ninth.

- 1) Need and economic feasibility
- 2) Economically feasible and prudent alternative route (defined at 43 CFR 36.2(h))
- 3) Feasibility of consolidating routes
- 4) Social, economic, and environmental impacts
- 5) Impacts on national security interests
- 6) Impacts on ANILCA unit purposes
- 7) Measures to avoid or minimize negative impacts
- 8) Comparison of adverse and beneficial affects to public values
- 9) Impacts, if any, on subsistence uses

D. Lead agency shall assure compliance with ANILCA Section 810 [43 CFR 36.6(a)(6)]

Section 810 applies to all federal agency decisions affecting "use, occupancy, or disposition of public lands" and requires an "evaluation" of effects on subsistence uses and efforts to "minimize adverse impacts" but does not require a complete absence of such impacts.

E. Cost Recovery

- 1) Application processing costs shall be reimbursed by the applicant if required by the authorities and policies of the appropriate federal agency [43 CFR 36.6(c)(1)]
- 2) Reasonable administrative and other costs of EIS preparation shall be reimbursed according to Bureau of Land Management's cost recovery procedures under Section 304 of the Federal Land Policy and Management Act (FLPMA) [43 CFR 36.6(c)(2)]

II. If the lead agency determines an EIS is not required, an EA and Finding of No Significant Impact (FONSI) will be prepared [43 CFR 36.6(a)(3)], or in rare cases a Categorical Exclusion may apply

III. If the lead agency determines an EIS is required:

- A. The draft EIS will be subject to a hearing in Washington DC and at least one location in Alaska [43 CFR 36.6(a)(4)]
- B. Consultation and public notice requirements include outreach to other federal agencies, the State, affected local governments, affected ANCSA corporations, and interested individuals and organizations [43 CFR 36.6(a)(5)]
- C. The final EIS will be completed within 3 months of completing the draft EIS or within 1 year of the application filing date – whichever is later. Notice of availability of the final EIS shall be published in the Federal Register [43 CFR 36.6(b)]

TWO DECISION PATHWAYS

I. **DECISION PATHWAY ONE: Agency(s) has applicable authority to issue rights-of-way, and the proposed TUS is not in designated Wilderness [43 CFR 36.7(a)]**

- A. Each appropriate federal agency has 4 months from completion of FONSI or Final EIS to decide to approve or disapprove the proposed TUS in accordance with applicable law and notify the applicant [ANILCA Section 1104(g); 43 CFR 36.7(a)(1)]

*Congress established a single statutory authority in Title XI for consistency in **processing** applications for TUSs in Alaska CSUs and Areas. Title XI provides no new authority for agency **decision-making on** applications. Each agency uses its own laws and regulations in **deciding** to approve or disapprove a TUS application. However, if there is conflict between agency procedures for processing applications and the provisions Title XI or its implementing regulations for processing applications, the provisions of Title XI and its implementing regulations supersede such agency procedures.*

- B. Each agency, in making its decision to approve or disapprove an application, shall consider and make detailed findings for the nine subjects⁶ listed in 43 CFR 36.7(a)(2)

*Although agencies use their existing authorities to make a decision whether to approve or disapprove a TUS application, Title XI and its implementing regulations require the agency to **consider** and make detailed findings on the nine subjects as part of their decision process. As a practical matter, these nine subjects are often addressed as part of NEPA compliance (see previous section).*

- C. If each agency makes its decision to approve a TUS, the system shall be deemed approved [ANILCA Section 1106(a)(1)(A)], and the agencies proceed to issue permit(s) or other forms of authorizations.
- D. If an appropriate federal agency disapproves any portion of a TUS, the entire application is disapproved [43 CFR 36.7(a)(4)]
- E. If the application is disapproved, the applicant may file an administrative appeal pursuant to ANILCA Section 1106(a)(2) [43 CFR 36.7(a)(4)]:

The remainder of the decision pathway one is outside the jurisdiction of the administering agencies, hence is not covered in the DOI regulations. From this point in decision pathway one, guidance comes from the statute itself, which moves the decision process to the President. If the TUS application is approved by the President, the 43 CFR 36 regulations have some additional guidance regarding issuing permits.

- 1) Applicant appeals to the President
- 2) President must decide to approve or disapprove the application within 4 months
- 3) President shall consider the nine findings in 43 CFR 36.7(a)(2), NEPA compliance, public and agency comments, and individual agency decision documents
- 4) President's decision to approve or deny, along with rationale, will be published in the Federal Register
- 5) President shall approve the application if he finds:
 - a) the system is in the public interest
 - b) the system is "compatible with the purposes of the unit," as defined in 43 CFR 36.1(f) to mean the TUS "will not significantly interfere with or detract from the purposes for which the area was established."

⁶ ANILCA and the regulations require the agency to "consider, and make detailed findings" for a specified list. For editorial convenience, the generic term "subjects" is used when referring to what the findings are required to address and no unsupported meaning is intended by use of that term to describe the lists.

Note that the President must use the Title XI definition of “compatible” which may be different than an agency’s definition of compatible.

- c) there is no economically feasible and prudent alternative route

Per Section 1106(a)(2), if the TUS meets all three of these criteria, the President’s approval of a TUS application is not discretionary. Section 1106 is a new authority with new decision-making criteria for processing and issuing rights-of-way.

- 6) If the President approves the application, each federal agency shall promptly issue rights-of-way and other applicable authorizations [ANILCA Section 1106(a)(3)]
- 7) If the President denies the application, the applicant has exhausted administrative remedies and may proceed to judicial review in federal court [ANILCA Section 1106(a)(4)]

II. DECISION PATHWAY TWO: Federal agency(s) does not have applicable law to authorize all or part of a TUS application, or any part of the proposed project would be in designated Wilderness [43 CFR 36.7(b)]

- A. The federal agency with jurisdiction over a portion of a TUS, for which the agency has no applicable specific law, shall recommend approval of that portion if it is determined [43 CFR 36.7(b)(1)(i)]:
 - 1) Such system would be compatible with the purposes for which the area was established [43 CFR 36.7(b)(1)(i)(A)], and
- 2) There is no economically feasible and prudent alternate route [43 CFR 36.7(b)(1)(i)(B)]
- B. Each appropriate federal agency has 4 months from completion of the FONSI or final EIS to tentatively approve or disapprove each right-of-way in their jurisdiction, and the Secretary of the Interior shall make notification pursuant to ANILCA Section 1106(b) [43 CFR 36.7(b)(1)]
- C. If there is applicable law for a portion of the TUS which is outside designated Wilderness, the applicable law shall be applied using Decision Process One in making the determination to approve or disapprove that portion of the TUS [43 CFR 36.7(b)(1)(ii)]

The provisions in B and C above might appear to contradict the intent that the TUS will ultimately be approved or disapproved as a whole. The Preamble to the regulations (51 FR 171, Sept. 4, 1986, page 31624] explains the purpose of the described distinctions:

*“When there is no existing law applying to a part of a TUS, there will most likely be some existing law for the other part. Some of the decision-making will therefore involve agencies which do and do not have existing authority. Those agencies that have authority will be able to process the permits and approvals and prepare the documents that will be transmitted to Congress. **Those agencies that do not have authority will only be able to prepare their recommendations.** The final decision on the whole project will rest with Congress, although it is not expected that Congress will revisit those determinations already made by agencies having preexisting congressionally delegated authority.”* [Emphasis added]

- D. The Federal Register notice of the FONSI or final EIS shall be accompanied by the rationale and findings supporting each appropriate federal agency's position, the findings regarding the nine subjects listed in 43 CFR 36.7(a)(2), the final NEPA compliance documents, and any comments from the public and other federal agencies [43 CFR 36.7(b)(2)]
- E. Each federal agency “promptly” notifies the President of their tentative approval or disapproval of each authorization for which they have jurisdiction, along with their rationale [ANILCA Section 1106(b)]
- F. There is no administrative appeal for a denial issued under the provisions of 43 CFR 36.7(b) [43 CFR 36(8)]

The remainder of decision pathway two is outside the jurisdiction of the administering agencies, hence is not covered in the DOI regulations. From this point, guidance comes from the statute itself, which moves the decision process to the President and then to Congress. If the TUS application is approved by Congress, the 43 CFR 36 regulations have some additional guidance regarding issuing permits.

- G. Within 4 months of receiving all NEPA documentation and agency rationale, the President shall decide whether the TUS application should be approved or denied [ANILCA Section 1106(b)(2)]
 - 1) If the President denies the TUS application, the applicant has no administrative appeal options but may file suit in federal court.
 - 2) If the President approves the TUS application, he/she shall submit such a recommendation for approval to Congress, along with the cumulative supporting documentation for the decision, plus conditions and stipulations that would govern the TUS if approved by Congress.
- H. Congressional approval requires the Senate and House to approve a joint resolution within 120 calendar days following receipt of the President’s recommendation and supporting documentation [ANILCA Section 1106(c)(1)]

Subparagraphs 1106(c)(2) and 1106(c)(3) contain technical details on how to calculate the 120 calendar days for purposes of this section. If Congress does not approve the TUS application within 120 calendar days, the TUS is effectively denied and the applicant has no administrative or judicial remedies.

ISSUING PERMITS [43 CFR 36.9]

The following are the regulatory requirements for the agency(s) to issue a permit:

- 36.9(a) Once an application is approved under the provisions of §36.7(a), a right-of-way permit will be issued by the appropriate federal agency or agencies, according to that agency's authorizing statutes and regulations or, if approved pursuant to the provisions of §36.7(b), according to the provisions of title V of the Federal Land Policy Management Act of 1976 [43 U.S.C. 1701] or other applicable law. The permit shall not be issued until all fees and other charges have been paid in accordance with applicable law.
- 36.9(b) All TUS right-of-way permits shall include, but not be limited to, the following terms and conditions:

- (1) Requirements to ensure that to the maximum extent feasible, the right-of-way is used in a manner compatible with the purposes for which the affected area was established or is managed;
- (2) Requirements for restoration, revegetation and curtailment of erosion of the surface of the land;
- (3) Requirements to ensure that activities in connection with the right-of-way will not violate applicable air and water quality standards and related facility siting standards established pursuant to law;
- (4) Requirements, including the minimum necessary width, designed to control or prevent:
 - (i) Damage to the environment (including damage to fish and wildlife habitat);
 - (ii) Damage to public or private property; and
 - (iii) Hazards to public health and safety.
- (5) Requirements to protect the interests of individuals living in the general area of the right-of-way permit who rely on the fish, wildlife and biotic resources of the area for subsistence purposes; and
- (6) Requirements to employ measures to avoid or minimize adverse environmental, social or economic impacts.

36.9(c) Any TUS approved pursuant to this part which occupies, uses or traverses any area within the boundaries of a unit of the National Wild and Scenic Rivers System shall be subject to such conditions as may be necessary to assure that the stream flow of, and transportation on, such river are not interfered with or impeded and that the TUS is located and constructed in an environmentally sound manner.

36.9(d) In the case of a pipeline described in section 28(a) of the Mineral Leasing Act of 1920, a right-of-way permit issued pursuant to this part shall be issued in the same manner as a right-of-way is granted under section 28, and the provisions of subsections (c) through (j), (1) through (q), and (u) through (y) of section 28 shall apply to right-of-way permits issued pursuant to this part.