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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NORTHERN ALASKA ENVIRONMENTAL
COUNCIL, et al.,

Plaintiffs,

v.

DEBRA HAALAND, in her official capacity, et al.,

Defendants,

and

AMBLER METALS, LLC, et al.

Intervenor-Defendants.

No. 3:20-cv-00187-SLG

ALATNA VILLAGE COUNCIL, et al.,

Plaintiffs,

v.

CHAD PADGETT, in his official capacity, et al.,

Defendants,

and

AMBLER METALS, LLC, et al.

Intervenor-Defendants.

No. 3:20-cv-00253-SLG

JOINT MOTION FOR CLARIFICATION

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Intervenor-Defendants Alaska Industrial Development and Export Authority (“AIDEA”), NANA Regional Corporation, Inc. (“NANA”), Ambler Metals, LLC (“Ambler Metals”) and the State of Alaska (“Intervenor-Defendants”) move this Court for clarification of its Orders on Remand and on Reconsideration (“Orders”). Specifically, the Intervenor-Defendants seek clarification that: (1) the Orders do not preclude pre-construction ground-disturbing activities; and (2) neither the Orders, the National Historic Preservation Act (“NHPA”), nor the Programmatic Agreement (“PA”) grant the Bureau of Land Management (“BLM”) authority to bar pre-construction work on State and private land.

INTRODUCTION

Of the 211 miles of the Ambler Access Project (“Project”), only 51 miles cross federal land. The remainder is State or private land owned by Alaska Native Corporations (“ANCs”). Yet, BLM has directed AIDEA not to perform preconstruction geotechnical work on any portion of the Project corridor, irrespective of ownership. BLM’s actions are inconsistent with the Court’s Orders, undermine the intent of the Alaska National Interest Lands Conservation Act (“ANILCA”), and exceed the agency’s jurisdiction.

The Court’s Order on Reconsideration contemplated work pending remand, including ground-disturbing activities. The Court also recognized that BLM’s approval authority was limited to federal lands. The Order required BLM to provide prompt notice to Plaintiffs of applications and authorization of work on federal lands and 28-days’ notice before ground-disturbing activities on federal lands. *See* Recon. Order [Dkt. 253, No. 150], at 12.

Yet BLM claims that its commitment to this Court to maintain the “environmental status quo” means that all geotechnical work is prohibited. BLM further claims that it has sole authority over the entire Project corridor, including veto authority over Alaska’s prior

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authorization of certain limited geotechnical activities on State and ANC-owned land. By claiming the authority to prohibit all geotechnical work, BLM ignores the Court’s equitable plan and prevents essential pre-design work that will help minimize impacts – work that the NHPA specifically contemplates.¹ Because BLM claims that its hands are tied by the Orders and its commitment to this Court, Intervenor-Defendants seek clarification that the Orders do not prohibit all geotechnical work.

BLM also claims that it alone may approve activities along the entire Project corridor. This claim is inconsistent with the Court’s Orders, misreads NHPA, and ignores BLM’s statutory jurisdiction. Intervenor-Defendants thus respectfully request that the Court clarify that neither the Orders, applicable statutes, nor the PA authorize BLM to control State and private land.

BACKGROUND

A. The Orders

Plaintiffs initiated this action in 2020. In February 2022, Federal Defendants moved for voluntary remand without vacatur, which Plaintiffs opposed. The Deputy Secretary’s declaration supporting remand indicated that the Department of Interior would suspend right-of-way (“ROW”) permits for the Project “to preserve the environmental status quo.” Remand Mot., Exhibit 1 [Dkt. 253, No. 111-1], at ¶ 12. Responding to Plaintiffs’ claims of harm pending remand, Federal Defendants cited this declaration, arguing: “Plaintiffs here cannot claim imminent or ongoing harm; the Road is not being built – only initial assessment and further study is contemplated in 2022, and Defendants have made clear their intention to ‘preserve the

¹ NHPA regulations allow “nondestructive project planning activities” before compliance with Section 106 “provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking’s adverse effects on historic properties.” 36 C.F.R. 800.1; *see also* Section IV(B), below.

environmental status quo’ during remand.” Reply ISO Remand Mot. [253, No. 132], at 6. The Court noted BLM’s commitment to “preventing environmental harm” among its reasons for concluding that remand would not harm Plaintiffs. Remand Order [Dkt. 253, No. 142], at 14-15.

Plaintiffs moved for reconsideration of the Remand Order, arguing that Federal Defendants’ ROW suspensions do not preclude ground-disturbing activities during remand. Recon. Mot. [Dkt. 253, No. 144], at 3-4. The Court denied Plaintiffs’ request. In order to ensure Plaintiffs’ right to be heard on activities during remand, the Court directed BLM to “provide prompt notice to Plaintiffs of any applications and authorizations for activities *on federal lands*,” and to “provide no less than 28 days’ notice to Plaintiffs in advance of any ground-disturbing activities occurring pursuant to the 404 permit or other authorizations, except no notice is required to proceed with limited brush clearing solely to allow for helicopter landings.” Recon. Order [Dkt. 253, No. 150], at 12 (emphasis added).

To be sure, the Court explained that it “granted voluntary remand without vacatur, in part because it found that doing so was unlikely to result in prejudice to Plaintiffs because Federal Defendants had suspended the challenged right-of-way permits and committed to preserving the environmental status quo during remand.” *Id.* at 4. However, the Court’s notice requirements specifically apply to “federal lands.” Further, the Court’s 28-day notice requirement for ground-disturbing activities makes clear that even on federal land, those activities do not inherently disturb the environmental status quo.

B. BLM’s Characterization of Its Authority

1. BLM’s Annual Workplan Letter

On August 19, 2022, BLM granted “conditional approval” of AIDEA’s 2022 Annual Workplan (“AWP”). AWP Ltr. [Dkt. 253, No. 157-2]. Among other limitations, BLM rejected

all geotechnical work – including work on State and private land and work Alaska had already approved.² *Id.* at 4. BLM used a two-part test in “determining whether to approve the proposed work described in the AWP.” *Id.* at 1. First, BLM evaluated the PA conditions; then it evaluated whether the work would preserve the “environmental status quo.” *Id.* BLM justified its use of the second standard because “[t]he Court based, in part, its orders granting remand (May 17, 2022) and denying reconsideration thereof (June 14, 2022), on DOI’s commitment to preserve the ‘environmental status quo’ during remand, and thus the BLM now considers itself to be legally obligated to preserve that status.” *Id.*

2. ADNR’s November 2022 Letter and BLM’s Response

In response to BLM’s blanket prohibition of geotechnical work, the Alaska Department of Natural Resources (“ADNR”) wrote to BLM, explaining ADNR’s prior evaluation and authorization of geotechnical data-gathering at three State locations.³ ADNR explains that it consulted with the Alaska State Historic Preservation Office (“OHA”)⁴ in February 2022,

² BLM has asserted broad jurisdiction elsewhere. Ten days after the Remand Order, BLM claimed jurisdiction over “the full length” of the Project, “whether on or off federally owned lands.” BLM’s May 27, 2022 letter to AIDEA [Dkt. 253, No. 149-3], at 11-13. AIDEA disputed BLM’s authority over non-federal land. AIDEA’s June 3, 2022 letter to BLM [Dkt. 253, No. 149-3], at 1-4. BLM’s AWP Letter addressed activities Project-wide without considering land ownership. AWP Ltr. [Dkt. 253, No. 157-2], at 5, 7. Of the thirty locations BLM addressed, only eleven are wholly or partially federally-owned. Alaska owns fifteen locations and private entities own four.

³ *See* Ex. A, ADNR’s November 18, 2022 letter to BLM re: “Winter Field Work Under Existing, PA-Compliant State Permits on State Lands”) (“ADNR Letter”); *see also* Ex. B, Alaska Limited Use Permit 33936 (“LUP”).

⁴ OHA is the state’s historic preservation agency and “serves as the state historic preservation office (SHPO), representing the state’s interest in protecting its heritage resources.” Program Guide for the State of Alaska Department of Natural Resources (January 17, 2023 Update), p. 116 (excerpt attached as Exhibit C). The same individual serves as both the SHP Officer and the Chief of OHA and staff members serve both entities. OHA is housed within

(continued...)

pursuant to AS 41.35.070, and provided public notice. ADNR Letter, at 2. ADNR and OHA determined that the work was unlikely to adversely affect significant cultural resources given established protective measures, and ADNR issued the LUP in March 2022. *Id.* at 1-2. Based on this analysis, ADNR explained to BLM that the work would also “maintain the environmental status quo,” although it emphasized that this was neither an applicable regulatory standard nor this Court’s mandate. *Id.* at 1, 5-6. As ADNR explained:

DNR believes that the activities that have already been approved under LUP No. 33936 should be allowed to move forward To the degree that BLM denied the geotechnical drilling and land clearing/site preparation in support of drilling for lands previously authorized and consulted upon, we believe this is in error and not based on authorities or processes outlined in the PA.

Id. at 3.

ADNR objected not only to BLM asserting control over State land but also because BLM had agglomerated all geotechnical work – combining the work at the three bridge crossings, which ADNR had already approved, with additional geotechnical work proposed in the subsequent AWP. In doing so, BLM did not recognize the fact that cultural and historic resource surveys had already been conducted for the three bridge crossings. That fact was considered for the Alaska permit and distinguished the bridge crossings from other locations where geotechnical work was subsequently proposed in the 2022 AWP. *See id.* at 2-3

BLM’s response argued that SHPO’s August 15, 2022 comments related to the AWP supported BLM’s concerns that geotechnical work could affect resources, justifying barring all

ADNR and administers programs authorized by both the Alaska Historic Preservation Act and NHPA. *See, e.g., id.* at p. 117 (“[OHA – Conducts federally required reviews of all development projects to determine their impact on historic and archeological sites and maintains the data repository for all of Alaska’s cultural resources information.]”).

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geotechnical work. Ex. D, BLM’s December. 5, 2022 letter to ADNR, at 2-3 (“BLM Response”). BLM again ignored the fact that OHA, which serves as the state historic preservation office, reviewed and approved the cultural and historic surveys submitted in support of AIDEA’s LUP application during the State permitting process. *See* ADNR Letter, at 2-3 (providing that during consultation regarding the LUP, OHA determined on February 22, 2022, that ““the proposed actions are unlikely to adversely affect significant cultural resources if minimization measures are enacted.””) *See also* Ex. B at 3-4. BLM simply lumped all geotechnical work together and either failed to note the February OHA conclusions or incorrectly assumed that the August 2022 comments on geotechnical work generally retroactively changed the State’s prior approvals for the three bridge crossings.

BLM’s response also posited that BLM alone has authority to determine (1) whether work may proceed on State or private land, and (2) whether an activity may cause adverse effects. BLM Response, at 2. In support, BLM pointed to its environmental status quo “commitment” to this Court, some general NHPA provisions, and the PA. *Id.* at 2-3.

C. NHPA Compliance

NHPA regulations authorize a PA “to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.” 36 C.F.R. §800.14. PAs provide a procedure for *ongoing* compliance with Section 106 as a Project proceeds. For example, a PA may be used when “*effects on historic properties cannot be fully determined prior to approval* of an undertaking.” *Id.* § 800.14(b) (emphasis added). “Compliance with the procedures established by an approved programmatic agreement satisfies the agency’s section 106 responsibilities for all individual undertakings of the

program” *Id.* § 800.14(b)(2)(iii). This is especially true for linear projects like the one at issue here:

Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts. The agency official may defer final identification and evaluation if it is specifically provided for in a memorandum of agreement executed pursuant to § 800.6, a programmatic agreement executed pursuant to § 800.14(b), or the documents used by an agency official to comply with the [NEPA] pursuant to § 800.8.

36 CFR § 800.4(b)(2).⁵

Consistent with these regulations, the PA here was intended to allow work to proceed concurrently with NHPA compliance activities. *See* BLM_0016936.⁶ The PA was not intended to change sovereignty. Rather, it provides that Alaska and BLM each address compliance on their respective lands.

ARGUMENT

BLM claims this Court’s Orders authorize and obligate it to forbid any geotechnical work across federal, State, and private land. In doing so, BLM has distorted this Court’s Orders and ignored its jurisdictional limits under ANILCA, the NHPA, and the Federal Land Policy and Management Act (“FLPMA”). BLM’s aggressive interpretation contravenes State sovereignty

⁵ Indeed, under NEPA, courts have held that where a federal agency has jurisdiction or approval authority over only a small part of a linear project, the entire project is not “federalized,” so that the agency need not even analyze potential effects from parts of the project outside the narrow scope of the agency’s control. *See, e.g., Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d 31, 34-35, 53 (D.C. Cir. 2015).

⁶ BLM also disregards this purpose by taking the position that full cultural resources inventories must be conducted prior to any geotechnical work, which could allow BLM’s prohibition to remain in effect well after the remand. *See, e.g., AWP Ltr.* [Dkt. 253, No. 157-2], at 4.

and ANC ownership rights and blocks data-gathering critical to Project design. This Court's clarification is needed to correct BLM's misinterpretation and allow AIDEA to continue its nondestructive project planning activities as part of its efforts to gather required pre-construction data.

I. BLM Misapplies the Court's Orders and Ignores the Nature of the Approved Work.

BLM asserts that its "environmental status quo" commitment, and the Orders citing BLM's commitment, require it to bar all geotechnical work pending remand, including work approved by Alaska on Alaska land⁷. AWP Ltr. [Dkt. 253, No. 157-2], at 1, 4.⁸ The Court, however, anticipated activities like those approved by Alaska would occur during the remand, and therefore required BLM to provide 28-days' notice for any ground-disturbing activities. Further, the minimally-disruptive nature of the work approved by Alaska – limited geotechnical work at three specific bridge-crossing locations that had been surveyed for cultural and historic resources – meant that it was permissible under NHPA as well as Alaska law, and even under BLM's "environmental status quo" standard. Indeed, this is precisely the type of work that is expected to occur at this stage of the process.

⁷ NANA also approved a land use permit in 2021 for AIDEA to conduct AAP-related activities on its land.

⁸ BLM's AWP Letter suggested the Orders gave it jurisdiction over non-federal land. *See* AWP Ltr. [Dkt. 253, No. 157-2], at 1. After ADNR questioned that suggestion, BLM appeared to acknowledge that the Orders do not change jurisdiction. *See* BLM Response, at 2. It reaffirmed, however, that it would apply its "environmental status quo" standard to the extent of its jurisdiction, maintaining that its jurisdiction extends across the Project's full length. Any claim that the Orders extend BLM's control to non-federal lands would be incorrect and inconsistent with the Court's Order. *See* Recon. Order [Dkt. 253, No. 150], at 12.

A. The Work's Minimal Effects Contradict BLM's Purported Veto.

Alaska concluded that the work, which would be subject to impact-minimization measures, was unlikely to adversely affect significant cultural resources. ADNR Letter, at 1, 4. Indeed, Alaska expressly found that the work satisfied even BLM's "environmental status quo" standard. *Id.* at 1, 5.

Alaska's findings are confirmed by the nature of the work. AIDEA would drill boreholes less than eight inches wide at three locations while the ground is frozen and backfill soil or bedrock afterwards. ADNR Letter at 2, 3-4. Ground impacts "would be temporary in duration and limited in geographic scope." *Id.* at 4.

Given these limited impacts, the Alaska-approved work is equivalent to federal "casual use" activities.⁹ Thus, even if BLM were correct in asserting jurisdiction over State lands, this work would be allowed as casual use. Federal Defendants' ROW suspensions, as filed with this Court, explicitly provides that "casual use" activities would proceed during remand. Suspension of ROW Grants [Dkt. 253, No. 122-1 & 122-2], at 2. The geotechnical work at the three bridge crossings is consistent with the types of activities considered "casual use" because it will result in either no or negligible, temporary ground disturbance. *See* 43 C.F.R. § 2801.5 ("Casual use means activities ordinarily resulting in no or negligible disturbance of the public lands, resources, or improvements. Examples of casual use include: Surveying, marking routes, and collecting data to use to prepare grant applications.").

⁹ "Casual use" applies to federal public lands. *See* 43 C.F.R. § 2801.5 (definition based on public lands disturbance). *See also* 43 C.F.R. § 2804.29 ("You may conduct casual use activities on the BLM lands covered by the application, as may any other member of the public. BLM does not require a grant for casual use on BLM lands.").

B. This Work is a Prerequisite to Project Design.

Barring this work also makes little sense as all parties agree it is a design prerequisite. Alaska explains that baseline geotechnical data “is essential for understanding potential design details of the proposed road and will assist AIDEA in tailoring project parameters to minimize potential environmental impacts while avoiding cultural or historical resources.” *Id.* at 1. The Army Corps requires geotechnical work as a prerequisite to project planning. *See* BLM_0016929, at ¶ 30 (construction work plan to be based on geotechnical work). Indeed, Plaintiffs argued geotechnical work was required before the Record of Decision, which acknowledges that it was essential for planning, had minimal impact, and could proceed without ROD authorization. *See* Plaintiffs’ Opening Brief [Dkt. 187, No. 99], at 12, 23-24. Combined, BLM’s and Plaintiffs’ positions create a catch-22: AIDEA must complete geotechnical work pre-ROD but geotechnical work is prohibited pre-ROD.

Intervenor-Defendants therefore request the Court’s clarification that the Orders do not prohibit nondestructive project planning activities, including geotechnical work or the specific activities authorized by Alaska and ANCs.

II. BLM’s “Environmental Status Quo” Standard is Unsupported and Does Not Justify a Veto of Alaska’s Approval.

BLM’s “environmental status quo” standard is not rooted in either the NHPA or the PA. In seeking remand, the Deputy Secretary represented that “the Department *intends to suspend the ROW permits . . . in order to preserve the environmental status quo.*” Remand Mot., Exhibit 1 [Dkt. 253, No. 111-1], at ¶ 12 (emphasis added). BLM now applies this standard as a mandate from the Court.

During remand briefing, BLM recognized that “initial assessment and further study” to inform the Project would continue on remand. *See, e.g.*, Reply ISO Remand Mot. [Dkt. 253, No. 132], at 6. BLM now maintains that the Court’s Orders require it to prevent this same assessment and study by disapproving all geotechnical work. *See* AWP Ltr. [Dkt. 253, No. 157-2], at 1 (BLM “now considers itself to be legally obligated to preserve [the environmental] status quo”); 4 (prohibiting geotechnical work in part because BLM concluded it would not preserve the “environmental status quo”).

BLM ignores the fact that the “environmental status quo” standard is a product of its own invention. Neither the NHPA nor the PA contemplates evaluating proposed activities based on the potential to alter the “environmental status quo.”¹⁰ BLM has not articulated, nor has AIDEA identified, any clear jurisprudential test for whether an action alters the “environmental status quo,”¹¹ leaving AIDEA to guess as to which pre-construction activities the agency might approve under this arbitrary standard. Intervenor-Defendants thus request clarification that this standard does not supersede NHPA.

III. BLM’s Asserted Jurisdiction Undermines the Congressional Balance in ANILCA.

Congress passed ANILCA in 1980, enshrining a compromise between conservation and development. For conservation, ANILCA codified protections for over 100 million acres of federal land in Alaska, doubled the size of the National Park system, and tripled the amount of

¹⁰ ADNR notified BLM of its view that the “environmental status quo” standard is unsupported. ADNR Letter, at 5.

¹¹ While the Ninth Circuit has provided guidance as to what constitutes alteration of the environmental status quo in determining whether an EIS is required in the National Environmental Policy Act context, that guidance does not apply to an adverse effect analysis under NHPA. *See, e.g., Confederated Tribes & Bands of Yakima Indian Nation v. Fed. Energy Regulatory Com.*, 746 F.2d 466, 475-77 (9th Cir. 1984).

land designated as wilderness in the United States. Edward T. Canuel, *The Four Arctic Law Pillars: A Legal Framework*, 46 Geo. J. Int'l L. 735, 748 n.69 (2015). For development, ANILCA reserved areas for that purpose and mandated that the federal government grant access to those areas. Statutory rights of access guaranteed under ANILCA include the right of the State or a private landowner to have “temporary access” to, or across, conservation areas “in order to permit the State or a private landowner access to its land for purposes of survey, geophysical, exploratory, or other temporary uses thereof whenever he determines such access will not result in permanent harm to the resources” *See* 16 U.S.C. § 3171(a). Nothing in the Alaska-approved work will permanently harm any resources of the area. Here, no intrusion on conservation lands is needed. BLM, however, would deny Alaska and ANCs control of their own lands to perform this data-gathering work.

As part of the ANILCA balance, Section 201(4)(b) provides “there is a need for access for surface transportation purposes across the Western (Kobuk River) unit of the Gates of the Arctic National Preserve (from the Ambler Mining District to the Alaska Pipeline Haul Road) and the Secretary *shall* permit such access. . . .” Pub. L. No. 96-487 § 201(4)(b) (emphasis added). Thus, ANILCA expressly contemplates this very Project.

ANILCA was also intended to fulfill the policy of the Statehood Act, by which Congress transferred 104 million acres of lands to Alaska and required that the State govern and hold the mineral value of those lands in trust for the benefit of the people of the State. *See Alaska v. Norton*, Civil Action No. 05-00012 (RMC), 2005 U.S. Dist. LEXIS 60538, at *3 (D.D.C. June 9, 2005) (citing Pub. L. No. 85-508); *see also Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 549 (1987); *Trustees for Alaska v. State*, 736 P.2d 324, 334 (Alaska 1987). Congress agreed Alaska would have the right to prospect for, mine, and remove minerals from statehood lands,

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vesting immediately upon statehood. *See* Alaska Statehood Act, 72 Stat. 339 § 6(i); *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 176 (2009) (“The consequences of admission [to statehood] are instantaneous, and it ignores the uniquely sovereign character of that event ... to suggest that subsequent [acts by Congress] somehow can diminish what has already been bestowed.”) (Internal quotation marks omitted).

Finally, to preserve the conservation/development balance, ANILCA’s “no more” clause forbade further executive branch withdrawals of Alaska land from development without congressional approval. *See* 16 U.S.C. § 3213(a). BLM’s asserted control over the entire Ambler Access route upends this congressional balance, removing the State’s control of its lands and banning work needed to design the road Congress envisioned.¹²

IV. BLM’s Jurisdiction Does Not Extend to State and Private Land.

BLM contravenes its statutory constraints and the PA by attempting to exercise jurisdiction beyond the 51 miles of federally owned Project land.

A. Federal Authority Over State and Private Land is Limited.

The federal government does not have police power to regulate land use decisions by State or private landowners. *See Solid Waste Agency v. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001). In addition, laws in derogation of State sovereignty must be construed strictly in the

¹² ANILCA (1980) post-dates NHPA (1979), so NHPA cannot reasonably be read to undercut ANILCA’s policy goals absent clear congressional mandate. Moreover, ANILCA is Alaska-specific and must be read as the clearest statement of congressional intent regarding State lands. *See Sturgeon v. Frost*, 577 U.S. 424, 425 (2016) (“ANILCA repeatedly recognizes that Alaska is different, and ANILCA itself accordingly carves out numerous Alaska-specific exceptions to the Park Service’s general authority over federally managed preservation areas. Those Alaska-specific provisions reflect the simple truth that Alaska is often the exception, not the rule.”).

State's favor. *United States ex rel. Walker v. Gunn*, 511 F.2d 1024, 1027 (9th Cir. 1975). The governing statutes do not support BLM's jurisdictional claims.

B. Congress Has Not Granted BLM Authority Over Non-Federal Land.

BLM's jurisdictional claims over State and private land lack statutory basis. Agency authority is limited to that explicitly conferred by statute. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Where a federal agency "lacks authority under [the relevant statute], then its action is plainly contrary to law and cannot stand." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). To determine whether agency action is lawful, courts examine whether Congress delegated authority to the agency to take the action. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Statutory ambiguity alone is not evidence of congressional delegation of authority. *See Sea-Land Serv. v. Dep't of Transp.*, 137 F.3d 640, 645 (D.C. Cir. 1998).

FLPMA, which creates BLM's surface management authority, expressly limits BLM's jurisdiction to federal lands. 43 U.S.C. § 1732; 43 U.S.C. § 1702(e). NHPA likewise charges agencies to "assume responsibility for the preservation of historic property *that is owned or controlled by the agency.*" 54 U.S.C. § 306101 (emphasis added). Nowhere does NHPA grant BLM control over State and private landowners' activities on their own land. The D.C. Circuit has specified that NHPA "is a narrow statute It is their own nest Congress has asked the agencies not to foul." *Lee v. Thornburgh*, 877 F.2d 1053, 1058 (D.C. Cir. 1989). Accordingly, "NHPA imposes obligations only on federal agencies [It] imposes no obligations on state governments[.]" *Id.* at 1056; *see also Presidio Historical Ass'n v. Presidio*, 811 F.3d 1154, 1169 (9th Cir. 2016) (quoting *Thornburgh*).

BLM's asserted prohibition of the Alaska-approved work is inconsistent with NHPA not only because it exceeds BLM's jurisdiction, but also because the State's approval is consistent with NHPA's treatment of preliminary data-gathering. BLM's NHPA regulations specifically contemplate that project planning work may proceed concurrent with ongoing Section 106 compliance:

(c) Timing. The agency official must complete the section 106 process 'prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.' ***This does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106,*** provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties.

36 C.F.R. § 800.1(c) (emphasis added).

The geotechnical work BLM vetoed constitutes the very "nondestructive project planning activities" that 36 C.F.R. § 800.1 supports. This work involves minimal ground disturbance, is key to informing project design, and will facilitate (rather than restrict) accommodations for cultural resources.¹³ In sum, BLM would prohibit work that will support continued and meaningful Section 106 consultation, which BLM claimed as a primary reason for voluntary remand. Remand Mot. [Dkt. 253, No. 111], at 17-20. NHPA, like NEPA, requires federal agencies to evaluate Project impacts, sometimes including impacts of aspects of the Project that are not federally authorized. Neither, however, gives federal agencies authority to prohibit or

¹³ Alaska's approval requires measures minimizing ground disturbance, including limiting geotechnical work to winter "when the ground is frozen and there is no less than six inches of snow." ADNR Letter at 1-2.

control those aspects of the Project not subject to federal approval.¹⁴ The AWP Letter, however, suggests that NHPA gives BLM control over non-federal land, asserting that BLM “has a responsibility under the [NHPA] to ensure that effects to any historic property, regardless of jurisdiction, is accounted for.” AWP Ltr. [Dkt. 253, No. 157-2], at 1 (citing 54 U.S.C. §§ 306102(b)(3) and 306108) (emphasis original). The “accounted for” language is telling. These provisions do not address jurisdiction.

Section 306102(b)(3) neither expands nor even identifies BLM’s *authority*. Rather, it merely requires that BLM’s program shall ensure that: “the preservation of property *not under the jurisdiction* or control of the agency *but potentially affected by agency actions* is *given full consideration* in planning[.]” 54 U.S.C. § 306102(b)(3) (emphasis added). This does not authorize BLM to seize control of activities outside of its jurisdiction. It specifies what BLM must consider when acting within its jurisdiction. “Considering” something is not the same as controlling it. Indeed, the existence of this provision underscores that BLM does not govern non-federal lands. By its terms, this provision applies where the agency lacks jurisdiction. If the agency has jurisdiction, it is not needed. Even if this language were ambiguous, that is not evidence of congressional delegation of authority – explicit delegation is required. *See Sea-Land Serv.*, 137 F.3d at 645; *see also Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001) (Congress does not “hide elephants in mouseholes”).

¹⁴ *See City of Grapevine v. Dep’t of Transp.*, 17 F.3d 1502, 1508-09 (D.C. Cir. 1994) (Private project sponsor could proceed with “planning, engineering, or what have you short of construction” pending Corps’ completion of NHPA 106 process, recognizing investment could be lost due to later NHPA adverse effect finding by Corps); *Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d 31, 34-35, 53 (D.C. Cir. 2015).

Section 306108 conveys a similar message: agencies with authority over undertakings must “*take into account*” effects on historic properties. *See* 54 U.S.C. § 306108 (emphasis added). Requiring BLM to take effects into account says nothing about what BLM may *do* about them. This language does not displace State sovereignty.

BLM’s AWP Letter also points to an NHPA regulation, claiming it proves “it is ultimately the BLM and SHPO, in consultation with tribes, who make the final determination on what constitutes adverse effects[.]” AWP Ltr. [Dkt. 253, No. 157-2], at 1. Agency regulations, however, cannot expand statutory jurisdiction. Further, the regulation BLM cites – 36 C.F.R. § 800.5(a) – does not address jurisdiction and certainly does not authorize BLM to override State regulation of State lands: “In consultation with the SHPO/THPO . . . the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects.” As with the NHPA provisions above, this section supplies criteria that BLM must use *where it already has jurisdiction*: it does not allow BLM to apply those criteria beyond its statutory authority.

Because Congress has not delegated BLM authority over State lands, BLM’s purported veto is “plainly contrary to law and cannot stand.” *Michigan*, 268 F.3d at 1081.

C. The PA Does Not Grant BLM Authority Over Non-Federal Land.

BLM claims that the PA allows it to displace State and ANC jurisdiction over their own lands. It maintains that AIDEA must obtain BLM approval of any Project work on State and ANC lands, irrespective of State or ANC authorization, the nature of the work, or whether it could affect cultural or historic resources. *See, e.g.*, BLM’s May 27, 2022 letter to AIDEA (Dkt. 187, ECF No. 150-3, Dkt. 253, ECF No. 149-3) at 11-13; AWP Ltr. [Dkt. 253, No. 157-2], at 5.

1. The PA Does Not Grant BLM Authority Over State Lands.

Even if PAs could extend BLM’s statutory authority to State and private lands, the PA for this Project does not. Like most PAs, this PA’s function is to allow “nondestructive project planning activities” to proceed while NHPA activities are ongoing. Such information-gathering activities are essential to identify and protect historic resources as well as to support design, engineering, and permitting. The information gathered feeds into the NHPA process, not only to identify resources, but also to develop plans to minimize impacts.

The PA’s text recognizes that the State and federal governments have control within their separate spheres, particularly in managing activities on their respective lands and agency jurisdictions. The PA expressly states that each agency and the State manage activities according to their “*respective* jurisdictions.” BLM_0016939 (emphasis added); *see also* BLM_0016940 (PA at § IV(D)) (AIDEA will ensure that “all necessary federal, state, and private landowner permits and/or authorizations are obtained for conducting archaeological survey, excavation, and monitoring, consistent with the permitting process for the applicable agency and/or landowner.”).

In other words, the PA directs that each governmental entity controls its own land.

Section III(B) goes on to provide that:

The BLM, the NPS, the USACE, **and State shall ensure** that no ground disturbance, including brush clearing, geotechnical surveys, or any other activity associated with the Project that may affect historic properties, takes place within a Project Segment, Stage, or Component until identification, evaluation, and on-site measures for resolution of adverse effects have been completed for that Segment, Stage, or Component. The NPS, the USACE, **and State** will inform the BLM in writing **once the stipulations within each agency’s scope**, as outlined in this PA, **have been satisfied** by the Permittee. The BLM **will** then provide written **notice** to the Permittee that Section 106 requirements have been satisfied for that Segment, Stage, or Component.

BLM_0016939 (PA at § III(B)) (emphasis added). Again, authority for approval is divided based on each agency’s jurisdiction. The final subsection under this heading specifically identifies the separate federal and State cultural resources regulatory provisions that apply “respectively” to each distinct agency: “[t]he BLM, the NPS, the USACE and State shall consult, at a minimum, during the Annual Meeting to ensure that *each agency* independently satisfies *its respective regulatory requirements under 36 CFR 800 and AS 41.35.200(a)*.”¹⁵ BLM_0016939 (PA at § III(C)) (emphasis added); *see also* BLM_0016959 (PA at § XV(A)(iii)) (at annual meeting “facilitate(d)” by BLM, “[t]he BLM, together with the other PA Signatories, will consider: Whether *each agency* (BLM, NPS, USACE, *State*) has met its *respective responsibilities* under the PA”) (emphasis added)).

2. The PA Does Not Grant BLM Authority Over ANC Lands.

The PA belies BLM’s claims that the PA gives it authority over private lands. The PA completely exempts private lands: “[t]his PA shall apply to the Project . . . , *so long as* the activities occur *within the jurisdiction of a state or federal agency*.” BLM_0016938 (PA at § II(A)) (emphasis added).

NHPA’s regulations also make clear that the PA does not apply to ANC lands: “A programmatic agreement shall take effect . . . only when the THPO, Indian Tribe, or a designated representative of the tribe is a signatory to the agreement.” 36 C.F.R. § 800.14(b)(2)(iii). Both the regulations and the NHPA include Alaska Native (Regional) Corporations within the

¹⁵ The PA’s treatment of inadvertent discoveries makes the same distinction. While discoveries on State or private land require AIDEA to “consult” with the parties on an appropriate treatment plan (BLM_0016948-49 (PA at § XIII(D))), only discoveries on Federal land require compliance with specific Federal protocols (BLM_0016950 (PA at § XIII(E))).

definition of “Indian tribe.” 36 C.F.R. § 800.16(m); *see also* 54 U.S.C. § 300309. Neither Doyon nor NANA joined the PA. Accordingly, the PA does not govern activities on their lands.

BLM’s attempt to displace ANC jurisdiction is especially problematic given Supreme Court guidance that “federal statutes and regulations relating to tribes and tribal activities must be construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.” *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 846 (1982) (internal quotation marks omitted). Thus, “federal statutes must be read” against the “backdrop” of the fact that an Indian tribe’s “claim to sovereignty long predates that of our own Government.” *McClanahan v. State Tax Comm’n*, 411 U.S. 164, 172 (1973). “Rights arising from” statutes impacting tribal entities “must be interpreted liberally, in favor of the Indians.” *Parravano v. Masten*, 70 F.3d 539, 544 (9th Cir. 1995).

V. BLM’s Jurisdictional Claim Will Increase Harm to AIDEA.

BLM’s actions materially increase harm to AIDEA. “Geotechnical investigation is a critical item for developing the final engineering of the road.” Second San Juan Decl. [Dkt. 253, No. 149-1], at ¶ 11; *see also* Section I, *supra* (ADNR, Army Corps, Plaintiffs treating geotechnical work as prerequisite). BLM’s recent status report provides a one-year timeline for its review on remand. Defendants’ Third Status Report [Dkt. 253, No. 164], at 2-3. Thus, at a minimum, BLM would delay this information for at least a year.

Given the lengthy planning timelines for this type of work, the limited contracting and personnel resources available, and seasonal limitations on work, even a brief delay could force AIDEA’s schedule out another year, to at least the winter of 2024-2025. AIDEA, its contractors, and the many Alaskans who need Project work for their livelihoods, have already suffered from

BLM's delays. *See* AIDEA Joinder in Joint Response to Status Report [Dkt. 253, No. 162], at 2-3 & Exhibit A (identifying human and economic harms caused by BLM's delays). BLM's exercise of extra-jurisdictional control over State and ANC lands to block necessary information-gathering activities throughout the indefinite remand will only exacerbate these harms.

CONCLUSION

For the foregoing reasons, the Intervenor-Defendants respectfully request that the Court issue an order clarifying that (i) the Court's prior Orders do not prohibit all ground-disturbing activities; and (ii) neither the Orders, governing statutes, nor the PA grant BLM authority over State and ANC lands.

Dated: January 19, 2023

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CERTIFICATE OF SERVICE

I hereby certify on January 19, 2023, I caused to be electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification and electronic service of the same to all counsel of record.

HOLLAND & HART LLP

/s/ Kyle W. Parker

JOINT MOTION FOR CLARIFICATION

Northern Alaska Environmental Center v. Bernhardt, Case No. 3:20-cv-00187-SLG and *Alatna Village*

Council v. Padgett, Case No. 3:20-cv-00253-SLG

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Case 3:20-cv-00253-SLG Document 172 Filed 01/19/23 Page 25 of 25



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Natural Resources

OFFICE OF THE COMMISSIONER

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November 18, 2022

File No.: 3480 BLM Ambler / 2022-00455

Geoff Beyersdorf
District Manager, Fairbanks Office
Bureau of Land Management
Central Yukon Field Office
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Fairbanks, AK 99709-3816
gbeyersd@blm.gov

Subject: Winter Field Work Under Existing, PA-Compliant State Permits on State Lands

Dear Mr. Beyesdorf:

We write in follow up to the extensive dialogue and process that has occurred regarding the Ambler Access Project that is being developed by the Alaska Industrial Development and Export Authority (AIDEA), specifically concerning elements of the 2022 Annual Work Plan (AWP) and state-authorized preconstruction work and baseline data gathering activities on state-owned and managed lands.

Particularly, we wish to confirm that, per the Programmatic Agreement (PA) Section III.B. and consistent with 36 C.F.R.800.5(b), AIDEA has satisfied the PA stipulations within the Alaska Department of Natural Resources' (DNR) scope of authorities related to the subset of activities specifically authorized by DNR under Land Use Permit (LUP) No. 33936, and we urge your concurrence with our determination that the following described activities can proceed this winter field season:

“Geotechnical field investigations on the John, Wild, and Koyukuk Rivers as detailed in the Project Description submitted in the application materials, consisting of drilling boreholes using track mounted Eijkelkamp sonic drill, placement of thermistors in select boreholes, establishing temporary work camps during drilling activities, and conducting seismic surveys.”

This baseline data is essential for understanding potential design details of the proposed road and will assist AIDEA in tailoring project parameters to minimize potential environmental impacts while avoiding cultural or historical resources. Moreover, the geotechnical work permitted by LUP No. 33936 would maintain the environmental status quo.

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Exhibit A, Page 1 of 7

In adjudicating Permit No. 33936, the Alaska Division of Mining, Land and Water (DMLW) consulted fully with the State Office of History and Archaeology (OHA) in accordance with AS 42.35.070. In the course of this consultation, on February 22, 2022, OHA determined that “the proposed actions are unlikely to adversely affect significant cultural resources if minimization measures are enacted.”

OHA recommended minimization measures as follows:

- “that the Geotech testing occur when the ground is frozen and there is no less than six inches of snow.”
- “avoiding all recent use sites pending consultation with communities concerning their local significance.”
- “Should inadvertent discoveries of cultural resources occur during the duration of the projects, [OHA] should be notified...”

In response, DMLW incorporated all of OHA’s recommendations into Permit No. 33936, making them binding conditions of AIDEA for the limited uses and activities authorized under the permit. Consistent with Alaska law and policy, DMLW also issued a 14-day public notice on February 4, 2022, that described AIDEA’s proposed activities, including specific information on the location of the three bridge crossing sites.¹ AIDEA signed LUP No. 33936 on March 4, 2022, completing the authorization and their commitment to its conditions for purposes of State of Alaska review and approval.²

This approach is fully consistent with DNR’s authorities and jurisdiction over its own lands, resources, and processes as acknowledged in the PA, the processes laid out in the PA itself, and the substance and intent of the multiple reviews underway for the project as a whole. We ask that BLM provide concurrence and confirmation of this position by December 1, 2022, so that this authorized work may timely proceed this winter.

DNR has previously expressed concern to BLM that work authorized on State owned and managed lands was not proceeding expeditiously. On April 14, 2022, then-Commissioner Feige notified BLM that “BLM effectively prevented AIDEA from conducting activities on state lands and waters that had been approved by [DNR] through a Land Use Permit (No. 33936, issued March 4, 2022) and Temporary Water Use Authorization (F2022-009, issued March 1, 2022). This is inappropriate interference with state activities.” It is time to remedy this issue and allow AIDEA to proceed with the authorized work.

BLM’s Conditional Approval of AIDEA’s AWP Improperly Excluded Geotechnical Drilling Previously Authorized by the State.

¹ Available at: (<https://aws.state.ak.us/OnlinePublicNotices/Notices/View.aspx?id=205365>)

² DMLW also issued TWUA No. F2022-009 for water withdrawals related to proposed geotechnical drilling operations at the John River, the Wild River, and the Koyukuk River on March 1, 2022.

We also understand that the review of activities in the AWP has had a complex history, and we wish to clarify the scope of authority and responsibilities that are commended to the State under the PA, how we understand the reviews to date have addressed the subset of activities authorized under this permit compared with the broader suite of activities in the AWP, and the proper scope and interpretation in light of BLM's August 19, 2022 conditional approval of the AWP and general comments submitted by the State Historic Preservation Officer (SHPO) to BLM on August 15, 2022, just prior to the issuance of the conditional approval.

The AWP was subject to review by signatories to the PA and consulting parties, and, with regard to review of the AWP as a whole, SHPO provided a letter on August 15, 2022, providing general comments on the AWP. To clarify and confirm, these comments, submitted on the BLM's finding of effect in the capacity as SHPO under section 106 of the NHPA, did not detract from the specific consultation conducted under state law between DMLW and OHA on the specific subset of activities identified in LUP No. 33936 to define adequate avoidance and minimization measures.

Subsequently, on August 19, 2022, BLM conditionally approved certain activities in the AWP and declined to approve others – particularly, geotechnical drilling across a range of sites was not authorized. With its conditional approval, BLM enclosed the August 15, 2022, letter from SHPO that BLM appeared to interpret as concurrence from SHPO for BLM's blanket denial of geotechnical drilling and land clearing/site preparation in support of drilling. However, the August 15, 2022 letter by SHPO included concurrence regarding the finding of effect made by BLM on August 1, 2022, which included various measures to avoid and minimize effects to historic properties. OHA does not believe that additional avoidance and minimization measures are necessary under AS 41.35. DNR believes that the activities that have already been approved under LUP No. 33936 should be allowed to move forward under the measures requested by OHA to avoid potential effects to cultural resources on state lands. To the degree that BLM denied the geotechnical drilling and land clearing/site preparation in support of drilling for lands previously authorized and consulted upon, we believe this is in error and not based on authorities or processes outlined in the PA.

Accordingly, viewed in totality with the appropriate standard governing the State's review of preconstruction activities, and the State's authorities and responsibilities for the management of its own lands under the PA, DNR urges concurrence from BLM that the proposed geotechnical work authorized by DNR under LUP No. 33936 and TWUA No. F2022-009 satisfies the PA stipulations within DNR's scope of authorities on State lands as recognized in the PA. We reaffirm that requirements regarding evaluating potential adverse effects have been completed for this subset of work on state lands pursuant to AS 41.35.070.

Detailed Description of Activities for Permitted Geotechnical Drilling

AIDEA has been permitted to conduct geotechnical drilling on State lands to support collection of physical data that will inform appropriate Project design. This is only a subset of the broader suite of geotechnical drilling sought under the AWP. To perform this work, AIDEA is permitted to create a vertical hole in the ground no more than 8 inches in diameter, using a drill casing that

allows for retrieval of the soil or bedrock encountered. All material generated from advancing the boring – called cuttings – would be collected for backfilling into the annulus after the boring is completed. If insufficient cuttings are generated to completely backfill the hole, the remaining space would be filled with bentonite or cement grout. Replacing the cuttings and any additional backfilling will avoid introducing an annulus for water or adjacent soil migration and prevents disruption of the subsurface environment.

Geotechnical drilling activities on State lands would also require mobilizing personnel and equipment to potential material sites and bridge crossings by helicopter. Helicopter access requires the presence of a naturally occurring or project-created landing zone. The drill spread, which includes the drill rig, equipment staging area (*e.g.*, coring tubes, sawhorses, brushes for cleaning drill casings, sample boxes for core sample storage), personnel relief tent (*e.g.*, portable latrine, rest area, food and water area, first aid station) requires a larger area than the helicopter landing zone and would be established according to the same protocol as those applied to landing zones.

Following completion, AIDEA would effectively return the site to its prior visual conditions. All material used during geotechnical drilling activities would be removed from the site, and any native material that could not be used to backfill the hole would be spread adjacent to the boring. The area would appear altered only in the clearing of vegetation required for the helicopter landing zone and establishment of the drill spread.

Furthermore, ground impacts from these approved activities would be temporary in duration and limited in geographic scope. AIDEA also has planned numerous modifications to the geotechnical drilling activity described in the LUP to further minimize disruption of the environment. For example, AIDEA has eliminated plans of overland travel and remote camps, such that personnel and equipment would be transported by helicopter to drill sites and back to established camps (*e.g.*, Coldfoot, Bornite, or similar).

To the extent that the bridge sites where the work would occur have been identified as travel corridors, AIDEA's proposed work would adhere to all commitments outlined in the Environmental Impact Statement which require maintaining access to the river. The work would not restrict movement along the river. Most importantly, conducting this work in the winter minimizes any potential impacts. Any minimal impacts for the duration of the 2022-23 winter season would be temporary and limited to a time when travel is rare.

Thus, as acknowledged in OHA's consultation on the permit, AIDEA's geotechnical drilling will entail temporary ground disturbance and has a small potential to impact cultural resources. The mitigation measures to which AIDEA has committed, however, will ensure that any potential for adverse effects pursuant to 36 C.F.R. 800.5(a) will be avoided. Accordingly, a finding of no adverse effects was appropriate under Section 106 of the NHPA – consistent with the responsibility commended to SHPO under the National Historic Preservation Act. *See* 36 C.F.R. 800.5(b) (a finding of no adverse effect is appropriate when identification has been completed and where the undertaking's effects either do not meet the criteria in subsection (a)(1) "or the undertaking is modified or conditions are imposed" to ensure that adverse effects are avoided).

To the degree BLM claims that work under LUP No. 33936 would not preserve the “environmental status quo,” we assert this is without basis in the PA or law – in the National Historic Preservation Act or otherwise. AIDEA’s commitment to conduct work during the 2022-23 winter months will minimize ground disturbance, satisfying the PA and NHPA Section 106.

Appropriate Process and Considerations Under the PA

While BLM’s August 19, 2022, letter cites 36 C.F.R. 800.5 as authority, DNR is concerned that the letter – which purports to include SHPO’s concurrence – appears to broadly apply an additional standard of review to all of the activities in the AWP. BLM’s letter states that it adopted a two-part approach to analyzing activities proposed in the AWP. First, the BLM evaluated whether each activity would satisfy the conditions of the PA, informed in part by comments from Consulting Parties. For LUP No. 33936, the State believes that this has occurred. Second, the BLM determined whether each proposed activity would preserve the “environmental status quo,” per ongoing litigation before the U.S. District Court for the District of Alaska.³ BLM explained that “the Court based, in part, its orders granting remand (May 17, 2022) and denying reconsideration thereof (June 14, 2022), on DOI’s commitment to preserve the ‘environmental status quo’ during remand, and thus the BLM now considers itself to be legally obligated to preserve that status.”

DNR is unaware of a basis under either the NHPA or the terms of the PA for evaluating proposed activities based on whether they have the potential to alter the “environmental status quo.” We also do not understand the litigation before the U.S. District Court for the District of Alaska to direct the BLM to depart from its obligations under the NHPA as they pertain to actions within the State’s jurisdiction. BLM’s conditional approval letter provides no definition of the “environmental status quo” and cites no authority beyond the pending litigation for use of the standard to analyze proposed Project activities.⁴

Further, BLM’s assertion that it must maintain an “environmental status quo” finds no basis in the Court’s remand order. BLM misconstrues this order as a blanket prohibition to any ground disturbing activity. The Court, however, was not that restrictive. In fact, the Court did not prohibit *any* surface disturbing activities from occurring; instead, the Court required only that BLM provide the plaintiffs in that lawsuit with advance notice of any approval to conduct surface disturbing activities beyond a limited set of activities identified by the Court. Presumably, the advance notice is intended to allow plaintiffs to seek to enjoin the approved activity if they believe it to potentially impact cultural or historical resources. Because BLM’s refusal to permit ground disturbance has no basis in the Court’s order, it is inappropriate and unnecessary.

³ *Northern Alaska Environmental Center (NAEC) v. Haaland* (3:20-cv-00187-SLG); and *Alatna Village Council v. Cohn* (3:20-cv-00253-SLG).

⁴ DNR is concerned about the implications of BLM applying so extensive an interpretation of this legally undefined and unauthorized standard to deny activities as a general matter, but is available to discuss it once the immediate issue of LUP No. 33936 is resolved. We believe applying Section 106 in this manner going forward may create uncertainty for project proponents and could be deemed arbitrary decision-making.

Moreover, the PA, and the processes it has identified for approvals of activities occurring on federal, state, and private land, has not been suspended or modified by the Court. Although BLM may believe that it must apply this additional standard prior to authorizing any project activities on federal lands, BLM does not have the authority to apply this standard to DNR's authorization of activities on State lands, or to apply this standard to the processes identified in the PA as falling within the jurisdiction of SHPO to consult and assess for purposes of Section 106 compliance. BLM's role under the PA for activities permitted on State lands is not as an independent regulator, but instead BLM is to merely act as a record-keeper to ensure that the process has been completed. Section III(B) provides BLM no veto authority over State-issued permits for activities occurring on State lands, either under the PA or under the NHPA.

Request for Concurrence

DNR hereby requests BLM's concurrence that AIDEA's proposed geotechnical drilling, as permitted, and as outlined in detail within AIDEA's permit application and LUP No. 33936, will result in no adverse effect to historic and cultural resources, as recognized by SHPO and as required by Section III(B) of the PA and 36 C.F.R. 800.5(b). The PA⁵ gives the State of Alaska the responsibility for implementation of the PA on State lands, not the BLM – nonetheless, DNR seeks BLM's concurrence to preserve relations among the PA signatories, ensure that signatories are not working at cross-purposes, and avoid unproductive jurisdictional disputes.

DNR further understands from its engagements with AIDEA that time is of the essence to plan for and conduct this work. As outlined in this letter, undertaking this work during the winter months will minimize ground disturbance and limited time remains for AIDEA to plan for and mobilize work during the 2022-23 winter season. Accordingly, DNR requests that BLM provide its concurrence on this matter by December 1, 2022. Should BLM decline to respond to this letter, we will assume that BLM withholds its concurrence.

We thank BLM in advance for its prompt review and consideration of this matter and look forward to continuing to work in coordination to implement the PA in furtherance of a project which is vital to the State of Alaska and its residents.

Sincerely,



Akis Gialopsos
Acting Commissioner

Cc: Jeff San Juan, AIDEA jsanjuan@aidea.org
Bill Marzella, Advisory Council of Historic Preservation bmarzella@achp.gov
Steve Cohn, BLM blm_ak_state_director@blm.gov

⁵ See Sections II(B) and III(A).

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**STATE OF ALASKA DEPARTMENT OF NATURAL RESOURCES
DIVISION OF MINING, LAND AND WATER**

Northern Regional Land Office

Memorandum of Decision

LAS 33936

Alaska Industrial Development and Export Authority (AIDEA)

Application for Land Use Permit

AS 38.05.850

Requested Action

The Department of Natural Resources (DNR), Division of Mining, Land, and Water (DMLW), received an application for a 5-year Land Use Permit (LUP) to conduct geotechnical investigations at three bridge locations along the proposed Ambler Road alignment on the John, Wild, and Koyukuk Rivers. Work will occur when the sites are frozen and consist of drilling 100 ft bore holes using a small track mounted Eijkelkamp sonic drill, seismic investigations, and installation of thermistors in select boreholes.

Proposed Action

Issue an LUP for the activity as proposed on state lands.

Scope of Decision

The scope of this decision is limited to determining if it is appropriate for DNR to issue an authorization for the proposed land use activities.

Statutory Authority

This permit is being adjudicated pursuant to AS 38.05.850.

Administrative Record

The administrative record for the proposed action consists of the Constitution of the State of Alaska, the Alaska Land Act as amended, applicable statutes and regulations referenced here-in, Land Classification Order No. NC-001-21, and the casefile for the application serialized by DNR as LAS 33936.

Location Information

Geographic Location: Within the eastern 40 miles of the proposed alignment for Ambler Road, at the bridge crossings for the John, Wild, and Koyukuk Rivers. These sites are approximately 8 to 15 miles northerly of Bettles.

Latitude:

67.03716 N

67.04239 N

67.03073 N

Longitude:

-151.81074 W

-151.48494 W

-151.12958 W

Legal Description:

Within: Section 31, Township 26 North, Range 19 West; Sections 27 and 34, Township 26 North, Range 18 West; and Section 32, Township 26 North, Range 16 West, Fairbanks Meridian.

Other Land Information

Regional Corporation: Doyon, Ltd.

Title

Lands within Section 31, Township 26 North, Range 19 West, Fairbanks Meridian were acquired under General Grant GS 4758, and Tentatively Approved on July 24, 1984, excepting and reserving a right-of-way for ditches and canals, and a right-of-way for railroads, telegraph and telephone lines.

The remaining uplands in the area of interest are owned by Doyon, Ltd. However, the John, Wild, and Koyukuk are navigable rivers. The State received title to the submerged lands of navigable waterbodies under the Alaska Statehood Act (P.L. 85-508) and the Submerged Land Act of 1953 (P.L. 31, 83rd Congress, First Session; 67 Stat. 29). Therefore, the lands below ordinary highwater within Sections 27 and 34 of Township 29 North, Range 18 West, and Section 32 of Township 26 North, Range 16 West, are managed by the State.

Planning & Classification

The lands of interest are presently unclassified. However, a Site Specific Land Use Plan (SSP) under Land Classification Order No. NC-001-21 is being developed concurrently with the Ambler Road Easement ADL 421741, of which this authorization is a part. The lands of interest are proposed to be within Unit A-02 which would be designated Habitat and Recreation Dispersed. The activities proposed under this authorization are not inconsistent with the proposed land use plan.

Third Party Interests

The activities to be authorized by this LUP are in support of the proposed 211-mile Ambler Road, ADL 421741.

Background

The proposed bridge geotechnical drilling project on the John, Wild, and Koyukuk Rivers is part of the preliminary field work in support of the construction of Ambler Road. Ambler Road has been proposed by AIDEA as a 211-mile private industrial access road to the Ambler Mining District. The road is intended to facilitate mine development and transportation of ore as part of the Ambler Access Project.

The road alignment crosses lands owned and/or managed by federal, state, municipal, and private entities. Currently, AIDEA has applied to the State for a private exclusive easement for those portions of the road on state managed lands. Adjudication of the easement application is ongoing.

The geotechnical field work to be authorized by this permit is necessary to characterize the riverine environment for bridge planning and design. The main objectives include identification of subsurface thermal regime and permafrost, possible bedrock, and soil type.

The field work will be conducted in March while sites are frozen and consist of drilling 100 ft bore holes using a small track mounted Eijkelkamp sonic drill, seismic investigations, and installation of thermistors in select boreholes. Drilling operations will be conducted in two 12-hour shifts. The sonic drill will be transported to each site and to each side of the rivers using a helicopter but walked to adjacent boreholes on tracks. Seismic surveys of approximately 3,000 to 6,000 ft will be conducted on foot using Bluetooth enabled geophones. Thermistors will be installed in bore holes using one inch, schedule 80 PVC pipe. Data loggers mounted to Unistrut will be at each thermistor well. In-stream thermistors will be flagged. Sites within the flood plain and submerged lands will be protected during break up using a waterproof vault. Sites may be visited at any time of the year to retrieve data as necessary. Once data collection is complete, instrumentation will be removed and PCV pipe removed or cut below the surface as far as practicable.

All geotechnical equipment (drill, geophones, etc.) and camp equipment (tents, generators, etc.) will be slung by helicopter to the river sites. Temporary camps capable of supporting 15 personnel will be established at each site consisting of sleeping, dining, kitchen, office, and hygiene tents. Fuel storage of diesel and Jet A will consist of five double wall aluminum helicopter “fly” tanks of 110- or 119-gal capacity. One additional 110-gal tank will be used for unleaded gasoline. All fueling will include spill prevention methods such as drip pans and vinyl liners with foam dikes. Two snowmachines will be on site for incidental personnel transport between camp and Bettles.

Public Notice & Agency Review

Agency Review Summary

A request for Agency Review was sent on February 4, 2022, with comments due by February 18, 2022, to the following entities:

- Department of Fish and Game (ADF&G), Habitat Division;
- ADF&G, Access Defense;
- DNR, DMLW, Water Section;
- DNR, Office of History and Archaeology (OHA), State Historic Preservation Office (SHPO);
- Department of Environmental Conservation (DEC), Commissioner’s Office; and
- U.S. Fish and Wildlife Service (USFWS).

Agency Review Comment and Response

ADF&G, Habitat: Fish Habitat Permits have been issued for this proposed work. No additional comments.

DNR Response: Comment noted.

DNR, OHA, SHPO: State law requires all activities requiring licensing or permitting from the State of Alaska to comply with the Alaska Historic Preservation Act, which prohibits the removal or destruction of cultural resources on land owned or controlled by the State. The project area was surveyed for cultural resources in 2021. The methods used were adequate to identify above-ground

cultural resources. Our office believes that the proposed actions are unlikely to adversely affect significant cultural resources if minimization measures are enacted. Our office recommends that the Geotech testing occur when the ground is frozen and there is no less than six inches of snow. In addition, we recommend avoiding all recent use sites pending consultation with communities concerning their local significance.

Should inadvertent discoveries of cultural resources occur during the duration of the project, our office should be notified so that we may evaluate whether the resources should be preserved in the public interest (as specified in Section 41.35.070[d]).

DNR Response: The permit will specify that work shall be done when the ground is frozen and there is no less than six inches of snow on the ground. In addition, the permit will recommend that all recent use sites be avoided.

Further, the permit shall include the following stipulations:

The Alaska Historic Preservation Act, AS 41.35.200, prohibits the appropriation, excavation, removal, injury, or destruction of any state owned historic, prehistoric, archaeological or paleontological site without written approval from the DNR Commissioner. Should any sites be discovered, the Grantee shall cease any activities that may cause damage and immediately contact the AO (Authorized Officer) and the Office of History and Archaeology in the Division of Parks and Recreation.

DEC, Commissioners Office: No comments regarding this permit.

DNR Response: Comment noted.

Public Notice Summary

Public Notice was posted to the State of Alaska Online Public Notice System on February 4, 2022, with comments due on February 18, 2022.

Public Notice Comment and Response

On February 18, 2022, a letter from the Tanana Chiefs Conference and the Evansville Tribal Council was received by email via the Law Office of Teresa Clemmer. The letter requested that the DMLW find AIDEA's permit application insufficient and require AIDEA to submit a new application with additional information. The letter then outlined the State's permitting requirements, detailed the perceived inadequacies of the application, and outlined the additional information needed for a thorough evaluation of the activity.

The letter detailed several points that were argued as deficiencies in the application materials. These points are briefly summarized below, with a corresponding State response.

- Inadequate descriptions and diagrams within the application
The application materials do not contain sufficient detail of the proposed activity, lacked scaled drawings and maps of sufficient detail, and did not include certain supplemental application forms.

State Response: Prior to submission of the application, DMLW staff worked with the applicant to clarify the information necessary for a complete application. The submitted application included the information requested by DMLW and is sufficient for the activities that require an LUP. The application materials are also consistent with other applications for similar activities on state land.

- Project duration, timing, and length of permit

The application materials describe activities that occur on frozen ground but do not specifically outline a seasonal component or overall duration. Activity timing is inconsistent and vague because the permit term is for 5 years but described activities are consistent with a single season exploration. Activities are also described as “initial” which implies that the full scope of work is not described, and additional undisclosed exploration activities will occur.

DNR Response: The applicant has requested single season geotechnical drilling at three sites. The drilling will occur during the month of March, (possibly into April given field conditions), and not extend into other seasons or years. This permit will not authorize activities requiring a permit beyond what has been described in the application materials, and any new activities requiring a permit will need a new application. A 5-year authorization is used here for the placement of thermistors, which may remain in place for over a year, if necessary, and be visited periodically by helicopter. Any exploration activities not described or beyond the scope of the application materials are not authorized by this decision.

- Additional permitting and fees

The proposed borehole drilling will result in the removal of material from state land. It is presumed that the applicant will use material that is field classified to level working areas and tent platforms. It is also presumed that the applicant will require level working surfaces and camp platforms and if material from boreholes is not used for leveling, the application will remove material from the rivers as fill. This is akin to dredge-and-fill activities that would necessitate a material sale from the State, and potentially a permit under Section 404 of the Clean Water Act and a Stormwater Pollution Prevention Plan.

DNR Response: The applicant did not describe dredge-and-fill activities in the application materials, and such activities are not authorized under this permit.

While borehole drilling results in the removal of material from the borehole, this use does not rise to a material sale as the material is not being put to a beneficial use. The permit does not authorize the use of the removed material as a fill for any purpose other than to characterize the geology of the area. This is consistent with other permits issued by the DMLW for geotechnical drilling operations around the State.

It is also the responsibility of the applicant to determine and secure any additional permits necessary for the activity they are undertaking, such as a 404 permit and a SWPPP. The DMLW does not determine what additional permits may be necessary.

- Premature Reliance on Cultural Resource Investigation

The applicant relies on cultural resource surveys from 2021 which are in draft form and under review by the BLM and SHPO. The comment period on this report remains open until March 15, 2022, after the date when the applicant proposes to begin work. The State should reject the March 1 effective date until after the cultural survey work has been approved by the BLM.

DNR Response: SHPO was included in the agency review of this application and submitted comments on the proposed activities. SHPO comments did not raise any issues with the activities as long as the ground is frozen and there is six inches of snow. SHPO did not raise any concerns with a March 1 start date. As such the permit will be effective on the date the permit is signed by the applicant.

Further, the permit will contain stipulations should cultural resources be encountered during the course of work, as described above.

- Applicant as a Corporation, and requirements for Bonding and Insurance

The applicant is a corporation and needs include a license to do business in the State of Alaska as part of the application materials. No business license was included. Further to ensure compliance with permit stipulations and mitigate damage to state resources, the applicant must supply insurance and bonding. This information was not included in the application materials.

DNR Response: The applicant is AIDEA, a corporation established by the Alaska State Legislature to do business on behalf of the State of Alaska. As the applicant is a state entity, it is treated as an agency and no business license is required.

Insurance and bonding requirements are not noticed with the application during the agency or public notices. Insurance and bonding requirements are determined during the adjudication of the decision once the activity has been evaluated and comments have been received from noticed agencies. The applicant will be required to show sufficient insurance and/or bonding if it is determined by the State to be necessary for the permitted activity.

- Inadequate Discussion of Potential Impacts and Mitigation

The application materials offer no discussion of how their activities may harm resources in the area. There is no discussion of subsistence activities, cultural resources, fish populations, wildlife, or invasive species.

DNR Response: The DMLW solicits comments and information by noticing the application to agencies that specialize in these areas, and to the public. The goal of notice is to receive additional information about potential impacts or topics that the DMLW is unaware of. Relevant information is used to inform the decision-making process.

The DMLW received no additional information beyond what is addressed in the Agency Review section above. We received no additional information regarding possible subsistence impacts or possible adverse impacts to fish and wildlife.

The comments from TCC and Evansville submitted by Teresa Clemmer also included a supplemental letter of questions from Monty Rogers of Cultural Alaska. These questions are summarized below with corresponding DNR responses.

1. AIDEA's application doesn't address "noticeable animal use of the area" (Page 4 of the application). Is it AIDEA's position there is no wildlife at these locations? AIDEA should clarify plans to mitigate the effects of their activities on wildlife in the area, including procedures should wildlife approach the work areas.

DNR Response: DMLW included ADF&G in agency notice to solicit expert knowledge and concerns about possible fish and wildlife issues at these sites. No additional comments from ADF&G were received beyond confirmation that AIDEA has applied for and received the necessary Fish Habitat Permits.

2. The application does not describe the use of traditional knowledge of the Evansville residents in the project. If traditional knowledge is not being used, it does not describe why it has been omitted.

DNR Response: AIDEA coordination with residents of Evansville and the incorporation of traditional knowledge in the project plan is outside the scope of this decision. The DMLW permit process evaluates the potential impacts to state resources and state interests.

3. How does AIDEA plan to respond in the event of inadvertent cultural resource discoveries?

DNR Response: Cultural resource discovery is discussed above, and the permit will include a stipulation regarding the discovery of cultural resources during permitted activities.

Environmental Considerations

The environmental risk associated with the proposed activity is moderate as fuel spills risk contaminating state lands, but appropriate containment and refueling procedures are proposed. Double wall tanks be used and refueling will include spill prevention methods such as drip pans and vinyl liners with foam dikes. The risk of contamination will also be mitigated by permit stipulations.

Discussion

In adjudicating this application, the DMLW considered two alternatives: (1) deny the application, and (2) issue an LUP to AIDEA as applied:

1. Denying the application is not the preferred alternative. The proposed work is in support of Ambler Road, a large industrial access road intended to facilitate mine development and transportation of ore as part of the Ambler Access Project. Denying this proposed use would potentially delay design and construction of the road unnecessarily. The proposed

activities are of short duration and minimal impact considering that activities requiring a permit would occur in March when the ground is frozen or consist of visiting sites to collect sensor data during other times of the year.

2. Issuing an LUP is the preferred alternative. Issuing a permit will allow AIDEA to characterize the underlying geology of proposed bridge crossings in support of design and construction work for Ambler Road. Conducting this initial field work is needed to advance the Ambler Access Project in support of AIDEA's efforts to promote and develop the State's natural resources to further economic development within the State of Alaska.

Performance Guaranty

Performance guarantees are means to assure performance and to provide ways to pay for corrective action if the permittee fails to comply with the requirements set forth in the permit document. They are also used to protect state land from damage and to make certain that improvements are removed and that the land is returned in a usable condition upon termination of the permit.

The performance guarantee is waived given that AIDEA is a state entity and is in good standing with DNR.

Insurance

Insurance is a means to protect the state from liabilities incurred through the use of state property, or from damage to state property as a result of accidental or catastrophic events. This type of protection is necessary in the event of an accident or negligence that was consequentially connected to activities conducted on state land, and/or if the state is named in a lawsuit as a result of an accident or negligence.

As AIDEA is a state entity in good standing with DNR, no insurance is required.

Fees

Consistent with 11AAC 05.020(b)(5), as the applicant is a state entity and this permit is in support of a large economic development project such that a fee waiver is in the public interest, the fee is waived.

Fee: \$0

Relevant Fee Regulation(s): 11 AC 05.020(b)(5)

Term

Five Years

Effective Date: March 4, 2022

Expiration Date: March 3, 2027

Recommendation

Based on the information provided by the applicant, as well as review of relevant planning documents, statutes, and regulation related to this application, it is my recommendation to issue an LUP on condition that all permit stipulations are followed as described in the attached permit. During the period of the permit an inspection may be conducted at the discretion of DNR to ensure permit compliance.



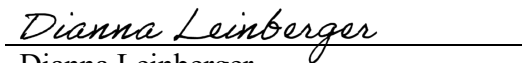
Adam Leland
Natural Resource Specialist

March 4, 2022

Date

Manager's Decision

It is the decision of this office to take the action as recommended above. This decision may be rescinded by written notification if, after 60 days from the effective date of this decision, the applicant has not completed all requirements outlined in this decision for issuance of the permit. Additional time may be allotted to complete these requirements at the applicant's request and concurrence of the Authorized Officer, however this will not extend the total term of the authorizations issued under this decision.



Dianna Leinberger
Natural Resource Manager

March 4, 2022

Date

Attachments

Land Use Permit
Location Diagram

A person affected by this decision may appeal it in accordance with 11 AAC 02. Any appeal must be received within 20 calendar days after the date of "issuance" of this decision, as defined in 11 AAC 02.040(c) and (d) and may be mailed or delivered to the Commissioner, Department of Natural Resources, 550 W. 7th Avenue, Suite 1400, Anchorage, Alaska 99501; faxed to (907) 269-8918, or sent by e-mail to dnr.appeals@alaska.gov. Under 11 AAC 02.030, appeals and requests for reconsideration filed under 11 AAC 02 must be accompanied by the fee established in 11 AAC 05.160(d)(1)(F), which has been set at \$200 under the provisions of 11 AAC 05.160 (a) and (b).

This decision takes effect immediately. If no appeal is filed by the appeal deadline, this decision becomes a final administrative order and decision of the department on the 31st calendar day after issuance. An eligible person must first appeal this decision in accordance with 11 AAC 02 before appealing this decision to the Superior Court. A copy of 11 AAC 02 may be obtained from any regional information office of the Department of Natural Resources.

OVERVIEW of the Division of Parks and Outdoor Recreation



The Division of Parks and Outdoor Recreation (DPOR) operates the largest state park system in the United States and supports the Governor's priorities of public protection, economic development, education, resource management, state operating infrastructure, and individual and community self-sufficiency by providing access to world-class outdoor recreation. Recreation in Alaska State Parks generates economic activity and employment while providing \$4.8 million in state revenue through park fees. State investment in parks ensures these world-class state assets continue to generate revenue, protect the resource, and contribute to the private-sector economy while enhancing the health and well-being of Alaskans.

Public Protection:

- Twenty-five Alaska state law enforcement park rangers provide safety to the public and protection of the resource throughout 3.6 million acres of Alaska park land
- Alaska's recreational boating fatalities have been cut nearly by half, from an average of 27.9 per year before the Alaska Boating Safety Program began in 2000, to 15.47 per year since.

Economic Development:

- The outdoor recreation industry contributes \$2.1 billion annually to Alaska's economy and supports 20,636 jobs, according to federal economic statistics
- Alaska State Parks help fuel a strong visitor industry that attracted 1.8 million visitors and \$1.97 billion in visitor spending in 2016, according to the most recent Alaska visitor statistics

Education:

- The division's Interpretation and Education Program develops interpretation through panels, brochures and other exhibits, and offers formal and informal interpretive programs to visitors

Individual, Community & Self Sufficiency:

- The Office of History and Archaeology and the grant administration of the Historical Preservation Fund, Land & Water Conservation Fund, Recreational Trails Program and Snowmobile Development Program helps community self-sufficiency by helping local projects via permitting

Resource Management:

- The Division's mission guides it in conserving natural resources for the use, enjoyment, and welfare of the people. The Office of History and Archaeology serves as the state historic preservation office (SHPO), representing the state's interests in protecting its heritage resources.

Statewide Operating Infrastructure:

- Having lost 29 PCNs since 2016 (five full time, seven part time, 17 non-permanent) the Division has had to reduce public services or rely on private contractors but will continue to seek efficiencies to provide efficient services to the public as budgets allow.

STRUCTURE & FUNCTIONS of the Division of Parks and Outdoor Recreation



The Division of Parks and Outdoor Recreation (DPOR) operates 157 park units and is the state's lead agency for technical expertise on outdoor recreation, boating safety and historic preservation. The Division is composed of five sections. User fees, federal grants and inter-agency receipts fund approximately 60 percent of the division's costs.

FY2023 Management Plan Budget					
PCNs	UGF	DGF	Fed	Other	Total
152	525.3	10,816.6	2,575.1	4,280.7	18,197

	PCNs	UGF	Total
Field Operations – Manages 157 state park units throughout Alaska and operates visitor facilities that enable public access to and enjoyment of park lands	97	0.0	8,652.8
Office of History and Archaeology – Conducts federally required reviews of all development projects to determine their impact on historic and archaeological sites and maintains the data repository for all of Alaska's cultural resources information	18	479.7	2,683.3
Design & Construction – Provides design, contract administration, and oversight for state park capital improvements as well as construction projects developed by other state agencies	17	0.0	2,431.9
Director's Office and Support – Oversees Division budget and collection of state park fees; supervises area managers, section chiefs, and administrative staff; manages park use permitting; and administers federal grant programs for the Division	13	45.6	2,896.4
Office of Boating Safety – Administers federally-funded programs that reduce non-commercial boating fatalities, injuries and property damage in Alaska	7	0.0	1,533.4



United States Department of the Interior



BUREAU OF LAND MANAGEMENT
Alaska State Office
222 West Seventh Avenue, #13
Anchorage, Alaska 99513-7504
www.blm.gov/alaska

Mr. Akis Gialopsos
Acting Commissioner
Department of Natural Resources
550 W. 7th Ave., Suite 1400
Anchorage, AK 99501

VIA EMAIL – akis.gialopsos@alaska.gov

Subject: Geotechnical Drilling Not Approved with AIDEA's 2022 Annual Workplan

Dear Acting Commissioner Gialopsos:

We have carefully considered your letter dated November 18, 2022 regarding geotechnical drilling along the Ambler Road route. As this correspondence came from you and in light of our ongoing discussions on this topic, I would like to take the opportunity to respond directly to your letter.

I want to start by sharing my appreciation for your thoughtful engagement with me and members of my staff as we separately raise and address areas of mutual interest and concern and do our best to work through differences in a professional and cordial manner. This is vital given the range of resources and projects we share interest in and responsibility for, that are important to the people and government of Alaska, and to the broader United States population and the federal government.

While that engagement remains important to me, this is not an issue where I see a path to resolution in the near-term in the manner you suggest. I appreciate that you value certainty, and my intent is to provide clarity in the BLM's position here that, while we may disagree, will hopefully allow for informed decision-making by the State and AIDEA moving forward.

Your letter raises concerns with the BLM not approving geotechnical drilling on State lands in the Ambler Road project area and questioning the BLM's authority to withhold its approval when all State permit requirements have been met. While you request the BLM's concurrence with the geotechnical drilling in accordance with your approved State permits, you are effectively requesting that we revisit and reverse a decision the BLM made on the 2022 Annual Workplan (AWP) reflected in the letter from the BLM on August 19, 2022.

INTERIOR REGION 11 • ALASKA

As we consider your letter, we must do so in light of that decision previously made on AIDEA's 2022 AWP with respect to the same proposed geotechnical drilling and with the benefit of the record of correspondence leading up to that decision.

In that letter, the BLM provided conditional approval for portions of AIDEA's 2022 AWP. In determining whether to approve the proposed work described in the AWP, the BLM evaluated whether the conditions of the Programmatic Agreement (PA) would be met. In doing so, the BLM considered comments and concerns shared by Consulting Parties regarding their review of the AWP as required by both the PA and the National Historic Preservation Act (NHPA).

While that letter also referred to the commitment the Department has undertaken with the District Court to preserve the "environmental status quo" during remand, it is important to clarify that that commitment does not change the BLM's role, responsibilities and analysis under the NHPA and the PA for this matter. The BLM does take very seriously its commitment to the Court and is under obligation to continue to preserve the "environmental status quo" to the full extent of its authority, recognizing that the BLM can only act within the scope of its authority (which includes the entire project area subject to the NHPA Section 106 process), and the commitment to the Court does not give the BLM any additional legal authority. That said, we are mindful that even if the BLM were to approve the geotechnical drilling during the remand period, we fully anticipate the District Court would be asked to step in to enjoin that activity and we think that risks opening the door for uncertainty as to the scope of any potential Court remedy.

It is ultimately the BLM and the State Historic Preservation Officer (SHPO), in consultation with Tribes, who make the final determination on what constitutes adverse effects; or in this case, potential adverse effects [see specific language at 36 CFR 800.5(a)].

The relevant BLM determination and decision is reflected at the top of page 4 of the August 19 BLM letter:

Geotechnical Drilling and Land Clearing/Site Preparation in support of drilling is NOT APPROVED for any lands. The BLM, with SHPO's concurrence, has determined that this work has the potential to adversely affect historic properties and monitoring is not an acceptable alternative to inventory. The USACE has also indicated full cultural resource inventories must be completed prior to any geotechnical exploratory activities associated with the Section 404 Permit (email to Jeff San Juan from John Sargent, dated June 2, 2022). (emphasis in original)

My staff has carefully reviewed your letter to see whether it indicates any material changes in the completion of the cultural and historical inventory in the proposed drilling locations or whether the description of the geotechnical drilling and its mitigation measures under the State permits suggest that the BLM should revisit its determination. However, the State's permits with its mitigation measures were already considered in the BLM's August decision and we are not aware of any significant completion of the inventory that would cause the BLM to revisit its determination.

In a prior letter to AIDEA in May, the BLM noted that the PA "prohibits AIDEA from initiating any ground disturbance, or other types of activities that could adversely affect historic properties,

before inventory, evaluation, assessment, and on-site measures for resolution of adverse effects has been completed for that Segment, Stage or Component.”¹

The August 19, 2022 BLM letter attached a letter from the State Historic Preservation Officer, Ms. Judith Bittner, dated August 15, 2022, that stated the following in a paragraph agreeing with various determinations by the BLM regarding its finding of effect for non-cultural activities: “We also agree that geotechnical drilling or land clearing/site preparation in support of drilling has the potential to adversely affect historic properties.”²

While noting that the BLM must make a determination independent of the SHPO, her concurrence is specific to the BLM determination regarding the potential to adversely affect historic properties. Your letter provides a determination from February 22, 2022, by the Office of History and Archeology, that that office had determined that “the proposed actions are unlikely to adversely affect significant cultural resources if minimization measures are enacted.” That determination was neither made by the SHPO herself nor was it made subsequent to her August 15, 2022 letter. In sum, there is nothing here that suggests the SHPO’s concurrence with that determination has changed. If the BLM was presented with information that the SHPO no longer concurred with the BLM’s determination on this matter, such as due to a change in relevant circumstances, then that might provide cause for the BLM to re-evaluate, but not necessarily change, its own determination.

The BLM August decision letter also attaches comments from the National Park Service, which notes that “Track mounted drills moving between borehole sites at a single location should not be subjected to a blanket approval for sites not yet inventoried for cultural resources.”³

Further, the August letter referenced but did not attach correspondence in June of 2022 with the US Army Corps of Engineers indicating that full cultural resource inventories must be completed prior to any geotechnical exploratory activities.⁴

Additionally, I highlight the letter from Tanana Chiefs Conference to the BLM which notes the following:

There has not been a “reasonable and good faith” identification effort that can serve as the basis for approving extensive geotechnical drilling and other damaging fieldwork in areas where it is well-known that cultural resources are likely to exist but have not yet been properly identified or delineated.⁵

Finally, we’ll note that the BLM would re-initiate Tribal consultation before making any decisions regarding its position on this matter. However, since we do not think there are any grounds to revisit our August 2022 decision on this matter, we do not intend to re-initiate consultation at this time.

¹ BLM Letter to AIDEA (August 19, 2022).

² SHPO Letter to BLM (August 15, 2022).

³ NPS Letter to BLM (August 15, 2022).

⁴ Email from USACE to AIDEA (June 2, 2022).

⁵ TCC Letter to BLM (August 15, 2022).

In closing, I would again like to thank you for your commitment to open dialogue on Ambler Road permitting issues, and I look forward to continuing to engage with you and your staff throughout the permitting process.

Sincerely,

STEVEN COHN

Digitally signed by STEVEN
COHN
Date: 2022.12.05 21:37:21 -09'00'

Steven M. Cohn
State Director
BLM-Alaska

cc: Via Email

Jeff San Juan, AIDEA jsanjuan@aidea.org

Bill Marzella, Advisory Council of Historic Preservation bmarzella@achp.gov

Sarah Creachbaum, National Park Service

Jeff Rasic, National Park Service jeff_rasic@nps.gov

Judy Bittner, State Historic Preservation Officer judy.bittner@alaska.gov

John Crowther, DNR john.crowther@alaska.gov

Brent Goodrum, DNR brent.goodrum@alaska.gov

Christy Colles, DNR christy.colles@alaska.gov

Geoff Beyersdorf, Bureau of Land Management

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NORTHERN ALASKA ENVIRONMENTAL
COUNCIL, et al.,

Plaintiffs,

v.

DEBRA HAALAND, in her official capacity, et
al.,

Defendants,

and

AMBLER METALS, LLC, et al.

Intervenor-Defendants.

No. 3:20-cv-00187-SLG

ALATNA VILLAGE COUNCIL, et al.,

Plaintiffs,

v.

CHAD PADGETT, in his official capacity, et al.,

Defendants,

and

AMBLER METALS, LLC, et al.

Intervenor-Defendants.

No. 3:20-cv-00253-SLG

[PROPOSED] ORDER RE MOTION FOR CLARIFICATION

Having reviewed and considered the Motion for Clarification filed by Intervenor-Defendants, it is HEREBY ORDERED that the motion is GRANTED.

Accordingly, IT IS ORDERED that:

1. This Court's prior orders do not preclude AIDEA from conducting all ground-disturbing activities; and

2. Neither this Court's orders, the governing statutes, nor the Programmatic Agreement for the Ambler Access Project grant the Bureau of Land Management authority to bar activities on State and ANC lands.

Dated the _____ day of _____, 2023.

Sharon L. Gleason, U.S. District Court Judge