Kyle W. Parker, ABA No. 9212124
Sarah C. Bordelon, NV Bar 14683 (*pro hac vice*)
HOLLAND & HART LLP
1029 W. 3rd Avenue, Suite 550
Anchorage, Alaska 99501
Telephone: (907) 865-2600
Facsimile: (907) 865-2680
kwparker@hollandhart.com
scbordelon@hollandhart.com

Attorneys for Alaska Industrial Development and Export Authority

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

NORTHERN ALASKA ENVIRONMENTAL CENTER, *et al.*, Plaintiffs, vs. CHAD PADGETT, *in his official capacity as Alaska State Director, U.S. Department of the Interior*, *et al.*, Defendants, and AMBLER METALS LLC, *et al.*, Intervenor-Defendants.	Case No. 3:20-cv-00187-SLG **INTERVENOR-DEFENDANT ALASKA INDUSTRIAL DEVELOPMENT AND EXPORT AUTHORITY'S QUALIFIED RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR VOLUNTARY REMAND**

ALATNA VILLAGE COUNCIL, *et al*., Plaintiffs, vs. CHAD PADGETT, *in his official capacity as Alaska State Director, U.S. Department of the Interior*, *et al*., Defendants, and AMBLER METALS LLC, *et al.*, Intervenor-Defendants.	)	Case No. 3:20-cv-00253-SLG

On February 22, 2022, the due date for their responses to Plaintiffs' summary judgment motions, Defendants filed a motion for voluntary remand, without vacatur, of each of the above-captioned actions. This about-face is not rooted in the law or facts surrounding the Ambler Access Project ("Project"). Defendants provide no specific or credible rationale for their sudden discovery of "deficiencies" in the approximately five-year-long (November 2015 to July 2020) impacts analyses conducted by career agency staff. Career staff produced a voluminous and detailed record, considered input from myriad governmental entities, private organizations, Alaska Native groups, and individual members of the public, responded in detail to thousands of comments, and exhaustively explained the bases for their conclusions in a 1300-page Final Environmental Impact Statement. Well over a year into this litigation, after repeated

extensions and concentrated political pressure from project opponents, the Department of the Interior ("DOI") abruptly announced its wish to revisit its analysis. No legal justification, only vocal special interest opposition, supports this reversal-of-course.

The Alaska Industrial Development and Export Authority ("AIDEA")[1] opposes Defendants' request for an open-ended remand, and, in the event the Court grants Defendants' motion, AIDEA requests that this Court (i) retain jurisdiction over these actions, (ii) impose a limited scope and fixed schedule on any reconsideration by Defendants (to the extent the Court grants such reconsideration), and (iii) consistent with Defendants' request, refrain from vacating the challenged agency actions.

BACKGROUND

In 1980, Congress determined that a road connecting the Ambler Mining District with the Alaska Pipeline Haul Road[2] was necessary. As part of the careful balancing process in the Alaska National Interest Lands Conservation Act ("ANILCA"), under which Congress set aside millions of acres of land in Alaska for conservation, it instructed the Secretary of the Interior that she "***shall***" permit such a route and issue the necessary rights-of-way ("ROWs"). Pub. L. 96-487 §§ 201(4)(b), (e). The Project—a 211-mile road from the Dalton Highway to the Ambler Mining District—is the road that

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[1] AIDEA is a corporation created by the Alaska State Legislature to "promote, develop and advance the general prosperity and economic welfare of the people of Alaska, to relieve problems of unemployment, and to create additional employment." A.S. § 44.88.070.

[2] Also known as the "Dalton Highway."

Congress required. In addition to fulfilling ANILCA's requirement, the Project will facilitate access to the critical and strategic minerals essential to the United States' economic and national security, as well as its transition to a clean energy economy. Development of the Project will also result in the creation of desperately needed local jobs and support long-term state and local revenue—another specific objective of the congressional mandate to provide access to the Ambler Mining District.

AIDEA submitted its application for the Project in 2015. Defendants' extensive environmental review and Native/tribal consultation spanned close to five years and two administrations. Career staff of multiple federal and state agencies worked together to develop the National Environmental Policy Act ("NEPA") analysis, and to conduct required consultations and analyses under the National Historic Preservation Act ("NHPA") and ANILCA.

This review process culminated in the issuance of a Joint Record of Decision ("JROD") in July 2020 and ROWs in January 2021. These decisions are supported by an extensive Environmental Impact Statement ("EIS"), an analysis of subsistence impacts under ANILCA § 810, and a detailed framework for ongoing evaluation of impacts to historic sites under a Programmatic Agreement.[3]

[3] The Programmatic Agreement was negotiated among participating tribes, State and federal agencies, and the applicant – AIDEA.

Plaintiffs challenged these agency actions and the underlying review process. In their answer to Plaintiffs' complaints, Defendants denied that any of the challenged actions were unlawful or that any aspect of the review process was deficient. Case No. 20-cv-187, ECF No. 11; Case No. 20-cv-253, ECF No. 8.

After taking extensive delays in preparation of the administrative record, Defendants, with no prior warning, requested a 60-day suspension of the briefing schedule to undertake additional government-to-government consultation on the Project. AIDEA objected, raising concerns about the uncertainty such delay would create for its planned 2022 field work on federal lands.[4] After taking full advantage of the entire 60-day suspension, Defendants re-committed to a new briefing schedule under which they

[4] During the 2022 field season, AIDEA plans to continue its cultural resources field survey program, which was started in 2021 at various locations on federal lands that are being investigated as part of the front-end engineering and design (FEED) baseline data collection effort. In addition to its ongoing cultural resources field survey program, AIDEA's other planned, non-ground disturbing field investigations include site preparation activities, engineering reconnaissance work, land survey activities, hydrological and hydraulics (H&H) investigations, fish habitat studies, wetlands investigations, and geophysical investigations and evaluations.

AIDEA also plans to initiate geotechnical drilling activities at various locations where cultural resources field surveys were completed in 2021. At those locations where it was determined there are no cultural or historic resources present, AIDEA will initiate its geotechnical drilling program after its contractors have completed required training on AIDEA's Cultural Resources Management Plan ("CRMP") and its established policies and procedures requiring the cessation of work in the event cultural resources or human remains are discovered. At those locations where it was determined cultural resources are or may be present, AIDEA plans to initiate its geotechnical drilling program after its contractors have completed required training (as described above) and employing avoidance and monitoring protocols as established in the CRMP. *See, e.g.,* San Juan Decl. at ¶9-16.

would defend the merits of the agencies' decision-making. AIDEA proceeded with preparations for its 2022 season.

Then, on the mandated due date for their merits brief following yet another extension request, Defendants declined to file, suddenly claiming that they had identified deficiencies in the agency review process. In so doing, they effectively cancelled AIDEA's 2022 field season on federal lands without legal or technical bases, and without AIDEA even having an opportunity to be heard. Defendants' representatives made broad statements about the effect of their request for a voluntary remand, despite the fact that this Court had not even received responsive briefing on the Defendants' motion, and certainly had not acted on it.

As a result, Defendants engineered a cloud of doubt over any potential 2022 operations. Based on newspaper reports and repetition of Defendants' statements, several of AIDEA's contractors have sought work on other projects as they are not willing to commit their crews and equipment to a work program that might not go forward given Defendants' repeated delays and shifting positions in response to political pressure. *See* San Juan Decl. at ¶20. Subsequently, Defendants compounded their unilateral actions,

very publicly issuing suspension notices for the BLM and NPS 50-year Rights of Way.[5] Defendants' erroneous legal pronouncements to the public, and to the political special interests they sought to mollify, replaced the rule of law and the careful consideration of this Court, and terminated AIDEA's potential operations unilaterally and without allowing AIDEA a voice.[6]

The purported deficiencies that Defendants identified included claimed flaws in the evaluation process under Section 810 of ANILCA and in the consultation process

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[5] On March 11 and March 14, 2022, Defendants sent AIDEA "Decisions" indicating that they were suspending the ROWs issued by BLM and by the National Park Service. *See* ECF 125-1 (20-cv-00187) and ECF 122-1 (20-cv-00253) ("Suspension of Right of Way Grant"), ECF 125-2 (20-cv-00187) and ECF 122-2 (20-cv-00253) ("Suspension of Right-of-Way Permit"). AIDEA does not waive any rights it may have with respect to these suspensions, including, without limitation, any right to challenge the lawfulness of the suspensions in any forum.

[6] Because of the extremely limited operational season in Alaska, Project planning and permitting, as well as retention of contractors, and hiring of equipment and personnel, must be addressed far in advance. Last-minute changes are extremely costly and create uncertainty that can have operational and economic impacts far into the future. For example, as early as the summer of 2021, AIDEA announced its plans to initiate its geotechnical drilling program at in-river crossings along the route starting in early March 2022. AIDEA had hoped to complete this work while the rivers and riverbanks were still frozen-solid, thereby minimizing any environmental impacts and risk to personnel. However, Defendants' repeated delays and confusion resulting from its various conflicting public pronouncements forced the deferral of this work program even though AIDEA had allowed more than enough time (over eight months) to complete permitting and contracting for the program. *See* San Juan Decl. at ¶¶9-16.

under Section 106 of the NHPA.[7] Defendants also expressed a desire to supplement the NEPA analysis for the Project despite failing to identify any purported deficiencies in that comprehensive analysis.

Defendants' delays to the Project flout multiple congressional mandates. *First,* Section 201(4)(b) of ANILCA provides that "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. 96-487 § 201(4)(b) (emphasis added). To fulfill that need, Congress mandated the issuance of ROWs. *Id.* at § 201(4)(e). Congress also set strict timelines for the environmental analysis and exempted it from judicial review. *Id.* at § 201(4)(d), (e). The ROW through the Gates of the Arctic is not subject to second-guessing.

Second, the procedures in Title XI of ANILCA govern the process for approving the route of a "transportation utility system," such as the Project. This system similarly

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[7] Notably, although Plaintiffs' original mélange of claims in their complaints alleged shortcomings in the Defendants' Section 106 ***consultation process***, not even ***Plaintiffs*** bothered to pursue any such claims when it came time to lay out facts and legal arguments in their summary judgment motions. Section 106 merely required Defendants to "consult" with interested parties. Defendants have undisputedly done so and will continute to do so pursuant to the ROW requirements. No "failure of consultation" claim could withstand scrutiny. Instead, Plaintiffs briefed a separate and narrow NHPA argument about the area of potential effects. Given that even Plaintiffs have abandoned their patently unsupportable consultation arguments, Defendants' purported need to reconsider their Section 106 process strains credulity.

provides strict timelines for the review of an application: a draft EIS must be prepared "within nine months of the date of filing"; the final EIS "shall be completed within one year from the date of such filing"; and the decision to "approve or disapprove" the application must be made "[w]ithin four months" after the Final EIS is published. Pub. L. 96-487 § 1104(e). These strict timelines may be extended, and, in fact, for this review those timelines were substantially extended to facilitate multiple years of community engagements and review. But the statute does not provide for the type of post-decisional review the Defendants propose here.

Finally, Section 1110(b) of ANILCA provides: "If State owned land, including subsurface rights of such owners . . . is within or is effectively surrounded by one or more conservation units . . . the State . . . ***shall*** be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned land . . . subject to reasonable regulations issued by the Secretary to protect the natural and other values of the land." 16 U.S.C. § 3170(b) (emphasis added). While the statute allows for "reasonable regulation" it does not allow the Secretary to reverse the agencies' decision without a reasonable basis or to engage in indefinite reviews to defer granting the access that Congress has instructed "shall" be granted.

Defendants' actions here, by threatening to indefinitely delay a congressionally endorsed access road for political reasons, defy congressional intent.

ARGUMENT

I. THIS COURT SHOULD RETAIN JURISDICTION.

"District courts have the authority to stay court proceedings and retain jurisdiction over cases even when an agency's request for a voluntary remand is granted." *N. Coast Rivers Alliance v. U.S. Dep't of Interior*, No. 1:16-cv-307-LJO-MJS, 2016 U.S. Dist. LEXIS 174481 at *39 (Dec. 15, 2016) (quotations omitted). Exercising this authority is particularly appropriate "when, for example, the court wishes to ensure that a voluntary remand will not, in fact, prejudice the non-movant." *Id.* (quotations omitted); *see also Greater Yellowstone Coal. v. U.S. E.P.A.*, No. 4:12-CV-60-BLW, 2013 U.S. Dist. LEXIS 59661, 2013 WL 1760286, at *7 (D. Idaho Apr. 24, 2013) (retaining jurisdiction during voluntary remand "to ensure a timely remand process and to allow the parties to challenge any new [agency] decision in this case").

To the extent that this Court grants Defendants an opportunity to reconsider their review process, AIDEA respectfully requests that the Court retain jurisdiction over these actions to ensure a timely reconsideration process and to minimize further prejudice to AIDEA. AIDEA has invested substantial time and money in developing the Project. Defendants' last-minute change of heart has not only delayed the Project overall, but has cost AIDEA its considerable investments in preparation for the 2022 operational season. *See* San Juan Decl. at ¶¶9-16. Ensuring a targeted and timely reconsideration process will help to prevent similar losses for future seasons by creating a more predictable

process and schedule and by minimizing Defendants' opportunities to frustrate Project planning by raising unfounded claims of "deficiencies" with the Project review at the most critical timing for field season mobilization. Timely reconsideration also is particularly important given that Defendants' delay conflicts with ANILCA.

Retaining jurisdiction is also consistent with the fact that most of Plaintiffs' claims are not within the scope of the voluntary remand Defendants request. Although Plaintiffs have alleged wide-ranging claims under numerous federal statutes, Defendants have identified purported deficiencies with respect to only two discrete issues—the ANILCA Section 810 evaluation and the NHPA Section 106 consultation. These are the only "deficiencies" relied upon to justify Defendant's ROW suspensions. Defendants have ***not*** identified ***any*** purported deficiencies in the NEPA analysis, although they nevertheless still request an opportunity to reconsider and supplement such analysis. Addressing the purported deficiencies that Defendants identify will thus not moot this action, because NEPA claims constitute a significant part of Plaintiffs' case. *See* Case No. 20-cv-187, ECF No. 99 at 17-35; Case No. 20-cv-253, ECF No. 99 at 71-81.

Further, Defendants have neither identified purported deficiencies nor requested an opportunity to reconsider (i) the Clean Water Act permit issued by the Corps of

Engineers,[8] (ii) the analysis governed by the Federal Land Policy and Management Act, or (iii) the validity of agency approvals under the Federal Vacancies Reform Act and the Appointments Clause of the Constitution—all of which are issues Plaintiffs have raised. *See* Case No. 20-cv-187, ECF No. 99 at 35-54, 61-66; Case No. 20-cv-253, ECF No. 99 at 81-87. Because Defendants do not seek to address all of Plaintiffs' concerns, the requested reconsideration will not moot these actions. For this additional reason, this Court should retain jurisdiction instead of allowing an unfettered remand.

II. ANY AGENCY RECONSIDERATION SHOULD BE SUBJECT TO A LIMITED SCOPE AND FIXED SCHEDULE.

To the extent this Court grants Defendants an opportunity to further evaluate their existing analyses of the Project, this Court should limit the evaluation to those topics for which Defendants have identified purported deficiencies and impose a fixed schedule on the supplemental review process. As noted above, Defendants have identified purported deficiencies only with respect to the ANILCA Section 810 evaluation and the NHPA Section 106 consultation.[9] Due to the lack of any other purported deficiencies, there is no basis for conducting a reevaluation beyond these discrete issues. The Court should limit

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[8] Indeed, it is not clear that all of the Defendants even support remand, as evidenced by the footnote stating that the Corps of Engineers has yet to determine what, if any, action it plans to take with respect to the permit it issued under Section 404 of the Clean Water Act. Case No. 20-cv-253, ECF No. 111 at 3 n.1.

[9] *See* ECF 125-1 (20-cv-00187) and ECF 122-1 (20-cv-00253) ("Suspension of Right of Way Grant"), ECF 125-2 (20-cv-00187) and ECF 122-2 (20-cv-00253) ("Suspension of Right-of-Way Permit")

the scope of the remand review to these specific issues and prohibit Defendants from embarking on a wide-ranging and unconfined review.[10] Given that Defendants identify no deficiencies in the existing NEPA analysis, there is no basis for undertaking additional NEPA review.

Furthermore, Defendants should not be permitted to indefinitely delay their reconsideration process, particularly given the evident political motivations of the instant request and the fact that it defies congressional intent. *See* Pub. L. 96-487 § 201(4)(b); *id.* § 1104(e); 16 U.S.C. § 3170(b); *N. Coast Rivers Alliance*, 2016 U.S. Dist. LEXIS 174481 at *39. The Project has already undergone nearly five years of extensive review by multiple federal agencies. To the extent Defendants seek to conduct further review,

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[10] AIDEA respectfully requests that the Court instruct Defendants that a further analysis of issues the Plaintiffs raised in their complaints yet declined to pursue in briefing their summary judgment motions, is not appropriate. For example, the FEIS thoroughly analyzed potential indirect and cumulative effects from hypothetical future mining operations, as evidenced by the fact that, at summary judgment, Plaintiffs declined to pursue their claims challenging the sufficiency of the EIS's consideration of the cumulative effects of potential future mining. Such issues thus cannot be the basis for judicial reversal of the agency's decision and are inappropriate for inclusion in a supplemental remand analysis. See Shakur v. Schriro, 514 F.3d 878, 892 (9th Cir. 2008) (plaintiff abandons claims by not raising them in opposition to a motion for summary judgment). Yet, the Declaration of Deputy Secretary Beaudreau supporting the instant motion suggests that the agency intends to revisit the detailed analysis of the impacts of a hypothetical mining scenario under Section 810. See Case No. 20-cv-253, ECF No.Dkt. 111-1 at ¶6. Even if Defendants think that their ANILCA 810 analysis did not adequately address these issues, the remedy is straightforward. Defendants need only use the information already available in the Administrative Record, including the FEIS's thorough discussion of any such potential impacts, and simply restate more explicitly their analysis under ANILCA. Any such claimed error does not justify wholesale reconsideration of matters the agencies have already considered.

they should be required to do so in a timely fashion, mindful of the strict time limits Congress set in ANILCA Title XI for the entire review of a "transportation utility system" – *i.e.,* ***one year and four months from the application to the final decision***. Here, Defendants propose targeted work to address specific alleged deficiencies. As such, their work should take substantially less time.

In light of these considerations, AIDEA proposes the following schedule for any reconsideration authorized by this Court:

1. Issuance of a Draft Analysis of information developed in response to this voluntary remand and in support of Defendants' decision-making, including information supporting its Draft ANILCA Section 810 analysis, and proposal for revisions to the NHPA Programmatic Agreement (if any) by June 1, 2022.

2. Issuance of a Final Analysis of information developed in response to this voluntary remand, including information supporting its final ANILCA Section 810 analysis, and final revisions to the NHPA Programmatic Agreement (if any) by November 1, 2022.

3. Notification to the parties and the Court of final decisions following the remand analysis by December 1, 2022.

4. Status reports to be filed with this Court every month, beginning the first day of the month after entry of an order.

III. VACATUR IS INAPPROPRIATE.

While AIDEA opposes Defendants' request for a voluntary remand, and asks that the Court limit any further agency evaluation and impose a fixed schedule for such evaluation if it decides to grant Defendants' motion, AIDEA agrees with Defendants that the challenged agency decisions should not be vacated. As a threshold matter, vacatur is unnecessary given Defendants' preemptive suspension of the challenged ROWs prior to the Court having the opportunity to consider their voluntary remand request.[11] *See* Case No. 20-cv-187, ECF Nos. 125, 125-1, 125-2; Case No. 20-cv-253, ECF Nos. 122, 122-1, 122-2. These suspensions expressly state that "AIDEA may not conduct any activities that rely on the authority of the ROW grant." Case No. 20-cv-253, ECF Nos. 122-1, 122-2. In light of these suspensions, Plaintiffs will not be harmed absent vacatur.

Even without the ROW suspensions, vacatur still would be unwarranted under the traditional two-factor test. When deciding whether to vacate agency action, courts consider (i) "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly)" and (ii) "the disruptive consequences of an

[11] AIDEA fully reserves its right to argue that the ROW suspensions are unlawful and therefore invalid, and that they are unnecessary to protect Plaintiffs or to avoid vacatur. However, the suspensions have been issued, and Defendants plan to keep them in effect throughout the supplemental review process. Case No. 20-cv-187, ECF No. 122-1 at 2 (stating that a new decision on the suspension and ROW application will be issued "[a]fter completing the additional analysis and consultation"); ECF No. 122-2 at 2 (stating that a new decision on the suspension will be issued "[a]fter completing th[e] additional [review] process").

interim change that may itself be changed." *Allied-Signal v. United States Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-151 (D.C. Cir. 1993), cited by *Cal. Communities Against Toxics* v. *U.S. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). Here, neither of these factors points toward vacatur.[12]

Under the first factor, there has been no determination that the challenged actions are unlawful, which means there are no clear deficiencies, let alone deficiencies "serious" enough to cast doubt on the ultimate agency decisions. Where, as here, a stay or remand would be issued prior to a ruling on the merits, vacatur is not appropriate. *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 135 (D.D.C. 2010) (court lacks "the authority to order vacatur of the [challenged agency action] without an independent determination that [the agency action] was not in accordance with the law"); *WildEarth Guardians v. Bernhardt*, No. CV 20-56 (RC), 2020 WL 6255291, at *1 (D.D.C. Oct. 23, 2020) ("The Court remands the decisions without vacatur because it has not reviewed the EAs, FONSIs, and DNAs underlying the leasing decisions—therefore, it has no basis to vacate the agency action.").

Here, Defendants have made a political decision to engage in additional consultation and analysis, but it is far from established that such analysis is necessary to cure any "deficiencies" in the original analysis. Indeed, one of the primary reasons

[12] Vacatur may be declined based on either or both factors. *See Nat'l Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92 (D.D.C. 2019).

Defendants cite as a reason for remand – consultation under NHPA Section 106 – is no longer at issue in this case because Plaintiffs chose not to brief the claim in summary judgment. The agency action therefore cannot be reversed based on alleged deficiencies in the Section 106 consultation process. *See Shakur*, 514 F.3d at 892. In addition, as explained by the Commissioner of the Alaska Department of Fish and Game, Plaintiffs have not presented any new information undermining the analysis of the Project's impacts on the subsistence use of caribou and salmon.[13] Decl. of Douglas Vincent-Lang, at ¶¶ 13-21.

Moreover, even where a court finds deficiencies in an agency's analysis (which has not occurred here), vacatur is still inappropriate when the agency is likely to redress the deficiencies on remand and reach the same result. *See Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (considering "whether the agency would likely be able to offer better reasoning or whether by complying with procedural rules, it could adopt the same rule on remand, or whether such fundamental flaws in the

[13] Deputy Secretary Beaudreau's declaration in support of voluntary remand alleged newly discovered "deficiencies" in the agencies' ANILCA Section 810 discussion of impacts on subsistence-related species, including caribou and salmon, and claims that these alleged deficiencies "are compounded by new information, not considered in the decisions, indicating significant declines in salmon and caribou populations critical to subsistence communities." Case No. 20-cv-253, ECF No. 111-1 at ¶7. In fact, as Commissioner Lang's declaration explains, this purported "new" evidence shows nothing more than expected – and previously analyzed – cyclical and annual variability in populations that are well within historic variations and does not justify initiating a new analysis. *See* Lang Decl. at ¶¶13-21.

agency's decision make it unlikely that the same rule would be adopted on remand"); *Allied-Signal*, 988 F.2d at 151 (declining to vacate because there was "at least a serious possibility that the [agency would] be able to substantiate its decision on remand"); *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) ("When an agency may be able readily to cure a defect in its explanation of a decision, the first factor in *Allied-Signal* counsels remand without vacatur."); *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013) (declining to vacate agency action where it was "plausible that [the agency] can redress its failure of explanation on remand while reaching the same result"); *Shafer & Freeman Lakes Envt'l Conservation Corp,. v. FERC*, 992 F. 3d. 1071, 1096 (D.C. Circ. 2021) (declining vacatur where agencies might reach same result and vacatur would be disruptive).

Under the second *Allied-Signal* factor, regarding disruptive consequences, vacatur would be highly disruptive both to AIDEA's efforts to advance the congressional mandates of ANILCA and secure Alaska's – and the Nation's – long-term economic interests.[14] As to AIDEA, vacatur would cast further uncertainty upon AIDEA's development of the Project, to which AIDEA has devoted years of planning and millions of dollars. *See* San Juan Decl. at ¶¶9-16. Further development of the Project is

[14] ANILCA's provisions reflect congressional intent to "balance" preservation and development of public lands. *See, e.g., Sturgeon v. Frost*, 577 U.S. 424, 430-31 and 438-39 (2016).

dependent on additional long-term planning, which will be severely disrupted by vacatur of the ROWs on which AIDEA has relied.[15] *See* San Juan Decl. at ¶¶19-20.

Vacatur would also have the "disruptive consequence" of undermining Congress's intent of ensuring an access road between the Dalton Highway and the Ambler Mining District. *Allied-Signal*, 988 F.2d at 150. Not only did Congress expressly authorize such a road; it prescribed an expedited timeline for reviewing and approving this road. Pub. L. 96-487 §§ 201(4), 1104(e). By terminating the ROWs necessary to develop this road, vacatur would directly conflict with Congress's mandate. For all of these reasons, vacatur is inappropriate.

CONCLUSION

After conducting nearly five years of detailed analysis and issuing a robustly supported decision, Defendants stalled this litigation for nearly a year before suddenly announcing that they had discovered purported deficiencies in their own ANILCA and NHPA processes. AIDEA opposes Defendants' request for a voluntary remand as unjustified and contrary to law. Defendants' unsubstantiated reversal in decision-making has already cost AIDEA its significant investment in the 2022 field season and cost Alaskans another year until this Project, critical to their communities and their economic

[15] Vacatur of the ROWs and underlying JROD would be more disruptive than the ROW suspensions that Defendants have already implemented, because vacatur could nullify the underlying applications and require AIDEA to start the process over from the beginning. That would completely undermine Congress's expedited timeframe for permitting this road.

future, can move forward. Defendants' history of delay before this Court, their inability – after more than a year – to identify credible claims of deficiency, and their open vulnerability to the political pressure of a small number of vocal Project opponents, all mean that they should not be given an open-ended remand. With no oversight, Defendants will be free to continue their pattern of delay and deferral indefinitely. Accordingly, to the extent the Court grants Defendants the opportunity to reconsider the review process for the Project, AIDEA respectfully requests that this Court stay and retain jurisdiction over the pending actions without vacatur, and impose a limited scope and fixed schedule requiring Defendants to timely complete their limited reconsideration process.

DATED this 22nd day of March, 2022.

HOLLAND & HART LLP

/s/ Kyle W. Parker

Kyle W. Parker, ABA No. 9212124
Sarah C. Bordelon, NV Bar 14683 (*pro hac vice*)
1029 W. 3rd Avenue, Suite 550
Anchorage, Alaska 99501
Telephone: (907) 865-2600
Facsimile: (907) 865-2680
kwparker@hollandhart.com
scbordelon@hollandhart.com

Attorneys for Alaska Industrial Development & Eport Authority

CERTIFICATE OF SERVICE

I hereby certify on March 22, 2022, 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.

/s/ Kyle W. Parker

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