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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALATNA VILLAGE COUNCIL, et al., Plaintiffs, v. THOMAS HEINLEIN, et al., Defendants. and AMBLER METALS, LLC, Intervenor-Defendant.	Case No. 3:20-cv-00253-SLG ORAL ARGUMENT REQUESTED

AMBLER METALS, LLC'S RESPONSE TO FEDERAL DEFENDANTS' MOTION FOR VOLUNTARY REMAND

Intervenor-Defendant Ambler Metals, LLC ("Ambler Metals") does not oppose Federal Defendants' motion for voluntary remand,[1] subject to the reasonable conditions set forth in

[1] Ambler Metals does not agree or concede that there are deficiencies in the analysis or that remand is warranted, and is prepared to brief Plaintiffs' challenges on summary judgment if the litigation proceeds.

this response. The reasonable conditions Ambler Metals proposes, in addition to the Federal Defendants' decisions to suspend the challenged rights-of-way pending the outcome of the remand,[2] appropriately balance the parties' interests during this pause in the litigation. Therefore, the Court should reject any efforts by Plaintiffs to vacate the challenged agency actions in the interim. Vacatur would be unnecessary, given the suspensions; improper, given the absence of any judicial findings of a legal violation; and disproportionate, given the nature and extent of the modest and wholly curable deficiencies Federal Defendants identify.

I. BACKGROUND

A. Project Background and Litigation

The Alaska National Interest Lands Conservation Act (ANILCA), as the Ninth Circuit has recently affirmed, "reflects a grand bargain in which Congress sought to balance two goals, often thought conflicting: to protect scenic, natural, cultural and environmental values," (which it accomplished by setting aside 104 million acres of land for preservation purposes), and to "provide[] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people."[3] The Act's stated purposes reflect the balancing Congress performed: "This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of

[2] Notice of Suspension Decisions, ECF No. 122, 122-1, and 122-2 (3:20-cv-00253); ECF No. 125, 125-1, and 125-2 (3:20-cv-00187).

[3] *Friends of Alaska Wildlife Refugees v. Haaland*, No. 20-35721, 2022 WL 793023, *5 (9th Cir. Mar. 16, 2022) (quotation marks omitted) (quoting *Sturgeon v. Frost,* 577 U.S. 424, 430–31 (2016)).

Alaska and its people."[4] Public lands were put in two separate categories; some were designated for "the reservation of national conservation system units," and others "for more intensive use and disposition."[5]

In ANILCA, Congress established the Gates of the Arctic National Preserve, but simultaneously found that "there is a need" to provide surface transportation access to the Ambler Mining District that would cross the Kobuk River unit of the Preserve.[6] ANILCA therefore directed that the Secretary "shall permit such access" in accordance with ANILCA provisions.[7] In 2009, in keeping with Congress' pledge, the State began to identify potential routes,[8] initiating many years of planning and pre-application work by the State and Federal Defendants. This early planning work included hosting community and government-to-government meetings to solicit information on subsistence activities,[9] and conducting surveys for cultural resources.[10]

The federal agencies continued this early outreach, which was followed by a comprehensive process of the National Environmental Policy Act (NEPA) analysis, National

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[4] 16 U.S.C. § 3101(d).
[5] *See also Friends of Alaska Wildlife Refugees*, 2022 WL 793023, *5 ("One of the purposes of ANILCA, therefore, is to address the economic and social needs of Alaskans.").
[6] ANILCA § 201(4)(b), Pub. L. No. 96-487, 94 Stat. 2371 (1980).
[7] *Id.*
[8] BLM_0015407.
[9] NPS_0029927 (June 24, 2013 meetings in Kobuk and Shungnak concerning right-of-way (ROW); June 26, 2013 meetings in Evansville and Bettles concerning ROW; June 27, 2013 meetings in Alatna and Allakaket concerning ROW); NPS_0030047 (July 1, 2013 meeting with Allakaket Tribal Council concerning ROW); NPS_0030044 (July 1, 2013 meeting with Alatna Tribal Council concerning ROW). *See also* NPS_0028940 (NPS request for funds to support travel to communities to explain management plan and objectives).
[10] NPS_0030100-01 (August 2013 public notice of cultural resource reconnaissance surveys); *see also* BLM_0104790–95 (discussing cultural resource reconnaissance conducted since 2012 to support the project).

Historic Preservation Act (NHPA) consultation, and ANILCA Section 810 procedures. Tribes were consulted variously in their capacities as NEPA cooperating agencies, NHPA consulting parties, and sovereign governments. On November 25, 2015, the Alaska Industrial Development and Export Authority (AIDEA) filed a ROW application to cross Bureau of Land Management (BLM) and National Park Service (NPS) lands as part of a 211-mile industrial access road to the Ambler Mining District.[11] BLM, as the lead federal agency, initiated a 90-day scoping comment period for the environmental impact statement (EIS) on February 28, 2017, hosting 13 public scoping meetings in Allakaket, Anaktuvuk Pass, Alatna, Fairbanks, Wiseman, Anchorage, Ambler, Kotzebue, Shungnak, Kobuk, Hughes, Huslia, and Evansville/Bettles.[12] BLM later extended the scoping period through January 31, 2018[13] and conducted meetings in eight villages and host two teleconferences with the Western Arctic Caribou Herd Working Group, inviting tribes and rural communities to share comments and concerns, including any concerns about subsistence hunting and fishing.[14]

Simultaneously with NEPA proceedings corresponding to scoping and publishing draft and final EISs, on April 20, 2017, BLM sent letters to 52 federally recognized tribes, four Alaska Native regional corporations, and 18 Alaska Native villages who could be potentially affected (directly or indirectly) by the proposed road corridor, offering government-to-government consultation on the project.[15] Regardless of a tribe's decision to participate in government-to-government consultation, BLM communicated with and conducted outreach to

[11] BLM_0015406–07. The application was revised in June 2016. NPS_0000184.
[12] BLM_0016004–17.
[13] BLM_0015411.
[14] BLM_0015410.
[15] *Id.*

the tribes throughout the NEPA process and invited them to become cooperating agencies and participate in EIS development.[16] Tribes were present at twenty-four cooperating agency meetings and participated in 15 government-to-government consultation meetings.[17]

Concurrently, under NHPA Section 106, BLM in coordination with the State Historic Preservation Officer (SHPO), and the Advisory Council on Historic Preservation (ACHP), determined that a Programmatic Agreement was appropriate for the project.[18] Section 106 consultation meetings took place from January 2018 through November 2019 to develop the Programmatic Agreement and review the Cultural Resources Management Plan.[19] BLM invited 108 parties to consult on the Section 106 process.[20] Of the 78 different tribal entities invited to participate in the Section 106 consultation, 13 federally recognized tribes and seven Alaska Native Claims Settlement Act corporations or tribal non-profits ultimately did so.[21] Seventeen tribal entities, including plaintiffs Alatna Village Council, Allakaket Tribal Council, Evansville Tribal Council, Huslia Tribal Council, and Tanana Chiefs Conference, actively engaged in two-way consultation with BLM to identify important cultural resources during the Section 106 process.[22]

The Programmatic Agreement was approved by BLM, the Alaska SHPO and the ACHP, and was included as Appendix J to the Final EIS and as Appendix H in the Joint Record of

[16] *Id.*
[17] BLM_0016013–16.
[18] 36 C.F.R. § 800.14(b); BLM_0016726.
[19] BLM_0016013–14.
[20] BLM_0017010.
[21] *Id.*
[22] BLM_0016035; BLM_0017010–12.

Decision.[23] The Programmatic Agreement became effective in April 2020[24] and the Cultural Resources Management Plan was finalized in April 2021.[25] Consistent with NHPA regulations, the Programmatic Agreement for the project establishes an ongoing process of consulting, identifying, inventorying, and mitigating adverse effects to cultural resources, and will be evaluated annually to determine whether any amendments, revisions, or addendums are needed.[26] BLM has stated that it remains open to holding consultation meetings with tribes when requested.[27] Under the auspices of the Programmatic Agreement, it has continued to consult with affected entities (including a Subsistence Advisory Committee composed of tribal representatives), twice even seeking a stay or extension of this litigation to do so.[28]

On August 30, 2019, BLM published the Draft EIS, providing a 60-day comment period and holding hearings in 18 rural communities, two hub communities (Anchorage and Fairbanks), and in Washington, DC.[29] BLM reviewed all comments provided and published

[23] BLM_0016933–17020.
[24] BLM_0016018–6105.
[25] BLM_00105349–5479.
[26] *See* BLM_0016942–43 (incorporating cultural resources management plan and instituting alternative four-step process for inventorying, evaluating, assessing, and resolving adverse effects to cultural resources); BLM_0016959.
[27] BLM_0105482.
[28] ECF No. 83 (3:20-cv-00253) (stay necessary to accommodate review by "officials within the United States Department of the Interior who have engaged in various discussions with multiple parties involving this matter and in government-to-government consultations with tribal entities at the end of July and who are in the process of scheduling further requested government-to-government consultations in October."); ECF No. 85 (3:20-cv-00187) (same); ECF No. 107 (3:20-cv-00253) ("This extension is necessary to accommodate additional requested meetings and further deliberation and coordination by officials within the United States Department of the Interior."); *id.* ("the Department has received, among other requests, an additional request for a meeting by federally recognized tribes affected by the Ambler Road Project. The Department seeks to honor that government-to-government consultation request prior to filing its responses on the merits, but has been unable to schedule it prior to January 21."); ECF No. 108 (3:20-cv-00187) (same).
[29] BLM_0015412; BLM_0006981; BLM_0015410.

the Final EIS on March 27, 2020.[30] In July of 2020, the Department of the Interior and U.S. Army Corps of Engineers published the Joint Record of Decision for the Project, selecting Alternative A for the Project.[31] Plaintiffs contend that Federal Defendants violated provisions of ANILCA, NHPA, NEPA, the Federal Vacancies Reform Act, and the Appointments Clause in evaluating AIDEA's application.[32]

B. Procedural Posture

On February 22, 2022, Federal Defendants moved for remand without vacatur in order to address "legal flaws that Federal Defendants intend to reconsider through a further administrative process."[33] Federal Defendants also stated that they plan to "suspend further activity" while they undertake the remand "to preserve the environmental status quo."[34] Federal Defendants expressed their commitment to completing the "necessary consultation, analysis and supplementation in a timely manner."[35] Federal Defendants suspended the BLM ROW on March 11, 2022, and suspended the NPS ROW on March 14, 2022.[36]

Although Plaintiffs brought 17 different claims[37] under six different statutes,[38] Federal

[30] BLM_0016558–93; BLM_0016698–99.
[31] BLM_0016720.
[32] Pls' Opening Br., ECF No. 99 (3:20-cv-00253); ECF No. 99 (3:20-cv-00187).
[33] Motion to Remand (Mot.) at 2, ECF No. 111 (3:20-cv-00253), ECF No. 113 (3:20-cv-00187). The motion explains that Federal Defendants are not seeking relief with respect to the Section 404 permit issued by the Army Corps of Engineers. *Id.* at n.1.
[34] *Id.* at 11; Decl. of Deputy Secretary Beaudreau (Beaudreau Decl.) ¶ 12, ECF No. 111-1 (3:20-cv-00253); ECF No. 113-1 (3:20-cv-00187).
[35] Beaudreau Decl. ¶ 11.
[36] ECF Nos. 122, 122-1, and 122-2 (3:20-cv-00253); ECF Nos. 125, 125-1, and 125-2 (3:20-cv-00197).
[37] Plaintiffs collectively assert eleven separately numbered claims, but many of these are broken up into additional subparts.
[38] Plaintiffs asserted claims under various provisions of ANILCA, NEPA, NHPA, Clean Water Act, Federal Lands Policy and Management Act, Federal Vacancies Reform Act, and the Constitution.

Defendants rely primarily on three asserted errors with the agencies' procedures in connection with the challenged agency decisions. Two of the deficiencies will be easy to cure because they merely involve a failure to "distill and summarize" information contained elsewhere in the record.[39] First, citing to text from Chapter 3 of the EIS and EIS Appendix H ("Indirect and Cumulative Impacts Associated with the Ambler Road") regarding impacts to caribou forage, Federal Defendants state that this issue was not sufficiently addressed in either the ANILCA Section 810 technical report or the Subsistence Evaluation.[40] Second, Federal Defendants argue that although "[t]he EIS qualitatively described the types of impacts that water withdrawals can have on fish, streams, lakes, and wetlands[,] . . . the only discussion of mine-related dewatering in the Tier 1 evaluation [of subsistence impacts] concerns its effect on vegetation."[41] Federal Defendants also cite information from websites, created after the Record of Decision for the Project was signed, regarding 2021 salmon and caribou population numbers they state must be considered.[42] The cited websites indicate that population numbers for salmon and caribou fluctuate from year to year, so it should not prove difficult to put these numbers into their historic context.[43]

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[39] Mot. n.11.
[40] *Id.* at 14–15.
[41] *Id.* at 15. The information upon which Federal Defendants rely in this discussion of dewatering comes from EIS Chapter 3. A review of the Plaintiffs' summary judgment brief in *Alatna Village Council* reflects that Plaintiffs' entire discussion of dewatering impacts on subsistence resources cites to the EIS and Appendix H (mostly the latter). *See* ECF No. 99, nn.17–22 (3:20-cv-00253).
[42] Mot. 17.
[43] *See* "A huge Alaska caribou herd's population is again in decline," ArcticToday (Dec. 23, 2021), https://www.arctictoday.com/a-huge-alaska-caribou-herds-population-is-again-in-decline/ (noting that "caribou populations can swing up and down and that the estimate itself contains an element of uncertainty"); ADFG Special Publication 21-07, "Run Forecasts and Harvest Projections for 2021 Alaska Salmon Fisheries and Review of the 2020 Season," at

Third, the government cites concerns regarding the adequacy of its consultation with Tribes and consideration of impacts under the NHPA. The Department of the Interior states that it provided "only limited correspondence" about a particular traditional cultural property identified by Plaintiffs,[44] and that it did not engage in adequate consultation with Tribes before adopting the Programmatic Agreement.[45] Deputy Secretary Beaudreau's declaration states that, in addition to correcting the ANILCA Section 810 and NHPA Section 106 deficiencies, the Department of the Interior will also supplement the EIS to more thoroughly address unspecified "impacts and resources identified as areas of concern in this litigation" that presumably track the ANILCA and NHPA issues, and can therefore be remedied in tandem with whatever supplemental procedures the government conducts.[46]

As stated above, Ambler Metals does not agree or concede that there are deficiencies in the analysis or that remand is warranted, and stands ready to brief Plaintiffs' challenges on summary judgment if the government's remand motion is denied. Plaintiffs have opined that Intervenor-Defendants are not entitled to respond to any arguments Plaintiffs might articulate in their response brief.[47] Ambler Metals and NANA Regional Corporation sought an

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60–61 (Mar. 2021), http://www.adfg.alaska.gov/FedAidPDFs/SP21-07.pdf (noting that recent runs of chum salmon "have fluctuated more widely and have produced runs as low as 252,000 fish in 2000 to as high as 2.2 million fish in 2005," and that "forecasts of run size remain difficult to determine with accuracy").

[44] Mot. 19.

[45] Mot. 15–17.

[46] Beaudreau Decl. ¶ 10.

[47] ECF No. 115, at 3 (3:20-cv-00187), ECF No. 114, at 2 (3:20-cv-00253). *But see WildEarth Guardians v. Bernhardt*, No. CV 20-56, 2020 WL 6255291, at *1 n.1 (D.D.C. Oct. 23, 2020) ("Intervenor Defendants filed motions for leave to file replies in support of Federal Defendants' motion. . . . The Court finds good cause to allow Intervenor Defendants to

extension in order to discuss with Federal Defendants the appropriate terms to govern the remand, but the parties involved were unable to reach final agreement in the time provided. Ambler Metals remains open to a negotiated resolution of this issue.

Given Federal Defendants' preference for remand and Plaintiffs' likely insistence on vacatur in their response briefs, Ambler Metals explains below why the Court should impose reasonable conditions on the requested remand, and why such remand should be without vacatur.

II. ARGUMENT

A. The Court Should Impose Reasonable Conditions on Remand.

Courts routinely impose reasonable procedural conditions when a challenged agency action is remanded to an agency for additional analysis.[48] Deputy Secretary Beaudreau has stated the government's intent to "undertak[e] the necessary consultation, analysis and supplementation in a timely manner."[49] This Court should impose a nine-month time limit on the remand in order to minimize harm to the Intervenor-Defendants. A time limit would also further the important interests Congress created in ANILCA Section 201(4), which prescribes surface transportation access from the Dalton Road to the Ambler Mining District through the

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respond to Plaintiffs' Opposition and, in light of the fact that no other parties object, the Court grants their motions.").

[48] *See, e.g., Friends of Park v. Nat'l Park Serv.*, No. 13–cv–03453, 2014 WL 6969680 (D.S.C. Dec. 9, 2014) (approving a four-month schedule for voluntary remand of NPS approval of conversion of restrictive covenants); *Nat. Res. Def. Council v. U.S. Dep't of the Interior*, 275 F. Supp. 2d 1136, 1143 (C.D. Cal. 2002) (approving ten-month schedule for voluntary remand of critical habitat rule); *TransWest Express LLC v. Vilsack*, No. 19-cv-3603, 2021 WL 1056513, *6 (D. Col. Mar. 19, 2021) (approving a 60-day schedule for voluntary remand of USDA/NRCS approval and funding of conservation easement); *Basinkeeper v. U.S. Army Corps of Eng'rs*, No. CV 15-6982, 2016 WL 3180643, *5 (E.D. La. June 8, 2016) (approving a 90-day schedule for voluntary remand of reissuance of general permit).

[49] Beaudreau Decl. ¶ 11.

Gates of the Arctic National Preserve and commands that such access "shall" be granted upon a request.[50] The provision granting access for the Ambler Mining District is but one of many examples of Congress' commitment in ANILCA not only to set aside 104 million acres of land for conservation purposes, but also to provide "adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people."[51] As stated in the Act, its scheme balances public lands in Alaska between "the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition."[52]

Accordingly and in keeping with Deputy Secretary Beaudreau's representation, this Court should impose a schedule under which the government's subsequent analysis is completed within nine months, require 60-day status reports from the parties during remand, and not vacate the challenged agency actions during the remand.[53] In addition, the government should be required to lodge any new, superseding decisions, and the administrative record(s) supporting those decisions, within 30 days of issuing them.

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[50] Congress expressly found "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 in accordance with the provisions of this subsection." ANILCA § 201(4)(b) (emphasis added).

[51] *Sturgeon*, 577 U.S. at 430–31 (quoting 16 U.S.C. § 3101(d)); *see also id*. at 438–39 (ANILCA recognized "'the need for development and use of Arctic resources with appropriate recognition and consideration given to the unique nature of the Arctic environment.'") (quoting 16 U.S.C. §§ 3101(b), 3111(2), 3147(b)(5)).

[52] 16 U.S.C. § 3101(d).

[53] *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 137 (D.D.C. 2010) (remanding recovery plan to the U.S. Fish and Wildlife Service with instructions to revise it within nine months, and to file status reports with this Court every 90 days "apprising the Court of its progress in developing the revised recovery plan").

B. The Court Should Not Vacate the Underlying Decisions or Permits, Which Has Been Suspended.

Vacatur is neither authorized nor warranted here. The Court should remand the decision without vacatur for three reasons. First, as Federal Defendants point out, courts generally do not award vacatur when there has been no judicial finding of a legal violation.[54] Thus, any cases Plaintiffs cite in opposition to Federal Defendants' motion in which a court vacated an agency's decision after a *judicial* finding that the challenged decision violated a statute are inapposite and should not be considered in resolving the government's motion.

Second, because Federal Defendants have issued suspensions that limit construction activity (but which do not preclude "casual use activities") during the remand period, the environmental, cultural, and subsistence interests upon which Plaintiffs' standing is based will not be harmed.[55] In any event, as set forth above, the agencies' remand period should be limited to nine months, which will also limit any arguable prejudice the remand could cause to Plaintiffs.

Third, the two factors courts consider when deciding whether to vacate remanded decisions both counsel against vacatur here. As the government notes, in deciding whether agency action should be vacated, courts should consider "how serious the agency's errors are 'and the disruptive consequences of an interim change that may itself be changed.'"[56] Here,

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[54] *WildEarth Guardians*, 2020 WL 6255291, at *1 ("Plaintiffs have pointed to no authority to vacate an administrative decision that the court has not had an opportunity to review.").
[55] ECF Nos. 122, 122-1 at 2 (citing 43 C.F.R. 2801.5(b)), and 122-2 (3:20-cv-00253).
[56] Mot. at 11 (quoting *Cal. Cmtys. Against Toxics v. U.S. Env't Prot. Agency*, 688 F.3d 989, 992 (9th Cir. 2012) (quoting *Allied–Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (internal quotation marks omitted)).

neither factor supports vacatur.[57]

First, the purported errors identified by Federal Defendants are not so serious as to be incurable through further administrative processes, either in their own right or in proportion to the number of claims Plaintiffs mounted against this Project. One way to measure the seriousness of the agency's errors is to evaluate the likelihood that the agency will be able to substantiate its decision on remand.[58] The Ninth Circuit considers "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 agency's decision make it unlikely that the same rule would be adopted on remand."[59] Although the Intervenor-Defendants do not concede that any of Plaintiffs' claims have merit, many of them—even if accepted by this Court—would require only additional explanation of analyses the agency has already performed, or harmonizing different parts of the administrative record. For instance, the alleged ANILCA deficiencies consist largely of supposed defects in the Section 810 Subsistence Evaluation based on information Plaintiffs glean from other sections of the EIS.[60] To cure these deficiencies, the agencies need only incorporate the requisite

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[57] A party need not demonstrate both factors for a court to decline vacatur; resolving the question of whether vacatur is appropriate requires the court to assess "the overall equities and practicality of the alternatives." *Nat'l Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92, 99 (D.D.C. 2019) (internal quotation marks and citations omitted).

[58] *See, e.g., Ctr. for Biological Diversity v. U.S. Forest Serv.,* No. 2:17-cv-372, 2021 WL 855938, at *3 (S.D. Ohio Mar. 8, 2021); *N. Coast Rivers All. v. U.S. Dep't of the Interior*, No. 1:16-cv-00307, 2016 WL 8673038, at *8 (E.D. Cal. Dec. 16, 2016).

[59] *Pollinator Stewardship Council v. U.S. Env't Prot. Agency*, 806 F.3d 520, 532 (9th Cir. 2015); *see also Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 98 (D.D.C. 2017) ("Correcting this flaw does not require that Defendants begin anew, but only that they better articulate their reasoning below.").

[60] *See Shafer & Freeman Lakes Env't Conservation Corp. v. Fed. Energy Regul. Comm'n*, 992 F.3d 1071, 1096 (D.C. Cir. 2021) (remanding without vacatur U.S. Fish and Wildlife

information already in the EIS into the Subsistence Evaluation.[61] Therefore, any alleged deficiencies in the EIS are not serious enough to warrant vacatur, as they can be remedied through additional explanation from the agency on remand after it undertakes whatever further analysis, ANILCA process, and Section 106 government-to-government consultation with Tribes it deems appropriate.

As to the second factor, the Ninth Circuit has "made clear that in addition to weighing the environmental consequences of vacatur, courts should consider economic and other practical concerns."[62] These economic and practical concerns include whether "vacatur would cause serious and irremediable harms that significantly outweigh the magnitude of the agency's error."[63] Here, vacatur would thwart Congress' clearly expressed goals in ANILCA Section 1108, which specifically envisioned *this* road, connecting *these* termini, for *these* purposes—and an expedited process for approving it.[64] Surface transportation access for mining in the

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Service's incidental take statement and FERC order because agencies might reach the same result after redressing deficiencies, and vacatur would lead to disruptive consequences).

[61] *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 . . . counsels remand without vacatur.").

[62] *Pac. Rivers Council v. U.S. Forest Serv.*, 942 F. Supp. 2d 1014, 1018 (E.D. Cal. 2013) (internal citations and quotation marks omitted); *see also Sierra Forest Legacy v. Sherman*, 951 F. Supp. 2d 1100, 1106 (E.D. Cal. 2013) ("[T]he determination of when to remand without vacatur should not be limited to situations where it is necessary to avoid environmental harm, but should instead be based on a broader examination of the equities.").

[63] *N. Coast Rivers All.*, 2016 WL 8673038, at *6.

[64] ANILCA § 201(4)(b) (the Secretary *shall* permit such access in accordance with the provisions of this subsection." (emphasis added)); § 4(c) ("Upon the filing of an application pursuant to section 1104 (b), and (c) of this Act for a right-of-way across the Western (Kobuk River) unit of the preserve, including the Kobuk Wild and Scenic River, the Secretary *shall* give notice in the Federal Register of a thirty-day period for other applicants to apply for access." (emphasis added)); § 4(d) (Secretaries of Interior and Transportation "*shall* jointly prepare an environmental and economic analysis solely for the purpose of determining the most desirable route for the right-of-way and terms and conditions which may be required for

Ambler District, which Congress clearly sought to provide in ANILCA, is an all the more timely goal given the need to protect domestic supply chains that yield both critical minerals and other raw materials necessary to achieve the transition to renewable energy.[65] Vacating this decision also would harm Intervenor-Defendants' interests by postponing the date when

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the issuance of that right-of-way. This analysis *shall* be completed within one year and the draft thereof within nine months of the receipt of the application and *shall* be prepared in lieu of an environmental impact statement which would otherwise be required under [NEPA] *shall* be deemed to satisfy all requirements of that Act and shall not be subject to judicial review. Such environmental and economic analysis shall be prepared in accordance with the procedural requirements of section 1104(e)." (emphasis added)); § 4(e) ("Within 60 days of the completion of the environmental and economic analysis, the Secretaries *shall* jointly agree upon a route for issuance of the right-of-way across the preserve. Such right-of-way shall be issued in accordance with the provisions of section 1107 of this Act." (emphasis added)). A statute's use of the word "shall" in a statutory directive to an agency "signals mandatory action." *Nat. Res. Def. Council v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993) (internal quotation marks and citation omitted); *Am. Forest Res. Council v. Hammond,* 422 F. Supp. 3d 184, 190 (D.D.C. 2019) (resource management plans violated "mandatory directives from Congress" by excluding portions of O&C timberland from sustained yield timber harvest) (appeal docketed).

[65] *See, e.g.,* Pub. L. No. 117-58 (Nov. 15, 2021) (Jobs Act) § 40206(b) (stating that "critical minerals are fundamental to the economy, competitiveness, and security of the United States"; that "many critical minerals are only economic to recover when combined with the production of a host mineral"; that "to the maximum extent practicable, the critical mineral needs of the United States should be satisfied by minerals responsibly produced and recycled in the United States"; and that "the Federal permitting process has been identified as an impediment to mineral production and the mineral security of the United States."); "This Russian Metals Giant Might Be Too Big to Sanction," Wall Street Journal, Mar. 7, 2022, https://www.wsj.com/articles/this-russian-metals-giant-might-be-too-big-to-sanction-11646559751 (discussing difficulty of sanctioning company that "is responsible for about 5% of the world's annual production of nickel, a key component of electric-vehicle batteries, and some 40% of its palladium, which goes into catalytic converters and semiconductor."); Office of Energy Efficiency & Renewable Energy, "U.S. Department of Energy Issues Comprehensive Plan to Strengthen America's Clean Energy Supply Chains and Bolster Domestic Manufacturing" (Feb. 24, 2022), https://www.energy.gov/eere/articles/us-department-energy-issues-comprehensive-plan-strengthen-americas-clean-energy (recognizing that "[t]he transition to a clean energy economy cannot proceed without a steady supply of the materials and components required to manufacture clean energy products," and that "[r]eliance on foreign sources for the procurement and processing of clean energy technologies is both a supply chain vulnerability and an impediment to the growth of the American manufacturing workforce.").

they can begin to achieve the benefits of the road (and in the case of Ambler Metals, begin to see a return on its total spent or committed investment of $290.9 million to date).[66]

CONCLUSION

For the foregoing reasons, Federal Defendants' motion for voluntary remand should be granted, subject to the conditions set forth in this response: that the remand will be completed within nine months; that the parties shall submit status updates to the Court every 60 days; that the government shall lodge the administrative record within 30 days of issuing any superseding decisions; and that the Court shall not vacate the challenged agency actions during the remand.

Dated: March 22, 2022

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[66] Decl. of Ramzi Fawaz dated January 19, 2021, ¶ 16 (ECF No. 26-1) (3:20-cv-00253); Decl. of Ramzi Fawaz dated November 13, 2020, ¶ 16 (ECF No. 17-1) (3:20-cv-00187).

CERTIFICATE OF SERVICE

I hereby certify on March 22, 2022, I caused the foregoing document to be electronically filed 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.

Dated: March 22, 2022

s/ Stacey Bosshardt
Stacey Bosshardt