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Evansville Tribal Council, Huslia Tribal Council, Tanana Tribal Council,
and Tanana Chiefs Conference*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

ALATNA VILLAGE COUNCIL, *et al.*,

Plaintiffs,

v.

Case No. 3:20-cv-00253-SLG

STEVEN COHN,¹ in his official capacity, *et al.*,

Defendants,

and

AMBLER METALS, LLC, *et al.*,

Intervenor-Defendants.

**PLAINTIFFS' JOINDER IN AND SUPPLEMENT TO
MOTION FOR RECONSIDERATION AND CLARIFICATION
(Local Civ. R. 7.3(h))**

¹ Pursuant to Fed. Civ. R. P. Rule 25(d), Steven Cohn is automatically substituted in this matter for his predecessor Defendant Thomas Heinlein.

1. Introduction

Plaintiffs hereby join in the Motion for Reconsideration and Clarification filed today in the parallel litigation pursuant to Local Civil Rule 7.3(h).² Plaintiffs are also supplementing the Motion to highlight the threat of irreparable harm to their cultural resources posed by the ongoing fieldwork in furtherance of the Ambler Road Project. Plaintiffs respectfully urge the Court to reconsider its decision and either allow the parties to proceed with merits briefing or suspend BLM's annual permitting process for ground-disturbing fieldwork while the government's supplemental review is carried out on remand. Plaintiffs also reserve the right to seek a preliminary injunction or other relief to protect cultural resources or prevent other types of harm.³

2. Factual Background

Plaintiffs' previous filings and exhibits detail the extensive geotechnical drilling, overland transport using tracked vehicles, and other ground-disturbing fieldwork that AIDEA seeks to conduct in 2022-23.⁴ Additional information submitted herewith further describes this fieldwork and demonstrates that BLM is still moving toward authorizing it.⁵ If approved, ground-disturbing fieldwork would be carried out in many areas without prior investigation to identify cultural resources.⁶

² *NAEC v. Haaland*, 3:20-cv-00187, ECF 145. *See* ECF 34, 81, 97 (encouraging the parties to confer, incorporate text by reference, combine briefing, and avoid repetition).

³ *See* ECF 128, at 30.

⁴ *See* ECF 113 and 113-1 through 113-8; ECF 128 and 128-1 through 128-3; ECF 133 and 133-1.

⁵ *See* Exhibits 1, 2. *See also* *NAEC*, ECF 145-2.

⁶ *See NAEC*, ECF 145-2, at 37.

3. Discussion

In the order granting Defendants' motion for a voluntary remand, the Court found remand was "unlikely to prejudice Plaintiffs."⁷ The Court's finding was informed by Defendants' assurance that the Programmatic Agreement ("PA") implementing their NHPA § 106 responsibilities would protect cultural resources from the harmful impacts of ground-disturbing activities.⁸ Defendants' assurance was misleading and, as a result, the Court's finding that the voluntary remand would not prejudice Plaintiffs was in error.

The PA creates a mechanism for BLM to approve ground-disturbing activities each year. BLM essentially grants a series of annual permits for the Ambler Road Project under the PA. Defendants have admitted that the PA is legally "deficient"⁹ and that "[s]hortcomings in the NHPA Section 106 compliance efforts ... necessitate a remand of the decisions to allow a more robust process to precede any future decisions."¹⁰

Defendants have indicated that, on remand, they will address the deficiencies by revisiting their consultation obligations with Tribes, evaluating whether Tribes should have the opportunity to serve as "signatories" (rather than being limited to "consulting party" status), and considering whether the geographic "area of potential effect" where cultural resources are identified and protected should be expanded.¹¹ In light of the many

⁷ ECF 142, at 14.

⁸ *See id.* at 11-12. *See also id.* at 14-15 (relying more generally on Defendants' assurance that their "suspension of the right-of-way permits and position on preventing environmental harm during the reconsideration period will avoid prejudice to Plaintiffs").

⁹ ECF 111, at 2, 20 and ECF 111-1, at 4 (emphasis added).

¹⁰ ECF 111, at 17 (emphasis added).

¹¹ *See id.* at 19-20.

fundamental flaws in the PA, and Defendants' admission that such flaws need to be fixed before BLM makes any future decisions approving ground-disturbing work, it was unreasonable and misleading for Defendants to suggest this very same PA permitting process could be relied on to protect cultural resources from irreparable harm while the government's review is carried out on remand.

The situation is urgent for Plaintiffs because, despite the admitted illegality of the PA and the threat to cultural resources posed by geotechnical drilling, tracked vehicles, and other aspects of the fieldwork, BLM is still moving forward with the PA permitting process. During a meeting on April 28, 2022, for instance, Plaintiff Tanana Chiefs Conference inquired "why are we meeting about the PA and the work plan" even though "BLM has admitted that the PA is unlawful?"¹² BLM responded "we actually got confirmation from the BLM director from our HQ yesterday that we are good to go with the activities that we're proceeding with" and that "the PA is still in place and it's still effective."¹³ Additionally, BLM sent a letter to Plaintiffs on May 12, 2022, granting an extension of the deadline for commenting on the proposed 2022-23 Fieldwork Plan until June 20, 2022.¹⁴ By doing so, BLM confirmed it is still moving toward granting an annual PA permit for ground-disturbing activities this year.

Compounding the problems discussed above, any approval of the extensive fieldwork proposed for 2022-23 would have to be granted without prior identification of

¹² Exhibit 1.

¹³ *Id.*

¹⁴ *See* Exhibit 2, at 1.

cultural resources for all affected areas, which is required under both the NHPA and NEPA.¹⁵ Defendants’ own experts have acknowledged that “no portion of the current proposed Project has had sufficient cultural resources investigations to allow for an assessment of the corridor, the road alignment, and ancillary construction areas.”¹⁶ This remains true today. For instance, BLM’s May 12 letter indicates it is just now initiating a “project” to “identify[] the presence of ethnographic resources.”¹⁷ Due to the complex and time-consuming nature of these and other types of cultural resource investigations, they could not be completed before the 2022-23 field season. Indeed, AIDEA has admitted that the proposed fieldwork would include ground-disturbing activities “[i]n areas where field inventories” to identify cultural resources have “not yet been conducted.”¹⁸ If BLM were to grant a PA permit for ground-disturbing activities in areas where cultural resources have not been properly identified, this would severely prejudice Plaintiffs and could result in irreparable harm to their cultural resources.

4. Conclusion

For the foregoing reasons, Plaintiffs respectfully urge this Court to reconsider its order granting Defendants’ motion for a voluntary remand and issue a new order either allowing the parties to promptly complete merits briefing¹⁹ or suspending implementation of the PA during the government’s supplemental review.

¹⁵ See ECF 99, at 64-80.

¹⁶ ECF 99, at 75.

¹⁷ Exhibit 2, at 1.

¹⁸ See *NAEC*, ECF 145-2, at 37.

¹⁹ See *NAEC*, ECF 145, at 4, 145-3.

DATED: May 24, 2022

Respectfully submitted,

CLEMMER LAW OFFICE, LLC

By: s/ Teresa B. Clemmer
Teresa B. Clemmer (AK Bar No. 0111059)

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that, on May 24, 2022, I caused copies of the following:

PLAINTIFFS' JOINDER IN AND SUPPLEMENT TO MOTION FOR
RECONSIDERATION AND CLARIFICATION

to be filed with the Court and served by electronic means on all counsel of record through the Court's CM/ECF system.

/s/ Teresa B. Clemmer
Teresa B. Clemmer