

STACEY BOSSHARDT (*Pro Hac Vice*)
DC Bar No. 458645
KERENSA GIMRE (*Pro Hac Vice*)
DC Bar No. 1780406
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6200
SBosshardt@perkinscoie.com
KGimre@perkinscoie.com

ERIC B. FJELSTAD
JAMES N. LEIK
PERKINS COIE LLP
1029 West Third Avenue, Suite 300
Anchorage, AK 99501-1981
Telephone: 907.279.8561
EFjelstad@perkinscoie.com
JLeik@perkinscoie.com

***Attorneys for Ambler Metals LLC,
Intervenor-Defendant***

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALATNA VILLAGE COUNCIL,
et al.,

Plaintiffs,

v.

THOMAS HEINLEIN, et al.,

Defendants.

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

**JOINT RESPONSE OF AMBLER METALS, NANA REGIONAL
CORPORATION, INC., AND THE STATE OF ALASKA TO FEDERAL
DEFENDANTS' SEPTEMBER 16, 2022 STATUS REPORT**

Alatna Village Council, et al., v. Heinlein, et al.

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After reviewing the status report filed by Federal Defendants (ECF No. 158) and the Notice of Intent described in the report, Ambler Metals, NANA Regional Corporation, Inc. and the State of Alaska (collectively, “Objecting Intervenor”) file this response to express their strong concerns about the Federal Defendants’ failure to carry out the remand in a manner that is timely and narrowly focused on the alleged deficiencies that were brought to the Court’s attention in the motion for remand (ECF No. 111). Federal Defendants’ actions are inconsistent with the representations and commitments they made in their motion for voluntary remand, and conflict with the requirements Congress imposed when it authorized the Ambler Road Project.

Last February, rather than responding to Plaintiffs’ motions for summary judgment, Defendant Department of the Interior (Interior) and its components, the National Parks Service (NPS) and the Bureau of Land Management (BLM), moved for an order remanding those bureaus’ decisions approving right-of-way permits held by the Alaska Industrial Development and Export Authority (AIDEA) back to Interior for further review.¹ The permits authorized the construction and operation of Ambler Road, an industrial use gravel roadway extending east from the Ambler Mining District to the Dalton Highway, over certain lands administered by the agencies.² The permits were the product of an extensive,

¹ See ECF No. 111. The involvement of the other primary Federal Defendant, the U.S. Army Corps of Engineers, in the remand proceedings is unclear. The Corps stated that it “will consider what action is needed with respect to the Section 404 permit in light of the Court’s ruling on this [remand] motion.” *Id.* at 3 n.1.

² About one-quarter of Ambler Road crosses federal land, including 25 miles of public land and 26 miles of NPS-administered land in the Gates of the Arctic National Park and Preserve. The remainder of the 211-mile road crosses State, Tribal, and private land. See, e.g., BLM_0015406-08 (background and overview of the project).

years-long environmental review process that began in February 2011,³ culminating in a robust review under the National Environmental Policy Act (NEPA).

Interior's (and the other agencies') investment in the Ambler Road Project reflects the Project's unique importance under the Alaska National Interest Lands Conservation Act (ANILCA).⁴ In the statute, Congress determined that "there is a demonstrable need for some form of improved surface access to the Ambler mineral district,"⁵ and authorized a transportation corridor across federal land to connect the Ambler Mining District to the Dalton Highway.⁶ As Interior and the U.S. Army Corps of Engineers recognized in the joint Record of Decision approving the authorizations, Congress, in ANILCA Section 201(4)(b), directed Interior to permit such access.⁷

Congress also enacted specific requirements for the approval process for the Ambler Road Project, including the type of environmental analysis needed to approve a route

³ See, e.g., NPS_0026726 (draft Ambler Mine District meeting minutes dated Nov. 8, 2011, discussing the success of "multi-agency field trips" on August 30 and 31, 2011, with EPA, USFWS, ADNR, and FHWA, and archaeological reconnaissance efforts with NPS archaeologists); NPS_0029927; NPS_0029939; NPS_0030047; NPS_0030044 (reflecting meetings with potentially affected Tribes in 2013, as well as community meetings in 2013 in Kobuk, Shungnak, Evansville, Bettles, Alatna, and Allakaket to provide information on the road and its impacts, and to solicit information on how the road could impact subsistence activities); NPS_30100-01; see also BLM_104772-893 (State conducted surveys for cultural resources along the proposed route, which were completed in August 2013).

⁴ 16 U.S.C. §§ 3161–3168; see also 43 C.F.R. pt. 36 (regulations governing applications for transportation and utility systems across conservation system lands in Alaska).

⁵ H.R. Rep. No. 96-97, pt. 1, at 156 (1979).

⁶ S. Rep. No. 96-413, at 147 (1979).

⁷ 16 U.S.C. § 410hh(4)(b); see also BLM_0016720–21 (Joint Record of Decision).

through the Gates of the Arctic National Park and Preserve (GAAR).⁸ In addition, in Title XI of ANILCA, Congress created a streamlined process that generally applies to transportation and utility systems that cross conservation system units in Alaska, including expedited environmental review and approval of right-of-way permits.⁹ Congress directed that these streamlined procedures apply to the Ambler Road Project, except to the extent they are superseded by the requirements specific to the project.¹⁰

In seeking remand last March, Federal Defendants stated that there were deficiencies in their evaluation of impacts to subsistence use under Section 810 of ANILCA, and in the consultation process under Section 106 of the National Historic Preservation Act (NHPA).¹¹ At the same time, the Deputy Secretary of the Interior issued two decisions that suspended the BLM and NPS right-of-way grants based on the same limited grounds, which were filed with the Court to support the remand request.¹² The Deputy Secretary also submitted a declaration stating that the agencies were “committed to undertaking the necessary consultation, analysis and supplementation *in a timely manner*.”¹³ Given the unique requirements applicable to the Ambler Road Project,

⁸ 16 U.S.C. § 410hh(4)(c)–(e).

⁹ 16 U.S.C. §§ 3161–67; *see also* 43 C.F.R. pt. 36 (BLM regulations governing applications for transportation and utility systems in and across conservation units in Alaska, implementing ANILCA).

¹⁰ 16 U.S.C. § 410hh(4)(d)–(e).

¹¹ *See* ECF No. 111 at 12–17 (discussing ANILCA Section 810), 17–20 (discussing NHPA Section 106).

¹² *See* ECF Nos. 122, 122-1, 122-2.

¹³ Decl. of Deputy Sec’y of the Dep’t of the Interior, ECF No. 111-1, ¶ 11 (emphasis added).

including Congress' express authorization for the Project, the limits imposed on environmental reviews for transportation and utility systems, and the limited deficiencies indicated in Federal Defendants' filings, "timely manner" should logically be considered to be a matter of months. The supplemental review certainly can and should be completed no later than 2023.¹⁴

Although the Court granted the remand motion on May 17, 2022, it took Federal Defendants four months to even produce a schedule. They have now issued a Notice of Intent to prepare a Supplemental Environmental Impact Statement (SEIS) under NEPA, which is discussed further below.¹⁵ But Federal Defendants still have not provided a deadline for the completion of the remand process. Although the status report notes that BLM aspires to publish the draft SEIS by the second quarter of 2023, it does not provide an estimated date for publication of a final SEIS or for the completion of the remand process generally.

In addition, BLM appears to have significantly expanded the scope of the remand compared to what it represented in its motion. When Federal Defendants filed their motion for remand, they identified three discrete issues under ANILCA and the NHPA, and

¹⁴ By contrast, under the presumptive deadlines in ANILCA and BLM's regulations governing transportation and utility system approval, the approval process for a right-of-way application for a transportation and utility system should be completed in approximately 16 months. *See* 16 U.S.C. § 3164(e)–(g). Here, the right-of-way application was submitted on June 30, 2016, more than six years ago.

¹⁵ ECF No. 158, at 2–3; *see also Notice of Intent to Prepare a Supplemental Environmental Impact Statement for the Proposed Ambler Mining District Industrial Access Road, Fairbanks, Alaska*, 87 Fed. Reg. 57509 (Sept. 20, 2022).

suggested a relatively narrow, targeted remand process.¹⁶ In his supporting declaration, the Deputy Secretary briefly mentioned plans to supplement the NEPA analysis for unspecified “impacts and resources identified as areas of concern in this litigation,” but did not identify any defect in the NEPA analysis previously completed; explain why supplementation under NEPA is necessary; or explain why an SEIS (as opposed to another form of supplemental analysis) is appropriate.¹⁷

In their status report, Federal Defendants indicated for the first time that they will engage in “scoping”—a process *not* required for supplemental NEPA analyses.¹⁸ More concerning, the Notice of Intent seeks public comments “on issues, concerns, potential impacts, alternatives, and mitigation measures that should be considered in the analysis.”¹⁹ This suggests that the equivalent of an entirely new NEPA process will be completed for no apparent reason. For example, there is no occasion to solicit or examine new “alternatives” to the Ambler Road Project because Project alternatives were not the basis of any NEPA claim that was briefed in Plaintiffs’ lengthy summary judgment briefs, nor was the issue identified by Federal Defendants (or by the Deputy Secretary) when they moved for remand. Moreover, given ANILCA’s mandate to permit access through the

¹⁶ See ECF No. 111, at 11.

¹⁷ See ECF No. 111-1, ¶ 10. Under NEPA, an SEIS is required only under limited circumstances, typically when new information shows that the proposed action will affect the human environment in a significant manner or to a significant extent not already considered. See 40 C.F.R. § 1502.9; *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 374 (1989).

¹⁸ See 40 C.F.R. § 1502.9(d).

¹⁹ 87 Fed. Reg. at 57510.

GAAR to provide surface transportation access linking the Ambler Mining District and Dalton Highway,²⁰ there is no need to consider alternative routes that do not connect the District with Dalton Highway; “[w]hen the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved.”²¹

If this were a project with which BLM had no prior experience, Federal Defendants’ efforts to fully explore the universe of potential alternatives and potential impacts might be justified. But Federal Defendants are intimately familiar with the environmental analysis for the Project. They have spent years permitting the Project, during which they offered multiple opportunities for public comment (including an 11-month scoping period)—opportunities in which the Plaintiffs participated. The federal agencies produced an administrative record that contains 199,658 pages. The Project was in litigation for 18 months before Federal Defendants even moved for remand, and the two sets of plaintiffs each filed voluminous summary judgment briefs addressing their claims in December 2021. No party contested the alternatives analyses under NEPA. Federal Defendants needlessly extended the timeframe for the remand process by including a scoping period, and they are significantly expanding the scope of the remand by inviting input on alternatives.

²⁰ 16 U.S.C. § 410hh(4)(b) (“Congress finds 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.”) (emphasis added).

²¹ *City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986) (finding no need to analyze alternatives to land transfer under ANILCA that would require legislation).

Objecting Intervenor therefore file this response to object to Federal Defendants' efforts to expand the scope of the remand far beyond what they represented in their remand motion and to their failure to provide a timetable for the remand process despite their representation that they would complete the analysis "in a timely manner."

Despite the Administration's professed interest in "clear timeline goals" and "clear information about the schedule, key milestones, and deadlines"²²; ANILCA's multiple statutory provisions requiring prompt action on the right-of-way through the GAAR; and the representations in the affidavit of the Deputy Secretary that BLM would complete the supplemental analysis in a timely manner, BLM still has provided no estimated date by which it will complete the remand proceedings.

Objecting Intervenor submit that the remand schedule here should be no longer than the remand schedule for the Willow Project, a case where this Court found "serious" errors in the analysis, including the consideration of alternatives, *after* fully adjudicating the plaintiffs' claims. *Sovereign Iñupiat for a Living Arctic v. BLM*, 555 F. Supp. 3d 739, 804 (D. Alaska 2021). Based on the expected publication date for the final EIS in that case, Federal Defendants could achieve a comparable schedule in the instant case by completing the remand for the Project by no later than the end of 2023. Given Federal Defendants'

²² See White House Fact Sheet: Biden-Harris Administration Releases Permitting Action Plan to Accelerate and Deliver Infrastructure Projects On Time, On Task, and On Budget (May 11, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/11/fact-sheet-biden-harris-administration-releases-permitting-action-plan-to-accelerate-and-deliver-infrastructure-projects-on-time-on-task-and-on-budget/>.

presentation of their remand as a targeted process to explore three discrete issues, the end of 2023 is a fair and realistic goal to complete the remand process.

Objecting Intervenor are not requesting a status conference before the Court at this time. The purpose of this filing is to highlight the serious shortcomings in the Federal Defendants' approach to the remand. These shortcomings threaten to delay Congress' prescription for this corridor. They will also significantly affect Ambler Metals (*see* ECF No. 26, at 7–10). The State of Alaska's sovereign and economic interests in the proper management and development of the State's natural resources and in ensuring the faithful execution of ANILCA by providing reasonable access to the Ambler Mining District are also being injured by the Federal Defendants' continuing, open-ended delay. If the issues have not been addressed by Federal Defendants, Objecting Intervenor will likely seek a status conference following Federal Defendants' next 60-day status report.

Dated: October 10, 2022

PERKINS COIE LLP

By: s/ Stacey Bosshardt

Stacey Bosshardt (*Pro Hac Vice*)
DC Bar No. 458645
Kerensa Gimre (*Pro Hac Vice*)
DC Bar No. 1780406
SBosshardt@perkinscoie.com
KGimre@perkinscoie.com
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6200
Facsimile: 202.654.6211

Eric B. Fjelstad
EFjelstad@perkinscoie.com
James N. Leik
JLeik@perkinscoie.com
1029 West Third Avenue, Suite 300
Anchorage, AK 99501-1981
Telephone: 907.279.8561

*Attorneys for Intervenor-Defendant
Ambler Metals, LLC*

STOEL RIVES LLP

By: s/ Beth S. Ginsberg

James E. Torgerson (Bar No. 8509120)
Connor R. Smith (Bar No. 1905046)
STOEL RIVES LLP
510 L Street, Suite 500
Anchorage, AK 99501
Telephone: 907.277.1900
Facsimile: 907.277.1920
Email: jim.torgerson@stoel.com
connor.smith@stoel.com

Beth S. Ginsberg (*Pro Hac Vice*)
James C. Feldman (Bar No. 1702003)
600 University Street, Suite 3600
Seattle, WA 98101

Phone: 206.386.7581
Facsimile: 206.386.7500
Email: beth.ginsberg@stoel.com
james.feldman@stoel.com

*Attorneys for Intervenor-Defendant
NANA Regional Corporation, Inc.*

**TREG R. TAYLOR
ATTORNEY GENERAL**

By: /s/ Ronald W. Opsahl
Ronald W. Opsahl
(Alaska Bar No. 2108081)
Assistant Attorney General
Alaska Department of Law
1031 West Fourth Avenue, Suite 200
Anchorage, Alaska 99501
Phone: (907) 269-5100
Facsimile: (907) 276-3697
Email: ron.opsahl@alaska.gov

Attorney for State of Alaska

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2022, a copy of the foregoing was served by electronic means on all counsel of record by the Court's DM/ECF system.

Dated: October 10, 2022

By: s/ Stacey Bosshardt
Stacey Bosshardt