Brook Brisson (AK Bar No. 0905013)
Suzanne Bostrom (AK Bar No. 1011068)
Bridget Psarianos (AK Bar No. 1705025)
Victoria Clark (AK Bar No. 0401001)
TRUSTEES FOR ALASKA
121 W Fireweed Lane, Suite 105
Anchorage, AK 99503
Phone: (907) 276-4244
Fax: (907) 276-7110
bbrisson@trustees.org
sbostrom@trustees.org
bpsarianos@trustees.org
vclark@trustees.org

Attorneys for Intervenor-Defendants Gwich'in Steering Committee, et al.

Karimah Schoenhut (*pro hac vice*)
SIERRA CLUB ENVIRONMENTAL LAW PROGRAM
50 F St., NW 8th Floor
Washington, DC 20001
Phone: (202) 548-4584
Fax: (202) 547-6009
karimah.schoenhut@sierraclub.org

Attorney for Intervenor-Defendant Sierra Club

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALASKA INDUSTRIAL DEVELOPMENT AND EXPORT AUTHORITY, *et al.*, Plaintiffs, and STATE OF ALASKA, Intervenor-Plaintiff,	Case No. 3:21-cv-00245-SLG

v.

JOSEPH R. BIDEN, JR., *et al*.,

Defendants,

and

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al*.,

Intervenor-Defendants.

INTERVENOR-DEFENDANTS GWICH'IN STEERING COMMITTEE ET AL.'S AND INTERVENOR-DEFENDANTS NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT ET AL.'S JOINT RESPONSE IN OPPOSITION TO MOTION TO ALTER OR AMEND SUMMARY JUDGMENT ORDER AND JUDGMENT

Intervenor-Defendants Gwich'in Steering Committee et al. (collectively Gwich'in Steering Committee) and Intervenor-Defendants Native Village of Venetie Tribal Government et al. (collectively the Tribes) oppose Plaintiffs Alaska Industrial Development and Export Authority et al. (collectively AIDEA) and Intervenor-Plaintiff State of Alaska's (the State) Motion to Alter or Amend Summary Judgment Order and Judgment. Mot. to Amend, ECF No. 76. AIDEA and the State do not meet the high bar for this Court to alter or amend its order on summary judgment or the judgment in this case. *See* Order Re Mots. for Summ. J., ECF No. 72 [hereinafter Order]; J. in a Civil Action, ECF No. 73. Their motion should be denied.

LEGAL FRAMEWORK

A motion to alter or amend a judgment under Federal Rule of Civil Procedure 59(e) is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kaufmann v. Kijakazi*, 32 F.4th 843, 850 (9th Cir. 2022) (quoting *Wood v. Ryan*, 759 F.3d 1117, 1121 (9th Cir. 2014) (per curiam)). Amending a judgment "is a high hurdle" and judgment "is not properly reopened 'absent highly unusual circumstances.'" *Weeks v. Bayer*, 246 F.3d 1231, 1236 (9th Cir. 2001) (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)). When considering whether to alter or amend a judgment, courts consider four factors:

> (1) if such motion is necessary to correct manifest errors or law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law.

Allstate Ins. Co. v. Herron, 634 F.3d 1101, 1111 (9th Cir. 2011). Such motions cannot be used to relitigate issues that have already been decided. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (citing 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2810.1, at 127–28 (2d ed. 1995)); *Guenther v. Lockheed Martin Corp.*, 972 F.3d 1043, 1058 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2596 (2021). Motions to alter or amend judgment also cannot be used to "raise arguments or present evidence for the first time when they reasonably could have been raised earlier in the litigation." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (citing *Kona Enters. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)).

ARGUMENT

In their motion, AIDEA and the State do not identify any clear error of law or fact. They do not identify any newly discovered evidence. They do not claim manifest injustice. And they do not identify any intervening change in controlling law. Indeed, they barely acknowledge the legal standard to alter or amend the judgment. Mot. to Amend at 2 n.1. Instead, they present arguments for the first time that could have been raised earlier as well as re-argue issues that have been decided. Neither are proper grounds to amend the judgment and their motion should be denied.

The first basis AIDEA and the State put forward to support their motion is that they should be allowed to proceed with "non-environment-impacting preliminary steps like archaeological surveys," asserting that the Naval Petroleum Reserves Production Act (NPRPA) and the lease terms do not allow suspension of such activities. Mot. to Amend at 2–6. There are two problems with this argument. First, AIDEA and the State never asked the Court for this relief or argued that purportedly "non-environment-impacting" activities could not be suspended as part of the program suspension.[1] *See* Plaintiffs' Mot. for Summ. J. at 40, ECF No. 60 [hereinafter AIDEA Mot.]; State of Alaska's Mot. for Summ. J. at 34, ECF No. 59 [hereinafter State Mot.]; Plaintiffs' Reply in Supp. of Mot. for Summ. J. at 25–26, ECF No. 67 [hereinafter AIDEA Reply]; State of Alaska's Reply in Supp. of Mot. for Summ. J. at 18, ECF No. 66 [hereinafter State Reply]; *see also Kona*

[1] The Gwich'in Steering Committee and Tribes do not concede that such surveys or other activities AIDEA might engage in are not environmentally impactful.

Enters., 229 F.3d at 890 (explaining motions to amend cannot be used to raise arguments for the first time). Instead, they claimed the agencies' actions were an unlawful moratorium across the board. Having failed in that claim, they are now attempting to cleave off an undefined subset of activities related to future exploration and asking the Court to compel authorizations of those activities regardless of the U.S. Bureau of Land Management (BLM) and U.S. Fish and Wildlife Service's (FWS) ongoing process to correct the legal errors infecting the Leasing Program.[2] In doing so, AIDEA and the State raise arguments for the first time about why the court should allow that subset of activities to proceed. Importantly, the Court previously understood that the activities sought to be conducted included archeological surveys. Order at 8. The Court also recognized that the temporary suspension of all authorizations was to allow the agencies to properly analyze the environmental impacts of all aspects of the leasing program, including exploration and related field work, to ensure compliance with the Coastal Plain's conservation purposes. Order at 27–28, 37; *see also id.* at 73 (recognizing that the agencies' action furthers the goals of applicable statutes). The Court did not commit a manifest error of fact or law in upholding BLM's and FWS's ability to suspend all authorizations implementing the program while the agencies correct the legal errors with the Leasing Program. *Allstate Ins. Co.*, 634 F.3d at 1111.

[2] The only justification put forth to allow these activities to proceed is that AIDEA does not want to miss another year before it could conduct the surveys. Mot. to Amend at 3. This does not rise to the level of a manifest injustice.

Second, AIDEA already attempted to refute the applicability of the NPRPA to the Leasing Program and the Court rejected that argument. AIDEA Mot. at 28 n.8; AIDEA Reply at 14–16; Order at 21–24, 33–34. AIDEA also already argued that the lease terms prevent the agencies from suspending operations. AIDEA Mot. at 29. The Court rejected this argument as well. Order at 37–40. The fact that AIDEA and the State have slightly shifted their arguments on these points to contend that the NPRPA and specific lease terms do not apply to a subset of undefined exploration-related activities that they claim do not impact the environment does not save them. They could have raised those arguments before but did not. *Carroll*, 342 F.3d at 945.

The next basis that AIDEA and the State put forward to support their motion is that the Court "infers too much from the absence of specific statutory deadlines" in the Tax Act, claiming that there is a timing element to the Secretary's duties to carry out the leasing program. Mot. to Amend at 7–11. AIDEA and the State assert that this Court applied an incorrect canon of statutory construction in reaching its conclusion that the Tax Act does not mandate any specific deadlines or actions beyond the two lease sales. Mot. to Amend at 7–8; *see* Order at 72 & 19 n.78. AIDEA and the State also argue for the first time that the Court should have applied a different canon of statutory construction to its analysis. Mot. to Amend at 9–10; *see also* AIDEA Mot. at 25, 29 & AIDEA Reply at 10–12, 15–16 (presenting statutory construction arguments). They do not claim any of this is a manifest error of law. Instead, this argument is a blatant attempt to relitigate an issue that was fully litigated and interject new arguments. AIDEA extensively briefed the

question of whether the Tax Act imposed deadlines and timelines on the agencies that were violated. AIDEA Mot. at 16–17, 24–25, 28–29, 39–40; AIDEA Reply at 17–18 & 18 n.10. This Court decisively rejected those arguments. Order at 18–21, 71–72; *see Exxon Shipping Co.*, 554 U.S. at 485 n.5 (explaining motions to amend cannot be used to relitigate issues); *Guenther*, 972 F.3d at 1058 (same). Moreover, in making this argument, AIDEA and the State now concede that there are no deadlines in the Tax Act beyond the lease sales. Mot. to Amend at 8–10. Far from showing a clear legal error, the argument reinforces the Court's holding that there are no deadlines outside of the lease sales.

AIDEA and the State also now ask this Court to order Interior to carry out those duties "with an urgency and timeliness proportional to the statutory deadline for the issuance of the leases." Mot. to Amend at 11. But again, AIDEA and the State never sought this specific relief during the litigation. AIDEA Mot. at 40; State Mot. at 34; AIDEA Reply at 25–26; State Reply at 18. They cannot raise it now. *Carroll*, 342 F.3d at 945. Regardless, the Court already determined that the agencies must act within a reasonable time and held that they are doing so. Order at 24, 73. Accordingly, AIDEA and the State failed to show that the Court committed a manifest error of law in interpreting the Tax Act. *Allstate Ins. Co.*, 634 F.3d at 1111.

CONCLUSION

Because AIDEA and the State raise issues for the first time and attempt to relitigate issues already decided, they do not meet the high bar to alter or amend the summary judgment order and judgment. This Court should deny the Motion to Amend.

Respectfully submitted this 19th day of September, 2023.

s/ Brook Brisson
Brook Brisson (AK Bar No. 0905013)
Suzanne Bostrom (AK Bar No. 1011068)
Bridget Psarianos (AK Bar No. 1705025)
Vicki Clark (AK Bar No. 0401001)
TRUSTEES FOR ALASKA

Attorneys for Intervenor-Defendants Gwich'in Steering Committee et al.

s/ Karimah Schoenhut (consent)
Karimah Schoenhut (pro hac vice)
SIERRA CLUB ENVIRONMENTAL LAW PROGRAM

Attorney for Intervenor-Defendant Sierra Club

s/ Matthew N. Newman (consent)
Matthew N. Newman (AK Bar No. 1305023)
Megan R. Condon (AK Bar No. 1810096)
NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Phone: 907-276-0680
mnewman@narf.org
wfurlong@narf.org
mcondon@narf.org

Lead Counsel for Intervenor-Defendants Native Village of Venetie Tribal Government et al.

Peter H. Van Tuyn (AK Bar No. 8911086)

Karen E. Schmidt (AK Bar No. 1211113)
BESSENYEY & VAN TUYN, LLC
310 K Street, Suite 200
Anchorage, AK 99501
Phone: 907-278-2000
peter@bvt-law.com
karen@bvt-law.com

Co-Counsel for Intervenor-Defendants Native Village of Venetie Tribal Government et al.

CERTIFICATE OF SERVICE

I certify that on September 19, 2023, I caused a copy of the INTERVENOR-DEFENDANTS GWICH'IN STEERING COMMITTEE ET AL.'S AND INTERVENOR-DEFENDANTS NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT ET AL.'S JOINT RESPONSE IN OPPOSITION TO MOTION TO ALTER OR AMEND SUMMARY JUDGMENT ORDER AND JUDGMENT to be electronically filed with the Clerk of the Court for the U.S. District Court of Alaska using the CM/ECF system.

s/ Brook Brisson
Brook Brisson