



November 3, 2022

Wendy Huber
Planning and Environmental Specialist
Bureau of Land Management
Alaska State Office
222 West 7th Avenue
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Submitted via email at: BLM_AK_AKSO_AmblerRoad_comments@blm.gov and
whuber@blm.gov

**Re: Notice of Intent to Prepare a Supplemental Environmental Impact Statement
for the Proposed Ambler Mining District Industrial Access Road**

Dear Ms. Huber:

The State of Alaska (State) has reviewed the Bureau of Land Management's (BLM) Notice of Intent to Prepare a Supplemental Environmental Impact Statement for the Proposed Ambler Mining District Industrial Access Road (NOI).¹ As explained below, the State is very concerned about the process described in the NOI. It states that the BLM is preparing a supplemental environmental impact statement (SEIS) on the Ambler Road Project, however a robust analysis of the project has already taken place in accordance with the National Environmental Policy Act (NEPA), and no new information or circumstances are present that would justify the preparation of an SEIS.² In short, the BLM appears to be engaging in an unnecessary and unlawful NEPA process in order to halt the Ambler Road Project. This violates the intent of Congress³ and the requirements for the development of transportation systems under the Alaska National Interest Lands Conservation Act (ANILCA).⁴

A. Background on the Ambler Road Project.

When it enacted ANILCA, 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 lands to connect the Ambler Mining District to the existing North Slope haul road (the Dalton Highway).⁶ This goal was clearly expressed in ANILCA Section 201(4)(b), which provides:

¹ 87 Fed. Reg. 57509 (Sept. 20, 2022).

² See 40 C.F.R. § 1502.9 (setting forth the circumstances under which an SEIS is required); BLM, NEPA HANDBOOK (H-1790-1) §§ 5.1 (determination of the adequacy of an existing NEPA document), 5.3 (setting forth the requirements for supplementing an existing EIS) (Jan. 2008).

³ 16 U.S.C. § 410hh(4)(b) (identifying and authorizing the Ambler Road).

⁴ 16 U.S.C. §§ 3161-3168; see also 43 C.F.R. pt. 36 (BLM 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.

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 [Interior] Secretary shall permit such access in accordance with the provisions of this subsection.⁷

Congress also enacted specific requirements for approval of Ambler Road, including the type of environmental analysis needed to approve a route 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 approving transportation and utility systems that cross conservation system units in Alaska, including expedited environmental review and approval of right-of-way applications.⁹ Congress directed that these streamlined procedures apply to the approval of Ambler Road, except to the extent they are superseded by the requirements specific to that project.¹⁰

In 2015, AIDEA began the process of effectuating the intent of Congress by filing an application to build a 211-mile road from the Dalton Highway to the Ambler Mining District pursuant to ANILCA Section 201(4)(a).¹¹ AIDEA's application triggered a robust NEPA process that took four years to complete – well beyond the presumptive deadlines in ANILCA and the BLM's regulations.¹² This environmental review process involved extensive public engagement, including numerous public meetings throughout Alaska and government-to-government consultation meetings with Alaska Native villages and tribal councils conducted pursuant to Section 106 of the National Historic Preservation Act (NHPA).¹³

The Final EIS for the Ambler Road Project was ultimately issued in March 2020. It is over 1,000 pages and provides a comprehensive and detailed analysis of the likely effects of the Ambler Road Project, including its effects on subsistence uses and cultural resources, and requirements to

⁷ 16 U.S.C. § 410hh(4)(b) (emphasis added); *see also* NPS_0009717-19 (describing the need for Ambler Road and explaining that Congress guaranteed access from the mining district to Dalton Highway in ANILCA). Citations in this format are to the Administrative Record filed in the litigation challenging the project: *Alatna Village Council v. Heinlein*, No. 3:20-cv-00253 (D. Alaska), and *N. Alaska Envtl. Council v. Haaland*, No. 3:20-cv-00187 (D. Alaska). The Secretary of the Interior, various BLM officials, and the BLM itself are parties to this litigation and therefore are aware of and have access to the federal agency documents that are contained in the administrative record.

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, e.g.*, BLM_0015406-08 (background and overview of the project).

¹² 16 U.S.C. § 3164(e)-(g); 43 C.F.R. §§ 36.6, 36.7(a). A draft EIS should be issued nine months after the date on which the right-of-way application for the TUS is filed, the final EIS should be issued three months later, and the final decision to approve the right-of-way should be made four months after the notice of availability of the final EIS has been issued. Thus, the approval process should take about 14 months.

¹³ *See* BLM_00160004-16 (Appendix I: Collaboration and Consultation).

mitigate those effects.¹⁴ In July 2020, the federal agencies issued a Joint Record of Decision (JROD), which approved the Ambler Road route and authorized rights-of-way and associated temporary use permits for road construction and operation over lands managed by the BLM and the National Park Service (NPS), subject to numerous terms, conditions, environmental protection measures, and mitigation measures.¹⁵ The JROD included the final ANILCA 810 Evaluation¹⁶ and three other appendices that include mandatory mitigation measures to avoid, minimize, and mitigate impacts to subsistence resources and uses.¹⁷ In early January 2021, the BLM and NPS issued right-of-way permits to AIDEA.¹⁸

Lawsuits challenging the Ambler Road Project's federal approvals were filed in August and October 2020. In the midst of briefing on dispositive motions, in February 2022, the Department of Interior requested a voluntary remand, stating additional legal analysis had revealed deficiencies in the BLM's analysis of subsistence impacts under ANILCA Section 810 and consultation with Alaskan Tribes pursuant to Section 106 of the NHPA.¹⁹ The Court granted the request in May 2022, returning the matter to the BLM to address the purported deficiencies.

B. The NOI Conflicts with the Department of Interior's Representations to the U.S. District Court.

BLM now proposes to prepare an SEIS to address the purported deficiencies and is providing this opportunity for additional scoping to identify impacts and resources that should be more thoroughly assessed. This new course of action conflicts with the representations made by the Department of Interior and its counsel to U.S. District Judge Sharon Gleason, to whom the pending lawsuits are assigned. The key court document in this regard is the Declaration of Tommy P. Beaudreau, the Deputy Secretary of the Department of the Interior, which provided the evidentiary basis for Department of Interior's motion for voluntary remand.²⁰

Mr. Beaudreau stated in his declaration that the Department has "identified substantial concerns regarding (1) the analysis of impacts to subsistence uses under ANILCA Section 810 and (2) the

¹⁴ See, e.g., BLM_0015578-99 (subsistence uses and resources); BLM_0015599-604 (cultural resources); BLM_0016018-105 (Section 106 Programmatic Agreement); BLM_0016188-411 (Subsistence Technical Report); BLM_0016412-41 (ANILCA Section 810 Final Evaluation).

¹⁵ See BLM_0016710-49 (main body of JROD and Appendix A (maps of route)). The JROD also included the decision of the Army Corps of Engineers to issue a permit authorizing the discharge of fill material in connection with constructing the road.

¹⁶ BLM_0016809-41.

¹⁷ BLM_0016723.

¹⁸ See BLM_0102514-53. Less than 25 percent of the selected route of Ambler Road crosses federal land. Federal involvement or control is limited over the remaining 75 percent of the route to authorization of bridges and road crossings impacting navigable rivers and waters of the United States. The BLM and, more broadly, the Department of Interior, have no regulatory authority over those activities.

¹⁹ The State opposed the BLM's request for remand, arguing that the EIS and ROD sufficiently analyzed the Proposed Ambler Road, and that no additional analyses were required. See State of Alaska's Opposition to Defendants' Motion for Voluntary Remand, Case No. 3:20-cv-0187-SLG (Marc 21, 2022).

²⁰ Declaration of Deputy Secretary of the Department of Interior, No. 3:20-cv-00253 (D. Alaska Feb. 22, 2022) ECF 111-1 (Beaudreau Decl.); Defendants' Motion for Voluntary Remand, No. 3:20-cv-00253 (D. Alaska Feb. 22, 2022) ECF 111.

adequacy of government-to-government consultation with Tribes and related consideration of impacts under the NHPA to properties of traditional religious and cultural importance to federally recognized tribes.”²¹ He goes on to provide some additional details about these two concerns. But Mr. Beaudreau’s declaration contains only a single, vague sentence about supplementing “the applicable environmental impact statement to more thoroughly assess the impacts and resources identified as areas of concern in this litigation.”²²

Given Mr. Beaudreau’s representations, the BLM’s decision to conduct scoping and initiate another NEPA process raises very serious questions. As explained below, it is not necessary to prepare an SEIS to address the concerns identified by Mr. Beaudreau, and the NOI contains no explanation for preparing an SEIS. None of the “impacts and resources” that would be analyzed have been disclosed. It appears that the BLM is engaging in an unnecessary process for the purpose of delaying the Ambler Road Project. This is contrary to the intent of Congress, as expressed in ANICLA, that approval of Alaskan transportation projects, and the Ambler Road Project in particular, proceed on a streamlined basis with a minimum of delay.

C. The BLM Has Failed to Explain Why an SEIS is Needed.

The Council on Environmental Quality’s (CEQ) regulations provide that the obligation to supplement an EIS is triggered by either substantial changes to the action or by significant new circumstances or information. Specifically, these regulations require supplementation if:

- (i) The agency makes *substantial changes* in the proposed action that are relevant to environmental concerns; or
- (ii) There are *significant new circumstances or information* relevant to environmental concerns and bearing on the proposed action or its impacts.²³

The BLM’s NEPA Handbook discusses these circumstances in more detail. It explains that “substantial changes” to the proposed action are changes that “would result in significant effects outside of the range of effects analyzed in the draft or final EIS.”²⁴ It also explains that “new circumstances or information” trigger the need for supplementation “if the new circumstances or information would result in significant effects outside the range of effects already analyzed”²⁵ The BLM’s NEPA Handbook also includes a third circumstance: a new alternative is added that is “outside the spectrum of alternatives already analyzed.”²⁶

On the other hand, the BLM’s NEPA Handbook states that supplementation of an EIS is not appropriate if changes to the proposed action are not substantial, i.e., the effects of the changes proposed action are still within the range of effects analyzed in the EIS.²⁷ Likewise, if new

²¹ Beaudreau Decl. at 3.

²² *Id.* at 4.

²³ 40 C.F.R. § 1502.9(c)(1) (emphasis added).

²⁴ BLM, NEPA HANDBOOK (H-1790-1) § 5.3.1.

²⁵ *Id.*

²⁶ *Id.* §§ 5.3, 5.3.1.

²⁷ *Id.* § 5.3.2.

circumstances or information becomes available but they would not result in significant effects outside the range of effects already analyzed in the EIS, supplementation is not appropriate.²⁸ An EIS must be supplemented only “if the new information is sufficient to show that the remaining action will ‘affect[t] the quality of the human environment’ in a *significant manner or to a significant extent not already considered.*”²⁹

In this case, none of the circumstances that would support supplementation of an EIS are present. The Ambler Road Project has not changed, nor is there any new information or circumstances bearing on the impacts of the Ambler Road Project. There is literally nothing to address in the Supplemental EIS. In fact, the BLM has requested that commenters tell the agency “which additional impacts and resources should be more thoroughly assessed.”³⁰ The BLM is still trying to figure out what to do, which explains Mr. Beaudreau vague assertions in his declaration.

The BLM also stated that it “will prepare a Supplemental EIS to help address the identified deficiencies” and to “focus on more thoroughly assessing the impacts and resources related to the identified deficiencies.”³¹ But, again, this statement fails to identify any project changes or new circumstances or information that would support supplementation. This is not a legitimate basis to reopen the NEPA process.

Boiled down, the BLM has failed to identify any specific reason that would support supplementing the Final EIS for the Ambler Road Project. If the BLM were to begin drafting an SEIS, the agency would have no idea what the SEIS would cover—there are no project changes or new circumstances or information that would meet the requirements of the CEQ and BLM’s own NEPA Handbook for supplementation. Perhaps, this is why the BLM is conducting scoping, even though scoping is not required in connection with supplementing an EIS and is illogical given the purpose of supplementing an EIS.³²

D. The Identified Deficiencies Can Be Addressed Without Preparing a Supplemental EIS.

As noted, the purported deficiencies identified by Mr. Beaudreau are very narrow: (1) insufficient analysis of impacts to subsistence uses under Section 810 of ANILCA and (2) inadequate consultation with Tribes under Section 106 of the NHPA.³³ The remedy for these purported deficiencies should likewise be very narrow. Unfortunately, a narrowly tailored remedy is not what the BLM is proposing in initiating an entirely new NEPA process, beginning with open-ended public scoping.

²⁸ *Id.*

²⁹ *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989) (emphasis added).

³⁰ NOI, 87 Fed. Reg. at 57510.

³¹ NOI, 87 Fed. Reg. at 57510.

³² BLM, NEPA HANDBOOK (H-1790-1) § 5.3.3. Scoping is illogical in the context of supplementation because supplemental is triggered by, and is intended to address, project changes or new circumstances or information that are already known by the agency and have been evaluated to decide whether supplementation is needed. The scope of the analysis is determined by this new information, not by public comments.

³³ Beaudreau Decl. at 3-4.

Although NHPA Section 106 consultations and ANILCA Section 810 subsistence analyses are often completed in conjunction with a NEPA analysis, neither the NHPA nor ANILCA require that the agency follow the NEPA process to comply with those statutes' requirements. Accordingly, correcting any perceived deficiencies in the analysis of the impacts on subsistence uses under ANILCA Section 810 and government-to-government consultation under NHPA Section 106 can and should proceed independently of NEPA. As explained above, supplementation of an EIS is appropriate under limited circumstances. NEPA serves a specific purpose—to ensure that federal agencies are aware of the environmental impacts of their proposed actions.³⁴ NEPA does not serve as a procedural framework for complying with other federal laws.

E. Engaging the NEPA Process to Correct the BLM's Perceived Deficiencies Will Result in Unnecessary Project Delay.

Under ANILCA's requirements, the approval process for a right-of-way application for a transportation and utility system should be completed in approximately 16 months.³⁵ This presumptive timeline has already been grossly exceeded; the application for the Ambler Road was originally submitted in 2015.³⁶ Despite the years of study and analysis already completed, in its request for remand, the Department of the Interior committed to undertaking the analyses it perceived as necessary “in a timely manner.”³⁷ Even with a limited scope, the preparation of an EIS is not a quick process. Congress recognized this fact when it enacted streamlined procedures specifically tailored to the Ambler Road Project³⁸ and more generally for transportation corridors that cross Alaska conservation system units.³⁹

Remarkably, given the 1,000-page EIS issued by the BLM in 2020, the NOI seeks “public comments on issues, concerns, potential impacts, alternatives, and mitigation measures that should be considered in the analysis.”⁴⁰ Initiating such a broad public scoping process is unwarranted and in conflict with the limited purpose of supplementing an EIS, as explained above. This is clearly unnecessary and excessive. The Ambler Road Project has already been subject to a multi-year environmental analysis in which alternatives, potential impacts, and mitigation measures have been identified and carefully considered. Indeed, the BLM has previously evaluated a wide range of project alternatives, as well as the No Action Alternative and extensive mitigation measures,⁴¹ and no information has suggested that reasonable, unique alternates to the proposed action exist. Revisiting “issues, concerns, potential impacts, alternatives, and mitigation measures” is well beyond the narrow non-NEPA deficiencies identified by Mr. Beaudreau and improperly creates delay, additional costs, and project uncertainty. This is contrary to the streamlined process required by Congress for Ambler Road and transportation projects in Alaska generally.

³⁴ See, e.g., *Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 768-9 (2004) (explaining the purposes of NEPA).

³⁵ See 16 U.S.C. § 410hh(4)(d), (e); *id.* § 3164(e)-(g).

³⁶ See BLM_0015406-08 (background and overview of the project).

³⁷ Beaudreau Decl. at 5.

³⁸ 16 U.S.C. § 410hh(4)(c)-(e).

³⁹ *Id.* § 3164(e)-(g).

⁴⁰ 87 Fed. Reg. 57510.

⁴¹ See BLM_0015414-40 (FEIS Chapter 2: Alternatives).

F. The BLM's Supplementation Process Violates the Agency's Obligations under the Section 106 Programmatic Agreement.

In regard to NHPA Section 106, the NOI states that the BLM intends to conduct additional consultation with Tribes with special emphasis on government-to-government consultation.⁴² The BLM, however, has been engaged in this additional government-to-government consultation with the Tribes since at least July 2021.⁴³ Given that this additional consultation has been ongoing for over 15 months, consultation should be nearing completion. At a minimum, the BLM should be able to identify a firm deadline for the completion of consultation. The NOI, however, is silent as to the timeline for completion of supplemental Section 106 consultation.⁴⁴

But of greater importance, the NOI does not mention the Programmatic Agreement, which is in effect and binding on the BLM. The Programmatic Agreement was made between the BLM, the Alaska State Historic Preservation Officer, and the Advisory Council on Historic Preservation (ACHP).⁴⁵ It sets forth the process to be followed in meeting the requirements of Section 106 for the Ambler Road Project.⁴⁶ The Programmatic Agreement (and the BLM's related Cultural Resource Management Plan) clearly provides that the BLM will conduct government-to-government consultation with Tribes throughout the life of the Programmatic Agreement and describes the BLM's obligations in that regard.⁴⁷

Given the existence of the Programmatic Agreement and the BLM's obligations, it is not clear what the SEIS is intending to address regarding Section 106 consultation. If the BLM intends to ignore the Programmatic Agreement, then the BLM must initiate the dispute resolution process provided in the agreement.⁴⁸ In fact, earlier this year, the State Historic Preservation Office recommended to the BLM that the agency initiate that process.⁴⁹ In that case, the BLM must forward all documentation relevant to the dispute, including the BLM's proposed resolution, to the ACHP, and allow the ACHP an opportunity to provide advice on the resolution of the dispute to the parties.⁵⁰ In the meantime, however, the BLM remains responsible for carrying out all of its obligations under the Programmatic Agreement that are not the subject of the dispute.⁵¹

⁴² 87 Fed. Reg. 57510.

⁴³ See Federal Defendants' Motion for Stay, Case No. 3:20-cv-0187-SLG (Sep. 28, 2021), ECF 83.

⁴⁴ 87 Fed. Reg. 57510. The fact that government-to-government consultation has been ongoing for 15 months highlights the fact that it is unnecessary to initiate a second NEPA process to address the purported deficiencies under NHPA Section 106. Section 106 consultation and NEPA are two different processes with entirely different purposes and requirements.

⁴⁵ The NPS and the U.S. Army Corps of Engineers are invited signatories to the Programmatic Agreement. The BLM, however, is the lead federal agency for ensuring compliance with Section 106 of the NHPA.

⁴⁶ The PA is attached as Appendix H to the JROD for the Project. BLM_0016931-7020. See also 36 C.F.R. § 800.14(b) (authorizing the use of programmatic agreements to resolve adverse effects on historic properties in complex project situations).

⁴⁷ See BLM_0016941-42.

⁴⁸ Programmatic Agreement, § XVI, BLM_0016961.

⁴⁹ A copy of the State Historic Preservation Office's letter is attached to these comments.

⁵⁰ *Id.*

⁵¹ *Id.*

At a minimum, the SEIS, if prepared, should address the BLM's obligations under the Programmatic Agreement and explain why those obligations are being ignored by the agency.

G. The Scope of the SEIS Should Be Limited to the Road Segment that Crosses BLM-Managed Public Land.

For the reasons set forth above, an SEIS is unjustified and inappropriate. The BLM has not identified any significant new circumstances or information that would require the 2020 EIS for the Ambler Road Project to be supplemented. But if the BLM were to prepare an SEIS anyway, the scope of the SEIS should be limited to alternatives, effects, and mitigation associated with the segment of the Ambler Road that crosses public land managed by the BLM, which is located in the far eastern portion of the project route.

As noted earlier, only about one-quarter of Ambler Road will cross federal land, including 26 miles of NPS-administered land in GAAR and 25 miles of public lands administered by the BLM. The public land managed by the BLM is located along the far eastern portion of the road's route.⁵² The balance of the land is owned by the State, Native corporations, and private individuals.⁵³

Under ANILCA Section 201(4), NEPA does not apply to approval of the segment of Ambler Road that travels through GAAR. Instead, the Secretaries of the Interior and Transportation are required to jointly prepare an "environmental and economic analysis solely for the purpose of determining the most desirable route for the right-of-way" through the national park.⁵⁴ The Secretaries completed this assessment and issued a joint decision approving the road alignment through GAAR in accordance with ANILCA.⁵⁵ This was a separate process conducted pursuant to the specific requirements of ANILCA. There was no mention of any problems or concerns with the GAAR environmental and economic analysis in Mr. Beaudreau's declaration or in the remand motion.⁵⁶ Accordingly, the BLM's NOI does not mention the NPS or the Department of Transportation, as there is no reason for them to be participating in this process.

The other major federal authorization for the Ambler Road Project is a permit issued by the U.S. Army Corps of Engineers (Corps) under Section 404 of the Clean Water Act for the construction of various crossings over rivers, streams, and wetlands along the project route.⁵⁷ The Department of Interior's motion for remand did not address the Corps' permit, nor did Mr. Beaudreau's declaration.⁵⁸ The Corps is not an Interior Department agency, and is not bound by the position taken by the BLM. Additionally, the BLM's NOI does not mention the Corps.

⁵² See, e.g., BLM_0015406-08 (describing the BLM's consultation obligations).

⁵³ *Id.*

⁵⁴ 16 U.S.C. § 410hh(4)(d).

⁵⁵ NPS_0009785-878; NPS_0009716-84.

⁵⁶ See generally Beaudreau Decl.; Defendants' Motion for Voluntary Remand, No. 3:20-cv-00253 (D. Alaska Feb. 22, 2022) ECF 111.

⁵⁷ See, e.g., ACE_0022266, ACE_0022385-464 (information supporting the Corps' permit decision).

⁵⁸ See generally Beaudreau Decl.; Defendants' Motion for Voluntary Remand, No. 3:20-cv-00253 (D. Alaska Feb. 22, 2022) ECF 111.

The bottom line is that the BLM is the only agency determined to proceed with this improper scoping exercise and, more broadly, supplementation of the EIS. Therefore, the scope of the SEIS should be limited to the portion of the project that crosses BLM-managed public land within the far eastern portion of the project route. The BLM has no authority to consider the balance of the project.

H. Conclusion.

The BLM has failed to provide a legitimate reason for reopening the NEPA process. Instead, it appears that BLM first made its decision to supplement, and now is asking the public to provide the justification for its already-made decision. The Ambler Road Project has been subject to an extensive evaluation under NEPA and other federal statutes, the project's purpose and need remain unchanged and are defined in ANILCA, and no new information has been identified or disclosed by BLM that would compel or benefit from additional evaluation. This is process for the sake of process—a mere device to delay commencement of the Project in derogation of the intent of Congress.

Rather than subjecting the Ambler Road Project to additional and unnecessary delay, the BLM should publish a notice that withdraws the NOI and announces the termination of the scoping process. An SEIS is not required for the BLM to address the deficiencies identified by Mr. Beaudreau in his declaration.

In the alternative, the BLM should immediately issue a written determination that specifically identifies the significant new circumstances or information that triggered the need for supplementation, and promptly prepare a draft SEIS that is limited to addressing those new circumstances. Scoping is not required in connection with supplementing an EIS because the scope of the SEIS is determined by the proposed project changes or by the new information or circumstances that trigger supplementation. Here, by contrast, scoping is being used improperly to generate additional issues and cause project delay. The BLM should also provide firm deadlines for the completion of the SEIS and remand generally.

While the State disagrees with BLM's undertaking of an SEIS, the opportunity to comment on the NOI is appreciated. Further, if BLM continues with this process, the State anticipates resuming participation as a Cooperating Agency under the existing Memorandum of Understanding (BLM MOU AK-2018-008). Please contact me at (907)269-5533 or kate.harper@alaska.gov if you have any questions or would like to discuss these comments in more detail.

Sincerely,



Kate Harper
Large Project Coordinator

Cc: Akis Gialopsos, DNR Commissioner
John Crowther, DNR Deputy Commissioner
Brent Goodrum, DNR Deputy Commissioner
Kyle Moselle, DNR OPMP Executive Director
Ron Opsahl, Senior Assistant Attorney General
Judy Bittner, State Historic Preservation Officer
Cathe Heroy, State ANILCA Program Coordinator

Enc: SHPO Letter of Support for the Ambler Programmatic Agreement dated April 1, 2022



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Natural Resources

DIVISION OF PARKS AND OUTDOOR RECREATION
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April 1, 2022

File No.: 3480 BLM Ambler Road / 2022-00360

Bill Hedman,
Acting Central Yukon Field Manager
US Bureau of Land Management
222 University Avenue
Fairbanks, AK 99709
whedman@blm.gov

Subject: Letter of Support, Amber Access Road Section 106 Programmatic Agreement

Dear Mr. Hedman:

The Alaska State Historic Preservation Office (AK SHPO) received notice of the Department of the Interior's determination (dated February 22, 2022) regarding the inadequacy of government to government consultation with Tribes regarding the identification and treatment of properties of religious and cultural significance to Tribes for the Ambler Access Road Project (Project) on February 23, 2022. We also received the subsequent request by Tanana Chiefs Conference (dated March 15, 2022) to place a hold on all procedural and substantive activities relating to Section 106 of the National Historic Preservation Act for the Project, including the Ambler Access Road Programmatic Agreement (PA) on March 15, 2022.

We recommend that BLM utilize Stipulation XVI *Dispute Resolution* of the PA as a mechanism to address the concern(s) raised by DOI and TCC. As a signatory, we recommend forwarding the documentation related to these and any other concerns raised to BLM for consideration by all the signatories to ensure that the collaborative intent of Section 106 can be carried out. Once additional information has been received from the Department of the Interior regarding the specifics of how to address the deficiencies and that information has been shared with signatories, we recommend that BLM schedule a signatories' meeting to discuss how to resolve the dispute.

We note that under dispute resolution, all the terms of the PA not subject to the dispute remain BLM's responsibility to carry out. As such, AK SHPO recommends that the BLM continue to implement the PA until signatories to the agreement have an opportunity to consult. AK SHPO and numerous other consulting parties participated in the consultation to develop the PA consistent with 36 CFR 800.14(b)(3). We would like to note that BLM staff followed BLM policies and procedures regarding consultation for the Project and development of the PA. It is our office's opinion that the BLM put forth an exemplary effort to consult and provide an opportunity to participate in the collaborative development of the PA, especially when compared to other large projects given our state's size and dispersed population. The PA consultation was complicated by the COVID-19 pandemic and the inability for all parties to engage in face-to-face meetings. For this reason, and in anticipation of unforeseen circumstances, the PA provides for the ability to amend the body of the agreement and its appendices. Such an amendment may be a way to address the identified deficiencies.

Our office is concerned that the procedural issues related to the issuance of the right-of-way and other authorizations are being transferred to the PA. In contrast to a Record of Decision, a programmatic agreement outlines a process rather than an outcome and is an agreement between parties. In this case, the agreement was to ensure transparency in how phasing, which is allowed under regulation, was going to be carried out for this large,

multi-phase project. We believe it is important to consider that it was inherent in the consultation and final PA that identification of historic properties of all types was not complete, nor was assessment of effects complete at the time of PA development and execution. In addition, it was determined that it was appropriate and necessary to phase identification, evaluation, and assessment of effect consistent with 36 CFR 800.4(b)(2) and 36 CFR 800.5(a)(3) for the Project. As consultation with Tribes regarding the identification and treatment of properties of religious and cultural significance to Tribes was included in the process outlined in the PA, we believe that it would be premature to take action to suspend the PA or terminate it pending direction and/or details from the Department of the Interior regarding the deficiencies and how to address them.

Thank you for your careful consideration of these concerns. We look forward to continued consultation concerning the project. Please do not hesitate to contact me directly if you have any questions or wish to discuss this further.

Sincerely,



Judith E. Bittner
State Historic Preservation Officer