



**December 22, 2023**

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**Re: Comments of the Alaska Industrial Development and Export Authority on the Draft Supplemental Environmental Impact Statement for the Ambler Road Project**  
**Agency Docket Number: BLM\_AK\_FRN\_MO4500174129**  
**Docket Citation: 88 FR 72532**

Dear Mr. Director Cohn and Mr. Beyersdorf,

The Alaska Industrial Development and Export Authority (AIDEA) submits the following comments regarding the Draft Supplemental Environmental Impact Statement (SEIS) for the Ambler Road/Ambler Mining District Industrial Access Project (AAP). The SEIS is identified as NEPA number DOI-BLM-AK-F030-2016-0008-EIS.

The SEIS is fundamentally flawed in that the Bureau of Land Management (BLM) assumes federal authority and control over several areas of traditional state authority and land rights. This includes, but is not limited to, assuming federal authority to: regulate and require federal financial conditions or assurances over a hundred miles of state land right-of-way; impose National Historic and Preservation Act (NHPA) section 106 rules on state land (Alaska has its own statutes on historic preservation that apply); prohibit or unreasonably limit the ability of the state to “prospect for, mine, and remove” minerals from statehood lands under section 6(i) of the Alaska Statehood Act and sections 201(4) and 1110(b) of the Alaska National Interest Lands Conservation Act (ANILCA) which mandate access across federal lands to state lands and minerals; apply ANILCA section 810 subsistence analysis to state lands managed by the Alaska Department of Fish and Game; and control decisions affecting use of state lands and waters when Congress has clearly said the primary role in those decisions is vested in state authority (Section 1251(b), Clean Water Act).

None of these subject matter areas contain the “exceedingly clear language” from Congress necessary to “significantly alter the balance between federal and state power and the power of the Government over private property.” *Sackett v. EPA*, 598 U.S. \_\_\_ (2023). “Regulation of land and water use lies at the core of traditional state authority”. *Id.* An overly broad interpretation of federal

authority by BLM in the SEIS intrudes on and destroys state sovereignty and violates the 10th Amendment.

AIDEA agrees with the comment made by NANA Corporation in its December 19, 2023 comment letter on the SEIS on page 11, that “BLM has no authority to restrict activities on privately held lands owned by NANA...” BLM must grant Alaska its rights of access across federal land while at the same time respecting the views, aspirations, and rights of private landowners. A serious flaw in the SEIS is that it wrongfully applies federal statutes, such as Section 810 of ANILCA, to both State owned and privately held land when in fact these federal provisions apply to federal public lands.

The SEIS does not apply to the road segment of the AAP that runs through the Gates of the Arctic National Park & Preserve (GAAR). See Exhibit A, Right-of-Way Permit RW GAAR-21-001 (issued to the Alaska Industrial Development and Export Authority). The segment through GAAR is authorized under a separate agency process and final agency decisions by the Secretary of Transportation and Secretary of Interior (See Exhibit B, Record of Decision, United States Department of the Interior, United States Department of Transportation on Alignment for the Ambler Road through the Kobuk Preserve). Those Secretarial decisions are not subject to judicial review and were not made using the National Environmental Policy Act (NEPA) in conformity with Section 201(4) of ANILCA.

The AAP also has an Army Corps of Engineers (USACE) Clean Water Act Section 404 Permit for Alternative A of the original Environmental Impact Statement (FEIS). See Exhibit C, Department of Army POA-2013-00396, Kobuk, Alatna and Koyukuk Rivers. A proposed bridge, across the Koyukuk River has been determined to meet the Coast Guard’s requirements for advance approval under 33 CFR 115.70. so that a Coast Guard bridge permit is not required for this crossing. See Exhibit D, U.S. Coast Guard Letter Granting Advanced Approval dated December 18, 2020. Additionally, the Coast Guard has determined that bridge permits are not required for other proposed bridge crossings along the preferred route because they are not tidally influenced and not currently used for substantial commercial navigation. See Exhibit E, U.S. Coast Guard Letter declining to assert authority dated December 18, 2020. In addition to these exhibits, AIDEA has attached a Table of Comments (Exhibit F) and other supporting documents and exhibits, all of which AIDEA further incorporates by reference into this letter as part of AIDEA’s comments.

As a result of this permitting history and the applicable law, Alternative A used in the 2020 Joint Record of Decision (JROD) is the only route that comports with several federal laws that apply to this project. The SEIS, with its discussions of Alternatives B and C, ignores Title II of ANILCA and seeks to supplement the JROD issued by the Secretaries of Interior and Transportation, to which NEPA does not apply. In addition, the existing, permitted Alternative A is the Least Environmentally Damaging Practicable Alternative (LEDPA), but the SEIS only makes a single substantive mention of the LEDPA, buried in an appendix.

Alternative A is the only route that is consistent with the Statehood Act and Title II of ANILCA and is identified in the Secretaries’ JROD based on the National Park Service’s (NPS) Environmental and Economic Analysis (EEA). AIDEA supports this use of Alternative A. AIDEA’s strong preference and priority is to work with Doyon on a long-term access agreement. Only if the unfortunate situation occurred where Doyon refuses to provide access, would AIDEA naturally be forced to find another route using the tools provided by Congress in ANILCA.

AIDEA calls BLM’s attention to the beneficial impact that the Ambler Road Project has had on the Alaska economy. After the original JROD was made, a substantial increase in mineral activity along the 211-mile corridor. Table 1 below illustrates the economic impact of existing mineral development and the increase at existing mineral explorations. AIDEA notes that after the issuance of the SEIS, investment decisions in 2024 were paused.

<b>Table 1: Required Annual Labor Filings to the Department of Natural Resources on Active Mining Claims</b>				
<b>State Mining Claims</b>	<b>2020</b>	<b>2021</b>	<b>2022</b>	<b>2023</b>
<b>Arctic Deposit (Ambler Metals)</b>	\$ -	\$ 2,563,700	\$ 4,505,042	\$ 6,940,586
<b>Roosevelt Block (South32)</b>	\$ 1,028,867	\$ 3,235,998	\$ 4,119,294	\$14,261,401
<b>Sun Deposit (Valhalla)</b>	\$ 16,210	\$ 8,394	\$ 268,542	\$ 4,392,315
<b>Helpmejack (Trilogy/995)</b>	\$ -	\$ 18,547	\$ 31,133	\$ 64,519
<b>TOTALS</b>	<b>\$ 1,045,077</b>	<b>\$ 5,826,639</b>	<b>\$ 8,924,011</b>	<b>\$25,658,821</b>

In addition, AIDEA conveys that The Dear Reader letter states, “We request that you make your comments as specific as possible. Comments are most helpful if they include suggested changes, data sources, or analysis methods and refer to a section or page number.” The responses to comments in the Final EIS published in March 2020 were often only one sentence to several sentences long and left out important details. If BLM proceeds with a Final SEIS, AIDEA requests that BLM provide verbatim comments and responses with coding that allows the reader to cross reference to the commenter’s name.

**I. The Supplemental EIS Is Inconsistent with Alaska’s “Right to Prospect For, Mine, and Remove” Minerals under the Statehood Act.**

AIDEA is a political subdivision of the State of Alaska. Alaska Stat. § 44.88.020. As such, it seeks access to over 586,600 acres of state-owned mineral claims. See attached map, Exhibit G. As a matter of its statehood compact and contract with the Federal government, Alaska was granted title to surface lands, subsurface minerals, and the “right to prospect for, mine, and remove” the same.

The Federal government cannot deny the State of Alaska the ability to feasibly and economically access its minerals across federal lands.

Ensuring Alaska’s ability to develop its resources was a key concern to the State and Congress during statehood negotiations. The centerpiece of the Alaska Statehood Act is the State's right to select lands to be managed for the public's benefit. To this end, Congress conferred upon Alaska all rights and title to the lands it selected and agreed that “[m]ineral deposits in such lands shall be subject to lease by the State as the State legislature may direct.”<sup>1</sup> These lands provide the revenues necessary to support state and local governments and to sustain Alaska’s economy, culture, and way of life.<sup>2</sup> The responsible development of these claims has the potential to create thousands of jobs and diversify Alaska’s economy.

The Ambler Road would provide access to the mining district and facilitate the responsible development of high-grade mineral deposits—including copper, cobalt, zinc, silver, gold, and other metals. These critical minerals are crucial to all aspects of modern technology and national security and will help prevent the shortfalls that S&P Global, Bloomberg New Energy Finance, and others have forecast. “Even the Biden administration itself has acknowledged a national security and defense need for critical minerals from mines in the United States and domestic supply chains.”<sup>3</sup>

The Energy Act of 2020 defines a “critical mineral” as a non-fuel mineral or mineral material essential to the economic or national security of the U.S. and which has a supply chain vulnerable to disruption. Critical minerals are also characterized as serving an essential function in the manufacturing of a product, the absence of which would have significant consequences for the economy or national security. The minerals available in the Ambler Mining District and located on state mining claims and Alaska Native Claims Settlement Act (ANCSA) claims adjacent to route A can be used in the manufacture of a wide variety of products and contribute to economic growth

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<sup>1</sup> Pub. L. 85-508 (“Alaska Statehood Act”), § 66; see S. Rep. No. 1028, 83rd Cong. 2d Sess. 6 (1954) (“The State is given the right to select lands known or believed to be mineral in character”).

<sup>2</sup> See, 2, Alaska Cons. ar. VII, § 1, 2, 6; Alaska Stat. § 38.04.005-.015 (setting out the State’s land management policies); Alaska Stat. § 44.99.100(a) (declaring the State's economic development policy: “To further the goals of a sound economy, stable employment, and a desirable quality life the legislature declares that the state has a commitment to foster the economy of Alaska through purposeful development of the state’s abundant natural resources and productive capacity”); Alaska Stat. § 44.99.110 (declaring the State's mineral policy to “further the economic development of the state, to maintain a sound economy and stable employment, and to encourage responsible economic development within the state for the benefit of present and future generations through the proper conservation and development of the abundant mineral resources within the state...); Trustees for Alaska v. State, 736 P.2d 324, 335 (Alaska 1987) (“The primary purpose of the statehood land grants contained in section 6(a) and (b) of the Statehood Act was to ensure the economic and social well-being of the new state.”)

<sup>3</sup> FACT SHEET: Securing a Made in America Supply Chain for Critical Minerals, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/22/fact-sheet-securing-a-made-in-america-supply-chain-for-critical-minerals/>

by providing the United States with strategic metals. Many of the mineral resources could not be accessed by Alternative C. AIDEA also provides a map that is perhaps easier to read and that identifies the mineralization zones and claims, in addition to the land ownership partner. See Exhibit H-1, AIDEA Mineralization Map. In the SEIS, Appendix H “Maps,” page H-53 shows Alternative C’s path. See Exhibit H-2, SEIS Map of Alternatives. It is clear from the two maps that the majority of the mineral areas could not be accessed by Alternative C; Alternative A is the only reasonable and economic alternative.

## **II. The Supplemental EIS Is Inconsistent with ANILCA**

The SEIS wrongly assumes a No Action alternative is available. Alaska’s access to the Ambler Mining District (AMD) is statutorily mandated by ANILCA, Pub. L. 96-487. Title II, Section 201(4)(b) provides that: “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). “*Shall*” means access is not discretionary to any of the Federal Agencies.

Further, ANILCA section 1110(b), codified as 16 U.S.C. § 3170(b), says “the State or private owner or occupier *shall* be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned land by such State or private owner or occupier and their successors in interest” (emphasis added).<sup>4</sup> This Statutory language clearly requires the Secretary to grant access to inholdings for the State or other person with mineral rights.

Not only is access required under ANILCA section 1110(b), but conditions set by the agency cannot be unreasonable or make the project uneconomic. “[Access] *shall* be given by the Secretary ... as may be necessary to assure adequate and feasible access” (emphasis added). Despite this reasonableness requirement, the SEIS introduces a new phasing alternative that will not be economically feasible (SEIS Section 2.4.8, *Combined Phasing Option for All Action Alternatives*, page 2-20). AIDEA has proposed building the project in phases but in a manner that allows for efficient use of resources and minimizes environmental impacts. See, Exhibit I, Ambler Road Draft Conceptual Construction Planning.

In contrast, the phasing requirement set out in the SEIS will add complexity and expense to the project without creating any environmental mitigation (SEIS Section 2.4.8, *Combined Phasing Option for All Action Alternatives*, page 2-20.). It will also add construction challenges, delaying access to building sections of the road by staging multiple areas, camps, equipment, supplies and needing to have multiple contractors working concurrently. The Alaska DOT&PF (AKDOT) filed comments with BLM regarding the SEIS and the specific proposal by BLM to implement the “Combined Phasing” alternatives. This letter is attached here as Exhibit J. The SEIS suggests

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<sup>4</sup> See, 43 CFR 36.10.



dictating the method of construction that would eliminate the proposed 3-phase construction by eliminating Phase 1. For any significant new road project, strategically planning the logistics and the construction is the more economical process. As noted by AKDOT, the agency does not typically dictate how a road is to be built, but rather addresses the environmental or permitting restraints to accommodate the conditions and minimize impacts of the construction. As AKDOT conveyed, contractors should control the means and methods to optimize the sequencing of construction activities, minimize costs, and use equipment and materials. Logically, the Ambler Road Project will work at multiple locations at the same time. See Exhibit J. In this case, BLM appears to be making or proposing methods that are not as efficient. The phasing discussion is not well supported and should be removed.

### **III. AIDEA Is Entitled to Reasonable Access to the Ambler Mining District.**

AIDEA as a political subdivision of the State of Alaska filed an SF 299 Application seeking access to state-owned mineral lands (as shown in the attached map, Exhibit G) and is entitled, as a matter of law, to reasonable and economically feasible access to those lands. The applicable regulation, 43 CFR 36.10, make clear that the Secretary shall grant such access to inholdings for the State or another person to access and remove minerals.

Similarly, the 1976 Federal Land Policy and Management Act (FLPMA) section 302(b), codified as 43 U.S.C. § 1732(b), guarantees reasonable and feasible access to federal mining patents. There are over 500 acres of federally patented mining claims in the AMD. The guarantee of reasonable and economically feasible access across federal land to prospect for, mine, and remove minerals limits the Secretary's authority under NEPA. The only alternative providing reasonable and economically feasible access is Alternative A, which was the selected route in the FEIS and the JROD issued in 2020 in conformity with all NEPA requirements.

Despite this Congressional mandate, BLM as part of the SEIS process has suspended a right-of-way for the Ambler Road issued to AIDEA. The SEIS further ignores ANILCA because BLM has proposed an alternative route C for the road that does not pass through the National Preserve, which is uneconomic and environmentally unsound.

The applicable regulations specify that "Federal agencies should determine ... whether compliance with NEPA would clearly and fundamentally conflict with the requirements of another statute." 40 CFR 1501.1. Alternative C does not cross the GAAR as specified in Title II of ANILCA. Alternative C fails to provide access to numerous state mining claims in violation of ANILCA Section 110(b) (Exhibit H-2) and therefore is not the LEDPA as required under the Clean Water Act, is economically infeasible, and due to its length and topography, is detrimental to hydrology, wildlife and subsistence uses. AIDEA agrees with the view of NANA Corporation in its Comment Letter on the SEIS dated December 19, 2023 on page 13, that: "that Alternative C is the least preferred alternative in light of its unreasonably long length which will adversely affect the environment and subsistence resources while making it more difficult to maintain AAP in an Arctic environment and to police it to ensure public safety and prevent trespass."

IV. **The SEIS Is Legally Deficient Because It Fails to Incorporate or Reference the Reform to NEPA Under the Fiscal Responsibility Act that Became Law in June of 2023**

A serious legal flaw in the SEIS is that it fails to reference, incorporate or comply with significant NEPA reforms that apply to this document that was issued in October of 2023. In June of 2023, the Fiscal Responsibility Act (FRA), Pub. Law 118-5, became law and made significant and pertinent amendments to NEPA, including thresholds and the definition of “major federal action.” The effective date of the FRA NEPA amendments was June 3, 2023, when the statute was signed into law, as acknowledged by the Council on Environmental Quality’s (CEQ) publication in the Federal Register on July 31, 2023. 88 Fed. Reg. 49924.

Congress strengthened regulatory requirements in place in 2021 in the FRA by amending the NEPA statute to state that “[a]n agency is not required to prepare an environmental document with respect to a proposed agency action if ... the preparation of such document would clearly and fundamentally conflict with the requirements of another provision of law.” FRA § 106(a) (codified at 42 U.S.C. § 4336(a)(3)). The SEIS should have been issued in compliance with these statutory changes. It was not. There are no references in the SEIS to the FRA or the applicable CEQ regulations. The SEIS clearly has not considered or adhered to these new reforms.

The FRA states that an agency is not required to prepare an environmental document when the result of the threshold determination is that “the proposed agency action is a nondiscretionary action with respect to which such agency does not have the authority to take environmental factors into consideration in determining whether to take the proposed action.” 42 U.S.C. 4336. Under the 2023 FRA, NEPA does not apply to the Ambler Road.

It is undisputed that ANILCA Title II Section 201(4)(b) explicitly states that “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.” There is no discretion in the statute. It also provides that “the Secretary **shall permit** such access in accordance with the provisions of this subsection.” (emphasis added). This language is mandatory and not discretionary.

The rights-of-way issued to AIDEA by BLM and NPS in 2020-21 meet these criteria, but the suggested alternatives in the SEIS do not. It is critical that Alaska be accorded its right of access to its minerals under both ANILCA and the Statehood Act for the benefit of Alaskans and to provide the United States with the strategic minerals it needs.

If BLM continues with the SEIS process, AIDEA requests that BLM acknowledges and includes the following insert from page 3 of the narrative for the 1991 ROD for the 1986 Utility Corridor Resource Management Plan EIS, which is still in effect and states:

...as required by section 201(4)(b) of the ANILCA, *the need for access to the Ambler Mining District is hereby recognized and will be provided upon application by the State of Alaska.* [emphasis added]

The SEIS does not mention the 1991 ROD until page 3-158 and even then, it does not state the above requirement.

The Gates of the Arctic, General Management Plan confirms AIDEA's entitlement to the access it seeks, without excessive and unreasonable federal government interference. Specifically, the Plan addresses access to inholdings such as the state and federal mining claims throughout the project area. It provides:

#### Access to Inholdings

**Access is guaranteed to nonfederal land, subsurface rights, and valid mining claims, but any such access is subject to reasonable regulations to protect the values of the public lands that are crossed (ANILCA sections 1110 and 1111). Existing regulations (43 CFR 36.10) govern access to inholdings. Generally, traditional methods of access such as hiking, dog team, snowmachine, motorboat, and aircraft are compatible with park purposes. Certain methods of access could adversely affect park values, such as ATV trails or roads that destroy permafrost and tundra vegetation and erode soils. If adequate and feasible access is not provided by those methods generally allowed, a permit must be obtained from the superintendent specifying routes and methods. Mining access must also have an approved plan of operation. To prevent incompatible methods of access, acquisition of less-than-fee interests or easements are discussed in the land protection plan.<sup>5</sup>**

See Exhibit K, Gates of the Arctic General Management Plan. In addition, the Gates of the Arctic General Management Plan states: "...and one route would travel east, crossing the Kobuk River within the Gates of the Arctic National Park and preserve, and connecting to the Dalton Highway (provision for a right-of-way for this route was reserved by ANILCA section 201(4)(b).” *Id.* p. 40. Further, the Plan states: “The access will be given ‘such rights as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned lands,’ subject to reasonable regulations to protect park values.” *Id.* p. 179. That access was recognized by NPS almost forty years ago. The SEIS, written by BLM, now contradicts that which NPS acknowledged.

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<sup>5</sup> Gates of the Arctic, General Management Plan, p. 17 (emphasis added).



## **NEPA and Its Environmental Review Process Are Procedural and not Substantive Law**

Using a NEPA process for the requested access filed by AIDEA to a mining district and adjacent State mining claims and ANCSA sub-surface claims is improper. The agency has no discretion to deny access, and the road's route from the mining district to the Dalton Highway by crossing the National Preserve is set out in statute, as is the process for granting the needed rights-of-way. Under the terms of the FRA reforms, this is a non-discretionary action by BLM. By not following the express terms of ANILCA and by discussing other alternatives that do not provide for a surface transportation route from the Ambler Mining District through the National Preserve to the Dalton Highway, the SEIS is contrary to the agreement made in ANILCA between the State of Alaska and the federal government.

ANILCA is not only a statute; it is in the nature of a final settlement with decisions by Congress intended to be final. 43 CFR § 36.10, implementing ANILCA 1110(b) spells out the exact process and type of decision to be used by the Secretary when a request for a right-of-way is made under Section 1110(b) – inholding of state to access minerals: “(f) All right-of-way permits issued pursuant to this section [applying section 1110(b) of ANILCA] shall be subject to terms and conditions ... and (g) The decision by the appropriate federal agency under this section is the final administrative decision.” The decision document is the right-of-way permit itself.

### **V. AIDEA's Interest and Right-to-Access as a State of Alaska-Owned Corporation and Applicant.**

AIDEA is Alaska's economic development authority, which has as one of its statutory purposes the development of Alaska's natural resources. Alaska Stat. § 44.88.010(b); § 44.88.070 (2) and (3). Such development can include the application for a Right-of-Way providing for a non-public development road to the potential mineral developments in the Ambler Mineral District and other State and Federal mineral claims that might be made available by the construction of an industrial toll road. *Id.* § 44.88.080(5). AIDEA is formed and operates by statute as a public corporation of the State of Alaska, constituting a political subdivision under its laws “but with separate and independent legal existence.” *Id.* § 44.88.020.

The Alaska Legislature created AIDEA “to promote, develop, and advance the general prosperity and economic welfare of the people of the state, to relieve problems of unemployment, and to create additional employment.” *Id.* § 44.88.070. AIDEA encourages economic growth and diversification in Alaska by providing means of financing and assistance to Alaska businesses, including through its Credit and Development Finance Programs. *Id.* § 44.88.080. Revenue generated by AIDEA investments is allocated towards reinvestment in AIDEA programs, AIDEA projects, and dividends to the State's general fund.

As the proponent, AIDEA submitted in November of 2015 an SF 299 Application for a right-of-way for the road across BLM-managed and -owned lands in conformity with ANILCA, together with a right-of-way across the GAAR that would be granted by the Secretaries of Interior and

Transportation under ANILCA §201(4) (Pub. L. 96-487 § 201(4)). The SEIS correctly recognizes that most of the proposed road will traverse non-federal land, and the manner in which the road is constructed and operated will depend largely on agreements with non-federal landowners and stakeholders rather than on federal rights-of-way (SEIS Section 3.4.1, Land Ownership, Use, Management, and Special Designations).

Nevertheless, AIDEA has comments on the SEIS which would add clarity to the document and provide for an improved analysis of the type sought under NEPA. These comments reference the pages where the statements that need clarification or amplification appear in the SEIS. Additionally, AIDEA has comments on the SEIS based on public comments made at the public meetings held by BLM as part of the NEPA process.

Section 201(4)(b) of ANILCA declares that Congress recognizes a “need for access for surface transportation purposes” congruent with the right-of-way granted to AIDEA for the Ambler Mine Road “across the Western (Kobuk River) unit of the Gates of the Arctic National Preserve.” As Senator Hatfield observed in the congressional hearings preceding ANILCA’s enactment, “the extremely important Ambler district (where three of the mineral discoveries are valued at more than \$8 billion) is virtually surrounded by three Park Service wilderness areas and two wildlife refuges.”<sup>6</sup> ANILCA §201(4) addresses this specific problem by guaranteeing that the Ambler mining district will be accessible by road. The legislative history in the final debates before the bill’s passage in the Senate<sup>7</sup> in August 1980 and the House<sup>8</sup> in November 1980 makes the point particularly vividly. That section also specifies the beginning and endpoints of such surface transportation route as “from the Ambler Mining District to the Alaska Pipeline Haul Road.” But far from only recognizing a “need” for such access, Congress also created a mandate to which the

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<sup>6</sup> July 21, 1980 Congressional Record-Senate at 18718.

<sup>7</sup> “The mining community is assured that the mining companies in the Ambler area ... can proceed.” Cong. Recd. S21649 (Aug. 18, 1980) (remarks of Sen. Tsongas in explaining his substitute bill which passed the Senate the next day and was enacted into law as ANILCA). “The Kobuk unit of [GAAR] is adjacent to a nationally significant mineralized zone within which several new mines may be developed within the next few years. The subcommittee provided for a single transportation corridor through the Kobuk unit to connect the mineral district with an existing haul road along the trans-Alaska oil pipeline. Should the need arise for a transportation corridor through this area the Secretary will grant a right of way through the Kobuk unit for this purpose ...” in an “environmentally preferable location ... while still providing an economically sound route for access purposes.” Cong. Recd. S21661 (Aug. 18, 1980) (section-by-section summary of the Tsongas substitute). Cong. Recd. S21878 (Aug. 19, 1980) (Ambler Road provision “provides access to the mineralized zone in the Bornite Picnic Creek region ....”)

<sup>8</sup> The Senate approved the bill (the Tsongas substitute) on August 19, 1980, and the House approved it without changes on November 12, 1980. See Cong. Recd. H29264 (Nov. 12, 1980) (Ambler Road provision is for the “benefit of Anaconda’s claims in the Picnic Creek area as well as those of others nearby in the Ambler mining region”) (remarks of Rep. Udall); Cong. Recd. H29268 (Nov. 12, 1980) (introduction and use in House debate of the Tsongas section-by-section summary used in the Senate debate).

Department of the Interior remains bound: Congress stated that the Secretary “*shall* permit such access in accordance with the provisions of this subsection.”<sup>9</sup>

To ensure that such a road would be built, Congress specified an environmental and economic process which would apply to the road “in lieu of an environmental impact statement which would otherwise be required under section 102(2)(C) of the National Environmental Policy Act.”<sup>10</sup> Within 60 days of the completion of this process, Congress mandated that “the secretaries *shall jointly agree* upon a route for issuance of the right-of-way across the preserve,” and mandated that “[s]uch right-of-way *shall be issued* in accordance with the provisions of section 1107 of this Act.”<sup>11</sup> There is no room within this procedure for the relevant agencies to decline to grant a right-of-way at all, or to grant a right-of-way on terms which do not meet the need for which such access right was created: to facilitate the economic development of the Ambler mining district. As commentators have noted, the “[s]pecial access provisions in sections 201(4)(b) through (4)(e) of the Act guarantee that the Secretaries of the Interior and Transportation will approve the needed transportation system.”<sup>12</sup>

Though not squarely relevant to AIDEA’s right-of-way application, ANILCA also separately provides the owner of parcels surrounded by BLM lands with a mandatory right of access over BLM lands as BLM determines “adequate to secure” the “reasonable use and enjoyment” of the surrounded parcel, subject to BLM’s “rules and regulations applicable to access over public lands.”

(b) Reasonable use and enjoyment of land surrounded by public lands managed by Secretary

Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of the Interior may prescribe, *the Secretary shall provide such access to nonfederally owned land surrounded by public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976 (43 U.S.C. §§ 1701-1732) as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: Provided, That such owner comply with rules and regulations applicable to access across public lands.*<sup>13</sup>

AIDEA would expressly note that this mandatory right of access is for federal lands and does not apply to private lands or land owned or selected by an Alaska Native Corporation.

<sup>9</sup> ANILCA Pub. L. 96-487, at § 201(4)(b); emphasis added.

<sup>10</sup> *Id.* at § 201(4)(d).

<sup>11</sup> *Id.* at § 201(4)(e); emphasis added.

<sup>12</sup> Jerry R. Fish, *Preservation and Strategic Mineral Development in Alaska: Congress Writes A New Equation*, 12 *Envtl. L.* 137, 194 (1981).

<sup>13</sup> ANILCA § 1323(b) (16 U.S.C. § 3120(b), emphasis added.

**VI. Lands Managed by the Secretary of the Interior under FLPMA are BLM-Managed Lands.**

While the Ambler Mining District is not surrounded entirely by BLM land, ANILCA § 1110(b) appears to fill this possible statutory gap by requiring that the Secretary of the Interior grant access where land is “effectively surrounded” by the more protected NPS and U.S. Fish and Wildlife Service (FWS) lands, called “conservation system units”:

(b) Right of access to State or private owner or occupier  
Notwithstanding any other provisions of this Act or other law, *in any case in which State owned or privately owned land, including subsurface rights of such owners underlying public lands, or a valid mining claim or other valid occupancy is within or is effectively surrounded by one or more conservation system units, national recreation areas, national conservation areas, or those public lands designated as wilderness study, the State or private owner or occupier shall be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned land by such State or private owner or occupier and their successors in interest. Such rights shall be subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands.*<sup>14</sup>

These two similarly worded sections show Congress wanted parcel owners to have access to their land, regardless of whether less-protected BLM land or more-protected NPS/FWS land surrounds their parcel. The route proposed by AIDEA is the most practicable option for ensuring that the rights of fee owners in the Ambler district to access their property is fully realized, consistent with congressional intent.

These provisions of ANILCA are entirely consistent with Section 302 of FLPMA, which requires the Secretary to:

regulate, through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, the use, occupancy, and development of the public lands, including, but not limited to, long-term leases to permit individuals to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concerns...<sup>15</sup>

This section makes it clear that, except for the mandate to the Secretary to prevent “unnecessary or undue degradation” of public lands, and in three other particulars not relevant to miners' access rights, nothing in FLPMA shall amend the Mining Law of 1872 or “impair the rights of any

<sup>14</sup> ANILCA § 1110(b) (16 U.S.C. § 3170(b), emphasis added; *see* ANILCA § 102(4) (defining “conservation system unit”).

<sup>15</sup> Pub. L. 94-579 at § 302(b), codified as 43 U.S.C. § 1732(b).

locators or claims under that Act, including, but not limited to, rights of ingress and egress.”<sup>16</sup> FLPMA may be read in tandem with ANILCA and its predecessor Mining Law to serve as an additional basis through which Congress expressed its intent to mandate access to the Ambler Mining District.

## **VII. The SEIS Exceeds the Scope of the U.S. District Court’s Order for Voluntary Remand**

The position taken by the SEIS is that a supplemental NEPA document was needed to correct alleged deficiencies in the FEIS and JROD issued in 2020. See SEIS Abstract Vol. 1, page 1. It is set out that the SEIS responds to a Remand Order issued by the U.S. District Court for Alaska with regard to two cases that were filed challenging these 2020 NEPA Ambler Road documents. Unfortunately, in tension with its legal obligation to facilitate reasonable and economically feasible access to the Ambler Mining District, BLM and the U.S. Department of the Interior (DOI) far exceeded the Remand Order issued by the District Court and in effect used this voluntary remand opportunity to expand the scope of the issues to be addressed by the SEIS beyond any reasonable interpretation of the Court’s Order. See Exhibit L, Order Re Motions for Voluntary Remand. Case 3:20-cv-0253-SLG. May 17, 2022 [hereinafter cited as “Remand Order”].

At its very beginning, in a section entitled “Abstract,” the SEIS starts out with a misstatement of a critical element of this NEPA document. The statements in the Abstract section state and imply that the SEIS was drafted in response to a court finding, which in turn bears with it the implication that the U.S. District Court in Alaska had ruled on the merits of the FEIS and JROD issued regarding the Ambler Road in 2020. This is not accurate and is not in conformity with the record. The effect of this imprecise language is to suggest the existence of some error in the FEIS which did not exist.

There are two lawsuits filed in the U.S. District Court in Alaska which pertain to the 2020 FEIS and JROD. One is Case No. 320-cv- 00187-SLG and the other is Case No. 320-cv-00253-SLG. In both cases the DOI is a principal defendant. There have been no rulings by the Court in either case with regard to a substantive motion or to any plaintiffs’ claims. Both plaintiff groups filed opening briefs, but no rulings on the merits occurred. This is because in February of 2022 the Justice Department, on behalf of the DOI and other named federal defendants, filed motions for voluntary remand in each case. The Remand Order, Exhibit L, at pages 7-8 explains the Justice Department’s request for remand as follows:

Federal Defendants move for an order remanding the challenged decisions [by the plaintiffs] to the agencies for reconsideration, explaining that “[a]dditional scrutiny in defending the fully briefed merits of the Plaintiffs’ claims has illuminated legal flaws that Defendants intend to reconsider through a further administrative

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<sup>16</sup> Id.; see also *Access For Mineral Exploration And Development After FLPMA*, 16a Rmmlf-Inst 8 (1984); FLPMA § 701(f), 43 U.S.C.A. § 701 note (1984).



process.” In particular, Defendants identify deficiencies in their analysis of impacts to subsistence uses under ANILCA Section 810 and their consultation with Tribes pursuant to NHPA Section 106. They request remand in order to supplement the administrative record in these regards and determine “whether to affirm, amend, or terminate the right-of-way permits.” [footnotes omitted]

The Court approved the request for remand on the limited issues identified by the federal defendants. As the Court noted:

The fact that Federal Defendants have not committed to specifically addressing each of Plaintiffs’ claims on remand does not bar remand. The suitability of voluntary remand hinges on whether the agency has committed to revisiting “the original agency decision on review,” not whether the agency will address every manner in which a party claims that decision was erroneous. [*Id.* at page 13, footnotes omitted.]

Finally, the Court emphasized that it would grant the remand request without vacating any of the challenged action of the agency in the claims made by the plaintiffs absent a determination on the merits. *Id.* at 18. The Order notes that, as other courts have reasoned, granting vacatur without a merits determination would run contrary to the goals of the federal Administrative Procedure Act (APA). *Id.*

In sum, the remand was granted by the Court on the basis of and in response to a motion for voluntary remand filed by the Department of Justice which asked for the litigation pause to allow an agency review of the impacts to subsistence uses under ANILCA Section 810 and the agency consultation with tribes pursuant to the National Historic Preservation Act (NHPA) Section 106. *Id.* at 7.

Despite the care with which the Court noted that a limited scope of a remand is permissible and that a remand can be granted before there is any decision on the merits, the SEIS throughout many of its pages inaccurately implies that the broad scope of this SEIS – to include such issues as whether the Ambler Road might become public – is all required by the Court’s ordered remand.

This misimpression is contained even in the first section of the SEIS in an introductory Abstract section that provides:

**In response to a May 2022 court remand**, the proposed Ambler Road, which was analyzed in the March 2020 Final EIS and authorized in a joint record of decision issued in July 2020, **is being further evaluated. The U.S. District Court for Alaska (District Court) remanded the challenged decisions to BLM due to deficiencies** in, amongst other things, the BLM’s analysis of subsistence impacts under the Alaska National Interest Lands Conservation Act and tribal consultation pursuant the National Historic Preservation Act. In its remand motion, the DOI also

stated its intention to further supplement the EIS analysis to more thoroughly assess the impacts and resources identified as areas of concern. [emphasis added]

In fact, the limited scope of the remand is confirmed by the only affidavit that was used to support the Justice’s Department’s Motions for Voluntary Remand. Both motions included a declaration from Tommy Beaudreau, the then Deputy Secretary of the Interior. See Exhibit M, Declaration of Deputy Secretary of the Department of Interior, Case 3 20-cv-00187-SLG, dated February 22, 2022 [hereinafter cited as “Beaudreau Declaration”] The Beaudreau Declaration at paragraph 3 at page 3 identifies these two purported deficiencies in the Ambler Road FEIS and JROD, both issued in 2020:

3. The Department has identified substantial concerns regarding (1) the analysis of impacts to subsistence uses under ANILCA Section 810 and (2) the adequacy of government-to-government consultation with Tribes and related consideration of impacts under NHPA to properties of traditional religious and cultural importance to federally recognized Tribes.

No other specific deficiencies are identified in the Deputy Secretary’s declaration. The Declaration only contains a catchall pronouncement at page 4, Paragraph 10 that:

10. In addition to correcting ANILCA Section 810 and NHPA 106 deficiencies, the Department also intends to supplement the applicable environmental impact statement to more thoroughly assess the impacts and resources identified as areas of concern in this litigation.

The scope of topics addressed in the SEIS based on the Remand Order should have been:

- (1) subsistence impacts under Section 810 of the Alaska National Interest Lands Conservation Act;
- (2) additional tribal consultation pursuant the National Historic Preservation Act, and
- (3) areas of concern identified in the underlying NEPA litigation in Case No. 320-cv-00187-SLG and Case No. 320-cv-00253-SLG.

Unfortunately, the SEIS prepared by BLM covers many topics that were not or have not been referenced in the Remand Order and which were not identified as areas of concern in the litigation. For example, the SEIS in the Executive Summary at page four raises a concern about the impact of people trespassing on the Ambler Road. The topic of trespass is again discussed as an undesirable impact of the Ambler Road at Volume 1, Chapter 2 at page 23 and then it is referenced 39 more times in the SEIS.

Alaska Stat. § 38.04.058 is not necessarily included in that authority regarding trespass and the State’s ability to address and control trespass and access. Since the Caywood case references that the statute has limited application: “. . . section .058 is a statute of limited application. It does not

apply to this case because, among other reasons, the restrictions here were not mutually agreed upon between the commissioner and interested grantees, lessees, or interest holders. We thus agree that section .058 does not supply authority to restrict the use of the Rex Trail.” Caywood v. State Dept. of Natural Resources, 288 P.3d 745, 750 (2012). Both Caywood and Wilderness Society v. Morton, 479 F.2d 842 (U.S.App.D.C. 1973), stand for the proposition that the State of Alaska has the authority to restrict access by the public to public roads in the State of Alaska.<sup>17</sup>

This matter of trespass was not identified in the Remand Order or in the litigation. It does not appear in the Complaint in Case 320-cv-00187-SLG or in the Second Amended and Supplemental Complaint in Case 3-20-cv-00253-SLG, nor is it raised in Case 340-cv-00187 in the Plaintiffs’ 69-page Opening Brief for Summary Judgment, nor in the affidavits that support the motion. Therefore, the matter of trespass is not an identified concern raised in the litigation and is beyond the scope of the remand and the information provided to the Court in the Beaudreau Declaration. All references to trespass should be eliminated from the SEIS.

Another example is the numerous references to how AIDEA might fund the Ambler Road. The SEIS makes numerous references to financing the project and the use of revenue bonds, although this is not a topic that affects any environmental concern, and it is not a topic that was raised as an issue of concern in the litigation. Finance methods, bonds, or AIDEA’s ability to finance the project are not raised in the pleadings in Case 320-cv-00187-SLG or in Case 320-cv-00253-SLG. Nevertheless, bonds are discussed in the SEIS in Volume 1, Chapter 2 at pages 2-11 through 13 and again in Volume 1, Chapter 3 at page 2-193. It is a topic well beyond the limited scope of the Remand Order or the scope of the Beaudreau Declaration.

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<sup>17</sup> The SEIS fails to acknowledge that the State of Alaska has the legal authority to prevent the public from using the road and thereby more easily address issues concerning public safety and trespass. However, there is both case law and statutory authority that specifically confirms the State’s ability to do so. See Caywood, *supra* (“...insofar as the right-of-way crosses state land and also because it is a state-owned interest in land, the general management authority delegated to the Division of Mining, Land and Water under AS 38.05.035(a)(2) serves as authority for the restrictions. In its brief on appeal before this court the State has relied on section .035(a)(2), and other related provisions of the Alaska Land Act, arguing that the management of trails across state land falls under the general statutory duties and powers of DNR. We agree.”); Wilderness Society v. Morton, *supra* (Appellants contended that the Dalton highway would not qualify as a public “highway” because it will not be open to the public. Appellants effectively contended that because the public would be restricted from using the highway and the highway’s primary intent and purpose was for use as a haul road, construction road and to maintain the trans-Alaska pipeline, that these facts meant the road is not a “public highway.” However, as the court held, simply because Alaska intended to restrict the public from using the highway, did not mean that the road was not a public highway. Instead, it was acknowledged that the State could bar public use when the hazards posed by such use might endanger the public.). See also, Alaska Stat. § 38.05.035(a)(2) (the director of DNR Mines, Lands and Waters possesses the ability to “manage, inspect, and control state land and improvements on it belonging to the state and under the jurisdiction of the division AS 38.05.035(a)(2) serves as authority for the restrictions.”); Alaska Stat. § 38.04.058 (the DNR Commissioner may “restrict the use of an easement or right-of-way ... to protect public safety or property.”).

In sum, the SEIS does not even attempt to follow the scope of the Remand Order or even the information provided in the Beaudreau Declaration. The U.S. District Court for Alaska remanded the matter to the BLM due to alleged deficiencies in, amongst other things, the BLM's analysis of subsistence impacts under ANILCA and tribal consultation pursuant the National Historic Preservation Act. In its remand motion, the DOI also stated its intention to further supplement the EIS analysis to more thoroughly assess the impacts and resources identified as **areas of concern in the litigation**. Exhibit M, Beaudreau Declaration at Paragraph 10, page 4. Nothing beyond these topics should have been addressed in the SEIS.

The SEIS far exceeds the District Court's mandate. It misapplies the jurisdictional reach of Section 810 of ANILCA and raises a myriad of issues that were not raised in the pleadings in the two lawsuits concerning the Ambler Road. As a result, AIDEA urges the BLM to limit the topics addressed by the SEIS to Section 810 of ANILCA as it applied to federal public lands and a review pursuant to Section 106 of the NHPA.

#### **VIII. Inappropriate Application of ANILCA 810 Subsistence Analysis**

Pursuant to the U.S. District Court's Remand Order, one issue to be considered in the SEIS is the impacts of the Ambler Road on subsistence uses. DOI, in its application for a remand, relied upon the declaration of then Deputy Secretary of Interior Tommy Beaudreau. The Beaudreau Declaration, Exhibit M at paragraph 3 at page 3 identifies this subsistence use deficiency in the Ambler Road FEIS and ROD, both issued in 2020:

3. The Department has identified substantial concerns regarding (1) the analysis of impacts to subsistence uses under ANILCA Section 810...

What the DOI stated in its application for voluntary remand was that in order to correct alleged deficiencies in the 2020 FEIS and JROD, it would conduct a further analysis of possible subsistence impacts of the Ambler Road project under the aegis of Section 810 of ANILCA. Unfortunately, the SEIS applies Section 810 to private land and State of Alaska-owned land, over which neither it nor BLM have jurisdiction. It is a classic example of federal overreach.

As stated by the U.S. Supreme Court in Amoco Production v. Village of Gambell, 480 U.S. 531, 544 (1987):

The purpose of ANILCA § 810 is to protect Alaskan subsistence resources from unnecessary destruction. Section 810 does not prohibit all federal land use actions which would adversely affect subsistence resources but sets forth a procedure through which such effects must be considered and provides that actions which would significantly restrict subsistence uses can only be undertaken if they are necessary and if the adverse effects are minimized.

Because Section 810 is a section in ANILCA, its use is limited to an analysis of “federal public lands.” As the U.S. Supreme Court noted in Amoco Production, *supra*, at page 546-547:

By its plain language, that provision imposes obligations on federal agencies with respect to decisions affecting use of federal lands *within the boundaries of the State of Alaska*. Section 810 applies to "public lands." Section 102 of ANILCA, 16 U.S.C. § 3102, defines "public lands," and included terms, for purposes of the Act, as follows:

- (1) The term 'land' means lands, waters, and interests therein.
- (2) The term 'Federal land' means lands the title to which is in the United States after December 2, 1980.
- (3) The term 'public lands' means land situated in *Alaska* which, after December 2, 1980, are Federal lands, except [land selected by the State of Alaska or granted to the State under the Alaska Statehood Act, 72 Stat. 339, or any other provision of federal law, land selected by a Native Corporation under ANCSA, and lands referred to in ANCSA § 19(b), 48 U.S.C. § 1618(b)]. [emphasis in the original].

This means that, by the terms of the statute, a federal agency conducting a Section 810 subsistence analysis is to carry out that study for potential impacts occurring on federal land and not on land: (1) held or selected by the State of Alaska; (2) land owned by Native corporations; or (3) on private land. As a federal agency, BLM lacks jurisdiction to conduct an ANILCA 810 analysis on land for any identified route for the Ambler Road that belongs to a Native Corporation, the State of Alaska, or any private landowner.

This jurisdictionally restrictive view of Section 810 was confirmed by the U.S. Supreme Court in Amoco Productions. One issue in that case was whether Section 810 could apply to the areas of the Bering Sea under the Outer Continental Shelf Lands Act (OCSLA), 67 Stat. 462, *as amended*, 43 U.S.C. § 1331 *et seq.* (1982 ed. and Supp. III). Amoco Productions, *supra*, at 547. In considering this issue, the Supreme Court determined that Section 810 did not apply to the OSC land. In so holding, the Court held at page 548 that the statute should read as written and not be interpreted more expansively:

We reject the notion that Congress was merely waving its hand in the general direction of northwest North America when it defined the scope of ANILCA as "Federal lands" "situated in Alaska." Although language seldom attains the precision of a mathematical symbol, where an expression is capable of precise definition, we will give effect to that meaning absent strong evidence that Congress actually intended another meaning.



Further, in Footnote 13 at page 546, the Supreme Court addressed the scope of the term public land” as follows:

Section 102 [of ANILCA] provides that the definitions apply to the entire Act, except that, in Title IX, which provides for implementation of ANCSA and the Alaska Statehood Act, 72 Stat. 339, and in Title XIV, which amends ANCSA and related provisions, the terms shall have the same meaning as they have in ANCSA and the Alaska Statehood Act.

The definitions at 16 U.S.C. 3102 apply only to federal lands, which means land the United States held after December 2, 1980, and expressly exclude land selected or granted to the State of Alaska, Native Corporations, and privately held land.

Section 810 is so restricted even if there is a concern that activities on federal public land may spill over into private land or land not subject to ANILCA. This was considered by the Court of Appeals for the Ninth Circuit in City of Angoon v. Hodel, 803 F.2d 1016 (1986) (per curiam) cert. denied, 484 U.S. 870 (1987). In that case, plaintiffs argued that a Section 810 analysis was needed for potential subsistence impacts on private land that was adjacent to federal public land. The Ninth Circuit declined to expand the jurisdictional reach of Section 810, noting that the statute’s structure set out the limits for the statute. With respect to potential impacts on private land, the Appeals Court observed that:

In addition, other provisions of ANILCA tend to belie the applicability of section 810 to private lands. *E.g.*, ANILCA § 802(3), 16 U.S.C. § 3112(3) ("Federal land managing agencies ... shall cooperate with adjacent landowners and land managers, including Native Corporations ...."); *id.* § 810(d), 16 U.S.C. § 3120(d) ("After compliance..., the head of the appropriate Federal agency may manage or dispose of public lands under his primary jurisdiction....")

It seems likely that, as Sierra-Angoon argue, a subsistence evaluation of the government's Cube Cove actions would be beneficial and consistent with the purpose of ANILCA. The plain language of the statute, however, cannot fairly be read to require such an evaluation for actions regarding private lands. Sierra-Angoon argue strenuously that they are not advocating regulating private lands but only spillover “use” of public lands. This seems a distinction without a difference. We affirm the district court's holding that section 810 is inapplicable to Shee Atika's use of Cube Cove. [Id. at 1018.]

Despite the clarity in the ANILCA statute and the applicable caselaw, BLM in the SEIS has conducted an ANILCA 810 analysis on the entire route of each alternative, A, B, and C, considered in the SEIS. This has been done even though BLM acknowledges that for Alternative A, for example, the only federal public lands along the route are those belonging to the NPS in the Gates of the Arctic National Park and Preserve (GAAR) and approximately 30 miles of BLM-managed

land where the route begins at the Dalton Highway that is on land which has been selected by the State of Alaska. There is no dispute that for Route A, 61% of the route is on land belonging to the State of Alaska and 10 miles are on land owned by Doyon Limited, an ANCSA corporation. About 21 miles are on land owned by Native Corporation NANA with 3.11 miles of land selected by NANA and managed by BLM. Despite this clear land title situation, BLM has conducted an 810 review on these private and state-owned land in contravention of the statutory jurisdiction reach of Section 810 of ANILCA and the applicable caselaw.

On September 1, 2023, the Deputy Director of AIDEA inquired of BLM why Section 810 was being applied to private land, State-owned land, and ANCSA-owned land instead of being limited in conformity with ANILCA to federal public land. BLM responded in an email in pertinent part as follows:

“Hello Brandon,

Those are great questions, however your assumption is incorrect. You are correct that in order for a subsistence evaluation to be required under Section 810(a) of ANILCA, there must be a proposed use of federal "public lands" as the term is defined in Section 102 of ANILCA, which does not include State-selected lands. However, once an evaluation is triggered by a proposed action on federal "public lands," Section 810(a) of ANILCA requires that the evaluation consider the effect of such use (of the federal public lands) on subsistence uses and needs, wherever they may occur (i.e., both on and off the "public lands"). Note that Section 813 of ANILCA defines "subsistence uses" as:

*the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.*

This definition is not limited to uses on federal public lands.

Thus, while the focus of an 810 evaluation is typically on the direct impacts to subsistence uses that may occur on the federal "public lands," the evaluation must also address indirect impacts that may occur beyond the "public lands" due to the proposed action on "public lands." In the case of the Ambler Road Project, actions that are proposed to occur on BLM- and NPS-managed lands have impacts that extend beyond the public lands, including to State- and Native-owned lands.

Also, for clarification, note that lands top-filed by the State of Alaska are not validly selected lands, and thus fall within the definition of “public lands.”<sup>18</sup>

This position taken by BLM in the email is incorrect. As the U.S. Supreme Court held in Amoco Productions, supra, at page 546, “Section 810 applies to ‘public lands.’” It held that this term “public lands” was defined by statute that sets out the jurisdictional reach of Section 810. Further, in its Footnote 13, the Supreme Court noted that “Section 102 [of ANILCA] provides that the definitions apply to the **entire Act...**” (emphasis added) with certain limited exceptions in Title IX of ANILCA.

This means that the fact that the definition of “subsistence” in ANILCA does not expressly reference the term “public lands” is of no consequence because Section 102’s definitions of “public lands” apply to the entire statute including the definition of subsistence. Further, the spillover effect of impacts onto private or state-owned land was an argument that was rejected by the Ninth Circuit in City of Angoon v. Hodel, supra at page 1028.

Indeed, the SEIS itself explicitly states that it agrees that Section 810 only applies to federal public lands in this section:

1.5. Collaboration and Coordination\* 1.5.1 Key Agency Participation\* Lead  
Federal Agency Chapter 1 Introduction Page 1-5

Lead Federal Agency. The BLM is the lead federal agency for this Draft Supplemental EIS. In addition to NEPA, the BLM is leading the analysis under ANILCA Section 810, National Historic Preservation Act (NHPA) Section 106, and Essential Fish Habitat under the Magnuson-Stevens Fishery Conservation and Management Act. **ANILCA Section 810 requires evaluation of the project’s effects on subsistence resources and access to those resources where the project would use federal public land.** [emphasis added]

Finally, it should be noted that the BLM-managed land along route A has been selected by the State of Alaska. It is what is known as a top-filed selection. As explained on the State of Alaska’s Department of Natural Resources web site:

ANILCA gave the state of Alaska the right to make contingent selections, or top-filing, where land is subject to a federal restriction or withdrawal that prevents the lands adjudication as an entitlement selection. In the event the restriction is lifted, a state selection is automatically attached to the land. It is thus a future interest in a selection for the State, but not considered an actual selection until the relevant withdrawal is lifted. See <https://gis.data.alaska.gov/datasets/SOA-DNR::anilca-topfiled-all/about>.

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<sup>18</sup> This email chain in its entirety is included as Exhibit M.

As a result, there is no dispute that the lands at the beginning of route A have the status of “BLM Managed” lands, because they are not owned by BLM or another federal agency. In fact, they are land that has been selected by the State of Alaska under the selection procedures established in ANILCA. The term “selected” as used in 16 U.S.C. 3102(3)(A) is defined as follows:

(3)The term “public lands” means land situated in Alaska which, after December 2, 1980, are Federal lands,except—

(A) land selections of the State of Alaska **which have been tentatively approved or validly selected under the Alaska Statehood Act** and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;[emphasis added]

See also Exhibit O, BLM 810 Policy Statement, at page 1-1 and footnote 1: “1 The sole exception to State selected lands not meeting the definition of public lands are any State selections in a Conservation System Unit (CSU, e.g., Steese-White Mountains, and Wild and Scenic River Corridors). Such CSU lands are to be administered under applicable laws until actually conveyed (ANILCA Section 906(o)(2); §50CFR 100.4(2)).”

The fact that the State-selected lands are “top-filed” does not mean they have not been properly selected. They are selected by Alaska and title will pass when a temporary restriction under Public Law 5150 is lifted. The term “selected” as used in ANILCA is not limited to, as the BLM asserts, lands “properly selected”; instead, the statute uses the term “selected” and the term “tentatively approved”; these top-filed lands are tentatively selected because when restrictions are lifted, title will pass to the State of Alaska without any further action. Moreover, the fact that the lands at the beginning of route A are identified in the SEIS as being managed by BLM, rather than owned by BLM, demonstrates that BLM acknowledges these lands have been selected by the State of Alaska (SEIS Volume 4, Map 3-25 (page 37) and Map 3-26 (page 38)); that is why they are being managed by BLM and are not owned by BLM.

#### **IX. BLM’s 810 Analysis Is Not Only Jurisdictionally Overly Broad, but Also Procedurally Deficient**

An ANILCA 810 Subsistence Analysis requires three steps: 1. Evaluation, 2. Finding, and 3. Notice and Hearings. Step 1 consists of evaluating three specific factors. These three factors must be analyzed and separately described for each alternative in an EIS, including the cumulative effects analysis. It includes the consideration of the following factors:

- A. Factor 1. Evaluate the effect of each of the EIS’s proposed action(s) and alternatives on subsistence uses and needs.
- B. Factor 2. Evaluate the availability of other lands for the purposes sought to be achieved.

- C. Factor 3. Evaluate other alternatives that would reduce or eliminate the proposed action(s) from lands needed for subsistence purposes.

As the U.S. Supreme Court held in Amoco Productions, *supra*: “Section 810 does not prohibit all federal land use actions which would adversely affect subsistence resources but sets forth a procedure through which such effects must be considered and provides that actions which would significantly restrict subsistence uses can only be undertaken if they are necessary and if the adverse effects are minimized.”

**X. AIDEA Supports DOI Consultation Policies regarding Alaska Tribes and ANCs.**

Consultation with Tribes under Section 106 of the NHPA was the second reason the Department of Justice requested a voluntary remand from the U.S. District Court. *See*, Exhibit M, Beaudreau Declaration at page 3, paragraph 3 and page 4, paragraph 7. The Declaration at page 3, paragraph 7 acknowledges that in the FEIS issued in 2020: “The BLM and NPS jointly engaged in the NHPA Section 106 process, with the BLM serving as the designated lead agency consistent with 36 C.F.R. § 800.2(a)(2).” The Declaration states that the deficiencies with respect to tribal consultation were associated with the Programmatic Agreement rather than a fault in the FEIS or the JROD: “The programmatic agreement is deficient because the BLM did not engage in adequate consultation with Tribes prior to executing it.” *Id.* at page 4, paragraph 8. AIDEA does not concede that prior consultation for the original FEIS and JROD was insufficient, but there can be benefits in additional outreach and consultation.

AIDEA is committed to consultations with Alaska Natives, Alaska Tribes, and Alaska Native Corporations (ANCs). AIDEA has its own outreach effort to tribes, interested parties and local communities. As the Permittee, AIDEA is a signatory to the Programmatic Agreement (PA) regarding the Ambler Mining District Industrial Road, which was executed on April 27, 2020. As such, AIDEA agrees with the tribal consultation required by that agreement. That consultation relates to the National Historic Preservation Act (NHPA), as amended (54 U.S.C. 4321 et seq.) which proscribes ongoing consultations managed by BLM. AIDEA should have also been invited, subject to the consent of the communities, to the meetings held to help address the concerns of Alaska Natives. In addition, AIDEA has set up a Subsistence Advisory Committee (SAC); that is not the consultation discussed in the NHPA but provides a forum for local subsistence users’ input.

However, the SEIS is almost bereft of any references to tribal consultation. AIDEA, through a construction reimbursement agreement with BLM, is paying for some of the cost associated with tribal consultation, but there is almost no information about this consultation in the SEIS. This was one of the issues sought for the voluntary remand.

BLM should correct the SEIS to include all of the consultation they have done to date from June 2016 to the present (the October 2023 issuance of the SEIS) and planned consultation related to the NHPA. Since the planning and start of the SEIS process, BLM has engaged in consultations in



addition to those done with the original FEIS. The SEIS should identify steps taken to achieve meaningful tribal consultation with respect to the PA. The SEIS does not adequately provide detailed information as to where and when those consultations occurred, although AIDEA has requested that information. As the Permittee, AIDEA knows from BLM invoices that it is paying for some consultation that has taken place, but the SEIS offers almost zero information about this topic even though it was a topic addressed in the Remand Order, Exhibit L.

#### **XI. XI. Issues on which NANA and AIDEA Agree Related to the SEIS**

AIDEA has just recently become aware of the NANA SEIS Comment Letter and reviewed the issues raised by NANA. AIDEA agrees with NANA and commits to working with NANA to formalize agreements to address NANA's concern. AIDEA respectfully characterizes their concerns below.

NANA wants controlled, permitted access along the entire route. AIDEA agrees and we can reference our concurrence in the section of the AIDEA comments stating why the road will not be public. NANA asks for community benefits, shareholder jobs, and workforce development. AIDEA agrees with all three. AIDEA's concurrence with the essence of NANA's requests is part of the project benefits. NANA stresses the importance of the protection of caribou migration, fish and other subsistence resources – AIDEA agrees; we can add our agreement with these goals in the section in the AIDEA letter when it discusses: (1) SAC; (2) caribou and fish; (3) why Route A is better for subsistence

NANA agrees that Section 810 does not apply to ANC land, citing the same Ninth Circuit case that AIDEA does. AIDEA agrees and can add that NANA agrees that Section 810 does not apply to ANC land. NANA on page 10 notes the five-fold increase in the APE. AIDEA agrees that this increase is not in compliance with the statutes. NANA chides BLM for not transferring the 3.11 miles of land being managed by BLM for the corporation under the land selection process. AIDEA agrees that all the BLM-managed land along the route should be transferred to either NANA or DNR. NANA on page 13 of its letter states that Route A is preferred and that Route C is not tenable because: "Alternative C is the least preferred alternative in light of its unreasonably long length which will adversely affect the environment and subsistence resources while making it more difficult to maintain AAP in an Arctic environment and to police it to ensure public safety and prevent trespass." AIDEA agrees.

Of critical importance is that NANA in its letter asserts on pages 13-14 that AIDEA through the State Government authority is seeking to cross ANC land without permission. AIDEA respects all private landowners, including NANA and Doyon, and is committed to obtaining NANA's and Doyon's consent to cross ANC lands by an agreement in order to access for the Ambler Mining District.

## **XII. The Ambler Road Draft SEIS Fails to Incorporate a Logical Plan to Accomplish the Goals of the Remand**

As noted above, the scope of the SEIS for the Ambler Road should have been limited to the scope of topics addressed in the Remand Order:

- 1) subsistence impacts under Section 810 of the Alaska National Interest Lands Conservation Act;
- 2) (2) additional tribal consultation pursuant the National Historic Preservation Act, and
- 3) areas of concern identified in the underlying NEPA litigation in Case No. 320-cv-00187-SLG and Case No. 320-cv-00253-SLG.

Unfortunately, the SEIS has no internal structure or rationale for the topics covered therein. The SEIS covers topics such as impacts from trespass or public uses of the road even though these topics were not connected to a Section 810 subsistence uses analysis, to tribal consultation under Section 106 of the NHPA, or to the areas of concern in the NEPA related litigation. Instead, the SEIS verses off into how the road might be financed, potential trespass by non-authorized users, asbestos, fire management and wood frogs. This resulted from the failure of the SEIS to adhere to the scope of the remand and to lay out a plan at the outset to address the issues raised by that remand instead of essentially looking at any topic that might to connected to the project.

BLM knows how to do better. An examination of the remand in the Willow development in NPR-A is instructive. The Willow Master Development Project Record of Decision Supplemental Environmental Impact Statement at page 8 succinctly sets out what is to be accomplished in that document:

Project screening criteria were reevaluated and augmented while developing the Supplemental EIS to ensure any new alternatives **adequately addressed the District Court’s decision and were compliant with applicable law**. In its decision, the District Court remanded the Willow MDP EIS to BLM for the following reasons:

- BLM acted contrary to law insofar as it developed its alternatives analysis based on the view that CPAI had the right to extract all possible oil and gas from its leases.
- BLM acted contrary to law in its alternatives analysis for the TLSA insofar as it failed to consider the statutory directive that BLM give “maximum protection” to surface values in that area. [emphasis added]

In contrast, the SEIS prepared for the Ambler Road contains no provisions setting out a structure for a well-focused compliance document that would follow the scope of the Remand Order. Such a document would have addressed Section 810 under ANILCA, sought further consultation with tribes regarding the Programmatic Agreement in conformity with Section 106 of the NHPA, and

contained a survey of any issues of concern identified in the NEPA litigation complaints. This structured approach, in contrast to the Willow SEIS, was not followed.

The result is a meandering document which in 1200 pages mentions the issue of the LEDPA under the Clean Water Act only once, even though water issues are referenced at Paragraph 6 of the Beaudreau Declaration filed in support of the Motions for Voluntary Remand submitted by the U.S. Department of Justice. See Exhibit M. The Ambler Road SEIS never even mentions the Programmatic Agreement even though that document was a central issue in the remand requested by the Department of Interior. See Exhibit M, Beaudreau Declaration at Paragraph 8 page 4: “The administrative record shows that the priority of achieving a programmatic agreement within the timeframe established by the Department constrained the options for Tribal consultation, and that Tribes were afforded only a secondary role in the ultimate adoption of the programmatic agreement. Such limited consultation with Tribes is a **deficiency necessitating remand of the decisions for a renewed Section 106 process, to include revisiting whether Tribes should be included as invited signatories to a programmatic agreement.**” (emphasis added)

AIDEA would recommend that the BLM re-edit the draft SEIS and eliminate those issues that do not respond to or are not within the scope of the Remand Order.

### **XIII. The Ambler Road Project Is Not a “Major Federal Action” Subject To NEPA**

In the SEIS, BLM failed to apply the appropriate NEPA threshold to the Ambler Road Project. BLM failed to apply the CEQ regulations in place at the time the supplemental NEPA process was initiated in 2021. It also failed to apply the FRA amendments to NEPA that went into effect in June 2023, before BLM published the SEIS.

Effective June 3, 2023, the FRA, Pub. Law 118-5, made significant and pertinent amendments to NEPA, including thresholds and the definition of “major federal action.” The CEQ regulations in place in 2021 when BLM issued its NOI for the SEIS also include this definition.

Under the 2020 CEQ Regulations, a “major federal action” requiring environmental review **does not include**, “[a]ctivities or decisions that are non-discretionary and made in accordance with the agency’s statutory authority.” 40 CFR 1508.1(q)(1)(ii); *see* 42 U.S.C. § 4332 for the agencies’ statutory authority. Through ANILCA, Congress imposed a non-discretionary *mandate* on DOI to permit the Ambler Road across the boot of the GAAR. This non-discretionary activity does not, as a matter of law, constitute “major federal action.” Effective June 2023, the FRA reconfirmed this point by providing that the definition of a major federal action does not include “activities or decisions that are non-discretionary and made in accordance with the agency’s statutory authority.” § 111(10)(B)(vii) (codified at 42 U.S.C. § 4336e(10)(B)(vii)). Further, the FRA states that an agency is not required to prepare an environmental document when the result of the threshold determination is that “the proposed agency action is a nondiscretionary action with respect to which such agency does not have authority to take environmental factors into consideration in determining whether to take the proposed action.” § 106(a)(4) (codified at 42 U.S.C. § 4336(a)(4)).

The regulations that implement NEPA, which were revised in 2020 and 2022, state that in assessing whether NEPA applies, “Federal agencies should determine ... whether compliance with NEPA would clearly and fundamentally conflict with the requirements of another statute.” 40 CFR 1501.1.

The SEIS fails to take into account the significant reforms implemented by the FRA. Any final EIS must conclude that the approval of AIDEA’s right-of-way across Alternative A would not constitute “major federal action.”

The FRA NEPA reforms became law on June 3, 2023, months before the publication of the SEIS. Under these reforms the Ambler Road is not a “major federal action.” The FRA made these changes to NEPA that are not used or discussed in the SEIS:

- Amending NEPA to clarify and narrow agency considerations to “reasonably foreseeable environmental impacts of the proposed agency action.”
- Analysis limited to *reasonably foreseeable* environmental impacts: Clauses (C)(i) and (ii) limit a NEPA analysis to the “*reasonably foreseeable* environmental impacts of the proposed agency action,” rather than the universe of environmental impacts. The revision tracks the current definitions of “effects or impacts” and “reasonably foreseeable” in the CEQ regulations. 40 C.F.R. Section 1508.1(g), (aa).
- Alternatives must be *reasonable*: Rather than simply stating that a NEPA analysis must consider “alternatives to the proposed action,” new clause (C)(iii) requires agencies to consider “a *reasonable range of alternatives* to the proposed agency action.”
- The clause further specifies the alternatives considered must be “technically and economically feasible” and “meet the purpose and need of the proposal.”
- This change aligns with the 2020 revision to the definition of “reasonable alternatives” in the CEQ regulations implementing NEPA, 40 C.F.R. § 1508.1(z), and previous court decisions, which generally held that agencies do not need to consider alternatives that could not realistically be implemented.
- New Section 111 redefines “major federal action.” The new statutory definition largely tracks the definition in the CEQ regulations, 40 C.F.R. Section 1508.1(q), but is more constrained than the current definition. At the outset, Section 111 states a “major federal action” is one “subject to *substantial* Federal control and responsibility,” and excludes the following actions or activities from the definition, among others (Sec. 111; 42 U.S.C. § 4336e; emphasis added):
  - “(i) a non-Federal action—(I) with no or minimal Federal funding; or (II) with no or minimal Federal involvement where a Federal agency *cannot control the outcome of the project.*”
- The traditional trigger for NEPA review has been whether a proposed activity is a “major federal action,” defined as “effects that may be major and which are potentially subject to Federal control and responsibility.”
- After June of 2023, under the FRA, the new definition is “an action that the agency carrying out such action determines is subject to substantial Federal control and responsibility”—

which new definition does not even contain the term “major” (Sec. 111(10)(A); 42 U.S.C. § 4336e).

- Now excluded from NEPA review are projects that receive "no or minimal Federal funding" or for those "with no or minimal Federal involvement where a Federal agency cannot control the outcome of the project" (Sec. 111(10)(B)(i); 42 U.S.C. § 4336e).
- (ii) funding assistance when the Federal agency lacks “compliance or enforcement responsibility” over the subsequent use of such funds; (Sec. 111(10)(B)(ii); 42 U.S.C. § 4336e)

The Ambler Road, based on these reforms, is not a major federal action because it is not a project subject to a major federal role and responsibility. BLM owns one mile out of the 211-mile corridor. BLM only manages about 30 miles of the route and that will change when these lands that are selected are transferred to the State of Alaska. BLM has no responsibility with respect to the majority of the route that is on private or State land, none of which are federal public land as that term is defined in ANILCA. Additionally, the USACE after the 2023 U.S. Supreme Court decision in Sackett v. EPA, 598 U.S. \_\_\_ (2023) no longer has federal wetlands jurisdiction along most of the road because the lands it crosses are permafrost. As is explained later in this letter and in an expert report (See Exhibit P, Three-Tier Alaska Report) permafrost lacks a continual surface connection to any federal waters. The entire area is made up of permafrost (See Exhibit Q, DOWL Permafrost map of road route).

#### **XIV. NEPA Reform Concerning NEPA Data Sources**

As is a constant theme in this SEIS, it either misapplies the law or it ignores new statutory requirements and fails to follow the current applicable regulations. This failure is particularly acute with respect to its references to data sources used throughout the document. In particular, the FRA adopted new statutory elements requiring agencies to use reliable existing data sources. New paragraphs (D) and (E) require an agency conducting a NEPA analysis to “ensure the professional integrity, including scientific integrity, of the discussion and analysis in an environmental document” and “make use of reliable data and resources in carrying out this Act” (SEIS, Section Chapter 3, *Affected Environment and Environmental Consequences, Data Limitations*, page 3-3). This should mean going forward that agencies need to screen data sources carefully. New Section 106 of NEPA further provides that the agency is not required to undertake new scientific or technical research unless it is “essential to a reasoned choice among alternatives, and the overall costs and time frame of obtaining it are not unreasonable.”

Congress strengthened this regulatory requirement by amending the NEPA statute to state that “[a]n agency is not required to prepare an environmental document with respect to a proposed agency action if ... the preparation of such document would clearly and fundamentally conflict with the requirements of another provision of law.” FRA § 106(a) (codified at 42 U.S.C. § 4336(a)(3)). This statutory reform was effective in June of 2023, before this SEIS was issued, so the SEIS should have been issued in compliance with these statutory changes. The SEIS clearly appears not to have considered the new reforms.



Therefore, BLM, by misguided attempts to comply with NEPA, has created a conflict with ANILCA. The Department is without discretion in creating access for the Ambler Road Project. The Secretary's decision to *sua sponte* direct further environmental review violated current regulation in 2021 and now violates the basic parameters of NEPA as amended by the FRA; it also exceeds the Court's Remand Order, which was narrower in scope.

## **XV. The Decisions to be Made**

The SEIS states that the decision to be made is the following: "The BLM and other authorizing cooperating agencies will decide whether to reissue, amend, or deny, in whole or in part, authorizations for the project, based on the analysis contained in the Final Supplemental EIS, as well as other state and federal review processes." (SEIS page ES-2)

Consequently, the SEIS should have been focused on and be limited to those areas defined in ANILCA that have the highest potential for the facilitating economic development in Alaska including diverse mineral deposit discovers, mineral development, and facilitating economic development in rural and western Alaska. The purpose of the Ambler Road Project is only to allow for economic development and to determine *if* further development should occur. Moreover, the terms and conditions should focus on and be limited to activities that do not involve the impacts of mineral production and should address the environmental impacts of the Ambler Road Project.

The Congressional mandate in GAAR at Section 201(4)(a) of ANILCA sets forth special treatment for the National Preserve's "Kobuk Boot" (a southern appendage of the Unit) to facilitate mineral access to State-owned mineralized lands immediately to the west of the Boot. The statute guaranteed that the Department of the Interior, in consultation with the Department of Transportation, would permit a right-of-way through the Kobuk Boot for transportation between the Ambler Mining District and the Alaska Pipeline Haul Road (Dalton Highway).

## **XVI. Road Operations and Financing Affect the Environmental and Social Impacts of the Project**

In the scoping comments for the SEIS process received by BLM, as well as in public comments on the SEIS at public meetings, people expressed concerns that, over time, the proposed Ambler Mining District Industrial Access Project (AMDIAP) corridor could be opened to the public or be used for nonindustrial use, such as guiding services, hunting and fishing, or tourism. Concomitantly, some have commented that the road should be closed to the public, while others have indicated that, in the long term, they believe the road would eventually be open to the public.

Other commentators have opined in previous comments that the road in and of itself would lead to social interactions between truck drivers and local residents or the importation of alcohol or drugs via the road. For example, a representative of the Wilderness Society at the Anchorage meeting expressed concerns about public health impacts, and negative impacts on subsistence food

sources. Another commenter was critical of the SEIS because it did not address whether the road would remain a purely industrial road. Another person who commented indicated that, although the SEIS provides for a staffed gate at the Dalton Highway, it lacks detail on how the road would be policed.

## Environmental Impacts

The FEIS provided that the Ambler Road is based upon an application from AIDEA for a controlled-access right-of-way for a private industrial access road that would be closed to the public. This is first stated in Footnote 2 at p. 1-2. But the FEIS also cautions that, because only a portion of each route is on BLM-managed land, the “BLM’s authority to require and enforce specific measures is limited.”<sup>19</sup> In Scoping comments, public access on the road was frequently mentioned according to the FEIS (See, e.g. P. 1-6).

The SEIS makes statements about road operation that are not factually accurate and should be corrected. For example, at p. J-49, the document refers to contamination to the “surrounding environment due to fugitive dust from trucks hauling ore....” However, BLM specifically asked both AIDEA and Trilogy Metals how the ore would be transported and was told it would be moved in sealed welded containers that are loaded at a mine and put on a truck via a forklift. These sealed containers eliminate the need to tarp loads and prevent fugitive dust. This differs from both the original trucks at Red Dog Mine and the new hydraulically sealed trucks. AIDEA trusts this erroneous reference to “fugitive dust” will be corrected in the final SEIS.

At page 3-81, BLM continues with speculation on how road operations could impact the environment without analysis or citation to the record. “Cumulatively, the road and reasonably foreseeable future development has the potential if not properly constructed or maintained to have very substantial, long-term impacts of fish and aquatic life at the population level...” It is entirely improper for the SEIS to assert that the road could be improperly constructed. The road construction will have to be in conformity with a myriad of permits and requirements. AIDEA has deep experience building roads in the Arctic – e.g., the DeLong Mountain Transportation System (DMTS) and the Mustang Road. While BLM’s distrust of AIDEA’s professional capabilities is unfortunate, there is no basis to state that AIDEA would improperly construct the road. More pertinently, AIDEA’s SF299 Application provides a detailed explanation of its annual maintenance cost and how those costs would be met. Indeed, in a project financed by revenue bonds, it is likely the bond covenants will require the creation of an annual maintenance program and a report to the bond trustee annually of the satisfaction of that requirement.

At several sections, the SEIS presumes that contractors working on the Ambler Road and subsequent users of the road will not adhere to the law, applicable regulations, or road specific protocols. This assumption expressed in the SEIS is factually wrong and is contrary to a

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<sup>19</sup> FEIS at p. ES-6.

presumption in the law that both officials and citizens will adhere to norms of lawful, responsible conduct.

This presumption in American jurisprudence is old and well settled. In the case of U.S. v. Norton, 97 U.S. 164 (1877), the United States Supreme Court articulated the common-sense statement that “It is a presumption of law that officials and citizens obey the law and do their duty.” Id. at 168. More than one hundred years later, in 2005, the U.S. District Court for the District of Columbia considered in National Wildlife Federation v. Brownlee, 402 F.Supp.2d 1 (D.D.C. 2004), challenges brought by environmental groups to four nationwide dredge-and-fill permits issued by USACE based on purported violations of the Clean Water Act (CWA), NEPA, the Endangered Species Act (ESA), and APA. The plaintiffs asserted that these purported violations would result in adverse impacts to the Florida panther, a federally listed endangered species. Id. at 3.

While the Court ultimately found that USACE had failed to fulfill its obligation to consult with the FWS before issuing the permits and granted summary judgment to the plaintiffs on that basis, it observed that the Corps had engaged in substantial efforts to protect the panther, including the imposition of permit conditions that required the permittees to obtain prior Corps approval before proceeding with dredge-and-fill action in panther habitat. Id. at 5. In a footnote, the Court stated that “[it] presume[s], as [it] must barring any evidence to the contrary, that developers will comply with the law and seek Corps approval before proceeding with activities in the panther consultation area.” Id. at 5, n. 7 (citing Norton, 97 U.S. at 158).

Recently, a federal court in Montana confirmed that courts should presume that permittees will comply with all applicable laws. In Northern Plains Resource Council v. U.S. Army Corps of Engineers, 454 F.Supp.3d 985 (D.Mont. 2020), the Court heard a challenge by environmental groups to a Corps permit allowing the discharge of dredged or fill material into jurisdictional waters as required for the construction and maintenance of utility lines and related facilities. Id. at 987. As in Brownlee, the plaintiffs claimed that the permit was issued in violation of the ESA, NEPA, and the CWA.

The Court determined that the Corps had not adequately complied with its requirement to engage in an ESA Section 7(a)(2) consultation and remanded the permit to the Corps for that purpose. Id. at 954, 966. Instead of undertaking such a consultation itself, the Corps’ permitting structure delegated the Corps’ obligation to make an initial effect determination to the permittees. Id. at 993-94. While the Court disapproved of this process, it observed that it “certainly presumes that the Corps, the Services, and the permittees will comply with all applicable statutes and regulations.” Id. at 993 (citing Norton, 97 U.S. at 168; Brownlee, 402 F.Supp.2d at 5, n.7).

Again, the SEIS does not address the reality that the road would be operated as a restricted and controlled roadway by an operator that is collecting user fees and working to maintain and operate the road as a long-term investment. In this situation, maintenance of the road will not come from public funds, but rather from fees, just as part of rent payments are used by a building owner to maintain a long-term property. It is possible that BLM’s confusion on this point may come from a

lack of familiarity with AIDEA's structure as a public corporation and body corporate financed in large part by the proceeds of its own investments, rather than a conventional public agency reliant on legislative appropriations.

In sum, the SEIS lacks a discussion of why the legal, financial, and operational structure of a private industrial road will limit its impacts on the environment, prevent undesirable social impacts that could occur if the road was open to the public, and ensure that the character of the road does not change over time.

### Social Impacts

AIDEA understands many of the comments about the possibility the road could become public stem from the history of the Dalton Highway. The Dalton Highway was based on a public highway right-of-way granted by BLM, but at its inception was closed to most nonindustrial users by the AKDOT Commissioner. State officials made comments that the Dalton Highway would not be open to the public. Nevertheless, in 1990, AKDOT Commissioner Turpin used his authority as Commissioner to open the Dalton Highway to all types of traffic including the public. This decision was the subject of litigation between the North Slope Borough and the State of Alaska.

In Turpin vs. North Slope Borough,<sup>20</sup> the Alaska Supreme Court determined the Dalton Highway could be opened to the public because it was based on a **public right-of-way for a public highway** granted by BLM to the State of Alaska. The BLM right-of-way required the development of a public road and related public facilities. Additionally, the Alaska legislature by statute had requested a portion of the Dalton Highway be operated as a public road. As the Court noted:

Given these clear manifestations of intent by the state and federal governments, we believe that one cannot reasonably conclude that the plain meaning of AS 19.40.100 and AS 19.40.110 restricts travel by the general public on the Dalton Highway. The broad array of powers granted to DOT in regard to the planning, construction, maintenance, control (including closures) of any highway encompassed within the state's highway system also strengthen DOT's argument. It follows that DOT has the general authority to open the entire length of the highway to unrestricted travel by the general public.

Given this Alaska Supreme Court precedent and AIDEA's desire to develop a restricted-access industrial road, AIDEA specifically requested a controlled-access non-public right-of-way from the federal government when it filed its SF 299 application for the proposed Ambler Road corridor:

The road is being designed as an industrial access road to provide ingress to the Ambler Mining District (the District). The road would provide surface transportation access to the mining district to allow for expanded exploration, mine

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<sup>20</sup> 879 P.2d 1009, 1012 (1994).

development, and mine operations at mineral prospects throughout the District. Access to the road would be controlled and primarily limited to mining-related industrial uses, although some commercial uses may be allowed under a permit process. See Section 2, Ambler Mining District Industrial Access Project Corridor SF299 Supplemental Narrative at page 2.

The project is designed as a controlled access private industrial road providing responsible access to the Ambler Mining District. Additionally, AIDEA had reviewed comments by communities during the DOT and AIDEA scoping process which indicated a preference by some communities for a restricted-access corridor. BLM has accepted the right-of-way application as filed and is considering granting an access corridor across the BLM-managed lands which is restricted to mining related activities.

Nevertheless, there appears to be public concern that in the future AIDEA or the State of Alaska could open the proposed road to the public or seek to lessen restrictions on how the road is used, increasing traffic. There are concerns about how the Access Corridor might be used in the future.

AIDEA, as an economic development authority, is proposing the development of the Ambler Access corridor as a financial project upon which the authority will make a rate of return. In its application to BLM, AIDEA has indicated that it would hold the right-of-way granted by the federal government. This means the right-of-way across BLM lands would be issued to AIDEA and only AIDEA would be able to make use of the right-of-way. Further, because the right-of-way is granted by a federal agency, any change to the right-of-way conditions would first need to be approved by the AIDEA Board and then approved by BLM through a public process. This means, unlike the Dalton Highway, no single state official or AIDEA officer could change the status of the road.

While AIDEA would be granted a right-of-way, it may of course procure road design, construction, maintenance and operation services through third party contractors. This is a proven AIDEA business model and was successfully used to construct and manage the DMTS, which provides access to the Red Dog Mine in Northwest Alaska. AIDEA owns the DMTS, but it was constructed and is operated and maintained by private parties under contract to AIDEA. AIDEA would recoup the Ambler Road financing by charging those using the road for exploration and mine development activities or hauling ore to market. This user fee model means AIDEA has no interest in developing a public road or letting persons use a road who are not in a position to pay a user fee.

## **XVII. The Financing Terms of the Project would Restrict how the Road Could Be Used**

Another factor which ensures the road could not be opened by a single official or by decision of AIDEA's board, in and of itself, is the terms of the project financing. AIDEA intends to issue bonds as a principal means of financing the project. The bondholders will be informed that the road is based, in part, on a BLM right-of-way for a controlled-access corridor. This model will



become a condition of the financing and a change to the use or character of the road would mean that the bonds would be in breach. That is, they would become due and owing immediately. So, changing the way in which the road is used could require the payment of millions of dollars. Such a change is not economically feasible or practical.

#### **XVIII. Land Use Issues Will Restrict the Operation and Uses of the Ambler Road**

Another factor affecting how the road is used depends on the type of land ownership the route will cross. Most of the proposed corridor will be built on land owned by ANCSA land, or the Alaska Department of Natural Resources (DNR). Only a limited portion of the proposed route crosses federal land.

In order to cross land owned by a corporation such as NANA, AIDEA will be negotiating an easement. The easement will specify the conditions upon which AIDEA can use the land for the proposed road. It is anticipated that each landowner, whether it be Doyon, NANA, or DNR, will impose restrictions on how the road is used in order to protect their particular land interests.

If an effort was made by AIDEA to open the road to the public, it would have to renegotiate each of these easements with each of the landowners. Again, therefore, no single state or AIDEA official could simply open the road as happened with the Dalton Highway.

#### **XIX. Liability Issues - Restriction on Road Use Required by Insurance**

Because AIDEA intends to develop the Ambler Road as a controlled-access industrial access route, it will most likely form an entity, such as an LLC, which will operate, maintain, and perhaps even own a portion of the road. As noted above, AIDEA will finance the construction of the road and that financing will impose restrictions on the road use. Additionally, there will be restrictions imposed by the owner and operator of the road. Additionally, the rights-of-way issued for the road by NPS and BLM are issued to AIDEA. As a member of an LLC, AIDEA will be the right of way permittee and allow the LLC to use the access in accordance with conditions set by AIDEA. One condition is that the road must remain a controlled access industrial road used for accessing mining claims, mining exploration and eventually mine operations.

This is the same case as with the DMTS. The road has protocols which determine how and when it is used, creating rules of the road which all users must follow. For example, the DMTS has restrictions controlling procedures applicable for situations in which wildlife, particularly caribou, approach the road. In a similar fashion, the proposed Ambler Road operators will impose restrictions for reasons of safety, operation, and wildlife interfaces. In order to make the road public, the LLC that operates the road would have to consent to any of these changes.

Additionally, the LLC will have insurance for liability purposes. The insurance will be issued on the basis of the road being used as a controlled-access industrial access corridor primarily for mining-related activities. Any change to the use of the road will require the issuance of a new and

different insurance policy and the premiums for such a policy with lessened road use restrictions might be substantially higher. Again, this will act as a real-world constraint on the ability to change the character of the road.

## **XX. Could the State of Alaska Take Over the Road?**

Another type of comment found in the SEIS expresses a concern that, AIDEA could lose control over the road (SEIS Section 2.3.1, Modes and Concepts Eliminated, Public Access Road Versus Industrial Access Road, page 2-3). There is concern, for example, that the road could be transferred to AKDOT, which might then choose to make the road public in a fashion similar to what occurred with the Dalton Highway. For example, AIDEA has stated that it intends to operate the Ambler Road in a manner consistent with current practices on the Red Dog Mine's DMTS. On the DMTS, truck drivers are required to stop and halt operation when caribou are visible and at times this has meant closing the DMTS for hours or even days. If the road were to become public in the future, these strict protocols could not apply to a public highway.

As a result, it is important for the SEIS to explain why the project over its useful life would remain a restricted roadway that will be operated to minimize impacts on wildlife and subsistence resources. Under its statutes, AIDEA is required to make a rate of return and essentially earn profits on its economic development projects. This is the reason AIDEA would charge a usage fee for the use of the proposed Ambler Access corridor. AIDEA would probably use its bonding authority to finance all or part of the road construction. The debt would be paid back by the user fees charged by AIDEA to those utilizing the road.

If an entity such as a corporation of the State of Alaska hypothetically wanted to take over the project from AIDEA, it would have to essentially buy out AIDEA's and any other partners' positions. It would have to pay AIDEA and the LLC for its project based on its fair market value or upon an analysis of the income stream generated by the road over the life of the project. While AIDEA is a political subdivision of the State of Alaska, it is not a state agency. Instead, AIDEA is a public corporation governed by its Board, which would have to vote in a public meeting to agree to any significant change regarding (1) use of the road; (2) the ownership of the road; and (3) the manner in which it is financed. Finally, the AIDEA Board would have to agree to any proposed sale of the project because AIDEA would hold the federal right-of-way.

Moreover, even if a sale were agreed to, this does not mean any purchaser could make use of the project. BLM would have to agree to the transfer of the federal right-of-way from AIDEA to the project purchaser, and then the corridor landowners (Doyon, NANA and DNR) would have to agree to both the change of ownership and control. Finally, NPS would have to grant its consent for the portion of the route which goes across the Gates of the Arctic National Park & Preserve.

**XXI. References to AIDEA Financing in a BLM Plan of Development and Descriptions of Bonds in the SEIS**

The SEIS at several sections discusses the use of bonds as one method AIDEA could use to finance the development of the Ambler Road. See, e.g. SEIS Vol. 1, Chapter 2, Alternatives Page 2-11. There is also a discussion of bonds in the section of the SEIS under the heading General Responsibilities and Plan of Development at Vol. 1, Chapter 2, Alternative Page 2-13.

That section provides that in order to develop the road after the issuance of necessary permits, AIDEA would submit a plan of development (POD) that is described as “a financing plan that **indicated surety of the funding needed to build and operate the road** according to the POD.” Id. (emphasis added). This plan would provide, according to the SEIS, an “Indication of AIDEA’s financial ability to fund the project and its removal would be via binding agreements with mining companies, project investors, or other funders, indication of the ability to issue sufficient revenue bonds, and indication of acceptable financial instruments to ensure road closure and reclamation.” Id.

While the financial background of a proponent may be included in a POD, it is usually a brief review of the proponent’s background. As an example, here is a recitation in the Oberon Renewable Energy Project Plan of Development prepared for Intersect Power and submitted to the BM in January 2022 under the heading 1.9 Financial and Technical Capability of the Proponent at page 13:

**1.9 Financial and Technical Capability of the Proponent**

The Applicant’s expertise has led to successful creation of over 1.9 gigawatts of solar photovoltaic projects with over \$5 billion in total asset value. The Applicant has a taken more than 60 projects, from distributed to utility scale, from inception through to financing and commissioning. The project team’s expertise spans all relevant disciplines including site acquisition, permitting, interconnection, origination, engineering, procurement, construction and finance. The team includes real estate, entitlement, and NEPA expertise for energy infrastructure projects sited on federal land.<sup>21</sup>

As is readily apparent, the scope of the POD for the Ambler Road as described in the SEIS is much more detailed than a single paragraph, as used in the Oberon Renewable Energy Project Plan of Development; the SEIS specifies that the POD for Ambler Road submitted by AIDEA shall contain a detailed summary of AIDEA’s financial ability to fund the project by being able to, for example, issue “sufficient revenue bonds,” agreements with mining companies, arrangements with project investors, an “ indication of the ability to issue sufficient revenue bonds, and an indication of acceptable financial instruments to ensure road closure and reclamation” Id.

<sup>21</sup> [https://eplanning.blm.gov/public\\_projects/2001226/200478716/20053104/250059287/POD%20Plan%20of%20Development%20MAIN%20TEXT.pdf](https://eplanning.blm.gov/public_projects/2001226/200478716/20053104/250059287/POD%20Plan%20of%20Development%20MAIN%20TEXT.pdf)

In contrast, the much more typical POD for the Oberton project is a description of the proponent's past projects, a summary of the experience of the project team, and the expertise areas of that team.

This approach for the description of the proponent's financial capability is used for a large-scale project in a conservation area. The Oberton Renewable Energy Project impacts 5,000 acres of BLM administered land for the proposed solar facility that has a development footprint of approximately 2,600 acres. Additionally, all the land in the project application lies within the California Desert Conservation Area Planning Area. This is a 25-million-acre area in Southern California designated by Congress in FLPMA as a conservation area that has special values.

This Oberton POA is an example of a POA that meets BLM's requirements with a short exposition of the proponent's financial background. This is the type of POA that will be needed at some point in the future for the Ambler Road.

As a result, AIDEA would request that the SEIS delete all references to the use of a Plan of Development and eliminate references to speculative methods of developing the road from both a planning and financial perspective. References in the SEIS to such matters as financing plan including a surety of the funding needed to build and operate the road should be deleted. The SEIS is an environmental permitting document. At this stage of permitting, no POD is needed and reference to a POD in the SEIS is premature.

References to AIDEA's financial ability to fund the project when the when the road is being environmentally permitted are not needed. At some point in the future, AIDEA will submit a POD to BLM for those acres of the Ambler Road project that are owned or administered by BLM, just as was done in the Oberton Project.

A BLM POD is not needed for the sections of the road that make use of private land, State of Alaska-owned or -selected land, or land belonging to ANCs or to the Northwest Artic Borough. Planning and any required financial assurances on non-federal State-owned land will be a matter, for example, for the Alaska Department of Natural Resources to require under its own procedures under Title 38 of the Alaska Code, which has its own set of requirements for a road, easement, or land transfer. AIDEA will also need to comply with specifications needed to reach agreements for route usage with ANCSA corporations and the Borough government, which has its own planning department.

For avoidance of doubt, however, AIDEA would represent to BLM that the Authority is an experienced and responsible project proponent that has the financial experience and tools needed to develop and provide for the successful operation of the Ambler Road. AIDEA is a State of Alaska corporation that is a political subdivision the State with separate corporate identity by statute (Alaska Stat. § 44.88). AIDEA operates through a Board and employs experienced project development and financial staff. Under Alaska Stat. § 44.88.050(c), the Board "may employ professional advisors, counsel, technical experts, agents, and other employees it considers

advisable.” AIDEA has used this ability to retain advisors, firms such as HDR and DOWL; outside bond counsel, real estate counsel, and financial advisors with expertise in both taxable and non-taxable debt instruments. AIDEA has engaged experts for a variety of subject matters such as hydrology, real estate appraisals, SWOP analyses and the development of financial models.

AIDEA has its own authority to issue bonds, and can negotiate and enter into contracts and own land rights without involvement by or legal obligation of the State of Alaska. AIDEA’s funds are separate from the State of Alaska’s General Fund. AIDEA has separate bonding authority and a separate bond rating from the State of Alaska. Bonds issued by AIDEA do not become a liability of the State and, therefore, would not affect the State's bond rating. Attached as Exhibit R is a detailed description of bonds and bond terms as they apply to AIDEA’s development activities. This range of instruments is indicative of AIDEA’S financial experience and the tools it has to develop infrastructure projects such as the Ambler Road.

Major infrastructure projects have been developed using AIDEA bonds. Under AIDEA’s Conduit Revenue Bond Program, AIDEA acts as a conduit for the issuance of either taxable or tax-exempt bonds. Neither the assets nor credit of AIDEA is at risk in this program; the creditworthiness of the project, borrower strength, and credit enhancements offered by the applicant are essential to the underwriting and placement of bonds. AIDEA is also authorized to issue its own bonds; these bonds are not the debt of the State of Alaska, and are an obligation backed by AIDEA.

Over the years, AIDEA bonds and conduit revenue bonds have been used for a variety of projects. AIDEA has issued over \$1.2 billion in bonds since its inception to fund projects all over the state. Entities have utilized bond funding for new construction, expansion, refunding, and equipment purchases. AIDEA issued bonds have been used by businesses and non-profits to finance their business needs including the following.

- AKBEV Group, LLC
- Boys and Girls Home of Alaska, Fairbanks
- The Harry & Sally Porter Heart Center
- Hope Community Resources
- The William-Lynxs Alaska CargoPort
- Association of Village Council Presidents (AVCP)
- American Red Cross, South Central Alaska Chapter
- Fairbanks Sewer & Water Inc.
- Providence Health and Services
- Yukon Kuskokwim Health Corporation

AIDEA also has a long history of developing and/or proving financing to mining-related projects in Alaska. With respect to the Ambler Road, AIDEA intends to use revenue bonds to finance the project in a similar manner to its development of the DMTS. The DMTS is the road and port financed and owed by AIDEA that support the Red Dog Mine in Northwest Alaska. AIDEA refers to this method of financing as the Red Dog Model.



The DMTS provides the only means for large-scale shipments of mined ores from the Northwest Arctic Borough (NWAB) and is integral to the operations of the Red Dog mine. Some of the direct and indirect benefits provided through the continued operation of the mine and DMTS include more than 500 regular and 100 seasonal jobs provided through the mine and DMTS operations, with many of these operations staffed by NWAB residents or NANA shareholders.

Construction of the DMTS facilities was financed by AIDEA. *See, e.g.,* Exhibit S, Alaska Industrial Development Authority Delong Mountain Transportation Project Revenue Bonds, Series 1987 A. Repayment of these bonds is achieved through a “toll” structure for use of the system by mine company customers. Presently, the Red Dog mine is operated by Teck Resources and owned by NANA. The toll mechanism provides for a minimum annual assessment (aka payment) and additional payments based on escalated zinc prices and higher throughputs. The additional throughput payments are deposited to a reserve account that is used for any potential unpaid system operation costs or capital improvements. Excess reserve account balances are then periodically distributed to AIDEA and Teck according to the provisions of the AIDEA-Teck agreement. The financing structure for DTMS was so successful that AIDEA refinanced the outstanding bonds and issued General Obligation Bonds to lower the existing rates and earn a better return after the project was de-risked.

This Red Dog Model is applicable to the Ambler Road. Road user charges can service the bond debt load and provide for a reserve for maintenance and other expenditures. AIDEA is fully able to comply with the terms of the rights-of-way that were issued to the Authority by both BLM and NPS. AIDEA has the experience to finance large infrastructure projects such as the Ambler Road and can by statute retain the legal counsel, professionals, and consultants that will be needed to develop the project under the supervision of experienced AIDEA staff.

**XXII. The SEIS Fails to Reference and Incorporate and Ignores that Areas in the Ambler Road Project are Not “Wetlands” under the Supreme Court’s Decision in Sackett v. EPA.**

BLM’s SEIS attempts to burden AIDEA by identifying areas of “wetlands” which are inconsistent with recent United States Supreme Court precedent. Many areas within the scope of the AIDEA Ambler Road Project are located on permafrost.<sup>22</sup> As such, under the new definition of “wetlands” mandated by the U.S. Supreme Court decision in Sackett v. EPA, 598 U.S. \_\_\_ (2023), many of the areas impacted by the project would not be subject to USACE jurisdiction under section 404 of the CWA. See Exhibit P, Three-Tier Alaska Report.

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<sup>22</sup> See USGS Permafrost Map of Alaska. <https://dggs.alaska.gov/webpubs/usgs/i/oversized/i-0445sht01.pdf>

### **XXIII. Selection of the Least Environmentally Damaging Practicable Alternative (LEDPA)**

Another major legal flaw in the SEIS is that it provides a new analysis of route alternatives B and C, even though neither is available as an alternative.

Alternative B is a more southerly route that crosses the GAAR to the south of Alternative A. Its development in the 2020 FEIS was at the request of NPS. Pursuant to Title II, Section 201(d), NPS evaluated routes A and B as they cross the National Preserve. This analysis was set out in a document required by ANILCA known as an Environmental and Economic Analysis (EEA) that would be “prepared in lieu of an environmental impact statement which would otherwise be required under §102(2)(C) of the National Environmental Policy Act. Such analysis shall be deemed to satisfy all requirements of that Act and shall not be subject to judicial review.”<sup>23</sup>

In the 2020 JROD, the EEA was incorporated into the final decision of the Secretaries of Interior and Transportation that selected route A as the best road route to cross the National Preserve. There is no challenge to this selection of route A by the NPS and indeed there can be no challenge because that selection by statute is not subject to judicial review. Once route A was chosen as the preferred way to cross the National Preserve, then route A had to be used to provide the surface transportation route from the Ambler Mining District to the Dalton Highway mandated by Congress in Title II of ANILCA.

The SEIS acknowledges that route A is the LEDPA. Appendix C (Sec 1.5.2/pg C-6) references that Alternative A is the LEDPA in the USACE permit. However, the SEIS does not discuss what is meant by the selection of the LEDPA anywhere else in the document. The SEIS essentially is silent regarding the LEDPA in the Alternatives section of the main document (Section 2). This section should have included a discussion of the CWA and the LEDPA requirement relative to Alternative A, as it is an important point of consideration for that alternative relative to the other alternatives. At a minimum, it should have been mentioned in 2.4.5 (pg 2-19).

Despite this, the SEIS contains an alternative analysis of both routes B and C as they were referenced in the FEIS issued in early 2020. The SEIS ignores that the EEA chose route A and that route was then selected by the Secretaries of Interior and Transportation in a secretarial order (Exhibit B). That order cannot be disturbed or reviewed.

The proposed Alternative C does not meet AIDEA’s purpose and need to access all of the State’s mineral rights. As illustrated in Exhibit H-2, Alternative C will impose a need to traverse over 450 miles (over 900 miles, round trip) to access South32’s 263,680 acres of state mining claims. If BLM does not agree with AIDEA’s prior points related to Alternative A, then BLM needs to re-analyze Alternative C to include access to all of the state’s mining claims and not just to the terminus of the road as currently described. The objective of the project is to not get to a single

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<sup>23</sup> ANILCA § 201(4)(d).

destination (Ambler River), as the Ambler River does not make up the entire mining district and all of the state's legal right to access mineral deposits.

As is an oft repeated pattern in the legally flawed document, the SEIS also ignores the procedural history of the NEPA process to date for the Ambler Road and the requirements of critical federal statutes, such as the Clean Water Act. In the analysis of alternatives and in the wetland analyses, the SEIS should discuss the regulatory Clean Water Act's Section 404 requirements regarding the selection of the LEDPA. In accordance with the Guidelines at 40 CFR 230.10(a), USACE cannot issue a permit to fill wetlands if a practicable alternative exists that would have less adverse impact on the aquatic ecosystem, known as the LEDPA, provided that the LEDPA does not have other significant adverse environmental consequences to other natural ecosystem components.

AIDEA and its predecessor on this project, the Alaska Department of Transportation and Public Facilities (AKDOT), have consulted with USACE regarding the wetland delineations and the Section 404 permit application for many years. USACE has been involved in the EIS process as a cooperating agency, because its permitting authority requires compliance with NEPA. The SEIS states that BLM's preferred alternative is the Alternative A and B alignments (p. ES-7). Alternative A has substantially fewer wetlands (2,079 acres) than Alternative B (2,416 acres). The SEIS goes on to say that "ANILCA establishes that the decision regarding the best route across the National Preserve is left to the Secretary of the Interior based on the EEA...." However, under the Clean Water Act, USACE still has permitting authority for wetlands in the GAAR.

The EEA goes on to use a different approach without conducting field surveys. The EEA stated that the "NWI maps include significant areas of the alignment north of Nutuvukti Lake as wetlands that were not delineated in the 2014 wetland delineation. In addition to the wetland types noted in the 2014 wetland delineation report, the NWI maps also note the presence of palustrine moss-lichen wetlands. These are areas where mosses or lichens cover substrates other than rock. Because the NWI maps include additional wetlands not identified in the 2014 wetland delineation, these values represent a more conservative evaluation of potential wetland impacts."<sup>24</sup>

NWI maps are routinely used across the US as a starting point when conducting desktop screenings for wetlands. However, their shortcomings are well known and explicitly stated by FWS. "The Service's objective of mapping wetlands and deepwater habitats is to produce reconnaissance level information on the location, type and size of these resources. The maps are prepared from the analysis of high-altitude imagery. Wetlands are identified based on vegetation, visible hydrology and geography. A margin of error is inherent in the use of imagery; thus, detailed on-the-ground inspection of any particular site may result in revision of the wetland boundaries or classification established through image analysis."<sup>25</sup>

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<sup>24</sup> EEA at p. 22.

<sup>25</sup> <https://www.fws.gov/wetlands/Data/Limitations.html>

The SEIS prepared by BLM ignores the LEDPA determination made by USACE in 2020 – Alternative A - and only mentions LEDPA once, where BLM states that “USACE material is from preliminary considerations regarding a required USACE finding of which alternative may be the least environmentally damaging practicable alternative (LEDPA)” (SEIS Appendix C, Section 1.5, Summary of Impacts, page C-6). USACE has regulatory jurisdiction over wetlands and was involved in the 2014 delineation and the methodology for analyzing wetlands in the SEIS. In Alaska, USACE has developed nuanced approaches to characterizing wetlands on long linear projects like the pipeline for AK LNG. Those approaches are applied across the entire length of the project rather than adjusted at certain spots. NPS did not consult with USACE on their alternative approach, nor is any explanation given for the SEIS’s disregard of USACE’s expertise. Therefore, despite the verbosity of the SEIS, in part because of the designation by the NPS of the route across the GAAR, Alternative A is the LEDPA and described in the original FEIS and the original JROD.

As a result, Alternative A used in the JROD is the only route that can be used because it crosses the National Preserve in conformity with the EEA required by ANILCA and is the LEDPA for the project under the Clean Water Act. All the references to alternatives B and C in the context of the procedural history of this project are surplusage.

**XXIV. ANILCA Reinforced the State’s Right to Develop its Resources. And This Is Not Addressed in the SEIS.**

Beyond granting rights to and agreeing to allow Alaska to develop minerals on state land, Congress later prohibited further federal actions that amount to a “withdrawal” of lands in Alaska from resource development. In 1980, Congress enacted ANILCA. Known as “The Great Compromise,” the Act created massive areas of federal parks and preserves with limits on resource development in those areas. “[A]t the same time,” the Act sought to “provide adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people.”<sup>26</sup> ANILCA further reinforces that Congress considered its Alaska statehood land grants to turn over lands and resource development to the State, without future limitation by the federal government or its agencies. ANILCA’s promise of no more withdrawals is a dead letter if the United States has complete control over Alaska’s lands regardless and can make those lands de facto preserves through a misapplication of NEPA. In this case of Congressional intent to provide for access to the Ambler Mining District, Congress in ANILCA provided:

The Committee understands that the common law guarantees owners of inholdings access to their land, and that rights of access might also be derived from other statutory provisions, [i.e., section 6(i) of the Statehood Act] including other provisions of this Title [i.e., section 201(4) of ANILCA] or from constitutional grants [i.e., Constitutional Authority to admit new states and use of Federal Property clause to grant interest in statehood mineral lands to Alaska if it choose to

<sup>26</sup> 16 U.S.C. § 3101(d).

enter into a statehood compact and include 6(i) terms] This provision is intended to be an independent grant supplementary to all other rights of access, and shall not be construed to limit or be limited by any right of access granted by the common law, other statutory provisions, or the Constitution. [H.Rept. No. 97, Part 1, 96<sup>th</sup> Congress, 1<sup>st</sup> Sess. 1979, 240; also S.Rept. No. 413, 96<sup>th</sup> Congress, 1<sup>st</sup> Sess. 1979, 249.]

**Section 1110(B) of ANILCA creates access rights that are separate from but compatible with the route across the GAAR specified in Title II of ANILCA. These rights under Section 1110(b) are ignored in the SEIS. Here is the legislative history.**

“The Committee adopted a specific standard regarding access which is designed to include inholders and other landowners where lands are effectively surrounded by a unit or units established by this Act. [ANILCA]”

JUST SUBMITTED A REQUEST FOR 1110(B) ACCESS USING THE GENERAL TUS APPLICATION is not an admission that all requirements for a general TUS apply.

“Agencies will continue to use SF 299 [form for general TUS for ANILCA 1110(b) access] because it is adaptable to a variety of situations”

THE SECRETARY MUST ENSURE ADEQUATE AND FEASIBLE ACCESS FOR ECONOMIC AND OTHER PURPOSES CAN BE REALIZED

“The Committee expects the Secretary ... to work with the inholder to come to a reasonable solution which will assure that adequate and feasible access for economic and other purposes can be realized.”

On the granted lands, the Statehood Act must be interpreted in light of its own text and context. Nothing in the Act suggests that the rights conveyed to Alaska were conditioned on later federal law—or any conflicting federal law. And beyond the statutory text noted above, the context matters. “Alaska is different—from its ‘unrivaled scenic and geological values,’ to the ‘unique’ situation of its ‘rural residents dependent on subsistence uses,’ to ‘the need for development and use of Arctic resources with appropriate recognition and consideration given to the unique nature of the Arctic environment.’” Sturgeon I, 577 U.S.424 at 438–39 (quoting 16 U.S.C. §§ 3101(b), 3111(2), 3147(b)(5)). The “simple truth” is “that Alaska is often the exception, not the rule.” Therefore, under the Statehood Act and ANILCA, the issue of the Ambler Road Project is not a question of “if” but rather what are reasonable conditions and mitigation requirements that are economically reasonable and feasible.



**XXV. Connected Action Standard in the 9th Circuit—DOI Went Too Far in the Draft SEIS.**

The SEIS also ignores the pertinent 9<sup>th</sup> Circuit case law. The Thomas v. Peterson decision’s discussion regarding connected action is still good law. 753 F.2d 754 (9<sup>th</sup> Cir. 1985). As recently as 2020, the Ninth Circuit has cited Thomas for the proposition that an action is “connected” when the record reveals that it is at “an advanced stage of planning.” See Chilkat Indian Village of Klukwan v. Bureau of Land Management, 825 Fed.Appx. 425, 429 (9th Cir. 2020) (citing Thomas, 753 F.2d at 760-61; Sierra Club v. Bureau of Land Mgmt., 786 F.3d 1219, 1225 (9th Cir. 2015), and observing that “Because Appellants fail to demonstrate that the exploration plans “would [not] have taken place ... without” the future development of a mine, at 1226, BLM did not act arbitrarily by failing to consider those future impacts within a single EA.”). Exploration does not necessarily lead to mineral production, although AIDEA anticipates based on the available science that there is a very reasonable likelihood that mineral production may occur. Thus, development of an industrial road, exploration, and production may not be connected actions, meaning NEPA reviews relative to mineral production must be deferred until later.

Nevertheless, the SEIS incorrectly assumes that four mines will be developed simultaneously, which is highly unlikely (SEIS Executive Summary, page ES-3, and SEIS Appendix H, Indirect and Cumulative Scenarios). It also makes this assumption without any basis in the record or citation to any pertinent information. As such, the SEIS ignores the pertinent legal standard that the development of one or more mines is speculative. It is only the impacts of the road’s construction and operation that should be considered in the SEIS.

In Chilkat, the U.S. District Court for Alaska stated that the sole issue to be decided in the case was “whether NEPA requires consideration of **future** impacts from potential mine development as part of the environmental review for exploration activities.” Id. at page 915 (emphasis added). This is essentially the same issue presented by the standards and analysis applied in the Ambler Road SEIS.

In this case, the plaintiff asserted that mining was a “connected action” under 40 C.F.R. sec. 1508.25(a)(ii). The Court noted that CEQ regulations implementing NEPA require that the agency consider connected actions if “the two actions ‘[c]annot or will not proceed unless other actions are taken previously or simultaneously.’”<sup>27</sup> The Court noted that the Ninth Circuit “appl[ies] an ‘independent utility’ test to determine whether multiple actions are so connected to mandate consideration in a single EIS.”<sup>28</sup>

In the Chilkat case, the court found:

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<sup>27</sup> Id. at 916, citing 40 C.F.R. § 1508.25(a)(ii).

<sup>28</sup> Id. at 916-7.

Given this fact, the Court finds it cannot arrive at the conclusion that the Exploration Activities are “inextricably intertwined” with potential future mine development such that NEPA regulations mandate their consideration at the time of the NEPA review for the Exploration Activities.<sup>29</sup>

The Court cited the Thomas case to contrast that where there was a definitive future action, the project must be considered as a connected action. But, “[h]ere, no such definite plans exist regarding potential future mining.” Id. at 918. This is also the case with the analysis and consideration of mitigation of the various alternatives for the Ambler Road Project. Building a private restricted use industrial road does not convey that mineral development is assured in the future. The court stated:

Moreover, where the separate actions at issue are phases, or stages, of a single, larger effort, the Ninth Circuit has held that NEPA analysis must encompass all phases only where “[t]he dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken. Such is not the case here.... Rather, exploration is a necessary, rational step to determine whether such future activity will occur. “NEPA does not require the government to do the impractical,” and where details, planning decisions, and precise information about future phases, or activities, are unavailable, NEPA does not require that an agency consider those activities together. Accordingly, the Court finds that future development activities are not a “connected action” under 40 U.S.C. § 1508.25(a) such that BLM was required to consider these activities as part of the scope of the EAs issued for the Exploration Plan or Road Extension.<sup>30</sup>

The Court also noted:

NEPA regulations also separately define “cumulative actions” as “actions, which viewed with other proposed actions have cumulatively significant impacts.” 40 C.F.R. § 1508.25(a)(2). This regulation—which looks to “the obligation to wrap several cumulative action proposals into one EIS for decision making purposes”—is “separate and distinct” from the cumulative impact analysis required by 40 C.F.R. § 1508.7. See Dombeck, 304 F.3d at 896 n. 2. Plaintiffs do not otherwise challenge the adequacy of BLM’s cumulative impact analysis, or the impacts identified that would directly result from the Exploration Plan or Road Extension activities. Rather, Plaintiffs challenge only whether additional activities should have been included in the scope of that analysis. (footnotes and citations deleted for brevity’s sake).<sup>31</sup>

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<sup>29</sup> Id. at 917.

<sup>30</sup> Id. at 918-9.

<sup>31</sup> Id. at n. 200.

AIDEA contends that BLM, in developing the mitigation options and the proposed alternatives in the SEIS, overreaches the issues that need to be addressed to consider the industrial, limited access and non-public as required by ANILCA. The purpose of the Ambler Road Project program is to allow for exploration of the Ambler Mineral District and possible economic development in Northern and Western Alaska to determine *if* further development should occur. Should further development be determined to be appropriate, that development will be subject to a new and different Environmental Impact Statement. In effect, there is, as recognized by the Ninth Circuit, an independent utility for just the exploration allowed under the initial leasing program. AIDEA asserts that the Ambler Road Project SEIS unnecessarily and perhaps with purpose complicates the purpose and need for the proposed action in conflict with the standards of the Ninth Circuit Court of Appeals.

**XXVI. Flawed Alternatives that Confuse Decision-Making**

Again, the decisions evaluated in the Ambler Road Project FEIS and its JROD would not authorize on-the-ground activity associated with the exploration or development of minerals, and therefore BLM should not have developed alternative routes based on flawed analyses and unfounded assumptions on access and possible exploration and development. It is unclear to us how BLM developed the alternative routes or calculated acres of surface disturbance, a critical factor in differentiating the inappropriately constructed alternatives. BLM's failure to explain its methodologies serves to call its ultimate conclusions into question.

**XXVII. Review of Aquatic Resource Impacts in the Ambler Road SEIS: Alternative C Has the Most Impacts**

AIDEA requested from Three-Tier Alaska a review of the SEIS to determine whether Alternative C could be considered the LEDPA. Three-Tier Alaska's review is restricted to potential impacts to aquatic resources including wetlands and water quality. The report is attached as Exhibit P to this document and is incorporated in its entirety by reference. Some of the conclusions follow below.

According to the SEIS:

All action alternatives would result in impacts to vegetation; wetlands; and fish, bird, and mammal habitats. Besides direct fill in wetland and vegetation habitat due to road construction, the areas near the road would be affected by road dust, noise, movement, and light or shading (at culverts and bridges), and potentially spills of pollutants from truck traffic. The road would impact fish habitat and alter free fish passage based on likely changes to channels, flows, sedimentation, and other changes to the water resource caused by culverts, bridge piers, alteration of surface and subsurface flow patterns, and other effects. Nonpoint-source pollutants in

runoff and from dust as well as spills or leaks of toxic material could affect fish health and could damage spawning and rearing habitat. There are few known sheefish spawning areas in Alaska, and 2 are in the project area. Alternatives A and B would cross multiple streams upstream of these spawning areas, with Alternative B closest at 7 miles upstream. Alternative C would cross downstream of these spawning areas.<sup>32</sup>

Based on Three-Tier Alaska's review, the SEIS identifies Alternative A as the LEDPA route, followed by Alternative B. Alternative C would involve the most impact to the aquatic environment and should be rejected.

The SEIS indicates that the total length of the road to Fairbanks of all alternatives is approximately the same. However, the SEIS appears to largely consider the environmental impacts resulting from new construction and not the use of the existing road infrastructure. In terms of new road infrastructure:

- Alternative A results in 211 miles of new road construction;
- Alternative B results in 228 miles of new road construction; and
- Alternative C results in 332 miles of new road construction.

From the perspective of new road construction, Alternative A is the LEDPA route. Alternative B requires an additional 27 miles (13 percent) of new road infrastructure compared to Alternative A. Alternative C requires an additional 121 miles (53 percent) of new road infrastructure compared to Alternative A.

## **XXVIII. The References to Wetlands in the SEIS Are Flawed**

The SEIS utilized the following methods to quantify the impacts of the three alternatives to the wetlands:

The wetlands analysis used a combination of mapping products to provide a regional context for wetlands and to compare impacts among alternatives. The regional analysis was done using the Alaska Center for Conservation Science (ACCS) mapping... to provide context of the wetland types in the project area; however, the ACCS mapping greatly underestimates the true extent of wetlands in the area, which should be a consideration for the following alternatives analysis. Finer scale wetland mapping was prepared for the Alternative A and B alignments which is suitable for permitting and alternatives analysis (DOWL 2014a, 2016b).

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<sup>32</sup> SEIS at p. ES-4.

No fine-scale wetland mapping is available for the Alternative C alignment and it was analyzed using the ACCS regional mapping.<sup>33</sup>

Based on the SEIS, Alternative A is the LEDPA.

The greatest impact to wetlands under Alternative A would be to PSS, followed by PFO wetlands, which are the most common wetland types in the project area. The impacts to PSS wetlands would be roughly twice the impacts to PFO wetlands encompassing 1,341.0 and 601.4 acres in the footprint, respectively (see Appendix E, Table 11). PEM wetlands encompass 116.3 acres, or 2.6 percent, of the footprint area but likely include some higher value flooded wetlands that provide valuable fish and wildlife habitat. Alternative A is the only alternative that could result in impacts to the Nutuvukti Fen, a rare, patterned fen, located approximately 0.25 mile downgradient of the development footprint within GAAR.<sup>34</sup>

The SEIS includes an assertion that the construction of the road will alter the groundwater recharge in the alluvial fan above the Nutuvukti Fen and may create impacts. As noted in the SEIS, permeable road beds and the provision of culverts will prevent this from occurring.

The project proponent has committed to avoid the fen and the upgradient moraine through road rerouting, or if impacts to the upgradient moraine are unavoidable, to minimize the disruption of shallow subsurface flow through the moraine as much as possible through the use of appropriate construction techniques (such as a porous road prism).<sup>35</sup>

Based on the SEIS, Alternative B impacts more wetland acreage than Alternative A.

**XXIX. Comparison of the Alternatives Assuming, Arguendeno, that BLM May Analyze Production and Failure to Follow Applicable Regulations**

SEIS Chapter 2, Alternatives is seriously deficient due to its failure to comply with CEQ's 40 CFR 1502.14. This section requires that the alternatives section of an EIS present the environmental impacts of the proposed action and the alternatives in comparative form based on the information and analysis presented in the sections on the affected environment and the environmental consequences. The SEIS does not provide this comparison in Chapter 2. As CEQ has frequently stated, the alternatives section is the heart of the EIS. The section needs to include this comparative analysis so that it meets the test of sharply defining the issues for the decision maker and the public and providing a clear basis for the subsequent choice among alternatives.

<sup>33</sup> SEIS at p. 3-63.

<sup>34</sup> SEIS at p. 3-74.

<sup>35</sup> SEIS at p. 3-70.



There is a vast amount of information presented within the body of the document; at times the information seems to be extraneous and confusing, especially when considering the analysis is based on a hypothetical impact scenario rather than what is allowed under the express terms of the right-of-way application. This ultimately makes it confusing to understand the difference in impacts when comparing alternatives. The alternatives are described as having different amounts of direct land impacts. However, when factoring in the various ROPs and stipulations, the direct impacts among the alternatives become more difficult to distinguish.

Throughout the SEIS's various resource impact analyses, particularly biological resources, there is little to no comparison of impacts between the alternatives. Analyses are often loaded with various assumptions and models to attempt to achieve a reasonable analysis of impacts for a hypothetical project which ends up resulting in numerous data outputs (acres available, species numbers, percent of populations, etc.) that are extremely onerous for the reader to comprehend. Once all of this information and data is presented, there is no clear comparison (in one location of the document) that gives the reader (or decisionmaker) an idea of what it all means. For example, the impact methodology and analyses to caribou are extremely complicated and detailed, but there is no ultimate conclusion for each alternative on what the impacts actually mean and how they compare between alternatives. There is no discussion on the caribou impacts in the context of the overall populations, except one area where a few models indicate the potential percent reduction in population. But again, there is no statement on what that actually means in the context of the ever-changing populations that have been observed over the years. Overall, perhaps the impacts have no notable implications on the species, and the differences between alternatives is not notable, either, but this conclusion is not specified. In addition, the caribou is not a special status species by any state or federal agency or regulation. It is simply important for subsistence – a fact which AIDEA does not dispute.

**XXX. Methodology and Scientific Accuracy and Integrity (40 CFR 1502.23 and 42 U.S.C. 4332)**

Section 1502.23 Methodology and Scientific Accuracy and 42 U.S.C. 4332, as well as DOI Policy, require that agencies ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents. Agencies need to use reliable existing data and resources.

**Integrity of Scientific and Scholarly Activities:** The DOI also has a policy on integrity of science (DOI 2023):

*Science and scholarship play a vital role in the Department's mission, providing one of several critical inputs to decision-making on conservation and responsible development of natural resources, preservation of cultural resources, and responsibilities to tribal communities. Scientific information considered in*

*Departmental decision-making must be robust, of the highest quality, and the result of as rigorous a set of scientific processes as can be achieved. Most importantly, the information must be trustworthy.*

**The purpose of the policy** is to establish the expectations for how scientific and scholarly information considered in Departmental decision making is handled and used. Scholarly information considered in Departmental decision making must be robust, of the highest quality, and the result of as rigorous scientific and scholarly processes as can be achieved. Most importantly, it must be trustworthy. This policy helps us to achieve that standard.

**The goals of the policy** are to ensure that DOI:

- Decisions are based on science and scholarship are respected as credible;
- Science is conducted with integrity and excellence;
- Has a culture of scientific and scholarly integrity that is enduring;
- Scientists and scholars are widely recognized for excellence; and
- Employees are proud to uphold the high standards & lead by example.

This policy of using correct scientific data has now been codified in the 2023 NEPA reforms enacted by Congress, where 42 U.S.C. 4332 states “all agencies of the Federal Government shall ensure the professional integrity, including the scientific integrity, of the discussion and analysis in an environmental document.”

In the SEIS, omission of information and citations (e.g., Noel et al. 2004, 2006) and uncritical use of others (e.g., Johnson et al. 2020) on caribou impacts as described below under the **Displacement and Disturbance** comment section appear to deviate from the robust science practices required by the DOI policy. AIDEA acknowledges the literature on caribou and other wildlife impact issues is voluminous, but the DOI policy (and general scientific practice) requires thorough consideration of relevant science, and the information and analysis in the EIS should reflect this policy.

### **XXXI. Impacts on Caribou and Wildlife are Inaccurately Represented in the Draft SEIS**

The SEIS contains a variety of inaccurate and misleading statements and unsupported conclusions related to wildlife, specifically caribou and moose, in addressing the possible impacts of the development of the Ambler Road Project and the alternative routes discussed in the SEIS.

#### **Blocking or Delaying Caribou Movement Across the Road**

The SEIS indicates that the project’s potential effect of blocking or delaying caribou migration is important (SEIS page 3-137 text). In addition, the SEIS states that subsistence users have noticed changes to caribou habitats and migrations following roads and pipelines (SEIS page 3-211 and 3-

215). However, the SEIS does not note if the claims on pages 3-211 and 3-215 are substantiated by other data such as herd censuses and locations. The SEIS points out that the Western Arctic Caribou Herd (WAH) and Ray Mountains Caribou Herd (RMH) could have impacts because they have had less exposure to development than the Central Arctic Herd (CAH) and Teshekpuk (TCH) herds (SEIS page 3-215), which indicates the CAH and TCH have habituated to development (in contrast to the subsistence users quote from SEIS page 3-211). This inconsistency should be rectified in the Final SEIS, and the Final SEIS should acknowledge that caribou can habituate to development (Haskell and Ballard 2008).

The WAH is the primary caribou population of concern regarding potential impedance of movements and migration by the Ambler Road. It is important to note that the project will impact only a portion of the WAH migratory range (see cited text on SEIS page 3-128). This indicates that the number of road miles of migratory range impacted would be approximately: Alternative A which is 211 miles x 0.5 = 105.5 miles (170 km); Alternative B which is 228 miles x 0.5 = 114.0 miles (184 km); and Alternative C which is 332 miles x 0.333 = 110.7 miles (179 km).

These distances are approximately twice as long as the length of the Red Dog Mine Road (49.6 miles) for which Wilson et al. (2016) quantified WAH caribou crossing during the fall migration. Wilson et al. (2016) found that 12.5% (4/32) caribou never crossed the road, and 29% (8/28) of the caribou that crossed were delayed and took approximately ten times as long (33 days) to cross the road as 71% (20/28) of the caribou that crossed normally (3 days). Wilson et al. (2016) extrapolated this rate of delayed crossing to the entire WAH and estimated 70,000 caribou could be delayed crossing a road.

The Red Dog Mine Road has generally similar traffic rates (98 vehicles/day, 4/hour) as the proposed Ambler Road (80 to 168 vehicles/day), and similar width (36 feet Red Dog Road; 32 feet Ambler Road) without vertical structures (e.g., fences, power lines, pipelines) as the proposed Ambler Road. Therefore, some delay of caribou crossing the proposed Ambler Road can be expected, although other factors influence road crossing (e.g., snow depth, insect harassment, habituation; Wilson et al. 2016).

However, the SEIS and other sources note that other caribou herds regularly cross roads (including public-access roads and roads with elevated above-ground pipelines) during migrations including the Dalton highway, the Trans-Alaska Pipeline (TAPS 2001), several roads in the range of the Nelchina and Forty-mile caribou herds, and the Dempster Highway in the Yukon Territory, Canada, over which the Porcupine Caribou Herd crosses (and are hunted) in some years (Deuling 2015, Scott 2019). Caribou also regularly cross roads with adjacent elevated pipelines in the North Slope Alaska oil fields during the summer (i.e., not during migrations, Cronin et al. 1994, Lawhead et al. 2006). See Exhibit T for examples of caribou on existing infrastructure.

The TAPS has a little-known data set documenting occurrences of wildlife, including caribou, in the pipeline and service road right of way (TAPS 2001 pages 3.2-36 to 3.2-38). Also, Lenora (2020) provides data obtained from ground surveys of caribou occurrence close to the Dalton

Highway on Alaska's North Slope. The data cited in this comment provide insights into wildlife/caribou use of transportation corridors that should be considered in the SEIS.

### **Caribou Displacement and Disturbance**

As stated in the SEIS on Page 3-128, the proposed project could impact the northernmost portion of a limited area of the caribou winter ranges and peripheral ranges. The SEIS also describes displacement of caribou from roads, development, and human activity where it has been studied extensively in the North Slope Alaska oilfields and TAPS (SEIS Page 3-136).

This description of displacement is inadequate and does not cite relevant literature. Although the literature on caribou and oil fields and road disturbance is very large, additional important papers should be cited and described in the Final SEIS. Most important are the claims of displacement from roads during calving (Dau and Cameron 1986, Cameron et al. 1992, Johnson et al. 2020) and post-calving (Johnson et al. 2020). These papers show displacement of calving caribou as described in the SEIS, but a paper showing different results is not cited in the SEIS (Noel et al. 2004), as well as responses to it (Joly et al. 2006, Noel et al. 2006).

Noel et al. (2004) replicated a study in the Alaska North Slope Milne Point oil field (Dau and Cameron 1986, Cameron et al. 1992) and showed that displacement of calving caribou was only significant ( $p < 0.05$ ) 1 km (0.62 miles) from the road and not significant  $> 1$  km from the road for six years; and was not significant in the following 11 years.

This supports a hypothesis of caribou habituation to an oil field road. This is in contrast to the findings of displacement during calving as far as 5 km from roads (Johnson et al. 2020, Dau and Cameron 1986, Cameron et al. 1992). There are several considerations of these data and the Final SEIS should incorporate information from Joly et al. (2006) and Noel et al. (2004, 2006) for a full understanding. Regardless, the claim in the SEIS that displacement during calving is several kilometers needs to be reassessed with this additional literature.

Johnson et al.'s (2020) claim of displacement during post-calving periods also needs reassessment. Other studies (Cronin et al. 1998, Noel et al. 1998, Pollard et al. 1996, Prichard et al. 2020a, 2022) did not find displacement during the post-calving period in contrast to Johnson et al. (2020). Cronin (2020) describes deficiencies with Johnson et al.'s (2020) analysis and their inappropriate criticism of Noel et al. (2004) and Cronin et al. (1998).

### **Caribou Population/Herd Numbers**

As indicated in the SEIS (page 3-137 and 3-126), caribou herd numbers can increase and decrease over time and for different reasons. The SEIS discusses other caribou herds in Alaska, including the CAH and TCH, and BLM should include information on the fluctuations in these herds' populations for additional context on fluctuations in caribou numbers in Alaska. For example, the CAH and TCH have had variable numbers since the North Slope oil fields were established (see

attached Figure 1 and Figure 2 after table). Note that the small decline in CAH in the early 1990s was attributed partially to oil field impacts on calf production (National Academies of Science, Engineering, and Medicine 2003, but see Cronin et al. 1997, 2000) but the TCH, without oil fields in its range, had a similar decline in the same time period, and the CAH subsequently grew substantially (see attached Figures 1 and 2). Immigration and emigration, now known to affect the Arctic Alaska caribou herd numbers considerably (Cronin et al. 1997, Prichard et al. 2020b), is a more likely explanation for changes in caribou numbers. Multiple hypotheses should be considered (Betini et al. 2017) when considering the causes of changes in caribou population numbers, and this should be acknowledged in the Final SEIS. The speculation or hypothesis by the National Academies of Science, Engineering, and Medicine (2003) that the oil fields impacted the CAH herd numbers is not supported by all of the available data.

## **XXXII. Technical Comments on the Development and Structure of the SEIS**

AIDEA in its comments above has established a series of legal flaws in the SEIS. Under the new FRA NEPA reforms, BLM lacks discretion to issue a road permit and therefore no EIS is needed for this project. The SEIS uses alternatives when BLM has no discretion and must use Alternative A that allows for a route going from the Mining District across the GAAR to the Dalton Highway as required by Title II of ANILCA. The SEIS fails to adhere to the integrity of data usage required in a NEPA document and goes well beyond the scope of the District Court's Remand Order; all subjects not covered in that Order should be eliminated from the SEIS.

The SEIS ignores the impact of the need to use a route that is the LEDPA under the Clean Water Act, and further ignores the application of the Statehood Act and Section 1110(b) of ANILCA to this matter, which directly involves the ability of Alaska to access its mineral claims in the Ambler Mining District, on state land adjacent to the road route, and on lands with ANCSA claims. It ignores that Alternative A is required by ANILCA and that Section 810 of ANILCA applies only to federal public lands.

However, assuming *arguendo* that an EIS or a Supplemental EIS is needed, AIDEA has developed the following more technically oriented comments regarding the SEIS. These comments set forth in the ensuing pages of this comment letter focus on a series of faults in the SEIS with regard to its application of NEPA, its analysis of project impacts, its failure to incorporate relevant issues, and its misuse of applicable scientific standards.

### **A. Failure to Make Use of AIDEA Scoping Comments**

AIDEA is disappointed that none of the substantive comments and information included in the November 2, 2022 letter was considered for the SEIS. In fact, the record of comments from the Scoping Period (Appendix K) indicates that BLM may not have received these comments. The record of submittal of these comments (and the November 2, 2022 letter) is provided as an attachment to this letter (Exhibit U). That submittal documented several considerations related to the fish and caribou populations that should be considered for this SEIS. We note that updated



graphs, with 2023 released/available information, that were included in that 2022 letter are attached to this submittal (Exhibit V).

## **B. General Failures in the SEIS**

The following comments regarding the document are provided for BLM's consideration in development of the Final SEIS.

- Indigenous culture in Northern and Central Alaska values collaboration as a means of problem-solving. Any Final Record of Decision (FROD) and Final SEIS should similarly reflect this value, developing mitigation measures and future project activities with consensus between the landowners, the Subsistence Advisory Committee (SAC), and AIDEA. Many mitigation measures contained within the JROD and carried forward to this SEIS (Appendix N) do not include review or input by the SAC, other landowners, or other representatives from the local communities. It is recommended that the monitoring and management plans described through the SEIS and eventually through the Final SEIS should each include opportunities for review and input by the SAC. This will improve local buy-in and ultimately the effectiveness of these plans.
- AIDEA's mission includes the promotion of economic development for the state while being good stewards of its resources. As AIDEA indicated in previously submitted materials for the FEIS, the project is anticipated to be financed based on a lease agreement with mining companies. The lease agreement must include sufficient revenues for the operations and maintenance (O&M) of the road. AIDEA is anticipating the development of a design that minimizes O&M expenditures, including maintenance concerns due to potential road washout caused by inadequate hydrologic connection. Culverts and bridges are being located and sized to minimize the risk of costly washouts and road subsidence.
- AIDEA acknowledges that minimal design has occurred for the road to-date. The final right-of-way and any potential mitigation measures (as proposed in Appendix N) should reflect this low stage of development, providing opportunity for flexibility and design development. Reviews of the design by the SAC and other groups may also suggest refinements that further justify the need for overall flexibility in right-of-way conditions.

## **C. Specific Environmental/Technical Comments**

AIDEA appreciates the overall format of the document, especially its use of highlighted sections to provide a clear understanding of the new content as compared to the FEIS. However, several

areas of the document require further clarification and updated analyses are warranted for inclusion in the Final SEIS. These are described in greater detail as follows.

### ***Alternatives Development***

As stated above, only Alternative A should be used in the SEIS. If alternatives assuming *arguendo* needed to be examined, this SEIS is flawed in its alternatives analyses. The SEIS provides an analysis of 5 alternatives: Alternatives A, B, C, the No Action Alternative, and a variation on the 3 action alternatives that reduces the construction phases. The 2020 FEIS clearly described the reasons the BLM previously preferred Alternative A. The rationale provided in this SEIS for re-evaluating options outside of the previously preferred alternative are not adequately described in the document or Appendix G. Importantly, the inclusion of a new “Communities Route” (Alternative C) does not meet the objective for providing access to potential deposits located near the eastern end of the proposed corridor such as those contained within the Roosevelt block of claims on state lands; this prospect is not reflected in the information provided in Section 3.4.1. Lack of access to the Roosevelt block significantly minimizes the economic development opportunities for Doyon and the communities located near the eastern end of the corridor. This lack of access by Alternative C is shown in the attached route map, Exhibit H-2.

Alternative C requires several large bridges that will add to the project costs and to the construction schedule and complexity. Impacts from these large bridges are not adequately described or are minimized in comparison to the impacts described for Alternatives A and B. If Alternative C is retained for the Final SEIS, then the large bridges and other impacts should be described in greater detail.

### ***Access Issue – Mistakes in the SEIS***

The SEIS states “The road would not be open to the general public by design, but public use and trespass are expected and will be analyzed.” (Section 2.4.3, pg 2-7; Appendix H, Section 2.2.2). AIDEA has checked with operators of other private roads in Alaska, including examples such as the oil companies on the North Slope and the Pogo Road. These operators (Hilcorp and Northern Star Pogo) have confirmed that they have no known instances of “unauthorized access” in recent history. For example, on the North Slope, a gate exists just outside of Deadhorse to limit access to the Spine Rd. and connected roadways that extend over 60 miles to the west. More than 100 miles of road exist beyond the Spine Rd. gatehouse. Hilcorp does not have record of any trespassers traveling significantly past the gate and to the west (or vice versa).

Additionally, both operators (Hilcorp and Northern Star Pogo) indicate that standard operation procedures (SOPs) would quickly identify any unauthorized users and such traffic could be quickly stopped without any potential incidents.

AIDEA believes it is also disingenuous to suggest that the road may somehow be open/public access (in the future; Section 2.3.1, pg 2-3) when strict access measures will be required based on the stipulations from private landowners (primarily Doyon and NANA). The State of Alaska has also indicated that it will limit access, similar to its requirements for the Pogo Road and North Slope roads.

For the North Slope road system, local area residents may use the road system with appropriate prior approval (BLM 2019). AIDEA anticipates implementing an access-control system (similar to the system used on the North Slope) for local residents around the Ambler Access corridor. This access control will require users to follow the proposed Wildlife Management Plan and all other road operating procedures. Users will be provided training to further minimize potential safety or wildlife incidents.

### ***Mistakes in the SEIS Related to Potential Spill Incidents that Ignores Available Data***

The SEIS does not contain an analysis of either the potential risk or degree of impact from potential spill incidents (Section 3.2.3, pgs 3-18 – 3-21). Table 5 (Appendix D) identifies the potential characteristics of spills but does not relate this table to the likelihood (frequency) of occurrence or how the seasonality of the spill incidents may affect the overall risk from the spills. Numerous mining or industrial access roads exist in Alaska that can provide data for understanding the potential frequency, sizes, and overall characteristics of spill incidents. An analysis of the ADEC's spill database for spills along the Red Dog Mine Road (i.e., the DMTS) and the Pogo Road is provided in the table below (ADEC 2023).

<b>Table 2: Spills Along the Red Dog Mine Road and the Pogo Road</b>				
<b>Road</b>	<b>ADEC Research Time Frame</b>	<b>No. Petroleum Spills (≤1 gal/&lt;5 gal/≥5 gal)</b>	<b>No. Petroleum Spills Winter (10/1 – 5/1)</b>	<b>Notes</b>
<b>DMTS (52 mi)</b>	Jan 2011 – Nov 2023	9 (1 / 7 / 1)	7	<ul style="list-style-type: none"> <li>• Largest petroleum spill: 6 gal</li> <li>• 5 Zn concentrate spills</li> <li>• Glycol (non-petroleum) most common spill substance</li> </ul>
<b>Pogo Rd (51 mi)</b>	Jan 2011 – Nov 2023	14 (3 / 5 / 6)	5	<p>Largest spill: 70 gal (in Jan-2017)</p> <p>Hydraulic fluid (non-petroleum) is most common spill substance</p>

An analysis of the ADEC’s spill database for spills along the Red Dog Mine Road (i.e., the DMTS) and the Pogo Road between January 2011 and November 2023 (ADEC 2023 found here <https://dec.alaska.gov/applications/spar/publicmvc/perp/spillsearch>) found the total number of spills for DMTV was 9 over the 12 year period and 14 for Pogo Road over the 12 year period. This is based on actual data collected along mine roads in Alaska and the spill totals are substantially less than what the SEIS predicts for the proposed road. While the DMTS and Pogo Road distances are about ¼ the distance of the proposed road, applying a multiplication factor to the proposed road would still result in substantially fewer spills than what the SEIS estimates.

For both roads, non-petroleum liquids such as hydraulic fluid or ethylene glycol are the most common spilled substances; these substances are significantly less toxic than petroleum compounds. Additionally as noted, many of the spills occurred in the winter months, where cleanup can be more effective and the risk of runoff into nearby waterbodies is significantly minimized.

The SEIS document also incorrectly analyzes the potential for concentrate spills and provides an inaccurate calculation of the “R” value for the Harwood and Russell equation (Section 3.2.3, pg 3-19). It appears as though the calculation of the accident rate (R value) is based on an assumption that all of the spills that have occurred at locations such as Red Dog, Pogo and other active mines in Alaska are concentrate materials.

This is not the case, as identified in Table 2 above. For example, the ADEC database documents that 5 zinc concentrate spills have occurred along the RDM Port Road (DMTS) from January 2011 to November 2023 (and no lead concentrate spills). It is conservatively estimated that Red Dog has shipped roughly 1.2 million tons of concentrate each year with each truck carrying roughly 180 tons (in 2 trailers). This results in nearly 6,700 one-way trips from the mine to the port, or a total of 348,000 miles traveled. For the 12-year period (2011-2023), this would be roughly 4.1 million miles travelled. With the 5 concentrate accidents documented above, the calculated “R” value is therefore roughly  $1.2 \times 10^{-6}$  – nearly 5 times less than the value stated in the SEIS (pg 3-20). It is important to note that the potential Arctic Mine anticipates using connex-type shipping containers to transport produced ore concentrate. These containers have a significantly lower risk of release than the trailers that Red Dog utilizes. It is also important to note that no other active metal mines in Alaska have significant concentrate haul operations; the last sentence in first paragraph, pg 3-20 should be corrected. AIDEA requests that the calculations provided on pg 3-20 for potential incidents of concentrate spills for each alternative should be recalculated using the lower “R” value provided above.

The track record of mines such as Pogo and Red Dog provides evidence that it is highly unlikely that a large volume of toxic materials may be spilled and subsequently impact nearby waterbodies. This is in direct contrast to the statement provided in the final sentence of the 5<sup>th</sup> paragraph of pg 3-21.

The revised potential spill/accident calculations should also be carried forward to SEIS Appendix C, Section 1.5.5 and Table 2.

### ***Dust Impacts Issues That Require Clarification in the SEIS Due to Speculation by BLM***

The document attributes numerous potential impacts to fugitive dust that may be generated from the traffic along the road, including impacts to vegetation (Sections 3.2.1/3.3.1), waterways (3.2.5), fish (3.3.2), and animals/mammals (3.3.4). The document calculates potential dust emissions of roughly 6,000 tons per year (Alternative A, PM10; Appendix D, Table 22). These emissions are assumed to be spread equally across the 211-mile corridor.

To provide context to these emissions and their potential impacts, a deposition rate should be calculated for the affected area around the road and this rate should be compared against rates that may cause potential impacts. These details are described below:

- The document notes that the majority of the dust settles within 328 feet of the road (Section 3.2.1, pg 3-9).



- If this 328-foot width corridor is used along the length of the road, the total accumulation rate is roughly 0.03 lb/sq ft/year (based on 211-mile length and 6,000-ton/yr dust emissions).
- This deposition rate is reduced by nearly 50% with the use of dust control (see Table 22, Appendix D). The fugitive dust emissions when dust control is applied is 3,020 tons/year versus the nearly 6,000 tons without control.
- Precipitation would result in the dust washing off any vegetation and snow-containing dust would easily melt off (the vegetation) or be blown off with wind events. These natural processes would limit the impacts of the dust to vegetation.

Specific chemical concentrations within the dust are currently unknown given the inability to perform geotechnical and material testing of the potential gravel sites along the road over the past two field seasons.

Additionally, the document speculates about potential impacts from dust and heavy metals based upon data from the DMTS (Section 3.3.2, pg 3-94). It is important to note that the referenced papers (Hasselbach et al, 2005 and Neitlich et al, 2017) have been superseded by more recent publications (Melbi 2020 and Neitlich 2022). Further, Red Dog Mine has upgraded their concentrate transportation fleet and operations since the data analyzed in the referenced publications. Red Dog Mine is now using hard, pneumatically closed trailers and the trucks and trailers are also now being washed. Both actions greatly minimize the potential for dust generation, cross-contamination, and transport of lead/zinc between the mine and port. The noted metals concentrations in the vegetation and soils surrounding the DMTS have responded as a result of these improvements. The Final SEIS should reflect the newer publications and improvements implemented. Importantly, the proposed Arctic mine anticipates using completely enclosed connexes for transport of the concentrates, a further reduction of potential dust and spills (as noted above).

The potential generation rates of fugitive dust containing naturally occurring asbestos (NOA) can be calculated according to the methodology described above, since the NOA is a potential constituent of the road gravel and fugitive dust. If the fugitive dust is assumed to contain 0.1% asbestos (i.e., 1,000 mg/kg), then the maximum amount of potential asbestos emissions is 6 tons per year. We encourage BLM to apply this emission rate to the dispersion model developed for the project to assess the potential NOA concentrations in the air around the road. Importantly, the application of dust controls should also be included.

Regardless of the potential impacts from fugitive dust, additional mitigation measures, beyond those described in the D-SEIS, can be developed and implemented to monitor potential dust emissions and their impacts. As previously indicated, AIDEA intends to follow many of the proven dust mitigation strategies developed for the DMTS.

### ***Naturally Occurring Asbestos Impacts and Risks Are Overstated***

In general, the NOA risks discussed throughout the document (primarily Section 3.2.1) are overstated and can be easily mitigated. While NOA is potentially present in the bedrock around northwest Alaska, including in the area around Ambler, mitigation measures can be implemented to limit the potential use of these materials as gravel sources for the road. As described in the prior comment about potential dust issues, the inability to perform geotechnical work over the past three years has prevented AIDEA from assessing the potential material sites/sources and determining their NOA content. AIDEA is confident that material sources can be identified that will be far lower than the 0.1% NOA limit. Additionally, we are confident that the 0.1% limit is protective of human/animal health. The BLM is encouraged to run standard risk assessment calculations to confirm the potential risks at the noted NOA concentrations.

### **D. Socioeconomics**

The draft document contains numerous deficiencies and incomplete analyses regarding various socioeconomic impacts from the project. The following subsections outline key socioeconomic comments.

#### ***Employment***

The draft document identifies that unemployment rates in both the NAB and the Yukon-Koyukuk Census Area are 9% (2022) (Section 3.4.5/Appendix F, Table 12). These unemployment rates are gross understatements of the number of individuals that would like to work and the “under-employment” rate for the communities near the corridor. This should be corrected and the benefits of employment should be adequately emphasized throughout the document (see subsequent comments). For small communities such as Kobuk and Allakaket (population 191 and 177 respectively; Appendix F, Table 21), employment opportunities for even a handful of individuals can result in significant impacts, both personally and for the community as a whole.

Elders in communities such as Allakaket and Kobuk have indicated that over 50% of the working age residents are unemployed and would be interested in jobs with the road and potential mines, should jobs be available.

Just as important to note, the document does not mention the impact from individuals moving away from the communities to find employment opportunities (out-migration). While Table 21 (Appendix F) of the document provides current populations for the communities in the corridor, it does not provide the population changes for the communities in the region. A comparison of the SEIS with the FEIS shows how many of the communities closest to Alternative A have lost population; see the comparison table below. The best opportunity to reverse this outmigration is

through providing job opportunities, such as those available from the road and potential future mines. This should be addressed and emphasized in the document.

<b>Table 3: Population Change in Local Communities between the FEIS and the SEIS</b>			
<b>Community</b>	<b>SEIS Population</b>	<b>FEIS Population</b>	<b>% Change</b>
Allakaket	177	185	-4.5%
Alatna	15	37	-59.5%
Kobuk	191	152	25.6%
Shungnak	272	280	-1.1%
Ambler	274	299	-8.3%
Hughes	85	77	10.4%
Huslia	304	397	-23.4%
<b>Total</b>	<b>1,318</b>	<b>1,427</b>	<b>-7.6%</b>

**Poverty**

The stated poverty rates in Table 21 (Appendix F) reflect how communities such as Allakaket and Kobuk (59.2% and 35.9% poverty rates) lack sufficient job opportunities. As a comparison, Noatak, a community with significant mine related job opportunities (Red Dog) has a dramatically lower poverty rate (5.7%). A comparison of the median income for communities such as Kobuk and Allakaket (\$29,688 and \$22,000 respectively) with Noatak (\$56,667) further demonstrates the impact that mining opportunities have upon these communities. Construction of the road and the potential ensuing mines will provide opportunities to significantly reduce poverty rates and provide important income similar to the effect that Red Dog has upon Noatak. This should be emphasized in the document.

**Social Risks**

The document identifies numerous potential social risks to the communities from road construction and operation, including potential increases to crime and drug/alcohol sale to the communities (Section 3.4.5 and 3.4.6). However, the document does not adequately emphasize the positive impacts that may be realized from the road’s construction, including the jobs and related economic impacts that it will provide. Several studies have identified the relationship between jobs, health, crime, and alcohol/drug use in rural Alaska (I. Popovici and M. French, 2013; Narconon, 2020).

**Local Government Revenues**

The document speculates that potential revenues for both the State and local communities from the road (Section 3.4.5, pg 3-188) are not able to be determined. However, the Red Dog Mine provides a model that may be applied for the Ambler Road and potential mines. As described in the document, the Red Dog Mine provides a payment in-lieu of taxes (PILT) to the Northwest Arctic Borough (NAB) and a contribution to the Village Improvement Fund (VIF). These two funding sources are significant, providing over \$28 million in revenue that represents more than 90% of the borough's expenditures (NAB 2022). Such an agreement would provide valuable funds for improving and supporting essential community services.

Red Dog Mine is anticipated for closure in 2031. Following closure, funds from the VIF and PILT will no longer be received, resulting in a sizeable budget impact for the NAB and its communities. The SEIS should address this more definitively.

### ***Native Corporation Revenues***

The proposed road provides access to a large region of the state. Doyon and NANA have significant land holdings in the general area of the road. The development of resources from these lands will provide opportunities for both companies to increase their revenues and offset the dramatic decrease in ANCSA 7(i) payments that is anticipated with the potential future Red Dog closure (ADN 2021 and 2023). These payments are crucial sources of income for regional and village corporations across the state. In 2022, Teck paid \$353 million in royalty payments to NANA; according to ANCSA 7(i), 70% of these payments are shared with the other regional and village corporations (Teck 2023).

### **E. Subsistence**

Even assuming, arguendo, that Section 810 applies to areas other than "public lands" (as discussed above) the analysis of subsistence impacts in the SEIS is seriously flawed in methodology. The SEIS extends the analysis of potential subsistence impacts to 66 communities, including more than 30 communities that are more than 50 miles, many that are more than 200 miles, and some that are over 400 miles from the proposed road (including Alternative C). Exhibit W provides a table that indicates the distance of each community from Alternatives A and C. The extended subsistence analysis is unwarranted. We encourage BLM to include the distances for these communities from the road.

Potential road-related impacts to communities at significant distances away from the road cannot be quantified with any degree of certainty. Additionally, any impacts to these distant communities would be indistinguishable from any non-road related impacts (such as a large wildfire). For example, as noted above, the average petroleum spill for the Pogo Road is <10 gal, producing a very limited impact area that is easily remediated. Even if a large spill were to occur directly into

a waterbody, downstream concentrations of any petroleum constituents would be impossible to detect. We are not aware of any instances of extensive fish kills as a result of large petroleum or mine concentrate spills from trucking in Alaska.

As a precedent, other large EIS projects did not extend their primary subsistence analysis to distant communities. For example, the Pebble Project subsistence analysis focused on the 6 communities closest to the proposed activity and the recent Willow Master Plan SEIS only included the 2 primary North Slope communities nearest the proposed development (Utqiagvik and Nuiqsut). In neither case (Pebble or Willow) did the NEPA analysis extend to communities located more than a hundred miles from the area of potential impacts (BLM 2023).

## **F. Reasonably Foreseeable Actions**

The SEIS does not provide accurate references or proper information on the potential mining projects that may utilize the AAP. Updated information on these projects is publicly available and the references mentioned below are identified in the references section of this letter. These include the following:

- Arctic Deposit – This deposit is being explored by Ambler Metals LLC. A Feasibility Study (FS) on this proposed development was published on January 20, 2023 (Trilogy 2023a). This PFS should be referenced in lieu of the 2018 study used throughout the document. If the Arctic deposit moves forward to potential development, at least 3 years of permitting and further design would be required ahead of construction.
- Bornite Deposit – This deposit is being explored by Ambler Metals LLC. An updated NI 43-101 report is available for this deposit that should be referenced in lieu of the prior 2012 report used in the document (Trilogy 2023b). Further exploration is necessary prior to the potential permitting and design of any potential Bornite mine.
- Sun Deposit – This deposit is being explored by Valhalla Metals LLC. Valhalla recently completed a short summer (2023) exploration program; the last exploration completed for the project occurred in 2012 (SolidusGold 2022; North of 60 Mining News 2023). The Sun deposit will still require many more years of exploration and background data collection before it could potentially be moved forward to permitting and design, let alone potential future construction.
- Smucker Deposit – This deposit has not been the subject of any active exploration for many years. The inactivity led to recent supplemental filings from other companies for ownership of these state mining claims. A recent (2023) State Supreme court decision (reference) confirmed the claims are owned by Teck American Inc. Teck American has not announced any plans for future exploration or development.
- Roosevelt Block – Exploration of this large area (>400,000 acres of State of Alaska lands) began in 2023 by South32 (South32, 2023). Results of the exploration program



have not been released. Pending positive results, numerous more years of exploration and background data collection will be required prior to permitting and design.

Timeframes provided in Table 2-2 of Appendix H are generally accurate, however most of these timeframes are not consistent with the current status of each project as described above. Importantly, given the current status of each of these projects/deposits, the maximum traffic estimated in Table 2-5 (Appendix H) should be revised. Potential start and end dates should also be assigned for each project. This would result in a significantly lower daily traffic count over the analysis period (50 years), as many of the projects would no longer be occurring concurrently.

## **G. Reclamation**

The SEIS acknowledges that AIDEA has indicated that at the end of the road life (50 years) the road features will be demolished and removed (Section 2.4.4, pg 2-13). However, potential future mines will likely require continued access to facilitate long-term environmental monitoring and management, assuring the protection of the environment even after any mines are closed. Additionally, some communities near the road may desire to maintain continued accessibility.

Reclamation requirements should be continually evaluated to ensure that the latest reclamation methods and requirements are used. This approach is consistent with the requirements of the Willow Master Development Plan ROD (BLM 2023; Appendix A, Mitigation #43). Additionally, the financial commitment for reclamation should be based on the approved Reclamation Plan. This commitment will be specific for each landowner, therefore discussion regarding financial commitments for this document should only apply to the BLM lands.

## **H. Permafrost**

AIDEA acknowledges that permafrost melting needs to be a design criterion. The anticipated design is being developed to minimize the potential contribution from the road upon thawing. It is further acknowledged that any impacts (to the proposed road) from permafrost thaw will be managed through on-going maintenance. This would include repairs to culverts, road settling, road bank stabilization, etc. This management approach is similar to how on-going permafrost melt is being managed for the DMTS and roads on the North Slope.

It is important to provide context to the potential impacts from the potential permafrost thawing. As stated in the document (Appendix C, Table 1), the total footprint of the road ranges from 2,318 acres (Alternative A) to 5,262 acres (Alternative C). This is an extremely small fraction of the total areas surrounding the road, including millions of acres with underlying permafrost that is currently thawing (see Map 3-01). The impact of potentially expedited thaw from the proposed road upon

these millions of acres would be impossible to discern. This includes the potential impacts of thawing permafrost underlying the road upon water quality and wetlands.

## **I. Stakeholder Outreach**

The document should be updated to reflect the current status of the on-going activities that AIDEA has undertaken relative to the JROD commitments. These include the following:

- Since 2021, AIDEA has held or participated in more than 40 public meetings in the region providing input on current project activities, plans, and answering questions related to the proposed road. A list of the meetings held is provided in Attachment 2.
- AIDEA has supported the formation of the Subsistence Advisory Committee (SAC) in accordance with PA Section IV.G. The SAC includes members from each community closest to the proposed road and additional members from affiliated groups (Doyon, NANA, TCC, etc.). Membership and bylaws of the SAC meet the proposed requirements from Appendix N (Section 3.4.7). The SAC includes a total of 10 members. SAC meeting topics, agendas, and actions are completely determined by the members. Importantly, AIDEA has spent more than \$800,000 in support of SAC meetings and member stipends/travel since 2021.
- The SAC has met 7 times since 2022 including meetings within the region, such as this past August's (2023) meeting in Allakaket.
- Following input from residents of the region and the SAC members, in 2022 AIDEA formed the Workforce Development Working Group (WDWG) to receive input and develop plans and policies surrounding the potential employment opportunities and associated economic development that may result from the road and potential mines.
- In accordance with the PA, Section IV.G, AIDEA has employed 12 local tribal members/shareholders in the Tribal Liaison Program (TLP) to support the archaeology surveys. TLP representatives have provided valuable input to the development of the survey strategy and the field activities. Importantly, the TLP has also provided valuable employment opportunities for residents in the region.

## **J. Climate Change and Greenhouse Gases**

AIDEA recognizes that the GHG emission calculations are based upon the truck/trailer configurations and traffic values as provided in the Arctic Mine Pre-Feasibility Study (PFS) [Trilogy 2018]. The newer PFS (Trilogy 2023) also uses a similar truck/trailer configuration for the transport of the concentrate to Fairbanks. However, it is realistic to believe that a double-trailer combination may be permissible for the traffic on the Dalton Highway from its intersection with Alternative A and to Fairbanks. A significant portion of the supplies and fuel transported to the North Slope (via the Dalton Highway) are currently performed with double trailers (ADOT&PF

2023). Implementing these changes to the GHG calculations for Alternatives A and B should result in both of those options having lower GHG emissions than Alternative C.

GHG emissions over the life of the project should also recognize the continued improvement in truck fuel efficiency. It is noted that while fuel efficiency is currently averaging around 6.3 miles per gallon (mpg); this efficiency has increased from 5.8 mpg in 2011, an over 8% increase over the period. Continued improvements are anticipated as newer trucks are placed on the road that implement newer engine technology, such as turbochargers, cylinder management, etc. (NAFCE 2022). Similar fuel economy improvements are noted for construction equipment such as loaders, dozers, and large trucks. These efficiency improvements should be reflected in the GHG calculations in the SEIS.

### **XXXIII. Conclusion.**

The analysis an agency performs must conform to the issues they are mandated to act upon, i.e., administer a Supplemental EIS in conformity with a voluntary Court Remand consistent with the FEIS and JROD of 2020 and the applicable statutes and regulations.

Under the FRA, the actions BLM must take under ANILCA are mandated so that no SEIS is needed under the applicable laws and regulations.

Assuming that any EIS process is needed, any SEIS needs to rely on up-to-date statutes and regulations and to adhere to the scope of the Court-ordered remand. The BLM is under an obligation to develop an SEIS that uses the correct law, such as the jurisdictional reach of Section 810 of ANILCA, and ensure that other statutes such as the Clean Water Act are followed.

The Final SEIS should result in a reasonably economically feasible alternative for the Ambler Road Project that may provide for the exploration, development, production, and transportation of strategic minerals from Interior and Western Alaska.

AIDEA asserts the proposed action falls short of a major federal action triggering NEPA. EISs must always include a "no-action" alternative because NEPA requires and assumes the agency has full discretion whether or not to take an action. It requires this no-action option so that the decisionmaker and the public can understand the difference in impacts between the proposed action and no action. EISs will acknowledge that implementing a no-action alternative would violate a statute but that it is included for comparison. In addition, some of the proposed actions would violate a final Federal action arising from an issued Section 404 permit.

AIDEA understands that the DOI must comply and perform NEPA reviews to make decisions on the plethora of project details, including environmental mitigation measures. The terms of the Ambler Road Project are explicit as to this point. Congress mandated that there shall be a surface

transportation route across the GAAR. Logic dictates that Congress in 1980 anticipated that the DOI and DOT, along with the USACE, would issue and grant easements and permits for a private industrial haul road connecting the Dalton Highway with the GAAR. The right-of-way issued to AIDEA by the NPS and BLM met these criteria but has been illegally suspended.

Congress did not mandate one way or another precisely how environmental mitigation is done, so NEPA analysis is needed for that part of the agency decision-making. However, that basic yes/no question concerning whether to allow for an industrial and private haul road is resolved in the statute, leaving the agency no discretion.

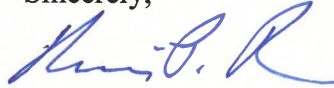
The report or analysis the BLM could produce here would not under applicable law and regulations (including the substantive amendments to NEPA applicable to this document under the FRA that are totally ignored) require any NEPA process because the agency does not have discretion to decide whether an industrial and private haul road will be administered and developed and allowed. These decisions have already been made for the agency by Congress. The No-Action Alternative cannot be used in these circumstances and NEPA is inapplicable.

The only discretion left to the agency is mitigating conditions of effects of a Right-of-Way and related easements or permits for a private and industrial haul road as the Secretary is allowed to require. BLM could create a report of the impacts of development, if the lessee proposes it, and recommend mitigating conditions, and the agencies could subsequently analyze development if a lessee proposes it. At this stage, because there are no production activities under consideration, only leasing and initial exploration, no further action is required. That discretion would occur at a subsequent stage of NEPA review. None of these highly pertinent issues are addressed in the SEIS.

The participation of project opponents in the deliberations and preparation of the SEIS calls into question the objectivity and integrity of the EIS process. While a lead agency may request state, tribal, or local agencies to participate as cooperating agencies if they have “special expertise with respect to any environmental issue,” it is inappropriate for project opponents to participate in deliberative meetings and the review of internal agency drafts by support to tribes who are cooperating agencies. The Tanana Chiefs Council and the Evansville Village Council are listed as Cooperating Agencies for the Ambler Road SEIS. See Exhibit X, Evansville Tribal Council Documents, and Exhibit Y, BLM-Tanana MOU re: Ambler Road SEIS. Specifically, Lois Huntington for the Tanana Chiefs Council and Frank Thompson for the Evansville Village Council are known opponents of the Ambler Road. They have made numerous public statements opposing Ambler Access. Meanwhile, the role of the applicant in the EIS process is proscribed by the NEPA regulations in numerous places, yet AIDEA has had limited input into the EIS. Appendix K. Ambler Road SEIS Scoping Summary Report does not list AIDEA in Table 2.1 as having provided comments. Moreover, the scoping summary provides little evidence of AIDEA’s comments.

The DOI has been instructed by Congress that the agency "shall" grant a surface transportation corridor across the GAAR and logic commands that Congress knew and anticipated that a Right-of-Way would have to be granted for a route to cross Federal, State and private lands to the Dalton Highway.

Sincerely,



Randy Ruaro  
Executive Director  
Alaska Industrial Development and Export Authority

Attachments:

- Exhibit A – Right of Way Permit RW GAAR-21-001
- Exhibit B – Joint Record of Decision
- Exhibit C – Department of Army POA-2013-00396
- Exhibit D – US Coast Guard Letter Granting Advance Approval
- Exhibit E – US Coast Guard Letter Declining Jurisdiction, with attachment
- Exhibit F – Table of Comments
- Exhibit G – Map of State-Owned Mineral Claims
- Exhibit H-1 – AIDEA Mineralization Map
- Exhibit H-2 – SEIS Map of Alternatives
- Exhibit I – Ambler Road Draft Conceptual Construction Planning
- Exhibit J – Letter from Alaska DOT&PF to BLM re: Ambler Road SEIS
- Exhibit K – Gates of the Arctic General Management Plan
- Exhibit L – Remand Order
- Exhibit M – Beaudreau Declaration
- Exhibit N – Email Chain between BLM and AIDEA
- Exhibit O – BLM 810 Policy Statement
- Exhibit P – Three-Tier Alaska Report
- Exhibit Q – DOWL Permafrost Map
- Exhibit R – AIDEA Description of Bonds Terms
- Exhibit S – DTMS Project Revenue Bonds
- Exhibit T – Images of Caribou on Existing Infrastructure
- Exhibit U – AIDEA Scoping Letter and Record of Submission, Nov. 2022
- Exhibit V – Updated Graphs for AIDEA Scoping Letter of Nov. 2022
- Exhibit W – Community Distance Table
- Exhibit X – Evansville Tribal Council Documents
- Exhibit Y – BLM-Tanana MOU re: Ambler Road SEIS



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CC:  
U.S. Senator Lisa Murkowski  
U.S. Senator Dan Sullivan  
U.S. Representative Mary Peltola



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