

From: [Gieryic, Michael S](#)
To: [Cohn, Steven M](#); [Boario, Sara D](#); [Gamper, Merry E](#); [Reed, Erika](#); [Pendergast, Kevin J](#); [Jones, Nichelle \(Shelly\)](#); [Roach, Emma K](#); [Lor, Socheata](#); [Loya, Wendy M](#)
Cc: [Sweet, Serena E](#); [Kuhns, Stephanie L](#); [Skibo, Bobbie Jo](#); [Deam, Seth R](#); [Lord, Kenneth M](#); [Routhier, Michael P](#)
Subject: Re: Alaska Industrial Development and Export Authority v. Biden et al Motion to Alter Judgment
Date: Wednesday, September 20, 2023 9:28:47 AM
Attachments: [2023.09.19 Gov't Opp to Motion to Amend SJ Order.pdf](#)
[2023.09.05 Plaintiffs' Motion to Alter or Amend SJ Order.pdf](#)

FYI -

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

ALASKA INDUSTRIAL
DEVELOPMENT AND EXPORT
AUTHORITY, *et al.*,

Plaintiffs,

and

STATE OF ALASKA,

Intervenor-Plaintiff,

v.

JOSEPH R. BIDEN, JR., in his official
capacity as President of the United States,
et al.,

Defendants,

and

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

Intervenor-Defendants.

Case No. 3:21-cv-00245-SLG

**DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS'
AND INTERVENOR-PLAINTIFF'S MOTION TO ALTER OR AMEND**

AIDEA v. Biden
DEFS.' RESP. IN OPP'N TO PLS.' MOT. TO ALTER OR AMEND

Case No. 3:21-cv-00245-SLG

1

Before the Court is a motion, ECF No. 76 (“Motion”), by Plaintiffs Alaska Industrial Development and Export Authority, et al., and Intervenor-Plaintiff State of Alaska (collectively “Movants”), seeking to alter or amend this Court’s Order Re Motions for Summary Judgment, ECF No. 72, and Judgment, ECF No 73, under Federal Rule of Civil Procedure 59(e). The Court should deny the Motion because Movants fall short of their heavy burden and fail to meaningfully engage the relevant legal standard.

A Rule 59(e) motion may be granted when necessary to correct manifest errors of law or fact. *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011). “But amending a judgment after its entry remains ‘an extraordinary remedy which should be used sparingly.’” *Id.*; see also *Orion Marine Contractors, Inc. v. City of Seward*, No. 3:15-CV-00151-SLG, 2016 WL 11670098, at *1 (D. Alaska Oct. 28, 2016) (same). Thus, a Rule 59(e) motion is not a means by which to raise new arguments, or “to rehash arguments already made in the parties’ principal briefs.” *Alaska Oil & Gas Ass’n v. Jewell*, No. 3:11-CV-0025-RRB, 2013 WL 11897792, at *2 (D. Alaska May 15, 2013). Nor should such a motion “ask a court to rethink what the court had already thought through – rightly or wrongly.” *Id.* (internal quotation marks and citations omitted). Instead, “[a]rguments that a court was in error on the issues it considered should be directed to the court of appeals.” *Defs. of Wildlife v. Browner*, 909 F. Supp. 1342, 1351 (D. Ariz. 1995) (citation omitted).

The Motion reflects many of these flaws. The first section of the Motion contends that the Court erred in upholding Defendants’ suspension of the Coastal Plain Leasing Program because the suspension would preclude even certain lease-associated activities

that Movants contend do not impact the environment. *See* Motion 1-2. This argument fails because it is built on the flawed premise that potential environmental impacts of specific activities that might be taken to “implement” the leases underlaid the suspension. Instead, the leases were suspended because the Department of the Interior “identified defects in the underlying record supporting the leases[.]” AR 3364; *see also* AR 3404.¹ Those defects in the record must be remedied before allowing any activities “implementing” the leasing program to proceed, whether they would impact the environment or not. And, to remedy those defects, the Department explained that it would undertake “additional NEPA analysis to determine whether the leases should be affirmed, voided or subject to additional mitigation measures.” AR 3405. Movants identify no manifest error in the Court’s decision to uphold the suspension decision on that basis, or indeed any error at all. And, in any event, their argument relies entirely on the false premise that “preliminary steps” such as archeological surveys are incapable of impacting the environment. As a practical matter, any access to the Coastal Plain for on-the-ground activities – even for “archeological survey” or “preliminary seismic” activity, Motion 2 – is, for example, capable of disturbing caribou and disrupting subsistence hunting, or causing surface disturbance and impacts to vegetation and wetlands. *See*,

¹ Nonetheless, the Court correctly cited Section 6 of the leases for the propositions that the terms of the lease allow BLM to impose conditions on the lessee to minimize environmental impacts, including measures affecting the timing of operations, and that, as a practical matter, supplemental environmental analysis would have informed any such measures. *See Alaska Indus. Dev. & Exp. Auth. v. Biden*, __F. Supp. 3d__, No. 3:21-cv-00245-SLG, 2023 WL 5021555, at *15 (D. Alaska Aug. 7, 2023).

e.g., AR 0220-21; AR 0308-09; AR 0164-66.²

Movants’ remaining argument fails because it improperly rehashes a contention this Court has already considered and rejected. Specifically, Movants argue that the Tax Act requires Federal Defendants to authorize ancillary activities “with an urgency and timeliness proportional to the statutory deadline for the issuance of the leases.” Motion 10. But the Court already rejected this argument. It correctly explained that “[b]y using broad language directing the Interior Secretary to administer the Program with no timetable apart from the two deadlines for the mandated lease sales, Congress left the timetable for the vast majority of the Program’s implementation to DOI’s discretion.” *Alaska Indus. Dev. & Exp. Auth.*, 2023 WL 5021555, at *9 (citations omitted). As such, this argument fails to address the Rule 59(e) burden and does little more than “ask [the C]ourt to rethink what the [C]ourt had already thought through – rightly or wrongly.” *Alaska Oil & Gas Ass’n*, 2013 WL 11897792, at *2 (internal quotation marks and citations omitted).

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs’ and Intervenor-Plaintiff’s Motion to Alter or Amend.

DATED: September 19, 2023.

TODD KIM
Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division

² It bears noting that Movants could not undertake lease implementation actions regardless of whether they prevail on their Motion, because the Department of the Interior cancelled the corresponding leases in a Decision dated September 6, 2023, *see* Ex. 1 hereto.

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2023, a copy of the foregoing was served by electronic means on all counsel of record by the Court's CM/ECF system.

/s/ Paul A. Turcke
Paul A. Turcke



THE DEPUTY SECRETARY OF THE INTERIOR
WASHINGTON

SEP 06 2023

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

DECISION

Alaska Industrial Development	:	Oil and Gas Leases
and Export Authority	:	AA095889
813 West Northern Lights Blvd.	:	AA095890
Anchorage, Alaska 99503	:	AA095893
	:	AA095897
	:	AA095898
	:	AA095900
	:	AA095901

Lease Cancellation

After careful review of all available information related to the seven oil and gas leases identified in the caption above, the Department of the Interior (Department) has determined that the leases were improperly issued due to pre-leasing legal defects. The record before the Department has confirmed the seriousness of those legal defects in the environmental review supporting the leases, and, in light of the minimal disruptive consequences of cancellation, the Department has determined that cancellation is appropriate. The reasons for that determination are set forth below.

I. Background

A. First Lease Sale

Section 20001 of the Tax Cuts and Jobs Act of 2017, Public Law 115-97 (Tax Act) directed the Secretary of the Interior (Secretary), acting through the Bureau of Land Management (BLM), to (1) “establish and administer a competitive oil and gas program for the leasing, development, production, and transportation of oil and gas in and from the Coastal Plain”; (2) issue “any rights-of-way or easements across the Coastal Plain for the exploration, development, production, or transportation necessary to carry out [the Program]”; and (3) conduct two oil and gas lease sales by December 2021 and December 2024, respectively, of not less than 400,000 acres each.

In September 2019, BLM issued the “Coastal Plain Oil and Gas Leasing Program Environmental Impact Statement” (Coastal Plain EIS) under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4231-4370h. In August 2020, the Secretary signed a record of decision (2020 ROD) approving a leasing program, determining where and under what terms and conditions leasing would occur. Shortly after issuance of the 2020 ROD, 4 lawsuits were filed by 16 environmental groups, 3 Alaska Native tribes and an Alaska Native organization, and 15 States. On January 5,

2021, without discussing whether plaintiffs were likely to succeed on any of their claims, the U.S. District Court for the District of Alaska denied three motions for preliminary injunction seeking to prevent issuance of leases.¹

During the first required lease sale held on January 6, 2021, BLM received 13 total bids on 11 tracts covering 552,802 acres of the 1,089,053 acres offered. On January 13, 2021, the Department issued seven leases to the Alaska Industrial Development and Export Authority (AIDEA). On January 15, 2021, the Department issued one lease each to Regenerate Alaska, Inc. and to Knik Arm Services, LLC. AIDEA abandoned its qualifying high bids on the two remaining lease tracts. The BLM relied on the Coastal Plain EIS for its NEPA compliance for the lease sale and conducted the lease sale and issued leases in accordance with the 2020 ROD.²

B. Secretary's Order 3401 and Lease Suspensions

On June 1, 2021, the Secretary issued Secretary's Order 3401, which identified "multiple legal deficiencies in the underlying record supporting the leases, including, but not limited to: (1) insufficient analysis under [NEPA], including failure to adequately analyze a reasonable range of alternatives in the [EIS]; and (2) failure in the August 17, 2020, [ROD] to properly interpret [the Tax Act]." Secretary's Order 3401 directed the initiation of a "process to conduct a comprehensive environmental analysis, complete necessary consultation, and correct the identified legal deficiencies" and "as appropriate and consistent with applicable law, take appropriate action with respect to existing leases in light of the direction provided herein."

Also on June 1, 2021, the Department suspended the nine leases, with each suspension decision stating:

The BLM will undertake this additional NEPA analysis to determine whether the leases should be reaffirmed, voided or subject to additional mitigation measures. The BLM will publish a notice of intent to begin this process to undertake additional analysis, complete necessary consultation, and correct defects in the EIS and ROD. When complete, the BLM will issue a new decision concerning this suspension of operations and production (SOP) of the above-referenced leases.

On August 4, 2021, BLM issued a *Notice of Intent to Prepare a Supplemental Environmental Impact Statement for the Coastal Plain Oil and Gas Leasing Program*, 86 Fed. Reg. 41989, which initiated the scoping process to begin the comprehensive analysis of potential environmental impacts, including addressing deficiencies identified in Secretary's Order 3401. On November 4, 2021, AIDEA filed a lawsuit in U.S. District Court for the District of Alaska (*Alaska Industrial*

¹ The four cases challenging the 2019 Coastal Plain EIS and 2020 ROD have been stayed prior to any briefing on the merits pending completion of the additional environmental analysis, with a court order of September 13, 2021, directing status reports at key milestones in the new environmental review. The next such status report is required at the issuance of the Draft Supplemental Environmental Impact Statement or no later than September 29, 2023.

² While the Department did not promulgate implementing regulations for the Tax Act, the Department generally looks to the NPRPA or its implementing regulations for guidance consistent with the Tax Act's direction that "the Secretary shall manage the oil and gas program in a manner similar to the administration of lease sales under the Naval Petroleum Reserves Production Act of 1976 (42 U.S.C. § 6501 et seq.) [NPRPA] (including regulations)."

Development and Export Authority v. Biden; 3:21-cv-00245-SLG), challenging, among other things, the Department’s issuance of Secretary’s Order 3401 and the lease suspensions.³

Based on an agreement initiated at the request of the lessee to rescind its lease and refund its payments, on April 28, 2022, BLM rescinded and cancelled the lease held by Regenerate Alaska, Inc. and started the process to refund the full bonus bid and first year’s rental. A similar request to rescind its lease and refund its payments, was made by Knik Arm Services LLC. On August 16, 2022, BLM rescinded and cancelled the lease and started the process to refund the cash bond, full bonus bid, and first year’s rental.

On August 19, 2022, the Department issued to AIDEA, the only remaining leaseholder under the Program, an “Addendum to Suspension of Operations and Production” (“Addendum”), identifying an additional legal defect related to the analysis of foreign greenhouse gas emissions:

In the Suspension of Operations and Production, dated June 1, 2021, the Department identified two legal defects and also several areas involving a potential legal defect, specifically including the treatment of foreign greenhouse gas (GHG) emissions in the Environmental Impact Statement (EIS). ... The Department has concluded that this legal defect provides an additional basis to continue to suspend the above-referenced leases and complete further environmental analysis under NEPA.

The Addendum repeated that “[t]he BLM is conducting this additional NEPA analysis to determine whether the leases should be affirmed, voided, or subject to additional mitigation measures.” The Addendum also indicated that the decision on the existing leases might happen prior to the completion of the additional environmental analysis: “Once sufficient information is developed, the BLM will issue a new decision concerning this suspension of operations and production (SOP) of the above-referenced leases.”

II. Exercise of Secretary’s Lease Cancellation Authority Due to Pre-Leasing Legal Defects

The Secretary has inherent authority, under her general managerial power over public lands, to cancel or suspend oil and gas leases issued in violation of a statute or regulation. *Boesche v. Udall*, 373 U.S. 472 (1963). This authority exists whether the statute or regulation violated is substantive (e.g., a law prohibiting leasing) or procedural (e.g., the National Environmental Policy Act).⁴

³ On August 7, 2023, the court issued a decision rejecting all the claims raised by AIDEA and dismissing the lawsuit. Order Re Motions for Summary Judgment, Slip Op. at 74.

⁴ The BLM has occasionally sought to address procedural errors by completing an additional process *post hoc* (e.g., additional NEPA analysis to address a NEPA error), and then determining whether the leases should be cancelled. See *Clayton W. Williams Jr.*, 103 IBLA 192, 203 (1988); *N. Cheyenne Tribe v. Lujan*, 804 F. Supp. 1281, 1285 (D. Mont. 1991); see also *Douglas Timber Operators v. Salazar*, 774 F. Supp. 2d 245 (D.D.C. 2011); *S. Utah Wilderness All. (SUWA)*, 194 IBLA 333, 334, 337 and note 28 (2019) (collecting cases); *Bd. of Cnty. Comm’rs of Pitkin Cnty.*, 186 IBLA 288, 293-295 (2015), *reconsideration denied*, 187 IBLA 328 (2016). Nothing obligates BLM to take such an approach, and, for the reasons set forth below, further process is inappropriate in this case given the gravity of the errors and the minimal consequences of cancellation.

After reviewing the Coastal Plain Oil and Gas Program pursuant to Section 4 of Executive Order 13990, entitled “Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis,” January 20, 2021, Secretary’s Order 3401 identified two specific legal deficiencies in the record supporting the leases: (1) insufficient analysis under NEPA, including failure to adequately analyze a reasonable range of alternatives in the EIS and (2) failure in the August 17, 2020, ROD to properly interpret the Tax Act.

With respect to the first and second identified defects, the Coastal Plain EIS failed to analyze a reasonable range of alternatives because it did not analyze any alternative—besides the no action alternative—that involved fewer than 2,000 acres of surface development. NEPA requires consideration of a reasonable range of alternatives, 40 C.F.R. § 1502.14, as the “heart” of the environmental impact statement. *See City of Sausalito v. O’Neill*, 386 F.3d 1186, 1207 (9th Cir. 2004). Here, BLM omitted consideration of an alternative that involved fewer than 2,000 acres to be covered by “production and support facilities” on the grounds that such an alternative would conflict with the direction in the Tax Act. *See Coastal Plain Oil and Gas Leasing Program Final Environmental Impact Statement (2019) at 2-44; Coastal Plain Oil and Gas Leasing Program Record of Decision (2020) at 10.*

This was in error. The Tax Act provides, in relevant part:

(3) SURFACE DEVELOPMENT.—In administering [the program], the Secretary shall authorize *up to* 2,000 surface acres of Federal land on the Coastal Plain to be covered by production and support facilities (including airstrips and any area covered by gravel berms or piers for support of pipelines) during the term of the leases under the oil and gas program under this section.

Pub. L. 115-97, § 20001(c)(3) (2017) (emphasis added).

The phrase “up to” plainly indicates that BLM may authorize less than 2,000 acres for production and support facilities, and BLM’s conclusion otherwise was incorrect as a matter of law, as well as unreasonable. *See Terumo Ams. Holding, Inc. v. Tureski*, 2015 U.S. Dist. LEXIS 97592, *12 (D. Mass. July 27, 2015) (collecting cases and concluding that “[t]he ordinary meaning of “up to” is one of limitation, implying a maximum cap or limit”); *see also AK Steel Corp. v. Sollac*, 344 F.3d 1234, 1285 (Fed. Cir. 2003); *Ass’n for Cmty. Affiliated Plans v. US Treasury*, 392 F. Supp. 3d 22, 45 (D.C. Dist. 2019). *Accord* 163 Cong. Rec. S7539-40 (daily ed. Nov. 30, 2017) (Sen. Murkowski, floor statement on the Tax Act legislation) (“[T]he environment and local wildlife will always be a concern, always be a priority That is why surface development will cover *up to*, but no more, than 2,000 Federal acres.”) (emphasis added).

The BLM’s mistaken interpretation of the Tax Act’s 2,000-acre provision constrained analysis of the reasonably foreseeable development scenario and IS—every action alternative evaluated in the 2019 EIS involved exactly 2,000 acres of surface development. By omitting any alternative that evaluated fewer than 2,000 acres of surface development, the EIS failed to adequately inform the decisionmaker and to provide a meaningful basis for comparison of alternatives.⁵

⁵ While the NEPA process is still ongoing, the Draft Supplemental Environmental Impact Statement, incorporating feedback from the Cooperating Agencies, has resulted in a substantially revised and expanded range of alternatives, including considering varying levels of surface development and the development of a new action alternative that is

The BLM's omission in this case was noteworthy because the statutory purposes of the Arctic National Wildlife Refuge include not merely provision of "an oil and gas program," but also the existing purposes impacted by surface development, including conservation of "fish and wildlife populations and habitats on their natural diversity," "the opportunity for continued subsistence uses by local residents," and "water quality." Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487 (1980) § 303(2)(B),⁶ *see Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.*, 555 F. Supp. 3d 739, 804 (D. Alaska Aug. 18, 2021) (finding the errors identified by the court to be serious, including "fail[ing] to adequately analyze a reasonable range of alternatives for the Willow Project—a process that is 'the heart of the environmental impact statement.'"); *Ctr. for Biological Diversity v. DOI*, 623 F.3d 633, 642 (9th Cir. 2010) ("The existence of reasonable but unexamined alternatives renders an EIS inadequate," quoting *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998)).

In addition to these specific defects, the Department's June 1, 2021 Suspension Order also identified "several areas for which additional analysis may either address a potential legal defect or, at a minimum, serve NEPA's purpose to meaningfully inform the decisionmaker as to the environmental consequences of federal action." Those areas included, but were not limited to, the EIS's treatment of foreign greenhouse gas (GHG) emissions and compliance with the subsistence analysis required by section 810 of the ANILCA. The Department also noted it was "carefully evaluating its approach to this issue and may later identify this issue as an additional specific legal error depending on the resolution of pending court cases involving similar issues."

On August 19, 2022, in its Addendum to the suspension decision, the Department identified an additional legal error in the record supporting the AIDEA leases. Specifically, the Department noted that, in *Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.*, 555 F. Supp. 3d 739 (D. Alaska Aug. 18, 2021), the District Court for the District of Alaska had invalidated approval of an oil and gas project that, like the NEPA analysis for the leases here, "did not give a quantitative estimate of the downstream GHG emissions that would result from changes in consumption of oil abroad due to the foreseeable production of Coastal Plain oil . . . [or] sufficiently explain why it could not do so and provide a more thorough discussion of how changes in foreign oil consumption might change the GHG emissions analysis." *See Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020) (holding that the Bureau of Ocean Energy Management's (BOEM) approval of the "Liberty" offshore drilling and production facility failed to comply with NEPA because it did not adequately estimate emissions resulting from increased foreign consumption of oil or sufficiently explain why it could not); *Friends of the Earth v. Haaland*, 583 F. Supp. 3d 113

significantly different from the action alternatives previously considered. For example, BLM has developed a scalable hypothetical development model which applies proportional adjustments across the range of alternatives to guide the hypothetical number of acres that may be developed. Additionally, BLM has developed revised stipulations and required operating procedures that provide significant new restrictions on where surface development can occur. These changes have impacted the availability for surface development of a large portion of the Program area, including a majority of the area currently under lease. These new stipulations and required operating procedures are included in the analysis of a new alternative, Alternative D, significantly expanding the range of alternatives from that previously considered.

⁶ Section 1.1 of the Coastal Plain Oil and Gas Leasing Program Final EIS (September 2019) acknowledges that "[t]he oil and gas leasing program must consider the Arctic Refuge purposes set out in Section 303(2)(B) of ANILCA, as amended by Section 20001 of PL 115-97."

(D.D.C. 2022), *vacated on other grounds* 2023 U.S. App. LEXIS 10554 (D.C. Cir. 2023) (citing *Ctr. for Biological Diversity* and *Sovereign Inupiat* and holding that BOEM’s decision to hold an offshore oil and gas lease sale was arbitrary and capricious because it failed to provide a quantitative estimate of downstream GHG emissions resulting from reduced foreign consumption or adequately explain why it could not). *See also Alaska Industrial Development and Export Authority v. Biden*; Order Re Motions for Summary Judgment, Slip Op. at 58-59 (citing *Ctr. for Biological Diversity* and finding that the Coastal Plain EIS failed to consider GHG emissions resulting from foreign oil consumption, in violation of NEPA).

A recent Court of Appeals decision highlighted the importance of quantifying downstream emissions in a NEPA document for a sizable fossil fuel authorization. *350 Montana v. Haaland*, 50 F.4th 1254, 1268 (9th Cir. 2022) (“The omission of combustion-related emissions also contradicts a key premise of the [agency’s environmental assessment and finding of no significant impact]—that climate change is a global problem.”). The EIS for the leasing decisions at issue here used the same model (MarketSim) as did BOEM and BLM in the cases cited above, which excluded consideration of the impacts of foreign consumption on downstream GHG emissions. Because the emissions from the leasing decisions at issue—like the discrete projects at issue in *Sovereign Inupiat for a Living Arctic* and *350 Montana*—readily lend themselves to quantification of reasonably foreseeable downstream GHG emissions in order to “inform[] the public and ensur[e] agency consideration of the environmental impacts of its actions,” the omission of that quantification was serious and tainted the leasing decisions before they were finalized. *350 Montana v. Haaland*, 50 F.4th at 1265. Furthermore, in the Ninth Circuit, vacatur is “the presumptive remedy for agency action that violates the NEPA as reviewed through the [Administrative Procedure Act].” *Env’t Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 882 (9th Cir. 2022) (citation omitted), *cert. denied sub nom. Am. Petroleum Inst. v. Env’t Def. Ctr.*, No. 22-703, 2023 WL 3801206 (U.S. June 5, 2023).

For the foregoing reasons, the Department has determined that the legal deficiencies undergirding the original lease sale were sufficiently serious and fundamental to the decision-making process to justify addressing the underlying issues in a completely new analysis rather than trying to rectify past errors through remedial NEPA analysis. While the original suspension order indicated that the Department might complete the NEPA process before deciding whether to cancel the leases, we also noted in the addendum to the original lease suspension that “[o]nce sufficient information is developed, BLM will issue a new decision concerning this suspension of operations.” As set forth above, that information has been revealed at the draft Supplemental Environmental Impact Statement stage. In addition, there are practical considerations that support cancelling the invalidly-issued leases now. Specifically, cancelling these leases before consummation of the NEPA process to support a 2024 sale as required by the Tax Act will enable the Department to consider whether some or all of the areas at issue in these leases may be offered in the second lease sale contemplated by the Tax Act. As a general matter, moreover, the Department recognizes the value of finality for all interested parties vis-à-vis the subject leases. Accordingly, there is no reason for further delay in this matter.

The Department has also considered the disruptive consequences of cancellation and finds those consequences to be minimal. Less than 140 days after the AIDEA leases were issued, the Department identified serious pre-leasing legal defects and suspended the leases. Since that time,

the lease terms have been tolled and lease rentals suspended. No approved permits or authorizations for exploration or other activity on the leases were affected by the lease suspension and no ongoing activity will be disrupted.⁷ Because AIDEA will receive a full refund of the bonus bid and first year's rentals consistent with this decision to cancel the leases, the consequences from cancellation are minimal.

III. Conclusion

In consideration of the foregoing, and in accordance with the Secretary's inherent authority under her general managerial power over public lands, the seven leases identified in the caption above are cancelled as being invalidly issued. I reach this decision based on the seriousness of the pre-leasing legal errors given the special legal and factual circumstances of the original leasing decisions, and on the minimal disruptive consequences from cancellation.

Lease payments not previously refunded, comprising lease sale bonus bids and first year rentals totaling \$12,801,425 were made in January 2021 for the seven leases. Our cancellation of the seven leases entitles AIDEA to a refund of that amount.

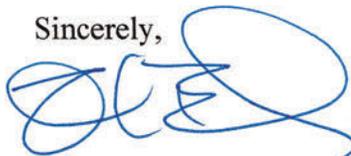
You are not entitled to interest on that amount because the United States cannot pay interest without statutory authorization and there is no applicable authority allowing payment of interest for refunds of lease bonus bid and rental payments.

IV. Final Agency Action

It is my decision to hereby cancel all seven of AIDEA's leases. You are entitled to a refund of lease payments totaling \$12,801,425. You are not entitled to interest on that amount.

My decision constitutes the final decision of the Department and, in accordance with the regulations at 43 C.F.R. § 4.410(a)(3), is not subject to appeal under Departmental regulations at 43 C.F.R. Part 4.

Sincerely,



Tommy P. Beaudreau

⁷ By way of contrast, this is not a case where the lessee had acquired and held the leases for several years, paying annual rent without notice of pre-leasing legal defects or limitations on development. Nor is it a case where a lessee has spent considerable time and money in exploration activities and invested large amounts in the engineering and preparation of a development plan. In fact, AIDEA has no outstanding reclamation obligations to BLM related to these leases because there has been no development or surface disturbance on the leases.

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(See signature page for additional counsel)

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

ALASKA INDUSTRIAL DEVELOPMENT
AND EXPORT AUTHORITY, et al,

Plaintiffs,

and

STATE OF ALASKA,

Intervenor-Plaintiff,

v.

JOSEPH R. BIDEN, JR., in his official
capacity as President of the United States, et al.,

Defendants,

and

NATIVE VILLAGE OF VENETIE
TRIBAL GOVERNMENT, et al.

Intervenor-Defendants

Case No. 3:21-cv-00245-SLG

**PLAINTIFFS' AND
INTERVENOR-PLAINTIFF'S
MOTION TO ALTER OR
AMEND SUMMARY
JUDGMENT ORDER AND
JUDGMENT**

Plaintiffs Alaska Industrial Development and Export Authority, North Slope Borough, Arctic Slope Regional Corporation, and Kaktovik Inupiat Corp. and Intervenor-Plaintiff State of Alaska (collectively, “Plaintiffs”) respectfully move under Fed.R.Civ.P. 59 to alter or amend the August 7, 2023 Order granting summary judgment (“Order”) and the related Judgment (Dkts. 72 and 73).¹

A. Lease Implementation Actions that do not Impact the Environment, Such as Archeological and Other Surveys, Should Proceed.

1. Introduction.

In that Order, the Court affirmed the decision of the Federal Agency Defendants to suspend all actions necessary to implement the statutorily-mandated oil and gas leasing program (the “Program”) on the Coastal Plain of the Arctic National Wildlife Refuge (“ANWR”). The Court in its analysis relied on statutory provisions and lease terms that address environment-impacting activities and so, however those terms are construed, do not support the Agency Defendants’ overbroad application of their moratorium to block even non-environment-impacting preliminary steps such as conducting archeological surveys. *See* AR3394-3400 (refusal to authorize archeology survey, refusal to consider preliminary seismic application). The Order and Judgment should be amended to

¹ The “district court enjoys considerable discretion in granting or denying the motion.” *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011) (quotation omitted). “[M]anifest errors of law or fact” is a proper ground for grant of such a motion. *Id.*

invalidate the Agency Defendants' moratorium to the extent that the moratorium blocks even non-environment-impacting preliminary steps like archeological surveys.²

Agency Defendants now forecast publishing a draft SEIS in September, 2023. *See* Order at 8. They earlier reported to the Court that it would take them one year from that point to publish a revised record of decision, which would be September, 2024. (Dkt. 85 at 5, Case 3:20-cv-00204-SLG). Archeology on the North Slope is done in a late summer window, in August of each year. By amending its Order and Judgment, the Court will facilitate Plaintiffs utilizing the August, 2024 window to conduct archeological surveys. This avoids the loss of almost an entire year that would occur if Plaintiffs, because of the overbroad moratorium imposed by Agency Defendants, cannot conduct archeological surveys until the next window after that, which is in August, 2025.³ In addition to archeological surveys, Agency Defendants at multiple instances in the Record of Decision require Plaintiffs, as first steps, to conduct surveys and baseline studies that do not impact the environment. But Plaintiffs can only proceed in those first steps if approved by Agency Defendants, and so are blocked by the moratorium on the Program.⁴

² While Plaintiffs respectfully disagree with other aspects of the Order and Judgment, they limit Point A of this motion to alter or amend to non-environment-impacting activities.

³ The Agency Defendants relied on the broad scope of the moratorium in declining to process permits for archeological survey work. AR3395. They alleged no environmental harm. *See id.*; *see also*, Plaintiff-Intervenor Reply Brief, Dkt. 66 at 16-17 (“no reason exists to implement the Moratorium while BLM prepares supplemental NEPA analysis. The Agency Defendants have not identified any adverse impacts that would result from continuing to implement the Program and, for example, from authorizing archeological surveys.”); Plaintiffs’ Reply Brief, Dkt. 67 at 13 (similar).

⁴ *See* AR3207 (“The lessee/operator/contractor will conduct a cultural and paleontological resources survey before any ground-disturbing activity, based on a study designed by the

2. Any Suspension Authority Borrowable from the NPRPA Does Not Apply to Pre-Operational Survey Work That Does Not Impact the Environment.

In its Order, the Court cited the Tax Act’s direction that, “except as otherwise provided in this section,” Federal Defendants should “manage the oil and gas program on the Coastal Plain in a manner similar to the administration of lease sales under the Naval Petroleum Reserves Production Act [NPRPA] of 1976, 42 U.S.C. § 6501, et seq. (including regulations).” Order at 21-22 (citing Tax Act, Pub. Law 115-97. § 20001(b)(3)). Citing a NPRPA provision under which “the Secretary [of the Interior] may direct or assent to the suspension of operations or productions on any lease or unit,” 42 U.S.C. § 6506a(k)(2), the Court upheld the Agency Defendants’ moratorium. *Id.*

Even if applicable, the borrowed NPRPA provision does not go so far as to authorize suspension of non-environment-impacting lease activities that are preliminary steps before operations under a lease even begin.⁵ The very next sentence of the NPRPA contemplates the Secretary using the suspension power “in the interest of conservation,”

lessee/operator/contractor and approved by the BLM Authorized Officer.”); *see also*, AR3163 (“Project proponents may be responsible for conducting or funding baseline studies, including fish, wildlife and vegetations surveys where applicable” as “determined by the BLM”); AR3168 (subsistence impact avoidance planning); AR3194 (must “develop an impact and conflict avoidance an monitoring plan” for areas within two miles of the sea); AR3196 (“polar bear interaction plans” must be developed “in consultation with and approved by the USFWS”); AR3197 (before filing site permit applications, lessee must obtain “a minimum of 1 year of baseline ambient air monitoring data for pollutants of concern, as determined by the BLM.”)

As can be seen from this list, the work Plaintiff seek to do now, pending the completion of the Agency Defendants’ supplemental NEPA work, consists of activities such as walking the land, collecting imagery and other data using passive means, and conducting interviews and meetings within individuals inside ANWR, not digging or other ground-disturbing work.

⁵ Plaintiffs showed that the NPRPA provision is not applicable to any of the issues in this case, Dkt. 67 at 14-16, but will not re-argue that larger issue in the context of this narrow motion.

which means to regulate environment-impacting actions, typically ground-disturbing activities. 42 U.S.C. § 6506a(k)(3). In an implementing rule, BLM defines the “circumstances” in which “BLM will require a suspension of operations and production” as being when suspension “(1) ... is in the interests of *conservation of natural resources*; (2) ... encourages the greatest ultimately recovery of oil and gas, such as by encouraging the planning and construction of a new transportation system ...; or (3) ... mitigates reasonably foreseeable and *significantly adverse effects on surface resources*.” 43 CFR § 3135.2(a) (emphasis added). The NPRPA suspension provision and its implementing rule thus do not support the Order’s conclusion that the Agency Defendants may use that provision to block the lessee’s pre-operational non-environment-impacting activities such as archeological surveys. Moreover, the Agency Defendants who administer the Program did not invoke the NPRPA provision. AR3364-65. Only Defendant-Intervenors cited it.

An additional consideration is that archeological survey work and other early permitting stage work that does not involve any surface disturbance is pre-operational, and so is not “operations and production” within the scope of the NPRPA suspension provision, 42 U.S.C. § 6506a(k)(2).⁶ In adopting the rule implementing the suspension

⁶ See Summers Oil and Gas § 14:4 (3rd ed.) (collecting cases on what level of activity by the lessee is active enough to qualify as “operations” under an oil and gas lease). Although the NPRPA does not define “operations,” a DOI regulation for non-Alaska NPS units places reconnaissance surveys” outside the definition of “operations.” 36 CFR § 9.40(2). The Record of Decision in this case does not define “operations” but describes “operations” as occurring later in the Program, after environmental review is conducted, which strongly implies there are also pre-operational permitting stage activities, such as archeological surveys, that are not operations:

“... [T]he BLM will consider alternatives to avoid adverse effects and incompatible development to protect the various cultural resources, subsistence resources and their habitat,

provision, Federal Defendant BLM explained that “BLM is committed to addressing environmental and subsistence issues prior to any development. However, there may be unanticipated issues, such as undiscovered archaeological finds or endangered species, that may not be evident prior to operations commencing.” 67 Fed.Reg. 17,866, 17,867 (April 11, 2002). Thus, the rule contemplates that archeological work would usually be completed “prior to operations commencing,” i.e., that such work is not “operations.”

3. Lease § 6 Only Addresses Environment-Impacting Operations.

The Court’s interpretation of Plaintiff AIDEA’s lease contains a similar error. Although not briefed by the parties, the Court cited Lease § 6 as supporting its conclusion that the Agency Defendants may lawfully temporarily suspend lease activities to take steps to protect the environment. Order at 39-40. However, Lease § 6 is limited to preventing harm to the environment and thus to environment-impacting “operations”:

Sec. 6 Conduct of operations – Lessee shall conduct operations in a manner that minimizes adverse impacts to the land, air, and water, to cultural, biological, visual, and other resources, and to other land uses or uses. To the extent consistent with the lease rights granted, lessee shall take reasonable measures deemed necessary by lessor to accomplish the intent of this section. Such measures may include, but are not limited to, modification to siting or design of facilities, timing of operations, and ... reclamation measures.

AIDEA Lease, AR3321. Section 6 echoes the NPRPA suspension provision discussed above in that it does not address (or provide Agency Defendants with authority to suspend) pre-operational non-environment-impacting activities. If the preliminary

and human health and the environment, before any on-the-ground activities are approved. This will be done through subsequent NEPA analysis, which will be conducted *before any construction or operation permits or approvals are issued.*” AR3171 (emphasis added).

actions under the ROD such as archeological and other surveys will not result in adverse impacts to the environment, suspension of those activities is not necessary or reasonable.⁷

4. Conclusion – Actions Not Impacting the Environment.

The Court earlier declined to grant project opponents a preliminary injunction preventing Agency Defendants from issuing the lease to Plaintiff AIDEA, distinguishing the non-ground-disturbing activities that would occur immediately following issuance of leases from the ground-disturbing activities that would only occur later, after further environmental analysis. *Gwich'in Steering Committee v. Bernhardt*, 2021 WL 46703, *8 (D. Alaska Jan. 5, 2021) (finding no irreparable harm). The Court should draw a parallel distinction here. It should amend its Order and Judgment and invalidate the Agency Defendants' overbroad moratorium to the extent it blocks Plaintiffs from conducting preliminary steps such as archeological surveys that do not impact the environment.

B. The Order Infers Too Much From the Absence of Specific Statutory Deadlines Regarding Follow-Up Actions Implementing the Major Directed Action.

The Court relied on *Gen. Motors Corp. v. United States*, 496 U.S. 530 (1990), in discerning a dispositive contrast between: (1) the Tax Act provision mandating that Federal Defendants issue an oil and gas lease for the Coastal Plain by a date certain (December, 2021) and (2) other Tax Act provisions that mandated that the Federal

⁷ Delay in carrying out non-environment-impacting surveys and baseline studies that are a necessary pre-requisite to seeking subsequent project approvals does substantially burden Plaintiffs. Order at 39. Such actions would not cause ground disturbance to any acreages or to subsistence hunting or fishing. See Order at 57 and n. 236 (discussing BLM's reconsideration of number of acres that may lawfully be subject to surface disturbance and ANILCA § 810 issues).

Defendants issue rights-of-ways and easements in connection with the lease, and take other actions to implement and administer the lease, but without specifying deadlines. Order at 18-19 and n. 78 (reviewing provisions in Pub. Law 115-97, § 20001). The Court concluded that the various post-leasing agency tasks were subject “only ... to” the general Administrative Procedure Act requirement that agencies act within a “reasonable period of time.” Order at 20 (citing 5 U.S.C. § 706(1)).

General Motors concerned a very different statutory structure and so its holding is not applicable here. The Clean Air Act (“CAA”) expressly addressed in different ways the consequences of agency delay in performing two equally significant tasks, neither of which was ancillary of the other. The CAA set a four month deadline for the Environmental Protection Agency (EPA) to approve or reject a State’s original proposal for air pollution rules (a “state implementation plan” or “SIP”). *Gen. Motors*, 496 U.S. at 536 (citing CAA § 110(a)(2), 42 U.S.C. § 7410(a) (1982)). The statute also addressed the possibility of delay in a second EPA task, EPA’s approval or rejection of a State’s proposal to revise an approved SIP. *Id.*, 496 U.S. at 538 (citing CAA § 110(g)). The CAA granted a specific remedy for EPA delay in approving or rejecting a revised SIP – the State’s Governor could issue a short-term suspension of industry’s duty to comply with the approved original SIP. *See id.* (quoting CAA § 110(g)(1)(B)).

General Motors asked the Supreme Court to imply an additional remedy, that when EPA was late in approving or rejecting a proposed revised SIP, EPA was barred from enforcing the original SIP, apparently even after the express statutory remedy (the

short-term suspension) had expired. *See id.* at 539-40. The Supreme Court declined, holding that the EPA was not under a four month deadline to process proposals to revise SIPs, that a rule of reasonableness governed delays, and that it could not be implied that EPA was barred from enforcing the original SIP even if EPA had unreasonably delayed. *See id.* *Gen. Motors* illustrates the canon that when a statute addresses related topics in differing ways, the differences are presumed to be meaningful. However, its holding was based on statute that expressly addressed in different ways the consequence of delays in two equally significant and parallel agency tasks (deciding whether to approve original SIPs and deciding whether to approve revised SIPs). That is not the situation here.

By contrast, the Tax Act establishes a specific deadline for the major action, the issuance of oil and gas leases, and directs the Federal Defendants to then take ancillary follow-up actions, including the issuance of “necessary rights-of-way or easements” and the “administration” of the program, without addressing the scenario of delay in the follow-up implementing actions. Tax Act, Pub. Law. 115-97, § 20001(b)(2)(A), (c)(1)(B) and (c)(2). Under this structure, a different canon of statutory construction controls, the canon that a statutory direction or authority to take a main action implies the authority and duty to take the variously ancillary actions necessary to make the main action effective. Sutherland calls it the “Implied Powers” canon:

A statute which confers powers or *duties* in general terms includes by implication all powers and *duties* incidental and necessary to make the legislation effective.

2B Sutherland Statutory Construction, § 55:4 (7th ed.) (emphasis added). [W]henver a power is given by a statute, everything necessary to making it effectual or requisite to

attaining the end is implied.” Antonin J. Scalia and Bryan A. Garner, *Reading Law, the Interpretation of Legal Texts* at 60 (Thompson/West, 2012) (quotation omitted). There are many examples illustrating this canon. *See, e.g., Jackson v. City and County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (“The Second Amendment ... does not explicitly protect ammunition. Nevertheless, without bullets, the right to bear arms would be meaningless. ... Thus the right to possess firearms for protection implies a corresponding right to obtain the bullets necessary to use them.”) (quotation omitted).⁸

As Sutherland further explains, legislation cannot be expected to address “peripheral matters” in the same level of detail as the main matter:

Courts extend statutes by implication and inference because legislation cannot practically or conveniently, or perhaps even possibly, specify all of the detailed operational effects it should have in all of the various circumstances to which it may apply. For this reason, statutory language tends to focus on a central idea, or to establish general principles or standards. Legislation often does not mention peripheral matters, or matters of minor detail, and if these could not be supplied by implication the drafting of legislation would be an interminable process and the true intent of the legislature likely to be defeated

Id., § 55:2 (quotation omitted). Thus, the absence in the Tax Act of detail with regard to peripheral matters such as the limits or consequences of delays in issuing the mandatory easements necessary to implement the Coastal Plain oil and gas leases, or the timing or content of agency actions regarding archeology surveys to be conducted at the outset of the post-leasing implement process, should not be accorded the dispositive significance

⁸ Second Amendment law has since evolved, *Warren v. U.S. Parole Commission*, 2023 WL 5348825, *1 (9th Cir. Aug. 21, 2023), but the statutory construction principle remains.

the Court in this case accorded that absence. *See* Order at 18-19.

Unlike the statute involved in *Gen. Motors, supra*, the Tax Act does not address one way or another the consequence of delay in the various implementing actions that follow-up the issuance of the lease, but does mandate that the follow-up actions occur, thereby effectuating the key directive in Tax Act § 20001(c)(1) to issue the leases. *See* Tax Act § 20001(b)(2)(A) (Federal Defendants “shall ... administer” all phases of the Program, which includes the post-lease follow-up actions), (c)(2) (Federal Defendants “shall issue any rights-of-way or easements across the Coastal Plain for the exploration, development, production or transportation necessary to carry out this section”). The Court should amend its Order and Judgement and recognize that the various follow-up matters ancillary to the issuance of the leases by the December, 2021 statutory deadline must be addressed by the Federal Defendants with an urgency and timeliness proportional to the statutory deadline for the issuance of the leases.

C. Conclusion

The Court should amend its Order and Judgment to (1) set aside with respect to non-environment-impacting steps the Federal Defendant’s moratorium on actions to implement the ANWR Coastal Plains oil and gas program, and (2) direct the Federal Defendants to carry out actions necessary to implement the oil and gas leases held by Plaintiff AIDEA at a pace proportional to the urgency expressed by Congress in directing that the Federal Defendants issue oil and gas leases by December, 2021.

Respectfully submitted this 5th day of September, 2023.

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