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Chad Padgett
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Alaska State Office
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Submitted via e-mail: blm_akso_ak932_cpcomments@blm.gov

Comments re: Call for Nominations and Comments for the Coastal Plain Alaska Oil and Gas Lease Sale, 85 Fed. Reg. 73292 (Nov. 17, 2020); Premature Notice of 2021 Coastal Plain Alaska Oil and Gas Lease Sale and Notice of Availability of the Detailed Statement of Sale, 85 Fed. Reg. 78,865 (December 7, 2020)

Dear Mr. Padgett,

Established in 1947, Defenders of Wildlife is a national nonprofit conservation organization dedicated to the protection of flora and fauna in its native habitat. Defenders has 1.8 million members and supporters nationwide, including over 6000 in Alaska. Headquartered in Washington, D.C., Defenders has regional field offices throughout the country, including one in Anchorage, Alaska. We have long advocated for conservation of wildlife and habitat on Alaska's public lands, including the Arctic National Wildlife Refuge.

We write to again underscore the incompatibility of industrializing the Arctic refuge coastal plain with conserving and recovering threatened polar bears, and the applicability of ANILCA to any future proposed transportation or utility system in the refuge. But first, we register our strong objection to BLM's subjugation of the rule of law and integrity of the public process to its desire to issue leases forthwith to the oil industry, as evidenced by the above-referenced Premature Notice of Lease Sale ("Premature Notice of Sale").

I. The Ends Don't Justify the Means.

BLM issued a Call for Nominations on November 17, 2020, with a 30-day comment period. The purpose of the comment period on the Call for Nominations is to allow potential bidders, government agencies, and the interested public an opportunity to indicate any tracts of particular importance to lease or not lease, or that should receive special consideration or analysis.

On December 3, about two weeks into the comment period, the agency announced that it would be issuing a Premature Notice of Sale on December 7, with the lease sale itself (the opening of bids) to occur on January 6, 2021.¹ That announcement made no attempt to explain why the agency would issue the Premature Notice of Sale halfway through the comment period designed to inform that document, and did not reference that pending comment period at all.

Issuing the Premature Notice of Sale was inconsistent with representations BLM made to the public and to the U.S. District Court for the District of Alaska. In the context of litigation directly related to the coastal plain leasing program, the agency informed the court regarding the Call for Nominations that “BLM will receive nominations and comments for a 30-day period.

Subsequently, should BLM determine to issue a notice of sale, it will publish such notice in the Federal Register prior to the date of any such sale.”² The BLM Alaska State Director also stated to the public that “Receiving input from the industry on which tracts to make available for leasing is vital in conducting a successful lease sale.”³

BLM’s own regulation provides:

(a) The State Director Alaska, Bureau of Land Management, shall issue calls for Nominations and Comments on tracts for leasing for oil and gas in specified areas. The call for Nominations and Comments shall be published in the Federal Register and may be published in other publications as desired by the State Director. Nominations and Comments on tracts shall be addressed to the State Director Alaska, Bureau of Land Management. The State Director shall also request comments on tracts which should receive special concern and analysis.

(b) The State Director, after completion of the required environmental analysis (see 40 CFR 1500-1508), shall select tracts to be offered for sale. In making the selection, the State Director shall consider available environmental information, multiple-use conflicts, resource potential, industry interest, information from appropriate Federal agencies and other available information. The State Director shall develop measures to mitigate adverse impacts, including lease stipulations and information to lessees. These mitigating measures shall be made public in the notice of sale.⁴

The State Director’s exclusive focus on the importance of what the industry has to say is notable, given the many sources of information the Director is required to consider in response to the Call

¹ “NOTICE OF SALE TO BE ISSUED FOR COASTAL PLAIN OIL AND GAS LEASING PROGRAM DEC. 7 Major step in carrying out mandate from the 2017 Tax Cuts and Jobs Act supporting energy security, job creation and economic growth for future generations.” <https://www.blm.gov/press-release/notice-sale-be-issued-coastal-plain-oil-and-gas-leasing-program-dec-7>

² Defendants’ Notice of Filing, Case No. 3:20-cv-00204-SLG (Nov. 16, 2020)(emphasis added).

³ Press releases, U.S. Department of the Interior, Bureau of Land Management, Coastal Plain Oil and Gas Lease Sale Nominations Sought Across All 1.6M Acres by Dec. 17 (Nov. 16, 2020), available at: <https://www.blm.gov/press-release/coastal-plain-oil-and-gas-lease-sale-nominations-sought-across-all-16m-acres-dec-17>

⁴ 43 C.F.R. § 3131.2.

for Nominations. The views of appropriate Federal agencies, for example, would seem to be an important consideration. The U.S. Fish and Wildlife Service, after all, manages the Arctic National Wildlife Refuge and might have something useful to say about tracts that “should receive special concern and analysis.” According to the final EIS, the cooperating agencies on the Leasing Program analyses were EPA, State of Alaska, North Slope Borough, Native Village of Kaktovik, Native Village of Venetie Tribal Government, Venetie Village Council, and the Arctic Village Council.⁵ There is no indication that BLM notified the EPA or the other cooperating agencies about its intent to issue the Premature Notice of Sale.

Finally, there is us, the interested public, including Defenders of Wildlife’s 1.8 million members and supporters, who were assuredly not notified. The public expects that agencies will honor their own statements about their own public processes. By issuing the Premature Notice of Sale on December 7 with no explanation, BLM has undermined its own procedure and made a mockery of its own words. It has misled a federal court, federal agencies, other cooperating agencies, and the public on an issue of national interest and importance.

It does not salvage the situation to claim, as BLM does, that it will nonetheless consider all comments submitted through December 17. Issuing the Premature Notice of Sale sends the clearest possible signal that comments on the Call for Nominations are not relevant to BLM’s decision, even if in fact BLM manages to consider those comments at some point. The fact is that BLM moved on the next stage of a highly controversial process of great public interest while the public comment that ostensibly provides an important foundation for doing so had not yet occurred. The harm to the integrity of the public process is already done, and for no legitimate reason. That can’t be fixed by any later acknowledgement of comments submitted after BLM had already inappropriately moved on.

The reason for proceeding in this haphazard, indefensible manner is obvious, though unstated: BLM is striving to issue leases prior to inauguration and is willing to violate basic principles of good government as well as its own regulations and public statements, and even its recent unequivocal representations to the court, to do so. Seemingly blinded by myopic dedication to this destructive goal, the agency is sabotaging the public’s trust through its incompetence and disregard for the integrity of the administrative process. It is also undermining its own goal, as these actions cast additional doubt on the legality of the lease sale, and any leases that may issue as a result.

II. There’s No Place Like Home.

Polar bears were listed as threatened under the Endangered Species Act in 2008 primarily due to the stunning loss of their sea-ice habitat globally due to human-caused atmospheric climate change. In the long term, reducing human-generated carbon pollution will be necessary to stabilize atmospheric carbon and allow sea-ice habitat to at least begin to recover. Leasing the entirety of the coastal plain to oil and gas companies will increase that carbon pollution by locking us into producing and using any oil found under the coastal plain for decades.

⁵ FEIS at ES-6.

But the project is even more harmful to bears in the short-term. Some polar bears always denned on the Arctic Refuge coastal plain and, with the demise of sea-ice habitat, their use of that terrestrial denning habitat is dramatically increasing.⁶ Conserving that increasingly important terrestrial denning habitat is a critical near-term survival strategy established by the FWS under the ESA – one that helps keep bears alive so that the population can avoid extinction while humanity gets its act together to significantly reduce carbon emissions.⁷

Indeed, “[t]he ability of bears to maintain access to terrestrial denning areas without compromising foraging opportunities pre- and post-denning may be an important factor determining whether reproduction and cub survival is affected by sea-ice loss.”⁸ Simply put, BLM’s proposal is inconsistent with FWS’s Polar Bear Conservation Management Plan.

The proposed lease tracts overlap significantly with polar bear terrestrial denning critical habitat.⁹ In fact, the proposed tracts comprise the entirety of the 1002 area, meaning that the existence of this critical habitat has had no mitigating effect on BLM’s desire to offer every last acre for lease. The Leasing Program ROD authorized leasing and development throughout this critical habitat without exception and now the Call for Nominations/Premature Notice of Sale makes 100% of designated polar bear terrestrial denning critical habitat in the coastal plain available for bidding. Leasing all terrestrial denning critical habitat will adversely impact and destroy that habitat, jeopardizing the continued existence of Southern Beaufort Sea polar bears.

The FWS Biological Opinion on which BLM relied in the ROD never assessed the impact of the entire leasing program or confronted the fact that all denning critical habitat in the coastal plain could be authorized for exploration, leasing and development. Instead, it omitted this essential inquiry and provided that later, individual applications for on-the-ground activities would need to comply with the ESA and MMPA, purportedly assuring that impacts to polar bears will be negligible. But the entire program as envisioned in the FEIS and ROD, which would be made possible by signing over the leases proposed for the auction block now, would harm, disturb and displace polar bears and destroy or adversely modify a large amount of terrestrial denning critical habitat. It would jeopardize the continued existence of Southern Beaufort Sea polar bears and its impact on those bears could not reasonably be found negligible.

The Premature Notice of Sale includes every possible acre for potential lease. This means that the very first lease sale under the Leasing Program would subject all of the terrestrial denning critical habitat on the coastal plain to potential leasing and development, in addition to the dangerous seismic exploration BLM says is already available for pre-lease permitting. BLM should rethink the Call for Nominations and Premature Notice of Sale and make a legitimate effort to conserve polar bears and their critical habitat.

⁶ E.g., A.S. Fischbach, et al., Landward and eastward shift of Alaskan polar bear denning associated with recent sea ice changes. *Polar Biology* (2007).

⁷ FWS, Polar Bear Conservation Management Plan (December 2016) at 47.

⁸ Id. at 30.

⁹ See attached map.

III. A Different Inconvenient Truth.

In our comments on the draft and final EISs, Defenders raised the fact that Title XI of the Alaska National Interest Lands Conservation Act (ANILCA) governs the establishment of “transportation and utility systems” (TUSs) on conservation system units in Alaska, including the Arctic National Wildlife Refuge.¹⁰ BLM’s draft EIS did not mention ANILCA Title XI among the list of laws relevant to the Leasing Program, but after some prodding the final EIS acknowledged that Title XI applies to those TUSs.¹¹ Nonetheless, BLM also insisted that it and only it can and must authorize necessary rights-of-way for exploration, development and production.

So we pointed out the inconsistency between those two positions in a subsequent letter to BLM. Under ANILCA, any proposal to establish a road or pipeline in the Arctic Refuge would be decided by at least three agencies, BLM, FWS and the U.S. Department of Transportation.¹² That decision would be based on mandatory detailed findings, supported by substantial evidence, listed at 16 U.S.C. § 3164(g)(2).¹³ Our letter specifically sought a clarification of the inconsistency in BLM stating both that it can and must authorize necessary rights-of-way on the coastal plain, and also that Title XI applies to the issuance of those rights-of-way.¹⁴

In the ROD, BLM characterized our letter as simply claiming that Title XI applies to TUSs in the coastal plain, and agreed with us.¹⁵ It ignored our request to explain its simultaneous and incompatible view that BLM can and must unilaterally approve all necessary rights-of-way, including those for roads and pipelines.

The Call for Nominations, Premature Notice of Sale, and Detailed Statement of Sale all omit any reference to Title XI, stating only that BLM can and must approve all necessary rights-of-way. The “Information to Lessees” (ITL) section of the Detailed Statement of Sale appears to revert to the view that Title XI is not relevant to approvals of TUSs in the Arctic Refuge:

Surface Development and Access: Section 20001(c)(2) of Public Law 115-97 states that the Secretary acting through the BLM “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.” BLM interprets the plain

¹⁰ 16 U.S.C. §§ 3161-3168. A “TUS” is defined very broadly and includes roads, pipelines, landing strips, electricity and communication systems, and improved rights-of-way for snow machines, air cushion vehicles, and other all-terrain vehicles, among other things. 16 U.S.C. 3162(4).

¹¹ FEIS, Appendix D at D-2 (“Applications for transportation and utility systems in conservation system units are processed under ANILCA Title XI.”); Appendix S at S-423.

¹² 16 U.S.C. 3164(b)(2).

¹³ We explained the process in greater detail in our letter to BLM dated November 18, 2019 (attached).

¹⁴ *Id.*

¹⁵ ROD at 38.

language of this provision as requiring that **it** authorize any such rights-of-way necessary to carry out the Coastal Plain oil and gas program established by Section 20001 of PL 115-97. This provision ensures that successful implementation of the mandated oil and gas program in this remote frontier region not be frustrated by the unavailability of necessary access. Off-lease rights-of-way and easements necessary for development under a particular lease will be granted, as well as any right-of-way or easement necessary to carry out the oil and gas program across the Coastal Plain.¹⁶

The ITL regarding surface development and access would seem an appropriate place to let lessees know that much of the typical surface development and access that they'll be interested in, such as development of any road or pipeline, will be subject to the TUS decisional framework set forth in ANILCA, noted above. Yet there is no mention of this key provision and the reader is left with the clear impression that BLM alone not only can but must unilaterally authorize whatever surface development and access is "necessary."

The "Tax Cuts and Jobs Act (Tax Act)" didn't waive otherwise-applicable laws, including ANILCA.¹⁷ What BLM interprets as the "plain language" of the Tax Act needs to be read in connection with the legal framework already in place when the Tax Act was enacted. ANILCA already required the Secretary of Interior to issue rights-of-way for TUSs in conservation system units – if they were approved via the appropriate process.¹⁸ The Tax Act didn't waive or repeal ANILCA and its directive to the Secretary to issue rights-of-way can be read entirely consistently with the similar directive in Title XI to issue those rights-of-way – once they are approved via the appropriate process detailed in the statute, as noted above.

In sum, BLM should withdraw the Premature Notice of Sale and cancel the lease sale prematurely scheduled for January 6, 2021. After reviewing all comments received on the Call for Nominations and the "available environmental information, multiple-use conflicts, resource potential, industry interest, information from appropriate Federal agencies and other available information" it should acknowledge the obvious, that industrializing the entire coastal plain is inconsistent with polar bear conservation and recovery. It should explain this to members of Congress and work with that body to repeal section 20001 of Tax Act and meanwhile prepare a much smaller lease sale offering posing significantly less harm to the treasured wildlife and other resource values of the Arctic National Wildlife Refuge.

¹⁶ Detailed Statement of Sale at 5-6 (emphasis added).

¹⁷ Tax Act, § 20001, Pub. L. 115-97 (2017); *see also* the Floor Statement of principal sponsor Senator Murkowski ("Many have raised concerns about the environmental process, does it get sidestepped; not at all. We have not preempted the environmental review process. We have not limited the consultation process with Alaska Natives in any way. All relevant laws, regulations, and executive orders will apply under our language. . . . Our title . . . will include a regular order environmental process, with laws like NEPA all fully applied, after we pass it." Available at <https://www.murkowski.senate.gov/press/speech/floor-speech-reconciliation-legislation-tax-reform> (last viewed December 14, 2020).

¹⁸ 16 U.S.C. § 3167(a)

If it does issue a timely, legitimate Notice of Sale in the future, then BLM must not propose to offer any tract that individually or in combination with other tracts would likely impede the recovery of the Southern Beaufort Sea polar bear population. It must also include notice that Title XI of ANILCA applies to any proposal to establish a road, pipeline or other transportation or utility system in the Arctic Refuge, and clarify that this means that BLM cannot unilaterally approve of any such road, pipeline or TUS. Instead, any such decisions would be made by at least three federal agencies pursuant to the appropriate ANILCA process.

Sincerely,

/s/

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cc:

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