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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

FRIENDS OF ALASKA NATIONAL WILDLIFE REFUGES, *et al.*,

Plaintiffs,

v.

RYAN ZINKE, in his official capacity as Secretary of the U.S. Department of the Interior, *et al.*,

Defendants,

and

KING COVE CORPORATION, *et al.*,

Intervenor-Defendants.

Case No. 3:18-cv-00029-TMB

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
(Civil Rule 56(a), Local Civil Rule 16.3)

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LIST OF SHORT NAMES AND ACRONYMS

ANCSA	Alaska Native Claims Settlement Act
ANILCA	Alaska National Interest Lands Conservation Act
APA	Administrative Procedure Act
Borough	Aleutians East Borough
Corps	U.S. Army Corps of Engineers
DOI	Department of the Interior
EIS	Environmental Impact Statement
ESA	Endangered Species Act
Izembek or the Refuge	Izembek National Wildlife Refuge
NEPA	National Environmental Policy Act
OPLMA	Omnibus Public Land Management Act of 2009
The Secretary	Secretary of the Interior
The Service	U.S. Fish and Wildlife Service

INTRODUCTION

This case is about a land exchange agreement (Exchange Agreement) between the Secretary of the Interior (the Secretary) and the King Cove Corporation. Under the Exchange Agreement, the Secretary agreed to trade away up to 500 acres in the heart of the Izembek National Wildlife Refuge (Izembek or the Refuge) — designated Wilderness — to allow construction of a road. The Secretary did this without following the mandates of the Alaska National Interest Lands Conservation Act (ANILCA), the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA). The Secretary entered into the Exchange Agreement without any public process or analysis of the impacts of the exchange. The Secretary entered into the Exchange Agreement despite the fact that for decades, the U.S. Fish and Wildlife Service (the Service) has — time and again — declined to enter into similar exchanges because of the significant and detrimental impacts such an exchange would have on the wildlife and resources of Izembek. The transportation challenges of moving between the communities of King Cove and Cold Bay, including for medical purposes, do not allow the Secretary to enter into the Exchange Agreement in violation of federal law.

The Secretary executed the Exchange Agreement on January 22, 2018. Plaintiffs Friends of Alaska National Wildlife Refuges, et al. (collectively "Friends") brought this challenge on January 31, 2018, because the Secretary violated multiple federal laws in executing the Exchange Agreement. More specifically, the Secretary violated ANILCA Title XI by failing to follow its mandatory procedures to approve a transportation system through a conservation system unit (Izembek) and Congressionally-designated Wilderness. Congress was clear in adopting Title XI — it intended Title XI to be the sole authority for authorizing transportation systems in conservation system units like Izembek. The Secretary cannot circumvent its mandatory requirements and act unilaterally to allow a road corridor through Izembek and its Wilderness. Additionally, the Exchange Agreement violates ANILCA Section 1302's mandate that land exchanges further the conservation purposes of ANILCA. The Secretary made no findings that the land exchange would further ANILCA's general and Izembek's specific purposes and failed to acknowledge or explain the decades of findings and conclusions by the Service that a land exchange and road were contrary to those purposes. The Secretary also entered into the Exchange Agreement without any new environmental analysis or public process. The land exchange is a major federal action that requires evaluation and review under NEPA.

The exemption from NEPA contained in Section 910 of ANILCA does not apply to this exchange because the exchange — by its terms — is not a conveyance to fulfill King Cove Corporation's Alaska Native Claims Settlement Act (ANCSA) entitlements. The Secretary failed to comply with NEPA. Finally, the Secretary violated the ESA by entering the Exchange Agreement without adhering to Section 7's mandatory consultation requirements to protect listed Steller's Eiders and Northern sea otters. Accordingly, the Court should vacate the Exchange Agreement and enjoin all activities under it from moving forward.

BACKGROUND

I. IZEMBEK'S UNIQUE BIOLOGICAL AND WILDERNESS VALUES HAVE BEEN RECOGNIZED AND PROTECTED FOR DECADES.

Izembek has "some of the most striking wildlife diversity and wilderness values of the northern hemisphere,"[1] due to its unique habitat types and sizes (including wetlands, lagoons, and shallow bays), and their arrangement on the landscape.[2] At the heart of the Refuge is a narrow isthmus of rolling tundra, separating the Izembek Lagoon and Bering Sea from the Kinzarof Lagoon and Gulf of Alaska.[3] The isthmus area is particularly valuable to wildlife because the tides, ice, and sea conditions on the north and south sides of the isthmus do not mirror one another.[4] This allows many animals — especially birds — to select the side with more favorable conditions at a given time, allowing consistent access to food and shelter.[5] It is a road corridor through this narrow isthmus that is the subject of the challenged land exchange.[6]

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[1] Administrative Record (AR) 9041. Citations to the Administrative Record refer to the record filed with the Court on June 1, 2018, consisting of documents compiled in 2018 and Bates stamped DOI #####, and documents complied for the Administrative Record from prior litigation, *Agdaagux Tribe of King Cove v. Jewell*, 3:14-cv-00220 (D. Alaska 2014), and Bates stamped numerically, (ECF No. 41), as well as those documents filed as a supplement to the Administrative Record on June 21, 2018 (ECF No. 47).

[2] AR 2925, 8992, DOI 3.

[3] AR 2925, 8992, 180579, DOI 3.

[4] AR 180794.

[5] AR 180794. This is especially important for Pacific Black Brant and Steller's Eiders. *See* AR 180804, 180865 (explaining how over-wintering Brant move between the lagoons).

[6] AR DOI 37 (area map).

Izembek is one of the world's most important migratory bird staging and wintering habitats, and supports highly sensitive and unique species.[7] Millions of migratory waterfowl and shorebirds find food and shelter in Izembek's coastal lagoons and freshwater wetlands on their way to and from their subarctic and arctic breeding grounds.[8] Izembek Lagoon's brackish water covers one of the world's largest eelgrass beds, creating a rich feeding and nesting area for hundreds of thousands of waterfowl.[9] The Kinzarof Lagoon, on the Gulf of Alaska side of the isthmus, also has a large intertidal eelgrass bed.[10] Over 98 percent of the entire world's population of Pacific Black Brant relies on Izembek's eelgrass beds as a critical food source before their non-stop 3,000 mile migration to wintering grounds in Mexico, during which they lose more than 30 percent of their body weight.[11] Brants' reliance on eelgrass for forage during migration and wintering (some Brant over-winter in Izembek) make them highly vulnerable to degradation of this essential habitat.[12] In addition to providing food for Brant, the eelgrass beds act as nurseries for salmon and other fish, provide year-round habitat for sea otters and other marine species, and support large concentrations of waterfowl during migration and winter.[13]

Izembek is also home to the only non-migratory population of Tundra Swans in the world, which has experienced a significant decline over the last three decades.[14] Emperor Geese also rely on the isthmus for staging, wintering, and migrating habitat, and for protection from predators.[15] Emperor Geese are "one of the rarest and most vulnerable goose species on the planet," and are found only in the Bering Sea area.[16] Steller's Eiders, a species listed as "threatened" under the ESA, also rely on Izembek.[17] As much as 40 percent of the entire world's population of Steller's Eiders over-winter in Izembek, switching to using Kinzarof Lagoon when

[7] AR 8993, 20415.
[8] AR 8993.
[9] AR 8992, 180730, DOI 3.
[10] AR 20415.
[11] AR 180804, DOI 7.
[12] AR 20415, 180804.
[13] AR 20415.
[14] AR DOI 7.
[15] AR DOI 8.
[16] AR DOI 8.
[17] AR DOI 8.

Izembek Lagoon becomes too icy.[18] Izembek and its adjacent wetlands and nearshore marine environment also provide habitat for other federally-protected species, such as the Northern sea otter and Stellar sea lion.[19]

In addition to exceptional bird habitat, Izembek provides high quality brown bear and caribou habitat.[20] The Joshua Green watershed on the northeast side of Cold Bay in Izembek is vital year-round habitat, supporting the highest density of brown bears on the southern Alaska Peninsula.[21] This area provides exceptional denning habitat for pregnant bears and a safe place for sows to rear cubs.[22] Many of the bears that populate the southern Alaska Peninsula are born in Izembek.[23] The Southern Alaska Peninsula caribou herd uses the Izembek isthmus as a migration corridor. The herd moves south through Izembek to the herd's wintering grounds on the Refuge and then re-traces their steps north in the spring to the herd's calving areas.[24]

Because of Izembek's ecological values, efforts to protect the area began in the early 1940s.[25] The area was officially recognized in 1960 when President Eisenhower's Secretary of the Interior established the Izembek National Wildlife Range (Range).[26] The Range was specifically set aside as a "refuge, breeding ground, and management area for all forms of wildlife,"[27] because of the area's importance to waterfowl, brown bear, and caribou.[28] In establishing the Range, DOI recognized that it "contain[s] the most important concentration point for waterfowl in Alaska."[29]

Izembek's significant wilderness values were also recognized early on. The area is "virtually undeveloped," containing "robust and stable" wildlife populations, and providing "outstanding opportunities for solitude."[30] It has "[p]ristine streams, extensive wetlands, steep

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[18] AR DOI 8, 180865.
[19] AR 180861.
[20] AR 19634, DOI 8.
[21] AR 19634, 20404, 180830.
[22] AR 19634, 20404.
[23] AR 20404.
[24] AR DOI 8.
[25] AR 194408–10.
[26] AR 561, 194410.
[27] AR 561, *see also* AR DOI 4 (citing Public Land Order 2216 establishing the Range).
[28] AR 563–65.
[29] AR 563.
[30] AR 182064–65.

mountains, tundra, and sand dunes . . . [that] provide high scenic, wildlife, and scientific values."[31] To protect these values, Izembek was first proposed for Wilderness designation in 1970.[32] In 1972, following the passage of ANCSA, the Secretary requested that Congress not act on Izembek's Wilderness proposal pending the selection of lands by the recently-created Alaska Native Corporations.[33] During the late 1970s, Congress debated multiple pieces of legislation regarding the conservation of Alaska's federal public lands, including Izembek, ultimately culminating in the passage of ANILCA.

II. CONGRESS PASSED ANILCA TO PROTECT NATIONALLY SIGNIFICANT WILDERNESS, WILDLIFE, AND OTHER CONSERVATION VALUES, INCLUDING IZEMBEK'S UNIQUE AND EXCEPTIONAL WILDLIFE HABITAT AND WILDERNESS VALUES.

Considered "one of the most important pieces of conservation legislation ever passed," President Jimmy Carter signed ANILCA into law in 1980.[34] Congress passed ANILCA to protect Alaska's exceptional ecological values, wildlife, and habitats on the landscape scale.[35] To achieve this purpose, ANILCA established 104 million acres of conservation system units, including National Wildlife Refuges and Wilderness areas.[36]

In ANILCA, Congress re-designated the Range as the Izembek National Wildlife Refuge because of its ecologically unique habitat and wilderness characteristics.[37] At 315,000 acres, Izembek is the smallest of Alaska's National Wildlife Refuges, but one of the most ecologically unique,[38] and "is an invaluable part of the network of lands and waters that constitute the National Wildlife Refuge System."[39] Nearly all of it is designated Wilderness ("Izembek

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[31] AR 4472.

[32] AR 2900, 194400.

[33] AR 194402

[34] Attach. 1 at 3, Alaska National Interest Lands Conservation Act: Remarks on Signing H.R. 39 into Law, Dec. 2, 1980, 16 WEEKLY COMP. PRES. DOCS. 2755 (Dec. 8, 1980); Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371 (1980).

[35] 16 U.S.C. § 3101(b).

[36] *Id.* § 3101(a).

[37] ANILCA § 303(3)(A).

[38] AR 8992; *see also* AR 4472 ("[The Izembek Refuge] is of National Significance in every respect, but particularly since the values incorporated in this site are not well represented in National Parks or other stringently protected areas.").

[39] AR DOI 5.

Wilderness") — 308,000 of its 315,000 acres.[40] Specific to Izembek, Congress recognized that Wilderness designation for the majority of Izembek would "protect this critically important habitat."[41]

In ANILCA, Congress also identified four additional purposes for Izembek: (1) to conserve "fish and wildlife populations and habitats in their natural diversity, including . . . waterfowl, shorebirds and other migratory birds, brown bears and salmonids"; (2) fulfill "the international treaty obligations of the United States with respect to fish and wildlife and their habitats"; (3) provide "the opportunity for continued subsistence uses by local residents"; (4) and protect water quality and quantity.[42] These purposes reflect Izembek's "unique, irreplaceable, and internationally recognized habitats that provide critical support to a rich diversity of species."[43]

In addition to national recognition and federal protection, Izembek is internationally-recognized for its unique and ecologically significant wetlands. The Ramsar Convention on Wetlands of International Importance ("Convention") designated Izembek as a "Wetland of International Importance" in 1986.[44] One of the Convention's central aims is to "identify those wetlands which . . . have international importance that extends beyond the country wherein such wetlands are located."[45] Listing under the Convention "reflects a national commitment to maintain the ecological characteristics of the area."[46] For Izembek, those characteristics are its "unique ecology," large eelgrass beds, and "the importance of the area to migratory birds."[47]

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[40] ANILCA §§ 303(3)(A), 702(6); AR 4472.
[41] Attach. 2 at 2, H.R. REP. NO. 96-97, pt. II, at 136 (1979).
[42] ANILCA § 303(3)(B).
[43] AR DOI 5.
[44] AR 6057, 180730, DOI 5.
[45] AR 6057; *see also* AR 180735–36 (noting that Izembek met 6 of the 8 criteria under the Convention for designation, discussing the unique habitats and their importance, and noting that "only 1 criterion is needed for designation").
[46] AR 6057.
[47] AR 5344.

III. THE SERVICE HAS DECLINED NUMEROUS TIMES TO EXCHANGE LAND FOR A ROAD AND COMPLETED MANY STUDIES THAT FOUND THAT A ROAD THROUGH IZEMBEK WOULD SIGNIFICANTLY DAMAGE THE REFUGE'S WILDLIFE AND WILDERNESS.

The Service has evaluated the effects of a road from King Cove to Cold Bay through Izembek numerous times, most recently in 2013.[48] The road was initially proposed as a way to move people and goods more easily between King Cove and Cold Bay for quality of life, economic, and medical reasons.[49] Each time that the Service evaluated the issue, the Service found that the impacts of a road on wildlife resources, habitats, and designated Wilderness would irreversibly damage Izembek's unique and ecologically important habitats and its "globally significant landscape."[50] Each time, the Service, therefore, declined to exchange Refuge lands for state or private lands to allow for a road.

DOI conducted a road analysis in the early 1980s as part of a regional planning effort.[51] In management planning documents for Izembek, the Service concluded that there would be impacts to Tundra Swans, waterfowl populations, brown bears, caribou (including migratory routes), wolf and wolverine populations, wilderness values, and subsistence from a road.[52] DOI also acknowledged that a road through Izembek's Wilderness could only be built with congressional approval under Title XI of ANILCA.[53]

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[48] AR DOI 6–7 (stating that the Service has evaluated a road through Izembek numerous times and has "consistently found that the impacts of building a proposed road on the wildlife resources, habitats and designated Wilderness would create irreversible change and damage to a unique and ecologically important area, and especially to designated Wilderness").

[49] AR DOI 5.

[50] AR DOI 2, 6–7. The Secretary's most recent decision to not move forward with a land exchange was upheld by the U.S. District Court in 2015. *See Agdaagux Tribe of King Cove v. Jewell*, 128 F. Supp. 3d 1176 (D. Alaska 2015).

[51] AR 9038.

[52] AR 4587–90; *see also* AR 180575 (listing the findings in the 1985 management plan of the impacts of a road through Izembek).

[53] AR 4590 ("Pursuant to the provisions of Title XI of ANILCA, the Service will develop an environmental impact statement (EIS) to further evaluate the impacts of the proposed road. Congressional approval will be required to build the road across the refuge."); *see also* AR 9040 (noting that legislation was requested to allow the road to "provide Congressional relief from environmental provisions in [ANILCA]" and "authorize the construction of a road corridor through . . . the Refuge and Wilderness").

The Service revisited the issue in 1996 and again found that a road through Izembek would have unacceptable environmental impacts.[54] One year later, the King Cove Corporation offered to exchange its lands at the mouth of Kinzarof Lagoon for a right-of-way across Izembek. The Service declined the offer because of the adverse impacts a road would have on wildlife.[55]

The Service completed yet another study analyzing the potential impacts of the road in 1998.[56] That same year, in a separate management document titled Land Protection Plan for Izembek National Wildlife Refuge Complex (Land Protection Plan), the Service called the proposal to build a road "the greatest known potential threat to wildlife and wilderness values within the Izembek Complex."[57] In discussing the 1997 proposal to exchange land and build a road, the Service stated that it declined the proposal because "the proposed road would have an adverse impact on the significant wildlife and wilderness resources in the area."[58]

During this time, Alaska's congressional delegation introduced bills that would have mandated a land exchange to allow a road.[59] In 1999, Congress sought to resolve the concerns for a transportation link between the two communities while also protecting the Refuge. Congress appropriated $37.5 million to purchase a hovercraft to travel between the two communities, construct a road outside the Izembek Wilderness to a hovercraft terminal, and improve King Cove's airstrip and health clinic.[60] Congress appropriated the funds for these projects expressly to avoid the construction of a road within Izembek's Wilderness.[61]

From 2001 to 2004, the U.S. Army Corps of Engineers (Corps) completed an environmental impact statement (EIS) for the hovercraft terminal due to be constructed as a

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[54] AR 9036–43

[55] AR 9039.

[56] AR 10380.

[57] AR 235488 (ECF No. 48-12 at 16).

[58] AR 235488 (ECF No. 48-12 at 16).

[59] *See* King Cove Health and Safety Act of 1997, S. 1092, 105th Cong. 1st Sess. (1997); *see also* AR 9039 (noting that the Secretary recommended that the President veto the bill).

[60] *See* Omnibus Consol. and Emergency Suppl. Appropriations Act, Pub. L. No. 105-277, § 353(a), (b), (c), (e), 112 Stat. 2681, 302–03 (1999).

[61] Omnibus Consol. and Emergency Suppl. Appropriations Act § 353(a); AR 174410 (noting that "The Committees have agreed to these funds as an alternative to an easement for a road through the Izembek National Wildlife Refuge wilderness area"); AR 197559 (same).

result of the 1999 appropriation.[62] In its analysis, the Corps acknowledged that there would be impacts from a road to ESA-listed species and that an ANILCA Title XI permit application would be necessary to move forward with a road.[63]

From 2007 to 2010, the hovercraft operated out of Lenard Harbor. The hovercraft performed all requested medical evacuations in almost all weather conditions.[64] At the time, the Mayor of the Aleutians East Borough (Borough) called the hovercraft a "life-saving machine . . . doing what it is supposed to do."[65] Despite this, the Borough suspended hovercraft services, citing unreliability and cost.[66]

During the operation of the federally-funded hovercraft, Alaska's congressional delegation again introduced bills that would have required the Secretary to convey Refuge lands to allow road construction.[67] Congress amended the legislation to avoid mandating a land exchange, and instead authorized the Secretary to make the exchange if found to be in the public interest. The amended legislation was wrapped into a national lands package that passed in 2009: the Omnibus Public Land Management Act (OPLMA).[68] In OPLMA, Congress directed the Secretary to analyze the land exchange and road construction and operation in an EIS pursuant to NEPA.[69]

For the land exchange considered under OPLMA, King Cove Corporation offered 13,300 acres of its land and the State of Alaska offered 43,093 acres of its land to the federal government, which would have been traded for 206 acres of land from Izembek.[70] The State of Alaska would have received the Refuge lands for road construction, operation, and

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[62] S*ee generally* AR 234364–235382 (Corps EIS) (ECF No. 47-3–48-7).
[63] AR 235394 (ECF No. 48-8 at 12).
[64] AR 220142, DOI 6.
[65] AR 34872.
[66] AR DOI 6.
[67] Izembek and Alaska Peninsula Refuge Enhancement Act of 2008, S. 1680, 110th Cong., 1st Sess. (as introduced by Lisa Murkowski, June 21, 2007); Izembek and Alaska Peninsula Refuge and Wilderness Enhancement and King Cove Safe Access Act, 110th Cong., H.R. 2801, 1st Sess. (as introduced by Don Young, June 20, 2007).
[68] Omnibus Pub. Land Mgmt. Act, Pub. L. No. 111-11, Subtitle E, § 6402(a), 123 Stat. 991, 1178 (2009).
[69] OPLMA § 6402(b).
[70] AR DOI 2–3.

maintenance.[71] Use of the road was restricted "primarily for health and safety purposes (including access to and from the Cold Bay Airport) and only for noncommercial purposes" with an exception for taxis, rideshares, and public transportation.[72]

After the public process and environmental review mandated by OPLMA, the Secretary declined to authorize the land exchange.[73] The Secretary concluded that Izembek "would be irretrievably damaged by construction and operation of the proposed road" and that this degradation "would not be offset by the protection of other lands to be received under an exchange."[74] The Secretary explained that the decision "protects the unique resources the Department administers for the entire Nation" and that the no action alternative protects Izembek's "unique and internationally recognized habitats," maintains the integrity of designated Wilderness, and ensures that the Refuge continues to meet the purposes for which it was originally established in 1960 as the Range and in ANILCA.[75]

The Secretary noted that migratory and resident bird species would be particularly vulnerable to impacts from road construction and operation on the narrow isthmus.[76] Specifically, the Secretary found that a road would disturb threatened Steller's Eiders at critical times in their life-cycle and set back recovery efforts for this species.[77] The Secretary also determined that a road across the isthmus would "have a major impact on bears" and "fragment undisturbed habitat for grizzly bear and caribou."[78] With respect to Wilderness, the Secretary determined that the impacts would not be limited to de-designated lands; impacts of road

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[71] AR DOI 2.

[72] OPLMA § 6403(a)(1).

[73] AR DOI 2.

[74] AR DOI 2; *see also* AR 180521 ("While the more than 55,000 acres offered contain important wildlife habitat, they do not provide the wildlife diversity of the internationally recognized wetland habitat within the refuge acreage of the Izembek isthmus . . . [The exchange] would not compensate for the adverse effects of removing a corridor of land and constructing a road within the narrow Izembek isthmus."); AR 182943 ("[T]he lands lost and lands gained have little in common with regard to cover types, wildlife potential, or ecological process/function.").

[75] AR DOI 4, 20; *see also* AR 180521 ("This alternative was selected because it is believed to best meet refuge purposes and the Service mission.").

[76] AR DOI 3, 7–8.

[77] AR DOI 8.

[78] AR DOI 8; *see also* AR 19635 (noting that road construction will cause brown bears to abandon some traditional foraging areas and denning sites).

construction and operation to wilderness character would extend far beyond the road corridor.[79] Road construction would increase human traffic and noise, change the hydrology by damaging wetlands and causing run-off, and introduce contaminants and invasive species.[80] Pedestrian and all-terrain vehicle use would have "profound adverse effects on wildlife use and habitats of the narrow isthmus that comprises the Refuge."[81] The Secretary found that these impacts would extend far into the Refuge and even outside Izembek's boundaries.[82]

The Secretary also found that a road through the isthmus would undermine the directives of various substantive statutes, while not allowing the land to be exchanged and the road constructed would "support[] the continued management of the Izembek Refuge consistent with the purposes for which it was established."[83] The Secretary specifically found that not proceeding with the exchange "best satisfies Refuge purposes, and best accomplishes the mission of the Service and the goals of Congress in ANILCA."[84] Further, the Secretary determined that selecting a land exchange alternative would "diminish the ability of the Service to meet the objectives of the Wilderness Act."[85] The impacts to the Wilderness lands that remained in the

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[79] AR DOI 9.

[80] AR DOI 4.

[81] AR DOI 4; *see also* AR DOI 7 ("Additionally, construction of a road through this Wilderness area will lead to increased human access and activity, including likely unauthorized off-road access.").

[82] AR DOI 9; *see also* AR 180521 ("Simply exchanging lands will not compensate for the ripple effects on habitat and wildlife due to uses on and beyond the road . . . .").

[83] AR DOI 7; *see also* 16 U.S.C. § 668dd(a)(3)(A) (National Wildlife Refuge System Administration Act directing that management of each refuge should fulfill the mission of the National Wildlife Refuge System and "the specific purposes for which that refuge was established").

[84] AR DOI 20; *see also* AR DOI 7 (finding that not proceeding with the land exchange met DOI's obligations to meet the mission of the national wildlife refuge system); 16 U.S.C. § 668dd(a)(2) ("The mission of the System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.").

[85] AR DOI 9; *see also* 16 U.S.C. § 1133(b), (c) (Wilderness Act directing that wilderness areas be managed to "preserv[e] the wilderness character of the area" for the "public purposes of recreational, scenic, scientific, educational, conservation, and historical use" and prohibiting the construction of roads within designated Wilderness).

system would also be "irreparabl[e] and significant[]."[86] For all of these reasons, the Secretary declined to proceed with the land exchange.[87]

In reaching the same decision as every administration before it, the Secretary recognized the need for safe transportation to medical services, and "carefully considered input from the State of Alaska, City of King Cove, King Cove Corporation, Agdaagux Tribe of King Cove, Belkofski Tribe, and Aleutians East Borough that a road connecting the City of King Cove to the Cold Bay Airport is the only safe, reliable, and affordable means of year round access to medical services."[88] The Secretary observed that other modes of transportation currently existed and that additional options could be developed that would be more cost-effective and have fewer impacts to the Refuge than a road.[89] In declining to move forward with the land exchange, the Secretary committed to continue to work with the community to achieve a solution that would both protect Izembek and meet King Cove's health and safety concerns.[90]

A group from King Cove, the Governor of Alaska, and one of Alaska's senators all requested that the Secretary reconsider the decision. The Secretary declined to do so.[91] The King Cove Corporation, along with the Agdaagux Tribe of King Cove, the Native Village of Belkofski, the Aleutians East Borough, the City of King Cove, and two individuals, challenged the Secretary's decision in federal court.[92] The State of Alaska joined that litigation as an intervenor-plaintiff. Many of the plaintiffs in this case participated as intervenor-defendants. The U.S. District Court of Alaska upheld the Secretary's decision to not move forward with a land exchange.[93] The Court held that "[t]he Secretary's determination that the No Action Alternative would best achieve the Refuge's purpose, the agency's statutory mission, and Congress' intent

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[86] AR DOI 9.
[87] AR DOI 20.
[88] AR DOI 10.
[89] AR DOI 3, 20; AR 180592.
[90] AR DOI 20; *see also* AR DOI 27–144 (2015 assessment of non-road alternatives for a transportation link between King Cove and Cold Bay finding that non-road alternatives could provide a reliable transportation link).
[91] AR DOI 21–25.
[92] *Agdaagux Tribe of King Cove v. Jewell*, 128 F. Supp. 3d 1176 (D. Alaska 2015).
[93] *Id.* at 1200–01.

under ANILCA was based on substantial evidence in the record."[94] The plaintiffs appealed that decision to the Ninth Circuit, but later voluntarily dismissed the case.[95]

IV. THE EXCHANGE AGREEMENT COMMITS THE SECRETARY OF INTERIOR TO EXCHANGING AWAY UP TO 500 ACRES IN THE HEART OF IZEMBEK WITH FEW RESTRICTIONS ON USE.

In early 2017, the King Cove Group began to meet with DOI regarding the road.[96] The record indicates that the new Secretary was committed to completing a land exchange and doing so quickly.[97] While the State of Alaska had originally identified itself as the other party to the exchange,[98] in May 2017, King Cove Corporation wrote to the new Secretary asking for an exchange of land under ANCSA and ANILCA "to complete a road connection between King Cove and Cold Bay, Alaska."[99] The State of Alaska reviewed potential routes and in June 2017, the Alaska Department of Transportation applied for and was granted a special use permit to conduct reconnaissance activities in Izembek Wilderness related to route identification and road construction.[100]

The Secretary signed an "Agreement for the Exchange of Lands" (Exchange Agreement) with King Cove Corporation on January 22, 2018.[101] The Exchange Agreement states that "[t]he authority for the exchange is section 1302(h) of [ANILCA]," and binds DOI and King Cove Corporation "to the exchange of real property interests."[102] The Exchange Agreement states that "the United States will convey to [King Cove Corporation] the surface and subsurface estate of up to 500 acres from within . . . [the Refuge] that are identified by [King Cove Corporation] as

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[94] *Id.* at 1194.

[95] *Agdaagux Tribe of King Cove v. Zinke*, No. 15-35875 (9th Cir. Aug. 10, 2017) (Mot. to Voluntarily Dismiss Appeal) (ECF No. 62); *Agdaagux Tribe of King Cove v. Zinke*, 2017 WL 5198384, No. 15-35875 (9th Cir. Aug. 11, 2017) (Order) (ECF No. 65).

[96] AR DOI 388.

[97] AR DOI 390 (noting that "the Secretary's expectation is to have a course of action with a very short timeline to complete this action"); *see also* AR DOI 779 (citing news article noting the Secretary's "push" for the land exchange).

[98] AR DOI 394.

[99] AR DOI 410–11. The State of Alaska remained involved in the land exchange agreement negotiations. *See, e.g.*, AR DOI 768, 839.

[100] AR DOI 392, 427–28.

[101] AR DOI 887–94.

[102] AR DOI 887–88.

being needed for the construction, operation, and maintenance of a road linking King Cove with the Cold Bay airport (the U.S. Exchange Lands)."[103] In return, the King Cove Corporation will select and "convey to the United States the surface estate of certain lands it owns in Izembek [National Wildlife Refuge] and Alaska Peninsula National Wildlife Refuge (the KCC Exchange Lands)."[104] Under the Exchange Agreement, King Cove Corporation will identify which exact lands it will convey to the United States from the KCC Exchange Lands.[105] The Exchange Agreement is a binding, final decision by DOI.

The Exchange Agreement commits the United States to exchange lands with King Cove Corporation.[106] The Exchange Agreement sets forth a process for King Cove Corporation to select the exact lands that will comprise the U.S. Exchange Lands and the KCC Exchange Lands, and mandates that the lands will be of equal value.[107] Under the Exchange Agreement, no additional decisions remain to be made by the Secretary, DOI, or the Service regarding whether to exchange lands. The only additional actions that DOI will take under the Exchange Agreement are to survey and appraise both the U.S. Exchange Lands and the KCC Exchange Lands Pool and notify King Cove Corporation of the exact number of acres of land from the KCC Exchange Lands Pool that will equal the value of the U.S. Exchange Lands.[108]

The Exchange Agreement also covers lands that will be used for material supply and disposal sites, as well as access to such sites, which were not included in previously considered (and rejected) land exchanges, potentially expanding the impacts of this exchange.[109] Additionally, the Exchange Agreement does not limit road use for medical emergencies or identify how the few restrictions on use it contains will be enforced. By its terms, the Exchange Agreement allows for commercial use and non-medical use of the road, including the commercial transport of fish and seafood products by individuals and small businesses.[110]

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[103] AR DOI 887.

[104] AR DOI 888. King Cove Corporation will also relinquish selection rights under ANCSA to 5,430 acres within Izembek but will receive 5,430 acres of other previously-selected lands outside of Izembek. AR DOI 890.

[105] AR DOI 889-890.

[106] AR DOI 888 ("The Parties agree to the exchange of real property interests set forth in the following paragraphs and agree to be bound thereby.").

[107] AR DOI 888–90.

[108] AR DOI 889–90.

[109] AR DOI 839, 840, 889.

[110] AR DOI 889.

In deciding to allow a road through Izembek, the Secretary did not attempt to follow the procedures set out in ANILCA Title XI for authorizing transportation systems in conservation system units. Additionally, there is nothing in the record to indicate that after the Secretary's 2013 decision declining the OPLMA land exchange, and prior to signing the Exchange Agreement in 2018, the Secretary undertook any additional analysis regarding the impacts of the new land exchange on Izembek, or whether the exchange met the purposes of Izembek and ANILCA. Similarly, there is no explanation of DOI's 180-degree change from its long-standing position and repeated decisions to decline to exchange land to allow a road to be built because of the detrimental impacts on Izembek. The Secretary also did not undertake any public process or engage in an environmental review pursuant to NEPA. And finally, the Secretary did not consult with the Service regarding the impact of the exchange and road on species and critical habitat protected by the ESA.[111]

SUMMARY JUDGMENT STANDARD AND STANDARDS OF REVIEW

Because this case is a challenge to a final agency action reviewed on the basis of an agency record under the Administrative Procedure Act (APA), resolution on motions for summary judgment is appropriate.[112] The role of the Court "is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did."[113] Under the APA, courts should "hold unlawful and set aside agency action, findings, or conclusions" if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"[114] or if adopted "without observance of procedure required by law."[115] An agency's decision is arbitrary and capricious where it "relie[s] on factors which Congress has not intended it to consider, entirely fail[s] to consider an important aspect of the

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[111] *See generally* AR DOI 1–902 (the agency record post-2013 record of decision through the signing of the Exchange Agreement).

[112] Fed. R. Civ. P. 56(a); Local Civ. R. 16.3(c)(2); *see*, *e.g.*, *City & County of San Francisco v. United States*, 130 F.3d 873, 877 (9th Cir. 1997).

[113] *Id.* (citation omitted).

[114] 5 U.S.C. § 706(2)(A); *see also Nat'l Audubon Soc. v. Hodel*, 606 F. Supp. 825, 833–35 (D. Alaska 1984) (concluding that a challenge to an agency exchange agreement under 1302(h) of ANILCA was reviewable under the arbitrary and capricious standard).

[115] 5 U.S.C. § 706(2)(D); *see also Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1165 (9th Cir. 2003) (for review of compliance with NEPA).

problem, offer[s] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[116]

When reviewing an agency's decision, the court must ensure that the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[117] The court should not attempt to make up for deficiencies: "We may not supply a reasoned basis for the agency's action that the agency itself has not given."[118]

Courts look particularly closely at agency reversals in policy. While an agency can change course, when "its new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate."[119] A policy change violates the APA if the agency "ignores or countermands its earlier factual findings without reasoned explanation for doing so."[120]

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[116] *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co. (Motor Vehicle)*, 463 U.S. 29, 43 (1983); *see also Ctr. for Biological Diversity v. Nat'l Highway Transp. Safety Auth.*, 538 F.3d 1172, 1193 (9th Cir. 2008) (explaining that a decision is arbitrary if it is not supported by the record).

[117] *Motor Vehicle*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

[118] *Motor Vehicle*, 463 U.S. at 43 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

[119] *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009); *see also Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (plurality opinion) ("Whatever the ground for the [agency's] departure from prior norms, . . . it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate."); *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687–88 (9th Cir. 2007) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute" (citation omitted)).

[120] *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (en banc) (internal quotation and citation omitted).

Interpretation of a statute is a question of law.[121] When reviewing an agency's interpretation of a statute, courts follow the two-step process set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[122] The first step is to consider the statute itself to "ascertain the intent of Congress in enacting it."[123] In determining Congress' intent, courts "assume that the legislative purpose is expressed by the ordinary meaning of the words used."[124] Courts employ the "traditional tools of statutory construction" to determine Congressional intent.[125] "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[126] If Congress has not spoken to the issue, or if Congress' intent is unclear, courts then consider the agency's interpretation of the statute, and give it effect if it is permissible.[127]

PLAINTIFFS' INTERESTS

Friends have standing to bring this action because they and their members will suffer injuries in fact, those injuries are traceable to DOI's actions, and they would be redressed by a favorable decision of this Court setting aside the Exchange Agreement as an arbitrary and unlawful action.[128] Each plaintiff organization has as its mission to protect public lands and wildlife, and have worked to protect Izembek for years.[129] Members of the organizations visit or

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[121] *Alyeska Pipeline Serv. Co. v. Khuti Kaah Native Vill. of Cooper Ctr.*, 101 F.3d 610, 612 (9th Cir. 1996).

[122] 467 U.S. 837 (1984).

[123] *United States v. Stephens*, 424 F.3d 876, 882 (9th Cir. 2005).

[124] *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (internal quotations and citation omitted).

[125] *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1162 (9th Cir. 1999) (internal quotations and citations omitted).

[126] *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 975 (9th Cir. 2013) (quoting *Chevron*, 467 U.S. at 842–43).

[127] *Chevron*, 467 U.S. at 843.

[128] *See Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180–84 (2000) (setting out the test for individual standing and explaining that organizations can bring lawsuits on behalf of their members if three requirements are met: (1) members have standing in their own right, (2) the lawsuit is germane to the organization's mission, and (3) individual member participation is not required).

[129] *See* Decl. of David Raskin in Supp. of Pls.' Mot. for Summ. J. ¶¶ 3, 10–11 [hereinafter Raskin Decl.]; Decl. of Nicole Whittington-Evans in Supp. of Pls.' Mot. for Summ. J. ¶¶ 4, 14–19 [hereinafter Whittington-Evans Decl.]; Decl. of Susan Culliney in Supp. of Pls.' Mot. for Summ. J. ¶¶ 3, 8, 10–14 [hereinafter Culliney Decl.]; Decl. of Kevin Proescholdt in Supp. of

otherwise enjoy Izembek for numerous purposes, including recreation, wildlife viewing, and hunting.[130] These members are injured by DOI's decision to exchange Wilderness and Refuge lands because it privatizes lands which have been set aside for conservation purposes and Wilderness without any public process or environmental review.[131] The harm is exacerbated because the Exchange Agreement is for a road to be built through the heart of the protected federal public lands that will harm habitat, wildlife, and wilderness values.[132] A favorable decision from the Court invalidating and vacating the Exchange Agreement would redress these injuries by ensuring that Wilderness and Refuge lands are protected for the conservation purposes for which they were established and that the land exchange and subsequent road construction does not occur, thereby protecting members' interests in Izembek.[133]

Pls.' Mot. for Summ. J. ¶¶ 3, 12, 19–20 [hereinafter Proescholdt Decl.]; Decl. of Randi Spivak in Supp. of Pls.' Mot. for Summ. J. ¶¶ 4, 11–13 [hereinafter Spivak Decl.]; Decl. of Mark Salvo in Supp. of Pls.' Mot. for Summ. J. ¶¶ 2, 5, 12–18 [hereinafter Salvo Decl.]; Decl. of Desiree Sorenson-Groves in Supp. of Pls.' Mot. for Summ. J. ¶¶ 3, 12 [hereinafter Sorenson-Groves Decl.]; Decl. of Adam Kolton in Supp. of Pls.' Mot. for Summ. J. ¶¶ 4–6 [hereinafter Kolton Decl.]; Decl. of Daniel Ritzman in Supp. of Pls.' Mot. for Summ. J. ¶¶ 6, 11 [hereinafter Ritzman Decl.] (filed concurrently); *see also* AR DOI 587–89, AR 187289–325, 197555–62, 213773–77 (letters and comments from plaintiff organizations supporting protection of Izembek); *see also Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1353–54 (9th Cir. 1994) (describing the zone of interests test for APA cases, which is satisfied in this case because each statute that DOI violated protects wildlife and habitat conservation interests or public participation and agency decision making).

[130] *See* Culliney Decl. ¶ 16; Sorenson-Groves Decl. ¶¶ 19–20; Raskin Decl. ¶¶ 15–16; Decl. of Jeff Wasley in Supp. of Pls.' Mot. for Summ. J. ¶¶ 3, 7–9 [hereinafter Wasley Decl.]; Whittington-Evans Decl. 26–27; Decl. of Victoria Hoover in Supp. of Pls.' Mot. for Summ. J. ¶¶ 6–7, 12 [hereinafter Hoover Decl.]; Decl. of Patrick Brian Rogers in Supp. of Pls.' Mot. for Summ. J. ¶¶ 7–9, 12 [hereinafter Rogers Decl.]; Decl. of Brianne Dugan in Supp. of Pls.' Mot. for Summ. J. ¶¶ 10–12 [hereinafter Dugan Decl.]; Salvo Decl. ¶ 19; Spivak Decl. ¶¶ 21, 34; Kolton Decl. ¶ 8.

[131] *See* Culliney Decl. ¶ 18; Dugan Decl. ¶ 20; Proescholdt Decl. ¶¶ 16, 18, 21; Raskin Decl. ¶ 14; Sorenson-Groves Decl. ¶ 10; Wasley Decl. ¶¶ 16–17; Whittington-Evans Decl. ¶ 31; Hoover Decl. ¶¶ 18, 20; Ritzman Decl. ¶¶ 14, 16–17; Rogers Decl. ¶ 15; Salvo Decl. ¶¶ 21–22, 24; Kolton Decl. ¶ 9–12; Spivak Decl. ¶¶ 17, 27, 32, 35.

[132] *See* Proescholdt Decl. ¶ 24; Culliney Decl. ¶¶ 16–17; Dugan Decl. ¶ 14; Hoover Decl. ¶¶ 17–18; Kolton Decl. ¶¶ 9–10; Raskin Decl. ¶ 19; Ritzman Decl. ¶ 16; Whittington-Evans Decl. ¶¶ 12, 29; Rogers Decl. ¶¶ 14, 16, 20; Salvo Decl. ¶¶ 21, 23; Sorenson-Groves Decl. ¶ 22; Spivak Decl. ¶¶ 25, 27–29; Wasley Decl. ¶¶ 14, 18.

[133] *See* Culliney Decl. ¶ 19; Dugan Decl. ¶¶ 14, 17; Raskin Decl. ¶¶ 24–25; Ritzman Decl. ¶ 17; Hoover Decl. ¶ 22; Salvo Decl. ¶ 26; Spivak Decl. ¶¶ 33, 35; Sorenson-Groves Decl. ¶ 26;

ARGUMENT

The Secretary entered into the Exchange Agreement with no public notice, no public process, and no regard to the decades of careful consideration given to the issue by DOI and Service officials. The Secretary's action violates numerous federal statutes and is contrary to Congressional intent. The Secretary violated Title XI of ANILCA, the sole statutory authority for allowing a road in Izembek, by proceeding with this land exchange for the express purpose of building a road without following mandatory statutory procedures. The Secretary asserted that Section 1302(h) of ANILCA authorized this action, but failed to comply with that Section's requirement that exchanges be done to achieve the purposes of ANILCA. The Secretary also failed to follow the environmental analysis and public process requirements under NEPA for major federal actions prior to entering into the Exchange Agreement. Finally, the Secretary did not consult under the ESA regarding the possible effects to the threatened and endangered species in the area. As a result, the Secretary's decision to enter into the Exchange Agreement is arbitrary and unlawful. The Exchange Agreement should be vacated and DOI enjoined from taking any further action under it pending compliance with all applicable laws.

I. THE LAND EXCHANGE IS INVALID BECAUSE THE SECRETARY DID NOT ACT PURSUANT TO ANILCA TITLE XI'S EXCLUSIVE PROCEDURES FOR APPROVAL OF A ROAD.

To allow a road to be built through a conservation system unit, the Secretary, King Cove Corporation, and the State of Alaska were required to follow the procedures in Title XI of ANILCA. Title XI provides the sole authority and outlines comprehensive procedures for the approval and authorization of transportation system units, including roads, through conservation system units like Izembek.[134] The express purpose of the Exchange Agreement is to allow for the construction of a road through Izembek.[135] As such, the Secretary violated Title XI, which imposes restrictions on the construction of all "transportation and utility systems", including

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Kolton Decl. ¶ 12; Proescholdt Decl. ¶¶ 24–25; Rogers Decl. ¶ 20; Wasley Decl. ¶ 14; Whittington-Evans Decl. ¶ 31; *see also Nat'l Audubon Soc.*, 606 F. Supp. at 832–33 (finding that plaintiff organizations had standing to challenge a similar land exchange under ANILCA).

[134] 16 U.S.C. § 3161.

[135] AR DOI 887, 889.

rights-of-way and roads, within any conservation system unit [136] because DOI failed to follow its procedures.

A. Congress Established the Sole, Mandatory Review Procedures for Transportation System Units in Conservation System Units in Title XI.

When Congress passed ANILCA, it included an entire title dedicated to the consideration and approval of transportation system units in conservation system units.[137] Congress found that doing so was necessary "to minimize the adverse impacts of siting transportation and utility systems within units established or expanded by this Act and to insure the effectiveness of the decisionmaking process."[138] To achieve this goal, Congress established "a single comprehensive statutory authority for the approval or disapproval of applications for such systems."[139] To ensure that the goal of minimizing impacts of transportation system units on lands protected by ANILCA would be met, Congress adopted a procedure specifically for transportation facilities which "supersedes rather than supplements" existing law.[140]

The detail with which Congress set out this process demonstrates the importance that Congress placed on it. Under Section 1104, which governs the approval of a transportation or utility system when Wilderness areas are not involved, applicants must use specific consolidated forms, and submit these forms to the heads of the federal agencies involved.[141] The agencies share decision-making responsibility on the application, and must provide specified forms of notice to the applicant throughout the process.[142] Congress also set specific time frames for preparation of an EIS for transportation system units, and mandated additional opportunities for involvement by stakeholders, governmental entities, ANCSA corporations, and the public.[143] Congress also mandated that the head of each federal agency involved make eight "detailed findings supported by substantial evidence" to approve a decision to construct a transportation

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[136] 16 U.S.C. § 3162(4).
[137] *Id*. §§ 3161–3168.
[138] *Id.* § 3161(c).
[139] *Id.* § 3161(c).
[140] Attach. 3 at 8, Senate Energy & Nat. Res. Comm., S. REP. NO. 96-413, at 246 (1979).
[141] 16 U.S.C. § 3164(b)(1), (c) (ANILCA § 1104).
[142] *Id*. § 3164(b)(2), (d).
[143] *Id*. § 3164(e), (f).

system unit in conservation system unit.[144] These include consideration of: alternative routes which would minimize impacts on the conservation system unit; whether impacts would affect the purposes of the conservation system unit; any "short- and long-term public values which may be adversely affected by approval of the transportation or utility system;" and "short- and long-term social, economic, and environmental impacts of national, State, or local significance, including impacts on fish and wildlife and their habitat."[145]

For transportation systems proposed through Congressionally-designated Wilderness areas, Title XI includes detailed procedures and expressly limits the Executive Branch's ability to act unilaterally. Under Section 1106, a transportation system unit is not allowed in Wilderness areas unless it is first recommended by the President and then approved by both houses of Congress.[146] More specifically, the President must provide his recommendation for approval to Congress, and include with this recommendation numerous specific documents: the application under consideration; a report detailing facts and reasons for the findings and recommendation; the EIS prepared for the project; and conditions and stipulations to govern the use of the system if it is approved by Congress.[147] Congress then has to approve the recommendation via a joint resolution.[148] Neither the President nor any executive agency has the independent authority to approve an application.[149] These strict requirements reflect the intent of Congress: ""[W]ilderness lands deserve a greater degree of protection."[150]

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[144] *Id*. § 3164(g)(2).

[145] *Id*.

[146] *Id.* § 3166(b) (ANILCA § 1106).

[147] *Id*. § 3166(b)(2).

[148] *Id*. § 3166(b)(2)(C).

[149] The procedure of requiring a recommendation from the President and approval from both houses of Congress to approve a transportation system unit in a Wilderness conservation system unit is consistent with the procedures set out in the Wilderness Act for designation of Wilderness. 16 U.S.C. § 1131(a).

[150] Attach. 2 at 4, H.R. REP. NO. 96-97, pt. II, at 157; *see also* Attach. 4 at 2, 124 Cong. Rec. S18088 (daily ed. Oct. 10, 1978) (Senator Nelson stating "[w]ilderness is what so much of the parkland and wildlife habitat of Alaska is all about. We cannot improve upon this wilderness and its natural wildlife community. It is the very finest, wildest we have. All we can do is choose to preserve it, bringing into play the strongest tools at our command . . . . A good example of this is the so-called "Transportation Process" in title XI of the bill . . . which requires a Presidential decision on transportation corridor applications, and ultimate approval by a joint resolution of the Congress . . . .").

B. The Secretary Must Comply with Title XI to Allow a Road in Izembek.

The mandatory nature of Title XI is express. Congress stated that it was establishing "a single comprehensive statutory authority" for approving transportation system units in order to minimize adverse impacts to conservation system units, including Izembek, while ensuring an effective decision-making process.[151] The Exchange Agreement states that it is for the purpose of constructing a road,[152] making it precisely the type of transportation system unit governed by Title XI.[153] ANILCA's exchange provision cannot be used to circumvent Title XI, which Congress passed to serve as the "single comprehensive authority" for approving roads through conservation system units.[154] To ensure compliance with Title XI, Congress declared that any action that purports to approve a transportation system unit but fails to adhere to Title XI's procedures would be invalid: "[n]otwithstanding any provision of applicable law, no action by any Federal agency . . . with respect to the approval or disapproval of the authorization . . . of any transportation or utility system shall have any force or effect unless the provisions of this section are complied with."[155]

The road would be built in a conservation system unit that is also a Wilderness area, making it subject to both Sections 1104 and 1106.[156] It is undisputed that the Secretary did not

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[151] 16 U.S.C. § 3161(c).

[152] AR DOI 887.

[153] 16 U.S.C. § 3161; *see also* AR 234928 (ECF No. 47-13 at 3) (U.S. Army Corps of Engineers describing the need for a completed ANILCA Title XI application and approval by the Secretary, both houses of Congress, and the President, in order to authorize a road through Izembek); AR 4590 ("Pursuant to the provisions of Title XI of ANILCA, the Service will develop an environmental impact statement (EIS) to further evaluate the impacts of the proposed road. Congressional approval will be required to build the road across the refuge.").

[154] 16 U.S.C. § 3161(c); *see also United States v. Raddatz*, 447 U.S. 667, 676 n.3 (1980) (stating that courts "cannot impute to Congress a purpose to paralyze with one hand what it sought to promote with the other" (quoting *Clark v. Uebersee Finanz-Korporation*, 332 U.S. 480, 489 (1947))). While ANILCA Section 1302(h) states that the Secretary is authorized to exchange lands "[n]otwithstanding any other provision of law" this clause cannot be relied on to obviate Title XI. Courts should "determine the reach of each such 'notwithstanding' clause by taking into account the whole of the statutory context in which it appears." *United States v. Novak*, 476 F.3d 1041, 1046 (9th Cir. 2007). Interpreting Section 1302(h) to eliminate Title XI's requirements would create a loophole that would nullify the protections Congress carefully put in place when it adopted Title XI. Such an interpretation must be rejected.

[155] 16 U.S.C. § 3164(a).

[156] *Id.* §§ 3164, 3166.

abide by any of Title XI's requirements.[157] The Secretary did not require the King Cove Corporation and/or the State of Alaska to submit the required applications.[158] The Exchange Agreement involved no joint decision-making by federal agencies. The Secretary prepared no EIS. The Secretary held no public hearings and provided no public process. The Secretary made no detailed findings on alternative routes or the likely environmental impacts of road construction.[159] The Secretary did not seek or obtain the President's recommendation or Congressional approval prior to executing the Exchange Agreement involving Izembek's Wilderness.

The Secretary followed none of the mandatory requirements which Congress carefully laid out in Title XI's framework. The Secretary's action in entering the Exchange Agreement to allow a road is, therefore, without "any force or effect," and the Court should declare it invalid.[160]

II. THE LAND EXCHANGE DOES NOT FURTHER THE PURPOSES OF ANILCA IN VIOLATION OF SECTION 1302.

Even if the Secretary was not required to follow Title XI's requirements in executing the Exchange Agreement, the Exchange Agreement violates ANILCA because it does not further its purposes. ANILCA is clear: acquiring lands under its exchange provision must be for the purposes of ANILCA.[161] ANILCA's overarching statutory purposes and the specific purposes recognized for Izembek and its Wilderness are for conservation and protection of ecologically important habitats and wildlife and wilderness values. The reason for the exchange is to allow a road in an area that Congress established as a National Wildlife Refuge to protect wildlife and habitat, and designated as Wilderness, where road construction is prohibited.[162] The exchange

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[157] Fed. Defs.' Answer to Pls.' First Am. Compl. at ¶¶ 90, 91, 113 (ECF No. 35; Defs.-Intervenors' Answer to Pls.' First Am. Compl. at ¶¶ 90, 113 (ECF No. 37).

[158] The State of Alaska will permit, construct, and operate the road. Fed. Defs.' Answer to Pls.' First Am. Compl. for Declaratory and Injunctive Relief at ¶ 101 (ECF No. 35); Intervenor-Defs. Answer to Pls.' First Am. Compl. at ¶ 101 (ECF No. 37).

[159] Indeed, given the record evidence demonstrating the feasibility of transportation alternatives less damaging to the Refuge than a road, AR DOI 10–11, 27–144 (2015 Assessment of Non-Road Alternatives), it is likely that the Secretary would have been unable to make the necessary findings under Title XI to allow a road through the isthmus.

[160] 16 U.S.C. § 3164(a).

[161] 16 U.S.C. § 3192(h) (ANILCA § 1302).

[162] *Id.* § 1131(c), 1133(c).

does not further the purposes of ANILCA. Rather, it is directly contrary to them. Indeed, decades of Service findings recognized the harm to Izembek's resources and values posed by a land exchange and road and determined that a land exchange would not meet the Refuge's purposes. These findings are the basis for the Service's repeated decision to decline to enter into a land exchange. The Secretary did not confront or address these conflicting findings or the Service's long-standing position prior to executing the Exchange Agreement.

A. Land Exchanges Under Section 1302 Must Advance the Purposes of ANILCA.

Section 1302(a) of ANILCA authorizes the Secretary "in order to carry out the purposes of this Act . . . to acquire . . . any lands within the boundaries of any conservation system unit."[163] Subsection (h) — the specific authority cited by the Secretary in the Exchange Agreement[164] — reaffirms that when the Secretary exchanges lands, he must do so for the purposes of ANILCA.[165] Taken together, the plain language of these provisions mandates that the Secretary find that exchanging land meets the purposes of ANILCA, including both the overall conservation purposes of ANILCA and the specific purposes of the affected conservation system unit established by ANILCA.[166]

The provision's legislative history reflects Congress' intent that the exchange authority be used to acquire lands to further ANILCA's conservation purposes. Congress included Section 1302(h) to give the Secretary the ability to acquire inholdings within conservation system unit boundaries to advance ANILCA's land protections. When drafting ANILCA, Congress drew conservation system unit boundaries to include entire ecosystems and to follow natural features.[167] As a result, the external boundaries of many conservation system units include state and private inholdings. Many in Congress recognized that inholdings presented challenges to

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[163] *Id.* § 3192(a).

[164] AR DOI 888.

[165] 16 U.S.C. § 3192(h) (stating that "in acquiring lands for the purposes of this Act, the Secretary is authorized to exchange lands . . .); *see also* AR DOI 887–88.

[166] *See Nat'l Audubon Soc.*, 606 F. Supp. at 842–43, 845 (considering the impacts to the specific purposes of the refuge at issue when evaluating a land exchange under Section 1302).

[167] *See* 16 U.S.C. § 3101(b) (explaining that conservation system units were designated on the landscape level to protect entire ecosystems).

conservation.[168] However, Congress saw land exchanges as a preferable means to condemnation for the Secretary to acquire inholdings.[169] In giving the Secretary exchange authority, Congress was clear that it did not intend that authority to be used to undercut the protections it was enacting.[170] That is why the land exchange authority in Section 1302 must be exercised to "carry out the purposes of" ANILCA.

Congress passed ANILCA to protect and preserve "nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values."[171] The codified purposes of ANILCA include the preservation of nationally significant lands for present and future generations and scenic and geological values associated with natural landscapes, to provide for the maintenance and habitat of wildlife, to preserve in an unaltered state extensive tracts of land in various Alaska ecosystems, and to provide opportunities for recreation and scientific research.[172]

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[168] *See*, *e.g.*, Attach. 5 at 2, 124 Cong. Rec. 14153 (May 17, 1978) (remarks of Congressman Udall regarding challenges with inholdings and land management) (third column); Attach. 6 at 2, 125 Cong. Rec. H2699 (daily ed. May 4, 1979) (Congressman Udall pointing out that the failure to acquire large amounts of land for conservation purposes and to eliminate inholdings in protected areas early in the development of the lower 48 was a mistake that should not be repeated in Alaska) (third column); Attach. 7 at 2, 126 Cong. Rec. S9430 (daily ed. July 21, 1980) (Senator Tsongas commenting that: "If we have learned anything as a nation in the administration of our public lands, it is that we should avoid wherever possible the creation of inholdings. It just does not make economic or ecological sense to create a pattern of fractured land ownership, particularly in areas of such high wildlife and scenic importance.").

[169] Attach. 8 at 6, House Committee on Interior and Insular Affairs, H.R. REP. NO. 96-97 pt. I, at 246 (1979) (noting that Congress "expects the Secretary to utilize his exchange authority and his authority to acquire easements where possible rather than resort to fee condemnation."); Attach. 3 at 10, Senate Energy and Natural Resources Committee, S. REP. NO. 96-413 at 304 (1979) ("It is the intent of the Committee that exchange authority be used as the major tool of acquisition authority and that condemnation be used only as a last resort."); *see also* Attach. 9 at 8–9, S. REP. NO. 95-1300, at 340–41 (1978) (Letter from Cecil Andrus, Secretary of Interior, to Senator Henry Jackson explaining that inholdings could be acquired through exchange).

[170] Attach. 10 at 10–11, H.R. REP. NO. 95-1045, pt. I, at 211–12 (1978) ("Of course, the committee does not expect that this flexibility will be used to undermine the integrity of any conservation system unit or to frustrate the purposes of any such unit.").

[171] 16 U.S.C. § 3101(a).

[172] *Id.* § 3101(b).

Congress established Izembek because of its ecologically unique habitat and wilderness characteristics.[173] The purposes of Izembek include the conservation of "fish and wildlife populations and habitats in their natural diversity, including . . . waterfowl, shorebirds and other migratory birds, brown bears and salmonids," fulfillment of "the international treaty obligations of the United States with respect to fish and wildlife and their habitats," providing "the opportunity for continued subsistence use by local residents," and protecting water quality and quantity.[174] For Izembek, the conservation values protected by ANILCA are inextricably tied to the isthmus remaining as Wilderness and in an undeveloped, roadless state.[175] To exchange these lands under Section 1302, the Secretary must find that these collective purposes are met.

B. The Land Exchange Does Not Further ANILCA's Purposes for Izembek.

The Secretary made no findings regarding how acquiring lands pursuant to the Exchange Agreement met the purposes of ANILCA and Izembek.[176] The exchange is the antithesis of wilderness protection and conservation goals recognized in ANILCA. Contrary to Congressional intent, the exchange undermines the protections ANILCA put in place for Izembek and its Wilderness.

The Exchange Agreement frustrates the purposes for which Izembek and its Wilderness was established. As described above,[177] Izembek's most important habitat area is the isthmus between the Izembek Lagoon and Kinzarof Lagoon, the area DOI has repeatedly found would be irreversibly damaged by the construction of a road.[178] When designating this area as Wilderness in ANILCA, Congress stressed that "[a] wilderness designation will protect this critically important habitat by restricting access to the Lagoon."[179] Congress specifically sought to limit

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[173] Attach. 3 at 6–7, Committee on Energy and Natural Resources, S. REP. NO. 96-413 at 221–22 (1979) (explaining that after conducting a wilderness review, Congress designated most of Izembek as Wilderness because of the habitat importance to birds and other wildlife).

[174] ANILCA § 303(3)(B). The purposes that the Range was established in 1960 was for a "refuge, breeding ground, and management area for all forms of wildlife." AR 561.

[175] ANILCA § 702(6) (designating Izembek Wilderness to protect wilderness values).

[176] 16 U.S.C. § 3192(h). *Cf. Nat'l Audubon Soc.*, 606 F. Supp. at 829 (explaining the six findings that the Secretary made regarding section 1302(h)'s mandate that an exchange be to acquire land for ANILCA's purposes).

[177] *See supra* Background Part I at 2–5.

[178] *See supra* Background Part III at 7–13.

[179] Attach. 2 at 4, H. R. REP. NO. 96-97, pt. II, at 136 (1979); *see also* Attach. 3 at 2, S.

access to the isthmus to protect Izembek lagoon and the "millions of waterfowl" that rely on its eel grass beds.[180]

In allowing the Secretary to enter land exchanges to acquire lands, Congress made clear that it did not intend the Secretary to use that authority to unravel such protections. Yet that is precisely the purpose of the Izembek exchange. The Secretary entered into the Exchange Agreement to transfer up to 500 acres of Refuge land to the King Cove Corporation to allow for the construction of a road between King Cove and Cold Bay.[181] In the exchange, DOI will receive an unknown number of acres identified by the King Cove Corporation, and King Cove Corporation will relinquish selection rights to 5,430 acres.[182] In executing the Exchange Agreement, the Secretary did not provide any reasoning or justifications for how the exchange would meet ANILCA's general and Izembek's specific purposes as required by the statute.[183]

1. The Secretary failed to explain his decision in light decades of prior factual findings that a land exchange would harm Izembek's resources and values and not be consistent with its purposes.

In executing the Exchange Agreement, the Secretary did not confront the decades of DOI factual findings and conclusions about the negative and harmful impacts of a land exchange and road on Izembek and its Wilderness. A proposed road connecting King Cove and Cold Bay has been analyzed multiple times since the Izembek Range was first protected.[184] Each time, the proposal was found to undermine the very purposes of Izembek and ANILCA.[185] Most recently, in 2013, the Secretary rejected an exchange that would have transferred only 206 acres out of Izembek in exchange for 13,300 acres of King Cove Corporation land and 43,093 acres of State of Alaska lands. The Secretary found that such an exchange — even with far fewer acres leaving

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REP. NO. 96-413, at 15 (1979) ("Izembek Lagoon is a special feature of the refuge.").

[180] Attach. 2 at 2, H.R. REP. NO. 96-97, pt. II, at 136 (1979); Attach. 8 at 5, H.R. REP. NO. 96-97, pt. I, at 209 (1979).

[181] AR DOI at 887–88.

[182] AR DOI 890.

[183] *See Nat'l Audubon Soc.*, 606 F. Supp. at 828 (stating that Section 1302(h) imposes the requirement that "the Secretary must determine that the exchange will result in 'acquiring lands for the purposes of [ANILCA]" (alternation in original)); *see also Gerber v. Norton*, 294 F.3d 173, 185 (D.C. Cir. 2002) ("When a statute requires an agency to make a finding as a prerequisite to action, it must do so.").

[184] *See supra* Background Part III at 7–13.

[185] *Id.*

Federal ownership and more acreage being gained compared to the present exchange — would undermine the purposes for which Izembek was established and Congress' goals when passing ANILCA.[186]

More specifically, the Secretary found that the land exchange would "be inconsistent with the purposes for which these lands were set aside in Public Land Order 2216"[187] — "a refuge breeding ground and management area for all forms of wildlife."[188] The Secretary also found that the land exchange would specifically "diminish the ability of the Service to meet the first, second, and fourth of the refuge purposes stated in ANILCA."[189]

Additionally, the Secretary found that the land exchange and road construction would be inconsistent with management duties under the National Wildlife Refuge Administration Act and the Wilderness Act.[190] The Secretary made numerous additional findings regarding the specific impacts of the land exchange and road construction on wildlife and habitat conservation,[191] wilderness considerations,[192] and refuge management considerations.[193] In making the final decision, the Secretary expressly found that not moving forward with the land exchange to allow

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[186] *See* AR DOI 7 (finding that a road through the isthmus would undermine the directives of various substantive statutes, while selecting the no action alternative would "support[] the continued management of the Izembek Refuge consistent with the purposes for which it was established."); AR DOI 20 (finding that not proceeding with the exchange "best satisfies Refuge purposes, and best accomplishes the mission of the Service and the goals of Congress in ANILCA."); AR 2928 (noting that "[a] road through Izembek would be inconsistent with the purposes of the Refuge described in ANILCA and the Wilderness Act"); AR 9042 ("Given the mandates sets forth in ANILCA, the Service has many concerns about the proposed road and ecological impacts to the fish, wildlife, and habitats in and around the road corridor.").

[187] AR DOI 7.

[188] AR DOI 4 (internal quotation omitted).

[189] AR DOI 7. Those purposes are the conservation of "fish and wildlife populations and habitats in their natural diversity," "[t]o fulfill international treaty obligations of the U.S. with respect to fish and wildlife and their habitats", and "[t]o ensure, to the maximum extent practicable . . . water quality and necessary water quantity within the refuge. ANILCA § 303(3)(B).

[190] AR DOI 7.

[191] AR DOI 7–9.

[192] AR DOI 9 (stating that "[n]othing is more contradictory with, or destructive to, the concept of Wilderness than construction of a road" and that a road "would irreparably and significantly impair this spectacular Wilderness refuge").

[193] AR DOI 9.

for road construction "best satisfies Refuge purposes, and best accomplishes the mission of the Service and the goals of Congress in ANILCA."[194]

This Exchange Agreement — which provides for more than double the acreage being removed from Izembek than previously considered and now includes gravel sites — does not mention ANILCA's broad or Izembek's specific purposes, much less explain how acquiring yet-unspecified lands in exchange for 500 acres in the center of the Refuge and Wilderness will further them.[195] The Secretary not only failed to provide the required level of detailed justification for reversing decades of prior findings, he provided no justification at all. [196]

2. The Land Protection Plan and transportation concerns do not support the exchange.

The Exchange Agreement notes that the King Cove Corporation lands that will be made available to DOI in the exchange "have been identified by the U.S. Fish and Wildlife Service for the future acquisition if such lands become available" and identifies transportation challenges as the basis for the exchange.[197] The Exchange Agreement presumably refers to the Service's 1998 Land Protection Plan.[198] However, the Land Protection Plan does not support the exchange. To the contrary, the Land Protection Plan recognizes that "[t]he proposal to construct a road across both refuge and King Cove Corporation lands is currently the greatest known potential threat to wildlife and wilderness values within the Izembek Complex."[199] The Land Protection Plan also states that "[l]and protection strategies should strive to preserve the ecological integrity of the refuge."[200] Transferring a corridor out of Izembek's isthmus — designated Wilderness — achieves the opposite result.[201]

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[194] AR DOI 20.

[195] *See generally* AR DOI 887–902.

[196] *See FCC v. Fox Television Stations*, 556 U.S. at 515 (stating "an agency may not, for example, depart from its prior policy *sub silento*" and that an agency must provide a more detailed justification "when, for example, its new policy rests on upon factual findings that contradict those which underlay its prior policy"); *Organized Vill. of Kake*, 795 F.3d at 966 ("[A] policy change violates the APA if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so." (internal quotation and citation omitted)).

[197] AR DOI 888.

[198] AR 235431–525 (ECF No. 48-9–48-16).

[199] AR 235488 (ECF No. 48-12 at 16).

[200] AR 235493 (ECF No. 48-12 at 21).

[201] *See Motor Vehicle*, 463 U.S. at 43 (stating that an agency is arbitrary and capricious

This argument was also rejected in the prior lawsuit. In that case, the King Cove Plaintiffs asserted that the identification of King Cove Corporation lands in the Land Protection Plan for acquisition was a justification for the exchange.[202] The Federal Defendants argued that the identification of lands in the Land Protection Plan did not support the exchange of 206 acres out of Izembek because other protections applied to those lands.[203] Those protections include a right of first refusal for the federal government and the requirement that the lands are subject to the laws governing use of the Refuge.[204] The Court upheld the Secretary's position that acquiring the lands offered, including the King Cove Corporation lands identified in the Land Protection Plan, would not offset the impacts to Izembek from the exchange and road.[205] The Secretary's current reliance on the Land Protection Plan to justify the exchange should likewise be rejected.

The Exchange Agreement also recites the challenges associated with travel between King Cove and Cold Bay, presumably as a justification for the land exchange.[206] It is undisputed that travel between remote Alaska villages is difficult. Increasing access by constructing roads through conservation system units and Congressionally-designated Wilderness is not, however, a purpose of ANILCA generally or Izembek specifically.[207] Indeed, the Secretary's prior decision

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when it "offered an explanation for its decision that runs counter to the evidence before the agency").

[202] *Agdaagux Tribe of King Cove*, 128 F. Supp. 3d at 1197.

[203] *Id*.

[204] AR 235476 (ECF No. 48-12 at 4); 43 U.S.C. § 1621(g) (ANCSA section 22(g) allowing for a right of first refusal and mandating that corporation lands within pre-ANCSA refuges are subject to the laws governing refuges); *see also* AR 235491 (ECF No. 48-12 at 19) (Land Protection Plan stating that "[i]n many cases, wildlife resources may be adequately protected under private ownership and no Federal action would be recommended").

[205] AR 235476 (ECF No. 48-12 at 4); *see also* AR DOI 9 (stating that "the lands proposed for exchange are not likely to be developed, if retained in their current ownership, in ways that would affect the same resources that would be affected by the construction and operation of a road through the Izembek Refuge"); *see also Nat'l Audubon Soc.*, 606 F. Supp. at 841 (rejecting the Secretary's finding that the exchange was in the public interest in part because the lands to be acquired were already protected under ANCSA section 22(g)).

[206] *See* AR DOI 887–88 (stating that "residents of King Cove cannot regularly reach Cold Bay airport . . . " and "there have been 68 medical evacuations [] from King Cove since December 23, 2013 . . . .").

[207] *Cf.* AR DOI 20 (concluding that not exchanging lands for a road "best satisfies Refuge purposes, and best accomplishes the mission of the Service and the goals of Congress in ANILCA").

rejecting the land exchange considered years of study and recognized the input from the local community, tribal, and government interests, discussed alternative means of access, and determined that "[t]he administrative record shows that there are viable alternatives to a road that would provide for the continued health and safety of King Cove residents."[208] A 2015 study also indicates that reliable non-road options are available.[209] In sharp contrast, the short recitations contained in the Exchange Agreement make no findings related to ANILCA's or Izembek's purposes, or any other factual findings that DOI is legally obligated to consider. In short, the decision to exchange away Refuge lands "ignores or countermands [the Service's] earlier factual findings without reasoned explanation for doing so."[210] It is arbitrary and capricious, and should be set aside.

In sum, the Exchange Agreement is for the specific purpose of taking land out of Izembek and designated Wilderness, and transferring it to a private entity to build a road. The exchange is not in furtherance of the purposes of ANILCA, as mandated by Section 1302. In executing the Exchange Agreement, the Secretary did not identify how ANILCA and Izembek's purposes would be met or explain the decades of contrary findings that a road would cause harm and be contrary to such purposes. Accordingly, the Exchange Agreement violates ANILCA and should be vacated.

III. THE SECRETARY VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT BY FAILING TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT ANALYZING THE IMPACTS OF THE LAND EXCHANGE.

The Secretary did not prepare an environmental impact statement (EIS) for the Izembek exchange, in violation of NEPA. NEPA requires federal agencies to prepare an EIS for any "major federal action significantly affecting the quality of the human environment."[211] The Exchange Agreement, which transfers as many as 500 acres of out of a National Wildlife Refuge and designated Wilderness for the purpose of building a road falls squarely within this requirement.[212] The Exchange Agreement improperly cites Section 910 of ANILCA for the

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[208] AR DOI 2–3, 10–11.

[209] AR DOI 27–144 (assessment of non-road alternatives including a ferry option that is reliable over 99% of the time).

[210] *See Organized Vill. of Kake*, 795 F.3d at 966 (internal quotation and citation omitted).

[211] 42 U.S.C. § 4332(2)(C).

[212] DOI formerly found that a similar exchange with fewer acres leaving Izembek would

proposition that this land exchange is exempt from NEPA. That section does not exempt this land exchange from NEPA's EIS requirement because this land exchange is not "a conveyance under ANCSA" within the meaning of Section 910.[213]

The plain language, overall structure, and legislative history of ANILCA demonstrate that Section 910 only waives the EIS requirement for conveyances undertaken to fulfill Alaska Native land entitlements pursuant to ANCSA or to the amendments to ANCSA made by ANILCA. The land exchange does not fulfill King Cove Corporation's ANCSA entitlements.[214] As a result, the Secretary violated NEPA by failing to prepare an EIS for this land exchange.

A. Congress Only Intended Section 910 to Exempt Conveyances to Alaska Natives of Land Entitlements under ANCSA or the ANCSA Amendments Contained in ANILCA from NEPA's EIS Requirement.

The land exchange purports to be a "conveyance under ANCSA" and, therefore, exempt from NEPA by Section 910 of ANILCA. The Secretary reads the targeted exemption found in Section 910 too broadly. In passing Section 910, Congress intended to exempt specific lands transactions that involve Alaska Natives or Native Corporations. ANILCA Section 910 provides a targeted exemption for conveyances to complete ANCSA entitlements, and states in relevant part:

> The National Environmental Policy Act of 1969 (83 Stat. 852) shall not be construed, in whole or in part, as requiring the preparation or submission of an environmental impact statement for withdrawals, conveyances, regulations, orders, easement determinations, or other actions which lead to the issuance of conveyances to Natives or Native Corporations, pursuant to the Alaska Native

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have significant impacts to the Refuge's values and resources. AR DOI 3; *see*, *e.g.*, *Nat'l Forest Preservation Grp. v. Butz*, 485 F.2d 408, 411 (9th Cir. 1973) (noting that NEPA applied to a land exchange and that the impacts of the later use must also be evaluated); *see also Lockhart v. Kenops*, 927 F.2d 1028, 1033 (8th Cir. 1991) ("When the federal government exchanges land, it must consider the environmental impact not only of the exchange itself, but also of the proposed use of the federal lands once it passed into private hands." (citing *Nat'l Forest Preservation Grp. v. Butz*, 485 F. 2d at 411–12)).

[213] AR DOI 888 (stating that the exchange is "a conveyance under ANCSA, which is therefore subject to section 910 of ANILCA, 43 U.S.C. § 1638").

[214] AR DOI 889; *see also* AR 86428 (explaining the status of King Cove Corporation's land selections and noting that the corporation's existing selections would complete their entitlement under ANCSA); AR DOI 895 (map of U.S. pool lands showing that the lands to be exchanged from Izembek's Wilderness do not include outstanding King Cove Corporation-selected lands).

Claims Settlement Act, or this Act.[215]

The plain language of this provision makes the exemption from NEPA dependent on the conveyance being made under ANCSA, or the ANILCA amendments to ANCSA, to fulfill land entitlements. Additionally, while the list included in Section 910 is inclusive, it does not expressly include exchanges.[216] This makes sense because the initial conveyances of lands to which Native Corporations were entitled under ANCSA and that Congress sought to expedite in ANILCA would generally not occur by land exchange. The context of this provision also instructs that Congress intended the exemption to only apply to those conveyances necessary to meet ANCSA-entitlements.[217] Section 910 is part of ANILCA Title IX, entitled "Implementation of Alaska Native Claims Settlement Act and Alaska Statehood Act." Title IX deals largely with amendments to ANCSA, aimed at fulfilling land entitlements under ANCSA.[218] Given the title's focus on fulfilling ANCSA entitlements, Section 910 should be read to only apply to conveyances and other actions related to fulfilling Alaska Native and Alaska Native corporation entitlements granted under ANCSA and its amendments.

Considering the overall structure of ANILCA reinforces this interpretation. ANILCA refers to conveyances with Alaska Natives almost solely in the context of fulfilling ANCSA entitlements. For example, the term "conveyance" is used almost exclusively in Title IX, "Implementation of Alaska Native Claims Settlement Act and Alaska Statehood Act," and Title XIV, "Amendments to [ANCSA] and Related Provisions," and is not used widely throughout the Act. Other provisions of ANILCA that discuss "conveyances" with Alaska Natives also focus

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[215] 43 U.S.C. § 1638 (ANILCA § 910).

[216] *See Nat'l Labor Relations Bd. v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017) (stating that the interpretive canon, *expressio unius est exclusio alterius*, or "expressing one item of an associated group or series excludes another left unmentioned" applies when "circumstances support a sensible inference that the term left out must have been meant to be excluded." (internal quotations omitted)).

[217] *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (stating the cannon of statutory construction that "reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole'" (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997))).

[218] *See*, *e.g.*, ANILCA § 908 ("Until a Native Corporation has received conveyances to all of the land to which it is entitled to receive under the appropriate section or subsection of this Act . . .").

almost exclusively on fulfilling ANCSA entitlements.[219] This indicates that when Congress used the term "conveyance" in Section 910, it was referring to those conveyances under ANCSA that transfer land to meet the entitlements under ANCSA. Section 910 must be interpreted in light of this overall statutory context, where Congress was focused on clearing the way for entitlements to Alaska Natives to be done quickly.

The legislative history of Section 910 also demonstrates that Congress only intended to exempt conveyances to Alaska Natives of land entitlements under ANCSA or the ANCSA amendments contained in ANILCA.[220] In enacting ANCSA amendments in ANILCA, Congress was concerned that Alaska Natives obtain their entitlements quickly, which had not been happening in the years following ANCSA's passage.[221] From the beginning of ANILCA's legislative process, the EIS exemption ultimately enacted as Section 910 was designed to streamline the expedited conveyance provisions to fulfill ANCSA entitlements.[222] Section 910 was first passed by the U.S. House of Representatives Interior Committee in April 1978, as

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[219] *See*, *e.g.*, ANILCA §§ 201(8)(b)(3) (used in context of ANCSA conveyances), 506 (re: instrument of conveyance to Kootznoowoo on Admiralty Island), 810(c) ("Nothing herein shall be construed to prohibit or impair the ability of the State or any Native Corporation to make land selections and receive land conveyances pursuant to the Alaska Statehood Act or the Alaska Native Claims Settlement Act.").

[220] *See Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 780 (2018) (relying on legislative history at *Chevron* step 1); *id.* at 782–83 (Sotomayor, J., concurring) (explaining that reliance on legislative history to inform statutory interpretation and discern Congressional intent is proper).

[221] Congress believed "[t]ime is of the essence," that "[i]t is imperative that the Natives receive their land as quickly as possible," and "[p]reparation of an environmental impact statement under the NEPA is unnecessary and not warranted where implementation of the ANCSA or of this Title is involved." Attach. 3 at 9, S. REP. NO. 96-413, at 292 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5236. While broad language is used in this report to describe the exemption (that it "cover every possible action . . . for the Secretary to take in the process of conveying land title to the Alaska Natives"), the report states that application of the exemption is limited to ANSCA or that particular title of ANILCA (the expedited conveyance procedures). *Id*. ("It is intended that there will be no ambiguity as to the intent of this section and it should be liberally construed in order to expedite the implementation of the ANCSA, as amended, and this Title.").

[222] These provisions are contained in Sections 801 and 802 of the version of H.R. 39 passed by the House in 1978, Attach. 10 at 2–6, H.R. REP. NO. 95-1045, pt. I, at 32–36, and Sections 901 and 902 of the version passed by the Senate in 1978, Attach. 9 at 2–6, S. REP. NO. 95-1300, at 32–36.

section 810 of H.R. 39.[223] In that version of the legislation, only conveyances pursuant to the expedited conveyance procedures contained in other sections of the bill were exempted from NEPA. The provision was broadened by the Senate in October 1978 to exempt both the expedited conveyance provisions of the House Bill and conveyances to fulfill entitlements under ANCSA.[224] This broader version of the exemption was passed by committees in both chambers in 1979.[225] The bills passed in 1979 applied the EIS exemption to conveyances pursuant to ANCSA "or this title." In each bill, the land exchange provision that corresponds to section 1302 of ANILCA was in a separate title,[226] and, as a result, not within the scope of the exemption.

In the final months of congressional deliberation for ANILCA, the expedited conveyance provisions were moved from Title IX to Title XIV, and ultimately passed as Section 1437.[227] As a result, the EIS exemption in Section 910 no longer covered the expedited conveyance procedures it was originally drafted to benefit. When ANILCA was ultimately passed by Congress in December 1980, section 910 had been reworded to address this: it applied to conveyances to Alaska Natives pursuant to ANCSA or "this Act."[228] In carving out this exemption to NEPA, Congress emphasized that the exempted actions "have principally been at the direction of Congress"[229] such that NEPA's safeguards were not needed to ensure rational decision making. While the transfer of land to Alaska Natives under ANCSA has "principally been at the direction of Congress,"[230] the same cannot be said for future exchanges under Section 1302. In sum, the text, context, and legislative history instruct that Congress intended Section 910 to apply only to those exchanges that fulfill ANCSA entitlements.

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[223] Attach. 10 at 7, H.R. REP. NO. 95-1045, at pt. I, 42.

[224] Attach. 9 at 2–7, S. REP. NO. 95-1300, at 32–36, 47.

[225] Attach. 8 at 2, H.R. REP. NO. 96-97, pt. I, at 81; Attach. 3 at 3, S. REP. NO. 96-413, at 54.

[226] Attach. 8 at 3–4, H.R. REP. NO. 96-97, pt. I at 100–101 (Section 1101(a); Attach. 3 at 4–5, S. REP. NO. 96-413, at 73–74.

[227] 43 U.S.C. § 1641.

[228] 43 U.S.C. § 1638.

[229] Attach. 7 at 8, H.R. REP. NO. 96-97, pt. I, at 303.

[230] *Id*.

B. Section 910 Does Not Apply to the Exchange Agreement.

In ANILCA Section 910, Congress intended to facilitate the land transfers provided for in ANCSA. This land exchange is not one of those land transfers. By the terms of the Exchange Agreement itself, the land being exchanged "will not result in any charge against [King Cove Corporation's] ANCSA entitlement."[231] This exchange was not executed to fulfill King Cove Corporation's outstanding ANCSA entitlements; it was executed to transfer land so that the State of Alaska can permit, construct, and operate a road linking the communities of King Cove and Cold Bay.[232] In short, the Izembek exchange is not the type of land transaction that Congress intended ANILCA Section 910 to cover.

In exempting some land transactions from NEPA to achieve the purpose of completing ANCSA-land entitlements, Congress did not intend to exempt all land exchanges with Alaska Natives from NEPA. As the courts have stated, the fundamental policies embodied in NEPA should not be discarded absent some clear indication that Congress so intended.[233] Instead, deciding whether to exchange federal lands for a road is the quintessential government decision that NEPA was passed to apply to: to ensure informed decision making about environmental impacts and to allow public participation in a decision regarding national public lands.[234] The safeguards of NEPA are vital to ensure that the Secretary's review of environmental impacts is

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[231] AR DOI 889. Friends recognize that King Cove Corporation will relinquish selection rights to lands within Izembek. AR DOI 890. This does not change the fact that the Exchange Agreement is not being executed to fulfill King Cove Corporation's ANCSA entitlements because King Cove Corporation retains other ANCSA selections to complete its entitlement. *See also* AR DOI 895, 898 (map of U.S. Exchange Pool lands across isthmus and map of King Cove Corporation patented and selected lands showing that the lands through the isthmus are not King Cove Corporation ANCSA-selected lands).

[232] AR DOI 887 (Exchange Agreement recitals identifying that King Cove Corporation will identify the lands "needed for the construction, operation, and maintenance of a road linking King Cove with the Cold Bay airport"); Fed. Defs.' Answer to Pls.' First Am. Compl. for Declaratory and Injunctive Relief at ¶ 101 (ECF No. 35) & Intervenor-Defs. Answer to Pls.' First Am. Compl. at ¶ 101 (ECF No. 37) (indicating that the State of Alaska will permit, construct, and operate the road).

[233] *See Train v. Colo. Pub. Interest Research Grp.*, 426 U.S. 1, 24 (1976) (citing *United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 168–69 (1976)).

[234] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1063 (9th Cir. 2002); *see also* 40 C.F.R. §§ 1500.1(a), 1502.2(f), 1506.1(a) (explaining that NEPA requires an environmental analysis based on high-quality information before decisions are made).

thorough and objective especially where, as in the Izembek exchange, the land exchange effectively repeals Congressionally-established environmental protections.

In sum, the land exchange is not exempt from NEPA by Section 910 because it is not the type of land transaction that Congress intended Section 910 to cover. Section 910 does not expressly reference land exchanges and Congress intended section 910 to apply to transactions necessary to complete ANCSA entitlements. The Exchange Agreement does not fulfill King Cove Corporation's ANCSA entitlements. Because Section 910 does not apply to the Exchange Agreement, the Secretary was obligated to follow NEPA's analysis and review procedures. The failure to do so violates NEPA and the Exchange Agreement should be vacated.

IV. DOI VIOLATED THE ENDANGERED SPECIES ACT BY FAILING TO CONSULT ON THE EXCHANGE AGREEMENT.

The Secretary failed to comply with Endangered Species Act (ESA) Section 7 consultation procedures before executing the Exchange Agreement. The ESA expressly requires that federal agencies, "in consultation with and with the assistance of the Secretary," ensure that any action taken by the agency is not likely to jeopardize the continued existence of any threatened or endangered species, or result in the destruction or adverse modification of critical habitat.[235] Section 7's consultation requirements are the mechanism through which agencies ensure their decisions meet the conservation mandates of the ESA. The decision to approve a land exchange for the purpose of constructing a road across Izembek, where threatened species and critical habitat are present, required the Secretary to consult. The Secretary, however, did not consult on the potential impacts from the land exchange on Steller's Eiders, Northern sea otters, and their respective critical habitats prior to (or since) entering into the Exchange Agreement, in violation of the ESA.

A. The ESA Imposes Important Requirements on Federal Agencies to Protect Threatened and Endangered Species and their Critical Habitat.

Congress enacted the ESA to conserve endangered and threatened species and the ecosystems upon which they depend. [236] As the Supreme Court observed, the ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any

[235] 16 U.S.C. § 1536(a)(2).
[236] *Id*.

nation."[237] The ESA demonstrates "an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species" and "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies."[238]

To implement these important national policies, Congress provided specific requirements for all Federal agencies whose activities may impact endangered or threatened species or their critical habitats, including Section 7(a)(2), which contains a mandatory "consultation" requirement. Section 7 affirmatively commands all federal agencies, through consultation, to ensure that their actions do not jeopardize the continued existence of threatened or endangered species.[239] "This language admits of no exception."[240]

The ESA consultation process involves three steps, with each step acting as a screening function to determine whether subsequent steps are required.[241] These mandatory steps are:

> (1) "An agency proposing to take an action must inquire of the [] Service whether any threatened or endangered species "may be present" in the area of the proposed action."[242]
>
> (2) If a species may be present, "the agency must prepare a "biological assessment" to determine whether the species "is likely to be affected" by the action."[243]
>
> (3) "If the [biological] assessment determines that a threatened or endangered species "is likely to be affected," the agency must formally consult with the [Service].[[244]] The formal consultation process results in a "biological opinion" issued by [the Service].[[245]] If the biological opinion concludes that the proposed action would jeopardize the species or destroy or adversely modify critical habitat,[[246]] the action cannot go forward unless [the Service] suggests an alternative that avoids such jeopardization, destruction or adverse modification of

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[237] *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).
[238] *Id.* at 185.
[239] 16 U.S.C. § 1536(a)(2).
[240] *Tenn. Valley Auth.*, 437 U.S. at 173. Congress later amended section 7(a)(2) to allow exceptions in extraordinary circumstances, none of which apply here. *See* 16 U.S.C. § 1536(h).
[241] *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985).
[242] *Id*. (citing 16 U.S.C. § 1536(c)(1)).
[243] *Id*. (citing 16 U.S.C. § 1536(c)(1)).
[244] *Id*. (citing 16 U.S.C. § 1536(a)(2)).
[245] *Id*. (citing 16 U.S.C. § 1536(b)).
[246] *Id*. (citing 16 U.S.C. § 1536(a)(2)).

> critical habitat.[247] If the opinion concludes that the action will not violate the Act, the [Service] may still require measures to minimize its impact."[248]

The process of consultation is important to inform the agency's decisions. A biological opinion "advises the action agency as to whether the proposed action, alone or 'taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.'"[249] Consistent with Congress' express purpose of protecting and conserving endangered species, the Service must provide "reasonable and prudent alternatives" to the proposed action that can be taken by the Federal agency or applicant, which "would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat."[250] Finally, biological opinions not only prevent possible substantive violations of Section 7 (i.e, jeopardizing listed species), but also propose conservation measures intended to mitigate or remove any adverse effects on endangered or threatened species.[251] These recommendations are based upon the statutory responsibility of agencies to carry out programs for the conservation of endangered species.[252]

B. The Secretary Did Not Consult on the Exchange Agreement Despite the Presence of Listed Species and Critical Habitat in Izembek.

The Secretary failed to comply with the ESA in considering the effects of the land exchange and subsequent road construction on threatened species and critical habitat. It is undisputed that threatened and endangered species are present in Izembek.[253] The Alaska breeding population of Steller's Eider was listed as threatened in 1997, and its designated critical habitat includes areas within Izembek adjacent to the U.S. Exchange Lands pool.[254] Northern sea otters, listed as threatened in 2005, appear year-round in marine waters adjacent to Izembek, and

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[247] *Id*. (citing 16 U.S.C. § 1536(b)(3)(A)).

[248] *Id*. (citing 16 U.S.C. § 1536 (b)(4)(ii)–(iii)).

[249] *Conservation Cong. v. U.S. Forest Serv*., 720 F.3d 1048, 1051 (9th Cir. 2013) (quoting 50 C.F.R. § 402.14(g)(4)).

[250] 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. §§ 402.02, 402.14(h)(3).

[251] *Fla. Key Deer v. Stickney*, 864 F. Supp. 1222, 1229 (S.D. Fla. 1994) (citing *Romero–Barcelo v. Brown,* 643 F.2d 835, 857 (1st Cir. 1981)).

[252] *Id*. (quoting 16 U.S.C. § 1536(a)(1)).

[253] Fed. Defs.' Answer to Pls.' First Am. Compl. ¶¶ 50, 124 (ECF No. 35).

[254] AR 180861–65.

Izembek Lagoon was designated as part of its designated critical habitat in 2009.[255] "Once an agency is aware that an endangered species may be present in the area of its proposed action, the ESA requires it to prepare a biological assessment to determine whether the proposed action "is likely to affect" the species, and therefore requires formal consultation with the [Service]."[256] Land exchanges are federal actions that trigger ESA consultation obligations.[257] The Secretary was, therefore, obligated to prepare a biological assessment for the land exchange.

Despite the presence of listed species, the Secretary failed to engage in Section 7 consultation before entering into the Exchange Agreement. The agency did not undertake any of the mandatory steps under the ESA. The Federal Defendants admit that no biological assessment was prepared to evaluate impacts from the land exchange and road construction on federally-protected species.[258] The presence of listed species triggered, at a minimum, the obligation to engage in informal consultation, and potentially more. The failure to do so violated section 7 of the ESA.

In an earlier proposed land exchange, the Service expressly recognized its obligation to consult.[259] As part of the 2013 Land Exchange EIS process, the Service prepared a biological assessment solely on the Service's preferred alternative — the No Action Alternative — under which the land exchange would not occur and no road would be built.[260] In its biological assessment, the Service determined there would be "no effect" to federally-listed species because the agency was not going to move forward with exchanging lands, thereby completing its

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[255] AR 180868–71.

[256] *Thomas v. Peterson*, 753 F.2d at 763.

[257] *See, e.g.*, *Town of Superior v. U.S. Fish & Wildlife Serv.*, 913 F. Supp. 2d 1087, 1136–37 (D. Colo. 2012), *aff'd sub nom. WildEarth Guardians v. U.S. Fish & Wildlife Serv.*, 784 F.3d 677 (10th Cir. 2015) (Biological Assessment and Biological Opinion prepared for land exchange which would "permanently convert" Preble mouse critical habitat into transportation facilities); *Shasta Res. Council v. U.S. Dep't of Interior*, 629 F. Supp. 2d 1045, 1064 (E.D. Cal. 2009) (Bureau of Land Management consulted with National Marine Fisheries Service on details of a proposed land exchange, preparing a biological assessment); *Rocky Mountain Wild v. Dallas*, No. 15-CV-01342-RPM, 2017 WL 6350384, at *6 (D. Colo. May 19, 2017) (the Forest Service consulted with the Service pursuant to Section 7 concerning whether its proposed land exchange would jeopardize the continued existence of the Canada lynx or the Southwestern willow flycatcher, the two species in the project area listed as threatened or endangered).

[258] Fed. Defs.' Answer to Pls.' First Am. Compl. ¶ 125.

[259] *See* AR 191907–26, 191953–56.

[260] AR 191901.

consultation requirements.[261] The Service did not prepare any biological assessments for any other alternatives at that time.[262] The Secretary recognized the requirement to prepare a biological assessment for the proposed land exchange when it decided not to move forward. The Secretary's current approach in failing to consult and asserting that consultation is not necessary is contrary to the express legal requirements of the ESA and the Service's prior position.[263]

Further, the Service previously stated that the decision to exchange lands for purposes of constructing, operating, and maintaining a gravel road through this Congressionally-designated Wilderness and National Wildlife Refuge would affect threatened species. For both road locations considered in 2013, the Service found that an exchange allowing road construction and the subsequent operation and maintenance of the road had the potential to affect Steller's Eiders.[264] Likewise, the Land Exchange EIS found that Northern sea otters may be affected by road construction resulting from the land exchange under either potential corridor.[265] ESA regulations require that once a determination is made that the agency action may affect a listed species, formal consultation is required.[266] The Service was at a minimum required to engage in informal consultation and likely obligated to engage in formal consultation prior to entering into the Exchange Agreement.[267]

The Secretary ignored the clear procedures required under Section 7 of the ESA. The Exchange Agreement was signed without any consideration as to whether the proposed road might jeopardize Steller's Eiders or Northern sea otters, or the species' critical habitat. The Exchange Agreement enables a road that would bisect an expanse of tundra, lagoons, and other

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[261] AR 191904, 191924; *see also* 50 C.F.R. § 402.14(b)(1) (a federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment or as a result of informal consultation with the Service, the federal agency determines that the proposed action is not likely to adversely affect any listed species or critical habitat).

[262] AR 191923–24.

[263] *See supra* Summary Judgment Standard and Standards of Review at 16–17; Fed. Defs. Answer to First Am. Compl. ¶¶ 50, 124.

[264] AR 181304–08, 181437.

[265] AR 181310, 181435.

[266] 50 C.F.R. § 402.14.

[267] *See* Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19,949 (June 3, 1986) (noting that the threshold for triggering formal consultation is very low, that "the burden is on the Federal agency" to show that the action is not likely to affect species or habitat, and that "[a]ny possible effect" triggers formal consultation).

waterways that provide a vital feeding ground for federally-protected species. As the Supreme Court recognized, "[i]f the biological opinion concludes that the agency action would put a listed species in jeopardy, the ESA contains a process for resolving the competing demands of agency action and species protection."[268] Without the benefit of ESA consultation, no reasonable and prudent alternatives or potential conservation measures were considered to mitigate or eliminate the adverse effects of the land exchange and road. The Exchange Agreement was made without any considerations of the procedural safeguards of Section 7, in violation of the ESA and its implementing regulations.

C. DOI Must Consult on All Impacts that Result from the Exchange Agreement, Including All Impacts from the Road.

In addition to consulting on the Exchange Agreement itself, DOI had to also consider the impacts from the proposed road, regardless of whether another entity may eventually build it. The Exchange Agreement states that it is for the express purpose of building a road through the Izembek Refuge. As a result, impacts from road construction, operation, and maintenance must be evaluated under Section 7.

The ESA regulations require that the consultation process consider "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action . . . ." as well as the action's "cumulative effects."[269] Cumulative effects "are those effects of future State or private activities . . . that are reasonably certain to occur within the action area of the Federal action subject to consultation."[270] In interpreting these regulations, courts require agencies to consider all related impacts to agency actions that may affect listed species.[271] To comply with its Section 7

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[268] *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 686 (2007).

[269] 50 C.F.R. § 402.02.

[270] *Id*.

[271] *See, e.g., Defenders of Wildlife v. Babbitt,* 130 F. Supp. 2d 121, 128–30 (D. D.C. 2001) (requiring ESA Section 7 consultation analysis to include impacts of all activities within the action area that affect listed species); *Conner v. Burford,* 848 F.2d 1441, 1453–54 (9th Cir.1988) (requiring consultation to consider not only oil and gas leases, but also impacts from future exploration and development); *Nat'l Wildlife Fed'n v. Coleman*, 529 F.2d 359, 373 (5th Cir. 1976) (requiring analysis of residential and commercial development that was expected as a result of the construction of a highway as an indirect effect of highway construction) (internal quotations omitted); *see also San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971,

consultation requirements, DOI must consult not only on the land exchange, but on the impacts of road construction, operation, and maintenance to federally protected species.

In conclusion, the ESA requires federal agencies to give first priority to the declared national policy of saving endangered species. This requirement is put into practice through the Section 7 consultation process. It is undisputed that the Secretary followed none of the consultation procedures in approving the Exchange Agreement to build a road despite the presence of threatened species and their critical habitat. Because the Secretary failed to comply with the ESA, the Exchange Agreement is invalid.

V. BECAUSE IT VIOLATES FEDERAL LAW, THE COURT SHOULD VACATE THE EXCHANGE AGREEMENT AND ENJOIN FURTHER ACTION.

The Secretary was required to abide by ANILCA Title XI's procedures for allowing a road system through Izembek.[272] He did not adhere to any of the statutory requirements. Additionally, ANILCA only allows land exchanges when they further the purposes of the statute.[273] The Izembek land exchange does not further the purposes of ANILCA — it is contrary to the conservation goals of the statute and the Refuge as well as decades of Service findings and decisions regarding the detrimental impacts of a land exchange and road.[274] The Secretary was also required to engage in a NEPA review process and ESA consultation prior to entering into the Exchange Agreement.[275] He did not.

Under the APA, when an agency action "is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," or "without observance of procedure required by law," "[t]he reviewing court shall . . . hold unlawful and set aside [the] agency action."[276] The Supreme Court and the Ninth Circuit have repeatedly held that vacatur is the proper remedy under the APA.[277] In executing the Exchange Agreement, the Secretary violated

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1009 (9th Cir. 2014) (referencing *Nat'l Wildlife Fed'n v. Coleman*, 529 F.2d at 373, as a clear, oft-cited example of an "indirect effect").

[272] *See supra* Argument Part I at 19–23.

[273] *See supra* Argument Part II.A at 24–26.

[274] *See supra* Argument Part II.B at 26–31.

[275] *See supra* Argument Parts III, IV at 31–43.

[276] 5 U.S.C. § 706(2).

[277] *See, e.g.*, *FCC v. NextWave Personal Commc'ns, Inc.*, 537 U.S. 293, 300 (2003) ("The [APA] requires federal courts to set aside federal agency action that is 'not in accordance with law.'" (citation omitted)); *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326,

numerous statutes and failed to explain the reversal of decades of agency findings and decisions to reject a land exchange for road construction.[278] The Secretary's violations are serious and harmful.[279] Accordingly, the Exchange Agreement must be declared void and vacated, and any activity carried out under its terms — including survey and appraisal work for the road— should be prohibited.[280]

The ESA provides Friends an additional remedy: enjoining any activities taken pursuant to the Exchange Agreement (including survey and appraisal work) until DOI complies with its obligations under the statute.[281] To obtain a permanent injunction, plaintiffs must generally show: (1) that they have suffered an irreparable injury; (2) that remedies available at law, such as

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331 (1976) ("If the decision of the agency 'is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded . . . .'" (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973))); *Organized Vill. of Kake*, 795 F.3d at 970 (vacating an invalid agency regulation); *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1095 (9th Cir. 2011) ("When a court determines that an agency's action failed to follow Congress's clear mandate the appropriate remedy is to vacate that action."); *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 681 (9th Cir. 2007) ("Under the APA, we must set aside [the agency's] action if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" (quoting 5 U.S.C. § 706(2)(A))); *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 654 (9th Cir. 2007) ("Under the APA, the normal remedy for an unlawful agency action is to 'set aside' the action."), *rev'd on other grounds sub nom. Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009); *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 567 (9th Cir. 2002) ("[A]gency action taken without observance of the procedure required by law will be set aside." (quoting *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000))).

[278] *See Motor Vehicle*, 463 U.S. at 42 (stating that when an agency changes course, it must "supply a reasoned analysis for the change").

[279] *See Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532–33 (9th Cir. 2015) (vacating a rule that could harm bee populations where there the rule was not supported by the record).

[280] 5 U.S.C. § 706(2); 16 U.S.C. § 3164(a) (stating that any action taken to approve a transportation system unit not following Title XI's requirements will not have "any force or effect").

[281] 16 U.S.C. § 1540(g)(1)(A) (allowing any person to bring a civil suit "to enjoin any person, including the United States and any other governmental instrumentality or agency . . . , who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof"); *see also Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1089 (9th Cir. 2015) ("[T]he appropriate remedy for violations of the ESA consultation requirements is an injunction pending compliance with the ESA." (quoting *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1035 (9th Cir. 2005))).

monetary damages, are inadequate; (3) that the balance of equities tips in their favor; and (4) that an injunction is in the public interest.[282] Because the injunction may be lifted after consultation is completed, the first prong of the test is modified to mirror the preliminary injunction test: plaintiffs must show that they are "likely to suffer irreparable harm in the absence of preliminary relief."[283] Additionally, the ESA removes the latter three factors in the four-factor test from the Court's equitable discretion; plaintiffs need only show a likelihood of irreparable harm.[284] To establish irreparable harm, plaintiffs must demonstrate harm to their members' interest in individual members of the threatened or endangered species — not harm to the entire species itself.[285] This test is met and any further action to carry out the Exchange Agreement should be enjoined.

Plaintiffs will suffer irreparable harm in the absence of an injunction. The Exchange Agreement authorizes an array of activities in this Congressionally-designated Wilderness and National Wildlife Refuge to carry out its provisions.[286] Ground-disturbing activities and human presence have the potential to disrupt wildlife, and any further activities such as constructing, operating, and maintaining a gravel road would affect threatened species, as the Service determined in the Land Exchange EIS.[287] Activities undertaken to implement the Exchange Agreement, as well as road construction, operation and maintenance, will in turn likely cause irreparable damage to Plaintiffs' members' interests in viewing and enjoying threatened Steller's Eiders and Northern sea otters.[288] Until the agencies remedy the Section 7 violation by

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[282] *Cottonwood,* 789 F.3d at 1088 (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

[283] *Nat'l Wildlife Fed'n. v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 817 (9th Cir. 2018) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

[284] *Id*. (citing *Cottonwood*, 789 F.3d at 1090).

[285] *Id.* at 818 ("The ESA accomplishes its purpose in incremental steps, which include protecting the remaining members of a species. Harm to those members is irreparable because once a member of an endangered species has been injured, the task of preserving that species becomes all the more difficult." (internal citations and quotation omitted)); *see also Friends of the Earth, Inc. v. Laidlaw Envt'l Servs.*, Inc., 528 U.S. at 181 (for standing purposes, plaintiff must show "injury to the plaintiff" rather than "injury to the environment").

[286] AR DOI 889–891 (describing survey needs to identify a road corridor and material sites, rights of access upon lands subject to the exchange, and the need for a contaminants survey).

[287] *See supra* text accompanying notes 264, 265.

[288] Culliney Decl. ¶ 17; Dugan Decl. ¶¶ 15–16; Hoover Decl. ¶¶ 13–14; Kolton Decl. ¶ 8;

completing consultation, the violation is ongoing and injunctive relief is the necessary and appropriate remedy for the Secretary's violation.

CONCLUSION

For the foregoing reasons, the Court should grant Friends' Motion for Summary Judgment, vacate and void the Exchange Agreement, and prevent any activities from moving forward pursuant to it. Additionally, the Court should enter a permanent injunction pursuant to the ESA that prevents any activities related to the Exchange Agreement until statutory consultation requirements are met.

Respectfully submitted this 11th day of July, 2018.

s/ Brook Brisson
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Raskin Decl. ¶¶ 18, 23; Rogers Decl. ¶¶ 16–17; Salvo Decl. ¶¶ 20, 23; Sorenson-Groves Decl. ¶¶ 19, 24 ; Spivak Decl. ¶¶ 12–13, 18, 23, 25; Wasley Decl. ¶¶ 12, 13; Whittington-Evans Decl. ¶ 25.

CERTIFICATE OF SERVICE

I certify that on July 11, 2018, I caused a copy of the MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT to be electronically filed with the Clerk of the Court for the U.S. District Court of Alaska using the CM/ECF system, which will send electronic notification of such filings to the attorneys of record in this case, all of whom are registered with the CM/ECF system.

s/ Brook Brisson
Brook Brisson