Nos. 20-35721, 20-35727, and 20-35728

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRIENDS OF ALASKA NATIONAL WILDLIFE REFUGES, et al.,
Plaintiffs-Appellees,

v.

DAVID BERNHARDT, et al.,
Defendants-Appellants,

and

KING COVE CORPORATION, et al.,
Intervenor-Defendants/Appellants,

and

STATE OF ALASKA,
Intervenor-Defendant/Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. 3:19-cv-00216 JWS

PLAINTIFF-APPELLEES' CORRECTED ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Friends of Alaska National Wildlife Refuges, Defenders of Wildlife, Wilderness Watch, Center for Biological Diversity, The Wilderness Society, National Audubon Society, National Wildlife Refuge Association, and Sierra Club state they have no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States and that no publicly held corporation owns 10% or more of their stocks because they have never issued any stock or other security.

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INTRODUCTION

The District Court correctly held that the Exchange Agreement to trade lands within the Izembek National Wildlife Refuge (Izembek or the Refuge) and its Wilderness to allow for construction of a road is unlawful. It violates the Alaska National Interest Lands Conservation Act (ANILCA) and is an impermissible reversal of agency policy. Congress established Izembek because of its ecologically unique habitat and wilderness characteristics. Izembek is "an invaluable part" of the National Wildlife Refuge System because of its "unique, irreplaceable, and internationally recognized habitats that provide critical support to a rich diversity of species."[1] Nearly all of it is designated Wilderness.[2] The Secretary of Interior (Secretary) entered an Exchange Agreement to allow for road construction through the heart of the Refuge. In doing so, he failed to comply with the substantive and procedural requirements of ANILCA and reversed agency policy without adequate explanation. The District Court's judgment should be upheld.

ISSUES PRESENTED FOR REVIEW

1. Title XI of ANILCA provides the sole authority for the approval and authorization of transportation systems within conservation system units like

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[1] Federal Defendants/Appellants' Excerpts of Record ("ER") at 2-ER-41.
[2] 2-ER-40 (noting that 300,000 of Izembek's 315,000 acres are Wilderness).

Izembek.[3] The Secretary did not follow Title XI's procedures in executing the exchange. Did the Secretary violate Title XI because he failed to follow its procedures to allow for a road through Izembek?

2. ANILCA's exchange provision requires that any land exchange must further the statute's purposes. ANILCA's overarching purposes and Izembek's specific purposes are for conservation and protection of ecologically important habitats, wildlife and wilderness values, and subsistence. Was the Secretary's determination that the Exchange Agreement meets ANILCA's purposes arbitrary and capricious?

3. For decades, the Secretary and U.S. Fish and Wildlife Service (Service) made factual findings that a road through Izembek would irreversibly damage its values and be incompatible with the Refuge's purposes. In reversing course and entering the land exchange to allow for a road through the Refuge, the Secretary relied on unexplained and contradictory facts. Did the Secretary's reversal violate the Administrative Procedure Act (APA)?

JURISDICTIONAL STATEMENT

Plaintiffs/Appellees agree with the Statement of Jurisdiction contained in Federal Appellants' Opening Brief.[4]

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[3] 16 U.S.C. § 3161.

[4] Federal Appellants' Opening Brief, ECF No. 14 [hereinafter "DOI Br."] at 8–9.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The Service has evaluated the effects of a road from the community of King Cove to Cold Bay through Izembek numerous times.[5] Each time, the Service found that the impacts would irreversibly damage Izembek and refused an exchange.[6] Most recently in 2013, the Secretary concluded, consistent with all prior decisions, that a road through Izembek would have significant detrimental impacts and again declined to exchange lands.[7]

This is the second time the Secretary has unlawfully reversed earlier decisions of the Department of Interior (Interior) and executed a land exchange for a road. In 2017, Interior tried to exchange lands with King Cove Corp. to allow for construction and operation of a road through Izembek.[8] Plaintiffs-Appellees Friends of Alaska National Wildlife Refuges, et. al. (collectively "Friends") challenged that exchange. The District Court found that agreement violated the APA because the Secretary failed to justify the change in policy from the 2013 decision.[9]

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[5] 2-ER-42–43.

[6] *Id.*

[7] 2-ER-39–40, 43.

[8] 2-ER-187–95.

[9] *Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt* (*Friends*), 381 F. Supp. 3d 1127, 1143 (D. Alaska 2019).

While that decision was on appeal to this Court, the Secretary entered into the Exchange Agreement at issue in this case, again attempting to trade lands in Izembek for a road. This time, the Secretary provided a memorandum in an effort to justify the exchange (Secretary's Memo).[10] Friends challenged the Exchange Agreement, alleging violations of the APA, ANILCA, the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA).[11] Defendants-Appellants King Cove Corp., Agdaagux Tribe of King Cove, Native Village of Belkofski (collectively "KCC"), and the State of Alaska (State) intervened as defendants.[12]

The District Court granted summary judgment for Friends.[13] The court again concluded that "the Secretary failed to provide adequate reasoning to support the change in policy in favor of a land exchange and a road through Izembek."[14] The court acknowledged that under Supreme Court and this Court's precedent, while an agency may give more weight to socioeconomic concerns based on the same record, if that rebalancing requires factual findings that contradict prior findings,

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[10] 2-ER-215–34.

[11] 1-ER-6–22.

[12] 1-ER-2. "KCC" is used throughout this brief to refer to Intervenor-Defendants/Appellants. King Cove Corp. refers solely to the Alaska Native Claims Settlement Act (ANCSA) Corporation.

[13] 1-ER-24.

[14] 1-ER-15.

the Secretary must provide a substantial justification.[15] The court found the Secretary's Memo did not provide good reasons for discounting Interior's prior conclusions and contained contradictory factual findings that were not supported by the record.[16]

The court also found that the exchange was impermissible under ANILCA for two reasons. First, it failed to further the purposes of ANILCA because the Secretary's assertions that the exchange for a road furthered ANILCA's purposes were not supported by the record.[17] Second, the court found that the Secretary failed to follow Title XI's exclusive procedures for approving a transportation system through Izembek.[18] As a result, the court ruled that the Exchange Agreement had "no force or effect."[19] Finding that the errors were "serious and fundamental," the court vacated the Exchange Agreement.[20] Federal Defendants, KCC, and the State (collectively "Appellants") now appeal. This Court should affirm the District Court's decision.

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[15] 1-ER-9.
[16] 1-ER-10–15.
[17] 1-ER-15–19.
[18] 1-ER-19–22.
[19] 1-ER-23 (citing 16 U.S.C. § 3164(a)).
[20] *Id.* The court did not reach Friends' NEPA or ESA claims. 1-ER-22.

II. IZEMBEK'S UNIQUE AND EXCEPTIONAL WILDLIFE HABITAT HAS BEEN PROTECTED FOR DECADES.

Izembek has "some of the most striking wildlife diversity and wilderness values of the northern hemisphere"[21] due to its unique habitat including wetlands, lagoons, and shallow bays.[22] 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.[23] The isthmus is particularly valuable to wildlife because the tides, ice, and sea conditions on its north and south sides do not mirror one another.[24] This allows many animals — especially birds — to select the side with more favorable conditions at a given time, providing consistent access to food and shelter.[25] A road corridor through this narrow isthmus is the subject of the invalidated land exchange.[26]

Izembek is one of the world's most important migratory bird staging and wintering habitats, and supports highly sensitive and unique species.[27] 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

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[21] SER-131

[22] SER-142, 134; 2-ER-39.

[23] SER-142, 134, 95; 2-ER-39.

[24] SER-99.

[25] *Id.* This is especially important for Brant and Steller's Eiders. *See* SER-96, 99 (explaining how over-wintering Brant move between the lagoons).

[26] 2-ER-35 (area map); 2-ER-244 (map appended to Exchange Agreement).

[27] SER-135, 114.

breeding grounds.[28] Izembek Lagoon's brackish water covers one of the world's largest eelgrass beds, creating a rich feeding and resting area for hundreds of thousands of waterfowl.[29] The Kinzarof Lagoon, on the Gulf of Alaska side of the isthmus, also has a large intertidal eelgrass bed.[30] 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.[31] Brants' reliance on eelgrass for forage during migration and wintering make them highly vulnerable to degradation of Izembek's habitat.[32] 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.[33]

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.[34] Emperor Geese also rely on the isthmus for staging, wintering, and

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[28] SER-135.
[29] SER-134, 98; 2-ER-39.
[30] SER-114.
[31] SER-99; 2-ER-43.
[32] SER-114, 100.
[33] SER-114.
[34] 2-ER-43.

migrating habitat, and for protection from predators.[35] Emperor Geese are "one of the rarest and most vulnerable goose species on the planet," and are found only in the Bering Sea area.[36] Steller's Eiders, a species listed as "threatened" under the ESA, also rely on Izembek.[37] 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 Izembek Lagoon becomes too icy.[38] 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.[39]

In addition to exceptional bird habitat, Izembek provides high quality brown bear and caribou habitat.[40] Izembek supports the highest density of brown bears on the Southern Alaska Peninsula.[41] The Southern Alaska Peninsula caribou herd also 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.[42]

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[35] 2-ER-44.
[36] *Id.*
[37] *Id.*
[38] *Id.*; SER-103.
[39] SER-102.
[40] SER-112; 2-ER-44.
[41] SER-112–13, 101.
[42] 2-ER-44.

Because of Izembek's ecological values, efforts to protect the area began in the early 1940s.[43] The area was first protected in 1960 as the Izembek National Wildlife Range (Range).[44] The Range was specifically set aside as a "refuge, breeding ground, and management area for all forms of wildlife,"[45] because of the area's importance to waterfowl, brown bear, and caribou.[46] In establishing the Range, Interior recognized that it "contains the most important concentration point for waterfowl in Alaska."[47]

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."[48] To protect these values, Izembek was first proposed for Wilderness designation in 1970.[49]

In 1980, Congress passed ANILCA to protect Alaska's exceptional ecological values, wildlife, and habitats on the landscape scale.[50] To achieve this,

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[43] SER-115–17.
[44] SER-170, 117.
[45] SER-170, *see also* 2-ER-40 (citing Public Land Order 2216 establishing the Range).
[46] SER-171–73.
[47] SER-171.
[48] SER-105–07.
[49] SER-111, 169.
[50] 16 U.S.C. § 3101(b).

ANILCA established 104 million acres of conservation system units, including National Wildlife Refuges and Wilderness areas.[51]

In ANILCA, Congress re-designated the Range as the Izembek National Wildlife Refuge because of its ecologically unique habitat and wilderness characteristics.[52] At 315,000 acres, Izembek is the smallest of Alaska's National Wildlife Refuges, but one of the most ecologically unique,[53] and "is an invaluable part of the network of lands and waters that constitute the National Wildlife Refuge System."[54] Nearly all of the Refuge is designated Wilderness (Izembek Wilderness) — approximately 300,000 of its 315,000 acres.[55] Congress recognized that Wilderness designation for the majority of Izembek would "protect this critically important habitat."[56]

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[51] *Id.* § 3101(a).

[52] Pub. L. No. 96-487, § 303(3)(A), 94 Stat. 2371, 2390 (1980).

[53] SER-134; *see also* SER-139 ("[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.").

[54] 2-ER-41.

[55] ANILCA §§ 303(3)(A), 702(6).

[56] SER-154, H.R. REP. NO. 96-97, pt. II, at 136 (1979); *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).

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 salmonoids"; (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.[57] These purposes reflect Izembek's "unique, irreplaceable, and internationally recognized habitats that provide critical support to a rich diversity of species."[58]

In addition to national recognition and federal protection, Izembek is internationally-recognized by the Ramsar Convention as a "Wetland of International Importance."[59] Izembek was designated because of its "unique ecology," large eelgrass beds, and "the importance of the area to migratory birds."[60]

[57] § 303(3)(B).
[58] 2-ER-41.
[59] SER-118, 98; 2-ER-41.
[60] SER-136.

III. NUMEROUS STUDIES AND DECISIONS HAVE 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.[61] 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.[62] Each time that the Service evaluated the issue, the Service found that the impacts of a road on wildlife resources, habitats, and the Izembek Wilderness would irreversibly damage Izembek's unique and ecologically important habitats and its "globally significant landscape."[63] Each time, the Service declined to exchange Refuge lands for state or private lands to allow for a road.

Interior conducted a road analysis in the early 1980s as part of a regional planning effort.[64] In management planning documents, the Service concluded that there would be impacts to Tundra Swans, waterfowl populations, brown bears,

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[61] 2-ER-42–43 (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").

[62] 2-ER-41.

[63] 2-ER-38, 42–43. The Secretary's most recent decision to not move forward with a land exchange was upheld in 2015. *Agdaagux Tribe of King Cove v. Jewell*, 128 F. Supp. 3d 1176 (D. Alaska 2015).

[64] SER-129.

caribou (including migratory routes), wolf and wolverine populations, wilderness values, and subsistence from a road.[65] Interior also acknowledged that a road through Izembek's Wilderness could only be built with Congressional approval under Title XI of ANILCA.[66]

The Service revisited the issue in 1996 and again found that a road through Izembek would have unacceptable environmental impacts.[67] One year later, the King Cove Corp. offered to exchange its lands for a right-of-way across Izembek. The Service declined the offer because of the adverse impacts a road would have on wildlife.[68]

The Service completed yet another study analyzing the potential impacts of the road in 1998.[69] 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

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[65] SER-137–41; *see also* SER-93 (listing the findings in the 1985 management plan of the impacts of a road).

[66] *See* SER-141 ("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."); SER-130 (noting that legislation was requested to "provide Congressional relief from environmental provisions in [ANILCA]" and "authorize the construction of a road corridor through Izembek National Wildlife Refuge and Wilderness").

[67] SER-126–33.

[68] SER-129.

[69] SER-125 (citing unpublished report available in Service Region 7 office).

threat to wildlife and wilderness values within the Izembek Complex."[70] In discussing the 1997 proposal, the Service stated that it "declined the exchange" because "the proposed road would have an adverse impact on the significant wildlife and wilderness resources in the area."[71]

In 1999, Congress sought to resolve King Cove's transportation concerns while protecting the Refuge by funding a hovercraft that operated from 2007 to 2010, performing all requested medical evacuations.[72] Nevertheless, the Aleutians East Borough (Borough) suspended hovercraft services.[73]

During the operation of the hovercraft, Congress authorized the Secretary to exchange Izembek lands if found to be in the public interest as part of the Omnibus Public Land Management Act of 2009 (OPLMA).[74] Under OPLMA, the King Cove Corp. offered 13,300 acres of its land and the State offered 43,093 acres of its land in exchange for roughly 200 acres within Izembek.[75] Road use would be

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[70] SER-121.

[71] *Id.*

[72] SER-110; SER-124, H.R. 4328 REP. NO.105-825 (1998); 2-ER-41–42; *see also Friends*, 381 F. Supp. 3d at 1131.

[73] 2-ER-42.

[74] Omnibus Pub. Land Mgmt. Act of 2009, Pub. L. No. 111-11, Subtitle E, § 6402(a), 123 Stat. 991, 1178 (2009). OPLMA authorized the Secretary to exchange lands, but did not itself authorize road construction, as the Secretary incorrectly asserts. DOI Br. at 16.

[75] 2-ER-38–39; SER-108.

restricted "primarily for health and safety purposes . . . and only for noncommercial purposes."[76]

IV. THE SECRETARY FOUND THAT A ROAD THROUGH IZEMBEK WOULD IRREPARABLY AND UNNECESSARILY DAMAGE THE REFUGE.

After the public process and environmental review mandated by OPLMA, the Secretary declined to authorize the land exchange.[77] 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."[78] The Secretary explained that the decision "protects the unique resources the Department administers for the entire Nation" and 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 and in ANILCA.[79]

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[76] OPLMA § 6403(a)(1).

[77] 2-ER-38.

[78] 2-ER-38–39; *see also* SER-108 ("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."); SER-107 (explaining "lands lost and lands gained have little in common with regard to cover types, wildlife potential, or ecological process/function").

[79] 2-ER-39, 56; *see also* SER-108 ("This alternative was selected because it is believed to best meet refuge purposes and the Service mission.").

The Secretary noted that migratory and resident bird species would be particularly vulnerable to impacts from road construction and operation on the narrow isthmus.[80] 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.[81] 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."[82] With respect to Wilderness, the Secretary determined that the impacts would not be limited to de-designated lands; impacts of road construction and operation to wilderness character would extend far beyond the road corridor.[83] Road construction would increase human traffic and noise, change the hydrology by damaging wetlands and causing run-off, and introduce contaminants and invasive species.[84] Pedestrian and all-terrain vehicle use would have "profound adverse effects on wildlife use and habitats of the narrow isthmus that comprises the Refuge."[85] The Secretary found that these

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[80] 2-ER-39, 43–44.
[81] 2-ER-44.
[82] *Id*.
[83] 2-ER-45.
[84] 2-ER-40.
[85] 2-ER-40; *see also* 2-ER-43 ("Additionally, construction of a road through this Wilderness area will lead to increased human access and activity, including likely unauthorized off-road access . . . .").

impacts would extend far into the Refuge and even outside Izembek's boundaries.[86]

The Secretary also found that a road would undermine the directives of various statutes, while not allowing an exchange for a road would "support[] the continued management of the Izembek Refuge consistent with the purposes for which it was established."[87] 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."[88] 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."[89] The impacts to the Wilderness lands that remained in the system would also be "irrreparabl[e] and significant[]."[90] For all of these reasons, the Secretary declined to proceed with the land exchange.[91]

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[86] 2-ER-45; *see also* SER-108 ("Simply exchanging lands will not compensate for the ripple effects on habitat and wildlife due to uses on and beyond the road . . . .").

[87] 2-ER-43; *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").

[88] 2-ER-56; *see also* 2-ER-43 (finding that no exchange meets Interior's obligations to achieve the mission of the National Wildlife Refuge System).

[89] 2-ER-45.

[90] *Id.*

[91] 2-ER-56.

In reaching the same decision as every administration before it, the Secretary recognized the need for safe transportation to medical services, and "carefully considered the input . . . 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."[92] 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.[93] 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.[94]

The King Cove Corp., along with the Agdaagux Tribe of King Cove, the Native Village of Belkofski, the Aleutians East Borough, the City of King Cove, two individuals, and the State of Alaska challenged the Secretary's decision.[95] The U.S. District Court of Alaska upheld the Secretary's decision to not move forward with a land exchange.[96] The Court held that "[t]he Secretary's determination that

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[92] 2-ER-46.

[93] 2-ER-39, 56; SER-96.

[94] 2-ER-56; *see also* 2-ER-59–176 (2015 assessment of non-road alternatives for a transportation link between King Cove and Cold Bay finding that non-road alternatives could provide reliable transportation).

[95] *Agdaagux Tribe of King Cove*, 128 F. Supp. 3d 1176.

[96] *Id.* at 1200–01.

the No Action Alternative would best achieve the Refuge's purpose, the agency's statutory mission, and Congress' intent under ANILCA was based on substantial evidence in the record."[97] The plaintiffs appealed that decision to this Court, but later voluntarily dismissed the case.[98]

V. THE SECRETARY ENTERED AN ILLEGAL EXCHANGE AGREEMENT VACATED BY THE DISTRICT COURT — TWICE.

The Secretary signed an "Agreement for the Exchange of Lands" (2018 Exchange Agreement) with King Cove Corp. in early 2018.[99] That agreement bound the United States to exchange up to 500 acres within Izembek for a road.[100] The 2018 Exchange Agreement cited Section 1302(h) of ANILCA as the authority for the exchange.[101] It set forth a process for the exchange and mandated that the lands would be of equal value.[102] The 2018 Exchange Agreement also included lands that would be used for material supply and disposal sites (i.e., gravel sites), as well as access to such sites, which were not included in previously considered (and rejected) land exchanges.[103] The 2018 Exchange Agreement imposed some

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[97] *Id.* at 1194.

[98] *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).

[99] SER-75–90; *see also Friends*, 381 F. Supp. 3d at 1133.

[100] 2-ER-188–89.

[101] 2-ER-187–88.

[102] 2-ER-188–91.

[103] SER-91–92; 2-ER-189, 195.

use prohibitions, including a requirement that the road be used primarily for health and safety purposes.[104] Friends challenged the 2018 Exchange Agreement.[105]

During the pendency of that lawsuit and in furtherance of the exchange, the Bureau of Land Management (BLM) conducted a cadastral survey of the road corridor within the Wilderness using a helicopter and installing survey monuments.[106] This survey delineates the lands being exchanged under the present Exchange Agreement.[107]

In March 2019, the District Court granted summary judgment to Friends.[108] The Court found that the 2018 Exchange Agreement violated the APA because the Secretary did not acknowledge the agency's change in policy, provided no reasoned explanation for disregarding prior determinations, and ignored findings concerning a road's environmental impact on Izembek, and vacated the agreement.[109] Defendants appealed the decision.[110]

While the appeal was pending, the Secretary signed this Exchange Agreement which is substantially similar to the 2018 Exchange Agreement. Once

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[104] 2-ER-189.
[105] *Friends*, 381 F. Supp. 3d at 1133.
[106] SER-6–73.
[107] 2-ER-235.
[108] *Friends*, 381 F. Supp. 3d at 1144.
[109] *Id*. at 1140–41, 1143–44.
[110] *See Friends*, Federal Defendants' Notice of Appeal to the United States Court of Appeals for the Ninth Circuit (May 24, 2019), at 2 (ECF No. 87).

again, the Exchange Agreement commits the United States to exchange lands with the King Cove Corp. for construction of a road.[111] 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. Under the Exchange Agreement, no additional decisions remain to be made by the Secretary, Interior, or the Service regarding whether to exchange lands.

Unlike the prior proposed exchanges, however, this Exchange Agreement does not limit use of the road for health and safety purposes nor does it impose restrictions on commercial use.[112] The Exchange Agreement was also accompanied by a memorandum that purports to explain the decision.[113] The Secretary's Memo instead makes erroneous legal arguments and ignores important factual findings to justify this second unlawful land exchange.

In June 2020, the District Court again granted summary judgment to Friends, finding the Exchange Agreement violated the APA and ANILCA.[114]

SUMMARY OF THE ARGUMENT

To authorize a road within Izembek, the Secretary was required to follow the procedures in ANILCA Title XI. This issue is dispositive and the District Court's

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[111] 2-ER-235.
[112] *See supra* note 76.
[113] *See* SER-5; 2-ER-215–234.
[114] 1-ER-1, 24.

judgment can be upheld on this basis alone. It is undisputed that the Exchange Agreement was executed to allow a road through Izembek. As such, this is the type of transaction Congress intended Title XI to govern. The Secretary's interpretation that Title XI does not apply because the lands would no longer be federal lands after they are exchanged would nullify the protections Congress established when adopting Title XI; ANILCA's exchange provision cannot be used to circumvent Title XI's requirements.[115] The Secretary was required to follow Title XI's procedures in entering the Exchange Agreement to allow for a road through Izembek. He did not. The District Court properly found that the Secretary violated ANILCA Title XI and the Exchange Agreement is, therefore, void.

In addition to violating Title XI, the Secretary violated ANILCA's exchange provision because the exchange does not achieve ANILCA's purposes. The Appellants argue that the land exchange achieves ANILCA's purposes because it benefits King Cove's economic and social needs.[116] As the District Court properly concluded, when executing an exchange, the Secretary must ensure that it furthers all of ANILCA's and Izembek's purposes.[117] The Secretary's findings that the

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[115] DOI Br. at 39–43.

[116] DOI Br. at 33; *see also* King Cove Corp. et. al., Intervenor-Defendant/Appellants Brief, ECF No. 11 [hereinafter "KCC Br."] at 37–39 (citing economic and social needs); State of Alaska Intervenor-Defendant/Appellants Brief, ECF No. 17 [hereinafter "SOA Br."] at 18–19 (same).

[117] 1-ER-18–22.

exchange would do so are not supported by, and are inconsistent with, the record. Because the Secretary did not ensure that the exchange was consistent with ANILCA's purposes, the agreement violated the law and the District Court's judgment should be affirmed on this basis.

Finally, the Secretary's "rebalancing" of facts does not meet the legal requirements for an agency reversal. The Secretary failed to adequately explain the reversal of findings and decisions that a land exchange to allow a road would harm Izembek and not further ANILCA's purposes. The Secretary's claims that he rebalanced facts, gave greater weight to health and safety, and agreed to the exchange regardless of the environmental harm does not satisfy the law.[118] While agencies may give more weight to different factors when changing decisions, the Secretary cannot disregard the prior findings that conflict with its new policy to exchange lands to allow for a road. The District Court properly found that the Secretary failed to provide the required reasoned explanation for its reversal in policy and the judgment should be affirmed on this basis.

ARGUMENT

To exchange lands within Izembek and its Wilderness to allow for a road, the Secretary was required to follow the detailed procedures of ANILCA Title XI.

[118] *FCC v. Fox Television Stations* (*Fox*), 556 U.S. 502, 515 (2009); *see* DOI Br. at 24–26.

The Secretary failed to do so, and the Exchange Agreement is therefore void. This Court can uphold the District Court's judgment solely on this basis. However, the Exchange Agreement violates the law for two additional reasons: the Secretary has not shown that it meets ANILCA's general and Izembek's specific purposes, and the Secretary made new, contradictory factual findings that are not explained or supported by the record. The Secretary asserts that the "factual developments . . . were in the nature of additional factual support for the decision. But those facts were not necessary to it."[119] In reality these facts — which contradict decades of agency findings — underpinned the Secretary's justification that the exchange meets ANILCA's purposes.[120] The Secretary cannot sweep aside these contradictory findings while simultaneously relying upon them to support his argument that the Exchange Agreement meets ANILCA's purposes.

[119] DOI Br. at 26.

[120] 2-ER-230–32 (Secretary's Memo explaining that the exchange meets the purposes of ANILCA because of a lack of viable transportation alternatives, costs of medevacs, and because of the value of lands received via exchange); *see also* DOI Br. at 32–33, 35–36 (relying on the value of lands to be received via exchange as furthering ANILCA's purposes), 38 (asserting that alternative transportation options are insufficient to meet ANILCA's economic and social purposes); SOA Br. at 22–26 (arguing that that the permanency of the protections for lands to be acquired would enhance the refuge).

I. STANDARD OF REVIEW

The District Court's grant of summary judgment is reviewed de novo.[121] All issues on this appeal are reviewed under the APA. Under the APA, courts "hold unlawful and set aside agency action, findings, and conclusions" if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"[122] or if adopted "without observance of procedure required by law."[123] 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 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."[124] Additionally, a court should not "defer to an agency decision that is without substantial basis in fact."[125]

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[121] *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1994).

[122] 5 U.S.C. § 706(2)(A); *see also Nat'l Audubon Soc'y v. Hodel*, 606 F. Supp. 825, 833–35 (D. Alaska 1984) (concluding that a challenge to an agency exchange agreement under Section 1302(h) of ANILCA was reviewable under the arbitrary and capricious standard).

[123] 5 U.S.C. § 706(2)(D).

[124] *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* (*State Farm*), 463 U.S. 29, 43 (1983).

[125] *Alaska v. Fed. Subsistence Bd.*, 544 F.3d 1089, 1094 (9th Cir. 2008) (quoting *Sierra Club v. EPA*, 346 F.3d 955, 961 (9th Cir.), *amended by* 352 F.3d 1186 (9th Cir. 2003) (internal quotation omitted)).

Interpretation of a statute is a question of law.[126] When reviewing an agency's interpretation of a statute, courts follow *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[127] The first step is to consider the statute to determine "whether Congress has directly spoken to the precise question at issue."[128] Courts employ "traditional tools of statutory construction" to determine Congressional intent.[129] "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."[130] If Congress has not spoken to the issue, or if Congress' intent is unclear, courts then consider the agency's interpretation, and give it effect if it is permissible.[131]

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

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

[127] 467 U.S. 837 (1984).

[128] *Id.* at 842.

[129] *Defs. of Wildlife v. Browner*, 191 F.3d 1159, 1162 (9th Cir. 1999) (quoting *Chevron*, 467 U.S. at 843 n.9).

[130] *Chevron*, 467 U.S. at 842–43.

[131] *Id.* at 843.

slate."[132] A policy change violates the APA "if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so."[133]

Finally, KCC's argument that ambiguities in the Exchange Agreement should be resolved in its favor is inapplicable because the Secretary's legal errors "do not stem from an interpretation of an ambiguous term in the agreement."[134]

II. THE EXCHANGE AGREEMENT VIOLATES ANILCA TITLE XI AND IS VOID.

To authorize a road within Izembek, the Secretary was required to follow the procedures in ANILCA Title XI. This issue is dispositive. It is undisputed that the Exchange Agreement is to allow a road through Izembek. Accordingly, Title XI governs. ANILCA's exchange provision (Section 1302(h)) does not exempt the Secretary from those requirements.

Congress enacted Title XI "to minimize the adverse impacts of siting transportation and utility systems within units established or expanded by this

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[132] *Fox*, 556 U.S. at 515; *see also 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." (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970))).

[133] *Organized Vill. of Kake v. U.S. Dep't of Agric.* (*Kake*), 795 F.3d 956, 966 (9th Cir. 2015) (en banc) (quoting *Fox*, 556 U.S. at 537 (Kennedy, J., concurring)).

[134] 1-ER-22 (quotation); KCC Br. at 49; *see also Friends*, 381 F. Supp. 3d at 1143 (noting lack of "reasoned explanation" for reversal of policy).

Act."[135] To achieve this goal, Congress established "a single comprehensive statutory authority for the approval or disapproval of applications for such systems,"[136] and adopted a detailed procedure that "supersedes rather than supplements existing law."[137]

Section 1104 governs the approval of all transportation systems and requires a very specific agency and public process.[138] Congress mandated that each federal agency make eight findings to approve a transportation system unit within a conservation system unit, including: alternative routes to minimize impacts; whether impacts would affect the purposes of the conservation system unit; 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."[139] For transportation systems proposed through Wilderness, Title XI expressly limits the Executive Branch's ability to act unilaterally. Under Section 1106, a transportation system is not allowed in Wilderness unless it is recommended by the President and approved by Congress.[140] These procedures

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[135] 16 U.S.C. § 3161(c).
[136] *Id.*
[137] SER-150, S. REP. NO. 96-413, at 246 (1979).
[138] 16 U.S.C. § 3164(b)–(f).
[139] *Id.* § 3164(g)(2)(B), (D), (F).
[140] *Id.* § 3166(b); *see also id.* § 1132(e) (explaining similar process for modifying Wilderness boundary).

reflect Congress' intent that "wilderness lands deserve a greater degree of protection."[141]

The Secretary and KCC argue that the Exchange Agreement is not an "authorization" such that they did not have to comply with Title XI.[142] It is undisputed that the purpose of the Exchange Agreement is to allow for a road and it is the first step in allowing a road. Indeed, the Secretary justifies the Exchange Agreement due to the "'acute necessity' for a road" connecting King Cove and Cold Bay,[143] and King Cove Corp. specifically requested the exchange for a "transportation system."[144] It is, as the District Court properly held, an "authorization . . . without which a transportation or utility system cannot, in whole or in part, be established or operated."[145] It is irrelevant that additional permits are required; there is no caveat that only a single authorization be required nor an exemption for initial decisions. Indeed, a central point of Title XI that would be circumvented by the Exchange Agreement is that all agency decisions be brought

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[141] SER-156, H.R. Rep. No. 96-97, pt. II, at 161; *supra* note 56 (explaining that the construction of roads is prohibited in designated Wilderness).

[142] DOI Br. at 41–43; KCC Br. at 46–49.

[143] DOI Br. at 18.

[144] 2-ER-196.

[145] 16 U.S.C. § 3162(1); 1-ER-19 ("[T]he Exchange Agreement is in fact an approval of a transportation system that falls within the ambit of Title XI. The Secretary's argument to the contrary elevates form over substance.").

together into one comprehensive process.[146] It is also irrelevant that the Exchange Agreement does not allow actual construction; Title XI was intended to apply to the route-selection stage of decision making, which is pre-empted by the exchange.[147] There is also no distinction in Title XI for hortatory roads, nor a provision that exempts such roads from its mandates.[148]

The Secretary and KCC argue that because the exchange precedes road construction, Title XI is not applicable because the lands would no longer be federal lands when the road is built.[149] This is inconsistent with Congress' express intent that Title XI is the "single comprehensive statutory authority for the approval or disapproval of applications for such systems."[150] The Secretary's interpretation would nullify the protections Congress established when adopting Title XI by enabling land exchanges to circumvent its procedures.[151]

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[146] 16 U.S.C. § 3164(b)(1) (describing the need to consolidate applications for transportation systems that require multiple permits); *see also Id.* § 3161(c) (explaining intent "to minimize adverse impacts" of siting transportation systems through conservation system units).

[147] 16 U.S.C. § 3164(g)(2); *see also id.* § 3161 (discussing need for orderly process of siting transportation systems).

[148] KCC Br. at 46–48.

[149] DOI Br. at 41–43; KCC Br. at 49–51. King Cove's assertion that ANILCA § 103(c) supports this argument is a red herring. Title XI applies to federal lands where a transportation system is sought; Section 103(c) limits federal regulation of private lands. Izembek is federal land.

[150] 16 U.S.C. § 3161(c).

[151] *See 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

Title XI is not subordinate to Section 1302's land-exchange authority. Statutory interpretation tools instruct that the general authorization to exchange lands in Section 1302 should not overcome the focused, specific procedures for authorizing transportation systems in Title XI.[152] The Secretary and KCC do not explain why the general exchange authorization in Section 1302(h) should overcome the focused, specific procedures in Title XI.[153] Where the two provisions could conflict, Title XI must control. Title XI's provisions generally do not contravene the Secretary's authority to enter land exchanges. The District Court's ruling would not subject all land exchanges to Title XI.[154] Section 1302(h) and Title XI could conflict only where the Secretary enters into a land exchange to enable a transportation or utility system without following Title XI's procedures, like he did here.[155] In cases like this, Section 1302's general authority must yield.

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sought to promote with the other'" (quoting *Clark v. Uebersee Finanz-Korporation*, 332 U.S. 480, 489 (1947))).

[152] *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384–85 (1992) (noting "it is a commonplace of statutory construction that the specific governs the general").

[153] King Cove states that Section 1302(h) is the "specific" authority governing the "general" provisions of Title XI. KCC Br. at 57. The statutory provisions themselves demonstrate otherwise.

[154] DOI Br. at 43.

[155] 1-ER-19–20 (explaining Title XI is applicable because "[i]t is undisputed that the purpose of the Exchange Agreement is to provide a corridor of land through Izembek to facilitate the building of a road."); *see also* 2-ER-237 (describing the federal lands to be exchanged as being delineated by U.S. Survey 14495). As described above, this survey delineates the road corridor and material

Similarly, Section 1302(h)'s "notwithstanding" clause does not overcome Title XI's application. KCC and the Secretary offer no support for their assertions that Congress intended Section 1302(h)'s "notwithstanding" clause to override "any" other provisions of law generally.[156] "Notwithstanding" clauses set aside potentially conflicting laws, not all legal dictates.[157] The Secretary and KCC do not address ANILCA's "notwithstanding" provisions in context, nor provide support in the case law or legislative history for why Section 1302(h) should prevail over Title XI.[158] Congress intended Section 1302(h)'s "notwithstanding" provision to exempt land exchanges from potentially conflicting requirements of an equal value or complex public interest exchange.[159] It should not be read to invalidate the

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sites. This belies Defendants' assertions that the Exchange Agreement simply contemplates an exchange of lands for which a road may someday be built — it would exchange the precise acreage and alignment of the corridor needed for the proposed road, as well as designated material sites to support construction.

[156] KCC Br. at 56; DOI Br. at 40–41.

[157] *Cisneros v. Alpine Ridge Grp*., 508 U.S. 10, 18 (1993); *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1083 (9th Cir. 2014).

[158] DOI Br. at 40. Further, had Congress intended Section 1302 to override provisions within ANILCA, it would have included such language. Elsewhere in ANILCA, Congress expressly exempted specific actions from the application of ANILCA and other laws. *See, e.g.*, 16 U.S.C. § 3121(b) ("Notwithstanding any other provision of this Act or other law . . . ."); *id*. § 3170(a) (same). No such language appears in Section 1302(h).

[159] *See, e.g.*, Fed. Land Policy and Mgmt. Act, 43 U.S.C. § 1716(b) (lands exchanged by the Secretary must be of equal value, or the values shall be equalized through monetary payments, but those payments may be waived for public interest exchanges); Nat'l Wildlife Refuge Admin. Act, 16 U.S.C. § 668dd(b)(3) (authorizes the Secretary to enter equal value exchanges or equalize value through

application of Title XI when the Secretary undertakes an exchange to allow for a road through a refuge. Construing Section 1302(h)'s "notwithstanding" clause to circumvent Title XI[160] is contrary to Congressional intent in enacting Title XI.[161]

Importantly, Title XI provides that "[n]otwithstanding any provision of applicable law," no action with respect to authorization of a transportation system "shall have any force or effect *unless* the provisions of this section are complied with."[162] Interpreting the plain language of Title XI and Section 1302 to require the Secretary to comply with Title XI here gives meaning to both provisions[163] and is consistent with Congress' intent that Title XI provides the "single comprehensive statutory authority" for siting transportation systems in conservation system units.[164] The Secretary does not provide support for the argument that the

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cash).

[160] DOI Br. at 40–41.

[161] *See supra* note 151.

[162] 16 U.S.C. § 3164(a) (emphasis added).

[163] *League of Conservation Voters v. Trump*, 363 F. Supp. 3d 1013, 1018 (D. Alaska 2019) ("[A] 'statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" (quoting *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018))); *see also Corley v. United States*, 556 U.S. 303, 314 (2009) ("The Government's reading is thus at odds with one of the most basic interpretive canons, that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (internal quotations and alterations omitted))).

[164] 16 U.S.C. § 3161(c).

difference in language between Section 1302(h) (which applies "[n]otwithstanding any other provision of law") and Title XI (which applies "[n]otwithstanding any provision of applicable law") is significant,[165] or why such language obviates established canons of statutory construction.[166]

The Secretary's argument that Section 1302(h) is not an "applicable law" for purposes of Title XI is not due deference because the statute is not ambiguous.[167] Moreover, this argument fails to give effect to Congress' intent to adopt a comprehensive and protective permitting and approval process for the siting of transportation systems through conservation system units.[168] Title XI applies to any "authorization . . . without which a transportation or utility system cannot, in whole or in part, be established or operated."[169] Because the Secretary chose to act pursuant to Section 1302(h) to allow for a road through Izembek, Section 1302 is an "applicable law" for purposes of Title XI.

Finally, the State asserts that the Exchange Agreement is permissible under Section 1110 of ANILCA because the City of King Cove is an inholding.[170] As the

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[165] DOI Br. at 40–41.

[166] *Supra* notes 152, 157, 163 (explaining that the specific governs the general, notwithstanding clauses nullify only conflicting provisions of law, and statutes should be construed so that effect is given to all provisions).

[167] DOI Br. at 39–41; *Chevron*, 467 U.S. at 842–43.

[168] 16 U.S.C. § 3161(c).

[169] *Id.* § 3162(1).

[170] SOA Br. at 28–29.

District Court recognized, this was not a basis for the exchange and should be rejected.[171]

In sum, Title XI is the "single comprehensive statutory authority" for authorizing transportation systems.[172] The Secretary may not use Section 1302(h) to circumvent Title XI's application. The Secretary was required to follow Title XI's procedures. He did not. The Exchange Agreement is, therefore, void.[173]

III. THE EXCHANGE AGREEMENT DOES NOT FURTHER ANILCA'S PURPOSES.

The District Court properly concluded that the Exchange Agreement is unlawful because it does not further ANILCA's purposes.[174] The Secretary, KCC, and the State raise two primary arguments to assert that the Exchange Agreement is consistent with ANILCA's purposes: (1) ANILCA does not allow the Secretary to consider the impacts to Izembek from the exchange, only the additional benefits of the lands to be acquired; and (2) economic and social development is a purpose of ANILCA, and the exchange meets that purpose.[175] Both fail. First, ANILCA is clear: acquiring lands under its exchange provision — 1302(h) — must further its purposes, including ANILCA's overarching purposes and Izembek's specific

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[171] 1-ER-22; *see also State Farm*, 463 U.S. at 50 ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.")

[172] 16 U.S.C. § 3161(c).

[173] *Id.* § 3164(a); *see also* 1-ER-23 (District Court explaining that Title XI voids the Exchange Agreement and any authorizations issued pursuant to it).

[174] 1-ER-19.

[175] DOI Br. at 33–38; KCC Br. at 40–42; SOA Br. at 14–16, 19–23.

purposes, which necessarily requires considering the impacts to existing Refuge lands. Second, ANILCA's purposes are conservation and protection of ecologically important habitats, wildlife and wilderness values, and subsistence, which the exchange does not satisfy. Even assuming that economic and social development are purposes of ANILCA, the exchange still must meet the conservation purposes, which it does not.

A. The Secretary Must Consider the Existing Lands in Executing an Exchange.

Section 1302(a) of ANILCA authorizes the Secretary to acquire lands within conservation system units "in order to carry out the purposes of this Act."[176] Subsection (h) — the specific authority for the Exchange Agreement[177] — reaffirms that when the Secretary acquires lands, they must do so for the purposes of ANILCA.[178] Taken together, the plain language of these provisions mandates that any land exchange must meet the broad conservation purposes of ANILCA and the specific purposes of the unit.[179] Logically, the Secretary cannot ensure the purposes of ANILCA are met if they do not consider the impact of removing lands

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[176] 16 U.S.C. § 3192(a). King Cove asserts that the Agreement is an exchange under ANCSA. KCC Br. at 43–44. This is incorrect; the Exchange Agreement cites only ANILCA as the legal authority for the exchange. 2-ER-235.

[177] 2-ER-235.

[178] 16 U.S.C. § 3192(h).

[179] *Chevron*, 467 U.S. at 842–43; *see, e.g.*, *Nat'l Audubon Soc'y*, 606 F. Supp. 825, 842–45 (D. Alaska 1984) (holding that a land exchange did not protect the purposes of the specific refuge).

from protected status on the unit's purposes. The Secretary's interpretation would place a thumb on the scale in favor of exchanges, contrary to Congress' intent.[180] Indeed, Congress was clear that the exchange authority not be used to undercut the protections it was enacting in designating land protections or "frustrate the purposes of any such unit."[181]

The Secretary fails to explain how his interpretation — which would focus only on the acquired lands — ensures that the exchange will achieve the purposes of Izembek.[182] The Secretary asserts that the District Court's interpretation would "hamstring" the Secretary's exchange authority, and "upset Congress's expectation that [the Secretary] would use that authority to further Congress's goals."[183] To the contrary, requiring the Secretary to consider the impact of the exchange on Izembek and to justify an exchange based on evidence in the record is consistent

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[180] The Secretary appears to implicitly argue that his exchange decision is unreviewable. DOI Br. at 36 ("Interior's conclusion that it is acquiring lands for the purposes of ANILCA cannot be found to be arbitrary or capricious."). That is incorrect. *Nat'l Audubon Soc'y*, 606 F. Supp. at 835. The Secretary's argument that the statute solely requires consideration of the benefits of the acquired lands is also undercut by his consideration of the impacts to Izembek of the Exchange Agreement itself. 2-ER-232–33.

[181] SER-167–68, H.R. REP. NO. 95-1045, pt. I, at 211–12 (1978). This directly refutes the Secretary's assertion that ANILCA "leaves entirely to Interior's discretion the choice of which lands to exchange when acquiring lands." DOI Br. at 35. That discretion is constrained, not unbounded.

[182] DOI Br. at 34–37; KCC Br. at 39–42; SOA Br. at 25.

[183] DOI Br. at 37.

with ANILCA and Congress' mandates for agency decision-making.[184] When executing an exchange, the Secretary must ensure that it furthers ANILCA's and Izembek's purposes. That is Congress' directive. It was not achieved here.[185]

B. The Exchange Agreement Does Not Meet ANILCA's Purposes.

Congress enacted ANILCA to protect and preserve "nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values."[186] ANILCA's purposes include the preservation of nationally significant lands, unaltered ecosystems, wildlife habitat, and to provide opportunities for recreation and scientific research.[187] The purposes of Izembek include the conservation of "fish and wildlife populations and habitats in their natural diversity," fulfillment of international treaty obligations, continued subsistence use, and protection of water quality and quantity, as well as the original

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[184] *City & Cnty. of San Francisco v. United States*, 130 F.3d 873, 877 (9th Cir. 1997) (explaining that in APA cases, 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." (quoting *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir.1985))).

[185] The Secretary asserts that the District Court improperly substituted its judgment for the Secretary's. DOI Br. at 29–30; *see also* SOA Br. at 20. It did not. The District Court applied the APA's deferential standard of review and considered the Secretary's arguments and the record to reach its holding. 1-ER-16 ("This assertion of purpose, however, is not supported by the record.").

[186] 16 U.S.C. § 3101(a).

[187] *Id.* § 3101(b).

Range purposes and Wilderness preservation.[188] To exchange lands under Section 1302, the Secretary had to ensure that the exchange furthered all of these purposes.

The Secretary's arguments that the exchange furthers ANILCA's purposes are not supported by the record. The Secretary relies on the 1998 Land Protection Plan that identified land for acquisition to support the exchange.[189] The Plan undercuts the exchange. It expressly found that a road through Izembek's isthmus is "the greatest known potential threat to wildlife and wilderness values within the Izembek Complex,"[190] and concluded that "[l]and protection strategies should strive to preserve the ecological integrity of the refuge."[191] The Secretary previously concluded that acquisition of the proffered lands would not offset the loss of the lands in the isthmus from the exchange.[192] The Secretary did not confront these contrary factual findings. The Secretary also ignores the fact that

[188] ANILCA, Pub. L., Title III, §§ 303(3)(B), 702(6), 94 Stat. 2371, 2391, 2418 (1980); SER-171.

[189] DOI Br. at 33–34; SOA Br. at 25.

[190] SER-121.

[191] SER-122; *see also* 2-ER-45 (prior finding that a road "would irreparably and significantly impair this spectacular Wilderness refuge" and that continued federal ownership of lands would be less impactful on Izembek than construction of a road).

[192] 2-ER-45.

other protections apply to the lands identified for exchange in the Plan,[193] and does not explain what development threats those lands face if not acquired.[194]

The Secretary also asserts that the exchange serves ANILCA's purposes because it results in a "net increase" in acreage of protected lands.[195] He does not explain how merely adding acreage achieves ANILCA's purposes, irrespective of conservation values impacted. While the 2013 exchange would have resulted in far more acreage being added to refuges than this exchange, the Secretary determined it would not offset or replace the extraordinary and unique ecological values of the lands removed from Izembek.[196] In short, a mere acreage increase does not ensure ANILCA's purposes are met.

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[193] SER-120; SOA Br. at 25–26 (explaining that the Secretary decided that more permanent protection for the lands being acquired would benefit Izembek); 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 — like Izembek — are subject to the laws governing refuges); *Agdaagux Tribe of King Cove*, 128 F. Supp. 3d at 1197–98 (explaining how the Land Protection Plan did not support an exchange).

[194] *See Nat'l Audubon Soc'y*, 606 F. Supp. at 837–840, 845 (rejecting explanation that exchange protects lands that are already subject to protections and unlikely to be developed); *see also Agdaagux Tribe of King Cove*, 128 F. Supp. 3d at 1196–97 (discussing unlikelihood of development of KCC lands to support not exchanging lands).

[195] DOI Br. at 38–39.

[196] 2-ER-38–39; *see also* SER-108 (explaining that the lands to be received do not provide the same "internationally recognized wetland habitat" and "will not compensate" for the impacts to Izembek).

The District Court did not improperly exclude economic and social development as a purpose of ANILCA.[197] ANILCA's purposes subsections focus on conservation and subsistence.[198] The language the Secretary relies on to elevate economic and social needs over conservation and subsistence does not support his assertions that those are purposes of ANILCA. Congress stated in subsection 101(d) that future legislation is unnecessary because it achieved the proper balance of conservation and economic and social needs in passing ANILCA.[199] In *City of Angoon v. Marsh*, this Court opined generally on ANILCA's goals and statements in Section 101, without specifically considering the structure or framework of that section.[200] But in *Alaska v. Federal Subsistence Board*, this Court more closely reviewed Section 101 and recognized that subsections (b) and (c) set out the statute's goals as conservation and subsistence.[201] The Supreme Court's recent decision in *Sturgeon v. Frost* summarized what Congress stated it achieved in enacting the statute, based on Congress' statement in subsection 101(d), in the context of interpreting a separate provision of ANILCA not at issue here (Section

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[197] DOI Br. at 36–37; KCC Br. at 37–39; SOA Br. at 19–21, 26–27.
[198] 16 U.S.C. § 3101(a)–(c).
[199] *Id.* § 3101(d).
[200] 749 F.2d 1413, 1415–16 (9th Cir. 1984).
[201] 544 F.3d 1089, 1091, 1098 (9th Cir. 2008) (stating that "ANILCA serves a dual purpose: protecting and preserving the subsistence lifestyle and protecting and preserving wildlife." (citing 16 U.S.C. § 3101(b)–(c))).

103(c)).[202] In doing so, the Court recognized the dual goals that Congress achieved in passing ANILCA, while expressly recognizing that Congress set aside lands in ANILCA for "preservation purposes" and "for conservation."[203] In sum, the District Court did not improperly focus review on ANILCA's conservation and subsistence purposes.

Even assuming that economic and social development are statutory purposes, the exchange still fails. First, the Secretary cannot elevate economic and social needs over the conservation purposes of ANILCA and Izembek.[204] As explained above, the exchange provision mandates that all of ANILCA's purposes be met. The Secretary states that the Exchange Agreement achieves the proper balance between conservation and the economic and social needs of King Cove.[205] This is not supported by the record. Izembek's isthmus is the Refuge's ecological heart, and Interior has repeatedly found the Refuge would be irreversibly damaged by the construction of a road.[206] Congress stressed that "[a] wilderness designation will protect this critically important habitat by restricting access to the Lagoon."[207]

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[202] 139 S. Ct. 1066, 1075 (2019).
[203] *Id*. at 1075, 1083–84, 1087.
[204] *See* 2-ER-234 (placing greater weight on the economic and social needs).
[205] 2-ER-216, 233–34, 236.
[206] *See supra* Statement of the Case at 12–19; *infra* Argument at 50–56.
[207] SER-154, H. R. REP. NO. 96-97, pt. II, at 136 (1979); *see also* SER-144, S. REP. NO. 96-413, at 15 (1979) ("Izembek Lagoon is a special feature of the refuge.").

Congress specifically sought to limit access to the isthmus to protect Izembek lagoon and the "millions of waterfowl" that rely on its eel grass beds.[208] Further, one of Izembek's purposes is to fulfill "international treaty obligations" for wildlife and habitat,[209] such as the Ramsar Convention, which recognizes Izembek's "unique ecology," eelgrass beds, and importance to migratory birds.[210] Importantly, the 2013 ROD found that a land exchange permitting a road through Izembek would diminish the Service's ability to meet ANILCA and Izembek's purposes, among other laws.[211] As explained below, the Secretary failed to explain or counter myriad contrary findings that these values — and relatedly Izembek's purposes — will be harmed by a land exchange.[212] Without confronting these contrary findings, the Secretary's summary assertion that the exchange achieves Izembek's and ANILCA's conservation purposes should be rejected.

Second, the record does not support the Secretary's specific findings. The Secretary's statement that use restrictions would protect the ecological values of the Refuge was a key finding supporting his assertion that conservation goals

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[208] SER-154, H.R. REP. NO. 96-97, pt. II, at 136 (1979); SER-161, H.R. REP. NO. 96-97, pt. I, at 209 (1979).

[209] ANILCA § 303(3)(B)(ii).

[210] SER-136, 118, 98.

[211] 2-ER-43, 56.

[212] *See infra* Argument IV.B; *see also Nat'l Audubon Soc'y*, 606 F. Supp. at 842–45 (considering impacts to the specific purposes of the refuge for a land exchange under Section 1302).

would be met by the exchange.[213] But there are no use restrictions imposed by the agreement. The Secretary did not explain how unidentified use restrictions would provide the protections necessary to satisfy ANILCA's purposes given that there are no restrictions in the agreement. As the District Court correctly found, this justification is not supported by the record.[214] Without restrictions in place or at least identified, the Secretary's conclusion should be rejected.[215] Another key finding supporting that the conservation purposes would be met in light of economic and social needs was that the Secretary was acquiring more acreage than Izembek was relinquishing.[216] As explained above, that finding is inconsistent with the record; although the quantity of acres might be greater, this is not the sole metric when determining conservation values. Relatedly, while the Secretary asserted in the District Court that ANILCA's subsistence purposes would be met by the exchange, that was not a basis given in the Exchange Agreement itself, and should be rejected.[217]

In sum, the Exchange Agreement is for the specific purpose of taking land out of Izembek and its designated Wilderness to allow for a road. Furthering

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[213] 2-ER-233. Notably, the Secretary no longer makes this assertion.

[214] 1-ER-17.

[215] *See Or. Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1121(9th Cir. 2010) ("We cannot defer to a void.").

[216] 2-ER-233.

[217] 1-ER-18–19. *Cf.* SOA Br. 27.

economic and social needs cannot be at the expense of ANILCA's and Izembek's conservation purposes. The Secretary's justification for how these purposes would be met is unsupported by or contrary to the record; it is arbitrary and capricious.[218] The exchange is not in furtherance of the purposes of ANILCA and Izembek; it violates them.

IV. THE SECRETARY'S "REBALANCING" OF FACTS DOES NOT MEET THE LEGAL REQUIREMENTS TO UPHOLD AN AGENCY REVERSAL.

In executing the Exchange Agreement, the Secretary failed to adequately explain his reversal of decades of agency findings and decisions rejecting a land exchange for a road. It is an established principle of administrative law that when an agency changes course, it "is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."[219] When changing positions, the agency must satisfy the four factors under *Fox*: (1) display "awareness that it *is* changing position;" (2) show that "the new policy is permissible under the statute;" (3) believe the new policy is better; and (4) provide "good reasons for the new policy."[220] When an agency changes course and its "new policy rests upon factual findings that contradict those which underlay its prior policy," — in addition to meeting the four *Fox* factors — the

[218] *See supra*, Standard of Review at 25.
[219] *State Farm*, 463 U.S. at 42.
[220] *Fox*, 556 U.S. at 515–16.

agency must include "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[221] This requires "a more detailed justification than what would suffice for a new policy created on a blank slate."[222]

The Secretary claims that his conclusion that health is more important than environmental harm alone was sufficient to justify the land exchange.[223] This does not satisfy the standard for agency reversals. The Secretary has not shown that the land exchange is permissible under applicable laws nor has he provided "good reasons" for the new policy. Further, because the Secretary relied on contradictory facts to justify his reversal in agency policy, a "more detailed justification" is required. But the Secretary failed to provide the required "more detailed justification." As a result, the District Court's order should be upheld.[224]

A. The Exchange Agreement Is Impermissible Under ANILCA.

The Secretary failed to demonstrate that the Exchange Agreement is permissible under the law. The Secretary asserts that the exchange serves the purposes of ANILCA.[225] For the reasons set out above, the exchange does not

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[221] *Id.*

[222] *Id.* at 515.

[223] DOI Br. at 24.

[224] *See* 1-ER-15 (concluding "the Secretary failed to provide adequate reasoning to support the change in policy in favor of a land exchange and a road through Izembek.").

[225] 2-ER-233; DOI Br. at 33–34; KCC Br. at 37–39; SOA Br. at 26–27.

achieve ANILCA's purposes.[226] The Exchange Agreement also violated ANILCA Title XI.[227] Thus, the Secretary failed to show the new policy is permissible under the law, violating the second *Fox* factor.

B. The Secretary Failed to Provide Good Reasons for Reversing Decades of Agency Policy Rejecting an Exchange and Relies on Contradictory and Unsupported Findings to Justify the Exchange Agreement.

The Secretary also failed to provide good reasons for the policy reversal or a reasoned explanation for disregarding facts and circumstances that underlay the Service's longstanding refusal to exchange lands.

The Secretary argues that the decision to exchange lands is not based on a change to the underlying facts.[228] As a result, the Secretary argues that the Exchange Agreement "is subject to no more searching review than would otherwise apply to agency decisionmaking under the APA."[229] This argument was not raised before the District Court and should be deemed waived.[230] Regardless, it is contrary to law and the record and should be rejected. It is undisputed that the Secretary's decision to exchange lands for a road is a reversal in agency policy; the

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[226] See *supra* Argument, Section III.B (explaining that the exchange does not meet ANILCA's purposes).

[227] *See supra* Argument, Section II.

[228] DOI Br. at 24.

[229] DOI Br. at 23.

[230] *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 510 (9th Cir. 2013) (explaining that an argument is generally deemed waived if not raised sufficiently in District Court).

Secretary acknowledged this in the Secretary's Memo.[231] KCC nonetheless asserts that the Exchange Agreement does not represent a policy change in part because it does not authorize road construction.[232] This argument is contrary to the record,[233] DOI's position,[234] prior judicial determinations,[235] and the history of this issue, as the 2013 ROD and OPLMA similarly did not authorize road construction and contemplated permitting after an exchange.[236] Because this was a reversal in policy, the Secretary was required to show "good reasons" for entering the exchange. But the Secretary's Memo provides only conclusory statements instead of good reasons supported by the record.[237]

The Secretary and KCC rely on *Organized Village of Kake v. U.S. Department of Agriculture* (*Kake*)[238] for the proposition that agencies may give

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[231] 1-ER-9; 2-ER-226–227; *see also* DOI Br. at 24 (stating "Interior had acknowledged a change in positions").

[232] KCC Br. at 29–37.

[233] 2-ER-196–202 (KCC letter requesting the land exchange to allow the "transportation system" of a "road between their community and the Cold Bay airport").

[234] 2-ER-227 (Secretary's Memo acknowledging that such a policy change requires an explanation under *Fox*), 232 (recognizing that the decision "represents a change in policy position").

[235] *Friends*, 381 F. Supp. 3d at 1140–41, 1143–44.

[236] 2-ER-42, 2-ER-254.

[237] *See Friends*, 381 F. Supp. 3d at 1142 (conclusory statements are insufficient to support agency reversals).

[238] 795 F.3d 956.

more weight to different factors when changing decisions.[239] While correct, the Secretary ignores this Court's subsequent affirmation that an agency must explain prior findings that conflict with its new policy:

> *State Farm* teaches that even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation.
>
> That is precisely what happened here. The 2003 ROD did not simply rebalance old facts to arrive at the new policy. Rather, it made factual findings directly contrary to the 2001 ROD and expressly relied on those findings to justify the policy change.[240]

As in *Kake*, the Secretary did not merely rebalance old facts. The Secretary relies on direct and unexplained contradictions to support his decision, as detailed below.

The Secretary also argues that the District Court misapplied the *Fox* test because the Secretary's factual findings were not contradictory, but merely additive.[241] This is contrary to the record. The Secretary tries to justify the exchange due to: (1) "[c]hanged information concerning the viability and availability of alternative means of transportation that have since proven to be neither viable nor available;" (2) the 2013 ROD's "previous failure to take into consideration the high ongoing and future costs to the taxpayers of continuing emergency medical evacuations from King Cove by the U.S. Coast Guard;" and

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[239] DOI Br. at 25–26; KCC Br. at 28–29.
[240] *Kake*, 795 F.3d at 968.
[241] DOI Br. at 27–32.

(3) that the 2013 decision "discounted the value of" lands that would be received via the exchange.[242] The Secretary expressly based the decision to exchange lands on these contradictory factual findings. As such, the Secretary must provide a reasoned explanation and "a more detailed justification than what would suffice for a new policy created on a blank slate."[243] The Secretary failed to do so.

Specifically, he failed to explain contrary findings regarding alternative transportation options, harm to Izembek's resources, and the value of the private lands received. As result, the Secretary does not provide "good reasons" or a substantial justification for the policy reversal. These failures are discussed in turn below.

First, the Secretary's contradictory findings regarding transportation alternatives are unsupported by the record. The 2013 ROD found that at least three viable alternatives exist to a road: hovercraft, landing craft, and ferry.[244] Here, the Secretary found that non-road options are not viable, directly contrary to these prior findings.[245] The Secretary provides no evidence to support his assertion that transportation alternatives are "neither viable nor available."[246] This fails the test for agency reversals. Contrary to the Secretary's assertions, the District Court did

[242] 2-ER-232; *see also* DOI Br. at 18.
[243] *Fox*, 556 U.S. at 515; *Kake,* 795 F.3d at 969.
[244] 2-ER-56.
[245] DOI Br. at 17.
[246] *Id.* at 18.

not raise the bar beyond what *Fox* requires; it merely held the Secretary accountable to provide "a more detailed justification" for disregarding the facts and circumstances underlying the 2013 ROD's findings that marine transportation alternatives are viable.[247]

The Secretary now asserts that "Interior concluded that a ferry was prohibitively expensive and laden with risks;"[248] however, that conclusion does not appear in the record and should be rejected as a *post hoc* justification.[249] The Secretary's Memo provided a review of transportation alternatives based on a 2015 study by the Army Corps of Engineers (Corps) to support its argument that marine alternatives are not viable.[250] However, the 2015 Corps study indicated marine and road transportation options are comparable in terms of cost and technical feasibility.[251] The Secretary provided no evidence that marine alternatives are cost

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[247] 1-ER-11–12 (explaining that "the Secretary's new factual assessment of these marine-based options must be substantially justified. . . . The information relied upon, however, does not provide the detailed reasoning needed to support the agency's about-face on the issue.")

[248] DOI Br. at 29 (citing 2-ER-223).

[249] *Supra* note 171 (explaining that an agency's action must be upheld on basis articulated by the agency).

[250] 2-ER-223–25 (stating "neither King Cove nor AEB has found any of the alternatives [in the report] viable" despite acknowledging that "the report concluded that the Marine Alternative's dependability exceeded 99%").

[251] 2-ER-47. The Corps study considered the cost and reliability of both road and non-road transportation options. The study found a marine link dependable over 99% of the time — slightly more than a road's 98% dependability. 2-ER-47, 101. The Secretary also asserts that the study concluded that a marine route's risks

prohibitive, nor discussed how he determined financial feasibility or technical viability. The Secretary was required to explain his findings given that they directly conflicted with the 2013 ROD.[252] The Secretary argues that "Interior looked at the incremental facts in the [2015 Corps] study and then drew its own conclusions."[253] While that may be permissible, the Secretary's conclusions must be supported by the record.[254] They are not. The 2015 Corps study and previous road cost estimates demonstrate that a road and marine ferry are comparable; the study, therefore, "does not provide the necessary justification for the Secretary's assertion."[255] Even if the Secretary's statements were supported by the record, it

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were "medium-serious" and costly. DOI Br. at 29. However, the study noted that funding and permitting would be necessary — as they would be for any alternative, including a road — not that costs are excessive. 2-ER-100. Further, the study estimated one of the ferry alternatives with 99.9% annual dependability has an estimated 75-year life-cycle cost of $56.7 million; the road a 35-year life cycle cost of $34.2 million plus annual maintenance costs of $670,000, or $61 million for 75 years of operation. *See* 2-ER-62 (ferry cost); SER-97 (road costs estimated in EIS).

[252] *Kake*, 795 F.3d at 966 (explaining that policy changes violate the APA if the agency "ignores or countermands its earlier factual findings without reasoned explanation for doing so.").

[253] DOI Br. 30.

[254] *State Farm*, 463 U.S. at 43 (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.'" (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962))).

[255] 1-ER-13.

would not obviate the Secretary's obligation to explain his conclusions in light of conflicting facts.[256]

Second, the Secretary failed to adequately address findings regarding harm to the Refuge's irreplaceable resources. The Secretary argues that "Interior simply recognized the undisputed facts that some of the environmental harms of a road can be mitigated through the permitting processes."[257] These facts are far from undisputed; they are directly refuted by the record. The 2013 ROD (like prior decisions) found that the exchange would not protect Izembek's resources.[258] It determined that the road proposal, despite limitations on use, would result in increased human access and activity that would have "profound adverse effects on wildlife use and habitats of the narrow isthmus" and Wilderness.[259] It found there would be negative impacts to multiple species including Pacific Black Brant, Tundra Swans, brown bear, caribou, and wolves.[260] The 2013 ROD also found that damage and impacts from off-road use could not be prevented through regulation, enforcement, or roadside barriers.[261]

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[256] *Kake*, 795 F.3d at 966.
[257] DOI Br. at 31.
[258] 2-ER-38–40, *see also* 2-ER-232–33 (acknowledging 2013 ROD finding).
[259] 2-ER-40, 45.
[260] 2-ER-43–44.
[261] 2-ER-45.

The Secretary's Memo "contains '[n]ot one sentence'"[262] explaining these previous findings in the context of this reversal.[263] Instead, it offers conclusory statements that restrictions and limitations on the construction and use of a road would balance conservation with social and economic needs. Unlike prior versions of the agreement, there are no longer use restrictions on the road, so the record does not support this contrary finding.[264] Moreover, the Secretary does not explain how the nonexistent limits on uses would protect resources, he simply states that they would.[265] Such "unexplained conflicting findings about the environmental impacts of a proposed agency action violate the APA."[266]

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[262] *Friends*, 381 F. Supp. 3d at 1141 (quoting *State Farm*, 463 U.S. at 48).

[263] 1-ER-10–11; *see also Friends*, 381 F. Supp. 3d at 1139–42 (describing Secretary's failure to address prior findings regarding environmental impacts of a road). The Secretary also failed to evaluate the environmental impacts of this particular exchange, which trades away more acreage within the Refuge and Wilderness than previously considered and includes material sites within the Refuge. *See supra* notes 78 (comparing lands that would be lost and gained under prior proposed exchange), 100 (explaining exchange would be for roughly 500 acres within Izembek), 103 (explaining agreement includes material sites), 196 (2013 proposal rejecting exchange that would have acquired more acreage). The Secretary's failure to explain his decision to enter a larger and more environmentally damaging exchange than the exchange previously considered and rejected is arbitrary. *State Farm*, 463 U.S. at 48.

[264] *See infra* 43–44; *see also* 1-ER-10–11 ("[T]he Exchange Agreement fails to provide any use limitations and the Memo fails to explain why use restrictions would now adequately protect Izembek's unique values.").

[265] 2-ER-233.

[266] *Kake*, 795 F.3d at 969.

Third, the Secretary failed to adequately explain his conclusion regarding the value of lands to be received via the exchange. The 2013 ROD found that these lands would not offset the impacts of an exchange for a road:

> The lands offered for exchange contain important wildlife habitat, but they do not provide the wildlife diversity of the internationally recognized wetland habitat that is proposed for exchange, nor would they compensate for the adverse effects of removing a corridor of land and constructing a road within the narrow, irreplaceable Izembek isthmus. . . . Thus, a conveyance of these lands to the United States does not actually offset the environmental impacts from the proposed road construction and operation.[267]

In contrast, the Secretary now states that there would be "substantial benefits" to the public from increasing the amount of acreage in the Refuge.[268] The Secretary asserts that the 2013 ROD's findings improperly discounted the habitat values or conservation status of lands to be received.[269] He cites nothing in the record to explain how the 2013 findings are flawed, or to support his statement that inadequate weight was given to the value of the lands to be received.[270] In 2013, the Secretary considered an exchange of 206 acres within Izembek, but found that

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[267] 2-ER-45.

[268] 2-ER-232.

[269] *Id.*; *see also* SOA Br. at 23 (arguing the Secretary's statements regarding land values should be given deference).

[270] *See Agdaagux Tribe of King Cove*, 128 F. Supp. 3d at 1194 (holding that the 2013 decision to not exchange lands was based on substantial evidence in the record).

the over-56,000 acres of lands proposed to come into federal ownership were not valuable enough to offset the resultant harm to Izembek.[271] The present exchange would trade away nearly 500 acres of Izembek for some, but less, of these same lands.[272] The Secretary does not identify any factual findings or information regarding the value of those lands, or explain his finding in light of the fact that prior rejected proposals had more lands coming into federal ownership than this one.[273] Such unsupported, contradictory and conclusory statements are legally insufficient to support an agency reversal.[274] In sum, the record does not demonstrate that the Secretary "balanced" the environmental impacts of road construction with other considerations — rather, he ignored them.

The State argues—contrary to the record—that the Exchange Agreement considered the broader purposes of ANILCA and ANCSA, whereas the 2013 ROD only considered the "public interest," as mandated by OPLMA.[275] The State further

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[271] 2-ER-38–39, 49–50; *see also* SER-108 ("[The exchange] would not compensate for the adverse effects of removing a corridor of land and constructing a road within the narrow Izembek isthmus."); SER-107 (explaining the "lands lost and lands gained have little in common with regard to cover types, wildlife potential, or ecological process/function").

[272] *Compare* 2-ER-244 (Exhibit A of Exchange Agreement depicting KCC Exchange Lands), *with* SER-104 (KCC Exchange Lands offered in 2013).

[273] *See supra* 40, 55–56 (comparing acreage of proposed land exchanges).

[274] *See supra* Standard of Review at 26–27; *see also Or. Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1121 (9th Cir. 2010) ("We cannot defer to a void.").

[275] SOA Br. at 20–21.

asserts that the District Court and the 2013 ROD narrowly looked at "conservation outcomes alone."[276] But, the Secretary made her 2013 decision rejecting an exchange fully informed about the health and safety concerns of King Cove, specifically finding that "the administrative record shows that viable transportation alternatives are available to address the health and safety needs of the residents of King Cove."[277] As a result, the Secretary was now required to provide "good reasons" for the reversal.[278] He failed to do so in violation of the APA.

Finally, the Secretary and KCC's reliance on *Ark Initiative v. Tidwell* is misplaced.[279] There, the U.S. Forest Service approved Colorado's state-specific rule governing roads for ski areas, which represented a different approach from the agency's nationwide 2001 Roadless Rule for National Forests.[280] The court concluded that the state-specific exclusion was not a "reversal" because it was "based on an entirely new record, including a new EIS, and supported with new, State-specific findings."[281] Here, it is undisputed that a reversal in policy

[276] SOA Br. at 22.
[277] 2-ER-41–43.
[278] *See supra* Standard of Review at 26–27.
[279] KCC Br. at 28–29; DOI Br. at 26.
[280] *Ark Initiative v. Tidwell*, 816 F.3d 119, 127–28 (D.C. Cir. 2016).
[281] *Id*. at 130.

occurred.[282] As described above, the Secretary made contrary factual findings to support this reversal. *Ark* is, therefore, inapplicable to this case.[283]

In conclusion, the Secretary's decision to exchange lands to allow for a road through Izembek reverses course on decades of Service decisions built on robust factual findings. As the foundation for his decision to exchange lands, the Secretary made factual findings contrary to those supporting the Service's previous decisions. The Secretary "was required to provide a 'reasoned explanation . . . for disregarding' the 'facts and circumstances' that underlay [the Service's] previous decision[s]."[284] He did not provide this reasoned explanation, in violation of the law. The District Court's decision should be affirmed.

CONCLUSION

This Court should affirm the District Court's summary judgment order and final judgment vacating and voiding the Exchange Agreement, void any approvals or decisions made in furtherance of the Exchange Agreement, and hold that the Secretary's action in entering the Exchange Agreement violated ANILCA and is

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[282] 2-ER-232.

[283] The Secretary and King Cove's reliance on *National Ass'n of Home Builders v. E.P.A.* should similarly be rejected because in that case it was undisputed that the agency's change in position was permissible under the statute and the agency did not rely on any new information — and thus made no contradictory factual findings — to support its reversal. 682 F.3d 1032, 1037 (D.C. Cir. 2012).

[284] *Kake*, 795 F.3d at 968 (citing *Fox*, 556 U.S. at 516).

arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

If this Court reverses the District Court, it should remand the case with instructions to address Friends' NEPA and ESA claims. In light of the District Court's ruling that the Exchange Agreement violates the APA and ANILCA, it declined to consider Friends' NEPA and ESA claims.[285] As a result, remand with instructions to consider these claims would be appropriate if this Court reverses the District Court's findings.

Submitted this 20th day of January, 2021.

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[285] 1-ER-22.

CERTIFICATE OF COMPLIANCE

I certify pursuant to Fed. R. App. P. 32-1(a) that this brief contains 13,512 words and has been prepared in 14-point Times New Roman proportionally spaced typeface.

s/ B. Psarianos
Bridget Psarianos

CERTIFICATE OF SERVICE

I certify that on January 20, 2021, I electronically filed a copy of the Attorneys for Plaintiffs-Appellees Friends of Alaska National Wildlife Refuges, et al.'s Corrected Brief in Opposition with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which will send electronic notification of such filings to the attorneys of record in this case.

s/ Bridget Psarianos
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