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, in his official capacity as
Secretary of the U.S. Department of the Interior, et al.,
Defendants/Appellants,

and

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

Appeal from the United States District Court for the District of Alaska
No. 3:19-cv-00216 (Hon. John W. Sedwick)

FEDERAL APPELLANTS' REPLY BRIEF

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INTRODUCTION

The district court committed three errors in setting aside the land exchange between Interior and King Cove Corporation. First, the court concluded that Interior had changed policy direction without adequately explaining contradictory factual findings, when instead Interior placed greater weight on the welfare of the people of King Cove, and less weight on environmental harms, than it had previously even assuming the same facts. Second, the court concluded that the Alaska National Interest Lands Conservation Act ("ANILCA") requires that the exchange on balance further environmental protection, when ANILCA instead requires only that land exchanges be for equal monetary value and that the land to be *acquired* further ANILCA's purposes. Third, the court concluded that Interior failed to comply with the procedural requirements of Title XI of ANILCA, when instead Title XI does not apply because Interior's land-exchange authority is not an "applicable law" under Title XI.

In their answering brief, Plaintiffs tackle those issues in reverse order. They first contend that Title XI voids the land exchange because the purpose of the land exchange "is to allow a road through Izembek" and Interior did not comply with Title XI. Answering Br. 27. But Title XI applies only to actions taken under laws providing an agency with "jurisdiction to grant any authorization" necessary to a transportation or utility system, and the Plaintiffs never explain why the land-exchange authority at issue here gives Interior "jurisdiction" to grant any "authorization" at all, much less

one necessary to the construction of a transportation or utility system. Next, the Plaintiffs contend that the land exchange does not further ANILCA's purposes because on balance the exchange would not increase environmental protections. But they never point to any statutory language requiring anything other than that the lands exchanged be for equal monetary value, and they ignore ANILCA's purpose to provide for the economic and social needs of the State of Alaska and its people. Finally, the Plaintiffs contend that Interior ran afoul of the APA by relying on new, contradictory facts. But they have no response to what Interior actually said in its decision memo—it would have reached the same result even if all of the relevant facts were the same.

ARGUMENT

I. Title XI of ANILCA does not apply to a land exchange under Section 1302(h) of the statute.

As explained in the government's opening brief, the first question when determining whether an agency must follow the procedures required by Title XI of ANILCA is whether the agency is acting under an "applicable law." That is so because Title XI explicitly requires agencies to follow its procedures only before taking an "action" under "applicable law" to approve or disapprove an "authorization" necessary for the transportation system, and also because Title XI provides that it applies "notwithstanding any provision of *applicable law*." 16 U.S.C. § 3164(a) (emphasis added). As a result, if a statute is not an "applicable law," then the agency

action taken under the authority of that statute is not subject to Title XI's procedures. And Title XI tells us exactly what an "applicable law" is, defining the term to mean "any law of general applicability" under which an agency "has jurisdiction to grant any authorization (including but not limited to, any right-of-way, permit, license, lease, or certificate) without which a transportation or utility system cannot, in whole or in part, be established or operated." *Id.* § 3162(1).

Despite the primacy of the question whether ANILCA section 1302(h)—Interior's land-exchange authority—is an "applicable law" within the meaning of Title XI, the Plaintiffs devote only a scant four-sentence paragraph to answering it. Answering Br. 34. In that paragraph, they first assume their premise that the agency action here would "allow" a road as a practical matter (which they assume is the same thing as "approving" an "authorization" necessary for a road, a premise contested below) and then reason backwards—if the agency action allows a road, they assert, then the agency must have been acting under an "applicable law." *Id.* In doing so, the Plaintiffs contend that Title XI "applies to any 'authorization'" necessary for a transportation or utility system. *Id.* But that is not what the statute says. Title XI does not apply to any agency action under any statute that might be related to building a transportation system, but only to actions taken under laws that provide an agency with "*jurisdiction* to grant any authorization" necessary for the system. *Id.* And if an agency is acting under a statute granting it jurisdiction to grant an authorization necessary for the system, Title XI applies whether the agency approves or disapproves

that authorization. The Plaintiffs' myopic focus on the practical impact of the agency action instead of the legal authority imparted by the law under which the agency was acting is misplaced.

Because they focus only on what they contend is the practical impact of the agency action, the Plaintiffs never explain how Section 1302(h) provides Interior with the jurisdiction to grant authorizations for a road or any other transportation or utility system, or grapple with the consequences of their argument for other land exchanges. Section 1302(h) does not provide Interior with jurisdiction to grant authorizations for a road or any other transportation or utility system. As is plain from Section 1302(h)'s language, that section provides jurisdiction only "to exchange lands" under certain conditions. 16 U.S.C. § 3192(h). It gives Interior no jurisdiction to "grant" any "authorization" at all. Instead, it authorizes Interior only to exchange lands for equal value (or for unequal value if in the public interest) to acquire land for the purposes of ANILCA. Because it does not provide the agency with jurisdiction to grant authorizations related to transportation or utility systems, Section 1302(h) is not an "applicable law" as defined by Title XI.

If Section 1302(h) were an "applicable law," then, as Interior explained in its opening brief, every contemplated land exchange involving lands from within a conservation system unit would be required to follow Title XI's procedures. The Plaintiffs respond that Title XI would only need to be followed where the land exchange is entered specifically to "enable" the construction of a transportation or

utility system. Answering Br. 31. The Plaintiffs do not identify where in the statute this restriction is to be found.

Indeed, every land exchange would inevitably "enable" the new owners to pursue building some sort of transportation or utility system by placing the land into private ownership. Title XI covers all manner of transportation and utility systems, including "ditches," systems to transmit and distribute "electrical energy," to transmit and receive "radio" and "television" and "telephone," improved rights-of-way, and of course "roads." 16 U.S.C. § 3162(4)(B). It is hard to imagine a land exchange where the land that moves into private ownership would not later involve at least one such system; presumably the new owners would intend to make use of their land. At the very least, every land exchange would open up the land to just such a system. The Plaintiffs do not explain why King Cove Corporation having more concrete intentions to build a road here subjects this land exchange to Title XI where others would not be. There is nothing in Title XI to suggest that Congress intended to graft Title XI's procedures onto a land-exchange provision in which Congress provided only that such exchanges be for "equal value."

Not only is Section 1302(h) not an "applicable law," Interior's action in entering into the land exchange was not an action "with respect to the approval or disapproval" of any authorization necessary for the road. The Plaintiffs and the district court equate "allowing" or "facilitating" a road with "the approval" of an "authorization" necessary for the road, Answering Br. 29, but the two are not the

same. A land exchange under Section 1302(h) does not "approve" or "grant" an "authorization" to any entity to do anything. Any authorization otherwise required to build a road or other transportation or utility system is still required. Interior thus made clear that "any decision by [King Cove Corporation] to pursue a road connection is separate and distinct from the land exchange authorized here." 2 E.R. 230. Interior agreed to exchange lands if King Cove, as an equal partner, likewise agreed to the exchange. The land exchange enables King Cove to *pursue* building a road—by obtaining the necessary authorizations to do so from other agencies—but it does not *approve* any *authorization* related to a road.

The Plaintiffs next contend that this Court would "nullify the protections Congress established when adopting Title XI" by recognizing that the land exchange will remove the area from the conservation system unit and, as a result, Title XI cannot apply to any subsequently constructed road. U.S. Opening Br. 41-43; 16 U.S.C. § 3162(4). Answering Br. 30. But Congress intended to provide Interior with "great flexibility in acquiring lands" which extended to "making exchanges of land within conservation system units." S.E.R. 164. And Congress understood that lands conveyed out of a conservation system unit would no longer receive the same protections they had while the lands were part of the unit, providing that once lands are "conveyed to the State, to any Native Corporation, or to any private party," they are not "subject to the regulations applicable solely to public lands within such units," 16 U.S.C. § 3103. Congress nevertheless gave Interior the authority to exchange lands

from conservation system units and made Title XI applicable only to transportation systems that will "be within" such a unit.

Finally, the Plaintiffs contend that Title XI should control because it is the more specific statute and also includes a "notwithstanding" provision. Answering Br. 31-33. Title XI, which applies to a wide swath of transportation and utility systems, is not more specific than Section 1302(h), which authorizes land exchanges with Native Corporations and the State of Alaska. The two statutory provisions simply deal with different subjects, and thus there is no "irreconcilable inconsistency between them" necessitating the invocation of the principle that the more specific statute usually controls when two statutes touch upon the same area and conflict. *See United States v. Trident Seafoods Corps.*, 92 F.3d 855, 862 (9th Cir. 1996). To show statutory inconsistency it "is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). Instead, "when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective." *Id.* (citation omitted). And if there were a conflict between the two "notwithstanding" provisions in ANILCA, Section 1302(h) prevails, because it applies notwithstanding *any* other provision of law, while the similar provision in Title XI applies notwithstanding only "applicable law," which as Interior has explained does not include Section 1302(h).

II. Section 1302(h) of ANILCA authorized Interior to exchange lands with King Cove Corporation.

As explained in the government's opening brief, there are two requirements under Section 1302(h) of ANILCA: (1) the exchange must be for lands of equal value unless an unequal value exchange is in the public interest; and (2) the exchange must be to acquire lands for the purposes of the Act. This exchange is for equal value and the lands Interior will acquire will further the purposes of the Act by adding significant, important acreage previously identified as a priority for acquisition to the Refuge. U.S. Opening Br. 26-32. The Plaintiffs do not argue otherwise.

Instead, the Plaintiffs advocate for an interpretation of ANILCA that would significantly restrict Interior's ability to exchange lands, contrary to the "great flexibility" contemplated by Congress. S.E.R. 164. They contend that ANILCA requires that every land exchange not only achieve a net environmental benefit but also further each distinct purpose of ANILCA and the conservation system unit at issue. Answering Br. 39. According to the Plaintiffs, if even one purpose is not furthered by a land exchange, then Interior cannot exchange lands. *Id.* ("To exchange lands under Section 1302, the Secretary had to ensure that the exchange furthered all of these purposes."). And Interior must ignore any economic or social benefits to the Native corporation acting as a partner in the exchange, or, if they may be considered, the exchange *still* must further every other purpose of ANILCA or fail. Answering Br. 35-45. On the Plaintiffs' reading of ANILCA, Interior has no ability to balance

ANILCA's often competing purposes when determining whether to enter into a land exchange.

The Plaintiffs' drastic interpretation, however, does not find support in the language of ANILCA. The Act's references to its purposes simply say that Interior is "authorized, . . . in order to carry out the purposes of this Act, to acquire" lands within the boundaries of conservation system units, 16 U.S.C. § 3192(a), and that "in acquiring lands for the purposes of this Act, the Secretary is authorized to exchange lands" from within those units, *id.* § 3192(h). The plain language focuses on the land to be acquired. But even if it did not, nowhere does ANILCA say that every exchange must further every purpose of ANILCA or fail, or that there is no room for Interior to balance competing purposes to serve Congress's overall goals.

Moreover, contrary to the Plaintiffs' contention, Answering Br. 41, it was not improper for Interior to consider the positive benefits to the people of King Cove from the land exchange. Both the Supreme Court and this Court have recognized that ANILCA was enacted to "provide an adequate opportunity for satisfaction of the economic and social needs of the people of Alaska." *City of Angoon*, 749 F.2d at 1415-16; *Sturgeon v. Frost*, 139 S. Ct. 1066, 1075 (2019). The Plaintiffs attempt to waive away those controlling statements as not relevant to the purposes of ANILCA because they are mere summaries of what Congress had already achieved by passing the statute. Answering Br. 41. But even if that were correct, one mechanism Congress used to achieve the balance between conservation and social needs was to empower Interior

to acquire lands through land exchanges. And Congress delegated to Interior the authority to strike the right balance when deciding whether to do so based on the facts before it.

Interior reasonably concluded that this land exchange strikes an appropriate balance in furthering ANILCA's dual purposes. The Plaintiffs do not contest that the exchange at issue here would greatly benefit Alaska Natives and other residents in addition to increasing the amount of land under federal protection. Nor do they contend that Interior struck the wrong balance in considering those issues. Instead, they contend that there can be no balancing, and even if the exchange does have significant benefits for the Alaskan people, it must fail because it does not also further ANILCA's conservation purpose. Answering Br. 44.

In agreeing to the land exchange, Interior reasonably balanced the interests of the people of Alaska and the conservation of Alaska's natural resources, as intended by ANILCA. To deny the residents of King Cove the opportunity to pursue the building of a light-use road to access a medical evacuation facility would fail to "provide[] adequate opportunity for satisfaction of the economic and social needs" of the Alaskan people, contrary to the express intent of ANILCA, as codified in 16 U.S.C. § 3101(d). It is well within Interior's discretion under ANILCA to determine that a land exchange that results in both a net increase in the amount of land and habitat being preserved in the refuge system and a potential improvement in public

safety for the Alaskan people serves the purposes of ANILCA. The district court's contrary conclusion was erroneous and should be reversed.

III. Interior satisfied the requirements of the APA when it adequately explained its change of decision.

In Interior's opening brief the government explained that Interior did not change its position from 2013 based on later contradictory factual findings; instead, Interior weighed the importance of the health of the people of King Cove more than the environmental harm at Izembek, a conclusion sufficient to justify the land exchange in accordance with the APA, *Fox Television*, and this Court's decision in *Organized Village of Kake v. USDA*, 795 F.3d 956, 968 (9th Cir. 2015).

The Plaintiffs contend that argument is waived, but the decision document is clear that Interior's differing value judgment formed the basis for Interior's decision, 2 E.R. 232-33, and Interior adequately preserved the argument in the district court. ECF 38 at 18-19.

The Plaintiffs admit that it is "correct" that Interior may change policies based on a different value judgment when looking at the same facts. Answering Br. 48-49. They simply disagree that Interior took that course here, contending that Interior "did not merely rebalance old facts" but instead "relies on direct and unexplained contradictions" in the record. *Id.* In particular, the Plaintiffs contend that Interior made contradictory findings in three areas—the viability of transportation alternatives, harm to Izembek, and the value of the lands to be received. *Id.* at 50-56. But Interior's

decision document belies the assertion that any of those supposed contradictory findings were necessary to Interior's decision. As Interior explained, it would have entered into the land exchange "even assuming all facts as stated in the 2013 ROD." 2 E.R. 233. Those facts were that "resources would be degraded by the road's construction" and that there were viable and at times preferable "transportation alternatives for medical services." 2 E.R. 232-33. Thus *even if* there would be harm to Izembek as outlined in 2013, and *even if* there were viable transportation alternatives to a road, Interior would still have determined that the land exchange would be "consistent with the public interest," the "purposes" of ANILCA, and "our responsibility to the Alaska Native People." *Id.*

As Secretary Bernhardt stated: "While I appreciate that Secretary Jewell placed greater weight on protecting 'the unique resources the Department administers for the entire Nation,' I choose to place greater weight on the welfare and well-being of the Alaska Native people who call King Cove home." *Id.* Accordingly, Interior did exactly what the district court and the Plaintiffs recognized that it may correctly do—"give more weight to socioeconomic concerns" than to environmental concerns even assuming the same record. 1 E.R. 9.

Because Interior would have reached the same conclusion even if there had been no further factual developments, and because the Plaintiffs do not contend that it was impermissible for Interior to do so, this Court should reverse without even

reaching the Plaintiffs arguments regarding Interior's additional, allegedly contradictory factual findings.

If the Court does consider those issues, Interior adequately explained its supplementary factual findings. As explained in the government's opening brief, the district court erroneously disregarded Interior's factual findings on the number and cost of medical evacuations that had occurred after the 2013 ROD. 2 E.R. 231. Interior explained that there were 101 medical evaluations in six years, including 21 by the Coast Guard, at a cost of about $50,000 for each Coast Guard rescue. *Id.*; 2 E.R. 236. Those rescues further highlighted the "acute necessity" for a road and the need to exchange lands. 2 E.R. 232. The Plaintiffs do not respond in defense of the district court's conclusion on this issue. Thus, neither the Plaintiffs nor the district court explain why Interior's reliance on increased costs of medical evacuations was not a "good reason" for Interior's policy reversal. And *Fox Television* and *Village of Kake* demonstrate that Interior is entitled to reach that judgment so long as it provides a reasoned explanation, which it has done. Interior's decision was well within its discretion on the basis of the frequency and costs of medical evacuations alone.

The Plaintiffs contend that Interior failed to adequately explain its conclusion that facts developed after 2013 showed that alternative means of transportation were not as viable or available as was believed in 2013. But the argument ignores the simple fact that, as Interior found, there are currently no hovercraft or landing craft available for use by residents of King Cove and any such availability is both highly speculative

and less likely than in 2013. 2 E.R. 222. The remainder of the Plaintiffs' argument boils down to a disagreement over the conclusions to draw from the June 2015 U.S. Army Corps of Engineers report. Answering Br. 51-52; 2 E.R. 59. Interior concluded that the facts developed in the Corps' report supported a conclusion that alternative means of transportation were not as viable or available as thought in 2013, while the Plaintiffs simply disagree with that reading of the report. Interior articulated its reasons for the new policy and that it believed the policy to be better, explaining that the 2015 Corps report provides support for that belief, as *Fox Television* requires. 2 E.R. 231-33.

The Plaintiffs are also incorrect that Interior made contradictory factual findings on the environmental harms to Izembek Br. 53-54. Interior did not contradict any of the findings it had previously made about the negative environmental impacts of a road and did not list any change to environmental impacts among its reasons for proceeding with the exchange. 2 E.R. 232-33. The Plaintiffs list numerous findings about the environmental impacts of a road but cannot point to a single finding by Interior in 2019 contradicting any earlier specific factual finding. Instead, Interior listed its previous findings from the 2013 EIS, 2 E.R. 220-21, assumed those impacts would occur, and noted only generally that use restrictions could limit the impacts of a road to those previously articulated and thus "enhance" the "balancing of needs" weighing in favor of the exchange, 2 E.R. 233.

Similarly, Interior's conclusion that it would acquire lands that will benefit "the protection of scenic, natural, cultural, and environmental values" does not contradict any earlier factual finding. 2 E.R. 232. The Plaintiffs' argue that Interior had previously concluded that the lands acquired would not offset the harms to the lands exchanged and did not explain why they would do so now. But Interior did not make a comparative factual finding that it was acquiring lands that would offset the environmental value of those lost. Instead, it merely articulated that the lands acquired would provide a substantial benefit to the refuge through a significant increase in the acreage protected. 2 E.R. 232. That is undoubtedly correct, and whether that benefit is sufficient to justify the land exchange given the impacts to the lands lost and the benefits to the people of King Cove of the ability to pursue building a road resides in the area of administrative judgment, not factual findings. Interior's conclusion reflects its decision to weigh human life and safety more than the environmental concerns previously raised, while recognizing that the land exchange will also have environmental benefits to the refuge. 2 E.R. 232-34. Interior's decision was entirely rational and supported by substantial evidence in the record. That is all that the APA requires. *State Farm*, 463 U.S. at 43.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed on Plaintiffs' claims under ANILCA, and the matter should be remanded for the court to resolve Plaintiffs' remaining claims.

Respectfully submitted,

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