No. 20-35721, No. 20-35727, and No. 20-35728

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: DAVID BERNHARDT, et al.,

Defendant-Appellants,

and

KING COVE CORPORATION, et al.,

Defendant-Intervenor-Appellants

v.

FRIENDS OF NATIONAL WILDLIFE REFUGES, et al.,

Defendants-Friends,

On Appeal from the United States District Court for the District of Alaska,

Case No. 3:19-cv-00216-JWS Hon. John W. Sedwick, District Judge

DEFENDANT-INTERVENOR-APPELLANTS' REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Defendant-Intervenor-Appellants inform the Court that: (1) The King Cove Corporation is an Alaska Native Village Corporation organized under the laws of the State of Alaska and the Alaska Native Claims Settlement 43 U.S.C 1601 et. seq. The King Cove Corporation does not offer shares to the public; (2) the Agdaagux Tribe of King Cove and Native Village of Belkofski are federally recognized tribal corporations that do not offer shares to the public; No Defendant-Intervenor-Appellant is an entity which offers shares to the public.

DATED this 4th day of March 2021.

s/Steven W Silver
Steven W. Silver
Attorney for King Cove Corporation

I. INTRODUCTION

This case is about the authority of the Secretary of Interior to enter a land exchange under the Alaska National Interest Lands Conservation Act (ANILCA) to benefit King Cove Corporation (KCC)) and two local tribes, Agdaagux and Belkofski, which have lived in the Exchange area for over 4000 years. As written the 2019 Land Exchange Agreement 2-E.R.-235 and supporting Decision Document 2-E.R.-215 authorize only the land exchange. The Decision Document 2-E.R-215. expressly makes clear that the Land Exchange does not commit to, or authorize, construction of a road.

The basic thrust of Appellees' (collectively "Friends") arguments, and the district court's decision, is that a land exchange that may "facilitate" a road, is the same as an exchange to authorize the establishment of a road, no matter however separate in time and legal process, and speculative construction of that road may be. Accordingly, Appellees' arguments, and the district court's decision, 1-E.R.-2 are "road construction dependent." That is, they require this Court to assume that road construction is authorized, committed to, or that it will soon follow the Exchange. Their assumptions are incorrect as was the district court's decision.

Based on this fundamental disagreement about the legal relationship of aspirational and speculative future road construction to the Land Exchange, this

Reply refutes Friends' assertions that: 1) Title XI of ANILCA applies to the Exchange; and 2) "satisfaction of the economic and social needs of the State of Alaska and its people" in ANILCA § 101 (d) is ***not*** a purpose of ANILCA. This Reply also shows that Secretary Bernhardt's 2019 Decision to proceed with the Land Exchange under ANILCA § 1302 (h) was a legal rebalancing of the same facts found by former Secretary Jewell in her 2013 Record of Decision (ROD) (denying the exchange otherwise authorized by Congress in the 2009 Omnibus Public Land Management Act (OPLMA) 2-E.R.-232.

II. TITLE XI DOES NOT APPLY[1]

A. Introduction

"I have also concluded that Title XI of ANILCA is not relevant to the land exchange envisioned by the Department. Title XI applies to any Federal '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.' While a King Cove land exchange agreement envisions that the KCC may construct a road, it is not an 'authorization' to do so. Furthermore, all of the examples within the scope of 'authorization' are for uses of land that remains in Federal ownership. Unlike a right-of-way or lease or permit, the exchange will remove land from Federal ownership, and should KCC never construct a road, the land would not revert to Federal ownership. Moreover, the provisions of Title XI do not apply to actions taken by the Secretary under the unique exchange authority provided to him under § 1302 (h) of ANILCA, and that authority exists "notwithstanding any other provision of law." 16 U.S.C. § 3192 (h)." Decision Document at 14 – 15, ftnt. 47. 2-E.R.-229

Friends fundamentally misunderstand the purpose of a § 1302 (h) land exchange and the purpose of Title XI. Friends incorrectly contend that the Title 1104 process applies to a §1302 (h) land exchange and that Title XI supersedes § 1302 (h).

The purpose of § 1302 (h) is to allow the Secretary to acquire lands for, and remove lands from, a Conservation System Unit (CSU) in an exchange. 16 U.S.C. 3192(h) ("… in acquiring lands for the purposes of this Act, the Secretary is authorized to exchange lands …"). The purpose of Title XI is to provide a coordinated environmental permitting process for granting rights-of-way *over Federal land within* a CSU. 16 U.S.C. 3161(a) ("Alaska's transportation and utility network is largely undeveloped and the future needs for transportation and utility systems in Alaska would be best identified a provided for through and orderly, continuous decision-making process involving the State and Federal Governments and the public.").

The premise of § 1302 (h) is that land removed from a CSU in an exchange becomes private land. (*See* ANILCA §103 (c)). The premise of Title XI is that private parties will need access across federal land and Title XI exists to provide the framework for that access. The Title XI premise is without effect and the Title XI procedures are of no purpose when the land is not held by the federal government. Private parties need no process to move through their own lands.

If Title XI was as expansive as Friends suggest, then such restrictions on the Secretary's exchange authority to adjust CSU and private land boundaries would have been a subject of legislative language setting parameters on its application (along with much debate and legislative history - generated especially by Native Corporations that held land within the CSUs). The absence is telling.

Moreover, Friends' Title XI arguments are not supported by the language of §1302 (h), Title XI, or the applicable canons of statutory construction. Further, the "notwithstanding" language of §1302 (h) controls potential conflicts with § 1104.

B. The District Court Findings and Friends' Arguments Are Inconsistent with The Applicable Statutory Language.

1. By Statutory Definition A "Corridor to Facilitate" an Expressly Unauthorized Road Is Not a TUS Under ANILCA Title XI.

Under Friends' flawed reasoning a "corridor to facilitate" a road somehow becomes a transportation utility system under ANILCA Title XI. Friends' Brief at 29. What the Secretary actually authorized is described at page 11 of the 2019 Decision Document.[2] 2-E.R.-215 Specifically, he authorized a land exchange

[2] "The land exchange itself would not authorize construction of a road, however, if KCC chose to pursue this option and was successful in obtaining the necessary financing, engineering and proper permits and authorizations, which could include compliance with federal laws including NEPA, such an exchange would eventually allow KCC to construct a road along the corridor, which by the terms of the agreement, be utilized primarily for health, safety, and quality-of-life purposes and generally not for commercial purposes." (Decision Document at 11). 2-E.R.-226

intended to provide land to KCC which in turn would allow it to seek authorization, financing, and permits to construct a road in a separate, future proceeding. No road or other ground disturbing activity was authorized by the 2019 Land Exchange. 2-E.R.-235. This is unlike the situation faced by Secretary Jewell in 2013 in which Congress authorized road construction contingent on her approval of the land exchange.[3]

Section 1102 (4)(A) defines a "transportation or utility system" as "any type of system described in subparagraph (B). Subparagraph (B) provides a list ((B) (i) – (vii)) of specific structures among which are "(vii) Roads, highways, railroad tunnels, tramways, airports, landing strips, docks, and other systems of general transportation." A "corridor through Izembek to facilitate the building of a road,"[4] for which construction is expressly not authorized, is not a road. Nor is it a "system of general transportation." It is an aspiration.

The district court's decision requires judicial addition of "any action that *facilitates* the building of a road" to the specific items listed in § 1102 (4)(B)(vii).

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[3] See OPLMA § 6402 (d)(1): "[T]o carry out the land exchange under subsection (a), **the Secretary shall determine that the land exchange (including the construction of a road between the City of King Cove, Alaska, and the Cold Bay Airport)** is in the public interest)." (Emphasis added). See also §§ 6403 (c), 6405 (a), and 6406 (a). Pub. L. No. 111-11, Title VI, Subtitle E, 123 Stat. 991 (Mar. 30, 2009).

[4] Order and Opinion at 18-19. 2-E.R.-219-220.

By so interpreting "facilitate," the district court and Friends would expand the scope of the items listed in §1102 (4)(B) (i-vii) to include any item that can reasonably be argued to "facilitate" them.

Instead of adding "a corridor to facilitate the building of an expressly not authorized road" to the specific systems listed in ANILCA § 1102 (4)(B)(vii), the district court should have assumed that Congress "listed" what it meant and meant what it "listed." (See *BedRoc Ltd., LLC v. United States* 541 U.S. 176, 183 (2004)). Finally, the *Expressio unius est exclusio alterius* canon of statutory construction presumes that when one or more things of a class is expressly mentioned, others of the same class are intentionally excluded. *United States v. Crooked Arm*, 788 F.3d 1065, 1075 (9th Cir. 2015).

Because a "corridor to facilitate the building" of an aspirational, but unauthorized, road is not listed in the § 1102 (4)(B) definition, it is not a "transportation system" and thus not subject to Title XI's § 1104 process.

2. By Statutory Definition Once the Land Exchange Occurs, Any Future Road Would Be Built on Private Land, Not Through A CSU. Title XI's §1104 Process Does Not Apply to Private Land.

Section 1302 (h) specifically authorizes the Secretary "in acquiring lands for the purposes of this Act to exchange lands (***including lands within conservation system units*** …)." (Emphasis added). Thus, the Secretary has specific authority to exchange the land within the Refuge. The exchange will remove the land transferred

to KCC from Federal ownership. At that point, as acknowledged by §103(c) (See *Sturgeon v. Frost,* 139 S. Ct. 1066, 1077 (2019)), it will no longer be within the boundaries of a CSU and "the corridor to facilitate the building of a road" will no longer be subject to any possible definition under § 1102 (4) as a "transportation or utility system."

3. Section 1302 (h) Does Not Preclude or Limit the Secretary's Authority to Exchange Land Due to the Native Corporation's Post-Exchange Plan for Use of the Land Transferred to It.

Congress did not intend to apply the "protection" of the § 1104 process to private land within the Refuge following a land exchange. To the contrary, the district court's observation contradicts the specific language of § 103 (c), including the Supreme Court's interpretation of §103 (c) in *Sturgeon v. Frost*, *supra.* and § 1302 (h).

In *City of Angoon v. Marsh*, 749 F.2d 1413, 1417 (9th Cir. 1984) this Court allowed timber harvest to proceed because it found that land within the Admiralty National Monument belonging to a Native Corporation was outside the "protections" of the Monument due to §103 (c):

> Thus, section 103(c) was added to ANILCA immediately prior to its enactment as part of the legislative "fine-tuning" process for the express purpose of "specifying that only public lands (and not State owned or private lands) are to be subject to the conservation system unit regulations applying to public lands" and "to make clear that other particular provisions of the bill

> apply only to public lands." 126 Cong. Rec. H. 30498 (November 21, 1980) (supplementary material furnished by Rep. Udall).

When it enacted § 1302 (h) Congress was aware that every land exchange proponent, as KCC here, would have a plan for using the land acquired from the Federal government after the exchange. Otherwise, why make the exchange?

Friends' interpretation would preclude any such post-exchange plan if the land transferred out of the CSU to the Native Corporation met, or could later potentially meet, the § 1102 (4)(A) and (B) definition of a TUS. To enforce it would require the Secretary to inquire of a land exchange proponent its purpose in making the exchange. There is no provision in Title XI or anywhere in ANILCA requiring such an inquiry or prohibiting a transfer based upon a post-exchange plan – probably because it would make §1302 (h) exchanges unworkable. Again, the district court's Order and Friends' argument require amendments to ANILCA that were not enacted by Congress.

In conclusion, the Land Exchange does not circumvent the §1104 process. It would be error to apply the §1104 process to non-CSU, private land within the geographic boundaries of the Refuge. First, §1302 (h) specifically authorizes the Secretary to transfer land out of a CSU when making a land exchange. Second, § 103 (c), as interpreted by *Marsh* and *Sturgeon*, shows that Congress did not intend the application of the §1104 process to private land that has been transferred out of a CSU into private hands. Third, ANILCA provides no authority for the Secretary

to prohibit, or otherwise restrict, a post-exchange plan for land transferred from a CSU to a private owner.

C. **Because § 1302 (h) Does Not Fall Within the Definition of "*Applicable Law*," the "Notwithstanding" Phrase of §1104 Does Not Apply to A § 1302 (h) Exchange. However, the "Notwithstanding *Any Other* Provision of Law" Language of § 1302 (h) Precludes Application of Title XI to § 1302 (h).**

The district court reads the interaction of the "notwithstanding" phrases of § 1104 and § 1302 (h) as follows: "[I]f Congress had intended §1302(h) to override provisions within ANILCA itself it would have done so explicitly, given that it did so elsewhere in ANILCA."[5]

Contrary to the district court's analysis, Congress harmonized §1302 (h) and § 1104 by limiting the scope of the § 1104 process to a "transportation or utility system," (which, by definition, is within a CSU) and by "explicitly" authorizing the Secretary by §1302(h) "to exchange lands (including lands within conservation system units …)" with non-federal parties. For the reasons given in *Marsh*, *Sturgeon*, and § 103(c), land within a CSU so transferred removes that land from the CSU and the reach of the Title XI process.

Importantly, § 1104 and §1302 (h) have different "notwithstanding" language. Section 1104(a) says "Notwithstanding any provision of ***applicable*** law." Section

[5] Order and Opinion at 20-21. 2 E.R, 21-22.

1302(h) says "Notwithstanding ***any other*** provision of law." The different words have different meanings, as applied here, that yield different results. The canons of statutory construction require that this difference in language be recognized. *Sosa v. Alvarez–Machain*, 542 U.S. 692, 711 n. 9, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.") (quoting 2A Norman J. Singer, Statutes and Statutory Construction § 46:06, at 194 (6th rev. ed.2000)) *Jane Doe No. 1 v. Backpage.Com, LLC*, 817 F.3d 12, 23 (1st Cir. 2016) ("The normal presumption is that the employment of different words within the same statutory scheme is deliberate, so the terms ordinarily should be given differing meanings.")

Yet without recognizing the separate and distinct meanings of "***applicable*** law" and "***any other*** provision of law," the district court interprets them to mean the same:

> Interpreting the two notwithstanding clauses to require the Secretary to comply with Title XI in this situation gives meaning to both provisions and is consistent with Congress's intent to provide a single comprehensive system for **approving roads through conservation lands**.[6] (Order and Opinion at 21). (Emphasis added). 1-E.R.-22.

[6] This misses the fact that an exchangee's land will not be CSU land after an exchange.

This misses the key language differences.

Section 1102(1) defines "applicable law" for purposes of Title XI to mean "any law of general applicability (other than this title) under which "any Federal department or 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."

But § 1302 (h) simply provides a means to acquire private land from a private party "for purposes of this Act." It does not give the Secretary jurisdiction to "grant a private party a "right-of-way, permit, license, lease, or certificate" or similar permission to establish operate a road.

Because the Secretary has no authority under § 1302 (h) to ***grant*** any of the authorizations listed in § 1102 (1), § 1302 (h) is not "applicable law" for purposes of the § 1104 process. (The fact that a road not currently authorized or permitted may ***result*** from the exchange in a future process is not a ***grant to establish or operate a road***). Accordingly, §1302(h) is not the "applicable law" to which § 1104 (a) refers by its "notwithstanding" phrase."

On the other hand, §1302 (h) says without limitation: "Notwithstanding ***any other*** provision of law." In the context here the words "***any other*** provision of law" clearly include § 1104 (a). Because there are no limitations on the §1302 (h) "notwithstanding phrase," §1302(h) is excluded by way of definition from the § 1104 (a) "notwithstanding applicable law" phrase." See *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (The "notwithstanding" phrase "clearly signals the drafter's intention that provisions of the `notwithstanding' section override conflicting provisions of any other section.") (citing *Shomberg v. United States*, 348 U.S. 540, 547-48 (1955)).

III. THE EXCHANGE AGREEMENT COMPLIES WITH ANILCA 1302 (h)

A. Introduction.

The district court held that the 2019 Exchange Agreement 2-E.R.-235, is unlawful because it does not further ANILCA's purposes.[7] Friends argued[8] and the district court agreed: 1) that both parts of the exchange (land acquired and land released) must meet the purposes of ANILCA[9]; and 2) that furthering the economic

[7] Order and Opinion at 18. 2-E.R-219.
[8] Friends Answering Br. at 36-37.
[9] "The plain language of the statute therefore requires that a land exchange pursuant to § 1302 of ANILCA be undertaken to further the purposes of ANILCA." Order and Opinion at 14. 2-E.R-215.

and social development needs (ANILCA § 101 (d)) of land exchange recipients like KCC is not a purpose of ANILCA.[10]

They are wrong on both counts: First, § 1302 (h) does not require that both the land acquired, and land released in an exchange must meet the purposes of the ANILCA. Rather, it says "in ***acquiring*** lands for the purposes of this Act, the Secretary is authorized to exchange lands (including lands within conservation system units" etc.). Congress would have referenced both the land acquired and the land released by the Secretary had it intended that both must meet the purposes of the Act. Instead, § 1302 (h) subjects only the land to be acquired to the phrase "for the purposes of this Act."

This interpretation is consistent with the language of § 1302 (a) which says in pertinent part: "… the Secretary is authorized, consistent with other applicable law ***in order to carry out the purposes of this Act,*** to ***acquire*** by … exchange, or otherwise any lands within the boundaries of any conservation system unit other than National Forest Wilderness." (Emphasis added). It is also consistent with the Secretary's interpretation that § 1302 is a land acquisition provision,[11] which

[10] Order and Opinion at 17. 2-E.R-218.

[11] "Section 11101 (f) [an earlier version of I302(h)] is the exchange portion of the general acquisition provisions. Modeled on section 22 (f) of the Alaska Native Claims Settlement Act, it is intended to provide the Secretary with great flexibility in ***acquiring*** lands by permitting him to enter into exchanges. This flexibility extends

interpretation is entitled to deference. *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008), aff'd, 629 F.3d 1074 (9th Cir. 2010). Only the lands acquired in an exchange must meet the purposes of ANILCA.

Second, the district court's finding that § 101 (d) is not a purpose of ANILCA is not only inconsistent with the plain language of § 101, but also with this Court's holding and reasoning in *City of Angoon v. Marsh*, 749 F.2d 1413, 1415-1416 (9th Cir. 1984) and the Supreme Court's Opinion in *Sturgeon v Frost*, 139 S. Ct. 1066, 1075 (2019).

B. The District Court's Findings and Friends' Arguments Are Inconsistent with The Applicable Statutory Language.

1. Friends' Argument Does Not Properly Analyze the Statutory Language of § 1302 (h) or the Policies Behind It.

The district court and Friends claim the 2019 Land Exchange should be set aside because the land transferred to KCC could "facilitate" the building of a future road. Such a road is aspirational and speculative not only because it is expressly ***not*** authorized by the 2019 Land Exchange,[12] but because it is also contingent upon KCC "obtaining the necessary financing, engineering and proper permits and authorizations, including compliance with federal laws like NEPA … ."[13]

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to making exchanges within conservation system units." H.R. Rep. No. 96-97, 96th Cong., Sess. l0i (April 18, 1979) quoted on page 15 of the Decision Document at ftnt. 50. 2-E.R-230.

[12] Decision Document at 2, 11, 14, and 16. 2-E.R.-216, 226, 229. 231.

[13] Decision Document at 11. 2-E.R.-226

Accordingly, any impacts to the land will not occur as part of the 2019 Land Exchange, but in a separate process only ***after*** the multiple future contingencies described above have been realized. After the exchange, as expressly acknowledged by ANILCA § 103 (c) (See *Sturgeon v. Frost*, 139 S. Ct. 1066, 1077 (2019)), the land KCC receives in the exchange will be private land outside the boundaries of a CSU. ANILCA does not manage land no longer under Federal control.

Friends' argument thus depends upon the Secretary being required ***prior*** to the exchange to determine how the Native Corporation will use its land following the exchange and place restrictions on that land to prevent it from being used as a TUS – all of which would make §1302(h) exchanges burdensome and unworkable and none of which has a scintilla of support in the language of §1302(h).

Congress must be assumed to have been aware that the recipient of land would not have entered the exchange without a plan for its use following the exchange. Yet, Congress did not require the Secretary to inquire into, or place restrictions on, the recipient's intended future. This is fully consistent with KCC's argument that only the acquired land in a § 1302 (h) exchange must meet the purposes of ANILCA.

2. The Supreme Court's Decision in *Sturgeon v Frost, supra.*, Controls the Legal Issue Whether ANILCA §101(d) Is A Purpose of ANILCA.

Citing *Alaska v Fed. Subsistence Bd.*, 544 F.3d 1089, 1091, 1098 (9th Cir.2008) the district court determined that Congress enacted ANILCA to further two ends: preservation and subsistence. The district court finds that § 101 (d) is not

a purpose of ANILCA, but instead "an acknowledgement that, in passing ANILCA, Congress has achieved the proper balance between conservation needs and economic and social needs and that it therefore believes no future legislation designating new conservation areas is needed."[14] The district court's opinion and Friends' reliance on it overlook clear precedents of this Court and the U.S. Supreme Court.

Friends dismiss this Court's holding in *City of Angoon v Marsh*, 749 F.2d 1413, 1415-1416 (9th Cir. 1984) that § 101 (d) is a purpose of ANILCA ("ANILCA was passed to furnish guidelines for the protection for the national interest in the scenic, natural, cultural and environmental values of the public lands in Alaska and to provide an adequate opportunity for satisfaction of the economic and social needs of the people of Alaska. *See* 16 U.S.C. §3101.") because it only "opined generally on ANILCA's goals and statements in Section 101, without specifically considering the structure or framework of that section."[15] Friends' argument comes up short, as there was no reason for *City of Angoon* to dissect the structure or structure of ANILCA's Purposes Section when the four purposes are clearly laid out and are easily understandable.

[14] Order and Opinion at 17. 2-E.R.-218.
[15] Friends Br. at 41.

Providing "for the adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people"[16] is clearly a purpose of ANILCA because: First, §101(d) is a subsection among the "Purposes" Section of Title I. Second, ANILCA is replete with provisions addressing economic and social needs.[17] As one example, Title XII establishes the Alaska Land Use Council which among other things is "to make recommendations to appropriate officials of the governments of the United States and the State of Alaska with respect to ways to ensure that economic development is orderly and planned and is compatible with State and national economic, social, and environmental objectives."[18]

Most important, citing § 101 (d) (providing for adequate opportunity for satisfaction of economic and social needs of Alaska and its people) the Supreme Court held in in *Sturgeon v Frost*, 139 S. Ct. 1066, 1075 (2019):

> Starting with the statement of purpose in its first section, ANILCA sought to "balance" two goals, often thought conflicting. 16 U.S.C.§3101(d). The Act was designed to "provide sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska." *Ibid.* "[A]nd at the same time," the Act was framed to "provide adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." *Ibid.* So if, as you continue reading, you see some tension within the statute, you are not mistaken: It arises from Congress's twofold ambitions.

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[16] ANILCA § 101 (d).
[17] For example, see sections 205, 502, 505, 507, 705, 706,708, Title VIII, Title IX, Title X, Title XI, Title XII,1110, 1307, 1308, 1319, 1313, 1318, 1319, 1326, 1329,
[18] ANILCA § 1201 (i)(2)(C)

Accordingly, the district court erred in determining that "provid[ing] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people" is not a purpose of ANILCA for purposes of § 1302 (h).

3. The Secretary Properly Exercised His Discretion in Balancing the Economic and Social Needs with The Conservation Purposes of ANILCA And Izembek In Making the 2019 Land Exchange.

Citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L.Ed.2d 377 (1989) the *en banc* Ninth Circuit Court in *Land Council v. MacNair* 537 F.3d 981, 993 (9th Cir.2008) stated: "[O]ur proper role is simply to ensure that the Forest Service made no "clear error of judgment" that would render its action "arbitrary and capricious."

ANILCA § 1302 (h) says "in acquiring lands for the purposes of this Act, the Secretary is authorized to exchange lands the Secretary … etc." *Sturgeon v Frost*, 139 S. Ct. 1066, 1075 (2019) says that the "purposes of the Act" includes ANILCA §§ 101 (a), (b), (c), and (d) which describe environmental, subsistence, and social and economic values. The law thus gives the Secretary the discretion to determine what weight to give each of these factors. In this case the Secretary considered the same factors as those considered by Secretary Jewell in the 2013 ROD which Judge Holland found met the requirements of law. *Agdaagux Tribe of King Cove v. Jewell*, No. 3:14-cv-0110-HRH (D. Alaska 2015).

Without changing any of the facts stated in Secretary Jewell's ROD, all of which the Secretary Bernhardt assumed were the case,[19] the Secretary decided to proceed with the Land Exchange. In *Organized Village of Kake v. U.S. Department of Agriculture*, 795 F.3d 956 (9th Cir. 2015). at 968, this Court authorized him to do so: "We do not question that the Department was entitled in 2003 to give more weight to socioeconomic concerns than it had in 2001, even on precisely the same record."

Secretary Bernhardt's decision to make the 2019 Land Exchange *without changing the facts* stated in Secretary Jewell's ROD, distinguishes this case from *Kake*. The rule at issue in *Kake* was found to violate the APA for failure to adequately explain a decision *based on different facts*. Nevertheless, the Court acknowledged that rebalancing for socioeconomic concerns is within the purview of agency decision makers. In the case at bar the Secretary carefully considered the needs of neighboring native communities and the federal government's overarching trust responsibilities in the balance of his decision while at the same time assuming the facts in Secretary Jewell's 2013 ROD to be unchanged.

[19] Decision Document at 19. 2-E.R-224.

Thus, Friends' contention that the Secretary "elevated economic and social needs over the conservation purposes of ANILCA and Izembek"[20] simply reflects their disagreement with the weight he gave socioeconomic concerns, which is not grounds for overturning his decision.

4. The Secretary Stated at Page 19 of the Decision Document That Any Road Would Have Restrictions and Those Restrictions Will Be Included in Conveyance Documents for Consistency with the Decision.

Friends point out that the Secretary's statement that use restrictions would protect the ecological values of the Refuge is not supported by the record because there are no such restrictions in the 2019 Land Exchange Agreement.[21]

The Secretary stated at page 19 of the Decision Document: "This balancing of needs would be enhanced through the adoption of restrictions on the nature of any road to single-lane gravel construction on which non-medical uses and access would be severely limited." 2-E.R.-224. This requirement was inadvertently left out of the Exchange Agreement but will be included in subsequent conveyance documents if KCC is able to meet all the contingencies necessary to proceed.

IV. THE EXCHANGE AGREEMENT DOES NOT VIOLATE *FOX* AND *KAKE*[22]

[20] Friends Answering Br. at 42.
[21] Friends Answering Br. at 43-44.
[22] *FCC v. Fox Television*, 556 U.S. 502 (2009) and *Organized Village of Kake v. U.S. Department of Agriculture,* 795 F.3d 956 (9th Cir. 2015).

A. Introduction.

Friends aver, and the district court found, that the 2019 Land Exchange is a change in policy made by Secretary Bernhardt without providing sufficient reasons for contradicting facts in former Secretary Jewell's description of the impacts of road construction on the Izembek Refuge in her 2013 ROD. The district court thus found the Secretary's decision to enter the Land Exchange was arbitrary and capricious because it violated the Supreme Court's decision in *Fox* and this Court's *en banc* decision in *Kak*e.[23]

In their Answering Brief. Friends contend that: 1) because Secretary Bernhardt was reversing policy he was required to show good reasons for entering the Exchange, but provided only conclusory reasons;[24] 2) Secretary Bernhardt not only rebalanced old facts, he relied on direct and unexplained contradictions to support his decision.[25] Friends then list and argue each fact it believes was contradicted, even though the Secretary expressly stated that he reached his decision "assuming all the facts stated in the 2013 ROD."[26]

For the reasons given at pages 17 - 27 of KCC's Opening Brief the district court's finding that Secretary Bernhardt violated the Supreme Court's decision in

[23] Order and Opinion at 14. 2 E.R. 16
[24] Friends' Br. at 48.
[25] Friends' Br. at 49.
[26] Decision Document at 17-20. 2 E.R. 232-235

Fox and this Court's *en banc* decision in *Kak*e by entering into the Land Exchange is clearly erroneous and Friends' contentions to the same effect are wrong because: 1) Secretary Bernhardt stated in the Decision Document 2-E.R.-215 that he would have entered the Land Exchange even if the impacts on the Refuge were exactly as presented in former Secretary Jewell's 2013 ROD[27] - *Kake* expressly recognizes his right to make such a rebalancing decision;[28] 2) the 2019 Agreement 2-E.R.-235 did not "***commit*** the federal government to exchange land with KCC ***for construction of a road through Izembek***." (Order and Opinion at 5) 2-E.R-7. (Emphasis added); 3) a land exchange which may facilitate a separate potential future process to consider road construction is not road construction and has no environmental impacts on the Refuge whatsoever; and 4) the decision to make the Land Exchange under ANILCA § 1302 (h) was a completely different decision than that made by former Secretary Jewell under OPLMA.

B. **Responses to Friends' Answering Brief.**

1. *Kake* Expressly Recognizes the Secretary's Right to Accept All. the Facts Underlying a Prior Policy and Rebalance Them to Reach a Different Decision. *(Kake* at 968). The Secretary Did Not "Rely on Direct and Unexplained Contradictions to Support His Decision."[29]

   This Court found in *Kake*:

[27] Decision Document at 18 – 19. 2 E.R. 233
[28] *Kake* 795 F.3d at 968
[29] Friends' Br. at 49.

> **We do not question that the Department was entitled in 2003 to give more weight to socioeconomic concerns than it had in 2001, even on precisely the same record.** "*Fox* makes clear that this kind of reevaluation is well within an agency's discretion." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 (D.C.Cir.2012). *Kake* at 968. (Emphasis added).

The Secretary did exactly what the Ninth Circuit instructed was needed to comply with *Fox* and *Kake*. The Secretary's reasons **do not** rest on contradictory facts. Rather, he decided to proceed with the 2019 Agreement "**even if the facts are as stated in the 2013 ROD**:"[30]

> I also find that a rebalancing of the factors involved, weighted by the responsibility to the Alaska Native people in the implementation of ANCSA and ANILCA, requires a different policy result for the ANILCA land exchange considered here than the policy conclusion drawn in the 2013 ROD pursued under the authority of OPLMA in light of:
>
> - - - - - -
>
> (5) My determination that**, even if the facts are as stated in the 2013 ROD, that is, that a road is a viable alternative but (a) there are "viable and at times preferable" transportation alternatives for medical services and (b) that resources would be degraded by road construction – human life and safety must be the paramount concern in this instance.** (Emphasis added)

Contrary to Friends' assertion, the Secretary explained why he was rebalancing the facts on which Secretary Jewell's 2013 ROD was based:

> In my judgment, when weighing the competing considerations here, preservation of human life must be given great weight. Accordingly, **even assuming all the facts stated in the 2013 ROD. in the exercise of policy**

[30] Decision Document at 18. 2-E.R.-233.

> **discretion, I find that executing the equal value exchange in a form substantially consistent with the "Draft Form of Agreement for Exchange of Lands" attached as Addendum B 2 E.R. 234 is consistent with the public interest, the purposes of ANSCA and ANILCA** and our responsibility to the Native people.[31] (Emphasis added).
>
> Friends clearly disagree with the Secretary's priorities on this point.:
>
> In sum, the Exchange Agreement is for the specific purpose of taking land out of Izembek and designated Wilderness for a road. **The protection of human life and safety cannot be at the expense of ANILCA's and Izembek's purposes.** (Friends' Opening Brief in the District Court at 24 – 25). (Emphasis added).

Section 1302 (h) vests tremendous discretion in the Secretary to make a land exchange agreement. The APA does not allow Friends to second guess the Secretary on the values and risks he is authorized to consider and weigh in making a land exchange decision. *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008), aff'd, 629 F.3d 1074 (9th Cir. 2010); *League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122 (9th Cir. 2010). Accordingly, Secretary Bernhardt had the authority under ANILCA to weigh the value of the lives of the people living in King Cove differently than Secretary Jewell and Friends:

> 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. I value the well-being of an entire community over the impacts derived from the change in

[31] Decision Document at 18 – 19. 2 E.R. 233-234.

ownership of these various parcels of property which are an incredibly small percentage of Alaska's Wilderness.[32]

Because the 2019 Land Exchange resulted from the Secretary placing a greater weight on the welfare and well-being of the Alaska Native people, without contradicting facts found by Secretary Jewell in the 2013 ROD, the district court erred in determining that Secretary Bernhardt's approval of the Exchange was arbitrary and capricious.

2. Because Secretary Bernhardt Determined That He Would Have Made the Land Exchange "**Even If the Facts Are as Stated in the 2013 ROD,"[33]** His Additional Reasons for Making the Exchange Are Surplus and Do Not Provide A Basis for Finding That His Decision to Make the Exchange Does Not Comply with *Fox* and *Kake*.

Because Secretary Bernhardt determined that he would have made the Land Exchange "**even if the facts are as stated in the 2013 ROD,"[34]** his additional reasons for making the Exchange (which Friends list and attempt to refute one-by-one at pages 38 - 40 and 49-57of their Brief) are surplus to his decision and do not provide a basis for finding that his decision to make the Exchange violates *Fox* and *Kake*.

[32] Decision Document at 19 - 20. 2-E.R.-234-235
[33] Decision Document at 18 – 19. 2-E.R.-233-234
[34] Decision Document at 18 – 19.

V. CONCLUSION

For the foregoing reasons KCC respectfully urges the Court to reverse and set aside the district court's grant of summary judgment to Friends.

RESPECTFULLY SUBMITTED this 4th day of March 2021.

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CERTIFICATE OF COMPLIANCE FOR BRIEFS PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(a) AND FORM 8

9th Cir. Case Numbers: 20-35721, 20-35727, and 20-35728

The undersigned attorney certifies that:

1. This brief contains 6056 words and thus complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the type face volume of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Office Word 2010, font size 1 4 and Times New Roman type style.

Signature: /s/ Steven W. Silver Date: March 4, 2021

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March 2021 I caused to be electronically filed the foregoing Defendant-Intervenor-Appellants' Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

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