No. 20-35721
(Consolidated with Nos. 20-35727 and 20-35728)

IN THE 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

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. Hon. John W. Sedwick

INTERVENOR-DEFENDANT APPELLANT STATE OF ALASKA'S OPENING BRIEF

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INTRODUCTION

The State reviewed the opening appellate brief of King Cove Corporation ("KCC"), *et al*. (Case 20-35727, Docket 10; filed 11/21/2020) and concurs with the arguments made by KCC. As the intended recipient of the strip of land to connect the existing road system on each side of the Izembek isthmus, and as the intended grantor of its biologically prized shorelands of the same isthmus, KCC is at the center of the challenged land exchange and has presented its interests well. The State concurs in KCC's reasoning and conclusions that: the district court incorrectly determined that the 2019 Land Exchange violated the Administrative Procedure Act; the district court incorrectly determined that the 2019 Land Exchange did not meet the purposes of Alaska National Interest Lands Conservation Act ("ANILCA"); and the district court incorrectly determined that the Secretary of the Interior and KCC were required to undergo an ANILCA Title XI process (including additional approvals by the President and Congress) prior to completing the land exchange. The State, however, presents the following arguments to show the larger context and the wider range of effects that the district court's errors would have on the implementation of ANILCA and the coordinated management of the hundreds of millions of acres of intermingled State, Native and Federal lands in Alaska.

JURISDICTIONAL STATEMENT

A. Jurisdiction Is Proper.

The district court had jurisdiction over this action under 5 U.S.C §§ 702-06 (APA) 28 U.S.C. §§2201-02 (declaratory judgment), and 28 U.S.C. § 1331 (federal question jurisdiction) because the Plaintiffs-Appellees (collectively "Friends") challenged an agency decision, raised federal questions and sought injunctive and declaratory relief. 2 E.R. 303. The State of Alaska ("State") intervened as a defendant as a matter of right. 2 E.R. 304-05.

The State of Alaska appeals a final decision of the district court, and this Court has jurisdiction under 28 U.S.C. § 1291. Final judgment was entered on June 17, 2020 and Alaska filed its notice of appeal on August 17, 2020. 1 E.R. 1 and 2 E.R. 25, respectively. Therefore, this appeal is timely under Federal Rule of Appellate Procedure Rule 4(a)(1)(B)

B. The State Has A Direct Interest In The Appeal.

Although the State is not a party to the vacated land exchange agreement ("2019 Land Exchange") between the federal Appellants and KCC, one of the Defendant-Intervenor Appellants, the State pursues this this appeal because it is injured by the final order. The 2019 Land Exchange was executed under the ANILCA and the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§ 1601, *et seq*. One of the purposes of the 2019 Land Exchange was to allow KCC

the potential for future construction of a life-saving road connecting King Cove to the all-weather airport in Cold Bay. 2 E.R. 235. The district court held that Secretary Bernhardt's decision to enter into the 2019 Land Exchange was unlawful agency action under the APA because the Secretary failed to provide adequate reasoning to support a change in policy, and that the 2019 Land Exchange was impermissible under ANILCA. 1 E.R 15 and 19. The district court stated that §101(d) of ANILCA, found in the section of ANILCA purposes, "does not state one of the purposes of ANILCA." 1 E.R. 19. In other words, the district court concluded that the economic and social needs of Alaska and its citizens could not support a lawful exchange under ANILCA.

In line with the U.S. Supreme Court, this Court has recognized that "[s]tates are 'entitled to special solicitude in [its] standing analysis.'" *Sierra Club v. Trump*, 977 F.3d 853, 866 (9th Cir. 2020) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007)). A "state may sue to assert its quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general." *Id.* (internal quotation marks omitted). Separately from these interests, the State also "has an interest in securing observance of the terms under which it participates in the federal system." *Id.* (internal quotation marks omitted).

Here, the State has a demonstrated interest in the health and safety of the residents of King Cove, whom the 2019 Land Exchange sought to protect. *See*

Alaska Const. Art. 7, §§ 4 & 5. This interest includes ensuring the State's residents have adequate access to emergency and medical care. *See* AS 19.05.125 (authorizing construction of roads to connect communities and improve the economic and general welfare of Alaskans). Without this land exchange, King Cove residents are isolated, as their community is effectively surrounded by the Izembek National Wildlife Refuge ("NWR"). Moreover, the State has repeatedly demonstrated its interest in protecting the residents of King Cove through its long history of pursuing state and federal legislation to connect the community of King Cove to the airport at Cold Bay by closing the 12-mile gap between existing road systems. *See e.g.*, King Cove Health and Safety Act, Pub. L. 105-277 § 253; 112 Stat. 2681 at *303 (federal appropriation of $20 million for road and marine facilities on KCC lands located outside Izembek NWR); Omnibus Public Land Management Act of 2009 ("OPLMA"), Pub. L. No. 111-11, Title VI, Subtitle E; reprinted at 2 E.R. 209-214 (State would receive federal land and road construction authorization in exchange for State and KCC lands); *See also,* State appropriations for King Cove access to Cold Bay airport: 2017 State Law of Alaska (SLA) Ch. 1 § 23 ($10,000,000); 2014 SLA Ch. 18 § 62 ($21,000,000); 2014 SLA Ch. 18 § 58 ($100,000); 2013 SLA Ch. 16 § 148 ($1,958,992); 2012 SLA Ch. 17 § 146 ($4,000,000); 2011 SLA First Special Session Ch. 5 § 35 ($300,000); 2010 SLA Ch. 43 § 48 ($15,000,000); 2010 SLA Ch. 43 § 95 ($300,000); 2008 SLA Ch. 29 §

103 ($2,000,000); 2005 SLA Ch. 3 § 136 ($2,000,000). The vacatur of the 2019 Land Exchange injured the State's interests in the health and safety of its citizens and connectivity of Alaskan communities.

The State as sovereign state and state land manager also has interests in increased local control and permanency in land determinations in Alaska. *See Sturgeon v. Frost*, 139 S.Ct. 1066 (2019), at 1074-77 (detailing Alaska's efforts and the efforts of Alaska Natives to secure ownership of land in Alaska). The State was injured by the district court's decision that undermined the local control and permanency created in the 2019 Land Exchange. Additionally, the district court's decision determines how this land will be used. When a decision deals with land use, this Court has recognized that the neighbors' interests—whether economic, environmental, or aesthetic—may be affected. *See Sierra Club*, 977 F.3d at 878 (commenting neighbors may sue over land use statutes and that neighbors' interests come within the ambit of such statutes) (citations omitted). Here, the State owns lands boarding both Izembek NWR and KCC lands and therefore any decision affecting land use within the Izembek NWR also affects Alaska's interests in managing its neighboring lands.

The State was also injured by the district court's interpretation of ANILCA because it undermines and narrows the ability of Alaska residents, Alaska Native Corporations and the State of Alaska to enter into land exchanges under §1302(h)

of ANILCA. ANILCA and ANCSA were compromise legislation that are vital to how residents of the state and Alaska fit within the federalism framework. Thus, the State has Article III standing and presents this appeal the district court's decision.

ISSUE PRESENTED

1. The district court held that the satisfaction of the economic and social needs of the State of Alaska and its people is not a purpose of ANILCA. Does the district court's decision contradict § 101(d) of ANILCA, as interpreted by the U.S. Supreme Court in *Sturgeon v. Frost*, 139 S.Ct. 1066, at 1075, which expressly states that ANILCA "provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people"?

2. To further the health and safety of the residents of King Cove, Secretary Bernhardt agreed to an equal value exchange lands within the Izembek National Wildlife Refuge: a continuous strip of uplands across the Izembek isthmus for biologically prized Izembek isthmus shorelands owned by King Cove Corporation. Was this decision consistent with the purposes of ANILCA as required by 16 U.S.C. § 3192(h)?

STATEMENT OF THE CASE

A. Historical Context of ANILCA.

A proper interpretation of ANILCA requires the Court to understand Congress's division of public lands in Alaska through the passage of ANILCA, ANCSA and the Alaska Statehood Act. While the Supreme Court provided a more detailed discussion in *Sturgeon v. Frost*, this summary focuses primarily on Congress's knowledge that its rough divisions would create inholdings, but any problems related to these inholdings could be corrected by the Secretary of the Interior via future land transactions.

In 1958, at the time of statehood, the federal government owned virtually all land in Alaska. *Sturgeon*, 139 S.Ct. at 1073. To propel industry and to create a tax base, the Alaska Statehood Act authorized the State to select for itself 103 million acres of "vacant, unappropriated, and unreserved" federal land. 72 Stat. 339, §§ 6(a) and (b). Over the course of the State's land selections, it became readily apparent that Native Alaskans asserted aboriginal title to much of the State's selected lands. *Sturgeon*, at 1073. Congress attempted to cure the competing land claims with passage of ANCSA in 1971, authorizing Alaska Natives to select for themselves 40 million acres of federal land. Congress sought to implement the settlement "rapidly, with certainty, in conformity with the real economic needs" of Alaska Natives. 43 U.S.C. § 1601(b).

ANCSA also included a provision directing the Secretary of the Interior to select up to 80 million acres of unreserved federal land, subject to congressional approval, for additional national parks, forests and wildlife systems. 43 U.S.C § 1616(d)(2). Congress failed to ratify the selections of the Carter administration, and instead enacted ANILCA to set aside 104 million acres of federal land in Alaska as new or expanded national parks, monuments, and preserves "but on terms different from those governing such areas in the rest of the country." *Sturgeon*, at 1075. One of those newly established refuges was the Izembek National Wildlife Refuge, formerly the Izembek National Wildlife Range, which became a conservation system unit ("CSU") under ANILCA. 16 U.S.C. § 668dd note; ANILCA § 303(3).

When setting the boundaries of these newly created CSUs, Congress made "an uncommon choice—to follow 'topographic or natural features,' rather than enclosing only federally owned lands." *Sturgeon*, at 1075 (quoting, 16 U.S.C. § 3103(b)). Congress's prior grants to the State and Alaska Natives created a "confusing patchwork of ownership" that made it impossible to exclude non-federal lands from these new and expanded parks and preserves. *Id.*, (quoting, C. Naske & H. Slotnick, Alaska: A History 317 (3d ed. 2011)). Ultimately, 18 million acres of State, Native, and private land wound up inside CSUs established by ANILCA. *Id.*, at 1075-76. The KCC land that the Department of Interior seeks

to acquire in the challenged land exchange is one such inholding located within the CSU. 2 E.R. 35 (Native Corporation Lands within Izembek National Wildlife Refuge Complex).

Not surprisingly, ANILCA's expansive drawing of CSU boundaries concerned the people of Alaska. As one Alaskan Senator noted: "[If] there is no real provision mandatorily that Alaskans can get to our land of our will, then there is something wrong, because what is being breached is the compact under the Statehood Act and the law of great justice which gave the Natives of Alaska their rightful legacy." 126 Cong. Rec. 11062 (1980) (remarks of Sen. Gravel). The other Alaskan Senator suggested that ANILCA authorize the Secretary of the Interior to re-acquire these State or Native holdings "wherever possible." *Sturgeon*, at 1075 (quoting, 126 Cong. Rec. 21882 (1980) (remarks of Sen. Stevens)). In March 1998 the Department of the Interior identified the KCC land that it seeks to acquire through the challenged land exchange as a "high priority" for acquisition. 2 E.R. 36 (Land Protection Priorities within Izembek National Wildlife Refuge Complex).

B. The 2019 Exchange Agreement.

The State reviewed the opening appellate brief of King Cove Corporation, *et al*. (Case 20-35727, Docket 10; filed 11/21/2020) and, pursuant to Rule 28(i) of the Federal Rule of Appellate Procedure, the State adopts statement of the case as presented in KCC's brief. In support of the narrow but important issues that the

State presents for this Court's review, the State also presents the following facts for its statement of the case.

The 2019 Exchange Agreement clearly expresses that the exchange of lands with KCC will "serve the purposes of ANILCA by striking the proper and appropriate balance between protecting the national interest in the scenic, natural, cultural and environmental values of the public lands in Alaska and providing an adequate opportunity for satisfaction of the economic and social needs of the State of Alaska." 2 E.R. 236. Secretary Bernhardt's decision to enter into the Exchange Agreement expands on this reasoning by explaining that meeting these dual purposes would be accomplished "by adding substantial acreage to the Izembek and Alaska Peninsula refuges that has been previously identified by the FWS [U.S. Fish and Wildlife Service] as being important habitat while offering KCC the opportunity to explore improved public safety through a safer and more reliable means of emergency access to the Cold Bay airport for the residents and visitors to King Cove." 2 E.R. 233.

More specifically, the shorelands identified by KCC for exchange under the 2019 Land Exchange are recognized for their biological importance by the Ramsar Convention on Wetlands of International Importance, a treaty for the conservation and wise use of wetlands and their resources. 2 E.R. 200. KCC also agreed to relinquish rights under ANCSA to 5,340 acres of land within the Izembek NWR

selected by KCC but not yet conveyed by the federal government. 2 E.R. 238. In exchange, the federal government would transfer title to a narrow strip of uplands totaling less than 500 acres that would begin and end at the existing road systems on each end of the Izembek isthmus. 2 E.R. 225 and 235. If a road is ever constructed on the exchanged land, the total footprint of disturbed land is only expected to be 155 acres that were carefully located in manner to avoid and minimize environmental impacts to wetlands and wildlife. 2 E.R. 199.

C. The District Court Invalidates The 2019 Land Exchange.

The district court examined Secretary Bernhardt's rationale for the land exchange and erroneously concluded that the economic and social needs of Alaska and its people is not one of the purposes of ANILCA. 1 ER 18. Instead, the district court stated that the purposes of ANILCA are limited to preservation and subsistence. 1 ER 18. By excluding consideration of one of the central purposes of ANILCA, the district court discounted much of Secretary Bernhardt's justification showing compliance with the requirements for an ANILCA § 1302(h) equal value land exchange. The district court's narrowing of ANILCA's purposes, if allowed to stand, could limit similar land acquisitions and exchanges, and prevent the Secretary of the Interior and the State from correcting problems created by Congress's decision to intentionally over-include State, Native, and private lands in ANILCA designated CSUs.

SUMMARY OF THE ARGUMENT

The district court incorrectly concluded that the land exchange—which would undisputedly serve the economic and social needs of Alaska and its people—was unlawful because it did not further the purposes of ANILCA as required by 16 U.S.C. § 3192(h). 1 E.R. 18. Under certain circumstances, §1302(h), 16 U.S.C. § 3192(h), of ANILCA allows the Secretary of the Interior to exchange lands within the boundaries of conservation system units if the exchange serves "the purposes of this Act." The purposes of ANILCA are set forth in § 101, 16 U.S.C. § 3101, and includes both providing "sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska," as well as providing "adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people."

In limiting the purposes of ANILCA, the district court took a narrow view of this Court's decision in *Alaska v. Federal Subsistence Board*, 544 F.3d 1089 (9th Cir. 2008). In doing so, the district court failed to recognize the more recent decision by the U.S. Supreme Court in *Sturgeon v. Frost*, 139 S.Ct. 1066 (2019). There, a unanimous supreme court recognized that ANILCA "sought to 'balance' two goals, often thought conflicting." *Id.* at 1075 (quoting 16 U.S.C. § 3101(d)). Not only was ANILCA designed to "'provide[] sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the

public lands in Alaska,'" it was also framed to "'provide[] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people.'" *Id.* (quoting 16 U.S.C. § 3101(d) (alterations in original)). By failing to follow the Supreme Court's decision in *Sturgeon*, the district court misapplied § 1302(h) and incorrectly concluded that Secretary Bernhardt failed to meet the requirements for an equal value land exchange with King Cove Corporation.

STANDARD OF REVIEW

This Court reviews the district court's decision to grant summary judgment *de novo*. *Center for Biological Diversity v. Zinke,* 868 F.3d 1054, 1057 (9th Cir. 2017). It will therefore evaluate the agency's decision on the 2019 Land Exchange in the "same position as the district court." *Marathon Oil v. U.S.*, 807 F.2d 759, 765 (9th Cir. 1986). The Court will set aside the Secretary's decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). Under this highly deferential standard, the Court will presume the Secretary's action is valid and will affirm if there is a rational basis. *Yazzie v. U.S. EPA*, 851 F.3d 960, 968 (9th 2017). On matters of fact, deference is due to the Secretary particularly "when reviewing an agency's technical analyses and judgments involving the evaluation of complex scientific data within the agency's technical expertise." *League of Wilderness Defs. Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010). On matters of

law, the Secretary's interpretation of a statute may be entitled to deference if Congress has not addressed the precise issue and given the silence or ambiguity in the statute the Secretary's interpretation is a permissible construction. 851 F.3d at 968. In this case, the Secretary's interpretation was not only a permissible construction, it was the interpretation required by the Supreme Court after *Sturgeon v. Frost*.

ARGUMENT

I. A CENTRAL PURPOSE OF ANILCA IS TO PROVIDE FOR THE ECONOMIC AND SOCIAL NEEDS OF THE STATE OF ALASKA AND ITS RESIDENTS

When examining the ANILCA § 101(d) statement of purpose, the district court incorrectly read the Act's required balancing of environmental values against the economic and social needs of Alaskans as a statement of Congress's past accomplishment rather than a continuing legal duty. 1 E.R. 18 ("it is an acknowledgment that, in passing ANILCA, Congress has achieved the proper balance"). The district court's reading of ANILCA § 101(d) ignores Congress's choice of the present tense phrase "This Act provides" to describe the Act's requirement to balance two competing goals. 16 U.S.C. § 3101(d). As the Supreme Court recently articulated, "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.' … [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." *Sturgeon*, 139 S.Ct. at 1075 (*quoting*, 16 U.S.C. § 3101(d)). There should be no doubt that Congress's use of the present tense in ANILCA § 101(d) established a continuing legal duty to consider the economic and social needs of Alaskans when implementing the provisions of ANILCA.

In reviewing Secretary Bernhardt's decision, the district court limited its consideration of valid ANILCA purposes to "preservation and subsistence" 1 E.R. 18. The district court bases its narrow view of the purposes of ANILCA on this Court's *Alaska v. Fed. Subsistence Bd.*, 544 F.3d 1089 (9th Cir. 2008). 1 E.R. 18. The issues presented in *Alaska v. Fed. Subsistence Bd*. required this Court to examine two other competing purposes of ANILCA: "to provide for sound populations of, and habitat for, wildlife species of inestimable value to the citizens of Alaska and the Nation" and "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." 544 F.3d at 1091 (*quoting,* ANILCA §§ 101(b) and (c); 16 U.S.C. §§ 3101(b) and (c)). That decision never held that these competing purposes were the *only* statutory purposes of ANILCA, or that the other statutory purposes were nullified or otherwise not in effect; the other purposes of ANILCA—the ones relevant to this case—were just not central to the resolution of issues in that particular litigation.

From the district court's narrowing of ANILCA's purposes to subsistence and conservation (to the exclusion of the needs of Alaska and its people), the district court goes on to determine that the Exchange Agreement and Decision do not articulate or rely upon any subsistence purposes of ANILCA. 1 E.R. 18-19. In so doing, the district court further narrows its analysis of Secretary Bernhardt's decision solely to whether the Exchange Agreement meets the conservation purpose of ANILCA. Restricting the consideration of ANILCA's purposes to merely conservation would have the practical effect of preserving all of the ANILCA CSU boundaries in amber. Recall that Congress encompassed 18 million acres of State, Native and private lands in its drawing of the ANILCA CSUs, and consideration of the needs of Alaska and Alaskans was meant to guide future federal acquisitions under ANILCA to harmonize the boundaries of the CSUs with lands previously ceded to the non-federal landowners. *See, Sturgeon*, at 1075 and 1082 ("facilitating those acquisitions was one reason Congress put non-federal lands inside park boundaries in the first instance.")

The district court's contrived narrowing of ANILCA's purposes makes the comparison of Secretary Bernhardt's decision more directly comparable to Secretary Jewell's decision in the failed 2013 OPLMA land exchange where the State would have received a road corridor and authorization for construction. However, this direct comparison is not supported in law. OPLMA empowered

Secretary Jewell to make a fully discretionary 'public interest' decision to approve or deny a land exchange without requiring her to consider the economic and social effect upon residents of the area or any other Alaskan. *See*, OPLMA § 6402 (d)(1) ("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"); *see also, Agdaagux Tribe of King Cove, et al. v. Jewell, et al.*, 128 F.Supp.3d 1176, 1200-1201 (D.Alaska 2015) ("Rather than make the hard choice between public health and safety and the environment itself, Congress left that decision to the Secretary … Under NEPA, the Secretary evaluated environmental impacts, not public health and safety impacts."). Secretary Bernhardt, on the other hand, was required to consider the purposes of ANILCA in his decision and placed front and center the health and safety of the residents of King Cove.

Secretary Bernhardt's decision reasonably considered the broader purposes of ANILCA, ANSCA, and the trust responsibilities of the federal government when considering whether to enter in the exchange. For instance, his decision states:

> "The lack of viable transportation alternatives results in maintaining a categorically unsatisfactory status quo for the region … It is my view that the health and safety access for the Alaska Native people of King Cove only worsens with time and that promises of help, accommodation, and transportation alternatives have been hollow statements to these Native

> people. The prior failure to allow KCC to use its ANCSA land selections to provide for the welfare and well-being of the Native people of King Cove frustrates the purposes of ANILCA and ANCSA.

2 E.R. 231. Therefore, examination of Secretary Bernhardt's consideration of the purposes of ANILCA, and any comparison of that to Secretary Jewell's earlier decision, cannot be reduced to an examination of conservation outcomes alone as was done by the district court.

The district court's narrow construction also completely misses the "Janus-faced nature in [ANILCA's] statement of purpose" and "ANILCA's grand bargain" between Federal, State and Native land holders. *Sturgeon*, 139 S.Ct. 1083-1084. Accordingly, the State respectfully requests that the Court reverse the district court's decision and find that Secretary Bernhardt's decision to acquire KCC lands by equal value exchange meets the purposes of ANILCA.

II. THE 2019 LAND EXCHANGE IS PERMISSIBLE UNDER ANILCA.

A. The Acquisition of Lands by the Secretary in The 2019 Land Exchange Meets the Purposes of ANILCA Because The Lands Would Enhance The Refuges.

Section 1302(h) of ANILCA allows the Secretary of the Interior to exchange lands within a CSU with Native Groups and the State when the exchange is based

on equal value and the exchange furthers the purposes of ANILCA.[1] Whether to enter into a land exchange under ANILCA is left to the discretion of the Secretary. 16 U.S.C. § 3192. When exercising his discretion, the Secretary must consider whether the land to be acquired is for the purposes of ANILCA. 16 U.S.C. § 3192(h)("in acquiring lands for the purposes of this Act, the Secretary is authorized to exchange lands"). ANILCA has multiple purposes and reflects a Congressional desire for balance. 16 U.S.C. § 3101. As long as the land exchange furthers the purposes of ANILCA, how the Secretary balances any competing goal or purpose should be reviewed with substantial deference to the Secretary. *League of Wilderness Defs,* 615 F.3d at 1130. Equal value land exchanges under ANILCA, like the one at issue here, require considerable technical expertise and judgments by the Secretary because land is unique.

Additionally, the Secretary's consideration of how land acquired is for the purposes of ANILCA requires the use of technical expertise and judgments by the Secretary because of the multitude of purposes that the Secretary may consider under ANILCA. Moreover, Congress in ANILCA did not rank any particular purpose of ANILCA above any other purpose. 16 U.S.C. § 3101. Congress was

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[1] The exchanges also may be for "other than equal value" if the Secretary determines it is in the public interest.

focused on the balance of interests provided under ANILCA. Congress's desire for balance and the silence as to the priority of any particular purpose of ANILCA also support substantial deference to the Secretary in its determination of whether any land acquired is for the purposes of ANILCA.

The legislative history on the land exchange authority in ANILCA noted that the Secretary would have "great flexibility" in making land exchanges even when the land exchange would result in conservation system land moving into private hands. H. Rpt. 95-1045, Pt. I, 95th Cong. at 211-212 (1978). In one of the few cases considering exchange authority under ANILCA, the district court in *National Audubon Society v. Hodel*, 606 F.Supp. 825, 836 (D.Alaska 1984), found that the Secretary had broad discretion to determine interests considered in arriving at a land exchange. The district court's decision failed to acknowledge these considerations for deference and the prior case authority. The district court's decision did not afford the Secretary's findings and judgments in the decision supporting the 2019 Land Exchange the substantial deference due.

The Secretary recognized the balanced purposes of ANILCA to be considered in acquiring land. The Secretary stated the exchange authority in ANILCA was "an important tool provided to the Secretary by Congress to adjust broad Conservation System Unit designations to reflect the health, safety, and other interests of local people in concert with the national interest in conservation."

2 E.R. 228. The Secretary also found that the "[f]ederal ownership and a more permanent conservation status for the lands and the land selection rights to be acquired enhances the purposes of the [Izembek] Refuge."2 E.R. 232. He also considered prior studies regarding the land to be acquired in the 2019 Land Exchange. 2 E.R. 232 (considering a 2013 record of decision and the 1998 Izembek Land Protection Plan that identified KCC lands as "containing valuable fish and wildlife habitat and prioritized this land for acquisition and protection.").

The district court reasoned that because prior secretaries had concluded that exchanges of land *out* of the Izembek would cause ecological damage that the record did not support the balance of purpose of ANILCA as determined by the Secretary. 1 E.R. 16. This was in error for two reasons. First, the land exchange authority in ANILCA provides that it is the lands *acquired* that need to be for the purposes of ANILCA. 16 U.S.C. § 3192(h). It does not make sense that Congress would require the Secretary to find that the lands leaving federal ownership would need to comply with ANILCA's conservation purposes for federal lands as the district court's decision suggest. Under the plain language of Section 1302(h) of ANILCA, the Secretary did not need to consider the ecological impact of lands leaving federal ownership under the land exchange authority in ANILCA.

Second, the Secretary has the flexibility and deference under ANILCA to weigh the risks tolerance and refuge land management objectives in land

exchanges for the purposes of ANILCA different from previous secretaries considering exchanges under different circumstances and authorities. Here, the Secretary found the permanency of the lands to be acquired would 'enhance" the refuge. 2 E.R. 232. This determination was made after review of the information provided by KCC regarding access, ecological factors, and a development risks. 2 E.R. 200. Thus, the Secretary's decision that the lands to be acquired in the 2019 Land Exchange met the purposes of ANILCA was supported by the record and a reasonable determination.

B. The 2019 Land Exchange Is Consistent With the Purposes of ANILCA.

The Secretary also considered the overall value of the 2019 Exchange and the purposes of ANILCA. The Secretary's Decision concluded that the 2019 Land Exchange would further the purposes of ANILCA because the exchange provided for the medical and social needs to rural residents in addition to the protection of the added lands. 2 E.R. 232. The Secretary was also very cognizant of the responsibilities of the federal government to Alaska Native people under ANILCA, ANSCA, and trust responsibilities of the federal government. 2. E.R. 233.

The district court's decision ignored the overall balancing goals of ANILCA and ANSCA and the federal government's trust responsibilities. Instead, the district court's decision that the 2019 Land Exchange violated ANILCA

impermissibly narrowed the purposes of ANILCA and thus the purposes of the exchange to "preservation and subsistence." 1 E.R. 18. The district court was short sighted in its dismissal of how the exchange would further subsistence from the broader perspective of maintaining healthy rural communities. 1 E.R. 18.

The Secretary's decision made the imminently reasonable judgment that "preservation of human life must be given great weight." 2 E.R. 233. The Secretary recognized the decades of efforts to find more reliable and dependable access for health and human safety needs and the lack of tangible process. 2 E.R. 233. These assessments of risks and balancing of interests by the Secretary were entitled to substantial deference by the district court.

The district court's decision failed to acknowledge that the purposes of ANILCA work together. The subsistence purposes of ANILCA have no meaning if rural native communities are not healthy enough to make use of them and the very laws that protect subsistence work to undermine it at the most fundamental level. A slow displacement of rural native residents due to lack of access to medical care cannot be consistent with the balance sought by Congress in ANILCA and ANSCA and the trust responsibilities of the federal government. The Secretary's decision by considering "the welfare and well-being of the Alaska Native people who call King Cove home" furthered the purposes of ANILCA. 2 E.R. 234.

C. The 2019 Land Exchange Has No ANILCA Title XI Presidential and Congressional Review Requirements.

As clearly articulated by KCC, Title XI is inapplicable to an exchange of fee interests between the federal government and a Native Corporation. It is important for this Court's analysis, however, to understand that the district court is incorrect in its premise that "[f]or proposed transportation systems through designated wilderness areas, Title XI requires additional approval by the President and Congress." 1 E.R. 19 (citing 16 U.S.C. § 3166(b)). In the same way that Congress designed ANILCA's federal acquisition and exchange authorities to adjust for State, Native and private land encompassed by CSUs, Congress guaranteed access to these same inholdings that are "effectively surrounded" by one or more CSUs. ANILCA § 1110(b); 16 U.S.C. 3170. Title XI's access to inholdings provision requires that "the State or private owner or occupier *shall be given by the Secretary* such rights as may be necessary to assure adequate and feasible access for economic or other purposes." *Id.* If the provisions of Title XI were applicable to the 2019 Land Exchange (they are not), then the controlling provision of Title XI would be ANILCA § 1110(b) that has no presidential or congressional approval requirements.

Congress recognized that the community of King Cove is an inholding effectively surrounded by the Izembek NWR, and thus entitled reasonable access, when it declared in OPLMA: "Applicable Law - Nothing in this section [§ 6403 -

King Cove Road] amends, or modifies the application of, section 1110 of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3170)." 2 E.R. 212. Although the land exchange and road construction authorization proposed in OLMPA was ultimately rejected, the community of King Cove's right to reasonable access under ANILCA § 1110 was preserved. Thus, if Title XI were applicable to the 2019 Land Exchange (it is not), then the applicable provision and processes would be those mandated by ANILCA § 1110.

CONCLUSION

The State asks this Court to reverse the district court's grant of summary judgment to plaintiffs and grant summary judgment to defendants.

Date: November 23, 2020

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STATEMENT OF RELATED CASES

This brief concerns three consolidated cases in this court: Nos. 20-35721, 20-35727, and 20-35728. *See,* Order, Docket Entry 9 in No. 20-35721 (Oct. 29, 2020) (granting motion to consolidate). Each of the three cases are appeals by distinct parties from the same final judgment entered by the district court in No. 3:19-cv-00216-JWS (D. Alaska). Counsel is aware of no related cases pending in this Court.

Date: November 23, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5705 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements 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 a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Date: November 23, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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