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.

SCOTT DE LAW VEGA,*
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 REPLY BRIEF

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* Scott De La Vega is substituted for his predecessor, David Bernhardt, as Acting Secretary of the Department of the Interior, pursuant to Fed. R. App. P. 43(c)(2).

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INTRODUCTION

The State of Alaska reviewed the reply appellate brief of King Cove Corporation (KCC), *et al.* (Case 20-35727, Docket 41; filed 11/04/2021) and concurs with the arguments made by KCC. The State presents the following arguments that address, in particular, the Friends of Alaska National Wildlife Refuges (Friends), *et al.* responses to the State's arguments concerning the implementation of the Alaska National Interest Lands Conservation Act (ANILCA) and the coordinated management of hundreds of millions of acres of intermingled State, Native and Federal lands in Alaska. The State's reply arguments also address the Friends' misstatements regarding the Secretary of the Interior's consideration of alternative means to provide access to the community of King Cove, and the Friends' misstatements regarding potential environmental effects from KCC's desired development of the lands identified for exchange.

SUMMARY OF THE ARGUMENT

In ANILCA, Congress sought to balance multiple competing, and often conflicting, interests in Alaska. The Friends' reasoning would destroy any balancing and force the Secretary to always value one interest, conservation, above the others. The result would turn ANILCA into a conservation-only statute and undermine Congress's delicate balancing in ANILCA. ANILCA's purposes include the economic and social needs of residents of Alaska. The Secretary's decision for

the 2019 Land Exchange balanced the purposes of ANILCA and simply placed greater weight on the well-being of the local community and Alaska Native people than wildlife interests.

The Friends ask the Court to place new limits on the Secretary's ability to conduct equal value land exchanges under ANILCA § 1302(h) that are without basis in ANILCA. The Friends fail to recognize the protection of subsistence lifestyles in ANILCA will be obsolete if Alaska Native communities can no longer exist in rural Alaska and, therefore, the health of those communities is a subsistence concern.

Despite the fact that the 2019 Exchange conveys land out of federal ownership, and out of a conservation system unit (CSU), the Friends ask the Court to apply the requirements for transportation systems across federal land to private land contrary to the language in ANILCA Title XI and § 103(c). These requirements would impede the Secretary from resolving ANILCA's land-locking of private property through the two separate and distinct tools provided for this purpose: the inholder access provisions of Title XI and the § 1302(h) land exchange authority. It is important for the millions of acres of inholdings across Alaska that these tools created in ANILCA remain separate and that Secretary is afforded flexibility in the exercise of ANILCA's exchange authority. Finally, the Friends overstate past decisions regarding road access across the Izembek National

Wildlife Refuge (NWR) and mischaracterize the Secretary's consideration of non-road alternatives.

ARGUMENT

I. ANILCA'S PURPOSES INCLUDE THE ECONOMIC AND SOCIAL NEEDS OF THE STATE OF ALASKA AND ITS RESIDENTS

The State's principal brief thoroughly examined the implications of the Supreme Court's decision in *Sturgeon v. Frost,* 139 S. Ct. 1066, 1075 (2019), where it held that the economic and social needs of the State of Alaska and its residents are purposes of ANILCA. The Friends provide a two-prong response: the Supreme Court interpreted "a separate provision of ANILCA not at issue here (Section 103(c));" and "[e]ven assuming that economic and social development are statutory purposes … the Secretary cannot elevate economic and social needs over the conservation purposes of ANILCA." Friends Br. at 48-49.[1] The Friends are incorrect on both points, and their arguments in support of the district court's opinion should be rejected.

To the Friends' first point, ANILCA's § 103(c) is very much at issue here, as it determines the applicability of ANILCA's Title XI requirements to lands within a conservation system unit (CSU), e.g., the lands within the Izembek

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[1] All page references to filed documents are to the Court's ECF system page numbering.

National Wildlife Refuge, and the inapplicability of those requirements to lands conveyed out of a CSU, e.g., the lands conveyed to KCC. *See* 16 U.S.C. § 3103(c). The Secretary's decision is consistent with *Sturgeon* because it recognized that the Title XI procedures would not apply to the *formerly* federal lands that were conveyed to KCC via the land exchange. As explained in the decision "the exchange will remove land from Federal ownership, and should KCC never construct a road, the land would not revert to Federal ownership." 2-ER-228 at fn. 47. Moreover, the Secretary reiterates this position in the federal appellants' brief by referencing § 103(c) as authority to support the decision's conclusion that Title XI's requirements would not apply to lands conveyed to KCC. Federal Br. at 42 (citing16 U.S.C. 3103(c)). Thus, the Friends' argument is incorrect; § 103(c) is relevant to this case because it defines how the federal government can regulate non-public lands contained within the boundaries of the refuge.

The Friends also mischaracterize the plain language of § 101(d) by ascribing to Congress an understanding that "it achieved the proper balance of conservation and economic and social needs." Friends Br. at 48. The Friends' argument assumes that Congress determined this balancing was done with the passage of ANILCA. But what Congress actually said is that ANILCA "*provides adequate opportunity* for satisfaction of the economic and social needs of the State of Alaska and its people." ANILCA § 101(d); 16 U.S.C. § 3101(d) (emphasis added). Meaning, the

opportunity for the economic and social needs of Alaskans, as well as the protection of natural resources, was not only considered by Congress when it enacted ANILCA, but must also be considered in the implementation of ANILCA. *See Sturgeon*, 139 S. Ct. at 1083-84 ("ANILCA announced its Janus-faced nature in its statement of purpose."). The only statement of congressional achievement in § 101(d) is that the need for future legislation "has been obviated thereby," which provides the rationale for Congress's restrictions on the expansion of ANILCA's CSUs. *See Southeast Conference v. Vilsack*, 684 F. Supp. 2d 135, 138 (D.C. Cir. 2010); *see also* ANILCA § 1326, 16 U.S.C. § 3213 (prohibition of executive branch actions withdrawing greater than 5000 acres of public lands in Alaska). Thus, the economic and social needs of Alaskans must be considered when a federal official is implementing ANILCA's purposes.

The Friends also make the unsupported statement that meeting ANILCA's purpose of economic and social needs of the State of Alaska and its people cannot be elevated over the conservation purposes of ANILCA. Friends Br. at 49. ANILCA does not rank its "twofold ambitions." *See Sturgeon,* 139 S.Ct. at 1075. In other words, it does not direct the Secretary to always elevate conservation values above economic social needs, nor does it direct the Secretary to elevate social needs above conservation. This is left to the Secretary's discretion. Secretary Bernhardt, quoting Secretary Jewell, describes the discretionary decision that each

faced as "weigh[ing] on the one hand the concern for more reliable methods of medical transport from King Cove to Cold Bay and, on the other hand, a globally significant landscape that supports an abundance and diversity of wildlife unique to the Refuge." 2-ER-216 (quoting, 2013 Record of Decision, 2-ER-38). Neither decision maker was required to elevate one ANILCA purpose over another.

Upon full consideration of the history of the King Cove community's access needs, the previous efforts of Congress and Department of the Interior, and the resulting environmental reviews and studies, Secretary Bernhardt was fulfilling the purposes of ANILCA when he concluded: "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." 2-ER-233-34. The twofold ambitions of ANILCA are designed to allow just this type of decision.

II. THE 2019 LAND EXCHANGE IS PERMISSIBLE UNDER ANILCA

A. The 2019 Land Exchange Is Consistent with the Text and Context of ANILCA §1302(h) Exchanges.

The Secretary's decision recognized and considered the multiple purposes of ANILCA in the 2019 Land Exchange. Contrary to Friends' assertions, Appellants do not claim that the Secretary is precluded from considering the impact of an exchange on the Izembek NWR. Friends Br. at 42. The Secretary in fact did

consider impacts to the Izembek NWR. 2-ER-233 (The Secretary noting "that even assuming all fact as stated in the 2013 ROD."); 2-ER-216 ("I have reviewed each of the extensive environmental analysis documents related to Izembek Refuge and past road development scenarios."). The parties differ in that the Friends argue for an interpretation of ANILCA §1302(h) that would require the Secretary to restrict exchanges to where the land conveyed out of a CSU in the exchange would retain its conservation status. Friends Br. at 44; 16 U.S.C. § 3192(h). This argument fails on many levels.

Most obviously, the exchange conveys a land corridor to KCC, not a road. The Friends' focus on the subsequent potential private use of lands conveyed out of a CSU through an exchange ignores the plain language of § 1302 and the context of ANILCA. 16 U.S.C. § 3192. The rationale behind § 1302 is to allow the Secretary to acquire lands and the structure of the statute reflects that acquisition is the focus, not lands conveyed. *Id*. Section 1302(h) states "in acquiring lands for the purposes of this Act, the Secretary is authorized to exchange lands." 16 U.S.C. § 3192(h). The "for the purposes of this Act" modifies "in acquiring". *Id.* The Friends' argument would require moving the "for the purposes of this Act" to modify "to exchange lands." *See* Friends Br. at 42. Contrary to the Friends' suggestion, § 1302(a) similarly reflects that the Secretary is to consider the

purposes of ANILCA in *acquisition* of land. Friends Br. at 43; 16 U.S.C. § 3192(a).

Moreover, Congress in § 1302(h) expressly assumed that exchanges would remove land from conservation status. 16 U.S.C. § 3192(h). Section 1302(h) provides "the Secretary is authorized to exchange lands (*including lands within conservation system units* and within the National Forest System)." *Id.* (emphasis added). No language in § 1302(h) limits the Secretary's discretion to acquire lands based on the retention of the conservation status of lands leaving federal ownership in the exchange.

The Friends' argument that the conservation status of lands conveyed out in an exchange must remain equal to the conservation values of the lands acquired in an exchange is inconsistent with ANILCA § 103(c). Friends Br. at 47; 16 U.S.C. § 3103(c). Section 103(c) clearly contemplates that *after* the passage of ANILCA that lands would leave CSUs and be conveyed to Alaska Native Corporations like KCC. 16 U.S.C. § 3103(c). Congress and *Sturgeon* make clear that those now private lands cannot be managed as CSUs. 139 S. Ct. at 1085. Accordingly, because the Secretary has no authority to manage for conservation purposes private land leaving a CSU, it likewise follows that the Secretary in a §1302(h) exchange considers whether the lands the Secretary is acquiring will meet ANILCA's

purposes, not whether the lands conveyed away will further the conservation purposes of the CSU.

The focus in § 1302(h) on whether the lands acquired are for the purposes of ANILCA is consistent with imposition of conservation management on *acquired* lands in § 103(c). 16 U.S.C. § 3192(h); 16 U.S.C. § 3103(c). This also undercuts the Friends' arguments that ANILCA's conservation purposes should "overarch" other purposes. The express limitations on conservation management in § 103(c) for land conveyed out of a CSU, coupled with § 1302(h)'s singular focus on land acquisitions meeting the purposes of ANILCA, evidences that conservation purposes are subordinate or irrelevant to other ANILCA purposes if the Secretary must consider the potential uses of land conveyed *out* of a CSU in a § 1302(h) exchange. *Id.*

As for the context of § 1302(h) exchanges considered by Congress, the 2019 Land Exchange follows the example of an exchange put forward in a Congressional report on ANILCA. After noting that the exchange authority was modelled after the exchange authority in the Alaska Native Claims Settlement Act (ANCSA) and the intent to provide the Secretary with "great flexibility in acquiring lands, by permitting [the Secretary] to enter into exchanges", the report explained what that great flexibility would look like. 3-ER-311-312; H.R. Rep No. 95-1045, pt. I at 211 (1978). "For example, [this flexibility extends to] permitting

the Secretary to acquire lands which Chugach, Inc., has selected within the Wrangell-St. Elias National Park/Preserve *by providing to that Corporation other lands inside* or outside *of that or some* other park, wildlife range, or *other conservation system unit*, or unit of the National Forest System." 3-ER-312 (emphasis added). Here, the Secretary has acquired lands for the Izembek NWR and the Alaska Peninsula NWR from KCC and is providing KCC with lands within the Izembek NWR. Thus, the Secretary is not limited to the purposes of one particular CSU in exchanges because the Secretary has the great flexibility in exchanges to acquire land in one CSU and convey land out of another. This is consistent with the flexibility afforded the Secretary for acquisition of desired lands and the "grand bargain" of ANILCA. *See, Sturgeon*, 139 S.Ct. at 1083-84.

The Friends argue that Congress did not intend that the Secretary could "place a thumb on the scale in favor of exchanges." Friends Br. at 44. First, the Court in *Sturgeon* has recognized that ANILCA reflects a balance. 139 S.Ct. at 1075. Given the absence of any hierarchy of purposes in ANILCA, Congress gave the Secretary the discretion to balance the purposes of ANILCA when considering whether to exchange land in a CSU. The congressional report noting the great flexibility of the Secretary in exchanges confirms this discretion is appropriate. Moreover, as the lead land and resource manager, the Secretary is in the best position to make technical and policy determinations on whether to acquire land in

an exchange under ANILCA. *National Audubon Society v. Hodel*, 606 F.Supp. 825, 836 (D.Alaska 1984) (The district court concluding that § 1302(h) gives the Secretary broad discretion); *League of Wilderness Defs Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010) (deference is highest when technical analysis and judgments involving evaluation within the agency's technical expertise.).

The Friends argue, based on the same congressional report that explained the great flexibility given the Secretary for exchanges, that Secretary's flexibility in exchanges should not be used to "frustrate the purposes" of a CSU unit. Friends Br. at 44. No examples were given for what that frustration might look like. Notably, another subsection of § 1302 reflects a disfavor for the acquisition of improved property. 16 U.S.C. § 3192(d). Acquisition of improved property might reasonably be considered to frustrate the purposes of a CSU and ANILCA. The exchange here does not involve the acquisition of improved property. The Secretary's flexibility and discretion in exchanges is maintained.

It is the Friends' arguments that would frustrate the intent of Congress in exchanges. Congress clearly intended that the exchange authority could be used to acquire land from Native Corporations and the Native Corporations might receive land from a CSU. If the Native Corporation could not use the land received through an exchange, then the purpose of the exchange provision and the ability of

the Secretary to enter into exchanges would be restrained because Native Corporations would be unwilling to enter into such exchanges. This would frustrate the purposes of ANILCA as it would hinder the use of an important tool provided to the Secretary to further the purposes of ANILCA.

The Friends' arguments that the § 1302(h) exchange must account for the specific conservation purpose of the Izembek NWR are negated by another subsection in §1302 that requires the Secretary in unrelated acquisitions to consider the purposes of ANILCA or the more specific purposes of the conservation system. 16 U.S.C. § 3192(d). Section 1302(d) restricts the Secretary's authority to acquire improved property absent owner consent and requires the Secretary to find the acquisition necessary for "the fulfillment of the purposes of this Act *or* to the fulfillment of the purposes for which the concerned conservation system unit was established or expanded." (Emphasis added), *Id.* Thus, even when Congress directed the Secretary to consider the purposes of a CSU in acquisitions, that consideration was as an alternative to the purposes of ANILCA, not an additional mandatory requirement. In contrast, the exchange authority in § 1302(h) only requires the Secretary's consideration of the purposes of ANILCA. 16 U.S.C. § 3192(h).

The Friends assume without support that the only "values" in an equal value exchange that the Secretary can consider are "conservation values." Friends Br. at

46-47. First, this argument conflates conservation purposes and impacts with land valuation concepts for the equal value exchange. There is no requirement § 1302(h) that the lands in an equal value exchange have equivalent or identical purposes under ANILCA, only equal values. 16 U.S.C. § 3192(h). Second, the Friends' argument ignores the next sentences of § 1302(h) that allow acceptance of *cash* to equalize an exchange. *Id.* Congress allowed for land within a CSU to leave federal ownership in an exchange and authorized those exchanges even if the federal government would not receive land with the same conservation purposes or values. There is nothing to support the Friends' more searching ecological and conservation-only value appraisal approach for § 1302(h) exchanges. The Friends' arguments likewise do not address the deference and flexibility afforded to the Secretary to determine and equalize values for land exchanges.

The 2019 Exchange Agreement is consistent with the Secretary's flexibility to enter into exchanges to acquire land for the purposes of ANILCA. The Secretary valued the additional acreage in the exchange, the additional permanency and priority of the acquired lands, and the worsening health and well-being of the Alaska Natives that have called area home for thousands of years over a small percentage of Alaska's extensive wilderness. 2-ER-233-234. The 2019 Exchange Agreement comports with the language and context of § 1302(h).

B. The 2019 Exchange Agreement Promotes The Subsistence Purposes Of ANILCA Because The Health and Economic Well-being Of Alaska Native Communities Are Required For Subsistence Lifestyles.

The Secretary's consideration of the health and economic well-being of the predominantly Alaska Native community of King Cove and the Secretary's trust responsibilities to Alaska Natives are concerns for the continuation of subsistence lifestyles. Thus, the Secretary's decision considered the subsistence purposes of ANILCA in the 2019 Exchange. The Friends' arguments reflect a flawed interpretation of the purposes of ANILCA as having "overarching" conservation purposes. Friends Br. at 49 ("First, the Secretary cannot elevate economic and social needs over the conservation purposes of ANILCA and Izembek"). If this were the case, that conservation reigns supreme above all the other purposes mentioned in ANILCA, then the purposes section in ANILCA § 101 would have been much shorter or at least differently structured to reflect such a priority. 16 U.S.C. § 3101. Instead, the purposes section contains no such conservation supremacy. Instead, the Secretary, in ANILCA, is to balance the purposes. The Secretary, when balancing those purposes, is not required to give them all equal weight. The Friends' interpretation that conservation must always be elevated over other purposes would effectively nullify the Secretary's ability to balance the other purposes. The Friends' overarching conservation interpretation would in many cases render the other purposes as inkblots. *See*, 139 S.Ct. at 1083. The no-

environmental-impact level of conservation that the Friends advocate for the Izembek NWR would be inconsistent with all other use. Under the Friends' reasoning, the land corridor conveyed in the exchange is irreplaceable and thus must be preserved to a level that would allow no environmental impacts. Therefore, the Friends view the Secretary's decision to allow the corridor to be exchanged, even if it results in a road with some environmental impacts, as contrary to the purposes of ANILCA. This preservationist reasoning is contrary to balancing objectives in §101 and the equal valuation allowed for exchanges in §1302(h). 16 U.S.C. § 3101; 16 U.S.C. § 3192(h).

Additionally, if the overarching purpose of ANILCA is conservation as the Friends present, then the Court in *Sturgeon* could have refrained from its discourse of the various interests balanced in the purposes of ANILCA, how ANILCA was a "grand bargain" to manage those competing interests in Alaska, and why ANILCA is different than national conservation statutes. 139 S.Ct. at 1072-77, 83-84. The Friends' preservationist rhetoric harkens back to the federal interference and disregard of Native lifestyles that underpin the uninhabited wilderness concepts that Congress moved away from for Alaska in ANILCA.[2]

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[2] *See Sturgeon,* 139 S.Ct. 1074-1077; *See also* Isaac Kantor, *Ethnic Cleansing and America's Creation of National Parks*, 28 Pub. Land & Resources L. Rev. 41, 61-62(2007).

The Friends' arguments reflect a narrow and ineffective interpretation of subsistence purposes in ANILCA. The Friends argue that subsistence was not a basis for the exchange. Friends Br. at 51. The purpose of subsistence provisions in ANILCA is to allow for the continuation of a subsistence lifestyle for Alaska Natives. The subsistence provisions have no meaning when rural Alaska Native communities that are surrounded by CSUs have their population, well-being, and growth strangled due to lack of access to medical care. If no one is around to enjoy a subsistence lifestyle in the community, the subsistence protections in ANILCA will be obsolete. This is not a hypothetical concern. For example, the former President of the Aadaguux Tribal Council at 34 weeks pregnant needed an emergency cesarean and had to be medevacked by a U.S. Coast Guard helicopter in 60 knot winds in order to reach the Cold Bay airport. 2-ER-198. It was merely fortuitous that a U.S. Coast Guard ship with a helicopter was in the area. *Id*. The severe weather in King Cove nearly prevented her from reaching Cold Bay. The Secretary considered the worsening health outcomes like that and the deaths associated with the lack of road access to Cold Bay for the predominately Alaska Native Community of King Cove. 2-ER-231. Alaska rural communities require access to health care in order to sustain families and traditional living in the way Congress intended to allow in ANILCA and ANCSA. While many rural communities undoubtedly face difficulties in access to medical care, the situation

for the community of King Cove is different because it is not location that causes these difficulties. It is the federal creation and wilderness status of the Izembek NWR that prevents access to emergency medical care. The Secretary's consideration of the health outcomes and medical needs of the Alaska Native community and the Secretary's trust responsibilities are subsistence lifestyle concerns.

Moreover, the Friends' arguments about subsistence ignores the overlap among the various purposes balanced in ANILCA. The purposes subsection § 101(c) balances fish and wildlife resources "with to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." 16 U.S.C. § 3101(c) .Section 101(d) balances national conservation interests with "adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d). Subsistence lifestyles are economic and social needs of the people of rural Alaska. Thus, the Secretary considered subsistence lifestyles and values in the Decision. The Secretary, in the balance of purposes of ANILCA, was permitted to weigh and prioritize those human needs over conservation purposes.

C. The 2019 Land Exchange Has No ANILCA Title XI Requirements

ANILCA's § 1302 is the Secretary of the Interior's general land acquisition authority 'to acquire by purchase, donation, exchange, or otherwise any lands

within the boundaries of any conservation system unit.' 16 U.S.C. § 3192(a). Section 1302's subsection (h) authorizes the Secretary to acquire lands for the purposes of ANILCA by "exchange [of] lands (including lands within conservation system units and within the National Forest System) or interests therein (including Native selection rights) with the corporations organized by the Native Groups." 16 U.S.C. § 3192(h). Congress intended that the Secretary's authority to exchange land for the purposes of ANILCA remain separate and distinct from the Secretary's ANILCA Title XI authority to allow an applicant to use federal land for transportation and utility purposes. Thus, the district court erred when it ruled that the exchange under § 1302 "falls within the ambit of Title XI." 1-ER-19. Likewise, the Friends are incorrect in their conclusion that "Section 1302 is an 'applicable law' for the purposes of Title XI." Friends Br. at 41.

The congressional record clearly demonstrates the error in the Friends' argument that "Section 1302's general [acquisition] authority must yield" to Title XI's procedures for permitting the use of federal land for transportation purposes. Friends Br. at 38. When discussing the ramifications of including non-federal property in the newly created conservation system units, Congress recognized that ANILCA's Title XI and § 1302(h) were separate and distinct authorities to resolve the land-locking of rural Alaskan communities: "The Committee recognizes that many of the units will contain State and Native inholdings; however the

Committee anticipates that the Secretary will use his authority under Title XI to work out voluntary, cooperative agreements with the other owners in planning and managing these lands, and his authority under section 1201(f) to make exchanges of lands." 3-ER-311; H.R. Rep No. 95-1045, pt. I at 211 (1978).[3] Thus, Congress clearly intended two separate and distinct authorities that the Secretary could rely upon to provide access to the individual and community inholdings that became landlocked by the creation of the surrounding ANILCA CSUs.

Further evidence that § 1302(h) is a freestanding authority for the Secretary's use, and not an "applicable law" requiring procedural compliance with ANILCA's Title XI, can be found in the Department of the Interior's 1986 final rulemaking to implement the provisions of Title XI. *See* 51 Fed.Reg. 31619; 1986 WL 106610. That rulemaking clarified "which laws and regulations administered by which agencies are meant within the ambit of 'applicable law'" by listing the Department of the Interior authorities to grant rights-of-way over federal lands for roads or utilities. *Id*. at 31620 (referencing: the Bureau of Land Management's 43 U.S.C. § 1761 and 30 U.S.C. § 185; the Fish and Wildlife Service's 16 U.S.C. § 668dd and 50 CFR § 29.21; the National Park Service's 54 U.S.C. § 100902 and

[3] The referenced exchange provision at section 1201(f) became ANILCA's section 1302(h) exchange provision.

36 CFR § 14; and the general right-of-way granting authority for federal-aid highways at 23 U.S.C § 317). Each of these authorities provide the federal agency discretionary jurisdiction to transfer an easement, permit or license for the restricted use of a road or utility crossing federal land, which is consistent with Title XI's definition of "applicable law." *See* ANILCA § 1102(1); 16 U.S.C. § 3162(1). None of the listed statutes and regulations authorize the federal agency to acquire land, and none authorize the federal agency to dispose a fee interest. Because Title XI's definition of 'applicable law' does not include a land exchange authority, and Congress intended the Secretary to have two distinct tools to remedy ANILCA's land-locking of State and Native properties inside CSUs, the district court erred when it determined that § 1302(h) falls within the ambit of Title XI.

The district court did not need to reach the question of which provision of Title XI would apply if the community of King Cove sought a permit or easement to cross the Izembek NWR; however, the district court's misunderstanding and misapplication of Title XI invites the unintended consequences of federal agencies or Alaskan landlocked property owners relying on the district court's misstatement. The district court erroneously concluded that, if Title XI is applicable, then the King Cove Corporation must receive additional approvals by the President and Congress before constructing a road. 1-ER-19 (citing 16 U.S.C. § 3166(b)); *see also* Friend's Br. 35-36. ANILCA's § 1106, the most onerous procedural process

of Title XI, does not apply to Title XI's requirement that the Secretary shall provide access rights to inholdings that are effectively surrounded by CSUs. *See* ANILCA § 1110(b); 16 U.S.C. § 3170(b) ("the State or private owner or occupier shall be given adequate and feasible access for economic and other purposes to the concerned land"); *see also* 43 C.F.R. § 36.10 (procedures to provide adequate and feasible access to inholdings). Additionally, when Congress approved the concept of the King Cove Road in the OPLMA, it made clear that nothing in that law amended or modified King Cove's right of access as an inholding under ANILCA § 1110. 2-ER-212; OPLMA § 6403(d) ("Nothing in this section ["6403. King Cove Road"] amends or modifies the application of section 1110"). The community of King Cove's right to access under Title XI's § 1110(b) was unaffected by Secretary Jewell's decision to reject the land exchange and construction contemplated by the OPLMA and, likewise, the inholding's right to access is unaffected by the 2019 land exchange between the Secretary and KCC.

The legislative history of Title XI's right of access to inholdings provides further support that Title XI is a separate and distinct tool for the Secretary to cure land-locking of properties by CSUs: "This provision [Section 1110(b)] is intended to be an independent grant supplementary to all other rights of access, and shall not be construed to limit or be limited by any right of access granted by the common law, other statutory provisions, or the Constitution." 3-ER-315; S.Rpt. 96-413, 96th

Cong. at 249. Thus, even though Title XI is completely inapplicable to the Secretary's land exchange under ANILCA § 1302(h), the district court opinion and the Friends' arguments misapply federal law on Title XI procedures. Section 1110 and the procedures under 43 C.F.R. § 36.10 would be the applicable Title XI requirements, rather than the § 1106 request to the President and Congress, if the community of King Cove was seeking a permit or easement to cross the CSU.

III. THE SECRETARY FULLY CONSIDERED THE PREVIOUSLY ANALYZED NON-ROAD ALTERNATIVES

The Friends claim that "[T]he Secretary provides no evidence to support his assertion that transportation alternatives are neither viable nor available." Friends Br. at 57. This is simply not true. The Secretary's decision describes the historic need for safe and reliable access, and details the continued financial and human costs from the federal government's continuation of the land-locking of King Cove. 2-ER-217-218 and 222, respectively. The Secretary considered the fact that the weather conditions in the area are some of the worst in Alaska, prohibiting the use of the King Cove airstrip approximately 100 days per year. 2-ER-197. The endemic wind and wave conditions during foul weather similarly limit the marine crossing of Cold Bay. 2-ER-196. On examination of the existing conditions the Secretary found that "[d]ecades of experience have established that these theoretical alternatives have been consistently found by the King Cove Native people to be infeasible or inadequate for their health and safety." 2-ER-222

The Friends also assert that "[t]he Secretary provided no evidence that marine alternatives are cost prohibitive" Friends Br. 58-59. This claim is similarly untrue. The Secretary's decision found that "due to excessive operating costs (approximately $3 million per year), the hovercraft proved to be an unsustainable option." 2-ER-218. The Secretary's finding of actual operating costs is in line with the FEIS's projected operating costs for marine alternatives. 2-ER-288 (projected operating cost of hovercraft would require $2.2 million subsidy and projected annual subsidy for ferry operating costs would be $2.5 million). Again, the Secretary's finding that the costs of marine links are excessive and unsustainable were based on data and observations of what had been tried and failed.

Lastly, the Friends make the statement that "The [Corps] study found a marine link dependable over 99% of the time – slightly more than a road's 98% dependability." Friends' Br. at 58, fn 251 (citing 2-ER-101). It should be no surprise that the weather conditions across Cold Bay greatly reduce the dependability of both air and marine alternatives, but the Friends' statement that a marine link is more dependable than a road does not align with the body of evidence in the record. The 2013 ROD found that "during the worst weather (estimated 2 percent of the time)" the road would not likely be open. 2-ER-47. The Corps study noted that the hovercraft designed and built specifically for the Cold Bay crossing "could not operate about 30 percent of the time." 2-ER-78.

Consistent with these conclusions, the Secretary's decision found that "the weather conditions that complicate air and sea corridor are less relevant to road transportation, and thus dependability of a road corridor exceeds that of the alternatives discussed in the 2015 report." 2-ER-225. On the basis of these observations and data, the Secretary properly concluded that "persistent and substantial number of emergency medevacs and periodic deaths that continue to occur. … Even if a road proves impassable at times as mentioned in the ROD, all indicators are that there will likely still be numerous other occasions when the access it gives to the airport at Cold Bay will make the difference between life and death for the residents." 2-ER-231.

IV. THE SECRETARY CONSIDERED THE POTENTIAL EFFECTS OF KCC'S DEVELOPMENT WITHIN THE ROAD CORRIDOR CONSIDERED IN THE 2013 FEIS.

The Friends' argument continuously references the USFWS's internal planning and briefing documents from the 1980's and 1990's for references to potential effects to the environment from road construction. Friends Br. at 19, 20, 21, 46, 47, 49, and 50. The proposed road in those early documents was a hypothetical corridor created by USFWS that traversed the Kinzarof Lagoon shoreline—the exact location of eel grass beds, migratory bird habitats, and other sensitive features. SER-133 ("While the exact routing or alignment of the proposed road is unknown it would most likely follow the eastern rim of Cold Bay and the

northern shore of Kinzarof Lagoon"). The USFWS's hypothetical road corridor is not in the same location as the lands selected by KCC for exchange, which are "nearly identical to the Southern Alignment analyzed in the 2013 FEIS [and] would be located approximately ½ mile to one mile north of Kinzarof Lagoon." 2-ER-199. Thus, Secretary Bernhardt did not have to "confront the[ ] contrary factual findings" from the 1998 Land Protection Plan, as the Friends argue (Friends Br. at 46), since USFWS's estimation of environmental harm from the 1998 Land Protection Plan was for a road corridor in a completely different location.

Similarly, the Friends' argument repeatedly references decades of USFWS's findings and decisions rejecting a land exchange for a road. *See* Friends Br. at 9, 20-21, 31, 52, 54, and 65. These assertions are simply not true. Secretary Jewell's 2013 rejection of the OPLMA's proposed land exchange and road construction across the Izembek isthmus was the *only* previous land exchange decision. *See Agdaagux Tribe of King Cove v. Jewell,* 128 F. Supp. 3d 1176, 1181-1183 (D. Alaska 2015); and *Friends of Alaska National Wildlife Refuges v. Bernhardt*, 381 F. Supp.3d 1127, 1131-1132 (D. Alaska 2019). The multiple "decisions" referenced by Friends are merely a series of meetings and document deliveries regarding a 1995 KCC offer to exchange land that relatively quickly morphed into a legislative proposal with no land exchange component. *Compare* Friends Br. At 19-20 *with* SER-125. Road construction in the Izembek NWR was authorized

under the resulting federal appropriation, though construction was required to remain on lands owned by KCC; the appropriation also included funds to address health and safety needs of King Cove, which was intended to alleviate the need to use of the Izembek NWR wilderness area for road access. SER-120. This history of efforts to obtain year-round access for the King Cove community is documented and fully considered in Secretary Bernhardt's decision. 2-ER-217-218. Secretary Bernhardt's decision likewise considers the 2013 EIS and the Record of Decision that rejected the only land exchange considered by the Department of the Interior. 2-ER-219-222. More importantly, Secretary Bernhardt fully considered the continuing hazards and burdens placed on the community of King Cove as the hollow promises of reliable access to the landlocked community remain unfulfilled. 2-ER-222-226.

Secretary Bernhardt confronted and considered the 2013 FEIS's environmental analyses of developing a road corridor on the lands currently proposed for exchange. 2-ER-219-222 and 229-230. As described in the 2013 FEIS: "This [southern] alignment is intended to strike a compromise between minimizing disturbance to Black Brandt (through distance from Kinzarof Lagoon) and disrupting caribou migration through the isthmus. The route was designed to avoid or minimize impacts to wetlands, minimize stream crossings, and to accommodate terrain considerations." 2-ER-261. It was precisely upon the

confrontation of the factual findings in the 2013 FEIS that Secretary Bernhardt made the determination that "to the extent an authorization under ANILCA constitutes a policy change from that described by Secretary Jewell in the 2013 ROD rejecting a similar, but not identical, land exchange under OPLMA, such change is warranted, necessary, and appropriate." 2-ER-216.

CONCLUSION

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

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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 6145 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: March 8, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2021, 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.

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