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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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**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,

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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

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# DEFENDANT-INTERVENOR-APPELLANTS' OPENING BRIEF

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**For this list, the following abbreviations apply:**

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**Alaska National Interest Lands Conservation Act (ANILCA)**

**Alaska Native Claims Settlement Act (ANCSA)**

**Administrative Procedure Act (APA)**



**Rules**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to F, 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 21st day of November 2020.

/s/Steven W. Silver
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*Attorney for King Cove Corporation. et al.*

## I. INTRODUCTION

This is a case about the ability of the federal government to make policy choices to uphold the promises and purposes of the Alaska National Lands Interest Conservation Act (ANILCA), the Alaska Native Claims Settlement Act (ANCSA) and the federal government's trust responsibilities to Alaska Natives.

## II. STATEMENT OF JURISDICTION.

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Appellees,' Friends of Alaska National Wildlife Refuges *et. al.* (hereinafter Friends) claims arose under federal statutes, namely the Administrative Procedures Act (APA), 5 U.S.C. § 706(2), ANILCA 16 U.S.C §§3101 et.seq. ANCSA, 43 U.S.C. §§ 1601 et seq., the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq. and the Endangered Species Act (ESA) 16 U.S.C. §§ 1531 et seq. (1973). ECF 17 at 38-44, 1 E.R. This Court has jurisdiction under 28 U.S.C. § 1291 because the appeal is from the June 1, 2020 Order of the district court (Docket 51) which entered its final judgment on June 15, 2020 (Docket 52). 1 E.R.1, 1 E.R. 25 Appellants filed a timely Notice of Appeal on August 17, 2020. (Docket 58). 1 E.R. 25,27, and 30

## III. ISSUES PRESENTED FOR REVIEW.

1. Did the district court err in granting summary judgment to Friends by failing to recognize that the Secretary of Interior (Secretary) stated in the Decision Document[1] at 18 that he would have approved the 2019 Agreement even if the facts about the availability of marine alternatives and the degradation to resources from road construction were exactly as stated in Secretary Jewell's 2013 decision?

2. Did the district court err in granting summary judgment to Friends by concluding that: "The Exchange Agreement again ***commits*** the federal government to exchange land with KCC ***for construction of a road through Izembek***?" (Order and Opinion at 5). 1 E.R. 6 (emphasis added).

3. Did the district court err in granting summary judgment to Friends by concluding that ANILCA § 101 (d) is ***not*** a purpose of ANILCA on which the Secretary could rely in support of an ANILCA § 1302 (h) land exchange?

4. Did the district court err in granting summary judgment to Friends by concluding that ANILCA§ 1302 (h) required that both the land acquired by the government and the land transferred by the government must meet the purposes of ANILCA?

[1] The formal title of the document is: "Findings and Conclusions Concerning A Proposed Land Exchange Between the Secretary of Interior and the King Cove Corporation." 2 E.R. 215-32., AR INT- 002814-33. (hereinafter Decision Document).

5. Did the district court err in granting summary judgment to Friends by concluding that the 2019 Agreement violates ANILCA and the APA because it was executed without following the procedural mandates of Title XI's ANILCA §1104 process? (Order and Opinion at 5). 1 E.R. 6

## IV. **STATEMENT OF THE CASE.**

Friends filed a Complaint in the district court for the District of Alaska on August 7, 2019 (Docket 1 3:19cv—00216-JWS) alleging harms due to potential future road construction, even though the Decision Document specifically says multiple times that the 2019 Agreement does not authorize road construction. (Decision Document at 2, 11, 14 and 16). 2 E.R. 216, 219, and 229.

Friends moved for Summary Judgment on January 23, 2020. (Docket. 32). The Defendant-Appellants (hereinafter Secretary) and Defendant-Intervenor Appellants, King Cove Corporation, *et al.* (KCC) and the State of Alaska (Alaska) opposed the motion. Friends filed a reply. (Dockets. 38,40 and 43).

On June 1, 2020, the district court entered an Order and Opinion that vacated the 2019 Exchange Agreement, holding that the decision to enter the exchange was unlawful under the APA and ANILCA. (Docket 51). 1.E.R 2-24 The district court entered its final judgment on June 15, 2020 (Docket 52). 1 E.R. 1 On August 14, 2020, the Secretary filed a timely Notice of Appeal of the district court's judgment. (Docket 57). 1 E.R. 30 On August 17, 2020 KCC filed a timely Notice of Appeal

of the district court's judgment. 1 E.R. 25 (Docket 58). On August 17, 2020, the State of Alaska filed a timely Notice of Appeal of the district court's judgment.1 E.R.27. (Docket 59).

The district court's final judgment in granting summary judgment to the Friends is now before this Court.

## V. STATEMENT OF FACTS.

**Background.**

KCC, the City of King Cove (King Cove) and the lands of the Native Village of Belkofski (Belkofski) and the Agdaagux Tribe are located on the Alaska Peninsula, which reaches out to the Aleutian Islands in southwest Alaska. The Alaska Peninsula separates the Pacific Ocean from Bristol Bay, an arm of the Bering Sea. The Izembek National Wildlife Refuge (Refuge) is also located on the Alaska Peninsula. 2 E. R. 217. Part of the Refuge lies on a narrow isthmus that separates the Bering Sea from the Pacific Ocean at Cold Bay.

King Cove and the City of Cold Bay are both located adjacent to or near the Refuge on opposite sides of the isthmus, immediately north of Cold Bay and are separated by the Refuge. King Cove has approximately 938 residents, of whom one-third are Alaska Natives. King Cove is the home of two federally recognized tribes, the Agdaagux Tribe, and the Native Village of Belkofski. Cold Bay is a very small

community of about 150 residents located approximately 18 miles from King Cove. 2 E.R. 218.

The Refuge has also been used for over 4000 years by the indigenous Aleut and other people who live in the area. Local residents continue to utilize the Izembek Isthmus for subsistence hunting and gathering along historic trails that have long existed in the Refuge. There are also military roads that were constructed during World War II onto the Isthmus and into the now-designated Refuge and wilderness area. Roads to U.S. Army hunting cabins are also sprinkled throughout the Refuge.

Establishment of a road corridor connecting King Cove and Cold Bay has been advocated by King Cove residents since at least the 1960s. A road would enhance access to Cold Bay and its all-weather airport, for personal safety, medical, and health purposes. 2 E.R. 196-202, 217-18. However, because it was designated as Wilderness by ANILCA § 303 (3) in 1980, no new roads are permitted in the relevant part of the Refuge. 2.E.R.215.

Following decades of emergencies and efforts to access the vital all-weather airport in Cold Bay, KCC requested that the Department of Interior (DOI) enter into an equal value land exchange under specific authority set out in ANCSA and ANILCA for such exchanges with Alaska Native corporations. The purpose was to allow the potential for a road in a separate, later authorization and permitting action. 2 E.R. 196, 2 E.R. 236.

**B. Marine Alternatives Have Failed to Address the Access Issues Created by The Izembek Refuge.**

In 1999 Congress attempted to address ANILCA's unintentional severing of King Cove from Cold Bay by enacting the King Cove Health and Safety Act (Section 353) of the Consolidated and Emergency Supplemental Appropriations Act of 1999 (Public Law 105-277). That Act provided funds for the AEB to construct a marine-road link between the communities of King Cove and Cold Bay. The federal funding for access specifically excluded the use of federal lands from the transportation system and required a marine vessel to bypass the Izembek Isthmus by crossing Cold Bay from a location near the northern most point of King Cove Corporation land.

In 2006, the Borough extended a one-lane gravel road from the end of the King Cove road system to a hovercraft dock four miles away where a newly constructed hovercraft ... carrie[d] up to 49 passengers, an ambulance, and cargo to and from Cold Bay."

Because of "cost and reliability concerns"[2] the hovercraft service was discontinued by the Borough in 2011. The annual operating costs of the hovercraft exceeded revenues by more than one million dollars per year.[3] Persistent foul

[2] The hovercraft was sold to the City of Akutan where it also proved unaffordable to operate.

[3] The Executive Summary of the FEIS identifies the costs of operating a hovercraft as a $2.2 million subsidy and a ferry as a $2.5million subsidy. FEIS ES-38. AR 00179444 2 E.R. 270.

weather and ice conditions on Cold Bay grounded the hovercraft nearly 35% of the time.[4] 2 E.R. 184-85.

### C. Due to The Failure of Marine Alternatives and The Continued Need for Reliable Access for Medical Treatment, Congress In 2009 Passed the Omnibus Public Land Management Act of 2009 (Public Law 111-11, Title VI, Subtitle E (OPLMA)

OPLMA provided a land exchange/road construction authorization different than the land exchange alone that is the subject of this litigation. 2 E.R. 209-14. The OPLMA FEIS described the Project's Purpose as follows:

> The basic project purpose is to provide a transportation system between the City of King Cove and the Cold Bay Airport. The overall, project purpose is to construct a long term, safe, and reliable year-round transportation system between the cities of King Cove and Cold Bay.[5]

It directed the Secretary "to analyze a land exchange, alternatives for road construction and operation, and a specific road corridor through the Refuge and the Izembek Wilderness." (ROD at page 2). (AR INT 001237) 2 E.R. 38, "The proposed land exchange would transfer to the State of Alaska all right, title, and interest to a road corridor for the construction, operation, and maintenance of a single lane gravel road between the communities of King and Cold Bay, Alaska." (ROD at page 2). (AR INT 001238). 2 E.R. 38, OPLMA§ 6402 (d)(1) provided that "[T]o carry out the land exchange under subsection (a) the Secretary shall determine that

[5] FEIS at page 1-5 AR 180930

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).

On December 13, 2013 Secretary Jewell promulgated a ROD in which she explained the issue before her as follows:

> The Record of Decision provides the determination of the U.S. Department of Interior regarding whether to proceed with a land exchange **and allow road construction through the Izembek National Wildlife Refuge,** as provided in the Omnibus Public Land Management Act of 2009. (2013 ROD at page 2). (Emphasis added). (AR INT 001237).

Secretary Jewell used the open-ended discretion given to her by Congress in OPLMA and selected the No Action Alternative, thereby denying the proposed land exchange and road construction.

KCC and the State of Alaska appealed Secretary Jewell's decision in the district court for the District of Alaska on the basis that OPLMA required a public interest determination based upon effects to the King Cove community. Their Motion for Summary Judgment was denied in an Order issued on September 8, 2015.

In denying KCC's Motion for Summary Judgment Judge Holland stated:

> In the OPLMA Congress recognized that a road from King Cove to Cold Bay would foster public health and safety and would present environmental concerns. Rather than make the hard choice between public health and safety and the environment itself, Congress left that decision to the Secretary, requiring that she comply with NEPA before approving the road and land exchange needed to construct the road. Given the sensitive nature of the portion of the Izembek Wildlife Refuge which the road would cross, the NEPA requirement for approval of the proposed road probably doomed the

> project. Under NEPA, the Secretary evaluated environmental impacts, not public health and safety impacts. Perhaps Congress will now think better of its decision to encumber the King Cove Road project with a NEPA requirement. (2015 Order at 36-37).

**D. KCC Requests A Land Exchange Under ANILCA That Does Not Authorize A Road.**

Taking Judge Holland's admonition to heart, in May 2017, KCC asked Secretary of Interior Zinke to consider conveying certain lands to KCC on a narrow stretch of uplands (about one-mile inland from each shore of the Izembek Isthmus) on the Refuge in exchange for a shoreline stretch of land on the Izembek Isthmus that is owned by KCC. The exchange was for lands of equal value held by KCC within the Izembek and Alaska Peninsula National Wildlife Refuges that had previously been identified by the United States for acquisition. This resulted in the "Agreement for the Exchange of Lands" with KCC, which Secretary Zinke signed on January 22, 2018. AR INT 00212029 2 E.R. 187-90.

Friends filed a Complaint in the district court for the District of Alaska on January 31, 2018 alleging harms due to potential future road construction. On March 29, 2019 Judge Gleason determined that the 2018 Land Exchange Agreement to transfer a corridor to KCC "facilitated" road construction,[6] thereby reversing the "no road construction" policy decision in the 2013 proposed land transfer and

[6] March 29, 2019 Order at 21 in Friends of Alaska National Wildlife Refuges v. Bernhardt (the 2018 Land Exchange Case).

construction authorization to the State of Alaska reached by Secretary Jewell in the 2013 ROD.

Judge Gleason found that Secretary Zinke's decision relied on facts that contradicted facts on which Secretary Jewell had relied. Therefore, Judge Gleason ruled that Secretary Zinke had failed to provide good reasons for relying on changed facts as required by *FCC v. Fox Television Stations, Inc.*, 556 U.S 502 (2009) and *Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015).[7]

KCC and the Secretary jointly decided that, even if the district court had misapplied *FCC v. Fox Television*, the best course would be to comply with Judge Gleason's ruling rather than appeal. On May 21, 2019, KCC requested that Secretary Bernhardt move forward with the proposed equal value land exchange. On June 28, 2019 KCC and Secretary Bernhardt executed the 2019 Land Exchange Agreement (2019 Agreement). It was supported by a decision document articulating the Secretary's reasons why his decision complied with *FCC v. Fox Television*, *supra*.

By the 2019 Land Exchange Agreement the Secretary would exchange 500 acres within the Refuge to acquire land of equal value from KCC's biologically

[7] March 29, 2019 Order at 28 in *Friends of Alaska National Wildlife Refuges v. Bernhardt* (the 2018 Land Exchange Case).

prized Alaska Native Claims Settlement Act (ANCSA) shorelands that are within the boundaries of the Refuge. Although no road or ground disturbing activity was authorized by this exchange (Decision Document at 2, 11, 14 and 16), 2 E.R. 216, 225, 238, 233. It did provide an overland corridor outside the Refuge connecting the neighboring towns of Cold Bay and King Cove.

The 2019 Agreement was again challenged by Friends. The Alaska district court again ruled that the 2019 Agreement violated the APA and ANILCA. Notices of Appeal were timely filed by the Secretary, Alaska, and KCC and the case is now before this Court. 1 E.R. 2.

## VI. SUMMARY OF ARGUMENT.

**The district court erroneously granted summary judgment to Friends, which KCC respectfully requests be reversed for the following reasons:**

### A. *Fox* and *Kake* "Good Reasons" Issue

The district court found, that, in violation of *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), the reasons cited for the 2019 Agreement by Secretary Bernhardt pursuant to ANILCA § 1302 (h) and ANCSA § 22 (f) contradicted facts supporting the 2013 denial by former Secretary of Interior Sally Jewell of the Congressionally-authorized, combined land exchange and authorization to construct

a road in the Refuge.[8] 1 E.R. 9-15, E.R. 15-1. There are two reasons why this is in error:

First, Secretary Bernhardt made a finding that he would have approved the 2019 Land Exchange even if the facts about the availability of a marine alternative and the degradation to resources from road construction were exactly as stated in Secretary Jewell's 2013 decision. 2019 (Decision Document at 18-19). 2 E.R.223-224 *Kake* authorizes an agency to reach a new policy conclusion based on the same record as long as the agency does not contradict the facts underlying the first decision without supplying good reasons for doing so. *Kake* at 968. That is exactly what Secretary Bernhardt's finding does. 1 E.4.17-18.

Second, unlike the specific Congressionally authorized, **combined land exchange/road construction authorization** that Secretary Jewell denied in 2013, the 2019 Agreement expressly stated that it did ***not*** authorize road construction. Decision Document at (2, 11, 14, and 16). 2 ER. 216, 226, 229, and 231. This is proven by the facts that no road construction can be authorized under an ANILCA 1302 (h) land exchange and that if KCC prevails in this litigation its remedy would

[8] OPLMA § 6402 (d)(1) says: "[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." OPLMA § 6406 (a) says: "Any **legislative authority** for construction of a ***road*** shall expire at the end of the 7-year period beginning on the date of the enactment of the subtitle unless a construction permit has been issued during that period." (Emphasis added).

be limited to proceeding with the land exchange only – **not road construction**. In short, the 2019 Agreement is a new policy, based on a different statute, a different record, and different facts than the Congressionally authorized, **combined land exchange/road construction** authorization that Secretary Jewell denied in 2013.

### B. Purposes of ANILCA Issue

The district court erroneously held that the 2019 Agreement failed to advance the stated purposes of ANILCA as required by ANILCA § 1302 (h) and thus constituted unlawful agency action under the APA. (Order and Opinion at 18). There are two reasons why the district court was wrong in finding that the Land Exchange failed to meet the purposes of ANILCA:

First, the district court incorrectly determined that the 2019 Agreement was not permissible under ANILCA § 1302 (h) because "the economic and social needs of Alaska and its people" set out in ANILCA § 101 (d), which the Secretary had referenced as support for the 2019 Agreement (Decision Document at 19), was not a purpose of ANILCA. The district court's narrow interpretation of ANILCA is inconsistent with the "Purposes of ANILCA" set out in ANILCA § 101 and determined by the Ninth Circuit's Opinion in *City of Angoon v. Marsh*, 749 F.2d 1413, 1415-16 (9th Cir. 1984) and the Supreme Court's Opinion in *Sturgeon v. Frost* 139 S. Ct. 1066, 1075 (2019). 1 E.R. 17-18.

Second, the district court erroneously held that both the land the Secretary transferred to the Native Corporation and the land the Secretary received in exchange had to meet the purposes of ANILCA. Section 1302 (h) of ANILCA does not say that. It says "***in acquiring lands for the purposes of this Act*** the Secretary is authorized to exchange lands … etc." (Emphasis added), Syntactically, this phrase requires that only the land acquired by the Secretary must meet "the purposes of the Act." It limits the reasons for which the Secretary can ***acquire*** land. It does not affect the land that the Secretary ***transfers*** to the Native Corporation.

**C. Title XI Issue.**

Finally, the district court erroneously concluded that the 2019 Agreement is subject to the requirements of the ANILCA § 1104 process. 1 E.R. 18-19. This is in error for three reasons: 1) the "corridor for a hortatory road" which would result from the 2019 Agreement does not meet the definition of a "Transportation or Utility System;" 2) once the 2019 Agreement is executed, the "corridor for a hortatory road" that is transferred to KCC would be deemed by ANILCA§ 103 (c) to be outside the Refuge and would not meet the definition of a "Transportation or Utility System" for that reason. *Sturgeon v. Frost*, 139 S. Ct. 1066, 1077 (2019); and 3) ) the definition of "applicable law" as used in ANILCA§ 1104 makes clear that the ANILCA § 1104 process does not apply to this ANILCA § 1302 (h) land exchange; and the "Notwithstanding any ***other provision*** of law" phrase of

ANILCA § 1302 (h) precludes application of the ANILCA § 1104 process to this ANILCA § 1302 (h) land exchange.

For these reasons, KCC respectfully requests that the district court's Judgment be reversed.

## VII. ARGUMENT.

### A. LEGAL STANDARDS

#### 1. Standard of review.

This Court reviews the district court's summary judgment *de novo*, applying the same standards to review the agency action that applied in the district court. *Westlands Water District v. Dep't of Interior*, 376 F.3d 853, 865 (9th Cir. 2004). Judicial review of the Secretary's action is governed by the APA, under which the reviewing court must uphold agency action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. 5 U.S.C 706(2)(a)

#### 2. Judicial review under the APA.

The "scope of review under the 'arbitrary and capricious' standard is narrow and precludes a court from substituting its own (or a litigant's) judgment for that of the agency." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007); *Lands Council v. McNair*, 537

F.3d 981, 987 (9th Cir. 2008), abrogated in part on other grounds by *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008).

Under the APA standard, federal agencies are owed substantial deference by courts reviewing agency action, particularly agency action involving scientific and technical matters within their expertise. *McNair,* 537 F.3d at 987-88. Reviewing courts should be at their *most* deferential when an agency is addressing difficult issues within its area of special expertise, such as DOI's expertise in making land exchange decisions. *Id.* at 993. *See also Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 376-77 (1989) (deference to an agency's decision is particularly appropriate where questions of scientific methodology or technical expertise are involved).

As a rule, the Ninth Circuit will "uphold agency decisions so long as the agencies have 'considered the relevant factors and articulated a rational connection between the factors found and the choices made.'" *City of Sausalito v. O'Neill,* 386 F.3d 1186, 1206 (9th Cir. 2004) (quoting *Selkirk Conservation All. v. Forsgren,* 336 F.3d 944, 953-54 (9th Cir. 2003). *See Protect Our Communities Found'n v. LaCounte,* 939 F.3d 1029, 1034 (9th Cir. 2019)).

ANILCA provisions that provide for agreements with Alaska Native Corporations should be construed liberally to further those agreements. *Tyonek Native Corp. v. Secretary of Interior,* 836 F.2d 1237, 1240 (9th Cir. 1988).

## B. **THE DISTRICT COURT ERRED IN DETERMINING THAT THE 2019 AGREEMENT VIOLATED THE APA.**

### 1. The District Court Failed to Recognize Secretary Bernhardt's Finding That *He Would Have Approved the Land Exchange Even If the Facts Were Exactly the Same as Stated in the 2013 ROD* and Thus the *Fox* and *Kake* Requirement to Provide Good Reasons for Changed Facts Does Not Apply.

The district court correctly stated that "the issue for the court is whether the Memo, which sets forth the Secretary's reasons for rebalancing, rests on factual findings that contradict those in the 2013 ROD and if so whether the Memo contains an adequate level of justification for such contrary findings." (Order and Opinion at 8). 1 E.R. 9.

The Secretary's reasons **do not** rest on contradictory facts. Rather, he decided to proceed with the 2019 Agreement based on the assumption that the facts were exactly as stated in Secretary Jewell's 2013 ROD.

The district court erred by failing to recognize the Secretary's decision to make the 2019 Agreement "**even if the facts are as stated in the 2013 ROD**:"

> 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.**
>
> 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 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 is consistent with the public interest, the purposes of ANSCA and ANILCA** and our responsibility to the Native people.[9] (Decision Document at 18 – 19). (Emphasis added). 2 E.R. 233-34.

The Secretary's finding, that approves the 2019 Agreement without changing the facts on which Secretary Jewell denied the 2013 OPLMA land exchange/road construction decision, requires that the district court's Order and Opinion be set aside. This is because *Fox*, *Kake*, and related cases provide that an agency is entitled to reverse its policy decision based on the same record as long as it does not contradict the facts on which the first decision was based. As the *en banc* Ninth Circuit Court found in *Kake*:

> **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).

In *Nat'l Ass'n of Home Builders v. Envtl. Prot. Agency*, 682 F.3d 1032, 1037 (D.C. Cir. 2012) the Court determined:

> [**T]he petitioners cannot point to any new findings, let alone contradictory ones, upon which EPA relied. - - - EPA did not rely on new facts, but rather on a reevaluation of which policy would be better in light of the facts**. - - - ***Fox*** **makes clear that this kind of reevaluation is well within an agency's discretion**. 556 U.S. at 514–15, 129 S.Ct. 1800. (Emphasis added).

In *Ark v. Tidwell*, 816 F.3d 119, 127-128 (D.C. Cir. 2016) the Court held:

> As discussed below, **no elevated burden of justification applies to the Service's decision because, in approving the 2012 Colorado Rule, the Service made no new factual findings contradictory to those supporting the nationwide 2001 Roadless Rule.** Consistent with the holding of the district court, and contrary to Ark's contention, we conclude that the agency's decision was valid and non-arbitrary. (Emphasis added).

In this case Secretary Bernhardt carefully listed the key facts on which Secretary Jewell had denied the land exchange and road construction in 2013 and said that he was proceeding with the 2019 Agreement assuming and notwithstanding exactly those facts. (Decision Document at 18 – 19). 2 E.R. 233-34. He did not contradict them as the district court erroneously found (and was the basis for the district court's grant of summary judgment to Friends). (Order and Opinion at 14). 1 E.R.15. Accordingly, KCC respectfully submits that there was no violation of the APA due to a change of policy based on an unexplained contradiction of facts and requests that the district court's grant of summary judgment to Friends be reversed for this reason.

**2. The Administrative Record Does Not Support the District Court's Finding that the 2019 Land Exchange Agreement "Commits" the Federal Government to Exchange Land with KCC for "Construction" of a Road through Izembek.**

The district court correctly observed that: "In reviewing an administrative agency decision, 'the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.'" (Order and Opinion at 5-6). 1 E.R. 6-7. (See also *City & Cty. of San Francisco v. United States*, 130 F.3d 873, 877 (9th Cir. 1997) (quoting *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985)). Unfortunately, this principle was not applied in this case.

Notwithstanding Secretary Bernhardt's multiple statements in the Decision Document that the 2019 Agreement did not authorize construction of a road, (Decision Document at 2, 11, 14, and 16) 2 E.R. 216, 226, 229, and 231.and the lack of legal authority under the authorizing statute (ANILCA § 1302 (h) to authorize such construction,[10] the district court nevertheless determined that: "The Exchange Agreement again ***commits*** the federal government to exchange land with KCC ***for***

[10] The operative authorizing language of ANILCA's § 1302 (h) is:

> "Notwithstanding any other provision of law, in acquiring lands for the purposes of this Act, the Secretary is authorized to exchange lands …" 16 USC 3192(h).

***construction of a road through Izembek***." (Order and Opinion at 5). 1 E.R.6. (Emphasis added).

This is clearly erroneous. The simple meaning of "commit" is to "perform as an **act."**[11] This Court recognizes "commit" as a binding pledge. (*Warren Security First Nat. Bank 1*21 F. 2d. 822 ,824, (9th Cir. 1941)). (holding that the signing of a document "committed" the signer of the document "to pay in full the obligation to the said Bank by November 15, 1940.")

There is no such "commitment for road construction" in the 2019 Agreement. This is illustrated by the fact that if this Court finds for KCC, it will do nothing more than restore the Secretary's authority to proceed with the 2019 Agreement. Since the construction of a road through the Refuge was specifically and expressly not authorized by Secretary Bernhardt, his land exchange decision (made pursuant to authority granted by Congress in ANILCA § 1302 (h)), was a new decision - not a change from what Secretary Jewell had decided.

Based on this incorrect and unsupported finding, the district court found that the Secretary's July 3, 2019 approval of the 2019 Agreement was a reversal of Secretary Jewell's 2013 wholly discretionary decision under OPLMA to reject a proposed land exchange that would have also included authorization to construct a

[11] Black's Law Dictionary (Abridged Sixth Edition).

road.[12] Although the 2013 decision and the 2019 decision were made under completely different legal authorities, based upon different records, and each had wholly different legal standards, and would carry out separate and distinct end results, the district court found further that Secretary Bernhardt's Decision was a change in agency policy subject to the requirements of *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).

This is not a proper application of *Fox* and *Kake* for numerous reasons:

First, Secretary Bernhardt made multiple statements in the Decision Document that the 2019 Agreement did not authorize construction of a road, (Decision Document at 2, 11, 14, and 16). 2 E.R. 216, 226, 229, and 231

Second, Secretary Bernhardt could not have authorized a land exchange ***and*** construction of a road through Izembek even had he wanted to do so. ANILCA § 1302 (h) does not grant the Secretary the power to authorize road construction or

[12] "This Record of Decision (ROD) provides the determination of the U.S. Department of the Interior (Department) regarding whether to proceed with a land exchange **and allow road construction through the Izembek National Wildlife Refuge**, as provided for in the Omnibus Public lands Management Act of 2009." 2013 ROD at 2. 2 E.R.38. (Emphasis added). See also OPLMA § 6402 (d)(1) which says: "[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).

any other ground disturbing activity and OPLMA's authority to construct a road had expired by its own terms in 2017.[13]

Third, the facts are different - Secretary Bernhardt was not reconsidering Secretary Jewell's 2013 OPLMA decision.

Fourth, the issues before Secretary Jewell in the 2013 ROD and the issue before Secretary of Interior in the 2019 Land Exchange were not just based on different statutory authority but were significantly different in scope. Secretary Jewell's decision was explained in the 2013 ROD as follows:

> The Record of Decision provides the determination of the U.S. Department of Interior regarding whether to proceed with a land exchange **and allow road construction through the Izembek National Wildlife Refuge, as provided in the Omnibus Public Land Management Act of 2009.** (2013 ROD at page 2). 2 E.R. 38 (AR INT- 001237-38). (Emphasis added).

OPLMA direction for Secretary Jewell's intertwined land exchange/road construction authorization was set out in OPLMA § 6402 (a) as follows: "The Federal land within the Refuge **shall be transferred for the purpose of constructing a single lane gravel road** between the communities of King Cove and Cold Bay, Alaska."[14] (Emphasis added).

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[13] See OPLMA § 6406 (a): "Any legislative authority for construction of a road shall expire at the end of a 7-year period beginning on the date enactment of this subtitle unless a construction permit has been issued during that period."

[14] See also OPLMA § 6406 (a).

In contrast the decision made by Secretary Bernhardt was set out as follows in the 2019 Decision Document:

> The question before me is whether to authorize a land exchange pursuant to ANILCA that will afford KCC the ability to use its land selections in the pursuit of a better range of health and safety options for their community.
>
> - - - - - - - - - -
>
> Nevertheless, as noted above, any decision by KCC to pursue a road connection is **separate and distinct** from the land exchange authorized here. (Decision Document at page 16). 2 E.R.31. (AR INT- 002829). (Emphasis added).

The test for whether there has been a change in policy requiring application of the *Fox* test in this case should follow *Ark Initiative v. Tidwell,* 816 F.3d 119, 129-130 (D.C. Cir. 2016) in which the D.C Circuit held that *Fox* did not apply. In that case environmental groups sued the Forest Service alleging that the Service had opted generally not to exempt ski areas from application of the 2001 Roadless Rule. Therefore, the environmental groups contended, that when it exempted ski-area acreage from the 2012 Colorado Roadless Rule the Forest Service was required to "provide a more detailed justification than what would suffice for a new policy created on a blank slate."

The Court distinguished *Organized Village of Kake*:

> The 2012 Colorado [Roadless] Rule, in contrast, was based on an entirely new record, including a new EIS, and supported with new, State-specific findings. None of the Colorado findings conflicts with the findings underlying the nationwide 2001 Roadless Rule, which looked at "the 'whole picture' regarding the management of the National Forest System," 66 Fed. Reg. at 3246; *see id.* at 3246–48, and which, the Service even then acknowledged, could affect states differently, *id.* at 3264. No enhanced justification was

required for the Service's State-specific ski-area exclusion.

Because Secretary Bernhardt's 2019 Agreement does not authorize construction of a road through the Refuge, and because it was made pursuant to a different statute (ANILCA § 1302 (h)) that specifically authorizes a land exchange in which an ANCSA corporations is authorized to become owner of land previously held in Federal Conservation System Unit (CSU) and, because the 2019 Agreement is based on a different record than Secretary Jewell's 2013 ROD; Secretary Bernhardt's decision to approve the 2019 Agreement is a new policy that does not reverse, any prior DOI policy. The facts that support the 2019 Agreement with no road do not contradict the facts underlying the Secretary Jewell's refusal of 56,390 acres for 206 acres ***plus a road*** in 2013. So, just as in *Ark Initiative v. Tidwell,* it is not subject to the *Fox* and *Kake* test on which Friends' entire case depends. The district court's grant of summary judgment to Friends should be reversed for these reasons.

### 3. The District Court Erroneously Equated "Approval" of the 2019 Agreement with A "Commitment" to "Construct" A Road.

The district court asserted that, even if the 2019 Agreement did not actually commit the federal government to road construction, the mere making of the land exchange amounted to the same thing and thus the 2019 Agreement should be treated as if it included authorization to construct a road:

> It is of no consequence that the Exchange Agreement does not constitute the **final** step in construction of a road. The express purpose of the agreement is to provide the necessary land for such a road, and prior DOI decisions have declined to approve a transfer of land out of Izembek for the same purpose. (Order and Opinion at 7). 1 E.R. 8 (emphasis added)

The Secretary's decision to allow "KCC to obtain land holdings that align with the needs of the King Cove ***community to potentially pursue the construction of a road at some point in time"*** (Decision Document at 16) 2 E.R. 231 is not a "commitment" to construct a road. Rather, it is aspirational because it describes no concrete action or commitment of resources.[15] 2 E.R. 231.

Secretary Bernhardt's Decision is different than Secretary Jewell's. Secretary Jewell was compelled by Congress to approve a road if she made the discretionary decision to approve the OPLMA land exchange.[16] Secretary Bernhardt's decision was a discretionary act under a different statute and limited to approving a transfer of land ownership to the indigenous people who have occupied that land for 4,000

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[15] *Alaska Wilderness League v. U.S. Forest Serv. (In re Big Thorne Project & 2008 Tongass Forest Plan)*, 857 F.3d 968, 974 (9th Cir. 2017):

> We need not map the precise contours of these concepts, however, because the Forest Plan provision that mentions sustainability is discretionary: It states only that the Service "[p]rovide, *where possible* , sufficient deer habitat capability to ... maintain sustainable wolf populations" (emphasis added). This is an aspiration, not an obligation. Because the Forest Service is only obligated to consider sustainability "where possible," there is no law for us to apply in second-guessing the agency.

*See also Wilderness v. Allen*, 871 F.3d. 719, 726 (9th Cir. 2017).

[16] OPLMA § 6402 (d)(1) shows that OPLMA statutorily authorized road construction as part of a land exchange had Secretary Jewell agreed to approve the land exchange.

years. As no more than a transfer of land ownership, the 2019 Land Exchange logically could not cause the adverse road impacts to the Refuge which caused Secretary Jewel to deny the intertwined land exchange/road construction alternative in the 2013 ROD. It was thus error for the district court to find that even if the 2019 Land Exchange did not authorize construction of road, the 2019 Land Exchange should be treated as if it did because of its aspirational references to potential future road construction. *In re Big Thorne Project, supra.*

Moreover, the "final step"[17] to which the district court refers is not the easy step which the court's statement implies. Road construction will only be approved if KCC is able to obtain the required financing and permits and survive almost certain litigation. Should any of these contingencies not occur, KCC will have transferred its land to the Izembek National Wildlife Refuge but there will be no road and the land exchange will not be undone. (Decision Document at 14 -15, n.47). 2 E.R. 229-230.

Accordingly, the district court's grant of summary judgment to Friends is in error and KCC respectfully requests that it be reversed.

### C. **THE DISTRICT COURT ERRED IN DETERMINING THAT THE 2019 AGREEMENT VIOLATED THE APA BECAUSE IT FAILED TO COMPLY WITH THE PURPOSES OF ANILCA**

[17] Instead of referring to it as the "final step" the district court later refers to the land exchange as the "first step" at page 18 of the Order and Opinion. 1 E.R. 19.

**1. The District Court's Holding That ANILCA § 101(d) Is *Not* a Purpose of ANILCA Is Inconsistent with *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) Which Held That Providing an Adequate Opportunity for the Economic and Social Needs of the People of Alaska Was a Purpose of ANILCA.**

ANILCA §1302 (h) provides in part:

> Notwithstanding any other provision of law, ***in acquiring lands for the purposes of this Act*** the Secretary is authorized to exchange lands (including lands within conservation system units and within the National Forest System) Etc.

Citing *City of Angoon v. Marsh*, 749 F.2d 1413, 1415-1416 (9th Cir. 1984), Secretary Bernhardt found that the 2019 Agreement was in accordance with the dual purposes of ANILCA as articulated by this Court:

> The Ninth Circuit has opined that these purposes of ANILCA can be distilled into the "dual purpose" of furnishing "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." (Decision Document at 13-14). 2 E.R. 228-229

*Marsh* states at 1415-1416:

> Sometime after the passage of ANCSA, Congress became aware of the need for a legislative means of maintaining the proper balance between the designation of national conservation areas and the necessary disposition of public lands for more intensive private use. Thus, 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. See16 U.S.C. § 3101 [ANILCA § 101].

However, even though Congress titled the entire ANILCA § 101 as "Purposes," the district court disagreed that all of the provisions of ANILCA §101 are "Purposes of ANILCA," In particular, the district court takes aim at ANILCA § 101(d), to say it is not part of ANILCA's purposes:

> This provision does not state that one of the purposes of ANILCA is to further the economic and social needs of Alaska and its people. Rather, it is an acknowledgment 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. The purpose of the statute is explicitly stated to be preservation and subsistence. (Order and Opinion at 17). 1.E.R.18

Based on this conclusion of law, the district court held: "Given the Exchange Agreement fails to advance the stated purposes of ANILCA, it is not permissible under that statute." (Order and Opinion at 18). 1 E.R. 19

The district court's conclusion on this point is not only inconsistent with the plain language of ANILCA §101 and the Ninth Circuit's *Marsh* decision, but also with the Supreme Court's Opinion 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.

Thus, the district court's finding that the 2019 Land Exchange did not advance a purpose of ANILCA is in error and should be set aside for this reason alone.

2. **The District Court Erroneously Interpreted ANILCA §1302 (h) to Require That Both The Proposed Use of Land Transferred To a Third Party and The Proposed Use of The Land Received From The Third Party (The Entire Exchange) Must Meet The Purposes of ANILCA. Instead, Only the Acquired Land Must Meet the Purposes of ANILCA.**

Aside from the fact that the court should defer to the expertise of the agency charged with its management in deciding whether impacts to land can be mitigated,[18] the district court misreads ANILCA §1302 (h)'s standard for the Secretary to authorize an exchange: "[when] acquiring land for the purposes of this Act." 16 USC 3192(h). The district court set aside the 2019 Exchange because of the perceived impacts on the federal land ***after*** it is exchanged to KCC and becomes private land. This shows that the district court reads ANILCA §1302 (h) to require that both the proposed use of the land transferred to a third party and the proposed use of the land received from a third party ( i.e., the entire exchange) must meet the purposes of ANILCA.

However, the language of ANILCA §1302 (h) does not say that. It says "***in acquiring lands for the purposes of this Act*** the Secretary is authorized to exchange lands … etc." Syntactically, this phrase specifies that only the acquired land is

[18] The *Lands Council v McNair*,537 F.3d 980 (9th Cir. 2008).

required to meet "the purposes of the Act." That is, it limits the reasons for which the Secretary can ***acquire*** land. It does not affect the land that the Secretary ***transfers*** to the Native Corporation.

If Congress had intended that both the proposed use of land the federal government receives and the proposed use of the land transferred out of federal ownership be for the purposes of ANILCA, §1302 (h), Congress would have said something like: "the Secretary is authorized to make a land exchange so long as the lands the federal government receives and the land that the federal government transfers are managed in accordance with the purposes of this Act."

Instead, the first sentence of ANILCA § 103 (c) expressly excludes land transferred out of federal ownership: "Only those lands within the boundaries of any conservation system unit which are public lands (as defined in this Act) shall be deemed to be included as a portion of such unit." Because the land transferred out of federal ownership is not deemed to be public land, it is not subject to federal regulation – including the requirement to meet the Purposes of ANILCA

Based on this interpretation of ANILCA § 103 (c), supported by a lengthy colloquy on the Senate Floor between Senator Stevens and Senator Jackson about the reasons for ANILCA § 103 (c), the Ninth Circuit upheld a land exchange between the federal government and an Alaska Native Corporation, the purpose of which was

to harvest timber within the Admiralty Island National Monument. *City of Angoon v. Marsh, supra.* at 1415-1416.

The district court's interpretation (that the land a Native Corporation receives in an exchange under ANILCA § 1302 (h) must meet the purposes of ANILCA) would so limit the ability of Native Corporations to make a land exchange that it would render ANILCA § 1302 (h) unable to fulfill its intended function.[19] A Native Corporation will have a plan for using the land it receives in an exchange or there would be no reason to proceed with the exchange. (Why would a Native Corporation exchange non-encumbered lands for federally encumbered lands by entering such an exchange?) In short, the district court's interpretation would eviscerate the ability and the authority of the Secretary to make land exchanges to Native Corporations under ANILCA §1302 (h) and be inconsistent with ANILCA § 103 (c).

To the extent that there is any ambiguity on this point in the language of ANILCA 1302 (h), Ninth Circuit and Supreme Court case law apply the canon of statutory construction that ambiguous statutes are to be construed in favor of Indians. See *Cnty. of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*,

[19] In 2013 and 2014 the Secretary used his ANILCA § 1302(h) authority to make at least three land exchanges for equal value for ANC Village Corporations within the Yukon Delta Wildlife Refuge. The exchanges involved lands located near the villages. See Appendix 9, KCC letter. (AR-INT 002214 and AR-INT 002504-38). 2 E.R.196 and 208The identical legal authority was used to make those exchanges as was used to make this exchange. None of these exchanges was challenged on either a legal or policy basis. These exchanges thus reflect Secretarial policy.

502 U.S. 251, 269, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992). *Gila River Indian Cmty. v. United States*, 729 F.3d 1139 (9th Cir. 2013). Accordingly, the "***in acquiring lands for the purposes of this Act"*** language of ANILCA §1302 (h) should be interpreted to apply only to the land the Secretary acquires, not what the Secretary transfers to KCC.

Accordingly, the district court's interpretation of ANILCA § 1302 (h) as applied to this case is in error and should be reversed.

**3. The District Court Erroneously Determined That the Land Exchange Was Not a Conveyance Under ANCSA As Well as ANILCA § 1302 (h).**

For the reasons set out below the 2019 Agreement was a conveyance under both ANCSA and ANILCA§1302 (h). That this ANILCA land exchange is also an ANCSA exchange is legally significant.

As the colloquy between the Senators Stevens and Jack1son at page 147 of *Marsh, supra* shows ANILCA 1302 (h) and 103 were intended to rationalize the fact that earlier Native land selections under ANCSA ended up within CSUs as a result of Congress' later CSU designations under ANILCA This raises the question whether the district court would have reached different conclusion had it known this. *PTS Labs LLC v. Abbott Laboratories*, 126 F. Supp. 2d 538, 541 (N.D. Ill. 2000) ("And one can question whether this court's ruling would have been the same if it had been aware of that information.")

Paragraph A sets out the authority under which the Secretary made the 2019 Agreement:

> The Parties agree that the exchange is made pursuant to the Secretary of the Interior's authority under section 1302(h) of ANILCA, as amended, 16 U.S.C. § 3192(h), that pursuant to 16 U.S.C. § 1613a this exchange of land is a conveyance under ANCSA and therefore subject to section 910 of ANILCA, 43 U.S.C. § 1638. 2 E.R 237

Congress granted sweeping authority to the Secretary to make land conveyances and exchanges benefitting Alaska Natives to which the Secretary referred in making the 2019 Land Exchange:

> ANCSA and ANILCA are both unique to Alaska and serve to provide very broad authority to undertake land exchanges on more flexible terms than the major land exchange legislation generally applicable elsewhere in the United States.
>
> - - - - - - - - - -
>
> Together, the two statutes provide an extremely broad scope of administrative authority to conduct land exchanges in Alaska.

(Decision Document at 15). 2 E.R. 230.

Nevertheless, the district court erroneously found that the 2019 Agreement was not a conveyance under ANCSA:

> King Cove references ANCSA's exchange provision as providing broad authority to enter into the land exchange. Doc. 39 at 41-42. The Exchange Agreement was not executed under that provision. The stated authority for the agreement is ANILCA. AR INT 002865. Order and Opinion at 14, n.63. 1 E.R. 15

The district court's finding is simply wrong. In addition to the Secretary expressly saying in Paragraph A that the 2019 Agreement is a conveyance under ANCSA, 16 U.S.C. § 1613a, referenced in Paragraph A of the Agreement, provides that a land exchange with Natives made under the circumstance here is deemed by law to be conveyance under ANCSA:

> All land and interests in land in the State of Alaska conveyed by the Federal Government under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) to a Native Corporation and reconveyed by that Native Corporation, or a successor in interest, in exchange for any other land or interest in land in the State of Alaska and located within the same region (as defined in section 9 (a) of the Alaska Native Claims Settlement Act (43 U.S.C. 1608(a)), to a Native Corporation under an exchange or other conveyance, **shall be deemed, notwithstanding the conveyance or exchange, to have been conveyed pursuant to that Act.**

As the Secretary pointed out in the Decision Document at 18-19: "[R]esponsibility to the Alaska Native people in the implementation of ANCSA and ANILCA requires a different policy result for the ANILCA land exchange." 2 E.R. 233-234. Accordingly, if there is an ambiguity regarding the application of ANCSA and ANILCA§1302 (h) to the land transferred to Native Corporations it should be resolved in favor of an interpretation that allows such land exchanges to work for the Native Corporations. *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 269, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992).

In *Tyonek Native Corp. v. Secretary of Interio*r, 836 F.2d 1237, 1240 (9th Cir., 1988) the Ninth Circuit recognized the deference owed the Secretary and the liberal construction to be given provisions favoring Alaska Natives:

> This case presents two conflicting canons of statutory construction. On one hand, statutes benefiting Native Americans should be construed liberally in their favor. See *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 467 U.S. 138, 149, 104 S.Ct. 2267 2274, 81 L.Ed.2d 113 (1984). On the other hand, we owe considerable deference to the interpretation of the Settlement Act by the Secretary of the Interior. See *Doyon, Ltd. v. Bristol Bay Native Corp.*, 569 F.2d 491, 496 (9th Cir.), cert. denied, 439 U.S. 954, 99 S.Ct. 352, 58 L.Ed.2d 345 (1978); see also Monet v. INS, 791 F.2d 752, 753 (9th Cir.1986).

Unlike the situation in *Tyonek*, the deference owed the Secretary and the liberal construction owed to Alaska Natives join in this case to support the Secretary's assertion of authority under ANILCA § 1302 (h) and ANCSA to make the 2019 Agreement.

**D. THE LAND EXCHANGE IS NOT SUBJECT TO, AND, THUS, DID NOT VIOLATE TITLE XI's § 1104 PROCESS.**

The district court's conclusion that the 2019 Agreement is subject to Title XI's § 1104 process depends on the district court's finding that the corridor for a hortatory "road corridor" falls within the definition of "transportation or utility system." It also depends upon the district court's finding that ANILCA § 1302 (h) does not allow an unrestricted transfer of land from a CSU into non-federal ownership when doing so could result in a corridor for "Transportation or Utility System" or a hortatory, unauthorized road. Finally, it depends on whether the district court's finding that the

Secretary's "authority" to exchange land pursuant to ANILCA § 1302 (h) is subject to the "Notwithstanding any provision of applicable law" phrase of ANILCA § 1104. Order and Opinion at 19. 1 E.R. 20. None of these findings is consistent with the relevant statutory definitions.

1. There are Two Principle Reasons Why the District Court's Holding is Inconsistent with the Statutory Definition of A "Transportation or Utility System."

a. By Statutory Definition A "Corridor" for a Hortatory, Unauthorized Road Is Not A "Transportation or Utility System."

The district court is correct that the last Recital clause in the Agreement says that it "allows for construction of a road." But, the Agreement also provides that the Recitals "shall not be used in the construction or interpretation of this Agreement."[20] Further, even if the use of a Recital in this way were not precluded by the Agreement, "allowing a road" subject to the qualifications described by the Secretary is very different than "authorizing construction of a road."

What the Secretary actually "authorized" is set out at page 11 of the 2019 Decision Document and describes what "allows for construction of a road" means for purposes of the 2019 Land Exchange Agreement:

> The land exchange itself would not authorize the 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 Federal permits requiring compliance with other Federal laws including NEPA, such an exchange would eventually allow KCC to

[20] Section P (7) of the 2019 Agreement 2 E.R. 241.

> construct a road along that corridor', which would, by the terms of the agreement, be utilized primarily for health, safety, and quality-of-life purposes and generally not for commercial purposes.

To correctly state it then, the Secretary "authorized" a land exchange intended to provide land to KCC which in turn would "allow" it to seek authorization and permits to construct a road in a separate proceeding at some point in the future. Unlike the situation faced by Secretary Jewell in 2013 in which road construction was mandated by OPLMA as part of the Secretary's approval of the land exchange,[21] no ground disturbing activity was "authorized" by the 2019 Land Exchange.

ANILCA § 1102 (4)(A) defines a "transportation or utility system" to mean "any type of system described in subparagraph (B). Subparagraph (B) is not generic. It 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 for a hortatory road (for which construction is expressly not authorized) (2019 Decision Document at 2, 11, 14, and 16) 2 E.R. 216, 226, 229, and 231 is not among them. Nor is a **"**a corridor of land through Izembek to facilitate the building of a road," (Order and Opinion at 18-19)

[21] 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)

1 E. R 19-20 as the district court described it. Nor is it a "system of general transportation." The district court provided no justification for adding a corridor for a hortatory, unauthorized road to the specific systems listed in ANILCA § 1102 (4)(B).

Instead, the district court should have assumed that Congress "listed" what it meant and meant what it "listed." In *BedRoc Ltd., LLC v. United States* 541 U.S. 176, 183 (2004) the Court observed:

> The preeminent canon of statutory interpretation requires us to "presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous. (Citations omitted).

Additionally, *Expressio unius est exclusio alterius* is a canon of statutory construction which presumes that when one or more things of a class are expressly mentioned, others of the same class are intentionally excluded. *United States v. Crooked Arm*, 788 F.3d 1065, 1075 (9th Cir. 2015); *Crandon v. United States*,494 U.S. 152, 163–64, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990). Because a corridor for a hortatory road is not listed in the ANILCA § 1102 (4)(B) definition, it is not a "transportation system" and thus is not subject to Title XI's § 1104 process under these canons of statutory construction.

These provisions are clear and thus should be interpreted as written. But even assuming *arguendo* that there is some ambiguity in how these provisions were

intended to interact in an ANILCA § 1302 (h) land exchange with a Native Corporation, it is a canon of statutory construction that such ambiguity should "be construed in favor of Indians." See *Cmty. of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 269, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992); *Gila River Indian Cmty. v. United States*, 729 F.3d 1139 (9th Cir. 2013)..

The district court provides no reason why these canons of statutory interpretation should not be applied in this case. Thus, the grant of summary judgment to Friends should be reversed.

b. By Statutory Definition Once the Land Exchange Occurs, Any Future Road Would Not Be Built Through A Conservation System Unit, But Through Private Land, and Title XI's § 1104 Process Would Not Apply.

ANILCA § 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 had 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 expressly acknowledged by ANILCA § 103 (c), it will no longer be deemed to be within the boundaries of a CSU and the corridor for a hortatory road (for which construction is expressly not authorized) will no longer be subject to any possible definition under ANILCA § 1102 (4)(A) as a "transportation or utility system." If the corridor for a hortatory road is not a "transportation or utility system," n within federal conservation lands. That is, the corridor of land through which the road is proposed to be constructed will not actually be a part of Izembek after the exchange. Such an interpretation of the statute is incorrect and not entitled to deference. Congress's intent was clear—it enacted Title XI as a "single comprehensive statutory authority for the approval" of transportation systems through public lands "to minimize the adverse impacts of siting transportation. . . systems within units established or expanded by [ANILCA

Order and Opinion at 19. 1 E.R. 20.

Nothing in ANILCA § 1302 (h) or ANILCA § 103 (c) provides statutory support for such a conclusion. To the contrary the district court's findings are in error because they contradict the specific language of ANILCA § 103(c), including the Supreme Court's interpretation of ANILCA § 103 (c) in *Sturgeon v. Frost*, and ANILCA § 1302 (h). Accordingly, the Secretary was authorized to proceed with the 2019 Land Exchange without reference to the ANILCA § 1104 process.

2. **ANILCA§ 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.**

The district court agrees with Friends that allowing KCC to seek to construct a road in the corridor after the exchange takes place "would nullify the protections Congress established when adopting Title XI by enabling land exchanges to circumvent its procedures." (Order and Opinion at 19). 1 E.R. 20. The district court provides no statutory support for its contention that Congress intended to apply the "protection" of the ANILCA § 1104 process to private land within the Refuge.

Indeed, in *City of Angoon v. Marsh, supra*. at 1417 the Ninth Circuit allowed timber harvest to proceed because it deemed timber land within the Admiralty National Monument belonging to a Native Corporation to be outside the Monument because of ANILCA § 103 (c). In doing so the Ninth Circuit observed:

> 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). Section 103(c) provides, in pertinent part, that "only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit."

Congress enacted ANILCA §103 (c) because it was aware that every land exchange proponent, as here, would have a plan for using the land acquired from the federal government after the exchange. Congress was also aware that under the district court's interpretation an ANILCA § 1302 (h) land exchange would be precluded as a practical matter, if the post-exchange plan for the land transferred out of the CSU to the Native Corporation met or would meet the ANILCA § 1102 (4)(A) and (B) definition of a transportation and utility system.

In short, the ANILCA § 1104 process should not be applied to non-CSU, private land within the geographic boundaries of the Refuge as the district court's interpretation would require. First, ANILCA § 1302 (h) specifically authorizes the Secretary to transfer land out of a CSU when making a land exchange. Second, while Congress may have intended the ANILCA § 1104 process to apply to transportation or utility systems within a CSU, ANILCA §103 (c) as interpreted by *Marsh* and *Sturgeon v. Frost* shows that Congress specifically prohibited applying the ANILCA § 1104 process to private land that has been transferred out of a CSU into private hands.

Even if there is some ambiguity in how these provisions were intended to interact such ambiguity is to be construed in favor of Alaska Natives. See *Cmty. of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation,* 502 U.S. 251, 269, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992); *Gila River Indian Cmty. v. United States*, 729 F.3d 1139 (9th Cir. 2013).

KCC respectfully submits that the district court's Order and Opinion on this point should thus be reversed.

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

The district court reads the interaction of the "notwithstanding" phrases of ANILCA § 1104 and ANILCA §1302 (h) as follows:

> The court agrees with Plaintiffs' analysis that the notwithstanding provision was meant to exempt land exchanges from the requirement of equal value or complex public interest exchanges that were required by other statutes in place when ANILCA was enacted. Indeed, it appears that if 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. (Order and Opinion at 20-21). 1 E.R. 21-22.

Contrary to the district court's analysis, Congress harmonized ANILCA § 1302 (h) and ANILCA § 1104 by limiting the scope of the ANILCA § 1104 process to a transportation or utility system, which, by definition, is within a CSU and by "explicitly" authorizing the Secretary by ANILCA §1302 (h) "to exchange lands

(including lands within conservation system units …)" with Native Corporations. In doing so, Congress is presumed to know that, because of ANILCA § 103 (c), exchanging land within a CSU to a Native Corporation would result in that land being deemed to no longer be part of the CSU.

ANILCA § 1104 and ANILCA §1302 (h) have different "notwithstanding" phrases. ANILCA § 1104 (a) says "Notwithstanding any provision of ***applicable*** law." ANILCA §1302 (h) says "Notwithstanding ***any other*** provision of law." They have different meanings as applied here that yield different results. The canons of statutory construction require that each meaning 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 treated them as meaning the same:

> Also, the court must read § 1302 (h)'s notwithstanding provision in light of the fact Title XI contains a notwithstanding clause as well: "[n]otwithstanding any provision of applicable law," no action with respect to **authorization of a transportation system** "shall have any force or effect unless the provisions of this section are complied with." 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**. (Order and Opinion at 21). (Emphasis added). 1 E.R. 22.

ANILCA §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."

Contrary to the district court's above-highlighted assumptions, ANILCA § 1302 (h) does not give the Secretary power to "grant an **authorization**," nor does the 2019 Agreement approve a "**road through conservation lands."** ANILCA § 1302 (h) provides for no more than a land exchange between the parties.

Because the Secretary has no authority to ***grant*** any of the authorizations listed in ANILCA §1102 (1), ANILCA §1302 (h) is not "applicable law" for purposes of the ANILCA § 1104 process. (The fact that a corridor for a hortatory road may ***result*** from an exchange is not a ***grant***). Accordingly, ANILCA §1302 (h) is not the

"applicable law" to which ANILCA § 1104 (a) refers in its "notwithstanding" phrase." On the other hand, ANILCA §1302 (h) says without limitation: "Notwithstanding ***any other***[22] provision of law." In the context here the words "***any other*** provision of law" clearly include ANILCA § 1104 (a). This is because there are no limitations on the ANILCA §1302 (h) "notwithstanding phrase" while, as explained above, ANILCA §1302 (h) is excluded by way of definition from the ANILCA§ 1104 (a) "notwithstanding applicable law" phrase."

As the Federal Claims Court found in *DGR Associates, Inc. v. United States*, No. 10-396C, at *21 (Fed. Cl. Aug. 13, 2010):

> [U]nder the rules of statutory construction, "notwithstanding any other provision of the law," must be given the meaning of its plain language. The Supreme Court has held that Congress includes a "notwithstanding" phrase to make clear its intent when one provision of a statute trumps another. *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)).

Given the wide application that the law gives the phrase "Notwithstanding any provision of law," which Congress is presumed to know, the conclusion is compelled

[22] The Eleventh Circuit found the word "any" in the phrase particularly important: "Nothing about the word "any" suggests that "law" should refer only to appropriation laws, rather than "any" laws. *Miccosukee Tribe of Indians v. United States Army Corps of Engineers* 619 F.3d 1289, 1301 (11th Cir. 2010).

that by its use in ANILCA § 1302 (h) Congress intended it to apply to the ANILCA § 1104 process.

Finally on this point, the district court's interpretation (that the general provisions of the ANILCA § 1104 process should trump conveyances to Natives under ANCSA and ANILCA § 1302 (h)) is inconsistent with the canon of construction that a specific provision applies over the general one no matter how "inclusive may be the general language of a statute." *Varity Corp. v. Howe*, 516 U.S. 489, 519 (1996). This canon is particularly applicable when, as here, "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *Id.*

By ANILCA § 1302 (h) Congress specifically enacted a process to expeditiously convey land to Natives to rationalize the interaction of ANCSA land conveyances with ANILCA's later creation of CSUs. As Secretary Bernhardt stated at page 14 of the Decision Document:

> This authority [ANILCA § 1302 (h)] is 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. In setting aside over 100 million acres of Federal lands (nearly one-third of the State of Alaska) as Parks, Wildlife Refuges, Wilderness, Monuments, and Wild and Scenic Rivers, a promise was made to the affected local populations, and particularly the resource dependent Alaska Native villages, that the Secretary of the Interior would have a tool box available to ensure national

> conservation goals were not achieved unfairly at the expense of the dependent local people.

Accordingly, Congress prioritized the specific directive of ANILCA § 1302 (h) over general provisions of law, like the ANILCA § 1104 process, when it included the "notwithstanding any other provision of law" clause in ANILCA § 1302 (h)'s lead-in language. Title XI's § 1104 process would not apply.

This reading of ANILCA § 103 (c) is supported by the Supreme Court's decision in Sturgeon v. Frost, 139 S. Ct. 1066, 1077 (2019): Section 103(c)'s first sentence makes clear that only public lands (again, defined as most federally owned lands, waters, and associated interests) would be considered part of a system unit (again, just meaning a national park, preserve, or similar area). Without reference to, or distinguishing, the above authorities the district court found: Defendants argue Title XI does not apply to the Exchange Agreement because after the exchange the road will not be located in a conservation system unit. By contrast, state, Native, or private lands would not be understood as part of such a unit, even though they in fact fall within its geographic boundaries.

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

**RESPECTFULLY SUBMITTED** this 21st day of November 2020.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November 2020 I caused to be electronically filed the foregoing Defendant-Intervenor-Appellants' Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit 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.

/s/ Steven W, Silver

**STATEMENT OF RELATED CASES PURSUANT TO CIRCUIT RULE 28-2.6 AND FORM 17**

**9th Cir. Case Number: 20-35721**

The undersigned attorney states that: I am unaware of any related cases pending in this Court other than 20-35727 and 20-35728 which are identical cases.

**Signature:** */s/ Steven W. Silver* **Date:** November 21st, 2020

**CERTIFICATE OF COMPLIANCE FOR BRIEFS**

**PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(a)**

**AND FORM 8**

**9th Cir. Case Number: 20-35727**

The undersigned attorney certifies that:

1. This brief contains 12,336 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 14 and Times New Roman type style.

**Signature:** */s/ Steven W. Silver* **Date:** November 21, 2020