Nos. 20-35721, 20-35727, and 20-35728

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRIENDS OF ALASKA NATIONAL WILDLIFE REFUGES, et al.,
Plaintiffs/Appellees,

v.

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

and

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

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

FEDERAL APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Court Rule

Other Authorities

INTRODUCTION

This case involves a challenge to a land-exchange agreement under the Alaska National Interest Lands Conservation Act ("ANILCA") between the Department of the Interior and King Cove Corporation, an Alaska Native village corporation. The people of King Cove have long sought to develop improved access between their village and the 18-miles-distant City of Cold Bay, Alaska. They want safe, reliable, and efficient access to Cold Bay's large airport, particularly for medical evacuations. Currently, the Izembek National Wildlife Refuge separates the two cities and prevents access to Cold Bay by road, making travel between them possible only by air or by sea—often a perilous endeavor. Consequently, King Cove residents facing medical emergencies can be subject to significant delays reaching Cold Bay. These medical emergencies therefore repeatedly require Coast Guard intervention when conditions are too rough for private transportation companies.

In 2009, Congress granted Interior temporary authority to study and, if in the public interest, to authorize a land exchange and the construction of a road between King Cove and Cold Bay. In 2013, Interior concluded that the negative environmental impacts of a road through Izembek outweighed the positive health and safety impacts a road would provide to the residents of King Cove. Interior declined to exchange lands under the authority of the 2009 statute. That authority then expired.

In 2018, Interior reconsidered that balance and approved a land exchange (but not a road) using ANILCA's separate statutory authority. But the district court set the

exchange aside because Interior had not adequately explained its change in course. In 2019, Interior again approved a land exchange (but not a road). Interior explained that its policy now placed greater weight on the welfare of the people of King Cove than it had previously, and that its new policy judgment supported a land exchange. And Interior explained would have adopted that policy even if the record had been the same as in 2013—i.e., even if Interior's previous findings that a potential road would have adverse environmental impacts and that there were other viable and at times preferable transportation alternatives were unchanged. Interior further explained that new facts—particularly regarding the 101 additional emergency medical evacuations from King Cove since 2013 and the viability of transportation alternatives as evaluated in a 2015 study by the Army Corps of Engineers—highlighted the need for a land exchange to enable King Cove to pursue a road.

But the district court once again set the exchange aside. The court concluded that Interior had still not adequately justified its change in position from 2013 and that the land exchange would violate two provisions of ANILCA. For the reasons set out below, that judgment is wrong and should be reversed.

STATEMENT OF JURISDICTION

(a) The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arose under ANILCA, 16 U.S.C. §§ 3101 et seq. ECF 17 at 38-44.

(b) The district court's judgment was final because it disposed of all claims against all defendants. 1 E.R. 1. This Court has jurisdiction under 28 U.S.C. § 1291.

(c) The judgment was entered on June 17, 2020. 1 E.R. 1. Interior filed its notice of appeal on August 14, 2020, or 58 days later. 2 E.R. 30. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether Interior satisfied the requirements of the Administrative Procedure Act ("APA") when it authorized a land exchange after previously having declined to do so on largely the same record, explaining that it was placing "greater weight on the welfare and well-being of the Alaska Native people who call King Cove home" than it had previously done.

2. Whether Interior acted within its authority under Section 1302(h) of ANILCA when it agreed to an "equal value" land exchange with King Cove Corporation, and the lands that Interior would acquire were previously identified by Interior's Fish and Wildlife Service as a top priority for acquisition to further the purposes of ANILCA.

3. Whether Interior was required to comply with the procedures of Title XI of ANILCA—which applies to decisions respecting the approval or disapproval of a "transportation or utility system"—when Section 1302(h) of ANILCA grants no jurisdiction to Interior to grant any authorization for a transportation or utility system, and Interior took no action to approve or disapprove such a system.

PERTINENT STATUTES AND REGULATIONS

Section 1302(h)(1) of ANILCA, 16 U.S.C. § 3192(h)(1), provides:

> 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) or interests therein (including Native selection rights) with the corporations organized by the Native Groups, Village Corporations, Regional Corporations, and the Urban Corporations, and other municipalities and corporations or individuals, the State (acting free of the restrictions of section 6(i) of the Alaska Statehood Act), or any Federal agency. Exchanges shall be on the basis of equal value, and either party to the exchange may pay or accept cash in order to equalize the value of the property exchanged, except that if the parties agree to an exchange and the Secretary determines it is in the public interest, such exchanges may be made for other than equal value.

Section 1104(a) of ANILCA, 16 U.S.C. § 3164(a), provides:

> Notwithstanding any provision of applicable law, no action by any Federal agency under applicable law with respect to the approval or disapproval of the authorization, in whole or in part, of any transportation or utility system shall have any force or effect unless the provisions of this section are complied with.

Section 1102(1) of ANILCA, 16 U.S.C. § 3162(1), defines "applicable law" to mean—

> any law of general applicability (other than this subchapter) 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.

Section 1102(4) of ANILCA, 16 U.S.C. § 3162(4), defines "transportation or utility system" to include—

> (A) . . . any type of system described in subparagraph (B) if any portion of the route of the system will be within any conservation system unit, national recreation area, or national conservation area in the State (and the system is not one that the department or agency having jurisdiction over the unit or area is establishing incident to its management of the unit or area).
>
> (B) The types of systems to which subparagraph (A) applies are as follows:
>
> . . . .
>
> (vii) Roads, highways, railroads, tunnels, tramways, airports, landing strips, docks, and other systems of general transportation.

STATEMENT OF THE CASE

A. Factual background

The Native Village of King Cove and the City of Cold Bay lie about 18 miles apart in southwestern Alaska. 2 E.R. 217. The Village and the City are separated not only by distance but also by the severe winds and waves of Cold Bay; mountainous terrain near the King Cove and its small airport; a three-mile wide isthmus separating the head of Cold Bay, which opens to the Pacific Ocean, from the Bering Sea; and two Wildlife Refuges—Izembek Refuge and Wilderness on the isthmus and the Alaska Peninsula National Wildlife Refuge along the shoreline. *Id.* Both communities are accessible only by sea or by air. *Id.* Travel between King Cove and Cold Bay is therefore often dangerous.

Though travel is dangerous, it is sometimes unavoidable even when conditions are not favorable. King Cove has a population of at least 800 people year round, but

the population expands to about 1,300 people during the summer. *Id.* Although King Cove has the larger population, Cold Bay has the larger airport—an instrument-capable airport with a paved runway more than 10,000 feet long (one of the longest in the state) and a crosswind runway. *Id.* It is a former military airport kept in service primarily as an emergency landing location on the long-haul great circle route between North American and Asian airport hubs. When someone in King Cove has a medical emergency requiring hospital treatment, he or she must get to Anchorage, which requires first getting to Cold Bay. From December 23, 2013, until the signing of the land-exchange agreement in 2019, there were 101 medical evacuations from King Cove, including 21 for which the United States Coast Guard was required to conduct the evacuation because commercial operators concluded that conditions were too dangerous to operate. 2 E.R. 236.

Understandably, therefore, the residents of the remote King Cove community have long sought reliable access to Cold Bay's all-weather airport to enable emergency medical evacuations and other purposes. 2 E.R. 196-202, 217-18. So far, despite several efforts, that reliable access has proven elusive. Between King Cove and Cold Bay is the 315,000-acre Izembek National Wildlife Refuge. Congress established the Refuge in 1980 as part of ANILCA. *See* Pub. L. 96-487, § 303(3), 94 Stat. 2371, 2390-91. At the time, legislators highlighted this region's "outstanding scenery, key populations of brown bear, caribou and other wilderness-related wildlife and critical watersheds for Izembek Lagoon." H.R. Rep. 96-97, pt. II, at 136 (1979). Through the

Fish and Wildlife Service, Interior manages the refuge so as to "conserve fish and wildlife populations and habitats in their natural diversity," "ensure … water quality," and "provide … opportunity for continued subsistence uses by local residents." ANILCA, § 303(3)(B), 94 Stat. at 2391. A portion of the refuge spans the isthmus that separates the Izembek Lagoon and the Bering Sea (to the north) from Cold Bay and the Pacific Ocean (to the south). Congress has designated the area as "wilderness." 2 E.R. 215. No road may be built on the isthmus while it remains a part of the Refuge designated as wilderness. 16 U.S.C. § 1133(c).

King Cove therefore looked to other possible transportation solutions. In 1999, Congress addressed "King Cove Health and Safety" as part of an omnibus appropriations statute. Pub. L. No. 105-277, § 353, 112 Stat. 2681, 2681–302 to –303. Congress there appropriated $20 million to construct a road-hovercraft link between King Cove and Cold Bay and $15 million for improvements to the King Cove airstrip. Those funds allowed for the purchase of a $9 million hovercraft and the construction of a landing along the northeastern shore of Cold Bay. 2 E.R. 72. From 2007 to 2010, the hovercraft was used to complete 30 medical evacuations, but was inoperable 30 percent of the time due to severe weather. *Id.* The hovercraft service was discontinued in 2011 due to exorbitantly high operating costs and concerns that it was unreliable. *Id.* King Cove residents continued to seek a road linking their community with Cold Bay. 2 E.R. 184-85.

In 2009, Congress tried again with the Omnibus Public Land Management Act of 2009 ("OPLMA"). Congress directed Interior to prepare an environmental impact statement to determine whether a land exchange and road construction would be in the public interest. Pub. L. No. 111-11, Title VI, Subtitle E, 123 Stat. 991, 1177-83; 2 E.R. 209-14. The contemplated land exchange would have removed a strip of land through Izembek from federal ownership (and the concomitant protections as part of the Refuge) while acquiring different lands from King Cove and adding them to full federal protection. That would have enabled King Cove to build a road connecting the Village with Cold Bay while also increasing the total acreage under federal ownership.

The land exchange through Izembek contemplated by the 2009 Act would thus have transferred to the State of Alaska all right, title and interest to a corridor of land "for the purpose of constructing a single-lane gravel road between the communities of King Cove and Cold Bay, Alaska." OPLMA § 6402(a), 123 Stat. at 1178. Subject to limited exceptions, the use of any portions of the road built on the conveyed federal lands would be "primarily for health and safety purposes (including access to and from the Cold Bay Airport) and only for noncommercial purposes." *Id.* § 6403(a)(1), 123 Stat. at 1180. The statute authorized road construction if Interior concluded that an exchange and a road were in the public interest. *Id.* § 6402(d)(1), 123 Stat. at 1179. But if no construction permits for the road were issued within seven years, then the authorization expired. *Id.* § 6406(a), 123 Stat. at 1182.

After preparing an environmental impact statement, Interior signed a record of decision ("ROD") on December 23, 2013. The ROD concluded that a road through the Izembek Refuge would not be in the overall public interest because it "would lead to significant degradation of irreplaceable ecological resources that would not be offset by the protection of other land to be received under an exchange," and "because reasonable and viable transportation alternatives exist to meet the important health and safety needs of the people of King Cove." 2 E.R. 39. King Cove Corporation asked for reconsideration. But after further consultation and a site visit by then-Secretary Jewell, Interior on August 13, 2014 affirmed its original conclusion and rejected the Village's plea that a road would best suit its citizens' needs. 2 E.R. 57-58.

King Cove Corporation sued, lost in the district court, and appealed to this Court. While the appeal was pending, the congressional authorization for the road expired. Also while the appeal was pending, Interior decided to reconsider whether a land exchange under the separate authority of Section 1302(h) of ANILCA would be appropriate. King Cove Corporation moved to dismiss its appeal in light of the ongoing discussions with Interior. *Agdaagux Tribe of King Cove v. Zinke*, No. 15-35875, 2017 WL 5198384 (9th Cir. Aug. 11, 2017).

On January 22, 2018, Interior agreed to exchange lands with King Cove Corporation pursuant to the authority granted it by Section 1302(h). 2 E.R. 187. Congress enacted ANILCA to preserve and protect "nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational,

and wildlife values" and landscapes by creating "conservation system units," such as national parks, preserves, refuges, and other federal reservations. *John v. United States*, 720 F.3d 1214, 1218 (9th Cir. 2013). Congress also sought to protect the "subsistence way of life for rural residents" and the resources upon which they depend, as well as to obviate the need for future legislation regarding environmental conservation and subsistence uses. *Id.* Section 1302(h) authorizes Interior, when acquiring lands for the purposes of ANILCA, to exchange lands in refuges and in other conservation system units with corporations organized by Native groups, Village Corporations, Regional Corporations, the State of Alaska, and others. 16 U.S.C. § 3192(h). Such exchanges are to be of "equal value" unless Interior determines that an unequal value exchange is in the public interest. *Id.* § 3192(h)(1). A land exchange under ANILCA, unlike the land exchange and road authorization under the time-limited authority in OPLMA, would not itself authorize construction of a road.

In the 2018 Agreement, the parties agreed to an "equal value" exchange: King Cove Corporation agreed to convey to the United States the surface estate of certain lands within the Izembek Refuge and the Alaska Peninsula National Wildlife Refuge and to relinquish its selection rights under the Alaska Native Claims Settlement Act ("ANCSA") to an additional 5,430 acres within the Izembek Refuge. 2 E.R. 187. In return, Interior agreed to convey to King Cove the surface and subsurface estates of not more than 500 acres in the form of a narrow corridor through the Izembek Refuge.

2 E.R. 188-90. The precise acreage to be conveyed to the United States would have been adjusted to ensure an equal value exchange. *Id.*

The same parties as Plaintiffs here sued to invalidate the 2018 Agreement, and the district court vacated the agreement after concluding that Interior had violated the APA by failing to provide reasoned explanations for the changes of course regarding the existence of viable alternatives to a road and the agency's prior determinations about any road's environmental impacts. *Friends of Alaska National Wildlife Refuges v. Bernhardt*, 381 F. Supp. 3d 1127, 1143 (D. Alaska 2019). The court did not reach the merits of the plaintiff's other statutory arguments. *Id.* Interior did not appeal that adverse judgment.

King Cove Corporation then asked Interior to enter into a new land exchange agreement. Following a review of the history of King Cove's access concerns, the previous efforts of Congress and Interior, the 2013 Environmental Impact Statement and corresponding ROD, and the 2018 Agreement, Interior in 2019 again approved a land exchange with King Cove. Specifically, the agency concluded that an exchange "comports with the purposes of ANCSA and ANILCA because it strikes the proper balance between protection of scenic, natural, cultural and environmental values and provides opportunities for the long-term social and physical well-being of Alaska Native people." 2 E.R. 216. Among other points, from December 2013 (when the agency first declined to enter into a land exchange) until May of 2019, a total of 101 emergency medical evacuations from King Cove were necessary. Of those 101, 21

evacuations had to be handled by the Coast Guard as rescue missions. 2 E.R. 236. Evacuations by the Coast Guard add significant cost per rescue mission and risk the lives of Coast Guard personnel as well as those of the King Cove residents being rescued. 2 E.R. 231.

After its review, Interior articulated five reasons weighing in favor of the land exchange. Most important, the agency forthrightly disagreed with the previous decision on policy grounds, even if the facts were the same as in 2013. 2 E.R. 232-33. That is, even if there are "viable, and at times preferable transportation alternatives for medical services," and even if environmental "resources would be degraded by the road's construction," Interior would authorize the land exchange because "human life and safety must be the paramount concern in this instance." *Id.* In addition, the 2013 ROD underestimated the "acute necessity" for a road, new information had shown that alternative means of transportation were "neither viable nor available," the high cost of Coast Guard intervention had not been adequately taken into account, and substantial benefits would accrue by increasing the total acreage in Izembek through the exchange. *Id.*

B. Proceedings below

Plaintiffs challenged the lawfulness of the 2019 Agreement under ANILCA, the National Environmental Policy Act ("NEPA), and the Endangered Species Act ("ESA"). The district court again concluded that Interior had not acted lawfully on three grounds. 1 E.R. 2. First, the court concluded that Interior had not satisfied the

APA because it had not adequately explained its change in position. Applying *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), the court concluded that Interior had failed to provide a "substantial justification" for what the court concluded were factual conclusions contrary to Interior's earlier conclusions on the need for a road, the viability of alternatives, the harm to the Refuge a road would present, and the value of the lands that Interior would receive in the exchange. 1 E.R. 9-15. Second, the court concluded that the exchange did not further the purposes of ANILCA. 1 E.R. 15-19. That is, the land exchange would not provide a net benefit to the Refuge and that the purposes of ANILCA do not include furthering "the economic and social needs of Alaska and its people." 1 E.R. 18. Third, the court ruled that the exchange must be set aside because it authorizes a transportation corridor without complying with the procedural requirements of Title XI of ANILCA. 1 E.R. 19-22. Given those holdings, the court found it unnecessary to reach Plaintiffs' NEPA or ESA claims. 1 E.R. 22. The district court therefore vacated the land-exchange agreement.

SUMMARY OF ARGUMENT

1. The district court erred in concluding that Interior had not adequately explained its change in policy between 2013 and 2019. To the contrary, Interior made a permissible change in policy, rationally determining that the benefits to human health and safety that a road (if later authorized) would provide outweigh the environmental harm that a road would cause. That decision rests on a permissible value judgment regarding the relative importance of human health versus environmental harm; it is

not, as the district court opined, dependent on an *unexplained* change in the underlying facts with respect to environmental harm or the viability of other transportation alternatives. That policy judgment, based on reweighing the existing facts to place more emphasis on human life and safety, was set forth explicitly in Interior's decision document. This Court and others have recognized that different policy makers are entitled to make different value judgments, even on the same factual record, without running afoul of the APA. That facts post-dating its 2013 decision provide further support for Interior's change in policy does not alter the analysis. The district court improperly substituted its judgment about the wisdom of Interior's policy choice for the agency's and should be reversed on that basis.

2. The district court also erred in concluding that this land exchange is not authorized by Section 1302(h) of ANILCA. That provision requires only that a land exchange be for "equal value," and that the lands acquired by Interior in the exchange further the purposes of ANILCA. Here, there is no dispute that the exchange is for equal value. Likewise, no one disputes that Interior will acquire lands that will further ANILCA's purposes. But the district court added an additional test not present in the statutory language. It required Interior to show that, on balance, the lands acquired in an exchange further ecological concerns more than the lands given up harm them. The court imposed this additional standard without giving any consideration to ANILCA's purpose of providing for the economic and social well-being of the people of Alaska. The district court was mistaken to impose that additional requirement. It

finds no basis in the statutory language. And it was further mistaken to discount the tangible benefits that would accrue to the Aleut Natives and other residents of King Cove through this land exchange. The district court's judgment that Interior was not authorized by Section 1302(h) of ANILCA to enter into the land exchange agreement should be reversed.

3. Finally, the district court erred in concluding that Interior was required to comply with the procedural requirements of Title XI of ANILCA before entering into a land exchange under Section 1302(h). Title XI imposes various procedural requirements before an agency takes an action under "applicable law" to approve or disapprove a "transportation or utility system." A law is an "applicable law" only if it gives an agency jurisdiction to grant an authorization necessary for such a system. Section 1302(h) is not an "applicable law" because it grants Interior no jurisdiction to grant any authorization at all related to a transportation or utility system. It grants Interior jurisdiction only to "exchange lands" under certain conditions. If a road is later approved, parties may at that time question the size, route, and other qualities. But since section 1302(h) is not such an "applicable law," Title XI does not apply.

The district court's judgment should therefore be reversed.

STANDARD OF REVIEW

The APA provides the standard of review for agency actions under ANILCA. *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1194 (9th Cir. 2000). The APA "specifies that an agency action may be overturned only where it is found to

be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002) (quoting 5 U.S.C. § 706(2)(A)). Review under the APA "is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). A court may reverse a decision as arbitrary and capricious only if an agency "relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *League of Wilderness Defenders Blue Mountains Biodiversity Project v. U.S. Forest Service*, 549 F.3d 1211, 1215 (9th Cir. 2008) (internal quotations and citation omitted). The court's role is solely to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Fyock v. City of Sunnyvale*, 779 F.3d 991, 995 (9th Cir. 2015) (indirectly quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

ARGUMENT

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

A. Interior's new policy decision is not based principally on a change in the facts, but instead on a change in Interior's discretionary judgment about those facts.

The district court held that Interior failed to satisfy the APA because it had impermissibly changed its policy without an adequate explanation. Relying on *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), the court concluded that Interior's decision to exchange lands rested on factual findings that contradict—and without substantial justification—the factual findings underlying the 2013 ROD. The district court, however, misapplied *Fox Television.*

In *Fox Television*, the Supreme Court explained that ordinarily an agency decision that is based on a change in position from an earlier decision is subject to no more searching review than would otherwise apply to agency decisionmaking under the APA. *Id.* at 515. An agency need only acknowledge the change in position, comply with the law, and supply reasons for the new policy that would survive traditional arbitrary-and-capricious review. *Id.* An agency must provide a more robust explanation only if it relies on facts that contradict those underlying the earlier policy choice or if there are reliance interests engendered by the former policy. Even then, it is not the agency change in position that requires the explanation, but the departure from the

facts and circumstances that underlay the prior policy. *Id.*; *see also Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 106 (2015).

The district court accepted that Interior had acknowledged a change in positions and articulated his belief that the new policy is the better one. 1 E.R. 9. And the court acknowledged that, under the APA, it is sufficient for Interior to justify its decision solely by giving "more weight to socioeconomic concerns" than environmental ones. *Id.* (internal quotation marks omitted). And it recognized that Interior's decision to enter into the exchange agreement "does not challenge the 2013 ROD findings as to the environmental harm that would stem from the construction and use of a road through Izembek"; instead, the decision "stresses that 'human life and safety' must take precedence over environmental degradation." 1 E.R. 10. So far, so good.

But then the district court took a wrong turn. It concluded that Interior's reasons for rebalancing rested "on factual findings that contradict those in the 2013 ROD" and thus required a "substantial justification for a switch" that Interior did not provide. *Id.* To the contrary, Interior's decision is not based on an unexplained change in the underlying facts. Instead, the decision rests on a value judgment: Interior weighed the importance of the health of the people of King Cove more than the environmental harm at Izembek. That conclusion alone was sufficient to justify the land exchange in accordance with the APA and *Fox Television*.

As Interior explained, it would have entered into the land exchange "even assuming all facts as stated in the 2013 ROD." 2 E.R. 233. Those facts were that

"resources would be degraded by the road's construction" and that there were viable and at times preferable "transportation alternatives for medical services." 2 E.R. 232-33. Interior concluded that *even if* those two things were true, it would still determine that the 2019 land-exchange agreement would be "consistent with the public interest," the "purposes" of ANILCA, and "our responsibility to the Alaska Native People." *Id.* As Secretary Bernhardt stated: "While I appreciate that Secretary Jewell placed greater weight on protecting 'the unique resources the Department administers for the entire Nation,' I choose to place greater weight on the welfare and well-being of the Alaska Native people who call King Cove home." *Id.* Accordingly, Interior did exactly what the district court recognized that it may do—"give more weight to socioeconomic concerns" than to environmental concerns even assuming the same record. 1 E.R. 9. Yet the district court nevertheless invalidated Interior's decision.

That invalidation was erroneous. There is robust precedent in this Court and others supporting Interior's ability to reweigh existing facts and make a policy choice different from what it had previously made. *Fox Television* itself countenances that result. As this Court has explained in applying *Fox*, an agency is entitled to "give more weight to socioeconomic concerns" than it had when making a previous decision, "even on precisely the same record." *Organized Village of Kake v. USDA*, 795 F.3d 956, 968 (9th Cir. 2015).

The D.C. Circuit has similarly concluded that where an agency does not "rely on new facts, but rather on a reevaluation of which policy would be better in light

of the facts," then "*Fox* makes clear that this kind of reevaluation is well within an agency's discretion." *National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1037 (D.C. Cir. 2012); *accord Ark Initiative v. Tidwell*, 816 F.3d 119, 127-28 (D.C. Cir. 2016) (holding that "no elevated burden of justification applies to the [Forest] 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").

Accordingly, different policy makers are entitled to make policy choices based on their differing value judgments without running afoul of the APA. The resulting change in policy must simply be a reasoned one and otherwise comply with the law. *Village of Kake*, 795 F.3d at 968. Indeed, the decision in this case is precisely what this Court anticipated would be permissible in *Village of Kake*: a "new Executive" merely "decided that it valued socioeconomic concerns more highly than environmental protection" and said so explicitly in the decision document. *Id.*

Because Interior would have reached the same conclusion even if there had been no further factual developments, the factual developments described in Interior's decision document were in the nature of additional factual support for the decision. But those facts were not necessary to it. Thus, the district court's reliance on those additional facts, and its demand for further substantial justification to support them, were unnecessary under *Fox Television* and *Village of Kake*. This Court should reverse without even reaching them.

B. Interior's additional factual findings provide further support for its decision and are substantially justified.

To the extent that Interior made new factual findings, the agency provided sufficient justification for them and did not act arbitrarily or capriciously. To start, Interior explained that the necessity for a road had become clearer given the number and cost of medical evacuations that had occurred after the 2013 ROD. 2 E.R. 231. Interior explained that there were 101 medical evaluations in six years, including 21 by the Coast Guard, at a cost of about $50,000 for each Coast Guard rescue. *Id.*; 2 E.R. 236. None of those facts was considered in the 2013 ROD. They further highlighted the "acute necessity" for a road and the need to exchange lands. 2 E.R. 232.

The district court did not conclude that those factual findings were incorrect, that they were based on faulty information, or that they contradicted Interior's earlier factual findings that medical evacuations are often necessary. Instead, the court dismissed Interior's concerns because the fact of medical evacuations was not itself new. In effect, the district court concluded that there was no basis to revisit Interior's policy judgment because the additional facts did *not* refute Interior's earlier findings. 1 E.R. 12. But that gets *Fox Television* backwards. Interior here did not produce facts *contradictory* to those that it had found before. Instead, the agency produced *additional* facts demonstrating the "persistent and substantial number of emergency medevacs," 2 E.R. 231, that reasonably further supported a different judgment about the decision before it. Interior ultimately made a new policy judgment based on those additional

facts pointing toward the "acute necessity" for a "road to serve the future emergency medical and other social needs" of the people of King Cove, 2 E.R. 232, it did not make a judgment based on contradictory facts that requires further explanation for why the facts changed.

Fox Television does not require that Interior provide a more "substantial justification" for its policy conclusion; instead, Interior must only show that its factual findings are supported in the record and, where those findings have changed from earlier findings, explain why. 556 U.S. at 515; *Perez*, 575 U.S. at 106. For example, if Interior had concluded that a road would not have a particular environmental impact that Interior had previously found the road would cause, it would need to provide further justification to support that new and contradictory finding to ensure that the finding was warranted. But there is no question that Interior's factual finding about the number of medical evacuations since 2013 is correct and well-supported. The only question is what Interior should do as a policy matter given that factual finding. This policy judgment revaluing existing facts requires no special justification, merely adequate explanation. *Village of Kake*, 795 F.3d at 968.

The district court did not explain why it was arbitrary for Interior to value the continued and repeated need for medical evacuations differently, or how the additional facts did not support the conclusion to reconsider the exchange of lands. The only thing contradictory here was the ultimate policy judgment. And *Fox Television* and *Village of Kake* demonstrate that Interior is entitled to reach that judgment so long as

it provides a reasoned explanation, which it has done. Interior acted well within its discretion, even if it acted on the basis of the frequency and costs of medical evacuations alone.

But those facts did not stand alone. Interior also concluded that new, different facts, developed after 2013, showed that alternative means of transportation were not as viable or available as was believed in 2013. For example, the U.S. Army Corps of Engineers issued a report in June 2015 analyzing non-road alternatives for medical evacuation from King Cove to Cold Bay, including an ice-capable marine vessel, a fixed-wing aircraft/new airport, and a helicopter/heliport. 2 E.R. 59. The Corps considered hovercraft or other landing vessels, on which Interior relied in 2013. But the Corps found that such vessels are not ice-capable, would not be able to perform shore landings in icy conditions, and would not be suitable for year-round medevac use. 2 E.R. 102. As Interior thus concluded, there are no hovercraft or landing craft available for use by residents of King Cove. And for the foreseeable future, any such availability is both highly speculative and less likely than in 2013. 2 E.R. 222.

After 2013, the Corps also analyzed the other marine alternative, a ferry. 2 E.R. 100. After reviewing the report, Interior concluded that a ferry was prohibitively expensive and laden with risks such as capital funding, operational funding, regulatory permitting, and lack of redundancy. 2 E.R. 223. Compounding the funding concerns, the Corps assigned a separate risk factor of "medium-serious" to each of three ferry route options, with the most important such risks relating to "operations at night and

in extreme weather, permitting, and delays in getting the project built with known important wildlife resources both on land and in the ocean." 2 E.R. 100-01.

Once again, the district court discounted Interior's conclusions and substituted its judgment for that of the agency. For example, the court concluded that the 2015 study did not "produce any recommendations or draw any conclusions." 1 E.R. 13. But that is beside the point. Interior looked at the incremental facts in the study and then drew its own conclusions. That is precisely what an agency should do with new facts. Similarly, the district court faulted Interior for not producing its own economic analysis or explaining away comparable costs for the road and other alternatives. *Id.* But that raises the bar far beyond what *Fox Television* requires. The agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates." 556 U.S. at 515. Here, Interior articulated its reasons for the new policy, as *Fox Television* requires. 2 E.R. 231-33. The district court simply thought those reasons were not good enough and wrongly substituted its judgment for Interior's.

The district court also faulted Interior for making contradictory factual findings in two other areas: whether the environmental harms to Izembek can be mitigated, and whether the value of lands acquired outweighs the negative effects of a road through Izembek. 1 E.R. 10-15. But in neither of those areas did Interior make new

factual findings at all. Instead, Interior simply recognized the undisputed facts that some of the environmental harms of a road can be mitigated through the permitting processes that will precede construction of the road, and that Interior would acquire lands that will benefit "the protection of scenic, natural, cultural, and environmental values." 2 E.R. 232. Given those facts, Interior's conclusion reflects its decision to weigh human life and safety more than the environmental concerns previously raised, while recognizing that the land exchange will also have environmental benefits to the refuge. 2 E.R. 232-34. The district court might have wanted more facts itself before reaching a different policy judgment. But that is not the district court's call to make. Interior's decision was entirely rational and supported by substantial evidence in the record. That is all that the APA requires. *State Farm*, 463 U.S. at 43.

In short, Interior provided in substantial detail new facts supporting its decision as well as a reasoned explanation for the change of policy. 2 E.R. 215-34. Specifically, Interior made clear that a rebalancing of the factors involved, more heavily weighted to its responsibility to the Alaska Native people—in and of itself—required a different policy result in light of several significant factors. But Interior also relied on continuing evacuations and necessity for a road to service the medical and social needs of the residents of King Cove, changed information concerning the viability and availability of alternative means of transportation, the high costs to the taxpayers for evacuations by the Coast Guard, the benefits of increasing acreage under federal ownership, and its determination that human life and safety is a paramount concern in this instance.

2 E.R. 232-34. Such a change in policy, based on a weighing of factors that includes humanitarian considerations and that is supported by a reasoned explanation, is neither arbitrary nor capricious. The district court's contrary decision substituting its judgment for the agency's was erroneous and should be reversed.

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

The district court also concluded that the land-exchange agreement was not legally authorized by Section 1302(h) of ANILCA. That conclusion was incorrect. Section 1302(h) provides that "in acquiring lands for the purposes of this Act," Interior may exchange lands, including lands from within the conservation system like Izembek, with Native corporations like the King Cove Corporation. 16 U.S.C. § 3192(h). Those "exchanges shall be on the basis of equal value," and either party may pay cash to equalize the value. *Id.* If the exchange is not for equal value, the parties may still agree to it if Interior "determines it is in the public interest." *Id.*

Thus, there are two requirements under section 1302(h): (1) the exchange must be for lands of equal value unless an unequal value exchange is in the public interest; and (2) it must be to acquire lands for the purposes of the Act. Both requirements are easily met here.

A. Interior is acquiring lands for the purposes of ANILCA through an equal value exchange.

We need not belabor Interior's compliance with ANILCA's requirement that the exchange be for "equal value." This land-exchange agreement expressly proposes

an equal value exchange. 2 E.R. 237. There is no allegation that the exchange is not for equal value. ECF No. 17. The district court did not conclude otherwise. 1 E.R. 2.

Interior's compliance with ANILCA's requirement that Interior acquire lands that will further the purposes of ANILCA needs only slightly more explanation. Congress summarized ANILCA's purposes as providing for the "protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska," while also providing "adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d). As the Supreme Court recently explained, Congress designed ANILCA, "starting with its statement of purpose," with "twofold ambitions": protect public lands while providing for the economic and social needs of Alaska's people. *Sturgeon v. Frost*, 139 S. Ct. 1066, 1075 (2019). This Court has thus long recognized that ANILCA's purposes can be distilled to 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." *City of Angoon v. Marsh*, 749 F.2d 1413, 1415-16 (9th Cir. 1984).

Interior reasonably concluded that the lands that it would acquire from King Cove Corporation would further the purposes of ANILCA. Indeed, the Fish and Wildlife Service has for many years recognized the value of those lands. In 1998, the Service prepared the Izembek Land Protection Plan, which identified privately owned

lands within the refuge boundaries that contain valuable fish and wildlife habitat and set "priorities for acquisition based on the resource value" of the lands. 2 E.R. 33-34. That Plan identified the land held by King Cove Corporation as containing just such valuable habitat and prioritized that land for acquisition. 2 E.R. 35, 36.

Thus, the land-exchange agreement recognizes that King Cove Corporation "owns lands . . . within the exterior boundaries of Izembek NWR [and the Alaska Peninsula National Wildlife Refuge]" that have been "identified by the U.S. Fish and Wildlife Service for future acquisition if such lands become available." 2 E.R. 236. The district court recognized that "the added lands would gain federal protection" and did not conclude adding those lands would fail to further ANILCA's purposes. 1 E.R. 17. Interior's conclusion that it would acquire lands through the exchange that further ANILCA's purposes was therefore neither arbitrary nor capricious. Yet the district court nevertheless held that Section 1302(h) does not authorize this exchange. In the next section, we explain how the court went wrong.

B. The district court wrongly focused on lands that Interior was *not* acquiring and improperly narrowed ANILCA to a single-purpose statute.

Even though the district court did not disagree that Interior will acquire lands that will further the purposes of ANILCA, it still concluded that Section 1302(h) does not authorize this land exchange. The court held that when considering the lands that Interior will give up along with those that it will acquire, *on balance*, the land-exchange agreement does not further the purposes of ANILCA because the ecological harm of

a potential road on the lands to be conveyed outweighs the ecological benefits of the added federal protections to the lands to be acquired. In so holding, the court misread ANILCA and refused to consider the benefits to the safety of the people of King Cove that may result from the land exchange and a possible road to Cold Bay. As a result, the court arrogated to itself from the Executive the policy choice of whether an exchange will further ANILCA's purposes.

The district court's first mistake was to consider whether the land exchange would be on balance ecologically beneficial to the area. ANILCA explicitly focuses only on the purposes for which the lands to be acquired are to be used. The statute says nothing about weighing those purposes against the lands to be exchanged. It leaves entirely to Interior's discretion the choice of which lands to exchange when acquiring lands. And it explicitly permits Interior to exchange lands from within the existing conservation system. The only comparison contemplated by the statute is that the lands to be exchanged be of equal value, meaning equal economic value.

Nothing in Section 1302(h) suggests that the statute empowers a reviewing court to second-guess whether a land exchange strikes the best deal overall in light of ANILCA's purposes. Consideration of the "public interest"—where such balancing would be appropriate—is only a factor in considering the propriety of an exchange if the exchange is *not* for equal value. In addition, where Congress sought to impose an additional focus on the characteristics of the lands to be exchanged, it did so explicitly, as in Section 1302(c), which requires an offer of an exchange of "appropriate land of

similar characteristics and like value" before condemnation proceedings may conclude. 16 U.S.C. § 3192(c). If the focus is placed on the lands Interior is acquiring, as the statute demands, Interior's conclusion that is acquiring lands for the purposes of ANILCA cannot be found to be arbitrary or capricious. The court should hot have "impose[d] upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978).

But even if the district court were correct that ANILCA adopts a balancing test for considering whether a particular land exchange furthers the Act's purposes, the court's other mistake was to conclude that the balance is limited to ecological concerns. The court did not include the interests of the people of King Cove in acquiring the land from Interior. As explained above, both the Supreme Court and this Court have recognized that ANILCA was enacted to serve two purposes. One is to "provide an adequate opportunity for satisfaction of the economic and social needs of the people of Alaska." *City of Angoon*, 749 F.2d at 1415-16. Congress adopted this purpose after it 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." *Id.* at 1415. But Congress did not dictate that balance within ANILCA itself: it delegated to Interior the authority to strike the right balance based on the facts before it.

The district court discounted both the statutory language and *City of Angoon* as only an acknowledgment of the overall balance struck by Congress. It concluded that the true purposes of the Act are only environmental preservation and the protection of subsistence living; those purposes do not include any non-subsistence social or economic needs. 1 E.R. 18. The court therefore concluded that if an exchange (when considered as a whole) does not serve those purposes, then it may not go forward. *Id.*

The district court's reading of ANILCA would hamstring Interior's land-exchange authority and upset Congress's expectation that Interior would use that authority to further Congress's goals. Indeed, in ANILCA's first section Congress noted that it was striking the balance between preservation and social and economic needs so as to obviate the need for future legislation on the use of federal lands in Alaska. 16 U.S.C. § 3101(d). To ensure that future legislation would be unnecessary, Congress granted Interior the authority to make fine-tune adjustments to Congress's decisions through land exchanges, including exchanges with Native Corporations and within existing conservation system units. *Id.* at 3192(h). The structural balance struck by Congress in ANILCA thus includes the authority to exchange lands like those here and to consider the impact to Alaska Natives in exercising that authority.

The exchange at issue here would indeed benefit Alaska Natives in addition to increasing the amount of land under federal protection. The exchange would involve a conveyance under ANCSA, 43 U.S.C. § 1613(a), 2 E.R. 237, that will enable King Cove to pursue the construction of a road to improve the health and safety of its

people. The land-exchange agreement notes that there is a 12-mile road gap between King Cove and the Cold Bay airport. 2 E.R. 236. That gap prevents residents of King Cove from reaching the Cold Bay airport during periods of inclement weather. *Id.* "King Cove residents and others have died attempting to travel to and from King Cove or Cold Bay and from being unable to get from King Cove to the Cold Bay airport for medevac transport to Anchorage." *Id.* Interior's findings supporting the agreement note that past attempts to address the safety needs of King Cove have been insufficient. 2 E.R. 222. After those failed past attempts, this exchange will enable the community to pursue one last option—a one-lane gravel road that would allow for safe transport to the Cold Bay airport. As a result, Interior entered into the 2019 Agreement to allow King Cove to pursue constructing a road, with a paramount concern being the preservation of human life and safety. 2 E.R. 233.

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

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

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

The district court concluded that the land exchange agreement was unlawful because Interior had not complied with Title XI of ANILCA. To the contrary, the plain language of Title XI makes clear that it does not apply to land exchanges under Section 1302(h), which is not an "applicable law" as defined by Title XI.

A. Section 1302(h) is not an "applicable law" as defined by Title XI.

Title XI sets forth the procedures for federal agencies to approve or disapprove "transportation or utility systems"—which include roads—within conservation areas like Izembek. 16 U.S.C. §§ 3162(4), 3164(a). Title XI requires agencies to follow those procedures before taking an "action" under "applicable law" to approve or disapprove an "authorization" necessary for the transportation system. *Id.* § 3164(a). Title XI defines "applicable law" to mean "any law of general applicability" under which an agency "has jurisdiction to grant any authorization (including but not limited to, any right-of-way, permit, license, lease, or certificate) without which a transportation or utility system cannot, in whole or in part, be established or operated." *Id.* § 3162(1).

Title XI therefore first looks to the law under which the agency is acting in order to determine whether the law provides jurisdiction for the agency to grant an authorization necessary for the transportation system. If the law does not provide the

agency with jurisdiction to grant such an authorization, then it is not an "applicable law" within the meaning of Title XI. Indeed, Title XI applies to actions with respect to *either* the approval *or* disapproval of an authorization, making clear that the statute's initial focus is on the jurisdictional authority under which the agency is acting, not on the effects of the agency action itself.

Here, Interior acted under the authority of Section 1302(h) of ANILCA, which provides jurisdiction only "to exchange lands" under certain conditions. 16 U.S.C. § 3192(h). That provision gives Interior no jurisdiction to "grant" any "authorization" at all, much less to grant an authorization to build a road or other transportation or utility system. Instead, it authorizes Interior to exchange lands for equal value (or for unequal value if in the public interest) to acquire land for the purposes of ANILCA. No more, no less. By its terms, then, Section 1302(h) is not an "applicable law," and so Title XI does not apply to land exchanges entered into under the authority granted by Section 1302(h).

Further, Section 1302(h) authorizes land exchanges under its provisions "notwithstanding any other provision of law." It cannot, therefore, be an "applicable law" such that actions taken under its authority are subject to Title XI's procedures. And because Section 1302(h) applies notwithstanding *any* other provision of law, the similar provision in Title XI, which says its procedures apply notwithstanding only "applicable law," does not control, where Section 1302(h) is not an "applicable law." The district court mistakenly treated those provisions as equivalent, not recognizing

that Section 1302(h) is much broader, and applies notwithstanding "*any other* provision of law." 16 U.S.C. § 3192(h) (emphasis added); 1 E.R. 21-22. The Supreme Court has explained that "the use of such a notwithstanding clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Cisneros v. Alpine Ridge Group.*, 508 U.S. 10, 18 (1993).

B. Interior did not take an action respecting the approval or disapproval of a transportation system.

Not only is Section 1302(h) not an "applicable law," Interior's action in this case was not an action respecting the approval or disapproval of any authorization necessary for the road. A land exchange under Section 1302(h) does not, in and of itself, "grant" an "authorization" to any entity to do anything. To "authorize" is to "give official permission"—in the context of governmental actors it is to give official permission to a regulated party to do something. *Authorize*, Oxford English Dictionary (3d ed. 2014). But a land exchange does not involve giving official permission to do anything. It is a change in ownership, not separate permission to engage in particular activity on the land. Thus, the 2019 land-exchange agreement itself provides various specifications about the "road, *if any*, constructed on the land conveyed." 2 E.R. 237 (emphasis added). As Interior put it: "To be clear, the exchange of lands does not itself authorize the construction of a road." 2 E.R. 216. Thus, as Interior concluded, "any decision by [King Cove Corporation] to pursue a road connection is separate and distinct from the land exchange authorized here." 2 E.R. 230.

Building a road on this land would require, for example, a permit from the Army Corps of Engineers under section 404 of the Clean Water Act—exactly the kind of "right-of-way, permit, license, lease, or certificate" contemplated by Title XI in 16 U.S.C. § 3162(1). *See* 33 U.S.C. § 1344; 2 E.R. 254. When Interior agreed to the land exchange, by contrast, it did not authorize King Cove Corporation to do anything. It merely agreed to exchange lands if King Cove, as an equal partner, likewise agreed to the exchange. The land exchange enables King Cove to *pursue* building a road—by obtaining the necessary authorizations to do so from other agencies—but it does not *authorize* King Cove to build a road, in whole or in part.

Moreover, the land exchange could not conceivably grant an authorization for any "transportation or utility system" as defined in ANILCA. Title XI applies only when "any portion of the route of the system will be within any conservation system unit, national recreation area, or national conservation area in the State." 16 U.S.C. § 3162(4). Once Interior has conveyed part of a conservation system unit to another party, any road built after the conveyance will, by definition, no longer "be within" such a unit, which is limited to "those lands within the boundaries of any conservation system unit which are public lands," *id.* § 3103(c)—i.e., "'lands, waters, and interests therein' to which the United States has 'title,'" *Sturgeon*, 139 S. Ct. at 1067 (quoting 16 U.S.C. § 3102). ANILCA is explicit that once lands are "conveyed to the State, to any Native Corporation, or to any private party," they are not "be subject to the regulations applicable solely to public lands within such units." 16 U.S.C. § 3103.

The district court nevertheless ruled that Title XI applies in this case because the land exchange "is in fact an approval of a transportation system" because the purpose of the exchange is to provide land "to facilitate the building of a road." 1 E.R. 19-20. But that observation about the exchange's purpose does not explain how conveying lands constitutes an "authorization" to build a road akin to "a right-of-way, permit, license, lease, or certificate." 16 U.S.C. § 3162(1). And as we have explained, the court was mistaken to focus on the ostensible reason for the land exchange at all because the focus of Section 1302(h) is only on the lands to be acquired, not on the lands to be traded to the counter-party in exchange.

Further, if the district court were correct that Title XI applies to land exchanges carried out under Section 1302(h), then the latter is always an "applicable law," and Title XI procedures would have to be followed any time there is even a *proposed* land exchange. After all, a road or other transportation or utility system could always be built on the land exchanged once it leave federal ownership, and Title XI applies not just to approvals but also to *disapprovals* of authorizations for transportation utility systems. There is no indication in ANILCA that Congress intended Interior to follow Title XI every time it merely *considered* a land exchange under Section 1302(h). The district court was wrong to impose that requirement, and this Court should therefore reverse and hold that Interior was not required to comply with Title XI in this matter.

CONCLUSION

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

Respectfully submitted,

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