Nos. 20-35721, 20-35727, and 20-35728
OPINION filed March 16, 2022 - Before: K. M. WARDLAW, E.D. MILLER, and B.S. BADE, Circuit Judges

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

DEBRA HAALAND, et al.,
Defendants-Appellants,

and

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

and

STATE OF ALASKA,
Intervenor-Defendant/Appellant.

On Appeal from the United States District Court
for the District of Alaska, Case No. 3:19-cv-00216 JWS

PETITION FOR REHEARING EN BANC

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STATEMENT OF BASIS FOR REHEARING EN BANC

Rehearing en banc is needed "to secure or maintain uniformity of the court's decisions" with Supreme Court and Ninth Circuit precedent regarding review of agency actions under the Administrative Procedure Act (APA) and to resolve a question of exceptional national importance concerning millions of acres of public land. Fed. R. App. P. 35(a). The panel majority (majority) held that the Secretary of the U.S. Department of the Interior (Secretary) may override Congress and exchange lands out of federal ownership for development purposes, putting millions of acres of conservation lands in Alaska at risk. *See Friends of Alaska National Wildlife Refuges v. Haaland,* 29 F.4th 432 (9th Cir. 2022) [hereinafter Op.].

The majority's decision eliminates the long-standing requirement that federal agencies must provide adequate justification when making a decision that reverses a prior agency policy. *FCC v. Fox Television Stations, Inc.* (*Fox*), 556 U.S. 502, 515–16 (2009); *Encino Motorcars, LLC v. Navarro (Encino)*, 579 U.S. 211, 221–22 (2016); *Organized Village of Kake v. USDA* (*Kake*), 795 F.3d 956, 968 (9th Cir. 2015) (en banc). The majority's analytical approach also runs afoul of the bedrock principle of administrative law that agencies must articulate a "rational connection between the facts found and the choices made" based on the evidence before the agency. *Motor Vehicle Manufacturers Ass'n of the U.S., Inc. v. State*

Farm Mutual Automobile Insurance Co. (State Farm), 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *Center for Biological Diversity v. Haaland (CBD)*, 998 F.3d 1061, 1067 (9th Cir. 2021).

This appeal also raises a question of exceptional importance concerning the Secretary's unilateral authority to redraw the boundaries of, and allow commercial development and transportation systems within, Alaska's millions of acres of public lands without regard for requirements established by Congress under the Alaska National Interest Lands Conservation Act (ANILCA).

BACKGROUND

This case arose after the Secretary exchanged land within the Izembek National Wildlife Refuge (Izembek) to allow a road for commercial and other uses to cut through it, which prior agency decisions repeatedly rejected. Izembek, on the Alaska Peninsula, has "some of the most striking wildlife diversity and wilderness values of the northern hemisphere" due to its unique habitat, including wetlands, lagoons, and shallow bays. SER-131, 134, 142; *see also* 2-ER-39. Izembek supports nearly the entire population of Pacific black brant on its annual migration, and numerous other bird species and wildlife, including caribou and bears. Op. at 9. Because of these values, nearly all of Izembek is Congressionally-designated

Wilderness. ANILCA, Pub. L. No. 96-487, §§ 303(3)(A), 702(6), 94 Stat. 2371, 2390, 2418 (1980).

The U.S. Fish and Wildlife Service (FWS) has evaluated the effects of a road from the community of King Cove to Cold Bay through Izembek numerous times. *Friends of Alaska National Wildlife Refuges v. Bernhardt (Friends I)*, 381 F. Supp. 3d 1127, 1131–32 (D. Alaska 2019). A road connecting these communities was sought for economic and commercial purposes, in addition to personal and medical use. 2-ER-40, SER-128. Multiple times, FWS found that the impacts would irreversibly damage Izembek and refused to exchange lands to allow a road. *Friends I*, 381 F. Supp. 3d at 1131–32. In 2013, the Secretary issued a Record of Decision ("2013 ROD") concluding that a road through Izembek, even with restrictions on commercial use, would have significant detrimental impacts and declining to exchange lands. *Id.* at 1132. The Secretary found that declining the exchange "best satisfies Refuge purposes, and best accomplishes the mission of the Service and the goals of Congress in ANILCA." 2-ER-56.

In 2018, the Secretary reversed course and approved a land exchange to allow a road. *Friends I*, 381 F. Supp. 3d at 1133. The agreement more than doubled the acreage considered for removal from Izembek in 2013 (500 acres versus 200 acres) in exchange for fewer acres coming into federal ownership, and for the first time, provided additional lands within Izembek to be used for gravel

mines. *Compare* 2-ER-38–39 *with* 2-ER-244 (acreage received); *and* 2-ER-49–50 *with* SER-87–89 (acreage removed); 2-ER-189 (explaining agreement includes gravel sites for road construction). The District Court invalidated that exchange. *Friends I*, 381 F. Supp. 3d at 1136–44. The Secretary then executed another nearly identical exchange agreement — without commercial road-use restrictions — accompanied by a memorandum purporting to explain the reversal in policy, challenged here. The District Court found that the agreement (1) violated the APA because the Secretary failed to justify the change in policy, (2) violated ANILCA because the record did not support the Secretary's finding that the exchange furthered ANILCA's purposes, and (3) violated ANILCA Title XI's procedures for approving a transportation system. *Friends of Alaska National Wildlife Refuges v. Bernhardt*, 463 F. Supp. 3d 1011, 1018–26 (D. Alaska 2020). This appeal followed.

A divided panel of this Court reversed, holding that the exchange furthered ANILCA's economic purposes, that the Secretary's decision to exchange lands complied with the APA, and that Title XI's procedures were inapplicable. Judge Wardlaw dissented on each point. En banc review is needed because the majority's decision is contrary to binding precedent interpreting the APA and because the majority's decision raises issues of exceptional importance for millions of acres of public lands governed by ANILCA.

ARGUMENT

I. EN BANC REVIEW IS NEEDED TO ENSURE CONSISTENCY REGARDING THE APA'S STANDARD FOR AGENCY REVERSALS IN POLICY.

The majority's opinion conflicts with Supreme Court and Ninth Circuit precedent concerning judicial review of agency policy reversals and decision making. When changing positions, agencies must satisfy four factors under *Fox*, including showing that "the new policy is permissible under the statute" and providing "good reasons for the new policy." *Fox*, 556 U.S. at 515–16; *see also Kake*, 795 F.3d at 967. When an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must also include "a reasoned explanation . . . for disregarding facts and circumstances that underlay. . . the prior policy." *Fox*, 556 U.S. at 516. This requires "a more detailed justification than what would suffice for a new policy created on a blank slate." *Id.* at 515; *see also Kake*, 795 F.3d at 966 (explaining policy change violates APA "if the agency ignores or countermands its earlier factual findings without reasoned explanation") (quoting *Fox*, 556 U.S. at 537)). Further, it is a bedrock principle of administrative law that agency decisions must be supported by the record. *See State Farm*, 463 U.S. at 43; *see also Encino*, 579 U.S. at 221.

The majority's misapplication of administrative law principles upends Supreme Court and Ninth Circuit law. Under the majority's reasoning, an agency's decision reversing a policy can be upheld based solely on the agency's assertion

that it balanced facts that were unsupported by record evidence to reach its desired outcome.

A. The Majority Failed to Require a Reasoned Analysis for the Secretary's Policy Reversal.

The Secretary's decision to exchange lands to allow for a road is an agency reversal of policy. The Secretary offered two justifications for this reversal: that he simply "rebalanced" the 2013 findings to reach a different decision, and that new factual findings explain any contrary facts. Neither justification passes muster.

First, instead of providing a reasoned explanation for disregarding the facts underlying FWS's prior policy, as required by *Fox*, the Secretary simply stated, "even if all facts are as stated in the 2013 ROD," an exchange to allow a road was proper. 2-ER-232–33. The Secretary stated that his conclusion that health concerns outweighed environmental harms was sufficient to justify the change in position. 2-ER-233. The majority improperly deemed the Secretary's statements that he rebalanced competing facts on the same record sufficient to satisfy *Fox*. Op. at 20–22.

As a threshold matter, the Secretary could not exchange lands assuming all facts as stated in 2013 because the record does not support that assertion. The present exchange involves substantially less acreage coming into federal ownership, and allows for gravel mines and commercial road use. *Supra* at 3–4.

These are fundamental changes relevant to the road's environmental and socioeconomic impacts that were never analyzed. *Encino*, 579 U.S. at 221 (explaining action is arbitrary "where the agency has failed to provide even [a] minimal level of analysis").

Turning to the majority's misapplication of *Fox* and *Kake,* while an agency may "reprioritize" concerns based on the same record, the agency must provide a detailed justification for disregarding contrary factual findings when doing so. *Kake*, 795 F.3d at 968–69 ("[U]nexplained conflicting findings about the environmental impacts of a proposed agency action violate the APA."). When an agency changes course, it "is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *State Farm*, 463 U.S. at 42; *see also Department of Homeland Security v. Regents of the University of California (Regents)*, 140 S. Ct. 1891, 1913 (2020) (explaining general requirements for agency policy changes); *CBD*, 998 F.3d at 1067.

It would negate the requirements of *Fox* and its progeny if an agency could meet its burden by simply stating it reached a new conclusion "even assuming all the [contrary] facts as stated." Op. at 20. As the dissent explained, "[t]he majority's position allows agencies to evade *Fox*'s explanation requirement so easily that it

actually eliminates it." *Id*. at 33. Accordingly, the majority's reasoning conflicts with binding precedent governing agency obligations when reversing decisions.

Rather than evaluate the Secretary's reversal under the appropriate legal framework and on the basis given by the Secretary, the majority sidestepped the issue, stating that the Secretary offered "genuine justifications" and independent "alternative rationales" for the decision. *Id*. at 20–21. These are not the applicable standards. The Secretary did not offer alternative rationales for the decision; rather, he expressly acknowledged that the decision to exchange lands for a road constituted a policy reversal. 2-ER-226–227; *see also* Federal Appellant's Opening Br. at 24, ECF No. 14 ("Interior had acknowledged a change in positions").[1] The Secretary's memo offered factual findings, discussed below, to explain the reversal after the District Court vacated the 2018 exchange agreement for failing to do so. 2-ER-215; *Friends I*, 381 F. Supp. 3d at 1136–44. The Secretary's policy reversal should have been evaluated under the framework of *Fox* and *Kake*.

Second, as the dissent explained, the Secretary relied on these new, contradictory facts to support his decision and explain the policy reversal. Op. at 33–34; *see also* 2-ER-232–33 (listing five changed findings). As a result, these

[1] To the extent the Secretary argued the decision was not a change in position, this argument is post hoc and should have been rejected. *Regents*, 140 S. Ct. at 1909.

findings were not "beside the point;" the Secretary was required to provide a reasoned explanation with a more detailed justification. Op. at 20; *Fox*, 556 U.S. at 515–16; *Kake*, 795 F.3d at 968; *see also*, *e.g.*, *Regents*, 140 S. Ct. at 1913 (rejecting Secretarial memo supporting agency policy reversal that failed to consider critical aspects of problem). He did not. And the new contrary facts he relied upon had to be supported by the record. *State Farm*, 463 U.S. at 42–43. They were not, as described below.

B. The Majority Failed to Require That the Secretary's Decision Be Supported by the Record.

The Secretary offered several contrary factual justifications. First, the Secretary stated that acquisition of other lands via the exchange and restrictions on use of the road would "balance" Izembek's conservation purposes with socioeconomic purposes. Op. at 22. The Secretary found that there would be "substantial benefits" to the public from the exchange and that the 2013 ROD "discounted" the habitat and conservation values of lands to be acquired. 2-ER-232. This directly contradicts the 2013 ROD's factual findings that the lands to be received do not provide the same "internationally recognized wetland habitat" and "would not compensate" for the impacts to Izembek. 2-ER-44–45; SER-107–08. The Secretary did not, as the majority states, make "uncontroversial observations that adding acreage to federal ownership promotes environmental values," Op. at

21–22; this assertion was contrary to prior findings and not supported by the record. 1-ER-17. Second, the 2013 ROD found that restrictions on commercial use of the road would not protect Izembek's purposes, but the Secretary now found they would "balance" those conservation and subsistence purposes. Op. at 22; 2-ER-40, 45. This contrary finding is also unsupported because the Exchange Agreement contains no limitations on commercial road-use. 1-ER-10–11. Finally, the Secretary's contrary finding that alternatives to a road are not viable or available are not supported by the 2015 report cited by the Secretary; that study indicated marine and road transportation options were comparable in terms of cost and technical feasibility. 2-ER-47; *but cf*. Op. at 22. Because the Secretary's contrary findings are unsupported by the record, they cannot provide the "substantial justification" needed under *Fox* and *Kake*.

The majority's acceptance of the Secretary's simple re-weighing of existing facts to reach a different decision — without ensuring that the decision is supported by the record and that fundamental changes were analyzed — eviscerates traditional APA review. A court should not "defer to an agency decision that is without substantial basis in fact." *Alaska v. Federal Subsistence Board*, 544 F.3d 1089, 1094 (9th Cir. 2008) (quoting *Sierra Club v. EPA*, 346 F.3d 955, 961 (9th Cir. 2003)) (internal quotations omitted); *Encino*, 579 U.S. at 224 (holding "conclusory statements do not suffice to explain [an agency's] decision").

As the dissent recognized, the Secretary's failure to analyze the facts underlying this decision is a fatal flaw under the APA. Op. at 33–34.

Even if the Secretary had presented alternative rationales for the decision, the court must ensure those justifications were supported by the record; the cases cited by the majority do not indicate otherwise. *See Id*. at 20–21. As explained above, the Secretary's justifications regarding road-use restrictions, conservation benefits from the exchange, and a lack of viable transportation alternatives are unsupported. *See supra* at 9–10. Nor did the record support the Secretary's argument that the road is "paramount" for health and safety purposes. Op. at 20; 1-ER-11–14. Considering whether the Secretary's findings are supported by the record is necessary to determine whether the agency could reach its decision as a matter of law. *City & County of San Francisco v. United States*, 130 F.3d 873, 877 (9th Cir. 1997). The majority cannot negate this requirement as it did here.

In sum, rehearing is needed to ensure consistency in the standards applicable to agency reversals and APA review under Supreme Court and Circuit case law.

C. The Majority Failed to Require That the Secretary's Decision Be Permissible Under the Statute.

The majority further misapplied *Fox* by upholding the Secretary's reversal in policy even though it violates ANILCA's conservation purposes. *Fox*, 556 U.S. at 515; *infra* Argument II.A. The 2013 ROD found an exchange would violate

ANILCA's conservation purposes. 2-ER-56. The Secretary did not argue ANILCA's conservation purposes could be overlooked or violated to further social and economic needs. Rather, the Secretary relied on the new, contrary factual findings described above to justify the exchange as "balancing" ANILCA's conservation purposes with a commercial road. 2-ER-231–33; Op. at 19–20. But the record does not support those findings. *Supra* Argument I.B. As a result, the majority failed to consider that the Secretary violated this *Fox* factor.

II. THE MAJORITY'S RULING RAISES ISSUES OF EXCEPTIONAL IMPORTANCE CONCERNING MILLIONS OF ACRES OF PUBLIC LANDS.

This appeal presents a question of exceptional national importance about the Secretary's authority to redraw the boundaries of national parks, wildlife refuges, and Wilderness in Alaska for economic development. The majority's interpretation of ANILCA undermines the purposes of that act and the Wilderness Act and allows the Secretary to override Congress' intent in establishing millions of acres of conservation lands in Alaska for the benefit of all Americans. As the dissent acknowledged, the majority's interpretation of ANILCA's purposes "turns ANILCA on its head" and would convert a conservation statute into a "rubber stamp" for any destructive project that the Secretary may find economically beneficial. Op. at 39. It also reads Title XI's strict procedures for the approval of transportation systems on conservation lands out of the statute by misapplying principles of statutory construction.

A. The Majority's Decision Erodes ANILCA's Conservation and Subsistence Protection Purposes.

Section 1302 of ANILCA authorizes the Secretary to enter land exchanges that further "the purposes of this Act." 16 U.S.C. § 3192(a), (h). ANILCA's purposes include the preservation of nationally significant lands, unaltered ecosystems, wildlife habitat, recreational and research opportunities, and preserving subsistence. *Id.* § 3101(b), (c). The majority held that economic and social development is also a purpose, on par with conservation and subsistence. Op. at 15. This puts all of Alaska's conservation system units, and their "nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values" at risk of being traded away for economic gains. 16 U.S.C. § 3101(a).[2]

The majority relied on subsection 3101(d) to interpret ANILCA's purposes; but that subsection contains a statement that Congress believed it had achieved the proper balance between conservation and economic and social needs in passing ANILCA, obviating future legislation. *Id*. § 3101(d). [3] As the dissent explained, this language recognizes the balance that Congress already struck in passing

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[2] "Conservation system unit" is defined to include national wildlife refuges, parks, wild and scenic rivers, and Wilderness areas in Alaska. 16 U.S.C. § 3102(4).
[3] Title XI of ANILCA, which allows private parties to request transportation and utility access through conservation system units, is an example of how Congress struck this balance. *Infra* Argument II.B.

ANILCA; it does not authorize the Secretary to administer ANILCA in a manner that prioritizes economic and social needs. Op. at 37. The Supreme Court did not hold otherwise in *Sturgeon v. Frost*, which recognized that Congress set aside lands in ANILCA for "preservation purposes" and "for conservation." 139 S. Ct. 1066, 1075, 1087 (2019).

Properly recognizing ANILCA's purposes, especially in the context of the exchange provision, is an issue of exceptional importance. The majority failed to recognize that, in establishing conservation system units in ANILCA, Congress drew broad and inclusive boundaries, 16 U.S.C. § 3101(b) (explaining Congress designated conservation system units on landscape levels to protect entire ecosystems). Congress included the exchange provision — section 1302(h) — principally to enable the Secretary to acquire private inholdings within units without resorting to condemnation. SER-152, S. REP. NO. 96-413 at 304 (1979); SER-162, H.R. REP. NO. 96-97 pt. I, at 246 (1979). The majority also overlooked Congress's express purposes for individual conservation system units, including Izembek. ANILCA, Pub. L. No. 96-487 §§ 201, 202, 302, 303, 701, 702, 707 (Izembek's purposes are at section 303(3)(B)), 94 Stat. 2371, 2377–83, 2385–93, 2417–18, 2421 (1980)). Congress was clear that 1302(h)'s exchange authority not be used to undercut those protections or "frustrate the purposes of any such unit." SER-167–68, H.R. REP. NO. 95-1045, pt. I, at 211–12 (1978).

This exchange would allow a road through Izembek's core, in the area Congress sought to protect with its most stringent land designation — Wilderness. If the Secretary is free to exchange lands out of federal ownership for economic gain with only a nod to ANILCA's conservation and subsistence purposes and no consideration of the unit's specific purposes, there are no meaningful limits on the Secretary's use of section 1302(h). For example, under the majority's interpretation, the Secretary could trade away North America's tallest mountain — Denali in Denali National Park — for economic gain. Such an interpretation directly contravenes the authority Congress granted the Secretary in section 1302(h) and Congress' intent in designating conservation units. Instead, it gives the Secretary boundless discretion to redraw boundaries, including in Wilderness, that Congress carefully established.

In sum, this appeal raises a question of exceptional importance regarding the Secretary's ability to override Congress, endangering millions of acres of federal conservation lands.

B. The Majority's Holding that ANILCA's Exchange Provision Overcomes Title XI Threatens All Conservation System Units.

In deciding a question of first impression that impacts all conservation system units in Alaska, the majority incorrectly held that ANILCA Title XI does not apply when the Secretary exchanges lands to allow a road. Op. at 23–25. The

majority's interpretation allows agencies to simply execute a land exchange to delineate a road corridor (or other transportation system) across conservation lands — including through Wilderness — effectively nullifying Title XI's protective mandates.

Congress enacted Title XI "to minimize the adverse impacts of siting transportation and utility systems" within conservation system units and to insure an effective decision-making process. 16 U.S.C. § 3161(c); *see also id*. § 3162(4)(B)(vii) (defining transportation system). To achieve these goals, Congress established "a single comprehensive statutory authority for the approval or disapproval of applications for such systems," *Id*. § 3161(c), voiding any agency action that does not follow its procedures: "[N]o 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," *id*. § 3164(a).[4] Consistent with this broad mandate, Congress defined "applicable law" expansively as:

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[4] Section 1104 governs all transportation systems and requires a very specific agency and public process, including mandated agency findings for approval. *Id*. § 3164(b)–(g). Section 1106 requires any transportation systems proposed through Wilderness to be recommended by the President and approved by Congress. *Id.* § 3166(b)

> any law of general applicability . . . 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.

Id. § 3162(a).

It is undisputed that the exchange agreement is to allow a road through Izembek. Op. at 24. The majority held that because the exchange agreement itself did not authorize road construction, it was not an "authorization" and ANILCA's land exchange provision was, therefore, not an "applicable law" subject to Title XI. *Id.* at 24–25. The majority failed to interpret the term "authorization" in light of its context and statutory purposes.

Although "authorization" is not defined in ANILCA, the statute contains a broad, non-exhaustive list of what may constitute an authorization; that includes "but [is] not limited to" a right-of-way or lease, which are functionally equivalent siting instruments to this exchange agreement. 16 U.S.C. § 3162(a); *see also Arizona State Board for Charter Schools v. U.S. Department of Education*, 464 F.3d 1003, 1007 (9th Cir. 2006) (explaining "including" is ordinarily used to illustrate examples); *Turtle Island Restoration Network v. National Marine Fisheries Service*, 340 F.3d 969, 975 (9th Cir. 2003) (explaining use of "including but not limited to" means list is not exhaustive).

The definition of "applicable law" is also broad and includes any agency action required to establish a transportation system "in whole or in part." 16 U.S.C. § 3162(a). As the dissent recognized, this evinces Congress' intent that "even partial authorizations of transportation systems must clear Title XI's requirements." Op. at 44. The land exchange sites a road corridor, without which a road could not be built, making it subject to Title XI.

The majority failed to consider this provision in context, which makes clear that authorizations subject to Title XI include those instruments that relate to route-selection and siting; not solely to road construction approvals. *Wilderness Society v. U.S. Fish and Wildlife Service*, 353 F.3d 1051, 1060 (9th Cir. 2003) (en banc) (emphasizing importance of reading words in context). Courts must interpret a statute in light of its purposes. *Id*. The majority's interpretation failed to give effect to Congress' intent to adopt a comprehensive and protective process to minimize and avoid degradation from siting transportation systems through conservation system units. 16 U.S.C. §§ 3161(c), 3164(g)(2), 3167. It also failed to account for ANILCA's conservation and subsistence purposes. *Supra* Argument Part II.A.

A statute should be interpreted to give meaning to all of its provisions and not render any provision surplusage or otherwise nullify it. *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000); *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 834 (9th Cir. 1996). The majority's

interpretation nullifies Title XI by allowing the Secretary to exchange lands instead of following Congressionally-established procedural mandates, which include a Presidential recommendation and Congressional approval for roads in Wilderness. 16 U.S.C. § 3166(b). As the majority acknowledges, once exchanged, lands are no longer federal and Title XI will not apply to future permitting. Op. at 24.

The majority's misinterpretation of ANILCA creates a loophole that swallows Title XI, threatening all conservation units in Alaska. It also allows the Secretary to override Congress in allowing for roads through Wilderness. The proper interpretation of Title XI raises an issue of exceptional national importance under public land law.

CONCLUSION

In light of the majority's significant errors, the Court should grant the Petition for Rehearing En Banc and vacate the panel opinion.

Respectfully submitted this 29th day of April, 2022.

s/ Bridget Psarianos
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CERTIFICATE OF COMPLIANCE

I certify pursuant to Fed. R. App. P. 32-1(a) and Ninth Circuit Rules 35-4(a) and 40-1(a) that this brief contains 4,198 words and has been prepared in 14-point Times New Roman proportionally spaced typeface.

s/ Bridget Psarianos
Bridget Psarianos

CERTIFICATE OF SERVICE

I certify that on April 29, 2022, I electronically filed a copy of the Attorneys for Plaintiffs-Appellees Friends of Alaska National Wildlife Refuges, et al.'s Brief in Opposition with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which will send electronic notification of such filings to the attorneys of record in this case.

s/ Bridget Psarianos
Bridget Psarianos

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing/Responses

Instructions for this form: http://www.ca9.uscourts.gov/forms/form11instructions.pdf

9th Cir. Case Number(s) 20-35721, 20-35727, and 20-35728.

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/response to petition is *(select one)*:

[X] Prepared in a format, typeface, and type style that complies with Fed. R. App. P.
32(a)(4)-(6) and **contains the following number of words:** 4,198**.**
(Petitions and responses must not exceed 4,200 words)

OR

[ ] In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature ____s/Bridget Psarianos_____ **Date: April 29, 2022**
*(use "*s/[typed name]*" to sign electronically-filed documents)*

ADDENDUM

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRIENDS OF ALASKA NATIONAL WILDLIFE REFUGES; THE WILDERNESS SOCIETY; DEFENDERS OF WILDLIFE; NATIONAL AUDUBON SOCIETY; WILDERNESS WATCH; CENTER FOR BIOLOGICAL DIVERSITY; NATIONAL WILDLIFE REFUGE ASSOCIATION; ALASKA WILDERNESS LEAGUE; SIERRA CLUB, *Plaintiffs-Appellees*, v. DEBRA HAALAND, in her official capacity as Secretary of the U.S. Department of the Interior; U.S. DEPARTMENT OF THE INTERIOR; UNITED STATES FISH AND WILDLIFE SERVICE, *Defendants-Appellants*, and KING COVE CORPORATION; AGDAAGUX TRIBE OF KING COVE; NATIVE VILLAGE OF BELKOFSKI; STATE OF ALASKA, *Intervenor-Defendants*.	No. 20-35721 D.C. No. 3:19-cv-00216-JWS

FRIENDS OF ALASKA NATIONAL WILDLIFE REFUGES; THE WILDERNESS SOCIETY; DEFENDERS OF WILDLIFE; NATIONAL AUDUBON SOCIETY; WILDERNESS WATCH; CENTER FOR BIOLOGICAL DIVERSITY; NATIONAL WILDLIFE REFUGE ASSOCIATION; ALASKA WILDERNESS LEAGUE; SIERRA CLUB,
Plaintiffs-Appellees,

v.

DEBRA HAALAND, in her official capacity as Secretary of the U.S. DEPARTMENT OF THE INTERIOR; U.S. DEPARTMENT OF THE INTERIOR; UNITED STATES FISH AND WILDLIFE SERVICE,
Defendants,

STATE OF ALASKA,
Intervenor-Defendant,

and

KING COVE CORPORATION; AGDAAGUX TRIBE OF KING COVE; NATIVE VILLAGE OF BELKOFSKI,
Intervenor-Defendants-Appellants.

No. 20-35727

D.C. No. 3:19-cv-00216-JWS

FRIENDS OF ALASKA NATIONAL WILDLIFE REFUGES; THE WILDERNESS SOCIETY; DEFENDERS OF WILDLIFE; NATIONAL AUDUBON SOCIETY; WILDERNESS WATCH; CENTER FOR BIOLOGICAL DIVERSITY; NATIONAL WILDLIFE REFUGE ASSOCIATION; ALASKA WILDERNESS LEAGUE; SIERRA CLUB,
Plaintiffs-Appellees,

v.

DEBRA HAALAND, in her official capacity as Secretary of the U.S. Department of the Interior; U.S. DEPARTMENT OF THE INTERIOR; UNITED STATES FISH AND WILDLIFE SERVICE,
Defendants,

KING COVE CORPORATION; AGDAAGUX TRIBE OF KING COVE; NATIVE VILLAGE OF BELKOFSKI,
Intervenor-Defendants,

and

STATE OF ALASKA,
Intervenor-Defendant-Appellant.

No. 20-35728

D.C. No. 3:19-cv-00216-JWS

OPINION

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted August 4, 2021
Anchorage, Alaska

Filed March 16, 2022

Before: Kim McLane Wardlaw, Eric D. Miller, and Bridget S. Bade, Circuit Judges.

Opinion by Judge Miller;
Dissent by Judge Wardlaw

SUMMARY*

Alaska National Interest Lands Conservation Act

The panel reversed the district court's judgment, which set aside a land-exchange agreement between the Secretary of the Interior and King Cove Corporation, an Alaska Native village corporation, and remanded.

King Cove Corporation wishes to use the land it will obtain in the exchange to build a road through the Izembeck National Wildlife Refuge to allow access to the City of Cold Bay. The residents of King Cove sought to build the road to access Cold Bay's larger, all-weather airport to facilitate medical evacuations.

In 2019, Secretary David Bernhardt approved a land exchange agreement, finding that the exchange comported

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

with the purposes of the Alaska National Interest Lands Conservation Act ("ANILCA").

The panel held that the Secretary's analysis of ANILCA's statutory purposes was correct. Congress gave the Secretary discretion to strike an appropriate balance between environmental interests and "economic and social needs." 16 U.S.C. § 3101(d). The panel held that Secretary Bernhardt exercised that discretion when he found that, without a road, the economic and social needs of the people of King Cove would not be adequately met. The panel further held that the district court's reading of ANILCA was contrary to the Supreme Court's decision in *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019). The panel concluded that the Secretary appropriately weighed the economic and social needs of Alaskans against the other statutory purposes in deciding whether to enter the land-exchange agreement.

The panel disagreed with the district court's conclusion that Secretary Bernhardt violated the Administrative Procedure Act ("APA") by departing from the position of his predecessor, Secretary Sally Jewell, on the land exchange without adequate explanation. Secretary Bernhardt acknowledged the competing policy considerations and the prior findings that keeping the area roadless would best protect the habitat and wildlife of the Izembek Refuge. But after examining the most recent available information about alternatives to a road, Secretary Bernhardt concluded that the value of a road to the King Cove community outweighed the harm that it would cause to environmental interests. The panel held that there was no reason to look beyond the valid justification that Secretary Bernhardt offered. Even if it was necessary to review Secretary Bernhardt's assessment of the facts, the panel would not agree with the district court that

Secretary Bernhardt arbitrarily contradicted prior agency findings.

Finally, the panel considered whether the land-exchange agreement was subject to the special procedures that ANILCA required for the approval of transportation systems. Title XI of ANILCA sets forth provisions that require an agency approving a transportation system to engage in a process of public consultation and make findings on various issues. 16 U.S.C. § 3164(g). The Secretary did not follow this process. The panel held that the Secretary did not have to follow the process because section 3192(h), the land-exchange provision that he invoked, was not an "applicable law" for purposes of Title XI. The panel did not need to consider the alternative argument advanced by the State of Alaska that the land exchange was exempted from Title XI by 16 U.S.C. § 3170(b).

Judge Wardlaw dissented. She would hold that the district court properly concluded that Secretary Bernhardt's decision to accede to King Cove's wish to build a road through Izembeck National Wildlife Refuge, despite the Department of the Interior ("DOI")'s long history of considering the impacts of the road and prior ruling against the road based on the detrimental effects on Izembek's ecological resources, violated both the APA and ANILCA. Secretary Bernhardt's memorandum contradicts key findings of the 2013 Record of Decision (ROD). Moreover, although the DOI purports to have the authority to enter the 2019 land-exchange agreement under ANILCA, in fact the agreement fails to advance ANILCA's stated purposes, and DOI failed to follow the procedural requirements set forth in Title XI of ANILCA. Judge Wardlaw would set aside the land exchange.

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OPINION

MILLER, Circuit Judge:

Several environmental organizations challenge a land-exchange agreement between the Secretary of the Interior and King Cove Corporation, an Alaska Native village corporation. King Cove Corporation wishes to use the land it will obtain in the exchange to build a road through the Izembek National Wildlife Refuge to allow access to the city of Cold Bay. The district court set aside the agreement. We reverse and remand.

I

The Native Village of King Cove and the city of Cold Bay, Alaska, are located near the southwestern end of the Alaska Peninsula. They are about 18 miles apart as the crow flies (or perhaps the raven—the area is outside of the range of the American crow). There is no road between them, and they are accessible to each other and to the rest of Alaska only by air or sea.

King Cove has just under 1,000 residents. It is home to the Agdaagux Tribe of King Cove and the Native Village of Belkofski, and about one-third of its residents are Alaska Natives. King Cove has limited medical facilities, so residents facing medical emergencies that require hospitalization must go to Anchorage or Seattle. The King Cove airport is small, dangerously close to high mountains, and frequently closed by bad weather. For several decades, the residents of King Cove have sought to build a road to Cold Bay to access its larger, all-weather airport to facilitate medical evacuations.

The proposed road would run through the Izembek National Wildlife Refuge. The refuge consists of tundra, wetlands, and lagoons, including the Izembek Lagoon, which contains one of the world's largest eelgrass beds. The refuge is an important habitat for birds, supporting almost all of the world's population of Pacific black brant, as well as emperor geese, Steller's eiders (a threatened species in the United States), and the world's only non-migratory population of tundra swans. It is also home to caribou, brown bears, and other mammals. Much of the refuge is designated as wilderness. So long as it retains that designation, no road may be built through it. 16 U.S.C. § 1133(c).

In 2009, Congress authorized the Secretary of the Interior to conduct a land exchange with King Cove Corporation under which King Cove Corporation would transfer land to the United States and, in return, the United States would transfer "all right, title, and interest of the United States" in a portion of the Izembek Refuge to allow the construction of a "single-lane gravel road between the communities of King Cove and Cold Bay" to "be used primarily for health and safety purposes (including access to and from the Cold Bay Airport) and only for noncommercial purposes." Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, §§ 6402(a), 6403(a)(1)(A), 123 Stat. 991, 1178, 1180. The statute instructed the Secretary to study the environmental impact of a road and to determine whether an exchange would be in the public interest. *Id.* § 6402(b)(2), (d)(1), 123 Stat. at 1178–79. It provided that the authority for construction of a road would expire in seven years unless a construction permit had been issued by then. *Id.* § 6406(a), 123 Stat. at 1182.

In 2013, Secretary Sally Jewell decided not to proceed with the exchange. The Secretary stated that the exchange

presented "difficult and controversial issues of public policy" and that she had weighed "the concern for more reliable methods of medical transport from King Cove to Cold Bay" against the threat to "a globally significant landscape that supports an abundance and diversity of wildlife." She acknowledged that "proponents of the proposed road believe it would be a reliable method of transport in most weather conditions, but conclude[d] that other viable, and at times preferable, methods of transport remain and could be improved to meet community needs." Such alternatives, she said, included "fishing vessels . . . , air service, and ferry service" and "an alternative marine-road transportation link" via landing craft. She also noted that between 2007 and 2010, a hovercraft had been used for medical evacuations from King Cove to Cold Bay, successfully completing at least 22 evacuations. Although that service was suspended because of "cost and reliability concerns," the Secretary nevertheless determined that "[a]ir, hovercraft, and ferry may be more expedient than driving." The Secretary also found that "construction of a road through the Izembek National Wildlife Refuge would lead to significant degradation of irreplaceable ecological resources that would not be offset by the protection of other lands to be received under an exchange." Those harms would occur even if the road were restricted to noncommercial use.

In 2018, Secretary Ryan Zinke changed course and approved a land-exchange agreement. By then, the Secretary's authority under the 2009 Act had expired, so he relied on a provision of the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371 (1980), allowing him, "in acquiring lands for the purposes of [ANILCA]," to exchange lands with Alaska Native village corporations. 16 U.S.C. § 3192(h)(1). Under the agreement, King Cove Corporation would transfer to the

United States certain lands within the Izembek and Alaska Peninsula National Wildlife Refuges and relinquish its selection rights to certain other lands within the Izembek Refuge; in exchange, it would receive a corridor of less than 500 acres through the Izembek Refuge.

Several environmental groups—the same plaintiffs as in this case—filed suit in the District of Alaska to challenge Secretary Zinke's decision. The district court vacated the land-exchange agreement. *Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt*, 381 F. Supp. 3d 1127, 1144 (D. Alaska 2019). It held that Secretary Zinke's decision was arbitrary and capricious because "the Secretary ignore[d] the agency's prior determinations concerning a road's environmental impact on Izembek without providing any reasoned explanation for this change." *Id.* at 1143. The Secretary did not appeal.

In 2019, King Cove Corporation asked Secretary David Bernhardt to reconsider a land exchange, and the Secretary approved an agreement similar to the vacated 2018 agreement. He found that the exchange "comports with the purposes of . . . 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 the Alaska Native people." He also stated that "to the extent an authorization under ANILCA constitutes a policy change from that described by Secretary Jewell in the 2013 [decision] rejecting a similar, but not identical, land exchange . . . , such change is warranted, necessary, and appropriate." The Secretary cited "[t]he acute necessity, underestimated in the 2013 [decision], for a road connecting King Cove and Cold Bay to serve the future emergency medical and other social needs of the Alaska Native

residents of King Cove and the Alaskan people." He also pointed to "[c]hanged information concerning the viability and availability of alternative means of transportation that have since proven to be neither viable nor available."

Secretary Bernhardt found that the feasibility of a marine transportation link—a "key" alternative mode of transportation considered in the 2013 decision—was "highly speculative at the time" and that "[d]ecades of experience have established that . . . theoretical [transportation] alternatives have been consistently found by the King Cove Native people to be infeasible or inadequate to provide for their health and safety." He explained that since 2013, "there have been over 70 medevacs from King Cove to hospital facilities in Cold Bay, Anchorage, or Seattle," and more than 20 "had to be handled by the U.S. Coast Guard at a cost of approximately $50,000 per rescue mission." The Secretary also stated that a 2015 study of transportation alternatives prepared by the Army Corps of Engineers had "assessed the viability of non-road alternatives" and revealed them to be "prohibitively costly and/or insufficiently dependable." He concluded that "even if the facts are as stated in the 2013 [decision]; 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) resources would be degraded by the road's construction—human life and safety must be the paramount concern in this instance."

Plaintiffs again challenged the agreement. The State of Alaska, King Cove Corporation, the Agdaagux Tribe of King Cove, and the Native Village of Belkofski intervened in defense of the agreement.

The district court granted summary judgment to plaintiffs and vacated the agreement. The district court held that "the Exchange Agreement fails to advance the stated

purposes of ANILCA, [so] it is not permissible under that statute." It also held that "the Secretary's decision to enter into the Exchange Agreement is arbitrary and capricious . . . because the Secretary failed to provide adequate reasoning to support the change in policy in favor of a land exchange and a road through Izembek." Finally, it concluded that "the Exchange Agreement is . . . an approval of a transportation system that falls within the ambit of [ANILCA] Title XI," which establishes procedures for approving such systems, and that the Secretary failed to follow that law's procedural requirements. *See* 16 U.S.C. §§ 3161(c), 3164(a). Plaintiffs had also asserted claims under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*, and the Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.*, but the district court declined to reach those claims.

II

We begin by considering whether Secretary Bernhardt correctly understood ANILCA's purposes when he decided that a land exchange was appropriate under that statute. The Secretary stated that he placed great weight on the interests of "[t]he Alaska Native Aleut people [who] have lived at the King Cove village site for thousands of years before ANILCA designated their backyard Wilderness." He reasoned that the exchange would promote ANILCA's purposes by "providing an adequate opportunity for satisfaction of the economic and social needs of the Alaska Native people of King Cove." The district court, however, concluded that ANILCA's purposes do not include "further[ing] the economic and social needs of Alaska and its people," so it held that the Secretary acted improperly in relying on those factors.

ANILCA authorizes the Secretary, "in acquiring lands for the purposes of this Act, . . . to exchange lands (including lands within conservation system units and within the National Forest System)" with Alaska Native village corporations. 16 U.S.C. § 3192(h)(1). The government argues that because the statute refers to "acquiring lands," it requires only that the lands acquired in an exchange will further "the purposes of this Act," and it does not require considering the lands that are given up. We need not resolve that issue because even considering the transaction as a whole, we think the Secretary's analysis of the statutory purposes was correct.

The district court construed ANILCA to be focused narrowly on "preservation and subsistence." The text of the statute reveals otherwise. The statute identifies its purposes in a section entitled "Congressional statement of purpose." 16 U.S.C. § 3101. One of the enumerated purposes is to protect environmental resources, *id.* § 3101(a), (b), and another is "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so," *id.* § 3101(c). But other purposes are set out in section 3101(d), which states that ANILCA "provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people"—the purposes the Secretary invoked here. *Id.* § 3101(d).

According to the district court, section 3101(d) does not mean "that one of the purposes of ANILCA is to further the economic and social needs of Alaska and its people." Instead, the court read that provision as "an acknowledgement that, in passing ANILCA, Congress has achieved the proper balance between conservation needs and

economic and social needs." But to say that Congress struck a "balance" between two sets of objectives is to say that, to the extent possible, it sought to achieve both of them. The Secretary's land-exchange authority is one way Congress did that: Providing the Secretary with authority to exchange lands obviates the need for continued congressional intervention to maintain the balance struck in ANILCA. It therefore would make little sense to say that the Secretary may not use that authority to satisfy the economic and social needs of Alaskans. To the contrary, by using the word "adequate," Congress gave the Secretary discretion to strike an appropriate balance between environmental interests and "economic and social needs." 16 U.S.C. § 3101(d). Secretary Bernhardt exercised that discretion when he found that, without a road, the economic and social needs of the people of King Cove would not be adequately met.

The district court's reading of ANILCA is contrary to the Supreme Court's decision in *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019). In that case, the Court explained that ANILCA reflects a "grand bargain," *id.* at 1083, in which Congress "sought to 'balance' two goals, often thought conflicting": to protect "'scenic, natural, cultural and environmental values'" and to "'provide[] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people,'" *id.* at 1075 (alteration in original) (quoting 16 U.S.C. § 3101(d)). In other words, the Court said, Congress had "twofold ambitions." *Id.* Those are the ambitions that spurred the Secretary to act here. Balancing them necessarily required the Secretary to make tradeoffs, giving greater weight to some considerations and less weight to others.

The district court relied on our decision in *Alaska v. Federal Subsistence Board*, 544 F.3d 1089 (9th Cir. 2008),

in which we said that ANILCA has the purposes of "protecting and preserving the subsistence lifestyle and protecting and preserving wildlife," *id.* at 1098. But we did not say that those were the statute's *only* purposes—economic and social needs were not at issue in the case—and we have previously described the "dual purpose" of ANILCA more broadly: "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." *City of Angoon v. Marsh*, 749 F.2d 1413, 1415–16 (9th Cir. 1984) (emphasis added).

One of the purposes of ANILCA, therefore, is to address the economic and social needs of Alaskans. The Secretary appropriately weighed those needs against the other statutory purposes in deciding whether to enter the land-exchange agreement.

III

The district court also concluded that Secretary Bernhardt violated the Administrative Procedure Act by departing from his predecessor's position on the land exchange without adequate explanation. We disagree.

The APA requires a court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). For an agency's decision to survive review, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck*

Lines v. United States, 371 U.S. 156, 168 (1962)). A "satisfactory explanation" need not be a perfect explanation. After studying an agency's decision, a reviewing court will usually be able to identify ways in which the agency might have been more precise or more thorough. But as long as the agency has considered the relevant factors, a court should not set aside the decision simply because it believes it could have written a better one. To the contrary, the Supreme Court has made clear that "a court is not to substitute its judgment for that of the agency" and must "'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *Id.* (quoting *Bowman Transp. Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 286 (1974)).

Secretary Bernhardt's decision satisfies those standards. Secretary Bernhardt acknowledged the competing policy considerations, approvingly quoting Secretary Jewell's description of the decision as requiring weighing "on the one hand the concern for more reliable methods of medical transport from King Cove to Cold Bay and, on the other hand, a globally significant landscape that supports an abundance and diversity of wildlife unique to the Refuge." He acknowledged the prior findings that "keeping the isthmus roadless" would "best protect[] the habitat and wildlife of the Izembek Refuge" and that building a road "would be likely to have negative effects" on the many species for which the refuge is an important habitat. But after examining the most recent available information about alternatives to a road, Secretary Bernhardt concluded that the value of a road to the King Cove community outweighed the harm that it would cause to environmental interests: "I choose to place greater weight on the welfare and well-being of the Alaska Native people who call King Cove home."

Had the Secretary been writing on a blank slate, there seems to be no dispute that his explanation of his decision would be adequate to survive review. But the district court concluded that the Secretary "failed to provide adequate reasoning to support the change in policy" from Secretary Jewell's contrary decision in 2013. That conclusion reflects a misunderstanding of how courts review an agency's change in policy.

Before the Supreme Court's decision in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), some courts had suggested that the APA requires agencies to provide a special explanation whenever they change policy. *See, e.g.*, *New York Council, Ass'n of Civilian Technicians v. FLRA*, 757 F.2d 502, 508 (2d Cir. 1985). But in *Fox*, the Court held that the APA "makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action." 556 U.S. at 515. It is therefore not true that "every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance." *Id.* at 514. While the agency must "display awareness that it is changing position" and must "show that there are good reasons for the new policy," "it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one." *Id.* at 515 (emphases omitted).

Sometimes, Congress may restrict an agency's authority to alter policies once they are in place. *See, e.g.*, 42 U.S.C. § 6295(o)(1) (authorizing the Secretary of Energy to make certain energy-efficiency standards more rigorous but forbidding her to make them more lenient). But when it does not do so, then an agency is free to change its approach—the APA does not require "regulatory agencies [to] establish rules of conduct to last forever." *State Farm*, 463 U.S. at 42 (quoting *American Trucking Ass'ns v. Atchison, Topeka, &*

Santa Fe Ry. Co., 387 U.S. 397, 416 (1967)). An agency may alter course either because of a change in circumstances or because of a shift in its policy priorities, perhaps due to a change in presidential administrations, such as the one that occurred between the tenure of Secretary Jewell and that of Secretary Zinke—or the one that occurred during the pendency of this appeal, when Secretary Bernhardt was succeeded by Secretary Debra Haaland. (The government informs us that Secretary Haaland is currently conducting a "review of this matter.") We have held that an agency may reprioritize some concerns over others it previously deemed more important, "even on precisely the same record." *Organized Vill. of Kake v. USDA*, 795 F.3d 956, 968 (9th Cir. 2015) (en banc); *see State Farm*, 463 U.S. at 57 ("An agency's view of what is in the public interest may change, either with or without a change in circumstances." (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970))); *accord National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 (D.C. Cir. 2012).

To be sure, when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," then the agency may need to provide a more detailed explanation for changing course. *Fox*, 556 U.S. at 515. But in that situation, it is not "the mere fact of policy change" that demands explanation, but instead "that a reasoned explanation is needed for disregarding facts and circumstances that underlay . . . the prior policy." *Id.* at 515–16; *accord Organized Vill. of Kake*, 795 F.3d at 968.

Here, the decision whether to approve the land exchange required balancing two competing objectives, with the outcome depending on which one was given greater weight. 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." The choice to place greater weight on the interests of King Cove residents sufficiently explained the change in policy. And the Secretary was entitled in 2019 "to give more weight to socioeconomic concerns" than his predecessor had in 2013, "even on precisely the same record." *Organized Vill. of Kake*, 795 F.3d at 968.

It is true that Secretary Bernhardt also found that some facts had changed since 2013. But he made clear that his decision did not depend on those findings. Specifically, he stated that he would reach the same decision "even assuming all the facts as stated" by Secretary Jewell. Secretary Bernhardt elaborated that if the facts were the same as in 2013, "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) resources would be degraded by the road's construction—human life and safety must be the paramount concern." Thus, the Secretary "did not rely on new facts, but rather on a reevaluation of which policy would be better in light of the facts." *National Ass'n of Home Builders*, 682 F.3d at 1038; *see Fox*, 556 U.S. at 514–16. His explanation of that reevaluation was sufficient to satisfy the APA.

For that reason, the district court's criticisms of the Secretary's factual findings are beside the point. It is true that a court must evaluate an agency's action on the basis of the explanation the agency gave at the time. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). But an agency may offer alternative rationales for its decision, and if the agency makes clear that one would have been independently sufficient to justify its action, then a court need not consider the others if it finds the first to be valid. *See National Fuel*

Gas Supply Corp. v. FERC, 468 F.3d 831, 839 (D.C. Cir. 2006); *United States v. Ross*, 848 F.3d 1129, 1135 (D.C. Cir. 2017). Plaintiffs do not dispute that both components of Secretary Bernhardt's decision—his new factual findings and his determination that changed policy priorities would lead him to the same result even without the new factual findings—were "genuine justifications" for his action. *See Department of Com. v. New York*, 139 S. Ct. 2551, 2575–76 (2019). The justifications were clearly stated in the decision; they "can be scrutinized by courts and the interested public"; and they allow the public to know where to assign credit or blame for the decision. *Id.*; *see also Department of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907–10 (2020); *East Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 990–91 (9th Cir. 2020) (Miller, J., concurring in part and dissenting in part). There is therefore no reason to look beyond the valid justification that Secretary Bernhardt offered.

In any event, even if we considered it necessary to review Secretary Bernhardt's assessment of the facts, we would not agree with the district court that Secretary Bernhardt arbitrarily contradicted Secretary Jewell's factual findings. First, the district court concluded that Secretary Bernhardt contradicted prior agency findings by determining "that the environmental harms to Izembek can be adequately mitigated through restrictions and added acreage." That is not what Secretary Bernhardt said. Secretary Jewell had found that the adverse effects of road use would not be mitigated by regulation or roadside barriers and that the lands offered in exchange by King Cove would not "compensate for the adverse effects of . . . constructing a road." But as the district court acknowledged, Secretary Bernhardt did not challenge those findings. Instead, he made the uncontroversial observations that adding acreage to

federal ownership promotes environmental values, and that the uses to which a single-lane gravel road can be put are inherently limited. He then proceeded to rebalance the "environmental values" of the exchange against "the economic and social needs of the Alaska Native people of King Cove." He did not determine that the land-acquisition and road-use limitations would completely offset any environmental harm—only that the exchange "strikes the proper balance." That conclusion did not disturb any underlying finding of fact.

Second, the district court observed that Secretary Bernhardt's "finding that there are no reasonable transportation alternatives to meet the urgent needs of King Cove residents" contradicts Secretary Jewell's earlier finding that a hovercraft, a landing craft, or a ferry were all viable options. That is indeed a difference in the assessment of the facts, but it is one that Secretary Bernhardt explained. He acknowledged the "theoretical alternatives" but concluded that "[d]ecades of experience have established that [they] have been consistently found by the King Cove Native people to be infeasible or inadequate to provide for their health and safety." Specifically, he cited a 2015 report prepared by the Army Corps of Engineers that identified the costs and risks of alternatives to a road and, as he put it, "indicate[d] that alternative transportation routes have . . . proven to be prohibitively costly and/or insufficiently dependable." Indeed, despite years of study and a now-defunct hovercraft program, none of the alternatives considered by Secretary Jewell has developed into a reliable means of transportation. That has resulted in what Secretary Bernhardt described as an "unsatisfactory status quo," and it supports his findings about the availability and practical viability of the alternatives.

IV

Finally, we consider whether the land-exchange agreement is subject to the special procedures that ANILCA requires for the approval of transportation systems. Title XI of ANILCA sets out "a single comprehensive statutory authority for the approval or disapproval of applications for [transportation and utility] systems," including roads, within conservation units or areas in Alaska. 16 U.S.C. § 3161(c); *see id.* § 3162(4) (defining "transportation or utility system"). It provides that "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." *Id.* § 3164(a). Those provisions, in turn, require the agency approving the system to engage in a process of public consultation and to make "detailed findings supported by substantial evidence" on various issues. *Id.* § 3164(g).

The Secretary did not follow that process, but the government argues that he did not have to do so because section 3192(h), the land-exchange provision that he invoked, is not an "applicable law" for purposes of Title XI. We agree. We therefore need not consider the alternative argument advanced by the State that the land exchange is exempted from Title XI by 16 U.S.C. § 3170(b), which guarantees a right of access to inholdings of state and native land within conservation system units.

Title XI defines an "applicable law" as "any law of general applicability . . . 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." 16 U.S.C. § 3162(1). Section 3192(h) is not such a law because it authorizes the Secretary only "to exchange lands." *Id.* § 3192(h)(1). It does not give him "jurisdiction to grant any authorization" necessary for a "transportation or utility system." *Id.* § 3162(1). To be sure, once lands are transferred, the recipient might use them to build a road. That, of course, is the purpose of the transfer at issue here. But under Title XI, a "transportation or utility system" includes only systems for which a "portion of the route of the system will be within any conservation system unit, national recreation area, or national conservation area." *Id.* § 3162(4)(A). Land transferred out of a conservation system unit in a land exchange is, by definition, no longer "within any conservation system unit." *Id.*; *see also id.* § 3103(c) ("No lands which . . . are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units."); *Sturgeon*, 139 S. Ct. at 1078 (noting that ANILCA defines "public land" as "(almost all) 'lands, waters, and interests therein' the 'title to which is in the United States'" (quoting 16 U.S.C. § 3102(1)–(3))). Nor is any road later built on such land.

Construing section 3192(h) to be an "applicable law" would make little sense because it would mean that essentially all land exchanges would be subject to Title XI. The statute defines "transportation or utility system" to include roads, airfields, ditches, pipelines, radio antennas, telephone systems, and electrical transmission and distribution systems. 16 U.S.C. § 3162(4)(B). Given the breadth of that definition, any entity receiving land in an exchange is likely to wish to install some type of "transportation or utility system" upon it. Plaintiffs attempt to resist that conclusion by arguing that Title XI applies only when the Secretary enters into a land exchange for the

purpose of enabling the construction of a transportation or utility system. But nothing in the statute suggests that the Secretary's subjective intent is relevant. All that matters is whether section 3192(h) authorizes construction of a road within a conservation system unit, and it does not.

Even if section 3192(h) could authorize roads in some cases, the land-exchange agreement at issue here does not authorize a road, whether "in whole or in part." 16 U.S.C. § 3164(a). Secretary Bernhardt explained that although the "land exchange agreement envisions that [King Cove Corporation] may construct a road, it is not an 'authorization' to do so." Such authorization will require King Cove Corporation to obtain permits under the Clean Water Act and other governing laws. *See, e.g.*, 33 U.S.C. § 1344. The agreement recognizes that reality by providing specifications for "[t]he road, *if any*, constructed on the land" (emphasis added). Because the agreement was not executed under an "applicable law" and does not purport to authorize a "transportation system," it is not subject to Title XI's requirements.

REVERSED and REMANDED.

WARDLAW, Circuit Judge, dissenting:

I respectfully dissent. The district court properly concluded that Secretary Bernhardt's decision to accede to King Cove's wish to build a road through Izembek National Wildlife Refuge, despite DOI's "long history of considering the impacts of a road through Izembek and ruling against the road based on the detrimental effects it would have on

Izembek's ecological resources,"[1] violates both the Administrative Procedure Act (APA) and the Alaska National Interest Lands Conservation Act (ANILCA). Of course, a change in presidential administrations may result in a policy shift, Maj. Op. 19, but that observation does not resolve the questions this particular tectonic shift raises.

As recently as 2013, DOI Secretary Jewell published a twenty-page record of decision (2013 ROD) following a lengthy public process, including preparation of a Draft Environmental Impact Statement (EIS), receipt of public comments, preparation of a Final EIS, and numerous public meetings and sessions in Alaska between senior DOI officials, officials from the Bureau of Indian Affairs, and King Cove Residents. The Final EIS demonstrated that "construction of a road through the Izembek National Wildlife Refuge would lead to significant degradation of irreplaceable ecological resources that would not be offset by the protection of other lands to be received under an exchange." Secretary Jewell decided against the land exchange then authorized by Congress[2] because "reasonable and viable transportation alternatives exist to meet the important health and safety needs of the people of King Cove."

In the aftermath of the 2016 presidential election, the new DOI Secretary, Secretary Zinke, made a public

[1] This long history is detailed in the district court's opinion vacating the 2018 Exchange Agreement. *See Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt*, 381 F. Supp. 3d 1127, 1130–33 (D. Alaska 2019).

[2] In 2009, Congress tasked DOI with this review of the propriety of a land exchange for the purpose of constructing a road through Izembek. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991, 1178–83 (2009) (OPLMA).

commitment to work on a land exchange with King Cove Corporation (KCC) to facilitate the construction of the road. When asked by Chairman Murkowski about the land exchange at his January 17, 2017, confirmation hearing, Secretary Zinke stated, "You have my absolute commitment that I will restore trust and work with you on [the land exchange] because it is important."[3] Shortly thereafter, on January 22, 2018, Secretary Zinke entered into the 2018 Exchange Agreement, which dictated that the road would be used "primarily for health, safety, and quality of life purposes (including access to and from the Cold Bay Airport) and generally for non-commercial purposes." Plaintiffs challenged the 2018 Exchange Agreement, and the district court vacated it as an unlawful agency action. The district court found that it "failed to acknowledge the change in DOI policy, provided no reasoned explanation for changing course on DOI's prior determinations, and ignored its prior determinations about the road's environmental impacts on Izembek." *Friends of Alaska Nat'l Wildlife Refuge v. Bernhardt*, 463 F. Supp. 3d 1011, 1017 (D. Alaska 2020). Indeed, the 2018 Exchange Agreement failed to address or acknowledge the 2013 ROD and its findings. *See Friends of Alaska*, 381 F. Supp. 3d at 1140.

Thereafter, Secretary Bernhardt entered into the 2019 Exchange Agreement now before us, and set forth his reasons in an accompanying memorandum that did address the 2013 ROD. However, this version of the agreement does not limit use of the road to health and safety purposes, nor does it prohibit commercial uses.

[3] Nomination Hearing of the Honorable Ryan Zinke To Be the Secretary of the Interior: Hearing Before the S. Comm. on Energy and Natural Resources, 115th Cong. 115–16 (2017).

And here is where I part company with my colleagues in the majority. Secretary Bernhardt's memorandum contradicts key findings of the 2013 ROD. Moreover, the DOI purports to have the authority to enter the 2019 Exchange Agreement under ANILCA, 16 U.S.C. § 3192(h), when in fact the Exchange Agreement fails to advance ANILCA's stated purposes, and DOI failed to follow the procedural requirements set forth in Title XI of ANILCA.

I.

Secretary Bernhardt failed to adequately justify DOI's change of policy under the APA. While an agency is permitted to rebalance the facts before it to reach an alternate policy decision, if its new policy "rests upon factual findings that contradict those which underlay its prior policy," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), the agency must provide a "more substantial justification," *Org. Vill. of Kake v. USDA*, 795 F.3d 956, 967 (9th Cir. 2015) (en banc) (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 106 (2015)). Specifically, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox*, 556 U.S. at 516. At multiple points, Secretary Bernhardt relied upon contradictory facts while changing the agency's land exchange policy, yet he failed to provide sufficiently detailed justifications. Thus, the APA requires that we set aside the 2019 Exchange Agreement for this reason alone. 5 U.S.C. § 706(2).

A.

First, Secretary Bernhardt found that the environmental harms inflicted by the road's construction could be adequately mitigated through use restrictions on the road and the substantial benefits of the land exchange's proposed

additional acreage. This directly contradicts Secretary Jewell's factual findings.

In the 2013 ROD, Secretary Jewell rejected the argument that limiting the proposed road's use to "health and safety purposes" that were "noncommercial" would sufficiently protect the Izembek's ecological virtues. Notwithstanding these use restrictions, Secretary Jewell found that the road's destructive impact would "radiate far beyond the footprint of the road corridor," because the process of constructing and maintaining the road would create a "high potential for increased off-road access." Thus, Secretary Bernhardt's finding that use restrictions would adequately limit the road's disruption of the Izembek Wilderness directly contradicts the agency's prior factual finding.

The same is true of Secretary Bernhardt's finding that the land exchange is justified because it would add acreage to Alaska's protected lands. Although the majority is correct that Secretary Bernhardt cast his decision as reweighing the exchange's "environmental values" against the Alaskan Native people's economic and social needs, he also stated that the land exchange would "enhance[] the purposes of the Refuge" and benefit Alaskan residents by protecting the "scenic, natural, cultural, and environmental values." But Secretary Jewell rejected the land exchange precisely because there would be "significant degradation of irreplaceable ecological resources that would not be offset by the protection of other lands," finding the additional acreage non-beneficial because it would "not provide the [same] wildlife diversity," nor prevent the road from "irreparably and significantly impair[ing] this spectacular Wilderness refuge." Thus, by basing his decision, at least in part, on a finding that the land exchange would enhance the Refuge and protect environmental values, Secretary

Bernhardt "disregard[ed] facts and circumstances that underlay" Secretary Jewell's decision. *Fox*, 556 U.S. at 516. Nor did Secretary Bernhardt provide any information or data to justify this change in factual finding.

Second, Secretary Bernhardt found that there were not sufficiently viable non-road transportation alternatives to the proposed road, directly contradicting Secretary Jewell's finding that hovercraft, landing craft, and ferry were all viable alternatives. Secretary Bernhardt based this finding on a 2015 U.S. Army Corps of Engineers study that evaluated the costs of transportation alternatives and the urgent need for a road. The district court correctly concluded that the 2015 study does not provide the necessary justification for the Secretary's conclusion.

Secretary Bernhardt cited to the 2015 study for the proposition that "theoretical alternatives have been consistently found by the King Cove Native people to be infeasible or inadequate to provide for their health and safety." But he places more weight on the 2015 study than it can bear. As the district court correctly found, this 2015 study merely provided information about the estimated costs of non-road alternatives. Secretary Bernhardt claims that the study "indicates that alternative transportation routes have been subsequently considered and proven to be prohibitively costly and/or insufficiently dependable," yet he fails to explain why the costs are prohibitive or the dependability inadequate. While empirical data is certainly a start, Secretary Bernhardt is required to provide a reasonable explanation as to how the data supports his change in policy position. He fails to do so.

This lack of explanation is especially troubling here, given that some of the 2015 study's data equally supports Secretary Jewell's finding that there are viable non-road

alternatives. For instance, the 2015 study estimated that one of the marine alternative's 75-year life cycle cost amounts to $56.7 million. That amount is *less* than the estimated life-cycle cost of the road: around $61 million for 75 years of operation.[4] As another example, the study states that a marine link would be dependable more than 99% of the year, while the 2013 ROD estimated that a road would be dependable for around 98% of the year. Although these comparable figures suggest that transportation alternatives are just as viable as a road, Secretary Bernhardt's memorandum does not explain why he concludes otherwise.

As to the claim that a road is urgently needed, the district court correctly found that Secretary Bernhardt failed to explain why the need for a road is more urgent now than Secretary Jewell understood it to be in 2013. Secretary Bernhardt relied heavily on a 2019 letter from KCC requesting that the agency reconsider the road due to the number of medical evacuations since 2014, a crash at King Cove airport, and a medical emergency. He also cited to testimony about the costs of Coast Guard medical evacuations in King Cove to bolster his finding that the need for a road is so urgent that transportation alternatives are infeasible. However, none of this information involves new issues of urgency that were not already understood and analyzed by Secretary Jewell. Like Secretary Bernhardt, Secretary Jewell listened to King Cove's residents' reasons for requesting a road, considered the potential dangers of

[4] According to the 2013 ROD, the 35-year life cycle cost for the road construction is an estimated $34.2 million. Given that the approximate yearly maintenance cost is an estimated $670,000, one would multiply $670,000 by 40 to determine the road's cost from year 35 to year 75: $26.8 million. By adding $34.2 million (cost of the road's first 35 years) and $26.8 million (cost of the road's following 40 years), one arrives at $61 million for the 75-year span.

emergency evacuations, and understood that the Coast Guard would need to provide medevacs, but nonetheless concluded that non-road transportation alternatives were viable. Secretary Bernhardt failed to provide a reasoned analysis of how this information justifies his finding that transportation alternatives must now be discarded in favor of a road.

Finally, Secretary Bernhardt asserts that his about-face on the land exchange is justified because the 2013 ROD failed to consider the impact of a marine-based transportation route on the "Southwest Alaska Distinct Population Segment of Northern Sea Otters." But without further reasoning, analysis, or fact-finding, Secretary Bernhardt has failed to explain why this single factor turns the tide against marine-based transportation routes. And, as the district court pointed out, the "prior EIS considered such impacts when assessing the various alternatives." Secretary Bernhardt again fails to provide a reasoned explanation for his contrary findings. Because "unexplained conflicting findings about the environmental impacts of a proposed agency action violate the APA," the land exchange cannot stand. *Kake*, 795 F.3d at 969.

B.

These contradictory factual findings are "beside the point" according to the majority, Maj. Op. 20–21, because Secretary Bernhardt said what apparently have become the magic words for surviving APA review of a change in agency policy: "even assuming all the facts as stated in the 2013 ROD, in the exercise of policy discretion," he finds the Exchange Agreement consistent with the public interest, a finding directly contrary to Secretary Jewell's 2013 decision. But that lets Secretary Bernhardt off far too easily. Certainly, agencies may reach different conclusions "even

on precisely the same record," but Secretary Bernhardt "did not simply rebalance old facts to arrive at the new policy." *Kake*, 795 F.3d at 968. As discussed above, the Secretary's 2019 memorandum relies upon new factual findings regarding the land exchange's environmental impact and the viability of transportation alternatives, with merely a tip of the hat toward any reweighing of the same facts. The panel should judge the Secretary's 2019 decision "by the grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

To determine that the Secretary relied on new factual findings rather than on reweighing the same facts in the 2013 ROD, one need only observe the lack of analysis in the Secretary's purported "reweighing." After purportedly assuming the same facts, the Secretary did not engage in any real analysis of how the facts as they were in 2013 prompted the decision he reached, exactly what led him to reweigh them, or the specific factors he was reweighing, aside from his pronouncement that "human life and safety must be the paramount concern." Such a dearth of analysis indicates one of two fatal flaws under the APA. Either the agency did not "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choices made," *Ctr. for Biological Diversity v. Haaland*, 998 F.3d 1061, 1067 (9th Cir. 2021) (quoting *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 675 (9th Cir. 2016)), or the agency simply "disregard[ed] facts and circumstances that underlay or were engendered by the prior policy," *Fox*, 556 U.S. at 516.

The majority's position allows agencies to evade *Fox*'s explanation requirement so easily that it actually eliminates it, as here. Secretary Bernhardt simply elided *Fox*'s requirement by "assuming all the facts as stated in the 2013

ROD," then reaching a contrary conclusion. Moreover, it is difficult to reconcile that statement when in fact his memorandum "rests upon factual findings that contradict those which underlay" the 2013 ROD. *Id.* at 515. While agencies must be permitted to advance alternative justifications for policy changes, *see* Maj. Op. 21, they should be actual alternative justifications, not merely a sleight of hand to avoid putting forward reasons adequate to justify contradictory conclusions.

II.

Moreover, the Secretary lacked statutory authority to enter into the Exchange Agreement. It was not authorized under ANILCA because it fails to further ANILCA's stated purposes. ANILCA authorizes the Secretary to enter land exchanges that further "the purposes of this Act." *See* 16 U.S.C. § 3192(a), (h). Section 3192(h) specifically authorizes land exchanges to acquire lands for the purposes of ANILCA.

The Secretary expressly states that he is not proceeding under the Omnibus Public Land Management Act of 2009 (OPLMA), but is proceeding only under ANILCA—so the land exchange agreement is valid only if it serves the two purposes of the statute. ANILCA emerged from President Carter's early commitment to set the conservation of Alaska's rich natural resources as a top priority for our nation. He exhorted the 95th Congress to "conserve large unspoiled sections of the American wilderness in Alaska," stating that "[n]o conservation action [it] could take would have more lasting value than this." *Message from the President of the United States*, H.R. Doc. No. 95-160 (1977). Three years later, President Carter signed ANILCA into law on December 2, 1980, setting aside over 104 million acres of Alaskan land for protection. *See* Alaska National Interest

Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980); *see also Sturgeon v. Frost*, 577 U.S. 424, 431 (2016). Moments before signing ANILCA into law, the President remarked, "With this bill we are acknowledging that Alaska's wilderness areas are truly this country's crown jewels and that Alaska's resources are treasures of another sort." *Remarks on Signing H.R. 39 into Law*, 3 Pub. Papers 2756–57 (Dec. 2, 1980).

Congress enacted ANILCA to further two specific ends, which are enshrined in 16 U.S.C. §§ 3101(b), (c). *See Alaska v. Fed. Subsistence Bd.*, 544 F.3d 1089, 1091 (9th Cir. 2008). Congress enacted ANILCA, first, "to preserve unrivaled scenic and geological values associated with natural landscapes," including Alaska's unique ecosystems, wildlife, subsistence resources, natural features, recreational opportunities, and scientific research sites. *See* 16 U.S.C. § 3101(b). Congress's second intent and purpose in enacting ANILCA was "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." *Id.* § 3101(c). Congress could not have been any more clear in stating its two purposes in enacting this statute.

The Secretary claims authority to enter into the land exchange under section 3192(h), which permits land exchanges in order to "acquire lands for the purposes of [ANILCA]." *Id.* § 3192(h). However, the 2019 Exchange Agreement neither purports to nor furthers either the preservation or the subsistence purposes of the Act. *Id.* §§ 3101(b), (c). Decades of agency deliberations, memoranda, and litigation attest that a road through Izembek will irreversibly harm the area's unique natural resources—the Secretary's 2019 memorandum does not dispute this. As the 2013 ROD stated, the habitat uses on the Izembek isthmus would be "irreversibly and irretrievably changed by

the presence of a road." This "narrow isthmus (~3 miles wide) of rolling tundra surrounded by sheltered wetlands, lagoons, and shallow bays . . . contains important, unique and undisturbed habitats, including the world's largest eelgrass beds." Due to the Izembek Refuge's unique placement and combination of habitats, it is "a critical area for wildlife, especially migratory birds, some of which use the area exclusively during certain stages of their life history, as they rest and feed in preparation for long migrations." Furthermore, the Refuge is vital to the world's only population of non-migratory Tundra Swans, as this population relies on the area to overwinter. The 2013 ROD found that the bird species, like the Tundra Swans, that overwinter there would be "particularly vulnerable" to the impacts of road construction and operation. The road would also disrupt a key area in which brown bear mothers regularly give birth, as well as fracture a uniquely undisturbed habitat for grizzly bears, caribou, and wolves. This is just a fragment of the multitude of losses that would accompany the construction of a road straight through nearly 300,000 acres of Alaskan wilderness.

As to ANILCA's second, subsistence purpose, the agency attempted to fit the 2019 Exchange Agreement into ANILCA's subsistence purpose only after the commencement of this lawsuit—neither the 2019 Exchange Agreement nor Secretary Bernhardt's accompanying memorandum justifies the Agreement under ANILCA's subsistence purpose. However, we may review an agency's action according to its "contemporaneous explanations" only, as we are prohibited from considering the agency's "*post hoc* justifications." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020); *see also SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). We are thus prohibited from

considering the agency's new-found subsistence purpose arguments.

Because it is obvious that the land exchange runs counter to ANILCA's stated purposes, DOI reads into the statute a third Congressional "purpose" for enacting ANILCA. In the 2019 Memorandum, the Secretary states that the land exchange

> serves the purposes of ANILCA by striking the proper and appropriate balance between protecting the national interest in the scenic, natural, cultural, and environmental values of the public lands in Alaska and providing an adequate opportunity for satisfaction of the economic and social needs of the Alaska Native people of King Cove.

This statement invokes the language of 16 U.S.C. § 3101(d) addressing the "economic and social needs" of the Alaskan population, but it lifts it entirely out of context. Subsection 3101(d) does not articulate ANILCA's purposes, but instead clarifies that further legislation is unnecessary because Congress *has already struck* the balance between preserving Alaska's unique resources and satisfying the needs of Alaska's people.

Comparing the plain language of subsection 3101(d) with subsections 3101(b) and 3101(c), it is evident that subsection 3101(d) does not enumerate a third purpose for enacting ANILCA. In subsection 3101(b), Congress expressly states, "It is the intent of Congress in this Act to preserve unrivaled scenic and geological values associated with natural landscapes . . . ." The language of subsection 3101(c) mirrors that of subsection 3101(b). There, Congress expressly states that "[i]t is further the intent and purpose of

this Act . . . to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." In these provisions, Congress used the words "intent" and "purpose" to make clear that preservation and subsistence were the twin purposes of Alaska's Conservation Act.

Notably, Congress struck a different tone in subsection 3101(d), suggesting it intended that subsection to have a function distinct from that of subsections (b) and (c). Subsection 3101(d) reads:

> This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.

Id. § 3101(d). Unlike subsections (b) and (c), subsection 3101(d) does not purport to enumerate the "intent of Congress" or the "intent and purpose of this act." Instead, subsection (d) acknowledges what Congress has already done by enacting ANILCA: Congress struck the balance

between preserving Alaska's natural resources and providing for Alaska's economic and social needs, obviating the need for future legislation. As the district court found, subsection 3101(d) does not state that Congress's purposes in establishing the conservation units under ANILCA was to further the economic and social needs of Alaska and its people. This reading turns ANILCA on its head by taking what is essentially a conservation measure and turning it into an economic stimulus.

Adopting an "economic and social needs" rationale for agency action not only undermines ANILCA's two express purposes, it countermands the entire statutory scheme. As nearly any environmentally destructive project could be billed as furthering economic and social needs, this putative statutory purpose would convert ANILCA from a constraint on over-using Alaska's natural resources to a rubber stamp for any land exchange that the current Secretary may desire. Environmentally protective legislation, such as ANILCA, is necessary precisely because it curbs the impulse toward over-use and extraction of our country's natural resources for the sake of otherwise worthy purposes. Congress did not act with economic and social goals in enacting ANILCA, and it did not give carte blanche to the agency to depredate Alaska's irreplaceable natural wonders under the guise of pursuing the "economic and social needs" of Alaskans.

The majority's contrary interpretation of ANILCA's purposes rests on a misreading of the Supreme Court's opinion in *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019). Maj. Op. 15. *Sturgeon* took us through Alaska's history from its acquisition from Russia to its statehood and resulting land grants to Alaskans and Alaskan Natives and finally the setting aside of extensive lands for national parks and preserves ultimately accomplished by Congress through

ANILCA. *See Sturgeon*, 139 S. Ct. at 1073–78. The specific dispute in *Sturgeon* is entirely unrelated to the land exchange provision we interpret here.[5] *See id.* at 1073. In passing, the Court describes "Congress's twofold ambitions" that it sought to accomplish in light of the history of conflicting claims to Alaska's vast natural resources and disputes over which land could be regulated by the National Park Service at all. The Court took these overarching goals from subsection 3101(d):

> 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 . . . you see some tension within the statute, you are not mistaken: It arises from Congress's twofold ambitions.

Id. at 1075. To the extent the Court discussed ANILCA's purposes, it spoke to what Congress had already accomplished by enacting ANILCA. The Court did not mention at all the statutory purposes expressly set forth in

[5] In *Sturgeon*, the Court addressed whether the portion of the Nation River that runs through the Yukon-Charley National Park qualifies as public land or non-public land under 16 U.S.C. § 3103(c). *Sturgeon*, 139 S. Ct. at 1073. The Court concluded that it was a non-public land for the purposes of ANILCA and thus was not subject to the Park Service's regulatory powers under ANILCA. *Id.* at 1087.

subsections 3101(b) and 3101(c), which are the "purposes" to which section 3192(h) refers. To authorize the Secretary to change the boundaries of the carefully defined conservation system units for the amorphous reason of satisfying economic and social needs would defeat the careful balance Congress struck. Thus, to the extent *Sturgeon* has any bearing on this issue—which is vanishingly slight—it supports our understanding of subsection 3101(d).

Therefore, because the land exchange does not further either of ANILCA's two purposes, it cannot be authorized under ANILCA. Given that the Secretary disavowed OPLMA as a source of authority, the ineluctable conclusion is that DOI entered into the 2019 Land Exchange without statutory authority to do so.

III.

Even assuming ANILCA authorized the Exchange Agreement, it would be an approval of a transportation system governed by the procedures set forth in Title XI of ANILCA, and would fall because DOI failed to follow those procedures. In ANILCA Title XI, Congress established "a single comprehensive statutory authority" for approving and disapproving transportation and utility systems through Alaska's conservation units and areas. 16 U.S.C. § 3161(c). Title XI mandates that "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 agency complies with Title XI's requirements. *Id.* § 3164(a). Because Secretary Bernhardt did not meet these extensive and detailed requirements, the land exchange was not authorized.

Title XI prohibits any federal agency action "under applicable law" with respect to approval or disapproval of a transportation system within Alaska's conservation units, unless the agency complies with detailed, mandatory procedures. The Secretary did not comply with these procedures, and the majority excuses compliance because it thinks section 3192(h), the land exchange provision, is not an "applicable law" for the purposes of Title XI. Maj. Op. 23–25. An "applicable law" is "any law of general applicability" that provides an agency with 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). The majority asserts that section 3192(h) is not an "applicable law" under Title XI because it authorizes the agency only to exchange lands, not to build a road. *See id.* § 3192(h)(1); Maj. Op. 24–25.

Here, Secretary Bernhardt argues that section 3192(h) authorized him to agree to a land exchange for the express purpose of allowing KCC to build a road. As the district court stated, the land exchange "is the required first step in the completion of such a road." Without section 3192(h)'s purported authorization, the "transportation . . . system cannot, in whole or in part be established or operated," thus falling squarely within Title XI's definition of applicable law. *Id.* § 3162(1).

The majority concedes that the purpose of the transfer here is to build a road. Maj. Op. 24. It is not an answer to say that once the land is transferred out of the conservation unit, it will no longer be part of the conservation unit, and thus Title XI is inapplicable. *Id.* As the district court said, Congress's intent was clear—it enacted Title XI as a "single comprehensive statutory authority for the approval of"

transportation systems within conservation areas such as Izembek "to minimize the adverse impacts of sitting transportation . . . systems within units established or expanded by [ANILCA]. *Id.* § 3161. To make Title XI subject to the exchange provision would undermine that purpose. The express purpose of the land exchange is to remove the road corridor from the conservation system so that a road may be built—that is why Title XI's requirements apply. *See id.* § 3162(1). The 2019 Exchange Agreement expressly acknowledges that the land exchange "allows for construction of a road between King Cove and Cold Bay," and Secretary Bernhardt's memorandum lists the "acute necessity . . . for a road connecting King Cove and Cold Bay" as the first reason for entering the land exchange. This appeal demands that we determine whether the removal of this corridor from the conservation unit via a land exchange is proper, not whether a road would be permitted after the land exchange is approved.

Contrary to the majority's assertion, construing section 3192(h) to be an "applicable law" would not open the door for Title XI challenges to all section 3192(h) land exchanges. Maj. Op. 24–25. Title XI applies only to authorizations of transportation projects, *id.* § 3162(1), not all land exchanges are de facto "authorizations," and not every land exchange has the express purpose of serving as part of a transportation system. Thus, an agency considering an ANILCA land exchange need only comply with Title XI's procedures if the stated purpose for the land exchange is to authorize a transportation system.

Nor does the fact that KCC must still obtain permits before it may begin the road's construction alter the Title XI analysis. Maj. Op. 25. Title XI mandates that "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." 16 U.S.C. § 3164(a) (emphasis added). By including the clause "in whole or in part," Congress clarified that even partial authorizations of transportation systems must clear Title XI's requirements. That is, even though KCC must still obtain the permits necessary for construction on the land corridor, the land exchange remains within Title XI's ambit as a partial authorization without which permits are irrelevant. Because the agency failed to follow Title XI's requirements, the land exchange should be set aside.

For the foregoing reasons, I respectfully dissent.

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.

DEBRA HAALAND, in her 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' RESPONSE IN OPPOSITION TO PETITION FOR REHEARING EN BANC

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INTRODUCTION

Plaintiffs' petition for rehearing en banc does not meet Federal Rule of Appellate Procedure 35(a)'s requirements and should be denied. The panel's holdings do not conflict with any decision of the Supreme Court or this Court, and do not present any question of exceptional importance within the meaning of the Rule. First, Plaintiffs and Amici are incorrect that the panel decision is inconsistent with *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) and this Court's decisions applying it. The panel correctly concluded that Secretary Bernhardt assumed the facts that motivated Secretary Jewell remained the same, but placed more weight on the health and well-being of the people of King Cove than the other factors.

Second, the petition presents no question of exceptional importance under ANILCA. Plaintiffs and Amici essentially argue that the panel has greenlit a giveaway of all of Alaska's conservation lands by recognizing that Congress enacted ANILCA to both further conservation and to provide adequate opportunity to meet the economic and social needs of Alaskans. But ANILCA requires that land exchanges be of equal value and that Interior acquire lands that further ANILCA's conservation and subsistence purposes. And while ANILCA allows Interior to consider the social and economic needs of Alaskans when weighing a land exchange, neither ANILCA nor the panel opinion creates an overriding social and economic purpose allowing Interior to disregard ANILCA's other purposes. All of this safeguards against the abuses Plaintiffs and Amici fear. Finally, the panel's reading of Title XI as not applying to

land exchanges is a matter of straightforward statutory interpretation that presents no question of great public importance.

This case does not merit en banc review.

BACKGROUND

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. Their stated purpose is the need for safe, reliable, and efficient access to Cold Bay's large airport for medical evacuations and emergencies. 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.

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. After completing an EIS 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 2019, Interior approved a land exchange using its ANILCA land exchange authority. Although the land exchange itself was technically not a legal authorization of a road, Interior analyzed the exchange in the context of a road to service King Cove. Accordingly, 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, although no additional environmental analysis was conducted. And Interior explained it would have adopted that policy even if the record had been the same as in 2013—that is, 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.

Plaintiffs challenged the land exchange, and the district court set it 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. Interior appealed, and the panel reversed, concluding that Interior had adequately explained its change in position, that Interior permissibly considered the benefits to the people of King Cove in deciding whether to exchange lands, and that Interior was not required to comply with Title XI of ANILCA before entering into the land-exchange agreement. Plaintiffs now petition for en banc review.

ARGUMENT

I. The panel opinion is consistent with *Fox* and *Village of Kake*.

The panel opinion is a straightforward application of well-established principles governing APA review to the facts of this case and presents no question warranting en banc review. As the panel correctly noted, the APA issue briefed to the Court was limited to whether Secretary Bernhardt violated the APA by failing to adequately explain his change in policy, because had the Secretary "been writing on a blank slate, there seems to be no dispute that his explanation of his decision would be adequate to survive review." Slip Op. 18. The panel then accurately set forth the test governing agency changes in policy established in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), noting that when an agency changes policies it must "display awareness that it is changing position" and provide good reasons for the new policy, but need not convince the court that "the reasons for the new policy are better than the reasons for the old one." Slip Op. 18. Only where the agency rests its policy on new, contradictory factual findings must an agency provide a more detailed explanation, and then only to explain the reasons for the new factual findings. *Id.*

After carefully examining the record, the panel concluded that Secretary Bernhardt relied on alternative rationales for his decision, Slip Op. 20-21, both of which survived review under the standards announced in *Fox*. The panel first concluded that Secretary Bernhardt had permissibly reweighed competing policy objectives—environmental protection and human well-being—while assuming that

the facts were the same as found by Secretary Jewell. In particular, Secretary Bernhardt assumed that there are alternatives to a road and that a road would degrade environmental resources and concluded that human life and safety were paramount. Slip Op. 20. The panel concluded that his "choice to place greater weight on the welfare and well-being of King Cove residents sufficiently explained the change in policy" and was consistent with this Court's decision in *Organized Village of Kake v. USDA*, 795 F.3d 956, 968 (9th Cir. 2015) (en banc), which held that agencies are permitted to "give more weight to socioeconomic concerns" than they have previously "even on precisely the same record." Slip Op. 19. Second, the panel examined Secretary Bernhardt's new factual findings, forming the basis for his alternate conclusion that a land exchange is warranted, and concluded that they were either not contrary to earlier findings or were adequately supported in the record. Slip Op. 21-22.

Despite the panel's routine, fact-bound APA analysis, Plaintiffs contend that the panel made two en-banc worthy mistakes. First, Plaintiffs contend that the panel failed to require a reasoned analysis for Secretary Bernhardt's policy reversal because it credited the Secretary's alternate finding that he would approve the land exchange even if there were viable and preferable alternatives to a road and even if the road would result in the environmental harm that Secretary Jewell predicted. Pet. 6-9.[1]

[1] Plaintiffs argue in a single, short paragraph that Secretary Bernhardt could not make a different policy decision assuming that the facts were the same as those presented to

According to Plaintiffs, *Fox* and *Village of Kake* do not allow an agency to assume that the critical facts underlying a previous agency decision remain the same and justify a change in position on pure policy grounds. *Id.* at 7-8. But that is exactly what this Court contemplated in *Village of Kake* when it noted that 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). *See also National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 (D.C. Cir. 2012) (when 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"). It is similarly well-established that agencies may properly rest their decisions on alternate grounds. *See National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006); *United States v. Ross*, 848 F.3d 1129, 1135 (D.C. Cir. 2017). The panel broke no

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Secretary Jewell because the facts are not the same, with less acreage coming into federal ownership, added gravel mines, and no commercial use restrictions on any road resulting from this land exchange, which were not adequately analyzed. Pet. 6-7. Though Plaintiffs were aware of those differences in the record, Brief of Appellee at 54 & n.263, they did not argue to the panel that because of those differences Secretary Bernhardt could not assume that the relevant facts that motivated Secretary Jewell remained the same. Brief of Appellee at 45-58. Courts are "not required to address an issue first raised in a petition for rehearing, and generally decline to do so." *United States v. Hernandez-Estrada*, 749 F.3d 1154, 1159 (9th Cir. 2014) (citation omitted). Moreover, as discussed below, Plaintiffs' claims regarding compliance with the National Environmental Policy Act and Endangered Species Act await to be addressed on remand.

new ground in finding that the Secretary's reevaluation of the better policy in light of the facts complied with the APA, and its decision is consistent with both *Fox* and *Village of Kake*.

Second, Plaintiffs argue that the panel failed to require record support for the Secretary's alternate rationale that the facts warranted the land exchange, essentially repeating the arguments Plaintiffs made before the panel. Pet. 9-11; *see also* Law Professors Amicus Br. 11-13. In particular, Plaintiffs claim a lack of record support for Secretary Bernhardt's findings respecting "road-use restrictions, conservation benefits from the exchange, and a lack of viable transportation alternatives," as well as his "argument that the road is 'paramount' for health and safety purposes." Pet. 11. As to the first two, the panel correctly explained that Secretary Bernhardt did not make any factual findings that contradicted those made by Secretary Jewell, but instead "made the uncontroversial observations that adding acreage to federal ownership promotes environmental values, and that the uses to which a single-lane gravel road can be put are inherently limited." Slip Op. 21-22; *see also* Op. Br. 26-32. As the panel concluded, Secretary Bernhardt did not make a comparative factual finding that Interior would be acquiring lands that would offset the environmental value of those lost. Instead, he merely articulated that the lands to be acquired, which had long been identified by the Fish and Wildlife Service as a priority for acquisition, 2 E.R. 33-36, would provide a substantial benefit to the refuge through a significant increase in the acreage protected. 2 E.R. 232. Whether that benefit is sufficient to

justify the land exchange given the impacts to the lands lost and the benefits to the people of King Cove of the ability to pursue building a road resides in the realm of administrative judgment, not factual findings.

Similarly, Secretary Bernhardt did not contradict any of the findings Interior had previously made about the negative environmental impacts of a road and did not list any change to environmental impacts among its reasons for proceeding with the exchange. 2 E.R. 232-33. Instead, the Secretary listed Interior's previous findings from the 2013 EIS, 2 E.R. 220-21, assumed those impacts would occur, and noted only generally that use restrictions could limit the impacts of a road to those previously articulated and thus "enhance" the "balancing of needs" weighing in favor of the exchange, 2 E.R. 233. That is sufficient record support to survive the APA, and presents no question worthy of this Court's further review.

Plaintiffs also contend that there was no record support for Secretary Bernhardt's conclusion that transportation alternatives were not as viable as Secretary Jewell had previously concluded. Pet. 10-11; *see also* Law Professors Amicus Br. 13-14. But, as the panel concluded, Secretary Bernhardt found that there are currently no hovercraft or landing craft available for use by residents of King Cove and any such availability is both highly speculative and less likely than in 2013, a finding supported by both experience and a 2015 report from the Corps of Engineers. Slip Op. 2 E.R. 222; 2 E.R. 59. Plaintiffs may disagree with the Secretary's interpretation of that

report, but the panel correctly concluded that Interior had sufficient record support for its action.

II. The panel's holding that Section 1302(h) of ANILCA allowed Interior to consider the benefits of the land exchange to the people of King Cove does not conflict with precedent and presents no question of exceptional importance.

The panel's holding that Section 1302(h) allows the Secretary of the Interior to consider the economic and social well-being of Alaskans when deciding whether to exchange lands does not conflict with precedent. This Court has recognized, albeit in a different context, that ANILCA generally accomplished 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); *see also Sturgeon v. Frost,* 139 S. Ct. 1066, 1075 (2019). To be sure, while *City of Angoon* did not assess ANILCA's goals in order to support a specific agency decision or action, the panel's holding here is consistent with this Court's description of ANILCA's intentions. As explained below, those general purposes of ANILCA are distinct from the specific conservation and subsistence purposes that must be accounted for when Interior is acquiring lands through a land exchange. And, even assuming that the satisfaction of the economic and social needs of the people of Alaska is not a

"purpose" of the statute, such concerns can still inform the exercise of the Secretary's discretion.

Plaintiffs, at bottom, insist that the environmental and ecological costs of a road through the Refuge mean that the exchange cannot further ANILCA's important conservation and subsistence purposes; but, notably, Plaintiffs' claims under the National Environmental Policy Act and the Endangered Species Act have not been resolved. Those issues await remand and, at that time, Plaintiffs will have the opportunity to argue that the Secretary has misapprehended the law and the true environmental and ecological consequences of the exchange. If Plaintiffs are correct about Interior's alleged flawed NEPA and ESA compliance the exchange may be set aside. But in the absence of that showing and where there is no conflict in the caselaw, there is no reason to grant, in a case in an interlocutory posture, rehearing en banc.

Plaintiffs also contend that the panel's holding will put "all of Alaska's conservation system units . . . at risk of being traded away for economic gains." Pet. at 13. The amicus briefs filed by President Carter and Secretary Babbitt echo that concern. To be sure, if the panel had held that Interior may trade away Denali, Pet. 15, or all the timberland on Admiralty Island, Babbitt Amicus Br. 12-15, or land for mining in the Katmai National Park, *id.* at 15-18, and could do so based purely on economic gains, that would be problematic and in need of correction. But Interior did

not seek, does not read the panel opinion as establishing, and does not believe that ANILCA supports an economic purposes trump card for ANILCA land exchanges.

Put simply, this case does not present a land exchange designed to further economic gains. To the contrary, Secretary Bernhardt determined that the exchange brings valuable conservation lands within federal ownership and protection while giving up lands that will improve the health and safety of the residents of King Cove. The panel held that the ultimate balance that Secretary Bernhardt struck on these specific facts was not arbitrary or capricious. But nothing in the panel opinion or the text or structure of ANILCA's land exchange provision would allow an Interior Secretary to arbitrarily exchange away Alaskan conservation lands for economic development, and to do so would be contrary to ANILCA.

Indeed, ANILCA contains two meaningful constraints on land exchanges that would prevent the scenarios Plaintiffs and Amici fear. The panel did not discuss those constraints because Interior had satisfied each one and they were not put at issue in this case. First, looking just at the lands to be acquired in a land exchange, the acquisition of those lands must further ANILCA's conservation or subsistence purposes. ANILCA authorizes Interior "to acquire" through an "exchange" non-federal lands from within the boundaries of conservation system units "in order to carry out the purposes of this Act." 16 U.S.C. § 3192(a). ANILCA then provides that "in acquiring lands for the purposes of this Act," Interior may exchange lands from within conservation system units with Native Corporations, the State, or other Federal

agencies. *Id.* § 3192(h). Any lands Interior acquires through such an exchange automatically become part of the relevant conservation system unit by operation of law. *See id.* § 3103(c) (providing that if the Secretary acquires lands within the boundaries of a conservation system unit "in accordance with applicable law (including this Act)" then "any such lands shall become part of the unit, and be administered accordingly"). Thus, the primary focus in evaluating any land exchange must be on the lands Interior will acquire and whether acquisition of those lands will further the purposes of ANILCA. And because Interior will be acquiring lands from within the boundaries of conservation system units in order to bring those lands into federal protection as part of the conservation system unit, the acquisition of the lands must further ANILCA's conservation and subsistence purposes.

Here, Plaintiffs have never disputed that Interior will further ANILCA's conservation purposes by acquiring the land at issue, but have contended only that *on balance* the land exchange does not further ANILCA's conservation purposes because the land Interior will give up is more environmentally important than the land Interior will acquire. The Fish and Wildlife Service has for many years recognized the value of the lands to be acquired. 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.

ANILCA's requirement that Interior acquire lands to further the statute's conservation and subsistence purposes is a meaningful constraint on abuses like the ones Plaintiffs and Amici fear, as one necessary component of any future land exchange would be the acquisition of land that has sufficient conservation or subsistence value such that the exchange can survive arbitrary or capricious review and comply with the statute. Because it was not put in issue, the panel found it unnecessary to discuss this important limitation on Interior's land exchange authority.

ANILCA contains a second constraint on land exchanges not discussed in the panel opinion—land exchanges must be for equal monetary value unless they are in the public interest. 16 U.S.C. § 1392(h)(1). Again, there is no question here that this land exchange would be for equal monetary value as the land-exchange agreement expressly proposes an equal value exchange and Plaintiffs have never contended otherwise. 2 E.R. 237. The panel thus did not discuss that statutory requirement.

The default requirement of equal value exchanges would prevent exactly the kinds of exchanges that Plaintiffs and Amici contemplate. By definition, Interior could not enter into an equal value land exchange while simultaneously trading away Denali

"for economic gain." Pet. 15. Likewise, there is no realistic prospect of exchanging "economically less valuable holdings from elsewhere in the Tongass for economically valuable lands within Admiralty Island National Monument to extract valuable old-growth trees." Babbitt Amicus Br. 15. The statute explicitly provides that exchanges "shall be on the basis of equal value" and the hypothetical posits an expressly unequal value exchange. Only if the exchange acquired significant conservation or subsistence lands and was also in the "public interest" could it go forward.

Finally, Interior's discretion to enter into land exchanges is not unbounded, but is subject to traditional arbitrary or capricious review under the APA. To say that Interior may take into account the economic and social benefits of the land it gives up in an exchange when deciding whether to enter into the exchange is not to say that Interior may value economic gain over ANILCA's conservation and subsistence purposes and trade away large swaths of important Alaskan lands. The panel conducted that review here and concluded Interior did not strike an arbitrary balance.

In sum, the panel opinion does not authorize future Secretarial actions that threaten all of the conservation system units in Alaska. This Court should deny en banc review.

III. The panel's holding that Title XI of ANILCA does not apply to a land exchange under Section 3192(h) of the statute is a matter of straightforward statutory interpretation that presents no question of great public importance.

The panel held that the special procedures in Title XI of ANILCA do not apply to land exchanges under section 3192(h) because that authority does not fit within Title XI's definition of an "applicable law." Slip Op. 23-25. Title XI explicitly requires agencies to follow its procedures only before taking an "action" under "applicable law" to approve or disapprove an "authorization" necessary for the transportation system. 16 U.S.C. § 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).

As the panel concluded, ANILCA's land exchange provision does not give Interior jurisdiction to grant authorizations for a road or any other transportation or utility system. 16 U.S.C. § 3192(h). That section provides jurisdiction only "to exchange lands" under certain conditions. It gives Interior no "jurisdiction" to "grant" any "authorization" at all. Because it does not provide the agency with jurisdiction to grant authorizations related to transportation or utility systems, the panel agreed that Section 1302(h) is not an "applicable law" as defined by Title XI.

The panel also recognized that if Section 1302(h) were an "applicable law," then every contemplated land exchange involving lands from within a conservation system unit would be required to follow Title XI's procedures. Slip Op. 24-25. There is nothing in Title XI to suggest that Congress intended to graft Title XI's procedures onto a land-exchange provision in which Congress provided only that such exchanges be for "equal value."

Finally, the panel concluded that the land-exchange agreement here does not "authorize" a road or any other transportation system "in whole or in part," triggering Title XI. While it is true that Interior analyzed the benefits of a road as part of its determination to enter the exchange, a land exchange under Section 1302(h) does not "approve" or "grant" an "authorization" to any entity to do anything within the meaning of Title XI. Interior made clear that "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.

There is no conflict with any precedent here as no court has previously interpreted the interplay between Title XI and ANILCA land exchanges. Nor is there any question of great importance, as the issue is unique to Alaska and has not previously arisen in the more than 40 years since ANILCA was passed.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for rehearing en banc.

Respectfully submitted,

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August 5, 2022
90-1-4-15825

Form 11. Certificate of Compliance for Petitions for Rehearing/Responses

9th Cir. Case Number(s) Nos. 20-35721, 20-35727, and 20-35728

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached response to petition is (*select one)*

[X] Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words: 4,063 words.**

OR

[ ] In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/*Michael T. Gray*

Date August 5, 2022

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

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

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

KING COVE CORPORATION, et al. (KCC)
Intervenor-Defendants/Appellants,
and

STATE OF ALASKA,
Intervenor-Defendant/Appellants.

Appeal from the United States District court, District of Alaska, Anchorage
Honorable John W. Sedwick Case No. 3:19-cv-00216

INTERVENOR-DEFENDANT-APPELLANT KCC'S BRIEF OPPOSING PLAINTIFF APPELLEES' PETITION FOR *EN BANC* REHEARING

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Defendant-Intervenor-Appellants inform the Court that: (1) The King Cove Corporation is an Alaska Native Village Corporation organized under the laws of the State of Alaska and the Alaska Native Claims Settlement 43 U.S.C 1601 et. seq. The King Cove Corporation does not offer shares

to the public; (2) the Agdaagux Tribe of King Cove and Native Village of Belkovsky are federally recognized tribes. No Defendant-Intervenor-Appellant is an entity which offers shares to the public. This 2nd day of August 2022.

s/Steven W Silver
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INTRODUCTION

In 2019 in exchange for lands owned by the federally created King Cove Corporation along with the Agdaagux Tribe of King Cove, the Native Village of Belkofski, and two local governments (hereinafter collectively referred to as KCC), Department of Interior (DOI) then Secretary David Bernhardt (Bernhardt) agreed to convey a narrow corridor of Native ancestral land within the Izembek Wildlife Refuge connecting the City of King Cove to an all-season, all-weather airport at the nearby town of Cold Bay. Emergency cases could then be flown from the Cold Bay Airport for treatment in Anchorage and Seattle.

Bernhardt provided two independent, stand-alone reasons to justify his decision: 1) he described how the facts had changed in the six years since DOI then Secretary Sally Jewell (Jewell) had denied a road in her 2013 Record of Decision (ROD);[1] and 2) he found that even accepting the key facts on which Jewell had decided, he would have authorized the exchange because he placed greater weight on the unmet need of the indigenous people for emergency medical access to the Cold Bay Airport than her decision had.

[1] In the Omnibus Public Land Management Act of 2009 (Public Law 111-11), Title VI, Subtitle E (OPLMA) Congress gave the Secretary discretion to authorize a land exchange and road construction. In selecting the "No Action" alternative in the 2013 ROD Jewell explained the ecological damages she thought would occur were either of the two road alternatives selected.

Bernhardt determined that inadequate access from King Cove to the Cold Bay Airport in emergencies had resulted in eighteen deaths between 1980 and 2013. He found that the land exchange was necessary to prevent the further loss of life of indigenous people by providing them safe, reliable, and affordable access to the Cold Bay Airport:

> I remain concerned regarding the persistent and substantial number of emergency medevacs and periodic deaths that continue to occur. Since Secretary Jewell's decision, there have been over 70 emergency medevacs from King Cove, a number that demonstrates there will unquestionably be many more in the years to come. Bernhardt Decision at 17. ER 231.

In March 2022, a Panel of this Court found that each of Bernhardt's standalone reasons satisfied the Administrative Procedure Act 5 U.S.C. 706 (2) (APA). *Friends of Alaska National Wildlife Refuges v. Haaland,* 29 F.4th 432, 441-442. (9th Cir. 2022). The district court and the Panel Dissent (Dissent) assert that, notwithstanding his second stand-alone justification, Bernhardt violated the APA because they disagree with some of his first stand-alone reasons for reversing Jewell's denial.

On May 16, 2022, this Court ordered DOI, and Defendant-Intervenors (the State of Alaska (Alaska), and KCC) to respond to Friends' petition for rehearing *en banc*. This brief explains why this case does not qualify to be reheard *en banc*.

I. The History of The Izembek Land Exchange Demonstrates a Thorough Justification For DOI's Policy Change.

A. KCC's 2017 Land Exchange Request

In 2017 KCC petitioned DOI's then Secretary Zinke (Zinke) for an equal value land exchange by which KCC would convey to the United States the surface estate of certain Native-owned ancestral lands within the Izembek and Alaska Peninsula National Wildlife Refuges and relinquish selection rights to 5,430 additional acres within the Izembek Refuge. In return, DOI would convey to KCC the surface and subsurface estates of former ancestral lands not exceeding 500 acres.

Zinke signed the land exchange agreement with KCC on January 22, 2018, which Friends challenged in Alaska Federal District court. Judge Gleason set aside the land exchange because Zinke failed to provide an inadequate explanation for facts underlying his decision that contradicted facts in Jewell's 2013 ROD. *Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt*, 381 F. Supp. 3d 1127, 1142-44 (D. Alaska 2019).

B. Bernhardt's Decision on KCC's 2019 Land Exchange Request.

KCC did not appeal Judge Gleason's Order. Instead, it filed a new land exchange request with DOI's new Secretary David Bernhardt. On July 12, 2019, Bernhardt issued a 20-page decision approving the new land exchange (not including a road). Bernhardt Decision. ER 215-234. Because, as shown below, Bernhardt's decision deliberately followed Judge Gleason's analytic framework for compliance with the seminal APA cases of *FCC v. Fox Television*, 556 U.S. 502 (2009) (*Fox*)

and *Organized Village of Kake v. U.S. Department of Agriculture,* 795 F.3d 956 (*en banc*) (9th Cir. 2015) (*Kake*), (Bernhardt Decision at 12. ER 226) an *en banc* hearing is not "necessary to secure or maintain uniformity of this court's [APA] decisions" in *Fox* and *Kake*.

1.Bernhardt Did Not Dispute Jewell's Ecological Reasons For Denying the 2013 OPLMA Land Exchange, but, Notwithstanding Them Approved the 2019 Land Exchange to Resolve the Unmet Emergency Health Access Needs of King Cove's Indigenous People.

For example, Judge Gleason found that the 2018 [Zinke] "Exchange Agreement [did] not … contain any discussion of the environmental impact of the road." *Friends, supra.* 381 F. Supp. 3d 1127, at 1140-1141. In contrast Bernhardt accepted Jewell's contentions that the road would not be in the public interest because it could "lead to significant degradation" of the environment and because "viable transportation alternatives exist" to address the healthcare needs of the residents of King Cove. Bernhardt Decision at 6. ER 231-233.

Moreover, Bernhardt specifically reviewed the reasons Secretary Jewell gave for her conclusions:

1. **Wildlife and Habitat Considerations**. Bernhardt recognized: "[t]he 2013 ROD concluded '[b]y keeping the isthmus roadless, a no road alternative best protects the habitat and wildlife of the Izembek Refuge'" (Decision at 6) and "'the 2013 ROD found "construction and use of a road corridor would be likely to have negative effects on each of the species referenced.' Bernhardt Decision at 6-7. ER 220-21.

2. **Wilderness Considerations.** Bernhardt said, "the 2013 ROD briefly considered the impacts to wilderness of a potential road corridor, noting the 'no action alternative protects nearly 300,000 acres of Wilderness.' It further observed that the proposed road corridors would jeopardize between 131 and 152 acres (or approximately 1/20th of one percent) in a manner entirely inconsistent with Wilderness purposes. Bernhardt Decision at 7. ER 221.

3. **Refuge Management Considerations**. Bernhardt acknowledged that 'the 2013 ROD discussed concerns "[i]n addition to the direct impacts of construction and vehicle traffic associated with the proposed road, there is high potential for increased off-road access with the proposed construction of a maintained, all-season gravel-surface road." Bernhardt Decision at 7. ER 221.

4. **Viable Transportation Alternatives**. Bernhardt recognized that Jewell found flights from King Cove to Cold Bay, boat transportation, a hovercraft, and an aluminum landing craft were acceptable alternatives to a road notwithstanding the community's negative experience with each. Bernhardt Decision at 7-8. ER 221-222.

The determinative factor that caused Bernhardt to reach a different policy conclusion than Jewell (that is given little to no consideration by Petitioners, the Amici, and the Dissent) was Bernhardt's "paramount" concern regarding the competing, unmet need of KCC's indigenous community for safe, reliable, and affordable access to Alaska's transportation network for medical emergencies. Bernhardt Decision at 18-19. ER 232-233:

> 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.

2. Bernhardt Provided Two Independent Sets of Reasons for Reversing Jewell's Denial of OPLMA's Land Exchange and Road Construction.

Bernhardt gave two stand-alone, independent sets of reasons for reversing Jewell's 2013 decision. The first described new evidence gathered from numerous medical evacuations by air since execution of the 2013 ROD:

(1) The acute necessity, underestimated in the 2013 EIS and ROD, for a road connecting King Cove and Cold Bay to serve the future emergency medical and other social needs of the Alaska Native residents of King Cove and the Alaskan people.

(2) Changed information concerning the viability and availability of alternative means of transportation that have since proven to be neither viable nor available.

(3) A previous failure to take into consideration the high ongoing and future costs to the taxpayers of continuing emergency medical evacuations from King Cove by the U.S. Coast Guard.

(4) The substantial benefits to the citizens of the United States and residents of Alaska in increasing the total amount of acreage in the Izembek National Wildlife Refuge and adjacent Alaska Peninsula National Wildlife Refuges for the protection of scenic, natural, cultural, and environmental values by way of a land exchange with King Cove Corporation.

Bernhardt Decision at 8-11 and 17-18. ER 222-225 and ER 231-232.

His second, independent set of reasons for a change in policy explicitly stated that human life must be given greater weight among the competing considerations "even **if *the facts are as stated*** in the 2013 ROD:"

(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) resources**

would be degraded by the road's construction -- human life and safety must be the paramount concern in this instance. (Emphasis added). Bernhardt Decision at 19. ER 233. This rationale fully conforms to the law of this Circuit. As the Majority said at *Friends, supra.*, 29 F. 4th 432, 441-442 (9th Cir. 2022):

> The choice to place greater weight on the interests of King Cove residents sufficiently explained the change in policy. And the Secretary was entitled in 2019 "to give more weight to socioeconomic concerns" than his predecessor had in 2013, "even on precisely the same record." *Organized Vill. of Kake* , 795 F.3d at 968.

Neither of Bernhardt's two separate, independent lines of reasoning creates a "direct and entirely unexplained, contradiction of Jewell's finding," (even though his land exchange did not authorize, and would thus cause less ecological damage than, a road). Bernhardt Decision at 2. ER 216. Bernhardt's first reasons provide a full explanation of facts bearing on his decision to approve the land exchange that had been learned since Jewell's 2013 decision – most importantly the indigenous people's need for access to medical treatment from the Cold Bay Airport to Anchorage and Seattle which had continued to remain unmet since Jewell's denial of a road. Bernhardt Decision at 17. ER 231.

Bernhardt's second reasons reach the same conclusion by subsuming, but not contradicting, Jewell's 2013 factual findings regarding the availability of potential transportation alternatives and the adverse impacts of a road on the Refuge. Friends, Amici, the Dissent and the District Court do not explain how, if Bernhardt's decision

accepted ***all*** the prior factual findings in the 2013 ROD, it can be logically argued that any were discarded. *Kake* 795 F.3d at 968.

Bernhardt's deliberate adherence to Judge Gleason's APA analytical framework and consideration and acceptance of all major decisional facts in the 2013 ROD assured compliance and uniformity with *Fox's* core APA requirement for an agency change in policy. Accordingly, his decision is consistent with the law of this Circuit and the Supreme Court and an *en banc* hearing is not "necessary to secure or maintain uniformity of this court's decisions."

C. Judge Sedwick's Order and Opinion.

Friends again filed suit, claiming that Bernhardt's decision did not comply with *Fox* and *Kake*. In a June 2020 Order and Opinion Judge Sedwick set aside Bernhardt's findings. *Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt*, 463 F. Supp. 3d 1011 (Alaska 2020). Importantly, Judge Sedwick did not conclude that Bernhardt's reasoning conflicted with the uniformity of Ninth Circuit law as applied to an agency's change in policy.

Rather, Judge Sedwick's Opinion and Order focused solely on what he called "unexplained contradictions" in Items 1-4 (Bernhardt Decision at 8 – 11 and 17 -

18).[2] ER 222-225 and ER 231-232.The Majority correctly found that Judge Sedwick had mischaracterized what Bernhardt had said in one instance and that Bernhardt had adequately explained what Judge Sedwick called a contradiction in another. *Friends, supra.* 29 F.4th 432, 442-443.

Because he failed to even address Bernhardt's second set of reasons (Bernhardt's Decision at 19. ER 233) Judge Sedwick does not explain how, since Bernhardt considered "all the facts as stated in the 2013 ROD" in approving the land exchange (Bernhardt Decision at Page 19, ER 234), Bernhardt could have logically contradicted the facts on which Jewell relied in her 2013 ROD.[3]

II. ARGUMENT

A. FRIENDS' PETITION DOES NOT QUALIFY FOR *EN BANC* CONSIDERATION UNDER FED. R. APP. P. 35 (A).

Friends seek a remedy that is as inappropriate here as it is disfavored by the Court. Fed. R. App. P. 35(a) provides that ~~an~~ *en banc* hearing or rehearing "is not favored and ordinarily will not be ordered unless:

> (1) *en banc* consideration is necessary to secure or maintain uniformity of this court's decisions; or

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[2] The Dissent and the Law Professors' Amicus brief focus solely on similar disagreements with Bernhardt's additional facts and dismiss Bernhardt's alternative finding as a "sleight of hand." *Friends, supra.*, 29 F.4th 432, at 450.

[3] Neither the Dissent nor Law Professors' Amicus Brief (at 14) explain this either.

(2) the proceeding involves a question of exceptional importance."

Friends and Amici petition for rehearing *en banc* should be denied because they have not shown that either situation exists here. They have only explained why they think the Majority reached the wrong decision.

This Court has noted the rehearing *en banc* process is "seldom used merely to correct errors of individual panels … even in cases that particularly agitate judges," but instead is employed sparingly when needed to answer questions of great importance. *Hart v. Massanari,* 266 F.3d 1155, 1172 n.29 (9th Cir. 2001) (internal quotation marks and citation omitted). This is not such a case. For reasons described below the Majority correctly found that Bernhardt provided a satisfactory explanation for his decision to approve the Izembek land exchange that was consistent with relevant APA Supreme Court and Ninth Circuit precedent.

B. The Ninth Circuit Majority Decision Correctly Concluded that Bernhardt's Decision Complied with *Fox* and *Kake* 29 F4th 432, (9th Circuit 2022).

Friends contend:

> The Majority's decision eliminates the long-standing requirement that federal agencies must provide adequate justification when making a decision that reverses a prior agency policy. *FCC v. Fox Television Stations, Inc. (Fox*), 556 U.S. 502, 515–16 (2009). (Friends' petition page 1).

Friends are wrong. The Majority upheld Bernhardt's Decision to reverse Jewell's 2013 for two separate, independent reasons: 1) it disagreed with the district

court and Dissent that Bernhardt arbitrarily contradicted Jewell's factual findings; and 2) it found that even if the facts were the same as Jewell had determined, Bernhardt would have authorized the land exchange because he placed greater weight than Jewell on the unmet need of King Cove's indigenous people for reliable and affordable access to the Cold Bay Airport in a medical emergency.

As to the first independent reason, the Majority determined that it did "not agree with the district court that Secretary Bernhardt arbitrarily contradicted Secretary Jewell's factual findings." The Majority correctly found that Judge Sedwick had mischaracterized what Bernhardt had said in one instance and that Bernhardt had explained the contradiction that Judge Sedwick had asserted in another. *Friends, supra.* 29 F.4th 432, 442-443.

As to the second independent reason, the Majority found at *Friends, supra.,* 29 F.4th 432, at 442 that Bernhardt's decision to authorize the land exchange - even if the facts were the same as those in the 2013 ROD - satisfied the APA because it "did not rely on new facts, **but rather on a reevaluation of which policy would be better in light of the facts**. *National Ass'n of Home Builders*, 682 F.3d at 1038; see *Fox,* 556 U.S. at 514–16. For that reason, Judge Sedwick's criticisms of the Secretary's first independent reason is "beside the point." *Friends, supra.,* 29 F.4th 432, at 441-442. (Emphasis added).

The Majority explained:

> [A]n agency may offer alternative rationales for its decision, and if the agency makes clear that one would have been independently sufficient to justify its action, then a court need not consider the others if it finds the first to be valid. See *National Fuel Gas Supply Corp. v. FERC,* 468 F.3d 831, 839 (D.C. Cir. 2006); *United States v. Ross,* 848 F.3d 1129, 1135 (D.C. Cir. 2017). Plaintiffs do not dispute that both components of Secretary Bernhardt's decision—his new factual findings and his determination that changed policy priorities would lead him to the same result even without the new factual findings—were "genuine justifications" for his action. See *Department of Com. v. New York,* 139 S. Ct. 2551, 2575–76 (2019). *Friends, supra.*, 29 F.4th 432, at 442.

The Majority concluded: "There is therefore no reason to look beyond the valid justification that Secretary Bernhardt offered." *Id.*

The Dissent disagreed:

> To determine that the Secretary relied on new factual findings rather than on reweighing the same facts in the 2013 ROD, one need only observe the lack of analysis in the Secretary's purported "reweighing." After purportedly assuming the same facts, ***the Secretary did not engage in any real analysis of how the facts as they were in 2013 prompted the decision he reached, exactly what led him to reweigh them, or the specific factors he was reweighing***, aside from his pronouncement that "human life and safety must be the paramount concern." (Friends, supra., 29 F.4th 432, at 448). (Emphasis added).

The Dissent is incorrect. Bernhardt did explain why he reweighed the 2013 facts. See ER 222-225. Moreover, *Fox* does not require the additional analysis sought by Friends, the Dissent, and the Law Professors Amicus Br. at 14. The Supreme Court held in *Fox*:

> The Court of Appeals for the District of Columbia Circuit has similarly indicated that a court's standard of review is "heightened somewhat" when an agency reverses course. *NAACP v. FCC,* 682 F.2d 993, 998 (1982).

> We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard. And our opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.

556 U.S. 502, 514. The Court continued: "it is not that further justification is demanded by the mere fact of a policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox* at 556 U.S. at 515. Bernhardt's finding that he would have reached the same decision even if all the facts in the 2013 ROD were true assured that the decisional facts that underlay the 2013 ROD were not disregarded.

C. *Kake* Does Not Require That the 2013 and 2019 Records Be Exactly the Same; Just That the 2019 Facts Do Not Contradict the 2013 Facts.

Friends argue that because the records are not the same, the Secretary "could not exchange lands assuming all the facts as stated in the 2013 ROD." Friends Br. at 6. They contend "the present exchange involves substantially less acreage coming into federal ownership and allows for gravel mines and commercial road use." *Id.*

Friends are correct - the records are not the same. Had Secretary Jewell selected alternatives 2 or 3 in the 2013 ROD instead of the No Action alternative, Alaska and KCC would have had Congressional authorization under OPLMA to build the road. Bernhardt's Findings only approve a land exchange that will not cause the ecological damage from road construction described in Jewell's 2013 ROD. Any

future road will have to be permitted, at which time such issues as gravel[4] use and commercial use will be considered. Bernhardt Decision at 16. ER 231.

But *Kake* does not require that the records be the same. Rather, it says: "*State Farm* teaches that even when reversing a policy after an election, **an agency may not simply discard prior factual findings** without a reasoned explanation." 795 F.3d 968. (Emphasis added). By considering "all the facts as stated in the 2013 ROD" Bernhardt clearly did not discard or contradict Jewell's prior factual findings.

D. Bernhardt's Decision Did Not Attempt to Evade *Fox's* Explanation Requirement

Friends claim: "It would negate the requirements of *Fox* and its progeny if an agency could meet its burden by simply stating that it reached a new conclusion "even assuming all the contrary facts as stated." Friends' Br. at 7. This is similar to the Dissent's argument that by "assuming all the facts in the 2013 ROD he would" authorize the land exchange are "magic words . . . for surviving APA review of a

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[4] The 2013 EIS does not mention "gravel mines," but contemplates that "[o]ne or more material sites" are anticipated for use in road construction in the Alternative 2 alignment. AR 00179343 Just like the current corridor, the road corridor for the 2013 EIS anticipates that "[t]he road would be constructed with both cuts and fills; cuts and fills will be balanced [i.e., without [importing materials] to the maximum extent practicable." AR 00179346.

change in agency policy." *Friends, supra.*, 29 F.4th 432, at 448. The Dissent contends that the "magic words" would allow "agencies to evade *Fox's* explanation requirement so easily that it actually eliminates it." *Id.*

"Magic words" is a catchy, dismissive rhetorical phrase that could be levied as an "evasion" of any agency's policy change which considers all the facts of a prior decision and reaches a different policy conclusion – just as *Fox* and *Kake* allow. Its use in this case also ignores Bernhardt's detailed discussion of the facts surrounding his first set of reasons for changing the 2013 ROD decision.

Moreover, as the Majority observed, Friends do not dispute that *Fox* and *Kake* allow an agency to consider all the facts of a prior decision and reach a different conclusion or that "both components of Secretary Bernhardt's decision—his new factual findings and his determination that changed policy priorities would lead him to the same result even without the new factual findings—were "genuine justifications" for his action. *Friends, supra.*, 29 F.4th 432, at 442. Friends thus contradict the Dissent's "magic words" evasion argument as applied to this case.

In sum, Friends contradict, and the Dissent cites no record or legal support for, their "evasion" claim. Bernhardt's conscious, thorough assessment of the situation in 2013 relative to his 2019 decision described above proves the contrary and satisfies the *Fox* APA factors for the reasons discussed above.

E. Bernhardt's Decision Is Supported by the Record.

Friends claim that Bernhardt's decision is not supported by the record (Friends Petition at 9) is without merit because, as the Majority pointed out, his actual Findings were either mischaracterized by the District Court or adequately explained by the Secretary. *Friends, supra*. 29 F.4th 432, 442-443.

III. The ANILCA Decision Is Consistent with Supreme Court and Ninth Circuit Court Precedent

KCC defers to, and incorporates by reference, the brief of the State of Alaska on this point.

IV. The Panel Majority's ANILCA Title XI Decision Is Correct.

KCC defers to, and incorporates by reference, the brief of the State of Alaska on this point.

CONCLUSION

Friends petition for rehearing *en banc* must be denied because, ironically, it would create the exact type of confusion and dissonance it purports to remedy and does not meet the Fed. R. App. P. 35 (a)(1) threshold burden for an *en banc* hearing.

DATED this 2nd day of August 2022.

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CERTIFICATE OF COMPLIANCE FOR BRIEF PURSUANT TO

FEDERAL RULE OF APPELLATE PROCEDURE 32(a)AND FORM B

The undersigned attorney certifies that:

1. This brief contains 3913 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: August 2nd, 2022

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of August 2022 I caused to be electronically filed the foregoing Defendant-Intervenor-Appellants' KCC'S Brief Opposing Plaintiff Appellees' Petition For *En Banc* Rehearing 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

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

and

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

and

STATE OF ALASKA,
Intervenor-Defendant/Appellant

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

INTERVENOR-DEFENDANT APPELLANT STATE OF ALASKA'S RESPONSE TO THE PETITION FOR REHEARING EN BANC

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EN BANC REHEARING IS NOT APPROPRIATE

A rehearing en banc is only appropriate when: (1) en banc consideration is necessary to secure uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance. Fed R. App. P. 35(a). Neither of those circumstances arise from the panel majority's opinion. The petition for rehearing from the Friends of Alaska National Wildlife Refuges, et al. (Friends) expresses impassioned dissatisfaction with the panel majority's opinion. However, the petition fails to identify an inconsistent opinion from this Court or the Supreme Court and fails to articulate how the opinion "substantially affects a rule of national application in which there is an overriding need for national uniformity." Circuit Rule 35-1. Having failed to demonstrate either condition for rehearing en banc, the petition should be denied.

SUMMARY OF THE ARGUMENT

The Friends' petition argues that the panel majority misreads the Alaska National Interest Lands Conservation Act (ANILCA) on two issues: (1) the majority held the enumerated purposes of ANILCA include the consideration of the economic and social needs of the State of Alaska and its people; and (2) the majority held that a land exchange authorized by ANILCA's section 1302 is not subject to ANILCA Title XI's procedures for the approval of transportation or utility systems. If the Friends' presentation of law was adopted by an en banc

panel, the resulting decision would be in direct conflict with the Supreme Court's decision in *Sturgeon v. Frost*, 139 S.Ct. 1066, 1075 (2019) and this Court's decision in *City of Angoon v. Marsh*, 749 F.2d 1413, 1415-16 (9th Cir. 1984). Accordingly, the Friends petition for rehearing en banc should be denied.

BACKGROUND

I. Historical Context of ANILCA.

When Alaska became a state in 1958, the federal government owned virtually all land in Alaska. *Sturgeon*, 139 S.Ct. at 1073. To propel industry and to create a tax base, the Alaska Statehood Act authorized the State to select for itself 103 million acres of "vacant, unappropriated, and unreserved" federal land. Pub. L. No. 85-508 §§ 6(a), (b), 72 Stat. 339 (1958). Over the course of the State's land selections, it became readily apparent that Alaska Natives asserted aboriginal title to much of the State's selected lands. *Sturgeon*, 139 S.Ct. at 1073. Congress attempted to resolve the competing land claims when it passed the Alaska Native Claims Settlement Act (ANCSA) in 1971, which created Alaska Native corporations that were authorized to select 40 million acres of federal land. 43 U.S.C. § 1611. Congress sought to implement the settlement "rapidly, with certainty, in conformity with the real economic needs" of Alaska Natives. 43 U.S.C. § 1601(b).

ANCSA also directed the Secretary of the Interior to select up to 80 million acres of unreserved federal land, subject to congressional approval, for additional national parks, forests and wildlife systems. 43 U.S.C § 1616(d)(2). Congress refused to ratify the selections of President Carter's administration, and instead enacted ANILCA to set aside 104 million acres of federal land in Alaska as new or expanded national parks, monuments, and preserves "but on terms different from those governing such areas in the rest of the country." *Sturgeon*, 139 S.Ct. at 1075. One of those newly established refuges was the Izembek National Wildlife Refuge, which became a conservation system unit (CSU) under ANILCA. 16 U.S.C. § 668dd note; ANILCA § 303(3).

When setting the boundaries of these newly created CSUs, Congress made "an uncommon choice—to follow 'topographic or natural features,' rather than enclosing only federally owned lands." *Sturgeon*, 139 S.Ct. at 1075 (quoting, 16 U.S.C. § 3103(b)). Congress's prior grants to the State and to Alaska Native corporations created a "confusing patchwork of ownership" that made it impossible to exclude non-federal lands from these new and expanded parks and preserves. *Id.* (quoting, C. Naske & H. Slotnick, Alaska: A History 317 (3d ed. 2011)). Ultimately, 18 million acres of State, Native, and private land wound up inside CSUs established by ANILCA. *Id.* at 1075-76. The land owned by the King Cove Corporation (KCC) that the Department of Interior seeks to acquire in the

2019 Exchange Agreement is one such inholding located within the CSU. 2-ER-35 (Native Corporation Lands within Izembek National Wildlife Refuge Complex).

Not surprisingly, ANILCA's expansive drawing of CSU boundaries concerned the people of Alaska. As Alaska's Senator Gravel noted: "[If] there is no real provision mandatorily that Alaskans can get to our land of our will, then there is something wrong, because what is being breached is the compact under the Statehood Act and the law of great justice which gave the Natives of Alaska their rightful legacy." 126 Cong. Rec. 11062 (1980). Alaska's Senator Stevens suggested that ANILCA authorize the Secretary of the Interior to reacquire these State or Native holdings "wherever possible." *Sturgeon*, 139 S.Ct. at 1075 (quoting 126 Cong. Rec. 21882 (1980)).

In March 1998 the Department of the Interior identified the KCC land that it seeks to acquire through the challenged land exchange as a "high priority" for acquisition. 2-ER-36 (Land Protection Priorities within Izembek National Wildlife Refuge Complex).

II. The 2019 Exchange Agreement.

The 2019 Exchange Agreement clearly expresses that the exchange of lands with KCC will "serve the purposes of ANILCA by [(a)] striking the proper and appropriate balance between protecting the national interest in the scenic, natural, cultural and environmental values of the public lands in Alaska and [(b)] providing

an adequate opportunity for satisfaction of the economic and social needs of the State of Alaska." 2-ER-236. Secretary Bernhardt's decision to enter into the Exchange Agreement expands on this reasoning by explaining that meeting these dual purposes would be accomplished:

> by adding substantial acreage to the Izembek and Alaska Peninsula refuges that has been previously identified by the FWS [U.S. Fish and Wildlife Service] as being important habitat while offering KCC the opportunity to explore improved public safety through a safer and more reliable means of emergency access to the Cold Bay airport for the residents and visitors to King Cove.

2-ER-233.

More specifically, the shorelands identified by KCC for exchange under the 2019 Land Exchange are recognized for their biological importance by the Ramsar Convention on Wetlands of International Importance, a treaty for the conservation and wise use of wetlands and their resources. 2-ER-200. KCC also agreed to relinquish rights under ANCSA to 5,340 acres of land within the Izembek NWR selected by KCC but not yet conveyed by the federal government. 2-ER-238. In exchange, the federal government would transfer title to a narrow strip of uplands totaling less than 500 acres that would begin and end at the existing road systems on each end of the Izembek isthmus. 2-ER-225, 235. If a gravel road is ever constructed on the exchanged land, the total footprint of disturbed land is only

expected to be 155 acres that were carefully located in manner to avoid and minimize environmental impacts to wetlands and wildlife. 2-ER-199.

The 2019 Land Exchange Agreement is the product of a discretionary policy decision that weighs two independently valuable and competing resources. As Secretary Bernhardt explained in his decision:

> Just as Secretary Jewel noted in her review years ago, a decision addressing the KCC request and evaluating the new proposed land exchange agreement must "weigh[ ] on the one hand the concern for more reliable methods of medical transportation from King Cove to Cold Bay and, on the other hand, a globally significant landscape that supports an abundance and diversity of wildlife unique to the Refuge …" Whether to proceed under the Congressional grant of authority in the Omnibus Public Management Act of 2009 (OPLMA) is a discretionary policy decision, as is whether to make an exchange under section 1302(h) of ANILCA.

2-ER-216 (internal quote to 2013 Record of Decision, at 2; 2-ER-38). Secretary Bernhardt quite succinctly captures the competing purposes that federal land managers face when implementing the "Janus-faced nature in [ANILCA's] statement of purpose" that arose from "ANILCA's grand bargain" between Federal, State, and Native land holders. *Sturgeon*, 139 S.Ct. at 1083-84.

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ARGUMENT

I. Supreme Court and Ninth Circuit precedents recognize the stated purpose of ANILCA to provide for the economic and social needs of the State of Alaska and its residents.

The U.S. Supreme Court is clear and direct in articulating ANILCA's competing goals: "The Act was designed to 'Provide[ ] sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska.' . . . '[A]nd at the same time,' the Act was framed to 'provide[ ] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." *Sturgeon*, 139 S.Ct. at 1075 (quoting 16 U.S.C. § 3101(d)). The Ninth Circuit's *City of Angoon v. Marsh* description of ANILCA's dual purposes is equally clear: "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." 749 F.2d 1413, 1415-16 (9th Cir. 1984) (emphasis added).

The Friends' petition does not address these clear recitations of ANILCA's two-fold directive but, instead, attempts to glean ANILCA's statement of intent from select pages of the *Sturgeon* decision where the Court discusses Congress's creation of CSUs. Docket 85 at 19. The Friends' selective reading of *Sturgeon* to justify ANILCA as a conservation-only statute begs the question: Why did the

Supreme Court dedicate one-half of its unanimous opinion to the history of the present patchwork of Federal, State, and Native lands and ANILCA's creation of the State, Native, and private inholdings—such as the community of King Cove—that resulted from ANILCA's over-inclusive CSU boundaries? *Sturgeon*, 139 S.Ct. at 1073-77. The answer is that the history and the current status of the inholdings within the federal protected areas confirms ANILCA's "grand bargain" of both "safeguarding 'natural, scenic, historic[,] recreational, and wildlife values,'" and "'providing for' Alaska's (and its citizens') 'economic and social needs,'" which supported both the Court's interpretation of ANILCA in *Sturgeon* and the Secretary's application of it here. *See Sturgeon*, 139 S.Ct. at 1083–84 (quoting 16 U.S.C. § 3101(a), (d)).

Rather than accepting the clear statements of law from Supreme Court and Ninth Circuit precedents, the Friends' petition mischaracterizes the plain language of ANILCA's § 101(d) by ascribing to Congress an understanding that "it had achieved the proper balance of conservation and economic and social needs." Docket 85 at 18. The Friends' argument uses past tense verbs to argue that Congress determined this balancing was done with the passage of ANILCA. But what Congress actually said, using the present tense, is that ANILCA "*provides adequate opportunity* for satisfaction of the economic and social needs of the State of Alaska and its people." ANILCA § 101(d); 16 U.S.C. § 3101(d)(emphasis

added). That means the opportunity for the economic and social needs of Alaskans, as well as the protection of natural resources, was not only considered by Congress when it enacted ANILCA, but must also be considered in the implementation of ANILCA. *See Sturgeon*, 139 S.Ct. at 1083-84 ("ANILCA announced its Janus-faced nature in its statement of purpose.").

The only statement of congressional achievement in ANILCA § 101(d) is the second sentence's statement that the need for future legislation "has been obviated thereby," which provides the rationale for Congress's restrictions on the expansion of ANILCA's CSUs. 16 U.S.C. § 3101(d). *See Se. Conference v. Vilsack*, 684 F. Supp. 2d 135, 138 (D.C. Cir. 2010); *see also* ANILCA § 1326, 16 U.S.C. § 3213 (prohibition of executive branch actions withdrawing greater than 5000 acres of public lands in Alaska). The Carter administration's overreaching and unpopular designation of vast swaths of Alaska for conservation was why Congress reacted with the "grand bargain" of ANILCA, "but on terms different from those governing such areas in the rest of the country." *Sturgeon*, 139 S. Ct. at 1075. The amicus brief of President Carter quotes the past tense language from this second sentence of ANILCA § 101(d) to argue that there is no present requirement to balance conservation needs with the needs of people living within and surrounded by ANILCA's CSUs. Docket 88-2 at 11. This selectively misleading focus on the past tense phrasing in the second sentence of ANILCA § 101(d)

ignores the present tense of the first sentence of ANILCA § 101(d) and the Act's historical context. Neither this Court nor the U.S. Supreme Court have read ANILCA's purposes as frozen in time. *Sturgeon*, 139 S.Ct. at 1075 (quoting 16 U.S.C. § 3101(d)) and *City of Angoon*, 749 F.2d at 1415-16 (same). Rather, the purposes continue to inform the present day interpretation and application of the Act. In line with the present-tense language of ANILCA § 101(d), the economic and social needs of Alaskans must be considered when a federal official is implementing ANILCA.

II. The 2019 Exchange Agreement is permissible under ANILCA and does not affect a rule of national application in which there is an overriding need for national uniformity.

A. The petition does not state with particularity the question of exceptional importance or the rule of national application needing national uniformity.

The Friends characterize Secretary Bernhardt's approval of the 2019 Exchange Agreement under the authority of ANILCA § 1302(h), rather than ANILCA Title XI, as presenting a "question of exceptional national importance" and a "question of first impression." Docket 85 at 17, 20. Neither statement is correct. The Friends therefore cannot meet the standards for en banc rehearing set by F.R.A.P. Rule 35(a) this Court's Circuit Rule 35-1 ("When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding

need for national uniformity, the existence of such conflict is an appropriate ground for petitioning for rehearing en banc.").

The Secretary of Interior's power to acquire lands by exchange under ANILCA § 1302(h) may only be exercised in Alaska with Native entities, Alaskan state or municipal governments, or other Alaskan landowners. *See* 16 U.S.C. § 3192(h). The narrow geographic scope and the limited availability of this federal land exchange authority is in line with the Supreme Court's acknowledgement that ANILCA "repeatedly recognizes that Alaska is different." *Sturgeon*, 139 S.Ct. at 1077 (quoting *Sturgeon v. Frost ("Sturgeon I")*, 577 U.S. 424, 438 (2016)). The panel majority's affirmance of the Secretary's Exchange Agreement therefore has a narrow potential application—if any—outside of the context of the specific exchange at issue, and there is no need for uniformity with rules of national application. The panel majority's decision, therefore, does not meet this Court's standards for rehearing en banc.

Not only are there no conflicting opinions by this Court or another court of appeals, there is a district court decision that analyzed a land exchange that included plans for transportation infrastructure and the district court nowhere mentioned ANILCA Title XI. In *National Audubon Society v. Hodel*, the U.S. District Court in Alaska examined a proposed exchange of lands under the authority of ANILCA § 1302(h) that would enable an Alaska Native corporation's

acquisition of a parcel within the St. Mathew Island wilderness area. 606 F. Supp. 825, 828 (D. Alaska 1984). The wilderness area parcel, which is part of the larger Alaska Maritime National Wildlife Refuge, was needed for the construction of a 3000-foot airstrip, a 400-by-400-foot gravel pad for a camp, and a connecting 9000-foot road. 606 F.Supp. at 845. Although roads and airports are certainly transportation systems, the district court did not require an ANILCA Title XI process for the Alaska Native Corporation to complete a land exchange with the Department of Interior. *Id.* at 828 ("The exchange provision in § 1302(h) of ANILCA imposes two requirements before a land exchange may be approved. First, the Secretary must determine that the exchange will result in 'acquiring lands for the purposes of [ANILCA].' Second, the exchange must further the 'public interest' if the lands exchanged are of unequal value." (quoting 16 U.S.C. § 3192(h))). Although the district court invalidated the land exchange for other reasons, the decision's interpretation of ANILCA § 1302(h)'s requirements clearly did not include an ANILCA Title XI prerequisite to the land exchange.

B. The 2019 Land Exchange is consistent with the text and context of ANILCA §1302(h) exchanges.

The Friends' petition offers an unusual argument that ANILCA § 1302(h) is "principally to enable the Secretary to acquire private inholdings within units without resorting to condemnation." Docket 85 at 19; *see also* Bruce Babbitt amicus, Docket 89 at 14 ("Congress intended to provide limited Secretarial

authority to acquire inholdings by exchange for conservation and subsistence purposes."). These arguments fail to recognize that these inholdings are populated by communities, non-federal public lands, Alaska Native properties, and homesteads, and they are the location of all associated activities that were occurring prior to Congress's wrapping the lands into the CSUs. As the *Sturgeon* decision recognizes, "Over three-quarters of Alaska's 300 communities live in regions unconnected to the State's road system." 139 S.Ct. at 1087. Congress certainly did not intend for the federal government to relocate inholder people or communities by eminent domain or otherwise. Secretary Bernhardt's decision gives a much more accurate description of the exchange authority in ANILCA § 1302(h) as "an important tool provided to the Secretary by Congress to adjust broad Conservation System Unit designations to reflect the health, safety, and other interests of local people in concert with the national interest in conservation." 2-ER-228.

Similarly, the panel majority's interpretation of ANILCA § 1302(h) does not give the Secretary of the Interior "boundless discretion to redraw boundaries" or to "trade away North America's tallest mountain—Denali in the Denali National Park—for economic gain" as argued by the Friends. Docket 85 at 20. As recognized by the *Hodel* decision, the Secretary's acquisition of lands by exchange is limited and must meet the purposes of ANILCA. 606 F.Supp. at 828. It is

extremely unlikely that the Secretary could complete an equal value exchange for Denali; but the Secretary likely could provide a rural community with access to a geothermal or hydropower source so the community could end its reliance on diesel fuel power generation. The Secretary could also complete an equal value exchange with a homesteading family or historic hunting lodge for safer transportation by improved shoreline access or lengthening an airstrip. Congress created landlocking issues when it drew over-inclusive CSU boundaries, and Congress gave the Secretary of the Interior tools to remedy the problems that Congress created.

C. The 2019 Land Exchange has no ANILCA Title XI requirements.

ANILCA § 1302 sets out the Secretary of the Interior's general authority "to acquire by purchase, donation, exchange, or otherwise any lands within the boundaries of any conservation system unit." 16 U.S.C. § 3192(a). Subsection (h) authorizes the Secretary to acquire lands for the purposes of ANILCA by "exchange [of] lands (including lands within conservation system units and within the National Forest System) or interests therein (including Native selection rights) with the corporations organized by the Native Groups." 16 U.S.C. § 3192(h). Congress intended that the Secretary's authority to exchange land for the purposes of ANILCA remain separate and distinct from the Secretary's ANILCA Title XI authority to allow an applicant to use federal land for transportation and utility

purposes by easement, permit, or license. Thus, the petition is incorrect when it argues that the fee simple exchange under ANILCA § 1302(h) is subject to the processes of Title XI. Docket 85 at 23. Likewise, the Friends are incorrect in their conclusion that Section 1302 "is an 'applicable law' subject to Title XI." Docket 85 at 23.

The legislative history of the land exchange authority in ANILCA noted that the Secretary would have "great flexibility" in making land exchanges even when the land exchange would result in conservation system land moving into private hands. 3-ER-167; H.R. Rep. No. 95-1045, pt. I, at 211-12 (1978). When discussing the ramifications of including non-federal property in the newly created conservation system units, Congress recognized that ANILCA's Title XI and ANILCA § 1302(h) were separate and distinct authorities to resolve issues associated with the landlocking of rural Alaskan communities: "The Committee recognizes that many of the units will contain State and Native inholdings; however the Committee anticipates that the Secretary will use his authority under Title XI to work out voluntary, cooperative agreements with the other owners in planning and managing these lands, *and* his authority under section 1201(f) to make exchanges of lands." 3-ER-311; H.R. Rep. No. 95-1045, pt. I, at 211 (1978)

(emphasis added).[1] Thus, Congress clearly intended two separate and distinct authorities that the Secretary could rely on to provide access to the individual and community inholdings that became landlocked by the creation of the surrounding ANILCA CSUs.

Further evidence that ANILCA § 1302(h) is a freestanding authority for the Secretary's use, and not an "applicable law" requiring procedural compliance with ANILCA's Title XI, can be found in the Department of the Interior's 1986 final rulemaking to implement the provisions of Title XI. *See* Transportation and Utility Systems in and Across, and Access Into, Conservation System Units in Alaska, 51 Fed. Reg. 31,619 (Sept. 4, 1986). That rulemaking clarified "which laws and regulations administered by which agencies are meant within the ambit of 'applicable law'" by listing the Department of the Interior authorities to grant rights-of-way over federal lands for roads or utilities. *Id*. at 31,620 (referencing: the Bureau of Land Management's 43 U.S.C. § 1761 and 30 U.S.C. § 185; the Fish and Wildlife Service's 16 U.S.C. § 668dd and 50 CFR § 29.21; the National Park Service's 54 U.S.C. § 100902 and 36 C.F.R. § 14; and the general right-of-way granting authority for federal-aid highways at 23 U.S.C § 317). Each of these

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

authorities provides a federal agency discretionary jurisdiction to transfer an easement, permit, or license for the limited use of a road or utility crossing federal land, which is consistent with Title XI's definition of "applicable law." *See* ANILCA § 1102(1); 16 U.S.C. § 3162(1). None of the listed statutes and regulations authorize the federal agency to acquire land, and none authorize the federal agency to dispose of a fee interest. Because Title XI's definition of "applicable law" does not include a land exchange authority, and Congress intended the Secretary to have two distinct tools to remedy ANILCA's landlocking of State and Native properties inside CSUs, the majority opinion was correct when it determined that ANILCA § 1302(h) does not fall within the ambit of Title XI.

Because the panel majority held that the 2019 Exchange Agreement is not subject to Title XI's requirements, it did "not consider the alternative argument advanced by the State that the land exchange is exempted from Title XI by 16 U.S.C. § 3170(b), which guarantees a right of access to inholdings of state and native land within conservation system units." *Friends of Alaska Nat'l Wildlife Refuges v. Haaland*, 29 F.4th 432, 443 (9th Cir. 2022). The Friends and amici incorrectly argue that if Title XI is applicable (it is not), then KCC must receive additional approvals by the President and Congress before building a road. Docket 85 at 24 (citing ANILCA § 1106(b); 16 U.S.C. § 3166(b)); *see also* President Carter amicus, Docket 88-2 at 14 (same); and Law Professors' amicus, Docket 86-

2 at 18 (same). ANILCA § 1106(b), the most onerous procedural process of Title XI, does not apply to ANILCA's requirement that the Secretary shall provide access rights to inholdings that are effectively surrounded by CSUs. *See* ANILCA § 1110(b); 16 U.S.C. § 3170(b) ("[T]he State or private owner or occupier shall be given adequate and feasible access for economic and other purposes to the concerned land . . . ."); *see also* 43 C.F.R. § 36.10 (procedures to provide adequate and feasible access to inholdings). Since the community of King Cove is an inholding surrounded by CSUs, the community would be exempt from ANILCA § 1106(b) if it were to seek a road easement under Title XI.

Additionally, Congress recognized the inholding status of King Cove when it approved the concept of the King Cove Road in the Omnibus Public Lands Management Act of 2009 (OPLMA). Congress made clear that nothing in that law would amend or modify King Cove's right of access as an inholding under ANILCA § 1110. 2-ER-212; OPLMA § 6403(d) ("Nothing in this section ['King Cove Road'] amends, or modifies the application of, section 1110 . . . ."). The community of King Cove's right to access under ANILCA's § 1110(b) was unaffected by Secretary Jewell's decision to reject the land exchange and construction contemplated by the OPLMA and, likewise, the inholding's right to access is unaffected by the 2019 Land Exchange between the Secretary and KCC.

CONCLUSION

The State respectfully requests this Court to deny the Friends' petition for a rehearing of the arguments en banc. The petition does not meet the requirements of Fed R. App. P. 35(a) and Circuit Rule 35-1.

Date: August 5, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that:

This brief complies with the type-volume limitation of Circuit Rules 35-4 40-1 (a) because this brief contains 4177 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Date: August 5, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

Date: August 5, 2022.

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