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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

FRIENDS OF ALASKA NATIONAL WILDLIFE REFUGES, *et al*., Plaintiffs, v. RYAN ZINKE, *et al*., Federal Defendants, and KING COVE CORPORATION, *et al*., Intervenor-Defendants.	CASE NO. 3:18-cv-00029-TMB **FEDERAL DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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I. INTRODUCTION

On January 22, 2018, Secretary of the Interior Ryan Zinke used his authority under section 1302(h) of the Alaska National Interest Lands Conservation Act ("ANILCA") to enter into the Agreement for the Exchange of Lands ("Agreement") with King Cove Corporation ("KCC"), an Alaska Native village corporation. Pursuant to the Agreement, King Cove, an isolated community on the Aleutian Peninsula in Alaska, will receive up to 500 acres of federal lands. Ownership of these lands will allow this community to pursue construction of a life-saving road between the village and a nearby all-weather airport, following decades of trying expensive alternative solutions that did not serve the community's needs – during which time, a number of people died unable to reach medical care. AR DOI-00414.[1]

As detailed in the Agreement, the Department of the Interior agreed to convey to KCC up to 500 acres out of the 315,000 total acres of land in the Izembek National Wildlife Refuge in exchange for an as-yet-to-be determined number of acres from lands owned by KCC that are adjacent to the refuge. The number of acres to be received from KCC and incorporated into the refuge will be that amount of land necessary for an equal value exchange. Additionally, KCC agreed to relinquish its selection rights under the Alaska Native Claims Settlement Act ("ANCSA") to 5,430 acres on the east side of Cold Bay, including acreage that the U.S. Fish and Wildlife Service (the "Service") had previously identified as being highly desirable for

[1] References to "AR ########" (documents compiled in 2014) or "AR DOI-#####" (documents compiled in 2018) in this brief refer to the bates-stamp numbering in the bottom right corner of each page in the administrative record.

preservation as habitat and inclusion in the refuge.[2] In other words, the Agreement will not reduce the amount of federal land protected as part of the refuge.

Plaintiffs have challenged the lawfulness of the Agreement under ANILCA, the National Environmental Policy Act ("NEPA"), and the Endangered Species Act ("ESA"). As Defendants establish below, the Agreement fully complies with ANILCA because it serves the statute's purposes of protecting the national interest in the public lands of Alaska while meeting the economic and social needs of the State and its people. As for Title XI of ANILCA, Plaintiffs claim that it requires a long and complex planning process for approval of a "transportation system," but no such system has been approved – the Agreement merely allows the community to take further steps in its pursuit of a possible gravel road. While execution of this Agreement was not subject to the requirements of NEPA, approval of actual construction of a road will likely be subject to NEPA review. Similarly, the Agreement itself has no effect on protected species or lands, and the execution of the Agreement did not violate the ESA.

Plaintiffs' claims largely relate to the use of land for a prospective road that may or may not be built. In other words, road construction will not occur simply as a result of the land exchange. Any such road would have to comply with all federal and state laws and regulations before it could be built, and Plaintiffs' concerns should be addressed at that time.

For these reasons, Plaintiffs' motion for summary judgment should be denied, and summary judgment should be granted for Federal Defendants.[3]

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[2] KCC, as the Native Corporation for the village of King Cove, was entitled under ANCSA to select and receive a patent for the surface estate of 161,280 acres of land as set forth at 43 U.S.C. § 1613(a).

[3] Pursuant to D.Ak. L.R. 16.3(c)(2), this brief in opposition to Plaintiffs' motion for summary judgment is deemed a cross-motion for summary judgment.

II. FACTUAL BACKGROUND

Congress established the 315,000 acre Izembek National Wildlife Refuge in 1980 when it passed ANILCA. *See* Pub. L. No. 96-487 (HR 39), Title III § 303(3) (Dec. 2, 1980).[4] At the time, legislators highlighted this region's "outstanding scenery, key populations of brown bear, caribou and other wilderness-related wildlife, and critical watersheds for Izembek Lagoon." H. Rep. 96-97, pt. II (1979). The Department of the Interior, through the Service, manages the refuge so as to "conserve fish and wildlife populations and habitats in their natural diversity," "ensure … water quality," as well as to "provide … opportunity for continued subsistence uses by local residents." Pub. L. No. 96-487, § 303(3)(B), 94 Stat. 2371, 2390-91. Part of the refuge spans the isthmus separating the Izembek Lagoon and the Bering Sea, to the north, from Cold Bay and the Pacific Ocean, to the south. AR DOI-00035.

The Village of King Cove and the City of Cold Bay in southwestern Alaska lie 18 miles apart. *Id*. Both are in close proximity to the Izembek Refuge. *Id*. King Cove has a population of approximately 800 people year-round, but the population expands to approximately 1,300 people during the summer. *Id*. While King Cove has the larger population, Cold Bay has the larger airport—an instrument-capable airport with a paved runway more than 10,000 feet long (one of the longest in the state) and a crosswind runway. *Id*. It is a former military airport kept in service primarily as an emergency landing location between North American and Asian airport hubs. *Id*. Both communities are accessible only by sea or by air.

King Cove and Cold Bay are separated not only by miles, but also by:

- the water body of Cold Bay, which is known for severe winds and waves, and infrequently for ice;
- mountainous terrain, particularly near the City of King Cove and its small airport;

[4] The area had formerly been designated as the "Izembek National Wildlife Range," which was established two decades earlier under Public Land Order 2216 (Dec. 6, 1960).

- an isthmus 3 miles wide separating the head of Cold Bay, which opens to the Pacific Ocean, from the Bering Sea; and,
- the Izembek Refuge and Izembek Wilderness on the isthmus and by the Alaska Peninsula National Wildlife Refuge along the shoreline.

Id.

The residents of the remote King Cove community have long sought reliable access to Cold Bay's all-weather airport to allow for emergency medical evacuations and other purposes. AR DOI-00410-412. Congress has repeatedly shown itself to be sympathetic to that need. In 1999, Congress passed the King Cove Health and Safety Act of the Consolidated and Emergency Supplemental Appropriations Act of 1999. Pub. L. No. 105-277, § 353, 112 Stat. 2681-302-03. Under this act, $20 million was made available to construct a road-hovercraft link from King Cove to the dock, $15 million was for improvements to the King Cove airstrip, and $2.5 million was for a major renovation of the King Cove health clinic. *Id*. These funds allowed for the purchase of a $9 million hovercraft and the construction of a landing along the northeastern shore of Cold Bay. AR DOI-00040.

Due to the unreliability of the hovercraft in severe weather and uncertainty about future funding for its high operational costs, King Cove residents continued to seek a road linking their community with Cold Bay. AR DOI-00415. In fact, the hovercraft service was discontinued between King Cove and Cold Bay after 2010 due to cost and reliability concerns. AR DOI-00040. During its years of operation from 2007-2010, the hovercraft was used to complete 30 medical evacuations but was inoperable 30 percent of the time. *Id*.

Ten years after passing the King Cove Health and Safety Act, Congress again took action to assist the residents of King Cove. In the Omnibus Public Land Management Act of 2009 ("OPLMA"), Congress directed the Secretary of the Interior to develop an environmental impact statement to determine whether or not a land exchange and road construction within the

boundaries of the Izembek Refuge would be in the public interest. Pub. L. No. 111-11, Title VI, Subtitle E, 123 Stat. 991 (Mar. 30, 2009). The proposed exchange would have transferred to the State of Alaska all right, title and interest to a corridor of land "for the purpose of constructing a single-lane gravel road between the communities of King Cove and Cold Bay, Alaska." OPLMA § 6402(a). Subject to limited exceptions, the use of any portions of the road built on the conveyed federal lands would be "primarily for health and safety purposes (including access to and from the Cold Bay Airport) and only for noncommercial purposes." *Id.* § 6403(a)(1). If the public interest determination was in the affirmative, then road construction was authorized. *Id*. § 6402(d)(1). However, if no construction permits for the road were issued within seven years, then the authorization expired. *Id.* § 6406(a).

On December 23, 2013, then-Secretary Jewell signed a Record of Decision in which she concluded that the road would not be in the overall public interest because it "would lead to significant degradation of irreplaceable ecological resources that would not be offset by the protection of other lands to be received under an exchange . . . [and] . . . because reasonable and viable transportation alternatives exist to meet the important health and safety needs of the people of King Cove." AR DOI-00003. King Cove submitted a request for reconsideration. AR DOI-00023-24. However, after further consultation and visiting the site, then-Secretary Jewell signed a letter dated August 13, 2014, affirming her conclusion and rejecting the community's decision that a road would best suit their needs. *Id*.

In the meantime, King Cove filed a complaint in the District Court for the District of Alaska, alleging that the Secretary's decision violated, among others, OPLMA, NEPA, ANILCA, the Administrative Procedure Act ("APA"), and the government's trust responsibility to tribes. *Agdaagux Tribe of King Cove, et al. v. Jewell, et al.,* Case No. 3:14-cv-0110-HRH (D.

Alaska). The State of Alaska intervened on behalf of the plaintiffs, while a number of environmental groups intervened on behalf of the federal government. *Id*. The Court granted the federal government's motion for summary judgment, and King Cove appealed. *Id*. During the pendency of the appeal, Congressional authorization for the road construction expired on March 30, 2016. OPLMA § 6406(a).

Since December 2013 when then-Secretary Jewell signed the ROD, there have been a total of 68 medical evacuations from King Cove. AR DOI-00888; AR DOI-00811-28 (describing each medevac from 2014-2017). Of those 68, 17 evacuations had to be handled by the U.S. Coast Guard. *Id*. Evacuations by the U.S. Coast Guard add significant cost at approximately $210,000 per rescue mission and risk the lives of the Coast Guard personnel as well as those King Cove residents being rescued. AR DOI-00808; AR DOI-00867.

Early in 2017, the Department of the Interior decided to re-consider the issue of a land exchange with KCC. AR DOI-00256-66 (transcript of Secretary Zinke's confirmation hearing where he committed to work on this issue); AR DOI-00390. In May 2017, KCC formally requested that Interior agree to an exchange, explaining:

> Although King Cove is only 12 miles from Alaska's fourth longest paved civilian runway, at Cold Bay, the residents of King Cove cannot regularly reach the airport. The weather in our area is some of the worst in Alaska and will often prevent us from accessing the Cold Bay airport by small aircraft. This weather is subject to radical change even during the same day. So, it is only possible to schedule air travel from our small airstrip about 50% of the time with any certainty of safety. Twelve persons have died in the past years trying to get to and from the King Cove unpaved, gravel landing strip.
>
> In addition, we have had many "near miss" events. For example, Etta, Kuzakin, President of the Agdaagux Tribal Council was medevaced from King Cove while 34 weeks pregnant to give birth by cesarean section in Anchorage. She was flown to Cold Bay on a Coast Guard helicopter from a Coast Guard ship, which fortuitously was in the area. There were 60 knot winds that forced her to fly a circuitous route to Cold Bay that took 40 minutes. Had the Coast Guard not been

> there or able to flyer her to Cold Bay she could not have given birth because the King Cove clinic lacks the ability to perform a cesarean section.

AR DOI-00410. Following discussions with KCC representatives, the parties agreed to explore the concept of an equal value land exchange that would give KCC a narrow corridor through the refuge on which a road could potentially be constructed in exchange for lands belonging to or selected by KCC, the end result of which would likely be a substantial increase in the total amount of public land comprising the refuge. AR DOI-00410-412. In light of these discussions, King Cove moved to dismiss its appeal, which the Court granted in August 2017. *Agdaagux Tribe of King Cove, et al. v. Zinke, et al.,* No. 15-35875, 2017 WL 5198384 (9th Cir. Aug. 11, 2017).

On January 22, 2018, Secretary Zinke entered into the Agreement with KCC pursuant to section 1302(h) of ANILCA. AR DOI-00887-902. In the Agreement, the parties agreed to an equal value exchange whereby KCC agreed to convey to the United States the surface estate of certain lands within the Izembek and Alaska Peninsula National Wildlife Refuges and relinquish its selection rights to an additional 5,430 acres within the Izembek Refuge. AR DOI-00887, -890. In return, the Secretary agreed to convey to KCC the surface and subsurface estates of not more than 500 acres in the form of a narrow corridor through the Izembek Refuge. AR DOI-00889. The precise location of the corridor has yet to be finalized, but when that occurs, the precise number of acres to be conveyed by KCC to the United States will be adjusted to ensure an equal value exchange. AR DOI-00889-90. The Agreement contemplates development of a road primarily for health, safety, and quality of life purposes and "generally for noncommercial purposes." AR DOI-00889.

III. STATUTORY BACKGROUND

A. Alaska National Interest Lands Conservation Act

Congress enacted ANILCA "to preserve and protect 'nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values' and landscapes by creating 'conservation system units,' such as national parks, preserves, refuges, and other federal reservations." *John v. United States*, 720 F.3d 1214, 1218 (9th Cir. 2013) (footnote omitted). Congress also protected the "subsistence way of life for rural residents" with this act as well as the resources upon which they depend, in order to remove the need for future legislation regarding environmental conservation and subsistence uses. *Id.* (footnote omitted).

In ANILCA, Congress included a provision, section 1302(h), that authorized the Secretary, when acquiring lands for the purposes of ANILCA, to exchange lands in refuges and other conservation system units with corporations organized by the Native groups, Village Corporations, Regional Corporations, the State, and others. 16 U.S.C. § 3192(h). Such exchanges are to be of equal value unless the Secretary determines that an unequal value exchange is in the public interest. *Id*. Significantly, Congress also included language clarifying that the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370h, should not be construed as requiring the preparation of an environmental impact statement for "withdrawals, conveyances, regulations, orders, easement determinations, or other actions" that lead to the issuance of conveyances to Native Corporations under the ANCSA[5] or ANILCA. 43 U.S.C. § 1638.

[5] 43 U.S.C. §§ 1601-1629(h). *See also Nat'l Audubon Soc'y v. Hodel*, 606 F. Supp. 825, 828 (D. Alaska 1984) ("Congress enacted ANCSA in 1971 to effectuate a comprehensive settlement of Fed. Defs.' Br. in Opp. to Pls.' Mot. for Summ. J.

B. National Environmental Policy Act

Under NEPA, whenever an agency proposes a "major Federal action[] significantly affecting the quality of the human environment," it must prepare an environmental impact statement. 42 U.S.C. § 4332(2)(C). When required, the environmental impact statement must "provide [a] full and fair discussion of significant environmental impacts" so as to "inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. NEPA is a procedural statute; it does not require that agencies reach a particular result. 42 U.S.C. § 4322; 40 C.F.R. § 1501.1; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Furthermore, courts have found that some agency actions are not subject to NEPA requirements. *Douglas County v. Babbitt*, 48 F.3d 1495, 1502 (9th Cir. 1995). Similarly, Congress has declined to apply NEPA to certain statutory schemes. *Id*.

C. Endangered Species Act

Section 7(a)(2) of the ESA requires each federal agency to ensure that any action authorized, funded, or carried out by that agency "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2). To assist these federal agencies in complying with Section 7(a)(2), the agency undertaking the action (the "action agency") is required to consult with the appropriate consulting agency (either the U.S. Fish & Wildlife Service or the National Marine Fisheries Service) whenever a federal action "may affect" a threatened or endangered species or critical habitat. 16 U.S.C. § 1536; 50 C.F.R.

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all Native claims based on subsistence use and occupancy of land in Alaska." (footnote omitted)).

§ 402.14(a). If a proposed action "may affect" a listed species or designated critical habitat, the action agency must conduct "informal consultation" or "formal consultation." *Id*. But if the action agency determines that a particular action will have "no effect" on an endangered or threatened species, the consultation requirements are not triggered. *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994). No concurrence by the consulting agency regarding the action agency's "no effect" determination is required. 50 C.F.R. § 402.14(a).

In assessing the potential effects of a proposed action, an action agency *may* prepare a biological assessment. A biological assessment is one mechanism, among others, whereby the action agency defines the nature and scope of its proposed action. A biological assessment, however, is required only if the action agency is proposing to engage in a "major construction activities" (or other undertaking having similar physical impacts) that is a "major Federal action significantly affecting the quality of the human environment" as referred to in NEPA, 42 U.S.C. § 4332(2)(C). 16 U.S.C. § 1536(c)(1); 50 C.F.R. §§ 402.12(a), (b), 402.01(a), 402.02 (definition of "major construction activity").

On occasion, as in the case at hand, the Service is both the action agency and consulting agency. When warranted, Service units will conduct an intra-Service Section 7 consultation with the appropriate Service ecological field office on actions they authorize, fund, or carry out that "may affect" listed species or designated or proposed critical habitat. *See* ESA § 7 Consultation Handbook at 1-5 to 1-6 (March 1998), available at http://www.fws.gov. These actions may include activities like national refuge operations, public use programs, private lands and federal aid activities, as well as promulgating regulations and issuing permits. *Id*. at 1-6. A Service office seeking intra-Service consultation, after first making a "may affect" decision for its proposed action, provides any required data and is treated as any other action agency. *Id*.

IV. STANDARD OF REVIEW

A. Summary Judgment

The Ninth Circuit has endorsed the use of summary judgment motions under Rule 56 of the Federal Rules of Civil Procedure for review of agency actions under the APA. *See*, *e.g.*, *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471-72 (9th Cir. 1994). The court's role in cases involving decisions of an administrative agency is not to resolve facts, but to "determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Eng'g Co. v. Immigration & Naturalization Serv.*, 753 F.2d 766, 769 (9th Cir. 1985). The administrative agency itself is the fact-finder; summary judgment is appropriate for determining the legal question of "whether the agency could reasonably have found the facts as it did." *Id*. at 770.

B. Administrative Procedure Act

Judicial review of agency decisions such as this one is governed by the APA, "which specifies that an agency action may be overturned only where it is found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002) (quoting 5 U.S.C. § 706(2)(A)). "The scope of review under the [APA] is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A court may reverse a decision as arbitrary and capricious only if an agency "relied on factors Congress did not intend it to consider, 'entirely failed to consider an important aspect of the problem,' or offered an explanation 'that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest*

Serv., 549 F.3d 1211, 1215 (9th Cir. 2008) (internal quotations and citation omitted). "In other words, there must be 'a clear error of judgment.'" *Id.* (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)). The court's role is solely to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

This standard is "exceedingly deferential." *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996); *see also The Lands Council v. McNair*, 537 F.3d 981, 992-94 (9th Cir. 2008) (en banc), *overruled in part on other grounds by Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008). "While we may not supply a reasoned basis for the agency's action that the agency itself has not given, we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974) (internal citation omitted); *see Friends of the Earth v. Hintz*, 800 F.2d 822, 831 (9th Cir. 1986) ("The court may not set aside agency action as arbitrary and capricious unless there is no rational basis for the action." (footnote and citation omitted)). "The [agency's] action . . . need be only a reasonable, not the best or most reasonable, decision." *Nat'l Wildlife Fed'n v. Burford*, 871 F.2d 849, 855 (9th Cir. 1989). The APA does not require – or even allow – a court to overturn an agency action because it disagrees with the agency's decision or even with its conclusions about the scope, breadth or effect of the environmental impacts of the project at issue. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 548, 553 (1978). The reviewing court's task is simply "to insure a fully informed and well-considered decision, not necessarily a decision [that the court] would have reached had [it] been [a] member [ ] of the decisionmaking unit of the agency." *Id.* at 558.

V. ARGUMENT

A. The Agreement Is Consistent With The Purposes of ANILCA.

Plaintiffs allege that the Agreement is inconsistent with the purposes of ANILCA, which they argue is largely concerned with "conservation and protection of ecologically important habitats and wildlife and wilderness values." Pls.' Mem. in Support of Mot. for Summ. J. ("Pls.' Mem.") 23, ECF No. 51. In making this argument, Plaintiffs ignore one of the other key purposes of ANILCA – to protect and enhance the economic and social interests of communities engaged in a traditional and subsistence way of life. Yet, Plaintiffs acknowledge that section 1302(h) allows the Secretary to exchange certain lands in Alaska if that exchange furthers the purposes of ANILCA. *Id*. at 26. The plain language of section 1302(h) contemplates such an exchange. It reads:

> **(1)** Notwithstanding any other provision of law, in acquiring lands for the purposes of this Act, the Secretary is authorized to exchange lands (including lands within conservation system units and within the National Forest System) or interests therein (including Native selection rights) with the corporations organized by the Native Groups, Village Corporations, Regional Corporations, and the Urban Corporations, and other municipalities and corporations or individuals, the State (acting free of the restrictions of section 6(i) of the Alaska Statehood Act), or any Federal agency. Exchanges shall be on the basis of equal value, and either party to the exchange may pay or accept cash in order to equalize the value of the property exchanged, except that if the parties agree to an exchange and the Secretary determines it is in the public interest, such exchanges may be made for other than equal value.

16 U.S.C. § 3192(h). This language clearly demonstrates that Congress anticipated that the Secretary might authorize an exchange of lands from within a conservation system unit such as the lands at issue within the Izembek National Wildlife Refuge.

ANILCA's Congressional statement of purpose expresses that in addition to "provid[ing] sufficient protection for the national interest in scenic, natural, cultural, and environmental values on the public lands in Alaska," the act "provides adequate opportunity for satisfaction of

the economic and social needs of the State of Alaska and its people . . . ." 16 U.S.C. § 3101(d). The Ninth Circuit has opined that the statute's purposes can be distilled into the "dual purpose" of furnishing "guidelines for the protection for the national interest in the scenic, natural, cultural and environmental values of the public lands in Alaska and to provide an adequate opportunity for satisfaction of the economic and social needs of the people of Alaska." *City of Angoon v. Marsh*, 749 F.2d 1413, 1415–16 (9th Cir. 1984). Congress structured ANILCA in this fashion after becoming "aware of the need for a legislative means of maintaining the proper balance between the designation of national conservation areas and the necessary disposition of public lands for more intensive private use." *Id*.

Here, there is no question that this land exchange is intended to serve the economic and social needs of Alaska and its people. The Agreement notes that there is a 12-mile road gap between King Cove and the Cold Bay airport. AR DOI-00887. This gap prevents residents of King Cove from reaching the airport during periods of inclement weather, and "King Cove residents and others have died attempting to travel to and from King Cove or Cold Bay and being unable to get from King Cove to Cold Bay airport for medevac transport to Anchorage." AR DOI-00888. In agreeing to the land exchange, the Department is establishing a "proper balance" between the interests of the people of Alaska and the conservation of Alaska's natural resources, as intended by ANILCA. To find that the Aleut Natives of King Cove are not entitled to a light-use road to access a medical evacuation facility would be failing to "provide[] adequate opportunity for satisfaction of the economic and social needs" of the Aleut Natives, contrary to the expressed intent when Congress passed ANILCA.

Contrary to Plaintiffs' argument that there is no conservation value to the land currently owned by KCC becoming part of the refuge, Pls.' Mem. 29-30, this Court should find that the

acquisition of the KCC-owned lands by exchange furthers the purpose of ANILCA. The Agreement states that "KCC owns lands . . . within the exterior boundaries of Izembek NWR [National Wildlife Refuge] and Alaska Peninsula National Wildlife Refuge" which have been "identified by the U.S. Fish and Wildlife Service for future acquisition if such lands become available." AR DOI-00888.[6] Under section 1302(a), the Secretary is authorized to acquire any lands within the boundaries of any conservation system unit. While the land that the federal government would receive from KCC is already subject to certain laws and regulations governing use and development as set forth in ANCSA section 22(g), there would be additional protections in place once the land becomes public. 43 U.S.C. § 1621(g); *see Sturgeon v. Frost*, 136 S. Ct. 1061, 1071 (2016) (recognizing a distinction between public and non-public lands within the boundaries of a conservation system unit); *see also City of Angoon*, 749 F.2d at 1416-17 (finding that ANILCA did not mandate that private lands conveyed to Native Corporations are to be treated as public lands because they are located within a conservation system). So, taking these lands into federal ownership is consistent with the creation of both refuges and with Congressional intent as set forth in ANILCA—to protect and manage these lands for an array of values for the benefit of future generations of Americans.[7]

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[6] The 1998 Izembek Land Protection Plan, which identified privately-owned lands within the refuge boundaries that contain valuable fish and wildlife habitat, AR 00235433 (ECF No. 48-9), shows the land held by KCC as well as prioritizes this land for acquisition. AR 00235456 (ECF No. 48-10 at 6 of 11); AR 00235485 (ECF No. 48-12 at 13 of 24).

[7] Section 302(1) of ANILCA established the Alaska Peninsula National Wildlife Refuge for various purposes including "conservation of fish and wildlife populations and habitats in their natural diversity," fulfillment of "international treaty obligations ... with respect to fish and wildlife and their habitats," "the opportunity for continued subsistence use by local residents," and to ensure "water quality and necessary water quantity within the refuge." Section 303(3) of ANILCA designated the then-existing Izembek National Wildlife Range as the Izembek National Wildlife Refuge for the same purposes.

The Agreement notes that past attempts to address the safety needs of King Cove have been insufficient and that the exchange will allow the community to pursue one last solution – a one-lane gravel, limited-purpose road that would allow safer transport to the Cold Bay airport. This finding comports with the purposes of ANILCA, which demonstrate Congress' intention to balance wilderness preservation with continued opportunities for Alaska residents to live a subsistence lifestyle in traditional communities. The Secretary's exchange authority under section 1302(d) is one element of Congress' strategy for maintaining proper balance by allowing disposition of federal lands to address "social needs" as "necessary and appropriate." It is well within the Secretary's discretion to determine that a land exchange that results in both a net increase in the amount of land and habitat being preserved in the refuge system and an improvement in public safety serves these purposes.

Secretary Zinke identified and stated on the face of the Agreement that the authority for the land exchange was section 1302(h) of ANILCA. AR DOI-00887. Contrary to the claims made by Plaintiffs, ANILCA does not require a formal record of decision showing the reasons that the Secretary decided to enter into the Agreement. There is an explanation provided on the face of the Agreement, which is supported in the administrative record before the Court. The Agreement identifies the 12-mile gap between the road from King Cove to the road to the Cold Bay airport and the difficulty for King Cove residents to reach that airport by air or boat during inclement weather. AR DOI-00887. Because of that difficulty, Congress has tried to address this transportation problem twice in the past 20 years with legislation. AR DOI-00888. But King Cove residents still do not have a satisfactory solution. *Id*. As a result, the Secretary entered this Agreement so that KCC could pursue construction of a gravel road, primarily for health, safety, and quality of life purposes. AR DOI-00889.

Furthermore, the Department explained its rationale to the public at the time the Agreement was announced. The Secretary stated: "Above all, the federal government's job is to keep our people safe and respect our treaty commitments with Native Americans and Alaska Natives.... Previous administrations prioritized birds over human lives, and that's just wrong. The people of King Cove have been stewarding the land and wildlife for thousands of years and I am confident that working together we will be able to continue responsible stewardship while also saving precious lives." January 22, 2018 Department of the Interior Press Release, available at https://www.doi.gov/pressreleases/secretary-zinke-approves-initial-plan-build-life-saving-road-alaska-native-village. The U.S. Coast Guard also expressed the view that a road would "significantly reduce the risk . . . U.S. Coast Guard aircrews are exposed to while operating in one of the U.S. Coast Guard's most unforgiving environments – Alaska." *Id*.

Plaintiffs note that this decision was an agency reversal and contend that it requires a more detailed justification. Pls.' Mem. 16. Under the APA, a court should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (citation omitted).

> And of course the agency must show that there are good reasons for the new policy. But 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; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.

Id. at 515 (emphasis in original). So, even if the Court were to conclude that this case involves "a decision of less than ideal clarity," the Secretary's path may reasonably be discerned. The Secretary understood the previous decision to reject the land exchange proposal due to possible impacts on wildlife, but the Secretary came to a more humane conclusion – regardless of the

potential environmental impacts that can be managed and minimized in cooperation with KCC, human life is more important.[8]

No court has addressed the requirement that an exchange be for "purposes of the Act." In *National Audubon Society v. Hodel*, the Court found that the exchange provision of section 1302(h) imposes two requirements on the Secretary. 606 F. Supp. 825, 828-29 (D. Alaska 1984). The first requirement, which is the one that is applicable here, is that the exchange will result in acquiring lands for the purposes of ANILCA. The second requirement is that the exchange must further the public interest if the lands to be exchanged are of unequal value. In the current matter, the proposed land exchange is to be an equal value exchange, which means that this second requirement is inapplicable. Additionally, because the precise lands that will be exchanged have not yet been determined, Plaintiffs cannot challenge the exchange on this basis.

In the exchange at issue in *National Audubon Society*, the Secretary chose to prepare a NEPA analysis and described in the Record of Decision how the land exchange would comport with the purposes of ANILCA:

> (1) the interests obtained in the Kenai and Yukon Delta NWRs would "be consistent with and further the purposes of the refuges to which they are added"; (2) these acquisitions would "consolidate significant recreational lands and wildlife habitat lying within units of the [NWR] System and National Wilderness Preservation System into permanent federal ownership"; (3) wildlife management benefits would result from this consolidation of conservation system units (CSUs); (4) protection of prime waterfowl habitat would be increased; (5) Native selection conveyance expenses would be reduced; and (6) the possibility of inconsistent land use by Natives within CSUs would be reduced.

[8] The U.S. Army Corps of Engineers issued a report in June 2015 analyzing non-road alternatives for medical evacuation from King Cove to Cold Bay, including an ice-capable marine vessel, a fixed-wing aircraft/new airport, and a helicopter/heliport. AR DOI-00027. That report was not intended to produce a final definitive answer about which alternative was best. AR DOI-00041-42. While the report discussed other options that could be pursued in theory, Pls.' Mem. 31, n.209, the road continues to be KCC's preferred choice to enhance the safety of its residents. AR DOI-00414.

Id. at 829. The Court did not address the sufficiency of these findings because the case was focused on the second requirement of the exchange authority, but the same reasoning applies to this Agreement. The land given to KCC will serve the public interest by fulfilling the health, safety, and quality of life needs of the King Cove residents.[9] In addition, the land received from KCC will be added to the refuge and further the purposes of conservation. Consequently, this Court should find that the Agreement complied with section 1302(h) of ANILCA.

B. Title XI of ANILCA Does Not Apply.

Title XI of ANILCA details the procedure for the federal approval and authorization of a "transportation and utility system" through a "conservation system unit."[10] 16 U.S.C. §§ 3161-3173. While there is no dispute that Izembek is a conservation system unit, Title XI does not apply because the Agreement is not a decision to build a transportation system unit.

Plaintiffs argue that the express purpose of the Agreement is to allow for the construction of a road, so the elaborate procedures set forth in Title XI should apply. Pls.' Mem. 19. Title XI provides a mandatory process for obtaining federal authorizations associated with a "transportation and utility system," which includes roads. It applies when any portion of the proposed route of such a system is located on "public lands" as defined in Section 102(3) of ANILCA, 16 U.S.C. § 3102(3), within any conservation system unit, national recreation area, or national conservation area in Alaska. Under ANILCA, lands within the National Wildlife Refuge System or the National Wilderness Preservation System in Alaska are considered to be

[9] Notably, this land will also be given with a reservation to the United States of the right of first refusal if the land is ever sold by KCC. 43 U.S.C. § 1621(g).

[10] A "conservation system unit" means "any unit in Alaska of the National Park System, . . . [or] National Wild and Scenic Rivers Systems, . . . including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated, or expanded hereafter." ANILCA Section 102, 16 U.S.C. § 3102(4).

conservation system units.[11] The mandatory process includes a timeline for the preparation of an Environmental Impact Statement, coordination between federal agencies involved, a deadline for a decision by each agency with jurisdiction, a potential appeal to the President and, in certain circumstances, a recommendation by the President and action by Congress. 16 U.S.C. §§ 3164-3167.

However, Title XI does not apply to the Agreement. Title XI applies to any federal "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). While the Agreement envisions that KCC may construct a road, it is not a federal "authorization" to do so. Furthermore, all of the examples within the scope of "authorization" are for uses of land that remains in federal ownership. Unlike a right-of-way or lease or permit, the exchange will remove land from federal ownership. Section 103(c), 16 U.S.C. § 3103(c), provides:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, 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. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

So, once the land is exchanged, any future road would not be built through a conservation system unit, but through private land, and Title XI would not apply.

Finally, the Secretary's exchange authority under section 1302(h) exists "notwithstanding

[11] The Department of the Interior has promulgated regulations implementing Title XI at 43 C.F.R. Part 36.

any other provision of law." 16 U.S.C. § 3192(h). Thus, the Secretary's authority to effectuate land exchanges pursuant to section 1302(h) is independent of other statutory requirements that might otherwise apply, including those set forth in Title XI. While Title XI has a provision stating that it too applies "notwithstanding any provision of applicable law," 16 U.S.C. § 3164(a), that phrase is limited to "applicable law" and can be harmonized with the broader "notwithstanding" provision of section 1302(h) by finding that section 1302(h) is not an "applicable law." A contrary reading would effectively repeal in part the "notwithstanding any other provision of law" provision of section 1302(h) by making the exchange authority subject to another provision of law (*i.e.*, Title XI).

Because Title XI does not apply here, this Court need not consider the purposes behind why Congress enacted this part of ANILCA or the specific procedures it describes. Nor is the Secretary required to comply with Title XI.

C. The Exchange Is Not Subject To NEPA.

Plaintiffs allege that the Agreement is unlawful because the Secretary violated NEPA by failing to prepare an environmental impact statement analyzing the impacts of the exchange. Pls.' Mem. 31. First, this land exchange does not require an environmental impact statement based on the plain language of section 910 of ANILCA. This statement is contained in the Agreement, and the agency's interpretation of section 910 is entitled to deference. Plus, the plain language of the statute supports the agency's interpretation. Plaintiffs attempt to limit section 910 to land transactions involving ANCSA, Pls.' Mem. 32, but that reading is faulty. Similarly, Plaintiffs' assertion that a land exchange is not a conveyance is also misleading. Pls.' Mem. 33-34.

"Congress has expressly provided that NEPA does not apply to certain statutory schemes." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 647 (9th Cir. 2014). There, the Ninth Circuit used the Clean Air Act as an example, which stated, "No action taken under the Clean Air Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969." *Id*. (citing 15 U.S.C. § 793(c)(1)). ANILCA's section 910 is another clear statement by Congress that NEPA does not apply to this land transaction. Section 910 states:

> The National Environmental Policy Act of 1969 (83 Stat. 852) shall not be construed, in whole or in part, as requiring the preparation or submission of an environmental impact statement for withdrawals, conveyances, regulations, orders, easement determinations, or other actions which lead to the issuance of conveyances to Natives or Native Corporations, pursuant to the Alaska Native Claims Settlement Act, or this Act. Nothing in this section shall be construed as affirming or denying the validity of any withdrawals by the Secretary under section 14(h)(3) of the Alaska Native Claims Settlement Act.

43 U.S.C. § 1638.

This land exchange is a conveyance to a Native Corporation pursuant to "this Act," *i.e.*, ANILCA. King Cove Corporation is a Native Corporation organized under the laws of the State of Alaska pursuant to the authority contained in ANCSA. AR DOI-00887. Plaintiffs do not dispute this second point, but they attempt to argue that the land exchange is not a conveyance. Pls.' Mem. 33-34. Neither ANCSA nor ANILCA define a conveyance. *See* 43 U.S.C. § 1602 and 16 U.S.C. § 3102. When a statute does not define a term, a court should construe it according to its ordinary or natural meaning. *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994) (citation omitted). "Conveyance" is defined in Black's Law Dictionary as "[t]he voluntary transfer of a right or of property." (10th ed. 2014). That is exactly what a land exchange is, and the statute does not have to list all of the possible types of conveyances for this Court to find that a land exchange is covered by the plain language in section 910.

Plaintiffs argue that this section applies only to conveyances made under ANCSA or "the ANILCA amendments to ANCSA." Pls.' Mem. 33. In essence, Plaintiffs interpret the words "this Act" so that they become superfluous, contrary to the rules of statutory construction. *Yamaguchi v. State Farm Mut. Auto. Ins. Co.*, 706 F.2d 940, 947 (9th Cir. 1983) (stating "a statute ought to be construed to avoid making any word superfluous" (citation omitted)). ANCSA is already referenced in this clause, so "this Act" does not refer to that statute. As section 910 is part of ANILCA, the phrase "this Act" refers to ANILCA.

Plaintiffs have offered no legal authority to show that section 910 of ANILCA should not be applied as it is plainly written. Instead, they rely on an argument that the structure of Title XI of ANILCA should add restrictions to how section 910 is applied. Pls.' Mem. 33. No such restrictions exist on the face of the statute. The Agreement will result in a conveyance to a Native corporation under ANILCA, thus, the Court should find that an environmental impact statement was not required for this Agreement pursuant to section 910.

D. Plaintiffs' ESA Arguments Lack Merit.

Plaintiffs argue that the Service was required to conduct intra-Service Section 7 consultation on the potential effects of the proposed land exchange agreement and subsequent road construction on the ESA-listed Steller's eider and the northern sea otter and their designated critical habitats. Pls.' Mem. 37-43. Plaintiffs' argument, however, fails. First, Plaintiffs failed to properly plead this particular argument and now seek to introduce it for the first time at summary judgment. On this basis alone, the Court should reject Plaintiffs' argument. Second, even if Plaintiffs had properly pled its argument, it is without merit because the Service was not required to consult under the unique circumstances of this case. The Agreement simply seeks a legal exchange of lands; it does not authorize King Cove's road construction or any other

ground-disturbing activity. Road construction, if any, can proceed only after King Cove passes numerous significant hurdles like funding, planning, any state approvals and permitting, and any federal approvals and permitting, including any required ESA review and compliance. For these reasons, the Service appropriately determined in 2013 that a land exchange of this nature would have "no effect" on listed species and/or critical habitat. Contrary to Plaintiffs' argument, because of the Service's "no effect" determination, it was not required to seek intra-Service consultation.

1. Plaintiffs Failed to Plead a "Failure to Consult" Claim

Plaintiffs argue that the Service violated the ESA by failing to undertake intra-Service Section 7 consultation on the potential effects of the land exchange on listed species and/or designated critical habitat. Pls.' Mem. 37-43. Not only is this argument misplaced but it is a new argument under Section 7(a)(2) that Plaintiffs did not plead in their amended complaint. *See* ECF No. 32, First Amended Complaint ("Pls.' Amend. Compl.") ¶¶ 123-126 (arguing Interior violated the ESA by failing to prepare a biological assessment under Section 7(c)). Accordingly, Plaintiffs' new argument, introduced for the first time at summary judgment, is not appropriate and should be rejected.

A party cannot advance an argument in summary judgment on grounds not in issue under the pleadings. *Coleman v. Quaker Oats Co*., 232 F.3d 1271, 1294 (9th Cir. 2000); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1080 (9th Cir. 2008) (en banc) ("[O]ur precedents make clear that where, as here, the complaint does not include the necessary factual allegations to state a claim, raising such a claim in a summary judgment motion is insufficient to present the claim to the district court."); *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) (plaintiff could not raise claim for the first time in opposition to a summary judgment

motion if it was not alleged in the complaint). Here, the only ESA claim identified in Plaintiffs' amended complaint is that the Service allegedly failed to prepare a biological assessment under Section 7(c). *See* Pls.' Amend. Compl. ¶¶ 123-126. That is an entirely separate claim than the Section 7(a)(2) "failure to consult" claim now advanced at summary judgment. Because Plaintiffs did not allege any violation based on a "failure to consult" theory, Plaintiffs should be limited to the allegations raised in their complaint. Regardless, both arguments fail and will be addressed in turn below.

2. The Agreement will have "No Effect" on Listed Species or Critical Habitat

Even if Plaintiffs had properly pled their new "failure to consult" argument in their amended complaint, *see* Pls.' Mem. 37-43, it is without merit. The Service, the agency charged with managing the Izembek National Wildlife Refuge, already determined in 2013 that a land exchange agreement, in and of itself, would have "no effect" on the Steller's eider and the northern sea otter or their designated critical habitat. AR 00181304; AR 00181308. The Service's "no effect" determination has not changed from 2013 to the present. As a result of its "no effect" determination, the Service was not required to undertake intra-Service consultation under the ESA.

Before taking any action, an action agency (here, the Service) is required to review its proposed action (the land exchange agreement) and determine whether consultation is required. *See* Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19,926, 19,945 (June 3, 1986); *see also Nat. Res. Defense Council v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998); *Def. of Wildlife v. Flowers*, 414 F.3d 1066, 1069-70 (9th Cir. 2005). If the action agency makes a "no effect" determination, there is no trigger for consultation. *Sierra Forest Legacy v. U.S. Forest Serv.*, 598 F. Supp. 2d 1058, 1065 (N.D. Cal.

2009); *see also Pac. Rivers Council*, 30 F.3d at 1054 n.8; *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv*., 100 F.3d 1443, 1447-48 (9th Cir. 1996). A "no effect" determination must be upheld if it is reasonable and supported by the record. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481, 496 (9th Cir. 2011).

Here, Congress, in 2009, directed the Service to analyze the potential environmental effects of two separate actions: (1) a proposed land exchange agreement; and (2) possible future road construction and operation. *See* Section 6402 of the *Omnibus Public Land Management Act of 2009* (Pub. L. No. 111-11, Title VI, Subtitle E, § 6402, 123 Stat. 991, 1178-79 (2009)). With respect to just the land exchange agreement, the Service, taking into account the legal nature of the agreement and the fact that it did not authorize the construction of any roads or any other ground-disturbing activity, determined that a land exchange agreement, in and of itself, would have "no effect" on listed species or critical habitat (nor was any critical habitat involved in the land exchange).[12] For example, the Service explained that "[n]o effects on Steller's Eider . . . have been identified that would result from the proposed land exchange, because no activities in the reasonably foreseeable future have been identified that would affect these species or their habitats within these parcels. These birds and their habitats . . . would remain the same, before and after the proposed land exchange." AR 00181304. The Service also noted that Section 7

[12] The 2013 "no effect" determination was made within a broader NEPA analysis of the direct and indirect effects of the land exchange (as required by the 2009 Omnibus Public Land Management Act). In that analysis, as required by NEPA, the Service analyzed whether the land exchange would result in any direct or indirect effects in the "reasonably foreseeable future" that would affect species. The ESA effects analysis, on the other hand, requires the Service to analyze whether the land exchange would result in any direct or indirect effects that are "reasonably certain to occur." While the 2013 "no effect" determination was made within the more expansive analysis required by NEPA, it is consistent with the stricter and narrower requirements of Section 7 of the ESA.

consultation would be required only if measures were taken to implement road construction. *Id*. The Service also made similar "no effect" determinations for the other listed species with respect to the proposed land exchange agreement. *See* AR 00181308; AR 00181310; AR 00181427; AR 00181437.

Nothing has changed since 2013 with respect to the potential effects of a land exchange agreement on listed species and critical habitat. The agreement, in and of itself, is still a purely legal transaction and does not authorize any ground disturbing activities. And no activities in the reasonably foreseeable future have been identified that would affect these species. This is because road construction, if any, can proceed only after any proposed road project successfully passes numerous significant hurdles like funding, planning, any state approvals and permitting, and federal approvals and permitting (after the appropriate ESA review). For these reasons, the Service continues to rely on its 2013 "no effect" determination. This determination is reasonable, supported by the record, and should be upheld.

3. Plaintiffs Fail to Show the Service's "No Effect" Determination is Unreasonable

Plaintiffs advance several arguments essentially challenging the Service's "no effect" determination, but none have merit.

a. A biological assessment is not required in this case.

As pled in their complaint, Plaintiffs argue that the Service violated ESA Section 7(c) by failing to prepare a biological assessment on the listed Steller's eider and southwest Alaska distinct population segment of the northern sea otter, and each species' designated critical habitat. Pls.' Amend. Compl. ¶¶ 123-126; *see also* Pls.' Mem. 38-42. Contrary to Plaintiffs' argument, while the Service may opt to prepare a biological assessment (and has in the past), it is not required to do so here.

The ESA's implementing regulations expressly state that a biological assessment is not mandatory unless the agency is proposing to engage in a "major construction activity." 50 C.F.R. § 402.12(b) ("The procedures of this section are required for Federal actions that are 'major construction activities'"); *see also* Interagency Cooperation; Endangered Species Act of 1973, 48 Fed. Reg. 29,990, 29,993-94 (June 29, 1983) (explaining in the preamble to the then proposed regulation that the relevant legislative history supports this interpretation). In reliance on this regulation, numerous courts have held that ESA Section 7(c) does not require a biological assessment unless a major construction activity is involved. *See, e.g., Newton Cty. Wildlife Ass'n v. Rogers*, 141 F.3d 803 (8th Cir. 1998); *Am. Littoral Soc'y v. U.S. EPA*, 199 F. Supp. 2d 217, 246-47 (D.N.J. 2002); *Waterkeeper All. v. U.S. Dep't of Defense*, 271 F.3d 21, 31-33 (1st Cir. 2001); *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 874-75 (D. Ariz. 2003), *aff'd*, 417 F.3d 1091 (9th Cir. 2005); *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, No. 04-3096-PA, 2007 WL 1072112, at *2-4 (D. Or. April 3, 2007); *see also* ESA § 7 Consultation Handbook at 3-11 (March 1998), available at http://www.fws.gov (noting that "[t]he [action] agency is not required to prepare a biological assessment for actions that are not major construction activities but, if a listed species or critical habitat is likely to be affected, the agency must provide the Services with an account of the basis for evaluating the likely effects of the action. The Services use this documentation along with any other available information to decide if concurrence with the agency's determination is warranted."). The regulations define a "major construction activity" as a "construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment" as referred to in NEPA. 50 C.F.R. § 402.02.

The Agreement, the agency action at issue in this case, is not a major construction activity. In fact, no ground-disturbing activity whatsoever is authorized by the agreement. The Agreement simply seeks a land exchange under section 1302 of ANILCA – the Service will receive lands currently owned by King Cove to include in the refuge and King Cove will receive some land currently part of the Izembek National Wildlife Refuge. To be clear, no road construction or any other ground-disturbing activity is authorized through this Agreement. Because the land exchange agreement itself is not a "major construction activity," the ESA does not require the Service to prepare a biological assessment – the Service's "no effect" determination as outlined in its environmental impact statement suffices. Therefore, because a biological assessment was not required, Plaintiffs' ESA claim, as pled in their complaint, fails.

b. Land exchange agreements do not automatically trigger consultation obligations.

While relying on several cases, Plaintiffs suggest that the Agreement automatically triggers Section 7 consultation obligations. Pls.' Mem. 40 n.257. But Plaintiffs' cited cases, however, that do not stand for that proposition. Rather, the cases merely demonstrate that, depending on the specific facts and circumstances – *e.g.*, specific terms of a proposed land exchange agreement, type of species involved, location of critical habitat, reasonably certain indirect effects, etc. – it is possible that a particular land exchange agreement "may affect" listed species and critical habitat, thereby requiring Section 7 consultation. This is not the case here. The Agreement specific to the Izembek National Wildlife Refuge has "no effect" on listed species and designated critical habitat. *See supra* Argument Section D.2. For this reason, intra-Service consultation under Section 7 of the ESA was not required. *Id*.

c. The Service was not required to analyze road construction impacts.

Plaintiffs also argue mistakenly that the Service must consider the direct, indirect, and cumulative effects of future road construction on listed species. Pls.' Mem. 42-43. However, Plaintiffs are improperly conflating the proposed land exchange with the much more speculative and uncertain road construction.

i. Direct Effects

Direct effects are undefined in the ESA's implementing regulations, but are commonly understood to be the immediate effects on a listed species or on critical habitat that will result from the proposed action. The Agreement only seeks to facilitate a land swap between the Service and King Cove. It does not authorize any road construction or any other ground-disturbing activity. Therefore, road construction is not an immediate or natural consequence of the Agreement and has no direct effects on listed species.

ii. Indirect Effects

Not every conceivable indirect effect must be considered. Indirect effects are "those that are caused by the proposed action and are later in time, but are still *reasonably certain to occur*." 50 C.F.R. § 402.02 (emphasis added). Indirect effects may involve subsequent actions by other parties but must ultimately be caused by the proposed action – the land exchange agreement. Here, effects on species from road construction are not "reasonably certain to occur" because of the numerous intervening steps before road construction. For example, the road must be funded, planned, and other state and federal authorizations are required. Future federal permissions (most notably, a decision by the U.S. Army Corp of Engineers under Section 404 of the Clean Water Act) will require compliance with Section 7 of the ESA. Additionally, there will likely be litigation over all of these intervening steps. While the Agreement makes it possible for King

Cove to pursue its road project, due to the numerous required intervening steps, road construction is not "reasonably certain to occur." Therefore, contrary to Plaintiffs' implication, there are no indirect effects of the Service's proposed action of exchanging lands.

iii. Cumulative Effects

Cumulative effects are those effects of future State or private activities—not including federal activities—that are reasonably certain to occur within the action area of the federal action subject to consultation. 50 C.F.R. § 402.02. Cumulative effects are taken into account at the formal consultation stage which is triggered as a result of the agency's threshold determination that the direct and indirect effects of its proposed action may have an effect on listed species or critical habitat. 50 C.F.R. § 402.14(c) and (g)(4). Because the Service first determined that a land exchange agreement would have "no effect" on listed species and critical habitat, it was not required to consult under Section 7 and was, therefore, not required to assess any cumulative effects for future road construction.

In sum, the Agreement did not approve road construction. Road construction, if any, can proceed only after any proposed road project successfully passes numerous significant hurdles to include funding, planning, any state approvals and permitting, and federal approvals and permitting. In particular, it is likely that the project will not be allowed to proceed unless the U.S. Army Corps of Engineers authorizes activities regulated under the Clean Water Act (which requires additional ESA review and compliance). Because road construction is not a direct, indirect, or cumulative effect of the Agreement, the Service was not required to consider it. Therefore, the Service's overall "no effect" determination with respect to this Agreement is reasonable, supported by the record, and should be upheld.

E. Additional Briefing Would Be Necessary To Address Remedy for Any Legal Error Found by the Court.

While Federal Defendants believe that the Agreement complied with the law, should this Court find any legal error, Defendants respectfully request additional briefing on the question of remedy. Under the APA, judicial relief—whether in the form of vacatur or injunctive relief—does not issue automatically upon a finding of legal error. Rather, courts are obligated to weigh the extent of the legal error as well as the equities, and the public interest in crafting relief. *See,* e.g., *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (holding an injunction is an "extraordinary remedy" that does not issue as a matter of course even "though irreparable injury may otherwise result to the plaintiff" (citation omitted)); *Cal. Cmtys. Against Toxics v. U.S. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (per curiam) (holding that the decision of whether to vacate an agency's action requires consideration of equitable factors); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1139 (10th Cir. 2010) ("Vacatur is an equitable remedy . . . and the decision whether to grant vacatur is entrusted to the district court's discretion"). Courts may, where the equities warrant, leave an agency decision in place while the agency corrects the legal errors on remand. *Cal. Cmtys. Against Toxics*, 688 F.3d at 994 (remanding without vacating decision); *W. Oil & Gas Ass'n v. U.S. EPA,* 633 F.2d 803, 813 (9th Cir. 1980) ("[G]uided by authorities that recognize that a reviewing court has discretion to shape an equitable remedy, we leave the challenged designations in effect."). Federal Defendants, therefore, respectfully request that the Court allow additional briefing on remedy if the Court finds any legal deficiency in this decision.

VI. CONCLUSION

For the reasons stated above, the Court should deny Plaintiffs' motion for summary judgment and grant judgment in favor of Federal Defendants.

Dated this 22nd day of August, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 22, 2018, a copy of the foregoing *Federal Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment* was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the court's electronic filing system.

/s/ Davené D. Walker
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