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

TODD KIM
Assistant Attorney General

DAVENÉ D. WALKER
MICHAEL T. GRAY
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
701 San Marco Boulevard
Jacksonville, Florida 32207
michael.gray2@usdoj.gov

Of Counsel:

KENNETH M. LORD
Attorney
U.S. Department of the Interior

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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,

s/ *Michael T. Gray*
TODD KIM
Assistant Attorney General
DAVENÉ D. WALKER
MICHAEL T. GRAY
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice

Of Counsel:

KENNETH M. LORD
Attorney
U.S. Department of the Interior

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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