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

OPINION filed March 16, 2022
Before: K. M. WARDLAW, E.D. MILLER, and B.S. BADE, Circuit Judges

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRIENDS OF ALASKA NATIONAL WILDLIFE REFUGES *et al*.,

Plaintiffs-Appellees,

v.

DEBRA HAALAND *et al*.,

Defendants-Appellants,

and

KING COVE CORPORATION *et al*.,

Intervenor-Defendants-Appellants.

On Appeal from the United States District Court
for the District of Alaska

AMICUS BRIEF OF SECRETARY BRUCE BABBITT AND JOHN LESHY IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR REHEARING EN BANC

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May 9, 2022

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IDENTITY AND INTERESTS OF AMICI CURIAE[1]

Secretary Bruce Babbitt served as Secretary of the Department of the Interior between 1993 and 2001 under President Bill Clinton. In that role, he carried out the Department's statutory charge to protect and manage our Nation's natural resources and cultural heritage; provide scientific and other information about those resources; and honor our trust responsibilities and commitments to American Indians, Alaska Native Peoples, and affiliated Island Communities.

As of 2018, nearly 50 percent of the lands Interior manages were in Alaska. *See* Cong. Research Serv., *Federal Land Ownership: Overview and Data* at 9-10, Tbl. 2 (Feb. 21, 2020), https://bit.ly/3MWFXyy. Secretary Babbitt oversaw more than 76.6 million acres of National Wildlife Refuge lands, 52.5 million acres of National Park Service lands, and 71.4 million acres of public lands the Bureau of Land Management manages. *Id.* at 9, Tbl. 2. He devoted considerable effort to implementing the Alaska National Interest Lands Conservation Act (ANILCA), which protects more than 30 percent of the Nation's public lands.

John Leshy is an emeritus law professor at University of California, Hastings, College of the Law. He served as Solicitor to the Department of the

[1] *Amici* state that no party or party's counsel authored this brief in whole or in part, and no party or entity other than *amici* and their counsel contributed money intended to fund preparation or submission of this brief.

Interior from 1993-2001, and was Associate Solicitor of the Department of the Interior for Energy and Resources from 1977-1980. He co-authors the standard law textbook on Federal Public Lands and Resources Law, now in its eighth edition (Foundation Press). He recently published a comprehensive history of America's public lands, Our Common Ground (Yale U. Press, 2022).

Secretary Babbitt and John Leshy offer their perspective to help the Court understand that the panel majority's misinterpretation of ANILCA puts this Nation's public lands at risk and is thus exceptionally important.[2]

INTRODUCTION

This Court should review this case en banc. ANILCA authorizes the Secretary of the Interior to acquire lands within congressionally protected areas—such as Katmai National Park. 16 U.S.C. § 3192(a). The panel majority read this acquisition provision as a divestiture provision that authorizes the Secretary to trade away lands for development. Op. at 16.

Left uncorrected, the panel majority interpretation empowers the Secretary to shred these protections by creating new non-federal inholdings that can be

[2] Pursuant to Circuit Rule 29-3, counsel for *amici* sought the consent of all parties for the filing of this *amicus curiae* brief. Plaintiffs-Appellees Friends of Alaska National Wildlife Refuges *et al.* and for Defendants-Appellants Debra Haaland *et al.* do not object to the filing of this brief. Intervenors-Defendants-Appellants King Cove Corporation *et al.* and Intervenor-Defendant-Appellant State of Alaska indicated they take no position.

developed for commercial purposes without any further action by Congress. The stakes are high: ANILCA governs more than 104 million acres in Alaska. Dissent at 34. Congress protected these lands because they have "global importance," because we are losing "natural habitats . . . at an alarming rate," and because "their permanent protection is a reasonable and attainable national objective." H. REP. NO. 96-97, at 5 (1979).

The threat to these lands is not hypothetical. History shows that they are prime targets for commercial exploitation. To date, attempts to use ANILCA's land acquisition provision to exploit public lands for private gain have failed. But the panel majority has now converted "ANILCA from a constraint on over-using Alaska's natural resources to a rubber stamp for any land exchange that the current Secretary may desire." Dissent at 39.

This Court should grant rehearing en banc, interpret ANILCA in line with its plain text, and ensure ANILCA can serve its protective purpose.

ARGUMENT

I. The panel majority's interpretation of ANILCA upends the statutory scheme and its purpose.

ANILCA's land-acquisition provision is central to its statutory scheme. Enacted after a decade of studies, public hearings, and debate—with special effort given to gathering the views of Alaska Native Peoples, non-native Alaska residents, and other members of the public—it reclassified more than 104 million

acres of lands within Alaska into new or expanded parks and refuges and other conservation areas.[3] Congress intentionally drew broad and inclusive boundaries over entire ecosystems. 16 U.S.C. § 3101(b) (explaining Congress designated conservation system units on landscape levels to protect entire ecosystems); H.R. REP. NO. 96-97, pt. I, at 246 (1979). In doing so, Congress recognized that there were parcels of privately-owned land within the areas it was now designating as conservation system units, known as inholdings. So, it included a provision in ANILCA authorizing the Secretary to acquire inholdings and thereby complete the protection of these areas.

The panel majority interpreted this acquisition provision to do the opposite. Under its interpretation, a Secretary can exchange out of federal ownership federal lands that Congress designated for specific protections to instead allow economic development. That transforms a statute designed to comprehensively protect entire ecosystems into one that allows the Secretary to *create* inholdings for exploitation and thereby create Swiss cheese-like holes in the protection Congress gave these lands. This interpretation does not just defy common sense, it cannot be squared

[3] *See, generally,* 16 U.S.C. §§ 3101-3233*; see also, Alaska National Interest Lands Conservation Act (ANILCA) (d-2) Public Hearings 1973*, University of Alaska Fairbanks, Rasmuson Library, https://library.uaf.edu/aprca/research-guides/anilca.

with the statutory text. The acquisition provision authorizes only exchanges that *acquire* inholdings to enhance the conservation values of protected areas.

A. Statutory text.

ANILCA's land-acquisition provision is focused on just that: acquiring lands. The provision, titled "land acquisition authority," 16 U.S.C. § 3192, contains two parts relevant here. The first, a general provision, authorizes the Secretary "to carry out the purposes of [ANILCA], to acquire by purchase, donation, exchange, or otherwise any lands within the boundaries of any conservation system unit . . . ." *Id.* § 3192(a). The second, a specific provision governing exchanges under section 3192(a), states that "in acquiring lands for the purposes of [ANILCA], the Secretary is authorized to exchange lands . . . or interests therein . . . ." with specified governmental entities. *Id.* § 3192(h). By the terms of these provisions, the Secretary may exchange lands only when "acquiring lands for the purposes of [ANILCA]." *Id.* § 3192(h)(1).

True, the concept of an exchange implies that the Secretary must give up some lands in the trade. But any land given up must be in service of *acquiring* inholdings to make an ecosystem more whole—the purpose of this section. The

panel majority's interpretation, contrary to a basic tenet of statutory construction,[4] allows the Secretary to do the inverse: divest itself of lands without acquisition as the driving force.

The panel majority's interpretation also cannot be squared with a separate provision that Congress enacted in 2009 authorizing an exchange similar to what the Secretary completed here—well after that specific authority had expired. The Omnibus Public Land Management Act of 2009 (OPLMA) authorized the Secretary to review a land exchange for a road through Izembek National Wildlife Refuge (Izembek) and complete the exchange if it was in the public interest.[5] Among other specific restrictions on this potential exchange, Congress put a seven-year clock on this authority, which expired in 2016, three years before the exchange at issue here.[6]

The panel majority's interpretation renders OPLMA superfluous, so it "cannot be correct." *United States v. Pangang Grp. Co., Ltd.*, 6 F.4th 946, 956 (9th Cir. 2021). If the Secretary had the authority to enter this exchange, which

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[4] "'[A]s in any case of statutory construction, our analysis begins with the language of the statute . . . . And where the statutory language provides a clear answer, it ends there as well.'" *Harris Trust & Savings Bank v. Salomon Smith Barney Inc.,* 530 U.S. 238, 254 (2000) (citation omitted).

[5] Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 6402, 123 Stat 991, 1178.

[6] *Id.,* Sec. 6406(a), 123 Stat 1183; 2-ER-219.

traded away an inholding for development, in exchange for lands on the periphery of Izembek, then Congress would not have needed to authorize that exchange in OPLMA. The panel majority has no answer to this. *See* Op. at 9–10. OPLMA cannot be dismissed as accidental, or not deeply considered: It followed two years of hearings, debates, and mark-ups.[7]

B. Legislative history.

The legislative history confirms the plain reading of the acquisition provision. ANILCA was enacted with the express purpose of finalizing the selection of conservation units in Alaska and protecting intact ecosystems. 16 U.S.C. § 3101(d). Congress, however, could foresee a time when the Secretary must exercise the governmental power of eminent domain to protect an imperiled landscape, but it wanted to encourage the use of exchanges in acquisitions to preserve some private property in the state. Therefore, Congress authorized exchanges to provide the Secretary with an option, other than condemnation, to acquire lands to make the protections whole where they were not before because of non-federal landowner inholdings within a conservation unit. S. REP. 96-413, at

[7] *Izembek and Alaska Peninsula Refuge and Wilderness Enhancement and King Cove Safe Access Act: Hearing on H.R. 2801 Before H. Comm. on Nat. Res.,* 110th Cong. 1-50 (2007); *Current Public Lands and Forest Bills: Hearing on S.570, S.758, S.1680, S.2109, S.2124, S.2581, H.R.1011, and H.R.1311 Before S. Subcomm. on Pub. Lands & Forests*, 110th Cong. 1 (2007); 154 Cong. Rec. D1070 (daily ed. Sept. 11, 2008).

303-04, *as reprinted in* 1980 U.S.C.C.A.N. 5070, 5247-48 (1979). Thus, as a Senate Report explains, the intent of the exchange provision was "to maximize the use of exchange authority and minimize the use of condemnation authority." *Id.* A taking might sometimes be necessary, for example in cases of "imminent danger to conservation system unit resources," but was otherwise to be avoided. *Id.* The House shared this understanding, noting that the Secretary should use this "exchange authority and [] authority to acquire easements where possible rather than resort to fee condemnation." H.R. REP. NO. 96-97, pt. I, at 246 (1979).

But it was clear that this authority cannot be used to undercut the protections Congress enacted or "frustrate the purposes of any such unit."[8] Again, the focus was on acquiring lands within protected areas—not giving them away. *Id.* (stating that the provision was "intended to provide the Secretary with great flexibility in acquiring lands"). Divestiture of lands was only contemplated in so far that it was

[8] "[I]t is always appropriate to consider all available evidence of Congress' true intent when interpreting its work product." *Koons Buick Pontiac GMC, Inc. v. Nigh,* 543 U.S. 50, 65 (2004) (Stevens, J. & Breyer, J., concurring); SER-167–68; H.R. REP. NO. 95-1045, pt. I, at 211–12 (1978).

in service of even more important inholding acquisition, thus protecting the most valuable ecosystem resources, not endangering them as was the case here.[9]

Congressional and judicial reaction to a controversial exchange soon after ANILCA was enacted provide further support to the plain-text reading of the statute. In 1983, the Secretary conducted an exchange with Alaska Native corporations that provided land so the corporations could lease it for oil exploration and development. *See Nat'l Audubon Soc. v. Hodel*, 606 F. Supp. 825, 827 (D. Alaska 1984). A district court invalidated the exchange because the Secretary's reasoning "suffer[ed] from serious errors of judgment and misapplication of law which have led to a clear error of judgment." *Id.* at 846. In that case, the district court explained that the Secretary overestimated the benefits of the exchange to the "[conservation system unit] and general wildlife conservation." *Id.* Congressman Mo Udall, a principal architect of ANILCA, wrote to the Secretaries of the Interior and Agriculture to reiterate the purpose of the land-acquisition provision and exchange authority in ANILCA. It:

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[9] The government's framing that the district court "focused on lands that Interior was *not* acquiring" (emphasis in original) is premised on a tortured reading of ANILCA—that all the court need do is look to see if there was an acquisition of lands of equal value and that as long as the lands have some benefit, it could not look further. *See* Federal Appellants' Opening Brief at 28-29. The government's attempt to twist the purpose of the section fails because it ignores the whole point—the acquisition of an inholding for conservation purpose must drive the exchange to be lawful.

> was intended for aiding the completion of acquisition of lands within boundaries of conservation system units in furtherance of the purpose of such units but certainly not at the expense of that unit or another conservation system unit and not for the purpose of responding to requests for approval of development activities . . . .[10]

To the extent a Secretary wished to exchange land for development and exploitation purposes, Congressman Udall reminded the Secretary that it should ask Congress for that authority.[11]

* * *

A plain reading of section 3192 along with a review of Congress' intent makes it clear that Congress intended to provide limited Secretarial authority to acquire inholdings by exchange for conservation and subsistence purposes, not to use the exchange provision to divest these lands for economic development. In this specific case, in his "Conclusion and Findings Concerning the Public Interest and the Purposes of ANILCA," Secretary Bernhardt stated that the "question before me is whether to authorize a land exchange pursuant to ANILCA . . . that will allow [King Cove Corporation] to obtain land holdings that align with the needs of the King Cove community to potentially pursue the construction of a road." 2-ER-230. An inholding acquisition was not the focus or purpose of the

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[10] M. K. Udall, Chairman, Committee on Interior and Insular Affairs, U.S. House of Representatives, Letter to Hon. W. Clark, Secretary, U.S. Department of the Interior *et al.* at 2 (Jan. 29, 1985).
[11] *See id.*

deal brokered by Secretary Bernhardt as is required by the statute. The reading of the panel majority opinion does "violence to the plain language of the statute and . . . ignore[s] much of the legislative history." *Mansell v. Mansell*, 490 U.S. 581, 594 (1989).

II. The panel majority's interpretation puts some of our Nation's most important protected lands at risk of being traded away by future Secretaries.

The prospect of industrial invasion into some of our most ecologically intact landscapes raises a "question of exceptional importance" justifying en banc review. Izembek will not be the last target if this decision stands. The panel majority interpretation could allow future Interior Secretaries to trade away some of our nation's most important protected public lands without any further action by Congress. Here are just a few examples of what the panel majority's interpretation puts at risk.

A. Admiralty Island National Monument.

 [12]

President Carter established the Admiralty Island National Monument in 1978. *See* Proclamation No. 4611, 43 Fed. Reg. 57,009, 57,009 (Dec. 5, 1978). In doing so, he recognized that it is home to high densities of brown bears, bald eagles, and 10,000-year-old archaeological sites, and is the "largest unspoiled coastal island ecosystem in North America." *Id.* at 57,009. In ANILCA, Congress confirmed the protection of the national monument designation and additionally prohibited logging within its boundaries. 16 U.S.C. § 431(b) & (d). Like President

[12] Windfall Harbor, a natural harbor in Admiralty Island National Monument, Alaska. U.S. Forest Service, *Windfall Harbor,* archived Aug. 5, 2006, https://web.archive.org/web/20060805080943/http://www.fs.fed.us/r10/tongass/districts/admiralty/.

Carter, Congress recognized its importance: for the production of salmon that sustain coastal fisheries; for its dense population of bald eagles; for its value as "one of the finest brown bear areas in Alaska" because of its large stretches of intact forests; for its abundant, high-quality winter deer habitat; for the numerous tidal flats and bays around the island that host migratory birds; and for its importance to traditional Tlingit culture. *See* S. REP. NO. 96-413, at 404-05 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5346-47 (statement of Sen. Metzenbaum and Sen. Tsongas).

Both Congress, and President Carter before it, recognized the need to prevent the decimation of Admiralty Island's dense old-growth forests. President Carter recognized the importance of preserving the entire island to keep the ecosystem intact. 43 Fed. Reg. at 57,009-10. And as Senators Metzenbaum and Tsongas explained, timber contracts on the Tongass National Forest (Tongass) threatened the integrity of the Admiralty Island ecosystem before its designation as a national monument. S. REP. NO. 96-413, at 393-94 (1978), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5335. The largest contract was for 8.75 billion board feet of timber that would have come primarily from Admiralty Island. *Id.* at 394. Because of the prohibition on logging, Admiralty Island today retains 99 percent of

its original productive old-growth trees, one of the highest of any biogeographic province in the Tongass.[13]

Interest in logging on large, old growth stands on the Tongass, like those on Admiralty Island, remains high. Senators Lisa Murkowski and Dan Sullivan have often and recently pressed the case for harvesting timber, mining, and building infrastructure within the Tongass, including in roadless areas.[14] "Alaska's unique land laws and land patterns continually change the landscape, and stimulate discussions regarding potential future land exchanges between the Forest Service, Tribal and Native corporations, and other local entities on the Tongass."[15] There is sufficient non-federal land within the Tongass that could be offered for an exchange: within the Tongass: state and local governments own 341,000 acres, the southeast Alaska regional Alaska Native Claims Settlement Act corporation owns

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[13] *See* U.S. Forest Service, Tongass Land and Resource Management Plan, Final Environmental Impact Statement at 3-196, Tbl. 3.9-6 (June 2016) (Tongass Plan FEIS), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd527907.pdf.
[14] *See, e.g.,* Sen. L. Murkowski, Press Release, *Delegation: Tongass Exemption Will Help Build Sustainable Economy in Southeast Alaska* (Oct. 29, 2020), https://www.murkowski.senate.gov/press/release/-delegation-tongass-exemption-will-help-build-sustainable-economy-in-southeast-alaska.
[15] Tongass Plan FEIS at 3-301; *see id.* at 3-298 to 3-301 (describing legislative and administrative land exchanges and conveyances as well as potential future conveyances).

363,000 acres, Alaska Native village corporations own 292,000 acres, and private and unknown owners hold 190,000 acres.[16]

Under the panel majority's interpretation of ANILCA's acquisition provision, any non-federal landowner on the Tongass may argue it should be able to exchange economically less valuable holdings from elsewhere in the Tongass for economically valuable lands within Admiralty Island National Monument to extract valuable old-growth trees. The prospect of future administrative exchanges to facilitate the clear-cutting of Admiralty Island's old growth puts "the largest unspoiled coastal island ecosystem in North America" at significant risk. 43 Fed. Reg. at 57,009.

B. Katmai National Park and Preserve.

 [17]

[16] *Id.* at 3-297, Tbl. 3.11-1.

[17] Photographs of the Ketavik Formation at Brooks Falls. C. Hults, *Ketavik Formation,* National Park Service, July 21, 2014, https://www.nps.gov/media/photo/view.htm?id=68a11a2f-1bfd-4a30-b329-200b316f5ef2.

Katmai National Park and Preserve encompasses four million acres of public land on the Alaska Peninsula.[18] Originally designated as a national monument in 1918,[19] Congress expanded and redesignated Katmai as a national park and preserve in ANILCA. 16 U.S.C. § 410hh-1(2). Katmai protects the Naknek Lake drainage, and other multi-lake watersheds, that provide vital spawning and rearing habitat for salmon, including to Bristol Bay sockeye salmon, the world's largest salmon run.[20] It "contains the largest concentration of protected brown bear populations in the world," including the iconic gathering of brown bears at Brooks Falls.[21] And it protects the Valley of 10,000 Smokes, which has 15 active volcanoes and was the site of the largest 20th century eruption on earth.[22]

Congress designated Katmai as a national park and preserve to protect these values, specifically providing that the area be managed "[t]o protect habitats for,

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[18] F. B. Norris, Isolated Paradise, An Administrative History of the Katmai and Aniakchak National Park Units at 4-5 (1996), http://npshistory.com/publications/katm/index.htm#handbooks (Norris);
[19] Proclamation No. 1487, 40 Stat 1855, 1855-56 (Sept. 24, 1918); Norris at 34.
[20] National Park Service, Katmai National Park and Preserve, Foundation Statement at 4, 10-11 (Dec. 2009), https://www.nps.gov/katm/learn/management/upload/KATM_Foundation_Statement_December2009-3.pdf (Foundation Statement); National Parks Service, Final Development Concept Plan Environmental Impact Statement, Brooks River Area, Katmai at 9 (1996), https://pubs.nps.gov/eTIC/INTE-LACL/KATM_127_96045_0578pg.pdf (Brooks River FEIS).
[21] Brooks River FEIS at 9.
[22] Foundation Statement at 4, 12.

and populations of, fish and wildlife including, but not limited to, high concentrations of brown/grizzly bears and their denning areas; to maintain unimpaired the water habitat for significant salmon populations; and to protect scenic, geological, cultural and recreational features." 16 U.S.C. § 410hh-1(2).

There is a long history of mining and commercial interest in the region. For example, in the 1940s, the territorial government and some Alaska residents engaged in a concerted effort to dismantle the national monument, with the goal of opening the area to mineral prospecting and other commercial uses.[23]

The pressure persists. U. S. Geological Survey reports demonstrate the area is likely to contain deposits of gold, copper, and other minerals.[24] The northern

[23] Norris at 74-77.

[24] J. R. Riehle *et al*., Mineral-Resource Assessments in Alaska—Background Information to Accompany Maps and Reports about the Geology and Undiscovered-Mineral-Resource Potential of the Mount Katmai Quadrangle and Adjacent Parts of the Naknek and Afognak Quadrangles, Alaska Peninsula (1994), https://pubs.usgs.gov/circ/1994/1106/report.pdf; S. E. Church *et al*., Mineral and Energy Resource Assessment Maps of the Mount Katmai, Naknek, and Western Afognak Quadrangles, Alaska (1992), https://pubs.usgs.gov/mf/2021-F/report.pdf.

border of Katmai National Park and Preserve is approximately 40 miles from the site of the proposed Pebble Mine, one of largest proposed mines in the country.[25]

The state could well seek to obtain access to land within Katmai to further mining and development interests through a land exchange, should the panel majority's opinion stand. The prospect of large-scale mining in Katmai and the Bristol Bay watershed presents unacceptable risks to an internationally renowned ecosystem.[26]

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[25] *See* National Parks Conservation Assoc., "Bears on the Line: Protecting Alaska's Brown Bears from the Pebble Mine," https://static1.squarespace.com/static/5c4025a7b40b9dc76548186e/t/5d7fd523e02a472930231d8c/1568658749091/NPCA+Report+Pebble+Mine+7+digital.pdf; *see also,* D. Main, *Alaska is the best place to see wild bears. A new mine could change that*, NATIONAL GEOGRAPHIC, Jan. 14, 2020, https://www.nationalgeographic.com/animals/article/alaska-brown-bears-pebble-mine.

[26] *E.g.*, Trustees for Alaska & Sierra Club Environmental Law Program, Comments on the Draft Environmental Impact Statement and Public Notice of Application for Permit Reference Number POA-2017-00271 for the Proposed Pebble Project (Jul. 1, 2019).

C. Denali National Park and Preserve.

 [27]

Originally established by Congress in 1917, what is today Denali National Park and Preserve is one of the national park system's most famous parks. It was created specifically to protect wildlife and is home to bears, wolves, Dall sheep, moose, and caribou.[28] It is also home to incomparable scenery, including Wonder Lake, an area at the heart of the park and preserve that is a popular destination for visitors and one of the best places to view Denali, North America's highest mountain.[29] Directly adjacent to Wonder Lake is the Kantishna Mining District, a

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[27] National Park Service, *A reflection of Denali in Wonder Lake,* Jan. 18, 2018, https://www.nps.gov/media/photo/view.htm?id=603ed779-947a-4791-a9d4-63922597ce33.
[28] *See* 16 U.S.C. § 351.
[29] National Park Service, "Wonder Lake Area," https://www.nps.gov/dena/planyourvisit/wonder-lake-area.htm.

historic mining area that predates the creation of the national park and has seen significant disruption from gold mining.[30] In 1980, through ANILCA, Congress incorporated the Kantishna district into the park and preserve.[31] In the decade following ANILCA's enactment, mining activities on existing inholdings continued, threatening significant harm to the park's wildlife and waters.[32] Eventually, as a result of years of administrative and congressional action and litigation, most existing mining interests within the park and preserve were acquired by the National Park Service, and the agency began the long process of restoring damage caused by the mining activity.[33]

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[30] *See generally* E. Johnson, National Register of Historic Places Multiple Property Documentation Form, Kantishna Historic Mining Resources of Denali National Park and Preserve, Alaska at E-4 to E-6 (Mar. 21, 2018), http://dnr.alaska.gov/parks/oha/publications/KantishnaMiningMPD.pdf (Johnson); W. E. Brown, A History of the Denali-Mount McKinley, Region, Alaska, Historic Resource Study of Denali National Park and Preserve, Epilogue (1991), http://npshistory.com/publications/dena/hrs/epilogue.htm.

[31] *See* ANILCA, Pub. L. No. 96-487, § 202(3)(a), 94 Stat. 2371, 2382-83 (1980) (codified at 16 U.S.C. § 410hh-1(3)(a)); Johnson at I-7, I-8.

[32] *See* Johnson at E-34 to E-36; National Park Service, Record of Decision, Denali National Park and Preserve, Final Environmental Impact Statement, Cumulative Impacts of Mining at 2-3 (Aug. 21, 1990), https://irma.nps.gov/DataStore/DownloadFile/640522 (1990 ROD) (describing history of National Park Service regulation of mining in the park).

[33] 1990 ROD at 2-6; G. Adema & P. Brease, *Restoration of Mined Lands in Kantishna* (2009), https://www.nps.gov/articles/denali-restoration-mined-lands-kantishna.htm; Johnson at E-35 to 36.

Mining still threatens the Wonder Lake area.[34] Now that the panel majority has opened the door to land exchanges that create inholdings for economic purposes, Denali National Park and Preserve and its incomparable wildlife and scenery are against at risk from destructive mining activity.

CONCLUSION

This Court should grant the petition for rehearing en banc.

Respectfully submitted this 9th day of May 2022,

s/ Carole A. Holley

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[34] *See, e.g, Shearer v. Bernhardt*, No. 3:18-CV-0035-HRH, 2020 WL 3405816, *1, *15 (D. Alaska June 19, 2020) (ordering Interior to issue patents for existing historic mining claims in the Kantishna Mining District within Denali National Park and Preserve); K. Repanshek, *Denali National Park Asked To Approve Placer Mining Operation At Kantishna*, NATIONAL PARKS TRAVELER (Feb. 29, 2016), https://www.nationalparkstraveler.org/2016/02/denali-national-park-asked-approve-placer-mining-operation-kantishna (describing interest in mining in the Kantishna area).

CERTIFICATE OF COMPLIANCE FOR BRIEFS PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(A) AND FORM 8

9th Cir. Case Numbers: 20-35721, 20-35727, and 20-35728

I am the attorney or self-represented party.

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