No. 15-35875

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AGDAAGUX TRIBE OF KING COVE, et al.,
Plaintiffs-Appellants,

and

STATE OF ALASKA,
Intervenor-Plaintiff-Appellant,

v.

SALLY JEWELL, et al.,
Defendants-Appellees,

and

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

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. 3:14-cv-0011 HRH

INTERVENOR-DEFENDANTS-APPELLEES' ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Friends of Alaska National Wildlife Refuges, Defenders of Wildlife, Wilderness Watch, Center for Biological Diversity, The Wilderness Society, National Audubon Society, National Wildlife Refuge Association, and Sierra Club state they have no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States and that no publicly held corporation owns 10% or more of their stocks because they have never issued any stock or other security.

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Congress established the Izembek National Wildlife Refuge ("Izembek" or "Refuge") because of its ecologically unique habitat and wilderness characteristics. Izembek "is an invaluable part of the . . . National Wildlife Refuge System."[1] At 315,000 acres, Izembek is the smallest of Alaska's National Wildlife Refuges, but one of the most ecologically unique.[2] Nearly all of it is designated Wilderness ("Izembek Wilderness").[3] The Secretary of Interior ("Secretary") protected this internationally-recognized habitat when she decided to not allow road construction through the heart of the Refuge. In doing so, she fully complied with the National Environmental Policy Act ("NEPA").

ISSUES PRESENTED FOR REVIEW

1. The Omnibus Public Lands Management Act of 2009 ("OPLMA")[4] provided the Secretary a seven-year grant of authority to exchange lands within Izembek for the purpose of building a road. That authority expired on March 30, 2016, and the Secretary can no longer move forward with a land exchange. Is this case now moot as the court can no longer grant any effective relief?

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[1] Plaintiffs-Appellants' Excerpts of Record ("ER") at 169.

[2] Federal Defendants' Supplemental Excerpts of Record ("SER") at 53; *see also* SER 41 ("[The Izembek Refuge] is of National Significance in every respect, but particularly since the values incorporated in this site are not well represented in National Parks or other stringently protected areas.").

[3] SER 41.

[4] Pub. L. No. 111-11, Title VI, Subtitle E, 123 Stat. 1177, 1178 (2009).

2. In OPLMA, Congress required the Secretary to analyze a potential land exchange and construction of a road through Izembek in compliance with NEPA. Does NEPA prohibit the Secretary from selecting the no action alternative?

3. The environmental impact statement ("EIS") for the proposed road and land exchange reviewed and discussed a landing craft in the no action alternative. Two other alternatives in the EIS fully considered similar options that encompassed the impacts of a landing craft alternative. Was the Secretary required to develop a stand-alone alternative or supplement the EIS to analyze a landing craft?

4. The Secretary detailed the values of the Refuge lands and the state and private lands that would be received in the proposed exchange ("exchange lands"), and evaluated all reasonably foreseeable impacts. Did she take the "hard look" required by NEPA at the impacts of each of the alternatives?

5. The Assistant Secretary of the Interior for Indian Affairs ("Assistant Secretary") prepared a report on health and safety concerns of the people of King Cove. The Secretary relied on this report when making her decision. The report did not contain a recommendation on whether the Secretary should proceed with the proposed road and land exchange. Nothing in NEPA required the report or that the report contain a recommendation. Did the Secretary fail to consider an important

part of the problem by making her decision in the absence of a recommendation by the Assistant Secretary?

STATEMENT OF THE CASE

Following Congress' directive in OPLMA to conduct a NEPA process to analyze a potential road and land exchange, the U.S. Fish and Wildlife Service ("Service") began preparing an EIS.[5] The EIS considered five alternatives: the no action alternative, two land exchange/road alternatives (with different road alignments), a hovercraft alternative, and a ferry alternative.[6] During the EIS process, the Aleutians East Borough ("Borough") indicated that it would explore the development and use of a landing craft if the road was not approved.[7] The Service incorporated this element into the no action alternative in the final EIS.[8] Near the end of the NEPA process but before reaching a decision, the Secretary sent the Assistant Secretary to King Cove to provide more opportunities for the community to express their concerns.[9] The Assistant Secretary prepared a report of his visit, which the Secretary relied on when making her decision.[10] Following the multi-year public process, the Secretary made her decision. She selected the no

[5] ER 166.
[6] ER 175–79.
[7] ER 175.
[8] ER 175.
[9] ER 181.
[10] ER 181.

action alternative, declining to exchange the lands and rejecting the road because of the detrimental impacts to Izembek's exceptional and irreplaceable wildlife habitat.[11]

Following the Secretary's decision, Plaintiffs-Appellants Agdaagux Tribe of King Cove, Native Village of Belkfoski, Aleutians East Borough, City of King Cove, King Cove Corporation, and two individuals sued.[12] The State of Alaska ("State") intervened as a plaintiff and Friends of Alaska National Wildlife Refuges, et al. ("Friends") intervened as defendants.[13] The Plaintiffs-Appellants and the State (collectively "King Cove") raised five claims: (1) various violations of OPLMA; (2) a violation of the Administrative Procedure Act ("APA"); (3) a violation of NEPA; (4) a violation of the Alaska National Interest Lands Conservation Act ("ANILCA") and (5) a violation of trust responsibilities owed by the federal government to Alaska Natives. The district court dismissed part of the OPLMA claim, the APA claim, and the trust claim.[14] The parties filed cross-motions for summary judgment on the remaining claims.[15]

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[11] ER 184.
[12] ER 10–61.
[13] ER 62–99.
[14] ER 76.
[15] ER 77.

The district court rejected King Cove's arguments and granted summary judgment in favor of the Secretary and Friends.[16] Specifically, the court rejected King Cove's argument that the Service had to develop a separate alternative for the landing craft, or that the Service had to supplement the EIS with information about the landing craft. The court relied on the facts that the Borough introduced the landing craft option, that the Secretary considered it in the no action alternative, and that the impacts from the landing craft were similar to those considered in the hovercraft alternative.[17] The court also rejected King Cove's argument that the Secretary's selection of the no action alternative violated NEPA because that alternative did not meet the purpose and need of the project. The court held there is no legal requirement that the alternative selected meet the purpose and need of the project and that OPLMA did not establish a health and safety purpose and need for the project.[18] Relatedly, the court held that the Secretary did not improperly predetermine the outcome of the NEPA process.[19] The court also rejected all of King Cove's arguments concerning the Service's evaluations of the impacts of the alternatives, holding that the Service had not changed its position regarding the

[16] ER 98.

[17] ER 80–84 (calling the hovercraft and the landing craft "functionally equivalent").

[18] ER 84–88.

[19] ER 88–89.

value of the exchange lands,[20] and that the Service took the required "hard look" at the reasonably foreseeable future actions, the value of the exchange lands, and the consequences of not proceeding with the land exchange.[21] Finally, the court held that the Assistant Secretary's report did not violate NEPA.[22] King Cove now appeals. This court should affirm the district court's decision.

SUMMARY OF THE ARGUMENT

As a threshold matter, this case is now moot because there is no effective relief that this court can grant King Cove. The statutory authority allowing the Secretary to proceed with the land exchange and road construction expired on March 30, 2016. The Secretary can no longer authorize the land exchange and road. The case should be dismissed on this basis.

If the court reaches the merits, the Secretary's decision selecting the no action alternative and rejecting the proposed road and land exchange alternatives fully complied with NEPA and should be upheld.[23] In OPLMA, Congress directed

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[20] ER 90–92.

[21] ER 92–97.

[22] ER 87.

[23] On appeal, King Cove only properly raises NEPA claims. King Cove Br. at 1, 3. King Cove purports to argue in its opening brief that the Secretary also violated OPLMA. King Cove Br. at 7, 46–47, 52. King Cove never develops these arguments. As a result, King Cove has waived any argument that the Secretary violated OPLMA. *In re Online DVD-Rental Antitrust Litigation*, 779 F.3d 914, 930 (9th Cir. 2015) (declining to consider a claim that only received "cursory mention" in an appellant's opening brief). Even if King Cove properly raised an OPLMA

the Secretary to consider "the potential construction and operation of a road" through the Izembek Wilderness, including whether to exchange a portion of the Refuge for state and private lands ("exchange lands"). The Service prepared an EIS to analyze a potential road, along with other alternatives to improve transportation options between the communities of King Cove and Cold Bay. Following an extensive public process and agency review, the Secretary rejected the potential road and declined to exchange the lands. Her decision was based on the significant and far-reaching impacts a road would have on the Refuge's internationally-recognized, unique, and irreplaceable resources.

King Cove claims that the decision violates NEPA. Undercutting many of their arguments is a failure to recognize that Congress did not require the Secretary to resolve King Cove's health and safety concerns or approve a road. Rather, in OPLMA, Congress directed the Secretary to evaluate the potential road and land exchange and complete a NEPA process, but left the decision whether to move forward with the road and land exchange to the Secretary. More specifically, King Cove's arguments fail because the Secretary acted within her authority when choosing the no action alternative; she was not required to analyze a potential

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violation, none occurred. The Secretary fully complied with OPLMA because she analyzed the proposed land exchange and road construction in compliance with NEPA and exercised her discretion not to proceed with the exchange. OPLMA § 6402(a), (b). OPLMA requires nothing more.

landing craft as a stand-alone alternative or otherwise supplement the EIS; she accurately described and took the required hard look at the impacts of each alternative; and she did not fail to consider an important part of the problem by making her decision in the absence of a recommendation from the Assistant Secretary. The district court's decision should be affirmed.

STANDARD OF REVIEW

The district court's grant of summary judgment is reviewed *de novo*.[24] King Cove claims violations of NEPA, which are reviewed under the APA's deferential standard of review.[25] In reviewing whether an agency's decision complies with NEPA, courts look to "whether it contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences."[26] The court "must ensure that the agency has taken a 'hard look' at the environmental consequences of its proposed action."[27] An agency action can be overturned only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[28]

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[24] *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1994).

[25] 5 U.S.C. § 706(2)(A); *Nw. Res. Info. Ctr., Inc. v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1060, 1066 (9th Cir. 1995).

[26] *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 809 (9th Cir. 1999).

[27] *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998).

[28] 5 U.S.C. § 706(2)(A).

STATEMENT OF FACTS

I. IZEMBEK PROTECTS UNIQUE AND EXCEPTIONAL WILDLIFE HABITAT.

Izembek has "some of the most striking wildlife diversity and wilderness values of the northern hemisphere."[29] This is due to the unique habitat types and sizes, and their arrangement on the landscape.[30] Izembek's narrow isthmus of rolling tundra separates sheltered wetlands, lagoons, and shallow bays, as well as the waters of the Bering Sea and the Gulf of Alaska.[31] These attributes make Izembek a critical area for migratory birds, bears, caribou, and other wildlife.

At the heart of the Refuge is the 150-square mile Izembek Lagoon.[32] Its brackish water covers one of the world's largest eelgrass beds, creating a rich feeding and nesting area for hundreds of thousands of waterfowl.[33] The Kinzarof Lagoon, on the Gulf of Alaska side of the isthmus, also has a large intertidal eelgrass bed.[34] The close proximity of Izembek Lagoon and coastal wetlands plays an important role in making this area so valuable to wildlife.[35] The tides, ice, and sea conditions on the north and south sides of the isthmus do not mirror one

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[29] SER 61.
[30] SER 32; ER 167.
[31] SER 32, 53; ER 167.
[32] SER 53.
[33] SER 53, 176; ER 167.
[34] SER 94.
[35] SER 186.

another.[36] This allows many animals — especially birds — to select the side with more favorable conditions at a given time, allowing consistent access to food and shelter.[37]

The importance of Izembek's eelgrass beds cannot be overemphasized.[38] Eelgrass beds are extremely productive ecosystems. They act as nurseries for salmon and other fish, provide year-round habitat for sea otters and other marine species, and support large concentrations of waterfowl during migration and winter.[39] As eelgrass habitats are increasingly degraded on the West Coast of North America, Izembek becomes even more important for migratory waterfowl.[40]

Izembek is one of the world's most important migratory bird staging and wintering habitats, and supports highly sensitive and unique species.[41] Millions of migratory waterfowl and shorebirds find food and shelter in Izembek's coastal lagoons and freshwater wetlands on their way to and from their subarctic and arctic breeding grounds.[42] Over 98 percent of the entire world's population of Pacific

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[36] SER 186.

[37] SER 186. This is especially important for Pacific Black Brant and Steller's Eiders. *See* SER 188, 204 (explaining how over-wintering Brant move between the lagoons).

[38] SER 94.

[39] SER 94.

[40] SER 94.

[41] SER 48, 94.

[42] SER 54.

Black Brant relies on Izembek's eelgrass beds as a critical food source before their non-stop 3,000 mile migration to wintering grounds in Mexico.[43] Brant need an undisturbed area to forage and rest before their migration, during which they lose more than 30 percent of their body weight.[44] Brant's reliance on eelgrass for forage during migration and wintering (some Brant over-winter in Izembek) makes them highly vulnerable to degradation of this essential habitat.[45]

Izembek is also home to the only non-migratory population of Tundra Swans in the world.[46] Izembek's small population of Tundra Swans has experienced a significant decline over the last three decades.[47] Emperor Geese also rely on the isthmus for "staging, wintering, and migrating" habitat.[48] Emperor Geese are "one of the rarest and most vulnerable goose species on the planet," and are found only in the Bering Sea area.[49] A high percentage of the goose population uses Izembek during the winter for food and protection from predators.[50] Steller's Eiders, a species listed as "threatened" under the Endangered Species Act ("ESA"), also rely

[43] SER 188; ER 171.
[44] SER 188; ER 171.
[45] SER 94, 188.
[46] ER 171.
[47] ER 171.
[48] ER 172.
[49] ER 172.
[50] ER 172.

on Izembek.[51] As much as 40 percent of the entire world's population of Steller's Eiders over-winter in Izembek.[52] Like other birds, Steller's Eiders switch to using Kinzarof Lagoon and Cold Bay when Izembek Lagoon becomes too icy.[53]

In addition to the exceptional bird habitat, Izembek provides high quality brown bear habitat.[54] During spring and early summer, bears search out food sources such as beached marine mammal carcasses, caribou and moose calves, and newly sprouted sedges.[55] In mid-July, bears concentrate on the plentiful salmon streams and upland berries in Izembek until they move to their den sites in late fall.[56] Because of its remoteness and relative inaccessibility, Izembek experiences low hunting pressure.[57] The Joshua Green watershed on the northeast side of Cold Bay in Izembek is vital year-round habitat, supporting the highest density of brown bears on the southern Alaska Peninsula.[58] This area provides exceptional denning habitat for pregnant bears and a safe place for sows to rear cubs.[59] Many of the bears that populate the southern Alaska Peninsula are born in Izembek.[60]

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[51] ER 172.
[52] ER 172.
[53] SER 204.
[54] SER 70; ER 172.
[55] SER 70.
[56] SER 70.
[57] ER 172.
[58] SER 70, 83, 193.
[59] SER 70, 83.
[60] SER 83.

Izembek also provides important caribou habitat. The Southern Alaska Peninsula caribou herd uses the Izembek isthmus as a migration corridor. The herd moves south through Izembek to the herd's wintering grounds on the Refuge and then re-trace their steps north in the spring to the herd's calving areas.[61]

II. IZEMBEK HAS BEEN RECOGNIZED AS DESERVING PROTECTION FOR DECADES.

Efforts to protect Izembek began in the early 1940s. The area was officially recognized in 1960 when President Eisenhower's Secretary of the Interior established the Izembek National Wildlife Range ("Range").[62] The Range was specifically set aside as a "refuge, breeding ground, and management area for all forms of wildlife,"[63] because of the area's importance to waterfowl, brown bear, and caribou.[64] In establishing the Range, the Department of the Interior recognized that it "contain[s] the most important concentration point for waterfowl in Alaska."[65]

Izembek's wilderness values were recognized early on as well. The wilderness values are significant, with the area being "virtually undeveloped,"

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[61] ER 172, 71.
[62] SER 24.
[63] SER 22–23.
[64] SER 24–25; *see also* ER 171 ("Conservation of the Pacific Black Brant has been a primary concern for the management of the Izembek Refuge since it was established in 1960.").
[65] SER 24.

containing "robust and stable" wildlife populations, and providing "outstanding opportunities for solitude."[66] The area has "[p]ristine streams, extensive wetlands, steep mountains, tundra, and sand dunes . . . [that] provide high scenic, wildlife, and scientific values."[67] To protect these values, Izembek was first proposed for Wilderness designation in 1970.[68] With the passage of ANILCA in 1980, Congress re-designated the Range as the Izembek National Wildlife Refuge and designated approximately 308,000 of the 315,000 acres as Wilderness.[69] Congress recognized that wilderness designation would "protect this critically important habitat."[70]

In ANILCA, Congress directed that the Refuge be managed to conserve "fish and wildlife populations and habitats in their natural diversity, including . . . waterfowl, shorebirds and other migratory birds, brown bears and salmonids," fulfill "the international treaty obligations of the United States with respect to fish and wildlife and their habitats," provide "the opportunity for continued subsistence use by local residents," and protect water quality and quantity.[71] These purposes

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[66] SER 275–76.
[67] SER 41.
[68] SER 26, 41.
[69] Alaska National Interest Lands Conservation Act ("ANILCA"), Pub. L. No. 96–487, §§ 303(3)(A), 702(6), 94 Stat. 2371 (1980).
[70] H. R. REP. NO. 96-97, Part II at 136 (1979).
[71] ANILCA § 303(3)(B).

reflect Izembek's "unique, irreplaceable, and internationally recognized habitats that provide critical support to a rich diversity of species."[72]

In addition to national recognition and federal protection, Izembek is internationally-recognized for its unique and ecologically significant wetlands and wildlife. The Ramsar Convention on Wetlands of International Importance ("Convention") designated Izembek as a "Wetland of International Importance" in 1986.[73] One of the Convention's central aims is to "identify those wetlands which . . . have international importance that extends beyond the country wherein such wetlands are located."[74] Listing under the Convention "reflects a national commitment to maintain the ecological characteristics of the area."[75] For Izembek, those characteristics are its unique ecology, large eelgrass beds, and the importance of the area to migratory birds.[76]

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[72] ER 169.

[73] SER 176; *see also* SER 181–82 (noting that Izembek met 6 of the 8 criteria under the Convention for designation and discussing the unique habitats and their importance).

[74] SER 50.

[75] SER 50.

[76] SER 47; *see also* SER 103 (noting that Izembek is recognized by the American Bird Conservancy as a Globally Important Bird Area).

III. NUMEROUS STUDIES HAVE FOUND THAT A ROAD THROUGH IZEMBEK WOULD SIGNIFICANTLY DAMAGE THE REFUGE'S WILDLIFE AND WILDERNESS.

The Service has evaluated the effects of a road from King Cove to Cold Bay through Izembek numerous times, beginning in 1960.[77] Each time, the Service found that the impacts on wildlife resources, habitats, and designated Wilderness would irreversibly damage Izembek's unique and ecologically important habitats and "globally significant landscape."[78]

The Department of the Interior worked with the State and others to conduct a road analysis in the early 1980s, and found that a road would cause significant long-term damage.[79] In management planning documents, the Service concluded that "significant wildlife and wilderness resources could be adversely affected by construction of this road."[80]

In 1994, King Cove passed a resolution supporting the road for "positive socioeconomic impacts."[81] The next year, the Alaska State Transportation Plan

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[77] ER 170.

[78] ER 166, 170–71.

[79] SER 98.

[80] SER 58; *see also* SER 42 (1985 planning document stating that the road would cut through key terrestrial and aquatic habitat and provide access to undisturbed areas); SER 44–45 (1985 plan describing the adverse impacts of the proposed road on the Izembek Refuge); SER 148 (1985 plan listing concerns about a potential road, including impacts to Tundra Swans and other waterfowl populations, caribou, brown bears, water quality, eelgrass beds, and wilderness resources).

[81] SER 98.

identified the road as a high priority for improving the economics of the area, but rated the road as less safe than a marine link or improved air travel between the two communities.[82] The Service revisited the issue in 1996 and again found that a road through Izembek would have unacceptable environmental impacts.[83] One year later, the King Cove Corporation offered to exchange Corporation lands at the mouth of Kinzarof Lagoon for a right-of-way across Izembek. The Service declined the offer because of the adverse impacts a road would have on wildlife.[84]

In 1997, Senator Frank Murkowski introduced a bill that would have required the Secretary to allow construction of a road through the Izembek Wilderness.[85] After a threatened veto,[86] the bill was amended and the legislation that Congress eventually passed as part of a larger appropriations act sought to protect the exceptional wildlife and wilderness values of Izembek while meeting the health and safety concerns of King Cove.[87] The legislation appropriated $37.5 million to address these concerns "without the necessity of constructing a road

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[82] SER 58, 98.

[83] SER 56–53.

[84] SER 98.

[85] S. 1092, 105th Cong., 1st Sess. (as introduced, July 30, 1997); *see also* SER 98.

[86] SER 98.

[87] Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105–277, § 353, 112 Stat. 2681, 302–03 (1999) (specifically prohibiting the construction of any road or other facilities within Izembek).

across the unique and internationally important habitats of Izembek and Izembek Wilderness."[88] Specifically, Congress appropriated $20 million for the construction of a one-lane, unpaved road to a hovercraft terminal, a dock, and marine facilities and equipment; $15 million for improvements to the King Cove airstrip necessary to accommodate non-stop flights between Anchorage and King Cove; and $2.5 million to the Indian Health Service for improvements to the health clinic in King Cove.[89] That same year, the Service completed yet another study analyzing the potential impacts of the road.[90]

From 2001 to 2004, the U.S. Army Corps of Engineers ("Corps") completed an EIS for the hovercraft terminal. The Corps concluded that a road would be prohibited by the Clean Water Act because it would not qualify as the Least Environmentally Damaging Practicable Alternative.[91] Following the completion of the Corps' permitting process, the Borough spent the $37.5 million appropriated by Congress.[92] The Borough purchased a hovercraft that seated 49 passengers with vehicles and that could accommodate an entire ambulance and crew, and built a

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[88] ER 169.

[89] *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act at § 353(a), (b), (c), (e).

[90] SER 64.

[91] SER 99; *see* 40 C.F.R. § 230.10(a) (prohibiting the discharge of dredged or fill material "if there is a practicable alternative . . . which would have less adverse impact on the aquatic ecosystem").

[92] SER 99.

state-of-the-art telemedicine facility in King Cove and a portion of the 17-mile road to the proposed hovercraft terminal in the northeast corner of Cold Bay (the waterbody, not the town) ("Northeast Terminal").[93] The funds appropriated for airport improvements were used to build this portion of road.[94]

From 2007 to 2010 — while road construction to the Northeast Terminal was underway — the hovercraft operated out of Lenard Harbor, an existing marine facility between King Cove and the Northeast Terminal. The hovercraft performed at least 22 medical evacuations in almost all weather conditions.[95] When operating, the hovercraft successfully completed every requested medical evacuation,[96] even though Lenard Harbor has less favorable wind and wave conditions than the Northeast Terminal.[97] The Borough Mayor called the hovercraft a "life-saving machine . . . doing what it is supposed to do."[98]

Despite this, the Borough suspended hovercraft services, citing unreliability and cost.[99] Shortly after, the Borough moved the hovercraft to another community within the Borough to transport passengers and freight between an airport and the

[93] SER 99.
[94] SER 99.
[95] SER 99; ER 170.
[96] SER 317.
[97] SER 99, 220; ER 170.
[98] SER 99.
[99] SER 317.

town of Akutan across 7 miles of open water.[100] To continue road construction under its permit from the Corps, the Borough told the Corps that it would potentially use an aluminum landing craft or passenger ferry at the Northeast Terminal that would use the same infrastructure as the hovercraft, and stated that such a vessel could be more technically and financially viable than the hovercraft.[101]

Even before hovercraft service was discontinued, Alaska's congressional delegation again introduced bills that would have required the Secretary to convey Refuge lands to allow road construction.[102] Congress amended the legislation to avoid mandating a land exchange, and instead authorized the Secretary to make the exchange if she found it in the public interest.[103] The amended legislation was wrapped into a national lands package that passed in 2009: the Omnibus Public Lands Management Act. In OPLMA, Congress directed the Secretary to comply with NEPA in "determining whether to carry out the land exchange" and required the Secretary to analyze the land exchange and potential road construction and

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[100] SER 39; ER 170.

[101] SER 317.

[102] S. 1680, 110th Cong., 1st Sess. (as introduced by Lisa Murkowski, June 21, 2007); H.R. 2801, 110th Cong., 1st Sess. (as introduced by Don Young, June 20, 2007).

[103] OPLMA § 6402(a); *see also* 155 Cong. Rec. 9, S426–27 (daily ed. Jan. 15, 2009) (statement of Sen. Akaka, one of the original co-sponsors, about crafting an amendment that was acceptable to all stakeholders).

operation in an EIS.[104] If the Secretary decided to move forward with the land exchange and road, Congress granted the Secretary a time-limited authority to do so: seven years from the date that OPLMA was passed.[105]

IV. THE SECRETARY FOUND THAT A ROAD THROUGH IZEMBEK WOULD IRREPARABLY AND UNNECESSARILY DAMAGE THE REFUGE.

After the extensive multi-year public process mandated by OPLMA, the Secretary declined to authorize the land exchange. The Secretary concluded that the impacts of a road through Izembek would significantly and adversely affect the Refuge and "would not be offset" by adding the exchange lands to Izembek.[106] The Secretary explained that her decision "protects the unique resources the Department administers for the entire Nation"[107] and that she chose the no action alternative to protect Izembek's "unique and internationally recognized habitats," to maintain the integrity of designated Wilderness, and to ensure that the Refuge continues to meet the purposes for which it was established in 1960 and re-designated in 1980.[108]

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[104] OPLMA § 6402(b).

[105] *Id.* § 6406(a). OPLMA passed on March 30, 2009. Seven years later was March 30, 2016.

[106] ER 166–68.

[107] ER 184.

[108] ER 168; *see also* SER 123 ("This alternative was selected because it is believed to best meet refuge purposes and the Service mission."); ER 184 ("Retaining the Wilderness is both consistent with the mission of the Service, and necessary to protect the unique values of the refuge lands in perpetuity.").

Specifically, the Secretary noted that migratory and resident bird species would be particularly vulnerable to impacts from road construction and operation on the narrow isthmus.[109] The Secretary also determined that a road across the isthmus would "have a major impact on bears" and "fragment undisturbed habitat for grizzly bear and caribou."[110] With respect to Wilderness, the Secretary determined that the impacts would not be limited to de-designated lands; impacts of road construction and operation to wilderness character would extend far beyond the road corridor.[111] The Secretary concluded that Izembek "would be irretrievably damaged by construction and operation of the proposed road" and that this degradation "would not be offset by the protection of other lands to be received under an exchange."[112]

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[109] ER 167; *see also* ER 171 (explaining the impact of the road on Pacific Black Brandt and Tundra Swans); ER 172 (explaining the impact of the road on Emperor Geese and Steller's Eiders).

[110] ER 172; *see also* SER 71 (noting that road construction will cause brown bears to abandon some traditional foraging areas and denning sites).

[111] ER 173.

[112] ER 173; *see also* SER 123 ("While the proposed land exchange would provide many more acres of land as part of the Refuge System, the habitat values of these lands do not compare with the habitat values of the areas within the proposed road corridors and do not compensate for the effects that locating a road within the Izembek Wilderness would have on wildlife, habitat, and wilderness values of the refuge.").

The Secretary found that a road through the isthmus would undermine the directives of various substantive statutes,[113] while selecting the no action alternative would "support[] the continued management of the Izembek Refuge consistent with the purposes for which it was established.[114] She determined that selecting the no action alternative aligned with her obligations under the National Wildlife Refuge System Administration Act, which directs the Service to conserve fish, wildlife, and plants, and their habitats; to maintain biological integrity, diversity, and environmental health; and to ensure the purposes of the Refuge system are fulfilled.[115] She also determined that the no action alternative "best satisfies Refuge purposes, and best accomplishes the mission of the Service and the goals of Congress in ANILCA."[116] Further, she determined that selecting a land exchange alternative would "diminish the ability of the Service to meet the

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[113] ER 171.

[114] ER 171; *see also* 16 U.S.C. § 668dd(3)(A) (directing that management of each refuge should fulfill the mission of the National Wildlife Refuge System and "the specific purposes for which that refuge was established").

[115] ER 171; 16 U.S.C. § 668dd(2) ("The mission of the System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.").

[116] ER 184; *see also* ER 171 (Stating that the no action alternative "supports the continued management of the Izembek Refuge consistent with the purposes for which it was established.").

objectives of the Wilderness Act."[117] The impacts to the Wilderness lands that remained in the system would also be "irreparabl[e] and significant[]."[118] Because of the impacts to wildlife and Wilderness, the Secretary determined that road construction and operation would impair the Service's ability to manage Izembek consistent with its multiple statutory obligations.[119] For all of these reasons, she declined to proceed with the land exchange.[120]

In reaching her decision, the Secretary observed that other modes of transportation currently existed and that additional options could be developed that would be more cost-effective and have fewer impacts to the Refuge than a road.[121] The robust public process and careful consideration given to this issue revealed that there is no option that guarantees safe and affordable access to Cold Bay from King Cove in all weather conditions. None of the options — including a road — would guarantee safe and affordable access from King Cove to Cold Bay's airport in bad weather:

> [N]o transportation system can ever be perfect, especially considering

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[117] ER 173; *see also* 16 U.S.C. § 1133(c) (prohibiting the construction of roads within designated Wilderness). If the land exchange went forward, it would have been the first time that lands designated as Wilderness were removed from the National Wilderness Preservation System for the purpose of building a road. SER 110–111.

[118] ER 173.

[119] ER 170–71.

[120] ER 184.

[121] ER 184; SER 165.

> the weather and topography of the area of King Cove and Cold Bay, and there will be times when weather precludes any type of travel.[122]

The Secretary recognized that the same bad weather that makes air and boat travel difficult could "also make roads impassable" and that it was "likely that the road would not be open during the worst weather."[123] Also, travel on the road would normally be slower than travel by air, hovercraft, or ferry.[124]

Recognizing that "no transportation system can ever be perfect," the Secretary observed that at least three additional alternatives considered in the EIS could be implemented.[125] These include resumption of hovercraft service, use of the landing craft as described by the Borough, and a ferry operating from Lenard Harbor.[126] The hovercraft and landing craft would each be less expensive than building a road.[127] These alternatives are in addition to current transportation options, which include fishing vessels, air service, and ferry service.[128] The Secretary stated her commitment to continue to work with the community to

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[122] ER 167.
[123] ER 174–75.
[124] ER 174.
[125] ER 167.
[126] ER 168, 184.
[127] ER 184.
[128] ER 168.

achieve a solution that would both protect Izembek and meet King Cove's health and safety concerns.[129]

ARGUMENT

King Cove prefers the road alternative.[130] But OPLMA provided for a time-limited grant of authority for the Secretary to exchange lands to allow a road. That authority expired earlier this year. Because the court can no longer provide King Cove any relief, this case is moot and should be dismissed. If the court determines that the case is not moot, the fact King Cove prefers a road does not mean that the Secretary failed to carry out her obligations under NEPA. Rather, the Secretary fully complied with her legal duties: she selected the no action alternative as allowed by NEPA, she adequately analyzed the potential impacts of a landing craft, she took a hard look at potential impacts to the exchange lands of selecting the no action alternative, and she fully considered King Cove's health and safety concerns. The court should reject King Cove's claims and affirm the district court's summary judgement order and final judgment.

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[129] ER 184.

[130] Pl.-Appellants' & Pl.-Intervenor-Appellant's Opening Br. at 1 (Dkt. 8-3) [hereinafter "King Cove Br."].

I. THIS CASE IS MOOT BECAUSE THE SECRETARY'S AUTHORITY TO EXCHANGE LANDS EXPIRED.

This case is moot because the Secretary no longer has authority to proceed with the land exchange to allow a road. A case is moot if the controversy posed by the plaintiff is no longer "live."[131] The basic question for determining whether a case is live or moot is whether "there is a present controversy as to which effective relief can be granted."[132] King Cove asks this court to hold that the "Secretary's selection of the No Action alternative" was arbitrary and capricious and to vacate the decision and remand it to the agency for additional proceedings.[133] King Cove also seeks a declaration that the selection of the no action alternative violates NEPA and an injunction prohibiting the Secretary from selecting the no action alternative.[134] But if this court holds that the Secretary violated NEPA and remands the decision the Service for additional NEPA process, the Secretary lacks the authority to select any alternative other than the no action alternative. The legislative authority granted to the Secretary to exchange the lands for a road

[131] *Powell v. McCormack*, 395 U.S. 486, 496 (1969) ("Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.").

[132] *Nw. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988).

[133] King Cove Br. at 58.

[134] ER 59–60; SER 17–18.

expired on March 30, 2016,[135] and the Secretary cannot implement the other action alternatives.[136]

OPLMA provides for two limited extensions to the seven-year deadline, neither of which are applicable here. First, OPLMA states that if a road construction permit is issued but the road is not completed, the authority would be extended for five additional years.[137] This extension is not applicable because the Secretary declined to move forward with the land exchange and no construction permit was issued. The second extension provides that the seven-year deadline would be tolled if litigation challenged the Secretary's decision to move forward with the land exchange and road construction.[138] This provision does not apply in this case because the plain language of statute does not allow for tolling for

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[135] *See* OPLMA § 6406(a) (stating that "[a]ny legislative authority for the construction of a road shall expire at the end of the 7-year period beginning on the date of the enactment of this subtitle unless a construction permit has been issued during that period."); *id.* § 6406(d) ("Upon the expiration of the legislative authority under this section, if a road has not been constructed, the land exchange shall be null and void and the land ownership shall revert to the respective ownership status prior to the land exchange as provided in section 6405.").

[136] ER 175 (explaining that the hovercraft and ferry alternatives were included at the request of the Corps and that they "are outside the purview of the Service but may be used by cooperating agencies.").

[137] OPLMA § 6406(b).

[138] *Id.* § 6406(c).

litigation challenging the Secretary's decision to reject the land exchange and road.[139]

The Secretary's authority to move forward with the land exchange has expired. Even if King Cove prevails, there is no longer any effective relief that the court could grant. Accordingly, the case is moot.[140]

II. THE SECRETARY'S SELECTION OF THE NO ACTION ALTERNATIVE COMPLIED WITH NEPA.

King Cove makes three incorrect assertions that the Secretary violated NEPA when selecting the no action alternative. First, King Cove argues that the selected alternative needs to solve King Cove's health and safety concerns. Second, King Cove alleges that Congress barred the Secretary from considering the statutes that govern Izembek. Third, King Cove claims that the Secretary's decision depended on the viability of the landing craft. The first two assertions misstate the law; the third misunderstands both the law and the record.

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[139] *Id.* (stating that the expiration is tolled if a challenge is brought to "the land exchange or construction of the road").

[140] *See Navajo Tribe of Indians v. Andrus*, 644 F.2d 790, 791 (9th Cir. 1981) (finding an appeal moot where a "clear directive from Congress foreclose[d] the possibility that [the appellant] can obtain any relief").

A. Congress Did Not Require the Secretary to Select an Alternative that Would Resolve King Cove's Health and Safety Concerns.

King Cove claims that the Secretary violated NEPA by basing her decision on factors other than health and safety and by selecting an alternative "based on a different purpose and need than that established by Congress in OPLMA."[141] This argument rests on fundamental misunderstandings of both NEPA and OPLMA, neither of which constrain the Secretary's discretion.

The role of the purpose and need statement in an EIS is to help define the reasonable range of alternatives to be analyzed.[142] By its very nature, the no action alternative often will not satisfy the purpose and need identified in an EIS. Here, the EIS explicitly recognized that selection of the no action alternative would not meet the purpose and need unless a new mode of transportation was developed.[143]

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[141] King Cove Br. at 16. King Cove confuses the issue by labeling the Secretary's reasons for her decision as a new "purpose and need." This is misplaced. A purpose and need statement is part of a NEPA analysis, used to identify the proposal and define the scope of reasonable alternatives. 40 C.F.R. § 1502.13. It does not constrain or otherwise limit the ultimate decision.

[142] 40 C.F.R. § 1502.13 ("The [purpose and need] statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action."); *accord City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997).

[143] *See*, *e.g.*, SER 303 (recognizing that the stated purpose and need of the project would not be met if the land exchange did not proceed).

But nothing in NEPA prohibits the agency from selecting the no action alternative.[144]

King Cove relies on *Earth Island Inst. v. U.S. Forest Serv.*[145] to argue that the Secretary violated NEPA because she did not base her decision "on Congress's reason for enacting OPLMA."[146] *Earth Island* contains no such holding. The court in that case noted that it does not make sense for an agency to consider an action alternative that does not promote the project purpose. But the case did not alter the requirement to consider a no action alternative or limit the Secretary's discretion to choose the no action alternative.[147]

Further, OPLMA does not establish a health and safety purpose and need for the EIS or otherwise limit the Secretary's authority to select an alternative. OPLMA states only that if the land exchange is approved — after analysis under NEPA, compliance with "other applicable law," and a public-interest determination — the exchange would be for the purpose of "constructing a single-

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[144] *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–52 (1989) (observing that "[a]lthough [NEPA's] procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process").

[145] 697 F.3d 1010 (9th Cir. 2012).

[146] King Cove Br. at 17, 23.

[147] *See Earth Island Inst.*, 697 F.3d at 1023 (discussing NEPA's requirements related to action alternatives).

lane gravel road" between King Cove and Cold Bay.[148] The terms "health and safety" do not appear in any discussion of statutory purpose, but instead as a limitation on the use of the road.[149] Neither health and safety, nor viable alternative transportation modes are one of the three topics OPLMA required to be evaluated in the EIS.[150] King Cove's repeated references to the "health and safety" as the "congressionally mandated purpose and need" of OPLMA draw no support from the statute's text.

Relatedly, OPLMA does not mandate a land exchange.[151] The fact that the Service inferred a general health and safety purpose from OPLMA to help the agency develop the EIS alternatives does not mean that the Service could only select a road and land exchange alternative under NEPA. To the contrary, as OPLMA makes clear, the Secretary was not required to select a land exchange alternative. Congress's purpose in passing OPLMA was to direct the Secretary to give the land exchange full consideration under NEPA and to grant her the authority to move forward with the exchange if — in her discretion — she elected

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[148] OPLMA § 6402(a).

[149] *Id.* § 6403(a)(1) (describing limitations on use of a road and stating that the road shall be used "primarily for health and safety purposes and only for noncommercial purposes.").

[150] *Id.* § 6402(b)(2)(B)(i).

[151] *See id.* § 6402(a), (b)(1) (delegating the decision of whether to proceed with the land exchange to the Secretary).

to do so.[152] OPLMA does not limit the Secretary's ability to select the no action alternative under NEPA.

B. The Secretary Properly Considered Statutes that Govern the Management of the Refuge and Did Not Predetermine the Outcome of this NEPA Process.

In support of its argument that the Secretary was barred from selecting the no action alternative, King Cove alleges that the Secretary improperly considered the objectives of multiple statutes that govern Izembek and the impacts of a road on those statutory mandates.[153] This argument fails because OPLMA did not narrow the issues or impacts that the Secretary was required to consider under NEPA.[154] In determining whether to proceed with the potential road and land exchange, OPLMA mandated that the Secretary comply with NEPA.[155] OPLMA identified three specific issues that the EIS needed to include: an analysis of the proposed land exchange, an analysis of the construction and operation of a road between the two communities, and an evaluation of "a specific road corridor" identified in consultation with regional groups.[156] These were in addition to the issues and impacts that the Secretary was obligated to consider under NEPA,

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[152] *Id.* § 6402(a), (b), (d).

[153] King Cove Br. at 17, 20–21, 24–25.

[154] *See* OPLMA § 6402(c) (requiring compliance with NEPA and only limiting application of existing law requiring valuation for exchange lands, not the application of NEPA).

[155] *Id.* § 6402(b)(1)(A), (2).

[156] *Id.* § 6402(b)(1)(A).

which include "agency statutory missions," "essential considerations of national policy," and other "relevant factors."[157] The Secretary properly considered all congressional mandates applicable to the Refuge, including the Wilderness Act, the National Wildlife Refuge Act, and ANILCA.

King Cove relies on *Alaska Wilderness Recreation and Tourism Association v. Morrison*[158] to argue that if the Secretary had considered health and safety objectives instead of these applicable statutory mandates, she would have been less likely to select the no action alternative.[159] King Cove is incorrect that the Secretary failed to consider health and safety objectives when making her decision. She did.[160] Further, the court's decision in *Alaska Wilderness Recreation and Tourism* is inapposite. That case addressed the impact of the cancellation of a long-term timber contract on the obligation of the U.S. Forest Service to prepare a supplemental EIS.[161] The court found that a supplemental EIS was required because the alternatives considered in a prior EIS were constrained by a

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[157] 40 C.F.R. § 1505.2(b).

[158] 67 F.3d 723 (9th Cir. 1995).

[159] King Cove Br. at 24.

[160] *See*, *e.g.*, ER 166 (noting that the Secretary "weigh[ed] on the one hand the concern for more reliable methods of medical transport from King Cove to Cold Bay and, on the other hand, a globally significant landscape that supports an abundance and diversity of wildlife unique to the Refuge that years of analysis shows us would be irretrievably damaged by construction and operation of the proposed road").

[161] 67 F.3d at 725–27.

previously-in-force contract and that a new analysis would be able to consider a variety of different alternatives not formerly available to the Forest Service.[162] The case had nothing to do with an agency's duty to consider applicable statutes when preparing a NEPA analysis or otherwise limit the selection of the no action alternative.[163]

The Secretary's consideration of applicable and relevant statutes did not predetermine her decision as King Cove asserts.[164] The standard for improper predetermination is an irretrievable commitment of resources prior to the agency making a final decision.[165] King Cove has not alleged any such irretrievable commitment of resources, and none was made. King Cove instead argues that the Secretary was biased against the road.[166] Even if the Secretary had a preference before evaluating the alternatives in the EIS, "NEPA does not require that agency

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[162] *Id.* at 730.

[163] *Id. Contra* King Cove Br. at 24.

[164] King Cove Br. at 23–24 n.52.

[165] *Conner v. Burford*, 848 F.2d 1441, 1446 & n.13 (9th Cir. 1988); *see also* 40 C.F.R. §§ 1502.2(f) (barring an agency from committing resources "prejudicing selection of alternatives before making a final decision"), 1506.1 (prohibiting an agency from taking any action prior to issuing a record of decision that would "limit the choice of reasonable alternatives").

[166] King Cove Br. at 25.

officials be subjectively impartial."[167] NEPA simply requires that alternatives are "objectively evaluated,"[168] which the Secretary did.

C. The Secretary Permissibly Based Her Decision on Adverse Impacts to the Refuge and the Availability of a Wide Array of Transportation Options.

King Cove argues that the Secretary's decision was "completely dependent on the viability of the landing craft" and that the Secretary improperly assumed that the landing craft was a viable transportation option when selecting the no action alternative.[169] This mischaracterizes the Secretary's decision. The Secretary observed that numerous existing and potential transportation options could help address King Cove's concerns, but her decision did not hinge on the implementation of any of these options, nor was it required to.[170] The final EIS described the landing craft only as a possibility under the no action alternative.[171]

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[167] *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000); *see also* 40 C.F.R. § 1502.14(e) (requiring an EIS to "[i]dentify the agency's preferred alternative or alternatives, if one or more exists").

[168] *Metcalf*, 214 F.3d at 1142.

[169] King Cove Br. at 26.

[170] ER 184. King Cove asserts that none of the non-road alternatives are viable because they would "not meet the Purpose and Need of OPLMA." King Cove Br. at 26. This reflects King Cove's continued misunderstanding of OPLMA; Congress did not mandate construction of a road in OPLMA or require the Secretary to resolve King Cove's health and safety concerns. *Supra* Argument I.A.

[171] *See*, *e.g.*, SER 415 ("If landing craft service is implemented at some date in the future . . . ."); SER 417 ("A possible future landing craft/passenger ferry with an unknown frequency of service . . . ."); SER 429 ("If the land exchange is not approved, a landing craft/passenger ferry could be implemented by the Aleutians East Borough at some date in the future to complete a marine-road link between

Similarly, the Secretary's decision recognized that the landing craft was only considered as a possible future development.[172] The Secretary based her decision to not proceed with the land exchange on a conclusion that a road would significantly and adversely affect the Refuge, and a determination that "other viable modes of transportation" are available.[173] These other transportation modes include both the potential for new options — like a ferry or landing craft — and currently existing options — such as fishing boats, air service, and the ferry service provided by the Alaska Marine Highway System.[174] In short, the Secretary's decision was not "completely dependent" on the landing craft as King Cove claims.[175] More importantly, nothing in NEPA or OPLMA required the Secretary to select an alternative that approved a specific mode of transportation or resolved King Cove's health and safety concerns.

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the communities of King Cove and Cold Bay.").

[172] *See*, *e.g.*, ER 166 (noting that the no action alternative "includes a description of a proposal for a landing craft/passenger ferry"); ER 175 ("The Borough has indicated to the Corps that, if the road through the Refuge is not approved, it will consider developing an alternative transportation link in the form of an aluminum landing craft/passenger ferry.").

[173] ER 168; *see also* ER 167 (the Secretary stating in the decision that "[t]he EIS shows that construction of a road through the Izembek National Wildlife Refuge would lead to significant degradation of irreplaceable ecological resources that would not be offset by the protection of other lands to be received under an exchange"); ER 170–75 (the Secretary further describing the basis for her decision not to proceed with the land exchange).

[174] ER 168.

[175] King Cove Br. at 26.

III. THE SECRETARY WAS NOT REQUIRED TO ANALYZE THE LANDING CRAFT IN A STAND-ALONE ALTERNATIVE OR SUPPLEMENT THE EIS.

King Cove maintains that the landing craft should have been analyzed as a stand-alone alternative.[176] King Cove's position relies on the misunderstanding that an EIS must evaluate all possible alternatives, and asserts that the Secretary's decision that the landing craft was "viable" meant that the EIS's failure to analyze it as a stand-alone alternative rendered the EIS inadequate.[177] This argument fails for two reasons: the landing craft was analyzed as part of the no action alternative, and the impacts of a landing craft would be similar to those analyzed in the hovercraft and ferry alternatives. The Secretary properly reviewed the landing craft and its impacts without adding it as a separate alternative. The same reasoning defeats King Cove's assertions that a supplemental EIS was required.

[176] King Cove Br. at 26, 27, 30. This is inconsistent with King Cove's argument that the landing craft was not a viable alternative. King Cove Br. at 27, 30 & n.67, 36. King Cove should not be permitted to pursue two inconsistent legal arguments. *See S. Appalachian Mountain Stewards v. A&G Coal Corp.*, 758 F.3d 560, 569 (4th Cir. 2014) (noting the inconsistent arguments of a party and stating that "[a]ppellant's attempt to have it both ways underscores why it cannot prevail"). *Cf.* King Cove Br. at 37 n.87.

[177] King Cove Br. at 25–26, 34.

A. The Potential Impacts of a Landing Craft Were Analyzed as Part of the No Action Alternative.

King Cove's argument that the EIS needed to analyze the landing craft as a stand-alone alternative fails. An EIS does not have to include a stand-alone alternative for an option that is included as part of the no action alternative.[178] A no action alternative must describe the status quo, including actions that a separate entity might take if the proposed action does not occur.[179] The landing craft was properly included as part of the no action alternative based on the Borough's representations to the Corps.[180] As a result, the EIS did not need to analyze the landing craft as a separate alternative.

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[178] *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1248–49 (9th Cir. 2005).

[179] *Kilroy v. Ruckelshaus*, 738 F.2d 1448, 1453 (9th Cir. 1984) (describing the no action alternative as the "'no action' status quo alternative"); Forty Most Frequently Asked Questions Concerning Council on Environmental Quality's Nat'l Envtl. Policy Act Regulations, 46 Fed. Reg. 18026, 18027 (Mar. 23, 1981) (codified at 40 C.F.R. pts. 1500 *et seq*.) [hereinafter "40 Most Asked NEPA Questions"] ("Where a choice of 'no action' by the agency would result in predictable actions by others, this consequence of the 'no action' alternative should be included in the analysis. For example, if denial of permission to build a railroad to a facility would lead to construction of a road and increased truck traffic, the EIS should analyze this consequence of the 'no action' alternative.").

[180] ER 387 (letter from the Borough to the Corps stating that "If the Secretary does not approve the land exchange the [Borough] will develop an alternative transportation link between King Cove and Cold Bay" and describing a landing craft/passenger ferry that would use the facilities authorized by the permit issued by the Corps); *see also* ER 176–77 & SER 303–04 (same).

King Cove relies on *Southeast Alaska Conservation Council v. Federal Highway Administration*[181] to argue that the analysis of the impacts of the landing craft as part of the no action alternative was inadequate.[182] King Cove's reliance on this case is misplaced. *Southeast Alaska Conservation Council* dealt with a challenge to the Federal Highway Administration's EIS that evaluated ways to improve ferry service in southeast Alaska. The action alternatives focused on infrastructure projects such as new roads and ports. The plaintiffs put forward an alternative that focused on improving service through changes to the ferry schedules and other means that did not involve new infrastructure. The agency argued that the EIS considered the plaintiffs' proposal as part of the no action alternative.[183] The Ninth Circuit rejected that argument because the no action alternative only briefly mentioned the possibility of altering ferry schedules, but did not actually analyze any changes. The court found that the agency's cursory explanation "does not represent the 'substantial treatment' required by NEPA's implementing regulations."[184]

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[181] 649 F.3d 1050 (9th Cir. 2011).

[182] King Cove Br. at 31–33; *see also* King Cove Br. at 37–38 (arguing that the only discussion of the landing craft in the EIS and decision was limited to an appendix of the EIS).

[183] 649 F.3d at 1058.

[184] *Id.* at 1058–59 (citing 40 C.F.R. § 1502.14(b)).

Unlike the EIS at issue in *Southeast Alaska Conservation Council*, the Secretary adequately analyzed the landing craft as part of the no action alterative. Even though the Borough refused to provide information on the potential landing craft when requested,[185] the no action alterative described the landing craft as accurately and in as much detail as possible based on the Borough's representations to the Corps and analyzed the impacts of the landing craft.[186] The Secretary disclosed what information was lacking, and then determined that the missing information was not essential to a reasoned choice among alternatives.[187] The no action alternative describes the landing craft in sufficient detail for the public to understand the potential impacts from its operation; this analysis complied with NEPA regulations that require a robust discussion of potential

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[185] SER 304.

[186] SER 413–91 (EIS describing the no action alternative and analyzing potential impacts on the social environment); SER 432 (EIS noting that if the Borough developed a landing craft, marine fish would be subject to "intermittent disturbance . . . similar to disturbances from fishing vessels commonly used in the area."); SER 435–36 (noting that a landing craft operating out of the Northeast Terminal would likely have a negligible impact on birds "but could vary, depending on levels of service"); ER 176–77 (Secretary's decision describing the landing craft information provided by the Borough and its incorporation into the no action alternative).

[187] *See* ER 170–75 (explaining how the Secretary based her decision on numerous other factors).

environmental impacts and the identification and impact of incomplete or unavailable information.[188]

B. The Potential Impacts of a Landing Craft Were Sufficiently Similar to Those Analyzed in the Hovercraft and Ferry Alternatives.

King Cove's argument that the Secretary needed to analyze the proposed landing craft in a stand-alone alternative also fails because King Cove does not show how a landing craft alternative would be significantly different from the hovercraft and ferry alternatives considered in the EIS. An agency is not obligated to analyze redundant alternatives.[189] King Cove failed to provide any information about how the environmental consequences of the landing craft would be sufficiently different from operations of the hovercraft or the ferry under Alternatives 4 and 5.

The proposed landing craft is sufficiently similar to these alternatives to not require separate analysis. All three modes of transportation would involve operating a vessel across Cold Bay, with associated noise, air, water quality, and fish and wildlife impacts — impacts that were thoroughly considered under the

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[188] 40 C.F.R. §§ 1502.16, 1502.22.

[189] *See Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 868 (9th Cir. 2004) ("Nor is an agency required to undertake a separate analysis of alternatives which are not sufficiently distinguishable from alternatives actually considered, or which have substantially similar consequences.").

ferry and hovercraft alternatives.[190] Further, both the landing craft and the hovercraft would use the same terminals and facilities, and take the same general route across Cold Bay.[191] The environmental impacts of this route and use of these terminals were analyzed extensively as part of the hovercraft alternative.[192]

Because the landing craft was considered as part of the no action alternative and because two additional marine-land transportation options were considered that are similar to the landing craft,[193] the Secretary did not have to consider a stand-alone landing craft alternative.

C. There Was No Significant New Information or Circumstances Requiring Supplementation of the EIS.

In a heading, King Cove also asserts that the Service was required to prepare a supplemental EIS.[194] King Cove waives this argument by failing to develop it any further.[195] Even if King Cove has preserved this argument, it fails to establish that

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[190] SER 751–876.

[191] SER 227; ER 175; *see also* ER 387 (the Borough stating that "[a]ny alternative we develop will include the utilization of the road to the Northeast Corner and associated facilities" and that it was "looking at building materials and techniques . . . that allow the vessel to use the landing pad at the Northeast Corner which is to be constructed in accordance with the existing plans, specs, and permits"). This is also the same route analyzed in the Corps 2003 EIS. ER 177.

[192] SER 751–810.

[193] SER 303–13.

[194] King Cove Br. at 25.

[195] *See Christian Legal Soc. Chapter of Univ. of Cal. v. Wu*, 626 F.3d 483, 485 (9th Cir. 2010) (noting that the court reviews "only issues that are argued specifically and distinctly in a party's opening brief").

supplementation is necessary. An EIS must be supplemented when "(i) [t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[196] The agency bases its decision on whether to prepare a supplemental EIS on the "significance — or lack of significance —of the new information."[197] The Secretary took the required hard look at the potential landing craft as part of the no action alternative.[198] King Cove has not identified anything regarding the landing craft that would rise to the level of substantial changes or significant new circumstances or information relevant to environmental concerns that would warrant supplementation. Further, the potential landing craft is sufficiently similar to the hovercraft and ferry alternatives analyzed in full such that the EIS does not require supplementation.[199]

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[196] 40 C.F.R. § 1502.9(c)(1); *Westlands Water Dist.*, 376 F.3d at 873 (providing that a supplemental EIS is required where changes, or new information or circumstances, may result in significant environmental impacts "in a manner not previously evaluated or considered").

[197] *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989); *see also* 40 Most Asked NEPA Questions, 46 Fed. Reg. at 18035 (explaining that when an alternative arises after the issuance of a draft EIS, a supplemental EIS is not needed where that alternative is "qualitatively within the spectrum of alternatives that were discussed in the draft").

[198] *See supra*, Argument III.A.

[199] *Russell County Sportsman v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011) (adopting the Council on Environmental Quality's standards for

IV. THE SECRETARY TOOK THE REQUIRED HARD LOOK AT POTENTIAL IMPACTS TO THE EXCHANGE LANDS.

Contrary to King Cove's arguments,[200] the Secretary took a hard look at the potential impacts to the exchange lands, reasonably determined that the exchange lands would not compensate for the irreparably damage a road would have on the Refuge, and acted consistently with the Service's 1998 Lands Protection Plan.

A. The EIS Thoroughly Evaluated the Exchange Lands and the Potential Impacts of Not Acquiring Those Lands.

King Cove asserts that the Secretary failed to adequately analyze the ecological values of the exchange lands, and the potential impacts to those lands if they were not added to the Refuge.[201] This is incorrect. The EIS thoroughly evaluated the values of the exchange lands,[202] and the Secretary took a hard look at the potential impacts to those lands of selecting the no action alternative.[203]

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supplementation and noting that under those standards, supplementation is not required when "(1) the new alternatives is a '*minor variation* of one of the alternatives discussed in the draft EIS,' and (2) the new alternative is '*qualitatively within the spectrum of alternatives* that were discussed in the draft [EIS].'" (quoting 40 Most Asked NEPA Questions, 46 Fed. Reg. at 18035 (alternation original))).

[200] King Cove Br. at 42–52.

[201] *Id.* at 42, 43, 47–52.

[202] *See*, *e.g.*, SER 183 (description of wetlands on exchange lands); SER 194–99 (description of land mammals on exchange lands); SER 277 (description of wilderness characteristics of exchange lands).

[203] *See*, *e.g.*, SER 428 (evaluating potential impacts to plant communities), 430 (evaluating potential impacts to wetlands), 435 (evaluating potential impacts to birds), 437–38 (evaluating potential impacts to land mammals), 442 (evaluating potential impacts to threatened and endangered species), 452–53 (describing the

King Cove alleges that specific potential impacts to the exchange lands were not evaluated.[204] These arguments are unsupported. First, King Cove attempts to renew its argument that the impacts of oil and gas leasing were not considered.[205] But before the district court, King Cove conceded that these impacts were given a hard look.[206] As the EIS explained, oil and gas leasing is not a reasonably foreseeable threat.[207] King Cove also asserts that if lands were not exchanged for a road, they would be conveyed to the King Cove Corporation and subject to development.[208] The EIS considered this potential, but recognized that any development on the conveyed lands would be subject to § 22(g) of the Alaska

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potential impacts to wilderness).

[204] King Cove also argues that the EIS failed to take a hard look at potential impacts to lands to be transferred to the Izembek State Game Refuge and to lands on Sitkinak Island if the land exchange were approved. King Cove Br. at 48–49. This is incorrect. These impacts were analyzed in the EIS's discussion of each of the land-exchange alternatives. SER 522, 582, 686, 711.

[205] King Cove Br. at 47.

[206] Pls.' and Pl.-Intervenor's Joint Reply to Defs.' and Def.-Intervenors' Opposition to Pls.' and Pl. Intervenor's Joint Mot. for Summ. J. and Pls. and Pl.-Intervenor's Joint Opp'n to Defs.' and Def. Intervenors' Cross Mot. for Summ. J. at 25, *Agdaagux Tribe of King Cove v. Jewell*, No. 3:14-cv-0110-HRH (D. Alaska Mar. 30, 2015), ECF No. 86 ("Defendants do discuss the threat of oil and gas leasing on the State Exchange Lands and say that Defendants did not believe that any such sales were 'reasonably foreseeable.' Plaintiffs acknowledge that Defendants are entitled to deference on that point.").

[207] *See* SER 267 (EIS noting that "[n]one of the proposed land exchange areas have experienced oil and gas exploration activity").

[208] King Cove Br. at 48.

Native Claims Settlement Act ("ANCSA"),[209] which requires that any proposed development not impair the ability of the Refuge to achieve its purpose.[210]

Next, King Cove alleges that the Secretary failed to take a hard look at the impacts to wetlands and wilderness values of King Cove selecting lands within the Izembek Wilderness.[211] However, the EIS analyzed the impacts of this transfer as part of the no action alternative.[212] The Service found that no development projects on these lands are reasonably foreseeable.[213] The EIS specifically described the

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[209] SER 430 (recognizing the applicability of ANCSA § 22(g) and the compatibility requirements of 50 C.F.R. part 25 and 26); SER 489 (same).

[210] 43 U.S.C. § 1621(g).

[211] King Cove Br. at 48.

[212] *See* SER 428 (discussing the impact of conveyance on plant communities and finding that the impacts would not extend to the Refuge); SER 430 (discussing the impact of conveyance on wetlands and finding that the impacts would not impair the Refuge's purposes); SER 432 (finding that the conveyance would not affect fish or Essential Fish Habitat); SER 435 (noting that the conveyance may lead to development that could adversely affect birds "through localized loss of habitat and periodic disturbance from human activities and vehicles used for access" but that this development would be subject to ANCSA § 22(g) and "would not result in a noticeable change in resource condition"); SER 437 (analyzing the impact of the conveyance on land mammals and finding that potential development would impact brown bears, caribou, and other mammals but that the impacts would be minor because of ANCSA § 22(g) requirements); SER 442 (finding that the impact of the conveyance would not likely impact Steller's Eider, Yellow-billed Loon, and Kittlitz' Murrelet because the conveyed lands "likely do not contain habitat [for these birds]" and any development would be subject to ANCSA § 22(g)); SER 489 (finding that impacts to wilderness from the conveyance are unlikely as "[t]here are no future plans identified for development and conveyance of this particular parcel is not assured" and any development would be subject to ANCSA § 22(g)).

[213] *See* SER 428, 490.

impacts to wilderness character of not making the land exchange at length and characterized them as minor.[214] The EIS noted that conveyance of the 5,430 acres to King Cove would result in long-term impacts to wilderness character.[215] But the EIS noted that because the parcel is "located at the margin of the wilderness and proposed developments would be subject to the provisions of ANCSA Section 22(g)," the impact to wilderness character would be "limited geographically."[216] This satisfies NEPA's hard look requirement.

Similarly, the EIS analyzed the impact to wetlands of the King Cove selected lands being taken out of federal ownership.[217] King Cove does not identify any reasonably foreseeable threat to these wetlands that the Secretary failed to consider.[218] The EIS determined that "no activities in the reasonably foreseeable future have been identified that would alter wetlands on these parcels."[219] This analysis meets NEPA's hard look requirement.

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[214] *See* SER 489–91.

[215] SER 490.

[216] *Id.*

[217] SER 430 (discussing the impact of conveyance on wetlands and finding that the impacts would not impair the Refuge's purposes).

[218] *See* 40 C.F.R. § 1508.8(b) (stating that an agency only has to consider reasonably foreseeable impacts).

[219] SER 522, 686.

King Cove claims that *Center for Biological Diversity v. U.S. Department of Interior*[220] is an analogous case where an agency failed to take a hard look under NEPA.[221] That decision is not instructive here. In *Center for Biological Diversity*, the Bureau of Land Management ("BLM") concluded that mining would occur on a particular area of BLM-managed land regardless of whether the federal government retained ownership. BLM assumed that there would be no environmental consequences of taking the land out of federal ownership despite different federal requirements applying to mining operations on federal land.[222] The court found that this assumption was arbitrary because the substantive requirements of a federal law would remain in effect only if the land was kept in federal ownership.[223] In the present case, King Cove has not alleged any false assumptions made with respect to exchange lands. The EIS considered the potential impacts on exchange lands and reasonably concluded that there were no reasonably foreseeable impacts that would be avoided if those lands were added to the Refuge. The EIS took the required hard look at these potential impacts in compliance with NEPA.

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[220] 623 F.3d 633 (9th Cir. 2010).
[221] King Cove Br. at 43–44.
[222] 623 F.3d at 642–43.
[223] *Id.*

B. The Secretary Reasonably Determined that a Road Would Irreparably Damage the Refuge.

King Cove appears to allege that the Secretary's determination that a road would irretrievably damage the Refuge was arbitrary.[224] King Cove asserts that because of this determination "the State and King Cove Corporation could have offered a million acres of prime wilderness in exchange for the 206 acres, and because the Secretary claims the 206 acres is 'irreplaceable,' she still would have presumably vetoed the land exchange."[225] King Cove's claim is based on a failure to recognize the broad discretion granted to the Secretary to evaluate the potential impacts a road would have on the Refuge, and to weigh the respective values of the Refuge and the exchange lands.

The Secretary reasonably found that allowing a road would "irreparably and significantly impair this spectacular Wilderness refuge."[226] Protecting the habitat values that would be detrimentally impacted by the road was the very reason Congress protected Izembek in the first place.[227] Road construction would increase human traffic and noise, change the hydrology by damaging wetlands and causing run-off, and introduce contaminants and invasive species.[228] Pedestrian and all-

[224] King Cove Br. at 51–52.
[225] King Cove Br. at 51.
[226] ER 173.
[227] ANILCA § 303(3)(B).
[228] ER 168.

terrain vehicle use would have "profound adverse effects on wildlife use and habitats on the narrow isthmus that comprises the Refuge."[229]

King Cove's argument implies that the impacts of a road would be limited to the 206 acres of the road's footprint.[230] The record belies this assertion. It demonstrates that a road would increase human access and activity extending beyond the road corridor, leading to impacts far into the Refuge and even outside Izembek's boundaries.[231] Accordingly, the Secretary's determination that the impacts from a road would reach beyond just the road corridor is supported by the record.

The Secretary also reasonably determined that the loss of the "unique values" of the isthmus — and the anticipated effects of a road on wildlife, subsistence resources, and wilderness values — would not be compensated for by the acquisition of the exchange lands even though the land exchange would

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[229] *Id.*; *see also* ER 171 ("Additionally, construction of a road through this Wilderness area will lead to increased human access and activity, including likely unauthorized off-road access.").

[230] King Cove Br. at 51–52.

[231] ER 168; *see also* SER 123 ("Simply exchanging lands will not compensate for the ripple effects on habitat and wildlife due to uses on and beyond the road, nor would new lands provide habitat for all the same species.").

increase the size of the Refuge.[232] The Secretary acted within her discretion to find the Izembek lands more valuable than the exchange lands.[233]

C. The Secretary's Decision Is Consistent with the Service's Land Protection Plan.

King Cove argues that the Secretary's failure to take a hard look at the exchange lands is illustrated by her finding that the exchange lands are not likely to be developed. According to King Cove, this is inconsistent with the Service's evaluation of threats to those lands in its 1998 Lands Protection Plan ("Plan").[234] King Cove misrepresents the Plan.

King Cove focuses on how the Plan noted potential development pressures to the exchange lands and determined that some of the exchange lands were a priority for acquisition.[235] The Plan generally identified parcels as high priority for acquisition based on numerous factors, including wildlife values, probability of development, and the willingness of a landowner to sell or otherwise work with the

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[232] SER 317; *see also* SER 123 ("While the more than 55,000 acres offered contain important wildlife habitat, they do not provide the wildlife diversity of the internationally recognized wetland habitat within the refuge acreage of the Izembek isthmus . . . [The exchange] would not compensate for the adverse effects of removing a corridor of land and constructing a road within the narrow Izembek isthmus."); SER 283 ("[T]he lands lost and lands gained have little in common with regard to cover types, wildlife potential, or ecological process/function.").

[233] *See Marsh*, 490 U.S. at 375 (reviewing courts are at their most deferential regarding scientific determinations).

[234] King Cove Br. at 45.

[235] King Cove Br. at 45; *see* ER 433 (map identifying lands as high, medium, or low priority for acquisition).

Service to protect the wildlife values of the parcel.[236] But the Plan makes it clear that, despite a parcel's general ranking for acquisition, each parcel proposed for acquisition would be later "evaluated on a case-by-case basis."[237] During this site-specific analysis is when the urgency of proposed development would be considered, as one of six factors.[238] More fundamentally, the Plan did not address whether those lands would be worth exchanging for current Refuge lands in a land trade.[239] Rather, the Plan described "[t]he proposal to construct a road across both refuge and King Cove Corporation lands [as] . . . the greatest known potential threat to wildlife and wilderness values within the Izembek complex."[240] Given this finding, the Plan cannot reasonably be read to prioritize the acquisition of the exchange lands over the protection of the Refuge from the proposed road.

Contrary to King Cove's argument, the Service did not change its policy or approach for acquiring lands set out in the Plan. Simply put, the Plan and the Secretary's decision address different questions, and the answers are compatible.

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[236] SER 370.
[237] SER 370.
[238] SER 370–73 (describing factors to be considered on a case-by-case basis).
[239] SER 319–92.
[240] SER 368.

V. THE SECRETARY THOROUGHLY CONSIDERED KING COVE'S HEALTH AND SAFETY CONCERNS.

King Cove asserts that the lack of a recommendation on the proposed road in the Assistant Secretary's report violates NEPA.[241] King Cove argues that a recommendation from the Assistant Secretary was an "important aspect of the problem" that the Secretary failed to consider.[242] But nothing in NEPA requires the report itself or mandates that the report contain any specific information or recommendation. As the Supreme Court explained, "the only procedural requirements imposed by NEPA are those stated in the plain language of the Act."[243] The Secretary had no NEPA obligation to require the Assistant Secretary's report and nothing in NEPA requires the report to contain a recommendation.

King Cove relies on *Tongass Conservation Society v. Cole*[244] to support its argument that the Assistant Secretary's failure to include a recommendation on a road violated NEPA.[245] This is misplaced. In that case, the court considered whether the U.S. Forest Service was required to prepare a supplemental EIS for a timber sale based on the agency's reliance on old and inaccurate economic

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[241] King Cove Br. at 53–55.

[242] *Id.* at 54.

[243] *Vt. Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 548 (1978) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 405–06 (1976)).

[244] No. 1:09-cv-00003-JWS (Dec. 7, 2009 D. Alaska) (included in the excerpts of record at ER 436–72).

[245] King Cove Br. at 54–55.

information in an EIS.[246] The court held that a supplemental EIS was required because the new economic information was significantly different, and impacted the economic analysis and the ultimate decision.[247] Here, King Cove does not point to any new information about health and safety contained in the report that was not considered in the EIS, and does not argue that the information in the Assistant Secretary's report is inaccurate.[248]

King Cove's argument also implies that any recommendation by the Assistant Secretary would have been binding on the Secretary's decision. King Cove fails to provide any support for this position.[249] Nor could they. OPLMA directed the Secretary, not the Assistant Secretary, to decide whether to proceed with a land exchange.[250] And she made her decision fully informed about the health and safety concerns detailed in the Assistant Secretary's report and the EIS.[251]

The Secretary fully considered the information included in the Assistant Secretary's report when making her decision.[252] The Secretary's thorough consideration of the health and safety concerns of King Cove and evaluation of the

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[246] ER 442–44.
[247] ER 447.
[248] *Contra* King Cove Br. at 54.
[249] *Id.* at 54–55.
[250] OPLMA § 6402.
[251] ER 174–75, 184; SER 475–77, 630–34, 735–37, 798–800, 861–63.
[252] ER 166, 181, 183.

ability of a road to meet those concerns — including review of the Assistant Secretary's report — satisfies NEPA.[253]

CONCLUSION

Friends respectfully request that the court dismiss the case as moot or, if the court reaches the merits, affirm the District Court's summary judgement order and final judgment and hold that the Secretary's decision selecting the no action alternative complied with NEPA.

Submitted this 13th day of May, 2016.

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[253] King Cove intimates that the Assistant Secretary's failure to include a recommendation on the road and the Secretary's failure to consider the health and safety concerns of King Cove violates a trust responsibility to the Aleut residents of King Cove. King Cove Br. at 53–56. The district court dismissed King Cove's trust claims early in the case, ER 125, and King Cove raises only NEPA claims on appeal. King Cove Br. at 1, 3.

CERTIFICATE OF COMPLIANCE

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) that this brief contains 12,958 words and has been prepared in 14-point Times New Roman proportionally spaced typeface.

s/ K. Strong
Katherine Strong

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellees Friends of Alaska National Wildlife Refuges, et al. state that they are unaware of any related cases pending in this court.

CERTIFICATE OF SERVICE

I certify that on May 13, 2016, I electronically filed a copy of the Appellees Friends of Alaska National Wildlife Refuges, et al.'s Brief in Opposition with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which will send electronic notification of such filings to the attorneys of record in this case.

s/ K. Strong
Katherine Strong