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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

**AGDAAGUX TRIBE OF KING COVE,
NATIVE VILLAGE OF BELKOFSKI, KING COVE
CORPORATION, ALEUTIANS EAST BOROUGH,
CITY OF KING COVE, ETTA KUZAKIN, and
LEFF KENEZUROFF**

Plaintiffs,

v.

**SALLY JEWELL, Secretary of the Department of
Interior; KEVIN WASHBURN, Assistant Secretary
For Indian Affairs; RACHEL JACOBSON, Acting
Assistant Secretary for Fish Wildlife and Parks;
DAN ASHE, Director, United States Fish and Wildlife
Service; GEOFF HASKETT, Regional Director,
United States Fish and Wildlife Service; and DOUG
DAMBERG; Manager, Izembek National Wildlife
Refuge**

Defendants

**CIV. CASE NO.
COMPLAINT FOR
DECKARATORY AND
INJUNCTIVE RELIEF**

(Violation of Omnibus
Public Land Management
Act of 2009, Administrative
Procedures Act, National
Environmental Policy Act,
Alaska National Interest
Lands Conservation Act,
and Title 25 of the United
States Code, Trust
Responsibility to American
Indians and Alaska Natives
and Article 1, Section 8 of
the U.S. Constitution

INTRODUCTION

1. This is a civil action in behalf of the Agdaagux Tribe, the Native Village of Belkofski, the King Cove Village Corporation, the Aleutians East Borough, and the City of King Cove seeking a Judgment declaring that Defendants prepared the Record of Decision for the Izembek National Wildlife Refuge Land Exchange/Road Corridor (Izembek) Final Environmental Impact Statement (FEIS) in violation of the Omnibus Public Land Management Act of 2009 (Public Law 111-11, Title VI, Subtitle E (OPLMA); the Administrative Procedure Act, 5 U.S.C. §§701-706 (APA), the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§4321-4361, and its implementing regulations, 42 CFR §1500 *et. seq.*; the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. 96-487 (Dec. 2, 1980), and their Trust Responsibility to American Indians and Alaska Natives set out in Title 25 to the United States Code and Article 1, Section 8 of the Constitution of the United States. The gravamen of Plaintiffs' Complaint is that Defendants' December 23, 2013 Record of Decision (ROD) violated OPLMA, the APA, NEPA, ANILCA and Defendants' Trust Responsibility under Title 25 of the U.S.C and the Constitution by failing to select an alternative displayed in the Izembek Land Exchange Final Environmental Impact Statement (EIS) that meets the statutory requirements of the OPLMA or of the APA, or of the Purpose and Need Statement of the EIS, or of ANILCA, or of the Trust Responsibility of the

United States to American Indians or Alaska Natives under Title 25 of the U.S.C. and the Constitution.

JURISDICTION AND VENUE

2. This action is brought pursuant to the Omnibus Public Land Management Act of 2009 (Public Law 111-11, Title VI, Subtitle E (OPLMA); the Administrative Procedures Act (APA), 5 U.S.C. §§701-706, and the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202. The United States has waived sovereign immunity in this type of action in 5 U.S.C. §702.
3. This Court has subject matter jurisdiction over this action under 28 U.S.C. §1331 and 28 U.S.C. §1361 because this case arises under OPLMA, the APA, NEPA, and ANILCA. Plaintiffs have exhausted their administrative remedies. Defendants' Record of Decision (ROD) of December 23, 2013 constitutes the final agency administrative action of Defendants Secretary of Interior Sally Jewel; Assistant Secretary for Indian Affairs Kevin Washburn; Acting Assistant Secretary of Interior for Fish, Wildlife, and Parks Rachel Jacobson; Director of the United States Fish & Wildlife Service Dan Ashe; Alaska Regional Director for United States Fish & Wildlife Geoff Haskett; and Izembek Refuge Manager Doug Damberg regarding the Izembek National Wildlife Refuge Land Exchange/Road Corridor FEIS directed by Congress in the OPLMA.
4. Venue in this action is proper in the District Court for the District of Alaska and in this Court under 28 U.S.C. §1391(b)(2) and § 1391(e).

PARTIES

5. Plaintiff, Agdaagux Tribe of King Cove, is a recognized tribe by the Department of Interior with 702 registered tribal members, all of whom are Aleuts and 209 of whom are residents of King Cove and travel regularly between King and the Cold Bay Airport to reach Anchorage Alaska to receive medical services at the Alaska Native Medical Center funded by and the responsibility of the Federal Government under its Trust Responsibility to these Alaska Native Aleuts.
6. Plaintiff, Belkofski Tribe is a recognized tribe by the Department of Interior with 100 registered tribal members, all of whom are Aleuts and of whom 26 are residents of King Cove. The tribal members travel regularly between King Cove and the Cold Bay Airport to reach Anchorage, Alaska to receive medical services at the Alaska Native Medical Center funded by and the responsibility of the Federal Government under its Trust Responsibility to these Alaska Native Aleuts.
7. Plaintiff, City of King Cove, is a political subdivision of, and first class city organized under the laws of, the State of Alaska. The City has 938 residents of whom more than one-third are Alaska natives. The Aleut name for King Cove is Agdaagux.
8. Plaintiff, King Cove Corporation is the village corporation established by the Aleut residents of King Cove under the Alaska Native Claims Settlement Act (ANCSA). King Cove Corporation has 424 shareholders, all of whom are Aleuts, other Alaska Natives or descendants of these original shareholders.

9. Plaintiff, Aleutians East Borough is a political subdivision and a second class Borough organized under the laws of the State of Alaska. The Borough includes King Cove and Cold Bay.
10. Plaintiff, Etta Kuzakin, is President of the Agdaagux Tribe of King Cove, an Alaska Native resident and a lifelong and full time resident of King Cove who was medevaced from King Cove by the Coast Guard in 60 knot winds while 34 weeks pregnant.
11. Plaintiff, Leff Kenezuroff, is an elder of the Native Village of Belkofski and a full time Alaska Native resident of King Cove , who has been medevaced from King Cove to Cold Bay four times due to heart attacks.
12. Defendant, Sally Jewell, is the Secretary of the United States Department of Interior and the government official charged by Congress under OPLMA with:
 - a. analyzing and approving or disapproving a land exchange authorized by Congress of 206 acres of federal land in the Izembek National Wildlife Refuge for 56,393 acres of State of Alaska and King Cove Corporation owned land, all of which would become part of the National Wildlife Refuge System and the vast majority of which would become part of the National Wilderness Preservation System; and
 - b. issuing a “public interest determination” whether or not such an exchange, which would allow the State to establish a State owned corridor to construct a single lane gravel road within the Izembek National Wildlife Refuge between the communities of King Cove and Cold Bay “primarily for health and safety purposes (including access to and from the Cold Bay

Airport) and only for non-commercial purposes,” would be in the public interest.

c. Defendant Secretary Jewell is the government official responsible for overseeing the actions of the United States Fish & Wildlife Service, the agency charged with the administration of the Izembek National Wildlife Refuge. She is sued in her official capacity.

13. Defendant Kevin Washburn is the Assistant Secretary for Indian Affairs, the principal official other than the Secretary in the Department of Interior responsible for administering the Trust Responsibility of the United States with respect to Alaska Natives and American Indians. He is sued in his official capacity.

14. Defendant Rachel Jacobson is the Acting Assistant Secretary for Fish Wildlife and Parks and is the principal government official responsible for overseeing the actions of the Fish and Wildlife Service other than the Secretary. She is sued in her official capacity.

15. Defendant, Dan M. Ashe, is Director of the United States Fish & Wildlife Service, the agency charged with the administration of the Izembek National Wildlife Refuge. He is sued in his official capacity.

16. Defendant Geoff Haskett is the Alaska Regional Director of the United States Fish and Wildlife Service. He is charged with administering all of the National Wildlife Refuges in the Alaska region, including the Izembek National Wildlife Refuge. He is sued in his official capacity.

17. Defendant Doug Damberg is the Refuge Manager of the Izembek

National Wildlife Refuge and is responsible for the day-to day administration of that Refuge. He is sued in his official capacity.

FACTS

18. Although historically used trails have long existed in the area, the idea of a road connecting King Cove and Cold Bay has been discussed since at least the 1940s. Residents of the King Cove community have long desired and advocated for a road to enhance access to Cold Bay and its all-weather airport, for personal safety, medical, and health purposes. During the Izembek Land Exchange EIS process, the State of Alaska, the City of King Cove, King Cove Corporation, Agdaagux Tribe of King Cove, Native Village of Belkofski, Etta Kuzakin, Leff Kenezuroff and the Aleutians East Borough identified the need for a road connecting the City of King Cove to the Cold Bay Airport as the only safe, reliable and affordable means of year round access to medical services not available in the City of King Cove, including infrequent but time-sensitive medical emergency evacuations.
19. In 1999 Congress passed the King Cove Health and Safety Act (Section 353) of the Consolidated and Emergency Supplemental Appropriations Act of 1999 (Public Law 105-277) that provided funds for the Plaintiff Aleutians East Borough to construct a marine-road link between the communities of King Cove and Cold Bay. The Corps of Engineers completed the King Cove Access Project EIS in 2003 and a ROD in 2004. Information from the 2003 EIS and 2004 ROD were incorporated and tiered in developing Alternatives 4 (hovercraft) and 5

(Lenard Harbor Ferry) in the EIS and ROD which are the subject of this Complaint.¹

20. In 2009 Congress passed the Omnibus Public Land Management Act of 2009 (Public Law 111-11, Title VI, Subtitle E (OPLMA) which authorized the land exchange and directed the Defendant Secretary of Interior (Secretary) “to analyze a land exchange, alternatives for road construction and operation, and a specific road corridor through the Izembek National Wildlife Refuge and the Izembek Wilderness.”² The law required that “the Secretary shall determine that the land exchange (including the construction of a road between the City of King Cove, Alaska, and the Cold Bay Airport) is in the public interest.”³
21. “The proposed land exchange would transfer to the State of Alaska all right, title, and interest to a road corridor for the construction, operation, and maintenance of a single lane gravel road between the communities of King and Cold Bay, Alaska.”⁴
22. The road would provide safe, reliable, and affordable access from King Cove to the Cold Bay Airport to allow medical evacuations from King Cove to Anchorage, particularly when wind and wave conditions make air and boat travel dangerous or highly uncomfortable for medical evacuees.
23. Eleven persons have been killed since 1980 while travelling during bad weather from King Cove to the Cold Bay Airport and from Cold Bay and Kodiak to King Cove.

¹ Izembek National Wildlife Refuge Land Exchange/Road Corridor EIS (hereinafter EIS) at pages 1-2 and 2-22-2-23

² ROD at page 2.

³ Section 6402(d) OPLMA

⁴ ROD at page 2.

24. Plaintiff, Etta Kuzakin, President of the Agdaagux tribal Council was medevaced from King Cove while 34 months pregnant to give birth by cesarean section in Anchorage. She was flown to Cold Bay on a Coast Guard helicopter from a Coast Guard ship, which fortuitously was in the area. There were 60 knot winds that forced a circuitous route to Cold Bay that took 40 minutes. Had the Coast Guard not been there or able to fly her to Cold Bay she could not have given birth because the King Cove clinic lacks the ability to perform a cesarean section.⁵
25. Plaintiff, Leff Kenezuroff, and Alaska native elder of the Belkofski Tribe and resident of King Cove has been medevaced to Cold Bay four times due to heart attacks. On one of those occasions planes could not fly and he was transported across Cold Bay and the Pacific Ocean in a 90 foot long crab boat. Upon arriving at the Cold Bay dock he was unable to climb the 25 foot ladder from the ship to the dock and had to be hoisted to the dock in a crab pot.⁶
26. OPLMA thus provided that the road “shall be used primarily for health and safety purposes, (including access to and from the Cold Bay Airport) and only for noncommercial purposes.”⁷
27. The FEIS describes the Project’s Purpose as follows:
- The basic project purpose is to provide a transportation system between the City of King Cove and the Cold Bay Airport. The overall, project purpose is to construct a long term, safe, and reliable year round transportation system between the cities of King Cove and Cold Bay.⁸

⁵ October 28, 2013 Washburn Report at page 8.

⁶ *Ibid* at page 9

⁷ Section 6402(d) OPLMA

⁸ FEIS at page 1-5.

28. The FEIS describes the Project's Need as follows:

The need for the proposed action is broader than the focused purpose specified in the Act. The project need arises from the underlying issues related to transportation to and from the community of King Cove. Three needs are identified:

- Health and Safety⁹
- Quality of Life¹⁰
- Affordable Transportation¹¹

29. On March 21, 2013, then Secretary of Interior Ken Salazar directed the Assistant Secretary of Interior for Indian Affairs, Kevin Washburn, to examine the

pending final decision concerning the Izembek National Wildlife Refuge, Land Exchange/Road Corridor as directed under the 2009 Omnibus Land Act (2009 Act). Pursuant to the unique trust relationship, the Assistant Secretary—Indian Affairs will visit King Cove to hold additional government-to-government consultations, including the Agdaguux Tribe of King Cove, the Belkofski Tribal Council, King Cove Corporation... and the Aleut Native Corporation. The Assistant Secretary will tour the area to assess the medical evacuation benefits from the proposed road and provide a report to the Secretary of the Interior. In preparing the report, the Assistant Secretary will address whether and to what extent the road is

⁹ "Historically, for cases requiring emergency care exceeding that available at King Cove Clinic, medical evacuations from the King Cove community arrive first at the Cold Bay Airport via aircraft and marine vessels, depending upon weather conditions and availability of transport modes." FEIS at page 1-7.

¹⁰ "Road access would provide peace of mind, particularly during extended periods of inclement weather that prevent marine and air travel. In addition, access to the Cold Bay Airport would provide the students, school board, borough assembly members, and medical service providers residing in the City of King Cove with enhanced opportunities to travel out of their community. Residents would be able to receive mail more frequently, attend sporting events and fundraisers, participate in school field trips, schedule doctor's appointments, meet with government officials in Anchorage and Juneau more reliably, and to visit extended families living in other communities." FEIS at page 1-8.

¹¹ "The transportation system must be affordable by local families and be constructed, operated, and maintained at a cost that can be borne by local or state government. The transportation must be practical in the context of the Cold Bay and King Cove area, so that it can be operated and maintained without undue requirements for specially trained personnel or specialized equipment, and can provide safe, reliable, affordable transportation with the least amount of interruption by weather conditions." FEIS at page 1-9.

needed to meet medical emergency requirements of King Cove. The report should specifically address, after consultation with the Indian Health Service, the emergency medical needs of King Cove. The Department will provide all necessary support for the Assistant Secretary to complete this assignment.

The Secretary of the Interior will also hold an official meeting in King Cove and receive written and oral testimony on the medical evacuation benefits of the proposed road. The information gathered from the Assistant Secretary's report and the Secretary's official visit will be used as part of the Secretary's determination of the proposed land exchange/road corridor under the 2009 Act.¹².

30. The Assistant Secretary for Indian Affairs, Kevin Washburn, made the official visit directed by the Secretary from June 26-29, 2013. The Washburn Report is part of the official record of the Record of Decision but was not made public until the Secretary announced her decision in the ROD on December 23, 2013.

31. That report further explains and reiterates the importance of the Trust Responsibility in the Secretary's decision making process:

Secretary Salazar premised our involvement in this inquiry on the fact that the United States has a unique trust responsibility to tribal communities and Alaska Native Corporations. Our directive was to assess the medical evacuation benefits of the proposed road...In light of this prescribed methodology, almost all the information we gathered during our visit, perhaps not surprisingly, was strongly in favor of building a road.¹³

32. Nevertheless, the Washburn Report failed to analyze or discuss or make recommendations regarding the need for the road for medical evacuation purposes.

33. On December 23, 2013 the Secretary published a ROD in which she selected the no action alternative, thereby denying the land exchange. She found:

¹² The Salazar letter is attached to the Washburn Report.

¹³ Washburn Report at pp.1-2.

The EIS shows that construction of a road through the Izembek National Wildlife Refuge [consisting of 206 acres] would lead to significant degradation of irreplaceable ecological resources that would not be offset by the protection of other lands [13,300 acres of King Cove Corporation land and 43,093 from the state of Alaska]¹⁴ to be received under an exchange.¹⁵

34. The Secretary also determined that “[t]he administrative record shows that there are alternatives to a road that would provide for the continued health and safety of King Cove residents.”¹⁶
35. The Secretary’s determination apparently was based upon a February 24, 2012 letter from the Borough to the Corps of Engineers which the Secretary characterizes as “indicat[ing] that it will *explore* the option of using an aluminum landing craft/passenger ferry to provide a marine-road link between the Northeast Terminal and Cross Wind Cove if the land exchange is not approved.”¹⁷
36. According to the ROD, the Borough letter caused the USF&WS to research companies that “have manufactured” what the USF&WS believed to be “a similar landing craft/passenger ferry and identified such a craft.”¹⁸ The USF&WS then “identified an available high speed craft fitted with two 500 horsepower inboard engines that is similar to the specifications described by the Borough.”¹⁹ The ROD declares: “The vessel is designed to meet U.S. Coast Guard requirements and a number of similar landing crafts are now operating in

¹⁴ ROD at page 2.

¹⁵ ROD at page 3.

¹⁶ ROD at page 11.

¹⁷ ROD at page 12.

¹⁸ ROD at page 13.

¹⁹ ROD at page 13.

Southeast Alaska.”²⁰ (Emphasis added.) (King Cove is located in *Southwest* Alaska – 1200 miles away.)

37. From this, the Secretary concluded: “[B]ecause reasonable and viable transportation alternatives exist to meet the important health and safety needs of the people of King Cove, the final decision of the Department is to adopt the no action alternative as described in the EIS.”²¹

38. Because the Secretary found in the ROD that there was no information available “from the Borough” on the “frequency of service” “nor the costs associated with the acquisition and operation of a landing craft/passenger ferry,” she relied upon the following assumptions made in constructing the “conceptual” landing craft used to determine the existence of a viable transportation alternative to the road:

- a. That the USF&WS’s identification of “an available high speed craft” is in fact “similar to the specifications described by the Borough.”²²
- b. Cost assumptions based upon a hovercraft previously operated by the Borough (even though the Secretary knew from page 2-21 of the EIS that annual operating costs of the hovercraft exceeded revenues by more than one million dollars);
- c. “[T]here would be no new capital costs for completion of the road to the Northeast Terminal, or for the construction of the building, fuel tanks, generator, water system, and concrete building ramp, since these are

²⁰ ROD at page 13. Wind and wave conditions in *Southwest* Alaska where Cold Bay is located are vastly different from the wind and wave conditions in the protected water of the Inside Passage of *Southeast Alaska* which is more than 1,200 miles away.

²¹ ROD at page 4.

²² ROD at page 13.

planned for completion under the previous contract to construct the road to the Northeast Terminal.”²³

39. In relying upon the Borough’s February 24, 2012 letter to conclude in the ROD that a reasonable transportation alternative to the road existed and to thus adopt the no action alternative **without making a public interest determination**, the Secretary did not refer to, rebut, or act upon the subsequent comments of the “King Cove Group” (i.e. the Plaintiffs) submitted to the record as an Attachment to its March 13, 2013 letter to then Secretary of Interior Ken Salazar. In those March 13, 2013 comments Plaintiffs pointed out:

- a. The FEIS is flawed because it does not evaluate information on wind and wave as well as water depths at the two terminals that are available in the 2003 King Cove Access Project FEIS that were incorporated in both the DEIS for the land exchange/road and this FEIS. This evaluation is necessary to validate the key assumption that a conceptual landing craft under Alternative 1 can:
 - Provide safe and reliable transportation across the Pacific Ocean and Cold Bay for access to urgent public health care not available locally and
 - Provide 24-7 emergency medical purposes to and from the Cold Bay Airport.
- b. The Service used these data to compare the reliability of the road, hovercraft, ferry, and air transportation modes. The Service chose not to use these same data to conduct an analysis to provide a comparable prediction on the reliability of the conceptual landing craft.
- c. The FEIS is flawed because it does not validate the key EIS assumption that no in-water facilities are required at the Northeast and Cross Wind Cove terminals for safe and reliable loading and unloading of an ambulance, of other vehicles and for passengers under known wind and

²³ ROD at page 13.

wave conditions and with known physical and biological resources at the two terminals.²⁴

40. In relying upon the Borough's February 24, 2012 letter to conclude in the ROD that a reasonable transportation alternative to the road existed and to thus adopt the no action alternative **without making a public interest determination**, the Secretary did not consider, rebut, or act upon the subsequent comments of the "King Cove Group" (i.e. the Plaintiffs) submitted to the record as an Attachment to its March 13, 2013 letter to then Secretary of Interior Ken Salazar in which Plaintiffs pointed out:

The FEIS does not reflect that on May 18, 2012 the Environmental Protection Agency stated that:

We recognize, however, that, non-road alternatives may not be practicable or meet the purposes of the Omnibus Public Lands Management Act of 2009 (the Act) and so believe that it is prudent to identify an environmentally preferable alternative. Based on the information currently presented in the Draft EIS, it appears that Alternative 3, Land Exchange and Central Road Alignment may be the environmentally preferable alternative.

Appendix G, page 618, EPA Region 10 letter to Stephanie Brady.²⁵

41. In relying upon the Borough's February 24, 2012 letter to conclude in the ROD that a reasonable transportation alternative to the road existed and to thus adopt the no action alternative **without making a public interest determination**, the

²⁴ Attachment to the King Cove Group March 13, 2013 "Comments on the Izembek land Exchange Final Environmental Impact Statement (FEIS)" at pages 32-33.

²⁵ Attachment to the King Cove Group March 13, 2013 "Comments on the Izembek land Exchange Final Environmental Impact Statement (FEIS)" at page 1. At page 15 of the ROD the Secretary simply says with respect to EPA's environmentally preferred alternative: "In comments on the Draft EIS, the Environmental protection Agency (EPA) stated that Alternative 4 was likely to be the environmentally preferable alternative. They also recommended that Alternative 3 was the environmentally preferable road alternative." Stephanie Brady was the USF&WS's project manager for the development of the EIS.

Secretary did not refer to, rebut, or act upon the subsequent comments of the “King Cove Group” (i.e. the Plaintiffs) submitted to the record as an Attachment to its March 13, 2013 letter to then Secretary of Interior Ken Salazar in which Plaintiffs pointed out that:

The FEIS does not re-evaluate the conclusions in the January 13, 2004 Record of Decision by the U.S. Army Corps of Engineers, Alaska District that the No Action Alternative did not fulfill the intent of Congress in the King Cove Public Health and Safety Act. The No Action Alternative would continue an “unsafe and un-reliable” transit to the Cold Bay Airport for both routine transportation and medevacs, which are also the Purpose and Need identified in the Act.²⁶

42. In relying upon the Borough’s February 24, 2012 letter to conclude in the ROD that a reasonable transportation alternative to the road existed and to thus adopt the no action alternative **without making a public interest determination**, the Secretary did not refer to, consider, or act upon the subsequent comments of the “King Cove Group” (i.e. the Plaintiffs) submitted to the record as an Attachment to its March 13, 2013 letter to then Secretary of Interior Ken Salazar in which Plaintiffs pointed out that the FEIS had failed:

to use available information about operability of the conceptual landing craft developed by the EIS consultant for the Service to provide: 6 day a week; for year-round ability to meet scheduled air service at the Cold Bay Airport; and for 24/7 ability to provide transportation for urgent medical care and for emergency medical evacuation. The 2003 King Cove Access Project provided these data that were incorporated by the Service in the DEIS and FEIS include known wind and wave conditions in Cold Bay and at the Northeast and Cross Wind Cove Terminal as well as the physical and biological factors associated with the two terminals. Although used in the DEIS and FEIS for reliability conclusions for the road, hovercraft and ferry alternatives, the Service chose not to validate the key FEIS

²⁶ Attachment to the King Cove Group March 13, 2013 “Comments on the Izembek land Exchange Final Environmental Impact Statement (FEIS)” at page 11.

assumption that no in-water modifications are required for the conceptual landing craft to provide safe and reliable loading and unloading of an ambulance, passengers, and other vehicles.²⁷

43. In relying upon the Borough's February 24, 2012 letter to conclude in the ROD that a reasonable transportation alternative to the road existed and to thus adopt the no action alternative **without making a public interest determination**, the Secretary did not refer to, rebut, or act upon the subsequent comments of the "King Cove Group" (i.e. the Plaintiffs) submitted to the record as an Attachment to its March 13, 2013 letter to then Secretary of Interior Ken Salazar in which Plaintiffs pointed out that:

The FEIS does not evaluate existing data in the Corps 2003 EIS, the DEIS and this FEIS about the physical setting and biological resources at the Northeast and Cross Wind Cove Terminals that is necessary to provide a professional opinion on the ability of the conceptual landing craft to use terminals designed for a hovercraft operation. The FEIS does not evaluate existing data on wind and wave conditions that set parameters for the safe and reliable use of the conceptual landing craft to and from the two hovercraft terminals. Without these analyses there is no basis to determine the ability of the conceptual landing craft to provide safe and reliable transportation across Cold Bay. Without these analyses the extent the conceptual landing craft can fulfill the need for the residents of King Cove to meet scheduled air service on a year-round basis, for urgent medical care and for emergency medical emergencies all remain speculative. Without this analysis there is no basis to compare the safety and reliability of the conceptual landing craft to a road, to a hovercraft or to a ferry.²⁸

44. The Secretary determined her obligation under OPLMA to be as follows:

²⁷ Attachment to the King Cove Group March 13, 2013 "Comments on the Izembek land Exchange Final Environmental Impact Statement (FEIS)" at pages 3-4.

²⁸ Attachment to the King Cove Group March 13, 2013 "Comments on the Izembek land Exchange Final Environmental Impact Statement (FEIS)" at page 11.

The OPLMA directed the Secretary of the Interior to prepare an EIS that must analyze the land exchange in accordance with the terms of the Act and the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), and its implementing regulations (40 C.F.R. Parts 1500-1508). Congress specified that the EIS must analyze the land exchange, potential road construction and operation, and identify a specific road corridor through the Izembek National Wildlife Refuge and the Izembek Wilderness in consultation with the State of Alaska, the City of King Cove, and the Agdaagux Tribe of King Cove. (Section 6402(b) (2)).

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The OPLMA does not require a public interest determination for the selection of an alternative that does not include the land exchange. Thus, Congress has required the Department to identify and consider fully the impacts of such an exchange, but has left the final decision as a policy choice on whether to proceed.²⁹

45. The Secretary summarized her findings and the reasons for her decision as follows:

1. The Service has consistently found that the impacts of building a proposed road on the wildlife resources, habitats, and designated Wilderness would create irreversible change and damage to a unique and ecologically important area, and especially to designated Wilderness.³⁰
2. A road through this area would not only be inconsistent with the purposes for which these lands were set aside in Public Land Order 2216, it would diminish the ability of the Service to meet the first, second, and fourth of the refuge purposes set forth in ANILCA.
3. Selection of the no action alternative is also consistent with the Secretary's obligations under the National Wildlife Refuge System Administration Act, including obligations to conserve fish, wildlife, and plants and their habitats, sustain biological integrity, diversity and

²⁹ ROD at page 6.

³⁰ The Secretary added: "Nothing is more contradictory with, or destructive to, the concept of Wilderness than construction of a road. The impact of road construction on wilderness character would radiate far beyond the footprint of the road corridor. It would irreparably and significantly impair this spectacular Wilderness refuge." ROD at page 9.

environmental health and ensure the purposes of the Refuge System are fulfilled.

4. Additionally, construction of a road through the Wilderness area will lead to increased human access and activity, including likely unauthorized off-road access, which will strain Refuge management resources.³¹

46. The Secretary determined that the net gain of 53,393 acres for the National Wildlife Refuge System pursuant to the land exchange would not compensate for the overall values of the 206 acres that would be removed from the existing Izembek Refuge. “Nor would the offered lands compensate for the anticipated impacts that the proposed road would have on wildlife and the habitat that surround the road corridor.”³²

47. The Secretary also determined; “Further, the lands proposed for exchange are not likely to be developed, if retained in their current ownership, in ways that would affect the same resources that would be affected by the construction and operation of a road through the Izembek Refuge. Thus, a conveyance of these lands to the United States does not actually offset the environmental impacts from the proposed road construction and operation.”³³

³¹ ROD at pages 6-7. The Secretary expanded upon this point: “Additional off-road use would likely occur in areas adjacent to the proposed road corridors upon completion of a road. Unfortunately, damage and impacts cannot all be prevented through regulation and enforcement and roadside barriers will not always be effective.” ROD at page 9. But the Secretary then stated with respect to Refuge management considerations: “Cutting a road through the middle of the Refuge would mean significant additional resources would be necessary to manage the resulting direct and indirect effects of a road to minimize habitat damage and wildlife disturbance.” ROD at page 9.

³² ROD at page 8.

³³ ROD at page 9.

48. In addition to the “no action alternative”(Alternative 1) the Secretary considered the “Land Exchange and Southern Road Alignment (Alternative 2)³⁴ and the Land Exchange and Central Road Alignment (Alternative 3).³⁵ The Secretary also considered two alternatives outside the “purview” of the USF&WS: the hovercraft alternative (Alternative 4) described in the 2003 EIS and ROD³⁶ and the “Lenard Harbor Ferry with Cold Bay Dock Improvements (Alternative 5) described in the 2003 EIS and ROD.³⁷

**FIRST CLAIM FOR RELIEF
OMNIBUS PUBLIC LAND MANAGEMENT ACT OF 2009**

49. Plaintiffs repeat and incorporate by reference the allegations of Paragraphs 1 through 48 of this Complaint.

50. The Secretary failed to comply with the substantive requirements of the Omnibus Public Land Management Act of 2009 (OPLMA)³⁸ in her decision.

51. Section 6402 (b) (2) (B) (i) (I) of OPLMA requires that the EIS “contain an analysis of the proposed land exchange.” The Secretary violated this provision in the following ways:

- a. The FEIS shows that a full evaluation of the fish and wildlife and other values of the State and King Cove exchange lands, including the relinquishment of a 5,430 acre selection by King Cove Corporation under the Alaska Native Claims Settlement Act, was not done with the same “hard look” as was used in evaluating the Refuge lands. Accordingly, the Secretary was unable to make her decision based upon a reasonable understanding of what the exchange lands would add to the Refuge and the National Wilderness system.

³⁴ ROD at page 13.

³⁵ ROD at page 14.

³⁶ ROD at page 14.

³⁷ ROD at page 15.

³⁸ Public law 111-11, Title VI, Subtitle E

- b. The exchange lands were not fully considered on the arbitrary and capricious ground that because they were not currently under developmental pressure, there was no reason for the Refuge to obtain them.³⁹ This is contrary to the evidence because the exchange lands are subject to the following development:
1. Deferred State oil and gas leasing plan for part of the 41,887 acres comprising the State Parcels possible under Alternatives 1, 4, and 5 but prohibited as Wilderness under Alternatives 2 and 3;
 2. Existing State Kodiak Area Plan that designates part of the 1,619 acres comprising the Sitkanak Parcel for Settlement and that the Spit reasonably would be used to support development for marine transportation for those Settlement lands that is possible under Alternatives 2 and 3 but not under Alternatives 1, 4 and 5;
 3. Access to and development of the thermal spring area with cultural importance to the two tribes located on the 5,430 acres of land (FEIS Figure 3.1-2) that would remain in the Izembek Wilderness under Alternatives 1, 4 and 5, but would very likely be treated as private land even with the requirements of ANCSA Section 22(g), but would be very difficult under Alternatives 2 and 3 because this resource would still be Wilderness;
 4. Continued legal surface access from the Cold Bay road network and from the Northeast Terminal and marine access to the Cold Bay and Izembek Lagoon shoreline and recreation facilities to promote commercial recreation activities for use of the unique resources having high recreation values on the private land in the Kinzarof Lagoon Parcel that is reasonably foreseeable in the short-range as private land even with the requirements of ANCSA Section 22(g) under Alternatives 1, 4

³⁹ The ROD claims "The lands offered for exchange contain important wildlife habitat, but they do not provide the diversity of the internationally recognized wetland habitat that is proposed for exchange, nor would they compensate for the adverse effects of removing a corridor of land and constructing a road within the narrow, irreplaceable Izembek isthmus. Further, **the lands for exchange are not likely to be developed, if retained in their current ownership**, in ways that would affect the same resources that would be affected by the construction and operation of a road through the Izembek Refuge. Thus, a conveyance of these lands to the United States does not actually offset the environmental impacts from the proposed road construction and operation." ROD at page 9. (Emphasis added).

and 5 that are prohibited under Alternatives 2 and 3 as Wilderness;

5. The continuing legal use of ATV on private and State ownerships and on the 5,430 acres of private land removed from the Izembek Wilderness as illustrated by the spider web of predicted trails in Figure 4.3-4 and Figure 4.2-5 under Alternatives 1, 4 and 5 that will be illegal as Wilderness under Alternatives 2 and 3; and
6. The transfer of 5,430 acres from the Izembek Wilderness to the King Cove Corporation excludes several water bodies that are deemed by BLM to be in State ownership under Alternatives 1, 4, and 5. As the most recent transfer of land from the Izembek Wilderness, this determination by BLM that the State owns the water body sets a precedent that more than 20 similar sized or larger lakes in the Izembek Wilderness are also in State ownership.⁴⁰

52. The Secretary violated OPLMA by failing to make a public interest finding regarding whether or not the “no action” alternative was in the best interest of the United States, including the federal government’s Trust responsibility to Alaska Natives.

53. a. The Secretary violated OPLMA by assuming a constant 100 foot width for the final corridor. The 100-foot wide corridor used in the two road alternatives to measure the impacts on the wildlife and wildlife habitat in the Refuge violates OPLMA because it is inconsistent with the width limits and mitigation requirements set out in OPLMA.

- i. Section 6403 (a) (3) (A) limits the width of the road to “a single lane, in accordance with applicable road standards of the State.” Subsection (a) (3) (B) requires that it be made of gravel. Subsection (a) (1) (A) limits its use “primarily for health and safety purposes” and “only for noncommercial purposes.”

⁴⁰ Attachment to the King Cove Group March 13, 2013 “Comments on the Izembek land Exchange Final Environmental Impact Statement (FEIS)” at pages 5-6.

- ii. Section 6403 (f) (1 and 2) require the Secretary to “minimize the adverse impact of the road corridor on the Refuge” and to “transfer the minimum acreage of Federal land that is required for construction of the road corridor” set out in OPLMA.
 - iii. Section 6402 (a) (3) (C) requires the road to comply with mitigation measures identified in the ROD “relative to the passage and migration of wildlife, and also exchanges of tidal flow... .” The ROD acknowledges that: “Mitigation measures identified in the statute include the avoidance of wildlife impacts and mitigation of wetland loss, and the development of an enforceable mitigation plan.”⁴¹
- b. The two road alternatives discussed in the ROD assume “a constant 100-foot corridor width.” The Secretary’s failure to use a flexible right of way width that would have reduced the acreage needed for the single lane gravel road ⁴² is arbitrary and capricious and violates OPLMA; and
- c. To treat the 100-foot wide corridor as constant and permanent for purposes of measuring the impacts of the gravel road to the Refuge substantially overstates what those impacts would be had a flexible right of way corridor been considered and thus is arbitrary and capricious. The overly wide corridor simply magnifies the “degradation of irreplaceable ecological resources” which led the Secretary to select the no action alternative.

**SECOND CLAIM FOR RELIEF
ADMINISTRATIVE PROCEDURES ACT**

54. Plaintiffs repeat and incorporate by reference the allegations of Paragraphs 1 through 53 of this Complaint.

55. An agency’s action is arbitrary and capricious if:

- a. It fails to consider an important aspect of a problem;

⁴¹ ROD at page 12.

⁴² See Design Criteria at FEIS pages 2-31 through 2-37.

- b. The agency offers an explanation for the decision that is contrary to the evidence;
- c. The agency's decision is so implausible that it could not be ascribed to a difference in view or be the product of agency expertise; or
- d. The agency's decision is contrary to governing law.

56. The Secretary recognized in the ROD that “methods of medical transport from King Cove to Cold Bay” must be “reliable.”⁴³ The FEIS statement of Purpose and Need defines a “reasonable and viable transportation alternative” for medical evacuations as one that is “reliable” and would provide access to Cold Bay 24 hours/day 365 days/year.⁴⁴

57. The Secretary's decision not to proceed with the land exchange is arbitrary and capricious because it is based upon the determination that “reasonable and viable transportation alternatives exist to meet the important health and safety needs of the people of King Cove... .”⁴⁵ This alternative is a “proposal for a landing craft/passenger ferry that could use the road that has been constructed to the Northeast Terminal on the border of the Refuge.”⁴⁶

58. Usage by Plaintiffs has demonstrated that a “landing craft/passenger ferry” operating across Cold Bay would not provide such access in periods of bad weather and is not affordable. Accordingly, the Secretary's decision is arbitrary and capricious because it is contrary to the evidence of Plaintiffs' usage and local knowledge and fails to consider an important aspect of the problem.

⁴³ *Id.*

⁴⁴ FEIS at pages 1-5 through 1-11.

⁴⁵ ROD at page 3. Indeed the Secretary declares: “We understand that the proponents of the proposed road believe it would be a reliable method of transport in most weather conditions, but conclude that other viable, **and at times preferable methods of transport** remain and could be improved to meet community needs. (Emphasis added).

⁴⁶ ROD at page 2.

59. The Secretary's determination that the landing craft was a viable alternative for medical evacuations, caused her not to take the required "hard look" at whether mitigation measures could be developed that would minimize the impacts on birds and other wildlife to provide safe, reliable, and affordable access to Cold Bay for medical evacuations for human beings.
60. The Secretary's determination that the landing craft was a viable alternative for medical evacuations is arbitrary and capricious because it is contrary to the evidence and because the Secretary failed in the ROD to address, rebut, or act upon important aspects of the problem raised by the comments that the "King Cove Group" (i.e. the Plaintiffs) submitted to the record as an Attachment to its March 13, 2013 letter to then Secretary of Interior Ken Salazar:
- a. The FEIS is flawed because it does not evaluate information on wind and waves as well as water depths at the two terminals that are available in the 2003 King Cove Access Project FEIS that were incorporated in both the DEIS for the land exchange/road and this FEIS. This evaluation is necessary to validate the key assumption[made in the FEIS] that a conceptual landing craft under Alternative 1 can:
 - Provide safe and reliable transportation across Cold Bay for access to urgent public health care not available locally and
 - Provide 24-7 emergency medical purposes to and from the Cold Bay Airport.
 - b. The Service used these data to compare the reliability of the road, hovercraft, ferry, and air transportation modes. The Service chose not to use these same data to conduct an analysis to provide a comparable prediction on the reliability of the conceptual landing craft."
 - c. The FEIS is flawed because it does not validate the key EIS assumption that no in-water facilities are required at the Northeast and Cross Wind Cove terminals for safe and reliable loading and unloading of an ambulance, of other vehicles and for passengers under known wind and

wave conditions and with known physical and biological resources at the two terminals.”⁴⁷

61. The Secretary’s determination that the landing craft was a viable alternative for medical evacuations is arbitrary and capricious because it is contrary to the evidence and because the Secretary failed in the ROD to address, rebut, or act upon important aspects of the problem raised by the May 18, 2012 comments of the Environmental Protection Agency to then Secretary of Interior Ken Salazar, specifically:

We recognize, however, that, non-road alternatives may not be practicable or meet the purposes of the Omnibus Public Lands Management Act of 2009 (the Act) and so believe that it is prudent to identify an environmentally preferable alternative. Based on the information currently presented in the Draft EIS, it appears that Alternative 3, Land Exchange and Central Road Alignment may be the environmentally preferable alternative.

Appendix G, page 618, EPA Region 10 letter to Stephanie Brady.⁴⁸

62. The Secretary’s determination that the landing craft was a viable alternative for medical evacuations is arbitrary and capricious because it is contrary to the evidence and because the Secretary failed in the ROD to address, rebut, or act upon an important aspect of the problem raised by the comments that the “King

⁴⁷ Attachment to the King Cove Group March 13, 2013 “Comments on the Izembek land Exchange Final Environmental Impact Statement (FEIS)” at pages 32-33. Neither of the two existing terminals can be used for landing craft operations without very significant in-water modifications including dredging and/or dock facilities.

⁴⁸ Attachment to the King Cove Group March 13, 2013 “Comments on the Izembek land Exchange Final Environmental Impact Statement (FEIS)” at page 1. At page 15 of the ROD the Secretary simply says with respect to EPA’s environmentally preferred alternative: “In comments on the Draft EIS, the Environmental protection Agency (EPA) stated that Alternative 4 was likely to be the environmentally preferable alternative. They also recommended that Alternative 3 was the environmentally preferable road alternative.”

Cove Group” (i.e. the Plaintiffs) submitted to the record as an Attachment to its March 13, 2013 letter to then Secretary of Interior Ken Salazar:

The FEIS does not re-evaluate the conclusions in the January 13, 2004 Record of Decision by the U.S. Army Corps of Engineers, Alaska District that the No Action Alternative did not fulfill the intent of Congress in the King Cove Public Health and Safety Act. That the No Action Alternative would continue an "unsafe and unreliable transit to the Cold Bay Airport for both routine transportation and medevacs, which are also the Purpose and Need identified in the Act.⁴⁹

63. The Secretary’s determination that the landing craft was a viable alternative for medical evacuations is arbitrary and capricious because it is contrary to the evidence and because in making it the Secretary failed to address, rebut or act upon an important aspect of the problem raised by the comments that the “King Cove Group” (i.e. the Plaintiffs) submitted to the record as an Attachment to its March 13, 2013 letter to then Secretary of Interior Ken Salazar in which Plaintiffs pointed out that the FEIS failed:

to use available information about operability of the conceptual landing craft developed by the EIS consultant for the Service to provide: 6 day a week; for year-round ability to meet scheduled air service at the Cold Bay Airport; and for 24/7 ability to provide transportation for urgent medical care and for emergency medical evacuation. The 2003 King Cove Access Project provided the data that were incorporated by the Service in the DEIS and FEIS including known wind and wave conditions in Cold Bay and at the Northeast and Cross Wind Cove Terminal as well as the physical and biological factors associated with the two terminals. Although used in the DEIS and FEIS for reliability conclusions for the road, hovercraft and ferry alternatives, the Service chose not to validate the key FEIS assumption that no in-water modifications are

⁴⁹ Attachment to the King Cove Group March 13, 2013 “Comments on the Izembek land Exchange Final Environmental Impact Statement (FEIS)” at page 11.

required for the conceptual landing craft to provide safe and reliable loading and unloading of an ambulance, passengers, and other vehicles.⁵⁰

64. The Secretary's determination that the landing craft was a viable alternative for medical evacuations is arbitrary and capricious because it is contrary to the evidence and because the Secretary failed to address, rebut, or act upon an important aspect of a problem raised by the comments that the "King Cove Group" (i.e. the Plaintiffs) submitted to the record as an Attachment to its March 13, 2013 letter to then Secretary of Interior Ken Salazar in which Plaintiffs pointed out that:

The FEIS does not evaluate existing data in the Corps 2003 EIS, the DEIS and this FEIS about the physical setting and biological resources at the Northeast and Cross Wind Cove Terminals that is necessary to provide a professional opinion on the ability of the conceptual landing craft to use terminals designed for a hovercraft operation. The FEIS does not evaluate existing data on wind and wave conditions that set parameters for the safe and reliable use of the conceptual landing craft to and from the two hovercraft terminals. Without these analyses there is no basis to determine the ability of the conceptual landing craft to provide safe and reliable transportation across Cold Bay. Without these analyses the extent the conceptual landing craft can fulfill the need for the residents of King Cove to meet scheduled air service on a year-round basis, for urgent medical care and for emergency medical emergencies all remain speculative. Without this analysis there is no basis to compare the safety and reliability of the conceptual landing craft to a road, to a hovercraft or to a ferry.⁵¹

⁵⁰ Attachment to the King Cove Group March 13, 2013 "Comments on the Izembek land Exchange Final Environmental Impact Statement (FEIS)" at pages 3-4.

⁵¹ Attachment to the King Cove Group March 13, 2013 "Comments on the Izembek land Exchange Final Environmental Impact Statement (FEIS)" at page 11.

65. The Secretary's decision not to proceed with the land exchange is arbitrary and capricious because the adverse impacts she associates with construction and operation of the road is based upon a finding that road usage would be far heavier than OPLMA allows or directs her to analyze:⁵²

Year-round and increased human access radiating off the road corridor via pedestrian traffic or all-terrain vehicles coupled with the physical use on wet soils made possible by the presence of the road would have profound adverse effects on wildlife use and habitats of the narrow isthmus that comprises the Refuge. The likely increased activity associated with the road would also place a strain on Refuge management in a time of decreasing Refuge budget and capacity.⁵³

66. It would be up to the agency to manage road usage through an agreement with the State as Congress directed in §6403 (a) (1) (C) of OPMLA. This could include requiring the State to pay for and police road usage. This alternative was not considered in the FEIS.

67. The two road alternatives discussed in the ROD assume "a constant 100-foot corridor width." Given: i) the limitations on road use,⁵⁴ and ii) the requirements to "minimize the adverse impact of the road corridor on the Refuge" and to "transfer the minimum acreage of Federal land that is required for construction of the road corridor" set out in OPLMA,⁵⁵ the Secretary cannot justify using a constant 100-foot wide corridor instead of a corridor with a flexible right-of-way width. . The 100-foot wide corridor is arbitrary

⁵² OPLMA Section 6403 (a) (1) LIMITATIONS ON USE (A) provides that the road "shall be used primarily for health and safety purposes (including access to and from the Cold bay Airport) and only for noncommercial purposes."

⁵³ ROD at page 4.

⁵⁴ See OPLMA § 6402 (a) (1-3)

⁵⁵ OPLMA § 6402 (f) (1-2)

and capricious because it is inconsistent with the Congressional limits set out in OPLMA and its mitigation requirements.

68. Because the constant 100 foot, corridor is overly wide, it is arbitrary and capricious. By increasing the affected acreage within the Refuge the constant 100 foot corridor magnifies the “degradation of irreplaceable ecological resources” which led the Secretary to select the no action alternative.⁵⁶
69. The Secretary’s decision not to proceed with the land exchange is arbitrary and capricious because it is based upon non-germane, parochial Refuge budget considerations that are inconsistent with the evidence.
- a. At page 9 of the ROD the Secretary asserts: “Cutting a road through the middle of the Refuge⁵⁷ would mean significant additional resources would be necessary to manage the resulting direct and indirect effects of a road to minimize habitat damage and wildlife disturbance. These resources would have to come at a time of decreasing Refuge System budgets **and would be at the expense of** accomplishing work directed at the Service’s core mission of wildlife and habitat management.” Emphasis added.
 - b. The Secretary arbitrarily assumes that, contrary to the evidence, this is a “zero sum” situation in which money used to manage road operations would come from “the Service’s core mission of wildlife and habitat management.”
 - c. As the ROD itself explains, this determination is contrary to the evidence. Congress has already provided funds for a transportation link to Cold Bay and to improve the King Cove medical facility.⁵⁸
 - d. OPLMA §6403 (a) (1) (C) requires an agreement between the Secretary and the State that enforces the limitations of use of the road set out in

⁵⁶ ROD at page 13.

⁵⁷ The two road alternatives proposed by the F&WS in the ROD do not “cut a road through the middle of the Refuge;” it goes around Kinzarof Lagoon. The Secretary’s hyperbolic statement is further evidence of the extent to which she overstates the impacts of the road.

⁵⁸ See History of the Road Proposal and Access Improvements for King Cove at ROD pages 5 - 6.

OPLMA. This agreement could require the State to pay for the “resources necessary to manage the resulting direct and indirect effects of a road to minimize habitat damage and wildlife disturbance.” Such an alternative was not considered in the FEIS.

70. The Secretary’s decision not to proceed with the land exchange is arbitrary and capricious because the adverse impacts she associates with construction and operation of the road is based in part upon a finding that there will be illegal off road usage by ATVs.⁵⁹ The Secretary’s conclusion does not reflect the successful USF&WS and State programs that for the last 33 years have prevented illegal ATV and other motorized travel from the existing Cold Bay road network⁶⁰ and is thus arbitrary and capricious because it is contrary to the evidence.

**THIRD CLAIM FOR RELIEF
NATIONAL ENVIRONMENTAL POLICY ACT**

71. Plaintiffs repeat and incorporate by reference the allegations of paragraphs 1-70 of this Complaint.

72. NEPA and its implementing regulations, 40 C.F.R. §§ 1500-1517, require that each federal agency prepare an EIS for every major action significantly affecting the environment. 42 U.S.C. § 4332(C). Major federal actions include “new or revised agency rules...” 40 C.F.R. § 1508.18(a). The purpose of an EIS is to “provide full and fair discussion of significant environmental impacts and ...inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts.” 40 C.F.R. §1502.1.

⁵⁹ ROD at pages 4, 7, and 9.

⁶⁰ Attachment to the King Cove Group March 13, 2013 “Comments on the Izembek land Exchange Final Environmental Impact Statement (FEIS)” at page 2.

73. NEPA requires Defendants to “study, develop, and describe appropriate alternatives to recommended courses of actions in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(E). The consideration of reasonable alternatives is the “heart” of the NEPA analysis. 40 C.F.R. § 1502.14. NEPA requires that an agency “[r]igorously explore and objectively evaluate, all reasonable alternatives,” *id.* § 1502.14(a), as well as describe the “underlying purpose and need to which the Agency is responding in proposing the alternatives, including the proposed action.” *Id.* § 1502.13.

74. The purpose and need for the proposed action govern what alternatives are reasonable. An alternative is reasonable if it meets the purpose and need for the proposed action as defined by the agency in the NEPA document (EA or EIS).⁶¹ The existence of a reasonable, but unexamined, alternative violates NEPA.⁶²

75. The FEIS describes the Project’s Purpose as follows:

The basic project purpose is to provide a transportation system between the City of King Cove and the Cold Bay Airport. The overall, project purpose is to construct a long term, safe, and reliable year round transportation system between the cities of King Cove and Cold Bay.⁶³

76. The FEIS describes the Project’s Need as follows:

⁶¹ *Natural Resources Defense Council, Inc. v. U.S. Forest Service*, 634 F.Supp.2d 1045, 1059 E.D.Cal., 2007; *‘Ilio’ulaokalani Coal v. Rumsfeld*, 464 F.3d 1083, 1097 (9th Cir. 1996) (citing *Nw. Coalition for Alternatives to Pesticides (NCAP) v. Lyng*, 844 F.2d 588, 591-592 (9th Cir. 1988)).

⁶² *Center for Biological Diversity v. U.S. Dept. of Interior*, 623 F.3d 633, at 642 (9th Cir. 2010); *see also, Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997); *Dubois v. U.S. Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996); *Louisiana Wildlife Federation v. York*, 761 F.2d 1044 (5th Cir. 1985).

⁶³ FEIS at page 1-5.

The need for the proposed action is broader than the focused purpose specified in the Act. The project need arises from the underlying issues related to transportation to and from the community of King Cove. Three needs are identified:

- Health and Safety⁶⁴
- Quality of Life⁶⁵
- Affordable Transportation⁶⁶

77. The no action alternative selected by the Secretary violates NEPA because, by failing to provide safe, reliable and affordable transportation from King Cove to the Cold Bay Airport, it does not meet the Project's Purpose and Need;

78. The Secretary's selection of the "no action" alternative is arbitrary and capricious because it fails to rebut or explain the contradiction between her decision and the conclusion of the U.S. Fish & Wildlife Service at page 2-21 of the EIS that the no action alternative would not meet the project's Purpose and Need:

⁶⁴ "Historically, for cases requiring emergency care exceeding that available at King Cove Clinic, medical evacuations from the King Cove community arrive first at the Cold Bay Airport via aircraft and marine vessels, depending upon weather conditions and availability of transport modes." FEIS at page 1-7.

⁶⁵ "Road access would provide peace of mind, particularly during extended periods of inclement weather that prevent marine and air travel. In addition, access to the Cold Bay Airport would provide the students, school board, borough assembly members, and medical service providers residing in the City of King Cove with enhanced opportunities to travel out of their community. Residents would be able to receive mail more frequently, attend sporting events and fundraisers, participate in school field trips, schedule doctor's appointments, meet with government officials in Anchorage and Juneau more reliably, and to visit extended families living in other communities." FEIS at page 1-8.

⁶⁶ "The transportation system must be affordable by local families and be constructed, operated, and maintained at a cost that can be borne by local or state government. The transportation must be practical in the context of the Cold Bay and King Cove area, so that it can be operated and maintained without undue requirements for specially trained personnel or specialized equipment, and can provide safe, reliable, affordable transportation with the least amount of interruption by weather conditions." FEIS at page 1-9.

If the no action Alternative is selected “the project purpose (Section 1.3) would not be met because a land exchange would not be executed for the purpose of constructing a road as specified by the Act. The project needs (Section 1,4) of health and safety, quality of life, and affordable transportation would not be met if a new mode of transportation is not implemented, but might be met by the landing craft/passenger ferry depending on levels of service.

79. The Secretary’s selection of the “no action” alternative without making a public interest determination, based upon her determination that the landing craft was a viable alternative for medical evacuations, is arbitrary and capricious and violates NEPA because it is contrary to the evidence and because the Secretary failed to address, rebut or act upon an important aspect of the problem raised by the comments that the “King Cove Group” (i.e. the Plaintiffs) submitted to the record as an Attachment to its March 13, 2013 letter to then Secretary of Interior Ken Salazar in which Plaintiffs pointed out:

- a. The FEIS is flawed because it does not evaluate information on wind and wave as well as water depths at the two terminals that are available in the 2003 King Cove Access Project FEIS that were incorporated in both the DEIS for the land exchange/road and this FEIS. This evaluation is necessary to validate the key assumption that a conceptual landing craft under Alternative 1 can:
 - Provide safe and reliable transportation across Cold Bay for access to urgent public health care not available locally and
 - Provide 24-7 emergency medical purposes to and from the Cold Bay Airport.
- b. The Service used these data to compare the reliability of the road, hovercraft, ferry, and air transportation modes. The Service chose not to use these same data to conduct an analysis to provide a comparable prediction on the reliability of the conceptual landing craft.”
- c. The FEIS is flawed because it does not validate the key EIS assumption that no in-water facilities are required at the Northeast and Cross Wind

Cove terminals for safe and reliable loading and unloading of an ambulance, of other vehicles and for passengers under known wind and wave conditions and with known physical and biological resources at the two terminals.⁶⁷

80. The Secretary's selection of the "no action" alternative based upon her determination that the landing craft was a viable alternative for medical evacuations is arbitrary and capricious and violates NEPA because it is contrary to the evidence and because the Secretary failed to address, rebut, or act upon an important aspect of the problem raised by the comments that the "King Cove Group" (i.e. the Plaintiffs) submitted to the record as an Attachment to its March 13, 2013 letter to then Secretary of Interior Ken Salazar in which Plaintiffs pointed out:

The FEIS does not reflect that on May 18, 2012 the Environmental Protection Agency stated that:

We recognize, however, that, non-road alternatives may not be practicable or meet the purposes of the Omnibus Public Lands Management Act of 2009 (the Act) and so believe that it is prudent to identify an environmentally preferable alternative. Based on the information currently presented in the Draft EIS, it appears that Alternative 3, Land Exchange and Central Road Alignment may be the environmentally preferable alternative.

Appendix G, page 618, EPA Region 10 letter to Stephanie Brady.⁶⁸

⁶⁷ Attachment to the King Cove Group March 13, 2013 "Comments on the Izembek land Exchange Final Environmental Impact Statement (FEIS)" at pages 32-33. Neither of the two existing terminals can be used for landing craft operations without very significant in-water modifications including dredging and/or dock facilities.

⁶⁸ Attachment to the King Cove Group March 13, 2013 "Comments on the Izembek land Exchange Final Environmental Impact Statement (FEIS)" at page 1. At page 15 of the ROD the Secretary simply says with respect to EPA's environmentally preferred alternative: "In comments on the Draft EIS, the Environmental protection Agency (EPA) stated that Alternative 4 was likely to be the environmentally preferable alternative. They also recommended that Alternative 3 was the environmentally preferable road alternative."

81. The Secretary's selection of the "no action" alternative based upon her determination that the landing craft was a viable alternative for medical evacuations is arbitrary and capricious and violates NEPA because it is contrary to the evidence and because the Secretary failed to address, rebut, or act upon an important aspect of the problem raised by the comments that the "King Cove Group" (i.e. the Plaintiffs) submitted to the record as an Attachment to its March 13, 2013 letter to then Secretary of Interior Ken Salazar in which Plaintiffs pointed out that:

The FEIS does not re-evaluate the conclusions in the January 13, 2004 Record of Decision by the U.S. Army Corps of Engineers, Alaska District that the No Action Alternative did not fulfill the intent of Congress in the King Cove Public Health and Safety Act that the No Action Alternative would continue an "unsafe and un-reliable transit to the Cold Bay Airport for both routine transportation and medevacs, which are also the Purpose and Need identified in the Act.⁶⁹

82. The Secretary's selection of the "no action" alternative, based upon her determination that the landing craft was a viable alternative for medical evacuations, is arbitrary and capricious and violates NEPA because it is contrary to the evidence and because the Secretary failed in the ROD to consider an important aspect of the problem by not addressing, rebutting, or acting upon an issue raised by the comments that the "King Cove Group" (i.e. the Plaintiffs) submitted to the record as an Attachment to its March 13, 2013 letter to then Secretary of Interior Ken Salazar in which Plaintiffs pointed out that the FEIS had failed:

⁶⁹ Attachment to the King Cove Group March 13, 2013 "Comments on the Izembek land Exchange Final Environmental Impact Statement (FEIS)" at page 11.

to use available information about operability of the conceptual landing craft developed by the EIS consultant for the Service to provide: 6 day a week; for year-round ability to meet scheduled air service at the Cold Bay Airport; and for 24/7 ability to provide transportation for urgent medical care and for emergency medical evacuation. The 2003 King Cove Access Project provided these data that were incorporated by the Service in the DEIS and FEIS include known wind and wave conditions in Cold Bay and at the Northeast and Cross Wind Cove Terminal as well as the physical and biological factors associated with the two terminals. Although used in the DEIS and FEIS for reliability conclusions for the road, hovercraft and ferry alternatives, the Service chose not to validate the key FEIS assumption that no in-water modifications are required for the conceptual landing craft to provide safe and reliable loading and unloading of an ambulance, passengers, and other vehicles.⁷⁰

83. The Secretary's selection of the "no action" alternative, based upon her determination that the landing craft was a viable alternative for medical evacuations, violates NEPA because it is contrary to the evidence and because the Secretary failed in the ROD to consider an important aspect of the problem by not addressing, rebutting or acting upon the comments that the "King Cove Group" (i.e. the Plaintiffs) submitted to the record as an Attachment to its March 13, 2013 letter to then Secretary of Interior Ken Salazar in which Plaintiffs pointed out that:

The FEIS does not evaluate existing data in the Corps 2003 EIS, the DEIS and this FEIS about the physical setting and biological resources at the Northeast and Cross Wind Cove Terminals that is necessary to provide a professional opinion on the ability of the conceptual landing craft to use terminals designed for a hovercraft operation. The FEIS does not evaluate existing data on wind and wave conditions that set parameters for the safe and reliable use of the conceptual landing craft to and from the two hovercraft terminals. Without these analyses there is no basis to determine the ability of the conceptual landing craft to provide safe and

⁷⁰ Attachment to the King Cove Group March 13, 2013 "Comments on the Izembek land Exchange Final Environmental Impact Statement (FEIS)" at pages 3-4.

reliable transportation across Cold Bay. Without these analyses the extent the conceptual landing craft can fulfill the need for the residents of King Cove to meet scheduled air service on a year-round basis, for urgent medical care and for emergency medical emergencies all remain speculative. Without this analysis there is no basis to compare the safety and reliability of the conceptual landing craft to a road, to a hovercraft or to a ferry.⁷¹

84. The Secretary's decision not to proceed with the land exchange is arbitrary and capricious and violates NEPA because the adverse impacts she associates with construction and operation of the road is based upon a finding that road usage would be far more extensive than consistent with what OPLMA would allow or directs her to analyze.⁷²

Year-round and increased human access radiating off the road corridor via pedestrian traffic or all-terrain vehicles coupled with the physical use on wet soils made possible by the presence of the road would have profound adverse effects on wildlife use and habitats of the narrow isthmus that comprises the Refuge. The likely increased activity associated with the road would also place a strain on Refuge management in a time of decreasing Refuge budget and capacity.⁷³

85. It would be up to the agency to manage road usage through an agreement with the State as Congress directed in §6403 (a) (1) (C) of OPMLA. This could include requiring the State to pay for and police road usage. The Secretary's decision violates NEPA because this alternative was not considered.

⁷¹ Attachment to the King Cove Group March 13, 2013 "Comments on the Izembek land Exchange Final Environmental Impact Statement (FEIS)" at page 11.

⁷² OPLMA Section 6403 (a) (1) LIMITATIONS ON USE (A) provides that the road "shall be used primarily for health and safety purposes (including access to and from the Cold bay Airport) and only for noncommercial purposes."

⁷³ ROD at page 4.

86. The Secretary's decision not to proceed with the land exchange is arbitrary and capricious and violates NEPA because the adverse impacts she associates with construction and operation of the road is based in part upon a finding that there will be illegal off road usage by ATVs.⁷⁴

- a. The Secretary's conclusion does not reflect the successful USF&WS and State programs that for the last 33 years have prevented illegal ATV and other motorized travel from the existing Cold Bay road network⁷⁵ and is thus arbitrary and capricious because it results in a gross overstatement of the impacts that the proposed road will have on the Isthmus; and
- b. The FEIS does not disclose the fact that the Service has no documented issuance of any notice of violation or fine for illegal use of ATVs to any of the 36,200 visitors, including 9,874 visitor use days by hunters to the Izembek National Wildlife Refuge during the 2006-2010 period.⁷⁶

87. The EIS violates NEPA because it failed to consider a reasonable range of alternatives and because every road alternative set out in the FEIS used a constant 100-foot wide road corridor, instead of a flexible road width corridor, thereby, magnifying the impacts to wildlife and wildlife habitat on the Refuge. The FEIS failed to consider an alternative having narrower road corridor consistent with the mitigation measures required by OPLMA and the FEIS⁷⁷ and with the Design Criteria set out at pages 2-31 through 2-35 of the FEIS.

⁷⁴ ROD at pages 4, 7, and 9.

⁷⁵ Attachment to the King Cove Group March 13, 2013 "Comments on the Izembek land Exchange Final Environmental Impact Statement (FEIS)" at page 2.

⁷⁶ FEIS Table 3.3-52.

⁷⁷ Section 6403 (a) (3) (A) limits the width of the road to "a single lane, in accordance with applicable road standards of the State." Subsection (a) (3) (B) requires that it be made of gravel. Subsection (a) (1) (A) limits its use "primarily for health and safety purposes" and "only for noncommercial purposes." Section 6403 (f) (1and 2) require the Secretary to "minimize the adverse impact of the road corridor on the Refuge" and to "transfer the minimum acreage of Federal land that is required for construction of the road corridor" set out in OPLMA. Section 6402 (a) (3) (C) requires the road to comply with

88. The ROD's and FEIS's comparison of alternatives is arbitrary and capricious and violates NEPA because it does not describe or evaluate the resources on all of the parcels of land as required by OPLMA.
89. The ROD and FEIS violate NEPA by using text and graphics that do not make clear that 5,430 acres will be removed from the Izembek Wilderness under Alternatives 1, 4, and 5.
90. The FEIS describes the removal of 5,430 acres from the Izembek Wilderness under Alternatives 1, 4, and 5 as an "indirect" adverse effect which violates NEPA because it is inconsistent with 40 C.F.R. §1508.8 which defines "indirect effect" as:
- Effects which are caused by an action and are later in time or further removed in distance, but are reasonably likely"
- The Secretary's decision to select the "no action" alternative has effectively removed the 5,430 acres from the Izembek Wilderness.
91. The FEIS violates NEPA because it presents a flawed assumption that §22(g) of the Alaska Native Claims Settlement Act (ANSCA) will preclude substantial future use and development of and use of private land in the Izembek National

mitigation measures identified in the ROD "relative to the passage and migration of wildlife, and also exchanges of tidal flow... ."

The ROD at page 13 acknowledges that: "Mitigation measures identified in the statute include the avoidance of wildlife impacts and mitigation of wetland loss, and the development of an enforceable mitigation plan."

Wildlife Refuge and Izembek Wilderness, thereby understating the impacts upon the Refuge and the Wilderness of selecting the No Action alternative.

92. The FEIS violates NEPA because it substantially understates the value of the King Cove Corporation lands involved in OPLMA in the following ways:⁷⁸

- a. Impact conclusions do not reflect the Service *Land Protection Plan Options for the protection of fish and wildlife habitats in the Izembek National Wildlife Refuge Complex* (1998) that identifies the 2,604 acres of private land between Kinzarof Lagoon and Cold Bay and the 8,092 acres of private land at Mortensens Lagoon as "High Priority" for addition to the Izembek and Alaska Peninsula National Wildlife Refuges;
- b. The 5,430 acres of land pending transfer to the King Cove Corporation from the Izembek Wilderness is shown as remaining part of the Izembek Wilderness;
- c. The FEIS effect conclusions do not reflect the fact that the Service and Department of the Interior determined the unique resources and superlative wilderness characteristics of the pending transfer of the 5,430 acres from the Izembek Wilderness. The impact conclusion does not reflect the fact that the privately owned 2,604 acres on the south side of Kinzarof Lagoon was already owned by King Cove Corporation and managed as private land, yet all 8,034 acres were included as inholdings within the boundaries of the Izembek Wilderness when ANILCA was enacted on December 2, 1980;
- d. The EIS effect conclusions do not reflect the fact that the resources associated with the State owned 4,320 acres of submerged land, 17 miles of intertidal wetland and 2,300 acres of eelgrass beds comprising Kinzarof Lagoon are so valuable that the Act required the State to enact legislation adding Kinzarof Lagoon to the Izembek Lagoon State Game Refuge and that all privately owned islands and all privately owned uplands and designated RAMSAR Wetlands of International Importance be added to the Izembek Wilderness.

⁷⁸ See FEIS Table ES-2 and Table 2.4-1.

93. The EIS violates NEPA because it overstates the impacts upon Tundra Swan of a 9 mile gravel road on the Izembek Isthmus and understates the habitat values of the Exchange Lands.
94. The EIS violates NEPA because it overstates the impacts upon Brant and Emperor Geese of a 9 mile gravel road on the Izembek Isthmus and understates the habitat values of the Exchange Lands.
95. The EIS violates NEPA because its conclusion that Alternatives 1, 4, and 5 would not diminish the USF&WS's ability to achieve refuge purposes is inconsistent with the evidence. The FEIS failed to consider:
- a. the fact that substantial future development on King Cove Corporation land has occurred within the boundary of the Izembek National Wildlife Refuge as demonstrated by the King Cove Access Project which authorized the construction of a single lane road, hovercraft terminal, material site, and waste material storage sites all with full compliance with the legislative and regulatory provisions of ANCSA Section 22(g). The Service also fails to evaluate the fact that the lands removed from the Izembek Wilderness are readily accessible from the King Cove Access Project road;
 - b. the likelihood of overland access from the Cold Bay road network and from the Northeast Terminal of vessel access from the Cold Bay and Kinzarof Lagoon for recreation and related commercial facilities on the private land (Kinzarof Lagoon Parcel) located on the narrow peninsula between Kinzarof lagoon and Cold Bay;
 - c. the likelihood of recreation and related commercial facilities on the isolated parcel of private land on the west side of the entrance to Kinzarof Lagoon including overland access through the Izembek Wilderness and through designated Critical Habitats at the mouth of Kinzarof Lagoon; and
 - d. the extension on the ANCSA 17(b) public access easement from the King Cove Access Road across the 5,430 acres to the new boundary of federal

land in the Izembek Wilderness will facilitate and promote development of adjacent private land.

96. While identifying Cold Bay as a underprivileged community and King Cove as a minority community, and while it “recognizes that for residents of the Aleutian East Borough the status quo under the No Action alternative is inadequate to meet the pressing needs for improved transportation and access to health care,”⁷⁹ the EIS violates NEPA because it nevertheless concludes that “[s]ince Alternative 1 represents the existing condition, a disproportionate adverse impact to the cities of King Cove and Cold Bay would not be introduced and no Environmental Justice issue would be created”⁸⁰ all of which violates Executive Order 12898 which states as follows:

1-101. Agency Responsibilities. To the greatest extent practicable and permitted by law, and consistent with the principles set forth In the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Marian islands.

By failing to adequately consider the health and safety needs of the residents of King Cove, and by failing to explain how its decision meets the requirements of the Environmental Justice Executive Order 12898, the Secretary has violated her legal responsibility under the Executive Order.

⁷⁹ FEIS at page 4-77.

⁸⁰ FEIS at page 4-77.

FOURTH CLAIM FOR RELIEF
ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

97. Plaintiffs repeat and incorporate by reference the allegations of Paragraphs 1 through 96 of this Complaint.
98. Section 810 (a) of the Alaska National Interest Lands Conservation Act (ANILCA) requires that an evaluation of the effect on subsistence uses and needs be completed for any Federal determination to “withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands.” When an EIS must be prepared, such as OPLMA directs in this case, an analysis of whether or not the action significantly restricts subsistence uses and needs is required by §810 to be incorporated into the EIS.
99. The analysis conducted by Defendants, which is set out in Appendix D to the EIS, violates ANILCA and NEPA because it arbitrarily and capriciously concludes contrary to the evidence “that there would be no significant restriction of uses under any of the alternatives, including the selected no action alternative (Alternative 1).”⁸¹
100. Each Alternative fails to consider that:
- a. the gain or loss of exclusive control over private land owned by the King Cove Corporation that range from a gain of 5,430 acres of high value subsistence resources with reasonable access from an existing road under Alternatives 1, 4 and 5 to a loss of 16,129 acres of high value subsistence resources with direct and reasonable access from an existing road and a gain of 5,430 acres with no access and lower priority subsistence resources under Alternatives 2 and 3;
 - b. substituting federal subsistence resources that are subject to federal law and regulation on 16,129 acres for all local residents will not be as

⁸¹ ROD at pages 19-20.

beneficial to the King Cove Corporation and its shareholders as permanent exclusive control of all access and use of the same 16,129 acres;

- c. adding 41,887 acres of State ownership to federal subsistence management has no direct value to the King Cove Corporation and its shareholders that has no documented subsistence use (see Figures 3.3-23 through 3.3-27);
- d. assuring continuing legal motorized vehicle access to existing trails and roads with existing traditional motorized access to, and use of, subsistence resources crossed by the Southern and Central Road Corridor with its ATV barriers on both sides of the alignment;
- e. providing safe and reliable access for the residents of King Cove to the subsistence resources on the west side of Cold Bay would have a beneficial major direct and cumulative effect on subsistence that is not considered under any of the Alternatives;
- f. the failure of the Service to evaluate the documented subsistence resources located in the ANCSA 12(b) area shown in Figure 3.3-1;
- g. the Service failed to compare the relative access to and use of the subsistence resources in the ANCSA 12(b) area to the 5,430 acres retained in the Izembek Wilderness which are available in the relevant graphics for the distribution and use of subsistence resources shown in Chapter 3;
- h. the FEIS fails to evaluate how access to the remote 5,430 "replacement" acres in the ANCSA 12(b) area from existing access terminating in the Mortensens Lagoon Parcel (that will be Federal land within the Alaska Peninsula National Wildlife Refuge) will be accommodated by the Service.

These effects on the access to and use of subsistence resources in the Project Area for the King Cove Corporation and its shareholders are neither "negligible" nor "minor" and the failure to evaluate them violates §810 of ANILCA and NEPA.

**FIFTH CLAIM FOR RELIEF
TRUST RESPONSIBILITY**

101. Plaintiffs repeat and incorporate by reference the allegations of Paragraphs 1 through 100 of this Complaint.

102. The Federal Government has a special constitutional and statutory responsibility to its Alaska Native and American Indian citizens; expressed by the Secretary as follows:

The United States has a unique legal and political relationship with Indian tribes and Alaska Native entities as provided by the Constitution of the United States.⁸²

103. President Obama acknowledged this Trust Responsibility in Executive Order 13592 issued Dec. 2, 2013:

By the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby order as follows:

Section 1. Policy. The United States has a unique political and legal relationship with the federally recognized American Indian and Alaska Native (AI/AN) tribes across the country, as set forth in the Constitution of the United States, treaties, Executive Orders, and court decisions. For centuries, the Federal Government's relationship with these tribes has been guided by a *trust responsibility (emphasis added)*

104. On June 26, 2013, in an Executive Order Establishing the White House Council on Native American Affairs, the President recognized that the Trust Responsibility of the federal government involved health care ***including special efforts to confront historic health disparities*** for Alaska Natives

⁸² <http://bia.gov/WhatWeDo/index.htm>

Executive Order -- Establishing the White House Council on Native American Affairs

Section 1. Policy. The United States recognizes a government-to-government relationship, as well as a unique legal and political relationship, with federally recognized tribes. This relationship is set forth in the Constitution of the United States, treaties, statutes, Executive Orders, administrative rules and regulations, and judicial decisions. Honoring these relationships and respecting the sovereignty of tribal nations is critical to advancing tribal self-determination and prosperity.

To honor treaties and recognize tribes' inherent sovereignty and right to self-government under U.S. law, it is the policy of the United States to promote the development of prosperous and resilient tribal communities, including by

(b) supporting greater access to, and control over, nutrition and healthcare, including special efforts to confront historic health disparities and chronic diseases;

(d) For purposes of this order, "federally recognized tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

(e) For purposes of this order, "American Indian and Alaska Native" means a member of an Indian tribe, as membership is defined by the tribe. (Emphasis added).

105. Congress acted upon the federal government's Trust Responsibility to provide health care to Indians and Alaska Natives by enacting the Indian Health Care Improvement Act of 1976 (25 USC § 1602):

Congress declares that it is the policy of this Nation, in fulfillment of its special trust responsibilities and legal obligations to Indians

(1) to ensure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy;

(2) to raise the health status of Indians and urban Indians to at least the levels set forth in the goals contained within the Healthy People 2010 initiative or successor objectives;

(3) to ensure maximum Indian participation in the direction of health care services so as to render the persons administering such services and the services themselves more responsive to the needs and desires of Indian communities;⁸³

106. In his March 21, 2013 letter former Secretary Salazar correctly acted upon the federal government's Trust Responsibility to "support greater access to ... healthcare," (as described in the Indian Health Care Improvement Act and the above referenced Executive Orders) by directing Assistant Secretary Washburn to *conduct a trip and investigation into the medical needs of the tribal members at King Cove.*

107. Secretary Salazar's determination that OPLMA includes a trust responsibility to provide Alaska Native access to medical care is not only based upon the Indian Health Care Improvement Act and the above referenced Executive Orders, it is also based upon the fact that approximately 38% of the residents of King Cove are Alaska Natives and upon a reasonable interpretation of § 6403 (a)(1)(A) which states that the road "shall be used primarily for health and safety purposes (including access to and from Cold Bay) and only for noncommercial purposes."

108. Notwithstanding the direction from the March 21, 2013 letter of then Secretary of Interior Ken Salazar that his report address "whether and to what extent the road is needed to meet emergency medical needs," the Report from

⁸³ See also 25 C.F.R. § 900.3.

Assistant Secretary Washburn does not do so. It merely discusses the transcribed testimony of the King Cove residents, all of whom testified in favor of the land exchange and construction of the road. The report does not analyze or discuss the extent to which the road is needed to meet medical emergencies as directed by Secretary Salazar's letter. As a consequence the Report violates the Trust Responsibility of the Department to the Natives of King Cove as defined by Secretary Salazar.

109. Secretary of Interior Jewell's acceptance of Assistant Secretary Washburn's Report notwithstanding its failure to address "whether and to what extent the road is needed to meet emergency medical needs," as ordered by Secretary Salazar, pursuant to Secretary Salazar's definition of Defendant's Trust Responsibility to require such an analysis, is arbitrary and capricious because, as a consequence, the Report:
- a. failed to consider an important aspect of the problem identified by Secretary Salazar; and
 - b. violated the federal government's Trust Responsibility by failing to analyze whether a road was needed to provide "greater access to, and control over, nutrition and healthcare, including special efforts to confront historic health disparities."
110. In OPLMA Congress declared it to be in the sovereign's interest that the Secretary of Interior analyze and determine whether the land exchange which it authorized in OPLMA was in the public interest. The Secretary's public interest determination violated her Trust Responsibility by:

1. Simply transcribing the testimony of members of the affected Alaska Native tribes, rather than conducting a genuine and meaningful “G2G” consultation with the Plaintiff tribes;
2. Failing to conduct any meaningful negotiation with the tribes to actually try to determine whether the Tribes’ needs could realistically be met by the No Action alternative. With the sole exception of conducting an “on the record” hearing, the transcript of which is a public document, no negotiations were offered or held by the Department prior to the decision announced in the ROD, as is the custom when a major Departmental decision affects a tribe; and
3. Making a decision that fails to explain how the Trust Responsibility of the Federal Government is met by selecting the No Action Alternative when it does not meet the Purpose and Need of the FEIS, namely to provide a safe, reliable, and affordable means of transportation from King Cove to Cold Bay.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs pray for judgment as follows:

- a. A declaration that the Secretary’s decision to adopt the no action alternative and the Record of Decision violates OPLMA;
- b. A declaration that the Secretary’s decision to adopt the no action alternative and the Record of Decision were arbitrary, capricious, and not in accordance with law, and violates the APA;
- c. A declaration that the Secretary’s decision to adopt the no action alternative and Record of Decision violates NEPA;
- d. A declaration that the Secretary’s decision to adopt the no action alternative and Record of Decision violates §810 (a) of ANILCA;
- e. A declaration that the Secretary’s decision to adopt the no action alternative and Record of Decision notwithstanding Assistant Secretary Washburn’s

Report's failure to address "whether and to what extent the road is needed to meet emergency medical needs," as ordered by Secretary Salazar, violates the Trust responsibility of the United States to Plaintiff Agdaagux Tribe of King Cove and Plaintiff Native Village of Belkofski and other Alaska Natives living in King Cove;

f. An Order invalidating the Secretary's decision to adopt the no action alternative and the Record of Decision and permanently enjoining Defendants from applying the no action alternative and the Record of Decision to the Plaintiffs or the Izembek National Wildlife Refuge and Izembek Wilderness;

g. An Order directing Defendants to comply with OPLMA, the APA, NEPA, ANILCA and their Trust responsibility to Plaintiffs and those similarly situated;

h. An award of the costs and disbursements incurred by Plaintiffs in this action, including such other costs and fees as may be allowed by applicable law;

i. An award of Plaintiffs' attorneys fees under the Equal Access to Justice Act, 28 U.S.C. § 2412; and

j. Such other relief as the Court deems just and proper.

DATED this 3rd day of June 2014, at Juneau, Alaska.

s/Steven W. Silver

s/Steven W. Silver
Robertson, Monagle and Eastaugh
Alaska Bar #7606089

s/ James F. Clark

s/James F. Clark
LAW OFFICE OF JAMES F. CLARK
Alaska Bar #690725

