



THE STATE  
of **ALASKA**  
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Public Comments Processing  
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Re: Docket No. FWS-R7-NWRS-2023-0072

To Whom it May Concern;

The State of Alaska (State) has reviewed the May 18, 2023 notice to initiate (NOI) a scoping process for a supplemental Environmental Impact Statement (SEIS) “to consider the effects of a potential land exchange of certain lands owned by the King Cove Corporation and/or the State of Alaska with certain lands owned by the U.S. Government.”<sup>1</sup> The State has several concerns with the proposed SEIS, such as a defective NOI, inconsistency with ANILCA, reliance on expired laws, and lack of consultation with the State as an affected land-owner, among other issues addressed below. Particularly, any action or transaction involving the State needs to be thoroughly discussed with the State in light of the full history of efforts to advance this life-saving road. We also request that the State participate in any review, with a strong preference as a joint lead agency, based on the specifics of what is being considered.

**A corrected notice to initiate scoping is required**

The NOI contains a legally incorrect and misleading paragraph regarding the June 1, 2020 decision from the District Court for the District of Alaska. On June 1, 2023 the Ninth Circuit Court of Appeals vacated the District Court’s 2020 judgment and opinion and, therefore, the NOI’s entire paragraph description of what the District Court concluded and did not rule on is misleading to readers—as there is no longer any court decision that questions the validity of the 2019 Land Exchange Agreement or that questions the legal reasoning and factual justifications or the July 3, 2019 Secretarial Memorandum. If the U.S. Department of Interior (DOI) provides the public with details of the 2020 District Court decision that is vacated and has no legal effect,<sup>2</sup> then DOI must also provide the public with details of the 2022 Ninth Circuit Court of Appeals decision that reversed the District Court on all counts but also was vacated.<sup>3</sup> The true and current status of the 2019 Land Exchange Agreement is that it became binding on DOI and the King

<sup>1</sup> 88 Federal Register (FR) 31813

<sup>2</sup> Reported at 463 F.Supp. 3d 1011 (D.Alaska 2020)

<sup>3</sup> Reported at 29 F.4th 432 (9th Cir. 2022)

Cove Corporation (KCC) on July 12, 2019, and DOI issued a decision to “withdraw” from the Agreement on March 14, 2023. There are no valid court decisions that have examined the legality of the 2019 Land Exchange Agreement or DOI’s 2023 Decision to “withdraw” from the binding land exchange agreement.

A second reason that a corrected NOI is necessary is that DOI gave a three-paragraph description of the proposed Omnibus Public Land Management Act of 2009 (OPLMA) land exchange between the State and DOI, but DOI provided no information or details about Alaska National Interest Land Conservation Act (ANILCA) section 1302(h) land exchange between KCC and DOI. DOI and KCC’s substantial completion of the requirements under the 2019 Land Exchange Agreement is necessary information for the public and will provide valuable information for the public’s consideration of alternatives and effects, including: 1) On October 10, 2018 BLM Alaska Cadastral Survey accepted and filed the surveys of the selected lands to be exchanged by DOI and by KCC;<sup>4</sup> 2) Appraisals of the selected lands were prepared and accepted by DOI’s Appraisal Valuation Services Office on August 10, 2020. DOI selected 1,737 acres of peninsulas, islands, and narrow shoals owned by KCC that form the southern boundary of the Kinzarof Lagoon within the Izembek National Wildlife Refuge (NWR), which have a market value of \$300,000. KCC selected the 490-acre narrow path connecting King Cove to the Cold Bay airport, which has a market value of \$252,000. The only two requirements left to be completed under the 2019 Agreement are: a) DOI must complete a survey of unexploded ordnance from the Thornbrough Air Force Base (a/k/a Cold Bay airport) live fire exercises between 1941 and 1958; and DOI must complete a Section 106 survey of the exchange lands for historical and archeological resources. Excluding this important information from the NOI is extremely misleading to the public and prejudices a fair examination of alternatives and impacts.

Lastly, detailed information and descriptions of DOI’s and KCC’s selected exchange lands are necessary for any SEIS. On October 20, 2010, during the scoping for the OPLMA EIS, DOI informed the State that the State’s maps and descriptions of land to be exchanged were not “specific enough to conduct the EIS for the land exchange” because the State had not mapped its inland navigable waters. If DOI required such an exacting degree of mapping for the 2013 EIS, the public would be right to question why DOI chose not to disclose the existence of the recorded surveys or otherwise describe the lands selected by DOI and KCC for exchange. Since ANILCA 1302(h) authorizes the Secretary of Interior to exchange lands on the basis of equal value, and appraisals have already been prepared and accepted for the lands selected by DOI and KCC, it also appears suspicious that there is no reference to the appraisal documents and appraised values as this is essential information for public review.

Because of these manifest errors in the NOI, which will prejudice a fair and complete review of any land exchange, the State requests that DOI restart any SEIS process with a corrected NOI.

### **State participation in SEIS process**

The May 18, 2023, Federal Register notice indicates that the SEIS will continue to consider “action alternatives from the 2013 EIS addressing the proposed land exchange and road

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<sup>4</sup> 83 FR 50956

construction and operation as outlined in the 2009 Act”<sup>5</sup>. The 2013 EIS considered a proposed land exchange involving State lands. The State requests Joint Lead Agency status, as allowed under the newly enacted NEPA section 107,<sup>6</sup> as that role is appropriate and necessary since DOI has proposed the acquisition of State-owned lands to replace its 2019 Land Exchange Agreement with KCC. Joint Lead Agency status is also the only means that the State can meaningfully review and participate in DOI’s proposal to acquire entire townships of State-owned land, and to participate in the scoping and review of environmental studies that will be used to condition the use of exchanged lands. At a minimum the State will need to serve as both a potential participant in the underlying action and cooperating agency in the review.

We must also note at the outset that DOI has not consulted with the State regarding DOI’s contemplated land exchange prior to releasing its public pronouncement of an intended exchange. Most troubling, however, is that DOI will need to amend federal and state laws for any of the potential land exchanges—i.e., the described action alternatives—that are intended to replace DOI’s 2019 land exchange with King Cove Corporation. On page 7 of this letter, the State offers comments and suggestions on how DOI could create an alternative that could be completed under existing laws. Since DOI does not have the current legal authority for the terms of any land exchange considered in the 2013 EIS, it appears that DOI’s intended SEIS only serves to delay the resolution of King Cove’s ongoing need for safe and reliable access to Alaska’s transportation network.

**DOI has not disclosed its proposed amendments to state and federal law that would be necessary to complete the potential land exchange.**

The National Environmental Policy Act (NEPA) section 102 requires that “all agencies of the Federal Government shall ... *include in any recommendation or report on proposals for legislation* or other major Federal actions ... a detailed statement by the responsible official on the impact of the proposed action.”<sup>7</sup> Completion of the potential exchange under any of the action alternatives described in the NOI will require enactment of state and federal laws similar to the expired provisions of the Omnibus Public Land Management Act of 2009 (OPLMA) and the expired Izembek State Game Refuge Land Exchange Bill.<sup>8</sup> It will be impossible for the State to provide detailed and useful comments on the scope and potential effects of DOI’s desired land exchange until DOI complies with NEPA section 102 and its implementing regulations by disclosing its desired amendments to existing state and federal laws.

**DOI will need amendments to state and federal law to limit the use of the road corridor “for noncommercial purposes.”**

The summary of the proposed action to be analyzed states that “King Cove would use the acquired land for a road corridor *for noncommercial use*.”<sup>9</sup> Thus, any action alternative will prohibit commercial use of any future road that may be built in the exchange corridor. The notice states that DOI “will prepare a supplemental EIS to address and exchange under section 1302(h)

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<sup>5</sup> *ibid*

<sup>6</sup> 42 USC 4336a(a)(1)(B) and (a)(2)

<sup>7</sup> 42 USC 4332(2)(C); see also 40 CFR 1506.8 (NEPA regulations for proposals for legislation)

<sup>8</sup> 123 STAT. 1177, and 119 SLA 2010, respectively

<sup>9</sup> 88 Fed. Reg. 31813

of ANILCA.”<sup>10</sup> However, ANILCA section 1302(h) provides no legal authority for the Secretary of Interior to discriminate between potential users of a road constructed in the exchanged corridor.<sup>11</sup> On the contrary, under federal and state laws public roads are open to all public travel without discrimination between users of the public-owned infrastructure.<sup>12</sup> In order for DOI to prohibit King Cove business owners and all other commercial actors from using a future public road, DOI must amend state and federal laws to allow this form of discrimination between public road users.

The State strongly recommends that DOI abandon its desire to prohibit commercial activities in any exchanged lands. The State recognizes that DOI has full authority to manage the Izembek NWR and entry into the NWR from any road. However, as the 2013 EIS fully recognized, the proposed narrow dirt road will only accommodate low-speed traffic and is projected to not exceed 40 vehicles per day. Protecting the Izembek NWR from this very-low volume public road can be accomplished with signs, education, and enforcement. There is no reason that the people of King Cove—after obtaining access to the State’s transportation system—should not be able to enjoy fresh produce, or dry goods, or hardware supplies, or any other commercial good or service just like every other connected community in North America. An explicit purpose of ANILCA is to “provide adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people.”<sup>13</sup> Similarly, Alaska law seeks to “link[ ] together cities and communities throughout the state ... and otherwise improve the economic and general welfare of the people of the state.”<sup>14</sup> DOI should not be seeking amendments to any state or federal law that would prohibit businesses or other commercial actors from using a future public road to King Cove, Alaska.

**DOI will need amendments to state and federal law to select any alternative from OPLMA’s 2013 EIS.**

Recall that the identified authority for DOI’s intended land exchange is ANILCA section 1302(h), which is an authority strictly limited to the exchange of lands. The NOI, on the other hand, proposes that “Potential action alternatives under consideration include one or more of the action alternatives from the 2013 EIS addressing the proposed land exchange *and road construction and operation*, as outlined in the 2009 [OPLMA] Act.” The OPLMA specifically authorized the Secretary of Interior to “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.”<sup>15</sup> With the OPLMA now expired, the Secretary of Interior is without statutory authority to authorize road construction and operation (or impose limitations and restrictions on road construction and operation) under the inherent limits of ANILCA section 1302(h).

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<sup>10</sup> 88 Fed. Reg. 31814

<sup>11</sup> See, 16 U.S.C. 3129(h)

<sup>12</sup> See e.g., 23 USC 101(a)(27) and AS 19.05.125

<sup>13</sup> 16 USC 3101(c)

<sup>14</sup> AS 19.05.125

<sup>15</sup> 123 STAT. at 1179

**DOI's SEIS proposal does not comply with the requirements of the June 3, 2023 amendments to NEPA.**

The Fiscal Responsibility Act of 2023, colloquially referred to as the Debt Ceiling Bill, was signed into law on June 3, 2023 and included the most substantive amendments to NEPA since the statute's enactment in 1970. The recent NEPA amendments codify many of the CEQ regulations promulgated in 2020. A number of the newly promulgated and codified NEPA efficiency measures are applicable to the scoping of FWS's proposed SEIS:

- Threshold determination shows NEPA is not required because DOI cannot implement any proposed alternative without new legislation. The newly enacted NEPA section 106 directs that “An agency is not required to prepare an environmental document with respect to a proposed agency action if (1) the proposed agency action is not a final agency action.”<sup>16</sup> Since amendments to state and federal laws will be required to add a “no noncommercial uses” limitation to the terms of the 2019 Land Exchange Agreement (i.e., the “new alternative” being proposed for the SEIS), and amendments to state and federal law are required for all of the 2013 EIS land exchange alternatives examined under OPLMA's authority (i.e., the “action alternatives” proposed for the SEIS), the only potential outcome from DOI's proposed NEPA process is the production of draft state and federal legislation that would authorize the lopsided exchange authorized by the now expired 2011 state and federal authorities. The production of documents that detail proposed legislation is not an “agency rule, order, license, sanction, [or] relief” therefore is not a “final agency action” for the purpose of the newly enacted NEPA Section 106.<sup>17</sup>

A counterpart to this newly enacted limitation on federal agencies can be found in the newly created NEPA section 111, which specifically excludes from NEPA's triggering phrase “major Federal action” those actions “where a Federal agency cannot control the outcome of the project.”<sup>18</sup> Since DOI currently lacks sufficient legal authority to approve any of the prior alternative land exchanges as proposed for its SEIS—and would require congressional action to authorize any selected alternative—DOI cannot control the outcome of the future state and federal legislative processes. Therefore, DOI does not satisfy Congress's new threshold determination of whether NEPA should be conducted at all.

- Threshold determination shows NEPA is not required because land exchanges with Native Corporations are statutorily exempted from NEPA. Congress's newly enacted NEPA section 106 similarly directs that an environmental document is not required when an “agency does not have authority to take environmental factors into consideration in determining whether to take the proposed action.”<sup>19</sup> This same prohibition is found in the recently codified amendments to the NEPA regulations, which requires federal

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<sup>16</sup> 42 USC 4336(a)(1)

<sup>17</sup> See, 42 USC 4336(a)(1) and 5 USC 551(13)

<sup>18</sup> 42 USC 4336e(1)(B)

<sup>19</sup> 42 USC 4336(a)(4)

agencies, prior to commencing a NEPA review, to determine “[w]hether the proposed activity or decision is expressly exempt from NEPA under another statute<sup>20</sup>. As discussed below, ANILCA section 910 exempts from NEPA land exchanges with Native Corporations, so application of the newly enacted NEPA section 106 would result in a threshold determination that a NEPA process should not be initiated for the potential land exchange.

### **Land exchanges must be equal-value**

The State notes that the 2019 land exchange agreement identified an equal-value exchange between King Cove and the U.S. Government, as required by Section 1302(h) of ANILCA, which was not true of the 2013 proposed land exchanges.

The laws of the State of Alaska require that land values in an exchange must be of approximate equal value. AS 38.50.010(b)(the State’s exchange provision is very similar to ANILCA section 1302(h)). DOI’s public notice describes the State of Alaska’s 2009 offer of 43,093 acres of land to be exchanged for 206 acres of federal land—and states an intent to analyze that offer as though it currently exists—but the uncodified special act that authorized the State of Alaska’s incredibly lopsided exchange was nullified both by the expiration of the OPLMA and by former Secretary Jewell’s rejection of the State’s offer.<sup>21</sup> Therefore, existing laws would only allow an equal value exchange with DOI if the State of Alaska was to participate in DOI’s currently contemplated land exchange.

### **Applicability of NEPA to the proposed land exchange**

Section 910 of ANILCA exempts land exchanges to Natives or Native Corporations from NEPA. Rather, NEPA would be required for the review of construction on federal lands or waters of the United States. ANILCA Section 910 clearly directs that:

“SEC. 910. The National Environmental Policy Act of 1969 (83 Stat. 852) shall not be construed, in whole or in part, as requiring the preparation or submission of an environmental impact statement for withdrawals, conveyances, regulations, orders, easement determinations, or other actions which lead to the issuance of conveyances to Natives or Native Corporations, pursuant to the Alaska Native Claims Settlement Act, or this Act [ANILCA].”<sup>22</sup>

DOI only gives the equal-value land exchange provision of ANILCA 1302(h) as authority for the proposed SEIS. Since ANILCA section 910 exempts from NEPA all land exchanges with Native Corporations, DOI does not have the statutory authority to conduct a NEPA review prior to a land exchange with King Cove Corporation. As DOI, KCC, and the State have consistently stated, DOI’s and all other regulatory agencies’ NEPA review of potential construction and operation of a road will occur during the environmental permitting of any future road.

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<sup>20</sup> 40 CFR 1501.1(a)(1)

<sup>21</sup> 119 SLA 2010 at §§ 7 and 8, respectively

<sup>22</sup> 43 USC 1638

### **Scoping notice disregards explicit purpose of ANILCA**

The State also notes an inaccuracy in the FR notice, which is of sufficient gravity to independently warrant a corrected NOI. The FR notice incorrectly identifies only two purposes of ANILCA in DOI's statement of necessary compliance with "the land exchange's furtherance of [ANILCA's] conservation and subsistence purposes." Every person can expect environmental advocacy groups to narrowly focus on the two protective purposes of ANILCA—conservation and subsistence preferences—as those two purposes are squarely within the charters of those organizations. The DOI is a public agency that must uphold the laws of the United States and, therefore, must recognize all of the purposes of ANILCA including the ANILCA 101(d) purpose to provide "adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people."<sup>23</sup> This purpose has been recognized by the United States Supreme Court and the Ninth Circuit Court of Appeals, and DOI cannot pretend this essential purpose of ANILCA does not exist.<sup>24</sup> DOI made a material error by not disclosing this essential purpose of ANILCA that must be considered in the intended land exchange, and the correction of that error requires a re-publication of the NOI.

### **Recommendation for viable alternative within existing law**

The State recommends that DOI clearly designate an alternative that accurately reflects the 2019 Land Exchange Agreement, to include the surveyed and recorded property descriptions, the appraised values and supporting appraisals for each property in the exchange, and the remaining need for DOI's completion of an unexploded ordnance survey and a Section 106 survey of the exchange lands. Most importantly, the accurate 2019 Land Exchange Agreement alternative doesn't include a non-commercial use restriction or any other restriction (such as unequal value exchange) that would require amendments to federal and state law. This accurate 2019 Land Exchange Agreement alternative needs to be clearly designated as the alternative that does not require legislative action to implement; failure to disclose that fact will unfairly prejudice the consideration of alternatives and will taint the entire SEIS process.

Congress's newly enacted NEPA section 107 also includes a "one document" document policy that requires, to the extent practicable, that all permitting agencies evaluate the proposed action in a single environmental document so that all permits and authorizations for the proposed action may be issued promptly following the NEPA decision.<sup>25</sup> Any supplemental EIS must involve the U.S. Army Corps of Engineers as an additional joint lead agency and have a stated goal of evaluating the effects of construction and operation of a road linking King Cove to Cold Bay airport so that authorizations and permits for road construction can follow shortly after the completion of a NEPA decision document.

### **Closing**

The issues addressed above, such as errors in the NOI, inconsistency with ANILCA, reliance on expired laws, and lack of consultation with the State as an affected land-owner, must be addressed by DOI.

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<sup>23</sup> 16 USC 3101(d)

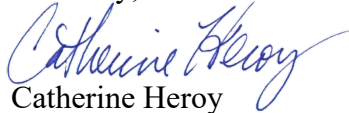
<sup>24</sup> *Sturgeon v. Frost*, 139 S.Ct. 1066 (2019) and *City of Angoon v. Marsh*, 749 F.2d 1413 (9th Cir. 1984)

<sup>25</sup> 42 USC 4336a(b); see also 40 CFR 1501.8(b)(8)

The State has long supported a land exchange of some kind to advance the needs of the community of King Cove and has been party to a right-of-way application for a road to the community of King Cove. The State encourages the DOI to be timely and responsive in the review process. We look forward to working cooperatively through this review to address issues of mutual interest.

Thank you for this opportunity to comment. If you have any questions regarding these comments, please contact me at (907) 269-0880 or by email at [Catherine.heroy@alaska.gov](mailto:Catherine.heroy@alaska.gov).

Sincerely,



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Large Project Coordinator  
Office of Project Management and Permitting

Cc: Jerry Moses, DC Office Director  
The Honorable Senator Murkowski  
The Honorable Senator Sullivan  
The Honorable Representative Peltola