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National Wildlife Refuge System
1011 East Tudor Road
Anchorage, AK 99503

February 13, 2025

Re: Docket No. FWS–R7–NWRS–2023–0072; FF07R00000–245–FXRS12610700000
Draft Supplemental EIS for Potential Land Exchange Involving Izembek National Wildlife Refuge Lands

Dear Ms. Skibo,

On behalf of our millions of members and supporters, our groups appreciate the opportunity to comment on the above-referenced document.[1] As detailed herein, the proposed action runs counter to fundamental principles and bedrock laws governing our nation's federal public lands. We urge the U.S Fish and Wildlife Service (Service or FWS) to reconsider this proposal.

The Alaska National Interest Lands Conservation Act (ANILCA) is one of our nation's most celebrated conservation achievements. It set aside over 100 million acres of Alaska's most remarkable federal lands for conservation and preservation of their nationally significant natural, scenic, cultural, wildlife, wilderness, and other values. It also recognized the critical importance of subsistence activities such as hunting and fishing to rural Alaskans and sought to maintain or enhance those opportunities. Congress designated over 50 million acres as Wilderness – affording those lands the very highest form of protection.

The Izembek National Wildlife Refuge (Izembek Refuge or Refuge) is among ANILCA's most iconic protected areas and remains one of the most ecologically significant and unique areas in the state, in the nation, and on the globe. Because of its importance for wildlife, including waterfowl, caribou and brown bears, Congress designated nearly all of the Izembek Refuge as Wilderness, where roads and other permanent human developments are prohibited. Izembek Lagoon and part of the adjacent isthmus in the center of the Refuge is also designated Wetland of International Importance under the Ramsar Convention.

The proposed action rests on the untenable premise that Congress granted the Secretary of the Interior the power to administratively undo ANILCA's historic protections and allow roads in protected areas – even in designated Wilderness. There is no statutory basis for this stunning assertion. Indeed, ANILCA makes unmistakably clear that roads in Wilderness ultimately require

[1] Prepared with assistance from Trustees for Alaska.

Congressional approval following a detailed process involving many required factual findings. There has never been, and under the law could never be, a land exchange to allow a road under ANILCA.

In an attempted end run around the law, the proposed action seeks to trade away a corridor of land in the very heart of the Refuge and straight through Wilderness. Once that corridor is privatized, the Service appears to assume that a private party could build the road and effectively circumvent ANILCA's requirements. But the cited mechanism for this maneuver, the statute's expressly limited land exchange provision, only authorizes land acquisitions that further the statute's conservation and subsistence purposes, not land divestments that undermine them.

In addition to obviously violating ANILCA, the proposed action would also contravene several other statutes as described herein. Also, the underlying analysis presented in the draft Supplemental Environmental Impact Statement (DSEIS) contains essentially the same reasons for rejecting the proposed land exchange as were explained in the original 2013 EIS being supplemented here. Based on that 2013 analysis, the Secretary of the Interior rejected a proposed road through Izembek Refuge because of the harms to Refuge resources and the agency's inability to meet its legal mandates. The DSEIS provides no basis to reach a different conclusion. Overall, the document is so unclear and confounding as to preclude informed public participation and agency decision-making, in violation of the National Environmental Policy Act (NEPA). In short, the preferred alternative cannot be selected for numerous compelling reasons.

While the community of King Cove has long sought more reliable access to the Cold Bay airport, multiple studies over many years have shown the economic and technical feasibility of non-road options that would provide this access. The DSEIS inexplicably and fatally fails to assess these alternatives. The marine options have become even more viable in recent years, with the availability of new federal funding for necessary improvements to the Cold Bay dock. There are win-win solutions here that can meet community transportation needs without degrading the Izembek Refuge and its protected wilderness, wildlife and subsistence values with a road. We encourage you to shift agency and public attention to those.

SUMMARY OF COMMENTS

As described in DSEIS, the Service is considering a land exchange that would create and privatize a road corridor through the center of the Izembek Refuge and its Wilderness. The proposed action would create a surface transportation link from King Cove to the Cold Bay airport.

For the Service's legal authority to take this action, the DSEIS points to the Secretary of the Interior's land exchange authority in Section 1302 of ANILCA. But ANILCA confers no Secretarial authority to trade away protected lands to allow roads. The land exchange provision only allows the Secretary to acquire land to further ANILCA's conservation and subsistence purposes, and the purposes of the protected lands (in this case the Izembek Refuge). Divesting Refuge lands to enable the construction of a road to an airport does not further these purposes. Indeed, it is contrary to them.

The Service has consistently found that road construction and use would harm Izembek Refuge resources and be inconsistent with ANILCA's and the Refuge's purposes. Despite this, the

Service now posits for the first time that an exchange of Refuge lands for the purpose of building a road furthers the conservation and subsistence purposes of ANILCA and the Refuge's purposes. This position contradicts the Service's longstanding position regarding the significant harmful impacts that road construction and use would have on the Refuge. It is irreconcilable with the analysis and conclusions that the agency reached in its 2013 Environmental Impact Statement being supplemented here, and its December 23, 2013 Record of Decision. And this position is unsupported by the new analysis and conclusions presented in the DSEIS. All available information continues to clearly show that the proposed action would undermine, not promote, the purposes of ANILCA and the Izembek Refuge.

Additionally, the only way to allow for a road through a conservation system unit (CSU) is to follow the mandatory, detailed process set forth in Title XI of ANILCA. Neither the Secretary's land exchange authority nor any other provision of law can be used to authorize a road through a refuge in Alaska; the Title XI provisions are the exclusive means of doing so.

The proposed action would also violate the National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997 (collectively, Refuge Act). Under the Refuge Act, each refuge must be managed to fulfill both the specific purposes for which it was established as well as the mission of the National Wildlife Refuge System as a whole. The Service has identified the isthmus as a critical area to achieving the Refuge's statutory purposes and the proposed road as the greatest threat to the ecological integrity of the Refuge. The proposed lands are thus not suitable for disposition as required for an exchange of Refuge lands. The proposed action also would not produce a net conservation benefit, would not protect the biological integrity, diversity and environmental health of the Refuge, and would not fulfill the specific purposes of the Refuge nor the mission of the Refuge System, as mandated by Congress.

The proposed action is inconsistent with the Wilderness Act because it would undermine the wilderness character of the Izembek Refuge. The DSEIS also ignores key provisions of the Alaska Native Claims Settlement Act (ANCSA) that affect the land management status of the lands proposed for trade into and out of Izembek Refuge. These provisions impact the analysis of the exchange in ways that the Service must account for. The agency will also need to consult under the Endangered Species Act (ESA) regarding impacts to threatened and endangered species, including Steller's eiders and northern sea otters.

The DSEIS is also deficient under NEPA for several reasons including a flawed purpose and need statement, its failure to evaluate a reasonable range of alternatives, a deficient analysis of the resources that will be harmed by the proposed action, and an overall lack of analytical clarity and content that confounds NEPA's goals of public participation and informed agency decision-making. Further, the mitigation measures contemplated in the DSEIS are uncertain, unenforceable, and/or insufficient to protect Refuge resources, which compounds the inadequacies present in the analysis. The Service's reliance on uncertain mitigation measures to support its conclusions about project impacts is legally problematic.

Finally, Section 810 of ANILCA requires a subsistence impact analysis that evaluates the impacts of the proposed action on any subsistence users and communities that rely on Izembek's resources. These impacts include harms to communities across western and interior Alaska that rely on migratory waterfowl as a subsistence resource. Those birds in turn depend on crucial

habitat that would be impacted by the proposed action. In the last year, resolutions representing the views of 78 Alaska tribes have been passed opposing the proposed road for this reason. The preliminary Section 810 analysis fails to analyze subsistence impacts to these communities, and in any event, it is unlikely that the Service will be able to make the requisite determination under Section 810 to support the proposed action. Specifically, the Service cannot show that a significant restriction on subsistence uses is necessary and that the proposed activity would involve the minimum amount of public lands necessary to accomplish the purpose of the action because there are non-road alternatives that would not necessitate the trading away of any Izembek Refuge lands, while still meeting the stated purpose of improved airport access for King Cove's residents.

These issues are addressed in detail below.

I. IZEMBEK'S HISTORY OF PROTECTION, THE SERVICE'S CONSISTENT REJECTION OF A ROAD, AND THE RECENT AGENCY ACTIONS REGARDING A LAND EXCHANGE

The historic conservation achievement of ANILCA provides the legal framework for managing Alaska CSUs. The world-class wetland and wildlife values at Izembek Refuge were recognized and first protected a generation earlier, and with ANILCA Congress accorded the highest possible protection to virtually all of the refuge. In keeping with its statutory mandate to preserve Refuge values and resources, the Service has consistently rejected the construction of a road through this protected Wilderness area, including previous attempted land exchanges.

A. ANILCA History and Values

Considered "one of the most important pieces of conservation legislation ever passed," President Jimmy Carter signed ANILCA into law in 1980. The intent of Congress in enacting this historic Act was

> to preserve unrivaled scenic and geological values associated with natural landscapes; to provide for the maintenance of sound populations of, and habitat for, wildlife species of inestimable value to the citizens of Alaska and the Nation, including those species dependent on vast relatively undeveloped areas; to preserve in their natural state extensive unaltered arctic tundra, boreal forest, and coastal rainforest ecosystems; to protect the resources related to subsistence needs; to protect and preserve historic and archeological sites, rivers, and lands, and to preserve wilderness resource values and related recreational opportunities including but not limited to hiking, canoeing, fishing, and sport hunting, within large arctic and subarctic wildlands and on freeflowing rivers; and to maintain opportunities for scientific research and undisturbed ecosystems."[2]

It was further "the intent and purpose of this Act consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for which each conservation system unit is established, designated, or expanded by or pursuant to this Act, to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so."[3]

[2] 16 U.S.C. § 3101(b)(emphasis added).
[3] 16 U.S.C. § 3101(c).

To achieve these two purposes, ANILCA established 104 million acres of new or expanded CSUs[4] including National Wildlife Refuges and Wilderness areas. ANILCA's management and other provisions were also extended to apply to the over 50 million acres of previously designated protected areas, for a total of over 150 million acres of protected CSUs. These areas contain "nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values" and were established to be "preserve[d] for the benefit, use, education, and inspiration of present and future generations."[5]

Title III of ANILCA addresses the designation, expansion, and management of National Wildlife Refuge System lands in Alaska. As explained in more detail below, Title III redesignated the original Izembek Range as a Wildlife Refuge and identified additional purposes. ANILCA Section 304(a) also specifies that the new or expanded units of the Refuge System "shall be administered by the Secretary [subject] to valid existing rights, in accordance with the laws governing the administration of units of the National Wildlife Refuge System, and this Act."

Title VII implements ANILCA's purpose of preserving wild lands in their natural state for future generations by designating over 50 million acres within CSUs as Wilderness, including approximately 308,000 acres in the Izembek Refuge,[6] more than tripling the size of the National Wilderness Preservation System at that time. "Wilderness" has the same meaning in ANILCA as in the Wilderness Act,[7] and wilderness lands must be managed in accordance with the Wilderness Act except as otherwise expressly provided for in ANILCA.[8]

In Title VIII, Congress sought to protect and provide the opportunity for continued subsistence uses on public lands by Alaska rural residents. Section 802 establishes a policy that actions utilizing Alaska's public lands must cause the least adverse impact possible on rural residents who depend on subsistence resources. Section 810 forbids federal agencies from undertaking or authorizing actions relating to public lands that would significantly restrict subsistence uses without meeting procedural and substantive requirements. It also requires that the agency give public notice, hold a hearing in the vicinity of the area involved, and determine whether the significant restriction of subsistence uses is necessary, among other required findings.

Title XI establishes a "single comprehensive statutory authority" for the approval or disapproval of applications for transportation and utility systems (TUS) within CSUs. It sets forth a comprehensive and detailed process that must be followed for all TUS proposals, including any authorizations needed to effectuate a road. Section 1104 plainly states that no federal agency action authorizing a TUS, in whole or in part, shall have any force or effect unless the agency has first complied with the provisions of Title XI.

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[4] The term "conservation system unit" means any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated, or expanded hereafter.16 U.S.C. § 3102(4).

[5] 16 U.S.C. § 3101(a).

[6] ANILCA § 702(6).

[7] 16 U.S.C. § 3102(13).

[8] See16 U.S.C. § 3203.

Title XIII contains a variety of administrative provisions addressing matters ancillary to the statute's historic creation of vast new protected CSUs, including the land exchange authority that the Service now purports to rely on for the proposed action: Section 1302(h). That section states that "in acquiring lands for the purposes of this Act," the Secretary may exchange lands (including lands within CSUs) for other lands. Congress was clear that this provision was intended to further, not to undermine or create an exception to, the strong protections it established for CSUs. It included this land acquisition tool as a way to avoid condemnation when acquiring lands to further ANILCA's conservation and subsistence purposes.[9] Congress never even discussed, let alone enacted, any provision authorizing the Secretary to trade lands to allow roads in CSUs.

B. Izembek Refuge History and Values

Efforts to protect the Izembek Refuge began in the early 1940s because of the area's ecological values.[10] The area was officially recognized in 1960 when President Eisenhower's Secretary of the Interior established the Izembek National Wildlife Range (Range).[11] The Range was specifically set aside as a "refuge, breeding ground, and management area for all forms of wildlife"[12] because of the area's importance to waterfowl, brown bear, and caribou.[13] In establishing the Range, Interior recognized that it "contain[s] the most important concentration point for waterfowl in Alaska."[14]

Izembek's significant wilderness values were also recognized early on. The area was described as "virtually undeveloped," containing "robust and stable" wildlife populations, and providing "outstanding opportunities for solitude."[15] It has "[p]ristine streams, extensive wetlands, steep mountains, tundra, and sand dunes . . . [that] provide high scenic, wildlife, and scientific values."[16] To protect these values, Izembek was first proposed for Wilderness designation — the highest level of conservation protection that can be afforded to public lands — in 1970.[17]

In ANILCA, Congress re-designated the Range as the Izembek National Wildlife Refuge because of its ecologically unique habitat and wilderness characteristics.[18] Izembek is the smallest refuge in Alaska but is ecologically unique[19] and "an invaluable part of the network of

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[9] S. REP. NO. 96-413 at 304 (1979) ("It is the intent of the Committee that exchange authority be used as the major tool of acquisition authority and that condemnation be used only as a last resort."); H.R. REP. NO. 96-97 pt. I, at 246 (1979) (noting that Congress "expects the Secretary to utilize his exchange authority and his authority to acquire easements where possible rather than resort to fee condemnation.").

[10] Memo Re Reserved Submerged Lands and Waters, Izembek National Wildlife Refuge (Oct. 24, 2000) at 2–4.

[11] PLO 2216, Establishing the Izembek National Wildlife Range (Dec. 6, 1960) at 1; Memo Re Reserved Submerged Lands and Waters, Izembek National Wildlife Refuge (Oct. 24, 2000) at 4.

[12] PLO 2216, Establishing the Izembek National Wildlife Range (Dec. 6, 1960) at 1; *see also* 2013 ROD at 4 (citing Public Land Order 2216 establishing the Range).

[13] Press Release Re Establishing the Izembek National Wildlife Range (Dec. 7, 1960) at 1–3.

[14] Press Release Re Establishing the Izembek National Wildlife Range (Dec. 7, 1960) at 1.

[15] 2013 FEIS Ch. 3.3 (Feb. 2013) at 3-361–62

[16] Izembek National Wildlife Refuge Comprehensive Conservation Plan (Izembek Refuge CCP) ROD Summary at 14 (June 1985).

[17] Article Re Wilderness/Road Issue Background at 1 (Oct. 1978); Federal Register, Vol. 35, No. 48, Not. of Public Hearing at 1 (Mar. 11, 1970).

[18] ANILCA § 303(3)(A).

[19] U.S. Fish and Wildlife Service Izembek National Wildlife Refuge Webpage at 1 (1996); *see also* Izembek Refuge CCP ROD Summary at 14 (June 1985) ("[The Izembek Refuge] is of National Significance in every respect, but particularly since the values incorporated in this site are not well represented in National Parks or other stringently protected areas.").

lands and waters that constitute the National Wildlife Refuge System."[20] Nearly all of Izembek is designated Wilderness — approximately 308,000 of its 315,000 acres.[21] Congress specifically recognized that Wilderness designation for the majority of Izembek Refuge would "protect this critically important habitat by restricting access to the Lagoon."[22]

In addition to its national recognition and maximum federal protection, Izembek Refuge is internationally recognized for its unique and globally ecologically significant wetlands. In 1986, upon application by the U.S. Fish and Wildlife Service and the Alaska Department of Fish and Game, the Izembek lagoon and some of the surrounding isthmus area was among the first sites designated in North America as a Wetland of International Importance under the Ramsar Convention (Convention), which promotes wetland conservation throughout the world.[23] One of the Convention's central aims is to "identify those wetlands which . . . have international importance that extends beyond the country wherein such wetlands are located."[24] The specific criteria that were met to support the listing were Volume of Waterfowl Use; Diversity of Waterfowl; Major flyway populations; Outstanding example of wetland types (largest eelgrass beds in North America); Scientific Research (long-term); and Practicality of conservation and management.[25] Listing under the Convention "reflects a national commitment to maintain the ecological characteristics of the area."[26]

C. Numerous Studies and Decisions Have Found that a Road Through Izembek Would Significantly Damage the Refuge's Wildlife and Wilderness

The Service has evaluated the effects of a road from King Cove to Cold Bay through Izembek numerous times.[27] The road was initially proposed as a way to move people and goods more easily between King Cove and Cold Bay for quality of life, economic, and medical reasons.[28] Each time that the Service evaluated the issue, it found that the impacts of a road on wildlife resources, habitats, and the Izembek Wilderness would irreversibly damage Izembek's unique and ecologically important habitats and its "globally significant landscape."[29]

The Service conducted a road analysis in the early 1980s as part of a regional planning effort.[30] In management planning documents, the agency concluded that there would be impacts to Tundra Swans, waterfowl populations, brown bears, caribou (including migratory routes), wolf and

[20] 2013 ROD at 5.
[21] ANILCA §§ 303(3)(A), 702(6); Izembek Refuge CCP ROD Summary at 14 (June 1985).
[22] H.R. REP. NO. 96-97, pt. II, at 136 (1979).
[23] Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Izembek at 2 (Dec. 18, 1986); DSEIS at 3-80; Proposal for the Designation of Izembek Lagoon as a Wetland of International Importance Under the RAMSAR Convention at 2 (Feb. 1986); 2013 ROD at 5.
[24] Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Izembek at 2 (Dec. 18, 1986); *see also* DSEIS at 3-80.
[25] DSEIS 3-80-81.
[26] Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Izembek at 2 (Dec. 18, 1986).
[27] U.S. Department of the Interior and U.S. Fish and Wildlife Service, Record of Decision: Izembek Land Exchange/Road Corridor at 5–7 (Dec. 23, 2013).
[28] *Id.* at 5.
[29] *Id.* at 2, 6–8.
[30] U.S. Fish and Wildlife Service, King Cove Road Briefing Report at 2 (Mar. 1996).

wolverine populations, wilderness values, and subsistence from a road.[31] The Service also acknowledged that a road through Izembek's Wilderness could only be built with Congressional approval under Title XI of ANILCA.[32]

The Service revisited the issue in 1996 and again found that a road through Izembek would have unacceptable environmental impacts.[33] One year later, the King Cove Corp. offered to exchange its lands for a road right-of-way across the isthmus. The Service declined the offer because of the adverse impacts a road would have on the significant wildlife and wilderness resources.[34]

The Service appears to have completed yet another study analyzing the potential impacts of the road in 1998.[35] That same year, in a separate management document titled Land Protection Plan for Izembek National Wildlife Refuge Complex (Land Protection Plan), the Service called the proposal to build a road "the greatest known potential threat to wildlife and wilderness values within the Izembek Complex."[36] In discussing the 1997 proposal, the Service stated that it "declined the exchange" because "the proposed road would have an adverse impact on the significant wildlife and wilderness resources in the area."[37]

In 1999, Congress sought to resolve King Cove's transportation concerns while protecting the Refuge by funding several measures, including a hovercraft that operated from 2007 to 2010, successfully performing all requested medical evacuations.[38] [39]

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[31] U.S. Fish and Wildlife Service, Record of Decision, Final Comprehensive Conservation Plan, Environmental Impact Statement and Wilderness Review (CCP) for the Izembek National Wildlife Refuge at 118–21 (June 1985); U.S. Fish and Wildlife Service, Land Protection Plan at 53 (Mar. 1998); U.S. Fish and Wildlife Service, King Cove Briefing Road Briefing Report at 6–17.

[32] *See* U.S. Fish and Wildlife Service, Record of Decision, Final Comprehensive Conservation Plan, Environmental Impact Statement and Wilderness Review (CCP) for the Izembek National Wildlife Refuge at 118 ("Pursuant to the provisions of Title XI of ANILCA, the Service will develop an environmental impact statement (EIS) to further evaluate the impacts of the proposed road. Congressional approval will be required to build the road across the refuge."); U.S. Fish and Wildlife Service, King Cove Briefing Report at 3 (noting that legislation was requested to "provide Congressional relief from environmental provisions in [ANILCA]" and "authorize the construction of a road corridor through Izembek National Wildlife Refuge and Wilderness").

[33] U.S. Fish and Wildlife Service, Land Protection Plan at 53; U.S. Fish and Wildlife Service, King Cove Road Briefing Report at 2–3.

[34] U.S. Fish and Wildlife Service, Land Protection Plan at 53.

[35] *See* U.S Fish and Wildlife Service, Potential Impacts of the King Cove to Cold Bay Road Project on Fish, Wildlife, and Habitat Resources, Unpublished Report (1998) (the contents of this study were not included in the administrative record provided in prior litigation; Groups request that it be added to this record); U.S. Fish and Wildlife Service, Land Protection Plan at 53.

[36] U.S. Fish and Wildlife Service, Land Protection Plan: Options for the protection of fish and wildlife habitat, Izembek National Wildlife Refuge Complex (March 1998) at 53.

[37] U.S. Fish and Wildlife Service, Land Protection Plan at 53.

[38] U.S. Department of the Interior and U.S. Fish and Wildlife Service, Record of Decision: Izembek Land Exchange/Road Corridor at 5–6 (Dec. 23, 2013); H.R. 4328 REP. NO.105-825 (1998); ; Committee Report King Cove Health and Safety at 1244 (1999); Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year 1999 (Oct 19, 1998); *see also Friends*, 381 F. Supp. 3d at 1131.

[39] U.S. Department of the Interior and U.S. Fish and Wildlife Service, Record of Decision: Izembek Land Exchange/Road Corridor at 6.

D. The Secretary Found that a Road Through Izembek Would Irreparably and Unnecessarily Damage the Refuge

During the operation of the hovercraft, Congress authorized the Secretary to exchange Izembek lands if doing so would be in the public interest as part of the Omnibus Public Land Management Act of 2009 (OPLMA).[40] Under OPLMA, the King Cove Corp. offered 13,300 acres of its land and the State of Alaska offered 43,093 acres of its land in exchange for roughly 200 acres within Izembek.[41] Road use would be restricted "primarily for health and safety purposes . . . and only for noncommercial purposes."[42]

After the public process and environmental review mandated by OPLMA, the Secretary declined to authorize the land exchange.[43] The Secretary made many findings and conclusions in reaching her decision. For example, the Secretary concluded that Izembek "would be irretrievably damaged by construction and operation of the proposed road" and that this degradation "would not be offset by the protection of other lands to be received under an exchange."[44] The Secretary also explained that the decision "protects the unique resources the Department administers for the entire Nation" and protects Izembek's "unique and internationally recognized habitats," maintains the integrity of designated Wilderness, and ensures that the Refuge continues to meet the purposes for which it was originally established in 1960 and in ANILCA.[45]

In reaching the same decision as every administration before it, the Secretary recognized the need for safe transportation to medical services, and "carefully considered the input . . . that a road connecting the City of King Cove to the Cold Bay Airport is the only safe, reliable, and affordable means of year round access to medical services."[46] The Secretary observed that other modes of transportation currently existed and that additional options could be developed that would be more cost-effective and have fewer impacts to the Refuge than a road.[47] In declining to move forward with the land exchange, the Secretary committed to continue to work with the community to achieve a solution that would both protect Izembek and meet King Cove's health and safety concerns.[48] The Secretary's decision to not move forward with a land exchange was upheld in 2015.[49]

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[40] Omnibus Pub. Land Mgmt. Act of 2009, Pub. L. No. 111-11, Subtitle E, § 6402(a), 123 Stat. 991, 1178 (2009).

[41] U.S. Department of the Interior and U.S. Fish and Wildlife Service, Record of Decision: Izembek Land Exchange/Road Corridor at 2–3.

[42] OPLMA § 6403(a)(1).

[43] U.S. Department of the Interior and U.S. Fish and Wildlife Service, Record of Decision: Izembek Land Exchange/Road Corridor at 2.

[44] U.S. Department of the Interior and U.S. Fish and Wildlife Service, Record of Decision: Izembek Land Exchange/Road Corridor at 2–3.

[45] U.S. Department of the Interior and U.S. Fish and Wildlife Service, Record of Decision: Izembek Land Exchange/Road Corridor at 3, 20.

[46] U.S. Department of the Interior and U.S. Fish and Wildlife Service, Record of Decision: Izembek Land Exchange/Road Corridor at 10.

[47] U.S. Department of the Interior and U.S. Fish and Wildlife Service, Record of Decision: Izembek Land Exchange/Road Corridor at 3, 20.

[48] U.S. Department of the Interior and U.S. Fish and Wildlife Service, Record of Decision: Izembek Land Exchange/Road Corridor at 20; *see also* U.S. Army Corps of Engineers, King Cove-Cold Bay: Assessment of Non-Road Alternatives (June 18, 2015) (2015 assessment of non-road alternatives for a transportation link between King Cove and Cold Bay finding that non-road alternatives could provide reliable transportation).

[49] *Agdaagux Tribe of King Cove v. Jewell*, 128 F. Supp. 3d 1176 (D. Alaska 2015).

E. 2018 Exchange Agreement, 2019 Exchange Agreement, and 2023 Withdrawal

Despite the multi-decade history of finding that a road would harm Izembek and the 2013 rejection of the land exchange, the Secretary signed an "Agreement for the Exchange of Lands" (2018 Exchange Agreement) with King Cove Corp. in early 2018. That agreement bound the United States to exchange up to 500 acres through Izembek Refuge Wilderness to allow a road.[50] For the first time, the Department of the Interior cited Section 1302(h) of ANILCA as the authority for the exchange.[51] It set forth a process for the exchange and mandated that the lands would be of equal value.[52] The 2018 Exchange Agreement also included lands that would be used for material supply and disposal sites (i.e., gravel sites), as well as access to such sites, which were not included in previously considered (and rejected) land exchanges.[53] The 2018 Exchange Agreement imposed some use prohibitions, including a requirement that the road be used primarily for health and safety purposes.[54] Groups challenged the 2018 Exchange Agreement in court.[55]

In March 2019, the Alaska District Court found that the 2018 Exchange Agreement violated the Administrative Procedure Act (APA) because the Secretary did not acknowledge the agency's change in policy, provided no reasoned explanation for disregarding prior determinations, and ignored findings concerning a road's environmental impact on Izembek, and vacated the agreement.[56] Defendants appealed the decision.[57]

While an appeal was pending, the Secretary signed another Exchange Agreement which was substantially similar to the 2018 Exchange Agreement. The 2019 Exchange Agreement committed the United States to exchange Izembek Refuge Wilderness lands with the King Cove Corp. for construction of a road.[58] Unlike the prior proposed exchanges, however, the 2019 Exchange Agreement did not limit use of the road for health and safety purposes nor did it impose restrictions on commercial use. In June 2020, the Alaska District Court again invalided the Exchange Agreement, finding that it violated the APA and ANILCA.[59] That decision was initially reversed by a three-judge Ninth Circuit panel, but the court granted en banc review, vacating the panel's decision.

While the case was on appeal, the Secretary issued a memorandum withdrawing the U.S. Department of the Interior from the 2019 Exchange Agreement. In doing so, the Secretary identified three main reasons: the lack of subsistence evaluation under ANILCA Section 810, the lack of a

[50] U.S. Department of the Interior and the Fish and Wildlife Service, Agreement for the Exchange of Lands at 2–3.
[51] U.S. Department of the Interior and the Fish and Wildlife Service, Agreement for the Exchange of Lands at 1–2.
[52] U.S. Department of the Interior and the Fish and Wildlife Service, Agreement for the Exchange of Lands at 2–5.
[53] U.S. Department of the Interior and the Fish and Wildlife Service, Agreement for the Exchange of Lands at 3, A-1.
[54] U.S. Department of the Interior and the Fish and Wildlife Service, Agreement for the Exchange of Lands at 3.
[55] *Friends of Alaska National Wildlife Refuges v. Bernhardt*, 381 F. Supp. 3d 1127, 1133 (D. Alaska 2019).
[56] *Id.* at 1140–41, 1143–44.
[57] *See Friends*, Federal Defendants' Notice of Appeal to the United States Court of Appeals for the Ninth Circuit (May 24, 2019), at 2 (ECF No. 87).
[58] Agreement for the Exchange of Lands between King Cove Corp. and the United States of America at 1 (June 28, 2019).
[59] Friends of Alaska National Wildlife Refuges v. Bernhardt, Judgment in a Civil Action at 1 (June 15, 2020); Friends of Alaska National Wildlife Refuges v. Bernhardt, Order and Opinion at 23 (June 1, 2020).

NEPA or ESA process prior to the 2019 Exchange Agreement, and policy reasons.[60] The Secretary stated that she would "explore a different path" to meet King Cove's transportation needs.[61]

Soon after withdrawing from the 2019 Exchange Agreement, the Service issued a notice of intent to prepare a supplemental environmental impact statement (SEIS) to analyze a land exchange for a road through Izembek.[62] That notice failed to identify a legal authority for a land exchange, and explained that although the legal authority in OPLMA had expired, the agency would be supplementing the NEPA analysis completed in 2013. Groups submitted extensive scoping comments raising significant factual and legal issues. Chief among the legal issues raised is the legal authority to execute a land exchange for a road, the fact that at the time that the notice was issued there had been no proposal submitted to the agency, and that supplementing a NEPA analysis for an action under an expired authority was legally questionable and highly confusing. Many of the issues groups raised in the scoping comments remain unaddressed in the DSEIS.

In May 2024, King Cove Corp. submitted a new proposal for a land exchange to allow for a road.[63] This proposal apparently followed a series of meetings with the Service. As explained by KCC, they were offering the proposed land exchange to get a "modest transportation alternative for a one-lane gravel road connecting the City of King Cove to the Cold Bay Airport for the purposes of health and safety, quality of life, and affordable transportation options." King Cove Corp. offered 30,651 acres in exchange for 490 acres in Izembek Refuge, and also signaled that it would consider offering an additional 17,280 acres, which have not been publicly identified. Unlike before, the State of Alaska is not a party to the land exchange proposed in the 2024 DSEIS.

The DSEIS purports to analyze this offer, as a supplement to the OPLMA analysis, while relying on ANILCA Section 1302(h) as its authority to complete the exchange. This is legally incorrect for many reasons, as explained below. Additionally, the Secretary must confront the history of this issue and address the contrary findings and conclusions that resulted in multiple decisions spanning decades that rejected a road and land exchange.[64]

II. A LAND EXCHANGE TO ALLOW A ROAD DOES NOT FURTHER THE PURPOSES OF ANILCA OR THE IZEMBEK REFUGE

ANILCA is clear: the Secretary's 1302(h) authority may only be used for a land exchange that furthers the purposes of the statute. ANILCA's overarching purposes and Izembek Refuge's specific purposes are for conservation and protection of ecologically important habitats, wildlife and wilderness values, and to ensure the continuance of a subsistence way of life. The proposed exchange is directly contrary to these purposes.

Section 1302(a) of ANILCA authorizes the Secretary to acquire lands within conservation system units "in order to carry out the purposes of this Act."[65] Subsection (h) reaffirms that when

[60] Withdrawal Memo at 2–4.
[61] Withdrawal Memo at 4.
[62] 88 Fed. Reg. 31813 (May 18, 2023).
[63] Ltr. From King Cove Corp. to Sara Boario, Regional Director, U.S. Fish and Wildlife Service (May 20, 2024).
[64] 5 U.S.C. § 706(2)(A); Organized Village of Kake v. U.S. Department of Agriculture, 795 F.3d 956 (9th Cir. 2015).
[65] 16 U.S.C. § 3192(a).

acquiring lands by exchange, the Secretary must do so for the purposes of ANILCA.[66] Taken together, the plain language of these provisions mandates that any land exchange must further the broad conservation and subsistence purposes of ANILCA as well as the specific purposes of the CSU wherein the exchange will occur — here, the Izembek Refuge.[67] Improving access to an airport doesn't further those purposes.[68]

As discussed above, Congress enacted ANILCA to protect and preserve "nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values."[69] ANILCA's purposes include the preservation of nationally significant lands, unaltered ecosystems, wildlife habitat, and to provide opportunities for recreation and scientific research.[70] ANILCA's purpose is also to "provide the opportunity for rural residents [of the state of Alaska who are] engaged in a subsistence way of life to continue to do so."[71]

The purposes of the Izembek Refuge encompass both ANILCA's more broad purposes and also the specific purposes identified when the area was first designated as a National Wildlife Range in 1960.[72] The Range was specifically set aside as a "refuge, breeding ground, and management area for all forms of wildlife,"[73] because of the area's importance to waterfowl, brown bear, and caribou.[74] In establishing the Range, the Department of the Interior recognized that it "contain[s] the most important concentration point for waterfowl in Alaska."[75]

In ANILCA, Congress re-designated the Range as the Izembek National Wildlife Refuge and designated nearly all of it as Wilderness because of its ecologically unique habitat and wilderness characteristics.[76] Congress also identified four purposes for the Izembek Refuge: (1) to conserve "fish and wildlife populations and habitats in their natural diversity, including . . . waterfowl, shorebirds and other migratory birds, brown bears and salmonids"; (2) to fulfill "the international treaty obligations of the United States with respect to fish and wildlife and their habitats"; (3) to provide "the opportunity for continued subsistence uses by local residents"; (4) and to protect

[66] 16 U.S.C. § 3192(h).
[67] *Nat'l Audubon Soc'y v. Hodel*, 606 F. Supp. 825, 842–43, 845 (D. Alaska, 1984).
[68] To the extent that King Cove Corp. more generally seeks a road for quality of life and affordable transportation between the two communities, *see* Ltr. From King Cove Corp. to Sara Boario, Regional Director, U.S. Fish and Wildlife Service (May 20, 2024), those are not purposes of ANILCA either.
[69] 16 U.S.C. § 3101(a).
[70] 16 U.S.C. § 3101(b).
[71] 16 U.S.C. § 3101(c).
[72] Memo Re Reserved Submerged Lands and Waters, Izembek National Wildlife Refuge (Oct. 24, 2000) at 2–4; PLO 2216, Establishing the Izembek National Wildlife Range (Dec. 6, 1960) at 1; Memo Re Reserved Submerged Lands and Waters, Izembek National Wildlife Refuge at 4.
[73] PLO 2216, Establishing the Izembek National Wildlife Range at 1; *see also* U.S. Department of the Interior and U.S. Fish and Wildlife Service, Record of Decision: Izembek Land Exchange/Road Corridor at 4 (Dec. 23, 2013)(citing Public Land Order 2216 establishing the Range).
[74] Press Release Re Establishing the Izembek National Wildlife Range (Dec. 7, 1960) at 1–3.
[75] Press Release Re Establishing the Izembek National Wildlife Range (Dec. 7, 1960) at 1.
[76] ANILCA § 303(3)(A).

water quality and quantity.[77] These purposes reflect Izembek's "unique, irreplaceable, and internationally recognized habitats that provide critical support to a rich diversity of species."[78]

As mandated by ANILCA and the Refuge Act, Izembek Refuge must be managed to achieve the purposes set out in ANILCA (which include the Range purposes) and the mission of the Refuge System, as well as to protect its wilderness characteristics and values consistent with the Wilderness Act.[79] Any land exchange authorized pursuant to Section 1302(h) must satisfy all of these legal mandates.[80]

As detailed below, a land exchange that would divest Izembek Refuge lands to allow a road would not fulfill the broad purposes of ANILCA nor Izembek's specific purposes.

A. Conserving Fish And Wildlife Populations And Habitats In Their Natural Diversity

The watershed surrounding the Izembek and Kinzarof Lagoons abounds with waterfowl, brown bear, caribou, and wolves, and is rich in anadromous fish streams.[81] The critical importance of the Refuge for wildlife led to 95 percent of its area being designated Wilderness.[82] Congress specifically sought to limit access to the isthmus in order to protect Izembek Lagoon and the "millions of waterfowl" that rely on its eelgrass beds.[83]

Decades of study have demonstrated that building a road through the isthmus will not protect these values and purposes. Indeed, it would violate them. For example, the 1985 Izembek National Wildlife Refuge Final Comprehensive Conservation Plan (Izembek CCP) describes the following adverse impacts to fish and wildlife populations and habitats from such a road: traversing key nesting and molting habitats for tundra swans and caribou migration corridors; displacement of swans to less desirable/protective habitat, resulting in increased mortality and productivity; access to key, presently remote, brown bear habitat; disturbance to waterfowl populations at critical times; and impacts to integrity and productivity of Southern Alaska Peninsula caribou herd.[84] The Service has emphasized that "[t]he proposal to construct a road across both refuge and King Cove Corporation lands is currently the greatest known potential threat to wildlife and wilderness values within the Izembek Complex."[85]

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[77] ANILCA § 303(3)(B).
[78] U.S. Department of the Interior and U.S. Fish and Wildlife Service, Record of Decision: Izembek Land Exchange/Road Corridor at 5 (Dec. 23, 2013).
[79] ANILCA §§ 303(3)(B), 702(6), 94 Stat. 2371, 2391, 2418 (1980).
[80] *Nat'l Audubon Soc'y v. Hodel*, 606 F. Supp. 825, 829 (D. Alaska 1984).
[81] DSEIS at 1-23.
[82] DSEIS at 1-23.
[83] H.R. REP. NO. 96-97, pt. II, at 136 (1979); H.R. REP. NO. 96-97, pt. I, at 209 (1979).
[84] DSEIS at 1-23.
[85] U.S. Fish & Wildlife Serv., Land Protection Plan at 53 (Mar. 1998); DSEIS at 1-24.

The Secretary declined the proposed land exchange pursuant to OPLMA because of the harms that a road would cause.[86] The Secretary concluded that the Izembek Refuge "would be irretrievably damaged by construction and operation of the proposed road" and that this degradation "would not be offset by the protection of other lands to be received under an exchange."[87] The Secretary noted that migratory and resident bird species would be particularly vulnerable to impacts from road construction and operation on the narrow isthmus.[88] Specifically, the Secretary found that a road would disturb threatened Steller's Eiders at critical times in their life-cycle and set back recovery efforts for this species.[89] The Secretary also determined that a road across the isthmus would "have a major impact on bears" and "fragment undisturbed habitat for grizzly bear and caribou."[90] The Secretary specifically found that a decision not to proceed with the exchange "best satisfies Refuge purposes, and best accomplishes the mission of the Service and the goals of Congress in ANILCA."[91]

In this DSEIS, the Service repeatedly revisits and reaffirms these same longstanding findings: the road will harm Izembek's fish and wildlife populations and habitats and fail to further the first purpose of the Izembek Refuge. The DSEIS acknowledges that a road through this ecologically sensitive habitat would fragment and degrade the integrity of the lagoon complex.[92] This would result in impacts that extend well beyond the road and affect the integrity of the entire refuge, including harming the eelgrass beds that are foundational to the wetlands ecosystem. For example, increased human access and the physical damage caused by all-terrain vehicles in wetland areas "would have profound effects on wildlife use and habitats of the narrow and mostly undeveloped isthmus of the refuge and on the ability of the refuge to meet the first purpose of

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[86] U.S. Department of the Interior and U.S. Fish and Wildlife Service, Record of Decision: Izembek Land Exchange/Road Corridor at 2 (Dec. 23, 2013).

[87] U.S. Department of the Interior and U.S. Fish and Wildlife Service, Record of Decision: Izembek Land Exchange/Road Corridor at 2 (Dec. 23, 2013); *see also* Questions and Answers about the Final Environmental Impact Statement for the proposed Izembek National Wildlife Refuge Land Exchange Road Corridor (Feb. 2013) at 3 ("While the more than 55,000 acres offered contain important wildlife habitat, they do not provide the wildlife diversity of the internationally recognized wetland habitat within the refuge acreage of the Izembek isthmus . . . [The exchange] would not compensate for the adverse effects of removing a corridor of land and constructing a road within the narrow Izembek isthmus."); U.S Department of the Interior and U.S. Fish and Wildlife Service, FEIS App. D ANILCA Section 810 Analysis (Feb. 5, 2013) ("[T]he lands lost and lands gained have little in common with regard to cover types, wildlife potential, or ecological process/function.").

[88] U.S. Department of the Interior and U.S. Fish and Wildlife Service, Record of Decision: Izembek Land Exchange/Road Corridor at 3, 7–8 (Dec. 23, 2013).

[89] U.S. Department of the Interior and U.S. Fish and Wildlife Service, Record of Decision: Izembek Land Exchange/Road Corridor at 8 (Dec. 23, 2013).

[90] U.S. Department of the Interior and U.S. Fish and Wildlife Service, Record of Decision: Izembek Land Exchange/Road Corridor at 8 (Dec. 23, 2013); *see also* Impact Analysis of Off Road Vehicle Use for Subsistence Purposes on Refuge Lands and Resources Adjacent to the King Cove Access Project at 7 (Apr. 16, 2004) (noting that road construction will cause brown bears to abandon some traditional foraging areas and denning sites).

[91] U.S. Department of the Interior and U.S. Fish and Wildlife Service, Record of Decision: Izembek Land Exchange/Road Corridor at 20 (Dec. 23, 2013); *see also* U.S. Department of the Interior and U.S. Fish and Wildlife Service, Record of Decision: Izembek Land Exchange/Road Corridor at 7 (Dec. 23, 2013) (finding that not proceeding with the land exchange met DOI's obligations to meet the mission of the national wildlife refuge system); 16 U.S.C. § 668dd(a)(2) ("The mission of the System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.").

[92] DSEIS at 422–23, 4-569.

ANILCA."[93] Waterfowl and mammals use the lagoons, isthmus wetlands, tundra, and tidal flats to nest, feed, transit, and forage and will be harmed by the road.[94] The species that experience the greatest harm will be those whose essential habitat would be directly or indirectly impacted by road construction, maintenance, and traffic.[95] Pacific black brant, Steller's eiders, emperor geese, caribou, tundra swans, brown bears, sea otters, and other marine mammals would be impacted.[96] Several of these species are rare, declining, or listed as threatened under the Endangered Species Act.[97] Vulnerable waterfowl species such Pacific black brant, emperor geese, and tundra swans would be susceptible to increased, more accessible harvest and increased challenges to enforcing hunting regulations and monitoring.[98]

In short, the proposed exchange would undermine the Service's ability to carry out the first purpose of the Izembek Refuge.[99]

B. Fulfilling International Treaty Obligations with Respect to Fish, Wildlife, and Their Habitats

The Izembek Lagoon is internationally recognized for its tremendous wildlife diversity, wilderness values, and unique and ecologically significant wetlands, including large eelgrass beds and their importance to migratory birds.[100] Importantly, in 1986, President Reagan named Izembek Lagoon as the first Wetland of International Importance in the United States under the Ramsar Convention.[101] A land exchange for a road through the core of these wetlands is counter to this designation.

As noted above, the Ramsar Convention is the international treaty that provides the framework for the conservation of globally significant wetlands and their resources.[102] Inspired by the vital importance of wetlands in providing ecosystem services and fresh water globally and the fact that they continue to be degraded and converted to other uses, the Convention took effect in 1975, and the United States became a contracting party in 1986.[103] Over 90% of United Nations member countries are contracting parties.[104]

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[93] DSEIS at 422, 4-569.
[94] DSEIS at 422–23, 4-569; *Infra* Sections VIII.E.2,3,7.
[95] DSEIS at 422–23, 4-569; *Infra* Sections VIII.E.2,3,7.
[96] DSEIS at 422–23, 4-569; *Infra* Sections VIII.E.2,3,7.
[97] *Infra* Section VII.
[98] DSEIS at 422–23, 4-569; *Infra* Sections VIII.E.7.
[99] DSEIS at 4-226.
[100] DSEIS at 4-233; Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Izembek at 2 (Dec. 18, 1986); U.S Department of the Interior and U.S. Fish and Wildlife Service, FEIS at 3-41 (Feb. 5, 2013); S. Department of the Interior and U.S. Fish and Wildlife Service, Record of Decision: Izembek Land Exchange/Road Corridor at 5 (Dec. 23, 2013).
[101] Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Izembek at 2.
[102] Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Izembek.
[103] Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Izembek;www.ramsar.org/sites/default/files/documents/library/annotated_contracting_parties_list_e.pdf
[104]Convention on Wetlands of International Importance Especially as Waterfowl Habitat, www.ramsar.org/sites/default/files/documents/library/annotated_contracting_parties_list_e.pdf

A key commitment by all contracting parties is to "designate suitable wetlands to the list of "Wetlands of International Importance" and ensure their effective management.[105] Given the goal of conserving these globally significant sites, it is difficult to square this commitment with a proposal to trade away protected wetlands to allow a road and all the expected degradation of the Izembek Lagoon area that would follow.

The DSEIS acknowledges that the construction of a road through the isthmus between Izembek and Kinzarof Lagoons and the resulting increased use of the area, particularly access by all-terrain vehicles, makes Izembek's ANILCA purpose to fulfill international treaty obligations "more difficult for the Service than under the current situation."[106] Indeed, these harms may be so impactful to warrant "reconsideration of the designation of the area as a Wetland of International Importance."[107]

The Refuge also supports internationally important migratory birds that the U.S. has helped to protect in treaties such as those implemented by Migratory Bird Treaty Act. Hundreds of thousands of migratory waterfowl traveling the Pacific flyway use the Izembek and Kinzarof Lagoon complex and its rich eelgrass beds as a fall staging area and as wintering grounds.[108] The lagoon complex provides wintering, breeding, molting, refueling, staging, or resting grounds for Pacific black brant "with more than 98 percent of the world's population using Izembek Lagoon as a staging area prior to their fall migration to Mexico",[109] emperor geese, Steller's eiders, and tundra swans.[110]

The proposed exchange would diminish the Service's ability to fulfill the second purpose of the Izembek Refuge.[111]

C. Providing the Opportunity for Continued Subsistence

A land exchange to allow a road would undermine the subsistence purposes of both ANILCA and the Izembek Refuge. ANILCA's purposes include "the opportunity for rural residents engaged in a subsistence way of life to continue to do so," as long as those opportunities are "consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for which each conservation system unit is established, designated, or expanded[.]"[112] Likewise, one of Izembek Refuge's specific purposes is to provide "opportunity for continued subsistence use by local residents."[113] While the DSEIS summarily concludes that the proposed exchange will further the subsistence purposes of ANILCA and the Izembek Refuge, this conclusion is unsupported and in fact, undercut by the analysis in the DSEIS.

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[105] Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Izembek at 2.
[106] DSEIS at 4-224.
[107] DSEIS at 4-224, 4-569.
[108] DSEIS at 4-233.
[109] DSEIS at 4-223.
[110] DSEIS at 4-223; *Infra* Section VIII.E.7.
[111] DSEIS at 4-226.
[112] 16 U.S.C. § 3101(c).
[113] ANILCA § 303(3)(B).

A road through Izembek's isthmus would harm subsistence resources and uses for subsistence users within the region and communities throughout Alaska who rely on Izembek's wildlife resources, primarily migratory waterfowl. Indeed, as early as 1985, the Service said so. The Izembek CCP identified long term effects on subsistence for local residents as one of its key concerns regarding the specter of a road through the Refuge and its disturbance to subsistence resources.[114] The current DSEIS is also replete with statements that the construction, operation, and maintenance of the road would negatively impact the abundance of subsistence resources, including caribou, birds (in particular, waterfowl), and fish.[115] As discussed in section X below, a road through Izembek Refuge would displace subsistence resources and reduce availability not only for the five studied communities, but for communities that have not been studied but must also be evaluated.[116] The preliminary Section 810 evaluation concludes that the proposed land exchange "may result in a significant restriction to subsistence uses" for the local communities of Cold Bay, King Cove, False Pass, Nelson Lagoon, and Sand Point, and these "residents may experience reduced availability and ultimately decreased hunting success in traditional harvesting areas."[117] The NEPA and ANILCA analyses must also account for other impacted communities.

In sum, the proposed exchange would undercut the Service's ability to carry out the subsistence purposes of the Izembek Refuge.[118]

D. Ensuring Water Quality and Quantity

Izembek and Kinzarof lagoons, their watersheds, and the isthmus make up the ecological heart of the Refuge. The Izembek CCP noted concerns that a road corridor across the Izembek isthmus would result in "[i]ncreased silt loads of streams flowing into the [Kinzarof] lagoon, which in turn could affect eelgrass growth."[119] The DSEIS notes that these impacts would be: "high intensity, permanent duration, and local to regional in scope."[120] In addition, "[s]ince there are no water quality or quantity issues currently on the Izembek National Wildlife Refuge, localized erosion issues along the road and all-terrain vehicle corridors would become a management concern under this alternative."[121]

The proposed exchange would diminish rather than promote the Service's ability to carry out the fourth purpose of the Izembek Refuge.[122]

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[114] DSEIS at 1-23.
[115] App'x D-2 at 17–23, 38.
[116] App'x D-2 at 23–33.
[117] App'x D-2 at 38, 40.
[118] App'x D-2 at 17–23, 38.
[119] DSEIS at 1-23.
[120] DSEIS at 4-224; *Infra* Section VIII.E.1.
[121] DSEIS at 4-224, 4-569.
[122] DSEIS at 4-226.

E. Wilderness Protection

One of ANILCA's explicit purposes is "to preserve wilderness resources values and related recreational opportunities[.]" ANILCA designated nearly all of Izembek Refuge as Wilderness — approximately 308,000 of the Refuge's 315,000 acres.[123] Thus, protecting Izembek's wilderness resources is a purpose of the Refuge that needs to be met to satisfy any exchange pursuant to Section 1302(h).[124] Road construction, maintenance, and use threatens these values and undermines Izembek's Wilderness purpose.[125] As noted in the Izembek CCP, the Refuge's large designated Wilderness areas (95 percent) contain many of its special values, including pristine streams, extensive wetlands, steep mountains, tundra, and sand dunes.[126]

According to the Izembek CCP:

> The presence of the road and the accompanying increased human presence would degrade wilderness values both along the road corridor and in the refuge interior—the noise from vehicles driving along the road and the visual presence of the road could adversely affect the wilderness experience of refuge users throughout much of the northern portion of the Izembek Wilderness.[127]

In the 2013 Record of Decision, Secretary Jewell declared that "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,"[128] in plain contravention of the Service's statutory obligations.

The DSEIS affirms and expands upon these impacts:

> During construction, heavy equipment would be visible from adjacent wilderness lands, creating a contrast in color and line with the existing landscape . . . noise and construction activity would affect the untrammeled, undeveloped, and natural qualities of the area, reducing opportunities for solitude or primitive and unconfined recreation.[129]

The intensity of impacts to wilderness characteristics would be high, substantially affecting the untrammeled, natural, and undeveloped qualities of the wilderness and the opportunity for solitude or primitive and unconfined recreation in the Izembek Wilderness and the eastern portion

[123] ANILCA §§ 303(3)(A), 702(6); Izembek CCP at 14.
[124] ANILCA §§ 303(3)(A), 702(6); DSEIS at 4-225–26.
[125] DSEIS at 1-23.
[126] DSEIS at 1-22.
[127] Izembek CCP at 121.
[128] U.S. Department of the Interior and U.S. Fish and Wildlife Service, Record of Decision: Izembek Land Exchange/Road Corridor (Dec. 23, 2013).
[129] DSEIS at 4-602.

of the Kinzarof Lagoon parcel. The changes to wilderness character would be highly noticeable to visitors.[130]

The DSEIS concludes that the proposed exchange will make it "considerably more difficult for the Service to manage the Izembek Wilderness to meet the wilderness purpose of the Izembek National Wildlife Refuge."[131] Anathema to both the spirit and letter of the Wilderness Act, such impacts would also inevitably violate the Service's antidegradation policy, which states that "at the time of wilderness designation, the conditions prevailing in an area establish a benchmark of that area's wilderness character and values. *We will not allow* the wilderness character and values of the wilderness to be degraded below that benchmark."[132] As noted above, the Service considers the road proposal to be "the greatest known potential threat to wildlife and wilderness values within the Izembek Complex."[133]

F. Range Purposes

The purposes of the Izembek Refuge encompass the specific purposes identified when the area was first designated as a National Wildlife Range in 1960.[134] The Range was specifically set aside as a "refuge, breeding ground, and management area for all forms of wildlife,"[135] because of the area's importance to waterfowl, brown bear, and caribou.[136] As detailed above, the DSEIS acknowledges that a road through Izembek threatens these original Range purposes. A road through Izembek's ecologically sensitive habitat would fragment and degrade the integrity of the lagoon complex resulting in impacts that affect the integrity of the entire refuge, including harm to the eelgrass beds that are foundational to the wetlands ecosystem.[137] Waterfowl and mammals use the lagoons, isthmus wetlands, tundra, and tidal flats to nest, feed, transit, and forage and will be harmed by the road.[138]

The species that will experience the greatest harm are those whose essential habitat would be directly or indirectly impacted by road construction, maintenance, and traffic, including Pacific black brant, Steller's eiders, emperor geese, tundra swans, brown bears, and caribou.[139] Many of these species are rare, declining, or listed as threatened under the Endangered Species Act.[140] In particular, vulnerable waterfowl species such Pacific black brant, emperor geese, and tundra swans, would be susceptible to increased, more accessible harvest and increased challenges to

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[130] DSEIS at 4-603.
[131] DSEIS at 4-225–26.
[132] U.S. Fish and Wildlife Service, General Overview of Wilderness Stewardship Policy, https://www.fws.gov/policy-library/610fw1
[133] DSEIS at 1-21 (emphasis added).
[134] Memo Re Reserved Submerged Lands and Waters, Izembek National Wildlife Refuge (Oct. 24, 2000) at 2–4; PLO 2216, Establishing the Izembek National Wildlife Range (Dec. 6, 1960) at 1; Memo Re Reserved Submerged Lands and Waters, Izembek National Wildlife Refuge at 4.
[135] PLO 2216, Establishing the Izembek National Wildlife Range at 1; *see also* U.S. Department of the Interior and U.S. Fish and Wildlife Service, Record of Decision: Izembek Land Exchange/Road Corridor at 4 (Dec. 23, 2013) (citing Public Land Order 2216 establishing the Range).
[136] Press Release Re Establishing the Izembek National Wildlife Range (Dec. 7, 1960) at 1–3.
[137] DSEIS at 422–23, 4-569.
[138] DSEIS at 422–23, 4-569; *Infra* Sections VIII.E.2,3,7. birds, bears, caribou.
[139] DSEIS at 422–23, 4-569; *Infra* Sections VIII.E.2,3,7
[140] *See* section VII.

enforcing hunting regulations and monitoring.[141] Additionally, as explained throughout the DSEIS, a land exchange for a road will also greatly impede the Service's management of the Refuge for wildlife generally.

The proposed exchange would diminish the Service's ability to carry out the original purposes of the Izembek Range.

In sum, like every analysis done to date, this DSEIS again demonstrates that a land exchange to allow a road directly conflicts with each of Izembek's ANILCA-established purposes as well as ANILCA's conservation and subsistence purposes. Because the proposed exchange does not further, and in fact violates, ANILCA and Izembek's purposes, including Wilderness protection, it cannot move forward under Section 1302(h).

III. THE SERVICE MUST COMPLY WITH THE REFUGE ACT

In enacting the National Wildlife Refuge System Improvement Act of 1997 (Improvement Act) amending the National Wildlife Refuge System Administration Act of 1966 (Administration Act) (collectively, Refuge Act), Congress explicitly found that "The System serves a pivotal role in the conservation of migratory birds, anadromous and interjurisdictional fish, marine mammals, endangered and threatened species, and the habitats on which these species depend."[142] Further, it found that "The System assists in the fulfillment of important international treaty obligations of the United States with regard to fish, wildlife, and plants and their habitats."[143]

The Administration Act consolidated the Secretary's (acting through the Service) legal authorities to administer areas for the conservation of fish and wildlife. The Improvement Act established that the mission of the National Wildlife Refuge System (Refuge System) is "to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans."[144]

The Refuge Act requires the Service, "[i]n administering the [Refuge] System," to "provide for the conservation of fish, wildlife, and plants, and their habitats within the System."[145] The term "conservation" means "to sustain and, where appropriate, restore and enhance, healthy populations of fish, wildlife, and plants utilizing, in accordance with applicable Federal and State laws, methods and procedures associated with modern scientific resource programs."[146] The Refuge Act further requires that "each refuge shall be managed to fulfill the mission of the System, as well as the specific purposes for which that refuge was established."[147]

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[141] DSEIS at 422–23, 4-569; *Infra* Section VIII.E.7.
[142] National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-107 § 2(3), 111 Stat. 1251, 1252 (1997).
[143] *Id*. § 2(4), 111 Stat. 1251, 1252 (1997).
[144] 16 U.S.C. § 668dd(a)(2).
[145] *Id*. § 668dd(a)(4), (a)(4)(A).
[146] *Id*. § 668ee(4).
[147] *Id*. § 668dd(a)(3)(A).

The statute imposes a mandate on the Service to maintain the biological integrity, diversity, and environmental health of the Refuge System.[148] It also mandates that, in planning and directing the continued growth of the Refuge System, the Service must do so "in a manner that is best designed to accomplish the mission of the System [and] to contribute to the conservation of the ecosystems of the United States[.]"[149] To the extent a conflict exists between the mission of the Refuge System as a whole and the purposes of a specific refuge, the Refuge Act specifies that "the conflict shall be resolved in a manner that *first* protects the purposes of the refuge, and, to the extent practicable, that also achieves the mission of the System."[150]

In its discussion of the legal mandates governing a proposed land exchange, the DSEIS notes that the Refuge Act "requires that potentially non-refuge-system lands and waters inside the boundary of a refuge from a willing party be suitable in contributing to the specific refuge purposes for acquisition, and that potential refuge lands and waters are suitable for disposition."[151] The Refuge Act limits the Service's authority to exchange refuge lands to where "[the Secretary] finds [the exchanged land] to be suitable for disposition."[152] The Service's policy for exchanges involving Refuge land reiterates this requirement: "all land exchanges must satisfy the following criteria: (a) The land to be divested must be suitable for disposition; (b) the exchange must be of benefit to the United States."[153]

The Service is obligated to comply with all applicable Refuge Act standards in conducting an exchange of Refuge land in Alaska. ANILCA states that all refuges shall be administered in accordance with applicable laws, including the Refuge Act.[154] Specifically, Congress authorized the Secretary, "consistent with other applicable law in order to carry out the purposes of [ANILCA]," the authority to execute land exchanges.[155] In the event a conflict exists between ANILCA and Refuge Act, Section 9 of the Improvement Act states that ANILCA prevails. Where ANILCA and the Refuge Act do not conflict, both authorities apply concurrently. Therefore, in administering the Refuge System — and in weighing the proposed Izembek land exchange — the Service must satisfy the mandates in the Refuge Act as well as those of ANILCA.

While "suitable for disposition" is not defined by statute, regulation, or policy, as the Interior Solicitor stated in an M-Opinion addressing land exchanges outside Alaska, "the requirement that land be 'suitable for disposition' is best read through the lens of the conservation-driven statutory language."[156] Thus, in any "suitable for disposition" analysis, the Service must necessarily exclude from disposition refuge lands that play a pivotal role in furthering a refuge's purposes as well as those that help accomplish the mission of the Refuge System. Further, disposition may be

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[148] *Id*. § 668dd(a)(4)(B).
[149] *Id*. § 668dd(a)(4)(C).
[150] *Id*. § 668dd(a)(4)(D) (emphasis added).
[151] DSEIS at 1-15.
[152] 16 U.S.C. § 668dd(b)(3).
[153] 342 FW 5.7(B)(1).
[154] ANILCA § 304(a). *See* ANILCA § 305, stating that proclamations, executive orders, and other administrative actions in effect on the day before enactment of ANILCA shall remain in force.
[155] 16 U.S.C § 3192(a).
[156] U.S. Department of the Interior, Office of the Solicitor, Memorandum M-37078, "National Wildlife Refuge Land Exchanges," 10 (May 31, 2023). As explained above, because nothing in ANILCA supersedes the Refuge Act requirement that refuge land be suitable for disposition before an exchange may proceed, the Solicitor's opinion as to the meaning of the phrase should be interpreted as definitive.

inconsistent with the goals, objectives, and strategies described by the refuge's comprehensive conservation plan (CCP). In such cases, lands considered for an exchange are inherently unsuitable and cannot be dispositioned without violating the Refuge Act.

The Service's land exchange authority is cabined by the requirements of the Refuge Act that it manage each refuge to fulfill the individual refuge's purposes and achieve the conservation mission of the Refuge System. The Service cannot exchange lands out of the Refuge System if it determines those lands are not suitable for disposition considering both the individual refuge's purposes and the Refuge System's mission. Notably, the Refuge Act does not establish a balancing test that allows the Service to determine that, even if particular refuge lands are not suitable for disposition, the overall benefit to the refuge or the system as a whole weighs in favor of the exchange. Additionally, some refuge lands cannot be exchanged because doing so would violate Service policies or undermine the agency's obligations under other statutes, including but not limited to ANILCA, the Endangered Species Act, and the Wilderness Act.

Only once it determines that refuge lands are suitable for disposition may the Service proceed to the next analytical step. The Service must weigh the conservation value of the lands to be divested against the conservation benefit of the land to be acquired to determine that the proposed exchange will result in an overall conservation benefit that advances the individual refuge's purposes and the Refuge System's conservation mission. In so doing, the Service must consider the impacts of the proposed use of the divested lands on the individual refuge and the Refuge System as a whole, especially considering its mandate to protect the biological integrity, diversity, and environmental health of the Refuge System.

In ANILCA § 303(3)(B), Congress declared that the purposes of the Izembek Refuge include:

> (i) To conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, waterfowl, shorebirds and other migratory birds, brown bears, and salmonoids;
>
> (ii) To fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;
>
> (iii) To provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and
>
> (iv) To ensure, to the maximum extent practicable and in [a] manner consistent with the purposes set forth in [sub]paragraph (i), water quality and necessary water quantity within the refuge.

Upon its designation as Wilderness, Izembek also took on as a fifth refuge purpose: those of the Wilderness Act,[157] which include:

[157] *See* 50 CFR § 25.12(a), stating in the definition of "purpose(s) of the refuge" that "for refuges that encompass Congressionally designated wilderness, the purposes of the Wilderness Act are additional purposes of the wilderness portion of the refuge."

> Secur[ing] for the American people of present and future generations the benefits of an enduring resource of wilderness . . . . [that] shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness . . . so as to provide for the protection of these areas, the preservation of their wilderness character, and [] the gathering and dissemination of information regarding their use and enjoyment as wilderness.[158]

As explained above with respect to ANILCA, the proposed exchange would not further the specific purposes for which Congress established Izembek. Thus, if the Service proceeds with the exchange, it will violate both ANILCA and the Refuge Act by failing to fulfill Izembek's established purposes.

As demonstrated below, in addition to violating ANILCA, the proposed land exchange would separately violate the Refuge Act. First, the lands proposed to be divested are not suitable for disposition because divesting them would adversely affect conservation and directly undermine the purposes for which the Izembek Refuge was established. Second, the wilderness lands proposed to be divested are essential to maintaining the wilderness character of the broader Refuge and are unsuitable for disposition for this independent reason. Third, the proposed land exchange would undermine the conservation mission of the Refuge System itself in addition to the individual purposes of the Izembek Refuge. Finally, the road proposed to be built on land exchanged out of the Refuge would undermine the Service's mandate to manage the Izembek Refuge in a manner that maintains its biological integrity, diversity, and environmental health.

A. The Lands Proposed to Be Divested Are Not Suitable For Disposition Because They Are Essential To Fulfilling Refuge Purposes

While all refuge lands have conservation value, they are not all equal. By virtue of the specific resources they contain or their location with respect to the surrounding landscape, some tracts contribute more than others to fulfilling a refuge's specific purposes. Certain lands may be so uniquely valuable that their removal would irretrievably diminish the refuge and leave it unable to fulfill the purposes for which it was established. The Izembek and Kinzarof lagoons and the isthmus that lies between them are indisputably examples of areas that provide this type of unique value, as recognized by Congress when it enacted ANILCA. Regardless of their size, such keystone lands cannot be considered suitable for disposition.

As former Interior Secretary Jewell recognized in determining not to exchange Izembek Refuge lands:

> The narrow strip of rolling tundra between Izembek and Kinzarof lagoons is a key component of the vital habitats that comprise the Izembek Refuge. It provides invaluable and potentially irreplaceable nesting and feeding areas for thousands of waterfowl and shorebirds, with essential wintering areas for many of these birds . . . Because of its unique, irreplaceable, and internationally recognized habitats that provide critical support to a rich diversity of species, the Izembek Refuge is an

[158] 16 U.S.C. § 1131(a). *See* 610 FW 1 (describing the Service policies for implementing the requirements of the Wilderness Act).

> invaluable part of the network of lands and waters that constitute the National Wildlife Refuge System.[159]

The DSEIS, CCP, and other Service documents make clear that the eelgrass beds in the Izembek and Kinzarof lagoons are among the Refuge's most indispensable resources. By supporting prodigious flocks of waterfowl, the lagoons are vital to achieving the first, second, and third purposes of the Refuge. Indeed, the "major attraction to waterfowl is one of the world's largest eelgrass beds,"[160] according to the descriptions submitted by the Service to the Ramsar Convention's Secretariat. "Izembek lagoon and its vast eelgrass beds are of international importance to migratory birds."[161] The value of the lagoons is also enhanced by their unique geographical context, being located on either side of the narrow isthmus. The DSEIS notes that:

> The close proximity of Izembek Lagoon and Cold Bay coastal wetlands, including Kinzarof Lagoon, plays an important role in why this area is so important; the tides and ice/sea conditions on the north and south sides of the Izembek isthmus are not synchronous, thereby allowing birds the opportunity to select the most beneficial habitat available as conditions deteriorate or improve on one side or the other.[162]

While the lagoons themselves are not subject to exchange, the proposed road corridor occupies some of the land in the Refuge closest to the lagoons, passing within as little as 0.5 mile of the Kinzarof Lagoon. The lands proposed for exchange are in the Kinzarof Lagoon watershed and would cross wetlands that are connected to it. As noted in the DSEIS, these wetlands "do not function as discrete features on the landscape" and "affected wetlands and hydrologically connected uplands may serve to moderate the flows in streams running into Kinzarof Lagoon."[163] Its present intact condition prevents the kind of damaging runoff that is anticipated to result from construction and use of the road. Consequently, the area proposed for exchange has, relative to other Refuge lands, a high degree of influence over the water quality and health of the lagoons and the ecological integrity of the Refuge.[164]

In addition to its role in maintaining the quality of the lagoons, the isthmus is a standout resource in its own right due to its role in facilitating wildlife movement. The isthmus:

> serves as a land bridge and large mammal corridor connecting the eastern portion of the refuge to the western end of the Alaska Peninsula. For birds, the isthmus is also a corridor, to be flown over in a north-south fashion at low elevation to connect the eelgrass beds of Izembek Lagoon on the Bering Sea to the eelgrass of Kinzarof Lagoon on the Pacific Ocean.[165]

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[159] U.S. Dep't of the Interior, U.S. Fish & Wildlife Serv., Record of Decision: Izembek National Wildlife Refuge, Land Exchange/Road Corridor, Final Environmental Impact Statement, 7 (Dec. 23, 2013).
[160] U.S. Fish & Wildlife Serv., Information Sheet on Ramsar Wetlands, 2009-2012 Version, 3 (Jan. 2011).
[161] *Id*.
[162] DSEIS at 3-160.
[163] *Id*. at 4-133.
[164] *See* 16 U.S.C. § 668dd(a)(4)(F) (Service must administer the Refuge System to "assist in the maintenance of adequate water quantity and water quality to fulfill the mission of the System and the purposes of each refuge").
[165] DSEIS at 4-61.

The isthmus is of particular importance for caribou, one of the species identified in the first purpose of the Refuge. The entire isthmus is designated as "high density – winter range/migration corridor" for the species.[166] The DSEIS notes that "caribou migrate through the project area between calving areas northeast of the project area and wintering grounds on the western side of Cold Bay" and that "the Izembek isthmus is the narrowest point of the migratory corridor."[167] Because the isthmus represents a pinch point in the caribou migration route, the proposed road corridor bisecting the isthmus risks disrupting caribou migration. In light of that risk, the DSEIS concludes that "if the herd [does] not cross the isthmus to reach their normal wintering/calving areas, it may have a long-term adverse effect on the entire Southern Alaska Peninsula Caribou Herd."[168]

The isthmus also provides exceptional habitat for brown bear, another species listed in the Refuge's purposes. The northern end of the isthmus is part of the Joshua Green watershed, an area that "supports the highest density of brown bears on Izembek National Wildlife Refuge and is considered to be the most important habitat for brown bears year-round on the refuge."[169]

In short, the lands proposed for divestment are not suitable for disposition because they are essential to Izembek's ability to meet all four of its original statutory purposes.

B. The Lands Proposed to Be Divested Are Not Suitable For Disposition Because They Are Central To Maintaining Izembek's Wilderness Character

In enacting ANILCA, Congress designated approximately 308,000 acres of Izembek as wilderness in accordance with the Wilderness Act.[170] The proposed land exchange would convey approximately 490 acres of Refuge and Wilderness lands out of federal ownership.[171]

The Service is required to preserve the wilderness character of refuge lands designated as Wilderness. The Wilderness Act states that wilderness areas "shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas [and] the preservation of their wilderness character."[172] Refuge lands cannot be considered suitable for disposition if removing their Wilderness designation would undermine the wilderness character of lands that remain in the Refuge or impair the enjoyment of such areas for later generations.

While ANILCA provides additional guidance unique to Alaska,[173] the Service is independently obligated by the Wilderness Act and the Refuge Act to preserve the wilderness character of Izembek by, among other obligations, "forego[ing] actions that have physical impact or would detract from the idea of wilderness as a place set apart, a place where human uses, convenience, and expediency do not dominate."[174] A report developed by the four federal agencies that administer the Wilderness Act defined the essence of wilderness character as:

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[166] *Id*. at 3-226.
[167] *Id*. at 4-173.
[168] *Id*. at 4-175.
[169] *Id*. at 3-207.
[170] ANILCA § 702(6).
[171] DSEIS at 1-4.
[172] 16 U.S.C § 1131(a) (emphasis added).
[173] *See* 610 FW 5.
[174] 610 FW 1.13(D).

> A holistic concept based on the interaction of (1) biophysical environments primarily free from modern human manipulation and impact, (2) personal experiences in natural environments relatively free from the encumbrances and signs of modern society, and (3) symbolic meanings of humility, restraint, and interdependence that inspire human connection with nature.[175]

In the case of the Refuge System, the preservation of wilderness character requires the agency to steward and manage for "natural night skies and soundscapes,"[176] "the primeval character of and influence on the land,"[177] and "opportunities for solitude, primitive and unconfined outdoor recreation."[178]

Due to its natural conditions and primitive qualities, the Service views the Izembek Refuge as an:

> Intact wilderness ecosystem that has been nearly untouched entirely by humankind . . . There are few to no projects that physically require management, restoration, or improvement by the staff. In most cases, the refuge is collecting data for observation rather than direct management . . . If no action is taken following the establishment of this [wilderness character monitoring] plan the state of the wilderness would likely remain stable.[179]

For this reason, the Service considers the whole of the approximately 308,000-acre Izembek Wilderness to be in "excellent condition."[180] There can be no question that the lands that would be exchanged are foundational to preserving Izembek's wilderness character and its unimpaired state for the use and enjoyment of the public and are therefore unsuitable for disposition. Simply put, trading away these lands is inconsistent with the Service's Wilderness Act mandates and Izembek's Wilderness purpose and cannot be exchanged without violating both the Refuge Act and the Wilderness Act.

C. The Exchange Would Fail to Further the Purposes of the Izembek Refuge

As described above, the Refuge lands that would be involved in the proposed exchange are unsuitable for disposition due to their unique contributions to achieving Refuge purposes. In addition, the ability of the Refuge to achieve its purposes would be impaired by the impacts that would follow disposition. An overwhelming administrative record conveys in detail the flagrant incongruity between protecting the world-class resources of the Izembek Refuge and the costs of carving a road through it, demonstrating the impossibility of protecting Refuge wildlife and furthering Izembek's purposes through the proposed land exchange.

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[175] Peter Landres et al., U.S. Dep't of Agric., Keeping it wild 2: An updated interagency strategy to monitor trends in wilderness character across the National Wilderness Preservation System 7 (2015).
[176] 610 FW 1.13(B)(4).
[177] 610 FW 1.13(B)(5).
[178] 610 FW 1.13(B)(7).
[179] Corey Anco, U.S. Fish & Wildlife Serv., FWS National Wildlife Refuge System Wilderness Fellows Report on Wilderness Character Monitoring, Izembek Wilderness, 34 (Oct. 2011).
[180] *Id*.

The first statutory purpose of the Izembek Refuge explicitly includes, but is not limited to, protecting waterfowl, shorebirds and other migratory birds, brown bears, and salmonids. Yet according to the CCP, with respect to waterfowl and migratory birds alone:

> The road could adversely affect the refuge's tundra swan population. Swans are extremely intolerant of human activity during nesting and molting periods. With daily traffic through sensitive areas, swans could be displaced to less desirable and less protective habitats, thus increasing mortality and lowering overall productivity of this unique essentially nonmigratory population--the only known tundra swan population known to exhibit this unusual characteristic.
>
> Both construction and use of the proposed road around Kinzarof Lagoon could disturb waterfowl populations at critical times [Refuge purposes i and ii].[181] Kinzarof Lagoon supports eelgrass beds that provide food for brant, emperor geese, Canada geese and several species of ducks. The lagoon receives heavy use from these species from mid-August to mid-November. Road construction activities would probably result in increased silt loads of streams flowing into the lagoon, which in turn could affect eelgrass growth. Protecting the ecological integrity of the Kinzarof Lagoon is extremely important.[182]

The DSEIS acknowledges that the proposed land exchange would harm these same resources, noting that impacts to "Tundra Swans, Brant, Emperor Geese, other breeding birds, migrating/wintering birds, and seabirds would be similar to Alternative 2, with the addition of potential disturbance to Aleutian Tern nesting colonies" — that is, the effects would be major for tundra swans, brant, and emperor geese.[183] It then goes on to highlight adverse impacts to brown bears, salmon, and other wildlife explicitly identified in the first purpose of the Refuge, as well as adverse impacts to caribou, a purpose of the Range that is still applicable.

Impacts to eelgrass beds and the lagoons would also implicate the fourth purpose of the Refuge: protecting its water quality and quantity. In 2015, the Service developed a threats analysis which categorized and tiered foreseeable threats facing the Refuge's water resources. A high-risk threat, according to this analysis, "prevents fulfillment of refuge[] purpose(s) or NWRS mission; threatens public safety; threatens T&E species; threatens adverse legal consequences; [and] threatens infrastructure."[184] Similarly, a moderate threat "hinders completion of one or more management objectives," described by either the CCP or step-down management plan for the Refuge.[185]

Of the various harms to water resources associated with roadbuilding, impaired stream connectivity, bank erosion, and sedimentation in Kinzarof Lagoon all received a moderate ranking.[186] The loss and alteration of estuarine and wetland habitats were both deemed high

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[181] Brown bears are also implicated by Refuge purpose i but are examined in greater detail in the following BIDEH section.
[182] U.S. Fish & Wildlife Serv., Record of Decision, Izembek National Wildlife Refuge Comprehensive Conservation Plan, Environment[al] impact statement, and Wilderness Review ("CCP"), 120 (1985).
[183] DSEIS at 2-78.
[184] U.S. Fish & Wildlife Serv., Izembek Final WRIA Threats Matrix (2015).
[185] *Id*.
[186] *Id*.

threats, as was the wetland filling that would be required for roadbuilding.[187] In fact, of the eight described, not a single impact associated with roadbuilding received a "low" ranking, which the Service defines as one that "directly or indirectly affects refuge operations but *does not hinder refuge purposes or management objectives*."[188]

These impacts would similarly undermine the United States' treaty obligations, virtually all of which require the protection of habitat and species that cross international boundaries,[189] such as migratory birds protected under the Migratory Bird Treaty Act that rely on the Refuge. A failure to uphold treaty obligations would, in turn, violate the second purpose of the Refuge.

Finally, relevant to the third refuge purpose, the CCP recognizes that the temporary uptick in subsistence opportunities provided by roadbuilding would be outweighed by long-term declines in the populations of harvestable wildlife. The road could result in major, long-term impacts to subsistence users in the Villages of Cold Bay, King Cove, and Sand Point:

> In the short-term, the road would improve access for local users, increasing their harvests of caribou, waterfowl, and furbearers. In the long-term, however, the increases in local and nonlocal use and the increased human presence associated with the road would likely result in significant adverse impacts to caribou, waterfowl, and furbearer populations . . . This in turn could result in major adverse impacts to the subsistence user harvests.[190]

Indeed, the Joshua Green area, according to the Service, has already experienced degradation due to off-road vehicle use that followed roadbuilding on the east side of Kinzarof Lagoon. "User conflicts have arisen between sport and subsistence hunters because of the increased access provided by the road,"[191] undermining the long-term viability of subsistence opportunities. Moreover, the Service has repeatedly identified harms that would befall species of subsistence value, including in such documents as the CCP, the Land Protection Plan, the Service's Threats Matrix, and the Priority Resources of Concern report, further indicating that roadbuilding would undermine the Refuge's subsistence purpose.

In sum, the Service's analyses to date, which span decades, support the same conclusion: a land exchange for a road through Izembek would violate Izembek's purposes.

D. The Exchange Would Fail to Further the Mission of the Refuge System by Not Providing an Overall Conservation Benefit

Just as the land exchange would clearly fail to further Refuge purposes, including its Wilderness purpose, it would also fail to further the mission of the Refuge System.

The purpose of the proposed action defined in the DSEIS includes, in part, "[increasing] the overall conservation value of lands preserved in the National Wildlife Refuge System."[192] As noted

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[187] *Id*.
[188] *Id*. (emphasis added).
[189] CCP at 264-265
[190] *Id*. at 121.
[191] U.S. Fish & Wildlife Serv., Identification of Priority Resources of Concern: Methods and Results, Izembek National Wildlife Refuge, ("PRC"), 13 (Oct. 2021).
[192] DSEIS at 1-8.

later in these comments, this is a partial recitation of the legal requirements for land exchanges under both ANILCA and the Refuge Act, not the project's purpose. Treating it as a project purpose serves to inappropriately narrow the analysis of alternatives for achieving the true purpose of the exchange: construction of a road. Regardless of whether the DSEIS is correct to include increased conservation value in the purpose and need, the document rightly states that ANILCA requires a determination that a refuge land exchange is "likely [to] result in an overall conservation or subsistence benefit"[193] and that the Refuge Act mandates that an exchange must "result in an overall conservation benefit for both the Refuge System and individual refuge."[194]

The document makes clear that the requirement for an overall conservation benefit stems from the statutorily-established mission of the Refuge System. It also notes that the Council on Environmental Quality has defined an agency's preferred alternative selected through the NEPA process as the "alternative which the agency believes will *fulfill its statutory mission and responsibilities*, giving consideration to economic, environmental, technical and other factors."[195] The Service must therefore explain how the preferred alternative in the DSEIS would fulfill its statutory mission by providing an overall conservation benefit to the Refuge System. It must also ensure that it complies with the Refuge Act's requirements that, in case of a conflict in a proposed land exchange between the purposes of the Izembek Refuge and the mission of the system, it resolves that conflict in a manner that first protects the Refuge.[196]

Conspicuously, the DSEIS provides no conservation-based rationale for why Alternative 6 is selected as the preferred alternative. Appendix B of the DSEIS outlines the methodology of an analysis to compare the conservation value of the non-federal lands being considered as part of the proposed land exchange. This analysis is intended to prioritize among the available parcels based on their potential to "contribute to Izembek National Wildlife Refuge purposes in accordance with the Refuge Administration Act as amended by the National Wildlife Refuge Improvement Act, in support of the mission of the Refuge System, and their contribution to the National Wilderness Preservation System."[197] However, by incorporating a broad suite of criteria—including density of brown bear habitat, protection of wintering and fall staging grounds for emperor and Pacific black brant geese, and protection of the Izembek and Kinzarof lagoon complex watershed—the analysis may also help to assess of the overall conservation value of the lands in question to the System as a whole. Its potential usefulness in this respect is difficult to judge because there is no adequate description of the methods or results.

While the only results presented in Appendix B are the rankings of the non-federal parcels relative to each other, Figure 1 makes clear that the same analysis was applied to current Refuge lands. Therefore, the analysis could be used to help determine whether the proposed exchange would result in an increase in the overall conservation value of lands held by the Refuge System. Figure 1 strongly suggests that it would not. The road corridor runs almost entirely through Refuge

[193] *Id*.
[194] *Id*. at 1-9.
[195] *Id*. at 2-70 (emphasis added).
[196] 16 U.S.C. § 668dd(a)(4)(D).
[197] DSEIS at B-2-1.

lands with criteria scores at or near the high end of the scale. In stark contrast, most of the non-federal lands are near the bottom.

By limiting its conclusions to the prioritization of the non-federal parcels, the DSEIS appears to be operating under the assumption that an exchange involving the available parcels with the greatest conservation value would necessarily result in an overall conservation benefit to the Refuge System. That faulty assumption is seemingly based on another: that a relatively large area of land received by the Refuge System would necessarily provide more conservation value than a relatively small area of Refuge land that is dispositioned.

In fact, conservation value is driven by the quality of land, not necessarily the quantity, with quality in turn driven partly by the habitat requirements of high-priority species (e.g., brown bears, caribou, and migrating and/or ESA-listed waterfowl in the case of the Izembek Refuge). In his independent review of the DSEIS, marine ecologist Dr. Jason Stutes notes that "while the DSEIS purports to have analyzed for in kind replacement of habitat types by the land exchange . . . it appears to assume that all habitat within a certain category contributes to the ecology of the landscape the same way in all areas regardless of ecological context."[198] What is necessary (but the DSEIS does not present) is a "functional assessment . . . to accurately determine not only a real impacts or gains from the proposed land exchange, but also determine [ecological] functions lost/gained within the Izembek Refuge vs. surrounding watersheds."[199]

The DSEIS has already tacitly acknowledged this with its use of a criteria-based analysis. In the Final SEIS, the Service must ensure that the analysis captures all relevant aspects of habitat quality and expand its scope to encompass both sides of the proposed exchange. It must not only determine which of the available parcels would result in the exchange most favorable to the Refuge but also determine whether any potential exchange would first fulfill Izembek's purposes, then fulfill the System's statutory mission, and provide an overall conservation benefit. If no exchange meets those standards, the Service cannot proceed with the proposed exchange.

Because Appendix B does not provide separate results for each of the criteria included in the prioritization analysis, it is not possible to evaluate how various criteria contributed to the combined scores shown in Figure 1. This is problematic. If the Service intends to rely on this analysis, it must clearly show the results for each criterion and explain how that criterion was analyzed, and the results reached. Discussion of wildlife resources elsewhere in the DSEIS suggests that habitat quality likely played a major role in producing the results that rank Refuge lands in the proposed road corridor much higher than the exchange parcels.

A recurring theme in the DSEIS is that the unique geographical context of different areas determines their habitat values at least as much as the resources they contain. For example, in a comparison of wetlands, the DSEIS finds that "the specific wetland vegetation communities identified within these 400-foot wide [road] corridors . . . are considered to have very high value for their hydrologic, biogeochemical, and habitat functions due to their strategic location in proximity

[198] Jason Stutes, Izembek Land Exchange Supplemental Environmental Impact Statement Review and Comment at 12 (2025).
[199] *Id*.

to both Izembek and Kinzarof lagoons."[200] It further makes clear that habitats in the road corridor are not qualitatively equivalent to those in the exchange parcels, noting that "these wetlands likely support different, and more water dependent, wildlife than wetlands further removed from Izembek and Kinzarof lagoons."[201]

The DSEIS reaches similar conclusions with respect to birds, finding that

> Even though the exchange parcels provide habitat for some migrating or wintering birds, they do not contain the same ecological value of habitat for Brant and Emperor Geese that may be disturbed [in the road corridor]. Furthermore, the exchange parcels do not provide the unique juxtaposition between Izembek and Kinzarof lagoons, which is one of the many reasons this area is critically important to a wide suite of species.[202]

The Refuge lands in the road corridor are also particularly important to large mammals. A substantial portion of the proposed road would pass through the Joshua Green River watershed, which "supports the highest density of brown bears on Izembek National Wildlife Refuge and is considered to be the most important habitat for brown bears year round on the refuge."[203] The exchange parcels located outside the watershed would not offer habitat of comparable value for brown bears. By running down the middle of the Izembek isthmus, the proposed road would also fragment an area that provides connectivity for migrating caribou and other wildlife moving through the lower Alaska Peninsula. The DSEIS notes that, "due to the narrow confines of the isthmus, there are no other alternative routes for migrating or resident large mammals to use to move through the project area."[204] Because of their peripheral locations and geographic distance from the isthmus, the exchange parcels cannot replace this essential value of Refuge land.

Additionally, an evaluation of whether an exchange would result in an overall conservation benefit should consider not only the present qualities of the lands involved but also their expected future conditions. Protecting land within the Refuge System provides greater conservation value if those same lands would otherwise be under threat of development. The DSEIS states that, "while major development projects are not currently planned for the exchange parcels by King Cove Corporation, the exchange would reduce the potential for future surface development of the exchange parcels."[205] The possibility that unanticipated development may occur on the exchange parcels must be weighed against the certainty that a road would be constructed on the land that would leave the Refuge. The only Refuge land under immediate threat is the land on which the road is proposed. All else being equal, keeping that land in the Refuge provides greater conservation value than replacing it with currently unthreatened land. And as explained in section IV.A, the land to be acquired under the proposed exchange is already subject to Refuge Act laws and regulations so it cannot be developed in a manner inconsistent with refuge purposes.

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[200] DSEIS at 3-119.
[201] *Id*.
[202] *Id*. at 4-544.
[203] *Id*. at 3-207.
[204] *Id*. at 4-553.
[205] *Id*. at 4-541.

Documents analyzing earlier iterations of the Izembek land exchange have considered all these factors and reached the correct conclusions. These include the 2013 Record of Decision, which found that:

> The lands offered for exchange contain important wildlife habitat, but they do not provide the wildlife 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 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.[206]

Notably, the exchange proposed in 2013 would have added substantially more acreage to the Refuge than the one currently under consideration — over 55,000 acres then compared to approximately 31,000 acres now. Nonetheless, the 2013 Record of Decision correctly determined that the "increased acreage would not compensate for the overall values of the existing Izembek Refuge lands and Wilderness that would be removed" and further that "the offered lands [would not] compensate for the anticipated impacts that the proposed road would have on wildlife and the habitat that surround the road."[207] Nothing has changed since 2013 to suggest that an exchange would now provide greater conservation value than it did then, especially considering that substantially less acreage is now being offered to the Service compared to the proposed 2013 exchange. The Service must follow its own previous determinations and conclude that the currently proposed exchange would not further the purposes of the Refuge or the mission of the System by providing an overall conservation benefit. Having reached that conclusion, the Service must not select the proposed land exchange in its Record of Decision.

E. The Proposed Use for the Divested Land Would Violate the Service's Statutory Mandate to Maintain the Biological Integrity, Diversity, and Environmental Health of the Refuge

In considering the proposed land exchange, the Service must consider not only the conservation value of the land proposed to be exchanged out of the Refuge in terms of the Refuge's purposes, its designation as wilderness, and the impacts to the Refuge System's conservation mission as a whole, but also in terms of the harms the proposed use of such divested lands poses to the remaining Refuge. Here, the proposed road will result in unacceptable impacts to both Izembek's and the Refuge System's biological integrity, diversity, and environmental health (BIDEH).

For decades, the Refuge System was overrun by "secondary" harmful uses. A damning government report documented grazing, logging, and other activities occurring on over 90 percent

[206] 2013 Record of Decision, 9.
[207] *Id*. at 8.

of refuges,[208] undermining the Service's ability to conserve wildlife. In remarking upon the need for change, Senator Lindsay Graham recognized that "[r]efuge managers, despite their best efforts, have often been susceptible to outside pressure to allow these damaging activities."[209] During that time, pollution events further strained the Refuge System; for example, a selenium contamination disaster befell Kesterson National Wildlife Refuge in 1985, deforming, poisoning, and ultimately killing thousands of migratory birds.

Taken together, these events inspired the enactment of the Improvement Act — a legislative amendment designed to refocus Refuge System management on wildlife. Today, the System is required to "provide for the conservation of fish, wildlife, and plants, and their habitats."[210] To that end, Congress instructed the Service to "protect the System and individual refuges from threats"[211] by maintaining the biological integrity, diversity and environmental health of the System.[212]

As legal scholar Rob Fischman has noted, "the mandate to maintain biological integrity, diversity, and environmental health does not contain the hedge phrases so common in public land law that endorse vast agency discretion. The Improvement Act does not soften its command by subordinating it to other organic objectives, or by limiting its application "where appropriate" or "to the degree practicable."[213] Instead, Congress imposed upon the Secretary of the Interior, acting through the Service, a mandatory "affirmative stewardship"[214] duty, according to the House report accompanying the bill. Of the 14 statutory directives codified by the Improvement Act, few are as unambiguous or unqualified as the BIDEH mandate.

Also unique is the mandate's grounding in science. When the Service promulgated the first BIDEH implementing policy, it defined the statute's language in sequence and prescribed a series of management instructions for individual refuges.

For instance, in managing a refuge for "biological integrity," the Service Manual instructs managers to "examin[e] the extent to which biological composition, structure, and function has been altered from historic conditions"[215] and provided guidance for restoring or mimicking natural processes.[216]

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[208] U.S. General Accounting Office, National Wildlife Refuges: Continuing Problems with Incompatible Uses Call for Bold Action, 3 (1989).

[209] 143 Cong. Rec. S9092-04, 1997 WL 561070 (statement of Sen. Graham).

[210] 16 U.S.C § 668dd(a)(4)(A).

[211] H.R. Rep. No. 105-106, at 10 (1997).

[212] 16 U.S.C § 668dd(a)(4)(B). *See* 601 FW 3.7(B), stating that "The Refuge Administration Act states that each refuge will be managed to fulfill refuge purpose(s) as well as to help fulfill the System mission, and we will accomplish these purpose(s) and our mission by ensuring that the biological integrity, diversity, and environmental health of each refuge are maintained, and where appropriate, restored. We base our decisions on sound professional judgment."

[213] Robert L. Fischman, The Meanings of Biological Integrity, Diversity, and Environmental Health, 44 Natural Resources Journal 989, 993 (2004).

[214] H.R. Rep. No. 105-106, at 10 (1997).

[215] 601 FW 3.10(A)(1).

[216] 601 FW 3.10(A)(4).

In managing a refuge for "biological diversity," the Manual directs managers to "maintain populations of breeding individuals that are genetically viable and functional,"[217] with a focus on "native species and natural communities such as those found under historic conditions."[218]

Finally, the Manual, among other directives, requires refuge managers to "manage for environmental health by preventing chemical contamination of air, water, and soils that may interfere with reproductive physiology or stimulate high rates of mutation. Such contamination includes carcinogens and other toxic substances."[219] "Unnatural physical structures," the Manual notes, can also "displace space or may be obstacles to wildlife migration," undermining the environmental health of refuges.[220]

These policies, informed by a clear statutory mandate, "catapult[ed] the Refuge System to the front lines of conservation biology,"[221] reimagining the Refuge System's role in recovering American wildlife. In subsequent Manual revisions, the Service recognized that "biological integrity, diversity, and environmental health are critical components of wildlife conservation"[222] and key considerations in the management of individual refuges.

While the Service largely avoided addressing discrete management threats in the first iteration of the BIDEH policy, the agency did confront what it saw as the imminently pressing challenge of its time: habitat fragmentation.

In the Manual, the Service declared that "fragmentation of the National Wildlife Refuge System's wildlife habitats is a direct threat to the integrity of the National Wildlife Refuge System, both today and in the decades ahead."[223] The agency accordingly prohibited actions "anticipate[d] to reduce the quality or quantity or fragment habitats on a national wildlife refuge."[224]

Since then, preventing habitat fragmentation has remained an important, if not central, tenet of the management of the Refuge System. In 2011, the Service published *Conserving the Future-Wildlife Refuges and the Next Generation*, which soberly acknowledged that the "Refuge System must tackle unprecedented challenges [in the coming decades]. At the root of these challenges is the increasing consumption of natural resources, which has caused loss, degradation, and fragmentation of habitat around the world."[225]

Subsequent policy updates have reiterated this theme, including the updated planning policy for the Refuge System,[226] which heavily emphasized the importance of maintaining and restoring habitat connectivity.

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[217] 601 FW 3.10(B)(3).
[218] 601 FW 3.10(B)(1).
[219] 601 FW 3.10(C)(2).
[220] 601 FW 3.10(C)(3).
[221] Robert Fischman, The National Wildlife Refuges: Coordinating a Conservation System Through Law 125 (2003).
[222] 601 FW 3.7(A).
[223] 603 FW 2.5(A).
[224] *Id*.
[225] U.S. Fish & Wildlife Serv., Conserving the Future: Wildlife Refuges & the Next Generation, 23 (Oct. 2011).
[226] *See* 602 FW 3.5(A), noting that one of the goals of comprehensive conservation planning is to "focus refuge management on stewarding diverse, resilient, and self-sustaining connected habitats or ecosystems."

In the Refuge's CCP, the Service noted that "there seems to be general agreement that the fish and wildlife of Izembek Refuge are extraordinary assets,"[227] even by Alaskan standards. "State and local governments, conservationists, professional hunters and guides, sport fishermen, the commercial fishing industry, Native corporations, the oil and gas industry, and people from out of state, around the state, and from Bristol Bay all attested to the importance of protecting these outstanding fish and wildlife resources."[228]

Of Izembek's foreseeable threats, roadbuilding was clearly top of mind for the Service in writing the Refuge's CCP. The CCP described in detail the harms that would result from habitat fragmentation and anticipated significant impacts to large mammals that would follow roadbuilding in the Izembek Wilderness.

Indeed, "with the presence of the road, and the increased human presence, bears would probably alter their behavior," according to the Service. "They may abandon some traditional areas, especially during road construction. With increased access into this remote area, brown bear recreational hunting would probably increase."[229] Moreover, the puncturing of the roadless area would "provide easy access to wilderness habitats important to such large furbearers as wolves and wolverines. Because these two species exhibit a low tolerance of human activity, the pressures resulting from the use of this road would likely reduce wolf and wolverine populations significantly in the eastern portion of the Izembek Refuge."[230] Finally, the presence of a road would impact the "integrity and productivity of the southern Alaska Peninsula caribou herd"[231] and "[v]ehicular traffic and humans could alter migratory patterns" in this area, "fragment[ing] the herd, [and] delaying migration to winter and calving grounds."[232]

Since the CCP was finalized, the Service has further amplified these dangers, cautioning that roadbuilding would spoil the health of the lagoons, impact the diversity and abundance of wildlife, and degrade the health of the Refuge through pollution and runoff, running afoul of the BIDEH mandate.

For instance, in the recent priority resources of concern analysis for Izembek, the Service noted that the "eelgrass ecosystem and the Joshua Green region are key to maintaining the biological integrity, diversity, and environmental health of the refuge."[233] "Access into the Joshua Green watershed," however, "could increase substantially if a proposed road right-of-way across King Cove Corporation and Izembek Refuge lands is approved," displacing brown bears from prime feeding and denning areas,[234] among other impacts.

In fact, of the five issues threatening the Service's ability to maintain BIDEH in priority areas in Izembek, the Service identified "construction and use of a road from King Cove to Cold Bay" as its top management challenge.[235] Service concerns include "increased human access and hunting

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[227] CCP at 16.
[228] *Id*.
[229] *Id*. at 120.
[230] *Id*. at 121.
[231] *Id*. at 120.
[232] *Id*.
[233] PRC at 20.
[234] U.S. Fish & Wildlife Serv., Land Protection Plan at 88.
[235] PRC at 41, 43.

pressure; wildlife disturbance, especially of waterfowl during migration; facilitated spread of trash, contaminants, and invasive species onto refuge lands; and habitat degradation in wilderness from off-road vehicles originating from the road."[236]

These anticipated impacts largely mirrored those described by Secretary Jewell in the 2013 Record of Decision, where she selected the no action alternative because it [was] "consistent with the Secretary's obligation[] to . . . sustain biological integrity, diversity and environmental health."[237]

The impacts to wildlife that would follow roadbuilding have not changed since 2013. Among the voluminous harms described by the DSEIS, the Service notes that roadbuilding would impair hydrological resources,[238] potentially cause uncontained releases of hazardous materials,[239] eliminate native plant communities along the road corridor,[240] force behavioral changes in large mammals,[241] and bifurcate the Refuge into two disjunct blocks, "transform[ing]"[242] the Izembek Wilderness and Refuge as it exists today.

Any one of these roadbuilding impacts would be sufficient to impair the quality and quantity of Refuge habitats. However, by working in concert, the impacts would affect nearly every facet of Refuge management, degrading if not destroying the superlative qualities Congress established Izembek Refuge to protect, including its biological integrity, diversity, and environmental health. Considering the irreplaceable conservation value of the land to be divested and the impacts to Izembek's BIDEH from construction and use of the road, the Service cannot reasonably find that the proposed exchange would fulfill its statutory mandates or uphold its responsibilities to the Refuge.

IV. THE DSEIS FAILS TO ADDRESS RELEVANT PROVISIONS OF THE ALASKA NATIVE CLAIMS SETTLEMENT ACT

Key provisions of the Alaska Native Claims Settlement Act (ANCSA) bear on the analysis surrounding lands proposed for exchange, but the DSEIS ignores these provisions. Also, while the DSEIS flags the existence of management challenges that will flow from split ownership of surface

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[236] *Id*. at 43.

[237] 2013 Record of Decision, 7.

[238] DSEIS at ES-40, stating "effects to hydrologic resources would occur as a result of fill placement in approximately 8.8 acres of wetland and the installation of an estimated 71 drainage structures along the road, including one bridge. The uncontained release of hazardous materials from stream turbidity generated by streambank construction activities could also occur. The increase in sediment load from road runoff could impact the quality of water bodies that are considered Essential Fish Habitat."

[239] *Id*.

[240] *Id*. at ES-41, stating that "construction would cause the loss of approximately 183 acres of native plant communities along the proposed road corridor and the loss of approximately 1 acre of native vegetation at two temporary barge landing sites."

[241] *Id*. at ES-42, stating "behavioral changes, habitat avoidance/displacement, habitat fragmentation, increased human access, noise, and collisions with vehicles could occur with the Alternative 6 road. Effects to brown bears, caribou, wolves, other large mammals, small mammals, and furbearers would be similar to Alternative 2 [effects to brown bears in Alternative 2 would be major; effects to other large mammals would be moderate but could be major for caribou if their migratory patterns were harmed] with an increase in potential habitat loss due to a larger footprint and the addition of material site effects."

[242] *Id*. at ES-46, stating Alternative 6 would "transform the landscape by introducing a road to a currently roadless area."

and subsurface estates, it fails to analyze those reasonably foreseeable issues and the potential impacts to Izembek Refuge resources. These issues must be addressed in the final SEIS.

A. ANCSA 22(g)

Congress passed ANCSA to provide for the expeditious, fair, and just settlement of Alaska Native land claims.[243] A provision of ANCSA, commonly referred to as 22(g) in reference to its section of the public law, requires that "[i]f a patent is issued to any Village Corporation for land in the National Wildlife Refuge System, the patent shall reserve to the United States the right of first refusal if the land is ever sold by the Village Corporation." This section also states that where a patent conveys lands within the National Wildlife Refuge System to any Village Corporation, that patent "shall contain a provision that such lands remain subject to the laws and regulations governing use and development of such Refuge."[244] This provision is relevant to the current land exchange proposal in two ways.

First, some of the lands that would be relinquished by King Cove Corporation (KCC) are lands within the boundary of Izembek that were conveyed to KCC under ANCSA and, therefore, currently subject to 22(g). The specific acres are those on the east and west sides of the mouth of the Kinzarof Lagoon, i.e., the Kinzarof Lagoon parcels. This means that the United States already has a right of first refusal should KCC ever try to relinquish these lands and that any development of these lands is currently subject to Refuge laws and regulations.[245] But absent from the analysis in the DSEIS of the benefit of bringing these lands into federal ownership is the recognition of the unlikelihood that these lands would be developed under current ownership and that the 22(g) restriction provides a means of protection for these lands already.[246] This needs to be considered in evaluating the proposed land exchange.

Second, any patent that the United States would issue to KCC to execute the exchange must include a provision making the lands that are divested from the United States subject to the "laws and regulations governing use and development" of Izembek. This includes the compatibility requirement of the Refuge Act, a cornerstone of refuge law. The DSEIS acknowledges this.[247] But absent from the DSEIS is any evaluation of what that means in terms of the construction and use of a road. Indeed, it is highly likely that, following an exchange, a road and the necessary gravel mines could not be built because the Service would not be able to find that they are a compatible use. A compatible use is one that "will not materially interfere with or detract from the fulfillment of the . . . the purpose(s) of the national wildlife refuge."[248] As explained in detail throughout these comments, the DSEIS is full of examples and statements recognizing that a road and gravel mines would harm Izembek's resources as well as the recognition that proposed mitigation measures would fail to

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[243] 43 U.S.C. § 1601.
[244] *Id*. § 1621(g).
[245] DSEIS at 1-17.
[246] *See* Jewell ROD at 8–9; *Nat'l Audubon Soc.*, 606 F. Supp. at 837–840, 845 (rejecting explanation that exchange protects lands that were otherwise already subject to protections and unlikely to be developed); *Agdaagux Tribe of King Cove v. Jewell*, 128 F. Supp. 3d 1176, 1196–97 (D. Alaska 2015) (discussing unlikelihood of development of KCC lands to support not exchanging lands).
[247] DSEIS at 4-567, App'x F at F-3.
[248] 50 C.F.R. § 25.12; Fish & Wildlife Serv. Manual 603 FW2 at 2.6; *see also* 50 C.F.R. § 25.21(b)(1) & 603 FW2 at 2.8.C (explaining that the compatibility standard applies to lands transferred from pre-ANCSA refuges via 22(g)).

protect those resources. These include the likelihood that the road would lead to increased illegal ATV use on Refuge lands despite the construction of a guardrail, the likelihood that the migration of caribou through the isthmus would be disturbed, the recognition that waterfowl habitat in the lagoons would be significantly affected, and that there will be significant harms to subsistence resources and uses from construction and use of the road. All of these harms would occur on Izembek's remaining lands following the exchange and would impede the Service from fulfilling Izembek's purposes. Given the strong likelihood of a future finding that a road and gravel mines would be incompatible with Izembek's purposes and, therefore, prevent construction, the Service should not proceed with the exchange now. The Service must address this issue in the final SEIS.

B. Split Estate Concerns

Under the proposed exchange, the United States would gain primarily surface estate of the offered KCC lands; the Aleut Corporation would retain ownership of the subsurface estate of 29,459 acres.[249] The Service acknowledges that there could be land management issues with the split estate if subsurface resource development and access is sought.[250] But the DSEIS is devoid of any actual analysis of what these management issues might be and their impacts to Izembek. This needs to be addressed in the final SEIS.

V. THE PROPOSED ACTION WOULD VIOLATE THE WILDERNESS ACT AND HARM IZEMBEK'S WILDERNESS RESOURCES

In passing the Wilderness Act, Congress sought "to secure for the American people of present and future generations the benefits of an enduring resource of wilderness."[251] To achieve this goal, it established the National Wilderness Preservation System and mandated that areas designated as Wilderness "be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness."[252] The Wilderness Act states that Wilderness areas "shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use."[253] Roads are anathema to Wilderness.[254]

The Wilderness Act mandates that "each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character."[255] ANILCA reinforces this mandate: "[e]xcept as otherwise

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[249] DSEIS ES-2, 1-4–1-5, 4-564.
[250] DSEIS at 4-566–4-567, App'x D-2 at 48, 51–52.
[251] 16 U.S.C. § 1131(a).
[252] *Id*. § 1131(a).
[253] *Id*. § 1133(b).
[254] *Id*. § 1133(c).
[255] *Id*. § 1133(b); *see also Id.* § 1133(a) (noting that the purposes of the Wilderness Act supplement the purposes for which national wildlife refuges "are established and administered").

expressly provided for in this Act wilderness designated by this Act shall be administered in accordance with applicable provisions of the Wilderness Act governing areas designated by that Act as wilderness."[256]

In designating Izembek's Wilderness in ANILCA, Congress recognized that "[t]he Izembek Wilderness possess outstanding scenery, key populations of brown bear, caribou and other wilderness-related wildlife, and critical watersheds to Izembek Lagoon" which are used by "millions of waterfowl for migration and wintering purposes."[257] Wilderness designation for the majority of Izembek would "protect this critically important habitat."[258] Izembek's purposes therefore include the Wilderness Act's purposes, and any exchange must ensure that it meets these purposes, in addition to meeting ANILCA's Izembek specific and general purposes, the National Wildlife Refuge System mission, and the original Izembek Range purposes.

However, as pointed out throughout this letter, the DSEIS is rife with examples and statements that Izembek's Wilderness purposes will not be achieved by the proposed land exchange.[259] Indeed, it is obvious that a land exchange to allow a road to be built through the core of the Izembek Wilderness along with the siting of 12 gravel mines will severely damage and degrade Izembek's wilderness resources. This is also true for the lands that will come into federal ownership and Wilderness — the DSEIS recognizes that wilderness values and characteristics of those lands will also be degraded by the construction and use of a road.

Regarding the specifics of the Service's analysis of the proposed land exchange on wilderness resources, the DSEIS states that the noise impacts on wilderness resources would be "slightly higher" than under Alternative 2 due to the allowance of gravel mining in the Refuge.[260] This is an understatement; gravel mining is inherently loud. The SEIS analysis should be revised to acknowledge that the impact of allowing gravel mining within the Refuge will significantly increase the noise effects on wilderness resources.

The DSEIS also states that the road will allow for commercial use.[261] This is confusing, as elsewhere the DSEIS states that commercial use would not be allowed.[262] The Service must clarify this point and revise the analysis if commercial uses would be allowed. The fact that it may eventually be used for commercial or other purposes beyond health and safety and subsistence-related travel is indicated in King Cove Corp.'s May 2024 proposal, which indicates that they seek a road for not only health and safety, but also "quality of life, and affordable transportation options."[263]

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[256] ANILCA § 707.
[257] H.R. REP. NO. 96-97, pt. II, at 136 (1979).
[258] *Id*.
[259] *See generally* DSEIS at 4-602–4-606.
[260] DSEIS at 4-602.
[261] DSEIS at 4-604.
[262] DSEIS at 1-6.
[263] Ltr. From King Cove Corp. to Sara Boario, Regional Director, U.S. Fish and Wildlife Service at 2.

Additionally, following an exchange, the lands that will remain in Wilderness and those that would be added to Wilderness will likely be degraded by off-road vehicle use, as the DSEIS recognizes throughout. But the DSEIS recognizes that the proposed mitigation measures, namely signage about restrictions on use and potential installation of a guardrail, are unlikely to prevent unauthorized use of the road or incursions into the Wilderness given maintenance and enforcement issues.[264][205] In short, the proposed mitigation measures are insufficient to protect the remaining Wilderness.

In sum, moving forward with the proposed land exchange is patently inconsistent with Izembek's wilderness purposes and would violate the Wilderness Act.

VI. THE SERVICE MUST COMPLY WITH TITLE XI OF ANILCA

Congress enacted Title XI "to minimize the adverse impacts of siting transportation and utility systems within units established or expanded by this Act and to insure the effectiveness of the decision-making process."[265] To achieve this goal, Congress established "a single comprehensive statutory authority for the approval or disapproval of applications for such systems."[266] The process must begin with the filing of application with all relevant federal agencies; road approvals and disapprovals notably cannot be accomplished by the Service or the Department of the Interior unilaterally.[267] Several specific findings supported by substantial evidence are required to be made at the conclusion of a required NEPA process.[268] For roads in Wilderness, the ultimate decisionmakers are the President and the Congress.[269]

Title XI established a clear, exacting and mandatory process that must precede approvals or disapprovals of roads in CSUs. No authorization of a transportation system, in whole or in part, shall have any effect unless the provisions of Title XI are complied with.[270]

Because the purpose and effect of the proposed land exchange is to facilitate construction of a road through Izembek Refuge, the proposed action must comply with the Title XI process.

VII. THE SERVICE MUST COMPLY WITH THE ENDANGERED SPECIES ACT

A. Section 7 Consultation

Congress enacted the Endangered Species Act (ESA) in 1973 "to provide a program for the conservation of . . . endangered species and threatened species."[271] According to the U.S. Supreme Court, Congress's "plain intent" in enacting the ESA "was to halt and reverse the trend toward species extinction, whatever the cost" and "to give endangered species priority over the 'primary missions' of federal agencies."[272]

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[264] *See, e.g.*, DSEIS at 4-604–4-605, App'x F at F-17–F-18.
[265] 16 U.S.C. § 3161(c).
[266] *Id*.
[267] 16 U.S.C. § 3164(b)(2), (c).
[268] 16 U.S.C. § 3164(g)(2).
[269] 16 U.S.C. § 3166(b).
[270] 16 U.S.C. § 3164(a).
[271] 16 U.S.C. § 1531(b).
[272] *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184–85 (1978).

Toward these goals, the ESA provides an array of protections not provided by any other law. As relevant here, section 7(a)(2) of the ESA contains the substantive requirement that all federal agencies ensure their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [their designated critical] habitat."[273]

To comply with this substantive mandate, section 7 and its implementing regulations establish several procedural obligations. This process "offers valuable protections against the risk of a substantive violation [of the ESA] and ensures that environmental concerns will be properly factored into the decision-making process as intended by Congress."[274] Specifically, section 7 requires federal agencies to consult with the FWS and/or the National Marine Fisheries Service (NMFS) (collectively, "the Services") whenever an agency action may affect a listed species.[275] The "may affect" standard for consultation is low, as "[a]ny possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the requirement."[276] Agency action is defined to include "*any* action authorized, funded, or carried out by such agency"[277] where the agency "makes an affirmative, discretionary decision about whether, or under what conditions, to allow private activity to proceed."[278] As the Ninth Circuit has made clear, there is "little doubt that Congress intended agency action to have a broad definition in the ESA."[279]

Effects of the action include "all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action but that are not part of the action."[280] This includes consequences of actions that will not occur unless the proposed action is carried out, consequences that may occur later in time, and those that occur outside of the immediate area.[281] Cumulative effects "are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.[282]

If the action agency concludes that a proposed action "may affect" any listed species or critical habitat, the agency must typically engage in formal consultation with FWS and/or NMFS.[283] Formal consultation is not required, however, if through a biological assessment or informal consultation, the action agency determines its action is "not likely to adversely affect" any listed species *and* the Services issue a written concurrence in that determination.[284] If the Services do not

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[273] 16 U.S.C. § 1536(a)(2).

[274] *Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1128-29 (9th Cir. 1998) (emphasis in original); *see also Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). Here, THE SERVICE is both the action agency and the consultation agency for several listed species and will engage in intra-agency consultation.

[275] 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

[276] *Id.* at 1027 (citations omitted).

[277] 16 U.S.C. § 1536(a)(2) (emphasis added); *see also* 50 C.F.R. § 402.03 (stating that Section 7 applies "to all actions in which there is discretionary Federal involvement or control."); *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1141 (11th Cir. 2008) (holding that the Federal Emergency Management Agency's administration of the National Flood Insurance Program is an agency action requiring ESA consultation); *Karuk Tribe of Cal. v. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (en banc) (holding that the Forest Service's approval of Notices of Intent to conduct mining activities is an agency action requiring consultation).

[278] *Karuk Tribe*, 681 F. 3d at 1030.

[279] *Id.* at 1020 (citation omitted).

[280] 50 C.F.R. § 402.02.

[281] *Id.*

[282] *Id.*

[283] 50 C.F.R. § 402.14

[284] *Id.* § 402.14(b).

agree, and believe the agency action is likely to adversely affect the protected species, formal consultation *must* occur.[285] Both the action agency and the consulting agencies must use the "best scientific and commercial data available" throughout the consultation process.[286]

If the biological opinion concludes that the action is likely to jeopardize a species or adversely modify critical habitat, the biological opinion must include reasonable and prudent alternatives to the offending agency action.[287] The Services may also "suggest modifications" to the action during the course of consultation to "avoid the likelihood of adverse effects" to the listed species even when not necessary to avoid jeopardy.[288]

Additionally, where an action is reasonably certain to take an ESA-listed species, the biological opinion must include an "incidental take statement" specifying the amount or extent of such incidental taking on the species; any "reasonable and prudent measures" that FWS and/or NMFS considers necessary or appropriate to minimize such impact; and the "terms and conditions" that must be complied with by the action agency to implement those measures.[289] Additionally, when the listed species to be incidentally taken is a marine mammal, the take must first be authorized pursuant to section 101(a)(5) of the MMPA, and the incidental take statement must include any additional measures necessary to comply with the MMPA take authorization.[290]

With regard to timing, the ESA regulations mandate that an agency "shall review its action at the earliest possible time" to determine whether the action may affect listed species or critical habitat and thus require consultation.[291] The Services' ESA Consultation Handbook also favors "[e]arly inclusion of section 7 in the NEPA process," as doing so allows action agencies to "share project information earlier" and improves "interagency coordination and efficiency."[292] The Handbook encourages agencies to initiate informal consultation prior to NEPA public scoping, with biological assessments completed prior to the release of a DEIS; formal consultation, if required, initiated prior to or at the time of the release of the DEIS; and section 7 consultation completed by the time a final EIS is issued.[293] In addition to the ESA requirements, NEPA mandates that, "[t]o the fullest extent possible, agencies shall prepare draft environmental impact statements concurrent and integrated with environmental impact analyses and related surveys and studies required by all other Federal environmental review laws and Executive orders applicable to the proposed action, including … [the ESA]." [294]

When a species is proposed for listing under the ESA, the action agency "shall confer" with FWS or NMFS regarding actions that are "likely to jeopardize the continued existence" of the proposed species or that would "result in the destruction or adverse modification of critical habitat proposed to be designated for such species."[295] This conference culminates in a conference

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[285] *Id*. § 402.14(a).
[286] 16 U.S.C. § 1536(a)(2).; 50 C.F.R. § 402.14(d).
[287] 16 U.S.C. § 1536(b)(3)(A).
[288] 50 C.F.R. § 402.13(b)
[289] 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(g)(7), (i).
[290] *Id*.
[291] 50 C.F.R. § 402.14(a).
[292] U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act, 4-11 (Mar. 1998) https://www.fws.gov/sites/default/files/documents/endangered-species-consultation-handbook.pdf.
[293] *Id*.
[294] 40 C.F.R. § 1502.25(a).
[295] 50 C.F.R. § 402.10(a); 16 U.S.C. § 1536(a).

opinion, which may contain advisory recommendations on ways to minimize or avoid adverse effects and may later be adopted as the biological opinion if the species is listed.[296]

Until section 7 consultation is complete, federal agencies are prohibited from making "any irreversible or irretrievable commitment of resources" with respect to the agency action that may foreclose "the formulation or implementation of any reasonable and prudent alternative measures."[297] This prohibition exists to maintain the status quo pending the completion of consultation and remains in effect throughout the consultation period and until the action agency has satisfied its obligations under section 7(a)(2).[298]

ESA-listed species that occur in the Izembek Refuge include the Alaska breeding population of Steller's eiders (*Polysticta stelleri*), the southwest Alaska distinct population segment of northern sea otter (*Enhydra lutris kenyoni*), and the western distinct population segment of Steller sea lion (*Eumetopias jubatus*). Spectacled eiders (*Somateria fischeri*), listed as threatened throughout their range since 1993, have also been spotted in the Refuge.[299] The sunflower sea star (*Pycnopodia helianthoides*), found in the Refuge's marine environments, has been proposed for listing by NMFS.[300]

One of the reasons for the Secretary's withdrawal of the Exchange Agreement was the lack of section 7 consultation.[301] Now, the DSEIS describes FWS's obligations to engage in section 7 consultation by stating that, "[i]f a proposed alternative involving land exchanges and new construction is selected and measures are taken to implement it, [ESA] Section 7 consultations would have to be conducted with [FWS and NMFS]… ."[302] Confusingly, the DSEIS also states that "[s]ection 7 consultation with the [FWS] is ongoing to address potential effects to threatened and endangered species."[303] The DSEIS also incorrectly concludes that the land exchange itself will not result in any effects to listed species.[304] Each of these statements are problematic. First, FWS's stated plan risks violating the ESA requirement that consultation conclude *before* the agency engages in any discretionary action that may affect listed species or their critical habitat.[305] FWS cannot use "post-hoc assessments of a done deal" to comply with section 7.[306] If FWS is taking the position that the land exchange is not an agency action that triggers consultation, it is wrong. Agency action is defined to include "*any* action authorized, funded, or carried out by such

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[296] 50 C.F.R. § 402.10(c),(d).

[297] 16 U.S.C. § 1536(d).

[298] *See Id.; Conner v. Buford*, 848 F.2d 1441, 1455 n.34 (9th Cir. 1988).

[299] DSEIS at 3-161.

[300] Proposed Rule To List the Sunflower Sea Star as Threatened Under the Endangered Species Act, 88 Fed. Reg. 16,212 (Mar. 16, 2023). The ESA mandates that each agency "shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed." 16 U.S.C. § 1536(a)(4); 50 C.F.R. § 402.10(a); *Am. Bird Conservancy v. FCC*, 516 F.3d 1027, 1034 (D.C. Cir. 2008) (quoting and citing same). The purpose of the conference is to identify and resolve potential conflicts "at an early stage in the planning process." 50 C.F.R. § 402.10(a); *Bd. of Cty. Comm'rs of Rocky Mt. Wild v. Bureau Land Mgmt*., 584 F. Supp. 3d 949, 974 (D. Colo. 2022).

[301] Secretary of the Interior, Decision Memorandum to Withdraw from the 2019 Land Exchange Agreement Between the Secretary of the Interior and King Cove Corporation, 3 (Mar. 14, 2023).

[302] DSEIS at 4-196.

[303] *Id*. at 4-560.

[304] *See, e.g.*, DSEIS at 4-560 (concluding that no effects on Steller's eiders have been identified that would result from the proposed land exchange, because no activities in the reasonably foreseeable future have been identified that would affect these species or their habitats within these parcels); DSEIS at 4-561 (same for Northern sea otter); DSEIS at 4-562 (same for Steller sea lion).

[305] *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 979, 1020 (9th Cir. 2011) (emphasis added).

[306] *Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1129 (9th Cir. 1998).

agency"[307] where the agency "makes an affirmative, discretionary decision about whether, or under what conditions, to allow private activity to proceed."[308] Both factors are met here, as a land exchange would be authorized and carried out by FWS and would be an affirmative, discretionary decision to transfer Refuge lands to private ownership, which would allow the private activity of building, operating, and maintaining a road to proceed.

Even if FWS is currently engaging in *intra*-agency consultation, the DSEIS gives no indication that FWS is consulting with NMFS, which it must do immediately. FWS must consult on all consequences of the land exchange, including the road and all of the harms to listed species and critical habitat that come with it, before moving forward with a land exchange. Section 7 of the ESA plainly considers these consequences of the land exchange to be "effects of the action."[309]

Moreover, FWS may not irreversibly or irretrievably commit resources which foreclose the consideration or implementation of reasonably prudent alternatives.[310] Committing to a land exchange without completing section 7 consultation, as FWS seems to be on the cusp of doing, would be a violation of section 7(d) of the ESA.[311]

Finally, engaging in section 7 consultation concurrently with the NEPA process will help FWS meet its obligations to take a "hard look" at environmental consequences and fully analyze effects to listed species or critical habitat as it develops, finalizes, and chooses among NEPA alternatives.[312] The concurrent process is also essential for public involvement; since there is no opportunity for public comment on the development of a biological assessment or biological opinion, it is only through the NEPA process that the public may comment on the impacts to listed species. If FWS plans to choose an alternative that affects listed species, the agency must engage in consultation and re-issue a new DSEIS for public notice and comment that provides sufficient public review and involvement.

At least four listed species that are currently listed or proposed for listing regularly occupy the Refuge, two have critical habitat in the Refuge, and a fifth has been seen in the Refuge. FWS, as the action agency, "has the ultimate duty to ensure that its actions are not likely to jeopardize listed species" or adversely modify critical habitat.[313] Unless FWS plans to choose the no action

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[307] 16 U.S.C. § 1536(a)(2) (emphasis added); *see also* 50 C.F.R. § 402.03 (stating that Section 7 applies "to all actions in which there is discretionary Federal involvement or control."); *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1141 (11th Cir. 2008) (holding that the Federal Emergency Management Agency's administration of the National Flood Insurance Program is an agency action requiring ESA consultation); *Karuk Tribe of Cal. v. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (en banc) (holding that the Forest Service's approval of Notices of Intent to conduct mining activities is an agency action requiring consultation).

[308] *Karuk Tribe*, 681 F. 3d at 1030.

[309] 50 C.F.R. § 402.02.

[310] *Id.,* at 1128 n.6 ("The district court also correctly concluded that if the [action agency] is not permitted to execute contracts that constitute an irreversible and irretrievable commitment of resources during the formal consultation, it also was not permitted to do so before it had initiated formal consultation.").

[311] 16 U.S.C. § 1536(d).

[312] *See, e.g., Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

[313] *Defenders of Wildlife v. Flowers*, 414 F.3d 1066, 1069-70 (9th Cir. 2005); *see also Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1127 (9th Cir. 1998) (finding agency failed to meet its "independent responsibilities under the ESA" when it failed to "request a formal consultation").

alternative, it must initiate the section 7 process now in order to comply with the requirements of the ESA and NEPA.[314]

B. Threatened Steller's Eiders

The Service listed the Alaska breeding population of Steller's eiders as threatened in 1997 and has designated critical habitat within the Izembek Refuge, including all waters of Izembek Lagoon.[315] During fall molt and staging, as well as staging during spring migration, large numbers of Steller's eiders frequent Izembek and Kinzarof lagoons, on either side of the isthmus where the land exchange and road are proposed.[316] Kinzarof Lagoon, in particular, is "an important high-density wintering habitat for Steller's eiders."[317] The expansive beds of eelgrass on the intertidal mudflats in both lagoons contain marine invertebrates, which Steller's eiders feed on.[318]

Steller's eiders fly over and occupy areas adjacent to land parcels proposed for exchange.[319] The Kinzarof Lagoon parcel, in particular, "abuts an important high-density wintering habitat for Steller's eiders in Kinzarof Lagoon and northern Cold Bay."[320] The DSEIS acknowledges that "[c]hronic disturbances could cause some displacement [of eiders] from areas of Izembek Lagoon and Kinzarof Lagoon closest to the road corridor."[321] Increased foot and all-terrain vehicle traffic resulting from the road is likely to lead to disturbance to the eider, particularly during flightless molting periods.[322] All-terrain vehicles in particular have already had significant impacts to tundra and aquatic vegetation, hydrology, and soils in the Refuge, as well as along the existing road corridor from King Cove to the marine terminal site.[323] Service enforcement of illegal all-terrain vehicle travel is poor because of diminished staffing.[324] These existing and expected perturbations will have a direct impact on adjacent marine habitats in Kinzarof and Izembek lagoons through alteration of freshwater flow and quality that, in turn, will compromise eelgrass beds important to foraging Steller's eiders.

Disturbed eiders would likely leave preferred feeding areas, expending energy and decreasing their ability to recover from molting.[325] Steller's eiders' tendency towards high site fidelity puts them at even higher risk, as scientists have found links between a species' refusal to abandon a deteriorating habitat area and declines in both overall population productivity and the fitness of individual members of that species.[326] The DSEIS also recognizes the "potential for Steller's eiders to suffer injury or mortality if they are struck by a vehicle or shot while flying across the isthmus between Izembek and Kinzarof lagoons."[327]

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[314] 16 U.S.C. § 1536(d); *Nat. Res. Def. Council*, 146 F.3d at 1128.
[315] DSEIS at 3-243.
[316] U.S. Fish and Wildlife Service, Status Assessment of the Alaska-breeding Population of Steller's Eiders, 67 (Mar. 2019).
[317] DSEIS at 4-559.
[318] Steller's Eiders Status Assessment at 24.
[319] DSEIS at 4-559.
[320] *Id*.
[321] DSEIS at 4-198.
[322] *Id*. at 4-199.
[323] *Id*. at 4-128.
[324] *See, e.g., Id*. at 4-342, 4-567, 4-571.
[325] *Id*. at 4-199.
[326] Merkle, J. et al., 2022. Site fidelity as a maladaptive behavior in the Anthropocene. *Front Ecol. Environ.*, pp. 187-194. DOI: https://doi.org/10.1002/fee.2456.
[327] DSEIS at 4-560.

The 2019 Species Status Assessment of the Alaska-breeding population of Steller's eiders recognizes several factors affecting the species' survival and reproductive capacity during the nonbreeding season.[328] One is the "availability of eelgrass bed communities," which influences the "quantity and quality of marine invertebrates."[329] Adequate invertebrate food sources, along with access to "deep, ice-free waters," affects body condition of Steller's eiders, which, in turn, affects adult, nest, duckling, immature, and adult eiders' survival, as well as breeding propensity and clutch size.[330] Damage to Izembek's eelgrass beds, and therefore the "availability and quality of food resources in the non-breeding areas" has serious negative implications for eiders' "ability to survive the winter and reproduce the following season."[331]

Even without the imposition of a road through the isthmus, populations of marine invertebrates in the Refuge are struggling due to the changing climate. A 2019 study of Izembek Lagoon showed significantly reduced biomass and mean size of benthic invertebrates when compared to a 1998 study.[332] The DSEIS notes that these reductions "may be related to higher sea temperatures and reduced winter sea ice cover of the lagoon," i.e., environmental effects due to climate change.[333] Unfortunately, climate projections show that the marine invertebrate food sources relied on by eiders will continue to decline in some areas, including Izembek Lagoon.[334]

The Status Assessment also identifies several stressors on the resiliency of eiders, including shooting, human disturbance, construction of new infrastructure, habitat loss, and collisions.[335] It also recognizes that the mortality of only a few breeding adults "could be detrimental to the resiliency" of the entire population.[336] The most recent Five-Year Review for Steller's eiders predicts that the current stressors faced by eiders "will continue, and possibly increase in magnitude due to the changing arctic and subarctic climate and expanding infrastructure and resource development within the range of Alaska-breeding Steller's eiders."[337]

A road through the isthmus, including its construction, operation, and maintenance, as well as the increased access to areas that eiders frequent, presents all of these threats. Harms to eelgrass beds from the road, described in the Eelgrass and Wetlands section, *infra*, increase the risk of habitat loss. This includes the addition of sediments that will occur from construction, operation, and maintenance of the road, which will impair water quality and therefore eelgrass productivity. The proposed gravel roadway will likely yield dust shadows on adjacent tundra vegetation and in waterways, especially during construction and maintenance. This can have serious, long-term impacts to terrestrial and aquatic systems.[338] The source gravel for construction

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[328] Steller's Eiders Status Assessment). at 25-27.

[329] *Id*. at 25-27.

[330] *Id*. at 27.

[331] *Id*. at 24.

[332] DSEIS at 3-246 (citing Maliguine A.M, 2024. Changes in benthic prey availability and quality suggest less favorable foraging conditions for threatened Steller's eiders (*polysticta stelleri*) molting at Izembek Lagoon, Alaska. Master's Thesis. University of Alaska Fairbanks.).

[333] *Id*.

[334] Steller's Eiders Status Assessment at 65.

[335] *Id*. at 49-55.

[336] *Id*. at 5, 53.

[337] U.S. Fish and Wildlife Service, Alaska-breeding population of Steller's eiders (*Polysticta stelleri*) 5-Year Review: Summary and Evaluation, 7 (Mar. 26, 2019).

[338] *See* Walker, D. A. and K. R. Everett, 1987. Road dust and its environmental impact on Alaskan taiga and tundra. *Arctic and Alpine Research*, pp.479-489. DOI: http://dx.doi.org/10.1080/00040851.1987.12002630; Myers-Smith, I. H. et al.,

may also contain toxic components that could negatively affect terrestrial and aquatic habitats. Because Steller's eiders use both Izembek and Kinzarof lagoons, on either side of the isthmus, they are at risk of vehicle collision if a road is installed.[339] Disturbance caused by the road is a lose-lose for eiders, as the road will "result in increased noise and human activity (such as hunting), which may affect movements of Steller's eiders across the isthmus between Kinzarof and Izembek Lagoons, or displace birds that may have use[d] those areas in the lagoons near the isthmus."[340] Steller's eiders' high degree of fidelity to specific lagoons may become maladaptive to individual and even population-level survival if eiders continue to return to the area despite increased disturbances and overall reduced fitness of the site.[341]

The 2021 Revised Recovery Plan for Steller's eiders identifies several actions "necessary to implement" the eiders recovery strategy and aimed at increasing the abundance of the species.[342] These actions include "[protecting] habitat in marine areas, specifically in important molting, wintering, and staging areas," e.g., Izembek and Kinzarof lagoons, and "[increasing] or maintain[ing] adult and juvenile survival rates," by discouraging use of lead shot and shooting of eiders generally and reducing collision risks in areas of high density.[343] The proposed action here would directly contravene these necessary recovery actions, and will negatively affect Steller's eiders and their critical habitat, including the eelgrass beds. The Service must complete the section 7 consultation process for the eider before deciding on a land exchange alternative.

C. Threatened Spectacled Eiders

Spectacled eiders (*Somateria fischeri*), listed as threatened throughout its range since 1993, have also been spotted in the Refuge.[344] The species is only mentioned once in the DSEIS, in Table 3.2-24 Bird List for Izembek National Wildlife Refuge.[345] The table notes that the spectacled eiders' presence in Izembek Refuge has been occasional in the winter, meaning it "has been recorded only a few times, but irregular observations are likely to occur over time."[346] Limited sightings may also be a result of more limited monitoring during the winter, rather than a paucity of presence. If a listed species may be present in an area, the ESA requires that the Service prepare a "biological assessment" to determine whether the listed species or habitat may be affected by the proposed action.[347] The Service must follow this process for spectacled eiders.

2006. Cumulative impacts on Alaskan arctic tundra of a quarter century of road dust. *Ecoscience*, pp.503-510. DOI: http://dx.doi.org/10.2980/1195-6860(2006)13[503:CIOAAT]2.0.CO;2; Walker D. A., et al., 2022. Cumulative impacts of a gravel road and climate change in an ice-wedge-polygon landscape, Prudhoe Bay, Alaska. *Arctic Science*, pp.1040–1066. DOI: https://doi.org/10.1139/as-2021-0014.

[339] *Id*. at 67.

[340] *Id.*; *see also* Safine, D.E. et al., 2020. Use of genetic mark-recapture to estimate breeding site fidelity and philopatry in a threatened sea duck population, Alaska-breeding Steller's eiders. *Endangered Species Research*, pp. 349-360. DOI: https://doi.org/10.3354/esr01026.

[341] Merkle et al. 2022; Steller's Eiders Status Assessment at 15 (citing Flint, P.L. et al, 2000. Annual survival and site fidelity of Steller's eiders molting along the Alaska Peninsula. *Journal of Wildlife Management*, pp.261-268. DOI: https://www.jstor.org/stable/3802998).

[342] U.S. Fish and Wildlife Service, Revised Recovery Plan for the Alaska-breeding Population of Steller's Eider (*Polysticta stelleri*), 19 (Dec. 2021).

[343] *Id*.

[344] DSEIS at 3-161.

[345] *Id*.

[346] *Id*. at 3-164.

[347] 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12.

D. Threatened Northern Sea Otter

Northern sea otters, which the Service listed as threatened in 2005, appear year-round in marine waters adjacent to the Izembek Refuge. Izembek and Kinzarof lagoons as well as Cold Bay are all designated as critical habitat for sea otters. The DSEIS recognizes that Kinzarof Lagoon is "an important high-density sea otter concentration area"[348] and that "[c]onstruction and operation of the southern alignment road could elicit disturbance responses from sea otters using northern Kinzarof Lagoon during the summer months."[349] Disturbance from operation and maintenance of the road is "possible," including noise generated by the road that could be heard by sea otters in north Kinzarof Lagoon.[350] Studies have also noted that Izembek Lagoon is an area of high sea otter concentration and that development in the Izembek area, including increased vessel traffic and construction resulting in increased noise and visual disturbances, may disturb otters and reduce valuable feeding time.[351] Sea otters have also been observed crossing the isthmus between Izembek and Kinzarof lagoons; if a road is built through the isthmus as proposed, sea otters will be vulnerable to being hit by passing vehicles.[352] Increased access to the area by subsistence hunters due to the road could also disturb sea otters, if waterfowl hunting occurs, and/or lead to an increased number of sea otters being harvested.[353]

Like many other species that rely on the Izembek Refuge, northern sea otters rely on the abundance of the eelgrass beds, including the benthic invertebrates that live in the eelgrass, for their survival.[354] As climate change causes environmental changes, the importance of the Izembek Refuge eelgrass beds has only grown, as other habitats that sea otters occupy, like kelp forests and seagrass meadows, are in global decline.[355] Warming oceans also promote harmful algae blooms as well as the spread and abundance of pathogens that may affect sea otters.[356] According to the DSEIS, "the effects of climate change on [northern sea otters] may be exacerbated by coastal development" which "can cause behavioral disturbances, habitat changes, or direct effects," like being struck by a vehicle.[357] The Service must engage in section 7 consultation for northern sea otters, as consequences of the proposed action will affect both the sea otter and its critical habitat.

E. Endangered Steller Sea Lion

NMFS classified the western distinct population segment of Steller sea lion as endangered in 1997, and its 20-nautical mile critical habitat buffer extends into the Izembek Lagoon. Steller sea lions are occasionally seen near Kinzarof Lagoon and Mortensens Lagoon.[358] At minimum, increased off-road vehicle use due to the existence of the road has the potential to disturb Steller

[348] DSEIS at 4-561.
[349] *Id*. at 4-201.
[350] *Id*.
[351] Cimberg, R. and D.P. Costa, 1985. North Aleutian shelf sea otters and their vulnerability to oil. *Oil Spill Conference Proceedings,* pp.211-217. DOI: https://doi.org/10.7901/2169-3358-1985-1-211.
[352] *Id*.
[353] *Id*.
[354] U.S. Fish and Wildlife Service, Species Status Assessment for the Southwest Distinct Population Segment of the Northern Sea Otter (*Enhydra lutris kenyoni*) Version 2.0, 28 (Dec. 2020).
[355] *Id*. at 28-29.
[356] *Id*. at 27.
[357] *Id*. at 107.
[358] DSEIS at 4-202.

sea lions that may be present in the area.[359] The Service must engage in section 7 consultation with NMFS for the endangered Steller sea lion before choosing to proceed with a land exchange.

F. Proposed Sunflower Sea Star

The sunflower sea star, found in marine environments in the project area, was proposed for listing as threatened by NMFS in March 2023.[360] The ESA mandates that each agency "shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed … or result in the destruction or adverse modification of [proposed] critical habitat."[361]

Sunflower sea stars are regularly found in eelgrass meadows.[362] Adult sunflower sea stars primarily feed on benthic and mobile epibenthic invertebrates, including sea urchins, snails, crab, sea cucumbers, and other sea stars.[363] As noted above a 2019 study of Izembek Lagoon showed significantly reduced biomass and mean size of benthic invertebrate when compared to a 1998 study.[364] The DSEIS notes that that these reductions "may be related to higher sea temperatures and reduced winter sea ice cover of the lagoon," i.e., environmental changes due to climate change.[365] Threatened Steller's eiders and northern sea otters also rely on benthic invertebrates, meaning all three listed species are competing in Izembek Lagoon for a contracting food source.[366]

Sunflower sea stars have also been decimated by a severe "onset of the coast-wide sea star wasting syndrome pandemic in 2013," [367] which led to a decline of more than 90 percent of the species throughout its range.[368] Negative impacts to the eelgrass beds in Izembek and Kinzarof lagoons, among other direct, indirect, and cumulative effects from the proposed land exchange and road, threaten the already fragile sunflower sea star population. Because the sunflower sea star is proposed for listing under the ESA, FWS must confer with NMFS before proceeding any further in its decision-making process.[369]

VIII. THE SERVICE'S NEPA ANALYSIS IS DEFICIENT

As groups noted in scoping comments, the Service's decision to analyze a new land exchange for a road by supplementing a stale EIS prepared for a different proposal pursuant to the long-expired OPLMA authority is fundamentally problematic. The result is a DSEIS that is

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[359] *Id*. at 4-563.

[360] Proposed Rule to List the Sunflower Sea Star as Threatened Under the Endangered Species Act, 88 Fed. Reg. 16,212 (Mar. 16, 2023).

[361] 16 U.S.C. § 1536(a)(4); 50 C.F.R. § 402.10(a); *Am. Bird Conservancy v. FCC*, 516 F.3d 1027, 1034 (D.C. Cir. 2008) (quoting and citing same). The purpose of the conference is to identify and resolve potential conflicts "at an early stage in the planning process." 50 C.F.R. § 402.10(a); *Bd. of Cty. Comm'rs of Rocky Mt. Wild v. Bureau Land Mgmt.*, 584 F. Supp. 3d 949, 974 (D. Colo. 2022).

[362] Proposed Rule to List the Sunflower Sea Star, 88 Fed. Reg. at 16,214.

[363] *Id*. at 16,217.

[364] DSEIS at 3-246 (citing Maliguine 2024).

[365] *Id*.

[366] *See, e.g.*, DSEIS 3-246 (describing reduction in benthic prey forage quality and abundance leading to a decrease in the number of Steller's eiders at Izembek), 3-248 (describing sea otters' diet of benthic marine invertebrates, such as abundant helmet crabs in Izembek Lagoon).

[367] Proposed Rule to List the Sunflower Sea Star at 16,217.

[368] *Id*. at 16,220.

[369] 50 C.F.R. § 402.10(a); 16 U.S.C. § 1536(a).

inadequate and confusing to the point that it fails to meet NEPA's goals of informed public comment and agency decision-making.[370]

The DSEIS ignores virtually all of those scoping comments. It does nothing to define the stated purpose and need for emergency medical transportation and fails to address how well a road, or non-road alternatives, would meet that need. It doesn't explain the components of the existing emergency medical services available or discuss the potential for improving them. The Service engaged no agencies or organizations with knowledge or expertise in any of these matters and presents no related reports or information of any kind. Instead, it just accepts that there are emergency medical transportation challenges without deeper examination and assumes that the proposed action would address them.

As detailed below, these failures result in an inadequate statement of purpose and need that is contorted to reflect the legal requirements for an apparently pre-ordained outcome – a land exchange - instead of plainly stating the purpose of the action. This in turn produces an overly narrow range of alternatives analyzed that impermissibly ignore viable transportation options. These foundational inadequacies infect the entire document and prevent the reader from understanding why the project is needed, from comparing alternative actions to meet the need, and from understanding the impacts of each alternative.

Additionally, the DSEIS fails to present sufficient information regarding road construction and use, including the cost of the road (as well as the cost of other transportation alternatives), responsibility for the permitting, construction, operation, and maintenance, anticipated legal and illegal use levels of the road, and the nature and efficacy of proposed mitigation and enforcement. It also fails to adequately analyze the impacts of road construction and use on numerous Refuge resources, including the eelgrass beds, the hundreds of thousands of migratory birds that use the area including ESA-listed Steller's eiders, marine mammals including ESA-listed northern sea otter and Steller sea lion, fish and other aquatic resources, caribou, bears, and subsistence resources and opportunities. It also fails to adequately analyze the proposed action in the context of climate change.

A. The Service's Supplementation of the 2013 EIS is Confusing and Inadequate

The Service launched this effort with a Notice of Intent to prepare a supplemental EIS on May 18, 2023, despite the absence of any proposal to evaluate.[371] (The DSEIS explains that the Service is now responding to an offer letter from KCC dated May 20, 2024, a full year later.) It stated its intent to supplement the 2013 OPLMA FEIS to consider a new potential land exchange that would trade a road corridor through Izembek Refuge, as well as other viable transportation alternatives.[372] In the Notice of Intent, the Service did not identify a specific proposal or authority to approve a land exchange for a road or other transportation option that the supplemental EIS would consider. The lack of any proposed action, absence of authority to act, and the choice to

[370] We note that the North Dakota District Court has vacated the 2024 Council on Environmental Quality (CEQ) NEPA regulations. *State of Iowa v. CEQ*, 24-cv-00089 (Feb. 3, 2025). The DSEIS relies on those vacated 2024 CEQ regulations. Considering this and other ongoing developments creating uncertainty around the CEQ regulations, the Service should pause work on this SEIS until it can ensure legal compliance with NEPA.

[371] 88 Fed. Reg. 31813 (May 18, 2023).

[372] *Id*.

supplement the outdated OPLMA EIS rather than initiate or respond to a viable proposal frustrated this process from the start.

The DSEIS provides very little in terms of supplementation. The basic facts needed to define detailed needs for enhanced emergency medical evacuation options—the specific stated need for this action—are completely ignored despite groups having raised numerous specific questions to be addressed in their scoping comments. There is no discussion of the range or frequency of medical conditions for which medical evacuations have been sought since 2013, and no details about those situations – for example, service provider; time and place patients were transported to/from; nature of emergency; type of transportation used; response and transport time; whether transport was successful etc.

There is also no attempt to assess to what degree a road or other transportation alternatives may have made any difference in any of these situations – especially whether any would have resulted in quicker response time and thus the potential for better outcomes in emergency situations. In short, the key factors and information that would tend to shed light on the dimensions of the emergency health travel challenges giving rise to this proposal, as well as the efficacy and impacts of potential actions to address them, are ignored.

Also unaddressed is why privatizing the road corridor is desired. The DSEIS identifies numerous problems related to the uncertain nature of road construction funding and responsibility for permitting, operations, management and enforcement – problems that are exacerbated by privatizing the road corridor land ownership. With the OPLMA exchange authority long-expired, there is now neither authority for the exchange nor any explanation why the Service would want to privatize the road corridor, should it wish to authorize a road.

Neither the proposed road nor non-road transportation alternatives are analyzed for technical or economic viability with any updated information. The DSEIS inexplicably fails to update life-cycle costs for any of the alternatives. It presents just one new alternative, Alternative 6, which is the only land exchange/road option analyzed that the Service says could be chosen since, according to the agency, Alternatives 2 and 3 are not proposed anymore.

The DSEIS is also confusing in many places because it appears to override some aspects of the 2013 analysis yet leaves previous language intact, leaving its meaning ambiguous. It describes a largely new project purpose and need, for example, but retains language from the Executive Summary of the 2013 EIS referencing other project purposes such as “quality of life and affordable transportation options;” this language is also included in KCC’s offer letter.[373] A broad, vague purpose to further “quality of life” and “affordable transportation options” stands in contrast to the updated language, which narrows this purpose more specifically to a transportation system for “health and safety purposes.” The Service should clarify that the purpose and need language related to road use for “quality of life, and affordable transportation options” is no longer applicable.

In all, the Service is considering a land exchange based on a legal authority that it cannot use and is relying on an inappropriate and woefully inadequate supplement to a stale EIS. A final

[373] DSEIS at ES-8; Ltr. From King Cove Corp. to Sara Boario, Regional Director, U.S. Fish and Wildlife Service at 2.

EIS would not support any agency decision because the Service lacks authority to approve or implement any of the alternatives. The Service should halt this ill-advised process.

B. The Service's Purpose and Need Statement is Inadequate

The Service's purpose and need statement is improper because it is vague, incongruous, and appears targeted to advance KCC's proposed exchange while otherwise dismissing viable alternatives to a land exchange to allow a road. The DSEIS fails to clearly and concisely describe its purpose in regard to evaluating KCC's proposed exchange. Instead, the DSEIS presents a confusing and selective summary of lengthy historical facts and partial summaries of applicable law and Izembek's purposes as part of its purpose and need. The Service should more clearly set out the purpose and need for this action and ensure that it is not limiting its consideration of alternatives based on an improperly narrow and ill-defined purpose and need statement.

As an initial matter, the Service has not identified a valid legal authority to support the proposed action. When fashioning the purpose and need for a project, an agency must consider the statutory context of the proposed action.[374] Agencies "should always consider the views of Congress, expressed, to the extent the agency can determine them, in the agency's statutory authorization to act."[375] As discussed above, the proposed land exchange for a road through Izembek does not further ANILCA or Izembek's purposes, the mission of the Refuge System, or the Wilderness Act, and, therefore, is not authorized pursuant to Section 1302(h) of ANILCA. The Service's purpose and need statement is flawed because the proposed action cannot be authorized by Section 1302(h). Because purpose and need statements are shaped by the statutory authority that the agency is purporting to act under, until the Service identifies a valid legal authority, its purpose and need statement will be flawed.[376]

Even assuming the Service could proceed under the legal authority found in Section 1302(h) (it cannot, as explained above), its current purpose and need statement is too ill-defined to proceed with a proper NEPA analysis. The stated purposes of the proposed action are "to provide a safe, reliable, year-round transportation system for health and safety purposes, with particular emphasis on emergency medical evacuations between King Cove and Cold Bay, Alaska, and increase the overall conservation value of lands preserved in the National Wildlife Refuge System and also maintain or increase the opportunity for subsistence uses by rural Alaskans."[377] The "need" for the action is never clearly identified; that section implies a need for improved access between the two communities but fails to define that need. There is no mention of any need to increase subsistence opportunities nor to divest or acquire any lands.[378]

The central purpose of the DSEIS is to evaluate "a transportation system for health and safety purposes." The second and third components of the Service's stated purpose reference its characterization of the legal requirements for land exchanges (i.e., they must further conservation and subsistence), but are not themselves purposes of the project. The DSEIS purpose and need

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[374] *See Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1085 (9th Cir. 2013); *Nat'l Parks & Conservation Ass'n*, 606 F.3d 1058, 1070 (9th Cir. 2010).

[375] Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D. D.C. 1991).

[376] 40 C.F.R. § 1502.4(a)(2022) ("Agencies shall define the proposal that is the subject of an environmental impact statement based on the statutory authorities for the proposed action.").

[377] DSEIS at 1-8.

[378] DSEIS at 1-8 – 1-9.

statement is confusing and poorly constructed and, as discussed below, artificially narrows the Service's proposed alternatives.

On the one hand, the agency has in part correctly differentiated and expanded the scope of its purpose and need statement from the narrow, road-focused statement found in the 2013 EIS. As the agency correctly acknowledges, the legislative authority granted under OPLMA to consider and execute a land exchange for a road from King Cove to Cold Bay expired on March 30, 2016.[379] Thus, the Service has correctly updated its purpose and need statement to encompass not necessarily a road but more inclusively, a "transportation system for health and safety purposes, with particular emphasis on emergency medical evacuations."

On the other hand, the second and third components of the purpose and need serve to confuse the statement and narrow the alternatives analysis. There is no identified "need" to acquire lands to increase the overall conservation value of refuge lands. Even if there were, a proposal to divest high-value conservation lands from the Refuge so that a private corporation can build a road through them would hardly be a reasonable means of fulfilling this need, as discussed above. Similarly, there is no identified "need" to maintain or improve subsistence opportunities for anyone. Indeed, as noted elsewhere, numerous Tribes have resolutions opposing the exchange and road because they would harm subsistence activities. In other words, the Service is putting forward a purpose and need statement that is narrowly targeted to meet KCC's proposal — a land exchange to allow a road through the Izembek Refuge. The Service should delete the second and third components from the purpose and need statement because they aren't the purpose of the action.

Additionally, since the purpose of the action is to improve transportation to an airport (with an emphasis on medical transportation), there is no "need" for a land exchange at all, even if that option were legally available. Marine transportation alternatives exist that would require neither a land exchange nor a road. And even if a road were considered a reasonable option, privatizing the road corridor only complicates and undermines efforts to ensure that the road be constructed and operated consistently with refuge laws and regulations, and to minimize impacts to refuge resources.

The Service's failure to properly define the purpose and need for the proposed exchange precludes consideration of a reasonable range of alternatives, as described below. An EIS must "rigorously explore and objectively evaluate reasonable alternatives to the action."[380] The alternatives considered should not be entirely driven by KCC's proposal. The Service must use its independent judgment to define the purpose and need for the project in such a way that the agency is not improperly narrowing its consideration of alternatives. It must fully consider non-road alternatives for a transportation system.[381] In short, the Service's purpose and need statement is flawed and must be revised.

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[379] DSEIS at 1-1.

[380] 40 C.F.R. § 1502.14(a)(2022); 42 U.S.C. § 4332(2)(C)(iii), (F); 43 C.F.R. §§ 46.415(b), 46.420(b), (c); *Western Watershed Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013).

[381] *See Friends of the Earth v. Hintz*, 800 F.2d 822, 835–36 (9th Cir. 1986) (recognizing the agency must rely on information provided by the applicant but must not do so "uncritically").

C. The Service Fails to Evaluate a Reasonable Range of Alternatives

NEPA requires that an EIS include "alternatives to the proposed action."[382] The purpose of the alternatives requirement is to analyze a variety of impacts and present a range of choices to the decision maker and inform the public.[383] Accordingly, the EIS must include an evaluation a "range of alternatives."[384] The alternatives considered should address "significant issues."[385] Consistent with NEPA's basic policy objective to protect the environment, this includes more environmentally protective alternatives.[386] "The existence of a viable but unexamined alternative renders an [EIS] inadequate."[387]

Many transportation alternatives between King Cove and Cold Bay have been evaluated over the years. The 2013 FEIS, however, did not include a robust consideration of non-road alternatives because the OPLMA primarily directed the Secretary to determine whether it would be in the public interest to approve a land exchange to allow for a road as identified in the statute. The only non-road transportation alternatives considered in detail were the hovercraft from the Northeast Corner (Alternative 4) and a ferry from Lenard Harbor (Alternative 5). Part of Secretary Jewell's rationale for not approving the land exchange for a road under OPLMA was that viable and less impactful marine transportation alternatives exist.

Other EISs and studies have also evaluated non-road alternatives for a transportation system between the two communities, including the 2003 EIS prepared by the ACOE and the Service pursuant to the King Cove Health and Safety Act of 1999,[388] and a 2015 ACOE assessment of feasible non-road options, which included additional analysis of a ferry option, as well as two air options: a new airport in King Cove and a helicopter.[389]

However, the DSEIS ignores these reasonable alternatives and only considers one additional alternative from those considered in 2013: Alternative 6, the proposed land exchange. This is insufficient to meet NEPA's mandate to consider a reasonable range of alternatives. The Service should revise the DSEIS to include analysis of additional non-road alternatives, all of which have been demonstrated to be viable and better meet the Service's mandates to protect Izembek's conservation purposes and subsistence uses and resources.

Regarding the ferry alternative, it is unclear why Alternative 5 is not more significantly updated despite additional developments since the 2013 ROD. This must be fixed. Despite the fact that the road now extends to the Northeast Terminal and there is marine infrastructure there,[390] the

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[382] 42 U.S.C. § 4332(2)(C)(iii); 43 C.F.R. § 46.415(a)(6), (b).
[383] *State of Cal. v. Block*, 690 F.2d 753 (9th Cir. 1982) (citation omitted).
[384] 43 C.F.R. § 46.415(b).
[385] *Id*.
[386] *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1121–22 (9th Cir. 2002) (citing cases), *abrogated on other grounds by The Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1178–80 (9th Cir. 2011) (en banc).
[387] *Mont. Wilderness Ass'n v. Connell*, 725 F.3d 988, 1004 (9th Cir. 2013) (quotations and citation omitted).
[388] U.S. Army Corps of Engineers, Alaska District, Draft Environmental Impact Statement, King Cove Access Project. July 2003.
[389] U.S. Army Corps of Engineers, Alaska District, King Cove-Cold Bay: Assessment of Non-Road Alternatives. June 18, 2015 (ACOE 2015).
[390] DSEIS at 2-25.

ferry alternative still originates in Lenard Harbor. Because the Northeast Terminal is more toward the head of the bay, it is better protected from wind and waves than a more southern marine route — which was the reason for spending some $50 million of taxpayer money on a 17-mile road from King Cove to the Northeast Terminal to allow for use by a hovercraft. A ferry route from the Northeast Terminal is also consistent with the Aleutians East Borough's commitment made to provide a marine route from the Northeast Terminal if the OPLMA land exchange was not approved.[391] Based on that commitment, the ACOE allowed AEB to complete the road to the Northeast Terminal even though it had removed the hovercraft from service.[392] That marine route was also included in the 2015 ACOE study.[393]

The ACOE 2015 study found that a passenger ferry would be 99.9% reliable — the most reliable transportation option identified to date.[394] The U.S. Department of Transportation also recently announced $43.3 million in federal grant funding to upgrade the docking facilities in Cold Bay, specifically in part to address the need for emergency medical transportation. This money was provided by the Infrastructure Investment and Jobs Act. The DSEIS, ACOE study, and recent funding for improvements to the Cold Bay dock show that this is a viable and reliable option. The final SEIS must include a Northeast Terminal ferry alternative and to more accurately describe its components, reliability, and viability.

Additionally, no air alternatives are included in the SEIS despite the ACOE analysis showing that a new airport for King Cove is a viable option with 94.9% reliability.[395] The benefit of a new airport alternative is that it would more directly achieve the objective sought, which is air access from King Cove to medical services in Anchorage, avoiding the time and difficulty of traveling to Cold Bay entirely. One airport option is estimated to cost less than a ferry and both are overall similar in costs to the road costs estimated in the 2013 FEIS.[396] While the prior EIS dismissed an air option from analysis, that dismissed alternative involved upgrades to the existing King Cove airport, not the construction of a new airport.[397] The DSEIS is therefore incorrect that there is no new data or information about the dismissal of air alternatives.[398] For due diligence, the Service should consider the construction of a new airport for King Cove as a viable alternative to meet the need for a transportation system.

As Groups also pointed out in their scoping comments, ACOE also evaluated helicopter options in the 2003 EIS and the 2015 study. The DSEIS continues to dismiss this option because "other alternatives better address the project purpose and need."[399] However, the core purpose of a

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[391] *See* 2013 FEIS App'x I at 8.
[392] *See* 2013 FEIS App'x I at 9.
[393] ACOE 2015 at 21.
[394] ACOE 2015 at ii.
[395] ACOE 2015 at ii.
[396] ACOE 2015 at ii.
[397] DSEIS at 2-18; ACOE 2015 at ii. As was commented on during public testimony, the existing King Cove airport is currently being upgraded. There is no information about this in the DSEIS. But Interior should explain what those upgrades are and analyze whether an alternative that utilizes air options from the existing airport would meet the transportation objectives of the community.
[398] DSEIS at 2-19.
[399] DSEIS at 2-19.

properly defined purpose and need is to "provide a safe, reliable, year-round transportation system for health and safety purposes, with a particular emphasis on emergency medical evacuations, between King Cove and Cold Bay, Alaska."[400] This alternative should also be reconsidered.

Concerning road alternatives, it is unclear why the Service has not included an additional road alternative that is similar to Alternative 2 but executed under the ANILCA land exchange authority that the Service is otherwise relying on for the proposed action. Although the OPLMA land-exchange authority has expired and the State of Alaska lands are no longer proposed for exchange, the Service should evaluate an alternative that accounts for these changes. To be clear, Groups do not believe that that authority can be relied on to execute a land exchange for a road for the reasons explained. But because the agency's position is that it can use this provision of ANILCA to execute an exchange for a road, the Service must consider a more protective exchange as an alternative in the SEIS.

Such an alternative could include: (1) only 203 acres leaving federal ownership, (2) not allowing gravel mining along the road corridor, and particularly not within the Izembek Wilderness, (3) require additional KCC lands to come into federal ownership with the Izembek Refuge, i.e., the full 2,604 acre Kinzarof Lagoon parcel instead of the 1,739 acres included in Alternative 6, (4) require KCC to relinquish its selection to 5,430 acres within the Izembek Wilderness and substitute a parcel within the Alaska Peninsula National Wildlife Refuge to satisfy KCC's selections, and (5) include the 29,459 acres of surface estate of the Mortensens Lagoon and Old Man's Lagoon/Thinpoint Lake parcels coming into the federal estate. The Service could also seek to include the Aleut Corporation in the negotiations to seek to obtain the subsurface rights to Mortensens Lagoon and Old Man's Lagoon/Thinpoint Lake parcels to avoid the split estate issues discussed above. The Service's failure to consider an exchange alternative that is more protective renders the SEIS insufficient under NEPA.

Regarding Alternative 6, the DSEIS states that it assumes that the State of Alaska or the Aleutians East Borough will oversee road planning, permitting, construction, operations, and maintenance.[401] This assumption is questionable, and underscores a problem with this entire proposal and analysis: the process for a road though Izembek should have been initiated by an applicant willing and able to apply for all permits, build, and maintain a road.[402] The Service must eliminate the assumption absent a concrete commitment from the State or Borough.

Also, the DSEIS does not state what entity would pay for road construction. Unlike prior years, a road through Izembek is not in the State of Alaska's 2024–2027 State Transportation Improvement Plan. The DSEIS should clarify who would pay for road construction.

The DSEIS also assumes that the costs for the road under Alternative 6 would be similar in costs to Alternative 2 because the road design would be similar.[403] But Alternative 6 involves

[400] DSEIS at 1-8. As explained above, the purpose and need's other components unnecessarily restrict the alternatives.
[401] DSEIS at 2-65, 2-68.
[402] 16 U.S.C. § 3164(c).
[403] DSEIS at 2-68.

significantly more fill for construction than Alternative 2.[404] It is unclear how this has been factored into the estimated costs of Alternative 6. More generally regarding the costs of the alternatives, the Service has not updated any of the projected costs for any of the alternatives (including failing to factor in federal funding for Cold Bay dock improvements), instead merely assuming that the costs for all of the alternatives will have increased.[405] To the extent that the Service considered costs in its alternatives development, it must update those costs to have a rational basis for any decision regarding the inclusion or exclusion of alternatives from analysis (explored more fully in the following subsection).[406] Additionally, it is likely that the Service will consider costs in making its decision. But to do so, the Service must have updated cost analysis for all of the alternatives; otherwise, the reliance on cost in supporting a final decision would be arbitrary.

In short, there are reasonable alternatives that the agency has failed to analyze and previously analyzed alternatives have not been sufficiently updated. These flaws with the alternatives analysis must be addressed.

Finally, the Service has identified Alternative 6, the land exchange for a road, as its preferred alternative.[407] As the DSEIS describes, the identification of a preferred alternative is one that the agency believes meets its statutory and management mandates, considering relevant factors.[408] As described throughout this comment letter, Alternative 6, or any exchange for a road, does not meet the Service's statutory mandates legally or factually; it is directly contrary to them. Additionally, the Service has rejected a land exchange for a road because it would violate the Service's mandates and damage Izembek's resources and consistently explained that a road through Izembek would harm Izembek's resources and conflict with mandates to protect those same resources, going back decades to the 1980s. the Service's change in position is extraordinary and unexplained, and in violation of the Administrative Procedure Act.

D. The Service's Road Cost, Use and Reliability Analysis is Flawed

This proposed exchange would allow development of 13.3 miles of new road through the Izembek isthmus, requiring 71 drainage structures, one 200-foot bridge, 7 culverts or small bridges, 63 cross drainage culverts, and 15 material sites, nearly all of which will be on lands that are currently wilderness.[409] Exchanging these lands and constructing the road as proposed will result in permanent and irrevocable disturbance and diminishment of Izembek's world-renowned and ecologically unique fish, wildlife, habitat, conservation, and wilderness resources. Despite the significant impacts of this proposed action, the analysis contained in the DSEIS, as described above, completely fails to provide accurate information regarding road cost, use, and reliability.

The true cost and funding source for the road remains unclear. The Service fails to provide an updated cost analysis for KCC's proposed exchange and road construction, Alternative 6. It also

[404] DSEIS at 2-32.
[405] DSEIS at 2-68.
[406] DSEIS at 2-4.
[407] DSEIS at 2-62.
[408] DSEIS at 2-70.
[409] DSEIS at 2-64.

fails to provide an updated cost analysis for Alternatives 1–5.[410] The DSEIS admits "[c]ost estimates for the 2013 alternatives have not been updated for [the 2024] SEIS *but will be higher* due to inflation of material, transportation, and labor costs."[411] Indeed, the DSEIS dramatically underestimates the actual cost of construction of the road, as proposed in Alternative 6.[412] The DSEIS estimates construction of the road will cost $30,000,000, and that maintenance and operations will cost $33,500,000 over a fifty-year period, resulting in a total cost of $63,500,000. As set forth in the attached report and updated cost analysis from Alaska-licensed Professional Engineer Lois Epstein, at a minimum, the road proposed in Alternative 6 will cost $127,000,000 to build and $48,750,000 to maintain and operate over a fifty-year period, resulting in a total cost of $175,750,000 for 50 years of operations.[413] However, as explained in the report, this updated analysis likely underestimates actual road costs because: the National Highway Construction Cost Index (used to update cost estimates) does not account for state-specific wages, and Alaska has 51% higher Highway, Street, and Bridge average weekly construction wages; estimates do not include importing gravel, which is likely necessary and will result in increased costs; fisheries data not yet collected may show the need for additional costly bridges and/or culverts; costs will increase with inflation and the increased tariffs proposed by the current administration.[414] This analysis is also based on prior estimates, which Groups have raised significant criticisms of over the years.

The DSEIS also assumes project funding for construction will come from the State of Alaska or the Aleutians East Borough. But the 2024–2027 Statewide Transportation Improvement Plan does not include funding for a road from King Cove to Cold Bay.[415] And although it is "anticipated" that the State of Alaska or Aleutians East Borough will oversee the maintenance and operation of the road, the DSEIS fails to identify any further details regarding this assumption.[416]

The Service fails to provide sufficient information to assess the scope of the road's projected use, including the proposed mitigation and enforcement mechanisms, rendering its impacts analysis incomplete and flawed. For example, the DSEIS fails to project and analyze the potential volume of road traffic, including the number of anticipated subsistence users, as well as both legal and illegal users. The DSEIS also notes the City of Cold Bay does not currently have a police force or Village Public Safety Officer or firefighting equipment and "while no new personnel are anticipated to be hired to monitor impacts or provide law enforcement, additional demands on these resources are anticipated."[417] The DSEIS also explains that the Service itself lacks enforcement personnel in the region.[418] To properly evaluate the direct, indirect, and cumulative impacts for the proposed action, the Service needs to provide accurate information about the

[410] DSEIS at 2-27, 2-43.
[411] DSEIS at 2-43 (emphasis added).
[412] DSEIS at 2-27, 2-43.
[413] Lois Epstein, Estimating Izembek Road Construction and Maintenance/Operations Costs at 2 (Jan. 2025).
[414] Lois Epstein, Estimating Izembek Road Construction and Maintenance/Operations Costs at 2-3 (Jan. 2025).
[415] State of Alaska, Department of Transportation and Public Facilities, 2024–2027 Statewide Transportation Improvement Plan, Amend. 1, Vol. 1 (2024), https://dot.alaska.gov/stip/amd1/STIP%2024-27%20Amendment%201%20Volume-1.pdf.
[416] DSEIS at 1-6, 2-42.
[417] DSEIS at 2-81; *see* DSEIS at 3-360.
[418] DSEIS at 3-360.

projected use of the road for all expected purposes: transportation needs for health and safety purposes and the number of subsistence users actively engaged in subsistence uses. The Service must also project how many unlawful users may use the road, including sport hunters, people transiting the road for any non-medical reasons, and the expansion of the road to allow for commercial uses. This information is critically important because the agency assumes that the proposed mitigation measures to enforce use restrictions (signage and a guard rail) will be ineffective, as explained below. Without accurate information about projected road use, both legal and illegal, including the ability of various government entities to be able to enforce any use restrictions, the DSEIS's analysis of road use and resulting impacts analysis cannot stand.

In addition, the DSEIS must reevaluate the reliability of a road traversing thirty-five miles from King Cove to Cold Bay, across a remote region prone to notoriously extreme weather events. The DSEIS acknowledges that reliability is "challenging to estimate" and provides that "estimates were generated as assumptions, and rely on personal communications, the 2003 EIS, and incomplete public records"[419] Notably, prior reliability estimates and analyses for the Izembek road are unexplained and unsupported.[420] For example, the 2013 ROD estimates a road through Izembek would only be impassable "during the worst weather (estimated 2 percent of the time)."[421] This percentage is likely much higher given that "the western Alaska Peninsula is considered one of the cloudiest regions in the Northern Hemisphere;" "dense fog can persist for many days … frequently restricting visibility to less than one mile;" "snowfalls in the area are heavy and wet;" "the high frequency of storms crossing the northern Pacific Ocean and the Bering Sea are dominant factor in the weather at Cold Bay, commonly producing gusty surface winds in excess of 50 knots;" King Cove is "famous" for intense williwaws "of gale force and higher .. usually [] associated with heavy snow squalls."[422] It is highly speculative that the road can be adequately maintained for use given these climatic conditions – regardless of the funding and enforcement challenges already noted above. FWS must provide a clear basis for any reliability estimate, and it must be supported by the record; the agency cannot rely on an unsupported or unexplained estimate.

Moreover, the same adverse weather events that may prevent an aircraft from landing in King Cove will likely also prevent safe driving from King Cove to Cold Bay. Numerous individuals have provided firsthand accounts of these challenges over the years. Additionally, the DSEIS does not address the reliability of flights to reach and depart Cold Bay.[423] Flights into Cold Bay airport are not infrequently unable to land. This issue must be evaluated, as underlaying the Service's analysis is the assumption that reaching Cold Bay means that someone could then fly to Anchorage for medical care. The DSEIS should also quantify the success rate of flight departures to and from Cold Bay across the year. It is likely that someone experiencing a medical emergency in King Cove in terrible weather would not reasonably attempt road travel, or could try a harrowing drive to Cold Bay and then not be able to fly to Anchorage. The clinic in Cold Bay is less equipped to handle medical needs than the clinic in King Cove and is only staffed and open on rotating two-week cycles. The Service should consider all of these factors when determining whether a road is

[419] DSEIS at 3-344; 2-89.
[420] 2003 FEIS at FES-20; 2013 ROD at 11.
[421] 2013 ROD at 11.
[422] 2003 DEIS at 184-85.
[423] 2003 DEIS at 289-90.

actually reliable and able to meet the DSEIS's stated purpose to provide "a transportation system for health and safety purposes."

Given these substantial information gaps regarding projected road cost, use, and reliability, the DSEIS fails to provide a complete and legally sufficient NEPA analysis for the resources evaluated.

E. The Service's Analysis of Resources is Flawed

Congress passed NEPA "to protect the environment by requiring that federal agencies carefully weigh environmental considerations and consider potential alternatives to the proposed action before the government launches any major federal action."[424] To accomplish this, "NEPA imposes procedural requirements designed to force agencies to take a 'hard look' at environmental consequences."[425] Among other things, this hard look requires an analysis of "[a]ny adverse effects that cannot be avoided should the proposal be implemented," and "the relationship between short-term uses of the human environment and the maintenance and enhancement of long-term productivity."[426] It must analyze any irretrievable commitment of resources as well as any conflicts between proposed action and objectives of federal land use plans.[427]

Direct effects, which are "caused by the action and occur at the same time and place";[428] indirect effects, which are "caused by the action and later in time or father removed in distance, but reasonably foreseeable";[429] and cumulative effects, which "result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions"[430] must all be fully analyzed to satisfy the requirements of NEPA.

1. Impacts to Eelgrass, Wetlands, and Plant Communities

The attached memorandum from Jason Stutes, PhD, Senior Marine Ecologist, which is incorporated into this comment letter, provides additional background, support, and analysis for this section.

The DSEIS recognizes that eelgrass is a foundational species in the nearshore habitats of Cold Bay and Izembek and Kinzarof lagoons, but fails to adequately analyze the effects of the proposed action to eelgrass, wetlands, and plant communities in the Refuge.[431] The extensive eelgrass beds serve as vital nursery and foraging grounds for numerous marine species, supporting a diverse ecosystem, which means that negative effects to eelgrass will impact almost every other species that spends time in the Refuge.[432] For example, the eelgrass beds of Izembek Lagoon and Kinzarof Lagoon are crucial for migratory waterfowl, with Izembek Lagoon providing food for an estimated 150,000 ducks and 300,000 geese during fall migration.[433] In addition to water birds,

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[424] *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005).
[425] *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1300 (9th Cir. 2003).
[426] 40 C.F.R. §§ 1502.16(a)(2), (3) (2022).
[427] 40 C.F.R. §§ 1502.16(a)(4), (5) (2022). As explained in sections II and III, *supra,* the proposed action would conflict with the Izembek CCP.
[428] 40 C.F.R. § 1508.1(g)(1) (2022).
[429] 40 C.F.R. § 1508.1(g)(2)(2022).
[430] 40 C.F.R. § 1508.1(g)(3) (2022).
[431] DSEIS at 3-59.
[432] *Id.*
[433] *Id.* at 4-134.

raptors, various marine mammals, and fish all rely on the eelgrass beds as valuable refuge, foraging, and/or spawning habitat.

Eelgrass is also an important climate change mitigation tool, providing an effective buffer against one of the most catastrophic climate change impacts: ocean acidification.[434] Ocean acidification occurs when atmospheric carbon dioxide is absorbed by the ocean, lowering the water's pH. As the ocean becomes less alkaline, entire ecosystems are severely threatened, particularly due to the impacts to the calcium-based exoskeletons of marine invertebrates.[435] Recent studies have shown that eelgrass provides a powerful buffer against this phenomenon, absorbing carbon three times more efficiently than terrestrial ecosystems and storing it in the sediment for millennia.[436] Eelgrass has been shown to locally alleviate low-pH conditions for up to three weeks, making eelgrass lagoons like Izembek's increasingly vital refuges for countless organisms.[437]

Eelgrass also absorbs large quantities of atmospheric carbon dioxide and mitigates climate change more generally, much like rainforests.[438] As such, Izembek's massive eelgrass lagoons are an important carbon sink. Eelgrass also provides crucial structural support along the coast, protecting Izembek from the severe and worsening climate impacts of sea level rise, coastal erosion, and increased flooding.[439] Accordingly, any activities that threaten Izembek's eelgrass beds also threaten the entire ecosystem and its resiliency in the face of a changing climate.

As previously mentioned, the DSEIS recognizes the high value of the wetlands located in Alternative 6's proposed road corridor:[440]

> These wetlands are considered to have very high value for their hydrologic, biogeochemical, and habitat functions due to their strategic location in proximity to both Izembek and Kinzarof lagoons. These wetlands likely support different, and more water dependent, wildlife than wetlands further removed from Izembek and Kinzarof lagoons. Some waterfowl that use the lagoons also feed on land, and the location of these wetlands in relation to the lagoons might make them more attractive to birds. The wetland vegetation provides some cover and contributes detritus and invertebrates to the streams identified as Essential Fish Habitat. The designation of this area as a Wetland of International Importance by the Ramsar Convention also supports their recognition as very high value wetlands.[441]

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[434] Ricart, A.M. et al., 2021. Coast-wide evidence of low pH amelioration by seagrass ecosystems. *Global Change Biology*, pp.2580-2591. DOI: https://doi.org/10.1111/gcb.15594.

[435] *See, e.g.*, Kroeker, K. et al, 2013. Impacts of ocean acidification on marine organisms: quantifying sensitivities and interaction with warming. *Global Change Biology*, pp.1884-1896. DOI: https://doi.org/10.1111/gcb.12179; Byrne, M., and Fitzer S., 2019. The impact of environmental acidification on the microstructure and mechanical integrity of marine invertebrate skeletons. *Conservation Physiology*. DOI: https://doi.org/10.1093/conphys/coz062.

[436] Ricart et al. 2021.

[437] *Id*.

[438] Krause-Jensen, D. et al., 2020. Imprint of Climate Change on Pan-Arctic Marine Vegetation. *Frontiers Marine Science*. DOI: https://doi.org/10.3389/fmars.2020.617324.

[439] Forrester, J. et al., 2024. Seagrass as a nature-based solution for coastal protection. *Ecological Engineering*. DOI: https://doi.org/10.1016/j.ecoleng.2024.107316.

[440] DSEIS at 3-114-5.

[441] *Id*. at 3-119.

The DSEIS also acknowledges some potential outcomes that are likely to occur as a result of the road through the isthmus:

> Soil erosion within or adjacent to streams and wetlands would result in the transport of sediment potentially impacting water quality, coastal wetlands, and eelgrass beds. Once established, all-terrain vehicle trails crossing streams and wetlands commonly become increasingly wider with deeper ruts, destroying additional vegetative cover and causing additional soil erosion, with possible habitat fragmentation and increasing habitat edge effects. Tundra and wetland habitats are slow to recover from habitat degradation caused by mechanized vehicles. Tracks and old trails created during World War II are still visible in the Cold Bay area more than 60 years later.[442]

Despite recognizing the essential roles of eelgrass and wetlands to a functioning Refuge ecosystem, the DSEIS fails to take a hard look at the effects of the proposed action on the Refuge's wetlands and eelgrass meadows. Simply providing information like the above fails to meet NEPA's hard look requirement because it does not analyze the *effects* of increased sediment on eelgrass and wetlands; simply stating that transport of sediment will occur is not enough. In particular, the final SEIS must analyze the effects on the lagoon systems, including wetlands and eelgrass, of the addition of sediments that will occur from the construction, operation, and maintenance of the road, including the proposed gravel mining, the annual accumulation of the relocation of sediments into surrounding lagoons that have eroded off of the road, and the additional all-terrain vehicle traffic that will occur if the road is built. This analysis must include the effects on eelgrass caused by impaired water quality and water clarity due to increased sediment—as this scenario may limit available light and therefore impair eelgrass productivity.[443] This impairment could ultimately lead to severe damage to the eelgrass meadows, particularly if foraging continues while the eelgrass is in an impaired state. Once eelgrass has been lost, it will be very difficult to get back.[444] The DSEIS must analyze the effects of dust shadows from the road, which will impact adjacent tundra vegetation and waterways, especially during construction and maintenance; dust shadows can have serious, long-term impacts to terrestrial and aquatic systems.[445]

Moreover, the DSEIS fails to analyze the indirect and cumulative effects to not just eelgrass and wetlands, but to the Refuge species that rely on them. Nor does the DSEIS analyze the effects of the increased sediment on eelgrass cumulatively with the ongoing effects of climate change, including the cumulative effects of the increased sediment from construction, operation, and maintenance of the road reducing the carbon storage or ocean acidification capabilities of Izembek's eelgrass beds. The above-described scenario would be catastrophic for the Refuge and all species that rely on the ecosystem services it provides, including multiple ESA-listed species, thousands of waterbird species, and ultimately human beings. It would also be a huge loss for the

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[442] *Id*. at 4-128.

[443] Thom, R.M., et al, 2008. Light requirements for growth and survival of eelgrass (Zostera marina L.) in Pacific Northwest (USA) estuaries. *Estuaries and Coasts*, pp.969-980. DOI: http://dx.doi.org/10.1007/s12237-008-9082-3.

[444] Carr, J. A., et al., 2012. Modeling the effects of climate change on eelgrass stability and resilience: future scenarios and leading indicators of collapse. *Marine Ecology Progress Series*, pp.289–301. DOI: http://dx.doi.org/10.3354/meps09556.

[445] *See* Walker, D. A. and K. R. Everett, 1987. Road dust and its environmental impact on Alaskan taiga and tundra. *Arctic and Alpine Research*, pp.479-489. DOI: http://dx.doi.org/10.1080/00040851.1987.12002630; Myers-Smith, I. H. et al., 2006. Cumulative impacts on Alaskan arctic tundra of a quarter century of road dust. *Ecoscience*, pp.503-510. DOI: http://dx.doi.org/10.2980/1195-6860(2006)13[503:CIOAAT]2.0.CO;2; Walker D. A., et al., 2022. Cumulative impacts of a gravel road and climate change in an ice-wedge-polygon landscape, Prudhoe Bay, Alaska. *Arctic Science*, pp.1040–1066. DOI: https://doi.org/10.1139/as-2021-0014.

global community, as lost eelgrass means lost carbon storage and less mitigation of the threats of climate change.

As explained in Dr. Stutes' memorandum, the DSEIS also fails to fully analyze the quality of the habitat, including wetlands, that will be leaving the Refuge relative to the habitat that will be gained. Appendix B shows a ranking of the conservation values of federal and non-federal land parcels in the area, including those proposed for exchange. The underlying method and analysis used for this ranking system is not fully explained. And, as noted by Dr. Stutes, standard practice would be to conduct a full habitat equivalency analysis showing the change in the ecological function of the area that FWS proposes to exchange out of the Refuge. FWS must do so here and make this analysis available for public comment.

Another failure of the DSEIS is its lack of analysis of the effects of acid rock drainage during construction activities on wetlands, eelgrass, and the surrounding ecosystem. Despite acknowledging that "the actual type of rock planned for use during construction is not known," and that if acid rock drainage does occur, it "can adversely impact water quality, which results in negative impacts to receiving waters and/or ecological receptors," the DSEIS entirely fails to assess what the resulting negative effects to the ecosystem will be.[446] The DSEIS then proceeds to dismiss any further analysis because "precautionary measures would be conducted to determine the usability of the geologic resource."[447] The DSEIS then points to a mitigation measure in Appendix F: acid rock testing for rock potentially used as infill of wetlands.[448] Appendix F, however, shows that "Applicant/Contractor" is responsible for implementing the acid rock testing, with no apparent mechanism for enforcement by the Service, and that this measure is only "likely" to implemented.[449] This is not the hard look required by NEPA and the final SEIS must fully analyze the effects of acid rock drainage without relying on an uncertain and unenforceable mitigation measure.

The same is true of other mitigation measures, like guardrails, and enforcement by the Service or other staff of use restrictions: the final SEIS may not rely on uncertain, undefined, and unenforceable mitigation measures in its effects analysis.[450] As the Supreme Court has instructed, "NEPA requires that agencies discuss mitigation measures with "sufficient detail to ensure that environmental consequences have been fairly evaluated."[451]

The DSEIS also highlights that current information regarding rare and non-native plants is inadequate, stating that "specific rare plant surveys have not been conducted in the proposed road corridor or exchange parcels; therefore, additional populations of rare plants potentially could exist within these lands. Additional rare plant surveys will be required to properly assess the potential impacts of this proposed action"[452] and "[a]dditional non-native plant surveys will be required to properly assess the potential impacts of this proposed action."[453] Before completing the final SEIS, the Service must gather additional sufficient information related to rare and non-native plants and fully assess environmental impacts related to both.[454] The final SEIS must also fully analyze the

[446] DSEIS at 4-502-3.
[447] *Id*.
[448] *Id*.
[449] App'x F at 4.
[450] See, e.g., Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 733-36 (9th Cir. 2001).
[451] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352 (1989).
[452] DSEIS at 3-68.
[453] *Id*. at 3-70, 3-72.
[454] 40 C.F.R. 1502.21(b)(2022).

impacts of the introduction of invasive species to habitats adjacent to the proposed road corridor. The Service itself recently pointed out the danger of vehicles transporting invasive species in a letter regarding the Man Choh mine and ore transport.[455]

The final SEIS must remedy the DSEIS's failure to accurately analyze the full impacts of the proposed action on the integrity of the wetland and tundra. The analysis must not underestimate the project's reasonably foreseeable impacts to essential ecosystem services, including the effects of increased erosion from all-terrain vehicles, including resulting sediment transportation, and enhanced turbidity due to the presence of the road. The final analysis must also contain a full assessment of the potential of acid-generating rock discharge into streams and wetlands and the potential effects this will have on the lagoon ecosystems. The final analysis cannot rely on uncertain mitigation measures.

2. Impacts to Caribou

Human disturbances are encroaching wildlife habitat at an unprecedented rate globally. Although widely distributed, caribou and wild reindeer populations have declined over 50% in the past two decades, which is thought to be led both by global changes in climate and anthropogenic landscape changes.[456] While the DSEIS paints a picture of caribou use in the area over time, it does not describe how severe the impacts of limiting its range can be.

Caribou play a critical role in the environment as well as for the culture, traditions, and food security of Alutiiq/Sugpiaq and Unangan people that have lived on and stewarded the Alaska Peninsula for thousands of years. The Southern Alaska Peninsula (SAP) caribou herd has been identified as a priority Resource of Concern for Izembek National Wildlife Refuge as a refuge purpose species which provide value for subsistence users as a protein source.[457] According to the DSEIS, the SAP has a history of management challenges and expressed vulnerability to climate change. The narrow isthmus between Izembek and Kinzarof lagoons is an important migration corridor between calving grounds and wintering areas.[458]

Movement is central to life for caribou, and the SAP herd is no exception. The DSEIS states, "If the herd did not cross the isthmus to reach their normal wintering/calving areas, it may have a long-term adverse effect on the entire Southern Alaska Peninsula Caribou Herd. This herd is just now recovering from a population low."[459] According to the ADFG Regional Management Coordinator, "the current population estimate is approximately 3,800 caribou," just finally crossing the low end of the population objective which is a minimum of 3,000 caribou.[460] The DSEIS does not state how these adverse effects may manifest in the already small SAP. Migrations allow caribou to take advantage of resources that change across habitats and seasons, such as moving to areas with greater winter food availability and shelter and then returning to calving grounds in the

[455] Letter from Neesha Stellrecht, Field Office Supervisor, Northern Alaska Fish and Wildlife Field Office, to Kinney Engineering, LLC, 5 (May 17, 2024).
[456] Russell, D.E., Gunn, A., and Kutz, S. 2019. Migratory tundra caribou and wild reindeer. In: Osborne, E., Richter-Menge, J., and Jeffries, M., eds. Arctic Report Card: Update for 2018. Effects of persistent Arctic warming continue to mount.
[457] DSEIS at 3-219.
[458] DSEIS at 4-175.
[459] DSEIS at 4-175.
[460] Personal Communication with Todd Rinaldi, Regional Management Coordinator at Alaska Department of Fish and Game. 12/11/2024.

spring. In addition to migration, caribou rely on unimpeded local movements for habitat selection, especially after calves are born, to optimize changing local nutrient availability and to avoid predators and harassing insects. In light of these strategies, unhindered movement, especially for the SAP whose migration corridor includes the Izembek isthmus and is only a few miles wide, is essential for caribou responding to the changing environmental, climactic, and disturbance regimes across their range. It is possible that caribou are forced to completely abandon the range west of the road at the start of the isthmus resulting in a 35% loss of quality habitat, as described in the next section.

Disturbance Can Cause Habitat Loss

Disturbances have differing responses in caribou, ranging from increased vigilance near development structures to complete abandonment of disturbed zones.[461] Human infrastructure can delay the crossing of man-made barriers such as roads and obstruct seasonal migration paths. The DSEIS correctly states, "Caribou would be affected most directly from the operation and maintenance of the road if it becomes a barrier to their movement, either physically or behaviorally. Any disruption of caribou movement could be detrimental to cow and calf survival because of increased dangers along new routes chosen and the delay of pregnant cows in reaching the calving grounds."[462] However, it fails to recognize the extent of the impacts that roads can have on caribou, as some caribou herds have been known to abandon zones up to 23km away due to disturbances.[463] Even long-standing infrastructure can result in increased energy use or less time spent in preferred habitats. Additionally, disturbances have been observed to prevent these ungulates from reaching certain parts of their range or disrupt their ability to align with the availability of vegetation.[464] Research on the Central Arctic Herd has shown that adult female caribou consistently avoid infrastructure, despite decades of continued exposure, suggesting they do not habituate to it.[465] This is consistent with anecdotal and scientific studies across many herds and regions.

Thus, it is entirely plausible that caribou would abandon their preferred habitat on the isthmus and in the western portion of the Refuge if a road through the area is constructed, maintained, and/or used. According to the DSEIS the isthmus is a well-documented caribou use area in recent times and historically.[466] Reducing well-documented, important parts of the SAP range further limits the availability for the population to thrive. Building a road through the thin isthmus between Izembek and Kinzarof lagoons has the potential to act as a significant physical barrier for the SAP.

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[461] DSEIS at 4-174.
[462] DSEIS at 4-174.
[463] Plante, S., Dussault, C., Richard, J.H. and Côté, S.D., 2018. Human disturbance effects and cumulative habitat loss in endangered migratory caribou. *Biological Conservation*, *224*, pp.129-143. https://doi.org/10.1016/j.biocon.2015.12.035
[464] *Id*
[465] Boulanger, J., Poole, K.G., Gunn, A. and Wierzchowski, J., 2012. Estimating the zone of influence of industrial developments on wildlife: a migratory caribou Rangifer *tarandus groenlandicus* and diamond mine case study. *Wildlife Biology*, *18*(2), pp.164-179.
[466] DSEIS at 3-226.

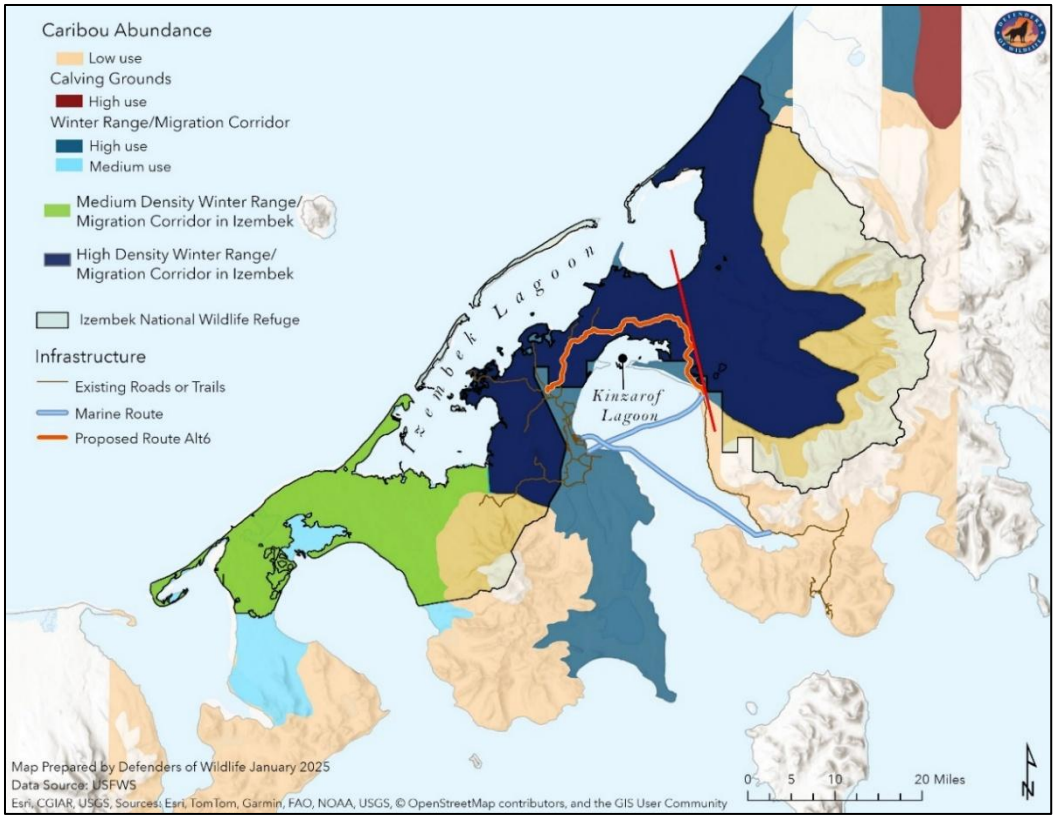

Figure 1: Caribou abundance and winter range use density map of Izembek Refuge. An imaginary red line is drawn right of the proposed road under the preferred alternative. This is the potential area of division where caribou would be effectively prevented from moving to preferred winter habitat.

About half of Izembek Refuge is classified as High Density Winter Range/Migration Corridor Habitat for caribou. If the proposed road prevents the passage of caribou at the isthmus (left of the red line depicted in Figure 1), substantial Medium Use habitat will no longer be usable to caribou, further constricting its range. Approximately 35% of the best quality caribou habitat would be completely unavailable to caribou in this scenario. It is important to again note that global caribou populations have been facing serious declines, most likely in response to climate change and development encroachment, which can best be mitigated by improving and enhancing habitat and range and minimizing human impacts—the exact opposite of building a road though an essential travel corridor.

Hunting Pressure Increases with the Presence of a Road

If movements of SAP caribou are not completely halted by the presence of a road through their migration corridor (described above), we can expect their movements to be restricted to a narrow (0.5-2.5 km-wide), more northerly lowland corridor, where they will be readily concentrated, visible, and accessible for hunting.[467] In addition to marginalized habitat, the long term impacts from a proposed road will likely reduce (not maintain or increase) subsistence use opportunities by

[467] Ward, et al., Comment Against the Preferred Alternative in the Supplemental EIS by Research Scientists of the Region, February 6, 2025 (attached as XX).

ultimately decreasing the carrying capacity of the range for caribou.[468] These issues are compounded by the propensity of people establishing spur roads off of the main gravel road.[469]

According to observations from a local resident from the community of Cold Bay, people create their own rules when it comes to roads. She relates serval examples:

> I should note that there is a construction worker who is working on a construction project in Cold Bay this year who bragged multiple times about driving his ATV over from King Cove instead of paying for a flight. I am certain he is not the only one doing this - the road that leads to the old hovercraft pad on the KC side goes right up to the wilderness boundary. From there, there are multiple trails that lead into the wilderness, including a very rough but well-worn path that allows someone on an ATV to get all the way from that Hovercraft site over to a connecting established road on the Cold Bay side utilizing shoreline at low tide.
>
> There has been increased offroad activity in the Refuge that we have witnessed this year. In the fall of 2024, the Alaska Fish & Game put up a new sign reminding users of Grant Point that mud motors and ATVs are not permitted in the Refuge. The State, despite local requests, did not make time while they were in town installing the sign to do any public education on this topic, but responded that they may make time when they next return to Cold Bay - likely in fall of 2025. ADF&G does not have any law enforcement presence in Cold Bay to my knowledge, a federal law enforcement official usually comes out for one week each fall and checks hunter licenses. Perhaps because of the new signage (or perhaps just coincidence), folks are flouting off-road restrictions more openly.
>
> The times we noticed the most offroad activity were in conjunction with the monthly May-September Tustumena Alaska Marine Highway Ferry that brings in vehicles and ATVs from King Cove (and perhaps other communities from farther up the peninsula) for a few days before the ship makes its return trip from the Aleutians and takes the visitors back out of town. Also, late Nov/early December this year there was a fishing boat up from King Cove with a few guys who had 2-3 ATVs. The offroad impact to the Refuge was very noticeable during their stay - off of the Grant Point and Outer Marker roads, Frosty Road, and road to Mortenson's."[470]

The addition of a road, and the inevitable informal roads that follow, high use caribou habitat would at best decrease the conservation value of the area for caribou by introducing the physiological and behavioral consequences caused by roads and human activity, including increased hunting pressures and access. At worst, the addition of a road bisecting a narrow travel corridor would completely prevent caribou from accessing high use habitat and severely restrict the

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[468] Ward, et al., Comment Against the Preferred Alternative in the Supplemental EIS by Research Scientists of the Region, February 6, 2025 (attached as XX).

[469] DSEIS at 4-155

[470] Personal communication with Brianne Rogers, Cold Bay community member. 12/20/2024.

spatial limits of their range. This creates challenges as caribou begin to navigate an uncertain climate future; the ability to travel unhindered to their preferred habitats with temporally differing nutritional values must be made a priority if the Service is interested in conserving this Resource of Concern and prioritizing a healthy Southern Alaska Peninsula caribou herd.

3. Impacts to Brown Bears

Brown bears are a priority Resource of Concern for Izembek Refuge because of its high profile and the high density of brown bears in the area.[471] As noted above, conserving brown bears is an explicit purpose of the Izembek Refuge. Service management challenges regarding Izembek Refuge bears include harvest pressure, conflicts among user groups, human disturbance, and habitat degradation.[472] As described below, the proposed action would exacerbate these management challenges, reducing its ability to conserve brown bears.

Harvest pressure on Izembek brown bears is significant and increasing. The DSEIS notes that brown bear densities are lower near Cold Bay than in adjacent areas of the Alaska Peninsula due to local harvest pressure.[473] It adds that "increased harvest could result from redistribution of current hunters, greater hunter success, or an increase in the total number of hunters attracted by the new road."[474] With the additive pressure of new hunter access not only from a new road, but from the inevitable spur roads and trails that will develop, we can expect that bears will be meaningfully impacted by significant additional hunting pressure.

Brown bears are a trophy species that are hunted overwhelmingly by non-residents in Alaska. The fall bear hunting season in Izembek Refuge is open in odd years, and over 80% of the 136 bears taken in an average odd year are taken by non-residents.[475] The number and percentage of adult male bears taken in Izembek Refuge is increasing. In a paper assessing the effort and success of brown bear hunters in Alaska, with other factors held equal, unsurprisingly hunter success was lower in areas with larger human populations and higher in areas with fewer people. Hunters with access to airplanes and chartered boats experienced greater success than those who did not, highlighting the significance of access to remote areas.[476] Roading a Refuge Wilderness area would likely lead to a large influx of hunters on and off the proposed road, facilitating access to otherwise remote trophy bears. In addition, bears are known to use roads as a travel corridor. Roads will result in increased human presence and hunting pressure, and an increased risk of bear-vehicle collisions.

The DSEIS explains the impacts of roads on bears, but does not fully explore the important consideration of informal spur roads created by users off the main road. As described above, the creation of numerous spur roads is unavoidable. In areas with human–bear overlap, a large majority of brown bears over the age of 2 are eventually killed by people and almost all are killed near roads

[471] DSEIS at 3-207.
[472] DSEIS at 3-207.
[473] DSEIS at 4-179.
[474] DSEIS at 4-179.
[475] DSEIS at 3-208.
[476] Albert, D.M., Bowyer, R.T. and Miller, S.D., 2001. Effort and success of brown bear hunters in Alaska. *Wildlife Society Bulletin*, pp.501-508. https://www.jstor.org/stable/3784174

(i.e. shot, and not caused by a vehicle collision).[477] There is a clear and strongly positive correlation between motorized access into brown bear habitat and bear mortality.[478] It is thoroughly documented that humans cause between 77% and 90% of grizzly bear mortalities across western North America.[479, 480] Additionally, where humans and bears overlap, adult bear survival decreases with most bears being killed near a road.[481]

The Joshua Green River watershed is prime brown bear habitat and would contain half of the proposed road through the isthmus. This road would modify natural drainage networks and accelerate erosion processes, which could "lead to changes in streamflow regimes, sediment transport and storage… that can also impact fish by degrading the quality of adjacent riparian habitat and water quality (Ottburg and Blank 2015). Road construction can increase the frequency of slope failures which can result in episodic sediment delivery to streams, potentially for decades after roads are built (Lehrter et al. 2024). All of these effects can have important biological consequences for anadromous and resident fishes by negatively affecting food, refugia, spawning habitat, water quality, and access for upstream and downstream migration"[482] Effects to the spawning anadromous salmonid populations would have direct effects to bears dependent on fish for survival, as noted in the DSEIS, where it states, "Bears in this area frequently roam Izembek Lagoon and the isthmus between the lagoon and Cold Bay in search of food."[483]

Road-induced changes in bear behavior could have other unintended consequences as well. If bears are forced to abandon their familiar territories or alter their movement patterns because of increased construction, disturbance, and human use, they may enter the territories of other conspecifics that aggressively defend their area, with the potential for injury or mortality. For example, both male and female brown bears are known to kill the young (infanticide) of other brown bears in or near their home ranges. Although infanticide is well-documented in brown bears, it is extremely difficult to obtain regular data due to the generally solitary life of bears. Of the long-term focal studies in the nearby McNeil River Falls bears, three of five published cases of female-perpetuated infanticide have occurred due to the extremely high-quality habitat lending to

[477] Proctor, M.F., McLellan, B.N., Stenhouse, G.B., Mowat, G., Lamb, C.T. and Boyce, M.S., 2020. Effects of roads and motorized human access on grizzly bear populations in British Columbia and Alberta, Canada. *Ursus*, *2019*(30e2), pp.16-39. https://bioone.org/journals/ursus/volume-2019/issue-30e2/URSUS-D-18-00016.2/Effects-of-roads-and-motorized-human-access-on-grizzly-bear/10.2192/URSUS-D-18-00016.2.full

[478] Boulanger, J., S.E. Nielsen, and G. Stenhouse. 2018. Using spatial mark–recapture for conservation monitoring of grizzly bear populations in Alberta. Scientific Reports 8: 5204. https://www.nature.com/articles/s41598-018-23502-3.pdf

[479] Schwartz, C., M.A. Haroldson, and G.C. White, R.B. Harris, S. Cherry, K.A. Keating, D. Moody, and C. Servheen. 2006. Temporal, spatial, and environmental influences on the demographics of grizzly bears in the Greater Yellowstone Ecosystem. Wildlife Monographs 161. https://kevintshoemaker.github.io/NRES-470/schwarz_grizzly1.pdf

[480] Mace, R.D., D.W. Carney, T. Chilton-Radandt, S.A. Courville, M.A. Haroldson, R.B. Harris, J. Jonkel, B. Mclellan, M. Madel, T.L. Manley, C.C. Schwartz, C. Servheen, G.B. Stenhouse, J.S. Waller, and E. Wenum. 2012. Grizzly bear population vital rates and trend in the Northern Continental Divide Ecosystem. Journal of Wildlife Management 76:119–128. https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1562&context=usgsstaffpub

[481] Mclellan, B.N.. 2015. Some mechanisms underlying variation in vital rates of grizzly bear on a multiple use landscape. Journal of Wildlife Management 749–765.

[482] DSEIS at 4-527.

[483] DSEIS at 3-225.

uncharacteristic tight range overlap.[484,485] If bears on the Izembek isthmus choose to avoid the human activity of a new road and enter nearby bear habitat, it is reasonable to expect that they could be challenged, injured, or ultimately killed during conflict with resident bears of those ranges.

In sum, the proposed action would significantly impact brown bears, exacerbating existing challenges that the Service faces in conserving these bears as directed by ANILCA. It would increase harvest pressure, habitat degradation and fragmentation, and human disturbance. The SDEIS fails to fully disclose these impacts.

4. Impacts to Salmon and Other Fish

As noted in the DSEIS, "there are a number of different habitat types" that "support a variety of fish and aquatic invertebrate species within the project area, including marine, freshwater, and anadromous species."[486] Many of the flaws in the DSEIS flagged in the eelgrass and wetlands section above also apply to salmon and other fish. In particular, despite recognizing the high value of eelgrass as a foundational food source for many species, including fish, the DSEIS fails to analyze the indirect and cumulative impacts of the proposed action on salmon and other fish that will flow from reduced eelgrass resilience that is likely to be caused by the road. The DSEIS also fails to analyze the cumulative impacts of those effects, along with climate change, to fish in the Refuge.

The DSEIS's analysis of impacts to fish also improperly relies on uncertain and unenforceable mitigation measures and/or scenarios that are not reasonably certain to occur. For example, in describing the direct and indirect effects from operation and maintenance of the road on fish and essential fish habitat, the DSEIS states that direct effects "are expected to be low in intensity and scale, provided culverts are designed using best available design criteria and crossing structures are regularly monitored, maintained, and repaired in a timely manner."[487] The Service has no authority to ensure either of those scenarios occur and Appendix F actually acknowledges that the likelihood of effective implementation of these measures is "[u]ncertain during operation (subject to available funds for monitoring and enforcement").[488] Similarly, the final SEIS cannot rely on uncertain guardrails, prevention, spill response, and restoration plans, or acid rock testing to conclude that any potential effects will be minimized and therefore "few direct effects on fish resources or Essential Fish Habitat will result from operation and maintenance of Alternative 6."[489]

The incorporated memorandum by Jason Stutes, PhD, Marine Ecologist, raises additional issues with the DSEIS, including its reliance on best design standards for fish passages, despite providing no additional information or details about what those standards are or showing that the Service will be able to enforce them. Dr. Stutes' memo also highlights the DSEIS's failure to analyze the effects of 6PPD-quinone particles, a toxic compound resulting from tire wear. Multiple studies as well as the Environmental Protection Agency have recognized that 6PPD-quinone has ecotoxic

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[484] McLellan, B. 1994. Density-dependent population regulation of brown bears. Int. Conf. Bear Res. Manage. Mon. Ser. 3, 3-34. https://wildlife.onlinelibrary.wiley.com/doi/epdf/10.1002/jwmg.896

[485] Mcloughlin, P.D., Ferguson, S.H. and Messier, F., 2000. Intraspecific variation in home range overlap with habitat quality: a comparison among brown bear populations. *Evolutionary Ecology*, *14*, pp.39-60. https://link.springer.com/article/10.1023/A:1011019031766

[486] *Id*. at 3-222.

[487] DSEIS at 4-529.

[488] App'x F at F-10-11.

[489] DSEIS at 4-530.

effects and can kill fish, especially salmonids, and potentially impact entire salmon populations.[490] The Service also recently acknowledged the danger of 6PPD-quinone because of the link the contaminant has to salmon die-offs.[491] The final SEIS must assess the impacts of 6PPD-quinone on fish in the Refuge that will result from implementation of Alternative 6.

Additionally, the DSEIS admits to missing essential information, which it must acquire[492] in order to fully assess the effects of the proposed action on salmon and other fish:

> This SEIS includes updated information on Alaska Department of Fish and Game AWC streams that have been designated within the project area. It should be noted that many more miles of anadromous fish habitat likely exist beyond those streams documented in the AWC (Service 2022b). Text, tables, and figures throughout this section have been updated with new data and information that have become available since the time of the 2013 EIS.[493]

> As described in Section 3.2.3, several streams on the east side of Kinzarof Lagoon are known to support anadromous salmonids (ADF&G 2024a; Figure 3.2-14). Adjacent marshes and small ponds within the tundra system may be accessible to fish either on a seasonal or year-round basis if there is a hydrological connection to fish-bearing streams. Although site-specific information on fish presence and habitat use is not available, these areas may support important rearing and overwintering habitat for juvenile salmonids.[494]

Similarly, the DSEIS fails to fulfill NEPA's requirements to assess the cumulative effects of climate change to fish in the context of the proposed action:

> Climate change may contribute to adverse effects over time by increasing temperature and precipitation during winter storm events. Increased flooding could contribute to more bank erosion, sedimentation, and stormwater pollutants into streams which could degrade downstream fish habitats. Climate change could also result in potential changes in spawning, migration and incubation timing, and changes in species assemblages, including introduction of invasive species. However, the potential extent and magnitude of these effects in the project area cannot be predicted at this time.[495]

While the exact magnitude of these effects may be unknown, that does not absolve the agency of its obligation to evaluate potential effects based on the available information, given that

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[490] Environmental Protection Agency, 6PPD-quinone, https://www.epa.gov/chemical-research/6ppd-quinone (Nov. 26, 2024); Tian, Z. et al., 2022. A ubiquitous tire rubber-derived chemical induces acute mortality in coho salmon. *Science*, pp. 185-189. DOI: https://doi.org/10.1126/science.abd6951; French, B.F. et al., 2022. Urban Roadway Runoff is Lethal to Juvenile Coho, Steelhead, and Chinook Salmonids but not Congeneric Sockeye. Environmental Science & Technology Letters, pp.733-738. DOI: https://doi.org/10.1021/acs.estlett.2c00467; *see also* Letter from Hon. Marilyn Strickland, U.S. Representative, et al. to NOAA Administrator Dr. Richard Spinrad, NOAA Administrator and Martha Williams, FWS Principal Deputy Director (Aug. 19, 2021); Letter from NOAA Administrator Richard Spinrad to Hon. Marilyn Strickland, U.S. Representative (Oct. 15, 2021).

[491] Letter from Neesha Stellrecht at 2-3.

[492] 40 C.F.R. § 1502.21(b)(2022); see, e.g., *Mont. Wilderness Ass'n v. McAllister*, 666 F.3d 549, 559 (9th Cir. 2011).

[493] DSEIS at 3-122; *see also Id.* at 3-146.

[494] *Id*. at 3-114.

[495] *Id*. at 4-435.

"[r]easonable forecasting and speculation is implicit in NEPA" and agencies cannot "shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry."[496] That is particularly true here, considering that the agency knows the types of activities that will be carried out in the future and knows that climate change will have significant impacts on the area.

Each of these flaws must be fixed in the final SEIS in order to meet NEPA's hard look requirement to analyze the full impacts to the Refuge's salmon and other fish populations, as well as their habitat.

5. Impacts on and from Climate Change

As discussed above and in Dr. Stutes' memo, in addition to playing a keystone role in the Izembek ecosystem, the Izembek and Kinzarof lagoons' eelgrass meadows provide a crucial tool in the fight against climate change and ocean acidification. At the same time, Izembek's ecosystem is—and will continue to be—severely affected by climate change. The land exchange and road proposed in Alternative 6 would not only have negative climate change effects, but the road itself would be threatened by the effects of climate change, including coastal erosion, sea level rise, storms that are increasing in frequency and intensity, and increased flooding. The DSEIS fails to adequately analyze the effects of the proposed land exchange and road on climate change, the effects of climate change on the road, and the cumulative effects of climate change and the road on the environment and resources in the project area.

Izembek and its wildlife are threatened by a variety of climate change impacts. These include sea level rise and other anthropogenic impacts that threaten eelgrass, which creates a negative feedback loop of climate change impacts.[497] Like other seagrasses, which have declined by 30% globally in the past 150 years, eelgrass is disappearing at an alarming rate.[498] Similarly, Izembek's wetlands and other ecosystems are threatened by climate change, particularly impacts like sea level rise, increased precipitation and flooding, and salinity changes.[499] Like eelgrass lagoons, these ecosystems are vital habitat for wildlife and important tools for mitigating climate change impacts.[500] Further, the waters surrounding Izembek have experienced major heatwaves in recent years, with Arctic waters warming four times faster than the rest of the world's oceans.[501] Because of this, Izembek and surrounding areas are especially vulnerable to climate change, and the impacts are expected to worsen in the coming years.[502] Many potential impacts of the road on the Izembek ecosystem would reduce the region's natural climate resilience. For example, if

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[496] *Kern v. BLM*, 284 F.3d 1062, 1072 (9th Cir. 2002).

[497] Stillman, R.A. et al., 2021. Predicting impacts of food competition, climate, and disturbance on a long-distance migratory herbivore. *Ecosphere*. DOI: https://doi.org/10.1002/ecs2.3405; Wilson, K.L. and Lotze, H.K., 2019. Climate change projections reveal range shifts of eelgrass *Zostera marina* in the Northwest Atlantic. *Marine Ecology Progress Series*, pp.47-62. DOI: https://doi.org/10.3354/meps12973.

[498] Waycott, M. et al., 2009. Accelerating loss of seagrasses across the globe threatens coastal ecosystems. *Proceedings of the National Academy of Sciences of the U.S.A.*, pp.12377-12381. DOI: https://doi.org/10.1073/pnas.0905620106; *see also* Northern Sea Otter Status Assessment at 29.

[499] May, C.L. et al., 2023. Ch. 9, Coastal Effects in *Fifth National Climate Assessment*. DOI: https://nca2023.globalchange.gov/downloads/NCA5_Ch9_Coasts.pdf.

[500] *Id*.

[501] Rantanen, M. et al., 2022. The Arctic has warmed nearly four times faster than the globe since 1979. *Communications Earth & Environment*. DOI: https://doi.org/10.1038/s43247-022-00498-3.

[502] *Id.*; see also Thomas, R. and H.R. McFarland, editors, 2024. Alaska's Changing Environment 2.0. Alaska Center for Climate Assessment and Policy, International Arctic Research Center, University of Alaska Fairbanks. uaf-iarc.org/communicating-change.

construction, maintenance, and use of the road damages the eelgrass beds, the coastal and low-lying areas of the Refuge would become far more vulnerable to coastal erosion. Coastal erosion is increasing in western Alaska due to reduced sea ice extent and increasing storm and flooding events (in both frequency and intensity).[503] Nearby Port Heiden, for example, has experienced up to 26 feet per year of coastal erosion.[504] The final SEIS must analyze the cumulative impacts of the proposed action along with these potential impacts from climate change.

Beyond its impacts to the Izembek ecosystem, climate change will also threaten the construction, operation, and maintenance of a road through the isthmus. The Service has recognized that "all economic development in coastal regions (and coastal development by proxy) will be subject to future changes brought on by climate change."[505] In southwestern Alaska, "damages from coastal erosion and increased flooding to coastal infrastructure, especially airports, roads, buildings, and electrical infrastructure, will account for the greatest portion of damages."[506] Any road in the isthmus will face flooding, presenting serious safety risks to users.[507] Beyond the safety concerns, the water will cause erosion of the road and the land supporting it, creating the need for frequent, costly renovations, and causing additional harm to the surrounding wetlands and the environment.[508] The DSEIS references a "hydrodynamic model" that was developed for this DSEIS, "DOWL 2024."[509] The DSEIS relies on this model to conclude that inundation from sea level rise combined with a 100-year return period coastal surge will not overtop the proposed road. The Service must make this hydrodynamic model/DOWL 2024, as the data that the agency is relying on to reach its decision, available for public review and comment as part of the NEPA process.[510]

Moreover, the DSEIS references "[a] potential mitigation measure proposed to minimize impacts associated with climate change includes use of a climate resilient road design (MM-WW) to address future climate driven change."[511] Analysis of the proposed "climate resilient road design" must be included in the final SEIS. The final SEIS must fully analyze the effects that climate change will have on the proposed action. It cannot simply conclude that the future is too uncertain.[512]

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[503] *See* May, C.L. et al., 2023. Ch. 9, Coastal Effects in *Fifth National Climate Assessment*. DOI: https://nca2023.globalchange.gov/downloads/NCA5_Ch9_Coasts.pdf; Buzard R. et al, 2024. Current and projected flood exposure for Alaska coastal communities. *Nature*, pp.7765. DOI: *https://doi.org/10.1038/s41598-024-58270-w;* Bieniek, P. et al, 2022. Anticipated Changes in Alaska Extreme Participation. *Journal of Applied Meteorology and Climatology.* DOI: https://doi.org/10.1175/JAMC-D-21-0106.1.

[504] Overbeck, J. et al., 2020. Shoreline Change at Alaska Coastal Communities, https://dggs.alaska.gov/webpubs/dggs/ri/text/ri2020_010.pdf; *see also* Kinsman N. and A. Gould, 2014. Contemporary Shoreline Retreat Rates at Meshik in Port Heiden, Alaska. *State of Alaska, Department of Natural Resources, Division of Geological & Geophysical Surveys;* Buzard R. et al, 2021. Erosion Exposure Assessment – Port Heiden. *State of Alaska, Department of Natural Resources, Division of Geological & Geophysical Surveys*.

[505] Northern Sea Otter Status Assessment at 28.

[506] *Id*.

[507] DSEIS at 4-500.

[508] *Id*.

[509] *Id*.

[510] *See Jones v. Nat'l Marine Fisheries Serv*., 741 F.3d 989, 998 (9th Cir. 2013) ("NEPA requires that the public receive the underlying environmental data from which [an agency] expert derived her opinion."): *Bering Strait Citizens for Responsible Res. Dev. v. United States Army Corps of Eng'rs*, 524 F.3d 938, 956 (9th Cir. 2008).

[511] *Id*. at 4-501; *see also* App'x F at 18 ("Use of a climate resilient design shall be evaluated to address future climate driven change.").

[512] DSEIS at 4-501.

6. Impacts to Steller's Eiders

As described in section VII, Steller's eiders are an ESA-listed species that have critical habitat within Izembek Lagoon and frequent both Izembek and Kinzarof lagoons.[513] The DSEIS fails to analyze the cumulative impacts on Steller's eiders of the action alternatives in the context of climate change and there is no mention of climate change in the environmental effects section that focuses on Steller's eiders, despite the vulnerability of this species to climate change impacts.

Steller's eiders are particularly vulnerable in the warming Arctic and sub-Arctic. Warming temperatures and acidifying waters in the Bering Sea threaten eiders' food supply, while at the same time forcing eiders to expend more energy in their search for food and reducing the amount of sea ice available for resting. The loss of the sea ice in the northern Bering Sea is reducing the abundance of the eiders' benthic invertebrate prey.[514] As competitors, such as fish and crabs, move northward with warming ocean temperatures, they invade the eider's foraging grounds and consume its food sources. Acidifying waters are making it more difficult for clams and snails to build their calcium carbonate shells, limiting abundance of these species and further reducing availability of the eider's food sources. The disappearance of sea ice may deprive eiders of dry places to rest, causing them to burn more energy. Climate change also threatens the eider's nesting grounds on the coastal tundra of Alaska and Siberia. Eiders nest in the tundra wetlands near shallow ponds and lakes that provide plentiful insect and plant food. However, rising temperatures are melting the permafrost, which threatens to dry up the eiders' nesting grounds and transform the tundra into shrublands and forests.[515]

The majority of the world population of Steller's eider molts along the north side of the Alaska Peninsula, primarily at Nelson and Izembek lagoons during September and October. Following the molt, some eiders move to wintering areas along the south side of the Alaska Peninsula and the easternmost Aleutian Islands, while many remain in the Izembek Lagoon where they molt. These coastal wintering populations of Steller's eiders will be impacted by climate change, as Alaskan coasts are heavily battered by erosion, which is wearing away the eider's coastal habitat and inundating it with saltwater.[516]

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[513] To be clear, a federal agency's legal obligations under NEPA and the ESA are entirely separate; compliance with the ESA Section 7's prohibition against jeopardizing a species' continued existence, 16 U.S.C. § 1536(a)(2), does not simultaneously satisfy NEPA's requirements to analyze significant impacts short of the threat of extinction. *See Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1275–76 (10th Cir. 2004) (recognizing FWS conclusion that action not likely to cause jeopardy does not necessarily mean impacts are insignificant); *Makua v. Rumsfeld*, 163 F. Supp. 2d 1202, 1218 (D. Haw. 2001) ("A FONSI . . . must be based on a review of the potential for significant impact, including impact short of extinction. Clearly, there can be a significant impact on a species even if its existence is not jeopardized."); *National Wildlife Federation v. Babbitt*, 128 F. Supp. 2d 1274, 1302 (E.D. Cal. 2000) (requiring EIS under NEPA even though mitigation plan satisfied ESA); *Portland Audubon Society v. Lujan*, 795 F. Supp. 1489, 1509 (D. Or. 1992) (rejecting agency's request for the court to "accept that its consultation with [FWS under the ESA] constitutes a substitute for compliance with NEPA."); *Forest Service Employees for Envtl. Ethics v. U.S. Forest Service*, 726 F. Supp. 2d 1195, 1213 (D. Mont. 2010) ("Plaintiff correctly observes that [*Envtl. Prot. Info. Ctr. v. U.S. Forest Service*, 451 F. 3d 1005 (9th Cir. 2006)] does not allow an action agency to completely ignore an issue in its NEPA documents so long as the matter is discussed in adequate detail in a biological opinion....").

[514] Lovvorn, J. R. et al., 2009. Modeling marine protected areas for threatened eiders in a climatically changing Bering Sea. *Ecological Applications* pp.1596-1613. DOI: https://doi.org/10.1890/08-1193.1.

[515] Myers-Smith, I. et al., 2011. Shrub expansion in tundra ecosystems: dynamics, impacts, and research priorities. *Environmental Research Letters*. DOI: http://dx.doi.org/10.1088/1748-9326/6/4/045509.

[516] Arp, C. D., et al., 2010. Two mechanisms of aquatic and terrestrial habitat change along an Alaskan Arctic coastline. *Polar Biology*, pp.1629–1640. DOI: http://dx.doi.org/10.1007/s00300-010-0800-5.

Climate change-induced shifts in productivity and food availability at Izembek may substantially decrease available nutrients in the area. Nearly half the population of Steller's eiders is found in Izembek during the molt, at which time the eiders are flightless and have higher energy demands. Molting and wintering eiders consume marine invertebrates that occur in the extensive eelgrass beds within Izembek Lagoon channels. Ocean acidification caused by greenhouse gas emissions may reduce the availability of the eider's food source, due to shifts in marine productivity and a decreased ability of invertebrates to form calcium carbonate shells.[517] Sea-level rise due to climate change may eliminate or reduce eelgrass beds, which would further reduce the availability of the small invertebrates that serve as the eider's primary food source. Nutrition obtained during the molt may be vital to long-term energy reserves, and reduced energy intake would impact survival and reproductive success of the Steller's eider.[518] Additionally, other studies have found that a decline in availability of preferred foods at wintering locations may have played a role in extinction of other migrating bird species.[519]

The DSEIS also fails to assess the cumulative impacts of the proposed action to the Alaska-breeding population of Steller's eiders in the context of other human development, including oil and gas development and projects like Nanushuk, Greater Mooses Tooth, CD5, Project Peregrine, Alaska LNG Project, and Willow. For example, the Willow Master Development Plan presents a threat to eiders through both carbon emissions, adding at least 280 million metric tons of CO_2E to the atmosphere over the next 30 years, and habitat destruction, encroaching directly onto the eider's breeding habitat, particularly in the Arctic Coastal Plain survey area.[520] Other oil and gas development poses well-documented threats to Steller's eiders during exploration, drilling, and production, including inevitable oil spills, construction, destruction of habitat, increased road traffic, noise, and dust. For example, a study of the nest density, productivity, and habitat use of tundra-nesting birds in the Teshekpuk Lake Special Area in the National Petroleum Reserve-Alaska, compared with a developed oilfield site at Prudhoe Bay, found that mean annual nest density of all bird species combined was significantly higher at Teshekpuk than at Prudhoe Bay.[521] Now all of those birds, including Steller's eiders, are at risk, as the Willow project would impose a pipeline and road in the eastern portion of Teshekpuk Lake Special Area.

Finally, as discussed in more detail earlier in this letter, the DSEIS's analysis of Steller's eiders is problematic due to its reliance on "potential," meaning uncertain and unenforceable, mitigation measures, like guardrails and plans.[522] The DSEIS also fails to analyze the effects of the project on eiders in the context of the species' tendency towards high site fidelity, which makes them especially vulnerable due to their refusal to abandon areas that are ecologically compromised.[523] In the final SEIS, the Service must remedy these issues and fully analyze all effects—direct, indirect, and cumulative—to Steller's eiders from the proposed action.

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[517] Orr, J.C., et al., 2005. Anthropogenic ocean acidification over the twenty-first century and its impact on calcifying organisms. *Nature*, pp.681-686. DOI: https://doi.org/10.1038/nature04095.

[518] Kertell, K., 1991. Disappearance of the Steller's eider from the Yukon-Kuskokwim Delta, Alaska. *Arctic*, pp.177-187. DOI: https://doi.org/10.14430/arctic1537.

[519] Lovvorn et al. 2009.

[520] *See* Bureau of Land Management, Willow Master Development Plan – Record of Decision (Mar. 2023); Bureau of Land Management, Willow Master Development Plan – Final Supplemental Environmental Impact Statement (Jan. 2023).

[521] Liebezeit, J.R., G.C. White, and S. Zack, 2011. Breeding ecology of birds at Teshekpuk Lake: a key habitat site on the Arctic Coastal Plain of Alaska. *Arctic.* DOI: https://doi.org/10.14430/arctic4078.

[522] DSEIS at 4-560-1.

[523] Merkle et al. 2022.

7. Impacts to Other Birds

The 2013 EIS detailed significant impacts to numerous bird species that a road through the isthmus would cause.[524] It found that cumulative impacts to Brant, Emperor geese, and Tundra Swans and other birds breeding on the isthmus would be "major."[525] The DSEIS contains virtually no new information or analysis regarding impacts to birds and these prior conclusions are uncontroverted.

In response to the proposed action, eleven scientists with decades of experience studying birds and wildlife in the Izembek Refuge provided additional information, including research published since 2013, that reinforces those conclusions.[526] This includes updated negative population trends for some species, and likely additional impacts from road construction and use on birds not considered in the DSEIS. Additionally, the DSEIS fails to account for impacts to other declining species that use Izembek Refuge, including impacts to birds and habitats that occur well beyond the Refuge itself. The following sections detail newer information as well as additional species and impacts for the Service to consider.

Additional Impacts to Birds

Road construction, operation and maintenance and offroad ATV activity will damage bird (and mammal) feeding habitat, disrupt movements, and bring significant adverse impacts to these species.[527] The road would bisect a north-south migratory corridor for wildlife such as black brant, emperor geese, northern pintail and Steller's eiders moving between feeding grounds in Izembek and Kinzarof Lagoons. It would also directly impact birds nesting on the tundra, including tundra swans, Aleutian terns and numerous species of shorebirds.[528] Much of the road corridor would traverse upland tundra habitat dominated by crowberries, important fall forage for Taverner's cackling geese, emperor geese, and shorebirds. Vehicle traffic will likely displace wildlife from crowberry feeding areas near the road.[529]

Habitat damage from the road will reach well beyond the 183-acre road footprint itself, through changes in hydrology, snow patterns, soil characteristics and ecosystem processes. In addition to road-adjacent impacts noted in the DSEIS, airborne dust accumulation will impact a much larger area. Those dust shadows have elsewhere increased pH levels in soil, resulting in declines of soil lichens, mosses and grasses up to 600 meters from gravel roads.[530] Beyond that, as noted in the DSEIS and elsewhere in these comments, habitat damage will extend outward from the road due to anticipated increased ATV use.[531] Habitat destruction by ATV over tundra is generally severe and long-lasting in this region of Alaska. In all, the proposed road would cause habitat

[524] DSEIS at 4-144 – 4-166.
[525] DSEIS at 4-160, 4-166.
[526] Ward, et al., Comment Against the Preferred Alternative in the Supplemental EIS by Research Scientists of the Region, February 6, 2025 (Ward comment).
[527] Ward comment at 2.
[528] *Id*. at 4.
[529] *Id*. at 2.
[530] *Id*. at 3.
[531] *Id.*; DSEIS 4-218, Figure 4.3-6.

destruction, including the loss of critical breeding and feeding sites for many bird species, over a much wider swath of the isthmus than reflected in the DSEIS.[532]

The road would increase hunting pressure in the fall on species such as black brant, Taverner's cackling geese and emperor geese, as well as some shorebirds in the spring.[533] Brant and emperor goose populations are especially vulnerable to over-harvest in spring because significant portions of their overall breeding populations are concentrated in the Refuge. Overall populations of black brant, Taverner's cackling geese and emperor geese have declined by 30%, 25% and 7%, respectively, and the increased access the road would provide to Izembek and Kinzarof Lagoons will put these species at greater risk of overall population decline.[534]

Impacts to Additional Bird Species

One key reason behind Izembek Refuge's global recognition as an irreplaceable habitat for migratory species is its strategic location at the intersection of the Pacific Americas, East Asian-Australasian, and West Pacific Flyways.[535] The lagoons and nearshore habitats, rich in eelgrass[536] and other food sources, support over 180 bird species.[537]

The proposed action threatens to impact these species by severely disrupting these habitats. The Refuge supports high concentrations of long-distance migratory shorebirds, which are among the fastest-declining bird groups in the Americas.[538] Notably, 32 shorebird species, including those listed on the Service's Birds of Conservation Concern,[539] rely on the Refuge's diverse wetlands for breeding, staging, and wintering (Table 1). Critical habitats, including mudflats, tundra, and barrier islands, are at risk of degradation, which would further endanger already vulnerable species such as the Dunlin, Sanderling, and Rock Sandpiper. Additionally, migratory raptor populations are already vulnerable to habitat loss, contaminants, and climate change. The

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[532] *Id*.; DSEIS at 4-152.

[533] Ward comment at 4. We note recent reporting that emperor goose hunting will be closed in Alaska in 2025-26 and perhaps beyond because of declining abundance. Field & Stream, "Alaska Closes Famed Emperor Goose Hunt," February 5, 2025. Available at: https://www.fieldandstream.com/hunting/alaska-closes-emperor-goose-hunt?fbclid=IwY2xjawIYugVleHRuA2FlbQIxMAABHeIIgwvq0Fr9eU8vl7gbsehhWjFwza7-w1jERVMzmT5_nouCZh8lHKJGw_aem_SHZBGg_l1qu79x36GmmIfQ.

[534] *Id*. at 5.

[535] BirdLife International Data zone Izembek-Moffet-Kinzarof Lagoons site description: https://datazone.birdlife.org/site/factsheet/izembek-moffet-kinzarof-lagoons-iba-usa

[536] Ward, D.H., K.R. Hogrefe, T.F. Donnelly, L.L. Fairchild, K.M. Sowl, and S.C. Lindstrom. 2022. Abundance and distribution of eelgrass (Zostera marina) and seaweeds at Izembek National Wildlife Refuge, Alaska, 2007–10: U.S. Geological Survey Open-File Report 2020–1035, 30 p., https://doi.org/10.3133/ofr20201035.

[537] Sowl K. 2004. Izembek National Wildlife Refuge (Including Izembek NWR, Unimak Island, Pavlof, and North Creek Units) 2004 Biological Program Review. U.S. Fish and Wildlife Service. Cold Bay, Alaska

[538] Rosenberg, K. V. et al. 2019. Decline of the North American Avifauna. Science 365(6461). doi: 10.1126/science.aaw1313; Tibbitts, T. Lee, R. E. Gill, C. P. Dau 1994. Abundance and Distribution of Shorebirds using Intertidal Habitats of Izembek National Wildlife Refuge, Alaska.

[539] Birds of Conservation Concern 2021. U.S. Fish and Wildlife Service. https://www.fws.gov/birds/management/managed-species/birds-of-conservation-concern.php

proposed project threatens crucial breeding areas for species like the Short-eared Owl, Gyrfalcon, and Rough-legged Hawk, all of which rely on the Refuge's cliffs and tundra for nesting.[540]

The DSEIS fails to adequately address the impacts of the proposed road on many of these species, especially in areas like the Izembek and Kinzarof Lagoons, which are among the most ecologically valuable in the Refuge. The Refuge supports multiple species listed on the Audubon Alaska Watchlist[541], including 8 species on the Red List and 5 species on the Yellow List (Table 1). These birds, which are already under significant threat, could face further declines if their habitats are compromised by the project. The Service should assess the potential impacts to the long-term health of migratory bird populations that depend on the Refuge's resources to complete their annual migrations.

Table 1. U.S. Fish and Wildlife Service Birds of Conservation Concern (BCC) Species list of birds known to occur at Izembek National Wildlife Refuge and adjacent areas.

	Audubon AK Watchlist[1]	**AK Shorebird Cons. Plan[2]**	**Boreal Partners in Flight[3]**
Aleutian Tern	R		
Ancient Murrelet			
Bar-tailed Godwit	R	G	
Black Oystercatcher		H	
Black Turnstone	Y	H	
Cassin's Auklet			
Kittlitz's Murrelet	R		
Lesser Yellowlegs	R	H	
McKay's Bunting	Y		WL
Pectoral Sandpiper	R	H	
Red-legged Kittiwake			
Rock Sandpiper (Pribilof)	Y	H	
Short-billed Dowitcher	Y	H	
Short-eared Owl			CBSD
Snowy Owl	R		WL
Tufted Puffin	R		
Wandering Tattler	Y	L	
Yellow-billed Loon	R		

Notes: [1]*Audubon Alaska Watchlist*. Warnock, N. 2017. https://ak.audubon.org/conservation/alaska-watchlist. R = Red List has the highest level of conservation concern: species are vulnerable and declining. Y= somewhat lesser concern: species are vulnerable but not declining. [2]*Alaska Shorebird Conservation Plan Version III*. Alaska Shorebird Group. 2019. https://ak.audubon.org/sites/default/files/alaska_shorebird_conservation_plan_2019.pdf. Scores follow USSCPP (2016) and include species, subspecies, and regional populations. G = Greatest Concern, H = High Concern, M = Moderate

[540] Alaska Department of Fish and Game. 2015. Alaska wildlife action plan. Juneau. Alaska. https://www.adfg.alaska.gov/static/species/wildlife_action_plan/2015_alaska_wildlife_action_plan.pdf

[541] Audubon Alaska Watchlist. Warnock, N. 2017. https://ak.audubon.org/conservation/alaska-watchlist.

Concern, L = Least Concern. [3]*Alaska Landbird Conservation Plan, version 2.0*. Boreal Partners in Flight. 2021. https://www.usgs.gov/centers/asc/science/boreal-partners-flight?qt-science_center_objects=0#qt-science_center_objects CBSD = Common Birds in Steep Decline include species whose populations have declined continentally by about 50% or more since 1970 but do not exhibit the broad vulnerability of Watch List species. WL = Watch List species are considered of greatest conservation concern because of a combination of small and declining populations, limited distributions, and high threats throughout their ranges.

Climate Change and Birds

The SEIS fails to rigorously account for the projected and compounding impacts of climate change on birds when examining the proposed action. A 2019 comprehensive climate study leveraged 140 million observations to examine where 604 North American bird species live today, and how their range may shift as climate change and other human impacts advance across the continent.[542]

In Alaska, the study identified 101 "high vulnerability species" and 65 "moderate vulnerability species."[543] Of the high vulnerability species, numerous species of conservation concern that utilize the Izembek Refuge were identified. Among many others, these species included Emperor Goose, Brant, Steller's Eider, and Tundra Swan. For Tundra Swan, for example, Audubon's climate model predicts a 61 percent loss of current winter range by 2080, with a limited potential for expansion in that season.[544] Arctic summer range is also forecast to contract for migratory birds, which further raises concerns about how they will adjust to disruption in both seasons.[545] The Service must account for how migratory birds' annual life cycles may be compromised by climate change and further harmed by the compounding impacts of the proposed action.

More specifically, the DSEIS fails to include a meaningful analysis of how sea level rise and the proposed road will impact Izembek's habitats and its associated avian values. Brant, for example, are highly specific in their foraging needs. The Service must account for how sea level rise will impact eel grass meadows within the context of the proposed road. This analysis should include both localized impacts to Izembek Refuge and how Refuge's importance may change as other habitats across this species range (e.g. coastal California and Mexico) will be altered by climate change. Audubon's model found that overall, only 42% of this species' winter climate space is likely to remain stable.[546]

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[542] National Audubon Society, "Survival By Degrees: 389 Bird Species on the Brink." Available at https://www.audubon.org/climate/survivalbydegrees

[543]See: https://media.audubon.org/briefs_ak_final.pdf?_gl=1*5pggvc*_gcl_au*MTY4MjA5MzEwMS4xNzMwMzk3OTk0*_ga*MTk3MDcyMTkxNC4xNzMwMzk3OTk1*_ga_X2XNL2MWTT*MTczNzk2MDU2Ny42My4xLjE3Mzc5NjE2NzQuNjAuMC4w

[544] See: https://climate2014.audubon.org/birds/tunswa/tundra-swan.

[545] Ibid.

[546] https://climate2014.audubon.org/birds/blkbra1/brant

Impacts to Shorebirds

Globally, shorebirds are an imperiled taxon. The Service must account for how Izembek Refuge supports breeding habitats and the life cycles of these birds, and how the proposed action would compromise these values.

Specifically, Izembek and Kinzarof lagoons are important breeding habitats for shorebirds (n=8) including Black Oystercatcher, Semipalmated Plover, Dunlin, Least and Rock Sandpipers, Short-billed Dowitcher, Wilson's Snipe and Red-necked Phalarope. Migratory shorebirds (n=18) that utilize the Refuge from the Arctic and Western Alaska include Ruddy and Black turnstones, Bar-tailed and Marbled godwits and Western Sandpipers. Dunlin, Rock Sandpiper and Bar-tailed Godwits are correctly listed as priority Resources of Concern.[547] Dunlin have a broad breeding range across Western Alaska, the Aleutian Rock Sandpiper's (*Calidris ptilocnemis couesi*) breeding and wintering ranges are limited to the Alaska Peninsula and Aleutian Islands.[548] [549] Rock Sandpiper's limited geographic distribution and small population size (75,000) puts the species at risk for the adverse impacts of habitat loss and fragmentation, disturbance, or increased predation pressures as a result of road construction.

Impacts Across Vast Geographies

Migratory bird tagging and tracking data exemplifies the regional, nation, and global importance of the Izembek National Wildlife Refuge. This proposed land exchange and road would have harmful impacts on Izembek's habitats and the birds that rely on the Refuge to complete their life cycles.

The Audubon Migratory Bird Explorer (Explorer) is a comprehensive platform that compiles publicly accessible or shared tracking data for migratory birds across the Western Hemisphere. While this dashboard does not contain all data tracks or cover the migratory movements of all species connected to Izembek, it does provide a robust and tangible understanding for how Izembek's management is connected to and influences resources, values, economies, and cultures across vast geographic regions. As such, the Service must account for how compromising the ecological integrity of Izembek Refuge will harm other places and people that are connected to Izembek through migratory birds.

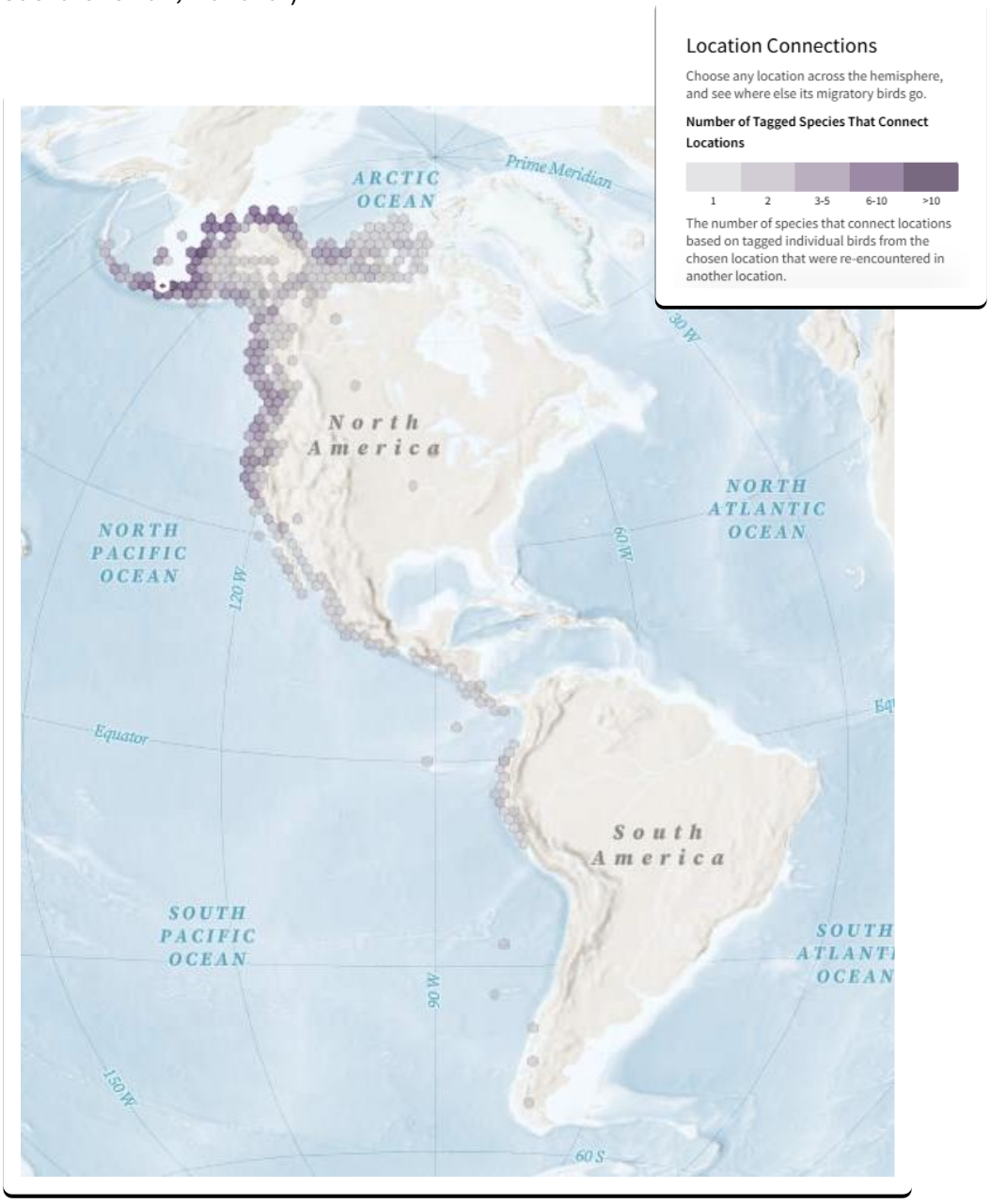
The Bird Explorer contains data for 24 species of tagged birds that utilize the Izembek Refuge. These species include: Arctic Tern, Bald Eagle, Black Scoter, Brant, Bufflehead, Crackling Goose, Canada Goose, Common Eider, Dunlin, Emperor Goose, Glaucous Gull, Glaucous-winged Gull, Golden-crowned Sparrow, King Eider, Long-tailed Duck, Mallard, Northern Pintail, Red-throated Loon, Sabine's Gull, Snow Bunting, Steller's Eider, Tundra Swan, Yellow Warbler, and Yellow-billed Loon. Of these 24 species, the Explorer contains migration data that connects Izembek Refuge to twelve

[547] U.S. Fish and Wildlife Service. 2021. Birds of Conservation Concern 2021. United States Department of the Interior, U.S. Fish and Wildlife Service, Migratory Birds, Falls Church, Virginia. http://www.fws.gov/birds/management/ managed-species/birds-of-conservation-concern.php

[548] Sowl K. 2004. Izembek National Wildlife Refuge (Including Izembek NWR, Unimak Island, Pavlof, and North Creek Units) 2004 Biological Program Review. U.S. Fish and Wildlife Service. Cold Bay, Alaska

[549] Gill, R. E., P. S. Tomkovich, and B. J. McCaffery (2020). Rock Sandpiper (*Calidris ptilocnemis*), version 1.0. In Birds of the World (A. F. Poole and F. B. Gill, Editors). Cornell Lab of Ornithology, Ithaca, NY, USA. https://doi.org/10.2173/bow.rocsan.01

countries outside the United States. These countries include: Canada, Russia, Mexico, Costa Rica, Ecuador, Peru, Chile, Colombia, El Salvador, Guatemala, Nicaragua, and Panama. The Explorer also shows connections between six states within the U.S. (Washington, Oregon, California, Wisconsin, Missouri, Arizonia) and five provinces in Canada (British Columbia, Yukon Territory, Northwest Territories, Saskatchewan, Nunavut):



Izembek Refuge is connected to much of Alaska through migratory bird life cycles, including interior communities like Fort Yukon and southeast coastal communities like Sitka and Hoonah. The Explorer shows a particularly strong connection between the Refuge and the lands and waters of western and northern coastal Alaska. These connections are largely driven by waterfowl that utilize these areas and Izembek Refuge to complete their life cycles. When considering the impacts of the proposed road, the Service must consider how degradation to the Refuge will impact the

ecosystems and resources in other parts of the state and across the hemisphere. Given the Refuge's critical importance to waterfowl, specific attention should be paid to how subsistence resources across Alaska may be compromised by a road and all its cumulative impacts.

Accounting for Impacts to Physical, Ecological, and Social Systems

As discussed above, the proposed land exchange and road will have cascading and interrelated impacts on the physical, ecological, and social systems of the Izembek Refuge and distant places and values connected to the Refuge by migratory birds. The Service must take a systems approach to this environmental analysis in order to fully account for and describe these impacts.

The relationships and connections between the proposed road, Izembek Refuge's eelgrass beds, Pacific Black Brant, and all associated human dimensions, are a prime example of how changes to the Refuge's physical environment can have localized, distant, and compounding impacts to ecological and cultural systems. With over 70 planned water crossings, a road through the Izembek Refuge will have negative impacts on the hydrologic systems of the Refuge. These impacts are likely to change sediment transport and water quality and are anticipated to harm the health of Izembek's eelgrass meadows, a crucial food source for brant. Moreover, the road will increase hunter access and hunting pressure within the Refuge. These conditions will lead to more harvested birds while also compromising the energetics of birds that are not killed. As a result, fewer birds and more birds with reduced overall fitness will be migrating out of Alaska or to the nesting grounds in western and northern Alaska.

A reduced number of brant on the nesting grounds will have ecological impacts on the surrounding landscape. Through active and consistent foraging behavior, Brant maintain high quality forage in the form of grazing lawns. If these lawns are not utilized or are utilized by fewer birds, they will revert to less fortifying vegetative conditions and lead to lower survival and recruitment rates of brant.[550] These cascades of impacts (compromised eel grass meadows, increased impact from hunting activities, and diminished conditions on the nesting grounds) will likely lead to a population-level impact to Brant.

In addition to impacts to the Yukon-Kuskokwim Delta, the SEIS must also account for impacts to the habitats of northern Alaska, Canada, and Russia. As described above, the Migratory Bird Explorer shows a strong connection between northern Alaska and Canada, and western Alaska. How a population-level decline of Brant will impact habitat use and condition across the species range through such processes as grazing must be considered. And finally, the availability of brant for hunters in Canada, Mexico, Russia, Washington, Oregon, and California must also be considered and disclosed.

[550] Person, B. T., Herzog, M. P., Ruess, R. W., Sedinger, J. S., Anthony, R. M., & Babcock, C. A. (2003). Feedback Dynamics of Grazing Lawns: Coupling Vegetation Change with Animal Growth. *Oecologia*, *135*(4), 583–592. http://www.jstor.org/stable/4223626

Considering Shorebird and Wetland Conservation Strategies

When examining the impacts of the proposed road, the Service must account for how the proposed land exchange and road would be in conflict to numerous conservation strategies for Pacific birds and their habitats. These technical documents, authored by experts in the fields of conservation biology, habitat and species management, and climate change are built on the best available science with the objective to advance the stewardship and recovery of ecosystems and species of conservation importance.

The 2016 "Pacific Americas Shorebird Conservation Strategy" identifies Izembek Refuge as a key shorebird site in the Pacific Americas Flyway.[551] The document's planning committee systematically evaluated threats using the *Conservation Standards* lexicon by each threat sub-category to determine which would have the greatest impact on the ability to restore or maintain stable, self-sustaining populations of target shorebird species across the Flyway.[552] Emerging from this analysis, climate change, development, invasive species, disturbance from recreational activities, water use and management, and wetland modification were all identified as threats. All these threats apply to the construction and use of the proposed road. The "Pacific Americas Shorebird Conservation Strategy" also articulates a series of conservation strategies and actions. Of these, managing and conserving existing habitats is the first and most important strategy, and is vital to sustaining shorebird populations within the [Pacific] Flyway.[553]

The Pacific Birds Habitat Joint Venture's "Coastal Wetlands Strategic Plan: 2024-2034" should also be considered within the context of this SEIS. This document includes tidal wetlands, intertidal mudflats, eelgrass meadows, and freshwater wetlands and lakes as priority coastal habitats included within the plan.[554] Across these habitats, protecting coastal wetlands and building reliance to climate change were identified as specific strategies. Like with the "Pacific Americas Shorebird Conservation Strategy", these priority habitats and strategies have direct applicability to the Izembek Refuge and further demonstrate why this national wildlife refuge should remain free from a harmful road.

8. Impacts to Marine Mammals

In its analysis of impacts to marine mammals, the DSEIS improperly relies on the implementation of uncertain mitigation measures, like guardrails and a Marine Mammal Protection Plan.[555] For example, despite acknowledging that Steller sea lions occur near Kinzarof Lagoon, the DSEIS quickly concludes that "[a]ny potential nearshore marine habitat impacts [to Steller sea lions] during construction would be mitigated through the imposition of mitigation measures."[556]

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[551] Senner, S. E., B. A. Andres and H. R. Gates (Eds.). 2016. Pacific Americas shorebird conservation strategy. National Audubon Society, New York, New York, USA. Updated and corrected, November 2017. Available at: https://pacificflywayshorebirds.org/downloads/PASCSv2_english_final.pdf.

[552] *Id*. at 23.

[553] *Id*. at 30.

[554] See: https://pacificbirds.org/wp-content/uploads/2024/07/PBHJV-Coastal-Wetlands-Plan-7.7.24_reduced-for-web.pdf

[555] App'x F at 15.

[556] DEIS at 4-203.

The DSEIS also concludes that Alternative 6 is unlikely to have effects on Steller sea lions, but then states that "installation of guardrails along the access road [] may deter some off-road vehicle use and reduce the potential for disturbance to Steller sea lions, if they were present nearby."[557]

The final SEIS must take a hard look at the effects of the proposed action on marine mammals and cannot arbitrarily conclude, without analysis, that there will be no impacts or that they will be negligible. For example, the DSEIS recognizes that Kinzarof Lagoon in particular, is "an important high-density sea otter concentration area"[558] and that "[c]onstruction and operation of the southern alignment road could elicit disturbance responses from sea otters using northern Kinzarof Lagoon during the summer months."[559] Despite this, and without additional analysis, the DSEIS concludes that the expected impacts to sea otters are "considered negligible."[560] As described in the ESA section of this letter, sea otters are vulnerable to the effects of climate change, and those effects "may be exacerbated by coastal development."[561] Those cumulative effects must be assessed in the final analysis. Other likely or at least potential threats to the northern sea otter are described in the ESA section of this letter; most of these go unexamined in the DSEIS, in violation of NEPA.

The DSEIS follows a similar pattern for other marine mammals: acknowledging that they are in the area, but going no further to actually analyze the impacts of the proposed land exchange and road on the species. The DSEIS notes that Pacific walrus have a known haul out site on Cape Glazenap and has been observed with increasing frequency swimming in channels within Izembek Lagoon.[562] Killer whales have been observed within Kinzarof Lagoon[563] and harbor seals commonly occur and haul out near Kinzarof Lagoon.[564] Harbor porpoise have been observed in Cold Bay, all the way to the mouth of Kinzarof Lagoon.[565] Gray whales have been seen in Cold Bay and Izembek Lagoon.[566] Many of these marine mammals rely on the benefits of an intact Izembek ecosystem for their survival, and they will experience direct, indirect, and cumulative effects from the proposed activities. Harms to eelgrass, wetlands, and the Refuge's hydrology will be felt by marine mammals, whether through the benthic prey and fish they feed on, discharges of contaminants from road construction, operation, and maintenance, through the introduction of silt and impacts due to gravel mining, or increased all-terrain vehicle operation on plant communities. Increased access to the Izembek and Kinzarof lagoons will affect the marine mammal species that are hunted for subsistence. An analysis of these effects to marine mammals is essential and almost entirely missing from the DSEIS, despite the acknowledgement of the proximity of various marine mammal species to the proposed action area. This failure must be remedied in the final EIS to comply with NEPA.

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[557] *Id*. at 4-563.
[558] *Id*. at 4-561.
[559] *Id*. at 4-201.
[560] *Id*.
[561] Northern Sea Otter Status Assessment at 107.
[562] DSEIS at 3-232.
[563] *Id*. at 3-236.
[564] *Id*. at 4-557.
[565] *Id*. at 3-236.
[566] *Id*. at 3-237.

9. Impacts on Subsistence

The DSEIS fails to adequately assess the impacts of the proposed action on subsistence. In the context of cumulative impacts, the DSEIS acknowledges that residents of the Yukon-Kuskokwim region, including the community of Hooper Bay, "have expressed concerns about the road and its potential cumulative effects on waterfowl."[567] Instead of analyzing those cumulative effects, the DSEIS arbitrarily concludes that any negative impacts "would be balanced by increased access to subsistence resources through construction of a road" and the net increase in federally-managed subsistence acreage that would result due to the land exchange.[568] These statements do not account for the impacts to communities that are geographically distant from Izembek but that rely on the waterfowl that use Izembek for key subsistence resources.

The conclusion that any increase in access to subsistence resources that a road would provide would have a positive impact on subsistence uses, users, and resources is both unsupported and contrary to the agency's prior findings on this exact question. And it is these project impacts on subsistence users and resources that should be the focus. Noting an increased or decreased net acreage under federal subsistence management cannot substitute for an impacts analysis. The final EIS must fully analyze the proposed action direct, indirect, and cumulative effects on subsistence in the context of all subsistence users, including those in the Yukon-Kuskokwim region, not just those that are adjacent to Izembek.

IX. The Proposed Mitigation is Inadequate, Not Mandatory, and Unenforceable

The proposed action claims to restrict road use to serve health and safety purposes and federally qualified subsistence users, but the viability and enforceability of these restrictions is not explained. It also assumes that the state or borough will pay for operation and maintenance, with no commitment from either. The DSEIS acknowledges the existing slim enforcement presence in this very remote area, but the proposed action includes no additional resources despite a large increased need. And most of the listed mitigation measures are neither adequate nor required.

The DSEIS states that the "State of Alaska or the Aleutians East Borough is anticipated to oversee the road planning, permitting, construction, maintenance, and operation under their normal operational plans."[569] It further states that "in order to minimize impacts to the environment, the road traffic type of use, frequency, and timing would be restricted to non-commercial uses, and further restricted to those necessary for health and safety purposes and access to Refuge resources by federally qualified subsistence users actively engaged in subsistence uses."[570]

These assertions raise a host of questions. How would the authorized users be identified and distinguished from unauthorized users? Who would make this decision, and when and where? What is the basis of the assumption regarding state or borough oversight? Is it the state or the borough that would be saddled with road planning, permitting, construction, and operation and maintenance responsibilities and expenses for a limited use road, including enforcement to ensure that limited use? At what cost? How would either entity maintain these or any restrictions on road

[567] *Id*. at 4-595.
[568] *Id*. at 4-596.
[569] DSEIS at 1-6.
[570] *Id*.

use, and who would require them to do so? Beyond signage, which the DSEIS acknowledges will be ineffective at preventing unauthorized use, there is no clear mechanism identified to impose these use restrictions on the future road. For example, there is no mention of a restrictive covenant in the patent. If there were, then how would that be implemented and enforced? The Service must clarify how it intends to impose any use restriction and then analyze its effectiveness. Without clarity on what mechanism the Service will use, the agency and public are unable to evaluate its effectiveness.

To maintain enforcement as a legal and practical matter, the land and road would need to be owned and managed by the Service. Privatizing the land and leaving law enforcement unfunded, non-FWS parties with completely different priorities and/or statutory directives cannot be reasonably expected to lead to diligent efforts to minimize impacts on Izembek Refuge resources in perpetuity. And even leaving the land and road under the Service ownership and management would likely not work without significant new committed funds for staff and resources, as the DSEIS acknowledges that the Service currently has very limited enforcement capacity and is already unable to properly enforce use restrictions on Refuge lands.

On top of these concerns, which go to the proposed authorized uses of the road, how would off-road use and impacts be regulated and minimized? The DSEIS states that "based on the history of previous all-terrain vehicle use in the area, it may be assumed that additional all-terrain vehicle routes could be extended from the Cold Bay road system, ultimately degrading natural resources and impacting fish and wildlife. Unauthorized all-terrain vehicle access to the Refuge would continue to be a management challenge and would increase under Alternative 6."[571] Given this valid concern, how would mitigation measures prevent or reduce these impacts to refuge wilderness lands?

Other mitigation measures are also problematic and unlikely to actually mitigate the harms to Izembek. Measure VV, guardrails, are identified as an important project component and pointed to throughout the DSEIS as a means to reduce impacts to resources. But again, maintenance and enforceability of these barriers over time cannot be reasonably relied upon. It is completely foreseeable that the guardrails would fail to prevent users from accessing the surrounding lands; indeed, a purported benefit of the road is that it would facilitate that access for subsistence users. And throughout the DSEIS, the Service acknowledges that guardrails will not be effective at preventing off-road use of the Refuge. Additionally, as discussed above, the road and its guardrails would bring significant adverse impacts to wildlife transiting the isthmus, especially caribou.

Measure AA1 makes the exchange contingent on the road being fully permitted and funded.[572] It thus serves to reinforce that the parties have inappropriately resorted to the land exchange mechanism to authorize a road, in contravention of Title XI's exclusive process for doing so, as explained above. Since the permits will not be written by the the Service, it also confirms the unenforceable nature of the "restrictions" discussed above.

Measure AA2 notes the ANCSA 22(g) requirement that the divested lands are subject to the laws and regulations governing use and development of the Refuge.[573] With exceptions not relevant

[571] DSEIS at 4-568.
[572] DSEIS App'x. F at F-3.
[573] *Id*.

here, those laws and regulations prohibit roads in the Refuge so this mitigation measure is not additive. Additionally, as explained above, a compatibility analysis conducted pursuant to 22(g) will prevent the road from being constructed post-exchange, demonstrating the untenability of this entire exercise.

Measure G.D. includes hydrodynamic sediment and transport modeling prior to construction, but the 2013 table to which it was added says that the timeframe is "post-construction, through life of the project.[574] All of the "G" measures are "uncertain (subject to available funds)" so are apparently not required and can't be counted upon to mitigate anything.

Measure II (the implementation of which is also "uncertain/subject to available funds") "requires" an acoustic assessment that would assess the effects of road noise on wildlife within Izembek Refuge.[575] This, together with the Wildlife Monitoring Program discussed below, could show that adaptive management strategies "may need to be employed" to reduce wildlife impacts. It's an optional measure that could demonstrate a need for optional management strategies.

Measure M.C addresses the Wildlife Monitoring Program. It is also "uncertain to occur" after construction and not a required measure. It "requires" monitoring the effects of road construction and use on caribou and brown bears for five years. New "requirements" to obtain fish information and develop and implement a fish monitoring plan inexplicably only apply to the "first two winters of hovercraft operations."[576]

Overall, the proposed mitigation measures are optional, ineffective, and/or unenforceable. The significant harms that will flow to Izembek Refuge resources and values from road construction and use through the ecologically critical isthmus between Izembek and Kinzarof lagoons cannot be avoided or appreciably reduced through these measures to the point where the proposed action could further Refuge purposes. They do nothing to change the conclusion that the proposed action is inconsistent with those purposes and cannot proceed under Section 1302(h) of ANILCA.

X. The Service's Preliminary ANILCA Section 810 Subsistence Analysis is Deficient

One of the reasons for the Secretary's withdrawal of the Exchange Agreement was the lack of an ANILCA Section 810 evaluation of the impacts of the exchange on subsistence.[577] A key purpose of this SEIS process is to conduct a proper Section 810 evaluation.[578] Engaging in a proper Section 810 analysis is critical to inform any action the Service may take and imposes substantive restrictions on the agency's final decision. However, the preliminary Section 810 analysis is deficient and requires significant revision.

[574] *Id*. at F-5.
[575] *Id*. at F-8.
[576] *Id*. at F-14. These are presumably intended to apply to the road but were appended to the old EIS in the wrong place. In any event, they are optional.
[577] Withdrawal Memo at 2, 4; 88 Fed. Reg. at 31814.
[578] 88 Fed. Reg. at 31814.

Title VIII of ANILCA recognizes that subsistence uses are a public interest and provides a framework to consider and protect subsistence uses in agency decision-making processes.[579] Congress' intent was to ensure that "the utilization of the public lands in Alaska" would "cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands."[580] Section 810 is intended to help achieve this goal by providing the agency and the public with information about subsistence impacts and ensuring that the agency affirmatively minimizes impacts from the proposed action before making its decision. The statute is not merely procedural; it drives toward substantive outcomes that protect subsistence.[581]

Pursuant to Section 810, actions which would significantly restrict subsistence uses may only be undertaken if an agency finds that such actions are necessary, involve the minimal amount of public lands necessary, and if the adverse effects to subsistence are minimized.[582] ANILCA Section 810 consists of a two-tiered process for evaluating subsistence impacts. At the "tier-1" stage, the agency must decide whether to take the proposed action by evaluating "the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes."[583] As part of this determination, the agency must analyze:

- Reductions in the abundance of subsistence resources caused by a decline in the population or amount of harvestable resources;
- Reductions in the availability of resources used for subsistence purposes caused by alteration of their normal locations, migration, or distribution patterns; and;
- Limitations on access to subsistence resources, including from increased competition for the resources.[584]

The agency must also consider cumulative impacts.[585]

The agency must provide notice to local and regional councils and hold hearings in potentially affected communities of its preliminary findings.[586] If an agency determines the activity will not "significantly restrict subsistence uses,"[587] the agency issues a Finding of No Significant Restriction and the requirements of ANILCA Section 810 are satisfied. However, if an agency

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[579] 16 U.S.C. §§ 3111–3126.

[580] *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1310–11 (9th Cir. 1990) (quoting 16 U.S.C. § 3112(1)); *see also* 16 U.S.C. §§ 3111–3112.

[581] *See Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 544 (1987) (noting "the underlying substantive policy the process was designed to effect [is the] preservation of subsistence resources"); *Sierra Club v. Marsh*, 872 F.2d 497, 502–03 (9th Cir. 1989).

[582] 16 U.S.C. § 3120(a).

[583] 16 U.S.C. § 3120(a); *Hanlon v. Barton*, 470 F. Supp. 1446, 1448 (D. Alaska 1988).

[584] State Director, Bureau of Land Mgmt., Instruction Memorandum No. AK-2011-008: Instructions and Policy for Compliance with Section 810 the Alaska National Interest Lands Conservation Act (ANILCA) (Jan. 14, 2010) [hereinafter Instruction Memorandum].

[585] *Sierra Club v. Penfold*, 664 F. Supp 1299, 1310 (D. Alaska 1897), *aff'd*, *Sierra Club v. Penfold*, 857 F.2d 1307 (9th Cir. 1988).

[586] 16 U.S.C. § 3120(a).

[587] 16 U.S.C. § 3120(a).

determines the action would "significantly restrict subsistence uses," the agency must then conduct a "tier-2" analysis.[588]

Under tier-2, an agency can only move forward with the proposed action if it conducts formal hearings and finds that the restriction on subsistence is: (a) necessary and consistent with sound public lands management principles; (b) involves the minimal amount of public lands necessary to accomplish the purpose of the use, occupancy or disposition of public lands; and (c) takes reasonable steps to minimize the adverse impacts to subsistence uses and resources from any use.[589] All three mandates must be satisfied to proceed with a proposed action.

The Service's preliminary Section 810 analysis is flawed because it does not evaluate the impacts to all communities that will be impacted by the proposed land exchange and road and the agency did not hold hearings in all impacted communities. Despite the submission of numerous resolutions from Tribes across Alaska prior to the release of the DSEIS, including resolutions from many Tribes that directly rely on the resources of Izembek, the Service did not expand the communities it considered under Section 810; it still only considered five communities: Cold Bay, King Cove, False Pass, Sand Point, and Nelson Lagoon.[590]

Resolutions opposing the land exchange have been passed by Native Village of Hooper Bay, Sea Lion Corporation, Native Village of Paimiut Traditional Council, Chuloonawick Native Village, Native Village of Saint Michael, Chevak Traditional Council, Stebbins Community Association, Levelock Village Council, Alatna Village Council, Native Village of Tyonek, Evansville Tribal Council, Arctic Village Council, Venetie Tribal Council, Native Village of Venetie Tribal Government, Ivisaappaat (Ambler) Tribal Council, Native Village of Scammon Bay, Eagle Village Council, Nondalton Tribal Council, the Norton Bay Watershed Council, and the Waterfowl Conservation Committee of the Association of Village Council Presidents. Chickaloon Village Traditional Council has written a letter in opposition to the land exchange. The resolutions and letter explain that the proposed land exchange and road threaten subsistence uses and practices across the state, including for Alaska Native people that will be directly impacted by the exchange and road. The resolutions express support for the marine transportation alternative.

Whether an action "may significantly restrict" subsistence is, by design, a low bar. The Section 810 analysis states that other communities that rely on waterfowl resources were considered, but nowhere in its Section 810 analysis did the Service actually analyze the impacts to those communities, nor hold hearings therein.[591] It is entirely unclear how these communities were "considered" in the analysis. The Service should revise the analysis to specifically and expressly include all communities for which the proposed action "may significantly restrict" subsistence, hold hearings in those communities, and take an inclusive approach in doing so, consistent with the low bar set by Congress.

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[588] *Kunaknana v. Clark*, 742 F.2d 1145, 1151 (9th Cit. 1984); *Hanlon*, 470 F. Supp. at 1448.
[589] 16 U.S.C. § 3120(a)(1)–(3).
[590] App'x D-2 at 7.
[591] App'x D-2 at 7.

The fact that the Section 810 analysis is so limited geographically is perplexing given that throughout the evaluation of the proposed action, the Service acknowledges that construction and operation of the road "could significantly affect abundance of waterfowl" as well as "the distribution of waterfowl populations" and that there could be population level changes under the cumulative case. The Service acknowledges that communities in the Yukon-Kuskokwim Delta rely on waterfowl species such as Pacific black brant and emperor geese for subsistence and that the community of Hooper Bay has high use of both species.[592] But instead of including additional communities in its Section 810 analysis, including Tribes that have specifically identified that they will be impacted, and holding hearings in those communities, the Service is artificially limiting the scope of its Section 810 analysis to a narrow study area. This must be revised in a new analysis.

This same mistake is made in the SEIS subsistence resources analysis and similarly must be fixed.[593] The failure of the subsistence section to include a broader analysis of communities is especially stunning given that the DSEIS otherwise includes updated subsistence use information for the five communities it did include.[594] There is no explanation for why additional communities that may be geographically distant from Izembek but that use subsistence resources that rely on Izembek are not included in that portion of the analysis as well.[595]

Further, the proposed mitigation to minimize the impacts to subsistence is insufficient to actually protect subsistence. The primary mitigation measure proposed is the installation of guardrails along the road.[596] But the DSEIS and preliminary Section 810 analysis are replete with statements recognizing that a guardrail will not be effective at limiting the incursion of ATVs off the road and that such off-road travel will cause additional harm to resources, including subsistence resources such as waterfowl. The Service must consider additional mitigation measures that will actually protect subsistence resources; if it cannot devise effective and enforceable measures, it cannot move forward with the proposed exchange.

Regarding the consideration of alternatives under Section 810,[597] the Service acknowledges that marine alternatives would eliminate the disposition of federal lands and "would not result in a significant restriction to subsistence uses."[598] And of course, the no-action alternative involves no disposition of federal lands and "would not result in a significant reduction in the availability or abundance of subsistence resources, or would it alter or restrict subsistence uses."[599] As such, these are the only options that are clearly consistent with ANILCA's purpose to "cause the least adverse impact possible" to rural subsistence users, and for which there is no need to make the three substantive findings to proceed.[600]

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[592] App'x D-2 at 39–40, 42, 46, 50.
[593] DSEIS at 3-382.
[594] *See, e.g.*, DSES at 3-408–3-410.
[595] *See* DSEIS 3-382 (explaining that the subsistence section considers communities "that use . . . resources that migrate through the project area and are harvested elsewhere" but only studying the impacts on the five communities).
[596] App'x D at 16.
[597] As explained above, the alternatives analysis is deficient under NEPA. ANILCA Section 810's alternatives requirement is separate and distinct from NEPA and drives substantive outcomes to ensure that subsistence is protected.
[598] App'x D-2 at 12–16, 37.
[599] App'x D-2 at 8–10, 37.
[600] 16 U.S.C. § 3112(1).

By comparison, the proposed land exchange would of course involve the disposition of public lands.[601] The construction, operation, and maintenance of the road would negatively impact the abundance of subsistence resources for the studied communities, including caribou, birds (in particular waterfowl), and fish.[602] It would also displace subsistence resources and reduce subsistence resource availability.[603] And there would be subsistence access impacts as well.[604] As a result, the Service necessarily concludes that the proposed land exchange "may result in a significant restriction to subsistence uses for the communities" studied, including in the cumulative case.[605]

Given the availability of alternatives that do not dispose of federal land and which would not significantly impact subsistence resources, if the Service attempts to move forward with the land exchange, the agency is unlikely to be able to demonstrate that the land exchange for a road is "necessary, consistent with the sound management principles for the utilization of public lands."[606] The Service would also have difficulty demonstrating that the adverse effects to subsistence are minimized and that its decision involves the "minimal amount of public lands necessary" needed to fulfill the purpose of the action,[607] which, when properly framed, is simply to provide for a transportation system between the communities of King Cove and Cold Bay for medical purposes. The purpose of establishing a transportation system between the two communities can be accomplished without a road. By contrast, the Service's analysis demonstrates that the proposed land exchange for a road would result in significant impacts on subsistence for multiple communities, including communities that were not evaluated in the preliminary analysis but must be. In sum, the proposed action would not comply with ANILCA Section 810's requirements.

CONCLUSION

For the foregoing reasons, the Service should halt this process. It should unequivocally inform road proponents and the public that it has no authority to trade away land through the middle of Izembek Refuge Wilderness to allow a road to be constructed there. It should engage agencies with relevant expertise to help define and develop any improvements in emergency health care services that may be warranted for the community, and to further assess non-road transportation options to Cold Bay as appropriate.

Sincerely,

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Defenders of Wildlife

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[601] App'x D-2 at 16.
[602] App'x D-2 at 17–23, 38.
[603] App'x D-2 at 23–33.
[604] App'x D-2 at 33, 36.
[605] App'x D-2 at 38–40, 49–52.
[606] 16 U.S.C. § 3120(a).
[607] *Id*.

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