Nos. 20-35721, 20-35727, and 20-35728
OPINION filed March 16, 2022 - Before: K. M. WARDLAW, E.D. MILLER, and B.S. BADE, Circuit Judges

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

DEBRA HAALAND, et al.,
Defendants-Appellants,

and

KING COVE CORPORATION, et al.,
Intervenor-Defendants/Appellants,

and

STATE OF ALASKA,
Intervenor-Defendant/Appellant.

On Appeal from the United States District Court
for the District of Alaska, Case No. 3:19-cv-00216 JWS

PETITION FOR REHEARING EN BANC

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STATEMENT OF BASIS FOR REHEARING EN BANC

Rehearing en banc is needed "to secure or maintain uniformity of the court's decisions" with Supreme Court and Ninth Circuit precedent regarding review of agency actions under the Administrative Procedure Act (APA) and to resolve a question of exceptional national importance concerning millions of acres of public land. Fed. R. App. P. 35(a). The panel majority (majority) held that the Secretary of the U.S. Department of the Interior (Secretary) may override Congress and exchange lands out of federal ownership for development purposes, putting millions of acres of conservation lands in Alaska at risk. *See Friends of Alaska National Wildlife Refuges v. Haaland,* 29 F.4th 432 (9th Cir. 2022) [hereinafter Op.].

The majority's decision eliminates the long-standing requirement that federal agencies must provide adequate justification when making a decision that reverses a prior agency policy. *FCC v. Fox Television Stations, Inc.* (*Fox*), 556 U.S. 502, 515–16 (2009); *Encino Motorcars, LLC v. Navarro (Encino)*, 579 U.S. 211, 221–22 (2016); *Organized Village of Kake v. USDA* (*Kake*), 795 F.3d 956, 968 (9th Cir. 2015) (en banc). The majority's analytical approach also runs afoul of the bedrock principle of administrative law that agencies must articulate a "rational connection between the facts found and the choices made" based on the evidence before the agency. *Motor Vehicle Manufacturers Ass'n of the U.S., Inc. v. State*

Farm Mutual Automobile Insurance Co. (State Farm), 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *Center for Biological Diversity v. Haaland (CBD)*, 998 F.3d 1061, 1067 (9th Cir. 2021).

This appeal also raises a question of exceptional importance concerning the Secretary's unilateral authority to redraw the boundaries of, and allow commercial development and transportation systems within, Alaska's millions of acres of public lands without regard for requirements established by Congress under the Alaska National Interest Lands Conservation Act (ANILCA).

BACKGROUND

This case arose after the Secretary exchanged land within the Izembek National Wildlife Refuge (Izembek) to allow a road for commercial and other uses to cut through it, which prior agency decisions repeatedly rejected. Izembek, on the Alaska Peninsula, has "some of the most striking wildlife diversity and wilderness values of the northern hemisphere" due to its unique habitat, including wetlands, lagoons, and shallow bays. SER-131, 134, 142; *see also* 2-ER-39. Izembek supports nearly the entire population of Pacific black brant on its annual migration, and numerous other bird species and wildlife, including caribou and bears. Op. at 9. Because of these values, nearly all of Izembek is Congressionally-designated

Wilderness. ANILCA, Pub. L. No. 96-487, §§ 303(3)(A), 702(6), 94 Stat. 2371, 2390, 2418 (1980).

The U.S. Fish and Wildlife Service (FWS) has evaluated the effects of a road from the community of King Cove to Cold Bay through Izembek numerous times. *Friends of Alaska National Wildlife Refuges v. Bernhardt (Friends I)*, 381 F. Supp. 3d 1127, 1131–32 (D. Alaska 2019). A road connecting these communities was sought for economic and commercial purposes, in addition to personal and medical use. 2-ER-40, SER-128. Multiple times, FWS found that the impacts would irreversibly damage Izembek and refused to exchange lands to allow a road. *Friends I*, 381 F. Supp. 3d at 1131–32. In 2013, the Secretary issued a Record of Decision ("2013 ROD") concluding that a road through Izembek, even with restrictions on commercial use, would have significant detrimental impacts and declining to exchange lands. *Id.* at 1132. The Secretary found that declining the exchange "best satisfies Refuge purposes, and best accomplishes the mission of the Service and the goals of Congress in ANILCA." 2-ER-56.

In 2018, the Secretary reversed course and approved a land exchange to allow a road. *Friends I*, 381 F. Supp. 3d at 1133. The agreement more than doubled the acreage considered for removal from Izembek in 2013 (500 acres versus 200 acres) in exchange for fewer acres coming into federal ownership, and for the first time, provided additional lands within Izembek to be used for gravel

mines. *Compare* 2-ER-38–39 *with* 2-ER-244 (acreage received); *and* 2-ER-49–50 *with* SER-87–89 (acreage removed); 2-ER-189 (explaining agreement includes gravel sites for road construction). The District Court invalidated that exchange. *Friends I*, 381 F. Supp. 3d at 1136–44. The Secretary then executed another nearly identical exchange agreement — without commercial road-use restrictions — accompanied by a memorandum purporting to explain the reversal in policy, challenged here. The District Court found that the agreement (1) violated the APA because the Secretary failed to justify the change in policy, (2) violated ANILCA because the record did not support the Secretary's finding that the exchange furthered ANILCA's purposes, and (3) violated ANILCA Title XI's procedures for approving a transportation system. *Friends of Alaska National Wildlife Refuges v. Bernhardt*, 463 F. Supp. 3d 1011, 1018–26 (D. Alaska 2020). This appeal followed.

A divided panel of this Court reversed, holding that the exchange furthered ANILCA's economic purposes, that the Secretary's decision to exchange lands complied with the APA, and that Title XI's procedures were inapplicable. Judge Wardlaw dissented on each point. En banc review is needed because the majority's decision is contrary to binding precedent interpreting the APA and because the majority's decision raises issues of exceptional importance for millions of acres of public lands governed by ANILCA.

ARGUMENT

I. EN BANC REVIEW IS NEEDED TO ENSURE CONSISTENCY REGARDING THE APA'S STANDARD FOR AGENCY REVERSALS IN POLICY.

The majority's opinion conflicts with Supreme Court and Ninth Circuit precedent concerning judicial review of agency policy reversals and decision making. When changing positions, agencies must satisfy four factors under *Fox*, including showing that "the new policy is permissible under the statute" and providing "good reasons for the new policy." *Fox*, 556 U.S. at 515–16; *see also Kake*, 795 F.3d at 967. When an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must also include "a reasoned explanation . . . for disregarding facts and circumstances that underlay. . . the prior policy." *Fox*, 556 U.S. at 516. This requires "a more detailed justification than what would suffice for a new policy created on a blank slate." *Id.* at 515; *see also Kake*, 795 F.3d at 966 (explaining policy change violates APA "if the agency ignores or countermands its earlier factual findings without reasoned explanation") (quoting *Fox*, 556 U.S. at 537)). Further, it is a bedrock principle of administrative law that agency decisions must be supported by the record. *See State Farm*, 463 U.S. at 43; *see also Encino*, 579 U.S. at 221.

The majority's misapplication of administrative law principles upends Supreme Court and Ninth Circuit law. Under the majority's reasoning, an agency's decision reversing a policy can be upheld based solely on the agency's assertion

that it balanced facts that were unsupported by record evidence to reach its desired outcome.

A. The Majority Failed to Require a Reasoned Analysis for the Secretary's Policy Reversal.

The Secretary's decision to exchange lands to allow for a road is an agency reversal of policy. The Secretary offered two justifications for this reversal: that he simply "rebalanced" the 2013 findings to reach a different decision, and that new factual findings explain any contrary facts. Neither justification passes muster.

First, instead of providing a reasoned explanation for disregarding the facts underlying FWS's prior policy, as required by *Fox*, the Secretary simply stated, "even if all facts are as stated in the 2013 ROD," an exchange to allow a road was proper. 2-ER-232–33. The Secretary stated that his conclusion that health concerns outweighed environmental harms was sufficient to justify the change in position. 2-ER-233. The majority improperly deemed the Secretary's statements that he rebalanced competing facts on the same record sufficient to satisfy *Fox*. Op. at 20–22.

As a threshold matter, the Secretary could not exchange lands assuming all facts as stated in 2013 because the record does not support that assertion. The present exchange involves substantially less acreage coming into federal ownership, and allows for gravel mines and commercial road use. *Supra* at 3–4.

These are fundamental changes relevant to the road's environmental and socioeconomic impacts that were never analyzed. *Encino*, 579 U.S. at 221 (explaining action is arbitrary "where the agency has failed to provide even [a] minimal level of analysis").

Turning to the majority's misapplication of *Fox* and *Kake,* while an agency may "reprioritize" concerns based on the same record, the agency must provide a detailed justification for disregarding contrary factual findings when doing so. *Kake*, 795 F.3d at 968–69 ("[U]nexplained conflicting findings about the environmental impacts of a proposed agency action violate the APA."). When an agency changes course, it "is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *State Farm*, 463 U.S. at 42; *see also Department of Homeland Security v. Regents of the University of California (Regents)*, 140 S. Ct. 1891, 1913 (2020) (explaining general requirements for agency policy changes); *CBD*, 998 F.3d at 1067.

It would negate the requirements of *Fox* and its progeny if an agency could meet its burden by simply stating it reached a new conclusion "even assuming all the [contrary] facts as stated." Op. at 20. As the dissent explained, "[t]he majority's position allows agencies to evade *Fox*'s explanation requirement so easily that it

actually eliminates it." *Id*. at 33. Accordingly, the majority's reasoning conflicts with binding precedent governing agency obligations when reversing decisions.

Rather than evaluate the Secretary's reversal under the appropriate legal framework and on the basis given by the Secretary, the majority sidestepped the issue, stating that the Secretary offered "genuine justifications" and independent "alternative rationales" for the decision. *Id*. at 20–21. These are not the applicable standards. The Secretary did not offer alternative rationales for the decision; rather, he expressly acknowledged that the decision to exchange lands for a road constituted a policy reversal. 2-ER-226–227; *see also* Federal Appellant's Opening Br. at 24, ECF No. 14 ("Interior had acknowledged a change in positions").[1] The Secretary's memo offered factual findings, discussed below, to explain the reversal after the District Court vacated the 2018 exchange agreement for failing to do so. 2-ER-215; *Friends I*, 381 F. Supp. 3d at 1136–44. The Secretary's policy reversal should have been evaluated under the framework of *Fox* and *Kake*.

Second, as the dissent explained, the Secretary relied on these new, contradictory facts to support his decision and explain the policy reversal. Op. at 33–34; *see also* 2-ER-232–33 (listing five changed findings). As a result, these

[1] To the extent the Secretary argued the decision was not a change in position, this argument is post hoc and should have been rejected. *Regents*, 140 S. Ct. at 1909.

findings were not "beside the point;" the Secretary was required to provide a reasoned explanation with a more detailed justification. Op. at 20; *Fox*, 556 U.S. at 515–16; *Kake*, 795 F.3d at 968; *see also*, *e.g.*, *Regents*, 140 S. Ct. at 1913 (rejecting Secretarial memo supporting agency policy reversal that failed to consider critical aspects of problem). He did not. And the new contrary facts he relied upon had to be supported by the record. *State Farm*, 463 U.S. at 42–43. They were not, as described below.

B. The Majority Failed to Require That the Secretary's Decision Be Supported by the Record.

The Secretary offered several contrary factual justifications. First, the Secretary stated that acquisition of other lands via the exchange and restrictions on use of the road would "balance" Izembek's conservation purposes with socioeconomic purposes. Op. at 22. The Secretary found that there would be "substantial benefits" to the public from the exchange and that the 2013 ROD "discounted" the habitat and conservation values of lands to be acquired. 2-ER-232. This directly contradicts the 2013 ROD's factual findings that the lands to be received do not provide the same "internationally recognized wetland habitat" and "would not compensate" for the impacts to Izembek. 2-ER-44–45; SER-107–08. The Secretary did not, as the majority states, make "uncontroversial observations that adding acreage to federal ownership promotes environmental values," Op. at

21–22; this assertion was contrary to prior findings and not supported by the record. 1-ER-17. Second, the 2013 ROD found that restrictions on commercial use of the road would not protect Izembek's purposes, but the Secretary now found they would "balance" those conservation and subsistence purposes. Op. at 22; 2-ER-40, 45. This contrary finding is also unsupported because the Exchange Agreement contains no limitations on commercial road-use. 1-ER-10–11. Finally, the Secretary's contrary finding that alternatives to a road are not viable or available are not supported by the 2015 report cited by the Secretary; that study indicated marine and road transportation options were comparable in terms of cost and technical feasibility. 2-ER-47; *but cf*. Op. at 22. Because the Secretary's contrary findings are unsupported by the record, they cannot provide the "substantial justification" needed under *Fox* and *Kake*.

The majority's acceptance of the Secretary's simple re-weighing of existing facts to reach a different decision — without ensuring that the decision is supported by the record and that fundamental changes were analyzed — eviscerates traditional APA review. A court should not "defer to an agency decision that is without substantial basis in fact." *Alaska v. Federal Subsistence Board*, 544 F.3d 1089, 1094 (9th Cir. 2008) (quoting *Sierra Club v. EPA*, 346 F.3d 955, 961 (9th Cir. 2003)) (internal quotations omitted); *Encino*, 579 U.S. at 224 (holding "conclusory statements do not suffice to explain [an agency's] decision").

As the dissent recognized, the Secretary's failure to analyze the facts underlying this decision is a fatal flaw under the APA. Op. at 33–34.

Even if the Secretary had presented alternative rationales for the decision, the court must ensure those justifications were supported by the record; the cases cited by the majority do not indicate otherwise. *See Id*. at 20–21. As explained above, the Secretary's justifications regarding road-use restrictions, conservation benefits from the exchange, and a lack of viable transportation alternatives are unsupported. *See supra* at 9–10. Nor did the record support the Secretary's argument that the road is "paramount" for health and safety purposes. Op. at 20; 1-ER-11–14. Considering whether the Secretary's findings are supported by the record is necessary to determine whether the agency could reach its decision as a matter of law. *City & County of San Francisco v. United States*, 130 F.3d 873, 877 (9th Cir. 1997). The majority cannot negate this requirement as it did here.

In sum, rehearing is needed to ensure consistency in the standards applicable to agency reversals and APA review under Supreme Court and Circuit case law.

C. The Majority Failed to Require That the Secretary's Decision Be Permissible Under the Statute.

The majority further misapplied *Fox* by upholding the Secretary's reversal in policy even though it violates ANILCA's conservation purposes. *Fox*, 556 U.S. at 515; *infra* Argument II.A. The 2013 ROD found an exchange would violate

ANILCA's conservation purposes. 2-ER-56. The Secretary did not argue ANILCA's conservation purposes could be overlooked or violated to further social and economic needs. Rather, the Secretary relied on the new, contrary factual findings described above to justify the exchange as "balancing" ANILCA's conservation purposes with a commercial road. 2-ER-231–33; Op. at 19–20. But the record does not support those findings. *Supra* Argument I.B. As a result, the majority failed to consider that the Secretary violated this *Fox* factor.

II. THE MAJORITY'S RULING RAISES ISSUES OF EXCEPTIONAL IMPORTANCE CONCERNING MILLIONS OF ACRES OF PUBLIC LANDS.

This appeal presents a question of exceptional national importance about the Secretary's authority to redraw the boundaries of national parks, wildlife refuges, and Wilderness in Alaska for economic development. The majority's interpretation of ANILCA undermines the purposes of that act and the Wilderness Act and allows the Secretary to override Congress' intent in establishing millions of acres of conservation lands in Alaska for the benefit of all Americans. As the dissent acknowledged, the majority's interpretation of ANILCA's purposes "turns ANILCA on its head" and would convert a conservation statute into a "rubber stamp" for any destructive project that the Secretary may find economically beneficial. Op. at 39. It also reads Title XI's strict procedures for the approval of transportation systems on conservation lands out of the statute by misapplying principles of statutory construction.

A. The Majority's Decision Erodes ANILCA's Conservation and Subsistence Protection Purposes.

Section 1302 of ANILCA authorizes the Secretary to enter land exchanges that further "the purposes of this Act." 16 U.S.C. § 3192(a), (h). ANILCA's purposes include the preservation of nationally significant lands, unaltered ecosystems, wildlife habitat, recreational and research opportunities, and preserving subsistence. *Id.* § 3101(b), (c). The majority held that economic and social development is also a purpose, on par with conservation and subsistence. Op. at 15. This puts all of Alaska's conservation system units, and their "nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values" at risk of being traded away for economic gains. 16 U.S.C. § 3101(a).[2]

The majority relied on subsection 3101(d) to interpret ANILCA's purposes; but that subsection contains a statement that Congress believed it had achieved the proper balance between conservation and economic and social needs in passing ANILCA, obviating future legislation. *Id*. § 3101(d). [3] As the dissent explained, this language recognizes the balance that Congress already struck in passing

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[2] "Conservation system unit" is defined to include national wildlife refuges, parks, wild and scenic rivers, and Wilderness areas in Alaska. 16 U.S.C. § 3102(4).
[3] Title XI of ANILCA, which allows private parties to request transportation and utility access through conservation system units, is an example of how Congress struck this balance. *Infra* Argument II.B.

ANILCA; it does not authorize the Secretary to administer ANILCA in a manner that prioritizes economic and social needs. Op. at 37. The Supreme Court did not hold otherwise in *Sturgeon v. Frost*, which recognized that Congress set aside lands in ANILCA for "preservation purposes" and "for conservation." 139 S. Ct. 1066, 1075, 1087 (2019).

Properly recognizing ANILCA's purposes, especially in the context of the exchange provision, is an issue of exceptional importance. The majority failed to recognize that, in establishing conservation system units in ANILCA, Congress drew broad and inclusive boundaries, 16 U.S.C. § 3101(b) (explaining Congress designated conservation system units on landscape levels to protect entire ecosystems). Congress included the exchange provision — section 1302(h) — principally to enable the Secretary to acquire private inholdings within units without resorting to condemnation. SER-152, S. REP. NO. 96-413 at 304 (1979); SER-162, H.R. REP. NO. 96-97 pt. I, at 246 (1979). The majority also overlooked Congress's express purposes for individual conservation system units, including Izembek. ANILCA, Pub. L. No. 96-487 §§ 201, 202, 302, 303, 701, 702, 707 (Izembek's purposes are at section 303(3)(B)), 94 Stat. 2371, 2377–83, 2385–93, 2417–18, 2421 (1980)). Congress was clear that 1302(h)'s exchange authority not be used to undercut those protections or "frustrate the purposes of any such unit." SER-167–68, H.R. REP. NO. 95-1045, pt. I, at 211–12 (1978).

This exchange would allow a road through Izembek's core, in the area Congress sought to protect with its most stringent land designation — Wilderness. If the Secretary is free to exchange lands out of federal ownership for economic gain with only a nod to ANILCA's conservation and subsistence purposes and no consideration of the unit's specific purposes, there are no meaningful limits on the Secretary's use of section 1302(h). For example, under the majority's interpretation, the Secretary could trade away North America's tallest mountain — Denali in Denali National Park — for economic gain. Such an interpretation directly contravenes the authority Congress granted the Secretary in section 1302(h) and Congress' intent in designating conservation units. Instead, it gives the Secretary boundless discretion to redraw boundaries, including in Wilderness, that Congress carefully established.

In sum, this appeal raises a question of exceptional importance regarding the Secretary's ability to override Congress, endangering millions of acres of federal conservation lands.

B. The Majority's Holding that ANILCA's Exchange Provision Overcomes Title XI Threatens All Conservation System Units.

In deciding a question of first impression that impacts all conservation system units in Alaska, the majority incorrectly held that ANILCA Title XI does not apply when the Secretary exchanges lands to allow a road. Op. at 23–25. The

majority's interpretation allows agencies to simply execute a land exchange to delineate a road corridor (or other transportation system) across conservation lands — including through Wilderness — effectively nullifying Title XI's protective mandates.

Congress enacted Title XI "to minimize the adverse impacts of siting transportation and utility systems" within conservation system units and to insure an effective decision-making process. 16 U.S.C. § 3161(c); *see also id*. § 3162(4)(B)(vii) (defining transportation system). To achieve these goals, Congress established "a single comprehensive statutory authority for the approval or disapproval of applications for such systems," *Id*. § 3161(c), voiding any agency action that does not follow its procedures: "[N]o action by any Federal agency under applicable law with respect to the approval or disapproval of the authorization, in whole or in part, of any transportation or utility system shall have any force or effect unless the provisions of this section are complied with," *id*. § 3164(a).[4] Consistent with this broad mandate, Congress defined "applicable law" expansively as:

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[4] Section 1104 governs all transportation systems and requires a very specific agency and public process, including mandated agency findings for approval. *Id*. § 3164(b)–(g). Section 1106 requires any transportation systems proposed through Wilderness to be recommended by the President and approved by Congress. *Id.* § 3166(b)

> any law of general applicability . . . under which any Federal department or agency has jurisdiction to grant any authorization (including but not limited to, any right-of-way, permit, license, lease, or certificate) without which a transportation or utility system cannot, in whole or in part, be established or operated.

Id. § 3162(a).

It is undisputed that the exchange agreement is to allow a road through Izembek. Op. at 24. The majority held that because the exchange agreement itself did not authorize road construction, it was not an "authorization" and ANILCA's land exchange provision was, therefore, not an "applicable law" subject to Title XI. *Id.* at 24–25. The majority failed to interpret the term "authorization" in light of its context and statutory purposes.

Although "authorization" is not defined in ANILCA, the statute contains a broad, non-exhaustive list of what may constitute an authorization; that includes "but [is] not limited to" a right-of-way or lease, which are functionally equivalent siting instruments to this exchange agreement. 16 U.S.C. § 3162(a); *see also Arizona State Board for Charter Schools v. U.S. Department of Education*, 464 F.3d 1003, 1007 (9th Cir. 2006) (explaining "including" is ordinarily used to illustrate examples); *Turtle Island Restoration Network v. National Marine Fisheries Service*, 340 F.3d 969, 975 (9th Cir. 2003) (explaining use of "including but not limited to" means list is not exhaustive).

The definition of "applicable law" is also broad and includes any agency action required to establish a transportation system "in whole or in part." 16 U.S.C. § 3162(a). As the dissent recognized, this evinces Congress' intent that "even partial authorizations of transportation systems must clear Title XI's requirements." Op. at 44. The land exchange sites a road corridor, without which a road could not be built, making it subject to Title XI.

The majority failed to consider this provision in context, which makes clear that authorizations subject to Title XI include those instruments that relate to route-selection and siting; not solely to road construction approvals. *Wilderness Society v. U.S. Fish and Wildlife Service*, 353 F.3d 1051, 1060 (9th Cir. 2003) (en banc) (emphasizing importance of reading words in context). Courts must interpret a statute in light of its purposes. *Id*. The majority's interpretation failed to give effect to Congress' intent to adopt a comprehensive and protective process to minimize and avoid degradation from siting transportation systems through conservation system units. 16 U.S.C. §§ 3161(c), 3164(g)(2), 3167. It also failed to account for ANILCA's conservation and subsistence purposes. *Supra* Argument Part II.A.

A statute should be interpreted to give meaning to all of its provisions and not render any provision surplusage or otherwise nullify it. *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000); *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 834 (9th Cir. 1996). The majority's

interpretation nullifies Title XI by allowing the Secretary to exchange lands instead of following Congressionally-established procedural mandates, which include a Presidential recommendation and Congressional approval for roads in Wilderness. 16 U.S.C. § 3166(b). As the majority acknowledges, once exchanged, lands are no longer federal and Title XI will not apply to future permitting. Op. at 24.

The majority's misinterpretation of ANILCA creates a loophole that swallows Title XI, threatening all conservation units in Alaska. It also allows the Secretary to override Congress in allowing for roads through Wilderness. The proper interpretation of Title XI raises an issue of exceptional national importance under public land law.

CONCLUSION

In light of the majority's significant errors, the Court should grant the Petition for Rehearing En Banc and vacate the panel opinion.

Respectfully submitted this 29th day of April, 2022.

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