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## Agdaagux Tribe of King Cove v. Jewell

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In a lengthy opinion by the Alaska District Court, the battle for a proposed medical emergency road through the Izembek National Refuge stalled. The court held that the Department of the Interior’s No Action Alternative blocked the construction of the road was decided in accordance within the Department’s authority. It is not the end of the battle over the road, as the court alluded that Congress may be able to change this decision.

**I. INTRODUCTION**

At issue in *Agdaagux Tribe of King Cove v. Jewell* was whether the “No Action Alternative” adopted by the Secretary of the Interior (“Secretary”) violated either the National Environmental Policy Act (“NEPA”) or the Omnibus Public Land Management Act of 2009 (“OPLMA”).<sup>1</sup> The plaintiffs, tribal entities (“KCG”) and the State of Alaska, challenged the decision to block a land exchange that would allow the construction of a road through the Izembek National Refuge (“Refuge”). The defendants were federal agencies, including Department of the Interior, the United States Fish and Wildlife Services (“FWS”) and numerous environmental advocacy groups.<sup>2</sup> While the plaintiffs possessed standing to bring the NEPA claim under the Administrative Policy Act (“APA”), the United States District Court for the District of Alaska held there was no merit to the contention that the Secretary’s decision regarding landing crafts and the land value of proposed exchanged land was arbitrary or capricious.<sup>3</sup> Citing the OPLMA, the court concluded that while Congress recognized the benefits of the road, its delegation of the road project to the Secretary with instructions to meet NEPA standards “probably doomed the project.”<sup>4</sup> The court granted summary judgment and dismissed the numerous claims with prejudice.<sup>5</sup>

**II. FACTUAL AND PROCEDURAL BACKGROUND**

*A. Standard of Review*

A review of the Secretary’s decision under the OPLMA and NEPA is governed by the APA, which allows a decision to be overturned only when it is found to be “arbitrary and capricious.”<sup>6</sup> In a NEPA claim, the court is to ensure that the “agency has taken a ‘hard look’ at the potential environmental consequences of the proposed action.”<sup>7</sup>

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<sup>1</sup> *Agdaagux Tribe of King Cove v. Jewell*, \_\_\_ F.Supp.3d \_\_\_, 2015 U.S. Dist. LEXIS 118882, at \*24 (D. Alaska Sept. 8, 2015) [hereinafter *Agdaagux v. Jewell*].

<sup>2</sup> *Id.* at \*2-3.

<sup>3</sup> *Id.* at \*33.

<sup>4</sup> *Id.* at \*56.

<sup>5</sup> *Id.* at \*57.

<sup>6</sup> *Id.* at \*8.

<sup>7</sup> *Id.* (quoting *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004)).

### B. Factual Background

The Alaskan communities of King Cove and Cold Bay are located eighteen miles apart within the Refuge, and are accessible solely by air or sea.<sup>8</sup> Since the 1980's, KCG has lobbied for an emergency-use-only road to link the two communities through the Refuge.<sup>9</sup> King Cove hosts the only all-weather airport in the area.<sup>10</sup> Proponents of the road argue that the road is a safe, reliable, and affordable way to access King Cove airport when weather prohibits safe evacuations on water.<sup>11</sup>

The Izembek National Refuge was established in 1980 as part of the Alaska National Interest Lands Conservation Act ("ANILCA").<sup>12</sup> The Refuge was created to conserve fish and wildlife habitats, fulfill the treaty obligations of the United States, and to ensure water quality and quantity.<sup>13</sup> The refuge is home to many protected species of wildlife and is home to the "world famous eelgrass beds" that attract the "largest concentration of migratory birds" in the area.<sup>14</sup>

Congress has attempted to solve the medical evacuation issues from Cold Bay to King Cove for years.<sup>15</sup> In 1999, Congress appropriated around thirty-seven million dollars to the communities to improve the King Cove airstrip and health clinic and to construct a road-hovercraft link.<sup>16</sup> The hovercraft was used from 2007 until 2011, when the Aleutian East Borough ("AEB") ceased operating the hovercraft, due to reliability and financial concerns.<sup>17</sup>

### C. Litigation Background

In 2009, Congress passed the Omnibus Public Land Management Act of 2009 ("OPLMA"), which, among other things, authorized the Secretary to conduct a land exchange of Refuge land for both Alaska and KCG land.<sup>18</sup> The purpose of the land exchange was to construct a single-lane gravel road, primarily used for health and safety reasons.<sup>19</sup> The OPLMA required the Secretary to comply with the NEPA, and all other applicable law, before exchanging the land.<sup>20</sup> Specifically, the NEPA analysis was to investigate the proposed land exchange, the potential construction and use of the road between the communities, and to evaluate a road corridor.<sup>21</sup> Additionally, the OPLMA allowed certain entities to be involved as "cooperating agencies", including Alaska, AEB, King Cove, and the Agdaagux Tribe.<sup>22</sup>

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<sup>8</sup> *Id.* at \*3.

<sup>9</sup> *Id.* at \*5.

<sup>10</sup> *Id.* at \*3.

<sup>11</sup> *Id.* at \*5-6.

<sup>12</sup> *Id.* at \*3-4.

<sup>13</sup> Pub. L. 96-487, 94 Stat. 2371 (1980).

<sup>14</sup> *Agdaagux v. Jewell*, 2015 U.S. Dist. LEXIS 118882, at \*4-5.

<sup>15</sup> *Id.* at \*6.

<sup>16</sup> *Id.* at \*6; *see* Pub. L. 105-277, § 353, 112 Stat. 2681 (1999).

<sup>17</sup> *Agdaagux v. Jewell*, 2015 U.S. Dist. LEXIS 118882, at \*6.

<sup>18</sup> *Id.* at \*7-8; Omnibus Public Land Management Act, Pub. L. 111-11, § 6402(a), 123 Stat. 991 (2009).

<sup>19</sup> Pub. L. 111-11, § 6403(a)(1)(A).

<sup>20</sup> *Id.* § 6402(b)(1).

<sup>21</sup> *Id.* § 6402(b)(2)(B).

<sup>22</sup> *Agdaagux v. Jewell*, 2015 U.S. Dist. LEXIS 118882, at \*9.

Once the OPLMA was enacted, the Secretary directed the FWS to conduct an Environmental Impact Statement (“EIS”) for the proposed road.<sup>23</sup> After publishing a Notice of Intent and holding seven public scoping meetings in 2010, the FWS developed five alternatives for the road.<sup>24</sup> In 2011, AEB sent a letter to the FWS informing them that the hovercraft would no longer be used.<sup>25</sup> In early 2012, AEB sent a second letter to the FWS describing a possible alternative maritime evacuation method, an aluminum landing craft, should the Secretary not approve the land exchange.<sup>26</sup> The FWS published a draft EIS (“DEIS”) on March 19, 2012, and opened public comment.<sup>27</sup> Shortly thereafter, the FWS reached out to AEB about the aluminum landing craft to incorporate that information into the “No Action Alternative” in the EIS.<sup>28</sup> In response, AEB reminded the FWS that the aluminum craft was a “concept,” that the concept had yet to be subject to public discussion, and as such no concrete details were available.<sup>29</sup>

The final EIS (“FEIS”) was published on February 6, 2013, and public comment was opened.<sup>30</sup> KCG commented, arguing that the FEIS was deficient because it did not use “available information about operability of the conceptual landing craft.”<sup>31</sup> Shortly after, Assistant Secretary of Interior for Indian Affairs Kevin Washburn was sent to King Cove and Cold Bay to tour, assess medical benefits of the road, and to provide a report to the Secretary.<sup>32</sup> In August, the Secretary traveled to King Cove and Cold Bay to hold official meetings and receive testimony.<sup>33</sup> The “No Action Alternative” was adopted on December 23, 2013.<sup>34</sup>

KCG commenced this APA action on June 4, 2014, challenging the No Action Alternative.<sup>35</sup> On December 19, 2014, the court dismissed a number of the alleged claims and reduced the claims alleging that the Secretary violated both the OPLMA and the NEPA.<sup>36</sup> KCG moved for summary-judgment on these claims, and the defendants cross-moved for summary judgment on the remaining claims.<sup>37</sup>

### III. ANALYSIS

The court analyzed four broad issues on appeal. First, the court held that KCB had standing to bring the NEPA claim;<sup>38</sup> second, it concluded the “No Action Alternative” decision based on a potential landing craft was not arbitrary

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at \*9-10.

<sup>25</sup> *Id.* at \*10-11.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at \*12.

<sup>28</sup> *Id.* at \*12-13.

<sup>29</sup> *Id.* at \*14.

<sup>30</sup> *Id.* at \*15.

<sup>31</sup> *Id.* at \*16.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at \*18.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at \*24.

<sup>36</sup> *Id.* at \*23-24.

<sup>37</sup> *Id.* at \*24.

<sup>38</sup> *Id.* at \*28.

or capricious;<sup>39</sup> third, it held the Secretary took the required “hard look” at the value of proposed land subject to exchange;<sup>40</sup> and fourth, the court concluded that the report written by Washburn did not violate the NEPA.<sup>41</sup>

#### A. *Standing to Bring NEPA Suit*

The defendants argued that the health and safety concerns alleged by KCB did not coincide with the NEPA’s purpose because there was not a strong enough environmental impact alleged by the defendants.<sup>42</sup> To bring a NEPA claim under the APA, a plaintiff must allege an interest within the “zone of interests” that are either regulated or protected by the statute or a constitutional guarantee,<sup>43</sup> and must allege an injury to the environment.<sup>44</sup> The court found that the health and safety interests fell within the NEPA’s zone of interests because the plaintiffs were deemed “cooperating agencies” for the NEPA proceedings.<sup>45</sup> Because KCB included landowners potentially subject to the land exchange, the owners had standing to question the evaluation of proposed lands.<sup>46</sup> The court also held that without the ability to question the decision, the value of the designation “cooperating agency” would be diminished.<sup>47</sup>

#### B. *NEPA Arguments: Landing Craft*

KCB alleged that the Secretary’s determination that an aluminum landing craft was a reasonable and viable alternative to the road was arbitrary and capricious, in violation of the NEPA.<sup>48</sup> While KCB alleged multiple reasons why this decision was not made correctly, the court ultimately disagreed.<sup>49</sup> The court held that because the Secretary did not conclude the landing craft was a viable alternative to the road, but did note the landing craft was being “considered” by the AEB, her finding that an aluminum landing craft was a reasonable and viable alternative, which was neither arbitrary nor capricious.<sup>50</sup>

Critically, while the Secretary used language suggesting the aluminum landing craft could be a viable alternative, she did not rely on the craft as the solution.<sup>51</sup> The Secretary acknowledged that the craft “holds promise” and may or may not happen.<sup>52</sup> This discussion gave the court the ability to find for the Secretary because it showed the determination that the landing craft was a possibility was not conclusory.<sup>53</sup> The court also upheld the decision that a

<sup>39</sup> *Id.* at \*31.

<sup>40</sup> *Id.* at \*54.

<sup>41</sup> *Id.* at \*56-57.

<sup>42</sup> *Id.* at \*27.

<sup>43</sup> *Id.* at \*26 (quoting *Nev. Land Action Ass’n v. U.S. Forest Serv.*, 8 F.3d 713, 715-16 (9th Cir. 1993)).

<sup>44</sup> *Id.* (quoting *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep’t. of Agric.*, 415 F.3d 1078, 1103 (9th Cir. 2005)).

<sup>45</sup> *Id.* at \*27.

<sup>46</sup> *Id.* at \*28.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at \*31.

<sup>50</sup> *Id.* at \*33.

<sup>51</sup> *Id.* at \*32.

<sup>52</sup> *Id.* at \*33.

<sup>53</sup> *Id.* at \*31.

secondary EIS was not required because the introduction of the landing craft did not have a significant environmental impact.<sup>54</sup>

The plaintiff's first argument was that the No Action Alternative must still meet the need and purpose of the project, and the No Action Alternative in consideration failed to do so.<sup>55</sup> However, the court determined that the No Action Alternative did not need to meet the purpose of a project, but was "required by NEPA as a basis of comparison."<sup>56</sup> As long as the decision document explained the agency decision, the court concluded it could be based on "any relevant considerations of law and policy."<sup>57</sup> The court found that the Secretary's decision that the No Action Alternative would be best for all of the relevant law and policy was based on enough evidence to support the decision to block the road.<sup>58</sup>

The court discussed that even if the federal agencies were opposed to the road, it was within the agency's right to pre-determine the outcome before an EIS was completed.<sup>59</sup> In fact, the court found it is encouraged to determine a course of action during the NEPA process.<sup>60</sup> KCB brought no evidence to support the contention that the Secretary predetermined the decision impermissibly.<sup>61</sup>

### C. NEPA Argument: Land Valuation

In addition to the numerous NEPA arguments about the landing craft, KCB argued that the Secretary and the FWS did not "adequately" analyze the value of the proposed lands subject to exchange, thus making the decision arbitrary and capricious.<sup>62</sup> Despite the many arguments about the land valuation being undervalued, arbitrary, and contrary to past evaluations, the court decided that the valuation of the land did not violate the NEPA.<sup>63</sup>

In 1998, the FWS issued a Land Protection Plan that identified land that was part of the current proposed land exchange, and explained that the lands were high value, and had potential for development.<sup>64</sup> However the Record of Decision stated that these offered lands were not likely to be developed, and the court determined this was not a change in policy.<sup>65</sup> Rather, this was an evaluation of a specific land use proposal for the OPLMA.<sup>66</sup> Simply put, the lands in the Refuge's biggest threat is the proposed road, and the land exchange would not adequately make up for the ecological loss.<sup>67</sup>

KCB also argued that the Secretary assumed the offered lands would not be developed and did not take the required "hard look" at the land's development

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<sup>54</sup> *Id.* at \*34.

<sup>55</sup> *Id.* at \*35.

<sup>56</sup> *Id.* at \*38 (quoting *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 905 (N.D. Cal. 2006)).

<sup>57</sup> *Id.* at \*39.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at \*43.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at \*43-44.

<sup>63</sup> *Id.* at \*54.

<sup>64</sup> *Id.* at \*44.

<sup>65</sup> *Id.* at \*46.

<sup>66</sup> *Id.* at \*47.

<sup>67</sup> *Id.*

potential.<sup>68</sup> However, the FWS did in fact take the required “hard look” at the development potential, and there was enough evidence to convince the court that it was unlikely that development was likely or foreseeable.<sup>69</sup> The court found persuasive the FWS’s determination of the wildlife and environmental value of the lands.<sup>70</sup>

The court perceived that the arguments about the “hard look” at land values were “simply disagreements as to the relative weight that the FWS accorded the impacts.”<sup>71</sup> The court went on to hold that despite KCB’s unhappiness with the land comparison value, it did not mean the FWS or Secretary acted in an “arbitrary or capricious manner.”<sup>72</sup>

#### *D. Washburn Report*

KCB argued that Washburn’s report to the Secretary violated the NEPA because it failed to “adequately discuss” the need for the road for medical purposes.<sup>73</sup> However, the court found this unpersuasive because the report did the minimum it was required to do, which was discuss the road.<sup>74</sup> Washburn was not required to recommend which alternative to choose, so the report did not violate the NEPA.<sup>75</sup>

### IV. CONCLUSION

The district court dismissed the claims with prejudice, finding that the Secretary’s decision did not violate the NEPA or the OPLMA.<sup>76</sup> Interestingly, the court argued that Congress was at fault for “dooming” the project by requiring the Secretary meet the NEPA requirements.<sup>77</sup> The Secretary executed the NEPA by evaluating the environmental impacts, and not health and safety impacts, which the court argued was a mistake by Congress.<sup>78</sup> This decision marks the end of the road for APA review, but the court hinted that Congress could intervene without demanding a NEPA review.<sup>79</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at \*50.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at \*51.

<sup>72</sup> *Id.* at \*54.

<sup>73</sup> *Id.* at \*55.

<sup>74</sup> *Id.* at \*55-56.

<sup>75</sup> *Id.* at \*56.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at \*57.