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January 31, 2018

Ryan Zinke, Secretary of the Interior
U.S. Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

Greg Sheehan, Principal Deputy Director
U.S. Fish and Wildlife Service
1849 C Street N.W.
Washington, D.C. 20240

RE: Notice of Violation of the Endangered Species Act Section 7 for Failing to Consult Regarding the Izembek Land Exchange

Dear Mr. Zinke and Mr. Sheehan:

On behalf of Friends Of Alaska National Wildlife Refuges, The Wilderness Society, National Audubon Society, Wilderness Watch, Center For Biological Diversity, Defenders Of Wildlife, National Wildlife Refuge Association, Alaska Wilderness League, and Sierra Club (collectively “Petitioners”), and pursuant to 16 U.S.C. § 1540(g)(2), Trustees for Alaska submits the following 60-day notice letter to inform you that Petitioners intend to sue the U.S. Department of the Interior and U.S. Fish and Wildlife Service (collectively “FWS”) for violating the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531–1544. FWS violated ESA Section 7 consultation requirements by failing to consult on threatened and endangered species that may be impacted by the Land Exchange Agreement signed by Secretary Zinke on January 22, 2018 that commits the Department of Interior to trading up to 500 acres of designated Wilderness of the Izembek National Wildlife Refuge (Izembek Refuge) to the King Cove Corporation for the purpose of constructing and operating a single lane gravel road between the communities of King Cove and Cold Bay, Alaska.

The Izembek Refuge, established in 1960, includes internationally significant eelgrass beds in Izembek and Kinzarof lagoons, as well as adjacent wetlands and uplands of the narrow isthmus. Many species depend upon these wetlands and lagoons, including several federally-protected species. In December 2013, Secretary of the Interior Sally Jewell issued a decision rejecting a proposed land exchange with the State of Alaska and Alaska Native corporations. The land exchange would have allowed for construction of a road through the Izembek Refuge, similar to that authorized by the Exchange Agreement signed by Secretary Zinke. Secretary Jewell’s decision was informed by a nearly four-year process that produced an Environmental Impact Statement (“Land Exchange EIS”) on the effects of the proposed land exchange. The Land Exchange EIS analyzed the impact a road would have on Izembek’s important ecology and congressionally-designated Wilderness. The proposed road would bisect an expanse of tundra, lagoons and other waterways that provide a vital feeding ground for migrating birds as well as bears, caribou and other species.

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Species listed as either threatened or endangered pursuant to the ESA, and occurring in the Izembek Refuge and area subject to the Exchange Agreement, include the Alaska breeding population of Steller's eider (*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*). The Alaska breeding population of Steller's eider was listed as threatened in 1997, and its designated critical habitat includes areas within the Izembek Refuge. Northern sea otters, listed as threatened in 2005, appear year round in marine waters adjacent to the Izembek Refuge and Izembek Lagoon was designated as part of its designated critical habitat in 2009. The National Marine Fisheries Service (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.¹

Congress enacted the ESA to ensure the protection and conservation of threatened and endangered species.² The fundamental, express purpose of this federal statute is to conserve endangered and threatened species and the ecosystems upon which they depend.³ The obligations imposed by the ESA on federal agencies are clear: "Each Federal agency, shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat"⁴ An agency's duty to consult is triggered when it has determined that its actions "may affect" a threatened or endangered species.⁵

When entering into the Exchange Agreement, FWS failed to satisfy its duties under the ESA because it failed to initiate consultation for the Steller's eider and northern sea otter, and their critical habitat, as mandated by section 7 of the ESA (see 16 U.S.C. § 1536). In its earlier Land Exchange EIS, the Service concluded that road construction "may affect" federally "threatened" Steller's eiders and Northern sea otters. As part of this process, FWS consulted internally and with NMFS solely on FWS's preferred alternative — the No Action Alternative — under which the land exchange would not occur and no road would be built.⁶ The new decision to enter into the Exchange Agreement and to trade away Izembek lands to allow the construction of a road requires FWS to initiate consultation, as the previous consultation's "no effect" finding was based on the selection of the no action

¹ As the action agency, FWS is responsible for determining whether an action may affect listed species. FWS determined that Steller sea lions are uncommon in the marine environment nearest to the land across which the road would be constructed and operated under both the southern and central road alignments. FWS then concluded that construction, operation and maintenance under Alternative 2 and 3 in the Land Exchange EIS would have no effects on Steller sea lions. Because FWS determined this action would have no effect on listed species under NMFS's jurisdiction, it has no legal obligation to consult with NMFS and Steller sea lions will not be discussed further in this Notice.

² 16 U.S.C. § 1531(b) (1973).

³ *Id.*

⁴ *Id.* § 1536(a)(2).

⁵ *Id.* § 1536(a)(3); 50 C.F.R. § 402.14.

⁶ See U.S. DOI Fish & Wildlife Service, Biological Assessment and Intra-Section 7 – Izembek National Wildlife Refuge, Memorandum (Feb. 12, 2013); Letter from Jeffrey Brooks, Acting Chief, Division of Conservation Planning and Policy, FWS to James Balsinger, Regional Administrator, NMFS (Feb. 13, 2013).

alternative, and because the FWS previously found during the Land Exchange EIS process that road construction “may affect” listed Steller’s eiders and Northern sea otters.

Steller’s Eiders may occur in nearshore and estuarine environments adjacent to the parcels to be exchanged. The Kinzarof Lagoon parcel abuts an important high density wintering habitat for Steller’s eiders in Kinzarof Lagoon and northern Cold Bay.⁷ The transfer of the submerged lands and waters of Kinzarof Lagoon include eelgrass habitat and intertidal shorelines, and the waters of Cold Bay adjacent to Mortensens Lagoon is moderate density wintering habitat for Steller’s eiders.⁸ Small numbers of Steller’s eiders have been reported in Sitkinak Lagoon during winter months.⁹ Tens of thousands of Steller’s eiders use Izembek Lagoon for molting in the fall and staging for migration in the spring.¹⁰ Steller’s eiders are particularly vulnerable to disturbance during pre-migration staging and molting.

The Land Exchange EIS evaluated two potential road corridors: a southern corridor and a central corridor. For both corridors, FWS found that an exchange allowing road construction had the potential to affect Steller’s eiders. For the southern corridor, FWS found that Steller’s eiders may experience some noise disturbance effects from road construction activities occurring during the fall construction period (August to November); they are absent from the area during most of the summer construction period, so the agency concluded that the birds would not be affected during that time.¹¹ Year round operation and maintenance of the road would coincide with Steller’s eiders presence in the area and could result in effects that are observable, long-term duration, and localized within the area of the Izembek isthmus.¹²

For the central corridor, the FWS found a decrease in noise exposure and disturbance effects on eiders using Kinzarof Lagoon but a potential increase of noise levels and disturbance to eiders in the nearshore areas of southern Izembek Lagoon.¹³ In addition, FWS also found that the central road alignment could lead to substantial increases in waterfowl hunting pressure in Izembek Lagoon due to improved access for foot and all-terrain vehicles travel.¹⁴

The Land Exchange EIS also found that Northern sea otters may be affected by the land exchange. Northern sea otters do not use the terrestrial habitats included in the proposed land exchange, but may occur in adjacent nearshore and estuarine environments in high densities. Kinzarof Lagoon, northern Cold Bay, and waters adjacent to Sitkinak Island include designated critical habitat. The nearshore environment of Mortensens Lagoon is also used by Northern sea otters.¹⁵

⁷ U.S. DOI FISH & WILDLIFE SERVICE, IZEMBEK NATIONAL WILDLIFE REFUGE LAND EXCHANGE/ROAD CORRIDOR EIS 4-184 (Feb. 2013).

⁸ *Id.*

⁹ *Id.* at 4-184.

¹⁰ *Id.* at 4-313.

¹¹ *Id.* at 4-185.

¹² *Id.* at 4-188.

¹³ *Id.* at 4-313.

¹⁴ *Id.* at 4-317.

¹⁵ *Id.* at 4-188.

FWS found that potential effects on northern sea otters from construction of the southern road alignment would be mostly from disturbance effects of noise. The road from the Northeast Terminal across the Izembek isthmus would range from ½ to 1 mile from Kinzarof Lagoon. FWS found that effects of road construction would be perceptible and measurable, but would not alter resource function in the ecosystem, temporary during the 2-year construction period and localized within the area of the Izembek isthmus.¹⁶ There is the potential for a low-level increase in noise disturbance to sea otters in close proximity to the road corridor during operation and maintenance of the road. Although noise disturbance would be intermittent, it would last for the life of the road.¹⁷

The central road alignment shifts the road corridor farther north of Kinzarof Lagoon than proposed under Alternative 2. Construction could elicit disturbance responses from sea otters using northern Kinzarof Lagoon and southern Izembek Lagoon during the summer months.¹⁸ Noise exposure and disturbance effects from operation and maintenance on otters using Kinzarof Lagoon would likely be lower; however; this alignment may increase potential noise levels and disturbance to sea otters in the nearshore areas of southern Izembek Lagoon.¹⁹ Under either alternative, although unlikely, injury or mortality of a sea otter crossing the road during winter could occur.²⁰

FWS has acknowledged that a decision to approve a land exchange for the purpose of constructing a road across the Izembek isthmus “may affect” listed Steller’s eiders and Northern sea otters. FWS, however, has failed in its clear duties to consult and reinstate consultation for Steller’s eiders, Northern sea otters, and their respective critical habitats under the Exchange Agreement signed by Secretary Zinke. Unless FWS takes immediate steps to initiate the required consultations, we will be forced to file suit 60 days from the date of this letter. Please do not hesitate to contact me at (907) 433-2011 or bpsarianos@trustees.org with any questions or to notify the Petitioners of any incomplete or erroneous information you find in this notice letter. Thank you for your prompt attention to our concerns.

Sincerely,



Bridget Psarianos
Staff Attorney
Trustees for Alaska

¹⁶ *Id.* at p. 4-189.

¹⁷ *Id.* at p. 4-190.

¹⁸ *Id.* at p. 4-315.

¹⁹ *Id.*

²⁰ *Id.*