J BELL-JONES PUBLIC COMMENT ON LANDS INTO TRUST IN ALASKA

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The questions posed by DOI regarding the Indian Reorganization Act (IRA) and Indian Country in Alaska are legal ones which I feel will be better answered by the attorneys who I know are participating in this ongoing discussion. I am providing my perspective as a legal scholar and teacher who is entrusted with furthering understanding of Indian law in Alaska, and where we stand today regarding the rights of Alaska Native tribes in our state. My contribution is lengthy because it has been my experience that many Indian law experts in the Lower 48 lack understanding of Alaska, and can benefit from seeing where we came from in order to better comprehend where we are today.

A Little History:

When the U.S. purchased Alaska from Russia in 1867, a treaty was negotiated between the two parties.[1] Treaties were, and still are, the supreme law of the land. That treaty included the following language: *"[t]he uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country."* At that time the United States could have, if it had so chosen, enacted law specific to Alaska Natives and granted full citizenship to all of them. This would have started them off on an even footing with non-Natives in the new district, and would likely have encouraged assimilation. The U.S. could have also immediately addressed the issue of tribal rights to land by engaging in treaty making, since it had in place a long history of negotiating Indian land cessions by this method. The U.S. chose neither of these options, and instead proceeded to subject Alaska Natives to the same laws and policy making as were applied to Lower 48 tribes. The U.S. did this without addressing aboriginal title to land.

As a result, Alaska Natives were legally barred from meaningful participation in economic activity in Alaska, and at the same time saw all manner of rights curtailed. On more than one occasion a Native community was bombed by the U.S. military.[2] Alaska Native children suffered under a legally segregated education system[3],[4], housing was segregated, Alaska Natives were barred from public businesses and places of entertainment. Early on, judges within the District

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[1] Russian American Treaty of Cession 15 Stat. 539. Ratified by the United States May 28, 1867; Exchanged June 20, 1867; Proclaimed by the United States June 20, 1867.

[2] Jones, Zachary R. The 1869 Bombardment of Ḵaachx̲ an.áak'w from Fort Wrangell: The U.S. Army Response to Tlingit Law, Wrangell, Alaska. Prepared under a grant from the National Park Service American Battlefield Protection Program Grant # GA 2255-12-022

[3] Act of Jan. 27; 1905, c. 277, 33 Stat. 616.

[4] See: In re Petition of CAN-AH-COUQ for Habeas Corpus. 29 F. 687 District Court, District of Alaska. UA1887., Davis et al. v Sitka School Board 3 Alaska 481 District Court, District of Alaska, First Division. No. 534. January 29, 1908., Sing v Sitka School Board. 7 Alaska 616 District Court, Territory of Alaska, First Division. No. 2698–A. April 26, 1927., Jones v Ellis et al., School Board 8 Alaska 146 District Court, Territory of Alaska, First Division. No. 1323-KA. Nov. 9, 1929.

Court system took license with their own interpretations of Indian law, and ignored the Indian law canons of construction to reach negative conclusions regarding tribal rights in Alaska. In one case, it was held that Alaska tribes were not sovereign because they had never signed any treaties with the U.S. Apparently the judge believed that tribal sovereignty was something to be created at the will of the United States.[5] In other words, non-Native immigrants to Alaska brought all of the racist and anti-Native sentiment that was prevalent in the Lower 48 with them when they came north. They also brought the idea that they had "rights" to acquire and use Native lands and resources with no regard for the rightful owners. Unfortunately some of that sentiment and those ways of thinking still persist in Alaska to day, which is one of the reasons the IRA remains so relevant for the State.

Alaska comprises around 375 million acres, so initial illegal taking of tribal land by incoming settlers did not have the same impact as it did in the Lower 48. In 1884 the United States Congress guaranteed to the Indians in Alaska the right to the occupancy and possession of the lands occupied by them when the Acts of Congress of May 17, 1884, 23 Stat. 24, c. 53, and further guaranteed these rights via subsequent legislation in March 1891, 26 Stat. 1095, c. 561, May 14, 1898, 30 Stat. 412, c. 299, and June 6, 1900, 31 Stat. 330, c. 786. Laws of course are only as good as their enforcers and enforcement was often lacking in Alaska, but Alaska Natives on more than one occasion were protected by the United States as non-Native settlers attempted to remove their lands.[6]

There are multiple records of legal interactions between Alaska Native leadership and the U.S. so, when you hear from some sources that "there were no tribes in Alaska", the historical and legal records simply do not bear this out. By the 1930s it was obvious that Alaska Natives had always had, and continued to have, powers of self-government. It was also becoming quite clear that the rights of Alaska Natives to retain their lands and communities would require protection from outside of the Territory. That protection could only come from one source: the United States government, because that government is the only American entity with a duty to protect those rights.

The Indian Reorganization Act.

The Indian Reorganization Act (IRA) was enacted to try to correct the damage caused by earlier federal Indian policy, especially the Dawes Allotment Act and related legislation, which removed millions of acres of land in the Lower 48 from tribal control. Alaska was included because the IRA was Indian law designed to further the fiduciary responsibility of the United States towards Indians and tribes, which clearly included Alaska Natives. I quote here from Solicitor Tompkins Opinion: "*The language of the Alaska IRA and its legislative history are fully consistent with a congressional intent of entitling Alaska Native tribes to certain benefits of the IRA by virtue of their status as tribes. In 1936, Secretary of the Interior Harold L. Ickes offered to*

[5] In Re Sah Quah 31 F. 327 District Court, D. Alaska. May 8,1886.

[6] See: U.S. v. Berrigan 2 Alaska 442, 1905 WL 344 D.D.Alaska.3.Div. 1905. June 21, 1905, and U.S. v Cadzow et al. 5 Alaska 125, 1914 WL 386 (D.Alaska Terr.) No. 1953. May 16, 1914.

Congress three reasons for establishing reservations in Alaska: (1) to identify Alaska tribes with the lands they occupy; (2) to demarcate the geographic limits of tribes' jurisdiction; and (3) to protect tribes' economic rights there."[7]

Prior to the Indian Reorganization Act (IRA) being amended to include Alaska in 1936, there were four ways that Alaska Native Reserves could be created:

- Treaty Reserves until 1871 but none were created in Alaska.
- Statutory Reserves of which two were created in Alaska; Metlakatla (Annette Island Reserve) in 1891 and Klukwan in 1957.
- Executive Order Indian Reserves with about 150 created in Alaska before 1919[8].
- Public Purpose Reserves; five were established between 1920 and 1933 but these were not technically Indian reserves because of the 1919 prohibition[9].

After the IRA was amended to include Alaska in 1936, the Secretary of the Interior created six reservations at Karluk (35,200 acres), Akutan (72,000 acres), Diomede (3000 acres), Unalakleet, (870 acres), Wales (21,000 acres including 14,000 acres of water) and Venetie (1,800,000 acres).[10] 80 Villages had applied for reservations by 1950[11], but the applications were not acted on. (Shaded text excerpted from ANS 111 Week 11 Lecture by J. Bell-Jones, 2018)

Clearly, by 1936, it was obvious that there was a real need to protect the rights and lands of tribes in Alaska, as indicated by the number of tribes that had applied for reservations. Those tribes are still here today and it is apparent, from the angry responses to their attempts to place the lands they own into trust, that they still need the protective measures of the IRA.

Geography of Tribal Land in Alaska.

The vast majority of land in Alaska is undeveloped. Most tribal communities live on their ancestral lands and most of these lands are extremely remote. Most of Alaska's tribal communities are not connected to the state's extremely limited highway system, and must be accessed by boat or plane, or in some cases by snow-machine in winter. The majority of the land owned in fee by Alaska tribes is far-removed from urban areas. Very little, if any, of that

[7] USDOI M-37043 January 2017

[8] In 1919 the President was deprived of the right to create reservations by executive order and after that only Congress could establish reservations or make boundary changes until the passage of the 1934/36 IRA. 41 Stat. 34 (1919)

[9] Case, David S and David Voluck. Alaska Natives and American Laws. University of Alaska Press, Fairbanks, 3rd ed. Page 84

[10] Case, David S and David Voluck. Alaska Natives and American Laws. University of Alaska Press, Fairbanks, 2012,3rd ed. Page 106

[11] IRA: A New Deal for Alaska Natives http://www.litsite.org/index.cfm?section=Timeline&page=The-Great-Depression,-WWII-and-The-Cold-War&cat=Alaska%27s-New-Deal&viewpost=2&ContentId=3096

land is currently on any tax rolls. There is little to no infrastructure to support economic development in these communities and, unless tribes do it themselves, there is unlikely to be any. The impact on non-Natives of placing lands into trust for tribes in Alaska is quite different than the kind of impact that may be experienced in the Lower 48. For the most part, Alaska tribes do not own "islands" of property in or near urban areas. One must ask why there would be any opposition to tribes placing their land into trust if that is their desire, when doing would have so little impact on others.

Trust Lands in Alaska Today.

In considering DOI's questions regarding trust lands, we must take note of who is asking them and why. Alaska tribes are not trying to find ways to change or circumvent existing law that supports their interests. The very fact that these questions are being posed in the face of clearly written law, and a subsequent supporting court decision[12], should make us seriously concerned. Why is the Department giving further space for opponents of trust lands to try to promote their position when that position clearly is not in the best interest of Alaska's tribes?

Opportunity was provided in 2014 for the public to provide commentary and 106[13] comments were received. 47 of those comments, including a majority from tribal organizations and ANCSA Corporations (ANCs), spoke in favor of the rule change. 40 spoke against it including a number of individual residents, current and former State of Alaska legislators, the State Attorney General, sportsmen's groups, and two ANCSA Regional Corporations.[14] Those who spoke against it (with the exception of the two ANCs) were mostly concerned with "losing access" to hunting and fishing which shows the lack of understanding of this entire situation. The lands that might be placed into trust are already private lands which the general public has no right to use. At least one non-Native commenter clearly stated that he should have long since been able to acquire and use ANCSA land, and was annoyed that ANCSA had been amended to prevent this. Since tribally owned lands are not the same lands as ANCSA lands, it is difficult to see where a comment like this should even be considered.

If you review these comments it becomes quite clear that the large majority of those who oppose the placing of land into trust do so because they want to be able to freely access and use Native lands and resources. This is precisely the kind of thing that the IRA was intended to help prevent. That the law still needs to be used to prevent such incursions today is a sad commentary on where we are in this state regarding the understanding of tribal rights.

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[12] Akiachak Native Community, Et Al., Appellees V. United States Department of The Interior And Sally Jewell, Secretary Of The Interior, Appellees, State Of Alaska, Appellant. United States Court Of Appeals For The District of Columbia Circuit. Decided July 1, 2016No. 13-5360

[13] The comments included 12 requests to extend the comment period, one against extension, and five others, one of which commented on an earlier extension request and four which did not state any clear position either way.

[14] Two ANCSA Regional Corporations had concerns about shareholder rights and loss of access to development

Who is behind the effort to revisit the rule making?

There is plentiful evidence pointing towards likely sources. A search of the major urban news sources in Anchorage and Fairbanks brings up a litany of angry voices opposing Indian trust lands in a battle that has gone on for years, and requires those of us who support the law as it stands to politely respond, over and over, to counter them. If you review these attacks you will find an array of misinformation about trust lands, misinformation about ANCSA, fears about "loss of access" to hunting and fishing opportunities, concerns about jurisdiction over non-Natives. Perhaps the most disingenuous of all are the concerns from non-Natives about how "creating reservations" will negatively affect the social and economic welfare of Alaska Natives. Any questions about the continuing relevance of the IRA should be easy to answer when you see who opposes it, and the vehemence with which they state their opposition. As long as we have people who view Indian trust lands as a "*ghastly attack*" on Alaska state sovereignty (Fairbanks Daily Newsminer Editorial, July 8th 2018) I must suggest that the IRA continues to be very relevant and much needed in Alaska.

While listening to the public is important, the Department should not be making decisions based on the complaints of people who are misinformed or who have self-serving motives that conflict with the needs of the tribes to whom the government has fiduciary responsibility. If the hidden agenda is to acquire Native property against the wishes of those Natives under the disguise of "equality", that agenda should be exposed and disregarded. When there are genuine concerns, and some of those brought forward by the two ANCs are legitimate, these need to be addressed within the framework of existing law. If indeed existing law were found to be insufficient, then changes would be needed only if the law is unable to serve the intended beneficiaries, in this case the tribes. It should not be changed because those who oppose tribal rights would prefer that the law meet their goals at the expense of tribes.

One legitimate concern about how the "proximity to reservations" language in the current rule would affect Alaska tribes was voiced by an ANC. "***The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation***…"[15] This language could be problematic for Alaska tribes because of the lack of existing reservations, but only if it is read to mean that a tribe must already have trust land before it can acquire more, which is not the intent of the regulation. A reading of this language to require existing trust lands before a tribe could petition for more, would be implying something than the intent of the regulation. Reading the regulation in this way would involve clear intent on the part of the reader to obstruct the tribe from achieving its goal of obtaining trust land, for no logical reason. While one would hope that this would not occur, addressing the language to make sure it does not is important.

This problem with language can be addressed in a number of ways without creating an "Alaska exception." If Part 151 were to be changed it would need to be changed for everyone. One

[15] 25 CFR 151.11(b)

option would be removing the "proximity to reservations" language in §151.11 (b) entirely. This would resolve the issue for Alaska, and would not result in undue problems for Lower 48 acquisitions since the Secretary would still have other sufficient criteria to make a decision for those tribes seeking off-reservation acquisitions away from existing reservations. A second option would be to replace existing language with ***"The exterior boundaries of the Tribe's reservation, if any …"*** This second option would prevent future discrimination against any tribes that do not currently have trust lands and wish to acquire them, not just Alaska tribes, and would be in keeping with the fiduciary duty of the Secretary to all tribes.

Does ANCSA bar the placing of lands into trust by Tribes?

The Alaska Native Claims Settlement Act (ANCSA) was needed to address the existence of unextinguished aboriginal title in Alaska. Legitimate claims of unextinguished title covered almost the entire state. Until that aboriginal title was extinguished, not much business could be conducted in terms of real estate conveyance because of the cloud on land titles created by the unextinguished claims. In this sense, ANCSA was a benefit to non-Natives because it allowed business to go forward. ANCSA was not however, legislated with the intent of benefiting non-Natives, although that population has since benefited greatly from the business created by the ANCs.

As originally written, the Act would have placed the ANCSA shares on the open market after twenty years, at which time non-Natives would have been able to acquire them. Those of us who know our Indian law history should revisit the provisions of the Dawes Allotment Act, which also had some conditions involving alienation of Indian property after twenty years, and refresh our memories as to how well that worked for the Indian beneficiaries. ANCSA was amended in 1987 to prevent this involuntary alienation of Native property. While there are apparently still some non-Natives who resent what they view as a lost opportunity to acquire Native lands[16], we should consider what would have happened to Alaska Native lands and property had this amendment not been put in place.

ANCSA conveyed lands in fee to the Corporations created by the Act. In a few cases, Tribes took title to former reservations lands, which they now own in fee. In some cases, ANCs have sold some of their lands and there may be instances where individuals who received land under an ANCSA provision have since sold their land. Once an owner holds land in fee with a clear title, that owner can do as they wish with the land. They can sell, subdivide, develop, donate, pledge … and they can place their land into a trust. In the case of an Indian tribe or Native individual, they have the option of petitioning the United States to be their trustee. The manner in which the Native owner acquired the land does not matter as long as they can prove legal ownership. If a tribe has acquired fee land via ANCSA it is now theirs to do with as they please. Placing that land into trust is a choice that has nothing to do with ANCSA.

[16] See the 2014 comment from Gary Wilken "Opposition to Trust Lands designation" in the DOI online consultation file

Individuals can and do acquire land and then place it into various types of trusts. Nobody asks who they bought the land from as long as they have a good title. When a tribe places land it has acquired into trust, the source of that acquisition does not matter either. It is the tribe's right to do with their land as they please. That is the intent of private property ownership. When opponents of trust land refer to the intent of ANCSA to not create "*a reservation system or lengthy wardship or trusteeship*"[17] and read this to mean that a tribe cannot place fee land it owns into trust, they are reading something into the law which does not exist. Nothing in ANCSA dictates what happens to ANCSA land after it is conveyed under U.S. Code › Title 43 › Chapter 33 › § 1618 (b). Nothing in ANCSA dictates what individuals or organizations who acquire ANCSA land by purchase or via donation may do with that land. And nothing in ANCSA has anything to do with lands that tribes may have acquired independent of the Act.

Nobody is suggesting that ANCSA Corporations will be required to convey their land to tribes. If shareholders want this to take place, they will have to work with the respective Corporation, and during the process become educated about the pros and cons of such a conveyance. At that time, issues surrounding sub-surface rights and shareholder dissent will need to be addressed. The process for placing land into trust is quite complex and nothing takes place over night. The decision over whether or not a Corporation should convey land to a tribe is something for the shareholders and their Corporation to decide. It is not up to others to decide what a privately held Corporation should do with its assets.

The "loss of access" concerns by outdoorsmen and developers ignore the private status of tribal lands. If privately owned lands are placed into trust, the public have not lost access … because they did not have access before, unless they had acquired permission to trespass. The same thing applies to ANCSA lands so, supposing an ANCSA Corporation conveys some land to a tribe and the tribe then places the land into trust, the public has not lost access because they never had it in the first place.

Tribal Jurisdiction over Non-Natives.

The concerns about a tribe having jurisdiction over non-Natives if it acquires trust lands are misplaced and, frankly, usually based in racism. The comment that people will "not be able to understand the laws" suggests that those laws are going to be written in foreign languages or are going to be in some way very unusual and different from the laws of states, boroughs and municipalities. When we see that argument, we should read instead that people will "not want to understand or abide by tribal laws." I have read multiple tribal codes from all over the United States and never found one I could not understand. In many cases I found them easier to read than non-tribal codes. In most examples, the laws of tribes are the same as, or very similar to, those of non-Native governments. A leash law is a leash law whether it is part of the Choctaw Nation Code or that of the City of Phoenix. A speed limit is a speed limit whether on the Navajo Nation or in upstate New York. Domestic violence and elder abuse are the same no matter

[17] 43 U.S. Code § 1601 - Congressional findings and declaration of policy (b)

where you are. We all visit different jurisdictions in our lives and manage quite well by using common sense.

Worrying that "creating reservations will worsen living conditions for Alaska Natives" indicates either ignorance of what reservations look like today, or ignorance of the living conditions in many of Alaska's Native communities, or both on the part of those who profess to worry. Given that we have conditions today in many of our villages that currently meet or beat those on some of the poorest reservations in the U.S. in terms of poverty and social ills, it is difficult to comprehend why anyone would make the argument that trust lands would make the situation worse. The lack of law enforcement in rural Alaska and the resulting lack of public safety is something nobody should have to live with. In the words of the Tribal Law and Order Commission: *"… the Indian Law and Order Commission's opinion is that problems in Alaska are so severe and the number of Alaska Native communities so large, that continuing to exempt the State from national policy change is wrong. It sets Alaska apart from the progress that has become possible in the rest of Indian Country. The public safety issues in Alaska – and the law and policy at the root of those problems – beg to be addressed*."[18] The Report continues on to recommend the restoration of Indian Country status to tribal lands so that tribes can have jurisdiction over the lands that constitute their communities.

In Conclusion:

The Indian Reorganization Act is still good law today, it is fully applicable to Alaska, and has been for many years. The Secretary has clear authority to take lands into trust for tribes in Alaska. There is already a working process in place that will be used to decide whether petitions to place land into trust are approved or not. The DOI should not be wasting public resources trying to pretend otherwise. 25 CFR 151 (Part 151), Land Acquisitions, is an appropriate process for tribes in Alaska to request the Department take land-in-trust, with the possible exception of §151.11 (b) regarding the proximity to reservations for off reservation acquisitions for all tribes. This language can be amended for the benefit of all tribes without creating any kind of Alaska exception.

The Alaska Native Claims Settlement Act, the Federal Land Policy and Management Act of 1976, and the Alaska National Interest Lands Conservation Act have no impact on the Secretary's ability to take land into trust in Alaska. The Secretary's ability to do this comes from the IRA and none of the above pieces of legislation have in anyway curtailed that ability. Congress's extension of Section 5 of the IRA (the provision authorizing the Secretary to acquire land in trust for Indians) to Alaska in 1936 provides specific authority for the Secretary to take Alaska lands into trust. Neither ANCSA nor FLPMA expressly or impliedly repeal that authority. If tribes want to place fee lands they own into trust, ANILCA would have no application. If a federally recognized tribe in Alaska owns land in fee, it may petition to have that land taken into trust

[18] Tribal Law and Order Commission Report, A Roadmap for Making Native America Safer. Updated 2015 Chapter Two – Reforming Justice for Alaska Natives: The Time is Now. Page 33 https://www.aisc.ucla.edu/iloc/report/

and has the same right to have that petition considered as any other federally recognized tribe in the United States.

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