

January 24, 2019

Daniel H. Jorjani, Acting Solicitor & Principal Deputy Solicitor  
Office of the Solicitor  
United States Department of the Interior  
1849 C Street, N.W.  
Washington, DC 20240

*Via electronic correspondence at [consultation@bia.gov](mailto:consultation@bia.gov)*

**Re: M-37053 – Withdrawal of Solicitor Opinion M-37043, “Authority to Acquire Land into Trust in Alaska” Pending Review**

Dear Acting Solicitor Jorjani,

Thank you for the opportunity to submit comments on Solicitor Opinion M-37053, which withdrew Solicitor Opinion M-37043 pending review of the Department’s policy concerning the Secretary’s authority to acquire land into trust in Alaska. In our view, the Secretary has clear statutory authority to acquire land in trust for Alaska Natives, which fully supported the Department’s long-awaited and much-needed decision in 2014 to revoke the Alaska exception to the land-into-trust process. We recommend that the Department retain its current policy and reaffirm the Secretary’s authority to acquire land in trust for Alaska Natives.

We are a group of law professors with longstanding academic expertise in administrative law, federal Indian law, property law, and statutory interpretation.\* Our experience includes researching, teaching, and writing about the Indian Reorganization Act (IRA), the Alaska Native Claims Settlement Act (ANCSA), the Federal Land Policy and Management Act (FLPMA), and the Supreme Court’s decision in *Carvieri v. Salazar*, 555 U.S. 379 (2009). We share an interest in the proper interpretation of these statutes and the Court’s precedent as they relate to the Secretary’s authority to take land into trust in Alaska. Given our academic expertise in questions concerning statutory interpretation in federal Indian law and the scope of the Secretary’s authority, we submit this comment to highlight fundamental legal principles that are central to the Department’s review of its policy.

The land into trust process is a vital component of achieving Congress’s self-determination policy and fulfilling the United States’ trust responsibility to Alaska Natives. The plain text of the 1936 amendments to the IRA extended the trust land acquisition authority in Section 5 to Alaska. Congress has never repealed the Secretary’s authority, nor has the Court called that authority into question.

In short, the Department’s current policy stands on sure statutory footing and is supported by fundamental principles of federal Indian law.

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\* The Appendix identifies the signatories to this comment. We submit this comment in our individual capacities, not on behalf of our institutions.

The United States has a government-to-government relationship with all federally recognized Indian tribes, not simply those in the lower 48 states. As a trustee for Indian tribes, the United States may take land into trust for the tribes' benefit. This land-into-trust process is a critical component of the United States' fulfillment of its responsibilities to Indian tribes. By taking land into trust for a tribe, the United States may facilitate tribal self-determination and economic development.

The plain text of the IRA specifies the Secretary's statutory authority to take land into trust for Alaska Natives. Statutory interpretation begins with the text of the statute and the "understanding that Congress says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). In 1936, Congress said, "Sections 1, 5, 7, 8, 15, 17, and 19 of the [IRA] shall hereafter apply to the Territory [now State] of Alaska." Act of May 1, 1936, ch. 254, § 2, 49 Stat. 1250. And by that Congress meant to authorize the Secretary to take land into trust in Alaska. Section 5 of the IRA provides that the Secretary "is authorized, in his discretion, to acquire . . . any interest in lands, water rights, or surface rights to lands . . . for the purpose of providing lands for Indians." 25 U.S.C. § 5108. Lest there should be any doubt, Congress also specified that "[f]or the purposes of [the IRA], Eskimos and other aboriginal peoples of Alaska shall be considered Indians." *Id.* § 5129.

In 2014, the Department affirmed what the plain text of the IRA makes clear when it took the much-needed step of eliminating the Alaska exception to the land-into-trust process. *See Land Acquisitions in the State of Alaska*, 79 Fed. Reg. 76,888 (Dec. 23, 2014). As the Department has explained, "[t]he goals of tribal self-governance and self-determination are equally as important to Alaska Native tribes as they are to tribes in the rest of the United States." *Id.* at 76,895. The Alaska exception was an irrational policy that stemmed from statutory misinterpretation and persisted as a result of regulatory inertia. *See id.* at 76,889 (discussing history of Alaska exception).

As the Court recognized in *Carvieri*, Congress extended Section 5 of the IRA to the government-to-government relationships between the United States and Alaska Native tribes. *See Carvieri*, 555 U.S. at 392 n.6 (quoting 25 U.S.C. § 5119)). As a result, Section 5 applies to Alaska Native tribes regardless of whether they were under federal jurisdiction in 1934. *See id.* at 392. The Court's interpretation of the 1936 IRA amendments thus reinforces what the Department has already concluded: The Secretary may take land into trust for Alaska Natives.

There are, of course, differences between the legal regime governing Indian tribes in the lower 48 and that governing Alaska Native tribes. Chief among these differences is ANCSA, which settled the aboriginal land claims of Alaska Natives and adopted a corporate system of land ownership. 42 U.S.C. §§ 1601, 1617, 1618. But neither this settlement, nor any other statute enacted since 1936, establishes a congressional intent to repeal the Secretary's authority to take land into trust for Alaska Natives.

It is a "cardinal rule" of statutory construction "that repeals by implication are not favored." *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 262 (1992) (internal quotation marks omitted). Where, as here, neither the plain meaning of a subsequent statute nor its legislative history evinces any intent to repeal an earlier statute, this cardinal rule controls. *See Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

We agree, therefore, with the Solicitor's interpretation of ANCSA and FLPMA in Opinion M-37043. ANCSA was a comprehensive settlement of land claims that left the Secretary's authority to take land in trust for Alaska Natives untouched. Congress did not expressly repeal the 1936 amendments to IRA. Nothing in ANCSA's plain meaning implies such an intent. Nor does the statute's purpose or history. While ANCSA aimed to avoid the creation of "a reservations system or lengthy wardship or trusteeship," it left trust lands and restricted fee lands in place because neither land status is incompatible with that aim. *See* 43 U.S.C. § 1601(b). As the Solicitor concluded in M-37043, a tribe's decision to pursue self-determination by applying to have land taken into trust is not inconsistent with ANCSA's aims. Sol. Op. M-3703, at 21.

The Solicitor also rightly concluded that FLPMA did not repeal the Secretary's authority to take land into trust. FLPMA repealed the statutory provisions authorizing the Secretary to establish reservations in Alaska and to reserve public domain lands for use by Alaska Natives. *See* Pub. L. No. 94-579, § 704, 90 Stat. 2743 (1976). But Congress left in place the Secretary's authority under Section 5 of the IRA, which, as the Solicitor concluded in M-37043, "further underscores the lack of Congressional intent to revoke the Secretary's land-into-trust authority." Sol. Op. M-3703, at 22.

As the Solicitor rightly points out in M-37053 (at p. 4), the Alaska National Interest Lands Conservation Act (ANILCA) established a land bank program "to facilitate the coordinated management and protection of Federal, State, and Native and other private lands" in Alaska. 42 U.S.C. § 1636(a). The land bank program does not cover tribal lands, and it provides only a limited degree of protection from taxation and some forms of involuntary loss for Native corporation fee lands. It does not even mention or purport to limit, or affect the trust land process made expressly applicable to Alaska by 25 U.S.C. § 5119. As the Department concluded in 2014, case-by-case implementation of the land-into-trust process in Alaska will allow for careful consideration of the interests of land management and Alaska Native corporations. *See* 79 Fed. Reg. at 76,982-94. Such concerns do not justify denying Alaska Native tribes the same opportunity to apply for a trust acquisition that tribes in the lower 48 have long enjoyed.

Congress has never repealed the Secretary's authority to facilitate tribal self-determination in Alaska by taking land into trust for Alaska Native tribes. Congress's intent to delegate such authority to the Secretary is plain. That should end the matter. *Cf. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 836, 842 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). The Department has no authority to contravene Congress's clear instruction in the 1936 amendments to the IRA. And the Department must resolve any ambiguities in statutes concerning Alaska Natives in their favor. *Ramah Navajo School Board v. Bur. of Revenue*, 458 U.S. 832, 846 (1982) ("We have consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be construed generously in order to comport with ... traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.").

The Department's current policy of accepting applications for trust acquisitions in Alaska thus stands on sure statutory footing. It is sound policy. And it reflects the fundamental principle that the United States has a government-to-government relationship with every Alaska Native tribe. Revocation of the Alaska exception to the land-into-trust process was long overdue. The Department's policy should be reaffirmed.

## Appendix\*

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