

**COMMENTS OF 29 TRIBES AND TRIBAL ORGANIZATIONS IN
RESPONSE TO THE DEPARTMENT OF THE INTERIOR'S QUESTIONS
FOR CONSIDERATION ON THE ALASKA IRA AND THE ALASKA LANDS
INTO TRUST PROGRAM**

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TRIBAL GOVERNMENT SIGNATORIES

Akiachak Native Community
Akiak Native Community
Anvik Village
Central Council of Tlingit and Haida Indian Tribes of Alaska
Chalkyitsik Village
Chilkoot Indian Association
Craig Tribal Association
Kenaitze Indian Tribe
Levelock Village
Manokotak Village
Native Village of Eklutna
Native Village of Ekuk
Native Village of Tanana
Native Village of Tazlina
Native Village of Tyonek
Native Village of Venetie Tribal Government
New Koliganek Village Council
New Stuyahok Village Council
Nondalton Village
Portage Creek Village Council
Traditional Council of Togiak
Tuluksak Native Community
Twin Hills Village Council

TRIBAL ORGANIZATION SIGNATORIES

Arctic Slope Native Association
Chugachmiut
Copper River Native Association
Eastern Aleutian Tribes
National Congress of American Indians
Tanana Chiefs Conference

January 25, 2019

Mr. John Tahsuda
Principal Deputy Assistant Secretary–Indian Affairs
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Mr. Tahsuda:

On July 2, 2018, you submitted letters to Alaska’s 229 federally recognized tribal governments requesting input on the Alaska IRA and the Secretary of the Interior’s (Secretary) authority to take lands into trust in Alaska. The tribes and tribal organizations listed above are in receipt of your letters and provide comment on each topic below.

THE INDIAN REORGANIZATION ACT AND ITS APPLICATION TO ALASKA

In order to provide context for our response to the questions relating to the 1936 amendments to the Indian Reorganization Act (IRA), we first offer some background on: (1) the application of the IRA to Alaska; (2) the subsequent congressional enactment of the Federally Recognized Indian Tribe List Act of 1994 (List Act) and associated IRA amendments; and (3) the legal implications of the List Act and IRA amendments on the Secretary’s authority to recognize tribes.

I. The IRA and the Alaska IRA

In 1928, the Meriam Report documented the failure of federal Indian policy during the Allotment period and provided the impetus for a sweeping change in federal policy. The capstone of this reform was Congress’s enactment of the IRA in 1934 (also known as the Wheeler-Howard Act).¹ The “overriding purpose” of the IRA is to establish the “machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.”²

The IRA ended the misguided allotment policy, and extended indefinitely the trust period for existing allotments still in trust. It further authorized the Secretary to acquire lands and water rights for tribes and to create new reservations. Section 16 of the IRA provides provisions by which tribes may organize for their common welfare and adopt appropriate constitutions and bylaws.³ Section 17 authorizes the formation of tribal corporations, with the power to own, hold, manage, operate and dispose of property.⁴ Section 19 of the IRA provides that “Eskimos and other aboriginal peoples of Alaska shall be considered Indians” for purposes of the IRA.⁵ But, as next

¹ Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 5102-5103, 5107-5118, 5120-5121, 5123, 5125, 5129).

² *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

³ 25 U.S.C. § 5123.

⁴ *Id.* § 5124.

⁵ *Id.* § 5129.

discussed, only five of the IRA's sections, plus the definitional section, initially applied to the then-Territory of Alaska.⁶

In 1934, the IRA was not fully applicable to Alaska Natives. This was the result of both a practical reality in Alaska and a congressional omission. As the leading treatise on Alaska Native law and policy explains:

First, the 1934 IRA was primarily oriented to the reorganization of Indian tribes 'residing on the same reservation,' and few Alaska Native communities were thought to be located on reservations. Second, Alaska Natives were inadvertently excluded from the provisions of Section 17 of the IRA, which provided for the incorporation of tribes for business purposes. This omission excluded Alaska tribes from access to federal loan funds available under Section 10 of the act.⁷

In 1936, Congress corrected its error by enacting a two-section statute remedying the IRA's limited application to Alaska.⁸

Section 1 of the Alaska IRA made seven additional provisions of the IRA applicable to Alaska:

[S]ections 1, 5, 7, 8, 15, 17, and 19 of the [IRA] shall hereafter apply to the Territory of Alaska: *Provided*, That groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under Sections 16, 17, and 10 of the [IRA].⁹

This precise language was based on Section 9 of the Federal Credit Union Act.¹⁰ Additionally, Section 1 of the Alaska IRA extended to Alaska Natives several relevant sections of the 1934 IRA, including Section 5, the source of the Secretary's authority to acquire lands in trust.¹¹

Section 2 of the Alaska IRA permitted the Secretary to create new Alaska Native reservations on lands occupied by Alaska Natives:

The Secretary of the Interior is hereby authorized to designate as an Indian reservation any area of land which has been reserved for the use and occupancy of Indians or Eskimos by Section 8 of the Act of May 17, 1884 (23 Stat. 26), or by

⁶ *Id.* § 5118.

⁷ DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 384 (3d ed. 2012) (quoting Pub. L. No. 73-383, § 16, 48 Stat. at 987 (codified as amended at 25 U.S.C. § 5123)).

⁸ Pub. L. No. 74-538, 49 Stat. 1250 (1936).

⁹ *Id.* § 1, 49 Stat. at 1250 (codified with some differences in language at 25 U.S.C. § 5119) (emphasis in original).

¹⁰ CASE & VOLUCK, *supra* note 7, at 386 n.78 (discussing 48 Stat. 1216 (June 26, 1934)).

¹¹ 25 U.S.C. § 5108.

Section 14 or Section 15 of the Act of March 3, 1891 (26 Stat. 1101), or which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof, together with additional public lands adjacent thereto, within the Territory of Alaska, or any other public lands which are actually occupied by Indians or Eskimos within said Territory¹²

Additionally, Section 1 of the Alaska IRA extended to Alaska Natives several relevant sections of the 1934 IRA, including: Section 5, the source of the Secretary’s authority to acquire lands in trust.¹³ Importantly, and as discussed in more detail below, Congress has never repealed Section 1, while Section 2 was expressly repealed by the Federal Land Policy and Management Act of 1976 (FLPMA).¹⁴

II. Congressional Enactment of the Federally Recognized Indian Tribe List Act of 1994

In 1994, Congress expressly delegated to the Secretary the authority to recognize tribes through the List Act.¹⁵ Prior to 1994, this power had been implied from other statutes. In that same 1994 law, Congress expressly ratified the Secretary’s preliminary 1993 list of federally recognized Alaska Native tribes, while also directing that one omitted Tribe be added.¹⁶

The List Act, codified at 25 U.S.C. §§ 5130-5131, expressly confers upon the Secretary the authority both to acknowledge American Indian and Alaska Native tribes and to publish annually a list of all such federally recognized tribes. Section 102(2) of the List Act defines the term “Indian tribe” as “any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of Interior acknowledges to exist as an Indian tribe,” and by its very terms ratifies the Secretary’s acknowledgment authority.¹⁷ Section 103(2) further explains that by “recognized tribes,” Congress means those tribes with which the United States “maintains a government-to-government relationship” in recognition of “the sovereignty of those tribes.”¹⁸

In the List Act’s accompanying House Report, Congress further explained its use of the term “recognition” as it pertains to tribes:

“Recognized” is more than a simple adjective; it is a legal term of art. It means that the government acknowledges as a matter of law that a particular Native American group is a tribe by conferring a specific legal status on that group, thus bringing it

¹² Pub. L. No. 74-538, § 2, 49 Stat. at 1250-51, *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792 (1976).

¹³ 25 U.S.C. § 5108.

¹⁴ *Akiachak Native Cmty. v. Salazar (Akiachak I)*, 935 F. Supp. 2d 195, 199 (D.D.C. 2013), *vacated as moot sub nom. Akiachak Native Cmty. v. U.S. Dep’t of Interior (Akiachak III)*, 827 F.3d 100 (D.C. Cir. 2016).

¹⁵ Pub. L. No. 103-454, §§ 101-104, 108 Stat. 4791, 4791-92 (1994).

¹⁶ Tlingit and Haida Status Clarification Act. *Id.* §§ 201-205, 108 Stat. at 4792-93.

¹⁷ 25 U.S.C. § 5130(2).

¹⁸ Pub. L. No. 103-454, § 103(2), 108 Stat. at 4791.

within Congress's legislative powers. This federal recognition is no minor step. A formal political act, it permanently establishes a government-to-government relationship between the United States and the recognized tribe as a "domestic dependent nation," and imposes on the government a fiduciary trust relationship to the tribe and its members. Concomitantly, it institutionalizes the tribe's quasi-sovereign status, along with all the powers accompanying that status such as the power to tax, and to establish a separate judiciary. Finally, it imposes upon the Secretary of the Interior specific obligations to provide a panoply of benefits and services by the Department of the Interior's Bureau of Indian Affairs (BIA), and establishes tribal status for all federal purposes.¹⁹

Sections 103(3) and (4) of the List Act expressly provide that, once recognized by any of the three branches, an Indian tribe "may not be terminated except by an Act of Congress."²⁰ Indeed, the House Report took strides to strongly confirm this point:

The Committee cannot stress enough its conclusion that the Department may not terminate the federally-recognized status of an Indian tribe absent an Act of Congress. Congress has never delegated that authority to the Department, or acquiesced in such a termination. Any attempt to the contrary by the Department will surely result in a more concrete and compelling assertion of Congressional primacy.²¹

The Tlingit and Haida Status Clarification Act of 1994 (Clarification Act) similarly confirms the Secretary's authority to acknowledge tribes, specifically those on the 1993 list. Congress found that "on October 21, 1993, the Secretary of the Interior published a list of federally recognized Indian tribes pursuant to part 83 of Title 25 of the Code of Federal Regulations which omitted the Central Council of Tlingit and Haida Indian Tribes of Alaska,"²² and that "the Secretary does not have the authority to terminate the federally recognized status of an Indian tribe as determined by Congress."²³ This action necessarily ratified the Secretary's underlying authority to publish the List, limited the Secretary's authority to terminate a tribe's federally recognized status, and corrected the one Alaska-specific omission Congress found in the Secretary's 1993 list.

The Secretary's listings of federally recognized tribes from 1995 through 2018 were all accomplished pursuant to the express statutory authorization of the List Act and the congressional approval reflected in the Clarification Act.

III. IRA Amendments of 1994

Congress took another significant action in 1994 by amending the IRA to prohibit the federal government and its agencies from taking any action that "classifies, enhances, or diminishes the

¹⁹ H.R. REP. NO. 103-781 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3768, 3769.

²⁰ Pub. L. No. 103-454, § 103(2), 108 Stat. at 4791.

²¹ H.R. REP. NO. 103-781, *as reprinted in* 1994 U.S.C.C.A.N. at 3770.

²² Pub. L. No. 103-454, § 202(2), 4791 Stat. at 4792.

²³ *Id.* § 202(3), 4791 Stat. at 4792.

privileges and immunities available to an Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.”²⁴ The amendments made it clear that a “tribe” shall be defined to include all federally recognized tribes in all federal statutes affecting Indian tribal governments.

The 1994 amendments revised Section 16 of the IRA by adding language in subsections (f) and (g) to ensure that federal agencies treat all federally recognized tribes equally, no matter when or how they received recognition from the federal government. In particular, subsection (f) prohibits the Secretary and other administrative agencies from promulgating any regulation that “classifies, enhances, or diminishes the privileges and immunities available to an Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.”²⁵ Subsection (g) ensured that any administrative actions that treated tribes in differing ways would be invalid.²⁶ Specifically, subsection (g) states that “[a]ny regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities” of an Indian tribe “relative to the privileges and immunities” of other federally recognized Indian tribes “shall have no force or effect.”²⁷

Congress intended the 1994 IRA amendments to put an end to the discriminatory practices developing within the Department of the Interior (Department) as to the treatment of federally recognized tribes. The Department “had begun to classify tribes as either ‘historic’ and entitled to the full panoply of inherent sovereign powers not otherwise divested by treaty or congressional action or ‘created’ and therefore possessing limited sovereign powers.”²⁸ In enacting the 1994 IRA amendments, “Congress explicitly rejected DOI’s classifications.”²⁹ Congress passed the amendments to ensure that the Department “upheld the original intent of the IRA to promote tribal sovereignty by allowing all federally recognized tribes to organize and self-govern.”³⁰

Senator Daniel K. Inouye (D-Hawaii), who co-sponsored the legislation, explained on the Senate floor that:

The amendment which we are offering . . . will make it clear that the Indian Reorganization Act does not authorize or require the Secretary to establish classifications between Indian tribes . . . [I]t is and has always been Federal law and policy that Indian tribes recognized by the Federal Government stand on an equal footing to each other and to the Federal Government. . . Each federally recognized Indian tribe is entitled to the same privileges and immunities as other federally recognized tribes and has the right to exercise the same inherent and

²⁴ Pub. L. No. 103-263, § 5(b), 108 Stat. 707, 709 (1994) (codified at 25 U.S.C. § 5123(f), (g)).

²⁵ 25 U.S.C. § 5123(f).

²⁶ *Id.* § 5123(g).

²⁷ *Id.*

²⁸ S. REP. NO. 112-166, at 12 (2012).

²⁹ *Id.*

³⁰ *Id.*

delegated authorities. This is true without regard to the manner in which the Indian tribe became recognized by the United States or whether it has chosen to organize under the IRA. By enacting this amendment . . . , we will provide the stability for Indian tribal governments that the Congress thought it was providing 60 years ago when the IRA was enacted.³¹

Senator John McCain (R-Arizona), the legislation's second co-sponsor, further added:

The purpose of the amendment is to clarify that Section 16 of the Indian Reorganization Act was not intended to authorize the Secretary of the Department of the Interior to create categories of federally recognized Indian tribes. In the past year, the Pascua Yaqui Tribe of Arizona has brought to our attention the fact that the Department of the Interior has interpreted Section 16 to authorize the Secretary to categorize or classify Indian tribes as being either created or historic. . . . All of this ignores a few fundamental principles of Federal Indian law and policy. . . . Congress itself cannot create Indian tribes, so there is no authority for the Congress to delegate to the Secretary in this regard. . . . [T]he interpretation of Section 16 which has been developed by the Department is inconsistent with the principle policies underlying the IRA.³²

Congress's repeated actions since 1934 leave no room for doubt as to the federal recognition of Alaska's 229 tribal governments or to the lack of the Secretary's authority to alter such recognition.

While the Secretary's agents have stated publicly that the current IRA-related initiative only applies to unrecognized tribes, it is critically important before any further administrative decision-making occurs that the Department is cognizant of the foregoing history. Before proceeding further with any administrative decision, the Department should expressly clarify to tribal leaders in writing: (1) that any current federally recognized Alaska Native tribe that seeks to reorganize under Section 16 of the IRA is not subject to the Federal Acknowledgement Process (FAP) process, and that its sovereignty may not be limited in any way through such a reorganization; and (2) that the questions posed in the July 2, 2018, letter regarding the Alaska IRA solely concern those non-federally recognized Alaska Native communities who now wish to organize under the IRA for purposes of federal recognition. We address the Department's specific questions below.

IV. Response to Questions

1. When the Alaska IRA was passed in 1936, Alaska was still a Territory. Is the Alaska IRA's organization provision still relevant in today's Alaska?

Yes. The Alaska IRA's organization provision is just as relevant in present day Alaska, as it was in the Territory of Alaska.

³¹ 140 CONG. REC. 11234-35 (1994).

³² *Id.* at 11234.

There are 229 federally recognized tribes in Alaska. Approximately one-third are organized as IRA councils, and the rest are traditional councils. A traditional council is a council organized under tribal law and custom. A traditional council is not formally required to adopt a constitution to be federally recognized, but it may petition to reorganize under the IRA if it perceives a benefit from doing so. IRA councils are organized under federal law pursuant to Section 16 of the IRA. Organizing as an IRA council requires a tribe to adopt a constitution and bylaws, obtain Secretarial approval of the constitution, and then to have the constitution ratified by a majority vote of the adult members of the tribe in an election conducted by the BIA.

The inherent powers of traditional councils are the same as the powers of IRA councils: both possess the inherent sovereign authority of an Indian tribe. These powers include the power to adopt and operate a government of the tribe's own choosing, define conditions of membership, prescribe rules of inheritance, and control conduct of its members. Both traditional councils and IRA councils possess sovereign immunity from suit unless waived. Importantly, however, IRA councils have the additional federally delegated power to prevent disposition of tribal land or assets without tribal consent. As an additional benefit to organizing under the IRA, Section 16's land protections extend to both developed and undeveloped lands. Section 16 protects against loss as a result of tax or mortgage foreclosure, bankruptcy or court ordered judgment sale, state condemnation, or adverse possession.³³ Traditional councils do not possess this statutory protection, and may lack the protection at common law.

In addition, some Alaska Native Claims Settlement Act (ANCSA) corporations (ANCs) rely on the IRA and traditional governments in their regions to fulfill the approval requirements of Section 14(f) of ANCSA. For instance, "[u]nder 1976 amendments to ANCSA, NANA has merged all of its village corporations into the regional corporation. One of the statutory requirements for doing so was that a separate entity be conveyed the right to 'withhold consent to mineral exploration, development, or removal within the boundaries of the Native village.'"³⁴ The IRA governing bodies perform that function in the NANA region.³⁵

The IRA's land protections and the Section 17 federal loan opportunities are clear incentives for traditional councils to reorganize under the IRA. So long as there are Indian communities in Alaska that desire to organize under the IRA, through the Alaska IRA's organization provision, it continues to be relevant.

The annually published Federal Register list states that all listed tribal entities "are acknowledged to have the immunities and privileges available to federally recognized Indian Tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities,

³³ See e.g., *In re 1981, 1982, 1983, 1984 & 1985 Delinquent Property Taxes Owed*, 780 P.2d 363, 367 (Alaska 1989) (holding that Section 16 of the IRA barred foreclosure proceedings against land held by an IRA tribe).

³⁴ CASE & VOLUCK, *supra* note 7, at 332 (quoting 43 U.S.C. § 1627 (e), *amended by* Pub. L. No. 94-204, § 6, 89 Stat. 1145, 1149 (1976)).

³⁵ *Id.*

powers, limitations, and obligations of such Tribes.”³⁶ Since the listed 229 Alaska Tribes are already federally recognized, the Department should clarify that: (1) its intention is not to alter the federally recognized status of any Alaska Tribes already identified and listed on the Department’s official list of federally recognized tribes; (2) its intention is not to address the status of currently-recognized Tribes organized under the Alaska IRA, including the application of the Secretary’s IRA election procedures set forth in 25 C.F.R. Part 81; (3) its intention is not to address petitions by traditionally organized, federally recognized tribes that wish to reorganize their governments under the Alaska IRA, again as specified in 25 C.F.R. Part 81; and (4) it is only concerned with petitions under the Alaska IRA submitted by groups which *are not currently listed* on the official BIA list of federally recognized tribes.

2. How should the Department of the Interior (Department) define or interpret the statutory phrase, “common bond”?

Any definition or interpretation of the statutory phrase “common bond” must be informed by historical context of the Alaska IRA, which states:

[G]roups of Indians in Alaska not heretofore recognized as bands or tribes, but having common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district may organize to adopt constitutions and bylaws and to receive charters of incorporation and federal loans.³⁷

Guidance on the congressionally-created organizational standard designed for, and applicable only to, groups of Alaska Natives was provided by Secretary Harold L. Ickes in a 1937 memorandum (Ickes Guidance).³⁸ There, the Secretary pointed directly to shared residence, as opposed to shared lineage, as being a major factor in determining a common bond.³⁹ Indeed, later IRA constitutions, developed with the aid of the Ickes Guidance, confirm this sound approach by codifying in their charters that tribal membership would extend to those individuals with a “common bond in the village” having “set up a home in the village.”⁴⁰

In 1993, Solicitor Thomas L. Sansonetti discussed the common bond standard:

[O]ur historical summary shows, although Alaska Natives were recognized as subject to general Indian law principles, and there had been some dealings with

³⁶ Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 83 Fed. Reg. 34,863, 34,863 (June 23, 2018).

³⁷ Pub. L. No. 74-538, § 1, 49 Stat. at 1250 (codified with some differences in language at 25 U.S.C. § 5119).

³⁸ See Instructions for Organization in Alaska under the Reorganization Act of June 18, 1934 (48 Stat. 984), and the Alaska Act of May 1, 1936 (49 Stat.1250), and the Amendments Thereto (Dec. 22, 1937) (hereinafter “Ickes Guidance”).

³⁹ *Id.* at 1.

⁴⁰ Constitution and By-Laws of the Native Village of Kotzebue Alaska (May 23, 1939), available at https://narf.org/nill/tribes/native_kotzebue.html.

groups, the absence of treaties and a pervasive reservation system meant that there had been no formal definition of Native groups. In applying the IRA to Alaska, it was therefore necessary to craft an approach to defining the specific groups with which the Federal Government would deal. The “common bond” provision did this.⁴¹

There is already a clear eligibility standard in the statute itself—the “common bond” standard—for petitions to organize under the Alaska IRA. The Department has utilized the Alaska IRA to recognize many Alaska tribes both prior to, and long after, statehood.

To our knowledge, two groups of Alaska Natives, Qutekcak and Knugank, are currently asking the Department to facilitate their organization under the Alaska IRA. Thus, the need for the Alaska IRA as an avenue for federal recognition for currently unrecognized groups of Alaska Natives still exists today. There is, however, no need to develop new regulations to implement a statutory regime that has been in place and working for decades. We encourage the Department to promptly act on the Qutekcak and Knugank petitions. They have been pending for 25 years and 17 years, respectively. The Department’s current undertaking only serves to further delay the recognition process these groups have worked tirelessly to complete.

3. How should the Department define or interpret the statutory phrase, “well-defined neighborhood, community, or rural district”?

The phrase “well-defined neighborhood, community, or rural district” means the location where the tribe or group resides, and over which it may exercise governmental powers. Further definition is unnecessary because a tribe or group in Alaska seeking to organize under the IRA is not seeking a defined reservation, and because even without a reservation, a tribe in Alaska (as elsewhere) still possesses governmental authority over its members.

4. In your view, should a group of Alaska Natives sharing a common bond of occupation have the ability to exercise sovereign governmental powers?

Yes. Each of the Alaska tribes listed on the annual list of tribal entities recognized and eligible to receive services from the BIA share a common bond of occupation and have the ability to exercise sovereign governmental powers.⁴² This is established law that has been ratified by Congress with the 1994 List Act.⁴³

Moreover, the Alaska Supreme Court and the United States Court of Appeals for the Ninth Circuit both agree that Alaska tribes possess jurisdiction to govern the domestic relations of tribal members concurrent with the State, based on inherent tribal sovereignty and irrespective of

⁴¹ Solicitor’s Opinion M-36975, Governmental Jurisdiction of Alaska Native Villages over Land and Nonmembers (Jan. 11, 1993).

⁴² See 83 Fed. Reg. 34,863.

⁴³ See 25 U.S.C. §§ 5130, 5131.

whether the tribal members reside within Indian country.⁴⁴ *Native Village of Venetie I.R.A. Council v. Alaska* concerned Alaska’s refusal to give full faith and credit to the Native Village of Venetie’s and the Native Village of Fort Yukon’s tribal court orders in violation of 25 U.S.C. § 1911(d). On interlocutory appeal, the Ninth Circuit noted:

However, tribal sovereignty is not coterminous with Indian country. *Cf.* 25 C.F.R. § 83.7(b) (1989) (in order to achieve federal recognition, a group of Indians need not inhabit formal “Indian country”; inhabitation of “a specific area” or a “community viewed as American Indian” is sufficient). Rather, tribal sovereignty is manifested primarily over the tribe’s members. *See Duro v. Reina*, 495 U.S. 676, 110 S.Ct. 2053, 2060, 109 L.Ed.2d 693 (1990) (“the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order [and] . . . to prescribe and enforce rules of conduct for [their] own members”); *Wheeler*, 435 U.S. at 326, 98 S.Ct. at 1087 (powers such as enforcement of internal criminal laws “involve only the relations among members of a tribe [and t]hus, they are not such powers as would necessarily be lost by virtue of a tribe’s dependent status”). A tribe’s authority over its reservation or Indian country is incidental to its authority over its members. *Cf. Duro*, 110 S.Ct. at 2056 (“retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership,” even if crime occurs on reservation); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 431, 109 S.Ct. 2994, 3008, 106 L.Ed.2d 343 (1989) (tribe’s authority over reservation land is limited to issues which “imperil the political integrity, economic security or the health and welfare of the tribe”); *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 152, 100 S.Ct. at 2080 (power to tax on reservation is “fundamental attribute of sovereignty” so long as it “significantly involv[es] a tribe or its members”).⁴⁵

As evidenced by congressional action, executive action, and court decisions, a group of Alaska Natives sharing a common bond of occupation clearly have the ability to exercise inherent sovereign governmental powers.

5. If your answer to number 4, above, is yes, then what should be the limits of those powers, if any?

The limits on the powers of recognized tribes organized under the Alaska IRA are no different from the limits applicable to any other American Indian or Alaska Native tribe in the United States. The Department should take no action to diminish the exercise of governmental powers by Alaska Natives sharing a common bond of occupation. Nor could it, given Congress’s express rejection of any agency regulation which “classifies, enhances, or *diminishes* the privileges and immunities

⁴⁴ *See John v. Baker*, 982 P.2d 738, 748-49 (Alaska 1999); *Native Vill. of Venetie I.R.A. Council v. Alaska (Venetie I)*, 944 F.2d 548, 558-59 (9th Cir. 1991).

⁴⁵ *Venetie I*, 944 F.2d at 558 n.12 (alterations in original).

available to an Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.”⁴⁶

6. How should the Department implement the Alaska IRA’s organization provision? Through regulations? Through formal Agency guidance? Through some other means?

The Department has historically used agency guidance to implement the election procedures of the Alaska IRA. The Department should continue to employ the same IRA election procedures that apply anywhere else in the United States, and which are set forth in 25 C.F.R. Part 81.

However, there is a regulatory problem that should be addressed by the Department. In 2015, the IRA election regulations at 25 C.F.R. Part 81 were amended to make them applicable only to federally recognized tribes. While this amendment was inconsequential for the 229 federally recognized tribes that exist in Alaska, it inadvertently cut off the rights of other Alaska groups to organize under the Alaska IRA.

Section 1 of the Alaska IRA states that Native groups in Alaska “may organize to adopt constitutions and bylaws . . . under Sections 5113, 5123 and 5124 of th[e] [IRA].”⁴⁷ Section 16 of the IRA then provides that to organize requires “a special election authorized and called by the Secretary.”⁴⁸ Due to the 2015 amendments to the Secretary’s IRA election procedures, the regulation limitation now appears to prohibit Alaska groups that are not federally recognized from securing Secretarial elections. Section 81.49 of the current regulations specifically states that a tribe seeking an IRA election “for the first time” must *already* be federally recognized.⁴⁹

Despite this unfortunate (and likely inadvertent) narrowing of the Part 81 regulations, there remains in place the 1937 Ickes Guidance.⁵⁰ Notwithstanding the limitations in the 2015 version of the Part 81 regulations, the Department should continue to follow the Ickes Guidance in the course of implementing Section 1 of the Alaska IRA for groups in Alaska not currently listed as federally recognized tribes.

The Department does not need regulations for the organization of groups of Alaska Natives not yet recognized because Congress has already provided a statutory standard for the Secretary to apply and the Department has already issued detailed guidance on the process for organization of these groups.

7. Is 25 CFR 83 (Part 83), Federal Acknowledgment of American Indian Tribes, an appropriate process for groups in Alaska to seek Federal acknowledgment?

⁴⁶ 25 U.S.C. § 5123(f) (emphasis added).

⁴⁷ 25 U.S.C. § 5119.

⁴⁸ *Id.* § 5123.

⁴⁹ 25 C.F.R. § 81.49.

⁵⁰ See Ickes Guidance, *supra* note 38, at 1.

No. It was clear from the inception of the FAP regulations that a tribe included on the list, *sua sponte* or otherwise, did not need to—and in fact could not—utilize the FAP petition procedures.⁵¹ Indeed, the majority of recognized tribes have not gone through the FAP recognition procedures. As noted by the United States District Court for the District of Alaska:

[T]he Secretary of the Interior has the power to recognize tribes due to the historical acquiescence of Congress . . . “[w]hen the Secretary promulgated the FAP regulations in 1978, he merely formalized a process exercising a power that he had been employing for decades.” The regulations created a procedure whereby unrecognized tribes could themselves initiate proceedings for use of the Secretary’s power to recognize tribes. A potential tribe that has been refused recognition through other channels may file a petition and receive an adjudication. The Secretary himself need not use this regulatory scheme, but may recognize a tribe due to his historically acquiesced power.⁵²

Tribal recognition can occur through a variety of means.⁵³ Congress has long been aware of this, and it is apparent from the legislative history of the 1994 IRA amendments, wherein Senator McCain (then ranking minority member of the Senate Committee on Indian Affairs) stated:

Over the years, the Federal Government has extended recognition to Indian tribes through treaties, executive orders, a course of dealing, decisions of the federal courts, acts of Congress and administrative action. Regardless of the method by which recognition was extended, all Indian tribes enjoy the same relationship with the United States and exercise the same inherent authority.⁵⁴

The Secretary’s role is to survey the scope of federal action with respect to a particular tribe and determine whether the sum of all such actions evinces sufficient indication of governmental intent that the group be treated as a tribe. The list is published to enumerate “those entities which are considered ‘Indian tribes’ as a matter of law by virtue of past practices and which, therefore, need not petition the Secretary for a determination that they now exist as Indian tribes.”⁵⁵ It is for this

⁵¹ See 43 Fed. Reg. 39,361, 39,362 (Sept. 5, 1978) (codified at 25 C.F.R. § 54.3(b) (current version at 25 C.F.R. § 83.3)) (“This part does not apply to Indian tribes . . . which are already acknowledged as such.”).

⁵² *Native Vill. of Venetie I.R.A. Council v. Alaska*, No. F86-0075 CIV (HRH), Order (Partial Motion for Summary Judgment–Tribal Status), slip op. at 9 (D. Alaska, Sept. 20, 1995) (citations omitted, second alteration in original) (quoting *Native Vill. of Venetie I.R.A. Council v. Alaska*, No. F86-0075 CIV (HRH), 1994 WL 730893, at *10 (D. Alaska Dec. 23, 1994)).

⁵³ See generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[4]-[5], at 136-41 (Nell Jessup Newton et al. eds., 2012 ed., 2017 supp.).

⁵⁴ 140 CONG. REC. 11234 (1994) (statements by Sen. McCain); see also *id.* (statements by Sen. Inouye).

⁵⁵ 60 Fed. Reg. 9,250, 9,250 (Feb. 16, 1995).

reason that the Alaska District Court concluded in *Native Village of Tyonek v. Puckett* that “BIA acknowledgment constitutes a recognition of that which has existed in the past.”⁵⁶

The Secretary’s listing of Alaska tribes forecloses consideration of the application of the FAP procedures to tribes that have already been recognized. Such tribes are not obliged to (and in fact forbidden to) utilize the FAP procedures. It follows then that the interest of an Alaska traditional council to organize under the IRA, if already listed on the list of federally recognized tribes, should not be subject to the FAP procedures. But neither should communities like Qutekcak and Knugank, which are currently asking the Department to facilitate their organization under the Alaska IRA, be required to utilize the FAP process. Congress has expressly provided for an alternate means of federal recognition in Alaska through the Alaska IRA.

The Department should put its time, energy, and resources into processing the pending Alaska IRA organization petitions so that these tribes have finality and closure. The request of the Qutekcak Native Tribe has been pending since 1993, and the request of the Knugank Tribe has been pending since 2001. These delays are unacceptable. If the Department does choose to propose regulations or more guidance as a result of the current tribal consultations and listening sessions, this should in no way affect its consideration of these two pending petitions.

8. Are there challenges specific to Alaska Native groups that make the requirements of Part 83 particularly challenging to satisfy?

Yes. The Department has long recognized that the FAP regulations may be “unduly burdensome” in the Alaska context because tribes in Alaska are less likely to have the proper evidentiary documentation necessary to succeed under Part 83.⁵⁷ In addition, Alaska tribes faced different historical circumstances that led Congress to understand that recognition of entities that qualify as Indian tribes in Alaska should not be based on descent, either genealogically or politically, from a tribe that existed during historical times.⁵⁸ Instead, Congress recognized in the Alaska IRA that Alaska Natives should utilize the common bond standard which addressed the historical differences confronting Alaska tribes.

9. Is there a need to create a separate process for Federal acknowledgment of Alaska groups, outside Part 83?

No. As stated above, federally recognized tribes are not obliged to (and in fact prohibited from) utilizing the FAP procedures. The Secretary has historically rejected an Alaska exception or modification of the process for Alaska, and in 1994 concluded that “a modification now of the acknowledgment process to address the specific circumstances in Alaska is unwarranted.”⁵⁹ Instead, language was added to the general FAP regulation “which explicitly takes into account

⁵⁶ *Native Vill. of Tyonek v. Puckett*, No. A82-0369-CV (HRH), Order (Tribal Status/Sovereign Immunity), slip op. at 18 (D. Alaska, Oct. 31, 1996).

⁵⁷ 53 Fed. Reg. 52,829, 52,833 (Dec. 29, 1988).

⁵⁸ Solicitor’s Opinion M-36975, Governmental Jurisdiction of Alaska Native Villages over Land and Nonmembers (Jan. 11, 1993).

⁵⁹ 59 Fed. Reg. 9,280, 9,284 (Feb. 25, 1994).

the inherent limitations of historical research on community and historical influence [and] allows for circumstances where evidence is genuinely not available.”⁶⁰ That language was made equally applicable to Alaska and the contiguous 48 states, and did not represent any special “Alaska” exception.

For those communities like Qutekcak and Knugank that are currently petitioning the Department to facilitate their organization, the Alaska IRA is the proper way for any remaining Alaska Native entity to secure federal recognition. The procedures set forth in Part 81 should be amended to provide, as they did prior to 2015, for organization by Alaska groups that are not currently listed as federally recognized tribes.

AUTHORITY TO TAKE LAND INTO TRUST IN ALASKA UNDER THE INDIAN REORGANIZATION ACT

In the interest of providing context for discussion of the questions, we first offer some background on the early land status of Alaska Natives and an overview of recent legal developments concerning the Secretary’s authority to take land into trust for Alaska Natives.

I. Early Land Status of Alaska Natives

The Treaty of Cession, in which Russia conveyed Alaska to the United States, provided that “[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.”⁶¹ When the Organic Act of 1884 established a civil government in Alaska, it also declared “[t]hat the Indians or other persons in said district [the Territory of Alaska] shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them.”⁶² However, the establishment of “the terms under which such persons may acquire title to such lands” was “reserved for future legislation by Congress.”⁶³ The United States Supreme Court has explained that both the Organic Act and the Act of June 6, 1900⁶⁴ were “intended . . . to retain the status quo” regarding the land claims of Alaska Natives “until further congressional or judicial action was taken.”⁶⁵

Over the next few decades, Congress enacted a series of laws providing land for Alaska Natives without resolving their claims to aboriginal title. In 1891, Congress established a reservation for the Metlakatla Indians, who had moved to Alaska from British Columbia.⁶⁶ In the years that

⁶⁰ *Id.* at 9,281.

⁶¹ Treaty concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all the Russias to the United States of America, U.S.-Russ., art. 3, Mar. 30, 1867, 15 Stat. 539, 542.

⁶² Organic Act of 1884, 23 Stat. 24, 26, ch. 53, § 8 (1884).

⁶³ *Id.*

⁶⁴ Ch. 786, 31 Stat. 321.

⁶⁵ *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278 (1955).

⁶⁶ *See Metlakatla Indian Cmty. v. Egan*, 369 U.S. 45, 48 (1962).

followed, other reservations were established by executive order.⁶⁷ While those reserves were being established, Congress enacted the Alaska Native Allotment Act⁶⁸ and the Alaska Native Townsite Act.⁶⁹

The Alaska Native Allotment Act allowed Alaska Natives to acquire title to as much as one hundred and sixty acres of land that they used and occupied, while the Alaska Native Townsite Act “provid[ed] for the patenting of lots within Native townsites.”⁷⁰ “Both acts placed restrictions on the title conveyed so that lands could not be alienated or taxed until . . . certain federally prescribed conditions were met.”⁷¹

Congress repealed the Alaska Native Allotment Act in ANCSA, but pending applications were protected.⁷² Many of the protected pending claims were later approved legislatively by the Alaska National Interest Lands Conservation Act (ANILCA).⁷³ Alaska Natives could also acquire townsite plots under the Alaska Native Townsite Act, until Congress repealed the Act in FLPMA.⁷⁴ The Alaska Native Townsite Act provided for Native communities to place township lands into trusteeship, from which individual townsite plots could be conveyed to individual Natives. Both types of individual title were subject to restraints on alienation.

II. Authority to Take Land into Trust in Alaska under the IRA

Section 5 of the IRA provides the Secretary the authority to acquire lands in trust for Indians. It states:

The Secretary of the Interior is authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands . . . within or without existing reservations, including trust or otherwise restricted allotments . . . for the purpose of providing land for Indians.⁷⁵

In 1936, Congress affirmatively expanded the application of Section 5’s land into trust authority to Alaska Native Tribes.⁷⁶ Following ANCSA’s passage in 1971, Congress repealed other statutes governing the procurement of land for use by Alaska Natives, including the Alaska IRA section

⁶⁷ See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 53, § 4.07[3][b][iii], at 337-38; CASE & VOLUCK, *supra* note 7, at 81-110 (both discussing the history of reservation policy in Alaska).

⁶⁸ 34 Stat. 197, ch. 2469 (May 17, 1906).

⁶⁹ 44 Stat. 629, ch. 379 (May 25, 1926).

⁷⁰ *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1015 (D. Alaska 1977), *aff’d*, 612 F.2d 1132 (9th Cir. 1980).

⁷¹ CASE & VOLUCK, *supra* note 7, at 113.

⁷² Pub. L. No. 92-203, § 18, 85 Stat. 688, 710 (1971).

⁷³ Pub. L. No. 96-487, § 905, 94 Stat. 2371, 2435 (1980) (codified at 43 U.S.C. § 1634).

⁷⁴ Pub. L. No. 94-579, § 703(a), 90 Stat. at 2789-90.

⁷⁵ 25 U.S.C. § 5108.

⁷⁶ *Id.* § 1, 49 Stat. at 1250 (codified with some differences in language at 25 U.S.C. § 5119).

authorizing the Secretary to create reservations in Alaska.⁷⁷ Importantly, however, Congress never repealed the Alaska IRA's trust acquisition authority.⁷⁸

III. Early Solicitor Opinions Regarding Alaska Trust Lands

In 1978, the Native Village of Venetie petitioned the Secretary to acquire its former reservation lands into trust status. The tribe's request "spurred the Department of Interior to determine ANCSA's effect on its authority to acquire trust lands in Alaska."⁷⁹ In response, the Department published a Solicitor's Opinion, concluding that "Congress intended permanently to remove from trust status all Native land in Alaska except allotments and the Annette Island Reserve."⁸⁰ The Department then published land-into-trust regulations that excluded "the acquisition of land in trust status in the State of Alaska."⁸¹ This provision became known as the "Alaska Exception."

In 1994, three Alaska Native tribes petitioned the Secretary to revise the land-into-trust regulations to remove the Alaska Exception.⁸² The Secretary put the petition out for notice and comment, describing it as a request that the Secretary "remove the portion of the existing regulation that prohibits the acquisition of land in trust status in Alaska for Alaska Native villages other than Metlakatla."⁸³ In 1999, the Secretary again proposed revisions to the land-into-trust regulations. At the time, the Secretary noted that "[t]he proposed regulations would . . . continue the bar against taking Native land in Alaska in trust."⁸⁴ The Secretary explained:

The regulatory bar to acquisition of title in trust in Alaska in the original version of these regulations was predicated on an opinion of the Associate Solicitor, Indian Affairs . . . which concluded that ANCSA precluded the Secretary from taking lands in Alaska. . . . Although that opinion has not been withdrawn or overruled, we recognize that there is a credible legal argument that ANCSA did not supersede the Secretary's authority to take land into trust in Alaska under the IRA.⁸⁵

In 2001, the Department finalized its updated land-into-trust regulations.⁸⁶ At the same time, Solicitor John Leshy withdrew the Fredericks Opinion, concluding "that there is substantial doubt about the validity of the conclusion reached in the 1978 Opinion."⁸⁷ Solicitor Leshy reasoned:

⁷⁷ Pub. L. No. 94-579, § 704(a), 90 Stat. at 2792.

⁷⁸ See *Akiachak I*, 935 F. Supp. 2d at 199.

⁷⁹ *Akiachak III*, 827 F.3d at 103.

⁸⁰ Memorandum from Thomas W. Fredericks, Associate Solicitor, Indian Affairs, to Assistant Secretary, Indian Affairs 3 (Sept. 15, 1978) (hereinafter "Fredericks Opinion").

⁸¹ 25 C.F.R. § 151.1 (1980).

⁸² *Akiachak I*, 935 F. Supp. 2d at 201 (quoting Petition for Rulemaking 1 (Oct. 11, 1994)).

⁸³ *Id.* (quoting Land Acquisitions, 60 Fed. Reg. 1,956, 1,956 (Jan. 5, 1995)).

⁸⁴ Acquisition of Title to Land in Trust, 64 Fed. Reg. 17,574, 17,578 (Apr. 12, 1999).

⁸⁵ *Id.* at 17,577-78 (citations omitted).

⁸⁶ Acquisition of Title of Land in Trust, 66 Fed. Reg. 3,452 (Jan. 16, 2001).

⁸⁷ Memorandum from John Leshy, Solicitor, Department of Interior at 1 (Jan. 16, 2001) (hereinafter "Leshy Memo").

Among other things, the Associate Solicitor found “significant” that in 1976 Congress repealed Section 2 of the Indian Reorganization Act (IRA). That section had extended certain provisions of the IRA to Alaska, and had given the Secretary the authority to designate certain lands in Alaska as Indian reservations. *See* U.S.C. § 704(a). 90 Stat. 2743, repealing 49 Stat. 1250. 25 U.S.C. 496. The 1978 Opinion gave little weight to the fact that Congress had not repealed Section 5 of the IRA, which is the generic authority by which the Secretary takes Indian land into trust, and which Congress expressly extended to Alaska in 1936. *See* 25 U.S.C. § 473a. The failure of Congress to repeal that section, when it was repealing others affecting Indian status in Alaska, five years after Congress enacted the Alaska Native Claims Settlement Act in 1971, raises a serious question as to whether the authority to take land in trust in Alaska still exists. . . .

Because of my substantial doubt about the validity of the conclusion in the 1978 Opinion, and in order to clear the record so as not to encumber further discussions over whether the Secretary can, as a matter of law, and should, as a matter of policy, consider taking Native land in Alaska into trust, I am hereby rescinding the Associate Solicitor’s 1978 Opinion.⁸⁸

Despite the withdrawal of the 1978 Fredericks Opinion, the Department retained the Alaska Exception in the revised land-into-trust regulations. The preamble of the revised regulation announced:

[T]he position of the Department has long been, as a matter of law and policy, that Alaska Native lands ought not to be taken in trust. Therefore, the Department has determined that the prohibition in the existing regulations on taking Alaska lands into trust (other than Metlakatla) ought to remain in place for a period of three years during which time the Department will consider the legal and policy issues involved in determining whether the Department ought to remove the prohibition on taking Alaska lands into trust. If the Department determines that the prohibition on taking lands into trust in Alaska should be lifted, notice and comment will be provided.⁸⁹

The Department eventually withdrew the revised land-into-trust regulations later that year after delaying their effectiveness several times.⁹⁰

IV. Litigation

In 2006, four Alaska Native tribes and one Alaska Native individual challenged the Alaska Exception in the United States District Court for the District of Columbia.⁹¹ The State of Alaska

⁸⁸ *Id.* at 1-2.

⁸⁹ 66 Fed. Reg. at 3,454.

⁹⁰ *See* Acquisition of Title to Land in Trust, 66 Fed. Reg 56,608, 56,609 (Nov. 9, 2001).

⁹¹ *See Akiachak I*, 935 F. Supp 2d at 197.

intervened, arguing that ANCSA implicitly revoked the Secretary's authority to take lands in trust in Alaska.⁹²

During the litigation, the Department argued that neither ANCSA nor FLPMA removed the Secretary's discretionary authority to take lands into trust in Alaska.⁹³ The Department argued that, while the Secretary has the authority and discretion to take lands into trust within Alaska, he is not legally obligated to do so.⁹⁴

On March 31, 2013, the district court ruled in favor of the plaintiff tribes. The court held that "ANCSA left intact the Secretary's authority to take land into trust throughout Alaska" and that "Congress did not explicitly eliminate the grant of [that] authority."⁹⁵ The court rejected Alaska's argument that ANCSA implicitly repealed the 1936 Alaska IRA amendment that authorized the acquisition of land in trust in Alaska under Section 5 of the IRA.⁹⁶ The court found compelling the fact that when Congress passed ANCSA and FLPMA, it expressly repealed other laws such as the Alaska Native Allotment Act, the Alaska Native Townsite Act, and Section 2 of the 1936 Alaska IRA.⁹⁷ The court concluded that Congress clearly understood how to repeal previous legislation, but left in place Section 5 of the IRA, as extended to Alaska by Section 1 of the Alaska IRA.⁹⁸ Lastly, the court found no "irreconcilable conflict" between the Secretary's discretionary authority to take new lands into trust and ANCSA.⁹⁹ The court held that while ANCSA settled land *claims* without creating trusteeships, petitions to take land into trust were not "claims," and ANCSA did "not necessarily mean that it prohibits the creation of any trusteeship outside of the settlement."¹⁰⁰

After affirming the Secretary's authority to take land in trust for Alaska Natives, the court turned to the question of whether the Alaska Exception was legal under the 1994 IRA amendments. The court found that the Alaska Exception violated the privileges and immunities clause of the 1994 IRA Amendment, which voids any regulation which diminishes the privileges of a tribe "relative to the 'privileges . . . available to all other federally recognized tribes by virtue of their status as Indian tribes.'"¹⁰¹ The court ultimately found that the Alaska Exception was severable from the rest of the Department's land-into-trust regulations and, accordingly, vacated and severed it from 25 C.F.R. § 151.1.¹⁰²

⁹² *Id.*

⁹³ *Id.* at 204 (citing *Defs.' Reply in Supp. of Defs.' Cross-Mot. for Summ. J.* at 1-2, *Akiachak Native Cmty. v. Salazar*, 935 F. Supp. 2d 195 (D.D.C. 2013) (No. 06-969 (RC))).

⁹⁴ *Id.* at 208 (citing *Defs.' Suppl. Br. Pursuant to Ct. Order at 10*, *Akiachak Native Cmty. v. Salazar*, 935 F. Supp. 2d 195 (D.D.C. 2013) (No. 06-969 (RC))).

⁹⁵ *Id.* at 207-08.

⁹⁶ *See id.* at 204-08.

⁹⁷ *Id.* at 205-07.

⁹⁸ *Id.*

⁹⁹ *Id.* at 206-07.

¹⁰⁰ *Id.* at 207.

¹⁰¹ *Id.* at 211 (quoting 25 U.S.C. § 476(g) (current version at 25 U.S.C. § 5123(g))).

¹⁰² *See Akiachak Native Cmty. v. Jewell (Akiachak II)*, 995 F. Supp. 2d 1, 6 (D.D.C. 2013), *vacated as moot sub nom. Akiachak III*, 827 F.3d 100.

The United States and the State of Alaska filed a notice of appeal soon after the district court's final judgment. While the appeal was pending, the Department initiated a rulemaking to revise its regulations and eliminate the Alaska Exception.¹⁰³ Following a public comment period, in 2014 the Department finalized the rule and removed the Alaska Exception from its land-into-trust regulations.¹⁰⁴ Noting “[a] number of recent developments,’ including “a pending lawsuit” and “urgent policy recommendatoins” from two blue-ribbon commissions, the Department “carefully reexamined the legal basis for the Secretary’s discretionary authority to take land into trust in Alaska” and concluded that “ANCSA left . . . the Secretary’s . . . land-into-trust authority in Alaska intact.”¹⁰⁵ According to the Department, “[t]he district court’s judgment in [*Akiachak I*] is consistent with the conclusion we reach but is not the basis for the Department’s decision to eliminate the Alaska Exception.”¹⁰⁶

After the Department issued the proposed rule, it also voluntarily dismissed its appeal. The State of Alaska, however, carried its appeal forward on the question of the Secretary’s land-into-trust authority. In light of its rulemaking and the removal of the Alaska Exception from Part 151, the Department then filed a motion to dismiss Alaska’s appeal as moot.¹⁰⁷

On appeal, the D.C. Circuit agreed that the 2014 rulemaking rendered the case moot. In responding to the State’s argument that the Department’s rulemaking simply implemented the first *Akiachak* decision, the court stated:

Interior did far more than merely acquiesce in the district court’s judgment. Instead, it engaged in a new rulemaking, in which it considered the history of trust ownership in Alaska, its prior legal interpretations of the governing statutes, policy issues such as public safety in Alaska Native communities, comments from Native communities and corporations, and the recommendations of blue-ribbon commissions formed to “investigate criminal justice systems in Indian country” and “evaluate the existing management and administration of the trust administration system.” Interior then exercised its discretion to promulgate a new rule that removed the Alaska exception, explaining that the new rule could “foster economic development, enhance the ability of Alaska Native tribes to provide services to their members, and give additional tools to Alaska Native communities to address serious issues, such as child welfare, public health and safety, poverty, and shortages of adequate housing, on a local level.” Significantly, *Interior made clear that “[t]he district court’s judgment . . . is not the basis for the Department’s decision to eliminate the Alaska exception” and that it had “independently concluded that there is no legal impediment to taking land into trust in Alaska, and*

¹⁰³ See Land Acquisition in the State of Alaska, 79 Fed. Reg. 24,648, 24,649 (May 1, 2014).

¹⁰⁴ Land Acquisition in the State of Alaska, 79 Fed. Reg. 76,888, 76,895 (Dec. 23, 2014) (codified at 25 C.F.R. § 151.1).

¹⁰⁵ *Id.* at 76,889-90.

¹⁰⁶ *Id.* at 76,891.

¹⁰⁷ *Akiachak II*, 827 F.3d at 105 (quoting Fedederal Appeeles’ Mot. to Dismiss Appeal as Moot 2 (Oct. 8, 2015)).

*there are sound policy reasons for giving Alaska tribes the opportunity to petition to take land into trust.*¹⁰⁸

After finding the case moot, the D.C. Circuit vacated the district court's decision.¹⁰⁹

On January 13, 2017, Solicitor Tompkins issued Opinion M-37043, affirming the Secretary's authority to take lands into trust in Alaska. The Tompkins Opinion's legal conclusions were consistent with the district court's opinion in *Akiachak I* and the Department's 2014 conclusions when it repealed the Alaska Exception. The 2017 Tompkins Opinion was issued a few days after the Department acquired a parcel of land in trust for the Craig Tribal Association.¹¹⁰

Less than two years later, on June 29, 2018, Deputy Solicitor Jorjani issued Opinion M-37053, withdrawing Opinion M-37043. In his withdrawal announcement, Mr. Jorjani asserted that Opinion M-37043 was incomplete; his principle criticism being that Solicitor Tompkins did not deal thoroughly enough with "post-ANCSA legislation," and may have improperly relied on a subsequently-vacated district court opinion.¹¹¹ But the Tompkins Opinion only cites the *Akiachak* opinion in passing to note a fact, not a legal conclusion, and incorporates by reference the legal opinions the Department set forth in its legal briefs and in the 2014 rulemaking.¹¹²

Ignoring the legal conclusions reached at the end of the 2014 rulemaking, Mr. Jorjani suggested that certain provisions of ANCSA, FLPMA, ANILCA and the 1988 ANCSA amendments "[c]ollectively . . . create a fundamentally different regime for Alaska Native tribes when compared to the tribes in the contiguous United States."¹¹³ As such, he concludes by calling for the development of a fresh "interim policy for off-reservation land-into-trust acquisitions within and outside of Alaska," and says that withdrawing the 2017 M-Opinion will permit the current consultation and policy development to occur "[un]encumbered."¹¹⁴ This approach fails to fully account for the fact that the judiciary, the Department, and the Department of Justice have all previously concluded that ANCSA and the other enactments left intact the Secretary's authority to take land into trust throughout Alaska, and that Congress did not explicitly eliminate the grant of that authority.

Mr. Jorjani's failure to acknowledge these prior authorities, along with his stated intention to create an interim policy for off-reservation land-into-trust acquisitions within and outside of Alaska, creates a false premise that tribal notice and comment on this topic will not have any influence whatsoever in the outcome of the decision. Indeed, it suggests that an arbitrary decision will be made not based on law, but on political dictates to reverse land into trust successes achieved both

¹⁰⁸ *Id.* at 112-13 (internal citations omitted, emphasis added).

¹⁰⁹ *Id.* at 113, 115.

¹¹⁰ *See* Land Acquisitions; Craig Tribal Association, Craig, Alaska, 82 Fed. Reg. 4,915 (Jan. 17, 2017).

¹¹¹ *See* Solicitor's Opinion M-37053 at 4.

¹¹² *See* Solicitor's Opinion M-37043 at 9 n.72, 10 n.82, 13 n.103, 21.

¹¹³ Solicitor's Opinion M-37053 at 4.

¹¹⁴ *Id.*

judicially and administratively. Such an approach will surely be challenged under the Administrative Procedures Act.

The Department's recent withdrawal of Opinion M-37043 incorrectly asserts it was incomplete. It was not. Opinion M-37043 was a 22-page single-spaced document with 136 footnotes. It also expressly noted that it was relying on *prior* Department legal opinions which had already been written regarding the IRA's application to Alaska in the wake of ANCSA and subsequent legislation, including FLPMA and ANILCA, and therefore it didn't repeat those prior legal assessments. Those prior legal assessments were contained in:

- Solicitor Leshy's Memorandum to the Assistant Secretary, dated January 16, 2001;
- The Department's lengthy briefs filed with the district court during the *Akiachak* litigation, and referenced in the notice proposing the repeal of the Alaska Exception at 79 Fed. Reg. at 24,650;
- The Solicitor's April 29, 2014, Memorandum to the Assistant Secretary – Indian Affairs, referenced in the Final Rule repealing the Alaska Exception and published at 79 Fed. Reg. at 76,890; and
- The Federal Register notices which accompanied the Proposed Rule and the Final Rule.

Opinion M-37043 expressly states it is relying on these prior legal opinions, all of which conclude that IRA Section 5's application to Alaska was not repealed by ANCSA or subsequent legislation. For this reason, the Opinion spends more time definitively addressing a *different* issue with which Mr. Jorjani does not take issue: the impact of *Carcieri v. Salazar*,¹¹⁵ on the application of the IRA's trust lands authority to Alaska.

Opinion M-37043 should be immediately reinstated. This position is generally supported by Indian Country, as evidenced by NCAI's Resolution DEN-18-055. Solicitor Tompkins's 2017 conclusions regarding the impact of the *Carcieri* decision on the IRA's application to Alaska are of critical importance and are not questioned in Mr. Jorjani's June 29 Memorandum. Moreover, significant questions remain about whether the Deputy Solicitor has the authority to withdraw a formal Solicitor's Opinion.

On July 2, 2018, Principal Deputy Tahsuda sent a letter requesting input from Alaska Tribes on questions concerning the Secretary's authority to take lands into trust in Alaska. With the foregoing contextual history, we turn to those questions below.

V. Response to Questions

1. How do you view the impact, if any, of the Alaska Native Claims Settlement Act, the Federal Land Policy and Management Act of 1976, and the Alaska

¹¹⁵ 555 U.S. 379 (2009).

National Interest Land Conservation Act on the Secretary's ability to take land-into-trust in Alaska?

A. Alaska Native Claims Settlement Act

ANCSA left intact the Secretary's authority to take land into trust throughout Alaska, and Congress, in ANCSA did nothing to eliminate its grant of that authority. Congressional passage of ANCSA thus had no impact on the Secretary's authority to take land into trust in Alaska.

In 1971, Congress enacted ANCSA to extinguish Alaska Native aboriginal land claims of use and occupancy in return for payment of some \$962.5 million and the conveyance of fee title in 44 million acres to newly-formed Native corporations.¹¹⁶

At the time of ANCSA's enactment, aboriginal claims of use and occupancy were blocking Alaska's Statehood Act land selections and Alaska's related efforts to develop newly-discovered oil and gas reserves.¹¹⁷ ANCSA thus extinguished "[a]ll aboriginal titles . . . and claims of aboriginal title in Alaska based on use and occupancy,"¹¹⁸ together with "[a]ll claims . . . that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy."¹¹⁹

As part of the settlement, Congress also revoked all Indian reservations in Alaska other than the Annette Island Reserve of the Metlakatla Indian Community.¹²⁰ The Metlakatla Indian Community is a Canadian tribe with no aboriginal claims in Alaska and did not participate in the ANCSA land claims settlement. Congress did not, however, alter or revoke any existing trust land titles in Alaska lying outside formal reservation boundaries.

Although ANCSA's findings noted an intent to avoid "establishing any permanent racially defined institutions, rights, privileges or obligations,"¹²¹ the newly-formed ANCs were entirely Native owned and controlled, and original provisions to make individual Native stock fully alienable and to remove Native-only voting restrictions after 20 years were later repealed so that those special rights now continue in perpetuity.¹²² Similarly, and again notwithstanding Section 1601(b)'s "no racially defined . . . rights" language, Congress adopted special protections for undeveloped ANC lands for 20 years, then later extended those special land rights in perpetuity.¹²³ In the meantime,

¹¹⁶ Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. §§ 1601-1642).

¹¹⁷ See generally CASE & VOLUCK, *supra* note 7, at 167.

¹¹⁸ 43 U.S.C. § 1603(b).

¹¹⁹ *Id.* § 1603(c).

¹²⁰ *Id.* § 1618(a).

¹²¹ *Id.* § 1601(b).

¹²² See 43 U.S.C. § 1606(h) (original version at Pub. L. No. 92-203, § 7(h), 85 Stat. 688, 691 (1971)).

¹²³ See 43 U.S.C. §§ 1620(d), 1636(d) (original version at Pub. L. No. 92-203, § 21(d), 85 Stat. 688, 713).

Congress left the federally recognized Alaska Native tribes undisturbed by ANCSA's land settlement provisions.¹²⁴

ANCSA expressly addressed, and even repealed, some existing laws concerning Alaska Native land rights, but it also left other laws in place and unaddressed. For instance, ANCSA expressly repealed the Alaska Native Allotment Act.¹²⁵ ANCSA also closed the period for Alaska Natives to apply for allotments under the Dawes Act and the Act of June 25, 1910.¹²⁶ But ANCSA left undisturbed all previously-issued Alaska Native allotments, and it even left in place all then-pending Alaska Native applications for future allotments.¹²⁷

On the other hand, ANCSA made no mention of the Alaska Native Townsite Act, under which Alaska Native occupants secured restricted fee title to their lands. The Alaska Native Townsite Act was then repealed in 1976 by FLPMA.¹²⁸

So too, ANCSA made no mention of the 1934 IRA, the 1936 Alaska IRA, or the Secretary's authority to acquire lands in trust in Alaska. This was no mere drafting gaffe. Congress has in other Indian lands settlements repeatedly made use of its authority to repeal or change the application of the IRA to a particular group of American Indians.¹²⁹ ANCSA also made no mention of tribal trust lands owned by the United States and lying outside the reservations that ANCSA repealed.¹³⁰

Congressional passage of ANCSA thus had no impact on the Secretary's authority to take land into trust in Alaska under the IRA. ANCSA was affirmative Indian legislation settling Alaska Natives' aboriginal land claims. One of ANCSA's prime architects, Senator Ted Stevens (R-Alaska), was clear on this point:

¹²⁴ See 25 U.S.C. §§ 5130, 5131, 1212-1215; CASE & VOLUCK, *supra* note 7, at 327-334.

¹²⁵ Pub. L. No. 92-203, § 18, 85 Stat. at 710 (codified at 43 U.S.C. § 1617(a)).

¹²⁶ 43 U.S.C. § 1617(a) (repealing Act of February 8, 1887 (Dawes Act), 24 Stat. 388, ch. 119 (1887); Act of June 25, 1910, 36 Stat. 855, ch. 431 (1910)).

¹²⁷ *Id.* §§ 1617(a), 1634.

¹²⁸ Pub. L. No. 94-579, § 703(a), 90 Stat. at 2789-90.

¹²⁹ *Accord* Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, § 5(e), 94 Stat. 1785, 1791 (1980) (codified at 25 U.S.C. § 1724(e)) ("Except for the provisions of this subchapter, the United States shall have no other authority to acquire lands or natural resources in trust for the benefit of Indians or Indian nations, or tribes, or bands of Indians in the State of Maine.").

¹³⁰ See Derril Jordan, Assoc. Solicitor, U.S. Dep't of Interior, to Frances Ayer, Morisset, Schlosser, Ayer & Jozwiak, *Status of U.S. Survey 963: 14.81 acres Deeded to the United States in Trust from the Organized Village of Kake* (July 2, 1998) (confirming the trust status of lands located in the village of Kake, Alaska). See also Solicitor's Opinion M-36975, *supra* note 41 ("During the 1940's and 1950's the Government acquired by purchase, and took title in trust to, cannery properties in three Southeast Alaska communities. . . . Beneficial title to these trust lands is still held by the IRA community and/or association as follows: Angoon (13.24 acres); Kake (15.9 acres); Klawock (1.91 acres)").

ANCSA was and is a land settlement. It did not terminate the special relationship between Alaska Natives from the Federal Government or resolve any questions concerning the governmental status, if any, of various Native groups. There's not one reference to sovereignty in ANCSA or in the 1971 Conference Report. The Act's declaration of settlement is very clear. It extinguishes aboriginal claims of land title and aboriginal hunting and fishing rights, and nothing more or less.¹³¹

Congress later noted in its 1987 amendments to ANCSA that: no provision of this Act shall . . . confer on, or deny to, any Native organization any degree of sovereign governmental authority over lands . . . or persons in Alaska."¹³²

ANCSA left intact the Secretary's authority to take land into trust throughout Alaska, and Congress has never impliedly or expressly eliminated that grant of authority. ANCSA thus had no impact on the Secretary's authority to take land into trust in Alaska. The judiciary, the Department, and the Department of Justice have all recognized and affirmed this inescapable legal conclusion.

B. Federal Land Policy and Management Act of 1976

Five years after ANCSA, Congress enacted FLPMA. As made clear from its name, FLPMA is federal public lands legislation. It "requires the retention of public lands in public ownership unless, through the Act's extensive land use planning procedures, disposition of a parcel of land is found to be in the national interest."¹³³ While prioritizing the retention of public lands in public ownership, FLPMA also holds that public lands are to be managed in recognition of "the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands."¹³⁴

In FLMPA, Congress also addressed two pre-ANCSA Native land statutes. First, FLPMA repealed the Alaska Native Townsite Act which provided for Native communities to place township lands into trusteeship, and from which individual townsite plots could be conveyed to individual Natives.¹³⁵ Second, FLPMA repealed Section 2 of the 1936 Alaska IRA which granted the Secretary authority to create Indian reservations in Alaska.¹³⁶

While Congress used FLMPA as a vehicle to repeal some Alaska Native land statutes, it did not repeal, nor even mention, the lands into trust authority provided by Section 1 of the 1936 Alaska IRA. Indeed, as the court noted in *Akiachak*:

¹³¹ *To Amend the Alaska Native Claims Settlement Act: Hearings on S. 2065 Before the Subcommittee on Public Lands, Reserved Water and Resource Conservation of the Senate Committee on Energy and Natural Resources, 99th Cong., 329 (1986) (statement of Sen. Stevens).*

¹³² Pub. L. No. 100-241, § 2(8), 101 Stat. 1788, 1789 (1988) (codified at 43 U.S.C. § 1601 note).

¹³³ 43 U.S.C. § 1701(a)(1).

¹³⁴ *Id.* § 1701(a)(12).

¹³⁵ *See Akiachak I*, 935 F. Supp. 2d at 199-201.

¹³⁶ *Id.*

The text of ANCSA and its structure, read alongside FLPMA, suggests that the Secretary retains the authority to take Alaska land into trust. Congress explicitly . . . repealed the Allotment Act, the Townsite Act, and the Secretary's authority to establish reservations in Alaska. Congress did not explicitly eliminate the grant of authority to take Alaska land into trust. If the Secretary's authority to take land into trust had been implicitly repealed, it would follow that his authority to establish reservations was repealed by an even stronger implication. But Congress felt the need to explicitly repeal the Secretary's reservation authority in FLPMA. And the simple fact that the statute conferring land-into-trust authority in Alaska survives is a strong indication that the Secretary's authority to take Alaska land into trust also survives.¹³⁷

In the Alaska Native lands context, FLPMA does exactly what Congress meant for it to do: it repealed the Townsite Act and Section 2 of the Alaska IRA. It does nothing to effect the existing Secretarial authority to take lands into trust in Alaska, rooted in Section 1 of the Alaska IRA.

C. Alaska National Interest Land Conservation Act

ANILCA had its origin in Section 17(d)(2) of ANCSA, which directed the Secretary to withdraw up to 80 million acres for possible inclusion in the National Parks, Forests, Wildlife Refuges or Wild and Scenic River systems.¹³⁸ ANCSA gave the federal government seven years to accomplish this task.¹³⁹ When Congress failed to pass the necessary legislation to classify the lands permanently in one of the restrictive federal land management schemes, Secretary Cecil Andrus exercised his emergency withdrawal authority under FLPMA to set aside 110 million acres in temporary three-year withdrawals.¹⁴⁰ "Shortly thereafter, President Carter exercised his authority under the Antiquities Act to designate an additional 56 million acres as national monuments."¹⁴¹

In 1980, after two years of political debate, Congress passed ANILCA.¹⁴² Among other things, ANILCA provides a system for managing land withdrawn by the federal government for various purposes. One of the stated primary purposes of ANILCA is "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so."¹⁴³ By its terms, Title VIII of ANILCA is intended to fulfill a promise made in ANCSA and provides for subsistence-related hunting and fishing priorities for Alaska's rural communities.¹⁴⁴

¹³⁷ *Id.* at 208.

¹³⁸ *See* 43 U.S.C. § 1616(d).

¹³⁹ *Id.* § 1616(d)(2)(C)-(D).

¹⁴⁰ CASE & VOLUCK, *supra* note 7, at 296.

¹⁴¹ *Id.*

¹⁴² Pub. L. No. 96-487, 94 Stat. 2371.

¹⁴³ 16 U.S.C. § 3101(c).

¹⁴⁴ *See id.* § 3111.

Of greatest relevance to the Department's inquiry here is the fact that ANILCA granted pending Native allotment claims.¹⁴⁵ Those allotments had a restraint on alienation and are therefore considered a form of trust lands.¹⁴⁶ This action further undermines the false assertion that Congress did not intend Alaska Natives to hold lands in trust or restricted title.

ANILCA also did not revoke the village IRA constitutions or village IRA corporate charters. Nor did it repeal the authority in Section 1 of the Alaska IRA for Natives to reorganize and adopt constitutions. Since ANILCA's passage in 1980, Congress has taken no action to amend or repeal the 1936 Alaska IRA or the source of the Secretary's authority to take lands into trust in the original 1934 IRA. ANILCA, therefore, has no impact on the Secretary's continuing authority to take lands into trust in Alaska.

2. What impact, if any, do the 1994 amendments to the Indian Reorganization Act have on the Secretary's ability to promulgate rules specific to federally recognized tribes in Alaska?

As mentioned above, the 1994 IRA Amendments prohibit the Secretary from denying to Alaska Native tribes the privileges and immunities available to other federally recognized Tribes. The Secretary thus may not promulgate rules specific to Alaska tribes which would disadvantage them relative to other tribes. Only if such rules do not disadvantage such tribes, are they permissible under the 1994 IRA Amendments.

3. Should Congressional intent or legislative history play a role in determining whether the Secretary should accept land into trust in Alaska?

No. The primary guide to the meaning of a statute is found in the words of the statute. Statutory terms show what Congress elected to do or not to do. When Congress changes its mind, or decides to effect new policies, it acts by amending the law or enacting new laws. It is not the role of the courts or the Department to substitute their own judgments for Congress's express will.

4. Is 25 CFR 151 (Part 151), Land Acquisitions, an appropriate process for tribes in Alaska to request the Department take land-in-trust?

Yes. The cited process works in theory and has already worked in practice as was the case with the Craig Tribal Association. Despite not having been written with Alaska in mind, Part 151 together with the Secretary's existing discretion, has proven to be an able process for the consideration of Alaska trust land acquisitions. The Department should continue using the Part 151 process for reviewing trust land petitions from Alaska tribes.

Significantly, the issue of Part 151's application to Alaska was specifically addressed in the consultations leading up to the Final Rule repealing the Alaska Exception.¹⁴⁷ Nothing has changed

¹⁴⁵ See 43 U.S.C. § 1634(a); *cf. Alaska v. Babbitt*, 38 F.3d 1068 (9th Cir. 1994).

¹⁴⁶ *United States v. Ramsey*, 271 U.S. 476, 471-72 (1926) (rejecting distinction between restricted fee and trust allotments).

¹⁴⁷ See 79 Fed. Reg. at 76,894-95.

in the four years since those consultations were held that would warrant reaching a different conclusion today.

5. Are there challenges specific to tribes in Alaska that make the requirements of Part 151 particularly challenging to satisfy?

No. Again, the cited process was used in the case of the Craig Tribal Association and proved to be workable. The Department should continue using the Part 151 process for reviewing trust land acquisitions from Alaska Tribes. The issue of Part 151's application to Alaska was specifically addressed in the consultations leading up to the Final Rule repealing the Alaska Exception.¹⁴⁸ Nothing has changed in the four years since those consultations were held that would warrant reaching a different conclusion today.

6. If the Department were to promulgate regulations governing land-into-trust acquisitions specific to federally recognized tribes in Alaska, how might those regulations differ from Part 151?

The Department should not promulgate different regulations for Alaska. This issue was thoroughly assessed in the 2014 rulemaking, and suggestions along the lines of this question were thoroughly considered and rejected. The Department's successful experience with the Craig Tribal Association's trust land acquisition confirms that the Part 151 regulations are well-suited to the Alaska context.

Thank you for the opportunity to present these comments.



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¹⁴⁸ See *id.*