United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

January 19, 2021

M-37064

Memorandum

To: Secretary
Assistant Secretary – Indian Affairs

From: Solicitor

Subject: Permanent Withdrawal of Solicitor Opinion M-37043, "Authority to Acquire Land into Trust in Alaska"

On January 13, 2017, the Solicitor issued M-37043 ("Sol. Op. M-37043"),[1] concluding that the Alaska Native Claims Settlement Act ("ANCSA"),[2] the Federal Land Policy and Management Act ("FLPMA"),[3] and the U.S. Supreme Court ("Supreme Court") decision in *Carcieri v. Salazar*[4] did not prohibit the Secretary of the Interior ("Secretary") from accepting land in trust in Alaska ("Alaska" or "State"). Sol. Op. M-37043 provided the legal basis for the Department of the Interior's ("Department's") prior determination to remove the regulatory prohibition on trust acquisitions in Alaska ("Alaska Prohibition") through notice and comment rulemaking.[5] This action was itself a response to an earlier decision by a federal district court that ordered the severing of the Alaska Prohibition from the Department's fee-to-trust regulations.[6] That decision was subsequently vacated by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit").[7]

Sol. Op. M-37043 represented a departure from earlier Department precedent. The comment period that accompanied the associated rulemaking and informed the analysis of the Office of the Solicitor ("Solicitor's Office") was limited to 60 days,[8] and included only one tribal consultation

[1] Hilary C. Tompkins, Solicitor Opinion M-37043, "Authority to Acquire Land into Trust in Alaska" (Jan. 13, 2017) [hereinafter "Sol. Op. M-37043"].

[2] Pub. L. No. 92-203, 85 Stat. 688 (1971), *codified as amended at* 43 U.S.C. §§ 1601-1629h.

[3] Pub. L. No. 94-579, 90 Stat. 2743 (1976), *codified as amended at* 43 U.S.C. §§ 1701-1787.

[4] 555 U.S. 379 (2009).

[5] Final Rule, Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76,888 (Dec. 23, 2014).

[6] *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 1 (D.D.C. 2013), *vacated*, 827 F.3d 100 (D.C. Cir. 2016).

[7] *Akiachak Native Cmty. v. U.S. Dep't of the Interior*, 827 F.3d 100, 115 (D.C. Cir. 2016) ("vacatur is appropriate to 'clear[] the path for future relitigation of the issues….'") (quoting *United States v. Munsingwear, Inc*., 340 U.S. 36, 40 (1950)).

[8] Proposed Rule, Land Acquisitions in the State of Alaska, 79 Fed. Reg. 24,648 (May 1, 2014).

in Alaska.[9] This abbreviated consideration of the Secretary's ability to accept trust land in Alaska was in stark contrast to the three-year legal and policy review the Assistant Secretary – Indian Affairs ("AS-IA") thought necessary in 2000 for determining whether removal of the Alaska prohibition was appropriate.[10]

In consideration of the departure from the original Department policy, which was adopted shortly after ANCSA's and FLPMA's enactment, on June 29, 2018, the Solicitor issued M-37053, a withdrawal of Sol. Op. M-37043, pending review ("Sol. Op. M-37053").[11] Assisting in building a more robust consultation and public comment record to address factual and policy concerns, the Department solicited comments on six questions specifically addressing the statutory authority of future trust acquisitions in Alaska and the suitability of existing regulations governing fee-to-trust applications originating therein.[12] This consultation and public comment solicitation included five tribal consultations, one tribal listening session, one consultation with Alaska Native regional and village corporations ("ANCs"), one public meeting, and an extended opportunity for submitting written comments.[13] At the conclusion of this eight month period of external engagement, the Solicitor's Office began its review of the arguments and views presented by stakeholders.[14]

I have since considered the analysis provided by the Solicitor's Office regarding the significant omissions identified in Sol. Op. M-37043, as described in Sol. Op. M-37053. In light of these omissions, this review has led me to conclude that the legal analysis contained in Sol. Op. M-37043 is insufficient to support its determination that the Secretary has authority to accept land in trust in Alaska pursuant to section 5 of the Indian Reorganization Act ("IRA" or "Act"),[15] as implemented by 25 C.F.R. Part 151. Consistent with the approach adopted by the Solicitor in

[9] Final Rule, Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76,888, 76,890 (Dec. 23, 2014).

[10] Final Rule, Acquisition of Title to Land in Trust, 66 Fed. Reg. 3,452, 3,454 (Jan. 16, 2001). ("[T]he Department has determined that the prohibition in the existing regulations … 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.").

[11] Daniel H. Jorjani, Solicitor Opinion M-37053, "Withdrawal of Solicitor Opinion M-37043, 'Authority to Acquire Land into Trust in Alaska' Pending Review" (June 29, 2018).

[12] Letter from John Tahsuda III, Principal Deputy Assistant Secretary – Indian Affairs, to Tribal Leaders, Jul. 2, 2018; Letter from John Tahsuda III, Principal Deputy Assistant Secretary – Indian Affairs, to Alaska Native regional and village corporation Chief Executive Officers, July 2, 2018.

[13] Tribal consultations were held in Ketchikan on August 3, 2018; Anchorage on October 21, 2018; Bethel on March 5, 2019; and Kotzebue on March 7, 2019. An additional tribal consultation was held telephonically on December 12, 2018, for those tribes unable to send representatives to one of the four in-person consultations. A tribal listening session was held in Fairbanks on July 26, 2018. A consultation with ANCs was held in Anchorage on October 17, 2018. And a public meeting was held in Juneau on August 1, 2018. The public comment period was originally to end on December 20, 2018. It was extended to March 15, 2019 at the request of tribal leaders, and in response to an earthquake strike north of Anchorage on November 30, 2018 that disrupted the existing tribal consultation schedule.

[14] In addition to the numerous individuals who presented their views at the various in-person and telephonic sessions, 22 written comments were received from federally recognized tribes, the State, ANCs, tribal advocacy groups, law school professors, and concerned citizens.

[15] Act of June 18, 1934, ch. 576, Pub. L. No. 73-383, 48 Stat. 984, *codified as amended at* 25 U.S.C. §§ 5101-5129.

January 2001 when confronting this issue at the conclusion of the Clinton administration,[16] I am permanently withdrawing Sol. Op. M-37043. Substantial doubt exists regarding the validity of Sol. Op. M-37043's conclusions and Sol. Op. M-37043 should not encumber any future examination of whether the Secretary can, as a matter of law, and should, as a matter of policy, accept land in trust on behalf of federally recognized tribes in Alaska.

In the attached Memorandum,[17] I have identified several issues that have not heretofore been addressed in any Department analysis of the Secretary's trust acquisition authority in Alaska. Those significant issues give rise to serious concerns over the scope of the Secretary's statutory authority, and until those issues are addressed and resolved, the Department should not accept in trust any lands in Alaska pursuant to section 5 of the IRA, as implemented by 25 C.F.R. Part 151. There is substantial risk that any such action in advance of resolution of the issues addressed in the Memorandum would be subject to an Administrative Procedure Act challenge asserting that the Department's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[18]

DANIEL JORJANI

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Daniel H. Jorjani

Attachment

[16] Memorandum from John Leshy, Solicitor, to Assistant Secretary – Indian Affairs, "Rescinding the September 15, 1978, Opinion of the Associate Solicitor for Indian Affairs entitled 'Trust Land for the Natives of Venetie and Arctic Village" (Jan. 16, 2001) [hereinafter "Leshy Opinion"].

[17] Memorandum from Daniel H. Jorjani, Solicitor, to Secretary of the Interior and Assistant Secretary – Indian Affairs, "Authority to Acquire Land in Trust in Alaska" (Jan. 19, 2021).

[18] Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237, *codified as amended at* 5 U.S.C. § 706(2)(A).

United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

January 19, 2021

Memorandum

To: Secretary
Assistant Secretary – Indian Affairs

From: Solicitor DANIEL JORJANI Digitally signed by DANIEL JORJANI Date: 2021.01.19 14:44:57 -05'00'

Subject: Authority to Acquire Land in Trust in Alaska

I. Introduction.

On June 29, 2018, the Solicitor issued M-37053, *Withdrawal of Solicitor Opinion M-37043, "Authority to Acquire Land into Trust in Alaska" Pending Review* ("Sol. Op. M-37053").[1] This withdrawal was based on a determination the M-37043 ("Sol. Op. M-37043")[2] omitted discussion of important statutory considerations, which rendered its analysis "incomplete and unbalanced."[3] In order to address these concerns, Sol. Op. M-37053 contemplated a minimum of six months to solicit public comment and consult with federally recognized tribes and Alaska Native regional and village corporations.[4] Sol. Op. M-37053 further anticipated that the Department of the Interior ("Department") would require a minimum of six additional months to review any and all comments received.[5] Since that time, the Office of the Solicitor ("Solicitor's Office") has thoroughly considered the arguments and views presented by stakeholders, and has evaluated the conclusions reached by M-37043 ("Sol. Op. M-37043"). This review has identified numerous significant omissions in Sol. Op. M-37043. In light of these omissions, the legal analysis contained in Sol. Op. M-37043 is insufficient to support its determination that the Secretary of the Interior ("Secretary") has authority to accept land in trust in Alaska ("Alaska" or "State") pursuant to section 5 of the Indian Reorganization Act ("IRA" or "Act"),[6] as implemented by 25 C.F.R. Part 151.

This Memorandum is intended to memorialize the research and analysis conducted by the Solicitor's Office in its review of Sol. Op. M-37043. Such research and analysis represents a significant undertaking, and the issues discussed herein give rise to serious concerns over the scope of the Secretary's authority to accept land in trust for any particular Alaska Native tribe.

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[1] Daniel H. Jorjani, Solicitor Opinion M-37053, *Withdrawal of Solicitor Opinion M-37043, 'Authority to Acquire Land into Trust in Alaska' Pending Review* (June 29, 2018) [hereinafter "Sol. Op. M-37053"].

[2] Hilary C. Tompkins, Solicitor Opinion M-37043, *Authority to Acquire Land into Trust in Alaska* (Jan. 13, 2017) [hereinafter "Sol. Op. M-37043"].

[3] Sol. Op. M-37053 at 4.

[4] Sol. Op. M-37053 at 5.

[5] *Ibid*.

[6] Act of June 18, 1934, ch. 576, Pub. L. No. 73-383, 48 Stat. 984, *codified as amended at* 25 U.S.C. §§ 5101-5129.

Until these issues are addressed and resolved, the Department should not accept in trust any lands in Alaska pursuant to section 5 of the IRA, as implemented by 25 C.F.R. Part 151. There is substantial risk that any such action in advance of resolution of the issues addressed herein would be subject to an Administrative Procedure Act ("APA") challenge asserting that the Department's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[7]

II. Background.

A. Land Tenure in Alaska, 1867-1971.

The history of Alaska Native land tenure is complex, and is chronicled in the numerous statutes, judicial decisions, and administrative actions and legal opinions that have sought to address the issue. In 1867, the United States acquired Alaska by treaty ("Treaty").[8] At that time, all vacant, unoccupied and unappropriated lands became part of the United States' public domain.[9]

At the time of cession, 65,000 of Alaska's 75,000 inhabitants were Alaska Native.[10] And while Article III of the Treaty provided for the admission of Alaska's inhabitants to the "enjoyment of all the rights, advantages, and immunities of citizens of the United States" within three years, it excluded Alaska's "uncivilized tribes," who were instead to 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."[11]

Prior to 1934, the United States enacted few laws "in regard to the aboriginal tribes" of Alaska. The era of treaty-making formally ended in 1871,[12] before there was any consideration of negotiation of treaties between the federal government and Alaska Native tribes. The first extension of Congress' Indian affairs authority to Alaska occurred in 1873, when it made applicable two provisions of the Trade and Intercourse Act of 1834 relating to liquor sales in Indian country.[13] This prompted federal officials to consider whether and where there was "Indian country" in Alaska,[14] and whether Alaska's acquisition by treaty had extinguished any aboriginal title that might have existed.[15] Similar questions arose concerning the legal status of Alaska Natives. The Commissioner of Indian Affairs ("Commissioner") occasionally included in his annual report those reports prepared by the Department of War in Alaska in the years

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[7] Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237, *codified as amended at* 5 U.S.C. § 706(2)(A).

[8] Treaty of Cession, U.S.-Russia, Mar. 30, 1867, 15 Stat. 539.

[9] U.S. Dept. of the Interior, Office of the Solicitor, Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 403 (1942) [hereinafter "Cohen 1942"].

[10] H.R. Rpt. 40-37 at 12 (May 18, 1868).

[11] Treaty of Cession.

[12] *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 72 (1962) (citing 16 Stat. 544, 566 (1871)).

[13] Act of Mar. 3, 1873, ch. 227, 17 Stat. 510, 530. *See also U.S. v. Seveloff*, 2 Sawy. 311 (D. Oreg. 1872) (holding that Trade and Intercourse Act of 1834 was not extended to Alaska upon its acquisition).

[14] H.R. Exec. Doc. 44-135 at 8, 10-13 (Feb. 26, 1876).

[15] *Id*. at 50; *see also* 16 Op. Atty. Gen. 141 (Sep. 24, 1878) ("the Territory of Alaska cannot be considered as a country belonging to an Indian tribe").

immediately following cession.[16] It was not until 1930s, however, that the Commissioner's authority was formally extended to Alaska,[17] and only then after repeated requests to place Alaska Natives under the jurisdiction of the Department.[18]

Other legislation from this early period reflected uncertainty over the status of lands occupied by Alaska Natives. In 1884, for example, Congress enacted legislation creating the first civil government for the District of Alaska.[19] Known as the First Organic Act, it established Alaska as a land district under the jurisdiction of the Secretary of the Interior, but provided that Alaska Natives:

> shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.[20]

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[16] Annual Report of the Commissioner of Indian Affairs [hereinafter "ARCIA"] for 1868 at 308-317; ARCIA for 1869 at 533-561; ARCIA for 1875 at 202-205; *see also* S. Ex. Doc. 41-3 at 145 (Feb. 10, 1871) (recommendation by Board of Indian Commissioners to appropriate $100,000 for health, education, and welfare of Indians in Alaska).

[17] In 1905, Congress gave the Secretary responsibility for the education of Alaska Native children, thereby placing them under jurisdiction of the Department's Bureau of Education. In 1931, the Secretary transferred the authority for implementing this responsibility from the Department's Bureau of Education to its Office of Indian Affairs, thereby bringing its activities under the funding authority of the Snyder Act. *See* Sec. Order No. 494 (Mar. 14, 1931); Act of Nov. 2, 1921, 42 Stat. 208, codified at 25 U.S.C. § 13; *see also* David S. Case & David A. Voluck, ALASKA NATIVES AND AMERICAN LAWS 201, 223 (3d ed. 2012) [hereinafter "ALASKA NATIVES AND AMERICAN LAWS"].

[18] *See, e.g.*, S. Ex. Doc. 47-30, at 14, 15 (Dec. 19, 1881) (copying Feb. 13, 1872 resolution of the Board of Indian Commissioners requesting the President to place "the Indians of Alaska under the care of the Department of the Interior"); *id*. at 15-16 (copying letter of Commissioner of Indian Affairs Francis A. Walker to Secretary of the Interior Columbus Delano (Mar. 14, 1872) expressing doubt whether Alaska Natives "should be administratively recognized as Indians within the intention of the laws organizing the Indian Office"); 42 CONG. GLOBE (Apr. 12, 1872) (introduction of S. 965, a bill to authorize the Secretary of the Interior "to have the same jurisdiction over the people called Indians inhabiting Alaska that he now has over other tribes of American Indians); S. Ex. Doc. 47-30 at 19 (citing ARCIA for 1877 at 26-27 (recommending that "some plan for bringing these [Alaska] Indians under civilizing control of the government should be adopted at an early day, especially for furnishing them educational facilities"); *id.* at 18-19 (letter from Secretary of the Interior Carl Schurz (Dec. 1, 1879) noting lack of authority for Department to expend funds for the education of Alaska Natives); *see also* Alaska Road and Trail Act; Nelson Act: Hearing on H.R. 10435 Before the H. Comm. On the Territories, 58th Cong. 7 (Mar. 10, 1904) (statement of Dr. Sheldon Jackson) ("The natives of Alaska are on an entirely different footing from the natives in any other region in the United States. There has never been an Indian agent or an Indian reservation in Alaska. The natives of Alaska have never been under the Indian laws of the country, with the exception of the law as to the sale of liquors and breech-loading firearms.").

[19] Act of May 17, 1884, ch. 53, 23 Stat. 24 ("First Organic Act"). Congress formally established the Alaska Territory in 1912. *See* Act of Aug. 24, 1912, ch. 387, 37 Stat. 512. The 1912 act is also referred to as Alaska's Second Organic Act.

[20] First Organic Act, § 8. Section 8 also provided for setting aside lands for missionary stations "among the Indian tribes … until action by Congress." *Id*. Section 12 required the Secretary to appoint a commission to examine into and report on "the condition of the Indians residing in said Territory," "what lands, if any, should be reserved for their use," and what "conditions should be imposed when the land laws of the United States shall be extended" to Alaska. *Id*. § 12.

Seven years later, Congress authorized entry onto public lands in Alaska,[21] and permitted United States citizens to purchase any such lands they occupied and possessed for the purpose of trade or manufacture,[22] except public lands "to which the natives of Alaska have prior rights by virtue of actual occupation."[23] Notably, the statute also established the Annette Island Reserve for the Tsimshian of Metlakatla, a group of Indians from British Columbia who emigrated to Alaska in 1887.[24]

In legislation further addressing Alaska's civil government in 1900,[25] Congress extended to Alaska various federal laws relating to mining claims and mineral locations,[26] again providing that "[t]he Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use or occupation."[27] It further included certain protections for missionary stations "among the Indian tribes."[28] The Supreme Court would later describe this statute and the earlier First Organic Act as "intended merely to retain the status quo until further congressional or judicial action was taken."[29]

Congress further addressed Alaska Native land rights through enactment of the Alaska Native Allotment Act in 1906.[30] This statute authorized the Secretary to issue homestead allotments of nonmineral public lands to "any Indian or Eskimo of full or mixed blood," to be inalienable and nontaxable until Congress provided otherwise.[31] The House of Representatives Committee on Public Lands described the legislation as necessary, given that Alaska Natives "are not confined to reservations as they are in the several States and Territories of the United States," but instead lived in villages and small settlements on lands "to which they have no title, nor can they obtain a title under existing laws."[32] As a result, non-Alaska Native homesteaders could file claims that "forced [Alaska Natives] to move and give way,"[33] resulting in severe hardship "due more to a

[21] Act of Mar. 3, 1891, ch. 561, § 12, 26 Stat. 1095, 1100.

[22] *Id*. at § 11.

[23] *Id*. at § 14.

[24] *Id*. at § 15; *see also* 19 Op. Atty. Gen. 557 (1890).

[25] Act of June 6, 1900, ch. 786, 31 Stat. 321.

[26] *Id*. at § 26.

[27] *Id*. at § 27.

[28] *Id*. at § 27. The First Organic Act had authorized the Secretary to provide for the education of children in the Territory "without reference to race, until such time as permanent provision shall be made for the same." First Organic Act, § 13. The 1900 act restated this requirement. *Id*. at § 28. In 1905, however, Congress placed responsibility for the education of non-Indian children with the Alaska Governor, with the education of Alaska Natives to remain under the direction and control of the Secretary of the Interior. Act of Jan. 27, 1905, ch. 277, § 7, 33 Stat. 616, 619. The Act of Jan. 27, 1905 also gave Alaska Native children the same right to attend Indian boarding schools "as the Indian children in the States or Territories of the United States." *Ibid*.

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

[30] Act of May 17, 1906, Pub. L. No. 59-171, ch. 2469, 34 Stat. 197 [hereinafter "Alaska Native Allotment Act"], *codified as amended at* 43 U.S.C. § 1634.

[31] *Ibid*. Congress later amended the Alaska Native Allotment Act to allow allottees or their heirs to sell or convey title to their homestead allotments with the approval of the Secretary. Pub. L. No. 84-931, 70 Stat. 954 (1956), *repealed*, Pub. L. No. 92-203, § 18(a), 85 Stat. 688, 710 (1971). The 1956 amendment further made Alaska Native inhabitants of the Aleutian Islands eligible for allotments. S. Rpt. 84-2696, at 1 (July 20, 1956).

[32] H.R. Rpt. 59-3295 (Apr. 16, 1906).

[33] *Ibid*.

lack of needed legislation than to a wanton disposition on the part of those who have thus dispossessed them."[34]

The final consideration of Alaska Native land tenure during this period occurred in 1926, when Congress passed the Alaska Native Townsite Act.[35] This statute was introduced in response to a request from Secretary of the Interior Hubert Work for legislation authorizing the Department to issue townsite deeds to Alaska Natives, as there had previously been a distinction between how such deeds were treated, depending on the citizenship status of the Alaska Native grantee.[36]

In a marked break from prior federal Indian policy, Congress in 1934 passed the IRA "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism."[37] Referred to as the "Indian New Deal,"[38] the IRA was prompted in part by the conclusions reached in the Meriam Report, an investigation initiated by Secretary Work into the social and economic conditions of Indians throughout the United States.[39] Like the Meriam Report, the original draft of the IRA did not refer to Alaska Natives or otherwise address conditions in the Alaska Territory.[40] As ultimately enacted, however, the IRA made applicable to Alaska four of its substantive provisions through an exception ("Alaska Proviso") to a prohibition on extending the Act to the "Territories, colonies, or insular possessions of the United States" ("Territorial Prohibition")[41] As discussed in more detail below, none of these provisions were directly related to land.

Further, only two of the provisions could be fully implemented, as the Alaska Proviso omitted certain other provisions necessary for their operation.[42] For example, the Alaska Proviso included section 10 of the IRA, which authorized loans to tribal corporations, but omitted IRA section 17,[43] which authorized the establishment of the tribal corporations to which the loans were intended to be distributed. Difficulties in implementation also reflected the distinct status of Alaska Natives and the lands they occupied. As Secretary of the Interior Harold L. Ickes noted at the time, "Section 17 [of the IRA], in authorizing chartered corporations uses language based upon the status of Indians in [the] continental United States."[44] However, "Indian tribes do not exist in Alaska in the same sense as in the continental United States."[45] Section 19 of the

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[34] *Ibid*.

[35] Act of May 25, 1926, ch. 379, 44 Stat. 629.

[36] H.R. Rpt. 69-450 at 2 (Mar. 3, 1926).

[37] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (citing H.R. Rpt. 73-1804 at 6 (1934)).

[38] *Coleman v. U.S. Bureau of Indian Affairs*, 715 F.2d 1156, 1160 (7th Cir. 1983).

[39] *Red Lake Band v. United States*, 17 Cl. Ct. 362, 452 (1989). *Garreaux v. United States*, 544 F. Supp. 2d 885, 891 (D.S.D. 2008) (IRA enacted to address issues identified in Meriam Report). *See* Lewis Meriam, *The Problems of Indian Administration*, Institute for Government Research (1928).

[40] H.R. 7902, 73d Cong. (as introduced Feb. 12, 1934).

[41] IRA, § 13, *codified as amended at* 25 U.S.C. § 5118. Section 13 also prohibited the application of certain IRA provisions to specific tribes in the State of Oklahoma as well as the Indians of the Klamath Reservation in Oregon.

[42] Secretary of the Interior Harold L. Ickes explained that these additional provisions "were inadvertently omitted … in the turmoil of the last days of the Seventy-third Congress (June 18, 1934)." S. Rpt. 74-1748 at 2 (Feb. 24, 1936).

[43] IRA, § 17, *codified as amended at* 25 U.S.C. § 5124.

[44] S. Rpt. 74-1748 at 3.

[45] *Id*. 74-1748 at 3; *see also id*. at 2 ("Quite different is the situation in the United States proper where reservations already exist about which the tribes might organize for the purposes of this act. Not so in Alaska.").

IRA defines "tribe" as referring to "Any Indian tribe, organized band, pueblo, or the Indians residing on one reservation," yet "[w]ith few exceptions the lands occupied by natives of Alaska have not been designated as reservations."[46] Hence "to define an Alaskan tribe it is necessary to identify it with the land it occupies and in terms of the language of the act, 'reservation.'"[47] Secretary Ickes therefore supported corrective legislation that would authorize the Secretary to designate public lands withdrawn for the use and occupancy of Alaska Natives as "Indian reservations."[48] Noting the continuing uncertainty over Alaska Native lands status, he concluded that authorizing the designation of reservations would finally fulfill the United States' "moral and legal obligations in the protection of the economic rights of Alaska natives" acknowledged in the First Organic Act and the Act of 1891.[49]

To correct the Alaska Proviso's omissions and extend additional benefits to Alaska Natives, Congress passed the Act of May 1, 1936 ("Alaska IRA" or "AIRA").[50] Section 1 of the AIRA expanded the number of IRA provisions that the Alaska Proviso made applicable to the Alaska Territory, including sections 5 and 7. Section 2 of the AIRA provided the Secretary the authority to designate certain public lands withdrawn for Alaska Native use and occupancy as Indian reservations.[51]

In 1959, the Alaska Territory achieved statehood.[52] Section 6 of the Statehood Act granted Alaska the right to select lands within the public domain and national forests for the purpose of furthering "the development of and expansion of communities,"[53] but protected "the right or title to which may be held" by Alaska Natives (other than unrestricted fee lands), which were to remain under federal jurisdiction and control "except as to such extent as the Congress has prescribed or may hereafter prescribe."[54] Despite explicitly preserving the status quo, the Statehood Act "set in motion forces"[55] that ultimately led to enactment of the Alaska Native Claims Settlement Act ("ANCSA").[56] Conflicts between the State's selections and specific Alaska Native claims arose shortly thereafter.[57] Because many of the lands that the State sought to select under the Statehood Act were also claimed as of right by Alaska Native groups, it left doubt over land title and ignited litigation over aboriginal claims that stymied implementation of

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[46] *Id*. at 3.

[47] *Id*. at 3-4.

[48] *Id*. at 4.

[49] *Ibid*.

[50] Pub. L. No. 74-538, ch. 254, § 2, 49 Stat. 1250, *codified as amended at* 25 U.S.C. § 5119.

[51] As discussed *infra*, the authority of the Executive to create Indian reservations without Congressional authorization was proscribed in 1919. Act of June 30, 1919, ch. 4, § 27, 41 Stat. 3, 34 (providing that going forward, "no public lands of the United States shall be withdrawn by Executive Order, proclamation, or otherwise, for or as an Indian reservation except by act of Congress").

[52] Pub. L. No. 85-508, 72 Stat. 339 (Jul. 7, 1958) ("Statehood Act"); Proclamation No. 3269, 24 Fed. Reg. 81 (Jan. 6, 1959).

[53] Statehood Act, § 6(a).

[54] *Id.*, § 4.

[55] Thomas L. Sansonetti, Solicitor Opinion M-36975, *Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers* at 72 (Jan. 11, 1993) [hereinafter "Sol. Op. M-36975"].

[56] Pub. L. No. 92-203, 85 Stat. 688 (1971), *codified as amended at* 43 U.S.C. §§ 1601-1629h.

[57] Sol. Op. M-36975 at 72-73.

the Statehood Act and threatened the State's economic development.[58] To address these issues and finally resolve the question of aboriginal title,[59] Congress enacted ANCSA in 1971.[60]

B. Land Tenure in Alaska, 1971-Present.

ANCSA extinguished all aboriginal claims in the State and revoked all existing Indian reservations, save one,[61] in exchange for nearly $1 billion and over 40 million acres of land patented in fee. ANCSA's settlement of these claims rejected what some at the time considered a paternalistic approach in favor of a model that promoted self-determination. This novel model directed settlement proceeds to be distributed among State-chartered corporations established as part of the settlement. Ownership in these corporations was initially restricted to Alaska Native shareholders.

Within five years of ANCSA's enactment, Arctic Village and the Native Village of Venetie petitioned the Department to take their former reservation into trust, title to which they had received in fee pursuant to ANCSA section 19(b).[62] In 1978, Thomas W. Fredericks, Associate Solicitor for Indian Affairs, prepared a memorandum rejecting this request ("Fredericks Opinion").[63] In it, he concluded that it would be an abuse of the Secretary's discretion to accept in trust the village communities' former reservation lands.[64] He based this advice on ANCSA's declaration that its settlement "should be accomplished ... without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges…,"[65] as well as legislative history containing similar statements of intent.[66] Shortly thereafter, the Department promulgated land-into-trust regulations that prohibited consideration of any trust acquisitions in Alaska, "except acquisitions for the

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[58] S. Rpt. 92-405 at 76 (Oct. 21, 1971) (describing Congress' failure to "define, confirm, deny, or extinguish" aboriginal title as resulting in doubts over the Secretary's authority to grant the State and other parties rights in, or patent to, public lands in Alaska claimed by Alaska Natives); *see also* Nathan Brooks, CONGRESSIONAL RESEARCH SERVICE, THE ALASKA LAND TRANSFER ACCELERATION ACT: BACKGROUND AND SUMMARY 1-3 (Jan. 14, 2005).

[59] *See, e.g.*, S. Rpt. 92-405 at 80 ("The legal history of Alaska Native land claims is not so much one of action but of inaction, postponement, and preservation of the controversy for resolution at a later time."); *id*. at 75-76, 106, 187; *see also* Act of May 17, 1884, ch. 53, § 8, 23 Stat. 24 (protecting existing Alaska Native use and occupancy but deferring resolution of the terms under which Alaska Natives could acquire title to such lands).

[60] *See also* Sol. Op. M-37043 at 6 (noting how the Statehood Act revived disputes over aboriginal title that ANCSA ultimately resolved).

[61] ANCSA's revocation did not apply to the Metlakatla Indian Community, Annette Island ("Metlakatla"). ANCSA, § 19(a), *codified at* 43 U.S.C. § 1618(a).

[62] This provision permitted any Alaska Native village corporation to acquire the surface estate to any reservation lands that had previously been set aside for the "use or benefit of its stockholders or members." ANCSA, § 19(b), *codified at* 43 U.S.C. § 1618(b).

[63] Memorandum from Thomas W. Fredericks, Associate Solicitor for Indian Affairs, to Forrest Gerard, Assistant Secretary – Indian Affairs, "Trust Land for the Natives of Venetie and Arctic Village," (Sep. 15, 1978) [hereinafter "Fredericks Opinion"].

[64] *Ibid.*

[65] ANCSA, § 2(c), *codified at* 43 U.S.C. § 1601(b).

[66] Fredericks Opinion at 1 (citing S. Rpt. 92-405 at 108).

Metlakatla Indian Community of the Annette Island Reserve or its members" ("Alaska Prohibition").[67]

During the 1990s, Alaska Native groups petitioned the Department to remove the Alaska Prohibition,[68] and in 1999 the Department concluded that "a credible legal argument" existed that ANCSA had not extinguished the Secretary's authority to accept land in trust under section 5 of the IRA.[69] Two years later, Solicitor John Leshy rescinded the Fredericks Opinion based on "substantial doubt" regarding the validity of its conclusions.[70] Despite this concern, however, the Alaska Prohibition remained part of the land-into-trust regulations, while the Department sought time to "consider the legal and policy issues involved in determining whether [it] ought to remove the prohibition."[71]

In 2006, four federally recognized tribes in Alaska mounted a challenge to the Alaska Prohibition in the United States District Court for the District of Columbia ("District Court"),[72] claiming that the Alaska Prohibition violated the privileges and immunities provisions of IRA section 16 ("Privileges and Immunities Amendments").[73] After the District Court granted the tribes' motion for summary judgment, the Department removed the Alaska Prohibition through notice-and-comment rulemaking.[74] Based on this action, the United States Court of Appeals for the District of Columbia Circuit vacated the District Court's ruling and dismissed the State's appeal as petitioner-intervenor as moot.[75] The following year, Solicitor Hilary Tompkins issued Sol. Op. M-37043, memorializing her views on the applicability of IRA section 5 in Alaska.

Among other things, Sol. Op. M-37043 concluded that the AIRA extended IRA section 5 to all federally recognized tribes in Alaska, that the second clause of IRA section 19 identifying Alaska Natives as "Indians" ("Alaska Definition") obviated the need for an inquiry into the

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[67] Final Rule, Land Acquisitions, 45 Fed. Reg. 62034 (Sept. 18, 1980).

[68] Notice of Petition, Land Acquisitions, 60 Fed. Reg. 1,956 (Jan. 5, 1995).

[69] Proposed Rule, Acquisition of Title to Land in Trust, 64 Fed. Reg. 17574, 17578 (Apr. 12, 1999).

[70] Memorandum from John Leshy, Solicitor, to Assistant Secretary – Indian Affairs, "Rescinding the September 15, 1978, Opinion of the Associate Solicitor for Indian Affairs entitled 'Trust Land for the Natives of Venetie and Arctic Village" (Jan. 16, 2001) [hereinafter "Leshy Opinion"] at 2.

[71] *Ibid.* On November 9, 2001, the Department withdrew the revised final rule that included in its preamble a discussion of the perceived need to revisit the Alaska Prohibition. This had the effect of leaving in place the original regulations, which also included Alaska Prohibition, *sans* preamble.

[72] Complaint, *Akiachak Native Cmty. v. Jewell*, 06-CIV-0969 (D.D.C., May 24, 2006).

[73] Pub. L. No. 103-263, § 5(b), 108 Stat. 707 (1994), *codified at* 25 U.S.C. § 5123(f)-(g). These prohibit the Department from making any determination that "classifies, diminishes, or enhances" the privileges and immunities available to federally recognized tribes based on their status as such. *See also Koi Nation of N. Cal. v. U.S. Dep't of Interior*, 361 F. Supp. 3d 14, 52 (D.D.C. 2019), *appeal dismissed sub nom*. 2019 WL 5394631 (D.C. Cir. Oct. 3, 2019) (rejecting United States' argument that the privileges and immunities provisions are limited to powers of self-governance and holding instead that they apply "to 'any' agency regulation or decision, pursuant to the IRA or 'any other Act of Congress'") (citations omitted).

[74] Proposed Rule, Land Acquisitions in the State of Alaska, 79 Fed. Reg. 24,648 (May 1, 2014); Final Rule, Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76,888 (Dec. 23, 2014).

[75] *Akiachak Native Cmty. v. U.S. Dep't. of Interior*, 827 F.3d 100, 102 (D.C. Cir. 2016) ("vacatur is appropriate to 'clear[] the path for future relitigation of the issues….'") (quoting *United States v. Munsingwear, Inc*., 340 U.S. 36, 40 (1950)).

jurisdictional status of any applicant Alaska Native tribe, and that neither ANCSA nor the Federal Land Policy and Management Act ("FLPMA")[76] altered this statutory arrangement.[77]

Sol. Op. M-37043 was withdrawn, pending review, in order to allow the Solicitor's Office time to examine the various deficiencies in Sol. Op. M-37043 identified in Sol. Op. M-37053. Based on my review of the findings of the Solicitor's Office, I now permanently withdraw Sol. Op. M-37043 because of the substantial doubt regarding the validity of the conclusions drawn therein.

III. Relevant Authorities.

A. The IRA and Alaska IRA.

The IRA provides the Secretary discretionary authority to acquire land in trust for the benefit of "Indians"[78] and to proclaim such lands an "Indian reservation."[79] Section 19 of the IRA defines "Indian" for purposes of the Act.[80] The first clause of section 19 describes three categories of persons of Indian descent who may be considered "Indians" under the Act:

> [1] members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation; and [3] all others persons of one-half or more Indian blood.[81]

The second clause – the Alaska Definition – provides that Alaska Natives "shall be considered Indians" for the purposes of the IRA.[82]

Section 13 of the IRA – the Territorial Prohibition – prohibits the Act's application to any of the "[t]erritories, colonies, or insular possessions" of the United States.[83] It includes, however, a limited exception – the Alaska Proviso – that makes four of the IRA's substantive provisions available to Indians residing in the Alaska Territory.[84] The Alaska Proviso did not include an extension to the Alaska Territory of IRA section 19.

1. The Alaska Proviso and Section 1 of the AIRA.

In 1936, Congress enacted the Alaska IRA to correct omissions to the Alaska Proviso that limited its implementation in the Alaska Territory. Secretary Ickes explained at the time that a separate enactment was needed, in part, to correct the inadvertent omission of section 17 of the

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[76] Pub. L. No. 94-579, 90 Stat. 2743 (1976), *codified as amended at* 43 U.S.C. §§ 1701-1787.

[77] Sol. Op. M-37043 at 20, 22.

[78] IRA, § 5, *codified at* 25 U.S.C. § 5108.

[79] *Id.*, § 7, *codified at* 25 U.S.C. § 5110.

[80] *Id.*, § 19, *codified at* 25 U.S.C. § 5129.

[81] *Ibid.*

[82] *Ibid.* As noted above, the third clause of section 19 provides that as used in the Act, the term "tribe" shall be construed to refer to "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation."

[83] IRA, § 13, *codified at* 25 U.S.C. § 5118.

[84] *Ibid*.

IRA from the Alaska Proviso.[85] Inclusion of section 17 was "basic to the satisfactory operation" of the IRA in Alaska,[86] as it authorized the charter of tribal corporations eligible to receive loans under IRA section 10. The AIRA addressed this error and made applicable additional provisions that Congress felt "necessary for the proper correction" of the omission.[87] As the House of Representatives Committee on Indian Affairs ("House Committee") described it, the purpose of the Alaska IRA was "to allow the Indians of Alaska to participate in the benefits of existing law to the same extent and manner as the Indians of the United States proper."[88]

As noted by Secretary Ickes, adoption of a section 17 charter could not be accomplished without a reservation land base,[89] as the "charter shall not become operative until ratified at a special election by a majority vote of: the adult Indians living on the reservation."[90] Similarly, the Alaska Proviso's inclusion of IRA section 16 was equally difficult to implement, as adoption of a tribal constitution required organization of a "tribe or tribes, residing on the same reservation."[91] With few reservations in Alaska, Secretary Ickes advised that "to define an Alaska tribe, it is necessary to identify it with the land it occupies and in terms of the language of the act, 'reservation.'"[92]

2. Authority to Establish Indian Reservations.

The Alaska IRA contains two separate provisions authorizing the Secretary to establish Indian reservations in the Alaska Territory. The first, found at AIRA section 1, authorizes the Secretary to accept fee lands in trust and then proclaim such lands an Indian reservation through IRA section IRA sections 5 and 7. AIRA section 2, later repealed, separately authorized the Secretary to designate certain public lands as Indian reservations.[93] These provisions reflect contemporary land tenure realities of the Alaska Territory. In 1936, virtually all of the Alaska Territory remained in the public domain.[94] Application of IRA section 5 was therefore limited, as it was

[85] Cohen 1942 at 413 (AIRA intended to remedy IRA's failure to extend its incorporation and credit privileges to organizations in Alaska and to authorize a type of organization more suited to Alaska Native groupings and activities than those in the Lower 48.).

[86] H.R. Rpt. 74-2244 at 4 (Mar. 26, 1936).

[87] *Ibid.*

[88] *Id.* at 3.

[89] *Ibid.*

[90] IRA, § 17, *codified as amended at* 25 U.S.C. § 5124.

[91] *Id.*, § 16, *codified as amended at* 25 U.S.C. § 5123.

[92] H.R. Rpt. 74-2244 at 4; *see also* Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the H. Comm. on Indian Affairs, 73d Congress, Second Session [Wheeler-Howard Act], Pt. 3 at 76 (Feb. 26, 1934) [hereinafter "H. Hrgs. on Wheeler-Howard Act"] (remarks of John Collier, Commissioner of Indian Affairs) (agreeing with Alaska Territorial Delegate Anthony Dimond that "There are no reservation Indians in Alaska in the ordinary sense of the term and [the Wheeler-Howard Act as introduced] is designed mainly to apply to Indians who are now or lately have been on reservations."); *see also* Sol. Op. M-36975 (discussing same).

[93] Alaska IRA, § 2.

[94] FEDERAL FIELD COMMITTEE FOR DEVELOPMENT PLANNING IN ALASKA, ALASKA NATIVES AND THE LAND (Washington, DC: Government Publishing Office, 1968), 449 [hereinafter "FIELD COMMITTEE REPORT"]. (By 1959, the Bureau of Land Management had patented about 435,559 acres of land in Alaska.). The FIELD COMMITTEE REPORT was expressly made part of ANCSA's legislative history. S. Rpt. 92-405 at 74.

intended principally to recoup former Indian lands that had been patented in fee.[95] And because the President and the Secretary were statutorily prohibited from withdrawing public lands for Indian reservations, separate authority was required to establish such reservations in the Alaska Territory, which AIRA section 2 provided.[96] Indeed, all six reservations established under the Alaska IRA were withdrawn from public lands pursuant to AIRA section 2.[97]

3. Alaska-Specific Eligibility Criteria.

Section 1 of the AIRA introduced Alaska-specific eligibility criteria ("AIRA Criteria") not found in the IRA. It provided that:

> [g]roups of Indians in Alaska not recognized prior to May 1, 1936 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].[98]

As originally drafted, AIRA section 1 authorized Alaska Native groups to incorporate under IRA section 17 "without regard to residence on any Indian reservation or reservations."[99] Though this addressed the fact that application of IRA section 17 required reservation lands, Secretary Ickes offered the AIRA Criteria as an amendment to accomplish the same purpose, while "establish[ing] a basis upon which such groups may be formed."[100] In the view of the Department, the AIRA Criteria addressed "the peculiar nontribal organizations under which the Alaska Indians operate…,"[101] with "no tribal organizations as the term is understood generally."[102]

The intent of the AIRA Criteria was to ensure that applicants under the Alaska IRA had "some connecting or underlying foundation."[103] They were drafted by Assistant Solicitor Felix Cohen and Office of Indian Affairs ("OIA") Field Agent William Paul.[104] Because Alaska Native

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[95] Pub. L. 49-105, 24 Stat. 338 (1887), *codified at* 25 U.S.C. § 331 *et seq*.

[96] *See* Act of June 30, 1919; *see also* H. Hrgs. on Wheeler-Howard Act at 78 (remarks of Commissioner Collier noting same).

[97] S. Rpt. 92-405 at 92 (noting that by 1946, only six reserves had incorporated as IRA reserves and that no others were formed despite numerous petitions from other native villages).

[98] 25 U.S.C. § 5119. The codified text substitutes "[g]roups of Indians in Alaska not heretofore recognized" for "recognized prior to May 1, 1936." Pub. L. No. 74-538, ch. 254, § 2.

[99] *Eligibility of Eskimo Village to Organize under the Indian Reorganization Act*, Memorandum from Associate Solicitor, Indian Affairs to Director, Office of Indian Services at 2 (July 10, 1978).

[100] H.R. Rep. No. 74-2244 at 5.

[101] *Id.* at 1.

[102] *Id.* at 1-2.

[103] Letter from William L. Paul, U.S. Indian Field Service, to Harold L. Ickes, Secretary of the Interior (Sep. 21, 1937).

[112] Donald C. Mitchell, *SOLD AMERICAN: THE STORY OF ALASKA NATIVES AND THEIR LAND, 1867-1959* (Fairbanks: University of Alaska Press, 2003), 306-309 (citations omitted). As further evidence, Anthony Diamond, the Alaska Territory's nonvoting delegate to Congress, asked Commissioner Collier to provide a legislative proposal to "fix" the problem created by the IRA in section 17 was "inadvertently' left out of the provisions applied to Alaska (9, 10,

groups often had scattered membership, the drafters chose to adapt language from the Federal Credit Union Act to allow for "selective organization."[105] Assistant Solicitor Cohen later explained that the purpose of the AIRA Criteria was "to permit groups of Indians already associated with each other in some enterprise to adopt a constitution, regardless of past tribal or community affiliations."[106] While some Department staff sought to implement the AIRA Criteria "to build up general community organizations wherever possible," others thought they should be used by "any group [of Alaska Natives] that looks like a good commercial risk."[107] Assistant Solicitor Cohen preferred the former approach, but did not object to the latter,[108] as his primary concern was then for the organization of individuals "who have not been associated together previously but are simply associated for purposes of borrowing money" under the IRA.[109] This reflected the prevailing view at the time that the powers vested in an AIRA constitution would vary depending on whether the organization was being established for a commercial purpose, or for "self-government with a status similar to a municipal corporation," in which case they "would either be restricted or broad."[110]

B. The Statehood Act.

In 1958, Congress enacted the Statehood Act to admit Alaska to the Union.[111] The following year, President Dwight D. Eisenhower proclaimed Alaska's admission as the country's 49th state.[112] Section 1 of the Statehood Act declared Alaska admitted to the Union "on an equal footing with the other States in all respects whatever."[113] Section 4 of the Statehood Act "forever disclaim[ed]" all right and title to "any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives)."[114] This includes lands "held by the United States in trust for said natives."[115] The

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11, 12 and 16). *See* Letter from Anthony Diamond, Delegate, to Dear Sir, March 5, 1935, Anthony J. Diamond Papers, University of Alaska, Fairbanks.

[105] Cohen 1942 at 414.

[106] Memorandum from Felix Cohen, Assistant Solicitor, to Mr. [Allen G.] Harper [, Special Assistant to the Commissioner of Indian Affairs] (Dec. 18, 1936).

[107] *Ibid*.

[108] *Ibid*.

[109] *Ibid*.

[110] *Alaska Conferences*, Memorandum from Fred H. Daiker, Assistant Commissioner, to John Collier, Commissioner of Indian Affairs at 2 (Feb. 6, 1937). This view is likely connected to the long-standing distinction the Department once drew between "historic" and "non-historic" tribes. *See, e.g.*, Nathan R. Margold, Solicitor Opinion M-27781, *Powers of Indian Tribes* (Oct. 25, 1934); Land Acquisitions, 45 Fed. Reg. 62,034 (the IRA's definition of "tribe" includes groups "other than sovereign entities"); *Historic v. Non-historic Tribal Status and Amendments v. Revisions*, Memorandum from Scott Keep, Assistant Solicitor, Division of Indian Affairs, to Acting Associate Solicitor for Indian Affairs (May 19, 1993). Congress eliminated such distinction when it amended IRA section 16 in 1994. Pub. L. No. 103-263, § 5(b), 108 Stat. 707 (May 31, 1994).

[111] Statehood Act, § 1.

[112] Proclamation No. 3269, 24 Fed. Reg. 81.

[113] Statehood Act, § 1.

[114] *Id.*, § 4.

[115] *Ibid*. The Alaska Constitution includes a similar disclaimer. ALASKA CONST. art. XIII, § 12, cl. 2 ("The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission.").

intent behind section 4 was to "preserve the status quo with respect to aboriginal and possessory Indian claims, so that statehood should neither extinguish them nor recognize them as compensable."[116]

Section 6 of the Statehood Act authorized the new state to select over 100-million acres from the "vacant, unappropriated, and unreserved" public lands of the United States.[117] Section 8(d) of the Statehood Act provided that "[a]ll of the laws of the United States shall have the same force and effect within said State as elsewhere within the United States,"[118] defining "laws of the United States" to include "all laws or parts thereof enacted by the Congress that (1) apply to or within Alaska at the time of the admission of the State of Alaska into the Union, (2) are not 'Territorial laws'...,[119] and (3) are not in conflict with any other provisions of this Act."[120] And finally, section 30 of the Statehood Act provided that all acts or parts of acts "in conflict with the provisions of [the Statehood Act], whether passed by the legislature of said Territory or by Congress, are hereby repealed."[121]

C. ANCSA.

Many lands selected by the State under the Statehood Act were subject to claims of aboriginal title by Alaska Natives, which led to litigation and impacted the economic development of the State. These controversies were finally resolved by Congress in 1971 through enactment of ANCSA. ANCSA "unequivocally extinguished" all Alaska Native claims to aboriginal title and past damages based on trespass to aboriginal title.[122] In exchange, ANCSA directed the transfer of nearly $1 billion in settlement proceeds[123] and over 40 million acres of land[124] to ANCs, shares in which were distributed to eligible Alaska Natives.[125]

Section 4 of ANCSA extinguished any and all aboriginal titles, claims based on use and occupancy, and aboriginal hunting and fishing rights.[126] It further extinguished all claims that may have existed against the United States based on aboriginal right, title, use, or occupancy of land or water areas in Alaska, or based on any statute or treaty of the United States relating to

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[116] Sol. Op. M-36975 at 72 (citing *Kake*, 369 U.S. at 65).

[117] Statehood Act, § 6.

[118] *Id.*, § 8(d). The Statehood Act also provided that all Territorial laws then in effect would continue in full force and effect "except as modified or changed" by the Statehood Act or by the Alaska Constitution. *Ibid.*

[119] "Territorial laws" refers to "all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the Union." Statehood Act, § 8(d).

[120] *Ibid.*

[121] *Id.*, § 30.

[122] Robert T. Anderson, S*overeignty and Subsistence: Native Self-Government and Rights to Hunt, Fish, and Gather after ANCSA*, 33 ALASKA L. REV. 187, 204 (2016); ANCSA, § 4, codified at 43 U.S.C. § 1603; *see also* ALASKA NATIVES AND AMERICAN LAWS at 165-198.

[123] ANCSA, §§ 6, 9, *codified at* 43 U.S.C. §§ 1605, 1608; ALASKA NATIVES AND AMERICAN LAWS at 167.

[124] *Id.*, §§ 11, 12, *codified at* 43 U.S.C. §§ 1610-11.

[125] Aaron M. Schutt, ANCSA Section 7(i): $40 Million Per Word and Counting, 33 ALASKA L. REV. 229, 235 (2016).

[126] ANCSA, § 4(a), (b), *codified at* 43 U.S.C. § 1603(a), (b).

Alaska Native use and occupancy, including any claims then pending in any federal or state court, or the Indian Claims Commission.[127]

Fifteen years after enactment, the House of Representatives Committee on Interior and Insular Affairs concluded that few of ANCSA's goals had been achieved.[128] Congress thereafter passed a comprehensive set of amendments in 1988 that "virtually restructured" ANCSA, in part by extending restrictions on the sale of ANCSA corporate shares and providing indefinite tax exemptions and protection from creditors for undeveloped ANCSA lands ("ANCSA Amendments").[129] The ANCSA Amendments included a declaration of Congressional policy that confirmed that ANCSA and the ANCSA Amendments were "Indian legislation enacted by Congress pursuant to its plenary authority under the Constitution of the United States to regulate Indian affairs."[130]

D. FLPMA.

Enacted in 1976, FLPMA's purpose was to provide "comprehensive authority and guidelines for the administration and protection" of federal lands by the Bureau of Land Management.[131] It declared as one of its objectives that "all existing classifications of public lands that were [previously] effected by executive action or statute" be reviewed in accordance with FLPMA's provisions, and that Congress "delineate the extent to which the Executive may withdraw lands without legislative action."[132] Consistent therewith, Title VII of FLPMA repealed dozens of miscellaneous land laws governing the disposal of federal lands.[133] Of relevance here, FLPMA section 704(a) repealed, in whole or in part, twenty-nine separate statutes providing the President and the Secretary discretionary authority to withdraw public lands for specified purposes.[134] This included the Secretary's authority to establish Indian reservations on public lands in Alaska under AIRA section 2.[135]

IV. Discussion

A. The Source of the Secretary's Authority.

The issue Sol. Op. M-37043 attempted to address was whether the Secretary retains authority to take land into trust in Alaska. Not addressed by Sol. Op. M-37043 is the initial question, namely, what is the source of any such authority. Sol. Op. M-37043 asserted, without analysis,

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[127] *Id.*, § 4(c), *codified at* 43 U.S.C. § 1603(c).

[128] ALASKA NATIVES AND AMERICAN LAWS at 179.

[129] Pub. L. No. 100-241, 101 Stat. 1788 (Feb. 3, 1988), *codified as amended at* 43 U.S.C. §§ 1601-1629h [hereinafter "1988 Amendments"]. The restrictions against alienation of ANCSA shares were originally set to expire in 1991, for which reason the 1988 Amendments are sometimes referred to as the 1991 amendments.

[130] 1988 Amendments, § 2(9), *codified at* 43 U.S.C. § 1601.

[131] Roger Flynn, Daybreak on the Land: The Coming of Age of the Federal Land Policy and Management Act of 1976, 29 VT. L. REV. 815, 816 (2005) [hereinafter "Flynn 2005"].

[132] FLPMA, tit. I, § 102(3)-(4), *codified at* 43 U.S.C. § 1701(a)(3)-(4).

[133] *Id.*, tit. VII; Flynn 2005 at 818.

[134] *Id.*, tit. VII, § 704(a) (citing *U.S. v. Midwest Oil Co.*, 236 U.S. 459 (1915)).

[135] *Ibid.* (repealing, inter alia, Alaska IRA, § 2).

that AIRA section 1 "provides its own express authority for the Secretary to take land into trust for Alaska Natives,"[136] and that "[n]o further analysis is required in order to find that the Secretary has authority to approve the applications of Alaska Natives and to acquire land in trust on their behalf."[137] This suggests that, but for the AIRA, section 5 of the IRA would never have applied to Alaska. There is a substantial question as to whether this assumption is contrary to the doctrine of equal footing and the terms of the Statehood Act. By its terms, AIRA section 1 expands the Alaska Proviso contained in the Territorial Prohibition, so as to make additional IRA provisions applicable to the Alaska Territory. And while the AIRA extends to Alaska an additional seven IRA provisions – including IRA section 5 – it withholds application of others, including IRA section 4.[138]

The IRA's Territorial Prohibition does not address Alaska in particular, but all federal holdings outside the States.[139] The prohibition did not appear in the original draft of the IRA ("Wheeler-Howard Bill"), which was prepared with the assistance of Commissioner Collier and Assistant Solicitor Cohen, but was added later.[140] In an early hearing on the Wheeler-Howard Bill before the House Committee, Commissioner Collier and Alaska Territorial Delegate Anthony Dimond discussed the extent to which the Wheeler-Howard Bill's provisions would apply in Alaska.[141] This colloquy appears to have prompted Representative Hubert Peavey of Wisconsin to ask Commissioner Collier whether there were "any classes of people that might be called Indians, that could be termed Indians under the provisions of this bill, in any other territory of the United States (…) [o]utside of the 48 States?"[142] Commissioner Collier thought not, but added that the Department would not object to the "direct inclusion" of Alaska.[143] House Committee Chairman Edgar Howard later proposed an amendment to the Wheeler-Howard Bill in the form of a new Title V, which provided that:

> [the IRA] shall not apply to any of the Territories,[[144]] colonies, or insular possessions of the United States, except that the provisions of titles I and II of this

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[136] Sol. Op. M-37043 at 10.

[137] *Id.* at 12.

[138] IRA section 4 permits the exchange of Indian lands in certain circumstances.

[139] 25 U.S.C. § 5118 (prohibiting the Act's application "to any of the Territories, colonies, or insular possessions" of the United States.").

[140] H. Hrgs. on Wheeler-Howard Act Pt. 5 at 189 (Mar. 5, 1934).

[141] *Id.*, Pt. 3 at 76-79.

[142] *Id.* at 77; *see also Carino v. Insular Gov't of the Philippine Islands*, 212 U.S. 449 (1909) (upholding land claim based on tribal custom and recognition); *Repeal Act Authorizing Secretary of Interior to Create Indian Reservations in Alaska: Hearings Before the S. Subcomm. on Interior and Insular Affairs on S. 2037and S.J. Res. 162*, 80th Cong. at 332 (1948) [hereinafter "S. Hrgs. on S. 2037"] (statement of Assistant Solicitor Cohen describing special moral obligation of United States to the natives of Guam and the Hawaiian Islands).

[143] H. Hrgs. on Wheeler-Howard Act, Pt. 3. at 76-77. Collier further noted that the inclusion of Alaska Natives in the IRA would "imply an extension of the Indian Office functions and a transfer to the Indian Office of some functions," including administration of fishing rights, a question the Department had not sought to raise at that time. *Ibid*.

[144] In what are known as the Insular Cases, the Supreme Court created the doctrine of incorporated and unincorporated Territories, the former of which encompassed Territories "destined for statehood from the time of acquisition, and the Constitution was applied to them with full force," and which included Alaska. *Examining Bd. of Eng'r, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 599 fn.30 (1976) (citing *Rassmussen v. United*

> act shall apply to Alaska, and for the purposes of these titles Eskimos and other aboriginal peoples shall be considered Indians.[145]

The House Committee described section 3's principle clause as restricting the Wheeler-Howard Bill's application to the conterminous United States, except for the benefits of self-governance and education in titles I and II, respectively, which would be extended to Alaska Natives as an exception to the prohibition.[146] In form and substance, the language of section 3 of the Wheeler-Howard Bill closely resembles the Territorial Prohibition and Alaska Proviso ultimately found at IRA section 13. It also appears to reflect Congress' understanding that absent such a restriction, the IRA might otherwise apply to all territories, colonies, and possessions of the United States as a statute of general applicability.[147] The legislative history supports the view that Congress included the Alaska Proviso as an exception to the Territorial Prohibition to ensure that Alaska Natives could obtain at least some of the IRA's benefits.

Two decades after the Alaska IRA's passage, Congress provided for Alaska's admission to the Union as a state "on an equal footing with the other States in all respects whatever."[148] In addition to disclaiming all rights and title to any lands or other property held by Alaska Natives, including lands "held by the United States in trust for said natives,"[149] the Statehood Act declared that all laws of the United States would have the same force and effect within Alaska as elsewhere in the United States.[150] It further included a provision repealing all acts or parts of

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States, 197 U.S. 516, 520 (1905), *abrogated on other grounds by Williams v. Fla.*, 399 U.S. 78 (1970)); *see also Al Maqaleh v. Gates*, 605 F.3d 84, 93 (D.C. Cir. 2010).

[145] H. Hrgs. on the Wheeler-Howard Act Pt. 5 at 189 (citing tit. V, § 3) (as proposed).

[146] *Id*. at 195; *see also id*. at 199 (describing the amendment as meaning that the Wheeler-Howard Bill would not "extend outside of the United States, except that certain provisions may be applied to the natives of Alaska."). The House Committee offered no explanation for the second clause of section 3, which resembles the Alaska Clause at section 19 of the IRA.

[147] U.S. CONST. art. IV, § 3 (Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States); *Shively v. Bowlby*, 152 U.S. 1, 48 (1894) (United States has "the entire dominion and sovereignty, national and municipal, federal and state, over all the territories, so long as they remain in a territorial condition"); *United States v. State of Alaska*, 423 F.2d 764, 768 (9th Cir. 1970), *cert. denied*, 400 U.S. 967 (same); *John v. United States*, 720 F.3d 1214, 1224 (9th Cir. 2013), *cert. den. sub nom*. *Alaska v. Jewell*, 572 U.S. 1042 (2014) (Congress had "unfettered power" to regulate the Alaska Territory from 1867 to statehood in 1959); *see also* Cohen 1942 at 403 (as a recognized territory, Alaska is subject to the paramount and plenary authority of Congress).

[148] Statehood Act, § 1.

[149] *Id*., § 4. The Alaska Constitution includes a similar disclaimer. ALASKA CONST. art. XIII, § 12, cl. 2 ("The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission."). The only lands to which the United States held title in trust for Alaska Natives in 1959 consisted of cannery properties separately acquired in 1948 and 1950 for the Alaska Native communities of Angoon, Kake, and Klawock, which had organized under IRA section 16 on the basis of a common bond of occupation in the fishing industry. Defendants' Supplemental Brief Pursuant to Court Order, *Akiachak Native Community v. Department of the Interior, et al.*, Case No. 06-cv-0969-RC (D.D.C.), ECF 101 at 9 n.4 (filed Jul. 6, 2012); *see also* Sol. Op. M-36975 at 112 n.277.

[150] *Id*., § 8(d). The Statehood Act also provided that all Territorial laws then in effect would continue in full force and effect "except as modified or changed" by the Statehood Act or by the Alaska Constitution. *Ibid*.

acts "in conflict with the provisions of [the Statehood Act]."[151] As relevant here, it defined "laws of the United States" as consisting of:

> all laws or parts thereof enacted by the Congress that (1) apply to or within Alaska at the time of the admission of the State of Alaska into the Union, (2) are not "Territorial laws"…,[152] and (3) are not in conflict with any other provisions of this Act.[153]

Sol. Op. M-37043 nowhere considers the Statehood Act or its possible effect on application of the Territorial Prohibition to Alaska and, by extension, on AIRA section 1.

For these reasons, it is unclear whether the AIRA remains the source of authority for application of IRA provisions in Alaska beyond 1959. The Alaska Proviso was enacted as an exception limiting the scope of the Territorial Prohibition. As such, it is reasonable to conclude that its applicability was limited to that time period when Alaska was a territory,[154] since the scope of any proviso is presumptively confined to the subject matter of its principal clause.[155] Statehood arguably rendered the Territorial Prohibition and its Alaska Proviso inoperative and without further effect.[156] As a result, the IRA and all of its provisions – to include section 5 – were made generally applicable to the State.[157]

I acknowledge that such a conclusion represents a departure from previous Department statements on this issue. Associate Solicitor Fredericks opined in 1978 that AIRA section 1 continued to apply in Alaska even after FLPMA's repeal of AIRA section 2.[158] Similarly, Solicitor Leshy in 2001 presumed that AIRA section 1 remained in effect after ANCSA.[159] Like

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[151] *Id.*, § 30.

[152] *See infra* n.119.

[153] Statehood Act, § 8(d).

[154] A statutory exception removes certain persons or conduct from the statute's operation. BLACK'S LAW DICTIONARY (11th ed. 2019) (definition of "statutory exception").

[155] *Republic of Iraq v. Beaty*, 556 U.S. 848, 857 (2009). As a general rule, a proviso is intended as a special carve-out of operation of the section in which it is found. *McDonald v. United States*, 279 U.S. 12, 20-21 (1929); *see also Tiger v. W. Inv. Co.*, 221 U.S. 286, 307 (1911); *San Luis & Delta-Mendota Water Auth. v. Haugrud*, 848 F.3d 1216, 1230 (9th Cir. 2017), *as corrected* (Mar. 23, 2017) (citing *United States v. Morrow*, 266 U.S. 531, 534 (1925) *and Pennington v. U.S.*, 48 Ct. Cl. 408, 412 (1913)).

[156] *See, e.g.*, *United States v. Maldonado-Burgos*, 844 F.3d 339, 344 (1st Cir. 2016) (citing *Moore v. United States*, 85 F. 465 (8th Cir. 1898) (indictment alleging violation of restraint on trade in the then-Territory of Utah under federal law applicable "in any territory of the United States" had no continued effect after Utah achieved statehood because the relevant law no longer applied); *Firstcom, Inc. v. Qwest Corp.*, 555 F.3d 669, 676 (8th Cir. 2009) ("'It is well established that when a statute is repealed or otherwise becomes inoperative no further enforcement proceedings can take place unless 'competent authority' has kept the statute alive for that purpose.'") (quoting *United States v. van den Berg*, 5 F.3d 439, 441 (9th Cir.1993) (quoting *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 432 (1972))).

[157] *See, e.g.*, *Tyonek Native Corp. v. Sec'y of Interior*, 836 F.2d 1237, 1240, 1243 n.2 (9th Cir. 1988) (cessation of the Alaska Territory's existence mooted need for express repeal of statutes that expressly applied to the Territory as such).

[158] Fredericks Opinion at 3 (section 5 remains applicable to Alaska "pursuant to the unrepealed portion of the Act of May 1, 1936").

[159] Leshy Opinion at 1.

Sol. Op. M-37043, however, these opinions did not acknowledge or assess of the effect of Alaska statehood on the applicability of the Territorial Prohibition and the continuing effect of the Alaska Proviso.[160] Only by first identifying the source of the Secretary's authority can the Department determine the effect on its scope from subsequent developments – an inquiry Sol. Op. M-37043 did not pursue.

B. ANCSA's Effect on Federal Responsibilities for Alaska Native Lands.

Congress enacted ANCSA in 1971 to finally resolve those issues left open since Alaska's acquisition in 1867. It was preceded "by more than one hundred years of at least theoretical uncertainty" about the legal status of Alaska Natives and the lands they used and occupied.[161] Such uncertainty was reflected in the absence of any consensus on an "appropriate comprehensive framework" that would take into account "the unique circumstances of Alaska."[162] Prior to ANCSA's enactment, there were numerous reservations created in Alaska by executive order, two reservations set aside by statute,[163] six reservations established pursuant to AIRA section 2,[164] and at least one parcel accepted in trust under IRA section 5.[165] Although ANCSA's primary impetus was the resolution of Alaska Native land claims, it stands apart as "the most comprehensive statute to address Alaska Native issues."[166]

As discussed above, ANCSA section 19(a) revoked all reservations in Alaska, excepting the Annette Island Reserve, which had its own unique history:

> The various reserves set aside by legislation or by Executive or Secretarial Order for Native use or for administration of Native affairs, including those created under the Act of May 31, 1938 (52 Stat. 593), are hereby revoked subject to any valid existing rights of non-Natives.[167]

Allotments issued pursuant to the Alaska Native Allotment Act were not disturbed by ANCSA, nor did ANCSA specifically address the status of any parcel the Secretary may have accepted in trust pursuant to IRA section 5. Solicitor Thomas L. Sansonetti would later confirm that the Bureau of Indian Affairs considered such acquisitions to be "valid existing rights under ANCSA

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[160] As noted, Sol. Op. M-37043 did not consider the effect of Alaska's Statehood on the Alaska IRA, and no public comments were provided on this issue in submissions received on the withdrawal of Sol. Op. M-37043. One commenter addressed the legislative history of the Statehood Act, but not its effect on the IRA or AIRA. *See* Letter from Donald C. Mitchell, Esq. to Daniel H. Jorjani, Principal Deputy Solicitor at 32-38 (Dec. 13, 2018).

[161] ALASKA NATIVES AND AMERICAN LAWS at 165.

[162] Sol. Op. M-36975 at 4.

[163] As discussed above, Congress established a reservation for the Indians at Metlakatla in 1891. In 1957, it additionally confirmed and enlarged the boundaries a reservation for the Chilkat Indian Village (Klukwan). Act of Sept. 2, 1957, Pub. L. No. 85-271, 71 Stat. 596.

[164] FIELD COMMITTEE REPORT, 444, figure V-3.

[165] In 1950, the Commissioner for Indian Affairs accepted in trust a small parcel for the Klawock Cooperative Association at the location of the community's cannery. Deed to Restricted Indian or Eskimo Land in Alaska, sold Mar. 29, 1950 by Charles W. Demmert, Emma F. Demmert, and George Demmert to United States of America in trust for the Klawock Cooperative Association.

[166] Sol. Op. M-36975 at 3.

[167] ANCSA, § 19(a), *codified at* 43 U.S.C. § 1608(a).

section 14(g)."[168] With these exceptions noted, it is apparent that Congress intended ANCSA to represent a distinct break from the Indian affairs system found in the conterminous United States. This view is expressed in ANCSA's declaration of policy, wherein Congress pronounced its intent that the settlement be accomplished:

> without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges….[169]

Statements made during the ANCSA floor debates support this view. For example, Representative John Henry Kyl of Iowa noted that he did "not know of any member of the committee who wanted anything to do with setting up a reservation system in the State of Alaska similar to that which we have in the lower 48 states."[170] Similarly, Representative E. Lloyd Meeds of Washington observed that "[e]very one of the bills in our committee and the bills in the other body, all of them, eschew the reservation or trust concept.[171] Multiple other statements confirm the conclusion reached by Solicitor Thomas L. Sansonetti in Sol. Op. M-36975, namely that Congress sought through ANCSA "an unambiguous rejection of the reservation system or any categories of trust or restricted land."[172]

Notably, these sentiments were also shared by Alaska Native leaders who, early on, "proposed and endorsed" the "choice to do away with the reservation system."[173] The expansion of such a system "had been considered and rejected by the Native leadership as a possible alternative to settlement legislation before the first land claims bill was even introduced."[174] Indeed, Solicitor Sansonetti noted that since the founding of the Alaska Federation of Natives in 1966, it "had as a primary goal the enactment of federal legislation to protect Native land rights by some mechanism other than by placing large tracts into trust status."[175]

1. Repeal of IRA Section 5.

The Solicitor's Office's review of the legislative history of ANCSA confirms that Congress did not intend for the disestablishment of Alaska's reservation system to be a temporary measure. Years of settlement discussions and the transfer of nearly $1 billion to ANCs in 1971 was meant to permanently alter the relationship between the federal government and Alaska Natives, at least with regard to future trust responsibilities over lands. In light of the totality of settlement, it is

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[168] Sol. Op. M-36975, 112 n.277.

[169] ANCSA, § 2(b), *codified at* 43 U.S.C. § 1601(b).

[170] 117 Cong. Rec. 36828, 36856-57 (Oct. 19, 1971).

[171] *Id*. at 36865.

[172] Sol. Op. M-36975 at 88 (*see, e.g.*, statement of Senator George McGovern of South Dakota: "Those who are concerned about creating new Indian reservations in Alaska can find a solution to this problem by assuring an opportunity for the Natives to secure productive and promising lands." 117 Cong. Rec. 38444 (1971)).

[173] *Id.* at 89.

[174] *Ibid*. (citing R.D. Arnold, ALASKA NATIVE LAND CLAIMS 106 (2d ed. 1978)).

[175] *Ibid.*

inconceivable that Congress would have intended to revoke all but one of Alaska's reservations, then permitted the Department to reconstitute and expand them pursuant to IRA sections 5 and 7.

However clear the legislative intent, ANCSA neither discusses nor explicitly repeals any provision of the IRA or AIRA. Congress addressed the Secretary's authority to establish AIRA section 2 reservations in Alaska five years after ANCSA's enactment when it repealed AIRA section 2 in FLPMA.[176] Thus, to the extent the more general statute, FLPMA, controls over or nullifies the more specific, ANCSA, the FLPMA repeal of section 2 can be viewed as evidence that IRA section 5 remains applicable to the State absent a finding of implied repeal.[177]

Repeals by implication are disfavored,[178] and the stringent standard applied in determining such repeals means that they are quite rare.[179] The presumption against implied repeals rests on the view that Congress legislates "with knowledge of former related statues" and will therefore "expressly designate the provisions whose application it wishes to suspend, rather than leave that consequence to the uncertainties of implication compounded by the vagaries of judicial construction."[180] All previous opinions considering the Secretary's trust acquisition authority in Alaska have concluded that IRA section 5 was not repealed by implication, with varying degrees of analysis. For example, in 1978, Associate Solicitor Fredericks concluded that "attempt[ing] to use Section 5 of the IRA (which, along with §§ 1, 7, 8, 15, and 17 of the IRA still apply to Alaska pursuant to the unrepealed portion of the [AIRA])," would be "an abuse of the Secretary's discretion" in light of the "clear legislative intent and policy expressed in ANCSA's extensive legislative history.[181] More recently, Sol. Op. M-37043 briefly explored ways in which ANCSA and IRA section 5 coexist, finding that they do not irreconcilably conflict.[182] While there is merit to that analysis, this is only one of two tests the Supreme Court considers in its implied repeal analysis:

> An implied repeal will only be found where provisions in two statutes are in "irreconcilable conflict," or where the latter Act covers the whole subject of the earlier one and "is clearly intended as a substitute."[183]

Thus, while acknowledging the analysis of Sol. Op. M-37043 regarding the irreconcilable conflict, the analysis of whether ANCSA intended to "cover the whole subject" of federal responsibilities relating to Alaska Native lands is lacking. For the reasons discussed below, ANCSA may present the rare case where an analysis of whether the statute was intended to

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[176] *See* Sol. Op. M-36975 at 39, n. 110; Sol. Op. M-37043 at 8.

[177] *See Morton v. Mancari*, 417 U.S. 550-51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

[178] *Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936); *Mancari*, 417 U.S. at 550 (1974); *Swinomish Indian Tribal Cmty. v. BNSF Railway Co.*, 951 F.3d 1142, 1156 (9th Cir. 2020).

[179] *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 381 (1996).

[180] *United States v. Hansen*, 772 F.2d 940, 944-45 (D.C. Cir. 1985) (Scalia, J.), *cert. denied*, 475 U.S. 1045 (1986) (internal quotes and brackets omitted).

[181] Fredericks Opinion at 3.

[182] Sol. Op. M-37043 at 21-22.

[183] *Branch v. Smith*, 538 U.S. 254, 273 (2003) (citing *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)).

occupy the field is essential to address whether Congress impliedly repealed the Secretary's discretionary authority to accept land in trust in Alaska.

a. Implied Repeal: Irreconcilable Conflict

As more fully excerpted above, ANCSA's preamble declares Congress' intent that its settlement of Alaska Native land claims be realized "without creating a reservation system or lengthy wardship or trusteeship."[184] This language, and similar statements in ANCSA's legislative history,[185] have previously been viewed as a basis for precluding future application of trust acquisition authority in Alaska.[186] And while ANCSA's preamble and legislative history undeniably reflect an antipathy toward the trust relationship, standing alone, this policy declaration does not provide sufficient grounds to argue that Congress impliedly repealed IRA section 5's application in Alaska.

As a matter of statutory construction, a preamble is neither considered an operative part of a statute, nor as enlarging or conferring powers on administrative agencies or officers.[187] A preamble may inform the interpretation of ambiguities in a statute's substantive provisions,[188] but it cannot be used to contradict the text of the statute itself.[189] Where those operative parts of the statute that prescribe rights and duties and otherwise declare the legislative will are unambiguous,[190] their meaning cannot be controlled by a declaration of policy.[191]

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[184] ANCSA, § 2(b), *codified at* 43 U.S.C. § 1601(b).

[185] *See, e.g.*, S. Rpt. 92-405 at 108 ("A major purpose of this Committee and the Congress is to avoid perpetuating in Alaska the reservation and the trustee system which has characterized the relationship of the Federal government to the Indian peoples in the contiguous 48 states.").

[186] For example, it has been claimed that ANCSA's preamble shows an "unmistakable" intent to "permanently" remove all Native lands in Alaska from trust status (Fredericks Opinion at 1) and that any future trust acquisitions in Alaska would be "wholly inconsistent with Congress' purposes in ANCSA" and would undermine ANCSA's extinguishment of aboriginal claims of use and occupancy. (Letter from Bruce M. Botelho, Attorney General of Alaska, to The Hon. Gale Norton, Secretary of the Interior (June 14, 2001) at 2).

[187] *Yazoo Railroad Co. v. Thomas*, 132 U.S. 174, 188 (1889) (preamble is not part of an act and cannot enlarge or confer powers or control the words of the act where they are not doubtful or ambiguous). *See also Sturgeon v. Frost*, 139 S. Ct. 1066, 1086 (2019) (citing A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS at 220 (2012)); 1A SUTHERLAND STATUTORY CONSTRUCTION § 20:12 (7th ed.)) (congressional statements of purpose cannot override a statute's operative language).

[188] *Rothe Dev., Inc. v. U.S. Dep't of Def.*, 836 F.3d 57, 66 (D.C. Cir. 2016) (findings and preambles may contribute to a general understanding of a statute, but unlike provisions that confer and define agency powers they are not an operative part of the statute) (citing *Ass'n of Am. Railroads v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977)).

[189] *Tex. Children's Hosp. v. Azar*, 315 F. Supp. 3d 322, 334 (D.D.C. 2018), *appeal dismissed*, No. 18-5238, 2018 WL 7080504 (D.C. Cir. Dec. 28, 2018).

[190] As the courts have repeatedly held, the "most reliable guide to congressional intent is the legislation Congress enacted." *Sierra Club v. E.P.A.*, 294 F.3d 155, 161 (D.C. Cir. 2002); *Barnhart v. Sigman Coal Co.*, 534 U.S. 438, 461-62 ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.") (internal quotes and citations omitted).

[191] *Nat'l Wildlife Fed'n v. E.P.A.*, 286 F.3d 554, 569 (D.C. Cir. 2002), *supplemented sub nom. In re Kagan*, 351 F.3d 1157 (D.C. Cir. 2003) (citing *Costle*, 562 F.2d at 1316) (preamble to agency rule no more binding than statutory preamble); *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1979 (2016) (no deference given to agency's interpretation of rulemaking preamble where statute is unambiguous); *see also Rubin v. Islamic Republic*

Thus, however clear one thinks ANCSA's preamble, courts will seldom look to legislative intent without inclusion of language in the statute's substantive provisions that reflect and effect such declarations of policy. Having now disposed of this issue in a more comprehensive manner than addressed by Sol. Op. M-37043, the focus now turns to whether ANCSA's treatment of reservations or other Alaska Native lands within Alaska is such that the statute is irreconcilable with application of the Secretary's IRA section 5 authority.

As discussed elsewhere in this Opinion, ANCSA section 19(a) revoked all reservations in the State, with the single exception of the Annette Island Reserve. Despite the clear Congressional declaration to the contrary, ANCSA is inexplicably silent regarding the prospective authority of the Secretary to establish reservations in Alaska. This silence could be understood to reflect an assumption that the settlement definitively spoke to prospective federal responsibilities over Alaska Native lands, or to have implicitly allowed for the continued establishment of Indian reservations.[192] And if Congress viewed the Secretary's authority under AIRA section 2 to have survived ANCSA, by implication, so also might have the Secretary's authority under IRA sections 5 and 7.

Over the years, the Department has taken inconsistent positions as to the scope of FLPMA's repeal.[193] To be clear, the relevant provision at section 704(a) of FLPMA expressly repeals only the Secretary's authority to establish reservations under AIRA section 2. Further, FLPMA's repeal of AIRA section 2 was incidental to its general repeal of laws relating to the withdrawal of public lands, for which neither Alaska nor Indian lands were specifically targeted.[194] That FLPMA did not modify the applicability of IRA sections 5 and 7 to Alaska is unsurprising, particularly as the character of AIRA section 2 reservations is distinct from that of Indian trust lands. For example, AIRA section 2 neither authorized a power of permanent disposition of federal property,[195] nor did it create lands in which there was a compensable interest.[196]

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of Iran, 830 F.3d 470, 479 (7th Cir. 2016), *aff'd,* 138 S. Ct. 816 (2018) (using preamble as aid to interpret statutory ambiguity).

[192] FLPMA § 704(a) adds indirect support to the view that ANCSA was not intended to affect lands held in trust, as it only expressly repealed authority to designate Indian reservations on public lands withdrawn for that purpose.

[193] *See, e.g.*, Fredericks Opinion at 2-3 (incorrectly characterizing AIRA section 2 as having "extend[ed] the provisions of the [IRA] to Alaska"); *Rescinding the September 15, 1978, Opinion of the Associate Solicitor for Indian Affairs entitled "Trust Land for the Natives of Venetie and Arctic Village"*, Memorandum from John D. Leshy, Solicitor, to [Kevin Gover,] Assistant Secretary – Indian Affairs at 1 (Jan. 16, 2001) (same); *Status of Alaska Native Village Courts and List of Recognized Tribal Entities*, Memorandum from Scott Keep, Assistant Solicitor, Division of Indian Affairs, to William G. Myers III, Solicitor at 5 (Oct. 9, 2003) (Secretary's authority to create reservations in Alaska expressly repealed by FLPMA). *Cf.* Sol. Op. M-37043 at 8 (FLPMA rescinded Secretary's authority to establish reservations under AIRA section 2); *see also* Cohen 1942, § 4.07[3][b][iii] ("ANCSA left untouched the Secretary's authority to create reservations in Alaska pursuant to the IRA. In 1976, Congress repealed the provision authorizing the creation of reservations in Alaska.").

[194] FLPMA's stated purpose was to repeal the implied authority of the President to make withdrawals and reservations from the public lands resulting from the acquiescence of Congress. FLPMA, tit. VII, § 704(a).

[195] *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 104-05; *see also Bennett Cty., S.D. v. United States*, 394 F.2d 8, 11 (8th Cir. 1968) ("As a general rule, Indian lands are not included in the term 'public lands' which are subject to sale or disposal under general laws.").

[196] ALASKA NATIVES AND AMERICAN LAWS, 104.

ANCSA contains three express references to trust lands: two such references are to lands held in trust by the State or by a unit of municipal government under State law;[197] the third refers to a definition of "trust or restricted Indian-owned land areas" in the Public Works and Economic Development Act for the limited purpose of making certain lands granted to Alaska Natives under ANCSA eligible for loan and grant programs.[198] As these references relate only to lands that form part of ANCSA's proceeds of settlement, Congress was silent as to its views on trust lands generally.

Further, ANCSA did not expressly reference IRA section 5 or otherwise prospectively limit the Secretary's trust acquisition authority. And because Congress is presumed to have knowledge of former related statutes when it enacts new legislation,[199] it cannot be credibly argued that it was unaware of the IRA's provisions.[200] This seems all the more so, given that ANCSA refers to numerous other Indian laws, including contemporaneous statutes such as the Johnson-O'Malley Act, enacted in April 1934,[201] and the Act of May 31, 1938, which authorized the Secretary to withdraw tracts of land from the public domain for the administration of the affairs of Alaska Natives.[202]

b. Implied Repeal: Covering the Whole Subject, Intended as a Substitute

Sol. Op. M-37043 did not address this second test by which the Supreme Court considers implied repeals. Though the bar for any finding of implied repeal is high, ANCSA represents the rare statute that may meet the demands of this analysis. There is an argument that from the time the United States acquired Alaska in 1867, the federal government's consideration and treatment of Alaska Native land rights was not directly addressed until comprehensively resolved and clarified by ANCSA in 1971. From the First Organic Act to the Statehood Act, Congress and the courts time-and-again sought to defer the issue. To amplify what has already been said regarding the Statehood Act, its legislative history reveals that the purpose of the provision disclaiming the State's right to land on which there were Alaska Native claims was to avoid dealing with the unresolved question of "indigenous rights but to leave the matter in status quo for either future legislative action or judicial determination."[203] It was the subsequent efforts to implement the

[197] ANCSA, § 14(c)(3), *codified at* 43 U.S.C. § 1613(c)(3).

[198] *Id.*, § 2(g), *codified at* 43 U.S.C. § 1601(g) (citing Pub. L. No. 89-136, 79 Stat. 552).

[199] *Hollingsworth v. Duff*, 444 F. Supp. 2d 61, 65 (D.D.C. 2006) (Congress presumed to legislate with knowledge of former related statutes) (citing *United States v. Hsia*, 176 F.3d 517, 525 (D.C. Cir. 1999)).

[200] *United States v. Fausto*, 484 U.S. 439, 453 (1988) ("it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change").

[201] ANCSA, § 21(e), *codified at* 43 U.S.C. § 1620(e) (citing 25 U.S.C. § 452 (reclassified in 2016 to 25 U.S.C. § 5342)).

[202] ANCSA, § 19(a), *codified at* 43 U.S.C. § 1618(a) (citing Act of May 31, 1938, ch. 304, 52 Stat. 593); *see also* Act of July 9, 1968, Pub. L. No. 90-392, 82 Stat. 307, 321 and Act of July 13, 1970, Pub. L. No. 91-335, 84 Stat. 431 (relating to appropriation and distribution of certain judgment funds to Tlingit and Haida Indians of Alaska); Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, and Act of May 17, 1906 (authorizing allotments for Alaska Natives); Act of Mar. 3, 1891, § 15 (establishing Annette Island Reserve of Metlakatla Indians).

[203] Sol. Op. M-36975 at 72 (citing H.R. Rpt. 85-624 at 19 (June 25, 1957)).

Statehood Act that set in motion the "forces which finally brought the issue of Native land claims to a head."[204]

In 1993, Solicitor Sansonetti issued Sol. Op. M-36975, a 133-page legal opinion examining the jurisdiction of Alaska Native villages. Sol. Op. M-37043 contained no discussion of or reference to Sol. Op. M-36975, which was never withdrawn, and thus remains in effect today. While Sol. Op. M-36975 did not directly consider ANCSA's effect on the Secretary's authority to take land into trust under section 5 of the IRA,[205] it did include extensive discussions of ANCSA's provisions, their legislative history, and their effect on federal responsibilities toward Alaska Native lands that are directly relevant to the present discussion.

ANCSA's comprehensive settlement can be seen as intended to finally resolve over 100 years of deferred action and ad hoc responses to Alaska Native land claims, not least since it included a number of unique provisions that were developed after extensive consultation with Alaska Native leaders.[206] As observed by Under Secretary of the Interior Kent Frizzell in 1976, in resolving all aboriginal claims and establishing a new system of Alaska Native land tenure, Congress, through ANCSA, necessarily adjusted the federal government's trust responsibilities with respect to Alaska Native lands.[207] ANCSA "fundamentally reduced" the federal trust responsibility to Alaska Native lands,[208] and the Supreme Court has since concluded that ANCSA's protections over Alaska Native lands "do not reach the level of federal involvement necessary for a finding of Indian country."[209]

Though titled as a land claims settlement, ANCSA in actuality was much more. Congress' approach in ANCSA reflected a larger shift in federal policy toward Indian self-determination, away "from a pattern of services provided directly to individual Indians" and toward "direct grants to tribes and administration of programs by tribes."[210] To that end, ANCSA marked a significant shift in federal responsibilities for Alaska Native lands. The vast amount of lands comprising its settlement were transferred in fee and divided among village and regional

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[204] *Id*. at 72-73.

[205] In referring to the repeal of the Secretary's prospective authority to create Indian reservations in Alaska, the Sansonetti Opinion included a reference to the view expressed in the Fredericks Opinion to the effect that IRA section 5 "was not repealed with respect to Alaska." Sol. Op. M-36975 at 112, n. 276 (citing Fredericks Opinion). While it is unclear whether Solicitor Sansonetti intended to adopt that view as his own, the fact remains that the Fredericks Opinion was subsequently withdrawn based on "substantial doubt" for the validity of its conclusions. *See* Leshy Opinion.

[206] Sol. Op. M-36975 at 89.

[207] Letter from Kent Frizzell, Under Secretary of the Interior, to Hon. Ted Stevens, U.S. Senator at 1-2 (Dec. 30, 1976) (describing ANCSA as necessarily having lifted the BIA's trust responsibilities to provide realty-related services for trust lands in Alaska other than individual Indian allotments); *see also* ALASKA NATIVES AND AMERICAN LAWS at 30 (federal government acknowledged "a relatively limited and fragmented land-related trust responsibility toward Alaska Natives prior to ANCSA); *id*. at 106-108 (discussing 1968 memorandum of Alaska Regional Solicitor on federal trust responsibilities toward reserves established under section 2 of the Alaska IRA).

[208] ALASKA NATIVES AND AMERICAN LAWS at 111 (citing Monroe E. Price, *Region-Village Relations under the Alaska Native Claims Settlement Act*, 5 UCLA-ALASKA LAW REV. 58, 61 (1975)).

[209] *Id*. at 111 (citing *Alaska v. Native Vill. of Venetie Tribal Gov't.*, 522 U.S. 520 (1998)).

[210] Sol. Op. M-36975 at 40.

corporations chartered under Alaska State law.[211] The lands available to village corporations, in turn, were dependent upon their resident population.[212]

There is strong evidence that Congress intended ANCSA to prospectively limit federal responsibilities for Alaska Native lands. This is reflected in ANCSA's legislative history, which early on showed a consensus on transferring its proceeds of settlement to incorporated entities rather than having the federal government hold them in trust for the benefit of Alaska Native groups.[213] This also reflected the interest of Alaska Native themselves "for economic self-determination, and in particular to be freed from the heavy hand of BIA supervision of their economic activities,"[214] which echoed the IRA's declared policy goals.[215] The requirement that Alaska Native villages incorporate under Alaska state law reflected in part a rejection of "the idea of utilizing pre-existing Native institutions as the organizational vehicles for the settlements."[216]

Solicitor Sansonetti rejected the notion that ANCSA was intended to terminate federal trust responsibilities toward Alaska Natives, concluding that it did not otherwise affect the retained governmental powers of tribes to determine their membership and to regulate their internal affairs. Instead, ANCSA "contains a very complete address to the issue of land."[217] Solicitor Sansonetti found that ANCSA's legislative history confirmed Congress' evident intent that "after enactment there was to be no reservation or trust relationship between the United States and Alaska Native groups with respect to ANCSA lands, such as exists between the [federal] government and many Indian tribes in other states."[218] Alaska Native organizations supported these goals,[219] with Alaska Native leadership then believing reservations to be incompatible with "maximum economic self-determination," as "land held in trust by the United States could not be leased, developed, or sold without government permission."[220] Solicitor Sansonetti noted that since 1966, the Alaska Federation of Natives had sought legislation to protect Alaska Native land rights by means other than by placing land into trust status,[221] and had criticized the original bill endorsed by the Department, which called for settlement lands to be held in trust for Alaska Native villages.[222]

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[211] *Id*. at 78.

[212] *Ibid*. at n.210 (citing ANCSA, § 11). ANCSA also established a variety of other special categories of conveyances. *Ibid*.

[213] *Id*. at 84.

[214] *Id*. at 85. *See also id.* at n.224.

[215] The terms of some settlements proposed in earlier bills provided for incorporation under the IRA. *Ibid*. at n.225.

[216] Sol. Op. M-36975 at 87.

[217] *Id*. at 107.

[218] *Id*. at 88 (citing S. Rpt. 92-581 at 40 (1971) ("The lands granted by this Act are not 'in trust' and the Native villages are not Indian 'reservations.'"), H.R. Rep. No. 92-523 at 9 (1971) (corporations established under ANCSA not to be subject to federal supervision "except to the limited extent provided in the bill")).

[219] *Id*. at 89 (citing Arnold at 106).

[220] *Ibid.*

[221] *Ibid*.

[222] *Ibid*. (citing S. 1964, § 3(e), 90th Cong., 1st Sess. (1967)).

Congress also made clear its intent that ANCSA would not diminish the effectiveness of the institution of local municipal government, "a major institution by which the State of Alaska protects and promotes the rights and welfare of [Alaska] Natives as citizens of Alaska," which ANCSA protected.[223] ANCSA accommodated the interests of State-chartered local governments which, Solicitor Sansonetti concluded, ANCSA "must surely have recognized as local governments of and for [Alaska] Native people, as well as others, in the Native communities dealt with as Native villages under ANCSA."[224] Despite ANCSA's many amendments, which reflected the continuing oversight role Congress assumed in respect to ANCSA's novel and complex approach, "none fundamentally altered [ANCSA's] overall settlement scheme in any relevant way,"[225] and Congress took pains to avoid any contrary interpretation.[226]

ANCSA's comprehensive statutory scheme, which revoked tribal and individual Native trust land statewide, arguably left no room for the Secretary to create trust land outside of the settlement. Legislative history and subsequent amendments to ANCSA support the view that Congress considered and rejected trust land, and therefore firmly declined to delegate to the Secretary the important legislative function of reinstituting trust land in Alaska. As confirmed by the Supreme Court in *Venetie*,[227] Congress intended to depart completely and permanently from the trust land model of providing land for Alaska Natives.[228]

As stated in the Senate Report on the bill that ultimately became ANCSA:

> A major purpose of this Committee and the Congress is to avoid perpetuating in Alaska the reservation and the trustee system which has characterized the relationship of the Federal government to the Indian peoples in the contiguous 48 states.[229]

In drafting ANCSA section 19(a), Congress progressed from referencing just two acts to the much broader final language in the statute. As introduced in April 1969, Senate Bill 1830 extinguished "any and all claims … arising under the [First Organic Act] and the Act of June 6, 1900 (31 Stat. 321)."[230] The bill was amended in June 1970 to extinguish "any and all claims" based on these acts "or any other statute or treaty of the United States relating to Native use or occupancy of land."[231] The enacted statute further expanded the scope to extinguish "all claims … based on any statute or treaty of the United States relating to Native use and occupancy."[232]

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[223] *Id*. at 92 (emphasis removed) (citing ANCSA, § 14(c)(3)).

[224] *Ibid*.

[225] *Id*. at 93.

[226] *Id*. at 94.

[227] *Native Vill. Of Venetie Tribal Gov't.*, 522 U.S. at 532.

[228] "The text and legislative history of the ANCSA make clear that Congress sought to avoid creating any fiduciary relationship between the United States and any Native organization." *Seldovia Native Ass'n v. United States*, 144 F.3d 769, 784 (Fed. Cir. 1998).

[229] S. Rep. No. 92-405, at 108-109 (1971).

[230] 115 Cong. Rec. 9110-11 (Apr. 15, 1969).

[231] S. Rep. No. 91-925, at 3 (June 10, 1970).

[232] 43 U.S.C. § 1603(c).

These revisions lend further support to the notion that ANCSA intended to comprehensively address Alaska Native rights in land and federal responsibilities therefor.[233]

As set forth above, there is merit to the argument that ANCSA was intended to occupy the field of federal responsibilities toward Alaska Native lands. Prior to any potential future exercise of discretionary authority to accept land in trust in Alaska, the impact of ANCSA's novel yet comprehensive framework for addressing Alaska Native rights in land and future federal responsibilities should be considered, and whether thereby ANCSA impliedly repealed the application of IRA section 5 in the State.[234]

C. IRA Section 19 and the Alaska Definition.

Sol. Op. M-37043 dedicates a significant portion of its analysis to interpreting the Alaska Definition at IRA section 19. Section 19 of the IRA defines in two separate clauses the categories of persons who may be considered "Indian" for the purposes of the Act. The first clause describes three categories of persons of Indian descent ("Categories") who may be considered "Indian" for purposes of the Act.[235] Two derive from the history of the trust relationship in the conterminous United States and require some evidence of federal jurisdiction in 1934.[236] The third relies on evidence of Indian descent alone.

Section 19's second clause, known as the Alaska Definition, simply provides that, "for the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians."[237] The Alaska Definition does not specify any degree of Alaska Native descent, or otherwise define "Eskimos" or "aboriginal peoples of Alaska."[238] Sol. Op. M-37043 concludes that:

> [b]y the plain language of Section 19, Alaska Natives are in a separate category of "Indians" under the IRA. If Congress had intended to require Alaska Natives to meet one of the first three definitions of "Indian" in the first sentence of Section 19, then the reference to Alaska Natives in the next sentence of Section 19 would be

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[233] *United States v. Claflin*, 97 U.S. 546, 553 (1878).

[234] *Ibid*.

[235] "[Category 1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [Category 2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and [Category 3] all other persons of one-half or more Indian blood." IRA, § 19, *codified at* 25 U.S.C. § 5129.

[236] Category 1 applies to members of a tribe recognized and under federal jurisdiction in 1934. *See Determining Eligibility under the First Definition of "Indian" in Section 19 of the Indian Reorganization Act of 1934*, Memorandum from Kyle E. Scherer, Deputy Solicitor for Indian Affairs, *et al.*, to Daniel H. Jorjani, Solicitor (Mar. 05, 2020). Category 2 applies to such members' descendants who resided on a reservation in 1934. *See* Daniel H. Jorjani, Solicitor Opinion M-37054, *Interpreting the Second Definition of "Indian" in Section 19 of the Indian Reorganization Act of 1934* (Mar. 5, 2020).

[237] IRA, § 19, *codified at* 25 U.S.C. § 5129.

[238] Soon after the AIRA's enactment, the Comptroller General concluded that the Alaska Definition did not make "Eskimos" and "non-Indian" Alaska natives "Indians within the purview of other laws." 19 Comp. Gen. Op. 122 (A-81364) (July 31, 1939).

> surplusage, as eligible Alaska Natives would have already met one of the other three definitions.[239]

While Sol. Op. M-37043 attempts to engage with the history of conflicting interpretations of this provision, it does not consider a reasonable alternative that may explain the drafting choices of Assistant Solicitor Cohen, the primary author of the IRA. Almost immediately after the Alaska IRA's enactment, OIA officials expressed uncertainty as to how the Categories and the Alaska Definition related to one another.[240] In response to questions from OIA leadership, Assistant Solicitor Cohen twice concluded that the Alaska Definition should be "read into" the Categories. First, in an undated, hand-written memorandum to Fred H. Daiker, Assistant to the Commissioner of Indian Affairs, he stated:

> It seems to me that sec. 19 puts Eskimos on the same basis as Indians. To qualify for the benefits of the [IRA] they must meet one of 3 criteria: tribal affiliation, tribal descent plus residence on a reservation, or the half-blood test.[241]

Then, in the year following enactment of the AIRA, Assistant Solicitors Cohen, Kenneth Meiklejohn, and Charlotte Westwood revisited the issue, jointly responding to various questions regarding the application of the Alaska IRA from OIA Field Agent William Paul. In an internal memorandum addressing this matter, they concluded that "as a matter of construction and necessity," the Alaska Definition "should be read in conjunction" with the Categories, since otherwise "there would be no law as to what persons of Indian blood were eligible for benefits and organization."[242] This opinion, dated October 5, 1937, appears to be the last time the Solicitor's Office considered the issue until publication of Sol. Op. M-37043. Sol. Op. M-37043 minimizes this early advice from the Solicitor's Office, instead elevating conflicting views presented by others in the Department, including those of Field Agent Paul[243] and D'Arcy McNickle, then serving in the OIA's Indian Organization Division.[244]

I give significant weight to the opinion of Assistant Solicitor Cohen as one of the IRA's primary authors. Whereas Sol. Op. M-37043 concludes that the Alaska Definition is "surplusage,"[245] an examination of the historical context points to a different result. It seems probable that the

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[239] Sol. Op. M-37043 at 13-14.

[240] *See, e.g.*, *Alaska Organization Issues*, Memorandum signed by Felix S. Cohen, Charlotte T. Westwood, and Kenneth Meiklejohn at 4 (Oct. 5, 1937) [hereinafter "*Alaska Organization Issues*"]; *Legal Issues Affecting Alaska Organization*, Memorandum signed by Felix S. Cohen, Charlotte T. Westwood, and Kenneth Meiklejohn (Oct. 5, 1937) [hereinafter "*Alaska Legal Issues*"]; Felix S. Cohen, Handwritten Note captioned "Memo for Mr. Daiker" (n.d.) [hereinafter "Cohen Handwritten Note"] (on file with Solicitor's Office-Division of Indian Affairs) (asserting that IRA § 19 puts Alaska Natives "on the same basis as Indians," and that to qualify for IRA benefits, "they must meet one of 3 criteria: tribal affiliation, tribal descent plus residence on a reservation, or the half-blood test.").

[241] Cohen Handwritten Note.

[242] *Alaska Legal Issues* at 3.

[243] Letter from William L. Paul, Field Agent, at 6 (Feb. 26, 1937) ("Section 19 defines the word 'Indian' and the word 'tribe' and the words 'adult Indians.' By so many words 'Eskimos and other aboriginal peoples of Alaska shall be considered Indians', and so the limitation of one-half blood or more does not apply to Alaska.").

[244] Memorandum from D'Arcy McNickle, Indian Organization Division to Fred H. Daiker, Assistant to the Commissioner of Indian Affairs (June 15, 1937).

[245] Sol. Op. M-37043 at 14.

Alaska Definition was intended to bring clarity to an issue of active legal debate. The Solicitor had opined in 1894 that Alaska Natives did not enjoy the same trust relationship with the United States as did Indians in the conterminous United States.[246] This view continued into the early 20th century, where it was not uncommon for federal statutes to distinguish "Eskimos" from "Indians." In the Alaska Native Allotment Act, for example, Congress in 1906 provided for land in restricted fee "to any Indian or Eskimo of full or mixed blood…."[247] Similarly, in 1926, the Alaska Native Townsite Act provided for a deed to be issued to "a tract claimed or occupied by an Indian or Eskimo of full or mixed blood."[248] Through inclusion of the disjunctive conjunction "or," it is clear that Congress then considered the term "Indian" to be distinct from "Eskimo." This was the view elsewhere within the federal government, as well, with the Census Bureau having long-classified Alaska "aboriginal stock" as including "Aleut, Eskimo, [and] Indian."[249] Relatedly, and as discussed above, the jurisdiction of the OIA had not been extended to the Alaska Territory until 1931.

The legal implications of this ethnographic distinction were also on contemporaneous display, as the Supreme Court of Canada considered this very issue in 1938, with the Government of Canada arguing that "Eskimos" were not, in fact, "Indians" for the purposes of the foundational British North America Act, 1867.[250] It is inconceivable that Assistant Solicitor Cohen would have been unfamiliar with these academic and legal conversations. As such, and against this historical backdrop, it is probable that he intended the Alaska Definition to simply remove any doubt as to the availability of certain benefits to "Eskimos" under the *Indian* Reorganization Act. Through this lens, the Alaska Definition then functions as a defined term.

Interpreting the Alaska Definition in this manner also avoids the challenges associated with Sol. Op. M-37043's unconstrained, stand-alone definition. As described by the Department's three Assistant Solicitors in their joint opinion on the matter, reading the Alaska Definition into the Categories provides necessary limits "as to what persons of [Alaska Native] blood were eligible for benefits and organization."[251] Viewed in this light, one begins to see the reasonableness of Assistant Solicitor Cohen's insistence that the Alaska Definition be incorporated into the Categories.

Sol. Op. M-37043's analysis of IRA section 19 wholly neglected to consider this alternative, ethnographic-based justification for the Alaska Definition. Given the significance of IRA section 19 in determining eligibility, until there has been a thorough consideration of how to interpret the relationship between the Alaska Definition and the Categories, the Secretary should refrain from accepting land in trust in Alaska pursuant to IRA section 5.

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[246] John Brady, *et al*., Alaska-Legal Status of Natives, 19 L.D. 323 (1894).

[247] Alaska Native Allotment Act.

[248] *Ibid*.

[249] Bureau of the Census, Howard G. Brunsman, "General Characteristics: Alaska," *United States Census of Population: 1950*, (Washington, DC: Government Printing Office, 1952).

[250] *Reference whether "Indians" includes "Eskimo"* [1939] 2 DLR 417; [1939] SCR 104.

[251] *Alaska Legal Issues* at 3.

D. The AIRA and IRA Section 5 Eligibility.

In addition and further to the lengthy discussion in Sol. Op. M-37043 regarding the Alaska Definition, Sol. Op. M-37043 separately cites to a footnote in the United States Supreme Court's ("Supreme Court") opinion in *Carcieri v. Salazar*[252] to conclude that "Interior need not render a determination whether Alaska Native tribes fit within any of the other definitions of 'Indian' in Section 19 of the IRA (…)."[253] In context, Justice Thomas, writing for the majority, observed that:

> In other statutory provisions, Congress chose to expand the Secretary's authority to particular Indian tribes not necessarily encompassed within the definitions of "Indian" set forth in [IRA section 19].[254]

To this sentence was appended a footnote, which read:

> *See, e.g.*, [AIRA § 1] ("Sections … [5] … and [19] of [the IRA] shall after May 1, 1936, apply to the Territory of Alaska"); §1041e(a) ("The [Shawnee] Tribe shall be eligible to have land acquired in trust for its benefit pursuant to section 465 of this title …"); §1300b-14(a) ("[IRA sections 5 and 19] hereby made applicable to the [Texas] Band [of Kickapoo Indians] …"); §1300g-2(a) ("[IRA sections 5 and 19] shall apply to the members of the [Ysleta Del Ser Pueblo] tribe, the tribe, and the reservation").[255]

Given the complicated history of the IRA and AIRA, it is unlikely that the Supreme Court intended to make a pronouncement regarding trust acquisition eligibility in Alaska through such an illustrative, non-explanatory footnote. And with respect to Sol. Op. M-37043, it is my opinion that it is an overstatement to assert that "[t]he Supreme Court endorsed" its view that "the plain language of the Alaska IRA provides its own express authority for the Secretary to take land into trust for Alaska Natives."[256]

It is certainly true that AIRA section 1, by its terms, extended IRA section 5 to the Territory of Alaska. As discussed above, such a specific inclusion of applicable provisions was necessary to overcome the Territorial Prohibition of IRA section 13. It does not follow, however, that the extension of the Secretary's trust acquisition authority over a geographic area makes all Alaska Natives therein residing eligible to petition the Secretary to take land in trust. In this context, it seems significant that AIRA section 1 also extended to Alaska section 19 of the IRA. The list of IRA provisions identified in AIRA section 1 functions as an expansion of the Alaska Proviso, which when read together delimit the IRA provisions that are available in Alaska. As such, it is reasonable to conclude that section 19 functions as a statutory constraint on the Secretary's trust acquisition authority in Alaska in the same manner it does in the conterminous United States. This view is lent support by the fact that the Department's Assistant Solicitors felt compelled to

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[252] 555 U.S. 379 (2009).

[253] Sol. Op. M-37043 at 11.

[254] 555 U.S. at 392.

[255] *Ibid*.

[256] Sol. Op. M-37043 at 10-11.

provide their opinion on the scope of the Alaska Definition in 1937. If inclusion on the list of provisions identified in AIRA section 1 functions as described in Sol. Op. M-37043, there would have been no need for such an interpretation of IRA section 19 from the Solicitor's Office. The Department's interpretation of the statutory language during the AIRA's early implementation should be given great weight, particularly when considering the impact of the AIRA's "definitions" provision to Alaska.

1. AIRA Criteria.

In reviewing the work of the Solicitor's Office in their examination of the AIRA and its history, an additional concern that was not addressed in Sol. Op. M-37043 or other Department advice merits attention. AIRA section 1 states:

> Sections 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 section 16, 17, and 10 of the [IRA].[257]

As discussed above, the "common bond" or AIRA Criteria was adopted to address "the peculiar nontribal organizations under which the Alaska Indians operate…,"[258] with "no tribal organizations as the term is understood generally."[259] AIRA section 1 introduces the AIRA Criteria by referring to "groups of Indians in Alaska not heretofore recognized as bands or tribes." As such, there was an awareness within Congress and the Department that certain groups in Alaska were "heretofore recognized," meaning that prior to May 1, 1936, the federal government had taken actions toward a band or tribe on a more-or-less sovereign-to-sovereign basis, or had clearly acknowledged a trust responsibility.[260] That these groups existed in Alaska is readily apparent, in that Congress by land reservation and statute had "recognized" the Metlakatla Indian Community at Annette Island in 1891,[261] and the Tlingit and Haida Indians in 1935.[262]

Further, prior to 1936, the President or Secretary had on numerous occasions withdrawn public lands for the use and occupancy of Alaska Natives.[263] In contrast to these "bands or tribes" of Alaska Natives that the Department understood to be "recognized," there were other groups that were encouraged to organize under the AIRA "*regardless* of past tribal or community

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[257] AIRA, § 1.

[258] H.R. Rep. No. 74-2244 at 1.

[259] *Id.* at 1-2.

[260] Deputy Solicitor's Memorandum at 9.

[261] Act of Mar. 3, 1891.

[262] Act of June 19, 1935, ch. 275, 49 Stat. 388.

[263] Whether the establishment of such reservations constitute "recognition" of an Alaska Native band or tribe requires a thorough examination of the circumstances of the land withdrawal.

affiliations."[264] In these cases, organization was possible through the AIRA Criteria's "common bond" standard. For such groups, AIRA section 1 specifically identifies IRA sections 10, 16, and 17 as provisions available to entities so organized. Again, these three specifically identified provisions relate to adoption of a constitution and bylaws, corporate charters, and corporate loans. The interpretation of AIRA section 1 discussed below, in light of the historical context, may impact eligibility for IRA section 5 trust acquisitions, should such authority ultimately be found to still exist.

The Privileges and Immunities Amendments enacted in 1994 prohibit the Department from treating federally recognized tribes dissimilarly through "regulation or administrative decision or determination."[265] Congress, however, is not bound by this restriction, and may limit the applicability of certain statutory provisions as against particular tribes, as it has on several occasions.[266] Sol. Op. M-37043 did not address the District Court's finding in *Akiachak Native Community v. Jewell* that the Alaska Prohibition in the Department's fee-to-trust regulations violated the IRA's Privileges and Immunities Amendments.[267] In relevant part, the Privileges and Immunities Amendments state:

> Any 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 available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.[268]

While recognizing the District Court's decision as persuasive authority,[269] its conclusions rely on the premise that IRA section 5 was made generally applicable in Alaska in the same way as in the conterminous United States, and that the Department's regulations created the problematic administrative distinctions among federally recognized tribes. Whether this is accurate or not turns on the conclusions to the various issues raised in this Opinion. To be clear, the issue is not whether a particular Alaska Native group is federally recognized, but whether a federally recognized group also meets the statutory requirements Congress established for eligibility. The District Court in *Akiachak* did not consider, and the parties did not brief, whether or how Congress may have intended to distinguish eligibility for trust lands and other IRA benefits in Alaska.

The Department's early implementation of the AIRA indicates that it viewed Congress as limiting application of the IRA to groups organizing under the AIRA Criteria to IRA sections 10,

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[264] Memorandum, Felix Cohen, Assistant Solicitor, to Mr. [Allen G.] Harper[, Special Assistant to the Commissioner of Indian Affairs] (Dec. 18, 1936) (emphasis added).

[265] 25 U.S.C. § 5123(g).

[266] *See, e.g.*, IRA § 19, *codified as amended at* 25 U.S.C. § 5129; Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 1785; Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116; Texas Band of Kickapoo Act of 1983, Pub. L. No. 97-429, 96 Stat. 2269.

[267] *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 1 (D.D.C. 2013), *vacated*, 827 F.3d 100 (D.C. Cir. 2016).

[268] 25 U.S.C. § 5123(g).

[269] *Koi Nation*, 361 F. Supp. 3d at 52.

16, and 17. As distinct from those "heretofore recognized" tribes or bands of Alaska Natives, "[t]he criterion of organization [under the AIRA Criteria] was adopted from section 9 of the Federal Credit Union Act, and the interpretation of this language by the authorities administering that act [was] looked to for guidance in determining the eligibility of native groups seeking to organize."[270] This focus on economic development is further expressed in the Department's instructions on organizing groups under the AIRA Criteria ("Alaska Instructions"), approved by the Secretary in December 1937.[271]

The Alaska Instructions set forth three potential forms of organization under the AIRA Criteria: (1) groups comprising all Alaska Native residents of a locality seeking to carry out municipal and public activities, as well as economic enterprises; (2) groups comprising all Alaska Native residents of a locality seeking to organize solely for economic purposes; and (3) groups not comprising all Alaska Native residents of a locality but seeking to organize solely for economic purposes based on a common bond of occupation or association. From 1938 to 1971, the Department organized nearly 70 such groups, and would vary the powers contained in their respective constitutions depending on whether they established themselves for a commercial purpose, or for "self-government with a status similar to a municipal corporation," in which case they "would either be restricted or broad."[272]

Based on this history, there is an argument that Congress intended to extend certain provisions of the IRA in Alaska based on the circumstances of Alaska Native organization. Before the Secretary considers accepting land in trust in Alaska pursuant to IRA section 5, this seeming incongruity should be addressed using traditional tools of statutory construction and interpretation along with detailed analysis of the impact of the Privileges and Immunities Amendments.

V. Conclusion.

As detailed above, uncertainty over the effect of the Statehood Act on the Secretary's underlying statutory authority, the relationship between the Alaska Definition and IRA section 19's Categories, the impact of the Alaska Criteria on eligibility under the AIRA, and the effect of ANCSA on federal responsibilities over Alaska Native lands, all caution against the Secretary implementing IRA section 5 in Alaska pursuant to 25 C.F.R. Part 151. Without further clarification or direction from Congress and given the near certainty of future litigation, further substantial legal analysis is required before concluding that IRA section 5 authorizes the Secretary to take land in trust for any particular Alaska Native tribe.

A departure from the original policy of the Department that the Secretary not exercise his or her discretionary authority to accept land in trust in Alaska should be strongly supported by weighty legal analysis, informed by legislative history, the Department's contemporaneous interpretations of the scope of the Secretary's authority, and the views of Alaska Native leadership in the period immediately surrounding ANCSA's enactment, none of which Sol. Op. M-37043 clearly provided.

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[270] Cohen 1942 at 414.

[271] *Ibid*.

[272] As discussed above, Congress eliminated such distinctions in 1994. *See infra* n.110.

Ultimately, the legal uncertainty and questions of appropriate Department policy with regard to land in trust in Alaska are best answered by the constitutional branch that enacted the IRA, the Alaska IRA, the Statehood Act, ANCSA and FLPMA: the United States Congress. Absent such clear direction, a determination by the Secretary to accept land in trust in Alaska would likely be subject to protracted litigation and a credible APA challenge asserting that the Department's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." [273]

[273] Administrative Procedure Act, 5 U.S.C. § 706(2)(A).