



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

IN REPLY REFER TO:

**JAN 13 2017**

M-37043

Memorandum

To: Secretary

From: Solicitor

Subject: Authority to Acquire Land into Trust in Alaska

## **I. Introduction**

This Memorandum analyzes whether the Alaska Native Claims Settlement Act (“ANCSA”),<sup>1</sup> the Federal Land Policy and Management Act (“FLPMA”),<sup>2</sup> or the Supreme Court’s decision in *Carcieri v. Salazar*,<sup>3</sup> limit the authority of the Secretary of the Interior (“Secretary”) to accept land in trust in Alaska under the Indian Reorganization Act (“IRA”).<sup>4</sup> As set forth below, I have determined that Congress’s extension of Section 5 of the IRA<sup>5</sup> (the provision authorizing the Secretary to acquire land in trust for Indians) to Alaska in 1936 provides specific authority for the Secretary to take Alaska lands into trust. That authority is not constrained by the Supreme Court’s *Carcieri* decision. Moreover, neither ANCSA nor FLPMA expressly or impliedly repeal that authority.<sup>6</sup>

## **II. Background and Relevant Laws**

### **A. Land Tenure in Alaska Prior to 1934**

The history of the United States’ relationship with Alaska Natives is complex and has been the subject of many court decisions, statutes, administrative actions, and legal opinions. For purposes of this opinion, I focus on those historical and legal developments that relate to land tenure in Alaska. Under the 1867 Treaty of Cession, Russia ceded its territorial possessions in North America, providing that “[t]he uncivilized tribes will be subject to such laws and regulations as

<sup>1</sup> Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629h).

<sup>2</sup> Pub. L. No. 94-579, 90 Stat. 2744 (1976) (codified as amended at 43 U.S.C. §§ 1701-1787).

<sup>3</sup> 555 U.S. 379 (2009).

<sup>4</sup> Act of June 18, 1934, ch. 576, 48 Stat. 984.

<sup>5</sup> 25 U.S.C. § 5108. Effective September 1, 2016, the compilers of the U.S. Code editorially reclassified Section 5 of the IRA as 25 U.S.C. § 5108. This opinion will use the new designations.

<sup>6</sup> The conclusion of this memorandum notwithstanding, an application to put land in trust in Alaska under the IRA can only be approved if it meets the requirements of the Department’s fee-to-trust regulations at 25 C.F.R. Part 151. Part 151 limits our authority to acquire land in trust to federally recognized tribes, “individual Indians” as defined by the regulations, and tribal corporations chartered under Section 17 of the IRA pursuant to certain statutory authorities not relevant here. *See* 25 C.F.R. § 151.2. We will comply with our regulations in applying our authority to acquire land in trust in Alaska.

the United States may, from time to time, adopt in regard to aboriginal tribes of that country.”<sup>7</sup> In the decades that followed, several acts of Congress recognized the rights of Alaska Natives to the lands they occupied.<sup>8</sup> The 1884 Organic Act, which provided for a civil government in what was then a military district controlled by the United States government,<sup>9</sup> declared “[t]hat the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them.”<sup>10</sup> In 1900, a second Organic Act provided that “Alaska Natives were not to be disturbed in their use and occupancy of land in Alaska.”<sup>11</sup> The Supreme Court has held that these Acts did not grant Alaska Natives permanent ownership rights for Fifth Amendment purposes, but rather preserved Indian title until further congressional or judicial action was taken.<sup>12</sup>

Before the enactment of the IRA, Congress passed several laws providing land for Alaska Natives. In 1891, Congress established a reservation for the Metlakatla Indians, who had recently moved to Alaska from British Columbia.<sup>13</sup> Other reserves for Alaska Natives were established by executive order.<sup>14</sup> There were approximately 19 large reserves of different origins in Alaska by the time the IRA was enacted.<sup>15</sup> Meanwhile, Congress provided for individual Alaska Natives to acquire title to land through the Alaska Native Allotment Act<sup>16</sup> and the Alaska Native Townsite Act.<sup>17</sup> The title that individual Alaska Natives received under these statutes was subject to restrictions on alienation.<sup>18</sup>

## **B. The Secretary’s Land Acquisition Authority Under the IRA**

Congress enacted the IRA in 1934 to “establish machinery whereby Indian tribes would be able to assume a greater degree of-self-government, both politically and economically.”<sup>19</sup> The IRA sought to improve the economic status of Indians through, *inter alia*, “ending the alienation of tribal land and facilitating tribes’ acquisition of additional acreage and repurchase of former tribal domains.”<sup>20</sup> Described as the “capstone” of the IRA’s land related provisions,<sup>21</sup> the

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<sup>7</sup> Treaty of Cession, U.S.-Russia, art. III, Mar. 30, 1867, 15 Stat. 539, 542.

<sup>8</sup> FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 411 (1942) (“1942 COHEN”). See also DAVID S. CASE AND DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 24 n.148 (3d ed. 2012) (“Case & Voluck”).

<sup>9</sup> Alaska did not officially become a U.S. territory until the Act of August 24, 1912, ch. 387, 37 Stat. 512.

<sup>10</sup> Act of May 17, 1884, § 8, 23 Stat. 24, 26.

<sup>11</sup> Act of June 6, 1900, 31 Stat. 321.

<sup>12</sup> *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278 (1955)

<sup>13</sup> See *Metlakatla Indians v. Egan*, 369 U.S. 45, 48 (1962), citing Act of March 3, 1891, § 15, 26 Stat. 1095, 1101.

<sup>14</sup> See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.07[3][b][iii] (Nell Jessup Newton ed., 2012) (discussing the history of reservation policy in Alaska). The President’s authority to establish these reserves was upheld in a May 18, 1923 Solicitor’s Opinion. See 49 Pub. Lands Dec. 592.

<sup>15</sup> See FEDERAL FIELD COMMITTEE FOR DEVELOPMENT PLANNING IN ALASKA, ALASKA NATIVES AND THE LAND 443-446 (1968).

<sup>16</sup> Act of May 17, 1906, Pub. L. No. 59-171, ch. 2469, 34 Stat. 197 (repealed 1971) (permitting any Indian or Eskimo to acquire up to 160 acres of non-mineral land as an “inalienable and nontaxable” homestead).

<sup>17</sup> Act of May 25, 1926, Pub. L. No. 69-280, ch. 379, 44 Stat. 629 (repealed 1976) (providing for individual Alaska Natives to obtain title to lots they occupied).

<sup>18</sup> *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1015 (D. Alaska 1977), *aff’d*, 612 F.2d 1132 (9th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980).

<sup>19</sup> *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

<sup>20</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.05 (2012 ed.).

<sup>21</sup> *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2211 (2012).

Secretary's authority to acquire land in trust for Indians is found in Section 5 of the IRA. Section 5 provides that the Secretary "is authorized, in [her] discretion, to acquire . . . any interest in lands, water rights, or surface rights to lands . . . for the purpose of providing lands for Indians."<sup>22</sup> The statute further provides that "[t]itle to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired."<sup>23</sup>

Section 19 of the IRA defines those who are eligible for IRA benefits.<sup>24</sup> That section provides that the term "tribe" refers to "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation."<sup>25</sup> Section 19 defines "Indian" in three distinct ways:

The term "Indian" . . . shall include all persons of Indian descent who are  
[1] members of any recognized Indian tribe now under [f]ederal 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 shall further  
include [3] all other persons of one-half or more Indian blood.<sup>26</sup>

In addition, Section 19 provides that "Eskimos and other aboriginal peoples of Alaska shall be considered Indians" for purposes of the statute.<sup>27</sup>

However, Section 13, as enacted in 1934, provided that the IRA did not apply to any of the "Territories, colonies, or insular possessions of the United States."<sup>28</sup> It instead specified that only certain enumerated provisions of the statute, and not Section 5, would apply in Alaska.<sup>29</sup> Specifically, these provisions of the IRA initially applicable to Alaska pertained to the appropriation of funds to defray the expenses of tribal organization (Section 9); the establishment of a revolving loan fund for tribal economic development (Section 10); the appropriation of funds for tuition (Section 11); the appointment of Indians to positions in the Indian Office and preference in hiring (Section 12); and tribal organization and the adoption of tribal constitutions (Section 16).

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<sup>22</sup> 25 U.S.C. § 5108.

<sup>23</sup> *Id.*

<sup>24</sup> 25 U.S.C. § 5129.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (numbers in brackets supplied).

<sup>27</sup> *Id.*

<sup>28</sup> 25 U.S.C. § 5118.

<sup>29</sup> *Id.* ("The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16 [25 U.S.C. §§ 5112, 5113, 5115, 5116, and 5123], shall apply to the Territory [State] of Alaska"). Specifically, these provisions of the IRA pertained to: the appropriation of funds to defray the expenses of tribal organization (Section 9); the establishment of a revolving loan fund for tribal economic development (Section 10); the appropriation of funds for tuition (Section 11); the appointment of Indians to positions in the Indian Office and preference in hiring (Section 12); and tribal organization and the adoption of tribal constitutions (Section 16).

In 1936, Congress adopted amendments to the IRA that extended additional IRA provisions to Alaska,<sup>30</sup> including the trust land acquisition authority in Section 5, along with the authority to proclaim new Indian reservations provided by Section 7 of the IRA.<sup>31</sup>

Sections 1, 5, 7, 8, 15, 17, and 19 of the [IRA] shall hereafter apply to the Territory [State] of Alaska: *Provided*, That groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under Sections 16, 17, and 10 of the [IRA].<sup>32</sup>

In addition, Section 2 of the 1936 Act authorized the Secretary to establish reservations on any area of land which had been reserved for the use and occupancy of Alaska Natives and any other public lands occupied by them.<sup>33</sup>

Interior has promulgated regulations guiding the Secretary's exercise of discretion in acquiring land in trust, including pursuant to the IRA. These regulations set forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust for individual Indians and for tribes.<sup>34</sup> The regulations define "tribe," as relevant here, to include "any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians, including the Metlakatla Indian Community of the Annette Island Reserve, which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs..."<sup>35</sup> "Individual Indian" is defined to include, *inter alia*, "any person who is an enrolled member of a tribe..."<sup>36</sup> The regulations further limit acquisitions for individuals to land "located within the exterior boundaries of an Indian reservation, or adjacent thereto," and land that is "already in trust or restricted status."<sup>37</sup> The regulations require that when considering an application for the acquisition of trust land, the Secretary must consider several criteria, including "[t]he existence of statutory authority for the acquisition and any limitations contained in such authority."<sup>38</sup>

### C. *Carcieri v. Salazar*, 555 U.S. 379 (2009)

In 1991, the Narragansett Indian Tribe of Rhode Island ("Narragansett") purchased 32 acres of land in the town of Charleston adjacent to the Tribe's 1,800 acres of settlement lands, which were already held by the Secretary in trust, and asked the Secretary to accept the 32-acre parcel into trust for the Tribe pursuant to Section 5 of the IRA as low income housing for elderly

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<sup>30</sup> Act of May 1, 1936, ch. 254, 49 Stat. 1250 ("Alaska IRA").

<sup>31</sup> 25 U.S.C. § 5110.

<sup>32</sup> 25 U.S.C. § 5119.

<sup>33</sup> Act of May 1, 1936, ch. 254, § 2, 49 Stat. 1250, repealed by Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792 (1976).

<sup>34</sup> 25 C.F.R. § 151.1.

<sup>35</sup> *Id.* § 151.2(b).

<sup>36</sup> *Id.* § 151.2(c).

<sup>37</sup> *Id.* § 151.3(b)(2).

<sup>38</sup> 25 C.F.R. § 151.10(a).

members. Narragansett was acknowledged as a federally recognized tribe in 1983.<sup>39</sup> The Bureau of Indian Affairs (“BIA”) approved Narragansett’s application, and the Interior Board of Indian Appeals affirmed the BIA’s decision.<sup>40</sup>

The State of Rhode Island and the town of Charleston filed an action in federal district court claiming that the Secretary’s decision to take the 32 acres into trust was arbitrary and capricious under the Administrative Procedure Act; that the Rhode Island Indian Claims Settlement Act<sup>41</sup> precluded the acquisition; and that the IRA was unconstitutional and did not apply to Narragansett. The district court ruled in favor of the Secretary.<sup>42</sup> In 2007, the First Circuit, *en banc*, affirmed the district court ruling, rejecting the State’s argument that Section 5 did not authorize the BIA to acquire land for a tribe who first received federal recognition after the date the IRA was enacted.<sup>43</sup> The State sought review in the Supreme Court.

In a 6-3 ruling (Breyer, J., concurring, Souter & Ginsburg, JJ., concurring in part and dissenting in part, Stevens, J., dissenting), the Supreme Court reversed the First Circuit on the meaning of “now” in the phrase “now under Federal jurisdiction” in the first definition of Indian. Justice Thomas, writing for the majority, determined that the Court’s task was to interpret the term “now” in the statutory phrase “now under Federal jurisdiction” in Section 19 of the IRA.<sup>44</sup> The Court analyzed the ordinary meaning of the word “now” in 1934, within the context of the IRA, as well as in contemporaneous departmental correspondence, concluding that “the term ‘now under Federal Jurisdiction’ in § [19] unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934.”<sup>45</sup> The majority, however, did not address the meaning of the phrase “under [f]ederal jurisdiction.” The Court, however, found that the parties in effect had conceded that the Narragansett were not under federal jurisdiction in 1934. As a result, the Court held that the Secretary lacked authority to take the land at issue into trust for the Narragansett.

While the *Carcieri* Court held that the first definition of “Indian” in Section 19 unambiguously refers to those tribes that were under federal jurisdiction in 1934, the Court also acknowledged that Congress expressly exempted some tribes from the requirement of demonstrating their 1934 jurisdictional status. The Court noted that “[i]n other statutory provisions, Congress chose to expand the Secretary’s authority to particular Indian tribes not necessarily encompassed within

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<sup>39</sup> Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6,177 (Feb. 10, 1983).

<sup>40</sup> *Town of Charleston, Rhode Island v. Eastern Area Director, Bureau of Indian Affairs*, 35 IBIA 93 (June 29, 2000).

<sup>41</sup> Pub. L. No. 95-395, 92 Stat. 813 (1978).

<sup>42</sup> *Carcieri v. Norton*, 290 F. Supp. 2d 167, 179 (D.R.I. 2003).

<sup>43</sup> *Carcieri v. Kempthorne*, 497 F.3d 15, 30-31 (1st Cir. 2007).

<sup>44</sup> *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009). Furthermore, while the definition of Indian includes members of “any recognized Indian tribe now under federal jurisdiction,” the Supreme Court did not suggest that the term “recognized” is encompassed within the phrase “now under federal jurisdiction.” *Id.* Consistent with the grammatical structure of the sentence- in which “now” qualifies “under [f]ederal jurisdiction” and does not qualify the word “recognized,”- and consistent with Justice Breyer’s concurring opinion, we construe the term “recognized” and “under [f]ederal jurisdiction” as necessitating separate inquiries. *See* The Meaning of “Under Federal Jurisdiction” for Purposes of the Indian Reorganization Act, Op. Sol. Interior M-37029 at 16-21 (March 12, 2014) (“*Carcieri* M-Opinion”).

<sup>45</sup> *Carcieri*, 555 U.S. at 395.

the definitions of ‘Indian’ set forth in [Section 19]”<sup>46</sup> and cited to numerous statutes as examples in which Sections 5 and 19 apply to tribes regardless of whether they were under federal jurisdiction in 1934, including the statute that specifically extends Sections 5 and 19, among other provisions, to Alaska.<sup>47</sup>

#### D. The Enactments of ANCSA and FLPMA

In the 1950s and 1960s, Alaska Natives began to actively assert aboriginal land claims. Although the Alaska Statehood Act in 1958 recognized the existence of Native land claims,<sup>48</sup> it also granted the State the right to select and receive title to approximately 102.5 million acres of Alaska’s nearly 600 million acres.<sup>49</sup> Alaska Natives protested the State’s selections to Interior on the basis that the selected lands were subject to their use, occupancy, and claims of right. Ultimately, in 1966 Interior announced a moratorium on dispositions of federal lands in Alaska, pending Congressional settlement of Native land claims.<sup>50</sup> This moratorium was followed by Public Land Order 4582, January 17, 1969 that froze further patenting or approval of applications for public lands in Alaska, pending the settlement of claims.<sup>51</sup>

In 1971, Congress enacted ANCSA,<sup>52</sup> “a comprehensive statute designed to settle all land claims by Alaska Natives.”<sup>53</sup> In enacting ANCSA, Congress broadly declared its findings and policy that:

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<sup>46</sup> *Id.* at 392.

<sup>47</sup> *Id.* at 392 n.6 (“25 U.S.C. § 473a (‘Sections . . . 465 . . . and 479 of this title 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) (‘Statutory provisions applicable. The Act of June 18, 1934 . . . is hereby made applicable to the [Texas] Band [of Kickapoo Indians] . . .’); § 1300g-2(a) (‘The Act of June 18, 1934 . . . , as amended, . . . shall apply to the members of the [Ysleta del Sur Pueblo] tribe, the tribe, and the reservation’)) (ellipses original).

<sup>48</sup> Act of July 7, 1958, Pub. L. No. 85-508, § 4, 72 Stat. 339 (“the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation.”).

<sup>49</sup> *Id.* § 6(b), 72 Stat. at 340 (State of Alaska is granted and entitled to select up to 102,550 acres of land “which are vacant, unappropriated, and unreserved at the time of their selection: Provided, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the lands so occupied.”)

<sup>50</sup> Donald L. Simasko, *Alaska Land Problems*, 10 NAT’L INST. FOR PETROLEUM LANDMEN 333, 350-51 (SW Legal Foundation 1969). Secretary Udall suspended issuance of federal patents and federal approval of state land selections until Alaska Native claims based on aboriginal possession were resolved. *State of Alaska v. Udall*, 420 F.2d 938 (9th Cir. 1969). See also *Edwardsen v. Morton*, 369 F. Supp. 1359 (D.D.C. 1973) (Native lands in Alaska were held valid under claims of aboriginal title and Section 4 under ANCSA did not extinguish plaintiff’s trespass claims.).

<sup>51</sup> Withdrawal of Unreserved Lands, 34 Fed. Reg. 1,025, ¶ 1 (Jan. 23, 1969) (“Subject to valid existing rights, and subject to the conditions hereinafter set forth, all public lands in Alaska which are unreserved . . . are hereby withdrawn from all forms of appropriation and disposition under the public land laws, including section by the State of Alaska . . . and reserved under the jurisdiction of the Secretary of Interior for the determination and protection of the rights of the native Aleuts, Eskimos, and Indians of Alaska.”).

<sup>52</sup> Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629h).

<sup>53</sup> *Alaska v. Native Village of Venetie Tribal Gov’t.*, 522 U.S. 520, 523 (1998).

the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, 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 or to the legislation establishing special relationships between the United States Government and the State of Alaska[.]<sup>54</sup>

Accordingly, ANCSA extinguished aboriginal land claims and certain use and occupancy rights in Alaska.<sup>55</sup> It also explicitly revoked “the various reserves set aside . . . for Native use” groups (not including the Annette Island Reserve established for the Metlakatla Indian Community) pursuant to legislation or by Executive or Secretarial Order.<sup>56</sup> ANCSA additionally repealed the existing authority to patent new allotment applications for individual Alaska Natives.<sup>57</sup>

Congress also authorized the transfer of \$962.5 million of state and federal funds and approximately 44 million acres of Alaska land to regional and village Native corporations that were to be formed pursuant to the statute.<sup>58</sup> ANCSA set forth a complex statutory scheme for the distribution of the cash and land. While ANCSA corporations received title to the transferred land in fee simple, the Alaska Native tribes did not receive land or money pursuant to ANCSA.<sup>59</sup> Instead, their members received stock in the Native-owned corporations that received settlement land and funds.<sup>60</sup> In addition, the Village corporations, which were organized on behalf of Native villages under the statute, located within a revoked reserve had the option of taking full legal title to its former reserve as an alternative to the surface estate acreage to which it otherwise would have been entitled.<sup>61</sup>

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<sup>54</sup> 43 U.S.C. § 1601(b).

<sup>55</sup> *Id.* § 1603(b) (“[a]ll aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.”).

<sup>56</sup> *Id.* §§ 1603, 1618(a). Prior to the enactment of ANCSA, only six villages obtained reservations under Section 2 of the Alaska IRA. *See* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.07[3][b][iii] (2012 ed.). *See also Alaska Native Management Report*, May 15, 1973, at 5; Case & Voluck at 106.

<sup>57</sup> 43 U.S.C. § 1617(a). (“No Native covered by the provisions of this Act, and no descendant of his, may hereafter avail himself of an allotment under the provisions of the Act of February 8, 1887 (24 Stat. 389), as amended and supplemented, or the Act of June 25, 1910 (36 Stat. 363). Further, the Act of May 17, 1906 (34 Stat. 197), as amended, is hereby repealed. Notwithstanding the foregoing provisions of this section, any application for an allotment that is pending before the Department of the Interior on the date of enactment of this Act may, at the option of the Native applicant, be approved and a patent issued in accordance with said 1887, 1910, or 1906 Act, as the case may be, in which event the Native shall not be eligible for a patent under section 1613(h)(5) of this title.”)

<sup>58</sup> *Id.* §§ 1605, 1607.

<sup>59</sup> *See id.* § 1618.

<sup>60</sup> *See id.* §§ 1606-1607.

<sup>61</sup> *Id.* § 1618(a) (“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 section 497 of Title 25, are hereby revoked subject to any valid existing rights of non-Natives. This section shall not apply to the Annette Island Reserve established by section 495 of Title 25”).

Despite its changes to the Native land ownership scheme in Alaska through the revocation of the reservation system in Alaska,<sup>62</sup> ANCSA did not repeal or amend the Secretary's authority to place land into trust in Alaska pursuant to Section 5 of the IRA, as extended by the 1936 amendments to the IRA ("Alaska IRA").

Five years later, in 1976, Congress enacted FLPMA, which rescinded the Secretary's authority to establish reservations in Alaska under Section 2 of the Alaska IRA and her authority to patent lots within Alaska Native townships, but did not address other authorities with respect to Alaska lands, including the application of Section 5 of the IRA to Alaska.<sup>63</sup>

### **E. The "Alaska Exception" in the Department of the Interior's Land-Into-Trust Regulations**

The ability of the Secretary to take land into trust in Alaska using her IRA authority has been the subject of internal scrutiny and debate at the Department of the Interior ("Interior") for nearly forty years. In 1978, after the Native Village of Venetie Tribal Government acquired its former reservation lands in fee, the Associate Solicitor – Indian Affairs reviewed the question of whether ANCSA precluded Interior from taking that property back into trust. In a memorandum, he concluded that in light of "the clear legislative intent and policy expressed in ANCSA's extensive legislative history, it would . . . be an abuse of the Secretary's discretion to attempt to use Section 5 of the IRA . . . to restore the former Venetie Reserve to trust status" and that "Congress intended permanently to remove from trust status all Native land in Alaska except allotments and the Annette Island Reserve" ("Fredericks Memorandum").<sup>64</sup>

In 1980, Interior promulgated regulations governing the acquisition of land into trust process for the first time.<sup>65</sup> The final regulations included a provision stating: "These regulations do not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or it[s] members."<sup>66</sup>

In 1999, the Solicitor considered comments on a proposed rule that would have, among other things, continued to bar taking Native land in Alaska in trust under the IRA, but in its preamble, also requested views on the continued validity of the Fredericks Memorandum.<sup>67</sup> Comments were received from Alaska Native governments and groups, the State of Alaska and leaders of

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<sup>62</sup> *See id.*

<sup>63</sup> Pub. L. No. 94-579, 90 Stat. 2744 (1976) (codified as amended at 43 U.S.C. §§ 1701-1787). FLPMA also repealed the Secretary's authority to reserve public domain lands in Alaska for use by Alaska Natives. *See id.* § 704(a) (repealing the Act of May 31, 1938, 52 Stat. 593 (formerly 25 U.S.C. § 497)).

<sup>64</sup> "Trust Land for the Natives of Venetie and Arctic Village," Memorandum to Assistant Secretary – Indian Affairs from Associate Solicitor – Indian Affairs Thomas W. Fredericks at 3 (Sept. 15, 1978).

<sup>65</sup> Land Acquisitions, 45 Fed. Reg. 62,034 (Sept. 18, 1980).

<sup>66</sup> *Id.* at 62,036 (formerly codified at 25 C.F.R. § 151.1) (the "Alaska exception"). The preamble to the final rule stated that "[i]t was also pointed out that the Alaska Native Claims Settlement Act does not contemplate the further acquisition of land in trust status, or the holding of land in such status, in the State of Alaska, with the exception of acquisitions for the Metlakatla Indian Community." *Id.* at 62,034.

<sup>67</sup> Acquisition of Title to Land in Trust, 64 Fed. Reg. 17,574, 17,578 (Apr. 12, 1999).

the Alaska State legislature, and Interior conducted its own internal legal review.<sup>68</sup> The Solicitor in 2001 rescinded the Fredericks Memorandum, concluding that “there is substantial doubt about the validity of the conclusion reached in the 1978 Opinion” and opining that “[t]he failure of Congress to repeal [Section 5 of the IRA as extended to Alaska] when it was repealing [other provisions] affecting Indian status in Alaska . . . raises a serious question as to whether the authority to take land into trust in Alaska still exists.”<sup>69</sup>

At the same time, Interior published a final rule amending the land-into-trust regulations and also including a provision substantially similar to the Alaska exception in the original regulations.<sup>70</sup> Later that same year, and without comment, Interior withdrew the final rule that would have replaced the land acquisition regulations.<sup>71</sup> The original exception in the regulations prohibiting the acquisition of Alaska lands into trust therefore remained in effect, although the Fredericks Memorandum was not reinstated. The Alaska exception was challenged in federal court by four Alaska Native tribes and one individual Alaska Native. The challenger prevailed in district court.<sup>72</sup>

The existence of the Alaska exception neared a conclusion in 2014, when “a number of recent developments, including a pending lawsuit, caused Interior to look carefully at this issue again.”<sup>73</sup> After it “carefully reexamined the legal basis for the Secretary’s discretionary authority to take land into trust in Alaska under Section 5 of the IRA,” Interior then issued a final rule eliminating the regulatory ban on trust land acquisitions in Alaska, provided in the 25 C.F.R. Part 151 regulations.<sup>74</sup> Interior concluded that ANCSA left intact the Secretary’s land-into-trust authority in Alaska and restated Interior’s policy that “there should not be different classes of federally recognized tribes.”<sup>75</sup>

### III. Discussion

As set forth below, and consistent with the recently enacted 2014 regulation, I reaffirm that Congress’s extension of the IRA to Alaska in 1936 provides specific authority to take lands into trust on behalf of Alaska Natives.<sup>76</sup> In addition, the Supreme Court’s opinion in *Carcieri* does not limit this authority. The *Carcieri* decision does not address taking land into trust for groups that either (1) fall under other definitions of “Indian” enumerated in Section 19 of the IRA, or (2) are the subject of separate legislation authorizing the Secretary to apply the IRA or to otherwise take land into trust for them. Alaska Native tribes, as explained below, fall into both of these

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<sup>68</sup> See “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 to Assistant Secretary – Indian Affairs from Solicitor John D. Leshy (Jan. 16, 2001).

<sup>69</sup> *Id.* at 1.

<sup>70</sup> Acquisition of Title to Land in Trust, 66 Fed. Reg. 3,452, 3,460 (Jan. 16, 2001). The preamble to the final rule stated that Interior would consider the legal and policy implications associated with the Alaska exception over the course of three years, but that never occurred.

<sup>71</sup> See Acquisition of Title to Land in Trust, 66 Fed. Reg. 56,608, 56,609 (Nov. 9, 2001).

<sup>72</sup> *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 1 (D.D.C. 2013), *vacated on other grounds by Akiachak Native Cmty. v. U.S. Dep’t of the Interior*, 827 F.3d 100 (2016).

<sup>73</sup> Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76,888, 76,889 (Dec. 23, 2014).

<sup>74</sup> *Id.* at 76,889-90.

<sup>75</sup> *Id.* at 76,890.

<sup>76</sup> See 25 U.S.C. §§ 5108, 5119.

categories. In particular, the Alaska IRA expressly made Section 5 of the IRA applicable to Alaska Native tribes and renders immaterial the question of whether they were “under [f]ederal jurisdiction” in 1934 as required by the Supreme Court’s interpretation of the first definition of “Indian” in the IRA.<sup>77</sup>

Furthermore, the Secretary’s authority to acquire land in trust for Alaska Natives was not repealed or otherwise amended when, several decades after the IRA, Congress enacted ANCSA and FLPMA.<sup>78</sup> Although ANCSA settled aboriginal land claims in a manner that did not create new trust land in Alaska, Congress never extinguished or abrogated the existing land-into-trust authority expressly granted by the Alaska IRA. Similarly, Congress did not repeal or otherwise limit the Secretary’s land acquisition authority under the IRA when enacting FLPMA.

In analyzing our trust acquisition authority in Alaska, our interpretation of the relevant statutes follows the same two-step analysis that courts follow when reviewing an agency’s interpretation. At the first step, the agency must answer “whether Congress has spoken directly to the precise question at issue.”<sup>79</sup> If the language of the statute is clear, the court and the agency must give effect to “the unambiguously expressed intent of Congress.”<sup>80</sup> If, however, the statute is “silent or ambiguous,” pursuant to the second step, the agency must base its interpretation on a “reasonable construction” of the statute.<sup>81</sup>

#### **A. The 1936 Alaska Amendments to the IRA (Alaska IRA)**

Here, the plain language of the Alaska IRA provides its own express authority for the Secretary to take land into trust for Alaska Natives, and is an independent basis by which the *Carcieri* decision is rendered inapplicable to trust acquisitions in Alaska.<sup>82</sup> Congress extended the applicability of additional provisions of the IRA to Alaska through legislation enacted in 1936. The first section of the Alaska IRA states that:

Sections 1, 5, 7, 8, 15, 17, and 19 of the [IRA] shall hereafter apply to the Territory [State] 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

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<sup>77</sup> *Carcieri*, 555 U.S. at 395.

<sup>78</sup> 66 Fed. Reg. at 76,890.

<sup>79</sup> *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

<sup>80</sup> *Id.* at 843.

<sup>81</sup> *Id.* at 840.

<sup>82</sup> In *Akiachak*, the United States similarly argued that “. . . while Section 13 of the IRA expressly extended certain provision[s] of the IRA to the territory of Alaska, Section 5 was not one of those initially extended to Alaska. It was not until 1936 when the major provisions of the Indian Reorganization Act, including Sections 5 and 7, were expressly extended to Alaska Natives through a separate provision. The 1936 Act that extended Section 5 to Alaska did not use the word ‘now’ in its special criteria. Therefore, the Secretary’s statutory authority to take Alaska land into trust for the benefit of Alaska Natives, is not governed by the language interpreted by the Supreme Court in *Carcieri*.” Defendants’ Supplemental Brief Pursuant to Court Order at 8-9, *Akiachak Native Community v. Salazar*, No. 06-00969, (D.D.C. July 6, 2012).

to receive charters of incorporation and Federal loans under Sections 16, 17, and 10 of the Act of June 18, 1934.<sup>83</sup>

This section of the Alaska IRA as originally enacted remains in place and has never been repealed.<sup>84</sup> By its terms, therefore, the Alaska IRA extends the Secretary's land-into-trust authority in Section 5 of the IRA to Alaska, which authorizes the Secretary to acquire lands on behalf of "Indians."<sup>85</sup>

The Supreme Court endorsed this view in *Carcieri*. It acknowledged that "[i]n 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 § [5129]," and cited to numerous statutes as examples in which Sections 5 and 19 apply to tribes regardless of whether they were under federal jurisdiction in 1934.<sup>86</sup> The *Carcieri* Court expressly cited to the Alaska IRA as an example of one of those statutes.<sup>87</sup> The Secretary, therefore, possesses the requisite authority to acquire land in trust for Alaska Natives under the Alaska IRA and 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, including the first definition that was at issue in the *Carcieri* decision.

The objective of the Alaska IRA was to remedy the limited applicability of the IRA in Alaska.<sup>88</sup> For instance, because Alaska Natives generally did not live on reservations and were not generally "grouped as bands or tribes, as in the States," Section 16 of the IRA, which authorized tribal constitutional governments, had limited effect in Alaska.<sup>89</sup> Furthermore, due to a drafting error by the 73rd Congress in 1934, the corporate organization provisions in Section 17 were "inadvertently omitted" from the sections of the IRA initially made applicable to Alaska.<sup>90</sup> Because of this oversight, Alaska Natives could not incorporate and thus were unable to receive money from the credit loan fund established by the original IRA.<sup>91</sup> The Alaska IRA rectified these omissions and made seven additional provisions of the IRA applicable in Alaska, including not only Sections 16 and 17, but also the land-into-trust provision in Section 5.

The language of the Alaska IRA and its legislative history are fully consistent with a congressional intent of entitling Alaska Native tribes to certain benefits of the IRA by virtue of

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<sup>83</sup> 25 U.S.C. § 5119.

<sup>84</sup> Section 2 of the Alaska IRA initially authorized the Secretary to designate Indian reservations in Alaska. Act of May 1, 1936, Pub. Law No. 74-538, § 2, 49 Stat. 1250. However, this provision was repealed in 1976 with the enactment of FLPMA.

<sup>85</sup> The Alaska IRA ensures that Section 19 is applicable to Alaska. While the reference to Alaska Natives in Section 19 was included when the IRA was enacted in 1934, the express extension of Section 19 to Alaska in the Alaska IRA was due to the fact that the term "tribe" in Section 19 was viewed as having little pertinence to Alaska, as emphasized in the Secretary of the Interior's report on the bill. *See* H. Rep. No. 74-2244 at 4 (1936). In response to that concern, Congress in 1936 authorized groups of Alaska Natives to organize as tribes based on "common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district." *See* 25 U.S.C. § 5119.

<sup>86</sup> 555 U.S. at 392.

<sup>87</sup> *Id.* at 392 n.6.

<sup>88</sup> *See* 1942 COHEN at 413.

<sup>89</sup> *See id.* at 414.

<sup>90</sup> *See* H. Rep. No. 74-2244 at 2; *see also* 1942 COHEN at 413-14.

<sup>91</sup> *See* H. Rep. No. 74-2244 at 2.

their status as tribes. In 1936, Secretary of the Interior Harold L. Ickes offered to Congress three reasons for establishing reservations in Alaska: (1) to identify Alaska tribes with the lands they occupy; (2) to demarcate the geographic limits of tribes' jurisdiction; and (3) to protect tribes' economic rights there.<sup>92</sup> With respect to Section 5, both the House and Senate Reports, while sparse, cite the letter from Secretary Ickes stating:

The bill provides that reservations shall be set up by the Secretary of the Interior only upon approval of the majority of the residents of such proposed reservation who vote at a special election. This stipulation is in line with the policy of permitting Indians to participate in deciding matters of importance to them.

Sections 1, 5, 7, and 8 of the Indian Reorganization Act, extended to Alaska by H.R. 9866, are necessary in the establishment and the administration of such reservations.<sup>93</sup>

In the words of Felix Cohen, the Alaska IRA therefore “offered a new source of federal protection to the natives ‘who in the past,’ according to Commissioner of Indian Affairs Collier, ‘have seen their land rights almost universally disregarded, their fishing rights increasingly invaded, and their economic situation grow every year more desperate.’”<sup>94</sup>

The Alaska IRA explicitly made certain provisions of the original IRA, including the provision for taking land into trust, applicable to Alaska Natives. Moreover, to the extent there is any ambiguity in the language of the Alaska IRA, the Indian canon of construction requires us to construe it to benefit Alaska Natives. Our interpretation is confirmed by a report prepared by Interior in 1947 regarding Interior's implementation of the IRA, *Ten Years of Tribal Government Under I.R.A.*, which specifies, in part, tribes that either voted to accept or reject the IRA pursuant to elections under Section 18 of the IRA (“Haas Report”). The Haas Report notes that no elections were held in Alaska as to whether to accept or reject the IRA, because, Alaska Indians “were automatically brought under the law.”<sup>95</sup>

By enacting the Alaska IRA, Congress provided Alaska Natives the ability to enjoy additional benefits of the IRA, including Section 5. No 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.

## **B. Section 19 of The IRA**

As explained above, in *Caricieri*, the Supreme Court noted that in some instances Congress has expressly applied Section 5 of the IRA to particular tribes regardless of the question of whether the tribe was under federal jurisdiction in 1934.<sup>96</sup>

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<sup>92</sup> See H.R. Rep. No. 74-2244 at 4; S. Rep. No. 74-1748 at 4 (1936).

<sup>93</sup> See H.R. Rep. No. 74-2244 at 4 (emphasis supplied).

<sup>94</sup> See 1942 COHEN at 413 (quoting ANNUAL REPORT OF SECRETARY OF THE INTERIOR 163 (1936)).

<sup>95</sup> THEODORE H. HAAS, TEN YEARS OF TRIBAL GOVERNMENT UNDER IRA 3 (1947).

<sup>96</sup> *Caricieri*, 555 U.S. at 392.

In addition, the *Carcieri* decision does not impact the Department’s authority to acquire land in trust for individuals or entities meeting one of the other categories of “Indian” in Section 19. Section 5 of the IRA authorizes the Secretary to acquire land in trust for “Indians.” In Section 19 of the IRA, Congress expressed its intent that “Eskimos and other aboriginal peoples of Alaska shall be considered Indians.”<sup>97</sup> To the extent there is any ambiguity in the IRA, the IRA’s legislative history, its broad remedial purposes, and the Indian canon all establish that Section 5 is applicable to Alaska Natives. We address each in turn.

**1. The plain language of the IRA applies Section 5’s authorization to take land into trust to Alaska Natives**

As discussed above, in 1934, Section 13 of the IRA was plain on its face in applying only certain enumerated sections of the statute to the Alaska Territory.<sup>98</sup> However, in 1936, Congress expressly and plainly added the application of Section 5 of the IRA to the Alaska Territory.<sup>99</sup> The sections initially applicable to Alaska, as enumerated in the original IRA (Sections 9, 10, 11, 12, and 16) all contain the terms “Indian” or “Indians.”<sup>100</sup> Section 5 of the IRA specifically states that the Secretary of the Interior is “authorized, in [her] discretion, to acquire . . . any interest in lands, water rights, or surface rights to lands . . . for the purpose of providing land for Indians.”<sup>101</sup> In turn, Section 19, the definitional section of the IRA, provides that “[f]or the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.”<sup>102</sup> Thus Section 19 of the IRA reaffirms Congress’ clear intent in Section 13 of the IRA and the Alaska IRA to treat Alaska Natives as “Indians” for certain specified sections of the IRA.

The reference to Alaska Natives in Section 19 is not related to or associated with any of the three preceding categories of “Indian.” The inclusion of “Eskimos and other aboriginal peoples of Alaska” is a separate category of “Indian,” in that it stands apart from and is not dependent upon any other definition of “Indian” in the IRA. For example, the reference contains no temporal limitation resembling the term “now,” which was included in the first definition of “Indian,” or any reservation residency requirement, which was included in the second.<sup>103</sup>

By 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

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<sup>97</sup> 25 U.S.C. § 5129 (emphasis added).

<sup>98</sup> See 25 U.S.C. § 5118.

<sup>99</sup> *Id.* § 5119.

<sup>100</sup> *Id.* §§ 5101, 5108, 5110, 5121, 5124, and 5129.

<sup>101</sup> *Id.* § 5108.

<sup>102</sup> *Id.* § 5129. The previous sentence provides: “[t]he term “Indian” . . . shall include all persons of Indian descent who are [1] members of any recognized Indian tribe now under [f]ederal 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 shall further include [3] all other persons of one-half or more Indian blood.”

<sup>103</sup> The United States likewise took this position before the Federal district court in *Akiachak Native Community v. U.S. Dep’t of the Interior*, 935 F. Supp. 2d 195 (D.D.C. 2013). See Defendants’ Supplemental Brief Pursuant to Court Order at 8-9, *Akiachak Native Community v. Salazar*, No. 06-00969 (D.D.C. July 6, 2012) (“The Court in *Carcieri* did not consider the fact that Section 19 of the IRA also provides that ‘[f]or the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.’ The definition includes no temporal limitation similar to the ‘now’ in first sentence of the section . . . Therefore, the Secretary’s statutory authority to take Alaska land into trust for the benefit of Alaska Natives, is not governed by the language interpreted by the Supreme Court in *Carcieri*.”) (citation omitted).

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 surplusage, as eligible Alaska Natives would have already met one of the other three definitions. Instead, the use of the word “considered” in Section 19 suggests that Alaska Natives were to be regarded as “Indians” in the appropriate sections of the IRA, regardless of whether they meet one of the other definitions. Two dictionary definitions of “consider” and “considered” support our interpretation. For example, in the 1933 version of Black’s Law Dictionary, “considered” is defined as “[d]eemed; determined; adjudged; reasonably regarded.”<sup>104</sup> Webster’s New International Dictionary defines “consider,” as relevant here, as “[t]o view as in a certain relation; to regard; to judge.”<sup>105</sup> In other words, Alaska Natives were to be deemed “Indians” without further analysis. Furthermore, the term “Eskimos and other aboriginal peoples of Alaska” is sufficiently expansive to cover all of the native peoples of Alaska, demonstrating Congress’s intent that the IRA apply broadly in what was the Territory. If Congress intended to limit the term to only certain groups in Alaska, it would have used narrower language, such as only “Eskimos and Aleuts.”

It can perhaps be argued that had Congress intended to create a separate category of “Indian” encompassing Alaska Natives, Congress would have simply added another phrase to the first sentence of Section 19. However, Congress could have just as readily added limiting language and explicitly clarified that “Eskimos and other aboriginal peoples of Alaska” were “Indians” *provided* that they met one of the three preceding definitions. It did not. Instead, furthermore, Section 13 of the IRA and the Alaska IRA on their face each demonstrate their unqualified applicability to Alaska. And as explained below, Congress recognized the unique history of Alaska and intended to treat Alaska Natives distinctly for purposes of the IRA. This reading is bolstered by the overall structure and scope of the IRA, which, as noted above, at the time of its enactment, treated Alaska Natives differently by only extending five of the IRA’s provisions to the Territory of Alaska.<sup>106</sup>

## **2. The legislative history of the IRA demonstrates that Congress recognized the unique position of Alaska Natives and sought to unequivocally extend provisions of the IRA to them**

Even if the Section 19’s language identifying Alaska Natives as “Indians” for the purposes of the IRA is ambiguous, the overall purposes of the IRA and its legislative history resolve any ambiguity. The legislative history of the IRA corroborates our conclusion that Congress intended Alaska Natives to be treated uniquely under the IRA.<sup>107</sup>

In the years leading up to the passage of the IRA, Congress and Interior recognized both that Alaska Natives had a unique history and that they were under the supervision of the Federal

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<sup>104</sup> BLACK’S LAW DICTIONARY 406 (3d ed. 1933) (citing *State v. District Court of Eighth Judicial Dist. in and for Cascade County*, 64 Mont. 181, 208 P. 952, 955 (1922); *Polsgrove v. Moss*, 154 Ky. 408, 157 S.W. 1133, 1135 (1913)).

<sup>105</sup> WEBSTER’S NEW INTERNATIONAL DICTIONARY 568-69 (def. 5(a)) (2d ed. 1934).

<sup>106</sup> 25 U.S.C. § 5118.

<sup>107</sup> For a more comprehensive legislative history of the IRA, including the debate on the definition of “Indian,” see *Carcieri* M-Opinion at 9-12.

government along with Indians in the continental United States.<sup>108</sup> The initial version of the House bill that would become the IRA, as proposed in February 1934, did not address Alaska.<sup>109</sup> However, the House hearings included a debate on whether H.R. 7902 applied to Indians in Alaska, which resulted in the inclusion of the aboriginal people of Alaska in the bill.<sup>110</sup> In a colloquy on February 26, 1934 between Commissioner of Indian Affairs John Collier, Alaska Territorial Delegate Dimond of Alaska, and Representatives Gilchrist of Iowa and Peavey of Wisconsin regarding the proposed legislation, concern was expressed that Alaska lacked a traditional reservation system and that jurisdiction over the aboriginal people of Alaska was “scattered”:

Mr. DIMOND. . . . Mr. Commissioner, can you tell me how far if at all this bill will apply to the Indians in Alaska?

Mr. COLLIER. You will find at the beginning of the first line of the first page – “it is hereby declared to be the policy of Congress to grant to those Indians living under Federal tutelage and control the freedom to organize for the purpose of local self -government.” You can tell us whether the Alaska Indians live under Federal tutelage.

Mr. DIMOND. It is not so easy to answer.

Mr. GILCHRIST. Federal tutelage and control is what it says.

Mr. COLLIER. I should think it ought to be made definite one way or the other.

Mr. DIMOND. I see there are very few limitations. There are no reservation Indians in Alaska in the ordinary sense of the term and this bill is designed mainly to apply to Indians who are now or lately have been on reservations, as I understand. Is that correct?

Mr. COLLIER. Yes, except where voluntary colonies are formed and you might have that in Alaska.

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Mr. PEAVY. Would there be any objection on the part of the Department to direct inclusion of Alaska?

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<sup>108</sup> In 1932, the Chairman of the House Indian Affairs Committee wrote to Interior seeking an opinion on the legal status of Alaska Natives. Interior Solicitor Finney opined that the legal status of Alaska Natives was “in material respects similar to that of the Indians of the United States,” and they are “all wards of the Nation.” By the time of the passage of the IRA, Congress had passed numerous laws providing “services and protection to Alaska Natives on the same or similar terms as provided to Indians in the contiguous 48 states.” *Id.* at 23.

<sup>109</sup> *Readjustment of Indian Affairs: Hearings Before the Committee on Indian Affairs, House of Representatives on H.R. 7902, 73d Cong., 2d Sess. at 1-14 (Feb 22, 1934) (“House Hearings”).* An identical version of the bill was introduced in the Senate during the same month.

<sup>110</sup> *Id.* at 76-77 (Feb. 26, 1934).

Mr. COLLIER. No. The principal cause that has held us back from including Alaska in titles 1 and 2 lies in this, that the jurisdiction over Indians up there is a scattered jurisdiction. It has never been lodged in the Indian Office, and in the passing of a declared policy by Congress this would quite definitely extend the function of the Indian Office to Alaska, not only in health but in other matters. Nevertheless there does not seem to be any reason why the permissive features should not be made accessible to them.<sup>111</sup>

Accordingly, an early amendment to the bill in the House addressed the Alaska question and was endorsed by Interior.<sup>112</sup> This amendment, which was proposed by the Chairman of the House Committee on Indian Affairs without elaboration or explanation, resembles portions of the IRA as finally enacted by Congress. The amendment provided that:

The provisions of this act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that the provisions of titles I and II of this act shall apply to Alaska, and for the purposes of these titles Eskimos and other aboriginal peoples shall be considered Indians.<sup>113</sup>

In a later House hearing on the bill on May 8, 1934, Delegate Dimond again discussed the different land tenure in Alaska. In particular, he believed that Indians in Alaska would benefit from the establishment of reservations there and described successes at the reserve set aside at the Annette Islands for the Metlakatla Indians:

Mr. DIMOND. Mr. Chairman, if the committee would permit, I would like to make a statement in reference to the Alaskan situation under the proposed bill.

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Mr. DIMOND. If it were not for the rights of other people that have come to life, I would like to go back and establish a reservation for the other Indians. I think they would have been much better off if in the beginning there had been set aside a reservation of our Alaskan territory for the benefit of the natives, and they could have taken care of them in this fashion without hurting anybody else. But now, of course, the white men have come in and taken up the best locations and if one tries to change the status there will be great difficulty. In 1891, when this act was passed, nobody cared about the Annete [sic] Island group, and this worked out very satisfactorily.<sup>114</sup>

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<sup>111</sup> *Id.*

<sup>112</sup> *See id.* at 189 (March 5, 1934).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 497-99 (May 8, 1934). Delegate Dimond also stated that he had provided copies of the bill to individuals and institutions in Alaska, including the Alaska Native Brotherhood. He went on to cite a letter commenting on the bill from William L. Paul, an attorney, a former member of the Alaska territorial legislature, and an executive committee member of the Alaskan Native Brotherhood:

Hon. A.J. Dimond,  
Washington, D.C.

Later, in discussing the addition to Section 19's definition of "Indian" in a Senate hearing on May 17, 1934, Commissioner Collier remarked that the effect of the amendment would "be to extend the land acquisition and credit benefits to these Alaska Indians who are pure-blood Indians and very much in need, and they are neglected, and they are Indians pure and simple."<sup>115</sup> Apart from this observation, there was little substantive discussion by the Senate of the definition of "Indian" with respect to Alaska.

These statements in the legislative history of the IRA demonstrate recognition by Congress of the unique status of Alaska Natives, as well as an intent to include them within the scope of the IRA. As set forth above, Collier asked Congress for a "definite" answer, "one way or the other," whether "the Alaska Indians live under Federal tutelage,"<sup>116</sup> and he got his answer when Congress unequivocally extended the IRA to Alaska Natives, namely by the addition of "Eskimos and other aboriginal people" to Section 19 and the extension of certain provisions of the IRA to Alaska in Section 13 in 1934 and, later, as expressly provided in the Alaska IRA in 1936. It would have made little sense for Congress to twice expressly extend application of the IRA within the entire territory of Alaska while simultaneously subjecting this unique category of indigenous people to *Carrieri* criteria distinct to the Lower 48 states. The better reading, which reflects the legislative history, is that Congress did not qualify or condition the application of the IRA in Alaska.

Indeed, this intent is especially evident in the proposed amendment in March 1934, which resembles the reference to "Eskimos and other aboriginal people" in Section 19 of the IRA, as enacted, and provided that "for the purposes of the [Titles I and II of the proposed legislation] Eskimos and other aboriginal peoples shall be considered Indians."<sup>117</sup> The House amendment, which was to be included in a separate title of "Miscellaneous" IRA provisions, made no mention and was not connected in any way to any other definitions of "Indian" that appeared in Section 19.<sup>118</sup> There was also no temporal requirement in that proposed amendment, and it covered all aboriginal people in Alaska.

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My dear Tony: Referring to H.R. 7902, I have read it very carefully and wish to say that it seems to be the first sound step ever taken by the Indian Department to solve the Indian question on a sound basis.

There is very little that can apply to Alaska, and that little appears to be entirely beneficial—the matter of education principally.

Some people without an understanding of the legal position of the Alaska native would think that these natives would come under the bill. Such questions could be solved when we got to them. In the meantime, I hope you will feel free to support the bill, and that you will also inform Mr. Collier of our general approval of the bill.

With sincere good wishes, I remain,

Yours faithfully,  
William L. Paul

*Id.* at 498.

<sup>115</sup> *To Grant to Indians Living under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 before the Senate Committee on Indian Affairs, 73rd Cong., 2d Sess. at 265 (May 17, 1934) ("Senate Hearings").*

<sup>116</sup> *House Hearings at 189 (March 5, 1934).*

<sup>117</sup> *House Hearings at 76 (March 5, 1934).*

<sup>118</sup> *Id.*

In addition, John Collier's interpretation of Section 19 of the IRA before it was enacted makes no reference to the requirements of the first three definitions of "Indian" applying to Alaska Natives. At the time of Collier's statement in May 1934, the other definitions in the first sentence of Section 19 had already been introduced, which suggests that Congress intended for Alaska Natives to be categorized separately under Section 19 of the IRA. Indeed, Collier explicitly stated that the effect of the amendment is that Alaska Natives, whom he described as "pure-blood Indians" and "Indians pure and simple," would be able to avail themselves of the benefits of the IRA without qualification.<sup>119</sup> The legislative history therefore strongly reflects that "Eskimos and other aboriginal peoples of Alaska" were to be considered "Indian" without qualification for purposes of the IRA. Accordingly, it is unnecessary to determine further whether an Alaska Native tribe also fits within any of the other definitions of "Indian" in the IRA, including the first definition that was at issue in the Supreme Court's *Carcieri* decision.

In addition, this approach is consistent with the broad remedial purposes of the legislation. The IRA marked a dramatic change in the direction of the federal government's policy toward Indians. It replaced what was a disastrous assimilationist policy characterized by the General Allotment Act, which had been designed to "put an end to tribal organization" and to "dealings with Indians ... as tribes."<sup>120</sup> While the IRA's land acquisition provision was to address in part the dismal failure of the assimilation and allotment policy, the Act also had a broader purpose to "rehabilitate the Indian's economic life," and "give the Indians the control of their own affairs and of their own property."<sup>121</sup> By including Alaska Natives separately in the definition section of the IRA, Congress signaled its intent that they be able to avail themselves of the five applicable portions of the IRA as originally enacted, for the same goals of economic development and self-governance available for Indian tribes in the lower 48 states.

Finally, the Indian canons of construction, which derive from the unique relationship between the United States and Indian tribes, guide our interpretation. Under these canons, statutes are to be construed liberally in favor of Indians, with any ambiguities resolved in their favor.<sup>122</sup> The Indian canons support our conclusion that Congress intended to treat Alaska differently without applying a similar standard used in the Lower 48 states given the differences in land tenure and organization of Alaska Natives. The Indian canons ensure that the IRA applies as broadly as possible.<sup>123</sup>

### 3. Interior's prior interpretations of Section 19 of the IRA

Although the plain language of the IRA, its broad remedial purposes, and its legislative history all demonstrate that Congress intended to extend the IRA to Alaska Natives, at times certain

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<sup>119</sup> *Senate Hearings* at 265 (May 17, 1934).

<sup>120</sup> *United States v. Celestine*, 215 U.S. 278, 290 (1909).

<sup>121</sup> *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., at 6 (1934), and 78 Cong. Rec. 11125 (1934) (statement of Sen. Burton Wheeler)). See also THE INSTITUTE FOR GOVT. RESEARCH, STUDIES IN ADMINISTRATION, THE PROBLEM OF INDIAN ADMINISTRATION (1928) ("Meriam Report") (detailing the deplorable status of health, *id.* at 3-4, 189-345, poverty, *id.* at 4-8, 430-60, 677-701, education, *id.* at 346-48, and loss of land, *id.* at 460-79). The IRA was not confined to addressing the ills of allotment, as evidenced by the inclusion of Pueblos in the definition of "Indian tribe."

<sup>122</sup> *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269 (1992).

<sup>123</sup> See *Carcieri* M-Opinion at 5 (noting that the Indian canons guide our interpretation of any ambiguities in the IRA).

Interior officials informally interpreted the IRA in disparate ways. After the IRA was enacted, Interior periodically articulated tentative and informal interpretations of the inclusion of “Eskimos and other aboriginal peoples of Alaska” in Section 19 of the IRA. For instance, in a handwritten memo to Fred H. Daiker, Assistant to the Commissioner of Indian Affairs, Assistant Solicitor Felix Cohen, who was one of the primary drafters of the initial proposal for the legislation, stated:

It seems to me that sec. 19 puts Eskimos on the same basis as Indians. To qualify for the benefits of the W.H. act they must meet one of 3 criteria: tribal affiliation, tribal descent plus residence on a reservation, or the half-blood test.<sup>124</sup>

On the other hand, in a February 1937 draft letter explaining the provisions of the Alaska IRA for general distribution, Field Agent William L. Paul reached a different conclusion, observing:

Section 19 defines the word “Indian” and 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.<sup>125</sup>

Later that year, D’Arcy McNickle, who at the time worked in the Indian Organization Division, responded to a question from Fred Daiker regarding whether Alaska Natives who resided elsewhere in the United States would be able to enjoy the benefits of the 1936 Alaska IRA. He surmised that Alaska Natives residing outside of Alaska should meet the qualifications for other Indians under the IRA, but noted that they were not traditionally members of recognized tribes under federal supervision:

Referring to the question you raised concerning the attached outgoing letter, I doubted whether an Alaskan Indian residing outside of Alaska would be entitled to the benefits of the Alaska Amendment, unless he could meet the definition of an Indian set forth in Section 19 of the I.R.A.\* If we interpret the Alaska Amendment to mean that Alaskan natives residing in the United States may benefit by provisions of the I.R.A. without meeting the qualifications which other Indians in this country have to meet, are we not practicing a kind of discrimination not intended by the Alaska Amendment? I should think exception could be taken to such a policy.

\*That is to say, Indians of Alaska have not been members of recognized tribes under Federal supervision nor, except in one (?) instance, have they been residents of a reservation. How else, then, can they qualify as Indians in much of Alaska except as of ½ degree?<sup>126</sup>

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<sup>124</sup> Memorandum from Felix S. Cohen, Assistant Solicitor to Fred H. Daiker, Assistant to the Commissioner of Indian Affairs (undated).

<sup>125</sup> Letter from William L. Paul, Field Agent, at 6 (Feb. 26, 1937).

<sup>126</sup> Memorandum from D’Arcy McNickle, Indian Organization Division to Fred H. Daiker, Assistant to the Commissioner of Indian Affairs (June 15, 1937).

Perhaps Interior's firmest pronouncement on the reference to "Eskimos and other aboriginal peoples of Alaska" in Section 19 of the IRA occurred on October 5, 1937. Assistant Solicitors Felix Cohen, Charlotte Westwood, and Kenneth Meiklejohn jointly issued a memorandum addressing legal issues related to the organization of Alaska Native groups. In response to the question of whether the first sentence in Section 19's definition of Indian applies to Alaska, they believed that it was connected to and should be read in tandem with the sentence about Alaska Natives:

Section 19 of the I.R.A. is included in the Composite Indian Reorganization Act for Alaska. It provides a definition of "the term 'Indian' as used in this Act" and then states that Eskimos and other aboriginal peoples of Alaska shall be considered "Indians." It is the present opinion of the undersigned that as a matter of construction and necessity the second reference to the term Indian should be read in connection with the definition of the term. Otherwise there would be no law as to what persons of Indian blood were eligible for benefits and organization. However, if desired, this conclusion can be reopened and submitted to the Solicitor for decision. While a "tribe" in Alaska may be a matter of language and not of organization, the existence of tribes and the state of "tribal relations" has been repeatedly recognized in the courts.<sup>127</sup>

Although some Interior officials in 1937 did not interpret the inclusion of "Eskimos and other aboriginal peoples of Alaska" in Section 19 of the IRA as distinct from the first three definitions of "Indian," their statements fall short of the official legal position for Interior. Not only are these comments conclusory, but they also lack any thorough legal explanation or analysis of the legislative history of the IRA. In fact, Assistant Solicitors Cohen, Westwood, and Meiklejohn opened the door for further investigation by the Solicitor's Office on whether Alaska Natives were required to fulfill the other requirements of Section 19 in order to use the IRA. There is no evidence that this further investigation ever occurred. Further, the unbounded, undefined scope problem the Assistant Solicitors identified is not a concern given that the Part 151 regulations are applicable only to federally recognized tribes and "individual Indians" as defined by that part.<sup>128</sup>

In sum, contrary to these thinly developed interpretations, the text, purpose, and legislative history support reading the reference to Alaska Natives as treating them as "Indians." As a result, the Secretary's statutory authority to take Alaska lands into trust for the benefit of Alaska Natives does not depend on whether they also meet any one of the three general definitions of "Indian," including the first definition which encompasses recognized Indian tribes that were under federal jurisdiction in 1934. Accordingly, the Secretary's land-into-trust authority with respect to Alaska Natives is unaffected by the Supreme Court's decision in *Carcieri*, which solely concerned the meaning and scope of the first definition of "Indian." Simply stated, Congress made clear that Alaska Natives are "Indians" under the IRA.

### **C. Congress Did Not Revoke the Secretary's Authority to Acquire Alaska Lands in Trust**

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<sup>127</sup> Memorandum on Legal Issues Affecting Alaska Organization, Memorandum from Felix Cohen, Assistant Solicitor, et al., at 3 (Oct. 5, 1937).

<sup>128</sup> 25 C.F.R. §§ 151.1-151.2.

As advanced by Interior in the course of the *Akiachak* litigation and Interior’s 2014 rulemaking, Congress has never revoked the Secretary’s discretionary authority to acquire trust lands in Alaska pursuant to the IRA. Neither ANCSA nor FLPMA have curbed this authority.

As noted above, ANCSA revoked existing reservations in Alaska (with one exception) and established a novel and complex system of land tenure that did not require reservations or trust land. Several provisions of ANCSA expressly repeal or revoke reservations or land acquisition authority.<sup>129</sup> However, ANCSA did not mention, much less repeal or amend, Section 5 of the IRA. Unlike other claims settlement acts,<sup>130</sup> ANCSA left the Secretary’s land-into-trust authority under Section 5 of the IRA, as extended by the Alaska IRA, unaffected.

It is well-settled that repeals by implication are disfavored under the law.<sup>131</sup> Moreover, “when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”<sup>132</sup> The establishment of trust lands in Alaska is not incompatible with ANCSA’s system of land tenure. Significantly, even following the enactment of ANCSA, there currently exists in Alaska the Metlakatla Reserve and other scattered trust lands, as well as more than one million acres of restricted fee land granted under the Alaska Native Allotment Act of 1906 and the Alaska Native Township Act of 1926.<sup>133</sup> The latter are subject to the same restrictions on taxation and alienation as trust lands, and are generally treated by Congress and Interior as the equivalent of trust land.<sup>134</sup> Although ANCSA repealed the Native Allotment Act, ANCSA preserved the claims of individuals with pending allotment applications, and the restrictions on existing allotments. Thus, the establishment of trust land through Section 5 cannot be described as irreconcilable with ANCSA, in that ANCSA did not extinguish all trust or restricted land in Alaska, or prevent the issuance of new restricted fee patents.

Furthermore, ANCSA’s primary purpose – to settle Alaska Natives’ aboriginal land claims “with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, [and] without creating a reservations system or lengthy wardship or trusteeship”<sup>135</sup> – is also not irreconcilable with the Secretary’s authority to create new trust land. Although ANCSA effectuated this goal, in part by rescinding all existing reservations except for Metlakatla and creating a new system of land tenure, it did not prohibit the creation of any trusteeship or new reservation proclamations in Alaska beyond the settlement. Moreover, a tribal decision to seek to have land acquired in trust is not about imposing a trusteeship, but rather reflects tribal decision-

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<sup>129</sup> See, e.g., 43 U.S.C. §§ 1617(a), 1618.

<sup>130</sup> Cf. Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, § 5(e), 94 Stat. 1785, 1791 (“Except for the provisions of this subchapter, the United States shall have no other authority to acquire lands or natural resources in trust for the benefit of Indians or Indian nations, or tribes, or bands of Indians in the State of Maine.”).

<sup>131</sup> See *Morton v. Mancari*, 417 U.S. 535, 549-50 (1974) (citing *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)).

<sup>132</sup> *Id.* at 551.

<sup>133</sup> Act of May 17, 1906, Pub. L. No. 59-171, ch. 2469, 34 Stat. 197 (repealed 1971); Act of May 25, 1926, Pub. L. No. 69-280, ch. 379, 44 Stat. 629 (repealed 1976).

<sup>134</sup> *United States v. Ramsey*, 271 U.S. 467, 471-72 (1926) (holding that both trust allotments and restricted fee allotments qualify as Indian country); *Oklahoma Tax Comm’n v. United States*, 319 U.S. 598, 618 (1943).

<sup>135</sup> 43 U.S.C. § 1601(b).

making followed by discretionary decision-making on the part the Secretary. It is consistent with ANCSA's goals of supporting tribal self-governance and maximizing Alaska Natives' stake in their rights and property. ANCSA and the Secretary's IRA Section 5 authority in Alaska can therefore coexist.

Lastly, if Congress had implicitly repealed the Secretary's authority to take Alaska land into trust, it would not have expressly repealed the Secretary's authority to establish reservations in Alaska five years later in FLPMA.<sup>136</sup> FLPMA, which repealed most statutory provisions for Executive withdrawal authority, repealed Section 2 of the Alaska IRA, but left untouched Section 5, which provides the Secretary authority to acquire lands in trust. FLPMA's repeal of the reservation authority in Section 2 of the 1936 Act while leaving the rest of that statute in effect further underscores the lack of Congressional intent to revoke the Secretary's land-into-trust authority.

Because ANCSA and FLPMA did not repeal Section 5 of the IRA as it applies to Alaska through the Alaska IRA, the Secretary's authority to acquire land into trust in Alaska remains intact.

#### **IV. Conclusion**

The Secretary's authority to acquire land into trust for Alaska Natives is found in the Alaska IRA, which specifically extends the Secretary's authority in Section 5 of the IRA to Alaska. ANCSA and FLPMA did not repeal the Secretary's authority to acquire land in trust in Alaska, and likewise, the Supreme Court has recognized that such authority is separate and unaffected by the "under federal jurisdiction" standard in the *Carcieri* ruling.



Hilary C. Tompkins

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<sup>136</sup> See Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792 (1976).