

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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AKIACHAK NATIVE COMMUNITY)	
<u>et al.</u> ,)	
)	
Plaintiffs)	
)	
v.)	
)	
DEPARTMENT OF THE INTERIOR,)	
<u>et al.</u> ,)	
)	No. 1:06-cv-00969 (RC)
Defendants)	
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STATE OF ALASKA’S SUPPLEMENTAL BRIEF ON SCOPE OF REMEDY

INTRODUCTION

The Court’s May 23, 2013 Order¹ directs the parties to submit supplemental briefs addressing the appropriate remedy in light of the Court’s finding that 25 C.F.R. § 151.1, which makes the land-into-trust regulations inapplicable to Alaska,² violates 25 U.S.C. § 476(g), which states that “any regulation or administrative decision or determination . . . 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 Indian tribes by virtue of their status as Indian tribes shall have no force or effect.” The Court specifically directed the parties to discuss whether the Alaska exception contained in 25 C.F.R. § 151.1 can be severed from the remainder of

¹ Doc. 115.

² Except for the Annette Island Reserve, which is the reservation for the Metlakatla Indian Community. *See* State’s Opp. & Cross-Mot. Summ. J. (Doc. 77) at 2 n.5.

the land-into-trust regulation; whether vacatur is required or whether the Court may simply remand the invalid portion of the regulation; and whether it would be appropriate to stay the effect of the judgment for a period of time.³

The Alaska exception at 25 C.F.R. § 151.1 should be severed from the rest of the regulation. In its entirety, section 151 reads:

These regulations set forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes. Acquisition of land by individual Indians and tribes in fee simple status is not covered by these regulations even though such land may, by operation of law, be held in restricted status following acquisition. Acquisition of land in trust status by inheritance or escheat is not covered by these regulations. *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 its members.*⁴

The last sentence—the Alaska exception—was the only part of the regulation challenged and briefed by the parties in this litigation, and the remaining provisions in the regulation would continue to function effectively and in accordance with the intent of 25 U.S.C.

§ 465, the land-into-trust statute, in the absence of the last sentence of § 151.1. Vacatur is appropriate because the Court has found that the Alaska exception violates the law; therefore, under this Court’s ruling, it is unlikely that the defendants will be able to justify the exception on remand. Vacatur, with prompt entry of final judgment, also would expedite the inevitable appeal in this case.

³ Order (Doc. 115) at 2.

⁴ 25 C.F.R. § 151.1 (emphasis added).

ARGUMENT

I. The last sentence of Section 151.1 should be severed from the remaining provisions of 25 C.F.R. Part 151.

The APA defines “rule” to include “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency”⁵ Thus, the Court may hold that only a portion of the regulation is “not in accordance with law,”⁶ and is not required to invalidate the entire rule.⁷ Even a single sentence in a regulation may be held invalid.⁸

The Supreme Court holds that severance of the invalid portion of a regulation is appropriate when continued implementation of the remaining regulatory provisions will not impair the function of the statute as a whole, and “there is no indication that the regulation would not have been passed but for [the severed part’s] inclusion.”⁹ In this instance, severance is particularly appropriate because the portion of the regulation found

⁵ 5 U.S.C. § 551(4).

⁶ Order (Doc. 115) at 1 (citing 5 U.S.C. § 706(2)(A) (establishing the standards for judicial review of agency action)).

⁷ *Community for Creative Nonviolence v. Turner*, 893 F.2d 1387, 1394-95 (D.C. Cir. 1990) (invalidating specific sections and subsections of a regulation); *Shays v. Fed. Election Comm’n*, 340 F. Supp.2d 39, 42-43 (D.D.C. 2004) (upholding specific subsections of a regulation and invalidating others).

⁸ *Humane Society of U.S. v. Babbitt*, 849 F. Supp. 814, 818 (D.D.C. 1994) (“[T]he final sentence of 50 C.F.R. § 15.11(c) violates the language of the Wild Bird Conservation Act, 16 U.S.C. § 4904(c), and is therefore invalid.”)

⁹ *K Mart Corp. v. Cartier*, 486 U.S. 281, 294 (1988) (invalidating a subsection of a customs regulation because of “its conflict with the unequivocal language of the statute.”)

invalid is limited to a single sentence and operates only to prevent application of the rule in Alaska. The Alaska exception does not affect operation outside of Alaska of the land-into-trust statute¹⁰ nor the other provisions in 25 C.F.R. Part 151, and severing it would therefore have no impact anywhere except Alaska. The process for accepting and processing applications for trust acquisitions on behalf of individual Indians and Tribes outside Alaska would remain unchanged, which is appropriate because the applicability of the statute and the regulation to non-Alaska Indians and Tribes has not been challenged and is not before the Court. Severance of the Alaska exception would allow the land-into-trust statute to continue to function—as intended and without interruption—outside Alaska.

Additionally, there is no indication that the Alaska exception was vital to adoption of the rest of the land-into-trust regulation. The exception is not so intertwined with the remaining provisions of Part 151 that its absence would impair implementation of the rest of the regulation, or “give[] rise to a substantial doubt that a partial affirmance would comport with the [agency’s] intent.”¹¹ To the contrary, during the rulemaking process, the agency explicitly distinguished the issue of its authority to take land into trust in Alaska,

¹⁰ 25 U.S.C. § 465.

¹¹ *Ass’n Private Coll. & Univ. v. Duncan*, 870 F.Supp.2d 133, 154 (D.D.C. 2012) (quoting *Telephone & Data Sys. v. FCC*, 19 F.3d 42, 50 (D.C. Cir. 1994)).

declaring first that ANCSA did not permit the Secretary to create trust land in the state,¹² and later that it reserved the issue for further evaluation.¹³

The land-into-trust regulation at 25 C.F.R. Part 151 was developed to address the circumstances applicable to trust land applications from individual Indians and Tribes outside of Alaska.¹⁴ Application of the regulation outside Alaska has not been challenged or litigated on the merits here, and the Alaska exception is not so intertwined with the rest of the rule that striking it would frustrate the purpose of the land-into-trust statute or the rest of the regulation. Therefore, the Court should sever from the rest of Part 151 and declare invalid only the last sentence of 25 C.F.R. § 151.1.

II. The last sentence of Section 151.1 should be vacated.

Whether invalid agency action must be vacated or simply remanded without vacating depends on two key factors: the seriousness of the deficiencies of the agency action, and the degree of disruption caused by vacatur.¹⁵ Here, the Court has found the deficiency is serious, holding that the Alaska exception violates the plain language of 25 U.S.C. § 476(g), which declares that regulations that discriminate between federally recognized Tribes “by virtue of their status as Indian tribes shall have no force or

¹² AR 18, 20.

¹³ AR 535.

¹⁴ AR 18, 20, 535.

¹⁵ *Heartland Regional Med. Ctr. v. Sebelius*, 566 F.3d 193, 197 (D.D.C. 2009) (citing *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). See also *Internat’l Union UMWA v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 966-67 (D.C. Cir. 1990)

effect.”¹⁶ Additionally, for the same reasons that the Alaska exception can be severed from the rest of the rule, vacatur would not be disruptive to those affected by the land-into-trust regulation.

Vacatur is the presumptive remedy when a regulation is invalidated, and is especially appropriate when it is unlikely that the agency can justify the invalidated rule.¹⁷ Because the Court has held that the Alaska exception violates the plain language of 25 U.S.C. § 476(g),¹⁸ it is unlikely that the agency on remand will be able to adequately articulate a justification for the provision.¹⁹ Vacatur is appropriate when the Court has determined that the rule is legally deficient, and when vacatur would not circumvent the notice and comment proceedings that are otherwise required when an agency repeals a rule.²⁰ Here, the Secretary would not be exercising its discretion to amend 25 C.F.R. 151.1 by repealing the Alaska exception, nor addressing a procedural deficiency under the APA. Instead, the Secretary would be correcting the substantive legal deficiency identified by the Court. Vacating the Alaska exception thus would not inappropriately undermine APA notice and comment requirements applicable to agency action.

¹⁶ Mem. Op. (Doc. 109) at 23-25.

¹⁷ *Natural Resources Defense Council v. EPA*, 489 F.3d 1250, 1260-61 (D.C. Cir. 2007).

¹⁸ Mem. Op. (Doc. 109) at 23-25.

¹⁹ *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (noting “a serious possibility that the Commission will be able to substantiate its decision on remand”).

²⁰ *Id.*

As discussed above, vacating the Alaska exception would not be disruptive to the individual Indians and Tribes currently within the scope of the land-into-trust regulation. The Alaska exception has no bearing on whether non-Alaska Indians and Tribes can apply to have land taken into trust, nor does the Alaska exception influence how non-Alaska applications are evaluated and processed. Additionally, vacatur provides the exact relief sought by Plaintiffs in this case. Vacating the Alaska exception would remove the Alaska exclusion, making the land-into-trust regulations applicable to individual Indians and Tribes in Alaska and eliminating the discriminatory effect of the rule that the Court has found illegal. Vacatur provides the remedy directed by 25 U.S.C. § 476 (g) by depriving the Alaska exception of “force or effect.”

The creation of new trust land in Alaska will be highly disruptive to the State because essential aspects of the State’s sovereignty are challenged when land is placed into trust status, including the state’s ability to tax,²¹ and, potentially, the state’s ability to manage its fish and game resources, protect the environment, provide public services, and ensure public safety. Creation of trust land also will create jurisdictional conflict between the State and Alaska Tribes, because trust land may be considered Indian country.²²

Currently, the Annette Island Reserve is the only Indian country in Alaska. The creation

²¹ 25 U.S.C. § 465 mandates that land held in trust “shall be exempt from State and local taxation.”

²² There is dispute as to whether merely taking land that is outside of a reservation into trust under 25 U.S.C. § 465 transforms it into Indian country. Compare *U.S. v. Roberts*, 185 F.3d 1125 (10th Cir. 1999) with *U.S. v. Stands*, 105 F.3d 1565 (8th Cir. 1997). However, Indian country status is clearly the result sought by some, if not all, of the plaintiffs.

of trust land in Alaska also will be disruptive to the federal defendants, as they will receive additional trust land acquisition applications from within the state, and the regulations at 25 C.F.R. Part 151 were not developed with the understanding that they would be applied in Alaska.

The Court's finding that the Alaska exception violates substantive law is a serious deficiency, and the disruption caused to the defendants, and particularly to the State of Alaska is substantial. However, the only appropriate administrative response to the Court's ruling is to remove the Alaska exception from the regulation.²³ The potential disruption caused by creating trust land in Alaska is an unavoidable consequence of the Court's ruling. Vacatur is the appropriate remedy.

III. Judgment vacating the Alaska exception should be entered immediately.

Courts often mitigate the disruption of vacatur by delaying entry of judgment to give the agency reasonable time to respond to the judgment and develop a rule that cures the defects of the one that has been vacated.²⁴ In this instance, however, immediate entry of judgment provides the least disruptive path to ultimate resolution of this litigation. As discussed above, the Court has found that the Alaska exception violates substantive law.

It is unlikely, if not impossible, that the agency on remand will be able to adequately

²³ At any time, the Secretary may, in her discretion, choose to amend the land-into-trust regulation in other ways, but the only issue presented and decided in this case is the validity of excluding Alaska from the scope of the rule.

²⁴ *Natural Resources Defense Council v. EPA*, 489 F.3d 1250, 1262 (D.C. Cir. 2007) (inviting parties to "file a motion to delay issuance of the mandate to request either that the current standards remain in place or that EPA be allowed reasonable time to develop interim standards") (citing *Cement Kiln Recycling Coal'n v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001)).

articulate a justification for the provision.²⁵ Therefore, the only responsive action available to the Secretary is to repeal the last sentence of 25 C.F.R. § 151.1.

Immediate entry of judgment ensures appellate review is available, and avoids the situation where issues evade review because a district court remand to an agency is not a final judgment.²⁶ Once judgment is entered, an appeal as of right may be taken to the Circuit Court of Appeals.²⁷ At that time, a motion for stay pending appeal would be ripe for consideration and, if granted, would mitigate the disruptive consequences of the district court judgment.²⁸ Alaska must appeal the merits of the Court's Memorandum Opinion at some point, because the issue directly and significantly impacts Alaska's sovereignty and the State's interests as a settling party in ANCSA.²⁹ Immediate entry of judgment provides the most efficient and direct route to final resolution of the key legal issue in this case: whether ANCSA prohibits the creation of new trust land in Alaska.³⁰ Immediate entry of judgment also conserves judicial resources because the Court would thereby dispose of the matter and not be required to retain jurisdiction for the duration of any stay during remand. Finally, immediate entry of judgment also conserves the

²⁵ *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (noting "a serious possibility that the Commission will be able to substantiate its decision on remand").

²⁶ *NRDC*, 489 F.3d at 1264.

²⁷ 28 U.S.C. § 1291; Fed. R. App. P. 4(a).

²⁸ Fed. R. App. P. 4(a) & 8(a).

²⁹ State's Mem. Supp. Mot. Recons. & Interloc. Appeal (Doc. 112-1) at 16.

³⁰ *Id.* at 13-14.

resources of the parties by providing for immediate appeal without awaiting agency action to implement the judgment.

CONCLUSION

The Court has found that the exclusion of Alaska from the scope of the land-into-trust regulations violates 25 U.S.C. 476(g). It is therefore highly unlikely, if not impossible, that the Secretary could bring the rule into conformance with the Court's finding through a procedural remedy or providing additional justification for the Alaska exception. The offending part of the rule is limited to a single sentence in 25 C.F.R. § 151.1, which may be severed from the rest of the regulation with minimal disruption to non-Alaska Indians and Tribes. Therefore, the State requests that the Court vacate the Alaska exception and enter judgment immediately.

DATED June 24, 2013.

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Certificate of Service

The undersigned hereby certifies that, in the above-captioned case, on June 24, 2013, a true and correct copy of *State of Alaska's Supplemental Brief on Scope of Remedy* was served by electronic means upon the following:

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