

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
AKIACHAK NATIVE COMMUNITY)	
et al.,)	
)	
Plaintiffs,)	
)	
v.)	No. 1:06-cv-00969 (RC)
)	
DEPARTMENT OF THE INTERIOR,)	
et al.)	
)	
Defendants.)	
_____)	

**FEDERAL DEFENDANTS’ RESPONSE TO ALASKA’S MOTION FOR
RECONSIDERATION OR IN THE ALTERNATIVE, FOR CERTIFICATION FOR
INTERLOCUTORY REVIEW**

In 2006, four Alaskan Tribes and one individual Alaska Native filed lawsuits challenging the Secretary of the Interior’s regulations, 25 C.F.R. § 151, which govern procedures used by the Secretary of the Interior, in her discretion, to acquire title to land in trust for Indian tribes and individuals. These land-into-trust regulations state that they do not apply to the acquisition of land-into-trust in Alaska other than for the Metlakatla Indian Community or its members (the “Alaska exception” to the regulations). The State of Alaska intervened and argued that the Alaska Natives Claims Settlement Act (“ANCSA”) prevents the Secretary from taking title to land in Alaska on behalf of Alaska Tribes or Natives. The other parties to this lawsuit (including the Federal Defendants) argued that Congress did not expressly repeal the Secretary’s authority under the Indian Reorganization Act (“IRA”) to take land-into-trust in Alaska. On March 31, 2013, this Court found that ANCSA did not implicitly or explicitly repeal the Secretary’s authority in the IRA and granted summary judgment in favor of plaintiffs, but withheld ruling on

remedy. See Memorandum Opinion (ECF No. 109). The parties filed opening briefs as to remedy on June 24, 2013.

On April 17, 2013, Alaska filed a motion for reconsideration or in the alternative for interlocutory certification. See Alaska's Mot. (ECF No. 112); Alaska's Mem. (ECF No. 112-1). Alaska's Motion requests that this Court reconsider its holding on the relationship between the IRA and ANCSA. In the alternative, Alaska's Motion requests that the Court certify its opinion for interlocutory review by the D.C. Circuit. The Court should deny Alaska's Motion in both respects. First, the relationship between ANCSA and the IRA was fully briefed and Alaska's motion contains no new information or legal rationale in support of reconsideration. Second, Alaska's request for certification was based on Alaska requesting that the Court remand the Alaska exception. Alaska's Remedy Brief now changes positions and requests the Court set aside the Alaska exception along with the "immediate entry of judgment[,] " which will "ensure[] appellate review is available" and "conserve judicial resources." See Alaska's Supp. Br. on Scope of Remedy at 9 (ECF No. 119). Accordingly, if the Court sets aside the Alaska exception, there is no reason to rule on Alaska's request for certification. In addition, because this litigation is almost concluded, the factors for an interlocutory appeal weigh against certification. The Court should deny Alaska's Motion.

I. The Court should deny Alaska's request for reconsideration of the Secretary's authority under the Indian Reorganization Act to take land-into-trust for Alaska Natives.

The Court characterized the "relatively straightforward" issue in this case as being "whether the Secretary still possesses the statutory authority to take land into trust for the benefit of Alaska Natives outside of Metlakatla." Mem. Op. at 11. Congress enacted the Indian Reorganization Act in 1934 (48 Stat. 984, June 18, 1934), to provide the "machinery whereby

Indian tribes would be able to assume greater degree of self-government, both politically and economically.” See Morton v. Mancari, 417 U.S. 535, 542 (1974). Section 5 of the IRA authorizes the Secretary to acquire land in trust for Indians, providing in part:

The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to land, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

25 U.S.C. § 465. Section 5 of the IRA did not initially apply to Alaska. Two years later, in 1936, Congress made Section 5 applicable in Alaska, 25 U.S.C. § 473a; 49 Stat. 1250 (May 1, 1936), and, thus, specifically authorized the Secretary to take Alaska lands in trust for Alaska Natives.

In 1971, Congress enacted ANCSA, 85 Stat. 688, 43 U.S.C. §§ 1601 – 1629h, which effected a comprehensive settlement of aboriginal land claims in Alaska. Although this legislation contained many features not found before in legislation regarding Native Americans, it did not directly address the provisions of the IRA that were applicable to Alaska Natives, including Section 5 that authorized the Secretary to take Alaska land in trust for Natives. It did, however, revoke all but one of the existing Native Reserves, repeal the authority for new allotment applications, and set forth a broad declaration of policy to settle land claims. See 43 U.S.C. §§ 1618(a), 1617(d) and 1601(b).

Alaska first argues that the Court should reconsider whether there is an “irreconcilable conflict” between the extension of authority to take land-into-trust under Section 5 of the IRA and ANCSA. Alaska’s Mem. at 8. The Court held that ANCSA did not create an explicit or

implicit repeal of the general authority found in the IRA to take land-into-trust for Alaska.¹

Specifically, the Court held that “there may be a tension between ANCSA’s elimination of most trust property in Alaska and the Secretary’s authority to create new trust land, but a tension is not ‘irreconcilable conflict.’” Mem. Op. at 18. Alaska once again asks the Court to view ANCSA stated intent of “avoid[ing] perpetuating in Alaska . . . the trustee system” as prohibiting taking land-into-trust in Alaska. Alaska’s Mem. at 8. Alaska criticizes the Court’s holding for too narrowly reading this statutory purpose as applying only to the land conveyances directly at issue in the settlement. Id.

The Court has already addressed this argument in its Memorandum Opinion by stating that ANCSA’s direction to not create a lengthy trusteeship does not prohibit additional trust land outside of the settlement. See Mem. Op. at 16-19. The Court also looked to other statutory land

¹ As this Court is aware, in 1978, the Associate Solicitor, Indian Affairs concluded that in enacting ANCSA, Congress had an “unmistakable” intent to “permanently remove all Native lands in Alaska from trust status.” “Trust Land for the Natives of Venetie and Arctic Village,” Memorandum to Assistant Secretary - Indian Affairs from Associate Solicitor, Indian Affairs, Thomas W. Fredericks (September 15, 1978). Administrative Record (AR) 00001-00004. The Alaska exception to the land-into-trust regulations embodies this legal premise. On January 16, 2001 (AR00575), the Solicitor rescinded the Associate Solicitor’s 1978 opinion because the earlier opinion had not addressed whether the IRA was expressly or implicitly repealed by later congressional enactments. “The failure of Congress to repeal that section, when it was repealing others affecting Indian status in Alaska, five years after Congress enacted [ANCSA] in 1971, raises a serious question as to whether the authority to take land into trust in Alaska still exists.” 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 Leshy (Jan. 16, 2001). AR 00619. On the same day, the Department published notice of a revised final rule for taking land into trust. 66 Fed. Reg. 3452 (Jan. 16, 2001). AR 00585. These regulations maintained the existing bar on taking land into trust in Alaska. On November 9, 2001, Interior withdrew the January 16, 2001 final regulations. 66 Fed. Reg. 56,608 (Nov. 9, 2001). AR at 00748. Contrary to Alaska’s representation, Alaska’s Mem. at 5, the evolution of Interior’s position does not support reconsideration.

claim settlements in finding that if Congress meant to foreclose new trust lands in Alaska, Congress would have expressly stated. Id. at 19, n.10 (citing Conn. ex rel Blumenthal v. United States, 228 F.3d 82, 90 (2d Cir. 2000) (“We . . . find in the Maine Settlement Act an obvious demonstration that Congress knew how to prohibit the Secretary from taking into trust any lands outside of specifically designated settlement lands. The absence of an analogous provision in the [Connecticut] Settlement Act at issue in this case confirms that the [Connecticut] Settlement Act was not meant to eliminate the Secretary’s power under the IRA to take land purchased without settlement funds into trust for the benefit of the Tribe.”)).

Alaska further presents as a ground for reconsideration, its disagreement with the Court’s reliance on Congress’ explicit repeal of the Secretary’s reservation authority in Alaska in determining ANCSA did not implicitly repeal authority to take land-into-trust in Alaska. Alaska’s Mem. at 8-10. In the 1936 Act (25 U.S.C. § 473a) along with providing for the taking of land-into-trust in Alaska, Congress authorized the Secretary to “proclaim new Indian reservations on lands acquired” pursuant to the authority granted in the IRA. Alaska argues that repeal of the entirety of the 1936 Act would have adverse implications for Native Alaskans, that certain provisions “are still valid in Alaska” and not repealed, but ANCSA implicitly repealed the land-into-trust authority. Alaska’s Mem. at 9-10. No party is arguing (or has argued) that Congress revoked all authority under the 1936 Act. Instead, Congress specifically repealed certain provisions, leaving the other provisions intact. For example, in Section 19 of ANCSA, Congress expressly repealed the creation of new reservations in Alaska. 43 U.S.C. § 1618(a). Five years after the passage of ANCSA, Congress enacted the Federal Land Policy and Management Act (“FLPMA”), Pub. L. No. 94-579, 90 Stat. 2743 (1976), which expressly

repealed many public land laws, including some statutes like the 1926 Alaska Native Townsite Act that applied to Alaska lands. Congress again did not repeal Section 5 of the IRA in FLPMA.

After considering the various statutory enactments, the Court held that “the simple fact that the statute conferring land-into-trust authority in Alaska survives is a strong indication that the Secretary’s authority to take Alaska land into trust also survives.” Mem. Op. at 19. Alaska argues that Congress did not need to specifically amend 25 U.S.C. § 473a (the 1936 statute that extended Section 5 of the IRA to Alaska and some other provisions) to remove authority to take land-into-trust in Alaska because “ANCSA simply limits the applicability of 25 U.S.C. § 473a in Alaska.” Alaska’s Mem. at 10. Alaska’s circular conclusion here merely reiterates their earlier argument, while also not providing any new rationale or legal analysis. Accordingly, the Court should deny Alaska’s request for reconsideration.

II. The Court should deny Alaska’s request that it certify its order for interlocutory review.

At this point in the litigation, it would be most efficient for the Court to decide the remaining motions and enter final judgment setting aside the Alaska exception. Alaska can then decide whether to appeal a final judgment rather than pursuing an interlocutory appeal. Alaska’s position in its remedy brief concedes that its request for interlocutory appeal will be overtaken once the Court’s rules on remedy and issues final judgment setting aside the Alaska exception. See Alaska’s Supp. Br. at 2 (“Vacatur, with prompt entry of final judgment, also would expedite the inevitable appeal in this case.”); id. at 9 (“Immediate entry of judgment ensures appellate review is available . . .”). Moreover, as discussed below, the Court should deny Alaska’s request for an interlocutory appeal because the request does not meet the factors for an interlocutory appeal.

Whether to allow an interlocutory appeal of a non-final order is left to the discretion of the district court. Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 47 (1995). Although courts have discretion, certification of an issue for interlocutory appeal “is granted rarely and only under ‘exceptional circumstances.’” Arias v. Dyncorp, 856 F.Supp.2d 46, 53 (D.D.C. 2012) (quoting Al Maqaleh v. Gates, 620 F. Supp. 2d 51, 54 (D.D.C. 2009)); see also Am. Council of the Blind v. Paulson, 525 F.3d 1256, 1265 (D.C. Cir. 2008). The party seeking interlocutory appeal bears the burden of persuading the court that “circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.” In re Vitamins Antitrust Litig., No. 99–197-TFH, 2000 WL 33142129, at *1 (D.D.C. Nov. 22, 2000). Indeed, the party seeking appeal “must meet a high standard to overcome the strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals.” Arias, 856 F. Supp. 2d at 53 (quoting Graham v. Mukasey, 608 F. Supp. 2d 56, 57 (D.D.C. 2009)); see also Tolson v. United States, 732 F.2d 998, 1001–02 (D.C. Cir. 1984). Alaska has not met that high burden here.

Section 1292(b) creates a three-part test for certification that requires the party seeking an interlocutory appeal to show: (1) that the order involves a controlling question of law, (2) as to which a substantial ground for difference of opinion exists, and (3) that an immediate appeal would materially advance the disposition of the litigation. See Howard v. Office of Chief Admin. Officer of U.S. House of Representatives, 840 F. Supp. 2d 52, 55 (D.D.C. 2012); APCC Servs., Inc. v. AT & T Corp., 297 F. Supp. 2d 101, 104 (D.D.C. 2003).

A “controlling question of law” under section 1292(b) “is one that would require reversal if decided incorrectly or that could materially affect the course of litigation with resulting savings

of the court's or the parties' resources." Feinman v. FBI, No. 09–2047-ESH, 2010 WL 962188, at *1 (D.D.C. Mar. 15, 2010) (quoting Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group, 233 F. Supp. 2d 16, 19 (D.D.C. 2002)). "A steadily growing number of decisions ... have accepted the better view that a question is controlling ... if interlocutory reversal might save time for the district court, and time and expense for the litigants." See 16 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE, § 3930. The parties recently filed remedy briefs and this litigation is almost complete. Accordingly, there is no benefit to judicial resources from certification of an interlocutory appeal. As Alaska states in its Remedy Brief, the imminent entry of judgment setting aside the Alaska exception actually "conserves judicial resources" and "provides the least disruptive path to ultimate resolution of this litigation." Alaska's Supp. Br. at 8-9.²

Section 1292(b) further provides that to obtain certification of an interlocutory order for appeal, a substantial ground for difference of opinion on the controlling question of law must exist. A substantial ground for difference of opinion is often established when other courts have issued conflicting decisions. See APCC Servs., 297 F. Supp. 2d at 107; see also In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 212 F. Supp. 2d 903, 909–10 (S.D.Ind. 2002) (certification is appropriate where other courts have adopted conflicting positions regarding the issue of law proposed for certification). With regard to the relationship of the IRA and ANCSA, as discussed in the Court's Memorandum Opinion at 12-13, Interior has held multiple opinions over the years as to whether ANCSA prohibits taking land-into-trust in Alaska. But Alaska has not identified any court that has agreed with their argument that ANCSA constituted an implied repeal of the IRA's general authority to take land-into-trust in Alaska.

² Of note, although Intervenor's do not necessarily have a guaranteed right of appeal after final judgment, the entry of a final judgment setting aside the Alaska exception would allow for Alaska to pursue an appeal.

See generally Arias, 856 F. Supp. 2d at 54 (denying certification for appeal because the defendants failed to identify “any split in this district or this circuit regarding any controlling issue of law”) (internal citations and quotation marks omitted). This factor also does not weigh in favor of interlocutory review.

Finally, Section 1292(b) provides that certification of an interlocutory order for appeal is appropriate if an immediate appeal will materially advance disposition of the litigation. See APCC Servs., 297 F. Supp. 2d at 109 (certifying appeal because “[a]n immediate appeal would conserve judicial resources and spare the parties from possibly needless expense if it should turn out that this Court’s rulings are reversed”). Alaska argues that if they are correct, the court will not need to proceed with a ruling on remedy and thus, certification will conserve judicial resources. Alaska’s Mem. at 15-16. Again, the parties have already briefed the appropriate remedy and the litigation is almost at an end. As such, an interlocutory appeal will not conserve judicial resources or materially advance disposition of this litigation.

CONCLUSION

In conclusion, the Federal Defendants respectfully request the Court deny Alaska’s Motion for Reconsideration or in the Alternative, for Certification for Interlocutory Review.

RESPECTFULLY SUBMITTED,

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