

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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

**STATE OF ALASKA’S CONSOLIDATED REPLY IN SUPPORT OF ITS
MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR
CERTIFICATION FOR INTERLOCUTORY REVIEW, AND RESPONSE TO
DEFENDANTS’ MOTION FOR RECONSIDERATION**

Alaska’s motion for reconsideration or, in the alternative, for certification for interlocutory review (“motion for reconsideration”) asks that the Court reconsider its decision that ANCSA did not implicitly repeal the Secretary’s authority to take land into trust in Alaska.¹ Alaska has demonstrated that the interests of justice support reconsideration of the Court’s decision, and defendants’ and plaintiffs’ arguments otherwise are unavailing.

Defendants oppose Alaska’s motion for reconsideration because they claim that it provides no new argument on the issue of whether the Secretary retains authority, post-ANCSA, to create trust land in Alaska and because immediate entry of judgment severing and invalidating the Alaska exception would moot the question of whether interlocutory

¹ Doc. 112-1. The State’s motion for reconsideration also asked the Court to reconsider the part of its March 31, 2013 Order directing the parties to brief the scope of the remedy. Doc. 112-1 at 3, 4, 10-12.

review is appropriate.² Defendants also seek reconsideration of the Court's decision, but instead request that the Court limit its holding to finding that the Alaska exception is arbitrary and capricious and not reach the issue of whether the land-into-trust regulation violates 25 U.S.C. § 476(g).³ Plaintiffs oppose the State's motion for reconsideration, arguing that the State has not demonstrated that the interests of justice support reconsideration of the Court's opinion nor that the Court's opinion meets the requirements for interlocutory certification under 28 U.S.C. § 1292(b).⁴

Defendants and plaintiffs both oppose Alaska's request that the Court certify its decision for interlocutory review. Plaintiffs agree that the issue of whether the Secretary retains authority to take land into trust in Alaska is a controlling issue of law in the case,

² Defs.' Resp. Alaska's Mot. Recons. (Doc. 121) at 2. Defendants claim that Alaska's remedy brief "changes position" in requesting that the Court set aside the Alaska exception and enter judgment immediately. Defs.' Resp. Alaska Mot. Recons. (Doc. 121) at 2. To the contrary, Alaska's request for reconsideration or certification for interlocutory review clearly states that "[t]he appropriate remedy is to enter judgment and remand the matter to the Secretary for further action consistent with the Court's determination of the applicable legal standard." Alaska Mem. Supp. Recons. (Doc. 112-1 at 12). In its motion for reconsideration, Alaska did not understand the direction in the Court's March 31, 2014 order (Doc. 109) to brief "whether it is only the Alaska exception that is deprived of 'force or effect,' or whether some larger portion of the land-into-trust regulation must fall" to implicate the issue of whether the effect of the judgment should be stayed for a period of time. Instead, the State interpreted the Court's directive to require briefing on the merits of other provisions in 25 C.F.R. Part 151. The State agrees that prompt entry of judgment invalidating and severing the Alaska exception from the rest of the regulation would moot its request that the Court certify for interlocutory review its decision on the merits. In light of the Court's May 23, 2013 Order (Doc. 115) clarifying the remedy issues to be briefed, and the fact that briefing on the scope of the remedy has been completed, the State recognizes that its request that the Court reconsider its order to provide briefing on the scope of the remedy is moot.

³ Defs.' Resp. Alaska's Mot. Recons. (Doc. 121) at 1-2.

⁴ Pls.' Opp. Alaska's Mot. Recons. (Doc. 113).

but deny that substantial ground for difference of opinion exists or that immediate appeal would materially advance the disposition of this litigation.⁵ Defendants do not directly state whether they believe the question of whether the Secretary retains authority to take land into trust is a controlling issue of law in this case,⁶ but their own motion for reconsideration focuses solely on this issue, indicating that they do,⁷ and their response to the State's motion points out that it would be "most efficient" for the Court to "decide the remaining motions and enter final judgment setting aside the Alaska exception," which would permit immediate appeal of a final judgment and moot the State's request for interlocutory review.⁸ The State agrees that immediate entry of judgment severing and vacating the Alaska exception would moot the State's request that the Court certify its decision for interlocutory review.⁹

ARGUMENT

I. The interests of justice support reconsidering the Court's holding that the Secretary retains discretion to create new trust land in Alaska.

Defendants challenge the merits of the State's arguments supporting reconsideration, but do not claim that the State's request is unsupported by the interests

⁵ *Id.* at 8, 9-12.

⁶ Defs.' Resp. Alaska's Mot. Recons. (Doc. 121) at 7-8 (discussing what makes an issue "controlling" without stating defendants' position).

⁷ Defs.' Mot. Recons. (Doc. 120).

⁸ Defs.' Resp. Alaska's Mot. Recons. (Doc. 121) at 6.

⁹ Alaska's Supp. Reply Remedy Br. (Doc. 122) at 6.

of justice.¹⁰ Plaintiffs' opposition to the State's motion for reconsideration hinges largely on the fact that the State asks the Court to reevaluate arguments advanced by the State during summary judgment briefing, and on plaintiffs' claim that the State fails to identify any injustice that would result if reconsideration were to be denied and fails to recognize plaintiffs' interests in defeating the State's motion.¹¹

The interests of justice support reconsideration of a decision that "has made an error not of reasoning but of apprehension," including a decision that does not consider "controlling decisions or data that might reasonably be expected to alter the conclusion reached by the court."¹² The Court's decision that the Secretary retains authority to create new trust land in Alaska acknowledges only a "tension" between ANCSA and the land-into-trust statute, and relies on the Court's finding that neither ANCSA nor any subsequent legislation explicitly or implicitly repealed 25 U.S.C. § 473a, which was enacted in 1936 and extended several provisions of the 1934 Indian Reorganization Act (IRA) to Alaska, including 25 U.S.C. § 465, the land-into-trust statute.

Alaska's motion for reconsideration points to applicable law indicating that an alternate conclusion is more appropriate, including the 1998 Supreme Court decision in *Venette*, which directly addresses ANCSA's repudiation of trust lands in Alaska:

¹⁰ Defs.' Resp. Alaska's Mot. Recons. (Doc. 121) at 2-6. The fact that defendants also seek reconsideration of the Court's decision indicates that defendants believe reconsideration is consistent with the interests of justice.

¹¹ Pls.' Opp. Alaska's Mot. Recons. (Doc. 113) at 3-6.

¹² *Singh v. George Washington Univ.*, 383 F. Supp.2d 99, 101 (D.D.C. 2005).

[I]t is significant that ANCSA, far from designating Alaskan lands for Indian use . . . revoked all existing reservations in Alaska, “set aside by legislation or by Executive or Secretarial Order for Native use.” *In no clearer fashion could Congress have departed from its traditional practice of setting aside Indian lands.*¹³

The land-into-trust statute was enacted in 1934, and made applicable to Alaska in 1936: it defines Congress’ “traditional practice of setting aside Indian lands.” Creation of new trust land in Alaska is inconsistent with the Supreme Court’s finding that ANCSA intended a permanent departure from the trust land model in Alaska. The Supreme Court quoted Ninth Circuit Justice Fernandez, who concurred in the result of the Ninth Circuit decision, but wrote separately to note ANCSA’s “attempt[] to preserve Indian tribes, but simultaneous[] attempt[] to sever them from the land; it attempted to leave them as sovereign entities for some purposes, but as sovereigns without territorial reach.”¹⁴

The State’s motion also emphasizes the settlement language in ANCSA, which directs that the settlement be accomplished

without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or

¹³ *Alaska v. Native Village of Venetie*, 522 U.S. 520, 532 (1998) (quoting ANCSA, 43 U.S.C. § 1618(a))(emphasis added). *See* Alaska’s Mot. Recons. (Doc. 112-1) at 6-8.

¹⁴ *Venetie*, 522 U.S. at 526 (quoting *Venetie*, 101 F.3d 1286, 1303 (9th Cir. 1996) (Fernandez, J., concurring in the judgment). Justice Fernandez wrote separately to note that he was bound by Ninth Circuit precedent but that he did not “embrace [the opinion] with the gusto shown by the majority” nor “accept all of the majority’s reasoning.” *Venetie*, 101 F.3d at 1303.

obligations, [and] *without creating a reservation system or lengthy wardship or trusteeship.*”¹⁵

Taking land into trust in Alaska would create the lengthy trusteeship expressly disavowed by Congress.

The Court’s decision turns on the finding that neither ANCSA nor any other statute had expressly or implicitly repealed 25 U.S.C. § 473a. Alaska’s motion to reconsider argues that ANCSA operated to make 25 U.S.C. § 473a’s application of the land-into-trust statute to Alaska ineffective, except with respect to Metlakatla.¹⁶ Repeal—implicit or explicit—of § 473a would have extinguished other authorities applicable to Alaska that were not affected by ANCSA, such as 25 U.S.C. §§ 475 and 477.¹⁷ The Supreme Court has held that the meaning of one statute may be affected by another statute, particularly where Congress has spoken subsequently and more specifically to the issue.¹⁸ Such is the case here.

Defendants argue that Alaska’s interpretation of ANCSA’s effect on § 473a fails to consider that ANCSA “specifically repealed” certain provisions of the 1936 IRA,¹⁹ and

¹⁵ 43 U.S.C. § 1601(b) (emphasis added). *See* Alaska’s Mot. Recons. (Doc. 112-1) at 7-8.

¹⁶ Alaska’s Mot. Recons. (Doc. 112-1) at 8-10.

¹⁷ Plaintiffs concede that repeal of 25 U.S.C. § 465 would be inappropriate given the nationwide application of the statute. *See* Pls.’ Reply Mem. (Doc. 62) at 2.

¹⁸ *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (quoting *United States v. Estate of Romani*, 523 U.S. 517, 530-531, (1998); *United States v. Fausto*, 484 U.S. 439, 453 (1988)).

¹⁹ Defs.’ Resp. Alaska’s Mot. Recons. (Doc. 121) at 5-6.

point to section 19 of ANCSA²⁰ as an example. Section 19, however, revokes existing reservations in Alaska (except for the Annette Island Reserve) and does not repeal any legislation.²¹ Congress acted separately in 1976 to repeal the authority for creating Indian reservations in Alaska.²² Similarly, while section 18(a) of ANCSA repealed the Alaska Native Allotment Act of 1906,²³ it did not repeal the Dawes Act (General Allotment Act).²⁴ Instead, section 18(a) prohibits Alaska Natives subject to ANCSA, and their descendants, from “availing” themselves of the provisions of the Dawes Act, even though it remains codified in the United States Code.²⁵ Notably, the 1934 IRA itself prohibited allotment of reservation lands,²⁶ which made section 1 of the Dawes Act ineffective on

²⁰ 43 U.S.C. § 1618(a).

²¹ Notwithstanding any other provision of law, and except where inconsistent with the provisions of this Act, the various reserves set aside by legislation or by Executive or Secretarial Order for Native use or for administration of Native affairs, including those created under the Act of May 31, 1938 (52 Stat. 593), are hereby revoked subject to any valid existing rights of non-Natives.

43 U.S.C. § 1618(a).

²² FLPMA § 704(a), 90 Stat. 2792.

²³ Act of May 17, 1906 (34 Stat. 197).

²⁴ Act of February 8, 1887, 24 Stat. 388, codified at 25 U.S.C. § 334.

²⁵ *Id.*

²⁶ 25 U.S.C. § 461.

reservations, but Congress did not repeal section 1 of the Dawes Act until 66 years later, on November 7, 2000.²⁷

As the State has argued, ANCSA's limited application to Alaska, and *within* Alaska, operates to limit application of certain statutes to and within the state while leaving the statutes effective elsewhere. Section 19(a) of ANCSA specifically excludes the Metlakatla Indian Community from the ANCSA settlement, and specifically preserves the Annette Island Reservation.²⁸ ANCSA does not apply to Metlakatlans and the Annette Island Reservation because the Metlakatlans emigrated from Canada in 1887 and therefore had no aboriginal claims to land in the State.²⁹ Therefore, it would have been inappropriate, and Congress did not intend, to repeal IRA authorities (including the land-into-trust statute) that continue to apply to Metlakatla but are inconsistent with the implementation of ANCSA elsewhere in the State.

Plaintiffs do not dispute the merits of Alaska's arguments supporting reconsideration, but instead argue that reconsideration would frustrate the goal of

²⁷ Pub. L. No. 106-462, Title I, § 106(a)(1), 114 Stat. 2007.

²⁸ This section shall not apply to the Annette Island Reserve established by the Act of March 3, 1891 (26 Stat. 1101) and no person enrolled in the Metlakatla Indian community of the Annette Island Reserve shall be eligible for benefits under this Act.

43 U.S.C. § 1619(a).

²⁹ Alaska's Opp. Pls.' Mot. Summ. J. & Cross-Mot. Summ. J. (Doc. 76) at 2 n.5. *See* Case & Volluck, Alaska Natives and American Laws 70 & n.26 (2nd ed. 2002).

promoting finality in judicial proceedings and work injustice against them.³⁰ Plaintiffs also claim that the State's motion fails to allege that some harm or injustice would result if reconsideration were denied.³¹

Alaska's motion to reconsider furthers the goal of promoting finality in judicial proceedings by seeking to ensure that the Court's opinion fully apprehends and addresses the important issues in the case, and that the legal issues are clearly framed for any further action by the Secretary or an appellate court. Plaintiffs' assertion that the Court's decision offers the finality that plaintiffs have sought for so long rings hollow in light of the State's stated intent to appeal, either on an interlocutory basis (if the State's pending motion is granted) or once final judgment is entered. That the federal defendants filed a motion for reconsideration also indicates that the Court's March 13 decision is probably not the last word on the issue.

II. The Court should also reconsider its decision with respect to the applicability of 25 U.S.C. § 476(f) and (g).

Defendant's motion for reconsideration asks that the Court revise its decision that the Alaska exception violates substantive law to hold instead that the Alaska exception is arbitrary and capricious, and refrain from deciding whether the Alaska exception violates 25 U.S.C. § 476(g).³²

³⁰ Pls.' Opp. Mot. Recons. (Doc. 113) at 4-6.

³¹ *Id.* at 4.

³² Defs.' Mot. Recons. (Doc. 120) at 1-2. *See* Mem. Op. (Doc 109) at 23-24 (finding that the Alaska exception is "not in accordance with law").

The State agrees that the Court need not reach the issue of whether the Alaska exception violates 25 U.S.C. § 476(f) and (g), but disagrees that the question of whether the Secretary may take land into trust *in Alaska* is one of Secretarial discretion. The Secretary's *general* authority to take land into trust is discretionary: "[t]he Secretary of the Interior is authorized, *in his discretion*, to acquire . . . any interest in lands . . . for the purpose of providing land for Indians."³³ However, as the State has consistently argued, ANCSA superseded the Secretary's discretionary authority with respect to Alaska tribes and Alaska Natives subject to the provisions of that statute. Therefore, Congress has left no room for the Secretary to apply her discretion to the question of whether additional trust land may be created in Alaska.

Because ANCSA requires as a matter of law that the Secretary treat Alaska Natives and Tribes covered by the Act differently than elsewhere, the Alaska exception does not violate 25 U.S.C. § 476(g), which invalidates any regulation that "classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes *by virtue of their status as Indian tribes*."³⁴ The Alaska exception recognizes the status of Alaska Natives and Tribes subject to ANCSA as parties to a comprehensive land claims settlement. The Alaska exception does not discriminate against Alaska Natives and Tribes relative to other federally recognized tribes "by virtue of their status as Indian tribes."

³³ 25 U.S.C. § 465 (emphasis added).

³⁴ Emphasis added.

The State agrees with defendants, however, that the Court's holding regarding the applicability of 25 U.S.C. § 476(f) and (g) to this case may have far-reaching, unintended consequences that are not supported by plain language of the statute nor its legislative history.³⁵ Additionally, the Court's opinion could imply that Congress' ability to discriminate among tribes through separate statutory settlements, such as ANCSA, is limited.³⁶ As interpreted in the Court's decision, sections 476(f) and (g) also could be read to authorize the Secretary to restore legal authorities that Congress has revoked. This could not have been Congress' intent.

The State takes no position at this time regarding the issue of whether the language in 25 U.S.C. § 476(f) and (g) is ambiguous or how it should be interpreted, other than that subsections 476(f) and (g) do not impair Congress' ability to discriminate among tribes through separate statutory settlements, such as ANCSA. As the State has repeatedly argued, the Secretary is prohibited as a matter of law, not discretion, from taking land into trust in Alaska. However, the State recognizes and shares defendants' concerns that, as currently structured, the Court's opinion could appear to support the proposition that

³⁵ See Defs.' Mot. Recons. (Doc. 120) at 13.

³⁶ See, e.g., Rhode Island Indian Claims Settlement, 25 U.S.C. §§ 1701-12; Maine Indian Claims Settlement, 25 U.S.C. §§ 1721-35; Florida Indian (Miccosukee) Land Claims Settlement, 25 U.S.C. §§ 1741-50e; Connecticut Indian Land Claims Settlement, 25 U.S.C. §§ 1751-60; Massachusetts Indian Land Claims Settlement, 25 U.S.C. §§ 1771-71i; Washington Indian (Puyallup) Land Claims Settlement, 25 U.S.C. §§ 1773-73j; Seneca Nation (New York) Land Claims Settlement, 25 U.S.C. §§ 1774-74h; Mohegan Nation (Connecticut) Land Claims Settlement, 25 U.S.C. §§ 1775-75h; Crow Boundary Settlement, 25 U.S.C. §§ 1776-76k.

25 U.S.C. § 476(f) and (g) prohibit the Secretary from exercising discretion that Congress may have intended to delegate to her.

III. Certification for interlocutory review is appropriate if the Court stays the effect of the judgment or does not sever the Alaska exception.

The State and plaintiffs agree that whether ANCSA prohibits trust land acquisitions in Alaska or not is the controlling issue of law in this case.³⁷ Defendants do not directly state that they agree on this point, but their response to Alaska's motion does not dispute the point.³⁸ Defendants and the State further agree that immediate entry of final judgment would moot the State's motion for interlocutory review.³⁹ Defendants and plaintiffs both argue that the State has not demonstrated that a substantial ground for difference of opinion exists regarding the Court's decision.⁴⁰ Plaintiffs also argue that interlocutory review would not materially advance disposition of the litigation.⁴¹

The State's motion for reconsideration and the first section of this consolidated reply and response to defendants' motion for reconsideration demonstrate that substantial ground for difference of opinion exists. The State has identified Supreme Court precedent with direct bearing on the controlling issue in this case: whether ANCSA prohibits the

³⁷ Alaska's Mot. Recons. (Doc. 112-1) at 13-14; Pls.' Opp. Alaska's Mot. Recons. (Doc. 113) at 8.

³⁸ Defs.' Resp. Alaska's Mot. Recons. (Doc. 121) at 7-8.

³⁹ Alaska's Supp. Remedy Reply Br. (Doc. 122) at 6; Defs.' Resp. Alaska's Mot. Recons. (Doc. 121) at 6.

⁴⁰ Defs.' Resp. Alaska's Mot. Recons. (Doc. 121) at 8-9; Pls.' Opp. Alaska's Mot. Recons. (Doc. 9-11.

⁴¹ Pls.' Opp. Alaska's Mot. Recons. (Doc. 113) at 11-13.

Secretary from taking new land into trust in Alaska. The fact that defendants also have sought reconsideration of the Court's decision demonstrates that substantial ground for difference of opinion exists. Additionally, the State has provided argument and analysis that could reasonably be expected to alter the Court's opinion. For the same reasons that reconsideration would serve the interests of justice, so has Alaska demonstrated the substantial ground for difference of opinion regarding the Court's decision.

Plaintiffs' claim that interlocutory review would not materially advance the disposition of this litigation is based largely on the argument that the issue of whether ANCSA prohibits the creation of new trust land in Alaska is controlling, and not collateral to the merits.⁴² Plaintiffs also assert that interlocutory review would "by-pass the final judgment rule and begin a full merits appeal of this case."⁴³ Plaintiffs fail to acknowledge that they have advocated for delayed entry of judgment pending "curative rulemaking," a remedy which, if implemented, could delay appellate review of a final judgment for a substantial period of time.⁴⁴ This scenario also would inevitably create additional issues for litigation pertaining to the "curative" rule, requiring a significant increase in resources by all parties and the judiciary over immediate appellate review of the controlling legal issue in the case. Interlocutory review also would prevent the

⁴² Pls.' Opp. Alaska's Mot. Recons. (Doc. 113) at 11-12.

⁴³ *Id.* at 12.

⁴⁴ Alaska has repeatedly stated that the importance of the issues in this case require that it seek appellate review as soon as it's available. Alaska's Mot. Recons. (Doc. 112-1) at 16; Alaska's Remedy Br. (Doc. 119) at 2, 9; Alaska's Supp. Remedy Reply (Doc. 122) at 6.

Secretary from expending significant resources on a rulemaking that is destined for appeal. Certainly, the prompt entry of final judgment vacating the Alaska exception provides the most direct path to resolution of this litigation. Should the Court choose another remedy, interlocutory review of the Court's decision that ANCSA does not prohibit the Secretary from taking land into trust in Alaska becomes the most direct path to resolution.

CONCLUSION

Reconsideration would ensure that the issues are appropriately framed for appellate review and the State has demonstrated that the interests of justice warrant reconsideration of the Court's March 31, 2013 decision. If the Court elects to stay the effect of the judgment pending further administrative action by the Secretary, the ultimate termination of this litigation would be advanced by certifying the Court's decision for interlocutory review. The State of Alaska therefore respectfully requests that the Court grant its motion for reconsideration, and, if the Court chooses to stay the effect of the judgment pending additional rulemaking, the State respectfully requests that the Court certify its decision for interlocutory review.

DATED August 9, 2013.

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By: /s/ J. Anne Nelson
J. Anne Nelson
Assistant Attorney General
Alaska Bar No. 0705023

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By: /s/ Elizabeth J. Barry
Elizabeth J. Barry
Assistant Attorney General
Alaska Bar No. 8106006

Certificate of Service

The undersigned hereby certifies that, in the above-captioned case, on August 9, 2013, a true and correct copy of *Alaska's Consolidated Reply in Support of its Motion for Reconsideration or, in the Alternative, for Certification for Interlocutory Review, and Response to Defendants' Motion for Reconsideration* was served by electronic means upon the following:

Richard A. Guest Native American Rights Fund 1514 P Street, NW (Rear) Suite D Washington, DC 20005	Heather Kendall Miller Native American Rights Fund 745 W. 4th Avenue, Suite 502 Anchorage, Alaska 99501-1736
Hollis L. Handler Alaska Legal Services Corporation 1648 S. Cushman, Ste. 300 Fairbanks, Alaska 99701	Maureen E. Rudolph United States Department of Justice P.O. Box 7611 Washington, DC 20044-0663

/s/ J. Anne Nelson
J. Anne Nelson
Assistant Attorney General
Alaska Bar No. 0705023