
No. 13-5360

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF ALASKA

Appellants,

v.

AKIACHAK NATIVE COMMUNITY, et al.,

Plaintiffs-Appellees,

and

UNITED STATES DEPARTMENT OF THE INTERIOR AND SALLY JEWELL,
SECRETARY OF THE INTERIOR,

Defendants-Appellees,

Appeal from the District Court for the District of Columbia

APPELLANTS' OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici.

No amici appeared in this matter before the district court. The parties in the district court and in this appeal are Appellant State of Alaska, Appellees United States Department of the Interior and Sally Jewell, Secretary of the Interior (“Secretary”), and Appellees Akiachak Native Community, Chalkyitsik Village, Chilkoot Indian Association, Tuluksak Native Community (collectively, “the Tribes”), and Alice Kavairlook.

B. Rulings under review.

Akiachak Native Community et al. v. Salazar and State of Alaska, No. 06-969 (Mar. 31, 2013) (Contreras, J.) (Doc. 109), located in Appendix at ____ and published at 935 F. Supp. 2d 195 (D.D.C. 2013).

Order, *Akiachak Native Community et al. v. Sally Jewell et al. and State of Alaska*, No. 06-969 (Mar. 31, 2013) (Contreras, J.) (Doc. 110), located in Appendix at ____

Akiachak Native Community et al. v. Sally Jewell et al. and State of Alaska, No. 06-969 (Sept. 30, 2013) (Contreras, J.) (Doc. 130), located in Appendix at ____ and published at 995 F. Supp. 2d 1 (D.D.C. 2013).

Order, *Akiachak Native Community et al. v. Sally Jewell et al. and State of Alaska*, No. 06-969 (Sept. 30, 2013) (Contreras, J.) (Doc. 131), located in Appendix at ____.

C. Related cases.

Alice Kavairlook v. Kempthorne et al., No. 06-1405 (D.D.C) (Roberts, J.) (Doc. 12) was consolidated with this case on July 31, 2007.

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GLOSSARY

This brief uses the following abbreviations and acronyms not in common use:

AFN—Alaska Federation of Natives

ANCSA—Alaska Native Claims Settlement Act

FLPMA—Federal Land Policy and Management Act

IRA—Indian Reorganization Act

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JURISDICTIONAL STATEMENT

Appellees Akiachak Native Community, Chalkyitsik Village, Chilkoot Indian Association, and Tuluksak Native Community invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1346(a)(2), 1361, and (as to the Tribes) 28 U.S.C. § 1362, and (as to Alice Kavairlook) 28 U.S.C. § 1353. The district court granted summary judgment to the Tribes and Kavairlook, and the State filed its appeal on November 29, 2013. This Court has jurisdiction under 28 U.S.C. § 1291.

STATUTES AND REGULATIONS

Statutes and regulations are in the separately bound addendum.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does Alaska have standing to appeal the district court's decision?
2. Does the Alaska Native Claims Settlement Act ("ANCSA"), which disposed of aboriginal land claims by replacing trust land and reservations with fee land owned by Alaska Natives as shareholders in state-chartered, for-profit corporations, prohibit the creation of new trust land in Alaska?
3. Does ANCSA supersede 25 U.S.C. § 473a's application of 25 U.S.C. § 465—a 1934 statute allowing the Secretary of the Interior to take land into trust "for the purpose of providing land for Indians"—to Alaska?
4. Does 25 U.S.C. § 476(g), which nullifies any regulation or agency decision that discriminates between tribes by virtue of their status as tribes,

mandate that the Secretary accept applications to take land into trust in Alaska, notwithstanding ANCSA?

STANDARD OF REVIEW

The Court reviews a district court's statutory interpretation de novo.¹ It reviews de novo the district court's grant of summary judgment in an Administrative Procedure Act case, "as if the agency's decision had been appealed to this court directly."² "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."³ The Court must "place the provision in context, interpreting the statute to create a symmetrical and coherent regulatory scheme."⁴ The Court also "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy

¹ *Loving v. I.R.S.*, 742 F.3d 1013, 1016 (D.C. Cir. 2014).

² *Rempfer v. Sharfstein*, 583 F.3d 860, 864-65 (D.C. Cir. 2009). *See also* *Narragansett Indian Tribe v. National Indian Gaming Comm'n*, 158 F.3d 1335, 1338 (D.C. Cir. 1998).

³ *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 & n.9 (1984).

⁴ *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121 (2000).

decision of such economic and political magnitude to an administrative agency.”⁵

No agency deference is due when Congress’ intent is unambiguous.⁶

STATEMENT OF THE CASE

I. Introduction

“In enacting ANCSA, Congress sought to end the sort of federal supervision over Indian affairs that had previously marked federal Indian policy.”⁷ ANCSA⁸ established a statewide system of Native land ownership that wholly rejects the reservation and trust land model predominant elsewhere in the United States. ANCSA revoked existing reservations and discontinued other forms of trust land in Alaska, and in exchange provided 44 million acres of fee land to Alaska Natives as shareholders in state-chartered, for-profit corporations. The settlement framework thus preserves Alaska tribes “as sovereign entities for some purposes, but as sovereigns without territorial reach.”⁹

ANCSA was the first statutory land claims settlement of its kind, and remains unique in its scope and approach. It encompasses the entire state and resolves all aboriginal and statutory land claims by Natives other than Tsimshian

⁵ *Id.*

⁶ *Chevron*, 467 U.S. at 842-43 & n.9.

⁷ *Alaska v. Native Vill. of Venetie*, 522 U.S. 520, 523-24 (1998).

⁸ 43 U.S.C. § 1601-1629h.

⁹ *Venetie*, 522 U.S. at 526 (quoting Fernandez, J. concurrence in 101 F.3d 1286, 1303 (1996)).

Indians who are enrolled in the Metlakatla Indian Community.¹⁰ ANCSA also stands alone in its authorization of state-chartered, Native-owned for-profit corporations as the vehicle for implementing the settlement.¹¹

One of the most—if not *the* most—significant aspects of ANCSA is that it is a settlement. The State of Alaska participated in that settlement by providing \$500 million in funding (about \$2.9 billion in today’s dollars)¹² and giving up its land selection priorities under the Alaska Statehood Act.¹³ The State participated in ANCSA with the understanding that its jurisdiction over land within its borders would be preserved and that Native villages would eventually have local

¹⁰ 43 U.S.C. §§ 1602(b), 1603(b)&(c).

¹¹ A survey of other Indian land claims settlement statutes reveals none as comprehensive in scope as ANCSA (i.e., statewide revocation of all reservations, discontinuation of individual allotments, and extinguishment of existing and future claims based on both aboriginal title and statutory property rights). *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.

¹² *See CPI Inflation Calculator*, Bureau of Labor Statistics, http://www.bls.gov/data/inflation_calculator.htm (last visited Aug. 13, 2015) (calculating value in 2014 dollars).

¹³ 43 U.S.C. §§ 1608, 1610; *Venetie*, 522 U.S. at 524.

governments organized under state law. This expectation is codified in

43 U.S.C. § 1601(b):

[T]he settlement should be accomplished . . . without establishing any permanent racially defined institutions, rights, privileges, or obligations, *without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges.*¹⁴

In addition to eschewing trusteeships and special tax privileges, ANCSA also extinguished claims based on “any statute . . . of the United States relating to Native use and occupancy,”¹⁵ including 25 U.S.C. § 465, the land-into-trust statute. As the Supreme Court observed, “[i]n no clearer fashion could Congress have departed from its traditional practice of setting aside Indian lands.”¹⁶

Instead of providing land for tribes, ANCSA established an alternative, comprehensive framework for providing land for Alaska Natives. In the process leading to ANCSA’s enactment, Congress specifically considered and rejected trust land as a settlement option, and has affirmed this decision in later amendments to the statute. Furthermore, restoration of Indian country in Alaska would restore elements of aboriginal title that Congress extinguished. In short,

¹⁴ Emphasis added.

¹⁵ 43 U.S.C. § 1603(c).

¹⁶ *Venette*, 522 U.S. at 532 (quoting ANCSA, 43 U.S.C. § 1618(a)) (emphasis added).

Congress did not implicitly delegate to the Secretary the authority to unravel ANCSA by taking land into trust in Alaska.

Upholding the district court's judgment—which requires the Secretary to apply the land-into-trust regulations to Alaska—would enable an administrative end-run around ANCSA, facilitating the re-creation of trust land in Alaska after Congress expressly revoked it. This would disrupt the governance of the State by creating widespread uncertainty about governmental jurisdiction, re-opening questions that have been considered settled for decades. Reinstatement of trust land—and Indian country—is a policy decision of great political magnitude that Congress did not intend to delegate to the Secretary.¹⁷

Alaska has standing to appeal the district court's decision because application of the land-into-trust regulations to Alaska harms the State's proprietary and sovereign interests in maintaining regulatory jurisdiction and taxing authority over land within its borders. As one of the settling parties, Alaska also has a judicially cognizable interest in preserving the terms of ANCSA's settlement. Because the primary issue here is a legal question—whether ANCSA prohibits the creation of new trust land in Alaska—the matter is ripe for judicial review and delaying resolution of this important issue would serve no purpose.

¹⁷ *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121 (2000).

The Court should reverse the district court's decision that the ANCSA permits the Secretary to create trust land in Alaska and that 25 U.S.C. § 476(g) requires application of the trust land acquisition regulations in the state.

II. Historical background

Alaska Natives, from the organization of Alaska's first civil government in 1884 forward, have been subject to the same laws as non-Natives, including the criminal code, taxes, and civil laws governing matters such as hunting and fishing, employment, and even domestic issues.¹⁸ "There was never an attempt in Alaska to isolate Indians on reservations," and "[v]ery few were ever created."¹⁹ Because Alaska Natives were not categorically displaced from their land, there was little need throughout most of Alaska's history to address the status of the title to the land they occupied.²⁰

In the 1960s, however, two events brought the land claims issue to a head. First, the State began selecting the land to which it was entitled under the

¹⁸ See, e.g., *Native Vill. of Stevens v. Alaska Mgmt. & Planning*, 757 P.2d 32, 35 (Alaska 1988) (state laws and taxes); *United States v. Sitarangok*, 4 Alaska 667 (D. Alaska 1913) (territorial public works laws); *United States v. Doo-Noch-Keen*, 2 Alaska 624 (D. Alaska 1905) (territorial fishing laws).

¹⁹ *Metlakatla Indian Cmty v. Egan*, 369 U.S. 45, 54 (1962).

²⁰ *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1014-19 (D. Alaska 1977) ("ARCO"), *aff'd* 612 F.2d 1132 (9th Cir. 1980). The ARCO district court opinion provides an excellent summary of the history of Native land claims in Alaska and ANCSA.

Statehood Act.²¹ This Act granted Alaska the right to select 103 million acres from vacant, unappropriated, and unreserved public land, but it also included a disclaimer by the State of any right or title to “any lands or other property . . . the right or title to which may be held by any Indians, Eskimos, or Aleuts . . . or is held by the United States in trust for said natives.”²² The State’s land selections prompted Native opposition and eventually led the Secretary in 1966 to freeze the statehood selection process.²³ Second, in the midst of this dispute, oil was discovered on the Arctic Slope, increasing the need to resolve the land claims so that this resource could be developed.²⁴ The State turned to Congress for a solution.²⁵

During the legislative process, Alaska Natives—represented en masse by the Alaska Federation of Natives (AFN)—made clear that they were “very vehemently antireservation.”²⁶ They also opposed the proposal advanced by the Secretary to

²¹ Act of July 7, 1958, Pub. L. No. 85-508, § 6(a) & (b), 72 Stat. 339, 340.

²² *Id.* §§ 4, 6(a) & (b); *ARCO*, 435 F. Supp. at 1016.

²³ *ARCO*, 435 F. Supp. at 1017.

²⁴ *Id.*; AR 73-74. *See also Seldovia Native Ass’n v. United States*, 144 F.3d 769, 772 (Fed. Cir. 1998).

²⁵ *ARCO*, 435 F. Supp. at 1018.

²⁶ *Alaska Native Land Claims: Hearings on S. 2906 Before the S. Comm. on Interior and Insular Affairs*, 90th Cong. 89 (1968) (statement of Barry W. Jackson, AFN counsel).

have the federal government hold settlement land in trust for Alaska Natives.²⁷

Congress specifically considered settlement models that would provide trust land for Alaska Natives, or fee land to tribes, and—with the support of the Alaska Natives—rejected these approaches.²⁸ The result was ANCSA, which departs radically from the reservation and trust land model that had defined Indian land settlements elsewhere. ANCSA preserved Alaska tribes, but “simultaneously attempted to sever them from the land.”²⁹

Enacted in December 1971, ANCSA revoked all Indian reservations in the state, save one,³⁰ and discontinued Indian allotment authority in Alaska.³¹ ANCSA also extinguished “[a]ll aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy . . . including any aboriginal hunting or fishing rights that may exist,” as well as “[a]ll claims against the United States, the State,

²⁷ *Id.* at 576 (AFN “object[s]” to the “propos[al] that the lands go initially in trust to the Secretary” (Barry W. Jackson, AFN counsel)).

²⁸ S. 1964, 90th Cong. (1967); S. 2690, 90th Cong. (1967).

²⁹ *Venetie*, 522 U.S. at 526 (stating that ANCSA “attempted to leave them as sovereign entities for some purposes, but as sovereigns without territorial reach”).

³⁰ ANCSA revoked all existing reservations except for the Annette Island Reserve, which is the reservation for the Metlakatla Indian Community.

³¹ 43 U.S.C. §§ 1617(a), 1618.

and all other persons that are based on . . . any statute or treaty of the United States relating to Native use and occupancy.”³²

Instead of providing land for tribes, ANCSA provided a state- and federally-funded cash settlement of \$962.5 million and fee title to 44 million acres to Alaska Natives as shareholders in regional and village corporations created under the statute.³³ The federal government provided \$462 million of the cash settlement, and the State paid \$500 million from revenue derived from mineral leases on public land.³⁴ The State also subordinated its land selections under the Statehood Act to the process by which the newly formed Native corporations selected and received fee title to the settlement land.³⁵ ANCSA envisioned that the land and cash settlement would provide Alaska Natives valuable resources and the corporate infrastructure with which to develop them.

ANCSA directed the Secretary to divide the State into twelve geographic regions “composed as far as practicable of Natives having a common heritage and sharing common interests,” and approximating the areas covered by existing non-

³² 43 U.S.C. § 1603(b) & (c). ANCSA thus extinguishes three kinds of claims: (1) existing claims of aboriginal title, use or occupancy; (2) future claims based upon aboriginal title, use or occupancy; and (3) claims based upon any statute relating to Native use and occupancy. *See, e.g., United States v. Atlantic Richfield Co.*, 612 F.2d 1132, 1134-36 (9th Cir. 1980)

³³ 43 U.S.C. § 1605.

³⁴ *Id.* §§ 1605, 1608.

³⁵ *Id.* §§ 1610, 1611; *ARCO*, 435 F. Supp. 1009, 1018 (D. Alaska 1977).

profit Native Associations.³⁶ Each region was directed to incorporate under state law a regional corporation to conduct business for profit that would be eligible for ANCSA benefits as long as the corporation was organized and functioned in accordance with the Act.³⁷ Eligible Alaska Natives received stock in the regional corporation in which they enrolled.³⁸

To this day, these regional corporations are major economic forces, with most having subsidiary enterprises that do business in a number of fields, including 8(a) minority enterprise contracting with the federal government, resource extraction and development, and tourism. In 2010, the Arctic Slope Regional Corporation reported \$2.33 billion in revenues, \$164.4 million in net profits, and paid \$73.6 million in dividends to its 12,000 shareholders.³⁹ Bristol Bay Native Corporation reported \$1.8 billion in annual revenue for fiscal year 2014, with

³⁶ 43 U.S.C. § 1606(a).

³⁷ *Id.* § 1606(d). In addition to the twelve regional corporations, ANCSA also authorized a thirteenth regional corporation in which eligible Alaska Natives who were not permanent residents in one of the twelve geographic regions could enroll. *Id.* §§ 1604, 1606. The thirteenth regional corporation received only a cash settlement. *Id.* § 1605(c).

³⁸ *Id.* § 1606(g).

³⁹ *Alaska Native Regional Corporation Roundup*, Alaska Journal of Commerce (May 6, 2015, 2:24 p.m.), <http://www.alaskajournal.com/Alaska-Journal-of-Commerce/May-Issue-2-2015/Alaska-Native-Regional-corporation-round-up/> (last visited Aug. 22, 2015).

earnings of \$49.2 million.⁴⁰ The company issued dividends of \$14 million to 170 Native shareholders and paid shareholders wages of nearly \$13 million.⁴¹ NANA Regional Corporation earned \$1.6 billion in revenue in its fiscal year 2014, including approximately \$143 million net proceeds from the Red Dog Mine, located on ANCSA land.⁴² The mine is one of the largest zinc and lead mines in existence and operates in partnership with Canadian mining corporation Teck Resources Limited.⁴³

ANCSA also required creation of village corporations by the Native residents of each village entitled to receive land and benefits under the Act.⁴⁴ After receiving selected land, village corporations were required to re-convey in fee to current occupants the surface estate of tracts occupied as primary residences, places of business, or subsistence campsites, and tracts occupied by non-profit corporations.⁴⁵ This provided an alternative to the discontinued Native allotment

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ 43 U.S.C. §§ 1607, 1610. The village corporations could organize as either for profit or non-profit entities. *Id.* § 1607(a). Alaska Natives who did not live in the villages did not receive stock in a village corporation, only the regional corporation. *Id.* §§ 1607(a), 1604, 1606(g). Four historically Native communities (Sitka, Kodiak, Juneau, and Kenai) did not meet the requirements to form village corporations and instead formed four “urban corporations.” *Id.* § 1613(h)(3).

⁴⁵ *Id.* § 1613(c).

authorities for providing land for individual Alaska Natives.⁴⁶ The village corporations were then required to convey to any municipal corporation in the village—or to the State in trust for a future municipal corporation—title to no fewer than 1,280 acres of the remaining surface estate of the improved land on which the Native village was located plus as much additional land as necessary for community expansion, rights-of-way for public use, and other foreseeable community needs.⁴⁷ Alternatively, village corporations could take fee title to former reservation land and forego the monetary payments and land selection process.⁴⁸ Some of the village corporations are also significant economic players.⁴⁹

Thus, ANCSA settled aboriginal claims by granting land to Native corporations, rather than to tribes. It also established the foundation for municipal governments in Native villages instead of preserving or providing a land base for tribal governance. ANCSA intended that the Native corporations operate in lieu of the tribal model as the primary conduit for providing benefits and services to shareholders.

⁴⁶ *Id.* § 1617(a).

⁴⁷ *Id.* § 1613(c)(3). ANCSA defines “Municipal Corporation” to mean “any general unit of municipal government under the laws of the State of Alaska.” *Id.* § 1602(i).

⁴⁸ *Id.* § 1618(b).

⁴⁹ *See, e.g.,* Huna Totem Corporation, Operations, <http://www.hunatotem.com/operations> (last visited Aug. 22, 2015).

Only one tribe, the Metlakatla Indian Community, did not participate in the ANCSA settlement, the Annette Islands Reserve.⁵⁰ The Metlakatlans emigrated from British Columbia in the 1800s and thus have no aboriginal land claims in Alaska.⁵¹ Therefore, ANCSA excludes the Metlakatlans from its settlement provisions by excluding them from the statute's definition of "Native."⁵²

III. Facts and proceedings

The land-into-trust statute, 25 U.S.C. § 465, was enacted in 1934 and authorizes the Secretary of Interior "in his discretion, to acquire . . . any interest in lands, water rights, or surface rights to lands . . . for the purpose of providing land for Indians." It specifies that title to any lands acquired under the statute "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, and such lands or rights shall be exempt

⁵⁰ *Id.* § 1618(a).

⁵¹ Act of March 3, 1891, 26 Stat. 1101. Aboriginal title is a right of occupancy on lands that a tribe has inhabited from time immemorial. *Oneida Cty v. Oneida Indian Nation of New York State*, 470 U.S. 226, 233-34 (1985).

⁵² 43 U.S.C. § 1602(b):

"Native" means a citizen of the United States who is a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians *not enrolled in the Metlakatla Indian Community*), Eskimo, or Aleut blood, or combination thereof."

from State and local taxation.”⁵³ 25 U.S.C. § 473a, enacted in 1936, applied the land-into-trust statute to the Territory of Alaska.

The land-into-trust regulation, 25 C.F.R. § 151.1—adopted by the Secretary in 1980—“govern[s] the acquisition of land by the United States in trust status for individual Indians and tribes.”⁵⁴ When originally enacted, this regulation implemented the Secretary’s determination 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”⁵⁵ and included the “Alaska exception,” which states: “[t]hese 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.”⁵⁶

In 1994, plaintiff-appellee Chilkoot Indian Association and two other tribes petitioned the Secretary to remove the Alaska exception.⁵⁷ The Secretary provided for notice and comment on the petition, and again on later, more comprehensive changes to the land-into-trust regulation.⁵⁸ The Secretary published a final rule in

⁵³ 25 U.S.C. § 465.

⁵⁴ 45 Fed. Reg. 62036 (Sept. 18, 1980); AR 018.

⁵⁵ 45 Fed. Reg. 62034 (Sept. 18, 1980).

⁵⁶ *Id.*

⁵⁷ AR 272-296.

⁵⁸ AR 355-370.

2001 that retained the Alaska exception,⁵⁹ but the preamble acknowledged the Secretary's long-standing position that "as a matter of law and policy . . . Alaska Native lands ought not to be taken in trust," and stated that the Alaska exception would remain in place for three years while the Department of the Interior considered "the legal and policy issues involved."⁶⁰ The preamble stated that notice and comment would be provided if the Department determined that "the prohibition on taking lands into trust in Alaska should be lifted."⁶¹ However, the Department withdrew the 2001 rule prior to its effective date, leaving the original 1980 regulation and Alaska exception unchanged.⁶²

The Tribes and Alice Kavairlook separately filed suit to challenge the Alaska exception in 2006 and the district court consolidated their cases. The plaintiffs' main arguments were based on 25 U.S.C. § 476(g), which invalidates any administrative action 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." The district court granted Alaska's motion to intervene as of right, but only after the agency record—which addressed only the

⁵⁹ AR 299, 585-617.

⁶⁰ 66 Fed. Reg. 3452, 3454 (Jan. 16, 2001).

⁶¹ *Id.*

⁶² 66 Fed. Reg. 56608, 56609 (Nov. 9, 2001)

response to the 1994 petition and not the still-effective 1980 rule—had been produced and summary judgment briefing was well underway.⁶³ Alaska defended the Alaska exception based on ANCSA, an argument not raised by the Secretary.

The district court rejected Alaska's arguments and held that the creation of new trust land in Alaska did not irreconcilably conflict with ANCSA. The court noted that Congress had not repealed the land-into-trust statute⁶⁴ or the 1936 statute applying it to the Territory of Alaska.⁶⁵ The court also found that the Alaska exception violated the 25 U.S.C. § 476(g) prohibition on treating tribes differently based on their status as tribes.

The Secretary appealed the district court's decision in December 2013, but this Court granted the Secretary's motion to voluntarily dismiss her appeal in June 2014. In May 2014, the Secretary proposed a rule implementing the district court's judgment by eliminating the Alaska exception.⁶⁶ On the State's motion, the district court enjoined the Secretary from taking any land into trust in Alaska pending this appeal.⁶⁷ The Secretary then moved to dismiss the State's appeal for

⁶³ Doc. 74 at 2, 16.

⁶⁴ 25 U.S.C. § 465.

⁶⁵ 25 U.S.C. § 473a.

⁶⁶ 79 Fed. Reg. 24,648, 24,649 (May 1, 2014).

⁶⁷ Doc. 145.

lack of standing.⁶⁸ The Court referred the Secretary's motion to dismiss to the merits panel which directed the parties to address the issues in their briefs.⁶⁹ The Secretary adopted a final rule removing the Alaska exception in December 2014.⁷⁰ The final rule⁷¹ and congressional testimony by the Assistant Secretary for Indian Affairs⁷² indicate that any new trust land in Alaska would be considered Indian country, meaning that primary jurisdiction rests with the federal government and the Indian tribe inhabiting it, and not with the State.⁷³

SUMMARY OF ARGUMENT

Neither standing nor ripeness serves as a jurisdictional barrier to Alaska's appeal, because the only thing currently preventing the Secretary from unraveling ANCSA—and thereby harming the State's proprietary and sovereign interests, as well as its interest as a settling party—is the district court's order enjoining the Secretary from placing land into trust. The land base at issue is potentially millions

⁶⁸ #1503306.

⁶⁹ #1511845.

⁷⁰ 79 Fed. Reg. 76888 (Dec. 23, 2014).

⁷¹ *Id.* at 76893.

⁷² *Hearing on S. 1603, S. 1818, S. 2040, S. 2041, and S. 2188 Before the S. Comm. on Indian Affairs*, 113th Cong. 79-85 (2014) (response by Kevin Washburn, Assistant Secretary, Bureau of Indian Affairs, to written questions submitted by Sen. Lisa Murkowski, S. Comm. on Indian Affairs), available at <http://www.gpo.gov/fdsys/pkg/CHRG-113shrg91817/pdf/CHRG-113shrg91817.pdf> (hereinafter "Washburn Testimony").

⁷³ *Alaska v. Native Vill. of Venetie*, 522 U.S. 520, 527 n.1 (citing *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998)).

of acres. The key issue in this appeal is purely legal: whether ANCSA prohibits the creation of new trust land in Alaska. The State has a sufficient stake in the controversy to warrant exercise of the Court's remedial powers on its behalf.

Whether Alaska should revert from the land ownership and governance system established by ANCSA to a trust and reservation system is a policy decision of great magnitude that Congress did not delegate to the Secretary. ANCSA declared that the statute should be implemented “without creating a . . . trusteeship” and “without adding to the categories of property and institutions enjoying special tax privileges,”⁷⁴ yet placing land into trust does both.⁷⁵ ANCSA also extinguished all claims to land based on “any statute . . . of the United States relating to Native use and occupancy,” which includes the land-into-trust statute. ANCSA's comprehensive statutory scheme, which revoked tribal and individual Native trust land statewide, left no room for the Secretary to create trust land “outside of the settlement.”⁷⁶ Legislative history and subsequent amendments to ANCSA demonstrate that Congress considered and rejected trust land, and therefore firmly declined to delegate to the Secretary the important legislative function of reinstituting trust land in Alaska.

⁷⁴ 43 U.S.C. § 1601(b).

⁷⁵ 25 U.S.C. § 465.

⁷⁶ Doc. 109 at 18.

Finally, because ANCSA prevents the Secretary from taking land into trust in Alaska, the district court erred in holding that an exemption for Alaska violates the statutory provision prohibiting agencies from treating tribes differently based on their status as tribes.

ARGUMENT

I. Neither standing nor ripeness serves as a jurisdictional barrier to Alaska's appeal.

Alaska has standing to appeal the district court's decision because it is "under threat of suffering 'injury in fact' that is concrete and particularized . . . actual and imminent . . . and fairly traceable" to the district court's decision invalidating the Alaska exception.⁷⁷ The district court decision requires the Secretary to apply the land-into-trust regulations in Alaska, which harms the State's sovereign and proprietary interests and its interests as a participant in the ANCSA settlement. This harm is concrete, actual and imminent; the Secretary's argument that she may never take land into trust in Alaska is not credible, particularly given the district court's holding that she may not treat Alaska tribes differently from other tribes in this context. The only thing currently preventing land-into-trust in Alaska is the district court's injunction, and no purpose would be served by delaying consideration of the purely legal issues raised here.

⁷⁷ *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

A. The district court's decision injures Alaska's sovereign and proprietary interests as well as its interests as a participant in the ANCSA settlement.

The crux of Article III standing is that the party seeking it “has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on [its] behalf.”⁷⁸ Alaska has a major stake in the issue of whether ANCSA remains viable and how millions of acres of land within its borders will be governed.

The creation of trust land in Alaska would frustrate the State’s expectations in contributing approximately half a billion dollars (around \$9 billion in today’s dollars) and ceding valuable land selection priorities in exchange for the implementation of a system of fee land ownership under state law, which replaced a system of reservations and Indian country.⁷⁹ The district court’s judgment that ANCSA preserved the Secretary’s discretion to restore Indian country in Alaska even when Congress could have “in no clearer fashion” revoked it undermines the State’s expectations in participating in the statutory settlement.⁸⁰ Alaska’s harm on this score has already occurred and is directly traceable to the district court’s decision that ANCSA codifies an agreement with terms different than those to which the State agreed. Invasion of legal rights created by Congress may confer

⁷⁸ *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975).

⁷⁹ 43 U.S.C. §§ 1605, 1608, 1610, 1611, 1617, 1618.

⁸⁰ *Venetie*, 522 U.S. at 532.

standing to sue “even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.”⁸¹ Injury-in-fact has occurred here because the district court judgment prevents the State from getting what it bargained for in ANCSA.⁸²

Trust land in Alaska would diminish the State’s authority by creating islands of land within its borders potentially controlled by 229 competing sovereigns, thus harming Alaska’s sovereign and proprietary interests.⁸³ The State has no authority to tax trust land.⁸⁴ Furthermore, the Secretary has stated that trust land in Alaska would be considered Indian country,⁸⁵ which means the State could also lose authority to impose on it land use restrictions, natural resource management requirements, and certain environmental regulations. Exercise of police powers and regulation of state resources are fundamental elements of state sovereignty.⁸⁶ New

⁸¹ *Warth v. Seldin*, 422 U.S. at, 514; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992).

⁸² *Zivotofsky ex rel. Ari Z. v. Sec’y of State*, 444 F.3d 614, 617 (D.C. Cir. 2006).

⁸³ “Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States.” *Venetie*, 522 U.S. at 527 n.1 (citing *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998)).

⁸⁴ 25 U.S.C. § 465.

⁸⁵ *Washburn Testimony* at 79-85 (2014).

⁸⁶ U.S. Const. art. IV, § 3, cl. 1. Although its discussion concerned only Native allotments, and not the village lands owned in fee at issue in this case, a decision by the Alaska Court of Appeals directly addresses the importance of uniform management of state fish and game resources:

trust land in Alaska thus harms the State by abrogating its authority over land within its borders and creating widespread uncertainty over governance. Trust land and Indian country could confuse Alaskans and nonresidents who could be subject to a patchwork quilt of legal and regulatory authorities, depending on where they are and whether they are a tribal member or nonmember.

Although the existing tribal and individual Native land base consists mostly of relatively small, noncontiguous parcels, the potential trust land base in Alaska is huge. The Secretary takes the position that ANCSA provides no sideboards on her authority to take land into trust in Alaska, and that she has the authority to take former reservation lands into trust.⁸⁷ The former Venetie reservation encompasses 1.8 million acres, approximately the size of Rhode Island, and was transferred by ANCSA village corporations to the Native Village of Venetie Tribal Government.⁸⁸ Similarly, the Tetlin Native Corporation “re-tribalized” 643,000 acres of the 743,000 acres that comprised the former Tetlin Indian Reserve by

If the State could not regulate hunting and fishing on Native allotment parcels, the result would be islands of non-regulation spread throughout practically every game-management unit in the state - leading to disruption and endangerment of the State’s efforts to protect and conserve game resources.

Jones v. State, 936 P.2d 1263, 1267 (Alaska App. 1997).

⁸⁷ 79 Fed. Reg 76888, 76894 (Dec. 23, 2014); Washburn Testimony at 84-85.

⁸⁸ *Venetie*, 522 U.S. at 523.

conveying it to the Tetlin tribe, the Native Village of Tetlin.⁸⁹ The Secretary asserts she could take this land into trust, and also interprets her authority to extend to the 44 million acres of ANCSA settlement land currently owned in fee by the Native corporations, should any of them elect to transfer their land to a tribe.⁹⁰ Aggregated, that ANCSA settlement land constitutes an area approximately the size of Oklahoma.⁹¹

Application of the land-into-trust regulations in Alaska could have significant economic impacts on the State. Some of the ANCSA regional corporations own and manage valuable commercial properties that are subject to state business and licensing taxes. For example, the Cook Inlet Regional Corporation owns Tikahtnu Commons—a 900,000-square foot shopping and entertainment center that it bills as “Alaska’s premier retail and entertainment center”—as well as other valuable commercial business properties in Anchorage.⁹²

⁸⁹ Tanana Chiefs Conference, <https://www.tananachiefs.org/about/communities/tetlin/> (last visited Aug. 20, 2015); Tetlin Native Corporation, Our Community, <http://www.tetlincorp.com/our-community.html> (last visited Aug. 20, 2015).

⁹⁰ 79 Fed. Reg. 76888, 76894 (Dec. 23, 2014); Washburn Testimony, at 79 (“The proposed rule does not prohibit the Department from taking “ANCSA lands into trust”), 82, 83 (asserting *Venetie* does not limit the Secretary’s authority).

⁹¹ Statemaster.com, Geography Statistics, http://www.statemaster.com/graph/geo_lan_acr_tot-geography-land-acreage-total (last visited Aug. 22, 2015).

⁹² CIRI, Real Estate, <http://www.ciri.com/our-businesses/real-estate/> (last visited Aug. 20, 2015).

Eklutna, Inc. claims to be “the largest private landowner in Anchorage,” and the owner of “some of the last remaining prime commercial, industrial, and residential real estate within the Municipality of Anchorage.”⁹³ The State and the Municipality could lose valuable tax revenue if this land base is taken into trust.

The State also has prudential standing to appeal because implementation of the land-into-trust statute necessarily implicates questions of jurisdiction over land and land use.⁹⁴ There are 229 federally-recognized tribes in Alaska, nearly half of the 567 tribes recognized nationwide.⁹⁵ Under the district court’s ruling, all of these 229 Alaska tribes could have lands placed into trust, leading to a complex and confusing patchwork of dissimilarly governed areas.

The State’s interests in consistent, statewide application of state laws and regulations, and in not having land within its boundaries subject to regulation by a competing sovereign, fall within the zone of interests contemplated by the land-into-trust statute, which is “concern[ed] with land use.”⁹⁶ The State therefore has

⁹³ Eklutna Inc., Corporate Lands & Land Development, <http://www.eklutnainc.com/2013/corporate-lands/> (last visited Aug. 20, 2015).

⁹⁴ *Match-E-Be-Nash-She-Wish Band of Indians v. Patchak*, 132 S. Ct. 2199, 2210-12 (2012) (holding that the interests of neighbors to land placed in trust status “come within § 465’s regulatory ambit.”)

⁹⁵ 80 Fed. Reg. 1942, 1946-48 (Jan. 14, 2015). The 567th tribe—the Pamunky Indian Tribe of Virginia—was recognized on July 8, 2015. 80 Fed. Reg. 39144 (July 8, 2015).

⁹⁶ *Patchak*, 132 S.Ct. at 2211.

prudential standing to litigate this appeal. Furthermore, “[t]he parties’ dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court.”⁹⁷

Additionally, the Secretary incorrectly asserts that only she would have standing to appeal the vacatur of the Alaska exception, and that the Court cannot compel her to retain it.⁹⁸ The government’s failure to appeal does not deprive an intervenor of its ability to appeal an adverse judgment.⁹⁹ “The general rule [is] that an intervenor may appeal from any order adversely affecting the interest that served as a basis for intervention.”¹⁰⁰ A court ruling that ANCSA prohibits the creation of new trust land in Alaska would effectively exempt Alaska from the trust land acquisition regulations. Thus, the Secretary’s argument that she cannot

⁹⁷ *Massachusetts v. E.P.A.*, 549 U.S. 497, 516, 127 S. Ct. 1438, 1453, 167 L. Ed. 2d 248 (2007).

⁹⁸ Doc. 1503306 at 10.

⁹⁹ *Bryant v. Yellen*, 447 U.S. 352, 366–68 (1980); *Nat’l Wildlife Fed’n v. Lujan*, 928 F.2d 453, 456 & n.2 (D.C. Cir. 1991) (finding that industry appeal of district court judgment was not moot even though agency did not appeal because “[i]ndustry could benefit from an appellate decision reversing the district court’s interpretation of the Act and upholding the current regulation”). *See also W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 482 (9th Cir. 2011).

¹⁰⁰ *Cerro Metal Prod. v. Marshall*, 620 F.2d 964, 969 (3d Cir.1980).

be compelled to retain the Alaska exception begs the very question at issue here: whether the Alaska exception is required by ANCSA.¹⁰¹

B. The injury to Alaska's sovereign and proprietary interests is imminent and not speculative.

The Secretary's assertion that the State's standing hinges on "multiple events that may or may not ever occur"¹⁰² presumes an uncertainty that does not exist here. This argument overlooks the persistence of at least four Alaska tribes and one individual (the appellees) in pursuing what will be more than nine years of litigation to submit applications to have specific parcels taken into trust. It also overlooks the district court's holding that 25 U.S.C. § 476(g) curbs the Secretary's discretion to treat Alaska tribes differently than tribes elsewhere in administering the land-into-trust regulation.¹⁰³

The Secretary's assertion that she may not ever take any land into trust in Alaska is not credible.¹⁰⁴ She has adopted a final rule that implements the district court's judgment. The only legal barrier preventing land from being taken into trust in Alaska is the district court order enjoining the Secretary from doing so.

¹⁰¹ #1503306 at 10. The Secretary does not explain why this Court's reversal of the district court's decision would not compel her to retain the Alaska exception, but that is precisely the relief sought by the State.

¹⁰² *Id.* at 14.

¹⁰³ Doc. 109 at 23-25; Doc. 130 at 5-6.

¹⁰⁴ # 1503306 at 16.

The Supreme Court allowed standing in a far more speculative situation in *Bryant v. Yellen*,¹⁰⁵ where it found that a group of residents had standing to appeal even though the Department of Interior did not appeal.¹⁰⁶ The residents desired to purchase excess lands that might be sold if the Omnibus Adjustment Act of 1926¹⁰⁷ was found to limit irrigation rights to 160 acres per person. The Court specifically noted that no owner of “excess lands” would be required to sell, but found that it was “highly improbable” that all owners of excess lands would elect to withdraw their irrigable lands from agriculture in order to avoid the Act’s limitations.¹⁰⁸

Such is the situation here. Removing the Alaska exception does not compel the Secretary to take any specific land into trust in Alaska, but in light of the district court’s holding that 25 U.S.C. § 476(g) prohibits the Secretary from treating Alaska tribes differently than tribes elsewhere it is “highly improbable” that the Secretary would not take land into trust in Alaska.

Similarly, in *Massachusetts v. EPA*, Massachusetts challenged EPA’s determination that the agency lacked authority to regulate greenhouse gas emissions that contributed to climate change, including rising sea levels.¹⁰⁹ The

¹⁰⁵ 447 U.S. 352, 366-67 (1980).

¹⁰⁶ *Id.* at 365-66.

¹⁰⁷ 43 U.S.C. § 423e.

¹⁰⁸ *Bryant*, 447 U.S. at 366-67.

¹⁰⁹ 549 U.S. 497, 504-505 (2007).

Supreme Court found that Massachusetts’ “well-founded desire to preserve its sovereign territory” coupled with the fact that the state “does in fact own a great deal of the ‘territory alleged to be affected’ only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power.”¹¹⁰ The Court specifically acknowledged that the remedy sought (regulation of greenhouse gas emissions) would probably have only a small, incremental effect on slowing or reducing the impact of climate change, but found this potential and minor impact sufficient to support Massachusetts’ standing.¹¹¹

Likewise here, Alaska has a “well-founded desire to preserve its sovereign territory,” and Alaska exercises governmental jurisdiction over “a great deal of the territory” that will be affected. It is far more certain that the Secretary will eventually place some land in trust in Alaska under the new regulation than that EPA’s regulation of greenhouse gasses will protect Massachusetts’ coastline. The situation here is analogous to removing a stop sign from a traffic intersection: The act of removing the sign harms nobody, but there is more than a reasonable certainty that a collision will happen soon afterwards.

¹¹⁰ *Id.* at 519.

¹¹¹ *Id.* at 523-26.

C. The issues Alaska raises are ripe for decision.

The ripeness doctrine requires the Court to consider “the fitness of the issues for judicial review and the hardship to the parties of withholding court consideration.”¹¹² “[T]he fitness of an issue for judicial decision depends on whether it is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency’s action is sufficiently final.”¹¹³

The critical inquiry here is whether ANCSA prohibits the creation of new trust land in Alaska. A purely legal question in the context of a facial challenge is presumptively reviewable.¹¹⁴ The district court’s judgment and the agency’s action implementing it are final. Furthermore, resolution of this question requires no factual development. The characteristics of any particular parcel, its intended use, and the circumstances of the proposed placement into trust are irrelevant to the question of whether ANCSA revoked the Secretary’s authority to place land in trust status in Alaska. That the Secretary “retains some measure of discretion” in implementing the land-into-trust regulation does not make the State’s “purely legal challenge unripe.”¹¹⁵ Finally, the Secretary’s ripeness argument overlooks the fact

¹¹² *Nat’l Ass’n of Home Builders v. U.S. Army Corps of Eng’rs*, 417 F.3d 1272, 1281 (D.C. Cir. 2005).

¹¹³ *Id.*

¹¹⁴ *Nat’l Ass’n of Home Builders v. U.S. Army Corps of Eng’rs*, 440 F.3d 459, 464 (D.C. Cir. 2006).

¹¹⁵ *Nat’l Ass’n of Home Builders*, 417 F.3d at 1282.

that she is enjoined from taking any land into trust pending resolution of this appeal.

The Secretary's ripeness argument parallels her argument that Alaska lacks standing "in the absence of a concrete decision by the Secretary to accept land in trust in Alaska."¹¹⁶ The Secretary adopted a final rule repealing the Alaska exception and applying the existing land-into-trust regulation to Alaska in December 2014.¹¹⁷ Thus, the Secretary's assertions that the State's appeal is an "abstract challenge to the agency's regulatory regime" until "a process has been established" to place land into trust in Alaska no longer apply. The Secretary has adopted a final rule, and but for the district court's injunction, would be able to place land into trust in Alaska now.

Finally, waiting until the Secretary has acted on a particular application to litigate the legal question of whether ANCSA prohibits the creation of new trust land in Alaska would expend significantly more judicial resources and inflict considerably more harm than resolving the issue in this appeal. If the Court defers deciding the central legal issue in this case, much effort would be expended by tribes and the Secretary in developing and evaluating applications to take land into

¹¹⁶ Doc. 1503306 at 17.

¹¹⁷ 79 Fed. Reg. 76888 (Dec. 23, 2014).

trust, and by the State in commenting on these applications.¹¹⁸ Because the central legal issue would remain unsettled, the State would likely litigate a decision to place land in trust status, potentially clouding any other pending or completed trust land acquisitions. This case has been ongoing since 2006. Withholding judicial review at this late stage would merely prolong already lengthy litigation when the key legal question at issue requires no further factual development.

II. ANCSA precludes the creation of new trust land in Alaska.

ANCSA specifically emphasizes that the settlement shall not result in a “reservation system” or “trusteeship,” and shall not “add[] to the categories of property and institutions enjoying special tax privileges.”¹¹⁹ Furthermore, the Act’s comprehensive approach to providing land for Alaska Natives—including Congress’s considered rejection of trust land—demonstrates that Congress did not intend for the Secretary to revive trust land or Indian country in Alaska. As confirmed by the Supreme Court in *Venetie*,¹²⁰ Congress intended to depart completely and permanently from the trust land model of providing land for Alaska Natives.¹²¹ The district court’s finding of only a “tension” between ANCSA

¹¹⁸ See 25 C.F.R. § 151.12.

¹¹⁹ 43 U.S.C. § 1601(b).

¹²⁰ 522 U.S. 520, 532 (1998).

¹²¹ “The text and legislative history of the ANCSA make clear that Congress sought to avoid creating any fiduciary relationship between the United States and any Native organization.” *Seldovia Native Ass’n v. United States*, 144 F.3d 769,

and the trust land acquisition statute is an understatement. When ANCSA is interpreted as “a symmetrical and coherent regulatory scheme,” fitting where possible, “all parts into an harmonious whole,”¹²² it is apparent that Congress foreclosed any creation of new trust land in Alaska.

A. ANCSA specifically prohibits trusteeships and land enjoying special tax privileges.

Congress directed that ANCSA should be implemented “without creating a reservation system or lengthy wardship or trusteeship,” and “without adding to the categories of property . . . enjoying special tax privileges.”¹²³ The land-into-trust statute provides that title “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, and such lands or rights shall be exempt from State and local taxation.”¹²⁴ Taking land into trust in Alaska under this statute would, by definition, create a “trusteeship” in direct violation of ANCSA. Land taken into trust is also exempt from taxation, so it would add to the categories of property “enjoying special tax privileges”—again, in direct violation of ANCSA.

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

784 (Fed. Cir. 1998) (citing 43 U.S.C. § 1601(b); S. Rep. No. 92-405 at 108 (1971)).

¹²² *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *Loving v. I.R.S.*, 742 F.3d 1013, 116 (D.C. Cir. 2014).

¹²³ 43 U.S.C. § 1601(b).

¹²⁴ 25 U.S.C. § 465.

A major purpose of this Committee and the Congress is to avoid *perpetuating* in Alaska the reservation *and the trustee system* which has characterized the relationship of the Federal government to the Indian peoples in the contiguous 48 states.¹²⁵

There exists more than a “tension”¹²⁶ between ANCSA and the trust land statute; Congress’s stated intent irreconcilably conflicts with the creation of new trust land—and Indian country—in Alaska.

B. ANCSA extinguished statutory claims, including those relating to the trust land acquisition statute.

The land-into-trust statute authorizes the Secretary “to acquire . . . any interest in lands, water rights, or surface rights to lands . . . for the purpose of providing land for Indians.”¹²⁷ This stated purpose—to provide land for Indians—falls squarely within the scope of ANCSA’s language extinguishing all claims that are based on any statute “relating to Native use and occupancy.”¹²⁸ Thus, ANCSA extinguishes claims based on the land-into-trust statute.

In drafting ANCSA’s extinguishment clause, Congress progressed from referencing just two acts to the much broader final language in the statute. As introduced in April, 1969, Senate Bill 1830 extinguished “any and all claims . . . arising under the Act of May 17, 1884 (23 Stat. 24) [The Alaska Organic Act] and

¹²⁵ S. Rep. No. 92-405, at 108-109 (1971) (emphasis added).

¹²⁶ Doc. 109 at 18.

¹²⁷ 25 U.S.C. § 465.

¹²⁸ 43 U.S.C. § 1603(c).

the Act of June 6, 1900 (31 Stat. 321).”¹²⁹ The bill was amended in June 1970 to extinguish “any and all claims” based on these acts “or any other statute or treaty of the United States relating to Native use or occupancy of land.”¹³⁰ The enacted statute expanded its scope to extinguish “*all* claims . . . based on *any* statute or treaty of the United States relating to Native use and occupancy.”¹³¹ In its final amendments to this section, Congress specifically considered that Alaska Natives also possessed land in Alaska pursuant to the land-into-trust statute:

Another source of lands held by Alaska Natives by some means other than the right to possession of aboriginal occupancy is the Wheeler-Howard Act of 1934, the terms of which were extended to Alaska in 1936.¹³²

Congress intended to extinguish *all* claims by Alaska Natives, as Alaska Natives, to land in Alaska, whether the claim originated from aboriginal title or a statute, including the land-into-trust statute.

The district court reasoned that an application to the Secretary to take land into trust is not a “claim” extinguished by ANCSA because the Secretary has the discretion to accept or reject the application, and the application is not an existing

¹²⁹ 115 Cong. Rec. 9110-11 (Apr. 15, 1969).

¹³⁰ S. Rep. No. 91-925, at 3 (June 10, 1970).

¹³¹ 43 U.S.C. § 1603(c) (emphasis added).

¹³² S. Rep. No. 92-405, at 91 (1971). The land-into-trust statute, 25 U.S.C. § 465, was enacted as section 5 of the Indian Reorganization Act of 1934, also known as the Wheeler-Howard Act, Pub. L. No. 73-383, ch. 576, 48 Stat. 985 (1934).

right that is adverse to any party.¹³³ However, the claim asserted by the appellees is that the Secretary has denied them *the right* to submit a trust land application to the Secretary, not that any particular application itself is an existing right, or that they have the right to have a particular parcel placed into trust.¹³⁴ The right to petition the Secretary to create trust land, as articulated in this litigation, is a claim against the United States.

The district court based its conclusion in part on the mistaken observation that ANCSA could not have limited the land-into-trust statute's applicability to Alaska because the Secretary retains the discretion to consider trust acquisitions for the benefit of the Metlakatlans.¹³⁵ But ANCSA's definitions and the scope of the two extinguishment clauses clarifies this apparent contradiction. ANCSA's extinguishment of aboriginal titles and claims of aboriginal title¹³⁶ does not apply to the Metlakatlans because they emigrated to Alaska in the 1800s and had no aboriginal title in Alaska.¹³⁷ ANCSA's extinguishment of "[a]ll claims against the United States . . . that are based on any statute or treaty of the United States

¹³³ Doc. 109 at 15.

¹³⁴ Doc. 15 ¶¶ 29, 36, 40, 42.

¹³⁵ Doc. 109 at 16.

¹³⁶ 43 U.S.C. § 1603(b).

¹³⁷ *Inupiat Cmty of Arctic Slope v. United States*, 680 F.2d 122, 128 (Ct. Cl. 1982) ("Aboriginal title is a right of occupancy based on possession from time immemorial.") *See also* *NW. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338-39 (1945).

relating to Native use and occupancy”¹³⁸ does not apply to Metlakatlangs because they are excluded from the statute’s definition of “Native.”¹³⁹ Thus, ANCSA excludes Metlakatlangs from its extinguishment clauses and thereby preserves their ability to petition the Secretary to take land into trust, while extinguishing that right for others.

C. ANCSA establishes a comprehensive framework for providing land for Alaska Natives that does not include trust land.

Not only does ANCSA explicitly prohibit future creation of trust land in Alaska, ANCSA’s comprehensive approach to providing land for Alaska Natives leaves no room for the Secretary to administratively revert to an earlier model of Native land ownership in Alaska. The ANCSA settlement substituted corporate fee ownership of land for tribal lands and discontinued trust land for individual Natives in favor of fee ownership and participation in municipal governments organized under State laws.

Had Congress intended for the Secretary to continue trust acquisitions in Alaska, it would not have revoked all reservations,¹⁴⁰ discontinued Native

¹³⁸ 43 U.S.C. § 1603(c).

¹³⁹ *Id.* at § 1602(b):

“Native” means a citizen of the United States who is a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians *not enrolled in the Metlakatla Indian Community*), Eskimo, or Aleut blood, or combination thereof.”

¹⁴⁰ *Id.* at § 1618(a).

allotment authority,¹⁴¹ and required the state-chartered Native corporations to choose between taking former reservation land in fee or participating in the statute's land and monetary distributions.¹⁴² Instead, Congress would have included existing reservations in the settlement, or at least left that option available to Alaska Natives. Congress did not do this, even though at least one tribe, Venetie, specifically requested it, and initial proposals from the Department of Interior included taking land into trust.¹⁴³

Congress did not envision tribal jurisdiction over land. ANCSA required each Native village to reconvey at least 1,280 acres for local government purposes.¹⁴⁴ Congress intended "to encourage the establishment and the vitality of *normal units of local government* which can provide many of the services necessary to life in a quality community."¹⁴⁵

It would be illogical for Congress to require the transfer of village lands to local municipal governments and at the same time intend that tribes could later have land become Indian country subject to tribal regulation. Instead, Congress intended ordinary state and local government regulation over land in Alaska and

¹⁴¹ *Id.* at § 1617.

¹⁴² 43 U.S.C. § 1618(b).

¹⁴³ AR 002; S. Rep. No 91-925, at 91-94 (1970).

¹⁴⁴ An amendment allows negotiation of a lesser amount of land. *See* 43 U.S.C. § 1613(c)(3).

¹⁴⁵ S. Rep. No. 92-405, at 133 (emphasis added).

meant for Alaska Natives to “participate as fully as possible in the life of the State and society.”¹⁴⁶ Barry Jackson, an attorney representing the AFN, reiterated this view:

The land and the money will not be given to villages as municipal cities and will not be given to the village as tribal entities. Instead, business corporations will be formed by the village members and the land and the money will go to these business corporations. This is very important because it separates the municipal corporation or the native group as a municipal corporation from the native group as a tribal entity. Otherwise, there is a very real danger that it will freeze the natives to the land and to the villages and make it difficult or impossible for them to be mobile in American society today.¹⁴⁷

This philosophy is codified in ANCSA’s authorization for individual Natives to receive unrestricted fee title to their primary residence,¹⁴⁸ and simultaneous repeal of the Alaska Native Allotment Act.¹⁴⁹ That ANCSA would repeal the authority to provide restricted title land to Alaska Natives while providing an alternative mechanism for individual Natives to acquire fee title to land further demonstrates Congress’s intent to discontinue trust land in Alaska.

Three properties in Southeast Alaska remain in trust status for the benefit of Native villages, but this handful of acreage is not evidence that Congress intended

¹⁴⁶ *Alaska Native Land Claims: Hearings on S. 2906 Before the S. Comm. On Interior and Insular Affairs*, 90th Cong. 89 (1968).

¹⁴⁷ *Id.* at 575.

¹⁴⁸ 43 U.S.C. § 1613(h)(5).

¹⁴⁹ Act of May 17, 1906, 34 Stat. 197, repealed by 43 U.S.C. § 1617(a).

to perpetuate the Secretary's land-into-trust authority in Alaska. These three parcels are small cannery properties acquired by the federal government in the 1940's and 1950's.¹⁵⁰ The Secretary has viewed these parcels as being held as "valid existing rights" under section 14(g) of ANCSA, which required ANCSA village corporations to reconvey selected land to any municipal corporation in the village or to the State in trust for any municipal corporation established in the future.¹⁵¹ The fact that the Department views these parcels as "*existing* rights under ANCSA" indicates only that ANCSA preserved the existing property interests that it did not expressly extinguish.¹⁵²

Congress specified that ANCSA's provisions were to be "broadly construed,"¹⁵³ and not be interpreted to perpetuate the trust model of Native land ownership. As stated in the identical Senate and House Conference Reports:

It is the clear and direct intent of the conference committee to extinguish All aboriginal claims and All aboriginal land titles, if any, of the Native people of Alaska and the language of settlement is to be broadly construed to eliminate such claims and titles as any basis for any form of direct or indirect

¹⁵⁰ AR 246. A 1993 Solicitor's Opinion reports the size of the parcels as follows: Angoon (13.24 acres), Kake (15.9 acres), and Klawock (1.91 acres).

¹⁵¹ 43 U.S.C. § 1613(c) & (g).

¹⁵² AR 246 (emphasis added).

¹⁵³ *United States v. Atlantic Richfield Co.*, 612 F.2d 1132, 1136-37 (9th Cir. 1980) (citing the identical Senate and House conference reports, S. Conf. Rep. 92-748, at 40 (1971) & H. Conf. Rep. 92-748, at 40 (1971)0

challenge to land in Alaska.¹⁵⁴

The district court's holding that ANCSA permits "creation of [a] trusteeship outside of the settlement" thus conflicts with ANCSA's all-inclusive statutory scheme and Congress' clearly stated intent.¹⁵⁵

D. Congress specifically considered and rejected trust land in Alaska.

In crafting ANCSA, Congress considered and rejected the concepts of preserving reservations and creating new trust land in Alaska. Courts cannot interpret a statute to permit something that Congress specifically considered and rejected.¹⁵⁶ "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."¹⁵⁷ Congress's considered

¹⁵⁴ *Id.*

¹⁵⁵ Doc. 109 at 18.

¹⁵⁶ *Rapanos v. United States*, 547 U.S. 715, 750 (2006); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000); *Pacific Gas & Elec. v. State Energy Res. Cons. & Dev. Comm'n*, 461 U.S. 190, 220 (1983); *Whitaker v. Thompson*, 239 F. Supp. 2d 43, 49-50 (D.D.C. 2003).

¹⁵⁷ *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)).

rejection of trust land in Alaska thus “strongly militates against a judgment that Congress intended a result that it expressly declined to enact.”¹⁵⁸

Consistent with the approach that Alaska Natives then advocated, Congress rejected a settlement based on trust land and tribal jurisdiction over land. An earlier version of the legislation provided for the United States to hold settlement land in trust for Alaska Native villages.¹⁵⁹ Native leaders criticized this, and the bill originally supported by the AFN gave villages the option of receiving fee simple title to the land.¹⁶⁰

AFN attorney Barry Jackson confirmed that trust status of lands in Alaska was inconsistent with the desires of Alaska Natives:

[T]he natives in Alaska are very vehemently anti reservation and they have never been in favor of reservations and are not today. . . .

Now, we also are trying to get away from the BIA, frankly, and from the Secretary of the Interior . . . We are trying to build in provisions which will prevent us from having, if you will pardon the expression, our villages frozen in history. It is my personal feeling that the Pueblos of New Mexico are frozen in history because of their rules that they have, and this is something that we want to avoid.¹⁶¹

¹⁵⁸ *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974). *See also Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001).

¹⁵⁹ S. 1964, 90th Cong. (1967).

¹⁶⁰ S. 2690, 90th Cong. (1967).

¹⁶¹ *Hearings on S.2906 before S. Comm. on Interior and Insular Affairs*, 90th Cong. 89-90 (1968).

Two years later, Native leaders rejected the trust land proposal. AFN President Emil Notti testified that the proposal implied that Natives were “something less than other citizens” and stated that “wardship” status was unacceptable:

We have been treated as “wards” for many years. We have not profited by the “wardship;” we are humiliated by the very concept which assumes that we are something less than other citizens—and I assure you that we are not.

To put it bluntly, we want to manage our money and our lives, and we must question the fairness of any settlement which does not enable us to do so.¹⁶²

Congress explained its decision to eschew trust land:

Some of the factors which the Committee considered in arriving at the present land grant provisions of S. 1830 are as follows: . . . (3) the desire to avoid the granting of huge land enclaves which could result in remote, land locked reservations rather than viable open communities.¹⁶³

Thus, earlier versions of ANCSA proposed different entities to receive the settlement benefits, and with Alaska Native support, Congress considered and rejected providing land to IRA and traditional tribal councils. It is improper to read a statute to allow a result that Congress considered and rejected.¹⁶⁴

¹⁶² *Hearing on S. 1830 before S. Comm. on Interior and Insular Affairs*, 91st Cong. (1969).

¹⁶³ S. Rep. No. 92-405, at 76-77 (1971).

¹⁶⁴ *Pacific Gas & Elec. v. State Energy Res. Cons. & Dev. Comm’n*, 461 U.S. 190, 220 (1983).

E. Amendments to ANCSA confirm Congress' rejection of trust land.

Since ANCSA's enactment, Congress has rejected amendments that would result in trust status or tribal jurisdiction over land, instead enacting amendments that have augmented the protections afforded Native corporations while reinforcing the fee land ownership scheme.

Two specific provisions of the "1987 amendments" to ANCSA¹⁶⁵ illustrate Congress's intent to ensure State jurisdiction over settlement land. The first is the Alaska Land Bank, was created in 1980 by the Alaska National Interest Lands Conservation Act (ANILCA).¹⁶⁶ The 1987 amendments automatically added all undeveloped and unleased ANCSA land to the Land Bank.¹⁶⁷ The Land Bank provides protection for ANCSA lands from adverse possession and execution on

¹⁶⁵ Although this major set of amendments passed in 1988, the act is known as the "Alaska Native Claims Settlement Act Amendments of 1987." 43 U.S.C.A. § 1601 notes; Pub. L. No. 100-241, Sec. 2(5), 101 Stat. 1788 (1988).

¹⁶⁶ Pub. L. No. 96-487, 94 Stat. 2371(codified as amended at 16 U.S.C. §§ 3101-3233 (2015)). ANILCA resolved the land withdrawals and classifications that originated in ANCSA sections 17(d)(1) and (2). In ANILCA, Congress settled the disputes over classification of the withdrawn land by re-designating and expanding the system of national parks, forests, wildlife refuges and wild and scenic rivers and also enacted protections of rural subsistence practices in Alaska. *See generally* David S. Case and David A. Voluck, *Alaska Natives and American Laws* 288-89 (2nd ed. 1984).

¹⁶⁷ 43 U.S.C. § 1636(d).

most judgments.¹⁶⁸ As with land held under the land-into-trust statute, land in the Land Bank is not subject to real property tax.¹⁶⁹

The Land Bank's purpose, however, is broader than protection of ANCSA lands alone, because *any* private landowner may add land to the Land Bank.¹⁷⁰ The Native corporations and Native individuals whose undeveloped property automatically goes into the Land Bank are explicitly recognized as "private landowners." Others, *including tribes*, may also add their land to the Land Bank if they choose.¹⁷¹ Any landowner may withdraw its land from the Land Bank by complying with certain requirements.¹⁷² Congress also specified that, notwithstanding the land's tax-exempt status and other protections, "no provision of this section shall be construed as affecting the civil or criminal jurisdiction of the State of Alaska."¹⁷³ The Land Bank thus emphasizes Congress's choice to ensure that Native land in Alaska is managed as private property, subject to state jurisdiction, not tribal control.

¹⁶⁸ 43 U.S.C. § 1636(d)(1)(A).

¹⁶⁹ Compare 25 U.S.C. § 465 with 43 U.S.C. § 1636(d)(1)(A)(ii).

¹⁷⁰ 43 U.S.C. § 1636(a).

¹⁷¹ *Id.*

¹⁷² 43 U.S.C. § 1636(b)(7).

¹⁷³ 43 U.S.C. § 1636(g).

The 1987 amendments also created the settlement trust option.¹⁷⁴ This program allows ANCSA corporations to establish a settlement trust under state law to which the corporation may convey some portion of its assets, not including any subsurface estate, to be managed to “promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives.”¹⁷⁵ The conveyed assets are then subject to limited protections against involuntary transfers.¹⁷⁶ If the assets include undeveloped land, that land is still automatically included in the Land Bank, and is not subject to real property tax until it is developed.¹⁷⁷ The objectives of the settlement trust (i.e., promoting health, education and welfare and preserving the heritage and culture of Alaska Natives) are strikingly similar to the appellee Tribes’ stated objectives in seeking to have tribal fee land taken into trust.¹⁷⁸ Tribes may take advantage of the settlement trust through their corresponding Native corporation.

The settlement trust option represents yet another deliberate congressional choice to promote institutions organized under state law rather than tribal control

¹⁷⁴ 43 U.S.C. § 1629e.

¹⁷⁵ 43 U.S.C. § 1629e(b).

¹⁷⁶ 43 U.S.C. § 1629e(c)(5).

¹⁷⁷ 43 U.S.C. § 1636(d).

¹⁷⁸ Doc. 15 ¶¶ 40 (“The Chilkoot Indian Association wishes to have this land placed in trust in order to ensure its protection for future generations of tribal members”), 42 (stating Tuluksak Native Community’s desire to protect a parcel with special historic significance against state and borough taxation).

of lands in Alaska. The bill originally permitted transfer of corporate assets to “qualified transfer entities” (QTEs), which would have included traditional tribal governments. Debate over the proposal specifically addressed the potential for interpreting use of QTEs to create Indian country. The final form of the amendments excluded QTEs from consideration for asset transfer,¹⁷⁹ over the express contrary wishes of some Natives, who sought to “guarantee Native tribal villages the same governmental opportunities exercised by tribes in the lower 48.”¹⁸⁰

Congress’ repeated rejection of trust land in Alaska does not support the Secretary’s administrative attempts to recreate it.

¹⁷⁹ 43 U.S.C. § 1629e.

¹⁸⁰ *Alaska Native Claims Settlement Act: Hearings on H.R. 4162 Before the H. Interior and Insular Affairs Comm.*, 99th Cong. 140 (1985) (testimony of John Borbridge, Jr., representing the Alaska Native Coalition). *See generally id.* at 137-78, 189-246 (including proposed legislation, ultimately rejected, that provided option for creation of trust land). *See also, Amendments to the Alaska Native Claims Settlement Act and the Alaska National Lands Conservation Act and to Establish a Memorial in D.C Hearings on S. 2065 (and other bills) Before the Subcomm. on Public Lands, Reserved Water, and Res. Conserv’n, S. Energy and Natural Res. Comm.*, 99th Cong. 184-96, 223-48, 307-32 (1986); *Alaska Native Claims Settlement Act Amendments of 1987: Hearings on S. 1145 and H.R. 278 Before the S. Subcomm. on Public Lands, National Parks, and Forests, S. Energy and Natural Res. Comm.*, 100th Cong. 151, 157, 165, 249-59 (1987).

F. Because the land-into-trust statute has limited applicability in Alaska, Congress did not need to repeal it.

The district court thought it significant that Congress did not repeal 25 U.S.C. § 473a—enacted in 1936 to apply the land-into-trust statute and several other provisions of the 1934 Indian Reorganization Act to the Territory of Alaska¹⁸¹—even though ANCSA specifically repealed the Alaska Native Allotment Act, and the Federal Land Policy and Management Act (FLPMA) later repealed other Alaska-specific Indian land provisions.¹⁸² But the court’s reasoning overlooks the fact that the land-into-trust statute has continued application in Alaska to the Metlakatla Indian Community as well as the rest of the nation. It therefore would have been inappropriate for Congress to repeal it. Additionally, other provisions of the 1934 Indian Reorganization Act extended to Alaska by 25 U.S.C. § 473a continue to apply to Alaska tribes.

Alaska was not a state when the land-into-trust statute was enacted in 1934, and most sections of the 1934 Indian Reorganization Act, including the land-into-trust statute, did not apply to “any of the Territories, colonies, or insular possessions of the United States.”¹⁸³ Therefore, even though the 1934 IRA definition of “Indian” included “Eskimos and other aboriginal peoples of

¹⁸¹ 25 U.S.C. § 473a, 25 U.S.C. § 465.

¹⁸² Doc. 109 at 11-13, 15-16, 19.

¹⁸³ 25 U.S.C. § 473.

Alaska,”¹⁸⁴ Congress had to enact Alaska-specific legislation to extend certain provisions of the 1934 IRA to the Alaska Territory.¹⁸⁵ The Alaska IRA was enacted in 1936.¹⁸⁶

Section 1 of the Alaska IRA, codified at 25 U.S.C. § 473a, makes several sections of the IRA applicable to Alaska. Some of those provisions remain effective statewide, and others apply only to the Metlakatla Indian Community’s Annette Islands Reserve. Section 473a applies 25 U.S.C. § 461 to Alaska, which prohibits allotment of land on Indian reservations to individual Indians. Like the land-into-trust statute, this provision has nationwide application, but despite being included in the provisions extended to Alaska by section 473a, it now only applies in Alaska to the Annette Islands Reserve because ANCSA revoked all other Alaska reservations.¹⁸⁷ Section 473a also makes 25 U.S.C. §§ 475 and 477 applicable to Alaska, which, respectively, preserves the right of tribes to bring claims against the United States and authorizes the Secretary to issue charters of incorporation to tribes. These provisions clearly still pertain to all tribes in Alaska.

¹⁸⁴ 25 U.S.C. § 479.

¹⁸⁵ Alaska became the 49th state on January 3, 1959.

¹⁸⁶ Act of May 1, 1936, 49 Stat. 1250-51.

¹⁸⁷ 43 U.S.C. § 1618.

Section 2 of the Alaska IRA gave the Secretary authority to designate Indian reservations in Alaska.¹⁸⁸ Congress repealed this provision when it enacted FLPMA in 1976,¹⁸⁹ five years after ANCSA.¹⁹⁰ FLPMA also repealed the Act of May 31, 1938, which authorized the Secretary to withdraw tracts of land less than 640 acres for schools, hospitals and other purposes “as may be necessary in administering the affairs of the Indians, Eskimos, and Aleuts of Alaska.”

The district court’s reliance on FLPMA’s repeal of the reservation authority in section 2 of the 1936 Alaska IRA while leaving 25 U.S.C. § 473a intact overlooks the fact that section 473a addresses more than trust land in Alaska, and that section 465—the land-into-trust provision—still applies to Metlakatla.

Furthermore, ANCSA is a statute of specific application: it applies only to tribes and land in Alaska. Its provisions therefore control over general statutes,¹⁹¹ including 25 U.S.C. §§ 465 and 473a. “Where there is no clear intention otherwise,

¹⁸⁸ Act of May 1, 1936, sec. 2, 49 Stat. 1250.

¹⁸⁹ Pub. L. No. 94-579, 90 Stat. 2743.

¹⁹⁰ Pub. L. No. 92-203, 85 Stat. 688, codified as amended at 43 U.S.C. § 1601 et seq.

¹⁹¹ *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (“Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.”).

a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.”¹⁹²

ANCSA’s enactment 37 years after 25 U.S.C. § 465¹⁹³ and 35 years after 25 U.S.C. § 473a¹⁹⁴ also must be considered. Each Congress has plenary authority to enact statutes modifying the authorities granted the executive branch in prior legislation.¹⁹⁵ “[T]he implications of a statute may be altered by the implications of a later statute,” and “[t]his is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand.”¹⁹⁶ The Court has instructed that “a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended.”¹⁹⁷

After enacting ANCSA, Congress did not repeal 25 U.S.C. § 465 or § 473a for a straightforward reason: it did not have to. Repeal of statutes having broader application than ANCSA was not necessary to accomplishing ANCSA’s goals and would have affected legal authorities and tribes not subject to ANCSA.

¹⁹² *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

¹⁹³ Act of June 18, 1934, c. 576, § 5, 48 Stat. 985.

¹⁹⁴ Act of May 1, 1936, § 1, 49 Stat. 1250.

¹⁹⁵ *Dorsey v. United States*, 132 S. Ct. 2321, 2331 (2012).

¹⁹⁶ *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (internal citation omitted).

¹⁹⁷ *Id.* See *Dorsey*, 132 S. Ct. at 2331 (“And Congress remains free to express any such intention either expressly or by implication as it chooses.”)

Furthermore, ANCSA's savings clause cements Congress' intent that ANCSA prevail over other generally-applicable statutes:

To the extent that there is a conflict between any provision of this Act and any other Federal laws applicable to Alaska, the provisions of this Act shall govern.¹⁹⁸

G. Creating trust land in Alaska would restore elements of aboriginal title that Congress extinguished.

Tribal regulatory power over land, which is the relief sought by some of the appellee Tribes¹⁹⁹ and would be the result of creating Indian country, is an essential aspect of aboriginal title. Taking land into trust in Alaska would administratively resurrect key elements of aboriginal title, which Congress extinguished in ANCSA.

The understanding that tribal regulatory authority over land is one component of aboriginal title has been embedded in the Supreme Court's decisions since the earliest days of the nation. The Supreme Court held that, until extinguished by the federal government, aboriginal title includes the right of tribes "to use [the soil] according to their own discretion."²⁰⁰ Tribes were understood to be "Indian nations," —"distinct political communities, having territorial boundaries, *within which their authority [was] exclusive*, and having a right to all

¹⁹⁸ Pub. L. No. 92-203, § 26, 85 Stat. 715, 43 U.S.C. § 1601n.

¹⁹⁹ Appellee Tribes Chalkyitsik and Akiachak seek regulatory jurisdiction to enforce the village alcohol ban. Doc. 15 ¶¶ 27-36.

²⁰⁰ *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543, 574 (1823).

the lands within those boundaries.”²⁰¹ Aboriginal title “is the treaty right of occupancy with all its beneficial incidents.”²⁰² Within those lands, tribes “possessed rights with which no state could interfere,”²⁰³ including the authority to exclude non-Indians.²⁰⁴ When they possessed unfettered aboriginal title, “[t]he Indians had *command* of the lands and the waters, — *command* of all their beneficial use...”²⁰⁵ The “command” of land—one of the “beneficial incidents” of aboriginal title²⁰⁶—of necessity includes the right of tribes to regulate lands in which aboriginal title has not been extinguished.

The broad scope of aboriginal title means that treaties between tribes and the United States are “not a grant of rights to the Indians, but a grant of right from them, —[and] a reservation of those not granted.”²⁰⁷ Thus, continuing into the modern era, the Supreme Court has recognized that “Indian tribes within ‘Indian country’ . . . possess[] attributes of sovereignty over both their members *and their*

²⁰¹ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) (emphasis added).

²⁰² *Shoshone Tribe of Indians v. United States*, 299 U.S. 476, 496 (1937).

²⁰³ *Worcester*, 31 U.S. at 560.

²⁰⁴ *Id.* at 561.

²⁰⁵ *Winters v. United States*, 207 U.S. 564, 576 (1908) (emphasis added).

²⁰⁶ *Shoshone Tribe of Indians*, 299 U.S. at 496.

²⁰⁷ *United States v. Winans*, 198 U.S. 371, 381 (1905); *see also United States v. Skokomish Indian Tribe*, 764 F.2d 670, 671 (9th Cir. 1985) (recognizing that treaties reserved “pre-treaty” tribal rights).

territory,”²⁰⁸ a sovereignty that includes “an inherent power necessary to tribal . . . territorial management.”²⁰⁹ Thus, the “geographical component to tribal sovereignty”²¹⁰ is derived from an aboriginal title that includes the exercise of tribal governmental authority over tribal land. This governmental authority continues until aboriginal title is extinguished.

While inherent tribal sovereignty does not include the authority to “independently determine their external relations,” *Montana v. United States*²¹¹ confirms that a tribe’s retained inherent power to regulate land use, a reserved aboriginal right, continues undisturbed on the portions of its reservation remaining in tribal ownership or in trust.²¹² *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*²¹³ likewise confirms that territorial sovereignty is an aspect of aboriginal title, holding that a tribe does retain, as an element of its inherent sovereignty, an enforceable right to prevent development on the land that poses a threat to its political integrity, economic security, and health and welfare.²¹⁴

²⁰⁸ *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (emphasis added))

²⁰⁹ *Merrion*, 455 U.S. at 141.

²¹⁰ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980).

²¹¹ 450 U.S. 544, 564-65 (1981).

²¹² *Id.* at 557.

²¹³ 492 U.S. 408 (1989).

²¹⁴ *Id.* at 430-31.

In Alaska, however, all aboriginal title has been explicitly extinguished.²¹⁵ This includes the geographic component to tribal sovereignty, the right to govern or regulate land. It is this aspect of extinguished aboriginal title—tribal regulatory power over land—that the appellee tribes and the Secretary propose to revive by having land taken into trust. The land-into-trust statute cannot be read to give the Secretary power to resurrect an element of aboriginal title that Congress extinguished in ANCSA.

H. The district court’s decision raises constitutional concerns

The district court’s decision fails to heed the Supreme Court’s admonishment that “courts should not lightly presume congressional intent to implicitly delegate decisions of major . . . political significance to agencies,”²¹⁶ such as whether to radically and permanently alter the patterns of land ownership and governmental jurisdiction in Alaska that Congress established in ANCSA. This principle applies with particular force in the context of this case, where the Constitution grants “plenary and exclusive” powers to Congress to legislate in the

²¹⁵ 43 U.S.C. § 1604(b)&(c).

²¹⁶ *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (1999); *Loving v. I.R.S.*, 742 F.3d 1013, 1021 (D.C. Cir. 2013).

field of Indian affairs,”²¹⁷ and the district court decision effectively cedes this legislative power to the Secretary.

The district court judgment does not limit the Secretary’s authority to use the land-into-trust statute to reverse ANCSA, and her interpretation of her authority under the district court judgment calls into question whether a sufficiently “intelligible principle” guides her implementation of the land-into-trust statute.²¹⁸ Whether the land-into-trust statute contains a sufficiently “intelligible principle” has been litigated. Reviewing Circuits, including this Court, have not been satisfied with statute’s perfunctory language “for the purpose of providing land for Indians,”²¹⁹ and have relied on legislative history and historic context to uphold the statute.²²⁰ In fact, but for the “grant-vacate-remand” decision in *Dep’t of Interior v.*

²¹⁷ U.S. Const., art. I, § 8, cl. 3; *United States v. Lara*, 541 U.S. 193, 200 (2004) (collecting cases).

²¹⁸ Congress unconstitutionally delegates its legislative power when it fails to “lay down by legislative act an intelligible principle to which the [agency] is directed to conform.” *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472 (2001) (internal citation omitted). *See also Dep’t of Interior v. South Dakota*, 519 U.S. 919 (1996) (Scalia, J. dissenting from decision to grant certiorari, vacate 8th Circuit judgment, and remand to federal district court on question of availability of judicial review of trust land acquisitions).

²¹⁹ 25 U.S.C. § 465.

²²⁰ *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999) (discussing legislative history); *South Dakota v. Dep’t of Interior*, 423 F.3d 790, 797 (8th Cir. 2005) (“We conclude that the purposes evident in the whole of the IRA and its legislative history sufficiently narrow the delegation and guide the Secretary’s discretion in deciding when to take land into trust.”); *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 973-74 (10th Cir. 2005)(following circuit precedent

South Dakota,²²¹ a circuit split would exist on the constitutionality of the land-into-trust statute. The statute's expansive, even vague, textual purpose should not be construed to control over the plain text of ANCSA—a later-enacted and specifically-applicable statute—which supersedes or severely curbs it.²²² In the words of Justice Thomas:

I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than “legislative.”²²³

Upholding the district court's decision in this case would cede a policy decision of legislative significance to an administrative agency, raising constitutional concerns that the Court should avoid.²²⁴

in *United States v. Roberts*); *Carcieri v. Kempthorne*, 497 F.3d 15, 41-43 (1st Cir. 2007) (relying on legislative history and historical context), *reversed on other grounds*, 555 U.S. 379 (2009); *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 32, 30-33 (D.C. Cir. 2008) (upholding the statute based on the history and “broader factual context” of the IRA); *Cnty. Of Charles Mix v. Dep't of Interior*, 674 F.3d 898, 901-902 (8th Cir. 2012) (following circuit precedent of *South Dakota*).

²²¹ 519 U.S. 919 (1996).

²²² *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133.

²²³ *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 487 (2001) (Thomas, J. concurring).

²²⁴ *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (2001) (“an otherwise acceptable construction of a statute” must be avoided if it “would raise serious constitutional problems.”)

III. 25 U.S.C. § 476(g) does not mandate that the Secretary accept trust land applications from Alaska tribes.

Finding that ANCSA does not preclude new trust land in Alaska, the district court then held that 25 U.S.C. § 476(g) curbs the Secretary's discretion to exclude Alaska tribes from the trust land acquisition regulation.²²⁵ Section 476(g) nullifies any "regulation or administrative decision or determination of a department or agency" that discriminates between tribes "by virtue of their status as Indian tribes." Excluding Alaska tribes from the land-into-trust rule is required by ANCSA, and is therefore a direct result of Congress' exercise of its plenary authority under the Indian Commerce Clause to legislate on the subject of Indian tribes—not a prohibited administrative distinction "by virtue of [Alaska tribes'] status as Indian tribes."

The Alaska exception distinguishes Alaska tribes from tribes elsewhere because they participated in a statutory land claims settlement that precludes creation of trust land in Alaska. Section 476(g) prohibits *regulatory or administrative* actions that discriminate between tribes because of their status as tribes, but does not nullify any aspect of ANCSA. Section 476(g) does not, and could not, limit Congress' authority to treat tribes differently in separate statutory

²²⁵ Doc. 109 at 24-25; Doc. 130 at 5-6.

settlements, such as ANCSA. Nothing in section 476(g) suggests that the Secretary must restore rights to Alaska tribes that have been extinguished by Congress.

Section 476(g) was enacted in 1994—twenty-three years after ANCSA—to clarify that all recognized tribes should “[r]egardless of the method by which recognition was extended,” be treated the same “by virtue of their status as Indian tribes with government-to-government relations[] with the United States.”²²⁶ As stated by Senator John McCain, sponsor of the bill that added sections 476(f) and (g), the law was enacted in response to concerns that the Secretary was classifying tribes based on whether they were “created” or “historic”:

In the past year, the Pascua Yagui Tribe of Arizona has brought to our attention the fact that the Department of the Interior has interpreted [section 476] to authorize the Secretary to categorize or classify Indian tribes as being either created or historic. According to the Department, created tribes are only authorized to exercise such powers of self-governance as the Secretary may confer on them.

. . . .

Over the years, the Federal Government has extended recognition to Indian tribes through treaties, executive orders, a course of dealing, decisions of the Federal courts, acts of Congress and administrative action. Regardless of the method by which recognition was extended, all Indian tribes enjoy the

²²⁶ 140 Cong. Rec. 11234, 11235 (Senate, May 19, 1994). *See also* 140 Cong. Rec. 11376-78 (House, May 23, 1994).

same relationship with the United States and exercise the same inherent authority.²²⁷

Thus, sections 476(f) and (g) state that a tribe is either a federally recognized tribe or is not; there are no categories of federal recognition. Federal recognition of Alaska tribes is not at issue in this case. Nor is the issue of whether Alaska tribes are “historic” or “created” in the eyes of the Secretary. The issue is whether section 476(g) overrules the Secretary’s duty to respect and enforce legislative settlements of Native land claims. As shown above, it does not.

Under the Indian Commerce Clause,²²⁸ Congress has plenary power to legislate on the subject of Indian tribes.²²⁹ Congress has exercised this power in enacting ANCSA, thereby discontinuing trust land acquisitions in Alaska. “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”²³⁰

CONCLUSION AND RELIEF SOUGHT

For all of the reasons presented above, the Court should reverse the district court holding that ANCSA permits the creation of new trust land and Indian country in Alaska.

²²⁷ 140 Cong. Rec. S6144-03, S6146 (1994) (statement of Sen. McCain), 1994 WL 196882 (Cong. Rec.).

²²⁸ U.S. Const. art. I, § 8, cl. 3.

²²⁹ *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989).

²³⁰ *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

DATED August 24, 2015.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(c)

I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 13,833 words.

Dated August 24, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2015 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ J. Anne Nelson

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United States Code

25 U.S.C. § 461. Allotment of land on Indian reservations

On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

25 U.S.C. § 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, 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.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed \$2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) 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, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 473. Application generally

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.A. §§ 469, 470, 471, 472, 476] shall apply to the Territory of Alaska: Provided, That sections 4, 7, 16, 17, and 18 of this Act [25 U.S.C.A. §§ 464, 467, 476, 477, 478] shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Section 4 of this Act [25 U.S.C.A. § 464] shall not apply to the Indians of the Klamath Reservation in Oregon.

25 U.S.C. § 473a. Application to Alaska

Sections 461, 465, 467, 468, 475, 477, and 479 of this title shall after May 1, 1936, apply to the Territory of Alaska: *Provided*, That groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title.

25 U.S.C. § 475. Claims or suits of Indian tribes against United States; rights unimpaired

Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. It is declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by said sections shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States.

25 U.S.C. § 476(g). Organization of Indian tribes; constitution and bylaws and amendment thereof; special election

* * *

(g) Privileges and immunities of Indian tribes; existing regulations

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

* * *

25 U.S.C. § 477. Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

25 U.S.C. § 479. Definitions

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and 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 all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be

considered Indians. The term “tribe” wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words “adult Indians” wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

43 USC § 1601. Congressional findings and declaration of policy

Congress finds and declares that—

(a) there is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims;

(b) 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;

(c) no provision of this chapter shall replace or diminish any right, privilege, or obligation of Natives as citizens of the United States or of Alaska, or relieve, replace, or diminish any obligation of the United States or of the State or Alaska to protect and promote the rights or welfare of Natives as citizens of the United States or of Alaska; the Secretary is authorized and directed, together with other appropriate agencies of the United States Government, to make a study of all Federal programs primarily designed to benefit Native people and to report back to the Congress with his recommendations for the future management and operation of these programs within three years of December 18, 1971;

(d) no provision of this chapter shall constitute a precedent for reopening, renegotiating, or legislating upon any past settlement involving land claims or other matters with any Native organizations, or any tribe, band, or identifiable group of American Indians;

(e) no provision of this chapter shall effect a change or changes in the petroleum reserve policy reflected in sections 7421 through 7438 of Title 10 except as specifically provided in this chapter;

(f) no provision of this chapter shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue, nor to grant implied consent to

Natives to sue the United States or any of its officers with respect to the claims extinguished by the operation of this chapter; and

(g) no provision of this chapter shall be construed to terminate or otherwise curtail the activities of the Economic Development Administration or other Federal agencies conducting loan or loan and grant programs in Alaska. For this purpose only, the terms “Indian reservation” and “trust or restricted Indian-owned land areas” in Public Law 89-136, the Public Works and Economic Development Act of 1965, as amended [42 U.S.C.A. § 3121 et seq.], shall be interpreted to include lands granted to Natives under this chapter as long as such lands remain in the ownership of the Native villages or the Regional Corporations.

43 USC § 1602. Definitions

For the purposes of this chapter, the term—

(a) “Secretary” means the Secretary of the Interior;

(b) “Native” means a citizen of the United States who is a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled in the Metlaktla¹ Indian Community) Eskimo, or Aleut blood, or combination thereof. The term includes any Native as so defined either or both of whose adoptive parents are not Natives. It also includes, in the absence of proof of a minimum blood quantum, any citizen of the United States who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member and whose father or mother is (or, if deceased, was) regarded as Native by any village or group. Any decision of the Secretary regarding eligibility for enrollment shall be final;

(c) “Native village” means any tribe, band, clan, group, village, community, or association in Alaska listed in sections 1610 and 1615 of this title, or which meets the requirements of this chapter, and which the Secretary determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives;

(d) “Native group” means any tribe, band, clan, village, community, or village association of Natives in Alaska composed of less than twenty-five Natives, who comprise a majority of the residents of the locality;

(e) “Public lands” means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary,

enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to January 17, 1969;

(f) “State” means the State of Alaska;

(g) “Regional Corporation” means an Alaska Native Regional Corporation established under the laws of the State of Alaska in accordance with the provisions of this chapter;

(h) “Person” means any individual, group, firm, corporation, association, or partnership;

(i) “Municipal Corporation” means any general unit of municipal government under the laws of the State of Alaska;

(j) “Village Corporation” means an Alaska Native Village Corporation organized under the laws of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of a Native village in accordance with the terms of this chapter.²

(k) “Fund” means the Alaska Native Fund in the Treasury of the United States established by section 1605 of this title;

(l) “Planning Commission” means the Joint Federal-State Land Use Planning Commission established by section 1616 of this title;

(m) “Native Corporation” means any Regional Corporation, any Village Corporation, any Urban Corporation, and any Group Corporation;

(n) “Group Corporation” means an Alaska Native Group Corporation organized under the laws of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of members of a Native group in accordance with the terms of this chapter;

(o) “Urban Corporation” means an Alaska Native Urban Corporation organized under the laws of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of members of an urban community of Natives in accordance with the terms of this chapter;

(p) “Settlement Common Stock” means stock of a Native Corporation issued pursuant to section 1606(g)(1) of this title that carries with it the rights and restrictions listed in section 1606(h)(1) of this title;

(q) “Replacement Common Stock” means stock of a Native Corporation issued in exchange for Settlement Common Stock pursuant to section 1606(h)(3) of this title;

(r) “Descendant of a Native” means—

(1) a lineal descendant of a Native or of an individual who would have been a Native if such individual were alive on December 18, 1971, or

(2) an adoptee of a Native or of a descendant of a Native, whose adoption—

(A) occurred prior to his or her majority, and

(B) is recognized at law or in equity;

(s) “Alienability restrictions” means the restrictions imposed on Settlement Common Stock by section 1606(h)(1)(B) of this title;

(t) “Settlement Trust” means a trust—

(1) established and registered by a Native Corporation under the laws of the State of Alaska pursuant to a resolution of its shareholders, and

(2) operated for the benefit of shareholders, Natives, and descendants of Natives, in accordance with section 1629(e) of this title and the laws of the State of Alaska.

43 USC § 1603. Declaration of settlement

(a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

(b) All 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.

(c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States

relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

43 USC § 1604. Enrollment

(a) The Secretary shall prepare within two years from December 18, 1971, a roll of all Natives who were born on or before, and who are living on, December 18, 1971. Any decision of the Secretary regarding eligibility for enrollment shall be final.

(b) The roll prepared by the Secretary shall show for each Native, among other things, the region and the village or other place in which he resided on the date of the 1970 census enumeration, and he shall be enrolled according to such residence. Except as provided in subsection (c) of this section, a Native eligible for enrollment who is not, when the roll is prepared, a permanent resident of one of the twelve regions established pursuant to section 1606(a) of this title shall be enrolled by the Secretary in one of the twelve regions, giving priority in the following order to—

(1) the region where the Native resided on the 1970 census date if he had resided there without substantial interruption for two or more years;

(2) the region where the Native previously resided for an aggregate of ten years or more;

(3) the region where the Native was born; and

(4) the region from which an ancestor of the Native came:¹

The Secretary may enroll a Native in a different region when necessary to avoid enrolling members of the same family in different regions or otherwise avoid hardship.

(c) A Native eligible for enrollment who is eighteen years of age or older and is not a permanent resident of one of the twelve regions may, on the date he files an application for enrollment, elect to be enrolled in a thirteenth region for Natives who are non-residents of Alaska, if such region is established pursuant to section 1606(c) of this title. If such region is not established, he shall be enrolled as provided in subsection (b) of this section. His election shall apply to all dependent members of his household who are less than eighteen years of age, but shall not affect the enrollment of anyone else.

43 USC § 1605. Alaska Native Fund

(a) There is hereby established in the United States Treasury an Alaska Native Fund into which the following moneys shall be deposited:

(1) \$462,500,000 from the general fund of the Treasury, which are authorized to be appropriated according to the following schedule:

(A) \$12,500,000 during the fiscal year in which this chapter becomes effective;

(B) \$50,000,000 during the second fiscal year;

(C) \$70,000,000 during each of the third, fourth, and fifth fiscal years;

(D) \$40,000,000 during the period beginning July 1, 1976, and ending September 30, 1976; and

(E) \$30,000,000 during each of the next five fiscal years, for transfer to the Alaska Native Fund in the fourth quarter of each fiscal year.

(2) Four percent interest per annum, which is authorized to be appropriated, on any amount authorized to be appropriated by this paragraph that is not appropriated within six months after the fiscal year in which payable.

(3) \$500,000,000 pursuant to the revenue sharing provisions of section 1608 of this title.

(b) None of the funds paid or distributed pursuant to this section to any of the Regional and Village Corporations established pursuant to this chapter shall be expended, donated, or otherwise used for the purpose of carrying on propaganda, or intervening in (including the publishing and distributing of statements) any political campaign on behalf of any candidate for public office. Any person who willfully violates the foregoing provision shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$1,000 or imprisoned not more than twelve months, or both.

(c) After completion of the roll prepared pursuant to section 1604 of this title, all money in the Fund, except money reserved as provided in section 1619 of this title for the payment of attorney and other fees, shall be distributed at the end of each three months of the fiscal year among the Regional Corporations organized pursuant to section 1606 of this title on the basis of the relative numbers of Natives

enrolled in each region. The share of a Regional Corporation that has not been organized shall be retained in the Fund until the Regional Corporation is organized.

43 USC § 1606. Regional Corporations

(a) For purposes of this chapter, the State of Alaska shall be divided by the Secretary within one year after December 18, 1971, into twelve geographic regions, with each region composed as far as practicable of Natives having a common heritage and sharing common interests. In the absence of good cause shown to the contrary, such regions shall approximate the areas covered by the operations of the following existing Native associations:

- (1) Arctic Slope Native Association (Barrow, Point Hope);
- (2) Bering Straits Association (Seward Peninsula, Unalakleet, Saint Lawrence Island);
- (3) Northwest Alaska Native Association (Kotzebue);
- (4) Association of Village Council Presidents (southwest coast, all villages in the Bethel area, including all villages on the Lower Yukon River and the Lower Kuskokwim River);
- (5) Tanana Chiefs' Conference (Koyukuk, Middle and Upper Yukon Rivers, Upper Kuskokwim, Tanana River);
- (6) Cook Inlet Association (Kenai, Tyonek, Eklutna, Iliamna);
- (7) Bristol Bay Native Association (Dillingham, Upper Alaska Peninsula);
- (8) Aleut League (Aleutian Islands, Pribilof Islands and that part of the Alaska Peninsula which is in the Aleut League);
- (9) Chugach Native Association (Cordova, Tatitlek, Port Graham, English Bay, Valdez, and Seward);
- (10) Tlingit-Haida Central Council (southeastern Alaska, including Metlakatla);
- (11) Kodiak Area Native Association (all villages on and around Kodiak Island); and
- (12) Copper River Native Association (Copper Center, Glennallen, Chitina, Mentasta).

Any dispute over the boundaries of a region or regions shall be resolved by a board of arbitrators consisting of one person selected by each of the Native associations

involved, and an additional one or two persons, whichever is needed to make an odd number of arbitrators, such additional person or persons to be selected by the arbitrators selected by the Native associations involved.

(b) The Secretary may, on request made within one year of December 18, 1971, by representative and responsible leaders of the Native associations listed in subsection (a) of this section, merge two or more of the twelve regions: *Provided*, That the twelve regions may not be reduced to less than seven, and there may be no fewer than seven Regional Corporations.

(c) If a majority of all eligible Natives eighteen years of age or older who are not permanent residents of Alaska elect, pursuant to section 1604(c) of this title, to be enrolled in a thirteenth region for Natives who are non-residents of Alaska, the Secretary shall establish such a region for the benefit of the Natives who elected to be enrolled therein, and they may establish a Regional Corporation pursuant to this chapter.

(d) Five incorporators within each region, named by the Native association in the region, shall incorporate under the laws of Alaska a Regional Corporation to conduct business for profit, which shall be eligible for the benefits of this chapter so long as it is organized and functions in accordance with this chapter. The articles of incorporation shall include provisions necessary to carry out the terms of this chapter.

(e) The original articles of incorporation and bylaws shall be approved by the Secretary before they are filed, and they shall be submitted for approval within eighteen months after December 18, 1971. The articles of incorporation may not be amended during the Regional Corporation's first five years without the approval of the Secretary. The Secretary may withhold approval under this section if in his judgment inequities among Native individuals or groups of Native individuals would be created.

(f) The management of the Regional Corporation shall be vested in a board of directors, all of whom, with the exception of the initial board, shall be stockholders over the age of eighteen. The number, terms, and method of election of members of the board of directors shall be fixed in the articles of incorporation or bylaws of the Regional Corporation.

(g) Issuance of stock

* * *

43 USC § 1607. Village Corporations

(a) The Native residents of each Native village entitled to receive lands and benefits under this chapter shall organize as a business for profit or nonprofit corporation under the laws of the State before the Native village may receive patent to lands or benefits under this chapter, except as otherwise provided.

(b) The initial articles of incorporation for each Village Corporation shall be subject to the approval of the Regional Corporation for the region in which the village is located. Amendments to the articles of incorporation and the annual budgets of the Village Corporations shall, for a period of five years, be subject to review and approval by the Regional Corporation. The Regional Corporation shall assist and advise Native villages in the preparation of articles of incorporation and other documents necessary to meet the requirements of this subsection.

(c) The provisions of subsections (g), (h) (other than paragraph (4)), and (o) of section 1606 of this title shall apply in all respects to Village Corporations, Urban Corporations, and Group Corporations.

43 USC § 1608. Revenue sharing

(a) The provisions of this section shall apply to all minerals that are subject to disposition under the Mineral Leasing Act of 1920, as amended and supplemented [30 U.S.C.A. § 181 et seq.].

(b) With respect to conditional leases and sales of minerals heretofore or hereafter made pursuant to section 6(g) of the Alaska Statehood Act, and with respect to mineral leases of the United States that are or may be subsumed by the State under section 6(h) of the Alaska Statehood Act, until such time as the provisions of subsection (c) of this section become operative the State shall pay into the Alaska Native Fund from the royalties, rentals, and bonuses hereafter received by the State (1) a royalty of 2 per centum upon the gross value (as such gross value is determined for royalty purposes under such leases or sales) of such

minerals produced or removed from such lands, and (2) 2 per centum of all rentals and bonuses under such leases or sales, excluding bonuses received by the State at the September 1969 sale of minerals from tentatively approved lands and excluding rentals received pursuant to such sale before December 18, 1971. Such payment shall be made within sixty days from the date the revenues are received by the State.

(c) Patents; royalties: reservation of percentage of gross value of produced or removed minerals and of rentals and bonuses from disposition of minerals
Each patent hereafter issued to the State under the Alaska Statehood Act, including a patent of lands heretofore selected and tentatively approved, shall reserve for the benefit of the Natives, and for payment into the Alaska Native Fund, (1) a royalty of 2 per centum upon the gross value (as such gross value is determined for royalty purposes under any disposition by the State) of the minerals thereafter produced or removed from such lands, and (2) 2 per centum of all revenues thereafter derived by the State from rentals and bonuses from the disposition of such minerals.

(d) All bonuses, rentals, and royalties received by the United States after December 18, 1971, from the disposition by it of such minerals in public lands in Alaska shall be distributed as provided in the Alaska Statehood Act, except that prior to calculating the shares of the State and the United States as set forth in such Act, (1) a royalty of 2 per centum upon the gross value of such minerals produced (as such gross value is determined for royalty purposes under the sale or lease), and (2) 2 per centum of all rentals and bonuses shall be deducted and paid into the Alaska Native Fund. The respective shares of the State and the United States shall be calculated on the remaining balance.

(e) The provisions of this section shall be enforceable by the United States for the benefit of the Natives, and in the event of default by the State in making the payments required, in addition to any other remedies provided by law, there shall be deducted annually by the Secretary of the Treasury from any grant-in-aid or from any other sums payable to the State under any provision of Federal law an amount equal to any such underpayment, which amount shall be deposited in the Fund.

(f) Revenues received by the United States or the State as compensation for estimated drainage of oil or gas shall, for the purposes of this section, be regarded

as revenues from the disposition of oil and gas. In the event the United States or the State elects to take royalties in kind, there shall be paid into the Fund on account thereof an amount equal to the royalties that would have been paid into the Fund under the provisions of this section had the royalty been taken in cash.

(g) The payments required by this section shall continue only until a sum of \$500,000,000 has been paid into the Alaska Native Fund less the total of advance payments paid into the Alaska Native Fund pursuant to section 407 of the Trans-Alaska Pipeline Authorization Act. Thereafter, payments which would otherwise go into the Alaska Native Fund will be made to the United States Treasury as reimbursement for the advance payments authorized by section 407 of the Trans-Alaskan Pipeline Authorization Act. The provisions of this section shall no longer apply, and the reservation required in patents under this section shall be of no further force and effect, after a total sum of \$500,000,000 has been paid to the Alaska Native Fund and to the United States Treasury pursuant to this subsection.

(h) When computing the final payment into the Fund the respective shares of the United States and the State with respect to payments to the Fund required by this section shall be determined pursuant to this subsection and in the following order:

(1) first, from sources identified under subsections (b) and (c) hereof;
and

(2) then, from sources identified under subsection (d) hereof.

(i) Outer Continental Shelf mineral revenues; provisions of section inapplicable

The provisions of this section do not apply to mineral revenues received from the Outer Continental Shelf.

43 U.S.C. § 1610. Withdrawal of public lands

(a) Description of withdrawn public lands; exceptions; National Wildlife Refuge lands exception; time of withdrawal

(1) The following public lands are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, as amended:

(A) The lands in each township that encloses all or part of any Native village identified pursuant to subsection (b) of this section;

(B) The lands in each township that is contiguous to or corners on the township that encloses all or part of such Native village; and

(C) The lands in each township that is contiguous to or corners on a township containing lands withdrawn by paragraph (B) of this subsection.

The following lands are excepted from such withdrawal: lands in the National Park System and lands withdrawn or reserved for national defense purposes other than Naval Petroleum Reserve Numbered 4.

(2) All lands located within the townships described in subsection (a)(1) hereof that have been selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from the creation of third party interests by the State under the Alaska Statehood Act.

(3)(A) If the Secretary determines that the lands withdrawn by subsections (a)(1) and (2) hereof are insufficient to permit a Village or Regional Corporation to select the acreage it is entitled to select, the Secretary shall withdraw three times the deficiency from the nearest unreserved, vacant and unappropriated public lands. In making this withdrawal the Secretary shall, insofar as possible, withdraw public lands of a character similar to those on which the village is located and in order of their proximity to the center of the Native village: *Provided*, That if the Secretary, pursuant to section 1616, and 1621(e) of this title determines there is a need to expand the boundaries of a National Wildlife Refuge to replace any acreage selected in the Wildlife Refuge System by the Village Corporation the withdrawal under this section shall not include lands in the Refuge.

(B) The Secretary shall make the withdrawal provided for in subsection (3)(A) hereof on the basis of the best available information within sixty days of December 18, 1971, or as soon thereafter as practicable.

(b) List of Native villages subject to chapter; review; eligibility for benefits; expiration of withdrawals for villages; alternative eligibility; eligibility of unlisted villages

(1) The Native villages subject to this chapter are as follows:

NAME OF PLACE AND REGION

(2) Within two and one-half years from December 18, 1971, the Secretary shall review all of the villages listed in subsection (b)(1) hereof, and a village shall not be eligible for land benefits under section 1613(a) and (b) of this title, and any withdrawal for such village shall expire, if the Secretary determines that--

(A) less than twenty-five Natives were residents of the village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; or

(B) the village is of a modern and urban character, and the majority of the residents are non-Native.

Any Native group made ineligible by this subsection shall be considered under section 1613(h) of this title.

(3) Native villages not listed in subsection (b)(1) hereof shall be eligible for land and benefits under this chapter and lands shall be withdrawn pursuant to this section if the Secretary within two and one-half years from December 18, 1971, determines that--

(A) twenty-five or more Natives were residents of an established village on the 1970 census enumeration date as shown by the census or other

evidence satisfactory to the Secretary, who shall make findings of fact in each instance; and

(B) the village is not of a modern and urban character, and a majority of the residents are Natives.

43 USC § 1613. Conveyance of lands

(a) Immediately after selection by a Village Corporation for a Native village listed in section 1610 of this title which the Secretary finds is qualified for land benefits under this chapter, the Secretary shall issue to the Village Corporation a patent to the surface estate in the number of acres shown in the following table:

If the village had on the 1970 census enumeration date a Native population between--	It shall be entitled to a patent to an area of public lands equal to--
25 and 99	69,120 acres.
100 and 199	92,160 acres.
200 and 399	115,200 acres.
400 and 599	138,240 acres.
600 or more	161,280 acres.

The lands patented shall be those selected by the Village Corporation pursuant to section 1611(a) of this title. In addition, the Secretary shall issue to the Village Corporation a patent to the surface estate in the lands selected pursuant to section 1611(b) of this title.

(b) Immediately after selection by any Village Corporation for a Native village listed in section 1615 of this title which the Secretary finds is qualified for land benefits under this chapter, the Secretary shall issue to the Village Corporation a patent to the surface estate to 23,040 acres. The lands patented shall be the lands within the township or townships that enclose the Native village, and

any additional lands selected by the Village Corporation from the surrounding townships withdrawn for the Native village by section 1615(a) of this title.

(c) Each patent issued pursuant to subsections (a) and (b) of this section shall be subject to the requirements of this subsection. Upon receipt of a patent or patents:

(1) the Village Corporation shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as of December 18, 1971 (except that occupancy of tracts located in the Pribilof Islands shall be determined as of the date of initial conveyance of such tracts to the appropriate Village Corporation) as a primary place of residence, or as a primary place of business, or as a subsistence campsite, or as headquarters for reindeer husbandry;

(2) the Village Corporation shall then convey to the occupant, either without consideration or upon payment of an amount not in excess of fair market value, determined as of the date of initial occupancy and without regard to any improvements thereon, title to the surface estate in any tract occupied as of December 18, 1971 by a nonprofit organization;

(3) the Village Corporation shall then convey to any Municipal Corporation in the Native village or to the State in trust for any Municipal Corporation established in the Native village in the future, title to the remaining surface estate of the improved land on which the Native village is located and as much additional land as is necessary for community expansion, and appropriate rights-of-way for public use, and other foreseeable community needs: *Provided*, That the amount of lands to be transferred to the Municipal Corporation or in trust shall be no less than 1,280 acres unless the Village Corporation and the Municipal Corporation or the State in trust can agree in writing on an amount which is less than one thousand two hundred and eighty acres: *Provided further*, That any net revenues derived from the sale of surface resources harvested or extracted from lands reconveyed pursuant to this subsection shall be paid to the Village Corporation by the Municipal Corporation or the State in trust: *Provided, however*, That the word “sale”, as used in the preceding sentence, shall not include the utilization of surface resources for governmental purposes by the Municipal Corporation or the State in trust, nor shall it include the issuance of free use permits or other authorization for such purposes;

(4) the Village Corporation shall convey to the Federal Government, State, or to the appropriate Municipal Corporation, title to the surface estate for airport sites, airway beacons, and other navigation aids as such existed on December 18, 1971, together with such additional acreage and/or easements as are necessary to provide related governmental services and to insure safe approaches to airport runways as such airport sites, runways, and other facilities existed as of December 18, 1971; and

(5) for a period of ten years after December 18, 1971, the Regional Corporation shall be afforded the opportunity to review and render advice to the Village Corporations on all land sales, leases or other transactions prior to any final commitment.

There is authorized to be appropriated such sums as may be necessary for the purpose of providing technical assistance to Village Corporations established pursuant to this chapter in order that they may fulfill the reconveyance requirements of this subsection. The Secretary may make funds available as grants to ANCSA or nonprofit corporations that maintain in-house land planning and management capabilities.

(d) Rule of approximation with respect to acreage limitations

(1) The Secretary may apply the rule of approximation with respect to the acreage limitations contained in this section.

(2) For purposes of applying the rule of approximation under this section, the largest legal subdivision that may be conveyed in excess of the applicable acreage limitation specified in subsection (a) of this section shall be—

(A) in the case of land managed by the Bureau of Land Management that is not within a conservation system unit, the next whole section;

(B) in the case of land managed by an agency other than the Bureau of Land Management that is not within a conservation system unit, the next quarter-section and only with concurrence of the agency; or

(C) in the case of land within a conservation system unit, a quarter of a quarter section, and if the land is managed by an agency other than the Bureau of Land Management, only with the concurrence of that agency.

(3)(A) If the Secretary determines pursuant to paragraph (2) that an entitlement of a Village Corporation (other than a Village Corporation listed in section 1615(a) of this title) or a Regional Corporation may be fulfilled by

conveying a specific tract of surveyed or unsurveyed land, the Secretary and the affected Village or Regional Corporation may enter into an agreement providing that all land entitlements under this chapter shall be deemed satisfied by conveyance of the specifically identified and agreed upon tract of land.

(B) An agreement entered into under subparagraph (A) shall be—

(i) in writing;

(ii) executed by the Secretary and the Village or Regional Corporation; and

(iii) authorized by a corporate resolution adopted by the affected Village or Regional Corporation.

(C) After execution of an agreement under subparagraph (A) and conveyance of the agreed upon tract to the affected Village or Regional Corporation—

(i) the Secretary shall not make any further adjustments to calculations relating to acreage entitlements of the Village or Regional Corporation; and

(ii) the Village or Regional Corporation shall not be entitled to any further conveyances under this chapter.

(D) A Village or Regional Corporation shall not be eligible to receive land under subparagraph (A) if the Village or Regional corporation has received the full land entitlement of the Village or Regional Corporation through—

(i) an actual conveyance of land; or

(ii) a previous agreement.

(E) If the calculations of the Secretary indicate that the final survey boundaries for any Village or Regional Corporation entitlement for which an agreement has not been entered into under this paragraph include acreage in a quantity that exceeds the statutory entitlement of the corporation by $\frac{1}{10}$ of 1 percent or less, but not more than the applicable acreage limitation specified in paragraph (2)—

(i) the entitlement shall be considered satisfied by the conveyance of the surveyed area; and

(ii) the Secretary shall not change the survey for the sole purpose of an acreage adjustment.

(F) This paragraph does not limit or otherwise affect the ability of a Village or Regional Corporation to enter into land exchanges with the United States.

(e) Immediately after selection by a Regional Corporation, the Secretary shall convey to the Regional Corporation title to the surface and/or the subsurface estates, as is appropriate, in the lands selected.

(f) When the Secretary issues a patent to a Village Corporation for the surface estate in lands pursuant to subsections (a) and (b) of this section, he shall issue to the Regional Corporation for the region in which the lands are located a patent to the subsurface estate in such lands, except lands located in the National Wildlife Refuge System and lands withdrawn or reserved for national defense purposes, including Naval Petroleum Reserve Numbered 4, for which in lieu rights are provided for in section 1611(a)(1) of this title: *Provided*, That the right to explore, develop, or remove minerals from the subsurface estate in the lands within the boundaries of any Native village shall be subject to the consent of the Village Corporation.

(g) All conveyances made pursuant to this chapter shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this chapter, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. Upon issuance of the patent, the patentee shall succeed and become entitled to any and all interests of the State or the United States as lessor, contractor, permitter, or grantor, in any such leases, contracts, permits, rights-of-way, or easements covering the estate patented, and a lease issued under section 6(g) of the Alaska Statehood Act shall be treated for all purposes as though the patent had been issued to the State. The administration of such lease, contract, permit, right-of-way, or easement shall continue to be by the

State or the United States, unless the agency responsible for administration waives administration. In the event that the patent does not cover all of the land embraced within any such lease, contract, permit, right-of-way, or easement, the patentee shall only be entitled to the proportionate amount of the revenues reserved under such lease, contract, permit, right-of-way, or easement by the State or the United States which results from multiplying the total of such revenues by a fraction in which the numerator is the acreage of such lease, contract, permit, right-of-way, or easement which is included in the patent and the denominator is the total acreage contained in such lease, contract, permit, right-of-way, or easement.

(h) The Secretary is authorized to withdraw and convey 2 million acres of unreserved and unappropriated public lands located outside the areas withdrawn by sections 1610 and 1615 of this title, and follows:

(1)(A) The Secretary may withdraw and convey to the appropriate Regional Corporation fee title to existing cemetery sites and historical places.

(B) Only title to the surface estate shall be conveyed for lands located in a Wildlife Refuge, when the cemetery or historical site is greater than 640 acres.

(C)(i) Notwithstanding acreage allocations made before December 10, 2004, the Secretary may convey any cemetery site or historical place—

(I) with respect to which there is an application on record with the Secretary on December 10, 2004; and

(II) that is eligible for conveyance.

(ii) Clause (i) shall also apply to any of the 188 closed applications that are determined to be eligible and reinstated under Secretarial Order No. 3220 dated January 5, 2001.

(D) No applications submitted for the conveyance of land under subparagraph (A) that were closed before December 10, 2004 may be reinstated other than those specified in subparagraph (C)(ii).

(E) After December 10, 2004—

(i) no application may be filed for the conveyance of land under subparagraph (A); and

(ii) no pending application may be amended, except as necessary to conform the application to the description in the certification of eligibility of the Bureau of Indian Affairs.

(F) Unless, not later than 1 year after December 10, 2004, a Regional Corporation that has filed an application for a historic place submits to the Secretary a statement on the significance of and the location of the historic place—

(i) the application shall not be valid; and

(ii) the Secretary shall reject the application.

(G) The State and the head of the Federal agency with administrative jurisdiction over the land shall have 30 days to provide written comments to the Secretary—

(i) identifying any third party interest to which a conveyance under subparagraph (A) should be made subject; and

(ii) describing any easements recommended for reservation.

(2) The Secretary may withdraw and convey to a Native group that does not qualify as a Native village, if it incorporates under the laws of Alaska, title to the surface estate in not more than 23,040 acres surrounding the Native group's locality. The subsurface estate in such land shall be conveyed to the appropriate Regional Corporation unless the lands are located in a Wildlife Refuge;

(3) The Secretary may withdraw and convey to the Natives residing in Sitka, Kenai, Juneau, and Kodiak, if they incorporate under the laws of Alaska, the surface estate of lands of a similar character in not more than 23,040 acres of land, which shall be located in reasonable proximity to the municipalities. The subsurface estate in such lands shall be conveyed to the appropriate Regional Corporation unless the lands are located in a Wildlife Refuge;

(4) The Secretary shall withdraw only such lands surrounding the villages and municipalities as are necessary to permit the conveyance authorized by paragraphs (2) and (3) to be planned and effected;

(5) The Secretary may convey to a Native, upon application within two years from December 18, 1971, the surface estate in not to exceed 160 acres of land occupied by the Native as a primary place of residence on August 31, 1971.

Determination of occupancy shall be made by the Secretary, whose decision shall be final. The subsurface estate in such lands shall be conveyed to the appropriate Regional Corporations unless the lands are located on a Wildlife Refuge;

(6) The Secretary shall charge against the 2 million acres authorized to be conveyed by this section all allotments approved pursuant to section 1617 of this title during the four years following December 18, 1971. Any minerals reserved by the United States pursuant to the Act of March 8, 1922 (42 Stat. 415), as amended [43 U.S.C.A. §§ 270-11 to 270-13], in a Native Allotment approved pursuant to section 1617 of this title during the period December 18, 1971, through December 18, 1975, shall be conveyed to the appropriate Regional Corporation, unless such lands are located in a Wildlife Refuge or in the Lake Clark areas as provided in section 12 of the Act of January 2, 1976 (Public Law 94-204), as amended.

(7) The Secretary may withdraw and convey lands out of the National Wildlife Refuge System and out of the National Forests, for the purposes set forth in paragraphs (1), (2), (3), and (5) of this subsection; and

(8)(A) Any portion of the 2 million acres not conveyed by this subsection shall be allocated and conveyed to the Regional Corporations on the basis of population.

(B) Such allocation as the Regional Corporation for southeastern Alaska shall receive under this paragraph shall be selected and conveyed from lands that were withdrawn by sections 1615(a) and 1615(d) of this title and not selected by the Village Corporations in southeastern Alaska; except lands on Admiralty Island in the Angoon withdrawal area and, without the consent of the Governor of the State of Alaska or his delegate, lands in the Saxman and Yakutat withdrawal areas are not available for selection or conveyance under this paragraph.

(C)(i) Notwithstanding any other provision of this subsection, as soon as practicable after December 10, 2004, the Secretary shall allocate to a Regional Corporation eligible for an allocation under subparagraph (A) the Regional Corporation's share of 200,000 acres from lands withdrawn under this subsection, to be credited against acreage to be allocated to the Regional Corporation under subparagraph (A).

(ii) Clause (i) shall apply to Chugach Alaska Corporation pursuant to the terms of the 1982 CNI Settlement Agreement.

(iii) With respect to Cook Inlet Region, Inc., or Koniag, Inc.—

(I) clause (i) shall not apply; and

(II) the portion of the 200,000 acres allocated to Cook Inlet Region Inc. or Koniag, Inc., shall be retained by the United States.

(iv) This subparagraph shall not affect any prior agreement entered into by a Regional Corporation other than the agreements specifically referred to in this subparagraph.

(9) Where the Regional Corporation is precluded from receiving the subsurface estate in lands selected and conveyed pursuant to paragraph (1), (2), (3), or (5), or the retained mineral estate, if any, pursuant to paragraph (6), it may select the subsurface estate in an equal acreage from other lands withdrawn for such selection by the Secretary, or, as to Cook Inlet Region, Incorporated, from those areas designated for in lieu selection in paragraph I.B.(2) of the document identified in section 12(b) of Public Law 94-204. Selections made under this paragraph shall be contiguous and in reasonably compact tracts except as separated by unavailable lands, and shall be in whole sections, except where the remaining entitlement is less than six hundred and forty acres. The Secretary is authorized to withdraw, up to two times the Corporation's entitlement, from vacant, unappropriated, and unreserved public lands, including lands solely withdrawn pursuant to section 1616(d)(1) of this title, and the Regional Corporation shall select such entitlement of subsurface estate from such withdrawn lands within ninety days of receipt of notification from the Secretary.

(10)(A) Notwithstanding the provisions of subsection 1621(h) of this title the Secretary, upon determining that specific lands are available for withdrawal and possible conveyance under this subsection, may withdraw such lands for selection by and conveyance to an appropriate applicant and such withdrawal shall remain until revoked by the Secretary.

(B) If a Regional Corporation does not have enough valid selections on file to fulfill the remaining entitlement of the Regional Corporation under paragraph (8), the Secretary may use the withdrawal authority under subparagraph (A) to withdraw land that is vacant, unappropriated, and unreserved on the date of enactment of this subparagraph for selection by, and conveyance to, the Regional Corporation to fulfill the entitlement.

(11) For purposes set forth in paragraphs (1), (2), (3), (5), and (6) of this subsection, the term Wildlife Refuges refers to Wildlife Refuges as the boundaries of those refuges exist on December 18, 1971.

43 USC § 1617. Revocation of Indian allotment authority in Alaska

(a) No Native covered by the provisions of this chapter, 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 repealed. Notwithstanding the foregoing provisions of this section, any application for an allotment that is pending before the Department of the Interior on December 18, 1971, 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.

(b) Charging allotment against statutory grant

Any allotments approved pursuant to this section during the four years following December 18, 1971, shall be charged against the two million acre grant provided for in section 1613(h) of this title.

(c) Relocation of allotment

(1)(A) Notwithstanding any other provision of law, an allotment applicant, who had a valid application pending before the Department of the Interior on December 18, 1971, and whose application remains pending as of October 14, 1992, may amend the land description in the application of the applicant (with the advice and approval of the responsible officer of the Bureau of Indian Affairs) to describe land other than the land that the applicant originally intended to claim if--

(i) the application pending before the Department, either describes land selected by, tentatively approved to, or patented to the State of Alaska or otherwise conflicts with an interest in land granted to the State of Alaska by the United States prior to the filing of the allotment application;

(ii) the amended land description describes land selected by, tentatively approved to, or patented to the State of Alaska of approximately equal acreage in substitution for the land described in the original application; and

(iii) the Commissioner of the Department of Natural Resources for the State of Alaska, acting under the authority of State law, has agreed to reconvey or relinquish to the United States the land, or interest in land, described in the amended application.

(B) If an application pending before the Department of the Interior as described in subparagraph (A) describes land selected by, but not tentatively approved to or patented to, the State of Alaska, the concurrence of the Secretary of the Interior shall be required in order for an application to proceed under this section.

(2)(A) The Secretary shall accept reconveyance or relinquishment from the State of Alaska of the land described in an amended application pursuant to paragraph (1)(A), except where the land described in the amended application is State-owned land within the boundaries of a conservation system unit as defined in the Alaska National Interest Lands Conservation Act. Upon acceptance, the Secretary shall issue a Native Allotment certificate to the applicant for the land reconveyed or relinquished by the State of Alaska to the United States.

(B) The Secretary shall adjust the computation of the acreage charged against the land entitlement of the State of Alaska to ensure that this subsection will not cause the State to receive either more or less than its full land entitlement under section 6 of the Act entitled “An Act to provide for the admission of the State of Alaska into the Union”, approved July 7, 1958 (commonly referred to as the “Alaska Statehood Act”), and section 906 of the Alaska National Interest Lands Conservation Act (43 U.S.C. 1635). If the State retains any part of the fee estate, the State shall remain charged with the acreage.

43 USC § 1618. Revocation of reserved rights; excepted reserve; acquisition of title to surface and subsurface estates in reserve; election of Village Corporations; restoration of land to Elim Native Corporation

(a) Notwithstanding any other provision of law, and except where inconsistent with the provisions of this chapter, 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 and no person enrolled in the Metlakatla Indian community of the Annette Island Reserve shall be eligible for benefits under this chapter.

(b) Notwithstanding any other provision of law or of this chapter, any Village Corporation or Corporations may elect within two years to acquire title to the surface and subsurface estates in any reserve set aside for the use or benefit of its stockholders or members prior to December 18, 1971. If two or more villages are located on such reserve, the election must be made by all of the members or stockholders of the Village Corporations concerned. In such event, the Secretary shall convey the land to the Village Corporation or Corporations, subject to valid existing rights as provided in section 1613(g) of this title, and the Village Corporation shall not be eligible for any other land selections under this chapter or to any distribution of Regional Corporations funds pursuant to section 1606 of this title, and the enrolled residents of the Village Corporation shall not be eligible to receive Regional Corporation stock.

43 USC § 1629e. Settlement Trust option

(a) Conveyance of corporate assets

(1)(A) A Native Corporation may convey assets (including stock or beneficial interests therein) to a Settlement Trust in accordance with the laws of the State (except to the extent that such laws are inconsistent with this section and section 1629b of this title).

(B) The approval of the shareholders of the corporation in the form of a resolution shall be required to convey all or substantially all of the assets of the corporation to a Settlement Trust. A conveyance in violation of this clause shall be void ab initio and shall not be given effect by any court.

(2) No subsurface estate in land shall be conveyed to a Settlement Trust. A conveyance of title to, or any other interest in, subsurface estate in violation of this subparagraph shall be void ab initio and shall not be given effect by any court.

(3) Conveyances made pursuant to this subsection—

(A) shall be subject to applicable laws respecting fraudulent conveyance and creditors rights; and

(B) shall give rise to dissenters rights to the extent provided under the laws of the State only if—

(i) the rights of beneficiaries in the Settlement Trust receiving a conveyance are inalienable; and

(ii) a shareholder vote on such transfer is required by section 1629b(a)(4) of this title.

(4) The provisions of this subsection shall not prohibit a Native Corporation from engaging in any conveyance, reorganization, or transaction not otherwise prohibited under the laws of the State or the United States.

(b) Authority and limitations of a Settlement Trust

(1) The purpose of a Settlement Trust shall be to promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives. A Settlement Trust shall not—

(A) operate as a business;

(B) alienate land or any interest in land received from the settlor Native Corporation (except if the recipient of the land is the settlor corporation or the land is conveyed for a homesite by the Trust to a beneficiary of the Trust who is also a legal resident under Alaska law of the Native village of the settlor corporation and the conveyance does not exceed 1.5 acres); or

(C) discriminate in favor of a group of individuals composed only or principally of employees, officers, or directors of the settlor Native Corporation.

An alienation of land or an interest in land in violation of this paragraph shall be void ab initio and shall not be given effect by any court.

(2) A Native Corporation that has established a Settlement Trust shall have exclusive authority to—

(A) appoint the trustees of the trust, and

(B) remove the trustees of the trust for cause.

Only a natural person shall be appointed a trustee of a Settlement Trust. An appointment or removal of a trustee in violation of this paragraph shall be void ab initio and shall not be given effect by any court.

(3) A Native Corporation that has established a Settlement Trust may expand the class of beneficiaries to include holders of Settlement Common Stock issued after the establishment of the trust without compensation to the original beneficiaries.

(4) A Settlement Trust shall not be held to violate any laws against perpetuities.

(c) Savings

(1) The provisions of this chapter shall continue to apply to any land or interest in land received from the Federal Government pursuant to this chapter and later conveyed to a Settlement Trust as if the land or interest in land were still held by the Native Corporation that conveyed the land or interest in land.

(2) No timber resources subject to section 1606(i) of this title conveyed to a Settlement Trust shall be sold, exchanged, or otherwise conveyed except as necessary to—

(A) dispose of diseased or dying timber or to prevent the spread of disease or insect infestation;

(B) prevent or suppress fire; or

(C) ensure public safety.

The revenue, if any, from such timber harvests shall be subject to section 1606(i) of this title as if such conveyance had not occurred.

(3) The conveyance of assets (including stock or beneficial interests) pursuant to subsection (a) of this section shall not affect the applicability or enforcement (including specific performance) of a valid contract, judgment, lien, or other obligation (including an obligation arising under section 1606(i) of this title) to which such assets, stock, or beneficial interests were subject immediately prior to such conveyance.

(4) A claim based upon paragraph (1), (2), or (3) shall be enforceable against the transferee Settlement Trust holding the land, interest in land, or other assets (including stock or beneficial interests) in question to the same extent as such claim would have been enforceable against the transferor Native Corporation, and valid obligations arising under section 1606(i) of this title as well as claims with respect to a conveyance in violation of a valid contract, judgment, lien, or other obligation shall also be enforceable against the transferor corporation.

(5) Except as provided in paragraphs (1), (2), (3), and (4), once a Native Corporation has made, pursuant to subsection (a) of this section, a conveyance to a Settlement Trust that does not—

(A) render it—

(i) unable to satisfy claims based upon paragraph (1), (2), or (3); or

(ii) insolvent; or

(B) occur when the Native Corporation is insolvent; the assets so conveyed to the Settlement Trust shall not be subject to attachment, distraint, or sale on execution of judgment or other process or order of any court, except with respect to the lawful debts or obligations of the Settlement Trust.

(6) No transferee Settlement Trust shall make a distribution or conveyance of assets (including cash, stock, or beneficial interests) that would render it unable to satisfy a claim made pursuant to paragraph (1), (2), or (3). A distribution or conveyance made in violation of this paragraph shall be void ab initio and shall not be given effect by any court.

(7) Except where otherwise expressly provided, no provision of this section shall be construed to require shareholder approval of an action where shareholder approval would not be required under the laws of the State.

(8) A beneficiary's interest in a settlement trust and the distributions thereon shall be subject to creditor action (including without limitation, levy attachment, pledge, lien, judgment execution, assignment, and the insolvency and bankruptcy laws) only to the extent that Settlement Common Stock and the distributions thereon are subject to such creditor action under section 1606(h) of this title.

43 USC § 1636. Alaska land bank

(a) Establishment; agreements

(1) In order to enhance the quantity and quality of Alaska's renewable resources and to facilitate the coordinated management and protection of Federal, State, and Native and other private lands, there is hereby established the Alaska Land Bank Program. Any private landowner is authorized as provided in this section to enter into a written agreement with the Secretary if his lands adjoin, or his use of such lands would directly affect, Federal land, Federal and State land, or State land if the State is not participating in the program. Any private landowner described in subsection (d)(1) of this section whose lands do not adjoin, or whose use of such lands would not directly affect either Federal or State lands also is entitled to enter into an agreement with the Secretary. Any private landowner whose lands adjoin, or whose use of such lands would directly affect, only State, or State and private lands, is authorized as provided in this section to enter into an agreement with the State of Alaska if the State is participating in the program. If the Secretary is the contracting party with the private landowner, he shall afford the State an opportunity to participate in negotiations and become a party to the agreement. An agreement may include all or part of the lands of any private landowner: *Provided*, That no lands shall be included in the agreement unless the Secretary, or the State, determines that the purposes of the program will be promoted by their inclusion.

(2) If a private landowner consents to the inclusion in an agreement of the stipulations provided in subsections (b)(1), (b)(2), (b)(4), (b)(5), and (b)(7) of this section, and if such owner does not insist on any additional terms which are unacceptable to the Secretary or the State, as appropriate, the owner shall be

entitled to enter into an agreement pursuant to this section. If an agreement is not executed within one hundred and twenty days of the date on which a private landowner communicates in writing his consent to the stipulations referred to in the preceding sentence, the appropriate Secretary or State agency head shall execute an agreement. Upon such execution, the private owner shall receive the benefits provided in subsection (c) hereof.

(3) No agreement under this section shall be construed as affecting any land, or any right or interest in land, of any owner not a party to such agreement.

(b) Terms of agreement

Each agreement referred to in subsection (a) of this section shall have an initial term of ten years, with provisions, if any, for renewal for additional periods of five years. Such agreement shall contain the following terms:

(1) The landowner shall not alienate, transfer, assign, mortgage, or pledge the lands subject to the agreement except as provided in section 14(c) of the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1613(c)], or permit development or improvement on such lands except as provided in the agreement. For the purposes of this section only, each agreement entered into with a landowner described in subsection (d)(1) of this section shall constitute a restriction against alienation imposed by the United States upon the lands subject to the agreement.

(2) Lands subject to the agreement shall be managed by the owner in a manner compatible with the management plan, if any, for the adjoining Federal or State lands, and with the requirements of this subsection. If lands subject to the agreement do not adjoin either Federal or State lands, they shall be managed in a manner compatible with the management plan, if any, of Federal or State lands which would be directly affected by the use of such private lands. If no such plan has been adopted, or if the use of such private lands would not directly affect either Federal or State lands, the owner shall manage such lands in accordance with the provisions in paragraph (1) of this subsection. Except as provided in (3)¹ of this subsection, nothing in this section or the management plan of any Federal or State agency shall be construed to require a private landowner to grant public access on or across his lands.

(3) If the surface landowner so consents, such lands may be made available for local or other recreational use: *Provided*, That the refusal of a private landowner to permit the uses referred to in this subsection shall not be grounds for

the refusal of the Secretary or the State to enter into an agreement with the landowner under this section.

(4) Appropriate Federal and/or State agency heads shall have reasonable access to such privately owned land for purposes relating to the administration of the adjoining Federal or State lands, and to carry out their obligations under the agreement.

(5) Reasonable access to such land by officers of the State shall be permitted for purposes of conserving fish and wildlife.

(6) Those services or other consideration which the appropriate Secretary or the State shall provide to the owner pursuant to subsection (c)(1) of this section shall be set forth.

(7) All or part of the lands subject to the agreement may be withdrawn from the Alaska land bank program not earlier than ninety days after the landowner—

(A) submits written notice thereof to the other parties which are signatory to the agreement; and

(B) pays all Federal, State and local property taxes and assessments which, during the particular term then in effect, would have been incurred except for the agreement, together with interest on such taxes and assessments in an amount to be determined at the highest rate of interest charged with respect to delinquent property taxes by the Federal, State or local taxing authority, if any.

(8) The agreement may contain such additional terms, which are consistent with the provisions of this section, as seem desirable to the parties entering into the agreement: *Provided*, That the refusal of the landowner to agree to any additional terms shall not be grounds for the refusal of the Secretary or the State to enter into an agreement with the landowner under this section.

(c) Benefits to private landowners

(1) In addition to any requirement of applicable law, the appropriate Secretary is authorized to provide technical and other assistance with respect to fire control, trespass control, resource and land use planning, and the protection, maintenance, and enhancement of any special values of the land subject to the agreement, all with or without reimbursement as agreed upon by the parties, so long as the landowner is in compliance with the agreement.

(2) The provision of section 21(e) of the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1620(e)] shall apply to all lands which are subject to an agreement made pursuant to this section so long as the parties to the agreement are in compliance therewith.

(d) Automatic protections for lands conveyed pursuant to Alaska Native Claims Settlement Act

(1)(A) Notwithstanding any other provision of law or doctrine of equity, all land and interests in land in Alaska conveyed by the Federal Government pursuant to the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.] to a Native individual or Native Corporation or subsequently reconveyed by a Native Corporation pursuant to section 39 of that Act [43 U.S.C.A. § 1629e] to a Settlement Trust or conveyed to a Native Corporation pursuant to an exchange authorized by section 22(f) of the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1621(f)] or section 3192(h) of Title 16 or other applicable law shall be exempt, so long as such land and interests are not developed or leased or sold to third parties from—

- (i) adverse possession and similar claims based upon estoppel;
- (ii) real property taxes by any governmental entity;
- (iii) judgments resulting from a claim based upon or arising

under—

- (I) Title 11 or any successor statute,
- (II) other insolvency or moratorium laws, or
- (III) other laws generally affecting creditors' rights;

(iv) judgments in any action at law or in equity to recover sums owed or penalties incurred by a Native Corporation or Settlement Trust or any employee, officer, director, or shareholder of such corporation or trust, unless this exemption is contractually waived prior to the commencement of such action; and

(v) involuntary distributions or conveyances related to the involuntary dissolution of a Native Corporation or Settlement Trust.

(B) Except as otherwise provided² specifically provided, the exemptions described in subparagraph (A) shall apply to any claim or judgment existing on or arising after February 3, 1988.

(2) Definitions

(A) For purposes of this subsection, the term—

(i) “Developed” means a purposeful modification of land, or an interest in land, from its original state that effectuates a condition of gainful and productive present use without further substantial modification. Any such modification shall be performed by the Native individual or Native Corporation. Surveying, construction of roads, providing utilities, or other similar actions, which are normally considered to be component parts of the development process but do not create the condition described in the preceding sentence, shall not constitute a developed state within the meaning of this clause. In order to terminate the exemptions listed in paragraph (1), land, or an interest in land, must be developed for purposes other than exploration, and the exemptions will be terminated only with respect to the smallest practicable tract actually used in the developed state. Any lands previously developed by third-party trespassers shall not be considered to have been developed.³

(ii) “Exploration” means the examination and investigation of undeveloped land to determine the existence of subsurface nonrenewable resources; and

(iii) “Leased” means subjected to a grant of primary possession entered into for a gainful purpose with a determinable fee remaining in the hands of the grantor. With respect to a lease that conveys rights of exploration and development, the exemptions listed in paragraph (1) shall continue with respect to that portion of the leased tract that is used solely for the purposes of exploration.

(B) For purposes of this subsection—

(i) land shall not be considered developed solely as a result of—

(I) the construction, installation, or placement upon such land of any structure, fixture, device, or other improvement intended to enable, assist, or otherwise further subsistence uses or other customary or traditional uses of such land, or

(II) the receipt of fees related to hunting, fishing, and guiding activities conducted on such land;

(ii) land upon which timber resources are being harvested shall be considered developed only during the period of such harvest and only to the extent that such land is integrally related to the timber harvesting operation;

(iii) land subdivided by a State or local platting authority on the basis of a subdivision plat submitted by the holder of the land or its agent, shall be considered developed on the date an approved subdivision plat is recorded by such holder or agent unless the subdivided property is a remainder parcel; and

(iv) lands or interest in lands shall not be considered developed or leased or sold to a third party as a result of an exchange or conveyance of such land or interest in land between or among Native Corporations and trusts, partnerships, corporations, or joint ventures, whose beneficiaries, partners, shareholders, or joint venturers are Native Corporations.

(3) Action by a Trustee

(A) Except as provided in this paragraph and in section 14(c)(3) of the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1613(c)(3)] no trustee, receiver, or custodian vested pursuant to applicable Federal or State law with a right, title, or interest of a Native individual or Native Corporation shall—

- (i) assign or lease to a third party,
- (ii) commence development or use of, or
- (iii) convey to a third party,

any right, title, or interest in any land, or interests in land, subject to the exemptions described in paragraph (1).

(B) The prohibitions of subparagraph (A) shall not apply—

(i) when the actions of such trustee, receiver, or custodian are for purposes of exploration or pursuant to a judgment in law or in equity (or arbitration award) arising out of any claim made pursuant to section 7(i) or section 14(c) of the Alaska Native Claims Settlement Act [43 U.S.C.A. §§ 1606(i) or 1613(c)];

(ii) to any land, or interest in land, which has been—

(I) developed or leased prior to the vesting of the trustee, receiver, or custodian with the right, title, or interest of the Native Corporation; or

(II) expressly pledged as security for any loan or expressly committed to any commercial transaction in a valid agreement; or

(iii) to actions by any trustee whose right, title, or interest in land or interests in land arises pursuant to an agreement between or among Native Corporations and trusts, partnerships, or joint ventures whose beneficiaries, partners, shareholders, or joint venturers are Native Corporations.

(4) Exclusions, Reattachment of Exemptions

(A) The exemptions listed in paragraph (1) shall not apply to any land, or interest in land, which is—

(i) developed or leased or sold to a third party;

(ii) held by a Native Corporation in which neither—

(I) the Settlement Common Stock of the corporation,

(II) the Settlement Common Stock of the corporation and other stock of the corporation held by holders of Settlement Common Stock, nor

(III) the Settlement Common Stock of the corporation and other stock of the corporation held by holders of Settlement Common Stock and by Natives and descendants of Natives, represents a majority of either the total equity of the corporation or the total voting power of the corporation for the purposes of electing directors; or

(iii) held by a Settlement Trust with respect to which any of the conditions set forth in section 39 of the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1629e] have been violated.

(B) The exemptions described in clauses (iii), (iv), and (v) of paragraph (1)(A) shall not apply to any land, or interest in land—

(i) to the extent that such land or interest is expressly pledged as security for any loan or expressly committed to any commercial transaction in a valid agreement, and

(ii) to the extent necessary to enforce a judgment in any action at law or in equity (or any arbitration award) arising out of any claim made pursuant to section 7(i) or section 14(c) of the Alaska Native Claims Settlement Act [43 U.S.C.A. §§ 1606(i) or 1613(c)].

(C) If the exemptions listed in paragraph (1) are terminated with respect to land, or an interest in land, as a result of development (or a lease to a third party), and such land, or interest in land, subsequently reverts to an undeveloped state (or the third-party lease is terminated), then the exemptions shall again apply to such land, or interest in land, in accordance with the provisions of this subsection.

(5) Tax Recapture Upon Subdivision Plat Recordation

(A) Upon the recordation with an appropriate government authority of an approved subdivision plat submitted by, or on behalf of, a Native individual, Native Corporation, or Settlement Trust with respect to land described in paragraph (1), such individual, corporation, or trust shall pay in accordance with this paragraph all State and local property taxes on the smallest practicable tract integrally related to the subdivision project that would have been incurred by the individual, corporation, or trust on such land (excluding the value of subsurface resources and timber) in the absence of the exemption described in paragraph (1)(A)(ii) during the thirty months prior to the date of the recordation of the plat.

(B) State and local property taxes specified in subparagraph (A) of this paragraph (together with interest at the rate of 5 per centum per annum commencing on the date of recordation of the subdivision plat) shall be paid in equal semi-annual installments over a two-year period commencing on the date six months after the date of recordation of the subdivision plat.

(C) At least thirty days prior to final approval of a plat of the type described in subparagraph (A), the government entity with jurisdiction over the plat shall notify the submitting individual, corporation, or trust of the estimated tax liability that would be incurred as a result of the recordation of the plat at the time of final approval.

(6) Savings

(A) No provision of this subsection shall be construed to impair, or otherwise affect, any valid contract or other obligation that was entered into prior to February 3, 1988.

(B) Enactment of this subsection shall not affect any real property tax claim in litigation on February 3, 1988.

(e) Condemnation

All land subject to an agreement made pursuant to subsection (a) of this section and all land, and interests in land, conveyed or subsequently reconveyed pursuant to the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.] to a Native individual, Native Corporation, or Settlement Trust shall be subject to condemnation for public purposes in accordance with the provisions of this Act and other applicable law.

(f) Existing contracts

Nothing in this section shall be construed as impairing, or otherwise affecting in any manner, any contract or other obligation which was entered into prior to December 2, 1980, or which (1) applies to any land which is subject to an agreement, and (2) was entered into before the agreement becomes effective.

(g) State jurisdiction

Except as expressly provided in subsection (d) of this section, no provision of this section shall be construed as affecting the civil or criminal jurisdiction of the State of Alaska.

Code of Federal Regulations**25 CFR § 151.1 Purpose and scope.**

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.

25 CFR § 151.2 Definitions.

(a) Secretary means the Secretary of the Interior or authorized representative.

(b) Tribe means 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. For purposes of acquisitions made under the authority of 25 U.S.C. 488 and 489, or other statutory authority which specifically authorizes trust acquisitions for such corporations, "Tribe" also means a corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 477) or section 3 of the Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C. 503).

(c) Individual Indian means:

(1) Any person who is an enrolled member of a tribe;

(2) Any person who is a descendent of such a member and said descendant was, on June 1, 1934, physically residing on a federally recognized Indian reservation;

(3) Any other person possessing a total of one-half or more degree Indian blood of a tribe;

(4) For purposes of acquisitions outside of the State of Alaska, Individual Indian also means a person who meets the qualifications of paragraph (c)(1), (2), or (3) of this section where "Tribe" includes any Alaska Native Village or Alaska Native Group which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs.

(d) Trust land or land in trust status means land the title to which is held in trust by the United States for an individual Indian or a tribe.

(e) Restricted land or land in restricted status means land the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of limitations contained in the conveyance instrument pursuant to Federal law or because of a Federal law directly imposing such limitations.

(f) Unless another definition is required by the act of Congress authorizing a particular trust acquisition, Indian reservation means that area of land over which

the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, Indian reservation means that area of land constituting the former reservation of the tribe as defined by the Secretary.

(g) Land means real property or any interest therein.

(h) Tribal consolidation area means a specific area of land with respect to which the tribe has prepared, and the Secretary has approved, a plan for the acquisition of land in trust status for the tribe.

25 CFR § 151.3 Land acquisition policy.

Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary.

(a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status:

(1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or

(2) When the tribe already owns an interest in the land; or

(3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

(b) Subject to the provisions contained in the acts of Congress which authorize land acquisitions or holding land in trust or restricted status, land may be acquired for an individual Indian in trust status:

(1) When the land is located within the exterior boundaries of an Indian reservation, or adjacent thereto; or

(2) When the land is already in trust or restricted status.

25 CFR § 151.4 Acquisitions in trust of lands owned in fee by an Indian.

Unrestricted land owned by an individual Indian or a tribe may be conveyed into trust status, including a conveyance to trust for the owner, subject to the provisions of this part.

25 CFR § 151.5 Trust acquisitions in Oklahoma under section 5 of the I.R.A.

In addition to acquisitions for tribes which did not reject the provisions of the Indian Reorganization Act and their members, land may be acquired in trust status for an individual Indian or a tribe in the State of Oklahoma under section 5 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 465), if such acquisition comes within the terms of this part. This authority is in addition to all other statutory authority for such an acquisition.

25 CFR § 151.6 Exchanges.

An individual Indian or tribe may acquire land in trust status by exchange if the acquisition comes within the terms of this part. The disposal aspects of an exchange are governed by part 152 of this title.

25 CFR § 151.7 Acquisition of fractional interests.

Acquisition of a fractional land interest by an individual Indian or a tribe in trust status can be approved by the Secretary only if:

- (a) The buyer already owns a fractional interest in the same parcel of land;
- or
- (b) The interest being acquired by the buyer is in fee status; or
- (c) The buyer offers to purchase the remaining undivided trust or restricted interests in the parcel at not less than their fair market value; or
- (d) There is a specific law which grants to the particular buyer the right to purchase an undivided interest or interests in trust or restricted land without offering to purchase all of such interests; or
- (e) The owner of a majority of the remaining trust or restricted interests in the parcel consent in writing to the acquisition by the buyer.

25 CFR § 151.8 Tribal consent for nonmember acquisitions.

An individual Indian or tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over

such reservation consents in writing to the acquisition; provided, that such consent shall not be required if the individual Indian or the tribe already owns an undivided trust or restricted interest in the parcel of land to be acquired.

25 CFR § 151.9 Requests for approval of acquisitions.

An individual Indian or tribe desiring to acquire land in trust status shall file a written request for approval of such acquisition with the Secretary. The request need not be in any special form but shall set out the identity of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of this part.

25 CFR § 151.10 On-reservation acquisitions.

Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. If the state or local government responds within a 30-day period, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply and/or request that the Secretary issue a decision. The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:

- (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
- (b) The need of the individual Indian or the tribe for additional land;
- (c) The purposes for which the land will be used;
- (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
- (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. (For copies, write to the Department of the Interior, Bureau of Indian Affairs, Branch of Environmental Services, 1849 C Street NW., Room 4525 MIB, Washington, DC 20240.)

25 CFR § 151.11 Off-reservation acquisitions.

The Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated:

(a) The criteria listed in § 151.10(a) through (c) and (e) through (h);

(b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.

(c) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.

(d) Contact with state and local governments pursuant to § 151.10(e) and (f) shall be completed as follows: Upon receipt of a tribe's written request to have lands taken in trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

25 CFR § 151.12 Action on requests.

(a) The Secretary shall review each request and may request any additional information or justification deemed necessary to reach a decision.

(b) The Secretary's decision to approve or deny a request shall be in writing and state the reasons for the decision.

(c) A decision made by the Secretary, or the Assistant Secretary--Indian Affairs pursuant to delegated authority, is a final agency action under 5 U.S.C. 704 upon issuance.

(1) If the Secretary or Assistant Secretary denies the request, the Assistant Secretary shall promptly provide the applicant with the decision.

(2) If the Secretary or Assistant Secretary approves the request, the Assistant Secretary shall:

(i) Promptly provide the applicant with the decision;

(ii) Promptly publish in the Federal Register a notice of the decision to acquire land in trust under this part; and

(iii) Immediately acquire the land in trust under § 151.14 on or after the date such decision is issued and upon fulfillment of the requirements of § 151.13 and any other Departmental requirements.

(d) A decision made by a Bureau of Indian Affairs official pursuant to delegated authority is not a final agency action of the Department under 5 U.S.C. 704 until administrative remedies are exhausted under part 2 of this chapter or until the time for filing a notice of appeal has expired and no administrative appeal has been filed.

(1) If the official denies the request, the official shall promptly provide the applicant with the decision and notification of any right to file an administrative appeal under part 2 of this chapter.

(2) If the official approves the request, the official shall:

(i) Promptly provide the applicant with the decision;

(ii) Promptly provide written notice of the decision and the right, if any, to file an administrative appeal of such decision pursuant to part 2 of this chapter, by mail or personal delivery to:

(A) Interested parties who have made themselves known, in writing, to the official prior to the decision being made; and

(B) The State and local governments having regulatory jurisdiction over the land to be acquired;

(iii) Promptly publish a notice in a newspaper of general circulation serving the affected area of the decision and the right, if any, of interested parties who did not make themselves known, in writing, to the official to file an administrative appeal of the decision under part 2 of this chapter; and

(iv) Immediately acquire the land in trust under § 151.14 upon expiration of the time for filing a notice of appeal or upon exhaustion of administrative remedies under part 2 of this title, and upon the fulfillment of the requirements of § 151.13 and any other Departmental requirements.

(3) The administrative appeal period under part 2 of this chapter begins on:

(i) The date of receipt of written notice by the applicant or interested parties entitled to notice under paragraphs (d)(1) and (d)(2)(ii) of this section;

(ii) The date of first publication of the notice for unknown interested parties under paragraph (d)(2)(iii) of this section.

(4) Any party who wishes to seek judicial review of an official's decision must first exhaust administrative remedies under 25 CFR part 2.

25 C.F.R. § 151.13 Title examination.

If the Secretary determines that he will approve a request for the acquisition of land from unrestricted fee status to trust status, he shall acquire, or require the applicant to furnish, title evidence meeting the Standards For The Preparation of Title Evidence In Land Acquisitions by the United States, issued by the U.S. Department of Justice. After having the title evidence examined, the Secretary shall notify the applicant of any liens, encumbrances, or infirmities which may exist. The Secretary may require the elimination of any such liens, encumbrances, or infirmities prior to taking final approval action on the acquisition and he shall require elimination prior to such approval if the liens, encumbrances, or infirmities make title to the land unmarketable.

25 C.F.R. § 151.14 Formalization of acceptance.

Formal acceptance of land in trust status shall be accomplished by the issuance or approval of an instrument of conveyance by the Secretary as is appropriate in the circumstances.

25 C.F.R. § 151.15 Information collection.

(a) The information collection requirements contained in §§ 151.9; 151.10; 151.11(c), and 151.13 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned clearance number 1076–0100. This information is being collected to acquire land into trust on behalf of the Indian tribes and individuals, and will be used to assist the Secretary in making a determination. Response to this request is required to obtain a benefit.

(b) Public reporting for this information collection is estimated to average 4 hours per response, including the time for reviewing instructions, gathering and maintaining data, and completing and reviewing the information collection. Direct comments regarding the burden estimate or any other aspect of this information collection to the Bureau of Indian Affairs, Information Collection Clearance Officer, Room 337–SIB, 18th and C Streets, NW., Washington, DC 20240; and the Office of Information and Regulatory Affairs [Project 1076–0100], Office of Management and Budget, Washington, DC 20502.