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

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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] ANCSA[8] 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

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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

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[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,

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14 Emphasis added.

15 43 U.S.C. § 1603(c).

16 *Venetie*, 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

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[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

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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,

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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-

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[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

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[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

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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.

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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

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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

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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

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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 statute[64] 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

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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 rule[71] and congressional testimony by the Assistant Secretary for Indian Affairs[72] 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

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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.

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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.

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[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

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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

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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

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> 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]

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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

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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

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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.

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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 1926[107] 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

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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.

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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

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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

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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

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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:

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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

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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

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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 title[136] 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

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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 Metlakatlans because they are excluded from the statute's definition of "Native."[139] Thus, ANCSA excludes Metlakatlans 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

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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

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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

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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

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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

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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]

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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]

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[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 ANCSA[165] 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

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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.

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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

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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.

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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 Alaska[181]—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

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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.

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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,

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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. § 465[193] and 35 years after 25 U.S.C. § 473a[194] 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.

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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 Tribes[199] 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

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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 title[206]—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*

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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]

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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

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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.*

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[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]

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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

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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.
>
> . . . .
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> 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.

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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.

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/s/ J. Anne Nelson