

5-15-2015

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### Recommended Citation

Strommer, Geoffrey D.; Osborne, Stephen D.; and Jacobson, Craig A. (2015) "Placing Land Into Trust in Alaska: Issues and Opportunities," *American Indian Law Journal*: Vol. 3 : Iss. 2 , Article 6.

Available at: <https://digitalcommons.law.seattleu.edu/ailj/vol3/iss2/6>

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## Placing Land Into Trust in Alaska: Issues and Opportunities

### Cover Page Footnote

Mr. Strommer is a partner at Hobbs, Straus, Dean & Walker, LLP, a national law firm that has specialized for over thirty years in representing tribes and tribal organizations throughout the United States. Mr. Osborne and Mr. Jacobson are also both partners at Hobbs, Straus' Portland, Oregon office. This article reflects the views of the authors only.

## PLACING LAND INTO TRUST IN ALASKA: ISSUES AND OPPORTUNITIES

GEOFFREY D. STROMMER, STEPHEN D. OSBORNE, CRAIG A. JACOBSON\*

### I. INTRODUCTION

Federal law authorizes the Secretary of the Interior to acquire lands in trust “for the purpose of providing land for Indians.”<sup>1</sup> This authority helps tribes in many ways; for example, by facilitating tribal land restoration and economic development, insulating tribes from state and local jurisdiction and taxation, and protecting land with historical and cultural significance. However, the fee-to-trust regulations found in 25 C.F.R. Part 151 have excluded Alaska tribes (except for the Metlakatla Indian Community) from this process for decades.<sup>2</sup> In 2013, a Federal court struck down the “Alaska exception,” holding that it discriminated against Alaska tribes.<sup>3</sup> The court subsequently determined that the appropriate remedy was for the Department of the Interior (hereafter “Department,” “Interior,” or “DOI”) to simply strike the offending language and make available the trust application process to Alaska tribes just like tribes in the lower 48 states.<sup>4</sup>

On December 23, 2014, the Department implemented this remedy when it published the Federal Register Final Rule that omitted the “Alaska exception” from the Land-into-Trust regulations in 25 C.F.R. Part 151.<sup>5</sup> On June 8, 2014, as part of the rulemaking process, the Department had held a tribal consultation in Anchorage, Alaska where 106 written comments were submitted. Tribal governments overwhelmingly supported the proposed rule. The State of Alaska nevertheless opposed it, along with others. Some Alaska Native corporations expressed deep reservations about how the rule would be implemented in the context of the unique land ownership regime imposed by the Alaska Native Claims Settlement Act (ANCSA).

In the *Akiachak* case, the court later issued a stay preventing the Department from issuing any decisions on Alaska land-into-trust applications pending the outcome

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<sup>1</sup> This program was a key element of the Indian Reorganization Act of 1934. See 25 U.S.C. § 465 (§ 473(a) for Alaska tribes) and Bureau of Indian Affairs (BIA) regulations at 25 C.F.R. Part 151.

<sup>2</sup> Dep't of the Interior, Land Acquisitions in the State of Alaska, 79 Fed. Reg. 24648 (May 1, 2014) at 24649 (describing, in notice of proposed rulemaking, history of Alaska exception).

<sup>3</sup> *Akiachak Native Cmty. v. Salazar*, 935 F. Supp. 2d 195, 197 (D.D.C. 2013).

<sup>4</sup> *Akiachak Native Cmty. v. Jewell*, 2013 WL 5428741 (D.D.C. 2013).

<sup>5</sup> Dep't of the Interior, Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76888 (Dec. 23, 2014) (hereinafter, “Final Rule”).

of the State of Alaska's appeal in the Ninth Circuit.<sup>6</sup> Assuming the decision is upheld on appeal, Alaska tribes will be able to apply to place land into trust. This prospect opens up opportunities for Alaska tribes to expand tribal jurisdiction and potentially expand economic development. It also raises questions about how the application criteria in Part 151 will be applied in the context of the unique history and status of Alaska tribal lands. In this article, we first present a preliminary and partial discussion of some of these issues and opportunities. Part II lays out a brief history of Alaska Native land tenure for context. Part III discusses why placing land-into-trust in Alaska is important. Part IV provides a description of the current process and a checklist for Land-into-Trust applications. Part V then discusses the Alaska-specific issues that may arise when the current process and checklist are utilized for Alaska applications. While many questions still need to be addressed and resolved, the inclusion of Alaska tribes in the regulatory land-to-trust process represents a historic opportunity to strengthen Alaska tribal sovereignty.

## II. BACKGROUND ON ALASKA NATIVE LANDS AND LAND TENURE

The potential significance of the Final Rule cannot be fully appreciated without a brief look at the history of Alaska Native land tenure, ANCSA, and the Supreme Court's decision in *Venetie*.<sup>7</sup> Currently, Alaska tribes generally (aside from the Metlakatla Indian Community) remain "sovereigns without territorial reach."<sup>8</sup> That is, without the territorial jurisdiction required to carry out ordinary governmental functions such as protecting public safety and regulating environmental and other activities. To the extent that trust acquisitions in Alaska can expand tribal territorial jurisdiction, they will likewise expand Alaska tribes' ability to exercise sovereignty and self-determination on par with other federally recognized tribes.<sup>9</sup>

### A. Occupation Since Time Immemorial

Alaska Natives have occupied the lands and waters now known as the State of Alaska since time immemorial, pre-dating any Russian or United States governance of the region.<sup>10</sup> Nonetheless, a complex history surrounds the 1867 Treaty of Cession,<sup>11</sup>

<sup>6</sup> *Akiachak Native Cmty. v. Salazar*, *supra* note 3, Memorandum Opinion and Order, Document 145 (June 26, 2014).

<sup>7</sup> *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998).

<sup>8</sup> *Id.* at 526 (quoting *Alaska ex rel. Yukon Flats School Dist. v. Native Vill. of Venetie Tribal Gov't*, 101 F.3d 1286, 1303 (9th Cir. 1996) (Fernandez, J., concurring)).

<sup>9</sup> See Final Rule at 76895 ("By providing a physical space where tribal governments may exercise sovereign powers to provide for their citizens, trust land can help promote tribal self-governance and self-determination.")

<sup>10</sup> *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955) (tribal contention of occupancy to the Supreme Court).

<sup>11</sup> Treaty of March 30, 1876, 15 Stat. 539.

wherein the United States purchased from Russia a “quit claim deed” to whatever title Russia had to Alaska. This complex history also included Treaty of Cession language that purportedly did not confer ordinary citizenship “rights” to the Alaska region’s “uncivilized native tribes,”<sup>12</sup> and subjected those “uncivilized native tribes” to federal “Indian law” then in place.<sup>13</sup>

Following the United States’ purchase of the Alaska region, a schizophrenic Federal land policy—made so in part by broader federal Indian policy trends and Alaska-specific factors—has continued to impact Alaska Native land tenure. In 1891, the Metlakatla Indian Community became the first statutorily created reservation in Alaska. Still in existence today, the Metlakatla reservation is now known as the Annette Island Reserve.<sup>14</sup> Following the creation of that reservation, another reservation was created in Alaska by statute: Klukwan. Many other reservations created by executive order followed, up until 1919, when Congress revoked the president’s authority to create Alaska Native reserves through Executive Order.<sup>15</sup>

Following the “Reservation Era,” the assimilationist policies of the Allotment Era (1887-1934) were also extended to Alaska. The Alaska Native Allotment Act of 1906 (ANAA)<sup>16</sup> authorized conveyances of up to 160 acres of unappropriated land to eligible Natives. Although the ANAA was repealed in 1971, many allotments continue to be held in restricted status,<sup>17</sup> and the Federal government has repeatedly been held to have a fiduciary duty to administer these lands for the benefit of Natives.<sup>18</sup>

Two Acts in the 1920s and 1930s had large-scale effects on Alaska Native lands and land tenure. The Alaska Native Townsite Act (ANTA) enacted in 1926 allowed conveyance of lots to individuals in certain areas designated as townsites.<sup>19</sup> Both Natives and non-Natives were eligible for townsite lots under ANTA, which was repealed in 1976.<sup>20</sup> The Natives that received townsite lots received restricted title, alienable only with approval by the Secretary.<sup>21</sup> Following the passage of the IRA in 1934, its provisions—aimed at rebuilding tribal governments—were amended and

<sup>12</sup> *Id.*, at Article III.

<sup>13</sup> David Case and David Voluck, *ALASKA NATIVES AND AMERICAN LAWS* 62-66 (3<sup>rd</sup> ed. 2012) (discussing Alaska Native aboriginal title and citizenship rights coming out of the Treaty of Cession history).

<sup>14</sup> Act of March 30, 1891, 25 Stat. 1101, 25 U.S.C.A. § 495

<sup>15</sup> FEDERAL FIELD COMMITTEE FOR DEVELOPMENT PLANNING IN ALASKA, *Alaska Natives and the Land: Report of the Federal Field Committee* (1968) at 443-445; *supra* note 16 at 83-86.

<sup>16</sup> Act of May 17, 1906, ch. 2469, 34 Stat. 197 (repealed 1971).

<sup>17</sup> Indian Country includes allotments held in trust or in restricted fee. See *Oklahoma Tax Comm’n v. Sac and Fox Nation*, 508 U.S. 114, 115 (1993).

<sup>18</sup> *E.g.*, *Aguilar v. United States*, 474 F. Supp. 840 (D. Alaska 1979).

<sup>19</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 745 (2012).

<sup>20</sup> ACT OF OCT. 21, 1976, Pub. L. No. 94-579, § 703(a), 90 Stat. 2743, 2789.

<sup>21</sup> *Id.* (citing authorities).

extended to Alaska in 1936.<sup>22</sup> Six additional reservations of varying size and purpose were created in Alaska through the authority of the IRA.<sup>23</sup> The history and success of placement of these lands into trust for Alaska Natives was severely impacted by the Federal government's subsequent lack of willingness, and/or capacity, to carry out its fiduciary responsibilities to protect tribal resources from trespass and encroachment, including, but not limited to, tribal fishing rights.<sup>24</sup>

The pressures on Alaska Native land ownership—particularly trust land ownership—would only continue to increase with growing non-Native development in the region and coming events. The Alaska region became a state government in 1959 with passage of the Alaska Statehood Act.<sup>25</sup> Section 6 of the Alaska Statehood Act purported to allow the State to “select” certain “vacant” lands, regardless of Alaska Native occupancy of the entire region since time immemorial. Discovery of major oil fields in Prudhoe Bay in 1968, and the land needed to develop those resources, would lead—along with many other factors—to the development of the Alaska Native Claims Settlement Act (ANCSA) of 1971.<sup>26</sup>

### ***B. ANCSA, Venetie, and “Indian Country” in Alaska***

Congress enacted ANCSA as a “comprehensive statute designed to settle all land claims by Alaska Natives.”<sup>27</sup> ANCSA revoked all but the Annette Island Reserve belonging to the Metlakatla Indian Community,<sup>28</sup> repealed the authority for new allotment applications,<sup>29</sup> and extinguished all aboriginal title (“if any”) in Alaska along with any claims based on such title.<sup>30</sup> In exchange, Alaska Natives would receive \$962.4 million and the rights to select 44 million acres of land.<sup>31</sup> Rather than replicate the reservation system of the lower 48, Congress directed that the vast majority of these lands go to state-chartered corporations: a village corporation for each village identified in the Act,<sup>32</sup> and thirteen regional for-profit corporations.<sup>33</sup> This corporate model reflects the assimilationist policy animating ANCSA, as does the Act's declaration that the settlement be accomplished “without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying

<sup>22</sup> Act of May 1, 1936, 49 Stat. 1250, amending 25 U.S.C.A § 461.

<sup>23</sup> *Supra* note 14 at 106; citing Alaska Native Management Report, Volume 2, No. 9 (May 15, 1973) at 5.

<sup>24</sup> *Supra* note 14 at 97-106.

<sup>25</sup> Alaska Statehood Act, Public Law 85-508, 72 Stat. 339, Act of July 7, 1958.

<sup>26</sup> David Case & David Voluck, *ALASKA NATIVES AND AMERICAN LAWS* 167 (3d ed. 2012).

<sup>27</sup> *Alaska v. Native Village of Venetie*, 522 U.S. 520, 523 (1998).

<sup>28</sup> 43 U.S.C. § 1618 (1971).

<sup>29</sup> 43 U.S.C. § 1617 (1971).

<sup>30</sup> 43 U.S.C. § 1603(b) & (c) (2015).

<sup>31</sup> 43 U.S.C. § 1605.

<sup>32</sup> 43 U.S.C. § 1607 (1971); 43 U.S.C. § 1610(b) (1971).

<sup>33</sup> 43 U.S.C. § 1606(a) & (c) (1971).

special tax privileges.”<sup>34</sup> This statement would inform the Department’s reading of ANCSA when crafting the Alaska exception, as well as the Supreme Court’s interpretation in the landmark *Venetie* decision that continues to undermine the authority of Alaska tribal governments to this day.<sup>35</sup>

The Supreme Court has recognized that “there is a significant territorial component to tribal power.”<sup>36</sup> Typically, tribes exercise jurisdiction only within “Indian Country.” Subject to limitations Congress has imposed, “Indian tribes within ‘Indian Country’...possesses attributes of sovereignty over both their members and their territory.”<sup>37</sup> Generally speaking, the Federal government and tribes have primary jurisdiction within Indian Country, while, states have primary jurisdiction outside Indian Country, unless Federal law provides otherwise.<sup>38</sup> Moreover, within Indian Country, tribes have greater authority over members and their property, including limited authority over non-members, while the state has correspondingly less authority.<sup>39</sup>

In *Venetie*, the status of ANCSA lands and the extent of Alaska tribal governmental authority, if any, over them were at issue. Federal law defines Indian Country as comprised of: (1) reservation lands; (2) “dependent Indian communities”; and (3) allotments.<sup>40</sup> The Venetie Tribal Council sought to collect tax from non-tribal members doing business on Venetie tribal lands. In *Venetie*, the Supreme Court considered whether ANCSA lands conveyed to the Tribal Government by the village corporation fit within the second category of Indian Country as “dependent Indian communities.” The Court found they did not. The Court found that ANCSA’s purpose was to avoid a “lengthy wardship or trusteeship,” and the ANCSA lands were not set aside for use by tribes, but rather by state-chartered corporations. Nor were such lands

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<sup>34</sup> 43 U.S.C. § 1601(b).

<sup>35</sup> Final Rule at 76889 (describing genesis of Alaska exception in Solicitor’s opinion relying on ANCSA declaration); *Venetie*, 520 U.S. at 533 (quoting § 1601(b) in support of proposition that ANCSA “ended federal superintendence” over Venetie’s lands). The State of Alaska opened its comments opposing the Proposed Rule by quoting the same ANCSA policy declaration. State of Alaska, Dep’t of Law, *Comments on Land Acquisitions in the State of Alaska* at 2 (July 31, 2014), available at <http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PS;D=BIA-2014-0002>.

<sup>36</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982).

<sup>37</sup> *Merrion*, 455 U.S. at 140 (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

<sup>38</sup> For example, in companion cases involving application of Alaska’s fish trap laws to Native communities, the United States Supreme Court held those laws inapplicable within the Annette Island Reserve but applicable to Natives in non-reservation communities. *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962).

<sup>39</sup> See *Montana v. United States*, 450 U.S. 544, 565-6 (1981) (tribes retain authority over non-Indians in Indian Country when (1) the non-Indian has entered into a consensual relationship with the tribe, or (2) the tribe is regulating conduct that threatens or directly affects “the political integrity, the economic security, or the health and welfare of the Tribe”); see also *United States v. Lara*, 541 U.S. 193 (2004) (affirming tribe’s inherent authority to assert criminal jurisdiction over non-member Indians).

<sup>40</sup> 18 U.S.C. § 1151 (1948).

subject to federal superintendence.<sup>41</sup> Thus, the Native Village of Venetie lacked jurisdiction to impose a business tax on a private contractor hired by the state to build a public school. ANCSA did not terminate tribal sovereignty, but it left Alaska tribes “sovereigns without territorial reach.”<sup>42</sup> Consequently, *Venetie* established that the *territorial* jurisdiction of Alaska tribes does not extend to the 45 million acres of land affected by ANCSA—the vast majority of Native lands in Alaska—even when those lands are owned by tribal governments.

Native allotments, and possibly restricted townsites, are the only Native lands in Alaska that may still qualify as Indian Country, beside the Annette Island Reserve.<sup>43</sup> In the absence of territorial jurisdiction, tribes in Alaska may still exercise governmental powers deriving from membership-based jurisdiction. As the Alaska Supreme Court concluded in *John v. Baker*, Alaska Native villages have the inherent sovereign power to adjudicate child custody disputes between tribal members, even in the absence of Indian Country.<sup>44</sup> While member-based jurisdiction is significant, the expansion of tribal territorial jurisdiction through trust acquisitions would help tribes in Alaska assert governmental authority over tribal members and, in some cases, non-members to address public safety and other governmental responsibilities in their ancestral

<sup>41</sup> *Alaska v. Native Village of Venetie*, 522 U.S. 520, 533 (1998) (quoting 43 U.S.C. § 1601(b)).

<sup>42</sup> *Id.* at 526 (quoting *Alaska ex rel. Yukon Flats School Dist. v. Native Vill. of Venetie Tribal Gov't*, 101 F.3d 1286, 1303 (9th Cir. 1996) (Fernandez, J., concurring)); see also *Alyeska Pipeline Serv. Co. v. Kluti Kaah Native Vill. of Copper Ctr.*, 101 F.3d 610 (9th Cir. 1996) (invalidating tribal tax on ANCSA lands held by village corporation because such lands were not Indian Country).

<sup>43</sup> See Geoffrey D. Strommer & Stephen D. Osborne, “*Indian Country*” and the Nature and Scope of Tribal Self-Government in Alaska, 22 ALASKA L. REV. 1, 19-21 (2005); David Case & David Voluck, ALASKA NATIVE AND AMERICAN LAWS 399 (3d ed. 2012). Interior Solicitor Thomas Sansonetti, in his important 1993 opinion on the status of Alaska Natives, concluded that Native restricted allotments are Indian Country for purposes of federal protection and jurisdiction, but nonetheless provide “little or no basis for an Alaska village claiming *territorial* jurisdiction.” DOI Sol. Op. M-36975, at 129 (Jan. 11, 1993) (emphasis in original). Sansonetti similarly concluded that village-owned townsite lots would be Indian Country only if they qualified as dependent Indian communities under the Indian Country statute. *Id.* at 124. In *Venetie*, the Supreme Court held they do not.

<sup>44</sup> *John v. Baker*, 982 P.2d 738, 748 (Alaska 1999). The father John Baker, a Northway Village member, challenged the order granting shared custody with Anita John, a member of the Mentasta Village. *Id.* at 744-5. The Supreme Court premised tribal court jurisdiction on the membership, or eligibility for membership, of the *children*, and remanded to the superior court to determine, using tribal law, the children’s membership status. *Id.* at 764. If the children were members, or eligible to be members, of Northway Village, the tribal court’s subject matter jurisdiction would have been proper and the state court should defer to the tribal court decision under the doctrine of comity. *Id.* at 763-65. The Alaska Supreme Court suggested tribal authority beyond membership and child custody, holding that Alaska Native villages have “non-territorial sovereignty” to resolve child custody matters as part of “the core of sovereignty – a tribe’s inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.” *Id.* at 758 (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981)).



territory.<sup>45</sup> For many years, however, the established regulatory trust acquisition process was not available to Alaska tribes.

### **C. The Alaska Exception and the Akiachak Case**

The Secretary's general discretionary authority to acquire land in trust for tribes derives from the Indian Reorganization Act (IRA) enacted in 1934.<sup>46</sup> Repudiating the assimilationist allotment policy that resulted in the loss of 90 million acres of Indian land since 1887, Congress enacted the IRA to revive tribal governments and restore their land bases. Section 5 of the IRA authorizes the Secretary of the Interior to acquire lands-in-trust "for the purpose of providing land for Indians."<sup>47</sup> This authority has proven critical to tribes, facilitating tribal land restoration and economic development, insulating tribes from state and local jurisdiction and taxation, and maintaining protection for land with historical and cultural significance.

In 1936, Section 5 was expressly extended to Alaska.<sup>48</sup> This provision has never been repealed. Nevertheless, in 1978 the Interior Solicitor issued an opinion concluding that given Congress's stated intentions in ANCSA to avoid "trusteeship," accepting Alaska lands into trust would be an abuse of the Secretary's discretion, given Congress's stated intentions.<sup>49</sup> Two years later, the Department slipped the "Alaska exception" into the land-to-trust regulations.<sup>50</sup> As recounted in the preamble to the Final Rule, the Department has questioned the validity of the 1978 Solicitor's Opinion, and rescinded it in 2001.<sup>51</sup> Nonetheless, that same year, DOI still published proposed revisions of the Part 151 regulations that would have kept the Alaska exclusion. Those proposed rules were subsequently withdrawn, and the exclusion remains in place.<sup>52</sup>

In 2006, four Native Villages, including the Akiachak Native Community, and one individual Native brought suit against the Interior, arguing that the Alaska exclusion violates the IRA, which states that any regulation "that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe"

<sup>45</sup> See Indian Law and Order Commission, *A Roadmap For Making Native America Safer: Report to the President and Congress of the United States* at 52-53 (Nov. 2013).

<sup>46</sup> 25 U.S.C. § 465, et. seq.

<sup>47</sup> This program was a key element of the Indian Reorganization Act of 1934. See 25 U.S.C. § 465 (§ 473(a) for Alaska tribes) and Bureau of Indian Affairs (BIA) regulations at 25 C.F.R. Part 151.

<sup>48</sup> Act of May 1, 1936, Pub. L. No. 74-538, § 1, 49 Stat. 1250, *codified* at 25 U.S.C. 473a.

<sup>49</sup> Final Rule at 76889.

<sup>50</sup> *Id.*; 45 Fed. Reg. 62034 (Sept. 18, 1980).

<sup>51</sup> Final Rule at 76889.

<sup>52</sup> *Id.*

relative to those of other federally recognized tribes "shall have no force or effect."<sup>53</sup> The plaintiffs argued that by excluding Alaska tribes from the administrative land-into-trust process the DOI had created an illegal classification that diminished the rights of every Alaska tribe (save Metlakatla) compared to all others in the United States.<sup>54</sup> The State of Alaska viewed *Akiachak* as a potential avenue for expanding tribal jurisdiction and correspondingly weakening the State's, so it intervened to defend the regulation.

The court in *Akiachak* agreed with the tribal plaintiffs and struck down the regulation. First, the court determined that the Secretary retained authority, under the 1936 Alaska extension of the IRA, to take land into trust for Alaska tribes. The creation of new trust property would be in "tension" with ANCSA's revocation of reservations and elimination of most trust property. But the court found creation of new trust property would not be "irreconcilable" with ANCSA, as would be required in order to hold that ANCSA implicitly repealed the 1936 statute.<sup>55</sup> While ANCSA said the settlement itself did not create a "trusteeship," ANCSA did not prohibit the creation of trusteeship in Alaska outside the settlement.<sup>56</sup> As the Department agreed in the Final Rule, "There is nothing precluding the settlement codified in ANCSA and the Department's land-into-trust authority under the IRA from coexisting in Alaska."<sup>57</sup>

Next, the court addressed whether the Alaska exclusion was legal. On this issue, the court held that the regulation, by creating a distinct classification of Alaska tribes and diminishing their rights compared to other tribes, runs afoul of 25 U.S.C. § 476(g), and therefore, "shall have no force or effect."<sup>58</sup> Following further briefing on the scope of the remedy, the court issued a second decision, holding that the Alaska exception could be severed by deleting the last sentence of 25 C.F.R. § 151.1 and leaving the remainder of the trust acquisition regulations unchanged.<sup>59</sup>

The State of Alaska appealed the district court's decision on the propriety of the Alaska exception to the United States Court of Appeals for the D.C. Circuit.<sup>60</sup> Interior did not join in the appeal. Instead, following the district court's ruling and its own internal

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<sup>53</sup> *Akiachak Native Community v. Salazar*, 935 F. Supp. 2d 195, 197 (D.D.C. 2013); 25 U.S.C. § 476(g). The plaintiffs also claimed that the Alaska exception was "arbitrary and capricious" in violation of the Administrative Procedure Act.

<sup>54</sup> *Akiachak*, 935 F. Supp. 2d at 210.

<sup>55</sup> *Id.* at 207.

<sup>56</sup> *Id.*

<sup>57</sup> Final Rule at 76890.

<sup>58</sup> *Akiachak*, 935 F. Supp. 2d at 211 (quoting 25 U.S.C. § 476(g)).

<sup>59</sup> *Akiachak Native Cmty. v. Jewell*, 2013 U.S. Dist. LEXIS 141120 (D.D.C. 2013) at \*10-\*16. The tribal plaintiffs argued for a remand to DOI to draft regulations taking into account the Alaska-specific factors discussed below in section V. The State of Alaska and DOI urged the court to simply sever the Alaska exception, which the court did.

<sup>60</sup> *Id.*

review, the Department issued a notice of proposed rulemaking to remove the Alaska exception from the regulations.<sup>61</sup> The State then sought, and the district court granted, an injunction prohibiting the Secretary from taking any land into trust in Alaska pending the outcome of the appeal.<sup>62</sup> The court held that DOI may continue with its rulemaking, and even process applications, provided no final decisions on the applications are made.<sup>63</sup> The Department did proceed with the rulemaking, issuing a notice of proposed rulemaking on May 1, 2014.<sup>64</sup> The Department subsequently held three tribal consultation sessions and received 105 written comments.<sup>65</sup> On December 23, 2014, DOI issued the Final Rule.

Assuming that the *Akiachak* decision is upheld on appeal, the Final Rule opens the door to Alaska trust applications, providing the opportunity to develop a land base over which Alaska tribes can exercise territorial jurisdiction. Importantly, the Final Rule does not *require* the Secretary to take any land into trust in Alaska; it simply allows the Secretary to do so, at her discretion, based on the criteria set forth in Part 151.<sup>66</sup> Therefore tribes need to understand those criteria and the components of a successful land-to-trust application, which we discuss in section IV below. First we address some of the reasons Alaska tribes may wish to have lands placed in trust.

### III. TRIBAL RIGHTS AND JURISDICTION IN INDIAN COUNTRY—WHY PLACE LAND INTO TRUST?

Trust lands would constitute Indian Country.<sup>67</sup> As explained above, there are several benefits for tribes who reside in “Indian Country.” Generally, in Indian Country tribes have greater authority over members and their property, and some authority over non-members when they are within Indian Country, while the state has correspondingly less authority. For example, trust lands are generally beyond the reach of state and

<sup>61</sup> Dep’t of the Interior, Land Acquisitions in the State of Alaska, 79 Fed. Reg. 24648 (May 1, 2014).

<sup>62</sup> *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 19 (D.D.C. 2014).

<sup>63</sup> *Id.* at 15-16.

<sup>64</sup> 79 Fed. Reg. 24648 (May 1, 2014) (hereinafter “Proposed Rule”) at 24649.

<sup>65</sup> Final Rule at 76890.

<sup>66</sup> Final Rule at 76889 (executive summary of rule).

<sup>67</sup> See Final Rule at 76893 (“The Department’s position has been that land held in trust by the United States on behalf of a federally recognized Indian tribe is ‘Indian Country.’”). See also COHEN 193 (“Notwithstanding the *Venetie* decision, off-reservation trust or restricted lands set aside for Indian use should be considered Indian Country under the dependent Indian community section of the statute. They are by definition set aside for Indian use and subject to pervasive federal control.. .”) The State of Alaska, in its comments on the Proposed Rule, disputes that trust lands necessarily become Indian Country. State of Alaska, Dep’t of Law, *Comments on Land Acquisitions in the State of Alaska 79 Fed. Reg. 24,648 (proposed May 1, 2014) Amending 25 C.F.R. part 151* (July 31, 2014) (hereinafter State of Alaska Comments), available at <http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PS;D=BIA-2014-0002>. The State quotes *United States v. Stands*, 105 F.3d 1565, 1572 (8<sup>th</sup> Cir. 1997): “For jurisdictional purposes, tribal trust land beyond the boundaries of a reservation is ordinarily not Indian Country.” But as explained in COHEN 193 n.426, this statement is dictum and conflicts with U.S. Supreme Court precedent.

local laws, including taxing authority. Trust status also brings federal protections and may confer eligibility for certain federal funds.<sup>68</sup> In this section, we explore some of the benefits of trust land in more detail, often citing the comments of Alaska tribes and tribal organizations on the Proposed Rule published in May 2014, along with the Department's response to those comments in the Final Rule. The examples here do not comprise a complete or exhaustive list of the benefits of placing land into trust.<sup>69</sup>

### A. Taxation

Trust lands in Alaska would not be completely insulated from state jurisdiction, but they would have significant protections in the areas of taxation and other state authority. This freedom from regulation enhances self-determination. As Chief Justice Marshall remarked long ago, "the power to tax involves the power to destroy."<sup>70</sup> As the *Akiachak* litigation illustrates, in Alaska, the State and tribes have maintained a contentious history.<sup>71</sup>

The IRA specifies that lands acquired pursuant to the Act "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.*"<sup>72</sup> Several tribes pointed to this benefit in voicing their support for the Proposed Rule. For example, the Native Village of Perryville stated that taxation by the Lake & Peninsula Borough hinders the Village's ability "to exercise its governmental functions and responsibilities in a number of ways."<sup>73</sup> Even the State of Alaska conceded that trust lands would not be subject to taxation by the State or any of its political subdivisions: "Trust land alone, even if not considered Indian Country, will preempt state and local tax laws."<sup>74</sup>

On the positive side, tribes possess their own taxation authority, an inherent part of their sovereignty, so the potential impacts of trust land in Alaska need to be

<sup>68</sup> See, e.g., EPA Region 10 Regional Tribal Operations Committee, Comments on Potential Rule Removing Prohibition on Taking Land into Trust in Alaska, ("Allowing lands to be taken into trust will greatly expand funding available from EPA. . . ."), available at <http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PS;D=BIA-2014-0002>.

<sup>69</sup> For a good summary of the potential benefits and drawbacks of trust land based on comments received during the rulemaking, see Final Rule at 76891-93.

<sup>70</sup> *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819).

<sup>71</sup> See also State of Alaska Comments. Predictably, the State opposes the Proposed Rule and decries the potential creation or expansion of Indian Country in the state.

<sup>72</sup> 25 U.S.C. § 465 (emphasis added)

<sup>73</sup> Comments of the Native Village of Perryville, available at <http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PS;D=BIA-2014-0002>. The Native Village of Port Graham described defending itself against foreclosure actions by the Kenai Peninsula Borough for failure to pay assessed taxes. *Id.*

<sup>74</sup> State of Alaska Comments *supra* note 67 at 15.

understood within this context.<sup>75</sup> Within Indian Country, this authority extends to the activity and property of non-members and non-Indians.<sup>76</sup> Thus, Alaska tribes with trust lands would be able to impose a tax on parties doing business on those lands—the type of tax the Supreme Court invalidated in the *Venetie* case solely because the activity was not in Indian Country.<sup>77</sup> Several tribes pointed out the benefits of a potential tax base to provide revenue for education, health care, law enforcement, and other governmental services.<sup>78</sup>

### **B. Land Use**

Trust lands would be free from not only taxation but other regulation by state and local authorities, such as zoning and land-use laws. For example, the Craig Tribal Association stated its current efforts to provide tribal housing and economic development “are hampered because the tribe is at the mercy of the City of Craig’s zoning, land use, and land development laws.”<sup>79</sup> The Tribe supported the Proposed Rule as a way to create tribal opportunities notwithstanding those restrictions. As a general rule, the State and its political subdivisions do not have zoning authority over Indian-owned lands in Indian Country, even in a P.L. 280 state such as Alaska.<sup>80</sup>

While the State of Alaska has no zoning authority, tribes can impose their own land use regulations on trust lands and other Indian Country in Alaska. Tribes have the inherent sovereign authority to regulate land use within their territory, but this authority generally does not extend to non-Indian owned fee land, even within Indian Country.<sup>81</sup> In comments on the Proposed Rule, some tribes anticipated benefits from environmental and other land use regulation,<sup>82</sup> while some ANCSA corporations and the State of Alaska feared the same regulatory authority.<sup>83</sup>

<sup>75</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137–40 (1982).

<sup>76</sup> *Id.* at 135. *Cf. Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 (2001) (invalidating tax on non-Indian activity on fee land within reservation, but noting that *Merrion* involved activity on trust land).

<sup>77</sup> *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1997). See *supra* notes 28 and accompanying text in that section.

<sup>78</sup> E.g., Comments of Organized Village of Kasaan; Comments of Craig Tribal Ass’n at 3.

<sup>79</sup> Comments of the Craig Tribal Association. See also Comments of Native Village of Port Graham (anticipating trust application to relieve Tribe from Borough’s taxing authority and land-use restrictions).

<sup>80</sup> *Santa Rosa Band of Indians v. King County*, 532 F.2d 655 (9<sup>th</sup> Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).

<sup>81</sup> See *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (plurality opinion holding that tribe could zone non-Indian lands only in the “closed” portion of the reservation, where the vast majority of the land was tribal-owned and few non-Indians lived).

<sup>82</sup> Comments of Craig Tribal Ass’n at 2-3 (explaining that trust lands would allow Association to develop its own environmental quality standards for resource extraction projects affecting tribal land).

<sup>83</sup> Comments of Doyon at 3; Comments State of Alaska at 6-8. Alaska’s Department of Natural Resources (DNR) submitted comments separate from those of the Department of Law just cited. DNR opposed the Proposed Rule on many of the same grounds, recognizing for example that “this proposed rulemaking would provide for territorial jurisdiction by tribes.”

Non-Native trade associations and recreational sports organizations adamantly opposed the Proposed Rule, arguing that DOI should not “create ‘indian [sic] country’ by bureaucratic fiat,”<sup>84</sup> and worrying that villages imposing fishing and hunting regulations would upset the carefully crafted conservation regime and “inflame tensions between groups.”<sup>85</sup> Both supporters and opponents of the Proposed Rule recognized its potential to expand tribal regulatory jurisdiction in Alaska.

The DOI responded to the concerns of opponents in the Final Rule by pointing out that the regulations not only allow but also require the Secretary to consider jurisdictional issues when considering a trust application.<sup>86</sup> The Department addresses such issues on a case-by-case basis during each application review.<sup>87</sup>

### C. Gaming

The Indian Gaming Regulatory Act (IGRA) permits tribes to conduct gaming “on Indian lands.”<sup>88</sup> The statute defines Indian lands as (1) land within the limits of a reservation, or (2) land over which a tribe exercises governmental power and that is held in trust or restricted status by the United States for the benefit of the tribe or an individual.<sup>89</sup> While the Annette Island Reserve clearly qualifies as “Indian lands” under IGRA, allotments and townsites may or may not constitute Indian lands under the Act.<sup>90</sup> Lands acquired in trust for a tribe would undoubtedly constitute “Indian lands” under IGRA, but the statute prohibits the conduct of gaming on lands acquired in trust after 1988 unless one of several exceptions is met.<sup>91</sup> A detailed discussion of potential gaming rights is beyond the scope of this article.

<sup>84</sup> Comments of Territorial Sportsmen, Inc. at 1.

<sup>85</sup> Comments of Safari Club International Alaska Chapter at 2.

<sup>86</sup> See 25 C.F.R. § 151.10(f); *id.* § 151.11.

<sup>87</sup> Final Rule at 76893.

<sup>88</sup> 25 U.S.C. § 2701(5) (1988).

<sup>89</sup> *Id.* § 2703(4); 25 C.F.R. § 502.12.

<sup>90</sup> An informal opinion of the Interior Office of the Solicitor issued before the *Venetie* case was decided questioned whether the Native Village of Akiachak exercised jurisdiction over a townsite. Letter from Scott Keep, Assistant Solicitor, to Michael Cox, General Counsel, National Indian Gaming Commission (June 2, 1995), *available at*

[http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f01\\_akiachkntvecomnty.pdf&tabid=120&mid=957](http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f01_akiachkntvecomnty.pdf&tabid=120&mid=957). The opinion stated that the question presented factual issues, and it made no decision on the matter. The National Indian Gaming Commission also ruled that the Native Village of Barrow did not have jurisdiction over a townsite allotment. Letter from Philip Hogen, Commissioner of the NIGC, to Hans Walker (Feb. 1, 1996),

[http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f31\\_nativevillageofbarrowappeal1996.pdf&tabid=120&mid=957](http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f31_nativevillageofbarrowappeal1996.pdf&tabid=120&mid=957). See also Letter from Michael J. Anderson, Associate Solicitor, to Michael Cox, NIGC General Counsel (Nov. 15, 1993) (Native Village of Kwalock could not game on townsites, but could game on trust lands). None of these opinions were challenged in court.

<sup>91</sup> 25 U.S.C. § 2719.

### **D. Authority Over Non-Members**

In *Montana*, the Supreme Court set forth “the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,” on non-Indian fee land within a reservation.<sup>92</sup> Tribes may regulate non-Indians on such lands only if one of two exceptions applies: (1) the non-Indian has entered a consensual relationship with the Tribe or tribal member, such as a contract having to do with the land; or (2) the non-Indian activity threatens “the political integrity, the economic security, or the health and welfare of the Tribe.”<sup>93</sup> In addition to this common law test for jurisdiction over non-Indians, some Federal statutes specifically provide for tribal jurisdiction over non-Indians. Under the Clean Water Act, for example, tribes can exercise Clean Water Act jurisdiction over non-Indians, even on non-Indian-owned fee land, where necessary to protect the health and welfare of the tribe.<sup>94</sup> The Clean Water Act authority is premised on the tribe “exercising governmental authority over a Federal Indian reservation,” however, and thus would not apply in Alaska outside the Annette Island Reserve unless amended.<sup>95</sup>

### **E. Law Enforcement**

For years tribal advocates have called for establishing (or affirming) tribal territorial jurisdiction to improve public safety in remote rural villages where the tribe is typically the only governmental presence.<sup>96</sup> In November 2013, the Indian Law and Order Commission (ILOC), a bipartisan, blue-ribbon panel appointed by Congress and the Administration, issued a detailed report aimed at strengthening tribal law enforcement and justice systems.<sup>97</sup> The report dedicated an entire chapter to Alaska—the only state to warrant such extensive concern.<sup>98</sup> The ILOC recommended, among other things, that Congress overturn the *Venette* decision and amend ANCSA to allow transferred lands to be put into trust and included within the definition of “Indian Country.”<sup>99</sup> The Commission found that expanding Alaska tribal land bases would

<sup>92</sup> *Montana*, 450 U.S. 544, 565 (1981).

<sup>93</sup> *Id.* at 565-66.

<sup>94</sup> See *Albuquerque v. Browner*, 97 F.3d 415, 418-9 (10<sup>th</sup> Cir. 1996), *cert. denied*, 522 U.S. 965 (1997) (Clean Water Act jurisdiction); *Arizona v. U.S. EPA*, 151 F.3d 1205 (9<sup>th</sup> Cir. 1998), *as amended* 170 F.3d 870 (9<sup>th</sup> Cir. 1999) (Clean Air Act jurisdiction).

<sup>95</sup> 33 U.S.C. § 1377(h) (Clean Water Act definition of “Indian tribe” for purposes of treating tribes as states).

<sup>96</sup> *E.g.*, Geoffrey D. Strommer & Stephen D. Osborne, “*Indian Country*” and the Nature and Scope of Tribal Self-Government in Alaska, 22 ALASKA L. REV. 1, 28-9 (2005).

<sup>97</sup> Indian Law and Order Commission, *A Roadmap For Making Native America Safer: Report to the President and Congress of the United States* (Nov. 2013).

<sup>98</sup> *Id.* at 33-61.

<sup>99</sup> *Id.* at 45, 51-2.

improve not only public safety, but subsistence and other environmental and economic activities.<sup>100</sup>

The Final Rule echoes the ILOC report, as well as a similar recommendation made by the Commission on Indian Trust Administration and Reform.<sup>101</sup> This commission was formed under President Obama and former Secretary of the Interior, Ken Salazar, to look at the Department's management of trust funds, lands, and resources.<sup>102</sup> On December 10, 2013 the commission issued a report that included substantial testimony from Alaska Natives and conclusions that trust land acquisition in Alaska was an important prerequisite to greater tribal sovereignty within the State.<sup>103</sup>

Tribal comments on the Proposed Rule regularly invoked this same theme. For example, the comments on behalf of the Organized Village of Kasaan discussed the ILOC report and noted that trust lands "would provide the jurisdictional basis and additional authority for Alaska tribal governments to address public safety issues, including domestic abuse, sexual violence and other offenses that disproportionately affect Native Alaskan women and children."<sup>104</sup> As the Native Village of Tetlin put it, "placing land in trust in Alaska is necessary to ensure that tribes have the requisite authority to protect their Native women."<sup>105</sup>

The State of Alaska would share jurisdiction within this new Indian Country under the terms of Public Law 83-280, enacted in 1953. In P.L. 280, as it is commonly known, Congress extended the civil and criminal jurisdiction of certain states over the "Indian Country" within their borders.<sup>106</sup> After the *Venetie* decision, P.L. 280 has had very little relevance in Alaska due to the general absence of Indian Country outside of the Annette Islands Reserve. That would change if Alaska tribes expand their trust land base.

In the Final Rule, the DOI acknowledged the concerns of the State and other opponents, but found that the "acute public safety problems" documented in the ILOC report constituted a compelling public policy consideration in favor of deleting the Alaska

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<sup>100</sup> *Id.* at 53.

<sup>101</sup> Final Rule at 76892.

<sup>102</sup> DEP'T OF THE INTERIOR REPORT OF THE COMMISSION ON INDIAN TRUST ADMINISTRATION AND REFORM 59-67 (2013).

<sup>103</sup> DEP'T OF THE INTERIOR REPORT OF THE COMMISSION ON INDIAN TRUST ADMINISTRATION AND REFORM 59-67 (2013*Id.*).

<sup>104</sup> *Land Acquisitions In Alaska*, REGULATIONS.GOV, available at <http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PS;D=BIA-2014-0002>.

<sup>105</sup> *Id.*

<sup>106</sup> See 18 U.S.C. § 1162 (1954)(criminal jurisdiction); 28 U.S.C. § 1360 (civil jurisdiction). Alaska was added to these lists upon statehood.



Exception.<sup>107</sup> The Department sensibly concluded that tribal governments are in the best position to decide whether trust lands would provide a helpful “jurisdictional underpinning” to help address public safety challenges.<sup>108</sup> The State will retain concurrent criminal jurisdiction under P.L. 280, the Department noted, so the rule potentially increases federal resources and opportunities for tribal-state collaboration without significantly reducing state jurisdiction.<sup>109</sup>

In sum, the benefits of new tribal trust land in Alaska do not inure solely to tribal communities and Alaska Natives, but also to Alaska residents more broadly, as is made abundantly clear in the context of public safety related issues.

#### IV. CURRENT PROCESS AND CHECKLIST FOR A LAND-INTO-TRUST APPLICATION WITH THE DOI

The Final Rule, though beneficial to tribal self-governance, leaves some uncertainty as to how the Department will implement the Land-into-Trust application process for Alaska. The Final Rule strikes the “Alaska exception” and leaves the remainder of the Part 151 regulations unchanged. There are, however, several incongruities between the Land-into-Trust Regulations and the realities of land tenure within Alaska. For example, the regulations assume that the applicant has a reservation and that the land to be acquired is either “on” or “off” that reservation. These Alaska-specific issues will be discussed below in Part V, following this more general discussion of the Land-into-Trust process in Part IV.

Nevertheless, even if all the implementation details are not yet known, there are elements of the Land-into-Trust process in the existing regulations that will apply to Alaska tribes just as they have for several decades to other tribes. What follows below is a brief summary of the Land-into-Trust application process—a checklist tracking the regulations and DOI’s Fee-to-Trust Handbook.<sup>110</sup> We do not include discussion of gaming acquisitions, but note that they entail additional requirements. Where there are inconsistencies with the existing Land-into-Trust process, or concerns about Land-into-Trust implementation in Alaska, those are pointed out.

In general, a Land-into-Trust application includes the following:

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<sup>107</sup> Final Rule at 76892.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> 25 C.F.R. Part 151 (Land Acquisitions); Dep’t of Interior, Acquisition of Title to Land Held in Fee or Restricted Fee Status (Fee to Trust Handbook), Version III 7-10 (June 16, 2014) (hereinafter, Fee-to-Trust Handbook).

1. *A written request identifying the parties and describing the land.*<sup>111</sup> The request that BIA take the land into trust generally must include a description of the land [list regulatory requirements] and include the following information and documents:
  - a physical description of the location of the land; the present and past uses of the land; a proof of present ownership, or a description of the circumstances which will lead to tribal ownership;
  - a legal description supported by a survey or other document; an indication of the location and proximity to the Tribe's reservation, the reservation boundaries or to trust lands (as discussed above, this requirement will need to be addressed for Alaska in the implementation phase of the Proposed Land-into-Trust Rule);
  - a plat/map indicating such location and proximity of the land to the reservation<sup>112</sup>; and
  - the DOI Regional Solicitor generally requires that the request contain a memo from the Area Director requesting a preliminary title opinion (PTO).<sup>113</sup>
  
2. *A Description of the Tribal authority for the trust acquisition.*<sup>114</sup> The Tribe must include a copy of the resolution of the governing body of the Tribe authorizing the trust acquisition request. The resolution should include a request to take the land into trust, the exact legal description of the property, the location, the intended purpose of the trust acquisition, and a citation to the portion of the Tribe's governing document (i.e. Constitution), if any, which permits the governing body to make the request. In addition, the Tribe should include a copy of the Tribe's governing organic documents, if any, which identify the scope of authority for the action.
  
3. *Statutory authority for the acquisition.*<sup>115</sup> Usually this will be the IRA, 25 U.S.C. § 465.<sup>116</sup> As discussed below in Section V.E, however, this authority extends only to

<sup>111</sup> 25 C.F.R. § 151.9; Fee-to-Trust Handbook at 8-9 and 45.

<sup>112</sup> Fee to Trust Handbook at 7-10.

<sup>113</sup> Field Solicitor, DOI, Checklist for Non-Gaming Trust Acquisition Preliminary Title Opinions (April 20, 2001).

<sup>114</sup> 25 C.F.R. § 151.9; *Id.*

<sup>115</sup> 25 C.F.R. §151.10(a).

<sup>116</sup> This is the general authority within the IRA for tribal trust land acquisition. There are other federal authorities for tribal trust land acquisition (tribal recognition legislation is an example), and Alaska tribes may want to determine if there are, in the region, federal enactments that provide for discretionary, or mandatory, acquisition of tribal land and whether those enactments will bear on the Land-into-Trust process.

tribes that were “under federal jurisdiction” in 1934, and it may be argued that tribes in Alaska were not.

4. *Explanation of the need of the Tribe for the additional land.*<sup>117</sup> The Tribe must explain the need for the additional land, why current land holdings are inadequate to fulfill that need, and why trust status is needed. For example, the Tribe or its members may be eligible for certain federal programs—e.g. Housing and Urban Development (HUD) financing, certain types of mortgage insurance, etc.—only if the land is held in trust status. The Tribe should *not* simply state that it wishes to avoid taxes through trust status, as the DOI has generally not found that to be, on its own, a compelling enough reason to acquire a trust interest in land.
5. *Purposes for which the land will be used.*<sup>118</sup> The purposes will reflect the needs identified in #4 above, so these two requirements overlap somewhat. There are three primary reasons for which tribes take land into trust:
  - a) to facilitate tribal self-determination—for instance, using the property for governmental offices, healthcare, or public services;
  - b) for economic development—e.g., for an industrial use, a business venture, or gaming; and
  - c) for tribal housing.<sup>119</sup>

There are many other valid purposes for acquiring land in trust—expansion of tribal jurisdiction, protection of sensitive lands, etc. The Tribe’s application should state which purposes the acquisition will fulfill.

6. *Impact on the State and its political subdivisions.*<sup>120</sup> If the land to be acquired is in unrestricted fee status, placing it in trust will remove it from the tax rolls, to the extent there are any. Therefore the county, the borough, the municipality and/or the state will often resist land in its jurisdiction being taken into trust. Once it has received the Tribe’s application, the BIA must notify the state and local governments having regulatory jurisdiction over the land to be acquired, and give those governments 30 days to comment on potential impacts of the acquisition. The Tribe should submit any evidence indicating that loss of tax revenue to the state or local government will be minimal. In some cases, the state or local government may even benefit from the trust acquisition—e.g., if the proposed use

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<sup>117</sup> 25 C.F.R. § 151.10(b).

<sup>118</sup> 25 C.F.R. § 151.10(c).

<sup>119</sup> 25 C.F.R. § 151.3(a)(3).

<sup>120</sup> 25 C.F.R. § 151.10(e).

generates jobs producing taxable income or other taxable revenues, or if the tribe assumes authority to provide services that the State cannot or does not provide.

7. *Jurisdictional problems and potential conflicts of land use.*<sup>121</sup> As noted above, the BIA must provide affected state and local governments notice of, and an opportunity to comment on, proposed trust acquisitions. The Tribe should submit evidence, if possible, that the proposed use is already permitted under the local government's zoning or land use regime, is allowed as a conditional use, and/or will not conflict with existing uses in the surrounding area. Any cooperative agreements entered into, or voluntary actions taken, by the Tribe to address jurisdictional and/or land use conflicts, should be submitted. Potential issues to be addressed include law enforcement, utilities, and emergency services such as fire protection and ambulance service. In the lower 48 states, some BIA Regions also consider the proposed acquisition's impact, if any, on adjoining tribes. These nearby tribes are then made aware of the proposed transaction, and possible impacts on them are to be considered in the application. It is again unclear what approach would be taken in Alaska to this consideration.
8. *BIA's ability to discharge additional responsibility resulting from the acquisition.*<sup>122</sup> The Tribe should set forth facts indicating that BIA will need to devote few if any resources to oversight of the land to be held in trust. The Tribe may consider the distance of the land from the BIA office, and whether the BIA office has sufficient staff to conduct inspections, etc. This issue will be discussed further below in section V.C.
9. *Environmental impact documentation.*<sup>123</sup> To help ensure approval and speed the process, the Tribe should provide information that helps the BIA comply with (a) the National Environmental Policy Act (NEPA), and (b) 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. Tribes can prepare their own NEPA documentation, which begins with an environmental assessment (EA) examining the potential environmental impacts of the proposed action, and can lead, where the impacts are significant, to a full environmental impact statement (EIS). With respect to potential contamination, the United States government's basic concern is potential liability for contamination from leaking gas or oil tanks or other pre-existing environmental hazards. If the Tribe can provide evidence of tank decommissioning or a recent environmental inspection, for example, it should do so.

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<sup>121</sup> 25 C.F.R. § 151.10(f).

<sup>122</sup> 25 C.F.R. § 151.10(g).

<sup>123</sup> 25 C.F.R. § 151.10(h).

10. *Title Examination and Draft Deed.*<sup>124</sup> The Tribe should furnish as part of its application a Commitment for Title Insurance or a Certified Abstract meeting the Standards for the Preparation of Title Evidence in Land Acquisitions by the United States.<sup>125</sup> Although an abstract of title may suffice in some cases, getting title insurance is generally better policy and will speed the trust acquisition process. Basically the government wants to identify—and may require the Tribe to eliminate—any liens, encumbrances (such as easements) or other legal infirmities that may exist on the property.
11. *Additional Documents for Preparation.* Over the past twenty years or so, the DOI has often sent Land-into-Trust applications back to the applying Tribe requesting additional information. As a result, most tribes work to eliminate this potential delay by including in their application additional documents that the DOI frequently requests, including: an affidavit acknowledging existing rights of way and easements (statement that existing rights of way and easements will not interfere with the use of the property); a statement that the development of minerals will not interfere with the intended use of the property (this could become a significant issue in Alaska, where surface and sub-surface estates are often split in ownership); an appraisal or other evidence of value of the property (e.g., evidence of consideration paid by current owner or county assessor's statement of value); proof of payment of taxes (expect to update prior to issuance of the final title opinion); a short plat survey if only a smaller portion of a larger tract is being placed into trust (again, this could be a substantial issue in Alaska where surveyed tracts of land are often huge in comparison to the lower 48); flood certification (if reliable flood information is not otherwise provided, i.e., in the appraisal, by copy of FEMA maps, etc.); and a draft deed using the template developed for trust transfers by the United States.
12. *The location of the land relative to state boundaries, and its distance from the boundaries of the Tribe's reservation.*<sup>126</sup> Under the regulation, the farther the land is from the reservation, the more closely the BIA will generally scrutinize the Tribe's justification of the acquisition, and the more weight the BIA will give to concerns of state and local governments. The Tribe generally provides a map showing the location of the land relative to the reservation. As discussed further below, it is

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<sup>124</sup> 25 C.F.R. § 151.13.

<sup>125</sup> Title Standards of 2001: *A Guide for the Preparations of Title Evidence in Land Acquisitions by the U.S.A*, ENVIRONMENTAL AND NATIONAL RESOURCE DIVISION, available at [http://www.justice.gov/enrd/2001\\_Title\\_Standards.html](http://www.justice.gov/enrd/2001_Title_Standards.html).

<sup>126</sup> 25 C.F.R. § 151.11(b).

unclear how the DOI would apply this “distance from the reservation” criterion in Alaska.

13. *A business plan.*<sup>127</sup> When the land is being acquired for business purposes, the Tribe must provide a plan specifying the anticipated economic benefits of the proposed use. In the gaming context, the Office of Indian Gaming Management (OIGM) has historically expected this plan to be fairly detailed, referring to it in one previous guidance as “the tribe’s comprehensive economic development plan.”<sup>128</sup> It is likely that the more detailed the economic reasons for trust transfer, the more detailed the BIA will require the business plan to be.

The BIA considers all of the factors in subsections 1-13 above in deciding whether to accept land into trust. As a high-level BIA official has indicated, however, the decision-making process is relatively simple: “Of course, the factors that really matter in these applications are the impact on the state and political subdivisions and the jurisdictional problems.”<sup>129</sup> Since this will be a contentious issue within the State of Alaska, given the *Akiachak* litigation leading up to the rulemaking, how the Land-into-Trust process moves forward in Alaska may prove unpredictable—specifically with respect to the issues discussed next.

## V. ALASKA-SPECIFIC IMPLEMENTATION ISSUES

While the Final Rule simply deletes the sentence setting forth the Alaska exception and leaves the rest of the Part 151 regulations unchanged, both Alaska tribes and the DOI understand that some of the criteria in those regulations may not apply in Alaska in the same way they do in the lower 48.<sup>130</sup> In the written comments and elsewhere, many questions have arisen about how the land-into-trust regulations will be implemented in Alaska, given the unique history sketched above and the resulting Native land tenure system. This Section V discusses some of the most prominent, but by no means all, of these questions.

Due to the uncertainty as to how some of the issues below would be addressed under the current Part 151 application process, many comments on the Proposed Rule called for a second rulemaking that would attempt to spell out exactly how the rule would

<sup>127</sup> 25 C.F.R. § 151.11(c).

<sup>128</sup> OIGM, CHECKLIST FOR GAMING ACQUISITIONS, GAMING-RELATED ACQUISITIONS AND IGRA SECTION 20 DETERMINATIONS § IX.C (October 2001) (hereinafter OIGM Checklist).

<sup>129</sup> Larry E. Scrivner, Acting Director, Office of Trust Responsibilities, BIA, *Acquiring Land into Trust for Indian Tribes*, 37 NEW ENG. L. REV. 603, 606 (2003).

<sup>130</sup> *Supra* note 3; Final Rule at 76895.

be implemented in Alaska.<sup>131</sup> In the Final Rule, however, the Department explained that it did not believe further revisions were needed. The Secretary's overarching discretion will allow her to account for the unique aspects of Alaska land tenure within the existing rules and review process.<sup>132</sup> If Alaska-specific issues arise that the existing process cannot handle, DOI will consider additional measures.<sup>133</sup>

**A. How will the on-reservation/off-reservation distinction be applied?**

A key issue the regulations may address is whether or not the parcel is "on-reservation"—that is, within or contiguous to the applicant's reservation. If the parcel is on-reservation, the Secretary must still exercise her discretion following a thorough review,<sup>134</sup> but the field is tilted in favor of the land being accepted into trust.<sup>135</sup> However, when the parcel is off-reservation, the regulations require that the application satisfy the on-reservation requirements plus some additional requirements.<sup>136</sup> The Department considers the application according to a sliding scale of scrutiny: the farther the land is from the tribe's reservation, the greater scrutiny the Department gives to the tribe's justification of anticipated benefits, and the more weight the Department gives to the concerns of state and local authorities.<sup>137</sup> State and local authorities routinely object to trust applications, claiming devastating effects from loss of tax revenue and regulatory jurisdiction. Consequently, the farther off the reservation the parcel is, the more difficult it is to obtain approval.

As a result of ANCSA, tribes in Alaska (other than the Metlakatla Indian Community) have no reservations.<sup>138</sup> The regulations define "Indian reservation" as, "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been diminished, *Indian reservation* means that area of land constituting the former reservation of the tribe as defined by the Secretary."<sup>139</sup>

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<sup>131</sup> See, e.g., Comments of Sealaska Corporation at 3-4; Comments of State of Alaska at 10-12; Comments of NANA Regional Corp. at 2; Comments of Mike Williams at 3-6 (suggesting several ways to make the final rule "more reflective of the on-the-ground realities in village Alaska").

<sup>132</sup> See Final Rule at 76894.

<sup>133</sup> *Id.*

<sup>134</sup> See 25 C.F.R. § 151.10.

<sup>135</sup> See 25 C.F.R. § 151.3(a) (setting forth policy that lands may be acquired in trust *either* if they are within or adjacent to reservation *or* are "necessary to facilitate tribal self-determination, economic development, or Indian housing").

<sup>136</sup> See 25 C.F.R. § 151.11.

<sup>137</sup> 25 C.F.R. § 151.11(b).

<sup>138</sup> See *supra* notes 24-26.

<sup>139</sup> 25 C.F.R. § 151.2(f).

Under this definition, there would appear to be no room for the Department to apply the on-reservation test in Alaska outside Metlakatla—even if, for example, the land to be acquired is within a former reservation, or within the tribe’s village corporation lands. In the Final Rule, the Department confirmed that applications from these tribes will be reviewed under the “off-reservation” criteria—whether or not they previously had reservations.<sup>140</sup> This is not advantageous for Alaska tribes, as the “off-reservation” criteria means greater scrutiny, and more discretion, for Secretarial decisions to place land into trust.

Additionally, the Final Rule did not clarify how the Department will apply the proximity-to-the-reservation factor. One possibility would be to simply disregard this factor, as it cannot be measured. Another possibility, one which recognizes the unique circumstances of tribes in Alaska, would be to apply the sliding scale based on proximity to the tribe’s former reservation (if any), to its traditional homelands, its village corporation lands, or to the Village itself. However, any of these Alaska-specific tests would likely require revision of the regulations, which define “reservation” in a way that excludes virtually all of Alaska. Absent such revision, Part 151 may remain biased against Alaska even with the Alaska exception cut out.

### ***B. How will the Department handle split estates and subsurface rights?***

Trust applications involving ANCSA lands will often raise the issue of whether the title to those lands is sufficiently “clean” to allow for trust transfer. The United States has raised concerns when faced with accepting title to surface rights when another entity owns the sub-surface rights, although this has never been an insuperable barrier to a trust acquisition.<sup>141</sup> ANCSA lands often have such split estates, with the surface typically owned by the village corporation and subsurface rights owned by the regional corporation.<sup>142</sup>

Comments on the Proposed Rule from ANCSA regional corporations expressed great concern about the impact of trust acquisitions on access to, and development of, subsurface resources.<sup>143</sup> For example, Doyon feared that trust acquisition would subject the land to tribal regulatory jurisdiction, impose federal review and approval requirements,

<sup>140</sup> Final Rule at 76894-95.

<sup>141</sup> See, e.g., Dep’t of the Interior, *Land Acquisitions; Little River Band of Ottawa Indians of Michigan*, 63 Fed. Reg. 64,968 (Nov. 24, 1998) (taking 152.8 acres of surface land into trust, subject to existing rights to explore, develop, and market oil, gas, and minerals from subsurface); Dep’t of the Interior, *Land Acquisitions; Lone Band of Miwok Indians of California*, 77 Fed. Reg. 31,871 (May 30, 2012) (final agency determination to acquire in trust 228.04 acres, excepting certain mineral rights).

<sup>142</sup> See 43 U.S.C. § 1613(f).

<sup>143</sup> E.g. Comments of Doyon, Ltd. at 2; Comments of Arctic Slope Regional Corp. at 3; Comments of NANA Regional Corp. at 3. The Alaska Federation of Natives also raised this issue and supported Doyon’s request for further consultation in its comment letter dated June 23, 2014.



or both.<sup>144</sup> The Arctic Slope Regional Corporation even worried that the Proposed Rule could result in an “unintended ‘taking’ of subsurface estate belonging to [Alaska Native Corporations].”<sup>145</sup> While a taking seems far-fetched, concerns about tribal and federal regulation and potential impacts on ANCSA corporations and their shareholders are legitimate. As Doyon pointed out, “Tribes can create laws, taxes, policies, ordinances, fees and other requirements which would benefit the tribe and tribal members,” but impose costs on the corporations.<sup>146</sup> Doyon even argued that a subsequent rulemaking should add a requirement that holders of subsurface rights consent before the surface estate may be taken into trust.<sup>147</sup>

Even without such a revision, however, the Secretary could—and probably should—favor surface estate trust applications where the tribe has obtained the subsurface owner’s consent and perhaps entered an agreement ensuring access and development subject to reasonable regulation. In the Final Rule, the Department said it would “encourage” surface and subsurface owners to enter into access agreements.<sup>148</sup> The Department also pointed out that, even absent such an agreement, the mineral estate remains dominant under settled law, the surface estate is subservient, and the subsurface owner has a right of reasonable access to the minerals below.<sup>149</sup> The concerns of ANCSA corporations with respect to any particular parcel will be heard and addressed as part of the application process.<sup>150</sup>

***C. Does the BIA Regional Office have sufficient staffing and capacity to handle an influx of Alaska Land-into-Trust applications?***

The answer is, No. As many tribes have experienced with Secretarial elections, Section 17 Corporation applications and various other BIA services that involve internal review, the BIA staffing in Alaska is inadequate to handle its current workload. Adding

<sup>144</sup> Comments of Doyon, Ltd. at 1 (second page of comment letter).

<sup>145</sup> Comments of Arctic Slope Regional Corp. at 3.

<sup>146</sup> *E.g.*, Doyon Comments at 3.

<sup>147</sup> *E.g.*, Doyon Comments at 4 (arguing that regulations should be revised to require “express consent of the owner of the subsurface estate”).

<sup>148</sup> Final Rule at 76893.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* In addition to the prevalence of split estates, Alaska also has the unique “section line easement” system. Section line easements are public rights of way of various widths that run along the “section lines” of the rectangular survey system. These easements date back to “Revised Statute 2477” (a part of the 1866 federal Mining Act), and in Alaska, the legislature prohibited local governments (i.e. boroughs) from being able to vacate, or remove, these easements pursuant to AS 29.35.090. It is unclear how a section line easement would be treated by the United States if it were on the title of a parcel of land a tribe sought to place in trust in Alaska, but the issue is worth noting and may require additional analysis. Tribes may want to apply for smaller parcels than are currently surveyed. Short-platting or sub-dividing parcels is a separate process governed by the State, so that may add yet another wrinkle to the process.

additional work in the form of potentially contentious land-to-trust applications will only add to the backlog.

For example, while some have predicted that “there will not be a rush to request the Secretary to accept trust lands,”<sup>151</sup> others expect BIA to be flooded with applications.<sup>152</sup> With 229 federally recognized tribes in Alaska, BIA could find itself overwhelmed in fairly short order, particularly given the Regional Office’s lack of experience with trust applications and the pent-up demand caused by four decades of the arbitrary Alaska exception.<sup>153</sup> Processing trust applications can be a slow process even in the lower 48, where the Regional Offices have lots of experience. Note that the BIA frequently requires land-into-trust applicants to re-do environmental documentation if it is older than six months,<sup>154</sup> or sometimes a year. Unless this practice is changed or the BIA acquires substantial staffing to handle applications, a tribe could well find itself paying, and then re-paying, to complete environmental work multiple times. Processing applications in a timely manner takes funding, staff, training, and capacity.

One model to consider is the California Fee-to-Trust Consortium (CFTC) that was formed by tribal governments in the late 1990s to address the unique history of California tribes, many of whom had little to no trust lands due to the termination policy in the state and other historical factors.<sup>155</sup> The CFTC brings together the BIA and over 60 tribes in California in a joint effort to identify opportunities to streamline the land-into-trust process, pool tribal and federal resources to meet staffing needs, produce a uniform application process that eliminates confusion and delay and meet on an ongoing basis to continue to adapt the joint efforts to significantly increase the tribal trust land base within the state. The CFTC and the process by which it was created and successes it has had in placing land into trust in California, has made it a model that is definitely worth considering in Alaska.<sup>156</sup>

An additional capacity-related issue is raised by the regulations themselves. When evaluating an application, the Department must consider “whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the

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<sup>151</sup> Comments of Calista Corp. at 2 (June 16, 2014).

<sup>152</sup> Final Rule at 76894 (summarizing comments questioning whether BIA has “the resources to handle an influx of these applications”).

<sup>153</sup> The testimony provided by Alaska tribes at the June 8, 2014 Proposed Rule consultation in Anchorage made clear that some Alaska tribes already have land-into-trust applications pending with the BIA. It is unclear how previously submitted applications will be addressed by the BIA, but strong policy arguments can be made that those applications that have been pending the longest should be processed first.

<sup>154</sup> *Supra* note 62 at 14.

<sup>155</sup> Harvard Project on American Indian Economic Development, “Honoring Nations 2010 Honoree”, California Fee-to-Trust Consortium (2010), discussing in greater detail the work of the CFTC. [https://nnidatabase.org/db/attachments/text/honoring\\_nations/2010\\_HN\\_EVR\\_california\\_fee\\_to\\_trust.pdf](https://nnidatabase.org/db/attachments/text/honoring_nations/2010_HN_EVR_california_fee_to_trust.pdf)

<sup>156</sup> *Id.*

acquisition of the land in trust status.”<sup>157</sup> The Metlakatla Indian Community—the only tribe in Alaska currently receiving trust land services from BIA —generally supported the Proposed Rule, but questioned whether BIA is “equipped to discharge” the additional duties resulting from trust acquisitions.<sup>158</sup> The Department’s response should be to proactively provide and train staff rather than to use lack of staffing as an excuse to deny applications and preserve a de facto Alaska exception. Nevertheless, funding for such training and capacity within the Department is not apparent. The Final Rule’s response to comments on this issue was also not encouraging. The Department simply acknowledged that the regulations require consideration of whether BIA is equipped to discharge its responsibilities associated with the proposed trust land, and stated that the “Department’s policy is to process trust applications as expeditiously as possible.”<sup>159</sup> There was no discussion of the resources necessary to meet these responsibilities, let alone a commitment to providing them.

#### ***D. How will the Department handle federal lands a tribe wishes to place in trust?***

Most trust applications involve lands a tribe owns in fee simple. However, tribes across the country have expressed a desire to have available federal lands transferred directly to tribal trust when the tribal government makes such a request. A resolution was passed at the 2013 National Congress of American Indians (NCAI) Mid-Year Conference requesting that Congress amend and reauthorize a number of federal land management laws and regulations in order to facilitate such land transfers.<sup>160</sup> Given the predominance of federal land in Alaska—63.8% of the State is owned by the United States, according to the Alaska Department of Natural Resources<sup>161</sup>—this could be a significant issue in the implementation of the Proposed Rule. Most, if not all, of this federal land is carved out of Alaska tribes’ ancestral homelands, and much of it abuts village or village corporation lands, making it a natural candidate for expanding tribal trust land bases. Comments on the Proposed Rule illustrate that Alaska tribes and tribal organizations are already contemplating federal-land-to-trust applications.<sup>162</sup>

<sup>157</sup> 25 C.F.R. § 151.10(g). See also 25 C.F.R. § 151.11(a) (incorporating same consideration into off-reservation acquisition process).

<sup>158</sup> Comments on the Proposed Change to 25 CFR 151.1 Submitted by the Metlakatla Indian Community, available at <http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PS;D=BIA-2014-0002>.

<sup>159</sup> Final Rule at 76894.

<sup>160</sup> NCAI, *Transferring Federal Lands to Tribal Trust*, (Resolution REN-13-003, 2013).

<sup>161</sup> Alaska Dep’t of Natural Resources, Division of Forestry, *Who Owns/Manages Alaska?*, available at [http://forestry.alaska.gov/pdfs/07who\\_owns\\_alaska\\_poster.pdf](http://forestry.alaska.gov/pdfs/07who_owns_alaska_poster.pdf). Federal agencies managing Alaska lands include the Bureau of Land Management (82.5 million acres), the U.S. Fish & Wildlife Service (78.8 million acres), the National Park Service (52.4 million acres), the U.S. Forest Service (22.3 million acres), and the Department of Defense (1.7 million acres). *Id.*

<sup>162</sup> Sealaska Corporation expressed the hope that federal agencies such as the U.S. Forest Service and National Park Service “will be supportive of and open to the transfer of federal lands to tribes in Alaska to be taken into trust.”

Tribes can acquire federal land through exchanges, legislation, the administrative process for disposal of “excess” or “surplus” lands, or other means. Tribes and tribal organizations have the right to acquire federal excess and surplus properties under the Indian Self-Determination and Education Assistance Act (ISDEAA).<sup>163</sup> In the ISDEAA, tribes step into the shoes of the BIA and the Indian Health Service to provide services to their citizens that the agencies would otherwise have been obligated to provide.<sup>164</sup> Therefore, it makes sense that the same statute effectively affords tribes the status of a Federal agency for the purpose of acquiring federal property, placing tribes in a priority position over non-federal parties. Once the tribe identifies the available property, it submits a request to the Secretary of the Interior describing how the property is appropriate for a purpose authorized by its ISDEAA agreement.<sup>165</sup> These purposes are quite broad, ranging from natural resource management to government capacity building, and are largely determined by the tribe itself, so this requirement should be easily met. The Secretary then requests the property from the holding agency, specifying that the request is on behalf of an Indian tribe pursuant to the ISDEAA, and requesting a waiver of any fees in accordance with applicable regulations.<sup>166</sup>

If the tribe requests that the acquired land be held in trust by the United States, the Secretary must “expeditiously” process the request “in accord with applicable Federal law and regulations.”<sup>167</sup> Thus, the Part 151 process must be followed. But because the land effectively never loses its federal character, a strong policy case can be made that the Part 151 review should be streamlined.<sup>168</sup> The principal objections that state and local authorities raise to trust acquisitions—removal of the property from tax rolls and loss of jurisdiction—do not apply because the land never loses its federal ownership status.<sup>169</sup> Now that the Final Rule has been promulgated, Alaska tribes may wish to advocate for a fast-track federal-land-into-trust process, either as part of revised regulations or simply as part of the implementation policy of the current regulations.

### ***E. Will the Carcieri decision affect land-into-trust applications in Alaska?***

<sup>163</sup> 25 U.S.C. § 450j(f); *id.* § 458ff(c). See also 25 C.F.R. §§ 900.95–.101 (BIA and Indian Health Service property); *id.* §§ 900.102–.106 (other federal agencies’ property). For a description of this process under the ISDEAA and a Defense Department statute, see Geoffrey D. Strommer & Craig A. Jacobsen, *Indian Tribes and the Base Realignment and Closure Act: Recommendations for Future Trust Land Acquisitions*, 75 N. DAK. L. REV. 509 (1999).

<sup>164</sup> *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2186 (2012).

<sup>165</sup> 25 C.F.R. § 900.104(a). Here we focus on the process involving property of federal agencies other than BIA and IHS, as most Alaska acquisitions would likely be from land-management agencies such as the Forest Service, National Park Service, and Bureau of Land Management.

<sup>166</sup> 25 C.F.R. § 900.104(b)–(e).

<sup>167</sup> 25 C.F.R. § 900.104(c)(2).

<sup>168</sup> See Strommer & Jacobsen, *supra* note 163, at 530–32.

<sup>169</sup> *Id.* at 531 (noting that such a transfer “has no net impact on state or local government”).

As discussed above, the Part 151 regulations implement the statutory authority conferred on the Secretary by Section 5 of the IRA.<sup>170</sup> In *Carcieri*, the Supreme Court ruled that the Secretary can only take land into trust for tribes that were “under federal jurisdiction” on June 8, 1934, when the IRA was enacted.<sup>171</sup> Currently, tribes seeking to have land taken into trust must present a sufficient legal and factual record that shows they were under federal jurisdiction in 1934—and that requirement applies to Alaska tribes under the Final Rule.<sup>172</sup>

It has been argued that “the *Carcieri* decision had no impact in Alaska” because in *Carcieri* the Court interpreted 25 U.S.C. § 465, while the question of trust acquisition authority in Alaska is governed by the 1936 amendment that applied the IRA to Alaska.<sup>173</sup> However, that amendment applied both section 465 and section 479, containing the “under federal jurisdiction” language, to Alaska tribes.<sup>174</sup> It seems unlikely that Alaska tribes are exempt from the *Carcieri* decision. Opponents of an Alaska trust application could argue that no Alaska tribes were federally recognized for political purposes in 1934<sup>175</sup> and/or challenge the facts supporting federal jurisdiction in 1934 over an individual tribal applicant.

#### ***F. What will happen to the ANCSA “land bank” protections during pendency of a trust application?***

Under the so-called land bank provisions, ANCSA lands that are not developed, leased, or sold to third parties enjoy exemptions from property taxes, adverse possession, and judgments under federal bankruptcy or other insolvency and creditors’

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<sup>170</sup> 25 U.S.C. § 465.

<sup>171</sup> *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009). The Court decision turned on interpretation of 25 U.S.C. § 479, which defines “Indian” to “include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction.” The Court read the term “now” to mean at the time of the IRA’s enactment in 1934, not the date when the land would be taken into trust. *Id.*

<sup>172</sup> See Dep’t of the Interior, Acquisition of Title to Land Held in Fee or Restricted Fee Status (Fee-to-Trust Handbook) (Version III, June 16, 2014) (advising tribes to submit with application “information in support of the tribal applicant being ‘under Federal jurisdiction’ in 1934”). The Final Rule does not mention *Carcieri* at all.

<sup>173</sup> Alaska Federation of Natives, Analysis of Decision in *Akiachak Native Community v. Salazar* at 8-9, available at <http://www.nativefederation.org/?s=Analysis+of+Decision+in+Akiachak+Native+Community+v.+Salazar>.

<sup>174</sup> See 25 U.S.C. § 473a (“Sections . . . 465 . . . and 479 of this title shall after May 1, 1936, apply to the Territory of Alaska”).

<sup>175</sup> Donald Craig Mitchell, *Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts*, 14 ALASKA L. REV. 353, 362 (1997). Mr. Mitchell argues that there are no federally recognized tribes, for political purposes, in Alaska, and that the Assistant Secretary of the Interior for Indian Affairs acted unlawfully in recognizing Alaska tribes in 1993 and subsequently.

rights laws.<sup>176</sup> Only federally recognized tribes can apply to have land taken into trust, so any ANCSA corporation lands for which trust status is sought must first be conveyed to a tribe. This conveyance to a “third party” would remove the protections of the ANCSA land-bank provisions.<sup>177</sup> While trust status would eventually confer essentially the same protections, they would be lacking during the pendency of the application, which in some cases can take years. Tribes may wish to pursue an administrative or legislative means of bridging this potentially significant gap.

***G. Will the Department undertake an additional rulemaking to address the Alaska-specific implementation issues discussed above?***

Comments from a wide range of stakeholders—tribes, ANCSA corporations, private citizens, and the State of Alaska—urged the Department to engage in further rulemaking or policy development to clarify how the trust application process would be implemented given the unique history and status of Alaska lands.<sup>178</sup> The consensus appears to be that the considerations discussed above raise substantial concerns that need to be addressed in a supplemental rulemaking. However, in the Final Rule, the Department made clear it has no plans for further revisions, although it left the door open should Alaska-specific issues arise that cannot be addressed as part of the current discretionary review process under Part 151.<sup>179</sup>

## VI. CONCLUSION

The opportunity to potentially place land-into-trust in Alaska could be a game changer: a shift in ownership and land tenure that brings enhanced tribal jurisdiction and opportunities for economic development, cultural resource protection, and the exercise of tribal sovereignty. As discussed above, several implementation issues and concerns will need to be resolved, and Alaska tribes will want to participate in this resolution process and ensure a fair and efficient land-to-trust policy and procedure in Alaska.

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<sup>176</sup> 43 U.S.C. § 1636(d)(1). “Developed” means a purposeful modification of land, or an interest in land, from its original state that effectuates a condition of gainful and productive present use without further substantial modification.” *Id.* § 1636(d)(2)(A).

<sup>177</sup> The Native Village of Port Heiden made this point in its comments on the Proposed Rule.

<sup>178</sup> See, e.g., Comments of Sealaska Corporation at 3-4; Comments of State of Alaska at 10-12; Comments of NANA Regional Corp. at 2; Comments of Mike Williams at 3-6 (suggesting several ways to make the final rule “more reflective of the on-the-ground realities in village Alaska”).

<sup>179</sup> Final Rule at 76894.

