



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

M-37053

JUN 29 2018

Memorandum

To: Secretary
Assistant Secretary – Indian Affairs
Director, Bureau of Indian Affairs

From: Principal Deputy Solicitor Exercising the Authority of the Solicitor Pursuant to Secretary’s Order 3345, Amendment No. 18

Subject: Withdrawal of Solicitor Opinion M-37043, “Authority to Acquire Land into Trust in Alaska” Pending Review

On January 13, 2017, the Solicitor issued M-37043 (the “Sol. Op. M-37043”), an analysis of the effects of the Alaska Native Claims Settlement Act (“ANCSA”),¹ the Federal Land Policy and Management Act (“FLPMA”),² and the Supreme Court decision in *Carcieri v. Salazar*³ on the Secretary of the Interior’s (the “Secretary”) authority to accept land in trust in Alaska under the Indian Reorganization Act (the “IRA”).⁴ The Solicitor concluded that neither the plain language of these statutes nor the Court’s decision in *Carcieri* repealed or precluded the Secretary’s ability to acquire land in trust for Alaska Natives.⁵

On January 20, 2017, the President’s Chief of Staff announced a regulatory review process for any new or pending regulation, including any agency statement of general applicability and future effect other than a regulatory action that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue.⁶ Subsequent thereto, the Acting Assistant Secretary – Indian Affairs notified all Bureau of Indian Affairs Regional Directors that the delegated authority for off-reservation land-into-trust acquisitions under 25 C.F.R. § 151.11 will lie with the Acting Assistant Secretary – Indian Affairs.⁷

Since initiating the regulatory review process mandated by the President’s Chief of Staff, I have

¹ Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629h) (“ANCSA”).

² Pub. L. No. 94-579, 90 Stat. 2744 (1976) (codified as amended at 43 U.S.C. §§ 1701-1787) (“FLPMA”).

³ 555 U.S. 379 (2009).

⁴ Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101-5129 (formerly §§ 461-479)) (“IRA”).

⁵ Sol. Op. M-37043 at 22.

⁶ Memorandum for the Heads of Executive Departments and Agencies; Regulatory Freeze Pending Review, 82 Fed. Reg. 8,346 (Jan. 24, 2017) (citing Exec. Order No. 12,866, § 3(e) (1993); Exec. Order No. 13,422, § 3(g) (2007)).

⁷ U.S. Dept. of the Interior, Office of the Secretary, *Delegated Authority for Off-Reservation Fee to Trust Decisions* (Apr. 6, 2017).

determined that Sol. Op. M-37043 omits discussion of important statutory developments, resulting in an incomplete analysis of the Secretary's authority to acquire land in trust in Alaska. To facilitate both the regulatory review process announced by the President's Chief of Staff and the preparation of the Department's statement of interim policy, I therefore withdraw Sol. Op. M-37043, pending review.

Questions as to the Secretary's authority to acquire land in trust for Alaska Natives originated when the Department first published regulations governing the acquisition of land in trust for Indians, pursuant to Section 5 of the IRA.⁸ The Associate Solicitor for Indian Affairs concluded in 1978 that it would "be an abuse of the Secretary's discretion" to acquire land in trust in Alaska based on the language and apparent intent of ANCSA:⁹

[T]he settlement should be accomplished rapidly, (...) without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges.¹⁰

In 1999, the Department proposed to revise its land acquisition regulations.¹¹ The proposed rule left in place the regulatory prohibition on trust acquisitions in Alaska in effect since 1980,¹² and invited comment on the Associate Solicitor's 1978 Opinion.¹³

On January 16, 2001, the Department issued final revised land acquisition regulations.¹⁴ The Solicitor concurrently issued an opinion to the Assistant Secretary – Indian Affairs, advising him that subsequent to ANCSA, Congress's repeal in FLPMA of Section 2 of the IRA had "raise[d] a serious question as to whether the authority to take land into trust in Alaska still exists."¹⁵ The Solicitor noted that the preamble to the final revised regulations would continue the bar on trust acquisitions in Alaska, other than at Metlakatla, for three years, during which time the Department would "consider the legal and policy issues involved in determining whether the Department ought to remove the prohibition."¹⁶

⁸ 45 Fed. Reg. 62034 (Sept. 18, 1980); *see* 25 U.S.C. § 5108.

⁹ "Trust Land for the Natives of Venetie and Arctic Village" Memorandum to Assistant Secretary – Indian Affairs from Associate Solicitor – Indian Affairs Thomas W. Fredericks at 3 (Sept. 15, 1978).

¹⁰ ANCSA at § 1601(b).

¹¹ 64 Fed. Reg. 17,574 (Apr. 12, 1999).

¹² From 1980-2015, 25 C.F.R. § 151.1 included the following language: "These regulations set forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes. Acquisition of land by individual Indians and tribes in fee simple is not covered by these regulations even though such land may, by operation of law, be held in restricted status following acquisition. Acquisition of land in trust status by inheritance or escheat is not covered by these regulations. *These regulations do not cover the acquisition of land in trust status in the State of Alaska, except acquisition for the Metlakatla Indian Community of the Annette Island Reserve or its members.*" (Emphasis added).

¹³ 64 Fed. Reg. 17,574, 17,578 (Apr. 12, 1999).

¹⁴ 66 Fed. Reg. 3452 (Jan. 16, 2001).

¹⁵ "Rescinding the September 15, 1978, Opinion of the Associate Solicitor for Indian Affairs entitled 'Trust Land for the Natives of Venetie and Arctic Village,'" Memorandum to Assistant Secretary – Indian Affairs from Solicitor John D. Leshy (Jan. 16, 2001) (the "Leshy Opinion"). Section 2 of the IRA had extended certain provisions of the IRA to Alaska. *See* 43 U.S.C. § 704(a), 90 Stat 2743 (repealing 49 Stat. 1250, 25 U.S.C. § 496) (1976).

¹⁶ Leshy Opinion at 2.

The Solicitor went on, however, to inform the Assistant Secretary – Indian Affairs that: Because of my substantial doubt about the validity of the conclusion in the 1978 Opinion, and in order to clear the record so as not to encumber future discussions over whether the Secretary can, as a matter of law, and should, as a matter of policy, consider taking Native land in Alaska into trust, I am hereby rescinding the Associate Solicitor’s 1978 Opinion.¹⁷

On November 9, 2001, the Department withdrew the revised final rule in order to “better address the public’s continued concerns regarding the Department’s procedures for taking land into trust for federally recognized Indian tribes.”¹⁸ The withdrawal of the revised final rules left the original regulations, including the Alaska exclusion, in effect. But because the Department did not reinstate the Associate Solicitor’s 1978 Opinion, however, this left the Alaska exclusion in place without a clear legal basis or policy rationale.

In 2006, four Alaska Native tribes and one Alaska Native individual challenged the lawfulness of the Alaska exclusion in *Akiachak Native Community v. Jewell*.¹⁹ The U.S. District Court for the District of Columbia (the “District Court”) issued an opinion in favor of the Alaska Natives and severed and vacated the Alaska exception from the regulations.²⁰ In response, the Department engaged in notice and comment rulemaking on the issue and ultimately determined to remove the Alaska exclusion through the administrative process.²¹ The U.S. Court of Appeals for the District of Columbia Circuit (the “DC Circuit”) subsequently found that the Department’s rulemaking had rendered the appeal by petitioner-intervenor State of Alaska moot, and vacated the decision of the District Court.²²

Viewed against the background of this chronology of events, the limitations of Sol. Op. M-37043 become more apparent. Excepting a passing reference to FLPMA,²³ there is no mention in Sol. Op. M-37043 of the nature, extent, or impact of such post-ANCSA legislation. The District Court decision that prompted the Department’s notice and comment rulemaking relied on the “privileges and immunities” amendments to the IRA in striking the Alaska exception.²⁴ Given that the Department’s revision of the land acquisition regulations occurred prior to the decision by the DC Circuit vacating the lower court’s merits decision, it is unclear from Sol. Op. M-37043 the extent to which the Department relied on the District Court’s interpretation of the applicability of 25 U.S.C. § 476(g)²⁵ after that Court’s decision had been vacated.²⁶

¹⁷ Leshy Opinion at 2, citing 66 Fed. Reg. 3452 (Jan. 16, 2001).

¹⁸ 66 Fed. Reg. 56,609 (Nov. 9, 2001).

¹⁹ 995 F. Supp. 2d 1 (D.D.C. 2013).

²⁰ *Id.* at 6.

²¹ 79 Fed. Reg. 76,888, 76,889 (Dec. 23, 2014).

²² *Akiachak Native Cmty. v. U.S. Dep’t of the Interior*, 827 F.3d 100 (D.C. Cir. 2016).

²³ Sol. Op. M-37043 at 8.

²⁴ Pub. L. No. 103-263 § 5(b); *Akiachak Native Cmty. v. Jewell* at 4-5.

²⁵ Effective September 1, 2016, certain provisions in Chapter 14 of Title 25 of the United States Code were reorganized and transferred to new chapters within Title 25. See Office of the Law Revision Counsel, *Editorial Reclassification Title 25, United States Code*, <http://uscode.house.gov/editorialreclassification/t25/index.html>. Consistent with the filings in *Akiachak*, we use the numbering of Chapter 14 in effect at that time. For the reader’s reference, 25 U.S.C. § 476 is now codified at 25 U.S.C. § 5123.

²⁶ In Sol. Op. M-37043, the Solicitor briefly summarized the final rule eliminating the regulatory ban on trust land

The lack of such a discussion represents a significant omission given the realities of ANCSA and post-ANCSA legislation. For example, the passage of the Alaska National Interest Lands Conservation Act (“ANILCA”) in 1980 established a subsistence priority for rural residents²⁷ and a land bank program to protect undeveloped lands that were available to ANCSA corporations.²⁸ FLPMA rescinded the Secretary’s authority to establish reservations in Alaska and his ability to patent lots within Alaska Native townsites.²⁹ And the 1988 amendments to ANCSA created settlement trusts,³⁰ prohibited indefinitely the alienation of the ANCSA corporate stock,³¹ and authorized the corporations to amend their governing documents to permit the issuance of stock to Alaska Natives born after December 18, 1971.³² Collectively, ANCSA and the aforementioned post-ANCSA statutes create a fundamentally different regime for Alaska Native tribes when compared to the tribes in the contiguous United States. In addition, the Department of Justice took the view before the District Court that 25 U.S.C. § 476(g) did not necessarily require the Alaska exception be severed from 25 C.F.R. § 151.1.³³ The Solicitor failed to address the changed landscape in Alaska and left unanswered the degree to which the Department relied on the District Court’s now vacated opinion in determining to strike the Alaska exception.

In summary, the failure to discuss fully the possible implications of post-ANCSA legislation on the Secretary’s authority to take land in trust in Alaska, the failure to address the District Court’s holding regarding the applicability of 25 U.S.C. § 476(g) to Alaska Native tribes and the Department’s reliance thereon in promulgating revised regulations leave the Solicitor’s analysis incomplete and unbalanced.

When former Solicitor Leshy concluded in 2001 that there was substantial doubt about the validity of the Associate Solicitor’s 1978 Opinion, he rescinded it “in order to clear the record so as not to encumber future discussions over whether the Secretary can, as a matter of law, and should, as a matter of policy,” take land in trust for Alaska Natives.³⁴ I have doubts as to the completeness and balance of Sol. Op. M-37043, and therefore believe the approach taken by former Solicitor Leshy in his 2001 opinion is appropriate.

Accordingly, I am withdrawing Sol. Op. M-37043 so that we may conduct the regulatory review process mandated by the President’s Chief of Staff and prepare for consultation with the Indian and Alaska Native communities on an interim policy for off-reservation land-into-trust acquisitions within and outside of Alaska.

acquisition in Alaska, stating, without further elaboration, “Interior concluded that ANCSA left intact the Secretary’s land-into-trust authority in Alaska and restated Interior’s policy that ‘there should not be different classes of federally recognized tribes.’” Sol. Op. M-37043 at 9 (citing 79 Fed. Reg. 76,888, 76,890 (Dec. 23, 2014)).

²⁷ 16 U.S.C. § 3111.

²⁸ 43 U.S.C. § 1636.

²⁹ 43 U.S.C. § 704(a).

³⁰ ANCSA at § 1629e.

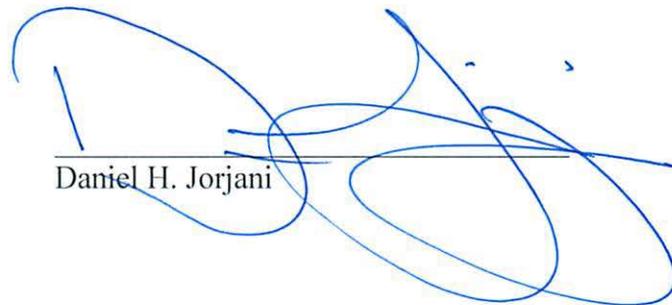
³¹ *Id.* at § 1629c.

³² *Id.* at § 1606(g)(1).

³³ Federal Defendants’ Motion for Reconsideration, *Akiachak Native Cmty., et al. v. Dep’t of the Interior, et al.*, No. 1:06-CV-00969 (D.D.C. July 3, 2013).

³⁴ Leshy Opinion at 2.

The Department allowed only 60 days for comment when it proposed removing the Alaska exclusion from its trust land acquisition regulations in 2014.³⁵ That is in stark contrast to the three years the Department proposed in 2001 to consider the legal and policy implications of removing the Alaska exclusion. Based on the geographical distribution and cultural diversity of Alaska Native communities, a minimum of six months would seem appropriate to provide adequate notice and a meaningful opportunity to comment on the Secretary's exercise of his authority to take off-reservation land into trust in Alaska and the issues left unresolved by Sol. Op. M-37043, followed by a further six months to allow the Department to conduct a considered review of any and all comments received.



Daniel H. Jorjani

³⁵ 79 Fed. Reg. 24,648 (May 1, 2014).