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Land Acquisition in the State of Alaska: Akiachak Native Community v. Salazar

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***Akiachak Native Community v. Salazar*, 935 F. Supp. 2d 195
(D.D.C. 2013)**

**Land Acquisition in the State of Alaska, 79 Fed. Reg. 76888
(Dec. 23, 2014)**

Wesley J. Furlong

ABSTRACT

*Akiachak Native Community v. Salazar*¹ and the BIA’s repeal of the Alaska Exception² are set to mark sweeping changes for Alaska Natives. Following the United States District Court for the District of Columbia’s holding that the prohibition of trust acquisitions in Alaska violates the IRA, and before the United States Court of Appeals for the D.C. Circuit could issue an opinion on the merits, the BIA repealed its rule prohibiting such acquisitions. The potential for drastic changes to the landscape of native communities and villages in Alaska is highly likely.

I. INTRODUCTION

Section five of the Indian Reorganization Act (“IRA”), passed in 1934, grants the Secretary of the Interior (“Secretary”) the authority to take land into trust “for the purpose of providing lands for Indians.”³ Originally, the IRA excluded Alaska and Alaska Natives from its ambit.⁴ In 1936, the Secretary was conferred the authority to take land into trust and to establish reservations in Alaska.⁵ In the 1970s, Congress passed legislation extinguishing title to land for Native Alaskans, reorganizing Alaska Native Communities and Villages into Native Corporations, terminating all Alaska Native land claims against the United States and the state, and eliminating the Secretary’s authority to create reservations in Alaska.⁶ Following this legislation, the Department of the Interior (“DOI”), through the Bureau of Indian Affairs (“BIA”), promulgated new regulations detailing the extent of the Secretary’s authority to take land into

¹ *Akiachak Native Cmty. v. Salazar*, 935 F. Supp. 2d 195 (D.D.C. 2013) [hereinafter *Akiachak I*].

² Land Acquisition in the State of Alaska, 79 Fed. Reg. 76888 (Dec. 22, 2014).

³ 25 U.S.C. § 465 (2012).

⁴ *Cohen’s Handbook of Federal Indian Law*, § 4.04[3][a][i], 257 (Neil Jessup Newton, ed. 2015).

⁵ *Akiachak I*, 935 F. Supp. 2d at 203 (citing Act of May 1, 1936 §§ 1-2, 49 Stat. 1250, 1250-51 (codified at 25 U.S.C. § 473a (2012))).

⁶ *See* Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601-29h (2012)); *see also* Federal Land Policy and Management Act, Pub. L. No. 94-579, § 704(a), 90 Stat. 2743 (1976).

trust for Alaska Natives under 25 U.S.C. § 465.⁷ In establishing the “Alaska Exception” the BIA amended 25 C.F.R. § 151.1, stating that the Secretary’s authority to take land into trust did “not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reservation.”⁸ The plaintiffs in *Akiachak* challenged the Secretary’s findings that the trust acquisition authority was repealed by Congress and also argued the Alaska Exception violated the IRA.⁹ On May 1, 2014, following the district court’s opinion that struck down the Alaska Exception, the BIA issued a rule change announcement proposing to remove the Alaska Exception from § 151.1 and opened a comment period.¹⁰

II. FACTUAL AND PROCEDURAL BACKGROUND

In a 1978 memorandum, the Associate Solicitor for the Division of Indian Affairs found that the passage of the Alaska Native Claims Settlement Act (“ANCSA”)¹¹ repealed much of the IRA’s applicability in Alaska, specifically removing the trust status of land and prohibiting claims settlements from being apportioned to Alaska Natives in trust.¹² The memorandum found that it would be an abuse of discretion to take land into trust for Alaska Natives.¹³ A 2001 BIA memorandum rescinded the 1978 findings and found that the ANCSA did not specifically repeal section five of the IRA.¹⁴ The same day as the memorandum’s publication, the BIA issued final rules amending § 151.1, leaving intact the Alaska Exception.¹⁵ While the BIA stated it would “consider the legal and policy issues involved in . . . remov[ing] the prohibition,” the regulation was never changed.¹⁶

The Alaska Exception was challenged in *Akiachak* by four Alaska Native tribes and one individual.¹⁷ They alleged the Alaska Exception was an abuse of discretion by the Secretary because the

⁷ *Akiachak I*, 935 F. Supp. 2d at 200-01.

⁸ 25 C.F.R. § 151.1 (2014), amended by 79 Fed. Reg. 76888 (effective Jan. 22, 2015).

⁹ *Akiachak I*, 935 F. Supp. 2d at 203.

¹⁰ Land Acquisition in the State of Alaska, 79 Fed. Reg. 24648 (May 1, 2014).

¹¹ 79 Fed. Reg. at 76889; *Akiachak I* recognized the FLPMA also repealed sections of the IRA applicable to Alaska. 935 F. Supp. 2d at 198-200 (*see infra* note 32; *see also supra* note 6).

¹² 79 Fed. Reg. 76888.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* (quoting Acquisition of Title to Land in Trust, 66 Fed. Reg. 3452, 3454 (Jan. 16, 2001)).

¹⁷ *Akiachak I*, 935 F. Supp. 2d at 197.

ANCSA and the Federal Land Policy and Management Act (“FLPMA”) did not repeal the Secretary’s authority to take land into trust in Alaska.¹⁸ The plaintiffs also argued that the Alaska Exception violated the IRA, specifically 25 U.S.C. § 476(g).¹⁹

Any regulation or administrative decision . . . that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes *shall have no effect*.²⁰

The State of Alaska intervened on behalf of the Secretary.²¹ On a motion for summary judgement, the district court ruled in favor of the plaintiffs on both issues.²² The district court granted a stay in part as the case was appealed to the D.C. Circuit.²³ The DOI subsequently moved to drop its appeal, and a decision from the D.C. Circuit on Alaska’s appeal is pending.²⁴

Following the district court’s opinion in *Akiachak*, on May 1, 2014 the BIA issued a proposed rule change repealing the Alaska Exception due to “urgent policy recommendations.”²⁵ After a sixty-day comment period and public meetings, the BIA issued its final rule repealing the Alaska Exception on December 23, 2014.²⁶ While the amended language of § 151.1 took effect on January 22, 2015, implementation of the amendment is stayed.²⁷

III. ANALYSIS

A. The Legality of the Alaska Exception

The central issue in *Akiachak* was whether the ANCSA and the FLPMA actually repealed the Secretary’s authority to take land

¹⁸ *Id.*

¹⁹ *Id.* at 209 (citing U.S.C. § 476(g) (2012)).

²⁰ 25 U.S.C. § 476(g) (emphasis added).

²¹ *Akiachak I*, 935 F. Supp. 2d at 197.

²² *Id.*

²³ *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 11 n. 1 (D.D.C. 2014) [hereinafter *Akiachak IV*] (granting stay in part).

²⁴ *Akiachak Native Cmty. v. U.S. Dep’t of the Interior*, No. 13-5361, 2014 WL 3014864 (D.C. Cir. June 12, 2014) [hereinafter *Akiachak III*] (dismissing appeal).

²⁵ 79 Fed. Reg. 24648.

²⁶ *Id.*; 79 Fed. Reg. at 76890.

²⁷ 79 Fed. Reg. at 76888; *Akiachak IV*, 995 F. Supp. 2d at 18-19.

into trust pursuant to Section five of the IRA.²⁸ If the Secretary was found to have retained his authority, the issue became whether the Alaska Exception violated 25 U.S.C. § 476(g).²⁹

The court found that while the FLPMA repealed the Secretary's authority to establish reservations in Alaska,³⁰ the ANCSA did not explicitly repeal the Secretary's authority to take land into trust for Alaska Natives.³¹ The court noted that the ANCSA extinguished "[a]ll *claims* against the United States . . . based on claims of aboriginal right, title, use, or occupancy."³² The court stated, "a 'claim' is necessarily an assertion of [a] right" and trust petitions could not be construed as claims since the Secretary has the discretionary authority to grant or deny them.³³

Additionally, the court found that language within the ANCSA, which established that "the settlement [of claims] should be accomplished . . . without creating a reservation system or lengthy wardship or trusteeship," would not be affected by the repeal of § 151.1.³⁴ Alaska argued that the ANCSA, read together with the FLPMA, implicitly repealed the Secretary's authority to take land into trust.³⁵ The court noted that repeal of statutes "by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest."³⁶

The court ruled that Congress's intent to rescind the Secretary's trust acquisition authority was not "clear and manifest."³⁷ Noting how "Congress felt the need to explicitly repeal the Secretary's" authority to establish reservations, the absence of any explicit repeal of the Secretary's trust acquisition authority was "a strong indication that the" authority still existed.³⁸ The court found that while the ANCSA prohibited land conveyed from claims settlements to be held in trust, it did not "prohibit[] the creation of any trusteeship outside of the settlement."³⁹

²⁸ *Akiachak I*, 935 F. Supp. 2d at 197.

²⁹ *Id.*

³⁰ *Id.* at 203 (citing Pub. L. No. 94-579, § 704(a), 90 Stat. 2743).

³¹ *Id.* at 207.

³² *Id.* at 204-05 (quoting 43 U.S.C. § 1603(c) (2012)) (emphasis added, brackets in original).

³³ *Id.*

³⁴ *Id.* at 206 (quoting 43 U.S.C. § 1601(b) (2012)).

³⁵ *Id.* at 203-06.

³⁶ *Id.* at 204 (quoting *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 622 (2007)) (internal quotation and citations omitted).

³⁷ *Id.* at 207.

³⁸ *Id.*

³⁹ *Id.*

The district court next turned to whether § 151.1 was “in accordance with the law.”⁴⁰ The plaintiffs contended that § 151.1 violated the IRA, specifically 25 U.S.C. § 476(g) which provides, “[a]ny regulation . . . diminish[ing] the privileges and immunities available to a federally recognized tribe” compared to those of others, simply “by virtue of their status as Indian tribes shall have no force of effect.”⁴¹ The Secretary contended that Congress passed § 476(g) in an effort “to clarify . . . section 16 of the [IRA].”⁴² The court found that “§ 476(g) plainly applies to ‘[a]ny regulation,’” and that “Congress commonly enacts statutes that address more than the precise concern.”⁴³

Additionally, the Secretary admitted the Alaska Exception diminishes the privileges of Alaska Natives, but argued that § 476(g) only applies to discrimination between “‘similarly situated’ tribes.”⁴⁴ Since Alaska Natives are not similarly situated to other tribes, the Secretary argued the Alaska Exception does not violate the IRA.⁴⁵ However, the court pointed out that “similarly situated” appears nowhere in the statute, and when “the statute’s language is plain, the sole function of the courts is to enforce it according to its terms.”⁴⁶ The court found § 151.1 was an impermissible classification based purely on the tribal status of Alaska Natives.⁴⁷ The court denied the Secretary “substantial deference for [its] interpretation of [its] own regulation[s]”⁴⁸ because the statute’s “language is plain and its meaning unambiguous,”⁴⁹ and ruled that “the Alaska exception [sic] is a regulation that diminished the privileges of non-Metlakatlan Alaska Natives relative to all other Indian tribes.”⁵⁰

B. Repealing the Alaska Exception

The BIA asserted that acquisition of trust lands provides a “physical space where tribal governments may exercise sovereign

⁴⁰ *Id.* (quoting 5 U.S.C. § 706(2)(A) (2012)).

⁴¹ 25 U.S.C. § 476(g).

⁴² *Akiachak I*, 935 F. Supp. 2d at 210 (quoting 140 Cong. Rec. 11,234 (1994) (statement of Sen. John McCain)).

⁴³ *Id.* (quoting 25 U.S.C. § 476(g)).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 210-11 (quoting *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)) (internal quotation marks and citations omitted).

⁴⁷ *Id.* at 210.

⁴⁸ *Id.* at 208 (quoting *Tozzi v. U.S. Dep’t of Health and Human Servs.*, 271 F.3d 301, 311 (D.C. Cir. 2001) (internal quotation marks and citations omitted)).

⁴⁹ *Id.* at 211 (quoting *City of Hous. v. Hill*, 482 U.S. 451, 468 (1987)).

⁵⁰ *Id.* at 210.

powers”⁵¹ and that trust acquisitions help assist in the furtherance of tribal self-governance and self-determination for Alaska Native tribes, which are “equally important” to Alaska Natives as they are to all other tribes.⁵² The BIA considered the effects on Alaskan native corporations’ sovereignty and self-governance, public safety in Alaska native communities, effects on economic development and resource management, and impacts on state and tribal jurisdiction.⁵³ The BIA stated that the repeal of the Alaska Exception would allow any “Alaska Native tribe or individual possessing fee title to alienable land, including ANCSA lands, [to] apply to have that land taken into trust.”⁵⁴

The BIA noted that it was the “[DOI]’s policy . . . that there should not be different classes of federally recognized tribes.”⁵⁵ The BIA found that “Alaska Native tribes and individuals have the right to decide for themselves whether to apply to have their land taken into trust.”⁵⁶ The BIA stated that “[t]he Secretary’s authority to acquire land in trust” is “critical to carrying out the Federal trust responsibility” and “taking land into trust . . . is unlikely to have a negative effect on Alaska Native Corporations.”⁵⁷

The BIA’s reasoning followed a similar analysis as the district court in *Akiachak*. The BIA noted that while Congress explicitly granted the Secretary the authority to take land into trust in Alaska in 1936, it had “not passed any legislation that revoke[d] the Secretary’s authority to make trust land acquisitions in Alaska.”⁵⁸ The BIA emphasized that the ANCSA only extinguished existing title and claims, and limited the status of land transferred in any settlements.⁵⁹ The BIA stressed that the ANCSA did not ever revoke the Secretary’s trust acquisition authority.⁶⁰ The BIA asserted there is no “irreconcilable conflict” between the elimination of trust land by the ANCSA and the Secretary’s section five authority to acquire new trust land in Alaska.⁶¹ The BIA stated that that the “removal of the Alaska Exception [was] supported by both legal and public policy consideration.”⁶²

⁵¹ 79 Fed. Reg. at 76895.

⁵² *Id.*

⁵³ *Id.* at 76891-92.

⁵⁴ *Id.* at 76894.

⁵⁵ *Id.* at 76890.

⁵⁶ *Id.* at 76891-92.

⁵⁷ *Id.*

⁵⁸ *Id.* at 76890.

⁵⁹ *Id.*

⁶⁰ *Id.*; see *Akiachak I*, 935 F. Supp. 2d at 208.

⁶¹ *Akiachak I*, 935 F. Supp. 2d at 207 n. 8; 79 Fed. Reg. at 76890.

⁶² 79 Fed. Reg. at 76895.

III. CONCLUSION

The BIA's repeal of the Alaska Exception, and the district court's finding that the prohibition is not in accordance with the law, signifies a significant shift in federal Indian law and policy in Alaska. There is potential for profound changes in the landscape for Alaska Natives and native corporations because the acquisition of trust lands in Alaska opens up benefits that were previously unavailable.⁶³ As the BIA noted, the acquisition of trust land would allow native communities to better protect historical tribal land and establish a trust relationship with the federal government to ensure the lands' protection.⁶⁴

The establishment of trust relationships in Alaska due to the impacts of this decision and rulemaking may prove to be an effective tool for Alaska native communities to combat the effects of climate change. In 2012, the U.S Court of Appeals for the Ninth Circuit dismissed the Native Village of Kivalina's suit against energy producers for their contribution to climate change and rising sea levels, because the Clean Air Act had replaced federal common law nuisance claims.⁶⁵ Additionally, the establishment of trust lands in Alaska would implicitly override *Alaska v. Native Village of Venetie Tribal Government*, in which the Supreme Court effectively held that Indian country did not exist in Alaska.⁶⁶

While the BIA's repeal of the Alaska Exception would seem to make the issue of its legality moot before the D.C. Circuit, the court could find that the repeal of most of the IRA provisions applicable to Alaska by the ANCSA, read together with the FLPMA, *did* show clear congressional intent to repeal section five as it applied to Alaska as well. The BIA's repeal of § 151.1 and the district court opinion in *Akiachak* announce a new era for Alaska Natives. While they represent potential for positive, seismic changes to Alaska native communities, the specter of an adverse ruling by the D.C. Circuit, and potentially the Supreme Court, should, for the moment, temper any expectations the repeal of the Alaska Exception has created.

⁶³ 79 Fed. Reg. at 76891.

⁶⁴ *Id.* at 76891-92.

⁶⁵ *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012).

⁶⁶ *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998). It should be noted that Chief Justice Roberts successfully argued *Venetie* for the State of Alaska.