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Maggie Massey
2880 Mill Street
Eugene, OR 97405

Bureau of Indian Affairs
Department of the Interior
1849 C Street, N.W.
MS-4606-MIB
Washington, D.C. 20240

To Whom It May Concern:

Thank you for the opportunity to comment on the Bureau of Indian Affairs' review of M-Opinion 37043¹ and the Secretary of the Interior's legal authority to take land into trust in Alaska. My name is Maggie Massey and I am a third-year law student at the University of Oregon School of Law. I am a Bowerman fellow in the Environmental and Natural Resources Law Center's Native Environmental Sovereignty Project and serve on the executive board of the University of Oregon's Native American Law Students Association.²

On June 20, 2018, the Department of the Interior ("Department") published M-37053 and withdrew M-Opinion 37043. Known as the Tompkin's Memorandum, M-Opinion 37043 assessed the Secretary of the Interior's ("Secretary") authority pursuant to the Indian Reorganization Act ("IRA") to take land into trust in Alaska in light of the Supreme Court's decision in *Carcieri v. Salazar*³ and the Alaska Native Claims Settlement Act ("ANCSA"). In its "Withdrawal Memorandum," the department asserts that it withdrew the Tompkin's Memorandum for several reasons. First, because it "fails to fully discuss the possible implications of legislation enacted after ANCSA, and second because of the failure to address the District Court's holding regarding the applicability of 25 U.S.C. § 476(g) [25 USCA § 5123], and the Department's reliance thereon" on the Secretary's authority under the IRA.⁴

However, the lengthy history of administrative and judicial review of this issue demonstrates that it has been examined in its historical context, from all directions, for many years. There is no dearth of knowledge on this issue. The Tompkin's Memorandum, coupled with the 2014 rulemaking, provide sufficient discussion of the Secretary's authority to take land into trust in Alaska. Congress has given only clear statements about its intention to allow land to be taken into trust, and no post-ANCSA legislation repeals this authority. The Department's regulation specifically exempting Alaska from the Secretary's authority (the "Alaska Exception") was vacated by the D.C. District Court in 2013.⁵

¹ Sol. Op. M-37043.

² I prepared this comment in my personal capacity. The opinions expressed are my own and do not reflect the views of the University of Oregon School of Law, the Environmental and Natural Resources Law Center, or the Native American Law Students Association.

³ 55 U.S. 379 (2009).

⁴ Sol. Op. M-37053.

⁵ *Akiachak Native Community v. Jewell*, 995 F. Supp. 1, 6 (D.D.C. 2013); *See* 25 C.F.R. § 151.1 (1980).

Even if ambiguity is present in the statutes and regulations governing this issue, the Indian canons of construction require that this ambiguity be read in favor of the Alaska Native tribes who seek to have land taken into trust by the Secretary.⁶

And Alaska Native tribes want to have land taken into trust by the Secretary. In fact, transcripts from meetings with tribal leaders in Alaska indicate an overwhelmingly preference for the reinstatement of the Tompkin's Memorandum and rapid processing of all pending land into trust applications filed by Alaska Native tribes.⁷ Tribal leaders demonstrated their strong desire for lands in Alaska to be taken into trust. They traveled to consultation sessions, during their important subsistence harvest seasons, to advocate against reconsideration of an issue that has been fully considered in the courts, in the halls of Congress, and within the agency itself.

I. *Post-ANCSA legislation does not remove the ability of the Secretary to take lands into trust for Alaska Native tribes.*

The 2017 Withdrawal Memorandum cites “the [Tompkin's Memorandum's] failure to discuss fully the possible implications of post-ANCSA legislation on the Secretary's authority to take land into trust in Alaska” as a reason for the withdrawal.⁸ The Withdrawal Memo points specifically to the Federal Land Policy and Management Act (FLPMA) and the Alaska National Interest Lands Act (ANILCA) as post-ANCSA statutes that could impact the Secretary's ability to take land into trust in Alaska.⁹ This assertion is made without citation to any specific language within either statute to evince Congress's intention to repeal the Secretary's authority as explicitly extended by the Alaska IRA in 1936.¹⁰ The Tompkin's Memorandum adequately addresses the plain language and the legislative history of the Alaska IRA, and subsequent legislation, to demonstrate an express intention to take land into trust in Alaska.¹¹

Congress enacted FLPMA and ANILCA in 1974¹² and 1980¹³ respectively, after the passage of the Alaska IRA. FLPMA removed the ability for the Secretary to create new reservations in Alaska, but said nothing about the ability to take land into trust.¹⁴ ANILCA established a subsistence priority for rural Alaskans and created Conservation System Units for federal land management, but said nothing about the Secretary's ability to take land into trust.¹⁵

Repeal by implication, without express intent, is disfavored.¹⁶ When Congress intends to overturn previous legislation, it must clearly state its intention to do so. The topic of taking land into trust in Alaska has a lengthy history of discussion and debate. If Congress intended to repeal

⁶ See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

⁷ See transcripts from 2018 listening sessions in Fairbanks, AK (https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/07-26-18.Transcript-Fairbanks-AK-FTT_508.pdf) and Ketchikan, AK (https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/08-03-18.Transcript-Ketchikan-AK-FTT_508.pdf).

⁸ See *Morton v. Mancari*, 417 U.S. 535, 549-50 (1974) (citing *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)).

⁹ Sol Op. M-37053 at 5.

¹⁰ *Id.*

¹¹ Sol. Op. M-37043 at 13-18.

¹² Pub. L. No. 94-579, 90 Stat. 2744 (1976) (codified as amended at 43 U.S.C. § 1701-1787).

¹³ 16 U.S.C. § 3111

¹⁴ 43 U.S.C. § 1701-1787.

¹⁵ *Id.*

¹⁶ See *Morton*, 417 U.S. at 549-50.

a provision explicitly extended to Alaska Native tribes in the Alaska IRA, it would have said so directly.¹⁷

When considering whether ANCSA impliedly repealed the Secretary's authority, the District Court of Alaska "concluded that '[f]rom the weight of the textual and structural evidence, and the strength of the presumption against implicit repeals, . . . ANCSA left intact the Secretary's authority to take land into trust in Alaska.'"¹⁸

Additionally, if any ambiguity exists regarding the Congressional intent regarding the Secretary's land-into-trust authority, the Indian canons of construction require that the ambiguity be interpreted in favor of Alaska Natives, i.e. in favor of the Secretary's authority to take lands into trust.¹⁹

II. *25 U.S.C. § 476(g) requires that the Secretary maintain the authority to take lands into trust for Alaska Native tribes.*

The Withdrawal Memorandum cites "the failure to address the District Court's holding [in *Akiachak*] regarding the applicability of 25 U.S.C. § 476(g) [25 USCA § 5123]" as an additional reason for withdrawing the Tompkin's Memorandum.²⁰ "The Solicitor [Tompkins] 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."²¹ However, this argument does not support the withdrawal of the Tompkin's Memorandum.

First, the emphasis on the vacated opinion is misplaced because the vacatur was a result, requested by both the plaintiff tribes and federal government defendants, of mootness.²² The D.C. District Court concluded in 2013 that the Alaska exception to the Secretary's land into trust authority violated the Indian privileges and immunities clause (25 U.S.C. § 476(g)), because it discriminated against Alaska Native tribes by denying them an opportunity afforded to other federally recognized tribes.²³ Following this ruling, the Department voluntarily promulgated a draft regulation to overturn the Alaska exception and permit the Secretary to take land into trust for Alaska Native tribes.²⁴ The regulation was finalized after a public notice and comment

¹⁷ Sol. Op. M-37043 at 14-17.

¹⁸ *Akiachak Native Community v. United States Department of Interior*, 827 F.3d 100, 104 (D.C. App. 2016) (citing *Akiachak Native Community v. Salazar*, 935 F. Supp. 2d 195, 208 (D.D.C. 2013)). "Significantly, Interior made clear that '[t]he district court's judgment . . . is not the basis for the Department's decision to eliminate the Alaska Exception' and that it had 'independently concluded that there is no legal impediment to taking land into trust in Alaska, and there are sound policy reasons for giving Alaska tribes the opportunity to petition to take land into trust.'" 112-13 (citing Fed Reg at 76, 891)

¹⁹ *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269 (1992).

²⁰ Sol. Op. M-37053 at 4.

²¹ *Id.*

²² "This brings us, finally, to the question of whether we should vacate the district court's decision. All parties urge us to do so, and we agree. The Supreme Court has instructed courts to 'dispose[] of moot cases in the manner 'most consonant to justice . . . in view of the nature and character of the conditions which have caused the case to become moot.'" At 115 (quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994)).

²³ 25 USCA § 5123 "(g) Privileges and immunities of Indian tribes; existing regulations Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect."

²⁴ Sol Op. M-37043 at 113-14.

period. The district court decision was later vacated by the D.C. Circuit Court of Appeals because the challenged regulation, the Alaska exception, no longer existed, not for any underlying deficiencies with the court's reasoning surrounding 25 U.S.C. § 476(g). Accordingly, the vacatur does not indicate that the Department's position regarding land into trust regulations was based on an improper district court holding.

Second, the withdrawal memo expresses concern about the extent to which the Solicitor or the Department relied on the vacated district court opinion when changing the regulations. This is unpersuasive. When the Department decided to update its regulations, it considered many factors, including but not limited to, the ongoing lawsuit. The D.C. Court of Appeals explained the process:

Noting that '[a] number of recent developments . . . caused the Department to look carefully at this issue again,' 'including a pending lawsuit' and 'urgent policy recommendations' from two blue-ribbon commissions, Interior 'carefully reexamined the legal basis for the Secretary's discretionary authority to take land into trust in Alaska' and concluded that 'ANCSA left . . . the Secretary's . . . land-into-trust authority in Alaska intact.'²⁵

The Department relied upon its inherent authority to reexamine its regulation. The Department clearly stated that "a number of recent developments" including but not limited to the lawsuit, persuaded it to reexamine its position. This is a valid exercise of agency authority. Additionally, the district court opinion was not vacated until after the new regulations were promulgated because once the Alaska exception was removed, the lawsuit based on that exception was moot. The Withdrawal Memorandum attempts to create a controversy where none exists. Pursuant to its authority, the Department decided to re-examine its position and issue new regulations. There is no reason for the Department to now rescind that position because constitutional case and controversy requirements later required a lawsuit based on a no longer existing regulation be dismissed. This is circular logic that should not provide the basis for reconsidering regulations enacted pursuant to a robust public process.

III. *Conclusion*

The Tompkin's Memorandum adequately addressed both post-ANCSA legislation and the impact of the *Akiachak* litigation on the Secretary's authority to take land into trust in Alaska. The Withdrawal Memorandum's concerns are misplaced as this issue has been extensively discussed and evaluated for decades. The agency should listen carefully to the testimony of the Alaska Native elders and leaders who attended the listening sessions on this subject. These leaders reminded the Department representatives that Alaska Native tribes are actively seeking to have land taken into trust and that the Withdrawal Memorandum places unnecessary barriers on the process. Thank you for taking the time to consider these comments.

Sincerely,


Maggie Massey

²⁵ *Akiachak Native Community*, 827 F.3d at 105 (citing 79 Fed. Reg. 76,888, 76,889-90 (2014)).