Michigan Journal of Race and Law

Volume 29

2024

Reviving Indian Country: Expanding Alaska Native Villages' Tribal Land Bases Through Fee-to-Trust Acquisitions

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https://doi.org/10.36643/mjrl.29.1.reviving

REVIVING INDIAN COUNTRY: EXPANDING ALASKA NATIVE VILLAGES' TRIBAL LAND BASES THROUGH FEE-TO-TRUST ACQUISITIONS

Alexis Studler[*]

ABSTRACT

For the last fifty years, the possibility of fee-to-trust acquisitions in Alaska has been precarious at best. This is largely due to the Alaska Native Claims Settlement Act of 1971 (ANCSA), which eschewed the traditional reservation system in favor of corporate land ownership and management. Despite its silence on trust acquisitions, ANCSA was and still is cited as the primary prohibition to trust acquisitions in Alaska. Essentially, ANCSA both reduced Indian Country in Alaska and prohibited any opportunities to create it, leaving Alaska Native Villages without the significant territorial jurisdiction afforded to Lower 48 tribes. However, recent policy changes from the Department of Interior reaffirmed the eligibility of trust acquisitions post-ANCSA and a proposed rule from the Bureau of Indian Affairs signals a favorable presumption of approval for Alaska Native fee-to-trust applications. This Note reviews the history and controversy of trust acquisitions in Alaska, and more importantly, it demonstrates the methods in which Alaska Native Villages may still acquire fee land for trust acquisitions after ANCSA.

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INTRODUCTION

In federal Indian law, "Alaska-specific provisions reflect the simple truth that Alaska is often the exception, not the rule."[1] This pervasive and partially correct statement exemplifies the disparate treatment of Alaska Natives in federal Indian policy.[2] In a more literal sense, an "Alaska exception" in the Department of Interior's ("Interior") authority to take land into trust for tribes barred Alaska Native trust acquisitions until 2014.[3] While *that* Alaska exception is officially "off the books," it lingers in Interior's wavering position on the legality of trust acquisitions in Alaska.[4]

The latest development in Interior's position is a progressive one: at the end of 2022 Interior Solicitor Robert Anderson issued an opinion reaffirming the Secretary of Interior's authority to acquire land in trust for

1. Sturgeon v. Frost, 577 U.S. 424, 440 (2016). *Sturgeon* is specifically referencing public land statutes, but the quote is used repeatedly in Alaska cases. *See, e.g.*, Cully Corp. v. United States, 160 Fed. Cl. 360, 366 (2022), *reconsideration denied*, 163 Fed. Cl. 676 (2022); Yellen v. Confederated Tribes of the Chehalis Rsrv., 141 S. Ct. 2434, 2438 (2021).

2. *See generally* Natalie Landreth & Erin Dougherty, *The Use of the Alaskan Native Claims Settlement Act to Justify Disparate Treatment of Alaska's Tribes*, 36 AM. INDIAN L. REV. 321, 321-27 (2012) (describing how the sovereignty of Alaska Natives is frequently questioned, especially in respect to tribal land and jurisdiction).

3. Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76888, 76889 (Dec. 23, 2014) (codified at 25 C.F.R. pt. 151).

4. Robert T. Anderson, Solicitor Opinion M-37076, The Secretary's Land into Trust Authority for Alaska Natives and Alaska Tribes Under the Indian Reorganization Act and the Alaska Indian Reorganization Act 11-14 (Nov. 16, 2022) [hereinafter Anderson Opinion] (summarizing the changes in Interior's policy towards trust acquisitions in Alaska).

Alaska Natives and establish reservations in the state.[5] Shortly after, Interior approved a trust acquisition in downtown Juneau for the Central Council of Tlingit and Haida Indian Tribes of Alaska.[6] The Central Council of Tlingit and Haida Indian Tribes has four additional fee-to-trust applications pending, and other Villages are following suit;[7] both the Ninilchik Traditional Council and the Native Village of Fort Yukon have submitted applications.[8] Solicitor Anderson's recent opinion and Interior's subsequent trust acquisition provides a hopeful signal that federal Indian policy in Alaska is aligning with that of the Lower 48—eliminating the Alaska exception for new, protected tribal land bases.

However, by January 17th, 2023, the State of Alaska filed suit alleging that the Tlingit and Haida trust acquisition was unlawful and challenging the Secretary's authority to make trust acquisitions in the state.[9] Ultimately, the State is not suing over 787 square feet of Tlingit and Haida trust land; rather, it aims for a judicial ruling categorically denying any future trust acquisitions in Alaska.[10] The suit jeopardizes Alaska Natives' only option to expand their territorial jurisdiction after the Alaska Native Claims Settlement Act ("ANCSA").

In 1971, Congress enacted ANCSA to settle aboriginal claims to millions of acres across the State of Alaska, effectively clearing the way for oil and gas development.[11] ANCSA was a highly experimental attempt to avoid the perceived shortcomings of the reservation system in the Lower 48.[12] Rather than issuing the settlement proceeds to benefitting tribes, Congress created for-profit Alaska Native Corporations to receive and manage assets resulting from the settlement.[13] While ANCSA revoked all but one of the existing reservations in Alaska,[14] it never addressed the Secretary's authority to take land into trust for Alaska Natives after ANCSA.

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5. *Id*. at 3.

6. Land Acquisitions; Central Council of Tlingit and Haida Indian Tribes of Alaska, Alaska, 87 Fed. Reg. 73321 (Nov. 29, 2022).

7. Complaint at 6, State of Alaska v. Newland, No. 3:23-cv-00007-SLG (D. Alaska filed Jan. 17, 2023).

8. *Id*.

9. *Id*. at 1-2.

10. *See id*. at 3 (requesting that the court "conclusively decide whether the Secretary's authority to take lands into trust for Alaska Natives . . . survived the passage of ANCSA").

11. *See generally* DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 165–67 (3d ed. 2012) (describing the events and pressures leading to the enactment of ANCSA); *see also* DONALD C. MITCHELL, TAKE MY LAND TAKE MY LIFE: THE STORY OF CONGRESS'S HISTORIC SETTLEMENT OF ALASKA NATIVE LAND CLAIMS, 1960-1971 3-9 (2001).

12. MITCHELL, *supra* note 11, at 157.

13. *See* 43 U.S.C. §§ 1606, 1607.

14. 43 U.S.C. § 1618(a).

Solicitor Anderson's opinion and a recent proposed rule from the Bureau of Indian Affairs ("BIA") streamline the trust acquisition process. Interior's current policy states that any fee land owned by an Alaska Native individual or Village may be eligible for fee-to-trust applications.[15] Villages still have opportunities for acquiring fee land post-ANCSA; Village governments have successfully acquired fee land by transferring land from Alaska Native Corporations[16] and by dissolving state law municipalities.[17] Additionally, a municipal trust land program managed by the State enables partial land transfers to Villages within Village boundaries.[18]

Nonetheless, ANCSA was and still is cited as the primary prohibition to trust acquisitions in Alaska.[19] This interpretation of ANCSA has left Alaska Native Villages frequently characterized as "sovereigns without territorial reach" and without Indian Country.[20] This is not to posit that the Villages cannot exercise tribal jurisdiction;[21] unlike tribes within Indian Country, Alaska Native Villages exercise tribal jurisdiction as "membership- and interest-based" rather than land-based.[22]

While land is not the "magic bullet" for the exercise of tribal sovereignty,[23] there are several benefits to developing a protected tribal land base designated as Indian Country.[24] For Alaska Natives specifically, tribal territorial jurisdiction could enhance economic development, enable

15. 25 C.F.R. §§ 151.2, 151.4 (2023).

16. CASE & VOLUCK, *supra* note 11, at 391.

17. *See* ALASKA DEP'T OF COM., CMTY., & ECON. DEV., CITY GOVERNMENTS IN ALASKA THAT HAVE BEEN DISSOLVED OR OTHERWISE CEASED TO EXIST (Apr. 29, 2015), https://www.commerce.alaska.gov/web/Portals/4/pub/LBC/04_29_15%20LIST%20OF%20DISSOLVED%20ALASKA%20CITY%20GOVERNMENTS.pdf (listing dissolved Alaska municipalities succeeded by tribal governments).

18. ALASKA STAT. § 44.33.755(a)-(b). *See, e.g.*, ALASKA DEP'T OF COM., CMTY., & ECON. DEV., PUBLIC NOTICE REGARDING DISPOSAL OF MUNICIPAL TRUST LAND IN MINTO, ALASKA BY THE MUNICIPAL LANDS TRUSTEE (June 4, 2012), https://aws.state.ak.us/OnlinePublicNotices/Notices/View.aspx?id=163998.

19. Hilary C. Tompkins, Solicitor Opinion M-37043, Authority to Acquire Trust Land in Alaska (Jan. 13, 2017) at 8 [hereinafter Tompkins Opinion] (quoting "Trust Land for the Natives of Venetie and Arctic Village," Memorandum from Thomas W. Fredericks, Associate Solicitor - Indian Affairs, to the Assistant Secretary Thomas W. 3 (Sept. 15, 1978)).

20. Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 526 (1998) (quoting Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Vill. of Venetie Tribal Gov't, 101 F.3d 1286, 1303 (9th Cir. 1996)).

21. In this Note, "Alaska Native Villages" or "Villages" refers to the tribal governments, councils, or other entities of Alaska Natives. It does not include village corporations.

22. Landreth & Dougherty, *supra* note 2, at 322.

23. *Id.* at 333.

24. *See generally* Marilyn J. Ward Ford, *Indian Country and Inherent Tribal Authority: Will They Survive ANCSA?*, 14 ALASKA L. REV. 443, 451 (1997) (listing various authorities associated with Indian Country).

regulations of abused substances, improve Village law enforcement, and bolster self-governance and self-determination.[25]

This Note does not attempt to advise Alaska Native Villages to or to not put their land into trust. It reinforces the fact that the choice to expand territorial jurisdiction is a choice inherent to tribal sovereignty and must be afforded to the Alaska Native Villages accordingly.

This Note argues that the availability of trust acquisitions in Alaska is critical to facilitate a fuller form of tribal self-determination after ANCSA. It does so by summarizing the current and historical status of trust land in Alaska, reviewing recent developments in trust acquisition rules that may impact Alaska trust acquisitions, and exploring the avenues through which Alaska Natives can expand tribal territorial jurisdiction through trust acquisitions.

Part I summarizes the current state of Alaska Native Village tribal jurisdiction and the statutes that inform the status of Indian Country in Alaska. Part II explores both the opportunities and threats to trust acquisitions in Alaska—including Interior's shifting policies, the Supreme Court's *Carcieri* decision,[26] and new proposed regulations. Part III explores the opportunities and considerations for Alaska Native Villages in acquiring land through corporate transfers, municipal dissolution, and municipal trust land transfers.

PART I: A BRIEF HISTORY OF INDIAN COUNTRY IN ALASKA

Federal treatment of Alaska Natives has been "scattershot" at best.[27] After the Treaty of Cession in 1867, every branch of the federal government oscillated on whether federal Indian law applied to Alaska Natives at all.[28] For example, early court decisions determined Alaska Natives were "not tribal" in the same sense as American Indians.[29] Statutes enacted between 1884 and 1900 protecting aboriginal title were presumed to be inapplicable

25. *See generally* William H. Holley, *Starting from Scratch: Reasserting "Indian Country" in Alasky by Placing Alaska Native Land into Trust*, 11 FLA. A&M U.L. REV. 333, 343-49 (2016) (reviewing challenges faced by Alaska Native Villages and general benefits of trust land).

26. Carcieri v. Salazar, 555 U.S. 379 (2009).

27. See Jon W. Katchen & Nicholas Ostrovsky, *Strangers in Their Own Land: A Survey of the Status of the Alaska Native People from the Russian Occupation Through the Turn of the Twentieth Century*, 39 ALASKA L. REV. 1 (2022), for a comprehensive survey of Alaska's unique legal history and its impact on Alaska Natives.

28. *See generally* Thomas L. Sansonetti, Solicitor Opinion M-36975, Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers (Jan. 11, 1993) at 15-22 [hereinafter Sansonetti Opinion] (describing early federal Indian policy in Alaska).

29. *In re* Sah Quah, 31 F. 327, 329 (D. Alaska 1886) (holding that the United States had not recognized the tribal independence or affiliation of Alaska Natives).

to Alaska Natives.[30] It was not until the twentieth century that the judiciary[31] and Congress[32] acknowledged that federal Indian law applied to Alaska Natives. Reserves were established for the exclusive use of Alaska Natives[33] and in 1923 Interior asserted authority over negotiating leases as it did for Lower 48 tribes.[34] By 1932 an Interior Department Solicitor stated, "[i]t must now be regarded that the laws of the United States with respect to the American Indians are applicable generally to the Natives of Alaska."[35] Nonetheless, Alaska Native tribes were not formally recognized under federal law until 1994,[36] or under state law until 2022.[37]

Recognition of tribal land in Alaska fared little better than the formal recognition of tribal status. Early statutes regarding land claims entitled Alaska Natives to property they occupied as individuals but not as tribes.[38] Similarly, whether Alaska Native land was eligible for any claims of

30. CASE & VOLUCK, *supra* note 11, at 24. These statutes included: Organic Act of 1884, 23 Stat. 24; Act of Mar. 3, 1891, 26 Stat. 1095; Homestead Act of May 14, 1898, 20 Stat. 412; and Act of June 6, 1900, 31 Stat. 330.

31. *In re* Naturalization of Minook, 2 Alaska 200, 222-23 (D. Alaska 1904) (holding that the General Allotment Act of 1887 was applicable to Alaska Natives as well as American Indians); United States v. Berrigan, 2 Alaska 442, 451 (D. Alaska 1905) (holding that Alaska Natives could not sell land to non-Natives).

32. The Nelson Act of 1905 formalized that federal services were provided to Alaska Natives based on their status as Indigenous Peoples, aligning with the federal government's treatment of Lower 48 tribes. Act of Jan. 27, 1905, ch. 277, 33 Stat. 617; CASE & VOLUCK, *supra* note 11, at 26.

33. CASE & VOLUCK, *supra* note 11, at 27.

34. *Leasing of Lands Within Reservations Created for the Benefit of the Natives of Alaska*, 49 PUB. LANDS DEC. 592, 593.

35. Sansonetti Opinion, *supra* note 28, at 25 (quoting 54 Interior Dec. 39, l Op. Solic. on Indian Affs. 329, at 42 (1932)).

36. In 1993, Interior included 227 Alaska tribes to its list of federally recognized tribes. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54364, 54368 (Oct. 21, 1993). Although the first list of federally recognized tribes in 1979 noted that Alaska Natives should be added at a later date, a preliminary list of Alaska Native entities eligible for federal recognition was not published until 1982. *See* Indian Tribal Entities that have a Government-to-Government Relationship with the United States, 44 Fed. Reg. 7235 (Feb. 9, 1979); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 47 Fed. Reg. 53130, 53133-35 (Nov. 24, 1982). ANCSA and its creation of Alaska Native Corporations contributed to the confusion surrounding recognition of Alaska Native Villages as Interior included both corporate entities and tribal governments on the 1988 list. Native Entities Within the State of Alaska Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 53 Fed. Reg. 52832 (Dec. 29, 1988). The 1993 list corrected this and removed the corporate entities. 58 Fed. Reg. 54365-66. Congress ratified the publication of the list in 1994 and required Interior to republish the list annually. 25 U.S.C. §§ 479a, 479a-1 (1994).

37. H.R. 123, 32d Leg., 1st Reg. Sess. (Alaska 2022). State recognition does not carry the same legal significance as federal recognition and is symbolic.

38. CASE & VOLUCK, *supra* note 11, at 24. *See also* Miller v. United States, 159 F.2d 97, 1002 (9th Cir. 1947) (holding that the Treaty of Cession had extinguished any aboriginal title).

aboriginal title[39] or Indian Country status was initially unclear.[40] While Alaskan aboriginal title was eventually confirmed by the Supreme Court in 1955,[41] the status of Alaskan Indian Country remains muddled in a century-long debate informed by two statutory schemes: the Indian Reorganization Act ("IRA") and the Alaska Native Claims Settlement Act.

A. *Alaska Native Tribal Jurisdiction and the Benefits of Indian Country*

The "Indian Country" designation is critical to tribal governments' full exercise of inherent sovereign powers; it delineates tribal jurisdiction for both civil and criminal purposes.[42] Indian Country is a statutory term of art that encompasses reservations, "dependent Indian communities," Indian allotments, and land held in trust.[43] This last category of land held in trust, or "trust land," is property held in title by the United States[44] for the benefit of "individual Indians or tribes."[45] Trust land was not originally included under the umbrella of Indian Country;[46] its inclusion is judicially-imposed.[47] It enjoys the same jurisdictional benefits as the other categories of Indian Country. Thus, having land designated as trust land, or Indian Country generally, usually precludes the application of state law and enables the exercise of a variety of governmental powers.[48]

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39. CASE & VOLUCK, *supra* note 11, at 24. *But see* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278-80 (1955) (holding that the Tlingit tribe did have aboriginal title, but that it was only a right of occupancy).

40. *See* United States v. Seveloff, 1 Alaska Fed. 64, 71 (D. Or. 1872). S*ee generally* Deborah Niedermeyer, *"The True Interests of a White Population": The Alaska Indian Country Decisions of Judge Matthew P. Deady*, 21 N.Y.U. J. INT'L L. & POL'Y 195, 195-96 (1988) (noting that Alaska was not initially considered Indian Country).

41. *Tee-Hit-Ton*, 348 U.S. 272, 278-80.

42. *See* Kristen A. Carpenter, *Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 TULSA L.J. 73, 78 (1999). The Supreme Court has noted that "there is a significant territorial component to tribal power." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 136, 142 (1982).

43. 18 U.S.C. § 1151. While this definition was originally coined to determine federal criminal jurisdiction, courts have repeatedly applied it "to questions of both civil and criminal jurisdiction." Indian Country. U.S.A. v. Oklahoma Tax Comm'n, 829 F.2d 967, 973 (10th Cir. 1987), *cert. denied*, 478 U.S. 1218 (1988); *see also* United States v. McGowan, 302 U.S. 535, 537-40 (1938) (holding that land purchased by the federal government and held in trust for American Indians was considered Indian country).

44. 25 U.S.C. § 2201(4).

45. 25 C.F.R. § 151.2 (2023).

46. 18 U.S.C. § 1151.

47. *McGowan*, 302 U.S. at 537-40.

48. *See id*. *But see* Nevada v. Hicks, 533 U.S. 353, 364-66 (limiting tribal jurisdiction over state police officers in Indian Country).

Specifically, tribal governments may enact and impose taxes, enforce tribal laws, adjudicate civil and criminal disputes including minor criminal offenses occurring on tribal lands, issue marriage licenses, buy and sell real property, regulate land use, provide essential and non-essential governmental services, and regulate the affairs of non-Natives on tribal land.[49]

Perhaps more importantly, aside from its legal importance, Indigenous authors characterize Indian Country as "a place that marks the endurance of Indian communities against the onslaught of a marauding European society . . . a place that holds the promise of fulfillment."[50]

For a variety of historical and statutory reasons,[51] Alaska has significantly less Indian Country than the Lower 48.[52] This does not deprive Alaska Native Villages of tribal jurisdiction,[53] as a "tribe's authority over its reservation or Indian Country is incidental to its authority over its members."[54] However, it does shift the basis of jurisdiction to "membership- and interest-based" rather than "land-based."[55] Thus, Alaska Native tribal courts retain jurisdiction over both their members and nonmembers who have entered a consensual relationship with the tribe and its members.[56] For example, relatively recent cases have solidified concurrent state and tribal jurisdiction over child welfare cases,[57] required State enforcement of tribal court decisions,[58] and espoused judicial comity with tribal courts as well as tribal court exhaustion.[59]

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49. *See* Ford, *supra* note 24, at 451.

50. FRANK POMMERSHEIM, BRAID OF FEATHERS 11 (1995).

51. There are no treaties with Alaska Natives as Congress ceased treaty-making in 1871, only four years after the Alaska Territory "purchase." Sansonetti Opinion, *supra* note 28, at 16. Very few reservations were established in Alaska and all but one were dissolved by ANCSA in 1971. *See* 43 U.S.C. § 1618(a). A more detailed discussion of ANCSA is included later in this Part.

52. The existence of any Indian Country in Alaska was in flux before ANCSA and the dissolution of reservations. *See generally* Niedermeyer, *supra* note 40. It is generally accepted that any remaining reserves, allotments, and trust parcels in Alaska are Indian Country. Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 527 n.2 (1998); *see also* CASE & VOLUCK, *supra* note 11, at 391.

53. John v. Baker, 982 P.2d 738, 751-53 (Alaska 1999) (holding that internal functions involving tribal membership and domestic affairs lie within the inherent sovereign powers retained by the tribe).

54. *See* Native Vill. of Venetie I.R.A. Council v. State of Alaska, 944 F.2d 548, 558 n.12 (9th Cir. 1991).

55. Landreth & Dougherty, *supra* note 2, at 322. See Mitchell Forbes, *Beyond Indian Country: The Sovereign Powers of Alaska Tribes Without Reservations*, 40 ALASKA L. REV. 171-88 (2023) for a recent and thorough discussion of the development and current state of membership-based jurisdiction in Alaska Native Villages.

56. *John*, 982 P.2d at 756; *see also* State of Alaska v. Cent. Council of Tlingit & Haida Indian Tribes, 371 P.3d 255, 272-73 (Alaska 2016).

57. *John*, 982 P.2d at 759.

58. *State of Alaska*, 371 P.3d at 257.

59. *See* Simmonds v. Parks, 329 P.3d 995, 1011-14 (Alaska 2014).

However, while Alaska Native Villages may not need Indian Country to exercise their inherent sovereignty, certain aspects of sovereignty may only be exercised territorially; therefore, there are a number of benefits to putting land into trust. For example, because the Indian Country designation is necessary to regulate economic activity and tax transactions occurring in tribal territory, trust land is an important tool for managing tribal economic development.[60] Additionally, a number of federal grant programs—such as those for housing or environmental and cultural resource protection—are only available on land held in trust.[61] For rural Villages specifically, an Alaska Commission on Rural Governance and Empowerment Report noted that putting land into trust could effectively manage "a range of land-based jurisdictional issues involving alcohol and other substance abuse control, economic development, environmental management and local governance innovation."[62]

Putting land into trust could also benefit the State, for example, by alleviating the strain on Alaska's criminal justice system. Alaska is one of five states where concurrent state and tribal jurisdiction over criminal matters is mandated by Public Law 280.[63] While state courts exercise comity with tribal courts over some criminal misdemeanors, Alaska Native and Village tribal courts may not be able to exercise tribal jurisdiction over non-members without the Indian Country designation. For example, the Violence Against Women Reauthorization Act of 2013 provides for special tribal criminal jurisdiction over offenses committed by non-members *in Indian Country*.[64] Despite the fact that Alaska Natives are several times more likely to become victims of violent crime than other Alaskans,[65] their communities have the least law enforcement presence.[66] But, a 2013 report from the Indian Law and Order Commission ("ILOC") suggested that because remote Villages are better positioned, culturally and

60. *See, e.g.*, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980) ("[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status").

61. Holley, *supra* note 25, at 348.

62. ALASKA COMM'N ON RURAL GOVERNANCE AND EMPOWERMENT, FINAL REPORT TO THE GOVERNOR 65 (June 1999).

63. Act of Aug. 15, 1953, 67 Stat. 588 (now codified as amended in various provisions of 18 U.S.C. § 1162, 25 U.S.C. § 1321, and 28 U.S.C. § 1360) (transferring federal law enforcement authority within certain tribal nations to state governments in California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska).

64. Pub. L. No. 113-4, 127 Stat. 54.

65. INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE U.S. (2013) at 41 [hereinafter ILOC Report].

66. *Id.* at 39.

geographically, to address criminal justice in their communities than the highly centralized state system, [67] a tribal trust land base would facilitate criminal justice administration in Alaska Native Villages.[68]

Most importantly, putting land into trust protects Alaska Natives' right to self-governance and self-determination.[69] Proponents of trust acquisitions in Alaska note trust land would "improve Alaska Native tribes' ability to maintain their cultural integrity, including language preservation, religion, traditional Native foods, and other aspects of tribal identity and sovereignty."[70] Just as taking land into trust for tribes in the Lower 48 "succeeded in allowing tribes to reconsolidate and preserve homelands,"[71] land held in trust for Alaska Natives would also protect traditional land bases, including by bridging gaps between existing allotments.[72] Trust land would enable tribal governments, rather than corporate entities,[73] "to guide development to take more useful forms and improve standards of living for all tribal members."[74]

B. *The Indian Reorganization Act*

Often referred to as "the Indian New Deal,"[75] the Indian Reorganization Act of 1934 signaled a progressive move toward tribal self-determination after "a century of oppression and paternalism."[76] It established the "machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."[77] Contrary to the assimilation policies of preceding allotment statutes, the IRA emphasized the protection of tribal land bases,[78] encouraged tribal constitutions and bylaws,[79] and granted Interior authority to take land into trust[80] and establish reservations.[81]

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67. *See id.* at 35-51.

68. *See id.* at 51.

69. *See* Land Acquisitions in the State of Alaska, 79 Fed. Reg. at 76891.

70. *Id.*

71. *Id.*

72. Holley, *supra* note 25, at 348.

73. One of the criticisms leveraged against ANCSA is that Alaska Native Corporations did not adequately provide and manage economic development in remote Villages, leading to mass emigration to urban centers. See MITCHELL, *supra* note 11, at 504, 536.

74. Land Acquisitions in the State of Alaska, 79 Fed. Reg. at 76891.

75. Coleman v. U.S. Bureau of Indian Affs., 715 F.2d 1156, 1160 (7th Cir. 1983).

76. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973)

77. Morton v. Mancari, 417 U.S. 535, 542 (1974).

78. Sansonetti Opinion, *supra* note 28, at 29.

79. 25 U.S.C. § 5123.

80. 25 U.S.C. § 5108.

81. 25 U.S.C. § 5110.

While the IRA's definition of "Indians" included Alaska Natives,[82] it was not fully applicable in Alaska due to an unintentional drafting error.[83] Congress remedied that error in 1936 through an amendment to the IRA sometimes called the "Alaska Indian Reorganization Act" ("Alaska IRA")[84] that tailored the existing classifications of the IRA to better fit Alaska Natives.[85] The Alaska IRA provided that Alaska Natives were not "recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district may organize to adopt constitutions and bylaws and receive charters of incorporation and Federal loans" under the IRA.[86]

The Alaska IRA also extended the IRA's provisions authorizing the Secretary of Interior to take land into trust and establish reservations[87] to land in Alaska.[88] The Secretary instructed that only Villages consisting of "all Native residents" could exercise governmental powers and it was assumed these Villages would petition to create reservations.[89] Organizations of Alaska Natives occupying existing territorial municipalities alongside non-Natives or organizations of Alaska Natives based on common occupation could not.[90]

Pursuant to the Alaska IRA, sixty-nine Alaska Native Villages or regional groups adopted IRA constitutions, and over sixty also adopted corporate charters.[91] They were encouraged to use standard forms, and many constitutions did not specify what kind of IRA organization they

82. 25 U.S.C. § 5129.

83. CASE & VOLUCK, *supra* note 11, at 98; Sansonetti Opinion, *supra* note 28, at 29 (noting that many of the IRA's provisions only applied to tribes residing on reservations, effectively precluding most Alaska Natives).

84. Act of May 1, 1936, Pub. L. No. 74-538, 49 Stat. 1250 (1936) (codified as amended at 25 U.S.C. § 5119); Anderson Opinion, *supra* note 4, at 2.

85. 25 U.S.C. § 5119; FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 360-361 (2005).

86. 25 U.S.C. § 5119.

87. Prior to the Alaska IRA, some reserves were created via executive orders; however, Interior denied trust land status to any reserve lands that were not leased for natural resource extraction. CASE & VOLUCK, *supra* note 11, at 94-95. There were also "public purpose reserves" that were established via Executive Orders for vocational training. *Id.* at 96-97. Public purpose reserves also were not eligible for trust land status. *Id.* at 98.

88. 25 U.S.C. § 5119. The Alaska IRA also initially extended IRA § 2 to Alaska, which allowed the Secretary to designate public lands as reservations for Alaska Natives. CASE & VOLUCK, *supra* note 11, at 98-99. This section of the IRA was repealed by the Federal Land Policy and Management Act (FLPMA) Section 704(a). *See* 43 U.S.C. § 1701.

89. Sansonetti Opinion, *supra* note 28, at 32.

90. *Id.* at 32-33.

91. *Id.* at 33.

established.[92] The first two significant reservations, the Venetie Reserve and Karluk Fishing Reserve,[93] were established in 1943.[94] Eventually, a total of six reserves were established under the Alaska IRA, all of which earned trust land status.[95] However, all six IRA reservations were abolished with the passage of the 1971 Alaska Native Claims Settlement Act.[96]

C. *The Alaska Native Claims Settlement Act*

ANCSA is a stunningly complex and experimental statute that has cast uncertainty on both the existence of Indian Country[97] and even *recognizable tribes*[98] in Alaska decades after its enactment. The need for ANCSA originated from land claims disputes upon statehood. The Alaska Statehood Act admitted Alaska into the Union in 1959.[99] It required the State to disclaim "all right and title" to tribal lands[100] but permitted it to select 103 million acres of "vacant, unappropriated, and unreserved" public federal lands.[101] However, the boundaries and claims of aboriginal title in Alaska were left unclear and unsettled.[102] Alaska Natives protested the State's selections and claimed aboriginal title over most of the state.[103] In 1966, the Secretary of the Interior issued a moratorium on land conveyances until the Alaska Natives' claims could be settled by Congress.[104] The result was the 1971 passing of ANCSA.

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92. *Id*.

93. Reservation status was initially limited after the Alaska IRA, only available to small land bases associated with existing Villages, townsites, or areas with strictly proven occupancy. CASE & VOLUCK, *supra* note 11, at 99. Many early reservations or reserves in Alaska expressly included the purpose of protecting Alaska Natives from nonmember trapping and fishing. *See id*. at 100.

94. *Id*.

95. *See id*. at 106; s*ee also* FED. FIELD COMM. FOR DEV. PLANNING IN ALASKA, ALASKA NATIVES AND THE LAND: REPORT OF THE FEDERAL FIELD COMMITTEE 88 (1968), https://files.eric.ed.gov/fulltext/ED055719.pdf.

96. 43 U.S.C. § 1608.

97. *See* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 534 (1998) (holding that land transferred to tribes through ANCSA was not Indian Country).

98. Landreth & Dougherty, *supra* note 2, at 321.

99. Alaska Statehood Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339, as amended, and Presidential Proclamation of January 3. 1959, 72 Stat. 339 (codified as amended at Proclamation No. 3269, 24 Fed. Reg. 81 (Jan. 3, 1959)).

100. *Id*.

101. *Id*. at 340.

102. CASE & VOLUCK, *supra* note 11, at 167.

103. *Id*.; FED. FIELD COMM. FOR DEV. PLANNING IN ALASKA, ALASKA NATIVES AND THE LAND: REPORT OF THE FEDERAL FIELD COMMITTEE 244 (1968).

104. Pub. Land Order No. 4582, 34 Fed. Reg. 1025 (Jan 17, 1969); *see also* Alaska v. Udall, 420 F.2d 938, 939 (9th Cir. 1969) (upholding Interior's land freeze).

ANCSA extinguished all claims of aboriginal title[105] in exchange for approximately 45 million acres of land[106] and $962.5 million.[107] Unlike similar settlements in the Lower 48,[108] it "severed Native land ownership from Native government."[109] Rather than allocating settlement assets to tribal governments and their territory,[110] ANCSA mandated the sharing of assets among state-chartered Alaska Native village and regional corporations.[111] The over 200 village corporations were to select up to 23 million acres of surface estate within or around townships enclosing Native Villages,[112] while the twelve regional corporations received the subsurface estate allocations within their region in addition to subsurface estates of land conveyed to village corporations.[113] Eligible Alaska Natives also received shares in both the village and regional corporations with which they were affiliated.[114]

ANCSA did not address the tribal sovereignty and jurisdiction of Alaska Native Villages beyond the revocation of reservations and the preservation of allotments.[115] Some scholars have insinuated that the village

105. 43 U.S.C. § 1603.

106. 43 U.S.C. §§ 1611, 1613, 1615, 1618.

107. 43 U.S.C. §§ 1605, 1608.

108. 43 U.S.C. §§ 1606, 1607; *see, e.g.*, South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116, 107 Stat 1118 (codified at 25 U.S.C. § 941) (Catawba); Rhode Island Claims Settlement Act, Pub. L. No. 95-395, 92 Stat. 813 (codified at 25 U.S.C. §§ 1701-16) (Narragansett); Maine Indian Claims Settlement Act, Pub. L. No. 96-420, 94 Stat. 1785 (codified at 25 U.S.C. §§ 1721-35) (Passamaquoddy, Penobscot, and Maliseet); Connecticut Indian Land Claims Settlement, Pub. L. No. 98-134, 97 Stat. 851 (codified at 25 U.S.C. §§ 1751-60) (Mashantucket Pequot Tribe); Puyallup Tribe of Indians Settlement Act of 1989, Pub. L. No. 101-41, 103 Stat. 83 (codified at 25 U.S.C. § 1773) (Puyallup); Mohegan Nation Land Claims Settlement, Pub. L. No. 103-377, 108 Stat. 3501 (codified at 25 U.S.C. § 1775) (Mohegan).

109. CASE & VOLUCK, *supra* note 11, at 390.

110. 43 U.S.C. § 1618. The Annette Islands (Metlakatla) Reserve was created by statute in 1891 for Metlakatlans who had emigrated from British Columbia to Alaska. Act of Mar. 30, 1891, 25 Stat. 1101 (codified as amended at 25 U.S.C. § 495 (2016)).

111. 43 U.S.C. §§ 1606, 1607.

112. 43 U.S.C. § 1613(b). Leftover land not selected by village corporations was acquired by regional corporations to be distributed "on an equitable basis" to Villages within its region. 43 U.S.C. § 1611(b).

113. Land allocations were based on population. 43 U.S.C. § 1613(a). Six regions had relatively large land claims with relatively small populations, therefore losing more land relative to their populations. CASE & VOLUCK, *supra* note 11, at 171-172. These "land lost" regions were entitled to surface and subsurface estates of an additional 16 million acres as a remedy. 43 U.S.C. § 1611(c). Ahtna, Arctic Slope, Chugach, Cook Inlet, Doyon, and NANA regional corporations received this benefit. CASE & VOLUCK, *supra* note 11, at 172. An additional thirteenth regional corporation was later added for Alaska Natives not residing in Alaska at the time of enactment. 43 U.S.C. § 1606(c).

114. 43 U.S.C. § 1606.

115. 43 U.S.C. §§ 1617, 1618.

corporations essentially replaced Village governments,[116] and others have argued that ANCSA "specifically abrogated" an "extended trust relationship with the federal government."[117] For decades, commentators contended that ANCSA was a *de facto* termination statute,[118] pointing to its oft-cited declaration of policy:

> [T]he settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, *without creating a reservation system or lengthy wardship or trusteeship* . . . .[119]

In a 1993 Opinion issued by Solicitor Thomas Sansonetti ("Sansonetti Opinion"), Interior acknowledged that the lack of trust land, abolition of reservations, and minimal federal supervision of ANCSA corporations paralleled the tribal termination legislation of the 1950s.[120] However, scholars note that ANCSA differs from termination legislation by preserving the federal trust relationship between the United States and Alaska Natives based on "their status as tribal people, not because of the status of their land."[121] While the recognition of Alaska Native sovereignty was judicially confirmed post-ANCSA, the Indian Country question would not be addressed until *Alaska v. Native Village of Venetie Tribal Government*.[122]

D. *Alaska v. Native Village of Venetie Tribal Government*

In 1943, Interior designated 1.8 million acres of land as the Chandalar Reservation for the Neets'aii Gwich'in.[123] This reservation was revoked pursuant to ANCSA, but Section 19 of the Act permitted

116. *See* Martha Hirshfeld, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form,* 101 YALE L.J. 1331, 1354-1355 (1992) (advocating that ANCSA corporations "receive quasi-governmental powers").

117. Sarah Arnott, *Legislation: The Alaska Native Claims Settlement Act: Legislation Appropriate to the Past and Future*, 9 AM. INDIAN L. REV. 135, 155 (1981).

118. *See, e.g.*, Benjamin W. Thompson, *The De Facto Termination of Alaska Native Sovereignty: An Anomaly in an Era of Self-Determination*, 24 AM. INDIAN L. REV. 421, 421-22 (2000).

119. 43 U.S.C. § 1601(b) (emphasis added).

120. Sansonetti Opinion, *supra* note 28, at 103-04.

121. Landreth & Dougherty, *supra* note 2, at 326.

122. Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998).

123. Carpenter, *supra* note 42, at 76.

village corporations on former reservations to keep the surface and subsurface estates of those lands in lieu of all other ANCSA benefits.[124] The Venetie and Arctic Village Corporations exercised Section 19 to transfer fee title of the former Chandalar Reservation to the Venetie Tribal Government and sought to tax business activities occurring in the reservation under the rules governing Indian Country.[125]

However, the Supreme Court held that lands conveyed pursuant to ANCSA did not constitute a "dependent Indian community," which would have been the only applicable category of Indian country according to the Court.[126] To meet the "dependent Indian community" definition, the land must be set aside "for the use of Indians as Indian land" and held under federal superintendence.[127] The Court asserted former ANCSA corporation could not meet either requirement because ANCSA lands were transferred in unrestricted fee title, so Venetie could use it for "non-Indian purposes," and "ANCSA's settlement provisions were intended to avoid a lengthy wardship or trusteeship" associated with federal superintendence.[128] As a result, any land conveyed pursuant to ANCSA, even if it ended up in tribal ownership, would not be considered Indian Country.

PART II: REASSERTING TRUST ACQUISITIONS FOR ALASKA NATIVES

After ANCSA and *Venetie*, Alaska Native Villages became characterized as "sovereigns without territorial reach,"[129] and Indian Country in Alaska was limited to allotments, trust land, or other restricted land set aside for federal superintendence.[130] Although multiple village corporations have conveyed land in fee simple to Village governments, without further action, it will not constitute or confer the benefits of Indian Country.[131] However, one option to convert such fee land into Indian

124. 43 U.S.C. § 1618. The reservations (and associated villages) that opted to do this were: St. Lawrence Island (Gambell and Savoonga), Elim (Elim), Chandalar (Venetie and Arctic Village) (this reservation was renamed the Venetie Reservation when the land was transferred at a later date), Tetlin (Tetlin), and Klukwan (Chilkat Indian Village). CASE & VOLUCK, *supra* note 11, at 172.

125. Venetie, 522 U.S. at 524-25.

126. *Id.* at 527.

127. *Id.*

128. *Id.* at 533. The Court noted there was federal superintendence, but not *enough*: "federal protection of the Tribe's land is essentially limited to a statutory declaration that the land is exempt from adverse possession claims, real property taxes, and certain judgments as long as it has not been sold, leased, or developed." *Id.*

129. *Id.* at 526.

130. CASE & VOLUCK, *supra* note 11, at 391.

131. *Id.*

Country is to put it into trust. Over the past decade, Alaska Natives launched a successful campaign to remove the "Alaska exception" from the Secretary of Interior's authority to acquire new trust land in Alaska, reopening the opportunity to expand Indian Country through trust acquisitions.

A. *Akiachak and Removing "the Alaska Exception"*

Until 2014, the Department of the Interior interpreted ANCSA as precluding any new Alaska trust land acquisitions under Section 5 of the IRA.[132] The land into trust regulation, 25 C.F.R. Part 151.1 ("Part 151"), stated it 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 Reserve or its members."[133] This exclusion, commonly called the "Alaska exception," derived from a 1978 memorandum from Associate Solicitor Thomas W. Fredericks ("1978 Opinion") regarding *Venetie*. Citing ANCSA's policy declaration to avoid "creating a reservation system or lengthy wardship or trusteeship," he concluded that it would be an abuse of discretion to accept the former reservation lands into trust.[134] Despite the later withdrawal of the Fredericks Opinion[135] and acknowledgements that the validity of the Alaska exception was questionable,[136] it remained in place "without a clear legal basis or policy rationale."[137]

In 2006, Akiachak Native Community, Chalkyitsik Village Council, Tuluksak Native Community, and the Chilkoot Indian Association (collectively "Akiachak") successfully sought judicial review of the Alaska exception in *Akiachak Native Community v. Salazar*.[138] In 2013, the D.C.

132. *See* 25 C.F.R. § 151.1 (1980); *see also* Anderson Opinion, *supra* note 4, at 11.

133. 25 C.F.R. § 151.1 (1980); *see* Land Acquisitions in the State of Alaska, 79 Fed. Reg. at 76889.

134. 43 U.S.C. § 1601(b); Memorandum from Thomas W. Fredericks, Assoc. Solic. for Indian Affs., to Forrest Gerard, Assistant Sec'y of Indian Affs., Tr. Land for the Natives of Venetie and Arctic Vill. 3 (Sept. 15, 1978).

135. Memorandum from John Leshy, Solic., to Assistant Sec'y of Indian Aff., Rescinding the Sept. 15, 1978, Op. of the Assoc. Solic. for Indian Affs. Entitled Tr. Land for the Natives of Venetie and Arctic Vill. 1 (Jan. 16, 2001).

136. Acquisition of Title to Land in Trust, 66 Fed. Reg. 3452, 3454 (Jan. 16, 2001) (preamble to the final rule stating that the Department would reconsider the Alaska exception in next three years—it did not).

137. Anderson Opinion, *supra* note 4, at 13.

138. Akiachak Native Cmty. v. Salazar, 935 F. Supp. 2d 195 (D.D.C. 2014), *on reconsideration in part sub nom.* Akiachak Native Cmty. v. Jewell, 995 F. Supp. 2d 1 (D.D.C. 2013), *vacated sub nom.* Akiachak Native Cmty. v. U.S. Dep't of Interior, 827 F.3d 100 (D.C. Cir. 2016), *and vacated sub nom.* Akiachak Native Cmty. v. United States Dep't of Interior, 827 F.3d 100 (D.C. Cir. 2016).

District Court held that the Alaska exception violated the IRA's privileges and immunities clause barring "any regulation . . . that discriminates among federally recognized . . . [t]ribes relative to the privileges and immunities available to them by virtue of their status as Indian tribes."[139] The court noted that ANCSA did not explicitly revoke trust land eligibility[140] and that such an aspect of tribal sovereignty cannot be implicitly repealed.[141]

During the decade-long *Akiachak* litigation,[142] Interior amended Part 151 to remove the Alaska exception ("2014 Final Rule")[143] and Solicitor Hilary Tompkins issued Solicitor Opinion M-37043 ("Tompkins Opinion"), memorializing the Department's views on the applicability of IRA Section 5 in Alaska.[144] The "rule gives Alaska Native tribes the option of applying to have fee land taken into trust through the same procedures as Indian tribes elsewhere in the United States."[145] With regard to any lands transferred under ANCSA, the rule states: "[i]f an application for ANCSA or other lands owned by a tribe meets the statutory and regulatory criteria, the land could be taken into trust."[146] Land that is eligible for fee-to-trust applications includes "fee title to any alienable land, including ANCSA lands," held by Alaska Native tribes or individuals.[147] In the 2014 Final Rule, Interior's position is clear: *any* fee land owned by Alaska Natives may be applied to be taken into trust.

Despite the ruling in *Akiachak* and the 2014 Final Rule, the certainty of trust land acquisitions in Alaska was short-lived. In 2018, just four years later, trust acquisitions temporarily halted when Acting Solicitor Daniel Jorjani withdrew the Tompkins Opinion to review the validity of the Alaska exception.[148] Later, on the last full day of the Trump

139. Akiachak Native Cmty. v. Jewell (Akiachak II), 995 F. Supp. 2d 1, 6 (D.D.C. 2013); *see* 25 U.S.C. § 5123(g).

140. Akiachak Native Cmty. v. Salazar (Akiachak III), 935 F. Supp. 2d 195, 207 (D.D.C. 2013).

141. *Id.* at 207-08.

142. After the 2013 ruling, the State of Alaska won a motion to enjoin Interior from actually taking land into trust. *See Akiachak II*, 995 F. Supp. 2d at 18-19 (D.D.C. 2014). The D.C. Circuit dismissed the district court's decision for mootness—Interior had already modified Part 151 at the time of the injunction. *See* Akiachak Native Cmty. v. U.S. Dep't of Interior, 827 F.3d 100, 102 (D.C. Cir. 2016). The ultimate ruling remained: the Alaska exception was contrary to law. *Id.*

143. 25 C.F.R. § 151.1 (2023).

144. Tompkins Opinion, *supra* note 19, at 1.

145. Land Acquisitions in the State of Alaska, 79 Fed. Reg at 76888, 76891.

146. *Id.* at 76893.

147. *Id.* at 76894.

148. Daniel H. Jorjani, Solicitor Opinion M-37053, Withdrawal of Solicitor Opinion M-37043, "Authority to Acquire Land into Trust in Alaska" Pending Review 4 (June 29, 2018).

Administration,[149] Solicitor Jorjani permanently rescinded the Tompkins Opinion in M-37064 ("Jorjani Opinion").[150] However, in April of 2021, Solicitor Robert Anderson withdrew the Jorjani Opinion, criticizing it on the grounds that it did not "engage, explain, or attempt to reconcile its concerns with the . . . regulations, which allow for land into trust acquisitions in Alaska." [151] Solicitor Anderson also noted that the Jorjani Opinion was not "accompanied by any formal change in policy (*e.g.* a proposed rulemaking for [25 C.F.R.] § 151.1)."[152] As of 2023, "the Secretary's land into trust authority and reservation proclamation authority for Alaska Natives and Alaska Tribes remain intact."[153]

However, because the Interior's Solicitor Opinions are binding on all Interior offices and officials until formally modified or revoked,[154] even without formal regulatory changes, trust acquisitions for Alaska Natives remain vulnerable to changing attitudes and administrations.

B. *Carcieri v. Salazar and its Applicability to Alaska*

The Secretary's general authority to take land into trust is limited by *Carcieri v. Salazar*, which dictates that Interior may only acquire and hold land in trust for tribes or members of tribes that were "under Federal jurisdiction" at the time of the IRA's enactment in 1934.[155] The Court based its classification on the IRA's definition of "Indian," which is limited to "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction."[156] However, Interior's current policy is that Alaska Natives are included under the IRA's definition of Indian because IRA Section 19 states that "Eskimos and other aboriginal peoples of Alaska shall be considered Indians." [157] Interior posits

149. Kyle Scherer, *Alaska's Tribal Trust Lands: A Forgotten History*, 38 ALASKA L. REV. 37, 39-40 (2021). Scherer notes a pattern of "eleventh hour" determinations of Alaska trust land. *Id.*

150. Daniel H. Jorjani, Solicitor Opinion M-37064, Permanent Withdrawal of Solicitor Opinion M-37043, Authority to Acquire land into Trust in Alaska 3 (Jan. 19, 2021).

151. Robert T. Anderson, Solicitor Opinion M-37069, Withdrawal of M-37064 and Announcement of Consultation on the Department's Interpretation of the Indian Reorganization Act and the Alaska Native Claims Settlement Act in Connection with the Secretary's Land into Trust Authority 1 (Apr. 27, 2021).

152. *Id.* at 3.

153. Anderson Opinion, *supra* note 4, at 37.

154. U.S. Dep't of the Interior, 209 Departmental Manual 3.2(A)(11), https://www.doi.gov/sites/doi.gov/files/elips/documents/209-dm-3-chapter.pdf.

155. 555 U.S. at 395.

156. *Id.*; *see* 25 U.S.C. § 5129.

157. 25 U.S.C. § 5129.

that because Alaska Natives fall under this "stand-alone definition," they are not subject to *Carcieri*'s "under federal jurisdiction" analysis.[158]

This position on the *Carcieri* requirements to Alaska Natives has not been challenged in court; however, the *Carcieri* requirements may not be applicable to any Indigenous tribes in the future. In 2023, legislation was introduced in both the House of Representatives and Senate to amend Section 19 of the IRA by replacing the phrase "any recognized Indian tribe now under Federal jurisdiction" with "any federally recognized Indian tribe."[159] This amendment would overrule the *Carcieri* criteria and codify Interior's authority to acquire trust land for any federally recognized tribes.[160]

C. *Proposed Rule for Improved Trust Acquisitions*

Interior's current support for trust acquisitions is bolstered by the Bureau of Indian Affairs' ("BIA") recent proposed rule.[161] The rule "make[s] the land into trust process more efficient, simpler, and less expensive to support restoration of tribal homelands" by modifying a number of sections within Part 151.[162] Broadly speaking, these modifications establish "a clear Departmental policy to support land into trust," require a 120-day deadline for trust application decisions, streamline the process for different forms of acquisitions, define the process for determining whether a tribe is eligible for IRA benefits as required by *Carcieri*, and modify minor aspects of the rule that tend to create obstacles to trust acquisition.[163]

The Proposed Rule makes it clear that "the Secretary's policy is to support acquisitions of land in trust for the benefits of tribes and individual Indians."[164] BIA proposes a list of reasons to support the Secretary's policy, including "establishing a tribal land base and providing for climate change-

158. Anderson Opinion, *supra* note 4, at 27. Courts have considered Alaska Natives "wards" of the federal government as early as 1905. United States v. Berrigan, 2 Alaska 442, 451 (D. Alaska 1905).

159. S.563, 118th Cong. (2023); H.R. 1208, 118th Cong. (2023).

160. *Id*.

161. Land Acquisitions, 87 Fed. Reg. 74334 (Dec. 5, 2022) amending 25 C.F.R. Part 151.

162. *Id*. at 74334.

163. For the fifth objective, BIA used the example of tribes having to conduct Phase I Environmental Site Assessments multiple times to keep them valid during the application process. *Id*. at 74335.

164. *Id*. at 74336.

related acquisitions."[165] However, tribes will not need to demonstrate or argue these reasons if they already own a fee interest in the land.[166]

Perhaps most promising to Alaska Native tribal governments is the Proposed Rule's third objective. In addition to streamlining the application processes for existing acquisition methods,[167] BIA added a new category called "initial Indian acquisitions"[168] that is "designed to ease the process of acquiring first trust lands for those tribes who do not currently possess any land in trust."[169] Tribes currently without trust land are eligible for this category, regardless of whether they have had trust land at some earlier point.[170] BIA specifically notes that Alaska Native individuals qualify for individual Indian trust acquisitions in "the same manner and to the same extent as any eligible individual Indian under these regulations."[171] These changes afford greater "weight to applications pursuing certain important purposes for tribal welfare, including, for instance, the need to protect tribal homelands" and establishes a *presumption of approval* for initial Indian acquisition requests.[172]

PART III: EXPANDING LAND ELIGIBLE FOR TRUST ACQUISITIONS

Current tracts of Indian Country in Alaska include allotments, townsites, the Metlakatla Reserve, and a few fishing reserves that maintained

165. *Id.* The policy goals are particularly useful for Alaska Natives. Arctic and sub-arctic communities are disproportionately impacted by climate change. See Sasha Kahn, *It Takes a Village: Repurposing Takings Doctrine to Address Melting Permafrost in Alaska Native Towns*, 39 ALASKA L. REV. 105, 108-14 (2022), for a more detailed explanation of climate impacts on Alaska Natives.

166. Land Acquisitions, 87 Fed. Reg. at 74336. Policy reasons include: "When the Secretary determines that the acquisition of the land will further tribal interests by establishing a tribal land base or protecting tribal homelands, protecting sacred sites or cultural resources and practices, establishing or maintaining conservation or environmental mitigation areas, consolidating land ownership, reducing checkerboarding, acquiring land lost through allotment, protecting treaty or subsistence rights, or facilitating tribal self-determination, economic development, Indian housing, or for other reasons the Secretary determines will support tribal welfare." *Id.* at 74342.

167. Previously, Alaska Natives were subject to the stricter requirements in the "off-reservation" acquisition category. Land Acquisitions in the State of Alaska, 79 Fed. Reg. at 76895. For off-reservation acquisitions, the Secretary had to consider the need for a tribal government's acquisition, the impact on state and local government tax rolls, jurisdictional problems, conflicts of land, and distance from existing reservations. 25 C.F.R. § 151.11 (2023). These requirements would no longer be in place for off-reservation or initial Indian acquisitions. Land Acquisitions, 87 Fed. Reg. at 74338.

168. *Id.* at 74335.

169. *Id.*

170. *Id.* at 74336.

171. *Id.*

172. *Id.* at 74338 (emphasis added).

trust status after ANCSA.[173] As long as Interior maintains trust acquisition authority in Alaska, any fee land owned by Alaska Natives may be put into trust through BIA's fee-to-trust applications.[174]

A. *Former Reservations or Reserves*

Former IRA reservations, executive order reservations, and public purpose reserves do not currently have trust land status;[175] however, land within reserves that existed before ANCSA are eligible for fee-to-trust applications if the land is owned in fee by tribal governments.[176] Under BIA's Proposed Rule, acquisitions of former reservation land would be considered initial Indian acquisitions and would enjoy a presumption of approval.[177] These former reservations and reserves, if now owned in fee, could constitute a significant gain in trust land. For example, the six IRA reservations constitute over 1.9 million acres,[178] the former executive order reserves constitute almost half a million acres,[179] and the former public purpose reserves constitute approximately 777,500 acres.[180]

B. *Transferring Land from Village Corporations*

A majority of the land within former reserves is likely not held in fee by tribal governments, but rather by village and regional corporations.[181]

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173. *See* Scherer, *supra* note 149, at 53-56 (explaining how some IRA canneries maintained or regained trust status).

174. *See generally* BUREAU OF INDIAN AFFAIRS, ACQUISITION OF TITLE LAND HELD IN FEE OR RESTRICTED FEE STATUS (FEE-TO-TRUST HANDBOOK) (2016).

175. *See* 43 U.S.C. § 1618.

176. 25 C.F.R. § 151.4 (2023).

177. Land Acquisitions, 87 Fed. Reg. at 74338.

178. CASE & VOLUCK, *supra* note 11, at 106. The IRA reservations include the Karluk, Akutan, Diomede, Wales, Unalakleet, and Venetie, which comprise 35,200 acres, 72,000 acres, 3,000 acres, 21,000 acres, 870 acres, and 1.8 million acres, respectively. *Id.*

179. *Id.* at 96. The Copper Center executive order reserve comprises 1,041 acres; the Fort Yukon executive order reserve, 75 acres; Kobuk River, 144,000 acres; Tyonek (Moquawkie), 26,918 acres; Klukwan, 82 acres; Chilkat Fisheries, 17 acres; Yendistucky, 143 acres; Norton Bay (Elim), 316,000 acres; and Akiak, 1,373 acres. *Id.*

180. *Id.* at 87. Former public purpose reserves include those at/of the White Mountain, Eklutna, Tetlin, Point Hope, and Amaknak Island, which comprise 1,200 acres, 1,819 acres, 768,000 acres, 6,400 acres, and 110 acres respectively. *Id.* Hydaburg (7,833 acres) and Klawock (230 acres) were established and revoked by executive order, reduced to school reserves of approximately two acres each. *Id.*

181. Land selected via ANCSA's selection process but not yet conveyed to Villages is not eligible for fee-to-trust applications. Land Acquisitions in the State of Alaska, 79 Fed. Reg. at 76894. Over 90% of land selected for Villages and village corporations has been conveyed. *Id.* at 173.

Five reserves—St. Lawrence Island, Elim, Chandalar, Tetlin, and Klukwan—were transferred to village corporations in fee under Section 19 of ANCSA. As a result, these reserves (and their associated villages)[182] maintained a combined total of almost 4 million acres. [183]

By contrast, part or all of the former Chandalar and Tetlin reserves are held in fee simple by the Native Village of Venetie's and the Native Village of Tetlin's respective tribal governments rather than village corporations.[184] This was achieved by transferring land distributed to their respective village corporations under ANCSA back to the tribal governments.[185] While not a novel idea,[186] the corporate element of these transfers imposes requirements from the Alaska Corporate Code on the transaction and exposes Native corporations to liabilities like shareholder derivative suits and dissenters' rights.[187] A sale of all, or substantially all, of a corporation's assets requires a shareholder vote,[188] which in turn requires the village corporation's board of directors to issue proper notice and hold a shareholder meeting for the vote.[189] For corporations without classes of shareholders, approval requires an affirmative vote of two-thirds of the outstanding shares of common stock.[190] If a corporation does have classes of shares,[191] approval requires the affirmative vote of two-thirds of each class in addition to the affirmative vote of two-thirds of total outstanding shares.[192]

The Tetlin Native Corporation ("TNC") successfully transferred land to the Tetlin Village Council in this manner. After an affirmative shareholder vote, TNC transferred 643,000 of its 743,000 acres to the tribal

182. St. Lawrence Island comprises the Gambell and Savoonga Villages, Elim comprises the Elim Village, Chandalar comprises the Venetie and Arctic Villages, Tetlin comprises the Tetlin Village, and Klukwan comprises the Chilkat Indian Village. *Id.*

183. *Id.* at 172 n.50.

184. *Id.* at 391.

185. *Id.*

186. *Id.* at 441.

187. *See* Lisa Jaeger, LAND TRANSFERS FROM ANCSA VILLAGE CORPORATIONS TO TRIBES 6 (2000).

188. ALASKA STAT. § 10.06.568. Whether a shareholder vote is required turns on not the size of the sale but whether the sale is within the "regular course of business." *See* ALASKA STAT. § 10.06.566. However, the scant Alaska state case law on the issue holds that not having shareholder approval for the sale of major assets can constitute a violation of fiduciary duty. *See* Jackson v. Von Gemmingen, No. S-17051, 2019 WL 5588812, at *5 (Alaska Oct. 30, 2019).

189. ALASKA STAT. § 10.06.568; ALASKA STAT. § 10.06.570.

190. ALASKA STAT. § 10.06.570.

191. Alaska Native corporations are permitted to have different classes of shares to benefit certain members of the community or preserve cultural heritage. 43 U.S.C. § 1629e(b).

192. ALASKA STAT. § 10.056.570(a).

government for $10.[193] However, a group of "dissenting" shareholders later sued the TNC Board of Directors alleging the transfer constituted a breach of fiduciary duty.[194] Typically, dissenting shareholders would have the opportunity to have their shares purchased, ANCSA's restrictions on alienability seemed to prevent TNC from purchasing the plaintiffs' shares.[195] While the Alaska Supreme Court held that any settlement agreement involving the alienation of dissenters' shares would violate ANCSA, it did not address what dissenter's rights exist with respect to shares in Native corporations.[196] The actual transfer of title to the Village government was not challenged or struck down. Notwithstanding the question of dissenters' rights, current law allows Alaska Native Corporations to convey land to Village governments upon a successful shareholder vote. Once land ownership passes to the Village government it is eligible for a fee-to-trust application.

In addition to corporate duties and shareholder suits, another consideration for corporate transfers is the existence of split estates. Except for Section 19 conveyances mentioned above, estates are typically split between surface estates, given to the village corporations, and subsurface estates, given to the regional corporations.[197] In the 2014 Final Rule, several commenters noted concerns over the regional corporations' rights and abilities to continue development on their subsurface estates if the corresponding surface estates were taken into trust.[198] Interior noted that subsurface estates would not only be unaffected, but also that mineral estates are considered dominant over surface estates; subsurface owners retain a "right of reasonable access to the minerals below."[199] Having

193. Jimerson v. Tetlin Native Corp., 144 P.3d 470, n.1 (Alaska 2006).

194. Brief of Appellee noted the now-dissenters originally voted affirmatively for the land transfer. Brief of Appellee at 5-6, Jimerson v. Tetlin Native Corp., 144 P.3d 470 (Alaska 2006) (No. S-11757).

195. ALASKA STAT. § 10.06.574; *Jimerson*, 144 P.3d at 473.

196. *Jimerson*, 144 P.3d at 473. ANCSA provides some guidance for dissenter's rights but it is fairly limited. Alaska Native corporation shareholders may be bought out only if they dissented regarding a vote to terminate stock alienability restrictions. 43 U.S.C. § 1629d(a). It is unclear if there are any dissenters' rights for land transfer proposals and votes.

197. 43 U.S.C. § 1611. Note that village corporations who opted to use ANCSA § 19 to retain former reservation lands gained fee title to both surface and subsurface estates. 43 U.S.C. § 1618(a).

198. Land Acquisitions in the State of Alaska, 79 Fed. Reg. at 76893. Split estates are not uncommon in Indian Country. COHEN, *supra* note 85, at 1088 (explaining that "there are at least nine different split-estate situations involving not only tribes and allottees, but private parties, states, and the federal government").

199. Land Acquisitions in the State of Alaska, 79 Fed. Reg. at 76893; *see, e.g.*, Norken Corp. v. McGahan, 823 P.2d 622, 628 (Alaska 1991) ("[T]he mineral estate is the dominant estate, carrying with it the right to make such use of the surface as is reasonably necessary to remove the minerals").

surface estates held in trust for Villages, instead of owned by village corporations, will not change the development rights of regional corporations. However, regional corporations will be subject to tribal regulatory jurisdiction for any activities on the surface estate in addition to ANCSA's consent requirements.

Regional corporations must receive consent from village corporations for any mining activities "within the boundaries of [a] Native village."[200] The Ninth Circuit has interpreted "boundaries" to include the actual territory of Villages defined by occupied area rather than historical boundaries or the land owned by village corporations.[201] Because the area requiring consent is based upon Village territory, having land in trust for Villages would solidify and potentially expand those boundaries.

For village corporations that merge, consolidate, or otherwise dissolve, the consent requirement passes to "a separate entity composed of the Native residents of such Native village."[202] For example, village corporations that have merged with other ANCSA corporations have required in their merger agreements that regional corporations seek consent from Village tribal governments.[203] Whether a village corporation continues to operate after a land transfer to a tribe or not, the regional corporations must seek permission for subsurface development,[204] and Villages may exert their inherent sovereign power to regulate economic activities on the surface estate if it is held in trust.[205]

C. *Acquiring Land from Municipalities and Municipal Trust Land*

Municipalities and land held in trust by the State for future municipalities may also be sources of fee land for eventual fee-to-trust applications. To encourage Alaska Native Villages to adopt municipal governments under state law,[206] ANCSA required village corporations to convey to municipalities land "on which the Native village is located and

200. 43 U.S.C. § 1613(f).

201. Leisnoi, Inc. v. Stratman, 154 F.3d 1062, 1071 (9th Cir. 1998).

202. 43 U.S.C. § 1627.

203. *See* Alyeska Pipeline Serv. Co. v. Kluti Kaah Native Vill. of Copper Ctr., 101 F.3d 610, 611 (9th Cir. 1996).

204. Note that Villages may seek to maintain their village corporations to take advantage of ANCSA's revenue sharing provisions, which enable village corporations to receive some royalties from subsurface mineral development. 43 U.S.C. § 1606(i).

205. Tribal governments generally have regulatory jurisdiction over their land as an aspect of their inherent sovereignty. *See* Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 812 (9th Cir. 2011).

206. The statute also calls these municipalities "Municipal Corporations." This includes "any general unit of municipal government under the laws of the State of Alaska." 43 U.S.C. § 1602(i).

as much additional land as is necessary for community expansion, and appropriate rights-of-way for public use, and other foreseeable community needs."[207] For Villages without a state-chartered municipality, the land was put into trust with the State for future municipalities.[208]

1. Existing Municipalities

At the passage of ANCSA in 1971, 120 Alaska Native Villages had existing municipalities organized under state law.[209] These municipalities have the power to "to acquire, manage, control, use, and dispose of real and personal property, whether the property is situated inside or outside the municipal boundaries."[210] Municipal governing bodies establish the procedures for acquiring and disposing of land or interests in land by the municipality.[211] However, the state constitution limits the acquisition and disposal of municipal land.[212] Most notably, the Alaska State Constitution's Equal Protection Clause has been interpreted to bar restrictions on municipal land sales that allow sales only to Alaska Native individuals.[213] Additionally, municipal transfers to tribal governments may not survive an equal protection challenge without special provisions ensuring that the land "will be used for public purposes on a nondiscriminatory basis."[214] Therefore, while it is technically possible for established municipalities to

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207. 43 U.S.C. § 1613(c)(3).

208. 43 U.S.C. § 1613(c)(3).

209. CASE & VOLUCK, *supra* note 11, at 327. As these municipalities are organized under state law, there is no guarantee that the municipalities will remain predominantly Alaska Native. *Id.*

210. ALASKA STAT. § 29.35.010(8).

211. ALASKA STAT. § 29.35.090.

212. The Alaska Constitution states that public property cannot be transferred without a public purpose. ALASKA CONST. art. IX, § 6. Municipal transfers priced below the fair market value or with preference provisions need an especially strong public purpose argument. However, these transfers are commonly used to facilitate land ownership for low-income residents. ALASKA DEP'T OF COM., CMTY., & ECON. DEV., ALASKA MUNICIPAL LAND MANAGEMENT HANDBOOK: MODEL ORDINANCES AND PROCEDURES FOR THE ACQUISITION, MANAGEMENT, AND DISPOSAL OF MUNICIPAL LAND 3-5 (2009) [hereinafter ALASKA MUNICIPAL LAND MANAGEMENT HANDBOOK].

213. ALASKA MUNICIPAL LAND MANAGEMENT HANDBOOK, *supra* note 212, at 154 (citing Municipal Land Conveyances to Traditional or IRA Councils, Op. Alaska Att'y Gen., File No. 366-178-84 (May 1, 1984); Conveyance of Municipality-Owner Lots in Townships to Individuals, Op. Alaska Att'y Gen., File No. J-66-725-81 (May 6, 1981)). Note that residency requirements, without consideration of tribal status, may be used to ensure that Village residents are the only eligible recipients of municipal transfers. ALASKA MUNICIPAL LAND MANAGEMENT HANDBOOK, *supra* note 212, at 152-54 (discussing equal protection considerations and validity of residency requirements).

214. *Id.* at 155.

transfer land directly to Alaska Natives or Village governments, equal protection restrictions make this route less feasible or attractive.

2. Municipal Dissolution

Through the State, Village governments may acquire the property of dissolved municipalities for fee-to-trust applications by petitioning the Local Boundary Commission or securing signatures from 25% of local voters.[215] Generally, petitions to dissolve come from the municipality itself or its citizens.[216]

In the event of a successful dissolution petition, there are two methods for entities to succeed to the interests of the dissolved municipality.[217] First, the dissolving municipality may designate another municipality to act as a successor for their assets and liabilities.[218] Second, if no such successor exists, the assets and liabilities succeed to the State.[219] Dissolving municipalities may not directly designate tribal governments as successors through this first method because tribal governments and entities are not included in the statute's definition of "municipality."[220] However, several tribal governments are listed as successors to assets and liabilities for dissolved municipalities,[221] and both state and federal documents reference tribal

215. ALASKA STAT. §§ 29.06.460, 29.06.450. Alaska Statute § 29.06.470 sets the standards for petitioning for dissolution. ALASKA STAT. § 29.06.470.

216. ALASKA DEP'T OF COM., CMTY., & ECON. DEV., CITY AND BOROUGH DISSOLUTION IN ALASKA 10 (2018).

217. ALASKA STAT. § 29.06.520.

218. *Id.*

219. The State may contract with a third-party organization to "perform the duties or powers in the area of the dissolved municipality." *Id.* A 1988 amendment to Alaska Statute § 29.06.520 added that said contracts with organizations "do not constitute recognition by the state of governmental powers of that organization." 1994 Alaska Sess. Laws ch. 58. The Alaska Attorney General at the time noted that these contracts were frequently granted to "nonprofit corporations or Native organizations." Letter to Governor Steve Cowper from Att'y Gen. Grace Berg Schaible. No. File No. 883-88-0037, 1988 WL 249432, at *2 (Alaska A.G. May 10, 1988). The Attorney General approved of the added language, stating: "[t]his language should alleviate concerns over potential sovereignty claims that might be made by various Native organizations with which the state contracts to perform duties and powers in the area of a dissolved municipality." *Id.* As tribal governments are designated as successors by the State, and not as contractors for public services, this provision appears to reference for-profit and nonprofit entities created pursuant to ANCSA.

220. *See* ALASKA STAT. § 29.71.800.

221. This includes the City of Atmautluak and the Atmautluak Traditional Council, City of Kasigluk and the Kasigluk Traditional Council, City of Newtok and the Newtok Traditional Council, City of Tuluksak and Tuluksak IRA Council, and the City of Tununak and the Tununak Traditional Council. *See* ALASKA DEPT. OF COM., CMTY., AND ECON. DEV., CITY GOVERNMENTS IN ALASKA THAT HAVE BEEN DISSOLVED OR OTHERWISE CEASED TO EXIST (2015).

governments as successor entities for former municipalities.[222] While this implies that tribal governments may be designated successors, a judiciary committee hearing regarding a proposed amendment to the statute governing successor entities revealed that the ownership of assets and liabilities always passes to the State before it is passed to tribal governments.[223] Marjorie Vandor, Assistant Attorney General at the Alaska Department of Law, noted that "[t]here is a split second of time when the transferring document is recorded . . . where the state is in this transfer of title."[224] This means that Village governments may not be directly designated as municipal successors without some level of state intervention and permission.

To succeed the municipalities, tribal governments sign an agreement prepared by the Department of Law transferring any assets and liabilities and waiving tribal sovereign immunity.[225] In 1996, at the time of the proposed amendment, these agreements included "an actual assertion . . . that [Alaska Natives and Village governments] will not claim this property to be Indian [C]ountry now or in the future."[226] However, because this proposed amendment eventually died in committee, the process for transferring former municipal assets, including land, to Village governments still requires state action.[227] While the state action requirement may not create a substantial hurdle for Villages seeking to acquire former municipal lands, any anti-Indian Country provisions in the transfer agreements may impact future fee-to-trust applications. Because Interior currently states that any land held in fee by Alaska Natives is eligible for fee-to-trust applications, former municipal lands now owned in fee by Village governments may still be eligible; however, it is not clear how Interior would treat such an agreement between the State and the tribal entity.[228]

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222. *See, e.g.*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., ALASKA COMMUNITY PROFILES: AKIACHAK 8 (2010); CITY & BOROUGH DISSOLUTION, *supra* note 216, at 14.

223. *Dissolved Municipalities/Succession: Hearing on H.B. 391 Before the H. Judiciary Comm.*, 19th Leg. (Alaska 1996), https://www.akleg.gov/basis/Meeting/Detail?Meeting=HJUD%201996-02-26%2013:08:00.

224. *Id.* (statement of Marjorie Vandor, Assistant Att'y Gen., Alaska Dept. of Law).

225. *Id.*

226. *Id.*

227. ALASKA ADMIN. CODE tit. 3, § 194.010 states that the Commissioner of the Department of Commerce, Community, and Economic Development ("DCCED") may accept title to real property of dissolved municipalities "for the commissioner's subsequent conveyance of title to real property to a local entity." Local entities include tribal governments and IRA organizations. Alaska Admin. Code tit. 3, § 194.900(3).

228. Trust acquisitions would benefit Villages succeeding dissolved municipalities financially; within trust land, Villages can receive additional federal grants to compensate for the State grants lost with municipal dissolution. ALASKA DEPT. OF COM., CMTY., AND ECON. DEV., CITY AND BOROUGH DISSOLUTION IN ALASKA 23 (2018).

3. Municipal Trust Lands

As briefly mentioned above, ANCSA mandated that land not transferred to existing municipalities was to be held in trust by the State for future municipalities.[229] As of 2019, the State held approximately 11,500 acres in trust for future municipalities.[230] While title to this "municipal trust land" is held by the State, it is restricted in how it may manage and dispose of the land on behalf of unincorporated Villages.[231] For example, transfers of interest in municipal trust lands may not be made without the approval of an "appropriate village entity such as the traditional council, a village meeting, or a village referendum."[232] Specifically, transfers such as sales, leases, easements, and permits require appropriate village entity approval.[233]

Village governments may use municipal trust land, but the State will only fully transfer ownership if a municipality forms under state law.[234] At that point, all title to the municipal trust lands will then transfer to the municipality and the State will release its trust responsibility.[235] However, mandatory public notices issued prior to the transfer municipal trust land demonstrate that the State will partially transfer land to individuals and Village entities through quitclaim deeds.[236] For individuals, the State has granted quitclaim deeds of former municipal trust land for residential purposes.[237] By contrast, for Village entities such as the Minto Village

229. 43 U.S.C. § 1613(c)(3). The Commissioner of the Department of Commerce, Community, and Economic Development is responsible for accepting, managing, and disposing of land conveyed in trust to the State. ALASKA STAT. § 44.33.755.

230. ALASKA DEP'T OF COM., CMTY., & ECON. DEV., MUNICIPAL LANDS TRUSTEE PROGRAM ANNUAL REPORT 1 (2019).

231. *See* ALASKA ADMIN. CODE tit. 3, § 190.010; ALASKA STAT. § 44.33.755(b).

232. ALASKA STAT. § 44.33.755(a)-(b).

233. ALASKA STAT. § 44.33.755(b).

234. ALASKA ADMIN. CODE tit. 3, § 190.520.

235. ALASKA STAT. § 45.33.755; *see also* ALASKA DEP'T OF COM., CMTY., & ECON. DEV., AN OVERVIEW OF THE MUNICIPAL LANDS TRUSTEE PROGRAM 9 (2012).

236. ALASKA ADMIN. CODE tit. 3, § 190.420 establishes the public notice requirement. Quitclaim deeds transfer the land in fee without guarantees of the validity of title. ALASKA STAT. § 34.15.040; *see* Oliver v. Piatt, 44 U.S. 333 (1845) (noting quitclaim deeds do not carry warranties of title). As title to municipal trust lands is statutorily vested in the State, the use of quitclaim deeds is likely the more efficient option of transfer and not an implication that there are defects in the title.

237. *Public Notice Regarding Disposal of Municipal Trust Land in Minto, Alaska by the Municipal Lands Trustee*, ALASKA DEP'T OF COM., CMTY., & ECON. DEV. (Aug. 26, 2019), https://aws.state.ak.us/OnlinePublicNotices/notices/View.aspx?id=197281. The State has also conveyed land to nonprofit housing authorities serving Village residents. *Public Notice Regarding Disposal of an Interest in Municipal Trust Land in Tatitlek, Alaska by the Municipal Land Trustee*, ALASKA DEP'T OF COM., CMTY., & ECON. DEV. (July 7, 2020), https://aws.state.ak.us/OnlinePublicNotices/notices/View.aspx?id=198759. Individuals may also receive a conveyance from the State without specifying residential purpose. *See, e.g.*, *Public Notice Regarding Disposal of an Interest in Municipal Trust Land in Takotna, Alaska*

Council and the Native Village of Nelson Lagoon, the State deeded former trust land to the Village governments outright.[238]

The language of relevant statutes and regulations does not impose a limit on how much land may be transferred out of trust to individuals or Village entities.[239] However, the Commissioner may reject a proposed transfer of trust land "if he or she finds that the disposal would be inconsistent with the good faith execution of the commissioner's trust responsibility to [the municipality] that might be incorporated in the Native village."[240] Additionally, a "resolution of a recognized village entity or the village residents" that "request[s] and approv[es] the disposal of specific municipal trust land" does not "impose a duty upon the commissioner to make such a disposal."[241] While a request for a full transfer of municipal trust lands to a Village entity may run afoul of the Commissioner's duty to "future" state-chartered municipalities, parcels successfully transferred to Alaska Native individuals or Village governments are nonetheless transferred in fee, making them eligible for federal fee-to-trust applications.[242]

CONCLUSION

If an Alaska Native Village chooses to pursue trust acquisition, Village governments have several opportunities to acquire additional fee land for fee-to-trust application. Former reservation land owned in fee by Village governments is already eligible for trust acquisition. Village corporations that took advantage of ANCSA's Section 19 may grant both surface and subsurface estates to Villages via corporate transfers, and other village corporations may do the same with their surface estates. In the municipal sphere, Villages may directly receive land from existing municipalities or become the eventual successors to dissolved municipalities. Finally, Villages may acquire some of the municipal trust land within the boundaries of their Village through quitclaim deeds issued by the State. Alaska Native Villages that employ these methods to acquire land can take advantage of Interior's new presumption for trust acquisitions to significantly expand legally protected tribal land bases in Alaska.

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by the Municipal Land Trustee, ALASKA DEP'T OF COM., CMTY., & ECON. DEV. (May 29, 2015), https://aws.state.ak.us/OnlinePublicNotices/notices/View.aspx?id=177100.

238. *Public Notice Regarding Disposal of Municipal Trust Land in Minto, Alaska by the Municipal Lands Trustee*, ALASKA DEP'T OF COM., CMTY., & ECON. DEV. (June 4, 2012) https://aws.state.ak.us/OnlinePublicNotices/Notices/View.aspx?id=163998; Regarding Disposal of Municipal Trust Land in Nelson Lagoon, Alaska by the Municipal Lands Trustee, ALASKA DEP'T OF COM., CMTY., & ECON. DEV. (Mar. 20, 2018),

https://aws.state.ak.us/OnlinePublicNotices/notices/View.aspx?id=189292.

239. *See generally* ALASKA STAT. § 44.33.755; ALASKA ADMIN. CODE tit. 3, § 190.410.

240. ALASKA ADMIN. CODE tit. 3, § 190.440.

241. *Id*.

242. Note that a Village with mixed parcels of state and federal trust lands may result in the jurisdictional checkerboarding usually associated with allotments.