THE STATE of ALASKA
GOVERNOR MICHAEL J. DUNLEAVY

Department of Law
CIVIL DIVISION

P.O. Box 110300
Juneau, Alaska 99811
Main: 907.465.3600
Fax: 907.465.2520

January 25, 2019

SENT VIA USPS AND EMAIL

Daniel H. Jorjani
Principal Deputy Solicitor
Office of the Solicitor
United States Department of the Interior
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240
Daniel_Jorjani@ios.doi.gov
consultation@bia.gov

Re: Objection to Solicitor Opinion M-37043, "Authority to Acquire Land into Trust in Alaska" Pending Review

The State of Alaska hereby comments upon, and objects to, the 2017 Solicitor's Opinion (M-37043) (hereafter "2017 Solicitor's Opinion") supporting the Department of the Interior's 2015 regulation change permitting Alaska Tribes to place lands into trust.[1] New trust acquisitions in Alaska conflict with the settlement embodied in the Alaska Native Claims Settlement Act[2] (hereafter "ANCSA") and are not in Alaska's best interests. The Department of the Interior (hereafter "Interior") should permanently rescind the 2017 Solicitor's Opinion and reinstate its prior regulatory prohibition on new trust acquisitions in Alaska. From the enactment of ANCSA in 1971 until 2015, Alaska Tribes could not place lands into trust. However, in 2015, in a dramatic policy shift, Interior changed its regulations' long-standing prohibition on trust acquisitions in

---

1 Your office rescinded the 2017 Solicitor's Opinion pending review. Sol. Op. M-37043 (June 29, 2018).

2 43 U.S.C. § 1601 *et seq.*

Alaska.[3] The 2017 Solicitor's Opinion supported the dramatic policy shift.

The State appreciates the opportunity to comment upon, and object to, the 2017 Solicitor's Opinion. The State's comments and objections are set forth in detail below.

A. The 2017 Solicitor's Opinion incorrectly concludes that new trust acquisitions are allowed after ANCSA.

Placing new land into trust in Alaska is antithetical to the settlement embodied in ANCSA. Congress enacted ANCSA to settle all Alaska Native land claims, and it expressly intended to accomplish this "without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges."[4] Allowing new trust acquisitions in Alaska—and thereby reestablishing a privileged category of property and a trusteeship that ANCSA largely extinguished—begins unwinding ANCSA's settlement.

From Alaska's territorial days through early statehood, the status and title of land occupied by Alaska Natives remained unresolved.[5] In the 1960s, the newly formed state government began selecting its land entitlement under the Statehood Act.[6] This created a conflict with Alaska Native land claims, eventually leading the Secretary of Interior to freeze land selections. Discovery of oil on Alaska's North Slope injected the conflict with urgency and, in 1971, Congress resolved the disputed land claims through ANCSA.

Congress provided no land directly to tribes through ANCSA. Instead, ANCSA settled Alaska Native land claims by providing $926.5 million and fee title to 44 million acres of land to state-chartered, Alaska Native-owned, for-profit regional corporations,

---

[3] Dep't of Interior, *Land Acquisitions in the State of Alaska*, 79 Fed. Reg. 76,888, 76,897 (Dec. 23, 2014) (deleting provision of regulations excluding land acquisitions in trust in Alaska, effective January 22, 2015).

[4] 43 U.S.C. § 1601(b); *see Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 532-33 (1998) (quoting ANCSA § 2(b), 43 U.S.C. § 1601(b)).

[5] *See United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1014-19 (D. Alaska), *aff'd* 612 F.2d 1132 (9th Cir. 1980).

[6] Alaska Statehood Act, Pub. L. No. 85-508, § 6, 72 Stat. 339 (1958).

and village corporations.[7] ANCSA ended the federal government's authority to issue Alaska Native allotments, and it revoked all reservations in Alaska (save one).[8]

In 1978, Interior expressly concluded that ANCSA precluded taking land into trust in Alaska, a conclusion Interior found "unmistakable."[9] In 2001, Interior speculated that ANCSA allowed trust acquisitions, and withdrew the 1978 opinion, but left the prohibition on taking land into trust in Alaska as law.[10] The 2017 Solicitor's Opinion improperly concludes that because ANCSA did not explicitly repeal the lands-into-trust section of the Indian Reorganization Act (hereinafter "IRA") as it applies to Alaska, [11] authority to acquire new trust lands survived ANCSA.[12]

That conclusion misinterprets Congress' intent in passing ANCSA. Congress did not need to expressly repeal the IRA trust statute's application in Alaska because it already foreclosed expanding trust lands by ANCSA's terms, and because the IRA's trust authority potentially retains its application for Alaska's sole reservation. Moreover, contrary to the 2017 Solicitor's Opinion's assertion that ANCSA sought to "support[] tribal self-governance,"[13] Congress's goal—and the goal of the settling parties, including Alaska Natives represented in part by the Alaska Federation of Natives[14]—was to further

---

7 43 U.S.C. §§ 1605, 1606, 1607, 1610, 1611, 1613.

8 *Id.* §§ 1617, 1618. The Annette Island Reserve, the one remaining reservation in Alaska, was set aside for Tsimshian Indians who immigrated from, and are indigenous to, Canada. This group, descended from Old Metlakatla, British Columbia, have no claims of aboriginal title in Alaska.

9 *See Akiachak Native Cmty. v. Salazar*, 935 F. Supp. 2d 195, 200 (D.D.C. 2013) (quoting Memorandum from Thomas W. Fredericks, Associate Solicitor, Indian Affairs, Dep't of the Interior 1-3 (Sept. 14, 1978)).

10 *Id.* at 202 (quoting Memorandum from John Leshy, Solicitor, Dep't of the Interior 1-2 (Jan. 16, 2001)).

11 Act of June 18, 1934, ch. 576, 48 Stat. 984; 25 U.S.C. § 5119.

12 Sol. Op. M-37043, at 21 (Jan. 13, 2017).

13 Sol. Op. M-37043, at 22 (Jan. 13, 2017).

14 *See, e.g.*, Hearings on S.2906 before Sen. Comm. on Interior and Insular Affairs, 90th Cong. 2d Sess., 55 (1968) (statement of Byron Mallot); Hearings on S.1830 before

Alaska Native self-determination in an innovative way: not by expanding federal superintendence and creating patches of tribal jurisdictions, but instead by giving Alaska Native entities full fee title over land, subject to state regulatory jurisdiction.[15]

Bringing back the Alaska exclusion realigns the land-into-trust regulations with ANCSA.

1. ANCSA's extinguishment of statutory claims removed the right to petition for lands to be placed in trust in Alaska.

ANCSA settled, and extinguished, all "claims . . . that are based on claims of aboriginal right, title, use, or occupancy" in Alaska,[16] and further extinguished all claims "that are *based on any statute* or treaty of the United States *relating to* Native use and occupancy."[17] Thus, ANCSA's language extinguished the right to petition for trust lands.

Petitioning Interior to place lands into trust under the IRA is a claim "based on [a] statute . . . relating to Native use and occupancy."[18] The IRA allows Interior to acquire "any interest in lands . . . for the purpose of providing land for Indians."[19] Thus, by its terms, the IRA is a statute "relating to Native use and occupancy." A "claim" is ordinarily defined as an "assertion of an existing right," a "demand for . . . property, or a

---

Sen. Comm. on Interior and Insular Affairs, pt. 1, 91st Cong. 1st Sess. 115 (1969) (testimony of Emil Notti); Hearings on S.2906 before Sen. Comm. on Interior and Insular Affairs, 90th Cong. 2d Sess., 89-90 (1968) (testimony of Barry Jackson, representing the Alaska Federation of Natives).

15 *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 532 (1998) ("In no clearer fashion could Congress have departed from its traditional practice of setting aside Indian lands.") *See also id.* at 523-24 (noting that "Congress sought to end the sort of federal supervision over Indian affairs that had previously marked federal Indian policy"); *id.* at 534 (explaining that ANCSA was the antithesis of a "desire to retain federal superintendence over the land").

16 43 U.S.C. § 1603(c).

17 *Id.* (emphasis added).

18 *Id.*

19 25 U.S.C. § 5108.

legal remedy to which one asserts a right," or an "interest or remedy recognized by law."[20] Petitioning Interior to place lands into trust is asserting a right to a unique property—to that specific legal privilege of trust status—and is therefore a "claim." When ANCSA extinguished claims based on statutes relating to Native use and occupancy, it ended the right to petition for land to be placed in trust in Alaska.

ANCSA's legislative history bolsters this conclusion. Early ANCSA extinguishment clause drafts only referenced claims under two specific statutes.[21] Congress rejected that narrow approach in favor of a sweeping extinguishment of "*all* claims . . . based on *any statute* or treaty of the United States relating to Native use and occupancy."[22] Congress intended to extinguish *all* claims by Alaska Natives to interests in land in Alaska, whether the claim originated from aboriginal title or from a statute, including the land-into-trust statute.

2. ANCSA's comprehensive framework for providing land for Alaska Natives does not include new trust acquisitions for tribes.

In a 1971 committee report discussing a draft of ANCSA, Congress laid out the "most important innovations" that set the bill apart from other Indian settlement agreements: the ANCSA settlement applied statewide and to all Alaska Natives; the assets granted by the settlement would be managed by Alaska Natives as individuals or by corporations controlled by them; and the settlement would "with minor exceptions *put an end to racial or ethnic distinctions in land tenure* or hunting and fishing rights."[23] In crafting ANCSA's comprehensive framework for Alaska Native lands, Congress intended to avoid future trust lands. Moreover, that intent is highlighted in three of

---

20 *Claim*, BLACK'S LAW DICTIONARY (10th ed. 2014).

21 As introduced in 1969, Senate Bill 1830 extinguished "any and all claims . . . arising under the Act of May 17, 1884 (23 Stat. 24) [The Alaska Organic Act] and the Act of June 6, 1900 (31 Stat. 321)." 115 Cong. Rec. 9110-11 (Apr. 15, 1969).

22 43 U.S.C. § 1603(c) (emphasis added).

23 S. Rep. No. 92-405, at 80 (1971) (discussing differences between ANCSA and previous Indian land claims settlements).

ANCSA's specific features: ANCSA's extinguishment of reservations,[24] its facilitation of municipal governments,[25] and its allowance for fee title home sites.[26]

ANCSA extinguished all reservations in Alaska, except one.[27] ANCSA village corporations in the former reservations had the option of accepting fee title to all of the former reservation lands, or participating in the statute's land and monetary distributions.[28] The Supreme Court held that even where a village corporation chose to accept former reservation land in fee and re-convey it to the local tribes, the lands did not form a tribal jurisdictional land-base—that is, they were not Indian country.[29]

But if those lands could now be placed into trust and if—as Interior previously stated would happen—new trust lands are considered Indian country,[30] a reservation expressly extinguished by ANCSA and re-conveyed in fee title could once again become Indian country. The current land-into-trust regulations encourage this to happen. Criteria for so-called on-reservation applications are less stringent than off-reservation applications, and Interior defines "reservation" to include "where there has been a final judicial determination that a reservation has been disestablished or diminished . . . that area of land constituting the former reservation of the tribe as defined by the Secretary."[31] The 2017 Solicitor's Opinion goes so far as to say that ANCSA could not preclude "new

---

24 43 U.S.C. § 1618.

25 *See id.* § 1613(c)(3).

26 *Id.* §§ 1613(c)(1), (h)(5).

27 *Id.* § 1618. *See also supra*, note 8.

28 43 U.S.C. § 1618(b).

29 *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 532 (1998).

30 Dep't of Interior, *Land Acquisitions in the State of Alaska*, 79 Fed. Reg. 76,888, 76,893 (Dec. 23, 2014) ("The Department's position has been that land held in trust by the United States on behalf of a federally recognized Indian tribe is 'Indian country.' ").

31 25 C.F.R. § 151.2(f). *See also* 25 C.F.R. § 151.10 (setting out criteria for on-reservation acquisitions); 25 C.F.R. § 151.11 (setting out criteria for off-reservation acquisitions, including "greater scrutiny" "as the distance between the tribe's reservation and the land to be acquired increases").

reservation proclamations in Alaska."[32] Yet in no clearer way could Congress' intent be undermined than by recreating something, through an administrative process, that Congress expressly extinguished by law.

Congress also facilitated municipal, rather than tribal, jurisdiction in Alaska's villages. ANCSA required each village corporation to convey to the local municipality[33] at least 1,280 acres of the land within and near the village for local government purposes.[34] Congress intended "to encourage the establishment and the vitality of normal units of local government which can provide many of the services necessary to life in a quality community."[35] It is illogical for Congress to transfer village lands to local municipal governments and at the same time intend that tribes could later have that land in the same community become Indian country subject to tribal regulation.

Congress' intention that Alaska Native land be held in fee, rather than in trust, is further supported by ANCSA's authorization for individual Alaska Natives to receive unrestricted fee title to their primary residence[36] and simultaneous repeal of the Alaska Native Allotment Act.[37] ANCSA repealed the authority to provide restricted title land to Alaska Natives while providing an alternative mechanism for individuals to acquire fee title for their homes.

3. Allowing new trust acquisitions frustrates the settlement expectations embodied in ANCSA.

Creating trust land in Alaska frustrates the State's expectations in contributing approximately half a billion dollars (around $3 billion in today's dollars) and ceding

---

32 Sol. Op. M-37043, at 21 (Jan. 13, 2017).

33 If a local municipal government did not exist, then the land is required to be conveyed to the State to be held in trust for any municipality established there in the future. 43 U.S.C. § 1613(c)(3).

34 An amendment allows negotiation of a lesser amount of land. *See* 43 U.S.C. § 1613(c)(3).

35 S. Rep. No. 92-405, at 133 (1971).

36 43 U.S.C. §§ 1613(c)(1), (h)(5); 43 U.S.C. § 1617.

37 Act of May 17, 1906, 34 Stat. 197, repealed by 43 U.S.C. § 1617(a).

valuable land selection priorities in exchange for implementing a fee land ownership system under state law.[38]

Exercising police powers and regulating state resources are fundamental elements of state sovereignty.[39] Yet permitting new trust land in Alaska diminishes the State's authority in islands of land within its borders potentially controlled by 229 competing sovereigns.[40] The State and local municipal governments have no authority to tax trust land.[41] And Interior stated that trust land in Alaska would be considered Indian country,[42] meaning the State also loses authority to regulate conduct on the land through, for example, land use restrictions, natural resource management requirements, and environmental regulations. Permitting new trust land in Alaska harms the State by abrogating its authority over land within its borders and creating widespread uncertainty over governance.

Potential impacts on state governance could be widespread. Although much of tribally held fee land in Alaska currently consists of smaller, noncontiguous parcels, that is not true of all tribal parcels. For example, Interior earlier took the position that ANCSA provides no limit on its authority to take land into trust in Alaska, and that Interior has the authority to take former reservation lands into trust.[43] The former Venetie reservation encompasses 1.8 million acres—an area larger than the State of Delaware—and was transferred in fee by ANCSA village corporations to the Native

---

38 43 U.S.C. §§ 1605, 1608, 1610, 1611, 1617, 1618.

39 *See* U.S. Const. art. IV, § 3, cl. 1 ("New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state . . . .").

40 "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998) (citing *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998)).

41 25 U.S.C. § 5108.

42 Dep't of Interior, *Land Acquisitions in the State of Alaska*, 79 Fed. Reg. 76,888, 76,893 (Dec. 23, 2014).

43 *Id.* at 76,894.

Village of Venetie Tribal Government.[44] Similarly, the Tetlin Native Corporation conveyed 643,000 acres of former Tetlin Indian Reserve land to the Tetlin tribe.[45] Acquiring in trust any of the 44 million acres of ANCSA settlement land (provided land-owner corporations elect to transfer to a tribe) unwinds the State's settlement in ANCSA that assured it statewide governance over State and Alaska Native corporation lands.

4. Legislation enacted after ANCSA also supports interpreting ANCSA to preclude trust lands.

As noted in your June 29, 2018 memorandum, aside from a "passing reference to FLPMA," the 2017 Solicitor's Opinion failed to discuss "the nature, extent, or impact of such post-ANCSA legislation."[46] While legislation enacted after ANCSA does not explicitly address lands-into-trust in Alaska, it demonstrates that Congress intended ANCSA to be more than a one-time action—it intended ANCSA to be a comprehensive, living structure for furthering Alaska Native interests in land.

Two specific provisions of the 1987 amendments to ANCSA[47] illustrate Congress' intent to ensure the viability of ANCSA's land structure, including state jurisdiction over settlement land. The first is the Alaska Land Bank, which was created in 1980 by the Alaska National Interest Lands Conservation Act (ANILCA).[48] The 1987 amendments automatically added all undeveloped and unleased ANCSA land to the Land Bank.[49]

---

44 *Native Vill. of Venetie Tribal Gov't*, 522 U.S. at 523.

45 *See* Statutory Quitclaim Deed from Tetlin Native Corporation to Tetlin Tribal Council (July 17, 1996) (recorded in the Fairbanks Recording District at Book 969, Page 1) (deeding U.S. Survey #2547, "representing the Tetlin Indian Reservation" to the tribal council, except for land on the north side of the Tanana River).

46 Sol. Op. M-37053, at 3 (Jun. 29, 2018).

47 Although this major set of amendments passed in 1988, the act is known as the "Alaska Native Claims Settlement Act Amendments of 1987." 43 U.S.C.A. § 1601 notes; Pub. L. No. 100-241, Sec. 2(5), 101 Stat. 1788 (1988).

48 Pub. L. No. 96-487, 94 Stat. 2371 (codified as amended at 16 U.S.C. §§ 3101-3233 (2015)).

49 43 U.S.C. § 1636(d).

This protects ANCSA lands from adverse possession and execution on most judgments.[50] As with land held in trust under the IRA, land in the Land Bank is not subject to real property tax.[51] Congress thus sought to protect the viability of ANCSA's land structure.

Furthermore, in establishing the Land Bank, Congress again treated Alaska Native lands like other fee lands. Any private landowner may add land to the Land Bank.[52] The Alaska Native corporations and Alaska Native individuals whose undeveloped property automatically goes into the Land Bank are explicitly recognized as "private landowners."[53] Any landowner may withdraw its land from the Land Bank by complying with certain requirements.[54] Congress also specified that, notwithstanding the land's tax-exempt status and other protections, "no provision of this section shall be construed as affecting the civil or criminal jurisdiction of the State of Alaska."[55] The Land Bank demonstrates Congress's continuing choice to ensure that Alaska Native land is managed as private property, subject to state jurisdiction.[56]

The 1987 amendments also created the settlement trust option.[57] This program allows ANCSA corporations to establish a settlement trust under state law to which a corporation may convey some portion of its assets, not including any subsurface estate, to be managed to "promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives."[58] The conveyed assets are subject to

---

50 *Id.* § 1636(d)(1)(A).

51 *Compare* 25 U.S.C. § 5108, *with* 43 U.S.C. § 1636(d)(1)(A)(ii).

52 43 U.S.C. § 1636(a).

53 *See id.*

54 *Id.* § 1636(b)(7).

55 *Id.* § 1636(g).

56 Excepting restricted fee allotments and townsite parcels owned by individual Alaska Natives.

57 43 U.S.C. § 1629e.

58 *Id.* § 1629e(b).

limited protections against involuntary transfers.[59] If the assets include undeveloped land, that land is still automatically included in the Land Bank, and is not subject to real property tax until it is developed.[60] Like the Land Bank, the settlement trust option demonstrates another deliberate congressional choice to further Alaska Native interests by promoting the ANCSA institutions organized under state law.

5. FLPMA's limited repeal of Alaska reservation and townsite authority, without repealing the remainder of the Alaska IRA, does not mean that trust land authority survives ANCSA.

In 1934 Congress enacted the IRA.[61] Only certain sections of this act were applicable to the then-territory of Alaska.[62] In 1936, however, Congress enacted the Alaska Indian Reorganization Act[63] (hereinafter "Alaska IRA"). Section 1 of the Alaska IRA extended additional sections of the 1934 IRA to Alaska, including section 5 of the IRA—the authority to acquire lands in trust.[64] Section 2 of the Alaska IRA authorized the Secretary of Interior to designate Indian reservations in Alaska.[65] In 1976, the Federal Land Policy and Management Act (hereinafter "FLPMA"), in a section repealing the executive branch's authority to make withdrawals and reservations, repealed section 2 of the Alaska IRA (the authority to designate reservations).[66] But, as the 2017 Solicitor's

---

59 *Id.* § 1629e(c)(5).

60 *Id.* § 1636(d).

61 Act of June 18, 1934, ch. 576, 48 Stat. 984.

62 25 U.S.C. § 5118 (applying to the Alaska Territory IRA sections 9 (funds for Indian chartered corporations), 10 (economic development loans), 11 (educational loans), 12 (appointments of Indians to the Indian Office), and 16 (right of Indians residing on same reservation to organize for common welfare)).

63 Act of May 1, 1936, 49 Stat. 1250.

64 25 U.S.C. § 5119.

65 *Id.* § 496 (1970) *repealed* by Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, Title VII, § 704(a), 90 Stat. 2793.

66 *See id.* FLPMA also repealed the Alaska Native Townsite Act. *Id.* § 703(a) (repealing Act of May 25, 1926, ch. 379, 44 Stat. 629).

Opinion emphasized,[67] FLPMA did not repeal Section 1 of the Alaska IRA, the section making the IRA's trust land provision applicable in Alaska. That does not, however, demonstrate Congress' intent that trust land acquisitions should survive ANCSA.

ANCSA's savings clause makes it clear that Congress intended that ANCSA prevail over other generally-applicable statutes like the Alaska IRA: "To the extent that there is a conflict between any provision of this Act and any other Federal laws applicable to Alaska, the provisions of this Act shall govern."[68]

After enacting ANCSA, Congress did not repeal the Alaska IRA section 1's application of the IRA's trust lands section for two straightforward reasons. First, ANCSA's clear rejection of trust lands meant Congress did not have to take that action. Second, the trust lands section potentially has continuing application for the Annette Islands Reserve. Moreover, other IRA provisions that Congress extended to Alaska continue to apply to Alaska tribes—such as the provisions allowing Alaska Native groups outside of reservations to organize and adopt constitutions and bylaws, and receive charters of incorporation and federal loans.[69] That Congress retained the Alaska IRA's incorporation of the trust lands section, along with other IRA sections, does not demonstrate that Congress intended to broadly allow new trust acquisitions after ANCSA.

B. Trust land in Alaska raises unique governance concerns for the State of Alaska.

In addition to conflicting with ANCSA's congressional intent, acquiring new lands into trust in Alaska, and potentially creating new Indian country in Alaska, creates enormous policy concerns for the State. The State raised these concerns in its 2014 comments to Interior when the agency first proposed amending its regulations to allow Alaska trust acquisitions. The State reiterates those concerns here. That permitting new

---

67 Sol. Op. M-37042 at 21 (Jan. 13, 2017)

68 ANCSA, Pub. L. No. 92-203, § 26, 85 Stat. 688, 715 (1971).

69 25 U.S.C. § 5119 (applying Indian Reorganization Act §§ 10, 16, 17 to, as originally worded in the Alaska IRA, "groups of Indians in Alaska not heretofore 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"). *Cf.* Act of June 18, 1934, ch. 576, § 16, 48 Stat. 984, 987 (limiting right to organize through a constitution or bylaws to "Indian tribe, or tribes, residing on the same reservation").

trust lands in Alaska will upend Alaska's current jurisdictional framework—a framework that the ANCSA settlement reinforced—should weigh heavily in favor of reinstating the Alaska trust acquisition prohibition.

1. Taking additional land into trust will create fragmented, confusing jurisdictional boundaries.

Congress intended the 1934 IRA's land-into-trust process to help Lower 48 tribes recover reservation land lost under the federal government's late 19th century allotment policies.[70] But Alaska reservations were never fragmented by allotment—in fact, it was the Alaska IRA's reservation authority that led to the creation of the bulk of the State's previous reserves,[71] and Congress expressly revoked Alaska's reservations (save one) through ANCSA.[72] Taking land into trust in Alaska does not serve the IRA's purpose to restore fragmented reservations. Instead, it creates new jurisdictional fragmentation where, since the enactment of ANCSA, none previously existed.

If new trust land is permitted, communities will likely end up peppered with enclaves exempt from state and local taxation, and if treated as Indian country, possibly subject to overlapping state and tribal criminal jurisdiction while exempt from state and local regulatory authority. This will not be the clarifying and unifying effect that taking

---

70 *See* 25 U.S.C. § 5108. *See also* 25 U.S.C. § 5103(a) (authorizing Interior to "restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal"); General Allotment Act of Feb. 8, 1887, 24 Stat. 388. The Lower 48 allotment policies were different than the 1906 Alaska Native Allotment Act: "The General Allotment Act is usually credited with the terrible erosion of the Native American land base, whereas the Alaska Native Allotment Act promised a significant increase in Alaska Native land ownership." DAVID CASE & DAVID VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 115 (3d ed. 2012) (hereinafter "CASE & VOLUCK"). During the late 19th and early 20th centuries, reserves in Alaska were being established—not fragmented. *See id.* at 85-93 (discussing creation of statutory and executive order reserves, as well as six reserves under the Indian Reorganization Act).

71 CASE & VOLUCK at 107 ("[P]rior to ANCSA there were only two statutory reserves and six IRA reserves.").

72 43 U.S.C. § 1618 (a), (b) (revoking reservations in Alaska, but providing that village corporations could elect to acquire surface and subsurface estates in any reserve previously set aside for its stockholders).

land-into-trust sometimes has in the Lower 48. In Alaska, the public will suffer jurisdictional uncertainty.

2. Trust land could undermine essential state civil regulation.

In its rule rescinding the Alaska exception to the trust regulations, Interior posited that trust land will become "Indian country."[73] If trust land is indeed considered Indian country it will severely undermine the State's regulatory authority.

Indian country defines land subject to tribal and federal jurisdiction.[74] Primary jurisdiction over land that is Indian country is with the federal government and the tribe, not with the state.[75] The State of Alaska has some jurisdiction in Indian country,[76] but there is an argument the State's civil jurisdiction is limited to adjudication: while state civil courts can hear disputes from Indian country, that does not necessarily grant the state regulatory authority thereon.[77] On trust land, state and local government authority to regulate civil matters will be diminished, if not lost entirely.

---

[73] Dep't of Interior, *Land Acquisitions in the State of Alaska*, 79 Fed. Reg. 76,888, 76,893 (Dec. 23, 2014).

[74] 18 U.S.C. § 1151; *see also Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 534 (1998).

[75] *See Native Vill. of Venetie Tribal Gov't*, 522 U.S. at 527 n.1 (citing *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998)); *American Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1096 n.3 (9th Cir. 2002) (stating that states have limited power to assert jurisdiction in Indian country).

[76] 28 U.S.C. § 1360(a); 18 U.S.C. § 1162(a).

[77] *See* 28 U.S.C. § 1360(b). *See also Bryan v. Itasca Cnty.*, 426 U.S. 373, 383 (1976) (explaining that the civil jurisdiction provision of Public Law 280 "seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes"); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987) (explaining that Public Law 280's grant of criminal jurisdiction authorizes prohibitory laws, but the grant of civil jurisdiction does not authorize regulatory laws); FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 6.04[3][b][ii] at 540-41 (Nell Jessup Newton ed., 2012 ed.).

This loss compromises the State's ability to manage public resources, to provide public services, and to ensure public safety. Within trust land, Alaska and local governments could lose authority to effectively regulate important areas like tobacco and cannabis, environmental and public health protection, fish and game, forest practices, and zoning. This situation is rife with uncertainty. As one commentator notes, in determining state jurisdiction in Indian country, "judicial efforts to characterize laws dealing with traffic violations, fireworks, child welfare, and hunting and fishing, among other subject areas, have produced contradictory and confusing results."[78]

A state's exercising its police powers and regulating its resources are fundamental elements of state sovereignty. These sovereign interests are "direct, significant and legally protectable interests,"[79] and include the State's duties under the Alaska Constitution.[80]

3. Trust land could block access and impede infrastructure development.

Regardless if trust land is considered Indian country, accepting land-into-trust may impede access to natural resources and stall developing statewide infrastructure. It will be difficult for the State to maintain or confirm existing public rights-of-way across trust land (including, for example, RS 2477[81] rights-of-way), or to acquire new rights-of-way. That means a tribe or individual with trust land could unilaterally block access, short of

---

78 COHEN, *supra* note 77 § 6.04[3][b][ii] at 542.

79 *Miami Tribe of Oklahoma v. Walden*, 206 F.R.D. 238, 242 (S.D. Ill. 2001).

80 Alaska Const. art. VIII, § 4 (requiring management of fish and game under sustained yield principles); Alaska Const. art. VIII, § 17 (requiring laws and regulations governing the use of fish and game resources "apply equally to all persons"). *See also Jones v. State*, 936 P.2d 1263, 1267 (Alaska App. 1997) (recognizing that creating "islands of non-regulation spread throughout practically every game-management unit in the state" would "disrupt[] and endanger[] the State's efforts to protect and conserve game resources"; and discussing state regulation on Native allotments); *Alaska v. Babbitt*, 72 F.3d 698, 704 (9th Cir. 1995) (noting difficulties presented by dual federal-state management of state fish and game).

81 43 U.S.C § 932, *repealed by* FLPMA, Pub. L. 94-579, Title VI, § 706(a), 90 Stat. 2793.

extensive litigation or permission from the federal government.[82] Any litigation regarding rights-of-way ownership across the later-created trust land might be further complicated by federal law, which can prevent quiet title actions on trust lands.[83] Further, trust determinations are effectively permanent without an act of Congress because once land is taken into trust, there is no regulatory mechanism to reverse that determination.

4. Trust land will be exempt from property taxes—hurting government services and raising the tax burden for others.

Trust land (Indian country or not) is exempt from state and local taxation.[84] Tax exempt status extends not only to the land, but also to permanent improvements, including those that are not owned by a tribe or Alaska Native.[85]

Yet the mere presence of trust land in a community does not undo the State and local governments' obligations to provide vital services such as schools, infrastructure, and public safety. Enclaves of tax-free land may compromise the State and local governments' ability to provide public services, while allowing some businesses and individuals to reap the benefits of government services without paying their fair share.

5. Trust land could be subject to tribal criminal jurisdiction.

If trust land is considered Indian country, it could be subject to concurrent state and tribal criminal jurisdiction.[86] Under federal law, tribes may exercise criminal

---

82 *See* 25 U.S.C. § 323 (granting the Secretary of the Interior authority to grant rights-of-way across trust land); 25 U.S.C. § 311 (allowing the Secretary of the Interior to grant permission to State or local authorities to open highways over Indian reservations or allotments).

83 *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2205 (2012) (citing 28 U.S.C. § 2409a(a)).

84 25 U.S.C. § 5108.

85 *See Confederated Tribes of Chehalis Reservation v. Thurston Cnty. Bd. of Equalization*, 724 F.3d 1153, 1159 (9th Cir. 2013).

86 *See* COHEN, *supra* note 77 § 6.04[3][c], at 555 ("The nearly unanimous view . . . is that Public Law 280 left the inherent civil and criminal jurisdiction of Indian nations untouched."); 18 U.S.C. § 1162 (discussing criminal state jurisdiction).

jurisdiction over crimes committed in Indian country by a Native American; tribes generally have no criminal jurisdiction over non-Native Americans and no criminal jurisdiction outside of Indian country.[87]

Tribal law crimes can be more restrictive than state law crimes. For example, an Alaska tribe could make it a crime to possess small amounts of marijuana, which is legal under current Alaska law. Tribal prosecutions must comply with the Indian Civil Rights Act, but not the federal or state constitutions.[88] There is no right to counsel for misdemeanor-level prosecutions.[89] Tribes can also detain and exclude non-Indians from tribal trust lands.[90]

With 229 federally recognized tribes, just as many tribal codes, and scattered patches of trust land, it will not be easy for Alaskans to discern when they may be subject to tribal criminal laws. Public safety is the State's top policy priority, but the State maintains that consistent application of the State and municipal law, and collaboration with tribal courts, will do more for public safety than Indian country on scattered trust land parcels.

The State of Alaska prefers exercising State jurisdiction using law enforcement resources authorized under State law, coupled with civil diversion agreements that allow tribal courts to adjudicate certain classes of offenses, over creating Indian country and tribal police departments.

C. Conclusion.

The State of Alaska requests that the Department of the Interior withdraw the 2017

---

87 *See* COHEN, *supra* note 77 § 9.04, at 765 (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)). *But see* 25 U.S.C. § 1304 (allowing tribes to prosecute non-Natives for certain domestic violence crimes).

88 *See United States v. Becerra-Garcia*, 397 F.3d 1167, 1171 (9th Cir. 2005) ("[T]he constitution does not directly apply to the conduct of tribal governments . . . ."). The Indian Civil Rights Act includes the 1st, 4th, 5th, 6th, 8th, and 14th amendments. 25 U.S.C. § 1302.

89 *See* 25 U.S.C. § 1302.

90 *See Becerra-Garcia*, 397 F.3d at 1175 ("Intrinsic in tribal sovereignty is the power to exclude trespassers from the reservation, a power that necessarily entails investigating potential trespassers.").

Solicitor's Opinion. The State of Alaska urges Interior to amend its trust land regulations to reinstate the Alaska exclusion. Acquiring new lands in trust in Alaska was foreclosed by ANCSA and is not in Alaska's best interests.

Sincerely,

Kevin G. Clarkson
Attorney General

KC/rjc