

Controversy Over Interior's Trust Authority in Alaska Remains Unresolved

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A majority panel of the U.S. Court of Appeals for the District of Columbia Circuit recently dismissed the State of Alaska's challenge to the U.S. Secretary of the Interior's authority to acquire land in trust for Alaska tribes on the ground that the state's challenge is moot in *Akiachak Native Community v. U.S. Department of the Interior*. The majority leaves unanswered the central legal question—whether the Secretary has the legal authority to acquire land into trust in Alaska—for future relitigation.

District Court Decision and Validity of the Alaska Exception

Congress passed the Alaska Native Claims Settlement Act (ANCSA) in 1971 to settle all land claims by Alaska Natives, and in doing so extinguished aboriginal lands claims and revoked all designated reservations. Since the Act's passage, the Secretary has interpreted ANCSA to prohibit her from acquiring land in trust on behalf of Alaska tribes. The Secretary, in fact, promulgated a regulation known as the "Alaska exception," excluding from the Secretary's trust authority the acquisition of land in trust in the State of Alaska.

In 2006, the Akiachak Native Community and two other tribes (Tribes) filed a complaint in federal district court challenging the Alaska exception. The Tribes argued that the regulation violated the 1994 antidiscrimination provision amending the Indian Reorganization Act (IRA), 25 U.S.C. 476(f), (g), by discriminating between tribes, the Due Process and Equal Protection Clauses of the U.S. Constitution, and the Administrative Procedure Act. The State of Alaska intervened in the suit as a defendant to defend the Alaska exception, arguing that ANCSA "implicitly repealed the Secretary's statutory authority to take Alaska land into trust outside of Metlakatla," the only reservation not revoked under ANCSA. The state did not assert cross-claims against the United States.

The district court rejected Alaska's argument, severing and vacating the portion of the regulation containing the Alaska exception. Although both the Secretary and the state appealed the district court's decision, the Secretary voluntarily dismissed its appeal and—through notice and comment rulemaking—promulgated a new regulation eliminating the Alaska exception. Alaska pursued its appeal but did not challenge the Secretary's new regulation, leaving it in the position of challenging a regulation that no longer existed.

Circuit Court's Decision

Over a strenuous dissent, the majority held that the state's challenge of the Alaska exception was moot because the Secretary had rescinded the exception from the trust regulations. Holding that it lacked jurisdiction to resolve the underlying legal issue, the majority not only dismissed the case but also vacated the underlying district court decision, which held that the Secretary did, in fact, have authority to acquire land in trust. The court concluded that vacatur was appropriate because Alaska had been prevented from appealing the district court's decision by the Secretary's revocation of the Alaska exception, an action outside of the state's control. Thus, the D.C. Circuit's decision allows for relitigation of the effect of ANCSA on the Secretary's trust authority on a clean slate.

D.C. Circuit Decision Likely to Spur Litigation

The question of the authority of the Secretary to acquire land in trust in Alaska after ANCSA remains an open question and is likely to be raised either in a facial challenge to the Secretary's regulation or in an "as applied" challenge, after the Secretary issues a decision to acquire land in trust for an Alaska tribe. The rulemaking raised other concerns from stakeholders, such as how trust status would be administered in a split estate context (e.g., where a regional Alaska Native Corporation owns the subsurface). The Secretary also disclaimed any obligation to evaluate the effects of the new trust regulation under the National Environmental Policy Act, concluding that the action was covered by a categorical exclusion. Given the issues, it seems possible that other stakeholders, such as local governments, Alaska Native corporations and resource development interest groups, may decide to challenge the regulation or a specific trust decision.

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