

The Secretary’s Land into Trust Authority for Alaska Natives and Alaska Tribes Under the Indian Reorganization Act and the Alaska Indian Reorganization Act

I. Introduction	2
II. Background and Relevant Laws.....	3
A. Land Tenure in Alaska Prior to 1934.....	3
B. The Indian Reorganization Act and the Alaska Indian Reorganization Act.....	5
C. Alaska Statehood	8
D. The Alaska Native Claims Settlement Act and Other Post-ANCSA Legislation.....	8
E. The “Alaska Exception” in the Department’s Part 151 Regulations	11
III. Discussion.....	14
A. Congress Made IRA Sections 5 and 7 Applicable in Alaska when it Enacted the Alaska IRA	15
1. The IRA and Alaska IRA are Plain on their Face	15
2. Alaska Statehood did not Alter the Applicability of IRA Sections 5 and 7 to Alaska Natives and Alaska Tribes	16
B. The Secretary’s Statutory Authority to Acquire Lands in Trust for Alaska Natives or Alaska Tribes Remains in Force	21
1. No Irreconcilable Conflict Exists.....	21
2. ANCSA Does not Cover the Whole Subject.....	24
C. Section 19 Provides a Stand-alone Definition of “Indian” Applicable to Alaska Natives and Alaska Tribes.....	26
1. Section 19’s Plain Language	27
2. Section 19’s Legislative History	28
3. Early Implementation of the Alaska IRA.....	32
4. Congress Expressly Applied the IRA to Alaska Natives and Alaska Tribes	35
5. The Alaska IRA does not Establish Two Classes of Tribes in Alaska	36
IV. Conclusion	37



United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

November 16, 2022

M-37076

Memorandum

To: Secretary
Assistant Secretary for Indian Affairs
Director, Bureau of Indian Affairs

From: Solicitor

Subject: The Secretary's Land into Trust Authority for Alaska Natives and Alaska Tribes
Under the Indian Reorganization Act and the Alaska Indian Reorganization Act

I. Introduction

On January 13, 2017, Solicitor Hilary Tompkins issued Solicitor Opinion M-37043 (M-37043),¹ an analysis of the effects of the Alaska Native Claims Settlement Act (ANCSA),² the Federal Land Policy and Management Act (FLPMA),³ and the Supreme Court decision in *Carcieri v. Salazar* (*Carcieri*)⁴ on the Secretary of the Interior's (Secretary) statutory authority to accept land in trust in the State of Alaska (Alaska or State) under the Indian Reorganization Act (IRA)⁵ and the Alaska Indian Reorganization Act (Alaska IRA).⁶ Solicitor Tompkins concluded that neither FLPMA nor ANCSA's plain language, legislative history, or the Court's decision in *Carcieri* repealed, limited, or precluded the Secretary's authority to acquire land in trust for Alaska Natives and federally recognized Tribes in Alaska (Alaska Tribes).⁷

Despite M-37043 providing clarity to this longstanding matter, on January 19, 2021, Solicitor Daniel Jorjani issued Solicitor Opinion M-37064 (M-37064)⁸ withdrawing M-37043 and

¹ Hilary C. Tompkins, Solicitor Opinion M-37043, "*Authority to Acquire Land into Trust in Alaska*" (Jan. 13, 2017) [hereinafter M-37043].

² Pub. L. No. 92-203, 85 Stat. 688 (1971) (*codified as amended at* 43 U.S.C. §§ 1601-1629h) [hereinafter ANCSA].

³ Pub. L. No. 94-579, 90 Stat. 2744 (1976) (*codified as amended at* 43 U.S.C. §§ 1701-1787) [hereinafter FLPMA].

⁴ 555 U.S. 379 (2009).

⁵ Act of June 18, 1934, 48 Stat. 984 (*codified as amended at* 25 U.S.C. §§ 5101-5129) [hereinafter IRA].

⁶ Act of May 1, 1936, Pub. L. No. 74-538, 49 Stat. 1250 (1936) (*codified as amended at* 25 U.S.C. § 5119) [hereinafter AIRA].

⁷ M-37043 at 22 (Alaska Tribes are also often referred to as Alaska Native Villages).

⁸ Daniel H. Jorjani, Solicitor Opinion M-37064, "*Permanent Withdrawal of Solicitor Opinion M-37043, 'Authority to Acquire Land into Trust in Alaska'*" (Jan. 19, 2021) [hereinafter M-37064] (finding that the "failure to discuss fully the possible implications of post-ANCSA legislation on the Secretary's authority to take land in trust in

identifying concerns over the scope of the Secretary's land acquisition authority in the State of Alaska. However, M-37064 did not engage, explain, or attempt to reconcile its concerns with the Department of the Interior's (Department) regulations, which allow for land into trust acquisitions in Alaska. Nor was the opinion accompanied by any formal change in policy (*e.g.* a proposed rulemaking for 25 C.F.R. § 151.1). Because a signed M-Opinion is binding on Department offices and officials until modified by the Secretary, the Deputy Secretary, or the Solicitor,⁹ M-37064 effectively halted trust land acquisitions in Alaska. Accordingly, and to eliminate any uncertainties regarding the Secretary's land acquisition authority in Alaska, on April 27, 2021, I withdrew M-37064, and at the expiration of a consultation period on the subject, the Department resumed processing land into trust applications in Alaska.¹⁰

The Department's regulations for processing land into trust applications require the Secretary to consider several criteria, including "[t]he existence of statutory authority for the acquisition and any limitations contained in such authority."¹¹ This memorandum affirms that the Secretary has statutory authority to accept land in trust for Alaska Natives and Alaska Tribes. Having reviewed the concerns identified by M-37064, I conclude that none of the concerns affects the existence or scope of the Secretary's authority under Section 5 of the IRA. As such, this opinion concludes that the IRA and the provisions made applicable under the Alaska IRA provide statutory authority for the Secretary to take land into trust for Alaska Natives and Alaska Tribes and to proclaim such lands as reservations for Alaska Tribes. I further conclude that Section 19 of the IRA provides a stand-alone definition of "Indian" applicable to tribes in Alaska, obviating the need to make a *Carcieri* "under Federal jurisdiction" determination for such acquisitions.

II. Background and Relevant Laws

A. Land Tenure in Alaska Prior to 1934

Unlike in the lower 48 states, there were never any treaties with Alaska Natives.¹² Instead, the United States' relationship with Alaska Natives and Alaska Tribes has been defined through a complex array of court decisions, statutes, administrative actions, and Departmental legal opinions.

Alaska, the failure to address the District Court's holding regarding the applicability of 25 U.S.C. § 476(g) to Alaska Native tribes and the Department's reliance thereon in promulgating revised regulations leave the Solicitor's analysis incomplete and unbalanced.").

⁹ U.S. Dep't of the Interior, 209 Departmental Manual 3.2(A)(11).

¹⁰ 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*" (Apr. 27, 2021) [hereinafter M-37069].

¹¹ See 25 C.F.R. §§ 151.10-11 (regulations governing on-reservation and off-reservation acquisitions) (when considering an application for the acquisition of trust land, the Secretary must consider several criteria, including "[t]he existence of statutory authority for the acquisition and any limitations contained in such authority.").

¹² *United States v. Atl. Richfield Co.*, 435 F. Supp. 1009, 1015 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980).

Under the 1867 Treaty of Cession, Russia ceded its territorial possessions in North America to the United States and provided that “[t]he uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.”¹³ In the decades that followed, several acts of Congress recognized Alaska Natives’ rights to the lands they occupied.¹⁴ The 1884 Organic Act, which established Alaska as a civil and judicial district subject to the general laws of the State of Oregon,¹⁵ declared “[t]hat the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them.”¹⁶ Five years later, Congress established a reservation for the Metlakatla Indian Community, which had recently moved to Alaska from British Columbia.¹⁷ Other reserves for Alaska Natives were established by Presidential executive order.¹⁸ In 1900, Congress enacted legislation providing civil laws for the District of Alaska, which provided that “Alaska Natives were not to be disturbed in their use and occupancy of land in Alaska.”¹⁹ These Acts, however, did not define or otherwise address Alaska Natives’ rights in their lands, deferring the issue for future congressional and judicial consideration.²⁰

Congress proceeded to open Alaska to settlement and development by extending several general land laws to Alaska.²¹ As a result, non-Alaska Native settlers filed homestead claims that “forced [Alaska Natives] to move and give way,”²² resulting in severe hardship “due more to a lack of needed legislation than to a wanton disposition on the part of those who have thus dispossessed them.”²³ The House of Representatives Committee on Public Lands explained that Alaska Natives “[were] not confined to reservations as they [were] in the several States and Territories

¹³ Treaty of Cession, March 30, 1867, art. III, 15 Stat. 539, 542.

¹⁴ Felix S. Cohen, *Handbook of Federal Indian Law* 411 (1942) [hereinafter 1942 Cohen]; see also David S. Case and David A. Voluck, *Alaska Natives and American Laws* 24 n.148 (3d ed. 2012) [hereinafter Case & Voluck].

¹⁵ Alaska did not officially become a U.S. territory until the Act of August 24, 1912, ch. 387, 37 Stat. 512.

¹⁶ Act of May 17, 1884, § 8, 23 Stat. 24, 26 (the 1884 Organic Act established the first framework for a territorial civil government).

¹⁷ See *Metlakatla Indians v. Egan*, 369 U.S. 45, 48 (1962) (citing Act of March 3, 1891, § 15, 26 Stat. 1095, 1101).

¹⁸ See Cohen’s *Handbook of Federal Indian Law* § 4.07[3][b][iii] (Nell Jessup Newton ed., 2012) (discussing the history of reservation policy in Alaska). The President’s authority to establish these reserves was upheld in a May 18, 1923, Solicitor’s Opinion. See 49 Pub. Lands Dec. 592. (There were approximately 19 large reserves of different origins in Alaska by the time the IRA was enacted). See Federal Field Committee for the Development and Planning in Alaska, *Alaska Natives and the Land* 443-446 (1968).

¹⁹ Act of June 6, 1900, 31 Stat. 321.

²⁰ *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278 (1955).

²¹ *Atl. Richfield Co.*, 435 F. Supp. at 1014-15 (D. Alaska 1977), *aff’d*, 612 F.2d 1132 (9th Cir. 1980). See, e.g., The Act of March 3, 1891, authorized the establishment of townsites and conveyances of town lots to individual occupants. In 1898 Congress extended the homestead laws to Alaska and in 1900 the mining laws of the United States to Alaska in the second Organic Act. In 1914 Congress enacted the Alaska Coal Lands Act, directing the President to reserve potential coal-bearing lands and issue leases for those lands. The Mineral Leasing Act enacted in 1920 authorizes the Secretary of the Interior to lease lands owned by the United States that contain deposits of coal, oil, and other minerals.

²² H.R. Rpt. 59-3295 (Apr. 16, 1906).

²³ *Id.*

of the United States,” but lived instead in villages and small settlements on lands “to which they [had] no title, nor [could] they obtain a title under existing laws.”²⁴

Congress responded in 1906 by enacting the Alaska Native Allotment Act (Allotment Act).²⁵ The Allotment Act provided a means for Alaska Natives to acquire legal title to land they occupied and authorized the Secretary to issue homestead allotments of nonmineral public lands to “any Indian or Eskimo of full or mixed blood,” to be inalienable and nontaxable until Congress should provide otherwise.²⁶ Twenty years later, in 1926, Congress enacted the Alaska Native Townsite Act,²⁷ which helped resolve a conflict between how townsites issued to Alaska Natives who had secured certificates of citizenship under the territorial laws compared with those issued to Alaska Natives deemed noncitizens.²⁸ The title individual Alaska Natives received under these statutes was subject to restrictions on alienation.²⁹

B. The Indian Reorganization Act and the Alaska Indian Reorganization Act

Referred to as the “Indian New Deal,”³⁰ the IRA was prompted in part by an investigation into the social and economic conditions of Indians throughout the United States known as the Meriam Report.³¹ In 1934, Congress enacted the IRA “to rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.”³² The legislation encouraged tribes “to revitalize their self-government,” to take control of their “business and economic affairs,” and to assure a solid territorial base by “putting a halt to the loss of tribal lands through allotment.”³³ Beyond alleviating the negative impacts of allotment, Congress enacted the IRA to “establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.”³⁴

²⁴ *Id.*

²⁵ Act of May 16, 1906, ch. 2469, 34 Stat. 197.

²⁶ Congress later amended the 1906 act to allow Alaska Native allottees or their heirs to sell or convey title to their homestead allotments with the Secretary’s approval. Pub. L. No. 84-931, 70 Stat. 954 (1956), repealed, Pub. L. No. 92-203, § 18(a), 85 Stat. 688, 710 (1971). The amendment further made native inhabitants of the Aleutian Islands eligible for homestead allotments under the act. S. Rpt. 84-2696 (Jul. 20, 1956). By 1955, a total of 79 homestead allotments had been issued under the Alaska Native Allotment Act and 64 applications were pending. *Id.* at 3.

²⁷ Act of May 24, 1926, ch. 379, 44 Stat. 629.

²⁸ H.R. Rpt. 69-450 at 2 (Mar. 3, 1926).

²⁹ Act of May 25, 1926, Ch. 379, 44 Stat. 629; *see also Atlantic Richfield Co.*, 435 F. Supp. at 1015 (D. Alaska 1977), *aff’d*, 612 F.2d 1132 (9th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980).

³⁰ *Coleman v. U.S. Bureau of Indian Affairs*, 715 F.2d 1156, 1160 (7th Cir. 1983).

³¹ *Red Lake Band v. United States*, 17 Cl. Ct. 362, 452 (1989); *Garreaux v. United States*, 544 F. Supp. 2d 885, 891 (D.S.D. 2008) (IRA enacted to address issues identified in Meriam Report). *See* Lewis Meriam, *Report of the Institute for Government Research, The Problems of Indian Administration* (1928). The Meriam Report followed a similar investigation into the Office of Indian Affairs. Lawrence F. Schmeckebier, *Report of the Institute of Government Research, The Office of Indian Affairs, Its History, Activities and Organization* (1927).

³² *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (citing H.R. Rpt. 73-1804 at 6 (1934)).

³³ *Id.* at 151.

³⁴ *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

Section 5 of the IRA serves as the “capstone” of the land-related provisions of the IRA, which “play a key role in the IRA’s overall effort ‘to rehabilitate the Indian’s economic life.’”³⁵ Section 5 provides the Secretary discretionary authority to acquire lands in trust for “Indians.”³⁶ Section 19 defines “Indian” as including the following categories:

[1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include [3] all other persons of one-half or more Indian blood.³⁷

Section 19 further provides that “Eskimos and other aboriginal peoples of Alaska shall be considered Indians” for purposes of the statute.³⁸ Despite Section 19’s seemingly clear intent, IRA Section 13 prohibited the IRA’s application to any of the “[t]erritories, colonies, or insular possessions” of the United States.³⁹ But because Congress intended it to apply to Alaska Natives,⁴⁰ it included a proviso in Section 13 making five of the IRA’s sections – 9, 10, 11, 12, and 16 – applicable in the Alaska Territory despite the generalized territorial prohibition.⁴¹ The Section 13 proviso did not include the Secretary’s Section 5 land into trust authority or the Secretary’s Section 7 reservation proclamation authority.⁴²

Omission of these authorities from the proviso in IRA Section 13 was an oversight with profound consequences for the IRA’s implementation in Alaska.⁴³ Alaska Natives generally did not live on reservations and were not generally “grouped as bands or tribes, as in the States.” As a result, Section 16 of the IRA, which authorized tribal constitutional governments for Indians “residing on the same *reservation*,” could not be implemented despite being made applicable in IRA Section 13’s proviso.⁴⁴ Section 13’s proviso also “inadvertently omitted” IRA Section 17, which Secretary Harold L. Ickes described as “nullify[ing] the intent and purpose of that part of the [IRA] designed to aid Indian communities to obtain something of economic security.”⁴⁵

³⁵ *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 567 U.S. 209, 226 (2012).

³⁶ 25 U.S.C. § 5108.

³⁷ 25 U.S.C. § 5129 (bracketed numerals added).

³⁸ *Id.* The term “Alaska Natives” is inclusive of those individuals described in the IRA as “Eskimos and other aboriginal peoples of Alaska.” See, e.g., Memorandum, *Relationships between the United States and the Natives of Alaska*, Acting Associate Solicitor to Deputy Solicitor (May 8, 1973).

³⁹ IRA at § 13, *codified at* 25 U.S.C. § 5118 (“The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that Sections 9, 10, 11, 12, and 16 [25 U.S.C. §§ 5112, 5113, 5115, 5116, and 5123], shall apply to the Territory [State] of Alaska”).

⁴⁰ *Readjustment of Indian Affairs: Hearings Before the Committee on Indian Affairs, House of Representatives on H.R. 7902*, 73d Cong., 2d Sess. [hereinafter H. Hrgs. on Wheeler-Howard Act] (discussing IRA’s applicability to the “Indians” of Alaska).

⁴¹ *Id.*

⁴² 25 U.S.C. §§ 5108, 5110.

⁴³ See H. Rep. No. 74-2244 at 2; see also 1942 Cohen at 413-14.

⁴⁴ 1942 Cohen at 414 (emphasis added).

⁴⁵ H. Rep. No. 74-2244 at 4.

Because “the lands occupied by Alaska Natives have not been designated as reservations,” Secretary Ickes explained, it would be necessary “to identify [an Alaska tribe] with the land it occupies” in the terms used by the IRA itself, that is, a “reservation.”⁴⁶ If Alaska tribes were to set up systems of local government, it would further be necessary to demarcate the geographic limits of their jurisdiction, which “[r]eservations set up by the Secretary of the Interior will accomplish.”⁴⁷ Thus, in addition to proposed Section 2 of the Alaska IRA, which authorized the Secretary to designate certain public lands as Indian reservations for Alaska Natives,⁴⁸ Secretary Ickes observed that extending Sections 5 and 7 to Alaska was necessary for the establishment and the administration of new reservations.⁴⁹

Congress responded to these concerns in 1936 by enacting the Alaska IRA, making additional IRA provisions applicable to Alaska,⁵⁰ including the land into trust and reservation proclamation provisions contained in Sections 5 and 7.⁵¹ Section 1 of the Alaska IRA provided that:

Sections 1, 5, 7, 8, 15, 17, and 19 of the [IRA] shall hereafter apply to the Territory [State] of Alaska: *Provided*, That 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, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under Sections 16, 17, and 10 of the [IRA].⁵²

⁴⁶ 1942 Cohen at 413 (AIRA intended to remedy IRA’s failure to extend its incorporation and credit privileges to organizations in Alaska and to authorize a type of organization more suited to Alaska Native groupings and activities than those in the Lower 48.).

⁴⁷ H.R. Rep. No. 74-2244 at 4; S. Rep. No. 74-1748 at 4 (1936).

⁴⁸ AIRA § 2 (Section 2 of the AIRA authorized the Secretary, subject to a vote of its Alaska Native residents, “to designate as an Indian reservation any area of land which has been reserved for the use and occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat. 26), or by section 14 or section 15 of the Act of March 3, 1891 (26 Stat. 1101), or which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof, within the Territory of Alaska, or any other public lands which are actually occupied by Indians or Eskimos within said Territory.” Congress later expressly repealed AIRA Section 2. *See* FLPMA Title VII, § 704(a), 43 U.S.C. § 1701 et seq., 90 Stat. 2743 (1976)).

⁴⁹ *See* H.R. Rep. No. 74-2244 at 4 (emphasis added).

⁵⁰ AIRA; *see also* Letter and Memo, *Explanation of the Alaska Indian Reorganization Act*, John Collier, Commissioner of Indian Affairs to Claude M. Hirst, Director of Education, Juneau, Alaska (May 13, 1938) (The explanatory memo attached to Commissioner Collier’s letter stated that “[w]hile section 19 of the [IRA] provided that ‘Eskimos and other aboriginal peoples in Alaska shall be considered Indians’ for the purposes of the act, few of the important provisions were actually extended to Alaska. The Alaska Act not only corrected this defect but added new provisions to make the opportunities and benefits provided for the Indians in the States fit the conditions of the natives in Alaska.”).

⁵¹ 25 U.S.C. § 5119.

⁵² *Id.*

C. Alaska Statehood

In 1958, Congress enacted legislation to admit Alaska to the Union (Statehood Act).⁵³ The following year, President Eisenhower proclaimed Alaska as the 49th state.⁵⁴ Section 6 of the Statehood Act granted Alaska the right to select lands within the public domain and national forests for the purpose of furthering “the development of and expansion of communities.”⁵⁵ Section 4, however, sought to preserve aboriginal and possessory Indian claims “so that statehood should neither extinguish them nor recognize them as compensable.”⁵⁶ Specifically, Section 4 required Alaska to “forever disclaim all right and title to” . . . “any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives . . .”⁵⁷ Despite explicitly preserving the status quo, the Statehood Act precipitated conflicts between the State’s land selections and Alaska Native claims.⁵⁸

D. The Alaska Native Claims Settlement Act and Other Post-ANCSA Legislation

Because many of the lands that the State sought to select under the Statehood Act were also claimed as of right by Alaska Native groups, it left doubt over land title and ignited litigation over aboriginal title in Alaska.⁵⁹ Even though Section 4 of the Alaska Statehood Act recognized the possibility that Alaska Natives held right and title to “lands or other property,”⁶⁰ it also granted the State the right to select and receive title to approximately 102.5 million acres of Alaska’s nearly 600 million acres.⁶¹ Alaska Natives protested the State’s selections to the Department on the basis that the much of the selected land was subject to Alaska Native use, occupancy, and claims of right.⁶²

Questions of aboriginal title stymied implementation of the Statehood Act and consequently, the State’s economic development.⁶³ Ultimately, in 1966 the Department announced a moratorium on disposition of federal lands in Alaska pending Congressional resolution of Alaska Native land

⁵³ Pub. L. No. 85-508, 72 Stat. 339 (Jul. 7, 1958).

⁵⁴ Proclamation No. 3269, 24 Fed. Reg. 81 (Jan. 6, 1959).

⁵⁵ Statehood Act § 6(a).

⁵⁶ Thomas L. Sansonetti, Solicitor Opinion M-36975, *Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers*, 72 (Jan. 11, 1993) [hereinafter Sansonetti Opinion] (citing *Kake v. Egan*, 369 U.S. 60, 65 (1962)).

⁵⁷ Statehood Act § 4.

⁵⁸ Sansonetti Opinion at 72-73.

⁵⁹ See M-37043 at 6 (noting how the Statehood Act revived disputes over aboriginal title that ANCSA ultimately resolved).

⁶⁰ Statehood Act § 4.

⁶¹ AIRA § 6(b).

⁶² *Atl. Richfield Co.*, 435 F. Supp. at 1017-18 (D. Alaska 1977), *aff’d*, 612 F.2d 1132 (9th Cir. 1980).

⁶³ S. Rep. 92-405 at 76 (describing Congress’s failure to “define, confirm, deny, or extinguish” aboriginal title as resulting in doubts over the Secretary’s authority to grant the State and other parties rights in, or patent to, public lands in Alaska claimed by Alaska Natives). See also Nathan Brooks, Congressional Research Service, *The Alaska Land Transfer Acceleration Act: Background and Summary* 1-3 (Jan. 14, 2005).

claims.⁶⁴ This moratorium was followed by Public Land Order 4582, January 17, 1969, which froze further patent or approval of applications for public lands in Alaska, pending the resolution of Alaska Native title claims.⁶⁵

To address these issues and finally resolve the question of aboriginal title,⁶⁶ in 1971 Congress enacted the Alaska Native Claims Settlement Act (ANCSA),⁶⁷ “a comprehensive statute designed to settle all land claims by Alaska Natives.”⁶⁸ In enacting ANCSA, Congress broadly declared its findings and policy that:

the 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*, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska[.]⁶⁹

ANCSA extinguished aboriginal land claims as well as Alaska Native use and occupancy rights in Alaska.⁷⁰ The Act revoked the various reserves that had been set aside for Alaska Native groups or for the administration of Native affairs (excluding the Annette Island Reserve established for the Metlakatla Indian Community).⁷¹ ANCSA additionally repealed the Alaska Native Allotment Act, though it included a savings provision for allotment applications for individual Alaska Natives pending on the date its enactment.⁷²

⁶⁴ Donald L. Simasko, *Alaska Land Problems*, 10 Nat'l Inst. for Petroleum Landmen 333, 350-51 (SW Legal Foundation 1969). Secretary Udall suspended issuance of federal patents and federal approval of state land selections until Alaska Native claims based on aboriginal possession were resolved. *State of Alaska v. Udall*, 420 F.2d 938 (9th Cir. 1969). *See also Edwardsen v. Morton*, 369 F. Supp. 1359 (D.D.C. 1973) (Native lands in Alaska were held valid under claims of aboriginal title and Section 4 under ANCSA did not extinguish plaintiff's trespass claims.).

⁶⁵ Withdrawal of Unreserved Lands, 34 Fed. Reg. 1,025, § 1 (Jan. 23, 1969) (“Subject to valid existing rights, and subject to the conditions hereinafter set forth, all public lands in Alaska which are unreserved . . . are hereby withdrawn from all forms of appropriation and disposition under the public land laws, including section by the State of Alaska . . . and reserved under the jurisdiction of the Secretary of Interior for the determination and protection of the rights of the native Aleuts, Eskimos, and Indians of Alaska.”).

⁶⁶ *See, e.g., id.* at 80 (“The legal history of Alaska Native land claims is not so much one of action but of inaction, postponement, and preservation of the controversy for resolution at a later time.”); *id.* at 75-76, 106, 187. *See also* Act of May 17, 1884, § 8, 23 Stat. 24 (protecting existing Alaska Native use and occupancy but deferring resolution of the terms under which Alaska Natives could acquire title to such lands).

⁶⁷ ANCSA.

⁶⁸ *Alaska v. Native Village of Venetie*, 522 U.S. 520, 523 (1998).

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

⁷⁰ *Id.* § 1603.

⁷¹ *Id.* § 1618(a).

⁷² *Id.* § 1617(a) (the Secretary retained the power to process pending applications).

ANCSA's settlement of aboriginal claims was novel. Instead of being directly distributed to Alaska Tribes,⁷³ its settlement proceeds were distributed among state-chartered, Alaska Native regional and village corporations formed pursuant to the statute, all the shareholders of which were required to be Alaska Native.⁷⁴ As part of the settlement, Congress authorized the transfer of \$962.5 million in state and federal funds and approximately 44 million acres of Alaska land to Alaska Native corporations formed under the statute.⁷⁵

As originally enacted, shares in the corporations were exempt from property taxation⁷⁶ and were inalienable for a period of twenty years.⁷⁷ As the twenty-year deadline approached, however, dissatisfaction with ANCSA and concerns over the risk of loss of Native corporations and their land prompted Congress to take action.⁷⁸ The Alaska National Interest Lands Conservation Act (ANILCA) enacted in 1980 sought to exempt ANCSA lands from some of these risks by establishing a land bank program.⁷⁹ By 1987 it was clear that the voluntary land bank established under ANILCA was too cumbersome to implement.⁸⁰ Amendments to ANCSA automatically extended the restriction on alienation indefinitely⁸¹ and exempted the lands from property taxation and other risks of loss including adverse possession and judgments incurred by the Alaska Native corporation.⁸²

FLPMA, enacted several years after ANCSA in 1976, is also relevant to our discussion of Alaska lands.⁸³ FLPMA sought to provide "comprehensive authority and guidelines for the administration and protection" of federal lands by the Bureau of Land Management.⁸⁴ Title VII of FLPMA repealed dozens of miscellaneous land laws governing the disposal of federal lands.⁸⁵ With respect to Alaska lands, FLPMA Section 704(a) rescinded the Secretary's authority under Section 2 of the Alaska IRA to designate certain public lands as reservations in Alaska.

⁷³ Similar settlements have been restricted to tribes. *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).

⁷⁴ *Venetie*, 522 U.S. at 524, 118 S. Ct. 948 (citing ANCSA §§ 6, 8, 14 (codified at 43 U.S.C. §§ 1605, 1607, 1613)).

⁷⁵ *Id.*

⁷⁶ ANCSA § 21(d).

⁷⁷ *Id.* §§ 7(h)(1), 8(c).

⁷⁸ *See Case & Voluck* at 185.

⁷⁹ 43 U.S.C. § 1636.

⁸⁰ *Case & Voluck* at 194.

⁸¹ Alaska Native Claims Settlement Act Amendments of 1987, Pub. L. No. 100-241, §§ 8, 11 101 Stat. 1788, 1797, 1806 (codified as amended at 43 U.S.C. § 1629(c) (1988)).

⁸² 43 U.S.C. § 1636 (tax exemption in place so long as such land and interests are not developed or leased or sold to third parties).

⁸³ FLPMA.

⁸⁴ Roger Flynn, *Daybreak on the Land: The Coming of Age of the Federal Land Policy and Management Act of 1976*, 29 Vermont L. Rev. 815, 816 (2005).

⁸⁵ FLPMA, Title VII.

However, FLPMA did not repeal Section 1 of the Alaska IRA, which (among other provisions) authorized the Secretary to take Alaska land into trust on behalf of Alaska Natives and proclaim them reservations.⁸⁶

Despite its sweeping changes to the Alaska Native land ownership scheme in Alaska, neither ANCSA nor any other post-ANCSA legislation explicitly amended or retracted the Secretary's authority to place land into trust in Alaska under Section 5 of the IRA.

E. The “Alaska Exception” in the Department’s Part 151 Regulations

The ability of the Secretary to take land into trust under the IRA for Alaska Natives and Alaska Tribes has been a matter of Departmental regulation and subject to internal scrutiny for over forty years. From 1980-2015, the Department's land acquisition regulations at 25 C.F.R. Part 151 (Part 151) effectively prohibited the Secretary from acquiring land in trust in Alaska except for the Metlakatla Indian Community.⁸⁷ The regulations as amended in 2015, however, make clear that no such prohibition applies in Alaska.⁸⁸

The Department's policy against acquiring trust land in Alaska developed in the wake of ANCSA's enactment. A 1978 request to take land into trust spurred the Department to determine ANCSA's impact on the Secretary's authority to acquire trust lands in Alaska. After obtaining fee title to their former reservation lands under ANCSA section 19(b), Arctic Village and the Native Village of Venetie petitioned the Department to have the lands transferred into trust.⁸⁹ Then-Associate Solicitor for Indian Affairs, Thomas W. Fredericks, authored a legal memorandum⁹⁰ concluding that it would be an abuse of the Secretary's discretion to accept the village communities' former reservation lands into trust (Fredericks Opinion).⁹¹ He based this advice on ANCSA's policy declaration that its settlement “should be accomplished . . . without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges . . . ,”⁹² as well as legislative history containing what he viewed as similar statements of intent.⁹³

⁸⁶ *Id.* § 704(a), 43 U.S.C. § 1701 et seq., 90 Stat. 2743 (1976).

⁸⁷ The Department's 1980 land acquisition regulations are still in place but have been redesignated from 25 C.F.R. part 120a to 25 C.F.R. Part 151), *see* Redesignation Table for Chapter I Title 25— Indians, 47 Fed. Reg. 13,327 (Mar. 23, 1982).

⁸⁸ *See* Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76,888, 76,889 (Dec. 23, 2014).

⁸⁹ This provision permitted any Alaska Native village corporation to acquire the surface estate to any reservation lands that had previously been set aside for the “use or benefit of its stockholders or members.” ANCSA § 19(b), *codified at* 43 U.S.C. § 1618(b).

⁹⁰ Memorandum from Thomas W. Fredericks, Associate Solicitor for Indian Affairs, to Forrest Gerard, Assistant Secretary – Indian Affairs, “Trust Land for the Natives of Venetie and Arctic Village” 3 (Sept. 15, 1978) [hereinafter Fredericks Opinion].

⁹¹ *Id.*

⁹² ANCSA § 2(c), *codified at* 43 U.S.C. § 1601(b).

⁹³ Fredericks Opinion at 1 (citing S. Rpt. 92-405 at 108).

In 1980, the Department promulgated regulations governing the acquisition of land into trust process for the first time.⁹⁴ Consistent with the Fredericks Opinion, the final regulations included a provision stating that, “[t]hese regulations do 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 it[s] members” (Alaska exception).⁹⁵

In 1993, Solicitor Thomas W. Sansonetti issued Solicitor Opinion M-36975.⁹⁶ While the Sansonetti Opinion did not directly consider ANCSA’s effect on the Secretary’s authority to take land into trust under Section 5 of the IRA, it included extensive discussion of ANCSA, its legislative history, and its effect on federal responsibilities toward Alaska Native lands.⁹⁷ Solicitor Sansonetti included a reference to the view expressed in the Fredericks Opinion that IRA Section 5 “was not repealed with respect to Alaska” but that “in light of the clear expression of congressional intent in ANCSA not to create trusteeship or a reservation system, it would be an abuse of discretion for the Secretary to acquire lands in trust in Alaska.”⁹⁸

In the mid-1990s, Alaska Native tribes and organizations petitioned the Department to remove the Alaska exception⁹⁹ from the regulations and in 1999, the Solicitor considered comments on a proposed rule that would have, among other things, continued to exclude taking land in trust for Alaska Natives and Alaska Tribes under the IRA.¹⁰⁰ In a nod to the unease that developed around the Fredericks Opinion, the preamble to the proposed rule requested views on the continued validity of the Alaska exception and the Fredericks Opinion, while proffering that “a credible legal argument” existed that ANCSA had not extinguished the Secretary’s authority to accept land in trust under Section 5 of the IRA.¹⁰¹ Alaska tribal governments, Alaska Native groups, the State and leaders of the Alaska State legislature all submitted comments.¹⁰²

On January 16, 2001, after conducting an internal legal review, Solicitor John Leshy withdrew the Fredericks Opinion based on “substantial doubt” regarding the validity of its conclusions.¹⁰³

⁹⁴ Final Rule, Land Acquisitions, 45 Fed. Reg. 62,034, 62,034 (Sept. 18, 1980).

⁹⁵ *Id.* at 62,036 (formerly codified at 25 C.F.R. § 151.1) (the “Alaska exception”) (the Preamble to the Final Rule specifically noted the Alaska Native Claims Settlement Act did not contemplate the further acquisition of land in trust status, or the holding of land in such status, in the State of Alaska, except for the Metlakatla Indian Community).

⁹⁶ Sansonetti Opinion at 72.

⁹⁷ *Id.* at 112, n.276 (citing Fredericks Opinion). While it is unclear whether the Sansonetti Opinion intended to adopt that view as its own – which in any event was not material to its analysis or its conclusions – the fact remains that the Solicitor later withdrew the Fredericks Opinion based on “substantial doubt” for the validity of its conclusions.

⁹⁸ *Id.* at 112, n.276 (citing Fredericks Opinion).

⁹⁹ Notice of Petition, Land Acquisitions, 60 Fed. Reg. 1,956 (Jan. 5, 1995).

¹⁰⁰ Proposed Rule, Acquisition of Title to Land in Trust, 64 Fed. Reg. 17,574, 17,578 (Apr. 12, 1999).

¹⁰¹ *Id.*

¹⁰² Memorandum from John Leshy, Solicitor, to Assistant Secretary – Indian Affairs, “*Rescinding the September 15, 1978, Opinion of the Associate Solicitor for Indian Affairs entitled ‘Trust Land for the Natives of Venetie and Arctic Village’*” 1 (Jan. 16, 2001) [hereinafter Leshy Opinion].

¹⁰³ *Id.* at 2.

On the same day, the Department issued its final revised land acquisition regulations.¹⁰⁴ Despite withdrawing the Fredericks Opinion and casting doubt on the validity of its conclusions, the Alaska exception remained part of the revised land acquisition regulations while the Department sought time to “consider the legal and policy issues involved in determining whether [it] ought to remove the prohibition.”¹⁰⁵ Later that year, newly appointed Assistant Secretary – Indian Affairs, Neal A. McCaleb, withdrew the revised final rule in order to “better address the public’s continued concerns regarding the Department’s procedures for taking land into trust for federally recognized Indian tribes.”¹⁰⁶ Withdrawal of the revised final rule left the original regulations, including the Alaska exception, in effect. But because the Department did not reinstate the Fredericks Opinion, this left the Alaska exception in place without a clear legal basis or policy rationale.

In 2006, four Alaska Tribes and one Alaska Native individual challenged the lawfulness of the Alaska exception in *Akiachak Native Community v. Jewell*.¹⁰⁷ The United States District Court for the District of Columbia (D.C. District Court) issued an opinion in favor of the plaintiffs. The D.C. District Court held that the Department’s Part 151 Alaska exception violated the privileges and immunities clause of the IRA, and the court severed and vacated the prohibition from the regulations.¹⁰⁸ In response, the Department issued a proposed rule eliminating the Alaska exception and engaged in notice and comment rulemaking on the issue.¹⁰⁹

The long history of the Alaska exception neared a conclusion in 2014, when after “carefully reexamin[ing] the legal basis for the Secretary’s discretionary authority to take land into trust in Alaska under Section 5 of the IRA,” the Department finalized the revised rule and removed the Alaska exception from the Part 151 regulations.¹¹⁰ The Department concluded that “a number of recent developments, including the pending *Akiachak* litigation, caused the Department to look carefully at this issue again”¹¹¹ and that ANCSA had left intact the Secretary’s land acquisition authority in Alaska and restated its policy that “there should not be different classes of federally recognized tribes.”¹¹² The United States Court of Appeals for the District of Columbia Circuit subsequently found that the Department’s rulemaking had rendered the appeal by petitioner-intervenor State of Alaska moot, and vacated the D.C. District Court’s decision.¹¹³ The following

¹⁰⁴ See Acquisition of Title to Land in Trust, 66 Fed. Reg. 3,452, 3,460 (Jan. 16, 2001) (The preamble to the final rule stated that the Department would consider the legal and policy implications associated with the Alaska exception over the course of three years but that never occurred).

¹⁰⁵ *Id.*

¹⁰⁶ Acquisition of Title to Land in Trust, 66 Fed. Reg. 56,608, 56,609 (Nov. 9, 2001) (the Department withdrew the revised final rule that included in its preamble a discussion of the perceived need to revisit the Alaska Prohibition. This had the effect of leaving in place the original regulations, which included Alaska Exception).

¹⁰⁷ 995 F. Supp. 2d 1 (D.D.C. 2013).

¹⁰⁸ *Id.* at 6.

¹⁰⁹ Land Acquisitions in the State of Alaska, 79 Fed. Reg. 24,648, 24,649 (May 1, 2014).

¹¹⁰ Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76,888, 76,889 (Dec. 23, 2014).

¹¹¹ *Id.*

¹¹² *Id.* at 76,890.

¹¹³ *Akiachak Native Cmty. v. U.S. Dep’t of the Interior*, 827 F.3d 100 (D.C. Cir. 2016).

year, on January 13, 2017, Solicitor Tompkins issued Solicitor Opinion M-37043, memorializing the Department's views on the applicability of IRA Section 5 in Alaska.¹¹⁴

Certainty on the matter was short lived. On June 29, 2018, Acting Solicitor Jorjani issued Solicitor Opinion M-37053 withdrawing M-37043 pending review.¹¹⁵ On January 19, 2021, Solicitor Jorjani permanently withdrew M-37043, concluding that despite the Department's forty years of grappling with the issue, "further substantial legal analysis is required before concluding that IRA section 5 authorizes the Secretary to take land in trust for any particular Alaska Native tribe."¹¹⁶ Because M-37064 did not engage, explain or attempt to reconcile its concerns with the Department's Part 151 regulations allowing for land into trust acquisitions in Alaska, on April 27, 2021, I withdrew the opinion in M-37069.¹¹⁷

III. Discussion

As set forth below, Congress's express application of IRA Sections 5 and 7 to Alaska in 1936 provides specific statutory authority for the Secretary to accept land into trust for Alaska Natives and Alaska Tribes.¹¹⁸ This authority was not repealed or otherwise amended when, several decades after passage of the IRA and Alaska IRA, Congress enacted the Statehood Act, ANCSA or any other post-ANCSA legislation.¹¹⁹ Furthermore, I conclude that Section 19 of the IRA provides a stand-alone definition of "Indian" applicable to Alaska Natives and Alaska Tribes, eliminating any need to consider their eligibility under Section 19's other definitions of "Indian," including whether an applicant was "under Federal jurisdiction."¹²⁰

In analyzing the Secretary's trust acquisition authority in Alaska, my interpretation of the IRA, Alaska IRA, the Statehood Act, ANCSA and FLPMA follows the same two-step analysis articulated in *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.* for reviewing an agency's statutory interpretation.¹²¹ At the first step, the Department must answer "whether Congress has spoken directly to the precise question at issue."¹²² If the language of the statute is clear, the Department must give effect to "the unambiguously expressed intent of Congress."¹²³ If, however, the statute is "silent or ambiguous," pursuant to the second step, the Department must base its interpretation on a "reasonable construction" of the statute.¹²⁴

¹¹⁴ M-37043.

¹¹⁵ Daniel H. Jorjani, Principal Deputy Solicitor Exercising the Authority or the Solicitor Pursuant to Secretary's Order 3345, Amendment No. 18, Solicitor Opinion M-37053, "*Withdrawal of Solicitor Opinion M-37043, 'Authority to Acquire Land into Trust in Alaska' Pending Review*" (June 29, 2018) (Acting Solicitor Jorjani temporarily withdrew M-37043 in a review process directed by the President's Chief of Staff and sought consultation on the issue with Indian and Alaska Native communities).

¹¹⁶ M-37064 at 33.

¹¹⁷ M-37069.

¹¹⁸ See 25 U.S.C. §§ 5108, 5119.

¹¹⁹ 79 Fed. Reg. at 76,890.

¹²⁰ *Carcieri*, 555 U.S. at 395.

¹²¹ 467 U.S. 837 (1984).

¹²² *Id.* at 842-43.

¹²³ *Id.* at 843.

¹²⁴ *Id.* at 840.

A. Congress Made IRA Sections 5 and 7 Applicable in Alaska when it Enacted the Alaska IRA

The plain language of the Alaska IRA and its legislative history are fully consistent with Congress's intent to make the trust land and reservation proclamation provisions of the IRA applicable to Alaska Natives and Alaska Tribes. M-37064, however, posited an alternative source for the Secretary's authority. The opinion argued that the Statehood Act rendered IRA Section 13's Alaska proviso inoperable because it was specific to the Territory of Alaska and that as a result the IRA and all its provisions – including Sections 5 and 7 – were made generally applicable to the State.¹²⁵

After applying the ordinary tools of statutory construction to the statutes and examining relevant federal court precedent, the more persuasive interpretation is that Congress made IRA Sections 5 and 7 applicable to Alaska Natives and Alaska Tribes when it enacted the Alaska IRA, irrespective of Alaska's transformation from a territory to a state. Those sections of the IRA made applicable to Alaska Natives and Alaska Tribes by the Alaska IRA are, therefore, the source of the Secretary's authority to acquire land in trust and proclaim reservations in Alaska. The Statehood Act, adopted years later in 1958, had no bearing on the Alaska IRA.

1. The IRA and Alaska IRA are Plain on their Face

The IRA as enacted provided that “Eskimos and other aboriginal peoples of Alaska shall be considered Indians” for purposes of the statute¹²⁶ and specified certain enumerated provisions of the statute that would apply in Alaska.¹²⁷ In 1936, Congress enacted the Alaska IRA expressly making IRA Section 5, which authorizes the Secretary to acquire trust land for Indians,¹²⁸ and IRA Section 7, which authorizes the Secretary to proclaim new Indian reservations applicable to Alaska.¹²⁹ Section 2 of the Alaska IRA, later repealed by FLPMA, additionally authorized the Secretary to designate certain public lands as Indian reservations in Alaska.¹³⁰

The objective of the Alaska IRA's trust-land and reservation-related provisions was to remedy inadvertent omissions in IRA Section 13 that hindered the IRA's implementation in Alaska.¹³¹ As the House of Representatives Committee on Indian Affairs described it at the time, the purpose of the Alaska IRA was “to allow the Indians of Alaska to participate in the benefits of existing law to the same extent and manner as the Indians of the United States proper.”¹³² The Alaska IRA, therefore, “offered a new source of federal protection to the natives ‘who in the

¹²⁵ M-37064 at 17.

¹²⁶ IRA § 19.

¹²⁷ *Id.* § 13.

¹²⁸ *Id.* § 5.

¹²⁹ *Id.* § 7.

¹³⁰ AIRA § 2.

¹³¹ *See* 1942 Cohen at 413.

¹³² H.R. Rpt. 74-2244 at 3 (Mar. 26, 1936).

past,' according to Commissioner of Indian Affairs John Collier, 'have seen their land rights almost universally disregarded, their fishing rights increasingly invaded, and their economic situation grow every year more desperate.'"¹³³

Making applicable the omitted and additional provisions of the IRA to Alaska was intended to "remove[] the last significant difference between the position of the American Indian and that of the Alaska native."¹³⁴ In providing for the acquisition of trust lands and the proclamation of reservations in Alaska, Congress expressed its intent to identify Alaska Natives and Alaska Tribes with the land, as well as protect their assertion of sovereignty, self-governance and economic rights associated with having reservations.¹³⁵ And in Assistant Solicitor Felix Cohen's view, by 1942 "[t]he legal position of the individual Alaskan natives has been generally assimilated to that of Indians in the United States."¹³⁶

A federal report prepared in 1947 by Theodore Haas entitled *Ten Years of Tribal Government Under IRA* documents the IRA's subsequent implementation and application to Alaska Natives and Alaska Tribes.¹³⁷ IRA Section 18 directed the Secretary to conduct elections to allow Indians residing on a reservation to vote to accept or reject application of the Act.¹³⁸ In order for the Secretary to conclude that a reservation was eligible for an election, a determination had to be made that the residents satisfied one of the IRA's definitions of "Indian." The 1947 Haas report compiled the results of 258 so-called opt-out elections held between 1934 and 1936 in accordance with Section 18 of the IRA.¹³⁹ The Haas report notes that no such elections were held in Alaska because "Alaska Indians were not concerned in these elections as they were *automatically brought under the law*."¹⁴⁰

2. Alaska Statehood did not Alter the Applicability of IRA Sections 5 and 7 to Alaska Natives and Alaska Tribes

The plain language of the IRA and Alaska IRA demonstrate that Congress expressly granted the Secretary authority to take land into trust and proclaim reservations in Alaska. M-37064, however, expressed concern that prior Solicitor's opinions failed to acknowledge or grapple with the effect of Alaska statehood when identifying the specific source for the Secretary's authority.

¹³³ See 1942 Cohen at 413 (quoting Annual Report of Secretary of the Interior at 163 (1936)).

¹³⁴ 1942 Cohen at 406.

¹³⁵ See H. Rep. No. 74-224, at 4 (1936); S. Rep. No. 74-1748, at 4 (1936).

¹³⁶ 1942 Cohen at 404. Cohen served as Assistant Solicitor for the Department from 1933 to 1943 and as Associate Solicitor from 1943 to 1948. He also served as Chairman of the Department's Board of Appeals from 1936 to 1948. In 1939 Cohen became a Special Assistant to the Attorney General on loan for one year to head the Indian Law Survey of the Department of Justice. With the assistance of his colleague and friend, Theodore H. Haas he compiled a 46-volume collection of Federal laws and treaties. The collection served as the basis for Cohen's 1942 *Handbook of Federal Indian Law*. See Dedication, 9 Rutgers L. Rev. 343-50 (1954).

¹³⁷ Theodore Haas, *Ten Years of Tribal Government Under the IRA* 3 (U.S. Indian Service Tribal Relations Pamphlets 1947).

¹³⁸ IRA § 18, *codified at* 25 U.S.C. § 5125.

¹³⁹ *Id.*

¹⁴⁰ *Id.* (emphasis added).

M-37064 argued that assuming the provisions Congress enacted for the Territory of Alaska automatically applied in the State neglected to account for a significant textual distinction.¹⁴¹

In describing the concern, M-37064 pointed out that IRA Section 13's Alaska proviso and Section 1 of the Alaska IRA apply to the "Territory of Alaska"¹⁴² and that consequently when Alaska was admitted as the 49th state, those provisions specific to the Territory were rendered inoperable and without further effect.¹⁴³ A close examination, however, confirms that Alaska statehood did not affect Congress's application of IRA Sections 5 and 7 to Alaska¹⁴⁴ and that the Alaska IRA's application of those specific provisions to Alaska remain the source of the Secretary's authority.

a. Purpose of the Alaska Proviso

Section 13 of the IRA makes certain sections of the IRA applicable to the "Territory of Alaska" through an exception to the more general prohibition against extending the IRA to the "[t]erritories, colonies, or insular possessions of the United States."¹⁴⁵ The Alaska IRA enacted two years later uses the phrase "Territory of Alaska" in making additional sections of the IRA applicable to Alaska.¹⁴⁶ M-37064 explains that "Congress provided for Alaska's admission to the Union as a state 'on an equal footing with the other States in all respects whatever'" and that "the Statehood Act declared that all laws of the United States would have the same force and effect within Alaska as elsewhere in the United States." M-37064 concludes that, "[a]s such, it is reasonable to conclude that [Section 13's] applicability was limited to that time period when Alaska was a territory"¹⁴⁷

In support of its conclusion, M-37064 cites *United States v. Maldonado-Burgos*, a case that examined the applicability of a federal statute in Puerto Rico in light of the island's transformation from a United States territory to a "self-governing Commonwealth"¹⁴⁸ and *Moore v. United States*, a case which held that an indictment alleging violation of a federal law applicable "in any territory of the United States" had no continued effect after Utah achieved statehood.¹⁴⁹ The cases cited do not, however, support in any way the conclusion that the IRA or

¹⁴¹ M-37064 at 14-18 (acknowledging that such a conclusion represented a departure from previous Department statements on this issue).

¹⁴² *Id.* at 15 (discussing the impacts of Alaska statehood on IRA Section 13, which states that the IRA shall not apply in the Territories "except that sections 9, 10, 11, 12, and 16 shall apply to the *Territory* of Alaska" and Alaska IRA Section 1, which provides that "Sections 1, 5, 7, 8, 15, 17, and 19 of the [IRA] shall hereafter apply to the *Territory* of Alaska.") (emphasis added).

¹⁴³ *Id.* at 17.

¹⁴⁴ While I disagree with M-37064's assertion regarding the effect of the Statehood Act on the IRA and Alaska IRA, I note that even if the premise were accepted as true (*i.e.* that Section 13 of the IRA and Section 1 of the Alaska IRA were made inoperable once Alaska became a state), what remains is the generally applicable IRA, which includes Sections 5, 7 and 19 of the IRA. None of these provisions were repealed by any subsequent legislation.

¹⁴⁵ IRA § 13, *codified as amended* at 25 U.S.C. § 5118.

¹⁴⁶ AIRA § 1.

¹⁴⁷ M-37064 at 16-17.

¹⁴⁸ *Id.* at 17 (citing *United States v. Maldonado-Burgos*, 844 F.3d 339, 340 (1st Cir. 2016)).

¹⁴⁹ *Id.* (citing *Moore v. United States*, 85 F. 465 (8th Cir. 1898)).

Alaska IRA were made inapplicable upon statehood. Rather, the outcome in each case turned upon the non-application of statutes that by their terms generically applied only to United States territories.

The *Maldonado-Burgos* rationale supports the Department's long-held view that the Alaska IRA extended the Secretary's land acquisition and reservation proclamation authorities to the State of Alaska after its territorial status ended.¹⁵⁰ The court held that the statute's use of the generic term "territory" triggered the need to determine whether the term was meant to apply to Puerto Rico. Because Puerto Rico had been granted "commonwealth" status, general statutes made applicable only to United States territories no longer applied, just as in *Moore v. United States*. The opposite is true for the IRA and Alaska IRA; both address the "Territory of Alaska" specifically and were intended to apply to Alaska Natives.¹⁵¹ The specific reference to the Territory of Alaska in the IRA and Alaska IRA demonstrates Congress's clear intent to apply both statutes to the geographic area that would become the State of Alaska rather than the then existing United States territories in general.

Beyond the plain language, the legislative history of the Alaska IRA shows Congress's intent to make the enumerated provisions of the IRA applicable to Alaska Natives and Alaska Tribes, notwithstanding Alaska statehood.¹⁵² Section 13 of the IRA reflects Congress's understanding that absent a broader territorial restriction, the IRA might otherwise have applied to all territories, colonies, and possessions of the United States as a statute of general applicability.¹⁵³ In an early hearing on the Wheeler-Howard bill (which would become the IRA) before the House Committee, Commissioner Collier and Alaska Territorial Delegate Anthony Dimond discussed the extent to which the Wheeler-Howard bill's provisions would apply in Alaska.¹⁵⁴ This colloquy appears to have prompted Representative Hubert Peavey of Wisconsin to ask Commissioner Collier whether there were "any classes of people that might be called Indians, that could be termed Indians under the provisions of this bill, in any other territory of the United

¹⁵⁰ On this point, the Department has taken a consistent position. See *Fredericks Opinion* at 3; see also *Leshy Opinion* at 1 (explaining that AIRA Section 1 remained in effect after ANCSA).

¹⁵¹ IRA § 13, AIRA § 1.

¹⁵² At the time the IRA and Alaska IRA were passed, Congress would have been aware that the Alaska territory was on a path to statehood. In a series of cases known as the "Insular Cases," the Supreme Court in the early 20th century held that under the doctrine of territorial incorporation, territories such as Alaska and Hawaii deemed on a path to statehood were distinct from other territories in that the constitution applied within their borders. See *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976) (citing *Rasmussen v. United States*, 197 U.S. 516, 520 (1905), *abrogated on other grounds by Williams v. Fla.*, 399 U.S. 78 (1970)); see also *Al Maqaleh v. Gates*, 605 F.3d 84, 93 (D.C. Cir. 2010).

¹⁵³ U.S. CONST. art. IV, § 3 (Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States); *Shively v. Bowlby*, 152 U.S. 1, 48 (1894) (United States has "the entire dominion and sovereignty, national and municipal, federal and state, over all the territories, so long as they remain in a territorial condition"); *United States v. State of Alaska*, 423 F.2d 764, 768 (9th Cir. 1970), *cert. denied*, 400 U.S. 967 (same); *John v. United States*, 720 F.3d 1214, 1224 (9th Cir. 2013), *cert. den. sub nom. Alaska v. Jewell*, 572 U.S. 1042 (2014) (Congress had "unfettered power" to regulate the Alaska Territory from 1867 to statehood in 1959); see also 1942 Cohen at 403 (as a recognized territory, Alaska is subject to the paramount and plenary authority of Congress).

¹⁵⁴ H. Hrgs. on Wheeler-Howard Act, Pt. 3. at 76-77 (Feb. 26, 1934).

States (...) [o]utside of the 48 States?”¹⁵⁵ Commissioner Collier thought not, but added that the Department would not object to the “direct inclusion” of Alaska.¹⁵⁶

Both the IRA and Alaska IRA sought to achieve this “direct inclusion” of Alaska by reference to the Territory of Alaska, and as the House of Representatives Committee on Indian Affairs described it, the purpose of the Alaska IRA was “to allow the *Indians* of Alaska to participate in the benefits of existing law to the same extent and manner as the Indians of the United States proper.”¹⁵⁷

In his 1942 treatise Assistant Solicitor Cohen later observed that the “the laws of the United States with respect to the Indians resident within the boundaries of the United States proper are generally applicable to the *Alaskan natives*.”¹⁵⁸ He goes on to state that “[t]he extension of the Wheeler-Howard Act to Alaska has re-moved almost the last significant difference between the position of the American Indian and that of the Alaskan native.”¹⁵⁹ Here again use of the term Alaska is used to describe and encompass the Alaska Natives residing within the geographic boundary of the Territory of Alaska irrespective of its status as a territory or a state.

The plain language and legislative history provide sufficient evidence to conclude that Congress intended to make Sections 5 and 7 of the IRA applicable to Alaska Natives living in the Alaska Territory. And although Congress may express hesitancy to intervene in the local affairs of a state after achieving statehood,¹⁶⁰ the IRA and Alaska IRA address matters reserved to the federal government – namely Indian Affairs.¹⁶¹ In sum, Alaska statehood did not alter the United States’ jurisdictional and legal relationship established under the IRA and Alaska IRA with Alaska Natives and Alaska Tribes. Indeed, as discussed below, Congress included in the Statehood Act a disclaimer of any authority by the new State over Alaska Native lands or other property – including fishing rights.

¹⁵⁵ *Id.* at 77; see also *Carino v. Insular Gov’t of the Philippine Islands*, 212 U.S. 449 (1909) (upholding land claim based on tribal custom and recognition); *Repeal Act Authorizing Secretary of Interior to Create Indian Reservations in Alaska: Hearings Before the S. Subcomm. on Interior and Insular Affairs on S. 2037 and S.J. Res. 162*, 80th Cong. at 332 (1948) [hereinafter S. Hrgs. on S. 2037] (statement of Assistant Solicitor Cohen describing special moral obligation of United States to the natives of Guam and the Hawaiian Islands).

¹⁵⁶ H. Hrgs. on Wheeler-Howard Act, Pt. 3. at 76-77 (Feb. 26, 1934). Collier further noted that the inclusion of Alaska Natives in the IRA would “imply an extension of the Indian Office functions and a transfer to the Indian Office of some functions,” including administration of fishing rights, a question the Department had not sought to raise at that time. *Id.*

¹⁵⁷ H.R. Rpt. 74-2244 at 3 (Mar. 26, 1936) (emphasis added).

¹⁵⁸ 1942 Cohen at 404 (emphasis added).

¹⁵⁹ *Id.* at 406.

¹⁶⁰ See, e.g., *United States v. Maldonado-Burgos*, 844 F.3d 339, 344 (1st Cir. 2016) (citing *Moore v. United States*, 85 F. 465 (8th Cir. 1898) (indictment alleging violation of restraint on trade in the then-Territory of Utah under federal law applicable “in any territory of the United States” had no continued effect after Utah achieved statehood because the relevant law no longer applied).

¹⁶¹ U.S. CONST., art. I, § 8, cl. 3: “[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .” See, e.g., *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020).

b. The Statutes do not Conflict with the Statehood Act

Two decades after the Alaska IRA's passage, Congress provided for Alaska's admission to the Union as a state "on an equal footing with the other States in all respects whatever."¹⁶² In addition to disclaiming all rights and title to any lands or other property held by Alaska Natives, including lands "held by the United States in trust for said natives,"¹⁶³ the Statehood Act declared that all laws of the United States would have the same force and effect within Alaska as elsewhere in the United States.¹⁶⁴ As relevant here, the Statehood Act defined "laws of the United States" as consisting of:

all laws or parts thereof enacted by the Congress that (1) apply to or within Alaska at the time of the admission of the State of Alaska into the Union, (2) are not "Territorial laws"..., and (3) are not in conflict with any other provisions of this Act.¹⁶⁵

The IRA and Alaska IRA are acts of Congress passed under its constitutional authority to regulate Indian affairs.¹⁶⁶ Both make plain that Congress intended Alaska Natives to enjoy some IRA benefits including the provisions extended to Alaska Natives under the Alaska IRA.¹⁶⁷ At the time of admission, IRA Sections 5 and 7,¹⁶⁸ applied to or within Alaska and were not in conflict with any other provisions of the Statehood Act. Furthermore, neither the IRA nor the Alaska IRA were "Territorial laws," meaning those laws enacted by the Territorial legislature established under the Organic Act.¹⁶⁹ Therefore, there is nothing in the Statehood Act to suggest Congress intended to make the provisions extended to Alaska Natives under the IRA and the

¹⁶² Statehood Act § 1.

¹⁶³ *Id.* § 4. The Alaska Constitution includes a similar disclaimer. ALASKA CONST. art. XIII, § 12, cl. 2 ("The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission."). The only lands to which the United States held title in trust for Alaska Natives in 1959 consisted of cannery properties separately acquired in 1948 and 1950 for the Alaska Native communities of Angoon, Kake, and Klawock, which had organized under IRA Section 16 on the basis of a common bond of occupation in the fishing industry. Defendants' Supplemental Brief Pursuant to Court Order, *Akiachak Native Community v. Department of the Interior, et al.*, Case No. 06-cv-0969-RC (D.D.C.), ECF 101 at 9 n.4 (filed July 6, 2012); *see also* Sansonetti Opinion at 112 n.277.

¹⁶⁴ *Id.* § 8(d). The Statehood Act also provided that all Territorial laws then in effect would continue in full force and effect "except as modified or changed" by the Statehood Act or by the Alaska Constitution.

¹⁶⁵ *Id.* § 8(d); Section 30 of the Statehood Act further included a provision repealing all acts or parts of acts "in conflict with the provisions of [the Statehood Act]." *Id.* § 30.

¹⁶⁶ U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have the Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

¹⁶⁷ Since 1936, the IRA and AIRA have collectively been referred to as the "Composite Indian Reorganization Act for Alaska." *See, e.g.*, M-37043 at 20 (Jan. 13, 2017).

¹⁶⁸ As discussed, both Sections were enumerated in and made applicable to Alaska under the Alaska IRA.

¹⁶⁹ Statehood Act § 8(d) (defining "Territorial Laws" as laws for which the validity was "dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State into the Union.").

Alaska IRA – laws of the United States specifically passed to regulate the federal relationship with Alaska Natives – inapplicable upon statehood.

B. The Secretary’s Statutory Authority to Acquire Lands in Trust for Alaska Natives or Alaska Tribes Remains in Force

Having established that the Statehood Act left the Secretary’s land acquisition and reservation proclamation authorities for Alaska Natives and Alaska Tribes intact, I turn to whether Congress in enacting ANCSA or any other post-ANCSA legislation, prohibited the Secretary from accepting lands into trust and proclaiming new reservations in Alaska. Absent a “clearly expressed congressional intention,”¹⁷⁰ an implied repeal will only be found where provisions in two statutes are either in “irreconcilable conflict,” or where the latter act covers the whole subject of the earlier one and “is clearly intended as a substitute.”¹⁷¹ After having reviewed the statutes, their legislative history, and arguments both for and against, I conclude that Congress did not repeal the Secretary’s authorities.

1. No Irreconcilable Conflict Exists

In 1971, Congress enacted ANCSA, which served as a comprehensive settlement of all aboriginal land claims in Alaska.¹⁷² Prior to ANCSA’s enactment, the federal government had established numerous reservations in Alaska, most by executive order, two by statute,¹⁷³ six pursuant to Alaska IRA section 2,¹⁷⁴ and held at least three parcels in trust pursuant to IRA section 5.¹⁷⁵ ANCSA revoked these existing reservations (with one exception) and established a novel and complex system of land tenure independent from the established reservations.¹⁷⁶

ANCSA’s preamble declares Congress’s intent that its settlement of Alaska Native land claims be realized “without creating a reservation system or lengthy wardship or trusteeship.”¹⁷⁷ This language, and similar statements in ANCSA’s legislative history,¹⁷⁸ have previously been viewed

¹⁷⁰ *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

¹⁷¹ *Branch v. Smith*, 538 U.S. 254, 273 (2003) (citing *Posadas v. Nat’l City Bank*, 296 U.S. 497, 503 (1936)).

¹⁷² ANCSA, Pub. L. No. 92-203, 85 Stat. 688.

¹⁷³ As discussed above, Congress established a reservation for the Indians at Metlakatla in 1891. In 1957, it additionally confirmed and enlarged the boundaries of a reservation for the Chilkat Indian Village (Klukwan). Act of Sept. 2, 1957, Pub. L. No. 85-271, 71 Stat. 596. See Case & Voluck at 85-110 (detailing the history of Alaska Native reservations).

¹⁷⁴ Field Committee Report at 444, figure V-3.

¹⁷⁵ During the 1940’s and 1950’s, the federal government acquired by purchase, and took title in trust to, cannery properties in three Southeast Alaska communities. The Department has not viewed trust title to these parcels as having been revoked by ANCSA or affected the parcels’ trust status. See Sansonetti Opinion at 112 n.277.

¹⁷⁶ See, e.g., 43 U.S.C. §§ 1617(a), 1618.

¹⁷⁷ ANCSA § 2(b), codified at 43 U.S.C. § 1601(b).

¹⁷⁸ See, e.g., S. Rpt. 92-405 at 108 (“A major purpose of this Committee and the Congress is to avoid perpetuating in Alaska the reservation and the trustee system which has characterized the relationship of the Federal government to the Indian peoples in the contiguous 48 states.”).

as precluding the future exercise of the Secretary's authority under IRA Section 5 in Alaska.¹⁷⁹ ANCSA's policy declaration, however does not provide sufficient grounds to conclude that Congress impliedly repealed the Secretary's land into trust or reservation proclamation authorities in Alaska.

As a matter of statutory construction, a preamble is neither considered an operative part of a statute, nor as enlarging or conferring powers on administrative agencies or officers.¹⁸⁰ A preamble may inform the interpretation of ambiguities in a statute's substantive provisions¹⁸¹ but it cannot be used to contradict the text of the statute itself.¹⁸² Where those operative parts of the statute prescribe rights and duties and are otherwise unambiguous,¹⁸³ their meaning cannot be controlled by a declaration of policy.¹⁸⁴ It is also worth noting the preamble itself is ambiguous and can reasonably be read as limiting federal responsibilities as it relates to the terms and provisions of the settlement only and not the Secretary's broader land into trust and reservation proclamation authority, which are rooted in other statutes.

Moreover, a cardinal rule of statutory construction is that repeals by implication are disfavored.¹⁸⁵ ANCSA does not mention, much less repeal or amend, the IRA provisions extended to Alaska Natives and Alaska Tribes. Unlike other claims settlement acts, ANCSA left

¹⁷⁹ For example, it has been claimed that ANCSA's preamble shows an "unmistakable" intent to "permanently" remove all Native lands in Alaska from trust status (Fredericks Opinion at 1) and that any future trust acquisitions in Alaska would be "wholly inconsistent with Congress' purposes in ANCSA" and would undermine ANCSA's extinguishment of aboriginal claims of use and occupancy. (Letter from Bruce M. Botelho, Attorney General of Alaska, to The Hon. Gale Norton, Secretary of the Interior, 2 (June 14, 2001).

¹⁸⁰ *Yazoo Railroad Co. v. Thomas*, 132 U.S. 174, 188 (1889) (preamble is not part of an act and cannot enlarge or confer powers or control the words of the act where they are not doubtful or ambiguous). *See also Sturgeon v. Frost*, 139 S. Ct. 1066, 1086 (2019) (citing A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* at § 20:12 (7th ed.)) (congressional statements of purpose cannot override a statute's operative language).

¹⁸¹ *Rothe Dev., Inc. v. U.S. Dep't of Def.*, 836 F.3d 57, 66 (D.C. Cir. 2016) (findings and preambles may contribute to a general understanding of a statute, but unlike provisions that confer and define agency powers they are not an operative part of the statute) (citing *Ass'n of Am. Railroads v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977)).

¹⁸² *Tex. Children's Hosp. v. Azar*, 315 F. Supp. 3d 322, 334 (D.D.C. 2018), *appeal dismissed*, No. 18-5238, 2018 WL 7080504 (D.C. Cir. Dec. 28, 2018).

¹⁸³ As the courts have repeatedly held, the "most reliable guide to congressional intent is the legislation Congress enacted." *Sierra Club v. E.P.A.*, 294 F.3d 155, 161 (D.C. Cir. 2002); *Barnhart v. Sigman Coal Co.*, 534 U.S. 438, 461-62 ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.") (internal quotes and citations omitted).

¹⁸⁴ *Nat'l Wildlife Fed'n v. E.P.A.*, 286 F.3d 554, 569 (D.C. Cir. 2002), *supplemented sub nom. In re Kagan*, 351 F.3d 1157 (D.C. Cir. 2003) (citing *Costle*, 562 F.2d at 1316) (preamble to agency rule no more binding than statutory preamble); *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1979 (2016) (no deference given to agency's interpretation of rulemaking preamble where statute is unambiguous); *see also Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 479 (7th Cir. 2016), *aff'd*, 138 S. Ct. 816 (2018) (using preamble as aid to interpret statutory ambiguity).

¹⁸⁵ *Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936); *Mancari*, 417 U.S. at 550 (1974); *Swinomish Indian Tribal Cmty. v. BNSF Railway Co.*, 951 F.3d 1142, 1156 (9th Cir. 2020).

the Secretary's trust acquisition authority unaffected.¹⁸⁶ Allotments issued pursuant to the Alaska Native Allotment Act were not disturbed by ANCSA, nor did ANCSA specifically address the status of any parcel the Secretary may have accepted in trust pursuant to IRA section 5. The Sansonetti Opinion later confirmed that the Bureau of Indian Affairs considered such acquisitions to be "valid existing rights under ANCSA section 14(g)."¹⁸⁷

Moreover, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."¹⁸⁸ ANCSA's primary purpose – to settle Alaska Natives' aboriginal land claims "with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, [and] without creating a reservations system or lengthy wardship or trusteeship"¹⁸⁹ is not irreconcilable with the Secretary's authority to create new trust land. Significantly, even following the enactment of ANCSA, there currently exists in Alaska the Metlakatla Reserve and other scattered trust lands, as well as more than one million acres of restricted fee land granted under the Alaska Native Allotment Act of 1906 and the Alaska Native Township Act of 1926.¹⁹⁰ The latter are subject to the same restrictions on taxation and alienation as trust lands and are generally treated by Congress and the Department as the equivalent of trust land,¹⁹¹ and are defined as Indian country.¹⁹²

Although ANCSA repealed the Native Allotment Act, ANCSA preserved the claims of individuals with pending allotment applications and the restrictions on existing allotments. And most recently Congress enacted legislation authorizing additional allotments for Alaska Native Vietnam veterans.¹⁹³ Thus, the acquisition of trust land through IRA Section 5 cannot be described as irreconcilable with ANCSA, not least because ANCSA did not extinguish all trust or restricted land in Alaska or prevent the issuance of new restricted fee patents.¹⁹⁴

Lastly, if Congress implicitly repealed the Secretary's authority to take Alaska land into

¹⁸⁶ Cf. Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, § 5(e), 94 Stat. 1785, 1791 ("Except for the provisions of this subchapter, the United States shall have no other authority to acquire lands or natural resources in trust for the benefit of Indians or Indian nations, or tribes, or bands of Indians in the State of Maine.").

¹⁸⁷ Sansonetti Opinion at 112 n.277.

¹⁸⁸ *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

¹⁸⁹ 43 U.S.C. § 160l(b).

¹⁹⁰ Act of May 17, 1906, Pub. L. No. 59-171, ch. 2469, 34 Stat. 197 (repealed 1971); Act of May 25, 1926, Pub. L. No. 69-280, ch. 379, 44 Stat. 629 (repealed 1976).

¹⁹¹ *United States v. Ramsey*, 271 U.S. 467, 471-72 (1926) (holding that both trust allotments and restricted fee allotments qualify as Indian country); *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 618 (1943).

¹⁹² 18 U.S.C. § 1151(c).

¹⁹³ John D. Dingell, Jr. Conservation, Management, and Recreation Act of 2019, Pub. L. No. 116-9; 43 U.S.C. § 1629 g-1.

¹⁹⁴ See, e.g., Sansonetti Opinion at 112, n.277. In addition, Congress has amended ANCSA to alter the provisions dealing with alienation of stock and adopted land tenure protections in order to enable permanent Native ownership of corporate stock, and limit involuntary encumbrance or alienation of the lands base. Pub. L. 100-241, 101 Stat. 1788 (1988). See Nell J. Newton, ed., *Cohen's Handbook of Federal Indian Law* § 407[3][b], pp. 334-337 (Lexis/Nexis 2012).

trust, it would have been unnecessary for Congress to expressly repeal the Secretary's authority to establish reservations under Alaska IRA Section 2 five years later in FLPMA.¹⁹⁵ To be clear, the relevant provision at FLPMA Section 704(a) expressly repeals only the Secretary's authority to establish reservations under Alaska IRA Section 2 and leaves IRA Section 7 reservation proclamation authority (made applicable under Alaska IRA Section 1) intact.¹⁹⁶ Further, FLPMA's repeal of Section 2 was incidental to its general repeal of laws relating to the withdrawal of public lands, for which neither Alaska nor Indian lands were specifically targeted.¹⁹⁷

Therefore, based on my review the Secretary's authority under IRA Section 5 to acquire land into trust and to proclaim reservations under Section 7 was not repealed or otherwise amended when, several decades after passage of the IRA and Alaska IRA, Congress enacted ANCSA and FLPMA.¹⁹⁸

2. ANCSA Does not Cover the Whole Subject

While agreeing that there is no irreconcilable conflict between ANCSA and IRA Section 5 authority, M-37064 posits that ANCSA may present the rare case in which Congress intended the latter statute to act as a full substitute for the earlier one.¹⁹⁹ M-37064 asserted that ANCSA could be viewed as a comprehensive settlement of aboriginal land claims meant to "finally resolve over 100 years of deferred action and ad hoc responses to Alaska Native land claims,"²⁰⁰ and that as such, covers the whole subject of Alaska Native lands.

That ANSCA was meant to settle aboriginal land claims is not in dispute. It does not follow, however, that settlement of long-standing aboriginal land claims was intended to eliminate, without reference, the Secretary's established discretionary land into trust and reservation proclamation authority. While the *Akiachak* district court's conclusions may not be binding, the court's rejection of the State's argument that ANSCA implicitly repealed the Secretary's land into trust authority (at least on irreconcilable conflict grounds) is persuasive. As the district court stated:

If the Secretary's authority to take land into trust had been implicitly repealed, it would follow that his authority to establish reservations [under Alaska IRA Section 2] was repealed by an even stronger implication And the simple fact that the statute conferring land-into-trust authority in Alaska survives is a strong

¹⁹⁵ See Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792 (1976).

¹⁹⁶ FLPMA, Title VII, § 704(a).

¹⁹⁷ FLPMA's stated purpose was to repeal the implied authority of the President to make withdrawals and reservations from the public lands resulting from the acquiescence of Congress. FLPMA, Title VII, § 704(a).

¹⁹⁸ This conclusion is consistent with the district court's decision in *Akiachak* and the Department's 2014 rulemaking.

¹⁹⁹ M-37064 at 21-22.

²⁰⁰ *Id.* at 24.

indication that the Secretary's authority to take Alaska land into trust also survives.²⁰¹

Moreover, since ANCSA's enactment, Congress has continued to adjust federal responsibilities for Alaska Native lands, authorizing the issuance of additional restricted fee allotments for Alaska Natives²⁰² and permitting the owners of such allotments to subdivide their interests in accordance with State and local laws if they choose.²⁰³ If ANSCA was sufficiently comprehensive to meet the high bar for implied repeals, these later enactments would not have been necessary, significantly undermining the legal reasoning for ANCSA covering the whole subject.²⁰⁴

M-37064 further suggests that ANCSA left no room for the Secretary to create trust land outside of the ANCSA settlement because Congress made clear its intent not to diminish the effectiveness of the institution of local municipal government, "a major institution by which the State of Alaska protects and promotes the rights and welfare of [Alaska] Natives as citizens of Alaska."²⁰⁵ M-37064 submits that ANCSA accommodated the interests of state-chartered local governments that, as Solicitor Sansonetti previously concluded, Congress "must surely have recognized as local governments of and for [Alaska] Native people, as well as others, in the Native communities dealt with as Native villages under ANCSA."²⁰⁶ That ANCSA focused on municipal government as a substitute for tribal jurisdiction over trust land, however is contrary to and diminishes Alaska Tribes right to sovereignty or self-government, which both ANSCA²⁰⁷ and the IRA²⁰⁸ encouraged.

The idea that ANCSA supports the divestiture of tribal sovereignty, or that local municipalities can properly represent their interests, is insufficient to support a finding of implied repeal and contravenes subsequent legislation – like 25 U.S.C. § 5123(f) and (g) – which limits the ability of the executive branch to treat federally recognized tribes differently, or to recognize lesser sovereignty for certain "classes" or categories of tribes. It also contravenes the Federally Recognized Indian Tribe List Act and Alaska Tribes' inclusion on the list of federally recognized

²⁰¹ *Akiachak Native Cmty. v. Salazar*, 935 F. Supp. 2d 195, 207 (D.D.C.).

²⁰² Alaska Native Vietnam Era Veterans Allotment Act of 2019, Pub. L. No. 116-9, Title I, § 1119 (Mar. 12, 2019) (authorizing restricted fee allotments of federal lands to Alaska Native veterans of the Vietnam War). *See also* ANCSA § 2(c) (directing Secretary to "make a study of all Federal programs primarily designed to benefit Native people and report back to Congress with his recommendation of for the future management of and operation of these programs").

²⁰³ Alaska Native Allotment Subdivision Act of 2004, Pub. L. No. 108-337, 118 Stat. 1357.

²⁰⁴ *See also* note 193, *supra*.

²⁰⁵ M-37064 at 26.

²⁰⁶ *Id.*

²⁰⁷ *See* ANCSA § 2(c) ("no provision of this Act shall replace or diminish any right, privilege, or obligation of Natives as citizens of the United States or of Alaska, or relieve, replace, or diminish any obligation of the United States or of the State or Alaska to protect and promote the rights or welfare of Natives as citizens of the United States or of Alaska"). Also, note that under ANCSA the 44 million acres of land and nearly \$1 billion granted to Alaska Natives are controlled by Native boards of directors of Native corporations. The federal government neither directs nor supervises the use of the land or the money.

²⁰⁸ *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (citing H.R. Rpt. 73-1804 at 6 (1934)).

tribes.²⁰⁹ Assuming Congress left the protection and welfare of Alaska Natives to local municipal governments is also contrary to the conclusion of the Congressionally created Indian Law and Order Commission, which concluded that trust land in Alaska could improve safety of Alaska Native Indian communities, and a Secretarial Commission that arrived at a similar conclusion.²¹⁰

None of the arguments offered in M-37064 support the conclusion that ANCSA was intended to cover the whole subject of federal responsibilities relating to Alaska Native lands. The legislative history cited in M-37064 in support of repeal is neutral at best and certainly does not express Congress's clear and manifest intent to preclude land into trust in Alaska or, indeed, a rejection of the IRA's recognition that having a land base is central to economic self-determination, a policy entirely consistent with ANCSA's encouragement toward tribal self-determination.

C. Section 19 Provides a Stand-alone Definition of "Indian" Applicable to Alaska Natives and Alaska Tribes

The first clause of Section 19 defines three categories of persons of Indian descent who may be considered Indians under the IRA.²¹¹ Section 19's second clause provides that "Eskimos and other aboriginal peoples of Alaska *shall* be considered Indians" (Alaska Definition) for the purposes of the IRA.²¹² The inclusion of Alaska Natives as a separately defined group of "Indians" stands apart from and is not dependent upon any other definition of Indian in the IRA.²¹³ Indeed, M-37043 concluded that the Alaska Definition established a separate eligibility criterion for Alaska independent of Section 19's first three definitions. Its conclusion derived from an analysis of the Alaska Definition's plain language; Congress's intent to make IRA benefits broadly available in Alaska; the fact that requiring Alaska Natives to satisfy one of the first three definitions would render the Alaska Definition surplusage; the absence of other limiting language in the Alaska Definition; and the plain language of IRA Section 13 and Alaska IRA Section 1, which demonstrate the IRA's unqualified applicability to Alaska.

²⁰⁹ Federally Recognized Indian Tribe List Act, Pub. L. No. 103-454, 108 Stat. 4791, 4792 (1994). Separate from Alaska Native lands, it is also difficult to understand how the notion that ANCSA "covered the entire subject" of the IRA relates to tribal self-governance. For example, if a Native village organized pursuant to the IRA before ANCSA, it still operates pursuant to that organization today, it did not become inoperative simply because ANCSA was enacted. Numerous Alaska Native villages operate pursuant to leadership organized under the IRA but also have an Alaska Native Corporation pursuant to ANCSA. Such coexistence undercuts any argument that ANCSA covers the field sufficient to support an implied repeal of the IRA.

²¹⁰ United States Final Answering Appellate Brief at 15, *Akiachak Native Community v. U.S. Dep't of the Interior*, 827 F.3d 100 (D.C. Cir. Jan. 7, 2016).

²¹¹ IRA § 19, *codified at* 25 U.S.C. § 5129.

²¹² *Id.* (emphasis added) (the third clause of Section 19 provides that as used in the Act, the term "tribe" shall be construed to refer to "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.").

²¹³ The United States likewise took this position before the Federal district court in *Akiachak Native Community v. U.S. Dep't of the Interior*, 935 F. Supp. 2d 195 (D.D.C. 2013). *See* Defendants' Supplemental Brief Pursuant to Court Order at 8-9, *Akiachak Native Community v. Salazar*, No. 06-00969 (D.D.C. July 6, 2012) ("The Court in *Carcieri* did not consider the fact that Section 19 of the IRA also provides that '[f]or the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.' The definition includes no temporal limitation similar to the 'now' in first sentence of the section . . . Therefore, the Secretary's statutory authority to take Alaska land into trust for the benefit of Alaska Natives, is not governed by the language interpreted by the Supreme Court in *Carcieri*." (citation omitted)).

M-37064 acknowledged M-37043's detailed analysis, yet with little analysis of its own, rejected M-37043's conclusion, asserting that Alaska Natives or Alaska Tribes seeking trust acquisitions in Alaska must satisfy one of the first three definitions regardless of whether they also satisfy the Alaska Definition. M-37064 did so without any consideration of Section 19's language or legislative history. Instead, M-37064 looked to and placed significant weight on administrative materials prepared several years after Section 19's enactment for purposes of implementing the Alaska IRA.

M-37064's incomplete analysis of Section 19 and reliance on limited, non-legislative sources raise substantial doubts about the validity of its conclusions. Indeed, Section 19's plain language, legislative history, and early implementation reaffirm that the Alaska Definition provides a stand-alone source of eligibility for trust acquisitions in Alaska independent of the criteria contained in Section 19's first three definitions of "Indian." Furthermore, because Section 19 provides a stand-alone definition, there is no need to engage in an "under Federal jurisdiction" analysis under the Supreme Court's *Carcieri*²¹⁴ decision to establish the Secretary's land acquisition authority for Alaska Natives and Alaska Tribes.

1. Section 19's Plain Language

The plain language of IRA Section 19 expressly states that, "[f]or purposes of this Act," Alaska Natives "*shall be considered Indians*." The Alaska Definition does not include any term or grammatical feature to suggest that those deemed "Indians" under the Alaska Definition must, in addition, meet the criteria from one of the first three definitions in Section 19.

The ordinary meaning of "shall" when used in a statute or regulation is to express a command or exhortation.²¹⁵ Case law supports that the ordinary meaning of "shall" is "must,"²¹⁶ making the plain language of the Alaska Definition mandatory, and exclusive to itself.²¹⁷ Use of the word "considered" also suggests that Alaska Natives were to be regarded as "Indians" in the appropriate sections of the IRA, regardless of whether they meet one of the other definitions.

Two contemporary dictionary definitions of "consider" and "considered" support this interpretation. In the 1933 version of Black's Law Dictionary, "considered" is defined as

²¹⁴ In 2009, the Supreme Court in *Carcieri* construed the term "now" in IRA Section 19's first definition of "Indian" to refer to 1934, the year of the IRA's enactment. The Supreme Court did not consider the meaning of the phrase "under Federal jurisdiction," however, or whether it applied to the phrase "recognized Indian tribe." *Carcieri*, 555 U.S. at 379.

²¹⁵ <https://www.merriam-webster.com/dictionary>, explaining that the term "shall" is also used in laws, regulations, or directives to express what is mandatory.

²¹⁶ *Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023, 1030 (D.C. Cir. 2016) (citing *Cook v. Food & Drug Admin.*, 733 F.3d 1, 7 (D.C. Cir. 2013)). See also *Shapiro v. McManus*, 577 U.S. 39, 43 (2015) (the mandatory 'shall' normally creates an obligation impervious to judicial discretion).

²¹⁷ *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 661 (2007).

“[d]eemed; determined; adjudged; reasonably regarded.”²¹⁸ Webster’s 1934 New International Dictionary defines “consider,” as relevant here, as “[t]o view as in a certain relation; to regard; to judge.”²¹⁹ In other words, Alaska Natives were to be deemed “Indians” without further analysis.

Furthermore, the term “Eskimos and other aboriginal peoples of Alaska” is sufficiently expansive to cover all of the Native peoples of Alaska,²²⁰ demonstrating Congress’s intent that the IRA apply broadly to Alaska Natives residing in what was then the Territory of Alaska. Congress could have just as readily added limiting language and explicitly clarified that “Eskimos and other aboriginal peoples of Alaska” were “Indians” *provided* that they met one of the three preceding definitions. It did not. Therefore, requiring those who satisfy the Alaska Definition to further satisfy one of the first three definitions would run counter to Congress’s clear mandate.²²¹

2. Section 19’s Legislative History

The IRA’s legislative history corroborates the plain language and the conclusion that Congress intended Alaska Natives and Alaska Tribes to be treated uniquely under the IRA.²²² The initial version of the Wheeler-Howard bill that would become the IRA, as proposed in February 1934, originally did not address Alaska.²²³ However, the House hearings included a debate on whether the Wheeler-Howard bill would apply to Indians in Alaska, which resulted in the ultimate inclusion of the aboriginal people of Alaska being added to the bill.²²⁴ In a colloquy on February 26, 1934 Territorial Delegate Anthony Dimond of Alaska, and Representatives Gilchrist of Iowa and Peavey of Wisconsin expressed concern to Commissioner of Indian Affairs John Collier over the fact that Alaska lacked a traditional reservation system and that jurisdiction over the aboriginal people of Alaska was “scattered”:

Mr. DIMOND. . . . Mr. Commissioner, can you tell me how far if at all this bill will apply to the Indians in Alaska?

Mr. COLLIER. You will find at the beginning of the first line of the first page – “it is hereby declared to be the policy of Congress to grant to those Indians living

²¹⁸ Black’s Law Dictionary, 406 (3d ed. 1933) (citing *State v. District Court of Eighth Judicial Dist. in and for Cascade County*, 64 Mont. 181, 208 P. 952, 955 (1922); *Polsgrove v. Moss*, 154 Ky. 408, 157 S.W. 1133, 1135 (1913)).

²¹⁹ Webster’s New International Dictionary, 568-69 (def. 5(a)) (2d ed. 1934).

²²⁰ See, e.g., Bureau of the Census, Howard G. Brunsman, “General Characteristics: Alaska,” *United States Census of Population: 1950* (Washington, DC: Government Printing Office, 1952) (classifying Alaska “aboriginal stock” as including “Aleut, Eskimo, [and] Indian”).

²²¹ M-37043 noted, the plain meaning of “considered” supports the view that by enacting the Alaska Definition, Congress intended Alaska Natives to be regarded as “Indians” without more. See M-37043 at 14.

²²² For a comprehensive legislative history of the IRA, including the debate on the definition of “Indian,” see *The Meaning of “Under Federal Jurisdiction” for Purposes of the Indian Reorganization Act*, M-37029 (Mar. 12, 2014).

²²³ H. Hrgs. on Wheeler-Howard Act, Pt. 1 at 1-14 (Feb. 22, 1934). An identical version of the bill was introduced in the Senate during the same month.

²²⁴ H. Hrgs. on Wheeler-Howard Act, Pt. 3 at 76-77 (Feb. 26, 1934).

under Federal tutelage and control the freedom to organize for the purpose of local self-government.” You can tell us whether the Alaska Indians live under Federal tutelage.

Mr. DIMOND. It is not so easy to answer.

Mr. GILCHRIST. Federal tutelage and control is what it says.

Mr. COLLIER. I should think it ought to be made definite one way or the other.

Mr. DIMOND. I see there are very few limitations. There are no reservation Indians in Alaska in the ordinary sense of the term and this bill is designed mainly to apply to Indians who are now or lately have been on reservations, as I understand. Is that correct?

Mr. COLLIER. Yes, except where voluntary colonies are formed and you might have that in Alaska.

* * *

Mr. PEAVY. Would there be any objection on the part of the Department to direct inclusion of Alaska?

Mr. COLLIER. No. The principal cause that has held us back from including Alaska in titles 1 and 2 lies in this, that the jurisdiction over Indians up there is a scattered jurisdiction. It has never been lodged in the Indian Office, and in the passing of a declared policy by Congress this would quite definitely extend the function of the Indian Office to Alaska, not only in health but in other matters. Nevertheless there does not seem to be any reason why the permissive features should not be made accessible to them.²²⁵

Following Commissioner Collier’s testimony on the issue, the chair of the House Committee introduced an amendment endorsed by the Department whose provisions addressed the concerns raised in Collier’s colloquy with Delegate Dimond and Representative Peavey.²²⁶ This amendment, which was proposed by the Chairman of the House Committee on Indian Affairs resembles portions of the IRA as finally enacted by Congress. The amendment provided that:

The provisions of this act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that the provisions of titles I and

²²⁵ *Id.*

²²⁶ H. Hrgs. on Wheeler-Howard Act, Pt. 5 at 189 (March 5, 1934).

II of this act shall apply to Alaska, and for the purposes of these titles Eskimos and other aboriginal peoples shall be considered Indians.²²⁷

The House Committee explained the amendment as providing that “the Wheeler-Howard bill shall not extend outside of the United States, except that certain provisions may be applied to the natives of Alaska,”²²⁸ making clear that the Committee understood the Alaska Definition as making Alaska Natives eligible for IRA benefits without more and as placing them within the authority of the Office of Indian Affairs.²²⁹ Other than their internal cross-references and the addition of the term “Territory of” before Alaska, language identical to the Alaska amendment was enacted as the Alaska proviso in IRA Section 13 and the Alaska Definition in IRA Section 19.

In a later House hearing on the bill on May 8, 1934, Delegate Dimond again discussed the different land tenure in Alaska. In particular, he believed that Indians in Alaska would benefit from the establishment of reservations there and described successes at the reserve set aside at the Annette Islands for the Metlakatla Indians:

Mr. DIMOND. Mr. Chairman, if the committee would permit, I would like to make a statement in reference to the Alaskan situation under the proposed bill.

Mr. DIMOND. If it were not for the rights of other people that have come to life, I would like to go back and establish a reservation for the other Indians. I think they would have been much better off if in the beginning there had been set aside a reservation of our Alaskan territory for the benefit of the natives, and they could have taken care of them in this fashion without hurting anybody else. But now, of course, the white men have come in and taken up the best locations and if one tries to change the status there will be great difficulty. In 1891, when this act was passed, nobody cared about the Annette [sic] Island group, and this worked out very satisfactorily.²³⁰

²²⁷ *Id.*

²²⁸ *Id.* at 195 (describing Alaska Amendment as restricting application of the IRA “to the continental United States, except that the benefits of titles I and II are extended to Alaska aborigines), *id.* at 199 (describing Alaska Amendment as providing that IRA “shall not extend outside of the United States, except that certain provisions may be applied to the natives of Alaska.”).

²²⁹ *Id.* at 193 (remarks of Commissioner Collier) (describing Alaska amendment as “an important proviso which would allow the Indians of Alaska to take advantage of titles I and II, the self-government title, which gives them the opportunity of Indian Service employment and the educational advantages.”).

²³⁰ H. Hrgs. on Wheeler-Howard Act, Pt. 9 at 497-99 (May 8, 1934). Representative Dimond also stated that he had provided copies of the bill to individuals and institutions in Alaska, including the Alaska Native Brotherhood. He went on to cite a letter commenting on the bill from William L. Paul, an attorney, a former member of the Alaska legislature, and an executive committee member of the Alaskan Native Brotherhood:

Hon. A.J. Dimond,
Washington, D.C.

Testifying before the Senate Committee on Indian Affairs on the last day of hearings on May 17, 1934, Commissioner Collier explained the intent of the Alaska amendment more directly.²³¹

The CHAIRMAN...Next you have, 'For the purposes of this act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.' What is the law at the present time?

Commissioner COLLIER. The law is that they are entitled to educational aid, health aid, but otherwise are not under the guardianship of the Government. The effect of this [provision] will be to extend the land acquisition and credit benefits to these Alaska Indians who are pure-blood Indians and very much in need, and they are neglected, and they are Indians pure and simple.²³²

Collier's response demonstrates that the Department understood the Alaska Definition as making Alaska Natives eligible for IRA benefits by virtue of their status *as* Alaska Natives, placing the administration of their affairs under the Office of Indian Affairs for the first time. Without further mention of the Alaska Definition, the Chair and members of the Committee returned to their discussion of Section 19's first three definitions of "Indian."²³³

The Senate Committee's adoption of the Alaska Definition without debate or significant change contrasts sharply with its debates over the first three definition's criteria. These debates nowhere referenced the Alaska Definition at all. This suggests Congress considered the Alaska Definition distinct from the first three.

My dear Tony: Referring to H.R. 7902, I have read it very carefully and wish to say that it seems to be the first sound step ever taken by the Indian Department to solve the Indian question on a sound basis.

There is very little that can apply to Alaska, and that little appears to be entirely beneficial—the matter of education principally.

Some people without an understanding of the legal position of the Alaska native would think that these natives would come under the bill. Such questions could be solved when we got to them. In the meantime, I hope you will feel free to support the bill, and that you will also inform Mr. Collier of our general approval of the bill.

With sincere good wishes, I remain,

Yours faithfully,

William L. Paul

Id. at 498.

²³¹ *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645 Before the S. Comm. on Indian Affairs*, 73rd Cong. at 265 (May 17, 1934) [hereinafter S. Hrgs.]. The structure of the Wheeler-Howard bill, then known as S. 3645, had by this point been revised, resulting in the separation of the Amendment's Alaska Proviso and Alaska Definition into separate sections of the bill.

²³² S. Hrgs. at 265 (emphasis added).

²³³ See S. Hrgs. at 265-267. These further discussions culminated in the addition of the phrase "now under Federal jurisdiction" to the General Definition's first criteria.

Lastly, reading the reference to “Eskimos and other aboriginal peoples of Alaska” as an independent definition of “Indian” in Section 19 of the IRA is consistent with the broad remedial purposes of the legislation. The IRA marked a dramatic change in the direction of the federal government’s policy on Indians. It replaced what was a disastrous assimilationist policy characterized by the General Allotment Act, which had been designed to “put an end to tribal organization” and to “dealings with Indians . . . as tribes.”²³⁴ While the IRA’s land acquisition provision was to address in part the dismal failure of the assimilation and allotment policy, it also had a broader purpose to “rehabilitate the Indian’s economic life,” and “give the Indians the control of their own affairs and of their own property.”²³⁵ By including Alaska Natives separately in the definition section of the IRA, Congress meant for them to use directly the five applicable portions of the IRA as originally enacted and those later made applicable by the Alaska IRA, for the same goals of economic development and self-governance available for Indian tribes in the lower 48 states.

3. Early Implementation of the Alaska IRA

M-37064 suggested that interpreting the Alaska Definition as a stand-alone provision separate from the first three definitions would create “challenges”²³⁶ and leave unclear “what persons of [Alaska Native] blood were eligible” for IRA benefits.²³⁷ M-37064 points to internal Department correspondence²³⁸ as evidence of this “uncertainty” over the relation between the Alaska Definition and the first three definitions.²³⁹ The cited correspondence consisted of various notes, internal memoranda, and correspondence on the Alaska IRA’s implementation prepared in the Solicitor’s Office and the Office of Indian Affairs over the course of the year in 1937. None was formal in nature, and none reflected the formal views of the Department.²⁴⁰

The first correspondence consisted of handwritten notes with a drawing by Felix Cohen directed to Fred Daiker, the Assistant to Commissioner Collier. In it, Cohen explained:

It seems to me that sec. 19 puts Eskimos on the same basis as Indians. To qualify for the benefits of the W.H. act they must meet one of 3 criteria: tribal affiliation, tribal descent plus residence on a reservation, or the half-blood test.²⁴¹

²³⁴ *United States v. Celestine*, 215 U.S. 278, 290 (1909).

²³⁵ *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934), and 78 Cong. Rec. 11125 (1934) (statement of Sen. Wheeler)). See also Meriam Report (detailing the deplorable status of health, *id.* at 3-4, 189-345, poverty, *id.* at 4-8, 430-60, 677-701, education, *id.* at 346-48, and loss of land, *id.* at 460-79). The IRA was not confined to addressing the ills of allotment, as evidenced by the inclusion of Pueblos in the definition of “Indian tribe.”

²³⁶ M-37064 at 29.

²³⁷ *Id.*

²³⁸ *Id.* at 28.

²³⁹ *Id.* at 33. Based on this, M-37064 announced that a more “thorough consideration of how to interpret the relationship” between the definitions was needed. *Id.* at 29.

²⁴⁰ *Id.* at 19.

²⁴¹ Handwritten Note captioned “Memo for Mr. Daiker” from Felix S. Cohen, Assistant Solicitor to Fred H. Daiker, Assistant to the Commissioner of Indian Affairs (Undated).

M-37064 interpreted Cohen's handwritten note as evidence that the IRA's primary author believed that Alaska Natives must also satisfy one of the first three definitions in addition to the Alaska Definition. The underlying premise, however, that Cohen drafted the Alaska Definition is contrary to Cohen's role in drafting the IRA. No doubt Cohen helped draft the IRA, but he would have done so when the Office of Indian Affairs lacked administrative authority over Alaska Native affairs. As discussed above, the Alaska Definition was not part of the Wheeler-Howard bill when introduced; rather the Alaska Definition's legislative history shows it was introduced by the House Committee on Indian Affairs as an amendment to the proposed bill.²⁴² It therefore seems unlikely Cohen would have drafted the terms of what became Section 19's first three definitions of "Indian" with Alaska or Alaska Natives in mind.²⁴³ Instead his handwritten note amounts to an impromptu interpretation of the House Committee's Alaska amendment rather than the considered views of its primary author.

The second item M-37064 cites was an internal Solicitor's memorandum from October 5, 1937 drafted by Cohen and two of his Solicitor's Office colleagues, which the opinion characterized as "expressing uncertainty" over the relation of the Alaska Definition and the first three definitions after the Alaska IRA's enactment.²⁴⁴ Assistant Solicitors Cohen, Charlotte Westwood, and Kenneth Meiklejohn jointly issued the memorandum addressing legal issues related to the organization of Alaska Native groups under Section 1 of the Alaska IRA. Regarding the question of whether the first sentence in Section 19's definition of "Indian" applies to Alaska, they believed that it was connected to and should be read in tandem with the sentence about Alaska Natives:

Section 19 of the I.R.A. is included in the Composite Indian Reorganization Act for Alaska. It provides a definition of "the term 'Indian' as used in this Act" and then states that Eskimos and other aboriginal peoples of Alaska shall be considered "Indians." It is the present opinion of the undersigned that as a matter of construction and necessity the second reference to the term Indian should be read in connection with the definition of the term. Otherwise there would be no law as to what persons of Indian blood were eligible for benefits and organization. However, if desired, this conclusion can be reopened and submitted to the Solicitor for decision. While a "tribe" in Alaska may be a matter of language and

²⁴² See H. Hrgs. on Wheeler-Howard Act, Pt. 5 at 189 (Mar. 5, 1934). As discussed above, the terms of the Alaska Definition formed no part of the Wheeler-Howard bill when introduced. Felix Cohen's role in drafting the Wheeler-Howard bill is widely acknowledged, but M-37064 suggested he also drafted the Alaska Definition. M-37064 did not explain why, if Cohen had drafted the Alaska Definition, he did so without anticipating the later debates regarding Alaska Natives. None of the views expressed by Cohen in 1937, which M-37043 considered more thoroughly than M-37064, suggest this was the case. In any event, M-37064 nowhere identifies any ambiguities in Section 19 or gaps in its legislative history rendering recourse to such administrative understandings relevant.

²⁴³ See M-37064 at 28 (discussing Cohen's "drafting choices").

²⁴⁴ *Alaska Organization Issues*, Memorandum signed by Felix S. Cohen, Charlotte T. Westwood, and Kenneth Meiklejohn (Oct. 5, 1937).

not of organization, the existence of tribes and the state of “tribal relations” has been repeatedly recognized in the courts.²⁴⁵

The third item M-37064 cited was a separate internal memorandum by the same authors issued the same day.²⁴⁶ Section 5 of the memorandum addressed the applicability of Section 19.²⁴⁷ Noting how the Alaska Definition provided that Eskimos and other aboriginal peoples of Alaska shall be considered “Indians,” the authors expressed their opinion that as a matter of construction and necessity, the second reference to the term “Indian” [*i.e.*, the Alaska Definition] should be read in connection²⁴⁸ with the first three definitions because otherwise there would be no law as to what persons of Indian blood were eligible for benefits and organization.²⁴⁹

Although the Solicitor’s Office in 1937 did not interpret the inclusion of “Eskimos and other aboriginal peoples of Alaska” in Section 19 of the IRA as distinct from the first three definitions of “Indian,” the statements fall short of becoming formal legal analyses for the Department. Not only are these comments conclusory, but they also lack any thorough legal explanation or analysis of the legislative history of the IRA. It also appears the conclusions were based, at least in part on the policy concern that accepting the plain language’s meaning would result in “no law as to what persons of Indian blood were eligible for benefits and organization.” The tentative nature of their interpretation is highlighted by the fact that Assistant Solicitors Cohen, Westwood, and Meiklejohn opened the door for further investigation by the Solicitor’s Office on whether Alaska Natives were required to fulfill the other requirements of Section 19.

M-37064 gave significant weight to the foregoing 1937 Assistant Solicitors’ correspondence but dismissed other correspondence regarding the Alaska IRA and its implementation. In a February 1937 draft letter explaining the provisions of the Alaska IRA for general distribution, Field Agent William L. Paul reached the opposite conclusion of the Assistant Solicitors, observing:

Section 19 defines the word “Indian” and word “tribe” and the words “adult Indians.” By so many words “Eskimos and other aboriginal peoples of Alaska shall be considered Indians”, and so the limitation of one half blood or more does not apply to Alaska.²⁵⁰

Most importantly, M-37064 and M-37043 alike overlooked the Department’s formal views on the issue as expressed by the Secretary of the Interior Harold L. Ickes to the Senate Committee on Indian Affairs in 1939. In a letter to the Chair of the Committee, Secretary Ickes confirmed that the Department understood Section 1 of the Alaska IRA, which made Section 19 applicable

²⁴⁵ *Id.* at 3.

²⁴⁶ *Legal Issues Affecting Alaska Organization*, Memorandum signed by Felix S. Cohen, Charlotte T. Westwood, and Kenneth Meiklejohn (Oct. 5, 1937) [hereinafter Alaska Legal Issues Memo].

²⁴⁷ *Id.* at 2-3.

²⁴⁸ M-37064 misquoted this passage, incorrectly asserting that it states that the Alaska Definition should be read “in conjunction” rather than “in connection” with the first three definitions. See M-37064 at 28.

²⁴⁹ Alaska Legal Issues Memo at 2-3.

²⁵⁰ Letter from William L. Paul, Field Agent, 6 (Feb. 26, 1937).

to Alaska, as having brought the Indians and Eskimos of Alaska “fully within the terms” of the IRA.²⁵¹

Secretary Icke’s view presaged the Supreme Court’s opinion in *Carcieri*, which almost seventy years later points to Section 1 of the Alaska IRA as an example of a statutory provision in which “Congress chose to expand the Secretary’s authority to particular Indian tribes not necessarily encompassed within the definitions of ‘Indian’ set forth” in IRA Section 19.²⁵² M-37064 cavalierly dismissed the Court’s view and its reference to Section 1 of the Alaska IRA as “unlikely...[to have been intended] to make a pronouncement regarding trust acquisition eligibility,” notwithstanding that *Carcieri* precisely involved a challenge to a trust acquisition eligibility.

To the contrary, there is little ambiguity in Congress’s directive that the Native peoples of Alaska “shall be considered Indians.”²⁵³ M-37064 however chose to accord great weight to the Assistant Solicitors’ initial interpretation of Section 19²⁵⁴ and back-of-the-envelope view that Alaska Natives must also meet one of the first three definitions of “Indian.” I find that the Department’s correspondence surrounding implementation of Section 19 is inconclusive about Congressional intent and see no need to deviate from the plain text of Section 19, which directly supports the conclusion that it provides a stand-alone definition for Alaska Natives and Alaska Tribes.

4. Congress Expressly Applied the IRA to Alaska Natives and Alaska Tribes

In *Carcieri*, the Supreme Court acknowledged that after 1934, Congress expressly extended the Secretary’s trust land authorities to certain tribes. It acknowledged that “[i]n other statutory provisions, Congress chose to expand the Secretary’s authority to particular Indian tribes not necessarily encompassed within the definitions of ‘Indian’ set forth in § [5129],” and cited to numerous statutes as examples in which Sections 5 and 19 apply to tribes regardless of whether they were under federal jurisdiction in 1934.²⁵⁵ In footnote 6 of the *Carcieri* decision, the Supreme Court cited to the Alaska IRA as an example of one of those statutes where Congress

²⁵¹ *Repeal of the So-Called Wheeler-Howard Act*, S. Rep. 76-1047 at 17 (Aug. 2, 1939) (citing letter from Secretary of the Interior Harold L. Ickes to Senator Elmer Thomas, Chairman, Senate Committee on Indian Affairs (Mar. 31, 1939)).

²⁵² *Carcieri*, 555 U.S. at 392; *id.* at n.6; *see also* M-37043 at 5-6.

²⁵³ The words of a statute should be given the meaning that proper grammar and usage assign them. *Lake Cty’ v. Rollins*, 130 U.S. 662, 670 (1889). Lawmakers are generally presumed to be aware of the rules of grammar, *United States v. Transocean Deepwater Drilling, Inc.*, 767 F.3d 485, 494 (5th Cir. 2014) (citing *United States v. Goldenberg*, 168 U.S. 95, 102-03 (1897), for which reason such rules should govern statutory interpretation so long as they do not contradict a statute’s legislative intent or purpose. *Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019) (citing A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 140 (2012).

²⁵⁴ M-37064 at 28 (assigning “significant weight to the opinion of Assistant Solicitor Cohen as one of the IRA’s primary authors”).

²⁵⁵ 555 U.S. at 392.

chose to expand application of the IRA independent of the IRA Section 19 definition of Indian.²⁵⁶

M-37064 expresses skepticism that the Supreme Court intended to make such a pronouncement regarding trust acquisition eligibility in Alaska through an illustrative, non-explanatory footnote.²⁵⁷ I disagree. The Alaska IRA fits squarely within the Supreme Court's rationale for exempting certain tribes from having to satisfy the Section 19 definition of Indian.

5. The Alaska IRA does not Establish Two Classes of Tribes in Alaska

As part of its concerns, M-37064 attempts to draw a distinction between Alaska Tribes understood to be recognized prior to 1936 and those encouraged to organize later under the Alaska IRA. As enacted, Section 1 of the Alaska IRA reads:

“Provided, That groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond [of a specific nature] may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 16, 17, and 10 of [the IRA].”

M-37064 interprets this language as establishing two classes of tribes. The first being those bands or tribes for whom the President or Secretary, prior to 1936, had on numerous occasions withdrawn public lands for the use and occupancy of Alaska Natives.²⁵⁸ The second being those groups having a common bond and encouraged to organize under the Alaska IRA *“regardless of past tribal or community affiliations.”*²⁵⁹ M-37064 goes on to posit that for groups established under the common bond criteria, Section 1 only extends three IRA provisions; the ability to organize to adopt constitutions and bylaws, to receive charters of incorporation, and to receive Federal loans.

Section 1 states that “common bond” tribes “may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans” under sections 10, 16, and 17. The statute, however, does not state that these are the *only* things they can do, and it is not clear why Section 1 would be read to say that so-called common bond tribes may not rely on other IRA provisions. It does not follow that Congress in establishing two different paths to eligibility meant that those established under the common bond criteria would be treated differently once organized. The provision seems to make more sense not as a separate extension of authority but as an

²⁵⁶ *Id.* at 392 n.6 (citing 25 U.S.C. § 5119 (“Sections . . . 465 [25 U.S.C. § 5108] . . . and 479 [25 U.S.C. § 5119] of this title shall after May 1, 1936, apply to the Territory of Alaska”); § 1041 e(a) (“The [Shawnee] Tribe shall be eligible to have land acquired in trust for its benefit pursuant to section 465 of this title . . .”); § 1300b-14(a) (“Statutory provisions applicable. The Act of June 18, 1934 . . . is hereby made applicable to the [Texas] Band [of Kickapoo Indians] . . .”); § 1300g-2(a) (“The Act of June 18, 1934 . . . , as amended, . . . shall apply to the members of the [Ysleta del Sur Pueblo] tribe, the tribe, and the reservation”).

²⁵⁷ M-37064 at 30.

²⁵⁸ *Id.* at 31-32.

²⁵⁹ *Id.* (citing Memorandum, Felix Cohen, Assistant Solicitor, to Mr. [Allen G.] Harper, [Special Assistant to the Commissioner of Indian Affairs] (Dec. 18, 1936) (emphasis added).

elaboration on how villages or groups sharing a common bond could organize to adopt a constitution and by-laws even if they did not have an existing reservation.

In addition, it is hard to understand why Congress would have provided such limited application of the IRA for the common bond tribes. Congress recognized that a land base was pivotal to the goals of organization or incorporation. It seems unlikely Congress would want to create a path toward organization or incorporation, while at the same time precluding one fundamental piece of that process – forming an established land base.²⁶⁰

IV. Conclusion

The Secretary's authority to place Alaska lands in trust derives from Section 5 of the IRA, as made applicable by the Alaska IRA.²⁶¹ No subsequent Congressional action repealed such authority. Furthermore, the Supreme Court's decision in *Carcieri* does not bar the Department from acquiring land into trust for Alaska Natives or Alaska Tribes or require an "under Federal jurisdiction" analysis.

In M-37064, Solicitor Jorjani identified what were in his view serious concerns over the scope of the Secretary's land acquisition authority in Alaska. To the extent necessary, I have reviewed, addressed, and resolved, those concerns. I am not persuaded that any of the concerns raised in M-37064 cloud or contradict my firm conclusion that the Secretary's land into trust authority and reservation proclamation authority for Alaska Natives and Alaska Tribes remain intact.

This Opinion was prepared with the substantial assistance of Attorney Robert Hitchcock and Assistant Solicitor John Hay in the Solicitor's Office.



Robert T. Anderson

²⁶⁰ Indeed, three Southeast Alaska Native Communities, Angoon, Kake, and Klawock, were formed post-1936 pursuant to IRA § 16 on the basis of a common bond of occupation in the fishing industry. Each applied for and received IRA § 10 revolving loans which they then used to purchase land that was conveyed to the United States in trust. See Defendants' Supplemental Brief Pursuant to Court Order, *Akiachak Native Community v. Department of the Interior, et al.*, Case No. 06-cv-0969-RC (D.D.C.), ECF 101 at 9 n.4 (filed July 6, 2012); see also Sansonetti Opinion at 112 n.277. In 1943, the Secretary of the Interior also created a reservation for the Neets'aiti Gwich'in out of the land surrounding Venetie Village and another nearby tribal village, *Arctic Village Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 523 (1998); see also Case & Voluck at 100 n.113.

²⁶¹ See 25 U.S.C. §§ 5108, 5119.