



United States Department of the Interior

OFFICE OF THE SOLICITOR

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M-37069

Memorandum

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

From: Principal Deputy Solicitor

Subject: 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

On the last day of the previous administration, the Solicitor issued M-37064¹ "*Permanent Withdrawal of Solicitor Opinion M-37043, 'Authority to Acquire Land into Trust in Alaska'*" concluding that an irreconcilable conflict exists between the Alaska Native Claims Settlement Act (ANCSA) and the Secretary's land into trust authority under Section 5 of the Indian Reorganization Act (IRA). However, M-37064 did not address the conflict with existing Departmental regulations. Specifically, M-37064 contradicts the Department's 2014 rulemaking that eliminated the Alaska Exception from 25 C.F.R. § 151.1, which is the general regulation governing Indian trust land acquisitions

The Federal Register Notice for the 2014 Final Rule explained, "[a]s the foregoing overview of the development, interpretation, and litigation of the Alaska Exception demonstrates, the Department has ongoing statutory authority to take land into trust in Alaska under Section 5 of the IRA. This authority, explicitly granted by Congress, has never been revoked. Subsequent enactment of ANCSA and the Federal Land Policy and Management Act (FLPMA) have provided additional context for the exercise of such authority, but no legal impediment exists to deleting the Alaska Exception from the land-into trust regulations."² M-37064 did not engage, explain or attempt to reconcile this conflict nor was the opinion accompanied by any formal change in policy (e.g. a proposed rulemaking for § 151.1). Moreover, M-37064 did not acknowledge that the Alaska exception to the general Indian trust acquisition regulations was declared unlawful by the federal district court for the District of Columbia. *Akiachak Native Cmty. v. Salazar*, 935 F. Supp. 2d 195 (D.D.C. 2013), which was vacated as moot after the 2014 Final Rule was published. *Akiachak Native Cmty. v. U.S. Dept. of Interior*, 827 F.3d 100 (D.C. Cir. 2016).

¹ Sol. Op. M-37064, *Permanent Withdrawal of Solicitor Opinion M-37043, 'Authority to Acquire Land into Trust in Alaska'* (Jan. 19, 2021).

² Land Acquisitions in the State of Alaska, 79 Fed. Reg. 24,648 (May 1, 2014).

For the foregoing reasons, and pursuant to delegated authority, I hereby withdraw M-37064. This withdrawal will allow for consultation with Tribal Nations consistent with President Biden’s January 26, 2021 *Memorandum on Tribal Consultation and Strengthening Nation to Nation Relationships*. President Biden’s Memorandum emphasizes that respect for Tribal sovereignty and a commitment to the trust and treaty responsibilities is a priority. The Presidential Memorandum further states that “regular, meaningful, and robust consultation with Tribal Nations [is] a cornerstone of Federal Indian policy.”³ Accordingly, I recommend that within the next 90 days the Bureau of Indian Affairs schedule virtual consultation sessions with Tribal Nations to engage in meaningful and robust consultation on the Secretary’s land into trust authority in Alaska. Furthermore, because the duly promulgated rule allowing discretionary trust acquisitions remains in effect, the Department may begin processing trust applications after the expiration of the consultation period.

Robert T. Anderson

³ Presidential Memorandum of January 26, 2021, *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships*.