UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AKIACHAK NATIVE COMMUNITY et al.,	)	
Plaintiffs,	)	
v.	)	No. 1:06-cv-00969 (RC)
DEPARTMENT OF THE INTERIOR et al.,	)	
Defendants.	)	

PLAINTIFFS' REPLY TO DEFENDANTS' SUPPLEMENTAL BRIEF FILED PURSUANT TO COURT ORDER

I. INTRODUCTION

Defendants plainly concede that Congress has "specifically authorized the Secretary to take Alaska lands in trust for Natives."[1] Defendants are less consistent about the effect of 25 C.F.R. § 151.1 on the exercise of that statutory authority. While Defendants repeatedly refer to the regulation as a "bar" on taking land into trust in Alaska,[2] they have also claimed that the regulation "cannot be read as an absolute prohibition on the Secretary's discretionary authority to take lands into trust in Alaska."[3] Defendants argue that the regulation "does not flatly prohibit the Secretary from taking Alaska land in trust *outside of* [Part 151]."[4] The semantic distinction Defendants rely on

[1] Defs.' Suppl. Br. 7.

[2] *See, e.g.*, Defs.' Suppl. Br. 5 (referring to the "*existing bar* on taking land into trust in Alaska") (emphasis added).

[3] Defs.' Mem. in Support of Cross-Mot. for Summ. J. 16, ECF No. 57.

[4] *Id.* (emphasis added).

is irrelevant: under the current regulatory scheme, no Alaska Native individual or community can submit a land-into-trust request to the Secretary and have it considered.[5] Because this regulatory bar is expressly impermissible by statute, Plaintiffs agree with Defendants that Part 151 must be amended in order for the Secretary to exercise his trust land acquisition authority in Alaska.[6]

II. HISTORICAL OVERVIEW

Tribal lands held in trust form an essential part of the exercise of tribal self-determination, yet Defendants continue to arbitrarily single out Native tribes with homelands in Alaska from eligibility to petition for their fee lands to be conveyed in trust. Defendants convey a one-sided picture of the historical record as the context for reviewing the Secretary's bar to the acquisition of trust lands in Alaska. Absent more historical analysis, the reader is left to believe that as a general matter, trust land—and therefore Secretarial trust responsibilities—were minimal both before and after the passage of ANCSA. Logic, then, would support the proposition that the Secretary is lawfully adhering to a long-held policy that divines congressional intent as "'permanently remov[ing] all Native lands in Alaska from trust status.'"[7] But this would be incorrect

Prior to enactment of ANCSA, Congress adopted statutes that imposed trust responsibilities on the Secretary over lands in Alaska for Alaska Natives, including

[5] Defs.' Suppl. Br. 11 ("…there are no procedures in place that would allow the Secretary to consider such a request.").

[6] *See* Defs.' Mem. in Support of Cross-Mot. for Summ. J. 17, ECF No. 57 (stating that Part 151 "ought to be amended before the Secretary could, if he chose, exercise his authority to take Alaska land in trust.")

[7] Defs.' Suppl. Br. 4 (quoting the now rescinded Memorandum from Associate Solicitor, Indian Affairs to Assistant Secretary–Indian Affairs 1, AR 1 (Sept. 15, 1978) [hereinafter 1978 Fredericks Opinion or Fredericks Opinion]).

statutory obligations over Native allotments,[8] fiduciary responsibilities over restricted Native townsites, general trust authority over Indian Reorganization Act (IRA) tribal reserves, and specific responsibilities related to leases on executive order reserves.

With the enactment of ANCSA, Congress dealt primarily with the conveyance of land to Alaska Native corporations. The ANCSA land settlement disestablished Alaska IRA reservations[9] and prohibited new Native allotments, but it also permitted approximately 9,000 then-pending allotment applications to be "approved."[10] In 1998 Congress also provided an opportunity for certain Alaska Native veterans to apply for allotments.[11] These restricted fee allotments are administered by the Bureau of Indian Affairs in the same manner as trust allotments in all other States.[12] That some of these lands were subject to restrictions on alienation rather than held in trust is of no consequence, as courts have treated the two as indistinguishable *vis-à-vis* Secretarial authority to manage and protect property on behalf of Alaska Natives.[13]

[8] For seventy five years the Interior Department officially interpreted the Alaska Allotment Act to authorize *trust* allotments only. Then in 1980, the Indian Board of Land Appeals (IBLA) overruled the department's earlier precedent and held that Alaska Native allotments were held in restricted title. *State of Alaska*, 45 IBLA 318 (1980). The decision permitted Alaska Native allottees to obtain fee patents to their allotments in their own names but the restriction against alienation could only be removed by the Secretary's grant of a "certificate of competency" upon the allottee's application.

[9] 43 U.S.C. § 1618(a).

[10] 43 U.S.C. § 1617(a).

[11] Act of October 21, 1998, Pub. L. 105-276, 112 Stat. 2516 (codified as amended at 43 U.S.C. §1629g; Alaska Native Allotments For Certain Veterans, 43 C.F.R. 2560, Subpart 2568 (2012)).

[12] *See* Email from Sandra Ashton, Solicitor's Office, Department of the Interior, to Carol Russell, Solicitor's Office, Department of the Interior, AR 797 (Mar. 5, 1997) ("most BIA programs in Alaska presently are NOT conditioned on being on or near a reservation. . . . [T]he existence of Indian country will have little impact.").

[13] *U.S. v. Bowling*, 256 U.S. 484 (1921). *See also* FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 127-138 (1982 ed.) (discussing the history of federal allotment policies).

The Department's ongoing responsibility to manage restricted-fee Alaska Native allotments like other trust properties renders hollow Defendants' tired response that the Alaska regulatory bar is premised on a long-held policy that divines congressional intent as "'permanently remov[ing] all Native lands in Alaska from trust status.'" [14] These examples of congressional action reaffirming the Secretary's trust authority and administration over trust lands in Alaska declaim any residual argument that ANCSA foreclosed the possibility of future trust land acquisitions in the state.

III. RESPONSES TO THE COURT'S SIX QUESTIONS

1. When did the Secretary first adopt the position that, despite the enactment of ANCSA, he retains the statutory authority to take Alaska land into trust for the benefit of Alaska Natives outside of Metlakatla? How did the Secretary announce his interpretation? Please describe any previous interpretations of the Secretary's statutory authority, when they were adopted, how they were announced, and why they were abandoned.

Outside the context of this litigation, the Secretary has never clearly stated his position regarding his retained statutory authority to take Alaska land into trust for the benefit of Alaska Natives outside of Metlakatla. Indeed, the Secretary's failure to do so in response to Plaintiffs' petition for rulemaking on this very issue is what made this question ripe for litigation.

The earliest specific mention in the record of Secretarial authority to take land into trust in Alaska after the enactment of ANCSA is the March 1977 Peterson Memorandum which concluded that such authority had survived ANCSA. [15] The

[14] Defs.' Suppl. Br. 4 (quoting the now rescinded 1978 Fredericks Opinion).

[15] Memorandum from Dennis Peterson, Chief, Division of Government Services, to Commissioner of Indian Affairs 2, AR 10 (Mar. 30, 1977) ("the Secretary's authority to take land in trust under Section 5 of the IRA has not been considered extinguished by the [ANCSA]").

Peterson memo urged the conclusion that the Secretary's authority to take land into trust was not extinguished by ANCSA, and should be exercised in Alaska on a case by case basis.[16] Later that year, in December 1977, the Deputy Secretary for Administration wrote a memorandum which apparently also urged that the Secretary's authority to take land into trust in Alaska survived ANCSA.[17] In July 1978, the Secretary published the proposed regulation governing trust land acquisitions. The proposed initial rule published in the Federal Register contained no Alaska bar, nor any specific mention of ANCSA or Alaska except to include Alaska Natives. [18]

A request by the Venetie Tribe to have its fee land placed back in trust generated the flawed legal analysis issued by Associate Solicitor Fredericks in September 1978 that later served as a basis for the adoption of the Alaska regulatory bar set forth in the final 1980 rule.[19] However, even the Fredericks Opinion did not unequivocally state that the Secretary actually lacked statutory authority to take land into trust in Alaska, nor did it address his unimpeded statutory authority under Section 5 of the IRA; it merely posited that, "[i]n view of the clear legislative intent and policy expressed in ANCSA's legislative history, it would . . . be an abuse of the Secretary's discretion to attempt to use Section 5 of the IRA . . . to restore the former Venetie Reserve to trust status."[20]

---

[16] *Id.* ("the Secretary should exercise . . . [his Section 5 authority] on a case by case basis to protect the village's possession of their lands").

[17] This memo, written by the Deputy Assistant Secretary for Administration and dated December 13, 1977, is not contained in the record. It is referred to in the September 15, 1978 Fredericks Opinion, AR 1.

[18] Land Acquisitions—Proposed Rulemaking, 43 Fed. Reg. 32,311, 32,312 (July 26, 1978) (§ 120a.2 (b) of the proposed rule defines "tribe" to specifically include Alaska Native villages).

[19] Land Acquisitions—Final Rule, 45 Fed. Reg. 62,034, 62,036, AR 20 (Sept. 18, 1980).

[20] 1978 Fredericks Opinion, AR 3.

The final 1980 regulations acknowledged the Secretary's general statutory authority to take lands into trust pursuant to Section 5 of the IRA and other statutes enabling trust acquisitions.[21] The 1980 regulations did not announce any interpretation by the Department that the Secretary lacked statutory authority to take Alaska lands in trust after enactment of ANCSA. Rather, the 1980 regulations simply placed an absolute bar on Alaska Tribes from participating in the regulatory process.[22] The explanation for the Alaska bar mimicked the rationale contained in the 1978 Fredericks Opinion and stated "that the [ANCSA] does not contemplate the further acquisition of land in trust status, or the holding of land in such status, in the State of Alaska, with the exception of acquisitions for the Metlakatla Indian Community."[23] There is no indication in the record of any other possible rationale for implementing the Alaska bar other than the Fredericks Opinion.

Once the 1980 rule was adopted, the Department did not address the question of the Secretary's retained statutory authority to take Alaska land into trust until the 1994 filing of Plaintiff Chilkoot's Rulemaking Petition.[24] The first public announcement that the Secretary was reconsidering the Department's rationale underpinning the Alaska bar was in the preamble to the 1999 Proposed Rule.

> The regulatory bar to acquisition of title in trust in Alaska in the original version of these regulations was predicated on an opinion of the Associate

[21] Land Acquisitions—Final Rule, 45 Fed. Reg. 62,034, 62,036, AR 20 (Sept.18, 1980) ("The authority for adoption of these regulations is contained in 5 U.S.C. 301; 25 U.S.C. 1 and 2; 25 U.S.C. 450h, 450k, 464, 465, 501, 1466, 1469, 1495 and 1498; and 209 DM 8.").

[22] *Id.* at 62,034, AR 18 (Sept. 18, 1980) ("the regulations do not apply, except for Metlakatla, in the State of Alaska.")

[23] *Id.*

[24] Chilkoot Indian Association et al., Petition for Rule-making, AR 272 (Oct. 11, 1994). Notice of the petition was published at Land Acquisitions—Notice of Petition, 60 Fed. Reg. 1956, 1956 (Jan. 5, 1995).

> Solicitor, Indian Affairs ("Trust Land for the Natives of Venetie and Arctic Village," September 15, 1978), which concluded that the Alaska Native Claims Settlement Act (ANCSA) precluded the Secretary from taking land into trust for Native in Alaska (again, except for Metlakatla).
>
> *Although that opinion has not been withdrawn or overruled, we recognize that there is a credible legal argument that ANCSA did not supersede the Secretary's authority to take land into trust in Alaska under the IRA* (see relevant IRA provision at 25 U.S.C. 473a). *See also* the Petition of Chilkoot Indian Association, Native Village of Larsen Bay, and Kenaitze Indian Tribe, requesting the Department to undertake a rulemaking to remove the prohibition on taking land in trust in Alaska (60 FR 1956 (1995)).[25]

The Secretary invited comments regarding the continued validity of the Fredericks Opinion and the issues raised by the petition.[26]

The Department also conducted an internal analysis of the arguments made in Plaintiffs' 1995 rulemaking petition. The administrative record reflects a consensus within the Department that the 1978 Fredericks Opinion was wrongly decided and that "25 C.F.R. 151.1 arguably exceeds the scope of Secretarial authority, since it conflicts with IRA sections 465 and 473a, which makes section 465 applicable in Alaska."[27]

---

[25] Acquisition of Title to Land in Trust—Proposed Rule, 64 Fed. Reg. 17,574, 17,577, AR 358 (April 12, 1999) (emphasis added).

[26] *Id*.

[27] Draft Memorandum from Office of the Solicitor, Department of the Interior, to Carol Russell, AR 805 (Mar. 3, 1997). The record is replete with references to the ongoing Section 5 authority in Alaska. *See* Email from Roger Hudson, Office of the Regional Solicitor, Alaska, to John Leshy, Office of the Solicitor, Department of the Interior, AR 814 (Aug. 13, 1997) ("In conclusion, it is my opinion that the Secretary does have under existing law the statutory authority and discretion to take land in trust for Alaska Native tribes and individuals."); Memorandum from Roger L. Hudson, Office of the Regional Solicitor, Alaska, to Sandy Ashton, Department of the Interior, AR 810 (July 30, 1997) ("basic reasoning requires a rejection of an implied repeal argument based upon . . . ANCSA [and its amendments]"); Email from Roger Hudson, Office of the Regional Solicitor, Alaska, to Sandra Ashton and John Leshy, Office of the Solicitor, Department of the Interior, AR 811 (July 30, 1997) (requesting a draft paragraph "that would raise and reject an argument that . . .the Secretary no longer had the authority to take land in trust"); Memorandum from Tribal Government and Alaska Division of Indian Affairs, to Carol Russell, AR 794 (Mar. 6, 1997) ("The statute authorizing trust land acquisitions, 25 U.S.C. § 465, contains no . . . [basis for the regulatory] limitations.")

The Department's internal analysis as well as comments submitted to the Secretary on the validity of the Fredericks Opinion,[28] resulted in the rescission of that memorandum by Solicitor John Leshy on January 16, 2001.[29] The announcement of the Department's action was contained in the preamble of the Rule published on the same day:

> The Solicitor has considered the comments and legal argument submitted by Alaska Native governments and groups and by the State of Alaska and two leaders of the Alaska State Legislature on whether the 1978 Opinion accurately states the law. The Solicitor has concluded that there is substantial doubt about the validity of the conclusion reached in the 1978 Opinion. Among other things, the Associate Solicitor found "significant" that in 1976 Congress repealed section 2 of the Indian Reorganization Act (IRA). That section had extended certain provisions of the IRA to Alaska, and had given the Secretary the authority to designate certain lands in Alaska as Indian reservations. See 43 U.S.C. 704(a), 90 Stat. 2743, repealing 49 Stat. 1250, 25 U.S.C. 496. *The 1978 Opinion gave little weight to the fact that Congress has not repealed section 5 of the IRA, which is the generic authority by which the Secretary takes Indian land into trust, and which Congress expressly extended to Alaska in 1936. See 25 U.S.C. 473a. The failure of Congress to repeal that section, when it was repealing others affecting Indian status in Alaska, five years after Congress enacted the Alaska Native Claims Settlement Act, raises a serious question as to whether the authority to take land in trust in Alaska still exists. Accordingly, the Solicitor has signed a brief memorandum rescinding the 1978 Opinion.*
>
> At the same time, the position of the Department has long been, as a matter of law and policy, that Alaska Native lands ought not to be taken in trust. Therefore, the Department has determined that the prohibition in the existing regulations on taking Alaska lands into trust (other than Metlakatla) ought to remain in place for a period of three years during

[28] *See, e.g.*, Chilkoot Indian Association et al., Petition for Rulemaking, AR 272 (Oct. 11, 1994). The record reflects that comments submitted in response to the 1999 Proposed Rule strongly promoted the repeal of the Alaska bar as lacking in statutory basis. *See, e.g.*, Comment, Alaska Inter-Tribal Council, Chilkoot Indian Association, Native Village of Larsen Bay, Kenaitze Indian Tribe, Native Village of Tuluksak, RurAL CAP, Alaska Village Council Presidents, Tanana Chiefs Conference, Mashpee Wampanoag Tribal Council, Shinnecock Indian Nation, United Houma Nation, Pamunkey Indian Tribe, AR 405 (Nov. 10, 1999).

[29] Memorandum from Solicitor, Department of the Interior, to Assistant Secretary for Indian Affairs, AR 619 (Jan. 16, 2001).

> which time the Department will consider the legal and policy issues involved in determining whether the Department ought to remove the prohibition of taking Alaska lands into trust. If the Department determines that the prohibition on taking lands into trust in Alaska should be lifted, notice and comment will be provided.[30]

With the rescission of the Fredericks Opinion, Defendants were left with no rationale to support the continuation of the Alaska bar. As demonstrated by the record and Defendants' arguments in briefing, there has since been no basis articulated for the Alaska bar.

Defendants now correctly concede in their briefing that ANCSA did not repeal the Secretary's statutory authority to take Alaska lands into trust.[31] Defendants are not correct, however, in asserting that "the position that the Secretary retains the authority to acquire land in trust in Alaska was announced in the preamble to the January 16, 2001 regulations."[32] To the contrary, Defendants' "announcement," quoted above, was rather an equivocation that wholly failed to answer the Petition's request that Defendants squarely address the Alaska bar. As noted above, the preamble states "[t]he failure of Congress to repeal [Section 5], when it was repealing others affecting Indian status in Alaska, five years after Congress enacted the Alaska Native Claims Settlement Act, *raises a serious question* as to whether the authority to take land in trust in Alaska still exists."[33] This equivocation is further illustrated by the Department's statement that it would take an additional three-year period to "consider the legal and policy issues

[30] Acquisition of Title to Land in Trust—Final Rule, 66 Fed. Reg. 3452, 3454, AR 585 (Jan. 16, 2001) (emphasis added).

[31] Defs.' Suppl. Br. 10 ("No statute prohibits the Secretary from taking land into trust for the benefit of Alaska Natives.").

[32] Defs.' Suppl. Br. 7.

[33] Acquisition of Title to Land in Trust—Final Rule, 66 Fed. Reg. 3452, 3454, AR 535 (Jan. 16, 2001) (emphasis added).

involved in determining whether the Department ought to remove the prohibition on taking Alaska lands into trust." Short of Defendants' litigation position, the Department's equivocal position lingers as the three-year study was never completed, and no formal announcements in the Federal Register, or elsewhere, of any change in policy or law have been made.

In sum, the Secretary has been "straddling the fence" for years and has never announced a position, let alone a rationale, for the continued regulatory bar against Alaska trust land acquisitions set forth in 25 C.F.R. § 151.1. As Plaintiffs have argued elsewhere, the Secretary's continuing refusal to squarely address the legality of the Alaska bar, and Defendants' choice to instead re-promulgate the discriminatory 1980 regulations, is both contrary to the Secretary's statutory authority under the IRA and a discriminatory abuse of discretion.

2. Was the Secretary's view of his statutory authority affected by the Supreme Court's decision in *Carcieri v. Kempthorne,* 129 S. Ct. 1058 (2009)? Does his statutory authority to take Alaska land into trust for the benefit of Alaska Natives outside depend in any way on whether those Natives are members of a recognized Indian tribe that was under federal jurisdiction in 1934, 1936, or any subsequent date?

Plaintiffs agree with Defendants that "the Secretary's statutory authority to take Alaska lands into trust for the benefit of Alaska Natives[] is not governed by the language interpreted in the Supreme Court in *Carcieri*" because of the specific extension of IRA

Section 5 to Alaska in the Alaska IRA of 1936.[34] Defendant-Intervenor State of Alaska has also conceded this point in earlier briefing.[35]

3. When did the Secretary first adopt the position that 25 C.F.R. § 151.1 allows him to take Alaska land into trust for the benefit of Alaska natives outside of Metlakatla? How did he first announce this interpretation? Please describe any previous interpretations of that regulation, when they were adopted, how they were announced, and why they were abandoned.

The Secretary has never clearly stated that § 151.1 allows him to take Alaska land into trust outside of Metlakatla.

4. Does any other statute, regulation, or policy bar the Secretary from taking Alaska land into trust for the benefit of Alaska Natives outside of Metlakatla? If so, please describe any changes in that regulation and its interpretation as requested above.

Defendants concede, and Plaintiffs agree, that no other statute, regulation, or policy bars the Secretary from taking Alaska land into trust for the benefit of Alaska Natives outside of Metlakatla.

Because all federally recognized tribes must be treated on an equal footing under the IRA, there is no lawful barrier to Defendants' exercise of their Section 5 authority with respect to Alaska Native trust petitions.[36] To the contrary, the bar is solely based on the language of the current regulations and is unsupported by any articulated agency

[34] Defs.' Suppl. Br. 9.

[35] State of Alaska's Resp. to Ct.'s Minute Order Entered Sept. 17, 2009, 2-3, ECF No. 96 ("Alaska maintains that the date of federal recognition of any Alaska Tribe is not at issue in this case, and that the *Carcieri* decision therefore is not relevant to the issues presently before this Court").

[36] 25 U.S.C. §§ 476(f)-(g).

rationale, let alone any legal argument or authority. So long as the Alaska bar remains in place, the Secretary is acting in excess of his statutory authority.

5. If no statute, regulation, or policy bars the Secretary from taking Alaska land into trust for the benefit of Alaska Natives outside of Metlakatla, how does the Secretary process requests that he do so? If the plaintiffs in this suit submitted their requests in accordance with that procedure, would those requests be duly considered? Please also describe any previous procedures, when they were adopted, how they were announced, and why they were changed.

Defendants correctly concede that the Secretary has no process or criteria for reviewing or considering a petition for trust lands in Alaska.[37] Instead, the Secretary has a policy of inertia, illustrated by the failure to even consider requests to take lands into trust in Alaska.[38] Plaintiff Chilkoot and others originally submitted their rulemaking petition in 1994.[39] Now, nearly twenty years later, there has still been no responsive action taken by Defendants to that Petition, other than rescinding the Fredericks Opinion, despite several indications that the petition was under consideration.[40] It is apparent from the Defendants' brief that without judicial intervention, the Secretary's inertia will continue indefinitely. Indeed, it is Defendants' failure to articulate a method by which Plaintiffs may pursue their statutory entitlement as parties eligible for Section 5 petitions

[37] Defs.' Suppl. Br. 11.

[38] *See e.g.*, Native Village of Point Hope, Petition for Acquisition of Lands in Trust, AR 101 (Feb. 21 1990); Memorandum from Niles Cesar, BIA Area Director, to Office of the Regional Solicitor, Alaska, AR 28 (May 1, 1991) (requesting Solicitor's support for pending petition from an Alaska Native tribe).

[39] Chilkoot Indian Association et al., Petition for Rulemaking, AR 272 (Oct. 11, 1994).

[40] *See, e.g.*, Memorandum from Solicitor, Department of the Interior, to Assistant Secretary for Indian Affairs, AR 619 (Jan. 16, 2001); Acquisition of Title to Land in Trust—Proposed Rule, 64 Fed. Reg. 17,574, 17,578 (April 12, 1999); Land Acquisitions—Notice of Petition, 60 Fed. Reg. 1956, 1956, (Jan. 5, 1995); Memorandum from Tribal Government and Alaska Division of Indian Affairs, to Carol Russell, AR 795 (Mar. 6, 1997) ("No additional actions have been undertaken concerning the petition.").

that is at the heart of this matter: unlawful discrimination under the IRA and unlawful inaction under the Administrative Procedure Act (APA).

Under the APA, the agency bears the burden of responding in a timely manner to petitions it receives and must address the legal basis under which it accepts or declines any request.[41] The Secretary has utterly failed to satisfy this burden with respect to its pending land-into-trust request from Point Hope or the broader request for rulemaking from Plaintiff Chilkoot and others. Defendants admit they have taken no action in the three years since the last trust request has been submitted, and admit "there are no procedures in place" that would allow the Secretary to consider a petition to take land into trust in Alaska."[42] A deliberate policy of inaction does not warrant any deference.[43]

6. What is the Secretary's view of the State of Alaska's request to supplement the administrative record in this case with additional materials pertaining to the promulgation of 25 C.F.R. § 151.1?

Plaintiffs maintain that the Alaska bar exceeds Defendants' statutory authority, and that the case should therefore be disposed of without further factual inquiry. This may be done by reference solely to the statutory text of the IRA and the current Part 151

[41] 5 U.S.C. § 706(1) ("The reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed").

[42] Defs.' Suppl. Br. 11.

[43] *See, e.g., In re American Rivers and Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) ("[A] reasonable time for agency action is typically counted in weeks or months, not years"); *Telecommunications Research and Action Center v. F.C.C.*, 750 F.2d 70, 79 (D.C. Cir. 1984) ("It is obvious that the benefits of agency expertise and creation of a record will not be realized if the agency never takes action"); *Potomac Electric Power Co. v. ICC*, 702 F.2d 1026, 1034 (D.C. Cir. 1983) ("[E]xcessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decisionmaking into future plans").

regulations. Plaintiffs thus concur with Defendants that the State of Alaska's motion to reopen and supplement the record is unwarranted.

Dated this 15th day of August, 2012.

Respectfully submitted,

/s/ Heather R. Kendall-Miller
Heather R. Kendall-Miller
Admission pro hac vice
NATIVE AMERICAN RIGHTS FUND
800 B Street, Suite 404
Anchorage, Alaska 99501
Tel.: (907) 257-0505
Fax: (907) 265-2466
kendall@narf.org
Attorney for the Plaintiff Tribes

/s/ Richard Guest
Richard A. Guest
D.C. Bar No. 477572
NATIVE AMERICAN RIGHTS FUND
1514 P Street NW, Suite D
Washington, D.C. 20005
Tel.: (202) 785-4166
Fax: (202) 822-0068
richardg@narf.org

/s/ Hollis L. Handler
Hollis L. Handler
Admission pro hac vice
ALASKA LEGAL SERVICES CORP.
419 Sixth Street, #322
Juneau, AK 99801
Tel.: (907) 452-5181
Fax: (907) 456-6359
hhandler@alsc-law.org
Attorney for Plaintiff Kavairlook

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, in the above-captioned case, on the 15th day of August, 2012, a true and correct copy of **PLAINTIFFS' REPLY TO DEFENDANTS' SUPPLEMENTAL BRIEF FILED PURSUANT TO COURT ORDER** was served by electronic means upon the following:

Daniel G. Steele
U.S. DEPARTMENT OF JUSTICE
P.O. Box 7611
Washington, D.C. 20044-7611
daniel.steele@usdoj.gov
Attorney for Defendants

J. Anne Nelson
STATE OF ALASKA DEPARTMENT OF LAW
1031 W 4th Ave., Suite 200
Anchorage, AK 99501
anne.nelson@alaska.gov
Attorney for Defendant-Intervenor

Elizabeth Jeanne Barry
STATE OF ALASKA DEPARTMENT OF LAW
1031 W 4th Ave., Suite 200
Anchorage, AK 99501
elizabeth.barry@alaska.gov

/s/ Jonathan Briggs
Jonathan Briggs
Legal Administrative Asst.
Native American Rights Fund
801 B Street, Suite 401
Anchorage, AK 99501