UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM IN SUPPORT OF STATE OF ALASKA'S MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE, FOR CERTIFICATION FOR INTERLOCUTORY REVIEW

The State of Alaska submits this memorandum in support of its motion for reconsideration of the Court's March 31, 2013 Memorandum Opinion[1] and accompanying Order,[2] or in the alternative, for certification for interlocutory review of the Court's March 31, 2012 Opinion and Order finding that the Secretary has authority to take land into trust in Alaska.

BACKGROUND AND SUMMARY

Plaintiffs filed suit against the Secretary of the Interior to challenge the legality of Alaska's exclusion from the regulations at 25 C.F.R. Part 151, which

[1] Doc. 109.

[2] Doc. 110.

implement the Secretary's authority to take land into trust for Tribes.[3] Plaintiffs argued that 25 U.S.C. § 473a extended to Alaska the Secretary's discretionary authority under section 5 of the Indian Reorganization Act[4] to take land into trust for the purpose of providing land for Indian tribes, and that excluding Alaska from the scope of the land-into trust-regulations violated the proscription at 25 U.S.C. § 476(f) against agency action that "classifies, enhances, or diminishes the privileges and immunities available to [an] Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." They argued that the regulation therefore must be declared invalid pursuant to 25 U.S.C. § 476(g).[5] In response, the Secretary argued that the Alaska Native Claims Settlement Act (ANCSA)[6] preserved her discretion under 25 U.S.C. § 465 to take land into trust in Alaska, but that it was a proper exercise of her discretion to exclude Alaska tribes from the scope of the regulation.

Alaska intervened and participated in summary judgment briefing. The State argued that ANCSA revoked the Secretary's discretion to create new trust land in Alaska, and that the exclusion of Alaska tribes from the land-into-trust regulation did not

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[3] The regulations do not exclude the members of the Metlakatla Indian Community of the Annette Island Reserve. The Metlakatlans immigrated to Alaska from Canada in the 19th century and thus never had aboriginal claims in Alaska and were not subject to the ANCSA settlement.

[4] 25 U.S.C. § 465.

[5] Pls.' Mem. Points & Auth. Summ. J. (Doc 46-4) at 3.

[6] Pub. L. No. 92-203, 85 Stat. 688, 43 U.S.C. § 1601 et seq.

run afoul of 25 U.S.C. § 476(f) or (g) because the Alaska exception was based on Alaska tribes' status as settling parties under ANCSA, not on their status as Indian tribes.

After receiving supplemental briefing on the applicability of the Supreme Court's ruling in *Carcieri v. Salazar*[7] and other questions, the Court issued its Memorandum Opinion and Order[8] on March 31, 2013. The Court held that ANCSA did not repeal, explicitly or implicitly, 25 U.S.C. § 473a, and that the Secretary therefore retained the authority to take land into trust in Alaska. Because the Secretary's authority remained intact, the Court concluded that 25 U.S.C. § 476(f) and (g) prohibited her from treating Alaska tribes differently than other tribes elsewhere by excluding them from the scope of the land-into-trust regulation. Alaska respectfully requests that the Court reconsider this holding, along with its order that the parties brief whether other provisions in the land-into-trust regulation should be invalidated. In the alternative, Alaska requests that the Court certify its Memorandum Opinion and Order for interlocutory review as authorized by 28 U.S.C. § 1292(b).

ARGUMENT

I. The Interests of Justice Support Reconsideration of the Court's Decision that ANCSA Permits the Creation of Trust Land in Alaska

"Where the interests of justice require it, [the district] court has plenary powers to set aside or otherwise modify its interlocutory orders at any time before final

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[7] 555 U.S. 379 (2009).

[8] Docs. 109, 110.

judgment."[9] Civil Rule 60(b)(6) allows the Court, "on motion and just terms," to relieve a party from an order or proceeding for any reason that justifies relief. Additionally, Civil Rule 54(b) authorizes a district court to revise its own interlocutory rulings "at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."[10] A court may reconsider any interlocutory judgment "as justice requires."[11]

In the interest of justice, the Court should reconsider both its finding that ANCSA did not abrogate the Secretary's discretion to take land into trust, and its order to brief the scope of the remedy.[12] The reasons supporting Alaska's request for reconsideration also demonstrate that substantial grounds for difference of opinion exist with respect to the Court's ruling, which is the second prong of the test for determining whether interlocutory review is appropriate. These reasons are initially presented here in support of the motion to reconsider, and are incorporated by reference below in the

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[9] *Schoen v. Washington Post*, 246 F.2d 670, 673 (D.C. Cir. 1957). The law of the case doctrine does not apply. *Langevine v. District of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir. 1997).

[10] Fed. R. Civ. P. 54(b). *American Soc. Prevention Cruelty to Animals v. Ringling Bros. Barnum & Bailey Circus*, 246 F.R.D. 39, 41 (D.D.C. 2007).

[11] *Childers v. Slater*, 197 F.R.D. 185, 190 (D.D.C. 2000) ("Motions to reconsider interlocutory orders—in contrast to motions for reconsideration of final judgments—are within the discretion of the trial court, subject to appellate review under the abuse of discretion standard.")

[12] Mem. Op. (Doc. 109) at 25 ("The court will order briefing as to the scope of the remedy in this case: whether it is only the Alaska exception that is deprived of 'force and effect,' or whether some larger portion of the land-into-trust regulation must fall."); Order (Doc. 110).

portion of this memorandum addressing Alaska's motion to certify the Court's decision for interlocutory review.

As the Court noted, until recently the defendants themselves maintained that ANCSA left the Secretary with no discretion to exercise in Alaska pertaining to trust land.[13] In fact, until this litigation was filed in 2006, the Secretary's formal position was that "the Alaska Native Claims Settlement Act 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."[14] In 1999, twenty-eight years after ANCSA's enactment, the Secretary stated that the Department of the Interior "recognize[d] 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."[15] Only in defending this litigation did the Secretary adopt the position that ANCSA did not curb the Secretary's discretion to create trust land in Alaska.[16]

Agency expertise in the policy and practical implications of Congressional

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[13] Mem. Op. (Doc. 109) at 12-13. *See also* State's Resp. Supp. Br. (Doc 103) at 4-7; Pls.' Reply Supp. Br. (Doc 104) at 6-10 (documenting the Secretary's "straddling the fence" since inviting comment on the issue in the preamble to the 1999 proposed rule).

[14] 45 Fed. Reg. 62,034 (Sept. 18, 1980) (AR 18).

[15] 64 Fed. Reg. 17,574, 17,578 (Apr. 12, 1999) (AR 359).

[16] Mem. Op. (Doc. 109) at 12-13. *See also* State's Resp. Supp. Br. (Doc 103) at 4-7.

delegations underlie *Chevron* deference.[17] Therefore, an agency's "contemporaneous construction" of a statute it is charged with administering "carries persuasive weight."[18] The fact that the Secretary would change such a long-time understanding of his authority under ANCSA—an understanding rooted in the days, events, and policy discussions during and immediately after the statute's enactment—demonstrates a substantial ground for difference in opinion.

The Court acknowledges "a tension between ANCSA's elimination of most trust property in Alaska and the Secretary's authority to create new trust land."[19] As the Secretary held until at least 1999, the State believes that the tension is irreconcilable. The United States Supreme Court decision in *Native Village of Venetie*[20] supports this conclusion. Had Congress intended to preserve the Secretary's authority to create new trust land, the ANCSA settlement would not have so completely rejected any form of

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[17] *Chevron U.S.A. v. Natural Res. Defense Council*, 467 U.S. 837, 844 (1984); *Pension Ben. Guar. Corp. v. LTV Corp*., 496 U.S. 633, 651-52 (1990) ("practical agency expertise is one of the principal justifications behind *Chevron* deference.")

[18] *Watt v. Alaska*, 451 U.S. 259, 272-73 (1981). In this case, the Court found that the Secretary's change of position entitled the Secretary's views only to the "weight derived from their power to persuade." Mem. Op. (Doc 109) at 13, citing *Landmark Legal Found. v. IRS,* 267 F.3d 1132, 1136 (D.C. Cir. 2001).

[19] Mem. Op. (Doc 109) at 18. The Court identifies the Annette Island Reserve and the three cannery parcels as exceptions to ANCSA's wholesale rejection of trust land. The Metlakatla Indian Community of the Annette Island Reserve was not subject to ANCSA because the Metlakatlans had no aboriginal claims in Alaska. The Metlakatlans immigrated to Alaska in the 19th century. The three existing trust parcels in Southeast Alaska survived ANCSA because they were viewed by the Secretary as valid existing rights under section 14(g) of ANCSA. 43 U.S.C. § 1613(g); AR 246.

[20] *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998).

tribal jurisdiction over land. ANCSA revoked all tribal jurisdiction over land in the state, and gave the newly chartered Native corporations the option of taking unrestricted fee title to former reservation lands, or receiving the monetary settlement and transfers of land.[21] Trust land, with either ANCSA Native corporations or Alaska tribes as the beneficiary, was not an option. Had Congress intended to preserve the Secretary's authority to create trust land in Alaska, Congress surely would have accommodated trust land in the ANCSA settlement. It did not.

The Supreme Court has highlighted Congress's repudiation of the concept of trust lands in Alaska in ANCSA. In *Alaska v. Native Village of Venetie*, the Supreme Court noted:

> [I]t is significant that ANCSA, far from designating Alaskan lands for Indian use, revoked the existing Venetie Reservation, and indeed revoked all existing reservations in Alaska, "*set aside* by legislation or by Executive or Secretarial Order *for Native use*." *In no clearer fashion could Congress have departed from its traditional practice of setting aside Indian lands*.[22]

ANCSA's clearly stated goal is to preclude "any permanent racially defined institutions, rights, privileges, or obligations" and it specifically eschews "creating a reservation system or lengthy wardship or trusteeship" or "adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special

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[21] 43 U.S.C. § 1618(b). *See Venetie*, 522 U.S. at 524.

[22] *Alaska v. Native Village of Venetie*, 522 U.S. 520, 532 (1998) (quoting ANCSA, 43 U.S.C. § 1618(a))(emphasis added).

relationships between the United States Government and the State of Alaska."[23] The legislative history of this provision states that "[a] major purpose of this Committee and the Congress is to avoid perpetuating in Alaska the reservation *and the trustee system*."[24] Creation of trust land in Alaska, post-ANCSA, directly contradicts Congress' departure from the "traditional practice of setting aside Indian lands"[25] and Congress' stated intent to "avoid perpetuating in Alaska . . . the trustee system."[26]

This Court's order reads this statutory admonition to apply only to the land conveyances prescribed by ANCSA. However, as the Supreme Court noted, Congress' wholesale rejection of federal superintendence over Native land in Alaska—and Native sovereignty over this land—strongly indicates that it intended a much less constrained reading. Thus, substantial ground for difference of opinion exists regarding the Secretary's authority to create trust land in Alaska.

In deciding that the Secretary retains authority to create trust land in Alaska, the Court also relied on the fact that Congress did not repeal 25 U.S.C. § 473a, the 1936 statute that extended to Alaska certain provisions of the 1934 IRA, including 25 U.S.C. § 465, the land-into-trust statute. The Court also found no "irreconcilable conflict" between ANCSA and 25 U.S.C. § 473a to indicate that section 473a had been

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[23] 43 U.S.C. § 1601(b).

[24] S. Rep. No. 92-405, at 108 (1971)(emphasis added).

[25] *Venetie*, 522 U.S. at 532.

[26] S. Rep. No. 92-405, at 108 (1971).

implicitly repealed.[27] The Court should reconsider the State's argument that ANCSA renders the land-into-trust statute inapplicable to Alaska, yet leaves extant other authorities extended to Alaska by section 473a.

Section 473a extended to Alaska several statutes, not just the land-into-trust statute, and some of these provisions remain vital to the interests of Alaska tribes. Others, including the land-into-trust provision, have no continuing effect due to later enacted statutes. For example, repeal of 25 U.S.C. § 473a also would have repealed sections 475 and 477 in Alaska; these provisions preserve the right of tribes to bring claims against the United States and authorize the Secretary to issue charters of incorporation to tribes, respectively, and they are still valid in Alaska. Also, the land-into-trust statute continues to apply to Metlakatla, which is located in Alaska.[28] Section 473a also extends to Alaska 25 U.S.C. § 461, which prohibits allotment of land on Indian reservations to individual Indians. Like section 465, this provision has nationwide application but does not apply to most of Alaska—despite its inclusion as a provision extended to Alaska by section 473a—because ANCSA revoked all reservations in the

[27] Mem. Op. (Doc. 109) at 13-19.

[28] AR 18.

state except for Metlakatla.[29] Plaintiffs have conceded that repeal of 25 U.S.C. § 465 would be inappropriate given the nationwide application of the statute.[30]

By its own terms, section 465 grants discretionary authority to the Secretary.[31] ANCSA curbs that discretion in Alaska, while preserving the Metlakatla reservation and prohibiting those enrolled in the Metlakatla Indian Community from receiving benefits under ANCSA.[32] But applying the Secretary's land-into-trust authority to Metlakatla does not mean that the Secretary retains discretion to take land into trust in the rest of the State. ANCSA does not apply to Metlakatlans nor the Annette Island Reserve, so it did not need specific language preserving the Secretary's discretion to take land into trust for their benefit. Similarly, ANCSA did not need specific language repealing or amending 25 U.S.C. § 473a, because ANCSA simply limits the applicability of 25 U.S.C. § 473a in Alaska.

II. The Interests of Justice Support Reconsideration of the Court's Order to Brief the Scope of the Remedy

The Court also should reconsider the portion of its order directing the parties to brief the scope of the remedy, i.e. "whether it is only the Alaska exception that

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[29] 43 U.S.C. § 1618. As previously noted, the Metlakatlans immigrated to Alaska in the 19th century and therefore have no aboriginal claims in the state and are not subject to ANCSA. *See* State's Summ. J. Opp. & Reply (No. 79) at 3-4.

[30] Pls.' Reply Mem. (Doc. 62) at 2.

[31] 25 U.S.C. § 465 reads "[t]he Secretary of the Interior is authorized, *in his discretion*, to acquire . . ." (emphasis added).

[32] 43 U.S.C. § 1618(a).

is deprived of 'force or effect,' or whether some larger portion of the land-into-trust regulation must fall."[33] That issue is beyond the scope of this case.

The Administrative Procedure Act provides the Court with the authority to:

> compel agency action unlawfully withheld or unreasonably delayed; and ... hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ... in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; without observance of procedure required by law.[34]

Therefore, once a district court has determined that an agency made an error of law, "the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards."[35] Absent exceptional circumstances, the district court should not retain jurisdiction to devise a specific remedy for the Secretary to follow.[36]

In this case, Plaintiffs have challenged only the regulatory bar that prohibits Alaska tribes from petitioning the Secretary under 25 C.F.R. Part 151 to have land taken into trust.[37] The parties have briefed the legal issues pertaining to that prohibition, and the Court has found it invalid. No other provision of the regulation has been challenged,

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[33] Mem. Op. (Doc 109) at 25; Order (Doc. 110).

[34] 5 U.S.C. § 706.

[35] *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999) quoting *PPG Indus., Inc. v. United States,* 52 F.3d 363, 365 (D.C. Cir. 1995).

[36] *Id.*

[37] Consol. Compl. (Doc. 15).

and no issues other than its legality have been briefed for the Court's consideration. The appropriate remedy is to enter judgment and remand the matter to the Secretary for further action consistent with the Court's determination of the applicable legal standard.

III. This Case Meets the Requirements for Certification for Interlocutory Review Pursuant to 28 U.S.C. § 1292(b)

If the Court denies the State's request for reconsideration, it should certify its decision for interlocutory review. An order may be properly certified for interlocutory appeal when: 1) the order involves a controlling question of law; 2) there exists substantial ground for difference of opinion regarding the decision; and 3) an immediate appeal from the order may materially advance the ultimate termination of the litigation.[38] Generally, § 1292(b) certification is appropriate when "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment."[39] These requirements are met here. Additionally, the Court granted Alaska's motion to intervene as of right, finding that the State meets the requirements for standing under Article III of the United States Constitution and the prudential standing requirements applicable to a party seeking judicial review of agency action.[40] The State

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[38] 28 U.S.C. § 1292(b).

[39] *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978) quoting *Fisons Ltd. v. United States*, 458 F.2d 1241, 1248 (7th Cir. 1972).

[40] Doc. 74 at 11-13.

thus has independent standing to pursue an appeal, separate from the party on whose side intervention was granted.[41]

A. The Court's Memorandum Opinion and Order Involve a Controlling Question of Law

"Controlling questions of law include issues that would terminate an action if the district court's order is reversed."[42] Procedural determinations that may "significantly impact the action" or that determine the future course of the litigation also may be controlling.[43] A question also may be controlling if interlocutory reversal might save time for the district court, and time and expense for the litigants.[44]

The Court found that the Secretary has authority to take land into trust in Alaska, notwithstanding ANCSA's admonition against "creating a reservation system or lengthy wardship or trusteeship" and "adding to the categories of property and institutions enjoying special tax privileges," and the Secretary's 30-plus year position that ANCSA abrogated this authority.[45] Based on the determination that ANCSA did not abolish the Secretary's authority, the Court further concluded that the regulatory prohibition against considering trust land applications in Alaska violates the proscription

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[41] *Diamond v. Charles*, 476 U.S. 54, 68 (1986).

[42] *APCC Services, Inc. v. AT&T Corp.*, 297 F. Supp. 2d 101, 105 (D.D.C. 2003).

[43] *Id.* at 105 (collecting cases).

[44] *Id.*, citing 16 Wright, Miller & Cooper, Federal Practice & Procedure, § 3930 at 426 (1996).

[45] Mem. Op. (Doc. 109) at 11-19.

in 25 U.S.C. § 476(g) against agency action that discriminates between federally recognized tribes "by virtue of their status as Indian tribes."[46]

If the Court's order were reversed, this action would terminate. An appellate court ruling that ANCSA prohibits the creation of new trust land in Alaska would completely dispose of the litigation, obviating any need for briefing on the appropriate remedy or for further rulemaking by the Secretary. Alternatively, an appellate decision upholding the Court's decision would obviate later appeal of the issue, after the Secretary and other parties have invested considerable time and energy in revising the rule. Thus, the question of whether ANCSA prohibits the creation of new trust land in Alaska is not just a controlling question of law in this case, it is *the* controlling question.

B. A Substantial Ground for Difference of Opinion Exists

A substantial ground for difference of opinion exists when contrary, unclear, or inconsistent authority pertains to the ruling.[47] "[A] court faced with a motion for certification must analyze the strength of the arguments in opposition to the challenged ruling to decide whether the issue is truly one on which there is a substantial ground for dispute."[48] Interlocutory review may be justified when "proceedings that

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[46] *Id.* at 23-25.

[47] *APCC Services, Inc. v. Sprint Communications*, 297 F. Supp.2d 90, 97-98 (D.D.C. 2003).

[48] *Id.* at 98.

threaten to endure for several years" depend on early resolution of a key issue.[49] In short, when there are reasons to conclusively and expeditiously determine an issue, the Court should take a broad view of whether there is a substantial ground for difference of opinion.[50]

Here, contrary and inconsistent authority applies to the issue on which the State seeks interlocutory review. As discussed above, existing case law, statutory language, and legislative history persuasively support a different conclusion than that expressed in the Court's decision. The United States Supreme Court described ANCSA as antithetical to the concept of trust lands, stating that "[i]n no clearer fashion could Congress have departed from its traditional practice of setting aside Indian lands."[51] The record in this case also demonstrates that substantial ground for difference of opinion on this issue developed within the Department itself. Further, a more liberal approach to evaluating the existing grounds for difference of opinion is justified by the fact that the issue for which review is sought is the only controlling issue in the litigation.

C. Immediate Appeal from the Order Will Materially Advance the Ultimate Termination of the Litigation

An immediate appeal materially advances the ultimate termination of litigation if it "would conserve judicial resources and spare the parties from possibly

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[49] *Id.* quoting 16 Wright, Miller & Cooper, Federal Practice & Procedure, § 3930 at 422 (1996).

[50] *Id.*, citing *Atlantic City Elec. Co. v. Gen. Elec. Co.*, 207 F. Supp. 613, 620 (S.D.N.Y. 1962).

[51] *Alaska v. Native Village of Venetie*, 522 U.S. 520, 532 (1998).

needless expense if it should turn out that this Court's rulings are reversed."[52] Certainty is not necessary; section 1292(b) requires only that "immediate appeal from the order *may* materially advance the ultimate termination of the litigation."[53] Whether an appellate ruling reverses or upholds this Court's decision, appellate review at this time will almost certainly materially advance the termination of the litigation. As discussed above, an appellate court ruling that ANCSA prohibits the creation of new trust land in Alaska would terminate the litigation, eliminating issues of remedies and the need to amend regulations. An appellate court ruling upholding the Court's decision likewise would not be an unnecessary waste of time, as the appellate ruling would become law of the case, possibly limiting the issues subject to appeal after the Secretary revises the land-into-trust rule.

Alaska must appeal the merits of the Court's Memorandum Opinion at some point, because the issue directly and significantly impacts Alaska's sovereignty and the State's interests as a settling party in ANCSA. Interlocutory review of the core legal issue in this case—whether the Secretary has discretion to take land into trust in Alaska—would materially advance the termination of this litigation by either avoiding the burden of unnecessary rulemaking or by avoiding an appeal of the issue after a new rule is promulgated.

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[52] *APPC Services*, 297 F. Supp. 2d at 109 (citing *Lemery v. Ford Motor Co.*, 244 F. Supp. 2d 720, 728 (S.D. Tex. 2002)).

[53] 28 U.S.C. § 1292(b) (emphasis added).

CONCLUSION

The State respectfully requests that the Court reconsider its Memorandum Opinion and Order, including the instruction to the parties to brief the appropriate scope of the remedy. In the alternative, the State asks that the Court certify its Memorandum Opinion and Order for interlocutory review pursuant to 28 U.S.C. § 1292(b). This action has been pending since 2006, with prerequisite events dating back to Plaintiffs' 1994 petition for rulemaking. Certainly all parties desire an expeditious resolution. Interlocutory review at this stage will conserve the resources of all parties and the judiciary, and focus any subsequent rulemaking effort.

DATED this 17th day of April, 2013.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, in the above-captioned case, on the 17th day of April, 2013, a true and correct copy of **Memorandum in Support of State of Alaska's Motion for Reconsideration, or In The Alternative, for Certification for Interlocutory Review** was served by electronic means upon the following:

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