UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AKIACHAK NATIVE COMMUNITY et al., Plaintiffs, v. SALLY JEWELL, Secretary of the Interior, et al., Defendants, and THE STATE OF ALASKA, Intervenor.	No. 1:06-cv-00969 (RC)

PLAINTIFFS' SUPPLEMENTAL BRIEF ON REMEDIES AS ORDERED BY THE COURT

I. INTRODUCTION

In its March 31 Memorandum Opinion (Opinion)[1] and Order,[2] the court held that the regulations at 25 C.F.R. Part 151.1—which "do not cover the acquisition of land in trust status in the State of Alaska" except for the Metlakatla Indian Community—violated the anti-discrimination provision contained in 25 U.S.C. § 476(g).[3] The court granted summary judgment in favor of Plaintiffs but withheld entry of final judgment in order to allow the parties to submit supplemental briefing on the issue of the appropriate remedy.[4]

[1] *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC) (D.D.C. March 31, 2013), Dkt. #109.
[2] *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC) (D.D.C. March 31, 2013), Dkt. #110.
[3] Opinion at 23-25, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC), Dkt. #109.
[4] *Id*. at 25.

On May 23 the court directed the parties to submit the additional briefing on remedies pursuant to a briefing schedule.[5] Specifically, the court requested that the parties address: (1) whether the Alaska exception contained in 25 C.F.R. Part 151.1 (Part 151.1) could be severed from the rest of the land-into-trust regulation, or whether the entire regulation—or some larger portion of it—is now invalid; (2) Whether vacatur of the regulation is required, or whether the court may remand the regulation or invalid portion thereof back to the Secretary of the Interior (Secretary); and (3) whether it would be appropriate to stay the effect of the judgment for a period of time.[6]

In response to these questions, Plaintiffs respectfully submit that vacatur is not required and this court can simply sever the Alaska exception from Part 151.1; that this court then remand the regulation to the agency for purposes of adopting curative rulemaking procedures that accommodate petitions for lands in Alaska to be considered trust lands consistent with this court's ruling; and, that the court stay the effect of the judgment until the agency completes its rulemaking process. Plaintiffs' position is consistent with and supported by the law of the D.C. Circuit as discussed more fully below.

II. SEVERANCE OF THE ALASKA EXCEPTION IS PROPER BECAUSE THERE IS NO SUBSTANTIAL DOUBT THE SECRETARY WOULD DECLINE TO ADOPT THE REMAINING SECTIONS AS A VALID REGULATION AND SEVERANCE FROM THE REMAINDER OF PART 151 WILL NOT IMPAIR THE FUNCTIONALITY OF THE REGULATION'S REMAINING SECTIONS.

A. Discussion of controlling case law that guides the analysis.

The D.C. Circuit takes a two-pronged approach in determining when it is appropriate for a court to sever a clause or portion of an agency regulation. "Whether the

[5] Order, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC) (D.D.C. May 23, 2013), Dkt. #115.
[6] *Id*. at 2.

offending portion of a regulation is severable depends upon the (1) intent of the agency, and (2) whether the remainder of the regulation could function sensibly without the stricken provision."[7] Each of the two prongs is discussed below.

As to the first prong—the agency's intention—the court will look to the language of the regulation and any information concerning the regulation's purpose or history to determine if the agency itself viewed portions of the regulation as severable from the others.[8] This information is often gleaned from language in the form of a "savings" or "severability" clause.[9] If no such intention is clear, the court will examine the regulation under the "substantial doubt" test.[10] Under this test, severance will be improper if the court substantially doubts that the agency would have adopted the remaining language as a regulation by itself without the offending provisions.[11] Under the second prong—whether the remaining language can function without the stricken provision—the court will determine whether the severance would "impair the function"[12] of the regulation's remaining sections or whether the remaining provisions can independently "serve the goals for which [the regulation] was designed."[13]

The application of the two prong approach is illustrated in *Davis County Solid Waste Management v. EPA* where the court held that the invalidated sections in a comprehensive air quality regulation promulgated by EPA could be severed from the rest of the regulation.[14] At issue was a regulation dictating separate air quality standards for large and small municipal waste

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[7] *MD/DC/DE Broadcasters Ass'n v. FCC* (*MD/DC/DE Broadcasters I*), 236 F.3d 13, 22 (D.C. Cir. 2001) (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988)).
[8] *Id*. ("Here, the Commission clearly intends that the regulation be treated as severable, to the extent possible, for it said so in adopting the regulation.")
[9] *MD/DC/DE Broadcasters Ass'n v. FCC* (*MD/DC/DE Broadcasters II*), 253 F.3d 732, 734 (D.C. Cir. 2001) (citing *Report & Order*, 15 FCC Rcd. 2329, ¶ 232, 2000 WL 124381 (2000) ("If any provision of the rules . . . [is] held to be unlawful, the remaining portions of the rules . . . shall remain in effect.")).
[10] *Davis Cnty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997).
[11] *Id*. (citing *Bell Atl. Tel. Co. v. FCC*, 24 F.3d 1441, 1447 (D.C. Cir. 1994)).
[12] *K Mart Corp.*, 486 U.S. at 294.
[13] *MD/DC/DE Broadcasters I*, 236 F.3d at 22 (citing *K Mart Corp.*, 486 U.S. at 294).
[14] 108 F.3d at 1459-60.

combustors.[15] Although the court severed the sections regulating small waste combustors, it validated and affirmed the sections regulating large waste combustors.[16] Though there was no formal "severance clause" the court held there was a demonstrated agency intent in favor of severance where the agency promulgated the sections on large waste combustors separately from those on small waste combustors.[17] Addressing the second prong, the court found that the purpose of the regulation was to regulate emissions from a known pollutant source; specifically municipal waste combustors.[18] Even though the sections governing *small* waste combustors were invalidated, others sections governing *large* waste combustors were found to serve the overall purpose they were written to achieve.[19] And while the small and large waste combustor sections were part of the same regulation, they were not so "intertwined" that the one could not operate independent of the other.[20] Because the sections regulating large waste combustors could function independently from the sections on small waste combustors the court held that severability was appropriate.[21]

In contrast to the holding in *Davis County*, the application of the two-prong test in *MD/DC/DE Broadcasters I* weighed against severance of a FCC regulation that included an unconstitutional race-based classification.[22] The regulation at issue provided local broadcasting licensees two options for compliance with an equal employment opportunity program.[23] The court held that one of the two options, Option B, was an unconstitutional race-based

[15] *Id*. at 1455-56.
[16] *Id*. at 1459-60.
[17] *Id*.
[18] *Id*. at 1460.
[19] *Id*.
[20] *Id*. at 1459 (quoting *Tel. & Data Sys. v. FCC*, 19 F.3d 42, 50 (D.C. Cir. 1994)).
[21] *Id*. at 1460.
[22] 236 F.3d at 22.
[23] *Id*. at 16.

classification.[24] In determining whether severance was proper, the court held that Option B satisfied the first prong because the agency's on record position was that the provision was severable from the rest of a regulation.[25] However, the court held the offending provision failed to satisfy the second prong because doing so would "undercut" the entire purpose of the regulation.[26] Without Option B, the regulation failed to serve the goal of implementing *alternative* options for equal employment opportunity programs—the reason the regulation was promulgated.[27] Because the remaining provisions could not independently serve the purpose of the regulation, the court declined to subject the regulation to severance.[28]

Using the same two-prong analysis again, the court in *National Treasury Employees Union v. Chertoff*, examined a union's challenge to a regulation restricting collective bargaining promulgated by the Secretary of Homeland Security.[29] The regulation provision, issued in the early days of the then new Department of Homeland Security, allowed the Secretary of that agency to limit or restrict the collective bargaining abilities of agency employees.[30] The provision even allowed the Secretary of Homeland Security to modify preexisting employment agreements.[31] After invalidating the collective bargaining provisions, the court turned to whether the entirety of the large regulation could remain.[32] Because the court could not determine the agency's intentions as to severability based on the agency record, the court endeavored to determine whether there was "substantial doubt" that the agency would have adopted the rest of

[24] *Id*. at 22.
[25] *Id*. (citing *Report & Order*, 15 FCC Rcd. at ¶ 232).
[26] *Id*.
[27] *Id*.
[28] *Id*. at 23.
[29] 394 F.Supp.2d 137, 139 (D.D.C. 2005), *rev'd on other grounds*, 452 F.3d 839 (D.C. Cir. 2006).
[30] *Id*. at 140-41.
[31] *Id*. at 141.
[32] *Id*. at 143.

the regulation by itself, without the offending collective bargaining restrictions.[33] Finding that the general goal of the regulation was to ensure the Secretary of Homeland Security was able to make swift changes in any preexisting employment agreements as the interests of national security required,[34] the court found the limitations to collective bargaining were the primary method for achieving those desired ends.[35] Accordingly, the court held that in light of those goals the regulation "would not have been passed but for [the] inclusion of the [offending provisions]."[36] Because there was a substantial doubt that the Department of Homeland Security would have adopted the regulation without the restrictions on collective bargaining, the court declined to sever those sections and leave the rest of the regulation in place.[37]

B. The Alaska exception is severable under the first prong of the severance analysis because it is not so "intertwined" with the remainder of the land-into-trust regulation so as to raise a substantial doubt that the Secretary would not have adopted the regulation absent the exception.

The first prong of the severance analysis examines whether the agency intended for a regulation's provisions to be severable.[38] In the absence of an explicitly stated agency position, however, the court must try to determine the agency's intent from other sources.[39] Specifically, the court will endeavor to determine whether there is a substantial doubt about whether the agency would have adopted the regulation without the offending or invalidated language.[40] If the court does not have such a doubt—that is, if the court determines the agency would likely adopt the remaining regulation on its own—then severance of the offending

[33] *Id*. at 144.
[34] *Id*.
[35] *Id*.
[36] *Id*. (quoting *Davis Cnty.*, 108 F.3d at 1460).
[37] *Id*. at 145.
[38] *MD/DC/DE Broadcasters I*, 236 F.3d at 22 (citing *K Mart Corp.*, 486 U.S. at 294).
[39] *Davis Cnty.*, 108 F.3d at 1459.
[40] *Id*. (citing *Bell Atl. Tel. Co.*, 24 F.3d at 1447).

language is the proper remedy.[41] There is no "savings" or "severability" clause in Part 151, nor is there any clear indicator of the Secretary's views on severability from the regulation's history. In fact, in the years since the Alaska exception was promulgated, the Secretary's own position on The Alaska exception has evolved.[42] Therefore, the substantial doubt test is necessary to determine whether the Alaska exception is severable under the first prong.

The land-into-trust regulation at Part 151 contains fifteen detailed sections on the application procedure an Indian tribe or individual must follow to place a fee simple parcel into trust status.[43] The regulation details a range of differing procedures from on-reservation and off-reservation acquisitions, to acquisitions of parcels with fractionalized ownership interests.[44] None of these operative sections rely on or make mention of the Alaska exception in Part 151.1. As discussed above, in *National Treasury Employees Union* the court declined to sever the offending sections from the rest of the regulation because those sections served as the primary method of achieving the goals of regulation.[45] Without those operative sections, the court determined the regulation "would not have been passed but for [the] inclusion of the [offending provisions]."[46] Here, there is no such indication that the Alaska exception plays such a vital role in Part 151. In fact, the Alaska exception was not even included in the first proposed version of Part 151.[47] Rather, the Alaska exception was added to Part 151 only after "[i]t was . . . pointed out that the Alaska Native Claims Settlement Act does not contemplate the further acquisition of

[41] *Nat'l Treasury Emp. Union*, 394 F.Supp.2d at 144.
[42] *See* Opinion at 6-10, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC), Dkt. #109 (discussing the regulatory history of Part 151.1 and the evolving position of the Secretary from believing in an outright general prohibition on trust lands in Alaska to trust lands in Alaska being within the discretion of the Secretary, but not subject to the Part 151 procedures).
[43] Land Acquisitions, 25 C.F.R. § 151.7-151.11 (2013).
[44] *Id.*
[45] 452 F.3d at 144.
[46] *Id.* (quoting *Davis Cnty.*, 108 F.3d at 1460).
[47] Land Acquisitions, 43 Fed. Reg. 32,311, 32,312 (July 26, 1978).

land in trust status"[48]—a proposition of law that the Secretary has since doubted[49] and this court has explicitly rejected.[50] Given this history, this court should have no doubt that the Secretary would adopt the land-into-trust regulation without the Alaska exception and sever the exception from the remainder of the regulation.

C. The Alaska exception is severable under the second prong of the severance analysis because its removal will not "impair the function" of the regulation's remaining sections.

The second prong of the severance analysis examines whether the remaining regulatory language can function without the stricken provision.[51] The court will determine whether the severance would "impair the function"[52] of the regulation's remaining sections or whether the remaining provisions can independently "serve the goals for which the regulation was designed."[53] In *MD/DC/DE Broadcasters I*, the court declined to sever the offending provision under the second prong because the provision's content was critical to the implementation of the whole regulation.[54] In *Davis County*, the court held that severability was proper under the second prong where the remaining provisions could independently function and still serve the purpose of the overall regulation.[55]

The overall goal of Part 151 is to implement Section 5 of the Indian Reorganization Act (IRA), which permits the Secretary, in her discretion, to acquire property

[48] Land Acquisitions, 45 Fed. Reg. 62,034, 62,034 (Sept. 18, 1980).
[49] Acquisition of Title to Land in Trust, 64 Fed. Reg. 17,574, 17,578 (Apr. 12, 1999) ("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 Solicitor . . . 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.").
[50] Opinion at 19-20, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC), Dkt. #109.
[51] *MD/DC/DE Broadcasters I*, 236 F.3d at 22 (citing *K Mart Corp.*, 486 U.S. at 294).
[52] *K Mart Corp.*, 486 U.S. at 294
[53] *MD/DC/DE Broadcasters I*, 236 F.3d at 22 (citing *K Mart Corp.*, 486 U.S. at 294).
[54] 236 F.3d at 23.
[55] 108 F.3d at 1460.

"for the purpose of providing land for Indians."[56] As stated above, the Alaska exception was not included in the original draft of the land-into-trust regulations.[57] The exception itself only appears in the last sentence of the first section of the regulation.[58] Removal of the one-sentence long Alaska exception will not impact the remaining sections of the land-into-trust regulation. None of the remaining sections reference, allude to, or rely upon the Alaska exception to function. The history of the "Alaska exception" demonstrates that it was an afterthought in drafting the land-into-trust regulation, added due to a misinterpretation of law.[59] Severance of the Alaska exception will not "impair the function" of the land-into-trust regulation nor will it impact the remaining sections' ability to "serve the goals for which the regulation was designed."[60] Therefore, the Alaska exception should be severed under the second prong.

III. REMANDING PART 151 TO THE SECRETARY FOR CURATIVE RULEMAKING RATHER THAN VACATING THE REGULATION ENTIRELY IS PROPER IN THIS CASE WHERE THE REGULATION'S DEFICIENCY IS SLIGHT COMPARED TO THE POTENTIAL DISRUPTIVE CONSEQUENCES OF VACATUR.

A. Discussion of controlling case law that guides the analysis.

In deciding whether to vacate a regulation entirely or to remand back to an agency for curative rulemaking, the law of this circuit is guided by two principal factors.[61] Under the first factor, the court will examine "the seriousness of the [regulation's] deficiencies."[62] This factor examines the depth of the agency's error and the extent to which the agency would be able

[56] 25 U.S.C. § 465.
[57] 43 Fed. Reg. at 32,312.
[58] 25 C.F.R. § 151.1 (2013).
[59] *See* Acquisition of Title to Land in Trust, 64 Fed. Reg. 17,574, 17,577 (Apr. 12, 1999) ("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 Solicitor, Indian Affairs.")
[60] *MD/DC/DE Broadcasters I*, 236 F.3d at 22 (citing *K Mart Corp.*, 486 U.S. at 294).
[61] *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009).
[62] *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (citing *Int'l Union United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 976 (D.C. Cir 1990)).

to cure any defect in the rulemaking process.[63] Under the second factor, the court will examine the "disruptive consequences" of vacatur.[64] At its core, this factor examines the potential hardships created by terminating an existing and relied upon regulation.[65]

The foundational case on issues of vacatur and remand is *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*.[66] In *Allied-Signal*, the Nuclear Regulatory Commission promulgated regulations charging certain usage fees on energy licensees while forbidding those licensees from passing on that operating expense to their consumers.[67] The usage fees, however, were not charged to licensees classified by the agency as "educational institutions."[68] After ruling that the distinction was not a "reasoned decision-making," the court moved to the issue of vacatur.[69] Under the first factor, the court determined the seriousness of the regulation's deficiency was minor and curable.[70] The court opined that strong policy reasons could support the difference in treatment between educational and non-educational institutions.[71] The regulation's differential treatment was arbitrary simply because it was not supported by an adequate agency record.[72] Accordingly, the court held that an "inadequately supported rule" did not necessarily require complete vacatur, and postulated that a remand back to the agency could in fact result in "develop[ing] a reasoned explanation based on an alternative justification."[73] The court then weighed the remand option for remedying the regulation's slight defect against

[63] *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002).
[64] *Id*. 1048-49 (D.C. Cir. 2002) (quoting *Allied-Signal*, 988 F.2d at 150-51).
[65] *Allied-Signal*, 988 F.2d at 152-53.
[66] 988 F.2d 146 (D.C. Cir. 1993).
[67] *Id*. at 149-50.
[68] *Id*. at 150.
[69] *Id*.
[70] *Id*.
[71] *Id*. at 151.
[72] *Id*.
[73] *Id*. at 150-51. (citing *Int'l Union United Mine Workers of Am.*, 920 F.2d at 976-77).

the "disruptive consequences" of vacating the regulation altogether.[74] One disruptive consequence cited by the court was that vacating the regulation would have required the agency to return all of the usage fees it had collected as a result on the invalidated collection system; a near impossible accounting task.[75] Because the disruption caused by vacatur would have been too great, the court chose to remand the rule back to the agency for curative rulemaking.[76]

In *Fox Television Stations, Inc. v. FCC*, the court addressed issues of vacatur and remand in the context of broadcast television regulations issued by the Federal Communications Commission.[77] Several major broadcast networks, cable television providers, and First Amendment advocates challenged regulations restricting ownership of broadcast television stations and prohibiting broadcast television stations from owning cable television stations.[78] On the merits, the court held the two rules violated the Administrative Procedures Act.[79] On the issue of remedies, the invalidated rules were addressed separately. The court first discussed rule restricting ownership of broadcast television stations.[80] Though the rule was arbitrary and capricious, it was not vacated because the court was not convinced the rule was "irredeemable."[81] In fact, in discussing the history of the rule, the court noted past changes in the agency's position on the rule as being a source of confusion.[82] The court even reflected that a source of the agency's error was a past misunderstanding of the law.[83] In light of the complex history of the rule, the court was hesitant under the first *Allied-Signal* factor to declare the

[74] *Id*. at 151.
[75] *Id*.
[76] *Id*.
[77] 280 F.3d at 1033.
[78] *Id*. at 1036-37.
[79] *Id*. at 1033.
[80] *Id*. at 1048.
[81] *Id*.
[82] *Id*. at 1049.
[83] *Id*.

agency's deficiency incurable through remanded rulemaking.[84] The court remanded the rule back to agency after holding that the second *Allied-Signal* factor—the disruptive consequences of vacatur—was negligible.[85] As to the rule prohibiting broadcast television stations from owning cable television stations, the court was not so deferential to the agency's ability to remedy the error on remand.[86] Under the first *Allied-Signal* factor, the court held the rule incurable because the agency could not establish a "plausible reason" for why the rule was necessary.[87] Finally, because vacatur of the rule would cause "some," but not necessarily "substantial" disruption, the court ruled vacatur was the appropriate remedy under the *Allied-Signal* factors.[88]

B. Application of the factors supports a remand in this case rather than a vacatur of the regulation.

In its March 31 Opinion the court held that the Alaska exception contained in Part 151.1 "shall have no force or effect."[89] The exception, however, represents only one invalid provision in an otherwise valid regulation. In terms of the "seriousness of the [regulation's] deficiencies," the Secretary's error of including the Alaska exception in the otherwise appropriate land-into-trust regulation is not beyond remand and curative rulemaking. Like the invalid rule restricting ownership of broadcast television stations in *Fox Television Stations*, the Alaska exception was promulgated based on a misunderstanding of the law.[90] In both *Allied-Signal* and *Fox Television Stations* the court expressed a desire to allow the agencies to correct

[84] *Id.* ("In sum, we cannot say it is unlikely the Commission will be able to justify a future decision to retain the [r]ule.")
[85] *Id.*
[86] *Id.* at 1052.
[87] *Id.* at 1052-53.
[88] *Id.* at 1053.
[89] Opinion at 25, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC), Dkt. #109 (quoting 25 U.S.C. § 476(g)).
[90] *See* 280 F.3d at 1049. *See also* 64 Fed. Reg. at 17,578 ("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 Solicitor . . . 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.")

invalid sections of a regulation through curative rulemaking before vacating the rule entirely.[91] Plaintiffs' have not challenged any other provision or section of Part 151 and it is Plaintiffs' position that Part 151, minus the Alaska exception, is a valid regulation. The Secretary should be given the opportunity to engage in rulemaking consistent with this court's March 31 Opinion. Vacatur is too severe a remedy to right the wrong caused by the Alaska exception. Allowing for a remand back to the Secretary over full vacatur is even more appropriate in light of the second *Allied-Signal* factor.

The second factor examines the "disruptive consequences of vacatur"[92] and the potential hardships created by terminating an existing and relied upon regulation.[93] Unlike the regulations at issue in *Fox Television Stations*, full vacatur of the entire land-into-trust regulation codified at Part 151 would have serious disruptive consequences across the nation. Although the Secretary declined to take land-into-trust for Alaska Native tribes, tribes in the continental United States have been relying on the provisions of Part 151 since it was promulgated.[94] In *Allied-Signal*, the court declined vacatur of the regulation because the disruption would have been too great.[95] A similar disruption would result from vacatur of Part 151. Because the seriousness of the Secretary's error in including the Alaska exception is relatively minor compared to the disruptive consequences caused by the complete vacatur of the regulation, the court should remand the offending section—Part 151.1—back to the Secretary for curative rulemaking.

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[91] *Allied-Signal*, 988 F.2d at 203; *Fox Television Stations*, 280 F.3d at 1049.
[92] *Fox Television Stations*, 280 F.3d at 1048-49 (quoting *Allied-Signal*, 988 F.2d at 150-51).
[93] *Allied-Signal*, 988 F.2d at 152.
[94] Since 2009, the Obama administration has completed more than one-thousand acquisitions of land into trust for Indian tribes in the continental United States—totaling nearly 200,000 acres. Bryan Newland, *A Retrospective on Federal Indian Policy During President Obama's First Term*, INDIAN COUNTRY TODAY (Jan. 19, 2013), http://indiancountrytodaymedianetwork.com/opinion/retrospective-federal-indian-policy-during-president-obama%E2%80%99s-first-term-147085.
[95] *Allied-Signal*, 988 F.2d at 151.

IV. IT IS APPROPRIATE TO STAY THE EFFECT OF THE JUDGMENT DURING CURATIVE RULEMAKING.

Plaintiffs submit that a stay of the effect of judgment is appropriate during the period in which the agency is conducting its curative rulemaking on remand. The parties can offer their views to the agency during the course of the rulemaking through notice and comment to aide in the revision of the rule as it pertains to lands in Alaska.[96] A stay will accommodate curative agency proceedings before the judgment becomes final and subject to appeal. "[A]s a general rule, a district court order remanding a case to an agency for significant further proceedings is not final."[97] This rule "best serves the interests of judicial economy and efficiency" because it "avoids the prospect of entertaining two appeals, one from the order of remand and the one from entry of a district court order reviewing the remanded proceedings."[98] Accordingly, this court should stay the effect of the judgment pending the curative ruling making.

V. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request this court to sever the Alaska exception contained in Part 151.1 from the remainder of the land-into-trust regulation, remand to the Secretary of the Interior for curative ruling making consistent with this court's March 31 Opinion, and stay the effect of the judgment pending the final rule.

Respectfully submitted this 24th day of June, 2013.

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[96] *Cf.* Land Acquisitions: Appeals of Land Acquisition Decisions, 78 Fed. Reg. 32,214, 32,215 (May 29, 2013) ("This rule revises § 151.12 to remove procedural requirements that are no longer necessary in light of the *Patchak* Supreme Court decision and to increase transparency by better articulating the process for issuing decisions to acquire land in trust under this part.")

[97] *Pueblo of Sandia v. Babbitt*, 231 F.3d 878, 880 (D.C. Cir. 2000) (quoting *In re St. Charles Preservation Investors, Ltd.*, 916 F.2d 727, 729 (D.C. Cir. 1990)).

[98] *Id.*

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