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.	

FEDERAL DEFENDANTS' REMEDY BRIEF

In 2006, four Alaskan Tribes and one individual Native Alaskan filed lawsuits challenging the Secretary of the Interior's regulations, 25 C.F.R. § 151, which govern procedures used by the Secretary of the Interior, in her discretion, to acquire title to land in trust for Indian tribes and individuals. These land-into-trust regulations state that they do not apply to the acquisition of land-into-trust in Alaska other than for the Metlakatla Indian Community or its members (the "Alaska exception" to the regulations). On March 31, 2013, this Court found that the Alaska exception is arbitrary and capricious and granted summary judgment in favor of plaintiffs, but withheld ruling on remedy. See Memorandum Opinion (ECF No. 109). Subsequently, on May 23, 2013, the Court ordered the parties to submit simultaneous briefing on the appropriate remedy, including "the scope of the 'agency action' that must be 'set aside,' 5 U.S.C. § 706, or the 'regulation or administrative decision or determination' that is deprived of 'force or effect,' 25 U.S.C. § 476(g)." See Order at 2 (ECF No. 115). The Court ordered the parties to address whether the remedy should consist of vacatur or remand, and whether the court should "stay the effect of the judgment for a period of time." Id. In addition, the Court ordered

the parties to brief "whether the Alaska exception contained in 25 C.F.R. § 151.1 can be severed from the remainder of the land-into-trust regulation." Id. As discussed below, the federal defendants believe the appropriate remedy, in light of the Court's March 31 decision, is to set aside the portion of 25 C.F.R. 151.1 that contains the Alaska exception and enter final judgment.

I. The Court Should Set Aside the Alaska Exception and Enter Final Judgment

Section 706(2) of the Administrative Procedure Act provides that agency action, including a rule, that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" shall be held "unlawful and set aside." 5 U.S.C. § 706(2). "[A]n agency rule is arbitrary and capricious if the agency relies upon improper factors, ignores important arguments or evidence, fails to articulate a reasoned basis for the rule, or produces an explanation that is 'so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" Natural Res. Def. Council, Inc. v. Envtl. Prot. Agency, 822 F.2d 104, 111 (D.C. Cir. 1987) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

Plaintiffs challenge the "Purpose and Scope" provision of the land-into-trust regulations, which states the purpose of these regulations as "set[ting] forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes." 25 C.F.R. § 151.1. The last sentence of this section contains the "Alaska exception:"

> These 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 [sic] members.

Id. In its March 31, 2013 Memorandum Opinion, the Court rejected Interior's rationale adopted in promulgating the Alaska exception that the Alaska Native Claims Settlement Act ("ANCSA")

prohibited taking land-into-trust in Alaska.[1] Instead, the Court held that is "possible to give effect to both ANCSA and [the IRA,] the statute giving the Secretary land-into-trust authority in Alaska." Mem. Op. at 18. The Court further concluded (Mem. Op. at 25) that the Alaska exception is not in accordance with law, on the ground that it violates 25 U.S.C. § 476(g), which provides as follows:

> Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

25 U.S.C. § 476(g). On the basis of this finding, the Court concluded that the Alaska exception "is deprives of force or effect." Mem. Op. at 25.

In 1980, when Interior first promulgated the land-into-trust regulations, Interior reasoned that 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." 45 Fed. Reg. 62,034 (Sept. 18, 1980) (AR 18). This rationale was set forth in a 1978 Opinion of the Acting Solicitor. See Memorandum from Associate Solicitor to Assistant Secretary-Indian Affairs, Trust Land for the Natives of Venetie and Arctic Village (Sept. 15, 1978) (AR 3). Since 1994, however, Interior has called this rationale for the Alaska exception into question numerous times. See, e.g., 66 Fed. Reg. 3,452, 3,454 (Jan. 16, 2001) (AR 589); Memorandum from 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" (Jan. 16, 2001) ("2001 Leshy Memo.") (AR 619). Interior's position on the interaction of ANCSA and Section

[1] As discussed below, and as this Court understood (Mem. Op. at 20), Interior does not now view ANCSA as precluding the acquisition of trust in Alaska.

5 of the Indian Reorganization Act ("IRA") has so evolved, that it has argued in this litigation that ANCSA does not preclude the Secretary from taking land into trust in Alaska. See Fed. Defs.' Reply In Support of Summary Judgment at 1-2 (ECF No. 67); see also Fed. Defs.' Supplemental Brief in Response to Court's Order (ECF 101). Despite its abandonment of the legal rationale that underlies the Alaska exception, Interior has maintained the Alaska exception in the regulations.

The decision whether to set aside without a remand "depends on (1) the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and (2) the disruptive consequences of an interim change that may itself be changed." Milk Train, Inc. v. Veneman, 310 F.3d 747, 755-56 (D.C. Cir. 2002) (quoting Allied-Signal, Inc. v. Nuclear Regulatory Comm'n, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). The finding of a substantive defect, as opposed to a procedural defect, weighs in favor of setting aside the agency action. Sierra Club v. Envtl Prot. Agency, 705 F.3d 458, 465 (D.C. Cir. 2013) (vacating and partially setting aside a rule based on the agency request and on the finding that the agency lacked authority to promulgate the rule).

As the Court pointed out, the question presented in this lawsuit is whether the Alaska exception "is legally valid." Mem. Op. at 23. This Court has now ruled that ANCSA did not repeal the provisions of the IRA that permit land to be taken into trust in Alaska, and has concluded that ANCSA does not prohibit the Secretary from taking land into trust in Alaska as a matter of law. Id. 11-20. Accordingly, the appropriate remedy here is for the Court to set aside the Alaska exception on the grounds that Interior retains its authority to take land-into-trust in Alaska pursuant to Section 5 of the IRA and that the Alaska exception is not supported by Interior's own statements in the record that call into question its justification for maintaining the

prohibition. See, e.g., AR 619 (2001 Leshy Memo), AR 589. Setting aside the Alaska exception will not disrupt the land-into-trust process either within or outside Alaska. As such, the Court should enter final judgment after resolving all outstanding motions.[2]

II. The Alaska Exception Can Be Severed From the Remainder of the Part 151 Regulations

The Court has requested briefing on whether the Alaska exception is severable from the remainder of the Part 151 regulations. In this Circuit, the question of severability "depends upon the intent of the agency *and* upon whether the remainder of the regulation could function sensibly without the stricken provision." MD/DC/DE Broadcasters Ass'n v. FCC, 236 F.3d 13, 22 (D.C. Cir. 2001), reh'g denied w/ opinion, 253 F.3d 732 (D.C. Cir. 2001); see also Financial Planning v. SEC, 482 F. 3d 481 (D.C. Cir. 2007); Nat'l Treasury Employees Union v. Chertoff, 394 F. Supp. 2d 137 (D.D.C. 2005) ("Severance and affirmance of a portion of an administrative regulation is improper if there is 'substantial doubt' that the agency would have adopted the severed portion on its own.") (quotation and citation omitted) (Rev'd on other grounds). The presence or absence of a severability provision is not dispositive. MD/DC/DE, 253 F.3d at 736. Removal of the Alaska exception does not impact Interior's ability to process land-into-trust applications pursuant to Part 151. Accordingly, the court need not address any other provision of Part 151.

Moreover, the amendments to the land-into-trust regulations demonstrate that the existence or non-existence of the Alaska exception does not concern the remainder of the regulations. To begin with, when initially considering promulgation of the land-into-trust regulations in 1978, Interior published a notice of proposed rule. See 43 Fed. Reg. 32,311-14

[2] As we will address in greater detail in our response to Alaska's Mot. for Reconsideration (ECF No. 112), entry of final judgment obviates Alaska's request for an interlocutory appeal.

(July 26, 1978). The proposed rule did not contain the Alaska exception and in fact, expressly included Alaska Native villages and groups within the proposed definition of "Tribe." Id. at 32,312. In 1980, Interior promulgated the final rule for the land-into-trust regulations. 45 Fed. Reg. 62,034-37 (Sept. 18, 1980) (AR 18-21). Interior noted that, based on comments received during the public comment period, it was adding the Alaska exception into §151.1. Id. at 62,034 (AR 18). In addition, also based on the comments received, Interior removed Alaska Native villages and groups from the definition of "Tribe." Id.[3] Importantly though, Interior did not revise the remainder of the land-into-trust regulations based on its decision to include the Alaska exception.

In January 2001, Interior decided to continue the Alaska exception and sought public comment on removal of the Alaska exception. 66 Fed. Reg. at 3,453-54 (AR 589-90). The fact that Interior sought public comment on the issue but did not change the remainder of the regulation reveals that Interior did not consider the changes to the remainder of the regulations to be intertwined with the existence or non-existence of the Alaska exception. Further, in November 2001, when Interior withdrew the January 2001 rules, which continued the Alaska exception and revoked further consideration of removing the Alaska exception, the Federal Register notice did not discuss the Alaska exception. 66 Fed. Reg. 56,608-10 (Nov. 9, 2001)

[3] Of note, the existing definition of "Tribe" in Part 151 includes all tribes located on the list of federally recognized tribes, which includes Alaska Native tribes. As such, no further revisions are necessary for Part 151 to apply to Alaska Native tribes. With respect to the acquisition into trust for individual Indians, in 1995 Interior distinguished between acquisitions for individual Indians in Alaska and those outside Alaska by adding the following introductory phrase to 25 C.F.R. § 151.2(c)(4) "[f]or purposes of acquisitions outside the State of Alaska . . . ." On its face though, this introductory phrase only applies to taking land-into-trust outside of Alaska for individual Indians, which is not at issue in this lawsuit. Therefore, the Court need not address the definitions section of Part 151.

(AR 750-51). This lack of discussion of the Alaska exception in November 2001 further confirms that the existence or non-existence of the Alaska exception has no impact on the remainder of the land-into-trust regulations.

In sum, because the Alaska exception "will not impair the function of [the remainder of the land-into-trust regulations] . . . and there is no indication that the regulation would not have been passed but for [the] inclusion" of the Alaska exception, the Alaska exception can be severed from Part 151. Davis Cnty. Solid Waste Mgmt. v. Envtl Prot. Agency, 108 F.3d 1454, 1460 (D.C. Cir. 1997) (quoting K Mart Corp. v. Cartier Inc., 486 U.S. 281, 294 (1988)); see also Sierra Club v. Envtl Prot. Agency, 705 F.3d 458, 465-66 (D.C. Cir. 2013) (granting a partial vacatur of the rule); Sierra Club v. Van Antwerp, 719 F. Supp. 2d 77, 79-80 (D.D.C. 2010) (same). Additionally, setting aside Part 151 as a whole has the potential to disrupt the land-into-trust process nationwide, and thus, should be avoided. Therefore, the federal defendants request that the Court set aside only the sentence in 25 C.F.R. §151.1 comprising the Alaska exception.[4]

[4] If the Court sets aside the Alaska exception, Interior believes the remainder of the Part 151 regulations could apply in Alaska. In fact, an Alaskan Native tribe (not Plaintiffs here) submitted an application to have land taken into trust in Alaska pursuant to the IRA in 2009. While the Part 151 regulations divide acquisitions into the categories of on-reservation and off-reservation, in promulgating these categories, Interior discussed acquisitions for "landless" tribes. 60 Fed. Reg. 32,874-01, 32,875-75 (Jun. 23, 1995); see, e.g., Elk Valley Rancheria (2003); Guidiville Rancheria (1999); and the Wiyot Tribe (Table Bluff Rancheria) (1990). Interior has also processed applications involving split estates under Part 151. See, e.g., Chickasaw Nation (2013); Muscogee (Creek) Nation (2010); and the Citizen Potawatomi Nation (2010). Moreover, how Interior proceeds to process any land-into-trust applications for land within Alaska is squarely within the discretion of the agency. Arkansas Power and Light Co. v. Interstate Commerce Comm'n, 725 F.2d 716, 723 (D.C. Cir. 1984) ("It is well-established that the choice between rulemaking and case-by-case adjudication 'lies primarily in the informed discretion of the administrative agency.'") (citation omitted); Hawaii Longline Ass'n.v Nat'l Marine Fisheries Service, 281 F. Supp. 2d 1, 38 (D.D.C. 2003) ("it is up to the agency to determine how to proceed next – not for the court to decide or monitor").

RESPECTFULLY SUBMITTED,

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