IN THE 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 FEDERAL DEFENDANTS' REMEDY BRIEF AND STATE OF ALASKA'S SUPPLEMENTAL BRIEF ON SCOPE OF REMEDY

I. INTRODUCTION

On May 23 the court issued an order directing the parties to submit supplemental briefing on remedies in light of the court's prior ruling that the Alaska exception included in 25 C.F.R. Part 151.1 was contrary to law.[1] Specifically, the court requested the parties address: (1) whether the Alaska exception was severable from the rest of the land-into-trust regulation; (2) whether vacatur was required or whether the court could remand the regulation to the Secretary of the Interior (Secretary); and (3) whether it would be appropriate for the court to stay the effect of the judgment for a period of time.[2] The parties submitted their remedies briefs on June 24.

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

[2] *Id.* at 2.

The parties all agree that the Alaska exception is severable from the remainder of Part 151.[3] The parties disagree, however, on the issues of remand vs. vacatur and staying the court's judgment.

II. THE *ALLIED-SIGNAL* FACTORS SUPPORT REMAND OF PART 151 BECAUSE OF THE SERIOUSNESS OF THE REGULATION'S HISTORICAL DEFICIENCIES AND THE POTENTIAL DISRUPTIVE CONSEQUENCES OF VACATUR.

In deciding whether to vacate a regulation or to remand it back to an agency for curative rulemaking, the court will examine "the seriousness of the [regulation's] deficiencies" and the "disruptive consequences" of vacatur.[4] Although the Secretary and the State argue that the *Allied-Signal* factors support vacatur of the Alaska exception without remand, they each travel a different path to reach that conclusion.[5]

In her remedies brief, the Secretary argues that vacatur is the appropriate remedy in light of the court's holding that the Alaska Native Claims Settlement Act (ANCSA) did not repeal the Secretary's authority to take land into trust in Alaska.[6] The Secretary claims that "[a]ccordingly, 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 . . . and that the Alaska exception is not supported by Interior's own statements in the record that call into question its

[3] *See* Pls.' Supplemental Br. on Remedies as Ordered by the Ct. (Pls' Remedies Br.) at 2, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC) (D.D.C. June 24, 2013), Dkt. #116; Fed. Defs.' Remedy Br. (Defs.' Remedy Br.) at 5, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC) (D.D.C. June 24, 2013), Dkt. #118; State of Alaska's Supplemental Br. on Scope of Remedy (State's Remedies Br.) at 3, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC) (D.D.C. June 24, 2013), Dkt. #119.

[4] *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)).

[5] Defs.' Remedy Br. at 4-5, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC), Dkt. #118; State's Remedies Br. at 6-7, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC), Dkt. #119.

[6] Defs.' Remedy Br. at 4, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC), Dkt. #118 (citing Memorandum Opinion at 11-20, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC) (D.D.C. March 31, 2013), Dkt. #109).

justification for maintaining the prohibition."[7] The Secretary then makes a general reference to the second *Allied-Signal* factor by stating that "[s]etting aside the Alaska exception will not disrupt the land-into-trust process either within or outside Alaska."[8]

The State agrees with the Secretary's conclusion that vacatur is the appropriate remedy, but seems to disagree on the level of disruption vacatur would have. At one point in its remedies brief, the State argues that "vacating the Alaska exception would not be disruptive to individual Indians and Tribes currently within the scope of [Part 151]."[9] Later, however, the State goes to great lengths to demonstrate how disruptive vacatur will be for its interests:

> The creation of new trust land in Alaska will be *highly disruptive* to the State because essential aspects of the State's sovereignty are challenged when land is placed into trust status, including the state's ability to tax . . . . The creation of trust land in Alaska *also will be disruptive to the federal defendants*, as they will receive additional trust land acquisition applications from within the state, and the regulations at 25 C.F.R. Part 151 *were not developed with the understanding that they would apply in Alaska*.[10]

In *Allied-Signal* the court declined to vacate the regulations at issue on the basis that such a remedy would prove too disruptive to the stakeholders.[11] The State clearly has serious concerns regarding the potential disruptive consequences of vacatur.

Plaintiffs also have concerns regarding the potential disruptive consequences of vacatur.[12] It was for this reason that Plaintiffs argued for a remand to the agency and a stay of

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[7] *Id*. at 4-5.

[8] *Id*. at 5.

[9] State's Remedies Br. at 7, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC), Dkt. #119.

[10] *Id*. at 7-8 (internal citations omitted) (emphasis added).

[11] 988 F.2d at 150-51.

[12] *See* Pls.' Remedies Br. at 13, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC), Dkt. #116

judgment—so that the agency could contemplate a process and decisional criteria to guide the Secretary in exercising her discretion to acquire trust land in Alaska. Plaintiffs will not have full relief in this case if it is not remanded for curative rulemaking. This is because the regulation was never considered applicable to Alaska and thus prior revisions to Part 151 never contemplated decisional criteria for the exercise of the Secretary's discretion to acquire trust lands in Alaska.

Indeed, the last time the Secretary proposed major revisions to Part 151 were on April 12, 1999.[13] The revisions were prompted in part by a decision of the U.S. Court of Appeals for the Eighth Circuit holding that section 5 of the Indian Reorganization Act (IRA) was unconstitutional.[14] On remand to the agency for reconsideration of his administrative decision, the agency issued a notice of proposed rulemaking which stated:

> These regulations have not undergone substantial revision since their adoption [in 1980]. We now propose to amend these regulations to make clearer that we will follow a process that is somewhat different, and we will apply a standard which is somewhat more demanding when a land-into-trust application involves title to lands which are located outside the boundaries of a reservation ("off-reservation lands"). In contrast, when the application involves title to lands which are located inside the boundaries of a reservation ("on-reservation lands"), we will apply a process and a standard which reflect a presumption in favor of acquisition of trust tile to those lands. In addition, the proposed rule sets out the process we will use to comply with a mandate from Congress directing us to use our administrative procedures to place a particular tract of land into trust. Finally, the proposed rule establishes a framework in which a tribe without a reservation can establish a geographic boundary within which it may acquire land under the on-reservation provisions of the regulations.[15]

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[13] Acquisition of Title to Land in Trust, 64 Fed. Reg. 17,574, 17,574-88 (April 12, 1999).

[14] *See South Dakota v. Dept. of the Interior*, 69 F.3d 878 (8th Cir. 1995) (IRA violated nondelegation doctrine providing no legislative standards governing the Secretary's acquisition of trust land); *cert granted, judgment vacated by Dept. of Interior v. South Dakota*, 519 U.S. 919 (1996).

[15] 64 Fed. Reg. at 27,574.

A remand is necessary here so that the regulation can be revised again to incorporate processes for decisional criteria for the exercise of the Secretary's discretion to acquire trust land in Alaska. The importance of this remedy is highlighted by the fact that the Secretary used her remedies brief to announce a new agency interpretation of Part 151, as discussed below.

III. THE SECRETARY'S SUDDEN CHANGE IN POSITION EMPHASIZES THE NEED FOR REMAND RATHER THAN VACATUR.

In a footnote appearing on the second to last page of her brief, the Secretary claims that "[i]f the court sets aside the Alaska exception, Interior believes the remainder of the Part 151 regulations could apply in Alaska."[16] This footnote represents a reversal not only of the Secretary's litigation position on the removal of the Alaska exception, but nearly twenty-years of agency understanding of Part 151's ability to work in Alaska.

In her 2012 Supplemental Brief Pursuant to Court Order,[17] the Secretary claimed that, despite her belief she retained the authority to acquire trust land in Alaska, she would only consider an Alaska application "if or when" the Part 151 regulations were "amended or promulgated to provide a process and decisional criteria for the exercise of the discretion to acquire land in trust for Alaska Natives."[18] This litigation position was reflective of the agency's internal opinion on Part 151's suitability for Alaska tribes. In an internal memorandum to Solicitor Leshy, one agency official noted, "[o]ne other point to ponder in connection with

[16] *Id*. at 7 n.4.

[17] Defs.' Supplemental Br. Pursuant to Ct. Order at 10, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC) (D.D.C. July 6, 2012), Dkt. #101.

[18] *Id*. at 10.

amending the regulations is whether the existing Part 151 is wholly suitable to the Alaska situation. I think it was really drafted with the lower 48 situation in mind, where what is typically contemplated is an incremental addition to an existing reservation, rather than a change in land status . . . ."[19] The State agrees. In its remedies brief, the State argues that Part 151 "was developed to address the circumstances applicable to trust land applications from individual Indians and Tribes outside of Alaska"[20] and "with the understanding that they would not be applied in Alaska."[21] For Plaintiff Kavairlook, this presents a grave concern. This is because—as the Secretary herself points out—applying the existing Part 151 in Alaska "is particularly troublesome as to the individual's claim request for relief because there are no reservations in Alaska (except for the Metlakatla Indian Community)" and "it is current BIA policy not to acquire land in trust for an individual Indian when the land to be acquired is located off a reservation."[22]

Part 151 was promulgated in 1980 and since that time the Secretary's position, in one incarnation or another, has been that it was not entirely suitable for "the Alaska situation." After thirty-three years, the Secretary has changed her position—in a footnote—and now claims that she "*believes* the remainder of the Part 151 regulations *could* apply in Alaska."[23] This is not reasoned rulemaking. Stakeholders in Alaska—including the plaintiffs in this case, ANCSA

[19] Memorandum from Roger Hudson to John Leshy, Solicitor, Dept. of Interior (July 28, 1997) (AR 809).

[20] State's Remedies Br. at 5, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC), Dkt. #119 (internal citations omitted) (emphasis added).

[21] *Id*. at 8.

[22] Defs.' Reply in Supp. of Defs.' Cross-Mot. Summ. J. at 12 n. 2, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RWR) (D.D.C. July 25, 2008), Dkt. #67.

[23] Defs.' Remedies Br. at 7, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC), Dkt. #118 (emphasis added).

corporations, tribal governments, individual Alaska Natives, and even the State itself—have not had opportunity to provide notice and comment on the promulgation of a process and decisional criteria for the exercise of the Secretary's discretion to acquire land in trust in Alaska. The Secretary's footnote-rulemaking process demonstrates the need for remand in this instance. The Secretary has shown, time and again, that she is not willing to seriously consider procedures accommodating trust lands in Alaska. Vacatur in this instance will circumvent the notice and comment proceedings that would aid the agency in devising a reasoned land-into-trust regulation that contemplates a process and criteria for taking lands into trust in Alaska. The Secretary should not be permitted to promulgate a new rule in the footnote of a legal brief.

IV. STAYING THE EFFECT OF THE COURT'S JUDGMENT IS APPROPRIATE IN LIGHT OF THE STATE'S AND PLAINTIFFS' POSITIONS ON THE DISRUPTIVE CONSEQUENCES OF VACATUR.

As discussed above, the State's brief outlines several instances of how, in the interim, vacatur of Part 151.1 will be "highly disruptive to the State" and its interests.[24] For this reason the State concedes that "[c]ourts often mitigate the disruption of vacatur by delaying entry of judgment to give the agency reasonable time to respond to the judgment and develop a rule that cures the defects of the one that has been vacated."[25] Plaintiffs also advocate for this course, citing the general rule that "a district court order remanding a case to an agency for significant further proceedings is not final."[26] This general rule "best serves the interests of judicial economy and efficiency" because it "avoids the prospect of entertaining two appeals, one from

[24] State's Remedies Br. at 7, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC), Dkt. #119.

[25] *Id*. at 8 (citing *NRDC v. EPA*, 489 F.3d 1250, 1262 (D.C. Cir. 2007).

[26] *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)).

the order of remand and the one from entry of a district court order reviewing the remanded proceedings."[27]

Despite its concerns that vacatur will be "highly disruptive," the State nevertheless urges the court "*in this instance*" to vacate Part 151.1 and enter final judgment immediately.[28] The State makes its motivations abundantly clear on the following page of its remedies brief, where it admits that its preferred vacatur remedy would immediately "ensure[] appellate review is available," which would allow the State to seek a stay pending appeal.[29] The brief reiterates the State's position that "Alaska must appeal the merits of the [c]ourt's Memorandum Opinion at some point . . . ."[30] This argument is a familiar one from the State, as it has appeared before in previous attempts to expedite an appeal of the court's Memorandum Opinion.[31] As the State makes clear in multiple filings—it will appeal this matter to the D.C. Circuit regardless of the outcome at the administrative or district court levels. The State also makes clear that it is willing to pursue appellate review in spite of the vacatur's acknowledged disruptive consequences. Plaintiffs urge the court to reject the State's arguments favoring vacatur "in this instance" where Plaintiffs and the State, as parties in interest, have thoroughly outlined the disruption that vacatur would cause. Staying the court's judgment and giving "the agency reasonable time to respond to the judgment and develop a rule that cures the defects of

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[27] *Id.*

[28] State's Remedies Br. at 8, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC), Dkt. #119 (emphasis added).

[29] *Id.* at 9.

[30] *Id.*

[31] *See* Memorandum in Supp. of State of Alaska's Mot. for Reconsideration, or in the Alternative, for Certification for Interlocutory Review at 16, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC) (D.D.C. April 17, 2013), Dkt. #112-1 ("Alaska must appeal the merits of the court's Memorandum Opinion at some point . . . .")

the one that has been vacated" is the most effective method to alleviate the concerns expressed by the State and Plaintiffs.[32]

V. CONCLUSION

Plaintiffs brought this suit in order to ensure they would be treated by the Secretary in the same manner as all other federally recognized Indian tribes and individuals in regards to the land-into-trust process.[33] The court has ruled the Alaska exception was arbitrary and capricious as well as violative of 25 U.S.C. § 476(f) and (g).[34] Despite the court's ruling, the Secretary continues to insist on treating Alaska Native tribes differently. After thirty-three years of maintaining the status quo barring Alaska trust acquisitions under Part 151, the Secretary now claims—in a footnote—that Part 151 will work for Alaska Natives. This decision was made without notice to interested parties or the possibility of public comment by those with a stake in the outcome. While other stakeholders are given the opportunity to weigh in on rulemaking that will affect their interests,[35] Alaska tribes are once again being left out. Remanding Part 151 to the agency is the only way to ensure that Alaska tribes will finally receive the opportunity to participate in crafting a lands-into-trust regulation that considers *all* federally-recognized Indian tribes.

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[32] State's Remedies Br. at 8, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC), Dkt. #119 (citing *NRDC v. EPA*, 489 F.3d at 1262).

[33] Complaint at 13-15, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RWR) (D.D.C. May 24, 2006), Dkt. #1.

[34] Memorandum Opinion at 25, *Akiachak Native Cmty. et al.*, No. 1:06-cv-00969 (RC), Dkt. #109.

[35] *Cf.* 64 Fed. Reg. at 17,574-75 ("We now propose to amend these regulations to make clearer that we will follow a process that is somewhat different, and we will apply standard which is somewhat more demanding when a land-into-trust application involves title to lands which are located outside the boundaries of reservation . . . . If you wish to comment, you may submit your comments by any one of several methods . . . .")

Respectfully submitted this 8th day of July, 2013.

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