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.	)	

REPLY IN SUPPORT OF FEDERAL DEFENDANTS' MOTION FOR RECONSIDERATION

In 2006, four Alaskan Tribes and one individual Alaska Native 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 held that the Alaska exception is arbitrary and capricious. See Mem. Op. (ECF No. 109). In its Memorandum Opinion, the Court found that Interior promulgated the Alaska exception based on a misunderstanding of the law reflected in Interior's now-abandoned interpretation of Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§ 1601-1629h ("ANCSA") and the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 ("IRA"). Id. The Court also found that the Alaska exception violated 25 U.S.C. § 476(g). Id.

The Federal Defendants have asked the Court to revise its interlocutory Memorandum Opinion to rest solely on the ground that Interior retains its authority to take land-into-trust in Alaska under Section 5 of the IRA and did not legally justify retaining the exception without reaching whether Interior violated 25 U.S.C. §§ 476(f) and (g). See generally Fed. Defs.' Mot. for Reconsideration (ECF No. 120) ("Fed. Defs.' Mot."). In support of this request, the Federal Defendants argued that the Court can revise its decision to hold that Interior retains its authority to take land-into-trust in Alaska under Section 5 of the IRA because Interior did not legally justify retaining the exception in light of its change in legal position. See id. at 3-5. The Federal Defendants further argued that the ambiguity of the statutory text of 25 U.S.C. §§ 476(f) and (g), background of the 1994 Amendment to the IRA, and the potential for unintended consequences weigh in favor of the Court limiting its holding to a finding that the Indian Reorganization Act authorizes the Secretary to take land into trust in Alaska. See id. at 5-14.

In response, the State of Alaska agrees that "the Court need not reach the issue of whether the Alaska exception violates 25 U.S.C. § 476(f) and (g)." See State of Alaska's Consolidated Reply in Supp. of Mot. for Reconsideration, at 10 (ECF No. 126). The State further agrees "that the Court's holding regarding the applicability of 25 U.S.C. § 476(f) and (g) to this case may have far-reaching, unintended consequences . . . ." Id. at 11. The State concludes by noting that "[r]econsideration would ensure the issues are appropriately framed for appellate review . . . ." Id. at 14.

Plaintiffs, on the other hand, take issue with timing of the request and characterize Federal Defendants' Motion as a repackaging of arguments already presented, and as a result, they argue that the standard for reconsideration is not met. Pls.' Mem. in Opp'n to Fed. Defs.' Mot. for Reconsideration, at 2-7 (ECF No. 127) ("Pls.' Resp."). First, there is no question that

this Court has inherent authority to reconsider interlocutory decisions. See Malewicz v. City of Amsterdam, 517 F. Supp. 2d 322, 327-8 (D.D.C. 2007) (citing Langevine v. District of Columbia, 106 F.3d 1018, 1023 (D.C. Cir. 1997) ("Interlocutory orders are not subject to the law of the case doctrine and may always be reconsidered prior to final judgment")); see also Bailey v. Potter, 498 F. Supp. 2d 320, 321 (D.D.C. 2007). As explained in Federal Defendants' motion, the motion sought to explain the ambiguity of the statutory text along with the history of 25 U.S.C. §§ 476(f) and (g), along with additional information not previously provided to the Court. See Fed. Defs.' Mot. at 5-6. There are accordingly compelling reasons for the Court to limit its holding to the ruling that the Secretary retains the authority to take land into trust in Alaska pursuant to the IRA. See generally id. Second, Plaintiffs undercut their claim that Federal Defendants' motion is simply a repackaging of arguments previously presented by conceding that some of the arguments are "newly-introduced," Pls.' Resp. at 7, and by declining to address Interior's contemporaneous interpretation of the 1994 Amendment. Moreover, even if this Court were to find that some of Federal Defendants' arguments overlap with previously presented positions, Federal Defendants have provided good reasons for the Court to revise its Memorandum Opinion.

Additionally, contrary to Plaintiffs' view, "privileges and immunities available to federally recognized tribes" does not have a clear meaning and is an ambiguous phrase. See Fed. Defs'. Mot. at 5-12. First, Plaintiffs focus only on "privileges and immunities" ignoring the modifying language "available to federally recognized tribes." Pls.' Resp. at 9-10. Plaintiffs' then disingenuously claim that the phrase "privileges and immunities" has never "been found to be vague or ambiguous." Id. at 9. Plaintiffs ignore the Supreme Court case law cited in Federal Defendants' Motion discussing "privileges and immunities" as interpreted in the context of the

Fourteenth Amendment and the complexities of precisely identifying and defining the fundamental rights of citizens. See Fed. Defs.' Mot. at 7 (citing Slaughter–House Cases, 83 U.S. (16 Wall.) 36 (1872); Saenz v. Roe, 526 U.S. 489, 503 (1999) (continuing to struggle with what are fundamental rights in the context of privileges and immunities of citizens)).

Likewise, Plaintiffs' reference to nine different statutes within Title 25 of the United States' Code containing the "[un]vague" and "[un]ambiguous" phrase "privileges and immunities" is misleading. Pls.' Resp. at 9, n.37 (citing 25 U.S.C. §§ 182, 348, 349, 379, 465, 476(f) and (g), 757(b), 1212(4), 1311 (2012)). Of Plaintiffs' nine citations, only five actually contain the phrase "privileges and immunities." See 25 U.S.C. §§ 182 ("rights, privileges, and immunities of any such [United States'] citizen"); 348 (patents to be held in trust, no "privileges and immunities" language); 349 (same); 379 (sale of allotted lands, no "privileges and immunities" language); 465 (acquisition of lands, no "privileges and immunities" language); 476 (f) and (g) ("privileges and immunities available to federally recognized tribes"); 757(b) ("rights, privileges, immunities, and obligations as such [United States'] citizens"); 1212 (affirming congressional recognition of the government to government relationship between the United States and the Tlingit and Haida Indians of Alaska, and in the findings section 4 notes that "the Secretary may not administratively diminish the privileges and immunities of federally recognized tribes without the consent of Congress"); 1311 ("rights, privileges, and immunities . . . as . . . any citizen of the United States"). Of the five uses of "privileges and immunities" in Title 25 cited by Plaintiffs, three go to "privileges and immunities" of United States citizens and only two concern "privileges and immunities" regarding tribes (one of which is 476, the other being a statement in the findings section of a recognition bill). Id. In sum, none of the Plaintiffs' other cited uses by Congress of the phrase "privileges and immunities" in Title 25 provides any

basis for concluding that "privileges and immunities available to federally recognized tribes" in the context of 476(f) and (g) has an unambiguous meaning, or what that meaning is.

Second, Plaintiffs do not provide any interpretation of what "privileges and immunities" are "available to federally recognized tribes" or explain how the statute is clear. Plaintiffs instead claim that the Memorandum Opinion finds that the "privilege" at issue in this case is "the privilege to participate in the land into trust process relative to all other federally recognized tribes." Pls.' Resp. at 8 (citing Mem. Op. at 24-25), 9-10. The Memorandum Opinion does not state what "privilege" the Court found to be at issue here. Plaintiffs' focus on the specific process found in Part 151 disregards Federal Defendants' position in this litigation that land can be taken into trust in Alaska and that other Alaska tribes have filed applications under Part 151 to have land taken into trust. See Fed. Defs.' Remedy Br., at 7, n.4 (ECF No. 118). Plaintiffs now also take the position that they must have access to Part 151 although they previously stated that "[a]s far as Plaintiffs are concerned, the Secretary can proceed either by amending 25 CFR 151 to remove the Alaskan ban, or by conceding that he must consider Alaska petitions outside the ambit of 25 CFR 151." See Pls.' Reply Mem. in Support of Pls.' Mot. for Summ. J. at 7 (ECF No. 62).

Moreover and most importantly, Plaintiffs' reading that the Memorandum Opinion finds that the "privilege" at issue here is access to a process confirms that the holding could have unintended consequences. There are numerous federal processes that are only available to certain Indian tribes. See e.g., 25 C.F.R. Part 167 (Navajo Grazing Regulations); 25 C.F.R. Part 213 (Leasing of Restricted Lands of Members of Five Civilized Tribes, Oklahoma, for Mining); 25 C.F.R. Part 243 (Reindeer in Alaska); 25 C.F.R. Part 247 (Use of Columbia River Treaty Fishing Access Sites); 25 C.F.R. Part 242 (Commercial Fishing on Red Lake Indian

Reservation); 25 C.F.R. Part 241 (Indian Fishing in Alaska). Under Plaintiffs' view of subsections 476(f) and (g), Interior may be faced with the argument that it must make the processes in these regulations available to all federally recognized tribes.

Plaintiffs further characterize the Secretary's "bureaucratic recalcitrance" in declining to remove the Alaska exception from the regulations -- even though Interior believes it has authority to take land-into-trust for Alaska tribes -- as weighing against granting the Federal Defendants' Motion for Reconsideration. Pls.' Resp. at 6-7. In so arguing Plaintiffs confirm that the real issue in this case is whether the Secretary has authority to take land-into-trust in Alaska and thus, what the relationship is between ANCSA and the IRA. Instead of weighing against granting the Federal Defendants' Motion, Plaintiffs' response provides additional reasons in favor of the Court's limiting its holding to the question of the relationship between ANCSA and the IRA and not relying on subsections 476(f) and (g). Further, Plaintiffs claim that Interior has "shown . . . a lack of interest . . . in the development of procedures that accommodate petitions for lands in Alaska." See id. at 7. Yet, as Plaintiffs themselves point out, the Secretary's position is that "[i]f the Court sets aside the Alaska exception, Interior believes the remainder of the Part 151 regulations could apply in Alaska." Id. n.27 (quoting Fed. Defs.' Remedy Br. at 7, n.4). Plaintiffs also baselessly (and for no apparent legal reason) characterize the Federal Defendants' Motion for Reconsideration as a discriminatory tactic to "avoid treating Alaska Native tribes as equals to all other federally recognized tribes." Id. at 7.

Finally, Plaintiffs assert that the Court should disregard the complexity of the legal issues presented as to the application of subsections 476(f) and (g). Pls.' Resp. at 10. Contrary to Plaintiffs' position, the complexity of the legal issues demonstrates that the interpretation of those provisions as they relate to the Secretary's authority to take land into trust calls for the

application of agency expertise, and supports the view Interior should opine in the first instance regarding that interpretation. If and when the agency decides to do so, it will be afforded appropriate deference. See Fed. Defs.' Mot. at 12; see also City of Arlington, Tex. v. FCC, 133 S. Ct. 1863 (2013). Plaintiffs' inability to point to clear language in 25 U.S.C. §§ 476(f) and (g) or to refute the ambiguity found in the terms also further emphasizes why the Court should limit its holding and permit Interior to opine on the full extent and reach of 476(f) and (g).

In sum, the Court should grant the Federal Defendants' Motion for Reconsideration, and revise its opinion to rest solely on the ground that Interior retains its authority to take land-into-trust in Alaska under Section 5 of the IRA and did not legally justify retaining the exception without reaching whether Interior violated 25 U.S.C. §§ 476(f) and (g).

RESPECTFULLY SUBMITTED,

ROBERT G. DREHER
ACTING ASSISTANT ATTORNEY GENERAL

/s/ Maureen E. Rudolph
Maureen E. Rudolph, DC Bar No. 976416
Senior Trial Attorney
Department of Justice
Environment and Natural Resources Division
P.O. Box 7611
Washington, DC 20044

Tel. 202-305-0479
Fax. 202-305-0506
Email: maureen.rudolph@usdoj.gov

DATED: August 19, 2013