NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 13-5360

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AKIACHAK NATIVE COMMUNITY, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,
Defendants-Appellees,

and

STATE OF ALASKA,
Intervenor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Hon. Rudolph Contreras

TRIBAL APPELLEES' RESPONSE BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND AMICI

All parties appearing before the district court and in this Court are listed in the Brief of Appellant the State of Alaska.

II. RULINGS UNDER REVIEW

All references to the rulings at issue appear in the Brief of Appellant the State of Alaska.

III. RELATED CASES

Alice Karairlook v. Kempthorne et al., No. 06-1405 (D.D.C.) (Roberts, J.) (Doc. 12) was consolidated with this case on July 31, 2007.

/s/ HKM
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the undersigned declares the following:

The Akiachak Native Community is a federally recognized Indian tribe that has no parent corporation(s) and no publicly held corporation(s) owns 10% or more of its stock.

The Chalkyitsik Village is a federally recognized Indian tribe that has no parent corporation(s) and no publicly held corporation(s) owns 10% or more of its stock.

The Chilkoot Indian Association is a federally recognized Indian tribe that has no parent corporation(s) and no publicly held corporation(s) owns 10% or more of its stock.

The Tuluksak Native Community is a federally recognized Indian tribe that has no parent corporation(s) and no publicly held corporation(s) owns 10% or more of its stock.

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GLOSSARY

ANCSA ..... Alaska Native Claims Settlement Act

IRA ..... Indian Reorganization Act

FLPMA ..... Federal Lands Policy and Management Act

APA ..... Administrative Procedures Act

AR ..... Administrative Record

JURISDICTIONAL STATEMENT

This Court lacks jurisdiction. During the pendency of this appeal the Secretary of the Interior repealed the regulation that was the original subject of the Appellees' lawsuit. Alaska's appeal is therefore moot.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in Appellant Alaska's addendum.

COUNTER-STATEMENT OF THE ISSUES

1. Whether Alaska's appeal in defense of the Alaska Exception, formerly codified at 25 C.F.R. § 151.1, was rendered moot by the Secretary's repeal of that regulation on December 23, 2014.

2. Whether the 1971 Alaska Native Claims Settlement Act (ANCSA) implicitly repealed the Secretary's authority to acquire lands in trust for Alaska Native Tribes and individuals under Section 5 of the 1934 Indian Reorganization Act (IRA) and Section 1 of the 1936 Alaska Native Reorganization Act.

STANDARD OF REVIEW

This appeal involves "pure legal question[s]" which this Court reviews de novo. *Validus Reinsurance, Ltd. v. United States*, 786 F.3d 1039, 1042 (D.C. Cir. 2015). Grants of summary judgment are reviewed de novo. *Ass'n of Private Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 440 (D.C. Cir. 2012).

STATEMENT OF THE CASE

This appeal seeks judicial review of a regulation that no longer exists. In 1980, the Secretary adopted a regulation which excluded Alaska Natives from petitioning to place their fee land in trust status under Section 5 of the IRA. 25 C.F.R. § 151.1. This provision served as the basis of Appellee Tribes' lawsuit. In 2013, the district court held the provision arbitrary, capricious, and otherwise contrary to law, and thereafter ordered it severed from the remainder of Part 151. In 2014, during the pendency of this appeal and after notice and comment, the Secretary repealed the regulation outright and announced she would begin accepting Alaska Native trust land petitions.

With the Alaska Exception repealed there is no longer any live case or controversy. Alaska's appeal must therefore be dismissed. But, even if the Alaska Exception remained, the district court correctly found that the regulation was invalid because Congress never repealed the underlying authorizing statute for acquiring trust lands in Alaska.

STATEMENT OF FACTS

At the heart of this litigation is the now-repealed Alaska Exception which appeared at the end of 25 C.F.R. 151.1. It provided: "[t]hese 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

its members." This regulation cannot be read in a vacuum. Rather, the Alaska Exception must be read in the context of the Secretary's authority to acquire trust lands in Alaska.

A. The Indian Reorganization Act and its Application to Alaska

Congress enacted the IRA, 25 U.S.C. §§ 471-479, to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). One of the IRA's key provisions was Section 5, which granted the Secretary the authority to acquire lands in trust for the benefit of Indian tribes and individuals. 25 U.S.C. § 465.

From the beginning, Alaska Natives were included in the IRA's definition of "Indian." 25 U.S.C. § 479 ("Eskimos and other aboriginal peoples of Alaska shall be considered Indians."). But, only five of the IRA's sections, plus the definitional section, initially applied to the then-Territory of Alaska. 25 U.S.C. § 473. In 1936, Congress enacted a two-section statute to remedy the IRA's limited application to Alaska. 25 U.S.C. § 473a (Alaska IRA).

Section 1 of the Alaska IRA made seven additional provisions of the IRA applicable in Alaska. *Id.*[1] One of these provisions was Section 5, 25 U.S.C. §

[1] Section 1 reads:

465—the source of the Secretary's authority to acquire lands in trust. To this day, Section 1 of the 1936 Alaska IRA has never been repealed and lies as the cornerstone of this litigation.

Section 2 of the Alaska IRA authorized the Secretary to formally designate Indian reservations in Alaska. 25 U.S.C. § 496 (repealed 1976).[2] Although Congress repealed Section 2 in 1976, it left Section 1 in place. Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792 (1976).

> [S]ections 1, 5, 7, 8, 15, 17, and 19 of the [IRA] shall hereafter apply to the Territory of Alaska: *Provided*, That groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 16, 17, and 10 of the [IRA]. 25 U.S.C. § 473a.

[2] Section 2 read:

> [T]he Secretary of the Interior is hereby authorized to designate as an Indian reservation any area of land which has been reserved for the use and occupancy of Indians or Eskimos by Section 8 of the Act of May 17, 1884 (23 Stat. 26), or by Section 14 or Section 15 of the Act of March 3, 1891 (26 Stat. 1101), or which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof, together with additional public lands adjacent thereto, within the Territory of Alaska, or any other public lands which are actually occupied by Indians or Eskimos within said Territory . . . ."

Congress amended the IRA in 1994 to declare that no then-existing regulation shall have "force or effect" if, among other things, it "diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes." 25 U.S.C. § 476(g). The district court relied on this provision to declare the Alaska Exception unlawful. Doc. 109 at 25.

B. The Alaska Native Claims Settlement Act

Congress enacted the Alaska Native Claims Settlement Act in 1971. Pub. L. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629(h)). ANCSA extinguished Alaska Native aboriginal land rights of use and occupancy in return for payment of $962.5 million, the conveyance of fee title in 44 million acres to newly-formed Alaska Native corporations, and the extinguishment of aboriginal title to all other lands. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 524 (1998).

At the time of ANCSA's enactment, aboriginal claims of use and occupancy were blocking Alaska's land selections under the Statehood Act as well as its related efforts to develop newly-discovered oil and gas reserves. *See generally* DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 167 (3rd ed. 2012). Thus, ANCSA extinguished "[a]ll aboriginal titles . . . and claims of aboriginal title in Alaska based on use and occupancy," 43 U.S.C. § 1603(b),

together with "[a]ll claims . . . that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy . . . ." 43 U.S.C. § 1603(c). As part of the land claims settlement, Congress also revoked all Indian reservations in Alaska other than the Annette Island Reserve of the Metlakatla Indian Community.[3] 43 U.S.C. § 1618(a). Congress did not, however, alter or revoke any existing trust land titles in Alaska lying outside formal reservation boundaries.

Although ANCSA's findings noted an intent not to "establish[] any permanent racially defined institutions, rights, privileges or obligations," 43 U.S.C. § 1601(b), the newly-formed Alaska Native corporations were entirely Native owned and controlled, and provisions to make individual stock fully alienable and to remove Native-only voting restrictions after 20 years were later repealed so that those special rights now continue in perpetuity. *Compare* ANCSA, Pub. L. 92-203, § 7(h), 85 Stat. at 691, with 43 U.S.C. § 1606(h). Similarly, and again notwithstanding Section 1601(b)'s "no racially defined" rights language, Congress adopted special protections for undeveloped Native corporate lands for 20 years, then later extended those protections in perpetuity. *Compare* ANCSA, Pub. L. 92-

[3] The Metlakatla Indian Community is descended from a Canadian tribe that did not settle in Alaska until the 1880s and thus did not participate in the ANCSA land claims settlement. *See* CASE & VOLUCK at 86 n.26.

203, § 21(d), 85 Stat. at 713, with 43 U.S.C. §§ 1620(d), 1636(d). In the meantime, federally recognized Alaska Native tribes were left undisturbed by ANCSA's land settlement provisions. *See* 25 U.S.C. §§ 479a, 479a-1; CASE & VOLUCK at 327-34.

ANCSA expressly addressed—and even repealed—some existing laws concerning Alaska Native land rights, but it also left other laws in place. For instance, ANCSA expressly repealed an act authorizing homestead allotments for Alaska Natives. Act of May 17, 1906, ch. 2469, 34 Stat. 197 (*repealed by* 43 U.S.C. § 1617(a)) (formerly codified at 43 U.S.C. §§ 270-1–210-3). ANCSA also closed the application period for Alaska Natives seeking allotments under the General Allotment Act, 24 Stat. 388 (codified at 25 U.S.C. §§ 348-49), and the Act of June 25, 1910, 36 Stat. 363 (codified at 25 U.S.C. § 336). 43 U.S.C. § 1617(a). But, ANCSA left undisturbed all previously-issued Alaska Native allotments, while also leaving in place all pending, but not yet approved, applications for allotments. 43 U.S.C. §§ 1617(a), 1634.[4]

[4] Allotments are lands conveyed to Alaska Natives based upon individual use and occupancy of the lands. *See* 43 U.S.C. § 270-1 (*repealed by* 43 U.S.C. § 1617(a)); 43 C.F.R. § 2561.2(a)). Title to an allotment is conveyed by the United States to the allottee in a restricted fee title which bars alienation of any interest in the allotment without the United States' written consent. *Id*. *See also* 43 C.F.R. § 2561.3. Restricted fee title is equivalent to federal trust land status. *United States v. Ramsey*, 271 U.S. 476, 471-72 (1926) (rejecting distinction between restricted fee and trust allotments).

On the other hand, ANCSA made no mention of the Alaska Native Townsite Act of May 25, 1926, 44 Stat. 629 (formerly codified at 43 U.S.C. §§ 733–736), under which Alaska Native occupants secured restricted fee title to their lands. *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1015 (D. Alaska 1977), *aff'd* 612 F.2d 1132 (9th Cir. 1980).[5] So too, ANCSA made no mention of the IRA, much less of the 1936 Alaska IRA, or the Secretary's authority under Section 1 of the 1936 Act to acquire lands in trust in Alaska. *Cf.* Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, § 5(e), 94 Stat. 1785, 1791 ("Except for the provisions of this subchapter, the United States shall have no other authority to acquire lands or natural resources in trust for the benefit of Indians or Indian nations, or tribes, or bands of Indians in the State of Maine.") (codified at 25 U.S.C. § 1724(e)). Finally, ANCSA made no mention of existing tribal trust lands in Alaska owned by the United States and lying outside the reservations ANCSA repealed.

As a consequence of Congress's careful actions, today there exist in Alaska: (1) ANCSA lands held by Alaska Native corporations in fee title; (2) thousands of individual Alaska Native allotments held in restricted fee title; (3) hundreds of individual Alaska Native and tribal townsite lots also held in restricted fee title; and (4) a few parcels of Alaska Native tribal trust lands the Secretary acquired

[5] Congress later repealed the Alaska Native Townsite Act in FLMPA § 703(a).

under section 5 of the IRA to facilitate tribal cannery operations. *See* Doc. 109 at 4, *citing* AR 246 (Op. Sol. M-36,975, *Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers*, 112 n.277 (Jan. 11, 1993) (Sansonetti Opinion)).

C. Promulgation of Trust Land Regulations and the Alaska Exception

Ever since Congress enacted Section 5 of the IRA, the Secretary has actively exercised her authority to take land into trust for tribes and individual Indians. *See* CASE & VOLUCK 384-87; WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 443 (6th ed. 2015). But for the IRA's first 45 years, trust land acquisitions were generally done on an *ad hoc* basis with no regulatory regime in place to guide the Secretary's discretion. *See* Land Acquisitions, 43 Fed. Reg. 32,311 (July 19, 1978). In the 1970s, the Secretary began to formulate regulations to bring more order to this process, and one of the interpretive issues the Secretary addressed was her authority to take land into trust for the benefit of Alaska Native tribes and individuals.

Initially, the Department contemplated treating Alaska Native tribes and individuals no differently than it treated all other Indian tribes and individuals, because the then-prevailing view was that Congress's enactment of ANCSA in 1971 did not alter the Secretary's authority to acquire trust lands in Alaska. *Cf.* 43 Fed. Reg. at 32,312 (including those Native villages listed under ANCSA as

"tribes" for purposes of trust land acquisitions). A 1977 memorandum by the Interior Department's Chief of the Division of Tribal Government Services concluded that ANCSA did not amend the 1934 IRA's or the 1936 Alaska IRA's respective land acquisition provisions, and that Alaska tribal governments could therefore still petition the Secretary to acquire tribal lands into trust. AR 10-11. Accordingly, the first proposed land-into-trust regulations published in July 1978 applied equally to tribes inside and outside Alaska. 43 Fed. Reg. at 32,311.

That same year, however, then-Associate Solicitor Thomas W. Fredericks had under consideration a specific request from the Native Village of Venetie Tribal Government, asking the Secretary to acquire in trust status, lands which had recently been conveyed under ANCSA to two Native village corporations, who thereafter dissolved and reconveyed the lands in fee simple back to the Tribe. *See generally Venetie*, 522 U.S. at 524. Writing in the specific context of Venetie's request that the Secretary acquire Venetie's former ANCSA lands in trust, Fredericks concluded that, while ANCSA did not expressly repeal the IRA's application to Alaska, further trust acquisitions would be contrary to ANCSA's intent, and it would therefore be an abuse of discretion for the Secretary to acquire Venetie's former ANCSA lands in trust. Oddly, Fredericks supported his conclusion by citing FLPMA's repeal of Section 2 of the 1936 Alaska IRA (the Secretary's reservation authority), while acknowledging that Section 1 of the

Alaska IRA (the trust lands authority) remained untouched. AR 2-3. Two weeks later, the Acting Solicitor accepted the Fredericks Opinion, and the final 1980 trust land regulations followed suit by adding the Alaska Exception to the final regulations. 45 Fed. Reg. 62,034 (Sep. 18, 1980) (formerly codified at 25 C.F.R. 151.1).

D. Promulgation of New Trust Land Regulations and Withdrawal of the Fredericks Opinion

In 1990, the Native Village of Point Hope petitioned the Secretary to acquire some of its tribal fee lands in trust. AR 28, 79-98, 108, 113, 117-18. The Secretary never acted on the request. Later in October 1994, Appellee Chilkoot Indian Association and two other Alaska tribes filed a formal petition for rulemaking requesting the Secretary repeal the Alaska Exception to permit the consideration of the tribes' trust land petitions. AR 272-96. The petitioning Tribes also urged the Secretary to withdraw the 1978 Fredericks' Opinion as contrary to law. *Id*. at 292. In January 1995, the agency published notice of the petition and solicited comments from the public, 60 Fed. Reg. 1,956 (Jan. 5, 1995), but took no further action on the petition.

In April 1999, the Secretary proposed major revisions to her trust land regulations. 64 Fed. Reg. 17,574 (April 12, 1999). Although the proposed amendments retained the Alaska Exception, the Secretary's proposed rule questioned the validity of the Fredericks Opinion, stating: "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." *Id*. at 17,578 (emphasis added).

On January 16, 2001, the Interior Solicitor issued a formal memorandum rescinding the Fredericks Opinion and expressing "substantial doubt about the validity of [its] . . . conclusion." AR 619-20. The Solicitor reasoned: "[t]he 1978 [Fredericks] Opinion gave little weight to the fact that Congress had not repealed Section 5 of the IRA, which is the generic authority by which the Secretary takes Indian land into trust, and which Congress expressly extended to Alaska in 1936." AR 619.

In spite of this, the Secretary simultaneously published her final revised trust land regulations *retaining* the Alaska Exception. 66 Fed. Reg. 3,452, 3,452 (Jan. 16, 2001). The final rule explained this inconsistency by stating that "for a period of three years" the Secretary would continue to reconsider the validity and wisdom of the Alaska Exception, and she was temporarily maintaining it merely as a matter of policy. *Id*. at 3,454.

The newly-inaugurated Bush Administration initially delayed implementing the new trust land regulations. 66 Fed. Reg. 8,899 (Feb. 5, 2001). Following an additional delay, 66 Fed. Reg. 19,403 (April 16, 2001), the new trust land regulations were formally withdrawn, leaving the original 1980 regulations in

place. 66 Fed. Reg. 56,608 (Nov. 9, 2001). The suit underlying this appeal followed.

E. District Court Proceedings

In 2006, Tribal Appellees sued the Secretary to declare the Alaska Exception contrary to law,[6] arguing it violated 25 U.S.C. § 476(g) by denying Alaska Native tribes and individuals the privilege of petitioning the Secretary to accept land in trust. Doc. 1 at 14. In defense, the Secretary agreed that ANCSA did not repeal her authority to take lands into trust, but instead argued that she had the general discretion to consider Alaska petitions notwithstanding the Alaska Exception, thus making it unnecessary for the court to invalidate the exception. Doc. 55-2 at 24. Alaska intervened to defend the Alaska Exception, but on the basis that ANCSA *did* repeal the Secretary's authority to acquire Alaska lands in trust. Doc. 18 at 1-3.

In March 2013, the district court granted Plaintiffs summary judgment and declared the Alaska Exception unlawful. Doc. 109 at 25. In its Memorandum Opinion, the court observed that, despite "the length and complexity of the history," "the legal questions" were "relatively straightforward." Doc. 109 at 11.

First, the court acknowledged the lack of any explicit repeal of the Secretary's trust land authority. *Id*. at 12. Despite numerous repeals by FLMPA

[6] The district court later consolidated the complaints of Plaintiff Tribes and Alice Kavairlook. Doc. 12

and ANCSA of laws relating to Alaska Native lands, Section 1 of the 1936 Alaska IRA remained untouched. *Id*. This stood in stark contrast to other land claims settlement acts which expressly repealed the Secretary's authority to take land into trust. *Id*. Thus, the court concluded that "the simple fact that the statute conferring land-into-trust authority in Alaska survives is a strong indication that the Secretary's authority to take Alaska land into trust also survives." *Id*. at 19.

Second, the court rejected Alaska's argument that ANCSA's extinguishment of aboriginal "claims" somehow also extinguished the Secretary's authority to take lands into trust, explaining that "petitions to have land taken into trust are not 'claims.'" *Id*. at 15 (discussing 43 U.S.C. § 1603(c)). It pointed out that ANCSA's express repeal of the Alaska Native Allotment Act "would have been unnecessary if Congress understood" the claims extinguishment as the State argued. *Id*. Thus, in the court's view, "Congress did not understand ANCSA's extinguishment of claims to sweep as broadly as the State would have it." *Id*. In addition, the court noted that FLMPA's "explicit repeal[s]" of the Alaska Native Townsite Act and Section 2 of the 1936 Alaska IRA "would have been similarly redundant under the State's interpretation." *Id*. at 15-16.

Finally, the court rejected Alaska's reliance on ANCSA's general purpose statement, finding the "statement of purpose could only effect an implicit repeal if it was in 'irreconcilable conflict' with the Secretary's land-into-trust authority," or

that such an implicit repeal was "absolutely necessary in order that the words of the later statute shall have any meaning at all." *Id*. at 17 (internal quotations and citations omitted). Thus, the court observed: "the terms of the settlement are 'capable of co-existence' with the power to take Alaska land into trust," *id*. at 17, and that while there may be "tension" between ANCSA's general purpose statement and the Secretary's authority to acquire trust lands, "a tension is not an 'irreconcilable conflict.'" *Id*. at 18. Putting the issue more squarely, the court noted: "[i]t is perfectly possible for land claims to be settled by transferring land and money to tribal corporations, while the Secretary retains the discretion—but not the obligation—to take additional lands (or, perhaps, those same transferred lands) into trust." Because it was "possible to give effect" to ANCSA's terms and the Secretary's land-into-trust authority under the IRA, the court concluded it was its "obligation to do so." *Id*. at 18.

Based on these conclusions, the court held the Alaska exception to "have no force or effect," because it "diminishes the privileges available to tribes of Alaska Natives . . . relative to the 'privileges . . . available to all other federally recognized tribes by virtue of their status as Indian tribes.'" *Id*. at 25 (quoting 25 U.S.C. § 476(g)). The court separately considered the question of remedies, concluding the proper remedy was to sever the invalid portion of the regulation, rather than to remand the regulation to the Secretary for curative rulemaking. Doc. 130 at 8.

The district court formally severed the Alaska Exception on September 30, 2013. Doc. 131. Alaska and the Secretary filed their appeals on December 3, 2013. Doc. 1469840; Doc. 1469846.

F. Post-District Court Agency Rulemaking Repealing the Alaska Exception

After initially filing her appeal, the Secretary changed course and on May 1, 2014, she formally proposed repealing the Alaska Exception and accepting Alaska trust petitions. 79 Fed. Reg. 24,648, 24,649 (May 1, 2014). The Secretary explained the Department had come to the same conclusion as the district court—that she retains statutory authority to take land into trust in Alaska—and that the importance of trust lands for tribal self-determination, self-governance, and fulfillment of the federal trust responsibility had convinced the Secretary to adopt a new regulatory policy for Alaska trust land acquisitions. *Id.* at 24,651–24,652. Shortly after publishing the proposal, the Secretary moved to dismiss her appeal, and this Court thereafter granted dismissal. Doc. 1497236.

Soon after the Secretary published the May 1 Notice, Alaska moved the district court to stay the proposed rulemaking, "enjoin the Secretary's rulemaking activities, including accepting comments on the recently proposed rule," and enjoin "the Secretary from accepting and processing applications to take land into trust for Alaska tribes, pending resolution of the appeal." Doc. 139 at 3. The district

court refused to enjoin the Secretary's rulemaking and her processing of trust land petitions, but agreed to enjoin the Secretary from the final act of taking any Alaska lands in Alaska into trust pending the outcome of this appeal. Doc. 145 at 3.

The Secretary's proposed rule eventually received over 100 written comments, including from Alaska. 79 Fed. Reg. 76,888, 76,890 (Dec. 23, 2014). The Secretary also held tribal consultation sessions in Anchorage and in Washington, D.C. *Id.* The majority of the comments supported the Secretary's proposed rule. *Id*.

The Secretary published the final rule on December 23, 2014, concluding the "removal of the Alaska Exception is supported by both legal and public policy considerations." *Id*. at 76,895. The final rule removed "the categorical ban and provides for the Department to make a case-by-case determination on whether to take any given property in Alaska into trust." *Id*. With the Secretary's formal repeal of the Alaska Exception, the basis for this litigation no longer exists.

SUMMARY OF ARGUMENT

The Secretary's repeal of the Alaska Exception renders this appeal moot. The Secretary correctly withdrew her appeal, and the Court cannot render Alaska any effective relief where the underlying regulation has been repealed. The appeal should therefore be dismissed.

On the merits, Alaska cannot meet the extraordinarily high burden it carries to demonstrate that Congress intended ANCSA to implicitly repeal key provisions of the 1934 IRA and the 1936 Alaska IRA. There is no "clear and manifest" congressional intent to repeal these earlier enactments, ANCSA does not "expressly contradict" the IRA's provisions, and construing ANCSA to have repealed the IRA is not "absolutely necessary." *Hunter v. FERC*, 711 F.3d 155, 159 (D.C. Cir. 2013) (citing *Agri Processor Co. v. NLRB*, 514 F.3d 1, 4 (D.C. Cir. 2008)).

Comparing ANCSA to prior and subsequent enactments shows that Congress knew well how to address—and even forbid—the Secretary's ability to acquire land in trust. Further, Congress's studied repeal in ANCSA and FLPMA of certain legislation concerning tribal lands, including its specific repeal of one provision in the Alaska IRA, shows conclusively that Congress went only so far in ANCSA and no further. Congress's decision to leave intact the controlling provisions at issue here—Section 5 of the IRA and Section 1 of the 1936 Alaska IRA—must be respected.

ANCSA's "findings" cannot be stretched to effectuate an implicit repeal of prior law. Congress's statement that the 1971 land claims settlement should not create a "trusteeship" is perfectly reconcilable with Congress leaving in place continuing federal trust responsibilities and relationships grounded in other federal

law—as Congress plainly intended to do. So, too, are the policies reflected in ANCSA and those reflected in the IRA reconcilable, further precluding any finding of an implicit repeal.

ANCSA's Section 1603(c) extinguishment of claims provision cannot be stretched to repeal the Secretary's authority under the IRA to acquire trust lands in Alaska. First, Congress extinguished only "claims" to land, and a request that the Secretary exercise her discretionary authority to acquire tribal land in trust is not a "claim" in any reasonable sense of that word. Moreover, to accept Alaska's construction of the term "claims" in Section 1603(c) would sweep in a repeal of the Alaska Native Allotment Act and the Alaska Native Townsite Act, impermissibly rendering superfluous Congress's separate and express repeal of those Acts. Second, Section 1603(c)'s legislative history shows Congress was well aware of the difference between claims of aboriginal right and title—which Congress intended to extinguish—and statutes leading to the acquisition of recognized title, which Congress intended to leave in place. Third, Alaska's theory that the acquisition of lands in trust would restore aboriginal title to such lands, thereby unraveling ANCSA, reflects a fundamental misunderstanding of aboriginal versus recognized title. Finally, ANCSA's overall "framework" cannot be construed to preclude the acquisition of trust land in Alaska when ANCSA itself provided for the perpetuation of trust and restricted fee lands throughout the state,

alongside the ANCSA lands being held in corporate fee ownership. Moreover, Congress's steady enactments since 1971 show a deliberate intention to preserve and strengthen Alaska tribal authority over lands, belying Alaska's proposition that ANCSA eliminated any role for the tribes.

Lastly, Section 476(g) of the IRA required the district court to void the Alaska Exception. Congress never repealed the Secretary's authority to acquire trust lands in Alaska. Yet, the Alaska Exception denied Alaska tribes the privilege generally available to all other federally recognized Indian tribes of submitting trust land petitions to the Secretary. Congress commanded in Section 476(g) that such regulatory distinctions, unmoored in any statute, "shall have no force or effect." This compelled the district court's conclusion that the Alaska Exception was unlawful.

ARGUMENT

I. THE REGULATION GIVING RISE TO THE UNDERLYING LITIGATION HAS BEEN REPEALED. THIS CASE IS THEREFORE MOOT AND THIS COURT LACKS JURISDICTION OVER THIS APPEAL.[7]

[7] Appellees agree that Alaska also lacks standing to pursue its appeal for the reasons well stated by the Secretary in her Motion to Dismiss Intervenor State of Alaska's Appeal, filed July 17, 2014. Doc. 1503306. Appellees endorse and incorporate by reference the standing and ripeness arguments set forth in the Secretary's Motion.

This Court has "an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority . . . which includes the obligation to consider the possibility of mootness." *Lindell v. Landis Corp. 401(k) Plan*, 640 F. Supp. 2d 11, 14 (D.D.C. 2009) (quoting *Abu Ali v. Gonzales*, 387 F. Supp. 2d 16, 17 (D.D.C. 2005)) (omission in original) (internal quotation marks omitted). The mootness doctrine is rooted in the constitutional requirement that "limits federal courts to deciding actual, ongoing controversies." *Roane v. Leonhart*, 741 F.3d 147, 150 (D.C. Cir. 2014) (internal citations omitted). "A case becomes moot . . . when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Id*. (quoting *Already, LLC v. Nike, Inc.*, 133 S.Ct. 721, 726 (2013). "This occurs when, among other things, the court can provide no effective remedy because a party has already 'obtained all the relief that [it has] sought.'" *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1204 (D.C. Cir. 2013) (internal citations omitted). "Accordingly, even if litigation poses a live controversy when filed, a court is required to refrain from deciding it if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Roane*, 741 F.3d at 150 (internal citations omitted).

This law suit challenged the Alaska Exception contained in 25 C.F.R. § 151.1, a provision excluding Alaska Native tribes[8] from the scope of the Secretary's trust land regulations. In December 2014, the Secretary issued a final rule removing the Alaska Exception from the Department's regulations. 79 Fed. Reg. at 76,895. This independent agency action is a subsequent development that moots the previously justiciable controversy that gave rise to this litigation. *See e.g. Center for Science in the Public Interest v. Regan*, 727 F.2d 1161, 1164 (D.C. Cir. 1984) (case can be mooted by promulgation of new regulations). Indeed, with the deletion of the Alaska Exception from the trust lands regulation, the Secretary "completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S 625, 631 (1979). With the Alaska Exception repealed there can be no "reasonable expectation" that "the alleged violation will recur." *Id*. Thus, a justiciable controversy is no longer present and this case has been rendered moot.

Ignoring the mootness issue presented in its appeal, Alaska insists this Court should reverse the district court's opinion overturning the Alaska Exception. Br. at 26. But that is not possible. The Alaska Exception no longer exists; reversing the district court cannot restore it, and there is accordingly no longer any case or controversy for this Court or the district court to adjudicate. In short, this case is

[8] With the exception of the Metlakatla Indian Community of the Annette Island Reserve.

no longer an appropriate vehicle for assessing Alaska's arguments offered in defense of a non-existent regulation.

If Alaska contests the authority of the Secretary to acquire land in trust for Alaska Native tribes or individuals, Alaska must do so in a concrete case or controversy, as would arise if the Secretary one day takes final action to acquire a new parcel of trust land in Alaska—an action which may never occur. If she does, Alaska may bring an appropriate action at that time to test the validity of the Secretary's action. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2206 (2012) (Secretarial land into trust decisions subject to challenge under the Administrative Procedures Act). *See also Texas v. United States*, 523 U.S. 296, 301 (1998) ("The operation of [a] statute is better grasped when viewed in light of a particular application."). Alaska's ANCSA-based arguments must wait until it brings an independent action involving a concrete case or controversy, challenging the Secretary's exercise of her discretion in a particular setting, and in light of a full administrative record.

Viewed differently, this Court cannot offer Alaska any effective relief. *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) ("[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed.") (internal citations omitted). The Court cannot compel the Secretary to

put the Alaska Exception back into the Code of Federal Regulations. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004) ("courts can compel an agency to act, but have no power to specify what the action must be."); Doc. 130 at 8 ("the deficiencies of the Alaska exception are fatal; the Secretary could not promulgate it again on remand"). Since this Court cannot grant Alaska the requested relief, Alaska's appeal seeks nothing more than an advisory opinion unmoored from any actual case or controversy. The Supreme Court has made clear that federal courts have no authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of California*, 506 U.S. at 12 (internal citation omitted). *See also Flast v. Cohen*, 392 U.S. 83, (1968) ("no justiciable controversy is presented . . . when the parties are asking for an advisory opinion, [or] when the question sought to be adjudicated has been mooted by subsequent developments . . . .") (footnotes omitted).

Alaska's hyperbolic assertion that "the only thing preventing land into trust in Alaska is the district court's injunction," Br. at 20, is an exaggerated and incorrect characterization of the facts and the purported injury Alaska stands to suffer should this case be dismissed and the injunction lifted. As the district court recognized in ruling on Alaska's motion for stay pending appeal, Interior's land-into-trust regulations prescribe a lengthy, difficult, and costly process that must be

completed before the Secretary may exercise her discretion to acquire land in trust. Doc. 145 at 9-10. The regulations are supplemented by a publication called the "Acquisition of Title to Land Held in Fee or Restricted Fee," setting forth detailed requirements which include costly compliance with the National Environmental Policy Act (NEPA), and preliminary and final title opinions. BUREAU OF INDIAN AFFAIRS, ACQUISITION OF TITLE TO LAND HELD IN FEE OR RESTRICTED FEE (FEE-TO-TRUST HANDBOOK) (2014) available at: http://www.bia.gov/cs/groups/xraca/documents/text/idc1-024504.pdf.

The regulatory process requires a particularly detailed application for any trust land acquisitions. *See* FEE-TO-TRUST HANDBOOK at § 3 at 5-32 (outlining procedures required to process a trust lands petition). Once the application is complete, the Secretary must notify the state and local governments having jurisdiction over the land at issue and allow them to provide written comments on the proposed acquisition. 25 C.F.R. § 151.11. The Secretary, after receiving any additional information necessary to a decision and evaluating the proposed trust acquisition in light of numerous criteria prescribed in the regulations, must prepare a written decision. *Id*. at § 151.12. As part of that decision, the Secretary must assess whether the applicant tribe was "under federal jurisdiction" on the date of enactment of the 1934 IRA. *See Carcieri v. Salazar*, 555 U.S. 379, 395 (2009); Op. Sol. M-37,029, *The Meaning of "Under Federal Jurisdiction" for Purposes of*

the Indian Reorganization Act, 18-19 (Mar. 12, 2014); FEE-TO-TRUST HANDBOOK at 11. The Secretary's final decision is then subject to administrative and judicial review in the context of particularized facts. *Patchak*, 132 S.Ct. at 2206. Until this extended process results in a decision by the Secretary to take Alaska Native land into trust, Alaska cannot show imminent or impending injury to its sovereign interests from the application of the land-into-trust regulations.

Because the underlying question presented in this case is moot, this Court lacks jurisdiction to hear Alaska's appeal.

II. ANCSA DID NOT IMPLICITLY REPEAL SECTION 1 OF THE ALASKA IRA GRANTING THE SECRETARY DISCRETIONARY AUTHORITY TO ACQUIRE ALASKA NATIVE LANDS IN TRUST.

From the beginning, Alaska's argument runs off the rails by trying to reframe the issue presented as one involving the plain meaning of ANCSA's statutory language. Br. at 2-3. But that cannot be right, for Alaska concedes ANCSA never expressly repealed Section 1 of the 1936 Alaska IRA or Section 5 of the 1934 IRA, and Alaska concedes that ANCSA likewise never expressly repealed those statutes' trust land acquisition provisions as applied to Alaska (outside Metlakatla). Br. at 48. There is no term in ANCSA whose plain meaning can produce the result Alaska seeks.

The correct issue presented—albeit the one Alaska conspicuously avoids properly framing—is whether ANCSA *implicitly* repealed those statutory

provisions which, absent their repeal, admittedly authorize trust land acquisitions in Alaska. Alaska's avoidance of this core issue is understandable, for the law controlling implicit repeals is extraordinarily deferential to Congress's exclusive and constitutional role as lawmaker. Not only are "repeals by implication" merely unfavored, *Hunter*, 711 F.3d 155 at 159 (quoting *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Commission*, 393 U.S. 186, 193 (1968)), the "intention of the legislature to repeal must be clear and manifest." *Morton*, 417 U.S. at 549 (internal citation omitted); *see also Hunter*, 711 F.3d at 159 (repeals by implication "will not be found unless an intent to repeal . . . is *clear and manifest*") (emphasis in original; citation omitted). As this Circuit has observed, "courts should not infer that one statute has partly repealed another '*unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary*.'" *Agri Processor Co., Inc.*, 514 F.3d at 4 (quoting *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (emphasis added)). This "'cardinal rule'" of statutory interpretation, *Morton* 417 U.S. at 549 (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)), means that a repeal by implication will occur in only the "rarest of circumstances." *Izaak Walton League v. Marsh*, 655 F.2d 346, 367 (D.C. Cir. 1981). "Steady adherence" to this "venerable rule" is "important, primarily to facilitate not the task of judging but the task of legislating. It is one of

the fundamental ground rules under which laws are framed. Without it, determining the effect of a bill upon the body of preexisting law would be inordinately difficult, and the legislative process would become distorted by a sort of blind gamesmanship, in which Members of Congress vote for or against a particular measure according to their varying estimations of whether its implications will be held to suspend the effects of an earlier law that they favor or oppose." *United States v. Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1985).

Alaska ignores all of this for obvious reasons: nothing Alaska points to in ANCSA "contradicts" the application of the trust land provisions of prior enacted federal law, much less shows a "clear and manifest" congressional "intent to repeal" any aspect of the Secretary's authority to take land in trust in Alaska.

A. Nothing in ANCSA's Plain Language Reflects an Intent to Repeal Or Otherwise Revoke The Secretary's Authority Under Section 1 of the 1936 Alaska IRA and Section 5 of the 1934 IRA to Consider Trust Land Acquisitions For Alaska Native Tribes and Individuals.

That Congress did not intend for ANCSA to repeal the Secretary's authority to acquire trust lands in Alaska is perhaps best demonstrated by congressional actions elsewhere showing Congress's ability to make its intentions perfectly clear when ending federal trust services.

For instance, when Congress enacted legislation terminating its trust responsibilities with certain Oregon tribes in 1968, three years before ANCSA, it made its legislative intentions perfectly clear:

> The purpose of this subchapter is to provide for the termination of Federal supervision over the trust and restricted property of certain tribes and bands of Indians located in western Oregon and the individual members of thereof . . . and for a termination of Federal services furnished such Indians because of their status as Indians.

25 U.S.C. § 691. Similarly in 1954, Congress spoke unambiguously when it chose to eliminate all trust lands and trust status for certain Texas tribes:

> Upon the conveyance to the State of Texas of the lands held in trust by the United States for the Alabama and Coushatta Tribes of Texas, the Secretary of the Interior shall publish in the Federal register a proclamation declaring that the Federal trust relationship to such tribe and its members has terminated. Thereafter, such tribe and its members shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians.[9]

25 U.S.C. § 722.

ANCSA shares none of these characteristics. To the contrary, and as Solicitor Sansonetti noted:

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[9] *See also* 25 U.S.C. §§ 564q, 564r (Klamath Indians); 25 U.S.C. §§ 741, 757 (Paiute Indians); 25 U.S.C. §§ 791, 803-804 (Wyandotte Tribe) (repealed 1978); 25 U.S.C. § 821 (Peoria Tribe) (repealed 1978); 25 U.S.C. § 841 (Ottawa Tribe) (repealed 1978); 25 U.S.C. § 891 (Menominee Tribe) (repealed 1973); 25 U.S.C. § 935 (Catawba Tribe); 25 U.S.C. §§ 971, 980 (Ponca Tribe).

> [K]ey elements of a 1950s termination statute were not included in ANCSA. ANCSA did not provide for a termination plan, a vote by members on termination, or a Secretarial proclamation of termination. Eligibility of Native groups and individual natives for federal services was not ended. The Secretary's authority over then-existing IRA entities was not ended and the Secretary's authority to issue new constitutions or charters under the IRA was not repealed.

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Post-ANCSA land claims statutes, too, show Congress fully capable of addressing future trust land acquisitions when that is Congress's intent. For instance, the 1980 Maine Indian Claims Settlement Act specifically stated that "the United States shall have no other authority to acquire lands or natural resources in trust for the benefit of Indians or Indian nations, or tribes, or bands of Indians in the State of Maine." Pub. L. No. 96-420, § 5(e), 94 Stat. 1785, 1791 (codified at 25 U.S.C. § 1724(e)). When similar language was excluded from the Mashantucket Pequot Tribe's lands claims settlement, the Second Circuit gave full effect to Congress's different choice:

> We have compared both statutes and find in the Maine Settlement Act an obvious demonstration that Congress knew how to prohibit the Secretary from taking into trust any lands outside of specifically designated settlement lands. The absence of an analogous provision in the Settlement Act at issue in this case confirms that the Settlement Act was not meant to eliminate the Secretary's power under the IRA to take land purchased without settlement funds into trust for the benefit of the Tribe.

Connecticut ex rel. Blumenthal v. United States, 228 F.3d 82, 90 (2d Cir. 2000). The absence of any language in ANCSA repealing the Secretary's trust land authority in Alaska compels a parallel conclusion here.

As these examples show, Congress knows full well how to legislate when it wishes to remove Secretarial authority to take lands into trust. Its election not to do so in ANCSA must be respected. *See Bryan v. Itasca County*, 426 U.S. 373, 389 (1976) (express language of Indian termination acts was "cogent proof that Congress knew well how to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws and state taxation").

Honoring Congress's election in ANCSA not to repeal the Secretary's trust land authority in Alaska is even more compelled when it is paired with Congress's deliberate repeal of other measures, including the Allotment Act, the Townsite Act, and the Secretary's authority to establish reservations in Alaska. As the district court noted, "[t]he simple fact that the statute conferring land-into-trust authority in Alaska survives is a strong indication that the Secretary's authority to take Alaska land into trust also survives." Doc. 109 at 19. As Appellees demonstrate next, nothing in the three isolated ANCSA provisions Alaska mainly relies upon "contradicts" the application of the trust land provisions of prior enacted law, much less shows a "clear and manifest" congressional intent to silently but implicitly repeal any aspect of the Secretary's 1936 land acquisition authority.

B. ANCSA's Declaration of Purpose Does Not Contradict the Secretary's Discretionary Authority to Acquire Trust Land in Alaska, Much Less Show a Clear and Manifest Intent to Implicitly Repeal That Authority.

Alaska's first effort to find an implicit repeal rests on two clauses tucked into ANCSA's general "findings." Br. at 33 (discussing 43 U.S.C. § 1601). These general statements hardly meet this Circuit's demanding standard for finding a later enactment to have implicitly repealed an earlier enactment. To the contrary, Alaska both over-reads and misreads each provision.

1. Congress's finding that "the settlement should be accomplished . . . without creating a . . . lengthy wardship or trusteeship" does not show a clear and manifest intent to repeal any aspect of the 1934 IRA or the 1936 Alaska IRA.

Alaska asserts that since "[t]aking land into trust . . . would . . . create a 'trusteeship,'" the Secretary's 1936 Alaska IRA trust land authority is "in direct violation of ANCSA" because ANCSA's findings state an intent not to create "trusteeships." Br. at 33.

But this is not what ANCSA says. The relevant ANCSA provision says that "the settlement should be accomplished . . . without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges." 43 U.S.C. § 1601(b). The operative term is "the settlement." It is *the settlement* which is not

to "establish" a "lengthy . . . trusteeship."[10] Nothing in the quoted language speaks to other sources of trust-like relationships, such as the general trust relationship which exists between Alaska's 229 federally recognized tribes and the federal government, nor the trust relationship that is addressed under other federal laws—*besides* ANCSA—such as the 1934 IRA and the 1936 Alaska IRA. The quoted provision by its very terms speaks to ANCSA and ANCSA alone—not the IRA, not the Allotment Act, and not the various other statutes like the Indian Health Care Improvement Act, 25 U.S.C. § 1602, all of which reflect a continuing and active trust relationship between the United States and Alaska Native tribes.

Even within ANCSA's four corners, Congress did not understand the quoted finding as Alaska now re-interprets it. Although Congress spoke generally about not "establishing any permanent racially defined institutions, rights, privileges, or obligations," or "creating a . . . lengthy wardship or trusteeship . . . without adding to the categories of property and institutions enjoying special tax privileges," in actuality ANCSA did *all* of these things. It created exclusively Native corporations, those Native corporations possess perpetual special protections, and their exclusively Native-owned corporate lands enjoy perpetual tax and other special protections. *See* 43 U.S.C §§ 1606(h)(1)-(2), 1620(d).

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[10] The same is true of Congress's stated intent in the same section not to "create" "special tax privileges," another aspect of 43 U.S.C. § 1601(b) Alaska relies upon. Br. at 33.

Alaska's arguments fall far short of meeting this Circuit's high standard for finding the 1934 IRA and the 1936 Alaska IRA implicitly repealed by ANCSA's findings.

2. ANCSA's findings can be reconciled with the Secretary's continuing authority to acquire lands in trust in Alaska.

Alaska argues more broadly that ANCSA's "comprehensive approach to providing land for Alaska Natives," irreconcilably conflicts with the creation of new trust land in Alaska—even lands which, like Appellees' lands, were never a part of the ANCSA settlement. Br. at 32.

The district court found no such conflict, reasoning that land claims may be settled without removing the Secretary's discretion to take fee lands held by individuals or tribes into trust, and "the fact that the settlement would not create a trusteeship does not necessarily mean that it prohibits the creation of any trusteeship *outside* of the settlement." Doc. 109 at 18. The district court thus found the two statutes capable of co-existence, and "[w]here there are two acts upon the same subject, effect should be given to both if possible." *Posadas*, 296 U.S. at 503. Indeed, established principles of statutory construction oblige courts to construe statutes harmoniously whenever possible. *Hammontree v. NLRB*, 925 F.2d 1486, 1496 (D.C. Cir. 1991) (*citing* NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 53.01 (4th ed. 1984)). This rule is complementary to the cardinal rule against repeals by implication.

Whereas ANCSA was focused on settling aboriginal land claims, the IRA was focused on reviving tribal governments. In this regard, the IRA has been described as "one of the most significant pieces of Indian legislation ever enacted by Congress." CASE & VOLUCK at 28 (citations omitted). It ushered in a sweeping change in Indian policy, away from the failed policy of assimilation and federal repression, toward one that supported tribal land acquisition and facilitated tribes in restoring effective structures for self-government. CANBY at 26. The "intent and purpose [of the IRA] . . . was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism,'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (internal citation omitted), and thus "disentangle the tribes from the official bureaucracy." *Id*. at 153. Among other things, the IRA permitted the Secretary of the Interior to acquire new lands in trust, provided economic development loans, and provided an optional path to reorganizing tribal government institutions. CANBY at 26. "The over-riding purpose of the [IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton*, 417 U.S. at 542.

Since the original 1934 IRA did not fully apply to Alaska, Congress enacted the 1936 Alaska IRA applying most of its key remaining provisions to Alaska Native tribes on the same footing as other Native American tribes. 25 U.S.C. §

473a. By 1950, "over 80 villages had petitions pending with the Secretary in which they asked that reserves be established for them under the [IRA]." S. Rep. No. 92-405, 92nd Cong., 1st Sess., at 93 (1971) (1971 SENATE REPORT). The Secretary ultimately established six IRA reservations in Alaska, all of which ANCSA later expressly repealed. CASE & VOLUCK at 106 n.142. In addition, the Secretary took three properties in Southeast Alaska into trust during the 1940s and 1950s, none of which ANCSA repealed. AR 246 at 112 n.277. That Congress permitted these IRA trust lands to remain in existence after ANCSA utterly defeats Alaska's contention that the two statutory regimes—one focused on tribal trust land for governance and economic development, the other focused on corporate fee land as part of a land claims settlement—are in irreconcilable conflict. This conclusion is further supported by the fact that ANCSA left in place the federal government's land-related fiduciary obligations over the thousands of restricted fee Native allotments and restricted townsite lots in Alaska. *Cf. People of South Naknek v. Bristol Bay Borough*, 466 F. Supp. 870, 875 (D. Alaska 1979) (holding Alaska Native Allotments and Townsite lots continued to enjoy federal protections after ANCSA's enactment.).

Further defeating the notion that the IRA and ANCSA irreconcilably conflict is the fact that the IRA provides for chartering federal corporations through which tribes would have the:

> [P]ower to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business . . . .

25 U.S.C. § 477 (emphasis added). This provision, and 25 U.S.C. § 476, have been construed as "encourag[ing] tribal governments . . . to become stronger and more highly organized." *Williams v. Lee*, 358 U.S. 217, 220 (1959). The goal of the IRA—to diminish oppressive federal control over Indian tribes and to enhance and promote tribal independence through use of the "corporate model"—is virtually indistinguishable from ANCSA's goal. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.05 at 81 (Nell Jessup Newton ed., 2012).

Far from being in irreconcilable conflict with ANCSA, the IRA is complementary to ANCSA's land settlement goals. And "[w]here the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed." *Posadas*, 296 U.S. at 504 (citations omitted). This Court should reject Alaska's attempt to read into ANCSA's findings a congressional intent to prohibit the Secretary from exercising her preexisting discretionary authority to acquire Alaska Native lands in trust. The district court correctly found that ANCSA and Section 5 of the IRA can coexist; as such, the courts are obliged to enforce both unless and until Congress directs otherwise.

C. ANCSA's Extinguishment Of "Claims" Based On Any "Statute Or Treaty Of The United States Relating To Native Use And Occupancy" Does Not Contradict The Secretary's Discretionary Authority To Acquire Trust Land In Alaska, Much Less Show A Clear And Manifest Intent to Implicitly Repeal That Authority.

Alaska's second text-based assertion argues that ANCSA's extinguishment of certain land "claims" also extinguished the Secretary's discretionary authority to acquire land in trust. As Alaska puts it, ANCSA necessarily "extinguishe[d] claims based on the land-into-trust statute." Br. at 34 (discussing 43 U.S.C. § 1603(c)). But ANCSA's claims extinguishment provision is just that—an extinguishment of *land claims*—and a trust land petition is not a "claim." ANCSA's claims extinguishment provision does not limit the choices Alaska tribes make regarding their fee lands, and certainly does not limit the Secretary's statutory authority to acquire such lands in trust pursuant to existing law.

1. The exercise of Executive Branch discretion is a request for favorable action and not a "claim" of right.

As the district court correctly noted, "a claim is necessarily an assertion of a right." Doc. 109 at 15 (citing *Orenberg v. Thecker*, 143 F.2d 375, 377 n.6 (D.C. Cir. 1944)). In contrast, a petition for trust land acquisition asserts no right at all. It is merely a request that the Secretary exercise her discretion to grant or deny the petition.

When it comes to "claims," Section 1603(c) of ANCSA is perfectly clear: it addresses "claims" based on aboriginal "use and occupancy," and not just any

imaginable claim or request relating to land. The primary purpose of ANCSA was to extinguish aboriginal claims of use and occupancy, and to extinguish then-pending litigation over such claims, so that land titles in Alaska would be forever settled. CASE & VOLUCK at 75. That very targeted purpose has nothing to do with the manner in which lands are held, much less with the Secretary's authority to acquire lands in trust for the benefit of Alaska tribes.

Alaska's reliance on an elastic definition of the term "claim" is directly at odds with the Supreme Court's instruction that, in the absence of a statutory definition, the "starting point must be the language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Courts must "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 67 (1982) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). The generally accepted meaning of the term "claim" is "[a] demand for money, property, or a legal remedy to which one asserts a right." BLACK'S LAW DICTIONARY 281-82 (9th ed. 2009); *see also Orenberg*, 143 F.2d at 377 n.6 ("'Claim,' in its primary meaning, is used to indicate the assertion of an existing right."). This is the sense in which Congress in ANCSA understood and used the term "claim." *See also* H.R. Rep. No. 92-523, at 5 (1971) (repeatedly explaining the "claims" at issue are *land* claims). While Alaska now wishes to read in a more expansive provision, "'Congress wrote the

statute it wrote'—meaning, a statute going so far and no further." *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2033-34 (2014) (quoting *CSX Transportation, Inc. v. Alabama Department of Revenue*, 131 S.Ct. 1101, 1113–14 (2011)).

In short, there is no connection between a land "claim" involving aboriginal title—claims that were undisputedly extinguished by ANCSA—and a request that the Secretary exercise her discretion to acquire a particular parcel of land into trust. A request that the Executive Branch take a discretionary action is simply not a "claim" of right.

To accept Alaska's reading of Section 1603(c) also improperly renders other congressional actions superfluous. Alaska's construction of Section 1603(c) as eliminating any statute relating to Alaska Native lands would necessarily include the Alaska Native Allotment Act and the Alaska Native Townsite Act. But, ANCSA expressly repealed the Allotment Act though a separate section, 43 U.S.C. § 1617, and Congress repealed the Townsite Act five years later in FLMPA. *See* FLPMA § 703(a). To construe Section 1603(c) to extinguish not only aboriginal claims of use and occupancy, but any request or application for land under any other statutory authority in the United States Code would impermissibly render such separate repeals superfluous. But, "it is of course a well-established maxim of statutory construction that courts should avoid interpretations that render a

statutory provision superfluous." *In re Polar Bear Endangered Species Act Listing and Section 4(D) Rule Litigation*, 720 F.3d 354, 362 (D.C. Cir. 2013) (quoting *Davis County Solid Waste Management v. EPA*, 101 F.3d 1395, 1404 (D.C. Cir. 1996)). No "statute should be interpreted to render even a single word, clause, sentence, or phrase in another statute to be surplusage, superfluous, meaningless, or nugatory." SINGER at § 46.03. Instead, courts are to presume that Congress means what it says and says what it means. *See Negonsott v. Samuels*, 507 U.S. 99, 105 (1993) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) ("Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.")).

In sum, Section 1603(c)'s plain words cannot carry the weight Alaska places upon them. As Appellees next show, ANCSA's legislative history confirms that Congress clearly understood the difference between extinguishing claims based upon aboriginal title, and dealing with other kinds of land rights.

2. ANCSA's legislative history distinguishes between claims of Native use and occupancy and statutes providing mechanisms for Alaska Natives to acquire recognized title.

Alaska relies on select portions of ANCSA's legislative history showing a Senate committee was aware that Alaska Natives held trust lands under Section 5 of the IRA. Br. at 35. But it is one thing to use legislative history to ascertain the

meaning of statutory language, and quite another to resort to that history to write into the law something that is not there. *Shannon v. United States*, 512 U.S. 573, 583 (1994) (declining to give effect to "a single passage of legislative history that is in no way anchored in the text of the statute"); *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (declining to "resort to legislative history to cloud a statutory text that is clear."). If the language is clear—and Section 1603(c) is abundantly clear—legislative history cannot change it.

Contrary to Alaska's selective citations, a careful review of ANCSA's legislative history shows Congress was fully aware of the reach of its own actions—and that legislative history does not go anywhere as far as Alaska would take it. The specific passage Alaska relies upon is excised from a 1971 Senate Report's discussion of the distinction between: (1) statutes that relate to Native use and occupancy, and (2) statutes that provide mechanisms for Alaska Natives to acquire recognized title. With respect to the first category, the 1971 Senate Report noted "the common legal thread which runs through the diversity indicated above [the bewildering diversity among the claims and claimants] is the assertion of rights or claims based upon *aboriginal use or occupancy*." S. Rep. No. 92-405 at 75 (emphasis in original). Here the 1971 Senate Report cites several examples of congressional enactments designed to protect existing Alaska aboriginal Native use and occupancy from intrusion. *Id*. at 90. In enacting these laws, Congress

"intended in each instance that the status quo be maintained with respect to Native use, occupancy, and title until Congress should act upon these questions," but "refused in each instance to determine substantively what lands were in fact used or occupied by the Natives, or what was the nature of the title that the Natives held by virtue of that use and occupancy." *Id.* at 75. These were the first category of statutes relating to aboriginal Native use and occupancy.

With respect to the second category—leading to the acquisition of recognized title—the Senate Report lists various other statutes, starting in 1906, by which Congress provided mechanisms for Alaska Natives to acquire complete title, including the Alaska Native Allotment Act, *id*. at 90-91, the Alaska Native Townsite Act, *id*. at 91, and the Indian Reorganization Act "the terms of which were extended to Alaska in 1936." *Id*. The 1971 Senate Report makes abundantly clear that, while Congress was providing for "the full and final extinguishment of any and all claims based on aboriginal right," *id*. at 110, "[*r*]*emaining in effect and unextinguished* by this Act are all claims which are based upon grounds other than the loss of original Indian title land." *Id*.[11]

ANCSA's legislative history thus confirms that Congress never regarded the IRA as falling within the category of statutes "relating to Native use and occupancy" that were being extinguished in Section 1603(c). Since Section

[11] The Conference Report adopted "in substance, the same language of the Senate amendment." S. Rep. No. 92-581, 92nd Cong., 1st Sess. at 40 (1971)

1603(c) did not deal with enactments like the IRA concerning "recognized title," it left those measures untouched.

3. Those elements of aboriginal title Congress extinguished in ANCSA will not be restored by Secretarial action to acquire lands in trust in Alaska.

Alaska's last argument relating to ANCSA's extinguishment of aboriginal claims is the mistaken assertion that if an Alaska tribe's land is acquired by the Secretary in trust status, that land will resume an "aboriginal title" status, contrary to ANCSA. Br. at 52. Alaska buttresses this assertion by noting that trust land holds the status of "Indian country" under the jurisdiction of the beneficiary tribe. *Id*. (citing 79 Fed. Reg. at 76,893 ("The Department's positon has been that land held in trust by the United States on behalf of a federally recognized tribe is 'Indian country.'")). Alaska's assertion reflects a fundamental misunderstanding of federal Indian law: the acquisition of tribal land in trust does not resurrect the land's aboriginal title.

There is a fundamental distinction between aboriginal title and recognized title. Aboriginal title describes a tribe's right to occupy certain land. It is not a property right. It "amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955). The right stems from the legal theory that discovery and conquest by European nations gave the conquerors the right to own the land, but

not to disturb a tribe's right to occupy it. *See Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 588-91 (1823). The "right of occupancy" later came to be known as "original Indian title" or, more commonly today, "aboriginal title." *See* CANBY at 427-28. A taking by the federal government of lands held by aboriginal title, usually referred to as an "extinguishment" of aboriginal title, does not give rise to any right of compensation under the Fifth Amendment. *Tee-Hit-Ton Indians*, 348 U.S. at 279. In this important respect aboriginal title is to be distinguished from "recognized title." CANBY at 430.

"Recognized title," on the other hand, "is title to Indian land that has been recognized by federal treaty or statute." CANBY at 437-38. For example, the United States may by treaty "recognize" tribal title "by describing a particular land area as being reserved to the tribe." *Id*. But, such a parcel "may or may not have been part of the aboriginal territory of the tribe." *Id*. As noted earlier, there are also many statutory means by which tribes can acquire recognized title. *Supra* at 5-6. Recognized title is "property" within the meaning of the Fifth Amendment, so that its taking by the federal government gives rise to the duty to pay just compensation. *United States v. Creek Nation*, 295 U.S. 103, 110-11 (1935).

Alaska misunderstands Congress's broad authority over Indian affairs, including both (1) the power to extinguish aboriginal title *and* (2) the power to establish recognized title by setting aside reservations or taking lands into trust on

behalf of a tribe. The two concepts are entirely different, and the two land areas are often entirely different, too. Indeed, typically the President or Congress brokered treaties or enacted statutes which extinguished tribal claims of use and occupancy over certain lands, while conveying to the tribes recognized title to other lands elsewhere, to be held in trust status. CANBY at 19-20. Too commonly, the recognized lands reserved to the tribes were far from the lands the tribes originally possessed and occupied under aboriginal title. *Id*.

In sum, the Secretary's acquisition of trust land in Alaska would not resurrect any aboriginal titles extinguished by ANCSA, and trust lands cannot "reverse" ANCSA (as Alaska mistakenly suggests, Br. at 56). Congress never envisioned ANCSA as the only means left for Alaska Natives to secure land. Allotments, townsite lots, old trust land parcels, and new trust land acquisitions were all left in place by a Congress that well knew the difference between settling aboriginal land claims and forever foreclosing all other land acquisitions under alternative federal laws. Alaska would take Congress's measured settlement legislation far beyond what the statutory terms can reasonably bear—while coming far short of its heavy burden to establish an implicit repeal of prior legislation. Of course, if Congress wishes to go further, as one Congressman recently proposed,[12] that is Congress's prerogative. But until then, it remains the Court's role to say

[12] *See* H.R. 1291, 112 Cong., 1st Sess. (Mar. 31, 2011) (proposing to amend the IRA to prohibit trust land acquisitions in Alaska).

what the law is, not what Alaska believes the law should be. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, NA*, 530 US 1, 6 (2000) ("[W]e begin with the understanding that Congress "says in a statute what it means and means in a statute what it says there.") (internal citation omitted).

Alaska's final ANCSA-related argument urges that the Secretary's authority under Section 5 of the IRA is an unconstitutional delegation of legislative power because it proceeds without any "intelligible principle." Br. at 56 (quoting *Whitman v. Am. Trucking Ass'n.*, 531 U.S. 457, 472 (2001)). This tired argument has been uniformly rejected by the courts. *E.g. South Dakota v. Department of Interior*, 487 F.3d 548, 551 (8th Cir. 2007); *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 972 (10th Cir. 2005). The Secretary may accept land in trust for a tribe when it is within a reservation, is already owned by the tribe (as is the case here), or when the Secretary determines that "acquisition is necessary to facilitate tribal self-determination, economic development, or Indian housing," all under carefully laid out regulatory criteria. 25 C.F.R. § 151.3.

D. ANCSA's Overall Framework For Settling Aboriginal Claims Does Not Preclude The Secretary From Exercising Her Discretionary Authority To Consider Applications For The Acquisition Of Land Into Trust In Alaska.

Alaska's final argument moves from the textual to the general—a peculiar decision when arguing that ANCSA is in such irreconcilable conflict with the IRA that finding an implied repeal of the latter is required. Alaska asserts that

ANCSA's approach to providing land for Alaska Natives "leaves no room for the Secretary to administratively revert to an earlier model of Native land ownership in Alaska." Br. at 37. But this is merely a thinly veiled claim that Congress determined that there can be only one form of Native ownership—corporate fee ownership. Inconvenient facts, already discussed, soundly disprove Alaska's assertion. If Congress intended only corporate fee ownership, and no special federal land protections, it logically would have revoked existing trust titles, and existing allotments (much less actually expand them). Congress certainly would not have permitted the issuance of restricted townsite lots for another five years. Similarly, had Congress intended to subject all Alaska Native lands to unitary state law, it would not have exempted Alaska Native corporations from state corporate and property (including tax) law in myriad ways. The fact is Alaska's argument simply reaches too far. And to the extent Alaska is correct—that there is unfinished business to achieve the vision it aspires to—it is for Congress to undertake the legislative work, not this Court.

Indeed, since 1971 nearly every Congress has amended ANCSA in one way or another, reflecting extraordinary attention not just to the Act's implementation but to its interaction with other federal laws. Along the way, Congress effectively extended in perpetuity the inalienability of Native corporate stock and restrictions against non-Natives holding corporate voting rights. 43 U.S.C. §§ 1606(h)(1)-(2).

It created, then later enlarged and extended forever, detailed automatic protections for undeveloped lands from both taxation and virtually any involuntary loss. 43 U.S.C. § 1636(d). It exempted Native corporations from federal securities and investment laws, while also preempting state corporate law in a wide range of other matters including internal corporate affairs, corporate mergers, dissenters' rights, amendments to articles of incorporation, shareholder petitions, valuation of corporate assets, voting requirements, and formation of trusts. 43 U.S.C. §§ 1625, 1627, 1629b, 1620(c), 1629d, 1629e. Yet Congress has never seen fit to alter the application of the IRA to Alaska, including the Secretary's authority to acquire trust lands for Alaska tribes under appropriate circumstances.

Alaska responds that ANCSA's framework "preserves Alaska tribes 'as sovereign entities for some purposes, but as sovereigns without territorial reach.'" Br. at 3 (citing *Venetie*, 522 U.S. at 526 (quoting Fernandez, J. concurrence at 101 F.3d 1286, 1303 (9th Cir. 1996)). But *Venetie* involved tribal government jurisdiction over fee lands which had previously been ANCSA corporate lands; it did not involve trust land, much less trust land which—like all of the lands at issue here—were never part of ANCSA. Congress may well not have envisioned tribal jurisdiction over *ANCSA corporate fee lands*, but Congress said nothing about the Secretary's continuing authority under Section 5 of the IRA to acquire tribal lands in trust.

Alaska's heavy reliance on *Venetie* is misplaced. In *Venetie* the Court examined ANCSA to determine whether former village corporation lands, conveyed in fee to a tribal government, were the equivalent of trust lands such that they would qualify as "Indian country" under 18 U.S.C. § 1151. The Court held that ANCSA fee lands were not the equivalent of trust lands because ANCSA lands did not meet the "superintendence" and "set aside" requirements for "Indian country." *Venetie*, 522 U.S. at 532. Nothing in the Court's opinion even remotely suggests the Court thought the Secretary lacked the power to set aside and manage trust lands for the benefit of a tribe under Section 5 of the IRA, nor that if the Secretary did so, such lands would not qualify as Indian country lands. *Venetie* is particularly inapt where, as here, the issue presented does not even involve former ANCSA lands. Here, the situation more closely resembles the Connecticut Indian Land Claims Settlement Act, 25 U.S.C. §§ 1751-60, where "[n]othing in the Act indicates that Congress intended to establish the outermost boundaries of the Tribe's sovereign territory." *Connecticut*, 228 F.3d at 90.

Further belying Alaska's assertion that ANCSA's framework implicitly forecloses tribal territorial authority anywhere is the fact that a diverse array of post-1971 enactments generally refers to Alaska Native village lands as subject to village tribal jurisdiction. For instance, in the Native American Programs Act of 1974 which established the Administration for Native Americans (ANA), Congress

viewed Alaska Native village lands as subject to tribal jurisdiction. Codified and as amended at 42 U.S.C. § 2991-2992d. Under the 1990 amendments to that Act, the ANA provided financial assistance to Alaska Native villages to "improve[e] the capability of the governing body of the Indian tribe to regulate environmental quality pursuant to Federal and tribal environmental laws," 42 U.S.C. § 2991b(1), including "development of tribal laws on environmental quality," "enforcement and monitoring of environmental quality laws," and "training and education of [tribal] employees responsible for enforcing or monitoring compliance with environmental quality laws." *Id*. at §§ 2991b(d)(2)(A)-(C). The ANA also supports a wide range of other Alaska tribal territorial governance activities, including the development of civil tribal "codes and tribal court systems" and the strengthening of "village government control of land management, including land protection, through coordination of land use planning with village corporations and cities, if appropriate. *See, e.g.*, 60 Fed. Reg. 46,598 (Sep. 7, 1995) (a special ANA "Alaska Native initiative" begun in the early 1980s); 66 Fed. Reg. 34,206, 34,213 (June 27, 2001). The comprehensive Environmental Response, Compensation and Liability Act similarly includes Alaska Native villages as tribes that must be treated as States in connection with various environmental regulation activities in Indian country, such as clean-up of hazardous waste sites and responding to hazardous spills. 42 U.S.C. §§ 9601(36), 9626. And, the Clean Air Act puts all

tribes exercising "substantial governmental duties and powers" over any "areas within the tribe's jurisdiction," including Alaska Native villages, an on equal footing with states in connection with various initiatives. 42 U.S.C. §§ 7601(d), 7602(r). Congress has also provided special federal mortgage insurance if the mortgage is executed by an "Alaska Native tribe" and the property is located on "land acquired by Alaska Natives pursuant to statute by virtue of their unique status as Alaska Natives." 12 U.S.C. § 1715z-13(a)(1)(i). In addition, the House Report to the 1994 Tribal List Act explicitly acknowledged "taxation" as a form of tribal regulation that Alaska Tribes were eligible to exercise by virtue of being federally recognized. H.R. Rep. No. 103-781 at 3 (1994).

As all of these post-ANCSA statutes reflect, ANCSA's aboriginal land claims settlement left ample room for Congress to enact other measures enhancing tribal jurisdiction over land. Although tribal jurisdiction over land is not the issue presented here—an appeal which only concerns the Secretary's authority to acquire lands into trust status—ANCSA's overall framework is not inconsistent with tribal jurisdiction over land.

III. SINCE ANCSA DID NOT REPEAL THE SECRETARY'S AUTHORITY TO ACQUIRE TRUST LANDS IN ALASKA, 25 U.S.C. § 476(g) OF THE IRA RENDERED THE SECRETARY'S ALASKA EXCEPTION VOID.

Alaska's argument that 25 U.S.C. § 476(g) does not require the Secretary to process trust land applications from Alaska tribes rest solely on Alaska's argument

that ANCSA implicitly repealed the Secretary's trust land authority. Br. at 58-59. To be sure, had Congress prohibited trust land acquisitions in Alaska, Section 476(g) would not void a regulation mirroring that prohibition. But, as the district court correctly held, Congress *never* enacted such a prohibition. Doc. 109 at 18.

Since ANCSA did not repeal the Secretary's authority to take Alaska Native land into trust, Appellee Tribes are entitled to enjoy the same privilege other tribes enjoy in submitting trust land petitions to the Secretary. And since the Alaska Exception denied Appellee Tribes that privilege, the district court properly concluded that Section 476(g) rendered the exception "void." Doc. 109 at 24.

CONCLUSION

Alaska's appeal is moot and should be dismissed. In the alternative, and for the reasons stated above, the judgment below should be AFFIRMED.

Respectfully submitted this 3rd day of December 2015.

/s/ HKM

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I hereby certify that on December 3, 2015, I electronically filed the foregoing TRIBAL APPELLEES' RESPONSE BRIEF with the Clerk of the Court by using the CM/ECF system.

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