

ALASKA'S TRIBAL TRUST LANDS: A FORGOTTEN HISTORY

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ABSTRACT

Since the enactment of the Alaska Native Claims Settlement Act in 1971, there has been significant debate over whether the Secretary of the Interior should accept land in trust for the benefit of federally recognized tribes in Alaska. A number of legal opinions have considered the issue and have reached starkly different conclusions. In 2017, the United States accepted in trust a small parcel of land in Craig, Alaska. This affirmative decision drew strong reactions from both sides of the argument. Notably absent from the conversation, however, was any mention or discussion of Alaska's existing trust parcels. Hidden in plain sight, their stories reflect the complicated history of federal Indian policy in Alaska, and inform the debate over the consequences of any future acquisitions.

I. INTRODUCTION

On January 17, 2017, the U.S. Department of the Interior (“Department”) published a notice in the Federal Register informing the public that the Principal Deputy Assistant Secretary for Indian Affairs had acquired 1.08 acres of land in trust¹ for the Craig Tribal Association

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1. As described more fully below, for the purpose of this article, “trust land” refers to land, the title to which is held by the United States in trust for the benefit of a federally recognized Indian tribe or individual Indian. It does not refer to “municipal trust lands” conveyed to the State of Alaska pursuant to section 14(c)(3) of the Alaska Native Claims Settlement Act (“ANCSA”). Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629h (2018)).

(“Craig”).² Though smaller than a football field, this tract of land on Prince of Wales Island in Southeast Alaska represented the culmination of decades of activism and advocacy. It had long been the position of the Department that accepting land in trust in Alaska (“Alaska” or “State”) would “be an abuse of the [Secretary of Interior’s] discretion.”³ This view was primarily based on the Alaska Native Claims Settlement Act’s (“ANCSA” or “Settlement Act”) legislative history and declaration of policy.⁴ It was the interpretation embraced in the Department’s first legal opinion addressing the issue,⁵ and was codified in the Bureau of Indian Affairs’ (“BIA”) fee-to-trust implementing regulations in 1980.⁶ After a failed attempt in the 1990s to administratively remove the so-called Alaska prohibition,⁷ four Alaska Native communities filed suit in 2006 to challenge the Department’s existing rule.⁸ Seven years later, a federal district court judge ruled in their favor, finding that the “Alaska prohibition” violated legislation enacted in 1994 that eliminated distinctions as to the “privileges and immunities” enjoyed by federally recognized Indian tribes.⁹ This determination was the catalyst for

2. Land Acquisitions; Craig Tribal Association, Craig, Alaska, 82 Fed. Reg. 4,915 (Jan. 17, 2017).

3. Memorandum from Thomas W. Fredericks, Assoc. Solicitor, Indian Affairs, to Forrest Gerard, Assistant Sec’y, Indian Affairs (Sept. 15, 1978) [hereinafter Fredericks Opinion].

4. ANCSA, § 2(b) (codified at 43 U.S.C. § 1601(b) (2018)) (“[S]ettlement should be accomplished . . . without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges . . .”).

5. See Fredericks Opinion, *supra* note 3.

6. Land Acquisitions, 45 Fed. Reg. 62,034, 62,036 (Sept. 18, 1980) (originally codified at 25 C.F.R. pt. 120a, subsequently redesignated as 25 C.F.R. pt. 151) (“These regulations do not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or its members.”).

7. See Land Acquisitions, 60 Fed. Reg. 1956 (proposed Jan. 5, 1995) (setting forth the petition for rulemaking and soliciting comments therefor); Acquisition of Title to Land in Trust, 66 Fed. Reg. 3,452, 3,454 (Jan. 16, 2001) (codified at 25 C.F.R. pt. 151 (2021)) (confirming that the Department of the Interior would adhere to its longstanding prohibition on taking Alaska Native lands in trust).

8. Complaint, Akiachak Native Cmty. v. Salazar, 935 F. Supp. 2d 195 (D.D.C. 2013) (1:06-cv-00969).

9. Akiachak Native Cmty., 935 F. Supp. at 210–11 (D.D.C. 2013), *vacated sub nom.* Akiachak Native Cmty. v. U.S. Dep’t of the Interior, 827 F.3d 100 (D.C. Cir. 2016); see also Act of May 31, 1994, Pub. L. No. 103-263, sec. 5(b), § 16(g), 108 Stat. 707, 709–10 (current version at 25 U.S.C. § 5123(g) (2018)) (“Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on the date of enactment of this Act and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.”).

rulemaking,¹⁰ a revised Solicitor's Opinion,¹¹ and a series of actions that culminated in the Department's acceptance in trust of the parcel at Craig.

The Associated Press and other news organizations celebrated the decision,¹² and carried headlines announcing, "Craig Tribal Association Receives Approval for 1st Federal Land Trust in Alaska."¹³ Others were dismayed by the change in policy. Donald Craig Mitchell, a well-known author on Alaska Native history, commented in multiple articles appearing in the *Anchorage Daily News* that the Department's actions were legally suspect, and observed that "the secretary ha[d] never used his [trust acquisition] authority in Alaska."¹⁴ Setting aside the merits of any particular legal argument, it is clear that the significance of the Craig decision was understood by both sides of the debate. Equally apparent, however, is that neither the media nor the loudest voices for either position fully appreciated the history of trust lands in Alaska. Despite near-universal pronouncements to the contrary, Craig was *not* the first instance in which the Secretary of the Interior ("Secretary") had accepted land in trust in the forty-ninth state. In fact, even today these earlier acquisitions remain in trust for the benefit of the Alaska Native communities in which they are located.

On the final full day of the Trump Administration, the Department's Solicitor permanently withdrew his predecessor's legal opinion confirming the Secretary's authority to accept land in trust in Alaska.¹⁵ In so doing, he joined a list of three other Solicitors who similarly published eleventh-hour legal opinions on Alaska Native lands in the George H.W.

10. Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76,888 (Dec. 23, 2014) (codified at 25 C.F.R. § 151.1 (2021)).

11. Memorandum from Hilary C. Tompkins, Solicitor, U.S. Dep't of the Interior, to Sally Jewell, Sec'y, U.S. Dep't of the Interior (Jan. 13, 2017) [hereinafter 2017 Tompkins Opinion].

12. *Craig Tribe Gets Alaska's First Federal Land Trust*, ASSOCIATED PRESS (Jan. 14, 2017), <https://apnews.com/article/65f1b768bd07402c8c74406ea80bd170>; see also Maria Dudzak, *Craig Tribal Association's Land-Into-Trust Application Approved*, KRBD (Jan. 20, 2017), <https://www.krbd.org/2017/01/20/ctas-land-into-trust-application-approved/>.

13. Mary Kauffman, *Historic: Craig Tribal Association Receives Approval for 1st Federal Land Trust in Alaska*, STORIES IN THE NEWS (Jan. 16, 2017), http://www.sitnews.us/0117News/011617/011617_land-into-trust-Craig.html.

14. Donald Craig Mitchell, *The Road to 'Indian Country' in Alaska*, ANCHORAGE DAILY NEWS (July 2, 2016), <https://www.adn.com/opinions/2016/07/02/the-road-to-indian-country-in-alaska/>; see also Donald Craig Mitchell, *Taking Alaska Land into Federal Trust: How Did It Happen? What Can Be Done?*, ANCHORAGE DAILY NEWS (June 29, 2016), <https://www.adn.com/commentary/article/taking-alaska-tribal-land-trust-how-did-it-happen-what-can-be-done/2015/09/02/>.

15. Memorandum from Daniel H. Jorjani, Solicitor, U.S. Dep't of the Interior, to David Bernhardt, Sec'y, U.S. Dep't of the Interior (Jan. 19, 2021) [hereinafter 2021 Jorjani Opinion].

Bush, Clinton, and Obama Administrations.¹⁶ The Biden Administration has signaled its intent to revisit this issue, and has since withdrawn the most recent opinion addressing this important question.¹⁷ As the Solicitor again considers the legal arguments for and against Alaska land-in-trust, the history of the State's existing trust parcels should inform his analysis and conclusions.

II. THE INDIAN REORGANIZATION ACT, THE ALASKA AMENDMENTS, AND THE SECRETARY'S AUTHORITY TO ESTABLISH RESERVATIONS

In 1934, President Franklin D. Roosevelt signed into law the Indian Reorganization Act ("IRA").¹⁸ The IRA was the centerpiece of the federal government's ambitious effort to reverse decades of failed Indian policy through the promotion of tribal self-governance and self-sufficiency. Among its most significant provisions can be found at section 5, which was intended principally to restore tribal land bases that had previously been subject to allotment and sale to non-Indians. Section 5 states: "The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations . . . for the purpose of providing land for Indians."¹⁹ Such lands are "taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired."²⁰ Unless Congress has provided otherwise, these lands are generally exempt from state and local taxation, criminal jurisdiction, and civil regulatory enforcement.²¹

16. Solicitor Thomas L. Sansonetti issued an opinion on Alaska Native lands on January 11, 1993 at the end of the George H.W. Bush Administration. Memorandum from Thomas L. Sansonetti, Solicitor, U.S. Dep't of the Interior, to Manuel Lujan, Jr., Sec'y, U.S. Dep't of the Interior (Jan. 11, 1993) [hereinafter 1993 Sansonetti Opinion]. Solicitor John Leshy issued a memorandum on Alaska land-in-trust on January 16, 2001 at the end of the William J. Clinton Administration. Memorandum from John Leshy, Solicitor, Dep't of the Interior, to Kevin Gover, Assistant Sec'y - Indian Affairs (Jan. 16, 2001). Solicitor Tompkins issued the 2017 Tompkins Opinion on January 13, 2017.

17. Memorandum from Robert T. Anderson, Principal Deputy Solicitor, U.S. Dep't of the Interior, to Debra A. Haaland, Sec'y, U.S. Dep't of the Interior (Apr. 27, 2021) [hereinafter 2021 Anderson Memorandum].

18. Ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 5101-5129 (2018)).

19. *Id.* § 5, 48 Stat. at 985.

20. *Id.*

21. For example, Pub. L. No. 83-280 transferred federal law enforcement authority within Indian country to state governments on a mandatory or optional basis. Act of August 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C.

Since enactment of the IRA in the 1930s, tribes have sought to place land in trust for a variety of reasons. In many cases, restoring ancestral homelands is paramount. In others, motivations include opportunities to exercise greater sovereignty and the freedom to pursue self-determined economic development. In certain circumstances, this can mean the ability to conduct casino-style gambling or to manage those subsistence activities that are important for sustaining indigenous lifeways.

Consistent with congressional intent to reverse the effects of allotment, trust lands established pursuant to section 5 of the IRA are generally understood to enjoy the same status as that of reservations created by treaty or statute.²² And while such parcels located within the exterior boundaries of an Indian reservation are considered by definition to be “on-reservation,” for those tribes that are beneficiaries of an initial trust acquisition, it is common for the Secretary to concurrently issue a “reservation proclamation” pursuant to IRA section 7.²³ This most often occurs in connection with an application submitted pursuant to 25 C.F.R. Part 151 by a tribe that was recently acknowledged as such by the Department.²⁴

Alaska's unique history and its absence of treaty reservations initially resulted in Congress making available to the Territory's “Eskimos and other aboriginal peoples” only five of the IRA's nineteen provisions.²⁵ None of these involved land acquisitions, and of those made applicable to Alaska, three were found to be wholly unworkable.²⁶ Thus,

§ 1162 (2018)). The term “Indian country” is defined at 18 U.S.C. § 1151 (2018) and includes lands acquired in trust pursuant to section 5 of the IRA.

22. The Supreme Court has confirmed that land accepted in trust for the benefit of a tribe (as opposed to individual Indians) qualifies as a reservation for the purposes of 18 U.S.C. § 1151. *United States v. John*, 437 U.S. 634, 649 (1978). This determination is important for tribes, as 18 U.S.C. § 1151 provides the statutory definition of “Indian country” and does not explicitly include trust lands acquired pursuant to IRA section 5 (“[T]he term ‘Indian country’, as used in this chapter, means (a) all land within the limits of any Indian reservation . . . (b) all dependent Indian communities within the borders of the United States . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished . . .”).

23. Indian Reorganization Act § 7 (“The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act . . .”).

24. *E.g.*, Proclaiming Certain Lands as Reservation for the Mashpee Wampanoag, 81 Fed. Reg. 948 (Jan. 8, 2016). The Department's federal acknowledgment regulations are set forth at 25 C.F.R. pt. 83 (2021).

25. Indian Reorganization Act § 13 (“The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16, shall apply to the Territory of Alaska . . .”).

26. Sections 9 and 10 of the IRA support the organization and operation of Indian chartered corporations. In Alaska, section 13 of the IRA had not authorized such corporations to incorporate. Adoption of an “appropriate constitution and

in 1936, Congress extended additional sections of the IRA to include section 5. This Alaska-specific legislation (“Alaska IRA” or “AIRA”)²⁷ also established new criteria by which Alaska Natives could organize,²⁸ and new authorities by which the Secretary could designate Alaska Native reservations.²⁹ Between 1936 and the passage of ANCSA in 1971, sixty-nine groups of Alaska Natives were acknowledged by the Department pursuant to the AIRA’s Alaska-specific criteria.³⁰ In this same period, over 110 petitions were submitted to the Secretary, requesting the withdrawal of approximately four million acres of land for designation as AIRA reservations.³¹

Despite these many requests, however, the Department ultimately established only six such reservations.³² The reluctance to withdraw additional lands was due in part to an early legal challenge to the creation of the Karluk Indian Reservation on Kodiak Island. After years of litigation, the U.S. Supreme Court in 1949 issued a decision that prohibited federal enforcement of fishing regulations against non-Indians

bylaws” under section 16 was available to “[a]ny Indian tribe, or tribes, residing on the same reservation.” In Alaska, reservations did not exist in any comparable way to the expansive system found in the conterminous United States. *See* Procedures for Federal Acknowledgement of Alaska Native Entities, 85 Fed. Reg. 37 (proposed Jan. 2, 2020) (to be codified at 25 C.F.R. pt. 82) (“Congress understood that many Alaska Native entities did not resemble Tribes in the conterminous United States and generally lacked reservations within the meaning of the IRA.”).

27. Act of May 1, 1936, ch. 254, 49 Stat. 1250 (codified at 25 U.S.C. § 5119 (2018)).

28. *Id.* at 1250 (“[G]roups 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 Act . . .”).

29. *Id.* § 2 (“That the 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 [the Act of May 17, 1884], or by [the Act of March 3, 1891], 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 . . .”).

30. 1993 Sansonetti Opinion, *supra* note 16, at 33.

31. JOSEPH H. FITZGERALD, ET AL., FED. FIELD COMM. FOR DEV. PLANNING IN ALASKA, ALASKA NATIVES AND THE LAND: REPORT OF THE FEDERAL FIELD COMMITTEE 443 (1968) [hereinafter FIELD COMMITTEE REPORT].

32. Between 1941 and 1946, the Secretary established six reservations under section 2 of the AIRA at Akutan, Diomedé, Karluk, Unalakleet, Venetie, and Wales. *Id.* at 444 fig. V-3. Additional attempts to establish AIRA reservations at Barrow, Hydaburg, Shishmaref, Shungnak, and White Mountain were unsuccessful. *Id.* at 443.

in Karluk waters.³³ The opinion was based, in part, on a finding that AIRA reservations were only temporary withdrawals and thus lacked the permanence of treaty reservations in the conterminous United States.³⁴ Three years later, in a similar case challenging the creation of the Hydaburg Indian Reservation, a federal district court judge ordered its revocation, finding that the Secretary had impermissibly withdrawn lands managed by the U.S. Forest Service and waters held in trust for the future State of Alaska.³⁵ These decisions came after public outrage over the establishment of the Chandalar Indian Reservation and followed opposition from both the U.S. Fish and Wildlife Service and Alaska's Territorial Governor to further public land withdrawals.³⁶ These realities, coupled with shifting approaches to federal Indian policy, effectively halted the establishment of AIRA section 2 reservations. The termination era had arrived in Alaska,³⁷ and on its heels, Statehood and the Settlement Act.³⁸

A. Southeast Alaska's AIRA Reservations

The court-ordered disestablishment of the Hydaburg Indian Reservation was a severe blow to many of the early proponents of the Alaska IRA.³⁹ Even before the adverse district court ruling, however, the Secretary's decision to withdraw over 100,000 acres for the Hydaburg Cooperative Association ("Hydaburg Tribe") was controversial. Eight

33. *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 122–23 (1949).

34. *Id.* at 102 ("Section 2 of the [AIRA] . . . gives no power to the Secretary to dispose finally of federal lands There is no language in the various acts, in their legislative history, or in [the withdrawal order], from which an inference can be drawn that the Secretary has or has claimed power to convey any permanent title or right to the Indians in the lands or waters of Karluk Reservation.").

35. *United States v. Libby*, 107 F. Supp. 697, 702–03 (D. Alaska 1952).

36. DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* 101 (3d ed. 2012).

37. The "termination era" of federal Indian policy began in the mid-1940s and was most overtly expressed in House Concurrent Resolution 108: "[I]t is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship . . ." H.R. Con. Res. 108, 83d Cong., 67 Stat. 3132 (1953).

38. See Alaska Statehood Act of 1958, Pub. L. No. 85-508, 72 Stat. 339; Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601–1629h (2018)).

39. Felix Cohen, Assistant Solicitor and the principal architect of the IRA and AIRA, wrote that the Alaska IRA was intended to "remove[] almost the last significant difference between the position of the American Indian and that of the Alaska native." FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 406 (1942).

years earlier, the Department had expended considerable resources in evaluating the Hydaburg Tribe's petition for an AIRA reservation, along with those submitted by the Organized Village of Kake ("Kake Tribe") and the Klawock Cooperative Association ("Klawock Tribe").⁴⁰ Together, these Haida and Tlingit communities sought "more than two million acres of land and the exclusive right to fish within three thousand feet of the shore."⁴¹

To help assess whether such substantial reservations were permissible under the terms of the AIRA, the Department in 1944 and 1945 held public hearings throughout Alaska and the State of Washington.⁴² At their conclusion, the Department's Special Examiner recommended that the Secretary withdraw only modest amounts of land, and decline to include in the designation sole access rights to the fisheries.⁴³ He observed that "the Natives of Hydaburg, Klawock and Kake have ceased to maintain exclusive occupancy of approximately 92 percent of the foregoing described areas, either by reason of voluntary abandonment of lands once claimed or by acquiescence in the superior power and authority of the federal government"⁴⁴ The Secretary disagreed, and, in 1946, he sought to reserve for each village between 75,000 and 100,000 acres, and to confirm their implied fishing rights.⁴⁵ Whereas the Hydaburg Tribe accepted the Secretary's proposal in 1949, the Kake Tribe and the Klawock Tribe rejected their proffered reservations by a majority vote of their respective residents at special elections supervised by the Department.⁴⁶

B. Salmon Canneries and the OIA

Prior to 1936, the Department's efforts to encourage economic development among Alaska Native communities were limited to reindeer husbandry and vocational training.⁴⁷ Following enactment of the AIRA,

40. FREDERICK PAUL, THEN FIGHT FOR IT! THE LARGEST PEACEFUL REDISTRIBUTION OF WEALTH IN THE HISTORY OF MANKIND AND THE CREATION OF THE NORTH SLOPE BOROUGH 104 (2003).

41. CASE & VOLUCK, *supra* note 36, at 101.

42. *Id.*

43. PAUL, *supra* note 40, at 111.

44. *Id.*

45. CASE & VOLUCK, *supra* note 36, at 101.

46. PAUL, *supra* note 40, at 111.

47. Sheldon Jackson, the General Agent for Education in Alaska from 1885 to 1907, introduced reindeer to the Territory in 1891. CASE & VOLUCK, *supra* note 36, at 86. He established numerous "reindeer reserves" via executive order, withdrawing from the public domain approximately 1.25 million acres for such purposes as "[t]raining Natives in the 'civilizing arts' of animal husbandry." *Id.* at 87. Beginning in 1925, the Secretary additionally established four "public

however, Congress made explicit the authority of the Department's Office of Indian Affairs ("OIA") in Alaska.⁴⁸ Subsequent to this clarification, the OIA approved dozens of corporate charters pursuant to IRA section 17,⁴⁹ and distributed hundreds of thousands of dollars in loans to Alaska Native communities pursuant to IRA section 10.⁵⁰ Industries of particular interest for the OIA included logging and commercial fishing.⁵¹ These priorities are reflected in the Secretary's AIRA reservation designations, with the majority of the proposed land withdrawals intended to substantially improve the economic potential of the identified Alaska Native villages.

These AIRA maritime communities were more than familiar with commercial fishing and packing operations. Klawock, for example, was the location of Alaska's very first salmon cannery.⁵² By 1949, the Territory was home to thirty-seven such canneries, many of which were established near historic Haida and Tlingit fish camps.⁵³ These businesses relied heavily on Alaska Native labor,⁵⁴ though only one – the Annette Island Packing Company – was tribally-owned prior to enactment of the AIRA.⁵⁵ Beginning in 1938, the OIA sought to change these dynamics. That year, the Alaska Natives at Hydaburg received a corporate charter pursuant to

purpose" reservations pursuant to Congressional authorization encouraging the "establish[ment of] a system of vocational training for the aboriginal native people of the Territory of Alaska." *Id.* at 96-97. These reserves included Eklutna, Point Hope, Tetlin, and White Mountain. *Id.*

48. 2017 Tompkins Opinion, *supra* note 11, at 17.

49. See THEODORE H. HAAS, U.S. DEP'T OF THE INTERIOR, U.S. INDIAN SERV., TEN YEARS OF TRIBAL GOVERNMENT UNDER I.R.A. 29-30 (1947).

50. U.S. Dep't of the Interior, Office of Indian Affairs, *Alaska Natives Successfully Complete First Season in Cooperatively-Owned Salmon Cannery*, INDIANS AT WORK, Nov. 1939, at 9 [hereinafter INDIANS AT WORK].

51. See *Federal Indian Law for Alaska Tribes: Early Education and Effects of the Nelson Act (1905)*, UNIV. OF ALASKA FAIRBANKS (Fall 2020), https://www.uaf.edu/tribal/112/unit_2/earlyeducationandeffectsofthenelsonact1905.php (describing the OIA's establishment of sawmills and salmon canneries).

52. The North Pacific Trading and Packing Co. established the first salmon cannery in Alaska at Klawock in 1878. 1 ALASKA DEP'T OF FISHERIES ANN. REP. 30 (1949).

53. *Id.*

54. RENISA MAWANI, COLONIAL PROXIMITIES: CROSSRACIAL ENCOUNTERS AND JURIDICAL TRUTHS IN BRITISH COLUMBIA, 1871-1921, at 41-45 (2009).

55. The Annette Island Packing Company was founded in 1890 by Tsimshian Indians who had settled on Annette Island after emigrating from British Columbia in 1887. For a history of this unique community told by Tsimshian elder Clarence Nelson, see Leila Kheiry, *A Tale of Two Metlakatlas: Part 1*, ALASKA PUB. MEDIA (Aug. 4, 2016), <https://www.alaskapublic.org/2016/08/04/a-tale-of-two-metlakatlas-part-1/>. For historic cannery ownership information see ALASKA DEP'T OF FISHERIES, *supra* note 52, at 30-36.

IRA section 17.⁵⁶ In the companion constitution issued pursuant to IRA section 16, this group described themselves as “Indians having a common bond of occupation in the fish industry, including the catching, processing, and selling of fish and the building of fishing boats and equipment.”⁵⁷ This group purchased the Hydaburg Canning Company, thus becoming the second tribally-owned salmon cannery in Alaska.⁵⁸ Financed by \$142,000 in loans authorized by section 10 of the IRA, the company in 1939 packed over 35,000 cans of fish and proved in its first year to be a going concern, with one OIA official in Washington, DC even commenting that “it was the best salmon he had ever tasted.”⁵⁹

The success of the Hydaburg Canning Company encouraged Haida and Tlingit at Angoon, Kake, and Klawock to pursue similar paths of economic development. In 1949, the Angoon Community Association (“Angoon Tribe”) purchased Hood Bay Canning Co.⁶⁰ In 1950, the Kake Tribe purchased the local assets and real estate of P.E. Harris & Co.⁶¹ Later that year, the Klawock Tribe purchased the Charles W. Demmert Packing Co.⁶² The Department understood that inclusion of navigable waters in any AIRA reservation would further self-sufficiency among geographically well-positioned Alaska Native villages. And by providing such villages with exclusive offshore fishing rights, the chartered corporations to which the OIA had distributed loans would be placed at a competitive advantage.⁶³ As discussed above, however, the Secretary’s attempts to limit non-Indian access to various fisheries through AIRA reservation designations were frustrated by the courts in *Grimes Packing* and *Libby*.⁶⁴ Nonetheless, the initial profitability of the Hydaburg cannery demonstrated that continued viability of operations was possible. The near-certainty of their success, however, was now in doubt.

56. HYDABURG COOP. ASSOC., CORPORATE CHARTER (Apr. 14, 1938).

57. HYDABURG COOP. ASSOC., CONSTITUTION AND BY-LAWS pmb. (Apr. 14, 1938).

58. ALASKA DEP’T OF FISHERIES, *supra* note 52, at 36.

59. INDIANS AT WORK, *supra* note 50, at 9.

60. ALASKA DEP’T OF FISHERIES, *supra* note 52, at 34.

61. Deed, sold Feb. 15, 1950 by P.E. Harris & Co. to United States of America in trust for the Organized Village of Kake [hereinafter Kake Deed].

62. See ALASKA DEP’T OF FISHERIES, *supra* note 52, at 35 (noting how the Charles W. Demmert Packing Co. was founded in 1924 by Charles W. Demmert, an Alaska Native residing at Klawock).

63. FREDERICA DE LAGUNA, THE STORY OF TLINGIT COMMUNITY: A PROBLEM IN THE RELATIONSHIP BETWEEN ARCHEOLOGICAL, ETHNOLOGICAL, AND HISTORICAL METHODS, SMITHSONIAN INSTITUTION BUREAU OF AMERICAN ETHNOLOGY, BULLETIN 172, 10 (1960); see also INDIANS AT WORK, *supra* note 50, at 9.

64. See generally *Grimes Packing Co. v. Hynes*, 67 F. Supp. 43 (D. Alaska 1946), *aff’d*, 165 F.2d 323 (9th Cir. 1947), *vacated*, 337 U.S. 86 (1949); *United States v. Libby*, 107 F. Supp. 697, 702-03 (D. Alaska 1952).

C. The Secretary's Authority Under IRA Section 5

By the time the Supreme Court issued its 1949 opinion in *Grimes Packing*, the Department already had reason for serious concern over the efficacy of reservation designations made pursuant to section 2 of the AIRA. In 1946, a federal district court flatly rejected the position of the United States regarding the Karluk Indian Reservation.⁶⁵ So too did a seemingly sympathetic but unanimous panel of judges on the U.S. Court of Appeals for the Ninth Circuit.⁶⁶ These setbacks likely caused the OIA to consider alternative arrangements, and, by 1948, it appears that the Secretary's authority under section 5 of the IRA was found to be a workable means by which the Department could protect its significant commercial investments. That year, 10.24 acres of land that included the Angoon cannery were deeded to the United States in trust for the Angoon Tribe.⁶⁷ In 1950, 15.9 acres were similarly deeded for the benefit of the Kake Tribe.⁶⁸ And finally, that same year, the United States accepted in trust 0.92 acres for the benefit of the Alaska Natives at Klawock.⁶⁹

As OIA officials feared, without the benefit of exclusive fisheries access within AIRA-designated reservations, the Alaska Native-owned canneries struggled. At Hydaburg, for example, aggregated operating losses from 1944–1965 totaled \$1,104,047.⁷⁰ This indebtedness far exceeded the collateralized assets of the Hydaburg Tribe, and consequently, the BIA as sole creditor declared the consolidated IRA section 10 loan to be in default. Thereafter, the BIA forced the closure of

65. *Grimes Packing Co. v. Hynes*, 67 F. Supp. 43 (D. Alaska 1946).

66. *Hynes v. Grimes Packing Co.*, 165 F.2d 323 (9th Cir. 1947), *vacated*, 337 U.S. 86 (1949). The empaneled judges included Homer Bone, William Denman, and William Healy, all appointed by President Franklin D. Roosevelt, for which the IRA and the Alaska IRA were signature accomplishments of his Department of the Interior.

67. Deed, sold Mar. 24, 1948 by August Buschmann, H.A. Fleager, and Arthur P. Wolf to United States of America in trust for the Angoon Community Association [hereinafter Angoon Deed]; *see also* 1993 Sansonetti Opinion, *supra* note 16 (detailing how 13.24 acres were identified as Angoon trust lands; this figure was subsequently revised to 10.24 acres).

68. Kake Deed, *supra* note 61 (identifying the trust land acreage in the 1993 Sansonetti Opinion, 112, n.277); *see also* 1993 Sansonetti Opinion, *supra* note 16.

69. Deed to Restricted Indian or Eskimo Land in Alaska, sold Mar. 29, 1950 by Charles W. Demmert, Emma F. Demmert, and George Demmert to United States of America in trust for the Klawock Cooperative Association [hereinafter Klawock Deed]. In the 1993 Sansonetti Opinion, 1.91 acres were identified as Klawock trust lands. This figure was later corrected to 0.92 acres following Bureau of Land Management ("BLM") survey filed on Feb. 21, 2007. U.S. DEP'T OF THE INTERIOR, TITLE STATUS REPORT FOR KLAWOCK COOPERATIVE ASSOCIATION, app. D., certified Dec. 6, 2009.

70. *Hydaburg Co-op. Ass'n v. United States*, 667 F.2d 64, 65 (Ct. Cl. 1981).

the cannery and the lease of the facilities to a third party.⁷¹

After the flurry of activity designating and defending AIRA reservations in the 1940s and early 1950s, Congress confirmed and enlarged a final reservation in Alaska at Klukwan, near Haines, in 1957.⁷² As speculated by noted Alaska Native legal scholars David S. Case and David A. Voluck, this designation may have been the result of U.S. Steel Corporation's interest in securing an iron ore lease, which required there to be a statutory and permanent withdrawal of land.⁷³ Whatever the justification, this was to be the last serious consideration of reservations in Alaska until 1958, when the U.S. Atomic Energy Commission's controversial proposal to detonate a series of nuclear devices near Point Hope triggered an Alaska Native awakening.⁷⁴

III. ANCSA AND THE MEMORY OF ALASKA'S TRUST PARCELS

After years of difficult negotiations, the ANCSA was signed into law by President Richard M. Nixon on December 18, 1971.⁷⁵ Among other things, it extinguished all "claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska"⁷⁶ and revoked all but one of Alaska's reservations.⁷⁷ In exchange, ANCSA provided for the organization of State-chartered corporations ("ANCs") in which Alaska Natives were assigned shares.⁷⁸ It further transferred to such ANCs nearly \$1 billion and 44 million acres of land. To accomplish this herculean land transfer,⁷⁹ ANCSA outlined a process by which ANCs

71. *Id.* at 66.

72. Act of Sept. 2, 1957, Pub. L. No. 85-271, 71 Stat. 596.

73. CASE & VOLUCK, *supra* note 36, at 85 n.24.

74. DONALD CRAIG MITCHELL, TAKE MY LAND, TAKE MY LIFE: THE STORY OF CONGRESS'S HISTORIC SETTLEMENT OF ALASKA NATIVE LAND CLAIMS, 1960-1971, at 13-15, 34-35 (2001).

75. Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629 (2018)).

76. 43 U.S.C. § 1603(c) (2018).

77. *See id.* § 1618(a) (noting how the Metlakatla Indian Community of the Annette Island Reserve was not included in the settlement and was therefore not subject to reservation revocation).

78. Monica E. Thomas, *The Alaska Native Claims Settlement Act: Conflict and Controversy*, 23 POLAR REC. 27, 27-28 (1986) (noting how section 7(a) of ANCSA provided for the establishment of twelve for-profit regional corporations that were intended to be coterminous with the geographic footprint of existing Alaska Native associations (e.g., Arctic Slope Native Association, Tanana Chiefs' Conference) and section 8(a) provided for the establishment of village corporations).

79. *See* 43 U.S.C. § 1611(a)(1) (2018). Section 12(a)(1) of ANCSA provided that the land selection process be completed within three years of enactment. This transfer of more than 44 million acres of land to ANCs represents an area comparable in size to the State of Oklahoma (44,734,842 acres).

were permitted to select the surface and subsurface estates of available public lands.⁸⁰

Consistent with ANCSA section 16(b), the Kake Village Corporation selected approximately 23,000 acres in and around Kake township, including a 1.09-acre tract that was part of the historic cannery.⁸¹ A title examination would later reveal that the cannery lands had been deeded in trust to the United States in 1950.⁸² This finding effectively prohibited the transfer of the parcel to the Kake Village Corporation, as the Department took the view that doing so would violate the Nonintercourse Act.⁸³ This position caused confusion among the parties, with the Kake Village Corporation “believ[ing] that under the terms of [ANCSA], it was entitled to receive unconditional fee simple title to the surface estate in the land.”⁸⁴ This was only the first of many complications in the selection and conveyance process, with disputes later arising over the meaning of “reserves,” as used in ANCSA section 19.

A. Section 19 and Land Selection

Section 19 of ANCSA is captioned “Revocation of *Reservations*” (emphasis added). It provided both for the disestablishment of “the various *reserves* set aside by legislation or by Executive or Secretarial Order,”⁸⁵ and for “any Village Corporation . . . to acquire title to the surface and subsurface estates in any *reserve* set aside for the use or benefit of its stockholders or members.”⁸⁶ As exhibited here, the terms “reservation” and “reserve” are used interchangeably, which is consistent with historic usage in Alaska.⁸⁷ The character of the State’s many reservations varied considerably and included AIRA reservations,

80. See *id.* §§ 1610, 1611, 1613, 1615, 1618(b) (2018) (detailing how these public land selections would be conveyed to the ANCs in fee simple status).

81. See Letter from Derril Jordan, Assoc. Solicitor of Indian Affairs, to Ms. Frances Ayer (July 2, 1998) (confirming the status of U.S. Survey 963, which provided 14.81 acres Deeded to the United States in Trust for the Organized Village of Kake) [hereinafter the Jordan Memorandum].

82. *Id.*; see also Letter from Shannon & Wilson, Inc., to Alaska Dep’t of Env’t Conservation, 6 (Feb. 2014) (noting Phase I Environmental Site Assessment, Keku Cannery Main Building, Kake, and the history of deed transfers for the Kake cannery area).

83. Jordan Memorandum, *supra* note 81.

84. *Id.*

85. 43 U.S.C. § 1618(a) (2018) (emphasis added).

86. *Id.* § 1618(b) (emphasis added).

87. Colloquially, “reserve” is more commonly used to refer to lands set aside for the use and occupancy of Alaska Natives. Formally, however, the Executive Orders or Federal Register notices by which such lands were withdrawn reference “reservations.”

reindeer reserves,⁸⁸ Executive Order reservations,⁸⁹ “public purpose” reserves,⁹⁰ and statutory reservations.⁹¹ A discussion of the ways in which the Department and federal courts have distinguished among these reservations/reserves is beyond the scope of this inquiry.⁹² However, during ANCSA’s land selection process, the Department focused its attention on whether certain of these categories satisfied section 19(b)’s requirement that eligibility thereunder be limited to those reservations/reserves “set aside for the use or benefit of” resident Alaska Natives.⁹³

Clarifying this provision was important, as the acreage any single Village Corporation could select pursuant to ANCSA section 14(a) was governed by the population of the coterminous Alaska Native village.⁹⁴ For villages of 600 or more residents, the associated Village Corporation was permitted to select up to 161,280 acres; for villages of less than ninety-nine residents, selection was limited to 69,120 acres. By contrast, ANCSA section 19(b) permitted a Village Corporation to select the entirety of lands previously set aside for its members by reservation.⁹⁵ In some instances, these acreage differences were significant, as was the case for the 1.14 million-acre St. Lawrence Island reindeer reserve⁹⁶ and the 1.8 million-acre Chandalar Indian Reservation.⁹⁷ And while the AIRA section

88. CASE & VOLUCK, *supra* note 36.

89. See Field Committee Report, *supra* note 31, at 445 figs. V-4 & V-5 (detailing how between 1905 and 1930, the President established nearly twenty Executive Order reservations ranging in size from 17.21 acres (Chilkat Fisheries) to 768,000 acres (Tetlin)).

90. CASE & VOLUCK, *supra* note 36.

91. Congress established two reservations by statute in Alaska: Annette Island Reserve for the Indians of Metlakatla, and the Klukwan Indian Reservation for the Chilkat Indian Village. See Act of Mar. 3, 1891, ch. 561, § 15, 26 Stat. 1101 and *supra* note 72.

92. See CASE & VOLUCK, *supra* note 36, at 81–112 (providing a more fulsome analysis of these distinctions).

93. *Id.* at 87–89. President Theodore Roosevelt established a 1.14 million-acre reindeer reserve on St. Lawrence Island in the Bering Sea in 1903. Whether such a reserve was established “for Native use or for the administration of Native affairs” was determinative for the Village Corporations representing the native villages of Gambell and Savoonga to receive patents to the surface and subsurface estates within the former reserve.

94. 43 U.S.C. § 1611 (2018).

95. Ultimately, seven Village Corporations representing the Alaska Native communities of Arctic Village, Elim, Gambell, Klukwan, Savoonga, Tetlin, and Venetie elected to receive title to former reservation lands pursuant to ANCSA section 19(b).

96. FIELD COMMITTEE REPORT, *supra* note 31, at 448 fig. V-9.

97. The FIELD COMMITTEE REPORT identified the Venetie reserve as comprising 1.4 million acres. *Id.* at 33 n.94. This figure was later corrected to identify 1.8 million acres of reserved lands. See *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 523 (1998) (identifying 1.8 million acres of land owned by the Native

2 Chandalar Indian Reservation was clearly “set aside for the use or benefit” of Alaska Natives residing at Arctic Village and Venetie, the purpose of the Executive Order-created reindeer reserve on St. Lawrence Island was less certain. After a thorough consideration of the history of the reindeer reserve, the Department ultimately confirmed that it was established “for Native use or the administration of Native affairs,” and thus eligible for selection under ANCSA section 19(b).⁹⁸ In contrast to the relatively formal process by which the Department examined the character of the St. Lawrence Island reindeer reserve, the record appears silent as to whether there was any consideration of the applicability of ANCSA section 19(a) to Alaska’s IRA section 5 trust parcels.

B. Rediscovering Kake

As described above, the circumstances by which the Department rediscovered the trust status of the Kake cannery reveal that by the early 1970s, there was little institutional memory of the OIA’s actions at Angoon, Kake, and Klawock.⁹⁹ Even the exhaustive, federally-funded report in 1968 that informed the work of the Senate committee charged with drafting ANCSA makes no mention of the trust parcels.¹⁰⁰ In light of the findings of the title examination at Kake, Assistant Secretary for Indian Affairs Forrest Gerard expressed his view that “legislation was indeed the only recourse available to [the Village Corporation] to correct these problems.”¹⁰¹ Congress agreed with this assessment and shortly thereafter passed a bill that permitted the Secretary to transfer ownership of a 1.09-acre segment of the trust parcel at the direction of the Kake

Village of Venetie Tribal Government).

98. The Department confirmed that the St. Lawrence Island reindeer reserve was established “for Native use or the administration of Native affairs” by letter dated September 14, 1973 from Secretary of the Interior Rogers Morton to the Bering Straits Native Corporation. *CASE & VOLUCK*, *supra* note 36, at 88 n.39. After decades of cadastral surveying, the BLM transferred title to the Village Corporations representing Gambell and Savoonga on July 27, 2016. James Brooks, *BLM Finalizes Transfer of St. Lawrence Island to Village Corporations*, *JUNEAU EMPIRE* (July 28, 2016 2:05 PM), <https://www.juneauempire.com/news/blm-finalizes-transfer-of-st-lawrence-island-to-village-corporations/>.

99. This assertion is further supported by the decades of uncertainty surrounding the status of the cannery parcel at Angoon. *See* Memorandum from Weldon B. Loudermilk, Regional Dir., Bureau of Indian Affairs Alaska Region, to Alaska State Dir., Bureau of Land Mgmt. (Nov. 10, 2015) [hereinafter *Angoon Determination*] (overviewing the administrative history of the parcel).

100. FIELD COMMITTEE REPORT, *supra* note 31.

101. Letter from Forrest J. Gerard, Assistant Sec’y for Indian Affairs, to Morris K. Udall, Chairman, House of Representatives Comm. on Interior and Insular Affairs (Sept. 13, 1978) [hereinafter *Gerard Letter*], *in* 124 CONG. REC. 33,468 (1978).

Tribe.¹⁰² Though adjacent Department actions raise questions regarding the sufficiency of Assistant Secretary Gerard's analysis,¹⁰³ any incongruity can be explained by a desire for finality among stakeholders. Against this backdrop, the bill introduced and supported by Alaska's Congressional delegation was the surest way to definitively resolve what Senator Stevens described as "a serious problem . . . so that the entire community of Kake is not held hostage to Congress' program of operation."¹⁰⁴

The BIA would later determine that the parcels at Angoon, Kake, and Klawock were "valid existing rights under ANCSA § 14(g),"¹⁰⁵ which describes various limitations on conveyances that contain encumbrances such as "a lease, contract, permit, right-of-way, or easement."¹⁰⁶ However, this finding was only publicly communicated as a footnote in the 1993 Sansonetti Opinion, a 133-page legal opinion examining the scope of tribal jurisdiction in Alaska.¹⁰⁷ There, it was presented without analysis, and characterized as a "BIA view[]." ¹⁰⁸ As such, it is unsurprising that this conclusory footnote would be the subject of later scrutiny. That two of the three canneries mentioned would face reexamination speaks to the history of uncertainty over the lands' status.

IV. QUESTIONS OF CONVEYANCE

The results of the title examination at Kake during the ANCSA land selection process captured the interest of Congress and the attention of the Department. Two decades later, new questions were asked that challenged basic assumptions of whether the cannery parcels had ever, in fact, been held by the United States. These inquiries were focused on procedure, and were informed by principles of property law.

102. Act of Oct. 20, 1978, Pub. L. No. 95-487, 92 Stat. 1635.

103. Gerard Letter, *supra* note 101. Two days later, on September 15, 1978, the Fredericks Opinion was issued, which made no mention of the Kake cannery, and concluded, "Congress intended permanently to remove from trust status all Native land in Alaska except allotments and the Annette Island Reserve." Fredericks Opinion, *supra* note 3, at 3.

104. 124 CONG. REC. 33,467-68 (1978) (statement of Sen. Stevens) (speaking in support of H.R. 14026, 95th Cong. (1978), co-sponsored in the House of Representatives by Rep. Don Young of Alaska). Senator Mike Gravel of Alaska also spoke from the floor in support of the bill. *Id.*

105. 1993 Sansonetti Opinion, *supra* note 16, at 112 n.277.

106. ANCSA § 14(g), 43 U.S.C. § 1613(g) (2018).

107. 1993 Sansonetti Opinion, *supra* note 16, at 112 n.277.

108. *Id.* ("The BIA has not viewed trust title to these parcels as having been revoked by ANCSA § 19, 43 U.S.C. § 1618, and these lands have not been conveyed to the local Village Corporations under ANCSA § 16, 43 U.S.C. § 1615. BIA views these as valid existing rights under ANCSA § 14(g), 43 U.S.C. § 1613(g).").

A. The Cannery at Klawock

The cannery at Klawock was indisputably accepted in trust by the Secretary pursuant to IRA section 5.¹⁰⁹ Thus, a review of this conveyance may prove beneficial in demonstrating how such a land transfer should have been accomplished.

As was typical for Department property transactions, on March 29, 1950, a deed was prepared on Department letterhead for signature before a notary public. Captioned a “Deed to Restricted Indian or Eskimo Land in Alaska,” the indenture was signed by three “Indians of Klawock” who jointly owned the cannery parcel,¹¹⁰ subject to certain restrictions imposed by the Alaska Native Townsite Act.¹¹¹ The description of property contained therein totaled approximately 0.92 acres, and was conveyed to “the United States of America in trust for the Klawock Cooperative Association.”¹¹² On October 2, 1950, this transfer was approved by Commissioner of Indian Affairs Dillon S. Myer, pursuant to the delegated authority of the Secretary.¹¹³

Commissioner Myer’s acceptance of the cannery parcel represents the moment at which the United States “[took] upon itself solemn obligations and specific commitments to the Indian landowners with respect to that land.”¹¹⁴ This “formalization of acceptance” is necessary to demonstrate that the Secretary “did in fact exercise [his] discretion to accept land into trust,”¹¹⁵ and is consistent with the Department’s current fee-to-trust regulations.¹¹⁶ Thus, the transfer of the Klawock cannery was perfected in 1950, and the deed evidencing conveyance was subsequently recorded at the BIA Land Titles and Records Office in Anchorage.¹¹⁷

109. Klawock Deed, *supra* note 69, at 1 (“This conveyance is made pursuant to the provisions of the Act of June 18, 1934 (48 Stat. 984), as amended by the Act of May 1, 1936 (49 Stat. 1250).”).

110. *Id.*

111. Alaska Native Townsite Act of 1926, Pub. L. No. 69-280, 44 Stat. 629.

112. Klawock Deed, *supra* note 69.

113. *Id.* at 2. The Secretary delegated his authority to “approv[e] of the purchase of lands for individual Indians and Indian tribes” in 1949. Secretarial Order No. 2508, 14 Fed. Reg. 258, 259 (Jan. 18, 1949). This authority was further delegated to BIA Area Directors in 1951. BIA Order No. 551, 16 Fed. Reg. 2,939, 2,940 (Apr. 4, 1951).

114. Big Lagoon Park Co., 32 I.B.I.A. 309, 320 (1998).

115. Angoon Determination, *supra* note 99, at 6.

116. 25 C.F.R. § 151.14 (2021) (“Formal acceptance of land in trust status shall be accomplished by the issuance or approval of an instrument of conveyance by the Secretary . . .”).

117. Klawock Deed, *supra* note 69, at 1.

B. The Cannery at Kake

Nearly twenty years after Congress authorized the 1.09-acre transfer at Kake, a petroleum spill on the remaining cannery lands prompted a reexamination of their status.¹¹⁸ Associate Solicitor for Indian Affairs Derril Jordan would conclude that he had “found no express documentation indicating that the Department of the Interior ever accepted the [cannery] deed parcel into trust.”¹¹⁹ Nevertheless, he determined that there was “clear evidence that the Department through its subsequent acts” confirmed the acquisition.¹²⁰

Beginning in 1949, the Kake Tribe negotiated to purchase from P. E. Harris & Co. the real estate on which it was operating its cannery.¹²¹ The following year, a duly-appointed officer of the company executed a deed before a notary public in Seattle conveying 15.9 acres “to the United States of America in trust for the Organized Village of Kake.”¹²² Unlike at Klawock, however, this deed was never approved by the Secretary or the Commissioner of Indian Affairs. Despite recordation occurring without a “formalization of acceptance,”¹²³ Associate Solicitor Jordan noted three instances in which the federal government later “acted in a manner consistent with a proper and sufficient transfer of the parcel to the United States in trust.”¹²⁴

The first of these occurred in 1961, in the form of a memorandum authored by Acting Field Solicitor Laurie K. Luoma. In it, he stated without elaboration that the cannery was “purchased about ten years ago by the United States in trust” for the Kake Tribe.¹²⁵ This finding ultimately informed the advice provided to the BIA Area Director in Juneau regarding the status of certain disputed tidelands in Southeast Alaska.

The second and most significant of these “subsequent acts” began with correspondence from the Assistant Secretary for Indian Affairs in 1978 describing the parcel as “owned by the United States in trust for the

118. Jordan Memorandum, *supra* note 81, at 1.

119. *Id.* at 2.

120. *Id.* at 4. In support of this proposition, Associate Solicitor Jordan cited a Court of Claims opinion involving the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota: “To constitute acceptance of an offer, there must be an expression of the intention by word, signed writing, or act, communicated or delivered to the person making the offer or his agent.” *Slobojan v. United States*, 136 Ct. Cl. 620, 625 (1956).

121. Kake Deed, *supra* note 61.

122. *Id.* at 1.

123. The deed for the Kake parcel was recorded at Petersburg, Alaska on April 19, 1950. *Id.* at 2.

124. Jordan Memorandum, *supra* note 81, at 4.

125. Memorandum from L.K. Luoma, Acting Field Solicitor, to BIA Area Director (Aug. 24, 1961) [hereinafter 1961 Luoma Memorandum].

Organized Village of Kake.”¹²⁶ This determination was the basis for the Department’s aforementioned recommendation that legislation be enacted to permit the transfer of the cannery lands to the Kake Village Corporation.¹²⁷ The passage of such legislation would later be observed to have “ratified [the parcel] as being in trust through an act of Congress.”¹²⁸

Finally, Associate Solicitor Jordan cites to the 1993 Sansonetti Opinion, in which the Solicitor notes, “In one case, Kake, both the Department of the Interior and Congress have accepted as fact that the United States holds trust title to the lands.”¹²⁹ This statement by Solicitor Sansonetti was based upon certain assumptions, yet it demonstrated that for over thirty years, the Kake cannery was understood to have been held in trust by the United States for the Kake Tribe. Together, these acts led to a finding that “[o]verall, the Department’s treatment of the land indicates its belief that the [cannery parcel] is being held in trust for the tribe.”¹³⁰

In reliance on this opinion, the National Indian Gaming Commission (“NIGC”) approved the Kake Tribe’s pending gaming ordinance, determining that the lands “originally taken into trust in support of the [tribe’s] fish processing enterprise” were “Indian lands” within the meaning of the Indian Gaming Regulatory Act (“IGRA”).¹³¹ As such, in April 2000, the Kake Tribe became the first and only Alaska Native group permitted to “lawfully conduct class II gaming on its trust lands.”¹³²

C. The Cannery at Angoon

The facts at Angoon are substantially similar to those at Kake. In 1948, an authorized official of the Hood Bay Salmon Company executed a deed before a notary public in which 13.24 acres of land were conveyed to the “United States of America and its assigns in trust for the Angoon

126. Gerard Letter, *supra* note 101.

127. *Id.* (“We recommend the enactment of the bill. . . . Land held in trust by the United States for an IRA entity, such as the Organized Village of Kake, can only be disposed of pursuant to a specific Act of Congress.”).

128. Angoon Determination, *supra* note 99, at 7.

129. 1993 Sansonetti Opinion, *supra* note 16, at 112 n.277.

130. Jordan Memorandum, *supra* note 81, at 4.

131. Letter from Montie R. Deer, Chairman, Nat’l Indian Gaming Comm’n, to Christopher A. Karns, Attorney, Dorsey & Whitney LLP (Apr. 18, 2000), <https://www.nigc.gov/images/uploads/indianlands/Organized%20Village%20Kake2.pdf>.

132. *Id.* The IGRA categorizes games of chance into three categories. Indian Gaming Regulatory Act, Pub. L. No. 100-497, § 4(6)–(8), 102 Stat. 2468–69 (1988) (codified at 25 U.S.C. § 2703(6)–(8) (2018)). Class II is broadly defined as bingo, including electronic bingo. *Id.* § (7)(A). It does not include any banking card games, such as baccarat, chemin de fer, or blackjack. *Id.* § (7)(B).

[Tribe] forever.”¹³³ The deed was then recorded in Juneau without the approval of the Secretary or the Commissioner of Indian Affairs.

As with the canneries at Kake and Klawock, Acting Field Solicitor Luoma advised the BIA Area Director in 1961 that the Angoon parcel was held in trust by the United States.¹³⁴ Three decades later, Solicitor Sansonetti noted in his lengthy opinion on tribal jurisdiction in Alaska that the Angoon Tribe continued to hold beneficial title to 13.24 acres of trust land on Admiralty Island.¹³⁵ Despite these affirmative “subsequent acts,” in the 1970s two Tlingit families called into question the status of the cannery parcel, filing claims pursuant to the Alaska Native Allotment Act (“Allotment Act”).¹³⁶ Enacted in 1906, this statute authorized the Secretary to convey up to 160 acres of nonmineral land to “any Indian or Eskimo of full or mixed blood” residing in Alaska.¹³⁷ Congress intended such lands to be “the homestead of the allottee and his heirs in perpetuity,” and provided that they remain inalienable and nontaxable.¹³⁸

1. *Allotment Application of George Brown*

The first of the challenges to the Angoon parcel was initiated in 1978, when the Department undertook a reexamination of a claim for 59.33 acres “situate[d] on the north side of Hood Bay, about 10 miles south of Killisnoo.”¹³⁹ The application was originally filed in 1909 by George

133. *Angoon Deed*, *supra* note 67, at 2.

134. 1961 Luoma Memorandum, *supra* note 125, at 1. The 1961 Luoma Memorandum additionally identifies the cannery at Hydaburg as held in trust by the United States. *Id.* This determination may have been based on language in the Hydaburg corporate entity’s IRA section 10 loan application: “The [IRA section 17] corporation agrees that . . . title to all property and any finances therefrom, purchased with funds obtained under this application, will be forever held in the name of the United States and not for the corporation.” *Repeal Act Authorizing Secretary of Interior to Create Indian Reservations in Alaska: Hearings on S. 2037 and S.J. Res. 162 Before the Subcomm. of the S. Comm. on Interior and Insular Affairs*, 80th Cong. 89 (1948). The alleged “trust status” of the cannery would later form the basis of a breach-of-trust claim in which the United States would ultimately prevail on summary judgment. *Hydaburg Coop. Ass’n v. United States*, 667 F.2d 64 (Ct. Cl. 1981). This parcel was not subsequently listed among the Alaska trust lands identified in the 1993 Sansonetti Opinion, *supra* note 16. Nor did the Hydaburg Tribe assert the trust status of the cannery as a defense to a writ of execution shortly thereafter. *Hydaburg Coop. Ass’n v. Hydaburg Fisheries*, 925 P.2d 246 (Alaska 1996).

135. 1993 Sansonetti Opinion, *supra* note 16, at 112 n.277.

136. Act of May 17, 1906, ch. 2469, Pub. L. No. 59-171, 34 Stat. 197 (repealed 1971) [hereinafter Allotment Act].

137. *Id.*

138. *Id.*

139. Heirs of George Brown, 143 IBLA 221, 222 (1998). This reexamination was initiated in response to a federal court of appeals decision requiring certain due process requirements to be afforded to “applicants whose claims are to be rejected.” *Pence v. Kleppe*, 529 F.2d 135, 143 (9th Cir. 1976).

Brown, and was rejected in 1925 by D. K. Parrott, Acting Assistant Commissioner for the General Land Office.¹⁴⁰ His determination followed a field investigation that found Mr. Brown had died in 1921 and that he had never “occupied or made improvements on land on Hood Bay.”¹⁴¹ Prior to 1935, “occupancy” was not a requirement to secure an allotment,¹⁴² though it did provide a “preference right” against any other claim.¹⁴³ The field report additionally noted that a cabin had been “built for [Mr. Brown] in the Indian village on the . . . site of the Hidden Inlet Cannery Company.”¹⁴⁴

After the BLM rejected the allotment application a second time in 1994, the heirs of George Brown appealed the decision to the Department’s Interior Board of Land Appeals (“IBLA”).¹⁴⁵ The IBLA recounted the difficulties BLM faced in identifying the claimed allotment, and quoted Mr. Brown’s grandson, Daniel, who explained his delay in responding to “a number of notices from BLM”:

At the same time there was discussion from the Angoon Community Association [ACA] members saying that ACA owned those land and that they were tribal lands. ACA also says that they have title to the lands. They said that they were working with the Bureau of Land Management to get it on record that they are the rightful owners. I hope that you will understand that I have not wanted to rock the boat so to speak.¹⁴⁶

The IBLA then denied the appeal on grounds that “reinstatement of George Brown’s allotment application under the present facts” was improper,¹⁴⁷ as its rejection in 1925 neither “violated the requirements of

140. Heirs of George Brown, 143 IBLA at 222–24. The General Land Office would become the BLM in 1934, when it was merged with the U.S. Grazing Service, pursuant to the Taylor Grazing Act, ch. 865, Pub. L. No. 73-482, 48 Stat. 1269 (1934).

141. Heirs of George Brown, 143 IBLA at 223 (1998). This determination was supported by the fact that neither Mr. Brown nor the two witnesses present at the allotment application’s execution provided information as to the date of initial occupancy. *Id.* at 222.

142. Allotments of Public Lands in Alaska to Indians and Eskimos, 55 Interior Dec. 282, 285 (1935); *see also* 43 C.F.R. § 67.13 (1938); Act of Aug. 2, 1956, Pub. L. No. 84-931, § 3, 70 Stat. 954 (repealed 1971) (“No allotment shall be made to any person under this Act until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years.”).

143. Allotment Act, *supra* note 137.

144. Heirs of George Brown, 143 IBLA at 223.

145. *Id.* at 221.

146. *Id.* at 225.

147. *Id.* at 233.

due process [n]or worked a manifest injustice.”¹⁴⁸

2. *Allotment Application of Jimmie Albert George, Sr.*

The second challenge to the trust status of the Angoon parcel began in 1971, when Jimmie George, Sr. submitted an application for an Alaska Native allotment that included all 10.24 acres of the cannery lands.¹⁴⁹ Mr. George resided at Hood Bay from 1889 to 1913 with his father, a Tlingit heredity chief.¹⁵⁰ He continued to seasonally occupy the area until 1938,¹⁵¹ and had consented to the establishment of the Hidden Inlet Canning Company (“Hidden Inlet”) in 1918.¹⁵² For reasons unknown, Mr. George did not file for an allotment during this period, and the cannery lands were patented in 1929 to Hidden Inlet.¹⁵³ In 1933, ownership passed to the Hood Bay Salmon Company and, in 1948, to the Angoon Tribe, as described above.¹⁵⁴ A fire in 1961 destroyed the cannery, and it was never rebuilt, in part because Mr. George objected to new construction on his family’s ancestral land.¹⁵⁵ This action would ultimately prove decisive in bringing closure to an administrative process that would last for nearly 45 years.

Mr. George’s allotment application was initially rejected in 1978 based on the BLM’s narrow interpretation of certain requirements contained in the Allotment Act and its implementing regulations.¹⁵⁶ And while Mr. George would not live to see his allotment claim vindicated,¹⁵⁷ his heirs continued the fight. In 1988, after a lengthy legal battle resulting

148. *Id.* at 230.

149. Angoon Determination, *supra* note 99, at 3. ANCSA section 18(a) repealed the Allotment Act. Pub. L. No. 92-203, § 18(a), 85 Stat. 688, 710 (1971) (codified as amended at 43 U.S.C. § 1617(a) (2018)). However, it included a savings provision that allowed approval and patenting of any application pending as of December 18, 1971. 43 U.S.C. § 1617(a) (2019).

150. Jimmie A. George, Sr., 60 IBLA 14, 16 (1981).

151. *Id.*

152. Angoon Determination, *supra* note 99, at 3.

153. *Id.*

154. *Id.*

155. *Id.*

156. Jimmie A. George, Sr., 60 IBLA at 17. The BLM found Mr. George to be an unmarried individual under twenty-one years of age during all relevant periods of residence at Hood Bay. *Id.* The Allotment Act required applicants to be the “head of a family or . . . twenty-one years of age.” *Id.* at 14–15. Further, the BLM found Mr. George’s occupancy to be “nonexclusive.” *Id.* at 18. The Allotment Act’s implementing regulations required “substantially continuous use and occupancy for a period of five years,” with such occupancy being “at least potentially exclusive of others.” *Id.* at 15 (citing 43 U.S.C. § 270-3 (1970) (repealed 1971)).

157. Mr. George passed at Angoon on July 16, 1990, aged 100. *Jimmie Albert George Sr.*, FAM. SEARCH, <https://ancestors.familysearch.org/en/L1Q9-LKM/jimmie-albert-george-sr.-1889-1990> (last visited Feb. 9, 2021).

in a precedent-setting judicial decision,¹⁵⁸ all parcels except for the cannery site had been approved for conveyance.¹⁵⁹ To resolve the remaining cannery site issue, the BLM requested that the Department's Solicitor's Office provide advice regarding its disposition.¹⁶⁰ In a memorandum dated March 17, 1997 ("1997 Regional Solicitor's Memorandum"), the Alaska Regional Solicitor's Office explained the process by which the Department would have accepted land in trust in the 1940s:

there must be an acceptance by the United States before the lands can be considered trust lands. Historically, this acceptance was signified by a signed approval on the deed itself or on the transmittal letter forwarding the deed to the BIA Central Office in Washington, D.C.¹⁶¹

After a thorough search of available records, the Alaska Regional Solicitor's Office ultimately concluded that there was no evidence the Department had ever held the Angoon cannery in trust.¹⁶² This determination was in direct conflict with the 1961 Luoma Memorandum, the 1993 Sansonetti Opinion, and the Gerard Letter addressing the near-identical circumstances at Kake in 1978.

As such, in the years that followed, there was significant confusion within the Department as to the cannery's status. In 2000, for example, IBLA Administrative Judge C. Randall Grant, Jr., found that Mr. George's heirs were entitled to receive the cannery parcel.¹⁶³ This determination

158. *George v. Hodel*, No. A86-113, 1987 U.S. Dist. LEXIS 17088 (D. Alaska Apr. 30, 1987). The BLM's initial determination in 1978 was upheld by the IBLA in 1981. Jimmie A. George, Sr., 60 IBLA at 20. On appeal, a federal district court judge found evidence that Mr. George was an adult pursuant to Tlingit tradition despite his age and determined that the Department's requirement that "use and occupancy be independent and exclusive of immediate family members[] is unreasonable and inconsistent with the terms of the [Allotment Act]." *George*, 1987 U.S. Dist. LEXIS 17088, at *1.

159. Decision of Patricia A. Baker, Acting Chief, BLM Branch of KCS Adjudication re Native Allotment Application AA-6580 Parcels A, B, C, D and Village Selection Application AA-6978-B, to Jimmie A. George, Sr., et al. (Nov. 25, 1988).

160. *Id.* at 5.

161. Memorandum from Carlene Faithful, Office of the Reg'l Solicitor, Alaska Region, to State Dir., BLM Alaska State Office (Mar. 17, 1997) [hereinafter 1997 Regional Solicitor's Memorandum].

162. *Id.* ("We have contacted the Office of Trust Responsibilities of the Bureau of Indian Affairs in Washington, D.C., as well as the Area Director's Office in Juneau, and have found no documentation that the acquisition of U.S. Survey 1480 was approved by either the Commissioner of Indian Affairs or the Secretary of the Interior.").

163. *Heirs of Jimmie George, Sr. v. Alaska Reg'l Dir., Bureau of Indian Affairs*, 37 IBIA 146, 147 (2002) (citing Native Allotment Application of Jimmie A. George,

relied first on the 1997 Regional Solicitor's Memorandum, as trust status would have been a bar to alienability.¹⁶⁴ Judge Grant then found the 1948 transaction by which the Angoon Tribe acquired the cannery to be invalid, as "the [Angoon Tribe] had constructive if not actual, notice of the claim of Jimmie George to the tract of land . . . at the time it was purchased by [Hidden Inlet]."¹⁶⁵ Finally, he concluded that Mr. George had satisfied the Allotment Act's statutory and regulatory requirements by "establish[ing] substantial independent use and occupancy."¹⁶⁶

Complicating any conveyance, however, was a conflicting letter issued by the BIA Alaska Regional Director to the Angoon Tribe in 2001.¹⁶⁷ In its entirety, it read as follows:

This is to notify you that the [cannery parcel] is held in trust for the Angoon [Tribe]. Acceptance of title has been made pursuant to the [IRA]. The United States of American has accepted title on behalf of the Angoon [Tribe].¹⁶⁸

This cursory finding was immediately challenged by the heirs of Mr. George. The Department's Interior Board of Indian Appeals ("IBIA") vacated the Regional Director's action in early 2002 and remanded the query to which he was attempting to respond for further consideration.¹⁶⁹

The BLM in 2003 would reach the same conclusion as did the BIA in 2001, namely, it rejected Mr. George's request for inclusion of the cannery parcel in his allotment.¹⁷⁰ This result was based, in part, on the BLM's belief that the 1997 Regional Solicitor's Memorandum was unable to disrupt the conclusory statement contained in the 1993 Sansonetti Opinion regarding the canneries at Angoon, Kake, and Klawock.¹⁷¹ The heirs of Mr. George immediately appealed this decision, and it was vacated later that year by the IBLA, with instructions for the BLM to "seek to obtain a final determination from BIA as to the status of the lands" prior to taking any further action.¹⁷² Such a decision would take a full twelve years to develop.¹⁷³

In a 2015 letter addressed to the various parties involved in the

Sr., No. AA-6580 (2000)).

164. *Id.*

165. *Id.* at 9-10.

166. *Id.* at 7-8.

167. Heirs of Jimmy George, Sr., 37 IBIA 146, 146 (2002).

168. *Id.*

169. *Id.* at 148.

170. Angoon Determination, *supra* note 99, at 4 (citing Decision of BLM, Native Allotment Application AA-6580 Parcel C, to Jimmie A. George, Sr., et al. (May 9, 2003)).

171. *Id.*

172. Heirs of Jimmie A. George, IBLA 2003-279, 12.

173. Angoon Determination, *supra* note 99.

allotment dispute, BIA Alaska Regional Director Weldon B. Loudermilk concluded “that the 10.24 acres of land identified as Parcel C of Jimmie A. George, Sr.’s Native allotment . . . is not held in trust by the United States on behalf of the Angoon [Tribe].”¹⁷⁴ After favorably citing the historical analysis supplied in the 1997 Regional Solicitor’s Memorandum, he similarly concluded that there was no evidence the Secretary had ever accepted the cannery in trust.¹⁷⁵ Regional Director Loudermilk stressed the importance of “an affirmative act by the BIA” and found support in a federal court of appeals opinion describing the formalization process as a “considered evaluation and acceptance of responsibility indicative that the federal government has ‘set aside’ the lands.”¹⁷⁶

Finally, he pointed the parties’ attention to a case with a similar fact pattern concerning the Keweenaw Bay Indian Community (“Keweenaw Bay”) in Michigan.¹⁷⁷ There, a federal district court judge found that lands on which the tribe was gaming were, in fact, ineligible trust lands, as the warranty deed purporting to convey the parcel to the United States was not formally accepted by an authorized BIA official prior to a date of significance under the IGRA.¹⁷⁸

While Regional Director Loudermilk’s conclusion is well-reasoned and consistent with administrative and judicial precedent, it draws into focus Associate Solicitor Jordan’s opinion in *Kake*. As discussed above, the only substantive difference is the fact that at *Kake*, Congress authorized the Secretary to transfer a portion of the cannery lands. This difference may, however, be dispositive, as section 1 of the Act of October 20, 1978 provided the Secretary authority to convey “any lands described in section 2 of this Act . . . upon request of any Indian tribal or other entity for whom the United States holds title in trust.”¹⁷⁹ And while the argument is admittedly circular, it follows that the Secretary’s subsequent conveyance of 0.92 acres in fee to the *Kake* Tribe was possible only because such lands were, in fact, held in trust. As to the remaining 14.81 acres at *Kake*, it was the view of Regional Director Loudermilk that Congressional action in 1978 “ratified [the entire parcel] as being in trust.”¹⁸⁰ Subsequent approval by the NIGC of the *Kake* Tribe’s gaming

174. *Id.* at 2.

175. *Id.* at 5.

176. *Id.* (citing *Narragansett Indian Tribe of R.I. v. Narragansett Elec. Co.*, 89 F.3d 908, 920 (1st Cir. 1996)).

177. *Id.* at 6.

178. *United States v. Keweenaw Bay Indian Cmty.*, No. 2:92-CV-265, 1993 WL 818943 (W.D. Mich. Sept. 28, 1993). The IGRA § 2719 prohibits gaming on lands acquired after October 17, 1988, with certain exceptions that were not available to *Keweenaw Bay*. 25 U.S.C § 2719 (2018).

179. Act of Oct. 20, 1978, Pub. L. No. 95-487, § 1(a), 92 Stat. 1635.

180. *Angoon Determination*, *supra* note 99, at 7.

ordinance and the BIA's "several trust projects regarding the parcel" lend significant weight to this conclusion.¹⁸¹

The Angoon Tribe appealed Regional Director Loudermilk's decision on December 23, 2015. The IBIA dismissed the appeal on March 7, 2016, after the Angoon Tribe failed to cure a service of process deficiency.¹⁸² As of this writing, Parcel C has yet to be patented to the heirs of Jimmie George, Sr., though the Angoon Tribe's failure to exhaust administrative remedies effectively closed the book on this decades-long dispute.¹⁸³

V. CONCLUSION

The history of the cannery parcels at Angoon, Kake, Klawock, and Hydaburg reflects the frenetic nature of federal Indian policy in Alaska. These villages in the Alexander Archipelago have had particularly traumatic interactions with the United States,¹⁸⁴ and have more recently been subject to the trial-and-error approach of the Department's Alaska Native policy. Their varied experiences with IRA section 5 can inform decisionmakers tasked with balancing Alaska's federally recognized tribes' desire for trust acquisitions, with the State's concerns over a changed jurisdictional and regulatory landscape.

When the Solicitor withdrew the 2017 Tompkins Opinion, he stated that he was motivated by a desire not to "encumber any future examination of whether the Secretary can, as a matter of law, and should, as a matter of policy, accept land in trust on behalf of federally recognized tribes in Alaska."¹⁸⁵ The Solicitor's Office has since recommended that the BIA conduct "consultation sessions with Tribal Nations to engage in meaningful and robust consultation on the Secretary's land into trust authority in Alaska."¹⁸⁶ Given the Department's lengthy record evaluating the status of the various cannery parcels, their near-total

181. *Id.*

182. Angoon Cmty. Ass'n v. Alaska Reg'l Dir., Bureau of Indian Affairs, 62 IBIA 254 (2016).

183. 25 C.F.R. § 2.6(a) (2021) ("No decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. § 704 . . .").

184. Of particular note, the village of Angoon was bombarded by the United States Navy on October 26, 1882. Ninety-one years later, the Indian Claims Commission approved a \$90,000 compromise settlement "arising out of the actions of a United States military force in bombarding and burning the Tlingit village of Angoon." Tlingit & Haida Indians of Alaska v. United States, 32 Ind. Cl. Comm. 273, 273 (1973).

185. 2021 Jorjani Opinion, *supra* note 15, at 4.

186. 2021 Anderson Memorandum, *supra* note 17, at 2.

absence from discussions among Alaska Native policymakers, scholars, and legal practitioners is remarkable. The larger debate around land-in-trust in Alaska has been active and animated within tribal communities, at the Department, and among State and Federal stakeholders for over forty years. As those discussions continue with new leadership at the White House, the Congress, and the Department, it is important for all sides to acknowledge Alaska's seventy-year experience with trust lands, and to appreciate this complicated and surprising history that has largely remained hidden in plain sight.