ALASKA'S RECOGNITION OF TRIBES: ALASKA HOUSE BILL 123 AND TRIBAL TRUST LANDS

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ABSTRACT

For decades, the United States Department of the Interior's land acquisition regulations included an "Alaska Exception" that barred acquisition of land into trust in Alaska apart from those acquisitions made for the Metlakatla Indian Community. Although the "Alaska Exception" was initially removed from the regulations in 2014, the fight continues over land-into-trust acquisitions within Alaska. Throughout these debates, the state of Alaska has consistently opposed land-into-trust acquisitions. This Practitioner Guide provides an overview of the recent history of land-into-trust acquisitions in Alaska and analyzes the juxtaposition of the intent behind Alaska's "State Recognition of Tribes" in House Bill 123 and the continuing state opposition to land-into-trust applications. Specifically, this Practitioner Guide argues that, without state collaboration and cooperation with Tribal Nations on land-into-trust issues, House Bill 123, which was meant to signify "the State's desire to foster engagement with Alaska Natives and tribal organizations," ultimately rings hollow.

I. INTRODUCTION

Alaska Natives have always been subject to unique legislation.[1] The United States Supreme Court has stated that "Alaska is different,"[2] citing the "unique circumstances of Alaska and its indigenous population."[3]

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1. Jon W. Katchen & Nicholas Ostrovsky, Strangers in Their Own Land: A Survey of the Status of the Alaska Native People from the Russian Occupation Through the Turn of the Twentieth Century, 39 ALASKA L. REV. 1, 47 (2022).

2. Sturgeon v. Frost, 577 U.S. 424, 438 (2016).

3. Yellen v. Confederated Tribes of the Chehalis Rsrv., 141 S. Ct. 2434, 2438 (2021).

This unique history began with the Russian Occupation and continues with the lasting impact of the Alaska Native Claims Settlement Act (ANCSA).[4]

As the latest example, on July 28, 2022, Governor Mike Dunleavy signed Alaska House Bill 123, which provided for state recognition of all 229 federally recognized Tribal Nations in Alaska.[5] The bill intended to show the state's plans to develop a closer relationship with Alaska Natives and tribal organizations.[6] Prior to House Bill 123, tribal governments in Alaska already exercised tribal sovereignty under federal law, and the Supremacy Clause required Alaska to recognize their status.[7] Although enacting no substantive changes to tribal recognition, tribal acknowledgment can pave the way for the state to maintain better relations with Tribes.[8]

Alaska has a long and difficult history with Tribal Nations, especially when it comes to land disputes.[9] For instance, in light of ANCSA, Alaska has feuded with Tribes over land-into-trust applications.[10] The state has routinely opposed not only applications to put land into trust[11] but also opposed an amendment to the Indian

4. Alaska Native Claims Settlement Act, ch. 33, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601–1629h).

5. 2022 Alaska Sess. Laws ch. 42.

6. *Id*.

7. NAT'L CONG. OF AM. INDIANS, TRIBAL NATIONS AND THE UNITED STATES: AN INTRODUCTION 9 (2020).

8. 2022 Alaska Sess. Laws ch. 42. The legislative intent specifically states that "Passage of this Act is nothing more or less than a recognition of Tribes' unique role in the state's past, present, and future." The sponsor of the bill described the legislation as "formal recognition" and "beginning of a new chapter of collaboration and partnership between the State and Alaska's Tribes." *Dunleavy Signs Tribal Recognition Bill to Formally Recognize Alaska's Tribes*, OFFICE OF GOVERNOR MIKE DUNLEAVY (July 28, 2022), https://gov.alaska.gov/dunleavy-signs-tribal-recognition-bill-to-formally-recognize-alaskas-tribes/.

9. *See generally* Roy M. Huhndorf & Shari M. Huhndorf, *Alaska Native Politics Since the Alaska Native Claims Settlement Act*, 110 S. ATLANTIC Q.Y 385 (2011) (describing the legal challenges after the Alaska Native Claims Settlement Act).

10. *See Land-Into-Trust in Alaska*, U.S. DEP'T OF INTERIOR, https://www.bia.gov/as-ia/raca/regulations-development-andor-under-review/land-trust-alaska (last visited Sept. 15, 2023) (listing the Tribal Consultations and public meetings regarding land into trust in Alaska in light of the ANCSA).

11. Akiachak Native Cmty. v. Salazar (*Akiachak*), 935 F. Supp. 2d 195 (2013), *vacated*, 827 F.3d 100 (D.C. Cir. 2016). The State of Alaska intervened in the *Akiachak* case. *Id.* at 197. The plaintiffs brought the suit to challenge the U.S. secretary of the Interior's decision to exclude Tribal Nations in Alaska from putting land into trust. *Id.* The state intervened to make the argument against the Tribes that Tribal Nations in Alaska should be treated differently than other Tribal Nations due to the Alaska Native Claims Settlement Act (ANCSA). *Id.* The state argued that ANCSA "deprived the Secretary [of the Interior] . . . authority to take most Alaska land into trust." *Id.* The Court ultimately rejected the state's

Reorganization Act (IRA) that eliminated the Alaska exception.[12] If Alaska's House Bill 123 truly signified the state's intention to develop a closer relationship with Tribal Nations, the legislation should lead to a more collaborative approach on land-into-trust issues within Alaska.

Part II of this Practitioner Guide will examine the history of tribal recognition in the United States, Part III will examine the history of land into trust in Alaska, and Part IV will put H.B. 123 in context.[13]

II. HISTORY OF TRIBAL RECOGNITION IN THE UNITED STATES

A. Defining Tribe

Although the Constitution refers to "Indian Tribes" and "Indian nation[s]," there has never been a singular, clear definition of these terms for overarching federal purposes.[14] Rather, the term "Tribe" was originally defined for a very narrow purpose: determining which groups were political entities with which the federal government could negotiate treaties.[15] Because there is no all-purpose definition, federal courts have played a central role in determining which Tribal Nations are federally recognized as independent sovereigns.[16] Notably, the term "Tribe" has different meanings under federal law than it does for Tribal Nations.[17] While Tribal Nations often rely on shared language, rituals, narratives, kinship or clan ties, and a shared relationship to specific land to define their existence as a nation or a Tribe, the federal definition turns on whether a Tribal entity has formed a political relationship with the federal government.[18] This conception of "Tribe" does not always reflect tribal understandings.[19]

Three U.S. Supreme Court cases, commonly referred to as the Marshall Trilogy, established the foundation for Native American law

argument. *Id.*

12. Land Acquisitions in the State of Alaska, 79 Fed. Reg. 24648, 24649–50 (proposed May 1, 2014) (to be codified at 25 C.F.R pt. 151).

13. *See infra* Sections III.A.–C.

14. U.S. CONST. art. I, § 8, cl. 3 (Congress has the power "to regulate commerce with foreign nations and among the several states, and with the Indian Tribes").

15. *Id*.

16. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 3.02 (2016 ed.).

17. *See, e.g.*, Harold E. Driver & William C. Massey, *Comparative Studies of North American Indians*, 47 TRANSACTIONS OF THE AM. PHILOSOPHICAL SOC'Y 165 (1957) (explaining the different meanings of tribe for different groups).

18. *See, e.g.*, DAVID E. WILKINS, THE NAVAJO POLITICAL EXPERIENCE 5–6 (1999) (explaining the differences in the interpretation of existence between the Tribal Nations and the federal government).

19. *Id*.

and tribal sovereignty.[20] This sovereignty also applies to Alaska Native Tribal governments, because Alaska Native Tribes have the same relationship with the federal government, and the same inherent powers as the Tribes in the contiguous United States.[21] The first of these three cases, *Johnson v. M'Intosh*, established the supremacy of the federal government over states and individuals in affairs pertaining to tribal governments.[22] The Court affirmed that federal supremacy in *Cherokee Nation v. Georgia* and *Worcester v. Georgia.* In *Cherokee Nation,* the Court found that the Cherokee Nation was a domestic nation, not a state or foreign nation.[23] Then, under the Supremacy Clause, it found that state laws would have no force over the domestic nations' land, because federal statutes and treaties barred any such state laws.[24] In *Worcester*, the Supreme Court held that a Georgia state law prohibiting non-Native Americans from being present on Native American lands without a license was unconstitutional.[25] In his opinion, Chief Justice John Marshall stated, "[t]he Cherokee nation, then, is a distinct community occupying its own territory . . . in which the laws of Georgia can have no force . . . [t]he whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States."[26]

In 1995, the Supreme Court decided the *Tee-Hit-Ton* case, in which it held that if Congress "recognized" Indian title, whether by treaty, statute, or other agreement, then taking of property required just compensation under the Fifth Amendment.[27] Nonetheless, it found that under the Fifth

20. Johnson v. M'Intosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832). Although these cases acknowledge tribal sovereignty, they were largely based on racist beliefs, such as the discovery doctrine discussed at large in *Johnson* when the Court invalidated a land title purchase from a Native American. *Johnson*, 21 U.S. at 572–73, 592; *see also* Elisha H. Atkins, *Them and Us*, 138 ANNALS OF INTERNAL MEDICINE 515 (2003).

21. *See* Tee-Hit-Ton Indians v. U.S. (*Tee-Hit-Ton*), 348 U.S. 272, 278–79 (1955). The *Tee-Hit-Ton* case involved the Organic Act and the preservation of aboriginal title for Alaska Natives. *Id.* at 278. Thus, the taking of land (Tongass National Forest) was not a taking under the Fifth Amendment. *Id.* at 291. *See also* Kristin McCarrey, *Alaska Natives: Possessing Inherent Rights to Self-Governance and Self-Governing from Time Immemorial to Present Day*, 2 AM. INDIAN L.J. 437 (2013) (arguing that Alaska should recognize Alaskan indigenous communities' right to self-govern). Although Tribal Nations in Alaska have had their inherent sovereign powers questioned due to the passage of ANCSA, this legislation did not diminish their inherent rights to Tribal governance or change the relationship between Tribal Nations in Alaska and the federal government. *Id.* at 438.

22. Johnson v. M'Intosh, 21 U.S. 543 (1823).

23. Cherokee Nation v. Georgia, 30 U.S. 1, 10 (1831).

24. *Id.* at 38.

25. Worcester v. Georgia, 31 U.S. 515, 539–40 (1832).

26. *Id.* at 520.

27. Tee-Hit-Ton Indians v. U.S., 348 U.S. 272, 278–79 (1955).

Amendment, the Tee-Hit-Ton Tribe was not entitled to compensation because their right of ownership had not been recognized by the federal government.[28] Although they had a claim to possession of the land, they did not have a claim to ownership.[29]

The definition of "Tribe" is now codified, albeit rigidly.[30] The term "Tribe" is defined under the Indian Reorganization Act as:

> [A]ny Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.[31]

The 1975 Indian Self Determination and Education Assistance Act (ISDEAA) led to the first maintained list of current recognized Tribes.[32] Although ISDEAA included "any Alaska Native village, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act" in the definition of a Tribe,[33] it did not contain a definitive list of Tribes fitting that description.[34] As a result, in 1994, the Department of the Interior began to maintain a list of all federally recognized Tribes under the Federally Recognized Indian Tribe List Act.[35]

While the United States has attempted to strictly define the term "Tribe," international law scholars of statehood and sovereignty have instead shifted towards the right to tribal self-definition. For example, the United Nations believes that strict tribal definitions are "unnecessary."[36] In recognizing the right of indigenous peoples to self-define, the United Nations has opted not to provide a strict definition for indigenous

28. *Id.* at 277–79.
29. *Id.* at 285.
30. 25 U.S.C. § 5304(e).
31. *Id.*
32. *See* The Indian Self Determination and Education Assistance Act of 1975, Pub. L. 93-638, 88 Stat 2023 (1975) (defining eligibility for programs by Alaska Native status, which ultimately led to official lists); *see also* FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 22.02 (2016 ed.) (explaining how ISDEAA has led to significant changes in services to Indians in the modern era).
33. *See id.*
34. *See id.*
35. Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, 108 Stat. 4791, 4792 (1994).
36. Erica-Irene A. Daes, On the Concept of "Indigenous People" 21 (U.N. Comm'n on Hum. Rts., Working Paper, 1996).

people.[37] Instead, it endorsed four factors that the Working Group on Indigenous Populations consider to be relevant when understanding what it means to be indigenous:

> (a) Priority in time, with respect to the occupation and use of a specific territory;
> (b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
> (c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
> (d) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.[38]

As the chairperson of the working group has noted, these factors are not exhaustive.[39] While there has been an international shift towards self-definition, the United States has taken a more rigid approach through the Federal Acknowledgment Process (FAP).[40]

B. Paths to Federal Recognition

The federal government presently recognizes 574 Tribes.[41] OF these 574 Tribes, 229 are under the jurisdiction of the Alaska Regional Office.[42] However, not all Tribes have been able to achieve federal recognition.[43] The Federally Recognized Indian Tribe List Act sets out the procedures for establishing an American Indian group as a federally recognized Tribe.[44] There are three ways for a Tribe to be federally recognized: (1) an Act of Congress; (2) U.S. court decision; or (3) by the administrative procedures under FAP.[45]

The FAP is generally considered the most effective path to federal

37. *Id.*
38. *Id.* at 22.
39. *Id.*
40. Federally Recognized Indian Tribe List Act of 1994, *supra* note 35, at 4791.
41. *About Us*, U.S. DEP'T OF THE INTERIOR: INDIAN AFFAIRS, https://www.bia.gov/about-us (last visited Sept. 15, 2023).
42. *Overview*, U.S. DEP'T OF THE INTERIOR: INDIAN AFFAIRS, https://www.bia.gov/regional-office/alaska-region (last visited Sept. 25, 2023).
43. *See* Rachael Paschal, Comment, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 WASH. L. REV. 209, 209 (1991) (explaining the number of Indian tribes that lack federal recognition is nearly equal to those that have recognition).
44. Federally Recognized Indian Tribe List Act of 1994, *supra* note 35, at 4791.
45. *See id.*

recognition.[46] The Department of the Interior's FAP was put into place by the Bureau of Indian Affairs in 1978.[47] The Office of Federal Acknowledgment (OFA) within the Department of the Interior implements the FAP.[48] The OFA makes recommendations to the assistant secretary of Indian Affairs regarding whether to "acknowledge Tribal existence and establish a government-to-government relationship or to deny acknowledging a petitioning group as an Indian Tribe."[49] Congress has only revised the FAP on one occasion.[50] Nonetheless, presidential administrations can circumvent the lengthy process of legislative revisions by issuing orders that control how the regulation is implemented.[51] Therefore, the FAP consists not only of the regulation itself but also a myriad of executive documents and guidance opinions as well as a Department of the Interior precedent manual.[52]

In order to become a federally recognized Tribe under the FAP, the Tribe must satisfy all seven of its requirements.[53] Generally, this entails considerable genealogical, anthropological, and historical research to find the proof necessary to satisfy each requirement.[54] First, the Tribe must "identif[y] as an American Indian entity on a substantially continuous basis since 1900."[55] Second, a "predominant portion of the petitioning group [must] comprise[] a distinct community and ha[ve] existed as a community from historical times until the present."[56] The Tribe must also have "maintained political influence or authority over its members as an autonomous entity from 1900 until the present."[57] Fourth, the Tribe must provide a "copy of the [group's] present governing document including its membership criteria."[58] The fifth and sixth requirements pertain to

46. Lorinda Riley, *When a Tribal Entity Becomes a Nation: The Role of Politics in the Shifting Federal Recognition Regulations*, 39 AM. INDIAN L. REV. 451, 453 (2015).

47. *See* 43 Fed. Reg. 39361 (Sept. 5, 1978) (to be codified in 25 C.F.R pt. 54) (describing the final regulations for recognition procedures).

48. *See* Riley, *supra* note 46, at 462 (detailing changes to the FAP).

49. *OFA Home*, U.S. DEP'T OF THE INTERIOR: INDIAN AFFAIRS, https://www.bia.gov/as-ia/ofa (last visited Sept. 15, 2023).

50. *See* Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9280 (Feb. 25, 1994) (to be codified in 25 C.F.R. pt. 83) (proposing the only revisions to FAP since its creation).

51. Riley, *supra* note 46, at 453.

52. *Id.*

53. *Id.* at 455.

54. Joel A. Davis, *Federal Tribal Recognition*, N.M. LEG. (July 16, 2013), https://www.nmlegis.gov/handouts/IAC%20071513%20Item%207%20Federal%20Tribal%20Recognition%20Presentation.pdf.

55. 25 C.F.R. § 83.11(a) (2015). As would be expected, it is extremely difficult to trace when a Tribe began identifying as an American Indian entity.

56. *Id.* § 83.11(b) (2023).

57. *Id.* § 83.11(c) (2023).

58. *Id.* § 83.11(d) (2023).

tribal membership. Membership must consist of "individuals who descend from a historical Indian Tribe (or from historical Indian Tribes which combined and functioned as a single autonomous political entity)"[59] and be "composed principally of persons who are not members of any federally recognized Indian Tribe."[60] Seventh, "neither the petitioner nor its members [can be] the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship."[61]

As would be expected, FAP's requirements impose a long and burdensome process on Tribal entities seeking federal recognition.[62] It can take anywhere from two to nine years for a proposed Tribe to receive a decision once the application has come under active consideration by the Department of the Interior.[63] Many petitions have been stuck under consideration for much longer, however.[64]

III. HISTORY OF LAND INTO TRUST IN ALASKA

A. Occupation Since Time Immemorial

Long before Russia or the United States asserted any authority over the region, Alaska Natives occupied and used the lands now known as the state of Alaska.[65] The United States entered into the Treaty of Cession with Russia on March 30, 1867, through which they purchased modern-day Alaska for $7.2 million.[66] This transfer of governance disregarded Russia's lack of ownership before entering the purchase agreement with the United States.[67] Not only did Russia fail to purchase any of the land

59. *Id.* § 83.11(e) (2023).
60. *Id.* § 83.11(f) (2023).
61. *Id.* § 83.11(g) (2023).
62. Paschal, *supra* note 43, at 209–10.
63. Davis, *supra* note 54.
64. *Id.* For example, the Grand River Bands of Ottawa Indians started the process for federal recognition in 1999. Brandley Massman, *West Michigan Tribe Seeking Federal Recognition Will Have To Wait Longer As Feds Announce Delay*, MLIVE (Oct. 12, 2022), https://www.mlive.com/news/grand-rapids/2022/10/west-michigan-tribe-seeking-federal-recognition-will-have-to-wait-longer-as-feds-announce-delay.html. They have been on the "active consideration list" for ten years and still have yet to be federally recognized. *Id.*
65. Geoffrey D. Strommer, et al., *Placing Land into Trust in Alaska: Issues and Opportunities*, 3 AM. INDIAN L.J. 508, 509 (2015) (citing Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955)).
66. Treaty Concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of All the Russians to the United States of America, Russ.-U.S., May 28, 1867, 15 Stat. 539.
67. *See* DAVID CASE AND DAVID VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 62-66 (3rd ed. 2012) (discussing Alaska Native aboriginal title and citizenship rights coming out of the Treaty of Cession history).

from the Tribal Nations that originally occupied it, but Russia had only occupied a few scattered villages within the large amount of land included in the purported sale.[68] Instead of recognizing aboriginal title, the treaty merely stated that any issues of aboriginal titles would be subject to future U.S. statutory enactments.[69] The purchase agreement did not make any mention of Tribal Nations' title to the land, deriving from their continued occupation since long before Russia's first contact with Alaska in 1741.[70]

Despite this continued occupation, there have been multiple cases adjudicating whether the Treaty of Cession extinguished aboriginal title. Article VI of the Treaty of Cession stated, in part, that the cession "is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions . . . by any parties, except merely private individual property holders."[71] Although the Ninth Circuit originally interpreted this phrase as extinguishing aboriginal title in Alaska,[72] the Court of Federal Claims rejected the Ninth Circuit's holding in *Tlingit and Haida Indians v. United States*, finding instead that Article VI should be read narrowly to extinguish only the rights that the Russian American Fur Company may have had to lands in Alaska.[73] Subsequent cases interpreting the language of the related Organic Act of

68. Ernest S. Burch, *Native Claims in Alaska: An Overview,* 3 ÉTUDES INUIT STUD. 7 (1979).

69. *See* Treaty Concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all the Russias to the United States of America, Russ.-U.S., May 28, 1867, 15 Stat. 539 ("The uncivilized Tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal Tribes of that country."). This language not only pointed to the fact that any title to the land held by Tribal Nations had been purposely overlooked, it also highlights the disregard for original title that runs deep beneath the ongoing complex relationship that stemmed therefrom.

70. *See* Case and Voluck, *supra* note 67, at 62 (examining the effects of the Treaty of 1867 on Alaska Natives).

71. Treaty Concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all the Russias to the United States of America, Russ.-U.S., May 28, 1867, 15 Stat. 539.

72. *See* Miller v. United States, 159 F.2d 997 (9th Cir. 1947) ("As far as it relates to 'aboriginal Indian title,' the Supreme Court, as we have seen, already has rejected this theory. . . . By a parity of reasoning, we believe that the same conclusion should be reached with regard to what the appellee chooses to term the Indians' 'temporary right of occupancy.'").

73. Tlingit and Haida Indians v. United States, 177 F. Supp. 452 (Ct. Cl. 1959). Around the time of the treaty, while Alaska was still a territory, private parties attempted to push Native Alaskans off their land. The Tribes responded by bringing multiple cases in federal and state court. *Miller* is one example, where the Ninth Circuit upheld the actions of private parties seeking Native land. *See* 159 F.2d at 1002. Following this, *Tlingit and Haida Indians* attempted to resolve diverging interpretations of the Treaty of Cession. 177 F. Supp. 452 (Ct. Cl. 1959).

1884[74] have concluded that it also preserved aboriginal title.[75]

B. 1934 Indian Reorganization Act—"IRA"

Congress intended for the 1934 Indian Reorganization Act (IRA) to further tribal self-governance and self-determination.[76] Specifically, the legislation aimed to conserve and develop tribal lands and natural resources, encourage business formation, create a credit system for Tribal Nations, and "grant certain rights of home rule to Indians to provide for vocational education."[77] One of the IRA's most important provisions was Section Five, which authorized the U.S. secretary of the Interior to take into trust "any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians."[78] Notably, Section Five did not apply to Alaska, meaning that Alaska Native Tribes could not put land into trust.[79]

In 1936, however, Congress amended the IRA's provisions pertaining to Alaska in an act colloquially referred to as the Alaska Indian Reorganization Act (AIRA).[80] The AIRA extended Section Five to Alaska,[81] but regulations that passed following ANCSA implementing the fee-to-trust process still excluded Alaska Tribes (except for Metlakatla) from applying to put land into trust.[82]

74. Act of May 17, 1884, ch. 53, § 8, 23 Stat. 24, 26. Congress intended for the Organic Act to address the issue of aboriginal title more clearly, stating, "Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them." *Id.*

75. *See, e.g.*, Edwardsen v. Morton, 369 F. Supp. 1359, 1371 (D.D.C. 1973) (explaining that Native possessory rights remain intact unless Congress decides otherwise). Later, Congress also passed the Territorial Organic Act of 1912, which extended the laws that govern public land to Alaska. Act of Aug. 24, 1912, ch. 387, 37 Stat. 512. Section 9 of the Territorial Organic Act stated that "[t]he legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States . . . ." Similarly to the Organic Act of 1884, the Court in *Tee-Hit-Ton Indians* also found that this provision preserved the status quo regarding aboriginal title until Congress took further action. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278 (1955).

76. *See generally* Ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 5101–5129) (discussing giving Native Americans more extensive opportunities).

77. *Id.*

78. *Id.*

79. Indian Reorganization Act § 13 ("[S]ections 9, 10, 11, 12, and 16, shall apply to the Territory of Alaska . . . ."). When the Indian Reorganization Act was first passed, only five of the nineteen IRA provisions originally applied to Alaska. *Id.*

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

81. Indian Reorganization Act § 13 ("[S]ections 9, 10, 11, 12, and 16, shall apply to the Territory of Alaska . . . .").

82. *See* Land Acquisitions in the State of Alaska, 79 Fed. Reg. 24648, 24649

C. The Alaska Statehood Act and ANCSA

Beginning with The Treaty Concerning the Cession of Russian Possessions in North America—describing Alaska Natives as "uncivilized Tribes"—the federal and Alaska governments have continuously undermined Alaska Native land rights.[83] Although the Alaska Native Allotment Act of 1906 allowed for 160-acre tracts to be allocated as homesteads subject to certain requirements, the Alaska Native land claims were left unsettled.[84]

In 1958, the Alaska Statehood Act finally acknowledged Alaska Native land claims, but gave no resolution for determining their specific land rights.[85] Instead, the state disclaimed all title and rights to any lands to which title may be held by an Alaska Native.[86] Although its significance was not initially recognized, the state's disclaimer became increasingly important beginning in 1961 when Alaska began selecting the land granted to it under the Statehood Act.[87] This process gave rise to land

(May 1, 2014) (proposing altering the regulations, explaining the consequences of the current regulations, and noting that Metlakatla is the only exception).

83. Treaty Concerning the Cession of the Russian Possessions in N. Am. by His Majesty the Emperor of All the Russias to the United States of America, U.S.-Russ., art. 3, June 20, 1867, 15 Stat. 539. One notable exception is The Organic Act of 1884. "[T]he Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress." Ch. 53, 23 Stat. 24. Later the Supreme Court diminished the effect to these protections. *See* Tee-Hit-Ton Indians v. U.S., 348 U.S. 272, 278 (1955) (ruling that the Act simply maintained the status quo).

84. United States v. Atlantic Richfield Co., 435 F. Supp. 1009, 1015 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980). In *Atlantic Richfield*, the United States, on behalf of Alaska Native tribal governments, sued the state of Alaska and 140 corporations and private parties prior to the passage of ASCNA. The plaintiffs, on the basis of aboriginal title, sought to negate all of the state's claims to land. The court ultimately found that "[t]o hold, as intervenor urges, that Congress lacked the power to extinguish claims against the United States, the State and third parties for trespass to aboriginal lands in Alaska would mean that Congress is powerless to effect a final and comprehensive solution to the Native land claims problem in Alaska. It would mean the Settlement Act is illusory." *Id.* at 1031.

85. Pub. L. No. 85-508, 72 Stat. 339, *amended by* 73 Stat. 141 (1959) (codified as amended at 48 U.S.C. §§ 21–488 (1994)).

86. *Id.* This disclaimer became especially important when Congress looked for authority to pass ANCSA, allowing it to take back from Alaska some of the land that had previously been allotted to the state under the Alaska Statehood Act. James D. Linxwiler, *The Alaska Native Claims Settlement Act at 35: Delivering on the Promise*, 53 ANN. ROCKY MOUNTAIN MIN. LAW INST. 1, 20 (2007).

87. *See id.* at 20–22 (explaining the consequences of Alaska beginning to select and lease land, including Native Americans becoming more aware of the political process). In asserting that the state "forever disclaim[ed] all right and title to . . . any lands or other property . . . which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives), or is held by the United States in trust for said

disputes with Tribal Nations.

Alaska first began selecting land around cities and other settled areas but then extended land selection to the Central Arctic Coastal Plain in 1962.[88] The federal government granted Alaska temporary approval to select 1.65 million acres of land.[89] It then proceeded to hold sales for "conditional" oil and gas leases of the Central Arctic Coastal Plan land.[90] As soon as oil was discovered in the Prudhoe Bay and Kuparuk Rover Oil Fields, Alaska's state government held another competitive lease sale for the adjoining acreage.[91] These oil sales were particularly contentious because Alaska Natives had used the land impacted for subsistence far before any country asserted governance over the area.[92] The state's practice of selecting land adjoining Native Villages continued, causing impacted Native Villages to claim aboriginal title to 365 million acres of state land.[93]

Due in part to Alaska's land claims, Native Alaskans began to file claims asserting title to land with the Bureau of Indian Affairs.[94] By 1968, 40 conflicting claims had been asserted, covering approximately 80 percent of the state.[95] In response, the U.S. secretary of the Interior froze all conveyances of title under the Statehood Act in Alaska.[96] Alaska unsuccessfully attempted to challenge the freeze in 1969,[97] but later that year, the Department of the Interior promulgated Public Land Order 4582, withdrawing all claims to unreserved public lands in Alaska until it could determine how to protect Alaska Native land rights.[98] During this

natives" the state could not select lands that Alaska Natives may claimed title. Pub. L. No. 85-508, 72 Stat. 339 (1958).

88. ROBERT D. ARNOLD, ALASKA NATIVE LAND CLAIMS 139–41 (1978).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 741 (2016 ed.).

94. *Id.* at 102–03, 119.

95. *Id.*

96. Linxwiler, *supra* note 86, at 12.

97. Alaska v. Udall, 420 F.2d 938, 940 (9th Cir. 1969). This case found that the freeze was valid because the aboriginal rights and historic use of the land could make the lands that Alaska had selected unavailable for selection pursuant to the Statehood Act. *Id.* Specifically, the aboriginal title to these lands may have rendered the lands not "vacant, unappropriated, and unreserved" as was required for the state's land selection under the Statehood Act. Pub. L. No. 85-508, 72 Stat. 339 (1958).

98. 34 Fed. Reg. 1025 (Jan. 23, 1969). PLO 4582 was revoked by ANCSA § 17(d)(1). 43 U.S.C. § 1616(d)(1). This PLO was enacted after the BIA filed for withdrawal of all claims not otherwise withdrawn in Alaska, pursuant to the Pickett Act. Act of June 25, 1910, ch. 421, 36 Stat. 847 (codified as amended at 43 U.S.C. §§ 141–143, repealed in part in 1960 and 1976). This PLO was commonly referred to as the "Super Freeze." Joseph Rudd, *Who Owns Alaska? Mineral Rights*

secondary freeze, the Department of the Interior ordered the Federal Field Committee for Development Planning in Alaska to prepare a report for Congress on the status of Native land claims.[99] The report formally recognized Native land claims and provided a proposal for their resolution, although this proposal became largely irrelevant with the passage of the Alaska Native Claims Settlement Act (ANCSA).[100]

Congress quickly enacted ANCSA as a "solution" to the land freeze, effectively extinguishing aboriginal title, and complicating Alaska Native land rights with its complex legislative scheme.[101] ANCSA transferred title of approximately 40-million acres of land to Alaska Natives.[102] It also provided for $960 million to be given to Alaska Natives as compensation for their land claims.[103] However, these concessions were not handed directly to Tribal members.[104] The surface rights for 22 million of the 40 millions acres were given to Alaska Native Villages according to their population.[105] The remaining 18 million acres, as well as the subsurface rights to the Villages' 22 million acres, were given to the 13 regional corporations established by ANCSA.[106]

Although ANCSA extinguished aboriginal title, it did not extinguish all Indian Country in Alaska.[107] While *Alaska v. Native Village of Venetie Tribal Government* (*Venetie II*) held that lands conveyed by ANCSA are not Indian Country, the allotments granted under both the Alaska Native Allotment Act and the Alaska Native Townsite Act are still Indian Country.[108] Regardless of whether the Native Villages' lands constitute Indian Country, the Ninth Circuit has specified that "tribal sovereignty is

Acquisition Amid Rapidly Changing Land Ownership, 20 ROCKY MT. MIN. L. INST. 109, 116 (1974); s*ee also* Linxwiler, *supra* note 86, at 23–24 (explaining how PLO 4582 impacted public lands).

99. Joseph Rudd, *supra* note 98, at 116.

100. *Id.* at 117.

101. Marilyn J. Ford & Robert Rude, *ANCSA: Sovereignty and a Just Settlement of Land Claims or an Act of Deception*, TOURO L. REV. 479, 488 (1999).

102. 43 U.S.C. §§ 1611, 1613 (1986).

103. *Id.* § 1605.

104. *Id.* § 1611.

105. *Id.* § 1613.

106. *Id.* §§ 1611, 1613.

107. *See* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 527–28 (1998) (*Venetie II*). In *Venetie II*, the Native Village appealed a determination that ANCSA extinguished Indian Country in Alaska. This was at issue because extinguishing Indian Country would eliminate the tribal government's ability to use the Business Activities Tax that it could impose upon a state contractor. The Court held that lands conveyed by ANCSA are not considered "Indian Country," but allotments made to individual Natives, dependent Indian communities, and the Metlakatla Indian reservation not extinguished by ANCSA are still considered "Indian Country" under 18 U.S.C. § 1151. *Id.* at 527.

108. *Id.* at 527 n.2.

not coterminous with Indian Country."[109]

D. Changes to the Alaska Exception

For many years, Alaska Native Tribes were excluded from submitting applications to put land into trust,[110] but in 2013 the District Court for the District of Columbia struck down this prohibition in *Akiachak Native Cmty. v. Salazar*.[111] The court held that not allowing Alaska Native Tribes to put land into trust constituted discrimination against Tribes in Alaska, violating 25 U.S.C. § 465, which nullifies any regulations that discriminate among Tribal Nations.[112] To avoid discriminating among Tribes, the Court recommended striking the Alaska exception.[113] Following the ruling, the Department of the Interior held tribal consultations to determine whether striking the Alaska exception would be favorable to Tribes.[114] The secretary of the Interior then formally struck the Alaska exception in December of 2014.[115] Although the Department of the Interior had appealed the ruling in *Akiachak*, its voluntary rule change rendered the appeal moot.[116]

After the D.C. Circuit Court of Appeals found the *Akiachak* case moot, a new Solicitor's Opinion M-37043 was issued in January 2017, lifting the Alaska land-into-trust application freeze.[117] Craig Tribal Association's land-into-trust application was the first to be approved after the application freeze was lifted.[118] For Alaska Native Tribes, the Craig trust land seemed like a step towards allowing more Tribes to take advantage of Section Five and put their own land into trust.[119] However,

109. Native Vill. of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 558 n.12 (9th Cir. 1991) (*Venetie I*).

110. Act of May 1, 1936, Pub. L, No. 74-538, § 1, 49 Stat. 1250.

111. 935 F. Supp. 2d 195, 197 (D.D.C. 2013). This decision by a lower court was immediately appealed and all applications for land into trust were put on hold until there was a final decision at the appellate level. *See* Memorandum Op. and Ord., Akiachak Native Cmty. v. Salazar, 935 F. Supp. 2d 195 (D.D.C. 2013) (No. 145). This injunction essentially made the ruling in this case irrelevant for a while, although the ruling at least led to revisions by the Department of the Interior. *Id.*

112. *Id.*

113. *Id.*

114. *See id.*

115. *See* Land Acquisitions in the State of Alaska, 25 C.F.R. § 151 (2014).

116. Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76888, 76889–90 (to be codified at 25 C.F.R pt. 151).

117. 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. 18, 2017).

118. 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.

119. *Id.*

this hope did not last for long. In June 2018, the Trump Administration issued Solicitor Opinion M-37053 withdrawing the 2017 Solicitor Opinion M-37043 "pending review."[120] The Trump Administration then proceeded to "permanently withdraw" the previous opinion allowing acceptance of Alaska land-into-trust applications.[121]

In April of 2021, the Biden Administration announced its review of the previous Solicitor Opinion M-37064 (the 2017 opinion that reinstated the "Alaska exception").[122] The Department of the Interior issued a press release stating that it would be taking "steps to honor our nation-to-nation relationship with Tribes and uphold our trust and treaty responsibilities to them."[123] That same day, the Solicitor General issued a memorandum withdrawing Solicitor Opinion M-37064.[124] Although this withdrawal did not mean that the "Alaska exception" was removed, the memorandum called for consultation with Tribal Nations regarding the secretary's land-into-trust authority in Alaska.[125]

After over a year of relative silence from the Biden Administration on the topic of land-into-trust in Alaska, the Department of the Interior issued a press release announcing that Indian Affairs would accept land-into-trust applications for the Tlingit and Haida Tribes.[126] In the press release, U.S. Secretary of the Interior Deb Haaland stressed the importance of Tribal Nations' ability to put land into trust.[127] This is only the second approval of a land-into-trust application in Alaska (after Craig), and is the first application to be approved in the last five years.[128]

120. *Id*.

121. 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).

122. *See* Memorandum from Robert T. Anderson, Solicitor, U.S. Dep't of the Interior, to Debra Haaland, Sec'y, U.S. Dep't of the Interior (Apr. 27, 2021).

123. Press Release, U.S. Dep't of the Interior, Interior Dep't Takes Steps to Restore Tribal Homelands, Empower Tribal Governments to Better Manage Indian Lands (April 27, 2021).

124. Anderson, *supra* note 122.

125. *Id.*

126. Press Release, U.S. Dep't of the Interior, Indian Affairs, Indian Affairs to Accept Land Into Trust for Tlingit and Haida Indian Tribes of Alaska (Nov. 17, 2022).

127. *Id.*

128. *Id.* The land being taken into trust is located in Juneau, Alaska. *Id.* It is within an area known as the "Juneau Indian Village." *Id.* The Tlingit and Haida Indian Tribes have additional applications for land into trust currently pending, and they are hoping that this is just the first of many. *See Department of Interior Approves Tlingit & Haida's First 'Fee-to-Trust' Application,* SITNEWS (November 20, 2022),
http://www.sitnews.us/1122News/112022/112022_first_fee_to_trust.html.
Regarding the Department of the Interior's announcement of the application being accepted, Tribe's president Richard Chalyee Éesh Peterson stated, "Today's announcement brings us one step closer to ensuring our Tribe will have a center

E. Benefits of Land into Trust in the United States

Currently, there are over 56 million acres held in trust across the United States.[129] There are three purposes for which land can be taken into trust: "(1) to facilitate tribal self-determination through governmental offices, healthcare, and public services; (2) for economic development, such as gaming, industrial parks, or shopping malls; and (3) for Indian housing."[130] Placing land into trust gives multiple benefits to tribal governments, including legal, jurisdictional, economic, political, and cultural benefits.[131] For example, putting land into trust shields the land from both state and local taxes.[132]

One of the most significant benefits of putting land into trust is that land taken into trust constitutes "Indian Country."[133] Though the U.S. Supreme Court narrowed tribal jurisdiction, particularly criminal jurisdiction, in recent cases,[134] "Indian Country" still maintains more jurisdictional protections than other non-designated lands. This remains true even though recent Court opinions may have devalued some of the jurisdictional impact.[135]

Some benefits of putting land into trust are amplified by the tribal government being a sovereign or "quasi-sovereign" over the land, rather than just a landowner.[136] For example, landowners already possess a power to exclude.[137] This power is retained by tribal governments when

for our tribal government in perpetuity." *Id.* This is the largest land grant given to the Tribal Nation and is intended to expand broadband infrastructure in southeast Alaska. *Id.*

129. *Benefits of Trust Land Acquisition (Fee to Trust)*, U.S. DEP'T OF THE INTERIOR, https://www.bia.gov/service/trust-land-acquisition/benefits-trust-land-acquisition.

130. Larry E. Scrivner, *Acquiring Land Into Trust for Indian Tribes*, 37 NEW ENG. L. REV. 603, 603 (2002).

131. *See generally* Padraic I. McCoy, The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land Into Trust Through 25 C.F.R. Part 151, 27 AM. INDIAN L. REV. 421 (2003) (surveying the benefits to American Indians of placing tribal land into trust).

132. 25 U.S.C. § 5108 (2022).

133. The term "Indian Country" is best defined in *DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 425 n.1 (1975). Although Indian Country was originally simply defined as "'that part of the United States west of the Mississippi,' not within certain states, 'to which Indian title has not been extinguished,'" the definition is now more refined and is codified in 18 U.S.C. § 1151 (2000).

134. Most recently, *Oklahoma v. Castro-Huerta* held that states have concurrent criminal jurisdiction with federal and tribal governments over crimes by non-Indians against Indians on reservation lands. 142 S. Ct. 2486, 2504 (2022).

135. *See id.*

136. McCoy, *supra* note 131, at 477–78.

137. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

they put land into trust.[138] Trust land further strengthens tribes' exclusionary authority because the federal trust relationship allows the tribal government to request that the federal government intervene to protect the tribal trust land against trespass.[139]

Further, designation of trust land as Indian Country allows tribal governments to have the sovereign right to exercise their jurisdiction over the land.[140] If the land that is being put into trust was not previously designated as Indian Country, which is often the case in Alaska, placing the land into trust empowers tribal governments to enforce tribal codes, ordinances, regulations, and other laws on the land in trust.[141] Further, tribal governments have the power to tax on trust lands, pursuant to tribal regulatory authority.[142] Additionally, federal contracting preferences, housing benefits,[143] accelerated depreciation, and land use exceptions all apply to trust land thanks to its designation as Indian Country.[144]

Putting land into trust also has cultural significance because it can create "special domain where tribal identity and community can prosper."[145] In 2001, Deron Marquez, a Tribal chairman for the San Manuel Band of Mission Indians, wrote to the secretary of the Interior regarding the importance of tribal nations having the ability to put land into trust.[146] He commented that the "ability [of a Tribe] to buy back its own traditional and surrounding lands is key to fulfilling critical tribal governmental purposes and restoring a community which had existed for so long."[147] Thus, trust land acquisition is "essential for the continued self-sufficiency, dignity, and success of the Tribe and many others."[148]

138. McCoy, *supra* note 131, at 477–78.

139. *See, e.g.*, United States ex rel. Hualpai Indians v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941) (Attorney General brought suit to enjoin a railroad from trespassing on land possessed and occupied by a Tribal Nation pursuant to the federal trust relationship between the federal government and the tribal government).

140. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982) (holding that a Tribe had the inherent power to impose taxes on a reservation containing 742,315 acres of land held as tribal trust property).

141. *Id.*

142. *Id.*

143. *Converting Fee Land Into Trust Land and the Associated Economic Benefits*, U.S. DEP'T OF THE INTERIOR, https://www.bia.gov/sites/default/files/dup/assets/as-ia/ieed/pdf/FeetoTrust.pdf (last visited Sept. 25, 2023).

144. *Fee to Trust Land Acquisitions*, U.S. DEP'T OF THE INTERIOR, https://www.bia.gov/bia/ots/fee-to-trust (last visited Sept. 25, 2023).

145. McCoy, *supra* note 131, at 481.

146. *Id.* at 482 (quoting Letter from Deron Marquez, Tribal Chairman, San Manuel Band of Mission Indians to Gale Norton, Sec'y of the Interior (June 15, 2001)).

147. *Id.*

148. *Id.*

Marquez further argued that the ability to put land into trust allows smaller Tribal Nations to develop a larger community by putting clinics and housing on the trust land.[149] Taking advantage of the benefits that come with trust land furthers community development, particularly when it comes to housing, health care, and other important community services.[150]

Many Tribes have also harnessed land into trust to culturally preserve their land.[151] Proponents have argued that land into trust helps tribal governments "proactively insulate their tribal community from the cultural erosion that is the inevitable by-product of a lack of sufficient tribal land."[152] Beyond preserving the region in general, putting land into trust also gives Tribes a tool to preserve sacred and culturally significant sites.[153] The Chairman of the Hopi Tribe has explained:

[N]umerous ruins, shrines, and other sites are located far beyond the boundaries of the Tribe's current trust lands, all of these sites are of extreme importance to the Tribe culturally and as a matter of social cohesion. These places serve to knit together the fabric of Hopi life. They have past, present, and future significance.[154]

Although the motivations for putting land into trust vary between Tribal Nations, putting land into trust allows for jurisdictional, economic, and cultural advantages.[155]

As Alaska has shown, land-into-trust applications can have sweeping political consequences.[156] State and local governments, as well as landowners whose property surrounds the land being put into trust, may fear a loss of control.[157] Generally, this fear either stems from the state and local governments not being able to exercise control over the land, or the land potentially being used for gaming purposes.[158] However, these fears are largely diminished through both the regulations limiting gaming

149. *See id.* (summarizing Deron Marquez's letter to Gale Norton of the Department of Interior).
150. *Id.* at 478.
151. *Id.* at 483 (quoting Letter from Steven TeSam, Tribal Chairman, Viejas Band of Kurneyaay Indians to Terry Virden, Director, Office of Trust Responsibilities, Bureau of Indian Affairs 2 (June 14, 2001)).
152. *Id*.
153. *Id.* at 484 (quoting SALT RIVER PIMA-MARICOPA INDIAN COMM. RES. NO. SR-2094-2001 7 (June 13, 2001)).
154. *Id.* (quoting Letter from Wayne Taylor, Jr., Chairman, Hopi Tribe, to Gale Norton, Sec'y of the Interior (June 15, 2001)).
155. *See* McCoy, *supra* note 131, at 478 (stating the various rights that land in trust gives Native American tribes).
156. *See id*. (explaining the state of government operations under land-in-trust arrangements).
157. *Id.*
158. *See id*.

use under the Indian Gaming Regulatory Act and the extension of state jurisdiction under Public Law 280.[159]

Although there are some very narrow exceptions, gaming is typically not permitted on any land put into trust after October 17, 1988.[160] Even if one of the few exceptions were to apply to trust lands in Alaska, the Indian Gaming Regulatory Act does not allow Tribal Nations to operate any house-banked games, slot machines, or any other card games explicitly prohibited by the state if the state does not permit gaming for any purpose.[161] If the state does not completely prohibit gaming, the Tribal Nation and state would still have to agree to a tribal compact in order to operate such games.[162] As it pertains to fears relating to law enforcement, Alaska is a Public Law 280 state, meaning that Congress granted the state criminal jurisdiction and some civil responsibilities over "federal Indian lands" in Alaska (with the exception of the Metlakatla Indian Community).[163] On top of the regulations limiting gaming and extending state jurisdiction, land-into-trust applications typically cover small amount of land, as land-into-trust applications are only thirty acres on average.[164]

F. State Involvement in Land-Into-Trust Applications

State consent is not required to take lands into trust,[165] but the federal regulations mandate notice to state and local governments of the land-into-trust application and a thirty-business-day comment period.[166] 25 C.F.R. Part 151 was recently revised, with the new revisions effective as of January 11, 2024.[167] The revised regulations break land-into trust applications into four different categories: (1) land within a reservation, (2) land contiguous to a reservation, (3) land outside of and noncontiguous to a reservation, and (4) initial acquisitions of Tribal Nations that do not have any existing land in trust.[168] The previous version of the regulation did not account for Tribal Nations that did not have a reservation or existing land in trust, and increased scrutiny for

159. 29 U.S.C. §§ 2701–2721 (2000); 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321–1326 (2000).
160. 29 U.S.C. § 2710 (2000).
161. *Id.* at § 2710.
162. *Id.*
163. 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321–1326 (2000).
164. Acquisition of Title to Land in Trust, 66 Fed. Reg. 3452, 3457 (Jan. 16, 2001).
165. IRA, § 5, codified at 25 U.S.C. § 5108 (2022).
166. 25 C.F.R. 151.12(d) (2023).
167. 88 Fed. Reg. 86222 (2023).
168. 25 C.F.R. § 151.10–12.

land-into-trust applications when the distance between the trust acquisition and the reservation increased.[169]

Since many Tribal Nations in Alaska have no existing trust lands, their land-into-trust applications would now fall into the initial acquisition category.[170] Although there is a presumption that an acquisition will have minimal adverse impacts on the government's "regulatory jurisdiction, real property taxes, and special assessments," the state or local government is then given a 30-day comment period to rebut that presumption.[171] After the 30-day comment period, the Tribal Nation has a period of time in which they can either choose to reply to the comments or request that a decision be made.[172] Although the state, local, or both governments' comments may not be the deciding factor in land-into-trust applications, in reviewing the comments, the secretary of the Interior is specifically required to consider the location of the land and the "potential conflicts of land use."[173]

Considering potential conflicts of land use based on comments of state and local governments, who have historically opposed Tribal land-into-trust applications, has serious implications for impacted Tribes. Final approval of land-into-trust applications, including the decision on whether the secretary has authority to approve the applications, is ultimately in the control of the federal government.[174] However, the IRA provision allowing state and local government comments for off-reservation and initial acquisitions gives the state a say in the decision-making process.[175] Through these comments, the state has an opportunity to either acknowledge the sovereignty of Tribal Nations and collaborate on how to address potential issues regarding regulatory jurisdiction, or continue the pattern of uncooperativeness that reoccurs throughout the state's history with Tribal Nations. Through the current suit brought by the state, Alaska has chosen the latter.

169. 88 Fed. Reg. 86222 (2023). The BIA described the increased distance-based scrutiny as a "bungee cord" approach, making it increasingly difficult for Tribal Nations without an existing reservation or trust lands to put land into trust. *Id.*
170. 25 C.F.R. § 151.12.
171. *Id.*
172. *Id.*
173. *Id.*
174. 25 C.F.R. § 151.11–12.
175. *Id.*

IV. IMPACT OF HOUSE BILL 123

A. State Tribal Recognition and the Supremacy Clause

House Bill 123[176] (now codified at section 01.15.100 of the Alaska Statutes) is largely redundant because Alaska is already required to recognize federally recognized Tribes. The Constitution's Supremacy Clause declares federal law the supreme law of the land, including for tribal recognition.[177] The United States' recognition of Tribes as domestic dependent nations requires that states also recognize the federal government's recognition of a government-to-government relationship.[178] States may also recognize Tribes, but state recognition is not the same as federal recognition.[179] While the federal government allows for states to have relationships with Tribes that are not federally recognized, state recognition does not come with the same services and benefits that accompany the federal government's recognition.[180] Rather, the federal government merely permits the states and Tribes to enter a mutually beneficial political relationship.[181]

Alaska's House Bill 123 is not the same as traditional forms of state Tribal recognition.[182] Rather than providing a route for federally unrecognized Tribes to seek recognition at the state level, it simply reiterates Alaska's recognition of federally recognized Tribes.[183]

176. H.B. 123, 32nd Leg., 2d. Sess. (Alaska 2022).

177. *See* U.S. CONST. art. VI, cl. 2. ("This Constitution . . . shall be the supreme Law of the Land."); 25 U.S.C. § 5131 (2000).

178. *See* Kristin McCarrey, *Alaska Natives: Possessing Inherent Rights to Self-Governance and Self-Governing from Time Immemorial to Present Day*, 2 AM. INDIAN L.J.. 437 (2013) (discussing the turbulent history of self-governance in Alaska Native Tribes and their relationships with both federal and state governments).

179. Alexa Koenig & Jonathan Stein, Federalism and the State Recognition of Native American Tribes: A Survey of State-Recognized Tribes and State Recognition Processes Across the United States, 48 SANTA CLARA L. REV. 79, 83 (2008). Federal recognition is the only way for tribes to receive the funding and services through the Bureau of Indian Affairs. Id. at 95. However, some states provide some systems that allow for recognition on a state level. Id. at 83. Besides being recognized by the state, it is unclear what implications state recognition has besides being seen as a stepping stone to federal recognition. Id. at 94. Often, state recognition has no legal impact in cases where the tribe is only state recognized rather than being federally recognized. Id. Even so, state recognition is the only avenue for many tribes, or at least is the only avenue right now as they await acknowledgment by the federal government. Id. at 83.

180. *See generally* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 168–71 (explaining the doctrine of state wardship and its implications on state-tribe relationships).

181. Koenig & Stein, *supra* note 179, at 83.

182. H.B. 123, 32nd Leg., 2d. Sess. (Alaska 2022).

183. *Id.*

B. Legislative Intent

House Bill 123, enacted on July 28, 2022, is titled "Providing for state recognition of federally recognized Tribes; and providing for an effective date."[184] The bill purports to assert no new definitions, simply recognizing Tribes already recognized under the Alaska Tribal Recognition Act.[185]

The Act is nothing more than a recognition.[186] House Bill 123 creates a new section of Alaska Statute 44.03.100 recognizing federally recognized Tribes. The bill begins with a short description of the legislative intent.[187] It establishes that the "history of Tribes predated the United States and predates territorial claims to land in the state by both the United States and Imperial Russia."[188] In pertinent part, the bill states that "[i]ndigenous people have inhabited land in the state for multiple millennia, since time immemorial or before mankind marked the passage of time."[189] The second half of the legislative findings explains that the legislature intends to "acknowledge through formal recognition the federally recognized Tribes."[190] This historic bill received lots of media attention[191] but the impact of the bill remains limited.

C. H.B. 123 and Land-Into-Trust Disputes

The rocky relationship between the state and tribal governments over land persists, partially because the state maintains its position that

184. *Id.*

185. *Id.* 25 U.S.C. § 5131 is the U.S. statute that governs the publication of the list of federally recognized tribes. 25 U.S.C. § 5131. This statute requires the secretary to publish a list of all federally recognized tribes in the Federal Register. *Id.* This list is published every year and is updated with any new tribes that are subsequently acknowledged by FAC process, legislative process, or by court order. *Id.*

186. Part (b) of the legislative intent asserts that "[i]t is the intent of the legislature to exercise the legislature's constitutional policy-making authority and acknowledge through formal recognition the federally recognized tribes in the state. Passage of this Act is nothing more or less than a recognition of tribes' unique role in the state's past, present, and future." *Id.*

187. H.B. 123, 32nd Leg., Reg. Sess. (Alaska 2022).

188. *Id.*

189. *Id.*

190. *Id.*

191. Iris Samuels, *'A Historic Milestone': Alaska Formally Recognizes Native Tribes*, ANCHORAGE DAILY NEWS (July 30, 2022), https://www.adn.com/politics/alaska-legislature/2022/07/28/a-historic-milestone-alaska-formally-recognizes-native-tribes/. Joaquin Estus, *State of Alaska Recognizes Tribes with Historic Bill*, INDIAN COUNTRY TODAY (July 30, 2022), https://ictnews.org/news/state-of-alaska-recognizes-tribes-with-historic-bill.

the Alaska exception to land into trust should continue.[192] Currently, the ability for Tribal Nations in Alaska to put land into trust hinges on the political party in power, as it is the U.S. Secretary of the Interior who makes decisions on the Alaska exception.[193]

The state has chosen to take an official position opposing the ability of Alaska Tribal Nations to put land into trust.[194] Not only does it oppose the process in general, but the state continues to protest land disputes with Alaska Native Tribes, taking the position that the Alaska exception should be upheld.[195]

In *Alaska v. Newland*, Alaska is currently fighting a decision by the Department of the Interior to place into trust a 3.5 acre parcel of land located in downtown Juneau.[196] When the Central Council for the Tlingit and Haida Indian Tribes of Alaska originally submitted their applications, the Department gave notice to the state of Alaska and allowed for comments.[197] The state objected to the Department of the Interior considering each of the five applications comprising the action separately. The state specifically "questioned the Secretary's authority to take land into trust for tribes in Alaska" in light of ANCSA.[198] The motion for summary judgment filed by the state in *State v. Newland* continues to question the Department of the Interior's authority to place Alaska land into trust.[199] Rather than working cooperatively with Tribal Nations to discuss "potential impacts on regulatory jurisdiction,"[200] the state continues to wholly oppose land-into-trust applications by Tribal Nations in Alaska, despite their clear benefit to Alaska's Tribal Nations.

192. *See* discussion *supra* Sections II.A., III.A.–C.
193. *See supra* Section III.F.
194. *See infra* note 199 and accompanying text.
195. Strommer, *supra* note 65, at 3.
196. *See* Complaint for Declaratory Judgment and Injunctive Relief Against All Defendants, State v. Newland, No. 3:23-cv-00007 at 2, 20–21 (D. Alaska filed Jan. 17, 2023).
197. *Id.* at 1.
198. *Id*.
199. State of Alaska's Motion for Summary Judgment and Memorandum in Support, State v. Newland, No. 3:23-cv-00007 (D. Alaska filed Aug. 1, 2023). This argument is easily countered by the fact that, although ANCSA specifically repealed and mentioned multiple existing laws (such as the Alaska Native Allotment Act), it made no mention of either the 1934 or 1936 IRAs. 43 U.S.C. § 1617(a). This was not merely an oversight; rather it makes it clear that there was no intention of undermining the secretary's authority to approve land-into-trust applications in Alaska. HEATHER KENDALL-MILLER ET AL., COMMENTS OF 29 TRIBES AND TRIBAL ORGANIZATIONS IN RESPONSE TO THE DEPARTMENT OF THE INTERIOR'S QUESTIONS FOR CONSIDERATION ON THE ALASKA IRA AND THE ALASKA LANDS INTO TRUST PROGRAM 24–25 (2019).
200. State v. Newland, No. 3:23-cv-00007 (D. Alaska, Jan. 17, 2023).

House Bill 123[201] asserts that:

> The state recognizes the special and unique relationship between the United States government and federally recognized Tribes in the state. The state recognizes all Tribes in the state that are federally recognized under 25 U.S.C. 5130 and 5131. Nothing in this section diminishes the United States government's trust responsibility or other obligations to federally recognized Tribes in the state or creates a concurrent trust relationship between the state and federally recognized Tribes.[202]

This language seems to directly contradict the state's actions towards tribal governments when it comes to putting land into trust.[203] If the state truly recognized the Tribe's claims to the land that predated any sort of territorial claims and the history between Tribal Nations, Imperial Russia, the United States, and the state of Alaska, it would not continue to impede the ability of tribal governments in Alaska to put land into trust.[204]

While the ultimate decision-making power is in the hands of the federal government to approve land-into-trust applications and judicially decide whether the secretary of the Interior holds the authority to approve such applications, the state still plays a significant role in the success of land-into trust-applications.[205] Applications for off-reservation acquisitions require consideration of "regulatory jurisdiction, real property taxes, and special assessments."[206] The state has an opportunity to provide constructive feedback on the expected impact of these factors.

The state is given a 30-day period for these comments and has an opportunity to collaborate with Tribal Nations in finding solutions to any concerns regarding regulatory jurisdiction.[207] Participating in a collaborative effort would not only be consistent with the proclaimed intent behind House Bill 123, but it would also provide increased economic benefits to Tribal Nations while developing a more positive relationship between the state and Tribal Nations, which benefits all residents.

Without taking steps to recognize the sovereignty of Tribal Nations, House Bill 123 ultimately rings hollow. Governor Dunleavy himself

201. H.B. 123, 32nd Leg. (Alaska 2022) (now codified as AS § 01.15.100).
202. *Id.*
203. *Id.*
204. *See* discussion *supra* Section III.A.
205. *See* 25 C.F.R. § 151.11 (1995) (outlining "requirements in evaluating tribal requests for the acquisition of lands in trust status . . .").
206. 25 C.F.R. § 151.11(d) (1995).
207. *Id.*

stated that the bill was meant to recognize "the important role that Native Tribes play in our past, present, and future."[208] While the signing of this bill was meant to signify "the State's desire to foster engagement with Alaska Natives and tribal organizations,"[209] Alaska's actions since the signing of that bill, specifically the opposition of Tribal Nations' land-into-trust applications, show no such engagement. State citizens and Tribal members would all benefit from a collaborative and positive relationship between the state and Tribal Nations.[210] The state's current position on land-into-trust applications not only is in direct conflict with its stated intention in signing House Bill 123 but also poses an obstacle to any future collaborative relationship between Tribal Nations and Alaska's state government.

V. CONCLUSION

Although this Alaska Recognition of Tribal Nations Act does not make any changes to tribal recognition, since the state was already required to recognize Tribes, passage of the act should signify greater collaboration with Tribes in the future. Recognition of tribal connection to the land that predates colonial claims should signify that the state is finally ready to work with Tribes and cooperate with Tribes on issues such as putting land into trust. Additionally, should more changes be made concerning the Alaska exception to Section Five, the state should support the decision that Alaska land-into-trust applications should be accepted by the Department of the Interior. The very purpose of this bill was to signify a new chapter that many Alaskans have been fervently waiting for—"collaboration and partnership between the State and Alaska's Tribes."[211] Without the state changing their course of action when it comes to land-into-trust applications in Alaska, this overdue "new chapter" rings hollow.

208. Press Release, Office of Governor Mike Dunleavy, Dunleavy Signs Tribal Recognition Bill to Formally Recognize Alaska's Tribes (July 28, 2022).

209. *Id.*

210. *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, GOVERNMENT TO GOVERNMENT MODELS OF COOPERATION BETWEEN STATES AND TRIBES 12 (2009) (finding that building state-tribal relationships better serves both Tribal members and state citizens, since tribally-administered programs can relieve state-wide systems).

211. *Id.*