



Alaskans should prepare for major changes to the unique legal framework governing tribal lands in Alaska. In mid-November, the U.S. Department of the Interior (DOI) announced that it can acquire lands in trust for Alaska's 231 federally recognized tribes and establish Indian reservations. On the heels of this announcement, the DOI published proposed changes to its regulations that would make it easier for tribes to place lands in trust. Together, these changes could fundamentally reshape the legal landscape in the state.

The DOI's Alaska trust lands decision reverses more than 40 years of federal practice. For decades, the DOI maintained that it lacked authority to acquire trust lands in Alaska, based on the Alaska Native Claims Settlement Act (ANCSA) and other federal statutes.<sup>[1]</sup> With ANCSA, Congress charted a different approach to federal Indian policy for Alaska by extinguishing aboriginal land title, revoking all native reserves (excluding one), and transferring millions of acres of land into corporate ownership controlled by Alaska Native

shareholders. Five years later, Congress rescinded the authority to designate public lands in Alaska as reservations, reinforcing the DOI's understanding that the acquisition of trust lands for Alaska tribes was incompatible with the regime adopted for Alaska.<sup>[2]</sup> The DOI codified that view in its trust regulations in 1980 with the explanation that ANCSA "does not contemplate the further acquisition of land in trust status, or the holding of land in such status" in Alaska.<sup>[3]</sup>

This so-called "Alaska Exception" remained in place for 35 years, until a federal district court in Washington, D.C., vacated it in an apparently friendly suit between the Akiachak Native Community and the DOI.<sup>[4]</sup> Following the district court's decision, the Obama administration eliminated the Alaska Exception from its trust regulations and issued a new opinion concluding that ANCSA did not repeal its power to acquire lands in trust in Alaska.<sup>[5]</sup> The Trump administration suspended the opinion for reconsideration and permanently withdrew it immediately prior to leaving office.<sup>[6]</sup> The DOI's latest opinion reinstates the Obama administration's interpretation allowing the acquisition of trust lands in Alaska.<sup>[7]</sup>

Now, the DOI is poised to reshape land ownership and sovereign control in Alaska despite substantial legal uncertainty regarding its position; and it may do so rapidly. The DOI's proposed changes to its Fee-to-Trust (FTT) regulations would make the process easier for tribes and faster, by establishing favorable presumptions for tribes, reducing or eliminating consideration of jurisdictional problems and land use conflicts that might arise from the acquisition of lands, and jettisoning various informational requirements currently required of tribes.<sup>[8]</sup> Particularly relevant to Alaska, where almost all tribes currently have no lands in trust, the DOI proposes to create a new category of trust acquisition for "initial Indian acquisitions" that is "designed to ease the process of acquiring first trust lands for those tribes who do not currently possess any land in trust."<sup>[9]</sup>

The DOI's actions promise to fundamentally reorganize relations between federal, state, and tribal governments in Alaska by establishing a reservation system in Alaska—a system that Congress rejected for Alaska when it passed ANCSA. For more information regarding the DOI's Alaska trust lands decision or its proposed changes to the FTT regulations, please contact our [Native American Law & Policy practice](#).

## Footnotes

<sup>[1]</sup> Pub. L. No. 92-203, 85 Stat. 688 (1971) (*codified as amended at* 43 U.S.C. §§ 1601-1629h).

<sup>[2]</sup> *See* Federal Land Policy and Management Act (FLPMA), Pub. L. No. 94-579, 90 Stat. 2744 (1976) (*codified as amended at* 43 U.S.C. §§ 1701-1787), Title VII, § 704(a).

<sup>[3]</sup> *See* Bureau of Indian Affairs, *Land Acquisitions*, 45 Fed. Reg. 62034 (Sept. 18, 1980). The sole exception was the Metlakatla Indian Community of the Annette Island Reserve, which rejected ANCSA.

<sup>[4]</sup> *See Akiachak Native Community v. Jewell*, 995 F. Supp. 2d 1 (D.D.C. 2013), *vacated as moot*, *Akiachak Native Cmty. v. Dep't of the Interior*, 827 F.3d 100 (D.C. Cir. 2016) (vacating State of Alaska's appeal as mooted by the rulemaking).

<sup>[5]</sup> *See* Bureau of Indian Affairs, *Land Acquisitions in the State of Alaska*, 79 Fed. Reg. 76888 (Dec. 23, 2014) (effective Jan. 22, 2015); *see also* Hilary C. Tompkins, Solicitor Opinion M-37043, "*Authority to Acquire Land into Trust in Alaska*" (Jan. 13, 2017).

<sup>[6]</sup> Daniel H. Jorjani, Solicitor Opinion M-37064, "*Permanent Withdrawal of Solicitor Opinion M-37043, 'Authority to Acquire Land into Trust in Alaska'*" (Jan. 19, 2021).

<sup>[7]</sup> Solicitor of the Department of the Interior, *The Secretary's Land into Trust Authority for Alaska Natives and Alaska Tribes Under the Indian Reorganization Act and the Alaska Indian Reorganization Act*, M-Opinion



37076 (Nov. 16, 2022), available at: <https://www.doi.gov/solicitor/opinions>. The Solicitor issued his 37-page opinion, which is binding on the DOI, in conjunction with a decision to acquire a small parcel of land in Juneau in trust for the Central Council of Tlingit and Haida Indian Tribes. *See* Bureau of Indian Affairs, *Land Acquisitions; Central Council of Tlingit and Haida Indian Tribes of Alaska, Alaska*, 87 Fed. Reg. 73321 (Nov. 29, 2022). This is the first such acquisition in Alaska in five years, and only the second since the passage of ANCSA in 1971.

[8] Bureau of Indian Affairs, *Land Acquisitions*, 87 Fed. Reg. 74334 (Dec. 5, 2022).

[9] *Id.* at 74335.

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