No. 08-863

In the Supreme Court of the United States

OMAR STRATMAN, PETITIONER

v.

KEN SALAZAR, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Section 1427 of the Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2518, which provided that respondent Leisnoi, Inc., was entitled to a conveyance of land under the Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, 85 Stat. 688, ratified the Secretary of the Interior's 1974 determination that respondent is an eligible village corporation under ANCSA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 545 F.3d 1161. The opinion of the district court (Pet. App. B1-B18) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2008. The petition for a writ of certiorari was filed on January 5, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, 85 Stat. 688 (43 U.S.C. 1601 *et seq.*), to settle aboriginal

land claims by Natives and Native groups of Alaska. ANCSA listed approximately 200 native villages that were to be treated as eligible for benefits unless the Secretary of the Interior found that they failed to meet certain criteria. 43 U.S.C. 1610(b)(1) and (2). In addition, any village not specifically listed in the statute could qualify for benefits if the Secretary determined that "twenty-five or more Natives were residents of an established village on the 1970 census enumeration date," and "the village is not of a modern and urban character, and a majority of the residents are Natives." 43 U.S.C. 1610(b)(3).

Eligible villages are permitted to select available lands and may receive an amount of land that varies in accordance with the size of their Native Alaskan population. 43 U.S.C. 1613(a). If sufficient land is unavailable near an eligible village, the Secretary must "withdraw three times the deficiency from the nearest unreserved, vacant and unappropriated public lands." 43 U.S.C. 1610(a)(3)(A).

b. The village of Woody Island, Alaska, is located on a small island near Kodiak Island. Woody Island is not listed in 43 U.S.C. 1610(b)(1), but it applied to be recognized under 43 U.S.C. 1610(b)(3). Pet. App. D4-D5. After investigation, the Acting Area Director of the Bureau of Indian Affairs determined that Woody Island was eligible for benefits under ANCSA. 38 Fed. Reg. 35,028 (1973). Various parties—but not petitioner —unsuccessfully pursued administrative appeals, and in 1974, the Secretary approved the village's certification. Pet. App. D5.

Woody Island formed a village corporation called Leisnoi, Inc. (Leisnoi), and it began the process of land selection. There was insufficient available land in the

Kodiak Island area to satisfy the selections made by Leisnoi and other eligible village corporations, as well as selections made by Koniag, Inc. (Koniag), the regional corporation for the area. Pet. App. A7. The Secretary therefore made "deficiency selections" of lands on the Alaska Peninsula, but the natives in the Koniag region objected that those alternative lands were unsatisfactory. *Id.* at G2-G3.

c. In 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371. The statute's "primary purpose was to complete the allocation of federal lands in the State of Alaska" by providing a "means to facilitate and expedite the conveyance of federal lands within the State to the State of Alaska under the Statehood Act and to Alaska Natives under ANCSA." *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 549-550 (1987).

Section 1427 of ANILCA specifically addressed problems that had arisen in the Koniag region. It replaced the "deficiency lands" originally identified on the Alaska Peninsula with lands on Afognak Island, which is closer to Kodiak Island. § 1427(b)(1), 94 Stat. 2519-2520. Section 1427 provided that the conveyance of the Afognak Island land would be made to "a joint venture * * * consisting of the Koniag Deficiency Village Corporations, the Koniag 12(b) Village Corporations and Koniag, Incorporated." § 1427(c), 94 Stat. 2523. The "Koniag Deficiency Village Corporations" that were to receive substitute lands were defined to include "Leisnoi, Incorporated," and three other named corporations. § 1427(a)(4), 94 Stat. 2519.

Section 1427 also resolved a controversy over seven villages in the Koniag region that, unlike Leisnoi, had been found by the Secretary to be ineligible for benefits

under ANCSA. Congress "deemed" those seven villages to be eligible for ANCSA benefits, and it provided reduced benefits in return for the villages' dropping their claims against the government. ANILCA § 1427(e), 94 Stat. 2525.

2. In 1976, petitioner, a cattle rancher holding grazing leases on some of the land originally selected by Leisnoi, sued the Secretary seeking an injunction barring the transfer of any land from the United States to Leisnoi on the ground that the village of Woody Island did not satisfy ANCSA's eligibility requirements. Pet. App. A10. After Leisnoi dropped its selection of the lands overlapping petitioner's grazing leases, the district court dismissed petitioner's suit for lack of standing. Petitioner appealed, and the court of appeals held that petitioner had standing as a recreational user of the selected lands. *Stratman* v. *Watt*, 656 F.2d 1321, 1324 (9th Cir. 1981), cert. dismissed, 456 U.S. 901 (1982). The court remanded for a determination of whether there was a basis to excuse petitioner's failure to exhaust his administrative remedies. *Id.* at 1324-1326.

On remand, the parties entered into a settlement agreement under which petitioner dismissed his challenge to Woody Island's eligibility. Pet. App. B5. The Secretary then conveyed patents to Leisnoi for the lands it had selected. See *Leisnoi, Inc.* v. *Stratman*, 835 P.2d 1202, 1205 (Alaska 1992).

The settlement between petitioner and Leisnoi eventually failed, and in 1994 the court of appeals held that petitioner should be permitted to reopen his challenge to Leisnoi's eligibility. See *Stratman* v. *Leisnoi*, No. 93-36006, 1994 WL 681071 (9th Cir. Dec. 5, 1994), cert. denied, 516 U.S. 821 (1995); Pet. App. A11. The district court determined that petitioner's re-opened challenge

would not be ripe for review without a formal administrative determination, so the court remanded the case to the Interior Board of Land Appeals (IBLA). *Ibid.*

3. The IBLA referred the matter to an administrative law judge (ALJ) for a hearing to determine whether Woody Island met the requirements for eligibility as of 1970. After a hearing, the ALJ found that Woody Island did not meet the criteria of 43 U.S.C. 1610(b)(3). Pet. App. E1-E235. The ALJ did not consider the effect of Section 1427 of ANILCA.

The IBLA affirmed the ALJ's findings. Pet. App. D1-D44. The IBLA saw no reason to alter the ALJ's findings or conclusions regarding Woody Island's status as of 1970. *Id.* at D42. It rejected the contention that Section 1427 ratified the Secretary's 1974 determination of Leisnoi's eligibility, concluding that if Congress had intended to resolve the eligibility controversy, it would have included an express statement in Section 1427 that it "deemed" Leisnoi to be an eligible village, as it had for the seven Koniag villages that were specifically deemed eligible under Section 1427(e). *Id.* at D26-D31.

Leisnoi asked the Secretary to review the IBLA decision, and the Secretary referred the matter to the Solicitor of the Department of the Interior, who recommended that the Secretary disapprove the IBLA's decision. Pet. App. C4-C33. Viewing Section 1427 "as a whole," the Solicitor concluded "that Congress intended to resolve all of the uncertainties and did not intend to leave the parties at risk of having their entitlements upset by a judicial resolution of [petitioner's] challenge to Leisnoi's eligibility." *Id.* at C19-C20. The Solicitor also noted that there were significant differences between the seven Koniag villages that had been found ineligible by the Secretary (and therefore required con-

gressional action in order for them to be eligible), and Leisnoi, which had been found eligible by the Secretary (and therefore did not need Congress to "deem" it eligible). *Id.* at C31-C32. The Secretary formally adopted the Solicitor's conclusion that Section 1427 had resolved petitioner's challenge, and he therefore disapproved the IBLA decision. *Id.* at C2.

4. After the IBLA issued its decision, petitioner brought a new action in district court. Pet. App. B7. The court stayed the proceedings pending the final decision by the Secretary. *Ibid.* When the judicial action was reinstated, the court granted the Secretary's motion to dismiss, concluding that the Secretary's determination that ANILCA had ratified the 1974 eligibility determination, and thereby resolved petitioner's challenge, "was not only permissible, but persuasive." *Id.* at B16.

5. The court of appeals affirmed. Pet. App. A1-A28. The court held that the plain language of Section 1427 "inexorably leads to the conclusion that Congress intended to treat Leisnoi as an eligible village corporation under ANCSA." *Id.* at A17. It noted that "Congress viewed § 1427 as a cleanup measure in which it exercised its authority in order to effectuate the purposes [of] ANCSA, irrespective of determinations made by the Secretary." *Id.* at A23. The court concluded that Congress's exercise of its plenary power over federal lands to declare that Leisnoi was eligible for land under ANCSA mooted petitioner's challenge to the agency's 1974 eligibility determination. *Id.* at A24.

ARGUMENT

Petitioner renews his contention (Pet. 22-33) that Leisnoi is not a village corporation eligible to receive

lands under ANCSA. The court of appeals correctly rejected that claim, and its case-specific decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner does not appear to take issue with the court of appeals' conclusion that Section 1427 of ANILCA treated Leisnoi as an eligible village corporation. Pet. App. A17. He could not plausibly do so, given the clear language in that provision stating that "Leisnoi, Incorporated" is a "village corporation" that is entitled to a conveyance under ANCSA. ANILCA § 1427(a)(4) and (b)(1), 94 Stat. 2519. Instead, petitioner contends that "the court's finding that Section 1427 'treat[ed] Leisnoi as an eligible village corporation' should have been the beginning of the court's analysis, not the end." Pet. 26 (quoting Pet. App. A16). In petitioner's view (Pet. 27), the court of appeals should not have held that Section 1427 resolved the controversy over the 1974 eligibility determination unless it identified a clear and manifest intent to repeal ANCSA's village-eligibility provisions as to Leisnoi.

The decision of the court of appeals is limited to the question of one Alaska native corporation's eligibility for a grant of land, and it does not implicate any circuit conflict. Thus, even if petitioner were correct, the decision would not warrant this Court's review. In any event, petitioner's argument lacks merit, because there was no reason to conduct an implied-repeal analysis here. As the court of appeals observed, Congress's authority over public lands is plenary. Pet. App. A23. It follows that Congress may freely convey specific property to specific entities—or alter schemes for its distribution—as Congress finds necessary. See, *e.g., United States* v. *Jim*, 409 U.S. 80, 82 (1972); *Gritts* v. *Fisher*,

224 U.S. 640, 648 (1912). To accomplish such a result, Congress does not need to repeal earlier statutes relating to the lands.

ANCSA originally listed over 200 villages in Alaska that were presumptively eligible for benefits under the statute, and it created a procedure for other villages to apply for a determination of eligibility. 43 U.S.C. 1610(b). The process of making those determinations was expected to last only two and one-half years. See 43 U.S.C. 1610(b)(3). When the process ran into difficulties and delays, Congress exercised its plenary authority and resolved conveyancing issues with finality in ANILCA. It did not need to "repeal" (Pet. 27) the grant of authority it made to the Secretary in 1971 in order to resolve the remaining eligibility issues.

As the court of appeals explained (Pet. App. A24-A26), this case is analogous to *United States* v. *Alaska*, 521 U.S. 1 (1997), in which this Court held that congressional ratification of an administrative decision made the original propriety of that decision irrelevant. In *United States* v. *Alaska*, the Court considered whether certain submerged lands within a federal reservation had passed to Alaska upon statehood. The State contended that a 1923 Executive Order that had included the submerged land in a military reservation was beyond the President's authority. The United States responded that, whether or not the Executive Order was authorized, Congress had clearly expressed an intent in the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339, to preserve federal title to the lands. This Court agreed, concluding that by "acknowldeg[ing] the United States' ownership of and jurisdiction over the Reserve," Congress had "ratified the inclusion of submerged lands within the Reserve, whether or not it had intended the

President's reservation authority * * * to extend to such lands." *United States* v. *Alaska*, 521 U.S. at 45. The Court did not inquire whether the Alaska Statehood Act had impliedly repealed those portions of an earlier statute that allegedly barred the withdrawal of submerged lands. Instead, the Court pointed out that Congress "could achieve the same result" as a proper withdrawal of submerged lands under prior law "by explicitly recognizing, at the point of Alaska's statehood, an Executive reservation that clearly included submerged lands." *Id.* at 44.

The same is true here. Even if the Secretary's 1974 finding of Leisnoi's eligibility was erroneous, Congress could achieve the same result as a proper finding of eligibility on behalf of Leisnoi by explicitly recognizing, in ANILCA, that Leisnoi was eligible. That action was not a repeal, implied or otherwise, but simply a subsequent determination by Congress that superseded an allegedly erroneous Executive Branch determination under the earlier statute.

2. At all events, even if ANILCA were treated as an implied repeal, Section 1427 evidences the necessary "clear and manifest" intent to support confirming Leisnoi's entitlement to lands under ANCSA. *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) (quoting *United States* v. *Borden Co.*, 309 U.S. 188, 198 (1939)). The fact that Section 1427 specifically names "Leisnoi, Incorporated" as a village corporation entitled to certain lands makes plain that Congress in 1980 deemed Leisnoi to be eligible for lands under ANCSA no matter what the correct result may have been under the original eligibility provisions of ANCSA.

3. Petitioner also contends (Pet. 27) that the court of appeals erred by not examining the legislative history

of Section 1427, which, he says, shows that "Congress enacted Section 1427's provisions under the mistaken belief that the Secretary's determination of Leisnoi's eligibility had already become final." The court of appeals correctly concluded that consideration of legislative history was unnecessary, since Congress' intent that Leisnoi be treated as an eligible village corporation was plain on the face of the statute, Pet. App. A22, and, moreover, it was not the court's role to correct alleged legislative "mistakes," *id.* at A27; see *Lamie* v. *United States Tr.*, 540 U.S. 526, 542 (2000). In any event, even if an inquiry into legislative history were appropriate here, it would not help petitioner. The Senate Report accompanying ANILCA made clear that the "Native land exchange amendments were adopted in order to further and fulfill the purposes of the Settlement Act * * * and resolve or obviate the need for litigation." S. Rep. No. 413, 96th Cong., 2d Sess. 256 (1980). That statement refutes petitioner's contention that Congress intended to preserve litigation challenging eligibility determinations—as this case shows, such litigation can drag on for decades.[*]

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[*] Petitioner also asserts (Pet. 31) that Leisnoi "obtained its certification as an eligible Native village on the basis of a fraudulent application." That is incorrect. None of the courts that have considered this controversy have made any finding of fraud.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2009