No. 08-863

# In The Supreme Court of the United States

OMAR STRATMAN,

*Petitioner,*

v.

DIRK KEMPTHORNE,
SECRETARY OF THE INTERIOR;
LEISNOI, INC.;
KONIAG, INC.,

*Respondents.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## CORPORATE DISCLOSURE STATEMENT

Leisnoi, Inc. is an Alaska Native Village Corporation. It has no parent corporation(s). No publicly traded corporation owns more than 10% of its stock.

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## INTRODUCTION

This Court should refuse Omar Stratman's application for a writ of *certiorari* to review the October 6, 2008 judgment by the United States Court of Appeals for the Ninth Circuit because federal courts lack subject matter jurisdiction to entertain this 2002 suit by Omar Stratman. This Court need not reach the statutory construction issue presented at page ii of the petition for *certiorari* because subject matter jurisdiction is absent.

If Mr. Stratman wished to challenge the September 9, 1974 village eligibility decision [ER 304] by Secretary of the Interior Rogers C.B. Morton declaring the Native Village of Woody Island eligible for benefits under the Alaska Native Claims Settlement Act ("ANCSA"), then Petitioner should have, but failed, to appeal from the November 21, 1995 Final Judgment [ER 230] dismissing Civil Action No. A76-132, his so-called "decertification suit."

Likewise, if Mr. Stratman had wished to challenge the December 20, 2006 decision [Appendix C] by Secretary of the Interior Dirk Kempthorne declaring that Congress ratified the 1974 eligibility decision of his predecessor through enactment of section 1427 of the Alaska National Interests Lands Conservation Act ("ANILCA"), then Petitioner should have, but failed, to file suit challenging it within two years after the day Secretary Kempthorne issued his decision. The present action before this Court on petition for *certiorari* was commenced on November 29, 2002

challenging non-final agency action, an Interior Board of Land Appeals ("IBLA") panel decision dated October 29, 2002 [ER 103] that was subject to mandatory Secretarial review per 43 CFR § 2651.2(a)(2). Petitioner's third amended complaint [ER 137], which purported to complain about the December 20, 2006 decision by Secretary Kempthorne, is a nullity because subject matter jurisdiction was lacking over the case when first initiated in 2002.

The district court never addressed most of the jurisdictional defects Leisnoi had demonstrated in its series of Rule 12(b)(1) motions to dismiss, including the argument that the suit had been prematurely filed challenging non-final agency action, because the court found it unnecessary to address these arguments after it concluded subject matter jurisdiction was absent on the basis of ANILCA having mooted Petitioner's claims. [ER 150, Appendix B-18]. This Court need not grant *certiorari* to address the ANILCA issue because subject matter jurisdiction is absent for a host of other reasons.

Subject matter jurisdiction is lacking because:

(i) the present **suit was filed in 2002 impermissibly challenging non-final agency action**;

(ii) the petitioner **failed to exhaust his available administrative remedies** by neglecting to appeal the IBLA panel ruling to the

Secretary of the Interior and await the Secretarial review before filing suit;

(iii) the two-year ANILCA section 902 [43 U.S.C. § 1632(a)] **statute of limitations has lapsed** in which Stratman could challenge either Secretary of the Interior Rogers C.B. Morton's 1974 village eligibility decision in favor of the Native Village of Woody Island [ER 304] and/or Secretary of the Interior Dirk Kempthorne's December 20, 2006 ruling [Appendix C] affirming the 1974 eligibility decision;

(iv) **Stratman lacks administrative standing** required by 43 CFR 4.410(a), (d), and/or (e) to pursue a challenge to Woody Island's eligibility because the record reflects he holds no "property interest" or "cognizable interest" that was "adversely affected" by Woody Island's certification, and the agency expressly determined that Petitioner "lack[s] the necessary standing to bring an appeal", *In the Matter of Leisnoi, Inc., Appeal of Omar Stratman;*[1]

(v) **Stratman lacks judicial standing** because he admits [ER 406] having no property interest affected by Woody Island's certification, and he failed to introduce any evidence of having made recreational use of Leisnoi's land;

(vi) the doctrine of **administrative finality** attaches to the March 24, 1978 decision against Omar Stratman, *In the Matter of Leisnoi, Inc.,*

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[1] ANCAB No. LS 77-4C, March 24, 1978 Decision and Order of Dismissal, [ER 323]

*Appeal of Omar Stratman*[2] , and bars Stratman from relitigating his claim challenging Woody Island's eligibility that he litigated and lost therein, then failed to appeal; and

(vii) **collateral estoppel** bars Stratman from relitigating the issue of Woody Island's eligibility that the Alaska Native Claims Appeal Board ("ANCAB") decided on the merits in its final decision in favor of Woody Island, *In re Woody Island*, ANCAB No. VE 74-65 (Aug. 28, 1974) [ER 303], from which no appeal was taken.

For the convenience of the Court, and to avoid repetition, Leisnoi will focus this opposition to the application for *certiorari* on the significant jurisdictional defects that plague Petitioner's case, leaving to the Secretary and to Koniag, Inc. most of the briefing on ANILCA ratification and other factors that militate against issuance of *certiorari,* which arguments Leisnoi adopts.

## STATEMENT OF THE CASE

In 1974, the Bureau of Indian Affairs ("BIA") determined [ER 278], the Alaska Native Claims Appeal Board held,[3] and Secretary of the Interior Morton agreed [ER 304], that the Native Village of Woody Island qualifies for benefits under the Alaska Native Claims Settlement Act.

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[2] ANCAB No. LS 77-4C, March 24, 1978 Order of Dismissal [ER 318 -324].

[3] *In re Woody Island*, ANCAB No. VE 74-65 [ER 303].

On January 19, 1977, the BIA made its *Finding of Entitlement Pursuant to Section 14(a) of the Alaska Native Claims Settlement Act,* determining that "Leisnoi, Inc.", the ANCSA corporation for the village, is "an eligible village corporation" that is "entitled to a patent" of 115,200 acres, and published this Finding in the February 2, 1977 Federal Register, Volume 42, No. 22, pages 6419-26 [ER 306-13].

Kodiak cattle rancher Omar Stratman appealed this Finding to the Alaska Native Claims Appeal Board [ER 314]. In his April 26, 1977 Statement of Reasons for Appeal to the ANCAB [ER 316-17], Stratman argued that

> "the number of Native residents for Leisnoi, Inc. shown to be eligible for the purposes of computing entitlements to Federal lands is erroneous. Information and evidence in the possession of the appellants indicate that the number of Natives residing in the village upon the date specified in the Alaska Native Claims Settlement Act was zero....[T]here were no Native residents as required by the statute to provide eligibility."

The ANCAB rejected this argument, and ruled in favor of Leisnoi, Inc. on March 24, 1978 *In the Matter of Leisnoi, Inc., Appeal of Omar Stratman*, ANCAB No. LS 77-4C, declaring that

"Leisnoi has been found to be eligible as a village under § 11 of ANCSA.... [A] determination of eligibility is a finding that such village had at least a minimum Native population of 25 on the 1970 census enumeration date."[4] The ANCAB also held that Stratman has no administrative standing to challenge Leisnoi's entitlement to ANCSA benefits because he holds no property interest that would be adversely affected by the agency decision in favor of Leisnoi [ER 321-23].

Stratman could have appealed to federal district court from the March 24, 1978 ANCAB final ruling against him, and moved to consolidate it with his 1976 so-called "decertification suit" he was then pursuing [ER 194], but he failed to do so, instead leaving the fetid corpse of his failed ANCAB challenge to rot, and become the skeleton in his litigation closet.

Stratman abandoned all allegations of fraud on January 5, 1977 [ER 194].[5] He then pursued his 1976 decertification case on and off for many years, dropping the case when he thought he could get land or money for doing so.[6]

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[4] *In the Matter of Leisnoi, Inc., Appeal of Omar Stratman,* ANCAB No. LS 77-4C, Decision and Order of Dismissal dated March 24, 1978 at page 5 [ER 322].

[5] Petitioner's effort to resurrect in a January 5, 2009 petition for *certiorari* allegations of fraud that he formally abandoned exactly 32 years ago, on January 5, 1977, is ineffective.

[6] Petitioner at one time contended that a settlement agreement he entered into with regional corporation

The District Court for the District of Alaska ultimately decided, in 1995, to send the Woody Island eligibility dispute over to the Department of the Interior for agency review [ER 226-28].[7] One of the issues referred for agency consideration was whether Congressional enactment in 1980 of the Alaska National Interests Lands Conservation Act ratified the Department of the Interior's finding that the Native Village of Woody Island is eligible for ANCSA benefits [ER 227]. The district judge entered a Final Judgment in November 1995 [ER 230], dismissing the 1976 suit and referring the matter for agency review.

The 1995 judgment [ER 230] did not decertify Woody Island as Stratman had requested in his 1976 complaint, and the judgment dismissed

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Koniag, Inc. somehow applied to village corporation Leisnoi, Inc. He pursued claims to that effect in state court, but the Alaska Supreme Court ruled against him in *Leisnoi, Inc. v. Stratman*, 835 P.2d 1202 (Alaska 1992). After failing in that endeavor to line his pockets, he re-opened the 1976 case and continued to dog Leisnoi with litigation.

[7] The district court determined "this appears to be a perfect case to read ripeness and primary jurisdiction together to require that Stratman litigate his challenge to Leisnoi before the agency before he brings it here. The agency in the first instance should determine whether Leisnoi is a phantom of the Secretary's imagination, as Stratman contends, or as its members contend, the modern representative of an ancient people, the victim of an itinerant berry picker. Sending the issue back will permit the agency to exercise its expertise." [ER 227].

rather than merely stayed his suit; yet, Stratman failed to appeal the judgment. Instead, he pursued an interlocutory appeal from the denial of a motion for preliminary injunction in which he was trying to choke the small Native Village Corporation by freezing its bank accounts and halting its timber harvesting operations. The United States Court of Appeals for the Ninth Circuit dismissed that interlocutory appeal for lack of subject matter jurisdiction in 1996, because the district court had already entered a Final Judgment in 1995 terminating the 1976 civil action.[8]

After two weeks of hearings, followed by years of briefing at multiple levels of the Department of the Interior, Secretary of the Interior Kempthorne decided the matter in favor of Leisnoi, Inc. and against Petitioner on December 20, 2006 [ER 122]. The Secretary determined that Congress ratified his predecessor's 1974 eligibility determination in favor of Woody Island by legislating in ANILCA that Woody Island's Native Village Corporation, Leisnoi, Inc., has a "right" to ANCSA conveyances [ER 122-36].

In the meantime, however, four years before the Secretary ruled, Stratman had filed a new suit, on November 29, 2002, Civil Action No. A02-0290 [ER 162], this case now on petition for *certiorari,* claiming once again that Woody Island is ineligible for ANCSA benefits although Congress has declared otherwise. The district court stayed the

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[8] *Stratman v. Babbitt*, Ninth Circuit Case No. 95-35376, 1996 U.S. App. LEXIS 10946 (9th Cir. 1996) [ER 391].

case for more than three years while awaiting the Secretary's decision [ER 164].[9]

On December 20, 2006, Secretary Kempthorne issued his long-awaited ruling in favor of Leisnoi, Inc. and against Omar Stratman [ER 122]. The district court then lifted the stay and set a deadline in which Mr. Stratman could amend his complaint [ER 171, docket entry #103]. Stratman amended his complaint [ER 137], purporting to challenge Secretary Kempthorne's ruling [Appendix C]. Leisnoi promptly filed a series of Rule 12(b)(1) motions to dismiss detailing multiple reasons why federal subject matter jurisdiction is absent [ER

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[9] At district court docket #65, long before the Secretary ruled, Leisnoi notified the district court that subject matter jurisdiction was lacking because the 2002 suit was filed before the Secretary had reviewed the IBLA panel decision:

> "This Court should reject Stratman's theory that he can file a new suit, prematurely, before the agency has completed its review.... Stratman took a premature appeal from an interlocutory ruling by the IBLA, a ruling not yet reviewed by Secretary Norton.... Until such time as the Department of the Interior completes its review, with a final decision having been issued by the Secretary, it is premature for Stratman to be back in federal court.... Until the agency completes its review, there is no jurisdiction in federal court to challenge the agency action....."

171-174, docket entries ##107, 109, 111, 118, 120].[10]

On September 26, 2007, the Honorable James Singleton agreed with Secretary Kempthorne that ANILCA ratified Secretary Morton's 1974 eligibility determination, thereby mooting Stratman's case and depriving the federal court of subject matter jurisdiction [ER 150-58].[11] Stratman appealed that ruling to the United States Court of Appeals for the Ninth Circuit [ER 160].

On October 6, 2008, the Ninth Circuit agreed with Secretary Kempthorne and District Judge Singleton that ANILCA ratified Secretary Morton's 1974 eligibility determination in favor of the Native

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[10] One of the multiple reasons Leisnoi presented to the district court for Rule 12(b)(1) dismissal was that "Stratman filed suit in 2002, prematurely trying to challenge non-final agency action, without subject matter jurisdiction." [District court docket #110 at page 4]. Leisnoi renewed this argument with the Court of Appeals at page 7 of its Appellee's Brief.

[11] "The Court concludes that the Secretary's interpretation was not only permissible, but persuasive. Although the Court finds that the Secretary's interpretation must be upheld under *Chevron* deference, the Court notes that it would have come to the same conclusion had it been interpreting the statute in the first instance, or under the persuasive deference standard found in *Skidmore*.... Stratman's challenge to Leisnoi's eligibility is moot. As this Court lacks subject matter jurisdiction, [Leisnoi, Inc.'s] Motion to dismiss at Docket No. 120 is GRANTED." September 26, 2007 order granting Leisnoi, Inc.'s motion to dismiss Petitioner's 2002 case for lack of subject matter jurisdiction [ER 150, Appendix B-16 to B-17].

Village of Woody Island, and thus mooted Stratman's village eligibility challenge [Appendix A]. Omar Stratman did not seek rehearing *en banc*, instead petitioning this Court on January 5, 2009 for a writ of *certiorari*.

## STATEMENT OF THE ISSUES

**1.** Petitioner did not institute this 2002 suit within two years of either the 1974 eligibility decision in favor of Woody Island [ER 304], or the December 2, 1980 effective date of ANILCA. Does the two-year statute of limitations in ANILCA § 902 bar judicial review of Secretary Morton's 1974 decision?

**2.** The time has lapsed under § 902 in which Stratman could challenge the underlying 1974 eligibility decision itself. Accordingly, would it be a moot point for the Supreme Court to decide whether Congress in 1980 ratified that eligibility decision?

**3.** Federal courts can review challenges to final agency action pursuant to the Administrative Procedures Act, 5 U.S.C. § 704. Village eligibility decisions of the Interior Board of Land Appeals "are not final until personally approved by the Secretary." 43 CFR § 2651.2(a)(5). Was the IBLA's October 29, 2002 decision [Appendix D] on the eligibility of the Native Village of Woody Island a final agency decision that could be challenged in federal court without awaiting Secretarial review?

**4.** ANILCA section 902 [43 U.S.C. § 1632(a)] mandates that before suit is filed challenging decisions made by the Department of the Interior under ANCSA, "*Provided,* That the party seeking such review shall first exhaust any administrative appeal rights." The October 29, 2002 IBLA panel ruling could be appealed to the Secretary of the Interior pursuant to 43 CFR § 2651.2(a)(5). Did the federal courts have subject matter jurisdiction when Stratman filed suit in 2002 challenging the IBLA panel ruling without having first exhausted administrative appeal rights?

**5.** In order to have administrative standing to appeal a Department of the Interior decision relating to ANCSA, the protestant is required to prove he holds a "property interest" and/or a "legally cognizable interest" that would be "adversely affected" by the agency action. 43 CFR § 4.410. Petitioner concedes [ER 406] he holds no property interest in land that the United States patented to Leisnoi, and he failed to present any evidence that the eligibility of Woody Island in any way adversely affects a legally cognizable interest held by him. Does Mr. Stratman have administrative standing to appeal the decision that Woody Island is eligible for ANCSA benefits?

**6.** Constitutional judicial standing can extend as far as those who have mere recreational interests to protect. But at the hearings conducted by the Department of the Interior

on protestant Stratman's challenge in August 1998, in the lower courts, and in his petition for *certiorari,* Stratman presented no evidence of having ever made recreational use of land selected by or patented to Leisnoi, Inc. Has Stratman established judicial standing to petition this Court for *certiorari*?

**7.** The doctrine of administrative finality bars, in a subsequent litigation, reconsideration of earlier administrative proceedings which were or could have been subject to direct review. Stratman failed to appeal from the ANCAB's March 24, 1978 Order of Dismissal of his administrative challenge, *In the Matter of Leisnoi, Inc., Appeal of Omar Stratman*, ANCAB No. LS 77-4C. [ER 318] Does the doctrine of administrative finality bar Stratman, some 30 years after the ANCAB's order of dismissal, from suing to challenge the factual underpinnings of that ruling?

**8.** The doctrine of collateral estoppel prevents relitigation of issues actually litigated and necessarily decided, after a full and fair opportunity for litigation, in a prior proceeding. The August 28, 1974 ANCAB final decision, *In re Woody Island,* ANCAB # VE 74-65 [ER 303], approved by Secretary of the Interior Rogers C.B. Morton on September 9, 1974 [ER 304], determined that the Native Village of Woody Island is eligible for benefits under ANCSA. No appeal was taken from that final decision. Does the doctrine of collateral estoppel bar

re-litigation of the same eligibility issue once again, more than 30 years after the final ruling was entered deciding this issue in favor of the Native Village of Woody Island?

## ARGUMENT

### I. FEDERAL SUBJECT MATTER JURISDICTION IS LACKING BECAUSE PETITIONER FILED HIS 2002 ACTION PREMATURELY, CHALLENGING NON-FINAL AGENCY ACTION, WITHOUT HAVING EXHAUSTED ADMINISTRATIVE APPEAL RIGHTS TO SUPERIOR AGENCY AUTHORITY

This Court should deny *certiorari* because there exists no federal subject matter jurisdiction to entertain this 2002 suit contesting the eligibility of the Native Village of Woody Island. Mr. Stratman filed this suit prematurely, challenging non-final agency action by the Interior Board of Land Appeals. He failed first to exhaust administrative appeal rights by appealing the IBLA panel ruling to the Secretary of the Interior and awaiting a Secretarial decision before bringing suit.

#### 1. Lack of final agency action before Petitioner filed suit in 2002

The Administrative Procedures Act allows appeals to federal court from "final agency action."[12] But the IBLA panel ruling of October 29,

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[12] Section 10(c) of the Administrative Procedures Act, 5 U.S.C. § 704.

2002 [ER 103] was not final agency action because it had not been personally approved by the Secretary of the Interior.

Secretarial review of village eligibility decisions is mandatory under 43 CFR § 2651.2(a)(5): "Decisions of the Board [Interior Board of Land Appeals] on village eligibility appeals are **not final until personally approved by the Secretary**." (emphasis added) Secretary Kempthorne specifically noted the mandatory nature of his review in his December 20, 2006 ruling, observing that Secretarial "review of IBLA's decision is mandatory pursuant to 43 C.F.R. § 2651.2(a)(5)." [ER 125][13]

There exists no federal subject matter jurisdiction for the federal courts to entertain suits such as this one that sought to challenge non-final agency action.

### 2. Failure to exhaust administrative remedies before filing suit in federal court in 2002

Jurisdiction is also lacking because Mr. Stratman failed to exhaust his administrative remedies before bringing the 2002 suit. This doctrine of exhaustion is "related but distinct" from the finality requirement. *Clouser v. Espy.*[14]

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[13] Under this regulation, "the Secretary reserved to himself the ultimate decision in each case." *Koniag, Inc. v. Kleppe*, 405 F.Supp. 1360, 1367 (D.D.C. 1974), aff'd 580 F.2d 601 (U.S.App.D.C.), *cert. denied*, 439 U.S. 1052 (1978).

[14] 42 F.3d 1522, 1532 (9th Cir.1994).

This Court recognized in *Darby v. Cisneros*[15] that an appeal to superior agency authority is a prerequisite to judicial review when expressly required by statute. Likewise, the Ninth Circuit has ruled that "when exhaustion is statutorily mandated, the exhaustion requirement is jurisdictional and the district court must dismiss the action." *Eluska v. Andrus.*[16] Section 902 of ANILCA is such a statute requiring exhaustion of administrative appeal rights before a party can seek federal court review of agency action. Section 902, codified at 43 U.S.C. § 1632(a), mandates, before suit is brought challenging decisions made by the Department of the Interior under ANCSA, "***Provided*, That the party seeking such review shall first exhaust any administrative appeal rights**." (emphasis added)

Stratman did not first exhaust his administrative appeal rights as required by Section 902 before filing suit. He filed suit on November 29, 2002, prematurely, without having appealed the IBLA panel ruling to the Secretary. Subject matter jurisdiction is lacking over the suit he filed in 2002 without having exhausted his administrative remedies.

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[15] 509 U.S. 137 (1993).

[16] 587 F.2d 996, 999 (9th Cir. 1978).

### 3. Subsequent developments do not vest a federal court with subject matter jurisdiction which was absent when the suit was filed

The above discussion of 5 U.S.C. § 704, 43 U.S.C. § 1632(a), and 43 CFR 2651.2(a)(5) demonstrates that subject matter jurisdiction was absent over Mr. Stratman's 2002 suit when he filed it on December 2, 2002 because (i) the suit impermissibly sought to challenge non-final agency action; and (ii) the petitioner failed first to exhaust administrative remedies by appealing the IBLA panel ruling to the Secretary of the Interior and awaiting the Secretary's decision.

Subject matter jurisdiction having been lacking when the suit challenging non-final agency action was filed in 2002, later developments, such as the December 20, 2006 ruling by Secretary Kempthorne [Appendix C], referenced in Mr. Stratman's Third Amended Complaint filed on February 26, 2007 [ER 137] did not vest the federal courts with subject matter jurisdiction which was absent on the date suit was filed. Subject matter jurisdiction is determined as of the date suit is filed; it is not contingent upon future developments. The suit was filed when there was no "final agency action," at a time when the claimant had not yet exhausted appeals from the IBLA panel to the "superior agency authority," the Secretary of the Interior. Petitioner could not amend his way into federal subject matter jurisdiction which was non-existent at the outset:

> "Subject matter jurisdiction must exist as of the time the action is commenced. See *Mollan v. Torrance*, 22 U.S. (9 Wheat) 537, 538, 6 L.Ed. 154 (1824) (jurisdiction 'depends upon the state of things at the time of the action brought'); *Nuclear Eng'g Co. v. Scott*, 660 F.2d 241, 248 (7th Cir.1981) ('Jurisdictional questions are answered by reference to the time of the filing of an action....'), *cert. denied*, 455 U.S. 933, 102 S.Ct. 1622, 71 L.Ed.2d 855 (1982); *Mobil Oil Corp. v. Kelley*, 493 F.2d 784, 786 (5th Cir.) ('jurisdiction is determined at the outset of the suit'), *cert. denied*, 419 U.S. 1022, 95 S.Ct. 498, 42. L.Ed.2d 296 (1974). If jurisdiction is lacking at the outset, the district court has 'no power to do anything with the case except dismiss.' 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3844, at 332 (1986).... **If jurisdiction was lacking, then the court's various orders, including that granting leave to amend the complaint, were nullities.**"

*Morongo Band of Mission Indians v. California State Board of Equalization*, 858 F.2d 1376 (9th Cir.1988), *cert denied*, 488 U.S. 1006 (1989) (emphasis added).

As applied to this case, no federal subject matter jurisdiction existed to entertain this suit when filed in 2002 because the suit sought to challenge non-final agency action, and the petitioner had failed to exhaust administrative appeal rights as required by 43 U.S.C. § 1632(a). Consequently, the district court had no discretion to do anything other than dismiss the suit. Petitioner's third amended complaint [ER 137], purporting to challenge the 2006 ruling by Secretary Kempthorne, is an absolute nullity.

Petitioner should have waited until after the Secretary ruled to file suit. But having chosen to file suit challenging non-final agency action, and then been notified in writing by Leisnoi, Inc. of the absence of subject matter jurisdiction over the premature suit, the Petitioner, had he been prudent, should at the very least have filed a new suit in 2006 after Secretary Kempthorne ruled, and then moved to consolidate the two cases, rather than merely amending his complaint in the 2002 suit. But he failed to take the prudent course of action. Instead, he tried to amend his way into subject matter jurisdiction which had been absent when he first filed his case. Subject matter jurisdiction was absent at the outset, so the district court had "no power to do anything, other than to dismiss the action." *Morongo Band of Mission Indians.*[17] Petitioner's filing of an amended complaint [ER 137] on February 16, 2007, purporting to challenge the Secretary's ruling, is an absolute nullity because "a district court is

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[17] 858 F.2d at 1380.

powerless to grant leave to amend when it lacks jurisdiction over the original complaint."[18]

It is too late now for Mr. Stratman to correct his nonfeasance by belatedly filing suit challenging final agency action consisting of Secretary of the Interior Kempthorne's December 20, 2006 decision, *In re Appeal of Leisnoi, Inc. from Decision of Interior Board of Land Appeals* [Appendix C], because the statute of limitations in which to do so has lapsed. Ironically, the passing of the statute of limitations occurred just two weeks before Stratman filed the instant January 5, 2009 petition. The statute lapsed on December 20, 2008, the two-year anniversary of Secretary Kempthorne's December 20, 2006 ruling in favor of Woody Island. See, ANILCA § 902 "[A] decision of the Secretary under this title or the Alaska Native Claims Settlement Act shall not be subject to judicial review unless such action is initiated before a court of competent jurisdiction within two years after the day the Secretary's decision becomes final...."

*Certiorari* should be denied because subject matter jurisdiction was lacking on date suit in this case was first filed, and did not become vested by amendment addressing events transpiring four years after Petitioner prematurely filed suit.

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[18] *Id.* at 1381.

## II. THE 2002 SUIT WAS FILED TOO LATE TO CHALLENGE SECRETARY MORTON'S 1974 ELIGIBILITY DECISION.

Subject matter jurisdiction is absent in this 2002 suit that Petitioner has tried to use as a vehicle for challenging Secretary Morton's 1974 eligibility decision, because the two year statute of limitations in 43 U.S.C. § 1632(a) for contesting that decision had lapsed before Petitioner filed this suit. Accordingly, it would be a moot point for this Court to decide whether Congress later ratified that decision.

At the Ninth Circuit, Stratman attempted to portray his appeal as being a challenge to the 1974 decision by Secretary Morton **to certify**: "This is an appeal of the District Court's dismissal of Appellant Omar Stratman's ('Stratman') APA action against the Secretary of Interior, challenging the Secretary's **decision to certify** Appellee Leisnoi, Inc. ('Leisnoi') as an eligible Native Village...."[19] He repeats this theme in the petition, claiming "the Secretary's original 1974 determination of Leisnoi's eligibility still remains in effect – and it will remain in effect forever unless it is vacated in this case." But the "decision to certify" made decades ago by Secretary Morton [ER 304], cannot be "vacated in this case" because that 1974 Secretarial decision is not subject to judicial review by any federal court, including the Supreme

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[19] Appellant's Brief at page 2.

Court. The statute of limitations to challenge the September 9, 1974 decision has lapsed.

ANILCA section 902 imposes a two-year statute of limitations for suits challenging ANCSA decisions made by the Secretary of the Interior, mandating that such decisions "**shall not be subject to judicial review unless** such action is initiated before a court of competent jurisdiction within two years after the day the Secretary's decision becomes final or the date of enactment of this Act [enacted December 2, 1980]."[20] (emphasis added) Petitioner cannot use his 2002 case as a vehicle for challenging Secretary Morton's 1974 eligibility decision because the Petitioner did not file this suit within two years after the day of the September 9, 1974 decision or within two years after the effective date of ANILCA, December 2, 1980.

The 1976 suit, Civil Action No. A76-132 [ER 236], was Stratman's effort to challenge the 1974 decision that the Native Village of Woody Island meets the eligibility requirements for ANCSA benefits. That suit was timely brought within two years of the Department of the Interior's 1974 village eligibility certification.

But this 2002 case which is the subject of the petition for *certiorari* is not the 1976 suit. The 1976 suit ended in a Final Judgment on November 21, 1995 [ER 230]. Petitioner took no appeal from that judgment. He should have appealed from it, demanding that a mere stay order be entered in its

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[20] 43 U.S.C. § 1632(a).

place, if he wanted to preserve whatever right he had to challenge the 1974 village eligibility decision, because "The rule in [the Ninth Circuit] is that where a court suspends proceedings in order to give preliminary deference to an independent adjudicating body but further judicial proceedings are contemplated, then jurisdiction should be retained by a stay of proceedings, not relinquished by a dismissal...." *U.S. v. Henri,* 828 F.2d 526, 528 (9th Cir. 1987).

This rule enables claimants to protect themselves against the lapsing of the statute of limitations during the pendency of agency review by appealing a judgment of dismissal in favor of a mere stay. The rule stems from and applies the doctrine announced by this Court in *Carnation Co. v. Pacific Westbound Conference*,[21] that where a statute of limitations may lapse while a case is referred for agency action, a federal court should stay, rather than dismiss, the suit: "Such claims are subject to the Statute of Limitations and are likely to be barred by the time the Commission acts. Therefore, we believe that the Court of Appeals should have stayed the action instead of dismissing it."[22]

Had he appealed per *Carnation Co.* and *Henri,* and obtained an order reversing the judgment [ER 230] in favor of a stay pending further administrative consideration, then, upon

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[21] 383 U.S. 213 (1966).

[22] 383 U.S. at 223.

completion of the agency's review, Stratman could simply have re-activated his 1976 suit. He might thereby have obtained judicial review of the 1974 eligibility decision. But Stratman failed to act prudently.[23]

Congress declared in 43 U.S.C. § 1601 that the ANCSA settlement should be "accomplished **rapidly, with certainty**, in conformity with the real economic and social needs of Natives, **without litigation**..." (emphasis added) And in 43 U.S.C. § 1632(a), it mandated that ANCSA rulings "**shall not be subject to judicial review**" unless brought within two years of the Secretarial decision or the December 2, 1980 effective date of ANILCA. The Supreme Court should not disregard those directives by granting *certiorari* in a 2002 case

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[23] The Ninth Circuit addressed the legal consequences that flow from Stratman's imprudent failure to have appealed the Final Judgment that terminated his 1976 case. The appellate court dismissed an appeal Stratman had taken from a denial of his motion for preliminary injunction in the 1976 case, holding that the interlocutory appeal was mooted by entry of Final Judgment in the 1976 suit. *Stratman v. Babbitt*, No. 95-35376 (Order of April 19, 1996) [ER 391]. Despite learning from the appellate court of the jurisdictional-stripping effect flowing from entry of the Final Judgment, Stratman failed timely to move for Rule 60(b) relief. By opting neither to appeal from the judgment nor to move for relief under Rule 60(b), Petitioner deliberately disabled the safety mechanism this Court and the Ninth Circuit had put in place in *Carnation Co.* and *Henri,* thereby allowing the statute of limitations to expire and preclude judicial review of the 1974 agency decision.

being impermissibly used to try to upset a 1974 eligibility determination.

## III. STRATMAN LACKS ADMINISTRATIVE STANDING TO APPEAL WOODY ISLAND'S ELIGIBILITY

Who is this itinerant berry-picker that comes before this Court seeking *certiorari,* and what interest does he have in Woody Island's certification? His petition for *certiorari* does not reference any evidence in the record upon which this Court could find the petitioner has standing. The ANCAB held that Stratman does not have a claim of property interest sufficient to vest him with administrative standing to maintain an appeal.[24] That unappealed ANCAB ruling has lurked as a skeleton in Stratman's closet, and now has emerged to haunt him.

When Petitioner appeared before the Department of the Interior, in August 1998 at administrative hearings conducted before Administrative Law Judge Harvey Sweitzer, Petitioner conceded he holds no "property interest" affected by Woody Island's certification [ER 406]. [25]

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[24] *In the Matter of Leisnoi, Inc., Appeal of Omar Stratman,* ANCAB No. L77-4C, March 24, 1978 Decision and Order of Dismissal [ER 323].

[25] Stratman testified he has no property interest in land that would be affected by the eligibility determination. Transcript of August 4, 1998 proceedings, testimony of Omar Stratman at p. 724 ("I don't believe I have a property interest in it, no."); ("He doesn't have a claim of a property interest in this case.") [admission by Petitioner's counsel,

Stratman did not establish any "legally cognizable interest" of his that is "adversely affected" by the certification decision. He failed to establish administrative standing to ask the IBLA to overturn the BIA's certification decision.

Administrative standing is distinct from judicial standing.[26] Allowing Omar Stratman, whose grazing lease on Leisnoi's land has expired [ER 262], to challenge Woody Island's eligibility would not assist the Department of the Interior in the fulfillment of its functions because Stratman lacks any property interest in Leisnoi's land, and holds no legally cognizable interest affected by whether Woody Island retains its certification.

Administrative standing merely to protest[27] village eligibility is much broader than the administrative standing that is required to appeal from an eligibility ruling. The standing issue Leisnoi raises in opposing *certiorari,* and which it

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attorney Michael Schneider], transcript at pp. 722-723 [ER 394-421].

[26] *High Desert Multiple-Use Coalition, Inc.*, 116 IBLA 47 (1990) ("We, however, have rejected the notion that judicial determinations of standing control questions of administrative standing... [S]tanding before the agency should rest on an inquiry whether allowing standing to a party will assist the agency in fulfillment of its functions."). See also *In re Pacific Coast Molybdenum Co.*, 75 IBLA 16 (1983) [ER 334].

[27] Title 43 CFR § 2651.2 broadly allows "Any interested party" to "protest a proposed decision as to the eligibility of a village." (emphasis added).

raised in the courts below, is not whether Omar Stratman had a right to file an initial protest to the eligibility of the Native Village of Woody Island. Rather, the question is whether Stratman had standing to pursue an administrative appeal to the IBLA, challenging the Bureau of Indian Affairs' certification of Woody Island as being eligible for ANCSA benefits.

Once a decision has been made certifying a village as eligible for ANCSA benefits, standing to pursue an administrative appeal therefrom is narrow. To have standing to appeal Woody Island's certification, Stratman either had to prove under 43 CFR § 4.410 subsection (a)[28] that he was "adversely affected" by the decision, [29] or show

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[28] "Any party to a case **who is adversely affected** by a decision of an officer of the Bureau of Land Management or of an administrative law judge shall have a right to appeal to the Board..." 43 CFR § 4.410(a). The term "adversely affected" is defined in subsection (d): "A party to a case is adversely affected, as set forth in paragraph (a) of this section, when that party has **a legally cognizable interest, and the decision on appeal has caused or is substantially likely to cause injury to that interest**." 43 CFR § 4.410(d).

[29] The Administrative Procedures Act likewise requires that a protestant appealing to court prove he has been adversely affected in order to be permitted to challenge the agency determination. Sovereign immunity is waived only for suits brought by persons who are "adversely affected or aggrieved by agency action ...." 5 U.S.C. § 702. Stratman has not shown he was adversely affected by the agency action, so he has no viable APA claim.

under subsection (e)[30] that he holds a "property interest in land affected by the decision." The issue of which particular subsection of 43 CFR § 4.410 governs Stratman's attempted belated administrative appeal from the village eligibility determination is purely academic, because he does not meet either test. He failed in his petition for *certiorari* to show that he is "adversely affected" by the eligibility determination,[31] and has even sworn under oath [ER 394-421] that he holds no "property interest" in Leisnoi's land. His former grazing lease on Leisnoi's land [ER 259] expired in 2001, and Appellant has not shown he presently has a cognizable interest in the Department of the Interior's certification of the Native Village of Woody Island.

## IV. STRATMAN LACKS JUDICIAL STANDING TO CHALLENGE WOODY ISLAND'S CERTIFICATION

The Ninth Circuit seems to have assumed, in *Stratman v. Watt,* 656 F.2d 1321 (9th Cir.1981),

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[30] "For decisions rendered by Departmental officials relating to land selections under the Alaska Native Claims Settlement Act, as amended, any party **who claims a property interest in land affected by the decision**, an agency of the Federal Government or a regional corporation shall have a right to appeal to the Board." 43 CFR § 4.410(e).

[31] At the administrative proceedings [ER 394-421], Stratman never articulated any "legally cognizable interest" or explained how the eligibility determination "has caused or is substantially likely to cause injury to that interest." 43 CFR § 4.410(d).

that Stratman made recreational use of Leisnoi's land that would support a finding of judicial standing in his 1976 suit. But the court cited no evidence in the record in that case, and Leisnoi is unaware of any evidence in the record in this case to support such an assumption. Stratman did not offer any proof of recreational use by him of Leisnoi's land, either at the administrative hearings, in district court, in his appellant's brief, or in his petition for *certiorari*. He has not proven judicial standing.

## V. THE DOCTRINE OF ADMINISTRATIVE FINALITY BARS RELITIGATION OF STRATMAN'S CLAIM CHALLENGING WOODY ISLAND'S ELIGIBILITY FOR ANCSA BENEFITS

*Certiorari* should be denied also because the doctrine of administrative finality[32] bars Stratman from relitigating claims challenging Woody Island's eligibility. Petitioner already litigated those claims at the Alaska Native Claims Appeal Board, lost, then failed to appeal to federal court. *In the Matter of Leisnoi, Inc., Appeal of Omar Stratman*, ANCAB No. LS 77-4C (March 24, 1978) [ER 318].

Stratman had used his ANCAB case to challenge both village eligibility and land

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[32] The doctrine of administrative finality bars re-litigation in a subsequent case of claims brought in an earlier action which could have been subjected to appellate review. *Keith Rush d/b/a Rush's Lakeview Ranch*, 125 IBLA 346 (1993) [ER 370]; *Village of South Naknek*, 85 IBLA 74 (February 11, 1985) [ER 345].

entitlements. In his April 26, 1977 Statement of Reasons for Appeal [ER 316-17], Stratman argued that "the number of Native residents for Leisnoi, Inc. shown to be eligible for the purposes of computing entitlements to Federal lands is erroneous. Information and evidence in the possession of the appellants indicate that the number of natives residing in the village upon the date specified in the Alaska Native Claims Settlement Act was zero.... [T]here were no Native residents as required by the statute to provide eligibility." (emphasis added)

By contending there were "no Native residents... to provide eligibility", Stratman was claiming the Native Village of Woody Island is ineligible for ANCSA benefits.[33] This alleged lack

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[33] Petitioner was not the only one who used a land selection case as a vehicle to mount a village eligibility challenge against Leisnoi. The Kodiak-Aleutian Chapter, Alaska Conservation Society used the same tactic, and also failed. *In the Matter of Leisnoi, Inc., Appeal of Kodiak-Aleutian Chapter, Alaska Conservation Society*, ANCAB No. LS 77-11, Order of Dismissal dated March 31, 1978 [ER 325]. That case was decided just one week after the ANCAB ruled against Omar Stratman. [ER 318]. The ANCAB therein agreed with Leisnoi and the Bureau of Indian Affairs that, although labeled as a land selection challenge, the challenge in fact went to village eligibility:

> "In addition, the Board agrees with contentions of Leisnoi and the BIA that the present appeal constitutes an attack on the eligibility of Leisnoi, Inc. for land benefits under ANCSA... under the guise of an entitlement appeal under the theory that the village is not entitled to land under the Act because it is not in fact eligible for benefits as a village." [ER 329]

of a sufficient number of Natives on Woody Island is the same claim Stratman has sought to re-litigate in this 2002 suit, which he characterizes as an Administrative Procedures Act claim. But the doctrine of administrative finality bars relitigation of this claim because Stratman took no appeal from the ANCAB's March 24, 1978 Final Order of Dismissal [ER 318].

Stratman's failure to appeal from the administrative decision "renders that decision and the findings contained therein final for the Department and precludes a party from later challenging it..." *CCCo.,* 127 IBLA 291, 293-94 (1993). [ER 375] (emphasis added) The ANCAB, rejecting Stratman's arguments, wrote that "Leisnoi has been **found to be eligible** as a village under §11 of ANCSA... [A] determination of eligibility is a finding that such village had at least a minimum Native population of 25 on the 1970 census enumeration date." [ER 322] *Certiorari* should be denied because that finding of eligibility is final, and the doctrine of administrative finality precludes Stratman from relitigating it in this 2002 case.

## VI. COLLATERAL ESTOPPEL BARS RELITIGATION OF THE ISSUE OF WOODY ISLAND MEETING THE VILLAGE ELIGIBILITY REQUIREMENTS FOR ANCSA BENEFITS

Another reason *certiorari* is inappropriate is that collateral estoppel precludes Stratman from re-litigating village eligibility issues decided on the

merits in favor of Leisnoi by the Department of the Interior, Bureau of Indian Affairs, Area Director on February 8, 1974 in the *Final Administrative Determination Concerning the Eligibility of Woody Island as a Native Village for Purposes of ANCSA,* [ER 278] published in the Federal Register on February 21, 1974 [ER 282] affirmed by the Alaska Native Claims Appeal Board, *In re Woody Island*, ANCAB No. VE74-65 (August 28, 1974) [ER 303], approved by Secretary Morton on September 9, 1974. [ER 304]

Stratman was in privity with the parties who unsuccessfully challenged village eligibility in *In re Woody Island*, so he is collaterally estopped from re-litigating that same issue herein thirty years later. A commonality of interests and adequate representation are all that is required for privity. *Bayone v. Baca,* 2005 U.S.App. LEXIS 7950 (9th Cir.2005); *Shaw v. Hahn*, 56 F.3d 1128 (9th Cir.1995).

(a) Commonality of interests

Although Stratman himself was not party to the challenge to the certification of the Native Village of Woody Island brought by Phillip Holdsworth and the Alaska Wildlife and Sportsmen's Council, Inc., he shares a commonality of interests with them. He was in privity with these earlier protestants with whom he was "closely aligned in interests" and with whom "there is sufficient commonality of interests." See, *Shaw v. Hahn*, 56 F.3d at 1131. Both the earlier protestants and the protestant in the instant case had the same objective: to block the certification of

the Native Village of Woody Island. Both sets of protestants opposed Woody Island being deemed eligible for benefits under ANCSA, and raised similar arguments in seeking to achieve their common interest.

(b) Adequacy of representation

Protestants Phillip Holdsworth and the Sportsmen's Council were adequately represented by attorney James Clark of the well-respected Alaska firm then-known as Robertson, Monagle, Eastaugh & Bradley. He filed their protest to the eligibility of Woody Island on January 21, 1974 [ER 264]; and timely appealed [ER 284] to the ANCAB from the February 8, 1974 final administrative determination [ER 278] that Woody Island qualifies for ANCSA benefits.

Petitioner Stratman is collaterally estopped from relitigating the issue of Woody Island's eligibility for ANCSA benefits.

## VII. MISCELLANEOUS REASONS FOR DENYING *CERTIORARI*

In addition to the lack of subject matter jurisdiction, and the arguments against *certiorari* set forth in the oppositions of the United States and of Koniag, Inc., Leisnoi advises this Court of the following additional reasons it should not issue a writ of *certiorari*.

Petitioner's argument that *certiorari* is needed to correct what he labels as "fraud" is disingenuous because the Petitioner formally

abandoned all allegations of fraud on January 5, 1977 [ER 194].

Petitioner's argument that *certiorari* is necessary to prevent Leisnoi from keeping land the United States patented to it many years ago lacks merit because the land patents have been validated by the passage of more than six years since their issuance, per 43 U.S.C. § 1166, and the United States Court of Appeals for the Ninth Circuit quieted title in favor of Leisnoi. *Leisnoi, Inc. v. United States*, 267 F.3d 1019 (9th Cir. 2001); *Leisnoi, Inc. v. United States, Omar Stratman, Applicant in Intervention*, 313 F.3d 1181 (9th Cir.2002).[34] Petitioner failed to seek *certiorari* from this Court from the judgment quieting title in favor of Leisnoi. Petitioner's claim that title is at issue in this case, although the Ninth Circuit declared otherwise in quieting title in favor of Leisnoi in 2002,[35] renders the instant petition frivolous within the meaning of Supreme Court Rule 42, warrants a stern rebuke from this Court, and entitles Respondent to damages and costs.

The ruling by the Secretary of the Interior was correct, and is entitled to due deference. Resolution of an ambiguity in a statute by an agency head charged with the statute's

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[34] Stratman's argument that Leisnoi is not entitled its ANCSA conveyances is also inconsistent with the ANCAB ruling approving Leisnoi's ANCSA land selections, from which ruling Stratman took no appeal to federal court. *Appeal of Omar Stratman*, ANCAB No. LS 77-4C [ER 318].

[35] *Leisnoi, Inc. v. United States, Omar Stratman, Applicant in Intervention,* 313 F.3d 1181 (9th Cir.2002).

administration,[36] in the context of a formal agency adjudication, such as in this case, triggers mandatory deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) and *United States v. Mead Corp.*, 533 U.S. 218, 229-230 (2001). Petitioner himself previously argued, successfully, to the Ninth

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[36] The Secretary is charged with administration of ANCSA and ANILCA. The Secretary would be the one who would have to re-open enrollment to find villages to accommodate the diaspora of displaced Woody Islanders if their village were decertified: "[Upon decertification], the Secretary shall, in accordance with the criteria for residence applied in the final determination of eligibility, redetermine the place of residence on April 1, 1970 for all purposes under the Settlement Act". Section 1(c) of the Act of Jan. 2, 1976, P.L. 94-204, 89 Stat. 1145. Stratman has never challenged the Native blood quantum of individual Leisnoi shareholders. The Native Woody Islanders all have sufficient blood quantum to be entitled the ANCSA benefits. For example, Angeline Maliknak (1902-1972), one of the matriarchs of Woody Island, lived in the village for more than 50 years; yet, the harsh recommendation of the administrative law judge was that she be stripped of her Woody Island residency simply because she had sought nursing home care in Seward shortly before she died [ER 47]. If the Native Village of Woody Island were decertified, as Stratman has sought, then the Secretary would have to determine into what village and region Angeline should be re-enrolled. Angeline cannot decide for herself, since she is no longer alive. Other villages might not want the value of their respective shares diluted by adding new members. This process, and resulting litigation, would play out with more than 300 shareholders having to re-enroll more than thirty years after ANCSA was implemented. The Secretary would have to grapple with immense logistical difficulties if Woody Island were decertified. He is charged with implementing ANCSA and ANILCA, and his determination is entitled to substantial deference.

Circuit that an interpretation of ANCSA by the Secretary of the Interior is entitled to substantial deference. *Leisnoi, Inc. v. Stratman*, 154 F.3d 1062, 1068, 1072 (9th Cir.1998).

A misconception that permeates, even dominates, the petition for *certiorari*, is the incorrect assumption that the doctrine of implied repeal somehow applies. The petition leaves the reader bewildered, wondering "what is all this talk about implied repeal?" Neither Leisnoi, Inc., Koniag, Inc., nor the federal defendant has ever claimed that ANILCA impliedly repealed ANCSA. Rather, ANILCA ratified Secretary Morton's determination that Woody Island meets the ANCSA requirements for village eligibility.

Stratman himself, when presenting the statement of issues upon remand to the Department of the Interior in his January 25, 1996 Report Regarding Issues and Procedures on Remand [ER 381], referred to the ANILCA issue as one of ratification, not repeal. He phrased the issue as follows:

> "Does § 1427 (Afognak Island Joint Venture Provision) of the Alaska National Interest Lands Conservation Act of 1980 ('ANILCA'), Pub. L. 96-487, 94 Stat. 2371, **ratify** Leisnoi's existence as an eligible ANCSA village and thus preclude Mr. Stratman's further attack on Leisnoi's eligibility? (emphasis added)

Stratman's Report Regarding Issues and Procedures on Remand at p. 7 [ER 387].

Likewise, almost three years later, in his December 7, 1998 Post-Hearing Brief filed with the Department of the Interior [ER 422], Stratman again referenced the issue as being one of ratification, not repeal. Petitioner's effort now to recharacterize the issue rings hollow and does not militate in favor of *certiorari*.

Whether or not the Secretary of the Interior was initially correct or authorized in making his eligibility determination is irrelevant, and does not militate in favor of the Court granting *certiorari* inasmuch as Congress has plenary authority under the property clause of the United States Constitution to dispose of public lands as it sees fit. *Van Brocklin v. Anderson*, 117 U.S. 151, 165 (1886); *Maxwell Land Grant Case*, 121 U.S. 325 (1887); *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

If the Secretary of the Interior had erroneously certified the Native Village of Woody Island, as Stratman mistakenly contends, then Congress nonetheless had the authority to ratify the actions of the government official in certifying Woody Island as being eligible, even if his act was unauthorized or incorrect at the time it was made. *Swayne & Hoyt v. United States*, 300 U.S. 297 (1936); *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139 (1936). It no longer matters whether Woody Island met the regulatory test for benefits under ANCSA, since Congress enacted ANILCA recognizing Leisnoi, Inc. to be a Koniag Village

Deficiency Corporation that has a "right to conveyance" under ANCSA.

The Native Village of Woody Island properly met the village eligibility test, and was duly certified more than thirty years ago.[37] Congress ratified the Secretary's determination in 1980 by enacting ANILCA, Pub. L. 96-487, 94 Stat. 2371, which specifically confirmed that Leisnoi, Inc. has a "right" to ANCSA conveyances and is "entitled" to those benefits. There is no conflict amongst the circuits, or compelling reason for this Court to disturb those determinations and require the Secretary to reopen settled village enrollment decades after the process was completed. This Court should not grant *certiorari* in 2009 to review

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[37] The Native Village of Woody Island has played a colorful and well-documented role in the history of Alaska. For many years, it supplied fresh water ice from its lakes to the city of San Francisco. Native Woody Islanders cut ice and packed it in sawdust so that it could be shipped on oceangoing vessels from Woody Island to San Francisco, where ice was needed because of the population explosion generated by the 1849 California Gold Rush [Book 14, Chaffin, Yule, Alaska's Konyag Country]. In 1867, the United States and Russia signed a treaty for the purchase by the United States of Russian America (Alaska). The price was initially set at $7,000,000.00. But an additional $200,000.00 was added to the purchase price in the few days prior to the actual signing as compensation to the Russian American Company for the loss of its exclusive charter to operate in Alaska producing and trading ice and furs. This came about largely because of the Russian American Company operations on Woody Island [Document 409, Speech of Hon. Charles Sumner, of Massachusetts, on the Cession of Russian America to the United States].

a 1974 village eligibility decision; instead, the Court should heed Congress' admonition at 43 U.S.C. § 1601 that the ANCSA settlement should be accomplished "rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation..." Requiring the Woody Islanders to relitigate issues already decided in favor of their small Native Village decades ago would further deplete the assets of the Native Village corporation, depriving it of the means Congress had envisioned for it to meet the real economic and social needs of its Native shareholders.

WHEREFORE, subject matter jurisdiction being absent, and for the miscellaneous reasons set forth above, as well as those arguments articulated in oppositions of the other Respondents, this Court should DENY the petition for *certiorari.*

Respectfully submitted,

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