

**Written Comments on behalf of the Alaska Federation of Natives
Before the
Senate Committee on Indian Affairs**

**Oversight Hearing on Fulfilling the Federal Trust Responsibility:
The Foundation of the Government-to-Government Relationship**

May 17, 2011

The Alaska Federation of Natives, Inc. (AFN), hereby submits the following comments on the federal government's trust responsibility to Alaska Natives.

AFN was formed in 1966, to address Alaska Native aboriginal land claims. From 1966 to 1971, AFN devoted most of its efforts to passage of a just land settlement in the U.S Congress. On December 17, 1971, those efforts were rewarded with the passage of the Alaska Native Claims Settlement Act (ANCSA). Today, AFN is the largest Native organization in Alaska. Its membership includes the vast majority of Alaska's 244 Native villages, 13 regional for-profit corporations (established pursuant to ANCSA), and 11 of the 12 regional Native nonprofit tribal consortia that contract for and run a broad range of state and federal programs for their member villages. The overall mission of AFN is to enhance and promote the cultural, economic and political voice of the Alaska Native community.

Federal officials, often drawing from their experience of the "Indians" on reservations in the lower 48 states, sometimes have assumed the same legal principles applicable there do not apply in Alaska. This is perhaps due to the perception that Alaska's history is "different," and that ANCSA untethered the Alaska Natives and the federal government from the normal legal principles applicable to their relationship. Neither perception is accurate.

The fundamental "difference" in Alaska's American history is that it began with the Alaska Treaty of Cession in 1867¹ rather than with the adoption of the United States Constitution in 1789. This meant that Alaska Natives were not part of the first nearly 80-year history of federal Indian policy under the Commerce Clause of the United States Constitution, which grants Congress the power: "To regulate Commerce with foreign Nations, among the several States and with the Indian Tribes."² Article III of the 1867 Treaty of Cession divided all the inhabitants of Alaska into two broad categories: (1) the "uncivilized native tribes" and (2) "all the other inhabitants." The inhabitants "with the exception of the uncivilized native tribes" were to be admitted as citizens of the United States. As for the tribes, the last sentence of Article III provides that:

The uncivilized tribes will be subject to such laws and regulations as the United States may from time to time, adopt with regard to the aboriginal tribes of that country.

¹ Treaty Considering the Cession of Russian Possessions in North America, U.S.-Rus., 15 Stat-539, TS No. 301 (1867).

² U.S. Const., Art. I, §8, cl. 3.

As early as 1904 the federal courts held that this sentence applied the whole body of federal Indian law to the tribes of Alaska.³ Nonetheless, until perhaps the end of the 20th century, there was general judicial and policy confusion about the status of the Alaska Natives and their relationship to the federal government. It was often assumed that they did not have the same “trust” relationship with the United States and that, notwithstanding the 1867 treaty, federal Indian law did not apply in Alaska.⁴ Beginning with the enactments of ANCSA in 1971 and the Indian Self-Determination and Education Assistance Act in 1975, and continuing with a host of statutes enacted to the end of the 20th century, it is now well established that:

Alaska natives, including Indians, Eskimos and Aleuts, have the same legal status as members of Indian tribes singled out as political entities in the commerce clause of the United States Constitution.⁵

II. ORIGINS OF THE TRUST RESPONSIBILITY

The federal government’s trust responsibility to Native Americans finds its origins in the federal government’s assumption of power and responsibility over Indian lands and tribal governments. The power, exercised by Congress under the Commerce Clause, is characterized as “plenary” or complete.⁶ The executive branch is often delegated authority over Indian affairs, including the authority to “recognize” tribal governments.⁷ Both Congress and the executive are characterized as the “political” branches of the government whose determinations as to the existence of Indian tribes and the extent to which they are recognized as tribes are judicially unreviewable.⁸ The United States Supreme Court recently characterized the origins of the federal authority over Indian affairs as being “preconstitutional,” because it incorporates elements of military and foreign policy that are “necessary concomitants of nationality” which do not necessarily require the affirmative grant of federal power.⁹

The federal trust responsibility is founded on the inherently unequal relationship between the Native Americans and the federal government – an inequality largely of the government’s own making.¹⁰ The nature of that relationship was defined in the early years of the republic by congressional enactments and the decisions of the United States Supreme Court - the so-called

³ *In re Minook*, 2 Alaska Repts. 200, 220-221 (D. Alaska 1904) (so holding in determining a question of Alaska Native citizenship). See generally David S. Case and David A. Voluck, *Alaska Natives and American Laws*, 44-46 (2d ed., Univ. Alaska Press 2002) (discussing the application of the 1867 treaty to Alaska Natives).

⁴ Case and Voluck, *supra* at 6-8.

⁵ Cohen, *Handbook of Federal Indian Law* (2007 ed. LexisNexis Mathew Bender) at 336, n. 1068, citing among other authorities, AMERICAN INDIAN POLICY REVIEW COMMISSION, Final report, 95th Cong., 1st Sess. 489 (Comm. Print 1977) (“Alaska Natives did not differ markedly from other American native peoples. They organized themselves into social and political units (groups or tribes) as various and multiform, but of the same general nature, as those evolved by the Indians in the lower 48.”); David S. Case & David A. Voluck, *ALASKA NATIVES AND AMERICAN LAWS* 428-431 (2d ed. Univ. Alaska Press 2002).

See authorities cited there.

⁶ See, e.g. *United States v. Lara*, 541 U.S. 193, 201-202 (2004).

⁷ *U.S. v. Sandoval*, 231 U.S. 28, 46 (1913). See also, Federally Recognized Tribe List Act of 1994 (25 U.S.C. §479a, note and §479a-1).

⁸ *U.S. v. Holliday*, 70 U.S. 407, 419 (1865).

⁹ *U.S. v. Lara*, 541 U.S. *supra* at 200. (Citation omitted.)

¹⁰ E.g. *U.S. v. Kagama*, 118 U.S. 375, 384 (1886).

Marshall Trilogy. The Trade and Intercourse Acts of 1790 imposed a statutory restraint on the alienation on all tribal lands, preventing their disposition by the tribes except by a federal treaty.¹¹ The statute ensured a federal monopoly over the disposition of Indian lands, but it was the Supreme Court that defined the nature of Indian title.

In *Johnson v. M'Intosh*, John Marshall employed the fiction of the “rule of discovery” to find that the United States held a superior title to the lands (variously characterized as “fee,” “absolute title” or “absolute ultimate title”).¹² The Indians, on the other hand, were considered to have an exclusive right of use and occupancy (which later came to be described as “aboriginal title” or “Indian title”) that can only be defeated by the exercise of congressional authority. Because the United States gained the preemptive right to purchase the title, the result was that the Indian title was significantly diminished at common law in a way that paralleled the Trade and Intercourse Act’s restraint on alienation.¹³

In the Cherokee cases (*Cherokee Nation v. Georgia* and *Worchester v. Georgia*), Marshall extended the analysis of the federal-tribal relationship to describe the political status of the Indian tribes as “domestic dependant nations” whose relationship to the federal government was something like that of a “ward to his guardian.”¹⁴ As a result of the Marshall decisions, and as a matter of federal common law, the Indians lost control of the disposition of their lands, and their governments were deemed placed under the protection of the federal government, subject to further limitations of their powers by Congress.¹⁵

Supreme Court decisions in the late 19th to early 20th centuries expanded upon the Marshall Trilogy, to evolve a virtually unchallengeable interpretation of the scope of congressional authority to legislate in the field of Indian affairs.¹⁶ Congressional power to legislate seems to be limited only by other provisions of the Constitution, which, for example, require compensation for the taking of treaty lands and rights.¹⁷ Similarly:

[I]n respect distinctly Indian communities the question is whether, to what extent to and for what time they shall be recognized and dealt with as dependant tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.¹⁸

The trust responsibility, as exercised by Congress, is almost unfettered power without responsibility. Thus, Congress can extinguish Native land claims, settle them without

¹¹ Act of July 22, 1790, 1 Stat. 137 (25 U.S.C. §177).

¹² *Johnson v. M'Intosh*, 21 U.S. 543, 588 (1823).

¹³ See generally, *Cohen*, supra, section 5.04 [4][a], describing the development of the trust responsibility.

¹⁴ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1871).

¹⁵ *Cohen*, supra, at page 420. See also, *U.S. v. Lara*, 541 U.S. supra. at 205 (Inherent tribal power subject to divestiture by Congress.)

¹⁶ See e.g. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (tribal status determined exclusively by the political branches of government) and *U.S. v. Kagama*, 118 U.S. 375 supra at 384 (although not within the scope of the Commerce Clause, Congress had power to regulate and prescribe penalties for crimes by Indians in Indian country because from the federal relationship to the tribes “there arises the duty of protection, and with it the power.”

¹⁷ *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977) (Congress can not exercise plenty of power to deprive a tribe of its treaty lands without just compensation).

¹⁸ *U.S. v. Sandoval*, 231 U.S. 28, 46 (1913).

compensation to or the consent of the Natives, and terminate federal recognition of tribal status.¹⁹ However, once Congress delegates the power to manage tribal assets to the executive branch and prescribes the standards for doing so, the executive branch can be held to principles applicable to a private trustee.²⁰

To summarize, the federal trust responsibility is considered to arise out of the inherently unequal relationship between the federal government and the “distinctly” Native communities that are federally recognized as tribes. Whether, to what extent and for what time those tribes are to be recognized by the federal government is exclusively a matter left to Congress and the executive (“the political branches of government”). The power of the United States asserted in the field of Indian affairs, under both the Commerce Clause and federal common law, has been held to impose upon the United States a responsibility of trust when dealing with Indian tribes. Congressional exercise of the power is unreviewable so long as it is not inconsistent with other provisions of the United States Constitution. But once Congress has delegated power to the federal executive to administer Indian resources and has sufficiently described the standards by which those resources are to be managed, then the United States executive can be held accountable as would a private trustee.

The general trust responsibility is manifested primarily in the “government-to-government” relationship between the United States and the federally recognized tribes and the plenary authority of Congress to legislate on their behalf. The executive branch has also long been understood to have the authority to recognize the tribes, much as it has the authority to recognize foreign nations. In 1994 Congress confirmed this authority with the enactment of the Federally Recognized Indian Tribe List Act that required the Secretary of the Interior to publish an annual list of federally recognized tribes, and prohibited tribes from being removed from the list except by an act of Congress.²¹ Congress has gone even further in Alaska, where it has frequently defined the Alaska Native corporations established under ANCSA as “tribes” for particular purposes.

III. THE GOVERNMENT’S TRUST RESPONSIBILITY TO ALASKA NATIVES

The great confusion about the history of the relationship between the Alaska Natives and the federal government is that it is often characterized as being “unique.” In truth it is no more unique than the history of any other Native American community within the United States. Like all Native American communities, that history begins with a treaty between the United States and a European power ceding the European power’s authority over Native American territory to the United States. These cessions are understood to convey to the United States the exclusive right

¹⁹ See, e. g. *Tee-Hit-Ton Band of Indians v. U.S.*, 348 U.S. 272, at 283, n. 17 (1955) (Holding that Native land claims in Alaska are on the same footing as in the lower 48 states and congressional extinguishment of aboriginal title is not compensable under the Fifth Amendment.) See also, *U.S. v. Lara*, 541 U.S. 193 *supra*. at 202 (Congress can enact laws both restricting, then relaxing restrictions on tribal sovereignty).

²⁰ Compare *U.S. Mitchell I*, 445 U.S. 535 (1980) (Remanded to determine if federal government had defined statutory responsibilities in the management of allotment timber) with *U.S. v. Mitchell II*, 463 U.S. 206 (1983) (Upholding a statutory responsibility to manage Indian timber). See also, *Seminole Nation v. U.S.*, 316 U.S. 286, 297, n.12 (1942). (Holding the United States to “the most exacting judiciary standards” when it erroneously paid money to the agents of the Indian tribe knowing them to be dishonest).

²¹ Act of Nov. 2, 1994, 108 stat. 4791 (25 U.S.C. §479a, note and §479a-1).

recognized under *Johnson v. M'Intosh* to acquire the aboriginal title of the Native Americans.²² As in the contiguous United States, Native people living primarily in village communities historically denominated as "tribes" also populate Alaska.

As noted earlier, what *was* different about Alaska was that the year was 1867, not 1789. By that time, following the end of the Civil War, America was on the march west and the Indians were in the way. In the latter half of the 19th century the United States adopted policies calculated to assimilate Native Americans and break up their tribal governments and tribal lands. These policies found their expression in late 19th century Alaska judicial decisions and federal Alaska policies. Until 1884 Alaska was governed as a military district, but when the army attempted to use the Trade and Intercourse Act to stop the introduction of liquor, the courts held that Alaska was not "Indian country" subject to the Act.²³ The next year, Congress applied the liquor control sections of the Intercourse Act to Alaska, after which the courts upheld prosecutions for supplying liquor to the Indians.²⁴

Similarly, the BIA was held to have no authority to implement programs or spend money in Alaska.²⁵ The 1884 Organic Act also required education in the territory to be "without regard to race."²⁶ In 1886 the Alaska courts held that the Tlingit Indians did not have sovereign authority.²⁷ Much as was then the policy in the lower 48 states, these cases, statutes, and policies in Alaska were designed to assimilate the Natives into American society and generally avoided treating Alaska Natives as being subject to federal Indian law. At the end of the 19th century, the Department of the Interior Solicitor held that Alaska Natives did not have the same relationship to the federal government as other Native Americans.²⁸

In spite of these policies, other forces were at work to protect Alaska Native lands under the doctrines of aboriginal title and to deal with the Alaska Native villages as tribal governments. Two cases, in 1904 and 1914, upheld the authority of the United States to prevent trespass to aboriginal lands in Alaska.²⁹ Additionally, although education was to be "without regard to race", in fact, it was very much with regard to race.

A noted missionary, Dr. Sheldon Jackson, was appointed General Agent for Education in Alaska to implement the educational policies of the 1884 Organic Act. In that capacity he established numerous schools in remote Native villages, which became the focus of health care, reindeer herding, and other programs administered by the Department of Interior's Bureau of Education exclusively for Natives. In 1905 the Nelson Act specifically required the separation of white and Native children in the schools and increased the appropriations for Native services in Alaska.³⁰

²² *Fletcher v. Peck*, 10 U.S. 87, 142-143 (1810). ("[T]he Indian title. . . to be respected by all courts, until it be legitimately extinguished," continues with the land when it is acquired by a new sovereign.)

²³ See *U. S. v. Seveloff*, 1 Alaska Rpts. 64 (1872).

²⁴ *In re Carr*, 1 Alaska Rpts. 75 (1875).

²⁵ *Case and Voluck* supra at 187, n. 2.

²⁶ Act of May 17, 1884 §13, 23 stat 24.

²⁷ *In re Sah Quah*, 1 Alaska Fed. Rpts. 136 (1886).

²⁸ *Alaska-Legal Status of Native*, 19 L. D. 323 (1894).

²⁹ *U.S. v. Berrigan*, 2 Alaska Rpts. 442 (D. Alaska 1904) and *U.S. v. Cadzow*, 5 Alaska Rpts. 125 (D. Alaska 1914).

³⁰ Act of January 27, 1905, 33 stat 616, 619. See also *Case and Voluck* supra at 8.

In 1932, responsibility for Alaska Native programs was transferred to the BIA. Shortly thereafter the Interior Department Solicitor issued a new opinion, concluding after an exhaustive analyses of applicable cases, statutes and policies:

From the foregoing it is clear that no distinction has been or can be made between the Indians and other natives of Alaska so far as the laws and relations of the United States are concerned whether the Eskimos or other natives are natives or of Indian origin or not as they are all wards of the Nation, and their status is in material respects similar to that of the Indians of the United States. It follows that the natives of Alaska referred to in the [1867 Treaty of Cession], are entitled to the benefits of and are subject to the general laws and regulations governing the Indians of the United States.³¹

Four years later the Indian Reorganization Act was amended to specifically apply to the Alaska Natives.³² Nonetheless, the confusion about the status of the Alaska Natives continued to the end of the 20th century.

Alaska was admitted as a state on January 3, 1959. As was typical of most western states, a provision in the Alaska Statehood Act and an identical provision in the Alaska Constitution disclaimed “all right or title ... to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos or Aleuts (hereinafter called natives)” and retained these lands “under the absolute jurisdiction and control of the United States until disposed of under its authority.”³³ Six months later, in a long pending case, the United States Court of Claims affirmed the aboriginal title of the Tlingit and Haida Indians to virtually all of southeast Alaska.³⁴ This decision set the stage for the settlement of the broader Alaska Native claims to aboriginal title throughout the new state and implicitly rejected the notion that the Alaska Natives were “unique” and not entitled to such claims.

Responding to these claims, then Secretary of the Interior Udall imposed a land freeze on state selections under the Statehood Act. The state challenged the land freeze, but the Ninth Circuit Court of Appeals affirmed that the Native claim to exclusive use and occupancy was sufficient to prevent the state from making its selections under the statehood act until the claims were resolved.³⁵ Two years later, Congress, exercising its plenary power, enacted ANCSA, extinguishing aboriginal title throughout Alaska and confirming what would amount to 45 million acres of surface and subsurface estate to 12 regional and more than 200 village corporations.

The only mention of “tribes” in ANCSA is in the definition of “Native village,” which includes “any tribe, band, clan, group, village, community, or association in Alaska” that

³¹ *Status of Alaska Natives*, 53 I. D. 593, I Ops. Sol. 303, 310. (1932).

³² Act of May 1, 1936, §1, 41 stat 1250 (25 U.S.C. §473a).

³³ Act of July 7, 1958, §4, 72 stat. 339. See also Art. XII, §12 of the Alaska Constitution.

³⁴ *Tlingit and Haida v. U.S.*, 147 Ct. Cls. 315, 177 F. Supp. 452 (1959).

³⁵ *Alaska v. Udall*, 420 F. 2nd 938 (9th Cir. 1969).

qualified for ANCSA benefits.³⁶ The residents of each Native village were authorized to organize a “Village Corporation”³⁷ which is defined in ANCSA as:

an Alaska Native Village Corporation organized under the law of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and behalf of a Native village in accordance with the terms of [ANCSA].³⁸

The village corporations were to receive the surface lands under ANCSA and the regional corporations were to receive the subsurface of those lands as well as, in some cases, additional surface and subsurface lands.³⁹ Although the “Native villages” clearly included “tribes,” the corporations were not initially considered to be tribes. That soon changed.

In 1975 Congress enacted the Indian Self-Determination and Education Assistance Act (“ISDEA”). The ISDEA expressed a firm congressional commitment to:

the maintenance of the Federal Government’s unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful self-determination policy which will permit an orderly transition from the Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.⁴⁰

The ISDEA required the contracting of federal programs to an “Indian tribe” or the tribe’s designated “tribal organization.” The definition of these terms was crucial. “Indian tribe” under the ISDEA means:

Any 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, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. (Emphasis added.)⁴¹

A “tribal organization” is defined in important part as “any legally established organization of Indians which is controlled, sanctioned, or chartered by [the governing body of an Indian tribe].”⁴²

³⁶ Act of December 18, 1971, §3(c), 85 stat. 689 (43 U.S.C. §1602(c)).

³⁷ 43 U.S.C. §1607(a).

³⁸ 25 U.S.C. §1602 (j).

³⁹ Regional corporations were organized within each of the 12 ethnic regions of Alaska under 43 U.S.C. §1606.

⁴⁰ Act of January 4, 1975, §3 (b), 88 stat. 2203 (25 U.S.C. §450a(b)).

⁴¹ 25 U.S.C. §450 b(e).

⁴² *Id.* at 25 U.S.C. §450b(l).

Thus, four years following the enactment of ANCSA, Congress identified three separate Alaska Native institutions as “tribes.” At that time and up to the present most Alaskan Native villages are also organized as consortia of regional nonprofit corporations, which were ideally suited to act as a “tribal organization” for purposes of ISDEA contracting. This resulted in the rapid contracting of BIA and IHS services to those organizations, as well as in many cases, to individual villages.⁴³ Moreover, the inclusion of the village and regional corporations as “tribes” enabled the corporations to obtain contracts under the ISDEA when Native villages were not available for contracting.⁴⁴

A year earlier, Congress had enacted the Indian Financing Act.⁴⁵ The Indian Financing Act also defined “tribe” to include “Native villages and Native groups ... as defined in [ANCSA].”⁴⁶ Moreover, the Indian Financing Act defined “reservation” to include “land held by incorporated Native groups, regional corporations, and village corporations under the provisions of [ANCSA].”⁴⁷ The treatment of all of Alaska as being “on or near the reservation” is also a longstanding federal policy. The United States Supreme Court has described this policy in great detail as being the geographic area in which BIA social service programs are implemented in Alaska.⁴⁸ Current social service regulations also define “reservation” as “including Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act.”⁴⁹ Moreover, the Indian Financing Act definitions of reservation and the ISDEA definition of tribe are commonly repeated in more than two-dozen federal statutes enacted over the last twenty years.⁵⁰ These statutes include the Indian Health Care Improvement Act of 1976, under which hundreds of millions of dollars in health care programs are now provided annually through the Alaska Native Tribal Health Consortium.⁵¹

Likewise, federal courts have upheld preferential economic treatment for Alaska Native corporations and Native-owned enterprises. For example, under Section 7(b) of the ISDEA, preferences in subcontracts and contracts are to be given to Indian organizations and Indian economic enterprises in implementing housing and any other programs under the ISDEA.⁵² The Alaska Chapter of the Associated General Contractors challenged these regulations when applied to Department of Housing and Urban Development programs. In upholding the preferences the Ninth Circuit concluded that:

⁴³ See *Case and Voluck* at 221-224 describing the effect of the ISDEA in Alaska.

⁴⁴ *Cook Inlet Native Assn. v. Bowen*, 810 F. 2^d 1471-1476 (9th Cir. 1987) (ANCSA regional corporation held to be a tribe for purposes of ISDEA contracting for health and other federal services.)

⁴⁵ Act of April 12, 1974, 88 stat. 77 (25 U.S.C. §1451 et seq).

⁴⁶ *Id.* 25 U.S.C. §4539(c).

⁴⁷ *Id.* 25 U.S.C. §452(d).

⁴⁸ *Morton v. Ruiz*, 415 U.S. 199, 212-213 (1974). Oklahoma Natives have historically been afforded a similar special treatment.

⁴⁹ 25 C.F.R. §20.100 “Reservation.”

⁵⁰ See e.g. Indian Child Protection and Family Violence Act of November 28, 1990 (25 U.S.C. §3202(9) defining “Indian reservation” to include land held by Alaska Native groups on regional or village corporations under ANCSA and (10) defining “Indian tribe” to be the same as the definition under the ISDEA; See also American Indian Agriculture Resource Management Act of December 3, 1993, 25 U.S.C. §3703(10) defining “Indian tribe” to include Alaska Native village or regional corporations.

⁵¹ 25 U.S.C. §1601 et seq. The Act defines “Indian Tribes” as including ANCSA corporations. 25 U.S.C. §1603(d). See also, *Case & Voluck*, supra., note 2 at 220 -221. (Describing the scope of these programs.)

⁵² 25 U.S.C. §450e(b).

Congress has utilized methods other than tribal rolls or proximity to reservations, which have generally been used as eligibility criteria in statutory programs for the benefit of Indians. The Supreme Court has already noted and approved one such different treatment of Alaska Natives.⁵³

More broadly the Ninth Circuit noted that:

It is now established that through [the 1867 Treaty of Cession] the Alaska Natives are under the guardianship of the federal government and entitled to the benefits of the special relationship.⁵⁴

More recently, the District of Columbia Circuit Court of Appeals has similarly upheld a preference in defense contracting specifically benefiting the Alaska Native corporations. The legislation enabled an Alaska Native corporation joint venture to obtain a preferential contract for the management of a federal military base. Unlike the other statutes discussed above, the Defense Appropriation Acts adopted between fiscal years 1999 and 2000 allowed a preference in federal contracting for firms of at least 51 percent "Native American ownership." The joint venture applied for and received a preferential contract to manage Kirtland Air Force Base.⁵⁵

The D.C. Circuit Court rejected the argument that the preference was racially based because: "When Congress exercises this constitutional power [under the Commerce Clause] it necessarily must engage in classifications that deal with Indian tribes."⁵⁶ The court noted that Congress has the exclusive authority to "determine which 'distinctly Indian communities' should be recognized as Indian Tribes."⁵⁷ The court therefore upheld the contracting preference as applied to the Alaska Native corporations even though they were not specifically defined as "tribes" in the Defense Appropriation Acts.⁵⁸ This decision implicitly confirms the constitutionality of an earlier amendment to ANCSA that statutorily qualifies Alaska Native Corporations as "disadvantaged businesses" for purposes of the federal 8(a) contract set-aside program.⁵⁹

Beyond the congressional treatment of the Alaska Native corporations as tribes for certain purposes, it is also now well established in the general sense that the Alaska Native villages (also defined as "tribes" in ANCSA) are federally recognized tribal governments. Owing perhaps to ANCSA's omission of tribes in the settlement, it took more than twenty years of litigation to confirm their status. At the end of the first Bush administration, Thomas L. Sansonetti, the Solicitor for the Department of Interior, issued a comprehensive 133-page

⁵³ *Alaska Chapter, Associated General Contractors v. Pierce*, 694 F. 2nd 1162, 1169 n. 10 (9th Cir. 1982) citing *Morton v. Ruiz*, supra. at note 49.

⁵⁴ *Id.* at 1169, n. 10 (citation omitted).

⁵⁵ *American Federation of Government Employees v. U.S.*, 330 F. 3rd 513 (D. C. Cir. 2003).

⁵⁶ *Id.* At 521.

⁵⁷ *Id.* at 520, citing *U.S. v. Sandoval*, 231 U.S. 29, supra note 8.

⁵⁸ *Id.* at 522-523. ("[P]romoting the economic development of federally recognized Indian tribes (and their members) is rationally related to a legitimate legislative purpose and thus constitutional").

⁵⁹ 43 U.S.C. § 1626(e).

opinion examining the historical status of the Alaska Natives and their continued entitlement to federal services and programs. Although the opinion stopped short of deciding that all the Alaska villages were federally recognized tribes, it noted in conclusion that:

In our view, Congress and the Executive Branch have been clear and consistent in the inclusion of Alaska Natives as eligible for benefits provided under a number of statutes passed to benefit Indian tribes and their members. Thus we have stated that it would be improper to conclude that no Native village in Alaska could qualify as a federally recognized tribe.⁶⁰

Nine months later the new Clinton administration published a comprehensive "Notice" in the federal register listing more than 200 of the Alaska Native villages and two regional tribes as federally recognized Indian tribes. The Notice states specifically that:

This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather they have the same *governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States.*⁶¹

The very next year, Congress passed the Federally Recognized Indian Tribe List Act that required the annual publication of a list of all federally recognized Indian tribes.⁶² In 1998, after many years of litigation, the United States Supreme Court denied territorial jurisdiction to Alaska Native tribes to impose a tax on non-Natives on ANCSA land now held by the tribe.⁶³ In reaching its decision, the Supreme Court noted with apparent approval that the effect of ANCSA was to leave the Alaska Native villages as "sovereigns, without territorial reach."⁶⁴ The next year the Alaska Supreme Court concluded, in a ground-breaking decision, that even without territory Alaska Native villages, as federally recognized tribal governments, retained inherent jurisdiction over their members even outside of Indian country, sufficient to determine a child custody and probably other "internal" matters significant to the exercise of inherent tribal sovereignty.⁶⁵

IV. CONCLUSION

It is now beyond doubt that Alaska Native villages, as well as ANCSA regional and village corporations, are federally recognized "tribes." The "Native villages" defined in ANCSA, the ISDEA and other statutes and listed under the requirements of the Federally Recognized Tribe List Act are tribal governments with political jurisdiction over their members

⁶⁰ "Governmental Jurisdiction of Alaska Native Villages Over Land and Non-Members" (M-36975, January 11, 1993).

⁶¹ 58 F. Reg. 54365, 54366 (October 21, 1993).

⁶² See 25 U.S.C. §479a note, and 479a-1 at note 22, *supra*.

⁶³ *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998).

⁶⁴ *Id.* at 526.

⁶⁵ *John v. Baker I*, 982 P. 2nd 738 (Alaska 1999).

and perhaps others. Alaska Native regional and village corporations, as defined in or established under ANCSA, are also tribes for purposes of particular statutory programs and services, including preferences in government contracting as authorized under federal law. As the United States Supreme Court decided nearly a century ago in the case of “distinctly Indian communities ... whether to what extent and for what time they shall be recognized ... is to determined by Congress.”⁶⁶ In this respect, Alaska Native villages and ANCSA regional and village corporations are squarely within the scope of Congress’s plenary authority and trust responsibility over Native American policy under the commerce clause of the United States Constitution. Congress therefore has the same authority to legislate on behalf of all the “distinctly Indian communities” of Alaska as it does throughout the United States.

Finally, AFN agrees with the recommendations of many of the witnesses at the hearing who urged Congress to reverse some of the US Supreme Court ‘s holdings that have been adverse to tribal rights, and reassert itself as the primary policymaking entity for the federal government. A clear statement of the general trust responsibility of the federal government to Indian tribes would be helpful in ensuring that all federal agencies and the federal courts acknowledge Congress’s primacy as the lead policy maker in Indian Affairs. In doing so, Congress should link its restatement of the federal government’s general trust responsibility to the provisions of the UN Declaration on the Rights of Indigenous Peoples.

Congress settled our land claims but did not deal with tribal sovereignty at the time. The Supreme Court’s decision in *Venetie* terminated tribal powers over ANCSA lands. Congress also did not deal with our hunting and fishing rights. The substitute for Native hunting and fishing rights, Title VIII of ANILCA, has proved inadequate and does ensure food security for our people. Justice and fairness require that rights in these two areas be restored in consultation with Alaska’s tribes.

⁶⁶ *U.S. v. Sandoval*, 23 U.S. note 8 supra at 46.

