

Statement of Julie Kitka, President, Alaska Federation of Natives

**Before the
Secretarial Commission on Indian Trust Administration and Reform**

**Monday, August 19, 2013
Anchorage, Alaska**

Good Morning Mr. Chairman and members of the Committee. You have asked me to address the role of village corporations as well as to share my perspectives about trust land issues in light of the recent U.S. District Court decision in *Akiachak Native Community v. U.S. Department of the Interior* decided March 31, 2013. You also expressed an interest in my perspectives and suggestions about trust reform, and also for my recommendations specific to Alaska regarding the federal trust relationship with Alaska Native tribes, trust lands, or subsistence hunting and fishing rights. Thank you for the opportunity to address these issues.

For those of you who are not familiar with the Alaska Federation of Natives (AFN), I would like to first share with you a little bit of our history and mission. AFN was formed in October 1966, when more than 400 Alaska Natives representing 17 Native organizations gathered for three days to address Alaska Native aboriginal land rights. At this time there were no computers or cell phones. Native people had little money and everyone was focused on surviving the harsh winter and feeding their families. So it was a historic gathering—driven by fear of loss of traditional lands. AFN was formed from this gathering

From 1966 to 1971, AFN devoted most of its efforts to passage of a just land settlement in the U.S. Congress. On December 18, 1971, those efforts were rewarded when Congress passed the Alaska Native Claims Settlement Act (ANCSA). Today, AFN is the largest statewide Native organization in Alaska. Its membership includes 178 villages (both federally-recognized tribes and village corporations), 13 regional for-profit Native corporations (established by Congress pursuant to the Alaska Native Claims Settlement Act), and 11 regional Native nonprofit tribal consortia that offer a broad range of human services to their member villages. AFN's primary mission is to enhance and promote the cultural, economic and political voice of all Alaska Natives. Our priorities are decided through a resolutions process at our Annual Convention in October.

Alaska Village Corporations: To understand the role of Village Corporations in Alaska, one must understand the role ANCSA has played and continues to play. Prior to the passage of ANCSA, Alaska Natives, represented by over 200 villages or tribes, held aboriginal claim to most of Alaska – about 365 million acres of land. Unlike prior settlements with indigenous peoples, the lands and other assets conveyed to Alaska Natives under ANCSA were not held in trust or subject to any other form of permanent protection. Instead, they were conveyed to state-chartered business corporations, subject to the restriction that the stock could not be sold or otherwise disposed of for 20 years (until December 18, 1991). The shares in these corporations were issued to approximately 80,000 individual Alaska Natives who were alive on the date of ANCSA's enactment.

Where Alaska Natives resided on April 1, 1970, the date of the last census, determined where Alaska Natives were Alaska Natives were enrolled – to a village corporation or at-large; and in which region. Natives in four historically Native communities (Sitka, Juneau, Kenai and Kodiak) did not meet the requirements to form village corporations. Instead, they formed “urban” corporations. Finally, nine or 10 communities were too small to form village corporations and were instead organized as “group” corporations. Section 4 of ANCSA extinguished all aboriginal claims, including our hunting and fishing rights. Section 6 authorized payment of approximately \$1 billion for those claims (half from the State of Alaska and half from the federal government).

Of the approximately 45.7 million acres, the surface estate of 22 million acres was divided among the village corporations. The 12 regional corporations located in Alaska received the subsurface estate to the lands conveyed to the village corporations. This in itself was historic – many large land settlements that have occurred since ANCSA, especially in Canada, retained the subsurface rights in their federal governments.

ANCSA also extinguished all existing Indian reservations in Alaska (except the Annette Islands Reserve) and allowed the village corporations on those former reservations to select the surface and subsurface estate of and to forego all other ANCSA benefits (including cash payments) in settlement of their land claims. Four large reservations took advantage of this provision, with a combined land claim of nearly four million acres. The four reservations (and associated villages) were: St. Lawrence Island (Gambell and Savoonga), Elim (Elim), Chandalar (Venetie and Arctic Village), and Tetlin (Tetlin). In 1976, Congress amended ANCSA to allow the village corporation (Klukwan, Inc.) to select a township under ANCSA if it conveyed the lands of the former reserve (800 acres) in fee to the Chilkat Indian Village tribal government. ANCSA Section 14(f) required village corporation consent for regional subsurface mining activity “within the boundaries of the Native village.”

So, with the passage of ANCSA, Congress abolished the reservation trust land system in Alaska, and began its major experiment in federal public policy – imposing the for-profit corporate structure on traditional Native people and their land and resources. ANCSA did not abolish the preexisting tribal governments. This became a source of significant litigation in the 1980’s and 1990’s and into the twenty-first century as the tribes, left without any land, struggled for recognition and definition of their political existence and jurisdiction.

Since enactment of ANCSA, Alaska Natives have succeeded in persuading Congress to adjust the status of the corporations so that stock is restricted indefinitely against alienation (unless the shareholders vote otherwise), the land cannot be taxed unless it is developed, and it is further protected from creditor’s claims, court judgments, and bankruptcy. With the 1998 ANCSA amendments, the corporations can also provide benefits to their shareholders without regard to the stricter state law requiring equal benefits per share.

Thus, under ANCSA, village lands are, for the most part, owned by the Village Corporation. However, after the *Venetie* Supreme Court decision, ANCSA land is not considered “Indian Country.” That means the only “Indian country” in Alaska today, aside from the Metlakatla Indian Community (Annette Island Reserve), would be allotments or other trust or restricted lands set aside under federal superintendence, and a few small parcels held in trust for the

villages of Kake, Klawock, Angoon, and Hydaburg in southeast Alaska. AFN attempted for a number of years to persuade Congress to authorize a tribal transfer option, but was ultimately unsuccessful in that effort.

Today, it is estimated that well over one million acres of fee land in Alaska is tribally owned. Some of these lands were transferred to Alaska's tribes by village corporations in the years following the 1971 Settlement Act, some were acquired through the Alaska Native Townsite Act, and others by gift or purchase. These fee lands in tribal or Native ownership lack even the basic protections afforded undeveloped ANCSA lands held by ANCSA village or regional corporations under the provisions of the automatic land bank established by ANCSA. These lands are thus subject to loss. Alaska's tribes believe that the most secure means of ensuring these lands stay in Alaska Native ownership is through the federal land into trust process. It is for that reason, that AFN has historically supported allowing Alaska's tribes and individual Native land owners to petition the Secretary of the Interior to acquire and hold their lands in trust.

The Akiachak Case and Land-into-Trust in Alaska: Heather Kendall-Miller, one of the attorneys who litigated the Akiachak case, is scheduled to testify today, so I will not go into a great deal of history or background about the litigation as I'm sure that will be part of Heather's presentation. But I will share with you our perspectives on the case.

As noted previously, with the passage of ANCSA, Congress abolished the reservation trust land system in Alaska and created a system of lands held by Native corporations. Section 19 revoked the trust status of all 23 reservations that had been established in Alaska between 1891 and 1943, except for the Metlakatla Reservation. All of the core traditional lands of the native villages were patented in fee, not to tribal entities, but to newly established Village Corporations existing under state law.

Since passage of ANCSA, the Department of Interior has established by regulation that taking land into trust for Alaska tribes would be inconsistent with the enactment of ANCSA. And, as you know, the current regulations in 25 C.F.R., part 151 do not apply to Alaska. The Supreme Court in *Venetie* held that lands conveyed to Native corporations under ANCSA are not Indian country, and thus do not become Indian country when conveyed by a Village corporation to a tribal government.

The *Akiachak* court affirmed the ability of the Secretary of the Interior to take land into trust on behalf of Alaska Natives and Alaska's tribes. None of the lands involved in that case were ANCSA lands, and many in our state continue to question whether lands conveyed to a corporation under ANCSA should be among the lands eligible for trust status. Because the subsurface estate of village lands was conveyed by ANCSA to the regional corporations, many strongly believe that consent by the regional corporation in the region in which the land to be transferred into trust is located, must be a precondition for any such transfer of ANCSA land into trust.

On the other hand, tribes for the most part want the option of having their lands taken into trust. The State of Alaska is also strongly opposed to allowing tribes in Alaska to have their fee lands placed into trust.

In 1999, following the decision in *Venetie*, then Governor Knowles, established a Commission on Rural Governance and Empowerment to recommend ways the State government should respond to the reality of tribal governance. In its Final Report to the Governor, the Commission recommended that the State cooperate with tribal efforts to transfer land into trust status as a way to enhance local control and economic opportunities. That recommendation was consistent with the earlier Alaska Natives Commission Report issued in 1994, which called upon the Secretary to “at a minimum, . . . “take lands owned by tribes in Alaska into trust when requested by a tribe to the extent such lands have been transferred from an ANCSA village corporation pursuant to a vote of the ANCSA village corporation shareholders.” The Commission reasoned that “some tribes in Alaska are acquiring lands from their ANCSA village corporations independent of the process that led to the settlement of Alaska Native aboriginal claims. For that reason, there is questionable justification for treating tribes in Alaska any differently from tribes elsewhere in the United States by denying the protection of trust land status.” In the AFN Implementation Study, completed in December 1999, one of the proposals forwarded to Congress was to “Amend ANCSA to authorize land transfer of 14(c)(3) municipal lands to tribes and to include lands acquired by Alaska tribes as trust lands.”

By acquiring land in trust, tribes would be in a better position to provide essential governmental services to their members, including health care, education, housing, jobs and other economic development opportunities, as well as court and law enforcement services. The lack of recognized geographic delineation of tribal government jurisdiction frustrates Alaska’s tribes’ ability to fulfill needed governmental functions in rural Alaska. Alcohol control, economic development, land use, environmental regulation and other services are impacted as a result of the U.S. Supreme Court’s decision in *Venetie* holding that ANCSA lands are not “Indian country.”

As noted earlier, fee lands owned by a tribe do not have any special protections from taxation. Tribal trust lands, on the other hand, enjoy complete protection from state or local taxation, as well as from the exercise of eminent domain. For these reasons, even some opponents of taking ANCSA land in trust agree that a total ban in Alaska goes too far. There are situations where it may be appropriate for protection of cultural and religious sites or existing Native allotments.

In summary, there are a great many questions that must be addressed with respect to whether lands transferred under ANCSA should be eligible for trust status, and if so under what preconditions. How will the subsurface owners be assured that they will retain their ability to access and develop their interests? Some of our Corporations have called for legislation that would amend the IRA to prohibit the taking of ANCSA lands into trust under the Act without the approval of a majority of the shareholders of the Regional Corporation. Others have suggested that Congress should first direct the Secretary of Interior to undertake a comprehensive study of the political, social and economic needs of Alaska Native peoples, the current legal structures in place to address them, and the means and manner in which those structures can be improved into the future.

Whether these issues are clarified by Congress in legislation or through the regulatory process that results from the *Akiachak* case, we believe there will have to be a full and fair hearing and opportunity to allow all interested Alaska Native entities to be heard. Thoughtful consideration

must be given to the future land needs in Alaska, and all options need to be on the table for consideration.

The Federal Trust Responsibility to Alaska Natives: On May 17, 2011, AFN submitted written comments to the Senate Committee on Indian Affairs on the federal government's trust responsibility to Alaska Natives as part of an Oversight Hearing on Fulfilling the Federal Trust Responsibility. I am attaching a copy of those comments which trace the history of Alaska Natives relationship with the federal government. For today's purposes, it is important to understand that Alaska Natives are entitled to the benefits of the special trust relationship that all other Native Americans enjoy.

Federal officials, often drawing from their experience with 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 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.

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:

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.

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.

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

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.⁶ Congress has gone even further in Alaska, where it has frequently defined the Alaska Native corporations established under ANCSA as “tribes” for particular purposes.

In summary, 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. 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 be determined by Congress.”⁷ 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

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

⁷ *U.S. v. Sandoval*, 23 U.S. note 8 supra at 46.

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.

Alaska Native Hunting and Fishing Rights (Subsistence): Protection of Native hunting, fishing, and gathering rights is a part of federal law throughout the United States. Nowhere is it more important than in Alaska. What we call subsistence is not a relic from the past. It continues to be the foundation of Alaska Native society and culture. A vast majority of Alaska’s 120,000 Native people (nearly 20% of the population of Alaska) still participate in hunting, fishing and gathering for food during the year. Subsistence resources remain central to the nutrition, economies and traditional of Alaska Native villages. The ability of Alaska Natives to continue to pursue their subsistence activities is closely linked to their food security. The average harvest of subsistence resources in pounds per person in rural Alaska is estimated at 544 pounds, equivalent to 50% of the average daily caloric requirement. The economic significance of subsistence in rural Alaska is best appreciated in light of one study that suggested that replacing subsistence foods would range between \$98 and \$164 million, or about \$2,000-\$3,000 per person.⁸ Alaska Natives remain dependent on subsistence hunting and fishing for their economic and cultural survival.

Unfortunately the legal framework in Alaska significantly hampers the ability of Alaska Natives to access their traditional foods. Native leaders sought protection of their hunting and fishing rights in the settlement of their aboriginal land claims, but instead the Alaska Native Claims Settlement Act (ANCSA) extinguished those rights. Instead of explicit protection of Native hunting and fishing rights, Congress expected the State of Alaska and the Secretary of the Interior “to take any action necessary to protect the subsistence needs of Alaska Natives.”

Neither the Secretary nor the State fulfilled that expectation. As a result, Congress enacted Title VIII of the Alaska National Interest Land Conservation Act (ANILCA) in 1980. ANILCA’s scheme envisioned state implementation of the federal priority on all lands and waters in Alaska through a state law implementing the priority. Again, Native leaders sought explicit protection for “Native” hunting and fishing rights, but the State objected. Ultimately, the law was crafted to provide a subsistence priority for “rural residents” with the expectation that the State would enact laws that conformed to federal requirements. That system operated for less than a decade before the Alaska Supreme Court ruled that the State Constitution precluded State participation in the program. Consequently, the State lost regulatory authority over subsistence uses on federal lands.

Today, after more than 20 years of dual federal and state management, it has become abundantly clear that the State will not do what is required to regain management authority over subsistence uses on federal lands and waters. The State subsistence law has been effectively gutted – large areas of the state have been classified as “nonsubsistence use areas,” where subsistence users receive no priority, and “all Alaskans” have been declared eligible for the subsistence priority on all remaining state lands.

⁸ Scott Goldsmith, *The Remoter Rural Economy of Alaska* at 37-38, published by the University of Alaska Anchorage, Institute of Social and Economic Research (April 12, 2007); Alaska Department of Fish and Game, Division of Subsistence, *Subsistence in Alaska: A Year 2000 Update*.

ANILCA does not provide long-term protection for the Native subsistence way of life. Instead, subsistence harvests have been marginalized by other users and ineffective management regimes. Alaska Natives have been made criminals for feeding their families and communities, and penalized for practicing their ancient traditions. The fact that Alaska Natives were given only a very limited role in the management of their hunting and fishing rights through ANILCA – even on their own lands -- critically undermines all attempts to protect customary and traditional uses, practices and needs.

Congress settled our land claims in ANCSA, but 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 not ensure food security for our people. Justice and fairness require that these rights be restored in consultation with Alaska's tribes and corporations.

Rather than simply defending and repairing a broken system that no longer serves its intended purpose, it is time to consider options that reach back to Congress's original expectation that Alaska Native hunting, fishing and gathering rights be protected. Congress should introduce and pass legislation that will restore and protect Native hunting and fishing rights in Alaska, and provide a co-equal role for Alaska Natives in the management of fish, wildlife and other renewable resources that Alaska Natives rely upon for their economic and cultural existence. Congress has the authority to enact legislation that ensures a "Native" or "tribal" subsistence preference on all lands and waters in Alaska, and to provide a co-management role for Alaska Natives. It has done so in the enactment of numerous other federal laws that provide explicit protection for Native hunting and fishing rights in Alaska.

Federal legislation would fulfill the federal government's trust responsibility to protect Alaska Native subsistence culture and economy. It would end "dual management" and fulfill Congress' original intent to protect the Alaska Native subsistence way of life on all lands and waters in Alaska. By embracing co-management with Alaska Natives, the federal government could administer a much more responsive and cost-efficient management program. It would reduce the litigation that has plagued the implementation of Title VIII since its passage and would be consistent with the United States' obligations under the UN Declaration on the Rights of Indigenous Peoples.

I am attaching AFN's extensive comments to the Secretary of the Interior in 2010 during his review of Federal Subsistence Management in Alaska, as well as a briefing paper on administrative actions the Secretary can take immediately that would improve protections for our customary and traditional hunting and fishing rights. As we make clear in our comments, without fundamental structural changes to the law, more of our people will lose the right to live a subsistence way of life -- especially those whose traditional hunting and fishing grounds are on state and Native owned lands. Dual management will continue, as will the litigation, and our way of life will continue to be ensnared in a web of inconsistent state and federal laws and court decisions.

The competing federal and state administration of subsistence significantly impairs the food security of people who need it the most, and denies us our basic human rights to food security and self-determination and the right to maintain our own unique culture – rights that are recognized under International law and due protection by the United States.

