



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240



JAN 11 1993

M-36975

## Memorandum

To: Secretary

From: Solicitor

Subject: Governmental Jurisdiction of Alaska Native Villages  
Over Land and Nonmembers

In the fall of 1990 at your request, we conducted an Office-wide review of all pending legal issues in Alaska. On June 19, 1991, following that review and briefings with your policy and program staff, you issued a memorandum establishing as a priority the resolution of three of those issues. Among your priorities was a request that we work with the Department of Justice to develop the legal position of the United States on "the nature and scope of so-called governmental powers over lands and nonmembers that a Native village can exercise after the Alaska Native Claims Settlement Act." You indicated that the opinion would be useful in resolving questions that arise in the context of approving the constitutions put forward by villages and would aid you in deciding whether the jurisdictional claims made by the villages were consistent with law. You limited your request noting that you were not seeking "to question the existence of a long-recognized special relationship between the United States and Alaska natives" or "to revisit the eligibility of villages to participate in programs administered by the Department and available to Indians."

## I. INTRODUCTION

Prior to the enactment of the Alaska Native Claims Settlement Act, Act of December 18, 1971, Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. §§ 1601-1628) (ANCSA), sixty-nine Alaska Native villages and regional groups adopted constitutions pursuant to section 16 of the Indian Reorganization Act, Act of June 18, 1934, § 16, 48 Stat. 987 (codified as amended at 25 U.S.C. § 476) (IRA). All but two of these constitutions were adopted during the 1930's, 1940's and 1950's.<sup>1</sup>

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<sup>1</sup> Bureau of Indian Affairs, American Indians and Their Federal Relationship 2-5 (1972). Two constitutions were adopted in 1971: Inupiat Community of the Arctic Slope, approved on June 28, 1971, and adopted August 26, 1971; and Kenaitze Indian Tribe, approved June 21, 1971, and adopted August 1, 1971.

Although there was some interest in IRA constitutions during the 1970's,<sup>2</sup> it was not until the 1980's that there was evidence of widespread renewal of Native interest in IRA constitutions. As a result of this renewed interest, three villages have adopted amended constitutions<sup>3</sup> and three have adopted constitutions for the first time.<sup>4</sup> During this time, several Native groups have considered proposed constitutions or constitutional amendments and rejected them.<sup>5</sup> Approximately a dozen villages are currently considering proposed constitutions. The Bureau of Indian Affairs (BIA) is corresponding with these villages to provide technical comments.

The 1988 amendments to the IRA, Act of November 1, 1988, § 101, Pub. L. No. 100-581, 102 Stat. 2938 (codified 25 U.S.C. § 476), require that, 30 days prior to calling an election on the adoption or amendment of a tribal constitution, you advise a tribe in writing of any provision of the constitution that you believe is contrary to applicable law. Your request to this Office arises in the context of this provision. Legal guidance on the scope of village jurisdiction over land and nonmembers is necessary to determine whether the jurisdictional claims made by the villages are contrary to law.

As the length and detail of the opinion that follows indicates, the question you have asked is an exceedingly difficult and complex one. As you are aware, both the federal and state courts in Alaska have been grappling with issues concerning the sovereignty and powers of Alaska Native groups for several years. The results have been, to say the least, less than consistent.<sup>6</sup>

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<sup>2</sup> Several elections on the adoption of village constitutions were authorized in the 1970's but, for some reason, were never held.

<sup>3</sup> Tanana, adopted June 13, 1989, and approved July 26, 1989; Stevens Village, adopted June 25, 1990, and approved August 8, 1990; and Sitka, adopted November 26, 1991, and approved January 8, 1992.

<sup>4</sup> Eagle, adopted April 29, 1989, and approved June 13, 1989; Circle, adopted August 20, 1991, and approved October 4, 1991; and Seldovia, adopted April 3, 1992, and approved May 18, 1992.

<sup>5</sup> For example, the Metlakatla Indian Community of the Annette Islands Reserve rejected a proposed revised constitution on March 1, 1983, and the Native Village of Port Graham rejected a proposed constitution on January 30, 1992.

<sup>6</sup> Federal cases include: Native Village of Tyonek v. Puckett, 957 F.2d 631 (9th Cir.), superseding 953 F.2d 1179 (9th Cir. 1992); Alyeska Pipeline Service Company v. Alaska, No. A87-201

In formulating our opinion, we have attempted to step back from the details of these specific cases and examine the question of the impact of ANCSA on Native village jurisdiction over land and nonmembers from the perspective of the 125 year history of federal dealings with Alaska Natives and of general principles of Federal Indian law.

In our effort, we have consulted with the Governor and Attorney General of Alaska; numerous Native leaders in Alaska and the contiguous 48 states, as well as their counsel; the Alaska congressional delegation and other congressional leaders; and the members of the Joint Federal-State Commission on Policies and Programs Affecting Alaska Natives established by section 12 of the Act of August 18, 1990, Pub. L. No. 191-379, 104 Stat. 473, 478. We have received numerous comments, including several detailed legal briefs. These comments have been very helpful in developing our opinion.

As we discuss further below, the complexity of questions concerning the sovereign powers of Alaska Native groups arises in considerable measure from Alaska's unique circumstances and history.<sup>7</sup> Alaska was the last territorial acquisition of the United States on the North American continent. The remote location, large size and harsh climate of Alaska further delayed the need to confront questions concerning the relationship between the Native peoples of Alaska and the United States. As a result, all three branches of the Federal Government have dealt with the relationship in a tentative and reactive way. Often, decisions on issues concerning the relationship with Natives have been postponed, rather than addressed. Where aspects of the relationship have been addressed, they have often been resolved without a clear or consistent understanding or application of the fundamental legal principles governing the relationship.

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Civil (D. Alaska) (Tentative Decision, filed January 17, 1992); Blatchford v. Native Village of Noatak, 111 S.Ct. 2578 (1991), rev'g Noatak v. Hoffman, 896 F.2d 1157 (9th Cir. 1990); Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548 (9th Cir. 1991) (Venetie II), superseding 918 F.2d 797 (9th Cir. 1990); Chilkat Indian Village v. Johnson, 870 F.2d 1469 (9th Cir. 1989); Alaska v. Native Village of Venetie, 856 F.2d 1384 (9th Cir. 1988) (Venetie I).

State cases include: Nenana Fuel Co., Inc. v. Native Village of Venetie, 834 P.2d 1229 (Alaska 1992); Hydaburg Cooperative Association v. Hydaburg Fisheries, Inc., 826 P.2d 751 (Alaska 1992); Matter of City of Nome, 780 P.2d 363 (Alaska 1989); Native Village of Stevens v. Alaska Management & Planning, 757 P.2d 32 (Alaska 1988).

<sup>7</sup> See Part III, infra.

This is not to say that there has been a wholly consistent pattern of dealing with Native Americans in the contiguous 48 states. There obviously has not. But there is a fundamental difference between the approach to issues of Indian law and policy in the contiguous 48 and the situation in Alaska. The shifts in dealing with Native Americans in the contiguous 48 have been characterized by fundamental changes in national policy. An initial policy of separation of Native Americans from the rest of society through removal and reservations gave way in the 1880's to a policy of assimilation as reflected in the General Allotment Act of 1887. 24 Stat. 388. Assimilation gave way in turn to a policy of reinvigorated Native self-government as reflected in the IRA and other policies of the New Deal. There followed a brief period of termination and then, in the early 1970's, the current policy of tribal self-determination.<sup>8</sup> Dealings with Native groups in Alaska have, to be sure, reflected elements of then-current national policies. There has been, however, no consensus on the appropriate comprehensive framework for the relationship with Alaska Natives taking into account the unique circumstances of Alaska.

ANCSA is the most comprehensive statute to address Alaska Native issues. However, even with ANCSA, the primary impetus for, and focus of, the statute was resolution of a specific issue: Native claims to the land of Alaska.<sup>9</sup> A comprehensive statutory scheme to address this issue was enacted. In our opinion, as we detail below, this scheme has decisive implications for the current status of Native village jurisdiction over land and nonmembers.

In several statutes subsequent to ANCSA, Congress has disclaimed an intention to address the issue of Alaska Native village sovereign powers. Most recently, in the so-called "1991 Amendments" to ANCSA, Congress said that no provision shall "confer on, or deny to, any Native organization any degree of sovereign governmental authority over lands . . . or persons in Alaska . . . ." Act of February 3, 1988, Pub.L. No. 100-241, § 2(8)(B), 101 Stat. 1788, 1789 (1988) (43 U.S.C. § 1601 note). The Senate Energy and Natural Resources Committee explained, in its report on the legislation, that, "[t]his is an issue which should be left to the courts in interpreting applicable law and that these amendments should play no substantive or procedural

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<sup>8</sup> A concise history of Federal Indian policy through 1940 can be found in F. Cohen, Handbook of Federal Indian Law 1-88 (1942) (1942 Cohen). An update through 1981 is contained in F. Cohen, Handbook of Federal Indian Law 47-206 (1982) (1982 Cohen). A recent comprehensive history is F. Prucha, The Great Father (1984).

<sup>9</sup> See Part IV.B, infra.

role in such court decisions."<sup>10</sup> There is an element of self-fulfilling prophecy in the Senate Committee's statement. In the absence of further guidance from Congress, the courts will of necessity have to struggle with this issue. However, the courts must do so within the framework of laws enacted by the Congress and within the context of the specific cases and controversies that are brought before them. There is no assurance that the courts can comprehensively address the sovereign powers of Native villages. Further, the cases decided to date indicate that a judicial consensus on even specific issues will be elusive.

In the opinion that follows, we attempt to provide a broader perspective on the issue of Native village jurisdiction over land and nonmembers than can be provided in a specific case or controversy. However, the conclusions we reach can be no more than our best legal judgment. Further, like the courts, we are constrained by the framework of laws enacted by the Congress.

The ultimate and most satisfactory answer to the question you have posed should be provided by the Congress. Unlike the courts or the Department of the Interior, the Congress has the constitutional authority to craft general principles of Federal Indian law to address the unique circumstances of Alaska. Only with careful and deliberate action by the legislative branch, taken in consultation with the Native and non-Native citizens of Alaska, will there be an answer that will provide certainty and fairness in the future governance and development of Alaska.

## II. OUTLINE

In 1975 Congress established the American Indian Policy Review Commission to conduct the most comprehensive review of American Indian policy since the 1930's.<sup>11</sup> The Commission's review included examination of the status of Alaska Natives and is particularly relevant to our inquiry because its views on Alaska Natives and ANCSA were framed in the context of national Indian policy and were issued in 1977, six years after the Settlement Act. While we do not find persuasive everything said by the

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<sup>10</sup> S. Rep. No. 201, 100th Cong., 1st Sess. 35 (1987). See discussion Part IV.B.2, infra.

<sup>11</sup> Pub. L. No. 93-580, 88 Stat. 1910, as amended by Act of August 9, 1975, Pub. L. No. 94-80, §§ 1-4, 89 Stat. 415 and Pub. L. No. 95-5, 91 Stat. 13. The Commission was charged with conduct of "a comprehensive review of the historical and legal developments underlying the Indians' unique relationship with the Federal Government in order to determine the nature and scope of the necessary revisions in the formulation of policies and programs for the benefit of Indians." The work of the Commission is discussed in 1982 Cohen, supra n. 8, at 205-06.

Commission concerning Alaska Natives, the broad outlines of the Commission's findings provide a useful starting point for this opinion.

In Chapter 12 of its Final Report, the Commission described the status of Alaska Natives, in part, as follows:

In aboriginal social and political organization, the 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 of the lower 48.

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When, after the beginning of the 20th century, the United States began to take notice of the Alaska Natives, it dealt with them in much the same way as it was then dealing with the Indians of the lower 48.

American Indian Policy Review Commission, Final Report 95th Cong., 1st Sess. 489 (Comm. Print 1977) (footnotes omitted).

The Commission went on to conclude:

By and large, the United States recognized that the Native tribes of Alaska were of the same genus as the other Indian tribes within its jurisdiction, and formed its relationships with them and their members accordingly. In short, it regarded the Alaska Native tribes as dependent domestic sovereigns, possessed of the same attributes and powers as the Native tribes of the lower 48. And, just as in the case of other Native tribes, it acknowledged that a special relationship existed between it and the Alaska Native tribes and their members, as an incident of which it undertook to provide them with special services.

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The Alaska Native tribes (referring, of course, to the historic and traditional tribal entities, not to the Native corporations organized under the Settlement Act), just as the tribes of the lower 48, are domestic sovereigns. They possess all of the attributes and powers normally appertaining to such status, except those that have been specifically denied or taken from them by Congress.

Id. at 490-91 (footnote omitted).

The Commission found that ANCSA did not "effect a termination of the traditional Alaska Native tribes." Rather, the Commission found that, "as its very title implies," ANCSA was a settlement of aboriginal land claims. Id. at 491. It observed that:

No such [land claim] settlement has ever been held to have abolished the tribes concerned as political entities, to have affected their legal status, to have diminished their sovereign powers, or to have terminated the special relationship previously existing among them and their members and the United States.

The Settlement Act did not alter in any way the legal nature or status of any of the Alaska Native tribes. Nor did it alter the preexisting relationship between the United States and the Alaska Natives as members of such tribes. Particularly the Settlement Act neither terminated the tribes nor the status as "Natives" of the members thereof.

Id. at 491-92 (footnote omitted).

The Commission relegated to a deceptively simple footnote the essential conclusion for our present inquiry. After concluding that Alaska Natives "possess all of the attributes and powers normally appertaining to such [domestic sovereign] status, except those that have been specifically denied or taken from them by Congress," the Commission noted:

Although, technically, the Alaska Native Tribes still possess a number of sovereign powers relating to the governance of territory (e.g., to regulate hunting and fishing on tribal domain), these powers are largely in abeyance at the present time because the tribes currently do not possess tribal domains. However, were the United States in the future to set aside or acquire land in trust for an Alaska Native tribe, all of the slumbering powers of that tribe pertaining to the governance of territory would immediately rejuvenate. In short, lacking the subjects to which certain of the sovereign powers they still possess relate, the Alaska Native tribes at present have no occasion to exercise them.

Id. at 491 n. 2.

Our review of the history of Alaska Natives and their relationship with the United States that follows is consistent with the factual conclusions of the Commission. Similarly, our analysis of the law confirms the Commission's basic analysis and conclusions. Events and judicial decisions since the Commission's Final Report refine or expand upon the principles

the Commission discussed. They do not repudiate them.

Our analysis must start, as did that of the American Indian Policy Review Commission, with the question of whether there are tribes in Alaska. Whatever governmental powers Alaska Native villages have, they have by virtue of being "tribes," as that term is used in Indian law. Powers of inherent sovereignty are dependent on the villages being tribes.<sup>12</sup>

In Part III we review the ethnological history and the history of dealings between the United States and Alaska Natives for the light it sheds on villages as tribes. We then consider the legal issue of whether there are tribes in Alaska and the arguments that have been advanced against the conclusion that villages may be tribes. In Part IV, we turn to ANCSA and consider its effect on village exercise of governmental powers over land and nonmembers.

### III. VILLAGE TRIBAL STATUS

#### A. History

In examining questions relating to the status and powers of Indians, it is useful, if not essential, to review the historical backdrop for the issues.<sup>13</sup> In the current case, such a review is particularly important. As indicated above, an understanding of the current status and powers of Alaska Native groups depends on an understanding of the unique history and circumstances of Alaska and its Native peoples.

#### 1. Early History

The consensus of anthropological opinion is that man first entered Alaska from Asia across a then-existing land bridge. The land bridge is estimated to have emerged more than 40,000 years ago and to have existed on-and-off until 10,000 years ago. The first migrations may have occurred 25,000 to 40,000 years ago. At Old Crow Flats in the Yukon, east of Alaska in an area never glaciated, evidence has been found that man was present between 25,000 and 30,000 years ago or more. More than 2,700 archaeological sites have been identified in Alaska proper, some

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<sup>12</sup> See Powers of Indian Tribes, 55 I.D. 14, 1 Op. Sol. on Indian Affairs 445 (1934).

<sup>13</sup> C. Wilkinson, American Indians, Time, and the Law 32-52 (1987).

dating back 9,000 to 10,000 years.<sup>14</sup>

A first migration across the land bridge is believed to have moved through Alaska and spread east and south, reaching the east coast of North America and into South America as the Clovis and other fluted point cultures. A second migration is believed to have moved through the interior of Alaska, east into Canada, and south along the west coast of North America. Descendants of this migration include the Navajo and Apache tribes, the Indians of the Pacific Northwest and the Athabaskan Indians of Alaska. The final prehistoric migrants were the ancestors of the Eskimos and Aleuts.<sup>15</sup>

At the time of Russian arrival in the 1700's several distinct cultural groups of Alaska Natives existed: (1) the Inupiat (Northern Eskimo) and the Yupik (Southern Eskimo); (2) the Aleuts; (3) the Athabascans; and (4) the related, but distinct, tribes of southeastern Alaska, the Tlingit and the Haida. These groups were, in turn, further stratified into several dozen linguistic and cultural groups.<sup>16</sup>

Significant information is available concerning the various Native groups, dating from the period of early contact. Most groups had social/political ranking or hierarchy. Groups were organized to perform, regulate or accommodate subsistence and economic activity (including trading with other groups), accomplish distribution of wealth, recognize land boundaries, conduct war, maintain a slavery system, and regulate domestic matters, such as marriage, descent and distribution, and intergroup alliances and partnerships.<sup>17</sup>

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<sup>14</sup> R.D. Arnold, Alaska Native Land Claims 2-7 (2d ed. 1978) (Arnold). See also, J.D. Jennings, Prehistory of North America 323-52 (1968).

<sup>15</sup> C. Turner, Ancient Peoples of the North Pacific Rim, in Crossroads of Continents 111, 115 (Fitzhugh & Crowell eds. 1988) (Crossroads). See also, Jennings, Origins, in Ancient Native Americans 141 (Jennings ed. 1978); United States v. Berrigan, 2 Alaska Repts. 442, 447 (D. Alaska 1905).

<sup>16</sup> Arnold, supra n. 14, at 8-17.

<sup>17</sup> The summary that follows discusses key aspects of the organization and operation of Alaska Native groups. It necessarily does not probe in detail the complexities of the history and culture of the various groups. For in-depth information on the rich history and distinct culture of each Native group see Smithsonian Institution, Handbook of North American Indians, Vol. 5 (Arctic) and Vol. 6 (Subarctic) (1984) (Handbook). For information on the recent culture and

a. Social Organization

Some form of village, clan or band grouping was a common denominator of pre-contact Native Alaskan life. The sense of affiliation with a group, even for the relatively loosely organized Eskimos, was described as follows by anthropologist Jean Ray:

The Eskimos were extremely conscious of their tribal affiliations, extent of their territory, and relations with foreign groups. Inhabitants of the smaller villages felt a strong tie with members of the larger capital. Wherever they went they identified themselves as belonging to the specific larger group and were acutely aware of their crossing over into other tribal territory.<sup>18</sup>

The Tlingits were divided into two large moieties, the Raven and the Wolf. These were in turn divided into a number of matrilineal clans. In addition, each Tlingit also belonged to one of about 18 or 20 kwaan, large territorial groupings. Each kwaan had one or more permanent winter villages. In the complex Tlingit social structure, each of these levels played a role. The clan, for example, regulated marriage and ceremonial activities and owned specific hunting, fishing and gathering sites.<sup>19</sup>

The Athabascans were loosely organized in bands made up primarily of persons related by blood or marriage. During much of the year, these bands subsisted as small local groups, but during summer fishing and fall caribou migrations, they came together as larger regional bands.<sup>20</sup> For the Eskimo, permanent clan or

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organization of the Native groups, see Federal Field Committee for Development Planning in Alaska, Alaska Natives and the Land (1968) (Alaska Natives and the Land).

<sup>18</sup> Arnold, supra n. 14, at 15.

<sup>19</sup> A. Shinkwin, Traditional Natives Societies in D. Case, Alaska Natives and American Laws 333, 335-336 (1984) (Shinkwin). Haida social structure was similar to that of the Tlingits. See also, Tlingit and Haida Indians of Alaska v. United States, 177 F. Supp. 452, 147 Ct. Cl. 315, 361-380 (1959). The Federal Supplement publication of the Tlingit and Haida opinion includes only the court's legal opinion. The Court of Claims Reports also includes extensive findings of fact. Accordingly, subsequent citations are to the Court of Claims Reports.

<sup>20</sup> J. Van Stone, Northern Athapascans; People of the Deer, in Crossroads, supra n. 15, at 64-68.

family based villages were usually the basic social unit, but villagers also identified themselves with other villagers as part of a larger group.<sup>21</sup> Aleut society was also village based.<sup>22</sup>

b. Leadership

All Alaska Native groups had leadership or political structures, although the nature of political leadership varied considerably. The complex social organization of the Tlingit and Haida was reflected in a complex structure of nobles, chiefs, commoners and slaves.<sup>23</sup> Each Athabascan band had a chief, with authority derived from economic success or demonstrated ability in hunting or warfare. Persons with shamanistic power exercised the greatest authority.<sup>24</sup> Among the Aleut, each village had a dominant family and a chief, with chieftainship usually inherited. In some instances, several villages were affiliated under a higher chief, who had authority to protect hunting grounds, control behavior and lead in war.<sup>25</sup> Eskimo government was such that many observers have "assumed a lack of government."<sup>26</sup> However, a complex web of family and economic leaders and religious and cultural beliefs provided "naturally developed means of social control which serve the purposes of government and in fact are government."<sup>27</sup>

c. Land Ownership

The social/political subgroups of the major Alaska Native groups all, to varying degrees, controlled regions, consisting of well-defined territories used for a variety of purposes. Among the Tlingit and Haida, clans exercised control of land and there were "very definite concepts of proprietary rights in their territories extending to well known landmarks, such as rivers, rocks, reefs, mountain peaks, valleys, or natural characteristics

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<sup>21</sup> Arnold, supra n. 14, at 15.

<sup>22</sup> L. Black and R.G. Liapunova, Aleut: Islanders of the North Pacific, in Crossroads, supra n. 15, at 52-57.

<sup>23</sup> F. de Laguna, Tlingit: People of the Wolf and Raven, in Crossroads, supra n. 15, at 58-63.

<sup>24</sup> C-M. Naske & H. Slotnick, Alaska: A History of the 49th State 19-20 (1979) (Naske & Slotnick).

<sup>25</sup> Handbook, supra n. 17, Vol. 5 at 176.

<sup>26</sup> H.D. Anderson & W.C. Eells, Alaska Natives 48 (1935).

<sup>27</sup> Id.

or points on the shores, bays, inlets or watersheds."<sup>28</sup> Athabascan bands had subsistence use areas with well known boundaries. Band territory was ordinarily closed to other groups, unless permission for its use was granted.<sup>29</sup> Each Aleut village similarly had a specified territory. Boundaries of these territories were often marked by permanent look-out stations.<sup>30</sup> Eskimo groups exercised common possession of territory. Indeed, the name for an Eskimo social unit was "nunnatgatigiit," meaning "people who are related to one another through their common ownership of land."<sup>31</sup>

#### d. Law Ways

Alaska Native groups did not have legal systems in the modern European sense, but all had systems of social and political control, some quite elaborate. The Tlingits had relatively sophisticated legal arrangements. Disputes within clans and between clans were resolved by clan leaders, although each village also had a "peacemaker" whose position was marked by a special paddle. The Tlingit legal system included well-understood principles of liability and compensation for death and injury.<sup>32</sup> Among the Athabascans, justice for serious offenses was administered by a village chief, but was subject to question by a village council. A system of punishment for various offenses was understood.<sup>33</sup> Dispute resolution among the Aleuts and Eskimos was aimed primarily at restoring group social harmony, although punishment for serious crimes, such as murder

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<sup>28</sup> Tlingit and Haida Indians of Alaska v. United States, 147 Ct. Cl. 315, 384 (1959). See also, F. de Laguna, Tlingit: People of the Wolf and Raven, in Crossroads, *supra* n. 15, at 60.

<sup>29</sup> Shinkwin, *supra* n. 19, at 341.

<sup>30</sup> Id. at 345.

<sup>31</sup> Arnold, *supra* n. 14, at 12.

<sup>32</sup> Alaska Judicial Council, Resolving Disputes Locally: Alternatives for Rural Alaska 26-27 (1992). During the Navy's administration of Alaska between 1879-1884, which was centered at Sitka, Tlingit customary law was employed by the Navy to insure order. The Navy also employed Tlingits as policemen under the supervision of a Tlingit chief. Haring, The Incorporation of Alaska Natives Under American Law: United States and Tlingit Sovereignty, 1867-1900, 31 Ariz. L. Rev. 280, 301-02 (1989) (Haring).

<sup>33</sup> Resolving Disputes Locally, *supra* n. 32, at 22-23.

and theft, was imposed.<sup>34</sup>

## 2. Russian Rule and the Treaty of Cession

Russian traders and hunters ventured into Alaska in the mid-18th Century. In 1766, Russia declared sovereignty over Alaska. In 1799, the Russian American Company was granted a trading monopoly in Alaska. The Company, which was modeled on the British East India Company, served as the government of Alaska until the territory's sale to the United States in 1867.<sup>35</sup>

The Russian presence was initially centered in the Aleutians, but later expanded eastward into southeastern Alaska, with headquarters at what is now Sitka. The Russians had a major impact on Aleut society. To harvest furs for trade, the Russians impressed Aleuts, and some Eskimos, into forced labor. Aleut villages were disrupted and some destroyed. The Aleut population was devastated by infectious diseases brought by the Russians. In southeastern Alaska, the Tlingit opposed the Russian presence, destroying posts at Sitka in 1802 and Yakutat in 1805. Eventually, however, the Tlingit accommodated to the Russians, becoming active suppliers and trading partners. Contact with interior groups was limited, and often occurred through Tlingit intermediaries.<sup>36</sup>

The first charter of the Russian American Company did not significantly address the status of Natives. In contrast, the second charter, issued in 1821, and the third and final charter, issued in 1844, distinguished between classes of Natives.<sup>37</sup> Under the 1844 Charter, "settled tribes" under Russian administration were recognized as Russian subjects. These tribes were not subject to taxation and were allowed to remain under the governance of Native chiefs. However, the chiefs were subject to

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<sup>34</sup> Shinkwin, supra n. 19, at 346; A. Hippler and S. Conn, The Village Council and Its Offspring: A Reform for Bush Justice, 5 UCLA-Alaska L. Rev. 22 (1975).

<sup>35</sup> Useful brief summaries of Russian rule in Alaska are found in Naske & Slotnick, supra n. 24, at 27-56, and L.T. Black, The Story of Russian America, in Crossroads, supra n. 15, at 70-82. For more detail, see H.H. Bancroft, History of Alaska 1730-1885 (1886).

<sup>36</sup> Id.

<sup>37</sup> Relevant provisions of the charters are set out in Russian Administration of Alaska and the Status of Alaska Natives, a report prepared by the Library of Congress for the Senate Interior and Insular Affairs Committee in 1950, S. Doc. No. 152, 81st Cong., 2d Sess. 43-52 (1950).

appointment by the Administrator General of the Company and supervision by Company superintendents.<sup>38</sup> "Not wholly dependent tribes" living within the boundaries of Russian colonies were to "enjoy the protection of the colonial administration only on making a request therefor, and when such request is deemed worthy of consideration." Those "independent tribes" not dependent on the Company, were beyond its authority. Relations with these tribes were limited to "the exchange, by mutual consent, of European wares for furs and native products." The Company could establish posts within the territory of these groups only with their consent.<sup>39</sup>

A memorandum prepared by the Russian Ministry of Foreign Affairs in 1867 stated that, although an informal system of allotting homesites to settlers existed, Russia had not established a formal system of land titles. In the Aleutians, the memorandum said, "[t]he division of land between the Aleutian settlements was established at a time anterior to the Russian occupation and . . . [n]either the imperial government . . . nor agents of the company . . . ever interfered with the internal division of lands." In the interior, "no attempts were ever made, and no necessity ever occurred, to introduce any system of land ownership."<sup>40</sup>

In the 1850's the Russian American Company's fur markets declined. The Company's efforts to diversify into other areas, such as fishing were not economically successful. At the same time, the Russian Government became interested in the sale of Alaska, partly to raise funds for Czar Alexander II's program of social reform and partly because of concern about Russia's ability to defend the colony against the United States. Initial discussions with the United States Government were suspended because of the American Civil War. In 1867 the Russian ambassador to Washington reached agreement with Secretary of State Seward for sale of Alaska to the United States for \$7.2 million.<sup>41</sup>

Article VI of the Treaty of Cession by which the United States

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<sup>38</sup> Id. at 49-51 (Charter §§ 247-279).

<sup>39</sup> Id. at 52 (Charter §§ 280, 281-285).

<sup>40</sup> "Explanatory memorandum in answer to the communication of the ministry of foreign affairs, department of interior relations, dated August 31, 1867, pursuant to the communication addressed by Hon. W.H. Seward, Secretary of State, August 6, 1867, to St. Petersburg, to the American envoy near the imperial court." Id. at 53-56.

<sup>41</sup> Naske & Slotnick, supra n. 24, at 53-55.

acquired Alaska provided, in part, as follows:

The cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants or possessions, by any associated companies, whether corporate or incorporate, Russian, or any other, or by any parties, except merely private individual property holders; and the cession hereby conveys all the rights and franchises, and privileges now belonging to Russia in said territory or dominion, and appurtenances thereto.

15 Stat. 539, 543 (1867).

In Article III, the Treaty addressed the status of the inhabitants of Alaska:

The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

Id. at 542.

### 3. Early United States Administration 1867-1900

In the early years of United States ownership, little attention was paid to the administration of Alaska.<sup>42</sup> The country was preoccupied with recovery from the Civil War and controversies of the Reconstruction Era. Alaska was geographically remote and did not offer the prospect of early, profitable economic development. No formal government was established until the first Organic Act for the territory was adopted in 1884.<sup>43</sup> Before this legislation, such administration as existed in the territory was

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<sup>42</sup> C-M. Naske, An Interpretative History of Alaska Statehood 2-3 (1973) (Naske).

<sup>43</sup> Act of May 17, 1884, 23 Stat. 24. Owing to this delay in forming a territorial government, the Department of the Interior did not assume responsibility for Alaska until 1884.

provided by the military and, for a brief period, the Treasury Department.<sup>44</sup>

The lack of attention paid to Alaska extended to the question of relations with the Native population. Treaty-making with Indians was ended by Congress in 1871, only four years after the Alaska Purchase, but the conflicts leading to the negotiation of treaties in the continental United States were not present in Alaska.<sup>45</sup> The American immigrant population was initially small.<sup>46</sup> Although tensions existed between the Natives and immigrants, including increasing immigrant encroachment on Native resources, the vast size of Alaska resulted in a relative lack of intense or continuous competition and conflict over land or resources.<sup>47</sup> Military skirmishes with Natives occurred, but not on the scale seen in what became the contiguous 48 states.<sup>48</sup> Natives were not confined to reservations.<sup>49</sup> No Indian agents were dispatched and the Indian Office was not given

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<sup>44</sup> Nichols, Alaska: A History of Its Administration 34-82 (1927); Naske, supra n. 42, at 1-2.

<sup>45</sup> 1942 Cohen, supra n. 8, at 405.

<sup>46</sup> Of a total population of 33,426 reported in the 1880 Census, only 430 were whites. Arnold, supra n. 14, at 71. The details of the 1880 Census are reported in Petrov, Preliminary Report on the Population, Industry and Resources of Alaska, H.R. Exec. Doc. No. 40, 46th Cong., 3rd Sess. (1881).

<sup>47</sup> An important factor in this acceleration was the discovery of gold in 1880. This began a series of gold rushes that increasingly penetrated and exploited the Alaskan interior. Along with the influx of an alien population came new and disruptive economic developments such as commercial fishing, cannery operations, and aggressive hunting of local game populations. See generally, Naske & Slotnick, supra n. 24, at 195-97.

<sup>48</sup> Harring, supra n. 32, at 295-98 (1989). In 1870, the Army burned the Village of Kake after villagers killed two white traders in retaliation for the killing of two Kake warriors by the Army. In 1884, the Navy shelled and burned Angoon after villagers seized hostages in an effort to obtain compensation for the death of a Tlingit shaman in a whaling accident. Id. Wrangell was shelled by the Army in 1870 in retaliation for the killing of a white trader. Report of the Governor's Task Force on Federal-State-Tribal Relations 75 (1986) (Governor's Task Force).

<sup>49</sup> See supra n. 74.

responsibility for Alaska Natives until 1931.<sup>50</sup> No provision was initially made for separate Indian schools.<sup>51</sup>

Under these circumstances, official decisions on the legal status and rights of Natives were fitful at best and less than consistent. In 1869, Secretary Seward declared to the Secretary of War that laws regulating intercourse with Indian tribes applied to the new territory. Quoting the definition of "Indian country" from the Indian Trade and Intercourse Act of June 30, 1834, Seward said, "This [definition] by a happy elasticity of expression, widening as our dominion widens, includes the territory ceded by Russia."<sup>52</sup> Based on this guidance, and perhaps their experience in the contiguous states, the military in Alaska proceeded to treat Alaska as Indian country.<sup>53</sup>

However, in 1872, the U.S. District Court for Oregon (which then had judicial jurisdiction for Alaska) dismissed a prosecution for sale of liquor to Indians, finding that Alaska was not Indian country. United States v. Seveloff, 27 F. Cas. 1021, 1 Alaska Fed. 64 (D. Ore. 1872) (No. 16,252).<sup>54</sup> The court held that the 1834 Trade and Intercourse Act's definition of Indian country was territorially limited to areas east of the Rocky Mountains, except as specifically extended by Congress. The court rejected an argument that an 1868 statute extending the laws of the United

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<sup>50</sup> Secretarial Order No. 494 (March 14, 1931). Secretary Delano appointed an Indian agent for Alaska in 1873, but the Comptroller of the Treasury held that no authority existed to pay him and he was recalled. D. Case, Alaska Natives and American Laws, 223 n. 2 (1984) (Case).

<sup>51</sup> The 1884 Organic Act authorized the Secretary of the Interior to provide for "the education of the children of school age in the Territory of Alaska, without regard to race . . . ." Act of May 17, 1884, § 13, 23 Stat. 24, 27.

<sup>52</sup> Letter of January 30, 1869, quoted in, Brief on the Subject of the Jurisdiction of the War Department over the Territory of Alaska, H.R. Exec. Doc. No. 135, 44th Cong., 2d Sess. 5 (1876). Seward's letter was supported by a legal opinion issued by E. Peshine Smith, Examiner of Claims of the State Department. The opinion is set out in full in the findings of fact in Tlingit and Haida Indians of Alaska v. United States, 147 Ct. Cl. 315, 388-90 (1959).

<sup>53</sup> Id. at 4-6.

<sup>54</sup> The decision relied heavily on a decision of the Supreme Court of the Oregon Territory holding that Oregon was not Indian country for purposes of the 1834 Act, United States v. Tom, 1 Ore. 27 (1853).

States "relating to commerce" to Alaska was sufficient to extend the 1834 Act to the territory, id. at 1024,<sup>55</sup> and impliedly rejected the view that Article III of the Treaty of Cession made the 1834 Act applicable. Id. at 1023.

This decision alarmed the War Department.<sup>56</sup> Congress promptly reacted by extending the liquor control provisions of sections 20 and 21 of the 1834 Act to Alaska.<sup>57</sup> This action led, in turn, to a series of decisions concluding that, because the only liquor control provisions of the 1834 Act, and not other provisions, had been extended to Alaska, the territory Alaska was not Indian country for any other purposes. In Waters v. Campbell, 29 F. Cas. 411, 1 Alaska Fed. 91 (D. Ore. 1876) (No. 17,246), the Oregon District Court held the trader licensing provision of the 1834 Act inapplicable. In United States v. Williams, 2 F. 61, 1 Alaska Fed. 101 (D. Alaska 1880), the court held the general, non-liquor related criminal provisions of the Act inapplicable. And, in an 1878 opinion, the Attorney General held that section 3 of the 1834 Act could not be invoked to restrict the importation of molasses into Alaska. 16 Op. Att'y Gen. 141.<sup>58</sup>

The early Alaska Indian country decisions have been criticized by

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<sup>55</sup> The 1868 Act also made customs and navigation laws applicable to Alaska and was the source of the Oregon District Court's jurisdiction over the territory. Act of July 27, 1868, 15 Stat. 240.

<sup>56</sup> Brief on the Subject of the Jurisdiction of the War Department over the Territory of Alaska, H.R. Exec. Doc. No. 135, 44th Cong., 2d Sess. 49, 54 (1876), quoting Letter, Brig. Gen. Edward Canby to Assistant Adj. Gen., Military Division of the Pacific, December 13, 1872.

<sup>57</sup> 17 Stat. 485, 530 (1873). 14 Op. Att'y Gen. 327 (1873) confirms that this statute had its intended effect of designating Alaska as Indian country for purposes of restriction of liquor. The opinion agrees with Seveloff that importation of liquor had not previously been prohibited, but does so on the basis that a provision of the 1868 Act superseded operation of the 1834 Trade and Intercourse Act in Alaska, not on the basis of the 1834 Act's Indian country definition. This opinion was signed by Attorney General George Williams. As Justice of the Supreme Court of the Oregon Territory, Williams authored United States v. Tom, which was relied on in Seveloff.

<sup>58</sup> See also, 19 L.D. 323 (1894) (Opinion of Assistant Attorney General Hall) (Approval under R.S. 2103 of contract between Native and non-Native not required).

modern commentators<sup>59</sup> and were controversial even when issued. An Army Assistant Adjutant General wrote in 1875:

I do not comprehend that fine, metaphysical, vague reasoning which regards Alaska as Indian country in one case, but perhaps not in another case. If one desires to introduce liquor, it is Indian country . . . if he does not it is not Indian country, or doubtful. This method of reasoning calls to mind the interview between Hamlet and Polonius. Yonder cloud has the shape of a camel, weasel, or whale, depending upon the medium through which it is seen. Alaska is Indian country or not, according to the stand-point from which it is viewed. My opinion is that Alaska is Indian country, or it is not Indian country. If it is Indian country for any purpose it is Indian country for all.<sup>60</sup>

Whether correct or not, the early Alaska Indian country cases were based on technical issues of statutory construction. They did not turn on whether general Indian law principles were applicable in Alaska. The status of Natives was more substantively addressed in an 1886 habeas corpus case, In re Sah Quah, 31 F. 327 (D. Alaska 1886). The newly created District Court for Alaska held that ownership of a Tlingit slave by another Tlingit, as permitted by tribal law, violated the Thirteenth Amendment and the 1866 Civil Rights Act. The court contrasted the status of Alaska Natives to other Indians:

The United States has at no time recognized any tribal independence or relations among these Indians, has never treated with them in any capacity, but from every act of congress in relation to the people of this territory it is clearly inferable that they have been and are now regarded as dependent subjects, amenable to the penal laws of the United States, and subject to the jurisdiction of its courts. Upon a careful examination of the habits of these natives, of their modes of living, and their traditions, I am inclined to the

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<sup>59</sup> Haring, supra n. 32, at 284-93; Niedermeyer, Note, "The True Interests of a White Population": The Alaska Indian Country Decisions of Matthew P. Deady, 21 N.Y.U. J. Int'l. L. & Pol. 195 (1988). See also, Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 558 (9th Cir. 1991).

<sup>60</sup> Brief on the Subject of the Jurisdiction of the War Department over the Territory of Alaska, H.R. Exec. Doc. No. 135, 44th Cong., 2d Sess. 49, 54 (1876), quoting, Letter, H. Clay Wood to Brig. Gen. O.O. Howard, December 16, 1875 (emphasis in original). A contrary view was stated by Judge Advocate H.P. Curtis, id. at 44-48.

opinion that their system is essentially patriarchal, and not tribal, as we understand that term in its application to other Indians.

Id. at 329.

In an 1886 report under the heading "Not Indians," Sheldon Jackson, the Interior Department's general agent for education in Alaska, asserted that popular opinion classing Natives as Indians "is a mistake." Adding gloss to the Sah Quah opinion Jackson asserted that the District Court's decision on the legal status of the Natives supports this view.<sup>61</sup>

Congress was not so sure that there were not Indians in Alaska. At an early date, it recognized that questions on the status of Alaska Natives and their relation to the land of Alaska had not been resolved. The 1884 Organic Act provided that persons should not be disturbed in the possession of any lands actually in their use or occupation, or claimed by them, until terms for acquisition of title were established in future legislation. Although this provision was applicable to all Alaskans, Congress took care to distinguish between claims of "Indians" and "other persons." Act of May 14, 1884, § 8, 23 Stat. 24, 26.

The Senate Report on the legislation explained:

[T]he rights of the Indians to the land, or some necessary part of it, have not yet been the subject of negotiation or treaty. It would be obviously unjust to throw the whole district open to settlement under our land law until we are advised what just claim the Indians may have upon the land, or, if such a claim is not allowed, upon the beneficence of the Government.

S. Rep. No. 3, 48th Cong., 1st Sess. 2 (1883). On the floor, the bill's sponsor, Senator Benjamin Harrison, said, "It was the object of the committee absolutely to save the rights of all occupying Indians until . . . the Secretary of the Interior could ascertain what their claims were and could definitely define any reservations that were to be set apart for their use." 15 Cong. Rec. 531 (1884). To aid the Secretary's determination, the Act, in a provision presaging future legislation, provided for a commission to examine, inter alia, "the condition of the Indians residing in [Alaska], what lands, if any, should be reserved for

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<sup>61</sup> According to Jackson, in Sah Quah, "[t]he United States district court . . . affirmed that [Natives] are not Indians-- that they can sue and be sued, make contracts, go and come at pleasure, and do whatever any other person can do lawfully." Jackson, Report on Education in Alaska, S. Exec. Doc. No. 85, 49th Cong., 1st Sess. 10 (1886).

their use, [and] what provision shall be made for their education . . . ." Act of May 14, 1884, § 12, 23 Stat. 24, 27.<sup>62</sup> The Act also made special provision for continued use of land "occupied as missionary stations among the Indian tribes." Id. at § 8, 23 Stat. 24, 26.

The second Organic Act for Alaska, adopted in 1900, reaffirmed that Indians were not to be disturbed in their actual use and occupancy of land pending application of general land laws to Alaska. Act of June 6, 1900, § 27, 31 Stat. 321, 330. In 1891 and 1898, the right of Alaska Natives to continued use and occupation of land, at least pending further congressional action, was addressed in two additional statutes.<sup>63</sup>

The state of affairs at the end of the 19th Century is reflected in the 1891 report of Territorial Governor Lyman E. Knapp, H.R. Exec. Doc. No. 1, 52d Cong., 1st Sess. 496-501 (1892), and in an article published by Governor Knapp in the American Law Register, the leading law journal of the day.<sup>64</sup> The article summarizes the history between the United States and the Natives in terms paralleling the language of Sah Quah, concluding that the United States dealt with the Natives only as individuals, not as tribes. However, at the end of the article, Governor Knapp ventures a cautious opinion that, as a matter of law, the "uncivilized tribes" of Alaska may in fact be "subject to the 'laws and regulations' adopted by the United States in regard to its aboriginal tribes, and those laws and regulations already in force in other sections of the country are equally applicable here because the conditions are the same."<sup>65</sup>

In his 1891 report, Governor Knapp urges that "[t]he legal and political status of the native population ought to be defined by legislative enactment." He urges that Congress, in so doing, avoid what he characterizes as the "errors of policy" in dealing with Indians in the contiguous 48 states: "The Government is not

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<sup>62</sup> The work of this Commission is discussed at n. 159, infra.

<sup>63</sup> Act of March 3, 1891, § 14, 26 Stat. 1095, 1100 (Right of citizens to purchase public land for trade or manufacture inapplicable to lands "to which the natives of Alaska have prior rights by virtue of actual occupation."); Act of May 14, 1898, § 10, 30 Stat. 409, 413 (Secretary to reserve from homestead entry "suitable tracts of land along the water front of any stream, inlet, bay or sea shore for landing places for canoes and other craft used by [the Natives of Alaska]").

<sup>64</sup> L.E. Knapp, A Study Upon the Legal and Political Status of the Natives of Alaska, 39 Am. L. Reg. 325 (1891).

<sup>65</sup> Id. at 331-32, 338.

embarrassed by treaties with [Alaska Natives] or other precedents of recognition of tribal relations, and it has a fair and open field for inaugurating a system which shall yield better results than the old one." H.R. Exec. Doc. No. 1, 52d Cong., 1st Sess. 496-501 (1892).

#### 4. Evolution of Federal Law and Policy 1901-1932

After the turn of the century, a degree of consensus on the legal status of Alaska Natives began to emerge. In 1904, U.S. District Court Judge James Wickersham found that an Alaska Native could obtain citizenship under a provision of section 6 of the General Allotment Act of 1887 applicable to Indians of the United States. In re Naturalization of Minook, 2 Alaska 200 (D. Alaska 1904). This conclusion, Judge Wickersham held, was compelled by the final sentence of Article III of the Treaty of Cession:

The meaning of this sentence . . . is clear; it is intended to and does extend all general laws and regulations which the United States may from time to time adopt in regard to the Indian tribes of the United States to and over the [uncivilized] Indian tribes of Alaska. Upon its ratification and its further approval by Congress, this treaty and this clause became the supreme law of the land. It gave the Indian tribes of Alaska the same status before the law as those of the United States, and, unless a different intention appears upon the face of the law, extends all Acts of Congress, applicable and of a general nature, relating to the Indians of the United States, to Alaska.

Id. at 220-21. The same conclusion concerning the availability of the General Allotment Act citizenship provision to Natives was reached by the Ninth Circuit in Nagle v. United States, 191 F. 141 (1911).

In 1905, Judge Wickersham returned to the status of Natives in United States v. Berrigan, 2 Alaska 442 (D. Alaska 1905). He declined to give effect to the purported sale of land by Athabascans to non-Natives, holding that the 1900 Organic Act<sup>66</sup> forbade disturbing Indians in their use and occupancy of land "and renders void all attempts to dispossess them by deed or contract." Id. at 449-50.<sup>67</sup> In reaching this conclusion, Judge Wickersham analogized the situation of Alaska Natives to the

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<sup>66</sup> See p. 22, supra.

<sup>67</sup> An earlier territorial decision reached a contrary conclusion. Sutter v. Heckman, 1 Alaska Repts. 188 (D. Alaska 1901), aff'd on other grounds, Heckman v. Sutter, 119 F. 83 (9th Cir. 1902).

situation of Indians generally:

The United States has the right, and it is its duty, to protect the property rights of its Indian wards. . . . [A rule allowing a Native to convey property] would completely nullify the act of Congress, or at least permit the Indian to do it, and thus leave him a prey to the very evil from which Congress intended to shield him. Congress alone has the right to dispose of the lands thus specially reserved for his occupancy, and any attempt to procure him to abandon them is void. He is a dependent ward of the government, and his reserved lands are not subject to disposal or sale or abandonment by him.

Id. at 450-51.<sup>68</sup> This shift in the judiciary was matched by a trend in congressional action to provide services and protection to Alaska Natives on the same or similar terms as provided to Indians in the contiguous 48 states.

Both section 13 of the 1884 Organic Act, 23 Stat. 24, 27-28, and section 28 of the 1900 Organic Act, 31 Stat. 321, 330, provided for all Alaskan children to be educated in territorial schools without regard to race. In 1905, the Nelson Act, 33 Stat. 616 (1905), conformed the practice in Alaska to that in the contiguous 48 states, establishing a dual system of education, with the Department of the Interior remaining responsible for the education of Indian children and local authorities becoming responsible for the schooling of non-Natives.

In 1906, Congress passed the Alaska Native Allotment Act, 34 Stat. 616 (1906), which permitted any Indian or Eskimo to acquire up to 160 acres of non-mineral land as an "inalienable and nontaxable" homestead.<sup>69</sup> However, unlike most allottees in other states for whom the United States holds title in trust, Alaska Native allottees under the 1906 Act held the title in fee, subject to restraints on alienation.<sup>70</sup> In 1926, Congress passed the Alaska Native Townsite Act, 44 Stat. 629, which provided for individual Alaska Natives to obtain title to lots they occupied subject to restrictions on taxation, and prohibited alienation

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<sup>68</sup> Accord, United States v. Cadzow, 5 Alaska Repts. 125 (D. Alaska 1914).

<sup>69</sup> In 1956, the Act was extended to Aleuts. Act of August 2, 1956, Pub. L. No. 84-931, 70 Stat. 954.

<sup>70</sup> See State of Alaska, 45 IBLA 318, 322 (Feb. 6, 1980).

without Secretarial approval.<sup>71</sup>

A limited exception for Natives to restrictions on taking of fur seals appeared as early as 1894. Act of April 6, 1894, § 6, 28 Stat. 52, 53. Beginning in 1902, a series of wildlife conservation statutes made various special exceptions for Alaska Natives.<sup>72</sup> The 1916 Migratory Bird Treaty with Great Britain excepted Eskimos and Indians from seasonal restrictions on taking of migratory nongame birds. 39 Stat. 1702, Article II, Clause 3. Statutes were also passed encouraging raising of reindeer by Natives for their own subsistence and for sale on the market. Eventually, Congress provided in the Alaska Reindeer Act for purchase of all non-Native reindeer enterprises and prohibited future non-Native reindeer ownership to assure a Native monopoly in the reindeer business.<sup>73</sup> In 1925, Solicitor E.C. Finney held that the Territory of Alaska could not impose a tax on reindeer controlled or killed by Alaska Natives, stating "[i]f the Territory has the power to levy and collect that tax, it might . . . very materially interfere with this instrumentality which the Government has adopted for the advancement of these natives. That act, in so far as it relates to reindeer killed by natives is, consequently, repugnant to the Constitution and hence without effect." 51 L.D. 155, 157 (1925).

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<sup>71</sup> Over the years Interior Department interpretation of this statute varied with regard to whether Alaska Native townsites were to be administered identically to predominantly non-Native townsites established pursuant to the 1891 authority, 26 Stat. 1095, but the courts ultimately concluded that they were, and that the 1926 Act was intended to do no more than establish a different protected form of individual ownership for Alaska Natives, rather than to create two distinct types of townsites. Klawock v. Gustafson, No. K74-2 (D. Alaska, Nov. 11, 1976), discussed in Klawock v. Gustafson, 585 F.2d 428 (9th Cir. 1978).

<sup>72</sup> These statutes are summarized in 1942 Cohen, supra n. 8, at 409.

<sup>73</sup> The reindeer laws are summarized in 1942 Cohen, supra n. 8, at 409-10 and Case, supra n. 50, at 208-09. The House Report on the Alaska Reindeer Act explained the need for the legislation as follows: "The Natives of Alaska, including Eskimos, are held to have essentially the same status as the Indians of the United States. The Federal Government has recognized and acknowledged this responsibility through appropriations for their support, education and medical treatment as well as by the introduction and distribution of reindeer. It is likewise the responsibility of the Federal Government to look after the social and economic welfare of the Natives." H.R. Rep. No. 1188, 75th Cong., 1st Sess. 3 (1937). See generally, R.O. Stern, E.L. Arobio, L.L. Naylor and W.C. Thomas, Eskimos, Reindeer and Land (1980).

The trend in judicial and legislative action was reflected as well in executive action. Between 1914 and 1933, at least 13 Executive Order Indian reserves were established.<sup>74</sup> The President's authority for establishment of such reserves was upheld in a May 18, 1923 Solicitor's opinion dealing with the Tyonek Reserve. 49 I.D. 592. In this opinion, Solicitor Edwards held that Alaska Natives had been treated by Congress and the courts as "within the spirit, if not within the exact letter, of the laws relative to American Indians." Id. at 595.

In a later opinion, Solicitor Finney upheld the validity of marriage by custom among Alaska Natives. 54 I.D. 39, 1 Op. Sol. on Indian Affairs 329 (1932). "It must now be regarded as established," Finney said, "that the laws of the United States with respect to the American Indians are applicable generally to the natives of Alaska." Id. at 42. Under general Indian law principles, "the relations of the Indians among themselves in matters of this kind are to be controlled by the customs of the tribe [not state or territorial law] save where Congress expressly or clearly directs otherwise."<sup>75</sup>

While this preponderance of opinion on the fundamental legal status of Alaska Natives was developing, there was also a consensus that Alaska Natives should be subject to many of the

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<sup>74</sup> Alaska Natives and the Land, supra n. 17, at 445 (1968). Two other reserves, Hydaburg and Klawock, were established and subsequently revoked by Executive Order. Case, supra n. 50, at 117 n. 31. A motivation for establishing the Executive Order reserves was to protect continued traditional Native use of land. Governor's Task Force, supra n. 48, at 111 n. 179, quoting U.S. Dept. of the Interior, Bureau of Education, Report on the Work of the Bureau of Education for the Natives of Alaska 1913-1914 7 (1915). Prior to the Executive Order reserves, three significant reserves specifically for reindeer culture were established. Repeal Act Authorizing Secretary of Interior to Create Indian Reservations in Alaska: Hearings on S. 2037 and S.J. Res. 162 Before the Senate Subcomm. of the Committee on Interior and Insular Affairs, 80th Cong., 2d Sess. 53 (1948) Small reserves for school purposes had also been established. Id. The only statutory reservation at that time in Alaska was the Annette Islands Reserve for immigrant Canadian Metlakatla Indians, established by Congress in the Act of March 30, 1891, 26 Stat. 1101 (codified as 48 U.S.C. § 358).

<sup>75</sup> Id. at 46. See also 54 I.D. 15, 1 Op. Sol. on Indian Affairs 320 (1932) (General laws enacted by Congress conferring jurisdiction on the Secretary, in matters on probating estates of deceased American Indians, might be applied with respect to the restricted allotments and other restricted property of deceased Alaskan Natives.)

same laws as the non-Native residents of the Territory.

This was particularly true in the area of criminal law. The 1884 Organic Act made the Oregon criminal code applicable to Alaska. Act of May 14, 1884, § 7, 23 Stat. 24, 25-26.<sup>76</sup> Based on the decisions that Alaska was not Indian country for purposes other than liquor control, application of territorial law to Natives was upheld. Kie v. United States, 27 F. 351, 1 Alaska Fed. 125 (C.C.D. Oregon 1886).<sup>77</sup> The Supreme Court's decision in Ex parte Crow Dog, 109 U.S. 556 (1883), which had held that a murder committed by a Sioux in Indian country could not be prosecuted under either Federal or Dakota territorial law, was said to be inapplicable in "the anomalous condition of Alaska." Kie at 353.

In 1899, Congress enacted a comprehensive criminal code for the Territory. Act of March 3, 1899, 30 Stat. 1253-1343. The Code provided no exception for Natives and it applied to them. United States v. Doo-Noch-Keen, 2 Alaska 624 (D. Alaska 1905). In 1909, Congress confirmed this result by authorizing the Attorney General to appoint Alaska school service employees as special police officers with authority "to arrest . . . any native of the district of Alaska charged with the violation of any provisions of the [1899] Criminal Code of Alaska."<sup>78</sup> Section 142 of the 1899 Code prohibited the unauthorized sale of liquor to Indians, 30 Stat. at 1274.<sup>79</sup> This section was subsequently found to supersede applicability of the general Federal liquor prohibition. 55 I.D. 137, 147-48 (1937).

In 1912, Congress enacted a new Territorial Organic Act delegating much of its civil and criminal jurisdiction to a territorial legislature. 37 Stat. 312. Nothing on the face of that Act indicated that the Territory's authority over Native individuals and communities was not coextensive with its authority over other inhabitants. The new legislature proceeded to act on the basis of that presumed jurisdiction. In 1913, it enacted a criminal statute punishing Native parents for failing to send their children to federally-funded schools for Natives operated by the Interior Department's Bureau of Education. § 3, Ch. 44 SLA 1913. And in 1915, the legislature passed a so-called

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<sup>76</sup> The statute also made the civil law of Oregon applicable. Id.

<sup>77</sup> This holding was dicta, as the prosecution under review was brought under a general Federal criminal statute.

<sup>78</sup> Act of March 3, 1909, 35 Stat. 837.

<sup>79</sup> This section defined "Indian" to include "the aboriginal races inhabiting Alaska when annexed to the United States. . . ."

Indian Village Act, which authorized Alaska Natives living in communities of 40 or more residents to organize self-governing village councils of limited authority, which authority could be exercised so long as the ordinances enacted did not conflict with federal or territorial law.<sup>80</sup> Ch. 11 SLA 1913. Taxes levied by the legislature were applicable to, and collected from, Natives to the same extent as other residents, at least in villages where tax collection was logistically feasible.<sup>81</sup>

#### 5. Alaska Natives on the Eve of the New Deal

In January 1932, Representative Edgar Howard, Chairman of the House Indian Affairs Committee, wrote to Secretary Wilbur seeking an opinion on the legal status of Alaska Natives. In response, Solicitor Finney issued a comprehensive opinion, which was forwarded to Chairman Howard by Secretary Wilbur in March 1932.<sup>82</sup> Finney concluded his opinion by stating:

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 and other natives are 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.

53 I.D. 593, 605, 1 Op. Sol. on Indian Affairs 303, 310 (1932). In reaching his conclusions, Solicitor Finney quoted extensively from Solicitor Edward's 1923 opinion on the Tyonek Reserve. That opinion succinctly summarizes the ground covered above and is worth restating:

In the beginning, and for a long time after the cession of this Territory, Congress took no particular notice of these natives; has never undertaken to hamper their individual movements; confine them to a locality or reservation, or to place them under the immediate control of its officers, as has been the case with

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<sup>80</sup> The powers of Native villages under the statute were similar to those of second class municipal governments in white communities, Governor's Task Force, supra n. 48, at 92, but Native villages were forbidden to tax property of white residents, Ch. 25 SLA 1917.

<sup>81</sup> Governor's Task Force, supra n. 48, at 97.

<sup>82</sup> Letter, Edgar Howard, Chairman, House Committee on Indian Affairs to Secretary Roy Lyman Wilbur (January 28, 1932); Letter, Secretary Wilbur to Edgar Howard (March 14, 1932).

American Indians; and no special provision was made for their support and education until comparatively recently. And in the earlier days it was repeatedly held by the courts and the Attorney General that these natives did not bear the same relation to our Government, in many respects, that was borne by the American Indians.

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Later, however, Congress began to directly recognize these natives as being, to a very considerable extent at least, under our Government's guardianship and enacted laws to protect them in the possession of the lands they occupied; made provision for the allotment of lands to them in severalty, similar to those made to the American Indians; gave them special hunting, fishing and other particular privileges to enable them to support themselves, and supplied them with reindeer and instructions as to their propagation. Congress has also supplied funds to give these natives medical and hospital treatment and finally made and is still making extensive appropriations to defray the expenses of both their education and their support.

Not only has Congress in this manner treated these natives as being wards of the Government but they have been repeatedly so recognized by the courts.

From this it will be seen that these natives are now unquestionably considered and treated as being under the guardianship and protection of the Federal Government, at least to such an extent as to bring them within the spirit, if not within the exact letter, of the laws relative to American Indians.

49 I.D. 592, 594-95 (1923) (citations omitted; emphasis in original).

## 6. Indian Reorganization Act

### a. Background

In 1934, Congress enacted the Indian Reorganization Act (IRA). Act of June 18, 1934, 48 Stat. 984 (codified as 25 U.S.C. §§ 461-479). The "overriding purpose" of the Act was to establish "machinery whereby Indian tribes would be able to assume greater self-government, both politically and economically." Morton v. Mancari, 417 U.S. 535, 542 (1974). The allotment statutes of the late 19th Century and early 20th Century focused on assimilation

of individual Indians into the larger society. The IRA took a community-based approach through the preservation of a tribal land base and reorganization of tribal governments. Section 16 of the Act provided that tribes could organize for their common welfare and adopt appropriate constitutions and bylaws. Section 17 authorized formation of tribal corporations, with the power to own, hold, manage, operate and dispose of property. 25 U.S.C. §§ 476, 477.

Section 19 of the IRA provided that "Eskimos and other aboriginal peoples of Alaska shall be considered Indians" for purposes of the Act. 25 U.S.C. § 479. Section 13 applied portions of the statute, including section 16, to Alaska. 25 U.S.C. § 473.

Despite these provisions, initial administrative examination found that the IRA had limited practical applicability to Alaska.<sup>83</sup> The section 16 authorization for constitutional governments applied, by its own terms, only to tribes residing on reservations. Since most Alaska Natives did not reside on reservations,<sup>84</sup> this limitation effectively precluded many Native groups from organizing under the Act. Further, the list of sections applicable to Alaska omitted section 17. This prevented the formation of corporations and, as a result, made loans for economic development unavailable.

#### b. Alaska Amendment

T.H. Watkins, in his recent biography of Harold Ickes, characterizes the failure to fully extend the IRA to Alaska as a "mistake."<sup>85</sup> This is certainly true to a degree. The legislative history shows that both the House and Senate clearly intended the corporate organization provisions in section 17 to apply to Alaska. When the legislation's sections were renumbered in conference, the cross references in the Alaska section of the bill were not properly conformed.<sup>86</sup> However, the failure to

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<sup>83</sup> 1942 Cohen, supra n. 8, at 413-14; M-28978, 56 I.D. 110, 1 Op. Sol. on Indian Affairs 744 (1937).

<sup>84</sup> There were approximately 19 large reserves of different origins in Alaska at the time of the IRA. See Alaska Natives and the Land, supra n. 17, at 443-46.

<sup>85</sup> T.H. Watkins, Righteous Pilgrim: The Life and Times of Harold Ickes 1874-1952 542. (1990). See also, 1942 Cohen, supra n. 8, at 413-14.

<sup>86</sup> Compare S. Rep. No. 1080, 73rd Cong., 2d Sess. 1-3 (1934) with H.R. Rep. No. 1084, 73rd Cong., 2d Sess. 1-5 (1934) and H.R. Rep. No. 2049, 73rd Cong., 2d Sess. 1-6 (1934).

consider the problem of the absence of reservations in Alaska appears to have been less a drafting error than a failure to focus on the unique circumstances of Alaska.<sup>87</sup>

In 1936, Anthony J. Dimond, the territorial delegate for Alaska, introduced legislation to amend the IRA at the request of Secretary Ickes.<sup>88</sup> Hearings on the bill were held on March 20, 1936, and the legislation passed the House on April 1, 1936. Prompt Senate action followed and the legislation became law on May 1, 1936. 49 Stat. 1250.

The full extension of the IRA to Alaska, Felix Cohen wrote, "removed almost the last significant difference between the position of the American Indian and that of the Alaska native."<sup>89</sup> In the Alaska Amendment, Congress extended to Alaska section 17 and several other sections not originally applicable under the IRA. It also authorized the Secretary to establish reservations on any area of land which had been reserved for the use and occupancy of the Natives and any other public lands actually occupied by them. Finally, it allowed Native groups not recognized as bands or tribes before May 1, 1936, to organize under Federal constitutions and business charters pursuant to sections 16 and 17 of the IRA if they had "a common bond of occupation, or association, or residence within a well-defined neighborhood, community or rural district." 25 U.S.C. § 473a.

In providing for establishment of reservations, Congress relied on a letter from Secretary Ickes, who listed three reasons for establishing Alaska reservations. First, he said, reservations would define Alaskan tribes by identifying particular groups with the land they occupied. H.R. Rep. No. 2244, 74th Cong., 2nd Sess. 4 (1936). In this connection, Secretary Ickes pointed to the historical differences between Alaska and the continental United States:

Indian tribes do not exist in Alaska in the same sense as in [the] continental United States. Section 19 of the Indian Reorganization Act defines the word "tribe" as referring to "Any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." With a few exceptions the lands occupied by natives of Alaska have not been designated as reservations. In

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<sup>87</sup> The IRA legislation originally proposed by the Interior Department did not address Alaska at all. H.R. 7902, 73rd Cong., 2d Sess. (1934).

<sup>88</sup> The legislation was drafted by Felix Cohen. Watkins, supra n. 85, at 542.

<sup>89</sup> 1942 Cohen, supra n. 8, at 406.

order, therefore, to define an Alaskan tribe it is necessary to identify it with the land it occupies and in terms of the language of the act, "reservation."

Id.

Second, reservations would define geographic limits of jurisdiction so that Alaska Native communities could exercise powers of local government:

[I]f native communities of Alaska are to set up systems of local government, it will be necessary to stipulate the geographic limits of this jurisdiction. Reservations set up by the Secretary of the Interior will accomplish this.

Id.

Third, reservations would enable the United States to segregate Native lands and resources, thereby preserving the "economic rights" of the Natives. This was particularly important, Secretary Ickes wrote. By designating reservations, the United States would fulfill in part "its moral and legal obligations" undertaken in section 8 of the 1884 Organic Act, the section providing that Natives were not to be disturbed in their use and occupation of land pending further congressional action. Id. The House Report on the Alaska Amendment echoed this view, stating "[t]his provision in reality carries out the promise of this Government contained in its act approved on May 17, 1884 . . . ." Id. at 3.

In explaining the need for the provision allowing groups not recognized as bands or tribes before 1936 to organize based on occupational or residential bonds, the House Report stated:

The proposed amendment . . . is necessary because of the peculiar nontribal organizations under which the Alaska Indians operate. They have no tribal organizations as the term is understood generally. Many groups that would otherwise be termed "tribes" live in villages which are the bases of their organization.

Id. at 1-2, 3-5.

c. Instructions for Implementation of the Alaska Amendment

On December 22, 1937, the Department of the Interior issued detailed Instructions providing for the organization of Alaska

Native groups under the IRA.<sup>90</sup> The Instructions provided for three different kinds of organizations, with varying powers and authorities. In differentiating among the three types, the Instructions followed the lead of Secretary Ickes' comments on the Alaska Amendment and stressed the importance of reservations to the exercise of governmental powers.

The first kind of organization provided for was a group consisting of all of the Native residents of a community organized to carry on municipal and public activities, as well as economic enterprises. The Instructions indicated that this kind of organization was most suitable for Indian or Eskimo villages. The Instructions assumed that it would be accompanied by a petition to create a reservation and stressed that "[t]he power to prescribe ordinances for civil government, relating particularly to law and order, may extend only to such lands as may be held as an Indian reservation for the use of the community."<sup>91</sup>

The other two kinds of organizations, in contrast, were not to be reservation based and were not to be authorized to exercise governmental powers. The second kind of organization would consist of a group of all Native persons in a community and was said to be especially suitable for a group of Natives living among non-Natives in a town or city already organized to exercise governmental powers, as well as for Native groups already incorporated as a municipality under territorial law. Groups of this kind would be authorized to engage in business and to provide for the common welfare, but not to exercise municipal and public powers.<sup>92</sup>

The third kind of organization contemplated by the Instructions was for a group, not a community, comprised of persons having common bond of occupation or association, or of residence with

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<sup>90</sup> Instructions for Organization in Alaska Under the Reorganization Act of June 18, 1934 (48 Stat. 984), and the Alaska Act of May 1, 1936 (49 Stat. 1250), and the Amendments Thereto (1937) (Instructions). The Instructions were issued over the signatures of Assistant Commissioner of Indian Affairs Zimmerman and Secretary Ickes. The Instructions were supplemented by Supplementary Instructions Applicable to Alaska West of the 141st Meridian (May 10, 1939) that addressed the particular problems of communicating with remote areas of Alaska. The Instructions are discussed in 1942 Coh. supra n. 8, at 414 and Governor's Task Force, supra n. 48, at 112.

<sup>91</sup> Instructions, supra n. 90, at 1.

<sup>92</sup> Id.

a definite neighborhood. This kind of organization was to be given authority to "engage in business and to provide for the welfare of its members (excluding municipal and public powers)." <sup>93</sup>

d. IRA Organizations

Pursuant to the IRA, sixty-nine Alaska Native villages and regional groups adopted constitutions prior to enactment of ANCSA in 1971; more than sixty of those also adopted corporate charters. However, only six villages obtained reservations under section 2 of the 1936 Act. <sup>94</sup>

The Department's Instructions called for information to be submitted with proposed constitutions showing the basis of organization in terms of the three categories of organization. <sup>95</sup> Surveys conducted by the Indian Office to comply with the Instructions consistently failed to discuss the basis of organization. <sup>96</sup> Similarly, most constitutions followed standard forms. <sup>97</sup> Fifty-two constitutions contain only a general statement of powers. Seventeen contain enumerated powers. It is difficult to determine from the constitutions the basis of organization. For example, the constitution of the Village of Wales, for which a reservation was eventually established, contains only a general statement of powers, while a more expansive statement of powers is found in the constitution of the Douglas Indian Association, one of three Native associations

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<sup>93</sup> Id.

<sup>94</sup> See 1982 Cohen, supra n. 8, at 744; Alaska Natives and The Land, supra n. 17, at 442-48. The six reserves were Akutan (72,000 acres); Venetie (1.4 million acres); Unalakleet (870 acres) Karluk (32,200 acres); Wales (7,200 acres of land and 14,000 acres of water); and Diomedea (3,000 acres). The six reserves totaled 1.54 million acres. Withdrawals for two additional reserves (White Mountain and Shismaref) were revoked after the villages disapproved them in elections conducted under section 2 of the Alaska Amendment, which required that withdrawals be approved by a majority of voters in an election in which at least 30 percent of eligible residents participated. Id. at 443.

<sup>95</sup> Instructions, supra n. 90, at 4, ¶9.

<sup>96</sup> The surveys are reprinted in H.R. Rep. No. 2503, 82d Cong. 2d Sess. 1406-1537 (1952).

<sup>97</sup> Copies of the constitutions are contained in the files of the BIA's Branch of Tribal Relations.

clearly organized on the basis of common bond of occupation.<sup>98</sup>

#### 7. Extension of Public Law 280 to Alaska

When Congress compiled the Revised Statutes in 1874, it included a chapter entitled "Government of Indian Country." R.S. title 28, ch. 4, §§ 2127-2157. However, it omitted from the chapter any definition of "Indian country." This fact, together with the development of new approaches to Indian administration, such as the allotment policy, left it to the courts to determine the scope of Indian country.<sup>99</sup> In a series of decisions early in the 20th Century, the Supreme Court took up this challenge. In Donnelly v. United States, 228 U.S. 243 (1913), the Court held that a reservation created by Executive Order from public domain land to which original Indian title had been extinguished was Indian country. In United States v. Sandcval, 231 U.S. 28 (1913), it held that Pueblo lands owned in fee and not denominated a reservation were Indian country. In United States v. Pelican, 232 U.S. 442 (1914), it held a single trust allotment was Indian country for purposes of the Indian Major Crimes Act. And in United States v. McGowan, 302 U.S. 535 (1938), it found that a tract of land purchased by the Federal Government and held in trust for Indians was Indian country.

In codifying Title 18 of the United States Code in 1948, Congress relied on these decisions to fashion a new statutory definition of "Indian country."<sup>100</sup> As is discussed in greater detail below, this definition, found in 18 U.S.C. § 1151, defines "Indian country" to include reservations, dependent Indian communities, and Indian allotments.

This new statutory definition led to the reopening of the

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<sup>98</sup> The Douglas Indian Association was organized for the Juneau Douglas area pursuant to its members' common bond of occupation in the arts, crafts and fishing industries. Constitution and By-Laws of the Douglas Indian Association. At the time of organization, the Association was located in a racially mixed community governed by the municipalities of Juneau and Douglas, both of which were organized under the laws of the Territory of Alaska. The Natives at the time of organization were from various surrounding Native villages and elsewhere. H.R. Rep. No. 2503, 82d Cong., 2d Sess. 1442 (1952). With respect to Wales, as well as all other villages for which reservations were established, the adoption of an IRA constitution predated establishment of a reservation.

<sup>99</sup> 1982 Cohen, supra n. 8, at 31-33.

<sup>100</sup> 1982 Cohen, supra n. 8, at 34. See 18 U.S.C. § 1151, reviser's note.

question of whether, for purposes of criminal jurisdiction, Indian country existed in Alaska. In United States v. McCord, 151 F. Supp. 132, 17 Alaska 162 (1957), the District Court for Alaska held that the Moquawkie Indian Reserve at Tyonek was Indian country and that an Indian resident of the Reserve could not be prosecuted under territorial law for the statutory rape of another Indian resident. The Reserve, the court found, had been set aside and treated as Indian land, bringing it within the ambit of section 1151. The court rejected as "novel" and "inaccurate" a prosecution contention that "Alaska natives have a different status than Indians of the States." Id. at 135. The court, however, carefully limited the scope of its decision:

This decision should not be interpreted by members of the native groups, be they Indian or Eskimo, as a general removal of the territorial penal authority over them, for the reason that this court will take judicial notice that there are few tribal organizations in Alaska that are functioning strictly within Indian country. . . . Testimony indicates that the Tyonek area, unlike most other areas inhabited by Alaska natives, has been set aside for the use of and is governed by an operational tribal unit.

Id. at 136.

Less than a year later, a different judge of the District Court of Alaska, in United States v. Booth, 161 F. Supp. 269, 17 Alaska 561 (1958), faced the question of whether the Metlakatla Reserve was Indian country. He held that it was not. He found that Metlakatla had no tribal organization and was not a "traditional Indian Reservation" because "it is not made up of aboriginal Indians but largely of the descendants of immigrants who came from Canada during the 19th Century" and "Alaska natives who choose to join them," including "Aleut and Eskimo members of the community who are not of the Indian race." Id. at 271. He distinguished McCord on the ground that the Indians of southeastern Alaska "live under entirely different conditions" from the Indians on the Tyonek Reservation. In this connection, he quoted with approval a passage from United States v. Libby, McNeil & Libby stating:

the Indians of Southeastern Alaska \*\*\* have not only abandoned their primitive ways and adopted the ways of civilized life but are now fully capable of competing with the whites in every field of endeavor \*\*\* It is a matter of common knowledge that today the Indians of Southeastern Alaska prefer the white man's life despite all its evils and shortcomings.

Id. at 272, quoting United States v. Libby, McNeil & Libby, 107

F. Supp. 697, 699 (D. Alaska 1952).<sup>101</sup>

Congress reacted promptly to the McCord decision. In 1958, it enacted legislation amending Pub. L. No. 83-280, Act of August 15, 1953, 67 Stat. 164 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. §§ 1360, 1360 note), which conferred criminal and civil cause of action jurisdiction to Indian country on several named states, to extend the law's coverage "to all Indian country" in the Territory of Alaska. Act of August 8, 1958, 72 Stat. 545 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360). On statehood, Pub. L. No. 83-280 was amended to extend the same jurisdiction to the State of Alaska.<sup>102</sup>

Extension of Pub. L. No. 83-280 was recommended by the Department of the Interior, a recommendation consistent with the Department's then current policy of extending criminal and civil jurisdiction to the states whenever opportune. In accepting the Department's recommendation, the House Judiciary Committee explained the need for the legislation as follows:

In construing [18 U.S.C. § 1151] the court also decided that the native village of Tyonek, Alaska . . . came within the definition of Indian country. Such a construction, of course, affects a large number of other native villages in Alaska similarly situated. The committee has been advised that these native villages do not have adequate machinery for enforcing law and order. They have no tribal court, no police, no criminal code, and in many instances no formal organization. This is for the reason that the Territorial government in Alaska has maintained law and order in the native villages as well as in the rest of Alaska and the native tribal councils have had no reason to nor have they ever exercised these functions. Since the natives are not prepared to take over these activities, the recent court decision has left the villages and the people without protection. The instant legislation seeks to remedy this situation by restoring what, until the court decision, was the actual practice in the enforcement of the law in the Indian country in Alaska.

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<sup>101</sup> Libby, McNeil & Libby is discussed, n. 185, infra.

<sup>102</sup> 18 U.S.C. § 1162, note.

H.R. Rep. No. 2043, 85th Cong., 2d Sess. 2 (1958).<sup>103</sup> Congress also modified Booth, although less rapidly and in the context of modifying the applicability of Pub. L. No. 83-280 to the Metlakatla Indian Community. In 1970, legislation was enacted to allow the Community to exercise concurrent criminal jurisdiction with the State over offenses committed by Indians on its reserve in the Annette Islands. Act of November 25, 1970, Pub. L. No. 91-523, § 1, 84 Stat. 1358 (1970), amending 18 U.S.C. § 1162.<sup>104</sup> This legislation was sought not only by the Community, but also by the State of Alaska and the Department of the Interior. In supporting the legislation, Under Secretary Fred Russell explained:

The Metlakatla community is not a part of the Alaska mainland, but is located offshore on one of the Annette Islands. This island's location creates a serious isolation problem, resulting in the lack of adequate law and order services for members of the Metlakatla Indian community . . . . [T]he limited manpower of the State police makes it impossible for them to deal effectively with minor crimes in the isolated community of Metlakatla.<sup>105</sup>

In urging adoption of the legislation, the House floor manager explained that, contrary to the finding in Booth, the Metlakatla Community had a long history of policing misdemeanor offenses extending back to the founding of the Community. Extension of Pub. L. No. 83-280 disrupted this arrangement:

[T]he discussion centered on the fact that native villages in Alaska could be regarded as Indian country and most such villages did not have machinery for enforcing law and order. As is obvious from the history I have outlined, this was not the case as to Metlakatla. It is apparent that this community which has been operating perfectly satisfactory law enforcement system for over half a century was simply forgotten. . . . Strangely enough, neither the territory nor the Federal Government notified Metlakatla after enactment of the new statute to inform the community that its court and police had lost their

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<sup>103</sup> The Senate Interior Committee report contained an identical statement of the need for the legislation. S. Rep. No. 1872, 85th Cong., 2d Sess. 2 (1958).

<sup>104</sup> See 1982 Cohen, supra n. 8, at 765.

<sup>105</sup> Letter of June 2, 1970 to James O. Eastland, Chairman, Senate Judiciary Committee, reprinted in, S. Rep. No. 1180, 91st Cong., 2d Sess. 4 (1970).

authority to function. In the mid-sixties, when this fact became known, the community discontinued its practice of employing a magistrate and police. It tried [unsuccessfully] to make arrangements with the State of Alaska for the enforcement of law and order on the Annette Islands . . . .

116 Cong. Rec. 37,353 (1970) (statement of Rep. Donohue).

#### 8. ANCSA and Post-ANCSA Legislation

During the 1950's and 1960's, the focus of Federal-Alaska Native relations was on the long unresolved Native land claims. These claims, the role they played in consideration of Alaska Statehood, and the impact of the claims on implementation of the Statehood Act are discussed in Part IV, *infra*. We also postpone until Part IV consideration of the details of the approach to claims settlement adopted in ANCSA. For purposes of this Part, it is necessary only to consider those provisions of ANCSA bearing on the question of the tribal status of Native villages.

ANCSA settled aboriginal title claims, including any claims to aboriginal hunting and fishing rights, and all claims based on aboriginal title. 43 U.S.C. § 1603.<sup>106</sup> For purposes of the settlement, most Natives were enrolled to the villages where they resided.<sup>107</sup> In the absence of proof that an individual possessed the required quarter-degree Native blood quantum, the individual could be placed on the roll if he was regarded as an Alaska Native by the village of which he claimed to be a member. 43 U.S.C. § 1602(b). Section 3(c) of ANCSA, 43 U.S.C. § 1602(c), defines "Native village" to mean "any tribe, band, clan, group, village, community or association in Alaska" listed in sections 11 and 16 of the Act. 43 U.S.C. §§ 1610, 1615. Section 11 listed the names of 205 villages. Section 11(a) withdrew the township in which each village was located and the surrounding townships for Native selection. 43 U.S.C. § 1610(a). Section 11(b)(2) provided for the Secretary to review the list of named villages and remove those that were of an urban and modern character and in which a majority of the residents were non-Native. Section 11(b)(3) provided for the addition to the list of any village which was not of an urban and modern character and

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<sup>106</sup> See United States v. Atlantic Richfield Co., 435 F. Supp. 1009, 1029-30 (D. Alaska 1977), aff'd, 612 F.2d 1132 (9th Cir.), cert. denied, 449 U.S. 888 (1980).

<sup>107</sup> Those who were not residents of villages were enrolled to regions at large. See 25 C.F.R. §§ 43h.4 and 43h.6(c) (1977); 37 Fed. Reg. 5615. Columns 16-21 of enrollment application were to establish ties to village and region.

in which a majority of the residents were Native.<sup>108</sup> Section 16 listed 10 villages in Southeast Alaska, which were treated somewhat differently because the Natives of Southeast Alaska had already participated to some extent in the Tlingit and Haida settlement. Tlingit and Haida Indians of Alaska v. United States, 389 F.2d 778 (Ct. Cl. 1968).

Although Congress utilized Native villages as a basis for organizing the settlement, it determined not to convey settlement lands to the villages. Rather, as is discussed in Part IV, infra, land and associated property rights were conveyed to newly established Village and Regional Corporations established under state law. 43 U.S.C. §§ 1606, 1607. Village Corporations were defined in the Act 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 on behalf of a Native village." 43 U.S.C. § 1602(j). However, ANCSA did not revoke the village IRA constitutions or the IRA corporate charters for those villages that also had charters.<sup>109</sup> Nor did it repeal the authority in section 1 of the Alaska Amendment of the IRA for the Natives to reorganize and adopt constitutions.<sup>110</sup>

Contemporaneously with the consideration and passage of ANCSA, the Federal Government was reassessing its relationship with Native Americans. In 1968, Congress enacted the Indian Civil Rights Act. 25 U.S.C. §§ 1301-1326. The Act extended to Indians protections similar to those in the Bill of Rights against

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<sup>108</sup> To be eligible for land and money benefits under ANCSA, the listed and the unlisted villages also had to establish that they had at least 25 residents. Those which had less than 25 Native residents which were otherwise eligible could qualify for benefits as a Native group. 43 U.S.C. §§ 1602(d), 1613(h)(2). Natives in four urban areas (Juneau, Sitka, Kodiak and Kenai) were also eligible for benefits if they incorporated. 43 U.S.C. §§ 1602(o), 1613(h)(3).

<sup>109</sup> As discussed in Part III.A.6.d., more than 60 charters were issued to villages pursuant to § 17 of the IRA, which expressly provides that no charter shall be revoked or surrendered except by act of Congress. 25 U.S.C. § 477.

<sup>110</sup> Indeed, while § 19 of ANCSA, 43 U.S.C. § 1618, did revoke all reservations, except the Annette Islands Reserve for the Metlakatla Indian Community, it was not until the passage of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2743, 43 U.S.C. § 1701, that Congress expressly revoked the Secretary's authority to establish reservations under § 2 of the Alaska Amendment. FLPMA § 704(a).

actions by their tribal governments.<sup>111</sup> While the Act imposed some constraints on tribal governments by guaranteeing certain individual rights, 25 U.S.C. § 1302, President Johnson urged its enactment as part of a legislative and administrative program with the overall goal of furthering "self-determination," "self-help," and "self-development" of Indian tribes. 114 Cong. Rec. 5518, 5520 (1968). Moreover, the Act contained restrictions on states obtaining civil, 25 U.S.C. § 1322, and criminal, 25 U.S.C. § 1321, jurisdiction over Indian country and provided for a model code aimed at strengthening tribal government. The Act thus marked the beginning of a broad congressional policy shift toward strengthening tribal governments and a marked departure from the termination policies of the 1950's and early 1960's. On July 8, 1970, President Nixon sent a major Message to Congress transmitting his recommendations on an Indian policy, rejecting termination and encouraging self-determination for Indians.<sup>112</sup>

As part of the new approach to relations with Native Americans, Congress began to shift from a pattern of services provided directly to individual Indians through the BIA and the Indian Health Service to direct grants to tribes and administration of programs by tribes.<sup>113</sup> The pivotal point in this shift was the enactment of the Indian Self-Determination and Education Assistance Act of 1975. 25 U.S.C. §§ 450-458e. That Act directed the Secretaries of the Interior and Health and Human Services to

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<sup>111</sup> The central purpose of the Act was to "secur[e] for the American Indian the broad constitutional rights afforded to other Americans," and thereby to "protect individual Indians from arbitrary and unjust actions of tribal governments." S. Rep. No. 841, 90th Cong., 1st Sess. 5-6 (1967); see also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56-60 (1978).

<sup>112</sup> President's Message to Congress Transmitting Recommendations for Indian Policy, 6 Weekly Comp. Pres. Doc. 894-905, H.R. Doc. No. 363, 91st Cong., 2d Sess. (1970).

<sup>113</sup> 1982 Cohen, supra n. 8, at 180-206. Prior to 1921 most services to Native Americans were provided for in appropriations acts or tribal-specific statutes. From 1921 to the early 1970's the principal source of authority for programs operated by the BIA was the Snyder Act, 25 U.S.C. § 13, which authorized appropriations to the BIA for "the benefit, care, and assistance of Indians throughout the United States . . . ." Because Alaska Natives were under the jurisdiction of the Bureau of Education, rather than the BIA, the Snyder Act did not initially authorize appropriations for Alaska. Case, supra n. 50, at 243. However, in 1931 Alaska Natives were placed under the jurisdiction of BIA, supra n. 50, and the Bureau began to provide services to Alaska, e.g., Interior Appropriations Act, FY 1933, Act of April 22, 1932, 47 Stat. 91, 108, 110.

contract with any Indian tribe which requested to contract for the services and benefits provided by the Departments. 25 U.S.C. §§ 450f, 450g. The Act defined "Indian" to mean "a person who is a member of an Indian tribe." 25 U.S.C. § 450b(a). It defined "Indian tribe" to mean:

[A]ny 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 (85 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

25 U.S.C. § 450b(b).<sup>114</sup>

In addition to authorizing tribes to contract with the Secretary to perform services the Federal Government had been performing, the Act also authorized making grants to tribes, as defined in the Act to include Native villages, for the "strengthening or improvement of tribal government." 25 U.S.C. § 450h. Under the authority of this provision, the BIA has made numerous grants to Native villages.<sup>115</sup>

In 1972, the 92nd Congress, which enacted ANCSA, also enacted federal revenue sharing.<sup>116</sup> Alaska Native villages were included with Indian tribal governments as eligible to participate along with state and local governments nationally. General revenue sharing was enacted for the purpose of sharing federal revenues with other levels of government to provide fiscal assistance to

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<sup>114</sup> In 1988, Congress enacted major amendments to the Act adding to its statement of policy that the "United States is committed to supporting ~~and~~ assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities," thus further demonstrating the congressional trend toward strengthening tribal governments. 25 U.S.C. § 450a(b), Pub. L. No. 100-472, § 102, 102 Stat. 2285.

<sup>115</sup> See, e.g., "FY 1991 Report to Congress" filed by the BIA as required by 25 U.S.C. § 450j-1(c).

<sup>116</sup> Pub. L. No. 92-512, §§ 102-109, 86 Stat. 919 (codified as amended at 31 U.S.C. §§ 1221-1228).

them in exercising their powers and performing their responsibilities.<sup>117</sup>

The Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963, gives force and effect to tribal court proceedings concerning child custody, stating, "[t]he United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings." 25 U.S.C. § 1911(d). Under the Act, a tribe may assume child custody jurisdiction, 25 U.S.C. § 1918, and may enter into intergovernmental agreements with states. 25 U.S.C. § 1919. The Act defines "Indian tribe" to mean "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43 [the definitional section of ANCSA]." 25 U.S.C. § 1903(8).

The Tribally Controlled Community College Act of 1978 requires that a college under the Act must be one sanctioned or chartered by a tribal governing body. 25 U.S.C. § 1801(a)(4). The legislation assumes, without specifying, that a tribal government will create a legal entity, able to enter into contracts, 25 U.S.C. §§ 1805, 1806, and able to receive and administer federal grants. 25 U.S.C. § 1807. "Tribe" is defined to include Alaska Native village. 25 U.S.C. § 1801(a)(2).

In 1982 Congress passed the Indian Tribal Government Tax Status Act providing that Indian tribes would be treated as states for certain enumerated purposes.<sup>118</sup> As originally passed, the Act defined Indian tribal government to mean: "the governing body of any tribe, band, community, village, or group of Indians which is determined by the Secretary [of the Treasury], after consultation with the Secretary of the Interior, to exercise substantial governmental functions and in Alaska shall include only the Metlakatla Indian Community." 128 Cong. Rec. 33238 (1982). However, after passage but before the President signed the bill, Congress adopted House Concurrent Resolution 439, substituting new language for the definition in the enrolled bill. 128 Cong. Rec. 33310 (1982). The substituted language defined Indian tribal government to include "the governing body of any . . . group of . . . (if applicable) Alaska Natives, which is

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<sup>117</sup> The statute defined "units of local government" to include "the recognized governing body of an Indian tribe or Alaska native village which performs substantial governmental functions." 86 Stat. 919, 927.

<sup>118</sup> 96 Stat. 2605, as amended by 97 Stat. 65.

determined by the Secretary [of the Treasury], after consultation with the Secretary of the Interior, to exercise governmental functions."<sup>119</sup>

Generally, Congress has seen fit to include Alaska Native villages, along with Indian tribes, in other legislation dealing with federal relations with other governments, such as the Intergovernmental Personnel Act, 42 U.S.C. § 4762 (intergovernmental personnel programs in cooperation with other levels of government); public works legislation, 13 U.S.C. § 301.2 (assistance provided under the Public Works Economic Development Act); the Public Library Services and Construction Act, 20 U.S.C. § 351a (assistance in public library services and construction); and census legislation, 13 U.S.C. § 184 (inclusion as "local unit of general purpose government" for collecting interim current census data).

In addition, the following statutes are examples of instances where Alaska Native villages have been included in the statutory definition of Indian tribes or where Native villages have been included along with tribes in definitions of units of government affected by statutes (citations are mostly to the definition sections involved):<sup>120</sup>

5 U.S.C. § 3371. Provisions for personnel assignments to and from states.

15 U.S.C. § 637.\* Aid to small businesses.

16 U.S.C. § 470w.\* Assistance in the conservation of historic sites, buildings, objects, and antiquities.

16 U.S.C. § 470bb.\* Programs for archaeological resources protection.

20 U.S.C. § 3232. Assistance in bilingual education programs.

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<sup>119</sup> This legislation included a disclaimer similar to that in the 1991 Amendments to ANCSA, Part IV.A.2.d.iii, infra, concerning the effect of the definition on Native claims of jurisdiction over land and nonmembers. These disclaimers address jurisdiction over land and persons, not tribal status.

<sup>120</sup> The statutes marked with asterisks include the Village or Regional Corporations in the definition of "tribe" as well as the Native village. Several of the statutes also include Group (43 U.S.C. § 1602(n)) or Urban Corporations (43 U.S.C. § 1602(o)) in the definition of tribe as well and they are also marked with asterisks.

20 U.S.C. § 4402. Assistance in development of American Indian, Alaska Native, and Native Hawaiian culture and art.

23 U.S.C. § 101. Assistance provided for public roads under the program for federal aid for highways.

25 U.S.C. § 472a. Included as a "tribal organization" in applying Indian preference laws.

25 U.S.C. § 1452.\* The Indian Financing Act of 1974.

25 U.S.C. § 1603.\* The Indian Health Care Amendments of 1980.

25 U.S.C. § 1622. Eligibility of tribal organizations for health care grants and contracts.

25 U.S.C. §§ 2011 and 2019\*. Establishing a new national Indian education system.

25 U.S.C. § 2401. Indian alcohol and substance abuse prevention and treatment.

26 U.S.C. § 4225. Exemption of articles manufactured or produced by Indians.

29 U.S.C. § 706.\* Provision of vocational rehabilitation and other rehabilitation services.

29 U.S.C. § 1671. Employment and training programs for Native Americans and migrant and seasonal farm workers.

31 U.S.C. § 7501.\* The single audit requirement for state and local governments.

42 U.S.C. § 628.\* HHS payments to Indian tribal organizations for child welfare services.

42 U.S.C. § 1471. USDA financial assistance for farm housing.

42 U.S.C. § 2991b.\* HHS financial assistance for Native American projects under the HHS Native American Program, administered by ANA.

42 U.S.C. § 2992c. HHS programs for Native Americans.

42 U.S.C. § 3002.\* HHS programs for older Americans.

42 U.S.C. § 5061. HHS programs for administration and coordination of domestic volunteer services.

42 U.S.C. § 5122. Provision of federal assistance to other levels of government for disaster relief.

42 U.S.C. §§ 5302 and 5318. Assistance in providing public facilities under the Housing and Urban Development Act of 1968.

42 U.S.C. § 6707. Grants for public works projects.

42 U.S.C. § 6723. Assistance under anti-recession provisions for public works employment.

42 U.S.C. § 6903. Assistance in the planning and administration of solid waste disposal.

42 U.S.C. § 8802. Assistance in the development of biomass energy and alcohol fuels.

42 U.S.C. § 9601.\* Special programs and assistance relating to hazardous substance releases, liability and compensation.

42 U.S.C. § 10101. Assistance in handling nuclear waste.

42 U.S.C. § 11472.\* Set-asides to assist in education, training, and community services for the homeless.

In 1980 when Congress addressed the subsistence needs of Alaska Natives and rural residents in Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371, it found and declared that: "in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents." 94 Stat. 2422.

In 1987, citing its "plenary authority" over Indian affairs, Congress enacted extensive amendments to ANCSA.<sup>121</sup> Section 15 of the amendments provided that: "Alaska Natives shall remain eligible for all Federal Indian programs on the same basis as other Native Americans." 43 U.S.C. § 1626(d). While the congressional reports give no explanation for section 15,<sup>122</sup> the plain meaning of the provision is that Alaska Natives are to be

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<sup>121</sup> Alaska Native Claims Settlement Act Amendments of 1987, Pub. L. No. 100-241, § 2(9), 101 Stat. 1788, 1789 (1988) (1991 Amendments).

<sup>122</sup> S. Rep. No. 201, 100th Cong., 1st Sess. (1987).

treated on the same basis as Indians in the rest of the United States for all federal program purposes.

## B. Analysis

### 1. Treatment of Native Villages by Congress

From the foregoing historical review, several points are clear. First, Alaska Natives are aboriginal Americans who lived in organized societies prior to European contact and governed themselves. Like other Native Americans, the Alaska Natives migrated across the land bridge from Asia. Some Alaska Native groups are closely related ethnologically to tribes in the contiguous 48 states. Second, prior to the beginning of this century, the special legal status of Alaska Natives was unclear. During this period, territorial law was frequently made applicable to Natives on the same terms as to non-Natives. Third, although Natives continued to be subject to territorial law and are today subject to State law for many purposes, a degree of consensus on their legal status developed in the 20th Century. By the time of enactment of the IRA, the preponderant opinion was that Alaska Natives were subject to the same legal principles as Indians in the contiguous 48 states, and had the same powers and attributes as other Indian tribes, except to the extent limited or preempted by Congress.

When he was confronted with an inquiry as to the status of Alaska Natives more than 60 years ago, Solicitor Finney suggested:

Reference to the provisions of certain acts will give a definite idea of the extent to which the natives of Alaska have been recognized by the Congress as well as show the similarity of their treatment to that accorded the Indians of the United States.

53 I.D. 593, 596. Part III.A.5, supra.

His conclusion was that Alaska Natives are "all wards of the Nation and are treated in material respects the same as are the aboriginal tribes of the United States." Id. at 595.

The logic of Solicitor Finney's approach was sound. Where questions have developed as to whether a particular group of Indian descendants exists as an Indian tribe, the courts have generally deferred to political branches, i.e., Congress and the Executive.<sup>123</sup> The Supreme Court established this principle of

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<sup>123</sup> See James v. Department of Health and Human Services, 824 F.2d 1132, 1138; Cogo v. Central Council of Tlingit & Haida Indians, 465 F. Supp. 1286, 1289 (D. Alaska 1979). Cf. Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978), aff'd

judicial deference to the political branches when it considered whether Federal Indian liquor laws applied to a Saginaw Chippewa Indian of Michigan. The Court concluded:

In reference to all matters of this kind [tribal status], it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

United States v. Holliday, 70 U.S. (3 Wall.) 407, 419 (1865).

The continuing validity of this principle today was reaffirmed in the 1982 version of Felix Cohen's Handbook of Federal Indian Law. Although pointing out that Congress may not arbitrarily designate a body of people as a tribe,<sup>124</sup> the revision states, "judicial deference to the findings of tribal existence is still mandated by the extensive nature of congressional power in the field."<sup>125</sup>

Congress applied a Federal Indian statute (the Trade and Intercourse Act) in Alaska as early as 1873. Early in this century several statutes treated Alaska Natives on a basis parallel to the treatment of Native Americans in the contiguous 48 states. The Alaska Amendment to the IRA authorized organization of Native groups as tribes. Most recently, and perhaps most importantly, Congress has repeatedly defined the term "tribe" to include Alaska Native groups, usually villages. Although Congress has not, with the sole exception of the Metlakatla Indian Community, explicitly designated specific groups as tribes, the pervasive inclusion of Alaska Native groups as "tribes" must be viewed as reflecting congressional determination that there are tribal groups in Alaska.

What constitutes a tribe in the contiguous 48 states is sometimes a difficult question. So also is it in Alaska. The history of Alaska is unique, but so is that of California, New Mexico and Oklahoma. While the Department's position with regard to the existence of tribes in Alaska may have vacillated between 1867 and the opening decades of this century, it is clear that for the last half century, Congress and the Department have dealt with Alaska Natives as though there were tribes in Alaska. The fact that the Congress and the Department may not have dealt with all

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sub nom., Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979), cert. denied, 444 U.S. 866 (1979).

<sup>124</sup> 1982 Cohen, supra n. 8, at 5, citing United States v. Sandoval, 231 U.S. 28 (1913).

<sup>125</sup> Id. at 3.

Alaska Natives as tribes at all times prior to the 1930's did not preclude it from dealing with them as tribes subsequently. City of Sault Ste. Marie v. Andrus, 532 F. Supp. 157, 161 (D.D.C. 1980).

In the summer of 1990, Congress enacted legislation directing the establishment of the "Joint Federal-State Commission on Policies and Programs Affecting Alaska Natives." Act of August 18, 1990, Pub. L. No. 101-379, § 12, 104 Stat. 473, 478-83. That Commission has a broad mandate to review public policies affecting Alaska Natives. When the Commission completes its work and files its recommendations, Congress may revisit how it deals with Alaska Native villages. For now, we cannot say that Alaska Native villages are not tribes for purposes of federal law. We do not mean to conclude that every Native village is an Indian tribe.<sup>126</sup> Which specific Alaska Native villages are tribes is a factual determination beyond the scope of this opinion.

## 2. Arguments Against Finding Tribes

Before turning to a more detailed discussion of ANCSA and its implications for the scope of governmental powers the Native villages may have, we will consider the arguments which have been raised with regard to the tribal status of Native villages. The Attorney General of Alaska has suggested that there may not be "tribes" in Alaska.<sup>127</sup> This position is supported by the Alaska Supreme Court's decision in Native Village of Stevens v. Alaska Management & Planning, 757 P.2d 32 (Alaska 1988), and by some academic writers.<sup>128</sup> In reaching our conclusion that there are tribes for purposes of Federal Indian law, we have carefully considered these arguments. Although the arguments are effectively presented and supported by citations of authority, we do not find that they provide a basis to disregard prior Solicitor's opinions or the recent treatment by the Congress of Native villages as tribes.

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<sup>126</sup> Cf. Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 552, 556 (9th Cir. 1991) (Venetie II) (finding that the present-day Native villages of Venetie and Fort Yukon were tribes for purposes of federal court jurisdiction, 28 U.S.C. § 1362, but not necessarily tribes with inherent sovereignty over domestic relations and child custody).

<sup>127</sup> Letters of May 20 and October 17, 1992, from Charles E. Cole, Attorney General, State of Alaska, to the Solicitor.

<sup>128</sup> Comment, Alaska Native Sovereignty: The Limits of the Tribe-Indian Country Test, 17 Cornell International Law Review 375, 394-395 (1984); Comment, Alaskan Native Indian Villages: The Question of Sovereign Rights, 28 Santa Clara L. Rev. 875 (1988).

The key arguments against tribal status, and our analysis of each, are as follows:

1. Native organization is not "tribal".

As early as the Alaska district court's In re Sah Ouah decision, it was argued that Native organization is "essentially patriarchal, and not tribal." 31 F. 327, 329 (D. Alaska 1886). In Stevens Village, 757 P.2d at 35, the Alaska Supreme Court found that "the village rather than the ethnological tribe has been the central unit of organization."<sup>129</sup>

Unfortunately, there is no commonly accepted definition of the term "Indian Tribe," either by statute or from other generally accepted sources.<sup>130</sup> The Supreme Court in 1901 defined an Indian tribe simply as a "body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." Montoya v. United States, 180 U.S. 261, 266 (1901). In retrospect, that definition appears to be overly simplistic.<sup>131</sup> However, what is significant is that the United States has not relied on ethnological unity in determining what is a "tribe." As Felix Cohen summarized the problem:

The term "tribe" is commonly used in two senses, an ethnological sense and a political sense. It is important to distinguish between the two meanings of the term. Groups that consist of several ethnological

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<sup>129</sup> Citing Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977) (a wrongful death action in which the Alaska Supreme Court found that the Metlakatla Indian Community of the Annette Islands Reserve was entitled to sovereign immunity notwithstanding that the Community was composed of descendants of Tsimshian Indians who had migrated from British Columbia following a Christian missionary in the late 1880's).

<sup>130</sup> 1982 Cohen, supra n. 8, at 3-5.

<sup>131</sup> The decision set a liberal standard for what constitutes a tribe. The case involved the question of whether a group of Chiricahua, Mescalero and Southern Apache Indians constituted a tribe or band within the meaning of the Indian Depredations Act of 1891, 26 Stat. 851. The Court found that at the time of the depredations the military had been conducting operations against a group identified by name as Victoria's band for "two years or more." Under the statute, if Victoria's group constituted a band under the Act, as the Court ultimately held, their depredations were acts of war and the United States was not liable for damages.

tribes, sometimes speaking different languages, have been recognized as single tribes for administrative and political purposes . . . Likewise what is a single tribe, from the ethnological standpoint, may sometimes be divided into a number of independent tribes in the political sense.<sup>132</sup>

There is great variety in what is considered a "tribe" in the contiguous 48 states. The tribes vary from the large Navajo Nation with several hundred thousand members and a huge reservation to small rancherias of two dozen members and only small parcels of land.<sup>133</sup> Some bands of Indians may have had little or no tribal organization while others were highly organized. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 664 (1979). Groups that were not historically Indian tribes have been considered tribes for purposes of federal law. For example, the Supreme Court found that the Mississippi Choctaws, a community of half-blood Choctaw Indians descendants, was a tribe for purposes of federal law even though they were not historically an Indian tribe. United States v. John, 437 U.S. 634, 650 n.20 (1978).<sup>134</sup> In other instances, consolidated or confederated tribes consisting of several ethnological tribes have been treated as a single entity even though they may even speak different languages.<sup>135</sup>

In 1974, the District Court for the Western District of Washington decided that several "unrecognized" tribes were successors to treaty tribes and had maintained a tribal structure. Thus, they, as well as the recognized tribes which were either plaintiffs or represented by the United States in the suit, were entitled to the protection of the United States and, if they could demonstrate that they had self-regulating capacity, they could exercise their off-reservation treaty fishing rights free of state regulation. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974) ("Boldt decision"), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976). On the

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<sup>132</sup> 1942 Cohen, supra n. 8, at 268. Accord 1982 Cohen, supra n. 8, at 3-6.

<sup>133</sup> The Cabazon Band of Mission Indians, for example, had only 25 enrolled members at the time of the Supreme Court's decision in California v. Cabazon Band of Mission Indians, 408 U.S. 202, 204 n.1 (1987).

<sup>134</sup> Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (fourteen distinct bands considered a tribe).

<sup>135</sup> 1982 Cohen, supra n. 8, at 6; 1942 Cohen, supra n. 8, at 268.

other coast, the First Circuit Court of Appeals affirmed the district court's holding that the United States could not refuse to consider the Passamaquoddy Tribe's request that the United States sue the State of Maine to recover tribal lands conveyed by the State in violation of the Indian Trade and Nonintercourse Act, 25 U.S.C. § 177, simply because the United States did not "recognize" the tribe. The United States had admitted that the tribe existed as an Indian tribe in the historical sense. Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F. Supp. 649 (D. Me.), aff'd, 528 F.2d 370 (1st Cir. 1975).

These decisions encouraged a number of requests to the Department by groups of Indian descendants wanting to be recognized as Indian tribes. The Department responded by developing for the first time standardized procedures for determining that a group of Indian descendants was entitled to be acknowledged to exist as an Indian tribe.<sup>136</sup>

Since the late 1970's and the development of the Department's regulations, courts have clarified that a tribe need not have acquired or maintained a tribal structure that never existed. In addition, they have clarified that neither change, adaptation nor a degree of assimilation, which the courts viewed as inevitable, destroyed the tribal status or meant the abandonment of the tribal community. United States v. Washington, 641 F.2d 1368, 1373-74 (9th Cir. 1981), cert. denied, 454 U.S. 1143 (1982).

Support for the view that Alaska Native groups are not tribes has been found in Secretary Ickes' statement in his letter on the Alaska Amendment to the IRA that, "Indian tribes do not exist in Alaska in the same sense as in [the] continental United States." Native Village of Stevens v. Alaska Management & Planning, 757 P.2d 32 (Alaska 1988) (citing H.R. Rep. No. 2244, at 4). Read in context, this statement was not intended to suggest that there were not tribes in Alaska. In the two sentences immediately following the statement, Secretary Ickes says that the IRA defines "tribe" as referring to groups of Indians residing on a

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<sup>136</sup> 43 Fed. Reg. 39361 (1978). The regulations require that groups of Indian descendants petitioning for acknowledgment as Indian tribes establish, among other things: (a) facts establishing that the group has been identified from historical times until the present on a substantially continuous basis, as "American Indian," or "aboriginal"; (b) evidence that a substantial portion of the group inhabits a specific area or lives in a community viewed as American Indian and distinct from others in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area; and (c) facts which establish that the petitioner has maintained tribal political influence or other authority over its members. 25 C.F.R. § 87.7.

reservation and that there are few reservations in Alaska. Therefore, Secretary Ickes concludes, designation of reservations is necessary to define "tribes" for IRA purposes. H.R. Rep. No. 2244, 74th Cong., 2d Sess. 4 (1936). Clearly, in this context, Secretary Ickes' statement was no more than a technical comment on the nature of village organization.

This view of Secretary Ickes' statement is confirmed by his subsequent discussion of the status of Native groups in a 1945 opinion on the claims of three villages in Southeast Alaska to fishing rights. He found that the villages were "Indian communities organized along tribal lines and have been traditionally recognized as such by the Indians, by scientific observers, and by administrative authorities."<sup>137</sup> More specifically, the Secretary concluded that:

[T]he forms of tribal organizations in Alaska differ somewhat from the forms of tribal organizations which are most prevalent in the States (though not from the forms of tribal organizations utilized by the coast Indians of Washington, who are culturally similar to the Tlingit and Haida Indians). There are, however, Indian village groups in the United States proper, e.g., the New Mexico Pueblos, the California Rancherias, and the [Creek] tribal towns, which have all been considered tribal organizations for purposes of Federal jurisdiction.

It is clear, therefore, that native tribes exist in Alaska.<sup>138</sup>

The similarity of Alaska Natives to Indian groups in the contiguous 48 states which the Secretary noted in his 1945 decision reflects the greater understanding of the distinctions between Indian groups that first began to emerge at the time of the IRA. Prior to the IRA, statutes commonly referred simply to "Indians" or an "Indian tribe."<sup>139</sup> The IRA, however, defines

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<sup>137</sup> Decision of July 27, 1945, reprinted in S. Rep. No. 1366, Repeal Act Authorizing Secretary of Interior to Create Indian Reservations in Alaska: Hearings on S. 2037 and S.J. Res. 162 Before the Senate Subcomm. of the Committee on Interior and Insular Affairs, 80th Cong., 2d Sess. 435 (1948) (1948 Hearings).

<sup>138</sup> Id. at 442-43.

<sup>139</sup> See, e.g., 25 U.S.C. § 13 (the Act of November 2, 1921, commonly called the Snyder Act, providing for assistance for Indians throughout the United States) and 25 U.S.C. § 81 (R.S. 2103, requiring approval of any contract with any Indian tribe).

"tribe" to include: "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. § 479.

As with Secretary Ickes' statement, much emphasis has been placed on the statement in the House report on the Alaska Amendment referring to "the peculiar nontribal organization under which Alaska Indians operate" and on the provision of the amendment allowing Alaska Native groups to organize on the basis of "a common bond of occupation, or association, or residence within a well-defined neighborhood, community or rural district." Stevens Village, supra at 39-40. Again, as with Secretary Ickes' statement, these must be viewed in context. As our historical summary shows, although Alaska Natives were recognized as subject to general Indian law principles, and there had been some dealings with groups, the absence of treaties and a pervasive reservation system meant that there had been no formal definition of Native groups. In applying the IRA to Alaska, it was therefore necessary to craft an approach to defining the specific groups with which the Federal Government would deal. The "common bond" provision did this.<sup>140</sup>

2. The United States did not enter treaties with Alaska Natives.

Many Indian tribes were initially recognized by the United States through the treaty process.<sup>141</sup> The absence of treaties with Alaska groups is not dispositive of their tribal status, however. See Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. at 655-57, aff'd, 528 F.2d at 376-79. As pointed out in the historical summary, Congress ended treaty making in 1871, only four years after the acquisition of Alaska. Based on this fact, the Ninth Circuit's decision in United States v. Nagle, 191 F.2d 141 (9th Cir. 1911), found the absence of treaties irrelevant to determining the tribal status of Tlingits under Federal Indian law.

This is not to say that the existence of treaties is not significant. In the years immediately following the IRA, the Department was compelled to consider extensively what groups constituted "tribes" or "bands" because a showing that the group seeking to reorganize under the IRA constituted a tribe or band

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<sup>140</sup> This is not to say that every group organized under the "common bond" provision constitutes a "tribe" that can exercise inherent sovereign powers in addition to those powers delegated by Congress. Organization under the Alaska Amendment to the IRA has been held not to constitute conclusive evidence of historic tribal status. Stevens Village, 757 P.2d 32, 40 (Alaska 1988); Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548 (9th Cir. 1991).

<sup>141</sup> 1982 Cohen, supra n. 8, at 3-4.

was a prerequisite to holding an election on a proposed constitution pursuant to section 16.<sup>142</sup> From the Department's experience in implementing the IRA, Cohen distilled five criteria which were relied on singly or jointly to support a finding that a group constituted a "tribe" or "band."<sup>143</sup> One of the factors was the existence of a treaty. However, the existence of a treaty is not essential. Indeed, courts have rejected the notion that tribes which had not been the subject of some specific act of recognition, such as a federal treaty or a statute naming the tribe, were therefore unrecognized as tribes for the purpose of federal statutes and programs. As the First Circuit Court of Appeals stated in Joint Tribal Council of the Passamaquoddy Tribe v. Morton:

No one in this proceeding has challenged the Tribe's identity as a tribe in the ordinary sense. Moreover, there is no evidence that the absence of federal dealings was or is based on doubts as to the genuineness of the Passamaquoddies' tribal status, apart, that is from the simple act of recognition. Under such circumstances, the absence of specific federal recognition in and of itself provides little basis for concluding that the Passamaquoddies are not a "tribe" [within the meaning of] the [Nonintercourse] Act.

528 F.2d at 378.

The absence of treaties has not prevented the Pueblos of New Mexico or the Indians of California from being recognized and dealt with as Indian tribes. It was 23 years between the time the United States acquired the territory of New Mexico pursuant

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<sup>142</sup> 1942 Cohen, supra n. 8, at 270-71.

<sup>143</sup> The factors are:

- a. That the group has had treaty relations with the United States.
- b. That the group has been denominated a tribe by act of Congress or Executive order.
- c. That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe.
- d. That the group has been treated as a tribe or band by other Indian tribes.
- e. That the group has exercised political authority over its members, through a tribal council or other governmental forms.

Id. at 271.

to the Treaty of Guadalupe Hidalgo, 9 Stat. 922, and the end of the President's treaty making authority. However, no treaties were ever negotiated with any of the Pueblos.<sup>144</sup> Treaties were negotiated with California Indians, but none were ever ratified.<sup>145</sup>

In short, the United States has dealt, and continues to deal, with many Indian tribal groups which do not have treaties with the United States. Some tribes with which it had treaties have evolved into new entities and some have ceased to exist as distinct political entities.<sup>146</sup> It would be arbitrary to now impose the existence of treaty relations with the United States as a prerequisite for dealing with Alaska Natives villages as tribes.

3. Alaska Natives have consistently been subject to territorial and state law.

It cannot be denied that Alaska Natives have been subject to territorial and state law for many purposes. We are not persuaded, however, that the subjection of Alaska Natives to territorial or state law divests them of their status as tribes.

In 1978, the Supreme Court considered whether the United States had jurisdiction under the Major Crimes Act to prosecute a member of the Mississippi Band of Choctaw Indians for assault on lands belonging to the tribe. The State argued that the United States did not have jurisdiction because the State had exercised jurisdiction over the Choctaws and their lands. The Court assumed for purposes of the argument that there had been times when Mississippi's exercise of jurisdiction over the Choctaw lands had gone unchallenged but found that fact did not divest the Federal Government of its authority over them. United States v. John, 437 U.S. 634, 652-53 (1978); see also United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981), cert. denied, 459 U.S. 823 (1982). Similarly, the Passamaquoddy and Penobscot Tribes of Maine were subjected to complete state jurisdiction yet

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<sup>144</sup> 1942 Cohen, supra n. 8, at 387.

<sup>145</sup> S. Rep. No. 441, 102d Cong., 2d Sess. 3 (1992) relating to Advisory Council on California Indian Policy Act of 1992, Pub. L. No. 102-416, 106 Stat. 2131.

<sup>146</sup> Interestingly, while the existence of a treaty is not essential, we should also note that the existence of a treaty is not dispositive either. Once a group has had a treaty with the United States, the existence of that treaty does not, in and of itself, establish a presumption that the treaty group continues to exist as a tribe. United States v. Washington, 641 F.2d 1368, 1374 (9th Cir. 1981), cert. denied, 454 U.S. 1143 (1982).

did not lose their status as tribes. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. at 652, aff'd, 528 F.2d at 372, 374, 378.

Oklahoma, like Alaska, has a unique history. While substantial land in Oklahoma is still owned by Indian tribes and individual Indians, Indian reservations similar to those in other states have disappeared. Yet, the Tenth Circuit Court of Appeals found that lands still held by the Creek Nation in fee and used for a bingo operation were beyond state regulation. Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm'n, 829 F.2d 967 (10th Cir. 1987). The court found that the fact that the State had previously exercised jurisdiction over the lands without challenge was not inconsistent with continued tribal authority.

Even when Congress has permitted states to assert jurisdiction over Indian lands or tribal members within Indian country, that alone has not meant that Congress was revoking recognition or declining to recognize the Indian tribes and members affected. If anything, it reinforces Congress' recognition of the continued existence of tribes, even while it may seek to adjust jurisdictional authority for particular and usually limited purposes.<sup>147</sup>

There is no clearer example of a tribe being subjected to state jurisdiction than when the federal relationship with the tribe is terminated. Typically, although termination statutes revoked Secretarial powers and responsibilities under tribal constitutions, the acts did not expressly terminate the governmental authority of the tribes involved.<sup>148</sup> In 1979 the Ninth Circuit had occasion to consider the effects of the Klamath Termination Act, 25 U.S.C. §§ 564-564x, on the hunting and

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<sup>147</sup> Public Law 280, discussed supra at n. 102, provides examples of both broad and limited grants to states of authority within Indian country. In that statute, Congress granted to certain states broad criminal, but only very limited civil jurisdiction over Indian country. Yet it cannot reasonably be suggested that Public Law 280 constitutes an expression of congressional intent not to recognize the tribal status of tribes existing in Public Law 280 states. See Bryan v. Itasca County, 426 U.S. 373 (1976); California v. Gabazon Band of Mission Indians, 480 U.S. 202 (1987).

<sup>148</sup> Indeed, the acts commonly provided "such termination shall not affect the power of the tribe to take any action under its constitution and bylaws that is consistent with this subchapter without the participation of the Secretary or other officer of the United States," 25 U.S.C. §§ 758(b) (Utah Paiute tribes), 704 (60 Western Oregon tribes) and 723 (Alabama and Coushatta Indians of Texas).

fishing rights of members of the Klamath Tribe. The Act provided in part:

Upon removal of Federal restrictions on the property of the tribe and individual members thereof, the Secretary shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to the affairs of the tribe and its members has terminated. Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians and, except as otherwise provided in this Act, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

25 U.S.C. § 564q(a) (emphasis added). The Ninth Circuit found, however, that:

Although the [Klamath Termination] Act terminated federal supervision over trust and restricted property of the Klamath Indians, disposed of federally owned property, and terminated federal services to the Indians, it specifically contemplated the continuing existence of the Klamath Tribe. It did not affect the power of the tribe to take any action under its constitution and bylaws consistent with the Act. § 564r. The Klamaths still maintain a tribal constitution and tribal government, which among other things establishes criteria for membership in the Tribe. The tribal roll created by the Act was for purposes of determining who should share in the resulting distribution of property. Kimball I [Kimball v. Callahan, 493 F.2d 564 (9th Cir.), cert. denied, 419 U.S. 1019 (1974)] held that the Act did not abrogate tribal treaty rights of hunting, fishing, and trapping. Neither did the Act affect the sovereign authority of the Tribe to regulate the exercise of those rights.

Kimball v. Callahan, 590 F.2d 768, 775-76 (9th Cir.), cert. denied, 444 U.S. 826 (1979) (Kimball II) (footnotes omitted).

In short, the fact that a state has exercised jurisdiction over a tribe does not mean that a group of Indians is not a tribe or has ceased to exist as a tribe for purposes of federal law. We recognize that the exercise by a state of jurisdiction over a tribe may, among other factors, contribute to a voluntary or forced abandonment of tribal relations. If the members of a tribe have not maintained tribal relations, they will cease to be

a tribe regardless of the reasons. Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978), aff'd sub nom., Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979). However, the mere exercise of state jurisdiction does not in itself cause that result.

### 3. Which Villages are Tribes

It is not necessary for resolution of the question that you have asked to determine specifically which Native villages in Alaska are tribes.<sup>149</sup> However, a brief address to this point is necessary. Some Native leaders and other commenters have expressed concern that our opinion may threaten continued participation of Native villages in the programs of the BIA, the Indian Health Service and other federal agencies. Presumably, the concern is that, if some Native villages are not tribes, their participation in federal programs would be open to question.<sup>150</sup> To address these comments, as well as to provide guidance to the BIA and other agencies in administration of programs in Alaska, we turn briefly to the question of the number of tribes in Alaska.

There is an argument that Congress has recognized the existence of specific Native villages as tribes. This argument starts with the definition of "Native village" in ANCSA section 3(c). 43

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<sup>149</sup> See supra p. 1.

<sup>150</sup> The principal constitutional basis for Indian affairs legislation is the Constitution's Commerce Clause, which empowers Congress "[t]o regulate commerce with foreign nations, and among the several States, and with Indian tribes." U.S. Const. art. I, § 8, cl. 3 (emphasis added). 1982 Cohen, supra n. 8, at 208; McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n. 2 (1973); United States v. Antelope, 430 U.S. 461, 645 (1977); United States v. Holliday, 70 U.S. (3 Wall.) 407, 419 (1865). This clause provides broad authority for congressional action and has been a basis for sustaining federal laws singling out Indians as a class against claims that they violate the equal protection standard of the Fifth Amendment. In Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court upheld the Indian preference law, 25 U.S.C. § 472, against an equal protection challenge, finding that the preference was not "racial," but was rather based on the political relationship of the United States to tribes. In United States v. Antelope, 430 U.S. 641 (1977), the Court upheld the prosecution of an Indian under the Major Crimes Act, 18 U.S.C. § 1153, on the same basis. However, a necessary corollary to these decisions is that the authority of Congress to deal specially with Indians outside of the context of the relationship with tribes has limits. See United States v. Mazurie, 419 U.S. 556 (1975); United States v. Sandoval, 231 U.S. 28 (1913).

U.S.C. § 1602(c). This definition makes reference to lists appearing in sections 11 and 16, which identify 215 Native villages. 43 U.S.C. §§ 1610, 1615. ANCSA made provision for the Department to add or delete Native villages from the section 11 list using specific criteria. In implementing ANCSA, the Department made additions to and deletions from the section 11 list, producing a modified list. A number of post-ANCSA statutes have included Alaska Native villages within the definition of "tribe" by reference to the ANCSA definition of "Native village." These latter statutes arguably are a congressional determination that Native villages on the modified ANCSA list are tribes.

The counter-argument is that Congress has not been consistent in its inclusion of Alaska Native entities in definitions of "tribe." The statutes discussed and listed above use a variety of formulations in defining what is a "tribe" in Alaska. The repeated inclusion of Alaska Native entities as tribes establishes that Congress believes that there are tribes in Alaska. However, it also may be argued that the variety of definitions used by Congress forecloses a finding that Congress has recognized any specific entity as a tribe.

While we do not express a final conclusion on which of these arguments is better, we do believe that there is sufficient merit to the first argument for the BIA and other agencies to proceed in the administration of programs on the presumption that Native villages listed on the modified ANCSA list are tribes. Should new or additional information indicate that any particular entity does not, in fact, meet the accepted criteria for a tribe, the BIA is not compelled to continue to deal with the entity as a tribe.<sup>151</sup> Similarly, should it become apparent that an entity, although once a tribe, has ceased to maintain tribal relations, for whatever reason, BIA may cease to treat it as a tribe.<sup>152</sup>

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<sup>151</sup> The BIA has adopted substantive standards for determining whether a group of Indian descendants is a tribe based on the Department's experience with issues of tribal existence during the mid-1970's. 43 Fed. Reg. 39361 codified at 25 C.F.R. Part 83 (1992). The regulations currently apply to all groups in the continental United States, including those in Alaska. 25 C.F.R. § 83.1(n) (1992). Although a question has been raised whether the acknowledgment process (but not the substantive standards) is appropriate for Alaska, 53 Fed. Reg. 52832 (1988), the proposed revised acknowledgment regulations would still apply in Alaska. 56 Fed. Reg. 47320 (1991).

<sup>152</sup> If some entities are found under appropriate procedures not to qualify as tribes, the continued participation of individual members of these entities in programs is not necessarily at risk. The Supreme Court has upheld special treatment "[a]s long as the special treatment can be tied rationally to the fulfillment of

We now turn to Part IV to discuss the question of village jurisdiction over land and nonmembers.

#### IV. VILLAGE GOVERNMENTAL JURISDICTION OVER LAND AND NONMEMBERS

##### A. Native Land Claims

##### 1. Early Land Claims

The Russians did not introduce a system of land ownership to Alaska or significantly interfere with aboriginal use of the land.<sup>153</sup> When news of the sale of Alaska to the United States

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Congress' unique obligation toward the Indians . . . ." Morton v. Mancari, 417 U.S. at 555 (emphasis added). See also Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977); 1982 Cohen, *supra* n. 8, at 654-58. We believe that, on this basis, continued participation of individual Alaska Natives in programs for which they are eligible would generally be upheld. Cf. 25 C.F.R. § 83.9(j).

In a January 30, 1989 letter to Chairman Daniel K. Inouye of the Senate Select Committee on Indian Affairs, Thomas M. Boyd, the Assistant Attorney General, Office of Legislative Affairs, argued that language in a statute and implementing regulations of the Department of Education that give a preference to certain classifications of persons, including Alaska Natives, was unconstitutional under Mancari because they were not clearly predicated on tribal membership. We believe that this letter does not correctly read the Mancari "rationally tied" standard and that it does not give adequate consideration to the Supreme Court's decision in United States v. John, 437 U.S. 634 (1978), which upheld the constitutionality of the Indian Reorganization Act's definition of "Indian," 25 U.S.C. § 479, which includes both members of tribes and "all other persons of one-half or more Indian blood."

We should also note the issue that, as mentioned at *supra* at n. 120, some statutes include within the definition of "tribe" Alaska entities that are clearly not tribes, usually the ANCSA Village and Regional Corporations. For example, the Indian Self-Determination Act includes the Corporations as tribes eligible to contract to operate federal programs and to receive grants under the Act. 25 U.S.C. § 450b(b). Because the starting point for organization of the Corporations and the settlement of aboriginal claims was the Native villages, inclusion of the Corporations in the Self-Determination Act can be said to be tied rationally to Congress' constitutional authority.

<sup>153</sup> Section III.A.2, *supra*.

reached the Natives, objections to the transaction were raised and there was talk of armed resistance to the "Boston men."<sup>154</sup>

A Treasury Department agent reported in 1869 that the objections did not arise from "any special feeling of hostility" to Americans. Indeed, he found that the Natives were satisfied with the prices paid for furs by American traders. Their objections, he reported, were due to the fact that "their fathers originally owned all of the country" and were merely allowing the Russians to occupy it for the conduct of trade. The Natives asserted that the Russians did not have the right to sell the territory, "except with the intention of giving them the proceeds."<sup>155</sup>

Both the Treaty of Cession<sup>156</sup> and the 1884 Organic Act<sup>157</sup> recognized the existence of these claims and Senator Harrison, the sponsor of the Organic Act, expressed hope that they would be promptly resolved.<sup>158</sup> The vehicle for this resolution was to be the commission provided for in section 12 of the Act. 23 Stat. 24, 27. The commission would study the Natives' situation and report on what land should be reserved for their use. A commission report was submitted to the Secretary of the Interior on June 30, 1885. It dealt only with the Natives of southeastern Alaska. It recommended that the Natives be granted title to the land they actually used and occupied for homes and gardens and be secured in the use of their fishing sites. The land was otherwise recommended to be open for white settlement and exploitation.<sup>159</sup> No action was taken on this report.<sup>160</sup> Rather,

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<sup>154</sup> H.H. Bancroft, History of Alaska, 1730-1885 609 (1886). Because most Native dealings had been with whalers sailing out of Boston, Americans generally were referred to as "Boston men."

<sup>155</sup> C. Bryant, Report on Alaska, in S. Exec. Doc. No. 32, 41st Cong., 2d Sess. 14 (1869).

<sup>156</sup> Section III.A.2, supra.

<sup>157</sup> Section III.A.3, supra.

<sup>158</sup> 15 Cong. Rec. 531 (1884).

<sup>159</sup> The commission's report is summarized and portions quoted in Tlingit and Haida Indians of Alaska v. United States, 147 Ct. Cl. 315, 336-37, 414-15 (1959).

<sup>160</sup> The brevity and limited scope of the report were criticized at the time. Governor Swineford, on first arriving in Alaska in late 1885, wrote that the report "fails to show that [the Commission's] duties have been more than in very small part performed." Report of the Secretary of the Interior, Message and Documents, Vol. II, 923 (1885). See also, E. Gruening, The State

as discussed above, several subsequent statutes repeated the Organic Act's preservation of the status quo.

During the early administration of the land laws in Alaska, the Department acted to protect from non-Native entry lands actually occupied by Natives. In 1897, the Department refused to approve a townsite that included a waterway actually used by a Native village as a source of fresh water for domestic use and consumption. 24 I.D. 312 (1897). In 1898, the Department required exclusion from a claim of a trail used by Natives to obtain access from their village to a harbor site. 26 I.D. 512 (1898).<sup>161</sup> However, protection was generally limited only to permanent villages and other areas actually and visibly occupied and improved by Natives, and not to broader areas that Natives had aboriginally used for hunting, fishing and gathering.<sup>162</sup>

Throughout the 1890's and into the 20th Century, various protests concerning rights in land were made by Natives to the Secretary of the Interior, the President and Congress. These protests received little, if any, response.<sup>163</sup>

The extension of the allotment laws to Natives in 1906 was viewed by some as a vehicle to provide Natives title to land,<sup>164</sup> but relatively few Natives took advantage of it. Through 1960, only 80 allotments were sought.<sup>165</sup> Ernest Gruening says this was due to lack of appropriations for implementation of the law.<sup>166</sup> However, a more persistent problem was that allotments of 160 acres were not particularly suited to the subsistence based

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of Alaska 356 (1954) (Gruening, Alaska).

<sup>161</sup> Both this opinion and the 1897 opinion were prepared under the supervision of Willis Van Devanter, then the Assistant Attorney General for the Interior Department and later a Justice of the Supreme Court. In 1913, the title of Assistant Attorney General was changed to Solicitor. A result in accord with these opinions was reached in Johnson v. Pacific Coast S.S. Co., 2 Alaska 224 (D. Alaska 1904).

<sup>162</sup> Tlingit and Haida Indians of Alaska v. United States, 147 Ct. Cl. 315, 336-40 (1959).

<sup>163</sup> Id. at 426-37.

<sup>164</sup> Gruening, Alaska, supra n. 160, at 362.

<sup>165</sup> Alaska Natives and the Land, supra n. 17, at 435. See also, Land Use in Alaska, Preliminary Report, Advisory Committee on Land Use and Subcommittees to Alaska Planning Council 50 (1938).

<sup>166</sup> Gruening, Alaska, supra n.160, at 362.

communities of Alaska, many of them semi-nomadic.<sup>167</sup> A 1962 Department of the Interior task force observed that "[h]omestead laws designed for farmers who live and work upon the same piece of ground, and through cultivation of the soil . . . are scarcely suitable for hunters who live in villages often far removed from the land upon which they seek their quarry."<sup>168</sup>

As the non-Native population of Alaska increased, encroachments on land occupied and used by Natives increased and the problem of Native land claims became more pressing.<sup>169</sup> By the Census of 1900, non-Natives constituted a majority of the population of Alaska.<sup>170</sup> In 1915, a group of Athabascan chiefs and headmen met in Fairbanks with Delegate James Wickersham to discuss protection of their lands against settlement by others. Delegate Wickersham offered an option of homesteads or creation of reservations. The chiefs told him that neither option was acceptable. Homesteads would separate community members and did not account for the fact that Natives lived at many different places throughout the year. Reservations too were viewed as unduly restrictive. "[W]e wish to stay perfectly free just as we are now and go about just the same as now . . .," one chief said.<sup>171</sup>

Delegate Wickersham promised to report the Athabascans' concerns to Washington, but nothing came of the matter. The 1926 Native Townsite Act made available to Natives restricted deeds to surveyed townsite lots. But, like the Homestead Act, this legislation failed to address the broader issue of claims related to subsistence use of the land.<sup>172</sup>

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<sup>167</sup> Alaska Natives and the Land, *supra* n. 17, at 435; Naske & Slotnick, *supra* n. 24, at 199-200.

<sup>168</sup> Report to the Secretary of the Interior by the Task Force on Alaska Native Affairs 62 (Dec. 28, 1962).

<sup>169</sup> Arnold, *supra* n. 14, at 72-79.

<sup>170</sup> *Id.* at 71. The Native population in 1900 was 29,536 against a non-Native population of 34,056. The non-Native population peaked in 1910 and then declined in the wake of the end of the gold rushes, before beginning a sharp climb in the 1930's. By 1960, the Native population was 43,081 and the non-Native population 250,461. *Id.* In 1990, the totals were 85,698 and 464,345. 1990 Census of Population, General Population Characteristics, Alaska (May 1992).

<sup>171</sup> Arnold, *supra* n. 14, at 81-82; Naske & Slotnick, *supra* n. 24, at 199-200.

<sup>172</sup> Report to the Secretary of the Interior by the Task Force on Alaska Native Affairs 60-62 (Dec. 28, 1962).

## 2. Proposed Repeal of the Alaska Amendment to the IRA

As was discussed earlier, some proponents of the Alaska Amendment to the IRA viewed the creation of IRA reservations as a solution to Native land claims.<sup>173</sup> However, the establishment of the first six IRA reservations in Alaska generated intense opposition from non-Natives in Alaska. Of particular concern was the Venetie Reservation, which totalled 1.4 million acres. What startled Alaskans, Ernest Gruening wrote, was that these were "announced to be only the first of one hundred similar reservations from which all but local native residents would be excluded."<sup>174</sup> Reservations on this scale would, many non-Natives feared, stifle economic development. Concern was expressed that mining and other activities would be precluded "except on payment for the privilege to resident natives" and that the fishing and canning industries could be crippled by Native claims to exclusive fishing rights.<sup>175</sup>

In 1948 an effort was made in Congress to repeal the applicability of the IRA to Alaska and to rescind the reservations established pursuant to the Act. Lengthy hearings were held early in the year on two measures, Senate Joint Resolution 162 and S. 2037.<sup>176</sup> Senate Joint Resolution 162 asserted that the United States had never recognized rights of Alaska Natives based on use and occupancy, that the Secretary of the Interior had established a number of reservations and was considering a number of additional ones, and that the inclusion of vast areas of land within Indian reservations was retarding settlement and development of Alaska. The Joint Resolution proposed to rescind the Secretarial Orders establishing reservations under the IRA and to repeal section 2 of the Act of May 1, 1936, which gave the Secretary authority to establish IRA reservations in Alaska.<sup>177</sup>

The provisions of S. 2037 were broader. That bill proposed to transfer all duties, powers and functions of the Secretary of the Interior and Commissioner of Indian Affairs to the Alaska Territorial Government. Section 4 of the bill would have deleted the language of section 13 of the IRA that made certain provisions of the IRA applicable to Alaska, amended section 19 of

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<sup>173</sup> Section III.A.5, supra.

<sup>174</sup> Gruening, Alaska, supra n. 160, at 367.

<sup>175</sup> Id. at 367-68. Accord, reprinted in 1948 Hearings, supra n. 137, at 453.

<sup>176</sup> 1948 Hearings, supra n. 137.

<sup>177</sup> S. Rep. No. 1366, 80th Cong., 2d Sess. (1948).

the IRA to delete the inclusion of Eskimos and other aboriginal peoples of Alaska from the definition of "Indian," and repealed the 1936 Alaska Amendment in its entirety.

In letters to the Senate Interior Committee, Secretary Krug opposed both proposals.<sup>178</sup> The IRA reservations, he wrote, were in areas used by the Natives "since time immemorial" and "constitute the economic bases for native life." He further stated:

The exploitation and spoliation of some of the ancestral hunting, fishing, and trapping grounds of the natives by nonnatives have already worked a hardship on many of the native groups and seriously jeopardized their economic situation. Unless the natives are protected in their occupancy and use of these ancestral areas and are permitted to establish their local governments, the virtual destruction of these people is the almost sure result. They must be assisted in their efforts to become self-supporting and to combat the introduction of intoxicating liquor within the native communities.<sup>179</sup>

Secretary Krug also recalled the circumstances of the adoption of the Alaska Amendment to the IRA. A purpose of the amendment, he pointed out, was to fulfill the "moral and legal" obligation to the Natives arising from the 1884 Organic Act. A repeal of the Alaska Amendment would "repudiate" the commitment to fulfill this obligation.<sup>180</sup>

Proponents of the legislation in testimony before the Committee disputed Krug's position. R.E. Robertson, an attorney representing the Juneau Chamber of Commerce, testified that he had made an extensive study of aboriginal claims and had concluded that "no aboriginal rights existed, that none had existed under the Russian regime [and] that if any had existed . . . they would have been abolished by the Treaty of Cession." If the rights were not terminated by the Treaty, he said, they were extinguished by "nonrecognition of them by the Congress . . ."

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<sup>178</sup> Letter of February 18, 1948 to Senator Hugh Butler, re: S.J. Res. 162; Letter of February 19, 1948 to Senator Hugh Butler, re: S. 2037, reprinted in 1948 Hearings, supra n. 137, at 3-5.

<sup>179</sup> Letter of February 18, 1948 to Senator Hugh Butler, reprinted in 1948 Hearings, supra n. 137, at 3.

<sup>180</sup> Id. at 3-4.

. and abandonment by the Indians or by adverse use and possession for many years either by the Indians or private individuals."<sup>181</sup>

Felix Cohen, who had recently left federal service, appeared in support of Secretary Krug. He said, "[I]n the case of the Alaska Indians we have more than a moral obligation, we have a legal obligation." The idea of reservations in Alaska "as being a menace suddenly created out of the brain of Harold Ickes or myself or some other disagreeable individual, does not take sufficient account of the actual history."<sup>182</sup>

Assistant Secretary William Warne, who then supervised the Indian Office, rebutted the argument that reservations would impede development of the Territory. He recalled the long history of Native land claims. It took 17 years after acquisition of Alaska for Congress to first address Native land rights, he said. Congress then dealt with them by providing simply that they should not be disturbed until Congress addressed them in further legislation. Another 62 years elapsed before Congress, in the Alaska Amendment, authorized the Secretary of the Interior "to mark out and protect Indian land titles." During the 12 years that have passed since the Amendment, the Department has been "continually beset by pleas for delay." Further delay, Mr. Warne said, was not in the interest of Alaska's development:

[P]ostponing action on these issues is also postponing the clarification of Alaskan land titles and thus postponing the settlement and industrial development of Alaska. If that is the case, then either the Congress or the Interior Department is going to have to choose between facing the brickbats that any solution of this problem will draw, on one hand, and, on the other, leaving a vital segment of our national frontier undeveloped and almost uninhabited.<sup>183</sup>

No action was taken on S. 2037. In mid-June, the Senate adopted Senate Joint Resolution 162, but only after significantly amending it. The amendments deleted the provision which would have rescinded the Secretarial Orders establishing reservations under the IRA, reworded the provision relating to the repeal of section 2 of the Alaska Amendment, and added a provision authorizing the Secretary to issue patents to appropriate "native

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<sup>181</sup> Id. at 353. Robertson later represented the defendant in United States v. Libby, McNeil & Libby, 107 F. Supp. 697 (D. Alaska 1952), in which the Hydaburg IRA reserve was held to have been improperly established.

<sup>182</sup> Id. at 540, 544.

<sup>183</sup> 1948 Hearings, supra n. 137, at 41-42.

tribes and villages or individuals for lands actually possessed, used or occupied for town sites, villages, smoke houses, gardens, burial grounds, or missionary stations." 94 Cong. Rec. 9097 (1948). The House took up the Joint Resolution in the early hours of Sunday, June 20, but deferred consideration of it until another time because of the early hour. 94 Cong. Rec. 9348 (1948). The House never returned to the matter.

### 3. Land Claims in Court

Despite the failure of the IRA repeal legislation, the resolution of Native land rights through IRA reservations, as foreseen by Assistant Secretary Warne, did not materialize. Numerous reservation applications remained before the Department.<sup>184</sup> However, only one additional reservation was established and its establishment was later invalidated.<sup>185</sup> Further, the status of the first six IRA reservations was undermined in litigation concerning the exclusivity of Native fishing rights within one of the reserves.<sup>186</sup>

This left the issue of the rights of Natives to land uncertain and the subject of further litigation. In Miller v. United States, 159 F.2d 997 (9th Cir. 1947), the Ninth Circuit held that the Treaty of Cession had extinguished "original Indian title" in Alaska, but that individual Tlingit Indians had a compensable interest in lands taken by condemnation because the 1884 Organic Act constituted congressional recognition of their title as "individual" Indians. However, in Tee-Hit-Ton Indians v. United States, 348 U.S. 272, reh'g denied, 348 U.S. 965 (1955), the Supreme Court took a different approach.

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<sup>184</sup> Alaska Natives and the Land, supra n. 17, at 443, 446.

<sup>185</sup> A reserve at Hydaburg was established on November 30, 1949. Its establishment was invalidated in United States v. Libby, McNeil and Libby, 107 F. Supp. 697 (D. Alaska 1952). Two other reserves (Barrow and Shungnak-Kobuk) were preliminarily established at the same time as Hydaburg, but these were revoked after votes of disapproval in village elections. Alaska Natives and the Land, supra n. 17, at 443.

<sup>186</sup> Hynes v. Grimes Packing Co., 337 U.S. 86 (1949). This case is analyzed in detail in Case, supra n. 50, at 101-11. Native support for reservations, which was hardly unanimous in the first instance, also appears to have waned. In 1962, a Departmental task force found Indians, Eskimos and Aleuts "generally opposed to having reservations." Report to the Secretary of the Interior by the Task Force on Alaska Native Affairs 57 (1962).

Tee-Hit-Ton was an inverse condemnation action by a clan of the Tlingit Tribe. The clan sought compensation for timber taken by the United States from lands it claimed. The Court found that the clan's use of the land in question was "like the use of [land] by the nomadic tribes of the States Indians" and that its claim was "wholly tribal." Id. at 287-88. This conclusion did not, however, give rise to a right to compensation. Aboriginal title, the Court said, is "a right of occupancy which the sovereign grants and protects against intrusion by third parties," but is not a compensable property right unless specifically recognized as such by Congress. Such title "may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians." Id. at 279 (citing Johnson v. McIntosh, 21 U.S. (8 Wheat.) 542 (1823)).

Because of its conclusion, it was unnecessary for the Court to consider whether the Treaty of Cession had extinguished aboriginal title. However, it was necessary to address the 1884 Act to determine whether the Act provided the requisite congressional recognition to convert "mere Indian title" to a compensable possessory interest. The Court said that it had carefully examined the Act and its legislative history and that "it clearly appears that what was intended was merely to retain the status quo until further congressional or judicial action was taken." Id. at 277-79.

Justice Douglas, joined by Chief Justice Warren and Justice Frankfurter, dissented. Based on his own review of the legislative history of the 1884 Act, Douglas concluded that the Act recognized the Natives' title to their lands. "What those lands were was not known. Where they were located, what were their metes and bounds was also unknown . . . . But all agreed that the Indians were to keep them, wherever they lay." Id. at 292-94.

The issue of aboriginal title and the Treaty of Cession was revisited by the Court of Claims in Tlingit and Haida Indians of Alaska v. United States, 177 F. Supp. 452, 147 Ct. Cl. 315 (1959). A special 1935 jurisdictional statute authorized "all those Indians of the whole or mixed blood of the Tlingit and Haida Tribes" to bring suit for damages for taking by the United States of lands or other tribal or community property rights. Act of June 19, 1935, § 2, 49 Stat. 388. After lengthy delays, the Tlingit and Haida brought suit in 1947.<sup>187</sup> The case was tried in the mid-1950's and a decision issued by the Court of Claims on liability in 1959. The court held that the United

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<sup>187</sup> The period for the Tlingit and Haida to bring the case was twice extended. Act of June 5, 1942, 56 Stat. 232; Act of June 4, 1945, 59 Stat. 231.

States had taken over 18 million acres of land aboriginally used and occupied by the Tlingit and Haida in southeastern Alaska, 147 Ct. Cl. at 340-41. The court rejected the argument that aboriginal title was extinguished by Article VI of the Treaty of Cession, in which Russia had warranted that Alaska was "free of any reservations, privileges, franchises, grants or possessions." The court adopted a finding of its trial commissioner that the warranty went only to claims of the Russian government, the Russian American Company and other commercial enterprises. Id. at 334, 385-88.<sup>188</sup>

#### 4. The Statehood Act

Alaska's first statehood bill was introduced in 1916 by Alaska Delegate James Wickersham, who as a district court judge had authored the early 20th Century decisions on the status of Alaska Natives. At this time, however, the people of Alaska were largely disinterested in statehood, and Congress took no action on the bill.<sup>189</sup> Alaska's rapid economic development and population growth during World War II, however, brought renewed interest in Alaska Statehood.<sup>190</sup> Statehood bills were before Congress almost continuously from 1943 until Statehood was achieved in 1958. After World War II, Alaska's strategic position and security value in the Cold War with the Soviet Union generated support for Alaska Statehood among members of Congress. In 1950, a statehood bill passed for the first time in the United States House of Representatives. The Senate Interior and Insular Affairs Committee revised the bill and reported it favorably, but the measure did not pass the Senate. The Korean War halted debate on Alaska Statehood, which did not resume until 1952. On April 4, 1954, the Senate passed a combined Alaska-Hawaii Statehood measure, with no like action from the House.<sup>191</sup>

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<sup>188</sup> A money judgment for the taking found in the 1959 decision was not rendered until 1968. Tlingit and Haida Indians of Alaska v. United States, 389 F.2d 778 (Ct. Cl. 1968).

<sup>189</sup> Naske & Slotnick, supra n. 24, at 136.

<sup>190</sup> Id. at 143-45.

<sup>191</sup> Naske, supra n. 42, at 67-79, 95-126. For a detailed inside account of the statehood movement, see E. Gruening, The Battle for Alaska Statehood (1967). Mr. Gruening was Director of the Division of Territories and Island Possessions, U.S. Department of the Interior, for 5 years before his appointment as Governor of the Territory of Alaska in 1939. Mr. Gruening served as Governor until 1953. In 1956 he was elected a provisional Senator and in 1959, after Alaska became a state, a Senator. He served until 1969.

In 1955, the people of Alaska held a constitutional convention, partly to impress Congress with the Territory's political maturity and partly to win public support for Alaska Statehood. A convention of 55 delegates met for the first time on November 8, 1955. On February 5, 1956, the delegates signed a newly drafted Alaska Constitution, which was approved by the people of Alaska in April 1956, by a vote of 17,447 to 8,180.<sup>192</sup> The final push in Congress for Alaska Statehood began in March 1957. On July 1, 1958, Congress passed the Alaska Statehood Act.<sup>193</sup> Alaska joined the Union on January 3, 1959.

Throughout consideration of Alaska Statehood during the 1950's, proponents of Statehood sought to separate the question of Native land claims from the issue of whether Alaska should be a state. In hearings in 1950, Governor Gruening was asked if he regarded the matter of Indian title as important. He replied:

I think it is of great importance; I think it should be disposed of, but I doubt whether the statehood bill is the place to do it. It is a Federal matter, after all, and will be decided by the Federal Government whether Alaska is a State or a Territory, and I think you will needlessly complicate the statehood bill if you put it in there.<sup>194</sup>

Robert Atwood, editor and publisher of the Anchorage Times, echoed this view:

The Indians, with their aboriginal rights, are a Federal problem. We have no control over it, and we cannot dispose of it, and we have nothing to say about it. Whatever happens to Alaska, it will still be a Federal problem.<sup>195</sup>

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<sup>192</sup> Naske, supra n. 42, at 131-47.

<sup>193</sup> Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339, amended by Act of June 25, 1959, Pub. L. No. 86-70, 73 Stat. 141.

<sup>194</sup> Alaska Statehood: Hearings on H.R. 331 and S. 2036 Before the Senate Committee on Interior and Insular Affairs, 81st Cong., 2nd Sess. 351-52 (1950).

<sup>195</sup> Id. at 293. Other participants in the hearing expressed similar views, e.g., Delegate E.L. Bartlett, id. at 149; Democratic Committeewoman Essie R. Dale, id. at 261-62. See also, statement of Mildred R. Hermann, Secretary, Alaska Statehood Commission, Statehood for Alaska: Hearings on H.R. 20, H.R. 207, H.R. 1746, H.R. 2684, H.R. 2982, and H.R. 1916, Before the Subcommittee on Territories and Insular Possessions of the House Committee on Interior and Insular Affairs, 83rd Cong., 1st

In 1955, Congressman Clair Engle expressed the same position:

We do not want to get into a discussion of what the ultimate decision as to those rights should be, because it is not in the framework of the bill.

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We do not undertake to define them, and when we undertake to define those rights, we actually undertake to define the Indian and Eskimo problem in Alaska. We want to leave that undecided, without prejudice and without adding to it. We do not have to decide it, and we should not, in [this] legislation, try to decide it.<sup>196</sup>

The implementation of this position is found in section 4 of the Statehood Act. 72 Stat. 339. Section 4 contains three interrelated provisions addressing Native claims. It provides first that by accepting Statehood, Alaska disclaims any right to Native lands or other property:

As a compact with the United States the State and its people do agree and declare that they forever disclaim . . . all right and 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) or is held by the United States in trust for such natives; that all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restriction on alienation . . . .

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Sess. 195-96 (1953).

<sup>196</sup> Hawaii-Alaska Statehood: Hearings Before the Committee on Interior and Insular Affairs, House of Representatives on H.R. 2535 and H.R. 2536, Bills "To Enable the People of Hawaii and Alaska Each to Form a Constitution and State Government and to be Admitted into the Union on Equal Footing with the Original States, and Related Bills H.R. 49, H.R. 185, H.R. 187, H.R. 248, H.R. 511, H.R. 555, and H.R. 2531, 84th Cong. 1st Sess. 130 (1955).

It also provides that land taken in trust by the United States for Natives shall be free from state taxation:

And provided further, That no taxes shall be imposed by said State upon any lands or other property now owned or hereinafter acquired by the United States or which, as hereinafter set forth, may belong to said natives, except to such extent as Congress has prescribed or may hereinafter prescribe, and except when held by individual natives in fee without restrictions on alienation.

However, the third provision makes clear that neither of the other provisions is to be construed as recognizing Native land claims:

Provided, That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act . . . .

The House Committee Report stated that the section 4 disclaimer applies to "any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts, or is held by the United States in trust for them." The report stated that the purpose of the disclaimer was to provide "that no attempt will be made to deal with the legal merits of the indigenous rights but to leave the matter in status quo for either future legislative action or judicial determination." H.R. Rep. 624, 85th Cong., 1st Sess. 19 (1957).

In 1962, the Supreme Court held that, based on the legislative history of the Statehood Act, section 4 was intended to "preserve the status quo with respect to aboriginal and possessory Indian claims, so that statehood should neither extinguish them nor recognize them as compensable." Kake v. Egan, 369 U.S. 60, 65 (1962).

## 5. Move Toward Settlement

The 1958 passage of the Alaska Statehood Act, even though it explicitly purported to preserve the status quo, set in motion forces which finally brought the issue of Native land claims to a head. Chief among these forces, at least initially, was the

Native peoples' opposition to the State of Alaska's selection under the Statehood Act of lands that the Native people clearly regarded as being subject to their use, occupancy and claims of right.<sup>197</sup> The Statehood Act granted the State the right to select and receive title to approximately 105 million of Alaska's 375 million acres, and conflicts between state selections and specific Native claims began to arise almost as soon as the State began to make its selections. Spurred to action by the threatened transfer of lands they regarded as their own, Native villages and regional groups began to organize, and to more actively assert their claims. They filed administrative protests against specific state selections with the Department of the Interior, and also submitted broader claims to the geographic areas as to which they claimed federal protection for their use and occupancy. Eventually these claims practically blanketed the State.<sup>198</sup>

By the mid-1960's the issue of Native land rights had become a serious obstacle to most land transfers, and to land-related economic development. In the face of Native protests Secretary Udall in 1966 announced a moratorium pending congressional settlement of Native land claims, applicable to all dispositions of federal lands in Alaska, including the award to the State of title to lands it had selected, as well as federal oil and gas lease sales.<sup>199</sup> The State responded by filing suit to overturn the discretionary moratorium and to compel conveyance of Statehood Act selections, but a trial court decision in the State's favor was reversed in Alaska v. Udall, 420 F.2d 938 (9th Cir. 1969), cert. denied, 397 U.S. 1076 (1970). The Ninth Circuit concluded its decision reversing and remanding the case with the following observation:

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<sup>197</sup> Arnold, supra n. 14, at 100-03.

<sup>198</sup> Alaska Natives and the Land, supra n. 17, at 537, placed the total acreage claimed at about 340 million acres as of 1968, some of which consisted of overlapping claims. Arnold, supra n. 14, at 119, cited a figure of 380 million acres (with the difference presumably reflecting later additional claims), a total which exceeds the entire area of the State (as a result of overlapping or conflicting claims of neighboring groups).

<sup>199</sup> Simasko, Alaska Land Problems, 10 National Institute for Petroleum Landmen 333, 350-51 (SW Legal Foundation 1969). No official order was issued for the land freeze. Instead, Secretary Udall, utilizing his discretionary authority, ordered the federal land offices in Alaska to discontinue the issuance of oil and gas leases, patents under the Homestead Act or Small Tract Act, processing of State of Alaska land selections, and other dispositions. The action was effective the third week of October 1966. Id.

In view of the pendency in Congress of proposed legislation which, if enacted, would probably resolve all or most of the issues involved in this complex litigation, the district court may, in the exercise of this discretion, hold the trial in abeyance for a reasonable period of time.

Id. at 940. While that litigation was pending, Secretary Udall, as one of his last acts in office, formalized the federal "land freeze" with the issuance of Public Land Order 4582 on January 17, 1969.<sup>200</sup> In addition to obstructing selection of land by the State and others, this freeze had the effect of blocking issuance of a right-of-way for construction of the Trans-Alaska Pipeline. Anxious to move forward with the pipeline oil companies joined the Natives and the State in calling for a legislative resolution of the Alaska Native land claims question.<sup>201</sup>

Meanwhile, as the early settlement bills were introduced, beginning in 1967, and the House and Senate Committees on Interior and Insular Affairs began to consider them, relevant developments continued apace back in Alaska under existing federal and state legislative authorities. Two were particularly noteworthy. First, in anticipation of the possible repeal of the Native Allotment Act, a flood of applications poured into the Interior Department.<sup>202</sup> Secondly, an increasing number of Native villages organized as municipal governments under provisions of state law.<sup>203</sup>

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<sup>200</sup> 34 Fed. Reg. 1025 (1969). The order was amended to postpone the expiration of the period of withdrawal by PLO 4962, 35 Fed. Reg. 18874 (1970) (signed by Acting Secretary Fred J. Russell), and PLO 5081, 36 Fed. Reg. 12017 (1971) (signed by Secretary Rogers C.B. Morton).

<sup>201</sup> Arnold, supra n. 14, at 123.

<sup>202</sup> Only 80 allotments were issued between 1906 and 1960. Alaska Natives and the Land, supra n. 17, at 435. By the time ANCSA was passed on December 18, 1971, over 9,000 applications had been submitted to the Department of the Interior.

<sup>203</sup> 1967 figures reported to Congress in Alaska Natives and the Land, supra n. 17, at 47, indicated that 21 predominantly Native places were organized under state law only, another 21 under both state law and the IRA, 38 under the IRA only, and that 98 villages were "governed by councils without formal legal status." According to state records, the number of villages incorporated under state law basically doubled between 1968 and the time ANCSA was passed on December 18, 1971, although the substantial majority of villages were then, and roughly half today still

As Alaska Natives organized to press their land claims during the 1960's, considerable thought was given to the best means of protecting Native lands.<sup>204</sup> With the experience of the Tlingit and Haida claims litigation<sup>205</sup> fresh in their minds, Native leaders and others soon rejected the idea of depending on the courts to protect their lands. Not only had the claims litigation taken a long time, but the compensation recovered was viewed as inadequate.<sup>206</sup> Furthermore, Natives recognized the Court of Claims had no authority to grant legal title to Native lands.<sup>207</sup> Thus, a comprehensive legislative solution became the preferred approach.

The developments leading up to enactment of ANCSA, just described in the most abbreviated fashion, comprise in fact a subject matter of sufficient complexity to justify book-length treatment. Indeed, several authors have undertaken such an effort, although each has understandably brought a different perspective and emphasis to the subject.<sup>208</sup> But such a detailed consideration is beyond the scope of this discussion. Instead, our further

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remain, unincorporated under state law.

<sup>204</sup> Arnold, supra n. 14, at 106, 114.

<sup>205</sup> The original jurisdictional statute was enacted in 1935, 49 Stat. 388, but damages were not recovered until more than three decades later. Tlingit & Haida Indians of Alaska v. United States, 177 F. Supp. 452, 147 Ct. Cl. 315 (Ct. Cl. 1959) (viability); 389 F.2d 778 (Ct. Cl. 1968) (damages).

<sup>206</sup> See, e.g., Alaska Native Land Claims: Hearings on S. 2906 and Related Bills Before the Senate Committee on Interior and Insular Affairs, 90th Cong., 2d Sess. 345-46 (1968) (statement of John Borbridge, Jr., President of the Tlingit and Haida Central Council) (1968 hearings).

<sup>207</sup> In fact, the first settlement bills proposed in 1967, H.R. 1964 and H.R. 11164, 90th Cong., 1st Sess., would have given the Court of Claims jurisdiction to award land title as well as money, but the 1968 bill developed by a state-sponsored task force with important Native input, as well as all subsequent proposals, abandoned the idea of a judicial solution as far too time-consuming. Id. at 64-65, 79 (testimony of Willie Hensley).

<sup>208</sup> See, e.g., Gallagher, Hugh, Etok: A Story of Eskimo Power (1974); Berry, Mary Clay, The Alaska Pipeline: The Politics of Oil and Native Land Claims (1975); Groh, Clifford John, Oil, Money, Land, and Power: The Passage of the Alaska Native Claims Settlement Act of 1971 (unpublished manuscript, in the collection of the BLM Alaska Resources Library, 1976); and Arnold, supra n. 14.

discussion will emphasize primarily those selected aspects of the statute which have the greatest relevance to the subject of Native governmental powers. In particular, clues to congressional intent will be sought by tracing the development of the congressional findings and declaration of policy, the provisions making corporations established under state law the post-settlement landholding entities, the legislative revocation of existing reservations, and the statutory provisions assuring a land base to state-incorporated municipal governments.

## B. Alaska Native Claims Settlement Act

### 1. Overview

ANCSA as enacted was first and foremost an aboriginal land claims settlement. ANCSA § 2(d), 43 U.S.C. § 1601(d). After a century of postponing the question, or authorizing partial and incomplete solutions, Congress finally did its best to face and resolve the Alaska Native land claims issue in a single, comprehensive and conclusive legislative package. The bare bones of the settlement transaction were straight forward enough. The Act provided for extinguishment of all claims by Alaska Native groups based on aboriginal title. ANCSA § 4, 43 U.S.C. § 1603. In exchange, the Natives were granted full legal title to approximately 44 million acres of land intended to be located, by and large, near their Native villages. ANCSA §§ 12, 14, 16, 19, 43 U.S.C. §§ 1611, 1613, 1615, 1618. Additionally, Natives were to be paid cash compensation of \$962.5 million for the extinguishment of all aboriginal land claims. ANCSA §§ 6, 9, 43 U.S.C. §§ 1605, 1608.

Of course, the statutory settlement structure was far more complex than a simple swap of uncertain claims for land and money. This statutory complexity is a reflection of the scope and difficulty of the task Congress confronted in accommodating in some fashion the needs and interests of a whole variety of groups.<sup>209</sup> Section 2 set forth the congressional findings and a declaration of policy, portions of which will be considered in more detail below. The most often cited subsection of that declaration amounted to a legislative description of some of the policy goals Congress was seeking to advance through enactment of ANCSA:

[T]he settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting

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<sup>209</sup> Congressman Udall noted: "[i]f we serve here another 20 years, I do not think we will ever deal with a more complicated piece of legislation." 117 Cong. Rec. 46786 (1971).

their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska;

ANCSA § 2(b), 43 U.S.C. § 1601(b).

Section 3 provided definitions for key terms, including "Native village":

"Native village" means any tribe, band, clan, group, village, community or association in Alaska listed in sections 11 and 16 of this Act, or which meets the requirements of this Act, and which the Secretary determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives;

ANCSA § 3(d), 43 U.S.C. § 1602(d).

Native villages and regional organizations were in some respects the true parties to the settlement, in that it was their assertion of land claims that had helped to prompt the settlement, and their locations which determined what lands would be conveyed to Native Corporations under the statutory scheme. However, the only active role assigned to the Native villages in the implementation of ANCSA was to organize Village Corporations as a prelude to receiving lands or benefits under the Act. ANCSA § 8(a), 43 U.S.C. § 1607(a).

Provisions dealing with the organizational structure of the settlement included section 5, 43 U.S.C. § 1604, establishing an enrollment scheme, and sections 7, 8, and 14(h), 43 U.S.C. §§ 1606, 1607 and 1613(h), providing for Native Regional, Village, Urban and Group Corporations. Twelve Regional Corporations, to be formed pursuant to state law, were provided for in section 7 (along with the possibility, eventually realized, for the creation of a 13th region), and the organization of Village Corporations was required by section 8. The roughly 200 villages entitled to benefits under the Act were to be those which were determined to be eligible under section 11(b), including the ten villages automatically eligible under section 16. 43 U.S.C. §§ 1610(b), 1615. Native groups of less than 25 residents, and Natives residing in four named urban centers were also authorized to incorporate and receive benefits under the Act pursuant to sections 14(h)(2) and (3). 43 U.S.C. § 1613(h)(2) and (3).

Implications of this corporate structure will be more fully examined below.

The basic monetary aspects of the settlement were set forth in sections 6, 7, and 9. Section 6 established the Alaska Native Fund and provided for federal appropriations of \$462.5 million to it over an 11 year period. 43 U.S.C. § 1605. Section 7 specified the distribution scheme for this money. 43 U.S.C. § 1606. This scheme involved varying payments to different categories of enrolled Native Regional Corporation shareholders, payments to Village Corporations for their corporate use and shareholder distributions, and retention of funds by individual Regional Corporations. Section 7(i) contained a unique requirement for mandatory sharing among the Regional Corporations of revenues from timber resources and subsurface estate. 43 U.S.C. § 1606(i). The other source of funds for payment into the Alaska Native Fund was established in section 9, which required the State and Federal governments to pay a 2% royalty and 2% of rentals and bonuses under leases and sales of minerals until the cumulative payments from such sources reached \$500 million. 43 U.S.C. § 1608.

Other miscellaneous financial matters were addressed elsewhere in ANCSA, including provisions to deal with audits, attorney and consultant fees, and taxation, ANCSA §§ 7(o), 20, and 21, 43 U.S.C. §§ 1606(o), 1619, and 1620, but perhaps the most elaborate and important aspect of the Act was its treatment of land ownership issues. Of the approximately 44 million acres granted to Alaska Natives, the surface estate in 22 million acres was to be divided among the Village Corporations for Native villages identified in section 11. ANCSA §§ 12(a) and (b), 43 U.S.C. §§ 1611(a) and (b).<sup>210</sup> Almost 16 million more acres of surface and subsurface estate were to be divided among the 12 Regional Corporations, according to a formula which in practice resulted in six of the twelve receiving the entire 16 million acres of surface and subsurface estate. ANCSA § 12(c), 43 U.S.C. § 1611(c).<sup>211</sup> All 12 Regional Corporations received the

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<sup>210</sup> Each section 11 Village Corporation's total acreage entitlement depended on: (1) its enrolled population, which determined its total acreage entitlement by application of a sliding scale set forth in section 14(a), 43 U.S.C. § 1613(a), which ranged between 3 and 7 townships (69,120 to 161,280 acres); and (2) to a lesser extent, equitable allocation decisions made by its Regional Corporation in consideration of historic use, subsistence needs, and population of the villages within its Region.

<sup>211</sup> Doyon, Ltd., received over half of the 16 million acres, and Arctic Slope Regional Corporation roughly a quarter, with the remainder divided among Cook Inlet Region, Inc., NANA Corp.,

subsurface estate in lands conveyed to Village Corporations within their region.

For their land entitlement under ANCSA, the Village Corporations had to select the township or townships in which the village was located (the so-called "core townships"), plus additional contiguous acreage. 43 U.S.C. §§ 1611(a)(1)-(2). The surface estate of the selected lands was to be patented in fee to these new Village Corporations, subject to valid existing rights. Congress specifically decided not to transfer any of the benefits of the settlement under ANCSA to any traditional Native entities, including those previously organized under the IRA, even though the settlement extinguished all aboriginal land claims, including any aboriginal hunting and fishing rights. 43 U.S.C. § 1603. Instead, the benefits of the settlement went to the state-chartered Village Corporations, which were completely distinct legal entities from the traditional or federally-organized IRA village entities. Even the traditional villages' core townships were patented to the new ANCSA corporate entities.<sup>212</sup>

Other provisions of the land settlement included the variety of special categories of conveyance entitlement established by section 14(h), including cemetery sites and historic places, Native Groups, Urban Corporations, primary places of residence, and allotments approved in the first four years following ANCSA's passage. 43 U.S.C. § 1613(h). Two million acres were initially set aside to meet entitlements in those categories, with any unconveyed acreage eventually to be allocated to the Regional Corporations on the basis of population in accordance with section 14(h)(8). Special provision was also made in section 16, 43 U.S.C. § 1615, for ten villages in Southeast Alaska, which were given reduced acreage entitlements, each amounting to a single township, in light of their already having been at least indirect recipients of the funds appropriated to satisfy the judgment awarded by the Court of Claims in Tlingit & Haida Indians of Alaska v. United States, 389 F.2d 778 (Ct. Cl. 1968).

Also relating to the subject of land were ANCSA sections 18 and 19, which respectively repealed the 1906 Native Allotment Act and revoked all but one of the reservations that had been established in the State by various means between 1891 and 1943. 43 U.S.C. §§ 1617 and 1618. Under section 19, the Village Corporation formed by each village located within a revoked reserve had the option of taking full surface and subsurface title to its former reserve in lieu of the surface estate acreage to which it would

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Ahtna, Inc., and Chugach Natives, Inc. Arnold, supra n. 14, at 259.

<sup>212</sup> See discussion of Alaska Native Townsite Act, infra nn. 237, 306, 307.

otherwise have been entitled. 43 U.S.C. § 1618. The acreage transferred to the seven villages,<sup>213</sup> located on five reserves, that did elect to take title to their former reserves amounted to roughly 3.7 million acres, which were conveyed in lieu of land and cash under the otherwise applicable provisions of the statute.<sup>214</sup>

Another important aspect of ANCSA was creation of the statutory structure by which Congress sought to reconcile the Natives' land claims with those of other potential land claimants, both private and public. This legislative reconciliation is expressed through three basic statutory mechanisms. First, the conflicts between Native claims and the State of Alaska's land selection rights under the Statehood Act were resolved both as to location and priority. Under ANCSA, neither Village nor Regional Corporations were given as much freedom as the State enjoyed to select public domain land anywhere in the State on the basis of its economic value or other criteria, without regard to its location. Instead, the areas available for Native Corporation selections were limited to those locations withdrawn by Congress or the Secretary. ANCSA §§ 11(a), 16(a), 43 U.S.C. §§ 1610(a), 1615(a). Each Village Corporation, however, was entitled to select up to 69,120 acres of land within its withdrawal area which had been previously selected by, but not yet patented to, the State. ANCSA §§ 11(a)(2), 12(a), 43 U.S.C. §§ 1610(a)(2), 1611(a).

A second major accommodation of third party interests in land incorporated into ANCSA was that represented by the reconveyance obligations imposed on Village Corporations pursuant to section 14(c). 43 U.S.C. § 1613(c). This section established the rights of Native and non-Native residents, business operators, subsistence campsite users, reindeer herders, nonprofit corporations, Municipal Corporations, and the government agencies operating airports to receive reconveyance of lands which they

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<sup>213</sup> The seven were Venetie, Arctic Village, Tetlin, Gamble, Savoonga, Elim and Klukwan. In Klukwan's case, a subsequent amendment to ANCSA allowed the Village Corporation to belatedly select land under § 16, and thereby in effect side-stepped an original election made by Klukwan under § 19. See § 9 of the Act of January 2, 1976, Pub. L. No. 94-204, adding subsection (d) to 43 U.S.C. § 1615; and § 1 of the Act of October 4, 1976, Pub. L. No. 94-456, amending the newly-added subsection 16(d).

<sup>214</sup> A special appropriation of \$100,000 to each of the corporations which opted out of the cash portion of the claims settlement by their election to take full surface and subsurface title to their former reservations under ANCSA § 19 was subsequently enacted as § 14 of the Act of January 2, 1976, Pub. L. No. 94-204, 89 Stat. 1154.

actually occupied. Section 14(c)(3) entitled a Municipal Corporation to a reconveyance of title to improved lands, appropriate rights-of-way, and lands for community expansion and other foreseeable community uses. 43 U.S.C. § 1613(c)(3).

Finally, provisions such as ANCSA sections 14(g) and 22(b) and (c) were inserted in the Act to assure that the Native Corporations' selections would not be construed to invalidate prior claims validly initiated under other laws. 43 U.S.C. §§ 1613(g) and 1621(b) and (c). Among these were over 9000 Native allotment applications filed prior to ANCSA's passage. ANCSA § 18, 43 U.S.C. § 1617.

ANCSA also provided for submission of a number of reports. Section 2(c) required the Secretary of the Interior to prepare and submit to Congress within 3 years a study of all federal programs designed to benefit Alaska Natives. 43 U.S.C. § 1601(c). Section 23 called for the Secretary to submit annual reports on the implementation of the Act through 1984 to be culminated in 1985 with a report on the status of the Natives and Native groups in Alaska, and a summary of actions taken under the Act. 43 U.S.C. § 1622. In addition, sections 7(o) and 8(c) required annual audit reports from the Native Village and Regional Corporations. 43 U.S.C. §§ 1606(o) and 1607(c).

## 2. Key Provisions

### a. Use of Newly-Created Corporate Entities as the Vehicles for Implementing the Settlement

One of ANCSA's most significant departures from the government's past practice in resolving Indian or Native land claims was the choice made to deliver compensation and land title to corporate entities organized under state law, rather than directly to, or in trust for the benefit of, traditional tribal groups. Sections 7(d) and 8(a) required the incorporation of Regional and Village Corporations, and sections 14(h)(2) and (3) allowed for

incorporation of Native Groups<sup>215</sup> and of Urban Corporations for Native residents of four named cities,<sup>216</sup> all for the purpose of receiving the land title and other benefits to be conveyed under the Act.

ANCSA as enacted was the result of a substantial rewrite by the members of the Conference Committee. As they explained in their Joint Statement:

The language agreed upon by the managers is the result of long and careful consideration of the House passed bill and the Senate's amendment in the nature of a substitute to the House passed bill. The House bill and the Senate amendment were in major respects substantially different and the conference report -- the compromise between the two measures -- is in some respects different from the measures passed by the House and the Senate. The conference report is the final product of nine days of meetings by the conference committee since November 30, 1971.

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The conference report reflects a willingness on the part of the individual conferees after careful study of the issues involved to concur in the clear necessity for adoption of a settlement package, while reserving the right of all Members of Congress to debate further, at another time and in connection with other legislation, their individual views on some of the specific policies which are of necessity incorporated in this complex omnibus settlement.

S. Conf. Rep. No. 581, 92d Cong., 1st Sess. 34 (1971) (emphasis in original).

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<sup>215</sup> A Native Group is "any tribe, band, clan, village, community, or village association of Natives in Alaska composed of less than twenty-five Natives, who comprise a majority of the residents of the locality." ANCSA § 2(d), 43 U.S.C. § 1602(d).

<sup>216</sup> In contrast to Regional and Village Corporations which were entitled to direct and indirect distributions of cash from the Alaska Native Fund pursuant to §§ 6 and 7(j)-(m), only land conveyances to the Native Groups and the named Urban Corporations were originally authorized. Special one time cash grants to the §§ 14(h)(2) and 14(h)(3) entities were later authorized by amendment. Pub. L. No. 96-487, § 1413, 94 Stat. 2498 and Pub. L. No. 94-204, § 14(a), 89 Stat. 1154.

In particular, the final congressional decision to confer the land and other benefits of the settlement exclusively on state-chartered corporations was the result of a compromise between the approaches in the Senate and House passed bills:

The Conferees retained the provisions of the House bill providing for twelve Regional Corporations and a Village Corporation for each Native Village, but made one addition and one modification. The addition is the option of the Natives who are not permanent residents of Alaska to organize a 13th Regional Corporation which will receive and administer their share of the \$962,500,000 grant. The modification is the restriction of membership in the Village Corporations to Natives, rather than all residents.

Id. at 39 (emphasis added).

The above report language in a sense understates the difference between the House and Senate bills. Section 12 of the House-passed bill, H.R. 10367, called for conveyance of lands and other benefits to "any native village . . . which is an incorporated native village," and section 3(h) defined "incorporated native village" as one "incorporated as a governmental unit under the laws of the State of Alaska." Thus, under the House version, the Village Corporations would have been multi-racial institutions from the day of their formation. In contrast, section 15 of S. 35, the more complex Senate bill, provided for conveyance of lands to Village Corporations, defined in section 3(o) as "organized under the laws of the State of Alaska to hold, invest, manage and distribute lands, property, funds, and other rights and assets for and on behalf of a Native Village." That ANCSA as enacted adopts the Senate's approach is confirmed by the Conference Report, which explains that section 8, 43 U.S.C. § 1607, of ANCSA:

[W]as drawn from section 11 of the Senate amendment. The House bill provided for land and revenue grants to units of municipal government, or to Village Corporations. Under the conference report, before any lands may be granted an eligible village must organize as a non-profit or business for profit corporation to hold title to lands.

Id. at 42.

Over the five year period that settlement bills were before the Congress, a number of different organizational entities or institutions had been proposed as vehicles for the settlement, but the corporate model utilized in the final enactment came under consideration fairly early in the legislative process, and eventually prevailed. The earliest bills would have allowed a

very broad and inclusive range of organizational entities to assert claims, or receive title.<sup>217</sup> The original 1967 administration bills<sup>218</sup> provided for the grant "to each tribe, band, clan, village, community or group of natives in Alaska" of title to its village site and other lands used and occupied by the group, with group membership to be determined by the Secretary. The Natives' bills<sup>219</sup> authorized claims by "any tribe, band, village, community, association or other identifiable group of Indians, Aleuts or Eskimos of Alaska, resident in Alaska, including identifiable groups of residents of a locality." Both these original formulations were certainly inclusive enough to allow for granting land title directly to IRA and traditional village councils, and few would question the proposition that Congress could have made such governmental entities the vehicle for the settlement. In ANCSA, Congress did not choose to do so.

Instead, beginning with the various bills introduced in 1968, conferring the benefits of the settlement on some sort of incorporated entity was a common theme.<sup>220</sup> It appears to have been a consensus point reached by a Governor's Task Force formed in late 1967, which included substantial Native representation.<sup>221</sup> The bill developed by the Task Force, S. 2906, 90th Cong., 1st Sess., was one of the first to include the corporate concept. Both reports and witness testimony offered to the Senate Committee on Interior and Insular Affairs in a February 1968 hearing reflected a basic endorsement of such an approach.<sup>222</sup> A draft of the Task Force Commentary explained the new approach as follows:

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<sup>217</sup> Section 1(c) of S. 2690, 90th Cong., 1st Sess., for example, defined a claimant as "any tribe, band, village, community, association, or other identifiable group of Indians, Aleuts, or Eskimos of Alaska, resident in Alaska, including identifiable groups of residents of a locality." Section 3(a) of S. 1964, 90th Cong., 1st Sess., contains similar language.

<sup>218</sup> The identification of S. 1964 and S. 3586 as administration bills comes from the "Comparative Analysis of Land Claims Settlement Proposals" prepared by the Federal Field Committee as a supplement to Alaska Natives and the Land, *supra* n. 17, at 6.

<sup>219</sup> This characterization of S. 2020 and S. 2690 is stated in Alaska Natives and the Land, *supra* n. 17, at 7.

<sup>220</sup> Arnold, *supra* n.14, at 153.

<sup>221</sup> *Id.* at 119-20.

<sup>222</sup> See generally, 1968 Hearings, *supra* n. 206.

The aim of this chapter is to establish a form of business corporation by which the native beneficiaries of the state and federal acts can engage in business enterprise under conditions of modern commercial and corporate law.

The basic model is the general business corporation contemplated by existing Alaska law, which in turn is based on the Model Business Corporation Act. A number of sections then alter this basic form so that certain safeguards are provided against the dissipation of native assets, and so that the benefits of the corporate assets, for several generations to come, will be made available only to proper native beneficiaries. There are also provisions whereby there can be distributions of assets to natives under conditions not normally encountered in an ordinary business corporation.

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The Task Force views this chapter as embodying the best current thought on how native businesses should be conducted. It would place these enterprises on a modern and businesslike footing, but would permit these corporations to serve native group needs adequately.<sup>223</sup>

Some insight as to the Natives' reasons for supporting such an approach can be gleaned from the testimony presented to the Senate Committee, which reflected a desire on the part of Native spokesmen for economic self-determination, and in particular to be freed from the heavy hand of BIA supervision of their economic activities.<sup>224</sup> By the time passage had become a realistic pros-

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<sup>223</sup> Task Force Commentary Draft of February 24, 1968, reprinted in 1968 Hearings, supra n. 206, at 109-10.

<sup>224</sup> For example, Willie Hensley, chairman of both the Alaska Federation of Natives Land Claims Task Force, and the task force appointed by the Governor, reported the view of the Governor's Task Force that "the use of the corporate form would enable the village and regional groups to participate in the modern economy." Statement of William L. Hensley, reprinted in 1968 Hearings, supra n. 206, at 65. See also the remarks of Byron I. Mallott, then AFN Second Vice-President:

[T]he native people have arrived at the point where we can pick up the reins, as it were, and move forward and make these corporate provisions in Senate Bill 2906 work to the betterment of Alaska natives.

pect, the concept that some sort of entity incorporated under state law would be the settlement vehicle was a common feature of all the bills.<sup>225</sup> At the intermediate stage, some bills provided for village councils to exercise the villages' land selection rights,<sup>226</sup> although title was then to be conveyed to corporate entities, but by the final year of consideration both the House and Senate versions that were taken to conference provided for

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1968 Hearings, supra n. 206, at 52 and his prepared statement as well:

The corporate provisions of S. 20906 [sic] providing for the establishment of village, regional corporations, and a statewide corporation owned and operated solely by, and for the betterment of Alaska's natives-I submit will, if make reality, be one of the most significant development stories in Alaska's history. With this opportunity the natives will prove conclusively their worth as productive citizens both to the State of Alaska and to the Nation. Freed of their own volition and by their accomplishments, from dependency upon the Government, the native of Alaska will be able to take his rightful place in this Nation and the Government will be freed from this haunting responsibility in a nation of plenty.

Id. at 55.

<sup>225</sup> Some of the earlier bills allowed either incorporation under the IRA or under state corporation law. Section 11(a) of the October 21, 1971 version of S. 35, 92d Congress, 1st Sess., the primary bill developed by Senator Jackson's Interior Committee in 1971, provided for organization of villages as nonprofit membership corporations under Alaska law. ANCSA itself as eventually passed, wound up allowing incorporation of a village as either "a business for profit or nonprofit corporation," 43 U.S.C. § 1607(a). None of the villages went the non-profit route because they were advised that such an organizational form would present corporate law obstacles to the distribution of dividends to their members. Arnold, supra n. 14, at 198.

<sup>226</sup> Section 11 of the October 2, 1969 version of S. 1830, 91st Cong., 1st Sess., for example, provided for exercise of selection rights by a recognized village governing body, but § 12(b) provided that lands could only be conveyed when "such village organizes as a corporation, or otherwise qualifies to own real property."

entities incorporated under state law to both select and receive title to the lands to be conveyed.<sup>227</sup>

The corporate mechanism was fully consistent with relevant parts of the section 2(b) policy declaration, which stated that:

[T]he settlement should be accomplished . . . in conformity with the real economic and social needs of Natives, . . . with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges . . . .

43 U.S.C. § 1601(b).

ANCSA's requirement that villages incorporate under state law thus reflects a rejection of both an immediate commitment to non-Native institutions, such as H.R. 10367 would have required, and a rejection of the idea of utilizing pre-existing Native institutions as the organizational vehicles for the settlement.

However, the approach adopted in ANCSA was clearly a transitional one. The corporations, exclusively Native-owned at the time of their initial organization, were not required to remain so. Although corporate control was to be vested exclusively in Native shareholders for the first 20 years, section 7(h) of the original Act provided that voting stock would become freely alienable at the end of that period, and expiration of the original partial exemptions from state and local real property taxation after 20 years was also provided for in section 21(d). 43 U.S.C. § 1620(d).

#### b. Revocation of Reservations

A total of 23 reserves created between 1891 and 1943 were still in existence in 1971, two established by statute, six pursuant to the IRA, and the remainder by Executive Order.<sup>228</sup> In total these

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<sup>227</sup> Section 11 of S. 35, 92d Cong., 1st Sess., dictated that non-profit membership corporations be organized under Alaska law; § 12 of H.R. 10367, 92d Cong., 1st Sess., required villages to incorporate as governmental units under state law.

<sup>228</sup> Arnold, supra n. 14, at 106; Alaska Natives and the Land, supra n. 17, at 438 and 443-46; see generally Case, supra n. 50, at 83-129.

reserves encompassed a little over four million acres, or slightly more than one percent of the land in Alaska.

With one exception, section 19(a) of ANCSA revoked all of these reserves:

Notwithstanding any other provisions of law, and except where inconsistent with the provisions of this Act, the various reserves set aside by legislation or by Executive or Secretarial Order for Native use or for administration of Native affairs, including those created under the Act of May 31, 1898 (52 Stat. 593), are hereby revoked subject to any valid existing rights of non-Natives. This section shall not apply to the Annette Island Reserve established by the Act of March 3, 1891 (26 Stat. 1101) and no person enrolled in the Metlakatla Indian community of the Annette Island Reserve shall be eligible for benefits under this Act.

43 U.S.C. § 1618(a).

ANCSA's legislative history confirms the evident statutory intent that after enactment there was to be no reservation or trust relationship between the United States and Alaska Native groups with respect to ANCSA lands, such as exists between the government and many Indian tribes in other states. The Joint Statement of the Conference Committee makes the point in unmistakable terms that "lands granted to Natives under this Act [are not to be] considered 'Indian reservation' lands for purposes other than those specified in this Act. The lands granted by this Act are not 'in trust' and the Native villages are not Indian 'reservations.'" S. Conf. Rep. No. 581, 92nd Cong., 1st Sess. 40 (1971). The same point had been emphasized in the final House Report:

The [ANCSA] bill does not establish any trust relationship between the Federal Government and the Natives. The regional corporations and the village corporations will be organized under State law, and will not be subject to Federal supervision except to the limited extent specifically provided in the bill. All conveyances will be in fee -- not in trust.

H.R. Rep. No. 523, 92nd Cong., 1st Sess. 9 (1971).

There were no relevant differences between the Senate and House bills on this crucial point. As enacted, section 19 comes primarily from the House-passed bill rather than the more complex Senate version. S. Conf. Rep. No. 581, *supra*. But the House and Senate bills and the final Conference Committee version all had in common an unambiguous rejection of the reservation system or any categories of trust or restricted land.

Like the decision to utilize corporations rather than village entities as the vehicle for the land claims settlement, the choice to do away with the reservation system was one proposed and endorsed by the Native leadership relatively early on. The possibility of getting the executive branch to create more reservations under authority of section 2 of the Alaska Amendment to the IRA, 25 U.S.C. § 473a, had been considered and rejected by the Native leadership as a possible alternative to settlement legislation before the first land claims bill was even introduced.<sup>229</sup> Reservations were viewed with disfavor because land held in trust by the United States could not be leased, developed, or sold without government permission.<sup>230</sup> The reservation model was viewed by the Native leadership as incompatible with maximum economic self-determination.

The Alaska Federation of Natives (AFN), from the time of its inception in 1966, had as a primary goal the enactment of federal legislation to protect Native land rights by some mechanism other than by placing large tracts into trust status. Towards that end the original AFN-supported bill, introduced in 1967, would have authorized the grant to the Natives of complete title to an unspecified acreage.<sup>231</sup> In contrast, the original bill endorsed by the Department of Interior was criticized by Native spokesmen because it called for the Federal Government to hold the land in trust for the villages.<sup>232</sup> Alaska Natives and the Land, the October 1968 report prepared for the Congress by the Federal Field Committee for Development Planning in Alaska, clearly delineated these two approaches to management of lands and other forms of compensation to be given to the Natives in exchange for extinguishment of their more extensive land claims.<sup>233</sup> The two choices under consideration were the grant of assets in trust or the direct transfer of assets to the beneficiary groups themselves. As we have seen, the final decision was to reject the trust model and, in the words of the ANCSA section 2(b) declaration of policy, to settle the Natives' land claims "without creating a reservation system or lengthy wardship or trusteeship."

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<sup>229</sup> Arnold, supra n. 14, at 106.

<sup>230</sup> Id. at 106.

<sup>231</sup> Section 4(b) of S. 2690, 90th Cong., 1st Sess. (1967). It would also have given Native villages the option of receiving land in trust status.

<sup>232</sup> Section 3(e) of S. 1964, 90th Cong. 1st Sess. (1967). See Arnold, supra n. 14, at 119; Alaska Natives and the Land, supra n. 17, at 532, 546.

<sup>233</sup> Alaska Natives and the Land, supra n. 17, at 546.

Tracing the development of the reservation revocation provision of ANCSA down through the claims settlement bills introduced before three successive Congresses reveals relatively little relevant evolution. The chief variations resolved by the final enactment concerned the means of putting the villages located on the revoked reserves on at least equal footing with the substantial majority of other villages in terms of land and money benefits to be received as a result of the settlement. The final legislative solution, of course, gave the newly formed Village Corporations for villages on former reserves the option of either: (1) taking fee title to both the surface and subsurface estate of their former reserve, without sharing in the distribution of cash from the Alaska Native Fund; or else (2) participating fully in the settlement scheme as if no reserve had ever been created for their village in the first place. 43 U.S.C. § 1618(b).

c. Encouragement of Local Government Through State-Chartered Municipalities

One additional feature of the Settlement Act of particular relevance to issues of Alaska Native governmental authority is the provision which ultimately became section 14(c)(3), 43 U.S.C. § 1613(c)(3). That section imposes an obligation on each Village Corporation to reconvey certain acreage to a Municipal Corporation in the Native Village, or to the State of Alaska in trust for any Municipal Corporation which might be organized in the future.

The Conference Committee Report indicates that section 14(c)(3) as enacted was drawn from S. 35, the Senate passed bill. S. Conf. Rep. No. 581, supra at 43. No reconveyance to a state-chartered municipality would have been necessary under H.R. 10367 as it passed the House, because section 12 of that bill would have made the Municipal Corporations themselves the direct recipients of the federal land conveyances to villages. However, the Conference Committee which crafted the final version of ANCSA rejected the idea of making state-chartered municipal governments the organizational recipients of the land claims settlement precisely because the claims being extinguished were Native claims, and municipalities could not be formed or maintained even temporarily as exclusively Native institutions.<sup>234</sup>

In light of the nature of the surrounding reconveyance provisions, section 14(c)(3) can be seen in context as part of the general effort to protect or accommodate not only the land

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<sup>234</sup> Explaining the new provision requiring formation of Village Corporations, the committee highlighted "the restriction of membership in the Village Corporations to Natives, rather than all residents." S. Conf. Rep. No. 581, supra at 39.

rights of Alaska Natives, but those of other users and claimants as well.<sup>235</sup> Nonetheless, concern for the land ownership needs of local governments did differ to some degree from that expressed in regard to other land occupants granted reconveyance rights under section 14(c), in that municipal entitlements were not limited to land already in use. Under section 14(c)(3), each state-chartered municipality, or the State in trust on its behalf, was also granted the right to "as much additional land as is necessary for community expansion . . . and other foreseeable community needs." Satisfaction of this entitlement was enforced by a sizeable minimum acreage reconveyance requirement of 1280 acres, or two square miles.<sup>236</sup>

In the context of a settlement scheme granting exclusively Native-owned Village Corporations extensive surface estate, and mandating their selection of core townships,<sup>237</sup> which comprised the land in and immediately surrounding each village, it is unsurprising that such protections would be provided for local government. Indeed, even though ANCSA section 14(c)(3), 43 U.S.C. § 1613(c)(3), only appeared in its final form as part of the conference committee rewrite on the eve of passage, its provisions were basically consistent with the declared legislative purposes that the settlement be accomplished "without establishing any permanent racially defined institutions." 43 U.S.C. § 1601(b).

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<sup>235</sup> Section 14(c) also required the Village Corporation to convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as of December 18, 1971, as a primary place of residence or business, or as a subsistence campsite, or as a headquarters for reindeer husbandry. 43 U.S.C. § 1613(c)(1). Nonprofit organizations also had certain rights to a reconveyance from the Village Corporation of the surface estate in any tract they occupied on December 18, 1971. 43 U.S.C. § 1613(c)(2).

<sup>236</sup> The mandatory 1280 acre reconveyance requirement was later amended by § 1405 of ANILCA to permit a lesser quantity of land to be transferred if the Village Corporation and the Municipal Corporation or the State in trust could agree in writing on such an acreage reduction. Pub. L. No. 96-487, § 1405, 94 Stat. 2494.

<sup>237</sup> The actual land tenure situation in improved Village sites of roughly one-half of the Native Villages was complicated by withdrawals and conveyances for federal townsites under the Acts of March 3, 1891, 26 Stat. 1099, and May 25, 1926, 44 Stat. 629, formerly codified at 43 U.S.C. §§ 732-736, repealed with a savings clause by §§ 701 and 703 of the Federal Land Policy Management Act (FLPMA) of October 21, 1976, 90 Stat. 2744, 2789-90. The existence and effect of the townsites established under those authorities was not addressed in ANCSA.

Moreover, the concern for municipal government interests reflected in ANCSA section 14(c)(3) is also fully consistent with the congressionally declared policy that:

[N]o provision of this Act shall replace or diminish any right, privilege, or obligation of Natives as citizens of the United States or of Alaska, or relieve, replace, or diminish any obligation of the United States or of the State or [sic] Alaska to protect and promote the rights or welfare of Natives as citizens of the United States or of Alaska.

43 U.S.C. § 1601(c)(3).

Clearly, municipal government is a major institution by which the State of Alaska protects and promotes the rights and welfare of Natives as citizens of Alaska, and just as clearly, Congress took pains in ANCSA section 14(c)(3) to avoid diminishing the effectiveness of that institution.

Further indication of congressional support for State-chartered municipal government is found in the explicit provisos in ANCSA Section 21(d):

Provided, that municipal taxes, local real property taxes, or local assessments may be imposed upon leased or developed real property within the jurisdiction of any governmental unit under the laws of the State: Provided further, That easements, rights-of-way, leaseholds, and similar interests in such real property may be taxed in accordance with State or local law.

43 U.S.C. § 1620(d).

Clearly, Congress took care in ANCSA to accommodate the interests of State-chartered local governments, which it must surely have recognized as local governments of and for Native people, as well as others, in the Native communities dealt with as Native Villages under ANCSA.

d. Amendments

i. Numerous Technical Adjustments to a Novel and Complex Statute

In the twenty-one years since the December 18, 1971, passage of ANCSA, there has been extensive litigation over its

provisions,<sup>238</sup> and Congress has also enacted myriad technical amendments. In general, these amendments have dealt with specific problems encountered by the Natives, the State or the Department of the Interior as they worked to implement the original statutory scheme. By and large the amendments proposed and enacted were the product of the continuing oversight role Congress assumed due to the novel and complex approach that was adopted in ANCSA to deal with the settlement of the Alaska Natives' land claims.

Many amendments dealt with land selection and entitlement questions arising out of a wide variety of unique circumstances encountered by particular Native Corporations. General considerations of equity and practicality, along with other case-by-case factors, have led the Congress to enact amendments affecting the situations of specific Native Corporations on frequent occasions.<sup>239</sup> While some of these provisions absorbed a good deal of legislative attention, none fundamentally altered the overall settlement scheme in any relevant way. No reservations were re-established, and none of the benefits of the

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<sup>238</sup> See, e.g., Sealaska Corporation v. Roberts, 428 F. Supp. 1254 (D. Alaska 1977) (§ 5, enrollment); Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska 1977) (§ 17(b), location, nature and extent of public easements reserved across ANCSA conveyances); United States v. Atlantic Richfield Co., 435 F. Supp. 1009 (D. Alaska 1977), aff'd, 612 F.2d 1132 (9th Cir.), cert. denied, 449 U.S. 888 (1980) (§ 4, extinguishment of aboriginal claims); Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723 (9th Cir. 1978) (§ 7(i), revenue sharing among corporations; surface-subsurface estate distinction). Indeed, Congress has on more than one occasion cited the extraordinary cost and burden of such litigation, and the delays in implementing the Act to which it contributed, in explaining the need for subsequent amendments. See, e.g., § 2(3) of the 1991 Amendments, Pub. L. No. 100-241, 101 Stat. 1788 ("frequent and costly litigation ha[s] delayed implementation of the settlement and diminished its value"); S. Rep. No. 201, 100th Cong., 1st Sess. 20, ("the inordinate and prohibitively expensive amount of litigation engendered by the settlement"); S. Rep. No. 413, 96th Cong., 2d Sess. 237 ("Because there have been unanticipated delays in the conveyance of lands to Native Corporations, the 20-year tax moratorium originally proposed by Congress on undeveloped lands has become much less meaningful").

<sup>239</sup> See, e.g., §§ 9, 10, 11, 12, 14, 15 and 16 of Pub. L. No. 94-204, 89 Stat. 1145; §§ 1 and 3-5 of Pub. L. No. 94-456, 90 Stat. 1934; § 2 and 3 of Pub. L. No. 95-178, 91 Stat. 1369; §§ 1 and 2 of Pub. L. No. 96-55, 94 Stat. 947; §§ 1415-1436, Pub. L. No. 96-487, 94 Stat. 2371; and §§ 13, 15 and 17-21, Pub. L. No. 102-415, 106 Stat. 2112.

settlement were redirected specifically to Native villages as villages.

Congress also enacted a variety of amendments of more general applicability, either to clarify ambiguous provisions of ANCSA, or to respond to unanticipated problems encountered during the implementation process. Issues dealt with by amendments included enrollment,<sup>240</sup> securities law,<sup>241</sup> the cash settlement,<sup>242</sup> and taxation,<sup>243</sup> among others. As already noted with respect to the special provisions affecting only a single Native Corporation, none of these provisions of more general applicability evince any purpose to alter the fundamental scheme established by the Congress in the original 1971 Settlement Act. If anything, Congress took pains to avoid any contrary interpretation. For example, in a section relating to the status of funds in the Alaska Native Fund, the following proviso was included:

Provided, That nothing in this section shall be construed to create or terminate any trust relationship between the United States and any corporation or indi-

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<sup>240</sup> Section 1 of Pub. L. No. 94-204 established a second enrollment period for those who had missed the deadline in 43 U.S.C. § 1604, with the proviso that new enrollments would not affect the allocation of benefits among corporations. 89 Stat. 1145.

<sup>241</sup> Section 3 of Pub. L. No. 94-204, which added a new section to ANCSA, codified at 43 U.S.C. § 1625, temporarily exempting ANCSA corporations from certain federal securities laws, was further amended by section 14 of the 1991 Amendments, 101 Stat. 1811. Section 6 of Pub. L. No. 94-204 added a provision codified at 43 U.S.C. § 1627, governing Native Corporation mergers.

<sup>242</sup> Pub. L. No. 93-153, 87 Stat. 591, accelerated receipt of funds by Native Corporations "in view of the delay in construction of the pipeline," and amended ANCSA § 9 to adjust for the change.

<sup>243</sup> Section 541 of Pub. L. No. 95-600, 94 Stat. 2887, added several new subsections to ANCSA § 21, specifying details relating to tax treatment of various types of corporate income and expenses. ANILCA §§ 904, 1407 and 1408, at 94 Stat. 2434 and 2495-2496 further amended tax-related provisions of ANCSA § 21, and § 12(b) of Pub. L. No. 100-241, 101 Stat. 1810 (the 1991 Amendments) further amended ANCSA §§ 21(a) and 21(j), relating to the tax treatment of Alaska Native Fund distributions and Native Corporation homesite programs.

vidual entitled to receive benefits under the Settlement Act.<sup>244</sup>

The two aspects of the original 1971 settlement scheme most relevant to our analysis, which Congress has substantially modified are: (1) the provisions relating to maintenance of Native control of their corporations; and (2) the provisions relating to protection of the Native land base created by ANCSA.

ii. Stock Alienability Provisions Modified to Allow Preservation of Native Control

Under sections 7(h) and 8(c) of the original Act, Native Regional and Village Corporation stock, initially issued only to enrolled Natives was, subject to certain limited exceptions, inalienable. 43 U.S.C. §§ 1606(h) and 1607(c). Sale, pledge, execution, assignment, or other transfer of the stock, other than upon death, or pursuant to a court decree of separation, divorce or child support, was prohibited. In addition, any non-Native who acquired stock by a permissible means did not also acquire the voting rights which such stock would otherwise carry. However, under the terms of the original Act, and in keeping with the stated objective of section 2(b) not to "establish . . . any permanent racially defined institutions, rights, privileges, or obligations," the restrictions on stock alienation and non-Native voting were to expire on January 1, 1992. 43 U.S.C. § 1606. This fact was a source of concern to Native corporations and their shareholders alike. There was a fear that with the potential loss of Native stock ownership, Natives were at risk of indirectly losing control and ownership of corporate<sup>245</sup> lands and resources viewed as crucial to both their economic advancement and continued access to subsistence resources.

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<sup>244</sup> Pub. L. No. 94-204, § 5, 89 Stat. 1147-1148. See also substantially identical language included in § 2 of the same statute, which established an escrow account for revenues received by the Federal Government with respect to lands withdrawn for selection and conveyance to Native Corporations. 89 Stat. 1146. Congress has also included analogous language in amendments relating to the land entitlements of particular Native Corporations. See, e.g., Pub. L. No. 94-456, § 1, 90 Stat. 1934, relating to Chilkat Indian Village, and ANILCA §§ 1430(f)(4), 94 Stat. 2532-33, relating to Chugach Natives, Incorporated.

<sup>245</sup> Of course, Native Corporation lands had been subject to voluntary and involuntary disposal from the day they were first conveyed, without any restrictions, or requirements of federal review or approval. See further discussion in Part IV.C.2.d.i., infra.

In response to this concern, Congress revisited the issue in 1980, and included amendments to the original scheme in section 1401 of the ANILCA. Section 1401 amended section 7(b) of ANCSA to give Native Corporations significant new tools which they could use to defend against the perceived threat of loss of corporate control by Native shareholders. Specifically, section 1401 authorized Native Corporations to amend their Articles of Incorporation prior to December 18, 1991, upon the affirmative vote of a majority of voting shares outstanding, to permanently preclude exercise of voting rights by stockholders who were neither Natives nor descendants of Natives. It also allowed amendments to a corporation's Articles of Incorporation which would grant the corporation and a stockholder's immediate family a first right to purchase his stock prior to any form of voluntary or involuntary transfer.

However, the opportunity presented by section 1401 was not widely utilized in the years following its 1980 passage, and the question of preserving Native corporate control again became a focus of attention in connection with congressional consideration of the 1991 Amendments, which were ultimately enacted as the "Alaska Native Claims Settlement Act Amendments of 1987," Pub. L. No. 100-241, 101 Stat. 1788 (1991 Amendments). Relevant portions of the congressional findings and declaration of policy, at section 2, provide as follows:

(4) Natives have differing opinions as to whether the Native Corporation, as originally structured by the Alaska Native Claims Settlement Act, is well adapted to the reality of life in Native villages and to the continuation of traditional Native cultural values;

(5) to ensure the continued success of the settlement and to guarantee Natives continued participation in decisions affecting their rights and property, the Alaska Native Claims Settlement Act must be amended to enable the shareholders of each Native Corporation to structure the further implementation of the settlement in light of their particular circumstances and needs;

(6) among other things, the shareholders of each Native Corporation must be permitted to decide--

(A) when restrictions on alienation of stock issued as part of the settlement should be terminated, and

(B) whether Natives born after December 18, 1971, should participate in the settlement;

(7) by granting the shareholders of each Native Corporation options to structure the further implementation of the settlement, Congress is not expressing an opinion on the manner in which such

shareholders choose to balance individual rights and communal rights.

43 U.S.C. § 1601 note.

A detailed review of the extensive substantive rewrite of the stock-related provisions of ANCSA, enacted as sections 4 through 9 of the 1991 Amendments is not required, but it should be noted that they are indeed essentially consistent with the above-quoted declared statutory policy. Section 4 of the 1991 Amendments allows for the issuance of additional stock to Natives born after ANCSA was passed, or over the age of 65, or eligible but not enrolled pursuant to the enrollment provisions of ANCSA. 43 U.S.C. § 1606(g). Section 5 creates another exception to the restrictions on stock alienability to permit stockholders to make inter vivos transfers to certain relatives, and section 6 extends the amended provisions of ANCSA sections 7(g), (h) and (o) to Village Corporations, Urban Corporations, and Group Corporations. 43 U.S.C. §§ 1606(g), 1607(c).

But the most salient change effected by the amendments was the change in the duration of alienability restrictions on Native Corporation stock. Instead of merely permitting individual Native Corporations to extend the alienability restrictions on their own stock, as ANILCA section 1401 had done, section 8 of the 1991 Amendments provided that such restrictions would automatically continue indefinitely, unless and until a Native Corporation might choose to act affirmatively to amend its Articles of Incorporation to provide otherwise.<sup>246</sup> Procedures for consideration of amendments to Articles of Incorporation, and special rules governing dissenter's rights were also set forth in sections 7 and 9 of the 1991 Amendments. 43 U.S.C. §§ 1629b, 1629d.

Thus, the 1991 Amendments do in effect represent a reversal of Congress' original plan for a scheduled expiration of the uniquely Native character of the corporations formed pursuant to ANCSA. However, they do not disturb the original 1971 scheme under which benefits of the land claims settlement devolved upon corporations organized under state law, rather than Native governmental entities. The 1991 Amendments, for all the specialized rules and corporate reorganization options they may prescribe or authorize, do not alter the character of Native Corporations as non-governmental business organizations.

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<sup>246</sup> 43 U.S.C. §§ 1629c(a) and (b). An exception to this so-called "opt-out" procedure, which applied to most Native Corporations under 43 U.S.C. § 1629c(b), was made for the Bristol Bay and Aleut Regions and their Village Corporations. 43 U.S.C. § 1629c(d).

### iii. Provisions for Protection of the Native Land Base

Under ANCSA, lands, including former reserves, were conveyed to Native Corporations and others in fee simple status, not in trust or restricted status. The primary original limitation to this approach was the provision for a transitional 20-year moratorium on property taxation of undeveloped ANCSA lands. ANCSA § 21(d), 43 U.S.C. § 1620(d). As it did with the original temporary provisions relating to the corporate control issue, Congress has seen fit through a series of statutory amendments to broaden the scope and extend the period of applicability of special federal protections for Native Corporation land.

The first such amendment, relating to the original limited property tax moratorium, was section 904 of ANILCA, which merely altered the beginning date of the twenty-year tax exempt period from the December 18, 1971 date of passage of ANCSA, to a date twenty years after vesting of title or conveyance of the particular undeveloped parcel. 43 U.S.C. § 1620(d). However, ANILCA also provided the opportunity for Native Corporations and other ANCSA land recipients to obtain a much more extensive package of protections for their fee lands. The Alaska Land Bank provisions enacted as section 907 of ANILCA permitted a landowner to obtain additional immunities for its undeveloped lands by entering into a cooperative management agreement with federal or state land management agencies holding adjacent lands, subject to certain specified terms placing significant limitations on the landowners' use of covered lands for a period of ten years. 43 U.S.C. § 1636. In exchange, said lands were to enjoy, in addition to a tax exemption, immunities from adverse possession, or judicial enforcement of judgments, so long as they were included in the Land Bank Program. 43 U.S.C. § 1636(c).

In practice, the ANILCA Land Bank Program proved difficult to implement, with only two agreements executed by 1987.<sup>247</sup> As a result, Congress elected to provide a simpler mechanism for achieving the same ends in the 1991 Amendments. Instead of requiring the negotiation and execution of a Land Bank Agreement to trigger the available protections, Congress broadened them somewhat<sup>248</sup> and made them automatically applicable to all

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<sup>247</sup> S. Rep. No. 201, 100th Cong., 1st Sess. 36 (1987).

<sup>248</sup> Generally, the number of categories of possible creditors' rights from which undeveloped ANCSA lands are protected was increased to explicitly include bankruptcy and other insolvency laws, and involuntary corporate dissolutions. A change in the wording of the tax exemption clause was also made. Where the 1980 ANILCA version had protected against real property taxes and assessments by "the United States, the State, or any political

undeveloped ANCSA lands not leased or sold to third parties, with or without a Land Bank Agreement, and also without regard to whether they were reconveyed to a Settlement Trust.

Section 10 of the 1991 Amendments, authorizing a state-chartered Settlement Trust option, was enacted "[t]o accommodate the desire of certain Native Corporations to transfer a portion of their assets out of the corporate form."<sup>249</sup> This Settlement Trust option simply permits an ANCSA corporation to convey assets, not including subsurface estate, to a trust established and administered in accordance with state law, "to promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives." 43 U.S.C. § 1629e. It does not provide additional federal statutory protections for ANCSA corporation assets, but does explicitly authorize the utilization of state trust law mechanisms to insulate transferred assets from most claims which might be asserted against the property of the transferor Native Corporation if still in the corporation's hands.

This Settlement Trust option was not included in the bill that originally passed the House in both 1986 and 1987.<sup>250</sup> Instead, it was inserted in the Senate as a substitute for a provision, approved twice by the House, but dropped from the final bill, which would have authorized transfer of ANCSA Native Corporation assets to so-called "qualified transfer entities" (QTE's). As a means of assuring preservation of Native land ownership, section 7 of the House-passed bills<sup>251</sup> authorized the Native Corporations to transfer some of their lands to QTE's without complying with those provisions of Alaska corporate law which require shareholder action when a corporation transfers all or substantially all of its assets, and which recognize dissenter's rights. The idea was that the corporations could protect their assets by using this provision to transfer their land or some of it to an IRA or

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subdivision of the State," the clause in the 1991 Amendments provide for exemption from "real property taxes by any government entity." 43 U.S.C. § 1636(d)(1)(A)(ii).

<sup>249</sup> ANCSA § 39(b), 43 U.S.C. § 1629e(b), added by § 10 of the 1991 Amendments, Pub. L. No. 100-241, 101 Stat. 1804-06.

<sup>250</sup> S. Rep. No. 201, 100th Cong., 1st. Sess. 35 (1987).

<sup>251</sup> H.R. 4162, 99th Cong., 2d Sess. (1986); H.R. 278, 100th Cong., 1st Sess. (1987).

traditional Native village council possessing immunities under general principles of Federal Indian law.<sup>252</sup>

During the hearings leading to the 1991 Amendments, a great deal of the testimony was related to concerns over the possible existence of Indian country in Alaska and the existence of village governmental powers.<sup>253</sup> Ultimately, Congress expressly declined to address the issue. The congressional findings and declaration of policy section of the 1991 Amendments provided that no provision shall:

[C]onfer on, or deny to, any Native organization any degree of sovereign governmental authority over lands (including management, or regulation of the taking, of fish and wildlife) or persons in Alaska . . . .<sup>254</sup>

In commenting on this provision in the section-by-section analysis of its report, the Senate Committee on Energy and Natural Resources stated:

Although this section is largely self-explanatory, the Committee is aware that there is a controversy in Alaska over the issue of Native sovereignty; i.e., whether there are tribal entities in Alaska . . . that can exercise governmental authority over lands and individuals in Alaska. . . .

The finding set forth in section 2(8)(C) of the Committee reported bill states and reiterates, that neither the amendments nor any action taken pursuant to the 1991 amendments affect the sovereignty controversy one way or the other. It is the Committee's clear intent that this bill leave parties in the sovereignty issue, in exactly the same status as if the amendments were not enacted.

This is an issue which should be left to the courts in interpreting applicable law and that these amendments

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<sup>252</sup> See Alaska Native Claims Settlement Act: Hearings Before the House Interior and Insular Affairs Committee, 99th Cong., 1st Sess. 229, 264 (1985). These QTE provisions resulted in considerable debate over whether they would enhance the Natives' argument that there was Indian country in Alaska, and enhance the arguments for Native sovereignty contrary to Congress' desire to remain neutral on the issue. See also, infra n. 293.

<sup>253</sup> Id.

<sup>254</sup> Section 2(8)(B), 101 Stat. 1789; 43 U.S.C. § 1601 note.

should play no substantive or procedural role in such court decisions.

S. Rep. No. 201, 100th Cong., 1st. Sess. 23 (1987).

Given the debate over the possible governmental powers of the villages which had occurred during the hearings, Congress left nothing to chance in case its findings and declaration of policy were not sufficiently clear. In section 17 of the 1991 Amendments, Congress added a disclaimer to further emphasize its intended neutrality on the issue of Native village powers by providing in part that:

(a) No provision of this Act (the Alaska Native Claims Settlement Act Amendments of 1987), exercise of authority pursuant to this Act, or change made by, or pursuant to, this Act in the status of land shall be construed to validate or invalidate or in any way affect--

(1) any assertion that a Native organization (including a federally recognized tribe, traditional Native council, or Native council organized pursuant to the Act of June 18, 1934 (48 Stat. 987), as amended) has or does not have governmental authority over lands (including management of, or regulation of the taking of, fish and wildlife) or persons within the boundaries of the State of Alaska, or

(2) any assertion that Indian country (as defined by 18 U.S.C. 1151 or any other authority) exists or does not exist within the boundaries of the State of Alaska.<sup>255</sup>

Pub. L. No. 101-241, § 17, 101 Stat. 1788, 1814, 43 U.S.C. § 1601 note.

### C. Analysis

Having set out the history and key provisions of ANCSA, we now turn to the question of the effect of the statutory scheme adopted in this novel statute on the governmental powers of Native villages. We consider, first, whether ANCSA constituted a termination statute that forecloses the exercise of all governmental powers by Native villages. We then consider the effect of ANCSA on village governmental jurisdiction over land and nonmembers.

#### 1. ANCSA as Termination Legislation

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<sup>255</sup> See also S. Rep. No. 201, 100th Cong., 1st. Sess. 41 (1987).

The unprecedented approach and structure of ANCSA has led some to characterize ANCSA as "termination" legislation that forecloses the exercise of governmental jurisdiction by Native villages. In his concurring opinion in the Alaska Supreme Court's recent decision in Nenana Fuel Co. v. Native Village of Venetie, 834 P.2d 1229, 1234 (Alaska 1992), Justice Daniel Moore concludes that "Congress expressly pronounced in its 1971 enactment of ANCSA that no Native Alaska group other than the Metlakatla Indian community of the Annette Island Reserve may be entitled to sovereign tribal status." Id. at 1238.

To evaluate this view, it is appropriate to compare ANCSA with the termination legislation enacted during the so-called termination era of the 1950's and the 1960's. This legislation involved a comprehensive and fundamental approach to ending the relationship between the United States and specific tribes. The experience of this legislation was clearly fresh at the time ANCSA was considered. The last termination act was passed in 1962, only five years before the first versions of ANCSA were introduced in Congress. Terminations under previously enacted legislation occurred as late as 1970. The first legislation restoring a terminated tribe was not enacted until 1973.<sup>256</sup>

#### a. Termination Legislation

On August 1, 1953, Congress adopted House Concurrent Resolution 108, declaring as congressional policy the termination of federal control and supervision over Indian tribes and the freeing of tribes and their members "from all disabilities and limitations specially applicable to Indians." 67 Stat. B132. Individual acts were then passed to implement this policy.<sup>257</sup>

The individual acts followed a fairly standard pattern.<sup>258</sup> Incident to termination, Congress typically provided for fundamental changes in land ownership, requiring sale of tribal land previously held in trust by the United States or transfer of the land to a private trust or state corporation. The federal trust relationship was ended for most purposes. Tribes and their individual members were made subject to state jurisdiction for

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<sup>256</sup> 1982 Cohen, supra n.8, at 811-18. For a more detailed history and analysis of termination legislation, see C. Wilkinson & E. Biggs, The Evolution of Termination Policy, 5 Am. Indian L. Rev. 139 (1977).

<sup>257</sup> Fourteen such termination statutes were enacted involving approximately 100 tribes, bands and California rancherias. 1982 Cohen, supra n. 8, at 811.

<sup>258</sup> These standard provisions are summarized in 1982 Cohen, supra n. 8, at 812-13.

most purposes. Eligibility for special federal services for tribes and tribal members was ended.

Procedurally, termination statutes called for preparation of a final tribal roll and a termination plan to govern implementation of the termination. After a vote of tribal members for the termination plan, the federal-tribal relationship was proclaimed ended by Secretarial proclamation.<sup>259</sup>

The following operative provisions of the Paiute Termination Act, which terminated four bands of Paiute Indians in Utah, are typical of 1950's termination statutes:

Upon removal of Federal restrictions on the property of each tribe and individual members thereof, the Secretary shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to the affairs of the tribe and its members has terminated. Thereafter individual members of the tribe shall not be entitled to any of the services performed for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

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Effective on the date of the proclamation provided for in [this Act], all powers of the Secretary or other officer of the United States to take, review or approve any action under the constitution and bylaws of the tribe are terminated. Any powers conferred upon the tribe by such constitution which are inconsistent with the provisions of [this Act] are terminated. . . .

25 U.S.C. §§ 757, 758(b).

b. ANCSA

ANCSA does parallel termination statutes in significant respects. Because of Alaska's unique history, most of the land title affected by the statute was not held in trust. However, as discussed above, all reservations (save the Annette Islands Reserve) were revoked and all aboriginal claims to land were extinguished. The land provided to the Natives as part of the settlement was provided to Village and Regional Corporations

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<sup>259</sup> Id.

chartered under state law and subject to state jurisdiction for most purposes. Federal responsibility for and supervision of the corporations provided in ANCSA was minimal, indirect and of limited duration.

However, key elements of a 1950's termination statute were not included in ANCSA. ANCSA did not provide for a termination plan, a vote by members on termination, or a Secretarial proclamation of termination. Eligibility of Native groups and individual natives for federal services was not ended. The Secretary's authority over then-existing IRA entities was not ended and the Secretary's authority to issue new constitutions or charters under the IRA was not repealed.

### c. ANCSA Legislative History

The legislative history of ANCSA confirms that it cannot be regarded as a termination statute of the kind enacted in the 1950's. One of the bills considered in the 91st Congress, S. 1830, contained language proposing to terminate federal services to Alaska Natives, if not the entirety of the special Native-federal relationship. Section 4 of the bill provided in part:

(b) (1) The Secretary is authorized and directed, together with other appropriate agencies of the United States Government, promptly to initiate a study and to develop programs for the orderly transition of education, health, welfare, and other responsibilities for the Alaska Native people from the United States to the State of Alaska. Within five years from the date of enactment of this Act, the United States shall cease to provide services to any citizen of Alaska solely on the basis of his racial or ethnic background. . . .

116 Cong. Rec. 24408 (1970) (emphasis added).

When S. 1830 was considered on the Senate floor, Senator Harris offered an amendment to strike this provision. His amendment triggered debate over whether the bill was a termination act.<sup>260</sup> The debate came shortly after President Nixon's 1970 policy statement renouncing the policy of termination and calling for self-determination for all Indian people.<sup>261</sup> One side of the

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<sup>260</sup> 116 Cong. Rec. 24216, 24220-27, 24234-35 and 24378-82 (1970).

<sup>261</sup> President's Message to Congress Transmitting Recommendations for Indian Policy, 6 Weekly Comp. Pres. Doc. 894-905 (July 8, 1970); H.R. Doc. No. 363, 91st Cong., 2d Sess. (1970).

Senate debate focused on whether this provision of the Act rendered it a termination statute. The other side of the debate emphasized that the statute as a whole represented a new approach to the Federal Government's relations with its Indian wards, characterizing the bill as one which provided for self-determination. Toward the close of the floor debates on the entire bill, Senator Allott stated:

Therefore, the underlying concept of the bill is largely one of self-determination by the Natives, but beyond that, it also includes a type of termination of the Federal trustee obligation and assumption of part of those obligations by the State of Alaska.

116 Cong. Rec. 24404 (1970). Senator Harris' amendment was defeated and the language providing for the termination of services remained in the bill as finally passed by the Senate.<sup>262</sup>

When settlement legislation was introduced by Senators Jackson, Gravel and Stevens in the 92d Congress as S. 35, it again contained the termination of services provision.<sup>263</sup> However, when S. 35 went to the Senate floor, it had been revised and the provision for automatic termination of BIA services was no longer included. On November 1, 1971, addressing his colleagues on S. 35, Senator Harris stated that he had opposed the legislation the year before because of the provision for termination of services, that "that matter had been substantially altered" and that there had been substantial improvement toward self-determination. 117 Cong. Rec. 38445 (1970).

Although ANCSA as enacted contained no provision for termination of services, one provision related to the proposed termination did remain. In section 4(b)(1) of S. 1830 and the original S. 35, the automatic termination of services provision was linked to a requirement that the Secretary in cooperation with other agencies, study and develop programs for the orderly transition of responsibility for the programs from the United States to the State. Section 2(c) of the statute as enacted carried forward this thought. It directs the Secretary, together with all other appropriate agencies:

to make a study of all Federal programs primarily designed to benefit Native people and to report back to

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<sup>262</sup> 116 Cong. Rec. 24382 (1970). Because no bill passed the House of Representatives, the Senate-passed bill did not become law.

<sup>263</sup> Alaska Native Land Claims: Hearings on S. 35 and S. 835 Before the Senate Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess. 265-66 (1971).

the Congress with his recommendations for the future management and operation of these programs within three years of the date of enactment of the Act.

43 U.S.C. § 1601(c) (emphasis added). Thus, in the Act as finally passed, the Senate proposal for a study of programs to be followed by automatic termination of services had been replaced by a provision directing the Secretary to make a program study, to be followed by recommendations for "future management and operation" of programs for Natives.<sup>264</sup>

A report in response to section 2(c) was submitted in 1975.<sup>265</sup> However, the report was only a factual report. It contained no recommendations. No immediate congressional action was taken on the report.<sup>266</sup> When Congress enacted the 1991 Amendments it included a provision explicitly calling for the continued provision of services. 43 U.S.C. § 1626(d).

d. Effect of ANCSA

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<sup>264</sup> The study of the status of Natives provided for in § 23 of ANCSA similarly can be viewed as presaging further congressional consideration of the relationship of the United States to Alaska Natives. 43 U.S.C. § 1622.

<sup>265</sup> Secretary Morton by letter of April 22, 1975 submitted to Congress a four-volume report entitled 2(c) Report: Federal Programs and Alaska Natives.

<sup>266</sup> One instance in which Congress did later act specifically to discontinue a program for the benefit of Alaska Natives involved the BIA general assistance program, authorized by the Snyder Act, 25 U.S.C. § 13, and administered in the early 1980's under 25 C.F.R. § 20.21. Congress first attempted to cut-off funds for the program in Alaska in committee report language associated with the FY 1982 Interior and Related Agencies Appropriations Act, Pub. L. No. 97-100, 95 Stat. 1399 (1981). H.R. Rep. No. 315, 97th Cong., 1st Sess. 17 (1981). This cut-off was enjoined in Wilson v. Watt, 703 F.2d 395 (9th Cir. 1983). In bill language in the FY 1985 Interior and Related Agencies Appropriations Act, Congress terminated for that year the BIA general assistance program in Alaska. Pub. L. No. 98-473, 98 Stat. 1848. Identical provisions were included in the Interior Appropriations Acts for FY 1986 (Pub. L. No. 99-190, 99 Stat. 1235); FY 1987 (Pub. L. No. 99-591, 100 Stat. 3341-256); FY 1988 (Pub. L. No. 100-202, 101 Stat. 1329-228) and FY 1989 (Pub. L. No. 100-446, 102 Stat. 1794). The provision was dropped in FY 1990, H.R. Rep. No. 120, 101st Cong., 1st Sess. 53-54 (1989); S. Rep. No. 85, 101st Cong., 1st Sess. 45 (1989) and BIA general assistance was reinstated in Alaska.

As we have discussed earlier,<sup>267</sup> the classic termination statutes were held not to have terminated the tribal existence of the tribes involved. Court decisions also concluded that 1950's termination legislation did not terminate tribal rights and privileges not expressly addressed in the legislation, such as the treaty hunting and fishing rights of the Menominee and Klamath Tribes.<sup>268</sup> Against this background, we cannot conclude that ANCSA, which is a less complete address to the Federal-Native-State relationship, can be construed as completely extinguishing the sovereign powers of Native villages that are tribes. At a minimum, it is clear that ANCSA did not affect the retained governmental powers of these tribes to determine membership and to regulate internal tribal relations.<sup>269</sup> They may also exercise powers delegated to them by Congress, such as authority under the Indian Child Welfare Act. 25 U.S.C. §§ 1901-1963.<sup>270</sup> However, ANCSA contains a very complete address to the issue of land. We now turn to consideration of the effect of ANCSA on native village jurisdiction over land and nonmembers.

## 2. Jurisdiction over Land and Nonmembers after ANCSA

Although we have concluded that ANCSA did not terminate the political government-to-government relationship between the Federal Government and those entities that may qualify as tribes in Alaska, ANCSA did reflect a new approach on an unprecedented scale in defining the relationship between Alaska Natives and the Federal Government. Most significantly, the land and money assets provided in exchange for the extinguishment of Native claims were distributed not to the existing Native organizations, but to entirely new, state-chartered corporate organizations. With the exception of the Annette Islands Reserve for the Metlakatla Indian Community, ANCSA revoked all Native reservations in Alaska. 43 U.S.C. § 1618(a). With only two exceptions, even where there was an existing beneficial interest in reservation lands, the interest in the land was conveyed to

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<sup>267</sup> Part III.B, supra.

<sup>268</sup> Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968); Kimball v. Callahan, 590 F.2d 768 (9th Cir.), cert. denied, 444 U.S. 826 (1979) (Callahan II) (Klamath Tribe). See also, United States v. Felter, 752 F.2d 1505 (10th Cir. 1985) (Mixed-Blood Utes).

<sup>269</sup> See Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548 (9th Cir. 1991) (Venetie II).

<sup>270</sup> See In re Matter of J.M. DOB 02/04/84, 718 P.2d 150 (Alaska 1986) (Kaltag Village Council vested with exclusive jurisdiction as "tribal court" over matter of custody of Indian child).

the newly state-chartered Native Corporations rather than existing IRA or traditional Native village organizations.<sup>271</sup>

We must therefore consider whether the terms of this newly defined relationship are such that the status of the Natives under it has implications for the scope of their powers. We conclude that ANCSA largely controls in determining whether any territory still exists over which Alaska villages might exercise governmental powers. We also conclude that, notwithstanding the potential that Indian country still exists in Alaska in certain limited cases, Congress has left little or no room for tribes in Alaska to exercise governmental authority over land or nonmembers.

We begin our examination by discussing the general principles of Indian law that form the backdrop for our specific inquiry into the effect of ANCSA on Native village powers in Alaska.

a. The Territorial Component of Tribal Powers Generally

The Supreme Court has recognized that "there is a significant territorial component to tribal power." Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 142 (1982); see White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) (Indian tribes retain attributes of sovereignty over both their members and their territory). Generally speaking, the Court has relied upon the concept of "Indian country" to define those territorial boundaries. Indian tribes are "invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress." Merrion, 455 U.S. at 140 (quoting 1879 Senate Judiciary Committee report). Within the limitations that Congress has imposed, "Indian tribes within 'Indian country' . . . possess[] attributes of sovereignty over both their members and their territory." Merrion, 455 U.S. at 140 (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)).

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<sup>271</sup> Because ANCSA did not revoke the Annette Islands Reserve, the Metlakatla Indian Community's beneficial title interest remained unchanged. Although ANCSA did revoke the reservation for the Natives of the Village of Klukwan, the reservation lands were not conveyed to the ANCSA corporation for the Village of Klukwan. Instead, Klukwan became a special case during ANCSA's implementation when Congress amended § 16 of ANCSA in 1976 by adding § 16(d), 43 U.S.C. § 1615(d). As a result, the IRA-chartered "Chilkat Indian Village," organized in 1941 by the Natives of Klukwan, ended up holding fee title to the 897.4 acres of its prior statutory reservation.

In order to address the question of "the nature and scope of so-called governmental powers over lands and non-members that a Native village can exercise after ANCSA,"<sup>272</sup> we examine whether, after ANCSA, there is any Indian country in the State of Alaska, and if so, whether Congress has imposed limitations on the sovereign authority of whatever tribes may exist in the State to exercise tribal powers within that Indian country.

In Indian Country, U.S.A. v. Oklahoma Tax Comm'n, 829 F.2d 967 (10th Cir. 1987), cert. denied, 478 U.S. 1218 (1988), the court summarized the significance of determining whether lands are Indian country:

Although [18 U.S.C.] section 1151 by its terms defines Indian country for purposes of determining federal criminal jurisdiction, the classification generally applies to questions of both civil and criminal jurisdiction. . . . Numerous cases confirm the principle that the Indian country classification is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands. . . . We note that the Supreme Court of Oklahoma has also recognized the importance of this classification:

The touchstone for allocating authority among the various governments has been the concept of "Indian Country," a legal term delineating the territorial boundaries of federal, state and tribal jurisdiction. Historically, the conduct of Indians and interests in Indian property within Indian Country have been matters of federal and tribal concern. Outside Indian Country, state jurisdiction has obtained.

Indian Country, U.S.A. v. Oklahoma Tax Comm'n, 829 F.2d at 973 (emphasis added) (quoting Ahboah v. Housing Auth. of the Kiowa Tribe, 660 P.2d 625, 627 (Okla. 1983)) (other citations omitted); see DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 n.5 (1987); see also Alaska v. Native Village of Venetie, 856 F.2d 1384, 1390 (9th Cir. 1988) (Venetie I).

In general, lands not falling within the classification of Indian country are subject to state jurisdiction. Tribes and tribal members going outside the boundaries of Indian country generally are subject to state jurisdiction, though such state jurisdiction may still be limited. See Mescalero Apache Tribe v. Jones, 411 U.S. 147, 148-49 (1973) (off-reservation tribal activity: state

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<sup>272</sup> See supra p. 1.

could impose gross receipts tax on tribal enterprise, but state could not impose compensating use tax on tribal property). Within Indian country, the Federal Government and tribes generally have primary authority.<sup>273</sup>

Once the threshold determination is made whether the particular lands involved are properly classified as Indian country, the analysis must proceed from the above-stated general principles concerning tribal, federal, and state jurisdiction to the specific facts and law applicable to the particular situation to determine whether Congress has acted to alter the general principles. For example, in Public Law 280, Congress granted to certain states the authority to exercise broad criminal and limited civil jurisdiction over Indians within Indian country. Bryan v. Itasca County, 426 U.S. 373 (1976); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). In 1958, Congress extended Public Law 280 to Alaska. Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (codified as amended at 18 U.S.C. § 1162; 28 U.S.C. § 1360).<sup>274</sup>

#### b. Indian Country and Alaska

Having discussed the general relevance of the concept, we now turn to the language of the statute. In 1948, Congress defined "Indian country" as follows:

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<sup>273</sup> For cases illustrating some of these jurisdictional principles in the Alaska context, compare the companion cases of Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962) (upholding the Federal Government's authority to permit state-prohibited fish traps within the boundaries of the Annette Islands Reserve) and Organized Village of Kake v. Egan, 369 U.S. 60 (1962) (upholding the application of state fish trap laws to off-reservation Indian fishing).

<sup>274</sup> Other examples illustrating that state law is not always excluded from Indian country include Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (permitting state taxation of nonmember lessee) and County of Yakima v. Yakima Indian Nation, 112 S. Ct. 638 (1992) (permitting state taxation of certain Indian fee lands). Conversely, tribal jurisdiction within Indian country is not absolute, and has been limited in certain instances. See, e.g., Montana v. United States, 450 U.S. 544 (1981) (tribe could not regulate nonmember hunting and fishing on individual nonmember and state-owned lands); Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (tribe could zone certain nonmember fee lands on the reservation, but lacked jurisdiction over other nonmember fee lands).

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (emphasis added).<sup>275</sup>

We will address in turn each of the three categories of Indian country, and the relevance of each to Alaska.

### c. Reservations

The term "Indian reservation" generally refers to the territory or specific lands that "Congress intended to reserve for a tribe and over which Congress intended primary jurisdiction to rest in the federal and tribal governments." Indian Country, U.S.A., 829 F.2d at 973. Where formal reservation boundaries exist, all lands within those boundaries are Indian country. 18 U.S.C. § 1151(a); see Seymour v. Superintendent, 368 U.S. 351 (1962). However, no formal designation is required. In the absence of a formal reservation boundary, lands held in trust for the benefit of a tribe qualify as Indian country because they have been "validly set apart for the use of the Indians as such, under the superintendence of the Government." Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 111 S. Ct. 905, 910 (1991); see United States v. John, 437 U.S. 634 (1978). Even when the boundaries of a reservation may have been disestablished, lands remaining in Indian ownership, including tribal fee lands, remain Indian country when there is no clear evidence that Congress intended to divest such lands of their Indian country status. Indian Country, U.S.A., 829 F.2d at 973-75 & n.3 (Creek tribal fee lands held to be Indian country).

In our view, it is beyond question that no reservations exist in Alaska, with the single exception of the Annette Islands Reserve. In section 19 of ANCSA, 43 U.S.C. § 1618, Congress expressly and

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<sup>275</sup> With the exception of a 1949 amendment, 63 Stat. 94, inserting the special exception for §§ 1154 and 1156 (Indian country is defined more narrowly for purposes of Indian liquor laws than for other purposes), Congress has not changed the 1948 definition.

completely revoked all existing reservations in Alaska except the Annette Islands Reserve for the Metlakatla Indian Community in Southeast Alaska.<sup>276</sup> The statutory language satisfies the requirement that Congress explicitly and clearly evince its intent to revoke or diminish reservation boundaries. See Solem v. Bartlett, 465 U.S. 463, 470 (1984). Furthermore, except for the Annette Islands Reserve and a few small and isolated parcels, the United States holds no lands in trust for the benefit of an Alaska Native village.<sup>277</sup>

We recognize that some statutes and regulations do include ANCSA Native Corporation lands, as well as the former reservations of some tribes in the contiguous 48 states, within their definitions

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<sup>276</sup> The Secretary's prospective authority to create Indian reservations in Alaska eventually was also expressly revoked in the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792 (repealing section 2 of the Act of May 1, 1936, 49 Stat. 1250 (formerly 25 U.S.C. § 496)).

In 1978, the Acting Solicitor accepted the conclusion of the Associate Solicitor, Division of Indian Affairs, that although § 5 of the IRA, 25 U.S.C. § 465 (authority to acquire lands in trust for Indians), was not repealed with respect to Alaska, in light of the clear expression of congressional intent in ANCSA not to create trusteeship or a reservation system, it would be an abuse of discretion for the Secretary to acquire lands in trust in Alaska for the Natives of Venetie and Arctic Village. Letter to Donald Wright, Agent, Native Village of Venetie Tribal Government from the Acting Solicitor, Sept. 20, 1978 (enclosing Memorandum to the Assistant Secretary - Indian Affairs from the Associate Solicitor, Division of Indian Affairs, Sept. 15, 1978).

<sup>277</sup> During the 1940's and 1950's, the Government acquired by purchase, and took title in trust to, cannery properties in three Southeast Alaska communities. The BIA has not viewed trust title to these parcels as having been revoked by ANCSA § 19, 43 U.S.C. § 1618, and these lands have not been conveyed to the local Village Corporations under ANCSA § 16, 43 U.S.C. § 1615. BIA views these as valid existing rights under ANCSA § 14(g), 43 U.S.C. § 1613(g). In one case, Kake, both the Department of the Interior and Congress have accepted as fact that the United States holds trust title to the lands. 124 Cong. Rec. 33468 (1978) (remarks of Sen. Stevens and letter, dated September 13, 1978, from Assistant Secretary Gerard to Rep. Morris Udall). Beneficial title to these trust lands is still held by the IRA community and/or association as follows: Angoon (13.24 acres); Kake (15.9 acres); Klawock (1.91 acres).

of reservations for purposes of specific programs.<sup>278</sup> However, in light of the clear congressional expression in ANCSA, we conclude that these limited cases do not evince congressional intent to classify these lands as reservations for general jurisdictional purposes, and are confined to their specific terms.<sup>279</sup>

d. Dependent Indian Communities

A more complex issue is whether there may be lands in Alaska that form a jurisdictional Indian country enclave because they constitute "dependent Indian communities." Although there are tribal fee lands, Native townsites, and Native Corporation lands in Alaska, all of which have some Indian character and some of which fall within the protection of certain federal laws, we conclude that the nature of Native land tenure in Alaska after ANCSA leaves little if any room for finding the existence of a dependent Indian community for purposes of classifying lands as Indian country. Our conclusion is not stated in absolute terms because the test for a dependent Indian community is a highly fact-specific and functional one, resting on a number of variables. Nevertheless, in our view, tribal fee lands, so-called Native townsites, and Native Corporation lands, generally

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<sup>278</sup> Examples include 25 U.S.C. § 1452(d) (Indian Financing Act); 29 U.S.C. § 750(c) (Indian Vocational Rehabilitation Services); 42 U.S.C. § 2992c(2) (Native American Economic Opportunity Programs); 25 C.F.R. § 101.1(h) (Indian Revolving Loan Fund) and § 103.1(h) (Indian Loan Guaranty, Insurance, and Interest Subsidy Program); 34 C.F.R. § 361.1(c)(2) (Vocational Rehabilitation Services); 42 C.F.R. § 36.10 (Indian Health Service Programs); and 48 C.F.R. § 352.270-3(b)(2) (Indian Preference).

<sup>279</sup> In § 2(g) of ANCSA, Congress specified for what purposes ANCSA lands are to be considered "in trust" or as "reservation" lands. As described in the conference report:

Subsection 2(g) of the conference report is to be strictly construed and the conference committee does not intend that lands granted to Natives under this Act be considered "Indian reservation" lands for purposes other than those specified in this Act. The lands granted by this Act are not "in trust" and the Native villages are not Indian "reservations."

speaking, will not qualify as Indian country, as that term is used in 18 U.S.C. § 1151(b).<sup>280</sup>

The phrase "dependent Indian community" is a term of art which, like the term "reservation," reflects congressional intent to classify as Indian country certain lands intended for the use, occupancy, and special federal protection of dependent Indians, over which federal and tribal authority remain primary. The phrase was included within the definition of Indian country to ensure that certain lands not formally designated as a reservation, nor held in trust by the United States, nor even technically reserved by treaty or statute, would nevertheless have Indian country status.

Section 1151(b) essentially codified the results reached and the phrase adopted by the Supreme Court in United States v. Sandoval, 231 U.S. 28 (1913) and United States v. McGowan, 302 U.S. 535 (1938). In Sandoval, the Court held that Pueblo fee lands are Indian country because the Federal Government "regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection." Sandoval, 231 U.S. at 47. In McGowan, the Court held that the Reno Indian Colony, the lands of which were held in trust by the United States but not designated a reservation, was nevertheless Indian country.<sup>281</sup>

In light of the willingness of the Supreme Court to treat tribal trust lands as reservation lands under section 1151(a), notwithstanding the lack of formal designation, see Potawatomi, 111 S. Ct. 905, it is apparent that the distinction between sections 1151(a) and 1151(b) is not always clear. One court has observed that, at least with respect to classifying lands as Indian country, "Indian reservations and dependent Indian communities are not two distinct definitions of place, but definitions which largely overlap." Blatchford v. Gonzales, 100

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<sup>280</sup> As we discuss below, while the lands within the boundaries of a so-called Native townsite would not constitute a dependent Indian community simply by virtue of their Native townsite status, individual Native townsite lots issued in restricted fee to Alaska Natives in some communities may qualify as Indian country under § 1151(c). As discussed supra n. 71, at least one court has held that there is no distinction between so-called Native and non-Native townsites.

<sup>281</sup> The Reno Indian Colony lands were purchased by the United States to provide lands for needy Indians scattered over the State of Nevada. United States v. McGowan, 302 U.S. 535, 537 (1938). Thus, it was neither a reservation in the formal sense of the word, nor was it set aside for a particular historic tribe or tribes.

N.M. 333, 335, 670 P.2d 944, 946 (1983).<sup>282</sup> In each case, the "crucial consideration [is] whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples." Weddell v. Meierhenry, 636 F.2d 211, 213 (8th Cir. 1980) (citations omitted).

In Alaska v. Native Village of Venetie, 856 F.2d 1384 (9th Cir. 1988) (Venetie I), the Ninth Circuit summarized a number of factors that have been developed to determine whether a dependent Indian community exists:

In [United States v.] Martine, [442 F.2d 1022 (10th Cir. 1971)] the Tenth Circuit approved a three-pronged analysis, considering:

- 1) the nature of the area;
- 2) the relationship of the area inhabitants to Indian tribes and the federal government; and,
- 3) the established practice of government agencies toward that area.

442 F.2d at 1023.

In [United States v.] South Dakota, [665 F.2d 837 (8th Cir. 1981), cert. denied, 459 U.S. 823 (1982)] the Eighth Circuit applied a more extensive analysis, including the Martine considerations as well as:

- 1) the degree of federal ownership of and control over the area;
- 2) the degree of cohesiveness of the area inhabitants; and,
- 3) the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples.

665 F.2d at 839.

Venetie I, 856 F.2d at 1391.

In Martine, the court held that certain unrestricted Navajo tribal fee lands, purchased with tribal money, were Indian

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<sup>282</sup> In Blatchford, the New Mexico Supreme Court held that the Yah-Ta-Hey community, located approximately two miles from the Navajo reservation, was not a dependent Indian community. The land at issue was the site of a non-Indian owned "Indian trading post" and other businesses, and was owned in fee title. Notwithstanding the fact that 60 to 70 percent of the community was Indian and was within a "checkerboard" area near the Navajo reservation, the court, relying on McGowan and referring to the factors identified in United States v. Martine, 442 F.2d 1022 (10th Cir. 1971), concluded that the community was not Indian country. Blatchford, 670 P.2d at 949.

country.<sup>283</sup> The lands were located in a checkerboard area<sup>284</sup> known as the Ramah Community near to but outside the boundaries of the Navajo reservation. Based on an examination of the above-cited elements, the court concluded that the area in question was a dependent Indian community. The court made specific mention of the testimony of law enforcement officers and Bureau of Indian Affairs officials as supporting the trial court's conclusion that the lands were Indian country. Martine, 442 F.2d at 1023-24.<sup>285</sup>

In South Dakota, the court held that a tribal housing project located within the original boundaries of the disestablished Lake Traverse Indian Reservation on land held by the United States in trust for the tribe was a dependent Indian community and therefore Indian country. While the decision is useful because of the court's identification of relevant factors for finding a dependent Indian community, we note that in light of Potawatomie, the trust status of the land probably would now be considered a dispositive factor. In fact, the United States contended in South Dakota that the housing project was Indian country under section 1151(a), but the court declined to reach that argument because of its determination under section 1151(b). South Dakota, 665 F.2d at 841 n.9.

It is worth reiterating here that the above factors have been developed by the courts to ascertain the congressional intent underlying the phrase "dependent Indian community." The ultimate question in each case is whether the particular facts and circumstances fit within the congressional scheme intended to protect certain areas under federal and usually tribal control. In that respect, we repeat the guiding principle that Indian country comprises those lands that Congress intended, as a general matter, to be beyond the jurisdictional reach of the state and subject to the primary jurisdiction of the Federal Government and tribes, even though those lands are geographically within the boundaries of a state.

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<sup>283</sup> 25 U.S.C. § 635(b) provides congressional consent for the Navajo Tribe to alienate fee lands, notwithstanding any other provision of law.

<sup>284</sup> A checkerboard area is an area generally on or near an existing or former reservation in which Indian and non-Indian owned lands are interspersed.

<sup>285</sup> It is also worth noting that the Ramah community has a clear history as a distinct and cohesive Indian community associated with the Navajo reservation. Cf. Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832 (1981) (striking down as preempted New Mexico's tax on gross receipts received by non-Indian construction company from Ramah Navajo School Board).

As the Ninth Circuit noted after reviewing the Indian country cases: "the ultimate conclusion as to whether an Indian community is Indian country is quite factually dependent." Venetie I, 856 F.2d at 1391.<sup>286</sup> In his "tentative decision" in Alyeska Pipeline Service Company v. Kluti Kaah Native Village of Copper Center, No. A87-201 Civil, slip op. at 43-45 (D. Alaska, January 17, 1992), Judge Holland recognized that the title to the land in question was held by an ANCSA corporation but found that determining whether the land was Indian country required a complex factual inquiry. As a result he denied the plaintiffs' motion for summary judgment. He found that title was only one factor, albeit a significant one, in determining whether the land was Indian country.<sup>287</sup>

We need not decide here whether title may be a dispositive factor. After consideration of the tests summarized in Venetie I, we have concluded that Native Corporation lands and village-owned fee lands in Alaska do not as a general rule qualify as dependent Indian communities. We acknowledge, as pointed out by the Native American Rights Fund (NARF), one of the groups offering comments in connection with this opinion, that there are many Natives in Alaska who receive federal Indian program services, and who may thus be characterized in certain respects as "dependent" Indians or Native peoples, and that villages qualifying as tribes are "domestic dependent nations" as are tribes in the contiguous 48 states.<sup>288</sup> We also accept, for

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<sup>286</sup> In Venetie I, the State brought an action in federal court to enjoin the village from attempting to enforce a five percent gross receipts tax on a state contractor who was building a public high school in the village. The ANCSA Village Corporations for Venetie and Arctic Village had voted to take their former reservation in fee pursuant to § 19(b) of ANCSA. The Corporations subsequently transferred their interest to the IRA-organized Native Village of Venetie.

<sup>287</sup> This case arose when the Kluti Kaah Village Council enacted a property tax ordinance which by its terms applies to that portion of the Trans-Alaska Oil Pipeline passing through Native Corporation lands. Alyeska, the owners' agent for management of the pipeline, brought suit in federal court, seeking to enjoin enforcement of the taxation ordinance on the grounds, inter alia, that the Village Council was not an Indian tribe with sovereign taxing authority, and that it had no territorial jurisdiction over the pipeline.

<sup>288</sup> We have considered the arguments presented by NARF, reflected in letters submitted to this office, which attached NARF's brief filed in Alaska v. Native Village of Venetie, No. F 87-51 Civ. (D. Alaska) (Opposition to Plaintiffs' Renewed Motion for Summary Judgment), and its draft brief prepared in connection

purposes of this review, that many Alaska Natives live in cohesive Native communities. But cf. Martine, 442 F.2d at 1024 ("The mere presence of a group of Indians in a particular area would undoubtedly not suffice."). We even recognize that in some respects Native Corporation lands in Alaska have been set aside for the Natives, although not "under federal superintendence" as that phrase is understood in determining Indian country.<sup>289</sup> Nevertheless, Congress has treated ANCSA lands in a dispositive way. Our evaluation of all the factors, particularly in light of ANCSA's disposition of lands in Alaska for Natives, and the resulting nature of the land title, leads us to conclude that ANCSA lands, whether currently held by Native Corporations or by tribes, do not constitute dependent Indian communities, and that a contrary conclusion would be inconsistent with the ANCSA scheme.

i. Alaska Native Corporation Lands

In light of Congress' express revocation in ANCSA of Indian reservations in Alaska and the clearly evinced intent not to create a reservation system, we are unable to conclude that the lands that Congress provided for Alaska Native Corporations as part of the settlement constitute dependent Indian communities and thus Indian country. In both legal and practical effect, classifying Native Corporation lands as Indian country would create huge jurisdictional enclaves, presumptively outside the reach of state jurisdiction (except as provided by Congress), set aside for primary federal and tribal jurisdiction. Such a result, in our view, is inconsistent with the will of Congress expressed in ANCSA, notwithstanding Congress' willingness for

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with Alyeska Pipeline Service Co. v. Kluti Kaah Native Village, No. A87-201 Civil (D. Alaska). NARF contends that lands occupied by a tribe are Indian country by definition, regardless of ownership status. We are not persuaded that the ownership status of land can be so easily dismissed, nor that tribal occupancy, even when combined with tribal ownership, necessarily creates Indian country. This seems particularly true with respect to ANCSA lands, because in ANCSA Congress so clearly revoked tribal reservation boundaries and disposed of the lands to entities other than the tribes.

<sup>289</sup> Given the effect of the federal townsite laws, and the reconveyance provisions of ANCSA § 14(c), it is clear that few Native communities are physically located on Native Corporation-owned lands, but given ANCSA's dispositive treatment of these lands, even the presence of such communities on Corporation lands would not alter our conclusion.

limited purposes to treat ANCSA lands as distinct or to afford limited special protection to ANCSA corporations.<sup>290</sup>

Congress created a comprehensive system under ANCSA which did not assert any permanent or even long term federal supervisory control over the land owned or occupied by Native Corporations. Instead, such land has been patented to state-chartered corporations in fee pursuant to ANCSA. The substantive provisions of ANCSA as enacted in 1971 set a schedule for a 20-year transition, at the end of which the Native Corporation stock would be freely alienable, Native Corporation lands could be subject to state taxation, and other federal protections removed.

At the same time, even in 1971, Congress specifically contemplated that adjustments might be necessary and appropriate along the way in order to fulfill the Act's declared intent to effect a settlement "in conformity with the real economic and social needs of Natives." ANCSA § 2(b). Section 23 of ANCSA required annual reports that would be culminated by a 1985 Report. In other words, in 1971 Congress reserved the possibility of continued federal supervision over the settlement, which it exercised to some extent in ANILCA in 1980, and in the 1991 Amendments. Such subsequent adjustments, of course, were constrained by whatever property rights had already vested pursuant to the original Act. Recognizing that Congress provided for continued federal oversight, we nevertheless are not convinced that by reserving and exercising a limited continuing federal role in adjusting and effectuating the settlement, Congress intended to create the type of federal superintendence similar to that exercised over reservations or dependent Indian communities, or that Congress intended that the ANCSA lands would at some point be impressed with the status of Indian country.

This congressional declaration of policy and accompanying statutory scheme completely preclude any finding that under ANCSA, Congress somehow created a trust relationship between the

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<sup>290</sup> Examples of these limited forms of special treatment or protection include: the continued extension of federal forest fire protection services under ANCSA § 21(e), 43 U.S.C. § 1620(e); provision of technical assistance to Native Corporations under § 313 of the National Indian Forest Resources Management Act of 1990, Pub. L. No. 101-630, 104 Stat. 4040, 25 U.S.C. § 3112; the several provisions of ANCSA affording special tax treatment collected in § 21, 43 U.S.C. § 1620, and amendments thereto; and the land bank and settlement trust options afforded respectively by the provisions of ANILCA § 907, 43 U.S.C. § 1636 and ANCSA, as amended by the 1991 Amendments, 43 U.S.C. § 1629e. Both the existence and narrowly targeted focus of these special provisions undercut any argument that the basic thrust of ANCSA has been redirected.

Federal Government and these Native Corporations with respect to their lands.<sup>291</sup> In the absence of such a relationship, there is no basis for concluding that ANCSA corporate landholdings are per se dependent Indian communities simply by virtue of their Native Corporation ownership or their relationship to a Native land claims settlement.

In the 1991 Amendments, Congress did provide substantial automatic protections for undeveloped Native Corporation lands, including open-ended blanket exemptions from adverse possession, real property taxes, satisfaction of debts or judgments, or involuntary corporate dissolutions. 43 U.S.C. § 1636(d). In addition, Congress authorized Native Corporations to establish settlement trusts, in order to obtain additional state-law protection for certain assets, including stock and some categories of undeveloped lands. 43 U.S.C. § 1629e. While these expanded statutory protections reflect continuing congressional interest in protecting the resources granted to the Natives under ANCSA, they fall short of evincing any congressional intent that these Native Corporation fee lands be considered Indian country.<sup>292</sup>

The settlement trust provision permits a Native Corporation to convey assets (including stock or beneficial interests therein) to a settlement trust in accordance with the laws of the State of Alaska. 43 U.S.C. § 1629e. However, invoking or retaining the settlement trust protections is left to the free choice of the Native Corporations, not the Federal Government, and as indicated, the trusts involved are governed by Alaska law.<sup>293</sup>

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<sup>291</sup> See Cape Fox Corp. v. United States, 456 F. Supp. 784, 799 (D. Alaska 1978); see also H.R. Rep. No. 523, 92d Cong., 1st Sess. (1971); S. Rep. No. 405, 92d Cong., 1st Sess. (1971); and Governor's Task Force, supra n. 48, at 128-34.

<sup>292</sup> See supra pp. 104-105 for a discussion of the 1991 Amendments and the congressional disclaimer precluding use of the legislation to either support or refute claims of Native governmental authority in Alaska.

<sup>293</sup> In choosing state law settlement trusts as a vehicle for providing additional protection to Native Corporation lands, Congress rejected an earlier proposal that would have authorized Native Corporations to transfer some of their lands to "qualified transferee entities" (QTE's). The QTE proposal would have created a wholly federal scheme, and would have permitted transfer of lands to IRA or traditional Native villages. See Alaska Native Claims Settlement Act: Hearings Before the House Interior and Insular Affairs Committee, 99th Cong., 1st Sess. 229, 264 (1985). Considerable debate ensued over whether the QTE provisions, which could be viewed as similar to a more

Having granted lands to Native Corporations responsible only to their shareholders and the State, the Federal Government no longer exercises the kind of control and superintendence that led to the findings of dependent Indian communities in Sandoval and McGowan. The present relationship between ANCSA-conveyed Native landholdings and the Federal Government, particularly in light of the express language in ANCSA rejecting lengthy wardship or trusteeship, cannot be characterized as a guardianship or as related to a trust. Because Native Corporations have complete freedom to control their lands, those lands and the Natives located on them cannot be regarded as dependent Indian communities as that term has been understood. It would be anomalous to conclude that Native Corporation lands are the jurisdictional equivalent of reservations, when Congress specifically abolished reservations and designed a comprehensive system of landholdings purposely intended not to be the functional equivalent of reservations. Nor do any of the many and in some cases substantial amendments to the original ANCSA blueprint signal a significant modification or a reversal of the original 1971 Act's effect in this regard.

We do not discount nor minimize Congress' continuing interest and involvement in the affairs of the Native Corporations, but we cannot conclude that the lands conveyed to Native Corporations under ANCSA became, by virtue of that fact, Indian country. Simply put, we do not believe that Congress, in ANCSA or in subsequent legislation, has expressed an intent that Native Corporation lands be classified as Indian country, or has treated

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conventional Federal Indian law form of Indian land protection, would enhance the Natives' argument that the corporation lands were Indian country. See Alaska Native Claims Settlement Act: Hearings on H.R. 4162 Before the House Interior and Insular Affairs Committee, 99th Cong., 2d Sess. 137-78, 189-246 (1985); Amendments to the Alaska Native Claims Settlement Act and the Alaska National Interest Lands Conservation Act and to Establish a Memorial in D.C.: Hearings on S. 2065 (and other bills) Before the Subcommittee on Public Lands, Reserved Water, and Resource Conservation, Senate Energy and Natural Resources Committee, 99th Cong., 2d Sess. 184-96, 223-48, 307-32 (1986); Alaska Native Claims Settlement Act Amendment of 1987: Hearings on S. 1145 and H.R. 278 Before the Senate Subcommittee on Public Lands, National Parks, and Forests, Senate Energy and Natural Resources Committee, 100th Cong., 1st Sess. 151, 157, 165, 249-59 (1987). Shortly before the 1991 Amendments were finalized, the QTE provisions were replaced with the settlement trust option. Particularly in light of Congress' selection of state-chartered settlement trusts over the federal QTE provisions, we are not convinced that this additional Native land protection is analogous to the type of federal protection contemplated in the definition of dependent Indian communities.

these lands and areas in the manner contemplated in the factors summarized in Venetie I.<sup>294</sup>

ii. Village Fee Lands

At least two ANCSA corporations that held former reservation lands have conveyed those lands to a traditional Native entity. See Venetie I., 856 F.2d 1384. In another case, lands not formerly held as a reservation were conveyed to a traditional Native entity. Act of October 20, 1978, Pub. L. No. 95-487, 92 Stat. 1635 (conveyance of lands to Village of Kake in unrestricted fee title).<sup>295</sup> Other villages apparently have acquired or may acquire lands in fee from Village Corporations.

Without a co-existing reservation system or tribal trust lands creating federal jurisdictional enclaves for tribes in Alaska, we are not convinced that the mere acquisition of lands in fee by a Native village confers upon such lands the status of Indian country. Indian country depends primarily upon congressional, not tribal, intent. The ANCSA statutory scheme simply does not permit tribes to create Indian country in Alaska by unilateral action, nor by virtue of such tribal ownership to impose federal restrictions on the land that Congress in ANCSA sought to avoid. The declaration against a reservation system, implemented by the 1971 Act and undiluted by any subsequent amendments, is simply too strong to square with the proposition that tribes in Alaska

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<sup>294</sup> We also note that ANCSA § 14(c)(3), 43 U.S.C. § 1613(c)(3), requires each Village Corporation to convey lands of a specified quantity and character to the Municipal Corporation in the Native village, or to the State in trust for any Municipal Corporation established in the future. Although Congress rejected the option of making state-chartered municipalities the vehicle for the land claims settlement, and did not require Native villages to incorporate as political subdivisions of the State, it did make substantial and universally applicable provisions for state-chartered municipal governments to acquire title to lands in Native villages. In contrast, except as discussed supra p. 84, ANCSA contains no provision making land available to any other local governmental entities for either proprietary or governmental purposes. Such a scheme, while not necessarily dispositive with respect to tribal jurisdiction, appears inconsistent with any congressional intent that the Federal Government and tribes, and not municipal governments, would exercise primary jurisdiction over the lands and territory in and immediately surrounding Native villages.

<sup>295</sup> See 124 Cong. Rec. 32880 (1978) (adoption by House); 124 Cong. Rec. 33467-69 (1978) (consideration and adoption by Senate).

can create unilaterally what Congress sought so clearly to avoid.<sup>296</sup>

### iii. Village-Owned Townsite Lands

There is one unique category of non-ANCSA village fee lands, for which the Indian country question is more difficult. In the past several years, unoccupied lands within federal townsites have been conveyed in fee to 27 Native villages. These 27 villages are not incorporated as state law municipalities. In Aleknagik Natives Ltd. v. United States, 886 F.2d 237 (9th Cir. 1989), the court of appeals affirmed the district court's order requiring the federal townsite trustee to convey to the Native villages of Port Graham and English Bay title to the unoccupied townsite lands in those communities. The decision in effect overruled the Department of the Interior's prior refusal to convey unoccupied townsite lands to any entity other than a municipality organized under state law. As a result of this case, and the townsite trustee's compliance with the decision, the Federal Government has conveyed varying amounts of land in fee to 27 Native villages.

These townsite lands differ significantly from lands owned by ANCSA corporations, or even Native Corporation lands conveyed in fee to an IRA entity or traditional village council. In contrast to those cases, these townsite lands have been conveyed, pursuant to federal law, directly to Native villages in the capacity of local governments. While the townsite statutes do not explicitly refer to Native local governments, and are not properly

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<sup>296</sup> Our conclusion is consistent with the 1978 Acting Solicitor's conclusion discussed supra n. 276, that in light of Congress' clearly expressed intent in ANCSA, it would be an abuse of discretion for the Secretary to take lands in trust for Venetie and Arctic Village. To now conclude that the villages, by acquiring lands in fee, could essentially accomplish on their own what the Secretary cannot, is a proposition we cannot accept. See also 25 C.F.R. § 151.1 (BIA land acquisition regulations exclude Alaska, except for Metlakatla); 45 Fed. Reg. 62034 (same; "the Alaska Native Claims Settlement Act does not contemplate further acquisition of land in trust status, or the holding of land in such status, with the exception of . . . Metlakatla").

This is not to say that the acquisition of lands in fee by an IRA entity is without some legally significant consequences. See, e.g., In re 1981, 1982, 1983, 1984 and 1985 Delinquent Property Taxes, 780 P.2d 363 (Alaska 1989) (§ 16 of IRA barred City of Nome from foreclosing on lands owned by the IRA-organized Nome Eskimo Community, without its consent).

considered to be "Indian legislation,"<sup>297</sup> the fact remains that titles to these townsite lands in 27 villages are now owned by those villages as villages.

With respect to these non-ANCSA lands, we believe the extent of village governmental powers will depend upon the particular status of the village itself and upon a fact-specific inquiry into whether the area at issue qualifies as a dependent Indian community and thus Indian country. Congress simply did not address this specific situation in ANCSA. The outcome would depend upon the particular history of the village, specific applicable statutes, and general principles of Indian law.

#### e. Native Allotments

With respect to Alaska Native allotments, we conclude that they do fall within the statutory definition of Indian country. However, we also conclude that while Native allotments are Indian country for purposes of federal protection and jurisdiction, it does not necessarily follow that allotments are subject to tribal jurisdiction.

The language of section 1151(c) includes as Indian country "all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same" (emphasis added). Based upon the plain language of the statute, the court decisions interpreting section 1151(c), and an examination of the Alaska Native Allotment Act, we conclude that Alaska Native allotments are Indian country. Nevertheless, although we conclude that these allotments are Indian country for purposes of federal authority and protection, for the most part we are not persuaded that Congress intended Alaska Native villages to exercise governmental powers over these lands. Alaska Native allotments appear to be an exception to the general rule that the territorial basis for tribal authority coincides with the federal Indian country status of lands. See Native Village of Venetie IRA Council v. Alaska, 944 F.2d 548, 558 n.12 (9th Cir. 1991) (Venetie II).

#### i. Indian Allotments as Indian Country

Indian allotments were included within the definition of Indian country based on the Supreme Court's decision in United States v. Pelican, 232 U.S. 442 (1914). See reviser's note to 18 U.S.C. § 1151. In Pelican, the Court held that a trust allotment carved out of an existing reservation continued to be Indian country because it continued to be validly set apart for the use of Indians under the superintendence of the Government.

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See supra n. 71.

In the contiguous 48 states, Congress used two principle forms in creating Indian allotments: trust allotments and restricted fee allotments. In United States v. Ramsey, 271 U.S. 467 (1926), the Supreme Court rejected any distinction between the two types of allotments with respect to their Indian country status. The Court concluded that a restricted fee patent allotment carved out of the Osage Indian reservation "remained Indian lands set apart for Indians under governmental care." Id. at 471. The Court stated:

[I]t would be quite unreasonable to attribute to Congress an intention to extend the protection of the criminal law to an Indian upon a trust allotment and withhold it from one upon a restricted allotment; and we find nothing in the nature of the subject matter or in the words of the statute which would justify us in applying the term Indian country to one and not to the other.

Id. at 471-72.<sup>298</sup>

Indian allotments that were not carved out of existing Indian reservations also have been held to be Indian country. In In re Carmen's Petition, 165 F. Supp. 942 (N.D. Cal.), aff'd, 270 F.2d 809 (9th Cir.), cert. denied, 361 U.S. 934 (1958), the court held that a public domain trust allotment was Indian country and thus

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<sup>298</sup> See Heckman v. United States, 224 U.S. 413, 437 (1912) (federal guardianship continues over restricted fee Indian lands; "national interest" not to be expressed in terms of property, or limited to assertion of rights incident to ownership of reversion or "to the holding of a technical title in trust"); State v. Burnett, 671 P.2d 1165, 1166-67 (Okla. Cr. 1983) (restricted fee allotment held to be Indian country).

In United States v. Sands, 968 F.2d 1058 (10th Cir. 1992), petition for cert. filed, No. 92-6105 (U.S. Oct. 5, 1992), the Tenth Circuit concluded that a restricted fee allotment in the former territory of the Five Civilized Tribes in Oklahoma was Indian country, noting that "[b]y 1948, when § 1151 was enacted, 'Indian country' included both trust allotments and restricted fee allotments." Id. at 1062. In Sands, following defendant's conviction, the United States contended before the court of appeals that the United States lacks jurisdiction because the particularly unique history of the former Indian territory in present-day Oklahoma evinces congressional intent that restricted fee allotments of the Five Civilized Tribes not be treated as Indian country. Obviously, the fact that trust allotments and restricted fee allotments in general fall within the definition of Indian country would not preclude Congress from treating certain allotments differently.

subject to federal jurisdiction. In that case, California asserted that the public domain allotment was not Indian country because it had not been carved out of an existing reservation, as was the case in United States v. Pelican, 232 U.S. 442 (1914),<sup>299</sup> and was not land to which an underlying "Indian title" remained. The district court, affirmed by the Ninth Circuit, squarely rejected these assertions:

Respondent interprets the Pelican decision to mean that an allotment to be Indian Country must have been made from lands which were previously Indian Country. But this is an unduly restricted view of that decision.

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In Pelican, the reservation from which the allotment was made had itself been created out of the public domain rather than from land which had previously been in Indian possession. . . . Since all Indian allotments, regardless of their source, are maintained under the same type of Governmental supervision, either by holding title in trust for the allottee or by restricting alienation, there is no logical reason for making the application of protective criminal statutes dependent upon the source of the allotment.

In re Carmen's Petition, 165 F. Supp. at 946 (emphasis added). Based on the above considerations, we conclude that the language of section 1151(c) indeed encompasses Alaska Native allotments while they remain in restricted status.<sup>300</sup>

While the Indian country status of allotments provides the statutory basis for the exercise of federal jurisdiction, it does not necessarily follow that all Indian allotments are subject to tribal jurisdiction. Because of the distinct history of certain off-reservation allotments, we believe that whether an individual allotment is subject to tribal jurisdiction depends upon a

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<sup>299</sup> In United States v. Pelican, 232 U.S. 442 (1914), the Court determined that an Indian allotment was Indian country, even though it was within a reservation area restored to the public domain, which the Court appears to have presumed was no longer within the reservation's boundaries. The Court concluded that the same considerations apply to allotments as to other Indian lands in determining whether they are Indian country--whether the lands "had been validly set apart for the use of the Indians as such, under the superintendence of the Government." Id. at 449.

<sup>300</sup> Of course, because Alaska is a Public Law 280 state, it has broad criminal and limited civil jurisdiction over Indian country.

particularized inquiry into the relevant statutes and circumstances surrounding the creation of the allotment.

For example, various statutes enacted by Congress during the allotment era permitted certain Indians to acquire homesteads on the public lands. The Act of March 3, 1875, § 15, 18 Stat. 402, 420, permitted an Indian born in the United States, "who has abandoned, or may hereafter abandon, his tribal relations," to obtain a homestead under the Homestead Act of 1862, 12 Stat. 392.<sup>301</sup> The Indian homestead was restricted for a period of five years from the date of issuance of a fee patent. The Indian Homestead Act of 1884 also permitted Indians to avail themselves of the homestead laws of the United States, with the special provision that 25-year trust patents would issue. Act of July 4, 1884, 23 Stat. 76, 96. In United States v. Jackson, 280 U.S. 183 (1930), the Supreme Court held that restricted Indian homestead allotments carry the same federal rights and privileges as other Indian allotments, upholding the authority of the Secretary to extend the trust period for a restricted Indian homestead pursuant to 25 U.S.C. § 391.

While we are unaware of any court decisions addressing the question, it is our view that an assertion of tribal jurisdiction over an Indian homestead allotment obtained by an Indian who had abandoned tribal relations would fail. In such a case, it seems unlikely that there would be any indication of congressional intent to permit such jurisdiction, and there would be no original tribal nexus to support such jurisdiction over the allotment.

Public domain allotments obtained pursuant to section 4 of the 1887 General Allotment Act, 25 U.S.C. §§ 334, 336, differ from the homestead allotments in that Indians applying for such allotments must demonstrate membership or entitlement to membership in a recognized Indian tribe. 43 C.F.R. § 2531.1(a); see Regulations Governing Indian Allotments on the Public Domain Under Section 4, Act of February 8, 1887, as amended, 46 L.D. 344 (1918) ("applicant is required to show that he is a recognized member of an Indian tribe or is entitled to be so recognized").

Without addressing or deciding the possible scope of tribal jurisdiction over public domain allotments in the contiguous 48, we conclude that allotments issued pursuant to the Alaska Native Allotment Act are more similar to homestead act allotments rather than tribal-affiliation public domain allotments, and that particularly in the absence of a tribal territorial base (e.g., a reservation), there is little or no basis for an Alaska village

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<sup>301</sup> Repealed by FLPMA, Pub. L. No. 94-579, § 702, 90 Stat. 2743, 2787 (1976).

claiming territorial jurisdiction over an Alaska Native allotment.

ii. Alaska Native Allotments

Most allotments in Alaska have been issued pursuant to the Alaska Native Allotment Act of 1906,<sup>302</sup> although there are a few allotments issued under the General Allotment Act.<sup>303</sup> Although Alaska Native allotments are held in fee by the allottee subject to restrictions against alienation, we have already noted that the distinction between restricted fee and trust allotments is not significant for our purposes.<sup>304</sup>

A number of facts, however, do distinguish Alaska Native allotments from most allotments in the contiguous 48. First, the statute does not make tribal membership a criteria for receiving an allotment, probably because in 1906, Congress was not considering the Alaska Native allotments in a tribal context. This makes Alaska Native allotments more like Indian homestead allotments, rather than those issued pursuant to the General Allotment Act or other tribe-specific allotment acts.<sup>305</sup> Second,

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<sup>302</sup> Act of May 17, 1906, Pub. L. No. 59-171, 34 Stat. 197, as amended by Act of August 2, 1956, Pub. L. No. 84-931, 70 Stat. 954. The 1906 Act was repealed, with a savings clause for applications pending on December 18, 1971, by ANCSA § 18(a), 43 U.S.C. § 1617(a). The repealer does not purport to alter the status of Alaska Native allotments.

<sup>303</sup> See United States v. Clarke, 445 U.S. 253 (1980).

<sup>304</sup> Because the possible distinctions between restricted fee and trust allotment forms are not significant in our context, it is also not significant that the Interior Department initially viewed the Alaska Native Allotment Act as providing for trust allotments. See Charlie George, 44 L.D. 113 (1965); Status of Alaskan Natives, 53 I.D. 593, 602 (1932) (Solicitor's Opinion) (allotment creates reservation of land for allottee but title remains in the United States). In 1980, the Interior Board of Land Appeals overruled Charlie George and concluded instead that Alaska Native allotments were held in restricted fee title. State of Alaska, 45 IBLA 318 (1980). Regardless of the form of title, this Department consistently has taken the position that general federal statutes and Departmental regulations applicable to trust and restricted Indian property also apply to Native allotments and restricted Native townsite lots in Alaska.

<sup>305</sup> The Solicitor's Opinion, Status of Alaskan Natives, 53 I.D. 593, 602 (1932), also analogized Alaska Native allotments to public domain allotments issued pursuant to § 4 of the General Allotment Act of 1887, 25 U.S.C. § 334, 336. While they are

Alaska Native allotments were not carved out of any reservation. While we consider this factor insignificant for federal jurisdictional purposes, we believe it has at least some significance in determining questions of tribal authority. Third, the statute specifically provides that the allotment "shall be deemed the homestead of the allottee and his heirs." Again, while not a controlling factor as such, the language makes the Alaska Native Allotment Act appear more similar to a general Indian homestead act rather than a tribal or reservation related allotment act.

We wish to make clear that Alaska Native allotments, like other Indian allotments, remain under federal superintendency and subject to federal protection while in restricted status. Thus, we conclude that Congress has not divested the Federal Government of its jurisdictional authority over such lands, and they are Indian country.

However, after examining the statute and circumstances related to Alaska allotments, we are not convinced that any specific villages or groups can claim jurisdictional authority over allotment parcels. As we noted above, particularly in the absence of a tribal territorial base (e.g., a reservation), there is little or no basis for an Alaska village claiming territorial jurisdiction over an Alaska Native allotment.

### iii. Individual Native Townsite Lots

One other category of individual Native landholdings in restricted status is that of Native restricted fee townsite lots. It is our understanding that there are over 3,800 of these lots. To a limited extent, deeds to individual townsite lots are still being issued to Natives subject to statutory restrictions on alienation, pursuant to the former 43 U.S.C. § 733.<sup>306</sup> In People of South Naknek v. Bristol Bay Borough, 466 F. Supp. 870 (D. Alaska 1979), the court held that for purposes of federal court jurisdiction, the restricted Native townsite lots have the same status as allotments.

Our analysis and conclusions concerning potential tribal jurisdiction over these lots are the same as those set forth

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indeed analogous in many respects, § 4 allotments did require tribal affiliation, which conceivably provides a basis for tribal jurisdiction. Of course, we express no opinion concerning tribal jurisdiction over § 4 public domain allotments.

<sup>306</sup> 43 U.S.C. § 733 was repealed in 1976 by FLPMA § 703(a), Pub. L. No. 94-579, 90 Stat. 2743, 2790. Only applicants who can establish entitlement based on occupancy commenced prior to the enactment of FLPMA are eligible for a deed.

above with respect to Native allotments, with one possible exception. If individual restricted townsite lots properly are treated as allotments for purposes of section 1151, they would be Indian country. Those restricted lots located in one of the 27 Native villages receiving fee title to unoccupied townsite lots could conceivably be affected if the village qualifies as a tribe and if the area qualifies as a dependent Indian community. Even so, an assertion of tribal jurisdiction over individual restricted lots would be doubtful if there were no clear tribal nexus to the individual restricted lands.<sup>307</sup>

f. Authority over Nonmembers After ANCSA

We have previously established that there is a significant territorial component to tribal powers. In effect, by abolishing previously-existing reservations and avoiding federal trusteeship over Native lands, Congress largely removed a territorial base over which entities in Alaska qualifying as tribes could assert jurisdiction. Furthermore, except for the uncertainty surrounding some village-owned townsite lands, in the limited cases in which Indian country may still exist in Alaska for purposes of federal jurisdiction and protection, we are not convinced that Congress has in practical and legal effect left room for the exercise of tribal jurisdiction over land.

Our disposition of the issue of jurisdiction over land also resolves in large measure the question of the extent of tribal governmental authority over nonmembers. Indian tribes are possessed of sovereignty over "their members and their territory." Montana v. United States, 450 U.S. 544, 563 (1981). Without a tribal territory, tribal governmental power is limited to authority over members, unless Congress has clearly authorized the exercise of tribal power over nonmembers.<sup>308</sup> Absent such congressional consent, we conclude that Alaska tribes without territories are also without power over nonmembers.

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<sup>307</sup> If the area is not a dependent Indian community, we are not convinced that a village that qualifies as a tribe could assert jurisdiction over individually owned restricted townsite lots. Even if the lots are Indian country for federal jurisdictional purposes, the village would lack a distinctly tribal territorial base related to the lots, from which to assert extended jurisdiction over discreet individual Native-owned parcels. Nothing in the townsite laws even remotely suggests that the individual restricted lots issued to Natives could, by themselves, constitute any sort of tribal territorial base.

<sup>308</sup> For example, the Indian Child Welfare Act, discussed supra pp. 43-44 gives force and effect to tribal court child custody proceedings, and may affect nonmembers claiming parental or custody rights to an Indian child.

## V. CONCLUSION

This opinion has been one of the most difficult to prepare during my tenure at the Department of the Interior. We hope the research into the history, law and government policy toward Native Alaskans will be beneficial to all who are dealing with jurisdictional questions, whether they agree with the conclusions or not. The issues surrounding jurisdiction and governmental power are complex and easily susceptible to misinterpretation. In this opinion, we have provided the answer to the specific question posed by the Secretary: whether Alaska Native villages exercise jurisdiction over lands and nonmembers. In posing this issue, the Secretary made clear that he did not intend to revisit the unique relationship of the Federal Government to the Natives. That policy is sound in light of this legal review.

We have spent considerable time on the status of Native villages and the ongoing federal relationship with them to avoid any misapprehension that this opinion is intended to answer the question of whether or not the ongoing provision of federal benefits to Natives and federal recognition of Native villages is appropriate. In our view, Congress and the Executive Branch have been clear and consistent in their 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.

However, this opinion does conclude that, even if certain Native villages qualify as tribes for purposes of federal law, Congress clearly limited Native village exercise of sovereign jurisdiction over lands and nonmembers in a decisive fashion. The statutory scheme established in ANCSA precludes the treatment of lands received under that Act as Indian country. The purposes of ANCSA to develop state chartered business entities and to avoid the establishment of any permanent reservation system, trusteeship or other racially based institutions would be frustrated by a determination that enclaves of federal and tribal jurisdiction continue to exist.

I understand the significant impact of this decision. To conclude that areas are not Indian country greatly limits the powers those Native villages may exercise with respect to the establishment of courts, police powers and other sovereign attributes that attach to jurisdiction over land. Yet, this opinion reflects what we believe is the best reading of the law.

Our decision on this matter is very much based on what Congress did in ANCSA, and subsequent amendments and other legislation do not change this conclusion. As noted in the body of the opinion, the exercise of Congress' authority over Indian Affairs is broad. Should the outcome of this opinion be at variance with what

lawmakers believe is the proper view of Native village jurisdiction, Congress is free to legislate again in this area to provide certainty.

In summary:

1. We have rejected the notion that there are no tribes in Alaska. Which Native villages are tribes is a fact-specific determination beyond the scope of this Opinion. See Part III.B.
2. ANCSA is not a termination statute. It did not terminate tribes or the provision of federal services to Alaska Native individuals or entities. Congress and the Executive Branch have consistently extended to Alaska Natives benefits provided to Indian tribes and their members in the contiguous 48 states. See Part IV.C.1.
3. There is a territorial component to tribal power. Whether a Native village has governmental powers over lands and nonmembers depends, as a threshold matter, upon the existence of Indian country. See Part IV.C.2.a.
4. ANCSA reflected a new approach in defining the relationship between Alaska Natives and the federal government. ANCSA largely controls the determination whether any territory exists over which Alaska Native villages might exercise governmental powers. Congress has left virtually no room under ANCSA for Native villages in Alaska to exercise governmental power over lands and nonmembers. See Part IV.C.2.
5. Native Corporation lands in Alaska do not qualify as Indian country. See Part IV.C.2.b.ii.
6. ANCSA does not permit Native villages to create Indian country in Alaska by unilateral action. Native village acquisition of former ANCSA land will not impose federal superintendence over the land that Congress in ANCSA sought to avoid. See Part IV.C.2.b.iv.
7. The extent of Native village governmental powers over village-owned townsite lands will depend upon the status of the village itself and upon a fact-specific inquiry as to whether the village is a dependent Indian community. See Part IV.C.2.b.v.
8. Although an Alaska Native allotment constitutes Indian country, there is little or no basis for a Native village to claim territorial jurisdiction over an allotment. See Part IV.C.2.c.i.
9. Although individually owned restricted Native townsite lots may constitute Indian country, there is little or no basis for a

Native village to claim territorial jurisdiction over the lots.  
See Part IV.C.2.c.iii.

*Tom Sansonetti*

Thomas L. Sansonetti  
Solicitor

I concur

*Frank A. Bracken*

Frank A. Bracken  
Acting Secretary

Date: *January 11, 1993*



# United States Department of the Interior



OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

JAN 19 1993

M-36975 (Supp. I)

Memorandum

To: Secretary

From: Solicitor

Subject: Governmental Jurisdiction of Alaska Native Villages  
Over Land and Nonmembers

On January 11, 1993 you concurred in the Opinion issued by our Office on the same date concerning the extent of governmental jurisdiction of Alaska Native Villages over land and nonmembers. Upon review of our Opinion, the Office of Legal Counsel, Department of Justice has informed us that the wording of footnote 152 which appears on pages 59-60 does not comport with the official legal policy established by that Office. We acknowledge the role of the Department of Justice in establishing the Federal Government's legal policies and hereby state below verbatim the Office of Legal Counsel's position regarding footnote 152:

Legislation providing benefits to Indians on the basis of their race, rather than on the basis of tribal membership, raises questions under the equal protection component of the Fifth Amendment.

In general, explicit governmental classifications based on race or ethnicity are constitutionally highly suspect. See Richmond v. J.A. Croson Co., 488 U.S. 469 (1988) (majority of court imposes "strict scrutiny" on racial classification); see also Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) ("A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (invalidating racial classification in District of Columbia under strict scrutiny). In certain circumstances, racial classifications ordained by Congress are sustainable, but only if, at a minimum, "they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives." Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3000 (1991). Even under that standard of review, such "characteristics provide a relevant basis for disparate treatment only in extremely rare situations," and the justification for "any such classification

[must] be clearly identified and unquestionably legitimate.' " Id. at 3028 (Stevens, J., concurring) (quoting Fullilove v. Klutznick, 448 U.S. 448, 534-35 (1980) (Stevens, J., dissenting)).

Although Indians enjoy a special position under the law, the Supreme Court has consistently emphasized that racially-based legislation is not exempt from constitutional prohibitions on racial discrimination simply because the legislation involves or benefits Indians. See, e.g., Washington v. Yakima Indian Nation, 439 U.S. 463, 500-01 (1979); Craig v. Boren, 429 U.S. 190, 209 n.22 (1976) (laws which discriminate with respect to Indians on racial grounds are of "questionable constitutionality").

Acts of Congress conferring benefits on Indian tribes -- as distinct from Indians defined as a racial class -- stand on a different constitutional footing. Accord Memorandum for Diane Weinstein, Acting General Counsel, Dep't of Education, from Douglas W. Kmiec, Ass't Att'y Gen., Office of Legal Counsel, Dep't of Justice, re: Constitutionality of Preferences Contained in Public Law No. 100-297 (Nov. 9, 1988). In Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court upheld the Indian preference contained in the Indian Reorganization Act of 1934 against a limited constitutional challenge. The regulations in Mancari defined eligibility for the preference as follows:

To be eligible for preference in appointment, promotion, and training, an individual must be one-fourth or more degree Indian blood and be a member of a federally-recognized tribe.

417 U.S. at 553 n.24, quoting 44 BIAM 335, 3.1 (emphasis supplied). The Court explicitly relied on this definition to uphold the preference against the claim that it was racially discriminatory:

The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities . . . .

The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially to be classified as Indians. In this sense, the preference is political rather than racial in nature.

417 U.S. at 554 and 553 n.24 (emphasis supplied). Moreover, it is significant that throughout its constitutional discussion the Court refers to those Indians receiving benefits as "tribal Indians." See, e.g., id. at 552-55.

Although the classification at issue in Mancari contained a racial element (an "Indian blood" requirement), the Court held

that the classification's further requirement of tribal membership sufficed to save the preference. The Court also noted that the preference only applied to employment in the Indian service and therefore was reasonably and directly related to a legitimate, nonracially based goal -- that of furthering the cause of Indian self-government. 417 U.S. at 554. We do not believe that by adducing this additional distinction the Court implied that Indian preferences based on racial rather than tribal classifications would be constitutional if confined to positions relating to Indian self-government.

The Supreme Court has repeatedly relied upon this distinction between tribal and racial classifications in upholding Indian preferences against attack on racial discrimination grounds. See, e.g., Washington v. Yakima Indian Nation, *supra*, 439 U.S. at 500-01 ("It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive," quoting Mancari); United States v. Antelope, 430 U.S. 641, 647 (1977) ("Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians' . . .," quoting Mancari); Moe v. Salish and Kootenai Tribes, 425 U.S. 463, 480 (1976) ("statutes . . . according special treatment to Indian tribes and reservations" are "neither 'invidious' nor 'racial,'" citing Mancari); Fisher v. District Court, 424 U.S. 382, 390 (1976) (statute granting exclusive jurisdiction over certain claims to the Cheyenne Tribal Court, challenged as "impermissible racial discrimination," upheld on grounds that jurisdiction "does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law.")

Nothing in United States v. John, 437 U.S. 634 (1978), contradicts our conclusion. The Court's opinion in John involved questions of state and federal criminal jurisdiction over "Indian country," as that phrase was used in several statutes. The Opinion did not address any equal protection challenge to a racial classification.

*Tom Sansonetti*

Thomas L. Sansonetti  
Solicitor