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December 13, 2018

Daniel Jorjani
Principal Deputy Solicitor
Office of the Solicitor
U.S. Department of the Interior
1849 C Street, N.W. Mailstop 6341
Washington, D.C. 20240

Re: Comments Regarding Solicitor's Opinion M-37043

Dear Solicitor Jorjani:

On June 29, 2018 in Solicitor's Opinion M-37053 you withdrew Solicitor's Opinion M-37043 (Authority to Acquire Land into Trust in Alaska), and announced that you would provide six months for the submission of written comments regarding Solicitor's Opinion M-37043, after which the Department of the Interior will "conduct a considered review of any and all comments received."

Other than your announcement at the end of Solicitor's Opinion M-37053 the Department of the Interior has not published any notice that has informed the public regarding a public comment period and the date by which and to whom comments should be submitted. However, in a letter dated July 2, 2018 Principal Deputy Assistant Secretary of the Interior for Indian Affairs John Tahsuda informed unidentified "Tribal Leaders" in Alaska and the CEOs of ANCSA regional and village corporations in Alaska that "If you would like to provide written input, please email your comments to consultation@bia.gov by midnight Eastern Standard Time on December 20,2018.

On November 20, 2018 I sent an email to Kyle Scherer (copy enclosed) in which I asked what the process was for interested members of the public to submit written comments "regarding the legal issues relating to Solicitor's Opinion M-37043 that Principal Deputy Solicitor Jorjani identified in Solicitor's Opinion M-37053?"

To date, I have not received from Mr. Scherer the professional courtesy of a reply to that query.

Because I have not, please find enclosed my comments (with attachments) regarding Solicitor's Opinion M-37043.

The comments document that there are no groups in Alaska whose memberships are composed of Alaska Natives and/or the descendants of Alaska Natives that, for the purposes of the first prong of the "Indian" definition in section 19 of the Indian Reorganization Act (IRA), are "recognized Indian tribes" that on June 18, 1934 were "under Federal jurisdiction."

Because there are not, the Secretary of the Interior has no authority to acquire land at any location in Alaska pursuant to section 5 of the IRA.

Sincerely,

Don Mitchell

cc: Kevin Clarkson - Attorney General of Alaska

Subject: **Don Mitchell Query re Public Comment Period: Sol. Op. M-37043**
Date: 11/20/2018 2:27:32 PM Alaskan Standard Time
From: dcraigm@aol.com
To: kyle.scherer@sol.doi.gov
Cc: matthew.kelly@sol.doi.gov, marigrace.caminiti@sol.doi.gov, chris.fluhr@mail.house.gov

TO: Kyle Scherer
Deputy Solicitor - Indian Affairs

FROM: Don Mitchell

SUBJECT: Public Comment Period: Solicitor's Opinion M-37043

At the end of Solicitor's Opinion M-37053, which he issued on June 29 and in which he withdrew Solicitor's Opinion M-37043, Principal Deputy Solicitor Dan Jorjani advised Secretary Zinke that "a minimum of six months would seem appropriate to provide adequate notice and a meaningful opportunity to comment on the Secretary's exercise of his authority to take off-reservation land into trust in Alaska and the issues left unresolved by Sol. Op. M-37043 . . . ." (my emphasis).

That was more than four months ago. But, as of the date of this email, neither Principal Deputy Solicitor Jorjani, you, nor any other Department of the Interior official has announced to interested members of the Alaska public a comment period for submitting comments relating to the withdrawal of Solicitor's Opinion M-37043 or to whom such comments should be submitted.

However, only three days after Principal Deputy Solicitor Jorjani issued Solicitor's Opinion M-37053, on July 2 John Tahsuda, the Principal Deputy Assistant Secretary of the Interior for Indian Affairs who was running the Indian corridor at DOI prior to Assistant Secretary Sweeney's arrival, sent a letter to both all ANCSA corporation CEOs and all "Tribal Leaders" in Alaska, but apparently to no one else. The letter informed the recipients that BIA would hold four "Tribal Consultation" meetings (Ketchikan, Anchorage, Bethel, Kotzebue), one "ANC Consultation" meeting (Anchorage), a "Listening Session" (Fairbanks), a "Public Meeting" (Juneau), and a "Tribal Consultation" teleconference. The letter also instructed the recipients to submit written comments to the BIA by midnight, December 20.

As a consequence of the never-ending wonders of the Internet, this morning I came across the transcript of the "public" meeting Principal Deputy Assistant Secretary Tahsuda held in Juneau on August 1, which it turns out that you, Matt Kelly, and my old friend from my old Bethel days, Gene Peltola, attended.

The transcript indicates that, in addition to the four of you, the only individuals who attended were members of the Juneau-area Tlingit community, someone from the Native Village of Kwethluk, plus Heather Miller from NARF's office in Anchorage. No representative from Governor Walker's administration, from the Alaska Legislature, from the City of Juneau (even though the Tlingit-Haida Central Council has applied to have land in the middle of downtown Juneau taken into trust), or from any non-Native organization testified.

That signals to me that the public was not informed that the purportedly "public" meeting would be held.
It also signals to me that the BIA and the Office of the Solicitor consider the fate of Solicitor's Opinion M-37043 to be a matter between DOI and the Native community and no one else.

Because the latter is not the case, the purpose of this email is to ask what the public process is for affording the incoming Dunleavy administration, the Alaska Legislature, the City of Juneau, interested non-Native organizations, and interested non-Natives such as me to submit written comments regarding the legal issues relating to Solicitor's Opinion M-37043 that Principal Deputy Solicitor Jorjani identified in Solicitor's Opinion M-37053.

Thanks for your prompt attention to this query.

COMMENTS (WITH ATTACHMENTS) OF DONALD CRAIG MITCHELL REGARDING SOLICITOR'S OPINION M-37043 (AUTHORITY TO ACQUIRE LAND INTO TRUST IN ALASKA)

In 1934 the Seventy-Third Congress enacted, and President Franklin Roosevelt signed, Public Law No. 73-383, which is popularly known as the Indian Reorganization Act (IRA).

Section 5 of the IRA authorizes, but does not require, the Secretary of the Interior to acquire land "for the purpose of providing land for Indians." (emphasis added). Section 5 also provides that the title to land so acquired "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."

Section 19 of the IRA contains a three-prong definition of the term "Indian":

1) "persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction,"
2) "persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation," and
3) "all other persons of one-half or more Indian blood."

In 2009 in Carcieri v. Salazar[1] the U.S. Supreme Court determined that to come within the purview of the first prong of

[1] 555 U.S. 379 (2009).

the "Indian" definition the Seventy-Third Congress intended that a recognized Indian tribe must have been "under Federal jurisdiction" in 1934 on the date President Roosevelt signed Public Law No. 73-383 into law. Section 19 also provides that "For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians."

Despite the latter sentence, section 13 of the IRA provided that sections 5 and 19 of the IRA did not apply in the Territory of Alaska. However, in 1936 the Seventy-Fourth Congress enacted Public Law No. 74-538. Section 1 of that statute provided that sections 5 and 19 of the IRA "shall hereinafter apply to the Territory of Alaska."

More than eighty years later and a week before she and all other Obama administration officials departed the Department of the Interior, on January 13, 2017 Solicitor Hilary Tompkins issued Solicitor's Opinion M-37043 (Authority to Acquire Land into Trust in Alaska).

In Carcieri v. Salazar the U.S. Supreme Court had noted in passing that in statutes other than the IRA "Congress chose to expand the Secretary's authority to particular Indian tribes not necessarily encompassed within the definitions of 'Indian' set forth in [section 19 of the IRA]."[2] In a footnote the Court

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[2] Id. at 392.

identified four such statutes, one of which was Public Law No. 74-538.[3] Relying on those dicta as if they were a holding, in Solicitor's Opinion M-37043 Solicitor Tompkins announced that "Interior need not render a determination whether Alaska Native[4] tribes fit within any of the other definitions of 'Indian' in Section 19 of the IRA, including the first definition that was at issue in the Carcieri decision."[5]

In 1971 the Ninety-Second Congress settled all claims against the United States that Alaska Natives had asserted based on aboriginal right or occupancy of land by enacting the Alaska

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[3] Id. at n. 6.

[4] Solicitor's Opinion M-37043 purports to interpret the intent of the Seventy-Third and Seventy-Fourth Congresses embodied in the texts of the IRA and Public Law No. 74-538. While neither text contains the terms "Alaska Native" and "Alaska Natives," Solicitor's Opinion M-37043 employs those terms forty-seven times without explaining who the individuals are who Solicitor Tompkins intended to include within the purview of the terms. Section 3(b) of ANCSA defines "Native" to mean a "citizen of the United States who is a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled to the Metlakatla Indian Community)[,] Eskimo, or Aleut blood or combination thereof." (emphasis added). Are those the individuals to whom Solicitor Tompkins intended the terms "Alaska Native" and "Alaska Natives" to refer? Or did she intend a different definition? If she did intend a different definition, what is that definition and in what statute did any Congress adopt the definition? In the latter regard it merits mention that in section 19 of the IRA the Seventy-Third Congress defined the term "Indian" (a term that includes "Eskimos and other aboriginal peoples of Alaska") to mean an individual "of one-half or more Indian blood." (The section 19 definition exempted from compliance with the "one-half or more Indian blood" requirement individuals who in 1934 were members of a "recognized Indian tribe" that was "under Federal jurisdiction," and individuals who were descendents of such individuals and who on June 1, 1934 were residing on an Indian reservation.) Of the "Alaska Native tribes" that in Solicitor's Opinion M-37043 Solicitor Tompkins concluded are eligible to have the Secretary of the Interior acquire land pursuant to section 5 of the IRA, how many have memberships that are composed of individuals "of one-half or more" Indian, Eskimo, or Aleut blood? And how is the Secretary to make that determination?

[5] Solicitor's Opinion M-37043, at 11.

Native Claims Settlement Act (ANCSA).[6]

Section 2(b) of ANCSA directed the Secretary of the Interior to implement the settlement without establishing any "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." And to implement that directive section 19(a) of ANCSA revoked all reserves that had been set aside "for Native use or for administration of Native affairs."[7]

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[6] Public Law No. 92-203.

[7] Section 19(a) of ANCSA did not revoke the Annette Island Reserve because Indians resident within its boundaries were not Alaska Natives. They were the descendants of Tsimshian Indians who, led by the Anglican missionary William Duncan, in 1887 had emigrated from British Columbia to Annette Island, where they built Metlakatla, a town whose architecture was modeled on that of a nineteenth century English village. At Duncan's urging, prior to emigrating the Tsimshians had abandoned their tribal relations. See generally Peter Murray, The Devil and Mr. Duncan: A History of the Two Metlataklas (1985). At Duncan's request and at the urging of Senator Henry Dawes, the chairman of the Senate Committee on Indian Affairs - see 21 Cong. Rec. 10092 (1890) (statement of Senator Dawes) - in 1891 the Fifty-First Congress set apart Annette Island "as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who have recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may (sic) prescribed from time to time by the Secretary of the Interior." See 26 Stat. 1095, 1101. After apparently concluding that the Tsimshian residents of Metlakatla were "Indians" as section 19 of the IRA defines that term, in 1944 Assistant Secretary of the Interior Oscar Chapman approved a constitution for the Metlakatla Indian Community pursuant to section 1 of Public Law No. 74-538 and section 16 of the IRA. See Constitution of the Metlakatla Indian Community Annette Islands Reserve, Alaska, available at http://thorpe.ou.edu/IRA.html. However, in Article II of the Constitution "the people of the Metlakatla Indian Community" agreed "to obey all applicable laws of the Territory of Alaska and of the United States." (emphasis added). After holding an evidentiary hearing during which he heard testimony regarding the history of the Annette Island Reserve, in 1958 U.S. District Judge Raymond Kelly concluded that "There is no tribal organization in Metlakatla and in fact, the original settlers expressly renounced their tribal affiliations prior to coming to the Annette Islands." Judge Kelly also concluded that the Annette Island Reserve was not an "Indian reservation," that Metlakatla was not a "dependent Indian community," (cont.)

In disregard of both that clear congressional directive and the Ninety-Second Congress's revocation of the reserves, Solicitor Tompkins concluded Solicitor's Opinion M-37043 by announcing that "Because ANCSA . . . did not repeal Section 5 of the IRA as it applies to Alaska through the Alaska IRA [Public Law No. 74-538], the Secretary's authority to acquire land into trust in Alaska remains intact."

On June 29, 2018 Principal Deputy Solicitor Daniel Jorjani issued Solicitor's Opinion M-37053 in which he withdrew Solicitor's Opinion M-37043 because he had determined that the legal analysis contained therein was "incomplete" inter alia because Solicitor Tompkins did not analyze the implications of

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and, as a consequence, that the land within the boundaries of the reserve was not "Indian country." See United States v. Booth, 161 F. Supp. 269 (D. Ak. 1958). Nevertheless, the BIA today describes Annette Island as "Indian country" and asserts that residents of Metlakatla who are of Tsimshian Indian descent are a "federally recognized tribe." See 83 Fed. Reg. 34867 (2018) ("Metlakatla Indian Community, Annette Island Reserve" listed as a "Native Entity Within the State of Alaska Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs"). But Congress established the Annette Island Reserve during the assimilation era during which Congress's policy objective was to encourage Native Americans living on reservations in the coterminous states to abandon their tribal relations. Throughout that era Senator Dawes was Congress's most prominent assimilationist. According to Professor Frederick Hoxie, in 1881 when Senator Dawes became chairman of the Senate Committee on Indian Affairs "[f]or the next twelve years he used his position to advocate Indian assimilation." Dawes's policy objective "was not a blending of Indian and white societies but Anglo conformity: the alteration of native culture to fit a 'civilized' model . . . the senator believed in a single standard of civilization and expected that Indians - like other minority groups - could be made to conform to it." See Frederick E. Hoxie, A Final Promise: The Campaign to Assimilate the Indians, 1820-1920, at 32-33 (1984)[hereinafter "Final Promise"]. As a consequence, it defies credulity to believe, as the BIA professes, that Senator Dawes and other members of the Fifty-First Congress intended a create an Indian reservation on Annette Island that today is deemed "Indian country" within whose boundaries members of a federally recognized tribe reside.

the Ninety-Fourth Congress's repeal in 1976 of section 2 of Public Law No. 74-538, the Ninety-Fifth Congress's enactment in 1980 of the Alaska Native-related sections of the Alaska National Interest Lands Conservation Act, and the amendments to ANCSA the One Hundredth Congress enacted in 1987.

Solicitor Jorjani concluded Solicitor's Opinion M-37053 by announcing that a minimum of six months from the date of his issuance of the opinion should be afforded to submit written comments regarding those and other deficiencies in Solicitor Tompkins's legal analysis, as well as regarding "the Secretary's exercise of his authority to take off-reservation land into trust in Alaska;" to be "followed by a further six months to allow the Department to conduct a considered review of any and all comments received."

Inexplicably, neither Solicitor Jorjani nor any other Department of the Interior official has announced a public comment period. However, in a letter dated July 2, 2018 that he sent to ANCSA corporation CEOs and "Tribal Leaders" in Alaska, but apparently to no one else, Principal Deputy Assistant Secretary of the Interior for Indian Affairs John Tahsuda informed the recipients of his letter that they should submit written comments regarding "the Secretary's exercise of his authority to take land into trust in Alaska and on the issues left unresolved by Sol. Op. M-37043" by midnight, December 20,

2018.

These comments are being submitted prior to that deadline. As described below, the comments conclude that

1) while Congress has not repealed the applicability of section 5 of the IRA to Alaska, there is no group in Alaska composed of individuals of Alaska Native descent that qualifies as a "recognized Indian tribe now under Federal jurisdiction" within the meaning of that phrase in section 19 of the IRA;
2) while in 1994 Congress designated the Central Council of Tlingit and Haida Indian Tribes of Alaska as a "federally recognized tribe," that tribe was not recognized and under Federal jurisdiction in 1934 as the U.S. Supreme Court determined in Carcieri v. Salazar that section 19 of the IRA requires;
3) if arguendo there is a group in Alaska that qualifies as a "Indian tribe" that in 1934 was "recognized" and "under Federal jurisdiction," it would be an unlawful abuse of discretion for the Secretary of the Interior to acquire land in Alaska for such a group because, as Solicitor Leo Krulitz concluded in 1978, "the Secretary simply does not have the authority to ignore the policy and statutory provisions of the Alaska Native Claims Settlement Act."

4) The Seventy-Third Congress did not intend its inclusion of the sentence "For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians" in section 19 of the IRA to exempt individuals in Alaska who are of aboriginal descent and groups in Alaska whose memberships are composed of such individuals from compliance with the three-prong definition of the term "Indian" in section 19.

A. Between the Purchase of Alaska in 1867 and the Enactment by the Seventy-Third Congress of the Indian Reorganization Act in 1934 There Were No Federally Recognized Tribes in Alaska.

In 1941 Felix Cohen, who today remains an influential commentator on federal Indian law,[8] noted that "The term 'tribe' is commonly used in two senses, an ethnological sense[9] and a

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[8] Between 1933 and 1948 Cohen was an Assistant Solicitor in the Office of the Solicitor at the Department of the Interior. During that tenure Cohen became the Department's expert on federal Indian law. Between 1939 and 1941 Cohen supervised the research for, and was the principal author of, the Handbook of Federal Indian Law, which the Department of the Interior published in 1941. Jill E. Martin, "'A Year and a Spring of My Existence': Felix S. Cohen and the Handbook of Federal Indian Law," 8 Western Legal History 35-60 (1995).

[9] In 1891 the Fifty-First Congress enacted a statute that gave the Court of Claims jurisdiction to adjudicate "claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States." (emphasis added). 26 Stat. 851. In 1901 in Montoya v. United States, 180 U.S. 261, the U.S. Supreme Court decided that the Fifty-First Congress intended the undefined word "tribe" in the 1891 act to mean an ethnological tribe, which the Court defined 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." Id. at 266.

political sense."[10] He then cautioned that "It is important to distinguish between these two meanings of the term."[11]

In 1867 when the United States purchased from Russia the right to assert its jurisdiction over the land now known as Alaska the Indian, Eskimo, and Aleut ancestors of residents of communities that a century later would be designated as "Native villages" for the purposes of ANCSA[12] were members of ethnological tribes. But that did not mean that in 1867 or at any subsequent date the United States "recognized" those individuals as members of tribes in a "political sense."

With respect to recognition, the Committee on Natural Resources, which in the U.S. House of Representatives exercises jurisdiction over Native American-related legislation, has instructed that:

> "Recognized" is more than a simple adjective; it is a legal term of art. It means that the government acknowledges as a matter of law that a particular Native American group is a tribe by conferring a specific legal status on that group, thus bringing it within Congress' legislative powers. This federal recognition is no minor step. A formal political act, it permanently establishes a government-to-government

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[10] A group of individuals of Native American descent that has been lawfully recognized as a tribe in a political sense is known as a "federally recognized tribe."

[11] Handbook of Federal Indian Law, at 268 (1942 ed.).

[12] Sections 3(c) and 11(b)(3) of ANCSA define a "Native village" as a community a majority of whose residents on the 1970 census enumeration date were Alaska Natives, which had at least twenty-five Native residents, and which was "not of a modern and urban character."

> relationship between the United States and the recognized tribe as a "domestic dependent nation," and imposes on the government a fiduciary trust relationship to the tribe and its members. Concomitantly, it institutionalizes the tribe's quasi-sovereign status, along with all powers accompanying that status . . . . (emphasis added).[13]

What formal political act "recognized" the Native residents in each of more than two hundred Native villages as tribes in a political sense? There was and, with a single exception, to the present day there has been no such act.

The United States purchased the land that would be called Alaska from Russia in 1867. But Congress did not focus its attention on the nation's new possession until 1880 when the Forty-Seventh Congress began considering whether to authorize the non-Native residents of Alaska to organize a civil government. By that date the objective of Congress's Indian policy had evolved from clearing the public domain of the Native Americans who had occupied it to preparing Native Americans who had survived the clearing for citizenship.[14]

On Capitol Hill the principal lobbyist who urged the enactment of a bill authorizing the organization of a civil government was the Presbyterian missionary Sheldon Jackson. Jackson was also a prominent member of the group of Protestant

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[13] H.R. Rep. No. 103-781, at 2-3 (1994). Accord Cohen's Handbook of Federal Indian Law, at 133-134 (2012 ed.).

[14] See generally Final Promise.

clergyman who advised Congress and the Secretary of the Interior on Indian policy.[15] In 1880 when Jackson testified before the Senate Committee on Territories he described the Indian policy that he recommended that Congress implement in Alaska as follows:

> JACKSON: The people of Southeastern Alaska, the Indians, live in comfortable plank houses, from 40 feet by 60 feet ordinary size. They have comfortable clothing; many of them dress in European clothing . . . They have plenty of comfortable food. It is not necessary that the United States should feed or clothe them, or make treaties with them. This enables us in our Indian policy to take a new departure; and treat them as American citizens. All that is necessary to be done is to afford them government and teachers, which they cannot procure for themselves.
>
> SENATOR: In other words, you mean to say that if we should afford the protection of a well-organized government, they would subordinate themselves to the law of the United States? That is your idea?
>
> JACKSON: That is my idea.[16]

In 1884 when it enacted the Alaska Organic Act[17] the Forty-

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[15] See Donald Craig Mitchell, Sold American: The Story of Alaska Natives and Their Land, 1867-1959 65-99 (2003)[hereinafter "Sold American"](Sheldon Jackson's involvement in Alaska and as the principal lobbyist for the organization of a civil government described). See also Robert Laird Stewart, Sheldon Jackson 319-320 (1908)("From the date of his first visit [to Alaska in 1877] he [Sheldon Jackson] sought interviews with members of Congress and wrote letters to influential men of the nation, as well as appeals in the public press, - urging the establishment of public schools and the formation of a provisional government for the administration of justice and the protection of life and property").

[16] Statement of Rev. Sheldon Jackson, D.D., February 3, 1880, printed at S. Rep. No. 47-454, at 13 (1882).

[17] 23 Stat. 24.

Eighth Congress accepted Jackson's recommendation. Rather than recognizing the several hundred ethnological tribes in Alaska as tribes in a political sense, the Forty-Eighth Congress required Alaska Natives living at all locations, including in communities that subsequently would be designated as Native villages for the purposes of ANCSA, to comply with the same civil and criminal laws with which the non-Native residents of Alaska were required to comply.

Two years later, in 1886 Alaska District Judge Lafayette Dawson described Congress's Alaska Native policy as follows: "The United States has at no time recognized any tribal independence or relations among these Indians, [and] has never treated with them in any capacity."[18]

In 1885 Sheldon Jackson was appointed as the Department of the Interior's General Agent for Education in the District of Alaska. In that position, until his retirement in 1908, Jackson supervised the administration of the schools the Department's Bureau of Education operated in Native villages in Alaska. In 1895 in a speech at the annual Lake Mohonk Indian Conference Jackson explained to Commissioner of Indian Affairs Daniel Browning, the members of the Board of Indian Commissioners, and other Friends of the Indian who were in the audience that

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[18] In re Sah Quah, 31 F. 327, 329 (D. Alaska 1886).

> We have no Indians in Alaska; we have natives. When Alaska began to be developed, some wise man said: "What are you going to do with the natives? Do you want reservations?" The answer was, "No." "Do you want agents?" "No." "Do you want those people to be sheltered behind the Indian policy of the Government." "No: We do not want any Indian government at all." "What do you want, then?" "We want citizenship right from the start, and that the people should simply be called natives." It was at first a constant fight to keep them from being called Indians. We wanted to commence where the friends of the Indian left off. We wanted to avail ourselves of the experience of the past on the Indian question: and so we have no Indians, we have only natives. The natives have all the rights that any white man has. There has never been a time since the establishment of the courts in that land when a native could not go into court, could not sue and be sued, like any white man.[19]

In 1908 Alaska District Judge Royal Gunnison described how Alaska Natives fared in his courtroom as follows:

> The control governmentally of the native has been left to the district court and the commissioners, but that control is punitive only. When the Indian breaks the laws, established, by the way, for white men whose code of morals and habits of life are different, the Indian is hailed before the commissioner or the grand jury or the district court, indicted, tried, usually convicted, and sentenced to jail, oftentimes for matters which under his native customs was not a crime. He serves his term of imprisonment and returns to his people bewildered and embittered, but not bettered. Weeks of time and thousands of dollars in money are annually spent in these futile endeavors to make the Indian understand the white man's way and obey the white man's law.[20]

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[19] Address of Dr. Jackson, October 9, 1895, printed at 1895 Report of the Board of Indian Commissioners, at 25 (1896).

[20] Condition of Natives of Alaska, S. Doc. No. 60-257, at 2 (1908).

In 1932 Secretary of the Interior Ray Lyman Wilbur reaffirmed Judge Dawson's and Judge Gunnison's view of the law when he informed Representative Edgar Howard, the chairman of the House Committee on Indian Affairs, that "[t]he United States has had no treaty relations with any of the aborigines of Alaska nor have they been recognized as the independent tribes with a government of their own. The individual native has always and everywhere in Alaska been subject to the white man's law, both Federal and territorial, civil and criminal."[21]

The fact that since 1884 Alaska Natives had been subject to the same civil and criminal laws as those to which the non-Native residents of the District, later Territory, of Alaska were subject did not mean that in communities that subsequently would be designated as Native villages for the purposes of ANCSA the jurisdictional situation was well understood or that there was no semblance of local government in those communities. Rather, the situation in Noatak, an Inupiat Eskimo village in the northwest arctic, was typical. In 1933 J.B. Henderson, the teacher at the school the Bureau of Indian Affairs (BIA) operated at Noatak,[22]

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[21] Letter from Ray Lyman Wilbur, Secretary of the Interior, to the Hon. Edgar Howard, Chairman, House Committee on Indian Affairs, March 14, 1932, reprinted at Authorizing the Tlingit and Haida Indians to Bring Suit in the United States Court of Claims: Hearing on S. 1196 Before the S. Comm. on Indian Affairs., 72d Cong. 16 (1932).

[22] In 1932 Secretary Wilbur transferred responsibility for the administration of all Native programs in Alaska, including the operation of schools in Native villages, from the Bureau of Education to the BIA.

reported:

> There is a village council of seven men members which are elected by the people. This council discusses and passes on matters of the village which may be brought to its attention and makes regulations as to village life such as pertain to sanitation, police, and public safety, etc., and is very worthwhile. It has no strictly legal powers, of course, but as the community is in support of it, it is an excellent nucleus for dealing with such local matters as are not of sufficient seriousness to bring before a U.S. Commissioner. It derives its very limited powers and local jurisdiction from custom and consent of the community and that is power enough to get along with. It works out very well in practice.[23]

B. INDIAN REORGANIZATION ACT

In February 1934 Commissioner of Indian Affairs John Collier sent a bill to Congress that Montana Senator Burton Wheeler, the chairman of the Senate Committee on Indian Affairs, introduced as S. 2755. The text of the bill had been written principally by Felix Cohen.[24] But the bill's content had been developed jointly by Collier, Cohen, Assistant Commissioner of Indian Affairs

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Secretarial Order No. 494, March 14, 1931.

[23] Annual Report to the Commissioner of Indian Affairs of the School at Noatak, Alaska, for the Year Ending June 30, 1933, Alaska School Service, Office of Indian Affairs, U.S. Department of the Interior.

[24] See David E. Wilkins (ed.), On the Drafting of Tribal Constitutions, at xv and xxi (2006)("[In 1933] he [Felix Cohen] received a one-year appointment from Nathan Margold, solicitor for the Department of the Interior, as an assistant solicitor, expressly to help draft the basic legislation that came to be known as the Wheeler-Howard bill, or the Indian Reorganization Act" and "Cohen . . . did not work alone in drafting the IRA, although it appears that he was its principal author"); Dalia Tsuk Mitchell, Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism, at 81 (2007)("In retrospect, Collier recalled that the act [the IRA] was drafted by the Solicitor's Office, 'particularly' by Felix Cohen").

William Zimmerman, several other senior members of the BIA bureaucracy.[25]

Forty-eight pages long, S. 2755 consisted of sixty sections divided into four titles.[26] Because the purpose of the bill was to reorder day-to-day life on Indian reservations in the coterminous states, S. 2755 said nothing about Alaska Natives or the Territory of Alaska.

The Senate Committee on Indian Affairs held six hearings on S. 2755, after which, after listening to Commissioner Collier, the principal witness, explain the bill, Senator Wheeler rejected it. Wheeler then appointed a Subcommittee whose members would write a new bill. But before the Subcommittee began work Wheeler met privately with Assistant Commissioner Zimmerman (because the Senator by then had tired of Commissioner Collier's dour his-way-or-the-highway certitude). At that meeting Wheeler dictated to Zimmerman what the provisions of S. 2755 were that, at least in concept, he might be able to support.[27] As Wheeler explained when

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[25] The history of the development of the content of and the drafting of S. 2755 is described in Elmer R. Rusco, A Fateful Time: The Background and Legislative History of the Indian Reorganization Act 176-208 (2000) [hereinafter "Fateful Time"].

[26] The text of S. 2755 is printed at To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 before the S. Comm. on Indian Affairs 73rd Cong. 1-15 (1934)[hereinafter "Senate IRA Hearings"].

[27] Senator Wheeler's meeting with Assistant Commissioner Zimmerman is described in Fateful Time, at 249-251.

the Committee next convened, "I got together with the Commissioner of Indian Affairs (sic) and went over the important points that I thought were in controversy, and yesterday they sent up this bill, which eliminates, it seems to me, practically all of the matters that are in controversy."[28]

The new bill, which Senator Wheeler introduced as S. 3645 and whose text presumably was written by Felix Cohen, was only ten pages long and consisted of only nineteen sections.[29] Section 19 contained a three-pronged definition of the term "Indian" that was nearly, although not completely, identical to the definition of the term "Indian" that the Seventy-Third Congress would enact as section 19 of the IRA. Section 19 also contained this sentence: "For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians."

When the Senate Committee on Indian Affairs convened to review the new bill and Senator Wheeler asked Commissioner Collier to explain what the law was regarding Alaska Natives that made the inclusion of that sentence in section 19 appropriate, Collier answered: "The law is that [Alaska Natives] are entitled to educational aid, health aid, but otherwise are not under the

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[28] Senate IRA Hearings at 237.

[29] The text of S. 3645 is printed at id. at 234-234.

guardianship of the Government. The effect of [including the sentence referencing Alaska Natives in section 19] will be to extend the land acquisition and credit benefits to these Alaska Indians who are pure-blood Indians and very much in need, and they are neglected, and they are Indians pure and simple."[30] (emphasis added).

Section 10 of S. 3645 authorized a "recognized tribal authority" to petition the Secretary of the Interior to charter a corporation that would be empowered to "take, hold, manage, operate, and dispose of all collective and other corporate assets and property of every description, both real and personal, and to do such other things as are needed for the conduct of its business, except that no authority is granted to sell any of the land included within the limits of the reservation." (emphasis added). A corporation also was authorized to borrow money from a revolving fund for the purpose of "promoting the economic development of such tribes and of their members." And section 13 of S. 3645 authorized the Commissioner of Indian Affairs "to provide for the technical education of qualified Indians in the various services and functions now or hereafter performed by the Office of Indian Affairs."

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[30] Id. at 265.

Section 15 of S. 3645 then announced that the provisions of the bill would not apply in any of the Territories "except that the provisions dealing with corporations and the educational features of this Act shall apply to Alaska."[31]

Since a "recognized tribal authority" was the only entity that could petition for a corporate charter and section 10 implied that the members of the tribe the authority represented resided on a "reservation," if he did write S. 3645, how Felix Cohen believed that a group of Alaska Natives whose members were not "under the guardianship of the Government" and who did not reside on a reservation were eligible to petition the Secretary for a corporate charter is a mystery whose solution subsequent events would moot.

In the U.S. House of Representatives, Representative Edgar Howard, the chairman of the House Committee on Indian Affairs, and the other members of the Committee were as opposed to the original bill Commissioner Collier sent Congress as Senator Wheeler had been. So they wrote and then reported their own version of the bill whose content Senator Wheeler had dictated to

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[31] S. Rep. No. 73-1080, at 3 (1934)(explaining that section 15 of S. 3645 "makes the provisions dealing with Indian corporations and Indian education applicable to Alaska"). Section 15 exempted from application in the Territory of Alaska section 5 of H.R. 3645, which authorized the Secretary of the Interior to acquire land "for the purpose of providing land for Indians."

Assistant Commissioner Zimmerman.[32]

While section 21 of that text contained a definition of the term "Indian" that stated that "For the purposes of this Act, Eskimos and other aboriginal peoples of the Territory of Alaska shall be considered Indian," Section 14 stated that only four sections of the bill would "apply to the Territory of Alaska." Inexplicitly, those four sections did not include section 21. Rather, they included sections 9, 10, and 11, which authorized the "members of any recognized tribe" to incorporate an "Indian chartered corporation" empowered to borrow money from a revolving fund," as well as section 12, which authorized "Indians" to borrow money "for the payment of tuition and other expenses in recognized vocational and trade schools."

The situation vis-a-vis Alaska Natives became even more confused when a Conference Committee that Senator Wheeler and Representative Howard chaired blended the texts of the Senate and House versions of S. 3645 into the text the Seventy-Third Congress would enact as the IRA. In the enacted text, section 13 inexplicably continued to not apply in the Territory of Alaska the section 19 definition of the term "Indian" that contained the sentence "For the purposes of this Act, Eskimos and other

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[32] 78 Cong. Rec. 9268 (1934)(Representative Isabella Greenway, who was a member of the Committee on Indian Affairs, explaining that "Last night many of us redrafted the bill, leaving nothing in it but the title"). The text of the bill the Committee on Indian Affairs reported is printed at H. Rep. No. 73-1804, at 1-5 (1934), and 78 Cong. Rec. 11724-11726 (1934).

aboriginal peoples of Alaska shall be considered Indians." Equally inexplicably, section 13 applied in the Territory of Alaska section 9, which authorized funds to be expended for the purpose of organizing "Indian chartered corporations," and section 10, which created a revolving fund from which Indian chartered corporations could obtain loans. But section 13 did not apply section 17, which authorized "at least one-third of the adult Indians" of "such tribe" (emphasis added) to petition the Secretary of the Interior to issue a charter for a corporation that would be able to borrow money from the revolving fund.

The reference to "such tribe" (emphasis added) in section 17 appears to refer back to section 16, which authorized "Any Indian tribe, or tribes, residing on the same reservation" to "organize for its common welfare" by adopting "an appropriate constitution and bylaws." Section 13 did apply section 16 to the Territory of Alaska, even though two years earlier Secretary of the Interior Ray Lyman Wilbur had advised Representative Howard that Alaska Natives had never been "recognized as the independent tribes with a government of their own," and even though only a month earlier Commissioner Collier had explained to Senator Wheeler that, while the BIA operated schools in a number of villages and provided medical care, Alaska Natives were "not under the guardianship of the Government."

In 1978 District Judge Robert Kelleher observed that "Congress is constitutionally empowered to launch programs, the scope, impact, consequences, and workability of which are largely unknown, at least to the Congress, at the time of enactment."[33] The analytically incongruent manner in which the Seventy-Third Congress included Alaska Natives in the IRA validates Judge Kelleher's insight.

C. Public Law No. 74-538.

During the Seventy-Third Congress Anthony Dimond, the Territory of Alaska's nonvoting delegate in the U.S. House of Representatives,[34] was a member of the House Committee on Indian Affairs. But he was not a member of the Conference Committee whose members melded the texts of the Senate and House versions of S. 3645 into the text of the bill the Seventy-Third Congress enacted as the IRA. In 1935 Dimond described the Conference Committee's drafting errors and their consequence as follows:

> The Wheeler-Howard Act [i.e., the IRA] is the result of bills introduced in both the House and Senate. The Senate bill passed first and got to the House where it was very largely amended. On the last day of the session, the bill went to conference and when the Conference Committee submitted its report several things originally included in both bills had been

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[33] American Petroleum Institute v. Knecht, 456 F. Supp. 889, 931 (D.C.C.D. Cal. 1978).

[34] In 1906 Congress authorized male citizens of the United States living in the District, later Territory, of Alaska to elect a nonvoting delegate to the U.S. House of Representatives.

> inadvertently omitted. The Act itself provides that Sections 9, 10, 11, 12, and 16 thereof shall apply to the Territory of Alaska. Through mistake made by the Conference Committee, however, Section 17 was not made applicable to Alaska. Section 17 authorizes the Secretary of the Interior to issue charters of incorporations to tribes of Indians, and the inference is that they must live on Reservations. Section 16 provides that any tribe or tribes residing on the same Reservation shall have the right to organize for its or their common welfare. Under Section 10, an appropriation of $10,000,000 is authorized as a revolving fund from which the Secretary of the Interior may make loans to Indian chartered corporations. This section applies to Alaska but, as above stated, Section 17 does not, and Section 17 provides for the issuance of the charter.
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> Hence, it appears that through the mistake made in conference in omitting Section 17, it is now impossible for any Indian Community in Alaska to borrow any of the funds authorized to be appropriated under Section 10.[35]

To straighten out the snafu, Dimond asked Commissioner Collier to have his attorneys at the Department of the Interior write a bill whose enactment by the Seventy-Fourth Congress would apply section 17 of the IRA to the Territory of Alaska.[36] The attorney Collier assigned to write the bill was Felix Cohen.[37]

In 1936 Representative Dimond introduced the bill as H.R. 9866.

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[35] Letter from Anthony J. Dimond, Delegate, to Dear Sir, March 5, 1935. Anthony J. Dimond Papers, University of Alaska Fairbanks.

[36] Id. ("This matter [i.e., the problem with section 17] has engaged the attention of the Indian Office here and today the bill, of which a copy is enclosed, was submitted to me").

[37] See Sold American, at 295-296, 306-309 (involvement of Felix Cohen in drafting H.R. 9866 described).

Section 1 of H.R. 9866 extended section 17 of the IRA to the Territory of Alaska, and "Provided, That Indian-chartered corporations in Alaska may be organized and carry on business without regard to residence on any reservation."

Section 2 of H.R. 9866 delegated the Secretary of the Interior authority to designate land located within the boundaries of certain land withdrawals, as well as "other public lands which are actually occupied by Indians or Eskimos within said Territory" as "Indian reservations."

While Delegate Dimond had not asked that section 2 be included in the bill, Secretary of the Interior Harold Ickes explained to Dimond and the other members of the House Committee on Indian Affairs, to which H.R. 9866 had been referred, that section 2 had been included because,

> Indian tribes do not exist in Alaska in the same sense as in continental United States. Section 19 of the Indian Reorganization Act defines the word "tribe" as referring to "Any Indian tribe, organized band, pueblo, or Indians residing on one reservation." With a few exceptions the lands occupied by natives of Alaska have not been designated as reservations. In 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." In addition, <u>if native communities of Alaska are to set up systems of local government, it will necessary to stipulate the geographical limits of their jurisdictions. Reservations set up by the Secretary of the Interior will accomplish this</u>.
>
> An even more important reason for the designation of reservations in Alaska is that by doing so the United States Government will have fulfilled in part its moral

and legal obligations in the protection of the economic rights of the Alaska natives. (emphasis added).[38]

After H.R. 9866 was introduced, Cohen and William Paul, a Tlingit Indian who was Grand Secretary of the Alaska Native Brotherhood[39] and who at the Brotherhood's behest had traveled to Washington, D.C., to work with Cohen on the bill,[40] realized that section 13 of the IRA having extended section 16 of the IRA to the Territory of Alaska had created a problem separate from the problem that section 13 not having extended section 17 of the IRA to the Territory of Alaska had created. As Cohen and Paul explained to Commissioner Collier: "Because of the fact that there are apparently no recognized Indian reservations, tribes or bands in Alaska (except for the Annette Islands Reservation), it would be undesirable to carry over to this bill the requirement of the Indian Reorganization Act that organization be restricted

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[38] Letter from Harold L. Ickes, Secretary of the Interior, to the Hon. Will Rogers, Chairman, Committee on Indian Affairs, U.S. House of Representatives, March 14, 1936, reprinted at H.R. Rep. No. 74-2244, at 4 (1936).

[39] In 1912 twelve "civilized" Tlingit, Haida, and Tsimshian Indians who the Bureau of Education had gathered in Juneau to discuss how "uncivilized" Indians could be encouraged to assimilate created the Alaska Native Brotherhood (ANB). The ANB is composed of local chapters, called Camps, in towns and villages throughout southeast Alaska. William Paul was first elected Grand Secretary in 1920 at that year's Grand Camp, as the ANB's annual convention is called. See Sold American, at 221-223, 238-239 (organization of the ANB and William Paul's election as Grand Secretary described).

[40] After the Seventy-Fourth Congress enacted H.R. 9866, in the May 15, 1936 issue of the BIA newsletter Indians at Work Commissioner Collier reported that "The principal credit for the enactment of the legislation is due to Delegate Anthony J. Dimond of Alaska and to William L. Paul, representative of the Alaska Native Brotherhood."

to the Indians of a single tribe, band, or reservation."[41] (emphases added).

To remedy the problem, Cohen and Paul wrote an amendment to section 1 of H.R. 9866 that removed the sentence above-cited and substituted: "Provided, That groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 16, 17, and 10 of the [IRA]." (emphasis added).[42]

The members of the House Committee on Indian Affairs accepted the Cohen-Paul amendment. When it reported H.R. 9866 the Committee explained the need for the amendment as follows: "The proposed amendment no. 1 above set out 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."[43] (emphasis added).

With no discussion or debate, the House and Senate passed the version of H.R. 9866 the House Committee on Indian Affairs

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[41] Memorandum from William L. Paul, Felix S. Cohen, and Paul W. Gordon to Commissioner Collier, Jan. 22, 1936, printed in Sold American, at 309.

[42] Section 1, H.R. 9866, 74th Cong. (as reported by H. Comm. on Indian Affairs, March 26, 1936); H.R. Rep. No. 74-2244, at 1 (1936).

[43] H.R. Rep. 74-2244, at 1-2 (1936).

reported.[44] On May 1, 1936 President Roosevelt signed the bill into law as Public Law No. 74-538.

D. Implementation of Public Law No. 74-538.

The year after the Seventy-Fourth Congress enacted Public Law No. 74-538, in 1937 Assistant Commissioner of Indian Affairs William Zimmerman sent the teachers who taught in the schools the BIA operated in a number of Native villages written instructions the teachers were to follow when they assisted the residents of the villages in which the schools were located to write constitutions that section 1 of Public Law No. 74-538 authorized the Secretary of the Interior to approve pursuant to section 16 of the IRA.[45] Because, as Secretary of the Interior Harold Ickes had explained a year earlier to the House Committee on Indian Affairs, "if native communities of Alaska are to set up systems of local government, it will be necessary to stipulate the geographical limits of their jurisdictions," Assistant Commissioner Zimmerman instructed that

> If an Indian reservation has been designated and approved [pursuant to section 2 of Public Law No. 74-538], and if the group of Indians for whom the reservation has been designated are organizing as an entire community . . . , they may include in their constitutions appropriate powers for the civil

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[44] 80 Cong. Rec. 5029 and 6047 (1936).

[45] Instructions for Organization in Alaska Under the Reorganization Act of June 18, 1934, and the Alaska Act of May 1, 1936, and the Amendments Thereto, December 7, 1937.

> government of the area reserved, including police power over their own members and, under the supervision of the Department [of the Interior], the power to tax, license or exclude non-members. If the constitution has been adopted before the reservation became effective, such powers may be added by amendment. If at the time the constitution is being drafted, the designation and approval of an Indian reservation for the community organizing is anticipated, such powers may be included in the constitution, but limited to take effect only upon the designation and approval of a reservation for such community. (emphasis added).[46]

In July 1940, by which time the Secretary of the Interior had approved thirty-eight constitutions, Assistant Secretary of the Interior Oscar Chapman, who supervised Commissioner Collier and Assistant Commissioner Zimmerman, reaffirmed that "The Department has at no time recognized the existence in Alaska of Indian tribes, with powers of limited sovereignty, similar to the tribes in (sic) continental United States."[47]

Between 1938 and 1950 BIA teachers assisted the Native residents of sixty-nine communities that subsequently would be designated as Native villages for the purposes of ANCSA to write constitutions.[48] Insofar as local governmental authority was

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[46] Id. at 9.

[47] See Letter from William L. Paul, Grand Secretary, Alaska Native Brotherhood, to the Hon. Oscar L. Chapman, Aug. 18, 1940 (quoting letter dated July 6, 1940 from Assistant Secretary Chapman). William Paul Papers, Allen Library, University of Washington.

[48] The communities for which the Secretary of the Interior approved constitutions and corporate charters, and the date each constitution and charter was approved, are listed in Appendix A, Report of the Governor of Alaska's Task Force on Federal-State-Tribal Relations (1986).

concerned, consistent with Assistant Secretary Zimmerman's instructions, the "Powers of the Village" article in the boilerplate text of the constitutions granted a village council governmental authority only "To control the use by members or nonmembers of any reserve set aside by the Federal Government for the Village and to keep order in the reserve."[49]

Between 1941 and 1946 Secretaries of the Interior Harold Ickes and Julius Krug designated six Indian reservations in Alaska.[50]

The third reservation was a 1.8 million-acre reserve whose boundaries encircled Venetie and Arctic Village, two communities located on the south side of the Brooks Mountain Range in the Alaska interior whose residents were Gwich'in Athabascan Indians.[51] After the reserve was created Territorial Governor Ernest Gruening and other politically influential residents of the territory, as well as influential members of Congress,

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[49] See e.g., Article IV, Section 1, Constitution of the Organized Village of Kwethluk (approved May 11, 1938); Article 4, Section 1, Constitution of the Native Village of Kotzebue (approved May 23, 1939); Article IV, Section 1, Constitution of the Native Village of Stevens (approved December 30, 1939); Article IV, Section 1, Constitution of the Akiachak Native Community (approved August 6, 1948), available at http://thorpe.ou.edu/IRA.html.

[50] Repeal Act Authorizing Secretary of the Interior to Create Indian Reservations in Alaska: Hearings on S. 2037 and S.J. Res. 162 before the Subcomm. of the S. Comm. on Interior and Insular Affairs, 80th Cong. 13 (1948)(list of reservations designated pursuant to section 2)[hereinafter "1948 Hearings"].

[51] Id.

objected to the Secretary of the Interior designating of any more large tracts of public land in Alaska as Indian reservations.[52] One of those individuals was Anthony Dimond, the sponsor of H.R. 9866, who in 1947 told Delegate E.L. "Bob" Bartlett, who in 1944 had been elected Delegate when Dimond retired, that

> at the time the legislation [H.R. 9866] was before Congress I had no thought - or even suspicion - that it would be used to reserve anything more than the native settlements and villages with ample space around the same to prevent interference by others, with the necessary facilities including water supply and sea front and harborage areas. There was no suggestion at the time that vast areas would be reserved. Looking back upon the occasion after these intervening years, it seems probable that I would not have sponsored the legislation in its present form had I fully realized that the authority given might be abused. Of course, I should have written reasonable limitations into the bill before its introduction.[53]

That same year, 1947, the public affairs office at the Department of the Interior inadvertently revealed that Secretary of the Interior Julius Krug was planning to designate public land within and surrounding Hydaburg, a Native village in southeast Alaska, as a reservation.[54] In response, Senator Hugh Butler, the chairman of the Senate Committee on Interior and Insular Affairs

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[52] See Nomination of Oscar L. Chapman to be Secretary of the Interior: Hearing before the S. Comm. on Interior and Insular Affairs, 81st Cong. (1950).

[53] Confidential Memorandum from Anthony Dimond to E.L. "Bob" Bartlett, Nov. 20, 1947. E.L. Bartlett Papers, Rasmusen Library, University of Alaska Fairbanks.

[54] Sold American, at 339.

who believed that "the solution of the Indian problem in Alaska is not to set [Alaska Natives] apart from other people or from modern life but to give them tools with which to compete with white people,"[55] introduced Senate Joint Resolution No. 162. The resolution's passage by the Eightieth Congress would have rescinded the secretarial orders that created the Venetie Reserve and the five other reservations and repealed section 2 of Public Law No. 74-538. While the Senate passed Joint Resolution No. 162 by a unanimous voice vote,[56] the resolution died in the House when a procedural objection prevented it from being brought to the House floor prior to the adjournment of the Eightieth Congress.

A year later Secretary Krug tried to designate as reservations public land within and surrounding, not only Hydaburg, but also two other Native villages. That effort failed and over the succeeding twenty-seven years no Secretary of the Interior used the authority section 2 of Public Law No. 74-538 delegated to designate any additional Indian reservations, and in 1976 Congress repealed section 2.[57]

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[55] "Alaskan Indian Bill Introduced by Sen. Butler," Juneau Empire, Jan. 21, 1948.

[56] 94 Cong. Rec. 9095-9097 (1948).

[57] See Federal Land Policy and Management Act, Section 704(a), Public Law No. 94-579.

That situation resulted in the policy anomaly that in more than fifty communities that later would be designated as Native villages for the purposes of ANCSA the Native residents had been issued a constitution pursuant to section 1 of Public Law No. 74-538 and section 16 of the IRA. But no reservation had been designated within which the village council the constitution authorized could exercise local governmental authority. In 1961 a senior official in the BIA Alaska regional office described the legal situation that anomaly created as follows: "Villages not on reserves or reservations established for or reserved for the use of the resident Natives, even though organized under IRA, do not have legal authority to establish sales tax rates and collect the tax within the village, to enforce curfews, control the use and possession of intoxicants in the village, etc."[58]

E. Alaska Statehood Act.

Between 1947 and 1957 the Eightieth, Eighty-First, Eighty-Third, Eighty-Fourth, and Eighty-Fifth Congresses held hearings in Washington, D.C., and in Alaska on bills whose enactment would admit Alaska into the federal union, as well as oversight hearings in which conditions in Alaska relevant to the question

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[58] Memorandum entitled "Incorporation of Native villages" from Dale M. Belcher, credit officer, Alaska regional office, BIA, to Robert L. Bennett, director, Alaska regional office, BIA, February 23, 1961. Copy in administrative record for Solicitor's Opinion M-36975 (Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers).

of whether it was advisable for the Territory to become a State were investigated.[59] At those hearings numerous Department of the Interior officials, including four different Secretaries of the Interior, testified, as did Alaska Native witnesses.

Those and other witnesses informed the members of the Committees who conducted the hearings that Alaska Natives represented a significant percentage of the population of the Territory of Alaska, that the Alaska Native Service, a division within the BIA, operated schools in eighty-five communities in which most residents were Alaska Natives,[60] and that Alaska Native land claims based on aboriginal title were an important matter that Congress needed to resolve.[61]

No witness suggested that the Native residents of communities that subsequently would be designated as Native villages for the purposes of ANCSA were members of "federally recognized tribes" whose governing bodies, as a consequence of that legal status, possessed "inherent" local governmental authority. Instead, what the witnesses told Congress was that in the 1950s the situation in those communities was the same as it

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[59] See generally Claus-M. Naske, An Interpretative History of Alaskan Statehood (1973).

[60] Alaska Statehood: Hearings on H.R. 331 and S. 2036 before the S. Comm. on Interior and Insular Affairs, 81st Cong. 206-223 (1950).

[61] Id. at 325-326, 328-355; Hawaii-Alaska Statehood: Hearings on H.R. 2535, et al., before the H. Comm. on Interior and Insular Affairs, 84th Cong. 105-106, 129-135, 265-268, 358-360 (1955).

had been in 1933 when J.B. Henderson described the situation in Noatak: the Native residents of a community were subject to the civil and criminal laws of the Territory of Alaska with which the non-Native residents of the Territory were required to comply, but minor matters, both civil and criminal, were handled informally by village councils that had no legal imprimatur.

In 1955 the Subcommittee on Territorial and Insular Affairs of the House Committee on Interior and Insular Affairs held field hearings in Alaska. During the hearing in Fairbanks, Maxwell Penrod, a senior official in the Alaska Native Service, explained to the members of the Subcommittee that the Service's law and order division consisted of two officers based in Anchorage whose responsibilities included rendering "assistance to Federal and Territorial prosecuting agencies in preparation and presentation of cases to insure proper consideration and protection of the interests of the natives," participating "with native councils in developing local law and order codes, and advis[ing] them in the resolution of problems occasioned by the enforcement thereof," and conducting "a continuing program in acquainting natives with the provisions of laws and regulations and their rights thereunder."[62]

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[62] Alaska, 1955: Hearings on House Resolution No. 30 Before the Subcomm. on Territorial and Insular Affairs of the H. Comm. on Interior and Insular Affairs, 84th Cong. 96 (1955).

The Subcommittee held its next hearing in Barrow, the largest Inupiat Eskimo community on Alaska's North Slope.[63]

Prior to making the trip Representative Leo O'Brien, the chairman of the Subcommittee, asked the Library of Congress for information about Barrow. In the report it prepared the Library informed O'Brien and the other members of the Subcommittee that "Barrow was organized under the Indian Reorganization Act during March of 1940 with a charter, constitution, and bylaws. Under the terms of the Reorganization Act the village has a council, although the tribe owns no land, nor does it operate any enterprises as a tribe. The natives are under the jurisdiction of a United States commissioner located at Barrow . . . Minor crimes are handled by the village council, all others are prosecuted under the Territorial laws. The tribe does not have a law and order code."[64]

Two years later the Subcommittee held a hearing on Alaska statehood in Washington, D.C.

By that date as a condition for his support for statehood President Dwight Eisenhower wanted a provision included in the Alaska Statehood Act that would delegate him authority to create "special national defense withdrawals" north of a line that began

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[63] In 2016 Barrow residents voted to rename the community Utqiagvik.

[64] Id. at 234.

at the location where the Porcupine River crossed the Alaska-Canadian boundary and then ran west along the Yukon and Kukskowim Rivers to the coast of the Bering Sea. When during the Subcommittee's hearing the subject of what law would be applicable within the boundaries of the withdrawals was discussed, Alaska Delegate E.L. "Bob" Bartlett had the following confused colloquy with Acting Secretary of the Interior Olin Hatfield Chilson in which he tried to educate Chilson, who demonstrated that he knew nothing about the subject, to the fact that in communities located north of the Porcupine, Yukon, Kuskokwim line that later would be designated as Native villages for the purposes of ANCSA the Native residents were subject to the same civil and criminal laws of the Territory of Alaska as the laws to which the non-Native residents of the Territory were subject:

> BARTLETT: Let us take the little village of Point Hope [an Inupiat Eskimo community on the northwestern coast of Alaska], which, to the best of my information, is not incorporated. Let us say that it is to be involved in a defense withdrawal. They operate, I think, now through a council. They are not incorporated.
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> CHILSON: I am just trying to think this out. Those natives at the present time are under the Federal trusteeship that pertains to Indians, I assume, and under that trusteeship they have their own tribal government. Now the State laws still pertain in that area. I do not know whether the State laws would have anything to do with those natives or not. If they did, the State law would continue to operate.

BARTLETT: I do not believe that any Federal police laws or similar or associated laws apply to them now. I mean they are not directly under the control of the Bureau of Indians Affairs.

CHILSON: Now, as to whether or not they technically and legally, under the amendments which we have proposed, would continue to have the right to operate their tribal laws and setup, I do not know. I should think that they would be.

BARTLETT: They are under Territorial now, just as people of any community are. They are certainly not under any municipal law, because they do not have any incorporated municipality.

CHILSON: Then would they not continue to act under the Federal laws relating to Indians, which I assume is what they operate under now?

BARTLETT: No; I do not think so. (emphasis added).[65]

Eleven months later and four months before President Dwight Eisenhower would sign the Alaska Statehood Act into law as Public Law No. 85-508, in February 1958 Assistant Secretary of the Interior Roger Ernst, who since he supervised the BIA was better informed than Acting Secretary Chilson had been, reaffirmed that, as had been the situation since 1867, there were no federally recognized tribes in Alaska. Assistant Secretary Ernst told the House Committee on the Judiciary that "it had been the general practice for Territorial officers to apply Territorial law in

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[65] Statehood for Alaska: Hearings on H.R. 50, et al., Before the Subcomm. on Territorial and Insular Affairs of the H. Comm. on Interior and Insular Affairs, 85th Cong. 130 (1957).

native villages" and "none of the native villages has ever had any machinery for enforcing law and order. They have no tribal court, no police, and no criminal code."[66]

F. Alaska Native Claims Settlement Act.

In 1951 Alaska Delegate E.L. "Bob" Bartlett introduced H.R. 4388, a bill whose enactment by Congress would have settled Alaska Native land claims.[67] When the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs held a hearing on H.R. 4388, in the following colloquy with Representative Wesley D'Ewart, the chairman of the Subcommittee, Delegate Bartlett reaffirmed what the Committee on Indian Affairs had reported in 1936:

> D'Ewart: There is one more point, Mr. Bartlett. On page 2 [of H.R. 4388] I notice that the term "community of natives" means any clan, tribe, village or other community group of natives of Alaska. If this law were passed, would this not be the first time that tribes have been recognized by an act of Congress?

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[66] Letter from Roger Ernst, Assistant Secretary of the Interior, to the Hon. Emanuel Celler, Chairman, House Committee on the Judiciary, Feb. 25, 1958, reprinted in S. Rep. No. 85-1872, at 2-3 (1958). The single anomalous exception to Congress's consistent understanding subsequent to 1867 that Alaska Natives had not been recognized as "tribes" in a political sense is the enactment by the Eighty-Fifth Congress in 1958 of Public Law No. 85-615, in response to In re McCord, 151 F. Supp. 132 (D. Alaska 1957). The circumstances that resulted in the McCord decision and the enactment of Public Law No. 85-615 are described in Donald Craig Mitchell, "Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts," 14 Alaska Law Review 353, 382-85 (1997)[hereinafter "Why History Counts"].

[67] H.R. 4388, 82d Cong. (as introduced, June 11, 1951). The circumstances that motivated Delegate Bartlett to introduce H.R. 4388 are described in Sold American, at 398-399.

Bartlett: In Alaska?

D'Ewart: Yes.

Bartlett: I cannot say definitively, but that would be my opinion. We do not have, as you know, any tribal concept in the same manner as we find it in the States.[68] (emphases added).

After the hearing the Subcommittee took no further action on H.R. 4388.

In 1971 Congress finally settled Alaska Native land claims by enacting ANCSA.

Between 1968 and 1971 the House and Senate Committees on Interior and Insular Affairs held nineteen days of hearings on bills whose enactment would settle the claims.[69] At those hearings numerous Alaska Natives, attorneys representing Native organizations, and Department of the Interior officials testified. Consistent with what Delegate Bartlett had told the

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[68] Hearing on H.R. 4388 Before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs, 82d Cong. 31-32 (1951). The Subcommittee did not publish the transcript of its hearing. A copy the transcript is contained in the H.R. 4388 bill file at the Center for Legislative Archives, National Archives and Records Administration, Washington, D.C.

[69] See Alaska Native Land Claims: Hearings on S. 2906, et al., Before the S. Comm. on Interior and Insular Affairs, 90th Cong. (1968)[hereinafter "1968 Senate Hearing"]; Alaska Native Land Claims: Hearing on H.R. 11213, et al., Before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs, 90th Cong. (1968); Alaska Native Land Claims: Hearing on S. 1830 Before the S. Comm. on Interior and Insular Affairs, 91st Cong. (1969); Alaska Native Land Claims: Hearings on H.R. 13142, et al., Before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs, 91st Cong., Parts I and II (1969); Alaska Native Land Claims: Hearings on S. 35 and S. 835 Before the S. Comm. on Interior and Insular Affairs, 92d Cong. (1971); Alaska Native Land Claims: Hearings on H.R. 3100, et al., Before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs, 92d Cong. (1971).

Subcommittee on Indian Affairs in 1951, no witness suggested that Native residents of communities that would be designated as Native villages for the purposes of ANCSA as "federally recognized tribes" or that any other groups of Alaska Natives were members of a "recognized Indian tribe" within the meaning of that term in the "Indian" definition in section 19 of the IRA. To the contrary. As Willie Hensley, an Inupiat Eskimo who was a leader of the Native land claims movement and later would serve as president of the Alaska Federation of Natives (AFN),[70] explained in 1968 to the Senate Committee on Interior and Insular Affairs: "We have no administratively recognized tribal groups in the State, such as you have in Arizona and some of the other States."[71]

G. S. 2046.

By 1971 when the Ninety-Second Congress enacted ANCSA Alaska Natives had created twelve regional associations, all but one of which had been incorporated under the State of Alaska's Nonprofit

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[70] In 1967 the leaders of the Native land claims movement created the AFN as a statewide organization whose principal mission was to lobby Congress to settle Alaska Native land claims on fair terms. After the Ninety-Second Congress enacted ANCSA the AFN was incorporated under the Alaska Nonprofit Corporation Code to represent Alaska Natives regarding issues of statewide impact or concern.

[71] 1968 Senate Hearing, at 62-63. In 1979 Hensley recalled that in the mid-1960s when he attended George Washington University in Washington, D.C., "I met a lot of Indians, mostly traditional, and I began to wonder why we were different in Alaska, with no tribal organization." See "Profiles of the North: Willie Hensley," Alaska Journal, Spring 1979.

Corporations Code. Section 7(a) of ANCSA listed the associations by name and identified the geographic region in which each association was headquartered. Section 7(d) of ANCSA directed five incorporators, "named by the Native association in the region," to "incorporate under the laws of Alaska a Regional Corporation to conduct business for profit."

A year earlier, in 1970 President Richard Nixon announced his intention to send Congress a bill whose enactment "would empower a tribe or group of tribes or any other Indian community to take over the control or operation of Federally-funded and administered programs in the Department of the Interior and the Department of Health, Education and Welfare."[72]

In 1971 President Nixon sent the Ninety-Second Congress his bill, which was introduced in the Senate as S. 1573. Section 2 of the bill authorized "Indian tribes" to contract with the BIA and the Indian Health Service (IHS) to administer programs that the BIA and IHS had been administering. Section 1 of the bill defined "Indian Tribe" to mean "an Indian tribe, band, nation, or Alaska Native Community for which the Federal Government provides special programs and services because of their Indian identity."

When the Ninety-Second Congress adjourned without passing

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[72] The American Indians - Message from the President of the United States, 116 Cong. Rec. 23131, 23133 (1970).

S. 1573, in 1973 Senator Henry Jackson, the chairman of the Senate Committee on Interior and Insular Affairs, introduced his own bill in the Ninety-Third Congress as S. 1017. Section 4 of the bill defined "Indian tribe" to include any "organized group or community, including any Alaska Native community as defined in the Alaska Native Claims Settlement Act, for which the Federal Government provides special programs and services because of its Indian identity."

After the Senate passed S. 1017, in 1974 the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs held a hearing on the bill. One of the witnesses was Ray Paddock, the president of the Central Council of Tlingit and Haida Indians of Alaska, one of the regional associations listed in section 7(a) of ANCSA.

When Representative Lloyd Meeds, the chairman of the Subcommittee, asked Paddock whether the "Indian tribe" definition in S. 1017 adequately reflected the situation in Alaska, Paddock suggested that the Subcommittee amend the definition to include the "12 regional corporations named" in section 7(a) because "the regional corporations named in the Settlement Act were nonprofit corporations." He also pointed out that "There have since been named 12 other profitmaking corporations" that unlike the

regional associations "do not deal in human services."[73]

Representative Meeds and the other members of the Subcommittee accepted Paddock's suggestion that they amend the "Indian tribe" definition. But because Paddock had described the regional associations as "regional corporations," the member of the staff of the Committee on Interior and Insular Affairs who wrote the text of the version of S. 1017 the Committee reported apparently did not understand the difference between the regional associations listed in section 7(a) of ANCSA and the for-profit regional corporations that section 7(d) of ANCSA had required Alaska Natives to incorporate, as well as the business corporations section 8(a) of ANCSA required Alaska Natives in each community that was designated as a Native village for the purposes of ANCSA to incorporate. Because the Committee's new definition read:

> "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. (emphasis added).[74]

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[73] Indian Self-Determination and Education Assistance Act: Hearings on S. 1017 and Related Bills Before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs, 93d Cong. 118-19 (1974).

[74] H.R. Rep. No. 93-1600, at 2 (1974).

That is the "Indian tribe" definition that was included in the version of S. 1017 that on January 4, 1975 President Gerald Ford signed into law as the Indian Self-Determination and Education Assistance Act (Self-Determination Act).[75]

The definition authorized Native villages and the ANCSA for-profit regional and village corporations to contract with the BIA and IHS to administer BIA and IHS programs. But because they had not been included in the definition, the regional associations listed in section 7(a) of ANCSA with which the BIA and IHS had been contracting prior to the Ninety-Third Congress's enactment of the Self-Determination Act no longer could obtain contracts directly.[76] Instead, each association now was required to obtain a resolution from each Native village within its region that authorized the association to contract with the BIA and IHS in the village's stead.

During the same Ninety-Third Congress during which the Self-Determination Act was enacted, Senator Jackson introduced S. 2938, the Indian Health Care Improvement Act, a bill whose enactment would increase the amount of money that could be appropriated to the IHS to provide health services for Native

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[75] Public Law No. 93-638.

[76] See Cook Inlet Native Association v. Bowen, 810 F.2d 1471 (9th Cir. 1987)(holding that the term "Indian tribe" in the Self-Determination Act does not include within its purview the regional associations listed in section 7(a) of ANCSA).

Americans. S. 2938 also authorized the IHS to make grants to "Indian tribes," which the bill defined as "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village as defined in the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

That definition did not include the regional associations listed in section 7(a) of ANCSA, nor did it include ANCSA regional and village corporations.

In 1974 the Senate passed S. 2938, but the House did not consider the bill prior to the adjournment of the Ninety-Third Congress.

When the Ninety-Fourth Congress convened, in February 1975 Senator Jackson reintroduced S. 2938 as S. 522. In April when the Senate Committee on Interior and Insular Affairs reported an amendment in the nature of a substitute for the original text of S. 522 the amendment retained the "Indian tribe" definition that had been in S. 2938.

Five months later, in September 1975 the AFN Human Resource Board, whose membership was composed of a representative from each of the regional associations, hosted a conference to discuss the implementation of the Self-Determination Act in Alaska. A month later at a hearing the Subcommittee on Indian Affairs of

the House Committee on Interior and Insular Affairs held on the implementation of the Self-Determination Act, Robert Clark, the chairman of the AFN Human Resource Board, explained that

> Our first and foremost problem identified [at the conference] is the definition of "Indian tribe" and "Tribal Organization" of (sic) the act which does not account for the unique Alaska situation. We have recommended to BIA and IHS inclusion of nonprofit regional native associations. It is the position of the Alaska Federation of Natives, Inc. that Congress, in its declaration of policy under Public Law 93-639 [i.e., the Self-Determination Act], did not intend to exclude those organizations that have been contracting with IHS and BIA in the past and currently. We feel it is the oversight of Congress not to account for the unique Alaska Situation.[77]

In March 1976 the AFN Human Resource Board held another meeting at which the problem was discussed, at the conclusion of which the members passed a resolution that urged Congress to amend the "Indian tribe" definition in the Self-Determination Act to limit the definition "to the twelve Native regional associations listed in section 7(a) of the Alaska Native Claims Settlement Act and all Alaska Native villages."[78]

Five months later Alaska Senators Ted Stevens and Mike Gravel arranged with South Dakota Senator James Abourezk, the

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[77] Implementation of Public Law 93-638, the Indian Self-Determination and Education Assistance Act: Hearings Before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs, 94th Cong. 266 (1975).

[78] A Proposed Resolution Pertaining to the Indian Self-Determination Act, reprinted at Problems of Definition of Tribe in Alaska Relating to Public Law 93-638: Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs, 94th Cong. 324-325 (1976).

chairman of the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, for the Subcommittee to hold hearings in Juneau, Anchorage, Bethel, and Fairbanks to allow the leaders of the regional associations to voice their complaints.[79]

At the Juneau hearing Ray Paddock, the president of the Central Council of the Tlingit and Haida Indians of Alaska whose testimony two years earlier had unintentionally created the problem about which he now complained, told the Subcommittee that the "Indian tribe" definition prohibited the Central Council from contracting directly with the BIA and IHS, but allowed Native villages in southeast Alaska to do so, even though, "with the exception of the community of Klukwan, which has a very active IRA council," none of the village councils that had been created by the constitutions the Secretary of the Interior had approved between 1938 and 1948 pursuant to section 1 of Public Law No. 74-538 and section 16 of the IRA had been active for a quarter century.

At the Anchorage hearing Sam Kito, the president of the AFN, explained that "The nonprofit Native associations are the current delivery system for [the Self-Determination Act]. However, they do seem to be left out." At the Bethel hearing, Edward Hoffman,

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[79] Id.

the president of the Association of Village Council Presidents (AVCP), was adamant that the Yup'ik Eskimo residents of the fifty-six communities on the Yukon-Kuskokwim River Delta that had been designated as Native villages for the purposes of ANCSA were one "Yup'ik Eskimo tribe," and AVCP, the regional association listed in section 7(a) of ANCSA, "is the tribal governing body." And at the Fairbanks hearing Al Ketzler, the president of the Tanana Chiefs Conference (TCC), told the Subcommittee that, even though, like AVCP, it had been incorporated under the laws of the State of Alaska, "the TCC is the traditional governing body of the Athabascan people of Interior Alaska."

Five days after the hearings concluded, on September 9, 1976, the Senate renewed debate on S. 522 when Senator Henry Jackson, whose bill it was, offered an amendment that was a substitute for the bill text the U.S. House of Representatives had passed in lieu of the bill text the Senate Committee on Interior and Insular Affairs had reported and that had previously passed the Senate.

When he offered it Jackson explained that most of the changes his amendment made to the House bill text were "clarifying or technical." But one that was not was the decision he had made to replace the "Indian tribe" definition in the House bill text with the "Indian tribe" definition in the Self-Determination Act, which included ANCSA regional and village

corporations - but not the nonprofit regional associations listed in section 7(a) of ANCSA - within the definition's purview. Jackson explained that that change was necessary because "Most of the programs in S. 522 in which Indian tribes would participate would require activities which would be difficult for the usually small native villages and groups to perform. In most cases, the regional corporations with their wider jurisdiction and more skilled manpower, would be the entities most capable of participating effectively in S. 522's programs."[80]

Having been educated by the witnesses who had testified at the hearings in Alaska that Jackson had not attended, prior to the vote on the Jackson amendment Alaska Senator Ted Stevens offered an amendment to the amendment whose acceptance would have amended the "Indian tribe" definition to mean "any Indian tribe, band, nation, or other organized group or community, and in the case of Alaska such entity or entities designated by each region defined by the Alaska Native Claims Settlement Act.[81] (emphasis added).

Stevens told the Senate his amendment was needed because

> It is a very difficult problem in our State because we have not had recognition of tribes as it has been done in the traditional sense in the South 48.

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[80] 122 Cong. Rec. 29473 (1976).

[81] Amendment No. 436, S. 522, 94th Congress, reprinted at 122 Cong. Rec. 29480 (1976).

> What this amendment that I propose would do would be to permit each region, as created by the Alaskan Native Land Claims Act, to designate which entity or entities in that region are recognized tribes. It would be a measure of self-determination in letting the people of each area of our State determine which entity is in fact the legal governing body of a tribe and should be the designated entity to participate in the administration of an act such as this pursuant to the Indian Self-Determination Act.[82]

Stevens knew that Senator Jackson opposed his amendment. But he offered it in order to obtain from Jackson his promise that "in the next Congress we will endeavor to clarify the situation, either through the process of hearings or through whatever legislation may be needed."[83]

Having obtained his objective, Stevens withdrew his amendment, after which the Senate passed, and the House subsequently accepted, the Jackson amendment and S. 522 was enacted as the Indian Health Care Improvement Act[84] when President Ford allowed the bill to become law without his signature.

Taking Senator Jackson at his word, in June 1977 the leaders of the regional associations began meeting to write a bill whose enactment by the Ninety-Fifth Congress would amend the "Indian

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[82] Id.

[83] Id.

[84] Public Law No. 94-437.

tribe" definition in the Self-Determination and Indian Health Care Improvement Acts.[85] In July the participants in those meetings approved a bill text,[86] which in August Alaska Senators Ted Stevens and Mike Gravel introduced as S. 2046.[87]

In September the Senate Select Committee on Indian Affairs[88] held a hearing on S. 2046,[89] after which three members of the Select Committee staff held workshops in Ketchikan, Juneau,

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[85] "Non-Profit Native Corporations Hope for Relief on Contracting," Tundra Times, June 15, 1977 ("Representatives from state and federal agencies, congressional staffs, and the Native corporations met on June 1, 2, and 3 for the first in a series of conferences addressing the problems and future role of Native non-profit corporations . . . A tentative meeting has also been scheduled for mid-July in Washington, D.C. to meet with state and national leaders and to recommend legislative solutions for consideration by Congress").

[86] Memorandum from Francis Williamson, Commissioner of the Alaska Department of Health and Social Services, to the Honorable Jay S. Hammond, Governor of Alaska, July 28, 1977 ("the proposed act was unanimously adopted by representatives of the regional non-profit corporations on July 8, 1977"). Executive Director's Subject Files. Ruralcap Records. Rasmusen Library. University of Alaska Fairbanks.

[87] 123 Cong. Rec. 27509-27510 (1977)(statement of Alaska Senator Mike Gravel explaining that S. 2046 had been introduced "at the request of the Alaska Native Regional Non-Profit Corporations").

[88] At the beginning of the Ninety-Fifth Congress, in January 1977 the Senate reorganized its committee system. As part of the reorganization the Committee on Interior and Insular Affairs was renamed the Committee on Energy and Natural Resources and, at the instigation Senator James Abourezk, who had been chairman of the Committee's Subcommittee on Indian Affairs, the Committee's jurisdiction over Indian-related legislation was transferred to a new Select Committee on Indian Affairs that Senator Abourezk would chair. Senator Abourezk agreed that, as a condition of its creation, the Select Committee would terminate at the end of the Ninety-Fifth Congress. However, the life of the Select Committee was periodically extended, until 1984 when the Senate voted to make the Select Committee a permanent committee.

[89] Pueblo Lands and Alaska Natives Governing Bodies: Hearing on S. 1789 and S. 2046 Before the S. Select Comm. on Indian Affairs, 95th Cong. (1977) [hereinafter "First S. 2046 Hearing"].

Fairbanks, Barrow, Nome, Bethel, Aniak, and Anchorage.[90]

The Select Committee then took no further action regarding S. 2046 because the representatives of the regional associations had overreached by in section 2 of the bill defining "Indian tribe" to mean "the body of Alaska Natives represented by a Native Association, or its successor, named in section 7(a) of the Alaska Native Claims Settlement Act, hereinafter referred to as Alaska Regional Tribes," and then announcing that "the definition of Indian tribe as stated herein shall supercede, repeal, or modify the definition of Indian tribe in all other Federal legislation relating to or applicable to Alaska Natives."

Since that definition did not include Native villages and ANCSA regional and village corporations, representatives of those entities objected that if Congress enacted S. 2046 the villages and the corporations would lose the right that the Self-Determination Act conferred to obtain contracts.

However, Avrum Gross, the Attorney General of Alaska, and Eben Hopson, the Mayor of the North Slope Borough (NSB),[91]

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[90] Consolidating Alaska Native Governing Bodies: Hearings on S. 1920 and S. 2046 Before the S. Select Comm. on Indian Affairs, 95th Cong. (1977) [hereinafter "Second S. 2046 Hearing"].

[91] In 1972 the State of Alaska approved the incorporation of the NSB, a municipal government whose boundaries encompass 95,000 square miles of land from the crest of the Brooks Mountain Range north to the coast of the Arctic Ocean. Eight communities that have been designated as Native villages for the purposes of ANCSA are located within the NSB. See Bill Hess, Taking Control: The North Slope Borough, The Story of Self-Determination in the Arctic (1993).

objected to S. 2046 because of a different provision: section 6(a), which stated that "All rights, prerogatives, and duties held by federally recognized tribes in the contiguous States of the United States, shall accrue to the Alaska Native Regional Tribes established pursuant to this Act."

Attorney General Gross objected to section 6(a) because its enactment would "vest substantial and partially undefined sovereign or quasi-sovereign powers in racially exclusive groups not within one or more reservations, as it is customary, but rather over the entire territorial extent of the State of Alaska" and "establishing tribal organizations to exercise sovereign or quasi-sovereign powers not with respect to reservations but rather throughout the territory of an entire State is unprecedented and that it has not been shown to be necessary, proper, or desirable from any standpoint."[92] And Mayor Hopson objected because section 6(a) went "beyond the establishment of an agency to administer Indian money to constitute a conflict of jurisdiction between the Arctic Slope Regional Tribe and the North Slope Borough established under the laws of the State of Alaska" and the new tribe's "assumption of the functions of the North Slope Borough as a legally constituted government could

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[92] Second S. 2046 Hearing, at 373-77 (letter from Avrum Gross, Attorney General of Alaska, to the Senate Select Committee on Indian Affairs, Nov. 9, 1977).

result in a chaotic situation."[93]

H. Alaska National Interest Lands Conservation Act.

In 1971 in section 17(d)(2) of ANCSA, Congress directed the Secretary of the Interior to withdraw up to eighty million acres of unreserved public land in Alaska and then recommend what portions of those withdrawals Congress should include "as units of the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems." In 1980 Congress implemented the Secretary's recommendations by enacting the Alaska National Interest Lands Conservation Act (ANILCA).[94]

In addition to adding public land in Alaska to the four conservation unit systems, ANILCA contains a title that establishes a regulatory system to protect the taking of fish and wildlife for subsistence uses by Native and other residents of rural Alaska, amendments to ANCSA, and land exchanges between various ANCSA regional and village corporations and the federal government.

Between 1977 (the year the Senate Select Committee on Indian Affairs held its hearings on S. 2046) and 1980 the House Committee on Interior and Insular Affairs, the House Committee on Merchant Marine and Fisheries, and the Senate Committee on Energy

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[93] First S. 2046 Hearing, at 59 (statement of Eben Hopson, Mayor, North Slope Borough, Barrow, Alaska; Presented by Anna McAlear).

[94] Public Law No. 96-487.

and Natural Resources held seventy-seven days of hearings, town meetings, and workshops on bills whose enactment by Congress would implement the Secretary's recommendations.[95] Numerous Alaska Natives, attorneys representing Native organizations and ANCSA regional and village corporations, and Department of the Interior officials testified. During those hearings, meetings, and workshops no witness suggested that the Native residents of communities that had been designated as Native villages for the purposes of ANCSA were members of a "federally recognized tribe" or of a "recognized Indian tribe" within the meaning of that term in section 19 of the IRA.

I. The Beginning of the Native Tribal Sovereignty Movement and the One Hundredth Congrees's Enactment of the ANCSA "1991" Amendments.

In 1978 the BIA decided to publish in the Federal Register a list "of all Indian tribes which are recognized and receiving

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[95] See Inclusion of Alaska Lands in National Park, Forest, Widlife Refuge, and Wild and Scenic Rivers Systems: Hearings on H.R. 39, et al., Before the Subcomm. on General Oversight and Alaska Lands of the H. Comm. on Interior and Insular Affairs, 95th Cong. Parts I - XVI (1977); Alaska National Interest Lands Conservation Act of 1979: Hearings on H.R. 39 Before the H. Comm. on Interior and Insular Affairs, 96th Cong. (1979); Alaska Lands: Hearings on H.R. 39 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries, 95th Cong. Parts I and II (1977-1978); Alaska National Interest Lands: Hearings on H.R. 39, et al., Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries, 96th Cong. Parts I and II (1979); Alaska Natural Resource Issues and Alaska National Interest Lands Legislation: Hearings on S. 499, et al., Before the S. Comm. on Energy and Natural Resources, 95th Cong. Parts I - III (1978); Committee Print: Alaska Village Workshops on Alaska National Interest Lands Legislation Before the S. Comm. on Energy and Natural Resources, 95th Cong. (1978).

services from the Bureau of Indian Affairs."[96] (emphases added). In 1979 when Assistant Secretary of the Interior for Indian Affairs Forrest Gerard published the first list he announced that a "list of eligible Alaskan entities will be published at a later date."[97] (emphasis added).

In 1982 when he republished the 1979 list, Assistant Secretary of the Interior for Indian Affairs Ken Smith published a separate list of "Alaska Native Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs."[98] Assistant Secretary Smith also published a preamble in which he explained that "While eligibility for services administered by the Bureau of Indian Affairs is generally limited to historical tribes and communities of Indians residing on reservations, and their members, unique circumstances have made eligible additional entities in Alaska which are not historical tribes."[99]

Pursuant to authority that section 1 of Public Law No. 74-538 and section 17 of the IRA delegated to the Secretary of the Interior, in 1939 Assistant Secretary of the Interior Oscar

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[96] See 25 C.F.R. 54.6(b) (1978).

[97] 44 Fed. Reg. 7231 (1979).

[98] 47 Fed. Reg. 53133 (1982).

[99] Id. at 53133-53134.

Chapman approved a charter of incorporation for the Ketchikan Indian Corporation (KIC) that "a group of Indians [who had] a common bond of residence on Revillagigedo Island" on which Ketchikan, the second most populous town in southeast Alaska is located, had submitted.[100]

In 1977 when it became involved in a dispute with the Ketchikan Borough regarding the Borough's assessment of a property tax against a leasehold KIC owned, the KIC argued that it was not subject to the tax because it was "sovereign." In 1983 in its decision in Board of Equalization v. Alaska Native Brotherhood,[101] the lawsuit the KIC filed after the Board of Equalization had ruled in the Borough's favor, the Alaska Supreme Court held that the Borough could subject the leasehold to its property tax, but the Court reasoned to that result without deciding "whether KIC is an Indian tribe."[102]

When the KIC petitioned the Alaska Supreme Court to reconsider its decision, the KIC argued that it was a "tribal entity" because Assistant Secretary Smith had included the KIC on the list of Native Entities he had published in the Federal Register. In response to the petition, the Court issued an

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[100] See Corporate Charter of the Ketchikan Indian Corporation Alaska, ratified Dec. 20, 1939, available at http://thorpe.ou. edu/IRA/ketchrtr.html.

[101] 666 P.2d 1015 (Alaska 1983).

[102] Id. at 1020.

amended decision and Alaska Supreme Court Justice Jay Rabinowitz issued an amended concurring opinion in which he added a footnote in which he noted that it was "doubtful that the KIC has been 'recognized' as a tribe," among other reasons because in the preamble he published with his list Assistant Secretary Smith "expressly avoided characterizing Alaskan Native groups as tribes or Indian communities. Instead, the notice stated that 'unique circumstances have made eligible additional entities in Alaska which are not historical tribes.'"[103]

Three weeks after the Court issued its amended decision, David Case, an Anchorage attorney who was the founding legal theoretician of the Native tribal sovereignty movement,[104] sent a letter to Scott Keep, the assistant solicitor who handled Alaska Native-related legal issues at the Department of the Interior in Washington, D.C., and with whom Case was acquainted because between 1979 and 1982 he had worked with Keep when Case had been

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[103] Id. at 1024 n. 2

[104] In 1978 David Case authored The Special Relationship of Alaska Natives to the Federal Government: An Historical and Legal Analysis [hereinafter "Special Relationship"], a study of federal Indian policy in Alaska in which he asserted that "The Federal Government has recognized two types of Native government in Alaska - traditional and IRA," and those governments "have inherent governmental authority unless the Federal Government has specifically deprived them of it." Case subsequently would acknowledge that "so far as I can tell [the Special Relationship] was the first assessment to conclude that the villages were Alaska Native Tribes." While the BIA funded the study, according to Case, "the Department [of the Interior] first tried to embargo its release, but settled for a disclaimer that it did not represent government policy." Personal Communication from David Case to Donald Craig Mitchell, Feb. 25, 2018.

employed as an attorney in the Anchorage office of the Alaska Regional Solicitor.[105]

In his letter Case complained that Justice Rabinowitz had reasoned to his "erroneous conclusion" that the members of the KIC were not a federally recognized tribe because he had accepted as true the statement in the preamble that preceded the 1982 list of Native Entities that Alaska Natives were not members of "historical tribes."[106] The complaint accomplished its objective because, five months after Case lodged it, when Assistant Secretary Smith published a new list of "Native Entities" the preamble had disappeared.[107]

By 1983 when David Case sent his letter to Scott Keep the idea that the Native residents of each community that had been designated as a Native village for the purposes of ANCSA were members of a federally recognized tribe that possessed "inherent" governmental authority had become the core tenet of a nascent political movement that began in the Alaska interior. Two years earlier William "Spud" Williams, who had succeeded Al Ketzler as

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[105] Special Relationship, at iii (David Case acknowledging that Scott Keep "provided helpful insights on the Federal 'trust responsibility'").

[106] Why History Counts, at 403-404 (Board of Equalization v. Alaska Native Brotherhood decision and David Case letter discussed).

[107] See 48 Fed. Reg. 56865 (1983). And see also 58 Fed. Reg. 54364 (1993)(admission that in response to Board of Equalization v. Alaska Native Brotherhood "[a] number of Alaska Native organizations complained that the preamble was ambiguous and cast doubt on the tribal status of Alaska Native villages and regional tribes").

the president of the Tanana Chiefs Conference (TCC), the regional association headquartered in Fairbanks, described that tenet as follows: "[Alaska Natives have] the right to form IRA governments, even with ANCSA in place," and those governments have "the right to regulate their own fish and game, establish their own police and court systems, levy taxes, and to carry out all other functions of sovereign governments."[108]

In section 19(a) of ANCSA Congress revoked all reserves in Alaska other than the Annette Island Reserve. And in 1976 Congress repealed section 2 of Public Law No. 74-538, which had authorized the Secretary of the Interior to designate new Indian reservations in Alaska. But Congress had not repealed section 1 of Public Law No. 74-538, which authorized the Secretary to approve - pursuant to section 16 of the IRA - constitutions for Alaska Natives "not heretofore recognized as bands or tribes."

Since section 1 had not been repealed, in 1979 Spud Williams directed Michael Walleri, an attorney TCC had hired to work as a "village government specialist," to set about assisting Athabascan Indian residents of Native villages in the Alaska interior that did not have an IRA constitution to write one.

The first constitution Walleri wrote was for the Circle

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[108] See "Tribal Reservation Status Questioned by Hammond," Tundra Times, Dec. 16, 1981.

Native Community.[109]

When, on the recommendation of the BIA, in October 1981 Secretary of the Interior James Watt approved the Circle Native Community's constitution, Walleri celebrated the Secretary's action as follows: "While many state officials question the status of Alaskan Native villages as tribal governments, this decision by the Secretary of the Interior greatly strengthens the legal position of Native village councils throughout Alaska."[110]

Alaska Governor Jay Hammond responded to Secretary Watt's approval of the Circle Native Community's constitution by sending the Secretary a letter in which he pointed out that "The creation or recognition of federally-chartered tribal governments subsequent to passage of the Alaska Native Claims Settlement Act in 1971 raises many unanswered questions regarding State-Federal and State-Native legal and political relationships." The letter then asked six questions. The first was: "Do tribes or villages chartered under the IRA have authority to adopt ordinances and

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[109] Circle had been founded in 1893 on the Yukon River by prospectors who stampeded into the area when gold was discovered in the vicinity. By 1896 the town had 700 residents, ten saloons, an opera house, a library, school, and hospital, an Episcopal Church, and a newspaper. But in 1897 the news reached Circle that gold had been discovered on the Klondike River in the Yukon Territory and the town emptied out as prospectors moved upriver to the site of the new strike. By 1900 Circle had 242 residents, by 1910 144, by 1920 96, by 1930 50. Because in 1970 when the census was enumerated a majority of the 54 individuals living in Circle were of Athabascan Indian descent, in 1971 Congress designated Circle as a Native village for the purposes of ANCSA.

[110] "Interior Oks IRA Status for Circle," Fairbanks News-Miner, Oct. 15, 1981.

regulations, and upon what subjects may they act?" A second question was: "What are the territorial boundaries of jurisdiction of these IRA entities?"[111]

When he read the Governor's letter, Spud Williams was disparaging:

> What's happening is the state is challenging the sovereignty of Alaska Native governments. What they're really challenging is the validity of Alaska Natives! They would like to have it so there were no more Alaska Natives, only native Alaskans.
>
> The State of Alaska has only been in existence for how many years? Yet the Indians, Eskimos, and Aleuts have been here for thousands of years. It is ridiculous for the state to say the Natives no longer have the right to govern.[112]

A year later the validity of Williams's legal assertion that because for "thousands of years" Native residents of communities that had been designated as Native villages for the purposes of ANCSA had been "sovereign" they had the "right to govern" themselves became an issue of which everyone in Alaska became aware.

Tyonek is a community on the western shore of Cook Inlet forty-three miles southwest of Anchorage that Congress designated as a Native village for the purposes of ANCSA. In 1915 President

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[111] Letter from Jay S. Hammond, Governor of Alaska, to the Honorable James G. Watt, Nov. 5, 1981.

[112] "Tribal Reservation Status Questioned by Hammond," Tundra Times, Dec. 16, 1981.

Woodrow Wilson signed an executive order that created the Moquawkie Reserve, a 26,918 acre tract of public land whose boundaries encircled Tyonek.[113] In 1939 Maurice Carmody, the teacher at the BIA grade school, assisted Tyonek residents to write a constitution pursuant to section 1 of Public Law No. 74-538 and section 16 of the IRA that in May of that year Assistant Secretary of the Interior Oscar Chapman approved and in November Tyonek residents voted to ratify.[114]

Article IV of the constitution contained the boilerplate language that granted the village council Tyonek residents would elect authority "To control the use by members or nonmembers of any reserve set aside by the Federal Government for the Village and to keep order in the reserve." And at the meeting at which that election was held those in attendance directed the council to "make any laws, rules, or regulations which it considers to be for the common good of the members of the village."[115]

Rule No. 4, which the village council passed in 1942, prohibited non-Natives from remaining in Tyonek for more than

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[113] Executive Order No. 2141 (1915). See also Donald Craig Mitchell, Take My Land Take My Life: The Story of Congress's Historic Settlement of Alaska Native Land Claims, 1960-1971 67-75 (2001)[hereinafter "Take My Land"](history of Tyonek and Moquawkie Reserve discussed).

[114] Constitution and By-Laws of the Native Village of Tyonek, ratified Nov. 27, 1939, available at http://thorpe.ou.edu/IRA/tyocons.html.

[115] Report of the First Regular Meeting of the Members of Native Village of Tyonek, December 1, 1939.

twenty-four hours without the council's permission. Twenty-nine years later, in 1971 section 19(a) of ANCSA revoked the Moquawkie Reserve, after which the ANCSA village corporation the Indian residents of Tyonek had incorporated decided to select and be conveyed fee title to the surface estate of public land within and surrounding Tyonek pursuant to the ANCSA land selection and conveyance process.

In 1978 the Alaska Regional Solicitor of the Department of the Interior issued a legal opinion in which he concluded that "when the Tyonek reserve was terminated on December 18, 1971 by Section 19(a) of the Alaska Native Claims Settlement Act, Rule No. 4 became void and unenforceable."[116] Nevertheless, in July 1982 the village council ordered six non-Natives who had been living in Tyonek to leave the village. Donald Standifer, the president of the village council, asserted that the council had "inherent authority" to do so.[117]

When four of the non-Natives refused to leave, in September in the U.S. District Court in Anchorage the village council filed Native Village of Tyonek v. Puckett, a civil action whose prayer for relief asked the court to enforce Rule No. 4 by issuing an

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[116] Memorandum entitled "Enforcement of Native Village of Tyonek Rule No. 4 - Excluding 'White Men' from the Village" from Alaska Regional Solicitor to Alaska Area Director, Bureau of Indian Affairs, Jan. 20, 1983 (validity of the legal analysis regarding Rule No. 4 in the 1978 memorandum reaffirmed).

[117] "Village May Vote to Ban Whites," Anchorage Daily News, Aug. 11, 1982).

eviction order. In 1997 the lawsuit would end inconclusively.[118] But in 1982 the news that it had been filed was widely reported by the Alaska press.

Each October the AFN holds a convention, usually in Anchorage but occasionally also in Fairbanks, that delegates from Native villages throughout Alaska attend. Because of TCC's efforts to assist residents of Native villages in the Alaska interior to write IRA constitutions and the Native Village of

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[118] In 1986 District Judge James Fitzgerald issued an oral decision in which he dismissed the claims for relief the NVT had alleged in its complaint on the ground that they did not "arise under" federal law, and dismissed the defendants' counterclaims because "based upon Tyonek's history and the manner in which the federal government has dealt with Tyonek, . . . the Village possesses sovereign immunity from suit like that of any other Indian tribes in the contiguous states." See Native Village of Tyonek v. Puckett, U.S. District Court for the District of Alaska No. A82-369 Civil, Reporter's Transcript, Findings of Fact Conclusions of Law and Decision, Dec. 3, 1986. In 1989 the U.S. Court of Appeals for the Ninth Circuit reinstated the NVT's claims for relief, and, without explaining its reasoning, affirmed the dismissal of the defendants' counterclaims. See 890 F.2d 1054. And see also "Federal Court May Rehear Tyonek Suit," Tundra Times, Aug. 21, 1989 (commentator reporting that "This is the first ninth circuit case to confirm that Alaska villages enjoy the same sovereign immunity from suit that all other tribal governments enjoy"). In 1991 the U.S. Supreme Court granted the defendants' petition for a writ of certiorari, and then vacated and remanded the Circuit Court decision "in light of Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma," a decision in which the Court had held that the Band had not waived its sovereign immunity by filing a lawsuit. On remand, in 1992 the Circuit Court remanded the case to the District Court because "the present record fails to set forth sufficient facts to demonstrate that the Village is an Indian tribe in a political sense, and that the real property it owns is Indian country." See 957 F.2d 631. On that remand, District Judge H. Russel Holland issued an unpublished order in which he held that the members of the NVT were a federally recognized tribe because, as will be discussed, in 1993 Assistant Secretary of the Interior for Indian Affairs Ada Deer said they were. See Native Village of Tyonek v. Puckett, U.S. District Court for the District of Alaska No. A82-369 Civil, Order: Tribal Status/Sovereign Immunity, Oct. 29, 1996. Shortly thereafter, Judge Holland dismissed the action as moot, and in 1997 the Circuit Court affirmed the dismissal because the non-Natives whose refusal to leave Tyonek had motivated the NVT to file its lawsuit had "moved out of the village in 1983. They have not returned in the 14 years since they left. There is nothing in the record to suggest that they ever will." See Native Village of Tyonek v. Puckett, 133 F.3d 928 (9th Cir. 1997), 1997 WL 801472, at 1.

Tyonek v. Puckett lawsuit, by the October 1982 AFN convention Native sovereignty had become an issue of sufficient interest that during the convention the AFN held a workshop on the subject.

A year earlier when he received Governor Hammond's letter regarding the Circle Native Community's constitution, Secretary of the Interior James Watt told the BIA that he would not approve any additional IRA constitutions while the legal and policy issues the governor had identified in the questions he posed in his letter were being reviewed.

At the workshop, Michael Stancampiano, an attorney who worked for the BIA, told the standing-room-only crowd that the moratorium Secretary Watt had imposed would be lifted for constitutions whose texts were purposely vague regarding the governmental powers a constitution would grant. Then once the constitutions were approved, "individual villages could attempt to exercise whatever powers they wanted, and face state challenges as they arose."[119] According to the Tundra Times newspaper, in response to Stancampiano's announcement

> There was widespread agreement among the villagers that the federal government had no business allowing the state to become involved in what has always been a special trust relationship between the federal and tribal governments. Village leaders argued that the IRA

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[119] "Villagers Denounce 'Nebulous' IRA Language," Tundra Times, Oct. 27, 1982; "Villages Threaten to Bolt AFN," Anchorage Times, Oct. 22, 1982.

> governments did not give them sovereignty, it merely recognized those powers which they have always held. Therefore, they said, it was irrelevant what the state thought of the wording of their constitutions.[120]

On the morning of the last day of each AFN convention the delegates pass resolutions that identify the subjects on which the AFN staff is directed to work. Prior to the October 1982 convention Frank Ferguson, the president of the AFN, told the press that the AFN board of directors had put Native tribal sovereignty issues "on the back burner" because other issues merited more immediate attention.[121] But the delegates who attended the workshop brought a resolution to the convention floor whose passage directed the AFN "to make protection of the standing of Alaska Native communities as Indian tribes its top priority for the coming year."[122]

To begin implementing that directive, in March 1983 the AFN hosted a conference at the Hilton Hotel in Anchorage that three hundred Natives from Native villages throughout Alaska attended. For two days they listened to speakers that included Bert Hirsch, the General Counsel for the Association on American Indian Affairs who was representing the Native Village of Tyonek in the

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[120] "Villagers Denounce 'Nebulous' IRA Language," Tundra Times, Oct. 27, 1982.

[121] Id.

[122] "Native Convention Closes With List of Resolutions," Anchorage Times, Oct. 23, 1982.

Native Village of Tyonek v. Puckett lawsuit, Larry Jensen, the Associate Solicitor for Indian Affairs at the Department of the Interior in Washington, D.C., David Case, Michael Walleri, Donald Standifer, and Michael Stancampiano discuss the IRA and its application in Alaska post-ANCSA.[123] When it was his turn to speak Hirsch told the crowd:

> Are there tribes in Alaska? What did ANCSA do to Native sovereign powers? I think you can debate this forever. You do not have to ask permission to function as tribes. You do not have to ask the Department of the Interior whether you have sovereign powers. Nonsense. Do it. That's my message to you. If somebody doesn't like what you are doing, they will find the mechanism to challenge you. They will take you to court. There's ample time to fight out the issues then.[124]

During the workshop that had been held during the AFN convention, Theodore Katcheak, the president of the village council in Stebbins, a Native village at the mouth of the Yukon River whose Yup'ik Eskimo residents had obtained an IRA constitution in 1939, had suggested that he and the leaders in other Native villages that had either an IRA constitution or a "traditional" village council that had no legal imprimatur should form an organization.[125] During the conference that idea gained traction, and in May 1983 Natives who said they represented

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[123] "Natives Told to Use Sovereignty," Anchorage Times, March 10, 1983; "Sparks Fly at IRA Meeting in Anchorage," Tundra Times, March 23, 1983.

[124] The Indian Reorganization Act: Transcript of a Conference Sponsored by the Alaska Federation of Natives, March 8-9, 1983, at 47.

[125] "Villages Threaten to Bolt AFN," Anchorage Times, Oct. 22, 1982.

thirty-seven villages met in Anchorage and organized the United Tribes of Alaska (UTA).[126]

Several days before the October 1983 AFN convention the UTA held a two-day meeting in Anchorage, which it advertised as a General Assembly, at which various speakers discussed various aspects of the Native tribal sovereignty issue.[127]

A year later, on the first day of the October 1984 AFN convention the AFN held another workshop on Native tribal sovereignty at which Sheldon Katchatag, a thirty-seven-year-old Inupiat Eskimo from Unalakleet, a Native village on the coast of the Bering Sea north of the Yukon River, who was the chairman of the UTA, assured the several hundred Natives in attendance that Native villages "have the power to control their own lands - and they can even expel non-members if they so desire."[128] The next day he delivered a speech at the AFN convention during which he railed that ANCSA was "unfair" because it gave the money and the title to the land Alaska Natives had received as compensation for the extinguishment of their aboriginal titles to village and

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[126] "Statewide IRA Group Begun," Tundra Times, March 16, 1983; United Tribes of Alaska New IRA Federation," Tundra Times, May 11, 1983.

[127] "Native Leaders to Discuss Powers of Tribes," Anchorage Times, Oct. 16, 1983; "AFN Refuses Floor to Dissidents," Anchorage Times, Oct. 19, 1983; Agenda: United Tribes of Alaska General Assembly," Tundra Times, Oct. 19, 1983.

[128] "Tanana Chiefs President Says Sovereignty Move Not Takeover," Anchorage Times, Oct. 26, 1984.

regional corporations, rather than to tribal governments. When he concluded his remarks Katchatag received a standing ovation.[129]

While the core tenet of the Native tribal sovereignty movement that Spud Williams had described three years earlier was grounded in an ideology that by 1984 was capturing the hearts and minds of an increasing number of AFN convention delegates, the UTA was a letterhead organization and Sheldon Katchatag was an unpaid volunteer. That became apparent in September 1985 when the UTA rented the Anchorage Convention Center for a meeting that it now called a Congress. According to the Tundra Times:

> Thousands of Alaska Natives were expected at Anchorage's Egan Convention Center to attend the United Tribes of Alaska Second Annual Congress. Many of those expected to attend stayed home. Based on a Tundra Times count of registered delegates, approximately 250 Natives were in Anchorage . . . While UTA Chairman Sheldon Katchatag claimed, "We'll be representing half the villages in Alaska after this convention," the numbers of people milling in and out of the convention center did not reflect half of Alaska's villages.[130]

And the people milling in and out actually reflected considerably less than half because on the second-to-last day of the Congress when Charlie Kairaiuak, the chairman of the village council in Chefornak, a Native village in western Alaska near the coast of the Bering Sea, defeated Katchatag in the election for

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[129] "Speaker Criticizes Land Settlement Act," Anchorage Times, Oct. 27, 1984.

[130] "UTA Congress Puts Sovereignty on the Map," Tundra Times, Sept. 23, 1985.

chairman of the UTA, the vote was 38 to 18.[131]

After the UTA's Congress adjourned it was discovered that Katchatag had rented the convention center and run up other bills that totaled more than $300,000 by writing bad checks. When the fact that he had became public, Katchatag explained that "What we were doing was issuing these checks as a promise to pay and we had that understanding with all of our vendors and clients that everything was conditional on revenues coming in."[132] But when the Tundra Times asked three of the vendors whether they had been told the checks they had been given actually were just promissory notes none had been.[133] Katchatag was not arrested, but the UTA soon thereafter disbanded.

Sections 7 and 8 of ANCSA required each Alaska Native who was alive on December 18, 1971 (the date President Richard Nixon signed ANCSA into law) to be issued one hundred shares of stock in a regional corporation and, if the Native wanted them, one hundred shares of stock in a village corporation, and prohibited Native shareholders from selling their stock until December 18, 1991. Sections 7 and 8 also provided that on January 1, 1992 those shares of stock would be canceled and the regional and

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[131] "UTA Congress Elects Charlie 'K' New Chairman," Tundra Times, Sept. 23, 1985.

[132] "Can Sovereignty Survive the UTA?". Tundra Times, Oct. 14, 1985.

[133] Id.

village corporations would issue new shares that could be freely sold.

For many Alaska Natives, the possibility that when the new shares of stock were issued a majority of the shareholders of a regional or village corporation would sell their stock to non-Natives and, as a consequence, the shareholders who did not sell no longer would control the corporation that owned the land whose title the Secretary of the Interior had conveyed to the corporation was a matter of significant concern.

To contribute to the debate that was beginning inside the Alaska Native community regarding how Congress should be asked to amend ANCSA to prevent that possibility, at the urging of representatives from the NSB, in July 1983 the Inuit Circumpolar Conference (ICC)[134] created the Alaska Native Review Commission.

The Commission was one person: Thomas Berger, a former justice of the Supreme Court of British Columbia who had established a reputation in Canada as a stalwart defender of aboriginal treaty and land rights.[135] The ICC tasked Berger with investigating "the history and intent of the Alaska Native Claims

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[134] At the instigation of Eben Hopson, the Mayor of the NSB, in 1977 Inupiat Eskimos from Alaska, Greenland, and Canada organized the ICC to address issues of common concern to indigenous peoples in the arctic. See "Inuit Circumpolar Conference Underway," Tundra Times, June 15, 1977.

[135] "Berger: A Lifetime Devoted to Native Justice," Tundra Times, October 19, 1983. And see generally Thomas R. Berger, One Man's Justice: A Life in the Law (2002).

Settlement Act" and "the functions of the various Native Corporations in fulfilling the 'spirit' of ANCSA for Alaska Natives." He then was to submit a report that would contain whatever recommendations he deemed appropriate.[136]

Advised by David Case, who he hired as the Commission's general counsel, between February 1984 and March 1985 Berger held hearings in fifty Native villages and hosted meetings at which various experts expressed their views about ANCSA. Berger then wrote a report, which in March 1985 he published as a book entitled Village Journey.[137]

Chapter six of Village Journey, entitled "Native Sovereignty in Alaska," begins with a discourse on the history of federal Indian policy and is sprinkled with quotes from testimony Alaska Natives presented during the hearings he held that Berger selected to bolster a polemical argument; which was that Native residents of Native villages were, and had always been, "sovereign." Here are statements of history and law Berger offered Village Journey readers:

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[136] Agreement Made as of August 29, 1983 Between Thomas R. Berger and Inuit Circumpolar Conference and Revised Terms of Reference, reprinted in David S. Case, "Listen to the Canary: A Reply to Professor Branson," 4 Alaska Law Rev. 209, 220-221 (1987).

[137] Thomas R. Berger, Village Journey: The Report of the Alaska Native Review Commission (1985)[hereinafter "Village Journey"]. See also "Berger Report Released at Long Last," Tundra Times, Sept. 16, 1985; "Clash Avoided Over Study of Settlement Act," Anchorage Times, Sept. 17, 1985.

> Neither Russia nor the United States ever conquered Alaska, nor have Alaska Natives ever voluntarily given up or treated to give up their inherent political powers. They have not been absorbed into the mainstream of American society, and their occupation of their ancestral homelands remains unbroken. Sovereignty inheres in the Native people.[138]
>
> Some seventy Alaska villages have organized IRA councils under its terms. Many villages that do not have IRA councils are governed by traditional councils. Their recognition by Congress is indisputable: all of these villages, whether governed by IRA councils or by traditional councils, have as much right to be called tribes as any Indian community in the Lower 48.[139]
>
> It is apparent that many Alaska Natives hold high hopes for what can be achieved under tribal government. It is apparent that they believe tribal government will protect their interests better than ANCSA corporations or state-chartered local governments can. I believe they are right to think so. No one believes that tribal government can solve all the problems in the villages. Tribal government is, however, essential to the recommendations I intend to make regarding the future of Native lands and Native subsistence [hunting and fishing].[140]

When he later was asked who had advised him regarding the factual accuracy and legal validity of those statements, Berger responded that he "relied principally on the advice and counsel of David Case, especially chapter six."[141]

At the conclusion of Village Journey, Berger offered these

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[138] Village Journey, at 140.

[139] Id. at 141.

[140] Id. at 154.

[141] Letter from Thomas R. Berger to Donald Craig Mitchell, July 2, 2015.

recommendations regarding "Self-Government":

> Tribal governments established in all of Alaska's Native villages should assert their Native sovereignty.
>
> Pending and future applications by villages in Alaska for tribal constitutions and charters under the Indian Reorganization Act should be granted. The State should recognize tribal governments as appropriate local governments for all purposes under state law. These measures, important for Native self-rule, may entail the dissolution of some, but not all, of the state-chartered local governments in Native villages.
>
> I do not recommend the general establishment of Native reservations in Alaska. Instead tribal governments would hold the land in fee simple. But if there are villages that want their land taken into federal trust, this should be done.
>
> I urge that all land subject to the jurisdiction of Native governments should be described as Indian Country or, as the case may be, Eskimo Country or Aleut Country.[142]

On April 17, 1986 Thomas Berger testified at a hearing the House Committee on Interior and Insular Affairs held on a bill the AFN had written whose passage by Congress would amend ANCSA in various ways, but most particularly by continuing the prohibition on the sale of regional and village corporation stock unless and until a majority of the shareholders of a corporation voted to make the stock in their corporation available for sale.[143]

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[142] Id. at 170-171.

[143] Alaska Native Claims Settlement Act: Hearing on H.R. 4162 Before the H. Comm. on Interior and Insular Affairs, 99th Cong. 261-270 (1986)(statement of Hon. Thomas Berger, Commissioner, Alaska Native Review Commission) [hereinafter "1986 House Hearing"].

Berger began his testimony by informing the members of the Subcommittee that in the Native villages he had visited "there is a tribal government. They didn't vanish in 1971. They're still there exercising certain powers under the law. You can call them sovereign powers, if you will, but nobody disputes that those tribal governments are there and that they do have certain powers under U.S. jurisprudence."[144] He then recommended that Congress amend ANCSA to facilitate the ability of regional and village corporations to convey the title to the surface and subsurface estates of the land the corporations owned to "tribal governments."[145]

Thomas Berger had no influence with Alaska Senators Ted Stevens and Frank Murkowski and Alaska Representative Don Young who would decide the fate of AFN's bill. But he had a consequential influence with members of the Native tribal sovereignty movement. Thousands of copies of Village Journey were distributed in Native villages and sold in book stores. In October 1983 Berger was a featured speaker at the UTA's General Assembly.[146] And in a speech he delivered in September 1985 at the UTA's Congress, Berger assured those in attendance that Native

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[144] Id. at 262.

[145] Id. at 264.

[146] "UTA Won't Discuss Sovereignty," Tundra Times, Sept. 21, 1983; "Agenda, United Tribes of Alaska, General Assembly," Tundra Times, Oct. 19, 1983.

tribal sovereignty was "as American as apple pie."[147]

While Thomas Berger had been holding hearings in Native villages the AFN was engaged in a process whose objective was to develop a consensus within the Native community regarding the content of the bill above-described whose passage by Congress would amend ANCSA to continue the prohibition on the sale of regional and village corporation stock.

That objective seemingly was achieved at the October 1985 AFN convention when the delegates approved a proposal to include eight concepts in an AFN bill.[148] As the Anchorage Times reported, during the debate that preceded the vote, "Sovereignty backers . . . proposed the drafting of recommendations by Canadian jurist Thomas Berger into legislation. Berger interviewed some 1,450 natives during a two-year study of ANCSA and recommended the transfer of corporate lands to Native governments. However, the proposal adopted only 'acknowledged the testimony' of these Native interviewees."[149]

While the AFN board of directors had avoided having to include Berger's recommendations in the AFN bill, they did try to

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[147] "Berger Urges Sovereignty," Anchorage Times, Sept. 21, 1985.

[148] "8 Amendments Seek to Protect lands," Anchorage Times, Oct. 27, 1985.

[149] "AFN Winds Up Convention With Compromises," Anchorage Times, Oct. 27, 1985.

placate the members of the UTA and other Native tribal sovereignty advocates.

On February 6, 1986 Alaska Senator Frank Murkowski and Alaska Representative Don Young introduced the AFN bill in the Ninety-Ninth Congress as S. 2065 and H.R. 4162.

Section 5 of the bill added a new section 7a to ANCSA that authorized a regional or village corporation to "convey some or all of its assets, including title to the surface and/or subsurface estate of land, or any interest therein, to a qualified transferee entity for no consideration or for such consideration as its stockholders may approve." "Qualified transferee entity" was defined to mean "an entity organized pursuant to or recognized by State or Federal law;" an intentionally abstruse way to describe a village council that had been created in a constitution the Secretary of the Interior had approved pursuant to section 1 of Public Law No. 74-538 and section 16 of the IRA, as well as a "traditional" village council that had no legal imprimatur.

Caught between the growing number of members of the Native tribal sovereignty movement who, incited by Thomas Berger, were committed to "tribalizing" ANCSA and, as will be discussed, the opposition of Alaska Senators Ted Stevens and Frank Murkowski to that outcome, the AFN board of directors tried to maintain a calibrated neutrality by balancing off the qualified transferee

entity provision in its bill by including a provision that added a new section 7c to ANCSA that stated: "Nothing in this Act shall be construed as enlarging or diminishing or in any way affecting the scope of any governmental authority of a federally recognized tribe, traditional council or Native council organization pursuant to the Indian Reorganization Act, as amended, or any right, privilege or immunity of Alaska Natives as Native Americans in their relationship with the Government of the United States."

On April 17, 1986 the House Committee on Interior and Insular Affairs held a hearing on H.R. 4162. In addition to Thomas Berger and the president of the AFN, the witnesses included three representatives of the Alaska Native Coalition (ANC), a new organization that members of the defunct UTA had created a month earlier.[150]

John Borbridge, a Tlingit Indian who was the principal spokesman for the ANC, told the Committee that the ANC had six objections to the AFN bill. The two most consequential were, first, that H.R. 4162 attempted "to side step the critical issue

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[150] See "Alaska Native Sovereignty Backers Present Proposals in Washington," Anchorage Times, April 18, 1986 (Alaska Native Coalition described as "a new organization of some 25 tribal governments and village councils . . . that is apparent successor to the debt-crippled United Tribes of Alaska"); "ANC Speaks for Villagers in 1991 Issue," Tundra Times, March 23, 1987 (reporting that "In March 1986, well over 20 people gathered in Sitka to discuss the formation of a statewide coalition to represent the concerns of villages and tribes" and that "The ANC embraces the findings of the Alaska Native Review Commission and intends to bring those findings to Congress").

of tribal village status. We find the use of a qualified transferee entity to be ambiguous at best and clearly inadequate to meet our legitimate tribal government needs . . . if it is intended that tribal village governments be one of the entities qualified to receive those lands in order to afford them protection, so that Native ownership may continue, let us say that."[151] And second, that the text of section 7c was inadequate "because certain parties who oppose tribal government argue that ANCSA itself removed village governmental powers . . . It is our position that ANCSA 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."[152]

In his testimony Thomas Berger told the Committee that Congress should amend ANCSA to facilitate the conveyance by regional and village corporations of the title to the surface and subsurface estates of the land they owned to village councils because the corporations doing so would ensure that the land

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[151] 1986 House Hearing, at 138.

[152] Id. at 139.

would remain in Native ownership. But the ANC had a more expansive agenda.

Section 1151 of Title 18 of the U.S. Code defines the term "Indian country" to mean 1) "land within the limits of any Indian reservation", 2) "dependent Indian communities within the borders of the United States," and 3) "Indian allotments, the Indian titles to which have not been extinguished." In 1976 in Bryan v. Itasca County[153] the U.S. Supreme Court had held that a state within whose boundaries a tract of Indian country is located has no authority to assert its criminal and civil jurisdiction within the boundaries of that Indian Country, except to the extent Congress has delegated the State jurisdiction.

Similarly, in 1957 in In re McCord[154] the U.S. District Court for the District of Alaska had held that the public land inside the boundaries of the Moquawkie Reserve in which the village of Tyonek was located was an "Indian reservation" - and hence 18 U.S.C. 1151 "Indian country" - within which the Territory of Alaska had no jurisdiction to enforce its criminal statute that prohibited statutory rape. While In re McCord was wrongly decided,[155] rather than the Territory of Alaska appealing the

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[153] 426 U.S. 373 (1976).

[154] 151 F. Supp. 132 (D. Alaska 1957).

[155] For the circumstances that led to the In re McCord decision, see Why History Counts, at 382-385.

decision to the U.S. Court of Appeals for the Ninth Circuit, Alaska Delegate E.L. "Bob" Bartlett arranged for the Eighty-Fifth Congress to amend Public Law No. 83-280, a statute Congress had enacted in 1953 that granted several listed states authority to assert their criminal and civil jurisdiction within Indian country.[156] Delegate Bartlett's amendment added the Territory (later State) of Alaska to that list.

At the April 17, 1986 hearing on H.R. 4162, when John Borbridge concluded his testimony, the next ANC witness was Willie Kasayulie, a Yup'ik Eskimo from Akiachak, a Native village on the Kuskokwim River in western Alaska, who was the chairman of the ANC. Kasayulie attached to his written testimony a package of amendments to ANCSA and other statutes that the ANC wanted the Committee to include in the bill.[157]

One amendment defined "dependent Indian community" in the 18 U.S.C. 1151 "Indian country" definition to state that in Alaska a "dependent Indian community" included

> all lands and waters consisting of townsite lands, allotments, village and regional corporation lands, restricted townsite lots, core townships, municipal lands (and all other areas) regardless of ownership, which lie within the exterior boundaries of such lands, and provided such lands lie within the traditional boundaries of those Alaska Native villages made eligible for certain benefits pursuant to sections 11,

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[156] Id. 384-385.

[157] 1986 House Hearing, at 159-178.

> 14(h)((2), 14(h)(3), 16 or 19 of the Alaska Native Claims Settlement Act, or any other Alaska Native community.[158]

Another amendment amended section 22 of ANCSA to grant "Alaska Native Tribes" exclusive jurisdiction "to regulate hunting, fishing, and trapping in Indian country."[159]

When they wrote the amendment in the nature of a substitute for the original text of H.R. 4162 that on July 24, 1986 the Committee on Interior and Insular Affairs reported to the U.S. House of Representatives,[160] with one inconsequential exception, Representative Morris Udall, the Chairman of the Committee, and Alaska Representative Don Young rejected the amendments the ANC had presented. Then on July 28, 1986 the House passed H.R. 4162 without controversy and by a voice vote.[161]

Six days later the Subcommittee on Public Lands, Reserved Water and Resource Conservation of the Senate Committee on Energy and Natural Resources held a hearing on S. 2065, as the AFN bill

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[158] Id. at 164-165.

[159] Id. at 165-166.

[160] See H.R. Rep. No. 99-712 (1986).

[161] 132 Cong. Rec. 17798-17805 (1986).

had been denoted in the Senate.[162] The hearing was chaired by Alaska Senator Frank Murkowski. A banker by training, rather than an attorney familiar with the Talmudic intricacies of federal Indian law, in his opening remarks the Senator voiced his confusion regarding how those intricacies might affect the situation in Alaska. But he was clear that, having been educated by the ANC, he opposed its agenda. Senator Murkowski stated:

> The most controversial aspect of this legislation concerns its secondary impacts, how it affects the question of Indian country in Alaska and sovereignty. There are many different opinions on whether Indian country exists in Alaska and to what extent Alaska Natives possess sovereign powers of self-government.
>
> Whatever the 1971 Native Claims Settlement Act allowed or disallowed with respect to these questions will remain unchanged by this bill. Senator Stevens, Congressman Young, and I have consistently stated that the 1991 amendments will not foster sovereignty nor will they detract from any self-government powers which Alaska Natives may now possess under existing law. In short, the bill will not tip the scales on these issues in either direction.
>
> I have stated in my opening remarks in each of the hearings I have held in nine communities in Alaska that I will not support any legislation which leads to the creation of a series of independent sovereign entities in Alaska. One can only imagine the confusion that would exist if the State and Federal Government were required to enter into treaties with various sovereign Indian Nations.

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[162] Amendments to the Alaska Native Claims Settlement Act and the Alaska National Interest Lands Conservation Act and to Establish a Memorial in the District of Columbia: Hearing on S. 485, S. 1330, S. 2065, and S. 2370 Before the Subcomm. on Public Lands, Reserved Water and Resource Conservation of the S. Comm. on Energy and Natural Resources, 99th Cong. (1986) [hereinafter "1986 Senate Hearing"].

> I believe that such a situation is contrary to the best interests of all Alaskans, Native and non-Native alike. From the standpoint of where we go collectively as Alaska citizens, it is our intent to retain the current form of government that we have, and that is the government of the State of Alaska.[163]

After the hearing, members of the AFN staff began meeting with the Alaska Senators and representatives of Secretary of the Interior Donald Hodel to negotiate a new bill text that all of those parties could support.

Secretary Hodel had six objections to the version of H.R. 4162 that had passed the House. During the hearing at which Senator Murkowski presided, Assistant Secretary of the Interior William Horn explained that, for Secretary Hodel, the section that amended ANCSA to facilitate the conveyance of land to qualified transferee entities was particularly problematical because such conveyances

> could lead to attempts to establish independent Indian communities similar to the Indian country or reservation system in the lower 48 states. Efforts to exploit this provision through litigation would likely result. This clearly contravenes the intent of ANCSA as expressed in section 2(b). We recommend, instead, that an express provision against the establishment of such "Indian country," as defined in 18 U.S.C. section 1151, be substituted, along with an explicit statement that the United States does not bear the same trust responsibility for ANCSA settlement lands as it does

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[163] Id. at 3.

> for Indian lands. Without these recommended statements, the Administration would be compelled to oppose the bill.[164]

On September 25, 1986 the AFN announced that its staff no longer would participate in the negotiations.[165] The AFN did so because members of the ANC and other Native tribal sovereignty advocates who since 1983 had become increasingly influential with rank-and-file delegates who attended AFN conventions objected to a rewritten text of the disclaimer section of the bill that Senator Murkowski and Secretary Hodel said was nonnegotiable. As Dalee Sambo, a member of the ANC Executive Committee, explained to the Anchorage Daily News: "For tribes, it would have been too high a price to pay. Just yesterday we were coming up with strategies for how we could kill [the bill]. We're pleased it's not going forward."[166]

On October 6, 1986 Alaska Senators Stevens and Murkowski published in the Congressional Record an amendment in the nature of a substitute for the text of the version of H.R. 4162 that had passed the House that they were willing to support.[167] The substitute contained the amendment to ANCSA that authorized

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[164] 1986 Senate Hearing, at 76.

[165] See Senate Pulls 1991 Bill at Natives' Request," Anchorage Times, Sept. 25, 1986.

[166] "Native Group Opposes Senate Claims Amendments, Stops Bill," Anchorage Daily News, Sept. 26, 1986.

[167] 132 Cong. Rec. 29,049-29,060 (1986).

regional and village corporations to convey title to the subsurface and surface estates of the land they owned to qualified transferee entities. But the text of the disclaimer section of the version of H.R. 4162 that had passed the House had been rewritten. The text now provided that no provision in H.R. 4162 was intended to "enlarge or diminish or in any way affect the scope of the governmental authority, if any, of any Native organization, including any federally-recognized tribe, traditional Native council, Native council organized pursuant to [section 1 of Public Law No. 74-538 and section 16 of the IRA], or qualified transferee entity over lands (including management of, or regulation of the taking of, fish and wildlife) or over persons in Alaska."

The text also prohibited a land conveyance to a qualified transferee entity or any other change in the ownership of land from being "construed to validate or invalidate or in any way affect any assertion that Indian country, as defined in 18 U.S.C. 1151, exists or does not exist in Alaska," and it prohibited the federal courts from taking such conveyances and changes in ownership into account when determining the governmental authority of a Native organization or "the existence of Indian country within the boundaries of the State of Alaska."[168]

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[168] Id. at 29059.

With the Ninety-Ninth Congress rushing toward adjournment, on October 17, 1986 the AFN convention convened in Anchorage. During the convention, by a 2-to-1 margin the 1,200 delegates voted to reject the amendment in the nature of a substitute that Senators Murkowski and Stevens had published in the Congressional Record.[169] The next morning the delegates passed a resolution that directed the AFN board of directors to coordinate with "the Alaska Native Coalition and other affected Native organizations" during the One Hundredth Congress to write a new bill whose enactment would maintain "the existing inherent tribal rights of Alaska Native tribes."[170]

When the convention adjourned, the Anchorage Daily News summarized the outcome as follows: "Stevens and Murkowski said any 1991 bill should open no new doors to sovereignty claims. But their version of the bill was seen by many within AFN as diminishing existing legal arguments for tribal authority. The result was an upswelling of support in defense of sovereignty this year, compared to past years when tribal activists were a small but vocal minority at annual AFN gatherings."[171]

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[169] "AFN Decides to Try Again on Claims Bill," Anchorage Daily News, Oct. 19, 1986.

[170] AFN Resolution No. 86-02 (Oct. 18, 1986).

[171] "AFN Decides to Try Again on Claims Bill," Anchorage Daily News, Oct. 19, 1986.

The disagreement between Senators Murkowski and Stevens and the ANC would not be resolved until the next AFN convention.

On the second day of the One Hundredth Congress, January 7, 1987, Alaska Representative Don Young introduced H.R. 278,[172] a bill whose text was identical to the text of the version of H.R. 4162 the U.S. House of Representatives had passed during the Ninety-Ninth Congress. On March 27, 1987 the Committee on Interior and Insular Affairs reported H.R. 287 with four inconsequential amendments,[173] and four days later the House passed the bill after only cursory discussion and by a voice vote.[174]

The speed with which H.R. 278 moved from introduction to passage was no accident. On December 18, 1986 Richard Agnew, the Chief Counsel for the Republican members of the Committee on Interior and Insular Affairs, had reported to AFN's counsel that Representative Young "wants to be able to argue in committee and on the floor that the 1987 bill is identical to the 1986 bill and that it should be passed without amendment. This, in order to head off the threat of amendments by the environmental community and other interests. Young is convinced that if the bill is

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[172] 133 Cong. Rec. 860 (1987).

[173] H.R. Rep. No. 100-31 (1987).

[174] 133 Cong. Rec. 7376-7382 (1987).

opened by the Natives, no matter how inconsequential or technical the amendments may be, everyone will get on the band wagon" and that might "derail the bill."[175]

A month after the House passed H.R. 278, on May 6, 1987 Senators Stevens and Murkowski introduced S. 1145.[176] The bill incorporated changes to H.R. 278 that the leaders of the AFN had negotiated with the Senators. The bill included the qualified transferee entity section and a disclaimer section whose text was identical to the text of the disclaimer section in the amendment in the nature of a substitute the Senators had published in the Congressional Record and which the delegates who attended the 1986 AFN convention had rejected. When S. 1145 was introduced, Senator Murkowski told the Senate:

> Unfortunately, [the qualified transferee entity section] has been tangled up in the sovereignty issue. The status of tribal governmental authority is currently unresolved in Alaska and is not one that should be addressed in this legislation. Thus, I have consistently stated that this legislation will remain neutral on the question of sovereignty - it will neither enhance nor detract from the status quo on that question. This bill attempts to achieve this goal through the use of a sovereignty disclaimer. However, the issue of what neutrality is remains one which will need to be resolved.[177]

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[175] Memorandum entitled "1991 Strategies in U.S. House" from Morris Thompson to AFN 1991 Steering Committee, Dec. 19, 1986.

[176] 133 Cong. Rec. 11516 (1987).

[177] 133 Cong. Rec. 11525 (1987).

On May 19, 1987 when the Committee on Energy and Natural Resources held a hearing on S. 1145 and H.R. 278,[178] Senator Murkowski, who chaired the hearing, made it clear that his view of the situation had not changed. "There are those in the Alaska Native community who seek a greater opportunity for sovereignty in this legislation particularly through this provision [i.e., the qualified transferee entity section]," the Senator announced to the audience sitting in the hearing room that included two representatives of the ANC. "I personally will not support that position."[179] And Senator Stevens was equally adamant. "So long as the qualified transferee entity provision currently in S. 1145 is retained," he explained, "a comprehensive disclaimer that addresses the issue of a shift in land ownership from a Native corporation to a tribal entity really is necessary. That is the only way we can meet our commitment to keep the 1991 bill out of the Native sovereignty controversy at home in Alaska."[180]

When she testified, Janie Leask, the president of the AFN, attached to her written testimony a new bill text that, because it had been written in conjunction with leaders of the ANC, contained a qualified transferee entity section and a disclaimer

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[178] Alaska Native Claims Settlement Act Amendments of 1987: Hearing on S. 1145 and H.R. 287 Before the S. Comm. on Energy and Natural Resources, 100th Cong. (1987)[hereinafter "1987 Senate Hearing"].

[179] Id. at 2.

[180] Id. at 114.

section whose texts were acceptable to the ANC. Leask explained that the AFN's "preference" was that the Committee include those sections in the version of H.R. 278 the Committee reported.[181] But prior to the hearing the members of the Steering Committee the AFN Board of Directors had created to advise the Board regarding the bill had recommended that the Board "consider the option of dropping all QTE language provided all disclaimer language is excluded with it and after proper consultation with appropriate members of the Alaska Native Coalition."[182]

The AFN having crossed that Rubicon, Leask told Senator Murkowski that, if it was the only way he and Senator Stevens would allow the Committee to report H.R. 278, the AFN would support removing the qualified transferee entity section from the bill in exchange for "some kind of modified disclaimer."[183]

That is how the impasse was resolved.

On September 23, 1987 the members of the Committee on Energy and Natural Resources reported to the Senate an amendment in the nature of a substitute for the version of H.R. 278 that had passed the U.S. House of Representatives and whose text reflected the quid pro quo Janie Leask had told the Committee was

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[181] Id. at 249.

[182] See Motions Passed at the 1991 Steering Committee Meeting of May 7, 1987.

[183] 1987 Senate Hearing, at 249.

acceptable to the AFN.[184] In its report on the amendment the Committee explained that

> the amendment eliminates section 7 of the House-passed bill. Section 7 would amend the Alaska Native Claims Settlement Act to allow the shareholder (sic) of a Native Corporation to vote to convey any, or all, of the corporation's assets, including, but not limited to land and interests therein, to a qualified transferee entity. This provision was eliminated in the Committee reported bill. Having eliminated section 7, the Committee also modified the disclaimer in section 8 of the House version of H.R. 278 and contained in section 17 of the Committee amendment to ensure that the language of the disclaimer is viewed by all interested parties as truly neutral on the question of Native sovereignty in Alaska.[185]

Most significantly, the modified disclaimer section omitted the subsection in the disclaimer section in S. 1145 that prohibited the federal courts from considering whether land whose title the Bureau of Land Management had conveyed to a regional or village corporation pursuant to ANCSA had been transformed into "Indian country" because the corporation had conveyed its title to the land to a village council that had been organized pursuant to section 1 of Public Law No. 74-538 and section 16 of the IRA or to a "traditional" village council that had no legal imprimatur.

The Committee reported its amendment over the protestation of the ANC. As the Tundra Times explained the week before the

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[184] "'1991' Moves Ahead," Anchorage Daily News, Sept. 24, 1987.

[185] S. Rep. No. 100-201, at 23 (1987).

Cmmittee did so: "Among those who are seeking to stall the 1991 bill are members of the Alaska Native Coalition, who are objecting to the Murkowski version of the bill. They are concerned that the bill does not include a provision authorizing transfer of ANCSA corporation lands to a 'qualified transferee entity,' such as a tribal government."[186]

Three days after the Committee on Energy and Natural Resources sent its amendment to the Senate, on October 23, 1987 the delegates who attended the 1987 AFN convention voted, by a 3 to 1 margin, to reject a resolution the Tanana Chiefs Conference sponsored whose passage would have required the AFN to demand that Senators Stevens and Murkowski amend the Cmmittee's amendment by including the qualified transferee entity section.[187]

The dispute between the ANC and Senators Stevens and Murkowski regarding the qualified transferee entity section having now been settled in favor of removing the section from the Cmmittee's amendment, six days later at the Snators' urging the Senate accepted the Committee's amendment and passed H.R. 278 on a voice vote.[188]

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[186] "Senate Panel Delays Action on 1991 Bill," Tundra Times, Sept. 21, 1987.

[187] AFN Convention Resolution No. 87-01. See also "AFN Votes Yes on 1991 Proposals," Anchorage Times, Oct. 24, 1987.

[188] 133 Cong. Rec. 29803-29812 (1987). See also "1991 Land Bill Clears Senate," Anchorage Daily News, Oct. 30, 1987.

Over the next two months members of the AFN staff, Senators Stevens and Murkowski and Representative Young, and representatives of Secretary of the Interior Hodel and Representative Morris Udall (the Cairman of the House Committee on Natural Resources) and Senator Bennett Johnston (the Cairman of the Senate Committee on Energy and Natural Resources) negotiated changes to the text of the version of H.R. 278 that had passed the Senate.

On December 21, 1987 the Senate and U.S. House of Representatives passed a new version of H.R. 278 whose text reflected the outcome of those negotiations,[189] and on February 3, 1988 President Ronald Reagan signed that version of the bill into law as Public Law No. 100-241.[190]

During those negotiations, to placate the ANC, the text of the disclaimer section was modified to state that no provision of the bill was intended to "validate or invalidate or in any way affect"

> Any assertion that a Native organization (including a federally recognized tribe, traditional Native council, or Native council organized pursuant to the [IRA], 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. (emphasis added).

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[189] 133 Cong. Rec. 36727-36744 and 37713-37728 (1987).

[190] "Reagan Oks Extension of Alaska Stock Sales Ban," Anchorage Daily News, Feb. 4, 1988.

That text seemingly put the One Hundredth Congress on record as believing that in 1987 there were "federally recognized tribes" in Alaska. However, that was not the understanding of Senator Murkowski, who undoubtedly did not read the text of the disclaimer section to which his staff had agreed. Because prior to the voice vote in the Senate, Senator Murkowski explained to his colleagues that

> There is a great deal of controversy in Alaska over the issue of whether Alaska Native organizations may exercise some degree of governmental authority over lands or individuals. The controversy involves several complex questions - which Native groups might qualify as tribal organizations, what powers such organizations might possess, and whether there is Indian country in Alaska over which such organization (sic) might exercise governmental jurisdiction. The "1991" amendments are scrupulously neutral on this controversy. It is an issue which should be left to the courts in interpreting applicable law. This legislation should play no substantive or procedural role in such court decisions. It was and is my intent that this legislation leave all parties to the sovereignty controversy in exactly the same statue (sic) as if the amendments were not enacted. (emphasis added).[191]

Contrary to Senator Murkowski's intention, the inclusion of the reference to "federally recognized tribes" in the disclaimer section did not leave the sovereignty controversy "in exactly the same state as if the amendments were not enacted." However, six months after President Reagan signed H.R. 278, the Alaska Supreme

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[191] 133 Cong. Rec. 37722 (1987).

Court settled the Native tribal sovereignty controversy in the Ssenator's favor.

J. Native Village of Stevens v. Alaska Management & Planning.

In November 1982 Democrat Bill Sheffield was elected to succeed Republican Jay Hammond as Governor of Alaska. When he assumed office the new governor inherited the policy concern of how the State of Alaska should respond to the Native tribal sovereignty movement. For Sheffield, the issue was politically problematic because he had been elected in a four-candidate election he won only because the Republican Party and Libertarian Party candidates split the conservative vote.

A determinative percentage of the votes that elected Sheffield had been cast by Native voters in communities that had designated as Native villages for the purposes of ANCSA and in which support for the Native tribal sovereignty movement was growing. Sheffield defeated the Republican candidate in Tyonek 85 votes to 11 votes, in Unalakleet, the community in which Sheldon Kachetag, the future chairman of the UTA, resided, 210 votes to 47 votes, and in Akiachak, the community in which Willie Kasayulie, the future chairman of the ANC, resided, 164 votes to 10 votes. All told, Sheffield won 129 coastal Eskimo and interior

Indian villages 15,497 votes to 4,115 votes.[192] And he would need those votes again when he ran for reelection in 1986.

Sheffield's reluctance to alienate that politically important constituency became apparent four months after he assumed office when he spoke at the Village Participation Conference, an annual event held during the legislative session at the State capitol in Juneau that representatives from forty-eight Native villages attended and Sheldon Kachatag chaired. After listening to the Governor speak, the participants passed a resolution in which they commended the Sheffield administration for recognizing IRA governments.[193] However, his press secretary later said there had been a "misunderstanding" because the Governor had only told the participants that he was "interested in exploring the relationship" between the State and village councils in Native villages that had IRA constitutions.[194]

But if he was being pressured by members of the Native tribal sovereignty movement to concede that village councils in Native villages that had been issued constitutions pursuant to

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[192] State of Alaska, Official Returns by Election Precinct, General Election, Nov. 2, 1982, available at http://www.elections.alaska.gov/results/82GENR/82genr.pdf.

[193] Resolution, Rural Alaska Village Participation Conference, March 29-31, 1983.

[194] "Sheffield Declines Sovereignty Credit," Anchorage Daily News, April 9, 1983. And see also "UTA to Governor: Deal Directly with Tribes," Tundra Times, Nov. 2, 1983.

section 1 of Public Law No. 74-538 and section 16 of the Indian Reorganization Act (IRA) had "sovereign" political authority, Governor Sheffield also was being pressured by Alaska's congressional delegation.

A month after the Village Participation Conference he received a letter from Alaska Senators Ted Stevens and Frank Murkowski and Alaska Representative Don Young. After noting that the question of whether "certain Alaska Native communities have sovereign authority beyond those powers held by cities and towns organized under State law," was a matter of "continuing concern," the solons asked the Governor to tell them what his position regarding the subject was in order to be certain that in Washington, D.C., they were "accurately reflecting the position taken by the State concerning the degree of governing authority held by various types of Alaska Native Village government organizations."[195]

Since he had no position, in June Governor Sheffield sent a conciliatory letter to Native leaders of villages that had constitutions the Secretary of the Interior had approved pursuant to section 1 of Public Law No. 74-538 and section 16 of the IRA, as well as to leaders of other Native organizations. After

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[195] Letter from Alaska Senators Ted Stevens and Frank Murkowski and Alaska Representative Don Young to the Hon. Bill Sheffield, April 21, 1983. Alaska State Archives.

stressing the need to develop a consensus regarding the Native tribal sovereignty issue, the letter posed four questions that the recipients were asked to answer.[196]

A month later Sheffield announced his intention to convene a meeting with Native leaders.[197] And another two months later when Secretary of the Interior James Watt met with Sheffield, according the Governor's press secretary, "Watt agreed to stand back while the State met with Native leaders this fall to develop a consensus on how to respond to claims of sovereignty by individual villages."[198]

That meeting was not held because the Governor subsequently decided on an alternative plan.[199]

In March 1984 at the annual meeting of Doyon, the ANCSA regional corporation that Athabascan Indians in the Alaska interior had incorporated, Sheffield announced his appointment of a Task Force on Federal-State-Tribal Relations whose members

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[196] "Governor to Meet with Native Tribes," Anchorage Times, July 8, 1983; Letter from William C. "Spud" Williams, President, Tanana Chiefs Conference, to the Hon. Bill Sheffield, Oct. 6, 1983.

[197] "Governor to Meet with Native Tribes," Anchorage Times, July 8, 1983.

[198] "Sheffield, Watt Settle Oil Dispute," Anchorage Daily News, Aug. 24, 1983. And see "Watt, Sheffield to Address Native Sovereignty Issue," Anchorage Times, Aug. 23, 1983.

[199] "Sheffield Talks of Native Sovereignty," Tundra Times, March 21, 1984.

would study the Native tribal sovereignty issue.[200]

The Chairman was Emil Notti, the Commissioner of the Alaska Department of Community and Regional Affairs who between 1967 and 1970 had been President of the AFN. Four members of the Task Force were members of the Alaska Legislature. Two others were career BIA employees. Counting Notti, seven of the twelve members were Alaska Natives, including Willie Goodwin, a prominent member of the UTA.[201]

The Governor said he was hopeful the members of the Task Force would "arrive at some consensus on new laws and policies which will best serve Alaska Natives while protecting the rights of all the public."[202] However, that is not what happened.

After holding hearings around the state,[203] in March 1986 the Task Force sent Governor Sheffield a report that contained twenty-one recommendations. Since whether Native residents of Native villages were members of "federally recognized tribes," and since whether an IRA or a "traditional" village council that had no legal imprimatur possessed "the right of self government

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[200] "Sheffield Talks of Native Sovereignty," Tundra Times, March 21, 1984.

[201] "New United Tribes Groups Sets (sic) Session," Daily Sentinel (Sitka), Oct. 7, 1983 (Willie Goodwin described as "head of United Tribes"); "Native Sovereignty Task Force Appointed," Tundra Times, May 30, 1984.

[202] Letter from Governor Bill Sheffield to Ronald Somerville, Executive Director, Alaska Outdoor Council, May 8, 1984. Alaska State Archives.

[203] "Task Force Hears Two Sides," Tundra Times, Dec. 17, 1984.

over its village area and surrounding lands" were questions of federal, rather than State, law, the most important recommendation urged the Governor to ask the Secretary of the Interior what he believed the answers to those questions were.

The report also contained an analysis of Congress's Alaska Native-related enactments from 1867 when the United States purchased Alaska to the present that a majority of the members of the Task Force accepted by the margin of a single vote. Two years later that analysis would have a consequential influence.

In the late nineteenth century four Athabascan Indian brothers settled with their families at a location in the Alaska interior on the north shore of the Yukon River. When steamboats began transporting miners and freight from Fort St. Michael, the army post at the mouth of the river, to Dawson, the town near the site of the Klondike gold strike in the Yukon Territory, the Alaska Commercial Company opened a store in the community the brothers had established. The store was managed by Steven, the youngest brother, and in 1902 the community became known as Stevens Village.[204]

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[204] "How Stevens Village Came to Be," Alaska Sportsman Magazine, Sept. 1959. See also Stevens Village, Community Information, Alaska Department of Commerce, Community and Economic Development, available at https://www.commerce.alaska.gov/dcra/DCRAExternal/community/Details/ec8466c6-0e5a-4fcc-8a9c-f7fef6b557fc.

In 1939 Stevens Village had fifty-four residents, most if not all of whom were Athabascan Indians.[205] That same year Assistant Secretary of the Interior Oscar Chapman approved a constitution for the Native Village of Stevens pursuant to section 1 of Public Law No. 74-538 and section 16 of the IRA.[206] In 1971 Congress designated Stevens Village as a Native village for the purposes of ANCSA.

In 1982 the Department of Housing and Urban Development gave the Native Village of Stevens a $369,000 grant to finance construction of an electrical system in the community. In 1983 the Native Village of Stevens contracted with Alaska Management & Planning (AM&P) to oversee the construction. When the Native Village of Stevens subsequently abruptly terminated the contract AM&P filed a breach of contract action in the Alaska Superior Court in Fairbanks.

Represented by Michael Walleri, the attorney at TCC who had assisted the Athabascan Indian residents of Circle and other Native villages in the Alaska interior to file constitutions with the Secretary of the Interior pursuant to section 1 of Public Law No. 74-538 and section 16 of the IRA, the Native Village of Stevens filed a motion to dismiss AM&P's lawsuit on "the ground

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[205] Table 5, Sixteenth Census of the United States, at 1197 (1942).

[206] Constitution and By-Laws of the Native Village of Stevens Alaska, ratified Dec. 30, 1939, available at http://thorpe.ou. edu/IRA/stevcons.html.

that the suit was barred by the doctrine of sovereign immunity."[207]

Superior Court Judge Mary Greene denied the motion. When a jury then awarded AM&P $38,891 as damages for the breach of contract the company had suffered, the Native Village of Stevens appealed Judge Greene's denial of its motion to dismiss to the Alaska Supreme Court.

In May 1988 in the Alaska Supreme Court's decision in Native Village of Stevens v. Alaska Management & Planning,[208] Justice Warren Matthews, writing for a divided Court, affirmed Judge Greene's denial of the motion. Relying on the analysis of the history of Congress's Alaska Native-related enactments contained in the report of the Task Force on Federal-State-Tribal Relations, Justice Matthews concluded that

> In a series of enactments following the Treaty of Cession and extending into the first third of this century, Congress has demonstrated its intent that Alaska native communities not be accorded sovereign tribal status. The historical accuracy of this conclusion was expressly recognized in the proviso to the Alaska Indian Reorganization Act [i.e., Section 1 of Public Law No. 74-538] and, although that Act afforded a mechanism by which self-governing status might be achieved by Native communities, the mechanism was not utilized in the case of Stevens Village. No

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[207] The U.S. Supreme Court repeatedly has held that a "federally recognized tribe" has sovereign immunity. See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998); Michigan v. Bay Mills Indian Community, 572 U.S. ___ (2014).

[208] 757 P.2d 32 (Alaska 1988).

> enactment subsequent to the Alaska Indian Reorganization Act granted or recognized tribal sovereign authority in Alaska.[209]

Whether the Native Village of Stevens had sovereign immunity because the Athabascan Indian residents of Stevens Village had been designated by Congress (or by the Secretary of the Interior acting pursuant to authority that Congress had been delegated to the secretary) as a "federally recognized tribe" was a federal question that only the U.S. Supreme Court could answer definitively. But as Lloyd Miller, an attorney who several years earlier had opened an office in Anchorage for Sonosky, Chambers & Sachse, a Washington, D.C., law firm that specialized in representing Indian tribes, explained to the Tundra Times, "Unless reversed, the majority opinion in the Stevens Village case strikes a severe blow to village self-government in Alaska."[210]

To try to reverse the majority opinion, represented by Lloyd Miller and nine other attorneys, including David Case and Bert Hirsch, the Alaska Native Coalition, eight of the twelve regional associations, three of the twelve ANCSA regional corporations, and Tyonek, Akiachak, and three other Native villages petitioned the Alaska Supreme Court to rehear the Native Village of

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[209] Id. at 41.

[210] "Rulings Raise Sovereignty Issues," Tundra Times, May 30, 1988.

Stevens's appeal. And the AFN signed on as a petitioner because, as Janie Leask, the organization's president, explained: "We needed to get on the band-wagon."[211]

In August 1988 the Alaska Supreme Court denied the petition.[212]

K. At the Behind the Scenes Instigation of the Native American Rights Fund Assistant Secretary of the Interior for Indian Affairs Ada Deer Creates Federally Recognized Tribes in Alaska by Ultra Vires Agency Action.

Headquartered in Boulder, Colorado, the Native American Rights Fund, known by its acronym as NARF, is a nonprofit law

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[211] "Native Groups Seek Rehearing in Sovereignty," Tundra Times, June 13, 1988.

[212] Alaska Supreme Court No. S-1345, Order (Aug. 25, 1988); "Supreme Court Rejects Petition for Sovereignty," Tundra Times, Aug. 29, 1988. In 1939 Assistant Secretary of the Interior Oscar Chapman approved a constitution that "a group of Eskimos [who had a] common bond of living together in the Town of Nome, Territory of Alaska" had submitted to the Secretary of the Interior pursuant to section 1 of Public Law No. 74-538 and section 16 of the IRA. The constitution created an organization called the Nome Eskimo Community. The year after it issued its decision in Native Village of Stevens, in Matter of City of Nome, 780 P.2d 363 (Alaska 1989), the Alaska Supreme Court announced that, "Regardless of whether NEC is a 'tribe' for other purposes," the Seventy-Third Congress that enacted the IRA had intended section 16 to prevent States and their political subdivisions from foreclosing for nonpayment of property taxes on tracts of land owned by an organization that has a section 16 constitution. Three years later in Hydaburg Cooperative Association v. Hydaburg Fisheries, 826 P.2d 751 (1992), the Court reaffirmed its holding in Native Village of Stevens that "Alaska Native associations generally do not have sovereign immunity" because "Village reorganization under section 16 by itself is not sufficient to establish tribal status for purposes concerning the doctrine of tribal sovereign immunity," and its holding in Matter of City of Nome that the Seventy-Third Congress intended section 16 to bar States and their political subdivisions from foreclosing for nonpayment of property taxes on tracts of land owned by an organization that has a section 16 constitution. But the Court then announced that the Hydaburg Cooperative Association and other corporations incorporated pursuant to section 17 of the IRA "are amenable to suit and their assets are subject to execution."

firm that was established in 1971 to assist Indian tribes "maintain their government-to-government relationship with the United States" and assist unrecognized and terminated tribes "establish or re-establish such a relationship."[213] In 1984 NARF opened an office in Anchorage because, as John Ecohawk, the organization's executive director, explained, "Requests for assistance from Alaska Native villages increased to the point that a separate office in Alaska was the most feasible way to address the important Native issues of sovereignty and subsistence hunting and fishing that emerge as Native protections in the Alaska Native Claims Settlement Act move toward expiration in 1991."[214]

The attorneys NARF sent to Anchorage were Lawrence "Lare" Aschenbrenner and Robert Anderson.

When they arrived, Aschenbrenner and Anderson joined a self-appointed attorney "working group" that included David Case and Lloyd Miller that during the spring of 1985 developed eleven amendments to ANCSA, the IRA, and other Indian-related statutes whose enactment by Congress would codify the sovereign tribal status of Native residents of Native villages.

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[213] See http://www. narf.org/.

[214] Native American Rights Fund, 1984 Annual Report, at 3.

One amendment amended 18 U.S.C. 1151 to include within the purview of the "Indian country" definition all land within the "traditional boundaries" of Alaska Native communities, including "townsite lands, allotments, village and regional corporation lands, restricted townsite lots, core townships, municipal lands and private lands." Another amendment overturned a legal opinion (about which more will be said below) that Associate Solicitor for Indian Affairs Thomas Fredericks had issued in 1978 by amending section 5 of the IRA to authorize the Secretary of the Interior to take the title to land in Alaska into trust. A third amendment "clarified" that Congress did not intend ANCSA to "abridg[e] in any way the governmental powers of Alaska Native Tribes either over their members or over any areas of Indian country within their respective jurisdictions."[215]

That September at the Congress the UTA held at the Anchorage Convention Center, Robert Anderson and Lloyd Miller presented the working group's amendments to the attendees.[216] When the UTA disbanded and individuals who had been members of that organization created the ANC, Anderson and Lare Aschenbrenner

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[215] Memorandum from Lare Aschenbrenner and Bob Anderson (with attached Proposed Legislation) to AVCP and Calista Corporation, Aug. 22, 1985. Alaska State Archives.

[216] "United Tribes Aims to Establish Rights of Villages," Anchorage Daily News, Sept. 18, 1985 (reporting that "Anderson believes that Native sovereignty rights transcend [ANCSA]. But proposed legislation being considered by representatives of 89 villages at the United Tribes convention would make those rights clear").

began representing the ANC in its failed effort to persuade Alaska Senators Ted Stevens and Frank Murkowski and Alaska Representative Don Young, first to include the attorney working group's amendments in the ANCSA "1991" bill that the One Hundredth Congress would pass in 1987, and then to keep the qualified transferee entity section in the bill.[217]

As has been described, in 1982 Assistant Secretary of the Interior for Indian Affairs Ken Smith published in the Federal Register a list of 197 Native Entities that were eligible to receive services from the BIA even though, as Assistant Secretary Smith explained in the preamble that preceded the list, Alaska Natives who were members of the entities were not members of "historical tribes."[218]

With the preamble removed after David Case complained about its inclusion, in 1983, 1985, and 1986 Smith and his successors as Assistant Secretary republished the 1982 list.[219]

In 1988 when Assistant Secretary of the Interior for Indian Affairs Ross Swimmer again republished the list, rather than 197,

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[217] "Native Sovereignty Backers Seek Amendments to Settlement Act," Anchorage Times, April 18, 1986 (reporting that "[Robert Anderson] and attorney Lare Aschenbrenner, also of the native American fund, are primary legal counsel for the coalition"). See also 1986 Senate Hearing, at 283-284 (statement of Bob Anderson, staff attorney, Native American Rights Fund).

[218] 47 Fed. Reg. 53133-53135 (1982).

[219] 48 Fed. Reg. 56865-56866 (1983); 50 Fed. Reg. 6058-6059 (1985); 51 Fed. Reg. 25118-25119 (1986).

the list contained the names of 500 Native Entities.[220]

Swimmer explained the reason for the increase in a new preamble.[221] After noting that the preamble that preceded the 1982 list had been "inadvertently dropped from the subsequent lists" (emphasis added), he explained that the new list was not a list of federally recognized tribes that, as a consequence of that legal status, possessed powers of self-government. Instead, it was a list of Native Entities that were eligible to receive services from the BIA. And insofar as those entities were concerned, Congress had provided "guidance as to whom we should provide services." The preamble explained that

> The 1936 amendments to the Indian Reorganization Act [i.e., Public Law No. 74-538], applicable only to Alaska, authorized groups to organize as tribes which are not historical tribes and are not residing on reservations. They include groups having a "common bond of occupation or association, or residence within a well-defined neighborhood, community, or rural district." More recently, Indian statutes, such as the Indian Self-Determination Act, specifically include Alaska Native villages, village corporations and regional corporations defined or established under the Alaska Native Claims Settlement Act.[222]

Because, as the preamble noted, in 1975 Congress had included ANCSA regional and village corporations within the purview of the "Indian tribe" definition in the Indian Self-

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[220] 53 Fed. Reg. 52832-52835 (1988).

[221] Id. at 52832-52833.

[222] Id.

Determination Act, Assistant Secretary Swimmer included each of those corporations on the 1988 list.

After reading the 1988 list and preamble, Lare Aschenbrenner complained that "One of our stronger arguments in support of tribal status has been our position that inclusion on the prior list of Alaska Native entities constituted federal recognition. The new list, by including ANCSA corporations, which admittedly are not tribes, negates the argument that all entities on the new list have tribal government status."[223]

Slightly more than a year later, Aschenbrenner, writing on NARF letterhead stationary as one of the attorneys who represented the ANC, sent Assistant Secretary of the Interior for Indian Affairs Eddie Brown and William Lavell, the Associate Solicitor for Indian Affairs, a letter that David Case, Lloyd Miller, Mike Walleri, Bert Hirsch, and ten other attorneys active in the Native tribal sovereignty movement signed. The letter requested Assistant Secretary Brown to rescind the list Assistant Secretary Swimmer had published, and publish a new list "which corrects the errors and ambiguities of the 1988 list and explicitly recognizes the tribal status of Alaska Native villages and other tribes" because "It is clear that Alaska Native

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[223] "Interior's List Called a Blow to Sovereignty," Tundra Times, Jan. 2, 1989.

villages are tribes and that the 1988 BIA list substantively and procedurally violated federal law."[224]

When Assistant Secretary Brown did not do so, four months later Aschenbrenner tried again.

In 1980 the Alaska State Legislature added Chapter 89 to Title 29 of the Alaska Statutes to create a program that allowed municipalities to receive revenue-sharing monies.[225]

Because the residents of many communities that had been designated as Native villages for the purposes of ANCSA had not organized a municipal government, A.S. 29.89.050 directed the State to pay $25,000 to every "Native village government for a village which is not incorporated as a city under this title." And the statute defined "Native village government" to mean "a local governing body organized by authority of [section 1 of Public Law No. 74-538 and section 16 of the IRA]," or "a traditional village council or, if there is no traditional village council, the paramount chief or other governing body of a Native village which meets the requirements of [ANCSA]."

In 1981 the Attorney General of Alaska advised the Commissioner of the Alaska Department of Community and Regional

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[224] Letter from Lare Aschenbrenner and fourteen other attorneys to Eddie Brown, Assistant Secretary for Indian Affairs, and William Lavell, Feb. 27, 1990. See Attachment A.

[225] Ch. 155 SLA 1980.

Affairs that A.S. 29.89.050 was "unconstitutional if read literally" because limiting eligibility for the $25,000 payment to "unincorporated communities which are identified as Native villages . . . exclude[s] from participation a number of similarly situated communities which are not Native villages."[226]

The Attorney General then advised that the Commissioner could cure the statute's unconstitutionality by disregarding the words "Native" and "government" in the term "Native village government" and ignoring the "Native village government" definition in its entirety.

When the Commissioner interpreted the text of A.S. 29.89.050 as the Attorney General had recommended the consequence was that the number of communities eligible to participate in the revenue-sharing program increased. But since the Alaska Legislature had appropriated a fixed sum to fund the program, each community that had a "Native village government" received less than $25,000.

In response, representing the Native villages of Akiachak and Noatak and Circle, in 1985 in the U.S. District Court for the District of Alaska, NARF attorneys Lare Aschenbrenner and Robert Anderson filed Native Village of Akiachak v. Notti,[227] a lawsuit that requested the court to order the State of Alaska to pay

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[226] Informal Opinion of the Attorney General of Alaska No. J-66-829-81 (State Financial Aid to Benefit Unincorporated Communities), Sept. 2, 1981.

[227] U.S. District Court for the District of Alaska No. 85-503 Civil.

Native village governments $853,587 to which they would have been entitled if the Commissioner had implemented A.S. 29.89.050 in the manner the text of the statute required.

In their complaint Aschenbrenner and Anderson alleged 28 U.S.C. 1362 as the basis for the District Court's jurisdiction. That statute states: "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." (emphases added).

The Eighty-Ninth Congress had enacted 28 U.S.C. 1362 in 1966 in response to Yoder v. Assiniboine and Sioux Tribes,[228] a decision in which the U.S. Court of Appeals for the Ninth Circuit held that the District Court had no jurisdiction pursuant to 28 U.S.C. 1331 to adjudicate a claim for relief the Assiniboine and Sioux Tribes had alleged in the complaint the two tribes had filed because the tribes had not demonstrated that the matter in controversy exceeded $10,000 (the showing that at that time section 1331 required every plaintiff to make).[229]

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[228] 339 F.2d 360 (9th Cir. 1964).

[229] S. Rep. No. 89-1507, at 5 (1966)(Deputy Attorney General Ramsey Clark explaining that "One of the purposes of the bill apparently is to overcome the effect of the decision in the case of Yoder v. Assiniboine and Sioux Tribes").

Because S. 1356, the bill Congress would enact as 28 U.S.C. 1362, passed the Senate and House by voice votes and with only a cursory explanation in the Senate and no explanation at all in the House,[230] it is not possible to know whether the Eighty-Ninth Congress intended the term "Indian tribe" in section 1362 to mean "tribe" in its ethnological sense or "tribe" in its political sense.

In 1987 District Judge Andrew Kleinfeld dismissed the complaint in Native Village of Akiachak v. Notti on the ground that the claims Lare Aschenbrenner and Robert Anderson had alleged therein did not "arise under the Constitution, laws, or treaties of the United States."[231] Because he did not need to do so, Judge Kleinfeld declined to decide whether the Inupiat Eskimo residents of Noatak and the Athabascan Indian residents of Circle were members of "Indian tribes" within the meaning of that term in section 1362.[232]

In 1989 in its decision in Native Village of Noatak v.

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[230] 112 Cong. Rec. 20768, 22883, and 24827 (1966).

[231] Native Village of Akiachak v. Hoffman, U.S. District Court for the District of Alaska No. A85-503 Civil, Transcript of Oral Decision Granting Defendants' Motion to Dismiss, Oct. 28, 1987.

[232] Because the Yup'ik Eskimo residents of Akiachak had incorporated a municipal government, Akiachak was not a village eligible for a grant made pursuant to A.S. 29.89.050. For that reason, Judge Kleinfeld determined that the Native Village of Akiachak had no standing to be a plaintiff in the lawsuit.

Hoffman,[233] a divided panel of the U.S. Court of Appeals for the Ninth Circuit reversed Judge Kleinfeld. The two deciding judges held that the Eleventh Amendment to the U.S. Constitution did not bar the lawsuit and that the claims alleged in the complaint arose under the constitution and laws of the United States. They also held that the Inupiat Eskimo residents of Noatak and the Athabascan Indian residents of Circle were, for the purposes of 28 U.S.C. 1362, "Indian tribes with governing bodies duly recognized by the Secretary of the Interior."

Relying on Montoya v. United States,[234] the two deciding judges reasoned to that result by assuming that the Eighty-Ninth Congress intended the term "Indian tribe" in 28 U.S.C. 1362 to mean "tribe" in its ethnological sense, and that the Native residents of both villages fell within the purview of that definition.

With respect to Noatak, the deciding judges said "We see no reason to suppose that the Secretary of the Interior needs to issue a special document conferring a right to sue under the statute. Noatak Village has a governing body approved by the Secretary [pursuant to section 1 of Public Law No. 74-538 and section 16 of the IRA]. It is therefore a tribe with a duly

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[233] 872 F.2d 1384 (9th Cir. 1989), decision withdrawn and replaced, 896 F.2d 1157 (9th Cir. 1990).

[234] 180 U.S. 261, 266 (1901).

recognized governing body and qualifies for the benefits of section 1362."[235]

With respect to Circle, the deciding judges announced that the "governing body" of the community had been "duly recognized by the Secretary of the Interior" because Congress had designated Circle as a Native village for the purposes of ANCSA and because in three other statutes - the Indian Self-Determination Act, the Indian Financing Act, and the Indian Child Welfare Act - "Congress treated the Native Villages as Indian Tribes," albeit "only for the particular purposes of each piece of legislation."[236]

In May 1990 the State of Alaska filed a petition for a writ of certiorari that requested the U.S. Supreme Court to review the panel's decision.[237] The petition presented three questions. The second was: "Is an Indian group automatically a tribe for purposes of 28 U.S.C. section 1362 (federal jurisdiction over suits by Indian tribes) because it has received the same

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[235] 896 F.2d at 1160. In 1939 Assistant Secretary of the Interior Oscar Chapman approved a constitution for the Native Village of Noatak pursuant to section 1 of Pub. L. No. 74-538 and section 16 of the IRA. See Constitution and By-Laws of the Native Village of Noatak, available at http://thorpe.ou.edu/IRA/noacons.html.

[236] 896 F.2d at 1160.

[237] Hoffman v. Native Village of Noatak, U.S. Supreme Court, Petition for a Writ of Certiorari No. 89-1782.

treatment as an Indian tribe in or received benefits under certain federal statutes?"

A month later, and writing again on NARF letterhead stationary, Lare Aschenbrenner sent to his home address (rather than to his office at the Department of the Interior) a letter to William Lavell, the Associate Solicitor for Indian Affairs, that David Case, Lloyd Miller, Reid Chambers (Miller's law partner), and two other attorneys active in the Native tribal sovereignty movement signed. Aschenbrenner told Associate Solicitor Lavell:

> As you are aware it is critical that the Bureau issue a new list of federally recognized tribes in Alaska before the Supreme Court rules on the State's cert. petition in Noatak v. Hoffman. We thought it would be helpful; so we are enclosing a draft 1990 BIA list of federally recognized tribes in Alaska. In the preamble we attempt to set forth the circumstances giving rise to publication of the 1988 list, the problems it presented and the changes required to resolve them in the proposed 1990 list. Most importantly the 1990 draft unequivocally and expressly acknowledges the tribal status of the listed villages and regional tribes."[238]

Assistant Secretary of the Interior for Indian Affairs Eddie Brown ignored the back-channel appeal and did not publish a new list.[239]

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[238] Letter from Lare Aschenbrenner, Lloyd Miller, David Case, Reid Chambers, Eric Smith, and Fran Ayer to William Lavell, June 15, 1990. See Attachment B.

[239] On October 1, 1990 the U.S. Supreme Court granted the State of Alaska's petition for a writ of certiorari. 498 U.S. 807 (1990). Several days later Lloyd Miller informed the Native villages and organizations his law firm represented that the Court had agreed "to review all aspects of the Noatak decision, including whether Alaska villages are tribes" and "The Court's action is thus a direct threat to tribal status and tribal self-governance in Alaska." (emphasis in original). See Memorandum entitled "United (cont.)

A year and a half later Aschnebrenner, David Case, and Lloyd Miller (as well as Michael Walleri, Bert Hirsch, and nine other attorneys active in the Native tribal sovereignty movement) would try again. In a letter dated January 14, 1992 that they sent to Lynn Forcia, the chief of the BIA Branch of Acknowledgment and Research, they urged the BIA "to rescind its 1988 list and publish a new list which explicitly recognizes [Alaska Native] tribal status" because "The 1988 list casts into doubt the political status of the listed Villages not only because it includes Native corporations, which obviously are not 'tribes' in the political sense, but also because its preamble can be read as an attempt to rescind the government's prior recognition of their tribal status as expressed in the Secretary's earlier lists and

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States Supreme Court Action Threatens Tribal Status of Alaska Villages," from Sonosky, Chambers, Sachse & Miller to General Counsel Clients, Oct. 5, 1990. However, in its decision in Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991), a divided Court reversed the panel of the U.S. Court of Appeals for the Ninth Circuit and dismissed the lawsuit NARF had filed on behalf of the Native Village of Noatak and Circle on the ground that the lawsuit was barred by the Eleventh Amendment. The Court did not reach the question of whether the two deciding judges had been correct that, for the purposes of 28 U.S.C. section 1362, the Inupiat Eskimo residents of Noatak and the Athabascan Indian residents of Circle were members of "Indian tribes." For that reason, Lare Aschenbrenner told the press that "All the court has done is postpone the day in which we get a definite answer to the question of whether the 200 villages have the same tribal status as Indians." See "Court Backs State; Native Sovereignty in Limbo," Anchorage Daily News, June 25, 1991; "Villages Lose Fight to Sue Government: Top Court Doesn't Rule on Tribal Status," Anchorage Times, June 25, 1991 (Aschenbrenner explaining that "The decision just marks the end of Round 1. The issues of whether a village has tribal status and whether or not states can deal with tribes on a government-to-government basis has been returned to the lower courts").

numerous Acts of Congress."[240]

While the 1988 list was not rescinded, by the time the letter was sent the Department of the Interior was completing a review of the Alaska Native tribal status situation.

In 1991 Manual Lujan, who in 1989 President George H.W. Bush had appointed to succeed Donald Hodel as Secretary of the Interior, directed Thomas Sansonetti, the Solicitor of the Department of the Interior, "to develop the legal position of the United States on the nature and scope of so-called governmental powers over lands and non-members that a Native village can exercise after ANCSA." Secretary Lujan explained that: "This opinion will be useful in resolving questions which arise in the context of approving the constitutions put forward by villages seeking recognition under the Indian Reorganization Act. My request to the Solicitor will aid me in deciding whether jurisdictional claims made by the villages under this procedure are consistent with law."[241]

In response to that directive, on January 11, 1993 Solicitor Sansonetti sent Lujan, and released to the public, Solicitor's Opinion M-36975 (Governmental Jurisdiction of Alaska Native

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[240] Letter from Lare Aschenbrenner, Lloyd Miller, David Case, Michael Walleri, Bertram Hirsch, and nine other attorneys to Lynn Forcia, Chief, BIA Branch of Acknowledgment and Research, January 14, 1992. See Attachment C.

[241] Memorandum entitled "Priorities for Alaska Issues" from Secretary Manuel Lujan to Solicitor, Assistant Secretaries, Bureau Directors, Assistant to the Secretary for Alaska, June 19, 1991.

Villages Over Land and Members)(Sansonetti OPinion).

Stuffed to bursting with historical analysis, the 133-page opinion concluded that "While the Department [of the Interior]'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."[242] (emphasis added). However, the opinion announced that which groups of Alaska Natives were "federally recognized tribes" and which were not was a fact-driven question that would have to be decided group-by-group.

The story of the politics inside the Department of the Interior bureaucracy that led to the announcement in the Sansonetti Opinion that there were groups in Alaska, which the opinion declined to identify, whose Native members were members of "federally recognized tribes" is a subject beyond the scope of these comments other than to say that the evidence on which the opinion relied was cherry-picked and apparently intentionally miscited.

Three examples.

First, the opinion cites a Solicitor's Opinion titled "Status of Alaska Natives" that Solicitor Edward Finney wrote and

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[242] Id. at 47.

Secretary of the Interior Ray Lyman Wilbur approved on February 24, 1932.[243]

A year earlier Secretary Wilbur had transferred the administration of Alaska Native programs from the Bureau of Education to the BIA.[244] After he did so, a question arose regarding whether Congress had intended to include Alaska Natives within the purview of the undefined word "Indians" in statutes the BIA administered, particularly the Snyder Act,[245] which delegates the BIA authority to spend money that Congress appropriates "for the benefit, care, and assistance of the Indians throughout the United States."

In his opinion Solicitor Finney concluded that for the purposes of those statutes Alaska Natives were "Indians," and he justified post hoc the legal validity of Secretary Wilbur's decision to transfer the administration of Alaska Native programs to the BIA by advising 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

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[243] Sansonetti Opinion, at 27. See Solicitor's Opinion M-26915 (Feb. 24, 1932).

[244] Secretarial Order No. 494 (March 14, 1931).

[245] Public Law No. 67-85.

respects similar to that of the Indians of the United States," and, as a consequence, Alaska Natives "are entitled to the benefits of and are subject to the general laws and regulations governing the Indians of the United States."[246]

Those statements of purported law had nothing to do with the question of whether Congress, or the Secretary of the Interior acting pursuant to authority Congress had delegated to the Secretary, had previously "recognized" Native residents of communities that decades later would be designated as Native villages for the purposes of ANCSA as "tribes" in a political sense that, as a consequence of that designation, possessed powers of self-government.

With respect to that question, on the page of the Sansonetti Opinion on which Solicitor Finney's opinion is discussed a footnote references a letter Secretary Wilbur sent to Representative Edgar Howard, the chairman of the House Committee on Indian Affairs, three weeks <u>after</u> Secretary Wilbur approved Solicitor Finney's opinion.[247] But the footnote pointedly did not describe the content of that letter. The reason it did not is that, as has been described, in that letter Secretary Wilbur informed Representative Howard that "The United States has had no

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[246] <u>Sold American</u>, at 288-289 (circumstances that resulted in Secretary Wilbur's decision and Solicitor Finney's opinion described).

[247] Sansonetti Opinion, at 27 n. 82.

treaty relations with any of the aborigines of Alaska nor have they been recognized as the independent tribes with a government of their own. The individual native has always and everywhere in Alaska been subject to the white man's law, both Federal and territorial, civil and criminal."[248]

Second, as also has been described, in 1937 when the BIA began implementing Section 1 of Public Law No. 74-538, Assistant Commissioner of Indian Affairs William Zimmerman issued instructions to the teachers who taught in the grade schools the BIA operated in a number of Native villages that the teachers were to follow when they assisted the residents of the villages in which the schools were located to write constitutions that section 1 of Public Law No. 74-538 authorized the Secretary of the Interior to approve pursuant to section 16 of the IRA.

While it acknowledged that Assistant Commissioner Zimmerman issued his instructions,[249] the Sansonetti Opinion made no mention of the fact that the instructions directed that

> If an Indian reservation has been designated and approved [pursuant to section 2 of the 1936 act], and if the group of Indians for whom the reservation has been designated are organizing as an entire community . . . , they may include in their constitutions appropriate powers for the civil government of the area reserved, including police power over their own members

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[248] Authorizing the Tlingit and Haida Indians to Bring Suit in the United States Court of Claims: Hearing on S. 1196 before the S. Comm. on Indian Affairs, 72d Cong. 16 (1932) (Wilbur letter reprinted).

[249] Sansonetti Opinion, at 31-33.

> and, under the supervision of the Department [of the Interior], the power to tax, license or exclude non-members. If the constitution has been adopted before the reservation became effective, such powers may be added by amendment. If at the time the constitution is being drafted, the designation and approval of an Indian reservation for the community organizing is anticipated, such powers may be included in the constitution, but limited to take effect only upon the designation and approval of a reservation for such community. (emphasis added).[250]

Third, the administrative record on which the Sansonetti Opinion was based includes a letter dated June 26, 1940 that Assistant Commissioner of Indian Affairs William Zimmerman sent to Claude Hirst, the General Superintendent of the BIA in Alaska, in which he advised that Tlingit Indians living in the southeast Alaska communities of Klukwan and Haines were not eligible to obtain a constitution pursuant to section 1 of Public Law No. 74-538 and section 16 of the IRA.[251] While in that letter Assistant Commissioner Zimmerman advised Superintendent Hirst that "the Department has at no time recognized the existence in Alaska of Indian tribes, with powers of limited sovereignty, similar to the tribes in the continental United States," the Sansonetti Opinion made no mention of the letter.

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[250] Zimmerman Instructions, at 9.

[251] Letter from Assistant Commissioner William Zimmerman to Claude M. Hirst, General Superintendent, Juneau, Alaska, June 26, 1940. The letter indicates that the content of the letter had been approved by Assistant Commissioner Zimmerman's superior, Assistant Secretary of the Interior Oscar Chapman.

Section 1151 of Title 18 of the U.S. Code defines "Indian country" to mean 1) "land within the limits of any Indian reservation," 2) "dependent Indian communities," and 3) "Indian allotments, the Indian titles to which have not been extinguished."

After "reject[ing] the notion that there are no tribes in Alaska,"[252] the Sansonetti Opinion concluded by announcing that Congress did not intend the subsurface and surface estates of public land the Secretary of the Interior had conveyed in fee title to ANCSA regional and village corporations to be "dependent Indian communities," and hence "Indian country," within whose boundaries "tribes" could exercise governmental authority.[253]

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[252] Sansonetti Opinion, at 132.

[253] Id. at 113-122, 132. That had not always been the Solicitor's legal position. Sections 1154 and 1156 of title 18 prohibit the possession and sale of "intoxicating liquors" in "Indian country." However, 18 U.S.C. 1161 waives that prohibition if possession or sale is lawful in the State in which a parcel of Indian country is located, has been authorized by "an ordinance duly adopted by the tribe having jurisdiction over such ... Indian country," and the Secretary of the Interior certifies the ordinance and publishes a notice in the Federal Register that announces the certification. In 1980 the village council in Allakaket, a Native village in the Alaska interior, submitted a liquor ordinance to the Secretary. In response, Hans Walker, the Associate Solicitor for Indian Affairs, issued a memorandum opinion in which he advised the Commissioner of Indian Affairs that Alaska Native allotments located in the vicinity of Allakaket and "the village townsite and lands owned by the village or village corporation" were Indian country because those lands collectively constituted a "dependent Indian community." See Memorandum entitled "Liquor Ordinance, Village of Allakaket, Alaska," from Associate Solicitor, Division of Indian Affairs, to Commissioner of Indian Affairs, Oct. 1, 1980. For unrelated reasons the Secretary did not certify the ordinance. But seven months later, in May 1981 Associate Solicitor Walker and James Canan, the Acting Deputy Assistant Secretary of the Interior for Indian Affairs, told the Senate Select Committee on Indian Affairs that, while not all of the surface estate of the land surrounding a Native village whose title the Secretary had conveyed to the local village corporation pursuant to ANCSA was Indian country, "the village itself, the land - could be (cont.)

With respect to the land within the boundaries of the revoked Venetie Reserve (about which more will be said below) whose fee title the Venetie Indian Corporation and the Neets'ai Corporation had conveyed to the Native Village of Venetie, the Sansonetti Opinion further opined that that land was not "Indian country" because "The ANCSA statutory scheme simply does not permit tribes to create Indian country in Alaska by unilateral action."[254]

The Alaska Native Allotment Act,[255] which the Fifty-Ninth

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considered Indian country for the purposes of enforcement of the Indian liquor law" and "We did have a ruling on that." See Mutual Agreements and Compacts Respecting Jurisdiction and Governmental Operations: Hearing on S. 563 Before the S. Select Comm. on Indian Affairs, 97th Cong. 17 (1981). Chalkyitsik, Northway, and Minto are three other Native villages in the Alaska interior. In May 1983 John Fritz, the Acting Assistant Secretary of the Interior for Indian Affairs, published a notice in the Federal Register in which he certified that an ordinance "relating to the application of the Federal Indian Liquor Laws within an area of Indian country was duly adopted by the Chalkyitsik Village Council on March 18, 1982." See "Village of Chalkyitsik, Alaska; Ordinance Prohibiting the Introduction, Possession, and Sale of Intoxicating Beverages," 48 Fed. Reg. 21378 (1983). A month later Assistant Secretary Ken Smith published a notice in which he certified "that Ordinance No. 83-4 relating to the application of the Federal Indian Liquor Laws within an area of Indian country was duly adopted on January 20, 1983 by the Northway Native Village Council." See "Native Village of Northway; Ordinance Providing for the Introduction, Possession, and Sale of Intoxicating Beverages," 48 Fed. Reg. 30195 (1983). And in August 1986 Assistant Secretary Ross Swimmer published a notice in which he certified "that the Minto Liquor Ordinance was duly adopted by the Village Council of Minto on February 14, 1985." See "Village of Minto Liquor Ordinance," 51 Fed. Reg. 28779 (1986). Seemingly inexplicably, the Sansonetti Opinion made no mention of Associate Solicitor Walker's memorandum, his subsequent testimony, or the Chalkyitsik, Northway, and Minto liquor ordinances. The fact that the administrative record on which the opinion was based contains documents that mention the ordinances suggests that the omission of mention of the ordinances in the Sansonetti Opinion was not inadvertent, and that no mention was made because the certifications of the ordinances were evidence that contravened what Solicitor Sansonetti had decided should be the political outcome that his opinion would announce.

[254] Sansonetti Opinion, at 122.

[255] Public Law No. 59-171.

Congress enacted in 1906, authorized Alaska Natives to each obtain a restricted title to up to 160 acres of public land as "the homestead of the allottee and his heirs in perpetuity." In Section 18 of ANCSA the Ninety-Second Congress repealed the 1906 Act. But in 1993 there were more than 16,000 Alaska Native allotment parcels whose validity the Secretary of the Interior had approved or whose approval was pending.

The Sansonetti Opinion announced that land within the boundaries of approved allotment parcels was "Indian country." However, that legal conclusion was facially erroneous because - even if the Eightieth Congress that enacted the "Indian country" definition intended the term "Indian allotments" in the definition to include Alaska Native allotments within its purview (and the legislative history suggests that the Eightieth Congress intended no such result), the definition limited that inclusion only to those Indian allotments whose "Indian titles have not been extinguished." Because "Indian title" and "aboriginal title" are synonymous legal terms of art, and because in section 4(b) of ANCSA the Ninety-Second Congress extinguished "All aboriginal titles . . . in Alaska," contrary to the legal conclusion the Sansonetti Opinion announced, there were Alaska Native allotments whose Indian titles had not been extinguished.

But even if Alaska Native allotments were "Indian country," at the conclusion of his analysis of the subject Solicitor

Sansonetti announced that "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," and "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." (emphasis in original).[256]

By the fall of 1992 a draft of the Sansonetti Opinion was circulating inside the Department of the Interior bureaucracy and in Alaska the content of the opinion became known. Because the conclusion that there was no "Indian country" in Alaska within whose boundaries "federally recognized tribes" could exercise governmental authority was anathema for members of the Native tribal sovereignty movement, at the request of NARF and the AFN, on November 9, 1992 Senator Daniel Inouye, the chairman of the Senate Committee on Indian Affairs, met with Secretary Lujan to try to persuade him to order Solicitor Sansonetti not to release his opinion because, as the Senator argued in a letter he gave to the Secretary at that meeting, "the issuance of a Solicitor's opinion at this time, such as that contemplated to address the status of tribal governments in Alaska, would serve to seriously

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[256] Sansonetti Opinion, at 129.

undermine the ability of the incoming administration [Bill Clinton having been elected president a week earlier] to determine the federal government's policies as they relate to the legal status of Alaska Native governments."[257]

When Secretary Lujan ignored the Senator Inouye's request and Solicitor Sansonetti issued his opinion the Anchorage Daily News reported:

> "The solicitor's opinion essentially leaves the villages in the same position they were in as a result of recent federal court rulings," said Lare Aschenbrenner of the Native American Rights Fund in Anchorage. "It is positive in that it rejects the Alaska Supreme Court's position [announced in the decision the Court had issued in Native Village of Stevens v. Alaska Management & Planning] that there are not tribes in Alaska, but it means that each of the 230 Native villages will have to bring separate federal lawsuits to prove their tribal status," he said.
>
> Julie Kitka, the executive director (sic) of the Alaska Federation of Natives, complained that the opinion flatly rejects any Native powers over their lands beyond what ordinary land-owning citizens would have over their property. "This impinges on the desire of Natives to exercise their aboriginal and inherent self-government powers," Kitka said. She said the conclusion that Natives gave up their self-government powers with the enactment of the 1971 settlement act is a policy conclusion of the Bush administration that no federal

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[257] Letter from Daniel K. Inouye, Chairman, Select Committee on Indian Affairs, to the Hon. Manuel Lujan, Secretary, U.S. Department of the Interior, Nov. 9, 1992. And see also Letter from Daniel K. Inouye, Chairman, Select Committee on Indian Affairs, to the Hon. Warren Christopher and Vernon Jordan, Co-Chairman, President-Elect Clinton's Transition Board, Dec. 11, 1992 (reporting that "In November, I met with Interior Secretary Lujan for the purpose of encouraging him not to allow the issuance of a Solicitor's opinion of the status of tribal governments in Alaska, in order to provide the new Interior Secretary with the opportunity to make a determination as to whether such an opinion is warranted or necessary. I enclose a copy of the letter that I delivered to Secretary Lujan at the time of our meeting").

> court has yet endorsed and which she hopes the Clinton administration will reject.[258]

Nine days after the Sansonetti Opinion was issued, on January 20, 1993 Bill Clinton was sworn into office as President of the United States. A day later the Senate confirmed former Arizona Governor Bruce Babbitt to succeed Manual Lujan as Secretary of the Interior. Three weeks later Lare Aschenbrenner and Robert Anderson sent the new Secretary a letter, written on NARF letterhead stationary, that David Case, Bert Hirsch, and nine other attorneys active in the Native tribal sovereignty movement signed. The letter urged Babbitt to "publish a new list of Federally Acknowledged Tribes that expressly recognizes the tribal status of Alaska Native villages; and withdraw the former Solicitor's Opinion of January 11, 1993 insofar as it denied the existence of Indian country and tribal territorial powers in Alaska."[259]

On March 20, 1993 NARF attorneys Aschenbrenner and Anderson sent the other attorneys who had signed the letter to Secretary Babbitt a memorandum in which they reported:

> Please find for your review a draft letter to the Assistant Secretary [of the Interior for Indian Affairs], a draft 1993 Federal Register List of

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[258] "Ruling Gives Natives Tribal Status But Still Rejects Self-Government," Anchorage Daily News, Jan. 13, 1993.

[259] Letter from Lare Aschenbrenner, Robert Anderson, and other attorneys to the Hon. Bruce Babbitt, Secretary, United States Department of the Interior, Feb. 12, 1993. See Attachment D.

> Federally Recognized Tribes in Alaska and a draft Explanation and Rationale for the new list.
>
> We have been in contact with [Assistant Solicitor] Scott Keep [in Washington, D.C.] and he believes the time is right to follow up on our letter to Secretary Babbitt. The plan is to get [Assistant Secretary of the Interior for Indian Affairs] Eddie Brown (who is still in office) to direct the Bureau [of Indian Affairs] to review the proposed new Federal Register list and come up with its own draft list, and to give this matter priority starting now!
>
> If we wait for the appointment and confirmation of the new Assistant Secretary before we start this process, we will be just that much further behind.
>
> We plan to have John Ecohawk [the executive director of NARF] to direct Eddie Brown to take this action, if necessary. (emphases in original).[260]

Two days later Lare Aschenbrenner sent Scott Keep a copy of the memorandum dated March 20, 1993, the draft letter, the new Federal Register List of Federally Recognized Tribes in Alaska, and a draft Explanation and Rationale for the new list to which he had alluded in the March 20, 1993 memorandum, along with a note written on NARF letterhead in which Aschenbrenner told Keep: "Here is the package we hope to send back to D.C. later in the week after all the attorneys & the Juneau Area Office have had their final input. Please review & if we have made some gross

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[260] Memorandum entitled "New List of Federally Recognized Tribes" from "Lare A & Bob A." to attorneys, March 20, 1993. See Attachment E.

error please give me a call as we want it as error free as possible."[261]

If, as Lare Aschenbreener and Robert Anderson had said was the plan, John Ecohawk did ask Secretary Babbitt to direct Assistant Secretary Brown to order the BIA to publish NARF's new list of "Federally Recognized Tribes in Alaska," nothing came of it because no new list was published.

Three months later, on June 30, 1993 President Clinton nominated Ada Deer to replace Eddie Brown as Assistant Secretary of the Interior for Indian Affairs.[262] Fortuitously for Lare Aschenbrenner and Robert Anderson, as she explained to the Senate Committee on Indian Affairs during the hearing the Committee held on her nomination, Deer was a former "client, a staff member, a board member, a board chair, and finally, chair of the National Support Committee of the Native American Rights Fund."[263]

On July 16, 1993 the Senate confirmed Deer's nomination.[264] Soon thereafter Lare Aschenbrenner and Robert Anderson renewed their effort to have the Assistant Secretary publish in the Federal Register a new list of Native Entities and a new preamble

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[261] Facsimile Transmittal Cover Sheet from Lare A. To Scott Keep, March 22, 1993. See Attachment F.

[262] 139 Cong. Rec. 14839 (1993).

[263] Nomination of Ada Deer: Hearing Before the S. Comm. on Indian Affairs, 103d Cong. 9 (1993)(statement of Ada Deer).

[264] 139 Cong. Rec. 15999 (1993).

that would announce that the act of publication had the legal consequence of transforming each entity into a "federally recognized tribe." As Aschenbrenner and Anderson explained in a letter dated August 4, 1993 that they sent to Scott Keep and John Trezise, the Acting Associate Solicitor for Indian Affairs:

> [I]t will not, in our view, be enough to merely state in a single paragraph that Alaska Native villages have the same tribal status as tribes in the lower 48. To the contrary, in order to eliminate altogether, or at least reduce to the absolute minimum, any possible misconception as to the Department's position we believe it is essential for the preamble to expressly state how the earlier Federal Register lists have been misconstrued. According, we have no objection to reducing the narrative description of the misconstruction of the earlier lists provided the essential particulars are retained. In particular, we believe it is essential that the changes and defects in the 1988 list be specifically detailed.
>
> Finally, the operative language which we believe is indispensable . . . is as follows:
>
> > The purpose of the present publication is to eliminate any doubt as to the Department [of the Interior]'s intention by expressly and unequivocally acknowledging that the Department has determined that the villages and regional tribes listed below are distinctly Native communities and have the same tribal status as tribes in the contiguous states. Such acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits from the federal government available to Indian tribes. This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather, they have the same inherent protection, immunities and privileges available to other federally acknowledged Indian tribes by virtue of

> their status as Indian tribes with a government-to-government relationship with the United States. (emphases in original).[265]

On August 11, 1993 Secretary Babbitt arrived in Alaska to begin a three-week tour of the state.[266] He soon was joined by Assistant Secretary Deer.[267] On August 13 Deer met privately in Fairbanks with Dalee Sambo, the executive director of the Alaska Inter-Tribal Council (AITC), the organization that in December 1992 Native tribal sovereignty advocates had created to replace the by then defunct Alaska Native Coalition,[268] as well as with other members of the AITC. After the meeting the Tundra Times reported: "According to AITC spokesperson Dalee Sambo, lengthy memos written by Deer - who's only been in office since last month - for Babbitt's consideration, as well as remarks she made

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[265] Letter from Lawrence Aschenbrenner and Robert Anderson to John Trezise, Acting Associate Solicitor, Indian Affairs Division, and Scott Keep, Assistant Solicitor, Aug. 4, 1993.

[266] "Looking Back on Babbitt's Visit," Anchorage Daily News, Aug. 30, 1993.

[267] "What Babbitt Sees, Hears Will Affect Alaska Policies," Fairbanks Daily News-Miner, Aug. 9, 1993 (reporting that "Among those most delighted by the secretary's trip are Native leaders. Babbitt will tour Native villages with Ada Deer, assistant secretary for Indian affairs, who, like Babbitt, is a strong advocate of Native self-government"); "Babbitt Hears Whalers Woes," Fairbanks Daily News-Miner, Aug. 14, 1993 ("Also joining Babbitt in Kaktovik was Ada Deer, newly appointed director of the BIA, who will travel with the secretary for part of his trip").

[268] In December 1992 many of the same individuals who had created, first the UTA, and then the ANC, organized the AITC "to act as a unified voice of Alaska Native tribes and represent them on issues and initiatives of importance to their interests." See "New Group Links Governments," Anchorage Daily News, Dec. 11, 1992; "Alaska Inter-Tribal Council: United Nations for State's Tribes," Tundra Times, Jan. 7, 1993; "Alaska Inter-Tribal Council to Host Convention," Tundra Times, Nov. 2, 1994.

in Fairbanks, have been heartening to sovereignty advocates. 'Ada Deer supports the position of AITC,' said Sambo."[269]

What was the position of the AITC?

On August 19 Deer and Secretary Babbitt met with members of the AFN board of directors and other Native leaders in Dillingham, the largest Native village in southwestern Alaska.[270] Prior to the meeting Dalee Sambo held a news conference at which she told reporters: "The [AITC] wants the Clinton administration's support on two key points in the debate over tribal sovereignty. First, says the council, the feds should formally recognize that Alaska Native villages are, in the legal sense, tribes. Second, the feds should recognize that Alaska tribes can exercise the same legal powers as tribes in the Lower 48."[271]

When she returned to Washington, D.C., Assistant Secretary Deer set about implementing the AITC agenda.

In September John Trezise, the Acting Associate Solicitor for Indian Affairs, sent Lloyd Miller for his private review and comment a copy of the preamble Assistant Secretary Deer would publish in the Federal Register when she published a new list of

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[269] "Babbitt Says Solve Subsistence First," Tundra Times, Aug. 25, 1993.

[270] "Babbitt in for a Whirlwind Visit," Bristol Bay Times, Aug. 20, 1993.

[271] "Tribal Power: What Will Babbitt Hear in Dillingham," Anchorage Daily News, Aug. 19, 1993.

Native Entities. On September 30 Miller faxed Trezise his changes, along with a note that read: "John, I think the redraft is excellent, and I am glad the NARF submission we all worked on was helpful. I have proposed a sentence for page 3, and made a comment on page 5, a correction on page 6, and joined in Bob [Anderson]'s correction on page 7. I look forward to seeing your final (if possible) and to seeing the list itself at your earliest convenience."[272]

Three weeks later Assistant Secretary Deer flew to Anchorage where in a speech she delivered at that year's AFN convention she announced that, "Today, I'm releasing the 1993 revised list of Alaska Native entities with which the federal government has a government-to-government relationship. The preamble to the list expressly states that the listed villages are distinctly Native communities and have the same powers and attributes as tribes in the Lower 48, except to the extent that those powers or attributes have been limited by Congress."[273]

On October 21 Assistant Secretary Deer published her list and preamble in the Federal Register.[274]

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[272] Facsimile Transmission entitled "Alaska List," from Lloyd B. Miller to John D. Trezise, Deputy Associate Solicitor - Indians, Sept. 30, 1993. See Attachment H.

[273] "Deer Announces Tribal Regulations at AFN Meet: Shock, Anger for Tribes Missing from New List," Tundra Times, Oct. 20, 1993.

[274] 58 Fed. Reg. 54364-54369 (1993).

What statute delegated Assistant Secretary Deer authority to turn more than a century of Congress's Alaska Native policy inside out by, in Congress's stead, creating 212 "federally recognized tribes" in Alaska simply by publishing a list of Native Entities and a preamble in the Federal Register? The preamble stated: "This notice is published in exercise of authority delegated to the Assistant Secretary - Indian Affairs under 25 U.S.C. 2 and 9."[275]

But neither statute delegates the authority that, Assistant Secretary Deer purported to exercise.

The Twenty-Second Congress enacted 25 U.S.C. 2 in 1832.[276] As now codified, the statute reads: "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations."

The circumstances that motivated the Twenty-Second Congress to enact 25 U.S.C. 2 are as follows:

In 1806 Congress created the office of Superintendent of Indian Trade inside the War Department to manage the Indian trading posts, called factories, that Congress had authorized the

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[275] Id. at 54364.

[276] 4 Stat. 564.

President to operate on the frontier.[277] In 1816 President James Madison appointed Thomas McKenney superintendent.[278] In 1822 Congress ordered the factories closed. As a consequence, McKenney no longer had any statutorily mandated duties. To fill the vacuum, in 1824 "Secretary of War [John C.] Calhoun, by his own order, and without special authorization from Congress, created in the War Department what he called the Bureau of Indian Affairs. To head the office Calhoun appointed McKenney and assigned him two clerks as assistants."[279]

Because Secretary Calhoun had no authority to create a new bureau inside the War Department or to hire McKenney to run it, in 1826 McKenney wrote a bill whose enactment would create the position McKenney already occupied.[280] In 1832 the Twenty-Second Congress enacted McKenney's bill, which today is 25 U.S.C. 2.

When the bill passed, the Secretary of War was annually distributing more than $1 million in gratuities to Indians, operating fifty-four schools for Indian children, and as recently as 1830 had issued ninety-eight licenses to traders doing business in Indian country. As Senator Hugh White, the chairman

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[277] 2 Stat. 402.

[278] Herman J. Viola, Thomas L. McKenney: Architect of America's Early Indian Policy, 1816-1830, at 4-5 (1974).

[279] Francis Paul Prucha, American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, at 57 (1971).

[280] Id. at 58-59.

of the Senate Committee on Indian Affairs, informed his colleagues when the bill McKenney had written reached the floor of the Senate, "To all these different branches the personal attention of the Secretary of War is now required. The creation, therefore, of such an officer [i.e., the Commissioner of Indian Affairs] as is provided by the bill, be deemed to be indispensably necessary."[281]

If Assistant Secretary Deer is to be believed, the Twenty-Second Congress intended its enactment of the bill that would be codified as 25 U.S.C. 2 to delegate an obscure subordinate employee of the War Department[282] unfettered authority to decide on his (and later her) own which groups of Native Americans would be designated as "federally recognized tribes" whose members, as a consequence of having obtained that legal status, would have a "government-to-government" relationship with the United States. That interpretation of the intent of the Twenty-Second Congress embodied in the text of 25 U.S.C. 2 stretches credulity past breaking.

The Twenty-Third Congress enacted 25 U.S.C. 9 in 1834.[283] As now codified, the statute reads: "The President may prescribe

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[281] 8 Gales & Seaton's Register of Debates in Congress, at 988 (1832).

[282] In 1849 Congress moved the BIA from the War Department to the Department of the Interior.

[283] 4 Stat. 738.

such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs." On its face, 25 U.S.C. 9 delegated Assistant Secretary Deer no authority whatsoever.

Even if arguendo the Twenty-Second and Twenty-Third Congresses intended 25 U.S.C. 2 and 9 to delegate Assistant Secretary Deer authority to create 212 new "federally recognized tribes" in Alaska simply by publishing a list of Native Entities and a preamble in the Federal Register the U.S. Supreme Court has instructed that, while Congress may enact a statute in which it delegates a portion of its legislative power to the Executive Branch, the constitutional doctrine of separation of powers requires that the text of the statute contain an "intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform," and that a statute that delegates legislative authority is invalid if its text contains "an absence of standards for the guidance of [Executive Branch action], so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed."[284]

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[284] J.W. Hampton, Jr. & Company v. United States, 276 U.S. 394, 409 (1928); Yakus v. United States, 321 U.S. 414, 426 (1944). And see also Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374 (1986) (reiterating that "[a]n agency may not confer power on itself").

The texts of 25 U.S.C. 2 and 9 do not contain any intelligible principles or identifiable standards that could have guided Assistant Secretary Deer's decision to create new "federally recognized tribes" in Alaska. Because they do not Assistant Secretary Deer's attempt to create 212 "federally recognized tribes" in Alaska by unilateral agency fiat was, and today remains, ultra vires.

L. Alaska v. Native Village of Venetie Tribal Government.

Because, as Secretary of the Interior Ray Lyman Wilbur noted in 1932, "The individual native has always and everywhere in Alaska been subject to the white man's law, both Federal and territorial, civil and criminal," the Territorial, and later State, laws to which Alaska Natives living in communities that would be designated as Native villages for the purposes of ANCSA were subject included laws that regulate domestic relations, including adoption. For example, it is a common practice in Native villages for Native children to be adopted without the Native adoptive parents complying with the State's adoption statute. In 1977 in Calista Corporation v. Mann[285] the Alaska Supreme Court held that Native adoptive parents in Native villages were as subject to the State's adoption statute as all

[285] 564 P.2d 53 (Alaska 1977).

other adoptive parents in Alaska. But as an exercise of its power in equity, the Court directed the State to treat such de facto adoptions as if they were de jure adoptions for the limited purpose of implementing State laws relating to inheritance.

That same year the American Indian Policy Review Commission, which Congress had created two years earlier to study federal Indian policy, recommended that Congress grant tribal courts "exclusive jurisdiction" to adjudicate child custody disputes involving Indian children who are domiciled on Indian reservations, and, with respect to a State child custody proceeding involving an Indian child not domiciled on a reservation, to afford the child's "tribe of origin" the right to intervene in the proceeding.[286]

In 1978 the Ninety-Fifth Congress responded to that recommendation by enacting the Indian Child Welfare Act (ICWA).[287]

Because there were no federally recognized tribes and no reservations in Alaska, to afford Native parents and children the procedural protections in State child custody proceedings that ICWA mandated, and to afford Native villages an opportunity to intervene in those proceedings, the Ninety-Fifth Congress defined the term "Indian tribe" in section 4(8) of ICWA to include within

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[286] American Indian Policy Review Commission, Final Report, at 423 (1977).

[287] Public Law No. 95-608.

its purview "Alaska Native village[s] as defined in section [3(c) of ANCSA]." And the Ninety-Fifth Congress defined the term "Indian" in section 4(3) of ICWA to include within its purview any person who is "an Alaska Native and a member of a Regional Corporation as defined in section [7 of ANCSA]."

Significantly, section 108 of ICWA authorized a section 4(8) "Indian tribe" that had no jurisdiction to conduct child custody proceedings to petition the Secretary of the Interior to grant the tribe that jurisdiction within the boundaries of its reservation or former reservation. If a section 4(8) "Indian tribe" had no reservation or former reservation, section 108(b) authorized the tribe to petition the Secretary to grant the tribe jurisdiction to conduct child custody proceedings within "limited community or geographic areas without regard for the reservation status of the area affected."

Section 108 was included in H.R. 12533, the bill the Ninety-Fifth Congress enacted as the ICWA, by the House Committee on Interior and Insular Affairs. When it reported H.R. 12533 to the House the Committee explained that it had included section 108 in the bill "in order to take into consideration special circumstances, such as those occurring in Alaska."[288]

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[288] H.R. Rep. No. 95-1386, at 25 (1978).

Because petitioning the Secretary of the Interior to grant a section 4(8) "Indian tribe" jurisdiction was inconsistent with the tenet of the Native tribal sovereignty movement that the governing bodies of "federally recognized tribes" in Alaska possessed "inherent" governmental authority, in 1986 in the U.S. District Court in Fairbanks, Andrew Harrington and Judith Bush, attorneys in the Fairbanks office of the Alaska Legal Services Corporation (ALSC) who in 1990 would sign the letter NARF attorneys Lare Aschenbrenner and Robert Anderson would send to Assistant Secretary of the Interior for Indian Affairs Eddie Brown, filed Native Village of Venetie I.R.A. Council v. State of Alaska, a lawsuit that District Judge Andrew Kleinfeld would describe as "a test case brought by the plaintiffs to determine unsettled questions of the scope of the Indian Child Welfare Act."[289]

Courts that the village councils in Venetie and Fort Yukon, a Native village located southeast of Venetie at the confluence of the Yukon and Porcupine Rivers in the Alaska interior, had created had issued adoption decrees that the State of Alaska refused to recognize. While neither village council had petitioned the Secretary of the Interior for jurisdiction pursuant to section 108 of ICWA, section 101(d) of ICWA directs

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[289] 687 F. Supp. 1380, 1381-82 (D.C.D. Ak. 1988).

States to give "full faith and credit" to the "judicial proceedings" of a section 4(8) "Indian tribe." So in the Native Village of Venetie I.R.A. Council lawsuit the two village councils asserted that, because their courts possessed "inherent" jurisdiction to issue adoption decrees, section 101(d) imposed a nondiscretionary duty on the State to give full faith and credit to the decrees and issue new birth certificates.

After observing that "The fundamental question in this case is whether the tribal courts have jurisdiction to issue adoption decrees, even though they have not complied with statutory provisions for reassuming such jurisdiction," Judge Kleinfeld held that the two courts had no such jurisdiction. In so holding, Judge Kleinfeld observed that "The law of aboriginal peoples in Alaska has remained distinct from Indian law for the continental United States, because of the different historical path taken in Alaska."[290]

But rather than basing his decision on that ground, Judge Kleinfeld implied that the two courts might have had inherent jurisdiction if in 1958 Congress had not reversed the decision of the U.S. District Court for the District of Alaska in In re McCord[291] by enacting Public Law No. 85-615, the statute that

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[290] 687 F. Supp. at 1393.

[291] 151 F. Supp. 132 (D. Alaska 1957).

added the Territory (later State) of Alaska to the list of States in 28 U.S.C. 1360 whose civil laws "of general application to private persons or private property" were given "the same force and effect within . . . Indian country as they have elsewhere within the State."

In 1990, and then again in 1991, a panel of the U.S. Court of Appeals for the Ninth Circuit reversed Judge Kleinfeld.[292]

The panel first accepted the legitimacy of both the doctrine of "inherent" tribal sovereignty and the application of the doctrine in Alaska by announcing:

> [I]f native groups in Alaska were sovereign prior to the incorporation of the [Alaska] land mass into the United States, they could lose their sovereignty only by express act of Congress or assimilation by the natives into the non-native culture.
>
> Indian sovereignty flows from the historical roots of the Indian tribe. Tribal sovereignty exists unless and until affirmatively divested by Congress. Thus, to the extent that Alaska's natives formed bodies politic to govern domestic relations, to punish wrongdoers, and otherwise provide for the general welfare, we perceive no reason why they too, should not be recognized as having been sovereign entities. If the native villages of Venetie and Fort Yukon are the modern-day successors to sovereign historical bands of natives, the villages are to be afforded the same rights and responsibilities as are sovereign bands of native Americans in the continental United States.[293]

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[292] 918 F.2d 797 (9th Cir. 1990), opinion withdrawn and reissued 944 F.2d 548 (9th Cir. 1991).

[293] 944 F.2d at 558-559.

The panel then concluded that, because the texts of 28 U.S.C. 1360 and the ICWA were ambiguous, "resolving the jurisdictional ambiguities in favor of the villages, we hold that neither the Indian Child Welfare Act nor [28 U.S.C. 1360] prevents them from exercising concurrent jurisdiction."[294]

The panel then remanded the lawsuit to Judge Kleinfeld to "determine whether the Native villages of Venetie and Fort Yukon are the modern-day successors to an historical sovereign band of Native Americans."[295]

In February 1986 the Yukon Flats School District awarded Unalakleet/Neeser Construction Joint Venture (UNCJV) a contract to construct an addition to the high school the district operated in Venetie.

In 1971 in section 19(a) of ANCSA revoked the 1.8 million acre Venetie Reserve that the Secretary of the Interior had created in 1943 pursuant to section 2 of Public Law No. 74-538. In 1979 the the Secretary of the Interior conveyed fee title to the land within the boundaries of the former reserve to the Venetie Indian Corporation and the Neets'ai Corporation, the ANCSA village corporations the residents of the villages of Venetie and Arctic Village had incorporated.

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[294] Id. at 562.

[295] Id.

In 1939 Assistant Secretary of the Interior Oscar Chapman had approved a constitution for an organization called the Native Village of Venetie that "a group of Indians having the common bond of living together in the village of Venetie" had submitted to the Secretary of the Interior pursuant to section 1 of Public Law No. 74-538 and section 16 of the IRA.[296] And shortly after they were conveyed fee title to the former reserve the Venetie Indian Corporation and the Neets'ai Corporation conveyed their title to the Native Village of Venetie.

In May 1986 the village council in Venetie adopted an ordinance that imposed a business activity tax on construction projects within the boundaries of the former reserve, and established a "tax commission" whose members were the members of the village council. In November the tax commission notified UNCJV that it owed $100,751 in back taxes, which the commission later increased to $161,203.

When UNCJV ignored the notice, represented by NARF attorney Robert Anderson, in July the Native Village of Venetie filed a lawsuit against UNCJV in a "tax court" the village council had created, one of whose "judges" was Anchorage attorney David Case.

When UNCJV complained to the State of Alaska, in October 1987 the State filed a lawsuit in the U.S. District Court in

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[296] Constitution of the Native Village of Venetie Alaska (approved May 15, 1939), available at http://thorpe.ou.edu/IRA.

Fairbanks, State of Alaska ex rel. Yukon Flats School District and Unalakleet/Neeser Construction JV v. Native Village of Venetie Tribal Government,[297] to obtain an order enjoining the Native Village of Venetie from enforcing its tax. Three weeks later District Judge Andrew Kleinfeld issued the order. And in September 1988 a panel of the U.S. Court of Appeals for the Ninth Circuit affirmed Judge Kleinfeld.[298]

When it did so, the panel noted that the question of whether the members of the Native Village of Venetie were a federally recognized tribe that, as a consequence of that legal status, possessed sovereign immunity and the power to tax, and the question of whether the land within the boundaries of the former Venetie Reserve was "Indian country" within which a federally recognized tribe could impose a tax both were "quite factually dependent."[299]

Because the Native Village of Venetie I.R.A. Council v. State of Alaska and State of Alaska ex rel. Yukon Flats School District and Unalakleet/Neeser Construction JV v. Native Village of Venetie Tribal Government lawsuits both required Judge Kleinfeld to determine whether the members of the Native Village

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[297] No. F87-051. The preceding description of the events that resulted in the filing of the lawsuit is based on documents in the file of the U.S. District Court.

[298] 856 F.2d 1384 (9th Cir. 1988).

[299] Id. at 1391.

of Venetie were members of a federally recognized tribe, the lawsuits were consolidated. And when President George H.W. Bush appointed Judge Kleinfeld to the U.S. Court of Appeals for the Ninth Circuit the consolidated lawsuits were transferred to District Judge H. Russel Holland.

Because the State of Alaska did not make the argument, the six judges who were members of the panels of the U.S. Court of Appeals for the Ninth Circuit that decided the appeals in Native Village of Venetie I.R.A. Council v. State of Alaska and State of Alaska ex rel. Yukon Flats School District and Unalakleet/Neeser Construction JV v. Native Village of Venetie Tribal Government did not consider the question of whether, as the House Committee on Natural Resources would note in 1994, for a group of individuals of Native American descent to be designated as a "federally recognized tribe" requires a "formal political act" in the guise of a treaty, a statute, or final agency action of the Secretary of the Interior acting pursuant to authority Congress has delegated to the Secretary. Instead, in Native Village of Venetie I.R.A. Council the panel had announced that if the Native Village of Venetie was the "modern-day successor" to a "sovereign historical band of natives," then its members were a federally recognized tribe.[300] And in State of Alaska ex rel. Yukon Flats

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[300] 944 F.2d at 558-559.

School District a different panel reasoned to the same result, holding that "tribal status may . . . be based on conclusions drawn from careful scrutiny of various historical factors."[301]

Bound by that direction, in November 1993 Judge Holland conducted a trial at which NARF attorney Robert Anderson presented evidence regarding whether the Gwich'in Athabascan Indian residents of Venetie and Arctic Village were the "modern-day successors" to a "sovereign historical band of natives."

On December 23, 1994 Judge Holland issued an unpublished decision[302] in which he answered that question in the affirmative because, even though "The Venetie Council and Tribal Government ha[d] failed to convince the court that their tribal status ha[d] been acknowledged by the federal government," the facts presented at trial demonstrated that the Gwich'in Athabascan Indian residents of Venetie and Arctic Village "are a sovereign tribe as a matter of common law" and, as a consequence, the adoption degree the Venetie Tribal Court had issued was "entitled to full faith and credit from the State of Alaska."

In State of Alaska ex rel. Yukon Flats School District, the judges who were members of the panel that decided that appeal had

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[301] 856 F.2d at 1387.

[302] Native Village of Venetie I.R.A. Council v. State of Alaska and State of Alaska ex rel. Yukon Flats School District and Unalakleet/Neeser Construction JV v. Native Village of Venetie Tribal Government, 1994 WL 730893 (D. Ak. Dec. 23, 1994).

noted that, even if the Gwich'in Athabascan Indian residents of Venetie were a federally recognized tribe, insofar as the tribe's authority to require UNCJV to pay its business activity tax was concerned, "a tribal tax is only valid within the confines of Indian country."

18 U.S.C. 1151 defines the term "Indian country" to include "dependent Indian communities."

On August 2, 1995 Judge Holland issued a second unpublished decision in which he announced that the 1.8 million acres of land within the boundaries of the former Venetie Reserve that since 1979 the Native Village of Venetie had owned in fee title were not "Indian country" because Venetie was not a "dependant Indian community."[303]

In reasoning to that result, Judge Holland began by noting that "Indian country cannot exist . . . without proof of three elements." First, "a claim of Indian country must be brought by an Indian tribe." Second, "the tribe must be under the active superintendence of the federal government." And third, "the tribe must have had land set aside by the federal government for its people as Natives."[304] He then noted that in section 19(a) of

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[303] State of Alaska ex rel. Yukon Flats School District and Unalakleet/Neeser Construction JV v. Native Village of Venetie Tribal Government, 1995 WL 462232 (D. Ak. Aug. 9, 1995).

[304] Id. at 11.

ANCSA Congress had not only revoked the Venetie Reserve, but in section 2(b) of ANCSA it had directed that the ANCSA land settlement be accomplished "without establishing any permanent racially defined institutions, rights, privileges, or obligations," and "without creating a reservation system or lengthy wardship or trusteeship."[305] He further noted that

> This court finds that the conveyance of lands by the federal government to village business corporations was not intended to be and in fact was not a set-aside of lands "for the use of Indians as such . . . ." The court is not aware of any court having ever held that a government patent conveying fee title to a corporate entity (even one controlled by Indians) constituted a set-aside for Indians as such. The Native Village of Venetie Tribal Government had the right to acquire the land in question from the village corporations; but that unilateral decision of those corporations and the tribe (both of which are controlled by the Neets'aii Gwich'in) did not constitute "action . . . by the federal government indicating that it set aside the land for the use by the . . . [tribe as such]." The lands of the Neets'aii Gwich'in do not meet the set aside factor necessary to support a finding that the Neets'aii Gwich'in are a dependent Indian community. (citations omitted and emphasis in original).[306]

As a consequence, Judge Holland concluded that "the lands of the Neets'aii Gwich'in are not Indian Country; and, therefore, the Tribal Government does not have the power to impose a tax upon non-members of the tribe."[307]

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[305] Id. at 16.

[306] Id. at 20.

[307] Id.

Represented by NARF attorney Heather Kendall,[308] the Native Village of Venetie appealed to the U.S. Court of Appeals for the Ninth Circuit Judge Holland's decision that the land located within the boundaries of the former Venetie Reserve was not Indian country. But Alaska Attorney General Bruce Botelho did not appeal Judge Holland's decision that the Gwich'in Athabascan Indian residents of Venetie and Arctic Village were "a sovereign tribe as a matter of common law."

Botelho told the Senate and House Judiciary Committees of the Alaska Legislature that the reason he did not was that Alaska Governor Tony Knowles, at whose pleasure he served,[309] had decided "not to have a battle over [the tribal status] issue" in order to "try to develop a better, happier relationship with the villages throughout Alaska." And he further explained to the Speaker of the Alaska House of Representatives that

> the decision by the Knowles Administration to withdraw the challenge to federal recognition of tribes in Alaska was not driven by litigation considerations. Instead, it was motivated by a commitment to working with Alaska villages to achieve a healthier, safer

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[308] Five months earlier Kendall had replaced Robert Anderson as the NARF attorney who represented the Native Village of Venetie when Anderson left NARF to become Associate Solicitor for Indian Affairs at the Department of the Interior. See "Secretary Babbitt Selects Robert T. Anderson to be Counselor to the Secretary," Press Release: U.S. Department of the Interior, Dec. 18, 1997. A committed ideologue, in 2010 Kendall told First Alaskans magazine: "If it were not for my passion for Native rights work, I would not be an attorney, because I don't particularly like the law." See "Laying Down the Law," First Alaskans, June 2010.

[309] Alaska is one of five states in which, rather than being elected, the Attorney General is appointed by, and serves at the pleasure of, the Governor.

> environment in which the community is an active participant in solutions. Litigation over the issue of tribal status was viewed as a major impediment to this state-local partnership.[310]

While that explanation may have been true as far as it went, a year earlier Knowles, a Democrat, had been elected Governor by defeating Jim Campbell, his Republican opponent, by only 539 votes in an election in which 213,435 votes were cast and that Campbell would have won if Jack Coghill, a candidate who was even more conservative than Campbell was, had not won 27,838 votes as the gubernatorial candidate of the Alaska Independence Party.[311]

Even with Coghill's name on the ballot, Knowles still would have lost had he not actively courted Native voters by supporting the Native tribal sovereignty movement.

In September 1990 Steve Cowper, a Democrat who in 1986 had succeeded Bill Sheffield as Governor of Alaska, had signed Administrative Order No. 123 in which he announced that the State of Alaska henceforth would "treat as a tribe any Alaskan Native group that meets the common sense of the word."[312]

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[310] See Why History Counts, at 421 (Attorney General Botelho explanation of why he did not file an appeal described).

[311] See 1994 Alaska General Election Official Results Statewide Summary, available at http://elections.alaska. gov/results/94GENR/result94.htm#govltg.

[312] Alaska Administrative Order No. 123 (Sept. 10, 1990).

Cowper did so even though two years earlier in Native Village of Stevens v. Alaska Management & Planning the Alaska Supreme Court had instructed that more than a century earlier Congress had made a policy decision not to afford Native residents of Native villages "sovereign tribal status." Years later when he was asked Cowper recalled that he had had no qualms about conceding the validity of the Native tribal sovereignty movement's principal contention because beginning in 1968 when he had worked as an Assistant District Attorney he had traveled regularly to Native villages on the Yukon-Kuskokwim River Delta. So he understood that the day-to-day reality of village life had not changed appreciably from the situation J.B. Henderson, the BIA teacher at Noatak, had described in 1933.

According to Cowper, "When I was a prosecutor the protocol was, the village councils would call John Malone [the Alaska State Trooper stationed at Bethel] whenever there was something they couldn't handle. John had a Cessna 195. We would go get Nora Guinn [the district court judge in Bethel] and off John and Nora and I would go to Crooked Creek or Hooper Bay or some other village and sort it out. Sticklers for procedural due process would not have approved. But the village council members did and that was good enough for us."[313]

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[313] Personal Communication from Steve Cowper to Donald Craig Mitchell, May 4, 2017.

Based on that personal experience, Cowper believed that "a tribal organization would likely serve about as well as a city bureaucracy, of whatever class" because, "after all, the village people were the ones making the decisions."

But while, as Governor, Cowper was willing to tell members of the Native tribal sovereignty movement what they wanted to hear regarding tribal status, he was not willing to concede that village councils had the governmental authority that the attorneys in NARF's Anchorage office said they had. For that reason, after conceding tribal status, Administrative Order No. 123 instructed that "When the State treats a Native group outside of a reservation as a tribe, it does not recognize that the tribe has the governmental powers of a tribe on a reservation. Whether governmental powers exist in a tribe in any particular instance is a completely separate question from tribal status."

Governor Cowper also understood that his concession regarding tribal status had no force of law. Rather, according to Cowper, "As far as I was concerned the administrative order was just a statement of how I intended to treat village governments. Whether it had any legal effect beyond that was in the eye of the various beholders. I certainly don't recall thinking the order would survive my term in office."[314]

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[314] Id.

And it did not.

Two months after Cowper signed Administrative Order No. 123, in November 1990 Walter Hickel, a bombastic Anchorage businessman who was the candidate of the Alaska Independence Party, was elected to succeed Steve Cowper as Governor of Alaska.

For Hickel, who believed "Alaska is one country, one people,"[315] his predecessor's acquiescence to the Native tribal sovereignty movement was anathema. In January 1991 in his first State of the State address Hickel vowed that "we will not bow to those who would bring Native sovereignty in a legal sense into the sovereign state of Alaska."[316] And that August when he revoked Administrative Order No. 123[317] he explained that "This administration is not going to stand by and wait for the balkanization of Alaska."[318]

Charles Cole, who Hickel appointed to serve as his Attorney General, was of a similar mind. As Cole explained in 1992 when he spoke at the Alaska Mayors' Conference:

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[315] State of the State Address by the Honorable Walter J. Hickel, Governor of Alaska, before a Joint Session of the Seventeenth Alaska State Legislature, Jan. 22, 1991, Senate-House Joint Journal Supplement No. 1.

[316] Id.

[317] Alaska Administrative Order No. 125, Aug. 16, 1991.

[318] "Hickel Revises State Policy on Tribal Powers," Office of the Governor of Alaska (Press Release), Aug. 16, 1991.

> Fifteen years ago we all thought we knew the legal status of Alaskan Natives. The Alaska Native Claims Settlement Act became law in 1971, and we thought it settled the matter . . . Many Native villages had become municipalities and were receiving state funding for local projects. The combination of municipal corporations and ANCSA corporations was bringing new benefits to Native villages.
>
> But by the late 1970s, some individual Alaska Natives began making claims that they had special privileges under federal law - that their communities were the equivalent of Indian reservations in the Lower 48. Some even claimed that Native villagers were exempt from state laws, and that Native councils could impose their own laws on non-members and even on the state.
>
> The result was widespread confusion and litigation. Over the last decade, there has been constant litigation in the courts over the rights and privileges of Alaska Natives. The result, frankly, has not only been unhelpful, the litigation has added confusion.
>
> . . .
>
> As attorney general, I have the legal duty to oppose the most extreme sovereignty claims, those that would result in dozens of small states within our state of Alaska.[319]

At Governor Hickel's direction, the attorneys at the Alaska Department of Law who Attorney General Cole supervised aggressively litigated the consolidated Venetie lawsuits. But in January 1994 Cole resigned[320] and Governor Hickel appointed Bruce Botelho, a career attorney in the Alaska Department of Law, to

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[319] "Questions of Native Sovereignty Claims Never Get 'Settled' in Court," Anchorage Times, March 8, 1992.

[320] "Upset Cole Quits as Top Lawyer," Anchorage Daily News, Jan. 6, 1994.

succeed Cole as Attorney General.[321] When his appointment was announced, Botelho said there would be no "change in the general direction" Governor Hickel had "charted" for the Department of Law. As a consequence, throughout 1994 the attorneys Attorney General Botelho supervised continued to contest NARF attorney Robert Anderson's assertion in the consolidated Venetie lawsuits that the Gwich'in Athabascan Indian residents of Venetie were a federally recognized tribe.

In August 1994 Walter Hickel announced that he would not run for a second term. Hickel's withdrawal significantly advanced the chances of Tony Knowles, the former mayor of Anchorage who Hickel had defeated in the 1990 gubernatorial election and who would be the Democratic Party's candidate in the November 1994 election.

Knowing that Native voters in Native villages are a core Democratic constituency, less than two weeks prior to the 1990 election when he, Hickel, and Arliss Sturgulewski, the Republican Party's candidate, appeared at that year's AFN convention that was broadcast on satellite television to Native voters in Native villages throughout Alaska Knowles had tried to appeal to those voters by embracing the Native tribal sovereignty movement. As the Anchorage Daily News reported: "Knowles picked up more points with many Natives when he said he'd support Gov. Steve Cowper's

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[321] "Botelho Named Attorney General," Anchorage Daily News, Jan. 13, 1994.

declaration recognizing the tribal status of Alaska Native groups. Sturgulewski and Hickel both said no to the question and both wavered when asked if they'd support giving tribal councils the same powers as state-sanctioned local governments. Knowles said he would."[322]

Four years later Knowles promised those same Native voters that if they elected him Governor "I will withdraw Gov. Hickel's divisive and unrealistic executive order [that repealed Administrative Order No. 123 and] that denied the existence of tribes."[323] And in an advertisement printed in the Tundra Drums, the newspaper that was distributed in Native villages throughout the Yukon-Kuskokwim River Delta, candidate Knowles vouched that it was "time for tribal or village courts to handle many misdemeanors and civil matters."

Courting members of the Native tribal sovereignty movement paid its dividend when, for the first time in the history of the AFN, the delegates who attended the October 1994 convention endorsed a gubernatorial candidate. As the Tundra Times reported three weeks before the election: "The Alaska Federation of Natives delegates at its convention last week endorsed Democratic candidate Tony Knowles for Governor, primarily due to his stand

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[322] "Subsistence, Tribal Rights Top AFN Debate," Anchorage Daily News, Oct. 27, 1990.

[323] "Election '94," Tundra Drums, Aug. 18, 1994.

on subsistence, tribal self-governance, village sanitation, and the capital move issue." (emphasis added).[324]

On election day, in Venetie and Arctic Village Tony Knowles defeated Jim Campbell 77 votes to 5 votes. In Akiachak, the village in which Willie Kasaylie, the former head of the Alaska Native Coalition who now was chairman of the Alaska Inter-Tribal Council resided, he defeated Campbell 109 votes to 13 votes. And he did the same in other Native villages in which the Native tribal sovereignty movement had taken root.[325] So in 1995 when Governor Knowles directed Bruce Botelho, who he had retained as Attorney General,[326] not to appeal Judge Holland's decision that the members of the Native Village of Venetie were a federally recognized tribe, Knowles knew he would need those same votes again when he ran for reelection in 1998. And three weeks before the 1998 election the Anchorage Daily News would report that prior to the 1994 election candidate Knowles had promised that Governor Knowles would "drop[] the portion of the lawsuit that opposed recognition of tribal status for Venetie and other Alaska

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[324] "AFN Abandons Neutrality, Endorses Knowles," Tundra Times, Oct. 19, 1994.

[325] See 1994 Alaska General Election Official Results By Precinct, available at http://elections.alaska.gov/results/94GENR/resprg94.htm#dist39.

[326] See "Botelho Holds on to Job," Anchorage Daily News, Jan. 6, 1995.

villages, a move criticized by Republican legislators."[327]

On November 20, 1996 a panel of the U.S. Court of Appeals for the Ninth Circuit issued a decision in which it reversed Judge Holland's determination that the 1.8 million acres of land within the boundaries of the former Venetie Reserve was not a "dependant Indian community," and hence was not "Indian country."[328]

Since only a federally recognized tribe can occupy Indian country, if the members of the Native Village of Venetie were not one, whether the land within the boundaries of the former reserve was "Indian county" was a question the panel had no reason to decide. But when Attorney General Botelho did not appeal Judge Holland's decision regarding tribal status, the legal consequence was that the State of Alaska conceded that members of a federally recognized tribe resided within the boundaries of the revoked reserve.

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[327] "Candidates Court Natives' Favor," Anchorage Daily News, Oct. 16, 1998. In November 1998 Tony Knowles was elected to a second term. Three years later he directed Attorney General Botelho to write a document that became known as the "Millennium Agreement" and that on April 11, 2001 Governor Knowles and sixty-two tribal representatives signed. In the agreement, after acknowledging that there were "229 federally recognized tribes in the State of Alaska" each of which possesses "inherent sovereign authority," the State agreed that its future actions would be "respectful of Tribal sovereignty." See Millennium Agreement Between the Federally Recognized Sovereign Tribes of Alaska and the State of Alaska, April 11, 2001; "Natives, Knowles Ink Millennium Agreement, Anchorage Daily News, April 12, 2001.

[328] 101 F.3d 1286 (9th Cir. 1996).

After assuming tribal status, the two judges who issued the panel's controlling decision began their analysis by assuming that "a dependent Indian community requires a showing of federal set aside and federal superintendence."[329]

With respect to the set-aside requirement, they concluded that in ANCSA Congress intended to set aside public land for Alaska Natives "as such" when it directed the Secretary of the Interior to convey fee title to the land to village and regional corporations. The purported reason was that Congress had intended the corporations to be "the instruments of, and owe obligations to, the Native villages."[330]

With respect to the superintendence requirement, they announced that that element of the dependent Indian community test was "designed to determine the extent to which the traditional trust relationship between the federal government and Native Americans remains intact in a particular case."[331] They then concluded that Congress did not intend ANCSA to "extinguish federal superintendence of Alaska Natives," and that "the federal government continues to execute its trust responsibilities toward

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[329] Id. at 1294.

[330] Id. at 1295.

[331] Id. at 1296.

Alaska Natives."[332]

At the conclusion of their analysis, the two judges announced: "In sum, we hold that ANCSA neither eliminated a federal set aside for Alaska Natives, as such, nor terminated federal superintendence over Alaska Natives. As a result, Indian country may still exist in Alaska."[333]

They then applied the federal set aside and federal superintendence standards they had invented and concluded that Venetie was a "dependent Indian community," and, because it was, that the 1.8 million acres of land within the boundaries of the former Venetie Reserve was "Indian country." After so holding, they directed Judge Holland to determine whether the Native Village of Venetie had "the power to impose a tax upon a private party where the State of Alaska will ultimately pay the obligation."[334]

In 1953 Congress had assumed that States have no jurisdiction to enforce their civil laws within the boundaries of "Indian country" and had enacted 28 U.S.C. 1360, a statute that granted that jurisdiction to five listed states. And in 1958 Congress added the Territory (later State) of Alaska to that

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[332] Id. at 1297.

[333] Id. at 1299-1300.

[334] Id. at 1302-1303.

list.[335]

In 1976 in its decision in Bryan v. Itasca County[336] and then in 1987 in its decision in California v. Cabazon and Morongo Bands of Mission Indians,[337] the U.S. Supreme Court held that Congress did not intend 28 U.S.C. 1360 to grant the listed states jurisdiction to enforce their civil regulatory laws in Indian country.

If, as Assistant Secretary of the Interior for Indian Affairs Ada Deer had announced in 1993, there were more than two hundred federally recognized tribes in Alaska whose members resided in communities that had been designated as Native villages for the purposes of ANCSA, and if, as the panel of the U.S. Court of Appeals for the Ninth Circuit had announced in 1996 in its decision in State of Alaska ex rel. Yukon Flats School District v. Native Village of Venetie Tribal Government, the forty-four million acres of public land whose fee title the Secretary of the Interior was conveying to ANCSA regional and village corporations was transformed into "Indian country" whenever, as had happened with the land inside the boundaries of the former Venetie Reserve, a corporation conveyed its title to a

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[335] See Public Law No. 85-615. And see also Why History Counts, at 382-385 (circumstances that motivated Congress to add the Territory of Alaska to the list of states in 28 U.S.C. 1360 described.)

[336] 426 U.S. 373 (1976).

[337] 480 U.S. 202 (1987).

village council, the consequences for the State of Alaska were adverse in the extreme.

When Governor Knowles finally belatedly realized the seriousness of the situation he directed Attorney General Botelho to petition the U.S. Court of Appeals for the Ninth Circuit to reconsider the panel's decision.[338] When the court denied the petition, Knowles directed Botelho to petition the U.S. Supreme Court to issue a writ of certiorari and review the panel's decision.[339]

During its 1996 term the U.S. Supreme Court received 6,633 petitions and granted only 83.[340] So why would the Court agree to review a decision that affected only one state and that involved a question of statutory construction - i.e., the intent of Congress embodied in the undefined term "dependent Indian communities" in 18 U.S.C. 1151 - that if the panel had misconstrued Congress's intent Congress could remedy the error by amending the statute?

To improve the odds that the Court would grant the State's petition, Attorney General Botelho hired John Roberts, the head

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[338] "State to Seek Quick Appeal of Sovereignty Ruling," Anchorage Daily News, Nov. 22, 1996.

[339] "Court Sticks with Ruling on Villages," Anchorage Daily News, Jan. 10, 1997.

[340] U. S. Supreme Court Journal, 1996 Term available at http://www.supremecourt.gov/orders/journal/jnl96.pdf.

of the appellate section of Hogan & Hartson, a prominent Washington, D.C., law firm, to write it. A former Assistant Solicitor General who had argued twenty-five cases in the U.S. Supreme Court, Roberts had been a law clerk for, and was a protege of, Chief Justice William Rehnquist.[341]

To further increase the odds that the Court would grant the petition, Botelho arranged for Attorneys General representing twenty-five states to appear as amici curiae by filing a brief in which they informed the Court that they feared tribes in their jurisdictions would take "unilateral actions to acquire land and, based on minimal federal presence in the area, successfully assert the lands are Indian country as a 'dependent Indian community'" by invoking the federal set-aside and federal superintendence tests the Ninth Circuit panel had invented.[342]

Alaska Senator Ted Stevens also appeared as an amicus curiae and filed a brief.

A graduate of the Harvard Law School, between 1956 and 1961 Stevens had been a senior official at the Department of the Interior.[343] And for a short time at the end of the Eisenhower

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[341] "State Hires Help in Indian Country Case," Anchorage Daily News, Jan. 24, 1997.

[342] See State of Alaska v. Native Village of Venetie Tribal Government No. 96-1577, Brief of Amici Curiae States of California, et al., in Support of Petitioner State of Alaska, at 3.

[343] See Take My Land Take My Life, at 220-236 (Ted Stevens biography prior to his appointment to the Senate described).

administration he had served as the Acting Solicitor.[344]

Since he was knowledgeable about principles of federal Indian law and the history of Congress's decision not to apply many of those principles in Alaska, from its inception the Senator had been an opponent of the Native tribal sovereignty movement.

In 1971 the U.S. Supreme Court issued a decision, Kennerly v. District Court of Montana,[345] in which it held that federally recognized Indian tribes had no authority to grant the States in which their reservations were located authority to assert the States' criminal and civil jurisdiction within the boundaries of the reservations and the tribes' other "Indian country."

In February 1978 South Dakota Senator James Abourezk, the chairman of the Senate Select Committee on Indian Affairs, introduced S. 2502, a bill whose enactment would give tribes that authority. The bill defined "Indian tribe" to mean "any Indian tribe, band, nation, or other organized group or community exercising powers of self-government which is recognized as eligible for services provided by the United States to Indians

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[344] 107 Cong. Rec. 944 (1961)(Colorado Republican Senator Gordon Allott on January 17, 1961 telling the Senate: "Another of the brilliant young men with whom I have enjoyed working is Ted Stevens, Solicitor of the Department of the Interior"). See also id. 532 (Ten days before he departed office, on January 10, 1961 President Dwight Eisenhower nominated "Theodore F. Stevens of Alaska to be Solicitor for the Department of the Interior").

[345] 400 U.S. 423 (1971).

because of their status as Indians, including any Alaska Native villages included in the Alaska Native Claims Settlement Act." (emphasis added).[346]

In March the Select Committee held a hearing on S. 2502 during which no mention was made of the tribal status situation in Alaska.[347]

Six months later when the members of the Select Committee voted to send S. 2502 to the Senate their report on the bill explained the inclusion of "Alaska Native villages" in the "Indian tribe" definition as follows:

> Questions have been raised about the status of Alaska Native villages. The inclusion of these villages in this bill is intended to cover those villages which are recognized by the Department of the Interior as having powers of self-government springing from their own inherent sovereignty. It is noted that some villages in Alaska are organized under State law as second class cities. As such they are creatures of the State and are not authorized under this legislation to negotiate as Indian tribes. Other villages, and in fact some that are also organized as second class cities, are also organized under the Indian Reorganization Act and some have traditional governments which are recognized by Interior as having powers of self-government independent of State or Federal law. These entities are included within the meaning of the definition.[348]

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[346] Section 4(a), S. 2502, 95th Cong. (1978).

[347] Tribal-State Compact Act of 1978: Hearings on S. 2502 Before the S. Select Comm. on Indian Affairs, 95th Cong. iii-iv (1978).

[348] S. Rep. No. 95-1178, at 12 (1978).

The Senate passed S. 2502 on a voice vote and with no explanation of the bill's content or legal consequence.[349] But the U.S. House of Representatives did not consider S. 2502 prior to the adjournment of the Ninety-Fifth Congress.

In May 1979, Senator Abourezk having retired, Arizona Senator Dennis DeConcini, who had joined the Select Committee at the beginning of the Ninety-Six Congress, reintroduced S. 2502 as S. 1181. The bill contained the same "Indian tribe" definition as the definition in S. 2502.[350]

In March 1980 the Select Committee held a hearing on S. 1181 at which again no mention was made of the tribal status situation in Alaska.[351] However, in May when the members of the Select Committee voted to send S. 1181 to the Senate they amended the "Indian tribe" definition to state that, for the purposes of the bill, an "Indian tribe" was "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native Village as defined in section 3(c) of the Alaska Native Claims Settlement Act, which is exercising powers of self-government and which is recognized by the Secretary of the Interior as eligible for services provided by the United States to Indians because of

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[349] 124 Cong. Rec. 34458-34461 (1978).

[350] Section 3(a), S. 1181, 96th Cong. (1979).

[351] Jurisdiction on Indian Reservations: Hearings on S. 1181, S. 1722, and S. 2832 before the Senate Select Comm. On Indian Affairs, 96th Cong. iii-iv (1980).

regarding those Villages. Lands selected by native villages or regional corporations under the Alaska Native Claims Settlement Act are not considered Indian country within the meaning of section 1151, title 18, USC. Thus, the purposes of S. 1181 would not be applicable to lands acquired under the Alaska Native Claims Settlement Act."[355]

A year later, in 1981 Wyoming Senator Malcolm Wallop, the chairman of the Subcommittee of the Senate Finance Committee that had jurisdiction over the subject matter, introduced S. 1298, the Indian Tribal Government Tax Status Act (Tax Status Act),[356] a bill whose enactment would allow "Indian tribal governments" to be treated as municipal governments for certain tax purposes.

S. 1298, whose text likely was written by attorneys at the Department of the Interior,[357] defined "Indian tribal government" to mean "the governing body of any tribe, band, community, village, or group of Indians or Alaska Natives which is determined by the Secretary [of the Treasury], after consultation

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[355] Id. at 12815. And see Mutual Agreements and Compacts Respecting Jurisdiction and Governmental Operations: Hearing on S. 563 Before the S. Select Comm. on Indian Affairs, 97th Cong. 17 (1981)(Senator DeConcini noting "Under the last Congress, the committee was asked by Senator Stevens to delete any reference to Alaskan villages from the definition").

[356] Title II, Public Law No. 97-473.

[357] 1981-82 Miscellaneous Tax Bills XVI: Hearing on S. 1298, S. 2197, and S. 2498 Before the Subcomm. on Taxation and Debt Management of the S. Comm. on Finance, 97th Cong. 58 (1982) (statement of Deputy Assistant Secretary of the Interior for Indian Affairs Roy Sampsel).

with the Secretary of the Interior, to exercise governmental functions." (emphases added)[358]

However, when the Senate considered H.R. 5470, an omnibus tax bill into which the text of S. 1298 had been incorporated, before the Senate passed the bill Senator Stevens arranged for the "Indian tribal government" definition to be amended by removing the reference to "Alaska Natives" and at the end of the definition adding "and in Alaska shall include only the Metlakatlia (sic) Indian Community."[359]

When leaders of the nascent Native tribal sovereignty movement discovered what Stevens had done and complained, the Senator relented. Before H.R. 5470 was sent to the President for signing he arranged for Congress to pass a concurrent resolution that reinserted the reference to "Alaska Natives" in the "Indian tribal government" definition. But he included a paragraph in the definition that stated: "Nothing in the Indian Tribal Government Tax Status Act of 1982, or in the amendments made thereby, shall validate or invalidate any claim by Alaska Natives of sovereign authority over lands or people."[360]

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[358] Section 4, S. 1298, 97th Cong. 1st Sess. (as introduced, June 2, 1981).

[359] 128 Cong. Rec. 26901 (1982).

[360] H. Con. Res. 439, 97th Cong. (Dec. 21, 1982). See also 128 Cong. Rec. 33309-33310 and 33572-33573 (1982).

Six weeks later during his annual address to the Alaska Legislature Stevens explained his position as follows:

> I have worked to ensure that Alaska's villages are treated equally with lower 48 tribes for purposes of receiving social and health benefits. It has not been my assumption that such treatment implied that Alaska Native villages had the same police powers, taxation ability, and fish and game management authority as those reservations in the lower 48.
>
> Some have sought a federally-derived Native sovereignty - sovereignty not dependent upon our state's constitution or our laws. It has, and will continue to be, my position that village sovereignty is a matter for our state through this Legislature and the Governor to determine.
>
> However, there have been bills dealing primarily with reservation tribal powers that have led to some misunderstanding of my position on the issue. It is my hope Congress will pass a tribal state compact law that authorizes states to negotiate with Native tribes or villages, such as IRA Councils, to resolve the sovereignty issue. Meanwhile, I intend to ask Congress to follow the pattern of the Indian Tribal Government Tax Status Act, which we passed last year, which specifically stated that that Act cannot be interpreted "to validate or invalidate any claim by Alaska Natives of sovereign authority over lands or people."[361]

Having settled on neutrality as his response to the Native tribal sovereignty movement, five years later Stevens would insist that the AFN agree, over the protestation of members of the Alaska Native Coalition, to include a disclaimer section in the ANCSA "1991" bill that Stevens and Alaska Senator Frank Murkowski and Alaska Representative Don Young arranged for the

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[361] Remarks of the Honorable Ted Stevens before the Alaska State Legislature, Senate and House Joint Journal Supplement No. 5 (Feb. 8, 1983).

One Hundredth Congress to pass in 1987.

Another ten years later in the amicus brief he filed in support of the State of Alaska's petition for a writ of certiorari in Alaska v. Native Village of Venetie Tribal Government Stevens urged the Court to grant the petition because "Unless corrected, the [Ninth Circuit panel's] decision will irreparably harm the people of Alaska, both Native and non-Native, who until now have largely escaped the damage that Congress's early nineteenth century Indian policies inflicted in the coterminous states, and will severely damage the institutions Congress created to implement the ANCSA settlement."[362]

On June 23, 1997 the U.S. Supreme Court granted the State's petition.[363]

When she heard the news Heather Kendall Miller,[364] who would represent the Native Village of Venetie before the Court, said she was "optimistic that the Venetie tribe will prevail in the end."[365] But it did not. In the decision the Court issued on

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[362] State of Alaska v. Native Village of Venetie Tribal Government U.S. Supreme Court No. 96-1577, Brief of the Honorable Theodore F. (Ted) Stevens as Amicus Curiae in Support of Petitioner, at 1-2.

[363] 521 U.S. 1103 (1997).

[364] In 1996 Heather Kendall had married Anchorage attorney Lloyd Miller and changed her name to Kendall Miller. "Laying Down the Law," First Alaskans Magazine, June 2010 ("[Lloyd Miller] and Kendall-Miller were married in 1996").

[365] "Justices to Rule on Indian Country," Anchorage Daily News, June 24, 1997.

February 25, 1998[366] Justice Clarence Thomas, writing for a unanimous Court, announced that "After the enactment of ANCSA, the [1.8 million acres of land within the former Venetie Reserve] are neither 'validly set apart for the use of the Indians as such,' nor are they under the superintendence of the Federal government."[367] In reasoning to that result, Thomas explained that

> ANCSA transferred reservation lands to private, state-chartered Native corporations, without any restraints on alienation or significant use restrictions, and with the goal of avoiding "any permanent racially defined institutions, rights, privileges, or obligations." By ANCSA's very design, Native corporations can immediately convey former reservation lands to non-Natives, and such corporations are not restricted to using those lands for Indian purposes. Because Congress contemplated that non-Natives could own the former Venetie Reservation, and because the Tribe is free to use it for non-Indian purposes, we must conclude that the federal set-aside requirement is not met. (citations omitted).[368]

And that

> After ANCSA, federal protection of the Tribe's land is essentially limited to a statutory declaration that the land is exempt from adverse possession claims, real property taxes, and certain judgments as long as it has not been sold, leased, or developed. These protections, if they can be called that, simply do not approach the level of superintendence over the Indians' land that existed in our prior cases . . . Finally, it is worth noting that Congress conveyed ANCSA lands to state-chartered and state-regulated private business corporations, hardly a choice that comports with a

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[366] 522 U.S. 520 (1998).

[367] Id. at 532.

[368] Id. at 532-533.

> desire to retain federal superintendence over the land. (citation omitted and emphasis in original).[369]

Although it dealt only with the status of the land within the boundaries of the former Venetie Reserve, the practical legal consequence of the Court's decision was that none of the forty-four million acres of public land in Alaska that the Secretary of the Interior would convey in fee title to ANCSA regional and village corporations qualified as a "dependent Indian community," and hence as "Indian country."

However, because Governor Knowles had directed Attorney General Botelho not to appeal to the U.S. Court of Appeals for the Ninth Circuit District Judge Holland's decision that the members of the Native Village of Venetie were a federally recognized tribe, when they decided Alaska v. Native Village of Venetie Tribal Government Justice Thomas and the other justices simply assumed that the members of the Native Village of Venetie had that legal status. As a consequence, whether the Gwich'in Athabascan Indian residents of Venetie and the Native residents of the more than two hundred other communities in Alaska that have been designated as Native villages for the purposes of ANCSA are members of federally recognized tribes remains an unsettled question until such time as the U.S. Supreme Court decides the question.

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[369] Id. at 533-534.

In 1988 in its decision in Native Village of Stevens v. Alaska Management & Planning the Alaska Supreme Court offered its answer to that question when it announced that "Congress has demonstrated its intent that Alaska Native communities not be accorded sovereign status." However, as NARF attorneys Lare Ashenbrenner and Robert Anderson and the other attorneys active in the Native tribal sovereignty movement in 1993 had hoped it might, the year after the U.S. Supreme Court issued its decision in Alaska v. Native Village of Venetie Tribal Government the Alaska Supreme Court reversed course.

M. John v. Baker.

In 1941 when the U.S. Army began building an air field in the Alaska interior forty-two miles west of the Canadian border, several Athabascan Indian families settled near the field. They named the community they established Northway after Walter Northway, a locally prominent Athabascan patriarch.[370] Because in 1970 a majority of Northway's forty residents were of Athabascan Indian descent, in 1971 Congress designated Northway as a Native village for the purposes of ANCSA. And in 1993 Assistant Secretary of the Interior for Indian Affairs Ada Deer included

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[370] Community Information Northway Village, Alaska Department of Commerce, Community, and Economic Development ("Residence at the new site provided Native workers with construction jobs on the Alaska Highway and at the Northway airfield during World War II.") available at https://www.commerce.alaska.gov/dcra/DCRAExternal/community/Details/b6650fff-672c-46af-90c1-3f157a4ab13e.

"Northway Village" on the list of Native Entities she published in the Federal Register.[371]

In 1994 John Baker, an Athabascan Indian who lived near Northway, petitioned the court in Northway that the Tanana Chiefs Conference had assisted the village council to create to decide a dispute regarding the custody of his two sons that he was having with their mother, Anita John, an Athabascan Indian resident of Mentasta, a Native village ninety-four miles west of Northway.

In 1995 when the court in Northway held a hearing regarding his custody dispute and John Baker discovered that Lorraine Titus, the "judge" of the court, had invited Katie John, Anita John's grandmother, who was a "judge" of the court that had been created in Mentasta, to participate in deciding how the dispute would be resolved, he realized that the court in Northway was not an impartial tribunal. When, after consulting Katie John and Nora David, Anita John's adoptive sister who was the "first chief" of the Native Village of Mentasta, Titus issued an "order" in which she directed John Baker and Anita John to share custody of their sons, Baker drove to Fairbanks and hired an attorney named Rita

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[371] 58 Fed. Reg. 54369 (1993). Because the Secretary of the Interior has not approved a constitution for the Athabascan Indian residents of Northway pursuant to section 1 of Public Law No. 74-538 and section 16 of the IRA, in 1976 the village council in Northway adopted its own articles of incorporation and by-laws. In 2004 forty-three Northway residents voted to adopt a constitution "as a federally recognized Indian tribe and under the inherent sovereign authority of our Tribe." See Constitution of the Northway Tribe, available at http://http://www.aptalaska,net/~nicholr/Constitution%20of%20NVC.pdf.

Allee who on his behalf filed a custody action against Anita John in the Alaska Superior Court.[372]

Because she was income eligible, Anita John was represented in that action by Andrew Harrington, one of the attorneys in the Fairbanks office of the Alaska Legal Services Corporation (ALSC) who in 1986 had filed the Native Village of Venetie I.R.A. Council v. State of Alaska lawsuit. And between 1990 and 1993 Harrington had been a member of the group of attorneys led by NARF attorneys Lare Aschenbrenner and Robert Anderson that lobbied, first Assistant Secretary of the Interior for Indian Affairs Eddie Brown, and then Assistant Secretary of the Interior for Indian Affairs Ada Deer, to transform the Native residents of more than two hundred communities that had been designated as Native villages for the purposes of ANCSA into "federally recognized tribes" by publishing a list of Native Entities and a preamble in the Federal Register.

On Anita John's behalf, Harrington filed a motion in which he requested Superior Court Judge Ralph Beistline to dismiss the custody action Rita Allee had filed on the ground that the court in Northway had already asserted its jurisdiction over the custody dispute that was the subject of the action.

Judge Beistline denied the motion.

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[372] Baker v. John, Alaska Superior Court No. 4FA-95-3103 Civil, Complaint and Petition for Child Custody, Dec. 28, 1995.

At that point, John Baker ran out of money to pay Rita Allee. However, because Anita John was being represented by an ALSC attorney, John Franich, the supervising attorney at the Fairbanks office of the Office of Public Advocacy (OPA), a State agency that represents indigent individuals in certain types of cases, took over John Baker's representation.

After a bench trial, Judge Beistline awarded John Baker custody of his sons after finding that "Ms. John drinks when the children are around," "always drinks until she blacks out," and has "experienced serious bouts of depression with suicidal components."[373]

Andrew Harrington then appealed to the Alaska Supreme Court Judge Beistline's denial of the motion to dismiss that Harrington had filed.

Insofar as the legal status of the Athabascan Indian residents of Northway as a "federally recognized tribe" whose village council possessed authority to create a "court" that had jurisdiction to involve itself in child custody matters was concerned, in his opening brief Andrew Harrington asserted that "On October 21, 1993, the Department of the Interior published a new list of recognized Alaska tribes. Northway appears on that list. The list is preceded by an introduction which makes it

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[373] Baker v. John, Alaska Superior Court No. 4FA-95-3103 Civil, Findings of Fact, Conclusions of Law, and Judgment, April 1, 1997, at 3.

clear that Alaska tribes have the same sovereign status as tribes in the lower 48 states . . . Any continued distinction between tribes in Alaska and tribes in the contiguous United States is thus no longer tenable."[374]

Because he was not knowledgeable about federal Indian law and its application (and nonapplication) in Alaska, John Franich recommended to OPA that the agency contract with a Fairbanks attorney named Deborah Niedermeyer to write the briefs Franich would file on behalf of John Baker in the Alaska Supreme Court, and argue the appeal.[375]

While she knew more about federal Indian law than John Franich did, unfortunately for John Baker, according to Deborah Niedermeyer, "I've supported Alaska Native sovereignty from the get-go."[376] As a consequence, in the brief she filed on behalf of John Baker she did not contest Andrew Harrington's assertion that the Athabascan Indian residents of Northway were a "federally recognized tribe" because in 1993 in the list of Native Entities and preamble she published in the Federal Register Assistant Secretary Deer had said they were.

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[374] John v. Baker, Alaska Supreme Court No. S-08099, Appellant's Brief, at 40-41.

[375] While John Franich signed several, all of the briefs were written Deborah Niedermeyer. Personal communications from John Franich, April 6, 2016, and Deborah Niedermeyer, April 6, 2016, to Donald Craig Mitchell.

[376] Personal communication from Deborah Niedermeyer to Donald Craig Mitchell, April 8, 2016.

Instead, Deborah Niedermeyer argued that Congress intended 28 U.S.C. 1360, the statute that grants the State of Alaska "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country" to grant the State "exclusive jurisdiction" to adjudicate custody disputes that involve Native parents and children who are members of the federally recognized tribes that she had implicitly conceded existed.[377]

Then in a supplemental brief, Deborah Niedermeyer explicitly conceded that "the Native Village of Northway is a federally recognized tribe."[378] And during her oral argument, she told the Alaska Supreme Court that John Baker, whom she had never met, believed "the wisest decision this Court could make is to recognize tribal jurisdiction in Alaska as long as tribal court decisions meet the law of comity."[379]

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[377] John v. Baker, Alaska Supreme Court No. S-08099, Brief of Appellee, at 9.

[378] John v. Baker, Alaska Supreme Court No. S-08099, Supplemental Brief of Appellee, at 12.

[379] John v. Baker, Alaska Supreme Court No. S-08099, Oral Argument June 19, 1998, Audiotape AP 916, Tape Position 1048-1055. NARF attorney Heather Kendall Miller filed a brief on behalf of amici curie Native Village of Venetie and the Alaska Inter-Tribal Council in support of Anita John. Deborah Niedermeyer later recalled that after the oral argument "Heather assured everybody on her team that I was indeed on the sovereignty side, and invited me out to eat with all the attorneys and amici to celebrate what we thought might end up as an important achievement. It was a great conversation, largely celebrating how the attorneys had sort of ganged up on the judges - quite an unusual situation." Personal communication from Deborah Niedermeyer to Donald Craig Mitchell, April 6, 2016.

In addition to Deborah Neidermeyer's agreement that the Athabascan Indian members of the Native Village of Northway were a federally recognized tribe, the U.S. Department of Justice filed a brief as an amicus curiae in which it informed the Court that "It has consistently been the Interior Department's view that Congress did not intend ANCSA to 'terminate' the sovereign status of Tribes in Alaska or to divest those Tribes of authority to regulate their internal relations."[380] The brief concluded by asserting that "the Native Village of Northway is a sovereign Tribe . . . [and] the absence of Indian country is not a barrier to Northway tribal court jurisdiction over domestic relations cases involving the Village's members and their children."[381]

On behalf of the State of Alaska, Attorney General Bruce Botelho filed a brief as an amicus curiae in which he informed the Court that, as a consequence of Assistant Secretary Deer's publication in 1993 in the Federal Register of the preamble that accompanied her list of Native Entities, Congress's enactment in

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[380] John v. Baker, Alaska Supreme Court No. S-08099, Brief of the United States as Amicus Curiae, at 33. Five months earlier Secretary of the Interior Bruce Babbitt had promoted former NARF attorney Robert Anderson from Associate Solicitor for Indian Affairs to Counselor to the Secretary in order to advise Babbitt "on a wide variety of policy matters, including Native American . . . issues." See "Secretary Babbitt Selects Robert T. Anderson to be Counselor to the Secretary," U.S. Department of the Interior (Press Release), Dec. 18, 1997. The extent to which Anderson may have been involved in arranging for the Department of the Interior to have the U.S. Department of Justice file a brief in the John v. Baker appeal is not known.

[381] John v. Baker, Alaska Supreme Court No. S-08099, Brief of the United States as Amicus Curiae, at 47-48.

1994 of the Federally Recognized Indian Tribe List Act,[382] and the decision District Judge H. Russel Holland had issued in 1994 in which he announced that the members of the Native Village of Venetie were a federally recognized tribe, the State had concluded that "once Alaska villages were recognized as tribes, they could exercise the retained powers possessed by all tribes in the United States."[383] Botelho then urged the Court to "hold that under Pub. L. 280, Alaska tribes retained concurrent jurisdiction with the State over civil matters involving the domestic relations of their members."[384]

More than thirty years earlier the U.S. Supreme Court had admonished that it is important for disputed questions of law to be "presented in an adversary context"[385] in order, as the Court explained in a subsequent decision,[386] "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions."

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[382] Title I, Public Law No. 103-454.

[383] John v. Baker, Alaska Supreme Court No. S-08099, Amicus Brief of the State of Alaska, at 6.

[384] Id. at 45.

[385] Flast v. Cohen, 392 U.S. 83, 101 (1968).

[386] Baker v. Carr, 369 U.S. 186, 204 (1962).

Because Andrew Harrington and Deborah Niedermeyer, representing the parties, and the amici[387] all urged the Alaska Supreme Court to conclude that the Athabascan Indian members of the Native Village of Northway were a federally recognized tribe and, as a consequence of that legal status, that the village council in Northway possessed governmental authority to create a court that had jurisdiction to involve itself in the custody dispute between John Baker and Anita John, the requisite "concrete adverseness" regarding whether either of those propositions was legally correct was not present.

Because it was not, in the opinion it issued in John v. Baker[388] the Alaska Supreme Court concluded what the parties and the amici had urged it to conclude.

Writing for a unanimous Court,[389] Justice Dana Fabe began by observing that "Prior to 1993, no . . . recognition of Alaska villages had occurred. In Native Village of Stevens v. Alaska

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[387] In addition to the U.S. Department of Justice and the State of Alaska, the Native Village of Northway, the Native Village of Venetie Tribal Government, the Alaska Inter-Tribal Council, the Paskenta Band of Nomlaki Indians, the Scotts Valley Band of Pomo Indians, and the Death Valley Timbisha Shoshone Tribe filed amicus briefs.

[388] 982 P.2d 738 (Alaska 1999).

[389] While they did not question the conclusion of the majority that, as a consequence of Assistant Secretary Deer's publication in 1993 in the Federal Register of her list of Native Entities, the Athabascan Indian residents of Northway were a federally recognized tribe that possessed "the same sovereign powers as recognized tribes in other states" - see id. at 776 n. 75, two justices contended that the tribe at Northway could not exercise its sovereign powers outside the boundaries of "Indian country" unless Congress enacted a statute that authorized the tribe to do so. See id. at 765-805.

Management & Planning, we conducted an historical analysis and concluded that the federal government had never recognized Alaska villages as sovereign tribes."[390] Then rotely accepting the arguments that had been presented to the Court in all of the briefs, Justice Fabe perorated:

> In 1993, however, the Department of the Interior issued a list of federally recognized tribes that included Northway Village and most of the other Native villages in Alaska. In the list's preamble, the Department of the Interior explained that it was issuing the list in order to clarify confusion over the tribal status of various Alaska Native entities.
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> . . .
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> The language in the preamble to the 1993 list unquestionably establishes that the Department of the Interior views the recognized Alaska villages as sovereign entities.
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> . . .
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> And for those who may have doubted the power of the Department of the Interior to recognize sovereign political bodies, a 1994 act of Congress appears to lay such doubts to rest. In the Federally Recognized Indian Tribe List Act of 1994, Congress specifically directed the Department to publish annually "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." The Department published tribal lists for 1995 through 1998, all of which include Alaska Native villages such as Northway, based on this specifically delegated authority.
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> The text and legislative history of the Tribe List Act demonstrate that Congress also views the recognized tribes as sovereign bodies. In the Act's findings section, Congress discusses the "sovereignty" of federally recognized tribes. Similarly, the House

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[390] Id. at 749.

> report to the Act provides that federal recognition "institutionalizes the tribe's quasi-sovereign status. Acknowledging that federal recognition "is no minor step," the report states that such recognition "permanently establishes a government-to-government relationship between the United States and the recognized tribe as a "domestic dependent nation."
>
> Through the 1993 tribal list and the 1994 Tribe List Act, the federal government has recognized the historical tribal status of Alaska Native villages like Northway. In deference to that determination, we also recognize such villages as sovereign entities.[391]

Because they decided the John v. Baker appeal without adversarial briefing and oral argument Justice Fabe and the other justices of the Alaska Supreme Court did not consider whether the attempt by Assistant Secretary Deer to create federally recognized tribes in Alaska by publishing a list of Native Entities and a preamble in the Federal Register had been ultra

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[391] Id. at 749-750. After announcing that, because neither John Baker nor any of its other members resided within the boundaries of Indian country, "Northway's jurisdiction to adjudicate child custody disputes between village members" was not exclusive, but instead was concurrent with the jurisdiction of the Alaska courts - id. at 759, Justice Fabe sent the case back to Judge Beistline and instructed him to "determine whether the tribal court's resolution of the custody dispute between Ms. John and Mr. Baker should be recognized under the doctrine of comity." Id. at 765. When the case returned to his court Judge Beistline declined to recognize the custody order of the court in Northway under the doctrine of comity because the hearing the court conducted prior to issuing the order had not afforded John Baker due process of law. Anita John, again represented by Andrew Harrington, appealed that determination to the Alaska Supreme Court, and Deborah Niedermeyer again represented John Baker. In 2001 in John v. Baker II, 30 P.3d 68, a decision again written by Justice Fabe, the Court concluded that the court in Northway had not denied John Baker due process of law, even though it lost the audiotape recording of the hearing it conducted, as well as "other crucial documents and/or transcripts," and even though Lorraine Titus, the "judge" who had issued the order, had privately discussed John Baker's custody dispute with Nora David, Anita John's adoptive sister. After so holding, Justice Fabe declared that the custody order the court in Northway had issued had expired under its own terms, after which she remanded the custody dispute between John Baker and Anita John "to the Northway Tribal Court to conduct further child custody proceedings."

vires. Nor did they consider whether the description regarding the intent of the One Hundred and Third Congress embodied in the text and legislative history of the Federally Recognized Indian Tribe List Act (FRITLA) that Attorney General Botelho had presented in his brief was accurate.

In the latter regard, had there been adversarial briefing and oral argument the Court would have been informed that, on its face, the text of the FRITLA did not delegate the Secretary of the Interior authority to create new federally recognized tribes in Congress's stead, nor did the text mention, much less did it ratify, Assistant Secretary Deer's attempt to create federally recognized tribes in Alaska by publishing a list of Native Entities and a preamble in the Federal Register. The Court also might have been informed that the congressional findings in section 103 of the FRITLA had no force of law,[392] and that in its report on the bill the One Hundred and Third Congress enacted as the FRITLA the House Committee on Natural Resources had explained that the bill made "no changes in existing law,"[393] and that insofar as the situation in Alaska was concerned the report stated:

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[392] 140 Cong. Rec. 27,244 (1994)(statement of Representative Craig Thomas, the principal sponsor of the bill the One Hundred and Third Congress enacted as the FRITLA, explaining that the bill's "findings are not legally binding").

[393] H.R. Rep. No. 103-781, at 6 (1994).

> The Committee is aware that in January 1993 the Solicitor of the Department of the Interior issued an opinion which concluded that Congress has restricted the sovereign powers of Alaska Native tribes. As the BIA stated in the October 21, 1993 Federal Register Notice of Alaska Native Entities Recognized and Eligible to Receive Services, "[the Solicitor] concluded, construing general principles of Federal Indian law and ANCSA, that 'notwithstanding the potential that Indian country 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.' M-36,975 at 108. That portion of the opinion is subject to review, but has not been withdrawn or modified."
>
> The Committee notes that the Solicitor's opinion has generated controversy and that there is extensive litigation on the subject of the precise sovereign powers of Alaska Native tribes. While these issues deserve further review by Congress, nothing in this Act should be construed as enhancing, diminishing or changing in any way the status of Alaska Native tribes. It is the intent of the Committee that its previous position taken in the 1987 amendments to the Alaska Native Claims Settlement Act be maintained and that nothing in this Act shall "confer 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." P.L. 100-241, Section 2(8)(B). The Act merely requires that the Secretary continue the current policy of including Alaska Native entities on the list of Federally recognized tribes which are eligible to receive services. (emphases added).[394]

However, having crossed the Rubicon, in 2004, and again in 2011, when the lack of adversarial briefing and oral argument was brought to their attention, Justice Fabe and the other justices pointedly declined to revisit their acceptance of the legal

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[394] Id. at 4-5.

arguments the parties and the amici had urged on the Court during the John v. Baker appeal and on which the Court relied to reason to the result it announced in that decision.[395]

N. The Applicability of Section 5 of the Indian Reorganization Act Within the State of Alaska.

1. 1936 to 1971.

Section 5 of S. 3645, the second bill that in 1934 Commissioner of Indian Affairs John Collier sent to the Seventy-Third Congress after the members of the Senate and House Committees on Indian Affairs had rejected his first bill, S. 2755, authorized the Secretary of the Interior to acquire land "for the purpose of providing land for Indians."[396] But section 15 of the bill pointedly did not extend section 5 to the Territory of Alaska.[397]

Since Felix Cohen had been the principal draftsman who had written S. 2755, he presumably also wrote S. 3645.

A year later when at the request of Alaska Delegate Anthony

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[395] Runyon v. Association of Village Council Presidents, 84 P.3d 437, 439 n. 3 (Alaska 2004)("We decline the invitations of the Runyons and amicus Legislative Council to revisit John v. Baker"); McCrary v. Ivanof Bay Village, 265 P.3d 337, 340 (Alaska 2011)("McCrary argues that John v. Baker should not be considered binding precedent because no party in that appeal argued against recognition of the sovereign status of Alaska Native tribes. He contends this legal issue was not tested by the adversarial process. But our conclusion regarding the Executive Branch's tribal recognition and Congress's approval through the Tribe List Act was carefully considered and adopted by the entire court").

[396] See Senate IRA Hearings, at 232.

[397] Id. at 233.

Dimond Cohen wrote the bill that in 1936 Dimond introduced in the Seventy-Fourth Congress as H.R. 9866, in section 1 of the bill he included section 5 of the IRA as one of the sections of the IRA that "shall hereafter apply to the Territory of Alaska."

Secretary of the Interior Harold Ickes explained to Delegate Dimond and the other members of the House Committee on Indian Affairs that in H.R. 9866 Cohen had extended the application of section 5 of the IRA to the Territory of Alaska because doing so was "necessary in the establishment and the administration of [the reservations section 2 of the bill authorized the Secretary to designate]."[398] In other words, Cohen, Ickes, and Commissioner Collier intended that the Secretary of the Interior would use the authority that section 5 delegated for the singular purpose of acquiring privately-owned land located within the boundaries of the reservations that section 2 delegated the Secretary authority to designate in the future.

It is of determinative importance that while the amendment to section 1 of H.R. 9866 that Cohen and William Paul wrote authorized the Secretary of the Interior to approve constitutions and charters of incorporations for "groups of Indians in Alaska not heretofore recognized as bands or tribes" pursuant to

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[398] Letter from Harold L. Ickes, Secretary of the Interior, to the Hon. Will Rogers, Chairman, Committee on Indian Affairs, U.S. House of Representatives, March 14, 1936, reprinted at H.R. Rep. No. 74-2244, at 4 (1936).

sections 16 and 17 of the IRA, they did not amend the definition of the term "Indian" in section 19 of the IRA to include such groups within the purview of the definition. The consequence was that, as Cohen would explain at an unknown date that most likely was shortly after the Seventy-Third Congress enacted the IRA: "It seems to me that [the sentence "For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians" in] sec. 19 puts Eskimos on the same basis as Indians. To qualify for the benefits of the [IRA] they must meet one of 3 criteria: tribal affiliation, tribal descent plus residence on a reservation, or the half-blood test."[399]

If that was the result Cohen - and by extension the members of the Senate and House Committees on Indian Affairs and the Seventy-Third Congress - intended, the fact that, as has been described above, there were no groups of Indians, Eskimos, or Aleuts in Alaska that could qualify as a "recognized Indian tribe now under Federal jurisdiction" as that phrase appears in section

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[399] Memorandum from Felix S. Cohen, Assistant Solicitor, to Fred H. Daiker, Assistant to the Commissioner of Indian Affairs (undated), referenced in Solicitor's Opinion M-37043 (Authority to Acquire Land into Trust in Alaska), Jan. 13, 2017, at 19. After referencing the Cohen memorandum, in Solicitor's Opinion M-37043 Solicitor Hilary Tompkins dismissed its relevance by disparaging Cohen's expression of view as "conclusionary," "lack[ing] any thorough legal explanation or analysis of the legislative history of the IRA," and not "the official legal position for Interior." But in order to so blithely do so, Solicitor Tompkins was required to ignore the fact that in Carcieri v. Salazar, while it did not accept a similar expression of view by Commissioner of Indian Affairs John Collier as conclusive, the U.S. Supreme Court relied on the Commissioner's expression of view as relevant evidence of the intent of the Seventy-Third Congress embodied in section 19 of the IRA. See Carcieri v. Salazar, supra at 390.

19 of the IRA may explain why between 1936 when the Seventy-Fourth Congress enacted Public Law No. 74-538 and extended section 5 of the IRA to the Territory of Alaska and 1971 when the Ninety-Second Congress enacted ANCSA the Secretary of the Interior did not exercise the authority that section 5 delegated and acquire any land in Alaska for any group of Alaska Natives.[400]

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[400] There are three possible anomalous exceptions. Pursuant to authority that section 1 of Public Law No. 74-538 and section 17 of the IRA had delegated to the Secretary of the Interior, in 1938 Assistant Secretary of the Interior Oscar Chapman approved a charter of incorporation for the Klawock Cooperative Association, which "a group of Indians having a common bond of occupation in the fishing industry in Klawock" had submitted. In 1939 Assistant Secretary Chapman approved a charter of incorporation for the Angoon Community Association, which "a group of Indians having a common bond of residence in the neighborhood of Angoon" had submitted. And in 1947 Assistant Secretary of the Interior William Warne approved a charter of incorporation for the Organized Village of Kake, which, according to the charter, "the Kake Indians of Alaska, an Indian band or tribe," had submitted. Corporate charters available at http://thorpe.ou.edu/IRA.html. In 1939, by which time charters of incorporation also had been approved for the Tlingit and Haida Indian residents of four other communities in southeast Alaska, the BIA began loaning money to the corporations from the loan fund section 10 of the IRA established. See Annual Report of the Governor of Alaska to the Secretary of the Interior for the Fiscal Year Ending June 30, 1948, at 60 ("Since the credit program started in 1939 a total of 65 corporate loans have been made to the various native villages organized in Alaska"). In 1947 and 1949 the BIA loaned each of the corporations in Angoon, Klawock, and Kake several hundred thousand dollars to purchase from private owners salmon canneries located in or near those communities. See Annual Report of the Governor of Alaska to the Secretary of the Interior for the Fiscal Year Ending June 30, 1948, at 61 ("The Angoon Community Association purchased the Hood Bay Salmon Co. Cannery this year"); Annual Report of the Governor of Alaska to the Secretary of the Interior for the Fiscal Year Ending June 30, 1950, at 60 ("The Keku Cannery [was] purchased by Organized Village of Kake from the P.E. Harris Co. this year" and "The Klawock Cooperative Association purchased the Charlie Demmert Cannery which was still under lease in 1950 but should be in operation in 1951"); Fredericka de Laguna, The Story of a Tlingit Community, at 198-199 (1960)(reporting that the corporation in Angoon purchased "the salmon cannery at Hood Bay in November 1947" and "the loan from the Government to buy the cannery amounted to $258,000, with 20 years allowed in which to liquidate it"). When the canneries were purchased, rather than to the three corporations, the sellers conveyed the title to the land on which the buildings were located to the United States. See Sansonetti Opinion, at 112 n. 277. The deed in which the P.E. Harris & Co. conveyed its title to the land under its cannery at Kake states that the title was conveyed "to the United States of America in trust for the Organized Village of Kake." See Deed dated Feb. 15, 1950, available at Recorder's Office, Alaska Department of (cont.)

2. 1971 to 2016.

In 1971 section 19(a) of ANCSA revoked the 1.8 million acre Venetie Reserve. Pursuant to section 8 of ANCSA the Gwitch'in Indian residents of Venetie and Arctic Village then incorporated the Venetie Indian Corporation and the Neets'ai Corporation, after which, pursuant to section 19(b) of ANCSA, the corporations elected to be conveyed fee title to the 1.8 million acres.

Because ANCSA had not repealed the provision in section 1 of Public Law No. 74-538 that in 1936 had extended the applicability of section 5 of the IRA to the Territory, later State, of Alaska, in 1976 Donald Wright, who the village council in Venetie had hired as an advisor, informed Commissioner of Indian Affairs Morris Thompson that when the Secretary of the Interior conveyed to the Venetie Indian Corporation and the Neets'ai Corporation fee title to the 1.8 million acres of land within the boundaries of the former Venetie Reserve, the corporations intended to convey their title to Secretary of the Interior Thomas Kleppe and then request Commissioner Thompson to recommend to Secretary Kleppe that he accept the conveyance and take the title to the land into trust pursuant to section 5 of the IRA.

Natural Resources, Anchorage, Alaska. The P.E. Harris & Co. deed does not identify the statute that authorized the United States to acquire the land and accept the conveyance. Whether the two other deeds also do not do so is not known.

When Commissioner Thompson passed Wright's request up through the Department of the Interior bureaucracy, Under Secretary of the Interior Kent Frizzell, who before being appointed Under Secretary had been the Solicitor of the Department of the Interior, investigated the matter. After doing so, he informed Commissioner Thompson "that the Alaska Native Claims Settlement Act precludes the Secretary from restoring land held in fee by Alaska Natives to trust status pursuant to Section 5 of the Indian Reorganization Act."[401]

A year later when Jimmy Carter became president of the United States and appointed Idaho Governor Cecil Andrus to succeed Kleppe as Secretary of the Interior, Donald Wright renewed with Secretary Andrus the request he had made to Commissioner Thompson.[402]

In response, Associate Solicitor for Indian Affairs Thomas Fredericks researched the issue, after which he issued a legal opinion in which he advised Assistant Secretary of the Interior for Indian Affairs Forrest Gerard that his research had "reaffirm[ed] the conclusion of the former Under Secretary"

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[401] "Trust Land for the Natives of Venetie and Arctic Village," Memorandum to Assistant Secretary - Indian Affairs from Associate Solicitor - Indian Affairs, Thomas W. Fredericks, Sept. 15, 1978[hereinafter "Fredericks Memorandum"].

[402] Second S. 2046 Hearing, at 264 (statement of Donald Wright that "we petitioned the last administration and we have petitioned this administration [to have the Secretary of the Interior "hold the former reservation in trust status"]).

because "[t]he intent of Congress [in section 2(b) of ANCSA] to permanently remove all Native lands in Alaska from trust status is unmistakable." Fredericks also explained that,

> The structure and legislative history of Section 19 [of ANCSA] itself precludes the restoration of former reservations to trust status . . . It is clear from alternatives to Section 19 in earlier proposed settlement legislation that Congress did not exclude the alternative of continued trust status by oversight . . . the Councils of Venetie and Arctic Village proposed an amendment to Section 15 of H.R. 10193 (an earlier version of Section 19) which would have permitted the retention of trust status. The proposal was never incorporated into ANCSA.[403]

Based on that legal opinion, the Solicitor of the Department of the Interior informed Donald Wright that "the Secretary simply does not have the authority to ignore the policy and statutory provisions of the Alaska Native Claims Settlement Act and restore the former Venetie Reserve to trust status."[404]

A year later, in 1979 the Bureau of Land Management conveyed to the Venetie Indian Corporation and the Neets'ai Corporation fee title to the 1.8 million acres of land located within the boundaries of the former Venetie Reserve, after which the corporations conveyed their title to the Native Village of

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[403] Fredericks Memorandum.

[404] Letter from Solicitor of the Department of the Interior to Donald R. Wright, Sept. 20, 1978.

Venetie.[405]

Two months before Associate Solicitor Fredericks advised Assistant Secretary Gerard that "[t]he intent of Congress [in section 2(b) of ANCSA] to permanently remove all Native lands in Alaska from trust status is unmistakable," in July 1978 Assistant Secretary Gerard published in the Federal Register a proposed rule that, if published as a final rule, would promulgate regulations that would establish the procedure the Secretary of the Interior henceforth would follow to acquire interests in land pursuant to section 5 of the IRA.[406]

In 1980 when he published the final rule, Fredericks, who now was Deputy Assistant Secretary of the Interior for Indian Affairs, explained in the supplementary information section of the rule that during the public comment period it had been

> pointed out that the Alaska Native Claims Settlement Act does not contemplate the further acquisition of land in trust status, or the holding of land in such status, in the State of Alaska, with the exception of acquisitions for the Metlakatla Indian Community; consequently a sentence has been added to section 120a.1 to specify that the regulations do not apply,

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[405] State of Alaska, ex rel., Yukon Flats School Disdtrict v. Native Village of Venetie Tribal Government, U.S. District Court for the District of Alaska No. F87-0051 CV, Unpublished Order (Decision - Indian Country), Aug. 2 1995, at 30 ("In 1979, as part of a settlement of Alaska Native land claims, a United States patent was issued conveying the former Chandalar Reservation to Neets'ai Corporation and Venetie Indian Corporation . . . This same area was conveyed by warranty deeds dated September 1, 1979 (sic), from the two village corporations to the Tribal Government").

[406] 43 Fed. Reg. 32311 (1978).

except for Metlakatla, in the State of Alaska.[407]

The sentence stated: "These regulations do not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or its members."[408]

In the legal opinion he sent to Assistant Secretary Gerard, Associate Solicitor Fredericks apparently assumed, albeit without deciding, that the Gwich'in Athabascan Indian residents of Venetie and Arctic Village were "Indians" as section 19 of the IRA defines that term.

But were they?

In 1978 most residents of Venetie and Arctic Village undoubtedly were "persons of one-half or more Indian blood". And today most of the fewer than four hundred residents of the two communities undoubtedly continue to qualify as "persons of one-half or more Indian blood". So, if as an act of administrative discretion he should decide to exercise it, section 5 of the IRA delegates the Secretary of the interior authority to acquire land in Alaska for those individuals and to take the title to that land into trust for the benefit of those individuals as individuals.

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[407] 45 Fed. Reg. 62034 (1980).

[408] 25 C.F.R. 120a.1 (1980). In 1982 25 C.F.R. 120a.1 was renumbered 25 C.F.R. 151.1. See 47 Fed. Reg. 13326 (1982).

But in 1978 were the Gwich'in Athabascan Indian residents of Venetie and Arctic Village members of a "recognized Indian tribe" that on June 18, 1834 (i.e., the date President Roosevelt signed the IRA into law) was "under Federal jurisdiction" within the meaning of those phrases in the first prong of the "Indian" definition in section 19 of the IRA?

There is no evidence that in 1976 Under Secretary Frizzell and in 1978 Associate Solicitor Fredericks considered that question. Nor was any other mention made of it for the next sixteen years; until the year after Assistant Secretary of the Interior for Indian Affairs Ada Deer attempted to create more than two hundred "federally recognized tribes" in Alaska by publishing her list of Native Entities and preamble in the Federal Register.

In 1994 NARF attorneys Lare Aschenbrenner, Robert Anderson, and Heather Kendall filed a petition on behalf of three of those entities - the Chilkoot Indian Association, the Native Village of Larsen Bay, and the Kenaitze Indian Tribe - that requested Assistant Secretary Deer to "(1) remove the portion of the existing regulation that prohibits the acquisition of land in trust status in the State of Alaska for Alaska Native villages other than Metlakatla and (2) include in the definition of 'tribe' those Alaska Native villages listed on the Department of

the Interior's list of federally recognized tribes."[409] In the petition the NARF attorneys argued: "On October 21, 1993 the Department of the Interior, Bureau of Indian Affairs, published a new list of federally recognized tribes in Alaska. Through this publication, the Department expressly recognized the sovereign tribal status of Alaska Native villages . . . The Department of the Interior's express recognition that Alaska Native tribes share the same tribal status as other federally recognized tribes makes the present regulation with respect to acquisition of restricted or trust lands internally inconsistent. There is no basis in law for the exclusion of Alaska Native tribes from the regulations governing acquisition of trust lands."[410]

Assistant Secretary Deer took no action on the petition. But in 1999 Kevin Gover, who two years earlier had replaced Deer as Assistant Secretary,[411] released for public comment proposed

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[409] 60 Fed. Reg. 1956 (1995).

[410] Petition for Rule-Making to the Secretary of Interior to Revise 25 C.F.R. 151.1 to Bring Federally Recognized Alaska Native Tribes Within the Scope of Federal Regulations Authorizing the Acquisition of Land in Trust Status, at 13-14, Oct. 11, 1994.

[411] 143 Cong. Rec. 25690-25691 (1997)(Kevin Gover confirmed as assistant secretary). An attorney who was raised in Oklahoma but educated at prep school and Princeton, Gover is an enrolled member of the Pawnee Nation of Oklahoma. Prior to his confirmation Gover told Alaska Senator Frank Murkowski: "The position of the Administration . . . is that the federally recognized Alaska tribes and villages share an equal status with federally recognized Indian tribal governments in the lower 48 states . . . I share this view." See Nomination of Kevin Gover: Hearing Before the S. Comm. on Indian Affairs, 105th Cong. 51 (1997). And see also id. at 60-61 (Gover refuses to publish a new list of Native entities that includes the ANCSA regional and village corporations that had been included on the list of Native Entities Within the State of Alaska Recognized and Eligible to Receive Services From the (cont.)

regulations whose promulgation as a final rule would rewrite the regulations that governed the section 5 land-into-trust process.[412]

Section 151.3(c) of the proposed regulations continued to state that the BIA "will not accept title to land in trust in the State of Alaska, except for the Metlakatla Indian Community of the Annette Island Reserve of Alaska or its members."[413] However, in the preamble in which he explained the proposed regulations, Assistant Secretary Gover cited the petition the NARF attorneys had filed, and then opined that there was a "credible legal argument that ANCSA did not supercede the Secretary's authority to take land into trust in Alaska under the IRA." He then invited "comment on the continued validity of the Associate Solicitor's opinion and issues raised by the petition . . . in light of the Supreme Court's ruling in the Venetie case."[414]

Ten months later and only four days before he and all other Clinton administration appointees departed the Department of the

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United States Bureau of Indian Affairs that Assistant Secretary Ross Swimmer had published in 1988, but which Assistant Secretary Ada Deer had excluded from the list of Native Entities she published in 1993).

[412] Acquisition of Title to Land in Trust, 64 Fed. Reg. 17574 (1999).

[413] Id. at 17583.

[414] Id. at 17578. Fourteen months earlier, in its decision in Alaska v. Native Village of Venetie Tribal Government the U.S. Supreme Court ruled that the land within the boundaries of the former Venetie Reserve that the Native Village of Venetie owned in fee was not a "dependant Indian community," and hence was not "Indian country."

Interior, on January 16, 2001 Assistant Secretary Gover published in the Federal Register a modified version of his proposed regulations as a final rule.[415]

According to John Leshy, who at the time was Solicitor of the Department of the Interior, Secretary of the Interior Bruce Babbitt personally made the decision to retain in the modified regulations the sentence that prohibited taking the title to any land in Alaska into trust other than on Annette Island.[416] However, the same day Assistant Secretary Gover issued the final rule Solicitor Leshy signed a memorandum in which he rescinded the memorandum Associate Solicitor Thomas Fredericks had issued in 1978 because "The 1978 Opinion gave little weight to the fact that Congress had not repealed section 5 of the IRA, which is the generic authority by which the Secretary takes Indian land into trust, and which Congress expressly extended to Alaska in 1936. The failure of Congress to repeal that section, when it was repealing others affecting Indian status in Alaska, five years after Congress enacted the Alaska Native Claims Settlement Act in 1971, raises a serious question as to whether the authority to

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[415] Acquisition of Title to Land in Trust, 66 Fed. Reg. 3452 (2001).

[416] Personal communication from John Leshy to Donald Craig Mitchell, Aug. 30, 2016.

take land into trust in Alaska still exists."[417]

That rationale pointedly ignored the fact that in 1971 when they enacted ANCSA and in 1976 the Federal Land Policy and Management Act (FLPMA)[418] (the statute that in his memorandum Solicitor Leshy had referenced without identifying), the Ninety-Second and Ninety-Fourth Congresses had no reason to repeal the applicability of section 5 of the IRA to Alaska, first, because there is no evidence that any Secretary had ever exercised the authority that section 5 delegated, and, second, because in 1971 and 1976 there were no Alaska Native groups whose members were members of a "recognized Indian tribe now under Federal jurisdiction," and hence "Indians" as section 19 of the IRA defines that term.

Nevertheless, in the preamble to his rewrite of the section 5 regulations, after announcing his agreement with the legal conclusion Solicitor Leshy had announced in his memorandum, Assistant Secretary Gover explained that

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[417] Memorandum entitled "Rescinding the September 15, 1978, Opinion of the Associate Solicitor for Indian Affairs entitled 'Trust Land for the Natives of Venetie and Arctic Village,'" from John Leshy, Solicitor, to Assistant Secretary - Indian Affairs, Jan. 16, 2001.

[418] Public Law No. 94-579. Section 704 of FLPMA repealed twenty-nine statutes enacted between 1888 and 1952 that authorized public land to be withdrawn from the public domain. One of those statutes was section 2 of Public Law No. 74-538, which authorized the Secretary of the Interior to withdraw public land in Alaska as "Indian reservations."

> the position of the Department [of the Interior] has long been, as a matter of law and policy, that Alaska Native lands (sic) ought not to be taken in trust. Therefore, the Department has determined that the prohibition in the existing regulations on taking Alaska lands into trust (other than Metlakatla) ought to remain in place for a period of three years during which time the Department will consider the legal and policy issues involved in determining whether the Department ought to remove the prohibition on taking Alaska lands into trust. If the Department determines that the prohibition on taking lands into trust in Alaska should be lifted, notice and comment will be provided.[419]

The new regulations were to take effect three weeks after George W. Bush became president. However, on the day Bush was inaugurated his chief of staff directed the acting heads of all Executive Branch departments and agencies to postpone the effective date of all regulations that had not yet taken effect in order to afford the new President's appointees an opportunity to review their content.[420] That directive was the first of what became a series of postponements of the effective date of the regulations Assistant Secretary Gover had promulgated,[421] until November 2001 when Neal McCaleb, who President Bush had appointed to succeed Gover as Assistant Secretary of the Interior for

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[419] 66 Fed. Reg. 3454 (2001).

[420] Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (2001).

[421] See e.g., Acquisition of Title to Land in Trust; Delay of Effective Date, 66 Fed. Reg. 8899 and 19403 (2001).

Indian Affairs, withdrew the regulations.[422]

Five years later, in 2006 in the U.S. District Court for the District of Columbia NARF attorney Heather Kendall Miller, representing the Chilkoot Indian Association and three Native villages, filed Akiachak Native Community v. Department of the Interior [hereinafter "Akiachak Native Community"],[423] a lawsuit in which the plaintiffs sought "declaratory and injunctive relief preventing the Department of the Interior from excluding federally recognized Alaska Tribes from the regulation's land into trust petition process," as well as an injunction directing the Department "to implement the acquisition of land into trust procedures without regard to the bar against Alaska tribes as currently contained." In their complaint, and then in a consolidated complaint, each plaintiff alleged that it was "a federally recognized tribe recognized by the United States as a sovereign government with legal rights and responsibilities."

Since in 1993 Assistant Secretary of the Interior for Indian Affairs Ada Deer had attempted to create exactly that legal status, it is no surprise that in the answer it filed in response to the consolidated complaint, the Department of the Interior

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[422] Acquisition of Title to Land in Trust; Withdrawal of Final Rule, 66 Fed. Reg. 56608 (2001).

[423] U.S. District Court for the District of Columbia No. 1:06-cv-0069.

admitted those allegations.[424] It is somewhat more of a surprise that, when the District Court granted the motion of the State of Alaska to intervene as a defendant, the State filed an answer in which it also admitted that each plaintiff "is a federally recognized tribe."[425]

By gratuitously making that admission the State conceded the merit of the plaintiffs' first cause of action, which alleged that the sentence in the regulations that since 1980 had prohibited the Secretary of the Interior from exercising his discretion and taking title to land in Alaska into trust pursuant to section 5 of the IRA violated 25 U.S.C. 476(g).[426]

In 1936 the Solicitor of the Department of the Interior issued an opinion in which he concluded that two groups of Indians whose members were living on federal land in Minnesota could obtain a constitution pursuant to section 16 of the IRA. But the Solicitor also concluded that, since their members were not a "historical tribe," the groups did not possess "inherent" powers of self-government. Specifically, the Solicitor advised that, rather than those "powers as rest upon the sovereign

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[424] Id. Answer of the United States to Plaintiffs' Complaint, para. nos. 5-8, at 2.

[425] Id. Intervenor-Defendant Answer, para. nos. 5-8, at 2-3.

[426] Id. Consolidated Complaint, para. no. 54, at 14 ("The regulatory bar which prohibits plaintiffs from having the defendant take property in trust or restricted status, while other federally recognized tribes and their members are allowed to do so, is a violation of 25 U.S.C. 476(f)&(g)").

capacity of the tribe," each group possessed only those "powers which are incidental to its ownership of property and to its carrying on of business," as well as "those which may be delegated by the Secretary of the Interior."[427]

In 1993 that division of Indian tribes into "created" tribes and "historic" tribes became an issue when a bill regarding the Yaqui Indians was introduced in the U.S. House of Representatives.

Beginning in the seventeenth century Indians who lived along the Yaqui River, which flows into the Gulf of California in northern Mexico, had resisted, first Spanish, then Mexican, encroachments on the land they had occupied for generations. To end further resistance, in 1885 President Porfino Diaz sent the Mexican army to clear the Yaqui River Valley of Yaquis. In a series of military engagements thousands of Yaquis were killed.[428]

Several thousand other Yaquis fled north. By 1930 Yaqui refugees had established seven settlements in Arizona, one of which was Old Pascua, a thirty-two-acre parcel of desert on the outskirts of Tucson. In 1930 Tucson had a population of 32,000. By 1960 the population was 213,000 and the city had encircled Old

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[427] See "Sioux - Elections on Constitutions," 1 Op. Sol. on Indian Affairs 618, April 15, 1936; "Powers of Indian Group Organized Under IRA But Not as Historical Tribe," 1 Op. Sol. on Indian Affairs 813, April 15, 1938.

[428] See generally Evelyn Hu-DeHardt, Yaqui Resistance and Survival: The Struggle for Land and Autonomy, 1821-1910 (1984).

Pasqua within whose over-crowded neighborhood more than four hundred Yaquis lived in shacks they had constructed from railroad ties, rusted panels of discarded corrugated sheet metal, and cardboard.

In 1964 Representative Morris Udall, whose congressional district included Tucson, persuaded the Eighty-Eighth Congress to enact a statute that gave the Pascua Yaqui Association, a nonprofit corporation the Yaquis at Old Pascua incorporated, title to a 202-acre parcel of public land ten miles south of Tucson. However, because the Yaquis were Indians from Mexico who were "in no way associated with or under the jurisdiction of the Bureau of Indian Affairs,"[429] the statute made clear that "none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Yaqui Indians."[430]

Half the residents of Old Pasqua moved onto the 202-acre parcel, which the Yaquis named Pascua Pueblo. Fourteen years later, by which time no members of Congress still serving knew, or if they did know cared, that the Yaqui Indians were not American Indians, Representative Udall sponsored a new statute. Enacted in 1978, the statute announced that henceforth the

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[429] H.R. Rep. No. 88-1805, at 2 (1964).

[430] Public Law No. 88-350.

members of the Pascua Yaqui Association would be known as the Pascua Yaqui Tribe and would be eligible "for the services and assistance provided to Indians because of their status as Indians by or through any department or agency, or instrumentality of the United States, or under any statute of the United States." The statute also extended the provisions of the IRA to the members of the new tribe.[431]

After the Ninety-Fifth Congress enacted the 1978 statute, the BIA took the position that the Pascua Yaqui Tribe did not have "all the powers of a sovereign tribal government" because it was a "created" tribe, rather than a "historic" tribe.[432]

In 1993 members of the Pascua Yaqui Tribe complained about their legal status to Representative Edward Pastor, who in 1991 when Morris Udall resigned due to ill health had been elected to Udall's seat in the U.S. House of Representatives.

In February 1993 Representative Pastor introduced H.R. 734, a bill to amend the 1978 statute by adding a sentence that stated: "The Pascua Yaqui Tribe, a historic Indian tribe, is acknowledged as a federally recognized Indian tribe possessing all the attributes of inherent sovereignty which have not been specifically taken away by Acts of Congress and which are not

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[431] Public Law No. 95-375.

[432] H.R. Rep. No. 103-204, at 1-2 (1993).

inconsistent with such tribal status."[433] In April 1993 when the Subcommittee on Native American Affairs of the House Committee on Natural Resources held a hearing on H.R. 734 the BIA opposed the bill because:

> While the Pascua Yaqui may have had some status to justify Congress' extension of Federal Indian benefits to them in the exercise of Congress' power over Indians, the Pascua Yaqui cannot meet the criteria for a historic tribe. We see no justification for the change in the status of the Pascua Yaqui Tribe. There are numerous other Indian tribes that are eligible for Federal services and benefits but, like the Pascua Yaqui Indian Tribe, are not historic tribes with all the attributes of inherent sovereignty. Therefore, we urge the Committee to consider the precedent that would be set by enactment of H.R. 734.[434]

When members of the Pascua Yaqui Tribe complained about the BIA's intransigence to Arizona Senator John McCain, in April 1994 McCain introduced S. 2017, a bill whose enactment would add two subsections to section 16 of the IRA. Subsection (f) provided: "Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934, as amended or any other Act of Congress with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other

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[433] H.R. 734, 103d Cong. (as introduced, Feb. 2, 1993).

[434] Pascua Yaqui Status Clarification Act: Hearing on H.R. 734 Before the Subcomm. on Native American Affairs of the H. Comm. on Natural Resources, 103d Cong. 12-13 (1993)(statement of Carol A. Bagon, Director, Office of Tribal Services, Bureau of Indian Affairs).

federally recognized tribes by virtue of their status as Indian tribes." (emphases added). Subsection (g) provided: "Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on the date of enactment of this Act and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect." (emphases added).

The same day he introduced S. 2017 Senator McCain had an extended disquisition explaining his view of the need for the bill printed in the Congressional Record. The Senator was neither an attorney nor a historian. Nevertheless, in that disquisition, which undoubtedly was written by a member of the staff of the Committee on Indian Affairs of which he was vice chairman, McCain lectured:

> I find absolutely no basis in law or policy for the manner in which section 16 has been interpreted by the Department of the Interior . . . Neither the Congress nor the Secretary [of the Interior] can create a tribe where none previously existed. Not only is this simple common sense, it is also the law as enunciated by the Federal courts. Section 16 of the IRA did not authorize the Secretary to create Indian tribes. Congress itself cannot create Indian tribes, so there is no authority for the Congress to delegate to the Secretary in this regard. The recognition of a tribe by the Federal Government is just that - the recognition that there is a sovereign entity with governmental authority which

> predates the U.S. Constitution and with which the Federal Government has established formal relations. All that section 16 was intended to do was to provide authority and procedures for the adoption, amendment, and approval of tribal constitutions for those tribes that choose to employ its provisions . . . On its face, section 16 does not authorize or require the Secretary of the Interior to draw distinctions between tribes or to categorize them based on their powers of governance.[435]

Since he was vice chairman of the Committee on Indian Affairs, Senator McCain could have arranged for the Committee to hold a hearing on S. 2017 so that the legal and policy consequences that would result if the One Hundred and Third Congress enacted his bill could have been considered. Instead, five weeks after he introduced S. 2017, when the Senate took up S. 1654, a bill that amended five Indian-related statutes, the Senator added the text of S. 2017 as another amendment, after which the Senate passed S. 1654 by a voice vote.[436] Four days later the House suspended its rules and passed the amended version of S. 1654 by a voice vote.[437] When President Bill Clinton signed S. 1654 into law as Public Law No. 103-263, the McCain amendment was codified as 25 U.S.C. 476(f) and (g).

If, as the State of Alaska conceded in the answer to the consolidated complaint it filed in the Akiachak Native Community

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[435] 140 Cong. Rec. 7552 (1994).

[436] Id. at 11232-11235.

[437] Id. at 11376-11378.

lawsuit, the plaintiffs were "federally recognized tribes," pursuant to 25 U.S.C. 476(g) the regulation that since 1980 had prohibited the Secretary of the Interior from taking title to land in Alaska into trust had "no force or effect."

To try to avoid that outcome, in the motion for summary judgment it filed the State pointed out that in section 19(a) of ANCSA the Ninety-Second Congress had revoked all reserves in Alaska that had been set aside "for Native use or for administration of Native affairs," and in section 2(b) of ANCSA the Ninety-Second Congress had directed that the ANCSA settlement be accomplished "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 . . . ." Therefore, the State argued that "Taking land into trust in Alaska would, by definition, create a trusteeship in direct violation of Congress's intent."[438]

The State then attempted to explain away the plaintiffs' argument regarding 25 U.S.C. 476(g) as "largely red herrings that distract from the central legal issue in this case, which is

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[438] Akiachak Native Community, State of Alaska's Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment, at 12.

their status as Indians."[352] (emphasis added).

The report the Select Committee filed after the members voted to send S. 1181 to the Senate explained that the "Indian tribe" definition had been rewritten "To avoid any inference that the Congress is determining that all Alaska Native Villages included in the Alaska Native Claims Settlement Act are exercising powers of self-government" (emphasis added).[353] That explanation implied that Senator DeConcini and the other members of the Select Committee believed that some villages were exercising such powers.

Alaska Senator Ted Stevens was not a member of the Select Committee. However, before S. 1181 reached the Senate floor the bill came to his attention. As a consequence, before the Senate passed S. 1181 on a voice vote,[354] Senator DeConcini offered an amendment whose acceptance by the Senate removed the reference to "Alaska Native Villages" from the "Indian tribe" definition. Senator DeConcini subsequently explained in a statement in the Congressional Record that "The amendment which deletes the reference to Alaska Native villages, was suggested by Senator Stevens. It attempts to clarify the applicability of [S. 1181]

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[352] S. Rep. No. 96-759, at 1 (1980).

[353] Id. at 7.

[354] 126 Cong. Rec. 12813-12815 (1980).

whether ANCSA precludes the Secretary from taking land into trust in Alaska."[439] Continuing in the same vein, the State asserted that "The ANCSA ban does not discriminate between Alaska tribes and other tribes 'by virtue of their status as tribes.' The ban distinguishes Alaska tribes from other tribes by virtue of their status as tribes subject to the ANCSA land claims settlement."[440]

The State's attempt to persuade the District Court to ignore the plain meaning of the text of 25 U.S.C. 476(g) proved unavailing when in an opinion he issued in March 2013 District Judge Rudolph Contreras concluded:

> The Secretary [of the Interior] does not deny that his regulation diminishes the privileges available to tribes of Alaska Natives (except for the Metlakatlans) relative to the "privileges . . . available to all other federally recognized tribes by virtue of their status as Indian tribes." 25 U.S.C. 476(g). Instead he asks the court to adopt limiting constructions that have no basis in the statutory text. But a law "is not susceptible to a limiting construction" when "its language is plain and its meaning unambiguous." The Secretary offers no other arguments, and the challenged regulation shall therefore "have no force of effect." 25 U.S.C. 476(g). (emphasis added and citation omitted).[441]

After so holding, Judge Contreras issued a second opinion in which he severed the sentence "These regulations do not cover the

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[439] Id. at 27.

[440] Id. at 29.

[441] Akiachak Native Community v. Salazar, 935 F. Supp.2d 195, 211 (D.C.D.C. 2013).

acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or its members" from the rest of the text of the regulation, 25 C.F.R. 151.1, in which it had been included for more than thirty years.[442]

When Judge Contreras entered a final judgment, in November 2013 the Department of the Interior and the State of Alaska filed notices of appeal to the U.S. Court of Appeals for the District of Columbia Circuit.

Five years earlier, in 2008 the BIA had told the District Court that, even though the Department of the Interior was contesting the legal validity of the claims for relief NARF attorney Heather Kendall Miller had alleged in the plaintiffs's complaint, the BIA agreed with her central contention, which was that the Secretary of the Interior had authority pursuant to section 5 of the IRA to take the title to land in Alaska into trust. The BIA (in the guise of the Department of the Interior) told the court:

> Front and center in this litigation is the apparent agreement of the parties now that the Secretary of the United States Department of the Interior has discretionary authority to take Indian lands (sic) into trust status in Alaska. The Secretary's discretionary authority to do so is through 25 U.S.C. 465, enacted as Section 5 of the Indian Reorganization Act of 1934,

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[442] Akiachak Native Community v. Jewell, 995 F. Supp.2d 1 (D.C.D.C. 2013).

> which was made applicable to Alaska in the 1936 IRA amendments. Subsequent laws - the Alaska Native Claims Settlement Act of 1971, and the Federal Land Policy and Management Act, have not removed the Secretary's discretionary authority to take Indian lands (sic) into trust status in Alaska. (citations omitted).[443]

The year before Judge Contreras entered his final judgment in the Akiachak Native Community lawsuit, in August 2012 President Barack Obama appointed Kevin Washburn, a law professor at the University of New Mexico who specialized in federal Indian law who also was a member of the Chickasaw Nation in Oklahoma,[444] as Assistant Secretary of the Interior for Indian Affairs.[445]

The month after the Senate confirmed his appointment, Assistant Secretary Washburn flew to Anchorage to confer with Native leaders at the October 2012 AFN convention.[446]

Since from the outset of the Akiachak Native Community lawsuit the BIA had agreed with NARF that the title to land in Alaska not only could, but should, be taken into trust for the federally recognized tribes that Assistant Secretary Ada Deer had created, and since he personally supported that result, five

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[443] Akiachak Native Community, Defendants' Reply in Support of Defendants' Cross-Motion for Summary Judgment, at 1-2.

[444] Nomination of Kevin Washburn to Be Assistant Secretary for Indian Affairs, U.S. Department of the Interior: Hearing Before the S. Comm. on Indian Affairs, 112th Cong. 7-9 (2012)(statement of Kevin Washburn).

[445] "President Obama Announces More Key Administration Posts," White House (Press Release), Aug. 2, 2012.

[446] "Akaka and Washburn Speak at Alaska Federation of Natives Convention," Indian Country Today, Oct. 18, 2012.

months after the Department of the Interior filed its notice of appeal, Assistant Secretary Washburn published a proposed rule in the Federal Register whose promulgation as a final rule would remove the sentence in 25 C.F.R. 151.1 that had prohibited the Secretary of the Interior from taking the title to land in Alaska into trust.[447] In the explanation of the purpose of the rule-making he published in the Federal Register, Washburn perorated:

> The categorical exclusion of Alaska from the regulations is particularly unwarranted because . . . it was added to the regulations based on a mistaken legal interpretation of ANCSA, not because of public policy concerns. Congressional policy has remained constant since 1934 with the enactment of Section 5 of the IRA. By providing authority to take land into trust - an authority that was not revoked by ANCSA - Congress recognized that restoring tribal lands to trust status was important to tribal self-governance by providing a physical space where tribal governments may exercise sovereign powers to provide for their citizens. Restoring tribal homelands also supports the Federal trust responsibility to Indian nations because it supports the ability of tribal governments to provide for their people, thus making them more self-sufficient. Therefore, given that the authority in Section 5 remains intact for lands in Alaska, it is unnecessary and inappropriate to categorically exclude all Alaska lands from the land-into-trust regulations.
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> . . .
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> For more than 25 years, Alaska Native Tribal governments have been at the forefront of Federal policies supporting tribal self-determination and self-governance. The tribal governments in Alaska have made tremendous use of various Federal self-governance policies, thereby increasing self-sufficiency and better quality of life for Alaska Natives . . . For all the reasons mentioned above, the Department reconsiders

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[447] Land Acquisitions in the State of Alaska, 79 Fed. Reg. 24648 (2014).

> its past approach barring land into trust in Alaska and proposes to amend its regulations by removing the Alaska Exception.[448]

The month after Assistant Secretary Washburn published his proposed rule, at his direction the Department of the Interior filed a motion in the U.S. Court of Appeals for the District of Columbia Circuit in which it requested the court to dismiss the notice of appeal it had filed, and the court granted the motion.[449]

In December 2014 Assistant Secretary Washburn then issued a final rule that amended 25 C.F.R. 151.1 by removing the sentence: "These regulations do not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or its members."[450] When he did so he baldly asserted that the Secretary of the Interior taking the title to land in Alaska into trust would not contravene the policy objectives that the Ninety-Second Congress had intended ANCSA to achieve because

> It is important to remember that Alaska Native land and history did not commence with ANCSA, and that ANCSA did not terminate Alaska Native tribal governments . . . [W]hile ANCSA revoked existing reservations in Alaska

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[448] Id. at 24651-24652.

[449] U.S. Department of the Interior v. Akiachak Native Community, U.S. Court of Appeals for the District of Columbia Circuit No. 13-5361 [hereinafter "Akiachak Native Community Appeal"], Motion for Voluntary Dismissal Pursuant to Rule 42(b), and Order (June 12, 2014).

[450] Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76888 (2014).

> and established a separate statutory scheme in Alaska for the settlement of land claims, it did not repeal the Secretary's authority to take land into trust in Alaska under the IRA. There is nothing precluding the settlement codified in ANCSA and the Department's land-into-trust authority under the IRA from coexisting in Alaska.[451]

The month before the final rule was issued, in November 2014 Bill Walker, a Republican who had changed his party registration to Independent, was elected Governor of Alaska by defeating the incumbent Republican Governor by 6,223 votes.[452] Walker won because Byron Mallott, the Democratic Party's gubernatorial nominee, who had received 42,327 votes in the August primary election,[453] abandoned his party to join Walker's campaign as his running mate.

The son of a Tlingit Indian mother and Caucasian father, Mallott had been raised in Yakutat, a community located on the northern coast of the southeast Alaska Panhandle. Because in 1970 a majority of the community's residents were of Tlingit Indian descent, the Secretary of the Interior designated Yakutat as a Native village for the purposes of ANCSA. And in 1993 Assistant Secretary of the Interior for Indian Affairs Ada Deer included

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[451] Id. at 76890.

[452] State of Alaska, Division of Elections, November 4, 2014 Official General Election Results, posted at http://elections.alaska.gov/results/14GENR/data/results.pdf.

[453] State of Alaska, Division of Elections, August 19, 2014 Official Primary Election Results, posted at http://elections.alaska.gov/results/14PRIM/data/results.pdf.

"Yakutat Tlingit Tribe" on the list of Native Entities she published in the Federal Register

By 2013 when he began campaigning for the Democratic gubernatorial nomination Mallott, who was a former president of the AFN, had become an outspoken Native tribal sovereignty advocate who, as the Alaska Journal of Commerce subsequently reported, "told Bethel voters in 2013 that he agreed completely with the notion of tribal sovereignty."[454] And in December 2014 when he was sworn into office as Lieutenant Governor he did so wearing traditional Tlingit regalia.

Six weeks later, in January 2015 the State of Alaska asked the U.S. Court of Appeals for the District of Columbia Circuit to suspend briefing for six months in the State's appeal in the Akiachak Native Community lawsuit. The State told the court that the reason it wanted briefing delayed was that "Governor Walker has directed Lieutenant Governor Byron Mallott and Attorney General Craig Richards and other cabinet members to establish a working group to gather stakeholder input and explore a range of policy options on this issue and related tribal issues in Alaska, including potential alternatives to continuing this litigation."[455]

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[454] "Appeal in Akiachak Case Revives Tribal Sovereignty Fight," Alaska Journal of Commerce, Aug. 26, 2015.

[455] Akiachak Native Community Appeal, Motion to Suspend Briefing for Six Months, at 2.

When it learned of the State's request, the Alaska Dispatch News reported that "Gov. Bill Walker said during his campaign that the way to improve state-Native relations is to stop suing each other," and it quoted the Governor's press secretary saying that "We are looking at ways to improve the State's relationship with tribes, while still protecting the State's interest."[456]

In April when he appeared at the annual convention of the Central Council of the Tlingit and Haida Indian Tribes of Alaska and was asked "What your position is on land into trust in Alaska," Walker answered: "It's not anything that I'm personally opposed to. I want to make sure we do it in the right way and that it gets done as soon as we can, but there's a few nuances we have to address along the way."[457]

In August the Alaska Journal of Commerce described Lieutenant Governor Mallott, who was chairing the working group the Governor had established to address those nuances, as "a longtime backer of giving tribes the right to put land into trust."[458]

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[456] "State Holds Up Effort to Expand Indian Country in Alaska," Alaska Dispatch News, Feb. 5, 2015.

[457] Video: Governor Walker on Land Into Trust, Central Council of the Tlingit and Haida Indian Tribes of Alaska, April 15-17, 2015, available at http://www.ccthita.org/government/president/media/index.html.

[458] "Appeal in Akiachak Case Revives Tribal Sovereignty Fight," Alaska Journal of Commerce, Aug. 26, 2015.

However, even though he was, the working group's efforts to square the circle by appeasing Lieutenant Governor Mallott's constituency while still "protecting the State's interest" came to naught when in August the Alaska Dispatch News reported that "Gov. Walker in recent weeks traveled to the village of Akiachak and other communities involved in the court fight to speak to tribal members firsthand . . . [but] he didn't try to make a deal to settle the case."[459]

That same month the State finally filed its brief. Less than three of the document's sixty-one pages addressed the legal issue on which District Judge Contreras had based his decision, which was that the sentence in 25 C.F.R. 151.1 whose validity was at issue violated 25 U.S.C. 476(g). The rest of the brief was a rehash of the arguments about the intent of the Ninety-Second Congress embodied in ANCSA that Judge Contreras had concluded were legally irrelevant.

A year later, on July 1, 2016 two members of the panel who heard it, dismissed the State's appeal because, "Unfortunately for Alaska, which intervened in the district court as a defendant and brought no independent claim for relief, the controversy between the tribes and the Department [of the Interior] is now

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[459] "State Appeal in Alaska Tribal Land Case Fights Prospect of Indian Country," Alaska Dispatch News, Aug. 25, 2015.

moot"[460] because

> Even assuming, as Alaska argues, that the district court's interpretation of ANCSA injured the State, such injury cannot extend our jurisdiction by creating a new controversy on appeal. In essence, Alaska urges us to "entertain the appeal so as to advise the parties of what their rights would be in what is essentially a new legal controversy" - whether Interior's 2014 rule correctly interprets ANCSA. We are without jurisdiction to provide such an advisory opinion. Assuming Alaska's claim is ripe, we see no barrier to the State raising it directly under the A[dministrative] P[rocedure] A[ct], or if and when Interior attempts to take any land into trust in Alaska. (citations omitted).[461]

When its appeal was dismissed, the State had forty-five days to petition the U.S. Court of Appeals for the District of Columbia Circuit for rehearing, and ninety days to petition the U.S. Supreme Court to issue a writ of certiorari and review the panel's decision.

Instead of filing either petition, on August 15, 2016 Jahna Lindemuth (who Governor Walker two months earlier had appointed to succeed Craig Richards as Attorney General) announced that the State was conceding defeat because "I don't see any need to use our limited resources in pursuing dead-end litigation" and "it seems more productive to come back to the table and see if the State's concerns can be addressed outside of litigation."[462] That

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[460] Akiachak Native Community v. U.S. Department of the Interior, 827 F.3d 100, 102 (D.C. Cir. 2016).

[461] Id. at 113.

[462] "Alaska Attorney General Not Appealing Lands Into Trust Case," Alaska Department of Law (press release), Aug. 15, 2016.

same day NARF attorney Heather Kendall Miller issued a press release in which she celebrated the Attorney General's capitulation as a "historic victory for Alaska tribes."[463]

A week later Attorney General Lindemuth explained her understanding of what the present state of the law now was regarding the authority of the Secretary of the Interior to take the title to land in Alaska into trust pursuant to section 5 of the IRA:

> The way that case came down, it was mooted out by federal regulation, so basically the legal issues didn't exist anymore. We weren't going to win that issue, so it's as if that case never existed. So it's kind of fortuitous that the timing of that happened as it did, because it gives us some breathing room to deal with this issue of switching from litigation to diplomatic efforts.
>
> I'm going to meet with all the different people who have concerns about land into trust. And then I gather all those concerns and understand what all the issues are and see if as a state we can narrow down the issues and resolve the concerns that are left. I think this might be easier than we're all envisioning right now. The end result may be a set of federal regulations unique to Alaska. We could end up with a set of standards the Department of Law uses to evaluate trust applications, so we'd object to this particular instance, but not to that situation - here's our concerns and how we'll deal with them. (emphasis added).[464]

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[463] "Land Into Trust Litigation Ends - Historic Victory for Alaska Tribes, Native American Rights Fund (Press Release), Aug. 15, 2016.

[464] "Alaska's Attorney General Looks for Creative Solutions to Address Crime Amid Budget Cuts," Alaska Dispatch News, Aug. 23, 2016.

Since 25 U.S.C. 476(f) prohibits the Secretary of the Interior from promulgating a regulation "that classifies, enhances, or diminishes the privileges and immunities available to [an] Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes," Attorney General Lindemuth's assertion that "a set of federal regulations unique to Alaska" might alleviate the State's concerns about the land-into-trust situation reflected a startling lack of understanding of both a plain meaning reading of the text of 25 U.S.C. 476(f) and of the decision Judge Contreras had issued in the Akiachak Native Community lawsuit.

By the time the Akiachak Native Community lawsuit concluded four groups had submitted applications to the BIA that requested the Secretary of the Interior to take the title to land in Alaska into trust for the group pursuant to section 5 of the IRA: the Craig Tribal Association, the Central Council Tlingit and Haida Indian Tribes of Alaska, the Ninilchik Village Tribe, and the Native Village of Fort Yukon.

3. Craig Tribal Association.

Craig is a community located on a small island off the coast of Prince of Wales Island in southeast Alaska that grew up around a salmon cannery that began operating at that location in 1908. In 1922 the slightly more than two hundred residents of Craig incorporated a municipal government under the laws of the

Territory of Alaska.[465] In 1938 Assistant Secretary of the Interior Oscar Chapman approved a constitution for the Craig Community Association that "a group of Indians having a common bond of residence in the neighborhood of Craig" had submitted pursuant to section 1 of Public Law No. 74-538 and section 16 of the IRA.[466]

In 1971 section 16 of ANCSA authorized residents of Craig who were of one-quarter or more Tlingit or Haida Indian blood to incorporate a village corporation and authorized the Secretary of the Interior to convey to the corporation fee title to the surface estate of 23,040 acres of public land located within and around the community.

In 1982 when Assistant Secretary of the Interior for Indian Affairs Ken Smith published in the Federal Register the BIA's first list of "Alaska Native Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs," he included the "Craig Community Association" on the list.[467] When the list was republished in 1983, 1985, 1986, and 1988 the Craig Community Association remained listed.

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[465] Alaska Department of Commerce, Community and Economic Development, Division of Community and Regional Affairs, Community Information: Craig, available at https://www.commerce.alaska.gov/dcra/DCRAExternal/community/Details/03f82d00-0463-4dfc-b0e5-536ef93f176e.

[466] Constitution and By-Laws of the Craig Community Association of Craig, Alaska, available at http://thorpe.ou.edu/IRA.craigmcons.html.

[467] 47 Fed. Reg. 53130, 53134 (1982).

In 1993 when Assistant Secretary of the Interior for Indian Affairs Ada Deer published her list of Native Entities that she intended would be a list of "villages and regional tribes" that, because of their appearance on the list, henceforth would have "the same status as tribes in the contiguous 48 states," she included the Craig Community Association on her list.[468] When Assistant Secretary Deer's list was republished in 1995, 1998, 2000, 2002, 2005, 2009, and 2010 the Craig Community Association remained listed.

Then in 2011 Eugene Virden, the Regional Director of the BIA's Alaska Region, approved a constitution that had been submitted by "a group of Alaska Natives and American Indians having a common bond of residence in the neighborhood of Craig." The principal difference between the new constitution and the constitution Assistant Secretary Chapman had approved in 1938 was that the Craig Community Association was renamed the Craig Tribal Association.[469]

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[468] 58 Fed. Reg. 54364, 54369 (1993).

[469] See Section 2, Article I, Constitution and By-Laws of the Craig Tribal Association of Craig, Alaska, ratified July 9, 2011 ("The Craig Tribal Association of Craig, Alaska, is a continuation in existence of the same tribal entity formerly known as the Craig Community Association." (emphasis added). But in contravention of that bald assertion of tribal status, section 1 of Public Law No. 74-538 authorizes "groups of Indians in Alaska not heretofore recognized as bands or tribes but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district" to adopt constitutions pursuant to section 16 of the IRA. (emphasis added). To comply with that requirement, the 1938 constitution was submitted by "a group of Indians having a common bond of residence in the neighborhood of Craig, Territory of Alaska." (cont.)

A year later when Acting Assistant Secretary of the Interior for Indian Affairs Michael Black again republished the list, it now included the "Craig Tribal Association (previously listed as the Craig Community Association)."[470]

Five months after Assistant Secretary of the Interior for Indian Affairs Kevin Washburn published in the Federal Register a proposed rule whose promulgation as a final rule would remove from 25 C.F.R. 151.1 the sentence "These regulations do not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or its members," in September 2014 the Craig Tribal Association submitted an application to the BIA in which it requested the Secretary of the Interior to take into trust pursuant to section 5 of the IRA the title to two parcels of land, totaling 3.82 acres, located within the city limits of the City of Craig. On October 6, 2016 the Craig Tribal Association submitted a separate application for each parcel,

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Similarly, the preamble of the new constitution states that the new constitution had been submitted, not by members of a federally recognized tribe, but by "a group of Alaska Natives and American Indians having a common bond of residence in the neighborhood of Craig, State of Alaska." Simply put, despite Regional Director Virden's approval of the new constitution, the attempt by members of the Craig Community Association to transform themselves from a group of individuals of Tlingit and Haida Indian descent who have "a common bond of residence in the neighborhood of Craig" into a "recognized Indian tribe" within the meaning of that term in the "Indian" definition in section 19 of the IRA through a change in nomenclature was, as a matter of law, unavailing.

[470] 77 Fed. Reg. 47868, 47872 (2012).

one of which was 1.08 acres that the Craig Community Association had purchased in 1996 and on which it had constructed a building the Association uses as its headquarters and also leases to commercial users.

Pursuant to 25 C.F.R. 151.11(d),[471] on October 7, 2016 the Regional Director of the BIA's Alaska Regional Office notified the State of Alaska and the City of Craig that they had thirty days to submit comments regarding the application that requested the Secretary of the Interior to take into trust the title to the 1.08 acre parcel.[472]

Consistent with what Governor Walker had promised when he appeared at the annual convention of the Central Council of Tlingit and Haida Indian Tribes of Alaska, on December 9, 2016 Attorney General Jahna Lindemuth informed the Regional Director that "the State does not object to placing this particular parcel

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[471] 25 C.F.R. 151.11(d) provides: "Upon receipt of a tribe's written request to have lands taken into trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." (emphasis added). In violation of that directive, the Regional Director did not notify the State of Alaska and the City of Craig when the BIA Alaska Regional Office received the application the Craig Tribal Association submitted in September 2014, nor did the Regional Director notify the State, the City of Juneau, and the Kenai Peninsula Borough when the Regional Office received the applications that the Central Council Tlingit and Haida Indian Tribes of Alaska, the Ninilchik Village Tribe, and the Native Village of Fort Yukon submitted.

[472] Notice of (Non-Gaming) Trust Land Acquisition Application, Bureau of Indian Affairs, Alaska Region, Oct. 7, 2016, available at http://www.law.state.ak.us/press/releases/2016/101016-LandsTrust.html.

into trust."[473]

On January 12, 2017 Lawrence Roberts, the Principal Deputy Assistant Secretary of the Interior for Indian Affairs, issued a decision document in the form of a letter to the president of the Craig Tribal Association in which he announced that he had approved the Association's application for the 1.08 acre parcel.[474] According to the decision document,

> Craig Tribal Association is a federally recognized tribe with Tribal headquarters located in the City of Craig, Alaska. The Tribe is organized under the IRA and has a constitution and by-laws approved by the Secretary of the Interior on July 13, 1938 and ratified by members of the Tribe on October 8, 1938. The Tribe is included on the list of federally recognized tribes.[475]

That description of the legal status of the Craig Tribal Association pointedly did not mention that the constitution Assistant Secretary Chapman had approved in 1938 was for the Craig Community Association - rather than the Craig Tribal Association, that section 1 of Public Law No. 74-538 authorized "groups of Indians in Alaska not heretofore recognized as bands or tribes" to obtain a constitution pursuant to section 16 of the

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[473] Letter captioned "State of Alaska's Comments on the Craig Tribal Association's Trust Land Acquisition Application," from Jahna Lindemuth, Alaska Attorney General, to Kathy Cline, Acting Regional Director, Alaska Region, Bureau of Indian Affairs, Dec. 9, 2016.

[474] Letter from Lawrence S. Roberts, Principal Deputy Assistant Secretary - Indian Affairs, to Clinton Cook, Sr., Tribal President, Craig Tribal Association, Jan. 12, 2017.

[475] Id. at 3.

IRA, and that the Tlingit and Haida Indians who in 1938 submitted their constitution to the Secretary of the Interior for his approval had done so, not as a federally recognized tribe, but as "a group of Indians having a common bond of residence in the neighborhood of Craig."

Even if arguendo, in disregard of those considerations, Assistant Secretary Roberts's assertion that the members of the Craig Tribal Association are a "federally recognized tribe" was legally correct, there is another, equally legally consequential, consideration regarding whether his approval of the Craig Tribal Association's application was ultra vires.

In 2009 Carcieri v. Salazar,[476] the U.S. Supreme Court announced that the Seventy-Third Congress that enacted the IRA intended the word "now" in the phrase "recognized Indian tribe now under Federal jurisdiction" in the section 19 "Indian" definition to mean June 18, 1934, i.e., the date President Franklin Roosevelt signed the IRA into law.

For Assistant Secretary Roberts the Carcieri decision was problematical because if the Tlingit and Haida Indian residents of Craig became a "recognized Indian tribe" in 1938 when Assistant Secretary Chapman approved a constitution for the Craig Community Association, the "tribe" could not have been "under

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[476] 555 U.S. 379 (2009).

Federal jurisdiction" on June 18, 1934. To rid himself of that problem, in his decision document Assistant Secretary Roberts announced:

> After carefully examining the language of the Indian Reorganization Act ("IRA") and the 1936 Amendments to the IRA ("Alaska IRA"), as well as both statutes' purposes and legislative histories, and in accordance with the guidance provided by the Office of the Solicitor, I have determined that Congress's extension of Section 5 of the IRA (the provision authorizing the Secretary to acquire land in trust for Indians) to Alaska through the Alaska IRA provides specific authority for the Secretary to place land in trust for Federally recognized tribes in Alaska. That authority is not constrained by the Supreme Court's decision in Carcieri v. Salazar. Moreover, neither the Alaska Native Claims Settlement Act, nor the Federal Land Policy and Management Act, expressly or impliedly repeal that authority. I therefore conclude that the Department has authority to acquire land in trust for the Tribe. The Solicitor will be issuing a new opinion in the near future that sets out the supporting legal analysis of the underlying authorities upon which this decision has been made. (emphases added).[477]

4. Solicitor's Opinion M-37043 (Authority to Acquire Land into Trust in Alaska).

The Solicitor to whom Assistant Secretary Roberts referred in his decision document was Hilary Tompkins, an attorney of Navajo descent[478] who President Barack Obama appointed to the

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[477] Roberts Decision Document, at 5-6.

[478] See "Hilary Tompkins Shares Legal Hopes for Federal-Tribal Relations," Indian Country Today Media Network, Jan. 18, 2017 (Interview in which Tompkins explains: "I was born on the Navajo reservation into a family that was burdened with the social ills of alcoholism and poverty." After having been adopted by a Caucasian family, "As a young adult I reconnected with my roots and lived on the Navajo Reservation. I learned about my Navajo culture which at its core stresses the importance of living in harmony with the Earth").

position in 2009.

In 2014 Tompkins issued Solicitor's Opinion M-37029, entitled "The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act." For groups whose members had been lawfully designated as federally recognized tribes after June 18, 1934 - the opinion substantially reduced the adverse consequences of the Carcieri v. Salazar decision by inventing a two-part test for determining whether, even though a group had not been a "recognized Indian tribe" on June 18, 1934, the group nevertheless had, as a "tribe" rather than as individual Indians, been "under Federal jurisdiction" on that date.

Two days before President Donald Trump assumed office and she departed the Department of the Interior, on January 18, 2017 Indian Country Today Media Network published an interview with Solicitor Tompkins in which she celebrated as one of her most important accomplishments during her eight-year tenure as Solicitor her involvement in the rule-making in which Assistant Secretary Washburn removed the sentence "These regulations do not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or its members" from 25 C.F.R.

151.1.[479]

Of equal consequence, five days earlier, on January 13, 2017 Solicitor Tompkins issued Solicitor's Opinion M-37043, entitled "Authority to Acquire Land into Trust in Alaska," the Solicitor's Opinion to which Assistant Secretary Roberts had alluded in the decision document in which he approved the Craig Tribal Association's land-into-trust application.

In Carcieri v. Salazar the U.S. Supreme Court had noted in passing that in statutes other than the IRA "Congress chose to expand the Secretary's authority to particular Indian tribes not necessarily encompassed within the definitions of 'Indian' set forth in [section 19 of the IRA]."[480] In a footnote the Court identified four such statutes, one of which was Public Law No. 74-538.[481]

Transforming that dictum into a holding, after noting that "The Carcieri Court expressly cited to the Alaska IRA [i.e., Public Law No. 74-538]," Solicitor's Opinion M-37043 announced that "The Secretary, therefore, possesses the requisite authority to acquire land in trust for Alaska Natives under the Alaska IRA and Interior need not render a determination whether Alaska

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[479] Id.

[480] 555 U.S. at 392.

[481] Id. at n. 6.

Native tribes fit within any of the other definitions of 'Indian' in Section 19 of the IRA, including the first definition that was at issue in the Carciari decision."

Solicitor's Opinion M-37043 further opined that the Seventy-Third Congress had intended its inclusion of the sentence "For the purposes of this Act, Eskimos and other aboriginal people of Alaska shall be considered Indians" in section 19 of the IRA to create "a separate category of 'Indians' under the IRA." The Opinion then explained that Solicitor Tompkins had reasoned to that conclusion because "If Congress had intended to require Alaska Natives to meet one of the first three definitions of 'Indian' in the first sentence of Section 19, then the reference to Alaska Natives in the next sentence of Section 19 would be surplusage, as eligible Alaska Natives would have already met one of the other three definitions. Instead, the use of the word 'considered' in Section 19 suggests that Alaska Natives were to be regarded as 'Indians' in the appropriate sections of the IRA, regardless of whether they meet one of the other definitions."[482]

There is a difference between a good faith, but erroneous, reading of the text of a statute and intellectual dishonesty employed to achieve a favored policy result that a plain meaning reading of a text will not support. And in Solicitor's Opinion

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[482] Solicitor's Opinion M-37043, at 13-14.

M-37043 Solicitor Tompkins crossed that line.

The IRA is composed of eighteen sections, plus section 19, the "Indian" definition section. In those eighteen sections the words "Indian" and "Indians" collectively appear thirty-eight times. For that reason, the inclusion of the sentence "For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians" in section 19 simply makes clear that each time the word "Indian" or "Indians" appears in the eighteen other sections those words include within their purview, not only Indians who resided in the coterminous states, but also Indians, Eskimos, and Aleuts who resided in the Territory of Alaska. The inclusion of that sentence in section 19 allowed Indians, Eskimos, and Aleuts in Alaska to borrow money that section 11 of the IRA made available to "Indians" for "the payment of tuition and other expenses in recognized vocational and trade schools," and to benefit from the preference for employment with the BIA that section 12 of the IRA made available.

As has been previously described, to reason to the conclusion she announced in Solicitor's Opinion M-37043 regarding the intent of the Seventy-Third Congress embodied the sentence "For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians" in section 19 of the IRA required Solicitor Tompkins to disregard the

contemporaneously offered contrary view of Felix Cohen, who stated: "It seems to me that sec. 19 puts Eskimos on the same basis as Indians. To qualify for the benefits of the [IRA] they must meet one of 3 criteria: tribal affiliation, tribal descent plus residence on a reservation, or the half-blood test."[483]

In Solicitor's Opinion M-37043 Solicitor Tompkins disregarded both Cohen's understanding and other contemporaneous statements that are consistent with Cohen's understanding as "statements [that] fall short of the official legal position for Interior" and that also are "conclusionary" and lack "any thorough legal explanation or analysis of the legislative history of the IRA."[484] She did so even though Cohen's and the other statements are the type of evidence of the intent of the Seventy-Third Congress embodied in the text of the IRA that in Carcieri v. Salazar the U.S. Supreme Court found probative.

In summary, the legal analysis of the intent of the Seventy-Third Congress embodied in the sentence "For the purposes of this Act, Eskimos and other aboriginal people of Alaska shall be considered Indians" in section 19 of the IRA that Solicitor Tompkins announced in Solicitor's Opinion M-37043 was patently

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[483] Memorandum from Felix S. Cohen, Assistant Solicitor, to Fred H. Daiker, Assistant to the Commissioner of Indian Affairs, n.d., cited in Solicitor's Opinion M-37043, at 19.

[484] Solicitor's Opinion M-37043 at 20.

erroneous. Because it was, having been withdrawn by Solicitor's Opinion M-37053, Solicitor's Opinion M-37043 should not be reinstated.

5. The Central Council of Tlingit and Haida Indian Tribes of Alaska Is Not the Governing Body of a "Recognized Indian Tribe" That in 1934 Was "Under Federal Jurisdiction." Because It Is Not, the Secretary of the Interior Has No Authority to Acquire Land for the Central Council Pursuant to Section 5 of the IRA.

These comments demonstrate that, with one exception, there is no group in Alaska whose membership is composed of Alaska Natives or descendants of Alaska Natives that has been designated by Congress, or lawfully designated by the Secretary of the Interior acting pursuant to authority that Congress has delegated to the Secretary in a statute, as a "federally recognized tribe."

The one exception is the Central Council of Tlingit and Haida Indian Tribes of Alaska (Central Council), which in 1994 in section 203 of the Tlingit and Haida Status Clarification Act[485] the One Hundred and Third Congress designated as a "federally recognized Indian tribe."

However, on June 18, 1934 the members of the Central Council, which on that date did not exist, were not a "recognized Indian tribe," nor was the Central Council "under Federal jurisdiction" as the "Indian" definition in section 19 of the IRA

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[485] Title II, Public Law No. 103-454.

requires in order for the Secretary of the Interior to acquire land for a "recognized Indian tribe" pursuant to section 5 of the IRA.

The serendipitous circumstances that in 1994 resulted in the One Hundred and Third Congress designating the Central Council as a "federally recognized tribe" are as follows:

In 1935 the Seventy-Fourth Congress enacted a statute that authorized the "Tlingit and Haida Indians of Alaska" to file a civil action in the Court of Claims to obtain a judgment awarding monetary compensation for the extinguishment of the Tlingit and Haida Indians's aboriginal title to land in southeast Alaska that had been included within the boundaries of the Tongass National Forest and the Glacier Bay National Monument. The statute designated the judgment as an "asset" of the villages in which Tlingit and Haida Indians resided, and required the money to be used to purchase "productive economic instruments and resources of public benefit to such Indian communities." The statute also referenced a "Tlingit and Haida central council" that, although no such organization existed, was directed to prepare a roll of Tlingit and Haida Indians.[486]

In 1941 the BIA held village elections to create a Central Council for the sole purpose of selecting an attorney to file the

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[486] Section 7, Public Law 74-152.

lawsuit[487] that the Seventy-Fourth Congress had authorized in 1935 and that James Curry, the attorney the members of the Central Council selected, finally would file in 1947.[488]

In 1965 the Eighty-Ninth Congress enacted a second statute that authorized a new Central Council to be elected in an election conducted pursuant to rules that the Secretary of the Interior approved. The statute provided that the Council's sole purpose was to develop a plan for the use of the money judgment the Court of Claims would award.[489]

In 1968 the Court of Claims awarded the Tlingit and Haida Indians of Alaska $7.5 million.[490]

In 1970 the Ninety-First Congress enacted a third statute in which it authorized the "Central Council of the Tlingit and Haida Indians of Alaska," with the approval of the Secretary of the

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[487] Sold American, at 355 ("[Assistant Secretary of the Interior Oscar] Chapman instructed Claude Hirst, the Bureau of Indian Affairs Alaska superintendent in Juneau, to order bureau schoolteachers to hold an election in each southeast Alaska village to select a Tlingit-Haida Central Council"); Letter from John Carver, Under Secretary of the Interior, to Hon. Henry Jackson, Chairman, Senate Committee on Interior and Insular Affairs, March 16, 1965, reprinted at S. Rep. No. 89-159, at 4-5 (1965)("The present body calling itself the central council grew out of a meeting organized at Wrangell in 1941 for the purpose of selecting a claims attorney").

[488] Sold American, at 262-286, 360-364 (history of statute authorizing Tlingit-Haida land claims lawsuit to be filed and organization of Tlingit-Haida Central Council described).

[489] Public Law No. 89-130.

[490] Tlingit and Haida Indians of Alaska v. United States, 389 F.2d 778 (Ct. Cl. 1968).

Interior, to spend the $7.5 million however it wished.[491]

In February 1971 Commissioner of Indian Affairs Louis Bruce appointed Morris Thompson, a prominent leader of the Athabascan Indian community in Fairbanks, as Regional Director of the BIA's Alaska Region.[492] A month later Thompson and John Borbridge, the President of the Central Council who fifteen years later would become the principal spokesperson for the Alaska Native Coalition, signed a contract that allowed the Central Council to begin administering programs the BIA's Southeast Alaska Agency had been administering.[493]

In December 1971 the Ninety-Second Congress included the "Tlingit-Haida Central Council" as one of the regional associations listed in section 7(a) of ANCSA.

In April 1973 the Central Council adopted a constitution in which the organization granted itself authority, not only to spend the $7.5 million, but "to serve as the general governing

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[491] Public Law No. 91-335.

[492] "Native Area Director," Tundra Times, Feb. 10, 1971.

[493] "Agreement Signed T-H Take Over Programs," Tundra Times, March 3, 1971. The BIA relied on the Buy Indian Act, Ch. 431, Section 23, 36 Stat. 855, 861 (1910)(codified as amended at 25 U.S.C. 47), as the statute in which Congress had purportedly delegated the BIA authority to enter into the contract. However, the Buy Indian Act simply authorizes the Secretary of the Interior to employ "Indian labor" and to purchase the products of "Indian industry" in the open market.

body of the Tlingit and Haida Indians of Alaska."[494] Eight months later President Richard Nixon appointed Morris Thompson as Commissioner of Indian Affairs.[495] In January 1975 President Gerald Ford, who the previous August became President when President Nixon resigned, signed into law the Self-Determination Act, which authorized "Indian tribes" to contract with the BIA to administer programs such as the program the Central Council had been contracting with the BIA's Alaska Region to administer.

After the Self-Determination Act was enacted, the Regional Director of the BIA's Alaska Region questioned whether, because for the purposes of the Act the Central Council was not an "Indian tribe," the Alaska Region could continue to contract with the Central Council directly. In July 1975 Commissioner Thompson informed the Regional Director that "It was reported that some questions had been raised as to whether the Bureau recognized the Tlingit and Haida Tribes and the Central Council as empowered to speak on behalf of those Tlingit and Haida people that adhere to the organization," and "We were surprised that doubts continued to exist among our Juneau staff as to whether the Tlingit and Haida Central Council was a recognized tribal organization."

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[494] Cogo v. Central Council of the Tlingit and Haida Indians of Alaska, 465 F. Supp. 1286, 1290 (D.C.D.Ak. 1979)(adoption of THCC Constitution described).

[495] Robert M. Kvasnicka and Herman J. Viola (eds.), The Commissioners of Indian Affairs, 1824-1977, at 341-346 (1979)(Morris Thompson's tenure as Commissioner of Indian Affairs described).

Commissioner Thompson then advised that "the general explanations offered in this letter will clarify for all concerned that it is the view of the Bureau that the Tlingit and Haida Central Council is a tribal entity representing the Tlingit and Haida Indians of Alaska."[496]

That was a view regarding the Central Council's legal status on which Commissioner Thompson apparently settled without consulting the attorneys in the Office of the Solicitor who advised the BIA. Because in 1977 Ray Paddock, the president of the Central Council (who in 1974 had been responsible for the House Committee on Interior and Insular Affairs not including the Central Council and the other regional associations listed in section 7(a) of ANCSA in the "Indian tribe" definition in the bill it reported to the House that the Ninety-Third Congress would enact as the Self-Determination Act) would complain that "For the past two years, the Bureau of Indian Affairs in Alaska has been enforcing their interpretation of Indian tribe which provides first priority recognition to those groups of Indians organized pursuant to the provisions of the Wheeler-Howard Act [i.e., the IRA] and the Alaska Indian Reorganization Act of May

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[496] Letter from Morris Thompson, Commissioner of Indian Affairs, to Area Director, BIA Alaska region, July 24, 1975, reprinted in Cogo v. Central Council of the Tlingit and Haida Indians of Alaska, supra at 1289-1290.

1, 1936 [i.e., Public Law No. 74-538]."[497]

As has been described, five years later, in 1982 Assistant Secretary of the Interior for Indian Affairs Ken Smith published in the Federal Register the first list of Native Entities that were "not historical tribes" but to which BIA gave "priority for purposes of funding and services." Without explaining why, he included the "Tlingit & Haida Indians of Alaska" on the list,[498] but he did not include any of the other regional associations listed in section 7(a) of ANCSA. And the lists that were published in 1983, 1985, and 1986 continued to include the "Tlingit & Haida Indians of Alaska."[499]

In 1988 Assistant Secretary of the Interior for Indian Affairs Ross Swimmer published the list that increased the number of Native Entities by adding nine categories of entities to which various statutes, including the Self-Determination Act, authorized the BIA to provide funding and services. In addition to ANCSA regional and village corporations that were "Indian tribes" for the purposes of the Self-Determination Act,[500] the

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[497] Second S. 2046 Hearing, at 23 (statement of Ray Paddock, Jr., President, Central Council, Tlingit and Haida Indians of Alaska).

[498] 47 Fed. Reg. 53130, 53135 (1982).

[499] 48 Fed. Reg. 56862, 56866 (1983); 50 Fed. Reg. 6055, 6059 (1985); 51 Fed. Reg. 25115, 29119 (1986).

[500] 53 Fed. Reg. 52829, 52833-5285 (1988).

1988 list again included the "Central Council of Tlingit and Haida Indian Tribes of Alaska"[501] but none of the other regional associations.

In 1993 Assistant Secretary of the Interior for Indian Affairs Ada Deer published the list of Native Entities that she announced was a list of "federally recognized tribes," rather than a list of Native Entities eligible to receive funding and services. Because attorneys in the Office of the Solicitor who advised the BIA told her that the Central Council was not the governing body of a "federally recognized tribe," Assistant Secretary Deer did not include the Central Council on her list.[502]

When he found that out, Edward Thomas, the president of the Central Council, protested to Michael Anderson, the Associate Solicitor for Indian Affairs, that "there is little doubt that my Tribe has conducted itself (and continues to conduct itself) as a Tribe as many other Tribes in the 'Lower 48.'"[503]

When that protest was unavailing, Thomas complained to Alaska Senator Frank Murkowski who was sympathetic to the

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[501] Id. at 52833.

[502] 58 Fed. Reg. 54364, 54368-54369 (1993).

[503] Letter from Edward Thomas, President, Central Council, Tlingit and Haida Indian Tribes of Alaska, to Michael Anderson, Associate Solicitor, BIA, Sept. 29, 1993. Legislative Bill Files (S. 1675 - S. 1784), House Committee on Natural Resources, 103d Congress, Record Group 233, Center for Legislative Archives, National Archives and Records Administration [hereinafter "S. 1784 House Records"].

complaint of a locally prominent constituent about a matter whose legal consequence he did not understand.

Less than a month after Assistant Secretary Deer published her list the Senate Committee on Indian Affairs reported S. 1654, a bill that amended six Indian-related statutes in various noncontroversial ways. Since he was a member of the Committee, prior to the vote to report S. 1654 Senator Murkowski offered an amendment, which the other members accepted, that added a section 7 to the bill that directed the Secretary of the Interior to add to Assistant Secretary Deer's list "the tribe defined and recognized in the Act of June 19, 1935, as amended, relating to the Tlingit and Haida Indians of Alaska."[504] The Committee's report on S. 1654 explained that Senator Murkowski's amendment

> simply restores the status quo of the October 20, 1993 by placing the Central Council of Tlingit and Haida Indian Tribes of Alaska back on the list and restoring Central Council to the same position it was in before it was deleted from the republished list. The Bureau of Indian Affairs removed the Central Council of Tlingit and Haida Indian Tribes of Alaska from the list without Congressional oversight. The Senate Committee on Indian Affairs held no hearings on this matter and the Bureau of Indian Affairs did not formally present any explanation for the removal of the Central Council from the list. This is a significant misuse of federal departmental power. The amendment corrects the deletion.[505]

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[504] Section 7, S. 1654, 103d Cong. (as reported by S. Comm. on Indian Affairs, Nov. 19, 1993).

[505] S. Rep. No. 103-191, at 6 (1993). The text of the Murkowski amendment and the description of the amendment in the Committee's report were disingenuous in that, for the first time, they described the Tlingit (cont.)

Before the Senate passed S. 1654 on a voice vote the bill's manager removed section 7;[506] apparently because the BIA had threatened to have President Clinton veto the bill had section 7 not been removed.[507]

Senator Murkowski then introduced a stand-alone bill, S. 1784, whose sole provision directed the Secretary of the Interior to add to Assistant Secretary Deer's list "the tribe defined and recognized in the Act of June 19, 1935, as amended, relating to the Tlingit and Haida Indians of Alaska." That same day and with no explanation of the bill's content the Senate passed S. 1784 on a voice vote.[508] After the vote Senator Murkowski had a statement printed in the Congressional Record in which he explained that "The bill does not do anything new. The bill makes a technical correction to BIA's list and should not be viewed as setting any precedent for Federal recognition of a tribe. My bill simply restores the status quo of October 20,

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and Haida Indians as a "tribe," even though the 1935 Act and the amendments to the Act that the Eighty-Ninth and Ninety-First Congresses enacted in 1965 and 1970 did not do so.

[506] 139 Cong. Rec. 32429 (1993).

[507] Letter from Ada Deer, Assistant Secretary for Indian Affairs, to the Hon. George Miller, Chairman, Committee on Natural Resources, March 10, 1994 (explaining that the BIA "support[ed] the removal of the former section 7 from [S. 1654]. The removed portion has since been separately introduced as a bill, S. 1784. We have provided separately in testimony to this Committee, views on S. 1784, which we do not support"), reprinted at H.R. Rep. No. 103-479, Part 1, at 17-21 (1994).

[508] Id. at 32428.

1993, by placing the Central Council of Tlingit and Haida Indian Tribes of Alaska back on the list and restores Central Council to the same position it was in before it was deleted from the republished list."[509]

When S. 1784 reached the House the Subcommittee on Native American Affairs of the Committee on Natural Resources held a hearing on the bill. The first witness, Debra Maddox, the Director of the BIA Office of Tribal Services, told the members of the Subcommittee that the Department of the Interior opposed S. 1784 because

> The Central Council of the Tlingit and Haida Indians tribes is not a federally recognized tribe but is a regional organization created for a very specific purpose. The Act of June 19th, 1935, established that the Central Council is the entity under which the Tlingit and Haida Indians could bring suit in Federal Court for the taking of their community property. The Central Council was delegated the responsibility for establishing a roll of Tlingit and Haida Indians entitled to benefit from the judgment funds awarded by the court. Consequent amendments to the 1935 Act gave the council broader responsibilities for the use and distribution of the judgment funds. Thus, the Central Council is recognized by statute for the limited purpose of distributing judgment funds; not as a tribal government exercising general governmental powers over its members and member villages as contemplated by the

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[509] Id. In the Congressional Record Senator Murkowski appears to have been present on the floor and to have spoken to the Senate. However, the C-Span video recording of the floor session demonstrates that he was not and his statement was inserted into the Congressional Record before its publication but after the voice vote to pass S. 1784. See http://www.c-span.org/video/?52585-1/senate-session, at 50:40-51:23 (Senate floor session, Nov. 24, 1993).

Federal Register list.[510]

Several years earlier Edward Thomas had hired an attorney named Philip Baker-Shenk who had been a member of the staff of the Senate Select Committee on Indian Affairs to represent the Central Council on Capitol Hill.[511] After the hearing on S. 1784 Baker-Shenk persuaded Tadd Johnson, the staff director of the Subcommittee,[512] to disregard the BIA's opposition to the bill.

In June Johnson sent members of the staff of the Committee on Natural Resources the outline of a substitute bill that Johnson said would "appease the administration, the villages [that were members of the Central Council], and the Central Council." Section 2 of the bill "reaffirmed and acknowledged" that "the Central Council of Tlingit and Haida Indians is a federally recognized Indian tribe possessing all the attributes of inherent sovereignty which have not been specifically taken away by Acts of Congress and which are not inconsistent with such

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[510] Central Council Tlingit and Haida Status Clarification: Hearing on S. 1784 Before the Subcomm. on Native American Affairs of the H. Comm. on Natural Resources, 103d Cong. 5-6 (1994) (statement of Debra Maddox, Acting Director, BIA Office of Tribal Services).

[511] In 1994 Philip Baker-Shenk was a member of Pirtle, Morisset, Schlosser & Ayer, a law firm that specialized in representing Native American clients.

[512] 1993-1994 Congressional Directory, at 457. And see also https://cla.d.umn.edu/american-indian-studies/faculty-staff/tadd-johnson ("From 1990-1995, [Tadd Johnson] served as counsel and staff director to the United States House of Representatives Committee on Natural Resources in the Office of Indian Affairs and the Subcommittee on Native American Affairs").

tribal status."[513]

A month later, Baker-Shenk gave Johnson a bill text that was a rewrite of the text of the version of S. 1784 that had passed the Senate.[514] After meeting with Johnson and other staff members, two weeks later Baker-Shenk sent a second rewrite,[515] and another month later a third.[516]

On September 28, 1994 the members of the Committee on Natural Resources met, accepted an amendment to S. 1784 that Representative Bill Richardson, the Chairman of the Subcommittee on Native American Affairs, offered, and then reported the bill. Representative Richardson's amendment was a rewrite of the bill text that had been written by Tadd Johnson based on the bill text Philip Baker-Shenk had given to Johnson. The rewritten text contained a "finding" that "the United States has acknowledged the Central Council of Tlingit and Haida Indian Tribes of Alaska pursuant to the Act of June 19, 1935 as a federally recognized tribe." And section 3 of the text announced that "Congress

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[513] Memorandum entitled "Central Council of Tlingit and Haida," from Tadd Johnson to Jeff Petrich and Julie Petro, June 14, 1994. S. 1784 House Records.

[514] Memorandum entitled "S. 1784," from Philip Baker-Shenk to Tadd Johnson, July 12, 1994. Id.

[515] Letter entitled "Revisions as Discussed During our July 22, 1994 Meeting on S. 1784," from Philip Baker-Shenk to Jeffrey Petrich, Deputy General Counsel, Committee on Natural Resources, July 23 1994. Id.

[516] Memorandum entitled "Central Council," from Tadd Johnson to Jeff Petrich, Sept. 22, 1994. Id.

reaffirms and acknowledges that the Central Council of Tlingit and Haida Indian Tribes of Alaska is a federally recognized Indian tribe."

Prior to the vote to report S. 1784, Alaska Representative Don Young, the ranking Republican member of the Committee, announced that he supported Representative Richardson's amendment because: "This is an instance where the Tlingit-Haida Council had been the main council for this group of villages for many years and then were inadvertently left off the list. This is a way we can protect the villages' recognition and recognize the role of the council. This is strongly supported by the people of the Tlingit-Haida region."[517] Then Wyoming Representative Craig Thomas, the ranking Republican member of the Subcommittee on Native American Affairs, distributed a written statement in which he explained his understanding of the situation as follows: "I found the BIA decision to remove Tlingit-Haida from the list of recognized tribal entities - after almost twelve years of its inclusion thereon - to be highly worrisome. The decision was taken precipitously, with little or no notification to or discussion with the Congress." The statement concluded by vouching that "S. 1784 sets no precedent for the legislative recognition of a native group outside the BIA's Federal

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[517] Transcript of Proceedings, Mark-Up of S. 1784. Id.

Acknowledgment process. S. 1784 would simply restore a previously-recognized group to the BIA's list of recognized tribes, and is therefore only analogous to restoration legislation."[518]

Continuing those mischaracterizations of the Central Council's prior legal status, the Committee's report on S. 1784, which Tadd Johnson (and Philip Baker-Shenk?) undoubtedly wrote, asserted that the "Central Council has its legal organizational roots as a Tribe in a 1935 Act which refers to a 'central council' of Tlingit and Haida Indian tribes. The 1935 Act was substantially amended in 1965. The Senate and House Committee Reports accompanying the 1965 amendments clearly show that Congress intended those amendments to confirm Federal recognition of Central Council as a tribal government."[519] The report pointedly made no mention of the fact that the Director of the BIA Office of Tribal Services had testified that the 1935 and 1965 acts said no such thing.

With the One Hundred and Third Congress rushing to adjournment, in October Representative Richardson packaged the text of the version of S. 1784 the Committee on Natural Resources had reported and the texts of two other Indian-related bills into

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[518] Id.

[519] H.R. Rep. No. 103-800, at 2 (1994).

a single bill, H.R. 4180. On Representative Richardson's motion, the House then suspended its rules and passed H.R. 4180 on an voice vote.[520]

Five days later, with no explanation of the bill's content, the Senate passed H.R. 4180 on another voice vote.[521] The next day Senator Murkowski issued a statement in which he asserted that "We're not setting a precedent for federal recognition of tribes. We are simply restoring the former status by placing the Central Council back on the list."[522]

Since the Senate's passage of the bill text Tadd Johnson had written based on the bill text the Central Council's lobbyist had given to Johnson explicitly designated the Central Council as a federally recognized tribe, the Senator either did not read the bill before he issued the statement or he read it and did not understand the legal consequences that the One Hundred and Third Congress's enactment of the bill would bring about.

Because the BIA supported the two bills to which S. 1784 had been attached, on November 2, 1994 President Bill Clinton signed H.R. 4180 into law as Public Law No. 103-454. As a consequence, for more than twenty years the Central Council has been the

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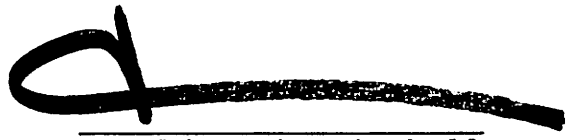
[520] 140 Cong. Rec. 27244-27246 (1994).

[521] Id. at 29537. And see also id. at 28832-28833.

[522] "Tribal Status Restored," Anchorage Daily News, Oct. 9, 1994.

governing body of a "federally recognized tribe."[523] But on June 18, 1934 the Central Council was not a "recognized Indian tribe" and, because on that date it did not exist, it was not "under Federal jurisdiction."

DATED: December 13, 2018



Donald Craig Mitchell

[523] See most recently State v. Central Council of Tlingit and Haida Indian Tribes of Alaska 371 P.3d 255, 259 (Alaska 2016) ("The Central Council of Tlingit and Haida Indian Tribes of Alaska is a federally recognized Indian tribe based in southeast Alaska").

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Re: Request to Rescind, Correct and Republish Bureau of Indian Affairs List of Recognized Tribes.

Dear Mr. Brown and Mr. Lavell:

This is to request you to rescind the list of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," published on Dec. 29, 1988, 53 Fed. Reg. 52829 - 52835, and publish a new list which corrects the errors and ambiguities of the 1988 list and explicitly recognizes the tribal status of Alaska Native Villages and other tribes. It is clear that Alaska Native villages are tribes and that the 1988 BIA list substantively and procedurally violated federal law.

We further ask you to ensure that the new list is completely accurate -- that the villages that were impermissibly left off the earlier lists are included on the new list. This request is based on the enclosed Memorandum and made on behalf of the Alaska Native Coalition; Tlingit and Haida Indian Tribes of Alaska; Tanana Chiefs Conference; Association of Village Council Presidents; Inupiat Community of the Arctic Slope; Sitka Community Association; Native Village of Tanana; Aleut Community of St. Paul; Copper River Native Association; Aleutian Pribilof Islands Association; The North Pacific Rim; Kodiak Area Native Association; Shoonaq Tribe of Kodiak; Native Village of Venetie Tribal Government and the numerous other Native communities and organizations represented by the undersigned which hav a vital interest in the federal recognition of Alaska Native tribes.

Thank you for your consideration of this urgent request. We look forward to working with you on it, and on the other critical lega issues facing the Alaska Native community.

Sincerely,

ATTACHMENT A

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June 15, 1990

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RE: BIA List of Federally Recognized Tribes.

Dear Bill:

As you are aware it is critical that the Bureau issue a new list of federally recognized tribes in Alaska before the Supreme Court rules on the State's cert. petition in Noatak v. Hoffman, 896 F.2d 1157 (9th Cir. 1990).

We thought it would be helpful; so we are enclosing a draft 1990 BIA list of federally recognized tribes in Alaska. In the preamble we attempt to set forth the circumstances giving rise to publication of the 1988 list, the problems it presented and the changes required to resolve them in the proposed 1990 list.

Most importantly the 1990 draft unequivocally and expressly acknowledges the tribal status of the listed villages and regional tribes. The federal acknowledgement language is taken verbatim from 25 C.F.R. Part 83, Sections 83.2 and 83.11.

On the assumption that it might be easier and quicker to get a new list out of the Department we have deleted all ANCSA Native Corporations and Groups with a statement that they would be included on a separate list of Alaska Native entities eligible for funding and services to be published in the near future. This, for the time being, would finess the problem posed by the Justice Department's letter to Senator Inouye, i.e. that federal funding untied to tribal status is unconstitutional.

We are also enclosing copies of the Juneau Area Director's Memorandums of January 13 & 23, 1988 which make a number of recommendations to correct errors and deficiencies in the 1988 list, all of which we have followed in the enclosed

ATTACHMENT B

draft except for his recommendation to restore the language of the 1985-86 preamble. We do not believe that language is sufficiently clear to affirmatively resolve the tribal status question. Accordingly, we urge you to incorporate the federal acknowledgement language from our draft. We have, however, corrected the names of the Traditional Councils for the following villages (based on information obtained from the Juneau Area Office, the affected tribes or our files):

1988 LIST NAME	CORRECTED NAME
Aukwon (Aukquon) (as listed in the 1/13/88 BIA Memo)	Aukwon (Aukquon) Traditional Council (aka Aukwon Tribe Juneau)
Central Council of Tlingit and Haida Indian Tribes of Alaska	The Tlingit and Haida Indian Tribes of Alaska (aka The Central Council of Tlingit and Haida Indian Tribes of Alaska)
Native Village of Marshall (aka Fortuna Ledge)	Takchugmute Traditional Council (aka Village of Takchak) (aka Marshall)
Napamute, Native Village of Napamute	Napamute, Native Village of Napamute (aka Native Village of Napiamuit)
Ohogamiut, Village of Ohogamiut	Ohogamiut, Village of Ohogamiut (aka Village of Ohogamuit)
Paimiut Native Village	Piamiut Native Village (aka Piamuit Native Village)
Unalaska Tribal Council	Unalaska Tribal Council (aka Qualingin Tribal Council)
Kalskag, Village of Kalskag	Kalskag, Village of Kalskag (aka Village of Upper Kalskag)

DELETED FROM 1988 LIST

St. George
St. Paul

These two communities were deleted because duplicative. They are the same as "Pribilof Aleut Communities of St. Paul and St. George Islands."

Thanks again for all your help on Tyonek v. Puckett.

Best regards,

Lare Aschenbrenner

Reid Chambers

Lloyd Miller

David Case

Eric Smith

Fran Ayer

cc: Enclosures

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January 14, 1992

Lynn Forcia, Chief
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Re: Comments on Proposed Amendments to Federal Acknowledgement Procedure Regulations, 25 CFR Part 83, 56 Fed. Reg. 47320-30, as they apply to Alaska and request to rescind and republish 1988 list of Federally Recognized Tribes.

Dear Ms. Forcia:

The Bureau's proposed amendments to the existing Federal Acknowledgment Procedure (FAP) regulations, 56 Fed. Reg. 47320-30, include several positive changes which should improve the Acknowledgment process in certain respects. We endorse these changes, and commend the Bureau for pursuing them. There are, however, other amendments which will make it more difficult, if not impossible, for Native American groups with otherwise meritorious petitions to satisfy the tribal status requirements solely for lack of written documentation of certain periods of their history. The latter amendments some of us address under separate cover. Our joint comments here and in the attached memorandum are directed exclusively to the Department's treatment of the tribal status of Alaska Native Villages and other tribes under the existing and proposed amendments to the FAP regulations.[1]

The basic problem with the proposed amendments is that they fail to clearly acknowledge the long-recognized tribal status of 230 Alaska Native Villages. As a result,

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[1] Other tribes include the two regional tribes, the Tlingit and Haida Indian Tribes of Alaska and the Inupiat Community of the Arctic Slope, and the Kenaitze Indian Tribe of the Kenai peninsula.

ATTACHMENT C

the Department invites continued challenges to their tribal status. These challenges, which the Department's equivocation encourages must be addressed by each Village on a case-by-case basis. All questions of tribal *power* aside, the Department has a trust responsibility to support and protect the tribal *status* of Alaska Native Villages and the privileges and benefits flowing from that status. As written and explained however, the proposed regulations suggest that Alaska Native Villages could be left off future lists published leading to the possible, albeit illogical, conclusion that Alaska Native Villages would then have to petition individually for administrative recognition under the new regulations to obtain service eligibility under a new "modified process." As explained below, the Department should simply confirm what is already clear - Alaska Native Villages are federally recognized tribes.

It bears repeating that the federal government has a very substantial commitment to Alaska Native Villages. Congress and the Department provide millions of dollars annually in funds and services to Alaska Native Villages. On four separate occasions in the early and middle nineteen-eighties, the Department published lists pursuant to 25 CFR 83.6 recognizing the tribal status of some 200 Alaska Villages along with tribes in the lower 48 states.[2] In addition, the Secretary has approved ordinances of Villages on theses lists regulating alcohol under the federal Indian liquor laws. *See e.g.*, 51 Fed. Reg. 28779 (Aug. 11, 1986) (Native Village of Minto, Alaska); 48 Fed. Reg. 21378 (May 12, 1983) (Native Village of Chalkyitsik, Alaska); 48 Fed. Reg. 30195 (June 30, 1983) (Native Village of Northway, Alaska). Such delegations of federal authority can only be made to tribes in the political or governmental sense. *United States v. Mazurie*, 419 U.S. 544 (1975). On December 29, 1988, however, the Department's position regarding the tribal status of Alaska Villages was clouded by the publication of a new list of federally recognized "entities." 53 Fed. Reg. 52832. The confusion was generated because the 1988 list added Alaska Native corporations to the earlier lists which were restricted to Alaska Native Villages and, unlike the earlier lists, purported to be merely a list of entities entitled to federal benefits rather than a list of recognized "tribes" in the political sense.

The tribes, tribal organizations and other Native organizations represented herein call upon the Bureau to eliminate the resulting confusion by amending the proposed 1991 regulations to expressly and unequivocally acknowledge the tribal status *in the political sense* of the Alaska Native Villages and other Alaska tribes (excluding ANCSA corporations) set forth on the Secretary's previously published lists of federally recognized tribes, and to rescind its 1988 list and publish a new list which explicitly

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[2] 47 Fed. Reg. 53133 (Nov. 24, 1982); 48 Fed. Reg. 5682 (Dec. 23, 1983); 50 Fed. Reg. 6058 (Feb. 13, 1985); and 51 Fed. Reg. 25118 (July 10, 1986).

recognizes their tribal status. As with all such prior lists, the issues of tribal powers and land status need not and should not be addressed in any manner whatsoever.

The Department's equivocation as to whether Native Villages possess tribal status has had profoundly adverse effects. It has made it far more difficult for Native Village governments to protect Native children from abuse and neglect through child custody and adoption proceedings, to attack severe problems of alcohol and drug abuse, assault and trespass, and to keep the peace generally in their 230 isolated communities. It has encouraged State and local governments as well as non-Native individuals and corporations to reject and challenge the political status of the Villages. While the Department may not be in a position to solve all these problems, surely it can refrain from contributing to them.

The 1988 list has had other adverse consequences. It has, for instance, provided the Office of Management and Budget (OMB) with an excuse for repeated attempts to delete or slash badly needed programs benefitting Alaska Natives. Both the Department of Justice and the President have questioned the constitutionality of federal Indian legislation untied to tribal status. (Copies of the President's Statement of May 25, 1990 and the Justice Department's opinion letter to Senator Inouye of January 30, 1989 are attached.) Although we strongly disagree with the position of Justice, it poses a significant threat we do not take lightly. So long as the tribal status of Native Villages remains under challenge the Justice opinion provides OMB with ammunition to fight the federal deficit at the expense of Alaska Natives. And, it provides an opening for opponents of Indian programs in Alaska to bring suit to cut them off.

The Bureau's explanation of the proposed amendments to the FAP regulations acknowledges the problem caused by including Native corporations on the 1988 list but does nothing to correct it. 56 Fed. Reg. 47320-21. Although the Bureau promises to consult with Alaska Natives concerning the development of "a modified process . . . so that Alaska organizations may seek inclusion on the list of entities recognized and eligible for services without using the present acknowledgement procedure," any such process, by the Bureau's express terms, would only apply to Villages which are not already "on the list of entities recognized and eligible for services," which of course, the 230 Villages in question already are. 53 Fed. Reg. at 52829. And it is the latter whose status the Department's 1988 list casts into doubt and which only the Department can rectify.

The 1988 list casts into doubt the political status of the listed Villages not only because it includes Native corporations, which obviously are not "tribes" in the political sense, but also because its preamble can be read as an attempt to rescind the government's prior recognition of their tribal status as expressed in the Secretary's earlier lists and in numerous acts of Congress. Once tribal status is recognized, however,

(whether by the executive or legislative branch) the Secretary is thereafter barred from unilaterally rescinding it. Upon recognition, certain rights and powers automatically attach, both proprietary (such as the land protections of the Non-intercourse Act, 25 U.S.C. 177) and governmental (such as the power to pass tribal laws and to receive the benefits and protections of the Federal Trust responsibility to Indian tribes). As Felix Cohen put it, "once powers of tribal self-government or other Indian rights are shown to exist . . . they may not be extinguished except by a 'clear and plain' expression of intent by Congress," F. Cohen, *Handbook of Federal Indian Law* at 224, (1982 ed.) *quoting United States ex rel., Hualpai Indians v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941), and even then only in compliance with due process of law. *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 83-85 (1977). Accordingly, once Congress recognized the Villages as tribes and the Secretary published his several lists likewise recognizing their tribal status, the Secretary could not thereafter change his mind and rescind such recognition, absent the consent of Congress. To the extent the 1988 list attempts to do so, it is substantively void.[3]

As a theoretical matter, even in the absence of past legislative and executive recognition, there can be little doubt that the Villages on the Secretary's 1988 list would ultimately be able to establish their tribal status in the Courts. This, however, would require the filing of some 230 federal lawsuits at a cost which virtually none of the Villages could afford. Further, the trial of 230 tribal status cases would be enormously time-consuming and not likely be completed before the middle of the 21st century. Fortunately, all this is simply unnecessary given past congressional and executive recognition of the Villages' tribal status. It is also useless - all it would do is place the Villages on the very list they are already on and confer upon them benefits which they already enjoy.

It has been suggested from time to time that somehow Alaska Native Villages do not qualify for federal recognition in the first place. This is demonstrably wrong. The Supreme Court concluded early on that when either the Congress or the executive has recognized a tribe, the judiciary must defer to their judgment.

> In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and the other political departments of the government, whose more special duty it 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 (1866). *Accord., Baker v. Carr*, 369

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[3] As we point out in the attached memo (part V.), it is also procedurally void for failure to follow the public notice and comment requirements of the Administrative Procedure Act.

U.S. 186, 215-17 (1962). The courts have never deviated from this position. No congressional or executive determination of tribal status has ever been overturned by the judiciary. Cohen, *supra*, at 5.[4] Indeed, the only limitation on the authority of the political branches to recognize tribes is the rule against arbitrary action, that is, Congress may not take a group of non-Indians and arbitrarily call it a tribe. *United States v. Sandoval*, 231 U.S. at 46. In short, so long as it is a "distinctly Indian communit[y]," it may be federally recognized. No one has or could maintain that Alaska Native Villages are anything but "distinctly Native communities." Accordingly, there could be no claim of arbitrary action in their federal recognition and thus it is difficult to see how such recognition could ever be successfully challenged.

As noted earlier, the Villages on the 1988 list are already receiving federal funds and services; therefore, it will not cost the government one additional cent to clarify their tribal status. To the contrary, by avoiding some 230 federal lawsuits, the government will save money, not to mention the time and effort it would require to defend what are ultimately indefensible cases.[5]

Finally, it has, for many years, been the Department's position that it, rather than Congress or the Courts should determine what Native groups should be recognized as tribes. Indeed, the Department has repeatedly objected to Congressional recognition legislation on a tribe by tribe basis. Most recently *See* the Department's Opposition to the Bill recognizing the Lumbee tribe of North Carolina dated August 1, 1991, a copy of which is attached,

The Bureau's proposed amendments to the FAP regulations, in conjunction with the Solicitor's forthcoming opinion on the powers of Alaska Native Villages, afford the

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[4] Moreover, the Federal Government can recognize a Native community as a tribe *regardless* of whether it was a historical tribe. Although the evidence overwhelmingly confirms that Alaska Native Villages are historical tribes, historical tribal status has never been a prerequisite to federal recognition. Congress has repeatedly recognized non-historical Native groups as Indian tribes. It has on numerous occasions created, consolidated and confederated tribal governing bodies of several ethnological tribes, sometimes even speaking different languages. Even "where no formal Indian political organization existed, scattered communities were sometimes united into tribes." Cohen, *supra*, at 6. Examples are the Confederated Tribes of the Colville Reservation and the Colorado River Indian Tribes of the Colorado River Indian Reservation. On the other hand, larger tribes have often been broken down into smaller units with each sub-group being recognized as a separate "tribe." The Sioux and Chippewas are examples. *See* Act of Mar. 2, 1889, ch. 405, 25 Stat. 888 (dividing the great reservation of the Sioux into seven separate reservations); Memo Sol. Int., Feb. 8, 1937 (Mole Lake Band of Chippewas), 1 Op. Sol. On Indian Affairs 724-25 (U.S.D.I. n.d.).

[5] The Government will not only have to bear the direct costs of defending 230 lawsuits (not to mention the costs of the judiciary), it will also no doubt pay for much of the Villages' litigation expenses through the Equal Access to Justice Act and through ANA grants to hire anthropologists, historians and lawyers.

Department a unique opportunity to lay to rest, once and for all, the burning issue of tribal status along with the adverse consequences flowing from the present uncertainty. For the reasons set forth here, and in the attached memorandum, we urge you to do so.

Respectfully submitted,

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February 12, 1993

Hon. Bruce Babbitt, Secretary
United States Department of the Interior
1849 C Street
Washington, D.C. 20240

Re: Request to partially withdraw Solicitor's Opinion of January 11, 1993 and expressly recognize tribal status of Alaska Native villages.

Dear Secretary Babbitt:

The most fundamental and far-reaching issues confronting Alaska Natives are whether their villages possess the same federally recognized tribal status and powers as tribes in the lower 48 states. The State insists they possess neither, but rather are merely racially-based social "entities" with no governing powers whatsoever. The Department has waffled on these issues for over two decades, most recently in the last minute Solicitor's Opinion from the Bush Administration that refuses to acknowledge the villages' recognized status and endorses the State's claim that they are not "Indian country" and therefore lack any governing powers over land or non-members. The Opinion is in error on both scores.

As we demonstrate below, both the Congress and the Executive branch have repeatedly and expressly recognized the villages' tribal status, and their villages are unquestionably "dependent Native Communities" and thus "Indian country," within the meaning of 18 U.S.C. § 1151. Therefore, in order to affirmatively resolve the villages' tribal status and erase the Opinion's erroneous conclusion with respect to their governing powers, we request you to: 1) publish a

ATTACHMENT D

new list of Federally Acknowledged Tribes that expressly recognizes the tribal status of Alaska Native villages;[1] and 2) withdraw the former Solicitor's Opinion of January 11, 1993 insofar as it denies the existence of Indian country and tribal territorial powers in Alaska.[2]

For many years the Department has refused to take a firm stand on the tribal status or powers of Alaska Native villages on the ground that such questions should be left to the courts. With the Department having abdicated its responsibility, the villages had no choice but to seek a judicial resolution of these matters. After over ten years of hard-fought litigation (*see* cases cited in memo to Lynn Forcia, n.1, above) the issues have still not been totally resolved but the federal decisions undeniably favor the villages on both questions. Solicitor Sansonetti, in a move unquestionably calculated to undercut the legal position of the villages in these cases, came forth on January 11, 1993 with an 11th hour Opinion. This Opinion was issued over the strong and unanimous objection of the entire Native community as well as the Clinton transition team, which repeatedly requested that it be withheld in order that the new Administration could make its own independent evaluation of these matters.

The Solicitor examined two issues:

1) whether Alaska Native villages are recognized as "Native American tribes?"

2) whether such tribes have governmental authority over land and non-

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[1] This request is supported by the attached memorandum and our earlier letter and supporting memorandum on the same subject to Lynn Forcia, Chief of the Branch of Acknowledgement and Research, of January 14, 1992, which are also attached.

[2] There is ample Departmental precedent for the partial withdrawal of a Solicitor's Opinion. *See* 88 I.D. 253 (1981) and 88 I.D. 1055 (1981).

members of the tribe?

His Opinion answers the first question in the affirmative, concluding that Native villages are tribes, however, it declines to state which villages possess *recognized* tribal status. In answer to the second question the Solicitor concludes that Native villages are not "Indian country" and therefore lack any governing power over land and non-members of the tribe.

TRIBAL STATUS

The Solicitor's conclusion that villages are tribes is undoubtedly correct, so far as it goes. But the Opinion's failure to acknowledge the villages' federally recognized status is contrary to numerous laws of Congress as well as repeated acts of express recognition by this Department. Moreover, this failure will require each of the 230 Native villages to bring separate lawsuits to prove their tribal status, or as the Ninth Circuit put it, prove they are the "modern day successors to historically sovereign bands of Native Americans." *Native Village of Venetie IRA Council v. Alaska,* 944 F.2d 548, 558-59 (9th Cir. 1991). There is little doubt they can provide such proof, but the expense of hiring the lawyers, historians and anthropologists required, will be utterly prohibitive for virtually all villages.[3] Nor are the few organizations that provide legal aid to Native villages capable of representing 230 villages in 230 federal lawsuits.

Thus, in the absence of Executive action, the tribal status of Alaska Native villages will remain in a state of limbo – precisely where the Interior Department's equivocation has left them for the past two decades. There is no conceivable need or justification for this situation to continue.

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[3] A rough estimate of the expert fees, travel costs and attorney time expended on the *Venetie* case totals over $500,000.00 to date.

Prior to 1971 the federal government had a far different position. In fact, from the purchase of Alaska in 1867 to the Alaska Native Claims Settlement Act (ANCSA) in 1971, federal officials and federal courts have, with the exception of the later years of the last century, taken the position that Alaska Native villages possess the same tribal status as tribes in the lower 48. Since 1971, however, the Interior Department has equivocated on this issue, most recently in the Secretary's list of federally acknowledged tribes published on December 29, 1988, which is ambiguous on the subject,[4] and the recent Solicitor's Opinion which "presumes" that Alaska Native villages are tribes, but stops short of identifying which villages have recognized tribal status.

The Department's equivocation has had a devastating effect upon the villages in the state courts. It has enabled the Alaska Supreme Court to take the position that aside from Metlakatla "there are not now and never have been tribes of Indians in Alaska as that term is used in Federal Indian Law." *Native Village of Stevens v. Alaska Management & Planning,* 757 P.2d 32, 35-36 (Alaska 1988); *accord, In the Matter of F.P., W.M. and A.M., slip op.,* No. 3906 (Dec. 18, 1992). Had the Department unequivocally recognized the tribal status of Native villages, even the Alaska Court acknowledges it would be bound by that determination. *Atkinson v. Haldane,* 569 P.2d 151, 163 (Alaska 1977).

The State's position, encouraged by the Department's ambivalence, directly affects daily life in the villages. The State, for example, refuses to recognize the

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[4] 53 Fed. Reg. 52829, 52832. This list can be and has been construed to disclaim any intention to recognize the "governmental" status of Alaska villages and rather to merely identify them as eligible for federal funds and services. *Alyeska Pipeline Service Co. v. Kluti Kaah Native Village of Copper Center,* No. A87-201 Civil, ORDER (Tentative Decision) at 20-25 (D. Alaska of Jan. 17, 1992).

validity of existing tribal adoptions, which number in the thousands. *See Native Village of Venetie IRA Council v. Alaska,* 944 F.2d 548 (9th Cir. 1991). As a result, Native adoptive parents are denied Aid for Families with Dependent Children (AFDC) and other benefits. The State refuses to recognize tribal sovereign immunity from suit, thereby subjecting tribes to the threat of bankruptcy, foreclosure, loss of lands, and ultimately their very existence. *Native Village of Stevens v. Alaska Management & Planning, supra; see Nenana Fuel Co. v. Native Village of Venetie,* 834 P.2d 1229 (Alaska 1992). The State also refuses to recognize tribal taxing powers which are indispensable to the provision of critical social services and the effective operation of tribal governments. *Alaska v. Native Village of Venetie,* 856 F.2d 1384 (9th Cir. 1988).

In fact, the State maintains that because the villages have not been federally recognized as tribes, they lack any inherent governing powers whatsoever – even over their own members. Therefore, according to the State, village councils have no authority to exercise the most basic power of a civilized community – the power to keep the peace – a power which they have exercised since time immemorial. The State's unceasing hostility to Native tribal status, together with Interior's equivocation, has inevitably had a chilling effect upon village actions, particularly their exercise of governmental functions. So long as the federal government wavers with regard to their tribal status, the villages' goal of self-determination will be denied.

The only alternatives for resolving the tribal status issue, outside of hundreds of court cases, lie with the political branches of government. But so long as the State government and the Alaska congressional delegation remain adamantly opposed to Native tribal status, there is little chance of a congressional

resolution. Accordingly, the only practical remedy is Executive action. As Secretary of the Interior you unquestionably have the legal authority to resolve this burning question and can do it with a stroke of your pen. The Supreme Court has repeatedly held that when either the Executive or the Congress has recognized a tribe, the judiciary must defer to their judgment.

> In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and the other political departments of the government, whose more special duty it 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 (1866), *accord, Baker v. Carr,* 369 U.S. 186, 215-17 (1962). The courts have never deviated from this position. No Congressional or Executive determination of tribal status has ever been overturned by the judiciary. F. Cohen, *Handbook of Federal Indian Law* at 5 (1982 ed.). Accordingly, to resolve the tribal status issue once and for all, the Department need only rescind its 1988 list of Federally Acknowledged Tribes and publish a new list that expressly and unequivocally recognizes that Alaska Native villages and regional tribes[5] have the same recognized tribal status as tribes in the lower 48 states.[6]

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[5] The regional tribes are the Tlingit and Haida Indian Central Council of Alaska, the Kenaitze Indian Tribe of the Kenai peninsula and the Inupiat Community of the Arctic Slope.

[6] All of the villages on the 1988 list are already receiving federal funds and services; therefore, it will not cost the government one additional cent to clarify their tribal status. To the contrary, by avoiding some 230 federal lawsuits, the government will save money, not to mention the time and effort it would require to defend what are ultimately indefensible cases. The government will not only have to bear the direct costs of defending 230 lawsuits (not to mention the costs of the judiciary), it will also likely end up paying for much of the villages' litigation expenses through the Equal Access to Justice Act, ANA grants or BIA grants to hire anthropologists, historians and lawyers.

INDIAN COUNTRY

The Solicitor's conclusion that Native villages are not "Indian country" and therefore lack governing powers over land and non-members renders his tentative acknowledgement of tribal status virtually meaningless – a cruel hoax. The effect of this conclusion, if accepted by the courts, would permanently deny Alaska Native tribes the inherent powers of self-government universally enjoyed by tribes in the lower 48 states. Such conclusion would, for example, preclude Alaska tribes from exercising police powers, regulating alcohol, imposing taxes or enforcing juvenile codes. Indeed, it would prohibit the use of tribal courts for virtually any substantive purpose other than those expressly delegated by Congress. The Alaska Judicial Council, for example, has recently issued reports on dispute resolution and sentencing, which recommend the utilization of tribal courts. The Opinion's negative conclusion on tribal territorial powers would negate both recommendations.[7]

The Indian country section of the Opinion poses an ominous threat to the villages in the pending cases. Although not binding, courts will no doubt give it serious consideration and perhaps even deference because it expresses views of the agency with the most experience in Indian Affairs.[8] While the Opinion is not

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[7] Alaska Judicial Council, *"Resolving Disputes Locally: Alternatives for Rural Alaska"* at ES-11 and ES-13 (August 1992); Alaska Judicial Council, *"Sixteenth Report: 1991-1992 to the Legislature and Supreme Court"* at 13 (January 1993).

[8] That the Opinion is being taken seriously by the courts has already been demonstrated. Immediately, after the Opinion was issued Chief Federal District Judge Russell Holland vacated the trial date in *Venetie v. Alaska, supra,* (which raises both the question of tribal status and Indian country) " . . . for the reason that the court has been informed of a recent Opinion of the Secretary of the Interior on Issues of tribal status and Indian lands in Alaska." *See* Order of Jan. 20, 1993.

binding on the courts, the Solicitor's finding that Alaska tribes lack any real powers *may bind you* as Secretary of the Interior. It arguably constrains your discretion to provide assistance to Alaska tribes. For example, you may well be barred from approving any tribal ordinance seeking to ban or regulate the importation of alcohol, thereby removing a critical weapon in the tribes battle against alcohol abuse in rural Alaska. The State and other enemies of tribal self-determination will undoubtedly argue that you are barred from approving any proposed constitution submitted under the Indian Reorganization Act which asserts jurisdiction over "Indian country," land, or non-Natives. You may also be forced to refuse requests for technical assistance in the development of tribal courts or tribal ordinances asserting territorial jurisdiction, such as the preparation of tribal tax or licensing codes that provide critical revenues to tribes.

As we demonstrate in the attached Memorandum, the Opinion's failure to acknowledge the federally recognized tribal status of Alaska Native villages and its total rejection of tribal territorial powers are contrary to federal court decisions, past opinions of the Solicitor and fundamental principles of federal Indian law. Accordingly, we urgently request you to: 1) publish a new list of Federally Acknowledged Tribes that expressly recognizes the tribal status of Alaska Native villages; and 2) withdraw the Solicitor's Opinion of January 11, 1993 insofar as it denies the existence of Indian country and tribal territorial powers in Alaska.

Thus, in your hands Mr. Secretary lies an historic opportunity to halt the discriminatory treatment and manifest injustice that Alaska Native tribes have

suffered for so many years at the hands of the federal government.

Very truly yours,

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MEMO

TO: Mike Walleri, Eric Smith, Dave Case, Bart Garber, Kari Bazzy Garber, Sky Starkey, Lloyd Miller, Robert Hickerson, Judy Bush, Paul Tony, Aleen Smith, Bruce Baltar, Bert Hirsch and Hans Walker

FROM: Lare A. & Bob A.

DATE: March 20, 1993

RE: New list of Federally Recognized Tribes

Please find for your review a draft letter to the Assistant Secretary, a draft 1993 Federal Register List of Federally Recognized Tribes in Alaska and a draft Explanation and Rationale for the new list.

We have been in contact with Scott Keep and he believes the time is right to follow up on our letter to Secretary Babbitt. The plan is to get Eddie Brown (who is still in office) to direct the Bureau to review the proposed new Federal Register list and come up with its own draft list, and to give this matter priority starting *now*!

If we wait for the appointment and confirmation of the new Assistant Secretary before we even start this process, we will be just that much further behind.

We plan to have John Echohawk ask Bruce Babbitt to *direct* Eddie Brown to take this action, if necessary. And speaking of that sort of thing, you'll be happy to learn that on March 17th the Justice Department filed its application to participate as Amicus in the *Tyonek* case. So *now* is the time to strike!

We have worked closely with Niles Cesar, Regina Parot and Andy Hope of the Juneau Area Office to identify the tribes on the proposed list along with the rationale and justification for their inclusion. They fully support this effort. If you are aware of any villages that have been erroneously omitted, now is the time to put them on. The Juneau Area office will be checking the villages on the list to insure the accuracy of the IRA or traditional names before this package goes out.

Please review and give us your suggested changes by 5:00 p.m., Tuesday, March 23rd. We have not enclosed the exhibits because they are too voluminous. If you need one or more of them give us a call.

ATTACHMENT E

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DRAFT

March 19, 1993

Eddie Brown, Assistant Secretary
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United States Department of
the Interior
1849 C Street
Washington, D.C. 20240

Dear Secretary Brown:

In our letter of February 12, 1993 to Secretary Babbitt we requested the Department to publish a new list of Federally Acknowledged tribes that expressly recognizes the tribal status of Alaska Native villages. This letter supplements that request, a copy of which is attached.

It is essential that the Bureau issue a new list of federally recognized tribes in Alaska before the Supreme Court rules on the *certiorari* petition in *In the Matter of F.P., et al.* 843 P.2d 1214 (Alaska 1992) which squarely presents the question as to whether Alaska Native villages possess tribal status; and likewise before the Federal District Court for Alaska rules on the same question in the pending cases of *Tyonek v. Puckett*, No. A82-369 Civil (D. Alaska); *State v. Venetie*, No. F87-051 Civil (D. Alaska); *Native Village of Venetie v. State of Alaska*, No. F86-075 Civil (D. Alaska); and *Alyeska v. Kluti Kaah Native Village of Copper Center*, No. A87-201 Civil (D. Alaska).

In order to expedite consideration of this request we are enclosing a draft Federal Register list of federally recognized tribes in Alaska. In the preamble we attempt to set forth the circumstances giving rise to publication of the 1988 list, the problems it created and the changes required to resolve them in the proposed 1993 list. Most importantly, this 1993 draft unequivocally and expressly acknowledges the tribal status of the listed villages and regional tribes. The federal acknowledgement language is taken verbatim from 25 C.F.R. Part 83, Sections 83.2 and 83.11.

To eliminate ambiguity and confusion we have deleted all ANCSA Native Corporations and Groups with a statement that they will be included on a separate list of Alaska Native entities statutorily eligible for funding and services, to be published in the near future.

We are also enclosing copies of the Juneau Area Director's Memoranda of January 13, & 23, 1989 which make a number of recommendations to correct errors and deficiencies in the 1988 list, all of which we have followed in the enclosed draft except for the recommendation to restore the language of the 1985-86 preamble. We do not believe that language is sufficiently clear to affirmatively resolve the tribal status question. Accordingly, we urge you to incorporate the federal acknowledgement language from our draft.

We have worked closely with the Juneau Area Director Niles Cesar, Regina Parot and Andy Hope of his staff in identifying the tribes on the proposed list as well as the rationale supporting their respective inclusion. The Juneau Area office strongly supports this effort. The basic justifications for the make-up of the list are set forth in the attached "Explanation and Rationale for new list of Federally Recognized Tribes in Alaska." We believe a meeting with you and representatives of the Solicitor's Office to discuss this important matter would be useful. We will be in touch to set up such a meeting soon.

Respectfully submitted,

Lawrence A. Aschenbrenner
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Heather K. Kendall
Native American Rights Fund
310 K Street, Suite 708
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Attorneys for Alaska Inter-tribal Council, Western Alaska Tribal Council, Native Village of Venetie, Kluti Kaah Native Village of Copper Center

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Paul Tony
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Attorney for Copper River Native Association

Hans Walker
Hobbs, Straus, Dean and Wilder
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Washington, D.C. 20006
Attorney for Inupiat Community of the Arctic Slope

cc: Honorable Bruce Babbitt
John Leshy
Renee Stone
John Tresize

	Original will follow VIA:
	U.S. MAIL
	OVERNIGHT MAIL
	HAND DELIVERY
	FAX ONLY

NATIVE AMERICAN RIGHTS FUND

310 "K" Street, Suite 708
Anchorage, AK 99501
Telephone: (907) 276-0680
Fax: (907) 276-2466

FACSIMILE TRANSMITTAL COVER SHEET

Date: 3-22-93 Cover Sheet: + ___ Page(s)

Time: 8:43

ATTENTION: Scott Keep.

FROM: Lare A.

RE:

Account/Case No.

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CONTACT:

NOTES: Scott,

Here is the package we ~~are~~ hope to send back to D.C. later in the week after all the attorneys & the Juneau Area Office have had their final input. Please review & if we have made some gross error please give me a call as ~~soon~~ as we can it as error free as possible.

FAX #: 202, 208-5134

Thanks

Lare A.

ATTACHMENT F

Native American Rights Fund

MEMO

TO: Mike Walleri, Eric Smith, Dave Case, Bart Garber, Kari Bazzy Garber, Sky Starkey, Lloyd Miller, Robert Hickerson, Judy Bush, Paul Tony, Aleen Smith, Bruce Baltar, Bert Hirsch and Hans Walker

FROM: Lare A. & Bob A.

DATE: March 20, 1993

RE: New list of Federally Recognized Tribes

Please find for your review a draft letter to the Assistant Secretary, a draft 1993 Federal Register List of Federally Recognized Tribes in Alaska and a draft Explanation and Rationale for the new list.

We have been in contact with Scott Keep and he believes the time is right to follow up on our letter to Secretary Babbitt. The plan is to get Eddie Brown (who is still in office) to direct the Bureau to review the proposed new Federal Register list and come up with its own draft list, and to give this matter priority starting *now*!

If we wait for the appointment and confirmation of the new Assistant Secretary before we even start this process, we will be just that much further behind.

We plan to have John Echohawk ask Bruce Babbitt to *direct* Eddie Brown to take this action, if necessary. And speaking of that sort of thing, you'll be happy to learn that on March 17th the Justice Department filed its application to participate as Amicus in the *Tyonek* case. So *now* is the time to strike!

We have worked closely with Niles Cesar, Regina Parot and Andy Hope of the Juneau Area Office to identify the tribes on the proposed list along with the rationale and justification for their inclusion. They fully support this effort. If you are aware of any villages that have been erroneously omitted, now is the time to put them on. The Juneau Area office will be checking the villages on the list to insure the accuracy of the IRA or traditional names before this package goes out.

Please review and give us your suggested changes by 5:00 p.m., Tuesday, March 23rd. We have not enclosed the exhibits because they are too voluminous. If you need one or more of them give us a call.

Attorneys

Lawrence A. Aschenbrenner
Robert T. Anderson

Native American Rights Fund

310 "K" Street, Suite 708 • Anchorage, Alaska 99501 • (907) 276-0680

Executive Director
John E. Echohawk

Main Office
1506 Broadway
Boulder, CO 80302-6926
(303) 447-8760
Fax 443-7776

DRAFT

March 19, 1993

Eddie Brown, Assistant Secretary
Indian Affairs
United States Department of
the Interior
1849 C Street
Washington, D.C. 20240

Dear Secretary Brown:

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It is essential that the Bureau issue a new list of federally recognized tribes in Alaska before the Supreme Court rules on the *certiorari* petition in *In the Matter of F.P., et al.* 843 P.2d 1214 (Alaska 1992) which squarely presents the question as to whether Alaska Native villages possess tribal status; and likewise before the Federal District Court for Alaska rules on the same question in the pending cases of *Tyonek v. Puckett*, No. A82-369 Civil (D. Alaska); *State v. Venetie*, No. F87-051 Civil (D. Alaska); *Native Village of Venetie v. State of Alaska*, No. F86-075 Civil (D. Alaska); and *Alyeska v. Kluti Kaah Native Village of Copper Center*, No. A87-201 Civil (D. Alaska).

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Respectfully submitted,

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Washington, D.C. 20006
Attorney for Inupiat Community of the Arctic Slope

cc: Honorable Bruce Babbitt
John Leshy
Renee Stone
John Tresize

DRAFT

A. EXPLANATION AND RATIONALE FOR NEW LIST OF FEDERALLY RECOGNIZED TRIBES IN ALASKA

The rationale for inclusion on the proposed list may be summarized as follows:

1. The inclusion of all 229 tribes on the proposed new list is justified because of their historical relationship with the United States Government and specifically with the Bureau of Indian Affairs, as demonstrated by, among other things, their receipt of Bureau funding and services, directly or through contractors and grantees under Public Law-93-638. *See,* Memoranda of January 13th and 23rd, 1989 from Juneau Area Director to Assistant Secretary in reference to the 1988 list of Federally Acknowledged tribes attached as Exhibits 1 and 2; and the Alaska Tribal Entities list of November 30, 1992 at page 1, attached as Exhibit 3.

2. All but 5 of these 229 tribes were also properly included on the new list because their tribal status has previously been acknowledged in one or more of the Secretary's Federal Register lists of recognized tribes. *See,* Secretarial lists of Federally Acknowledged Tribes; 47 Fed. Reg. 53133 (Nov. 24, 1982); 48 Fed. Reg. 5682 (Dec. 23, 1983); 50 Fed. Reg. 6058; (Feb. 13, 1985); 51 Fed. Reg. 25118 (July 10, 1986); 53 Fed. Reg. 52829 (Dec. 29, 1988). The five omitted villages are Aukwan, Pelican, Skagway, Tenakee and Shoonaq' (of Kodiak).

3. The inclusion of 213 villages is also justified because they are on the "modified ANCSA list" and therefore presumptively have tribal status, (Solicitor's Opinion of January 11, 1993 at 59) and because Congress has expressly defined them as "tribes" in twenty-three separate federal acts since 1971. *Id.* at 41-46. *See*

Modified ANCSA list - Juneau Area Office list of ANCSA Qualified Villages attached as Exhibit 4.

4. Inclusion of 73 IRA tribes is also justified on the ground they have previously been recognized by the Secretary pursuant to the Indian Reorganization Act; *see*, List of *Alaska Tribal Entities Organized under Indian Reorganization Act* (June 4, 1992) attached as Exhibit 5.

5. The Central Council of the Tlingit and Haida tribes and the Metlakatla tribe were included because of special Congressional legislation recognizing their tribal status. *See, Cogo v. Central Council of the Tlingit and Haida Indians of Alaska,* 465 F. Supp. 1286, 1289 (1979); and 25 U.S.C. § 495.

6. A number of tribes were also justifiably included on the basis of other acts of recognition by the Executive Branch, for example, the establishment of Executive Order Reservations for Venetie and Arctic Village, Gambell, Savoonga, Tetlin and Elim.

B. BREAKDOWN OF TRIBES ON NEW LIST

Section 43 U.S.C. § 1602(c) defines "Native Village" to mean any "tribe, band," *etc.*, listed in Sections 11 and 16 of ANCSA, now Sections 1610 and 1615. Section 1610 lists 205 villages and section 1615(a) lists 9 villages in the southeast, *i.e.*, Angoon, Craig, Hoonah, Hydaburg, Kake, Kasaan, Klawock, Saxman and Yakutat. In addition, section 1615(d)(1) lists Klukwan (Chilkat Indian Village) as eligible under the Act. Thus, a total of 215 villages are listed in sections 1610 and 1615.

Under ANCSA sections 1610(b)(2) and (3) the Secretary was authorized to

add to or subtract from the villages listed in sections 1610 and 1615. The result of these additions and subtractions is the "modified ANCSA list" referred to on page 59 of the January 11, 1993 Solicitor's Opinion. The modified ANCSA list includes 213 villages. *See,* Exhibit 4.

In addition to the 213 villages on the modified ANCSA list, nine IRA tribes were included on the proposed new list because they have previously achieved Secretarial recognition under the Indian Reorganization Act. They are the Kenaitze Indian Tribe, Sitka of Tribe of Alaska, Chilkoot Indian Association, Wrangell Cooperative Association, Ketchikan Indian Corporation, Douglas Indian Association, Native Village of Kanatak, Petersburg Indian Association and the Inupiat Community of the Arctic Slope (I.C.A.S.). Their addition raises the total on the new list to 222 tribes.

The Central Council Tlingit & Haida Tribes as well as Metlakatla were added to the new list by reason of Congressional recognition, which increases the total to 224 tribes.

Finally, the five traditional villages cited in Part A.2. above that were erroneously omitted from the 1988 list, were added to the new list because they also "have had an historical relationship with [the Bureau of Indian affairs]" and are provided funds and services directly or through contractors and grantees under PL-93-638. *See* Exhibit 1 at 2 and Exhibit 3 at 1., *supra.* The addition of these five villages raises the total of tribes on the proposed new list to 229.

DRAFT

NATIVE TRIBES WITHIN THE STATE OF ALASKA RECOGNIZED AND ELIGIBLE TO RECEIVE SERVICES FROM THE UNITED STATES BUREAU OF INDIAN AFFAIRS

AGENCY: Bureau of Indian Affairs, Interior

ACTION: Notice

SUMMARY: Notice is hereby given that the annual update of the list of tribes recognized and eligible for funding and services from the Bureau of Indian Affairs is published pursuant to 25 C.F.R. Part 83.

For Further Information Contact:

Bureau of Indian, Affairs, Division of Tribal Government Services, 18th and C Streets, N.W., Washington, D.C. 20240, Telephone: (202) 343-7445.

Supplementary Information:

This notice is published in exercise of authority delegated to the Assistant Secretary of Indian Affairs under 25 U.S.C. §§ 2 and 9 and 209 DM 8.

The Federal Acknowledgement Procedures contained in 25 C.F.R. Part 83 set forth a procedure whereby unrecognized Indian groups may document their existence as tribes with a special relationship to the United States so as to qualify them for federal acknowledgement as tribes and accordingly for federal funding and services. Section 83.6(b) requires the Secretary to publish a list of Indian tribes which are already acknowledged as such, and are receiving funding and services from the Bureau of Indian

Affairs, and therefore groups to which the Federal Acknowledgement Procedures do not apply. This list is published pursuant to section 83.6(b).

The Department first published a list of Indian Tribal Entities on February 6, 1979, with the notation that "[t]he list of eligible alaskan entities will be published at a later date." Subsequently, the Department published an updated list on November 24, 1982, which included a list of "Alaska native Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs." The preamble which described the scope and purpose of the Alaska list stated in pertinent part:

> [w]hile eligibility for services administered by the Bureau of Indian Affairs is generally limited to historical tribes and communities of Indians residing on reservations, and their members, unique circumstances have made eligible additional entities in Alaska which are not historical tribes. Such circumstances have resulted in multiple, overlapping eligibility of Native entities in Alaska. To alleviate any confusion which might arise from publication of a multiple eligibility listing, the following preliminary list shows those entities to which the Bureau of Indian Affairs gives priority for purposes of funding and services.

47 Fed. Reg. 53133-53134 (1982).

The Statement that, "unique circumstances have made eligible additional entities in Alaska which are not historical tribes" leading to "multiple, overlapping eligibility," was not directed to the tribes listed, but rather to the Native Corporations authorized by the Alaska Native Claims Settlement Act, 43 U.S.C. § 1602 *et. seq.*, which also became eligible for federal contract funding and services under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et. seq.*, and subsequent federal acts.

This statement, nonetheless, caused confusion as to the Departments' intent, with a number of Alaska Native organizations complaining that the preamble was ambiguous and cast doubt on the tribal status of Alaska Native villages and regional

tribes. In response to these complaints this statement was dropped from the subsequent lists published in 1983, 48 Fed. Reg. 56862 (Dec. 23, 1983); 1985, 50 Fed. Reg. 6058 (Feb. 13, 1985); and 1986, 51 Fed Reg. 25118 (July 10, 1986). This deletion, however, did not eliminate lingering uncertainties over whether inclusion on or exclusion from the Alaska Native Entities List constituted an official determination of the United States government as to the tribal status of the listed villages and regional tribes.

Prior to publication of the 1988 list a number of Alaska Native villages had also complained to the Department that they had been omitted from previous lists despite the fact that their tribal status had previously been acknowledged and they were already receiving funding and services from the Bureau of Indian Affairs. Other departments also made inquiry about the eligibility for their programs of entities included on or omitted from the 1982-1986 Alaska Native Entities Lists.

In addition the Department received a number of requests from Bureau personnel and other federal agencies for a list of the Alaska Native Corporations and Groups authorized by the Alaska Native Land Claims Settlement Act, since these entities had become eligible for certain benefits under the Indian Self-Determination and Education Assistance Act, and other subsequent federal acts.

In an attempt to satisfy these complaints and requests, on December 29, 1988 the Bureau published a new all inclusive list of "Native Entities within the State of Alaska Recognized and Eligible to receive services from the United state Bureau of Indian Affairs." 53 Fed. Reg. 52829, 52832 (Dec. 29, 1988).

The 1988 list departed from the previous lists in a number of respects. First it deleted the language preceding the earlier lists which defined Indian tribal entities to include "*villages, communities . . . Eskimos and Aleuts.*" (emphasis added)

Second, it deleted the language on the earlier lists which described the listed Indian groups as "Indian tribal entities which are recognized as having a special relationship with the United States."

Third, the 1988 publication greatly expanded the list of Alaska Native entities. It added most of the villages which had been erroneously left off the earlier lists (only Aukwon, Pelican, Tenakee Springs, Skagway, Shoonaq'-(Kodiak) and Tok were omitted from the 1988 list). Most significantly, it also added *all ANCSA Native Corporations and groups* without any indication as to which of the overlapping eligible entities (tribal councils, Native Corporations or groups), should be given preference in federal funding and services.

Fourth, the 1988 list changed the names of the villages with traditional councils. Earlier publications, listed traditional villages by their traditional village council names. For example, "Beaver Village," was listed as "Beaver traditional tribal community." The 1988 list merely stated "Beaver." This change raised new uncertainties regarding the tribal status of traditional villages especially since IRA organized communities, but not traditional non-IRA communities, were specifically referred to by their IRA names on the 1988 list, (*e.g.*, Akiachak is listed as "Akiachak Native Community" as designated in its IRA Constitution).

Fifth, the 1988 list contained a number of spelling errors, incorrect names, and incomplete identification of tribes.

Sixth, the Bureau added a special preamble which noted that:

> inclusion on a list of entities already receiving and eligible for Bureau funding does not constitute a determination that the entity either would or would not qualify for Federal Acknowledgment under the regulations, but only that no such effort is necessary to preserve eligibility. Furthermore, inclusion on or exclusion from this list of any entity should not be construed to be a determination by

this Department as to the extent of the powers and authority of that entity.

These changes in the 1988 publication have raised a number of questions with respect to the Department's intent and the effect of the 1988 list. The deletions in the preamble from earlier lists to all reference acknowledging the tribal status of the listed villages, and the inclusion of ANCSA Corporations which unquestionable lack tribal status in a political sense, particularly raised concerns regarding whether the 1988 list was merely intended to identify those Alaska Native entities eligible for federal funding and services, or to be a list of Federally Recognized Tribes, or both. Numerous Native villages, regional tribes and other Native organizations objected to the 1988 list on the ground that it failed to distinguish between Native corporations and Native tribes and failed to unequivocally recognize the tribal status of the listed villages and regional tribes.

The purpose of the present publication is to eliminate any doubt as to the Department's intention by expressly and unequivocally acknowledging that the villages and regional tribes listed below have the same tribal status as tribes in the contiguous 48 states. Such acknowledgement of tribal existence by the Department is a prerequisite to the protection, services, and benefits from the federal government available to Indian tribes. Such acknowledgement also means that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States.

The present list also includes those Native village tribes which were erroneously omitted from the 1988 list, and corrects other technical deficiencies in the 1988 list including incorrect tribal names and misidentified tribes.

A separate list of Native corporations and groups established pursuant to the Alaska Native Claims Act, which became eligible for Bureau funding and services under various Congressional Indian legislation will be published in the near future.

To alleviate any confusion which might arise from publication of two separate lists of Native entities eligible for federal funding and services, the present list sets forth those entities which, as noted above, the Department acknowledges to be tribes with a special government-to-government relationship with the United States and to which the Bureau of Indian Affairs gives priority for purposes of funding and services.

Afognak
Native Village of Akhiok
Akiachak Native Community
Akiak Native Community
Native Village of Akutan
Village of Alakanuk
Alatna Village
Native Village of Aleknagik
Algaaciq Native Village (St. Mary's)
Allakaket Village
Native Village of Ambler
Village of Anuktuvuk
Native Village of Andreaofski
Angoon Community Association
Village of Aniak
Anvik Village
Arctic Village
Native Village of Atka
Atkasook Village
Village of Atmautluak
Aukwan

Native Village of Barrow
Beaver Village
Native Village of Belkofski
Bethel - see Orutsararmiut Native Council
Bill Moore's Slough Native Village
Birch Creek Village
Brevig Mission Village
Native Village of Buckland

Native Village of Cantwell

Central Council of Tlingit & Haida Indian Tribes of Alaska
Chalkyitsik Village
Village of Chefornak
Native Village of Chenega
Chevak Native Village
Chickaloon Native Village
Native Village of Chignik
Native Village of Chignik Lagoon
Chignik Lake Village
Chilkat Indian Village
Chilkoot Indian Association
Chinik Eskimo Community (Golovin)
Native Village of Chistochina
Native Village of Chitina
Chuloonawick Native Village
Circle Native Community
Village of Clark's Point
Copper Center - see Native Village of Kluti Kaah
Village of Council
Craig Community Association
Village of Crooked Creek

Native Village of Deering
Native Village of Dillingham
Village of Dot Lake
Douglas Indian Association

Native Village of Eagle
Native Village of Eek
Egegik Village
Eklutna Native Village
Native Village of Ekuk
Ekwok Village
Native Village of Elim
Emmonak Village
English Bay - see Native Village of Nanwalek
Evansville Village
Eyak Native Village

Native Village of False Pass
Native Village of Fort Yukon

Native Village of Gakona
Galena Village (aka Louden Village)
Native Village of Gambell
Native Village of Georgetown
Golovin - see, Chinik Eskimo Community
Native Village of Goodnews Bay

Organized Village of Grayling
Gulkana Village

Native Village of Hamilton
Healy Lake Village
Holy Cross Village
Native Village of Hoonah
Native Village of Hooper Bay
Hughes Village
Huslia Village
Hydaburg Cooperative Association

Igiugig Village
Village of Iliamna
Native Village of Inalik
Inupiat Community of the Arctic Slope
Ivanoff Bay Village

Kaguyak (aka Akhiok Traditional Tribal Council)
Organized Village of Kake
Kaktovik Village
Village of Kalskag
Village of Kaltag
Native Village of Kanatak
Native Village of Karluk
Organized Village of Kasaan
Native Village of Kasigluk
Kenaitze Indian Tribe
Ketchikan Indian Corporation
Kiana Village
King Cove Village
King Island Native Community
Native Village of Kipnuk
Native Village of Kivalina
Klawock Cooperative Association
Klukan - see, Chilkat Indian Village
Native Village of Kluti Kaah
Knik Village
Native Village of Kobuk
Kokhanok Village
Koliganek Village Council
Kongiganak Native Village
Village of Kotlik
Native Village of Kotzebue
Native Village of Koyuk
Koyukuk Native Village
Organized Village of Kwethluk
Native Village of Kwigillingok

Native Village of Larsen Bay
Levelock Village
Lesnoi Council (Woody Island)
Lime Village
Village of Lower Kalskag

Manley Hot Springs Village
Manokotak Village
Native Village of Marshall (aka Fortuna Ledge)
Native Village of Mary's Igloo
McGrath Native Village
Native Village of Mekoryuk
Mentasta Lake Village
Metlakatla Indian Community
Native Village of Minto
Native Village of Mountain Village

Naknek Native Village
Native Village of Nanwalek (English Bay)
Native Village of Napaimute
Native Village of Napakiak
Native Village of Napaskiak
Native Village of Nelson Lagoon
Nenana Native Association
New Stuyahok Village
Newhalen Village
Newtok Village
Native Village of Nightmute
Nikolai Village
Native Village of Nikolski
Ninilchik Village Traditional Council
Native Village of Noatak
Nome Eskimo Community
Nondalton Village
Noorvik Native Community
Northway Village
Native Village of Nuigsut
Nulato Village
Native Village of Nunapitchuk

Village of Ohogamiut
Village of Old Harbor
Orutsararmiut Native Council (aka Bethel Native Village)
Oscarville Traditional Council
Native Village of Ouzinkie

Native Village of Paimiut
Pauloff Harbor Tribal Council

Pedro Bay Village
Native Village of Pelican
Native Village of Perryville
Petersbsurg Indian Association
Native Village of Pilot Point
Pilot Station Traditional Village
Native Village of Pitka's Point
Platinum Traditional Village
Native Village of Point Hope
Native Village of Point Lay
Port Graham Village
Native Village of Port Heiden (aka Meshick)
Native Village of Port Lions
Portage Creek Village (Ohgsenakale)

Native Village of Quinhagak

Rampart Village
Village of Red Devil
Native Village of Ruby
Native Village of Russian Mission (aka Chauthalve (Kuskokwim))
Native Village of Russian Mission (Yukon)

Village of Salamatoff
Sand Point Village
Organized Village of Saxman
Native Village of Savoonga
Native Village of Scammon Bay
Native Village of Selawik
Seldovia Village Tribe
Shageluk Native Village
Native Village of Shaktoolik
Native Village of Sheldon's Point
Shoonaq' (of Kodiak)
Skagway
Native Village of Shishmaref
Native Village of Shungnak
Sitka Tribe of Alaska
Village of Sleetmute
Village of Solomon
South Naknek Village
Native Village of Saint George
Saint Mary's - see Algaaciq Native Village
Native Village of Saint Michael
Aleut Community of Saint Paul Island
Stebbins Community Association
Native Village of Stevens
Village of Stony River

Takotna Village
Native Village of Tanacross
Native Village of Tanana
Native Village of Tatitlek
Native Village of Tazlina
Telida Village
Native Village of Teller
Tenakee
Native Village of Tetlin
Traditional Village of Togiak
Native Village of Toksook Bay
Tuluksak Native Community
Native Village of Tuntutuliak
Native Village of Tununak
Twin Hills Village
Native Village of Tyonek

Ugashik Village
Umkumiute Native Village
Native Village of Unalakleet
Unalaska Tribal Council
Unga Tribal Council
Native Village of Venetie

Village of Wainwright
Native Village of Wales
Native Village of White Mountain
Wrangell Cooperative Association
Woody Island - see Lesnoi Council

Native Village of Yakutat

DRAFT

MODIFIED ANCSA LIST: JUNEAU AREA OFFICE LIST OF QUALIFIED ANCSA VILLAGES

Map Name	Corporate Name	Region
Afognak	Old Harbor Native Corporation	Koniag
Akhiok	Akhiok-Kaguyak, Inc.	Koniag
Akiachak	Akiachuk, Limited	Calista
Akiak	Kokarmuit corporation	Calista
Akutan	Akutan Corporation	Aleut
Alakanuk	Alakanuk Native Corporation	Calista
Alatna	Kloyitl'ots'ina, Limited	Doyon
Aleknagik	Aleknagik Natives Limited	BBNC
Allakaket	K'oyitl'ots'ina, Limited	Doyon
Ambler	NANA	NANA
Anuktuvuk Pass	Nunamiut Corporation, Inc.	ASRC
Andreafsky	Nerklikmute Native Corporation	Calista
Angoon	Kootznoowoo, Inc.	Sealaska
Aniak	The Kuskokwim Corporation	Calista
Anvik	Ingalik, Incorporated	Doyon
Arctic Village	Ingalik, Inc.	Doyon
Atka	Atzam Corporation	Aleut
Atkasook	Atkasook Corporation	ASRC
Atmautluak	Atmautluak, Limited	Calista
Barrow	Ukpeagvik Inupiat Corporation	ASRC
Beaver	Beaver Kwit-chin Corporation	Doyon
Belkofski	Belkofski Corporation	Aleut
Bethel	Bethel Native Corporation	Calista
Bill Moore's Slough	Kongniklnomuit Yuita Corporation	Calista
Birch Creek	Tihteet'Aii, Inc.	Doyon
Brevig Mission	Brevig Mission Native Corporation	BSNC
Buckland	NANA	NANA
Cantwell	AHTNA, Inc.	AHTNA
Chalkyitsik	Chalkyitsik Native Corporation	Doyon
Chefornak	Chefarnimute, Inc.	Calista
Chenega	The Chenega Corporation	Chugach
Chevak	Chevak Company	Calista
Chickaloon	Chickaloon Moose Creek Native Assn.	CIRI
Chignik	Far West Inc.	BBNC
Chignik Lagoon	Chignik Lagoon Native Corporation	BBNC
Chignik Lake	Chignik River Limited	BBNC
Chistochina	AHTNA, Inc.	AHTNA
Chitina	Chitina Native Corporation	AHTNA
Chuloonawick	Chuloonawick Corporation	Calista
Circle	Danzhit Hanlaii Corporation	Doyon
Clark's Point	Saguyak Incorporated	BBNC

Map Name	Corporate Name	Region
Copper Center	AHTNA, Inc.	AHTNA
Council	Council Native Corporation	BSNC
Craig	Shan-Seet Incorporated	Sealaska
Crooked Creek	The Kuskokwim Corporation	Calista
Deering	NANA	NANA
Dillingham	Choggiung, Limited	BBNC
Dot Lake	Dot Lake Native Corporationa	Doyon
Eagle	NANA	Doyon
Eek	Iqfijouq Company	Calista
Egegik	Becharof Corporation	BBNC
Eklutna	Eklutna, Inc.	CIRI
Ekuk	Choggiung, Limited	BBNC
Ekwok	Ekwok Natives, Limited	BBNC
Elim	Ekwok Natives, Limited	BBNC
Emmonak	Emmonak Corporation	Calista
English Bay	The English Bay Corporation	Chugach
Evansville	Evansville, Incorporated	Doyon
Eyak	The Eyak Corporation	Chugach
False Pass	False Pass Corporation	Aleut
Fort Yukon	Gwitchyaazhee Corporation	Doyon
Gakona	AHTNA, Inc.	AHTNA
Galena	Gana-a'Yoo, Limited	Doyon
Gambell	Sivaqaq, Inc.	—
Georgetown	The Kuskokwim Corporation	Calista
Golovin	Golovin Native Corporation	BSNC
Goodnews Bay	Kuitsarak Incorporated	Calista
Grayling	Hee-Yea-Lindge Corporation	Doyon
Gulkana	AHTNA, Inc.	AHTNA
Hamilton	Nunapigiluraq Corporation	Calista
Healy Lake	Mendas Cha-ag Native Corporation	Doyon
Holy Cross	Deloycheet, Inc.	Doyon
Hoonah	Huna Totem Corporation	Sealaska
Hooper Bay	Sea Lion Corporation	Calista
Hughes	K'oyiti'its'ina, Limited	Doyon
Huslia	K'oyiti'its'ina, Limited	Doyon
Hydaburg	Haida Corporation	Sealaska
Igiugig	Igiugig Native Corporation	BBNC
Iliamna	Iliamna Natives Limited	BBNC
Inalik	Diomede Native Corporation	BSNC
Ivanoff	Bay View Incorporation	BBNC

Map Name	Corporate Name	Region
Kaguyak	Akhiok-Kaguyak, Inc.	Koniag
Kake	Kake Tribal Corporation	Sealaska
Kaktovik	Kaktovik Inupiat Corporation	ASRC
Kalskag	The Kuskokwim Corporation	Calista
Kaltag	Gana-a'Yoo, Limited	Doyon
Karluk	Koniag, Inc.	Koniag
Kasaan	Kavilco Incorporated	Sealaska
Kasigluk	Kasigluk Incorporated	Calista
Kiana	NANA	NANA
King Cove	The King Cove Corporation	Aleut
King Island	King Island Native Association	BSNC
Kipnuk	Kugkaktlik Limited	Calista
Kivalina	NANA	NANA
Klawock	Klawock Heenya Corporation	Sealaska
Klukwan	Klukwan, Incorporated	Sealaska
Knik	Knikatnu, Incorporated	CIRI
Kobuk	NANA	NANA
Kokhanok	Alkaska Peninsula Corporation	BBNC
Koliganek	Koliganek Natives Limited	BBNC
Kongiganak	Qemirtalet Coast Corporation	Calista
Kotlik	Kotlik Yupik Corporation	Calista
Kotzebue	Kikiktagruk Inupiat Corporation	NANA
Koyuk	Koyuk Native Corporation	BSNC
Koyukuk	Gana-a'Yoo, Limited	Doyon
Kwethluk	Kwethluk, Incorporated	Calista
Kwigillingok	Kwik, Incorporated	Calista
Larsen Bay	Koniag, Inc.	Koniag
Levelock	Levelock Natives Limited	BBNC
Lime Village	Lime Village Company	Calista
Lower Kalskag	The Kuskokwim Corporation	Calista
Manley Hot Springs	Bean Ridge Corporation	Doyon
Manokotak	Manokotak Natives Limited	BBNC
Marshall	Maserculiq Incorporated	Calista
Mary's Igloo	Mary's Igloo Native Corporation	BSNC
McGrath	MTNT, Limited	Doyon
Mekoryuk	Nima Corporation	Calista
Mentasta	AHTNA, Inc.	AHTNA
Minto	Set-de-ya-ah Corporation	Doyon
Mountain Village	Azachorok Incorporated	Calista
Naknek	Paug-Vik Incorporated, Limited	BBNC
Napaimute	The Kuskokwim Corporation	Calista
Napakiak	Napakiak Corporation	Calista
Napaskiak	Napaskiak Corporation	Calista

Map Name	Corporate Name	Region
Nelson Lagoon	Nelson Lagoon Corporation	Aleut
Nenana	Toghotthele Corporation	Doyon
New Stuyahok	Stuyahok Limited	BBNC
Newhalen	Alaska Peninsula Corporation	BBNC
Newtok	Newtok Corporation	Calista
Nightmute	NGTA Incorporated	Calista
Nikolai	MTNT, Limited	Doyon
Nikolski	Chaluka Corporation	Aleut
Ninilchik	Ninilchik Natives Association, Inc.	CIRI
Noatak	NANA	NANA
Nome	Sitnasuak Native Corporation	BSNC
Nondalton	Nondalton Native Corporation	BBNC
Noorvik	NANA	NANA
Northway	Northway Natives Incorporated	Doyon
Nooiksut (Nuigsut)	Kuugpik Corporation, Inc.	ASRC
Nulato	Gana'a'Yoo Limited	Doyon
Nunapitchuk	Nunpitchuk Limited	Calista
Ohogamiut	OHOG Incorporated	Calista
Old Harbor	Old Harbor Native Corporation	Koniag
Oscarville	Oscarville Native Corporation	Calista
Ouzinkie	Ouzinkie Native Corporation	Koniag
Paimiut	Paimiut Corporation	Calista
Pauloff Harbor	Sanak Corporation	Aleut
Pedro Bay	Pedro Bay Corporation	BBNC
Perryville	Oceanside Corporation	BBNC
Pilot Point	Pilot Point Native Corporation	BBNC
Pilot Station	Pilot Station Native Corporation	Calista
Pitka's Point	Pitka's Point Native Corporation	Calista
Platinum	ARVIQ Incorporated	Calista
Point Hope	Tigara Corporation	ASRC
Point Lay	Cully Corporation, Incorporated	ASRC
Port Graham	The Port Graham Corporation	Chugach
Port Heiden	Alaska Peninsula Corporation	BBNC
Port Lions	Afognak Native Corporation	Koniag
Portage Creek	Choggiung Limited	BBNC
Quinhagak	Qanirtuuq, Incorporated	Calista
Rampart	Baan-o-Yeel Kon Corporation	Doyong
Red Devil	The Kuskokwim Corporation	Calista
Ruby	Dineega Corporation	Coyon
Russian Mission (k) (Chuathbaluk)	The Kuskokwim Corporation	Calista
Russian Mission (y)	Russian Mission Native Corporation	Calista

Map Name	Corporate Name	Region
Salamatoff	Salamatoff Native Association, Inc.	CIRI
Sand Point	Shumagin Corporation	Aleut
Savoonga	Savoonga Native Corporation	BBNC
Saxman	Cape Fox Corporation	Saxman
Scammon Bay	Askinuk Corporation	Calista
Selawik	NANA	NANA
Seldovia	Seldovia Native Association, Inc.	CIRI
Shageluk	Zho-tse, Inc.	Doyon
Shaktoolik	Shaktoolik Native Corporation	BSNC
Sheldon Point	Swan Lake Corporation	Calista
Shishmaref	Shishmarek Native Corporation	BSNC
Shungnak	NANA	NANA
Sleetmute	The Kuskokwim Corporation	Calista
Solomon	Solomon Native Corporation	BSNC
South Naknek	Alaska Peninsula Corporation	BBNC
St. George	St. George Tanadax Corporation	Aleut
St. Mary's	St. Mary's Native Corporation	Calista
St. Michael	St. Michael Native Corporation	BSNC
St. Paul	Tanadgusix Corporation	Aleut
Stebbins	Stebbins Native Corporation	BSNC
Stevens Village	Dinyea Corporation	Doyon
Stony River	The Kuskokwim Corporation	Calista
Takotna	MTNT, Limited	Doyon
Tanacross	Tanacross Incorporated	Doyon
Tañāna	Tozitna, Limited	Doyon
Tatitlek	The Tatitlek Corporation	Chugach
Tazlina	AHTNA, Inc.	AHTNA
Telida	MTNT, Limited	Doyon
Teller	Teller Native Corporation	BSNC
Tetlin	Tetlin Native Corporation	BSNC
Togiak	Togiak Natives Limited	BBNC
Toksook Bay	Nunakauiak-Yupik Corporation	Calista
Tuluşak	Tulkisarmute Incorporated	Calista
Tuntutuliak	Tuntutuliak Land Limited	Calista
Tununak	Tununrmiut-Rinit Corporation	Calista
Twin Hills	Twin Hills Native Corporation	BBNC
Tyonek	The Tyonek Native Corporation	CIRI
Ugashik	Alaska Peninsula Corporation	BBNC
Umkumiute	Umkumiute Limited	Calista
Unalakleet	Unalakleet Native Corporation	BSNC
Unalaska	Ounalashka Corporation	Aleut
Unga	Unga Corporation	Aleut
Venetie	———	---

Map Name	Corporate Name	Region
Wainwright	Olgoonik Corporation, Inc.	ASRC
Wales	Wales Native Corporation	BSNC
White Mountain	White Mountain Native Corporation	BSNC
Woody Island	Leisnoi, Incorporated	Koniag
Yakutat	Yak-Tak Kwaan Incorporated	Sealaska

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August 4, 1993

John Trezise
Acting Associate Solicitor
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18th & C Streets, NW, Rm. 6459
Washington, D.C. 20240

Scott Keep
Assistant Solicitor
Indian Affairs Division
18th & C Street, NW, Rm. 6449
Washington, D.C. 20240

Dear John and Scott:

We agree that brevity has merit to a certain point. But clarity of the Department's intentions should not be sacrificed in the interest of brevity.

The Department has managed to successfully avoid clarifying its intentions with respect to the tribal status of Alaska Native villages ever since it first published a list of recognized tribes fourteen years ago in 1979. The 1982 list added to the confusion and the 1988 list, coupled with the recent Solicitor's Opinion, make it impossible to determine the Department's present position.

Given this tangled history, it will not, in our view, be enough to merely state in a single paragraph that Alaska Native villages have the same tribal status as tribes in the lower '48. To the contrary, in order to eliminate altogether, or at least reduce to the absolute minimum, any possible misconception as to the Department's position we believe it is essential for the preamble to expressly state *how* the earlier Federal Register lists have been *misconstrued*. Accordingly, we have no objection to reducing the narrative description of the misconstruction of the earlier lists *provided* the essential particulars are retained. In particular, we believe it is essential that the changes and defects in the 1988 list be specifically detailed.

Finally, the operative language which we believe is indispensable and which should be substituted for the second full paragraph on page 5 of the draft we previously submitted is as follows:

> The purpose of the present publication is to eliminate any doubt as to the Department's intention by expressly and unequivocally acknowledging that the Department has determined that the villages and regional tribes listed below are distinctly Native

ATTACHMENT G

communities and have the same tribal status as tribes in the contiguous 48 states. Such acknowledgement of tribal existence by the Department is a prerequisite to the protection, services, and benefits from the federal government available to Indian tribes. This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather, they have the same semi-sovereign status and are entitled to the same inherent protection, immunities and privileges available to other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States.

Very truly yours,

Lawrence A. Aschenbrenner

Robert T. Anderson

Robert T. Anderson

LAA/klm
RTA/klm

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TELEFAX COVER PAGE

DATE: September 30, 1993 **CLIENT NO.:** 808.00

PLEASE DELIVER THE FOLLOWING PAGES TO:

Name: John D. Trieise, Deputy Associate Solicitor-Indian

Firm: Office of the Solicitor, U.S. Dept. of the Interior

Fax No.: 202-219-1791

From: Lloyd B. Miller

Re: Alaska list

Number of pages (including cover): _____. **If you do not receive all the pages, please call [redacted] as soon as possible at: (907)258-6377. Thank you.**

DOCUMENT(S) BEING TRANSMITTED

MESSAGE

John, I think the redraft is excellent, and I am glad the NALF submission we all worked on was helpful. I have proposed a sentence for page 3, and made a comment on page 5, a correction on page 6, and joined in Bob's correction on page 7. I look forward to seeing your final (if possible) and to seeing the list itself at your earliest convenience.

Lloyd

NOTICE

ATTACHMENT H

4310-02

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

INDIAN ENTITIES RECOGNIZED AND ELIGIBLE TO RECEIVE SERVICES FROM THE UNITED STATES BUREAU OF INDIAN AFFAIRS

AGENCY: Bureau of Indian Affairs

ACTION: Notice.

SUMMARY: Notice is hereby given of the revision and update of the list of entities recognized and eligible for funding and services from the Bureau of Indian Affairs is published pursuant to 25 C.F.R. Part 83.

FOR FURTHER INFORMATION CONTACT: Bureau of Indian Affairs, Division of Tribal Government Services, 1849 C Street, N.W., Washington, D.C. 20240. Telephone number (202) 208-7445.

SUPPLEMENTARY INFORMATION: This notice is published in exercise of authority delegated to the Assistant Secretary - Indian Affairs under 25 U.S.C. §§ 2 and 9 and 209 DM 8.

In 1978 the Department of the Interior adopted regulations setting out "Procedures for Establishing That An American Indian Group Exists As An Indian Tribe." 43 Fed. Reg. 39361 (Sept. 5, 1978). The regulations "establish a departmental procedure and policy for

acknowledging that certain American Indian tribes exist. Such acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes. Such acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their status as Indian tribes as well as the responsibilities and obligations of such tribes. Acknowledgment shall subject the Indian tribe to the same authority of Congress and the United States to which other federally acknowledged tribes are subjected." 25 C.F.R. § 83.2.

Under the procedures, groups not recognized as tribes by the Federal government may apply for Federal acknowledgement. Tribes, bands, pueblos or communities already acknowledged as such and receiving services from the Bureau of Indian Affairs were not required to seek acknowledgement anew. 25 C.F.R. § 83.3(a), (b). To assist groups in determining whether they were required to apply, the procedures provided for the publication within 90 days of a list of "all Indian tribes which are recognized and receiving services from the Bureau of Indian Affairs." 25 C.F.R. § 83.6(b). This list is to be updated annually. Ibid.

The first list of acknowledged tribes was published in 1979. 44 Fed. Reg. 7325 (Feb. 9, 1979). The list used the term "entities" in the preamble and elsewhere to refer to and include all the various anthropological organizations, such as bands, pueblos and villages, acknowledged by the Federal government to constitute tribes with a government-to-government relationship with the United States. A footnote defined "entities" to include "Indian tribes, bands, villages, groups and pueblos as well as Eskimos and Aleuts." 44 Fed. Reg. at 7325, fn. *.

The 1979 list did not, however, contain the names of any Alaska Native entities. The preamble stated that: "[t]he list of eligible Alaskan entities will be published at a later date." 44 Fed. Reg. at 7235.

In 1982 the Department added to the list of tribal entities in the contiguous 48 states a "preliminary list" of Alaska Native entities under the heading "Alaska Native Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs". 47 Fed. Reg. 53133 (Nov. 24, 1982). The preamble to this list stated:

> [U]nique circumstances have made eligible additional entities in Alaska which are not historical tribes. Such circumstances have resulted in multiple, overlapping eligibility of Native entities in Alaska. To alleviate any confusion which might arise from publication of a multiple eligibility listing, the following preliminary list shows those entities to which the Bureau of Indian Affairs gives priority for purposes of funding and services.

1982 preamble's reference to

47 Fed. Reg. at 53133-53134.

The "multiple eligibility" ~~controlling~~ pursuant to "unique circumstances" referred to the eligib of village and regional corporations established under the Alaska Native Claims Settle Act of 1971 to participate in certain programs as if they were "tribes" pursuant to legislation as the Indian Self-Determination and Education Assistance Act of 19 1982 preamble was thus intended to distinguish such the list tribal governmen from the ANCSA village and regional corporations which, though eligible to partic various federal programs, plainly are not governments.

~~[Revised paragraph to the general effect that the 1982 preamble and list intended to distinguish between tribes, which are governments and were listed, and ANCSA corporations, which are not governments and which were not listed.]~~

The 1982 preamble, nodetheless, caused confusion as to the Department's intent. See, e.g., Board of Equalization v. Alaska Native Brotherhood 666 P.2d 1015, 1024, fn. 1 (Alaska 1983) (concurring opinion). A number of Alaska Native organizations complained that the preamble was ambiguous and cast doubt on the tribal status of Alaska Native villages and regional tribes. The statement was dropped from the subsequent lists published in 1983, 48 Fed. Reg. 56862 (Dec. 23, 1983); 1985, 50 Fed. Reg. 6058 (Feb. 13, 1985); and 1986, 51 Fed. Reg. 25118 (July 10, 1986). However, this deletion did not eliminate lingering uncertainties over whether inclusion on, or exclusion from, the Alaska Native entities list constituted an official determination of the United States government as to the tribal status of Native entities. In addition, in 1986, a number of Alaska Native entities complained that they had been wrongly omitted from the lists published between 1982 and 1986.

In 1988, as part of the annual publication required by 25 C.F.R. § 83.6(b), the Department published a new list of Alaska entities. The 1988 list departed from the previous lists in a number of respects. Rather than being limited to traditional Native governments and governments reorganized under Federal law, as were the prior lists, the 1988 list was expanded to include nine categories of Alaska entities, including the state-chartered regional, village and urban corporations established pursuant to ANCSA. The number of listed entities thus more than doubled, to over ____. The preamble to the list stated that the revised list responded to a "demand by the Bureau and other federal agencies ... for a list of organizations which are eligible for their funding and services based on their inclusion in categories frequently mentioned in statutes concerning federal programs for Indians." 53 Fed.Reg. at 52832.

The inclusion of non-tribal entities on the 1988 Alaska entities list departed from the intent of 25 C.F.R. § 83.6(b) and created a discontinuity from the list of tribal entities in the contiguous 48 states, which was republished as part of the same Federal Register notice. As in Alaska, Indian entities in the contiguous 48 states other than recognized tribes are frequently eligible to participate in Federal programs under specific statutes. For example, "tribal organizations" associated with recognized tribes, but not themselves tribes, are eligible for contracts and grants under the Indian Self-Determination Act. 25 U.S.C. §§ 450b(c), 450f, 450g. Unlike the Alaska entities list, the 1988 entities list for the contiguous 48 states was not expanded to include such entities.

Even more significantly, the change to the Alaska entities list compounded, rather than resolved, the question of the status of Alaska tribes raised by prior lists. First, the list did not distinguish between entities listed on the basis of their status as tribes and non-tribal entities listed because of their eligibility to participate in Federal programs under specific statutes. Second, it omitted the language on some of the earlier lists which described the listed Indian groups as "Indian tribal

entities which are recognized as having a special relationship with the United States" and instead included language applicable only to Alaska stating that:

> inclusion on a list of entities already receiving and eligible for Bureau funding does not constitute a determination that the entity either would or would not qualify for Federal Acknowledgment under the regulations, but only that no such effort is necessary to preserve eligibility. Furthermore, inclusion on or exclusion from this list of any entity should not be construed to be a determination by this Department as to the extent of the powers and authority of that entity.

53 Fed. Reg. at 52832. Finally, the 1988 list further confused the status of a number of specific entities by using names for some villages that were different from the names of these villages used by the Native traditional councils.

These changes in the 1988 publication have raised a number of questions with respect to the Department's intent and the effect of the 1988 list. The omission in the preamble of all references acknowledging the tribal status of the listed villages, and the inclusion of ANCSA corporations, which lack tribal status in a political sense, called into question the status of all the listed entities. Numerous Native villages, regional tribes and other Native organizations objected to the 1988 list on the ground that it failed to distinguish between Native corporations and Native tribes and failed to unequivocally recognize the tribal status of the listed villages and regional tribes.

In January 1993 the Solicitor of the Department of the Interior issued a comprehensive opinion analyzing the status of Alaska Native villages as "Indian tribes," as that term is commonly used to refer to Indian entities in the contiguous 48 states. The Solicitor analyzed at length the unique circumstances of Alaska Native villages. After a lengthy historical review, the Solicitor concluded that there are tribes in Alaska:

> By the time of enactment of the IRA [Indian Reorganization Act of 1934, as

amended in 1936], 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.

* * *

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 Alaska Natives as tribes at all times prior to the 1930's did not preclude it from dealing with them as tribes subsequently.

Sol. Op. M-36975, at 46, 47-48 (Jan. 11, 1993).

The Solicitor found it unnecessary for the purposes of his opinion to identify specifically those villages which are tribes, although he observed that Congress' listing of specific villages in the Alaska Native Claims Settlement Act and the repeated inclusion of such villages within the definition of "tribe" over the 20 years since the passage of ANCSA arguably constituted a congressional determination that the villages found eligible for benefits under ANCSA, referred to as the "modified ANCSA list," are considered Indian tribes for purposes of Federal law. M-36975, at 58-59.

In view of the foregoing, and to comply with the requirement of 25 C.F.R. § 83.6(b), the Department of the Interior has determined it necessary to publish a new list of Alaska tribal entities.

The Bureau of Indian Affairs has reviewed the "modified ANCSA list" of villages and the list of those villages and regional tribes previously listed or dealt with by the federal government as governments and found that the villages and regional tribes listed below have functioned as political entities exercising governmental authority and are, therefore, acknowledged to have "the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their status as Indian tribes as well as the responsibilities and obligations of such tribes."

The purpose of the current publication is to publish an Alaska list of entities conforming to the intent of 25 C.F.R. § 83.6(b) and to eliminate any doubt as to the Department's intention by expressly and unequivocally acknowledging that the Department has determined that the villages and regional tribes listed below are distinctly Native communities and have the same status as tribes in the contiguous 48 states. Such acknowledgement of tribal existence by the Department is a prerequisite to the protection, services, and benefits from the federal government available to Indian tribes. This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather, they have the same governmental status and are entitled to the same protection, immunities, privileges and limitations and to the exercise of the same inherent and delegated authorities available to other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States.

A directive accompanying the Department of the Interior and Related Agencies Appropriations Act for FY 1992 directed the Secretary to study the historical evidence relating to five villages for purposes of determining whether they were inadvertently denied village or urban status under ANCSA. H.R. Rept. No. 102-256, 102d Cong., 1st Sess. 42-43 (1991). Three of these villages are listed below on the basis of their reorganization under Federal law. A decision on inclusion of the remaining two villages (Skagway and Tenakee) will be made after the completion of the study.

Because the list published by this notice is limited to entities found to be Indian tribes, as that term is defined and used in 25 C.F.R Part 83, it does not include a number of non-tribal Native entities in Alaska that currently contract with or receive services from the Bureau of Indian Affairs pursuant to specific statutory authority, including ANCSA village and regional corporations and various tribal organizations. These entities are made eligible for Federal contracting and services by statute and their non-inclusion on the list below does not affect the continued eligibility of the entities for contracts and services.[1]

NATIVE ENTITIES WITHIN THE STATE OF ALASKA RECOGNIZED AND ELIGIBLE TO RECEIVE SERVICES FROM THE UNITED STATES BUREAU OF INDIAN AFFAIRS

[1] Under longstanding BIA policy, priority for contracts and services in Alaska is given to reorganized and traditional governments over non-tribal corporations. Proposed regulations to implement the 1988 Amendments to the Indian Self-Determination Act scheduled to be published in the near future will incorporate this policy.