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WHAT DOES INDIAN COUNTRY REALLY MEAN FOR ALASKA?
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Introduction

The Legislature has recently received a number of questions about the decision of the Ninth Circuit Court of Appeals in the *Native Village of Venetie* case. Among them are: Did the court declare Venetie to be "Indian country?" Did it declare some or all ANCSA land to be Indian country? Did it give governmental powers to Native villages? What is Indian country, and what are the potential impacts for Alaska if many villages or large parcels of land fit in that category? This paper attempts to address these and other frequently asked questions about Indian country in Alaska.

In the end, the *Venetie* case presented more questions than it gave answers. It will take either more litigation or legislation by Congress -- which has plenary authority over Indian matters -- before all the potential problems are resolved. Until then, an analysis of *Venetie* can only evaluate the range of possible impacts this decision may have on Alaska.

Background: General Principles of Indian Law

The rights and prerogatives of Native Americans and their tribes are controlled by *federal* law. That law has been developed over the years by court decisions and by Congressional legislation. It is complex and does not always provide a clear guide to relations between tribes and others. Some general principles can be stated, however:

- Native American tribes are recognized by the federal government as "dependent sovereigns", that is, governmental units which have some of the powers of a sovereign but are also within the authority of the federal government to define and limit those powers. They are not sub-units of state governments, but the federal government sometimes has permitted states limited authority over some tribal activities.

- Not every Native group is a tribe, but the federal government has issued a list of entities which it recognizes as tribes. At various times the federal government has taken contradictory positions on whether Alaska Native villages -- communities with an historic and predominantly Native character -- are tribes. Currently the federal government recognizes over two hundred Native villages in Alaska as tribes.

- Every recognized tribe has certain inherent powers over its own internal affairs, including the right to define its own membership and to conduct its purely internal affairs. The existence of broader powers depends on whether the tribe occupies "Indian country", such as a reservation, or has additional rights defined by federal statutes or by treaties with the federal government.

- "Indian country" is defined in federal statutes to mean reservations, Indian allotments, and "dependent Indian communities." When a tribe occupies Indian country, it generally has powers similar to that of a local government, with some important differences. For example, it does not appear to have authority to bring criminal charges against non-Natives; on the other hand, it is not bound by the same duty as a non-tribal state chartered municipality to accord all citizens their rights under the U.S. Constitution. (These topics will be described more fully later).

The Situation in Alaska

Prior to a string of litigation over the last fifteen years, there was little recognition of tribes or Indian country in Alaska. The federal government did not include Alaskan Native villages on its list of recognized tribes (although Native villages did receive a great deal of federal financial assistance usually reserved for tribes) and neither the federal nor state government recognized Native villages as self-governing enclaves. The sole exception was the Annette Island Reserve of the Metlakatla Indian Community, which has long been recognized as a true reservation with a tribal government. Although there had been other reserves established in Alaska by the federal government, they were all revoked (except Metlakatla) by the Alaska Native Claims Settlement Act in 1971. Since there was no official recognition of Alaskan tribes or Indian country in Alaska, and the State maintained that ANCSA had extinguished claims to Indian country in Alaska, many officials assumed that they did not exist. Thus, the stage was set for the litigation over sovereignty issues which began in the 1980's.

The *Venetie* Litigation

The village of Venetie and Arctic Village, both predominantly Native villages with historic Athabaskan roots, occupy an area south of the Brooks Range which was once set aside by the federal government as the Chandalar Reserve. The Reserve was revoked by ANCSA and the two villages formed ANCSA corporations which received the land area of the former reserve as their ANCSA entitlement. The corporations then transferred title to this land to the Native Village of Venetie, a council which included both Venetie and Arctic Village.

In the early 1980's Venetie experienced severe financial problems. It had a tribal council organized under the Indian Reorganization Act which acted as recipient for many federal projects. At about the same time, the state appropriated general funds to build a new school in Venetie for the local school district. The council asserted sovereign taxing authority and levied a tax, totaling over $160,000, against the construction contractor (a joint venture between a private contractor and a Native corporation). The state, believing there was no valid jurisdiction for the tax, brought suit, and the ensuing litigation centered around the issues of whether the council was a tribal organization which occupied Indian country and therefore had the authority of a government to levy a tax against a state-funded contractor. An injunction against the council's tax was issued, pending a final decision on the merits of the case. The litigation went on for years and eventually resulted in a trial court decision that the Native council was a tribe, but that it did not occupy Indian country and so lacked the power to levy a tax. The council appealed and the Court of Appeals recently reversed the trial court, finding that Venetie indeed occupied Indian country.

The Court of Appeals' decision focused on the fact that the Native Village of Venetie -- by then an uncontested tribal organization -- occupied land granted to it by the federal government under ANCSA. It reviewed the judicial tests by which it is determined whether an area is a "dependent Indian community" and hence Indian country, emphasizing the issue of whether the area was "set aside" by Congress for the "use and occupancy of Indians as such." The State argued that ANCSA was not a grant of Indian country lands but that the very terms of ANCSA show an intent

by Congress that it not be considered Indian country. It quoted this language from ANCSA:

> ...the [land] settlement should 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...[emphasis added]

The State also pointed out that the land was granted, not to tribal organizations, but to state chartered corporations which were subject to state law, and that the land, once developed, would be taxable by the state. None of this, the State argued, was consistent with the notion that Congress intended the ANCSA land grant to be Indian country. The village, on the other hand, argued that the land had been set aside for Natives "as such", that the village was still largely part of a federal system of trusteeship for Natives, and that Congress could not end Indian country status, if it existed, without an explicit declaration of that intent.

The court largely accepted the village's argument. It appeared to rely most heavily on the argument that the village occupied land originally set aside for it by Congress, and that although Congress changed the mechanism for holding title through ANCSA, it still continued that set-aside for the benefit of the Native occupants; so, it found, there was a dependent Indian community and the land was Indian country. The Court of Appeals then sent the case back to the trial court for a decision on whether the village council had the power to levy its tax against the State of Alaska.

State of Alaska's Interest in Pursuing an Appeal

The Legislature supports the State's decision to ask the U.S. Supreme Court to review the *Venetie* decision. We strongly believe the Court of Appeals misinterpreted federal law and that ANCSA is clear evidence of Congressional intent that there be no Indian country in Alaska. The Legislature believes the decision could have dangerous implications for Alaska. As one of the Court of Appeals judges who participated in the *Venetie* decision noted:

> **We have been asked to blow up a blizzard of litigation throughout the State of Alaska as each and every tribe seeks to test the limits of its power over what it deems to be its Indian country . There are hundreds of tribes, and the litigation permutations are as vast as the capacity of fine human minds can make them. They can include claims to freedom from state taxation and regulation, claims to regulate and tax for tribal purposes, assertions of sovereignty over vast areas of Alaska, and even assertions that tribes can regulate and tax the various corporations created to hold ANCSA land. The latter assertion would give the tribes the power to control, regulate and tax those corporations out of existence and would provide a fruitful area for intertribal conflict. This is no imaginative parade of horribles.** [Judge Fernandez, concurring opinion].

Beyond the massive litigation that will likely result, Alaska's authority over its own land and citizens will shrink substantially. The ability of the state to function effectively as a government is at risk. If the decision of the Court of Appeals is upheld, a complex web of governing units will be spread across the state, resulting in social divisiveness and controversy for all.

The Potential Consequences of Indian Country in Alaska

The following is a brief description of the potential consequences of a broad finding of Indian

country in Alaska. The conclusions are based on precedents from Indian law in the Lower 48. The application of this law to Alaska, however, is uncharted legal territory. Neither the State nor Indian tribes have confronted these issues in Alaska, since the concept of Indian country in Alaska has not been given the force of judicial recognition before the recent ruling. In addition, direct parallels with reservations in the Lower 48 can only be educated predictions, since ANCSA may have changed many of the ground rules potentially applicable to Indian country. ANCSA remains the major Congressional pronouncement on Indian jurisdiction in Alaska, since the court's decision did nothing to invalidate its application, whether ANCSA lands are Indian country or not.

1. Will All 226 Villages with Recognized Tribes Qualify as Having Indian Country?

Quite likely. Since the Court of Appeals established that the test for the existence of Indian country is whether the lands in question were set aside for the use of Alaska Natives, as such, and whether the Alaska Natives occupying these lands are under the superintendence of the United States, it is likely that most Alaska Native Villages will qualify.

The Native villages will have a strong argument that all of the lands they received under ANCSA were set aside for the use of Natives, as such, and that for the reasons set forth in the decision of the Court of Appeals, the Alaska Natives occupying them are under federal superintendence. Accordingly, their lands, they will claim, constitute Indian country.

2. Will All ANCSA Land Become Indian Country?

Possibly. It has been argued that ANCSA *village* corporation land must include a *community*, not merely be owned by shareholders who are tribal members. But no one knows to what extent the legal arguments may be advanced, especially if in the future corporation lands are transferred to tribes. So the State is concerned that large areas of ANCSA lands may become Indian country within the jurisdiction of a tribal government.

3. Does Indian Country Present any Potential Access Problems for Alaska?

Yes. Under ANCSA, some easements are provided across ANCSA lands to public lands, and those easements should continue to exist if the land is transferred to a tribe or becomes recognized as Indian country. However, if the state desires different or broader access, e.g., future road or rail corridors, it would be unable to condemn (take by eminent domain) any Indian country lands owned by a tribe, since the tribe would enjoy sovereign immunity. Thus, the state would be forced to negotiate purchases for whatever land it needed. Due to the location and complexity of ANCSA selected lands, major potential impediments to the creation of transportation corridors could be imminent. [see, e.g., attached maps]

4. Can Tribes be Sued?

No, unless they consent to be sued. Tribes, as sovereign governments, have the same sovereign immunity which states and the federal government possess. Tribes may consent to be sued, and indeed often have given limited waivers of their immunity in order to qualify for state grants and other aid. But generally there is no legal recourse available to private persons and other governments which have a claim against a tribe, and often tribal waivers limit suits to tribal courts.

5. Is the State Facing Unmanageable Litigation After Venetie?

Almost certainly. Judge Fernandez, in his concurring decision in *Venetie,* predicted a "blizzard of litigation." Many other Native villages are now looking at ways to assert tribal authority, and the

state must decide which assertions by tribes -- and which challenges to its own authority -- it will or can afford to litigate. Both the extent of tribal authority and the borders of each parcel of Indian country are largely unsettled. Resolution of the questions left undecided and of the claims of Indian country by other villages is apt to be extremely expensive and time-consuming.

6. Are All Civil Rights Protected in Indian Country?

No. The protections in the U.S. Bill of Rights and in the Alaska Constitution do not apply in Indian country. Most, but not all, of the same rights were declared as the law in Indian country by Congress through the Indian Civil Rights Act. Consider, for example, villages which have adopted ordinances excluding non-tribal members from the village for periods longer than 24 hours. The state and federal Equal Protection provisions of the constitution simply do not apply. Nor is a person's Fourth Amendment Constitutional right against unlawful search and seizure applicable in villages that automatically search one's person and luggage. Moreover, under the Indian Civil Rights Act, a person deprived of civil rights must first sue in tribal court, not state or federal court (unless they have been arrested, in which case there is access to the federal district court). Thus, both non-Natives and Natives themselves are deprived of significant judicial recourse in the case of civil rights violations by tribal governments. The state must be watchful that the civil rights of both non-Native and Native Alaskans are not jeopardized by Indian country.

7. Will There be New Tribal Court Systems in Indian Country? Will They Affect Non-Members?

Since each tribe is a separate government, it may have the right to operate its own civil and criminal court systems. Many Native villages already have courts, sometimes using the village council itself as a court. Under the Indian Child Welfare Act, even tribes outside of Indian country have a role in children's proceedings, and Alaskan tribes have become increasingly aggressive in asserting this right in their own courts. Some tribes have also adjudicated other internal tribal issues, even in the absence of a finding of Indian country. We can expect more and more tribal court proceedings.

One important question is the extent to which those courts will have jurisdiction over non-members. Tribes in Alaska generally do not have criminal jurisdiction over non-Natives. As to civil matters, however, there may be such jurisdiction if the tribe can assert a significant connection to the tribe's own well-being. Thus, any activities by non-Tribal members that occur on Indian country may be subject to review and ultimate jurisdiction in Tribal court. For example, a privately owned railroad running through Indian country land has been held to be subject to a Tribal court ruling if an accident or use dispute arises there.

Outside of Indian country, tribes probably do not have jurisdiction over non-members unless the non-member has entered into a "consensual relationship" with the tribe, e.g., through a business contact. Note, however, that tribal courts may assert jurisdiction even outside the Indian country boundaries where activities have a substantial impact on Indian country lands. Tribes are expected to move aggressively in this area, and there will probably be a great deal of litigation before the ground rules are clarified.

8. Will State Fish and Game Management Remain Intact in Indian Country?

Probably not. There is likely to be a severe loss of state jurisdiction. In the Lower 48, reservation tribes have almost exclusive authority over fish and game on tribally owned land within reservations. States may retain limited authority for conservation purposes, and may exercise some authority over non-tribal members in most instances. But the rules applicable to fish and game management on Indian country in Alaska are not clear. State enforcement, however, in Indian country may not be possible.

We can expect a great deal of confusion if 200+ tribes attempt unilateral control of fish and game management in their own areas of Indian country. Several tribal governments have already announced their intention to assert full fish and game management authority as soon as *Venetie* is resolved. Moreover, with federal takeover of subsistence management on federal lands and navigable waters, it appears likely that Alaska would be headed toward an unmanageable and misguided multi-party management scheme. At the very least Alaska faces a breakdown of areawide management of migratory species which roam across different land and water jurisdictions with significant resource conservation implications. At least one tribe is now attempting to gain *exclusive* rights to fishing in the ocean beyond the 3-mile state waters. If it succeeded it could throw into jeopardy the entire present system of fishing rights regulation and lead to management through litigation. The state must protect area-wide and species-wide management of fish and game. A checkerboard pattern of conflicting management rules, with no practical system for enforcement across jurisdictional boundaries, would severely threaten responsible management.

9. Are Lands and Activities in Indian Country Taxable by State and Local Governments?

No. In the Lower 48, tribally owned land and activities within reservations are rarely taxable by the state or local governments. In Alaska, ANCSA lands would be taxable only to the extent that ANCSA itself authorized it. ANCSA does authorize taxation of developed ANCSA lands, but there is a real question whether the lands would remain taxable if they were transferred to a tribe. Tribal members do not have to pay taxes on income earned within Indian country, or pay sales taxes on purchases within Indian country. Taxes would also be banned on sales to tribal members in Indian country. Although theoretically states may tax sales of cigarettes and other items to non-members, enforcement is problematical and has been a significant controversy in the Lower 48 as black market cigarette sales thrive in and around reservations.

10. Can Tribes Tax ANCSA Lands in Indian Country? Can They Tax Non-ANCSA Lands?

The answer is unclear. Many believe that the courts will eventually rule that ANCSA corporate lands within Indian country are taxable by the tribe. If ANCSA corporation lands end up being the bulk of Indian country lands, the ANCSA lands may become the main source of tribal tax revenue. As Judge Fernandez noted in his concurring opinion in *Venetie*, tribes may assert the power to "control, regulate, and tax [ANCSA regional] corporations out of existence." Likewise, if non-ANCSA lands fall within Indian country, they may also become taxable by a tribe. Even more disturbing is the possibility that tribal authority to tax lands or economic activity may preclude state taxation. In the past some sovereignty advocates have claimed that large parts of the state -- for example, the entire north slope -- are Indian country. Although this outcome is extremely unlikely, if it happened, state taxation of oil production would be jeopardized, and oil transportation facilities like pipelines could be threatened by tribal taxation. It is in the state's interest to attempt to limit Indian country to areas and to ground rules which do not jeopardize the state's economic viability.

11. Could it Cost More for the State to Deliver Public Services in Indian country?

Yes. The state is required by the constitutional requirement of equal protection to provide equal treatment, including services, to all persons even if they live in Indian country. The state may not withhold its services to some citizens simply because they have a tribal government capable of

delivering the same services. But if tribal governments tax the delivery of state services -- as happened in the *Venetie* litigation, when the tribe levied a heavy tax on construction of a new school built by the state -- the state will have to appropriate even more funds to cover any taxes imposed to provide the same level of services in rural areas.

Conclusion

The *Venetie* case is not free from controversy. The District Court found that ANCSA extinguished Indian country in Alaska, and so did one of the three judges on the Ninth Circuit. The evidence in ANCSA that Congress did not recognize Indian country in Alaska is strong. The case could easily have been decided a different way by another panel of the Court of Appeals. Later cases may or may not narrow the application of the *Venetie* decision, both in scope and in the number of Native villages to which it applies. In the meantime, the State cannot rely on future judicial narrowing to protect its interests. It must instead appeal to the highest court in the land to set appropriate precedent for future claims for Indian country in Alaska. If large areas of Indian country are found to exist, it could threaten the state's revenue base, make fish and game management ineffective, and deny Native and non-Native Alaskans the civil rights they enjoy now.* The Legislature is concerned that it may happen, and the possibility that the *Venetie* decision could move Alaska in that direction is too serious for us not to take every available action we can now. It is entirely appropriate for Alaska to ask the U.S. Supreme Court to reverse this decision.

* Please refer to the attached maps for examples of the complexities of land ownership in Alaska. These examples illustrate the areas in question as we address the Indian country issue.