

VENETIE

HEAR-

INGS

# Alaska State Legislature

Committee Chair  
Community & Regional Affairs

Committee Vice-Chair  
Labor & Commerce

Committee Membership  
Legislative Council



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*Senator John Torgerson*

## MEMORANDUM

March 11, 1997

TO: Tam Cook, Director

FROM: Senator John Torgerson 

RE: Native Sovereignty and State Appropriations

Is the State of Alaska in any way recognizing the sovereignty of village tribal councils by appropriating or allocating money to them? This question specifically pertains to the unincorporated community capital project matching grant program, and the revenue sharing for unincorporated communities program.

The State of Alaska currently has programs for municipalities and unincorporated communities. It allows native corporations and village councils to participate if they sign a waiver of immunity. It seems that this waiver says, theoretically that they are the same as a nonprofit corporation or a municipality. Could the case be made that, because of this, the state is in fact recognizing them as a separate governmental entity.

If so, could a future argument be made that since they are recognized as a government entity for this program, they should be recognized as a government entity for something else.

In other words, when the state appropriates or allocates funds to village councils, is it in effect recognizing them as government entities? Also, by requiring the village councils to sign waivers of immunity, is the state accepting the sovereignty of these councils.

QUESTIONS TO BE ADDRESSED BY ATTORNEY GENERAL AND LEG.  
LEGAL REGARDING TRIBAL SOVEREIGNTY  
MARCH 12, 1996

Community Grants and other State Appropriations to Tribes

1.) One element used in determining whether 'Indian Country' exists is the established practice of government agencies toward the area in question. See Alaska v. Native Village of Venetie, 856 F.2d 1384, 1391 (9th Cir. 1988). Therefore, could legislative appropriations of any kind that benefit only tribal members be used as additional evidence supporting the existence of dependent Indian communities, and concomitantly Indian Country? In other words, could every dollar granted as a matter of Alaska public policy be arguably used to define an "established practice" of Alaska toward tribal groups who will advocate a finding of Indian Country?

2.) Sovereign tribes as they now exist in Alaska are not public entities. Rather, they are partially self-governing units whose membership is strictly restricted by race. With this in mind, does the Alaska Constitution permit the appropriation of any public funds to non-public entities? Would any further state appropriations for the benefit of tribes violate our state constitution?

# MEMO

**To:** Senator Druc Pearce, President  
Representative Gail Phillips, Speaker of the House  
Representative Al Vezey, Majority Leader  
Senator Rick Halford, Majority Leader

**From:** Douglas L. Blankenship *DB*  
Ron Somerville  
Ted Popely *TP*

**Subject:** Recommendations in Follow up to February 21, 1996  
Tribal Status Legislative Hearing

**Date:** February 29, 1996

**THIS MEMO IS A CONFIDENTIAL AND PRIVILEGED  
ATTORNEY-CLIENT COMMUNICATION**

Despite the questions left unasked after the abbreviated hearing, the February 21, 1996, legislative hearing on the Knowles' Administration decision not to oppose the federal government's recognition of 226 Indian tribes reinforced the view that the decision was premature, the implications of the decision are unknown, and the decision was made to benefit the special interests supporting the Governor without regard to the public interest.

Specifically, the discussion revealed that the legal questions about the extent of sovereign immunity and tribal powers without Indian tribes remain unanswered, even by top legal experts in the field. In addition, after the hearing, a host of problems inherent in the recognition of 226 new tribes were acknowledged, including jurisdiction and I.C.W.A. - related issues.

Opinion differed markedly among the panelists with regard to whether Indian country currently exists in Alaska and whether and how we may progress toward an ultimate finding of Indian country in Alaska. Next, it became clear after the hearing that Alaska Indian tribes will not be bound by the United States Constitution, thus leaving the Alaska government with the arduous task of interpreting what laws shall govern this new class of citizens.

The difficulties and uncertainties associated with membership in multiple tribes became abundantly clear after the February 21 hearing. Furthermore, the baseline question of whether this move to recognize tribes will benefit or harm Alaska Natives went unanswered, even by representatives of various Native groups. Finally, the hearing accomplished the important goal of establishing the need for Congress to clarify the issues and for the Alaska Legislature to act in an effort to ensure that Indian country is not acknowledged. Before this situation gets worse or is swept into complacency, the hearings have underscored the need for an immediate real review of the implications with protection of state interests as the guiding light.

The purpose of this memo is to obtain authority to prepare a memo containing a

variety of options the legislature can take to protect state interests. Within 30 days after we receive the authorization to proceed we will provide the legislature specific, well reasoned actions it can take.

### Recommendations

Time is of the essence because of the Knowles' Administration unilateral action, without notice, conceding fundamental interests of the state in ongoing litigation. We recommend that you authorize the preparation of a report and action plans with alternatives to be delivered to you within 30 days of the authorization to proceed to cover the following:

1. Implications of Appropriations to Tribal Entities. One element in determining the existence of Indian country is a review of the established practice of government agencies toward the area. *Alaska v. Native Village of Venetie* 856 F.2d 1384, 1391 (9th Cir.1988). Legislative appropriations to tribal entities that benefit solely the tribal members could be cited as additional evidence of sovereignty and dependent Indian communities. This issue should be thoroughly reviewed so that the legislature is aware of the implications of its actions and alternatives. For example, the legislature could place conditions on appropriations which requires the recipient to make the appropriated resources available to all citizens. Even here, dependent Indian community questions could be implicated.

2. Statutory Review. Since the state and the public must now deal with 226 sovereign entities across the state the legislature should start the process of reviewing the existing statutes to determine where changes may be necessary. The impact of sovereign immunity should be immediately reviewed. Prudence may dictate that the legislature adopt a statute stating the all agreements with any entity purporting to be a tribe shall contain an appropriate waiver of sovereign immunity. Research on the scope of immunity and a review of similar statutes in other jurisdictions would be helpful for your considerations.

The legislature should consider enacting into law a requirement that the Attorney General notify the legislature 90 days prior to his taking any voluntary action in litigation which will result in the reduction of state jurisdiction. Conceivably, prior legislative approval is appropriately required when long term state interests are threatened. Research on the specific wording of the statute and the authority of the legislature to require the executive branch to make the notification, should be completed promptly.

3. Tribal Courts. The thorniest problem in Indian law is the jurisdiction of tribal courts, federal courts and state courts. As is stated in the American Indian Law Deskbook:

Courts adjudicating civil matters connected with Indian country must make the threshold decision of whether subject matter jurisdiction exists, or, in the case of federal courts, whether it should be exercised if present. Among the issues now unresolved are the standards of review applicable in federal court proceedings under 28 U.S.C. section 1331 (1988) following exhaustion of tribal court remedies where the latter court's jurisdiction is challenged; the extent of a federal court's obligation to defer to either existing or possible tribal court proceedings when diversity jurisdiction is asserted over a dispute under 28 U.S.C. section 1332 (1988); and whether a tribe's or state's adjudicatory jurisdiction over a nonconsenting defendant is measured by its power to regulate the controversy underlying the particular litigation. Nettlesome problems also exist concerning whether tribal court judgments are entitled to full faith and credit or merely comity when brought before state courts for enforcement and whether tribal courts have an obligation mandated by federal law to extend full faith and credit to federal and state court judgments. Perhaps more than any other aspect of Indian law, civil-adjudicatory issues present important questions that remain to be answered.

An overview of the tribal court jurisdiction in Alaska would be helpful to the legislature and the judiciary as they grapple with the problem of incorporating the tribal court system into the present system. Questions of comity and full faith and credit will also be reviewed.

4. Legislative Legal Actions. The Knowles administration discarded a strong argument when the governor directed the Department of Law not to argue the federal government exceeded its authority by recognizing 226 tribes without the factual inquiry required by federal regulation. It is prudent for the legislature to be advised confidentially as to all the alternatives for the reassertion of this argument in a court. This opinion would address:

a. Whether the Governor can adopt a state policy that is contrary to the law as interpreted by the state supreme court where the law in question is federal law as interpreted by the federal district court?

The issue derives from the Governor's decision not to contest the federal government's decision to recognize 226 tribes in Alaska. In *Native Village of Stevens v. Alaska Planning & Management* 757 P.2d 32, 34 (Alaska 1988) the Alaska Supreme Court held that

Stevens Village, like most native groups in Alaska, is not self-governing or in any meaningful sense of the word sovereign. This conclusion is supported by the decisions of this court. *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977) and *Metlakatla Indian Community, Annette Island Reservation v. Egan* 362 P.2d 901 (Alaska 1961). Further, the history of the relationship between the federal government and Alaska Natives up to the passage of the Indian Reorganization Act, 49 Stat. 1250 (1936) indicates that Congress intended that most Alaska Native groups not be treated as sovereigns. Finally, neither the Indian Reorganization Act, nor subsequent Congressional acts have signaled a change from non-sovereign to sovereign status.

As a result, the executive branch of government has adopted a position as official state policy exactly opposite that of the branch of government constitutionally charged with interpreting the law. The governor's position is that the recent Congressional Tlingit and Haida Status Clarification Act and the attendant circumstances described in Judge Holland's December 23, 1994 Order on Tribal status in the Venetie case are the "signals" alluded to in the last sentence of the above *Stevens Village* quote. The legislature could take the governor to task for adopting a state policy that is contrary to the law as interpreted by the Alaska Supreme Court. Legal research needs to be performed to determine if the governor's action is unconstitutional and, if so, what remedies are available. Second, even if the governor's actions are constitutional and his actions are just matters of policy or politics, the legislature should be advised what actions the legislature could take to uphold the law as interpreted by the Alaska Supreme Court.

b. Legislative Standing. Does the legislature, the presiding officers of the legislature or others have standing to challenge the validity of a federal regulation where the governor has directed that the state not appeal a federal district court ruling holding the regulation was valid?

Research needs to be performed on this issue but my sense is that the presiding officers have some standing because many statutes passed by the legislature will be affected by the immunity and jurisdiction of the tribes. Other individuals and organizations could be added to ensure standing. An alternative approach may be to find an appropriate "test case" as, for example, an adoption dispute or some other controversy where a majority of the public opinion would support the legislature getting involved assuming the legislature could legally fund a test case. The legislature could then participate and fund the litigation to determine if the federal government must follow its own rules.

The substantive argument that would be made in the case would be strong. The legislature could use the arguments already made by the Department of Law but dropped by the Governor. The argument made by the state in the Chickaloon case that the 1993 list was invalid was solid. The state dropped the issue in that suit too. In the Chickaloon case the state argued that the Interior Secretary was required to follow his department's regulations. The argument in the Chickaloon case develops the history of the regulation which supports the common sense principal that the government must follow its own regulations. The suit would also question Judge Holland's conclusion that Congressional acquiescence to Interior's actions validated tribal acknowledgment even though the regulations were not followed. The fundamental principal that would be upheld is that the government must follow its own regulations. We are confident a suitable plaintiff could be found.

**Legislative Funding of Test Cases.** If the legislature does not alone have standing to be a party in a suit or if the legislature determines it is not politically advisable to commence a suit, the legislature can appropriate money to itself to pay the legal expenses of a party in a "test case" where issues important to the legislature are litigated (e.g. does the federal government have to follow its own regulations when determining tribal status?). The answer to this issue is critical if the legislature desires to take action on the issues the administration has dropped. There is little doubt that the legislature may participate as *amicus* or fund its own litigation where the executive and legislative branches are directly at odds, as for example in a "veto case."

5. **Oversight of State Litigation.** We suggest someone be immediately designated to monitor existing state litigation where fundamental Indian law and Alaska sovereignty principals are at issue and report back to the legislature. (For example, the Indian country litigation where Alaska is going to need all of the assistance it can muster according to our sources.) This would require identifying the specific litigation, identifying the issues at stake in each case, obtaining the Administration's position and plans through communications with the Attorney General and Assistant Attorneys General.

In addition, the Administration is already looking for a suitable case to convince the Alaska Supreme Court to change the position it announced in the *Alaska v. Native Village of Stevens* case. The monitoring could be done through a combination discussions with Department of Law personnel, review of pleadings and inquiry letters from the legislative leadership which could be drafted for your signature. In addition to the Indian law issues the Administration's position on navigability claims, fishing rights, and federal vs. state conflicts could be monitored in a similar fashion. In this regard, there are several recent examples of the Alaska's failure to work with sister states on fundamental matters of joint interest.

6. Furthering Hearings Investigating the Decision. The legislature could decide to hold a series of hearings questioning various administration officials about the decision. The series of hearings is justified because the decision to give away a portion of the state's jurisdiction is important and could be monumental. If this decision was being made through a legislative process it would be open to public scrutiny with every facet being fully investigated. But since the decision was made in litigation (behind closed doors without notice to the legislature) the decision did not go through any public process. The legislature should hold more carefully planned and conducted hearings on the bill. We would like to give our views on the structure and organization on a series of hearings on this issue

#### Conclusion

Doug Blankenship proposes to deliver a report and recommend specific plans of action and alternatives to the legislative majority leadership covering the above items within 30 days of the authorization to proceed. Contractors with expertise in the particular area will be retained to provide the necessary assistance and expertise. Doug's contract with the legislature needs to be increased by \$35,000 to cover the estimated expenses to be incurred. After the report has been reviewed, the legislature can choose the alternatives to implement.



Ken Eikenberry

## ATTORNEY GENERAL OF WASHINGTON

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January 5, 1993

### TO WHOM IT MAY CONCERN:

This is to introduce and heartily recommend Jim Johnson, one of the finest attorneys I have known (and I have known many). It reflects my confidence in Jim and his abilities that he has been Chief of the Special Litigation Division for the last ten years. He has tried and/or litigated on appeal many major cases of high profile and importance to the State's people. As his resume reflects, his experience of nearly one hundred appellate cases - up to and including the United States Supreme Court - is unequalled anywhere in this state. The trial record is equally distinguished.

During this part of his career Jim has litigated with many top quality opponents, including all of the "major" firms in this state, as well as major New York and Washington, D.C. firms. With his leadership and expertise, Washington has won most of the litigation he has handled - and he has settled many other major cases on very favorable bases.

His reputation among professionals is indicated by the fact that his assistance has been requested on United States and Washington Supreme court cases by prosecutors' offices in this state, Attorneys General of other states, and the United States Solicitor General.

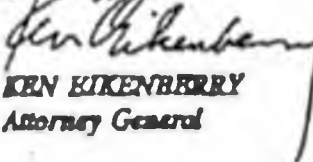
Jim's reported cases read like a list of major state litigation over the last decade. From the litigation over Washington's Ninth Congressional Seat, to the "Baldi" fish cases, to important commercial litigation for the state, he has acquired extensive and diverse experience. Some major cases are not reported. In recent years the Deferred Compensation Board's million dollar case against RainierBank and Consortium Automated Library Services vs. Dataphase were litigated aggressively to favorable settlement.

One of Jim's especially valuable talents is litigating economically - learned of necessity from litigating against far better funded opponents. Jim has both the ability to manage litigative resources, and advanced technological skills (computer research and discovery).

As you would expect, Jim has become a valuable resource for this office of over 400 attorneys because he is willing to advise and assist on problems for other attorneys. He has even found time to teach numerous CLR courses to improve professional levels in this office and publish on a variety of topics.

To these extensive skills, he adds enthusiasm for his work. I have no doubt of my conclusion that Jim Johnson would be a great asset to your organization.

Sincerely,

  
KEN EIKENBERRY  
Attorney General

# WORK CURR

## James M. Johnson

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1993 - Present: In private practice, I continue to apply the expertise in major litigation I developed as Chief of Special Litigation for the State of Washington. In United States v. Washington, Washington's (in)famous treaty fishing case, the tribes are attempting to extend their claims to shellfish and public and private lands. My clients are private landowners, parties only after I won a Ninth Circuit appeal of an order denying them intervention. In the Washington Supreme Court in Walker v. Washington, I successfully defended Washington's tax-limitation Initiative 601 (for the taxpayers, sponsors of the Initiative). In Mull-Lack Band of Chippewas v. Minnesota, I represent nine intervenor counties and work with the State of Minnesota to defend that Indian treaty case. In California, I represent sports and commercial fishing interests and coastal communities in Parryvot v. Rabbit, challenging federal ocean regulation. I also authored an amicus brief for Wyoming and Missouri counties in the United States Supreme Court in Hagen v. Utah, No. 97-6281, and participated in a NAAG moot court (as a "Justice") in preparing the Utah Attorney General for argument. On February 23, 1994, the Court ruled for us 7-2.

1983-1993: Until April of 1993, I was the Chief of the Special Litigation Division, in the Washington State Attorney General's Office, representing over twenty-five client agencies, and litigating "special" cases for the State. I enjoyed being the team leader for much of the State's important litigation at the state and federal trial and appeal levels, including the United States Supreme Court. I was also national affairs liaison to the National Association of Attorneys General (NAAG) and the Conference of Western Attorneys General (CWAG). I know personally and have worked with nearly every state's Attorney General, and top staff. I was contributing editor for the CWAG on American Indian Law Deskbook (March 1993, University of Colorado Press).

Recent major cases included the "Ninth Congressional District" litigation cases to retain Washington's 9th U.S. House seat (the last awarded after the census). This included four federal district court cases, and two United States Supreme Court cases. I also authored a brief amicus for twenty-two states in the successful effort to uphold states' election protection statutes last term in Borom v. Pressman, United States Supreme Court No. 90-1056.

I have handled nearly one hundred appellate cases in the federal courts of appeal, Washington Supreme Court and United States Supreme Court. Some of these cases are listed on the attached Appendix A.

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### Other Experience:

- 1970-71 Counsel to Washington State Legislative Joint Committee on Banking Insurance and Transportation.  
1971-73 United States Army Lieutenant (Chief of Administrative Services for Ninth Infantry Division).  
1973-1983 Chief Attorney for Fisheries/Game Division of Washington State.

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Interests: I enjoy running (including marathons), sailing, fishing, hunting, and opera.

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Education and Bar Admissions: Harvard University, B.A. 1967 (Economics); University of Washington, J.D. 1970.

Admitted to Washington Bar 1970; also admitted to practice in the Washington State Supreme Court; federal district courts of Washington and California, Eighth Circuit, Ninth Circuit and District of Columbia Circuit Federal Courts of Appeals; United States Supreme Court. I have also practiced on a pro hac vice basis in federal courts in several other states.

Attachment A  
**LITIGATION EXPERIENCE/LEGAL ACCOMPLISHMENTS**  
**JAMES M. JOHNSON**

**I. TRIAL AND APPELLATE EXPERIENCE**

My experience includes hundreds of trials in both the federal and state systems and nearly one hundred appellate cases up to, and including, the United States Supreme Court. Most of the appellate work involved cases I personally tried.

In federal court alone, I have tried over two hundred cases. Most cases have been civil trials, but my trial experience has also included criminal trials in Washington State Superior Courts involving environmental and hunting and fishing cases.

This extensive litigation and appeal practice has extended to each of the courts of which I am a bar member. I have appeared pro hac vice in another six states' federal courts.

Some noteworthy cases—my favorites—illustrating the variety of my experience are the following:

**A. United States Supreme Court**

1. I personally briefed and argued Munn v. Socialist Workers, 479 U.S. 499 (1986) successfully upholding the constitutionality of Washington election ballot restrictions.

2. Hagen v. Utah, (No. 92-6281, decided February 23, 1994). I wrote the brief for similarly-situated counties in Wyoming and Montana. I helped prepare the Utah Attorney General for argument (as a "justice") in moot court sessions.

3. Montana v. U.S. Dep't of Commerce, 112 S. Ct. 1704, 503 U.S. \_\_\_\_ (1992). The "Equal Proportions" method of allocating U.S. House seats was upheld, saving Washington's ninth seat from one challenge. I briefed at both the three-judge district and United States Supreme Court and was a justice in the moot court preparing Solicitor General Starr who argued.

4. Franklin v. Massachusetts, 112 S. Ct. 3056, 503 U.S. \_\_\_\_ (1992). The Courts' inclusion of U.S. military-overseers on the census day was upheld, saving Washington's ninth seat from another challenge. I briefed at both three-judge district and United States Supreme Court. At the Supreme Court level, this was coordinated with the U.S. Solicitor, whom I helped prepare for argument (again as a moot court justice).

5. Burson v. Freeman, United States Supreme court No. 90-1056. I authored a brief amicus for twenty-two states. The Tennessee law, like that of Washington, proscribes activities such as campaigning around the election polls. Our brief was especially important since one justice adopted our arguments in his concurring opinion. The case was won five to three to this vote was critical (four to four would have upheld the unfavorable lower court).

6. State of Idaho v. Washington, Oregon, 444 U.S. 380 (1980); 462 U.S. 1017 (1983). An original action between states, challenging regulation and harvest of fish runs in Columbia River and tributaries. I tried the case to the special master appointed by the Court and participated in briefing and argument preparation for the two United States Supreme Court hearings.

7. The treaty Indian "fish cases." Dep't of Game v. Pyralis, 414 U.S. 44 (1973); Pyralis Tribe v. Washington Dep't of Game, 433 U.S. 165 (1977); Washington v. Washington Comm'l

Passenger Fishing Vessel, 443 U.S. 658 (1979) involving fishing regulation and Indian treaty law. I was a participant in briefing and argument preparation.

8. Arizona v. Washington, 440 U.S. 194 (1975). This dealt with Indian reservation boundaries and hunting. I was a participant in briefing and argument preparation.

#### B. Washington Supreme Court and Washington Court of Appeals

I have personally handled and/or argued approximately 35 cases, more than half in the Washington Supreme Court. Some recent examples include:

1. Ellensburg v. Washington, 118 W.2d 709 (1992), held the State is not required to pay full funding for fire protection services for Central Washington University. I participated in writing the briefs and argued the case before the Supreme Court. It was decided in our favor on January 16, 1992.

2. Schropps v. Munro, 116 W.2d 929 (1991), involved a challenge to the Secretary of State's acceptance of initiative. I briefed and argued this case. The court held in favor of the Secretary—allowing the voters to decide.

3. Yantor v. Munro, 115 Wn. 2d 536 (1990), involving a challenge to the Secretary of State's processing of an initiative. I briefed and argued this case, which upheld the Secretary.

4. Rains v. State, 100 Wn.2d 660 (1983), upheld the State's immunity from suit for alleged civil rights violation under 42 U.S.C. § 1983 (briefed and argued).

5. Snyder v. Munro, 106 Wn.2d 380 (1986). Washington legislative redistricting, including two "split" districts, upheld as constitutional (briefed and argued).

6. Nicholl v. Munro, 104 Wn.2d 456 (1985). Election process for superior court judges upheld (briefed and argued).

7. Washington v. Crown Zellerbach, 92 Wn.2d 894 (1979). The stricter protections of the hydraulics code and enforcement through criminal prosecution for violations was upheld (briefed, argued, and won criminal jury trial on remand).

8. The Indian Treaty Fishing Cases: Numerous cases and trials at the Superior Court (Washington's trial court) led to Washington Supreme Court cases of Puget Sound Gillnetters v. Moos, 88 Wn.2d 677 (1977); State Comm. Prosecutors Ass'n v. Tollefson, 89 W.2d 276 (1977); Puget Sound Ass'n v. Moos, 88 W.2d 799 (1977). All held the state must treat citizens the same, and could not regulate for special Indian fisheries. After the United States Supreme Court review (see A-6, above), Fishing Vessel Ass'n v. Tollefson, 92 Wn.2d 939, (1980) upheld the state's authority to regulate fisheries.

#### C. Federal Courts of Appeal

I have personally handled and/or argued approximately 50 cases in the federal courts of appeal. Examples, indicating the breadth of experience are:

1. Federal Energy Regulation Commission appeals (FERC appeals). The Federal Power Act (16 U.S.C. 825(L)) allows appeals to either the circuit for the District of Columbia or the circuit in which the owner resides or does business. Among significant appeals, I have participated in both circuits, and:

- (a) Rock Island (Confederated Tribes v. FBRC, 734 F.2d 134 (9th Cir. 1983));
- (b) Lewis River-Marwin Dam (relicensing), Clark-Cowlitz IOA v. FERC, 826 F.2d 1074 (D.C. Cir. 1987). (Argued)
- (c) Ross Dam (Seattle Light)

2. Indian Treaty Fishing cases. United States v. Washington, 384 F. Supp. 319 (1974), is the "Boldt" case on Indian treaty fishing rights (which predates my tenure; I inherited the case one year later). Over 200 mini-trials ensued, involving implementation from one day to one week. Thirty-seven decisions (selected by the judge) are published serially, beginning 459 F. Supp. 1020 (1978). Dozens are separately reported. Approximately 30 appeals resulted from the first five years' implementation. One anecdotal illustration; four cases are found serially in 573 F.2d 1117, 1118, and 1121 (9th Cir. 1978). The latter was, itself, five separate proceedings. I argued this case and most of the others.

On November 2, 1993, I won an appeal granting private landowners party status in the Ninth Circuit (No. 93-35324) Phase III (shellfish and private beaches) case in time for the 1994 trial.

United States v. Oregon, 302 F. Supp. 899 (1969). (The Indian treaty fishing rights case on the Columbia River predated "Boldt." Washington only intervened in 1975). Here, too, there were dozens of hearings and trials (under a week). There are six separately reported appeals. Most important are: 657 F.2d 1009 (9th Cir. 1981) (our injunction against Yakima fishing, including on reservation, was upheld in face of tribal immunity argument) and 529 F.2d 570 (9th Cir. 1976) ("Boldt" 50 percent formula need not apply to Columbia). I briefed and argued both.

3. Confederated Tribes of Colville v. Washington, 649 F.2d 1274 (9th Cir. 1981). State has jurisdiction over non-Indians within boundaries of Indian reservation. (Argued)

4. Sandiger v. Washington, 813 F.2d 1025 (9th Cir. 1987). National Guard officer immune from civil rights suit by subordinate.

5. Herald v. Munro, 758 F.2d 350 (9th Cir. 1984) and 838 F.2d 380 (9th Cir. 1988). ABC, CBS, NBC, and the New York Times challenged the Washington Statute prohibiting "exit-polling" around election area. The statute was upheld—first decision, invalidated by second). (Argued both) My client did not authorize U.S. Supreme Court review, but see Bigman v. Freeman, *supra*, p.1.

6. Williams v. Dolliver. (Our client, Justice Dolliver, was then Chief Justice of Washington's Supreme Court) 894 F.2d 321 (1988). Washington courts' practice of dividing military retirement pay in divorce proceedings upheld. (Argued)

7. Socialist Workers' v. Munro, 765 F.2d 1417 (9th Cir. 1985) challenged Washington's election restrictions on ballot access for minor parties. The unfavorable decision was reversed by the U.S. Supreme Court, *supra*, which upheld Washington's law. (Argued both)

8. Columbia Gorge United v. Yeutter, 960 F.2d 110 (9th Cir. 1992) upheld the constitutionality of the Gorge Act (briefing was cooperative; Oregon Attorney General Frohnmayer argued this case).

9. Broughton Lumber v. Columbia Gorge Comm'n, State of Washington, Ninth Circuit Court of Appeals No. 91-35183 Sept. 15, 1992). State sovereign immunity was not waived by the Gorge Act; state may not be sued in federal court for actions of the Gorge Commission. (Argued)

**D. Administrative Proceedings: FERC and EFSEC**

Specialized practice before such agencies has included:

1. FERC (Federal Energy Regulation Commission) Hydroelectric dam cases. Trials of licensing, relicensing, jurisdiction, and sub-issues, including:
  - (a) Skagit River, "High" Ross Dam (Seattle City Light)
  - (b) Lewis River-Marwin Dam (Pacific Power & Light competing with Clark-Cowlitz JOA)
  - (c) Elwha River, Glines & Elwha projects (Crowe-Zellerbach Corporation)
  - (d) Nisqually River -- proceedings involving each project
    - Yelm diversion (City of Centralia)
    - Alder Dam (City of Tacoma)
    - La Grande Dam (City of Tacoma)
  - (e) Columbia River -- all five mid-Columbia projects
    - Rock Island Dam
    - Rocky Reach Dam
    - Wapatom Dam
    - Priest Rapids Dam
    - Wells Dam
  - (f) White River - (Puget Power & Light)
2. EFSEC (Washington State's Energy Facility Site Evaluation Council) provides and enforces licenses for major power facilities. I participated in trial proceedings involving:
  - (a) WPPSS II (Hanford Nuclear Plant)
  - (b) WPPSS 4 and 5 (Satsop Nuclear Plant)
  - (c) Northern Tier Pipeline
  - (d) Fish Kill supplemental proceedings in WPPSS II resulted in award of a hatchery facility

## II. TEACHING CREDENTIALS AND PUBLICATIONS (chronological listing with sponsoring organization)

### A. CLEs (Continuing Legal Education courses taught to Bar members)

1. Indian Treaty Hunting and Fishing, Washington State Criminal Justice Training Commission, 1977.
2. Indian Fishing Rights, Governmental Lawyers Association, 1978.
3. Anadromous Fish Management and Protection, Environmental Law Review, Northwest School of Law, 1979.
  - (1) Federal Energy Regulatory Commission Practice, Fish and Wildlife Protection; and
  - (2) Indian Fishing Rights (two separate presentations), Lewis and Clark Law School, 1980.
4. Environmental Law, Current Trends in Natural Resource Law, Office of the Attorney General, 1981.
5. Attorneys' Fees Awards Under the Civil Rights Act, Office of the Attorney General, 1982.
6. Federal Trial Practice (new Rule 16), Office of the Attorney General, 1984.
7. Constitutional Law; "EXIT-POLLING" Debate, Washington Bar Association, "Today's Constitution and You" (Bicentennial Program), 1986.
8. Appellate Practice (Argument), Office of the Attorney General, 1987.
9. Columbia River Legal Issues; Fish, Water, Power and Competing Users (U.S. and international), Western Association of Attorneys General, 1991.

### B. Publications

James M. Johnson, Indian and Aboriginal Hunting and Fishing Claims (including marine mammals), International Association of Fish and Wildlife Commissioners, Toronto, Canada, 1978 (published proceedings).

Kenneth O. Elkoberry, James M. Johnson, David M. Drissen, Enforcing Washington Judgments in Canadian Courts: Taking the Dams out of the Stream of Commerce: U. Puget Sound L. Rev. 491 (1990); Washington State Bar News 45 (1991); B.C. Sup. Ct. R. 54(2).

Conference of Western Attorneys General, (James M. Johnson, contributing author/editor) The American Indian Law Deskbook (U. Colorado press 1993).

QUESTIONS TO BE ADDRESSED BY ATTORNEY GENERAL AND LEG.  
LEGAL REGARDING TRIBAL SOVEREIGNTY  
MARCH 12, 1996

Community Grants and other State Appropriations to Tribes

1.) One element used in determining whether 'Indian Country' exists is the established practice of government agencies toward the area in question. See Alaska v. Native Village of Venetie, 856 F.2d 1384, 1391 (9th Cir. 1988). Therefore, could legislative appropriations of any kind that benefit only tribal members be used as additional evidence supporting the existence of dependent Indian communities, and concomitantly Indian Country? In other words, could every dollar granted as a matter of Alaska public policy be arguably used to define an "established practice" of Alaska toward tribal groups who will advocate a finding of Indian Country?

2.) Sovereign tribes as they now exist in Alaska are not public entities. Rather, they are partially self-governing units whose membership is strictly restricted by race. With this in mind, does the Alaska Constitution permit the appropriation of any public funds to non-public entities? Would any further state appropriations for the benefit of tribes violate our state constitution?

3.) According to the Alaska Supreme Court, do tribes in Alaska exercise sovereign immunity from suit by the State or private parties? If so, may tribes then waive that immunity?

4.) According to the Ninth Circuit Court of Appeals, do tribes in Alaska exercise sovereign immunity from suit by the State or private parties? If so, may tribes then waive that immunity?

\*\*\*\* ADD TO LETTER A REQUEST FOR EXPEDITED CONSIDERATION BY  
BOTH A.G. AND LEG. LEGAL

OPTIONS AND DECISION POINTS  
SENATE/HOUSE LEADERSHIP  
VILLAGE TRIBAL SOVEREIGNTY

UPDATED: 3/12/96

1. IMPLICATIONS OF APPROPRIATIONS TO TRIBAL ENTITIES - REVIEWED
2. STATE STATUTE - REQUIRING WAIVER OF SOVEREIGN IMMUNITY.
3. STATE LAW REQUIRING NOTIFICATION BY ATTORNEY GENERAL OF LITIGATION ACTION WHICH WILL RESULT IN REDUCTION OF STATE JURISDICTION.
4. REVIEW JURISDICTION OF TRIBAL COURTS - POTENTIAL STATE LEGISLATION.
5. ALTERNATIVE LEGAL REASSERTIONS AGAINST TRIBAL RECOGNITION.
6. LEGISLATIVE STANDING.
7. LEGISLATIVE FUNDING OF TEST CASE.
8. OVERSIGHT OF STATE LITIGATION
9. FURTHER HEARINGS.
10. THIRTY DAY CONTRACT WITH DOUG BLANKENSHIP TO PRODUCE REVIEWS, ALTERNATIVES, QUESTIONS FOR ATTORNEY GENERAL AND LEGISLATIVE LANGUAGE.
11. DETERMINATION OF DELEGATION VIEWPOINT VIA MEETING WITH LEADERSHIP.
12. POSSIBLE JOINT RESOLUTION DIRECTED AT CONGRESS.
13. POSSIBLE FILING OF AMICUS BRIEF BY LEGISLATURE IN INDIAN COUNTRY CASES.



# Alaska State Legislature

## HOUSE OF REPRESENTATIVES

Official Business

 State Capitol  
 Juneau, AK 99801-1182

### NOTICE OF MEETING

#### Joint House/Senate Judiciary Committee Meeting

Date: December 4, 1995  
 Time: 10:00 AM  
 Place: Anchorage LIO, 716 W. 4th Ave., 2nd Floor Conference Room  
 Subject: Impact of Venette Case to Tribal Status in Alaska

#### Senate Members

Senator Taylor, Chair  
 Senator Green  
 Senator Miller  
 Senator Ellis  
 Senator Adams

#### House Members

Rep. Porter, Chair  
 Rep. Green  
 Rep. Bunde  
 Rep. Toohey  
 Rep. Vezey  
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# Native leaders want state to address bigger issues

**TIM MOWRY**  
Staff Writer

The state's decision to recognize Alaska Native villages' tribal status is a small step in the right direction, but Native leaders in the Interior are still waiting for Gov. Tony Knowles to take a giant leap into the bigger issue of tribal sovereignty.

Nanana Native village chief Mitch Demestieff called Attorney General Bruce Betsko's announcement on Thursday that the state will drop its opposition to tribal status for Native villages a "new point" because a federal judge already had ruled against the state on the issue.

"We'd already won that," Demestieff said. "I guess it's good to see the state support a next point."

Tribal status allows villages to control such matters as marriage, divorce, adoption, child custody and inheritance.

Steve Ginnia, the chief of Fort Yukon Native village about 100 miles north of Fairbanks, said tribes want a "one-to-one government relationship" with the state.

"We want to be recognized as a government entity in this state just like a borough or first-class cities or second-class cities," said Ginnia. See NATIVE, Page A-10

# NATIVE: Le:

Continued from Page A-1  
Olnala.

Demestieff and other Native leaders said they want the Knowles administration to tackle the bigger issue of "Indian country" and tribal powers. On Thursday, Betsko said the state will continue to fight villages' efforts to have their land designated as Indian country, which would grant them the power to set and enforce their own criminal laws, among other things.

Tanana Chiefs Conference at

# aders seek more response from state on s

turner Mike Walker called the U.S. Interior Department's decision to expand tribal status to about 225 villages in Alaska in 1993 as the "final word" on that issue and that the state was merely accepting the federal government's decision. The issue was using the tribal status laws as "a red herring" to avoid the bigger issue of sovereignty, he said.

"The tribal powers and Indian country issue is where the serious questions lie," he said.

"What is the scope of tribal powers and what are the parameters of Indian country?"

"Now we're going to fight over real issues," he said. "We're not going to fight over ideology."

"It kind of gives us hope that Governor Knowles will follow up on some of what candidate Knowles had in say prior to the election last year," said Demestieff.

But Betsko said the state's position opposing Indian country remained "firm."

"In our view Indian country does not exist in this state," he said. "That's the battlefield today."

Last summer, U.S. District Court Judge Russell Holland ruled that the village of Venetie did not have Indian country status. Holland said that Native villages gave up many tribal rights when they accepted the Alaska Native Claims Settlement Act in 1971, which granted them land and cash.

The state and Venetie for

# sovereignty

acting as outside contractor who was building a school, claiming the village had no authority to collect taxes. Venetie is appealing the ruling in that case, which began in 1986.

Bet Walker called the state's recognition of tribal status "a courageous decision."

"There is a lot of pressure in certain elements in Alaska to continue this unreasonable legal contest," he said. "This governor has indicated he'd like to see a positive relationship between

tribes and the state instead of a combative one as in past administrations."

Alaska Outdoor Council executive director Dick Bishop, whose group probably represents the biggest public opposition to recognizing Native villages' sovereignty, said tribal status recognition is "a term of political convenience."

"It's consistent with the governor's policy of maximum accommodation of political priorities of AFN (Alaska Federation of Natives) and other Native organizations," said Bishop. "I really see no relationship to what tribes really want or really are."

Bishop said tribes in Alaska are different from Indian tribes in the Lower 48 who have treaties with the federal government. He said tribal status recognition is a way "to optimize or maximize their leverage" and qualify for special treatment from the federal government.

It's important the state does not disfigure Indian country, he said, because that question was dealt with in the ANCSA.

But Walker said Indian country recognition would allow villages to confront the big problems plaguing Native communities such as law and order, child welfare, domestic violence and alcohol abuse.

November 18, 1995 News & Mirror, Fairbanks AK

Post-Net Fax Note 7671 Date 11-20 1995

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	Fax:

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**FAX**

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TO: Brian Porter (619) 322-2741  
Fax Number

FROM: Bruce Botelho Number of Pages Including this Sheet 7

MESSAGE: Bruce asked that I send  
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Bob Fitchie

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**CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION  
TRIBAL RECOGNITION: LITIGATION BACKGROUND**

November 20, 1995

- **THE VENETIE CASE**

State v. Venetic involves two consolidated cases that raise the issue of tribal status and Indian country. The first case concerns whether the Native Village of Venetic I.R.A. Council had the power to issue an adoption decree that the state would have to recognize and base a substitute birth certificate on. The second arose out of the Native Village of Venetic Tribal Government's effort to impose a business activities tax on a school construction project in the village.

- **THE FORT YUKON CASE**

The Native Village of Fort Yukon I.R.A. Council is a co-plaintiff in the Venetic case with respect to the tribal adoptions issue.

- **TRIBAL STATUS ISSUE**

The issue of tribal status of both the Native Village of Venetic and the Native Village of Fort Yukon was raised in the Venetic consolidated actions.

- **INDIAN COUNTRY ISSUE**

The tax portion of the Venetic case raises the Indian country issue. The ability to tax depends on the tribe having a territory, Indian country, over which it exercises jurisdiction.

- **VENETIE TRIBAL STATUS DECISION**

In December 1994, Judge Holland decided that the people residing in the former Venetic Indian Reserve are a tribe under federal common law (the decision was not based on Interior's tribal list).

## • VENETIE INDIAN COUNTRY DECISION

In August 1995, Judge Holland decided that the ANCSA lands owned by Venetie are not Indian country. This decision, if it stands, means that ANCSA lands cannot be Indian country. It does not resolve the status of other lands in Alaska that may come within the definition of Indian country, such as Native allotments and Native townsite lots. This decision will be appealed by Venetie.

## • FORT YUKON TRIBAL STATUS PROCEEDINGS

Fort Yukon moved for summary judgment in May 1995 on the issue of whether the Native Village of Fort Yukon has tribal status based on its inclusion on the Secretary of Interior's published lists of federally recognized tribes.

The State opposed the motion, arguing that the 1993 and 1995 lists are invalid because the DOI regulations necessary to achieve tribal recognition were not followed.

The United States filed an *amicus curiae* brief in support of Fort Yukon. The United States took the position that Fort Yukon, and all of the entities included on the 1993 and subsequent lists, are federally acknowledged Indian tribes, arguing that the Secretary has the authority to acknowledge tribes and the intent to do so, as stated in the Preamble to the 1993 and 1995 lists, was unambiguous.

## • FORT YUKON TRIBAL STATUS DECISION

On September 20, 1995, Judge Holland ruled that the Native Village of Fort Yukon is a federally recognized tribe as of October 21, 1993, based on its inclusion on the Secretary of Interior's 1993 list of federally recognized tribes. The court found that the Secretary's intent to acknowledge tribes was "clearly announced" in the publication of the October 21, 1993, tribal list. Prior to this date, the Secretary's intent in publishing tribal lists was not clear. Thus, to establish tribal status prior to October 21, 1993, Fort Yukon and any other Alaskan entities would have to establish their historical tribal status through a trial in court or in proceedings before the Secretary.

Fort Yukon moved for reconsideration of the court's ruling that it must prove its historical tribal status prior to October 21, 1993.

The state's motion for reconsideration on the validity of the tribal list has been withdrawn.

- **CHICKALOON NATIVE VILLAGE CASE**

In October 1994, the State brought suit against the Chickaloon Native Village, the Secretary of Interior, and various individual defendants to quiet title to the Chickaloon River Road. The complaint also alleged that the federal defendants did not follow the proper procedures in including Chickaloon on the 1993 list of federally recognized tribes and that Chickaloon does not qualify as an Indian tribe. On November 17, 1995, the State moved to dismiss the tribal status portion of this case.

- **KLUTI KAAH (COPPER CENTER) CASE**

The Native Village of Kluti Kaah (Copper Center) enacted a gross receipts tax on the oil passing through the Trans-Alaska Pipeline in what the Native Village considered to be its tribal territory. Alyeska filed suit to enjoin enforcement of the tax and to obtain a ruling that the Native Village has no authority to enact or enforce such a tax. The State is a co-plaintiff with Alyeska.

Tribal status is not an issue in this case, as the state conceded the tribal status of the Native Village of Kluti Kaah prior to trial, based on the federal common law factors.

Indian country is the primary issue in this case. Trial was held in January, 1994. We are awaiting a decision from Judge Holland. If the court decides against Kluti Kaah on the Indian country issue, it is likely this case will proceed on appeal with the Yenetic Indian country case.

1. MULTICENTRAL TRIBES LIST

**CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION**  
**TRIBAL RECOGNITION: WHAT IT MEANS**

November 20, 1995

The following describes only the broad parameters of what tribal recognition means. The specifics will need to be determined based on the facts and circumstances in which tribal powers are at issue.

• **WHO RECOGNIZES INDIAN TRIBES**

The recognition of Indian tribes is a federal, not a state, function. The federal acknowledgment process arises out of the special relationship between the United States and the Indian tribes. Tribes can be recognized as having tribal status by Congressional act, executive action, or judicial determination.

• **THE 1993 AND 1995 LISTS OF FEDERALLY RECOGNIZED TRIBES**

On October 21, 1993, the Secretary of the Interior published a list of Native entities within the State of Alaska recognized and eligible to receive services from the United States Bureau of Indian Affairs. However, the list means more than this. In the Preamble to the list, it is stated that the listed entities "have the same governmental status as other federally recognized Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States. . . ."

In February 1995, the Secretary issued a new list that reaffirmed the principle that the listed entities are "acknowledged to have the 'immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States.'"

In September 1995, the federal district court in Alaska ruled in the Ventic/Fort Yukon case that Fort Yukon is a federally recognized tribe based on its inclusion on the 1993 list. Under this decision, all entities on the list are federally recognized tribes.

• **WHO CAN REVERSE A TRIBAL RECOGNITION DECISION**

Once the Secretary has made an tribal recognition decision, the federal courts may review that decision for arbitrariness only. Only Congress can reverse a recognition decision.

## • THE IMPACT OF TRIBAL RECOGNITION IN ALASKA

Tribes may exercise such governmental authority as is permitted under federal law (the extent of which is, of course, not entirely clear).

Tribes are eligible to receive funding and services from the federal government.

In the absence of a geographical area (i.e., Indian country) over which a tribe may exercise governmental powers left to them to exercise, the extent of a tribe's authority is limited to the regulation of the internal affairs of the tribe and its members, and immunity from suit.

## • TRIBAL AUTHORITY OVER INTERNAL AFFAIRS

Tribes have authority to set rules for tribal membership.

Tribes have jurisdiction over the domestic relations of their members. Tribes may regulate the relationships of their members, such as marriage, divorce, child custody, adoption, and inheritance. Since Alaska is a Public Law 280 state, the state courts have at least concurrent jurisdiction over domestic relations matters involving tribal members. This could lead to jurisdictional disputes.

Under the Indian Child Welfare Act (ICWA), the State must notify tribes about Alaska Native children who come under the child protection statutes and the tribes' right to participate in state court proceedings. All of the villages listed in ANCSA are "tribes" for the purposes of ICWA.

Tribal recognition may increase tribes' roles in child protection cases, including increased frequency of tribal court resolution of these matters, increased recognition by state courts of tribal court jurisdiction, and increased transfer of cases from state court to tribal court. The State has already entered into formal agreements with a number of tribes regarding how they will interact in child protection cases, and we may see more agreements negotiated.

## • IMMUNITY FROM SUIT

One of the attributes tribes enjoy is sovereign immunity. This means that tribes are immune from suit. Sovereign immunity does not bar suits against individual tribal officials. Congress can waive the tribes' sovereign immunity, but the waiver must be clearly expressed and strictly construed.

The extent to which and manner in which tribes themselves can waive their immunity is less clear. The Alaska Supreme Court has held that tribes can waive their sovereign immunity by contract. To waive immunity by contract in matters relating to trust property, tribes must receive consent of the Secretary of the Interior or Congress.

## • NO CRIMINAL JURISDICTION

Without Indian country, a tribe has no criminal jurisdiction, and as a Public Law 280 state, the State of Alaska has jurisdiction over all crimes committed in Indian country. However, courts have recognized concurrent tribal jurisdiction over minor crimes in Indian country.

## • THE IMPACT OF INDIAN COUNTRY IN ALASKA

While tribal status enables a tribe to exercise some authority over its members, the majority of governmental powers a tribe may want to exercise are only applicable in Indian country. These powers include civil and criminal jurisdiction, taxation, environmental regulation and compliance, fish and game management, land use regulation, and gaming.

The extent to which a recognized tribe acting within Indian country can exercise various powers over members and nonmembers has been a source of much litigation throughout the United States. Likewise, the power and authority of states in Indian country is regularly litigated.

This area is complicated and unsettled in the contiguous states.

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# FAX

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DATE: 11/22/95 TIME: \_\_\_\_\_ REF. NO: \_\_\_\_\_

TO: Brian Porter (49) 322-2741  
Fax Number

FROM: Bruce Botelho Number of Pages  
Including this Sheet 3

MESSAGE: Additional info by B Botelho

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# Alaska tribes

## State recognizes the obvious

Under Gov. Tony Knowles, the state has finally recognized the obvious: Alaska is home to scores of Native communities that are entitled to legal recognition as tribes. By dropping a legal challenge in a case involving Fort Yukon, the state recognized its position was not only legally weak but misguided.

The state's new stand reflects, in part, a greater respect for tribal traditions by Gov. Knowles, who owes his narrow election to overwhelming support from Bush voters.

Practically speaking, the impact of the state's concession will be modest. Exactly what Alaska tribal governments can legally do is hotly disputed; the list of their undisputed powers is quite short. Under current case law, Alaska tribes have jurisdiction only over their own members, and only in civil matters such as adoptions, divorces and child custody.

Though the state's move is largely symbolic, it is important — and overdue. It says the state will work with rural Native communities on their own terms, rather than treat tribes as somehow inherently threatening and divisive institutions.

The state's old policy often forced villages that wanted to exercise their modest list of powers to endure a long and costly legal battle. Now both sides can focus their attention on the more fundamental question: Do Alaska's tribes have all the same powers of their brethren in the Lower 48?

Tribal activists argue yes. They'd like to see tribes governing Alaska's vast amounts of Native-owned lands. Those tribal governments would have certain powers over non-Natives, including the ability to impose taxes, write land use laws and manage fish and game.

The state remains bitterly opposed to that vision of tribal government — and this time, it has a more plausible case. Congress created Native corporations as an alternative to Lower 48 reservations, so the courts may well conclude that Congress did not want Alaska tribes to have reservation-style powers over Native corporation land.

It's curious that the prospect of strong tribal government causes Alaskans such consternation. In the Lower 48, tribal government is hardly a radical concept. States and tribes have had some highly publicized conflicts, but generally, the two sets of governments peacefully coexist and at times they cooperate.

Tribal advocates here say there's no reason Alaska can't eventually reach the same point. If they're going to realize that vision, though, they may have to achieve it through an act of Congress, rather than the rulings of federal courts.



AH,W

# Familie

BOSTON — We are the kitchen running numbers. It's our annual prep course at Thanksgiving Central where we jot in list-making. The final count: 21 people, tables, 19 chairs, one plumb, 21 napkins, and pieces of silverware — you include the two spoons mangled in the disposal.

My husband goes to cupboard to add up glasses — 18 that we and half a dozen orphans subtract the napkins missing from our dinner roundup — one polka square unaccounted, three plain ones disappeared.

These numbers accumulate in my brain until I begin to feel as if I were compiling one of those statistical portraits they find in the newspaper under heading: Thanksgiving 1995.

I imagine next a statistical chart describing people who will fill the 21 seats. A numerical file of one Very Extended American Family:

Geography: five codes.

Countries of Origin: to 10 ethnic groups, pending on how you define them.

Age: from single digits to the 90s.

Religion: two to eight depending upon how figures denominated whether you include "rest of the above."

# Cheers & Jeers

# Land or

Alaska Daily News 11/21/95

TOTAL P.01

CLIPPING IN  
Daily New- Miner

DATE 11-22-95

### Daily News - Miner

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PAUL J. HARVEY

ALAN KIMMOP  
Editor

ALAN KIMMOP  
Editor

#### Defining the land

Gov. Tony Knowles has taken a brave but wise course in reaffirming the state's opposition to any recognition of "Indian country" in Alaska.

Bruce Botelho, Knowles' attorney general, announced last week that the state would recognize the tribal status of various Native groups in Alaska. But, as most commentators noted, that wasn't anything new. The more important development was Botelho's promise to fight the assertion of Indian country by such tribes.

Indian country is land over which a tribe has some legal authority. Basically, under federal Indian law, that authority exists on reservations and in places that can be considered "dependent Indian communities."

Federal District Court Judge Russel Holland of Anchorage said in July that he didn't think any villages here qualify as dependent communities. By law, dependent communities are those that are under the active superintendence of the federal government, he said. Since the Alaska Native Claims Settlement Act of 1971 ended the federal superintendent's role here, Holland said, so too did it end the possibility of Indian country.

However, Holland's order is sure to be appealed by those who argue that Native Alaskans' aboriginal authority should not disappear simply because the federal government decided to drop its role as overseer.

Greater strength is found in the opposing arguments, though. ANCSA, which was created, accepted and endorsed by grassroots Native organizations, didn't just drop the federal supervisory role; it explicitly extinguished aboriginal land claims. Indian country is such a claim and therefore cannot be recognized here. Besides, real cultural preservation and pride, one goal of those who advocate sovereignty, is not something government, no matter its origin, can accomplish. And economic self-sufficiency, another goal, would be discouraged by the presence of new and separate legal entities facing business investors.

While unsteadily pursuing those goals through Indian country, we also would risk creating deep racial and political divisions between Alaska's people. And that's something we definitely do not need.

OFFICE OF THE GOVERNOR

FAIRBANKS, ALASKA

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

NATIVE VILLAGE OF VENETIE )  
I.R.A. COUNCIL, et al., )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
STATE OF ALASKA, et al., )  
 )  
Defendants. )

No. F86-0075 Civ (HRH)

**FILED**

OCT 20 1995

UNITED STATES DISTRICT COURT,  
DISTRICT OF ALASKA

By \_\_\_\_\_ Deputy.

MOTION FOR RECONSIDERATION

The State of Alaska hereby moves for reconsideration of the court's order granting partial summary judgment entered September 20, 1995. Alaska urges reconsideration of the conclusions that the Secretary of the Interior is not required to follow his own regulations and that publication of the October 2, 1993, list therefore constituted recognition of the Native Village of Ft. Yukon as a tribe. Clerks Docket No. 166 at 8-10.

In its September 20, 1995 order, the court held that

...no Alaskan entity was recognized as a tribe by the federal executive by publication of a BIA list until the publication of the BIA's October 21, 1993, list. . . . As of that date, Ft. Yukon became an acknowledged tribe.

Clerk's Docket No. 166 at 8. In treating the 1993 list alone as the instrument of recognition of previously unrecognized tribes like Fort Yukon, the court overlooked the material proposition of

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law that federal agencies are required to comply with their own legislative regulations in the exercise of their delegated powers.

In this order, the court reiterated its earlier conclusion that the Secretary of the Interior has the power, now formalized in 25 C.F.R. Pt. 83, to recognize tribes because Congress has acquiesced in the Secretary's exercise of that power for decades. Clerk's Docket No. 166 at 8, citing Clerk's Docket 142 at 26-27. In that earlier decision, the court went on to conclude

. . . that the Secretary and, by delegation, the BIA had authority to adopt the FAP regulations [25 C.F.R. Pt. 83] and have authority thereunder to acknowledge tribal status.

Clerk's Docket No. 142 at 27 (emphasis added). This conclusion mirrors that of Solicitor Sansonetti: "The regulations [25 C.F.R. Pt. 83] currently apply to all groups in the continental United States, including those in Alaska." Cp. Solic. Dep't Interior M-36975 (January 12, 1993) at 59 n. 151 (citation omitted).

The Solicitor's opinion thus assumes that the Department of the Interior and its Secretary are bound by these regulations because they are "legislative" rules see K. Davis and R. Pierce, Jr., Administrative Law Treatise 233, 250 (3d ed. 1994). Legislative rules apply broadly to a class of people and must be further applied to affect particular members of the class. Id. at

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226-28. They must be adopted through a process including notice and comment procedures, as Part 83 was. Id. at 228, 234; 43 F. Reg. 39361 (1978). They have the same binding effect - on the public, on the courts and on the agency - as statutes. Id. at 228, 233-34, 251-52.

Interior has itself argued that Part 83 is a legislative rule and the federal courts have uniformly so treated these regulations. E.g., Miami Nation of Indians of Indiana, Inc. v. Rabbitt, 887 F. Supp. 1158, 1164-65. (N.D. Ind. 1995) (holding Part 83 is a legislative regulation binding on the petitioning tribe). Indeed, review of another case pending before this court demonstrates the inconsistent positions taken by the United States on this issue. In Alaska v. Harrison, Case No. A94-46 CV (HRH), the United States has conceded that the Secretary is bound to follow Part 83. See Harrison Clerk's Docket No. 35 at 5. Rather than claim that the Secretary has the discretion to dispense with the petitioning procedures and achieve acknowledgement merely by the act of listing a group on the 1993 List, the United States has argued that it need not follow the petitioning process for "previously acknowledged" tribes. Id.<sup>1</sup>

The court has already rejected this argument in the instant case. In its December 23, 1993 Order the court referred to the January 12, 1993 Solicitor's Opinion, noting that if any groups on the 1993 lists "were ever acknowledged as a tribe by the BIA, the Solicitor seems not to know of it." Clerk's Docket No. 142 at 30-31.

MOTION FOR RECONSIDERATION - 3 -  
No. F86-0075 Civ (HRH)

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The Supreme Court has held that where the Secretary of State had adopted regulations that limited his statutory authority to terminate foreign service officers, any actions inconsistent with those regulations were illegal. Service v. Dulles, 354 U.S. 363, 383-88 (1957). Similarly, once the Secretary of Interior decided to limit his implied, delegated discretion to acknowledge tribes by adopting regulations, he could not then recognize some 200 tribes in Alaska, none of which had met the substantive and procedural standards set out in Part 83.

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Nothing in these regulations creates an exemption for Secretarially-initiated acknowledgments. Rather, from the first publication of its proposed regulations the Department of the Interior was clear that it was replacing the practice of "acknowledgement . . . at the discretion of the Secretary" with "procedures to enable that-(sic) a uniform and objective approach be taken to [ ] evaluation [of requests for determination of federal recognition]." 42 F.Reg. 30647 (June 16, 1977). Despite significant substantive changes in the proposed regulations, development of a uniform and objective approach continued to be the goal. 43 F.Reg 23743 (June 1, 1978); 43 P.Reg. 39361 (September 5, 1978).

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No evidence has been provided to the court to demonstrate a continued practice of ad hoc recognitions by the

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Secretary. Allowing the Secretary to recognize by the stroke of a pen some 200 Alaska entities, none of which have complied with the applicable procedural and substantive requirements, would be completely inconsistent with the declared purpose of the regulations. It would also be an affront to and a cruel joke on the tribes that have gone through the process.

The court should therefore reconsider its conclusion that the publication of the 1993 or any subsequent list constituted recognition of Ft. Yukon as a tribe.

Dated: October 20, 1995,

BRUCE M. BOTELHO  
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OCT 23 1995

4th JUDICIAL DISTRICT  
STATE OF ALASKA

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

NATIVE VILLAGE OF VENETIE  
I.R.A. COUNCIL, NATIVE  
VILLAGE OF FORT YUKON  
I.R.A. COUNCIL, NANCY JOSEPH,  
and MARGARET SOLOMON,

Plaintiffs,

vs.

STATE OF ALASKA and KAREN  
PERDUE in her official capacity  
as Commissioner of Health  
and Social Services,

Defendants.

No. F86-0075 Civ (HRH)

PLAINTIFFS' MOTION FOR  
RECONSIDERATION

Plaintiffs Native Village of Fort Yukon IRA Council and Margaret Solomon seek reconsideration of that part of the court's September 20, 1995, Order (Partial Motion for Summary Judgment - Tribal Status) which concludes that "[t]he question of Fort Yukon's historical tribal status prior to October 21, 1993, is an open question. - A trial will be necessary to determine this question." Clerk's Docket No. 166 at 11.

The court correctly determined that the Preamble to the 1993 list clarified the intended effect of publishing a list of Alaska tribes recognized by the Secretary of the Interior. *Id.* at 8. "The executive's intent was clearly announced on October 21, 1993. As of that date, Fort Yukon became an acknowledged tribe." *Id.* Plaintiffs believe, for the reasons set forth below, that the court is incorrect, however, in its conclusion that Fort Yukon must prove its historical tribal status prior to October 21, 1993, either in a trial in this court or in proceedings before the Secretary. *Id.* at 11.

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First, the Preamble to the 1993 list is absolutely clear that a tribe's inclusion on the 1993 list of Alaska tribes was based on that tribe's prior history, including congressional recognition in the Alaska Native Claims Settlement Act, prior inclusion on the Secretary's lists, and a history of a government-to-government relationship with the federal government:

*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.'*

58 Red. Reg. 54364, 54365 (Oct. 21, 1993) (emphasis added). In other words, the clarifying Preamble itself acknowledged the prior historical, governmental status of the listed Alaska tribes. Given the Secretary's expressed reasons for including the Native Village of Fort Yukon, and all the other listed tribes, on the 1993 list, it would be a redundant and wasteful exercise to require these same tribes to prove what the Secretary has already found to be a prerequisite for inclusion on the 1993 list. Such an exercise undermines the very basis of the 1993 list and utterly fails to give the deference required by law to the Secretary's findings regarding tribal status.

Furthermore, the Secretary's clarifying Preamble and publication of the 1993 list did not create the Fort Yukon Tribe, nor did it grant the Tribe its powers of self-government. The tribe's existence pre-dates any action by the Secretary; powers the tribe was exercising prior to October 21, 1993, are presumed to be exercises of sovereign authority "until Congress affirmatively acts to take such authority away." *Native Village of Venetia L.R.A. Council v. State of Alaska*, 944 F.2d 548, 556 (9th Cir. 1991), cited in this court's Order, Clerk's Docket No. 166 at 10.

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Second, the court's distinction between Fort Yukon's tribal status pre- and post-October 21, 1993, resurrects the "historical/non-historical" distinction which Congress has specifically forbidden in its recent amendment of the Indian Reorganization Act. See 25 U.S.C. § 476(f) and (g). The Ninth Circuit's remand in this case set forth the requirement that Fort Yukon prove its historical status as a tribe. *Venetie*, 944 F.2d at 558-559. That decision, however, described the test for establishing tribal status when a group is not recognized by the federal government as an Indian tribe; the decision also pre-dated Congress' amendments forbidding any distinctions between so-called historical and non-historical tribes; and, most certainly, the decision did not anticipate publication of the Secretary's 1993 clarifying Preamble and list. These intervening and controlling events have significantly changed the tribal status landscape and removed any necessity that Fort Yukon prove its historical tribal status in a fact-based district court trial.

Third, Congress specifically included Alaska tribes in the definition of Indian tribes covered by the Indian Child Welfare Act, 25 U.S.C. § 1903(8):

'Indian tribe' means any Indian tribe, band, nation, or other organized groups of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native Village as defined in section 1602(c) of Title 43 [ANCSA].

Thus, with regard to the Indian Child Welfare Act, Congress has already recognized Alaska tribes on an equal footing with the other Indian tribes recognized by the Secretary, and the full faith and credit section of the Act, 25 U.S.C. § 1911(d) applies with equal force to Alaska tribes. As the Ninth Circuit found,

[N]either the Indian Child Welfare Act nor Public Law 280 prevents them [Alaska Indian tribes] from exercising concurrent jurisdiction. If the native villages of Venetie and Fort Yukon are sovereign entities which may exercise dominion over their members' domestic relations, Alaska must give full faith and credit to any child custody determination made by the villages' governing bodies in accordance with the full faith and credit clause of the Indian Child Welfare Act ...

If the district court determines that either village is a successor to such a sovereign, it must provide the relief necessary to ensure that the state of

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Alaska affords full faith and credit to adoption decrees issued by the tribal courts of the native village.

*Venette*, 944 F. 2d at 512. While the necessity of proving that Fort Yukon is the modern-day successor of an historical sovereign tribe has been removed by publication of the clarifying 1993 Preamble and list and Congress' amendment of the IRA, the remainder of the Appeals Court directive on remand must be fulfilled.

Finally, the court indicates that Fort Yukon should let the court know whether it wishes to proceed before the court or before the Secretary. Clerk's Docket No. 166 at 11. While it may be possible for Fort Yukon to proceed before the Secretary in a petition seeking to exercise exclusive or mandatory referral jurisdiction, Fort Yukon may not petition the Secretary to settle the question of its historical tribal status prior to October 21, 1993. This is because the Secretary's own regulations forbid a tribe from petitioning for federal recognition if that tribe is already on the Secretary's list of recognized tribes. 25 C.F.R. § 83.3 (a) and (b) (1994). Fort Yukon, of course, has been on all of the Secretary's published lists since 1982 and thus is precluded from petitioning for federal recognition prior to October 1993. Doubts about the effect of the lists that pre-dated publication of the 1993 Preamble and list have now been clarified by the Secretary: only the entities on the previous lists which were listed "on the basis of their status as tribes ..."; and which were on the "modified ANCSA list" and "functioned as political entities exercising governmental authority ..." have been included on the 1993 list. 58 Fed. Reg. 54364, 54365 (Oct. 21, 1993). Publication of the 1993 list was a "cleaning-up" of prior lists and a clarification, once and for all, of which entities in Alaska were recognized by the Secretary. Thus, resort to the Secretary is not an option for clarifying Fort Yukon's tribal status prior to October 21, 1993. The Secretary has already clarified this question.

For the foregoing reasons, plaintiff's Motion for Reconsideration should be granted and the court's Order modified to accurately reflect the intended purpose of the Secretary's 1993 Preamble and list - to "clarify the legal status of Alaska Native villages."

give "notice as to which entities the Department of the Interior deals with as 'Indian tribes'..." and identify those entities which are considered 'Indian tribes' as a matter of law by virtue of past practices and which, therefore, need not petition the Secretary for a determination that they now exist as Indian tribes." 58 Fed. Reg. 9250 (Feb. 16, 1995) (emphasis added). In the case of the Native Village of Fort Yukon, these past practices include acknowledgment by the federal government as far back as 1939-40 when its IRA Constitution was approved and adopted (see Plaintiffs' Memorandum in Support of Summary Judgment, Clerk's Docket No. 158 at 21-22); by Congress in the 1971 Alaska Native Claims Settlement Act and all subsequent Indian legislation including the 1978 Indian Child Welfare Act; and by the Secretary in all published lists of Alaska tribes since 1982. For purposes of this case, it is sufficient to find that the Native Village of Fort Yukon has been acknowledged as an Indian tribe and its 1986 adoption decree should be given full faith and credit by the State of Alaska.

Dated this 20th day of October, 1995.

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CERTIFICATE OF SERVICE

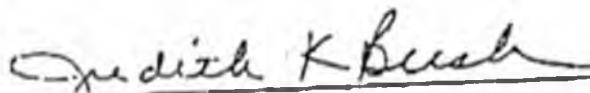
The undersigned certifies that on the 20th day of October, 1995, she mailed by U.S. first class mail a true and correct copy of Plaintiffs' Motion for Reconsideration to the following counsel of record:

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# REGIONAL REPORTS

## Court Voids Indian Land Trust Law

PITTSBURGH, S.D. — The 8th U.S. Circuit Court of Appeals has struck down a 60-year-old federal law that allows Native American tribes to buy land and render it exempt from state or local taxes by placing it in trust with the government.

Officials in many states worry about revenue lost when tribes buy land off the reservation and put it in trust. South Dakota Attorney General Mark Barnett said, "It has a nationwide impact," he said of the Nov. 7 decision by a three-judge panel of the 8th Circuit.

The panel ruled 2-to-1 that a law allowing the Interior Department to acquire land and place it in trust for tribes or individuals is unconstitutionally broad, failing to set standards on what purpose that land should serve. *South Dakota v. U.S. Dept. of Interior*, 94-2344.

There was no immediate response from the Interior Department's Washington, D.C., office.

The ruling came in a dispute that began when the Lower Brule Sioux Tribe bought 91 acres and the Interior

Department placed the land, partially within the city of Oacuma, in trust in 1992.

Tribal officials initially said the land should be placed in trust for use as an industrial park. They later proposed building a casino on the site.

The city of Oacuma and state sued to challenge the way the trust procedure was handled, but a federal judge dismissed the lawsuit.

The suit also questioned whether tribes can put casinos on land they purchase off their reservation, but the appellate panel did not address that issue, Mr. Barnett said.

The law's broad language could allow the secretary of the Interior to purchase and place in trust property such as factories, office buildings or golf courses, said the opinion by Circuit Judge James B. Loken.

"Indeed, it would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present," Judge Loken wrote.

### CALIFORNIA

## Court Upholds \$1.3M Award

SACRAMENTO — California workers can sue for wrongful demotion, the state Supreme Court held Nov. 13, upholding a \$1.3 million award to two engineers who claimed they were demoted in violation of the Pacific Gas & Electric Co. policy requiring good cause. The unanimous

panel ruled that the judge denied summary judgment on whether Time published with actual malice a statement that one source of church funds is the "notorious, self-regulated stock exchange in Vancouver, British Columbia, often called the scam capital of the world."

### OHIO

## Abortion Law Delayed

U.S. District Judge Walter Rice has delayed the implementation of the nation's

### PENNSYLVANIA

## Union Pact Bars Drug Suit

PHILADELPHIA — A person's access to the federal courts in drug and alcohol testing cases can be barred by the terms of the contract with his employer, the 3d U.S. Circuit Court of Appeals ruled unanimously Nov. 7. Circuit Judge Carol Los Mansmann wrote that "even where a drug testing policy has been held to be constitutionally infirm, a public employee may not pursue a civil rights suit based upon that infirmity where his union and his employer agree to operate that policy." Judge Mansmann ruled that Mr. due process claims were satisfied by his union contract's grievance and arbitration process. *Southeastern Pennsylvania Transportation A* 95-1032.



Judge Mansmann

### VIRGINIA

## Fiddler Settles With GC

SUFFOLK — A settlement was reached Nov. 1 between the state Republican Party and a fiddler who was \$20 million over crippling injuries suffered knocked over flag-bedecked scaffolding. Thomas M. Williams Jr. agreed to \$725,000 on the first day of trial, said Joseph Morrissey, an attorney for the country musician Mr. Williams, who played on the television show "Hee Haw." was his

# STATE OF ALASKA

TONY KNOWLES, GOVERNOR

## DEPARTMENT OF LAW

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December 13, 1995

The Honorable Brian Porter  
Alaska House of Representatives  
716 W. 4th St., Ste. 360  
Anchorage, AK 99501

Dear Representative Porter:

Concerns expressed by legislators about the recent decision to drop further litigation of the tribal status issue have reminded me of the need to do a better job of keeping you informed of activities of the Department of Law.

I intend to implement three steps in that regard:

**Monthly Reports:** We will circulate a monthly report of all departmental activities to you. I have enclosed the first report for activities in the month of October.

**Quarterly Reports:** We will provide you with quarterly updates on major litigation undertaken by the Natural Resources Section. This section manages most of our litigation against the federal government including the Statehood Compact Case and subsistence litigation.

**Special Reports:** On issues of major importance, we will periodically provide more in depth analyses. For instance, I will soon provide a more detailed background paper on "tribal status" based upon questions raised at the Joint Judiciary Committee hearing on the subject last week.

I hope these steps will contribute to an even better working relationship between the department and the legislative branch. I would appreciate any suggestions you have to improve the format of these reports.

The following is the quarterly report summarizing many of the active subsistence and other significant lawsuits being handled by the Natural Resources Section of the Department of Law.

## FEDERAL COURT CASES

1. Finstad v. Alaska. (U.S. District Court for the District of Columbia No. 95-1180 (Judge Royce Lamberth); our file no. 221-96-0007; state's attorney: Robert C. Nauheim; plaintiff's attorney: none (pro se); other defendants' attorneys: Ronald G. Birch (Fairbanks North Star Borough), Lisbeth Sapirstein (National Society of Professional Engineers); Moffet B. Roller (Tom Rosiduik and Roen Design, Inc.)) In June 1995, Clinton Finstad filed suit against the State of Alaska and other defendants alleging numerous claims relating to a contract dispute between Finstad and the Alaska Department of Natural Resources that first arose in 1981. Finstad's company, Alaska Architectural and Engineering, Inc., performed surveying work for the Department of Natural Resources in 1980-81. Finstad filed a suit against the state in 1982 alleging numerous contractual claims. The court dismissed the suit in 1986 for lack of prosecution. Finstad now asserts that the state has conspired to deprive him of his contractual and constitutional rights and has requested \$10 million in compensatory damages and \$10 million in punitive damages.

The state has filed a motion to dismiss the complaint asserting improper venue, immunity under the Eleventh Amendment to the United States Constitution, application of statutes of limitation barring the claims, the absence of standing to sue in behalf of the corporation, and failure to state a claim for which relief may be granted.

2. Confederated Tribes & Bands of the Yakama Indian Nation, et al. v. Malcolm Baldrige. (U.S. District Court for the District of Washington; state's attorneys: Myles Conway and Martin Weinstein). This case was originally filed in 1983 when certain northwest Indian Tribes' sued the federal government seeking to compel the United States to regulate fisheries in federal waters off Alaska to protect the Tribes' treaty fishing rights. In 1984, the Tribes, the United States and the States of Oregon, Washington and Alaska entered a stipulation which dismissed this litigation and provided that the allocation of salmon between Alaska and the south would be determined under the mechanisms established by the Pacific Salmon Treaty and that the State of Alaska would support ratification of that treaty.

In August of 1995, the Tribes, together with the States of Washington and Oregon, sought a Temporary Restraining Order and Preliminary Injunction against the southeast Alaska chinook salmon troll fishery, alleging that Alaska had implemented its fishing regime in bad faith and in violation of the stipulation and the mechanisms of the Pacific Salmon Treaty. Judge Barbara

Rothstein entered the TRO and, after a full evidentiary hearing, enjoined the southeast Alaska chinook troll fishery for the remainder of the 1995 season.

The state sought an emergency stay of the preliminary injunction in the Ninth Circuit but was not successful. The state then filed its appeal of the district court decision. All briefing will be complete by December 6, 1995. No date for argument has been set.

3. U.S. et. al. v. Washington, et. al. (U.S. District Court for the District of Washington; state's attorneys: Myles Conway and Martin Weinstein). In U.S. v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974), aff'd 520 F.2d 676 (9th Cir. 1975), Judge Boldt held that certain northwest Indian Tribes have a treaty fishing right to harvest 50 percent of the harvestable fish passing through recognized tribal fishing grounds. Under the continuing jurisdiction of the federal court, the northwest Tribes now seek a ruling that their treaty rights include salmon caught in southeast Alaska that would otherwise return to tribal fishing grounds.

The state has moved for summary judgment, arguing the Tribes do not have any historical rights to salmon caught in Alaska and could not have reserved any such rights in their treaties with the United States. The state also argues that the geographic scope of treaty fishing rights was adjudicated by Judge Boldt and that the tribal claims are barred by res judicata. Briefing and argument are complete and we are awaiting a decision from the district court.

A trial is now scheduled for October 1996 and discovery is moving forward. The parties are also working to develop a "Joint Biological Statement" which will contain agreed scientific facts related to the make-up of state and tribal fisheries.

4. Katie John v. United States (John II) (United States District Court No. A90-484 Civ. (Judge Holland); Ninth Cir. No. 94-35481; our file No. 223-91-0275; state's attorneys: Joanne Grace and Henry Wilson; plaintiffs' attorney: Heather Kendall of NARF; U.S.' attorneys: Dean Dummore and Elizabeth Ann Peterson. This is one of the jointly-managed ANILCA subsistence cases.<sup>1</sup> The plaintiffs claim that ANILCA requires the federal government to

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<sup>1</sup> In 1993, the district court decided to manage the following ANILCA cases jointly as to jurisdictional issues: Kluti Kaah Native Village of Copper Center v. Alaska (consolidated with Arctic Regional Fish and Game Council v. Babbitt), Katie John v. United States (consolidated with Alaska v. Babbitt), Fish and Game Fund v. Alaska, Native Village of Stevens v. McVee, Peratrovich v. United States, Native Village of Quinhagak v. United States, and Ketzler v. Alaska. The court

manage fisheries in navigable waters of Alaska, and accordingly, that the Federal Subsistence Board should take over management of the Copper River and authorize a subsistence fishery at Bazulnetas.

On March 30, 1994, Judge Holland ruled that navigable waters are "public lands" because the navigational servitude is an interest to which the United States has title. (The navigational servitude is a power that enables the federal government to regulate navigable waters for purposes of commerce, navigation and national defense). Judge Holland stayed his decision pending appeal.

On April 20, 1995 the Ninth Circuit Court of Appeals reversed Judge Holland's decision, rejecting the argument that all navigable waters are "public lands" because of the navigational servitude. However, the Ninth Circuit accepted an alternative argument advanced by the plaintiffs and federal defendants and held that "public lands" includes navigable waters in which the United States has reserved water rights. (Under the reserved water rights doctrine, when the United States withdraws land and reserves it for a federal purpose -- for example, a national park or wildlife refuge -- it also reserves by implication water rights necessary to fulfill the purposes of the reservation). The court remanded the case to the Departments of Interior and Agriculture to identify those waters.

The state filed a petition for rehearing before the Ninth Circuit, arguing that navigable waters are not "public lands" under any theory. The court denied the State's petition for rehearing on August 8, 1995. On August 9, the State submitted the Alaska Supreme Court's decision in Totemoff v. State, \_\_\_ P.2d \_\_\_, 1995 WL 479510 (Alaska 1995), to the Ninth Circuit as supplemental authority. On August 10, 1995, the Ninth Circuit sua sponte ordered the mandate withheld pending further order of the court, and on August 30, it ordered the parties to submit supplemental letter briefs addressing the analysis of ANILCA's definition of "public lands" in the Alaska Supreme Court's Totemoff decision. The parties all filed the requested briefs by September 13, 1995.

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decided to deal with the scope of the federal government's authority (the "who" issue) and whether navigable waters are "public lands," (the "where I" issue) first. The parties agreed to stay proceedings in the other cases until the Ninth Circuit rendered its decision in Babbitt and John on the "who" and "where" issues. The court identified the question raised in Stevens Village, whether the authority of the Federal Subsistence Board (FSB) extends to state and private lands, as the next major issue to be decided (the "where II" issue). The parties agreed to stay proceedings on the "where II" issue pending action by the Departments of Interior and Agriculture on a rulemaking petition submitted by the Stevens Village plaintiffs and others, requesting that the FSB's authority be extended to state and private lands.

As the state's deadline for petitioning the United States Supreme Court for certiorari approached, the state's counsel became concerned as to whether the state had a final order from the Ninth Circuit, and filed a motion asking the court to clarify whether it had issued a final order. The court responded in a manner that does not answer the question, but leads counsel to believe that the court still is considering the case. The state applied to the United States Supreme Court for an extension of time to file its petition for certiorari, and Justice O'Connor granted an extension until December 6. The petition for certiorari was filed on December 5, 1995.

5. Stevens Village v. McVee and Rosier (United States District Court No. A92-567 Civ. (Judge Holland); our file no. 221-93-0123; state's attorneys: Joanne Grace and Henry Wilson; plaintiffs' attorney: Eric Smith; U. S.' attorneys: Bruce Landon and Dean Dunsmore). This is one of the jointly managed ANILCA cases that have been stayed pending final resolution of the jurisdictional issues raised in John and the rulemaking petition requesting that federal regulatory authority be extended to state and private lands.

In 1992, plaintiffs filed suit against the Federal Subsistence Board (FSB) and ADF&G, alleging they are being denied their federal subsistence priority because the United States is allowing holders of state tier II permits to hunt moose on federal lands within Game Management Unit 25(D) West and because the federal hunting regulations are restrictive. Judge Holland denied plaintiffs' motion for a temporary restraining order (TRO). Following the TRO hearing, the federal defendants moved for a voluntary remand to the FSB. On remand, the FSB changed its regulations to accommodate plaintiffs' requests for: an extension of the season; provisions allowing a permittee to designate another person to hunt on his or her behalf; and closing federal public lands in GMU 25D West to hunting by non local residents. The parties filed cross-motions for summary judgment and held oral argument on the only remaining issue, which is whether the FSB has authority to regulate hunting on state managed lands adjacent to federal lands in GMU 25D West to protect subsistence uses on "public lands" in GMU 25D West. Judge Holland has characterized the question of whether the FSB can regulate the taking of fish and game off "public lands" as the "where II" issue.

Judge Holland tentatively indicated in the stay order filed as a result of the Babbitt and John decisions that the FSB lacks authority off "public lands" because the Secretaries of Interior and Agriculture did not grant such authority in the regulations establishing the FSB. Judge Holland expressed no opinion on the question of whether the Secretaries themselves have that authority, but indicated that he would entertain further briefing on the issue. Meanwhile, the Stevens Village plaintiffs and others submitted a rulemaking petition to the Secretaries of Agriculture and Interior, requesting that they extend the FSB's authority to state and private lands. The parties agreed to stay the case temporarily while the

Secretaries consider the petition. Comments were solicited in a Federal Register notice dated February 2, 1995, and the state submitted comments opposing the petition to initiate rulemaking. The federal agencies have not taken action on the petition, and the case remains stayed. The court held a status conference on August 16. At that time Judge Holland indicated that, if the federal agencies have not taken action on the rulemaking petition by January of 1996, that he would be inclined to rule on the issue. The federal defendants were directed to submit another status report on January 6, 1996.

6. Native Village of Quinhagak v. United States (United States District Court No. A93-023 Civ. (Judge Holland); Ninth Cir. No. 93-35496; our file no. 221-93-0041; state's attorneys: Henry Wilson and Joanne Grace; plaintiffs' attorneys: Carol Daniel and Joseph Johnson (ALSC); John Starkey (AVCP)). This is one of the jointly managed ANILCA cases that have been stayed pending final resolution of the jurisdictional issues raised in John and the rulemaking petition requesting that federal regulatory authority be extended to state and private lands.

The plaintiffs (the villages of Quinhagak and Goodnews Bay, the AVCP, and individual Yup'ik Natives) seek declaratory and injunctive relief allowing the harvest of rainbow trout from the Kanektok and Goodnews Rivers for subsistence. The plaintiffs claim that navigable rivers are "public lands" for purposes of ANILCA, that the state has no subsistence jurisdiction over the waters of the Kanektok and Goodnews River systems, and that the federal government has the authority to regulate non-public lands and waters owned by the state when necessary to provide for subsistence uses.

In March, 1993, the Board of Fisheries adopted regulations that lifted the ban on harvest of rainbow trout for subsistence in southwest Alaska and allowed fishermen to keep rainbow trout harvested incidentally in other subsistence fisheries. In April 1993 the Federal Subsistence Board adopted regulations which allow the harvest of rainbow trout for subsistence in non-navigable waters, with some restrictions. Judge Holland denied the plaintiffs' motion for preliminary injunction, finding the plaintiffs had not demonstrated irreparable harm. The plaintiffs appealed. On September 1, 1994, the Ninth Circuit reversed, finding that the villages face a threat of loss of an important subsistence food source, as well as destruction of their culture and way of life. The Ninth Circuit suggested that the state's "incidental takings" regulation denigrates the importance of subsistence fisheries, and that by its narrow interpretation of "public lands" the United States has allowed Alaska to continue a policy of promoting sport and commercial fishing at the expense of subsistence users. The Ninth Circuit expressed no opinion regarding the merits of the villages' claim that navigable waters are "public lands" subject to federal jurisdiction under Title VIII of ANILCA. Although the issue of attorneys fees was not raised, the Ninth Circuit's opinion provides that the plaintiffs are entitled to recover all of their

attorneys' fees, including fees related to their request for preliminary injunction. The state filed a petition for rehearing on the attorneys' fees issue, which the court denied.

The case was remanded to the district court, and the plaintiffs have filed an application for attorney's fees and costs in the total amount of \$355,534.14. The state and federal defendants are attempting to negotiate a settlement of the attorney's fees claim.

7. Peratovich v. United States (United States District Court No. A92-734 Civ. (Judge Holland); our file no. 221-93-0340; state's attorneys: Henry Wilson and Joanne Grace (monitoring); plaintiffs' attorneys: Thomas Luebben and Richard Young of Albuquerque, New Mexico; U.S.' attorney: Dean Dunsmore). This is one of the jointly managed ANILCA cases that have been stayed pending final resolution of the jurisdictional issues raised in John and the rulemaking petition requesting that federal regulatory authority be extended to state and private lands.

The plaintiffs seek declaratory and injunctive relief requiring the Federal Subsistence Board (FSB) to issue a collective permit allowing the harvest of up to 366,000 pounds of herring roe on kelp (1000 pounds per individual for 366 applicants) from the waters of southeast Alaska as "customary trade." The FSB has taken the position that it lacks jurisdiction over the navigable waters where the harvest would occur. The plaintiffs claim that navigable waters are "public lands" for purposes of ANILCA, or alternatively that the waters and submerged lands within the boundaries of the Tongass National Forest were reserved by the United States as part of a pre-statehood withdrawal. The state has not been named as a party, and has sought unsuccessfully to intervene. At its meeting in March, 1993, the State Board of Fisheries adopted a "customary trade" regulation allowing sale of up to 32 pounds of herring spawn on substrate by an individual, and up to 158 pounds per household. Also in March 1993, Judge Holland denied plaintiffs' motion for a preliminary injunction, finding that plaintiffs had not shown that they face irreparable injury or a likelihood of success on the merits.

8. Fish and Game Fund v. Alaska and United States (United States District Court No. A92-0443 Civ. (Judge Holland); our file no. 221-92-0832; state's attorneys: Joanne Grace and Henry Wilson; plaintiff's attorneys: Edgar Paul Boyko; intervenor attorneys: Mike Stanley and Marc Slonim). This is one of the jointly managed ANILCA cases that have been stayed pending final resolution of the jurisdictional issues raised in John and the rulemaking petition requesting that federal regulatory authority be extended to state and private lands.

A coalition of commercial salmon fishermen in the Yukon and Kuskokwim Rivers challenge the Area M (False Pass) fishery also addressed in the Elim state court case. Plaintiffs raise various constitutional and statutory grounds, including violation of the Magnuson Act and Title VIII of ANILCA, and seek to have the Secretary of Commerce or Interior take over management of commercial and subsistence fisheries in Area M and in the Y-K region. A coalition consisting of the Peninsula Marketing Association, Concerned Area M Fishermen, Aleutians East Borough, and various Area M Native groups have been granted leave to intervene. The state, federal defendants, and intervenors have filed motions to dismiss plaintiffs' second amended complaint. Judge Holland had the matter under advisement until the case was stayed.

9. Ketzler v. Alaska (United States District Court No. F90-040 Civ. (Judge Holland); our file No. 221-92-0278; state's attorney: Robert Nauheim; plaintiffs' attorney: none, as Marc Grober has withdrawn). This is one of the jointly managed ANILCA cases that have been stayed pending final resolution of the jurisdictional issues raised in John and the rulemaking petition requesting that federal regulatory authority be extended to state and private lands.

This case challenged the closure of the Kantishna and Toklat Rivers to subsistence fishing for chum salmon under state regulations now superseded. The plaintiffs assert that the Board of Fisheries has impermissibly denied them subsistence rights provided under ANILCA and the Alaska Native Allotment Act. The state moved for dismissal of plaintiffs' ANILCA and Allotment Act claims in September, 1991, based on jurisdictional grounds similar to those asserted by the state in John and Kluti-Kaah. The state's motion was denied with leave to renew if and when the case is reactivated.

10. Kluti Kaah v. Alaska (United States District Court No. A90-004 (Judge Holland); our file no. 221-90-0433; state's attorney: Robert Nauheim; plaintiff's attorneys: Eric Smith of RURALCAP and Heather Kendall of the Native American Rights Fund (NARF); Mike Walleri of Tanana Chiefs' Conference (TCC)). This is one of the jointly managed ANILCA cases that have been stayed pending final resolution of the jurisdictional issues raised in John and the rulemaking petition requesting that federal regulatory authority be extended to state and private lands.

Plaintiffs and intervenors initially challenged state and federal regulations governing subsistence hunting of caribou in the Copper River basin. Plaintiffs claimed, among other things, that the federal regulations impermissibly fail to cover caribou located on state lands. This case has been consolidated with Arctic Regional Council v. United States. Kluti-Kaah filed an amended complaint which does not include any claims against the state. The court granted an unopposed motion by the federal government to dismiss TCC's claims against it

and the court dismissed all of the claims against the state following an unopposed motion by the state.

11. Arctic Regional Council v. United States (United States District Court No. A90-419 Civ. (Judge Holland); our file no. 221-90-0433; state's attorney: (state not a party, but case is consolidated with Kluti Kaah v. Alaska -- Robert Nauheim, state's attorney); plaintiff's attorney: Eric Smith). This is one of the jointly managed ANILCA cases that have been stayed pending final resolution of the jurisdictional issues raised in John and the rulemaking petition requesting that federal regulatory authority be extended to state and private lands.

Plaintiffs challenge several aspects of regulations adopted by the Federal Subsistence Board including the failure of federal regulations to extend to navigable waters and territorial seas.

12. Alyeska Pipeline Service Co. v. Kluti Kaah Native Village of Copper Center (United States District Court No. A87-201 (Judge Holland); our file no. 223-87-0422; state's attorney: Elizabeth Barry; Alyeska's attorney: James Atwood; defendant's attorney: Larry Aschenbrenner of NARF). In 1987 the Native Village of Copper Center passed a business activities tax that applies on its face to the portion of TAPS that passes through the area. Alyeska sued to enjoin collection of the tax and the state intervened as a plaintiff. Summary judgment motions and motions to dismiss have been denied twice. The plaintiffs conceded the tribal status of Kluti Kaah for purposes of this case. A trial on the question of whether this land constitutes "Indian country" was held the week of January 18, 1994. On November 28, 1995, Judge Holland ruled that following passage of ANCSA, Alaska Native tribes are not under the superintendence of the federal government and ANCSA lands are not Indian country. The defendants will appeal to the Ninth Circuit.

13. Tyonek v. Puckett (United States District Court No. A82-369 Civ (Judge Holland); our file nos. 223-90-0182 and 661-93-0327; state's attorney: Elizabeth Barry (state is participating as amicus curiae); plaintiffs' attorney: Bart Garber; defendants Puckett's attorney: Randall Simpson; defendants Slawsons' attorney: Lewis Gordon; defendants Kaloa's and Constantine's attorney: Robert Wagstaff). Tyonek originally sued the defendants to enforce village ordinances prohibiting non-members from remaining in the village without village permission and prohibiting members from renting their houses to non-members without village permission. The case has been remanded for preparation of express findings to support the court's holding that Tyonek is an Indian Tribe protected by sovereign immunity and that its land is "Indian country." The state's motion to participate as amicus in the case was granted. The parties (not amici) have filed proposed findings of fact and conclusions of law on the issue

of tribal status. Cross motions for partial summary judgment on Tyonek's sovereign immunity are pending.

14. State v. Harrison (United States District Court No. A94-464 CI (Judge Holland); our file no. 221-95-0270; state's attorneys: John Baker and Robert Nauheim; U.S.' attorneys: Ann Juliano and Bruce Landon; private defendants' attorney: Michael Robbins). This action originally involved two separate but related counts: (1) the state's assertion of a right-of-way for the Chickaloon River Road across the Native allotment owned by members of the Harrison family, who claim that the allotment constitutes sovereign Indian country; and (2) a challenge to the inclusion of Chickaloon Native Village, of which the Harrisons are members, on the Bureau of Indian Affairs' October, 1993 list of federally-recognized tribes. The Harrisons had relied on Chickaloon's inclusion on the 1993 list to claim immunity from Alaska law, including charges of obstructing lawful public use of the Chickaloon River Road. The United States moved to dismiss the state's complaint, initially arguing that the Quiet Title Act, 28 U.S.C. § 2409a, forbids any judicial inquiry into the validity of the state's right-of-way to the extent that "trust or restricted Indian land" is implicated. We amended our complaint to seek a title adjudication under 25 U.S.C. § 357, the federal condemnation statute; we expect this to moot the U.S.' jurisdictional objection on the road issue. The U.S. moved to dismiss our challenge to Chickaloon's tribal status on the ground that it presents a political question which the federal courts may not review. We initially opposed on the basis that the U.S. acted arbitrarily and capriciously in listing Chickaloon, thus the political question doctrine does not apply. On November 17 we filed a motion to voluntarily dismiss our challenge to tribal status, based on the decision not to appeal Judge Holland's decision upholding the 1993 list in the Venetie (Ft. Yukon) case. On November 24 Judge Holland issued an order dismissing the tribal status count.

15. Alaska v. United States (United States District Court No. A93-437 CV (JKS) (Judge Singleton); Ninth Cir. No. 94-36176 state's attorneys: Joanne Grace and John Baker; U.S.' attorney: Bruce Landon; Doyon's attorney: Nathan Bergerbest). After notifying the United States of its intent to quiet title to over 100 waterbodies throughout Alaska, the state filed suit in November, 1993, to quiet title to three rivers in northeast Alaska. The federal government has previously determined that all three rivers, the Kandik, the Nation, and the Black, are navigable.

The United States' motion to dismiss the suit was denied by the District Court on October 6, 1994. The court agreed with the state that the mere possibility that the United States might own the riverbeds constituted a cloud on the state's title sufficient to trigger the waiver of sovereign immunity in the Quiet Title Act. The United States appealed the decision to the Ninth Circuit.

The Ninth Circuit ruled in favor of the state, holding that the United States did not have a right to appeal until the decision before the District Court is final, that is, until the District Court determines the underlying navigability claim. The United States' answer to the state's complaint was due in early November, 1995. Instead, the U.S. has filed a motion to certify for appeal the denial of its motion to dismiss.

16. Knowles, et al. v. NMFS (U.S. District Court, no. A95-121-CV (Judge Sedwick); our file no. 221-95-1012; state's attorneys: Henry Wilson and Martin Weinstein; federal attorneys: Samuel Rauch, Charles Shockey and Fred Disheroon; attorney for proposed intervenor Alaska Trollers Association (ATA): Bruce Weyhrauch). The state seeks declaratory and injunctive relief under the Endangered Species Act (ESA) and the Administrative Procedure Act (APA) with regard to the ESA Section 7 consultation and biological opinion for salmon fisheries off the coast of Alaska during the 1994 season and 1994/1995 winter season. Small numbers of Snake River fall chinook are believed to be harvested in the southeast Alaska fisheries. Only a fraction of the Snake River fall chinook that exit Alaska waters survive to reach the spawning grounds because of intervening losses in Canadian and southern U.S. fisheries and losses resulting from Columbia River hydropower operations.

The state alleges that harvest reductions imposed on the southeast Alaska fisheries by NMFS in 1994 were arbitrary and unlawful because the reductions did not result in a biologically significant contribution to the Snake River fall chinook spawning population. The state also alleges that the procedures followed by NMFS were improper, and that NMFS arbitrarily failed to take into account analyses presented by ADF&G that estimate the percentage of Snake River fall chinook that would actually reach the spawning grounds if not harvested in Alaskan fisheries. The Alaska Trollers Association has filed a motion to intervene in the case that the court has under advisement. The court also denied the federal defendants' motion to transfer the case to the District of Oregon.

NMFS filed a motion to dismiss the action on two grounds. First, NMFS argued that there is no case or controversy, because ADF&G "proposed" the fishery regime at issue as the result of negotiations with NMFS. Second, the federal defendants argued that the case is moot because the 1994 season is over. The state opposed the motion.

On November 2, 1995, Judge Holland granted NMFS' motion and dismissed the complaint on the theory that the state cannot argue that a final agency action it proposed is arbitrary and capricious. The court did not reach the mootness question. The state is determining whether to appeal. The state is also determining whether to file another lawsuit concerning the procedures followed in the ESA section 7 consultation for the 1995 southeast Alaska fisheries.

17. Ramsey, et al. v. Brown (U.S. District Court, Portland, Oregon; case no. C94-0224-WD; Ninth Cir. No. 95-35471; our file no. 221-94-0769; state's attorneys: Henry Wilson and Martin Weinstein). This suit challenges actions of federal agencies relating to Snake River salmon under the Endangered Species Act (ESA). The state is a defendant along with the U.S. Department of Commerce, NMFS, the Pacific Fishery Management Council, the North Pacific Fishery Management Council (NPFMC), the Department of Interior, the State of Oregon and the State of Washington. The plaintiffs are a private individual and the Direct Service Industries (DSIs), aluminum companies who purchase power generated in the Federal Columbia River Power System (FCRPS) directly from Bonneville Power Administration (BPA). The DSIs are concerned about the application of the ESA to Snake River salmon because measures that would benefit salmon, such as spilling water over dams without power production, increasing river flows, and drawing down reservoirs, would result in higher electric rates for the DSIs. The DSIs have sought to enjoin commercial fisheries that incidentally harvest listed Snake River salmon, including Southeast Alaska fisheries.

In this action, the DSIs have three sets of claims. First, the DSIs allege that if a mixed stock fishery harvests any listed salmon, the taking is not "incidental" within the meaning of the ESA, and is therefore illegal under section 9 of the ESA. This set of claims was dismissed after the Ninth Circuit rejected the same argument in PNGC v. Brown, 38 F.3d 1058 (9th Cir. 1994), an earlier action filed by the DSIs and utilities. Second, the DSIs argue that harvests approved by the federal and state agencies in which listed fish are taken incidentally constitute "major federal action" under NEPA, and that required environmental impact statements have not been prepared or supplemented. On October 20, 1994 Judge Marsh ruled against the DSIs on the NEPA claims. Third, the DSIs allege that NMFS should review certain fisheries, including the southeast Alaska fisheries, under section 10 instead of section 7 of the ESA. Section 10, which covers state or private action, is more restrictive than section 7, which covers federal action. Before the matter was fully briefed, the DSIs stipulated to dismiss this claim as to Alaska, and on April 4, 1995 Judge Marsh ruled against the DSIs on the claims against Oregon and Washington. The DSIs have appealed to the Ninth Circuit. The briefing is complete, but oral argument has not been scheduled.

18. Native Village of Eagle v. State & U.S. (U.S. District Court No. F95-005-Civ (Judge Singleton); our file 221-95-0706; state's attorney: Kathryn Skendzel; U.S.' attorney: Dean Dunsmore; plaintiff's attorney: Mike Walleri of Tanana Chiefs Conference). Eagle seeks a forfeiture of title to the former Eagle school site and abatement of any health and safety hazards on the property.

The U.S. quitclaimed the property to the state in 1967, requiring that the property be used for school or other public purposes. The state opened a new

school in 1986 and has not used the old site since then. The U.S. has not invoked the reverter clause in the quitclaim deed. Plaintiff asserts that vandalism of the property, the presence of asbestos-containing materials in the school and possible fuel spills have created a public health hazard and a nuisance to the village. It seeks restoration of the property, and reconveyance of title to the federal government. Judge Singleton denied the state's motion to dismiss and requested briefing on whether the property was within Indian Country prior to ANCSA. The parties have temporarily stayed the case pending settlement discussions.

19. Alaska v. Brown (9th Circuit Court of Appeals); Alaska v. United States (Federal Circuit Court of Appeals No. 95-5073; state's attorneys: Joanne Grace and Kathryn Skendzel). In May 1992 the state filed two lawsuits against the United States challenging the congressional ban on the export of North Slope crude oil. The State filed one case in the federal district court in Anchorage, alleging that the ban violates the tenth amendment, the guarantee clause, and the port preference clause of the U.S. Constitution, and one case in the Court of Federal Claims, seeking compensation for a fifth amendment taking. The State is represented by Birch, Horton, Bittner & Cherot.

In the claims court case, the United States filed a motion to dismiss, alleging that the statute of limitations had run on the State's claim. The court ruled against Alaska, holding that its claims are barred by the six-year statute of limitations imposed by federal statutes. The general statute of limitations for actions in the Court of Federal Claims provides that the petition must be filed within six years after the claim accrues. 28 U.S.C. 2501. The court held that the state's claim for a taking of its mineral rights in oil beneath state-owned land accrued when Congress passed the 1979 Export Administration Act. Alaska filed its complaint on April 30, 1992, more than six years after 1979. The State has appealed the case to the United States Court of Appeals for the Federal Circuit.

In the district court case, the court granted the United States' motion for summary judgment on March 1, 1994, finding the ban constitutional. The state appealed to the Ninth Circuit, and the parties briefed the appeal.

Both cases were intended to encourage members of Congress to support the lifting of the ban, but in light of the adverse rulings below were stayed pending Congress' consideration of a bill to authorize export of North Slope crude oil. Congress passed the bill, and on November 20 President Clinton signed it into law. These cases will likely be dismissed once the President signs the national interest determination, the final government step before export of oil may occur.

20. Alaska v. United States ([compact case], United States Court of Federal Claims 93-454-L Civ.; our file no. 221-94-0115; state's counsel: Joanne Grace and Heller, Erhman, White & McAullife; U.S.' attorney: Margaret Sweeney).

On July 22, 1993, the state filed suit against the United States in the Court of Federal Claims for violating the statehood compact. Congress included in the statehood act a grant to Alaska of 90% of the revenues from oil and gas development on federal lands, to assure that Alaska would be able to finance state government. The state alleges that the act constitutes a contract because it required approval of the voters of Alaska to become effective, and because Alaskans relied on the terms of the act in agreeing to accept the social, political, and financial responsibilities of statehood. The state argues that the United States cannot unilaterally amend an essential provision of this agreement.

Specifically, the state alleges that Congress breached its promise to give the state 90% of revenues from oil and gas development on federal lands by withdrawing land from mineral leasing, selling land to third parties, and paying Alaska less than 90% of the revenue it receives. The state also alleges a breach of the covenant of good faith and fair dealing, fraudulent inducement, and a taking without compensation in violation of the fifth amendment, for which it requests compensation of \$29 billion.

On November 30, 1994, the state moved for partial summary judgment to resolve the issue of whether the United States can deduct administrative expenses from Alaska's 90% share of the revenues. The United States has opposed the motion and filed a motion to dismiss all the claims. The state filed its responsive briefing on July 13, 1995, and the United States filed its final briefs on November 1, 1995. The state's final brief was filed on December 7, 1995. The court has not yet scheduled oral argument.

21. State of Alaska v. United States, United States District Court, A87-450-CV (HRH) [PLO 82]; (State's attorney: Joanne Grace; U.S. attorney: Bruce Landon; Intervenor Arctic Slope Regional Corp. attorney: David Crosby). Following administrative proceedings, the state brought this action in 1987 to quiet title to the lands underlying inland navigable waters in an area withdrawn in 1943 by Public Land Order 82 (PLO 82). The U.S. Supreme Court has held that title to submerged lands passes to new states at statehood as a matter of constitutional grace under the equal footing doctrine. At stake in this case is title to the lands underlying the navigable waters on 48 million acres. The United States maintains that the submerged lands within PLO 82 did not pass to the state because the area was reserved at statehood (the reservation was revoked in 1960). The state argues that the United States has not overcome the strong presumption against finding that Congress intended both to reserve the submerged lands and to defeat state title to them.

Arctic Slope Regional Corporation intervened in the case because it claims an interest in the submerged lands as well. The parties completed briefing

in 1993 and presented oral argument on June 30, 1994. The court has not yet issued a decision.

### STATE COURT CASES

1. Hanson v. State (Alaska Superior Court No. 3AN-94-11088 CI (Anchorage: Judge Woodward); our file no. 223-95-0291; state's attorney: Steven Daugherty, plaintiff's attorney: Eric Smith). Two members of the Alaska Board of Fisheries (Board), Virgil Umphenour and John Hanson, challenged the state's interpretation and implementation of the Executive Branch Ethics Act, AS 39.52. At the November 1994, Board meeting, the Board voted to uphold an ethics determination made by its chair, and Mr. Hanson and Mr. Umphenour were excluded from deliberating or voting on a number of proposals affecting the fisheries in which they participate and hold limited entry permits. They requested a declaratory judgment that a limited entry permit is not a "per se" significant financial interest, and that any proposal affecting a fishery for which a limited entry permit was issued will not have a "per se" significant impact upon that fishery under the Ethics Act. They also requested a declaratory judgment stating that the Board impermissibly disqualified them from participation at the November meeting. Judge Woodward denied all three of the plaintiffs' requests and dismissed their complaint in March of 1995.

2. Rutter v. Alaska Board of Fisheries (Alaska Superior Court No. 1SI-94-169 CI (Sitka: Judge Zervos); our file no. 223-94-0597; state's attorney: Steven Daugherty; plaintiff is pro se). Mr. Rutter, who holds both power and hand troll permits, has challenged the January 1994 allocation of chinook salmon by the Board of Fisheries. Mr. Rutter has also challenged regulations because they do not prohibit the use of downriggers by guided sport fishers. Among other claims, Mr. Rutter asserts that these regulations are intended to "disenfranchise" troll fishers and are arbitrary and capricious. Cross motions for summary judgment are pending.

3. Morry v. State (Alaska Superior Court No. 2BA-83-98 Civ. (Barrow: Judge Jefferies); Supreme Ct. Nos. S-4632, 4660; our file no. 223-91-0180; state's attorney: Steve White; plaintiff's attorney: Bill Caldwell of Alaska Legal Services; plaintiff-intervenor's attorney: John Starkey). A subsistence hunter from northwest Alaska claimed that state regulations requiring all brown bear hunters to purchase tags and seal the bears' hides and skulls violated traditional subsistence hunting practices.

The superior court in Barrow granted Morry partial summary judgment and, at the same time, created two new standards for the state subsistence law. The court held that fish and game regulations are not valid unless they create the

"least adverse impact possible" on subsistence uses and that the subsistence law protects the customary and traditional character of hunting.

The state appealed to the Alaska Supreme Court, and on July 10, 1992, the court issued a decision upholding the all-Alaskan policy and agreeing with the state's analysis of the subsistence law post-McDowell. The court also agreed that the "least adverse impact" standard was inapplicable and that the Boards of Fisheries and Game were not obligated to fashion regulations that track the customary and traditional methods of hunting in a given area. The court did find, however, that the Board had failed to adopt subsistence regulations in accordance with APA procedures. The matter was remanded to the Board of Game which reviewed and readopted the new hunter registration requirements in the spring of 1993. The superior court has not yet reviewed the board's readoption.

4. Sorenson v. State (Alaska Superior Court No. 3AN-91-10649 Civ. (Anchorage, Judge Woodward); our file no. 221-92-0417; state's attorney: Kevin Saxby; plaintiff's attorneys: Eric Smith and ALSC). This is a class action challenging the tier II subsistence permit system and the regulations for moose hunting in GMU 16B. In November 1992 the plaintiffs filed a motion for an order remanding the case to the Board of Game for reconsideration of the regulations in light of the 1992 subsistence law. In January 1993 Judge Woodward denied the motion, but stayed the case and retained jurisdiction pending the Board's March 1993 meeting. At that meeting the Board reviewed the tier II point system and Unit 16(B) hunting regulations, and made changes to the permit regulations. At its March 1994 meeting the Board made additional changes to the GMU 16(B) moose hunting regulations. The plaintiffs then challenged the new regulations, and the case has been certified as a class action. Judge Woodward recently ruled against the state on the parties' cross-motions for summary judgment, holding that, 1) the Board improperly determined the number of moose needed to provide a reasonable opportunity for subsistence, 2) the Board improperly permitted sport and tier II subsistence seasons on the same population, and 3) the tier II appeal process is inadequate. Final judgment has not yet been entered.

5. State v. Dale Raitto (Alaska District Court Nos. 2EM-S93-107 Cr. and 4BE-S92-1206 Cr. (Bethel, Judge Pengilly); our file no. 221-93-0068; state's attorneys: Lance Nelson and Kathryn Skendzel; defendant's attorney: Marc Grober). A commercial fisherman from Salcha was charged with selling closed season fish on the Lower Yukon River. He raised the defense that the fish were taken for subsistence and his conduct is thus subject to preemptive federal jurisdiction. The district court, however, denied a motion to dismiss based on that defense. Raitto moved for stay of his state prosecution in federal district court. Judge Holland denied the motion, finding that Raitto was not a rural resident for ANILCA purposes. The Ninth Circuit also denied an emergency motion for stay.

The case settled after we picked a jury. Raitto agreed to forfeit his \$40,000 boat and pay an additional \$16,000+. Raitto voluntarily dismissed the federal case.

6. Sumner Strait Advisory Committee v. State (Alaska Superior Court (Juneau, Judge Carpeneti); our file no. 223-91-0099; state's attorney: Steve White; plaintiff's attorney: ALSC). The Sumner Strait Advisory Committee claimed that in 1989 the Board of Fisheries incorrectly decided that fish stocks at two southeast villages - Point Baker and Port Protection - had not been subject to customary and traditional uses.

The committee presented a new proposal, and at a spring 1995 meeting, the Board made positive customary and traditional findings for certain stocks in the Point Baker-Port Protection area. Thereafter, the court dismissed the lawsuit with each side to bear its costs.

7. Native Village of Elim v. State (Alaska Superior Court No. 2NO-92-80 Civ.; consolidated with Peninsula Marketing Ass'n et al. v. Rosier, Alaska Superior Court No. 1JU-94-520 Civil (Nome, Judge Erlich); our file no 221-92-0645; state's attorney: Lance Nelson; plaintiffs' attorneys: Bill Caldwell (ALSC), Heather Kendall (NARF), Eric Smith, John Starkey; intervenor PMA's attorneys: Mike Stanley, Marc Slonim).

Plaintiffs claim that the Area M (False Pass) June fishery violates the subsistence law and the sustained yield provisions of the Alaska Constitution because it allegedly intercepts chum salmon bound for subsistence fisheries in Norton Sound. In 1992 plaintiffs moved for an injunction to prevent harvest of chum salmon in the Area M June fishery. The request for an injunction was denied.

At a March 1994 meeting, the Board adopted a number of measures intended to allow chum salmon to pass through the Alaska Peninsula (Area M) and western Alaska fisheries to spawning grounds and to provide the department with additional flexibility to conserve western Alaska chum salmon stocks. The Board retained the 700,000 Area M June fishery chum cap set out in the South Unimak/Shumagin Islands June Salmon Management Plan. Elim amended its complaint to challenge these actions and also the Board's recently adopted mixed stock fisheries management regulation.

Meanwhile, Peninsula Marketing Association (PMA), Concerned Area M Fishermen, the Aleutians East Borough, and Alaska Peninsula Native corporations and tribal councils filed a new action, PMA v. Rosier, seeking declaratory and injunctive relief to prevent the Commissioner from reducing the chum salmon harvest level to less than the 700,000 provided under the chum cap

established in the Board's management plan. The PMA v. Rosier case was consolidated with Elim.

In April 1994, Elim moved for a preliminary injunction to require the Commissioner to use his emergency order authority to limit the harvest of chum salmon in the June fishery to 300,000 fish. PMA sought the opposite relief, an order to restrain the Commissioner from managing the fishery in a manner that would result in the harvest of less than 700,000 chum salmon. The state opposed both motions.

Judge Erlich ruled that the Commissioner was prohibited from taking any action based upon information already presented to the Board at the March, 1994 meeting. Judge Erlich's ruling did not prevent the Commissioner from taking emergency order action based on additional information that was not available at the board meeting. Also, Judge Erlich found AS 16.05.270 to be "instructive" as a means of resolving the dispute between the Board and the Commissioner as to the chum cap, and, on his own motion, referred the matter to the Governor.

Both PMA and Elim petitioned for review to the Alaska Supreme Court, and moved for stays. The Alaska Supreme Court held that the Commissioner was prohibited from taking any action with regard to the 1994 Area M fishery, based upon information already presented to the Board, but was not prevented from taking emergency order action based on additional information that was not available at the board meeting. Peninsula Marketing Ass'n. v. Rosier, 890 P.2d 567 (Alaska 1995).

In January 1995 plaintiffs moved for summary judgment. In February 1995 the Board again examined the Area M June fishery and adopted additional measures to reduce harvest of chum salmon while allowing prosecution of the sockeye fishery. The Board retained the 700,000 chum cap. Plaintiffs supplemented their briefing after the February meeting. The state and PMA each opposed the motion and cross-moved for summary judgment on all claims.

On September 24, 1995, Judge Erlich issued his decision on partial summary judgment in favor of plaintiffs. He ordered the matter remanded to the Board of Fisheries, enjoining the June Fishery until the Board explains the basis of the chum allocation utilizing a scientific/rational approach and/or a historical analysis as justification for its allocation decisions. The PMA intervenor/defendants petitioned for review of Judge Erlich's decision to the Alaska Supreme Court. On November 22, 1995 the Supreme Court denied the petition for review, indicating that the injunction would be lifted once the board issued a written justification for its actions. In the meantime, the Board voted to appoint a four-person committee to draft a decisional document.

8. Lord v. Rosier (Alaska Superior Court No. 4FA-93-2294 Civ. (Fairbanks, Judge Savell); our file no. 221-94-0231; state's attorney: Bonnie Harris; Plaintiff's attorney: Mike Walleri of Tanana Chiefs Council; (Intervenors, represented by attorney Bill Caldwell of ALS, voluntarily dismissed their claims). After ADF&G reduced, then closed the entire Yukon River to subsistence fishing for fall chum salmon because the extremely low return of fall chum would not meet escapement goals, Lord, Tanana Chiefs Council, and the other plaintiffs filed suit claiming that the state illegally closed the Yukon River to subsistence fishing for fall chum salmon to protect sustained yield. Plaintiffs moved for preliminary injunction to enjoin the state from closing the fall chum subsistence fishery. The court denied the injunction.

On the merits, plaintiffs claimed that the closure was illegal because the department arbitrarily set the goal of 400,000 fall chum for the Yukon River, the department was required to adopt the escapement goal under the Administrative Procedure Act, the state failed to manage the fishery resource on the sustained yield principle, and the closure violated the subsistence law. Plaintiffs also claimed that the ADF&G's sonar under-counted the fish returning to the river. Lord amended the complaint to add a claim for monetary damages for loss of fishing opportunity.

The state moved for and was granted dismissal of Lord's claim that the state was required to lower escapement goals for Yukon fall chum in order to provide for subsistence uses. Lord's remaining claims concerned generally allegations of violations of the subsistence law in allocation of fall chum resources, and various claims of violation of the Administrative Procedure Act, equal protection, and sustained yield.

Trial was scheduled for the week of October 16, 1995, but in early October, we negotiated a settlement with the plaintiffs. In return for dismissal of the action, the state agreed to support two agenda change requests, one dealing with the Yukon Fall Chum Management Plan and the other with the post-June Area M fishery. We also agreed that if the fall chum proposal were endorsed by the Yukon River Drainage Fishermen's Association, that we would support the proposal before the Board. We made no such commitment concerning the Area M post-June fishery proposal.

It turned out that, after a YRDFA meeting, the plaintiffs withdrew their fall chum agenda change request and proposal before the Board considered it. The Area M post-June fishery agenda change request was denied by the Board because the members felt there were substantially similar proposals already on the agenda, and that any Board member could offer this particular one as an amendment to an existing proposal.

9. Kenaitze Indian Tribe v. State (Alaska Superior Court No. 3AN-91-4569 Civ. (Anchorage, Judge Fabe); our file no. 223-91-0528; attorneys for state: Steve White and Henry Wilson, attorney for plaintiffs: Carol Daniel (ALSC); attorney for intervenors: Eric Smith). The Kenaitze tribe filed suit to challenge the Cook Inlet subsistence fishing regulations. The case was stayed pending the Supreme Court's Morry decision. The Kenaitzes amended their complaint to challenge the constitutionality of the 1992 subsistence law. Other Native groups from Ninilchik, Eklutna and Knik intervened.

Judge Fabe granted summary judgment invalidating the nonsubsistence area provision of the 1992 law on the grounds that it violates the equal access provisions of the state constitution. On May 9, 1995 the Alaska Supreme Court reversed, holding that the nonsubsistence area provision is valid. However, the court found unconstitutional another provision of the 1992 subsistence law that makes the proximity of an individual's domicile a factor at the tier II level. The court ordered the parties to address the constitutionality of the tier II domicile factor because the Kenaitzes argued that residents of nonsubsistence areas would always be at a disadvantage when fish and game populations are insufficient to satisfy all subsistence needs and the tier II preference is invoked. Regulations have been adopted to reinstate the nonsubsistence areas.

The Kenaitzes' challenge to the findings of the Joint Boards that resulted in the establishment of the Anchorage/MatSu/Kenai Peninsula nonsubsistence area remains to be decided. A status conference was held before Judge Fabe on August 15, 1995.

The parties agreed on a briefing schedule with regard to the remaining issues. The plaintiffs will file a motion for summary judgment on February 1, 1996, the state will file an opposition on April 1, 1996, and the plaintiffs will file a reply on April 22, 1996.

10. Totemoff v. State (Alaska Supreme Court No. S-6151; our file no. 221-92-0668; state's attorney: Joanne Grace; appellant's attorney: Paul Malin). Mr. Totemoff, a resident of Tatitlek, was convicted of taking deer on Naked Island (federal "public land" located in Prince William Sound) using a spotlight, which is prohibited under state general and federal subsistence hunting regulations. Mr. Totemoff appealed, arguing that spotlighting is a customary and traditional method of subsistence hunting and that ANILCA preempts all state hunting regulations on Naked Island. The Alaska Court of Appeals affirmed the conviction. The court rejected his arguments that the state had no criminal jurisdiction to prosecute him, held that Alaska has concurrent game management authority on federal public lands in Alaska, rejected his argument that the virtually identical federal spotlighting prohibition pre-empted state law, and held that he

was not entitled to assert a subsistence defense. The Alaska Supreme Court granted Mr. Totemoff's petition for hearing and ordered the parties to specifically address three issues: (1) whether Mr. Totemoff is entitled to a subsistence defense under ANILCA; (2) whether there is "a sufficient nonfederal land nexus" to sustain Totemoff's conviction solely under Alaska law; and (3) whether John v. U.S. precludes the state from asserting that tidelands or lands under navigable waters to the 3 mile limit are not subject to ANILCA.

The court issued its decision in August 1995. It held that the state has jurisdiction to enforce its hunting and fishing laws against subsistence users on federal land as long as those laws do not conflict with federal laws or regulations (i.e. the Federal Subsistence Board's jurisdiction and promulgation of regulations do not preempt nonconflicting state laws, and the state can cite and prosecute rural residents violating these laws.)

The court held also that title VIII of ANILCA does not protect customary and traditional means and methods, and therefore even if Totemoff could establish that spotlighting deer is a customary practice, he has no entitlement to engage in that practice by virtue of ANILCA.

Alternatively, the court held that even if ANILCA did protect spotlighting, Totemoff did not shoot the deer from "public lands" as defined in § 102 of ANILCA because public lands do not include navigable waters. In so concluding, the court expressly disagreed with the Ninth Circuit Court of Appeals' decision in State v. Babbitt, 54 F.3d 549 (commonly known as the Katie John case).

Finally, the court found that the regulation banning spotlighting is not invalid because the Board of Game failed to hold a hearing to determine whether the regulation was suitable for application to subsistence hunting. Totemoff had not offered any evidence that the regulation was invalidly adopted. The District Court failed to consider this issue because it ruled that Totemoff's challenge was barred by Eluska, however, so the case is remanded to determine whether the regulation was invalidly adopted in some other way.

Because this case directly conflicts with the Ninth Circuit decision on the definition of "public lands," the defendant's attorney plans to petition the United States Supreme Court for certiorari.

11. Jones v. State (Alaska Court of Appeals No. A-5100; our file no. 221-94-0885; state's attorneys: John Baker, Robert Nauheim, David Wallace; defendant's attorney: Denton Pearson). Jones is a Sitka resident convicted of taking a deer out of season. Jones did not deny taking the deer, but claimed immunity from state prosecution on the grounds that he is an enrolled member of

the Sitka Tribe; that he took the deer within the boundaries of a Native allotment, which he alleges to be Indian country; and that he somehow derives aboriginal hunting rights from his presence on the allotment, which is owned by his uncle. The state has argued that tribal jurisdiction is not implicated in the case, since, even assuming the existence of the Sitka Tribe, Jones made no showing that the exercise of state jurisdiction would impair tribal functions; that Jones can claim no aboriginal hunting rights, since all such rights were extinguished by ANCSA; and, that the state has criminal jurisdiction over his conduct under 18 U.S.C. § 1162(a) ("Public Law 280"), regardless of whether the allotment in question is Indian country. On August 8, 1994, the Court of Appeals stayed the case pending a decision by the Alaska Supreme Court in Totemoff v. State, No. S-6151, in which the defendants, charged with "spotlighting" deer in violation of state law, claim a federal subsistence defense preempting state law. On October 20, the Alaska Supreme Court ruled in Totemoff that state law is not preempted, but that Totemoff may argue on remand that the regulation under which he was convicted was invalidly adopted. Because Jones never challenged the regulation in his case, we anticipate filing a motion in the Court of Appeals to lift the stay and affirm his conviction.

12. State v. Lillian E. Charles, Margaret Lauth, Daryl James, et al. (Alaska District Court Nos. 1CR-592-218 Cr.; 1CR-592-219 Cr.; 1CR-592-214; 1CR-592-215; 1CR-592-216; 1CR-592-217 Cr. (Craig, Judge Froehlich); state's attorneys: Robert Reges and Steve White; defendants' attorneys: James Wendt (Alaska Public Defender) and Theresa Chenhall). Six residents from the Craig-Klawock area were charged with possessing herring roe on kelp in excess of state permit limits, and three of the six were charged with commercial fishing for herring roe on kelp without a limited entry permit. All six moved to dismiss on the ground that the state lacks jurisdiction under Title VIII of ANILCA. They argued that the federal government has taken over subsistence fishing on federal public lands and that the waters in which the fishing occurred abuts the Tongass National Forest and hence are federal waters under federal, not state, jurisdiction. At the trial the court denied defendants' request to offer customary trade and mistake of law defenses but it granted their motion to dismiss the commercial fishing charge. The state dropped charges against one defendant, and the jury returned guilty verdicts on the five remaining defendants for the possession charge. The defendants appealed various legal rulings to the Alaska Court of Appeals, who upheld the trial court. The defendants have since appealed to the Alaska Supreme Court the issue of whether they should have been able to present a "subsistence defense."

13. Kodiak Seafood Processors Ass'n v. State (Superior Court No. 1JU-93-274 Civ. (Juneau, Judge Weeks); our file no. 223-93-0451; state's attorneys: Steve White and Martin Weinstein). On February 26, 1993, the Kodiak office of the Department of Fish and Game decided to conduct an exploratory research operation to obtain catch data on the abundance of scallop and crab

resources within waters that had been closed by the Board of Fisheries to commercial scallop fishing since 1969. The Board of Fisheries closed the area in 1969 to scallop dredging by regulation (5 AAC 38.425) in order to protect dwindling crab resources that would get caught in the scallop dredges. Since the Department has not done a stock assessment in these waters since 1969, the Department was eager to once again explore the area. To obtain the catch data, the Department entered into an arrangement with a commercial scallop fisherman permitting him to conduct a limited harvest of scallops under the supervision and control of a Department biologist who was aboard the vessel and monitored the operation. Under the arrangement, the commercial fisherman would keep the catch in exchange for the use of the vessel and gear. To protect against a crab by-catch problem, the Department had the power under the permit to stop the operation. KSPA sought a preliminary injunction and ultimately a permanent injunction to prevent the Department from authorizing scallop dredging in these closed waters. KSPA has raised numerous legal issues. Among the most important, KSPA challenges the Department's authority to authorize commercial fishing as a means to conduct research in waters closed by the Board of Fisheries, and challenges the Department's authority to issue emergency orders to open waters closed by the Board of Fisheries. The court, finding the issue was moot, denied KSPA's request for a preliminary injunction. The parties filed motions for summary judgment. Judge Weeks granted the state's motion, but denied the state's motion for attorney's fees. On appeal, the supreme court ruled in the state's favor on all issues except that it denied the state attorney's fees.

14. Metlakatla Indian Community & Herring Coalition v. State (Alaska Sup. No. 1KE-94-176 Civ. (Ketchikan, Judge Zervos); our file no. 223-94-0391; state's attorney: Martin Weinstein; plaintiffs' attorneys Leroy Wilder and Clifford Smith, defendant-intervenor Southeast Fishermen's Coalition's attorney, Bruce Weyhrauch). Plaintiffs brought this lawsuit to stop the department from prosecuting its 1994 herring sac roe fishery in the vicinity of Cat Island, which is located approximately 6 miles east of Annette Island. Plaintiffs alleged that at the 1994 meeting in Ketchikan, the Board of Fisheries failed to take a "hard look" at the scientific evidence the Metlakatla Indian Community put forth in support of their belief that a discrete "stock" of herring from Annette Island is mixing with herring in the state's Kah Shakes area in the Cat Island vicinity. The plaintiffs sought an injunction to prevent the state from conducting a sac roe fishery in the Cat Island area because of the alleged mixing of the "stocks." The court held a two-day evidentiary hearing on plaintiff's motion for a preliminary injunction and then denied the motion. The Department conducted its sac roe fishery in the Cat Island area this year. The parties have settled the case and a stipulation for dismissal with prejudice has been filed with the court.

15. Payton v. State (Alaska Superior Court No. 3AN-94-0150 Civil (Anchorage, Judge Souter); our file no. 221-94-0797; attorney for state: Kevin

Saxby; attorney for plaintiffs: William Caldwell of ALSC). This case challenges actions of the Board of Fisheries relating to salmon fisheries in the Upper Yentna River area. The Paytons allege that the Board improperly failed to find customary and traditional uses of salmon in the Yentna River. The Paytons also allege that the Board of Fisheries is unlawfully composed of representatives of special interest groups, and request that the Board of Fisheries be reconstituted. Class certification has been denied, and the court recently granted the state summary judgment upholding the Board's determination that current uses are not customary and traditional. The issues about how the Board is constituted remain undecided and may be the subject of further summary judgment motions.

16. Kluti Kaah Native Village v. State, Rosier (Kluti Kaah II) Superior Court No. 3AN-94-7363 Civ. (Anchorage, Judge Fabe); our file no. 221-95-0171; state's attorneys: Lance Nelson and Kevin Saxby; plaintiffs' attorneys: NARF (Heather Kendall). Kluti Kaah Native Village of Copper Center and Copper River Native Association, Inc. challenged Unit 13 moose regulations. They argue that it should be a tier II hunt and that the spike fork/50 inch antler provision fails to provide a reasonable opportunity. Plaintiffs recently dismissed the suit based on regulations adopted by the Board of Game last spring.

17. State v. Adam and Marie Arnariak (Alaska Court of Appeals no. A-5397; state's attorney: Kevin Saxby; Arnariaks' attorneys: Paul Snyder and Fred Torisi; amicus curiae Togiak's attorney: Bruce Baltar). The state initiated misdemeanor prosecutions of a husband and wife from Togiak who trespassed on Round Island, part of the Walrus Islands State Game Sanctuary, and illegally shot a walrus. The Dillingham District Court dismissed the charges on the grounds that the Marine Mammal Protection Act, 16 U.S.C. §1371 et seq., preempts any state regulation which would affect the hunting of marine mammals by Natives. The state appealed, arguing that the state may regulate uses and control access on its own land, and that 5th and 10th amendment analysis preclude interpreting the Marine Mammal Protection Act as forbidding such state control of state land. The Arnariaks and amici Native Village of Togiak and Bristol Bay Native Association argued that the intent of the federal Act was to preserve Native hunting rights and that under principles of Indian law, and because of the federal navigation servitude, state control of the sanctuary has been preempted, at least to some extent. The Court of Appeals ruled against the state but ignored the constitutional issues. The Alaska Supreme Court has granted discretionary review and briefing is complete. Oral argument has not yet been set.

18. Brady v. State (Alaska Superior Court Consolidated No. 4AN-94-2951 Civ. (Judge Michalski); state's attorney: Kevin Saxby; plaintiffs are pro se). Terry and Steven Brady (father and son) sued the state in separate actions seeking declaratory and injunctive relief, plus damages. They seek quantum meruit or contractual recovery for work done in relation to rejected applications for

negotiated state timber sales, breach of contract damages for the rejected sale contracts, damages for the state's alleged mismanagement of natural resources since statehood, and injunctive and declaratory relief requiring the state to adopt a much more intensive management scheme for its resources, especially forests. The state successfully moved to consolidate their cases and responded by arguing sovereign immunity, that no contract existed, that the work was volunteered, and that the necessary elements for injunctive and declaratory relief are absent. Summary judgment has been granted on all claims addressed in the state's motion. Discovery is being conducted on the remaining claims. The Bradys recently obtained permission to amend their complaints to add individual counts against several state officials for alleged tortious conduct.

19. Boat Owners United, et al. v. State (Alaska Superior Court No. 4BE-94-0383 Civ. (Judge Savelle); state's attorneys: Kevin Saxby and Bonnie Harris; intervenor Sleetmute's attorney: Cathleen Connolly, ALSC; plaintiffs' attorneys: Scott Sidell and Christopher Provost). Bethel-area hunters sued the state, claiming that the 40 horsepower restriction in the Holitna-Hoholitna Controlled Use Area unconstitutionally interfered with their subsistence moose hunting. They brought their suit just a few days before the '94 hunting season opened, and sought an immediate TRO and preliminary injunction against enforcement of the regulation and declaratory relief that the restriction was invalid. The state opposed, arguing that the regulation was a constitutional, tried-and-true methods and means restriction. On the day before the season opened, Judge Savelle granted the injunction, removing the restriction on use of boats equipped with motors over 40 h.p. for hunting. Intervenor Native Village of Sleetmute petitioned for review to the Alaska Supreme Court, and the state joined in their petition and submitted briefing. The court granted review and overturned the injunction mid-way through the season, making the regulation effective again. The Boat Owners have asked the Supreme Court to clarify its ruling, but have taken no other action in this matter.

20. Alaska Sportfishing Ass'n, et al. v. State (Alaska Superior Court No. 3AN-94-8606 Civ. (Judge Shortell); state's attorney: Kevin Saxby; Alaska Sportfishing Ass'n, et al.'s attorney: Jillian De La Hunt (Trustees for Alaska)). Alaska Sportfishing and a number of other environmental and sportsman's groups appealed each of DNR's decisions to conduct ten small timber sales on the Kenai Peninsula, as well as the Division of Forestry's Five Year Schedule of Timber Sales (a statutory prerequisite to timber sale decisions). They have indicated that all future proposed sales will also be appealed. Alaska Sportfishing has requested an emergency stay of each of the sales which have all been denied, so the sales have been made and logging may start in early December. Alaska Sportfishing argued that DNR violated various constitutional and statutory requirements in approving the sales, notably the sustained yield clause. The over 10,000 page record has been prepared, and the court held that Alaska Sportfishing, et al., must pay the

state's costs in doing so. Appellants then submitted their brief and an addendum to the record, which the state opposed. The Court recently ordered the appellants to redo their brief and struck their addendum, so issues have been somewhat simplified. The state's brief will be completed after appellants correct and refile their brief.

21. Krohn v. State (Alaska Superior Court No. 3KN-94-730 Civ. (District Court Judge Neville, pro tem); state's attorneys: Lance Nelson and Bonnie Harris; Krohn's attorney: Arthur "Chuck" Robinson). Edward Krohn, a Kenai area sport and subsistence fisherman, filed a complaint seeking to invalidate the emergency regulations adopted in the spring of 1994 establishing subsistence hunting and fishing in the former nonsubsistence areas (primarily the Kenai Peninsula) in response to the superior court's order in Kenaitze v. State, which invalidated the nonsubsistence area provisions of the state's subsistence law (the superior court's decision in Kenaitze has since been reversed by the Alaska Supreme Court).

Plaintiff claimed that the basis stated in the finding of emergency was not sufficient under the APA to justify emergency regulations, because the necessity for the emergency regulations was created by the state's own delay in appealing and seeking a stay of the superior court's Kenaitze order, which was issued in November 1993. The state opposed. Judge Neville upheld the finding of emergency. She found that the fact that the state had appealed and moved for and been granted a stay, which was later vacated, did not preclude the state from adopting emergency regulations to implement the Kenaitze order. She concluded that the circumstances necessitating emergency regulations could not fairly be said to be solely the fault of the agency. The fact that an agency's prior decisions contributed to, or caused, the existence of the claimed emergency did not necessarily preclude emergency regulations.

The state subsequently moved for, and was granted summary judgment and final judgment on all claims. The court held that the Commissioner of Fish and Game could, and properly did, adopt emergency regulations through a delegation from the Board of Fisheries, even though the Commissioner did not follow the same procedures the Board would have followed in its normal course of adopting regulations. The court also held the Commissioner was not required under the APA or the Open Meetings Act to hold a public meeting at which members of the public could appear to testify or personally submit written comments. The opportunity to submit written comments by mail satisfied the APA requirements.

On October 9, 1995, plaintiff filed a notice of appeal on all claims to the Alaska Supreme Court. We will oppose the appeal.

22. Miyasato v. State (Alaska Court of Appeals No. A-05486; our file no. 221-96-0004; state's attorney: Joanne Grace; appellant's attorney Galen Paine (public defender)). This is an appeal from a criminal conviction of Mr. Miyasato for taking salmon over 16 inches long from Starrigavin Creek in Sitka. Mr. Miyasato claims that the state does not have jurisdiction to prosecute him for violations of state regulations because he is a rural resident who was taking fish from federal "public lands," over which he claims the United States has exclusive jurisdiction. The state argued that it has jurisdiction because Starrigavin Creek does not constitute "public lands" under the Ninth Circuit's Katie John decision and because the state law does not conflict with federal law. The court has the case under advisement.

23. Cordova District Fishermen United v. State (Anchorage Superior Court 3AN-95-4880 CI; our file no. 223-95-0556; attorneys for state: Steve White and Steven Weaver; plaintiffs' attorney: Pat Laring, Trustees for Alaska). Cordova residents petitioned the Coastal Policy Council concerning DNR's proposed consistency finding for oil and gas lease sale #79 on tracts in the gulf of Alaska. We advised the Council that when considering petitions, it may only review standards that are set out in applicable district plans and may only consider the effects of projects that lie within the boundaries of land or water regulated by those plans. Based on that advice, the Council found that the lease sale area was not within the boundaries of the only applicable program (the Cordova Coastal Program), and it dismissed the petitions. On June 12, several Cordova fishers and a fisher's organization filed this action in superior court claiming that these interpretations of the Alaska Coastal Management Program are too narrow. The case has been briefed and argued before the superior court, and we are awaiting its decision.

Please do not hesitate to call if you have questions about this report or the October monthly report.

Sincerely,



Bruce M. Botelho  
Attorney General

Enclosure

ALASKA  
NATIVES  
COMMISSION



*Report*  
Volume I

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## KEY FACTS & FINDINGS

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**T**

he following are selected statistical and other findings of the Alaska Natives Commission.

Presented by issue area, these data are intended to acquaint the reader with key information about the many topics studied by the Commission. Volumes II and III of the Final Report contain additional statistics and analyses by issue area. Unless otherwise noted, statistics and findings were developed by the Alaska Natives Commission based on a number of federal, state and private sources, including 1990 Census data.



### *Social/Cultural*

The Alaska Native birthrate is 36.5 for each 1,000 population, therefore the demand for services such as elementary schools, Head Start programs and community health care has been increasing in the villages.

With respect to Native children, the public education system must encompass two sets of skills and values: the first set of skills is that necessary for success in traditional Native life-ways, the second set is that necessary for success in Western society.

The Native mortality rate is more than three times the national average, and a significant percentage of Natives deaths is alcohol-related.

*B*oth the Native infant mortality rate and Fetal Alcohol Syndrome rate are more than twice the national average.

*T*he birth rate among Alaska Native teens aged 15-19 was two and one-half times higher than their counterparts nationwide in 1988.

*T*he Alaska Federation of Natives found that between 1984 and 1988 the number of Native children receiving protection services from the State of Alaska increased from 2,035 to 3,109; this means that in 1988, at least one in every eleven Native children was in need of and receiving child protection services.

*I*n 1992, the State Department of Health and Social Services received 11,509 CPS (Child Protection Services) reports of harm (i.e. physical abuse, neglect, sexual abuse and mental injury). Of these, 30 percent (or about 3,500) involved Alaska Native children. That number translates into a rate of alleged victims of 94 per 1,000 Native children, as compared to 55 per 1,000 children in Alaska's non-Native community and 39 per 1,000 children nationwide.



*B*ased on juvenile offender characteristics such as sex, race and age as reported by the State of Alaska, it can be established that in 1992 nearly one in every eight Native males between the ages of 14 and 17 had been in, or was currently in, juvenile detention during the year.

*I*n April of 1993, over 27 percent of the Alaska Native inmate population was made up of those who had sexually abused either another adult or a child, strikingly, virtually half of the Native sex crimes for which prison time is currently being served were committed against children.

*M*any of the causes for today's upheaval in Alaska Native communities and families can be found in their history; specifically, Alaska Natives' experiences since contact with Europeans, and in the cultural, social, political and economic climate created for them by both the federal and state governments.

At the core of many problems in the Alaska Native community are unhealed psychological and spiritual wounds and unresolved grief brought on by a century-long history of deaths by epidemics and cultural and political deprivation at others' hands; some of the more tragic consequences include the erosion of Native languages in which are couched the full cultural understanding, and the erosion of cultural values.

### *Economics*

Despite some growth in incomes and numbers of jobs in the 1980s, villages still have much smaller incomes and higher unemployment rates than the state as a whole.

Villages are precariously dependent upon public sector spending, and the cost of living in villages is exorbitant.



One recent study indicates that many small Southwest region villages may be losing their geographic advantage due to thinning of fish and game stocks, lack of jobs and the need for goods and services available in larger population areas, such as Bethel or Anchorage... The plight of the villages will worsen in the absence of systematic efforts to reduce the problems associated with a rapidly growing population.

"Final Recommendations for Action," Celtra Corporation, 1993.

While 8.8 percent of Alaska's total work force was unemployed in 1990, over one fifth of that portion of Alaska's work force comprised of Alaska Natives was unemployed.\*

In one out of every eight villages, unemployment among Native men is in excess of 50 percent; in one-third of all Native villages, male unemployment — at 32 percent — is nearly quadruple the statewide average unemployment rate.\*

Among the roughly 16,000 Alaska Native men in the state's civilian labor force, about 42 percent (6,645) are concentrated in the crafts, trades and service sectors.

Nearly one in three of all employed Alaska Native women works either as a secretary or

\* With severely limited employment opportunities in most villages, percentages of so-called "discouraged workers," who are not reflected in official unemployment figures, are thought to be much higher than official estimates.

clerk, and one in four works in the service sector, primarily in the food preparation and custodial fields.

*W*hile all Natives, both male and female, are severely under represented in managerial and professional specialty occupations, Native women are about 60 percent more likely to be working in the management and professional fields than are Native men.

*W*ith two exceptions — the Indian Health Service and the Bureau of Indian Affairs — federal agencies surveyed had a combined cumulative Alaska Native/American Indian employment rate of 5.6 percent. (IHS and BIA have special congressionally approved Alaska Native/American Indian hire preference provisions.)

*I*n 1992, only 4.8 percent of the State of Alaska's executive branch work force of 13,703 individuals was comprised of Alaska Natives, of particular note are the Department of Law, the Department of Natural Resources, and the Department of Fish and Game, with percentages of full-time Alaska Native employees at 3.8 percent, 2.1 percent and 1.6 percent respectively.

*A*n estimated 21.5 percent of Alaska Native families had incomes below the officially established "poverty" line income (\$12,674 for a family of four) in contrast to 6.8 percent of all Alaskan families.

*K*nowingly in some cases and unknowingly in others, many Alaska Natives have turned to government subsidies, income maintenance programs and other components of the transfer economy to make ends meet.

### *Justice and Corrections*

*T*here is a prevalent misunderstanding or misconception on the part of many non-Natives that only by administering "Western justice" can there be justice, and this perspective is ultimately harmful to the pursuit of alternative dispute resolution strategies at the village level.

*I*n analyzing information from the State of Alaska, the Commission found that as of April 1993, Alaska Natives made up just over 32 percent of the state's incarcerated population,

despite the fact that Alaska Natives represent 16 percent of the overall population and only 13.5 percent of the prison-age population in the state.

Alaska Natives make up 59 percent of all persons incarcerated for violent crimes and 38 percent of those convicted of sex-related offenses.

Most Native crime is alcohol-related, and a much higher percentage than average involves violence or sexual assault.

Well over half (53%) of Alaska Native inmates are incarcerated for crimes falling into categories deemed among the most violent: Assault (14% of total Native inmates); Sexual Assault (14%); Sexual Abuse of a Minor (13%), and Murder/Manslaughter (12%).

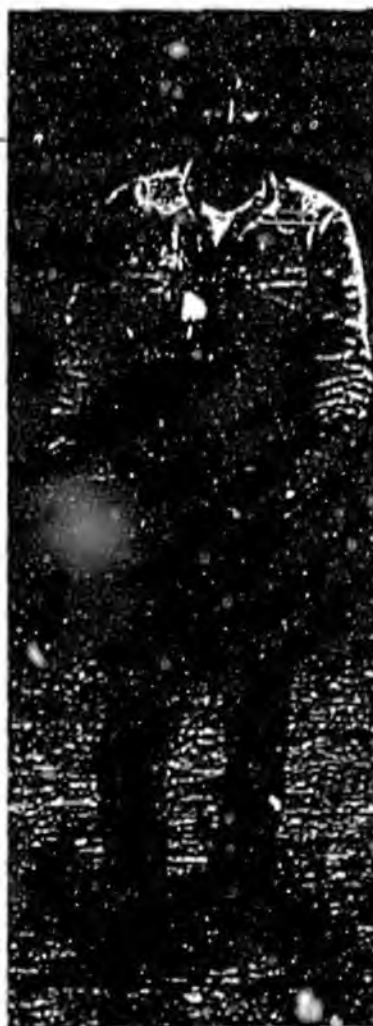
About 27 percent of all Native males between the ages of 14 and 17 were referred to the state juvenile intake system in 1992.

The murder rate among Alaska Natives is four times the national average.

Data indicate that there are differences in the types of crimes for which Natives are being incarcerated: within the misdemeanants, 43 percent are Native; among sex offenders, 39 percent are Native; and among probation and parole revocations, 41 percent are Native.

Data reported for 1990 showed that half of those convicted of second-degree murder were Native; for some other crimes, however, the representation of Natives was lower, among drug offenders, for example, only 8 percent were Native.

Although plea bargaining has been banned in Alaska for 16 years, "charge bargaining" exists, and it is a possibility that the disproportionate number of Alaska Natives convicted



and incarcerated may be in part due to their more readily admitting to a lowered charge, which may in turn be related to the mediating cultural ethic of avoiding confrontation.

## *Education*

*C*hildren with alcohol-related birth defects typically have learning problems in school; figures through 1988 suggest an Alaska Native FAS rate of 5.1 per 1,000 live births cumulative 1981-1988, roughly two and one-half times the overall FAS rate in North America (2.2 per 1,000).

*I*n urban areas, about 60 percent of Alaska Natives entering high school do not graduate, while in rural areas only 12 to 15 percent do not graduate. However, the high rural graduation rate is countered by much lower than average student achievement levels.



*A*laska Natives had American College Test (ACT) scores about 40 percent lower than those of other students in 1989.

*T*he cultural differences between students and teachers in Alaska's schools are exacerbated by a lack of Native teachers and administrators: only 7 percent of the instructional staff serving the 14,000 Alaska Native students in predominately rural school districts are themselves Alaska Natives; less than 2 percent of the instructional staff serving the 9,500 Alaska Native students in non-rural schools are Alaska Natives.

*M*ore than 12 percent of the students in rural schools are classified as "Chapter 1" pupils whose educational attainment is below the level appropriate for children of their age, compared to fewer than 4 percent of the pupils in the same classification in non-rural schools.

Despite the seeming association between small rural schools and low performance, specialists in rural education point out that they can offer advantages such as low student-teacher ratios and opportunities for teachers to significantly influence the lives of their students.

Fifty-three percent of all Alaska students had taken second-year algebra, compared to only 11 percent of Alaska Native students, forty-eight percent of all Alaska students had taken chemistry, compared to 8 percent of Alaska Native students.

Only about 67 percent of Alaska Native students complete high school, compared to a total overall statewide completion rate of 75 percent.

In some school districts up to 30 percent of Native children in elementary school are below grade level, in grades seven through 12, the figure jumps up to more than 40 percent. Despite this failure of the school system, some students are passed from grade to grade and finally graduated without achieving academic competency.

While the numbers of Native students graduating with educational degrees has increased over time, the absolute number remains small — 24 students with education degrees in the University of Alaska system in 1990.

*"Alaska Native Education: Issues in the Nineties," Institute of Social and Economic Research, University of Alaska — Anchorage*

High school graduation rates among rural students have greatly increased as a result of replacing boarding schools with small schools in the villages, achievement test scores of students in small rural high schools are, however, lower than statewide norms.

*"Alaska Native Education: Issues in the Nineties," Institute of Social and Economic Research, University of Alaska — Anchorage*

In 1960, the percentage of the adult non-Native population that had college degrees was five



times the percentage of the adult Native population with degrees.

*"The ANI Report on the Status of Alaska Natives: A Call for Action"*



## *Physical and Behavioral Health*

The lack of adequate sanitation and water facilities in the villages has been cited as the primary cause of many health problems and the rampant amount of disease found in the villages; the villages in southwestern Alaska have the highest incidences of hepatitis B and other communicable diseases.

In 1950, heart disease was the cause of death for only one of every 20 Alaska Natives; today every sixth Alaska Native dies from this cause.

Alaska Natives are more vulnerable to serious injury and infectious diseases than non-Natives.

Although more than \$1.3 billion has been spent building water and sewer systems in rural Alaska, many villages have only rudimentary water and sewer utilities.

For many years, Alaska Natives experienced cancer rates that were well below the rest of the nation, but that situation has clearly changed.

From 1985 to 1989, the rate of diabetes for Alaska Natives rose from 15.7 to 18.2 per 1,000 population; tuberculosis is far from eradicated even though the frightening statistics from 40 to 50 years ago are no longer prevalent.

Attention needs to be focused on the severe health and substance abuse problems in villages and the need to create functional communities at very basic levels.

The prevalence of tobacco smoking among all Alaskan adults is 26 percent, as compared to

39 percent among Alaska Natives, some Native villages have rates as high as 60 percent among adults.

### *Suicide*

The Native suicide rate has continued its upward climb in recent years, reaching nearly 69 per 100,000 population in 1989; death from suicide of an Alaska Native occurred once every 10 days, on average, during the 1980's, and preliminary figures from 1990-1993 indicate that the Alaska Native suicide rate is continuing to climb.

While about one in four of non-Native suicides in Alaska are committed by 15- to 24-year-olds, virtually half in the Native community are committed by this age group.

The steep, steady rise in the Native suicide rate during the 1930s continues an upward trend that dates back to the mid-1950s; in the quarter century between 1964 and 1989, the rate of Alaska Native suicides increased 500 percent.

During the 1980s, males accounted for 36 percent of Native suicide victims, the suicide rate for the latter part of the 1980s for males aged 20 to 24 years was in excess of 30 times the national rate for all age groups combined.

Native suicides occur more frequently in rural Alaska, while 61 percent of Alaska Natives live in village Alaska, over two-thirds of Native suicide deaths occurred in this geographic area during the 1988-89 period.

### *Alcohol: Deaths and Disorders*

In the decade of the 1980s, 305 Alaska Natives (173 males, 132 females) were killed by alcohol and drugs. Put another way, between 1980 and 1989, once every 12 days an Alaska Native died from alcohol. In contrast, during that same time period alcohol killed 478 non-Native Alaskans (341 males, 137 females). Considering that Alaska Natives made up roughly 16 percent of the state's population throughout the 1980s, the alcohol mortality rate of Natives was three and one-half times that of non-Natives (4.1/10,000 Natives, and 1.2/10,000 non-Natives).

For the period 1980-89, it is estimated that the cumulative YPLL (Years of Potential Life Lost: the number of years that a person died prior to his or her 65th birthday) attributable to alcohol was 6,607 among Alaska's non-Native population; an almost equal number of years (6,323) of potential life was lost within the Alaska Native community as a direct result of alcohol during that same time period, despite the fact that there are five non-Natives in Alaska for every Native.

The rate at which alcohol is an underlying or a contributing cause of injury death among Alaska Natives is nearly triple that among non-Natives.

About one-half of fire deaths, which occur roughly twice as often, per capita, in the Native community than the non-Native community, were attributable to alcohol in 1987.

Seventy-nine percent of all Native suicide victims have detectable levels of blood alcohol.

There is a clear connection between the abuse of alcohol and the commission of criminal offenses in Alaska; this alcohol connection is particularly strong in rural areas, and among Alaska Natives wherever situated.

"1992 Annual Report," Alaska Sentencing Commission

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## TABLE OF RECOMMENDATIONS

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**T**his section of Volume I includes all recommendations made by the Alaska Natives Commission and its task forces and not otherwise contained in Part II of this volume. Several of the following recommendations do, however, relate closely and at times overlap recommendations made in Part II. Each of these recommendations can be found in Volume II of the Final Report of the Alaska Natives Commission. That volume also contains substantive discussions and analyses on each of the listed recommendations.

### *Economic Recommendations*

#### *Employment*

1. Institute Native preference for all federal employment in or related to rural Alaska; at a minimum, every agency of the federal government that is available for contracting under P.L. 93-638 should have a Native hire requirement similar to that which is in place with the Indian Health Service and the Bureau of Indian Affairs.
2. Establish veteran's preference for service in the Alaska National Guard by changing the civil service employment procedures in order that those who have served in the Alaska National Guard receive veteran's preference.



3 • Davis Bacon (i.e. the federal Davis Bacon Act and the Alaska "Mini-Davis Bacon") requirements should be applied effectively and rationally for village/rural capital projects by following the statutory rule of the "local prevailing wage."

4 • Eliminate HUD requirements that prohibit local design and construction, enabling village councils, village corporations and ANSCA

regional corporations to become directly involved in housing construction with provisions in place that will both ensure substantial Native hire, improved housing and contract stability for participating Native firms.

5 • Facilitate contracting of land conveyance surveys, especially in rural areas of the state, and employ more Natives in the surveying field.

6 • The state and federal governments should reorient training programs, with support from the Job Training Partnership Act, to develop and implement dedicated programs to prepare young Alaska Natives to participate fully in the burgeoning Information Age employment and services opportunities.

7 • The Commission recommends that all Alaska Native corporations and organizations aggressively pursue employment and education opportunities that will soon be available through the new AmeriCorps (e.g., the National Service Corps).

8 • Establish a State Office of Alaska Native Recruitment within the Governor's Office to develop and implement procedures within all departments to ensure more equitable Alaska Native hire practices.

### ***Village Economies and Cottage Industry***

**9.** Congress should create an Alaska Native Economic Development Trust, the principal of the trust to be used in the development of feasible, locally initiated economic projects in predominantly Native areas of the state that create real local employment and training opportunities for rural residents.

**10.** The federal government should improve outcomes for village planning and training in economic development by evaluating the Administration for Native Americans and the extent to which its social and economic development strategies are actually accomplishing stated goals in Alaska; programs should be restructured if it is found that more effective means are available to effect economic growth in Alaska Native villages.

**11.** All Alaska Regional Development Organizations (ARDORs) should expand their support for Native businesses and review their policies and procedures to ensure that Alaska Natives are receiving their share of assistance, training and support.

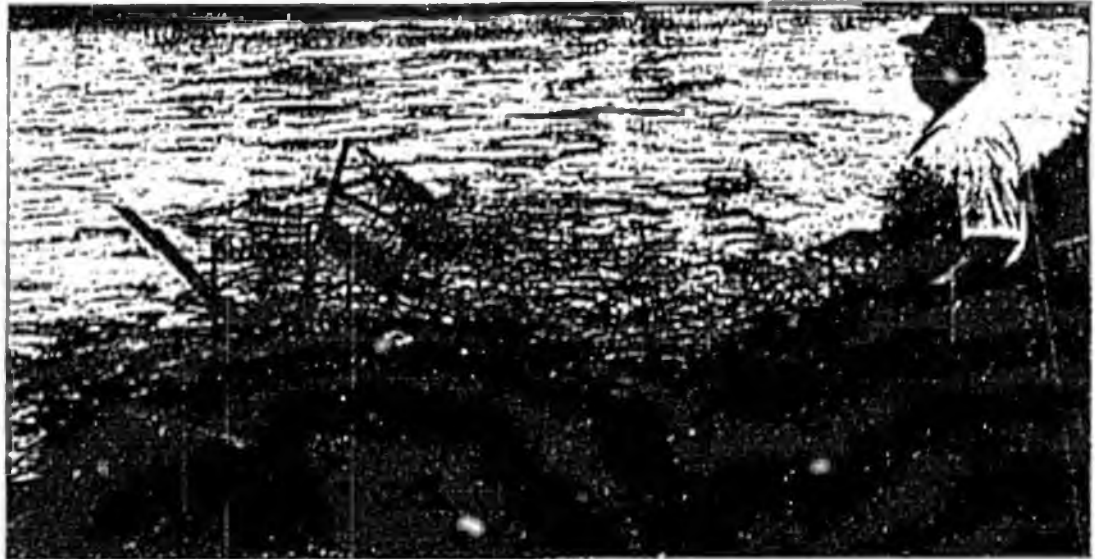
**12.** Government should increase support for Native tourism and ecotourism by promoting and assisting in the acquisition of capital investment by Alaska Native individuals, village councils and Native firms that wish to become involved in this growing industry.

**13.** It is recommended that the Community Development Quota (CDQ) program be expanded to include at least one other extraction industry, as a demonstration project, to be studied and further developed if its benefits resemble those that have already been realized from the CDQ for the pollock fishery.

**14.** A standing Bulk Fuel Task Force should be established by the State of Alaska to operate during the moratorium that the Coast Guard has given before forcing the cessation of fuel delivery to 75 villages that have unsafe storage facilities, and the Legislature, Congress and the private sector should set remediation of the bulk fuel storage problem as a high priority for future allocation of funds.

**15.** The Department of Housing and Urban Development should fund an Alaska

Native Housing Authority that: a) designs, manufactures and constructs houses for villages, with the participation of village residents, and b) has the long-term goal of substantially increasing rural local hire and other economic benefits to localities and regions in which major HUD construction activities are taking place.



### *Fish and Game Resources*

**16.** The State of Alaska should convene a special task force, with strong representation of Alaska Native communities, to study the problems created for Alaska Natives by the Limited Entry system and to propose ways in which the program can either be expanded to allow additional permits to be acquired or, alternatively, replaced with a program that accomplishes more effectively the program's original objectives.

**17.** The CDQ program should be codified in the Magnuson Act through its inclusion by the North Pacific Fisheries Management Council in its final comprehensive rationalization plan, the percentage should be raised from 7.5 percent to 15.0 percent of the pollock fishery and the CDQ should be expanded to other fisheries in the future.

**18.** Both the federal and state governments should develop long-range plans in order to effect stabilization of the reindeer industry, along with development of outside markets, to accomplish the Reindeer Industry Act's goal of a self-sustaining economy for Alaska Natives,

specifically, existing state agencies dedicated to developing and promoting markets for other Alaska products should assist in the expansion of reindeer markets.

**19.** The federal and state governments should become more active in establishing training programs related specifically to reindeer herding, animal husbandry, product preparation, business skills, marketing and other issues related to this industry.

**20.** The growing shellfish mariculture industry in many Alaska Native villages should be fully supported by federal and state government agencies through increased training and redirected economic development funding.

**21.** The State should reconsider its ban on fin-fish farming and establish an Alaska Native demonstration project, oversight for the program should be federal, with support and technical assistance provided by the Alaska Department of Community and Regional Affairs and the F.R.E.D. Division of the Alaska Department of Fish and Game.

## *Judicial and Law Enforcement Recommendations*

### *General*

**1.** The Village Public Safety Officers should: (a) receive significantly more professional training in law enforcement; (b) be given greater compensation for their work; (c) enforce local ordinances; (d) be empowered to make arrests (in addition to "citizens' arrests"); (e) wear a distinctive, standard uniform throughout the state; (f) have the option of carrying a non-lethal weapon (such as a nightstick or sap) or be armed, with appropriate training provided by the State Troopers; and, (g) be sought out as the first source of recruitment for positions in the State Troopers when vacancies occur.

**2.** Village Public Safety Officers should enforce village ordinances as well as state statutes.

**3.** The State of Alaska should empower local councils to: (a) pass their own ordinances; (b) enforce local ordinances; (c) apprehend those who fail to obey ordinances; and, (d) pass on

to locally established dispute resolution or judicial bodies those who are so apprehended (see later recommendations).

4. The State of Alaska should enter into formal agreements with each village court (i.e. tribal councils or courts, or other dispute resolution body or individual established by consensus of the village residents) to determine which infractions or which classes of infractions will be the domain of the local jurisdiction and which will be the domain of the State.

5. The State of Alaska should convene a task force composed of representatives of the different Alaska Native groups involved in the judicial system and all three branches of state government to devise a structure of parameters within which village (and Native community) court systems can be given due respect by the State.

6. The State of Alaska must evaluate its entire judicial system, from the District Court to the Supreme Court, relative to its incorporation of Alaska Native law ways and ethics; it must also pursue options and alternatives to the current system, returning dispute resolution and decision making authority to Alaska Native villages and the Native communities that exist in the state's larger municipalities.

7. Village Councils should be encouraged to establish dispute resolution bodies and procedures that are consistent with the predominant tradition and culture of the village, and the state and federal governments should provide training and technical assistance to further this establishment; the Tribal Court in Minto should be looked at as an exemplary model for local dispute resolution bodies.

#### *Correctional System Issues*

8. The legislative and executive branches of state government need to revise perspectives regarding its correctional system and the ways in which its three purposes (punishment, rehabilitation and protection of society) can be met; punishment can, as recommended by the Alaska Sentencing Commission, be achieved through the use of alternatives to incarceration, and incarceration can be accomplished closer to "home" if appropriate means are provided regionally.

9. The state and federal governments should develop alternative punishments consistent

with the ethics and culture of the village or region in which they are to be implemented, such alternatives must also be integrated with alternative forms of dispute resolution.

**10.** The Indian Health Service, Bureau of Indian Affairs, Alaska Department of Health and Social Services and the Department of Corrections must combine their resources and support the development and maintenance of half-way houses and other transitional and supportive living arrangements for Native offenders who can receive rehabilitative treatment at least regionally, if not in their own communities, and for incarcerated Natives who are in the process of returning home.

**11.** The Alaska Department of Corrections should increase opportunities for Native inmates to participate in substance abuse counseling and to begin that participation earlier in their stay in corrections.

**12.** The Alaska Department of Corrections should waive academic requirements for hiring Alaska Native counselors to enable the hiring of more Natives who have extensive life experience and a demonstrated ability to assist in the healing and spiritual strengthening that is needed for those inmates who have substance abuse and addiction problems.

**13.** The Alaska Department of Corrections should: (a) review all cases of Native individuals now incarcerated who are in correctional facilities merely because of a violation of probation or parole and release back to their home villages any individuals who are not dangerous to themselves or others, (b) establish a means by which probation and parole can be carried out in the home village of the offender, utilizing the cultural and social structure of the community both to support and monitor the individual, in the spirit of rehabilitation and community healing, (c) eliminate the requirement that Alaska Natives from rural areas who are on probation and parole must relocate to and remain in an urban area, thereby allowing them to return to their home villages, and, (d) report all the changes made and their impact on probation/parole violations and recidivism to the Alaska Judicial Council no later than July 1994.

**14.** Consistent with the recommended decentralization of the judicial and correctional systems, village dispute resolution bodies should have the authority to establish monitoring and assistance teams that will supervise a parolee or probationer in the village.

**15** An Office of Alaska Native Recruitment should be established within the Governor's Office to develop and implement procedures within other departments to ensure a more aggressive campaign of recruiting Natives into all levels of positions related to law enforcement, the judiciary and corrections.

### *Local Self-Determination Recommendations*

#### *Self-Governance Issues*

**1** • The state and federal governments and their respective agencies should give full and complete recognition to whatever governmental entity that a community has chosen, whether it be a traditional council, an IRA council or a state chartered municipality.

**2** • Existing programs for assistance to local governments available through the state and federal governments should be reviewed and their use be monitored to determine their effectiveness in strengthening the governance skills of the community and, to the extent necessary, such programs should be augmented to accomplish effective self-governance.

**3** • Native organizations, such as regional non-profit corporations, the Native American Rights Fund, and similar institutions which have the financial and technical capabilities to do so, should, in addition to pressing for resolution of tribal governance powers questions, examine the existing governmental entities used by Native communities in order to identify ways in which such entities can be used more effectively to achieve the goals of the communities.



4. An evaluation of Bureau of Indian Affairs programs and fund utilization should be completed and, unless there is compelling evidence that would convincingly argue against it, the 103(a) grant program should be re-instated to provide stable financial support for tribal administrations in Alaska.

5. Using the training funds now incorporated into the BIA Area's administration, a coordinated program of decentralized training and assistance should be offered by the Bureau at the village level to accompany the re-instatement of the 103(a) grant program; and, the Administration for Native Americans, which also has a goal of strengthening tribal governments and which invests approximately \$600,000 a year in pursuit of that goal in Alaska, should direct its funding into this statewide training and technical assistance effort.

6. Alaska Native regional non-profit corporations should be directed — as a requirement of their contracting with the Bureau of Indian Affairs and the Indian Health Service — to increase technical assistance to village tribal governments in their respective regions, and consideration should be given to establishing a matching-grant program under which regional non-profit corporations distribute portions of their administrative funds to tribal governments that become involved in the redesigned Section 103(a) and 103(b) grant programs.

7. The Alaska Native regional non-profit corporations, including health corporations, should work with member tribal governments to review significant shifts in programs and services from the regional to the village level, balancing community and tribal empowerment needs with the realities of providing cost-effective, high quality services throughout the state.

8. Federal and state departments that provide grants and contracts to Alaska Native non-profit corporations should be directed to evaluate the programs and fund utilization of the corporations for the purpose of limiting administrative costs and striving to move more of the funds, functions and services to village governments.

9. Congress should appropriate and specifically direct a minimum of \$10 million annually for five years for use by Alaska Native tribes in solving Alaska Native social problems in culturally appropriate ways.

### *Local Resource Management Issues*

**10.** The Governor and the State Legislature should reconfigure the Board of Fisheries and Board of Game to enable Alaska Natives to regain more local control over subsistence resources, harvests and traditional uses, and the federal government should augment the authority of the ANILCA (Alaska National Interest Lands Conservation Act) regional councils.

**11.** Each ANILCA regional board should have veto power over the application of hunting and fishing regulations impacting subsistence, and an oversight group, composed of representatives elected by the regional boards, should review subsistence policies and regulations no less often than annually.

**12.** The State of Alaska should establish a special task force — with strong representation of Alaska Native communities — to study the original intent of, and present problems with, the Limited Entry program and propose ways in which the program can either be expanded to allow additional permits to be acquired or, alternatively, replaced with a program that accomplishes more effectively the program's original objective while honoring Alaska Natives' traditions and needs.

### *Education Recommendations*

**1.** The Alaska Department of Education should continue or take action necessary to create a three-component K-12 education system of Alaska Natives that includes home community K-12 schooling that is the right of every American child, distance education delivery that effectively redresses the limitations inherent in small rural schools, regional academic and vocational schools that effectively redress the limitations of small rural schools that cannot be overcome by internal improvements and distance education delivery, and vocational schools that adapt curriculum to regional and local needs.

**2.** The State of Alaska should establish total local control of schools by recasting advisory boards as policymaking boards, and increasing Native administrators and teachers through affirmative hiring and alternative certification.

3. The State of Alaska should establish a model curricula that meet the needs of Alaska Native students by engaging Native scholars and educators in developing: model K-12 curricula differentiated on a regional basis; model post-secondary programs that will aid Native students in the transition from high school to college or vocational education; and model programs that will aid Native students in becoming proficient in the skills necessary to continue the subsistence tradition and economy.

4. The State of Alaska and local school districts should substantially increase efforts to recruit and train educational staff, including local Native professionals, to meet the special needs of Alaska Native students by, among other means, providing: incentives to Native college students to become teachers; incentives for Native teacher aides to become certified; alternative certification avenues to encourage qualified Native professionals to enter the field of education; and incentives to Native teachers to become school administrators.

5. The Congress and the State of Alaska — in a concerted effort to make real improvements in the social and cultural linkages between schools and the villages — should encourage parents and community leaders to become and stay involved with the education of Native children by, among other means: initiating a program to develop parent and village government involvement in rural school districts and using, where appropriate, culturally relevant methods and materials; and creating an Alaska Native Heritage Trust, the funds from which to be granted to Alaska Native tribes for use in schools and in the community for enhancing Natives languages and cultures.



6. The State of Alaska should commit to making measurable improvements in the percentage of Native teachers and other employees in schools with predominantly Native student populations by ensuring that requirements for measuring teacher competency are balanced with local Native needs.

7. The State of Alaska should ensure a competent, stable work force of teachers in village schools to enhance student learning and to maintain stability in school programs by amending Sec. 14.20.150(2) of the Alaska Administrative Code (AAC) to extend years necessary to qualify for teacher tenure from two years (current) to five years (desirable), and instituting remedies mainly through increasing the local Native teacher work force outlined above, to decrease teacher turnover in village schools.

8. The federal government and the State of Alaska should address options for management and funding of schools in village Alaska and other funding issues by, in addition to other means: enabling, over a five-year period, the Regional Educational Attendance Area system to delegate authority for schools to tribal governments in partnership with the State Department of Education, requiring tribal governments, to the extent of their local capabilities, and the Bureau of Indian Affairs to participate in the funding of schools whose authority for management has been delegated to said tribal government on a per capita level equaling the minimum state support given schools currently operated by rural municipalities; and providing one-time federal funding of \$50 million to \$100 million for upgrading and/or replacing former Bureau of Indian Affairs schools that are now being used as elementary schools.

9. Congress should create and fund an Alaska Native Heritage Trust to be administered by the Alaska Inter-Tribal Council; the funds to be granted to Alaska Native tribes for use in schools and Native communities for enhancing Native languages and cultures.



## *Physical and Behavioral Health*

### *General*

1. The Alaska Natives Commission endorses the recommendations made by the Alaska Sanitation Task Force which include, among others: involvement of communities in the planning, design, and construction of their sanitation utilities; expansion of the remote maintenance worker program to ensure certified, trained operators for all sanitation systems; and awarding of direct grants only to those communities providing at least 10% of the total project costs or an equivalent amount of in-kind services.



2. A coordinated data system should be established that integrates the efforts of the Alaska Area Native Health Service, the Centers for Disease Control and Prevention, the State of Alaska, the Veterans Administration, other cognizant agencies and Native health corporations.

3. Current governmental expenditures supporting the diversified data gathering that now occurs should be focused to support a comprehensive statewide health needs and status-evaluation survey of Alaska Natives: to include behavioral health risk assessment information and wellness indicators, and provide direction to the new health promotion and disease/risk reduction programs recommended by the Commission.

4. The Governor and Congress should safeguard the continued funding for the Community Health Aide Program (CHAP), increasing wages over time to ensure the continuity of the program and reduce turnover among CHA's, and providing training funds and other support.

5 • Congress should respond favorably to the need for increased support for patient travel in Alaska and appropriate funds to meet the authorization level of the Indian Health Care Improvement Act.

### *Child and Family Health*

6 • The Alaska Area Native Health Service should continue to set its objectives towards high rates of immunization in order that, by the end of the century, all Alaska Native children throughout Alaska will be age-appropriately immunized.

7 • Present reductions in Bureau of Indian Affairs' funding for Indian Child Welfare Act grants and any plans for the eradication of that important program should be reversed and the Bureau should reinstate the funding to levels available for federal FY 1993 and offer even further assistance to tribes and tribal organizations in their efforts to eliminate child abuse and its consequences in the Alaska Native community.

8 • Child abuse and neglect data should become part of a unified, comprehensive data system for Alaska Natives, and roles and responsibilities, especially between the Division of Family and Youth Services, the judiciary, Indian Health Service, regional health corporations and other tribal contractors, and federally recognized IRA and traditional councils need to be clarified.



### *Health Education and Preventative Health*

**9.** The entire health care system for Alaska Natives must be re-oriented to emphasize primary prevention, and every primary prevention program must concentrate on families and communities, not on individuals.

**10.** The Indian Health Service, through contract with the Alaska Native Health Board and in conjunction with the Alaska Department of Health and Social Services, should develop a comprehensive infectious disease prevention education strategy geared directly to address Alaska Native tribes, families and children with materials developed by and for Alaska Natives and in Native languages; the effort to be made through all mediums, schools and other institutions found in the villages and should clearly recognize the linkages between physical health and cultural, spiritual and mental well-being.

**11.** Aggressive health education campaigns specific to avoiding HIV and AIDS should be initiated and a curriculum addressing the disease should be established in schools statewide; educating and raising the awareness of parents, and helping them to help their children, is an essential element of a successful anti-AIDS program.

**12.** It is incumbent upon all levels of government and the entire educational system of the state to revisit the need for health education for Native children, youth, adults and elders; and the Public Health Service should augment funding and support for health education and promotion programs.

**13.** The Alaska Native Health Service and the Alaska Department of Health and Social Services should aggressively pursue new approaches to increasing cancer screening and diagnostic capabilities while at the same time offering greatly enhanced health education and risk prevention activities for Alaska Natives.

**14.** The capability of the Indian Health Service should be enhanced to make effective and timely diagnoses so that when Alaska Natives do seek help in response to early signs of illness they will be assured appropriate intervention and timely care to prevent more serious consequences.

**15.** The Suicide Prevention Program administered by the State Department of Health and Social Services should be examined as a possible model for the development of additional government-supported endeavors, upholding the goal of empowering communities to design, implement and be responsible for their own creative solutions.

#### ***Substance Abuse***

**16.** The Alaska Area Native Health Service, the Alaska Department of Health and Social Services, and others who provide funds for substance abuse prevention and treatment should conduct an outcome evaluation of the effectiveness of programs that they fund and, when relatively unsuccessful approaches are found, redirect the funding to fill in the gaps in the treatment system and implement new and different methods to reduce the incidence and prevalence of substance abuse.

**17.** The Alaska Department of Health and Social Services and the Alaska Area Native Health Service should use existing funds to support the establishment of an Alaska Native Family Development Center modeled after the successful Kakawis Centre in British Columbia, monitoring and evaluating its effectiveness over time for possible expansion.

**18.** Programs for early risk detection, for example the "Healthy Start" program that has proven to produce drastic reductions in child abuse, should be implemented for Alaska Natives with initial contact beginning prior to the birth of the child to also help prevent Fetal Alcohol Syndrome and Fetal Alcohol Effect.

**19.** There should be an immediate establishment of federal and state policies and procedures that will ensure: (a) consistent gathering of needs assessment data related to the incidence and prevalence of substance abuse among Alaska Natives; (b) routine sharing of data between the various agencies of the federal and state governments that collect information about substance abuse; (c) the establishment of a consistent evaluation methodology that will assess the performance of programs that receive funds from the state and federal governments to fight the substance abuse problems that have become endemic in Alaska Native communities; and, (d) research into the type of binge drinking common among Alaska Natives and evaluation of treatment approaches attuned to that type of client.

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## KEY FACTS & FINDINGS

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The following are selected statistical and other findings of the Alaska Natives Commission.

Organized by issue area, these data are intended to orient the reader with key information about the topics studied by the Commission. Volumes II and III of the report contain additional statistics and analyses by issue area. Unless otherwise noted, the data and findings were developed by the Alaska Natives Commission based on a number of public and private sources, including 1990 Census data.

### *Social/Cultural*

The Alaska Native birthrate is 36.5 for each 1,000 population, therefore the demand for services such as elementary schools, Head Start programs and community health care has been increasing in the villages.

In respect to Native children, the public education system must encompass two sets of values: the first set of skills is that necessary for success in traditional Native life; the second set is that necessary for success in Western society.

The Native mortality rate is more than three times the national average, and a significant percentage of Native deaths is alcohol-related.

In response to inquiry by the Legislature about the decision, the Attorney general responded in a letter dated January 11, 1996 :

"[T]he 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 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."

The Attorney General's letter to the Legislature attempted to answer a variety of questions raised at the December hearing. The hearing and the letter taken together, however, indicate that several important questions remain unanswered--questions brought to legislative attention by the public about exactly what this new concept of Alaska Native tribal sovereignty means for the future of Alaska. It is with these concerns in mind that the Joint Judiciary Committees convene this hearing. It is hoped that the panel invited to participate can offer a broad perspective on tribal sovereignty's impact on Alaska.

The Legislature and the public remain concerned that the Administration's decision to abandon litigation over the validity of tribal status in Alaska may have been made too hastily. It is now clear that many of the troubling issues regarding tribal status, including jurisdiction, sovereign immunity, and overlapping membership, are unknown, both to the people and to the Attorney General's office, the State's legal authority and representative. If in fact the implications of this decision are so uncertain, the political policy decision must be examined further. For it is Alaska government's mandate to protect and advocate the interests of the state and all of its citizens.

Present today will be Attorney general Bruce Botelho, a representative from the Governor's office, a representative from the Alaska Federation of Natives, a representative from the Bureau of Indian Affairs, Anchorage attorney Don Mitchell, Washington Indian law attorney Jim Johnson, and South Dakota Indian law attorney Tom Tobin.

After the round table discussion, we hope to accomplish four things:

- 1.) determine whether and to what extent the Administrative action in question will benefit Alaskans, particularly in Native communities;
- 2.) commence an inquiry to determine specific impacts on the state government created by the Administration's decision;
- 3.) identify other effects created by the new tribal status recognition; and
- 4.) explore legislative options in response to the Administration's actions to protect the interests of all Alaskans, Native and non-Native alike.

FEBRUARY 21, 1996 JOINT JUDICIARY COMMITTEE HEARING

INVITED PANEL MEMBERS

- 1.) Bruce Botelho, Attorney General
- 2.) Representative from the Governor's Office
- 3.) Don Mitchell, attorney
- 4.) Bureau of Indian Affairs Representative
- 5.) Julie Kitka, Alaska Federation of Natives
- 6.) Gary Oskoloff, Vice-Chairman, Alaska Inter-Tribal Council
- 7.) David O. David, Chairman, Association of Village Council Presidents
- 8.) David Getsches, attorney
- 9.) Tom Tobin, attorney
- 10.) Jim Johnson, attorney (Telephonic Participation)
- 11.) Arthur Snowden II, Administrative Director, Alaska Court System

# Alaska State Legislature



House of Representatives  
House Judiciary Committee

State Capitol, Room 120  
Juneau, Alaska 99801-1182  
(907) 465-4990

## NOTICE OF MEETING

### Joint House/Senate Judiciary Committee Meeting

DATE: February 21, 1996

TIME: 1:00 P.M.

PLACE: Capitol 5th floor--Senate Finance Committee room

SUBJECT: Impact of Tribal Status Recognition in Alaska

#### Senate Members

Sen. Taylor, Chair  
Sen. Green  
Sen. Miller  
Sen. Adams  
Sen. Ellis

#### House Members

Rep. Porter, Chair  
Rep. Green  
Rep. B. Davis  
Rep. Bunde  
Rep. Finkelstein  
Rep. Toohey  
Rep. Vezey

OPENING STATEMENT

SENATOR ROBIN TAYLOR

CHAIRMAN, SENATE JUDICIARY COMMITTEE

JOINT ALASKA STATE SENATE/HOUSE JUDICIARY COMMITTEES  
HEARING

2/21/96

The Senate and House Judiciary Committees convene this joint hearing this afternoon as a follow-up to the December hearing held in Anchorage. The subject of inquiry is the Knowles Administration's decision to discontinue the State's opposition to the acknowledgment of tribal status for 226 Alaska Native Villages.

On October 21, 1993 the Bureau of Indian Affairs published a list of federally recognized Alaska Native Indian tribes. The list for the first time purported to acknowledge the existence of tribes in Alaska. The list claimed to grant "the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian Tribes with a government-to-government relationship with the United States." *58 Fed. Reg. 54,346 & 54,366 (October 21, 1993)*. In other words, the list attempted to create 226 separate government entities within Alaska.

The State initially challenged the federal acknowledgment procedures in a U.S. District Court case called Native Village of Venetie I.R.A. Council v. State of Alaska, 1994 WL 730893, \*1 (D. Alaska 1994). In October 1995, Judge Holland concluded in the Venetie case that the 1993 list granted sovereign tribal status. The State of Alaska, presumably at the behest of the Governor, challenged the District Court decision, arguing in a motion for reconsideration that the federal tribe list was invalid because the federal government had failed to follow its own regulatory acknowledgment procedures. See CFR part 83. Prior to the District Court's ruling on the State's motion for reconsideration, the Governor directed the Department of Law to withdraw the motion. The Governor proclaimed that the new state policy was to not challenge the federal government's failure to follow its own regulations and to acquiesce to the federal decision.

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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January 11, 1996

The Honorable Gail Phillips  
Alaska House of Representatives  
State Capitol  
MS 3100  
Juneau, Alaska 99801

Dear Speaker Phillips:

At the conclusion of the Joint House-Senate Judiciary Committee hearing on tribal status held on December 4, 1995, I pledged to provide additional information about this important issue. This information is also being provided to legislators who did not participate in the committee hearing as a follow-up to my letter of November 27, 1995, on tribal status issues.

Let me emphasize once again 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 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.

Nevertheless, the Administration's decision to not pursue the litigation over tribal status is also supported by events that, taken together, lead one to conclude that the probability of prevailing in the federal courts was extremely low. Very few human endeavors are static. In this instance, litigation over tribal status began in the 1980's because, in the absence of any clear federal expression that tribes existed in Alaska, the state was unwilling to accept each and every assertion of tribal status. As discussed further below, there has been extensive federal activity

in the last two years that justified a fundamental reevaluation of the state's posture in the litigation.

## THE FRAMEWORK FOR FEDERAL RECOGNITION OF TRIBES

Historically, the Alaska Supreme Court has held that for the most part, except for Metlakatla, no tribes exist in Alaska. The court extended sovereign immunity to Metlakatla in *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977), holding:

Once the [federal] executive branch has determined that the Metlakatla Indian Community is an Indian tribe, which is a non-justiciable political question, the community is entitled to all of the benefits of tribal status.

569 P.2d at 163.

More recently, the court has declined to find sovereign immunity or has concluded that, if it did exist, it was waived by the tribe. These cases include *Nenana Fuel v. Native Village of Venetie*, 834 P.2d 1229 (Alaska 1992); *Hydaburg Coop. Ass'n v. Hydaburg Fisheries*, 826 P.2d 751 (Alaska 1992); *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988); and *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983). No case, however, has questioned the fundamental holding of *Atkinson v. Haldane*.

Four events have occurred since the Alaska Supreme Court's last decisions in 1992 that suggest the court would, if presented the question, decide tribal status issues differently today, in keeping with its decision in *Atkinson*. Those events are: (1) the Secretary of Interior's tribal listings published in 1993 and 1995; (2) Congress' enactment of the Federally Recognized Indian Tribe List Act of 1994; (3) Judge H. Russel Holland's decision in *Native Village of Venetie v. State*, No. F86-0075 CIV (HRH), issued December 23, 1994, holding that the Native Village of Venetie Tribal Government is an Indian tribe under the common law criteria; and (4) Judge Holland's decision in the same *Venetie* case on the tribal status of Fort Yukon issued on September 20, 1995.

*Department of Interior's 1993 and 1995 Tribal Lists*

In 1993, the executive branch of the federal government took a significant step intended to remove any ambiguity as to the tribal status of certain Alaska Native entities. On October 21, 1993, the Secretary of Interior published a list of more than 220 Alaska Native villages identified as having the same status as tribes in the contiguous 48 states. The preamble to the 1993 list expressly declared:

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 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 governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, privileges as other acknowledged tribes; have the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to the other tribes; and are subject to the same limitations imposed by law on other tribes.

58 Fed. Reg. 54365-54366 (Oct. 21, 1993) (footnote omitted; emphasis added).

The tribal list published by the Secretary on February 16, 1995, reinforces this intent. The preamble to the 1995 list states that it constitutes the list of "federally acknowledged tribes in the contiguous 48 states and in Alaska."

60 Fed. Reg. 9250 (Feb. 16, 1995). The preamble further points out that subsequent to the publication of the 1993 list, Congress enacted the List Act of 1994 in which "Congress confirmed the Secretary's authority and responsibility to establish a list of Indian tribes and mandated that he publish such a list annually." The updated 1995 list was published in response to that Congressional mandate. 60 Fed. Reg. at 9251.

### *The List Act of 1994*

In late 1994, Congress was called upon to address the 1993 tribal list because of the Department of Interior's failure to include two tribes on the earlier list. One of the excluded tribes was the Central Council of Tlingit and Haida Indian Tribes of Alaska.

The result was enactment of the "Federally Recognized Indian Tribe List Act of 1994." Public Law 103-454; 25 U.S.C. 479a. In the List Act of 1994, Congress directed that the Secretary annually publish a list of federally recognized tribes; under the Act, once recognized, an Indian tribe may be terminated only by an act of Congress. Title II of the Act noted that the Secretary's 1993 list did not include the Central Council and expressly reaffirmed the federal recognition of that tribe.

The House Natural Resources Committee report accompanying the legislation discusses the October 21, 1993, list of Alaska Native tribes and notes the continuing controversy over the existence of "Indian country" in Alaska. House Report No. 103-781; 1994 *U.S. Code Cong. and Adm. News*, p. 3768. The committee emphasized that the Act is neutral on the Indian country issue: "The Act merely requires that the Secretary continue the current policy of including Alaska Native entities on the list of Federally recognized Indian tribes which are eligible to receive services." *Id.* at 3771.

### *The December 23, 1994, Decision in the Venetie Case*

On December 23, 1994, Judge Holland ruled that the Native Village of Venetie Tribal Government (encompassing the Native Village of Venetie and Arctic

Village) is a tribe based on the federal common law criteria. Those criteria are: (1) the group is a group of Indians of the same or similar race; (2) it is united in a community; (3) it operates under one leadership or government; (4) it inhabits an area of some reasonable definition; and (5) it is the modern day successor to an historical sovereign entity which exercised at least minimal government functions. In applying these criteria to the evidence presented at trial, the court took a broad view of each one making it unlikely that any village would fail to meet the test.

*The September 20, 1995, Decision in the Venette Case (Fort Yukon)*

The 1993 and the 1995 tribal lists, as well as the List Act of 1994, were considered by the U.S. District Court for Alaska when it was called upon to decide Fort Yukon's tribal status in the *Venette* case. The state contested Fort Yukon's inclusion on the 1993 and 1995 lists because, in identifying the listed villages, the Secretary of Interior had failed to follow the Department of Interior regulations necessary to achieve tribal recognition.

In a decision issued on September 20, 1995, the court rejected the state's argument. The court held that the Secretary of Interior has the power to recognize tribes as a result of the historical acquiescence of Congress. The federal regulations established a procedure for unrecognized tribes themselves to initiate proceedings to gain the Secretary's recognition. However, the court concluded, this is not the exclusive means by which a tribe may receive federal recognition, and "[t]he Secretary himself need not use this regulatory scheme, but may recognize a tribe due to his historically acquiesced power." Order, September 20, 1995, at 9.

The court found that the ambiguity surrounding the status of the Alaskan entities on the tribal lists published by Interior from 1982 to 1988 was resolved by the publication of the October 21, 1993, list: "the executive's intent was clearly announced" on that date. *Id.* at 8. Thus, as of that date, the Native Village of Fort Yukon (as well as the other entities on the list) became a federally recognized tribe.

The court found support for its ruling on the tribal status of Fort Yukon in the List Act of 1994, stating:

Congress repudiated a decision by the Secretary to remove two Alaskan tribes from the Secretary's 1993 list of recognized tribes. Congress did not, however, repudiate any other portion of the 1993 list. Congress actually referred to the 1993 list and ordered the two tribes returned to it. Tribe List Act, section 202(2). This leads to the conclusion that Congress approved of this list.

Order, September 20, 1995, at 10.

On October 20, 1995, the state moved for reconsideration of the court's decision, thus precipitating a careful policy review by Governor Knowles. The state's motion for reconsideration was later withdrawn. The plaintiffs also moved for reconsideration, arguing that Fort Yukon was a federally recognized tribe by virtue of its inclusion on the Department of Interior's tribal lists published from 1982 to 1988. On December 12, 1995, Judge Holland issued a decision reaffirming his previous ruling. The court stated that it had reconsidered its order of September 20 on the tribal status of Fort Yukon and concluded that it had made no error of fact or law in that order. The court reiterated its holding that as of October 21, 1993, Interior clearly declared the listed villages, including Fort Yukon, to be federally acknowledged tribes.

## THE STATUS OF THE "INDIAN COUNTRY" ISSUE

In two recent decisions issued by Judge Holland, the *Venetie* case and the *Kluti Kaah* case, the court held that ANCSA lands are not Indian country. Both of these cases have been appealed to the Ninth Circuit Court of Appeals. As I stated in my November 27, 1995, letter, the Knowles Administration will defend Judge Holland's decisions in the Indian country cases on appeal.

The *Venetie* Indian country case arose out of Venetie's effort to impose a business activities tax on a school construction project in the village. The ability of a tribe to tax depends on the tribe having a territory, *i.e.*, Indian country, over which it exercises jurisdiction. In August 1995, Judge Holland determined that the

ANCSA lands owned by Venetie are not Indian country. Thus, the tribe cannot impose a tax on construction projects on ANCSA lands.

On November 28, 1995, Judge Holland ruled that the Kluti Kaah Native Village of Copper Center neither owns nor occupies land constituting Indian country. Therefore, Kluti Kaah lacks jurisdiction to impose a business activities tax on the section of the TransAlaska Pipeline System running through the area.

The essence of the *Venetie* and *Kluti Kaah* Indian country decisions is: (1) the test for Indian country is whether the land has been validly set apart for the use of Indians as such, under the superintendence of the federal government; (2) it is the tribe, not the land, that must be under federal superintendence; (3) following ANCSA, Alaska Native tribes are not subject to the degree of Congressional and Executive agency control that evidences an intention that the federal government, rather than the state, be the dominant political institution in the area and are therefore not under the superintendence of the government; and (4) under the terms and structure of ANCSA, land conveyed to ANCSA corporations cannot be said to have been set aside for the use of Natives *as such*, and therefore is not Indian country.

While the decision to not pursue litigation over tribal recognition may focus the debate on the Indian country issue, it does not dilute the state's arguments on that issue. The federal court has already rejected arguments that tribal status establishes the existence of Indian country. As stated by the Department of Interior in its preamble to the 1995 list, "[i]nclusion on the list does not resolve the scope of powers of any particular tribe over land or non-members. It only establishes that the listed tribes have the same privileges, immunities, responsibilities and obligations as other Indian tribes under the same or similar circumstances . . ." 60 Fed. Reg. at 9251. The department then noted the opinion of the Solicitor of the Department of Interior, which concluded, construing general principles of federal Indian law and ANCSA,

that ANCSA largely controls in determining whether any territory still exists over which Alaska villages might exercise governmental powers. We also conclude that, notwithstanding

the potential that Indian country still exists in Alaska in certain limited cases, Congress has left little or no room for tribes in Alaska to exercise governmental authority over land or nonmembers.

60 Fed. Reg. at 9251 n.1 (quoting Opinion of the Solicitor of the Department of Interior, Thomas Sansonetti, M-36975, at 108, January 11, 1993). *See also* 58 Fed. Reg. at 54366 n.1.

### SUMMARY OF ISSUES ADDRESSED

During the December 4 hearing, additional information was requested on a number of issues. One of the items requested was a list of tribal powers. Many of the issues discussed below concern the scope of powers of a recognized tribe without Indian country (*i.e.*, tribal authority over internal affairs and domestic relations of tribal members; the treatment of tribes under the Clean Water Act; sovereign immunity; alcohol control; criminal law enforcement; Indian gaming; and fish and game management). Questions were also raised concerning the relationship of certain sections of the Statehood Act and the Alaska Constitution to tribal recognition; the federal statutes in which Alaska Native villages are defined as tribes for specific federal purposes; and the budgetary impacts of the tribal status litigation. These questions are discussed below as well.

Before going into those issues, however, let me reiterate what I stated in my letter of November 27 on tribal recognition generally. Tribal recognition is a federal, not a state, function. Tribal recognition means that Alaska's tribes are eligible to receive funding and services from the federal government, are able to set rules for tribal membership and the domestic relations of their own members, and are immune from suit. Governmental powers such as the right to tax, manage fish and game, and prosecute criminal cases are only applicable in Indian country; in other words, without Indian country, tribes have no jurisdiction to exercise such powers.

*Tribal Authority over Internal Affairs*

It is well established in federal Indian law that each tribe has the power to set its own membership criteria. Identification of a person as a member of an Indian tribe is an issue solely within the control of the tribe, and perhaps the individual. Tribes can also choose the structure within which they govern themselves. They may consider traditional tribal councils, IRA councils, or some form which combines traditional and modern factors. Traditional councils and IRA councils are not subject to most state laws. Limitations on tribal action are governed by the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301, and by Congress.

*Child Protection - Indian Child Welfare Act Matters*

The Division of Family and Youth Services, Department of Health and Social Services, responds to reports of harm regarding child abuse and neglect. Reports concerning Native children involve those living in villages, those living in urban areas, and those whose families travel back and forth. All of the villages listed in ANCSA have long been recognized as "Indian tribes" for purposes of the Indian Child Welfare Act (ICWA). See 25 U.S.C. 1903(8). Therefore, state acceptance that the listed Native villages are tribes does not change DHSS's longstanding practice of notifying tribes regarding Alaska Native children who come under the child protection statutes and the tribes' right to participate in state court child protection cases.

Not all tribes participate in state court ICWA cases involving their children. This happens for many reasons, including lack of funds, agreement with the state's position, and concern about lay representation instead of representation by counsel at state court proceedings.

Over the years the state has entered into formal agreements with a number of tribes regarding how they will interact in child protection cases, from the earliest reports through the completion of each case. Some tribes have not signed the agreements because they do not address tribal jurisdiction.

The issue of jurisdiction under ICWA bears some discussion. Through ICWA, "Congress created a comprehensive jurisdictional scheme for the resolution of custody disputes involving Indian children. This scheme expanded the role of tribal courts and correspondingly decreased the scope of state court jurisdiction." *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 555 (9th Cir. 1991). For instance, under ICWA, jurisdiction is exclusive in the tribe when the child custody proceeding involves Indian children who reside on their tribal reservations (exclusive jurisdiction requires proof of Indian country). In the case of Indian children who do not reside or are not domiciled on their tribe's reservation, the state court may exercise jurisdiction (at least) concurrent with the tribal court. However, the state court must refer the dispute to the tribal court unless good cause is shown for the retention of state court jurisdiction.

For tribes in some states, the exclusive and referral jurisdiction provisions of ICWA took effect automatically. However, tribes located within Public Law 280 states, which include Alaska, can invoke such jurisdiction only after petitioning the Secretary of the Interior and having been granted jurisdiction. Public Law 83-280 (commonly referred to as Public Law 280) gave enumerated states concurrent jurisdiction over criminal and civil matters involving Indians, where jurisdiction had previously vested only in federal and tribal courts. The civil portion of this statute is codified at 28 U.S.C. § 1360.

The Alaska Supreme Court and the federal courts are not in agreement on their interpretation and application of Public Law 280 in the ICWA context. The disagreement is over whether, under Public Law 280 and ICWA, the state has exclusive jurisdiction or concurrent jurisdiction over child custody determinations when the tribe has not petitioned the Secretary for reassumption of jurisdiction.

The Alaska Supreme Court has held that, under Public Law 280, tribal courts in Alaska have no child custody jurisdiction (and the state court has exclusive jurisdiction) unless the tribe has petitioned for reassumption of jurisdiction under ICWA. *Matter of F.P.*, 843 P.2d 1214 (Alaska 1992); *In re K.E.*, 744 P.2d 1173 (Alaska 1987); *Native Village of Nenana v. Department of Health and Social Serv.*, 722 P.2d 219 (Alaska 1986). In Alaska, only the Metlakatla Indian Community has petitioned for and been granted such jurisdiction.

The Ninth Circuit has held that under ICWA and Public Law 280, a tribe that has not petitioned for exclusive or referral jurisdiction may exercise concurrent jurisdiction with the state over child custody cases. *Village of Venetie I.R.A. Council*, 944 F.2d at 561-562. The *F.P.* case was decided after, and explicitly declined to follow, the Ninth Circuit's holding in *Village of Venetie* that any Alaska Native entity that proved itself a tribe retained inherent power over child welfare without going through the reassumption process.

Therefore, the state courts and agencies currently cannot, under Alaska law, agree that any Alaska Native tribe other than Metlakatla may assert exclusive jurisdiction under ICWA, 25 U.S.C. § 1911(a). Similarly, the Alaska courts cannot order the transfer of a case from state court to a tribal court, even though courts in other states have been transferring cases to tribal courts in Alaska for years.

#### *Cultural Adoptions*

The state currently issues substitute birth certificates when the appropriate parties attest that a cultural, or customary, adoption has taken place. Such adoptions, which are recognized under both federal and state law, are a traditional practice in which, for a variety of reasons, responsibility for a child is shifted from the natural parents to others. Before a substitute birth certificate can be issued, both natural parents must sign a state-provided form identifying the child and the child's tribe and affirming that an adoption has occurred under tribal custom. In addition, the governing body of the child's tribe must certify, in writing, that the adoption has followed tribal custom.

The legal effect of issuing the substitute birth certificate is unclear, as is the legal effect of a cultural adoption in any given tribe. The state does not recognize tribal court adoptions because of the existing Alaska case law mentioned above, although the federal court has ordered the state to give full faith and credit to the adoption decrees of the Native Village of Venetie to the same extent it gives full faith and credit to adoption decrees from other jurisdictions. *Native Village of Venetie, I.R.A. Council v. State*, Memorandum of Decision, December 23, 1994. The court will be issuing a similar order regarding adoption decrees of the Native Village of Fort Yukon in the Fort Yukon portion of the *Venetie* case.

*Marriage, Divorce, and Child Custody*

A tribe's authority over the domestic relations of its members may prompt regulation of marriage and divorce and setting of tribal rules for each relationship. As tribes increasingly regulate the relationships of their members, they may perform more marriages and divorces and make more child custody decisions. Since Alaska is a Public Law 280 state, state courts have at least concurrent jurisdiction over family matters. This may lead to jurisdictional questions between the state courts and tribes which will need to be resolved.

*The Clean Water Act and Indian Tribes*

A question was raised concerning whether Alaska's tribes may be treated as "states" under the Clean Water Act. Under the longstanding federal interpretation of the Act, the answer is "no," except for the Metlakatla Indian Community, because "treatment as a state" is limited to federal Indian reservations.

The Federal Water Pollution Control Act, more commonly known as the Clean Water Act, contains two sections expressly dealing with Native Americans. Section 113, which was part of the 1972 Act, is entitled "Alaska village demonstration projects." It authorizes the EPA to enter into agreements with the State of Alaska to carry out safe water projects and pollution control projects in "Native villages of Alaska." "Village" is defined to mean:

an incorporated or unincorporated community with a population of ten to six hundred people living within a two-mile radius.

33 U.S.C. § 1263(g).

Section 113 also authorizes federal executive agencies to coordinate with the State of Alaska and "appropriate Native organizations" to develop comprehensive sanitation programs in the Native villages. The term "Native organizations" is defined by reference to the Alaska Native Claims Settlement Act. *Id.* at (e). Thus, the Clean Water Act has long recognized Alaska Natives as such.

In 1987, Congress added section 518 to the Act. 33 U.S.C. § 1377. Entitled "Indian Tribes," section 518 authorizes the EPA to promulgate regulations specifying how the agency will treat tribes in the same manner in which it treats states.<sup>1</sup> The statute specifies those programs in which an Indian tribe can be treated as a state and also lists three criteria that must be met to attain such status. *Id.* at (e). Essentially, a tribe may develop water quality standards and issue effluent permits only if: (1) the tribe has a governing body carrying out substantial governmental duties; (2) the affected water resources are held by or for the tribe or a tribal member "or [are] otherwise within the borders of an Indian reservation"; and (3) the tribe has the technical and legal ability to carry out the mandates of the Clean Water Act.

Section 518 expressly refers to Alaska Natives in several contexts. Some funds are expressly reserved for "Alaska Native Villages as defined in [ANCSA]." 33 U.S.C. § 1377(c). Subsection (g) expressly disclaims any effect section 518 may have on "the scope of the governmental authority, if any, of any Alaska Native organization, including any federally-recognized tribe . . ." Notwithstanding these two references, it is doubtful that section 518 applies to any Alaska Native tribe other than the Metlakatla Indian Community because, as explained below, the section appears to be limited to "reservations." See subsections (e)(2) and (h)(1).

Pursuant to section 518, EPA has promulgated "treatment as a state" regulations. One set of rules governs tribal establishment of water quality standards. 40 C.F.R. 131, 56 Fed. Reg. 64875-96 (1991). Another pertains to dredge and fill permits (wetlands). 40 C.F.R. parts 232 and 233, 58 Fed. Reg. 8171 (1993). Another pertains to financial grants. 40 C.F.R. parts 35 and 130, 54 Fed. Reg. 14354 - 60 (1989). The most recent publication of which we are aware "specifies how Tribes will be treated in the same manner as States for various provisions of the CWA." 40 C.F.R. 122, 123, 124 and 501, 58 Fed. Reg. 67966 (1993).

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<sup>1</sup> Similar language is found in the Clean Air Act and the Safe Drinking Water Act, 42 U.S.C. § 7601(d)(2)(B) and 42 U.S.C. § 300j-11(b)(1)(B) respectively.

A reading of the most recent rule shows EPA only treats tribes as states on matters related to resources within a reservation.<sup>2</sup> Thus, because Metlakatla is the only reservation tribe in Alaska, the decision to no longer contest the tribal status of Alaska Native villages on the 1993 and 1995 lists of federally recognized tribes will have no impact under the Clean Water Act "treatment as a state" provisions.

### *Sovereign Immunity*

One of the attributes tribes enjoy is sovereign immunity. See, e.g., *Native Village of Eyak v. GC Contractors*, 658 P.2d at 758. This immunity extends to corporations created by the tribe, such as those chartered under the Indian Reorganization Act. The most common Native corporations in the state currently are ANCSA corporations, which do not enjoy sovereign immunity because they are state-chartered corporations.

Sovereign immunity bars suits against tribes. It also bars cross-claims and counterclaims. *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940). It does not bar suits against individual tribal officials. Congress can waive the tribes' sovereign immunity, but the waiver must be clearly expressed and strictly construed. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Turner v. U.S.*, 248 U.S. 354 (1919).

The extent to which and manner in which tribes can waive their sovereign immunity is less clear. The Alaska Supreme Court has held that tribes can waive their sovereign immunity by contract. *Nenana Fuel v. Native Village of Venerie*, 834 P.2d at 1233; *Native Village of Eyak v. GC Contractors*, 658 P.2d at 759. However, federal law requires that to waive immunity by contract in matters relating to trust property, tribes must receive Secretarial or Congressional consent.

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<sup>2</sup> "EPA believes that it was the intent of Congress to limit Tribes to obtaining the status of Treatment in the Same Manner as a State for lands within the reservation. . . Tribes are limited to obtaining Treatment in the Same Manner as a State status for only water resources within the borders of the reservation over which they possess authority. . ." 58 Fed. Reg. 67970.

With respect to environmental laws, the federal courts generally hold that Congress has abrogated tribal sovereign immunity when the United States seeks to enforce federal environmental laws against tribes. Therefore, a tribe operating a business would not be immune from federal environmental standards and requirements. However, state enforcement of its standards and requirements against such an entity may be problematic. A few Native groups in Alaska have claimed sovereign immunity in response to efforts by ADEC to enforce the state's "little superfund law," AS 46.03. This could be an area of dispute with tribes in the future.

### *Alcohol Control*

Under state law, both Native and non-Native residents of rural villages have been delegated significant authority to control the use of alcohol. AS 04.11.490-04.11.506. In addition to adopting restrictions on alcoholic beverages, "local governing bodies" may protest the issuance, transfer, relocation, or renewal of liquor licenses. Currently, the Alcoholic Beverage Control Board regulates the licensing of establishments that manufacture, sell, or otherwise deal in alcoholic beverages, including those located within Native villages.

If a particular tribe were recognized as having control over an area of Indian country, that tribe could adopt alcohol ordinances for enforcement in its tribal courts. In addition, the tribe could choose to adopt ordinances regulating the sale, importation, or possession of alcoholic beverages within its Indian country through a federal process instead of the state process, thereby making the ordinance enforceable by a federal court. See 18 U.S.C. § 116. Otherwise, federal and state laws concurrently govern the control and regulation of alcoholic beverages in Indian country. *Rice v. Rehner*, 463 U.S. 713 (1983).

### *Criminal Law Enforcement*

Tribal recognition alone does not confer tribal jurisdiction over any criminal act. The criminal jurisdiction of a tribe is limited to the territory it controls. Without territorial jurisdiction, *i.e.*, Indian country, a tribe has no criminal jurisdiction.

A tribe can exercise criminal jurisdiction over its members within Indian country. Where Indian country exists, tribes have the power to make their own criminal laws and enforce them in tribal courts unless Congress limits that power. *U.S. v. Wheeler*, 435 U.S. 313 (1978). The Indian Civil Rights Act, 25 U.S.C. § 1302, limits how tribes exercise their powers of self-government. Tribes cannot exercise criminal jurisdiction over non-members unless Congress expressly grants that power. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

Generally states have no criminal jurisdiction over tribal members within Indian country. *Rice v. Olson*, 324 U.S. 786, 789 (1945); *Worcester v. Georgia*, 31 U.S.(6 Pet.) 575 (1832). However, in 1958 Congress gave the State of Alaska "jurisdiction over offenses committed by or against Indians in the areas of Indian country. . . ." 18 U.S.C. § 1162, Pub. L. 83-280. As a Public Law 280 state, Alaska has jurisdiction over all crimes committed in Indian country. Although 18 U.S.C. § 1162 refers to the state having "exclusive jurisdiction" within Indian country, courts have recognized concurrent tribal jurisdiction over minor crimes.

### *Indian Gaming*

Tribal recognition does not impact Indian gaming in Alaska. The federal Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-21 (IGRA), permits recognized Indian tribes to conduct Class III gaming on "Indian land" if such gaming is otherwise legal in the state, upon negotiation of a gaming compact that is approved by the federal Indian Gaming Commission. Class III gaming consists of all casino games except bingo, pull-tabs, and traditional social games of chance. Without Indian land, a tribe does not have the necessary territorial jurisdiction to conduct gaming. In addition, under current state law casino gaming is illegal and thus not allowed to Natives or non-Natives in Alaska.

### *Fish and Game Management*

State recognition of Alaska tribes does not affect fish and game management. Indian rights to manage fish and game originate from three sources: (1) reservation status of land; (2) off-reservation treaty rights; and (3) federal preemption of state regulation. Only one reservation exists in Alaska (Metlakatla),

and no treaties exist between the federal government and Alaska Natives. Therefore, any Native rights to manage fish and game can only be based on federal statutes preempting state control. In Alaska, ANILCA grants rural residents, both Native and non-Native, a priority for the taking of fish and wildlife on public lands for subsistence uses. Tribal recognition does not impact this individual federal right.

*Alaska Native Villages Defined as Tribes for Specific Federal Purposes*

Although blanket federal recognition of Alaska Native villages as tribes did not occur until the October 21, 1993, listing, Congress has repeatedly chosen to treat Alaska Native villages as tribes for specific purposes.

The following statutes are examples of instances in which Alaska Native villages have been included in the statutory definition of Indian tribes or where Native villages have been included along with tribes in definitions of units of government affected by statutes (citations are primarily to the definition sections involved):

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

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

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

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

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

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

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

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

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

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

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

25 U.S.C. § 1903. The Indian Child Welfare Act.

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

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

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

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

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

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

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

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

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

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

42 U.S.C. 3002. HHS programs for older Americans.

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

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

42 U.S.C. §§ 5302 and 5316. Assistance in providing public facilities under the Housing and Urban Development Act of 1968.

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

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

42 U.S.C. § 5903. Assistance in the planning and administration of solid waste disposal.

42 U.S.C. § 8803. Assistance in the development of biomass energy and alcohol fuels.

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

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

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

*Section 4, Alaska Statehood Act and Article XII, Section 12, Alaska Constitution*

A member of the public who testified at the hearing inquired about the relationship between section 4 of the Statehood Act and article XII, section 12 of the Alaska Constitution, and the tribal status and Indian country issues.

Both section 4 of the Alaska Statehood Act (Pub. L. 85-508, 72 Stat. 339 as amended) and article XII, section 12 of the Constitution of Alaska provide that the state and its people "forever disclaim all right and title to any lands or other property" owned or subject to disposition by the United States, and to any lands or other property, including fishing rights, the right or title to which may be held by or in trust for any Indians, Eskimos, or Aleuts. Both sections further provide that all such property shall be subject to the absolute control, jurisdiction, and right of disposal of the United States except as Congress otherwise provides.

These provisions have no relevance in the debate over tribal status; they do not address the issue. The Statehood Act expressly states that it shall not be construed to "recognize, deny, enlarge, impair, or otherwise affect" claims against the United States or to establish the validity or invalidity of any such claim. Tribes are not mentioned in either provision, and these sections have not been relied on by tribal advocates in the cases now in the federal courts. These provisions are cited as justification for permitting Native selections of state-selected lands under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*, and exempting undeveloped ANCSA land from taxation, but beyond that, they are not germane to the current debates over tribal status and Indian country.

*Budgetary Impacts of Tribal Status Litigation*

Concern was expressed by a legislator that the Department of Law may have made representations about litigating the tribal status issue in order to secure funding for litigation.

The Department of Law made no commitment in any budget document to litigate the tribal status issue. The department has in the past sought CIP funding

to litigate other issues that concern or involve the interests of Alaska Natives. These include the Endangered Species Act cases, the fishing treaty cases, the submerged lands cases, and various ANILCA challenges, most notably *Katie John v. United States* and *Totemoff v. State*. This litigation continues. See, e.g., CP Descriptions for FY 1995 and FY 1996.

## CONCLUSION

Some participants in the December 4, 1995, hearing<sup>3</sup> characterized the decision to no longer contest the tribal status of Alaska Native villages as a wholesale reversal of prior executive and legislative branch policies and an abdication of responsibility. This view does not reflect the true complexity of the state's dealings with tribes.

Successive state administrations have recognized the need to work with tribal entities in various contexts. For example, as discussed earlier, since the early 1980's the state has entered into memoranda of agreement with tribes implementation of the Indian Child Welfare Act. Governor Cowper's Administrative Order No. 123 acknowledged the existence of tribes in Alaska. Although Governor Hickel later revoked Administrative Order 123 and declared that the state "opposes expansion of tribal governmental powers and the creation of 'Indian Country' in Alaska," his administration did not oppose tribal status in a wholesale fashion. Thus, my predecessor chose not to contest the tribal status of the Kluti Kaah Native Village of Copper Center in litigation over the tribe's right to impose a tax on the TransAlaska Pipeline System.

Since 1985 the legislature itself has authorized state aid to Alaska Native village councils to the extent they waive immunity from suit for claims arising out of activities related to the payment. AS 29.60.140.

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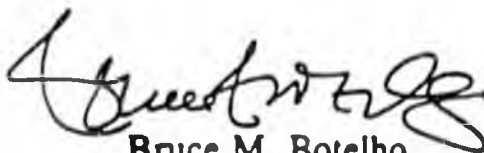
<sup>3</sup> During the hearing a legislator requested a copy of the report entitled *Legal Status of the Alaska Natives* by Robert E. Price (July 30, 1982; 1983 and 1989 supplements). Please let my office know if you would like a copy.

Alaska Legislators  
Re: Tribal Status Issues

January 11, 1996  
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Finally, while people may disagree with the wisdom of this policy change, there should be no doubt that the Governor has the authority to adopt and implement the tribal status policy for his administration, just as his predecessors have done. As attorney general, I will continue to provide the best legal advice available to the state's chief executive and to support his policy choices to the extent they are consistent with the law. In this instance, I have no reservation in doing so.

Very truly yours,

A handwritten signature in black ink, appearing to read "Bruce M. Botelho", written in a cursive style.

Bruce M. Botelho  
Attorney General

BMB:kh

**PREPARED REMARKS OF LLOYD B. MILLER  
BEFORE THE SENATE AND HOUSE JUDICIARY COMMITTEES  
ALASKA LEGISLATURE**

**February 21, 1996**

Members of the Committee, my name is Lloyd Miller and I am honored by the privilege of appearing before this joint session of the Senate and House Judiciary Committees.

This hearing has been convened to discuss the Attorney General's decision to abandon the State's legal challenge to the federally recognized tribal status of the Native Village of Fort Yukon, in a case recently concluded in the Federal District Court in Anchorage. I would like to confine my initial remarks to the legal issue of "recognized tribal status." After all, the concept is a legal one, and the guideposts for navigating this particular legal area are well known to all who practice law in this area. As I believe a dispassionate and impartial review of the law demonstrates, there is nothing remarkable about the Attorney General's decision in the Fort Yukon case.

There are ten steps that take us from the United States Constitution to the Attorney General's decision.

*First*, the Federal Government's authority to deal with Indian tribes comes from Article I, Section 8, Clause 3 of the United States Constitution. That is the clause which vests in the Congress the "power . . . to regulate commerce .

. . with the Indian tribes." We are dealing, then, in an area of exclusively federal law.

*Second*, the congressional power to legislate with regard to Indian tribes is "plenary", meaning that it is broad and general, rather than limited to specifically identified topic areas. Thus, Congress's exercise of its power under Article I is sustained so long as it has some rational basis. (This principle is discussed by the U. S. Supreme Court in *Delaware v. Weeks*, *Morton v. Mancari*, and *Sioux Nation v. United States*.)

*Third*, when Congress deals with Indian tribes under Article I, it deals with "political" entities -- entities whose rights to govern themselves predate even the Constitution. Legislation that deals with Indian tribes is thus legislation that deals with political entities, and not racial entities. And that is why issues of racial classification do not arise in this area. If you will, the fact that Alaska's Indian tribes happen to be of distinctive races other than Caucasian is legally irrelevant in analyzing Congress's power to legislate with regard to Indian tribes. (This principle was most clearly articulated by the U. S. Supreme Court in 1994 in *Morton v. Mancari*.)

*Fourth*, the power to accord "federal recognition" to tribes that may already exist -- and thus confer upon those tribes certain federally acknowledged rights -- is a part of Congress's overall general power under the Constitution under Article I.

*Fifth*, Congress's decision to accord federal recognition to a tribe is largely a "political" determination that is binding on federal and state courts and binding on the Executive Branch. As a practical matter, such decisions will not be reviewed by the courts. (The U. S. Supreme Court has frequently articulated this rule of law, in such cases as *U. S. v. Sandoval*, *U. S. v. Holliday*, and *U. S. v. Perrin*, and so has the Alaska Supreme Court in the *Atkinson* and *Stevens Village* cases.)

*Sixth*, in the area of Indian affairs, as in other areas of congressional power, Congress has the power to delegate to the Executive Branch the duty of implementing its Article I authority over Indian affairs.

*Seventh*, in 1832 Congress delegated to the Secretary of the Interior the implementation of its broad authority in the "management of Indian affairs", and in 1834 further authorized the President to issue regulations to carry out that authority "as he may think fit." The U. S. Supreme Court has long acknowledged the very broad authority conferred upon the Secretary of the Interior as a result of these two legislative enactments. (*See Morton v. Ruiz*) Moreover, in the specific area of identifying federally recognized tribes, Congress in 1994 expressly supplemented its earlier statutes by specifically delegating authority to the Secretary to "publish in the *Federal Register* a list of all Indian tribes which the Secretary recognizes" as such. (This very new statute is codified at 25 U.S.C. 479a-1(a).)

*Eighth*, the Executive Branch, through the Secretary of the Interior,

has for many years carried out the authority Congress has conferred upon it. From 1982 to 1995, it has issued seven lists of Alaska tribes. It is noteworthy that the most recent 1995 list was expressly published under the authority conferred by Congress in 1994.

The 1995 list, issued under an express delegation from Congress, identifies all federally recognized tribes in the United States, including approximately 200 tribes in Alaska.

*Ninth*, and though unnecessary, Congress has actually ratified the Secretary of the Interior's 1995 decisions identifying the federally recognized tribes that exist in Alaska. Specifically, in the Status Clarification Act Congress responded to the Secretary's omission of one tribe from the list in 1993 by ordering that the tribe be added to the next list. (The tribe involved was the Tlingit and Haida Central Council, and the statute is codified at 25 U.S.C. 1211 through 1215.) The Secretary has since complied with Congress' instructions.

*Tenth*, and finally, in a recent amendment to the Indian Reorganization Act, Congress expressly prohibited any federal agency from making any distinction among recognized tribes regarding their relative privileges and immunities. This new statute is codified at 25 U.S.C. 476(f) and (g).

To summarize, both Congress and the Secretary of the Interior have made a determination, binding on the courts, and binding on the State of Alaska under the Supremacy Clause of the Constitution, to accord federal recognition to

Alaska Native villages, including the Native Village of Fort Yukon.

Whatever strength, apparent or real, there might have been in past challenges to the federally recognized tribal status of Native villages before these recent developments, Congress's actions in this field have now definitively closed the door.

In the *Fort Yukon* case, the Federal District Court in Anchorage found these developments completely dispositive on the question of Fort Yukon's federally recognized tribal status today. It is clear from these developments that continuing to press a position against tribal status would have been foolish, wasteful and irresponsible. Indeed, so clear have the legal developments been in this area that a private litigant in the Attorney General's position might have been sanctioned for continuing to challenge the law. While there will always be some who do not accept that the law is as it is, here the more productive exercise is to explore constructive ways in which the State of Alaska and Alaska Native villages can now work more productively together for their mutual benefit.

Before closing, I did want to identify for the Committee one additional important legal issue which I think should inform any informed discussion in this area.

For many many years, the United States has devoted considerable financial resources to the well-being of Alaska Native villages. Indeed, by some estimates it has in recent years spent roughly \$500 million annually (not including

such extraordinary one-time expenditures as the construction of the new Alaska Native Hospital in Anchorage).

Opponents of tribal status argue that these services are based on the special relationship between the Federal Government and Native Americans. But to be accurate -- and accuracy here is critical -- the provision of federal services to Alaska Natives, of federal employment opportunities for Alaska Natives, and of federal educational opportunities for Alaska Natives, is founded on what the United States Supreme Court has termed a "political rather than racial" classification that benefits "Indians not as a discreet racial group, but, rather, as members of quasi-sovereign tribal entities." These quotations are from the U.S. Supreme Court's 1974 *Morton v. Mancari* decision.

As many of you know, only last year the U. S. Supreme Court put into question many affirmative action race-based programs because they are based on racial distinctions. However, the U. S. Department of Justice shortly thereafter confirmed that the Supreme Court's decision would not cast a cloud over Native American programs because of their tribal, rather than racial, basis, as pointed out in the Mancari case.

I wanted to call this matter to the attention of the Joint Committees because, while the implications of retaining federal recognition in a host of jurisdictional areas may not be entirely known, the devastating consequences of losing federal recognition are a certainty.

I thank the Committee for the opportunity to share these observations and would be pleased to answer any questions you may have.

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Copies of minutes listed below were originally included in this file. The minutes are available on the legislative computer database. In order to save space copies of minutes have not been left in the files.

Joint House and Senate Judiciary  
12-4-95 10:00am

Mary Pagenkopf

# STATE OF ALASKA

TONY KNOWLES, GOVERNOR

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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April 18, 1996

The Honorable Robin Taylor  
Chair, Senate Judiciary Committee  
Alaska State Senate  
State Capitol  
Juneau, Alaska 99801

Re: Tribal Sovereignty Questions

Dear Senator Taylor:

This is in response to your recent letter asking certain questions relating to tribal sovereignty that arose from the Joint House-Senate Judiciary Committee hearing held on February 21, 1996. I will address your questions in turn.

1. *Under the Alaska Constitution, may the Legislature appropriate money for the use exclusively by racially-defined groups, such as Alaska Tribes? This question may apply to the unincorporated community capital project matching grant program and the revenue sharing for unincorporated communities program.*<sup>1</sup>

At the outset, it is important to point out that Indian tribes are *federally recognized political entities*, they are not "racially-defined groups." *Worcester v. Georgia*, 31 U.S. 515 (1832); *Morton v. Mancari*, 417 U.S. 535 (1974). For purposes of the state programs discussed in this letter, however, the state has not dealt with the various Native village councils and other Native entities as "tribes," *i.e.*, political entities, but rather as entities eligible to serve as *contractors* with the state to deliver services in the unincorporated community. Nevertheless, the legislature may, in any case, appropriate

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<sup>1</sup> The questions posed in your letter have also been raised with respect to the village safe water program administered by the Department of Environmental Conservation. This response will address that program as well.

money to a racially-defined group under the conditions discussed below, all of which are requirements of the programs at issue here.

As we have opined several times in the past, the legislature may appropriate money for expenditure by a "racially-defined group" provided the money granted to the group is used for the benefit of the public generally. The use of public monies for the *private* benefit of a racially exclusive group would raise serious questions under article IX, section 6 of the Alaska Constitution, which prohibits expenditure of public money unless the expenditure is for a public purpose, and article I, section 1, which accords equal protection to all persons. 1981 Inf. Op. Att'y Gen. (April 27; J-66-335-81); 1981 Inf. Op. Att'y Gen. (Sept. 2; J-66-829-81). However, the test of whether a public purpose is being served does not depend on the nature of the recipient (*e.g.*, religious or non-religious, racially exclusive or non-racially exclusive, or some other limited group), but upon the character of the use to which the money will be put. *Lien v. City of Ketchikan*, 383 P.2d 721, 722 (Alaska 1963). The public purpose requirement is satisfied if the money is used for a public benefit. The distribution of state money to a racially exclusive group (or some other limited group) does not deny equal protection to persons who are not members of the group if the benefits provided with the funds are made available to the public-at-large in a non-discriminatory manner.

Both the public purpose and non-discrimination requirements, as well as the requirement for waiver of sovereign immunity discussed below, have long been included in the statutes, regulations, and administrative policies and practices governing the state revenue sharing program for unincorporated communities, the community capital project matching grant program for unincorporated communities, and the village safe water program.

#### *State Revenue Sharing for Unincorporated Communities*

The state revenue sharing program for unincorporated communities is set out in AS 29.60.140. That statute specifically addresses public purpose, waiver of sovereign immunity, and governmental authority or jurisdiction of a Native village council:

**State aid to unincorporated communities.** (a) The department shall pay to each unincorporated community an entitlement each fiscal year *to be used for a public purpose*. The department with advice from the Department of Law shall *determine whether there is in each unincorporated community an incorporated*

*nonprofit entity or a Native village council that will agree to receive and spend the entitlement.* If there is more than one qualified entity in an unincorporated community, the department shall pay the money under the entitlement to the entity that the department finds most qualified to receive and spend the money. *The department may not pay money under an entitlement to a Native village council unless the council waives immunity from suit for claims arising out of activities of the council related to the entitlement. A waiver of immunity from suit under this subsection must be on a form provided by the Department of Law.* If there is no qualified incorporated nonprofit entity or Native village council in an unincorporated community that is willing to receive money under an entitlement, the entitlement for that unincorporated community may not be paid. *Neither this subsection nor any action taken under it enlarges or diminishes the governmental authority or jurisdiction of a Native village council.* If at least \$41,472,000 is appropriated for all entitlements under AS 29.60.010 -- 29.60.310 for a fiscal year, the entitlement for each unincorporated community under this subsection for that year equals \$40,000. Otherwise, the entitlement equals \$25,000.

(b) In this section "unincorporated community" means a place in the unorganized borough that is not incorporated as a city and in which 25 or more persons reside as a social unit.

(Emphasis added.)

The regulations governing the program address the standards which must be met by an unincorporated community to receive payment. 19 AAC 30.055 provides:

- (1) the applicant must agree to irrevocably dedicate for a public purpose the payment that the applicant receives under AS 29.60.140;
- (2) the applicant must be providing the residents of the unincorporated community with a public facility or service as of October 1 of the computation year;

- (3) the applicant must have held a public meeting to give residents the opportunity to express their ideas and preferences for the use of money received under AS 29.60.140 and must have posted notice of the meeting in three public and prominent places in the community for at least 15 days before the meeting; and
- (4) the applicant must agree to make a service or facility provided with the money received under AS 29.60.140 available to every person in the community regardless of race, religion, color, national origin, age, physical handicap, sex, marital status, changes in marital status, pregnancy, parenthood, or political affiliation.

Copies of the resolutions and budget document required to be adopted by the unincorporated community applicant are attached to this letter as Appendix A.<sup>2</sup>

We have been advised by the Department of Community and Regional Affairs (DCRA), the agency that administers this program, that it is not aware of any instance in which a Native village council or tribe refused or failed to execute a resolution waiving immunity from suit for claims arising out of activities of the council related to their entitlement under this program. According to DCRA, since FY81, the first year that unincorporated communities received funding under the revenue sharing program, DCRA is aware of only four instances in which notice was received regarding a problem with the program. The problem was related to Native and non-Native entities submitting competing

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<sup>2</sup> The former AS 29.89.050 provided that the state was to pay \$25,000 annually to a "Native village government for a village which is not incorporated as a city. . . ." The attorney general's office concluded that this statute was unconstitutional if read literally to restrict aid to *only* Native villages because such a reading would exclude from participation a number of similarly situated communities which were not Native villages. Thus, the Department of Community and Regional Affairs was advised to interpret the statute to permit revenue sharing to all villages in the state, regardless of their racial composition or ancestry. 1981 Inf. Op. Att'y Gen. (Sept. 2; J-66-829-81). Included in Appendix A to this letter is a memorandum dated March 18, 1986, to then-Commissioner of DCRA, Emil Notti, setting out the history of the "State Aid to Native Village Governments" state revenue sharing program.

applications from within the same community for state revenue sharing funding. The unincorporated communities involved were: Cantwell (1983); Circle (1985); Chistochina (1993); and Chitina (1994). It is our understanding that each of these situations was resolved with the encouragement and assistance of DCRA, as appropriate, to help facilitate the parties working together to reach agreement on which entity would be the proper recipient; if necessary in this type of situation, DCRA makes the determination of the most qualified entity. 19 AAC 30.094.

### *Unincorporated Community Capital Project Matching Grant Program*

The unincorporated community capital project matching grant program was established by the legislature in 1993. Under AS 37.06.020, an unincorporated community is eligible for an allocation in a fiscal year under this program if the community was eligible to receive state aid under AS 29.60.140 (state revenue sharing for unincorporated communities) during the preceding fiscal year. Incorporated nonprofit entities or Native village councils are eligible to receive and spend this grant money, and in the event there is more than one qualified entity in the unincorporated community, the Department of Community and Regional Affairs designates the entity that the department finds the most qualified. AS 37.06.020(d).

AS 37.06.020(g) specifically addresses the issues of sovereign immunity and governmental authority or jurisdiction of a Native village council. That subsection provides:

(g) An entity designated by the department under (d) of this section that is *a Native village council may not draw money from an unincorporated community's individual grant account unless the council waives immunity from suit for claims arising out of activities of the council related to the draw. A waiver of immunity from suit under this subsection must be on a form provided by the Department of Law. Neither this subsection nor any action taken under it enlarges or diminishes the governmental authority or jurisdiction of a Native village council.*

(Emphasis added.)

The terms of the grant agreements for this program are further specified in 19 AAC 55.080, including a requirement that the unincorporated community must submit a resolution approving the capital project and accepting the terms of the grant agreement. 19 AAC 55.080(a)(5). In addition to the required resolution waiving sovereign immunity, the standard provisions of the grant agreement (which also must be approved by resolution of the recipient) provide that the project must be dedicated to a public purpose and that the "benefits of the project shall be made available without regard to race, religion, color, national origin, age, disability, sex, marital status, changes in marital status, pregnancy or parenthood." Standard Provisions, article 19. Article 26 of the Standard Provisions addresses sovereign immunity:

If the Grantee is an entity which possesses sovereign immunity, it is a requirement of this grant agreement that the Grantee irrevocably waive its sovereign immunity with respect to State enforcement of this grant agreement. The waiver of sovereign immunity, effected by a resolution of the entity's governing body, is hereby incorporated into this grant agreement.

Copies of the required resolution and the Standard Provisions of the grant agreement are attached to this letter as Appendix B.

DCRA has advised us that it is not aware of any instance in which a Native village council or tribe refused or failed to execute a resolution waiving sovereign immunity from suit for claims arising out of activities of the council related to its grant under this program. Also, DCRA is not aware of any instance in which a complaint or notice of improper action was received relating to a grant.<sup>3</sup>

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<sup>3</sup> Grants are also made to Native village councils under AS 44.47.130, the rural development assistance (RDA) grants. This program is targeted for rural communities with a population of 900 or less. 19 AAC 60.042. Participation in the program requires that the funds be spent for a public purpose, the facilities and services be available to all in a non-discriminatory manner, and, with respect to a tribal entity, that an express waiver of sovereign immunity be executed. 19 AAC 60.052; 19 AAC 60.082. DCRA advises that it is not aware of any instance in which a Native village council or tribe has failed or refused to execute a resolution waiving sovereign immunity related to this program, nor is it aware of any instance where a complaint or notice of improper action was received relating to a grant. Copies of the relevant portions of the RDA Standard Grant Provisions (continued...)

*Village Safe Water Program*

The Village Safe Water Act, AS 46.07.010 -- 46.07.080, is a means of funding water and sewer projects in small unincorporated communities, second class cities, and first class cities with a population of under 600 people. AS 46.07.040 authorizes the Alaska Department of Environmental Conservation (ADEC) to contract with "public agencies or private non-profit organizations, or otherwise." In 1982, ADEC asked for advice on whether this language would allow the department to contract with an IRA council for the construction of water and sewer projects. The answer was yes, provided the IRA council agreed to perform all services rendered under the contract in a non-discriminatory manner, and provided that the council executed a clear and explicit waiver of sovereign immunity for all purposes connected with the contract. 1982 Inf. Op. Att'y Gen. (May 11; 366-654-82).

Based on the attorney general's 1982 opinion, ADEC developed and issued a policy, which is still in effect, on when it would use IRA councils for safe water projects. The policy requires that the IRA council must represent the community as a whole, that it must agree to waive sovereign immunity for the purpose of the grant, and that it must plan, design, build, operate, and maintain the state-funded facility in a non-discriminatory manner. The grant agreement also contains non-discrimination and waiver of sovereign immunity provisions. Copies of the ADEC "General Management Order" on the village safe water program and the grant agreement are attached as Appendix E.

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<sup>3</sup>(...continued)

and the resolution waiving sovereign immunity are attached as Appendix C.

Similarly, under AS 37.05.316, grants to named recipients, and AS 37.05.317, grants to unincorporated communities, grants may be made to Native village councils. If the grant is to a Native entity, a resolution of the entity waiving its sovereign immunity is required. Copies of the required resolution and the relevant portions of the Standard Grant Provisions are attached as Appendix D. As with the other grant programs discussed here, DCRA reports that it is not aware of any instance in which a Native village council or tribe has failed or refused to execute a resolution waiving sovereign immunity related to these grant programs, nor is it aware of any instance in which a complaint or notice of improper action was received relating to a grant.

The Department of Environmental Conservation has advised that it is not aware of any instance in which a Native village council or tribe has refused or failed to execute a resolution waiving sovereign immunity with respect to its activities under this program, nor has it received any complaints or notice of improper action by a village council or tribe with respect to this program.

As discussed below, we believe that the waivers of sovereign immunity required for these programs are valid and enforceable under both state and federal law.

2. *According to the Alaska Supreme Court, do tribes in Alaska exercise sovereign immunity from suit by the State or private parties? If so, may tribes then waive that immunity?*

The Alaska Supreme Court and the federal courts agree that one of the sovereign privileges that Indian tribes possess is immunity from suit. The Alaska Supreme Court and the Ninth Circuit Court of Appeals also agree that a tribe can consent to a waiver of its sovereign immunity from suit by a state or private party, and that such immunity can be abrogated by Congress. Where the Alaska Supreme Court and the Ninth Circuit have disagreed is on the *existence* of tribes in Alaska and, thus, whether Alaska Native entities *have* sovereign immunity at all.

As discussed in my January 11, 1996, letter to the Legislature, the Alaska Supreme Court has held that judicial recognition of tribal sovereign immunity turns on whether Congress or the executive branch of the federal government has recognized the particular group in question as a tribe. In *Atkinson v. Haldane*, 569 P.2d 151, 163 (Alaska 1977), the court determined that Metlakatla was entitled to sovereign immunity, holding:

Once the [federal] executive branch has determined that the Metlakatla Indian Community is an Indian tribe, which is a nonjusticiable political question, the community is entitled to all of the benefits of tribal status.

The court in *Atkinson* went on to consider whether Metlakatla's sovereign immunity had been waived by the congressional act establishing state civil jurisdiction over action involving Indians (28 U.S.C. § 1360(a), commonly known as Public Law 83-280), by the purchase of liability insurance by the Community, or by the "sue and be sued" clause in the Community's corporate charter. The court concluded that none of these actions constituted or effected a waiver of Metlakatla's sovereign immunity. In the

absence of any clear waiver of sovereign immunity in the language of Public Law 83-280 or its legislative history, the court held that it should not imply one. 569 P.2d at 167. With respect to liability insurance, the court held that a waiver of sovereign immunity should not be implied from an act which was intended to protect tribal resources, *i.e.*, the purchase of liability insurance. *Id.* at 169. Finally, the court held that the "sue or be sued" clause in the corporate charter of the Metlakatla Indian Community had no effect on the suit involved because the suit was concerning acts of the Community in its governmental capacity (as organized by constitution and by-laws under section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476), not its corporate capacity (as organized by corporate charter under section 17 of the Indian Reorganization Act, 25 U.S.C. § 477, as made applicable to Alaska Native groups by the Act of May 1, 1936, 25 U.S.C. § 473a).

More recently, the court has declined to find sovereign immunity or has concluded that, even assuming that such immunity did exist, it was waived by the tribe. In *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983), the court held that an Indian tribe can waive its sovereign immunity from suit, and did so in that case by agreeing to contract terms inconsistent with sovereign immunity. In reaching this conclusion, the court relied on a number of decisions from the Ninth Circuit and other circuits holding that an Indian tribe may waive its sovereign immunity.

A waiver of sovereign immunity, to be valid, must be clear and unequivocal. In *Eyak*, the court found a valid waiver expressed in an arbitration clause in a construction contract for a building constructed on land leased from a private party. The Native Village of Eyak argued that the entire contract was void, including the waiver of immunity contained in it, because the Secretary of the Interior had not approved the contract under 25 U.S.C. § 81. That section requires that the Secretary of the Interior approve contracts made by Indian tribes that relate to tribal property or to claims against the United States. As tribal property was not involved, and no one had even argued that the contract involved a claim against the United States, the court found that the contract did not require Secretarial approval.

In *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988), the court ruled, in a 3-2 decision, that a contract action against Stevens Village was not barred by sovereign immunity because Stevens Village was not a sovereign and therefore did not possess sovereign immunity. The court, reiterating its conclusion in *Atkinson v. Haldane*, 569 P.2d at 161-63, that "judicial recognition of tribal sovereign immunity turn[s] on whether Congress or the executive branch of the federal government, ha[s] recognized the particular group in question as a tribe," found that neither the Indian

Reorganization Act nor any subsequent Congressional legislation had granted or recognized sovereign status to Alaska Native groups.<sup>4</sup> 757 P.2d at 34-35.

In *Hydaburg Coop. Ass'n v. Hydaburg Fisheries*, 826 P.2d 751 (Alaska 1992), the Alaska Supreme Court again considered the issue of sovereign status of an Alaska Native entity, the Hydaburg Cooperative Association (HCA), and waiver of sovereign immunity. The court found that HCA had failed to make any argument on appeal, or offer any evidence in the trial court, that the federal government had recognized the association as a tribe and noted that reorganization under section 16 of the Indian Reorganization Act by itself is not sufficient to establish tribal status for purposes of sovereign immunity. 826 P.2d at 754.

The court in *HCA* held that even assuming that HCA would be entitled to sovereign immunity based on its historical tribal status, HCA had waived its immunity by agreeing to arbitrate its dispute with Hydaburg Fisheries. *Id.* The court distinguished the facts in *HCA* from those in a Ninth Circuit decision which concluded that a consent to arbitrate disputes arising out of a management agreement between an Indian tribe and the non-Indian operator of the tribe's bingo enterprise on the reservation did not constitute a waiver of the tribe's sovereign immunity. *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989). In *Pan American*, the arbitration clause did not unequivocally and expressly indicate the tribe's consent to waive its sovereign immunity because, among other reasons, the tribe had not subjected itself to the jurisdiction of either the state or federal courts, as was the case in the arbitration clause in the HCA contract. 826 P.2d at 755. In addition, *Pan American* involved a challenge to a tribal ordinance and a direct attack on the tribe's authority to regulate matters on its reservation, not a suit to compel arbitration or enforce an arbitration award as in *HCA*. 826 P.2d at 754.

The Alaska Supreme Court also found an express waiver of sovereign immunity in *Nenana Fuel v. Native Village of Venetie*, 834 P.2d 1229 (Alaska 1992). In *Nenana Fuel*, the court held that a "Remedies on Default" clause contained in a note and security agreement between the tribal government and the seller of fuel effected a waiver of sovereign immunity. The clause provided that in the event of default, Nenana Fuel could bring an action upon the note or invoke any other remedy allowable under Alaska

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<sup>4</sup> As discussed in my January 11, 1996, letter, at pages 2-6, several events have occurred at the federal level (executive, congressional, and judicial) since the *Stevens Village* decision which suggest that the court would, if presented with the question, decide the tribal status issue differently today.

law. The court concluded that the clause expressly waived any sovereign immunity which Venetic might possess.

3. *According to the Ninth Circuit Court of Appeals, do tribes in Alaska exercise sovereign immunity from suit by the State or private parties? If so, may tribes then waive that immunity?*

It is well-established law that federally recognized Indian tribes possess sovereign immunity from suit. *Pit River Home and Agricultural Coop. Ass'n v. United States*, 30 F.3d 1083, 1100 (9th Cir. 1994); *State v. Native Village of Venetic*, 856 F.2d 1384 (9th Cir. 1988) (tribe recognized by the federal government or that establishes tribal status based on historical factors possesses sovereign immunity). "Absent congressional or tribal consent to suit, state and federal courts have no jurisdiction over Indian tribes; only consent gives the courts the jurisdictional authority to adjudicate claims raised by or against tribal defendants." *Pan American Co.*, 884 F.2d at 418. A tribe's immunity remains intact absent an express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978); *United States v. United States Fidelity & Guaranty*, 309 U.S. 506, 512 (1940). A waiver of sovereign immunity cannot be implied, but must be unequivocally stated. *Id.* However, even if the tribe is immune, individual officers of the tribe will not be immune unless they were acting in their representative capacity and within the scope of their authority, nor does tribal immunity extend to individual members of an Indian tribe. *Native Village of Venetic*, 856 F.2d at 1387; *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992).

These are virtually the same legal standards as are applied by the Alaska Supreme Court. As discussed above, the major difference between the Alaska Supreme Court and the Ninth Circuit has been whether tribes exist in Alaska, not whether tribes, once established, possess sovereign immunity, or whether and how that sovereign immunity may be waived. A tribe can consent to suit, and the critical question for both the state and the federal courts is whether the consent is unequivocally stated, or waived in unmistakable terms.

*Are the waivers of sovereign immunity required by the State for participation by a Native tribe in the unincorporated community revenue sharing program for unincorporated communities, the unincorporated community capital project matching grant program, and the village safe water program effective to waive that immunity?*

The answer to this question is yes. The waiver of sovereign immunity required for participation by an Alaska tribe or Native village council in these programs is express and unequivocal. In executing the waiver, the tribe waives its sovereign immunity from suit by the state in connection with the administration of the state grant or contract dollars at issue. Since at least the early 1980's, the state has required an express and unequivocal waiver of sovereign immunity from a Native entity when it has entered into a contractual relationship with that Native entity, as a precaution in the event the entity possessed sovereign immunity. See 1986 Inf. Op. Att'y Gen. (Dec. 5; 663-87-0110). We believe these waivers are fully enforceable under both Alaska Supreme Court and Ninth Circuit precedent, as does counsel for the Alaska Federation of Natives who was present at the February 21 Joint House-Senate Judiciary Committee hearing. See February 23, 1996, letter from Lloyd B. Miller to Senator Robin Taylor and Representative Brian Porter, p. 2.

4. *Could the State's granting of monies to tribal entities contribute to a future argument in support of a finding of "Indian Country"? If so, how?*

The state's granting of money to Alaska tribes for the programs discussed above will not contribute to a future argument in support of a finding of Indian country in Alaska. The state is not, by granting funds to a Native village council or tribe under any of these programs, acknowledging or endorsing any tribal authority over lands. In addition, the key element to a determination of Indian country is *federal superintendence*, not state involvement; in fact, state presence as the dominant political institution in the area cuts against, not in favor of, an Indian country argument.

First, when state monies are granted to a qualified recipient in an eligible unincorporated community under the state revenue sharing, capital project matching grant, and village safe water programs, whether that recipient is a Native village council or an incorporated nonprofit, the transaction is not an inter-governmental transfer of money. Rather, the state is *contracting* with an appropriate entity to deliver services in the

unincorporated community. These funds are provided to eligible entities across the state, regardless of their racial ancestry or make-up.<sup>5</sup>

Second, all of these programs include requirements that, to receive the funds, the recipient must agree that the funds will be used for public purposes and the facilities and services funded must be available to all persons in a non-discriminatory manner. In granting such funds to an eligible Native village council, the state does not treat the village or tribe as a special jurisdictional enclave, nor does the state allow the funds to be used solely for tribal purposes or solely for Native Alaskans or tribal members. The facilities and services provided by the grant recipient must be made available to all residents of the community without regard to tribal membership or tribal affiliation.

Third, an express waiver of sovereign immunity is required of any Native tribe or village council as a condition of receipt of the grant monies. Finally, the enabling statutes for both the revenue sharing program and the capital matching grant program specifically provide that neither of the programs, nor any action taken under them, enlarges or diminishes the governmental authority or jurisdiction of a Native village council. AS 29.60.140(a); AS 37.06.030(g).

Thus, when granting money to a Native village council or tribe as the qualified recipient in an eligible unincorporated community, the state requires that the tribe administer and expend the money in the same manner as would a non-Native grant recipient. Receipt of the state monies does not enlarge or diminish the governmental authority or jurisdiction of a tribe.

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<sup>5</sup> A decision *not* to grant funds under these programs to Native tribes *because* of their racial composition would clearly raise equal protection concerns. Similarly situated persons must be treated in a similar manner, and to selectively exclude an otherwise qualified entity from participation in a state program, because its members are of a particular racial group, would undoubtedly present serious constitutional questions.

The term "Indian country" has a long legislative and judicial history. Between 1913 and 1938, the Supreme Court issued four opinions from which the current definition is derived.<sup>6</sup> In 1948, Congress codified the holdings of these cases in 18 U.S.C. § 1151, which provides:

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

The litigation in Alaska on the issue of Indian country has to date focused on § 1151(b), the "dependent Indian community" portion of the definition.

The Supreme Court, both before and after the enactment of 18 U.S.C. § 1151, has consistently phrased the test for a "dependent Indian community" as whether the land at issue has been set aside for the use and occupancy of Indians as such, under the superintendence of the federal government. *United States v. John*, 437 U.S. 634, 648-49 (1978); *United States v. McGowan*, 302 U.S. 535, 539 (1938). As stated by the Ninth Circuit Court of Appeals in *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1391 (9th Cir. 1988), these decisions "turned on the dependent nature of the communities and the federal government's role as regulator and protector of those communities."

The Supreme Court recently reaffirmed its holdings on this issue in *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 113 S. Ct. 1985, 1991 (1993), and *Oklahoma Tax Comm'n v. Potawatami Indian Tribe*, 498 U.S. 505, 510 (1991). In *Sac and Fox Nation*, the Court held that Indian country includes "all lands set aside by whatever means for the residence of tribal Indians under federal protection. . . ." *Id.*

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<sup>6</sup> The cases are *United States v. McGowan*, 302 U.S. 535 (1938); *United States v. Pelican*, 232 U.S. 442 (1914); *Donnelly v. United States*, 228 U.S. 243 (1913); and *United States v. Sandoval*, 231 U.S. 28 (1913).

In two recent decisions issued by Judge Holland, the *Venetie* case and the *Kluti Kaah* case, the court held that ANCSA lands are not Indian country. The essence of these decisions is that (1) the test of Indian country is whether any land has been validly set apart for use of Indians as such, under the superintendence of the federal government; (2) following ANCSA, Alaska Native tribes are not subject to the degree of congressional and executive agency control that evidences an intention that the federal government, rather than the state, be the dominant political institution in the area and are, therefore, not under the superintendence of the government; and (3) under the terms and structure of ANCSA, land conveyed to ANCSA corporations cannot be said to have been set aside for the use of Natives *as such*, and therefore is not Indian country.<sup>7</sup>

Thus, the critical factors are *federal superintendence*, an intention that the federal government, rather than the state, be the dominant political institution in the area, and that *the lands be set aside for Indians as such*. ANCSA land is conveyed in unrestricted fee title to Native corporations formed under state law, not tribes. To the extent the residents' lives are intertwined with the state and the services and programs the state provides, which is extensive throughout Alaska and has been for many years, it is all the more apparent that the land occupied by tribes in Alaska is not under federal superintendence and is not set aside by Congress for the use, occupancy, and protection of Indian people as such.

Given the test for Indian country, as well as the requirements and conditions for receipt and expenditure of state grant funds by Native village councils and tribes under the state revenue sharing and capital matching grant programs for unincorporated communities and the village safe water program, we conclude that the state's granting of monies to tribal entities under these programs does not contribute to an argument in support of a finding of Indian country.

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<sup>7</sup> A copy of the federal court's decision in the *Kluti Kaah* Indian country case is attached as Appendix F. This decision and the *Venetie* Indian country decision are on appeal to the Ninth Circuit.

The Honorable Robin Taylor, Chair  
Senate Judiciary Committee

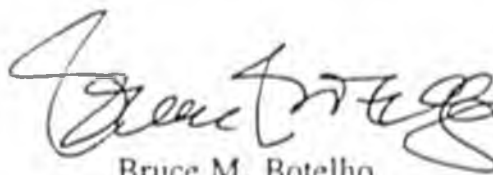
April 18, 1996  
Page 16

*Conclusion*

For the reasons discussed above, we conclude that (1) the granting of state monies under the programs discussed above to Native village councils and tribes does not violate the Alaska Constitution; (2) the waivers of sovereign immunity required of Native village councils and tribes in order to receive these grant funds are enforceable under both state and federal law; and (3) the granting of monies to tribal entities does not contribute to a future argument in support of Indian country.

Please do not hesitate to contact me if you have questions about this letter or if we can be of further assistance on these issues.

Very truly yours,



Bruce M. Botelho  
Attorney General

BMB:kh

Enclosures (Appendices A - F)

cc: Members of the Alaska Legislature  
Annalee McConnell, Director, Office of Management and Budget  
Pat Pourchot, Legislative Director, Office of the Governor  
Mike Irwin, Commissioner, Department of Community and Regional Affairs  
Michele Brown, Commissioner, Department of Environmental Conservation

# APPENDIX A

State Revenue Sharing for Unincorporated Communities

STATE REVENUE SHARING  
FOR  
UNINCORPORATED COMMUNITIES

FY 96 BUDGET

List how the FY 96 revenue sharing funds for your unincorporated community will be spent during July 1, 1995 - June 30, 1996.

All State Revenue Sharing funds must be spent for a public purpose. A public purpose is defined as: "a purpose the objective of which is to promote the public health, safety, and general welfare of the residents of an unincorporated community."

PUBLIC SERVICE or FACILITY	BUDGET AMOUNT
_____	\$ _____
_____	\$ _____
_____	\$ _____
_____	\$ _____
_____	\$ _____
_____	\$ _____

<b>TOTAL</b>	\$ <b>7,769</b>
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Describe each public service or facility:

STATE REVENUE SHARING  
FOR  
UNINCORPORATED COMMUNITIES

FY 96  
FUNDING AGREEMENT

RESOLUTION NO. \_\_\_\_\_

WHEREAS, the \_\_\_\_\_ represents the  
(organization)  
unincorporated community of \_\_\_\_\_ ; and,  
(community)

WHEREAS, the Department of Community and Regional Affairs provides funding  
for unincorporated communities under the State Revenue Sharing Program; and,

WHEREAS, the \_\_\_\_\_ advertised to all community  
(organization)  
residents that state revenue sharing funds were available to provide public services/  
facilities; and,

WHEREAS, a public meeting was held on \_\_\_\_\_ by the  
(date)  
\_\_\_\_\_ to give residents an opportunity  
(organization)  
to comment on the use of the FY 96 funds; and,

WHEREAS, the services or facilities listed in the approved budget will be  
paid for with state revenue sharing funds; and,

WHEREAS, the \_\_\_\_\_ agrees to follow the  
(organization)  
conditions of the Funding Agreement, State laws, regulations, and policies related to  
the State Revenue Sharing Program; now,

THEREFORE, be it resolved that the \_\_\_\_\_  
(organization)  
applies for state revenue sharing funding to pay for public services/facilities avail-  
able to all residents of the community of \_\_\_\_\_ .  
(community)

*(Continued, over please)*

Further, the applicant agrees to:

- \* • Use all state revenue sharing funds for a public purpose.
- Account for state revenue sharing funds separately.
- Report income and expenses for each fiscal year funds were received.  
Forms will be supplied by the Department.
- \* • Have a public meeting so residents can comment on the use of revenue sharing money. Notice of the meeting must be posted in three public places for at least 15 days before the meeting.
- Send copies of a signed resolution giving the date of the public meeting and a budget of how the revenue sharing funds will be spent.
- Let the Department of Community and Regional Affairs and/or its representative audit, examine, and copy any records related to State Revenue Sharing Program funds.
- \* • Make services/facilities available to every person in the community regardless of race, religion, color, national origin, age, physical handicap, sex, marital status, changes in marital status, pregnancy, parenthood or political affiliation.
- Offer any facility built, repaired, or improved with State Revenue Sharing money to any new municipality the community may become part of.

Resolution No. \_\_\_\_\_ was passed at a meeting held on \_\_\_\_\_  
(number) (Date)

\_\_\_\_\_  
Signature of President/Chief

\_\_\_\_\_  
Name (print)

Attest: \_\_\_\_\_  
Secretary/Clerk

Date: \_\_\_\_\_

Please send the completed Budget, Funding Agreement resolution and Waiver of Immunity resolution (for Native village councils only) to:



State Revenue Sharing Program  
Municipal and Regional Assistance Division  
P.O. Box 112100  
Juneau, AK 99811

STATE REVENUE SHARING  
FOR  
UNINCORPORATED COMMUNITIES

WAIVER OF IMMUNITY

RESOLUTION NO. \_\_\_\_\_

WHEREAS, the \_\_\_\_\_ wishes to receive money under an entitle-  
(Native village council)  
ment to the State Aid to Unincorporated Communities program for the unincorporated commu-  
nity of \_\_\_\_\_ ; and  
(community)

WHEREAS, the State of Alaska, Department of Community and Regional Affairs, is required by  
law to obtain from the council a waiver of immunity from suit for claims arising out of activities  
of the council related to the entitlement; now,

THEREFORE, BE IT RESOLVED THAT the \_\_\_\_\_ hereby gives  
(Native village council)  
its irrevocable consent to allow it to be sued by the State of Alaska upon any claims arising out of  
its activities under the entitlement, and hereby waives any immunity from suit by the State of  
Alaska for such claims. The \_\_\_\_\_  
(Native village council)  
hereby consents to the execution of any judgement obtained pursuant to this waiver of immunity  
against any of its property, whether real or personal, including money.

This resolution was adopted at a duly convened meeting of the \_\_\_\_\_  
on \_\_\_\_\_, 19 \_\_\_\_\_. (Native village council)  
(Date)

By: \_\_\_\_\_  
Chief or President


Attest: \_\_\_\_\_  
Secretary/Treasurer

# MEMORANDUM

State of Alaska  
Community and Regional Affairs


TO: Emil Notti  
Commissioner

DATE: March 18, 1986

THRU: Doug Griffin   
Deputy Director

FILE NO: 0534j/JP/rr

TELEPHONE NO: 465-4733

FROM: Jim Plasman   
Local Government Specialist IV  
Municipal and Regional  
Assistance Division

SUBJECT: History of  
"State aid to  
Native village  
governments"

We have been requested by Senator Sackett's office to furnish him with a history of the Aid to Native village governments section of the state revenue sharing program. What follows is my best reconstruction of that history.

The Revenue Sharing Program was enacted by Chapter 155, SLA 1980 and became law in July 1981. It provided at AS 29.89.050, "State aid to Native village governments", the following:

The state shall pay to a Native village government \$25,000. In this subsection, "Native village government" means

(1) a local governing body organized by authority of the Act of Congress of June 18, 1934 (25 U.S.C. sec. 476); or

(2) 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 the Alaska Native Claims Settlement Act (43 U.S.C. sec. 1601 - 1628).

House Bill 192, the bill ultimately passed as Chapter 155, SLA 1980, did not include this "State aid to Native village government" language when it was introduced. This language was added in the Senate Finance committee substitute (SCS CSHB 192 (Fin)) reported to the Senate on May 26, 1980. Although there was apparently little or no discussion on this issue at the Senate Finance Committee hearing (see attached minutes), there was written testimony on the bill regarding the inclusion of Native village governments apparently submitted to the committee and retained in committee files (see attached "CSHB 192 WRITTEN TESTIMONY").

Emil Notti, Commissioner  
March 18, 1986  
Page Two

Additionally, of possible peripheral import is SB 565, "An Act relating to Native village governments" (copy attached) which had been introduced by the Senate State Affairs Committee on April 17, 1980 and provided that a Native village government in some circumstances may be treated by the state as a second class city, including, significantly, eligibility for "state programs". That bill ultimately died in committee.

Upon enactment of Chapter 155, SLA 1980, questions were raised by the Department of Community and Regional Affairs as to the administration of this section. Advice of the Attorney General was sought and the Department of Law responded with various memoranda on this subject (copies attached). The thrust of these opinions was that to administer the program in a constitutional manner the Department should make funding available to all unincorporated communities, rather than just those with "Native village governments". The Department proceeded to administer the program consistent with this advice from the Attorney General. Additionally, the Attorney General advised the Department that unincorporated communities within an organized borough or incorporated municipality would not be eligible for funding and this advice was also followed by the Department.

Concern with this provision of the Revenue Sharing program was apparently shared by the legislature, as the Title 29 Revision passed in 1982 by the legislature but vetoed by then-Governor Hammond included a provision which amended the Native village government section with language which, consistent with the practice of the Department, opened the program to all unincorporated communities. (See SB 180 from the 12th Legislature, proposed section AS 29.60.140.) This language was the same as ultimately adopted by the 14th Legislature and enacted in Chapter 74, SLA 1985, which had an effective date of January 1, 1986. That provision now provides at AS 29.60.140:

(a) The department shall pay to each unincorporated community an entitlement of \$25,000 each fiscal year to be used for a public purpose. The department with advice from the Department of Law shall determine whether there is in each unincorporated community an incorporated nonprofit entity or a Native village council that will agree to receive and spend the entitlement.

Emil Notti, Commissioner  
March 18, 1986  
Page Two

If there is more than one qualified entity in an unincorporated community, the department shall pay the money under an entitlement to the entity the department finds most qualified to receive and spend the money. The department may not pay money under an entitlement to a Native village council unless the council waives immunity from suit for claims arising out of activities of the council related to the entitlement. A waiver of immunity from suit under this subsection must be on a form provided by the Department of Law. If there is no qualified incorporated nonprofit entity or Native village council in an unincorporated community that is willing to receive money under an entitlement, the entitlement for that unincorporated community may not be paid. Neither this subsection nor any action taken under it enlarges or diminishes the governmental authority or jurisdiction of a Native village council.

(b) In this section "unincorporated community" means a place in the unorganized borough that is not incorporated as a city and in which 25 or more persons reside as a social unit.

Enclosures

cc: Marty Rutherford, Director, MRAD  
Doug Griffin, Deputy Director, MRAD  
Bill Rolfzen, Admin. Assistant, MRAD

File code: 1413

# APPENDIX B

Unincorporated Communities Capital Project

Matching Grant Program

FY96  
UNINCORPORATED COMMUNITY  
CAPITAL MATCHING GRANTS  
PROJECT QUESTIONNAIRE



VIII. RESOLUTION FOR TRIBAL ENTITIES

RESOLUTION NUMBER \_\_\_\_\_

A RESOLUTION of the \_\_\_\_\_ 1  
accepting a State Matching grant in the amount of \$ \_\_\_\_\_ 2 for  
\_\_\_\_\_ 3 and providing for a waiver of  
sovereign immunity from legal prosecution by the State for claims which may arise from the utilization  
of said grant.

WHEREAS, the \_\_\_\_\_ 1  
wishes to provide the above described equipment/project for the community; and

WHEREAS, the Department requires as a condition of the grant that \_\_\_\_\_  
\_\_\_\_\_ 1 hereby irrevocably waives any sovereign immunity which it may  
possess, and consents to suit against itself or its officials in the court of the State of Alaska or any other  
court of competent jurisdiction, as to all causes of action by the State of Alaska or any other person  
arising out of or in connection with \_\_\_\_\_ ; 3

NOW THEREFORE BE IT RESOLVED THAT \_\_\_\_\_ 4  
is hereby authorized to negotiate, execute, and administer any and all documents and contracts required  
for granting funds to the \_\_\_\_\_ 1 and managing  
funds on behalf of this entity. \_\_\_\_\_ 4 is also authorized  
to execute any subsequent amendments to said contract to provide for adjustments to the project within  
the scope of services or tasks, based upon the needs of the project.

BE IT FURTHER RESOLVED THAT: this Alaska Native Village, acting through its \_\_\_\_\_  
\_\_\_\_\_ 1 hereby grants to the State of Alaska its irrevocable consent  
to be sued in the name of the Native Village for any unlawful act arising out of any contractual obligation  
entered into as a result of this resolution, and hereby waives immunity from execution of judgements  
obtained pursuant to the above against any property whether real or personal, including money, provided  
that such execution of judgement not exceed \$ \_\_\_\_\_ . 2

PASSED AND APPROVED BY THE \_\_\_\_\_ 1  
on \_\_\_\_\_ , 19 \_\_\_\_\_

IN WITNESS THERETO:

By: \_\_\_\_\_ 4 \_\_\_\_\_  
Signature Title

Attest: \_\_\_\_\_ 5 \_\_\_\_\_  
Signature Title

- 1 Name of Community
- 2 Amount of Grant
- 3 Description of Equipment/Project
- 4 Chief Administrative Officer (Chief, President)
- 5 Clerk or Secretary of Organization

**Article 1. Definition of "Certifying Officer".** In this grant agreement, attachments, and amendments, "Certifying Officer" means the person who signs this grant agreement on behalf of the Department and includes a successor or authorized representative.

**Article 2. State Saved Harmless.** The Grantee shall indemnify, hold and save the State, its officers, agents and employees harmless from liability of any nature or kind, which may arise from the grantee's performance of this grant agreement in any way whatsoever. Such liability may include, but is not limited to, costs and expenses for or on account of any and all legal actions or claims of any character whatsoever resulting from injuries or damages sustained by any persons or property which may arise from the grantee's performance of this grant agreement in any way whatsoever.

**Article 3. Inspections and Retention of Records.** The State may inspect, in the manner and at reasonable times it considers appropriate, all of the Grantee's facilities, records and activities under this grant agreement. The Grantee shall retain financial and other records relating to the performance of this grant agreement for a period of three years from completion of the project, or until final resolution of any audit findings, claims or litigation related to the grant.

**Article 4. Disputes.** Any dispute concerning a question of fact arising under this grant agreement which is not disposed of by mutual agreement, shall be decided without bias by the Certifying Officer. The decision shall be in writing and mailed or otherwise furnished to the Grantee. The decision of the Certifying Officer is final and conclusive, unless, within 30 days from the receipt of the Certifying Officer's decision, the Grantee mails or otherwise furnishes a written appeal of the Certifying Officer's decision in accordance with 19 AAC 55.150. The Department will render a decision in accordance with the provisions of 19 AAC 55.150.

**Article 5. Equal Employment Opportunity (EEO).** The Grantee may not discriminate against any employee or applicant for employment because of race, religion, color, national origin, age, disability, sex, marital status, changes in marital status, pregnancy or parenthood. The Grantee shall post in a conspicuous place, available to employees and applicants for employment, a notice setting out the provisions of this paragraph.

The Grantee shall state in all solicitations and advertisements for employees to work on State funded projects, that it is an Equal Opportunity Employer and that all qualified applicants will receive consideration for employment without regard to race, religion, color, national origin, age, disability, sex, marital status, changes in marital status, pregnancy or parenthood.

The Grantee shall include the provisions of this EEO article in every contract relating to this grant agreement and shall require the inclusion of these provisions in every agreement entered into by any of its contractors, so that those provisions will be binding upon each contractor and subcontractor.

**Article 6. Termination.** The Certifying Officer, by written notice, may terminate this grant agreement, in whole or in part, when it is in the best interest of the State. The State is liable only for payment in accordance with the provisions of this grant agreement for services rendered before the effective date of termination.

**Article 7. No Assignment or Delegation.** The Grantee may not assign or delegate this grant agreement or any part of it, or any right to any of the money to be paid under it, except with the written consent of the Certifying Officer.

**Article 8. No Additional Work or Material.** No claim will be allowed for services, not specifically provided for in this grant agreement, which are performed or furnished by the Grantee.

**Article 9. Independent Grantee.** The Grantee and any agents or employees of the Grantee act in an independent capacity and are not officers or employees or agents of the State in the performance of this grant agreement.

**Article 10. Payment of Taxes.** As a condition of this grant agreement, the Grantee shall pay all Federal, State and Local taxes incurred by the Grantee and shall require their payment by any contractor or other persons in the performance of this grant agreement.

**Article 11. Workers' Compensation Insurance.** The Grantee shall provide and maintain workers' compensation insurance as required by AS 23.30 for all employees engaged in work under this grant agreement. The Grantee shall require any contractor to provide and maintain workers' compensation insurance for its employees as required by AS 23.30.

**Article 12. Insurance.** The Grantee is responsible for obtaining any necessary liability insurance.

**Article 13. Current Prevailing Rates of Wage and Employment Preference.** Certain grant projects are constrained by the provisions of AS 36. PUBLIC CONTRACTS. To the extent that such provisions apply to the project which is the subject of this grant agreement, the Grantee shall comply with the law.

**Article 14. Budget Flexibility.** Notwithstanding the provisions in Article 18, Attachment A, "Changes," the Grantee may revise the project budget in Attachment B without a formal amendment to this agreement. Such revisions are limited to a maximum of 10% of the total amount of this agreement or \$10,000, whichever is less over the entire term of this agreement. Such budget revisions shall be limited to changes to existing budget line items. The creation of new budget line items may only be done through a formal amendment to the grant agreement. Budget revisions may not be used to increase any budget item for project administration expenses without prior written approval by the Certifying Officer.

Changes to the budget beyond the limits authorized by this provision may only be made by a formal amendment to this agreement.

**Article 15. Governing Law.** This grant agreement is governed by the laws of the State of Alaska. The Grantee shall perform all aspects of this project in compliance with all appropriate laws and regulations. It is the responsibility of the Grantee to ensure that all permits required for the construction and operation of this project by the Federal, State and/or Local governments have been obtained.

**Article 16. Officials Not to Benefit.** No member of or delegate to Congress or the Legislature, or officials or employees of the State or Federal government may share any part of this grant agreement or benefit to arise from it. This does not preclude officials or employees from sharing in the common benefits of the grant project.

**Article 17. Covenant Against Contingent Fees.** The Grantee warrants that no person or agency has been employed or retained to solicit or secure this grant agreement upon an agreement or understanding for commission, percentage, contingent fee, or brokerage except employees or agencies maintained by the Grantee for the purpose of securing business. For the breach or violation of this warranty, the State may terminate this agreement without liability or, in its discretion, deduct from the grant agreement price or consideration the full amount of the commission, percentage, brokerage or contingent fee.

**Article 18. Changes.** Any changes which have been agreed to by both parties will be attached and made a part of this grant agreement by use of an Amendment. Any such Amendment must be dated and must be signed by both parties before the change is considered official and approved.

\* **Article 19. Public Purposes.** The Grantee agrees that the project to which this grant agreement relates shall be dedicated to public purposes for its useful life. The benefits of the project shall be made available without regard to race, religion, color, national origin, age, disability, sex, marital status, changes in marital status, pregnancy or parenthood.

If the Grantee is a non-municipal entity and if monies appropriated under this grant constitute the sole or principal funding source for the acquisition of equipment or facilities, the Grantee agrees that in the event a municipal corporation is formed which possesses the power and jurisdiction to provide for such equipment or facilities, the Grantee shall offer, without compensation, to transfer ownership of such equipment or facilities to the municipal corporation.

If the Grantee is a non-profit corporation that dissolves, the assets and liabilities from this grant project are to be distributed according to statutory law, AS 10.20.200-10.20.452.

**Article 20. Site Control.** If the grant project involves occupancy and use of real property, the Grantee shall acquire the legal right to occupy and use such real property for the purposes of the grant, and further that there is legal access to such property.

**Article 21. Operation and Maintenance.** Throughout the useful life of the project, the Grantee shall be responsible for the operation and maintenance of any facility, equipment, or other items acquired under this grant.

**Article 22. Assurance.** The Grantee shall spend monies appropriated under this grant only for the purposes specified in the grant agreement.

**Article 23. Remission.** The Grantee shall return all unexpended grant monies to the State within 90 days of the project completion.

**Article 24. Reporting Requirements.** The Grantee shall submit progress reports to the Department according to the schedule established in Attachment B of this grant agreement. The Department shall provide forms and instructions necessary for the preparation of such reports.

**Article 25. Right to Withhold Funds.** The Department may withhold payments under this grant agreement for any violation of the provisions of the grant agreement or of 19 AAC 55.10-55.160.

\* **Article 26. Sovereign Immunity.** If the Grantee is an entity which possesses sovereign immunity, it is a requirement of this grant agreement that the Grantee irrevocably waive its sovereign immunity with respect to State enforcement of this grant agreement. The waiver of sovereign immunity, effected by a resolution of the entity's governing body, is hereby incorporated into this grant agreement.

**Article 27. Audit Requirements.** The Grantee shall comply with the audit requirements established by 02 AAC 45.010, set forth in Appendix A and B of this grant agreement.

**Article 28. Local Share of Project.** The Grantee shall contribute a local share to this grant project as specified in Attachment B of this grant agreement and in accordance with 19 AAC 55.60. The valuation and verification of this local share of the project will be made in accordance with 19 AAC 55.110.

**Article 29. Americans with Disabilities Act.** The Americans with Disabilities Act (ADA) prohibits discrimination against persons with disabilities. Title I of the ADA prohibits discrimination against persons with disabilities in employment and provides that a reasonable accommodation be provided for applicants and employees. Title II of the Act prohibits public agencies from discriminating against individuals with disabilities in the provision of services, programs or activities. Reasonable accommodations must be made to ensure or allow access to all services, programs or activities. This section of the Act includes physical access to public facilities and requires that public entities must, if necessary, make modifications to their facilities to remove physical barriers to ensure access by persons with disabilities. All new construction must assure accessibility for persons with disabilities. Programs and services provided by public entities must also be accessible to persons with disabilities. A public entity's subgrantees or contractors must also comply with the ADA provisions. Grantees are responsible for assuring their compliance with the ADA.

# APPENDIX C

Rural Development Assistance Grants

## Resolution for Tribal Entities

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**Who must submit this appendix with their application?**

*Every Tribal applicant for RDA funds, regardless of project or category.*

**What is the purpose of this appendix?**

Every Tribal applicant for RDA grant funds must submit a resolution, motion, or similar action granting authority to participate in the program which includes a Waiver of Sovereign Immunity from legal prosecution by the State for claims which may arise from the utilization of said grant. The resolution also establishes signatory authority to an appropriate official to conduct normal and usual business regarding the project.

On the following pages is a sample format for this resolution. You may change the format only to the extent that it does not eliminate the key components, including the amount of the grant funds requested, the project description, Waiver of Sovereign Immunity, and the signatory authority.

# Resolution for Tribal Entities

RESOLUTION NUMBER \_\_\_\_\_

A RESOLUTION of the \_\_\_\_\_ authorizing participation in the Rural Development Assistance (RDA) program and providing for waiver of sovereign immunity from legal prosecution by the State for claims which may arise from the utilization of said grant.

WHEREAS, the \_\_\_\_\_ wishes to provide a \_\_\_\_\_ for use in the community, and

WHEREAS, this tribal council is an applicant for a grant in the amount of \$ \_\_\_\_\_ from the Alaska Department of Community and Regional Affairs (hereinafter "Department"), under the RDA program authorized by AS 44.47 as amended, and WHEREAS, the Department requires as a condition of the grant that an Alaskan Native Village Tribal or IRA governing body waive sovereign immunity from legal prosecution for claims by the State which may arise from its activities under the grant.

NOW THEREFORE BE IT RESOLVED THAT: the \_\_\_\_\_ is authorized to negotiate and execute any and all documents required for granting and managing funds on behalf of this entity. The \_\_\_\_\_ is also authorized to execute any subsequent amendments to said grant agreement to provide for adjustments to the project within the scope of services or tasks, based upon the needs of the project.

BE IT FURTHER RESOLVED THAT: this Alaska Native Village, acting through its \_\_\_\_\_ hereby grants to the State of Alaska its irrevocable consent to be sued in the name of the Native Village for any unlawful act arising out of any contractual obligation entered into as a result of this resolution, and hereby waives immunity from execution of judgments obtained pursuant to the above against any property whether real or personal, including money, provided that such execution of judgment not exceed \$ \_\_\_\_\_

PASSED AND APPROVED BY THE \_\_\_\_\_ on \_\_\_\_\_, 199\_\_\_\_\_.

IN WITNESS THEREETO:

BY \_\_\_\_\_  
Signature and Title

ATTEST \_\_\_\_\_  
Signature and Title

## Attachment B

### Standard Provisions

#### Article 1. Definition

"Department" refers to the Department of Community and Regional Affairs within the State of Alaska.

#### Article 2. Indemnification

It is understood and agreed that this Grant Agreement is solely for the benefit of the parties to the Grant Agreement and gives no right to any other party. No joint venture or partnership is formed as a result of this Grant Agreement.

The Grantee, its successors and assigns, will protect, save, and hold harmless the Department and the State of Alaska and their authorized agents and employees, from all claims, actions, costs, damages, or expenses of any nature whatsoever by reason of the acts or omissions of the Grantee, its subcontractors, assigns, agents, contractors, licensees, invitees, employees, or any person whomever arising out of or in connection with any acts or activities authorized by this Grant Agreement. The Grantee further agrees to defend the Department and the State of Alaska and their authorized agents and employees in any litigation, including payment of any costs or attorney's fees for any claims or action commenced thereon arising out of or in connection with acts or activities authorized by this grant agreement. This obligation shall not include such claims, costs, damages, or expenses which may be caused by the sole negligence of the Department or the State of Alaska or their authorized agents or employees; Provided, that if the claims or damages are caused by or result from the concurrent negligence of (a) the Department and the State of Alaska and their agents or employees, and (b) the Grantee, its agents or employees, this indemnity provision shall be valid and enforceable only to the extent of the negligence of the Grantee, or Grantee's agents or employees.

#### Article 3. Legal Authority

The Grantee certifies that it possesses legal authority to accept grant funds under the State of Alaska and to execute the project described in this Grant Agreement by signing the Grant Agreement document. The Grantee's relation to the Department and the State of Alaska shall be at all times as an independent Grantee.

#### Article 4. Waivers

No conditions or provisions of this Grant Agreement can be waived unless approved by the Department in writing. The Department's failure to insist upon strict performance of any provision of the Grant Agreement, or to exercise any right based upon a breach thereof, or the acceptance of any performance during such a breach, shall not constitute a waiver of any right under this Grant Agreement.

The Grantee shall state, in all solicitations or advertisements for employees to work on state funded projects, that it is an equal opportunity employer (EEO) and that all qualified applicants will receive consideration for employment without regard to race, religion, color, national origin, age, physical handicap, sex, marital status, changes in marital status, pregnancy or parenthood.

The Grantee shall include the provisions of this EEO article in every contract relating to this Grant Agreement and shall require the inclusion of these provisions in every agreement entered into by any of its contractors, so that those provisions will be binding upon each contractor and subcontractor.

**Article 31. Public Purposes**



The Grantee agrees that the project to which this Grant Agreement relates shall be dedicated to public purposes for its useful life. The benefits of the project shall be made available without regard to race, religion, color, national origin, age, physical handicap, sex, marital status, changes in marital status, pregnancy or parenthood.

If the Grantee is a non-municipal entity and if monies appropriated under this grant constitute the sole or principal funding source for the acquisition of equipment or facilities, the Grantee agrees that in the event a municipal corporation is formed which possesses the power and jurisdiction to provide for such equipment or facilities, the Grantee shall offer, without compensation, to transfer ownership of such equipment or facilities to the municipal corporation.

If the Grantee is a non-profit corporation that dissolves, the assets and liabilities from the grant project are to be distributed according to statutory law, AS 10.20.290 - 10.20.452.

**Article 32. Operation and Maintenance**

Throughout the useful life of the project, the Grantee shall be responsible for the operation and maintenance of any facility, equipment, or other items acquired under this grant.

**Article 33. Assurance**

The Grantee shall spend monies awarded under this grant only for the purposes specified in this Grant Agreement.

**Article 34. Current Prevailing Rates of Wage and Employment Preference**

Certain grant projects are constrained by the provisions of AS 36. PUBLIC CONTRACTS. To the extent that such provisions apply to the project which is the subject of this Grant Agreement, the Grantee shall pay the current prevailing rates of wage to employees as required by AS 36.05.010. The Grantee shall also require any contractor to pay the current prevailing rates of wage as required by AS 36.05.010. Further, in accordance with AS 36.10.010, ninety-five percent (95%) of the work force employed in the completion of this project shall be residents where they are available and qualified. If ten (10) or fewer persons are employed, then ninety percent (90%) of the project work force shall be residents where they are available and qualified.

**Article 35. Severability**

If any provision under this Grant Agreement or its application to any person or circumstance is held invalid by any court of rightful jurisdiction, this invalidity does not affect other provisions of the contract agreement which can be given effect without the invalid provision.

**Article 36. Performance**

The Department's failure to insist upon the strict performance of any provision of this Grant Agreement or to exercise any right based upon breach thereof or the acceptance of any performance during such breach, shall not constitute a waiver of any rights under this Grant Agreement.

**Article 37. Sovereign Immunity**



If the Grantee is an entity which possesses sovereign immunity, it is a requirement of this grant that the Grantee irrevocably waive its sovereign immunity with respect to state enforcement of this Grant Agreement. The waiver of sovereign immunity, effected by a resolution of the entity's governing body, is hereby incorporated into this Grant Agreement.

**Article 38. Audit Requirements**

The Grantee shall comply with the audit requirements established by 02 AAC 35 010, set forth in Appendix A of this Grant Agreement.

**Article 39. Close-Out**

The Department will advise the Grantee to initiate close-out procedures when the Department determines, in consultation with the Grantee, that there are no impediments to close-out and that the following criteria have been met or soon will be met:

- A. All costs to be paid with grant funds have been incurred with the exception of close-out costs and any unsettled third-party claims against the Grantee. Costs are incurred when goods and services are received or contract work is performed.
- B. The last required performance report has been submitted. The Grantee's failure to submit a report will not preclude the Department from effecting close-out if it is deemed to be in the State's interest. Any excess grant amount that may be in the Grantee's possession shall be returned by the Grantee in the event of the Grantee's failure to finish or update the report.
- C. Other responsibilities of the Grantee under this contract agreement and any close-out agreement and applicable laws and regulations appear to have been carried out satisfactorily or there is no further state interest in keeping the grant open for the purpose of securing performance.

# APPENDIX D

Unincorporated Community and Named Recipient Grants



UNINCORPORATED COMMUNITY  
AND  
NAMED RECIPIENT

LEGISLATIVE GRANT QUESTIONNAIRE  
CAPITAL/NON-CAPITAL PROJECTS

VIII. RESOLUTION OF TRIBAL ENTITIES

RESOLUTION NUMBER \_\_\_\_\_

A RESOLUTION of the \_\_\_\_\_<sup>1</sup> accepting a State legislative grant in the amount of \$ \_\_\_\_\_<sup>2</sup> for \_\_\_\_\_<sup>3</sup> and providing for waiver of sovereign immunity from legal prosecution by the State for claims which may arise from the utilization of said grant.

WHEREAS, the \_\_\_\_\_<sup>1</sup> wishes to provide the above described equipment for use in the community; and

WHEREAS, the Department requires as a condition of the grant that an Alaska Native Village or IRA governing body waive sovereign immunity from legal prosecution for claims by the State which may arise from its activities under the grant.

NOW THEREFORE BE IT RESOLVED THAT \_\_\_\_\_<sup>4</sup> is hereby authorized to negotiate, execute, and administer any and all documents and contracts required for granting funds to the \_\_\_\_\_<sup>1</sup> and managing funds on behalf of this entity. \_\_\_\_\_<sup>4</sup> is also authorized to execute any subsequent amendments to said contract to provide for adjustments to the project within the scope of services or tasks, based upon the needs of the project.

BE IT FURTHER RESOLVED THAT: this Alaska Native Village, acting through its \_\_\_\_\_<sup>1</sup> hereby grants to the State of Alaska its irrevocable consent to be sued in the name of the Native Village for any unlawful act arising out of any contractual obligation entered into as a result of this resolution, and hereby waives immunity from execution of judgments obtained pursuant to the above against any property whether real or personal, including money, provided that such execution of judgment not exceed \$ \_\_\_\_\_<sup>2</sup>

PASSED AND APPROVED BY THE \_\_\_\_\_<sup>5</sup> on \_\_\_\_\_ 19\_\_<sup>6</sup>

IN WITNESS THERETO:

By : \_\_\_\_\_<sup>4</sup>  
signature title

Attest : \_\_\_\_\_<sup>7</sup>  
signature title

<sup>1</sup> Name of Organization

<sup>2</sup> Amount of Grant

<sup>3</sup> Description of Equipment

<sup>4</sup> Chief Administrative Officer (Chief, President)

<sup>5</sup> Governing Body (Council, Board of Directors)

<sup>6</sup> Date

<sup>7</sup> Clerk or Secretary of the Organization

**Article 18. Changes.** Any changes which have been agreed to by both parties will be attached and made a part of this grant agreement by use of an Amendment. Any such Amendment must be dated and must be signed by both parties before the change is considered official and approved.

**Article 19. Public Purposes.** The Grantee agrees that the project to which this grant agreement relates shall be dedicated to public purposes for its useful life. The benefits of the project shall be made available without regard to race, religion, color, national origin, age, physical handicap, sex, marital status, changes in marital status, pregnancy or parenthood.

If the Grantee is a non-municipal entity and if monies appropriated under this grant constitute the sole or principal funding source for the acquisition of equipment or facilities, the Grantee agrees that in the event a municipal corporation is formed which possesses the power and jurisdiction to provide for such equipment or facilities, the Grantee shall offer, without compensation, to transfer ownership of such equipment or facilities to the municipal corporation.

If the Grantee is a non-profit corporation that dissolves, the assets and liabilities from the grant project are to be distributed according to statutory law, AS 10.20.290 - 10.20.452.

**Article 20. Site Control.** If the grant project involves occupancy and use of real property, the grantee shall acquire the legal right to occupy and use such real property for the purposes of the grant, and further that there is legal access to such property.

**Article 21. Operation and Maintenance.** Throughout the useful life of the project, the Grantee shall be responsible for the operation and maintenance of any facility, equipment, or other items acquired under this grant.

**Article 22. Assurance.** The Grantee shall spend monies appropriated under this grant only for the purposes specified in this grant agreement.

**Article 23. Remission.** The Grantee shall return all unexpended grant monies to the State within 90 days of the project completion.

**Article 24. Reporting Requirements.** The Grantee shall submit progress reports to the Department according to the schedule established in Attachment B of this grant agreement. The Department shall provide forms and instructions necessary for the preparation of such reports.

**Article 25. Right to Withhold Funds.** The Department may withhold payments under this grant agreement for any violation of the provisions of this grant agreement.

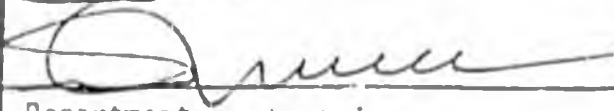
**Article 26. Sovereign Immunity.** If the Grantee is an entity which possesses sovereign immunity, it is a requirement of this grant that the Grantee irrevocably waive its sovereign immunity with respect to State enforcement of this grant agreement. The waiver of sovereign immunity, effected by a resolution of the entity's governing body, is hereby incorporated into this grant agreement.

**Article 27. Audit Requirements.** The Grantee shall comply with the audit requirements established by 02 AAC 45.010, set forth in Appendix A of this grant agreement.

**Article 28. Federal Requirements.** For those grant projects involving federal funds, the grantee shall comply with all applicable federal laws, regulation and requirements, including but not limited to: USOMB Circular A-87, Cost Principals for State and Local Governments; USOMB Circular A-102, Uniform Requirements for Assistance to State and Local Governments; USOMB Circular A-110; Grants and Other Agreements with Institutions of Higher Education, Hospitals, and other Non-profit Organizations; USOMB Circular A-122, Cost Principals for Non-profit Organizations; USOMB Circular A-128, Audits of State and Local Governments.

# APPENDIX E

Village Safe Water Program

STATE OF ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION  GENERAL MANAGEMENT ORDER	Procedure No.	Page 1/1
	Effective  June 1, 1982	
SUBJECT: When to Use IRA Councils for Safe Water Projects  Reference:  AS 46.07.010-080, Attorney General's Opinion, File Number 366-654-82, May 11, 1982, Article 1, Section 3, Alaska Constitution	Issued by:  Ernst W. Mueller	
		
	Department contact is:  Village Safe Water	

This order specifies conditions under which the Department of Environmental Conservation may contract with or make grants to an IRA council to carry out provisions of the VSW Act, in small, unincorporated communities.

It is proper for the Department to contract or make a grant with an IRA council under the following conditions:

1. The IRA council must represent the community and the collective views of residents of the community. The Commissioner will determine if an IRA truly represents the community as a whole. This determination will be based on an analysis of the demographic and political situation of the community.
2. The IRA Council must agree to waive sovereign immunity for the purpose of the grant. This waiver will normally be contained in the grant offer. The Attorney General's office will draft language upon request.
3. The IRA Council must plan, design, build, operate, and maintain the State funded VSW facility in a non-discriminatory manner. A clear statement of non-discrimination must be included in any grant agreements or contracts awarded by the Department.
4. If and when the village becomes an incorporated municipality, the IRA council must turn over its powers and duties associated with the State funded VSW project to the municipal government.

Under the above conditions, it is proper for the Department to contract with or make a grant to an IRA council for construction of a VSW project. However, the Department is under no obligation to do so.

Standard VSW Grant offer letter

FACILITY CONSTRUCTION AND OPERATION Phone: (907) 465-5180  
410 WILLOUGHBY AVE., #105, JUNEAU, AK 99801-1795 Fax: (907) 465-5177

Hard Date

Established by the Village Safe Water Act (AS 46.07), Governor ~~Weld~~ and the Department of Environmental Conservation (Department) offer the

\_\_\_\_\_ (Grantee) a grant \_\_\_\_\_ of State funds not

to exceed \$ \_\_\_\_\_. This grant will be applied toward financing

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Dear \_\_\_\_\_

Grant Offer: \_\_\_\_\_

*knowles*

As provided by the Village Safe Water (VSW) Act (AS 46.07), Governor ~~Weld~~ and the Department of Environmental Conservation (Department) offer the

\_\_\_\_\_ (Grantee) a grant \_\_\_\_\_ of State funds not to exceed \$ \_\_\_\_\_. This grant will be applied toward financing

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

This offer is expressly conditioned upon the terms and limitations contained herein and in 2 AAC 45.010 (copy enclosed).

GENERAL GRANT CONDITIONS

1. The Grantee designates the VSW engineer, \_\_\_\_\_ as its representative in the design and construction management of the VSW improvements. The representative will provide advice and assistance to the Grantee on administrative and technical matters relating to this grant.
2. The Grantee agrees to obtain all titles and easements necessary to provide clear title or authority to construct and maintain the proposed project.

3. The Grantee shall expend grant funds and project account interest only for the purpose(s) described above.
4. Plans and specifications must be approved by the Department before proceeding with the start of construction.
5. On behalf of the Grantee, the Department will procure the services of an accounting firm which shall provide record and bookkeeping services associated with the administration of the proposed sanitation improvements, including federal and State payroll taxes and reports, writing checks, and maintaining check registers.
6. The Grantee (accounting firm) shall be responsible, where applicable, for payment of all payroll and other taxes, general liability insurance, and Worker's Compensation.
7. The Grantee agrees to allow, at any reasonable time, Department inspection of all project work, including related records and data, and to maintain project accounts and records to verify project expenditures. These accounts and records shall be kept apart from other records.
8. The Grantee shall hold and save the Department, its officers, agents, and employees harmless from liability of any kind, including costs and expenses, for or on account of any and all suits or damages of any nature, sustained by any person or persons or property, by virtue of performance of the Grantee, or any person or entity acting in place of or for the Grantee for this project.
9. Upon completion of the project, the Grantee shall adopt a resolution stating the project has been constructed and completed, thereby releasing the Department from further liability.
10. The Grantee agrees to accept ownership and the responsibility for operation and maintenance of this project, assess user fees to ensure the system is self supporting, and select individuals who will be trained to operate and maintain the facility. Acceptance shall be effective on the date this grant offer is signed by the Grantee.
11. The Grantee agrees to operate the facility in a nondiscriminatory manner. No person shall be denied use of this facility due to race, religion, color, national origin, gender or disability.
12. The Grantee must certify that project and services provided under this grant are made available to the general public in compliance with the Americans with Disabilities Act of 1990.

13. The Grantee agrees to return all funds not utilized in the design and construction of this project to the Department.
14. The Grantee acknowledges the right of the Department to rescind this grant and seek recovery of payments already made if the Grantee has provided incorrect or misleading information to the Department or if a grant condition contained herein is violated. This grant offer may be terminated at any time it is in the best interest of the State to do so.

SPECIAL GRANT CONDITIONS

\* The Grantee agrees that it shall be subject to suit for actions arising out of activities performed under this grant in the same manner, and to the same extent, as any person and shall not be immune nor exempt from any administrative or judicial process, sanction or judgement.

No payments can be made until this grant offer is signed by the Grantee and returned to the Department. Nothing in this offer, whether or not accepted, may be deemed to constitute a contractual obligation on the part of the Department until the grant acceptance has been received.

The Department is pleased to provide improved sanitation facilities for the people of \_\_\_\_\_.

Sincerely,

Keith Kelton  
Director

KK/sb (for/Science/Grants)

Enclosure: 2 AAC 45.010

VSW Force Account Equipment Charge Rates Policy  
VSW Professional Services Policy

cc:

Shelia Westfall VSW

By accepting this grant offer, the \_\_\_\_\_ agrees to the terms in the grant conditions listed above.

Accepted on behalf of the \_\_\_\_\_ by:

\_\_\_\_\_  
Mayor

\_\_\_\_\_  
Date

\_\_\_\_\_  
Council Member

\_\_\_\_\_  
Date

\_\_\_\_\_  
Council Member

\_\_\_\_\_  
Date

\_\_\_\_\_  
Council Member

\_\_\_\_\_  
Date

# APPENDIX F

Federal District Court Decision

in *Kluti Kaah* Indian Country Case,

November 28, 1995

FILED

NOV 28 1995

UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA  
*am*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

ALYESKA PIPELINE SERVICE COMPANY, )  
et al., )  
 )  
 Plaintiffs, )  
 )  
 STATE OF ALASKA, )  
 )  
 Intervenor-Plaintiffs, )  
 )  
 vs. )  
 )  
 KLUTI KAAH NATIVE VILLAGE OF )  
 COPPER CENTER, et al., )  
 )  
 Defendants. )

RECEIVED  
NOV 29 1995  
Attorney General's Office  
Juneau

No. A87-0201 CV (HRH)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

This opinion constitutes the court's second decision on the subject of whether Indian Country exists within the boundaries of the State of Alaska.<sup>1</sup>

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<sup>1</sup> This court's earlier decision on this subject is found in State of Alaska, et al. v. Native Village of Venetie, F87-0051 CV, Clerk's Docket No. 154, August 2, 1995. This decision is herein-after referred to as "the Venetie Indian Country decision". 1995 W.L. 462232 (D. Alaska).

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### Introduction

Plaintiffs are the operator (Alyeska Pipeline Service Company, herein "Alyeska") and the owners (Amerada Hess Pipeline Corporation, et al.) of the TransAlaska Pipeline by which oil produced in the Prudhoe Bay oil fields north of the Brooks Range of Alaska is delivered to tidewater for shipment to market. The State of Alaska has intervened in this case as a plaintiff.

The lead defendant, Kluti Kaah Native Village of Copper Center (herein sometimes "the tribe"), is no longer a party to this litigation having been dismissed upon their motion for partial summary judgment on the issue of tribal status. Plaintiffs and intervenor conceded that, by reason of an Executive Branch declaration, the Kluti Kaah Native Village of Copper Center is an Indian tribe. 58 Fed. Reg. 54,364 (Oct. 21, 1993). The litigation continued, however, against the Copper Center Village Council and individuals including the Village Tax Commission. The defendants seek to impose and collect a business activity tax upon those portions of the TransAlaska Pipeline which cross lands which the tribe claims to constitute Indian Country.

By its amended complaint,<sup>1</sup> plaintiffs sought to enjoin the enforcement of the business activities tax or any similar assertion of jurisdiction over plaintiffs. They also sought a declaration

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<sup>2</sup> Clerk's Docket No. 23.

that the tax is invalid and that the tribe does not have territorial jurisdiction to impose such a tax.

The court granted a temporary restraining order<sup>1</sup> on May 13, 1987. By agreement of the parties, that temporary restraining order has remained in effect throughout the course of this litigation.

This case was tried to the court commencing on January 18, 1994. The sole issue for trial was: does the Resolution Area<sup>1</sup> constitute Indian Country? By the agreement of the parties, the court received written narrative statements from many of the trial witnesses. These were adopted as a part of the witness' direct examination which was in many instances supplemented and then subjected to cross-examination. The court has received a significant number of exhibits in support of the testimony of the witnesses of each of plaintiffs, intervenor, and defendants. At the conclusion of the trial, it was agreed that written briefs would be submitted in lieu of closing arguments; and in due course these briefs were filed.

As a part of the final pre-trial process, the court called upon the parties to submit in writing their agreements as to facts

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<sup>1</sup> Clerk's Docket No. 11.

<sup>2</sup> Joint Statement of Issues for Trial, Clerk's Docket No. 197 at 2. By "Resolution Area", the parties had reference to two townships (72 square miles) within which defendants claim a right to assert their business activity tax. See defendants' Exhibit 349.

which were not in dispute. The parties responded with a 46 page Joint Statement of Uncontested Facts.<sup>5</sup> The narrative statements, trial testimony, and exhibits have served to reiterate and to some degree expand upon that to which the parties agreed. In fact, however, there is precious little dispute as to the facts of this case.<sup>6</sup> Rather, the disagreements which are pointed out by the briefing have to do with how applicable law will treat the largely agreed facts of this case.

The court adopts as its initial findings of fact the entirety of the Joint Statement of Uncontested Facts presented by the parties, and that statement of uncontested facts shall be deemed incorporated into this decision by reference. As is appropriate to the arguments of the parties hereinafter discussed, the court will reiterate some of the more important of these findings and will supplement them as necessary.

Having fully considered all of the evidence and the arguments of counsel, and based upon the court's findings, the court concludes that the Resolution Area described by the tribe's Business Activity Tax Resolution<sup>7</sup> does not constitute Indian Country.

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<sup>5</sup> Clerk's Docket No. 196.

<sup>6</sup> "There is no longer any real dispute over the facts, only over application of the law to the agreed upon facts." Defendants' Post-Trial Brief, Clerk's Docket No. 238 at 1.

<sup>7</sup> Plaintiffs' Exhibit 1 at 4; Township 1 North, Range 1 West and Township 2 North, Range 1 East, Copper River Meridian.

### Applicable Law

In the Venetie Indian Country decision, the court traced the long and interesting history of the development of Indian Country case law.<sup>1</sup> It will suffice here to observe that modern Indian Country case law has its roots in three decisions of the United States Supreme Court: Donnelly v. United States, 228 U.S. 243 (1913) (land set apart from public domain as an Indian reservation is Indian Country); United States v. Sandoval, 231 U.S. 28 (1913) (fee lands of Pueblo Indians whom the Legislative and Executive Branches of government treat as dependent communities are Indian Country);<sup>2</sup> and United States v. Pelican, 232 U.S. 442 (1914) (trust lands validly set apart for use of Indians as such, under the superintendence of the government, are Indian Country). In 1948, Congress codified these three decisions in 18 U.S.C. § 1151 which defines the term "Indian Country" as:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a

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<sup>1</sup> Venetie Indian Country decision, Clerk's Docket No. 154 at 4-25.

<sup>2</sup> This brief comment on Sandoval really does not do that case nor its meaning justice. For a fuller discussion of Sandoval, see the Venetie Indian Country decision, Clerk's Docket No. 154 at 9-14.

state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151.<sup>10</sup>

Apropos of its common law heritage, the concept of Indian Country has continued to develop in courts of appeals and in the United States Supreme Court since the 1948 codification of the term. What emerges first, and from the courts of appeals, is a fact oriented methodology for evaluation of claims of Indian Country. Secondly, and coming from the United States Supreme Court decisions, we see a dramatic focusing upon the question of whether land has been validly set apart for the use of Indians as such, under superintendence of the government.

Two circuit court decisions, United States v. Martine, 442 F.2d 1022 (10th Cir. 1971), and United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981), cert. denied, 459 U.S. 823 (1982), appear to lead the way in shaping the law of Indian Country subsequent to the enactment of 18 U.S.C. § 1151. It is these two cases which the Ninth Circuit Court of Appeals drew upon for its analysis of the merits of the Indian Country issue before it on interlocutory appeal from this court's decision granting a preliminary injunction in

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<sup>10</sup> See Revisor's note, 1948 Act, Title 18 U.S.C.A. at 86 (West 1986). Although codified in Title 18 of the United States Code which covers crimes, there is no question but what the statutory definition of Indian Country has application in civil law as well as criminal law. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 n.5 (1987).

favor of the State of Alaska in the Venetie case. Alaska v. Native Village of Venetie, 856 F.2d 1384 (9th Cir. 1988). Each of Martine and South Dakota set out a multi-factored scheme of analysis for a determination of the "quite factually dependent" Indian Country issue. Id. at 1391.

In its Venetie Indian Country decision, this court discussed Martine and South Dakota" and for reasons explained there," the court has reformed the six factors discussed by the Ninth Circuit Court of Appeals in its Venetie decision" as follows:

- (1) the nature of the area;
- (2) the relationship of the area inhabitants to one another, to Indian tribes, and the federal government;
- (3) the extent to which the inhabitants and Indian tribes of the area are under the superintendence of the federal government; and
- (4) the extent to which the area was set aside for the use and occupancy of Indians as such.

Prior to the Eighth Circuit decision in South Dakota, the United States Supreme Court decided United States v. John, 437 U.S.

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" Venetie Indian Country decision, Clerk's Docket No. 154 at 16-18.

" Venetie Indian Country decision, Clerk's Docket No. 154 at 25-27.

" Venetie, 856 F.2d at 1391.

634 (1978).<sup>14</sup> The case seems not to have attracted as much attention in Indian law cases as one might have expected. John is briefly mentioned in South Dakota for the proposition that a state assertion of jurisdiction over land does not necessarily defeat a finding of a dependent Indian community.

In John, the Supreme Court dealt with Choctaw Indian lands which the government had purchased for the Mississippi Choctaws and which Congress had declared to be trust lands. Subsequently, the Department of the Interior proclaimed these same lands to be a reservation.

The defendant, John, was indicted by a federal grand jury. He was tried and convicted of simple assault. On appeal, the Fifth Circuit held that the lands in question were not Indian Country and for this reason, John could not be prosecuted under federal law. See 18 U.S.C. § 1153. While the federal appeal was underway, John was indicted by a state grand jury in connection with the same incident giving rise to the federal prosecution. John was convicted of a more serious offense after a state court trial. He appealed, and the Mississippi Supreme Court affirmed, holding that the federal court did not have jurisdiction.

The United States Supreme Court rejected the conclusion of the Fifth Circuit and the Mississippi Supreme Court on the Indian

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<sup>14</sup> The court here repeats at some length its decision of the most recent United States Supreme Court Indian Country cases because of their critical role in this decision.

Country issue. After expressly taking notice of the three categories of land which Congress defined as Indian Country, it held, drawing upon the authority of McGowan and Pelican, that the test for the existence of Indian Country is, "whether the land in question 'had been validly set apart for the use of the Indians as such, under the superintendence of the Government.'" John, 437 U.S. at 649 (quoting United States v. Pelican, 232 U.S. 442, 449 (1914), and United States v. McGowan, 302 U.S. 535, 539 (1938)). The Court held that the lands purchased for the Choctaws by the government, declared by Congress to be trust lands and by the Executive to be a reservation, constituted a set-aside of land for the use of Indians as such. The Court observed that "[t]he Mississippi lands in question here were declared by Congress to be held in trust by the Federal Government for the benefit of the Mississippi Choctaw Indians who were at that time under federal supervision." John, 437 U.S. at 649. This court takes the foregoing statement to reinforce a point that is easily overlooked: it is not land but Indians which must be under the superintendence of the government in the Pelican/John test for Indian Country.

The Court rejected Mississippi's contention that the Choctaw's had been assimilated and were no longer subject to federal government supervision. As regards superintendence, John contains several significant holdings. Firstly, the fact that the Mississippi Choctaws were a "remnant" of a larger tribe which had

been forced out of Mississippi did not defeat "federal power to deal with [the remnant]." John, 437 U.S. at 653. Secondly, the fact that federal supervision of the Mississippi Choctaws was not continuous did not defeat "federal power to deal with them." Id. Thirdly, citizenship status did not defeat the power of Congress to legislate for the Mississippi Choctaws. Id.

In 1991, in a case somewhat more analogous to that before this court, the United States Supreme Court again returned to the Indian Country question in Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991). In Potawatomi, the Indian tribe sold cigarettes without collecting state sales taxes from a store located upon land held in trust for the tribe by the federal government. Oklahoma sought to collect the taxes. The tribe sued to enjoin the collection of taxes and Oklahoma counterclaimed seeking both to collect the taxes past due and to enjoin the tribe from further sales without collecting applicable state taxes. The bulk of the discussion in Potawatomi has to do with issues of jurisdiction and sovereignty. The case is of value here, however, because unlike John which dealt with reservation lands, the land in Potawatomi was not in a reservation although it was, as indicated above, held by the federal government in trust for the tribe.

The Court held in Potawatomi that the characterization of land as tribal trust lands and reservations was not significant. Speaking for the Court, the Chief Justice wrote:

In United States v. John, 437 U.S. 634 (1978), we stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated "trust land" or "reservation". Rather, we ask whether the area has been "'validly set apart for the use of the Indians as such, under the superintendence of the Government.'" Id., at 648-49; see also United States v. McGowan, 302 U.S. 535, 539 (1938).

Potawatomi, 498 U.S. at 511.

One final circuit level case merits mention at the conclusion of this review of Indian Country case law. In Buzzard v. Oklahoma Tax Comm'n., 992 F.2d 1073 (10th Cir.), cert. denied, 114 S. Ct. 555 (1993), the Tenth Circuit revisited the Indian Country issue. In Buzzard, a band of Cherokee Indians who were organized as a tribe purchased fee land. Under the tribal charter, the tribe could not sell the land without federal approval. It was contended that such approval constituted sufficient federal government involvement for the land to have been validly set apart for Indians as such. The district court held that federal approval of a sale was not the equivalent of a federal set-aside of land for the tribe. The district court concluded that the land in question was not

Indian Country. With nary a mention of its decision in Martine some twenty years previous, the Tenth Circuit affirmed.<sup>11</sup>

In Buzzard, the circuit court expressly recited the Indian Country definition of section 1151 noting that:

In addition the Supreme Court has held that Indian country includes land "'validly set apart for the use of the Indians as such, under the superintendence of the Government.'" Potawatomi Indian Tribe, [498 U.S. at 511 (quoting John, 437 U.S. at 649)].

Buzzard, 992 F.2d at 1076. Thereafter, and without reference to the concept of a dependent Indian community, the circuit court proceeded to analyze the set-aside issue which confronted it. Pertinent to a fuller understanding of the concept of a set-aside, the Tenth Circuit observed, "land is 'validly set apart for the use of Indians as such', only if the federal government takes some action indicating that the land is designated for use by Indians." Id. Similarly, the Tenth Circuit observed that "[s]uperintendency over the land requires the active involvement of the federal government." Id. The court concluded that holding land in trust shows that the government means to exert jurisdiction over the land. Applying these views, the court concluded that the tribal land in question had not been validly set apart for the tribe's use by the federal

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<sup>11</sup> As discussed above, the Tenth Circuit in Martine held that fee land purchased by a tribe was Indian Country. Not surprisingly because it preceded John, Martine, while including as a factor to be considered the established practice of government agencies toward the area, does not focus the attention upon land being set aside for the use of Indian people as does John, South Dakota, and Potawatomi.

government even though Secretarial approval of any sale was required under the tribe's charter. The land was acquired by the tribe unilaterally. The court emphasized that the land in question was acquired just as any other person might do, an apparent reference to the requirement that land be set aside for Indians as such.<sup>16</sup> After discussing how certain consequences<sup>17</sup> of finding Indian Country supported the conclusion that the tribal lands in Buzzard were not Indian Country, the court concluded with the observation that, "[n]othing in McGowan or the cases concerning trust land indicates that the Supreme Court intended for Indian tribes to have ... unilateral power to create Indian country." Id. at 1077.

This court concludes that Buzzard and the United States Supreme Court cases upon which it is founded overturn Martine to the extent that the latter case suggests that a tribe may add to Indian Country by simply purchasing fee title to property from a private, third party. Sandoval, however, stands unaffected by John and Potawatomie owing to the fact that Congress declared the Pueblo lands

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<sup>16</sup> In Buzzard, the Tenth Circuit continued with a discussion of whether or not the subject "land [is] superintended by the federal government." Buzzard, 992 F.2d at 1076. As discussed above in connection with John, this discussion appears misdirected; for the United States Supreme Court has said that the question of land being set aside for Indians as such is one factor and the superintendence of Indians, not land, is another factor.

<sup>17</sup> The court discussed as flowing from an Indian Country determination the limitation of state criminal jurisdiction (which is not a factor in the instant case) and the impact of an Indian Country determination on taxing powers of states.

to be Indian Country as a matter of federal law even though the Pueblo lands were not set aside by the federal government.

This court concludes, based upon Potawatomi, that it does not matter as regards the Indian Country issue whether the tribe does or does not have a reservation. Reading John and Potawatomi together, what does matter is whether, as a matter of fact, the tribe occupies land set aside for Native Alaskans, as such, under the superintendence of the government.

This court concludes, on the basis of John and Potawatomi that Indian Country cannot exist at all without proof of three elements, one of which has almost never been in contest in the Indian Country case law and therefore receives little or no mention. As is explicit in the Ninth Circuit Court's interlocutory decision in Venetie, land claimed to be Indian Country must be inhabited by an Indian tribe. Venetie, 856 F.2d at 1391. Secondly, the tribe must be under the active superintendence of the federal government. Thirdly, the tribe must have had land set aside by the federal government for its people as Natives. If the proof of the claimants to Indian Country fails as to any one of these elements, then the claim of Indian Country fails. The other factors having to do with the area and its inhabitants and their relationships to one another, the tribe and the government focus principally on geographic and demographic considerations which have relevance principally where

there is some significant disagreement as to the extent of Indian Country as distinguished from its existence per se.<sup>18</sup>

The court proceeds now with the discussion of whether or not the defendants have established by a preponderance of the evidence that the Resolution Area constitutes Indian Country.

#### Discussion

As a consequence of motion practice initiated by defendant Kluti Kaah Native Village of Copper Center, the court has determined that the Kluti Kaah, including residents of the Native Village of Copper Center, are an Indian tribe.<sup>19</sup> Although defendant Kluti Kaah Native Village of Copper Center (the tribe) has been dismissed from this case with the concurrence of the plaintiffs, the remaining defendants are the proponents of the tribal tax which the plaintiffs

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<sup>18</sup> In this regard, the court recognizes that there is still some overlap between its factor 2 as regards the relationship of area residents to the federal government and factor 3 having to do with superintendence of Indian tribes by the federal government. See page 7, supra. Although the same facts may well be relevant as to both factors, the focus is different. The location of dealings between inhabitants and federal agencies may well help define the geographic extent of Indian Country where that is at issue. Where, as here, a principal issue is the extent of superintendence, the focus is upon federal activity per se-- what have Congress and the Executive agencies done in relating to Native people as distinguished from where the activity has effect.

<sup>19</sup> Order of December 22, 1993, Clerk's Docket No. 203 at 2. See also, Order of September 20, 1995, Clerk's Docket No. 166 in Native Village of Venetie, et al. v. State of Alaska, F86-0075 CV, with respect to the effect of 58 Fed. Reg. 54,364 (Oct. 21, 1993), a notice entitled: Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs.

challenge; and the court concludes that these remaining defendants are proper parties to defend that tax and assert the existence of Indian Country on behalf of the tribe as a jurisdictional basis for the tax.

As to the second (superintendence) and third (set aside) elements of this case, the court will here as it did in the Venetie Indian Country decision analyze the evidence produced as to all four Venetie factors for the purpose of determining whether the Resolution Area is a dependent Indian community and therefore Indian Country. As in Venetie, this court concludes that a dependent Indian community exists as to Alaska Native tribes when there is the requisite degree of political superintendence<sup>20</sup> by the federal government of a tribe occupying lands set aside for Alaska Natives as such.<sup>21</sup> That requisite degree of superintendence exists where the degree of congressional and Executive agency control over the Alaska Native tribe is so pervasive as to evidence an intention that

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<sup>20</sup> The statutory use of the term "dependent" to modify Indian Country tends to suggest that the focus is upon the state of the tribe claiming to occupy Indian Country. This focus too easily leads to a discussion of only economics. Current Supreme Court case law as hereinafter discussed largely avoids the term "dependent" in favor of the terms "superintendence" or "federal supervision" which tend to broaden and shift the focus of attention to the entirety of the relationship of the federal government to the tribe. United States v. John, 437 U.S. 634, 649 (1978).

<sup>21</sup> Venetie Indian Country decision, Clerk's Docket No. 154 at 4, 27.

the federal government, not the state, be the dominant political institution in the area.

Nature of the Area<sup>21</sup>

The area in which the defendants' business activity tax would apply (Resolution Area) consists of two townships<sup>21</sup> (72 square miles), is located in the center of a broad river valley, and straddles not only the Copper River but also the TransAlaska Pipeline, a major electric power transmission line, and the Richardson Highway, a principal (and the original) roadway connecting tidewater Valdez, Alaska to Fairbanks in the interior of Alaska.<sup>24</sup> That portion of the Resolution Area east of the Copper River is owned by the federal government and has been set aside as

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<sup>21</sup> Although not case dispositive, the court has determined to evaluate factors 1 and 2, nature of the area, and relationships of the area inhabitants, because they involve informative background material which will serve to establish a context for the discussion of other factors which are dispositive of the case.

<sup>22</sup> See note 7, supra.

<sup>24</sup> Defendants' Exhibit 321. See also defendants' Exhibit 349. See also attachment 1 to Second Brelsford Affidavit of May 29, 1987, Clerk's Docket No. 124. Plaintiffs' Exhibit 2 is a photocopy of the Brelsford Affidavit attachment; but the former does not adequately depict the latter for lack of color and lack of an acrylic overlay which depicts the location of the utility and transportation corridor withdrawal (Public Land Order 5150) discussed in the Uncontested Statement of Facts. Plaintiffs' Exhibit 21 is an enlargement of the central and most critical portion of the Resolution Area-- showing in detail the location of the town of Copper Center, the Ahzna subdivision where tribal members reside within the Resolution Area, the pipeline corridor and so forth.

the Wrangell-St. Elias National Park and Preserve.<sup>15</sup> At the very center of the Resolution Area, section 13, T2N, R1W, and section 18, T2N, R1E, straddle the Copper River meridian, one of two cardinal lines from which all land in the Copper River valley has been surveyed.<sup>16</sup> This two-square mile area is, as a practical matter, the "choke point" of the Resolution Area for through this two-square mile area passes the power transmission line, the TransAlaska Pipeline, the Copper and Klutina Rivers, and the Richardson Highway (both new and old). The army telegraph line used to pass through this area. The Copper Center landing strip is just outside of this two-square mile area. The non-Native town of Copper Center has been in existence at the confluence of the Klutina and Copper Rivers since the turn of the century. Except as otherwise noted below, this two-square mile area (plus the airfield land immediately to the north of it) is now and has since the turn of the century been the focal point of all human endeavor in the Resolution Area. Sections 13 and 18 (and a small amount of adjacent land including the airstrip area) are all owned by either private individuals or the State of Alaska. This land is subject to the TransAlaska Pipeline right-of-way.

With the exception of a little over four square miles of land located on the south side of the west one-half of the

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<sup>15</sup> Defendants' Exhibit 321.

<sup>16</sup> Defendants' Exhibit 349.

Resolution Area, the remainder (roughly the westerly one-half) of the Resolution Area is owned by Ahtna, Inc.<sup>27</sup> Ahtna, Inc. is an Alaska business corporation formed to meet the requirements of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601, et seq. As a consequence of ANCSA, Ahtna, Inc. became entitled to select and received patent to significant lands in the Copper River valley, including lands in the Resolution Area.<sup>28</sup> Kluti Kaah Corporation, also an Alaska business corporation formed by members of the tribe pursuant to ANCSA also received title to the surface of significant lands in the Resolution Area.<sup>29</sup> By an agreement and plan of merger entered into by Ahtna, Inc. and various Ahtna region village corporations including Kluti Kaah Corporation, the village corporations merged into Ahtna, Inc. and all of their property

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<sup>27</sup> Defendants' Exhibit 349.

<sup>28</sup> Plaintiffs' Exhibit 19. It is worth noting in passing that approximately half of the Ahtna land holdings in the Resolution Area were available for selection by settlement act corporations because of the revocation of Public Land Order 5150 which had withdrawn a utility and transportation corridor for the TransAlaska Pipeline as authorized by ANCSA. 43 U.S.C. § 1616(c). This withdrawal would have prevented ANCSA corporations from selecting the lands which are presently crossed by the TransAlaska Pipeline within the Resolution Area. In order to solve this land selection problem, Ahtna, Inc. and, among others, the Kluti Kaah Corporation, and Alyeska entered into a private agreement whereby Alyeska would provide certain employment for Ahtna Natives and would not object to revocation of Public Land Order 5150, thereby making these lands available for selection.

<sup>29</sup> Plaintiffs' Exhibit 18.

rights were given over to the successor corporation, Ahtna, Inc.<sup>10</sup> The net result is that neither the tribe nor its village corporation owns any land in the Resolution Area. The United States Government does not hold in trust for the tribe any land in the Resolution Area. Individual members of the tribe hold leases or land use permits authorizing their occupancy of homesite lots in the Ahtna subdivision located between the new and old Richardson Highways in sections 1 and 2 of the western half of the Resolution Area.<sup>11</sup> This subdivision is approximately two miles along the old Richardson Highway from the non-Native town of Copper Center. Although there are a few other amenities such as a community hall adjacent to the Ahtna subdivision, the latter is essentially a residential area. Commercial activity is focused in the non-Native town of Copper Center.

The Resolution Area and surrounding Copper River valley was occupied by perhaps three hundred Natives prior to the turn of the century. In 1898, as a part of the rush for gold in the Yukon Territory, stampedeers heading for the interior of Alaska and the Yukon Territory came down the Klutina River to its confluence with the Copper River; and a community developed there. At the time there was no Native community at this site, although there were small Native settlements north, south and across the Copper River

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<sup>10</sup> Defendants' Exhibit 180.

<sup>11</sup> Plaintiffs' Exhibit 21.

from the miners' community. Although the majority of the miners soon passed on, a few remained; and the court finds from the stipulated facts and other evidence before it that within the Resolution Area, there has always been a majority of non-Native people.

Relationship of Area Inhabitants to One Another,  
to Indian Tribes, and to the Federal Government

Members of the tribe and non-Natives have lived in very close proximity to one another in an area comprising less than three square miles<sup>12</sup> for very nearly a hundred years.

Perhaps realizing that the claim that the entire Resolution Area was Indian Country would necessarily cause the court to examine the relationships between residents of that entire area for purposes of evaluating the cohesiveness of the residents-- whether they constituted a single community or not, counsel at the outset of the trial in his opening statement on behalf of the defendants took the position that:

The area at issue is not the entire resolution area, even though the tax purports to assert

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<sup>12</sup> The court has reference here to sections 1 and 12 in the western one-half of the Resolution Area (T2N, R1W, C.R.M.) and section 18 in the eastern half of the Resolution Area (T2N, R1E, C.R.M.). Plaintiffs' Exhibit 21 and defendants' Exhibit 349. This appears to imply a gap of one or two miles between two communities. That is really not an accurate picture of the situation; for the reality is that the entire Copper Center community (meaning both the Native and non-Native community) is strung out along a three-mile stretch of the old Richardson Highway between the Ahtna subdivision on the north in sections 1 and 2 and the former Blix homestead property in the south located in section 18. The airport and the old school for the community are located in between.

jurisdiction over the resolution area. The area at issue, and the only area at issue, is the area underlining [sic] the -- Alyeska pipeline. ....

[T]he tribe does not contend that the non-Native community of Copper Center is a part of their dependent Indian community. All the tribe contends is that their former Kluti Kaah Corporation lands<sup>11</sup>) are Indian Country.

Trial Transcript, Vol. I at 9. In substance, defendants now contend that only the area outlined in red within the Resolution Area on defendants' exhibits is Indian Country.<sup>14</sup>

The court cannot force the defendants to claim as Indian Country an area as to which they desire to abandon that claim. The defendants cannot, however, by so doing force the court to disregard the relevant community and the relevant relationships of area inhabitants. Considering all of the evidence, including the Joint Statement of Uncontested Facts, the court finds, as summarized below, that for purposes of defendants' claim of Indian Country in this case, the relevant community extends from the former Blix homestead property in section 18 to the Ahtna subdivision property in sections 1 and 2 as well as the intervening lands adjacent to the old Richardson Highway and east of the new Richardson Highway as

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<sup>11</sup> As set out above, Ahtna, Inc. succeeded to ownership of most of the Western half of the Resolution Area upon merger of Kluti Kaah Corporation into Ahtna, Inc.

<sup>14</sup> Defendants' Exhibit 149.

they cross sections 12, 13 (T2N, R1W, C.R.M.), and the southwest corner of section 7 (T2N, R1E, C.R.M.).<sup>13</sup>

The Ahtna lived and hunted and fished in the vicinity of the area above-described including in the Resolution Area and beyond since before the first contact with Europeans. The Ahtna Indians of the general area met Russian explorers with force and apparently massacred them. A much different relationship developed very rapidly between United States Army personnel who came into the area following the gold rush in the 1890s. There is no evidence of hostility between the miners or army personnel and the Ahtna. Indeed, it appears that the Ahtna went out of their way to be of assistance. The population explosion put a severe strain on local resources; and it is clear that the Ahtna became dependent upon the army for sustenance for many years. The army was followed by government school teachers who in retrospect probably did the Ahtna more harm than good by luring them away from their traditional ways and more particularly by encouraging them to settle near Copper Center around the school which was located in what has now been surveyed as section 12 on the west side of the old Richardson Highway.<sup>14</sup> After enactment of ANCSA, the Native residential area moved north slightly into the Ahtna subdivision on Ahtna lands in

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<sup>13</sup> Plaintiffs' Exhibit 21. Both Native and non-Native residents of this community have, of course, used a much larger area for subsistence hunting and fishing.

<sup>14</sup> Plaintiffs' Exhibit 21.

sections 1 and 2. The non-Native residential and business area remained at its original site on the Blix homestead in section 18. All of these people have lived, hunted, fished and worked together, in the same area right down to the present.

As detailed in the Joint Statement of Uncontested Facts, there is a long history of Ahtna people performing non-traditional work in the area including cutting firewood for sale, operating ferries, performing labor on the construction of the army road which was the predecessor to the Richardson Highway, the government telegraph line and for non-Native miners in the area. Most recently, Ahtna, Inc., on behalf of members of the tribe, has secured commitments from Alyeska for substantial maintenance contracts and thus Native employment in connection with the operation of the TransAlaska Pipeline. There is a very long history of a community of interest between all residents of the Resolution Area as regards employment for wages.

Within the Resolution Area, Native and non-Natives reside in a segregated fashion as a general proposition. That said, however, it is also a fact that the State of Alaska has operated the only schools in the area since the 1960s; and there must therefore be a very definite community of interest between all residents of the area as regards education. The only commercial activity in the Resolution Area is located in section 18. There is, for example, no tribal store in the Ahtna subdivision.

Until the Ahtna lands were closed to non-members, Natives and non-Natives all hunted and fished the same areas, they all worked together, they all went to the same school, and they all shopped in the same commercial areas. Except socially and in the location of residences, there is a distinct community of interest amongst all who reside in the last mentioned area. The facts pointing to a cohesiveness between all of the residents of the area significantly outnumber those facts suggesting separation between the Native and non-Native communities.

The defendants refer to the tribe's ANCSA lands which Ahtna, Inc. now owns as the relevant Native community. That area is not now and never has been a community unto itself. As set out above, the court has found that the relevant community from a geographic prospective encompasses both the Native and the non-Native community of Copper Center. The best that can be said from the defendants' point of view is that there are two very interdependent communities of people residing in the relevant area. There is not one cohesive Native community.

The court now turns from the subject of the relationships of area inhabitants to the subject of relationships between area inhabitants and the tribe. Natives who reside in the Resolution Area are members of the tribe. Non-Natives are of course excluded from tribal activity. Non-Natives have had little or no knowledge of the tribe per se and virtually no contact with it as a legal

entity. The fact that non-Native residents of the area had little or no knowledge of the existence of a tribe is not at all instructive about whether the tribe occupies Indian Country.

Finally, the Resolution Area has long been the focus of significant contacts between area residents and the federal government. The United States Army assisted Natives and non-Natives alike as miners passed through the Resolution Area on their way to the gold fields in central Alaska and the Yukon Territory. The federal government provided schools for the Native residents of the area down to 1960 when the State of Alaska took over the education function. From the turn of the century, federal government agents assisted with the health and general welfare needs of Natives in the area. The federal government encouraged non-Natives to settle in the area through homestead laws and the short-term presence of an agricultural experiment station. The federal government built the original Richardson Highway through the area and undoubtedly subsidized the reconstruction of the road when the new Richardson Highway was built to the east of the original highway. The federal government made available much of the right-of-way for the TransAlaska Pipeline.

Native residents of the Resolution Area continue to receive significant services and benefits, either directly from various federal agencies such as the BIA and the Indian Health Service or indirectly through the Copper River Native Association.

Various medical and other similar social services are provided. Programs also exist in the fields of education, housing, and village government.<sup>37</sup>

In addition to currently providing the school for the area, the State of Alaska has, since statehood in 1959, provided a wide range of governmental services. The State of Alaska has exercised civil and criminal jurisdiction throughout the Resolution Area and surrounding territory including activities by the Alaska Department of Public Safety, State Troopers and Division of Fish and Wildlife Protection, Division of Fire Protection and Division of Motor Vehicles.<sup>38</sup> The Alaska Department of Environmental Conservation,<sup>39</sup> the Alaska Department of Transportation and Public Facilities,<sup>40</sup> the Alaska Department of Fish & Game,<sup>41</sup> and the Division of Forestry of the Department of Natural Resources<sup>42</sup> have all been involved in their respective areas with respect to the Copper River valley.<sup>43</sup> The State of Alaska commenced exercising

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<sup>37</sup> Joint Statement of Uncontested Facts, Clerk's Docket No. 196 at 39-40, ¶¶ 115-16.

<sup>38</sup> Clerk's Docket No. 201, Burton testimony at 1-5.

<sup>39</sup> Clerk's Docket No. 233a, Sandor testimony at 1-4.

<sup>40</sup> Clerk's Docket No. 201, Campbell testimony at 1-2.

<sup>41</sup> Clerk's Docket No. 201, Tobey testimony at 1-3.

<sup>42</sup> Clerk's Docket No. 201, Maricle testimony at 1-3.

<sup>43</sup> See Campisi testimony, TR 1-109-10.

taxing jurisdiction for the entire length of the TransAlaska Pipeline, including the Resolution Area, since the inception of pipeline operations.<sup>4</sup>

Finally, the court takes note of the fact that prior to enactment of the tribal business activity tax, the Kluti Kaah village counsel had not attempted to exert governmental authority over non-Natives. Cole, TR 2-83-84.

Defendants claim that the Department of the Interior has treated the area as Indian Country. They argue that having been declared a tribe, the Kluti Kaah must be a community. Community residence is a part of the common law concept of tribal status. Montoya v. United States, 180 U.S. 261, 266 (1901).

The Department of the Interior has indeed declared that the Kluti Kaah are a tribe, but that decision was an exercise of Executive, political power. The exercise of that power requires no special fact finding and is subject to attack only for arbitrariness. United States v. Sandoval, 231 U.S. 28, 46 (1913). The Executive decision to constitute the Kluti Kaah as a tribe does not prove that there is a distinctly Native, cohesive community in the Resolution Area. In addition, just prior to the trial of this case, the Solicitor for the Department of the Interior opined that "Native

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<sup>4</sup> Joint Statement of Uncontested Facts, Clerk's Docket No. 196 at 6, ¶ 10.

Corporation lands in Alaska do not qualify as Indian country."<sup>45</sup> The United States government has not treated the Resolution Area as Indian Country.

The defendants argue that the federal government exercises control over the tribe and point to a number of provisions of ANCSA to support this contention: limits upon alienability of corporation stock, section 1606(h)(1), tax exemptions, section 1620, security law exemptions, section 1625, corporate options with respect to corporate stock, section 1606(l)(B) and (C). Defendants also point to provisions for a land bank, section 1636. Undeniably, Congress has continued special provisions for Natives as regards their operation of ANCSA corporations. Congress has sought to ease these entities into the business world rather than turn them out all at once. As discussed further hereinafter, these provisions do not, however, amount to active superintendence of the tribe. These protections are passive provisions which either are self-executing or are optional, the control being with the corporations, not the federal government. For example, whether land is developed so as to become taxable is up to the corporations. Whether land should be placed in the special protected status of the land bank is entirely up to the corporation. How the Native corporations and

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<sup>45</sup> Op. Solic. Dep't Interior, M-36975 (Jan. 12, 1993) at 132, ¶ 5.

their lands should grow and develop is left almost entirely to the decision of the corporations.

The defendants contend that the federal government's administration of the pipeline right-of-way under 43 U.S.C. § 1651, et seq. amounts to oversight or control over the tribe. Defendants are wrong. It is the private plaintiffs, not the tribe, which are subject to oversight and regulation under the TransAlaska Pipeline Authorization Act.

Defendants suggest that an Indian community which is a tribe is by definition dependent. This argument begs the very question which this case presents. To prevail in this case the defendants must be a tribe (which is conceded), they must prove that the tribe occupies land set apart for Alaska Natives as such, and they must prove that the tribe is under the active superintendence of the federal government. For purposes of this case, the current discussion of relationships between area inhabitants, the tribe and the federal government provides useful background information as to the dispositive issues of land being set aside and active superintendence.

This information also shows that the role of the federal government vis-a-vis the area, its residents, and the tribe has significantly changed and diminished in relation to the role of the State of Alaska over the years. We are a very long way away from

the days of Indian agents whose reports are summarized in excruciating detail in the Sandoval decision.<sup>46</sup>

#### Federal Superintendence of Resolution Area

In order to establish their claim that the tribe occupies Indian Country, the defendants must prove by a preponderance of the evidence that the tribe is under superintendence of the federal government. This concept brings into play the "dependent" component of the second form of Indian Country defined by 18 U.S.C. § 1151(b). It is in this area that the case law developed above becomes most important.

The concept of dependence as regards American Indian tribes in fact pre-dates Sandoval. In the course of formulating the relationship which would exist between the United States and Indian tribes, Chief Justice Marshall in Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831), characterized Indian tribes as "domestic dependent nations." In Cherokee Nation as well as Worcester v. Georgia, 31 U.S. 515 (1832), Chief Justice Marshall used much language which is familiar to us even today as regards Indian tribes and their relationship to the federal government. As discussed in detail above, the Supreme Court spoke again of dependent Indian communities in Sandoval, 231 U.S. at 46; and here also the focus of the discussion was the relationship between distinctively Indian

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<sup>46</sup> Sandoval, 231 U.S. at 40-44.

communities and the federal government, in particular Congress, which has the primary obligation of determining for what period of time and to what extent Indian tribes shall remain under the guardianship and protection of the United States. Id. In John and Potawatomi, the Supreme Court has used different words-- speaking of superintendence of Indian tribes by the United States, but the substance of the concept is the same.

In briefing this issue for the court, the defendants have suggested that tribal dependence is a politically oriented issue; and the plaintiffs do not disagree. The foregoing authorities (especially Sandoval and John) show that the focus should indeed be political. As the dominant sovereign entity, it is for the federal government to determine for what time and to what extent tribes will be supervised. That is a political consideration. The court does not suggest that the economic relationship between the federal government and a tribe is irrelevant. Benefits provided to tribes by the federal government are some evidence of a congressional determination to continue superintendence. Our inquiry is the broader one of the totality of the interaction (the political relationship) between the federal government and the tribe wherein the focus is upon how the federal government conducts itself toward the tribe, not the reverse. Superintendence by the federal government, and the consequential political dependence on the part of the tribe, exists for purposes of section 1151(b) where the

degree of congressional and executive control over the tribe is so pervasive as to evidence an intention that the federal government, not the state, be the dominant political institution in the area.<sup>47</sup>

The court now analyzes the question of whether the federal government presently exercises active superintendence over the Kluti Kaah tribe. In doing so, the court reiterates its adoption of the Joint Statement of Uncontested Facts and continues its consideration of other fact findings made herein. To the foregoing, the court now adds its evaluation of the impact of ANCSA upon the question of whether the federal government has continued its political dominance of the tribe beyond 1971.

The tribe never petitioned for and does not have any formal, political relationship with the BIA as would be the case had it petitioned for such under the Indian Reorganization Act (IRA), 25 U.S.C. § 461, et seq. Similarly, there is no state chartered

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<sup>47</sup> "[T]he Indian country classification is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands." Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm'n., 829 F.2d 967, 973 (10th Cir. 1987), cert. denied, 487 U.S. 1218 (1988). The foregoing quotation is followed by a litany of authorities including Felix S. Cohen, Handbook of Federal Indian Law 5-8 (1942) ("Indian country" generally determines allocation of tribal, federal, and state authority). See also Op. Solic. Dep't Interior, M-36975 (Jan. 12, 1993) at 116, where the Solicitor opines that:

[W]e repeat the guiding principle that Indian country comprises those lands that Congress intended, as a general matter, to be beyond the jurisdictional reach of the state and subject to the primary jurisdiction of the Federal Government and tribes, even though those lands are geographically within the boundaries of a state.

municipal entity serving the residents of the Resolution Area. Rather, the entire gambit of state governmental services for the area are provided through the political branches of the state government.

Despite the foregoing, until 1971 there was room for a fair argument that the tribe had been treated by Congress and the Executive agencies of the federal government as being subject to active superintendence to such a degree as to amount to a dependent Indian community for purposes of 18 U.S.C. § 1151(b). Until 1971, the Native residents of the Resolution Area by and large lived within the boundaries of the school reserve set aside by the Executive Branch for a Native school in 1905.<sup>48</sup>

In 1971, as a part of the settlement of claims to aboriginal title to land and hunting and fishing rights, Congress enacted the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601, et seq. (ANCSA), and thereby effected a significant change in relationship as between the federal government and Alaska Natives. The legal and factual history of Alaska Native land claims was discussed extensively and was published by Judge Fitzgerald of this court in United States v. Atlantic Richfield Co., 435 F. Supp. 1009,

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<sup>48</sup> It is arguable that this reserve was purely for school purposes and not for Native occupancy; however, the evidence discloses that Executive Branch employees in fact encouraged Native occupancy of the land and, as indicated in the text, Natives have in fact occupied the area from shortly after designation of the school reserve right down to recent years.

1014 (D. Alaska 1977), aff'd on appeal 612 F.2d 1132, cert. denied, 499 U.S. 888 (1980).

In declaring a settlement with Alaska Natives, Congress expressly provided that all prior conveyances of public lands, including tentative approvals of lands under the Alaska Statehood Act, constituted an extinguishment of aboriginal title. 43 U.S.C. § 1603(a). Congress abolished all other aboriginal land titles including those with respect to submerged lands as well as aboriginal hunting and fishing rights. 43 U.S.C. § 1603(b). Finally, in extremely broad language, Congress extinguished all claims based on claims of aboriginal title or based on any statute or treaty of the United States relating to Native use and occupancy of land. 43 U.S.C. § 1603(c).

In exchange for all of the abrogated rights, Congress made provision for land grants totalling 44 million acres and the payment of over 962 million dollars. 43 U.S.C. §§ 1613, 1605, 1608(g). The land grants went to neither individual Natives, tribes, nor other Native organizations such as Indian Reorganization Act entities. Rather, Congress required the formation of regional and village, state law, "business for profit" corporations which would take title to land and receive the settlement funds. 43 U.S.C. §§ 1606(d), 1607(a).<sup>49</sup> Somewhat oversimplified, the regional corporations took

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<sup>49</sup> Villages were permitted to choose between "business for profit or nonprofit" state law incorporation. 43 U.S.C. § 1607(a).

fee title to the bulk of the land and ownership of the subsurface of village lands. Village corporations took surface title only to the lands immediately surrounding the village.

Also as a part of the statutory reorganization of the relationship between the federal government and Alaska Natives, Congress revoked all reservations in Alaska, whether created by Congress or the Executive Branch with the exception of that on Annette Island for the Metlakatla Indian community. 43 U.S.C. § 1618(a).<sup>50</sup> ANCSA does, however, contain a special provision applicable to Alaska Natives whose reservations were revoked. By section 1618(b), ANCSA permitted members or stockholders of village corporations which previously had the benefit of a reservation to vote that their corporation take fee title to the former reservation lands. As discussed in somewhat more detail in a following section of this decision, the tribe's village corporation, Kluti Kaah Corporation, did not endeavor to claim the school reserve as a basis for taking fee title to those lands pursuant to section 1618(b) of ANCSA. Rather, Kluti Kaah Corporation made selections and briefly took title to them, including lands in the Resolution Area.

This foregoing corporate model for a resolution of Native land claims was, of course, a dramatic departure from prior Indian settlements approved by Congress. Although some have apparently

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<sup>50</sup> In a parallel provision, 43 U.S.C. § 1617(a), the Indian Allotment Act was repealed as to Alaska, except as to pending allotment applications.

viewed ANCSA as a termination act, the court shares the view of the Secretary of the Department of the Interior who has opined that ANCSA is not "a termination statute that forecloses the exercise of all governmental powers by Native villages."<sup>31</sup> Rather, ANCSA is a new Native self-determination act. Whereas a prior termination effort sought to scatter Indians and Indian land holdings by allotting out reservations to individuals, the corporate settlement model leaves Alaska Natives with collective control of their lands and what should be done with them. That control is by and large in the hands of a board of directors, a management group made up from the Native communities themselves who must exercise collective judgment as to how to deal with the land grants and money. The federal government no longer has any right or responsibility for the active supervision of Alaska Natives with respect to the lands which they occupied after extinguishment of aboriginal titles. The court finds that this corporate model effects a significant diminution of the power of Congress and the Executive agencies over Alaska Native tribes

In addition to setting up a structure which largely freed Alaska Natives from congressional and Executive agency dominance as regards land and money, Congress was quite explicit in stating its

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<sup>31</sup> Op. Solic. Dep't Interior, M-36975 (Jan. 12, 1993) at 101; 104.

policy reasons for choosing the mode of settlement which was effected. In ANCSA, Congress has found and declared that:

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

43 U.S.C. § 1601(b).

Several aspects of the foregoing policy declaration are most pertinent to this court's analysis of the relationship between the federal government (Congress in particular) and Alaska Native tribes. Firstly, Congress sought to maximize the participation of Natives in decisions affecting their rights and property. This strongly suggests a shift from government superintendence to self regulation. This declaration of policy suggests tribal independence, not dependence. Secondly, Congress negated the establishment of permanent, racially defined institutions. This, too, bespeaks the intent of Congress to draw back from its historic role of adopting substantial legislation under the Indian Commerce Clause. U.S. Const. art. I, § 8, cl. 3. As a legal entity or person, corporations are race neutral. Tribes are by definition

race oriented."<sup>2</sup> Thirdly, the policy declaration disowns the reservation system which had been the centerpiece of the relationship between Congress and Indian tribes since the middle of the 19th century. Finally, and perhaps most notable, Congress expressly declared its intention not to have an ongoing "wardship or trusteeship" relationship with Alaska Native tribes. In very simple terms, a "ward" is, "[a] person, especially a child, or incompetent, placed by the court under the care of a guardian." Black's Law Dictionary 1420 (5th ed. 1979). In terms of Indian law, Indian people and tribes were long considered incompetent to manage their own affairs and property without the superintendence of Congress and Executive Branch agencies. By the foregoing declaration of policy, Congress has clearly said, no more! Congress now means for Alaska Natives to have "maximum participation ... in decisions affecting their rights and property ... without ... [a] wardship or trusteeship." 43 U.S.C. § 1601(b).

Also consistent with the view that Congress meant to establish an entirely new course or direction for Indian self-determination, Congress required that village corporations receiving land grants under ANCSA must convey 1280 acres of village corporation land to any municipal corporation in the village, and

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<sup>2</sup> The classic definition of an Indian tribe is contained in Montoya v. United States, 180 U.S. 261, 266 (1901): "[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...."

if there were none, such land must be conveyed "to the State in trust for any Municipal Corporation established in the Native village in the future...." 43 U.S.C. § 1613(c)(3). The court views this purposeful inclusion of and provision for state law municipal entities to be both practically and politically (although not legally) inconsistent with the greater degree of state exclusion which necessarily flows from a finding of Indian Country. The record in this case does not reflect whether, there being no municipality in the Resolution Area, lands have been conveyed in trust to the State of Alaska for municipal purposes in the Resolution Area. Be this as it may, the potential for such an obligation exists and the congressional purpose of facilitating the development of state law municipal entities as distinguished from traditional, Native entities is clear and consistent with the philosophy of ANCSA that the settlement with Alaska Natives be effected without the establishment of permanent, racially defined institutions. IRA institutions are racially oriented. Municipal entities are not racially oriented.

As enacted in 1971, ANCSA does not once mention the term "Indian Country". The court supposes, but does not know because the legislative history of ANCSA is uninformative, that Congress deliberately, and no doubt for political reasons, left unresolved the Indian Country question which this court ruled upon in its Venetie Indian Country decision. That the Indian Country issue was

not expressly resolved by ANCSA does not detract from the fact that ANCSA unmistakably affects the balance of power (the degree of dependence and superintendence) in the relationship between the federal government and Native tribes; and Congress is presumed to have known that it was affecting that relationship by the adoption of ANCSA."

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" It is appropriate to here observe that when Congress revisited the Settlement Act for purposes of the Alaska Native Claims Settlement Act amendments of 1987, Pub. L. No. 100-241, Feb. 3, 1988, 100 Stat. 1788, it exercised great care to make it clear that the amendatory act was not to tilt the scale one way or the other as regards the Indian Country issue. Section 17 of the amendments act provided that:

(a) No provision of this Act (the Alaska Native Claims Settlement Act Amendments of 1987) ... shall be construed to validate or invalidate or in any way affect --

(1) ...

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

Pub. L. No. 100-241, § 17(a), Feb. 3, 1988, 101 Stat. 1814. The published legislative history on the amendments of 1987 further underscore the intent of Congress that, "[t]his is an issue which should be left to the courts in interpreting applicable law and that these amendments should play no substantive or procedural role in such court decisions." S. Rep. No. 201, 100th Cong., 1st Sess. 23 (1987), reprinted in 1987 U.S.C.C.A.N. 3269, 3274. Similarly, the House of Representatives' explanatory statement with respect to the amendments of 1987 indicate an intention that the amendments "should be scrupulously neutral" on the question of tribal powers or self government. H.R. Explanatory Statement, 100th Cong., 1st Sess. 1 (1987), reprinted in 1987 U.S.C.C.A.N. 3269, 3299.

Clearly, Congress understood that this court would in the first instance decide the Indian Country issue based on all of the pertinent facts and law. This court is not, however, to be influenced in that decision by reason of Congress having amended ANCSA.

Other congressional acts, both pre-dating and post-dating ANCSA, have relevance to the court's appraisal of the degree of dependence and/or superintendence which exists now as between the federal government and Alaska Native tribes.

Firstly, as to Alaska and a relatively few other states, Congress has made special provision for state civil and criminal jurisdiction with respect to Indians. In 1958, the Territory of Alaska was added to California, Minnesota, Nebraska, Oregon and Wisconsin as jurisdictions in which 28 U.S.C. § 1360<sup>M</sup> would have application. Under section 1360(a),

Each of the States listed in the following table (which includes Alaska) shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.

Similarly, 18 U.S.C. § 1162(a) provides in pertinent part:

Each of the States or Territories listed in the following table (which again included Alaska as of 1958) shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere

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<sup>M</sup> Often referred to in both case law and legal literature as Public Law 280.

within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.

Thus, even if this court were to conclude that the Resolution Area or part of it was Indian Country, Congress had long before the adoption of ANCSA determined that there was no need to protect Alaska Natives from the imposition of state civil and criminal law. The evidence shows that the Alaska State Troopers and State Fish and Game officers, not federal authorities, provide law enforcement in the Resolution Area. In Alaska, there is not and, since 1958, has not been the exclusivity of protection for Alaska Natives under the jurisdiction of federal authorities that previously existed and still exists in many of the western states as to Indians."

In 1980, Congress adopted the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101. ("ANILCA")<sup>4</sup> Pertinent to the matter before this court, title VIII of ANILCA, 16 U.S.C. § 3111, made extensive provision for subsistence hunting and fishing

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<sup>3</sup> Defendants contend that this discussion of Public Law 280 proves too much since it only applies in Indian Country. Defendants miss the point. Public Law 280 demonstrates a significant diminution of federal superintendence of Alaska Natives to the extent that Indian Country exists in Alaska at the present time; for example, the Metlakatla Indian Reservation on Annette Island in southeast Alaska.

<sup>4</sup> ANCSA contemplated that there would be an Alaska lands act, the matter sometimes being referred to as the "D2" legislation. 43 U.S.C. § 1616(d)(2). Congress worked on the D2 legislation almost continuously from the enactment of ANCSA until the legislation was completed in 1980.

rights in Alaska. In enacting ANILCA, Congress invoked both its "constitutional authority over Native affairs" as well as its "constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on public lands by Native and non-Native rural residents" of Alaska. 16 U.S.C. § 3111(4). The court emphasizes here that the subsistence hunting and fishing rights were enacted in a fashion true to the declared policy of ANCSA that Congress would in the future avoid the creation of racially defined institutions. ANILCA was enacted for the benefit of all rural Alaskans, not just Native Alaskans.<sup>37</sup>

Based upon the Joint Statement of Uncontested Facts, the evidence produced at the trial of this case, and the discussion of both hereinabove, this court now finds that the tribe is not a dependent Indian community. By 1971, the federal government ended its active superintendence of the Kluti Kaah Tribe. The federal

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<sup>37</sup> The court does not mean to suggest that Congress has, since the adoption of ANCSA, evidenced an intention to abandon totally its Article I, Section 8 constitutional power to legislate with respect to Alaska Natives. Subsequent to the enactment of ANCSA, Congress has also had occasion to adopt or amend other federal laws for the benefit of Indians and has extended those laws to Alaska Natives. For example, the Indian Child Abuse and Family Violence Prevention Act, 25 U.S.C. § 3201, et seq., is made applicable in Alaska by expansion of the definition of the term "Indian Reservation" for purposes of this Act to include among other entities, "village corporations under the provisions of the Alaska Native Claims Settlement Act...." 25 U.S.C. § 3202(9). By contrast, the Indian Land Consolidation Act, 25 U.S.C. § 2201, et seq., unmistakably omits ANCSA corporation lands from that Act. 25 U.S.C. § 2201.

government is no longer the dominant political institution in the Resolution Area to the exclusion of the state.

Extent to Which Resolution Area was Set Aside  
for the Use and Occupancy of Alaska Natives

As already indicated, members of the tribe have inhabited small portions of the Resolution Area as well as lands adjacent thereto and have hunted and fished over all of the Resolution lands and adjacent lands since prior to the first contact with Europeans. In 1905, a school reserve was set aside by the Executive Branch and tribal members were encouraged to settle on the school reserve which was originally 1041 acres and was subsequently augmented by access to the former agricultural experiment station which added another 775 acres." What remained of the school reserve as of 1971 was revoked by ANCSA. 43 U.S.C. § 1618(a)."

Assuming for the sake of discussion that the school reserve constituted a set aside of land by the federal government for the use and occupancy of Natives, that land was in essence reclaimed by the federal government free of the reservation. The same lands and others were in due course conveyed away not to an Indian tribe, not to an IPA, and not to individual members of the tribe.

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" The entirety of lands set aside for an agriculture experiment station was withdrawn by 1941. Joint Statement of Uncontested Facts, Clerk's Docket No. 196 at 15, ¶¶ 45, 46.

" Joint Statement of Uncontested Facts, Clerk's Docket No. 196 at 16, ¶ 49.

Rather, through ANCSA, Congress required that the Native people of the area form a regional corporation and several village corporations; and it was a regional corporation, Ahtna, Inc., and a village corporation, Kluti Kaah Corporation, to which the Resolution lands now claimed by the defendants to be Indian country were conveyed. Kluti Kaah Corporation received title to its ANCSA lands by patent on July 18, 1980. Effective September 30, 1980, and by reason of the merger agreement between Ahtna, Inc. and the village corporations including Kluti Kaah Corporation, the lands of the latter were transferred to Ahtna, Inc.<sup>90</sup> This decision to abandon the village corporation was the private decision of the tribal member-stock holders of Kluti Kaah Corporation and Ahtna, Inc. It is true that federal law permitted such a merger.<sup>91</sup> However, the federal government did not require any such decision of either Ahtna, Inc. or Kluti Kaah Corporation as an act of a dominant sovereign entity. Rather, the availability of the option of a merger was consistent with the policy declaration of ANCSA that Alaska Natives have maximum participation "in decisions affecting their rights and property...." 43 U.S.C. § 1601(b).

The net result of the merger of Kluti Kaah Corporation into Ahtna, Inc. is that the latter came into ownership of

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<sup>90</sup> Joint Statement of Uncontested Facts, Clerk's Docket No. 196 at 22, ¶ 68; and at 37-38, ¶ 111.

<sup>91</sup> 43 U.S.C. § 1627.

unrestricted fee title to those portions of the lands which are now claimed by the defendants to be Indian Country. These lands are not subject to any trust arrangement for the benefit of Alaska Natives. The federal government has no ownership interest whatever in the lands inasmuch as Public Land Order 5150 has been revoked as to the Resolution Area and the lands absolutely conveyed away to ANCSA corporations subject only to the pipeline right-of-way.<sup>21</sup>

In the interest of both accuracy and preciseness, it should be observed at this point that, in a very practical way, ANCSA does set aside land for the benefit of Native Alaskans. In doing so, however, Congress has unmistakably negated the requirement of John, Potawatomi, and Buzzard<sup>61</sup> that land not only be set aside for Indians but that the land be set aside for Indians as such. Congress plainly intended and understood that ANCSA corporations would act as ordinary private business corporations-- like ordinary United States citizens, not Indians.

Summing up the foregoing, the court finds that by conveying unrestricted fee title to ANCSA lands to Ahtna, Inc. and Kluti Kaah Corporation, the federal government intended and in fact did eschew all further involvement in those corporate lands. By

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<sup>21</sup> It is of course true that Alyeska has a private agreement with Ahtna, Inc. under which the private plaintiffs are entitled to additional access to Ahtna lands for purposes of the pipeline if needed. This is a purely private arrangement. The federal government is not involved.

<sup>61</sup> See pages 12-13, supra.

instituting a corporate model for the settlement, and by insisting that ANCSA corporations make land available to state law municipal corporations in the village areas, Congress chose both a racially neutral form of land ownership and a racially neutral form of political governance. This court finds that the conveyance of land by the federal government to regional and village business corporations was not intended to be and in fact was not a set aside of lands "for the use of the Indians as such...." John, 437 U.S. at 649 (emphasis added). 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.<sup>4</sup>

What is particularly significant about this case is the fact that, in addition to the federal government not owing or holding any relevant land in trust for Natives, the tribe itself owns no land. There is no land controlled by the tribe to which its claims to Indian Country power or jurisdiction may attach. Indeed, the only connections between the tribe and any land to which the defendants can point are the right of individual tribal members to obtain from Ahtna, Inc. leases or land use permits for up to five

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<sup>4</sup> While this court thinks the Tenth Circuit would decide Martine differently today, even that case involved a tribe acquiring fee land from third parties which was adjacent to Indian Country--an extant reservation. The Kluti Kaah tribe in our case occupies no Indian Country whatsoever if the land it obtained from the federal government and conveyed to Ahtna, Inc.; is not Indian Country.

acres and the right of the tribe to have some say in the development of the former village corporation lands by Ahtna, Inc. Some tribal members have taken advantage of the former opportunity. These are purely private arrangements. They do not amount to a set aside of land by the federal government for the use and occupancy of Natives as such.

The defendants' response to all of the foregoing is in substance: there is no legal requirement that land be "set apart" for Natives in order to establish Indian Country." By reference to Bates v. Clark, 95 U.S. 204, 208 (1877), the defendants contend that no governmental action is required to establish Indian Country which flows from aboriginal title. Defendants misconstrue both Bates and John. Bates stands for the proposition that aboriginal Indian lands are Indian Country as long as Indians hold title to them but that as soon as they part with aboriginal title it ceases to be Indian Country, without further act of Congress. Bates, 95 U.S. at 208-9. By ANCSA, Congress itself expressly extinguished "all aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy...." 43 U.S.C. § 1603(b). As a consequence, defendants can make no claim that Indian Country exists in Alaska based upon aboriginal title. As for John, the defendants simply defy John and the other Supreme Court decisions upon which

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" Defendants' post-trial brief, Clerk's Docket No. 238 at 31.

it is founded, all of which stand for the proposition that the test for the existence of Indian Country is, "whether the land in question 'has been validly set apart for the use of Indians as such, under the superintendence of the Government.'" John, 437 U.S. at 649 (quoting United States v. Pelican, 232 U.S. 442, 449 (1914), and United States v. McGowan, 302 U.S. 535, 539 (1938)). In John, the Supreme Court held that a government purchase of land for Natives and subsequently declared to be trust lands by Congress and a reservation by the Executive constituted a set aside. Defendants in essence appear to argue that wherever a tribe resides, that is Indian Country. Such is simply not the law.

The Ahtna, Inc. lands located within the Resolution Area do not meet the set-aside factor necessary to support a finding that the Kluti Kaah occupy Indian Country.

#### Conclusion

In summary, this court finds that the lands of Ahtna, Inc. have not been set aside for Alaska Natives as such under the superintendence of the federal government. This court further finds that no lands have been set aside for the Kluti Kaah as a tribe under the superintendence of the federal government; and the rights which the Kluti Kaah have and exercise as between itself and Ahtna, Inc. are not the equivalent of a set aside under the superintendence of the federal government. The court finds that the Kluti Kaah,

although a tribe, are not a dependent Indian community for purposes of 18 U.S.C. § 1151(b).

Based upon the Joint Statement of Uncontested Facts as augmented by this decision, this court concludes that the lands of Ahtna, Inc. are not Indian Country, the Kluti Kaah do not occupy Indian Country, and, therefore, the Kluti Kaah tribe does not have the power to impose a tax upon non-members of the tribe such as Alyeska or the owners of the TransAlaska Pipeline.

DATED at Anchorage, Alaska, this 28 day of November, 1995.

  
United States District Judge

CNSL telephonically notified 11/28/95

AK7-0201--CV (888)

.....  
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B. BROWN (PAULEYER)  
D. LANDON (AUSA)  
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Z. BARRY (AG-STE-200)  
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