

ALASKA LEGISLATURE SPECIAL COMMITTEE / SUBJECT FILES 86 / 2

744 SCOMM23: TITLE 29 POLICY REVISION ADVISORY COMM. 1980

Statement by Commissioner:

This preliminary Statement has been reviewed, and its reproduction and distribution is hereby approved. It is not to be regarded as official policy or regulations, but as a method to solicit comments, input, and suggestions from interested parties. Involvement and participation by interested parties is desired and encouraged.

Based upon this statement and any later modifications resulting from comments by others, proposed regulations governing the State in trust program will be created and distributed. These proposed regulations also will be influenced by input received during the 25 to 30 village meetings, one or more to be scheduled in each regional area in the fall of 1977. After the Proposed Regulations are published and copies distributed to all interested parties of record, (probably in November or December of 1977), further opportunity for comment and input will be provided. Finalization of basic regulations for the Trustee program presently is planned for early 1978.

Lee McAnerney

Lee McAnerney, Commissioner

Department of Community Development

Regional Affairs

29 August 1977

Date

SECTION 14(c)(3) of the ALASKA NATIVE CLAIMS SETTLEMENT ACT:

(c) Each patent issued pursuant to subsections (a) and (b) shall be subject to the requirements of this subsection. Upon receipt of a patent or patents;

(3) the Village Corporation shall then convey to any Municipal Corporation in the Native village or to the State in trust for any Municipal Corporation established in the Native village in the future, title to the remaining surface estate of the improved land on which the Native village is located and as much additional land as is necessary for community expansion, and appropriate rights-of-way for public use, and other foreseeable community needs: Provided, That the amount of lands to be transferred to the Municipal Corporation or in trust shall be no less than 1,280 acres;

APPENDIX A (BOTTOM HALF)

ALASKA STATUTES 44.47.150:

Sec. 44.47.150. Village land conveyed in trust. (a) The commissioner of the Department of Community and Regional Affairs is designated to accept, administer, and dispose of land conveyed to the state in trust by village corporations under § 14(c)(3) of the Alaska Native Claims Settlement Act (P.L. 92-203, 85 Stat. 703) for the purposes specified in that section.

(b) Transfer of land by sale, lease, right-of-way, easement, or permit, including transfer of surface resources, may be made by the commissioner only after approval of an appropriate village entity such as the traditional council, a village meeting, or a village referendum. Such approval shall be by resolution filed with the department.

(c) Within one complete state fiscal year after the incorporation of a municipality in the village or of a municipality which includes all or part of the village, land acquired under this section shall be conveyed without cost to the municipality, and the municipality shall succeed to all the entrusted interest in the land.

(d) Separate accounts shall be maintained in the name of each village for the land, including the revenues from the land, acquired from each village corporation under this section, and within 90 days of the close of each state fiscal year a statement of the account for each municipality shall be prepared by the commissioner and be made available to the village and to the public upon request.

(e) Upon the conveyance of land to a municipality under this section, the commissioner shall account to the municipality for all profits including interest from the land, and the municipality may then request that the governor submit a request to the legislature for an appropriation for the amount due it.

(f) No title or interest to lands acquired by the department under this section may be acquired by adverse possession or prescription.

(g) For the purposes of this chapter, the term municipality includes only first and second class cities incorporated under the laws of the state. (§ 1 ch 119 SLA 1975)

APPENDIX B

Citations from Title 43, Code of Federal Regulations:

43 CFR 2650.5-4:

SECTION 2650.5-4 VILLAGE SURVEYS, BUREAU OF LAND MANAGEMENT RULES AND REGULATIONS FOR ALASKA NATIVE SELECTIONS

(a) Only the exterior boundaries of contiguous entitlements for each village corporation will be surveyed. Where land within the outer perimeter of a selection is not selected, the boundaries along the area excluded shall be deemed exterior boundaries. The survey will be made after the total acreage entitlement of the village has been selected.

(b) Surveys will be made within the village corporation selections to delineate those tracts required by law to be conveyed by the village corporations pursuant to section 14(c) of the act.

(c) (1) The boundaries of the tracts described in paragraph (b) of this section shall be posted on the ground and shown on a map which has been approved in writing by the affected village corporation and submitted to the Bureau of Land Management. Conflicts arising among potential transferees identified in section 14(c) of the act, or between the village corporation and such transferees, will be resolved prior to submission of the map. Occupied lots to be surveyed will be those which were occupied as of December 18, 1971.

(2) Lands shown by the records of the Bureau of Land Management as not having been conveyed to the village corporation will be excluded by adjustments on the map by the Bureau of Land Management. No surveys shall begin prior to final written approval of the map by the village corporation and the Bureau of Land Management. After such written approval, the map will constitute a plan of survey. Surveys will then be made in accordance with the plan of survey. No further changes will be made to accommodate additional section 14(c) transferees, and no additional survey work desired by the village corporation or municipality within the area covered by the plan of survey or immediately adjacent thereto will be performed by the Secretary.

DRAFT

TRIBAL-STATE RELATIONS:

A NEW PARADIGM FOR LOCAL
GOVERNMENT IN ALASKA

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INTRODUCTION.

Alaska is a state which has clearly adopted the philosophy of the "New Federalism." In adapting the local government section of the Alaska Constitution, the framers clearly indicated that it was their intent to further the philosophy of the new federalism in Alaska by decentralizing state government, and addressing the majority of local concerns through local mechanisms.¹ The Alaska Supreme Court has fully embraced the concept of New Federalism in the area of individual rights by specifically holding that the Federal Constitution does not limit the State of Alaska from securing to its citizens greater protection of individual liberties and freedoms than these found under the Federal Constitution.² In the political arena, the State of Alaska has sought to lessen federal concern over lands within the state. Finally, in the conduct of its own affairs, the state government has shown innovative during its attempts to reduce the size and scope of state government.

This report is yet another attempt to pursue this policy. The goal of this study is to devise a mechanism which enhances local control over local concerns in those areas of the state which are "unorganized." Additionally, this study investigates possible mechanisms for coordinating multiple governments which may exist in a community.

In pursuit of these objectives, this study suggests a new paradigm for local government in Alaska. The study focuses upon the possibility of developing a state/tribal governmental interface. Fundamental to this paradigm is the effort to develop government-to-government relations between the state and the Native people. Admittedly, this is in sharp contrast to the short history of the State of Alaska. Since statehood, Alaska has attempted to deal with its Native population within a state/citizen context. While this context is appropriate in many situations, the state/citizen context proves inadequate for all situations. In order for a pluralistic society such as Alaska to reflect the respective pluralistic structures within the society, those structures must reflect the various pluralistic interest which make up the society-at-large.

In the case of the Native people, early experiments and societal assimilation have proved only marginally successful. Rather it is the rule that the Alaska Native people remain culturally unassimilated and retain cultural and government characteristics which separate them as a people from the majority of Alaskan citizens. On the contrary, it is not uncommon for the rural non-Native residents to become assimilated into the Native culture and society. In the political sense, this assimilation is reflected in the active enfranchisement of many non-Native into rural Native government. Thus, in such rural Alaskan communities the dominant Native government and society has come to constitute the whole community's government and society, in spite of the presence and participation of individuals racially defined as non-Native. Under these circumstances, the tribal government constitutes the only feasible and viable form of local government for that community. In such cases, the tribal/state paradigm does not function to exclude representation of non-Native elements within the community, but rather becomes the most appropriate vehicle for the representation of local interests and concern. It is the purpose of this study to investigate the feasibility of utilizing Alaskan Native governments as an alternative local government form for those communities where such a form is the most appropriate vehicle for the representation of local interests and concerns. For such a mechanism to be successful, it is necessary that the mechanism will promote to the maximum extent possible the coordination of Native government and state government. It is hoped that through such coordination the respective interest of the state and the Native governments can be met.

There exists in rural Alaska the common perception that where a parallel government exists within a community, the municipality represents the non-Native interest in the community while the Native government represents the Native interest in the community. For this reason, the Native element in the community generally elects not to participate in the municipal government. The result is that the municipal government is not an expression of self-government for the community but an expression of self-government for the non-Native portion of that community. Furthermore, the Native element of a community tends to exclude non-Natives from participating in the affairs of the Native government.

Obviously, the Native government represents the expression of self-government for the Native portion of the community. In this situation, neither council represents self-government of the community as a whole. The exclusion of Native governments from the local government system of the state thereby results in the exclusion of the Native portion of many communities in rural Alaska. The inclusion of Native governments within the state system of local government would promote the more accurate representation of the community as a whole, albeit a representation through the various factions of the community.

PART I

EARLY AND CURRENT ALASKAN LOCAL GOVERNMENTS

A. EARLY ALASKAN LOCAL GOVERNMENTS

The earliest "local governments" in Alaska were Native. As Dave Case points out these primeval governments varied as between the Native cultures.¹ Generally, however, these early governments were loose associations of individuals based upon family relationships and customs. Group decisions were made by consensus.

Similarly, early non-Native local government in Alaska was very informal. After the purchase of Alaska by the U.S. in 1867, the primary mechanism of local government was the extra legal mining districts.² Like the Native governments, these early miner's governments were loose associations based on custom. Generally, decisions were made by majority vote. In 1884, Congress recognized the authority of these mining districts, but the status of Native governments remained in limbo.

In 1900, Congress enacted a civil code for Alaska which included authorization to form towns of over 300 residents.³ This first form of municipal government was patterned after the mayor-council city government common to the "lower 48." Towns were severely limited as to their ability to tax and contract debt and were highly dependent on intergovernmental transfers. Their primary function seems to have been providing school services. In 1904, some of these limitations were relaxed, but the next major change had to wait until the formation of a territorial government.

In 1905, Congress authorized the formation of independent (city) school districts, and school districts for unincorporated areas.⁴ In both cases, the districts were fiscally autonomous respecting current expenditures. They directly received a portion of intergovernmental

revenue transfers due the city. They remained dependent on the city or territory tax revenues for capital expenditures.

In 1912, Congress passed the Organic Act creating the Territorial legislature.⁵ In the following years, the legislature created a second class of territorial towns, subject to the limitations of the earlier Act of Congress. It was fully intentioned that local government be kept weak so as not to present a taxing or regulatory threat to commercial and mining interests in the territory.⁶ In fact, the Organic Act prohibited organization of "counties" or other regional local governments.⁷ In 1915, the legislature upgraded territorial towns so that they would be subject to the same limitations as the towns authorized under the federal legislation. At the same time, the legislature for the first time attempted to assimilate Native village government through the Indian Village Act of 1915. This Act authorized Indian villages to organize as units of local government.⁸

In 1917, the legislature authorized incorporation of school districts in unincorporated areas. Under this new legislation, the incorporated school districts achieved greater fiscal autonomy through authorization to tax, as well as an increase in shared intergovernmental transfer revenues.

The legislature undertook a revision of the territorial municipal code in 1923. The new code replaced federally authorized towns with first class cities which directly elected a mayor, expanded council powers, provided for mayoral vetoes, and established minimum procedures for city government.⁹ Later, in 1929, the legislature repealed the Indian Village Act of 1915, and revised the laws relating to second class cities making them substantially equal to first class cities.

By 1934, the federal policy toward Indians had again shifted away from assimilation. This was reflected by the passage of the Indian Reorganization Act, and the subsequent extension of the Act to Alaska in 1936.¹⁰ The Act was intended to vest "tribal organizations with

real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations."

At this same time, the legislature instituted reforms designed to authorize special purpose regional governments. In 1935, the legislature authorized incorporation of "independent school districts" which included both the area inside city limits and the surrounding adjacent areas. The new school districts were independent of city governments and were fiscally autonomous.¹² Also in 1935, the legislature authorized public utility districts which were fiscally autonomous special purpose governments capable of providing garbage, parks, street, fire, telephones, electrical, etc., services.¹³

In 1951, the legislature authorized third class cities, which were essentially the same as second class cities, differing only in geographical and population size.¹⁴

In 1957, the territorial legislature again attempted to create incorporate villages under territorial law.¹⁵ An Incorporated Village had limited powers which include its power to provide water, electing sewers, and fire protection; regulate dogs, curfews, and land use; and provide public works. The State amended the Act in 1959 to invest the incorporated village with general police powers and provided for village magistrates to levy limited fines. At the same time, the legislature defined the incorporated villages as a city of the fourth class.

At the time of statehood, there existed in the state:

- 24 first class cities
- 8 second class cities
- 2 third class cities
- 10 fourth class cities
- 69 I.R.A.'s
- 5 P.U.D.'s
- 8 independent school districts
- 1 incorporated school district
- unknown number of traditional Native councils

Statehood did not drastically alter the local government pattern since under Article XV, Section 1 of the Alaska Constitution, the laws of the territory remained in effect until they were repealed, amended or expired.

It was not until 1972, the state undertook a wholesale version of the municipal code to create the current system.

B. CURRENT STATE CHARTERED LOCAL GOVERNMENT

The system of local government authorized under the Alaska Constitution is relatively simple. It is possible to categorize Alaskan local governments into two basic types, i.e., general and special purpose governments. For the sake of analysis, a general purpose government is a government which exercises independent discretion over a broad range of topical concerns. In contrast, a special purpose government is a government which exercises discretion over a specific topical concern.

General Purpose Governments.

The general purpose government is the constitutionally preferred unit of local government in Alaska. This policy is specifically stated in Article X, Section 1 of the Alaska Constitution which states that, "The purpose of this article is to provide for maximum local self-government with a minimum of local government units, ..." This policy is implemented in Article X, Section 2 which provides that "All local government powers shall be vested in boroughs and cities," and is further stated in Article X, Section 15 which states "Special service districts existing at the time a borough is organized shall be integrated with the government of the borough as provided by law."

This concern for consolidating local powers into single general purpose governments is expressed throughout the Constitutional Convention record. The adoption of "one basic local government system" was

intended to prevent "creation of numerous types of local units which can become not only complicated but unworkable."¹⁶ Of immediate concern to the Delegates was the governance of the school boards, Public Utility Districts (P.U.D.s) and health districts. As stated by Delegate Victor Fischer:

"That is one of the points that we have tried to meet here, not to establish too many local governments but those that would be established would be effective to carry out not only the local but also state functions as may be necessary."¹⁷

To this end the constitution provides for the creation of boroughs and cities.¹⁸

The most unique aspect of the Alaskan general law municipality is the framer's intent to create strong local government units. Systems of government then operating in the majority of the states were felt to be too weak.¹⁹ In his initial address to the convention introducing the Local Government Committee's proposed article, Delegate Vic Fischer expressed the "New Federalist" philosophy favoring general decentralized government. Citing the Congressional Commission on Intergovernmental Relations, Delegate Fischer stated:

"The Commission concerned itself with the need for strengthening of state government and a decentralization of federal power. In this study they found that local government is an important factor in this process and I would like to briefly quote a few paragraphs. In discussing the strengthening of local government, the Committee says, 'The objective of decentralization cannot be obtained by a readjustment of national-state relations alone. It will be fully achieved only when carried through to the lowest levels of government where every citizen has the opportunity to participate actively and directly. The strengthening of local government requires the activities that can be handled by these units be allocated to them together with the financial resources necessary for

their support.' Then the report goes on and draws a picture of the tremendous number of overlapping tax jurisdictions and separate local entities we now have in the state and goes on to say, 'More or less hidden in this picture is a paradox that consistently plagues the state and bars any easy solution of the problem of achieving the decentralization of government -- too many local governments and not enough local government.' That is one of the points that we have tried to meet here, not to establish too many local governments but those that would be established would be effective to carry out not only the local but also state functions as may be necessary."²⁰

To implement this plan, the committee adopted the so-called "Texas Plan." This approach was explained to the convention by Delegate Victor Rivers as follows:

The old approach to county government was that they existed and had their authorities only in those specifically delegated to them and specifically spelled out to them by the legislature or by the constitution. The other approach which has been adopted and which has operated in a few states, approximately seven as I recall, particularly in Texas, has been called the Texas Plan, and there, under that plan, they allocate such powers to the intermediate tier of government and the cities are not specifically reserved or eventually withdrawn by the state itself. They have a broad exercise of local authority much as our cities have today. That has been the matter of the choice -- whether we wanted to follow the old pattern in which the constitution and the legislature would delegate certain specific powers to the intermediate form of government, which often is called the county and which we have designated as the borough, or whether we would follow the plan of reserving powers to the state and letting the local government exercise broad general authority within the limits of those reservations.²¹

It is quite clear that the "pure" Texas plan called for application of home rule principals to all local governments. The various classes of cities and boroughs would be defined in law by the quantity and quality of powers reserved by the state.

The record indicates that some delegates to the constitutional convention supported the "pure" Texas Plan.²² In fact, the concept of a "general law" municipality was not introduced in the floor debate, but seems to have been an assumed constant which carried over from the territorial local government concepts. This is reflected in Article X, Section 9 and 11 which respectively provide that first-class municipalities could assume home-rule status, and that the legislature could extend home rule to other classes of government. The concept of "general law" municipalities was enacted by statute.²³ It is interesting to note that although the "general law" concept was not discussed in convention floor debates, it has become a fundamental concept guiding the majority of local governments in Alaska.

1) Boroughs: A borough is the intermediate level of government in the State of Alaska. Although the term "borough" is somewhat unique, the notion of an intermediate level of government is common to the American local government scene. The borough "corresponds generally to the county in other states."²⁴ By statute, the borough is a government for an "area."²⁵ This is in contrast to a city, which is a government for a "community."²⁶ The framers of the constitution anticipated that an average size borough would be between 1,000-2,500 square miles.²⁷ Presumably, an area could include a number of communities and their outlying areas.²⁸ Clearly, the framers intended to create a system of two-tiered, local coexistent governments.

But the framers also intended local government to be flexible enough to adjust to future developments. It has, therefore, been observed that:

Boroughs in different parts of Alaska may serve two quite different purposes. In areas which include cities, they may

constitute a second tier of government. In other areas, they may themselves be the sole or primary local units.³¹

The Alaska Supreme Court has recognized this by stating that the Constitution does not require the coexistence of boroughs and cities.³²

There is a strong indication that the original concept of the borough was strongly linked to home rule. This is most notably demonstrated in committee answers to delegate questions regarding the unorganized borough.

V. Rivers: ... In the extent that the benefits that the legislature sets up will offset the added cost to the people, and the extent of their desire for home rule will govern how far they go in organizing those boroughs, but it was our thought there would be enough inducement for them to organize and exercise home rule so that as time went on they would gradually all become incorporated boroughs...³³

This sentiment is noticeable in comparing the respective constitutional sections dealing with cities and boroughs. Whereas the constitution specifically states that "Cities shall have the powers and functions conferred by law or charter."³⁴ (emphasis added) The comparable clause dealing with boroughs is less specific providing that, "The legislature shall classify boroughs and prescribe their powers and functions."³⁵ (emphasis added) It remains unclear whether such prescription should be by specific enumeration or reservation. Nevertheless, inclusion of reference to boroughs in Article X, Sections 9 and 10 leaves no doubt that general law boroughs were constitutionally contemplated.

ii) Cities. In contrast to boroughs, cities are statutory defined as the local government unit for "communities."³⁶ The local government committee of the Constitutional Convention considered the option of abolishing the city form of government. It was felt, however, that

such a move was "too drastic a step," and it was felt that the existing territorial units of governments should be perpetuated. On the other hand, it was also stated that,

"... we visualize the possibility that as the borough becomes a more definite unit of government over the years, which we hope it will, the scope better defined, that all the functions that can best be carried out on the unified basis be transferred over to the borough."³⁸

In City of Douglas v. City and Borough of Juneau,³⁹ the Court recognized that "Unification is consistent with the purpose expressed in Article X, Section 1 of minimizing the number of local government units." But in preserving the city, the convention did not intend to subordinate the city to the borough as indicated by the following exchange:

HURLEY: The borough then has nothing to say about the services that the city offers its own residents within its boundaries. Is that true?

ROSSWOG: Yes, the city should remain as much the same as today, or practically the same unless there are some gradual changes in the future. They can delegate powers back and forth but the borough would not tell the city that they had to supply certain services or couldn't supply certain services. That is why the two are set up as having the authority.

HURLEY: In essence, then, you have two local government units?

ROSSWOG: Yes, that is right.⁴⁰

appraising, its own assisting agency, its own condemnations.⁴²

This point was recognized by the Alaska Supreme Court in Macauley v. Hildebrand⁴³ where the Court held that a home rule borough may not require its school system by ordinance to participate in centralized accounting where the Legislature has delegated express authority to the school board to resist such requirements. The Court based its decision upon the theory that education was an area of "pervasive state authority." The obvious conclusion, therefore, is that service areas may exercise substantial autonomy in areas of "pervasive state authority." In a similar manner, the legislature could provide substantial autonomy to public utility districts since regulation of public utilities is also an area of state concern.⁴⁴ Thus, while the constitution provides that "all local powers shall be vested in boroughs and cities",⁴⁵ it does not exclude the exercise of governmental authority by governments other than cities and boroughs.

This balance is further demonstrated in those constitutional provisions which provide that when a borough is organized, existing service districts shall be "integrated" into the borough government.⁴⁶ Once a borough is organized, the assembly may create service areas within its borders.⁴⁷ This latter power is subject to the single prohibition that services areas cannot be established where such services can be rendered by annexation to an existing service area or city.⁴⁸ This prohibition is consistent with the general preference for integration rather than separate incorporation.

It is quite clear that service areas are only "semi-autonomous." As indicated above, the service area would be subject to the exclusive "fiscal jurisdiction" of the assembly. Beyond this, however, the framer's contemplated that service area boards could be set up and exercise substantial powers. This was clarified by Delegate Fischer who stated:

..., it is the intent of the committee that when you establish a service area you could, say, establish a

Thus, while the momentum set in force by the Constitutional Convention contemplates eventual dissolution of cities in favor of boroughs, the interim is governed by the principals of sovereign coexistence.

Special Purpose Governments

As noted above the integrated/unified local government is the preferred vehicle of local government in Alaska. The constitution, however, provided for service areas and districts which seem to be semi-autonomous special purpose governments. In understanding the role of special purpose governments, it is necessary to recognize that service areas represent a compromise between the constitutional delegates who argued in favor of wholly integrated local governments, and those delegates who favored continuing the independent school districts, health districts and P.U.D.s formed under the territorial government. In expressing this compromise, delegate Vic Fischer stated:

Mr. Johnson, it was not the intention of the committee to do away with any existing school districts just by the enactment of this article. (Sec 15). The intent was to leave them within a new framework of government.... what we visualize is putting them under the general fiscal jurisdiction of the larger entity, which includes all the people within the particular school district.⁴¹

This was again explained by Delegate Rivers who stated:

Mr. President, the idea was that the general powers of government would be with the general elected representatives of the people. Now, as Mr. Fischer has pointed out, the special functions in regards to the use of one group for one special purpose such as health, education or anything else, the power to take the board and take its powers away, the powers of the boards would probably continue except for the taxing power being centralized in the one taxing agency which would thus have its own

separate school board,...to supervise the school functions...⁴⁹

Thus, it is possible for a service area to exercise substantial power independent of the general borough assembly.

It must be remembered, however, that the service area may never exercise total autonomy. There seems to be two chief limitations on the service areas. First, the service area may not unilaterally tax. The Constitution specifically provides that only cities and boroughs may tax.⁵⁰ As indicated above, this limitation on service areas was perceived by the framers as the sufficient link needed to achieve local government coordination. There remains, however, substantial autonomy even in fiscal matters as indicated by the Macauley v. Hildebrand case. A school district may maintain separate financial records. Similarly, while service areas have limited control over tax revenues, they may possess substantial autonomy with respect to revenues from intergovernmental transfers. For example, under the terms of A.S. 29.89.030 (2), a health district operating a hospital may qualify for state revenue sharing. Although, the sponsoring municipality would initially receive the revenue sharing payments, the municipality is required to transfer such payments to the service area to be used for health services at the discretion of the hospital "directors".

The second major limitation on a service area's autonomy is related to the operation of the "local activity rule." As the Court stated in Macauley, the legislature may delegate to service areas power beyond the resolution of a parent municipality in those subject areas of state concern. It follows, therefore, that service area autonomy is inversely related to "local" concerns. For example, a municipality could certainly regulate the use of municipal property regardless of whether it was assigned to the service area, since municipal property is purely a local concern.⁵¹ Of course, it is not easy to define what is a "local" concern as opposed to a "state" concern. This is even less clear under the borough form of government in that the framers of the constitution intended boroughs to assume greater responsibility in the area of tradi-

tional state concerns as state government "decentralized." The framers seemed to have accepted this ambiguity, and left the matter to the legislature. The courts recognized this role for the legislature in the Macauley and Chugach Electric cases by holding that municipal regulation is invalid in the face of contrary statutory law.

In spite of these limitations, service areas would seem to be remarkably flexible mechanisms of local government. For example, the Constitution authorized intergovernment cooperative agreements between "any local governments" for joint administration of any functions or powers.⁵² Presumably, these provisions would apply to service areas since they are local governments. This view is supported by the fact, that only cities and boroughs are authorized to transfer powers, while "all local governments" are authorized to enter into intergovernmental agreements.⁵³ Thus, it would seem possible for co-extensive service areas to enter into cooperative administrative agreements for such things as centralized accounting and budgeting, personnel management and property management systems. Such mechanisms could be used rather extensively to provide a wide range of services for a community without city incorporation. This concept is not beyond the framer's contemplation, in that both pro-integration, and anti-integration factions within the constitutional convention characterized cities as "a collection of service areas".⁵⁴ It must be remembered, however, that a collection of service areas would lack the power to independently tax which a city possesses. Thus, such a collection would be totally dependent on intergovernmental transfers, whether from the borough or the state. Furthermore, a collection of service areas would be subordinate to borough regulation in areas of "local control". The collection of service areas, however, could exercise substantial autonomy in areas of state interest, upon approval of the legislature.

Service areas have their greatest utility in the unorganized boroughs. The constitution directs the legislature to provide necessary services in the unorganized boroughs, "allowing for maximum local participation and responsibility."⁵⁵ To implement this section, the legislature provided that it may authorize "service areas" in the unorganized borough.⁵⁶ It

is agreed that such service areas do not possess powers of fiscal autonomy,⁵⁷ however, they may exercise other powers delegated by the legislature.

The legislature has seen fit to authorize four types of service areas in the unorganized borough - i.e.: 1) aquaculture service areas; 2) coastal resource service areas; 3) regional educational service areas, and 4) volunteer fire departments.

The legislature authorized the Commissioner of Commerce and Economic Development to declare aquaculture service areas.⁵⁸ The purpose of these service areas are to provide fishery enhancement services. The service area board is comprised of representatives of member user groups.

The coastal zone management service areas are general "planning" units for coastal areas of the state. Whereas, coastal boroughs are automatically designated coastal zone management districts, unorganized areas may organize a special service area for the conducting of making district coastal management programs.⁵⁹ These programs operate to guide state agencies in the operation of their programs throughout the coastal areas of the state. While the state continues to be the basic provider of basic services, the service area boards operate as a centralized planning agency for the area. The board of the service area is popularly elected.

Third, the regional education attendance areas (REAA) are service areas providing educational services within the unorganized borough.⁶⁰ Like the coastal zone management areas, the REAA's are controlled by a popularly elected board, but were mandatorily organized by the legislature after a settlement of the "Molly Hootch" case.

Finally, the legislature has "impliedly" authorized organization of volunteer fire departments for unorganized areas of the state through the state revenue sharing program.⁶¹ Under this program, local fire departments may organize under regulations adopted by the state

marshall. Upon approval and registration of the departments, the organizations are eligible for state funding. Generally, these departments enjoy substantial fiscal autonomy, provided that they confine their activities to fire protection.

As noted above, there is great variety in the organization and operation of these special service areas. At the present time, the authority of these special service areas has not been challenged in court, so that it is impossible to define the limits of the legislature's discretion as to the manner and form that these service areas may take. If the past record is an indication of legislative authority, it can only be stated that the legislature possesses broad discretion in creating and organizing service areas, provided they remain impotent in regards to the levying of taxing authority.

C. ALASKA NATIVE GOVERNMENT ORGANIZATION

As with state chartered local governments, Alaskan Native governments can be categorized as general or special purpose governments. Additionally, there is an additional type of "quasi-governmental" entity. This latter type of entity is included in the following discussion.

General Purpose Governments.

It is commonly stated that there are two types of general Native governments in Alaska: Native Councils and IRA Councils.⁶² It practices there is little difference between the operation of these two types governments. The distinction between the two governments is largely theoretical. This distinction is important, however, when the authority or status of the government comes into question.

i) Traditional Councils. In a strict sense, traditional councils are not traditional to the Alaska Native people. As pointed by David Case, the traditional precontact of Native governments were primarily based on family ties.⁶³ Traditional councils have been formed in reaction to contact with the non-Native culture for local representation of the

Native community before outside interest. Many of these councils have adopted formal traditional constitutions while others seem to operate according to an unwritten constitution analogous to the British constitution. In all cases, the basic level of organization is the village.

The basis of these government's authority rests in their retained sovereignty, i.e., the principle that absent express Congressional action to the contrary, Indian nations retain the inherent power of internal self-government.⁶⁴

This observation has led to several inquiries regarding the tribal status of Alaskan Native villages. Although the question of tribal status in Alaska is intriguing from an ethnic and political perspective, its resolution has doubtful legal significance. More importantly, the courts have clearly stated that recognition of an Indian community's authority for self-government is directly linked to its dependent status with the federal government. In the United States v. Sandoval,⁶⁵ the Supreme Court stated that a Native community's dependent status is determined by legislative and executive course of action respecting the Native community in question.

Congress has specifically extended this recognition to Alaska Native villages and has treated them in the same manner as other Indian tribes. For example, Native villages receive identical treatment as Indian tribes under the Indian Self-determination Act,⁶⁷ the State and Local Fiscal Assistance Act of 1972,⁶⁸ the Housing and Community Development Act of 1974,⁶⁹ the Comprehensive Employment Training Act of 1974,⁷⁰ and the Indian Child Welfare Act.⁷¹ Additionally, Congress has recognized self-governing qualities of Alaska Native communities when it provided for the extension of state civil jurisdiction over Alaska Natives. In applying PL 83-290 to Alaska, Congress expressly reserved that:

Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community, in the exercise of any authority which it may possess shall, if not inconsistent

with any applicable civil law of the state, be given full force and effect in the determination of civil cause of action pursuant to this section.⁷²

The executive branch has likewise dealt with Alaska Native villages as Native governments where it exercises discretion. The best example of this is the Omnibus Crimes Control and Safe Streets Act of 1968 which places responsibility of the Secretary of the Interior to determine those Indian tribes which perform law and order functions.⁷³ Under this authority, the Secretary of the Interior has recognized several Alaska Native villages as exercising the law and order functions including the employment of tribal police, establishment of tribal courts, to undertake corrections functions, and to adopt a law and order code.⁷⁴

i) I.R.A.s. A second type of general Native government in Alaska is the "IRA Village Council." IRA stands for Indian Reorganization Act or the Howard Wheeler Act which was passed in the 1930s in an effort to modernize Indian or Native American governments.⁷⁵ IRA originally applied throughout the United States. Its application in Alaska was somewhat unique. A 1934 version of the Indian Reorganization Act provided that only "Indian tribe or tribes residing on the same reservation" could organize to adopt constitutions under the act. In that few reservations existed in Alaska at the time, the Act had, in its original form, doubtful utility in Alaska. To address the special problems of Indian organization in Alaska, Congress amended the Indian Reorganization Act in May of 1936 to specifically extend its provisions to the Territory of Alaska.⁷⁶ The operation of the Indian Reorganization Act under the 1936 Alaska amendment was substantially different than the general application of the Act in the "lower 48." The adoption of the Alaska amendment marked the extension of the reservation policy to Alaska. Under the Act, Indian communities could petition the federal government for the creation of reservations.⁷⁷ Between 1934 and 1949, several IRA reserves were established. The IRA reserve policy, however, was greatly opposed by non-Native residents of Alaska and through the operation of territorial politics, lawsuits and other pressures on the

Bureau of Indian Affairs, the Bureau abandoned the policy of creating IRA reserves in Alaska.⁷⁸ Even though the reservation policy was abandoned by the Bureau, the organizational efforts of the Bureau left in its wake a number of Native villages organized under the Act, but outside established reservations. Those few reservations actually formed pursuant to the Act were later revoked by the Alaskan Native Claims Settlement Act.⁷⁹ A net result of this course of events has left a number of Native governments continuing to operate under their IRA constitutions.

The legislative history accompanying passage of the Alaska amendment clearly indicates that Congress intended to recognize the Alaska Native village as analogous to a tribal organization. The House reports stated:

The proposed amendment, number 1 above, set out is necessary because of the peculiar nontribal organization under which the Alaska Indians operate. They have no tribal organizations as the term is understood generally. Many groups that would otherwise be termed tribes live in villages which are the basis of their organization.⁸⁰

In this sense, the Alaska amendment was consistent with the general statutory purpose of the Indian Reorganization Act. This general purpose was stated to be:

To stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real limited authority and by prescribing conditions which must be met by such tribal organizations.⁸¹

In light of these Congressional enactments and legislative history, it is clear that the Alaskan Native IRA Village Council is equivalent or at least analogous to the tribal organization found in the "lower 48." This principle is recognized under Alaskan state law and was enunciated by the Alaska Supreme Court in Ollestead v. Native Village of Tyonek.⁸² In that case, the court recognized tribal status of the Native village of Tyonek council.

It is, therefore, clear that to the extent that they exist, Alaska Native Village Councils organized under Indian Reorganization Act are recognized as local tribal government organizations.

Special Purpose Governments

Whereas it is clear that the general purpose governments of Alaskan Natives are organized at the village level, additional special purpose Native governments exist which complicate the governmental pattern of Alaskan Natives. Most notable in this category is the Tlingit/Haida Central Council.

The specific status of Tlingit/Haida Central Council was litigated in Cogo v. the United States.⁸³ In that case, an individual brought a lawsuit against the Council to require inclusion in the preparation of tribal roll under the Tlingit/Haida Settlement.⁸⁴ In that case, the council successfully claimed sovereign immunity as a tribal organization. The plaintiffs argued that the Council was not a tribal organization, and, therefore, could not assert tribal sovereign immunity. Specifically, the plaintiff pointed to the language in the Indian Self-Determination Act which seems to indicate that in Alaska, the village council was the tribal organization. The court rejected the plaintiff's claim stating that the language in the Indian Self-determination Act was irrelevant for the purposes of this suit and went on to state and whereas the Tlingit/Haida Central Council certainly was not a tribal organization for the purposes of the Indian Self-Determination Act; it was a tribal organization for the purposes of Tlingit/Haida Settlement. This case has clearly established a principle that special purpose tribal governments exist in Alaska, however, the exact extent of such special purpose tribal governments have not been fully delineated.

The organization of the Inupiat Community under the Indian Reorganization Act presents a similar problem. Prior to the passage of ANCSA, the Inupiat Community organized several northern slope villages to form a regional IRA. The Department of the Interior takes a position for the purpose of the Indian Self-Determination Act, the Inupiat Com-

munity cannot enter into contracts or accept grants without the prior approval of the affected villages.⁸⁵ In both cases, the Solicitor has depended upon the terms of the Indian Self-Determination Act itself which defined "Indian Tribe" as:

any Indian tribe, band, nation, or other organized group or community including any Alaskan Native or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act which is recognized as eligible for the special programs of services provided by the United States to Indians because of their status as Indians.⁸⁶

In these special cases, it is unclear which is the special purpose government and which is the general purpose government. As a general rule, Indian nations have the power to determine their own form of self-government in accordance with the political and cultural history.⁸⁷ This is in accordance with the principle that "the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal governments existed."⁸⁸ Under these circumstances, it is necessary to review an organization's status on a case-by-case basis. In light of the Cogo decision, however, it is also necessary to review any relevant specific statutory law to determine if the respective organization has a special function under federal law.

Native Quasi-Governments

In addition to the general purpose governments and the special purpose governments outlined below, there exists entities which, may be called, for the lack of a better term, Native quasi-governments. These types of organizations are not governments in the formal sense, however, they exercise a variety of functions which are generally exercised by governments. In rare cases, these types of organizations have been formally recognized as exercising governmental authority. The most notable example is illustrated in the court case State v. Aleut Corporation.⁸⁹ In that case, several Native organizations sued the

Alaska Division of Lands to prevent a proposed sale of lands adjacent to their communities. In addition to various villages, the plaintiff's list included the Bristol Bay Native Corporation and the Aleut Corporation, both regional corporations formed under the terms of the Alaska Native Claims Settlement Act. The plaintiffs in that case sued under AS 38.05.305, which provided that the Division should give notice and consult with incorporated municipalities and other organized communities adjacent to lands proposed for sale by the state. The court recognized that ANCSA regional corporations perform a number of quasi-governmental functions in rural Alaska. However, the court specifically held that for the purposes of the Alaska Lands Act, regional Native corporations formed under ANCSA did not possess the requisite governmental attributes to qualify them for notice and consultation under the terms of the then existing statute. Subsequent to the Alaska Supreme Court decision, the Alaska Legislature amended the Alaska Lands Act to specifically require the Division of Lands to give notice to the regional Native profit corporations prior to a proposed sale of lands by the state. In 1979, the legislature again amended Section 305 to require the Division of Lands to give notice and consult with village corporations formed under ANCSA, similar to that notice given to organized municipalities. In light of this legislative history, it would seem that the Alaska Legislature intended to vest in ANCSA corporations certain specific governmental powers in spite of their general corporate character.

A second type of quasi-governmental Native organization is characterized by the regional Native nonprofit corporation. The activities of these regional nonprofits substantially vary. Their activities include Self-Determination Act contracting for the administration of BIA programs; contracting from HUD for the administration of housing projects; contracting under Title VI, the Comprehensive Employment and Training Act, for the operation of Native CETA programs; etc.

The basic model for the regional Native nonprofit organization was established under the terms of the Indian Self-Determination Act. That Act authorizes contracts between the BIA and Native governments or, in their place, Native organizations. In Alaska, BIA programs cannot

generally be effectively administered independently by the villages. The sheer cost of administering such programs at the village level makes such contracting not feasible. In response to this problem, Natives have organized along regional lines to form Native organizations which can effectively contract with BIA for the operation of BIA programs within their region.⁹⁰ With the exception of the Inupiat Community and the Tlingit/Haida Central Council, none of these regional Native nonprofit organizations possess de jure governmental authority. Rather, they only provide those services normally provided by BIA or other federal or state agencies on a contract basis with those agencies. In this way, they are capable of performing governmental functions without the prerequisite governmental stature.

PART II

COMPARISONS OF GOVERNMENTAL AUTHORITY

The question of governmental authority is actually a question of the respective jurisdiction of the governments in question. Basically there are two types of jurisdiction: Territorial jurisdiction, i.e., the geographical area over which a government's authority extends; subject matter jurisdiction, i.e., the topical areas over which a government has the authority.

A. TERRITORIAL JURISDICTION

i) Municipalities. The Alaska Constitution provides that boundaries are determined by the Local Boundary Commission.¹ The Local Boundary Commission is charged by statute with establishing boundaries upon incorporations² and subsequent alterations.³

The territorial jurisdiction of Alaskan cities is ill-defined by Alaskan statutes. The statutes provide for the creation of boundaries,⁴ which presumably infers that boundaries constitute the jurisdictional demarcation of a city.⁵ This inference is further reinforced by statutes which provide for extra-territorial jurisdictions. These latter statutes authorize any municipality to provide parks, roads, trails, playgrounds, emergency medical services, cemeteries, and airports outside municipal boundaries.⁶ Additionally, cities outside boroughs may exercise extra-territorial curfew regulation.⁷

On the other hand, borough territorial jurisdiction is clearly defined in regards to each respective power. Certain powers are "area-wide," i.e., a power of an organized borough exercised throughout the borough.⁸ These include education, planning, platting, zoning, and tax assessment and collection and such additional powers acquired by the borough through transfer or referendum.⁹ The borough may exercise other municipal powers as "non-area-wide powers," i.e., powers exercised only in the area outside of cities.¹⁰ For first class boroughs,

any municipal power may be exercised as a non-area-wide power by ordinance.¹¹ Second class boroughs may only exercise certain enumerated powers as non-area-wide powers. These include regulatory power over fireworks, animals, motor vehicles, snow vehicles, garbage, water pollution, and any other municipal power specified in its charter or subsequently acquired by referendum.¹²

ii) Native Government. It is quite common that the various Native village constitutions, whether adopted under the traditional form of government or under the Indian Reorganization Act, fail to define the exterior boundaries of their territorial jurisdiction. It is, therefore, necessary to look to common law in order to determine the respective jurisdictions of the tribal organizations.

Generally, it is said that tribal law and custom are applicable within "Indian country." This rule was not altered when Congress extended the State of Alaska's jurisdiction to Alaskan Indian country. Congress expressly reserved that Indian law and custom shall be given full force and effect in the determination of civil causes of action arising within Indian country in Alaska.¹⁴

This observation, however, begs the question to whether Indian country exists in Alaska, and, if so, what are the limits of Indian country in Alaska. Unfortunately, in Alaska the question whether Indian country exists is largely disputed, and supported by a vacillating history of cases.

As Felix Cohen illustrates in his early attempt to define the term Indian country, the term is a dynamic concept. Originally, the concept seems to have been born out of respect for the territorial integrity of Indian nations.¹⁵ Later, the idea was supported in the Jacksonian policy of Indian removal to reserves, a policy designed to physically separate Indians and the immigrant culture.¹⁶ From thence, the concept found its way into the early Indian Intercourse Acts to indicate Indian lands west of the Mississippi.¹⁷ From this point, the courts and Congress have separately, albeit tangentially, developed the concept of "Indian country."

Congress repealed the definition section of the act in 1834 and failed to reenact a substitute general definition of Indian country.¹⁸ Later, however, Congress defined the term Indian country in relation to specific jurisdictional situations.¹⁹ The only current federal statutory definition of Indian country exists in 18 USC 1151 which defines 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 state.
- (c) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

It should be noted that this definition of Indian country only applies to a set of federal criminal statutes contained in Title 18 of the U.S. Code. The term Indian country, however, is also found in 28 USC 1360 dealing with state civil jurisdiction over Indians. The result is that there is no general statutory definition for Indian country, nor is there a statutory definition for Indian country in the civil sense.

The resulting ambiguity from the lack of a statutory definition of Indian country led to a series of Supreme Court decisions laying down the principal common law definition of Indian country. Felix Cohen states that the first ruling by the Supreme Court on the issue came in Bates v. Clark,²⁰ which stated in essence that:

"it follows from this that all the country described by the Act of 1834 is Indian country, remains Indian country so long as the

Indians retain their original title to the soil, and ceases to be Indian country when ever they lose that title, in the absence of any different provision by treaty or act of Congress."

This basic principle expanded in Donnelly v. U.S.,²¹ where the court stated that executive order reservations constituted Indian country even though the respective band did not possess original title to the land in question.

Of more importance to the Alaskan situation however, was the case U.S. v. Sandoval, 231 US 28 (1913) which held that Pueblo lands not held in trust by the United States, but owned in fee simple by a Native community under a Spanish land grant, was in fact Indian country. In his treatise on the federal-Indian relationship, David Case pointed out that the Sandoval doctrine presents a clear analogy to the Alaskan situation where Native communities own land in fee simple through their Native corporations. In the Sandoval case, the court looked to the statutory definition embodied in 18 USC 1151 and held that the Pueblos of New Mexico were clearly dependent communities within the definition of Indian country. In a similar case, U.S. v. Chavez,²³ the Court defined Indian country as "any unceded lands owned or occupied by an Indian nation or tribe of Indians." If these Court cases are to be literally applied to the Alaska situation, it is clear that Indian country does exist in Alaska. However, the matter has never truly been settled.

The modern federal courts have only addressed the question whether Indian country exists in Alaska on three occasions. In the first case, regarding McCord,²⁴ the Court heard a petition in a proceeding for a writ of habeas corpus arising from a conviction for statutory rape occurring upon the Tyonek Indian Reserve. In that case, the Court followed the Donnelly decision and held that the executive order reservation was in fact Indian country which denied state jurisdiction to prosecute the defendant in the case. The second major case following McCord by one year, was U.S. v. Booth.²⁵ In that case, the court held that the Metlakatla Indian Reservation did not constitute Indian country because the reservation was not a "reservation in the tradi-

tional sense." The court further distinguished the case from McCord by noting the different conditions and history behind the Metlakatla Reservation. The decision in the McCord case, however, led to a general public outcry in concern over the lack of law and order within Indian country in Alaska. Alerted to this apparent gap in jurisdiction, Congress passed an amendment to PL 83-280 including Alaska among those states where mandatory state jurisdiction extended over Indian country within the borders of the state.²⁶ The legislative history behind this action clearly indicates that the Congress reacted to the holding in the McCord case, and clearly desired to overrule and reverse the precedents set by that case.²⁷ If the application of PL 280 in Alaska was a congressional reaction to McCord, not Booth, it is safe to assume that the holding in McCord was a correct statement of the legal crisis prior to the application of PL 280 to Alaska. In that the Act specifically states that the State of Alaska shall have jurisdiction over Indian country within its borders, it seems incredible to assert that Indian country does not exist in Alaska.

But the doctrinal confusion regarding the existence of Indian country in Alaska has continued. This is primarily due to the nature of the cases in which the claim of Indian country arises. For example, in the People of South Naknek v. Bristol Bay Borough,²⁸ the plaintiffs claimed a tax exemption for Native townsites within the borough by claiming that the townsites were Indian country and therefore exempt from state taxation. The court firmly refused to attempt an answer as to whether or not the land in question was in fact Indian country. The court, however, noted the historical confusion over the question of Indian country in Alaska. The court blamed much of this confusion on "one of the principal Indian jurisdictional cases that has emerged from Alaska," specifically, the Organized Village of Kake v. Egan.²⁹ Like Naknek, the Kake case arose out of a claim denying state jurisdiction. It is important to note, however, that the case did not deal with the question of Indian country per se, but addressed a narrower question of whether state law applied to off-reservation Indians. It should be noted that the mere existence of Indian country and consequent tribal jurisdiction is not an exclusive claim to jurisdiction and does automatically not deny state criminal and civil jurisdiction.

As noted earlier, Alaska is subject to the mandatory provisions of PL 83-280 which authorized the extension of state jurisdiction over Indian country. As a general rule, however, the application of PL 83-280 does not create exclusive state jurisdiction nor does it substantially affect tribal jurisdiction. In the case Bryan v. Atasca County,³⁰ the court clearly stated that:

. . . nothing in its [PL 280] legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to states would result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than private voluntary organizations.³¹

In reaching this conclusion, the court noted that 28 USC Section 1360(c) provided for full force and effect of any tribal ordinances or customs heretofore or hereafter adopted by an Indian tribe if not inconsistent with any applicable civil laws of the state. In light of these cases, it would seem that territorial jurisdiction over those areas which can be determined to be Indian country, would seem to be concurrent between the state and the tribe.

There remains, however, substantial concern that the Alaska Native Claims Settlement Act placed in question the existence of Indian country in Alaska. Specifically, concern centers around Section 19, which revoked existing reservations in Alaska. The supporters of this theory contend that, when the reservations were revoked, the territorial jurisdictions of the respective villages was destroyed. The argument, however, rests upon the proposition that Indian country is exclusively coexistent with reservations. The Supreme Court has clearly announced that there is nothing magic in the term "reservation."³² It is also clear that tribal jurisdiction is not dependent upon federal ownership of the territory in question. The Pueblo cases arising out of the New Mexico situation clearly demonstrate this. For example, in Chavez, Indian country was defined as "any unceded land owned or occupied by an Indian nation or tribe of Indians." It is not necessary that clear, unequivocal boundaries be established. Rather, it is only

necessary that the lands in question are occupied by "distinctly Indian communities" recognized and treated by the government as dependent communities entitled to its protection.³³ Applying this rule to Alaska subsequent to ANCSA, it is quite easy to identify those villages in rural Alaska which continue to be predominantly Native. Such communities retain substantial cultural, social, and economic characteristics identifiable as Native. Those villages clearly fall within the definition of a dependent Indian community enunciated in the Sandoval decision. Additionally, it must be recognized that ANCSA clarified continued Native title to certain lands within the state. Under the terms of the Act, Alaskan Native aboriginal claims to the land were extinguished.³⁴ In compensation for the extinguishment of such claims, Alaska Native villages were allowed to select and receive substantial amounts of land surrounding the villages.³⁵ The main effect of this act was to continue Native occupancy and ownership of a substantial amount of land surrounding Native communities, thus those lands selected and ultimately conveyed to the village corporations clearly constituted "unceded lands owned and occupied" by the Native villages concerned. Thus, the definition of Indian country as specified in the Chavez case is clearly met. As noted earlier, the fact that such lands were conveyed in fee simple is irrelevant under the terms of the Sandoval case.

Of course, this does not address the substantial concern which may arise upon subsequent land transfers by the respective Indian communities. The problem presents itself in two distinct situations. First, what is the status of lands originally selected by a village corporation and then conveyed by the corporation to non-Natives? Secondly, what is the status of lands subsequently acquired by the Native village?

The basic rule governing subsequently acquired Indian lands and their respective status as Indian country was laid down. In that case, the lands in question were lands owned by the United States and purchased out of funds appropriated by Congress for this purpose. The ruling that such lands were in fact Indian country relied on the role of the government in the establishment of the colony. The role of the federal government in the creation of the Reno Colony is substantially

analogous to the role of the federal government in the identification and conveyance of lands received under the terms of ANCSA. Subsequent purchases of private land by Alaskan Native villages in fee simple would by definition not involve the federal government. Under the rationale of McGowan, the diminished federal role in the identification of Indian lands would substantially impact the status of those lands under the McGowan test. Subsequently, acquired land which would not involve federal government participation in the acquisition of such land would clearly not extend village jurisdiction.

The above type of subsequent acquisition, however, should be sharply contrasted from acquisitions authorized under the Indian Reorganization Act.³⁶ Lands acquired in this manner would fall under the black letter rule of McGowan, so that lands subsequently acquired pursuant to the terms of the Indian Reorganization Act would clearly extend village jurisdiction to those lands.

The possibility that a village might sell or otherwise dispose of village lands to nonmembers of the community presents a substantially different problem. In the case Seymour v. Superintendent,³⁷ the United States Supreme Court held that lands conveyed to non-Indians within the exterior boundaries of a former reservation did not lose the character of Indian country. This rests upon the theory that once Congress has set aside certain lands for the use and occupancy of Indians, such use and occupancy shall not be disturbed. Broadly applying this principle to Alaskan Native villages, it would seem that lands within the Alaskan Native village selections authorized under the terms of ANCSA, would continue to be Indian country in spite of subsequent conveyance of such lands to non-Indians by the village.³⁸ In contrast to these decisions, however, is the decision in DeCoteau v. District Court.³⁹ In that case, the Court held that the Lake Traverse Indian Reservation in South Dakota was terminated and returned to the public domain and, hence, Indian country on the Lake Traverse reservation ceased to exist on this reservation. The Court in DeCoteau noted that the Act in question was a ratification of a prior negotiated agreement which was fully intended to terminate the reser-

vation. By the terms of the agreement itself, the Indians would "cede, sell, and relinquish, and convey" all the remaining land in the reservation. The court distinguished Matz and Seymour as being cases involving unilateral Congressional action rather than possession or sale of land by the Indians. From this line of cases, it is only reasonable to conclude that a sale of Indian lands by a village would result in the relinquishment of tribal jurisdiction over those lands.

iii) Summary Comparison. In summary, it seems clear that the territorial jurisdiction of state municipal governments are basically defined in terms of their boundaries. Borough's territorial jurisdiction may be limited in regards to a number of powers by the existence of cities within its boundaries. Finally, all municipalities may exercise extra-territorial jurisdiction in respect to certain enumerated powers. The procedure for enlarging or diminishing boundaries is statutorily prescribed. In contrast, a Native village government's territorial jurisdiction is defined in reference to the village's "Indian country." It is most likely that a village's Indian country is coextensive with lands received under ANCSA, and any other lands subsequently acquired with federal participation. A village's Indian country may be diminished through unilateral sale or cession of village lands.

PERSONAL JURISDICTION

In contrast to a municipal government, tribal government has very limited personal jurisdiction. Whereas personal jurisdiction of a municipality extends to all or most individuals within its territorial jurisdiction, a tribe's jurisdiction is generally linked to its membership. The U.S. Supreme Court enunciated the basic principles of tribal personal jurisdiction in the companion cases, Oliphant v. Suquamish⁴⁰ and U.S. v. Wheeler.⁴¹ In Oliphant, the Suquamish tribe attempted to enforce a local traffic ordinance against a nontribal member. In its decision, however, the Court denied the tribe's claim to jurisdiction over non-members. In Wheeler, however, the Court upheld the Navajo Reservation's claim to enforcement jurisdiction over tribal members.

There are basically two ways to interpret the meaning of these cases. In the broad sense the Oliphant decision can be interpreted as denying tribal jurisdiction in a general sense over nontribal members. It is important to note, however, that the Court in Oliphant did not overrule the holding in U.S. v. Mazurie. In that case, the court upheld the extension of tribal liquor ordinances over nonmembers of the tribe. Although the cases seem irreconcilable at first glance, there were substantial differences in these two cases. In Mazurie, the Court upheld the prescriptive, i.e., legislative, act of a tribal government and stated that such prescriptive or legislative acts extend and apply to nontribal individuals. The actual enforcement mechanism in the Mazurie case were federal authorities, i.e., the federal courts. In contrast, the tribe in Oliphant was attempting to enforce tribal ordinances through tribal courts. The only way these two cases can be reconciled is to recognize that tribal ordinances extend to nonmembers and that tribes have the prescriptive jurisdiction over nontribal members. In contrast, Oliphant tells us that tribes do not have enforcement jurisdiction over nonmembers. The result is that tribes must seek alternative enforcement mechanisms against nontribal members, i.e., the state or federal courts. As noted in Bryan v. Itasca, federal courts are not available in a PL 280 state such as Alaska in that federal jurisdiction has essentially been withdrawn. Thus, the state courts are the only forum for enforcement of tribal ordinances which are available in a PL 280 state. As noted above, however, "PL 280" requires the state to give "full force and effect" to valid tribal ordinances in civil cases.⁴³ Under this rationale, a village would have prescriptive jurisdiction over non-tribal members with state enforcement in civil matters.

There remains, of course, the question of criminal cases. PL 280 has no comparable requirement for "full force and effect" of tribal ordinances in criminal cases. There exists, however, two lines of authority on this issue. Some states have extended "full faith and credit" to tribal ordinances by holding that a tribe is a "territory" under 28 USC 1738.⁴⁴ On the other hand, many states have refused full faith and credit, but have extended "comity" to tribal ordinances.⁴⁵ The issue remains unresolved.⁴⁶

B. SUBJECT MATTER JURISDICTION

Subject matter jurisdiction refers to the types of issues with which a government may concern itself. Often subject matter jurisdiction is referred to as the "powers" of a government. Title 29 of the Alaska Statutes enunciates in a comprehensive manner, the powers of state chartered local governments. In contrast, there exists no similar comprehensive and authoritative exposition of tribal powers. Understanding tribal powers requires a thorough review of a substantial body of federal and international common law. Finally, there exists a less formidable body of federal common law governing the interaction of these respective jurisdictions.

1) Concurrent Jurisdiction

There are two basic principals governing the interaction between municipal and tribal governments.

The first principle was enunciated by the United States Supreme Court in Williams v. Lee.⁴⁷ In that case, the United States Supreme Court held that states have jurisdiction over Indians except where such state jurisdiction infringes upon tribal self-government. This test was specifically applied to Alaska in Organized Village of Kake v. Egan.⁴⁸ In that case, the Court analyzed the development of this principle and stated:

"these decisions indicate that even on reservations, state laws may be applied to Indians unless such application would interfere with reservations, self-government, or impair a right granted or reserved by federal law."

In explaining these lines of decisions, the Supreme Court further stated that, "it must be remembered that the Courts in applying the Williams test, have dealt principally with situations involving non-Indians."⁴⁹ In these situations, both the tribe and state fairly claim an interest in asserting jurisdiction. The Williams test was designed to

resolve this conflict, but providing that the state could protect its interest in its non-Native citizens up to the point where tribal self-government would be affected.⁵⁰ In fulfillment of this policy, cases arising between tribal members fell within the exclusive interest of the tribal government.

The second major principle is a modification of the above rule required by the fact that Alaska is governed by the operation of Public Law 280.⁵¹ Generally, this law confers upon the state criminal and civil jurisdiction to adjudicate matters between Natives within Indian country. It is important, however, to understand the parameters of PL 280 as recently defined by the courts. The courts have generally attempted to limit the effect of PL 280 because of the "devastating impact on tribal governments" that the law has had.⁵² In Brian v. Itasca County, the U.S. Supreme Court in commenting on PL 280 stated:

"nothing in this legislative history remotely suggest that Congress meant the acts extension of civil jurisdiction to the states should result in the undermining or destruction of such tribal governments as did exist in a conversion of the affected tribes in the little more than "private volunteer organizations," a possible result if tribal governments and reservation Indians were subordinated to full Panoply of civil regulatory powers, including taxation of state and local governments. The act itself refutes such an inference: There is notably absent any conferral of state jurisdiction of the tribes themselves and Section 4 C, 28 U.S. C Section 1360(C) (28 U.S. CS Section 1360 (C)), providing for the "full force in effect" of any tribal ordinances or customs "heretofore or hereafter adopted by An Indian Tribe...if not inconsistent with any applicable civil laws of the state, contemplates the continuing vitality of tribal government."

The court went on in a footnote to further explain this policy of promoting Native governments. In a comment of particular importance to Alaska, the court stated:

"the suggestion is that since tribal governments are disabled under many state laws from incorporating as local units of government, general regulatory control might relegate tribal governments to a level below that of counties and municipalities, thus essentially destroying them, particularly if they might raise revenue only after the tax base had been filtered through many governmental layers of taxation. Present federal policy appears to be returning to a focus upon strengthening tribal government...and the Court of Appeals of the Ninth Circuit has impressed the view that courts are not obliged in ambiguous instances to strain to implement an assimilationist policy Congress has now rejected, particularly, where to do so will interfere with the present Congressional approach to what is after all an ongoing relationship."⁵⁴

This general policy, favoring the strengthening of tribal governments has two effects.

First, PL 280 does not confer a state's general civil regulatory control over Indian country.⁵⁵ Although the Supreme Court has failed to fully define what the scope of "regulatory" means, it is clear that taxation of personal property on trust land,⁵⁶ zoning authority,⁵⁷ and outdoor advertising⁵⁸ in Indian country is beyond the state authority. The second effect of Brian v. Itasca was that PL 280 only made applicable to Indian country those state laws which "had a general applicability throughout the state." In short, this general principle denies the authority of local governments to exercise authority over Indian country since their authority does not extend throughout the state.⁵⁹ This basic principle, if applied in Alaska, could have a crippling effect on rural municipal governments in Alaska. The result would be the creation of local governments chartered under state law whose authority only extended over non-Indians. The end result would be the creation of parallel local government units incapable of exercising jurisdiction over the respective persons subject to the other local government's personal jurisdiction.

2) Local Government Powers.

The basic rule regarding the powers of a tribal government is that such powers are not in general delegated powers granted by express Acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.⁶⁰ This has recently been compared with the concept of home rule under Alaska state law.⁶¹

In contrast, Alaskan municipalities are of two types. A home rule municipality, like an Indian tribe possesses all local government powers not reserved from it by state law.⁶² A general law municipality possesses powers delegated to it by state law.⁶³ As noted above, Alaskan municipalities are further divided between cities, boroughs, and service areas.

Basically, all these municipalities exercise four types of powers.

A municipality possesses "general powers" related to the municipal corporate identity. These powers include the power to be sued, power to employ municipal officers and officials, power to be sued, power to levy taxes and special assessments, enforce ordinances, prescribe penalties for violations, acquire manage control use, and dispose of personal and real property to promote legislation for the municipality to expend funds for community purposes, and to borrow money and issue evidence of indebtedness. By statute, all municipalities possess the unilateral authority to exercise these powers.

Second, municipal organizations possess "regulatory powers," which relate to: public rights-of-way facilities to services, traffic and general transportation including buses, taxis, etc., animal control, sales of goods, foods, and alcoholic beverages, dangerous insect and rodent control, recreational devices, building codes, public nuisance abatement, garbage & solid waste collection, water and air pollution, licensing of day-care facilities, police powers, or other general health safety and well-being welfare functions.⁶⁵

As a general rule, cities possess the unilateral authority to exercise the regulatory powers. Boroughs, however, are subject to a narrower grant of authority depending on whether the power is area-wide or non-area-wide (see Part II (i) above).

Third, Alaska Statutes outline a number of municipal facilities and services which municipalities may provide. These include services and facilities relating to streets and sidewalks, sewage treatment facilities, harbors, flood control, health and hospital services, cemeteries, police and jail services, cold storage, telephone, lights, power, heat, water, transportation, community centers, libraries, recreation facilities, airport facilities, garbage facilities, fire protection, parking, urban renewable, consumer protection, and historical sites, buildings and monuments.⁶⁶ Any city may exercise the powers necessary to provide these facilities, however, boroughs must assume the powers to provide these facilities and services in a like manner required for the exercise of regulatory powers. Third class boroughs are not specifically authorized to provide such facilities and services.

Fourth, municipalities are authorized to exercise what are commonly called area-wide powers, i.e., education, and planning, platting, and zoning authority. Generally, first and second class boroughs have the statutory authority to unilaterally provide such services on an area-wide basis. All third class boroughs may provide educational services on an area-wide basis and may, upon voter approval, exercise planning and zoning authority. As a rule, cities do not exercise such powers except when they are located outside borough boundaries.⁶⁸

An exhaustive comparison of these powers is certainly beyond the scope of this project if not impossible, however, it is possible to select three areas for special consideration.

i) Police Powers. While municipalities possess police powers,⁶⁹ tribes possess the power to regulate the conduct of members.⁷⁰ The federal government has withdrawn tribal jurisdiction over most felony crimes by enactment of the Major Crimes Act,⁷¹ and Assimilative Crimes Act.⁷²

Both the tribe and the municipality are limited from prescribing a punishment for violation of an ordinance in excess of \$500 and/or thirty (30) days in jail.⁷³ Municipalities are prevented from operating "courts" since the Alaska Constitution provides for an integrated court system under state government.⁷² This constitutional reservation of power to the state, however, does not prevent municipalities from operating "administrative tribunals" capable of enforcing its ordinances.⁷³

Such tribunals, however, are subject to the same constitutional guarantees protecting the rights of the accused, where the ordinance provides for the regulation of acting which traditionally connotes criminality.⁷⁴

In contrast to municipalities, Native governments possess the inherent power to create courts to enforce their ordinances.⁷⁵ Such tribal courts are not generally subject to the individual guarantees of the Bill of Rights.⁷⁶ To rectify this, Congress passed the Indian Civil Rights Act of 1968,⁷⁷ which applies the constitutional protections of the Bill of Rights to Indian governments.

ii) Planning. Both tribes and municipalities possess planning authority. Alaska statutes specifically provides for municipal planning authority. Within organized boroughs, planning is an area-wide function of the borough.⁸⁰ Of course, the borough may also delegate such powers to a city within its borders.⁸¹ Outside organized boroughs, first class cities are required, and second class cities may exercise planning powers.⁸² In unorganized areas of the state, planning authority rests with the Department of Natural Resources.⁸³

Tribal planning authority is a power retained by tribes in the absence of contrary federal law. This authority is already expressly recognized by the state. While the Court in State v. Aleut Corp.,⁸⁴ held that ANCSA regional corporations lacked governmental planning authority so as to require the State Division of Lands to give notice of pending land actions, the Court also held that traditionally organized Native villages constituted local authorized planning agencies.⁸⁵

While both entities enjoy substantially similar planning authority, the entities implement this authority in substantially different ways. Municipalities have authority to directly implement their plans through zoning, platting,⁸⁶ and operation of their program. The municipality, however, is not able to direct state agencies to comply with its plan. For example, the prior A.S. 29.33.090(d) required certain state land management programs to comply with municipal plans. This was repealed.⁸⁷

Municipalities also may implement their plans through its licensing power over vehicles, animals, day care facilities, etc.⁸⁸

A tribe's most potent implementation tool is its recognized authority to license. For example, in U.S. v. Mazurie,⁸⁹ the Supreme Court upheld a tribe's right to license bars owned by non-Natives on fee simple land within Indian country.⁸⁹ Secondly, a village may regulate the nature of member's ownership rights property.⁹⁰ Finally, there is some authority to believe that a Native village government may exercise zoning authority over Native land. In Santa Rosa Band of Indians v. Kings County,⁹¹ the Court struck down local zoning ordinances holding that "the extension of local jurisdiction is inconsistent with tribal self-determination and autonomy."⁹² This infers, of course, that the local government invaded a power to zone reserved to the tribe.

iii) Taxation. The right of a Native government to tax is a retained sovereign power.⁹³ The extent of this power is almost wholly uncertain, since few Native governments exercise this power. It would seem that a tribe may impose taxes on business,⁹⁴ lawyers,⁹⁵ or to accompany tribal permits.⁹⁵

The taxing powers of municipalities are more clearly defined. They may levy sales and use taxes,⁹⁷ and property taxes.⁹⁸ These taxing powers are subject to a substantial number of exemptions and limitations.⁹⁹

PART III

SUGGESTIONS TO INCLUDE NATIVE VILLAGE GOVERNMENTS WITHIN THE ALASKAN LOCAL GOVERNMENT SYSTEM

A. POLICY CONSIDERATIONS

The decision to allow inclusion of the Native tribal government within the local government system within the State of Alaska local government system is, of course, a policy issue. The Alaska Constitution and the basic principles which underlies Article 10 dealing with local government in Alaska provides certain objective standards for policy evaluation. The local government committee of the Alaska Constitutional Convention articulated five basic principles which guided the drafting of Article 10. These basic principles are:

1. Self-government.
2. A unified local government system.
3. Prevention of overlapping tax authorities.
4. Flexibility.
5. State interest.¹

The inclusion of Alaskan Native tribal government within the state local government system is consistent with these principles first enunciated in the Constitutional Convention.

1. Self-government. The maximization of local control over local government was a primary concern of the framers. This policy is specifically enunciated in Section 1 of Article 10 of the Constitution which provides that, "the purpose of this Article is to provide for maximum local self-government..." This concern is reflected in other provisions of Article 10. For example, Section 6 provides that the legislature shall provide performance of services that it deems necessary and advisable in the unorganized boroughs "allowing for maximum

local participation and responsibility." Section 9 provides that home rule charters of first-class municipalities shall be approved by popular election. This policy favoring local self-government in municipal matter is consistent with federal policy favoring self-determination of Indian tribes. Fundamental to self-government/self-determination, is the right of people to determine what form their government shall take and to establish rules and regulations regarding the management and operation of that government. For a variety of reasons, several Alaskan Native villages have failed to organize a second-class city under the Alaska state law preferring rather to organize themselves exclusively as Alaska Native villages. In many cases, such organizations reflect a community decision to organize a local government which best reflects the cultural and social character of the respective community. Under this rationale, the state should encourage communities to organize themselves under any authorized governmental form which best represents the respective communities' social, cultural and economic pattern. The inclusion of Native governments within the system of Alaska state local government promote that policy. This action would broaden the number of local options available to communities desiring to organize.

2. Integrated local government system. The framers of the Alaskan Constitution desired to create a single system of local government within Alaska. As noted by this report, however, two parallel systems of local government exist in Alaska, i.e., state chartered municipalities and tribal government. The quality and quantity of interaction between these two types of government varies from community to community. The quality and quantity of possible interaction ranges from substantial cooperative efforts to substantial opposition. Often times coordination between governments is merely a function of interlocking office holders. Where the Native council and the city council are substantially the same, the respective governmental efforts are highly coordinated. In contrast, where the councils are not interlocked there is little coordination and often counterproductive efforts. State and federal program operation is often dependent on this cooperation, since state programs prefer to operate through municipalities and many federal programs operate through tribal governments.

In contrast, non-recognition problems result where a community is exclusively organized as a Native village government. Such communities are not immuned from the same problems which plaque communities organized as municipalities. Where the municipality may draw on the resources of the state to help address such problems, the Native village encounters greater reluctance by the state to render equal assistance. The obvious solution to this problem is for the community to organize as a municipality. The community would in fact only trade problems--i.e., the community would trade a reluctance on part of the state to render assistance in exchange for duplicity and confusion of local government.

The inclusion of the Native government within the local government system, therefore, would further state policy favoring a unified local government system. It would promote cooperation where parallel governments exist and it would alleviate the necessity of creating parallel local governments where none exist now.

3. Prevention of overlapping taxing and authorities. As noted above, the framers of the Alaska Constitution specifically intended to eliminate overlapping tax authorities and promote physical integration within local government. For this reason, Article 10, Section 2, specifies that cities and boroughs are the only local governments authorized to tax under the Alaska Constitution. As noted above, however, this plan is somewhat frustrated by the existence of Native government which possess authority to levy taxes and dues on members. Additionally, the eligibility of Native villages to receive intergovernmental revenue transfers supports the state's objective to facilitate fiscal integration of local government. This lack of fiscal integration within the community leads to a number of problems including duplicate accounting systems, redundant and excessive administrative costs and, in some cases, program duplication. The framers had hoped to avoid such problems in adopting a policy favoring fiscal integration. The inclusion of Native governments within the local government system will help avoid these inefficient fiscal management systems as intended by the framers of the Constitution.

4. Flexibility. Throughout the Constitutional floor debates, the drafters of Article 10 emphasized their desire to provide a "framework" for local government which would be flexible enough to meet community demands throughout a highly pluralistic state such as Alaska. Native governments represent a flexible accommodation to the need for pluralistic representation in local government. It, therefore, follows that the inclusion of such governments fulfill a constitutional policy favoring flexibility in Alaskan local government.

5. State interest. As noted above, the framers of the Alaska Constitution felt that strong local government was a mechanism to facilitate the decentralization of state government. It was fully intended that strong local government could perform traditional state functions much better than a centralized government structure. This plan, however, is dependent on the existence of local government. The state by necessity remains responsible for the provision of basic services in the unorganized areas of the state. Thus, good strong local government serves the state's interest in a long term. The existence in unrecognized, parallel, and competing systems of government at the local level serves to delete the potency of local government and thereby thwarts the efficient implementation of the eventual decentralization of state government. The inclusion of Native governments within the system of local government within the State of Alaska makes available to the state existing government entities capable of pursuing the state's interest. In this sense, the Native government can serve as a conduit for the provision of state services. In a limited sense, the state has already adopted this policy. For example, in the Coastal Zone Management Act, the Rural Development Act, the Municipal Trust Land (14c) Program, the Community Legal Assistance Program, the Community Miscellaneous Assistance Program and various state contracting programs utilize Native government to administer and otherwise implement these programs where substantial community participation is required. The general inclusion of Native governments within the local government system of the State of Alaska will make available to the state a valuable local instrument for the fulfillment of the state interest.

6. Fundamental Rights. The greatest concern over inclusion of Native village governments into the Alaska local government system is the fact that the Native governments are racially defined institutions. As such, it is feared that non-Natives will be relegated to a status of second class citizens in their own communities. This view is founded on two questionable assumptions: 1) non-Natives cannot participate in Native government, and 2) non-Natives have no rights under a Native government.

It is a general rule of law that a Native tribe has the exclusive authority to determine its membership.² This power specifically includes the power to provide for adoption of non-Natives into the tribe.³ This general rule is subject to one exception. The Secretary of the Interior is charged with the responsibility of determining tribal enrollment for the purposes of distributing tribal trust funds.⁴

In contrast, Native governments providing services under federal contracts may also render services to non-Native tribal members, since for the purpose of contracting "Indian" is defined in terms of tribal membership.⁵ Benefits provided through state revenue sharing are required by state procedures equally available to non-Native residents of the respective communities. Thus, it is quite possible for non-Natives to fully participate in Native government.

*participation by non-Natives in Native government is quite common, despite efforts of the B.I.A. to discourage the practice. In one case, a Native village constitution goes so far as to guarantee non-member/non-Native heads of households representation on behalf of their Native children before the Native council.*⁶ In practice, Native councils are reluctant to open village roles to non-Natives who may be transient or are reluctant to establish permanent ties with the community. This is understandable in that membership in a village generally carries with it cultural duties and obligations. This reluctance is analogous to the policy of the federal government to extend citizenship to aliens, or for that matter, the reluctance of the State of Alaska to extend full state benefits to "cheechakos."

The second major concern relates to the individual rights of non-Natives under Native government. The prime guarantee of individual rights under a Native government is the Indian Civil Rights Act of 1968.⁷ The Act mandates that a Native government provide many of the same individual protections provided under the U.S. Constitution. These include:

- free exercise of religion
- freedom of speech, press and assembly
- freedom of unreasonable search and seizure
- protection from double jeopardy and self-incrimination
- protection from taking of property without compensation
- right of due process and counsel
- protection from cruel and unusual punishment and excessive bail
- right to equal protection of the laws
- prohibition of bills of attainder or expost facto laws, and
- right to trial by jury

These rights extend to members and non-members alike.⁸

There is some concern that the Act only provide relief through the right of habeas corpus. This concern focuses around dicta contained in Santa Clara Pueblo v. Martinez.⁹ In that case, the Court review a tribal ordinance which conferred benefits upon tribal members based upon distinction between patrilineal/matrilineal ancestors. In dicta, the Court stated that Congress only provided one clear remedy for plaintiffs under the Act - i.e., habeas corpus. A full reading of Martinez, however, reveals that the holding of the case rests upon a test which balances the two current policies of federal Indian law - i.e., self-determination and protection of individual rights. As one commentator remarked, "In litigation under the Indian Civil Rights Act, federal court jurisdiction outside the scope of habeas corpus proceedings has been firmly established."¹⁰

Conclusion. While the municipalities and tribes do not have co-extensive powers, they have many similar areas of concern where their powers overlap. It should be remembered that the tribal organization is a governmental unit with broader areas of concern and responsibility than the municipality. For example, tribal powers include regulation of property rights, marital relations, and child custody.¹⁰⁰ Tribes provide employment, welfare, economic development, child protection, and various other services generally felt to be beyond the scope of local government. As local government in Alaska develops along the path of decentralization envisioned by the framers, it is likely that municipal governments will also address these subject areas. In any case, it is clear that village and municipal government are not the same thing. It is also evident that they are closer than commonly perceived.

another reason a non-native would not want to join a Trib

B) PROPOSALS

There are three basic concepts which would allow inclusion of Native governments in the State system of local government. These three concepts are incorporation, service area designation, and recognition.

i) Incorporation- Incorporation is the formation of a unit of local government. Theoretically it is possible to incorporate Native governments as units of local government under State law. As noted in Part IA, above, this has been attempted twice in the past. Several current second class cities were originally incorporated under the 1957 Act. The Native character of these governments- ie the attributes of tribal self-government- have been so eroded that they are not currently recognized as tribal entities by their people or the federal government.

No unless it meets requirements for incorporation

This is not to say that incorporation is not possible. In Bryan v Itasca¹¹ the Court stated that one reason it was reluctant to extend local government jurisdiction over Native communities was the fact that many states did not allow incorporation of Native government under state law. This implies, of course, that such incorporation is constitutionally permissible. As noted above, however, Alaska is not bound by the

(how about multi-state tribes?)

standards of the U.S. Constitution when it is faced with interpreting the Alaska Constitution.. There is no precedence at all in regards to the position of the Alaska Constitution on this issue. Thus, incorporation of Alaska Native village government would be Constitutionally uncertain.

ii) Service Area Designation. Service area designation would allow the formation of service areas in unincorporated areas so as to provide a local mechanism for the provision of state services. This concept has two limitations. First, the Constitution prohibits the use of service areas where the service contemplated could be rendered through a city of annexation by a city.¹² This means that the service area could not be formed in cities. *(unincorporated cities, no state can annex village)* Secondly, the service area is a local government unit, and designation of a Native government would be *akin to incorporation, ie Constitutionally uncertain. To provide for independent organization of the service area would only be fostering further creation of parallel local government units.* *How? Service area would be a separate entity, not a village, not a city, not a town, not a borough, not a census area, not a district, not a county, not a state, not a federal government.*

iii) Recognition. Recognition is a concept borrowed from international law. It is the process whereby one government acknowledges the authority of another government. It is more than taking note of a mere fact. It is the process whereby two governments seek to establish intergovernmental relations. There are two types of recognition- recognition of the community and recognition of the government. Recognition of the community is acknowledgement that the community is a legal entity capable of being organized under an independent and effective government.¹⁴ Recognition of the government is acknowledgement that an individual or body of individuals act as the government for the community.¹⁵

*municipalities exist
under the authority
of the state*

The use of the concept of recognition is quite useful in the context of Native governments, since the state is not attempting to create a racially defined institution under its own authority. Rather the State is acknowledging the existence of the Native communities and governments. Thus the Native government gains no authority from the State, but merely enters into cooperative relations with the existing governments.

(as sovereign is not then would receive something like a foreign aid?)

*Can states enter into agreements w/ recognized
tribes?*

The draft bill (see Appendix A) would be sufficient to carry out this task. In addition to recognition, the bill defines the method whereby the State will engage in relations with the Native Villages. The proposal anticipates that Native villages could participate in State programs to the same extent as second class cities. This is analogous to federal programs which extend participation to states and tribes.¹⁶ Incident to recognition, the bill will clarify the status of Native village laws before state courts.

*but why?
AS
independence
not part of
state
2nd class
introduction*

The bill also proposes cooperative agreements between the State and the Native governments to carry out State programs. This section anticipates the passage of the Tribal-State Compact Act¹⁷ which would allow federal funding of programs conducted under a State-Tribal agreement, and thus reduce the burden on the State treasury for those areas affected by these agreements.

Finally, the bill conditions the relationship upon the Native government complying with antidiscrimination provisions. This of course exempts federally funded Indian programs. The bill allows the Governor to enforce compliance through withdrawal of recognition.

The bill does not attempt to expand the jurisdiction of the State or the Native village. Section three (3) allows municipalities and villages governments to enter into similar agreements.

APPENDIX A

A BILL

For an Act entitled : "An Act relating to Native Village Governments."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. FINDINGS AND PURPOSE. (a) The legislature has determined that

(1) there exist within the state several communities which have Native village governments whose members are citizens of the State; and

(2) the law and customs of Native village governments include notions of democracy, liberty, and the exercise of personal rights consistent with the State and federal constitutions.

(b) It is the purpose of this Act to

(1) extend recognition to Native village governments and encourage them in the administration of local government;

(2) provide for cooperative agreements between the State government and Native village governments to promote the equitable delivery of State services.

* Sec. 2. AS 29 is amended by adding a new chapter to read:

CHAPTER _____ NATIVE VILLAGE GOVERNMENTS.

Sec. 29. --. 010. NATIVE VILLAGE GOVERNMENTS. The State of Alaska hereby recognizes the Native Villages as distinct, independent, political communities exercising original tribal sovereignty in dependent association with the United States. Any Native village ordinance or custom heretofore or hereafter adopted by the duly constituted governing body of Native Village, in the exercise of any authority which it may possess shall, if not inconsistent with any applicable law or constitutional provision of the State of Alaska, be given full force and effect within the Alaska State Courts, Provided that such Court shall have jurisdiction to hear such cause

as a result of the withdrawal of federal jurisdiction pursuant to P.L. 83-280 (67 Stat. 588), as amended by P.L. 85-615 (72 Stat. 545).

Sec. 29.--. 020. ELIGIBILITY FOR STATE PROGRAMS. A Native Village government, for a village which is not incorporated under this title, and is not located within an organized borough is

- a) eligible to participate in all State programs to the same extent and in the same manner as a second class city;
- b) entitled to notice concerning proposed actions by the state to the same extent as a government of a second class city is entitled to notice; and
- c) entitled to consultation with the state on state actions and programs which affect the village to the same extent that the government of a second class city is consulted on state actions and programs.

Sec. 29.--.030. AGREEMENTS. (a) A Native Village government or a group of Native village governments may negotiate agreements with the Commissioner regarding coordination of State and Native Village facilities and services which may include judicial, law enforcement, and correctional services.

(b) When the Commissioner negotiates an agreement under this section, he shall first first consult with the head of each principal executive department which may be affected by the agreement. The Commissioner shall next submit the proposed agreement to the Governor. The Governor may approve the agreement and upon approval the agreement shall define the respective responsibilities of the State and of the Native village government during the period of time covered by the agreement.

Sec. 29.—.040. NON-DISCRIMINATION. (a) A Native Village government which is a party to an agreement under AS 29.—.030 may not adopt a rule or operate a program which creates or extinguishes a benefit, liability, privilege, immunity or licence dependent upon racial classification or membership in a Native tribe, clan or organization, except that a Native village government may participate in federally funded programs which provide services to persons or organizations because of their status as Native persons or Native organizations. Violation of this section renders an agreement entered into under AS 29.—.020 void.

(b) The Governor may withdraw recognition of a Native Village government authorized under AS 29.—.010 whenever he shall make a determination that the Native Village government has adopted a rule or operates a program which creates or extinguishes a benefit, liability, privilege, immunity or licence dependent upon racial classification or membership in a Native tribe, clan or organization, except that such determination may not be dependant a Native Village government's participation in federally funded programs which provide services to persons or organizations because of their status as Native persons or Native organizations .

(c) Actions and determinations made under this section shall be made in accordance with the Alaska Administrative Procedure Act (AS 44.62).

Sec. 29.—.050 LIMITATIONS. Nothing in this capter authorizes the alienation, encumbrance, or taxation of real or personal property, including water rights, belonging to a Native person of village that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States, or authorizes regulation of the use of property in a manner inconsistent with a federal treaty, agreement, statute, or regulation, or extends the jurisdiction of the State to adjudicate the ownership or right to possession of property. Nothing in this chapter deprives a Native person

Native village, or Native corporation of any right, privilege, or immunity afforded under federal or state treaty, agreement, or law, or alters the jurisdiction of the state, its political subdivisions, or a Native Village government. Nothing in this chapter shall create in the state any trust obligation toward a Native person or Native organization because of their status as Native persons or Native organizations.

Sec. 29.—.060. DEFINITIONS. In this chapter

(1) "Native person" means a person who meets the requirements for membership in a Native Village or organization authorized, chartered or incorporated under the authority of a Native village government;

(2) "Native Village government" means a local governing body organized by the authority of the Act of Congress of June 18, 1934, 25 USC sec. 476, or a traditional governing body of a Native village which meets the requirements of the Alaska Native Claims Settlement Act, 43 USC secs. 1601 et. seq.

(3) "Commissioner" means Commissioner of the Department of Community and Regional Affairs.

* Sec. 3 AS 29.48.010 (4) is amended to read:

(4) to enter into agreements, including those for cooperative or joint administration of any functions or powers with a local government, with the state, (OR) with the United States, or with a Native Village government recognized under AS 29.—.010.

Introduction

- 1 - Constitutional Convention Proceedings, Pt. 4, pp. 2616-7.
- 2 - See State v. Erickson 574 P.2d 1 (Alaska, 1978). Isakson v. Rickey, 550 P.2d 358 (Alaska, 1976); Lynden Transport, Inc., v. State, 522 P.2d 1125 (Alaska, 1974).

I. PART I

1. D. Case, The Special Relationship of Alaskan Natives to The Federal Government, pp. 119-127 (ANF, 1978).
2. Preliminary Report on Borough Government, p. 11 (Alaska Legislative Council, 1960) [hereinafter cited "Preliminary Report"].
3. id.
4. id. at 14
5. id. at 12
6. R. Cease & J. Saroff, The Metropolitan Experiment in Alaska, p. 2 (Praeger, 1968).
7. id.
8. Chapter 11, SLA 1915; amended Chapter 25, SLA 1917; repealed (h.23, SLA 1923).
9. Preliminary Report, supra, at 12-13
10. 25 U.S.C. 476
11. Sen. Rpt. 1080, 73rd Cong. 2d Session, 1 (1934)
12. Preliminary Report, supra, at 14
13. id. at 15
14. id.
15. Chapter 150, SLA 1957; amended Chapter 79, SLA 1959.
16. Con. Cov. Proc., Pt.4, p. 47
17. id. at 2161
18. Ak. Const., Art. X, Sec. 2.

19. Con. Cov. Proc., Pt. 6, p. 59.
20. Con. Cov. Proc., Pt. 4, pp. 2616-7.
21. id., pp. 2613-4
22. See comments by Delegate Lonberg, Con. Cov. Proc., Pt. 4, p. 2651.
23. A.S. 29.08.020
24. Walters v. Cease, 380 P.2d 263 (Alaska, 1964)
25. A.S. 29.18.030
- 26.
27. Con. Cov. Proc., Pt. 4, pp. 2621-2.
28. id.
29. id. at 2653
30. Con. Conv. Proc., Pt. 6, pp. 45-6
31. Local Government Under The Alaska Constitution, p. 46 (1959, Public Administration Service).
32. City of Douglas v. City and Borough of Juneau, 484 P.2d 1040 (Alaska, 1971). See also Mobil Oil Corp. v. Local Boundary Comm'n, 518 P.2d 92 (Alaska, 1974).
33. Con. Cov. Proc., Pt. 4, p. 2650.
34. Ak. Con., Art. X, Sec. 7.
35. id., Sec. 3.
36. A.S. 29.18.011
37. Con. Conv. Proc., Pt. 4, p. 2654.
38. Id.
39. 484 P.2d 1040 (Alaska, 1971).
40. Con. Conv. Proc., Pt. 4, p. 2653.
41. id., at 2623
42. id., at 2624.
43. 491 P.2d 720 (Alaska, 1971).

44. Chugach Electric Association v. City of Anchorage, 476 P.2d 115 (Alaska, 1970).
45. Ak. Const. Art. X, Sec. 2.
46. id., Sec. 15.
47. id., Sec. 5.
48. id.
49. Con. Conv. Proc., Pt. 4, pp. 2719-20.
50. Ak. Const., Art. X, Sec. 2 See Liberati v. Bristol Bay Borough, 384 P.2d 1130 (Alaska, 1978).
51. Wien v. City of Ketchikan, 383 P.2d 721 (Alaska, 1963).
52. Ak. Const., Art. X, Sec. 13.
53. id.
54. Compare Con. Conv. Proc. Pt. 4, pp. 2713 and 2652.
55. Ak. Const., Art. X, Sec. 6.
56. A.S. 29.03.020
57. 1961 Op. Attorney General No. 24
58. A.S. 16
59. A.S. 46.40.110 et. seq.
60. A.S. 14.08.031
61. A.S. 29.89.040
62. D. Case, supra at 130.
63. See generally id., at 119-127.
64. Cohen, Handbook on Federal Indian Law, 122 (1948); 55 ID14 (1934) Powers of Indian Tribes; Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).
65. 231 U.S. 28 (1913)
66. P.L. 93-638, Sec. 4(a)
67. P.L. 92-512, Sec. 108(b) (14)
68. P.L. 93-383, Sec. 102(a) (1)

69. P.L. 93-203, Sec. 302
70. P.L. 95-608, Sec. 4(8)
71. 28 U.S.C. 1360 (c)
72. P.L. 90-351, Sec. 601(b)
73. See Fed. Reg. (May 25, 1973) p. 13758; Fed. Reg. (July 10, 1980) p. 46581-2.
74. 25 U.S.C. 476
75. 25 U.S.C. 473(a)
76. 25 U.S.C. 466
77. See generally D. Case, supra, at 38-40
78. 43 U.S.C. 1618
79. House Rept. No. 2244, 74th Cong., Second Session, .2 (1936).
80. Senate Rpt. No. 1080, 73d Cong., Second Session, 1 (1934).
81. 560 P.2d 31 (Alaska, 1977)
82. 465 F. Supp. 1286 (D.C. Alaska, 1978).
83. Act of June 19, 1935 (49 Stat. 388), as amended by Act of August 19, 1965 (79 Stat. 543).
84. P.L. 93-638, Sec. 4(a).
85. Field Solicitor's memorandum, Status of the Inupiat Community of the Arctic Slope for Self-Determination Act contracting and other purposes, May 1, 1979 (unpublished).
86. 25 U.S.C. 450(b).
87. Pueblo of Santa Rose v. Fall, 273 U.S. 315 (1927).
88. Williams v. Lee, 358 U.S. 217 (1959).
89. 541 P.2d 730 (Alaska, 1975).
90. See D. Case, supra, at 136-141.

PART II

1. Ak. Const. Art. X, Sec. 12
2. A.S. 29.18.090
3. A.S. 29.68
4. A.S. 29.18.050 *et. seq.* and A.S. 29.68
5. See generally. Fairview Public Utility District No.1 v. City of Anchorage, 368 P.2d 540 (Alaska, 1962)
6. A.S. 29.48.037
7. A.S. 29.43.100
8. A.S. 29.78.010 (18)
9. A.S. 29.33.010 *et. seq.*
10. A.S. 29.78.010 (19)
11. A.S. 29.38.010
12. A.S. 29.48.020; A.S. 29.38.020; A.S. 29.38.030
13. F. COHEN, supra at 5
14. 2 U.S.C. 1360(c) (PL 83-280) states
Any tribal ordinance or custom heretofore or hereafter adopted by
an Indian tribe, band, or community in the exercise of any authority
which it may possess shall, if not inconsistent with any applicable
civil law of the state, be given full force and effect in the deter-
mination of civil causes of action pursuant this section (i.e., which
arise in Indian country).
15. See PRICE, LAW AND THE AMERICAN INDIAN, 79-84, (1973)
16. Id

39. 420 U.S. 452 (1975)
40. 436 U.S. 191 (1978)
41. 436 U.S. 313 (1978)
42. 419 U.S. 544 (1975)
43. 28 U.S.C. 1360(c)
44. Jim v. C.I.T. Financial Services Corp., 87 N.M. 362, 533 P.2d 751 (N.M., 1975). 28 U.S.C. 1738, requires that:
Acts, records, and judicial proceedings (of any State, Territory or Possession) shall have the same full faith in credit in every Court within the United States and its Territories and Possessions as they have by usage in the Courts of such State, Territory or Possession from which they are taken.
See also In re Buehl, 87 Wash 2d 649, 555 P.2d 1334 (1976);
Ragsdale, Problems in Application of Full Faith and Credit for Indian Tribes, 7 N. Mex. L. Rev. 133 (1977)
45. Fox v. Fox, 542 P.2d 918 (Or. App., 1975); Begay v. Miller, 70 Ariz. 380, 222 P.2d 624 (1950)
46. Compare Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670 (1978) and U.S. v. Wheeler, supra.
47. 358 U.S. 217 (1959)
48. 369 U.S. 69 (1962)
49. id., at 75-76
50. McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973).
51. P.L. 83-280 (67 Stat. 588), amended to add Alaska, P.L. 85-615 (72 Stat. 545). Now codified as 18 U.S.C. 1162, 28 U.S.C. 1360 and other scattered sections.

17. Indian Intercourse Act of 1834 (4 Stat. 729)
18. F. COHEN, supra, at 5-6
19. id. at 6n60
20. 5 U.S. 240 (1887)
21. 228 U.S. 243 (1913)
22. 231 U.S. 28 (1913)
23. 290 U.S. 357 (1933)
24. 151 F. Supp 132 (Alaska, 1957)
25. 161 F. Supp 269 (Alaska, 1958)
26. P.L. 85-615
27. 1978 Op. Atty. Gen. File No. J-66-001-67, J-66-503-77. Memo re:
State Taxation of Alaska Natives and Business Enterprises Operated
by Native Organizations. p.21
28. 466 F. Supp 860 (Alaska, 1979)
29. 369 U.S. 60 (1962)
30. 426 U.S. 373 (1976)
31. Citing U.S. v. Mazurie, 419 U.S. 544 (1975); See also
Santa Rose Band of Indians v. Kings County, 532 F.2d 655, (9th
Cir., 1975)
32. U.S. v. McGowan, 302 U.S. 535 (1938)
33. U.S. v. Sandoval, supra
34. 43 U.S.C. 1603(e)
35. 43 U.S.C. 1611, 1613
36. See generally 25 U.S.C. 465, 473(a)
37. 368 U.S. 351 (1962)
38. See Matz v. Arrnet, 412 U.S. 481 (1973)

52. See Goldberg, Public Law 280: The Limits of State's Jurisdiction Over Reservation Lands, 22 UCLA Law Review 535 (1975).
53. 426 U.S., 388-89 citing U.S. v. Mazurie, supra.
54. id.
55. id., at 384
56. id.
57. Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir., 1975)
58. Morongo Band of Mission Indians v. Area Director, IBILA 79-18-A (1979).
59. See generally Goldberg, supra; Santa Rosa Band of Indians v. Kings County, supra.
60. F. COHEN, supra, at 122
61. D. CASE, supra, at 152-3
62. A.S. 29.08.010
63. A.S. 29.08.020
64. A.S. 29.48.010
65. A.S. 29.48.035
66. A.S. 29.48.030
67. A.S. 29.33
68. A.S. 29.43
69. A.S. 29.48.030 (7); Town of Ketchikan v. Greenbaum, 5 Alaska 396 (1915)
70. 55 I.D. 14 (Powers of Indian Tribe)
71. 18 U.S.C. 1153
72. 18 U.S.C. 1152

73. Compare A.S. 29.48.200 and 25 U.S.C. 1302 (7)
74. Ak. Const. Art. IV, Sec. 1
75. See McKenzie, YOU HAVE THE RIGHT, 25-27 (AFN, 1976);
Keiner v. City of Anchorage 378 P.2d 406 (Alaska, 1963); State v. Lundgren
Pacity Const. Co. Slip Op. 1980 (Alaska, 1979).
76. Guthrie, Analysis of Amendment to HB 533 proposed by Tanana
Chiefs, Legislative Affairs Agency (March 21, 1980), citing
Baker v. City of Fairbanks, 471 P.2d 386; Alexander v. City of
Anchorage, 490 P.2d 910 (1979)
77. Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (1959)
78. Talton v. Mayes, 163 U.S. 376 (1896)
79. 25 U.S.C. Sections 1301-1303
80. A.S. 29.33.070. et. seq.
81. A.S. 29.33.070(b)(2)
82. A.S. 29.29.43.040
83. A.S. 38.05.037
84. 541 P.2d 730. See P.24 infra, for discussion
85. id, at 737-8
86. A.S. 29.33.070 et. seq.
87. Sec. 45, Chap 85 SLA 1979
88. A.S. 29.48.035
89. 419 U.S. 544 (1975)
90. Johnson v. Chilkoot Indian Village, 957 F. Supp. 384 (D. Alaska,
1978)
91. 532 F.2d 655 (9th Cir., 1977)
92. id, at 663

93. Buster v. Wright, 135 F.947 (8th Cir. 1905). Iron Crow v. Oglala Sioux Tribe, supra; Sarta v. Oglala Sioux Tribe, 259 F.2d 553. (8th Cir., 1958), cert. den. 385 U.S. 932 (1959); 55 I.D. 14, 28 (1934) (Powers of Indian Tribes)
94. Buster v. Wright, supra.
95. Maxey v. Wright, 105 F. 1003 (8th Cir., 1900)
96. Morris v. Hitchcock, 194 U.S. 384 (1904)
97. A.S. 29.53.415 et. seq. (boroughs); A.S. 29.53.440 (cities within boroughs); A.S. 29.43.020 (cities outside boroughs)
98. A.S. 29.53.010 (boroughs); A.S. 29.53.400, 410 (cities within boroughs); A.S. 29.43.020 (cities outside boroughs)
99. A.S. 29.53.020, et. seq.
100. 55 I.D. 14 (1934) (Powers of Indian Tribes). See also Indian Child Welfare Act, P.L. 95-608

PART III

1. Con. Conv. Proc., Pt. 6, p.478
2. 55 ID 14 (1934), Smith v. Bonifer, 154 F.883 (1909);
Ollestead v. Native Village of Tyonek, 560 P.2d 31 (1977).
3. Smith v. Bonifer, supra.
4. 25 USC 163
5. 25 CFR 271.2 (i)
6. Proposed IRA Constitution for Dish-Ina-Nek, Art. 5, Sec. 4
7. 25 U.S.C. 1301
8. Dodge v. Nakai, 298 F. Supp. 26 (D. Ariz., 1969); Dry Creek Lodge, Inc. v. United States, 515 F.2d 926 (10th Cir., 1975)
9. 436 U.S. 49 (1978)
10. MANUAL OF INDIAN LAW, B-9 (The American Indian Lawyer Training Program, Inc., 1976)
11. 426 U.S. 373 (1976)
12. Ak. Const., Art. X, Sec. 5
13. See Kelsen, PRINCIPLES OF INTERNATIONAL LAW, 387-410 (2ed ed., 1966)
14. id., at 387-8
15. id., at 395
16. See generally supra. notes 66-70 (Part I)
17. S. 1181, 96th Cong. 2d. Session

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AN AUTOPSY AND EPITAPH

OF

THE NEW DEVELOPMENT CITY OF LOST RIVER

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TRIBAL-STATE RELATIONS



A New Paradigm for Local
Government in Alaska



TRIBAL-STATE RELATIONS:
A NEW PARADIGM FOR LOCAL
GOVERNMENT IN ALASKA

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INTRODUCTION

Local government in rural Alaska is plagued by the existence of parallel government systems. On one hand, there exists a system of Native governments. On the other hand, the state has encouraged the formation of municipal governments. Often the dual system exists side-by-side in communities of less than 200 persons. In these situations, confusion, and the duplication of administrative costs and services has had a crippling effect on local government. Communities which attempt to avoid the duplication find themselves either ineligible for the respective benefits of the missing government, or forced to create exotic or ad hoc organizations which are marginally eligible for the desired benefits.

This study is an effort to sort out and compare these two systems of government. Additionally, the study makes suggestions on how to correct this situation within existing constitutional restraints.

PART I

EARLY AND CURRENT ALASKAN LOCAL GOVERNMENTS

A. EARLY ALASKAN LOCAL GOVERNMENTS

The earliest "local governments" in Alaska were Native. As Dave Case points out, primal governments varied between the Native cultures.¹ Generally, however, these early governments were loose associations of individuals based upon family relationships and customs. Group decisions were made by consensus.

Similarly, early non-Native local government in Alaska was very informal. After the purchase of Alaska by the U.S. in 1867, the primary mechanism of local government was the extra-legal mining districts.² Like the Native governments, these early miner's governments were loose associations based on custom. Generally, decisions were made by majority vote. In 1884, Congress recognized the authority of these mining districts, but the status of Native governments remained in limbo.

In 1900, Congress enacted a civil code for Alaska which included authorization to form towns of over 300 residents.³ This first form of municipal government was patterned after the mayor-council type of city government common to the "lower 48." Towns were severely limited as to their ability to tax and contract debt and were highly dependent on intergovernmental transfers for financial support. Their primary function seems to have been providing school services. In 1904, some of these limitations were relaxed, but the next major change had to wait until the formation of a territorial government.

In 1905, Congress authorized the formation of independent (city) school districts, and school districts for unincorporated areas.⁴ In both cases, the districts exercised fiscal autonomy over current operating expenditures. They directly received a portion of intergovernmental

revenue transfers due the city. They remained dependent on the city or territorial government for tax revenues for capital expenditures.

In 1912, Congress passed the Organic Act creating the Territorial legislature.⁵ In the following years, the legislature created a second class of territorial towns, subject to the limitations of the earlier Act of Congress. It was fully intentioned that local government be kept weak so as to prevent a taxing or regulatory threat to commercial and mining interests in the territory.⁶ In fact, the Organic Act prohibited organization of "counties" or other regional local governments.⁷ In 1915, the legislature upgraded territorial towns so that they would be subject to the same limitations as the towns authorized under the federal legislation. At the same time, the legislature for the first time attempted to assimilate Native village government through the Indian Village Act of 1915. This Act authorized Indian villages to organize as units of local government.⁸

In 1917, the legislature authorized incorporation of school districts in unincorporated areas. Under this new legislation, the incorporated school districts achieved greater fiscal autonomy through authorization to tax, as well as an increase in shared intergovernmental transfer revenues.

The legislature undertook a revision of the territorial municipal code in 1923. The new code replaced federally authorized towns with first class cities which directly elected a mayor, expanded council powers, provided for mayoral vetoes, and established minimum procedures for city government.⁹ Later, in 1929, the legislature repealed the Indian Village Act of 1915, and revised the laws relating to second class cities making them substantially equal to first class cities.

By 1934, the federal policy toward Indians had again shifted away from assimilation. This was reflected by the passage of the Indian Reorganization Act, and the subsequent extension of the Act to Alaska in 1936.¹⁰ The Act was intended to vest "tribal organizations with

real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations."¹¹

At this same time, the legislature instituted reforms designed to authorize special purpose regional governments. In 1935, the legislature authorized incorporation of "independent school districts" which included both the area inside city limits and the surrounding adjacent areas. The new school districts were independent of city governments and were fiscally autonomous.¹² Also in 1935, the legislature authorized public utility districts which were fiscally autonomous special purpose governments capable of providing garbage, parks, street, fire, telephones, electrical, and other services.¹³

In 1951, the legislature authorized third class cities, which were essentially the same as second class cities, differing only in geographical and population size.¹⁴

In 1957, the territorial legislature again attempted to incorporate villages under territorial law.¹⁵ An Incorporated Village had limited powers which included power to provide water, electricity, sewers, and fire protection; regulate dogs, curfews, and land use; and provide public works. The State amended the Act in 1959 to invest the incorporated village with general police powers and provided for village magistrates to levy limited fines. At the same time, the legislature defined the incorporated villages as a city of the fourth class.

At the time of statehood, there existed in the state:

- 24 first class cities
- 8 second class cities
- 2 third class cities
- 10 fourth class cities
- 69 I.R.A.'s
- 5 P.U.D.'s
- 8 independent school districts

- 1 incorporated school district
- unknown number of traditional Native councils

Statehood did not drastically alter the local government pattern since Article XV, Section 1 of the Alaska Constitution provided that, the laws of the territory remained in effect until they were repealed, amended or expired.

Finally in 1972, the state undertook a wholesale revision of the municipal code to create the current system. The main impact of the 1972 revision on the smaller rural communities was to strip those communities which organized under the Village Incorporation Act of their "village" status.

B. CURRENT STATE CHARTERED LOCAL GOVERNMENT

The system of local government authorized under the Alaska Constitution is relatively simple. It is possible to categorize Alaskan local governments into two basic types, i.e., general and special purpose governments. For the sake of analysis, a general purpose government is a government which exercises independent discretion over a broad range of topical concerns. In contrast, a special purpose government is a government which exercises discretion over a specified topical concerns.

General Purpose Governments.

The general purpose government is the constitutionally preferred unit of local government in Alaska. This policy is specifically stated in Article X, Section 1 of the Alaska Constitution which states that, "The purpose of this article is to provide for maximum local self-government with a minimum of local government units, ..." This policy is implemented in Article X, Section 2 which provides that "All local government powers shall be vested in boroughs and cities," and is further stated in Article X, Section 15 which states "Special service districts existing at the time a borough is organized shall be integrated with the government of the borough as provided by law."

This concern for consolidating local powers into single general purpose governments is expressed throughout the Constitutional Convention record. The adoption of "one basic local government system" was intended to prevent "creation of numerous types of local units which can become not only complicated but unworkable."¹⁶ Of immediate concern to the Delegates was the governance of the school boards, public utility districts (P.U.D.s) and health districts. As stated by delegate Victor Fischer:

"That is one of the points that we have tried to meet here, not to establish too many local governments but those that would be established would be effective to carry out not only the local but also state functions as may be necessary."

To this end the constitution provides for the creation of boroughs and cities.¹⁸

The most unique aspect of the Alaskan municipality is the framer's intent to create strong local government units. Systems of government then operating in the majority of the states were felt to be too weak.¹⁹ In his initial address to the convention introducing the Local Government Committee's proposed article, Delegate Vic Fischer expressed the "New Federalist" philosophy favoring general decentralized government. Citing the Congressional Commission on Intergovernmental Relations, delegate Fischer stated:

"The Commission concerned itself with the need for strengthening of state government and a decentralization of federal power. In this study they found that local government is an important factor in this process and I would like to briefly quote a few paragraphs. In discussing the strengthening of local government, the Committee says, 'The objective of decentralization cannot be obtained by a readjustment of national-state relations alone. It will be fully achieved only when carried through to the lowest levels of government where every citizen has the opportunity to participate actively and directly. The strengthening of local government requires the activities that can be handled by these units be allocated to them together with the financial resources necessary for their support.' Then the report goes on and draws a picture of the tremendous number of overlapping tax jurisdictions and separate local entities we now have in the state and goes on to say, 'More or less hidden in this picture is a paradox that

consistently plagues the state and bars any easy solution of the problem of achieving the decentralization of government -- too many local governments and not enough local government.¹ That is one of the points that we have tried to meet here, not to establish too many local governments but those that would be established would be effective to carry out not only the local but also state functions as may be necessary."²⁰

To implement this plan, the committee adopted the so-called "Texas Plan." This approach was explained to the convention by delegate Victor Rivers as follows:

The old approach to county government was that they existed and had their authorities only in those specifically delegated to them and specifically spelled out to them by the legislature or by the constitution. The other approach which has been adopted and which has operated in a few states, approximately seven as I recall, particularly in Texas, has been called the Texas Plan, and there, under that plan, they allocate such powers to the intermediate tier of government and the cities are not specifically reserved or eventually withdrawn by the state itself. They have a broad exercise of local authority much as our cities have today. That has been the matter of the choice -- whether we wanted to follow the old pattern in which the constitution and the legislature would delegate certain specific powers to the intermediate form of government, which often is called the county and which we have designated as the borough, or whether we would follow the plan of reserving powers to the state and letting the local government exercise broad general authority within the limits of those reservations.²¹

It is quite clear that the "pure" Texas plan called for application of home rule principals to all local governments. The various classes of cities and boroughs would be defined in law by the quantity and quality of powers reserved by the state.

The record indicates that some delegates to the constitutional convention supported the "pure" Texas Plan.²² In fact, the concept of a "general law" municipality was not introduced in the floor debate, but seems to have been an assumed constant which carried over from the territorial local government concepts. This is reflected in Article X, Section 9 and 11 which respectively provide that first-class municipalities could assume home-rule status, and that the legislature could extend home rule to other classes of government. The concept of

"general law" municipalities was enacted by statute.²³ It is interesting to note that although the "general law" concept was not discussed in convention floor debates, it has become a fundamental concept upon which the majority of local governments in Alaska are based.

It is also important to note that the framers specifically desired to provide independent authorization for city and borough powers, rather than provide that such powers be delegated to the cities and boroughs by the legislature. The legislature's authority over cities and borough is specifically enumerated. It may only regulate cities and boroughs through its authority to classify and define the respective powers and manner of incorporation.²⁴ Oddly enough the Constitution provides for legislative definition of borough assemblies' appointment and composition.²⁵ In contrast, it does not have a similar provision governing city councils. Rather, the Constitution merely provides that the council, however composed, shall be the governing body of the city.²⁶

On the other hand, the powers of service areas are delegated. In the case of an incorporated area, the service area's powers are derived from the organized borough.²⁷ The exercise of this borough power is subject to legislative regulation by the legislature. In contrast, service areas in unorganized areas of the state possess authority delegated and regulated by the legislature.²⁸

1) Boroughs: A borough is the intermediate level of government in the State of Alaska. Although the term "borough" is somewhat unique, the notion of an intermediate level of government is common to the American local government scene. The borough "corresponds generally to the county in other states."²⁹ By statute, the borough is a government for an "area."³⁰ This is in contrast to a city, which is a government for a "community."³¹ The framers of the constitution anticipated that an average size borough would be between 1,000-2,500 square miles.³² Presumably, an area could include a number of communities and their outlying areas.³³ Clearly, the framers intended to create a system of two-tiered, local coexistent governments.