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HB 18	STATUTE OF LIMITATIONS:POLICE/CORONERS	(S) JUD	02/16/95
HB 19	DEFINITION OF "FAULT" FOR CIVIL LIABILITY	(S) JUD	03/02/95
HB 127	120-DAY JAIL: ASSAULT ON OFFICERS	(S) JUD	04/18/95
HB 158	CIVIL LIABILITY	(S) JUD	05/01/95
HB 202	JUVENILE DELINQUENCY PROCEEDINGS	(S) JUD	05/09/95
HB 203	PREVIOUS CONVICTIONS FOR DWI OFFENSES	(S) JUD	04/06/95
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HB 19	DEFINITION OF "FAULT" FOR CIVIL LIABILITY	(S) JUD	3/02/95	Therriault	(S) RLS
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HB 202	JUVENILE DELINQUENCY PROCEEDINGS	(S) JUD	5/09/95	(H) RLS-GOV	(S) FIN
HB 203	PREVIOUS CONVICTIONS FOR DWI OFFENSES	(S) JUD	4/06/95	(H) RLS-GOV	(S) RLS
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SB 125	INCREASE FINE FOR CERTAIN CRIMES	(S) JUD	1/09/96	Donley	(S) FIN
SB 126	PFD ELIGIBILITY; MONEY FOR CRIME VICTIMS	(S) JUD	3/10/95	Donley	(S) FIN
SB 127	CRIME VICTIM'S CLAIM FOR DAMAGES	(S) JUD	3/10/95	Donley	(S) FIN
~~SB 140~~	~~WORKMEN COMPENSATION AMENDMENTS~~	~~(S) JUD~~	~~3/23/95~~	~~(S) L&C~~	~~(S) FIN~~
SB 149	NO ATTY FEES AGAINST STATE/CLASS ACTIONS	(S) JUD	4/05/95	Sharp	(S) FIN
~~SB 151~~	~~DO BAIL TIME BY ELECTRONIC MONITORING~~	~~(S) JUD~~	~~4/20/95~~	~~(S) JUD~~	~~(S) FIN~~
SB 175	"NO FRILLS" PRISON ACT	(S) JUD	5/06/95	Donley	(S) FIN
SB 194	GANG RELATED CRIMES	(S) JUD	1/09/96	Kelly	(S) RLS
SB 200	AMEND STATEHOOD ACT RE ANWR	(S) JUD	1/08/96	Adams	(S) FIN
SB 202	SENTENCING FOR KIDNAPPING	(S) JUD	1/09/96	Donley	(S) FIN
~~SJR 2~~	~~SUPPORT SUIT AGAINST FEDERAL GOVERNMENT~~	~~(S) FIN~~	~~1/22/95~~	~~Halford~~	~~(S) RLS~~
SJR 1	USE OF INITIATIVE TO AMEND CONSTITUTION	(S) JUD	1/16/95	Halford	(S) FIN
SJR 4	FED CONST AM RE: CAMPAIGN EXPENDITURES	(S) JUD	2/22/95	Donley	(S) FIN
SJR 5	CRIME VICTIMS RIGHTS/CONST AM	(S) JUD	1/09/96	Donley	(S) RLS
SJR 9	LINE ITEM VETO FOR U.S. PRESIDENT	(S) JUD	1/16/95	Dair	(S) RLS
SJR 11	LIMITING TERMS OF LEGISLATORS	(S) JUD	2/03/95	Kelly	(S) RLS
SJR 14	CONFIRMATION OF MEMBERS OF PUBLIC CORP	(S) JUD	3/08/95	Halford	(S) FIN
SJR 30	USE OF BUDGET RESERVE FUND	(S) JUD	5/09/95	Rieger	(S) FIN
SJR 31	VOTER APPROVAL:AK STATEHOOD ACT AMENDMENT	(S) JUD	1/08/96	Pearce	(S) FIN

or to hear week of 1/22

Hearing held in H RLS

Back to H Rules

Rules want moved to Fin.

VENETIE

HEAR-
INGS

Alaska State Legislature

Committee Chair
Community & Regional Affairs

Committee Vice-Chair
Labor & Commerce

Committee Membership
Legislative Council

District Address:
145 Main St. Loop, Suite 226
Kenai, AK 99611
(907) 283-2690: fax 283-9267

Session Address:
State Capitol, Room 427
Juneau, AK 99801-1182
(907) 465-2828: fax 465-4779

Senator John Torgerson

MEMORANDUM

March 11, 1997

TO: Tam Cook, Director

FROM: Senator John Torgerson

RE: Native Sovereignty and State Appropriations

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

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

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

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

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

Community Grants and other State Appropriations to Tribes

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

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

MEMO

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

From: Douglas L. Blankenship
Ron Somerville
Ted Popely

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

Date: February 29, 1996

THIS MEMO IS A CONFIDENTIAL AND PRIVILEGED ATTORNEY-CLIENT COMMUNICATION

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

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

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

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

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

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

Recommendations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

Ken Eikenberry
ATTORNEY GENERAL OF WASHINGTON
7th FLOOR, HIGHWAYS-LICENSES BUILDING • PO BOX 40100 • OLYMPIA, WASHINGTON 98504-0100

January 5, 1993

TO WHOM IT MAY CONCERN:

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

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

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

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

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

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

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

Sincerely,

KEN EIKENBERRY
Attorney General

WORK COPY

James M. Johnson

Office: Capitol Court, Suite 225
1110 S. Capitol Way
Olympia, Washington 98501
(360) 357-3104

Home: 3042 Oldport Lane
Olympia, WA 98502
(360) 866-2370

1995 - Present: In private practice, I continue to apply the expertise in major litigation I developed as Chief of Special Litigation for the State of Washington. In United States v. Washington, Washington's (in)famous treaty fishing case, the tribes are attempting to extend their claims to shellfish and public and private lands. My clients are private landowners, parties only after I won a Ninth Circuit appeal of an order denying them intervention. In the Washington Supreme Court in Walker v. Washington, I successfully defended Washington's tax-limitation Initiative 601 (for the taxpayers, sponsors of the Initiative). In Mille Lacs Band of Chippewa v. Minnesota, I represent nine intervenor counties and work with the State of Minnesota to defend that Indian treaty case. In California, I represent sports and commercial fishing interests and coastal communities in Pacific Coast v. Babbitt, challenging federal ocean regulation. I also authored an amicus brief for Wyoming and Montana counties in the United States Supreme Court in Hagen v. Utah, No. 97-6281, and participated in a NAAG moot court (as a "Justice") in preparing the Utah Attorney General for argument. On February 23, 1994, the Court ruled for us 7-2.

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

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

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

Other Experience:

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

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

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

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

Attachment A

LITIGATION EXPERIENCE/LEGAL ACCOMPLISHMENTS
JAMES M. JOHNSON

I. TRIAL AND APPELLATE EXPERIENCE

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

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

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

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

A. United States Supreme Court

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

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

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

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

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

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

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

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

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

B. Washington Supreme Court and Washington Court of Appeals

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

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

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

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

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

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

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

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

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

C. Federal Courts of Appeal

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

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

(a) Rock Island (Confederated Tribes v. FERC, 734 F.2d 134 (9th Cir. 1983);

(b) Lewis River-Merwin Dam (relicensing). Clark-Cowlitz JOA v. FERC, 826 F.2d 1074 (D.C. Cir. 1987). (Argued)

(c) Ross Dam (Seattle Light)

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

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

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

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

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

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

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

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

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

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

D. Administrative Proceedings: FERC and EFSEC

Specialized practice before such agencies has included:

1. FERC (Federal Energy Regulation Commission) Hydroelectric dam cases. Trials of licensing, relicensing, jurisdiction, and sub-issues, including:

   (a) Skagit River; "High" Ross Dam (Seattle City Light)

   (b) Lewis River-Merwin Dam (Pacific Power & Light competing with Clark-Cowlitz JOA)

   (c) Elwha River, Glines & Elwha projects (Crown-Zellerbach Corporation)

   (d) Nisqually River – proceedings involving each project
   - Yelm diversion (City of Centralia)
   - Alder Dam (City of Tacoma)
   - La Grande Dam (City of Tacoma)

   (e) Columbia River – all five mid-Columbia projects
   - Rock Island Dam
   - Rocky Reach Dam
   - Wanapum Dam
   - Priest Rapids Dam
   - Wells Dam

   (f) White River - (Puget Power & Light)

2. EFSEC (Washington State's Energy Facility Site Evaluation Council) provides and enforces licenses for major power facilities. I participated in trial proceedings involving:

   (a) WPPSS II (Hanford Nuclear Plant)

   (b) WPPSS 4 and 5 (Satsop Nuclear Plant)

   (c) Northern Tier Pipeline

   (d) Fish Kill supplemental proceedings in WPPSS II resulted in award of a hatchery facility

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

A. CLE's (Continuing Legal Education courses taught to Bar members)

1. Indian Treaty Hunting and Fishing, Washington State Criminal Justice Training Commission, 1977.

2. Indian Fishing Rights, Governmental Lawyers Association, 1978.

3. Anadromous Fish Management and Protection, Environmental Law Review, Northwest School of Law, 1979.

   (1) Federal Energy Regulatory Commission Practice, Fish and Wildlife Protection; and
   (2) Indian Fishing Rights (two separate presentations), Lewis and Clark Law School, 1980.

4. Environmental Law, Current Trends in Natural Resource Law, Office of the Attorney General, 1981.

5. Attorneys' Fees Awards Under the Civil Rights Act, Office of the Attorney General, 1982.

6. Federal Trial Practice (new Rule 16), Office of the Attorney General, 1984.

7. Constitutional Law; "EXIT-POLLING" Debate, Washington Bar Association, "Today's Constitution and You" (Bicentennial Program), 1986.

8. Appellate Practice (Argument), Office of the Attorney General, 1987.

9. Columbia River Legal Issues; Fish, Water, Power and Competing Users (U.S. and international), Western Association of Attorneys General, 1991.

B. Publications

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

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

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

SEN. TAYLOR

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

Community Grants and other State Appropriations to Tribes

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

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

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

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

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

OPTIONS AND DECISION POINTS

SENATE/HOUSE LEADERSHIP

VILLAGE TRIBAL SOVEREIGNTY

UPDATED: 3/12/96

1. IMPLICATIONS OF APPROPRIATIONS TO TRIBAL ENTITIES - REVIEWED

2. STATE STATUTE - REQUIRING WAIVER OF SOVEREIGN IMMUNITY.

3. STATE LAW REQUIRING NOTIFICATION BY ATTORNEY GENERAL OF LITIGATION ACTION WHICH WILL RESULT IN REDUCTION OF STATE JURISDICTION.

4. REVIEW JURISDICTION OF TRIBAL COURTS - POTENTIAL STATE LEGISLATION.

5. ALTERNATIVE LEGAL REASSERTIONS AGAINST TRIBAL RECOGNITION.

6. LEGISLATIVE STANDING.

7. LEGISLATIVE FUNDING OF TEST CASE.

8. OVERSIGHT OF STATE LITIGATION

9. FURTHER HEARINGS.

10. THIRTY DAY CONTRACT WITH DOUG BLANKENSHIP TO PRODUCE REVIEWS, ALTERNATIVES, QUESTIONS FOR ATTORNEY GENERAL AND LEGISLATIVE LANGUAGE.

11. DETERMINATION OF DELEGATION VIEWPOINT VIA MEETING WITH LEADERSHIP.

12. POSSIBLE JOINT RESOLUTION DIRECTED AT CONGRESS.

13. POSSIBLE FILING OF AMICUS BRIEF BY LEGISLATURE IN INDIAN COUNTRY CASES.

Alaska State Legislature
HOUSE OF REPRESENTATIVES

Official Business

State Capitol
Juneau, AK 99801-1182

NOTICE OF MEETING

Joint House/Senate Judiciary Committee Meeting

Date: December 4, 1995
Time: 10:00 AM
Place: Anchorage LIO, 716 W. 4th Ave., 2nd Floor Conference Room

Subject: **Impact of Venetie Case to Tribal Status in Alaska**

Senate Members	House Members
Senator Taylor, Chair	Rep. Porter, Chair
Senator Green	Rep. Green
Senator Miller	Rep. Bunde
Senator Ellis	Rep. Toohey
Senator Adams	Rep. Vezey
	Rep. Davis
	Rep. Finkelstein

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Native leaders want state to address bigger issues

TIM MOWRY
Staff Writer

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

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

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

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

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

"We want to be recognized as a government entity in this state just like a borough or first-class cities or second-class cities," said

See NATIVE, Page A-10

NATIVE: Le

Continued from Page A-1
Ginnis.

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

Tanana Chiefs Conference at-

aders seek more response from state on s

torney Mike Walleri called the U.S. Interior Department's decision to extend tribal status to about 226 villages in Alaska in 1993 as the "final word" on that issue and that the state was merely accepting the federal government's decision. The state was using the tribal status issue as "a red herring" to avoid the bigger issue of sovereignty, he said.

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

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

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

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

But Botelho said the state's petition opposing Indian country remained "first."

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

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

The state sued Venetie for

sovereignty

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

Still, Walleri called the state's recognition of tribal status "a courageous decision."

"There is a lot of pressure in certain elements in Alaska to continue this unreasonable legal contest," he said. "This governor has has indicated he'd like to see a positive relationship between tribes and the state instead of a combative one as in past administrations."

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

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

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

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

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

Post-it® Fax Note 7671	Date 11-20	Pages 1
To Doug Pierce	From	
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News-Miner, Fairbanks AK
November 18, 1995

5510

FAX

STATE OF ALASKA, DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 110300
Juneau, Alaska 99811
PHONE: (907) 465-2133
FRONT OFFICE FAX: (907) 465-2075

DATE: 11/22/95 TIME: 10:55 am REF. NO:

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

FROM: Bruce Botelho Number of Pages Including this Sheet 7

MESSAGE: Bruce asked that I send you this material —
Barb Pitcher

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION
TRIBAL RECOGNITION: LITIGATION BACKGROUND
November 20, 1995

- **THE VENETIE CASE**

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

- **THE FORT YUKON CASE**

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

- **TRIBAL STATUS ISSUE**

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

- **INDIAN COUNTRY ISSUE**

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

- **VENETIE TRIBAL STATUS DECISION**

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

- **VENETIE INDIAN COUNTRY DECISION**

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

- **FORT YUKON TRIBAL STATUS PROCEEDINGS**

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

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

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

- **FORT YUKON TRIBAL STATUS DECISION**

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

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

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

- **CHICKALOON NATIVE VILLAGE CASE**

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

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

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

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

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

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION
TRIBAL RECOGNITION: WHAT IT MEANS
November 20, 1995

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

- **WHO RECOGNIZES INDIAN TRIBES**

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

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

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

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

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

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

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

- **THE IMPACT OF TRIBAL RECOGNITION IN ALASKA**

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

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

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

- **TRIBAL AUTHORITY OVER INTERNAL AFFAIRS**

Tribes have authority to set rules for tribal membership.

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

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

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

- **IMMUNITY FROM SUIT**

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

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

- **NO CRIMINAL JURISDICTION**

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

- **THE IMPACT OF INDIAN COUNTRY IN ALASKA**

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

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

This area is complicated and unsettled in the contiguous states.

FAX

STATE OF ALASKA, DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 110300
Juneau, Alaska 99811
PHONE: (907) 465-2133
FRONT OFFICE FAX: (907) 465-2075

DATE: 11/22/95 TIME: _____ REF. NO: _____

TO: Brian Porter (69) 322-2741
Fax Number

FROM: Bruce Botelho Number of Pages Including this Sheet 3

MESSAGE: Additional info by B Botelho

Alaska tribes

State recognizes the obvious

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

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

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

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

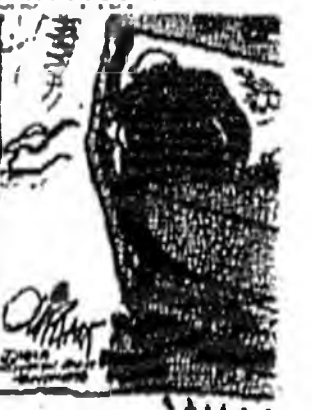
The state's old policy often forced villages that wanted to exercise their modest list of powers to endure a long and costly legal battle. Now both sides can focus their attention on the more fundamental question: Do Alaska's tribes have all the same powers of their brethren in the Lower 48?

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

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

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

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



AH,W

Familie

BOSTON — We ar the kitchen running numbers. It's our an prep course at Thanks ling Central where wo for in list-making. Th nal count: 21 people. tables, 19 chairs, one pi bench, 21 napkins, and pieces of silverware — you include the two spo mangled in the disposo

My husband goes to cupboard to add up glasses — 16 that m and half a dozen orphan subtract the napkins missing from our Thar roundup — one polka squares unaccounted three plain ones di peared.

These numbers accu late in my brain, unt begin to feel as if I w compiling one of those tistical portraits they in the newspaper under heading: Thanksgiv 1995.

I imagine next a stat cal chart describing people who will fill t 21 seats. A numerical file of one Very Exte American Family:

Geography: five a codes.

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

Age: from single di to the 90s.

Religion: two to f depending upon how figure denominations whether you include "r of the above."

Cheers & Jeers

Land or

Anch. Daily News 11/21/95

CLIPPINGS IN DATE 11-22-95

Daily New- Miner

Daily News - Miner

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KELLY DOSTAL — SAM BISHOP
Managing Editor — Editorial Page Editor

Defining the land

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

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

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

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

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

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

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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NATIVE VILLAGE OF VENETIE I.R.A. COUNCIL, *et al.*,

Plaintiffs,

vs.

STATE OF ALASKA, *et al.*,

Defendants.

No. F86-0075 Civ (HRH)

MOTION FOR RECONSIDERATION

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

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

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

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

OFFICE OF THE ATTORNEY GENERAL
STATE OF ALASKA
100 Cushman, Suite 400
Phone: (907) 451-2811
Fax: (907) 451-2845
Key Bank Building
Fairbanks, Alaska 99701

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

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

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

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

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

OFFICE OF THE ATTORNEY GENERAL
STATE OF ALASKA
100 Cushman, Suite 400
Phone: (907) 451-2811
Fax: (907) 451-2846
Key Bank Building
Fairbanks, Alaska 99701

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

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

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

OFFICE OF THE ATTORNEY GENERAL
STATE OF ALASKA
100 Cushman, Suite 400
Phone: (907) 451-2811
Fax: (907) 451-2846
Key Bank Building
Fairbanks, Alaska 99701

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

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

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

OFFICE OF THE ATTORNEY GENERAL
STATE OF ALASKA
100 Cushman, Suite 400
Phone: (907) 451-2811
Fax: (907) 451-2846
Key Bank Building
Fairbanks, Alaska 99701

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

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

Dated: October 20, 1995.

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: D. Rebecca Snow
D. Rebecca Snow
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
STATE OF ALASKA
100 Cushman, Suite 400
Phone: (907) 451-2811
Fax: (907) 451-2845
Key Bank Building
Fairbanks, Alaska 99701

Judith K. Bush
Andrew Harrington
Alaska Legal Services Corporation
1648 Cushman Street, Suite 300
Fairbanks, Alaska 99701
(907) 452-5181
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NATIVE VILLAGE OF VENETIE I.R.A. COUNCIL, NATIVE VILLAGE OF FORT YUKON I.R.A. COUNCIL, NANCY JOSEPH, and MARGARET SOLOMON, Plaintiffs, vs. STATE OF ALASKA and KAREN PERDUE in her official capacity as Commissioner of Health and Social Services, Defendants.	No. F86-0075 Civ (HRH) PLAINTIFFS' MOTION FOR RECONSIDERATION

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

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

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

> The Bureau of Indian Affairs has reviewed the *'modified ANCSA list' of villages and the list of those villages and regional tribes previously listed or dealt with by the Federal government as governments and found that the villages and regional tribes listed below have functioned as political entities exercising governmental authority* and are, therefore, acknowledged to have 'the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their status as Indian tribes as well as the responsibilities and obligations of such tribes.'

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

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

LAW OFFICES OF
ALASKA LEGAL SERVICES CORPORATION
1648 CUSHMAN STREET, SUITE 600
FAIRBANKS, ALASKA 99701-4808
(907) 452-8181 OR 452-8401

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

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

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

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

> [N]either the Indian Child Welfare Act nor Public Law 280 prevents them [Alaska Indian tribes] from exercising concurrent jurisdiction. If the native villages of Venetie and Fort Yukon are sovereign entities which may exercise dominion over their members' domestic relations, Alaska must give full faith and credit to any child custody determination made by the villages' governing bodies in accordance with the full faith and credit clause of the Indian Child Welfare Act. ...
>
> If the district court determines that either village is a successor to such a sovereign, it must provide the relief necessary to ensure that the state of

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1648 CUSHMAN STREET, SUITE 400
FAIRBANKS, ALASKA 99701-6106
(907) 452-5181 OR 452-5401

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

Venetie, 944 F. 2d at 552. While the necessity of proving that Fort Yukon is the modern-day successor of an historical sovereign tribe has been removed by publication of the clarifying 1993 Preamble and list and Congress' amendment of the IRA, the remainder of the Appeals Court directive on remand must be fulfilled.

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

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

LAW OFFICES OF
ALASKA LEGAL SERVICES CORPORATION
1648 CUSHMAN STREET, SUITE 300
FAIRBANKS, ALASKA 99701-4498
(907) 452-5181 OR 456-3401

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

Dated this 20th day of October, 1995.

ALASKA LEGAL SERVICES CORPORATION
Attorneys for Plaintiffs

By: Judith K Bush
JUDITH K. BUSH

LAW OFFICES OF
ALASKA LEGAL SERVICES CORPORATION
1648 GUSSIE STREET, SUITE 200
FAIRBANKS, ALASKA 99701-6208
(907) 452-5181 OR 456-9471

CERTIFICATE OF SERVICE

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

D. Rebecca Snow
Office of the Attorney General
100 Cushman Street, Suite 400
Fairbanks, Alaska 99701

Ann C. Juliano
Department of Justice
Environ. & Nat. Resources
Indian Resources Section
P.O. Box 44378
Washington, D.C. 20026-4378

Bruce M. Landon
Department of Justice
Environ. & Nat. Resources
801 B Street, Suite 504
Anchorage, AK 99501-3657

Dated: 10/20/95

Judith K Bush
JUDITH K. BUSH
Attorney for Plaintiffs

LAW OFFICES OF
ALASKA LEGAL SERVICES CORPORATION
[illegible]

1 copy

REGIONAL REPORTS

Court Voids Indian Land Trust Law

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

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

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

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

The ruling came in a dispute that began when the Lower Brule Sioux Tribe bought 91 acres and the Interior Department placed the land, partially within the city of Oacoma, in trust in 1992.

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

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

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

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

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

CALIFORNIA

Court Upholds $1.3M Award

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

OHIO

Abortion Law Delayed

... District Judge Walter Rice has delayed ... the nation's ... ner." But the judge denied summary judgment on whether Time published with actual malice a statement that one source of church funds is the "notorious, self-regulated stock exchange in Vancouver, British Columbia, often called the scam capital of the world."

PENNSYLVANIA

Union Pact Bars Drug Suit

Judge Mansma...

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

VIRGINIA

Fiddler Settles With GC

SUFFOLK — A settlement was reached Nov. 1 the state Republican Party and a fiddler wi $20 million over crippling injuries suffered knocked over flag-bedecked scaffolding. Thomas M. Williams Jr. agreed to $725,0 first day of trial, said Joseph Morrissey, an the country musician. Mr. Williams, who pe ... on television's "Hee Haw," was hit ... Continued ...

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-2075

December 13, 1995

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

Dear Representative Porter:

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

I intend to implement three steps in that regard:

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

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

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

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

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

FEDERAL COURT CASES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATE COURT CASES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Bruce M. Botelho
Attorney General

Enclosure

ALASKA

NATIVES

COMMISSION

Report

Volume I

KEY FACTS & FINDINGS

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

Social/Cultural

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

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

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

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

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

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

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

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

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

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

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

Economics

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

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

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

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

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

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

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

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

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

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

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

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

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

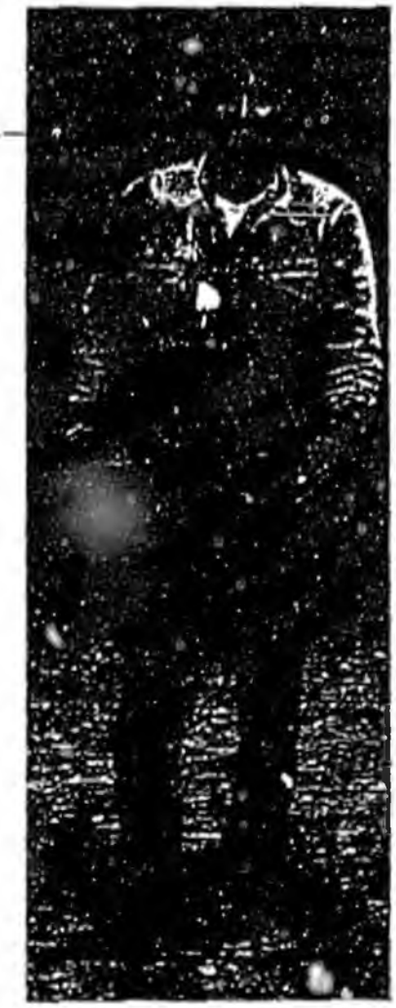
An estimated 21.5 percent of Alaska Native families had incomes below the officially established "poverty" line income ($12,674 for a family of four) in contrast to 6.8 percent of all Alaskan families.

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

Justice and Corrections

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

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



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

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

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

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

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

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

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

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

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

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

Education

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

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

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

The cultural differences between students and teachers in Alaska's schools are exacerbated by a lack of Native teachers and administrators: only 7 percent of the instructional staff serving the 14,000 Alaska Native students in predominately rural school districts are themselves Alaska Natives; less than 2 percent of the instructional staff serving the 9,500 Alaska Native students in non-rural schools are Alaska Natives.

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

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

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

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

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

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

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

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

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

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