ALASKA LEGISLATURE COMMITTEE FILES 1995-1996 8672
8887 SENATE JUDICIARY

The Grantee shall state, in all solicitations or advertisements for employees to work on state funded projects, that it is an equal opportunity employer (EEO) and that all qualified applicants will receive consideration for employment without regard to race, religion, color, national origin, age, physical handicap, sex, marital status, changes in marital status, pregnancy or parenthood.

The Grantee shall include the provisions of this EEO article in every contract relating to this Grant Agreement and shall require the inclusion of these provisions in every agreement entered into by any of its contractors, so that those provisions will be binding upon each contractor and subcontractor.

Article 31. Public Purposes

The Grantee agrees that the project to which this Grant Agreement relates shall be dedicated to public purposes for its useful life. The benefits of the project shall be made available without regard to race, religion, color, national origin, age, physical handicap, sex, marital status, changes in marital status, pregnancy or parenthood.

If the Grantee is a non-municipal entity and if monies appropriated under this grant constitute the sole or principal funding source for the acquisition of equipment or facilities, the Grantee agrees that in the event a municipal corporation is formed which possesses the power and jurisdiction to provide for such equipment or facilities, the Grantee shall offer, without compensation, to transfer ownership of such equipment or facilities to the municipal corporation.

If the Grantee is a non-profit corporation that dissolves, the assets and liabilities from the grant project are to be distributed according to statutory law, AS 10.20.290 - 10.20.452.

Article 32. Operation and Maintenance

Throughout the useful life of the project, the Grantee shall be responsible for the operation and maintenance of any facility, equipment, or other items acquired under this grant.

Article 33. Assurance

The Grantee shall spend monies awarded under this grant only for the purposes specified in this Grant Agreement.

Article 34. Current Prevailing Rates of Wage and Employment Preference

Certain grant projects are constrained by the provisions of AS 36 PUBLIC CONTRACTS. To the extent that such provisions apply to the project which is the subject of this Grant Agreement, the Grantee shall pay the current prevailing rates of wage to employees as required by AS 36.05.010. The Grantee shall also require any contractor to pay the current prevailing rates of wage as required by AS 36.05.010. Further, in accordance with AS 36.10.010, ninety-five percent (95%) of the work force employed in the completion of this project shall be residents where they are available and qualified. If ten (10) or fewer persons are employed, then ninety percent (90%) of the project work force shall be residents where they are available and qualified.

Article 35. Severability

If any provision under this Grant Agreement or its application to any person or circumstance is held invalid by any court of rightful jurisdiction, this invalidity does not affect other provisions of the contract agreement which can be given effect without the invalid provision.

Article 36. Performance

The Department's failure to insist upon the strict performance of any provision of this Grant Agreement or to exercise any right based upon breach thereof or the acceptance of any performance during such breach, shall not constitute a waiver of any rights under this Grant Agreement.

Article 37. Sovereign Immunity

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

Article 38. Audit Requirements

The Grantee shall comply with the audit requirements established by 02 AAC 45.010, set forth in Appendix A of this Grant Agreement.

Article 39. Close-Out

The Department will advise the Grantee to initiate close-out procedures when the Department determines, in consultation with the Grantee, that there are no impediments to close-out and that the following criteria have been met or soon will be met:

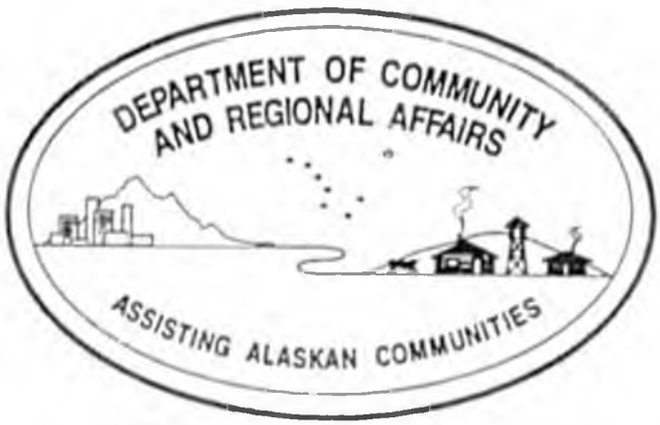
A. All costs to be paid with grant funds have been incurred with the exception of close-out costs and any unsettled third-party claims against the Grantee. Costs are incurred when goods and services are received or contract work is performed.

B. The last required performance report has been submitted. The Grantee's failure to submit a report will not preclude the Department from effecting close-out if it is deemed to be in the State's interest. Any excess grant amount that may be in the Grantee's possession shall be returned by the Grantee in the event of the Grantee's failure to finish or update the report.

C. Other responsibilities of the Grantee under this contract agreement and any close-out agreement and applicable laws and regulations appear to have been carried out satisfactorily or there is no further state interest in keeping the grant open for the purpose of securing performance.

APPENDIX D

Unincorporated Community and Named Recipient Grants



UNINCORPORATED COMMUNITY

AND

NAMED RECIPIENT

LEGISLATIVE GRANT QUESTIONNAIRE

CAPITAL/NON-CAPITAL PROJECTS

VIII. RESOLUTION OF TRIBAL ENTITIES

RESOLUTION NUMBER ____

A RESOLUTION of the _____[1] accepting a State legislative grant in the amount of $_____[2] for _____[3] and providing for waiver of sovereign immunity from legal prosecution by the State for claims which may arise from the utilization of said grant.

WHEREAS, the _____[1] wishes to provide the above described equipment for use in the community; and

WHEREAS, the Department requires as a condition of the grant that an Alaska Native Village or IRA governing body waive sovereign immunity from legal prosecution for claims by the State which may arise from its activities under the grant,

NOW THEREFORE BE IT RESOLVED THAT _____[4] is hereby authorized to negotiate, execute, and administer any and all documents and contracts required for granting funds to the _____[1] and managing funds on behalf of this entity. _____[4] is also authorized to execute any subsequent amendments to said contract to provide for adjustments to the project within the scope of services or tasks, based upon the needs of the project.

BE IT FURTHER RESOLVED THAT: this Alaska Native Village, acting through its _____[1] hereby grants to the State of Alaska its irrevocable consent to be sued in the name of the Native Village for any unlawful act arising out of any contractual obligation entered into as a result of this resolution, and hereby waives immunity from execution of judgments obtained pursuant to the above against any property whether real or personal, including money, provided that such execution of judgment not exceed $_____[2]

PASSED AND APPROVED BY THE _____[5]

on _____ 19__[6]

IN WITNESS THERETO:

By : _____[4] _____
signature title

Attest : _____[7] _____
signature title

[1] Name of Organization
[2] Amount of Grant
[3] Description of Equipment
[4] Chief Administrative Officer (Chief, President)
[5] Governing Body (Council, Board of Directors)
[6] Date
[7] Clerk or Secretary of the Organization

Article 18. Changes. Any changes which have been agreed to by both parties will be attached and made a part of this grant agreement by use of an Amendment. Any such Amendment must be dated and must be signed by both parties before the change is considered official and approved.

Article 19. Public Purposes. The Grantee agrees that the project to which this grant agreement relates shall be dedicated to public purposes for its useful life. The benefits of the project shall be made available without regard to race, religion, color, national origin, age, physical handicap, sex, marital status, changes in marital status, pregnancy or parenthood.

If the Grantee is a non-municipal entity and if monies appropriated under this grant constitute the sole or principal funding source for the acquisition of equipment or facilities, the Grantee agrees that in the event a municipal corporation is formed which possesses the power and jurisdiction to provide for such equipment or facilities, the Grantee shall offer, without compensation, to transfer ownership of such equipment or facilities to the municipal corporation.

If the Grantee is a non-profit corporation that dissolves, the assets and liabilities from the grant project are to be distributed according to statutory law, AS 10.20.290 - 10.20.452.

Article 20. Site Control. If the grant project involves occupancy and use of real property, the grantee shall acquire the legal right to occupy and use such real property for the purposes of the grant, and further that there is legal access to such property.

Article 21. Operation and Maintenance. Throughout the useful life of the project, the Grantee shall be responsible for the operation and maintenance of any facility, equipment, or other items acquired under this grant.

Article 22. Assurance. The Grantee shall spend monies appropriated under this grant only for the purposes specified in this grant agreement.

Article 23. Remission. The Grantee shall return all unexpended grant monies to the State within 90 days of the project completion.

Article 24. Reporting Requirements. The Grantee shall submit progress reports to the Department according to the schedule established in Attachment B of this grant agreement. The Department shall provide forms and instructions necessary for the preparation of such reports.

Article 25. Right to Withhold Funds. The Department may withhold payments under this grant agreement for any violation of the provisions of this grant agreement.

Article 26. Sovereign Immunity. If the Grantee is an entity which possesses sovereign immunity, it is a requirement of this grant that the Grantee irrevocably waive its sovereign immunity with respect to State enforcement of this grant agreement. The waiver of sovereign immunity, effected by a resolution of the entity's governing body, is hereby incorporated into this grant agreement.

Article 27. Audit Requirements. The Grantee shall comply with the audit requirements established by 02 AAC 45.010, set forth in Appendix A of this grant agreement.

Article 28. Federal Requirements. For those grant projects involving federal funds, the grantee shallcomply with all applicable federal laws, regulation and requirements, including but not limited to: USOMB Circular A-87, Cost Principals for State and Local Governments; USOMB Circular A-102, Uniform Requirements for Assistance to State and Local Governments; USOMB Circular A-110; Grants and Other Agreements with Institutions of Higher Education, Hospitals, and other Non-profit Organizations; USOMB Circular A-122, Cost Principals for Non-profit Organizations; USOMB Circular A-128, Audits of State and Local Governments.

APPENDIX E

Village Safe Water Program

STATE OF ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION GENERAL MANAGEMENT ORDER	Procedure No.	Page 1/1
	Effective June 1, 1982	
SUBJECT: When to Use IRA Councils for Safe Water Projects Reference: AS 46.07.010-080, Attorney General's Opinion, File Number 366-654-82, May 11, 1982, Article 1, Section 3, Alaska Constitution	Issued by: Ernst W. Mueller Department contact is: Village Safe Water	

This order specifies conditions under which the Department of Environmental Conservation may contract with or make grants to an IRA council to carry out provisions of the VSW Act, in small, unincorporated communities.

It is proper for the Department to contract or make a grant with an IRA council under the following conditions:

1. The IRA council must represent the community and the collective views of residents of the community. The Commissioner will determine if an IRA truly represents the community as a whole. This determination will be based on an analysis of the demographic and political situation of the community.

2. The IRA Council must agree to waive sovereign immunity for the purpose of the grant. This waiver will normally be contained in the grant offer. The Attorney General's office will draft language upon request.

3. The IRA Council must plan, design, build, operate, and maintain the State funded VSW facility in a non-discriminatory manner. A clear statement of non-discrimination must be included in any grant agreements or contracts awarded by the Department.

4. If and when the village becomes an incorporated municipality, the IRA council must turn over its powers and duties associated with the State funded VSW project to the municipal government.

Under the above conditions, it is proper for the Department to contract with or make a grant to an IRA council for construction of a VSW project. However, the Department is under no obligation to do so.

Standard VSW Grant offer Letter

FACILITY CONSTRUCTION AND OPERATION
410 WILLOUGHBY AVE., #105, JUNEAU, AK 99801-1795
Phone: (907) 465-5180
Fax: (907) 465-5177

Hard Date

_____

_____

_____

_____

_____ _____

Dear _____:

Grant Offer: _____

Knowles

As provided by the Village Safe Water (VSW) Act (AS 46.07), Governor [redacted] and the Department of Environmental Conservation (Department) offer the _____ (Grantee) a grant [redacted] of State funds not to exceed $_____. This grant will be applied toward financing _____

_____

_____

_____

_____.

This offer is expressly conditioned upon the terms and limitations contained herein and in 2 AAC 45.010 (copy enclosed).

GENERAL GRANT CONDITIONS

1. The Grantee designates the VSW engineer, _____ as its representative in the design and construction management of the VSW improvements. The representative will provide advice and assistance to the Grantee on administrative and technical matters relating to this grant.

2. The Grantee agrees to obtain all titles and easements necessary to provide clear title or authority to construct and maintain the proposed project.

3. The Grantee shall expend grant funds and project account interest only for the purpose(s) described above.

4. Plans and specifications must be approved by the Department before proceeding with the start of construction.

5. On behalf of the Grantee, the Department will procure the services of an accounting firm which shall provide record and bookkeeping services associated with the administration of the proposed sanitation improvements, including federal and State payroll taxes and reports, writing checks, and maintaining check registers.

6. The Grantee (accounting firm) shall be responsible, where applicable, for payment of all payroll and other taxes, general liability insurance, and Worker's Compensation.

7. The Grantee agrees to allow, at any reasonable time, Department inspection of all project work, including related records and data, and to maintain project accounts and records to verify project expenditures. These accounts and records shall be kept apart from other records.

8. The Grantee shall hold and save the Department, its officers, agents, and employees harmless from liability of any kind, including costs and expenses, for or on account of any and all suits or damages of any nature, sustained by any person or persons or property, by virtue of performance of the Grantee, or any person or entity acting in place of or for the Grantee for this project.

9. Upon completion of the project, the Grantee shall adopt a resolution stating the project has been constructed and completed, thereby releasing the Department from further liability.

10 The Grantee agrees to accept ownership and the responsibility for operation and maintenance of this project, assess user fees to ensure the system is self supporting, and select individuals who will be trained to operate and maintain the facility. Acceptance shall be effective on the date this grant offer is signed by the Grantee.

11. The Grantee agrees to operate the facility in a nondiscriminatory manner. No person shall be denied use of this facility due to race, religion, color, national origin, gender or disability.

12. The Grantee must certify that project and services provided under this grant are made available to the general public in compliance with the Americans with Disabilities Act of 1990.

13. The Grantee agrees to return all funds not utilized in the design and construction of this project to the Department.

14. The Grantee acknowledges the right of the Department to rescind this grant and seek recovery of payments already made if the Grantee has provided incorrect or misleading information to the Department or if a grant condition contained herein is violated. This grant offer may be terminated at any time it is in the best interest of the State to do so.

SPECIAL GRANT CONDITIONS

The Grantee agrees that it shall be subject to suit for actions arising out of activities performed under this grant in the same manner, and to the same extent, as any person and shall not be immune nor exempt from any administrative or judicial process, sanction or judgement.

No payments can be made until this grant offer is signed by the Grantee and returned to the Department. Nothing in this offer, whether or not accepted, may be deemed to constitute a contractual obligation on the part of the Department until the grant acceptance has been received.

The Department is pleased to provide improved sanitation facilities for the people of _____.

Sincerely,

Keith Kelton
Director

KK/sb (foo\clerical\grants\)

Enclosure: 2 AAC 45.010
VSW Force Account Equipment Charge Rates Policy
VSW Professional Services Policy

cc: Sheila Westlund - VSW

By accepting this grant offer, the _____ agrees to the terms in the grant conditions listed above.

Accepted on behalf of the _____ by:

_____ _____

Mayor Date

_____ _____

Council Member Date

_____ _____

Council Member Date

_____ _____

Council Member Date

APPENDIX F

Federal District Court Decision

in *Kluti Kaah* Indian Country Case,

November 28, 1995

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ALYESKA PIPELINE SERVICE COMPANY, et al.,

Plaintiffs,

STATE OF ALASKA,

Intervenor-Plaintiffs,

vs.

KLUTI KAAH NATIVE VILLAGE OF COPPER CENTER, et al.,

Defendants.

No. A87-0201 CV (HRH)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

This opinion constitutes the court's second decision on the subject of whether Indian Country exists within the boundaries of the State of Alaska.[1]

[1] This court's earlier decision on this subject is found in State of Alaska, et al. v. Native Village of Venetie, F87-0051 CV, Clerk's Docket No. 154, August 2, 1995. This decision is hereinafter referred to as "the Venetie Indian Country decision". 1995 W.L. 462232 (D. Alaska).

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Introduction

Plaintiffs are the operator (Alyeska Pipeline Service Company, herein "Alyeska") and the owners (Amerada Hess Pipeline C rporation, et al.) of the TransAlaska Pipeline by which oil produced in the Prudhoe Bay oil fields north of the Brooks Range of Alaska is delivered to tidewater for shipment to market. The State of Alaska has intervened in this case as a plaintiff.

The lead defendant, Kluti Kaah Native Village of Copper Center (herein sometimes "the tribe"), is no longer a party to this litigation having been dismissed upon their motion for partial summary judgment on the issue of tribal status. Plaintiffs and intervenor conceded that, by reason of an Executive Branch declaration, the Kluti Kaah Native Village of Copper Center is an Indian tribe. 58 Fed. Reg. 54,364 (Oct. 21, 1993). The litigation continued, however, against the Copper Center Village Council and individuals including the Village Tax Commission. The defendants seek to impose and collect a business activity tax upon those portions of the TransAlaska Pipeline which cross lands which the tribe claims to constitute Indian Country.

By its amended complaint,[2] plaintiffs sought to enjoin the enforcement of the business activities tax or any similar assertion of jurisdiction over plaintiffs. They also sought a declaration

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[2] Clerk's Docket No. 23.

that the tax is invalid and that the tribe does not have territorial jurisdiction to impose such a tax.

The court granted a temporary restraining order[1] on May 13, 1987. By agreement of the parties, that temporary restraining order has remained in effect throughout the course of this litigation.

This case was tried to the court commencing on January 18, 1994. The sole issue for trial was: does the Resolution Area[2] constitute Indian Country? By the agreement of the parties, the court received written narrative statements from many of the trial witnesses. These were adopted as a part of the witness' direct examination which was in many instances supplemented and then subjected to cross-examination. The court has received a significant number of exhibits in support of the testimony of the witnesses of each of plaintiffs, intervenor, and defendants. At the conclusion of the trial, it was agreed that written briefs would be submitted in lieu of closing arguments; and in due course these briefs were filed.

As a part of the final pre-trial process, the court called upon the parties to submit in writing their agreements as to facts

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[1] Clerk's Docket No. 11.

[2] Joint Statement of Issues for Trial, Clerk's Docket No. 197 at 2. By "Resolution Area", the parties had reference to two townships (72 square miles) within which defendants claim a right to assert their business activity tax. See defendants' Exhibit 349.

which were not in dispute. The parties responded with a 46 page Joint Statement of Uncontested Facts.[5] The narrative statements, trial testimony, and exhibits have served to reiterate and to some degree expand upon that to which the parties agreed. In fact, however, there is precious little dispute as to the facts of this case.[6] Rather, the disagreements which are pointed out by the briefing have to do with how applicable law will treat the largely agreed facts of this case.

The court adopts as its initial findings of fact the entirety of the Joint Statement of Uncontested Facts presented by the parties, and that statement of uncontested facts shall be deemed incorporated into this decision by reference. As is appropriate to the arguments of the parties hereinafter discussed, the court will reiterate some of the more important of these findings and will supplement them as necessary.

Having fully considered all of the evidence and the arguments of counsel, and based upon the court's findings, the court concludes that the Resolution Area described by the tribe's Business Activity Tax Resolution[7] does not constitute Indian Country.

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[5] Clerk's Docket No. 196.

[6] "There is no longer any real dispute over the facts, only over application of the law to the agreed upon facts." Defendants' Post-Trial Brief, Clerk's Docket No. 238 at 1.

[7] Plaintiffs' Exhibit 1 at 4; Township 1 North, Range 1 West and Township 2 North, Range 1 East, Copper River Meridian.

Applicable Law

In the Venetie Indian Country decision, the court traced the long and interesting history of the development of Indian Country case law.[1] It will suffice here to observe that modern Indian Country case law has its roots in three decisions of the United States Supreme Court: Donnelly v. United States, 228 U.S. 243 (1913) (land set apart from public domain as an Indian reservation is Indian Country); United States v. Sandoval, 231 U.S. 28 (1913) (fee lands of Pueblo Indians whom the Legislative and Executive Branches of government treat as dependent communities are Indian Country);[2] and United States v. Pelican, 232 U.S. 442 (1914) (trust lands validly set apart for use of Indians as such, under the superintendence of the government, are Indian Country). In 1948, Congress codified these three decisions in 18 U.S.C. § 1151 which defines the term "Indian Country" as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a

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[1] Venetie Indian Country decision, Clerk's Docket No. 154 at 4-25.

[2] This brief comment on Sandoval really does not do that case nor its meaning justice. For a fuller discussion of Sandoval, see the Venetie Indian Country decision, Clerk's Docket No. 154 at 9-14.

> state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151.[10]

Apropos of its common law heritage, the concept of Indian Country has continued to develop in courts of appeals and in the United States Supreme Court since the 1948 codification of the term. What emerges first, and from the courts of appeals, is a fact oriented methodology for evaluation of claims of Indian Country. Secondly, and coming from the United States Supreme Court decisions, we see a dramatic focusing upon the question of whether land has been validly set apart for the use of Indians as such, under superintendence of the government.

Two circuit court decisions, United States v. Martine, 442 F.2d 1022 (10th Cir. 1971), and United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981), cert. denied, 459 U.S. 823 (1982), appear to lead the way in shaping the law of Indian Country subsequent to the enactment of 18 U.S.C. § 1151. It is these two cases which the Ninth Circuit Court of Appeals drew upon for its analysis of the merits of the Indian Country issue before it on interlocutory appeal from this court's decision granting a preliminary injunction in

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[10] See Revisor's note, 1948 Act, Title 18 U.S.C.A. at 86 (West 1986). Although codified in Title 18 of the United States Code which covers crimes, there is no question but what the statutory definition of Indian Country has application in civil law as well as criminal law. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 n.5 (1987).

favor of the State of Alaska in the Venetie case. Alaska v. Native Village of Venetie, 856 F.2d 1384 (9th Cir. 1988). Each of Martine and South Dakota set out a multi-factored scheme of analysis for a determination of the "quite factually dependent" Indian Country issue. Id. at 1391.

In its Venetie Indian Country decision, this court discussed Martine and South Dakota[11] and for reasons explained there,[12] the court has reformed the six factors discussed by the Ninth Circuit Court of Appeals in its Venetie decision[13] as follows:

(1) the nature of the area;

(2) the relationship of the area inhabitants to one another, to Indian tribes, and the federal government;

(3) the extent to which the inhabitants and Indian tribes of the area are under the superintendence of the federal government; and

(4) the extent to which the area was set aside for the use and occupancy of Indians as such.

Prior to the Eighth Circuit decision in South Dakota, the United States Supreme Court decided United States v. John, 437 U.S.

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[11] Venetie Indian Country decision, Clerk's Docket No. 154 at 16-18.

[12] Venetie Indian Country decision, Clerk's Docket No. 154 at 25-27.

[13] Venetie, 856 F.2d at 1391.

634 (1978).[14] The case seems not to have attracted as much attention in Indian law cases as one might have expected. John is briefly mentioned in South Dakota for the proposition that a state assertion of jurisdiction over land does not necessarily defeat a finding of a dependent Indian community.

In John, the Supreme Court dealt with Choctaw Indian lands which the government had purchased for the Mississippi Choctaws and which Congress had declared to be trust lands. Subsequently, the Department of the Interior proclaimed these same lands to be a reservation.

The defendant, John, was indicted by a federal grand jury. He was tried and convicted of simple assault. On appeal, the Fifth Circuit held that the lands in question were not Indian Country and for this reason, John could not be prosecuted under federal law. See 18 U.S.C. § 1153. While the federal appeal was underway, John was indicted by a state grand jury in connection with the same incident giving rise to the federal prosecution. John was convicted of a more serious offense after a state court trial. He appealed, and the Mississippi Supreme Court affirmed, holding that the federal court did not have jurisdiction.

The United States Supreme Court rejected the conclusion of the Fifth Circuit and the Mississippi Supreme Court on the Indian

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[14] The court here repeats at some length its decision of the most recent United States Supreme Court Indian Country cases because of their critical role in this decision.

Country issue. After expressly taking notice of the three categories of land which Congress defined as Indian Country, it held, drawing upon the authority of McGowan and Pelican, that the test for the existence of Indian Country is, "whether the land in question 'had been validly set apart for the use of the Indians as such, under the superintendence of the Government.'" John, 437 U.S. at 649 (quoting United States v. Pelican, 232 U.S. 442, 449 (1914), and United States v. McGowan, 302 U.S. 535, 539 (1938)). The Court held that the lands purchased for the Choctaws by the government, declared by Congress to be trust lands and by the Executive to be a reservation, constituted a set-aside of land for the use of Indians as such. The Court observed that "[t]he Mississippi lands in question here were declared by Congress to be held in trust by the Federal Government for the benefit of the Mississippi Choctaw Indians who were at that time under federal supervision." John, 437 U.S. at 649. This court takes the foregoing statement to reinforce a point that is easily overlooked: it is not land but Indians which must be under the superintendence of the government in the Pelican/John test for Indian Country.

The Court rejected Mississippi's contention that the Choctaw's had been assimilated and were no longer subject to federal government supervision. As regards superintendence, John contains several significant holdings. Firstly, the fact that the Mississippi Choctaws were a "remnant" of a larger tribe which had

been forced out of Mississippi did not defeat "federal power to deal with [the remnant]." John, 437 U.S. at 653. Secondly, the fact that federal supervision of the Mississippi Choctaws was not continuous did not defeat "federal power to deal with them." Id. Thirdly, citizenship status did not defeat the power of Congress to legislate for the Mississippi Choctaws. Id.

In 1991, in a case somewhat more analogous to that before this court, the United States Supreme Court again returned to the Indian Country question in Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991). In Potawatomi, the Indian tribe sold cigarettes without collecting state sales taxes from a store located upon land held in trust for the tribe by the federal government. Oklahoma sought to collect the taxes. The tribe sued to enjoin the collection of taxes and Oklahoma counterclaimed seeking both to collect the taxes past due and to enjoin the tribe from further sales without collecting applicable state taxes. The bulk of the discussion in Potawatomi has to do with issues of jurisdiction and sovereignty. The case is of value here, however, because unlike John which dealt with reservation lands, the land in Potawatomi was not in a reservation although it was, as indicated above, held by the federal government in trust for the tribe.

The Court held in Potawatomi that the characterization of land as tribal trust lands and reservations was not significant. Speaking for the Court, the Chief Justice wrote:

> In United States v. John, 437 U.S. 634 (1978), we stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated "trust land" or "reservation". Rather, we ask whether the area has been "'validly set apart for the use of the Indians as such, under the superintendence of the Government.'" Id., at 648-49; see also United States v. McGowan, 302 U.S. 535, 539 (1938).

Potawatomi, 498 U.S. at 511.

One final circuit level case merits mention at the conclusion of this review of Indian Country case law. In Buzzard v. Oklahoma Tax Comm'n, 992 F.2d 1073 (10th Cir.), cert. denied, 114 S. Ct. 555 (1993), the Tenth Circuit revisited the Indian Country issue. In Buzzard, a band of Cherokee Indians who were organized as a tribe purchased fee land. Under the tribal charter, the tribe could not sell the land without federal approval. It was contended that such approval constituted sufficient federal government involvement for the land to have been validly set apart for Indians as such. The district court held that federal approval of a sale was not the equivalent of a federal set-aside of land for the tribe. The district court concluded that the land in question was not

Indian Country. With nary a mention of its decision in Martine some twenty years previous, the Tenth Circuit affirmed.[11]

In Buzzard, the circuit court expressly recited the Indian Country definition of section 1151 noting that:

> In addition the Supreme Court has held that Indian country includes land "'validly set apart for the use of the Indians as such, under the superintendence of the Government.'" Potawatomi Indian Tribe, [498 U.S. at 511 (quoting John, 437 U.S. at 649)].

Buzzard, 992 F.2d at 1076. Thereafter, and without reference to the concept of a dependent Indian community, the circuit court proceeded to analyze the set-aside issue which confronted it. Pertinent to a fuller understanding of the concept of a set-aside, the Tenth Circuit observed, "land is 'validly set apart for the use of Indians as such', only if the federal government takes some action indicating that the land is designated for use by Indians." Id. Similarly, the Tenth Circuit observed that "[s]uperintendency over the land requires the active involvement of the federal government." Id. The court concluded that holding land in trust shows that the government means to exert jurisdiction over the land. Applying these views, the court concluded that the tribal land in question had not been validly set apart for the tribe's use by the federal

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[11] As discussed above, the Tenth Circuit in Martine held that fee land purchased by a tribe was Indian Country. Not surprisingly because it preceded John, Martine, while including as a factor to be considered the established practice of government agencies toward the area, does not focus the attention upon land being set aside for the use of Indian people as does John, South Dakota, and Potawatomi.

government even though Secretarial approval of any sale was required under the tribe's charter. The land was acquired by the tribe unilaterally. The court emphasized that the land in question was acquired just as any other person might do, an apparent reference to the requirement that land be set aside for Indians as such.[16] After discussing how certain consequences[17] of finding Indian Country supported the conclusion that the tribal lands in Buzzard were not Indian Country, the court concluded with the observation that, "[n]othing in McGowan or the cases concerning trust land indicates that the Supreme Court intended for Indian tribes to have ... unilateral power to create Indian country." Id. at 1077.

This court concludes that Buzzard and the United States Supreme Court cases upon which it is founded overturn Martine to the extent that the latter case suggests that a tribe may add to Indian Country by simply purchasing fee title to property from a private, third party. Sandoval, however, stands unaffected by John and Potawatomi owing to the fact that Congress declared the Pueblo lands

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[16] In Buzzard, the Tenth Circuit continued with a discussion of whether or not the subject "land [is] superintended by the federal government." Buzzard, 992 F.2d at 1076. As discussed above in connection with John, this discussion appears misdirected; for the United States Supreme Court has said that the question of land being set aside for Indians as such is one factor and the superintendence of Indians, not land, is another factor.

[17] The court discussed as flowing from an Indian Country determination the limitation of state criminal jurisdiction (which is not a factor in the instant case) and the impact of an Indian Country determination on taxing powers of states.

to be Indian Country as a matter of federal law even though the Pueblo lands were not set aside by the federal government.

This court concludes, based upon Potawatomi, that it does not matter as regards the Indian Country issue whether the tribe does or does not have a reservation. Reading John and Potawatomi together, what does matter is whether, as a matter of fact, the tribe occupies land set aside for Native Alaskans, as such, under the superintendence of the government.

This court concludes, on the basis of John and Potawatomi that Indian Country cannot exist at all without proof of three elements, one of which has almost never been in contest in the Indian Country case law and therefore receives little or no mention. As is explicit in the Ninth Circuit Court's interlocutory decision in Venetie, land claimed to be Indian Country must be inhabited by an Indian tribe. Venetie, 856 F.2d at 1391. Secondly, the tribe must be under the active superintendence of the federal government. Thirdly, the tribe must have had land set aside by the federal government for its people as Natives. If the proof of the claimants to Indian Country fails as to any one of these elements, then the claim of Indian Country fails. The other factors having to do with the area and its inhabitants and their relationships to one another, the tribe and the government focus principally on geographic and demographic considerations which have relevance principally where

there is some significant disagreement as to the extent of Indian Country as distinguished from its existence per se.[18]

The court proceeds now with the discussion of whether or not the defendants have established by a preponderance of the evidence that the Resolution Area constitutes Indian Country.

Discussion

As a consequence of motion practice initiated by defendant Kluti Kaah Native Village of Copper Center, the court has determined that the Kluti Kaah, including residents of the Native Village of Copper Center, are an Indian tribe.[19] Although defendant Kluti Kaah Native Village of Copper Center (the tribe) has been dismissed from this case with the concurrence of the plaintiffs, the remaining defendants are the proponents of the tribal tax which the plaintiffs

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[18] In this regard, the court recognizes that there is still some overlap between its factor 2 as regards the relationship of area residents to the federal government and factor 3 having to do with superintendence of Indian tribes by the federal government. See page 7, supra. Although the same facts may well be relevant as to both factors, the focus is different. The location of dealings between inhabitants and federal agencies may well help define the geographic extent of Indian Country where that is at issue. Where, as here, a principal issue is the extent of superintendence, the focus is upon federal activity per se-- what have Congress and the Executive agencies done in relating to Native people as distinguished from where the activity has effect.

[19] Order of December 22, 1993, Clerk's Docket No. 203 at 2. See also, Order of September 20, 1995, Clerk's Docket No. 166 in Native Village of Venetie, et al. v. State of Alaska, F86-0075 CV, with respect to the effect of 58 Fed. Reg. 54,364 (Oct. 21, 1993), a notice entitled: Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs.

challenge; and the court concludes that these remaining defendants are proper parties to defend that tax and assert the existence of Indian Country on behalf of the tribe as a jurisdictional basis for the tax.

As to the second (superintendence) and third (set aside) elements of this case, the court will here as it did in the Venetie Indian Country decision analyze the evidence produced as to all four Venetie factors for the purpose of determining whether the Resolution Area is a dependent Indian community and therefore Indian Country. As in Venetie, this court concludes that a dependent Indian community exists as to Alaska Native tribes when there is the requisite degree of political superintendence[30] by the federal government of a tribe occupying lands set aside for Alaska Natives as such.[31] That requisite degree of superintendence exists where the degree of congressional and Executive agency control over the Alaska Native tribe is so pervasive as to evidence an intention that

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[30] The statutory use of the term "dependent" to modify Indian Country tends to suggest that the focus is upon the state of the tribe claiming to occupy Indian Country. This focus too easily leads to a discussion of only economics. Current Supreme Court case law as hereinafter discussed largely avoids the term "dependent" in favor of the terms "superintendence" or "federal supervision" which tend to broaden and shift the focus of attention to the entirety of the relationship of the federal government to the tribe. United States v. John, 437 U.S. 634, 649 (1978).

[31] Venetie Indian Country decision, Clerk's Docket No. 154 at 4, 27.

the federal government, not the state, be the dominant political institution in the area.

Nature of the Area[22]

The area in which the defendants' business activity tax would apply (Resolution Area) consists of two townships[23] (72 square miles), is located in the center of a broad river valley, and straddles not only the Copper River but also the TransAlaska Pipeline, a major electric power transmission line, and the Richardson Highway, a principal (and the original) roadway connecting tidewater Valdez, Alaska to Fairbanks in the interior of Alaska.[24] That portion of the Resolution Area east of the Copper River is owned by the federal government and has been set aside as

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[22] Although not case dispositive, the court has determined to evaluate factors 1 and 2, nature of the area, and relationships of the area inhabitants, because they involve informative background material which will serve to establish a context for the discussion of other factors which are dispositive of the case.

[23] See note 7, supra.

[24] Defendants' Exhibit 321. See also defendants' Exhibit 349. See also attachment 1 to Second Brelsford Affidavit of May 29, 1987, Clerk's Docket No. 124. Plaintiffs' Exhibit 2 is a photocopy of the Brelsford Affidavit attachment; but the former does not adequately depict the latter for lack of color and lack of an acrylic overlay which depicts the location of the utility and transportation corridor withdrawal (Public Land Order 5150) discussed in the Uncontested Statement of Facts. Plaintiffs' Exhibit 21 is an enlargement of the central and most critical portion of the Resolution Area-- showing in detail the location of the town of Copper Center, the Ahtna subdivision where tribal members reside within the Resolution Area, the pipeline corridor and so forth.

the Wrangell-St. Elias National Park and Preserve.[15] At the very center of the Resolution Area, section 13, T2N, R1W, and section 18, T2N, R1E, straddle the Copper River meridian, one of two cardinal lines from which all land in the Copper River valley has been surveyed.[16] This two-square mile area is, as a practical matter, the "choke point" of the Resolution Area for through this two-square mile area passes the power transmission line, the TransAlaska Pipeline, the Copper and Klutina Rivers, and the Richardson Highway (both new and old). The army telegraph line used to pass through this area. The Copper Center landing strip is just outside of this two-square mile area. The non-Native town of Copper Center has been in existence at the confluence of the Klutina and Copper Rivers since the turn of the century. Except as otherwise noted below, this two-square mile area (plus the airfield land immediately to the north of it) is now and has since the turn of the century been the focal point of all human endeavor in the Resolution Area. Sections 13 and 18 (and a small amount of adjacent land including the airstrip area) are all owned by either private individuals or the State of Alaska. This land is subject to the TransAlaska Pipeline right-of-way.

With the exception of a little over four square miles of land located on the south side of the west one-half of the

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[15] Defendants' Exhibit 321.

[16] Defendants' Exhibit 349.

Resolution Area, the remainder (roughly the westerly one-half) of the Resolution Area is owned by Ahtna, Inc.[27] Ahtna, Inc. is an Alaska business corporation formed to meet the requirements of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601, et seq. As a consequence of ANCSA, Ahtna, Inc. became entitled to select and received patent to significant lands in the Copper River valley, including lands in the Resolution Area.[28] Kluti Kaah Corporation, also an Alaska business corporation formed by members of the tribe pursuant to ANCSA also received title to the surface of significant lands in the Resolution Area.[29] By an agreement and plan of merger entered into by Ahtna, Inc. and various Ahtna region village corporations including Kluti Kaah Corporation, the village corporations merged into Ahtna, Inc. and all of their property

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[27] Defendants' Exhibit 349.

[28] Plaintiffs' Exhibit 19. It is worth noting in passing that approximately half of the Ahtna land holdings in the Resolution Area were available for selection by settlement act corporations because of the revocation of Public Land Order 5150 which had withdrawn a utility and transportation corridor for the TransAlaska Pipeline as authorized by ANCSA. 43 U.S.C. § 1616(c). This withdrawal would have prevented ANCSA corporations from selecting the lands which are presently crossed by the TransAlaska Pipeline witnin the Resolution Area. In order to solve this land selection problem, Ahtna, Inc. and, among others, the Kluti Kaah Corporation, and Alyeska entered into a private agreement whereby Alyeska would provide certain employment for Ahtna Natives and would not object to revocation of Public Land Order 5150, thereby making these lands available for selection.

[29] Plaintiffs' Exhibit 18.

rights were given over to the successor corporation, Ahtna, Inc.[10] The net result is that neither the tribe nor its village corporation owns any land in the Resolution Area. The United States Government does not hold in trust for the tribe any land in the Resolution Area. Individual members of the tribe hold leases or land use permits authorizing their occupancy of homesite lots in the Ahtna subdivision located between the new and old Richardson Highways in sections 1 and 2 of the western half of the Resolution Area.[11] This subdivision is approximately two miles along the old Richardson Highway from the non-Native town of Copper Center. Although there are a few other amenities such as a community hall adjacent to the Ahtna subdivision, the latter is essentially a residential area. Commercial activity is focused in the non-Native town of Copper Center.

The Resolution Area and surrounding Copper River valley was occupied by perhaps three hundred Natives prior to the turn of the century. In 1898, as a part of the rush for gold in the Yukon Territory, stampeders heading for the interior of Alaska and the Yukon Territory came down the Klutina River to its confluence with the Copper River; and a community developed there. At the time there was no Native community at this site, although there were small Native settlements north, south and across the Copper River

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[10] Defendants' Exhibit 180.

[11] Plaintiffs' Exhibit 21.

from the miners' community. Although the majority of the miners soon passed on, a few remained; and the court finds from the stipulated facts and other evidence before it that within the Resolution Area, there has always been a majority of non-Native people.

Relationship of Area Inhabitants to One Another, to Indian Tribes, and to the Federal Government

Members of the tribe and non-Natives have lived in very close proximity to one another in an area comprising less than three square miles[12] for very nearly a hundred years.

Perhaps realizing that the claim that the entire Resolution Area was Indian Country would necessarily cause the court to examine the relationships between residents of that entire area for purposes of evaluating the cohesiveness of the residents--whether they constituted a single community or not, counsel at the outset of the trial in his opening statement on behalf of the defendants took the position that:

> The area at issue is not the entire resolution area, even though the tax purports to assert

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[12] The court has reference here to sections 1 and 12 in the western one-half of the Resolution Area (T2N, R1W, C.R.M.) and section 18 in the eastern half of the Resolution Area (T2N, R1E, C.R.M.). Plaintiffs' Exhibit 21 and defendants' Exhibit 349. This appears to imply a gap of one or two miles between two communities. That is really not an accurate picture of the situation; for the reality is that the entire Copper Center community (meaning both the Native and non-Native community) is strung out along a three-mile stretch of the old Richardson Highway between the Ahtna subdivision on the north in sections 1 and 2 and the former Blix homestead property in the south located in section 18. The airport and the old school for the community are located in between.

> jurisdiction over the resolution area. The area at issue, and the only area at issue, is the area underlining [sic] the -- Alyeska pipeline. ....
>
> [T]he tribe does not contend that the non-Native community of Copper Center is a part of their dependent Indian community. All the tribe contends is that their former Kluti Kaah Corporation lands[11] are Indian Country.

Trial Transcript, Vol. I at 9. In substance, defendants now contend that only the area outlined in red within the Resolution Area on defendants' exhibits is Indian Country.[12]

The court cannot force the defendants to claim as Indian Country an area as to which they desire to abandon that claim. The defendants cannot, however, by so doing force the court to disregard the relevant community and the relevant relationships of area inhabitants. Considering all of the evidence, including the Joint Statement of Uncontested Facts, the court finds, as summarized below, that for purposes of defendants' claim of Indian Country in this case, the relevant community extends from the former Blix homestead property in section 18 to the Ahtna subdivision property in sections 1 and 2 as well as the intervening lands adjacent to the old Richardson Highway and east of the new Richardson Highway as

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[11] As set out above, Ahtna, Inc. succeeded to ownership of most of the Western half of the Resolution Area upon merger of Kluti Kaah Corporation into Ahtna, Inc.

[12] Defendants' Exhibit 349.

they cross sections 12, 13 (T2N, R1W, C.R.M.), and the southwest corner of section 7 (T2N, R1E, C.R.M.).[35]

The Ahtna lived and hunted and fished in the vicinity of the area above-described including in the Resolution Area and beyond since before the first contact with Europeans. The Ahtna Indians of the general area met Russian explorers with force and apparently massacred them. A much different relationship developed very rapidly between United States Army personnel who came into the area following the gold rush in the 1890s. There is no evidence of hostility between the miners or army personnel and the Ahtna. Indeed, it appears that the Ahtna went out of their way to be of assistance. The population explosion put a severe strain on local resources; and it is clear that the Ahtna became dependent upon the army for sustenance for many years. The army was followed by government school teachers who in retrospect probably did the Ahtna more harm than good by luring them away from their traditional ways and more particularly by encouraging them to settle near Copper Center around the school which was located in what has now been surveyed as section 12 on the west side of the old Richardson Highway.[36] After enactment of ANCSA, the Native residential area moved north slightly into the Ahtna subdivision on Ahtna lands in

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[35] Plaintiffs' Exhibit 21. Both Native and non-Native residents of this community have, of course, used a much larger area for subsistence hunting and fishing.

[36] Plaintiffs' Exhibit 21.

sections 1 and 2. The non-Native residential and business area remained at its original site on the Blix homestead in section 18. All of these people have lived, hunted, fished and worked together, in the same area right down to the present.

As detailed in the Joint Statement of Uncontested Facts, there is a long history of Ahtna people performing non-traditional work in the area including cutting firewood for sale, operating ferries, performing labor on the construction of the army road which was the predecessor to the Richardson Highway, the government telegraph line and for non-Native miners in the area. Most recently, Ahtna, Inc., on behalf of members of the tribe, has secured commitments from Alyeska for substantial maintenance contracts and thus Native employment in connection with the operation of the TransAlaska Pipeline. There is a very long history of a community of interest between all residents of the Resolution Area as regards employment for wages.

Within the Resolution Area, Native and non-Natives reside in a segregated fashion as a general proposition. That said, however, it is also a fact that the State of Alaska has operated the only schools in the area since the 1960s; and there must therefore be a very definite community of interest between all residents of the area as regards education. The only commercial activity in the Resolution Area is located in section 18. There is, for example, no tribal store in the Ahtna subdivision.

Until the Ahtna lands were closed to non-members, Natives and non-Natives all hunted and fished the same areas, they all worked together, they all went to the same school, and they all shopped in the same commercial areas. Except socially and in the location of residences, there is a distinct community of interest amongst all who reside in the last mentioned area. The facts pointing to a cohesiveness between all of the residents of the area significantly outnumber those facts suggesting separation between the Native and non-Native communities.

The defendants refer to the tribe's ANCSA lands which Ahtna, Inc. now owns as the relevant Native community. That area is not now and never has been a community unto itself. As set out above, the court has found that the relevant community from a geographic prospective encompasses both the Native and the non-Native community of Copper Center. The best that can be said from the defendants' point of view is that there are two very interdependent communities of people residing in the relevant area. There is not one cohesive Native community.

The court now turns from the subject of the relationships of area inhabitants to the subject of relationships between area inhabitants and the tribe. Natives who reside in the Resolution Area are members of the tribe. Non-Natives are of course excluded from tribal activity. Non-Natives have had little or no knowledge of the tribe per se and virtually no contact with it as a legal

entity. The fact that non-Native residents of the area had little or no knowledge of the existence of a tribe is not at all instructive about whether the tribe occupies Indian Country.

Finally, the Resolution Area has long been the focus of significant contacts between area residents and the federal government. The United States Army assisted Natives and non-Natives alike as miners passed through the Resolution Area on their way to the gold fields in central Alaska and the Yukon Territory. The federal government provided schools for the Native residents of the area down to 1960 when the State of Alaska took over the education function. From the turn of the century, federal government agents assisted with the health and general welfare needs of Natives in the area. The federal government encouraged non-Natives to settle in the area through homestead laws and the short-term presence of an agricultural experiment station. The federal government built the original Richardson Highway through the area and undoubtedly subsidized the reconstruction of the road when the new Richardson Highway was built to the east of the original highway. The federal government made available much of the right-of-way for the TransAlaska Pipeline.

Native residents of the Resolution Area continue to receive significant services and benefits, either directly from various federal agencies such as the BIA and the Indian Health Service or indirectly through the Copper River Native Association.

Various medical and other similar social services are provided. Programs also exist in the fields of education, housing, and village government.[37]

In addition to currently providing the school for the area, the State of Alaska has, since statehood in 1959, provided a wide range of governmental services. The State of Alaska has exercised civil and criminal jurisdiction throughout the Resolution Area and surrounding territory including activities by the Alaska Department of Public Safety, State Troopers and Division of Fish and Wildlife Protection, Division of Fire Protection and Division of Motor Vehicles.[38] The Alaska Department of Environmental Conservation,[39] the Alaska Department of Transportation and Public Facilities,[40] the Alaska Department of Fish & Game,[41] and the Division of Forestry of the Department of Natural Resources[42] have all been involved in their respective areas with respect to the Copper River valley.[43] The State of Alaska commenced exercising

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[37] Joint Statement of Uncontested Facts, Clerk's Docket No. 196 at 39-40, ¶¶ 115-16.

[38] Clerk's Docket No. 201, Burton testimony at 1-5.

[39] Clerk's Docket No. 233a, Sandor testimony at 1-4.

[40] Clerk's Docket No. 201, Campbell testimony at 1-2.

[41] Clerk's Docket No. 201, Tobey testimony at 1-3.

[42] Clerk's Docket No. 201, Maricle testimony at 1-3.

[43] See Campisi testimony, TR 1-109-10.

taxing jurisdiction for the entire length of the TransAlaska Pipeline, including the Resolution Area, since the inception of pipeline operations.[4]

Finally, the court takes note of the fact that prior to enactment of the tribal business activity tax, the Kluti Kaah village counsel had not attempted to exert governmental authority over non-Natives. Cole, TR 2-83-84.

Defendants claim that the Department of the Interior has treated the area as Indian Country. They argue that having been declared a tribe, the Kluti Kaah must be a community. Community residence is a part of the common law concept of tribal status. Montoya v. United States, 180 U.S. 261, 266 (1901).

The Department of the Interior has indeed declared that the Kluti Kaah are a tribe, but that decision was an exercise of Executive, political power. The exercise of that power requires no special fact finding and is subject to attack only for arbitrariness. United States v. Sandoval, 231 U.S. 28, 46 (1913). The Executive decision to constitute the Kluti Kaah as a tribe does not prove that there is a distinctly Native, cohesive community in the Resolution Area. In addition, just prior to the trial of this case, the Solicitor for the Department of the Interior opined that "Native

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[4] Joint Statement of Uncontested Facts, Clerk's Docket No. 196 at 6, ¶ 10.

Corporation lands in Alaska do not qualify as Indian country."[4] The United States government has not treated the Resolution Area as Indian Country.

The defendants argue that the federal government exercises control over the tribe and point to a number of provisions of ANCSA to support this contention: limits upon alienability of corporation stock, section 1606(h)(1), tax exemptions, section 1620, security law exemptions, section 1625, corporate options with respect to corporate stock, section 1606(1)(B) and (C). Defendants also point to provisions for a land bank, section 1636. Undeniably, Congress has continued special provisions for Natives as regards their operation of ANCSA corporations. Congress has sought to ease these entities into the business world rather than turn them out all at once. As discussed further hereinafter, these provisions do not, however, amount to active superintendence of the tribe. These protections are passive provisions which either are self-executing or are optional, the control being with the corporations, not the federal government. For example, whether land is developed so as to become taxable is up to the corporations. Whether land should be placed in the special protected status of the land bank is entirely up to the corporation. How the Native corporations and

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[4] Op. Solic. Dep't Interior, M-36975 (Jan. 12, 1993) at 132, ¶ 5.

their lands should grow and develop is left almost entirely to the decision of the corporations.

The defendants contend that the federal government's administration of the pipeline right-of-way under 43 U.S.C. § 1651, et seq. amounts to oversight or control over the tribe. Defendants are wrong. It is the private plaintiffs, not the tribe, which are subject to oversight and regulation under the TransAlaska Pipeline Authorization Act.

Defendants suggest that an Indian community which is a tribe is by definition dependent. This argument begs the very question which this case presents. To prevail in this case the defendants must be a tribe (which is conceded), they must prove that the tribe occupies land set apart for Alaska Natives as such, and they must prove that the tribe is under the active superintendence of the federal government. For purposes of this case, the current discussion of relationships between area inhabitants, the tribe and the federal government provides useful background information as to the dispositive issues of land being set aside and active superintendence.

This information also shows that the role of the federal government vis-a-vis the area, its residents, and the tribe has significantly changed and diminished in relation to the role of the State of Alaska over the years. We are a very long way away from

the days of Indian agents whose reports are summarized in excruciating detail in the Sandoval decision.[46]

Federal Superintendence of Resolution Area

In order to establish their claim that the tribe occupies Indian Country, the defendants must prove by a preponderance of the evidence that the tribe is under superintendence of the federal government. This concept brings into play the "dependent" component of the second form of Indian Country defined by 18 U.S.C. § 1151(b). It is in this area that the case law developed above becomes most important.

The concept of dependence as regards American Indian tribes in fact pre-dates Sandoval. In the course of formulating the relationship which would exist between the United States and Indian tribes, Chief Justice Marshall in Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831), characterized Indian tribes as "domestic dependent nations." In Cherokee Nation as well as Worcester v. Georgia, 31 U.S. 515 (1832), Chief Justice Marshall used much language which is familiar to us even today as regards Indian tribes and their relationship to the federal government. As discussed in detail above, the Supreme Court spoke again of dependent Indian communities in Sandoval, 231 U.S. at 46; and here also the focus of the discussion was the relationship between distinctively Indian

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[46] Sandoval, 231 U.S. at 40-44.

communities and the federal government, in particular Congress, which has the primary obligation of determining for what period of time and to what extent Indian tribes shall remain under the guardianship and protection of the United States. Id. In John and Potawatomi, the Supreme Court has used different words-- speaking of superintendence of Indian tribes by the United States, but the substance of the concept is the same.

In briefing this issue for the court, the defendants have suggested that tribal dependence is a politically oriented issue; and the plaintiffs do not disagree. The foregoing authorities (especially Sandoval and John) show that the focus should indeed be political. As the dominant sovereign entity, it is for the federal government to determine for what time and to what extent tribes will be supervised. That is a political consideration. The court does not suggest that the economic relationship between the federal government and a tribe is irrelevant. Benefits provided to tribes by the federal government are some evidence of a congressional determination to continue superintendence. Our inquiry is the broader one of the totality of the interaction (the political relationship) between the federal government and the tribe wherein the focus is upon how the federal government conducts itself toward the tribe, not the reverse. Superintendence by the federal government, and the consequential political dependence on the part of the tribe, exists for purposes of section 1151(b) where the

degree of congressional and executive control over the tribe is so pervasive as to evidence an intention that the federal government, not the state, be the dominant political institution in the area.[47]

The court now analyzes the question of whether the federal government presently exercises active superintendence over the Kluti Kaah tribe. In doing so, the court reiterates its adoption of the Joint Statement of Uncontested Facts and continues its consideration of other fact findings made herein. To the foregoing, the court now adds its evaluation of the impact of ANCSA upon the question of whether the federal government has continued its political dominance of the tribe beyond 1971.

The tribe never petitioned for and does not have any formal, political relationship with the BIA as would be the case had it petitioned for such under the Indian Reorganization Act (IRA), 25 U.S.C. § 461, et seq. Similarly, there is no state chartered

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[47] "[T]he Indian country classification is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands." Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm'n, 829 F.2d 967, 973 (10th Cir. 1987), cert. denied, 487 U.S. 1218 (1988). The foregoing quotation is followed by a litany of authorities including Felix S. Cohen, Handbook of Federal Indian Law 5-8 (1942) ("Indian country" generally determines allocation of tribal, federal, and state authority). See also Op. Solic. Dep't Interior, M-36975 (Jan. 12, 1993) at 116, where the Solicitor opines that:

> [W]e repeat the guiding principle that Indian country comprises those lands that Congress intended, as a general matter, to be beyond the jurisdictional reach of the state and subject to the primary jurisdiction of the Federal Government and tribes, even though those lands are geographically within the boundaries of a state.

municipal entity serving the residents of the Resolution Area. Rather, the entire gambit of state governmental services for the area are provided through the political branches of the state government.

Despite the foregoing, until 1971 there was room for a fair argument that the tribe had been treated by Congress and the Executive agencies of the federal government as being subject to active superintendence to such a degree as to amount to a dependent Indian community for purposes of 18 U.S.C. § 1151(b). Until 1971, the Native residents of the Resolution Area by and large lived within the boundaries of the school reserve set aside by the Executive Branch for a Native school in 1905.[48]

In 1971, as a part of the settlement of claims to aboriginal title to land and hunting and fishing rights, Congress enacted the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601, et seq. (ANCSA), and thereby effected a significant change in relationship as between the federal government and Alaska Natives. The legal and factual history of Alaska Native land claims was discussed extensively and was published by Judge Fitzgerald of this court in United States v. Atlantic Richfield Co., 435 F. Supp. 1009,

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[48] It is arguable that this reserve was purely for school purposes and not for Native occupancy; however, the evidence discloses that Executive Branch employees in fact encouraged Native occupancy of the land and, as indicated in the text, Natives have in fact occupied the area from shortly after designation of the school reserve right down to recent years.

1014 (D. Alaska 1977), aff'd on appeal 612 F.2d 1132, cert. denied, 499 U.S. 888 (1980).

In declaring a settlement with Alaska Natives, Congress expressly provided that all prior conveyances of public lands, including tentative approvals of lands under the Alaska Statehood Act, constituted an extinguishment of aboriginal title. 43 U.S.C. § 1603(a). Congress abolished all other aboriginal land titles including those with respect to submerged lands as well as aboriginal hunting and fishing rights. 43 U.S.C. § 1603(b). Finally, in extremely broad language, Congress extinguished all claims based on claims of aboriginal title or based on any statute or treaty of the United States relating to Native use and occupancy of land. 43 U.S.C. § 1603(c).

In exchange for all of the abrogated rights, Congress made provision for land grants totalling 44 million acres and the payment of over 962 million dollars. 43 U.S.C. §§ 1613, 1605, 1608(g). The land grants went to neither individual Natives, tribes, nor other Native organizations such as Indian Reorganization Act entities. Rather, Congress required the formation of regional and village, state law, "business for profit" corporations which would take title to land and receive the settlement funds. 43 U.S.C. §§ 1606(d), 1607(a).[49] Somewhat oversimplified, the regional corporations took

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[49] Villages were permitted to choose between "business for profit or nonprofit" state law incorporation. 43 U.S.C. § 1607(a).

fee title to the bulk of the land and ownership of the subsurface of village lands. Village corporations took surface title only to the lands immediately surrounding the village.

Also as a part of the statutory reorganization of the relationship between the federal government and Alaska Natives, Congress revoked all reservations in Alaska, whether created by Congress or the Executive Branch with the exception of that on Annette Island for the Metlakatla Indian community. 43 U.S.C. § 1618(a).[30] ANCSA does, however, contain a special provision applicable to Alaska Natives whose reservations were revoked. By section 1618(b), ANCSA permitted members or stockholders of village corporations which previously had the benefit of a reservation to vote that their corporation take fee title to the former reservation lands. As discussed in somewhat more detail in a following section of this decision, the tribe's village corporation, Kluti Kaah Corporation, did not endeavor to claim the school reserve as a basis for taking fee title to those lands pursuant to section 1618(b) of ANCSA. Rather, Kluti Kaah Corporation made selections and briefly took title to them, including lands in the Resolution Area.

This foregoing corporate model for a resolution of Native land claims was, of course, a dramatic departure from prior Indian settlements approved by Congress. Although some have apparently

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[30] In a parallel provision, 43 U.S.C. § 1617(a), the Indian Allotment Act was repealed as to Alaska, except as to pending allotment applications.

viewed ANCSA as a termination act, the court shares the view of the Secretary of the Department of the Interior who has opined that ANCSA is not "a termination statute that forecloses the exercise of all governmental powers by Native villages."[31] Rather, ANCSA is a new Native self-determination act. Whereas a prior termination effort sought to scatter Indians and Indian land holdings by allotting out reservations to individuals, the corporate settlement model leaves Alaska Natives with collective control of their lands and what should be done with them. That control is by and large in the hands of a board of directors, a management group made up from the Native communities themselves who must exercise collective judgment as to how to deal with the land grants and money. The federal government no longer has any right or responsibility for the active supervision of Alaska Natives with respect to the lands which they occupied after extinguishment of aboriginal titles. The court finds that this corporate model effects a significant diminution of the power of Congress and the Executive agencies over Alaska Native tribes

In addition to setting up a structure which largely freed Alaska Natives from congressional and Executive agency dominance as regards land and money, Congress was quite explicit in stating its

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[31] Op. Solic. Dep't Interior, M-36975 (Jan. 12, 1993) at 101; 104.

policy reasons for choosing the mode of settlement which was effected. In ANCSA, Congress has found and declared that:

> [T]he settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska.

43 U.S.C. § 1601(b).

Several aspects of the foregoing policy declaration are most pertinent to this court's analysis of the relationship between the federal government (Congress in particular) and Alaska Native tribes. Firstly, Congress sought to maximize the participation of Natives in decisions affecting their rights and property. This strongly suggests a shift from government superintendence to self regulation. This declaration of policy suggests tribal independence, not dependence. Secondly, Congress negated the establishment of permanent, racially defined institutions. This, too, bespeaks the intent of Congress to draw back from its historic role of adopting substantial legislation under the Indian Commerce Clause. U.S. Const. art. I, § 8, cl. 3. As a legal entity or person, corporations are race neutral. Tribes are by definition

race oriented.[32] Thirdly, the policy declaration disowns the reservation system which had been the centerpiece of the relationship between Congress and Indian tribes since the middle of the 19th century. Finally, and perhaps most notable, Congress expressly declared its intention not to have an ongoing "wardship or trusteeship" relationship with Alaska Native tribes. In very simple terms, a "ward" is, "[a] person, especially a child, or incompetent, placed by the court under the care of a guardian." Black's Law Dictionary 1420 (5th ed. 1979). In terms of Indian law, Indian people and tribes were long considered incompetent to manage their own affairs and property without the superintendence of Congress and Executive Branch agencies. By the foregoing declaration of policy, Congress has clearly said, no more! Congress now means for Alaska Natives to have "maximum participation ... in decisions affecting their rights and property ... without ... [a] wardship or trusteeship." 43 U.S.C. § 1601(b).

Also consistent with the view that Congress meant to establish an entirely new course or direction for Indian self-determination, Congress required that village corporations receiving land grants under ANCSA must convey 1280 acres of village corporation land to any municipal corporation in the village, and

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[32] The classic definition of an Indian tribe is contained in Montoya v. United States, 180 U.S. 261, 266 (1901): "[a] body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory...."

if there were none, such land must be conveyed "to the State in trust for any Municipal Corporation established in the Native village in the future...." 43 U.S.C. § 1613(c)(3). The court views this purposeful inclusion of and provision for state law municipal entities to be both practically and politically (although not legally) inconsistent with the greater degree of state exclusion which necessarily flows from a finding of Indian Country. The record in this case does not reflect whether, there being no municipality in the Resolution Area, lands have been conveyed in trust to the State of Alaska for municipal purposes in the Resolution Area. Be this as it may, the potential for such an obligation exists and the congressional purpose of facilitating the development of state law municipal entities as distinguished from traditional, Native entities is clear and consistent with the philosophy of ANCSA that the settlement with Alaska Natives be effected without the establishment of permanent, racially defined institutions. IRA institutions are racially oriented. Municipal entities are not racially oriented.

As enacted in 1971, ANCSA does not once mention the term "Indian Country". The court supposes, but does not know because the legislative history of ANCSA is uninstructive, that Congress deliberately, and no doubt for political reasons, left unresolved the Indian Country question which this court ruled upon in its Venetie Indian Country decision. That the Indian Country issue was

not expressly resolved by ANCSA does not detract from the fact that ANCSA unmistakably affects the balance of power (the degree of dependence and superintendence) in the relationship between the federal government and Native tribes; and Congress is presumed to have known that it was affecting that relationship by the adoption of ANCSA.[9]

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[9] It is appropriate to here observe that when Congress revisited the Settlement Act for purposes of the Alaska Native Claims Settlement Act amendments of 1987, Pub. L. No. 100-241, Feb. 3, 1988, 100 Stat. 1788, it exercised great care to make it clear that the amendatory act was not to tilt the scale one way or the other as regards the Indian Country issue. Section 17 of the amendments act provided that:

> (a) No provision of this Act (the Alaska Native Claims Settlement Act Amendments of 1987) ... shall be construed to validate or invalidate or in any way affect --
>
> (1) ...
>
> (2) any assertion that Indian country (as defined by 18 U.S.C. 1151 or any other authority) exists or does not exist within the boundaries of the State of Alaska.

Pub. L. No. 100-241, § 17(a), Feb. 3, 1988, 101 Stat. 1814. The published legislative history on the amendments of 1987 further underscore the intent of Congress that, "[t]his is an issue which should be left to the courts in interpreting applicable law and that these amendments should play no substantive or procedural role in such court decisions." S. Rep. No. 201, 100th Cong., 1st Sess. 23 (1987), reprinted in 1987 U.S.C.C.A.N. 3269, 3274. Similarly, the House of Representatives' explanatory statement with respect to the amendments of 1987 indicate an intention that the amendments "should be scrupulously neutral" on the question of tribal powers or self government. H.R. Explanatory Statement, 100th Cong., 1st Sess. 1 (1987), reprinted in 1987 U.S.C.C.A.N. 3269, 3299.

Clearly, Congress understood that this court would in the first instance decide the Indian Country issue based on all of the pertinent facts and law. This court is not, however, to be influenced in that decision by reason of Congress having amended ANCSA.

Other congressional acts, both pre-dating and post-dating ANCSA, have relevance to the court's appraisal of the degree of dependence and/or superintendence which exists now as between the federal government and Alaska Native tribes.

Firstly, as to Alaska and a relatively few other states, Congress has made special provision for state civil and criminal jurisdiction with respect to Indians. In 1958, the Territory of Alaska was added to California, Minnesota, Nebraska, Oregon and Wisconsin as jurisdictions in which 28 U.S.C. § 1360[4] would have application. Under section 1360(a),

> Each of the States listed in the following table [which includes Alaska] shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.

Similarly, 18 U.S.C. § 1162(a) provides in pertinent part:

> Each of the States or Territories listed in the following table [which again included Alaska as of 1958] shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere

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[4] Often referred to in both case law and legal literature as Public Law 280.

> within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.

Thus, even if this court were to conclude that the Resolution Area or part of it was Indian Country, Congress had long before the adoption of ANCSA determined that there was no need to protect Alaska Natives from the imposition of state civil and criminal law. The evidence shows that the Alaska State Troopers and State Fish and Game officers, not federal authorities, provide law enforcement in the Resolution Area. In Alaska, there is not and, since 1958, has not been the exclusivity of protection for Alaska Natives under the jurisdiction of federal authorities that previously existed and still exists in many of the western states as to Indians."[33]

In 1980, Congress adopted the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101. ("ANILCA")[34] Pertinent to the matter before this court, title VIII of ANILCA, 16 U.S.C. § 3111, made extensive provision for subsistence hunting and fishing

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[33] Defendants contend that this discussion of Public Law 280 proves too much since it only applies in Indian Country. Defendants miss the point. Public Law 280 demonstrates a significant diminution of federal superintendence of Alaska Natives to the extent that Indian Country exists in Alaska at the present time; for example, the Metlakatla Indian Reservation on Annette Island in southeast Alaska.

[34] ANCSA contemplated that there would be an Alaska lands act, the matter sometimes being referred to as the "D2" legislation. 43 U.S.C. § 1616(d)(2). Congress worked on the D2 legislation almost continuously from the enactment of ANCSA until the legislation was completed in 1980.

rights in Alaska. In enacting ANILCA, Congress invoked both its "constitutional authority over Native affairs" as well as its "constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on public lands by Native and non-Native rural residents" of Alaska. 16 U.S.C. § 3111(4). The court emphasizes here that the subsistence hunting and fishing rights were enacted in a fashion true to the declared policy of ANCSA that Congress would in the future avoid the creation of racially defined institutions. ANILCA was enacted for the benefit of all rural Alaskans, not just Native Alaskans.[37]

Based upon the Joint Statement of Uncontested Facts, the evidence produced at the trial of this case, and the discussion of both hereinabove, this court now finds that the tribe is not a dependent Indian community. By 1971, the federal government ended its active superintendence of the Kluti Kaah Tribe. The federal

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[37] The court does not mean to suggest that Congress has, since the adoption of ANCSA, evidenced an intention to abandon totally its Article I, Section 8 constitutional power to legislate with respect to Alaska Natives. Subsequent to the enactment of ANCSA, Congress has also had occasion to adopt or amend other federal laws for the benefit of Indians and has extended those laws to Alaska Natives. For example, the Indian Child Abuse and Family Violence Prevention Act, 25 U.S.C. § 3201, et seq., is made applicable in Alaska by expansion of the definition of the term "Indian Reservation" for purposes of this Act to include among other entities, "village corporations under the provisions of the Alaska Native Claims Settlement Act...." 25 U.S.C. § 3202(9). By contrast, the Indian Land Consolidation Act, 25 U.S.C. § 2201, et seq., unmistakably omits ANCSA corporation lands from that Act. 25 U.S.C. § 2201.

government is no longer the dominant political institution in the Resolution Area to the exclusion of the state.

Extent to Which Resolution Area was Set Aside for the Use and Occupancy of Alaska Natives

As already indicated, members of the tribe have inhabited small portions of the Resolution Area as well as lands adjacent thereto and have hunted and fished over all of the Resolution lands and adjacent lands since prior to the first contact with Europeans. In 1905, a school reserve was set aside by the Executive Branch and tribal members were encouraged to settle on the school reserve which was originally 1043 acres and was subsequently augmented by access to the former agricultural experiment station which added another 775 acres.[18] What remained of the school reserve as of 1971 was revoked by ANCSA. 43 U.S.C. § 1618(a).[19]

Assuming for the sake of discussion that the school reserve constituted a set aside of land by the federal government for the use and occupancy of Natives, that land was in essence reclaimed by the federal government free of the reservation. The same lands and others were in due course conveyed away not to an Indian tribe, not to an IRA, and not to individual members of the tribe.

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[18] The entirety of lands set aside for an agriculture experiment station was withdrawn by 1941. Joint Statement of Uncontested Facts, Clerk's Docket No. 196 at 15, ¶¶ 45, 46.

[19] Joint Statement of Uncontested Facts, Clerk's Docket No. 196 at 16, ¶ 49.

Rather, through ANCSA, Congress required that the Native people of the area form a regional corporation and several village corporations; and it was a regional corporation, Ahtna, Inc., and a village corporation, Kluti Kaah Corporation, to which the Resolution lands now claimed by the defendants to be Indian country were conveyed. Kluti Kaah Corporation received title to its ANCSA lands by patent on July 18, 1980. Effective September 30, 1980, and by reason of the merger agreement between Ahtna, Inc. and the village corporations including Kluti Kaah Corporation, the lands of the latter were transferred to Ahtna, Inc.[40] This decision to abandon the village corporation was the private decision of the tribal member-stock holders of Kluti Kaah Corporation and Ahtna, Inc. It is true that federal law permitted such a merger.[41] However, the federal government did not require any such decision of either Ahtna, Inc. or Kluti Kaah Corporation as an act of a dominant sovereign entity. Rather, the availability of the option of a merger was consistent with the policy declaration of ANCSA that Alaska Natives have maximum participation "in decisions affecting their rights and property...." 43 U.S.C. § 1601(b).

The net result of the merger of Kluti Kaah Corporation into Ahtna, Inc. is that the latter came into ownership of

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[40] Joint Statement of Uncontested Facts, Clerk's Docket No. 196 at 22, ¶ 68; and at 37-38, ¶ 111.

[41] 43 U.S.C. § 1627.

unrestricted fee title to those portions of the lands which are now claimed by the defendants to be Indian Country. These lands are not subject to any trust arrangement for the benefit of Alaska Natives. The federal government has no ownership interest whatever in the lands inasmuch as Public Land Order 5150 has been revoked as to the Resolution Area and the lands absolutely conveyed away to ANCSA corporations subject only to the pipeline right-of-way.[62]

In the interest of both accuracy and preciseness, it should be observed at this point that, in a very practical way, ANCSA does set aside land for the benefit of Native Alaskans. In doing so, however, Congress has unmistakably negated the requirement of John, Potawatomi, and Buzzard[63] that land not only be set aside for Indians but that the land be set aside for Indians as such. Congress plainly intended and understood that ANCSA corporations would act as ordinary private business corporations-- like ordinary United States citizens, not Indians.

Summing up the foregoing, the court finds that by conveying unrestricted fee title to ANCSA lands to Ahtna, Inc. and Kluti Kaah Corporation, the federal government intended and in fact did eschew all further involvement in those corporate lands. By

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[62] It is of course true that Alyeska has a private agreement with Ahtna, Inc. under which the private plaintiffs are entitled to additional access to Ahtna lands for purposes of the pipeline if needed. This is a purely private arrangement. The federal government is not involved.

[63] See pages 12-13, supra.

instituting a corporate model for the settlement, and by insisting that ANCSA corporations make land available to state law municipal corporations in the village areas, Congress chose both a racially neutral form of land ownership and a racially neutral form of political governance. This court finds that the conveyance of land by the federal government to regional and village business corporations was not intended to be and in fact was not a set aside of lands "for the use of the Indians as such...." John, 437 U.S. at 649 (emphasis added). The court is not aware of any court having ever held that a government patent conveying fee title to a corporate entity (even one controlled by Indians) constituted a set aside for Indians as such.[34]

What is particularly significant about this case is the fact that, in addition to the federal government not owing or holding any relevant land in trust for Natives, the tribe itself owns no land. There is no land controlled by the tribe to which its claims to Indian Country power or jurisdiction may attach. Indeed, the only connections between the tribe and any land to which the defendants can point are the right of individual tribal members to obtain from Ahtna, Inc. leases or land use permits for up to five

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[34] While this court thinks the Tenth Circuit would decide Martine differently today, even that case involved a tribe acquiring fee land from third parties which was adjacent to Indian Country--an extant reservation. The Kluti Kaah tribe in our case occupies no Indian Country whatsoever if the land it obtained from the federal government and conveyed to Ahtna, Inc.; is not Indian Country.

acres and the right of the tribe to have some say in the development of the former village corporation lands by Ahtna, Inc. Some tribal members have taken advantage of the former opportunity. These are purely private arrangements. They do not amount to a set aside of land by the federal government for the use and occupancy of Natives as such.

The defendants' response to all of the foregoing is in substance: there is no legal requirement that land be "set apart" for Natives in order to establish Indian Country.[65] By reference to Bates v. Clark, 95 U.S. 204, 208 (1877), the defendants contend that no governmental action is required to establish Indian Country which flows from aboriginal title. Defendants misconstrue both Bates and John. Bates stands for the proposition that aboriginal Indian lands are Indian Country as long as Indians hold title to them but that as soon as they part with aboriginal title it ceases to be Indian Country, without further act of Congress. Bates, 95 U.S. at 208-9. By ANCSA, Congress itself expressly extinguished "all aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy...." 43 U.S.C. § 1603(b). As a consequence, defendants can make no claim that Indian Country exists in Alaska based upon aboriginal title. As for John, the defendants simply defy John and the other Supreme Court decisions upon which

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[65] Defendants' post-trial brief, Clerk's Docket No. 238 at 31.

it is founded, all of which stand for the proposition that the test for the existence of Indian Country is, "whether the land in question 'has been validly set apart for the use of Indians as such, under the superintendence of the Government.'" John, 437 U.S. at 649 (quoting United States v. Pelican, 232 U.S. 442, 449 (1914), and United States v. McGowan, 302 U.S. 535, 539 (1938)). In John, the Supreme Court held that a government purchase of land for Natives and subsequently declared to be trust lands by Congress and a reservation by the Executive co ituted a set aside. Defendants in essence appear to argue that wherever a tribe resides, that is Indian Country. Such is simply not the law.

The Ahtna, Inc. lands located within the Resolution Area do not meet the set-aside factor necessary to support a finding that the Kluti Kaah occupy Indian Country.

Conclusion

In summary, this court finds that the lands of Ahtna, Inc. have not been set aside for Alaska Natives as such under the superintendence of the federal government. This court further finds that no lands have been set aside for the Kluti Kaah as a tribe under the superintendence of the federal government; and the rights which the Kluti Kaah have and exercise as between itself and Ahtna, Inc. are not the equivalent of a set aside under the superintendence of the federal government. The court finds that the Kluti Kaah,

although a tribe, are not a dependent Indian community for purposes of 18 U.S.C. § 1151(b).

Based upon the Joint Statement of Uncontested Facts as augmented by this decision, this court concludes that the lands of Ahtna, Inc. are not Indian Country, the Kluti Kaah do not occupy Indian Country, and, therefore, the Kluti Kaah tribe does not have the power to impose a tax upon non-members of the tribe such as Alyeska or the owners of the TransAlaska Pipeline.

DATED at Anchorage, Alaska, this 28 day of November, 1995.

United States District Judge

Cnsl Telephonically notified 11/28/95

A87-0201--CV (JWS)

W. BOZELL
R. BROWN (PAGLERBER)
B. LANDON (AUSA)
E. SMITH
L. ASCHENBRENNER
E. BARRY (AG-STE-200)
J. ATWOOD
D. SMITH III

SB

4

FISCAL NOTE

No. 3

Bill Version: SSSB 4

(S) Publish Date: 2-22-95

STATE OF ALASKA
1995 LEGISLATIVE SESSION

Revision Date:
Title: "...classifying certain offenses...driving while intoxicated ..failure to submit to a chemical test...as felonies..."
Sponsor: Senator Taylor
Requester: Governor's Office/OMB

Dept. Affected: Department of Law
BRU: Prosecution
Component: Third Judicial District
Fourth Judicial District
COMPONENT SERIAL NO. 0087-0088

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	299.8	299.8	299.8	299.8	299.8	299.8
TRAVEL	13.5	13.5	13.5	13.5	13.5	13.5
CONTRACTUAL	32.2	32.2	32.2	32.2	32.2	32.2
SUPPLIES	14.7	14.7	14.7	14.7	14.7	14.7
EQUIPMENT	36.5	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	396.7	360.2	360.2	360.2	360.2	360.2
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE	(Thousands of Dollars)					
1002 Federal Receipts						
1003 GF Match						
1004 GF	396.7	360.2	360.2	360.2	360.2	360.2
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	396.7	360.2	360.2	360.2	360.2	360

Estimate of any current year (FY95) cost: $ 0.0

POSITIONS						
FULL-TIME	5.0	5.0	5.0	5.0	5.0	5.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill makes several changes in state laws regarding alcoholic beverages, driving while intoxicated, driving while license suspended, and refusal to submit to a chemical test.

First, the bill amends AS 12.25.030(b) to make it clear that a peace officer may arrest a person under 21 years of age without a warrant when the peace officer has reasonable cause to believe that the person knowingly possessed, consumed or controlled alcoholic beverages in violation of AS 04.16.050. This provision overrules a recent court decision, and restores past practice. Therefore, this change will not have a fiscal impact.

Second, the bill increases the penalty for a third or subsequent driving while intoxicated conviction from a class A misdemeanor to a class C felony, except that only convictions occurring within five years preceding the date of the present offense may be included. A court would be required to impose a minimum sentence of

Prepared by: Richard I. Pegues, Director — Phone: 465-3672
Division: Administrative Services Division — Date: 2/14/95

Approved by Commissioner: Bruce M. Botelho, Attorney General — Date: 2/14/95
Agency: Department of Law

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ANALYSIS CONTINUATION:

imprisonment of 360 days and a fine of ot less than $1,000. A court would not be permitted to suspend execution of sentence or grant probation except on the condition that a person serve the minimum sentence of 360 days of imprisonment. And, a court would not be permitted to suspend imposition of sentence.

Currently, a third conviction results in a minimum sentence of sixty days imprisonment and a fine of not less than $1,000. A fourth conviction results in a minimum period of imprisonment of 120 days and a fine of not less than $2,000. A fifth conviction results in a minimum of 240 days imprisonment and a fine of not less than $3,000. And a sixth conviction results in not less than 360 days of imprisonment and a fine of not less than $4,000. The crime of driving while intoxicated, whatever the number of offenses, is a class A misdemeanor under existing law, and the counting of offenses for purposes of increasing the sentence covers a ten year span.

Third, the bill raises the penalty for a third or subsequent refusal to submit to a chemical test from a class A misdemeanor to a class C felony, under the identical circumstances (three or more convictions within five years), and imposes identical minimum sentences.

Finally, the bill would also make it a class C felony if a person drives a motor vehicle while their license was revoked as a result of a felony conviction for driving while intoxicated or refusal to submit to a chemical test. The minimum sentence would be imprisonment for not less than 30 days and a fine of not less than $1,000. Under current law, driving while a license is suspended or revoked is a class A misdemeanor. We note that the felony DWLS provision is triggered by a prior felony. The state's presumptive sentencing laws require a sentence of two years of imprisonment upon a second felony conviction.

During the past three years an average of 330 defendants have been convicted of three or more DWI/Refusal violations within five years. Based upon the department's DWI/Refusal conviction rate, approximately 400 additional felony level DWI/Refusal cases will be referred to the department for prosecution. Of this number, about 380 cases will be taken to the grand jury for indictment. The department currently handles about 4,000 felonies annually. Thus, raising this large a number of misdemeanor offenses to felony offenses represents a substantial increase in our workload, because of the additional effort required to process a felony case. This includes grand jury proceedings, motion practice, pre-sentence reports, 12-person juries, and sentencing hearings. None of these additional processes are required for the prosecution of misdemeanors. We also note, that although these cases are to be processed as felonies, the sentencing provisions are still those that attend misdemeanor offenses. Moreover, the six-fold increase in jail time (nearly 80% or 260 of 330 convictions are for third-time offenders) is bound to result in tougher defenses and more defendants going to trial, rather than pleading guilty. This will be of particular concern to felony defendants because of the consequences of presumptive sentencing.

Therefore, because of the large increase in felony processing, the department will have to add three Attorney III positions, one each in Anchorage, Fairbanks,and Palmer where the largest number of offenses occur. Additionally, because of the higher level of activity one Legal Secretary I position will have to be added at both Anchorage and Palmer.

DEPARTMENT OF LAW SCENARIO: 2

COMPONENT #: 6501020300 NAME: THIRD JUDICIAL DISTRICT DRU NAME: PROSECUTION

PCN	UNAUTH PCN	JOB CLASS TITLE	T S	LOCATION NAME	R C	B U	S	R&S	MOS	BUDG SALARY	PREM PAY	BENES	PER.SERV. COSTS	G. F. AMOUNT
03#026		ATTORNEY III	P	DILLINGHAM	A	XE	BB	22A	6	33900	0	9723	43623.54	

**** JUSTIFICATION:
Substantial increases in the penalties for commercial fishing violations will result in more vigorous defense by defendants and will increase the number of trials significantly.

TRAVEL COSTS	3500.00
CONTRACTUAL COSTS	5000.00
SUPPLIES COSTS	1200.00
EQUIPMENT COSTS	6500.00
OTHER COSTS	0.00
TOTAL COSTS	59823.54

*** FUNDING DETAIL:

1004 GENERAL FUND RECEIPTS	43623.54	
TOTAL FUNDING	43623.54	

03#059		ATTORNEY III	F	ANCHORAGE	A	XE	AA	22A	12	53304	0	18385	71689.98	

**** JUSTIFICATION:
This position will be needed to handle an increased felony caseload if state criminal mischief laws are amended to raise the penalty for joyriding from a class A misdemeanor to a class C felony.

TRAVEL COSTS	3000.00
CONTRACTUAL COSTS	8600.00
SUPPLIES COSTS	3300.00
EQUIPMENT COSTS	6500.00
OTHER COSTS	0.00
TOTAL COSTS	93089.98

*** FUNDING DETAIL:

1004 GENERAL FUND RECEIPTS	71689.98	
TOTAL FUNDING	71689.98	

03#067		ATTORNEY III	F	PALMER	A	XE	BB	22A	12	55260	0	18873	74133.41	

** JUSTIFICATION:
Is position will be required to handle the additional legal actions required to prosecute third-time DWI/ refusal prosecutions as felonies rather than misdemeanors. This includes securing grand jury indictments and overcoming a tougher defense due to the substantially increased penalties.

TRAVEL COSTS	3000.00
CONTRACTUAL COSTS	7600.00
SUPPLIES COSTS	3300.00
EQUIPMENT COSTS	6500.00
OTHER COSTS	0.00
TOTAL COSTS	94533.41

*** FUNDING DETAIL:

1004 GENERAL FUND RECEIPTS	74133.41	
TOTAL FUNDING	74133.41	

03#068		LEGAL SECRETARY I	F	PALMER	A	GG	2A	10A	12	25140	0	11463	36603.52	

**** JUSTIFICATION:
This position will be required to handle the additional legal actions required to prosecute third-time DWI/ refusal prosecutions as felonies rather than misdemeanors. This includes securing grand jury

TRAVEL COSTS	0.00
CONTRACTUAL COSTS	2000.00
SUPPLIES COSTS	2400.00
EQUIPMENT COSTS	8500.00

DEPARTMENT OF LAW SCENARIO: 2

COMPONENT #: 6501020300 NAME: THIRD JUDICIAL DISTRICT DRU NAME: PROSECUTION

PCN	UNAUTH PCN	JOB CLASS TITLE	T S	LOCATION NAME	R C	B U	S	R&S	MOS BUDG	SALARY	PREM PAY	BENES	PER.SERV. COSTS	G. F. AMOUNT

Indictments and overcoming a tougher defense due to the substantially increased penalties.

		OTHER COSTS	0.00
		TOTAL COSTS	53503.52	36603.52
*** FUNDING DETAIL:			
1004 GENERAL FUND RECEIPTS			36603.52
		TOTAL FUNDING	36603.52

**** COMPONENT TOTALS:

FULL TIME NEW POSITIONS	3	TOTAL PERSONAL SERVICES	226050.45
PART TIME/SEASONAL NEW POSITIONS	1	TOTAL COSTS INC. ASSOC COSTS	300950.4
NON PERMANENT NEW POSITIONS	0		
OTHER.....	0		
NUMBER OF NEW POSITIONS IN COMPONENT:	4		
		FUNDING DATA: G.F. & G.F. MATCH:	226050.45
		OTHER FUNDS:	0.00
		TOTAL FUNDING:	226050.45

11-17

FISCAL NOTE

No. 2

STATE OF ALASKA
1995 LEGISLATIVE SESSION

B Bill Version: SSSB 4

(S) Publish Date: 2-22-95

Revision Date:
Title: An Act relating to offenses...driving while intoxicated or failure to submit to a chemical test...
Sponsor: Sen. Taylor
Requester:

Dept. Affected: Corrections
BRU: statewide programs
Component: CC Dir.'s office CRCs

COMPONENT SERIAL NO. 1382

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	303.3	314.7	326.5	338.8	351.5	364.7
TRAVEL						
CONTRACTUAL	3,406.3	3,406.3	3,406.3	3,406.3	3,406.3	3,406.3
SUPPLIES						
EQUIPMENT	25.0					
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	3,734.6	3,721.0	3,732.8	3,745.1	3,757.8	3,771.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	3,734.6	3,721.0	3,732.8	3,745.1	3,757.8	3,771.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	3,734.6	3,721.0	3,732.8	3,745.1	3,757.8	3,771.0

Estimate of any current year (FY95) cost: $ 0.0

POSITIONS

FULL-TIME	1	1	1	1	1	1
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill would make the third or subsequent DWI or failure to submit to a chemical test a class C Felony and set a minimum sentence. 330 individuals annually would be convicted and sentenced under the language of this bill. The following formulas reflect the impact on DOC. ("added days to serve" allows for statutory goodtime calculations)

	offenders		added days to serve		cost per dday	annual cost
3rd offense	261	X	200	X	$57	$ 2,975.4
4th offense	53	X	160	X	$57	$ 483.4
5th or more	16	X	0	X	$57	$ 0
total	330					$ 3,458.8

CONTINUE NEXT PAGE:

Prepared by: Jerry Shriner
Division: Commissioner's Office
Phone: 465-4640
Date: 2/15/95

Approved by Commissioner: Marcia M. Poole
Agency: Department of Corrections
Date: 2/15/95

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With rare exception this class of offenders would serve their sentences in a treatment or CRC facility. A total of 60,680 annual bed days would be served and 167 new CRC beds would be required.

60,680 X $57 = $3,458.8

The Department's contracting officer is already working beyond a sustainable capacity and one additional staff person would be needed to implement and administer the new contracts. That cost has been separated from the $3,458.8 and shown in the personal services line. The balance is shown in the contractual line.

Recent experience shows that after the second offense covered by this bill, the ability to collect either from the individual or to attach their permanent fund to offset these costs tails precipitously and no program receipts are expected.

As a felony, each conviction would require a pre-sentence investigation and report prepared by a probation officer, as well as additional time in court. The departments standard for this process is 18 hours per pre-sentence report. 330 individuals would be convicted of a felony under this bill, even though some would not receive a longer sentence.

330 PSIs X 18 hours = 5,940 total hours.

Allowing for vacation and sick leave we can expect a probation officer position to devote 1,875 hours to pre-sentence investigations annually.

5,940 / 1,875 = 3.2 position equivalents

Four probation officer positions and one clerical person have been included to support the required investigation and report function and a one time cost of equipment a $5,000 per staff person has also been included.

FISCAL NOTE

No. 1

STATE OF ALASKA

BILL ...:

Bill Version: SSSB 4

1995 LEGISLATIVE SESSION

(S) Publish Date: 2-22-95

Revision Date: _____ Dept. Affected: Public Safety

Title: "An Act relating to arrests for possession of alcohol and drugs while intoxicated." BRU: Alaska State Troopers

Component: Detachments

Sponsor: Senator Robin Taylor

Requestor: (S) STA COMPONENT SERIAL NO. 0799

EXPENDITURES/REVENUES. (Thousands of Dollars) (inflation not included)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	59.4	59.4	59.4	59.4	59.4	59.4
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	59.4	59.4	59.4	59.4	59.4	59.4
CAPITAL EXPENDITURES	-0-	-0-	-0-	-0-	-0-	-0-
CHANGE IN REVENUES ( ) Revenue Code	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	59.4	59.4	59.4	59.4	59.4	59.4
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	59.4	59.4	59.4	59.4	59.4	59.4

Estimate of current year (FY 95) impact: $ -0-

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)

See attached analysis.

Prepared By: Francis C. Allen Phone: 269-5691

Division: Alaska State Troopers Date: 02/13/95

2/14/95

Approved by Commissioner: [signature] Date: 2/14/95

Agency: Ronald L. Otte, Dept. of Public Safety

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FISCAL ANALYSIS
SSSB4

This legislation will allow for the arrest of minors for violations of liquor laws, establishes Class C felonies for third time offenders of Driving While Intoxicated (DWI) or Breath Test Refusal and for Driving With License Revoked (DWLR) if the license was revoked as a result of a felony DWI or Breath Test Refusal Conviction. This fiscal note is intended to provide sufficient State Trooper and clerical support time to meet the increased demands resulting from this bill.

Section 1 of the bill allowing for the warrantless arrest of minors for alcohol violations addresses the impact of recent court interpretations that ruled that law enforcement officers must obtain an arrest warrant before an arrest of this type can be made. This statute change will allow the police to continue past practices in enforcement of the alcohol laws as they pertain to minors. Therefore this is change will have no financial impact.

Sections 5, 7 and 10 relating to the establishment of Class C felonies for third time DWI, Breath Test Refusal and or certain DWLR convictions will financially impact the Alaska State Troopers.

Although precise statistics can not be made available within the time frame necessary for this fiscal note response, approximately 400 DWI arrests per year are believed to be made for third time offenders. Off these 380 go to grand jury and approximately one-third or 127 of the grand jury cases involve the State Troopers.

The assumptions upon which this fiscal note are based are discussed below:

1) It is estimated that approximately 127 cases of this type per year will be investigated by the Alaska State Troopers.

2) Felony cases require evidentiary hearings and grand jury hearings that are not required had the cases been misdemeanors. Virtually all DWI arrests take place on swing or grave yard shifts, but all evidentiary and grand jury hearings take place during the day, causing Trooper time to be either overtime and/or on call out.

3) Felony cases average the following additional effort:

4 to 8 hours for grand jury and/or hearings
2 to 3 hours of clerical support time (transcriptions, etc.)
10 to 20% of felonies go to trial - 16 to 24 hours

FISCAL ANALYSIS
SSSB4

This bill contains a provision that would create a felony offense of Driving with a Revoked License (DWRL), if the revocation was for a felony conviction of DWI. While a statistical analysis at this time is not available, it is possible that in the future this provision of the bill could have a fiscal impact on the Alaska State Troopers.

Currently, Troopers arrest about 2,000 persons per year for DWLR and related offenses. If a significant number of these became felony offenses, increased trooper costs for grand jury and other related activities could impact the Division in the future. These costs are not included in this fiscal note since no firm basis exists on which to make a projection.

Costs other than personal services are not material and are not included in this fiscal note.

Division of Alaska State Troopers
Analysis
Sponsor Substitute for Senate Bill 4

	FY96	FY97	FY98	FY99	FY00	FY01
Personal Services:						
A) Grand Jury/Hearings 127 cases x 6 hour average x $46.75 (*1)	35,624					
B) Clerical Support 127 cases x 2.5 hour average x $18.98 (*2)	6,026					
C) Trials 19 cases x 20 hour average x $46.75 (*1)	17,765					
TOTAL PERSONAL SERVICES	**59,415**	**59.4**	**59.4**	**59.4**	**59.4**	**59.4**

*1 - Overtime hourly cost for a State Trooper, Range 76, Step D/E - (See PACS Scenario #1, PCN 1371)

*2 - Hourly cost for an Administrative Clerk II, Range 8, Step A - (See PACS Scenario #1, PCN 1444)

44-77

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. SSSB 4

Revision Date:
Title: An Act relating to DWI laws
Sponsor: Sen. Taylor
Requestor:

Dept. Affected: Alaska Court System
BRU: Trial Courts
Components:

COMPONENT SERIAL NO. 768

EXPENDITURES/REVENUES (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	59.6	59.6	59.6	59.6	59.6	59.6
TRAVEL						
CONTRACTUAL	68.0	68.0	68.0	68.0	68.0	68.0
SUPPLIES	1.0	1.0	1.0	1.0	1.0	1.0
EQUIPMENT	3.0					
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	131.6	128.6	128.6	128.6	128.6	128.6
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	131.6	128.6	128.6	128.6	128.6	128.6
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	131.6	128.6	128.6	128.6	128.6	128.6

POSITIONS

FULL-TIME						
PART-TIME	2.0	2.0	2.0	2.0	2.0	2.0
TEMPORARY	1.0	1.0	1.0	1.0	1.0	1.0

Estimate of current year (FY 95) cost: $ None

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: C. S. Christensen III, Staff Counsel
Agency: Alaska Court System
Phone: 264-8228
Date: 02/27/95

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System
Date: 02/27/95

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Alaska Court System
Fiscal Analysis
SSSB 4

SSSB 4 increases the classification of a third or subsequent conviction for driving while intoxicated or refusing to submit to a chemical test from a class A misdemeanor to a class C felony, if the offenses occurred within a five year period. A person would receive a minimum 360 days in jail for a third or subsequent conviction within a five year period.

The bill also allows a person under the age of 21 to be arrested without a warrant for the illegal possession, consumption or control of alcoholic beverages.

At the present time, approximately 380 persons are charged each year with a third or subsequent DWI or refusal within a five year period. Handling these as felony cases rather than misdemeanor cases will substantially increase the court costs associated with the offenses. An average third or subsequent misdemeanor DWI trial can be expected to last one day and is tried before a six member jury. A felony DWI trial can be expected to average 3 days in length and will be tried before a 12 member jury. The extra trial time results from the more serious consequences of a felony conviction; attorneys for both sides spend more time on matters such as jury selection, examination of witnesses, and motion practice.

Because of the more serious consequences of a felony conviction, the trial rates can be expected to increase substantially. Because there is no prosecutorial discretion with respect to charge or recommended sentence as there is in most other felony cases, the trial rate for this crime will very likely be higher than it is for more serious felonies. This note assumes that the trial rate will increase from approximately five percent to approximately 15 percent.

Unlike misdemeanor cases, felony cases require presentment to a grand jury. SSSB 4 will increase the number of cases presented to grand juries each year approximately 14 percent, with a corresponding increase in juror costs.

Alaska Court System
Fiscal Analysis
SSSB 4

Personal Services	Salary	Benefits	Total
Superior Court Judge, 50% vested pro tem, Anchorage, PPT, 7 months	$23,884	$13,903	$37,787
In-Court Clerk, range 12A, Anchorage, PPT, 7 months	15,813	6,801	22,614
Bailiff, range 6A, NPP, 7 months	11,137	1,002	12,139
New position costs			72,540
Offset of new position costs by reduction in District Court time			(12,900)
Net new position costs			59,640

Contractual	
Petit jury fees:	
38 new trials from increased trial rate (3 days, 13 jurors, at $25 a day)	37,050
19 existing trials increased from 1 to 3 days (2 days, 7 more jurors at $25 a day)	6,650
19 existing trials – add alternate juror (1 day, 1 more juror at $25 a day)	475
Grand jury fees:	
380 new felonies presented to grand jury (increase costs by 14%)	23,800
Total contractual costs	67,975

Supplies	
Estimated supply costs for new employees and from increased workload	1,000

Equipment (one-time cost)	
Equipment for new permanent part-time positions	3,000
Total estimated costs	$131,615

Alaska State Legislature

Chairman
Judiciary Committee

Vice Chairman
Transportation Committee

Member
Resources Committee
Western Legislative Forestry Task Force

Senator Robin L. Taylor

State Capitol
Juneau, Alaska 99801-1182
907-465-3873
Fax 907-465-3922

352 Front Street
Ketchikan, Alaska 99901
907-225-8088
Fax 907-225-0713

Sponsor Statement

SENATE BILL 4

Before the Senate Judiciary Committee
March 1, 1995

Senate Bill 4 would make drunk driving a felony on the third offense within a five year period and requires a minimum sentence of 360 days and a $1000 fine upon conviction. It would also require a sentence of not less than 30 days and a $1000 fine if a person convicted of felony DWI later drives a vehicle while that person's license is suspended or revoked.

It also gives the court the option of ordering a person to take antabuse or a similar drug as a condition of parole or probation. These drugs are intended to prevent the consumption of alcohol. The court may also order forfeiture of the vehicle or aircraft involved, subject to remission under existing law.

The need for SB4 is clear. In 1994, Anchorage had made 351 DWI arrests by August 24. Of that total, it was the second offense for 102 of the drivers and the third or more for 48 of them. The breath alcohol counts of most of these offenders is staggering. One driver, who already had seven DWIs on record, had a BAC of .267 .

We are all aware of the high profile cases. The guy with multiple DWI convictions who wipes out a family. Every one of the repeat offenders SB4 would get off our streets and highways has the potential of becoming a killer.

The goal of SB4 is to get these people off the road. They kill, they maim and they destroy property. The Impaired Driving Assessment conducted by a technical assistance team of the National Highway Traffic Safety Administration in Alaska this fall revealed that alcohol related motor vehicles crashes carry an annual price tag of nearly $32 million dollars. The human cost, the grief, the destruction of families, is impossible to calculate.

Section one of the bill addresses only a change needed in state law to over come a court ruling that a minor cannot be arrested for consuming alcohol unless the police actually witness the consumption. That ruling is currently in effect in the First Judicial District. Section one of this bill would add minor consuming to the list of offences for which an officer may make a warrantless arrest.

The remainder of SB4 deals strictly with what is needed to make it a felony to repeatedly drive drunk. It would give Alaska one of the toughest drunk driving statutes in the nation and send a clear message that will no longer tolerate those who cannot or will not stop this behavior.

ALASKA PEACE OFFICERS ASSOCIATION

State APOA Office • P.O. Box 240106 • Anchorage, Alaska 99524-0106 • (907) 277-0515

February 8, 1995

Senator Robin Taylor
Capitol Building
Juneau, Alaska 99801-1182

Dear Senator Taylor,

I am the State-wide president of the Alaska Peace Officers Association. Our organization represents over 1200 law enforcement officers from over 80 local, state and federal agencies. On January 31, 1995, the State Board met and discussed pending legislation dealing with peace officers.

We have chosen Senate Bill 4 as one of our priority pieces of legislation. We strongly feel this legislation will enhance public safety across the state. Drunk driving claims too many lives in this state. The repeat offenders need to be dealt with strongly through greater criminal sanctions for repeat offenders.

If there is anything this organization can do to assist your effort in passing this legislation please contact me (451-5316) or our Executive Director, Joseph Young (277-0515), or Alyce Hanley (243-7574). On behalf of the Alaska Peace Officers Association, I want to thank you for proposing this legislation and wish you the best in this legislative session.

Respectfully yours,

Michael Corkill by

Michael Corkill
Statewide President

SUPPORTING DOCUMENTS

ANCHORAGE DWI REPEATERS

DWI W/REPEAT OFFENDER - ZERO
AS OF 08/24/94

Jim Wolf – Muni Prosecution

LAST NAME	FIRST NAME	M I	CASE KEY	REPORT NUMBER	OFFENSE DATE	DC YR	DC NBR	BA RES	RPT OFF
[redacted]	FREDERICK	D	940003755	9489863	19940601	94	0004058	.215	02
RMAN	ADELBERT	P	940003965	9497636	19940613	94	0004172	127	01
S	FRANK	L	94000413	94100429	19940617	94	0004470	.000	01
AW	ANDREW		940005251	94133733	19940803	94	0005687	.225	02
MD	MICHELLE	Y	940002525	9458601	19940413	94	0002708	.248	02
ONAK	MATTHEW	J	940002793	9465728	19940424	94	0003043	.000	02
SSON	ART	A	940005126	94129940	19940729	94	0005529	.199	02
RSON	RONALD	A	930000189	93187572	19931121	93	0008760	.171	01
LL	KERRY	S	940005086	94129278	19940728	94	0005504	.118	01
ONY	ANNE	M	930000797	93205768	19931225	93	0009583	.335	02
	CHARLES		940003239	9475939	19940511	94	0003505	.246	01
THOLOMEW	DOUGLAS	J	940000615	94011708	19940122	94	0000551	221	02
CH	WADE	H	940005063	94128239	19940726	94	0005465	.336	01
ON	N...'	D	940001596	9438875	19940310	94	0001880	.206	02
MAN	MICHAEL	L	940004580	94115095	19940707	94	0004985	.242	02
NG	SCOTT	W	930000549	93197663	19931210	93	0009198	.170	01
GREN	JOHN	S	940004588	94115137	19940707	94	0004986	000	01
ARD	JOHN	J	940003343	9478015	19940514	94	0003575	.157	01
	SARAH		940000435	93869460	19931119	93	0008694	.172	01
TTE	MARY	J	940003231	9475761	19940510	94	0003499	.316	02
	MAUREEN	T	940000267	947760	19940115	94	0000366	.190	01
	AUGUST	E	940005624	94146073	19940822	94	0006158	.364	01
HFORD	THOMAS	S	940000436	93199630	19931215	93	0009274	.230	07
P	MARY	J	940001591	9438839	19940310	94	0001875	.241	01
	IAN	C	940003984	9496012	19940610	94	0004318	.184	03
CK	JOHNNY	L	940002413	9456119	19940409	95	0002594	.142	02
	STEVEN	J	940002827	9464522	19940422	94	0002986	.078	02
LIN	ROBERT	H	940001979	9446258	19940323	94	0002191	235	02
	JOEL	H	940000362	949662	19940118	94	0000428	.200	01
S	RICHARD	D	940000943	9420396	19940206	94	0001013	.200	02
S	RICHARD	D	940000875	9420396	19940206	94	0001013	.200	01
NDER	WILLIS	L	940003658	9486953	19940528	94	0003961	.232	01
	BRIAN	E	940003805	9491780	19940604	94	0004141	.251	01
AL	SHELLEY	P	940002044	9447723	19940326	94	0002262	.000	01
S	JOHNNIE	C	940003774	9490485	19940602	94	0004086	.296	01
S	ROLAND		940002207	9451593	19940401	94	0002389	.000	01
	ROLAND		940000540	9411909	19940126	94	0000645	.282	01
EIT	JULIE	A	940002152	9427984	19940219	94	0002152	.265	01
	JAMES	A	940000370	94007750	19940115	94	0000362	.214	03
	NICHOLAS	W	930000405	93195329	19931206	93	0009066	.079	01
	PAUL		940004628	94116851	19940710	94	0005064	000	02
MMER	MITCHELL	A	940001826	9444156	19940119	94	0002097	.324	03

[redacted]	RONNELL	J	940000754	9417772	19940201	94	0000851	.000	01
[redacted]	KENNY	L	940001592	9438752	19940310	94	0001872	.000	01
[redacted]	NICK	A	940001149	9426192	19940217	94	0001326	195	01
[redacted]	EARNEST	G	940000931	9419664	19940205	94	0000986	.230	01
[redacted]	DELBERT	A	940003387	9478675	19940514	94	0003598	.215	01
[redacted]	CLIFFORD	C	940001292	9430200	19940224	94	0001469	000	01
[redacted]	ROBERT	G	940000843	946077	19940112	94	0000254	017	01
[redacted]	STEVEN	J	940004020	9496281	19940611	94	0004124	.248	01
[redacted]	RICHARD	J	940001406	9433665	19940302	94	0001632	.236	03
[redacted]	MARVIN	R	940002045	9447802	19940326	94	0002266	.237	01

DWI W/REPEAT OFFENDER > ZERO
AS OF 08/24/94

LAST NAME	FIRST NAME	M I	CASE KEY	REPORT NUMBER	OFFENSE DATE	DC YR	DC NBR	BA RES	RPT OFF
.....	.....	.	.....	.....	.....	..	.....	...	...
OK	BRUCE	W	940003896	9493620	19940607	94	0004212	000	01
OK	LAURA	L	940002950	9467610	19940428	94	0001145	227	01
OLEY	MICHAEL	T	940001479	9435582	19940305	94	0001734	151	02
EBEIL	GORDON	C	940003304	9477156	19940512	94	0003537	.167	01
EDOVA	STEVE	A	940001333	9431378	19940226	94	0001537	101	02
EART	ROBERT	M	930000215	93189362	19931124	93	0008838	070	01
ISAN	VICTOR		9400 1645	94884256	19940510	94	0004005	142	02
UGHEN	JAMES	M	940000346	947164	19940114	94	0000118	105	02
Z	FORTUNATO	A	940002949	9467710	19940428	94	0003147	000	01
HINGS	ERIC		940002728	9461020	19940417	94	0002835	149	01
ID	MARK	C	940003927	9494885	19940609	94	0004279	220	01
ID	SHELBY	F	940004479	94111606	19940731	94	0004877	141	02
IDSON	DOUGLAS	G	940000773	9417787	19940201	94	0000813	188	01
IS	RICARDO		940000713	94015600	19940129	94	0000744	171	03
IS	ROBERT	W	940003519	9483070	19940523	94	0003731	139	01
SON	SUSAN	M	940001143	9426292	19940217	94	0001316	191	01
KETTIE	GERALD	H	940000246	94002752	19940105	94	0000115	.000	03
OE	LESLIE	M	940003501	9483272	19940521	94	0003759	144	02
BRE	JEFFREY	K	940000439	93186339	19931118	93	0008690	000	01
ARMON	RICHARD	D	940000147	944446	19940108	94	0000192	000	02
SON	LUDENE	S	940001088	9425022	19940214	94	0001257	259	02
IDIO	MICHAEL	B	940005023	94127011	19940724	94	0005434	000	01
LE	DENNIS	D	940002210	9452353	19940402	94	0002414	154	01
TERDAY	PATRICK	L	940005279	94134525	19940804	94	0005727	220	01
M	JEFFREY		940005462	94140031	19940813	94	0005919	175	01
ISON	ROBERT	L	910000819	91205933	19911225	00	0000000	145	03
SLEY	ROBERT	P	940002529	9458849	19940411	94	0002715	275	01
LINGER	JON	H	940000556	9413824	19940125	94	0000641	190	01
CAMELRA	BILLY	J	940000269	948364	19940115	94	0000382	118	01
IS	GREGORY	C	930000314	91192745	19931201	93	0008982	197	01
S	GREGORY	C	930000109	93185101	19931116	93	0008617	142	01
ER	ROCHELLE	M	940001478	9435554	19940305	94	0001726	247	02
YNUS	RAFAL		940005152	94131974	19940731	94	0005569	154	01
USON	TIMOTHY	C	940005154	94130862	19940730	94	0005566	000	03
D	CHAD	A	940003653	9487704	19940529	94	0003980	261	01
	BARBARA	L	940002058	9448627	19940327	94	0002391	000	01
AN	CHARLES	J	940000876	9419580	19940205	94	0000987	000	03
	ROBERT	W	940004309	94105196	19940624	94	0004624	.255	01
GHER	MICHAEL	A	940004957	94126597	19940724	94	0005413	160	02
HORN	FRANK	A	940000382	9410317	19940119	94	0000450	.000	03
	KEVIN	J	940001472	9436622	19940306	94	0001768	.150	02
EISLER	ERNEST	L	940001904	9441623	19940318	94	0002077	.146	03

G[redacted]ROY	JOSEPH	H	940004546	94113810	19940706	94	0004921	.000	03
G[redacted]OLI	MARTHA		930000145	91182774	19931112	93	0008520	.212	01
G[redacted]NS	CLAUD	W	930000114	91183844	19931114	91	0008576	.174	01
G[redacted]T	RALPH	E	940001615	9440019	19940112	94	0001911	.256	02
G[redacted]Y	TED	D	940004908	94124801	19940721	94	0005112	.211	01
G[redacted]SCH	BRYAN	S	940002186	9451044	19940401	94	0002146	.157	01
G[redacted]Y	KENNETH	H	940004973	94126141	19940721	94	0005191	.248	01
G[redacted]ERGEN	DUSTIN	L	940000572	9414459	19940127	94	0000677	.238	02
G[redacted]	RAUL	C	940000965	9420165	19940206	94	0001011	.168	03
G[redacted]NN	JOHN	E	940003974	9496599	19940611	94	0004111	.000	02