

5-2013

Alaska Natives: Possessing Inherent Rights To Self-Governance and Self-Governing From Time Immemorial To Present Day

Kristin McCarrey

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/ailj>



Part of the [Indigenous, Indian, and Aboriginal Law Commons](#)

Recommended Citation

McCarrey, Kristin (2013) "Alaska Natives: Possessing Inherent Rights To Self-Governance and Self-Governing From Time Immemorial To Present Day," *American Indian Law Journal*: Vol. 1: Iss. 2, Article 7. Available at: <https://digitalcommons.law.seattleu.edu/ailj/vol1/iss2/7>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in American Indian Law Journal by an authorized editor of Seattle University School of Law Digital Commons. For more information, please contact coteconor@seattleu.edu.

Alaska Natives: Possessing Inherent Rights To Self-Governance and Self-Governing From Time Immemorial To Present Day

Erratum

Due to error, volume 1, issue 2 was originally published as volume 2, issue 1 and some articles were misnumbered or not published at all. This document reflects the correct version of volume 1, issue 2.

ALASKA NATIVES: POSSESSING INHERENT RIGHTS TO SELF-GOVERNANCE AND SELF-GOVERNING FROM TIME IMMEMORIAL TO PRESENT DAY

Kristin McCarrey*

INTRODUCTION

There have been several events in Alaska Native history that have been interpreted by some to be proof that Alaska Native Tribes, unlike other Tribes, either (1) never possessed inherent self-government powers or (2) these powers were long ago terminated. In other words, Alaska Natives have no different rights or ability to govern than any other citizen in the state of Alaska. There are several reasons for this belief: (1) Alaska Natives are different from tribal entities within the contiguous United States and this difference meant they never had governmental powers; (2) the Alaska Native Claims Settlement Act (ANCSA) of 1971¹ terminated Alaska Natives' right to their land and extinguished their aboriginal title and any self-governmental powers; (3) the Supreme Court's holding in *Alaska v. Venetie* that ANCSA land was not "Indian Country" and therefore the Alaska Native Tribe did not possess the ability to impose a tax on business activities conducted on the land meant Alaska Native Tribes have no self-government powers in Alaska;² and (4) Alaska Native Tribes' possession of inherent self-government powers would have monumental, and potentially society-altering, consequences for the future of the State of Alaska as a cohesive polity.³

If indeed it were correct that Alaska Native Tribes either did not or do not possess inherent self-governance powers, this would be a travesty for the state of Alaska and Natives as a whole. It is undisputed that even today Alaska Natives have disparately high rates of poverty, abuse, and health problems. There is compelling evidence that indigenous self-determination is the *only* policy that has had broad, positive, sustained

* Kristin McCarrey is a 2013 J.D. Candidate at Seattle University School of Law. The author would like to thank Eric Eberhard and Emily McReynolds for their ideas and guidance on this article.

¹ Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 – 1629 (1971).

² *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 532 (1998).

³ Donald Craig Mitchell, *Alaska v. Native Village of Venetie*, 14 ALASKA L. REV. 353, 353-354 (1997).

impacts on Native poverty.⁴ Ultimately, in the remote regions of Alaska it is the Alaska Native Tribes that are administering and running the villages. Instead of arguing about whether or not they have inherent rights, the state of Alaska and Congress should acknowledge their inherent powers to self-govern and work with the Alaska Native Tribes to improve conditions in ways that have proven effective: through self-governance.

This article will first address whether the Alaska Native Tribes possessed self-government powers prior to the enactment of ANCSA. Second, it will analyze what impact, if any, ANCSA had on those powers. Third, it will discuss the effect post-ANCSA federal legislation had on any self-governance powers of the Alaska Native Tribes. Finally, the article will go through an analysis of what effective self-government powers Alaska Native Tribes have in the post-*Venetie* world.

I. STATUS OF ALASKA NATIVE TRIBES' ABILITY TO SELF-GOVERN PRIOR TO THE ENACTMENT OF ANCSA

A. Indigenous Peoples' Inherent Powers of Self-Government in the Coterminous States

It has been repeatedly affirmed that Tribes located within the coterminous United States were independent, self-governing societies long before any interaction or contact with European nations.⁵ Because of the Tribes' storied history of self-governance pre- and post-contact with European settlers, the United States has recognized all Tribes within the contiguous states as distinct, independent political communities capable of self-government.⁶ The United States has recognized tribal powers of self-government in the Constitution, treaties, and judicial decisions.⁷ These communities have long been recognized as possessing inherent powers of self-government.⁸ The powers of self-government did not come from a delegation by the federal government to the Tribes, but rather are inherent.⁹

⁴ Stephen Cornell and Joseph P. Kalt, *Alaska Native Self-Government and Service Delivery: What Works, Joint Occasional Papers on Native Affairs*, No. 2003-01 (2003) available at <http://udallcenter.org/jopna.net/>. (last visited Apr. 20, 2013).

⁵ FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* § 4.01[1][a] (2005 ed.).

⁶ *E.g.*, *Worcester v. Georgia*, 31 U.S. 515, 559 (1832). *See also*, *U.S. v. Lara*, 541 U.S. 193, 204-205 (2005).

⁷ COHEN, *supra* note 5

⁸ *United States v. Wheeler*, 435 U.S. 313, 322-324 (1978).

⁹ *Id.*

Federal authority is the only authority that can place limits on inherent tribal powers. This federal power is plenary.¹⁰ This means that the federal government can choose to abrogate a treaty or limit or remove a Tribe's self-governing powers.¹¹ However, Congress's power is not entirely unlimited.¹² The courts have insisted upon a clear and specific expression of congressional intent to extinguish the inherent self-government powers of Tribes in the coterminous United States.¹³

There is no reason to separate out Alaska Native Tribes as somehow different or inferior to the Tribes in the rest of the United States. Alaska Native Tribes had existed self-sufficiently for hundreds of years prior to any European contact and are entitled to the same presumption of possessing inherent powers of self-governance as long as the federal government has not acted to abrogate those powers.

B. Did the Federal Government Clearly Express the Intent to Extinguish the Self-Government Powers Prior to Enactment of ANCSA?

For many decades it was believed that the federal government did not initially deal with Alaska Native Tribes as it had the Native communities in the contiguous United States.¹⁴ However, treating differently does not mean that the Alaska Native Tribes did not possess inherent self-governance powers. In the 1867 Treaty of Cession (the treaty commemorating the United States' purchase of Alaska from Russia), article III created a distinction between the uncivilized Tribes and the other inhabitants of the ceded territory. The uncivilized Tribes were subject to "laws and regulations as the United States may from time to time adopt."¹⁵ The Treaty stated everyone else was to have the enjoyment of all rights,

¹⁰ Lone Wolfe v. Hitchcock, 187 U.S. 553, 565-66, (1903).

¹¹ CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 79-80 (1987).

¹² Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84-85 (1977) (affirmed a standard of review for judging Congress's actions should not be disturbed "(a)s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians.").

¹³ E.g., Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999). See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); See also Bryan v. Itasca, 426 U.S. 373 (1976).

¹⁴ DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 6-11 2ND ED. 2002.

¹⁵ Treaty of Cession, U.S. – Russ., art. III, March 30, 1867, 15 Stat. 539.

advantages, and immunities of citizens of the United States.¹⁶ The argument is that, due to Alaska Native Tribes being labeled as “uncivilized,” the federal government neither recognized that the Alaska Native Tribe possessed any form of self-rule or attributes of an independent political community nor intended to apply the body of federal Indian law to Alaska.

The 1st Organic Act¹⁷ and the 2nd Organic Territorial Act¹⁸ established a civil government for Alaska and applied the laws to all citizens.¹⁹ Both acts also identified that Congress had considered the Alaska Native Tribes because the acts explicitly mentioned that Natives or other persons in the district should not be disturbed in the possession of any lands actually in their use or occupation. It was generally assumed that these acts equated Native possession with non-Native possession and entitled Alaska Natives only to land that was in their individual and actual use and occupancy. The Solicitor for the Department of the Interior held initially that Alaska Natives did not have the same relationship to the federal government as other Native Americans.²⁰ The assumption relied upon was that if Alaska Native Tribes were treated as both uncivilized and fully subject to all the same laws of the territory as non-Native Alaskans, the federal government had never recognized them as independent communities who were able to self-govern.²¹

Whether or not the Alaska Natives Tribes were treated as being subject to Alaska Territorial jurisdiction does not resolve the question of whether or not the same people still possessed inherent ability to self-govern. Second, none of these acts explicitly addressed the issue of whether or not the Alaska Native Tribes had inherent powers or made a clear and explicit statement of Congress’s intent to divest the Alaska Native Tribes of their inherent self-governance powers.²²

¹⁶ *Id.*

¹⁷ Organic Act of 1884, §8, 23 Stat. 24, 26.

¹⁸ Organic Territorial Act of August 24, 1912, Pub. L. No. 334, 37 Stat. 512.

¹⁹ Citizens included the Alaska Native Tribes at that time.

²⁰ DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS, (2ND ED. 2002) (Citing, Alaska-Legal Status of Natives, 19 L.D. 323 (1894)).

²¹ Donald Craig Mitchell, *Alaska v. Native Village of Venetie*, 14 ALASKA L. REV. 353, 355-363 (1997) (discussing that federal government policy towards Alaska Natives was fundamentally different than with other Tribes, and because of this fundamental difference Tribes never possessed inherent self-government powers.).

²² During this time the majority of Natives could exist without encountering the non-Natives and due to the lack of interaction between them and the non-Natives there would

In addition, it was easy for the Solicitor of the Department of the Interior and others to assert that Alaska Native Tribes were not the same as the Tribes in the lower 48 when there was very little interaction between the two groups and outside knowledge of Alaska Natives Tribes was limited. The reality was that Alaska was a very sparsely populated land with approximately 365 million acres of land and a population, according to the 1880 census, of 36,000 – of which 430 were not Native Alaskan. The federal government formed the Treaty with Russia and passed all of the early legislation when Natives far outnumbered non-Natives and there was limited interaction between the two populations. It was relatively simple for the federal government to say that Alaska Native Tribes had only western possession of land when no non-Natives were attempting to acquire land for their own purposes. The true intent of the federal government as to the application of the body of federal Indian law to Alaska Native Tribes would be revealed when interaction between Alaska Native Tribes and non-Natives increased.

Any doubt that the federal government had the same unique relationship with the Alaska Native Tribes as with Natives in the coterminous United States was eliminated by the courts, administrative actions, and explicit inclusion of Alaska Native Tribes within legislation created for the benefit of Tribes in the contiguous United States. It started in *United States v. Berrigan*, where the court held that the United States had the right and the duty to file suit to prevent non-Natives from acquiring lands occupied by Natives.²³ It continued in 1931 when responsibility of the administration of Alaska Native affairs was transferred from the Bureau of Education to the Bureau of Indian Affairs.²⁴ This action put Alaska Native Tribes on the same footing as Tribes in the coterminous states. Then, in 1934, the Indian Reorganization Act was applied to Alaska.²⁵ The Indian Reorganization Act, in important part, permitted Native communities to organize their governments under federally approved constitutions and to establish federally chartered businesses or cooperatives. The inclusion of Alaska Native Tribes in this legislation was

have been no need for the federal government to legislate with the differences of their cultures in mind.

²³ *U.S. v. Berrigan*, 2 Alaska Rpts. 442 (D. Alaska 1904) (US brought suit to prevent non-Natives from trespassing and obtaining Native land, court held Alaska Natives Tribes were wards of the government.).

²⁴ Secretarial Order 494, March 14, 1931.

²⁵ Act of May 1, 1936, 49 Stat. 120, 25 U.S.C. § 473a.

an express acknowledgment by the federal government that the Alaska Native Tribes had self-governance powers.

Finally, several court cases upheld that Alaska Native Tribes had the same relationship with the federal government and possessed the same inherent powers as other Tribes. In *Tee-Hit-Ton Indians v. United States*, the Supreme Court ruled that the Organic Act preserved aboriginal title for later disposition and that the taking of Tongass National Forest trees did not require compensation because Alaska Native Tribes are treated the same as Tribes in the contiguous states and subject to full plenary power of Congress, such that the taking of the Tongass National Forest did not constitute a taking for Fifth Amendment purposes.²⁶

Prior to ANCSA, there was no clear expression of congressional intent to terminate self-governance powers of Alaska Native Tribes. The federal government and the courts affirmed that the same relationship existed between Alaska Native Tribes and the federal government as between the federal government and the Tribes in the contiguous states. This relationship is predicated upon the premise that Tribes possess inherent self-governance powers. Because there was no clear expression of intent to terminate the self-governance powers, prior to the enactment of ANCSA, the Alaska Native Tribes possessed these inherent powers of self-government.

II. DID THE ANCSA TERMINATE ALASKA NATIVE TRIBES' INHERENT POWERS OF SELF-GOVERNMENT?

A. The Formation of ANCSA

It is entirely probable that, even though the Alaska Statehood Act of 1958 left all right or title to Native land undisturbed, Alaska Native Tribes' land claims²⁷ would have been ignored if not for the organizations of the Natives. The Alaska Statehood Act said

“all right and title...to any lands or other property, the right or title to which may be held by any Indians, Eskimos, or Aleuts... or is held by the United States in trust for said

²⁶ *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955).

²⁷ Alaska Natives unsettled claims made up more than 90% the geographic area of the state. *See generally*, MARY CLAY BERRY, *THE ALASKA PIPELINE: THE POLITICS OF OIL AND NATIVE LAND CLAIMS* 6 (1975).

natives... shall be and remain under absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as Congress has prescribed or may hereafter prescribe.”²⁸

Essentially the Act preserved the land claims of the Alaska Native Tribes and left control over the land claims of the Tribes to the federal government. Included within the act was permission for the state of Alaska to select 102.5 million acres for its own use from “vacant” public lands.²⁹

Immediately after achieving statehood in 1959, Alaska started to select its 102.5 million acres. Native groups started protesting to the Secretary of the Interior that the lands were neither vacant, nor public.³⁰ This ramped up protests from Native groups, particularly the newly formed Alaska Federation of Natives (AFN).³¹ Contemporaneously, energy companies were buying land leases for oil exploration, putting more pressure on resolving land claims.³² The conflict between the Natives and the State led to the Secretary of the Interior suspending approval of state land selection. An effort by the State of Alaska to set aside the land freeze was rejected by the Ninth Circuit in *Alaska v. Udall*.³³

Ultimately, the land selection freeze for the State progressed to a “freeze on further patenting or approval of applications for public lands in Alaska pending the settlement of Native claims.”³⁴ In other words, no

²⁸ Alaska Statehood Act, Pub. L. No. 85-108, 72 Stat. 339 (1958).

²⁹ Alaska Statehood Act, Pub. L. No. 85-508, § 6(b), 72 Stat. 339.

³⁰ Robert T. Anderson, *Alaska Native Rights, Statehood, And Unfinished Business*, 43 TULSA L. REV. 17 (2007) (Alaska Native Tribes were very concerned that if they did not act the state would pick all the land without regard to them and they would have no access to any land).

³¹ Alaska Federation of Natives was formed with the express goal of seeking a land claims settlement from Congress. AFN formed a resolution that urged the Department of the interior to remove all lands in dispute from state of Alaska land selections. *E.g.*, DONALD CRAIG MITCHELL, TAKE MY LAND TAKE MY LIFE 11-81 (2001).

³² MARY CLAY BERRY, THE ALASKA PIPELINE 123, 163-214 (1975) (Energy companies were particularly able to put pressure upon the State of Alaska because without the profits from the sale of land patents the state had very few financial resources).

³³ *State of Alaska v. Udall*, 420 F.2d 938, 940 (9th Cir. 1969) (State filed to compel Secretary of the Interior to issue patents to land and grant approval to state of Alaska for land selection, court held genuine issue of material fact as to whether Indian camping, hunting, trapping made the lands vacant).

³⁴ Pub. Land Order No. 4582, 34 Fed. Reg. 1025 (1969).

entity could select any land for any development until the land claims were resolved.

Juxtaposed with this enormous pressure from the State of Alaska, and business interests brought by energy companies who wanted to develop oil in Alaska, were the Alaska Native Tribes. During the same time period, the 1960s, the majority of Alaska Natives were unemployed or only seasonally employed, and most of them lived in poverty, had limited education, and English was not their primary language.³⁵ Despite this power and resource imbalance between the groups, Alaska Native Tribes managed to make their voices heard such that Congress held hearings on the Alaska Native land controversy from 1968 – 1970 in Alaska.

Even though Alaska Native Tribes did not have a vote or a veto as to the terms of the settlement of their land claims, some of the concessions that they sought were included in ANCSA.³⁶ Although not all of the Alaska Native Tribes' wishes were reflected in ANCSA, they sought to keep at least a portion of their land, monetary compensation for the land taken from them, and protection for traditional hunting, fishing, and gathering activities. In addition, they wanted self-determination through Native management of the lands reserved for them and Native representation in decisions affecting federally managed lands. Overall, the Natives wanted a choice to lead their lives in either their traditional way or some abridged version.³⁷

B. Structure of ANCSA

ANCSA was passed by Congress on December 18, 1971.³⁸ It accomplished the oil companies and State of Alaska's goal of extinguishing aboriginal title of the tribal villages to the 365 million acres. In pertinent part it stated, "[a]ll aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including

³⁵ Federal Field Committee for Development Planning in Alaska, *Alaska Natives & The Land*, 1968, 12-13.

³⁶ Anderson, *supra* note 30, at 32.

³⁷ Alaska Native Land Claims Part II, Hearings before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, House of Representatives, Ninety-First Congress First Session on H.R. 13142, H.R. 10193. *See also*, H.R. 14212, Bills to Provide for the Settlement of Certain Land Claims of Alaska Natives, and for Other Purposes. U.S. Government Printing Office, 1970. (statement of Hon. Willie Hensley, a Representative in the Alaska Legislature from the 17th district, Kotzebue, Alaska).

³⁸ 43 U.S.C. § 1601.

submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist are hereby extinguished.”³⁹ In exchange for the extinguishment of their aboriginal title, Congress created a complex mechanism for Native selection of some lands and distribution of \$962.5 million.⁴⁰ ANCSA departed course from the usual method of vesting existing tribal governments with the assets from the extinguishment of title.⁴¹

Natives alive on December 18, 1971, were permitted to enroll and be issued stock in both one of the thirteen regional corporations and one of the more than two hundred village corporations.⁴² All but the thirteenth corporation received land and money; the thirteenth corporation, which was comprised of Natives residing outside of Alaska, only received money.⁴³ Corporations were delegated the task of selecting lands for their own use in twelve geographic regions and in the vicinity of Native villages. Plus, the newly formed corporations had to administer their portion of the Alaska Native Fund, including distributing funds to Native shareholders. ANCSA authorized distribution of the entire \$962.5 million⁴⁴ from the Alaska Native Fund to Native corporations.⁴⁵ One of the most controversial provisions, at least in spawning litigation, was the intricate revenue sharing provisions that required each landowning regional corporation to pay the other eleven regional corporations a percentage of revenue received from subsurface resources and from regional corporation timber sales.⁴⁶

³⁹ 43 U.S.C. §1603(b).

⁴⁰ *E.g.*, CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW, 79-80 (1987).

⁴¹ FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 4.07[3]b (2005 ed.).

⁴² 43 U.S.C. §1604.

⁴³ 43 U.S.C. §1606(c).

⁴⁴ It has been said that this monetary amount was unprecedented. *E.g.*, James D Linxwiler, *The Alaska Native Claims Settlement Act: The First 20 Years*, 38 RMMLF-INST 2 (1992) (But most if not everyone involved in ANCSA failed to understand or minimized the cost of implementing ANCSA. In the 1980s when several corporations looked like they were going to fail the Native corporations were permitted to sell their accumulated financial losses, they were permitted even when no other corporation was allowed to sell NOLs anymore. These net operating losses, called “NOLS” were sold to profitable corporations for the value of the tax write off. In the four years of NOL sales generated more than 1 billion in capital and has been called the refunding of the Native corporations.).

⁴⁵ 43 U.S.C. §1605(c).

⁴⁶ 43 U.S.C. §1606(i).

In addition, the land conveyed to corporations was not originally subject to restrictions on voluntary alienation and the stock in both regional and village corporations was restricted from alienation only for 20 years.⁴⁷ ANCSA exempted corporations from a variety of security laws for the same 20-year period and gave tax exemption for Native lands and stock for the same 20 years.⁴⁸

C. Did ANCSA Terminate Self-Government Powers?

ANCSA was a long and exhaustive statute, but despite its length, contained within it is no language that does away with the Alaska Natives' ability to self-govern.⁴⁹ This is important for two reasons. The first is that the canon of construction as to whether or not Congress has divested a tribe of inherent powers of self-government requires a clear expression of intent to abrogate the Tribes' powers. Silence on the issue is not a clear, unequivocal expression of Congress's intent to divest the Tribes of sovereignty. In fact, despite the extensive legislative hearings that were held, there was very little testimony or discussion of the Alaska Native Tribes' role in governance. The majority of the discussion focused on the value of the land and who was going to get what rights to the land.

The second reason that the silence in the statute regarding self-governance powers is important is because it supports the contention that the only issue ANCSA was resolving was land rights and it should not be read to be more than a resolution of property rights. Further support for reading ANCSA as only a resolution of property rights and not divestiture of the Alaska Native Tribes' inherent powers of self-governance is ANCSA's failure to include resolution as to Alaska Native Tribes' subsistence use of the land. Repeatedly the Alaska Native Tribes stated one of their foremost concerns they wanted addressed in ANCSA was preserving their ability to subsist only from the land.

As enacted in 1971, ANCSA extinguished subsistence claims seemingly without compensation. However, in the conference report accompanying ANCSA, Congress expressed a clear intent for the Secretary of the Interior and the State of Alaska to protect Alaska Native subsistence interests. The conference report stated that the committee,

⁴⁷ 43 U.S.C. §1606(h)1, §1607.

⁴⁸ 43 U.S.C. §1620.

⁴⁹ 43 U.S.C. §1601 et seq.

“believes after careful consideration that all Native interest in subsistence resource land can and will be protected by the Secretary through exercise of his existing withdrawal duty...[The] Conference Committee expects both the Secretary and the state to take any action necessary to protect the subsistence needs of the Natives.”⁵⁰

This statement is nothing but a platitude without a mandate included in ANCSA.

The Secretary of the Interior and the State failed miserably in this protection. For the nine years immediately following ANCSA, neither the Secretary for the Interior nor the State withdrew any lands for subsistence use or established any sort of preference to limit access of others to the necessary resources needed by subsistence. This inaction led to the passing of Alaska National Interest Lands Conservation Act of 1980 (ANILCA).⁵¹ ANCSA’s failure to address subsistence rights means that ANCSA should be interpreted as only addressing compensation for land and not as a comprehensive statute that intended to terminate Alaska Native Tribes’ inherent powers of self-government.

Finally, another reason ANCSA should be read narrowly and not as divesting Alaska Native Tribes’ ability to self-govern is that it did not invalidate any other federal legislation that treated Alaska Native Tribes as possessing the ability to exercise self-governance, such as the Indian Reorganization Act.

III. NUMEROUS AMENDMENTS TO ANCSA IMPLICATE CONGRESSIONAL INTENT TO MOVE AWAY FROM ASSIMILATION AND SUPPORT LONG-TERM EXISTENCE OF ALASKA NATIVE TRIBES INCLUDING INHERENT POWERS TO GOVERN

The amended ANCSA demonstrates Congress’s growing intent to support Alaska Native Tribes’ inherent power to self-govern. These amendments show a congressional intention to follow the policy of self-determination and encouragement of Alaska Native Tribes’ powers to self-govern.

In the original enactment of ANCSA the corporations were to receive the lands in fee, subject to voluntary alienation. In the case of

⁵⁰ H.R. Conf. Rep. No. 746, 1971 U.S.C.C.A.N. 2247, 2250.

⁵¹ Discussion of ANILCA is beyond the scope of this paper.

lands that the Native corporations received and did not develop, the original provisions of ANCSA set a time limit of 20 years that they would be exempt from local real property taxes. Congress extended this time period three times culminating in an ultimate exemption in the Alaska Native Claims Settlement Act Amendments of 1987. The amendments changed the 20-year time limitation on exemption for these taxes and made the land indefinitely exempt from local real property taxes.

The original ANCSA also allowed for the alienation of the stock of the corporations after 20 years. The amendments made the stock of the Alaska Corporations inalienable unless a majority of the shareholders consent to alienation; no Native corporation has elected to make its stock alienable.⁵² Without these provisions it is most likely that shortly after 1991 the corporations would devolve into non-Native ownership either through individual sales or hostile tender offers and takeover attempts.⁵³ Congress further ensured perpetual inclusion of Alaska Natives in the corporations by amending the requirement that only those Natives alive on the date of enacting could be shareholders without a transfer of a share. The act now allows for issuing new shares to newborn Alaska Natives if the majority of the shareholders consent.

Finally, ANCSA imposed no restriction on the land conveyed to Native Corporations created under ANCSA. But otherwise the lands were freely alienable – which means that the lands could be subject to creditor claims, liens, or taken to satisfy judgments. However, through congressional amendment ANCSA land is now exempt from adverse possession, real property taxes, judgment by bankruptcy, or other creditor claims and involuntary distributions.⁵⁴

The amendments show that, whatever Congress's initial policy was, it now supports a policy of self-governance and self-determination. Congress gave the Alaska Native Tribes the ability to determine the composition of the corporations and the longevity of the corporations. The amendments allow for a perpetual relationship between the lands, the

⁵² 43 U.S.C. §1606(h). *See also* Act of February 3, 1988 Pub. L. No. 100-241, § 5(h), 101 Stat. 1788, 1792.

⁵³ One reason the amendments were enacted is in the early years very few of the corporations were successful and several-faced bankruptcy. The amendments of ANCSA were necessary in order to prevent a very real threat that the corporations would fail leaving the Alaska Natives in a far worse position.

⁵⁴ 43 U.S.C. §1636(d)(1)A. *See also* Act of February 3, 1988, Pub. L. No. 100-241, § 11, 101 Stat. 1788, 1806.

corporations received, and the Natives. Congress endorsed the power of self-determination and ability of the people themselves to choose how to define their relationship to the land.

IV. DID CONGRESS, POST-ANCSA, TERMINATE SELF-GOVERNANCE POWERS?

Congress has, post ANCSA, expressed an affirmation of Native Alaskan Tribes utilizing their inherent self-government powers. Continually it did this by both including Native Alaskans to the list of any legislation that would provide a benefit to Tribes not in the coterminous United States and by federally recognizing the Alaska Native Tribes.

The Indian Self-Determination and Education Assistance Act (ISDEA), enacted in 1975, is one of the most important laws responsible for changes in how Natives receive services.⁵⁵ It allows for Tribes to enter into contracts with the federal government to take control of federal programs and schools for Natives. The ISDEA affirms the governments "commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to individual Indian Tribes and to the Indian People as a whole."⁵⁶ This Act explicitly states that its purpose is to help bolster tribal self-government.⁵⁷ The ISDEA includes in its definition of Indian "including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act."⁵⁸

The Indian Child Welfare Act (ICWA), enacted in 1978, gives jurisdiction over child custody determinations involving Native children and creates preferences for placing the child with a Native family. Its overriding purpose is to preserve and advance the integrity of Native families. Its function is to enhance tribal powers over the decision-making regarding those families.⁵⁹ Again, like in the Self Determination Act, the ICWA states that there is a "special relationship between the United States and the Indian Tribes and their members and the Federal responsibility to Indian

⁵⁵ COHEN, *supra* note 5, at § 22.02[2].

⁵⁶ 25 U.S.C. §450a(b).

⁵⁷ H. Rep. No. 103-653, 103d Cong., 2d Sess. 1 (1994). *See also* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 22.02[3] (2005 ed.).

⁵⁸ 25 U.S.C. §450(b).

⁵⁹ COHEN, *supra* note 5, at § 11.01[1].

people.”⁶⁰ Its purpose is to support the continued existence and integrity of Native Tribes.⁶¹ Congress explicitly included a definition of Indian that “Indian” means any person who is a member of a Native tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in ANCSA.⁶²

Although there are many other examples of where the federal government recognized that Alaska Natives possessed inherent powers of self-government, a particularly important example was Congress ratifying the Department of Interior’s list of federally recognized Tribes. The list included 227 Alaska Tribes.⁶³ Prior to this Act it was hotly contested whether Alaska Natives were Tribes in the sense of Federal Indian law. The argument was that Alaska Natives were eligible for administering federally provided services, but not possessed with attributes of other Tribes, like sovereignty.⁶⁴ While there was controversy surrounding the inclusion of Alaska Natives on the list, ultimately Congress could have acted in either not affirming the list or removing them from the list.

The action by Congress of including Alaska Native Tribes in numerous congressional policies that state a goal of affirming and supporting Tribal self-governance and the formal recognition of Alaska Natives on the list of federally recognized Tribes show that currently Congress has no intention of abrogating the inherent powers of the Alaska Native Tribes.

A. Impact of Alaska v. Venetie on Alaska Native Tribes Self-Government Powers

In *Alaska v. Native Village of Venetie Tribal Government*, the Supreme Court ruled that the village tribal lands, which were ANCSA lands, were not “Indian Country” within the meaning of 18 USC §1151(b). Due to the lands not being “Indian Country” the Tribe lacked the power to impose a tax upon nonmembers doing business on the village lands.⁶⁵ Some have argued that the ruling in *Venetie* resulted in de facto

⁶⁰ 25 U.S.C. §1901.

⁶¹ 25 U.S.C. §1901(3).

⁶² 25 U.S.C. §1903.

⁶³ Pub. L. No. 103-454, 108 Stat. 4791 (Nov. 2, 1994), *codified at* 25 U.S.C. §479a, 479a-1 (2000).

⁶⁴ *See generally* Donald Craig Mitchell, *Alaska v. Native Village of Venetie*, 14 ALASKA L. REV. 353 (1997).

⁶⁵ *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998).

termination of Alaskan Tribes' sovereignty.⁶⁶ However, this is not the case; there are other forms of self-government that the Alaska Native Tribes can engage in with or without the ability to tax non-members on their land.

It might be possible to limit the holding of *Venetie* to the facts of the case. The Court, in its short opinion, did not discuss the Alaska Tribes' inherent sovereignty or whether the status of inherent powers were affected by ANCSA. The lack of discussion leaves the path open for future courts to consider if Alaska Native Tribes possess taxation among their inherent powers.

In addition, the court only considered the congressional intent of ANCSA as it was originally codified in the 1971 version and did not consider that the intent of ANCSA was drastically changed by subsequent amendments. Furthermore, *Venetie* most likely did not terminate sovereignty because the ruling would only apply to land in the exact situation as the village in question in the case. The court articulated two requirements for dependent Indian Country which would most likely cover other land in Alaska. The court required that (1) the land be set aside by the federal government for the tribe's use and (2) the land needed to be overseen by the federal government. While this definition could cover some ANCSA land, it does not cover all ANCSA land and therefore it cannot be said that *Venetie* is a de facto termination of Alaska Tribes' sovereignty.

B. Alaska Supreme Court Affirmed Inherent Tribal Powers of Self-Governance Post-Venetie

Alaska Native Tribes possession of inherent self-government powers was supported by the Alaska Supreme Court ruling in *John v. Baker*.⁶⁷ In this case an Alaska Native filed a custody petition in tribal court, seeking sole custody of his two children. The tribal court entered an order granting shared custody. The father then filed an identical suit in state superior court and the mother moved to dismiss the suit because the claim had been settled in tribal court. The superior court disagreed and granted custody to the father. Alaska's Supreme Court ruled that the ICWA did not apply and that Alaska Native Tribes had inherent, non-territorial sovereignty allowing it to resolve its domestic disputes between

⁶⁶ Benjamin W. Thompson, *De Facto Termination of Alaska Native Sovereignty*, AM. INDIAN L. REV., VOL 24 NO. 2, 421-454 (2000).

⁶⁷ *John v. Baker*, 982 P.2d 738 (Alaska 1999).

its own members and that ANCSA did not, by eliminating “Indian Country,” divest the Alaska Tribes of their inherent sovereign powers.⁶⁸

The strongest support of Alaska Native Tribes’ self-government powers is their continual use of them, whether or not they are acknowledged by the State, the judicial system, or Congress. Throughout Alaska, the Alaska Native Tribes have been innovating ways to control and improve the well-being of their membership via increased oversight and administration of the local infrastructure, health, education, police and fire services, and employment in their communities.⁶⁹

CONCLUSION

The federal government has never expressly divested the Alaska Native Tribes of their inherent self-government powers. It has, however, allowed them to be limited. Due to the formidable circumstances facing the Alaska Native Tribes in both lack of economic resources and poverty, and the growing body of evidence that the most effective way to handle these challenges is to allow the Natives themselves to exercise their own self-government powers, both the state government and the federal government should support their exercise of these powers.

It is the Tribes themselves that are managing and handling the conditions in their villages, and to under-cut their ability to effectively deal with the challenges they are facing by arguing that they do not possess self-government powers in the name of convenience, efficiency, and cohesive polity of Alaska as a whole is a disingenuous challenge at best. The state of Alaska should issue a formal policy of support of the Tribes to end the distraction of arguing over whether or not the Tribes possess inherent powers and focus instead on working with the Alaska Native Tribes to solve the many challenges they are facing.

⁶⁸ *Id.*

⁶⁹ See generally Stephen Cornell and Joseph P. Kalt, *Alaska Native Self-Government and Service Delivery: What Works*, Joint Occasional Papers on Native Affairs, No. 2003-01 (2003) available at <http://udallcenter.org/jopna.net/> (last visited Apr. 20, 2013).