

# *Alaska v. Native Village of Venetie:* Statutory Construction or Judicial Usurpation? Why History Counts

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*This Article conducts a thorough review of the legislative history determining the sovereignty status of Alaska Natives and the existence of "Indian country" in Alaska. The Article discusses congressional policies toward Alaska Natives from the time the Territory was first acquired up to the Alaska Native Claims Settlement Act Amendments passed by the 100th Congress. The Article highlights the various pieces of legislation that have influenced the sovereignty of Alaska Natives and the designation of "Indian country," and describes the congressional intent behind this legislation, the executive branch's application of this intent, and the judiciary's interpretation of this intent. The Article culminates in an analysis based on this legislative history of the Venetie I and II decisions and concludes that the Ninth Circuit has erred in finding the existence of Indian country in Alaska.*

## I. INTRODUCTION

[I]f you put one rock ahead of the other, pretty soon you're across the stream. And many people, in my view, who sense that sovereignty is a huge issue are doing just that. They're saying if this happened and if that happened and if that happened and if that happened we'll have sovereignty.<sup>1</sup>

On November 20, 1996 a three-judge panel of the United

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1. *To Amend the Alaska Native Claims Settlement Act: Hearings on S. 2065 Before the Subcomm. on Public Lands, Reserved Water and Resource Conservation of the Senate Comm. on Energy and Natural Resources, 99th Cong. 92* (1986) (statement of Morris Thompson, President, Doyon Limited) [hereinafter *1986 Senate Hearings*].

States Court of Appeals for the Ninth Circuit issued *Alaska ex rel. Yukon Flats School District v. Native Village of Venetie Tribal Government (Venetie II)*.<sup>2</sup> The facts underlying the dispute are unique. But if, as the prevailing counsel contends, the principles of law announced in *Venetie II* “apply to virtually all . . . Native villages,”<sup>3</sup> the application of those principles throughout Alaska will have monumental, and potentially society-altering, consequences for the future of the State of Alaska as a cohesive polity.

In *Venetie II*, the circuit court first accepted the agreement of the parties (without deciding the question itself) that several hundred Gwich'in Indians who reside in two small villages located on the south side of the Brooks Mountain Range in north-central Alaska are a federally recognized Indian tribe whose governing body possesses inherent governmental authority.<sup>4</sup> The court then held that Congress intended 1.8 million acres of fee title land surrounding the villages to be an area occupied by a “dependent Indian community” and, hence, “Indian country,” within which the Alaska State Legislature has no criminal or civil jurisdiction, except in exceptional circumstances or to the extent explicitly granted by Congress.<sup>5</sup>

The State of Alaska petitioned the United States Supreme Court for certiorari; the Court granted the petition and will review *Venetie II* during its 1997 term.<sup>6</sup> The outcome of that review will turn on the Court's answers to esoteric questions of statutory construction. But like every lawsuit, *Venetie II* has a context. And that context must be understood for the *Venetie II* decision and its potential import to be understood.

In brief, since the birth in 1983 of what in Alaska now is known as the Native sovereignty movement, the members of the movement and their attorneys have pursued an audacious objective: the realignment by agency action and judicial fiat of Con-

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2. 101 F.3d 1286 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2478 (1997).

3. Native American Rights Fund, *Indian Country in Alaska: The Venetie Decision*, JUST., Spring 1997, at 1, 1 (announcing that the *Venetie II* holding “represents a complete and unqualified victory for tribes in Alaska. It eliminates the argument that ANCSA extinguished the territorial power of the tribes and, therefore, will apply to virtually all other Native villages.”).

4. *See Venetie II*, 101 F.3d at 1300 n.6 (“[T]he [district] court held that Venetie qualifies as an Indian tribe. This holding is not challenged on appeal.”).

5. *See id.* at 1302; *cf.* *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983) (holding that states can exercise authority over reservations only in “exceptional circumstances”); *Seminole Tribe v. Butterworth*, 658 F.2d 310, 312 (5th Cir. 1981) (“The [s]tates lack jurisdiction over Indian reservation activity until granted that authority by the federal government.”).

6. *See Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't*, 117 S. Ct. 2478 (1997).

gress's relationship with Alaska Natives into a configuration that approximates Congress's relationship with members of federally recognized Indian tribes who reside on reservations in the coterminous states. Over the past fourteen years, the pursuit of that objective has involved the adroit exploitation of "pro-Indian" sentiment inside the Department of the Interior bureaucracy, a competently executed litigation strategy, and a purposeful rewriting of the history of Congress's Alaska Native policy. The purposes of this article are, first, to correct the misconceptions about that history on which the *Venetie II* court based its misconclusions of law, and, second, to describe the political process that culminated in the court's blithe acceptance of those misconceptions.

Parts II and III of this Article trace the early congressional policy and legislation concerning Alaska Natives. Part IV describes the evolution of the definition of "Indian country" and its application to Alaska by Congress, the Department of the Interior, and the courts. Part V discusses the legislative history and intent of the Alaska Native Claims Settlement Act ("ANCSA"), followed by Part VI's analysis of the influence of the Alaska native sovereignty movement on the interpretation of ANCSA. Part VII describes the evolving process by which tribal recognition by the executive and judicial branches has occurred over time. Finally, Parts VIII and IX apply the information presented in the previous parts to analyze the court's decisions in *Venetie I* and *II*.

## II. CONGRESS'S ALASKA NATIVE POLICY, 1867-1936

The analysis of Congress's dealings with Native Americans begins with the Indian Commerce Clause of the United States Constitution, which grants Congress "Power . . . [t]o regulate [c]ommerce . . . with the Indian Tribes."<sup>7</sup> The clause grants Congress "plenary power to legislate in the field of Indian affairs."<sup>8</sup> In exercising that power, Congress may enact statutes that repudiate its earlier Indian policies,<sup>9</sup> as well as statutes whose policy objectives are inconsistent<sup>10</sup> or unjust.<sup>11</sup>

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7. U.S. CONST. art. I, § 8, cl. 3.

8. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (citing *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974)); FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 207-08 & nn.2-3 & 9-11 (Rennard Strickland & Charles F. Wilkinson eds., Michie 1982)).

9. See, e.g., *In re Heff*, 197 U.S. 488, 499 (1905) (confirming Congress's authority to abandon dealing with Native Americans by negotiating treaties and to pursue a new Indian policy whose objective was "the breaking up of tribal relations").

10. In 1854, for example, the Senate ratified a treaty that established a reservation in Wisconsin for the "Menominee tribe of Indians." Treaty with the Menominee Indians, May 12, 1854, 10 Stat. 1064, 1064. In 1954, Congress abolished the

Congress initially exercised its plenary power to legislate in the field of Indian affairs to accomplish a single objective: the compelled clearing of the public domain of the Native Americans who occupied it. Congress accomplished that objective, first by the Senate ratifying treaties that recognized particular Native American groups as political entities whose governing bodies were persuaded, and, when persuasion failed, were compelled, to cede their members' aboriginal title to vast tracts of land.<sup>12</sup>

Treaty-making opened the frontier for white settlement. But it did not physically clear the public domain of Native Americans. For that reason, in 1830 Congress delegated to the President the authority to relocate Native Americans who occupied land east of the Mississippi River to land located west of the river.<sup>13</sup> When in the 1840s large numbers of whites began settling west of the river, the President and the Senate began negotiating and ratifying treaties that compelled land cessions west of the river and established reservations for the members of tribes whose governing bodies made the cessions.<sup>14</sup> In 1871, Congress ordered the President to cease negotiating treaties.<sup>15</sup> But with Congress's approval, the President continued to negotiate land cessions and establish reservations.<sup>16</sup>

The army implemented Congress's removal and reservation policies with a facinorous ruthlessness<sup>17</sup> that continues to haunt the

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Menominee reservation and instructed the Secretary of the Interior to convey title to the land inside the reservation boundaries to a corporation organized under Wisconsin state law and in which tribal members were issued shares of stock. *See* Act of June 17, 1954, Pub. L. No. 83-399, 68 Stat. 250, 252. In 1973, Congress repealed the 1954 Act, reextended "[f]ederal recognition . . . to the Menominee Indian tribe of Wisconsin," and reestablished the Menominee reservation. Menominee Reservation Act of 1973, Pub. L. No. 93-197, 87 Stat. 770.

11. *See, e.g., Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) (upholding abrogation by Congress of a treaty provision that required Indian consent for cession of land inside a reservation because "[t]he power exists to abrogate the provisions of an Indian treaty").

12. *See* Richard Monette, *Treaties*, in *ENCYCLOPEDIA OF NORTH AMERICAN INDIANS* 643, 643-44 (Frederick E. Hoxie ed., 1996) "Through treaties, tribes gave to federal authorities virtually the entire territory we now know as the United States." *Id.* at 644.

13. *See* Act of May 28, 1830, ch. 148, 4 Stat. 411, 411.

14. *See generally* FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 315-409 (1984).

15. *See* Act of Mar. 3, 1871, ch. 120, § 3, 16 Stat. 544, 570.

16. *See, e.g., H.R. EXEC. DOC. NO. 47-68* (2d Sess.), at 6-7 (1883) (effecting cession "to the United States all of the Great Sioux Reservation" and committing "[t]he said bands [of Sioux Indians] . . . to accept and occupy the separate reservations to which they are herein assigned as their permanent homes").

17. For example, in 1836, the army forcibly relocated 2,495 Creek men, women

United States government's dealings with the descendants of the Native Americans who were the objects of those policies.<sup>18</sup> However, Alaska Natives<sup>19</sup> were spared the common Native American fate.

In 1867, when Congress purchased Russian America from the czar,<sup>20</sup> Alaska (as the territory henceforth was known) was populated by several hundred Russians and thousands of Alaska Natives who lived a nomadic life that revolved around seasonal relocations that facilitated Native participation in hunting, fishing, and gathering.<sup>21</sup>

The Alaska purchase coincided by chance with the beginning of an historic change in the objectives of Congress's Indian policy. As a precursor to that change, Congress in 1849 increased civilian

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and children from Alabama to Oklahoma, where "literally naked, without weapons or cooking utensils, [they] were dumped there to live or die." ANGIE DEBO, *A HISTORY OF THE INDIANS OF THE UNITED STATES* 103 (1970). Two years later, General Winfield Scott, who is said to have been sickened by the assignment, forced-marched the Cherokees from Georgia to Oklahoma. *See id.* at 108. As a private who served under Scott described the scene, "the helpless Cherokees [were] arrested and dragged from their homes, and driven by bayonet into the stockades. And in the chill of . . . [the] morning . . . [were] loaded like cattle or sheep into wagons and started toward the west." *Id.* at 108-09. West of the Mississippi River, "[v]irtually every major war of the two decades after Appomattox was fought to force Indians on to newly created reservations or to make them go back to reservations from which they had fled." ROBERT M. UTLEY, *THE INDIAN FRONTIER OF THE AMERICAN WEST, 1846-1890*, at 164 (1984).

18. As the American Indian Policy Review Commission in 1977 explained in the report in which it recommended a myriad of changes in Congress's Native American policies,

[t]oday, the past must be used as a backdrop, rather than as an indictment. But it is a backdrop that explains most of what must be known about the present-day condition of Indians and their relations with the [g]overnment and the rest of the American people. It is a way of seeing into the mind of the Indian people today.

AMERICAN INDIAN POLICY REVIEW COMM'N, 95TH CONG., FINAL REPORT 1 (Comm. Print 1977) [hereinafter AIPRC REPORT].

19. In this Article, the terms "Alaska Native" and "Native" refer collectively to the Aleut, Chugach, Yup'ik, and Inupiat Eskimo, Tlingit, Haida, and Athabascan Indian, Koniag and other indigenous peoples who resided in Alaska at the time the territory was purchased by the United States, as well as to the descendants of those peoples.

20. *See Treaty Concerning the Cession of the Russian Possessions in North Am.*, Mar. 30, 1867, U.S.-Russ., *reprinted in* 15 Stat. 539 [hereinafter *Treaty of Cession*]; *see also Act of July 27, 1868*, ch. 248, 15 Stat. 198 (appropriating \$7.2 million to purchase Russian America).

21. Thirteen years after the purchase of Alaska, the Department of the Interior Census Office estimated that in 1880 Alaska was populated by 32,996 Natives and 430 whites. *See IVAN PETROFF, SPECIAL AGENT, REPORT ON THE POPULATION, INDUSTRIES, AND RESOURCES OF ALASKA* 33 (1884).

participation in the implementation of Indian policy by moving the Bureau of Indian Affairs, which in 1824 had been established in the War Department, to the Department of the Interior.<sup>22</sup> In 1862, the Episcopal Church “proposed that a commission of citizens should be appointed to devise a better Indian policy.”<sup>23</sup> And in 1869, Congress authorized the President to appoint “men eminent for their intelligence and philanthropy” to a Board of Indian Commissioners<sup>24</sup> that, until the Board was abolished in 1933, advised the Secretary of the Interior and Congress on Indian policy.

In 1869, Vincent Colyer, the secretary of the new Board of Indian Commissioners, visited Alaska. After doing so, he recommended that “[t]he wild [Alaska] tribes should . . . be placed upon [a] reservation.”<sup>25</sup> Since not enough whites moved to Alaska subsequent to the Alaska purchase for Congress to need to clear the public domain of Alaska Natives, the recommendation was ignored. It also was ignored because neither Congress nor the Secretary of the Interior considered Alaska Natives to be “Indians” who were subject to the statutes that governed Congress’s dealings with other Native Americans.<sup>26</sup>

In 1872, the Senate passed a bill whose enactment would have granted the Secretary of the Interior “the same jurisdiction over the people called Indians inhabiting Alaska that he now has over the tribes of American Indians.”<sup>27</sup> The bill died in the House. But by the time it did, Congress had decided on a policy to govern its dealings with Alaska Natives whose content was dramatically different from that of the policy that governed Congress’s dealings with “the tribes of American Indians” in the coterminous states.

The linchpin of Congress’s Native policy was to subject Alaska Natives at all locations throughout the territory to the same

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22. See Act of Mar. 3, 1849, ch. 108, § 5, 9 Stat. 395, 395.

23. LORING BENSON PRIEST, *UNCLE SAM’S STEPCHILDREN: THE REFORMATION OF UNITED STATES INDIAN POLICY, 1865-1887*, at 42 (1942).

24. Act of Apr. 10, 1869, ch. 16, § 4, 16 Stat. 13, 40.

25. H.R. EXEC. DOC. NO. 41-3 (2d Sess.), pt. 3, at 1002 (1869). In article III of the Treaty of Cession, the United States promised the Russian government that it would afford all inhabitants of Russian America (other than members of “uncivilized tribes”) who preferred to remain in Alaska “all rights, advantages, and immunities of citizens of the United States.” As to members of the “uncivilized tribes,” article III reserved to the United States the right to subject tribal members “to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.” Treaty of Cession, *supra* note 20, art. III, reprinted in 15 Stat. at 542.

26. See DONALD CRAIG MITCHELL, *SOLD AMERICAN: THE STORY OF ALASKA NATIVES AND THEIR LAND, 1867-1959*, at 71-72 (1997).

27. CONG. GLOBE, 42 Cong., 2d Sess. 2957 (1872) (statement of Sen. Buckingham).

criminal and civil statutes to which Congress subjected non-Native residents of Alaska. Congress established the precedent for its Native policy when in 1868 it extended to Alaska “the laws of the United States relating to customs, commerce, and navigation.” One section of the statute that did so prohibited “any person” from “kill[ing] . . . fur-bearing animal[s], within the limits of said territory [of Alaska],” except to the extent the Secretary of the Treasury authorized such killings (of animals other than fur seals).<sup>28</sup> While the term “any person” included Natives and non-Natives, Congress intended the authority it conferred to authorize takings to be used by the Secretary to accommodate the Native subsistence economy.<sup>29</sup>

Two years later, Congress reaffirmed the precedent by enacting a statute that prohibited all persons — both Native and non-Native — from killing fur seals on the Pribilof Islands other than during the months of June, July, September, and October. However, the statute authorized “natives of said islands” to kill seals during the closed season for food and clothing.<sup>30</sup>

By 1880, when Congress turned its attention to the need to authorize a civil government in Alaska, its decision to subject Alaska Natives to the same criminal and civil statutes to which it subjected non-Natives had become mainstream on Capitol Hill. The reason is that the public domain in the coterminous states had been largely cleared of Native Americans by that date (except for those who had been sequestered on reservations). Since it had, a new Indian policy evolved, which had as its objective the preparation of Native Americans for citizenship.<sup>31</sup> According to the historian Francis Paul Prucha,

[t]he physical conquest of the western half of the continent that had begun before the Civil War, and continued to advance even during that conflict, by 1880 had clearly demonstrated that the plains and the mountains, as well as the Pacific slope were to be peopled and exploited by the rapidly multiplying Americans . . . Subdued by military force, dependent in large measure upon the federal government for subsistence to replace their old means now destroyed, yet refusing to disappear into the mainstream of

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28. Act of July 27, 1868, ch. 273, § 6, 15 Stat. 240, 241.

29. As Representative Elihu Washburne explained to the United States House of Representatives when the bill that became the 1868 Act was debated, “[t]here are certain kinds of fur-bearing animals upon which the natives subsist or get their living. We do not think we can put a stop to the killing of those kinds without doing great injustice to the people there.” CONG. GLOBE, 40th Cong., 2d Sess. 4488 (1868).

30. Act of July 1, 1870, ch. 189, § 1, 16 Stat. 180, 180.

31. See generally FREDERICK E. HOXIE, *A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920* (1984).

American society, the Indians became the object of a new reform movement that engaged the energies and the emotions of many people.<sup>32</sup>

The Presbyterian frontier missionary Sheldon Jackson, who between 1880 and 1884 was the principal lobbyist for Alaska civil government,<sup>33</sup> was an enthusiastic proponent of the new Indian policy. In 1880, when he testified on Alaska civil government before the Senate Committee on Territories, Jackson urged Congress to extend its new policy to Alaska:

Jackson: It is not necessary that the United States should feed or clothe them [*i.e.*, the Tlingit and Haida Indians of southeast Alaska], or make treaties with them. This enables us in our Indian policy to take a new departure; and treat them as American citizens. All that is necessary to be done is to afford them government and teachers, which they cannot procure themselves.

Butler: In other words, you mean to say that if we should afford the protection of a well-organized government, they would subordinate themselves to the law of the United States. That is your idea?

Jackson: That is my idea.<sup>34</sup>

Congress in 1884 accepted Jackson's recommendation by subjecting all Alaska residents, both Native and non-Native, to "the general laws of the State of Oregon."<sup>35</sup>

That was the settled law in 1886 when Alaska District Court Judge Lafayette Dawson in *In re Sah Quah*<sup>36</sup> held that

[t]he United States has at no time recognized any tribal independence or relations among these Indians, has never treated with them in any capacity, but from every act of congress in relation to the people of this territory it is clearly inferable that they have been and now are regarded as dependent subjects, amenable to the penal laws of the United States, and subject to the jurisdiction of its courts . . . . They . . . have no such independence or supremacy as will permit them to sustain and enforce a system of forced servitude at variance with the fundamental laws of the United States.<sup>37</sup>

It was the settled law when Alaska Governor Lyman Knapp in 1891 reported to Congress that

[s]ince the passage of . . . [the Alaska Organic Act], if not before,

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32. FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN CRISIS: CHRISTIAN REFORMERS AND THE INDIAN, 1865-1900*, at 133 (1976).

33. *See generally* Theodore C. Hinckley, *Sheldon Jackson, Presbyterian Lobbyist for the Great Land of Alaska*, 40 J. PRESBYTERIAN HIST. 3 (1962) (describing the accomplishments of Sheldon Jackson as a lobbyist for the State of Alaska).

34. S. REP. NO. 47-457, at 12 (1880).

35. Act of May 17, 1884, ch. 53, § 7, 23 Stat. 24, 25 (1884).

36. 31 F. 327 (D. Alaska 1886).

37. *Id.* at 329.

the courts assumed jurisdiction to try Indian offenders according to the laws of the United States, in no case allowing local customs among the tribes or native people to have any determining influence upon questions of punishment, as has ever been the case in the [s]tates where the tribal relation was recognized.<sup>38</sup>

It was the settled law when Sheldon Jackson in 1895 reported to the Board of Indian Commissioners that

[w]e have no Indians in Alaska: we have natives. When Alaska began to be developed, some wise man said: "What are you going to do with the natives? Do you want reservations?" The answer was, "No." "Do you want agents?" "No." "Do you want those people to be sheltered behind the Indian policy of the [g]overnment?" "*No: we do not want any Indian government at law.*" "What do you want, then?" "We want citizenship right from the start, and that people should simply be called natives." It was at first a constant fight to keep from being called Indians. We wanted to commence where the friends of the Indian left off. We wanted to avail ourselves of the experience of the past on the Indian question: and so we have no Indians, we have only natives. *The natives have all the rights that any white man has.* There has never been a time since the establishment of courts in that land when a native could not go into court, could not sue and be sued, like any white man.<sup>39</sup>

It was the settled law when Congress in 1899 and 1900 replaced "the general laws of the State of Oregon" with Alaska criminal and civil codes to which Native and non-Native Alaska residents were subject.<sup>40</sup> It was the settled law when Congress in 1912 authorized the citizens of Alaska to elect a territorial legislature, to which Congress granted authority to assert jurisdiction over Alaska Natives living in Native villages.<sup>41</sup>

38. H.R. EXEC. DOC. NO. 52-1, pt. 5 (1st Sess.), at 498 (1891).

39. REPORT OF THE BOARD OF INDIAN COMMISSIONERS 25 (1895).

40. See Act of Mar. 3, 1899, ch. 429, 30 Stat. 1253; Act of June 6, 1900, ch. 786, 31 Stat. 321 (1900). In 1909, Congress authorized the appointment of village school-teachers as "special peace officer[s]" authorized "to arrest . . . any native of the district of Alaska charged with the violation of any provisions of the Criminal Code of Alaska." Act of Mar. 3, 1909, ch. 266, 35 Stat. 837, 837. In *United States v. Booth*, 161 F. Supp. 269, 273 (D. Alaska 1958), the district court noted that the 1909 Act is "evidence that Alaska Indians – even those in remote communities – are subject to Alaska territorial law."

41. See Act of Aug. 24, 1912, ch. 387, 37 Stat. 512; see also, e. g., Act of Apr. 21, 1915, ch. 11, 1915 Alaska Sess. Laws 24 (Native Village Government Act authorizing Alaska Natives to establish "a self-governing village organization for the purpose of governing certain local affairs"); Act of Apr. 25, 1913, ch. 44, 1913 Alaska Sess. Laws 80 (failure of Native parents to send their children to village grade schools made a criminal offense). In 1917, the territorial legislature amended the Native Village Government Act to prohibit a village municipal council from levying a property tax over the property of whites living in the village. See Act of May 1,

It was the settled law when Congress in 1902, 1908, and 1925 enacted the Alaska Game Acts that required Natives and non-Natives to comply with the same hunting and trapping regulations, but exempted Alaska Natives and some groups of non-Natives from compliance with closed seasons when hunting for subsistence purposes.<sup>42</sup> It was the settled law when Secretary of the Interior Ray Lyman Wilbur in 1932 advised Congress that

[t]he United States has had no treaty relations with any of the aborigines of Alaska nor have they been recognized as the independent tribes with a government of their own. The individual native has always and everywhere in Alaska been subject to the white man's law, both [f]ederal and territorial, civil and criminal.<sup>43</sup>

And it was the settled law when Congress in 1934 enacted the Indian Reorganization Act.<sup>44</sup>

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1917, ch. 25, 1917 Alaska Sess. Laws 47. In doing so, the 1917 Act explained that the purpose of the Native Village Government Act was "to provide governments for the Indian residents of such villages only." *Id.*

42. See Act of June 7, 1902, ch. 1037, 32 Stat. 327; Act of May 11, 1908, ch. 162, 35 Stat. 102; Alaska Game Law, ch. 75, 43 Stat. 739 (1925). The 1925 Alaska Game Law, as amended, controlled Native and non-Native hunting in Alaska until President Eisenhower, in 1960, transferred authority to regulate the activity to the State of Alaska. See Exec. Order No. 10,857, 25 Fed. Reg. 33 (1960).

43. *Authorizing the Tlingit and Haida Indians to Bring Suit in the United States Court of Claims: Hearing on S. 1196 Before the Senate Comm. on Indian Affairs*, 72d Cong. 16 (1932) (letter from Ray Lyman Wilbur to the Hon. Edgar Hoover) [hereinafter *Wilbur Letter*].

Seventeen days before he sent his March 14 letter to Congress, Secretary Wilbur approved a legal opinion that Department of the Interior Solicitor Edward Finney had written in which Finney had advised the Secretary that "no distinction has been or can be made between the Indians and other natives of Alaska so far as the laws and relations of the United States are concerned . . . and their status is in material respects similar to that of the Indians of the United States." *Status of Alaskan Natives*, 53 Decisions of the Dep't of the Interior 593, 605 (1932). The opinion was written by Finney to justify post hoc a decision Wilbur had made to transfer responsibility for the administration of Alaska Native programs from the Department of the Interior Bureau of Education to the Bureau of Indian Affairs. See MITCHELL, *supra* note 26, at 254.

44. There was, however, an anomalous administrative decision. Four months after Secretary Wilbur reminded Congress that "[t]he individual native has always and everywhere in Alaska been subject to the white man's law, both [f]ederal and territorial, civil and criminal," *Wilbur Letter, supra* note 43, at 16, Solicitor Finney was asked "to advise the Indian Office as to whether marriages among Indians in Alaska are valid unless [the] ceremony is performed in accordance with [f]ederal or [t]erritorial law." Letter from E.C. Finney, Solicitor, Department of the Interior, to the Hon. George Parks, Governor of Alaska 1 (July 8, 1932) (on file with author). On September 3, 1932, Finney published an opinion in which he advised Secretary Wilbur that "marriages among [Alaska Natives] by native custom should be ac-

III. THE ALASKA AMENDMENTS TO THE INDIAN  
REORGANIZATION ACT AND THEIR IMPLEMENTATION, 1936-  
1950

In 1933, President Franklin Roosevelt appointed three “pro-Indian” activists — Secretary of the Interior Harold Ickes, Solicitor Nathan Margold, and Commissioner of Indian Affairs John Collier — to administer the Department of the Interior’s implementation of Congress’s Indian policies.<sup>45</sup> Solicitor Margold, in turn, recruited an attorney named Felix Cohen into the Solicitor’s Office, who during his tenure at the Department of the Interior established a national reputation as an authority on Indian law.<sup>46</sup>

In February 1934, Ickes sent Congress a bill<sup>47</sup> whose text in significant measure had been drafted by Cohen,<sup>48</sup> and whose enactment would have codified Collier’s private view that Congress should abandon the dismantlement of the reservation system and

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corded the same legal recognition and sanctity which the courts of this country have uniformly extended to similar relations among the American Indians.” *Validity of Marriage by Custom Among the Natives or Indians of Alaska*, 54 *Decisions of the Dep’t of the Interior* 39 (1932).

Reasoning to that result required the Solicitor to disregard 64 years of prior Acts of Congress that required Alaska Natives to comply with the federal and territorial criminal and civil statutes to which non-Native residents of Alaska were subject, as well as the long held understanding of Bureau of Indian Affairs village schoolteachers and other federal employees in Alaska. *See, e.g.*, H. DEWEY ANDERSON & WALTER CROSBY EELLS, *ALASKA NATIVES: A SURVEY OF THEIR SOCIOLOGICAL STATUS AND EDUCATIONAL STATUS* 149 (1935) (reporting after visiting a number of Eskimo villages in 1930-31 that “[t]he enforcement of our laws with respect to the legalizing of marriage is an excellent illustration of the maladjustment of the Eskimo’s age-old practices to the legal code of the white man,” that “[t]o live together without the sanction of the law makes an Eskimo man and woman adulterers and liable to court punishment as criminals,” and that “[a]n instance is known to the writer where an Eskimo couple was warned several times by the teacher to go to the commissioner for their license. They had already set up housekeeping and were recognized by the age-old customs of their people as married, but this did not satisfy the law of the white man”).

45. *See* T. H. WATKINS, *RIGHTEOUS PILGRIM: THE LIFE AND TIMES OF HAROLD L. ICKES* 202-06, 275, 328-32 (1990).

46. *See* MITCHELL, *supra* note 26, at 254-57; Jill E. Martin, “A Year and a Spring of My Existence”: Felix S. Cohen and the Handbook of Federal Indian Law, 8 *W. LEGAL HIST.* 35, 36-37 (1995).

47. *See* S. 2755, 73d Cong. (1934), *reprinted in Hearings on S. 2755 Before the Senate Comm. on Indian Affairs*, 75th Cong., 1-15 (1934) [hereinafter *1934 Senate Hearings*].

48. *See* JOHN COLLIER, *FROM EVERY ZENITH* 173 (1963) (recalling that in 1933, “Nathan R. Margold, the Interior Department Solicitor . . . and his legal staff, particularly Felix S. Cohen, went to work with the Indian Bureau on the bill that was to become the Indian Reorganization Act”).

the assimilation of Native Americans as the objectives of its Indian policy.<sup>49</sup> The members of the Senate and House Committees on Indian Affairs (to whom the bill was referred) did not share Collier's view, and rewrote the bill to retain only those concepts that the members believed would hasten the independence of Native Americans from Bureau of Indian Affairs supervision.<sup>50</sup> In that substantially modified form, in June 1934, the bill was enacted as the Indian Reorganization Act ("IRA").<sup>51</sup>

The IRA reordered Congress's Indian policy by prohibiting the further "allot[ment] in severalty" of reservation land,<sup>52</sup> and encouraging the (re)organization on reservations of tribal govern-

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49. For a description of John Collier's views on Indian policy, *see generally id.*

50. Since the members of the Committees on Indian Affairs and of the Appropriations Committees that funded Indian programs believed that assimilation should be the objective of Indian policy, throughout his tenure as commissioner of Indian affairs, John Collier misled Congress regarding his commitment to the achievement of that objective. As one commentator has explained:

Collier's position on assimilation was deliberately enigmatic. He maintained that his policy was intended to benefit those Indians who wished for assimilation by preparing them for a productive life in white society while providing those who chose to retain their tribal ways with the means for continued communal life. That was not quite the same thing as considering assimilation to be the goal of policy, and in practice Collier's interest was focused on those Indians who remained in or returned to the tribal relationship. . . .

To a certain extent Collier may have been misleading or misunderstood in presenting to Congress his concept of Indian reorganization as an instrument of assimilation.

GRAHAM D. TAYLOR, *THE NEW DEAL AND AMERICAN INDIAN TRIBALISM: THE ADMINISTRATION OF THE INDIAN REORGANIZATION ACT, 1934-1945*, at 23 (1980).

Finally tiring of the commissioner's disingenuousness, in 1945, members of the House Committee on Appropriations forced Collier's resignation. *See id.* at 142. Having learned the lesson that Collier's dismal relations with the men who enacted and funded Indian programs taught, between 1946 and 1961 senior Department of the Interior officials repeatedly reassured Congress that they were committed to the advancement of Congress's assimilationist objective. As Assistant Secretary of the Interior William Warne (who supervised the Bureau of Indian Affairs) in 1948 informed the Senate Committee on Interior and Insular Affairs,

[o]ur Department has tried to and is endeavoring to bring the Indian people, including the Indians and Eskimos of Alaska, to a point at which they may be considered assimilated, and where the special services extended by the [f]ederal [g]overnment may be safely withdrawn. I state that as a premise of our departmental operation.

*Repeal Act Authorizing Secretary of Interior to Create Indian Reservations in Alaska: Hearings on S. 2037 and S.J. Res. 162 Before the Subcomm. of the Senate Comm. on Interior and Insular Affairs*, 80th Cong. 23 (1948) [hereinafter *Butler Hearings*].

51. *See Act of June 18, 1934*, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-494 (1994)).

52. 25 U.S.C. § 461.

ments that were authorized to organize federally-chartered business corporations that would be eligible to borrow money from a loan fund the Act created.<sup>53</sup>

The original text of the bill Secretary Ickes sent to Congress made no mention of Alaska Natives.<sup>54</sup> For that reason, when John Collier testified on the bill before the House Committee on Indian Affairs, Alaska Delegate Anthony Dimond asked the commissioner to “tell me how far if at all this bill will apply to the Indians of Alaska?” Collier’s reply reflected considerable confusion regarding the extent to which the IRA would or should affect Alaska Natives.<sup>55</sup> As a consequence, when the bill was rewritten Dimond decided that only three provisions should apply to Alaska Natives: the authority to organize a federally chartered corporation that would be eligible to borrow money from the loan fund, the appropriation earmarked for tuition for Indian students, and the preference for Indian hire to positions in the Bureau of Indian Affairs.<sup>56</sup>

In June, the Senate passed a version of the bill whose original text had been rewritten to reflect the policy edicts of Senator Burton Wheeler, the chairman of the Senate Committee on Indian Affairs. Three days later, the House of Representatives passed a slightly different version of the bill, after which a conference committee negotiated the differences and drafted the version of the bill that President Roosevelt signed into law.<sup>57</sup>

Because Anthony Dimond was not a member of the conference committee, the committee made a drafting error in the final version of the bill that prevented Alaska Natives from organizing corporations. And only corporations were authorized to borrow money from the loan fund.<sup>58</sup> At Dimond’s request, Felix Cohen

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53. *See id.* §§ 470, 476-477.

54. The original text is reprinted in *1934 Senate Hearings*, *supra* note 47, at 1-15.

55. *See Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong. 76-78 (1934) (statement of John Collier, Comm’r, Indian Affairs) [hereinafter *1934 House Hearings*].

56. *See* 78 CONG. REC. 11,725 (1934).

57. *See generally* VINE DELORIA JR. & CLIFFORD LYTTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* (1984) (chronicling the enactment of the IRA).

58. In 1912, Tlingit and Haida Indians organized the Alaska Native Brotherhood (“ANB”), which in 1934 was the only Native organization in Alaska. In a letter that he mailed to the ANB after the enactment of the IRA, Dimond explained that

[t]he Senate [version of the IRA] . . . passed first and got to the House where it was very largely amended. On the last day of the session, the bill went to conference and when the Conference Committee submitted its report several things originally included in both bills had been inadvertently omitted. The Act itself provides that Sections 9, 10, 11, 12 and 16 thereof shall apply to the Territory of Alaska. Through mistake

drafted a bill to correct the error,<sup>59</sup> which Dimond introduced in February 1936,<sup>60</sup> and which Congress enacted in May.<sup>61</sup>

Section 1 of the two-section 1936 Act authorized “groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district” to “receive charters of incorporation and [f]ederal loans,” and “organize to adopt [the same] constitution and bylaws” that the IRA authorized members of Indian tribes who resided on reservations in the coterminous states to adopt.<sup>62</sup> Section 2 authorized the Secretary of the Interior

to designate as an Indian reservation any area of land which has been reserved for the use and occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat. 26), or by section 14 or 15 of the Act of March 3, 1891 (26 Stat. 1101), or which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof, together with additional public lands adjacent thereto, within the Territory of Alaska, or any other public lands which are actually occupied by Indians or Eskimos within said Territory.<sup>63</sup>

Section 1 of the Act corrected the problem that the IRA Conference Committee’s drafting mistake had created. Section 2 of the Act, by contrast, had been written into the bill by Felix Cohen in order to delegate to the Secretary of the Interior the authority

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made by the Conference Committee, however, Section 17 was not made applicable to Alaska. Section 17 authorizes the Secretary of the Interior to issue charters of incorporations to tribes of Indians, and the inference is that they must live on Reservations. . . . Under Section 10, an appropriation of \$10,000,000 is authorized as a revolving fund from which the Secretary of the Interior may make loans to Indian chartered corporations. This section applies to Alaska, but, as above stated, Section 17 does not, and Section 17 provides for the issuance of the charter.

Hence, it appears that through the mistake made in conference in omitting Section 17, it is now impossible for any Indian Community in Alaska to borrow any of the funds authorized to be appropriated under Section 10.

Letter from Anthony J. Dimond, Alaska Delegate, U.S. House of Representatives, to Cyril Zuboff et al. (Mar. 5, 1935) (Anthony Dimond Papers, Archives, University of Alaska, Fairbanks).

59. *See id.* (Dimond reporting to the ANB that the drafting error in the IRA “has engaged the attention of the Indian Office here and today the bill [to correct it], of which a copy is enclosed, was submitted to me”); *see also* MITCHELL, *supra* note 26, at 268-71.

60. *See* H.R. 9866, 74th Cong. (1936).

61. *See* Act of May 1, 1936, ch. 254, 49 Stat. 1250 (1936).

62. *Id.* § 1, 49 Stat. at 1250 (codified at 25 U.S.C. § 473a (1994)).

63. *Id.* § 2, 49 Stat. at 1250.

to settle Alaska Native land claims by administrative action.<sup>64</sup>

At the urging of the Department of the Interior Bureau of Education, between 1912 and 1930, the President signed executive orders that established reservations of varying acreages around several Native villages.<sup>65</sup> The purpose of the reservations was to enable the Bureau to try and replicate in the villages for which they were established the success that the Tsimshian Indians had demonstrated at Metlakatla, a village on Annette Island in southeast Alaska, which Congress had withdrawn for the Tsimshians' benefit in 1891.<sup>66</sup>

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64. As Secretary of the Interior Harold Ickes in a letter communicating his support for the bill explained to the House Committee on Indian Affairs,

[a]n even more important reason for the designation of reservations in Alaska is that by doing so the United States [g]overnment will have fulfilled in part its moral and legal obligations in the protection of the economic rights of the Alaska natives. In at least two acts of Congress this obligation is specifically acknowledged. . . .

Lands which should have been, by virtue of these acts, segregated for natives of Alaska have not been so segregated. The provisions of section 2 of H.R. 9866 will aid the [f]ederal [g]overnment in rectifying this condition, and in protecting the interests of the natives in the future. Section 2 of the bill which gives to the Secretary of the Interior power to designate certain lands as Indian reservations is, therefore, a logical sequence of the legislative history regarding Indian lands in Alaska.

Letter from Harold L. Ickes, Secretary of the Interior, to Hon. Will Rogers, Chairman, Comm. on Indian Affairs, U.S. House of Representatives, *reprinted in* H.R. REP. NO. 74-2244, at 4 (1936) [hereinafter *Ickes Letter*].

65. See MITCHELL, *supra* note 26, at 263-68.

66. In 1887, the Anglican missionary William Duncan and 800 Tsimshian Indians immigrated from British Columbia to southeast Alaska. On Annette Island they constructed Metlakatla, an imitation white town in which Indians wearing store-bought clothes resided in single-family homes and worked regular hours in the village salmon cannery and sawmill. See generally PETER MURRAY, *THE DEVIL AND MR. DUNCAN* (1985). At Duncan's urging, in 1891, Congress withdrew Annette Island for the exclusive use of the Tsimshian Indians "and such other Alaska Natives as may join them." Act of Mar. 3, 1891, ch. 561, 26 Stat. 1095, 1101.

The Metlakatla experiment was considered such a success that by the end of the first decade of the twentieth century Bureau of Education officials were committed to establishing reservations imitative of the Annette Island reserve elsewhere in Alaska. In 1914, the Commissioner of Education described the objectives of the Bureau's reservation policy as follows:

The [A]ct of May 17, 1884, providing a civil government for Alaska, stipulated that the natives should not be disturbed in the possession of any land used or occupied by them. However, with the influx of white men the village sites, hunting grounds, and fishing waters frequented by the natives from time immemorial have often been invaded, native settlements exploited by unscrupulous traders, and the pristine health and vigor of the natives sapped by the white man's diseases and by the white man's liquor. To protect the natives, the Bureau of Education has adopted the policy of requesting the reservation by Executive Order,

When they assumed office, Harold Ickes, Felix Cohen, and other New Deal Native policymakers were as impressed with Metlakatla as Bureau of Education officials had been.<sup>67</sup> And Anthony Dimond was equally so. For that reason, in 1935 when the Department of the Interior suggested it, Dimond was sympathetic to the idea of Congress authorizing the Secretary of the Interior to withdraw what he assumed would be a modest amount of land around Native villages.<sup>68</sup> But contrary to Dimond's expectation,<sup>69</sup>

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now, before Alaska becomes more thickly settled by white immigrants, of carefully selected tracts to which large numbers of natives can be attracted, and within which, secure from the intrusions of unscrupulous white men, the natives can obtain fish and game and conduct their industrial and commercial enterprises. To the humanitarian reasons supporting this policy are added the practical considerations that within such reservations the Bureau of Education can concentrate its work, and more effectively and economically influence a larger number of natives than it can reach in small and widely separated villages.

DEPARTMENT OF EDUCATION, DEP'T OF THE INTERIOR, REPORT OF THE COMM'R OF EDUCATION FOR THE YEAR ENDED JUNE 30, 1914, at 635 (1915).

67. For the influence that Metlakatla wielded throughout the 1930s and 1940s over Department of the Interior policymakers, see MITCHELL, *supra* note 26, at 277, 295, 300.

68. The year previous, Dimond had mused during the hearings that the House Committee on Indian Affairs held on the IRA that

I think [Alaska Natives] would have been much better off if in the beginning there had been set aside a reservation of our Alaskan territory for the benefit of the natives, and they could have taken care of them in this fashion without hurting anybody else. But now, of course, the white men have come in and taken up the best locations and if one tries to change the status there will be great difficulty.

In 1891, when this act [establishing the Annette Island Reserve] was passed, nobody cared about the Annette Island group, and this worked out very satisfactorily.

1934 House Hearings, *supra* note 55, at 499.

69. While he supported the designation of reservations of a modest size, Dimond subsequently regretted that the bill he had sponsored delegated the Secretary of the Interior authority to designate reservations of whatever size he wished. As he, in 1947, confided in a private letter to E.L. "Bob" Bartlett, who in 1944 had succeeded Dimond as Alaska Delegate,

at the time the legislation was before Congress I had no thought - or even suspicion - that . . . [the authority that section 2 of the 1936 Alaska amendments to the IRA conferred] would be used to reserve anything more than the native settlements and villages with ample space around the same to prevent interference by others, with the necessary facilities including water supply and sea front and harborage areas. There was no suggestion at the time that vast areas would be reserved. Looking back upon the occasion after these intervening years, it seems probable that I would not have sponsored the legislation in its present form had I fully realized that the authority given might be abused. . . . I should have written reasonable limitations into the bill before its introduction.

Letter from Anthony Dimond, former Delegate from Alaska, U.S. House of Representatives, to E.L. Bartlett, Delegate from Alaska, U.S. House of Representatives

over the next thirteen years the Secretary exercised the authority that section 2 of the 1936 Act conferred by designating large reservations whose withdrawal provoked a political backlash. As a consequence of the backlash, the Department of the Interior's implementation of its Alaska reservation policy resulted in confusion regarding the political status of the governing bodies of Native villages that sixty years later contributed to the misassumption regarding tribal recognition that underpins *Venetie II*.

The confusion occurred because in 1938 Bureau of Indian Affairs officials decided to encourage Native residents of Native villages to submit, and the Secretary of the Interior to approve, IRA constitutions that chartered village governing bodies, after which the Secretary *then* would designate a reservation for each village. Between 1938 and 1950, Bureau school teachers and field agents assisted Alaska Natives in sixty-nine villages to write and obtain secretarial approval of IRA constitutions.<sup>70</sup>

In 1941, the Secretary of the Interior designated an 870-acre reservation at Unalakleet, an Eskimo village located on the coast of the Bering Sea north of the Yukon River.<sup>71</sup> And three years later, he designated six additional reservations.<sup>72</sup> One was a 1.8-million acre reservation for the Gwich'in Indian residents of Venetie and Arctic Village (whose boundaries encircled the land that *Venetie II* fifty-three years later announced that Congress intended to be "Indian country"). Another was a 35,200-acre reservation at Karluk, an Aleut village on Kodiak Island.

The offshore boundary of the Karluk reservation encircled water at the mouth of the Karluk River that contained one of the most profitable commercial salmon fisheries in Alaska. As a consequence, a consortium of cannery companies filed a lawsuit in which they alleged that Congress did not intend the term "public lands" in section 2 of the 1936 Act to delegate to the Secretary of the Interior the authority to designate a reservation that included a large tract of water within its boundaries. In 1949, in *Hynes v. Grimes Packing Company*,<sup>73</sup> the United States Supreme Court held that Congress intended section 2 to delegate to the Secretary the authority to designate reservations whose boundaries encircled water, but intended the White Act,<sup>74</sup> which controlled the regulation of the Alaska commercial salmon fishery, to prohibit the Secretary

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(Nov. 20, 1947) (E.L. Bartlett Papers, Archives, University of Alaska, Fairbanks).

70. See GOVERNOR'S TASK FORCE ON FEDERAL-STATE-TRIBAL RELATIONS, REPORT TO GOVERNOR BILL SHEFFIELD app. A (1986) (Alaska Communities Organized Under IRA) [hereinafter SHEFFIELD TASK FORCE REPORT].

71. See 7 Fed. Reg. 548 (1942).

72. See 8 Fed. Reg. 7731-32, 8557, 9464 (1943).

73. 337 U.S. 86 (1949).

74. Act of June 6, 1924, ch. 272, 43 Stat. 464 (1924).

from preventing white fishermen from commercial fishing inside the reservation.<sup>75</sup>

The controversy that the Karluk reservation provoked (as well as a contemporaneous attempt by the Department of the Interior to protect Tlingit and Haida Indian aboriginal fishing and land rights in southeast Alaska) brought the Bureau of Indian Affairs' intention to urge the Secretary of the Interior to designate additional reservations to the attention of Senator Hugh Butler.

In December 1947, Butler, who earlier that year had become chairman of the Senate Committee on Public Lands,<sup>76</sup> introduced S.J. Res. 162.<sup>77</sup> Had its text been enacted as introduced, the resolution would have repealed section 2 of the 1936 Act, and rescinded "the orders of the Secretary of the Interior issued under the authority of the Act of May 1, 1936 establishing . . . Indian reservations in the Territory of Alaska."

After holding hearings on S.J. Res. 162, in May 1948 the Committee on Interior and Insular Affairs (as the Committee on Public Lands by then had been renamed) reported a rewritten version of the text that repealed section 2, but omitted the section of the original text that rescinded the orders that had designated the existing reservations.<sup>78</sup>

In June, the Senate passed the reported version of S.J. Res. 162 by unanimous consent.<sup>79</sup> And the U.S. House of Representatives the next morning would have done the same, but for the lone objection of a single congressman.<sup>80</sup>

Although S.J. Res. 162 died in the 80th Congress, when the 81st Congress convened, congressional hostility to the Secretary of the Interior's designation of reservations in Alaska was, if anything, even more intense.

In November 1949, in the final moments before he departed office, Julius Krug (who in 1946 had succeeded Harold Ickes as Secretary of the Interior) designated a 480,000-acre reservation at Barrow, an Eskimo village on the northernmost coast of Alaska; a 1.4 million acre reservation for the Native residents of Shungnak and Kobuk, Eskimo villages in the northwest arctic; and a 100,000 acre reservation for the Haida Indian village of Hydaburg, whose offshore boundaries included valuable commercial salmon fishing

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75. See *Hynes*, 337 U.S. at 104.

76. At the end of the 79th Congress, the Senate transferred the jurisdiction of the Committee on Indian Affairs to the Committee on Public Lands. See Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 819.

77. S.J. Res. 162, 80th Cong. (1947).

78. See S. REP. NO. 80-1366 (1948).

79. See 94 CONG. REC. 9095-97 (1948).

80. See *id.* at 9348.

locations.<sup>81</sup>

Krug's action so outraged the members of the Senate Committee on Interior and Insular Affairs that when Oscar Chapman, who President Truman nominated to succeed Krug as Secretary, testified before the Committee during his confirmation hearing, he felt compelled to promise the senators that he would take a "new look" at "the matter of reservations for the Indians of Alaska." And he promised that he would not designate additional reservations without first holding public hearings.<sup>82</sup>

Chapman's promises ended interest inside the Bureau of Indian Affairs in encouraging the Secretary of the Interior to designate additional reservations in Alaska pursuant to section 2 of the 1936 Act. And between 1949 and the enactment of the Alaska Native Claims Settlement Act ("ANCSA")<sup>83</sup> in 1971, no additional reservations were designated.<sup>84</sup> However, the end of the reservation era left as its legacy sixty-two villages whose Native residents had been issued IRA constitutions pursuant to section 1 of the 1936 Act, but for which no reservations had been designated pursuant to section 2 of the Act.

#### IV. INDIAN COUNTRY IN ALASKA

To implement its Indian policy in what today are the coterminous states, Congress in 1834 enacted an Indian Intercourse Act that defined "Indian country" to include "all that part of the United States west of the Mississippi."<sup>85</sup> In 1867, when the army arrived at Sitka to administer the nation's newest possession, its officers concluded that, since Alaska was located "west of the Mississippi," it was "Indian country" within the meaning of the 1834 Act.

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81. See 14 Fed. Reg. 7318-19 (1949). Section 2 of the 1936 Act required the residents of a village for which a reservation had been designated to approve the designation. At elections held at Barrow, Shungnak, and Kobuk, the Eskimo residents of those communities rejected their reservations. See 16 Fed. Reg. 2477 (1951). The Haida Indian residents of Hydaburg voted to approve the Hydaburg reservation. See *id.* But in 1952 the Alaska District Court invalidated the reservation on the ground that, in designating it, Secretary Krug had exceeded the authority that section 2 of the 1936 Act conferred. See *United States v. Libby, McNeil & Libby*, 107 F. Supp. 697, 703 (D. Alaska 1952); see also 20 Fed. Reg. 168 (1955) (notice of invalidation of Hydaburg reservation).

82. See *Nomination of Oscar L. Chapman to be Secretary of the Interior: Hearing Before the Senate Comm. on Interior and Insular Affairs*, 81st Cong. 12 (1950).

83. Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629 (1994)).

84. Five years after the enactment of ANCSA, the 94th Congress repealed section 2 of the 1936 Alaska amendments to the IRA. See *Federal Land Policy and Management Act of 1976*, Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792.

85. Act of June 30, 1834, ch. 161, § 1, 4 Stat. 729, 729.

However, when soldiers in 1872 arrested a Sitka resident for importing liquor in violation of the Act, a United States District Judge held that Congress had not intended the "Indian country" definition in the 1834 Act to include Alaska.<sup>86</sup>

In response to *United States v. Seveloff*, Congress in 1873 extended the liquor control provisions of the 1834 Act "to and over all the mainland, islands, and waters of [Alaska]."<sup>87</sup> The next year Congress repealed the "Indian country" definition in the 1834 Act, while reenacting substantive provisions of the Act that referenced "Indian country."<sup>88</sup> Although the term now was undefined, federal courts repeatedly subsequently held that Congress did not intend Alaska to be "Indian country" for any purpose other than enforcement of the federal Indian liquor laws.<sup>89</sup>

In 1899, when it enacted an Alaska criminal code, Congress continued the prohibition on the sale of alcohol to Natives that it had imposed in 1873, but abandoned referencing the liquor control provisions of the 1834 Indian Intercourse Act as the means to effectuate the prohibition. Instead, section 1 of the Alaska criminal code defined "the District of Alaska" to include all of "that portion of the territory of the United States ceded by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven."<sup>90</sup> And section 142 prohibited "any person" from selling, bartering, or giving liquor within the district to "any Indian or half-breed who lives and associates with Indians."<sup>91</sup>

From the enactment of section 142 forward, the concept of "Indian country" had no applicability to Alaska even for the narrow purpose of enforcement of the federal Indian liquor laws. And in 1932, Secretary of the Interior Ray Lyman Wilbur correctly reported to Congress that "[i]n the United States statutes Alaska has never been regarded as Indian country."<sup>92</sup>

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86. See *United States v. Seveloff*, 27 F. Cas. 1021, 1024 (D. Or. 1872).

87. Act of Mar. 3, 1873, ch. 227, 17 Stat. 510, 530.

88. See REV. STAT. §§ 2039-2159, 18 Stat. 359-75 (1978). Note especially REV. STAT. § 2139, 18 Stat. 373 (prohibiting the introduction of "spiritous liquor or wine into the Indian country").

89. See, e.g., *In re Sah Quah*, 31 F. 327, 328-29 (D. Alaska 1886) ("[O]nly as to the prohibited commerce [in alcohol] mentioned in the [two] sections [of the 1834 Intercourse Act] referred to, can Alaska be regarded as Indian country."); *Kie v. United States*, 27 F. 351, 355 (D. Or. 1886) ("Alaska [is] not 'Indian country' in the conventional sense of the term . . . [and] is not therefore 'Indian country' within the meaning of . . . the [I]ntercourse [A]ct of 1834 of the Revised Statutes."); *Walters v. Campbell*, 29 F. Cas. 411, 411 (D. Or. 1876) ("Alaska is not 'Indian country' in the technical sense of that term any further than [C]ongress has made it so.").

90. Act of Mar. 3, 1899, ch. 429, § 1, 30 Stat. 1253, 1253.

91. *Id.* § 142, 30 Stat. at 1274.

92. *Wilbur Letter*, *supra* note 43, at 16.

As described, between 1912 and 1930 the President signed executive orders that withdrew land around several Native villages as reservations. However, the executive order reservations were not "Indian country," and the Alaska Territorial Legislature asserted its criminal and civil jurisdiction within reservation boundaries.<sup>93</sup> Similarly, the reservations the Secretary of the Interior designated pursuant to section 2 of the 1936 Alaska amendments to the IRA also were not "Indian country." Rather, the 74th Congress, which enacted the 1936 Act, intended the Secretary of the Interior's designation of a reservation for Native residents of a Native village to grant the village's IRA council authority to simply exercise powers of local municipal government.

That was the Department of the Interior's view both during and subsequent to the enactment of the 1936 Act. During the House Committee on Indian Affairs' consideration of the bill that was enacted as the 1936 Act, Secretary of the Interior Harold Ickes (whose attorneys had drafted the measure) explained to the Committee that "if native communities of Alaska are to set up *systems of local government*, it will be necessary to stipulate the geographical limits of their jurisdictions. Reservations set up by the Secretary of the Interior will accomplish this."<sup>94</sup> In 1948, Assistant Secretary of the Interior William Warne (who supervised the Bureau of Indian Affairs) reaffirmed Secretary Ickes's understanding in testimony before the Senate Committee on Interior and Insular Affairs:

Warne: The Eskimos of Unalakleet are requesting a reservation so that they may exercise the power of self-government.

The excessive costs to the native of prosecuting a case through the [t]erritorial courts is prohibitive to most of the native people. The plane fare from Unalakleet to Nome and return is \$90. Boat transportation is available for 4 to 5 months, with round-trip fares at \$40. So in many cases, [t]erritorial laws are ignored. The people expect through establishing a reservation to set up ordinances for the members of their village that will enable them to improve the sanitation, health, and maintain law and order in the village.

At the present time, liquor is being brought into the village and sold to the native people. Many of the young peoples' [sic] health and morals will be ruined unless the alcohol habit is curbed. The members expect to prohibit the transportation and possession of liquor on the reservation.

[Senator George] Malone: Does this reservation of the order have the effect of taking this area of 870 acres out from under the jurisdiction of Alaska authorities?

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93. *See id.*

94. *Ickes Letter, supra* note 64, at 4 (emphasis added).

Warne: It has the effect of giving the people the right to establish ordinances and enforce them within their reservation, if they organize to do so, and *it does not remove the authority of the [t]erritory nor the [f]ederal [g]overnment.*

....

Malone: Does this allow them to make rules and regulations that do not conform in general —

Warne: *Only in the sense that any city of the United States or city of Alaska might pass ordinances that affected matters that were beyond the legislation of the [s]tate legislature, for example, or the [f]ederal legislation.* They do have the right, as our towns down here do, to adopt local option on prohibition, if they want, and that kind of thing. In that sense, they have authorities that are beyond what the [t]erritorial government has done.<sup>95</sup>

That was the jurisdictional situation in Alaska when, during the same session during which Secretary Warne testified, the 80th Congress revised Title 18 of the United States Criminal Code.<sup>96</sup>

#### A. The Revisers' Interpretation of the Intent of the 80th Congress Embodied in 18 U.S.C. § 1151

Section 1151 of the 1948 code revision added a definition of the term "Indian country" to Title 18.<sup>97</sup> Because no party raised the issue in *Venetie II*, the circuit court assumed that the 80th Congress intended section 1151 to apply to land located in Alaska.<sup>98</sup> However, the 80th Congress intended no such result.

In 1943, when the House Committee on Revision of the Laws decided to revise Title 18, it contracted with West and another law book publishing company to perform the work. The companies hired W.W. Barron, the former Chief of the Appellate Section of

95. *Butler Hearings*, *supra* note 50, at 26 (emphasis added).

96. See Act of June 25, 1948, Pub. L. No. 80-772, § 1151, 62 Stat. 683, 757 (codified at 18 U.S.C. § 1151 (1994)).

97. See *id.* Section 1151 provided that

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

*Id.*

98. See *Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't* (*Venetie II*), 101 F.3d 1286, 1291 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2378 (1997) ("Venetie occupies neither a reservation nor an allotment. Thus, we must establish the test for determining whether a tribe constitutes a dependent Indian community within the meaning of section 1151(b).").

the Criminal Division of the Department of Justice, to serve as chief reviser.<sup>99</sup> In February 1945, the Committee reported Barron and the other revisers' work product as H.R. 2200.<sup>100</sup>

To improve enforcement of the liquor control and other Indian-related provisions of the criminal code (many of which had their antecedents in the 1834 Indian Intercourse Act), H.R. 2200 contained a section 1151, which defined the term "Indian country" to include, in addition to Indian reservations and Indian allotments, "all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state."<sup>101</sup> In July 1946, the U.S. House of Representatives passed H.R. 2200,<sup>102</sup> but the Senate took no action, and H.R. 2200 died in the 79th Congress.

In the 80th Congress, H.R. 2200 was reintroduced as H.R. 1600, in slightly revised form and renumbered as H.R. 3190, in 1947, passed the House,<sup>103</sup> and in 1948 passed the Senate.<sup>104</sup> In both houses, H.R. 3190 passed by unanimous consent after cursory debate, none of which mentioned the section 1151 Indian country definition.

Prior to passage of the bill in the House, Representative Eugene Keogh, the former chairman of the Committee on Revision of the Laws,<sup>105</sup> explained to the House Committee on the Judiciary that

[t]he policy that we adopted, which in my mind has been very carefully followed by the revisers and by the staffs of the publishing companies as well as the employees of the committee, was *to avoid wherever possible and whenever possible the adoption in our revision of what might be described as controversial substantive changes of law.*

It is my opinion that that policy of the Committee on Revision of the Laws has been very carefully adhered to in the bills that are before this subcommittee.<sup>106</sup>

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99. See generally H.R. REP. NO. 79-152, at 3 (1945).

100. See *id.*

101. H.R. 2200, 79th Cong. § 1151 (1945).

102. See 92 CONG. REC. 9122 (1946).

103. See 93 CONG. REC. 5048-50 (1947).

104. See 94 CONG. REC. 8721 (1948). The version of H.R. 3190 passed by the Senate made 22 changes to the text of the bill that had passed the House, none of which related to the "Indian country" definition and all of which were accepted by the House. See *id.* at 8864.

105. In 1946, the U.S. House of Representatives transferred the jurisdiction of the Committee on Revision of the Laws to the Committee on the Judiciary. See Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 826-27.

106. *Revision of Titles 18 and 28 of the United States Code: Hearings on H.R. 1600*

Since creating Indian country in Alaska within which the Alaska Territorial Legislature would be divested of criminal and civil jurisdiction would have been a very “controversial substantive change of law,” it was not a change that W.W. Barron and the other revisers intended their inclusion of section 1151 in Title 18 to make.

Fifty-five years earlier, the Supreme Court in *United States v. Ryder*<sup>107</sup> announced the black-letter rule that it would not infer “that . . . [Congress], in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed.”<sup>108</sup> W.W. Barron and the other revisers who drafted section 1151 understood the *Ryder* rule and adhered to it.<sup>109</sup> As Barron subsequently explained with regard to the revision to Title 28 that he and the other revisers completed contemporaneously with their revision of Title 18,<sup>110</sup>

[t]here was no purpose on the part of the Revision staff to effect any change in existing law . . . .

Because of the necessity of consolidating, simplifying and clarifying numerous component statutory enactments no changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed.<sup>111</sup>

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and H.R. 2055 Before Subcomm. No. 1 of the House Comm. on the Judiciary, 80th Cong. 6 (1947) (emphasis added) [hereinafter *1947 Title 18 Hearings*].

107. 110 U.S. 729 (1884).

108. *Id.* at 740; accord Logan v. United States, 144 U.S. 263, 302 (1892); see also United States v. Le Bris, 121 U.S. 278 (1887). In *Le Bris* the question was whether when the 43d Congress, in enacting an 1874 code revision that reenacted provisions of the 1834 Indian Intercourse Act that referenced the term “Indian country,” intended the term to have a meaning different from the Indian country definition in the 1834 Act, which, by having been omitted from the code revision, had been repealed. The Court held that Congress intended the term “Indian country” in the code revision to embody the repealed definition because “[t]he re-enacted sections are to be given the same meaning they had in the original statute, unless a contrary intention is plainly manifested.” *Id.* at 280.

109. See William W. Barron, *The Judicial Code 1948 Revision*, 8 F.R.D. 439, 446 (1949) [hereinafter *Judicial Code Revision*].

110. When they revised Title 18, Barron and the other revisers also revised Title 28. See generally *1947 Title 18 Hearings*, *supra* note 106, at 6.

111. *Judicial Code Revision*, *supra* note 109, at 441, 446. When it was required to discern the intent of the 80th Congress embodied in the Title 28 code revision, the United States Supreme Court accepted Barron’s vouch that the revisers did not intend the revision to change the substantive law, unless their intent to do so was clearly expressed. See *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 227 (1957), quoted in *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993) (“[W]e do not presume that the [1948] revision [of Title 28] worked a change in the underlying substantive law ‘unless an intent to make such [a] chang[e] is clearly ex-

Given their clear understanding of the concept, it is difficult to believe that Barron and the other revisers intended a different result with respect to their revision of Title 18. And that was the Department of the Interior's contemporaneous interpretation of the intent of the revisers, and of the 80th Congress, embodied in section 1151.

B. The Department of the Interior's Interpretation of the Intent of the 80th Congress Embodied in 18 U.S.C. § 1151

The United States Supreme Court repeatedly has instructed that the contemporaneous interpretation of the intent of Congress embodied in a statute that has been adopted by an agency charged by Congress with responsibility for implementing the statute is entitled to deference,<sup>112</sup> particularly if the agency participated in the enactment of the statute.<sup>113</sup>

In 1945, when it reported H.R. 2200, the Committee on Revision of the Laws informed the House of Representatives that "[t]he officials in charge of a department or agency which might be affected by this revision were kept fully informed," and that "[c]opies of the preliminary draft were sent to all [g]overnment officials who might have the slightest interest in this work."<sup>114</sup>

Consistent with that explanation of the procedure to which W.W. Barron and the other revisers adhered, Barron explained in 1946 to the House Committee on the Judiciary that, while working on the Title 18 code revision, the revisers "had communications from the Interior Department. They pointed out certain sections. They had a long memorandum. We conformed to their suggestions."<sup>115</sup>

Because they participated with the revisers in drafting the Title 18 code revision, Department of the Interior officials were well-positioned to know the result the revisers intended, and the result the 80th Congress intended its enactment of the revision to effectuate. And for nine years subsequent to the enactment of the revision,

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pressed.").

112. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (holding that the Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"); *Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("[The] interpretation given [a] . . . statute by the officers or agency charged with its administration" is entitled to "great deference.").

113. See *Miller v. Youakim*, 440 U.S. 125, 144 (1979) ("Administrative interpretations [of the intent of Congress embodied in a statute] are especially persuasive where . . . the agency participated in developing the provision.").

114. H.R. REP. NO. 79-152, at 4 (1945).

115. *Hearing on H.R. 2200 Before the Subcomm. of the House Comm. on the Judiciary*, 79th Cong. 47-48 (1946) (on file with author).

sion, the Department believed that the revisers did not intend the 80th Congress's enactment of section 1151 to change existing law by creating Indian country in Alaska. As Assistant Secretary of the Interior Roger Ernst (who supervised the Bureau of Indian Affairs) in 1958 explained to the 85th Congress: "[T]he general understanding had been that the many native villages in Alaska were not Indian country, and it had been the general practice for [t]erritorial officers to apply [t]erritorial law in the native villages."<sup>116</sup>

In 1955-56, the delegates to the Alaska Constitutional Convention agreed with Secretary Ernst and assumed that the legislature of the state whose government would operate under the constitution they had been elected to write would have criminal and civil jurisdiction throughout Alaska, including both within and surrounding Native villages.

### C. Indian Country and the Alaska Statehood Act

In November 1955, fifty-five delegates convened the Alaska Constitutional Convention on the campus of the University of Alaska to write the Alaska Constitution.<sup>117</sup> With respect to the criminal and civil jurisdiction that the Alaska State Legislature would wield within and surrounding Native villages, the legal situation was clear, but the reality confused.

In several of Alaska's more than 220 Native villages, Alaska Natives had organized municipal governments pursuant to the Alaska Territorial Legislature's Municipal Government Act.<sup>118</sup> In sixty-nine villages, the Secretary of the Interior had approved constitutions pursuant to section 1 of the 1936 Alaska amendments to the IRA that authorized Native residents to elect a village coun-

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116. Letter from Roger Ernst, Assistant Secretary, Dep't of the Interior, to Hon. Emanuel Celler (Feb. 25, 1958), *reprinted in* S. REP. NO. 85-1872, at 3 (1958).

The Department's interpretation of the congressional intent embodied in 18 U.S.C. § 1151 is consistent with the 80th Congress's consideration of S.J. Res. 162, which passed the Senate and which would have passed the House but for the objection of a single member. Simply put, it strains credulity to believe that, with no mention made in any hearing and with no discussion or debate, the same members of the Senate who voted to repeal the Secretary of the Interior's authority to designate Indian reservations in Alaska intended their enactment of 18 U.S.C. § 1151 to divest the Alaska Territorial Legislature of criminal and civil jurisdiction within and surrounding more than 220 Native villages.

117. *See generally* VICTOR FISCHER, ALASKA'S CONSTITUTIONAL CONVENTION (1975).

118. For example, municipal governments were organized in Nenana in 1921, Craig in 1922, Hydaburg in 1927, Klawock in 1929, and Kake in 1952. *See* DEPARTMENT OF COMMUNITY AND REG'L AFFAIRS, STATE OF ALASKA, ALASKA MUNICIPALITIES 1-4 (1997).

cil.<sup>119</sup> However, an IRA village council did not possess any local municipal government authority until the Secretary of the Interior designated a reservation for the village pursuant to section 2 of the 1936 Act.<sup>120</sup> And for the reasons previously described, the Secretary did not designate a reservation for most villages.

Nevertheless, IRA councils that had been organized in villages for which no reservation had been designated exercised extra-legal local municipal government authority that village residents acknowledged. To compound the confusion, in Native villages in which neither a territorial municipal government nor an IRA council had been organized, the Native residents had organized informal, *i.e.*, traditional, councils that exercised extra-legal local municipal government authority that village residents acknowledged. In 1913, for example, the Bureau of Education teacher at the grade school at Mountain Village, an Eskimo village on the Yukon River, reported that

[f]or many years, I am told, these natives have had a sort of local council which undertook certain matters of village government. I have observed that they always settle any question of local significance in a quiet peaceable manner, but they appear utterly helpless in dealing with any influence having its origin outside the pale of [their] own social life.<sup>121</sup>

Seventeen years later, two members of the Stanford University faculty reported after visiting Mountain Village and a number of other Eskimo villages in western and northwest Alaska that

[i]n almost all social and economic practices the Eskimos are permitted to use their own initiative and judgment in village life. *But in matters where they come in conflict with the white man, territorial and federal law take authoritative precedence over tribal custom. . . .*

Our sampling of villages was among those which had government schools in operation and had long been subjected to the influence of these institutions. In the more isolated sections of the Eskimo country, especially along the coast south of the Yukon,

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119. See SHEFFIELD TASK FORCE REPORT, *supra* note 70, at app. A.

120. See *Instructions for Organizations in Alaska Under the Reorganization Act of June 18, 1934 and Alaska Act Of May 1, 1936 and the Amendments Thereto (December 22, 1937)* ("If at the time . . . [an IRA] constitution is being drafted, the designation and approval of an Indian reservation for the community organizing is anticipated, such powers may be included in the constitution but limited to take effect *only* upon the designation and approval of a reservation for such community" (emphasis added)), reprinted in SHEFFIELD TASK FORCE REPORT, *supra* note 70, at 114.

121. ALASKA DIV., DEP'T OF THE INTERIOR BUREAU OF INDIAN AFFAIRS, ANNUAL REPORT OF THE UNITED STATES PUBLIC SCHOOL AT MT. VILLAGE (1913), *microformed on* Univ. of Alaska Anchorage Microfilm (correspondence file 1908-1935).

the Eskimos conduct their village government much as they did before the white man came among them. The visits of the deputy marshal, who represents the law to them, are so infrequent as to leave only a temporary impression upon them of the white man's legal requirements.<sup>122</sup>

....

As has been suggested above, Eskimo custom prevails in village practices when the events under scrutiny do not affect a white man. Yet sometimes dissatisfaction among the Eskimos themselves induces someone, thinking to better his situation, to bring an issue to the attention of the legal machinery of the territorial and federal government for decision.<sup>123</sup>

That was the day-to-day reality in most Native villages that confronted the Alaska Constitutional Convention delegates.

When the convention convened, the delegates organized a Committee on Local Government to which it assigned responsibility for writing a local government provision.<sup>124</sup> Setting about the work, at their first meeting the Committee members discussed "the need of making local government work in the larger cities *as well as the smallest villages*."<sup>125</sup> And at the seventh meeting, "[a]ttention was . . . devoted to the status of native village councils which now provide an informal local government. These councils operate without actual powers, but do provide certain basic controls in unorganized communities."<sup>126</sup>

The Committee on Local Government wrote a local government provision that the delegates included in the Alaska Constitution as article X. In doing so, both the Committee members and the other delegates intended article X to grant the Alaska State Legislature authority to enact a municipal government statute whose jurisdiction would include all Native villages, including villages located within the boundaries of reservation and other land

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122. Consistent with that assessment, according to Russell Arnett, a longtime Alaska attorney who in 1952 served as U.S. Commissioner at Nome, during his tenure as U.S. Commissioner, Eskimos who violated territorial criminal laws in Seward Peninsula villages rarely were prosecuted: "Territorial law was applied in the villages, but only the really bad stuff was involved in our criminal justice system. Essentially the villages ran themselves, and expulsion [from the village] by the village council was a much-feared penalty." Telephone interview with Russell Arnett, Esq. (June 29, 1997).

123. ANDERSON & EELLS, *supra* note 42, at 146-47.

124. See FISCHER, *supra* note 117, at 36, 116-27.

125. *Minutes of the Comm. on Local Gov't of the Alaska Constitutional Convention* ¶ 8 (Nov. 15, 1955) (on file with Office of Local Boundary Comm'n, Alaska Dep't of Community & Reg'l Affairs) (emphasis added).

126. *Id.* ¶ 9 (Nov. 22, 1955) (on file with Office of Local Boundary Comm'n, Alaska Dep't of Community and Reg'l Affairs).

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withdrawals.<sup>127</sup>

In 1958, the 85th Congress approved and implemented the Alaska Constitutional Convention delegates' understanding when it enacted the Alaska Statehood Act<sup>128</sup> and in section 1 of the Act "accepted, ratified, and confirmed" article X of the Alaska Constitution.<sup>129</sup> In doing so, the 85th Congress reconfirmed Congress's

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127. In their commentary on Article X, the members of the Committee on Local Government informed the Alaska Constitutional Convention that

[s]ince the Territory of Alaska has no provisions for home rule and the people are governed directly from Washington, D.C. and the Capital of the Territory, the Committee on Local Government is proposing this article with the purpose of enabling the people *in any part of Alaska* to achieve a maximum amount of home rule for themselves. . . . We have not tried to detail the mechanics of setting up units of local government, but have tried to prepare a framework within which *the legislature of the State of Alaska* can provide by law for local government and home rule.

COMMITTEE ON LOCAL GOV'T, ALASKA CONSTITUTIONAL CONVENTION, COMMENTARY ON LOCAL GOV'T ARTICLE, at 1 (Jan. 18, 1956) (emphasis added).

Victor Fischer, the secretary of the Committee on Local Government, has described the Committee's understanding of the situation as follows:

During the discussions of the Committee on Local Government there was never any thought that Native villages and their surrounding areas would not be part of full state jurisdiction. When we got into the borough concept, which was a substitute for counties, we asked ourselves how the concept would apply to the Kotzebue area. We specifically looked at northwest Alaska as a potential borough. There was no question but that this was an approach to local government that would apply throughout the state, including in rural areas in which Native villages were located. And no one suggested anything to the contrary. . . .

The year after the Convention, it came to the [Territorial] Legislature's attention that loose dogs were a problem in Native villages and that there was no authority to have a dog control ordinance in villages whose residents had not organized a municipal government under territorial law because they did not have a tax base that the law required. So we passed a law [during the 1957 Legislature Mr. Fischer was a member of the House of Representatives] to authorize the creation of third class cities that had the power to levy a head tax in order to exercise local municipal government functions such as dog control [see Village Incorporation Act, ch. 150, 1957 Alaska Sess. Laws 304 (authorizing "limited self-government through the establishment of incorporated villages in rural areas where local residents are unable to bear the financial burden of supporting an incorporated city or other type political subdivision as is now provided by law")]. [Representative] Jack Coghill, who had served with me during the Constitutional Convention on the Committee on Local Government, sponsored the bill and I was a cosponsor. As we had during the Constitutional Convention, Jack and I certainly assumed that the Legislature had jurisdiction to authorize Alaska Natives in rural villages to organize third class municipal governments.

Interview with Victor Fischer, Secretary, Comm. on Local Gov't, in Anchorage, Alaska (Aug. 25, 1997).

128. Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339 (1958).

129. See *id.* "Between 1947 and 1956, hearings on Alaska statehood were conducted on seven different occasions in Washington and three times in Alaska. The

Native policy, which since 1868 had subjected Alaska Natives residing at all locations in Alaska to the federal and territorial criminal and civil statutes to which non-Native residents were subject. However, six weeks after the United States House of Representatives passed the Alaska Statehood Act, the House on July 7, 1958 passed a bill that seemingly recognized the existence of Indian country in Alaska,<sup>130</sup> which the Senate on July 28, 1958 passed a month after it passed the Alaska Statehood Act.<sup>131</sup>

#### D. Indian Country and *In re McCord*

At the urging of the Bureau of Education, in 1915 President Woodrow Wilson by executive order reserved 24,080 acres of federal public land on the west side of Cook Inlet in southcentral Alaska "for the use of the United States Bureau of Education."<sup>132</sup> Although the order made no mention of Alaska Natives, the transmittal letter that accompanied the order informed the President that the reserve would "benefit . . . Alaskan natives of that region."<sup>133</sup>

The Natives of the region lived at Tyonek, a small Indian village located inside the boundaries of what subsequent to issuance of the executive order was known as the Moquawkie reserve. In 1937, Secretary of the Interior Harold Ickes issued the residents of Tyonek an IRA constitution.<sup>134</sup> By the mid 1950s, the Tyonek IRA

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printed record of these investigations amounted to approximately 4,000 pages." CLAUDE M. NASKE, AN INTERPRETATIVE HISTORY OF ALASKAN STATEHOOD 151 (1973). At no time during those hearings, or during the statehood hearings held in 1957, did any Alaska Native, Department of the Interior official, or any other witness suggest to Congress that a land withdrawal made for the benefit of Alaska Natives, either pursuant to section 2 of the 1936 Alaska amendments to the IRA or otherwise, or any other land in Alaska, was Indian country within which the Alaska State Legislature would be devoid of criminal and civil jurisdiction. For a list of those hearings, see *id.* at 176-77.

130. See 104 CONG. REC. 13,076-77 (1958).

131. See *id.* at 15,231.

132. Exec. Order No. 2141 (1915).

133. Letter from A.A. Jones, Acting Secretary of the Interior, to President Woodrow Wilson (Feb. 25, 1915), reprinted in *Oil and Gas Leasing on Lands Withdrawn by Executive Order for Indian Purposes in Alaska*, 70 Decisions of the Dep't of the Interior 166, 176-77 (1963).

134. According to Maurice Carmody, who in 1937 was the Bureau of Indian Affairs school teacher at Tyonek,

[w]e organized the village under the IRA because really there wasn't any law enforcement there. There wasn't anything there, the village was kind of sitting as an island. [Was there a village council operating in Tyonek when Carmody arrived?] No, there wasn't anything. They had an old chief there, Simeon Chickalusion. He was actually about the only authority there. But there wasn't any other kind of law enforcement. There wasn't any council, but I thought there was a real need. So we

council routinely exercised local governmental authority that the Indian residents of the village acknowledged, even though — since the Secretary of the Interior had not designated the Moquawkie reserve as a reservation pursuant to section 2 of the 1936 Alaska amendments to the IRA — the council had no legal authority. And when the need to do so arose, territorial and federal officials routinely enforced territorial law inside the reserve.

In April 1957, a Bureau of Indian Affairs employee recommended to the U.S. Attorney that two Indian men who resided at Tyonek be prosecuted for violating the Alaska Territorial Legislature's statutory rape statute by having impregnated their underage girlfriends.<sup>135</sup> When the Indians were arrested, Stanley McCutcheon, a prominent Anchorage attorney, organized a defense team, one of whose members was Russell Arnett. According to Arnett,

[f]ourteen lawyers, almost half of the Anchorage bar, volunteered to defend the young men. Though the ages of the parties and the undisputed facts appeared to constitute statutory rape, we thought we could give the United States a good fight with a jury, with Stan McCutcheon as lead counsel. However, the District Judge was J.L. McCarrey Jr., a staunch Mormon, and we did not know what rulings he would make and what instructions he would give to the jury.

Indian law in Alaska was much less developed at that time. The doctrine of . . . "sovereignty" had neither been propounded nor argued in courts. I had heard mention of the "Five Major Crimes Act" and was able to locate it in the U.S. Code. Essentially it provided that in "Indian country" an Indian could only be prosecuted for five major crimes committed against another Indian, except in tribal courts. Forcible rape was one of the five major crimes but statutory rape was not. We thought it worth a try.

At the hearing on our petition for a writ of habeas corpus, Virgil Seizer of the Land Office testified that Tyonek was included in an educational reserve created in 1915 and he showed the boundaries on a map for the judge. Except for that, there was no Indian reservation.<sup>136</sup>

In support of his petition for the writ, Arnett, who was not familiar with the arcane principles of Indian law, filed a two-page memorandum that claimed that *In re Sah Quah* held "that Alaska was or contained 'Indian country,'" and miscited two U.S. Attorney General opinions as support for the same proposition.<sup>137</sup> The

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had a village meeting and organized it.

Interview with Maurice Carmody, in Anchorage, Alaska (Feb. 11, 1993).

135. See *In re McCord*, 151 F. Supp. 132, 133 (D. Alaska 1957).

136. Russell Arnett, *A Tale of Tyonek*, ALASKA BAR RAG 4 (July-Aug. 1996).

137. See Memorandum in Support of Petition for Writ of Habeas Corpus at 2, *In re McCord*, 151 F. Supp. 132 (D. Alaska 1957) (No. A-13363).

The first Attorney General opinion gave the War Department guidance re-

district court then held that the Moquawkie reserve was a "reservation" within the meaning of 18 U.S.C. § 1151(a), and, hence, Indian country within which the Alaska Territorial Legislature had no jurisdiction to enforce its statutory rape statute.

When Arnett raised the jurisdictional issue, the Department of Justice responded by asserting that the 80th Congress intended section 1151 to apply only to "areas within the several states."<sup>138</sup> However, in *In re McCord*, Judge McCarrey summarily rejected that contention by pointedly refusing to afford the Departments of Justice and Interior's longstanding interpretation of the intent of the 80th Congress any deference, and without investigating the legislative history of the Title 18 code revision of which section 1151 is a part.<sup>139</sup>

The Department of Justice could have appealed *McCord* to the circuit court. Instead, Alaska Delegate E.L. "Bob" Bartlett decided to reverse the decision's holding by congressional enactment. In 1953, Congress had amended Titles 18 and 28 of the United States Code to grant several states criminal and civil jurisdiction within Indian country located within their boundaries.<sup>140</sup> Three months after Judge McCarrey decided *McCord*, Bartlett introduced H.R. 9139<sup>141</sup> to add the Territory of Alaska to the list of states in the 1953 Act in order to "extend the territorial law of Alaska to all Indian countries in Alaska."<sup>142</sup>

When the House Committee on the Judiciary reported H.R. 9139, it explained in its report that Congress's enactment of the bill would "restor[e] what, until the court decision, was the actual practice in the enforcement of the law in the Indian country in

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garding the location of Indian country between the Mississippi River and the Rocky Mountains, as well as in the Territories of Oregon, New Mexico, and Utah. See 14 Op. Att'y Gen. 290 (1873). The second opinion advised that Congress in 1873 extended two, and only two, sections of the 1834 Indian Intercourse Act to Alaska. The first section prohibited the sale of spirituous liquor to Indians, and the second section prohibited the distilling of spirituous liquor. Other than for the purpose of enforcing those two prohibitions, the opinion advised that "Alaska cannot be considered merely as an Indian country." 16 Op. Att'y Gen. 141, 143 (1878).

138. 151 F. Supp. 132, 134 (D. Alaska 1957); see also Op. Sol. Gen. of Dep't of the Interior, M-36712, at 3 (Liquor Problems in 'Indian Country' in Alaska) (Sept. 26, 1967) (stating that "[t]he United States took the position in . . . [*McCord* and *United States v. Booth*, 161 F. Supp. 269 (D. Alaska 1958)] that Metlakatla was not a true reservation and, therefore, not 'Indian country'").

139. See *McCord*, 151 F. Supp. at 134 (noting that "[t]he [g]overnment's . . . contention that the [18 U.S.C. § 1151] definition is as to areas within the several states seems . . . to be incorrect").

140. See Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953).

141. See 103 CONG. REC. 13,805 (1957).

142. H.R. REP. NO. 85-2043, at 1 (1958).

Alaska.”<sup>143</sup> In July 1958, the House and Senate by unanimous consent passed H.R. 9139,<sup>144</sup> six weeks after the House and a month after the Senate passed the Alaska Statehood Act.<sup>145</sup>

Congress is presumed to be “knowledgeable about existing law pertinent to the legislation it enacts.”<sup>146</sup> Between *In re McCord* in 1957 and the enactment of ANCSA in 1971, the existing law about which Congress was knowledgeable was that the only Indian country in Alaska was the Indian country *McCord* identified. And the only Indian country *McCord* identified was land located within withdrawals that had been made for the benefit of Alaska Natives (and which 18 U.S.C. § 1151(a) characterized as “reservations”).<sup>147</sup>

For that reason, in 1971 when it enacted ANCSA, the only Indian country that the 92d Congress believed might exist in Alaska were reservations, all of which (other than the Annette Island Reserve) the 92d Congress revoked.

#### V. THE ALASKA NATIVE CLAIMS SETTLEMENT ACT

In 1884, section 8 of the Alaska Organic Act extended the Mining Law of 1872 to Alaska with the proviso

143. *Id.* at 2.

144. See 104 CONG. REC. 13,076, 15,231 (1958); see also Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (1958).

145. The 85th Congress’s enactment of the statute that reversed *McCord* is not evidence that the 80th Congress intended 18 U.S.C. § 1151 to apply to Alaska, either within the Moquawkie reserve or elsewhere. See *O’Gilvie v. United States*, 117 S. Ct. 452, 458 (1996) (holding that “the view of a later Congress cannot control the interpretation of an earlier enacted statute”).

146. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988).

147. As Judge McCarrey explained in *McCord*,

[i]n view of the opinions expressed by these courts [in *United States v. Kie*, 1 Alaska Fed. 125 (D. Or. 1886) and *In re Sah Quah*, 31 F.2d 327, 328-29, which hold “that the Territory of Alaska as a whole was not Indian country and that the natives of this area had not achieved independent status by treaty”] and the [Indian country] definition of Congress . . . any extension of the definition beyond those areas set apart from the public domain and dedicated to the use of the Indian people, and within which is found an operational tribal organization, would be unwarranted . . . .

This decision should not be interpreted by members of the native groups, be they Indian or Eskimo, as a general removal of the territorial penal authority over them, for the reason that this court will take judicial notice that there are few tribal organizations in Alaska that are functioning strictly within Indian country as defined in 18 U.S.C. § 1151 et seq. As I have said, only when the offense fits distinctly within the provisions of the applicable federal law will territorial jurisdiction be ousted. Testimony indicates that the Tyonek area, unlike most areas inhabited by Alaska natives, *has been set aside for the use of* and is governed by an operational tribal unit.

151 F. Supp. 132, 135-36 (D. Alaska 1957) (emphasis added).

[t]hat the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.<sup>148</sup>

In 1971, the 92d Congress exercised the decisionmaking authority that Congress reserved to itself in 1884 by enacting ANCSA. In exchange for the conveyance of legal title in fee simple to 44 million acres of land and the payment of \$ 962.5 million in compensation, section 4(b) of ANCSA extinguished all aboriginal titles in Alaska.<sup>149</sup>

Alaska Delegate E.L. "Bob" Bartlett introduced the first bill to extinguish Native aboriginal title throughout Alaska in 1946.<sup>150</sup> But the modern land claims era did not begin until 1967 when the Department of the Interior sent the 90th Congress a bill that Alaska Senator Ernest Gruening introduced as S. 1964.<sup>151</sup> In 1968, the Senate Committee on Interior and Insular Affairs held a hearing in Anchorage to afford Alaska Natives an opportunity to testify on S. 1964 and other pending bills.<sup>152</sup> And between that hearing and the enactment of ANCSA in 1971, the Senate and House Committees on Interior and Insular Affairs held nine additional hearings on Native land claims settlement legislation.<sup>153</sup> The

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148. Alaska Organic Act, § 8, 23 Stat. 24, 26 (1884).

149. Section 4(b) provides that "[a]ll aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished." 43 U.S.C. § 1603(b) (1994).

150. See H.R. 5731, 79th Cong. (1946).

151. See S. 1964, 90th Cong. (1967).

152. See *Alaska Native Land Claims: Hearings on S. 2906, S. 1964, S. 2690, and S. 2020 Before the Senate Comm. on Interior and Insular Affairs*, 90th Cong. (1968).

153. See *Alaska Native Land Claims: Hearings on S. 35 and S. 835 Before the Senate Comm. on Interior and Insular Affairs*, 92d Cong. (1971); *Alaska Native Land Claims: Hearings on S. 35, S. 835 and S. 1571 Before the Senate Comm. on Interior and Insular Affairs*, 92d Cong., pt. 2 (1971); *Alaska Native Land Claims: Hearings on H.R. 3100, H.R. 7039, and H.R. 7432 Before Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 92d Cong. (1971); *Alaska Native Land Claims: Hearing on S. 1830 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., pt. 2 (1969); *Alaska Native Land Claims: Hearings on H.R. 13142 and H.R. 10193 Before Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 91st Cong., pt. 1 (1969); *Alaska Native Land Claims: Hearings on H.R. 13142, H.R. 10193, and H.R. 14212 Before Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 91st Cong., pt. 2 (1969); *Alaska Native Land Claims: Hearings on S. 2906, S. 1964, S. 2690, and S. 2020 Before the Senate Comm. on Interior and Insular Affairs*, 90th Cong., pt. 2 (1968); *Alaska Native Land Claims: Hearing on H.R. 11213, H.R. 15049, and H.R. 17129 Before*

record of those hearings, including exhibits, totals 3,075 pages. A review of that record indicates that neither the Secretary of the Interior nor any other Department of the Interior witness, nor any Native witness, nor any attorney representing a Native organization, nor any other witness informed either Committee that they believed Alaska Native residents of Native villages were members of federally recognized Indian tribes whose governing bodies possessed governmental authority, or that Indian country existed in Alaska.

However, in 1968, the Alaska Federation of Natives ("AFN"), the statewide organization Alaska Natives organized to lobby Congress to enact settlement legislation,<sup>154</sup> presented the 90th Congress a settlement bill whose text recommended that Native groups be afforded the "option to incorporate under the Indian Reorganization Act as an alternative to incorporation under Alaska law," as well as the option of being conveyed title to land either in fee simple "or in fee to a trustee for the native group."<sup>155</sup>

In 1971, when it enacted ANCSA, the 92d Congress purposely rejected both recommendations. Rather than IRA councils, sections 7(d) and 8(a) of ANCSA<sup>156</sup> required Alaska Natives to organize corporations "under the laws of the State [of Alaska]" in order to obtain settlement benefits. And rather than conveying land in trust, section 14 of ANCSA<sup>157</sup> required the Secretary of the Interior to issue the corporations patents that conveyed title to land in fee simple. And most importantly, section 19(a) of ANCSA<sup>158</sup> revoked "the various reserves [other than the Annette Island reserve, but including the Venetie reservation and the Moquawkie reserve] set aside by legislation or by Executive or Secretarial Order for Native use or for administration of Native affairs."

The legislative history of ANCSA indicates that the 92d Congress intended sections 7(d), 8(a), and 19(a) to ensure that both fee title land conveyed to ANCSA corporations, and Alaska Natives who resided thereon, would be subject to the criminal and civil jurisdiction of the Alaska State Legislature.

H.R. 10367 was the bill the 92d Congress enacted as

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*Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 90th Cong., pt. 2 (1968); Alaska Native Land Claims: Hearing on S. 1830 Before the Senate Comm. on Interior and Insular Affairs, 91st Cong. (1968).*

154. See MARY CLAY BERRY, *THE ALASKA PIPELINE: THE POLITICS OF OIL AND NATIVE LAND CLAIMS* 46-47 (1975).

155. S. 2906, 90th Cong. §§ 209, 513 (1968), reprinted in *Alaska Native Land Claims: Hearings on S. 2906, S. 1964, S. 2690, and S. 2020 Before the Senate Comm. on Interior and Insular Affairs, 90th Cong. 2-16 (1968).*

156. 43 U.S.C. §§ 1606(d), 1607(a) (1994).

157. *Id.* § 1613.

158. *Id.* § 1618(a).

ANCSA.<sup>159</sup> H.R. 3100, introduced by Rep. Wayne Aspinall, the chairman of the House Committee on Interior and Insular Affairs, was the precursor to H.R. 10367.<sup>160</sup> When Alaska Governor Bill Egan testified on H.R. 3100 before the Committee's Subcommittee on Indian Affairs, he objected to Congress enacting any bill that would impinge upon "[s]tate jurisdiction" because "[n]o Native claim to this land should be immune to the 'zoning' powers of the [s]tate, from jurisdiction over fish and game, water or air quality, or other policy, natural resource or environmental regulation."<sup>161</sup> Alaska Attorney General John Havelock then explained the policy concern that underpinned the Governor's objection as follows:

[T]he [s]tate has jurisdiction in which to exercise a full range of planning and zoning. In fact, the [s]tate has not chosen to do so. The necessity has not been there because there has not been vast landholdings in other than public lands. The fact of the Native claim settlement will be to put such lands into other than public ownership. So we will have to consider after the claims legislation is concluded the enactment of further zoning legislation. This could be done in concert both with the United States and with the Native people of Alaska. That would be, I believe, the intention of our administration.

Our concern . . . with the form of legislation is that the form of enactment *not be such that it establishes reservations or limitations upon the jurisdiction of the [s]tate to enact and enforce such zoning legislation.* If, for instance, you set up a corporation that is chartered under the laws of the United States and is viewed as a [f]ederal instrumentality, with the land in question being viewed as Indian land, there would be considerable concern whether the [s]tate could in fact effectively regulate the use of such lands in concert with the public lands of Alaska.<sup>162</sup>

When the Subcommittee met to discuss the bill that the Committee on Interior and Insular Affairs reported as H.R. 10367, the members all agreed that Governor Egan and General Havelock had identified a policy concern that H.R. 10367 should address:

Kyl: I would like to guarantee as far as possible that there is no possibility that these Native reservations will be considered at any time in the future as Native reservations or Indian reservations, knowing the tremendous problems that we have because of the Indian reservations in the forty-eight adjacent states. And

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159. See H.R. REP. NO. 92-746, at 1 (1971).

160. See *id.* 92-523, at 3.

161. *Alaska Native Land Claims: Hearings on H.R. 3100, H.R. 7039, and H.R. 7432 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 92d Cong. 128-29 (1971) [hereinafter *Hearings on H.R. 3100, H.R. 7039, and H.R. 7432*].

162. *Id.* at 134-35 (emphasis added).

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there is a possibility — yes?

Aspinall: This troubles me, too, because it seems that the only possible way that we can do this is to find that these villages, wherever they may be, before they can take, must be incorporated under the laws of the State of Alaska which would be a final determination of their position . . . .

Kyl: I have a problem of this nature in my district. The Sac and Fox Indians live on lands which they own. They own every inch of it, and yet in the considerations of the public, it is still treated as a reservation. And I know the numerous problems of all sorts that arise because of that even though the land is totally owned by the tribe.

Aspinall: In other words, what my colleague is saying, if the State of Alaska has any laws on the maintenance of, enhancement of, protection of ecological values, then these citizens of Alaska should conform in those respects, too, is that correct?

Kyl: Yes.

Steiger: I think it is important that we underscore this. I will not attempt to commit the balance of this side of the aisle, but I will tell you that having nine reservations within my congressional district, and having experienced almost without exception problems that are unique only to reservation structure, problems between reservations, as between reservations and state and federal government, I would hope that we would not in the report but in the bill itself [include] language that would clearly exempt whatever is established from reservation status and I think that would be — I suspect anybody on the committee who has had similar experiences will endorse that . . . .

Aspinall: The next thing I would like to ask my colleague [Mr. Meeds], if he would care to comment, is what is the ultimate goal that we have in mind for the Natives of Alaska. Is it to make it possible for each individual Native of Alaska to enter into the stream of economic, social, political and other factors of Alaskan life and United States life or is it by some means or other to perpetuate ad infinitum a framework that will make it possible for certain Native leaders to get the benefits that we are trying to give to the individual Indians? This is perhaps the most difficult thing for me to keep in mind because what I would like to see is that within a very few years, each individual Native of Alaska be secure in his own responsibility as a citizen of Alaska to control especially his property and not to be at the mercy of some of his leaders or some of the advisors of the Department of the Interior or even Congress.

Meeds: I would answer the chairman by saying that of those two choices, obviously the first is the most acceptable and indeed the only acceptable choice. What I would prefer is that it be a combination of things. First of all, that it provide the framework under which the individual Native can best assert himself with some control, the maximum amount of control over his own destiny. I recognize that that has to work within a framework, with

a framework of some kind of social order as we work in these United States. I cannot do everything I want as an individual citizen but I hope I contribute to the welfare of all citizens through the social framework in which I participate. I would hope the same thing would apply to the Alaskan Native.

Aspinall: You are responsible just like the rest of us to your community, to your municipality, to your county organization.

Meeds: Exactly.

Aspinall: To your state organization, to any combination within the areas of operation, and to the federal government. Now, isn't what we have in mind as an ultimate goal placing these people up there in this position just as soon as we can possibly do it?

Meeds: Absolutely. I have absolutely no argument with that. I think that it is essential, that this be — that this legislation provide for an orderly integration of the Alaskan Native into the participation not only of his own village organization, his own regional organization, but all of the State of Alaska, municipal corporations, and all other organizations within the state, and the federal government.

Steiger: I hope what the gentleman [Mr. Meeds] was saying was that we are going to provide autonomy for these people wherever it does not present any of your civil rights problems *or is in conflict with states rights of Alaska* and I think if we approach it on that basis, I think we can come as close to accomplishing the gentleman's objective as possible.

Meeds: I agree with you wholeheartedly.<sup>163</sup>

At the conclusion of that discussion, chairman Aspinall summarized the policy objective that the Subcommittee on Indian Affairs intended to advance as "get[ting] these people into a position where they can be a part of the mainstream of Alaska and the United States of America."<sup>164</sup> To codify that policy objective, the House Committee on Interior and Insular Affairs included a section in H.R. 10367 that became section 2(b) of ANCSA. The Committee explained in its report that

[t]he bill does not establish any trust relationship between the [f]ederal [g]overnment and the Natives. The regional corporations and the village corporations will be organized under [s]tate law, and will not be subject to [f]ederal supervision except to the limited extent specifically provided in the bill. All conveyances

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163. *Transcript of Executive Session of the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92d Cong., June 21, 1971* (on file with Center for Legislative Archives, National Archives) (emphasis added).

164. *Id.*; see *Hearings on H.R. 3100, H.R. 7039, and H.R. 7432, supra* note 161, at 84 (statement of Representative Aspinall) ("Many of us on the committee do not wish to see another Bureau of Indian Affairs operation in Alaska, either reservations *or anything in proximity.*" (emphasis added)).

of land will be in fee — not in trust.<sup>165</sup>

When H.R. 10367 passed the U.S. House of Representatives, the Senate adopted an amendment in the nature of a substitute. But embracing the House consensus, in its report on the bill that became the amendment, the Senate Committee on Interior and Insular Affairs explained that “[a] major purpose of this Committee and the Congress is to avoid perpetuating in Alaska the reservation and the trustee system which has characterized the relationship of the [f]ederal government to the Indian peoples in the contiguous [forty-eight] states.”<sup>166</sup>

The House-Senate Conference Committee that wrote the text of the version of H.R. 10367 that was enacted into law also distributed a Joint Statement which explained that “the conference committee does not intend that lands granted to Natives under this Act be considered ‘Indian reservation’ lands for purposes other than those specified in this Act. The lands granted by this Act are not ‘in trust’ and the Native villages are not Indian ‘reservations.’”<sup>167</sup>

For the decade subsequent to the 92d Congress’s enactment of ANCSA there was a broad consensus among Alaska Natives, officials of both the State of Alaska and the Department of the Interior, and interested members of succeeding Congresses that the 92d Congress intended the land that the Secretary of the Interior conveyed to ANCSA corporations in fee title, as well as Alaska Natives who resided thereon, to be subject to the same criminal and civil jurisdiction that the Alaska State Legislature asserted over all other fee title land and over all other Alaska residents. However, in 1982 that consensus cracked, and in 1996 fully crumbled, as a consequence of the circuit court decision in *Venetie II*.

#### VI. THE ALASKA NATIVE SOVEREIGNTY MOVEMENT

In the late 1970s, the political pendulum inside the Alaska Native community began to swing away from support for the policy objectives that ANCSA embodied. When it did, IRA and traditional village councils were the entities around which Alaska Natives who were disillusioned with ANCSA began to organize what they hoped would be a new policy paradigm.

In March 1980, at the annual convention of the Tanana Chiefs Conference,<sup>168</sup> delegates from Athabascan Indian villages in inte-

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165. H.R. REP. NO. 92-523, at 9 (1971).

166. S. REP. NO. 92-405, at 108 (1971).

167. H.R. REP. NO. 92-746, at 40 (1971).

168. In June 1962, Athabascan Indians living in villages throughout interior Alaska met at the village of Tanana to organize to defend Athabascan land rights. To facilitate that objective, the participants organized Dena’ Nena’ Henash (Our

rior Alaska "adopted a resolution calling upon the State of Alaska to recognize the region's village governments as legitimate local governments . . . ." <sup>169</sup> Once launched, what would become known as the Native sovereignty movement spread rapidly through rural Native Alaska, and by 1981, Native residents of eighteen villages that had not been issued IRA constitutions petitioned the Secretary of the Interior to issue their village an IRA constitution. When the Bureau of Indian Affairs announced that Secretary James Watt would issue a constitution to the Athabascan Indian village of Circle, Alaska Governor Jay Hammond on November 5, 1981 pointed out to Secretary Watt that

[t]he creation or recognition of federally-chartered tribal governments subsequent to passage of the Alaska Native Claims Settlement Act in 1971 raises many unanswered questions regarding [s]tate-[f]ederal and [s]tate-Native legal and political relationships. . . . The Alaska Native Claims Settlement Act was silent regarding the future role of the Indian Reorganization Act in Alaska; it neither repealed the Act, nor defined its role with regard to the private, state-chartered Native village and regional corporations which were established pursuant to ANCSA to receive and administer the land and money granted in settlement of aboriginal land claims in Alaska. <sup>170</sup>

The Governor then requested the Secretary to respond to the following questions:

Do tribes or villages chartered under the IRA have authority to adopt ordinances and regulations, and upon what subjects may they act?

Do these tribes or villages have legal authority to control and sanction the conduct of non-members or non-Natives?

What are the territorial boundaries of jurisdiction of these IRA entities?

What is the legal relationship of IRA entities to local governments created under state law?

What legal relationship exists between federally-recognized IRA entities and the State of Alaska and its Constitution and laws?

How do the answers to these questions advance the statements of [c]ongressional policy and specific provisions of

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Land Speaks), an unincorporated regional association. *See Indian Leaders Vote to Organize to Solve Issues*, FAIRBANKS DAILY NEWS-MINER, June 27, 1962, at 2. In 1971, Dena' Nena' Henash, doing business as Tanana Chiefs Conference, incorporated under the State of Alaska Nonprofit Corporation Code.

169. *Chiefs Asks for Village Council Recognition*, TUNDRA TIMES, Mar. 19, 1980, at 4.

170. Letter from Jay S. Hammond, Governor, to Hon. James G. Watt, Secretary, Dep't of the Interior 1-2 (Nov. 5, 1981) (on file with author).

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In response to the Governor's letter, Secretary Watt ordered the Bureau of Indian Affairs to take no further action regarding the approval of new IRA constitutions.<sup>172</sup>

In Alaska, however, increasing numbers of Alaska Natives were embracing the new sovereignty ideology. Reacting to the interest in the subject among an expanding faction of its constituency, in March 1983, the Alaska Federation of Natives sponsored a conference on Native sovereignty in Anchorage, Alaska, that was attended by Natives from villages throughout Alaska.<sup>173</sup> After-hours the participants organized the United Tribes of Alaska ("UTA"),<sup>174</sup> an organization whose announced purpose was advancement of the Native sovereignty movement's agenda.<sup>175</sup>

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171. *Id.* at 2-3.

172. See Letter from Jay S. Hammond, Governor, to Hon. James G. Watt, Secretary, Dep't of the Interior (Aug. 4, 1982) (on file with author) ("There was some concern expressed at . . . [a recent] conference [with leaders of the Alaska native community] that there was still in effect a freeze of the issuance of constitutions to Alaska Native villages by the Department of the Interior on the basis of my earlier letters to you on that matter.").

173. See generally *The Indian Reorganization Act: Transcript of a Conference Sponsored by the Alaska Federation of Natives*, Mar. 8-9, 1983, Anchorage, Alaska (on file with author).

174. See Bill Hess, *Statewide IRA Group Begun*, TUNDRA TIMES, Mar. 16, 1983, at 1.

175. A major impetus for the organization of UTA was that in 1983 a majority of the members of the AFN board of directors did not believe that "tribalization" was in Alaska Natives' political or economic interest. For that reason, at the time it hosted the conference at which UTA was organized, and for sometime thereafter, AFN maintained a purposeful "neutrality" regarding the existence of federally recognized tribes and Indian country in Alaska. See Bill Hess, *UTA: Cooperation Vowed*, TUNDRA TIMES, Oct. 26, 1983, at 1 (reporting that at UTA's first convention Ms. Leask informed the delegates "that AFN had not taken a position on the issue of tribal sovereignty and would not until the board of directors could thoroughly discuss the issue"); Bill Hess, *AFN, IRA Advocates Foresee Cooperation*, TUNDRA TIMES, Apr. 20, 1983, at 2 (reporting that "AFN president Janie Leask said that the organization is keeping a neutral stance in the IRA issue, and in staging the [IRA conference] . . . sought only to provide information to interested parties"). Each October, AFN hosts a convention at which delegates from villages throughout Alaska debate and pass resolutions that establish AFN policy for the coming year. By 1985, a majority of village delegates enthusiastically embraced the idea of Native sovereignty that UTA had been organized to advance. As a consequence, at the 1985 convention, the delegates passed Resolution 85-1, which directed the AFN board of directors to develop a strategy for implementing and protecting tribal government powers in Alaska. See *Tribal Governments Committee to Present Findings to Convention in Written Report*, AFN CONVENTION NEWSLETTER 5, in TUNDRA TIMES, Oct. 13, 1986. In response, the AFN board organized a Committee on Tribal Gov-

Since 1983, the advancement of that agenda has involved the assertion of two legal concepts. The first is that Alaska Native residents of Native villages are members of federally recognized tribes whose governing bodies possess inherent governmental authority. The second is that land that ANCSA required the Secretary of the Interior to convey to ANCSA corporations in fee title is section 18 U.S.C. § 1151(b) dependent Indian community Indian country. For the reasons below, in *Venetie II* the circuit court erroneously accepted both concepts.

## VII. TRIBAL RECOGNITION

The legal status of particular groups of Native Americans as members of a "tribe" whose governing body possesses "inherent" governmental powers has been the subject of analytical confusion that has four root causes.<sup>176</sup>

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ernments. See *AFN Highlights '85-'86*, AFN CONVENTION NEWSLETTER 5, in TUNDRA TIMES, Oct. 13, 1986. At the 1986 AFN convention, the Committee presented a report that identified ten goals for implementing the aforementioned strategy, the first of which was "[c]onfirm[ing] that Alaska Native IRAs and traditional councils are federally-recognized tribes with sovereign immunities and governmental powers comparable to tribes elsewhere in the United States," and the second of which was to "[d]efine the territorial scope of tribal jurisdiction (Indian Country) in Alaska as including all ANCSA lands within the aboriginal use areas of Alaska native villages and all areas, regardless of ownership, contained within the exterior boundaries of those ANCSA lands." Report of the AFN Committee on Tribal Governments 9-13 (1986 AFN Convention) (on file with author). The delegates who attended the 1986 convention approved the report. As a consequence, since 1986 AFN has actively lobbied Congress and the Department of the Interior in support of tribal interests, and has participated in asserting those interests before the federal judiciary, including, most recently, by urging the United States Supreme Court to affirm *Venetie II*. See Brief of the Alaska Federation of Natives as Amicus Curiae, Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't, 117 S. Ct. 2478 (1997) (No. 96-1577).

176. The assertion that the governing bodies of federally recognized tribes possess "inherent" governmental authority is a fundamental principle of contemporary Native American legal ideology. See, e.g., FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 232 (Rennard Strickland & Charles F. Wilkinson eds., Michie 1982) (asserting that "Indian tribes . . . have been recognized . . . by the United States, as 'distinct, independent political communities' qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty" (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832))); see also 140 CONG. REC. H3803 (daily ed. May 23, 1994) (statement of Rep. Bill Richardson, Chairman, Subcomm. on Indian Affairs of the House Comm. on Natural Resources) (informing the U.S. House of Representatives that "[t]he recognition of an Indian tribe by the [f]ederal [g]overnment is an acknowledgement that the Indian tribe is a sovereign entity with governmental authority which predates the U.S. Constitution").

The assertions of Representative Richardson and the authors of the 1982 HANDBOOK OF FEDERAL INDIAN LAW are contemporary manifestations of a prevarication that John Collier and Felix Cohen launched in 1934 for the express purpose of usurping Congress's Indian Commerce Clause authority.

The original text of the bill Secretary of the Interior Harold Ickes sent to Congress, and which in rewritten form was enacted as the IRA, contained an "Indian Self-Government" title. Section 2 of the title authorized the Secretary of the Interior to issue charters to Indians who resided on reservations. The charters *granted* "to the said community group any or all of such powers of government . . . as may seem fitting in the light of the experience, capacities, and desires of the Indians concerned." And more particularly, section 4 of the title authorized the Secretary "to *grant* to any community which may be chartered under this Act . . . any or all of the powers hereinafter enumerated," after which the section enumerated ten governmental powers. *See 1934 Senate Hearings, supra* note 47, at 1-7 (emphasis added).

The members of the Senate and House Committees on Indian Affairs had no intention of granting the governing bodies of Indian tribes the powers enumerated in section 4 of the Indian Self-Government title. When that fact became apparent, Collier negotiated language that was included in section 16 of the version of the bill that the 73d Congress enacted into law which acknowledged that, in addition to the limited powers specified in the Act, the governing bodies of tribes that would be issued IRA constitutions possessed "all powers vested in any Indian tribe or tribal council by existing law."

Four months *after* the IRA was enacted, Solicitor Nathan Margold published an opinion (which likely was written by Felix Cohen) that enumerated the powers that "existing law" purportedly vested. *See Powers of Indian Tribes, 55 Decisions of the Dep't of the Interior 14 (1934).*

Vine Deloria, Jr. and Clifford Lytle, the historians of the enactment of the IRA, have described the objective and the consequences of Margold's subterfuge as follows:

"Powers of Indian Tribes" was issued on October 25, 1934, and was some thirty-two pages in length, hardly a casual commentary on the wording of the statute. The opinion adopted the theory that "those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished . . . ."

The reasoning of the opinion, therefore, simply reversed the first draft of Collier's original proposal in that it assumed that tribes already had certain powers and needed only to surrender those powers, or at least some of them, to the new tribal corporation that the IRA authorized . . . .

Some of these powers were undoubtedly of historical origin, and some of these powers can be found in treaty provisions or negotiations. Other powers were simply Margold's projections of rights he believed accrued to the tribes once their basic sovereignty had been established. The only limitation on this inherent sovereignty, according to the opinion, was the previous action of Congress insofar as it had limited tribal sovereignty. *Since Congress had never presumed that tribes had this astounding set of powers*, it was unlikely that they would have thought to limit them specifically. Margold's opinion worked steadily in one direction: buttressing the political powers of the tribe that had not been pre-

The first is that, as Felix Cohen long ago observed, “[t]he term ‘tribe’ is commonly used in two senses, an ethnological sense and a political sense. It is important to distinguish between these two meanings of the term.”<sup>177</sup> The second is that the authority to

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viously acknowledged by any organ, agency, or branch of the federal government . . . .

The scope of this revolutionary opinion cannot be underestimated. Less than a year before, Collier had come to Congress with a forty-page legislative proposal in which he had wanted to vest these same powers in federal municipal corporations that would be authorized by Congress. Section 4 enumerated a list of powers that these new corporations could exercise, and when the list of Margold’s “inherent powers” is compared with section 4 of the bill Collier submitted to Congress, it is apparent that in the opinion, Collier had finessed Congress and simply declared that the powers that Congress would not grant were inherent from the very beginning. Collier had pulled an administrative coup of the first magnitude . . . .

The shift in emphasis must be understood as precisely as possible. Had Collier’s original legislative package been approved without amendment, tribes would have been able to exercise these same powers, except that they would have been *delegated* powers . . . . Delegated powers would have made tribal government a part of the federal government; inherent powers preserved an area of political independence for the tribes across which the United States could not venture. *Modern tribal sovereignty thus begins with this opinion*, although it would be another generation before Indian tribes would understand the difference and begin to talk in the proper terms about their status . . . .

With rare exceptions, Collier, with the assistance of Margold and other members of the Interior legal staff, put considerable flesh on the resurrected idea of tribal sovereignty. They were not foolish enough to broadcast the idea too widely, however, and they rarely spoke of anything resembling sovereignty – it would have alerted the Indian committees of Congress and created a political fight they would undoubtedly have lost . . . .

Collier was safe in his position and secure from any real congressional interference as long as he did not articulate what he was doing in such a manner as to alert the Congress of the vast philosophical changes he was creating . . . .

Since few people could understand the difference between inherent and delegated powers, and no one really cared to understand that distinction, the substance of Collier’s revolution went unchallenged.

DELORIA & LYTLE, *supra* note 57, at 158-60, 168-69 (first and third emphasis added).

177. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 268 (1st ed. 1942). Congress’s decision to “recognize” a group of Native Americans as a tribe in a political sense has important policy consequences that the House Committee on Natural Resources (which exercises legislative jurisdiction over Indian policy in the U.S. House of Representatives) recently described as follows:

“Recognized” is more than a simple adjective; it is a legal term of art. It means that the government acknowledges as a matter of law that a particular Native American group is a tribe by conferring a specific legal status on that group, thus bringing it within Congress’[s] legislative powers. This federal recognition is no minor step. *A formal political act*, it permanently establishes a government-to-government relationship be-

“recognize” a group of Native Americans who are members of a tribe in an ethnological sense as members of a tribe in a political sense is a power that the Indian Commerce Clause of the United States Constitution reserves *exclusively* to Congress (although Congress may delegate the exercise of that power to the federal executive). The third is that Congress may intend its use of the word “tribe” in one statute to mean tribe in an ethnological sense, and may intend its use of the word “tribe” in a different statute to mean tribe in a political sense.<sup>178</sup> The fourth is that because its authority to regulate Native American affairs is plenary, Congress may recognize a group of Native Americans to be a “tribe” for some purposes, but not others.<sup>179</sup>

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tween the United States and the recognized tribe as a “domestic dependent nation,” and imposes on the government a fiduciary trust relationship to the tribe and its members. Concomitantly, it institutionalizes the tribe’s quasi-sovereign status, along with all the powers accompanying that status such as the power to tax.

H.R. REP. NO. 103-781, at 2-3 (1994) (emphasis added).

178. When it uses the word “tribe” or any other undefined word in a statute, Congress is presumed to have intended the word to embody its “ordinary or natural” standard dictionary definition. *Bailey v. United States*, 116 S. Ct. 501, 506 (1995). But that “bare meaning” may not accurately reflect Congress’s intent if the word’s “placement and purpose in the statutory scheme” indicates that Congress intended the word to embody a different definition, because “the meaning of statutory language, plain or not, depends on context.” *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991). In a particular context, Congress may intend an undefined word in one statute, or even in one section of a statute, to embody a definition different than the definition that the same word embodies in a different statute, or in a different section of the same statute:

[The presumption] that identical words used in different parts of the same act are intended to have the same meaning . . . is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent. . . . It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance.

*Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) (citations omitted).

For that reason, to discern the definition of the undefined word “tribe” that Congress intended in a particular statute requires analysis of the text and structure of the statute and the legislative history of the statute. *See Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407, 2412 (1995).

179. In 1976, for example, the 94th Congress recognized ANCSA corporations as “Indian tribe[s]” for the purposes of the Indian Self-Determination Act. *See* 25 U.S.C. § 450b(e) (1994). But in 1978, the 95th Congress recognized “Alaska Native village[s]” as “Indian tribe[s]” for the purposes of the Indian Child Welfare Act, but not ANCSA corporations. 25 U.S.C. § 1903(8) (1994).

In 1936, Solicitor Margold decided that in its enactment of the IRA the 73d

For those reasons, the historical record reveals a consistent uncertainty and even confusion on the part of the several branches of the government of the United States about its relations with and legal responsibilities toward certain Indian tribes throughout the nineteenth and early twentieth centuries. Indeed, a close scrutiny of the various executive orders, [c]ongressional legislation, departmental policies, Solicitor's opinions, and judicial decisions since 1783 . . . discloses an astonishing oblivion of the need for an express declaration or statement regarding which Indian tribes were to be regarded as recognized, until the enactment of the Wheeler-Howard (Indian Reorganization) Act of 1934.<sup>180</sup>

Section 16 of the IRA authorized "[a]ny Indian tribe, or tribes, residing on the same reservation . . . [to] . . . adopt an appropriate constitution and bylaws." And in circular fashion, section 19 of the Act defined the term "tribe" to mean "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." Neither the context in which the word appears nor the legislative history of the IRA provides guidance as to whether the 73d Congress, which enacted the IRA, intended the word "tribe" to mean tribe in an ethnological sense, or to mean a group of Native Americans that a preceding Congress had recognized as a tribe

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Congress did not intend the governing bodies of groups of Native Americans to whom the Secretary of the Interior issued IRA constitutions but who were not members of "historic tribes" to possess "such of those [governmental] powers as rest upon the sovereign capacity of the tribe." Instead, Margold concluded that the 73d Congress intended the governing bodies of nonhistoric tribes to possess only those governmental authorities "which may be delegated by the Secretary of the Interior." Memorandum from Nathan Margold, Solicitor, Dep't of the Interior, to William Zimmerman, Assistant Commissioner of Indian Affairs (Apr. 15, 1936), reprinted in *Pascua Yaqui Tribe Extension of Benefits: Hearing on H.R. 734 Before the Senate Comm. on Indian Affairs*, 103d Cong. 30-31 (1994). In 1978, when the 95th Congress recognized a group of Pascua Yaqui Indians in Arizona as the "Pascua Yaqui Tribe," the Secretary advised members of the new tribe that because they were not members of an historic tribe their governing body did not possess inherent powers of self-government. See Act of Sept. 18, 1978, Pub. L. No. 95-375, 92 Stat. 712. When the tribe complained, the 103d Congress amended the IRA to prohibit the federal executive from taking any administrative action "with respect to a federally recognized tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." Act of May 31, 1994, Pub. L. No. 103-263, § 5(b), 108 Stat. 707 (codified at 25 U.S.C. § 476(f)-(g) (1994)). The 103d Congress doing so was a lawful exercise of its plenary Indian Commerce Clause authority. If the 103d Congress had decided to create different categories of tribes whose governing bodies possessed different governmental authorities, the Indian Commerce Clause would have empowered it to enact that statute as well.

180. William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, AM. J. LEGAL HIST. 331, 332 (1990).

in a political sense. In 1942, Felix Cohen described the problem as follows:

The question of what groups constitute tribes or bands has been extensively considered in recent years by the administrative authorities of the [f]ederal [g]overnment in connection with tribal organization effected pursuant to section 16 of the [Indian Reorganization] Act of June 18, 1934. A showing that the group seeking to organize is entitled to be considered as a tribe, *within the meaning of the act*, is deemed a prerequisite to the holding of a referendum on a proposed tribal constitution, and the basis for such a holding is regularly set forth in the letter from the Commissioner of Indian Affairs to the Secretary of the Interior recommending the submission of a tribal constitution to a referendum vote.<sup>181</sup>

Since the 73d Congress had not addressed the question, Cohen decided on his own the elements of the definition of the word "tribe" in the IRA.<sup>182</sup> However, in 1975 the need for a more analytically precise standard arose as a consequence of *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*.<sup>183</sup>

In 1793, the Second Congress enacted a Nonintercourse Act that prohibited the "purchase or grant of lands . . . from any Indians or nation or tribe of Indians" unless the purchase or grant was "made by a treaty or convention entered into pursuant to the constitution."<sup>184</sup> In 1972 a group of Passamaquoddy Indians, who "constituted . . . a tribe of Indians in the racial and cultural [*i.e.*, ethnological] sense,"<sup>185</sup> filed an action against the Secretary of the Interior in which they alleged that they were a "tribe" within the meaning of the 1793 Act, even though "the [f]ederal [g]overnment ha[d] never entered into a treaty with the Passamaquoddy Tribe, and the Congress ha[d] never enacted legislation which specifically mention[ed] the Passamaquoddies."<sup>186</sup> In opposition, the Secretary argued "that only those Indian tribes which have been 'recognized' by the [f]ederal [g]overnment by treaty, statute or a consistent course of conduct are entitled to the protection of the Nonintercourse Act and, since the Passamaquoddies have not been 'federally recognized,' the Act is not applicable to them."<sup>187</sup>

Rejecting that contention, the United States District Court for the District of Maine concluded that the 2d Congress intended the word "tribe" in the 1793 Nonintercourse Act to mean tribe in an

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181. COHEN, *supra* note 177, at 270-71 (emphasis added).

182. *See id.*

183. 388 F. Supp. 649 (D. Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975).

184. Act of Mar. 1, 1793, ch. 19, § 8, 1 Stat. 329, 330.

185. *Passamaquoddy Tribe*, 388 F. Supp. at 652.

186. *Id.*

187. *Id.* at 654-55.

ethnological sense, rather than tribe in a political sense. In so holding, the court observed that

[i]t may be conceded that the [Passamaquoddy] Tribe has not been "federally recognized," but there is no suggestion in the statute that . . . the Act is not applicable to a particular Indian tribe unless that tribe has been recognized by the [f]ederal [g]overnment by a formal treaty, mention of the tribe in a statute, or a consistent course of administrative conduct.<sup>188</sup>

The district court decision was affirmed on appeal,<sup>189</sup> by which time the Bureau of Indian Affairs had been deluged with petitions from other groups of Native Americans, each asserting tribal status.<sup>190</sup>

Contemporaneously, Congress established the American Indian Policy Review Commission to "conduct a comprehensive review of the historical and legal developments underlying the Indians' unique relationship with the [f]ederal [g]overnment" and to recommend "necessary revisions in the formulation of policies and programs for the benefit of Indians."<sup>191</sup> In the report it submitted in 1977, the Commission recommended that "Congress adopt, in a concurrent resolution, a statement of policy affirming its intention to recognize all Indian tribes," and that, to accomplish that objective, it should create a "special office" whose responsibilities would include "recognizing" all groups of Native Americans as Indian tribes so that "the words 'nonfederally recognized' and federally 'unrecognized' shall no longer be applied to Indian people."<sup>192</sup> Seven months after the Commission submitted its report, Senator James Abourezk, the chairman both of the Commission and of the Senate Select Committee on Indian Affairs, introduced a bill in the 95th Congress whose enactment would have implemented the Commission's recommendation by delegating to the Secretary of

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188. *Id.* at 656.

189. *See* Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 377 (1st Cir. 1975). The First Circuit held that

while Congress'[s] power to regulate commerce with the Indian tribes includes authority to decide when and to what extent it shall recognize a particular Indian community as a dependent tribe under its guardianship, Congress is not prevented from legislating as to tribes generally; and this appears to be what it has done in successive versions of the Nonintercourse Act. There is nothing in the Act to suggest that "tribe" is to be read to exclude a bona fide tribe not otherwise federally recognized.

*Id.* (citations omitted).

190. *See* William W. Quinn, Jr., *Federal Acknowledgement of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83*, 17 AM. INDIAN L. REV. 37, 41 (1992).

191. S.J. Res. 133, 93d Cong., 88 Stat. 1910 (1975).

192. AIPRC REPORT, *supra* note 18, at 37-39.

the Interior the authority to “designate” groups as “federally acknowledged Indian tribes” that would be entitled “to all the rights, privileges, immunities, benefits, and other services which other federally acknowledged Indian tribes are eligible to receive by reason of their status.”<sup>193</sup> Similar bills were introduced in the House of Representatives.<sup>194</sup>

The Committees to which they were referred declined to report either Senator Abourezk’s or any of the other bills. When that fact became apparent, the Assistant Secretary of the Interior for Indian Affairs decided to simply grant to the Secretary of the Interior the authority that the 95th Congress refused to delegate by promulgating regulations that authorized the Secretary to “recognize” groups of Native Americans as tribes in a political sense.<sup>195</sup>

Although they were tribes in an ethnological sense, since 1867, Congress had not recognized Alaska Natives as tribes in a political sense. However, by 1978 Congress had for decades recognized Alaska Natives as tribes for the purposes of granting Alaska Natives eligibility for health and social services that the Indian Health Service and the Bureau of Indian Affairs provide to members of federally recognized tribes in the coterminous states, and allowing Alaska Natives to participate in specific programs such as the Indian Self-Determination Act.<sup>196</sup>

To compound the confusion over Alaska Natives’ tribal status, the supplementary statement that the Assistant Secretary published in 1978 to explain his new recognition regulations unartfully announced that while “[g]roups in Alaska are entitled to petition [for recognition as tribes] on the same basis as groups in the lower [forty-eight] [s]tates,” the regulations “are not intended to apply to groups, villages, or associations which are eligible to organize under the Alaskan Amendment of the Indian Reorganization Act (25 U.S.C. § 473a) or which did not exist prior to 1936.”<sup>197</sup>

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193. S. 2375, 95th Cong. (1977); *see also* 123 CONG. REC. 39,277 (1977) (statement of Sen. Abourezk) (S. 2375 “establishes an administrative procedure and sets forth guidelines to be followed by the Department of the Interior in response to petitioning Indian tribes seeking an acknowledgement of a [f]ederal relationship”).

194. *See* H.R. 11,630, 95th Cong. (1978); H.R. 13,773, 95th Cong. (1978).

195. *See* 43 Fed. Reg. 39,361 (1978). For an analysis of the *ultra vires* nature of the delegation of authority that the Bureau’s regulations conferred on the Secretary of the Interior, *see* Quinn, *supra* note 190, at 47-53.

196. *See* 25 U.S.C. §§ 450b, 1603(d) (1994) (Alaska Native villages and groups and ANCSA corporations are “Indian tribes” eligible “for the special programs and services provided by the United States to Indians because of their status as Indians”).

197. 43 Fed. Reg. 39,361 (1978).

Since ANCSA had not repealed section 1 of the 1936 Alaska amendments to the IRA, Alaska Natives in all Native villages to whom the Secretary of the Interior had not issued an IRA constitution remained eligible to organize under the 1936 Act. For that reason, the supplementary statement indicates that the recognition regulations were not intended to apply to Alaska Natives, and supports the conclusion that the Assistant Secretary of the Interior for Indian Affairs and senior Bureau of Indian Affairs officials did not believe that Alaska Native residents of Native villages previously had been "recognized" as tribes in a political sense.

In addition to granting the Secretary of the Interior authority to recognize groups of Native Americans as tribes in a political sense, the new recognition regulations directed the Secretary to publish "a list of all Indian tribes which are recognized and receiving services from the Bureau of Indian Affairs."<sup>198</sup> Consistent with the conclusion that Alaska Native residents of Native villages had not been "recognized," the first list of recognized tribes that the Assistant Secretary of the Interior for Indian Affairs (acting in the Secretary's stead) published in 1979 did not include any Alaska Native villages or groups.<sup>199</sup> In 1982, the Secretary published an updated list of recognized tribes that also did not include any Alaska Native villages or groups.<sup>200</sup> However, the document in which the updated list was published contained a second list, captioned "Alaska Native Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs," that identified 191 Native villages, plus organizations such as the Douglas Indian, Ketchikan Indian, and Wrangell Cooperative Associations that Natives had formed in non-Native communities, plus regional organizations such as the Inupiat Community of the Arctic Slope and the Tlingit and Haida Indians of Alaska. A preamble in the document that preceded the second list explained why Alaska Native villages and organizations had not been included on the list of tribes as follows:

While eligibility for services administered by the Bureau of Indian Affairs is generally limited to historical tribes and communities of Indians residing on reservations, and their members, unique circumstances have made eligible entities in Alaska which are not historical tribes. Such circumstances have resulted in multiple, overlapping eligibility of native entities in Alaska. To alleviate any confusion which might arise from publication of a multiple eligibility listing, the following preliminary list shows those entities to which the Bureau of Indian Affairs gives prior-

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198. *Id.* at 39,362.

199. *See* 44 Fed. Reg. 7235 (1979).

200. *See* 47 Fed. Reg. 53,130 (1982) (the Alaska Native villages and groups were recognized in a separate list in this same publication).

ity for purposes of funding and services.<sup>201</sup>

The fact that the Assistant Secretary of the Interior for Indian Affairs had concluded that Alaska Natives were not members of recognized tribes whose governing bodies possessed inherent governmental authority did not go unnoticed. Five months after publication of the list, the Alaska Supreme Court in April 1983 in *Board of Equalization v. Alaska Native Brotherhood*<sup>202</sup> held that real property that had been leased by the Ketchikan Indian Corporation ("KIC"), which had been included on the 1982 list of "Alaska Native Entities" and whose Indian members had been issued an IRA constitution in 1940, was subject to taxation by the Borough of Ketchikan. And in response to KIC's petition for rehearing, the court subsequently issued an amended opinion that reaffirmed its original decision.<sup>203</sup>

In a concurring opinion attached to the original decision, Chief Justice Jay Rabinowitz concluded that "KIC is not an Indian tribe and enjoys no sovereign immunity."<sup>204</sup> In his amended concurring opinion, Justice Rabinowitz noted that, although KIC had argued in its petition for rehearing "that 'the United States specifically recognizes KIC as a tribal entity' by virtue of [the 1982 list of Alaska Native Entities],"

[a]s of this writing it is doubtful that the KIC has been "recognized" as a tribe, band, or community. On November 24, 1982, the Bureau of Indian Affairs included the KIC in its notice of "Alaska Native Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs." This listing, however, expressly avoided characterizing Alaskan Native groups as tribes or Indian communities. Instead, the notice stated that "unique circumstances have made eligible additional entities in Alaska which are not historical tribes."<sup>205</sup>

Three weeks after the Alaska Supreme Court issued its amended decision, David S. Case, a prominent member of the Native sovereignty bar,<sup>206</sup> by letter advised Scott Keep, the Department of the Interior Assistant Solicitor for Tribal Government and Alaska, that

[i]t looks like the "Alaska List" chickens are coming quickly home to roost. . . .

From my point of view . . . Justice Rabinowitz's revised con-

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201. *Id.* at 53,134.

202. No. 6453 (Alaska Apr. 15 1983), *withdrawn and replaced by* 666 P.2d 1015 (Alaska 1983).

203. *See Board of Equalization*, 666 P.2d at 1023.

204. *Board of Equalization*, No. 6453, slip op. at 22.

205. *Board of Equalization*, 666 P.2d at 1024 n.2 (citation omitted).

206. Mr. Case is the author of *ALASKA NATIVES AND AMERICAN LAWS* (1984). He also is a judge of the Venetie Tax Court and a defendant in *Venetie II*.

currence is of greater importance than the majority opinion. Ironically, Rabinowitz reads the language of the list of "Alaska native entities" published last year to mean that the Ketchikan Indian Corporation is *not* a federally recognized tribe. He goes on to conclude that KIC is not an "historical" tribe either and therefore not entitled to sovereign immunity.

It would be easy to blame Justice Rabinowitz for what I hope you will agree is an erroneous conclusion, but I think at least part of the credit goes to the Interior Department. Certainly, read one way, it is possible to conclude that the list is in fact a publication of "additional entities in Alaska which are not historical tribes." Reading the FAP regulations (25 CFR Part 83) one might conclude, as does Justice Rabinowitz, that "historical" existence is the *sine qua non* of tribal existence. It therefore follows that since KIC is not an historical tribe it is not a recognized tribe.

Without debating the department's responsibilities to protect and promote tribal government in Alaska, it does seem to me that the department has the responsibility not to confuse things any more than they already are. I would hope, for example, that one thing everybody could agree on is that a group organized under the IRA in Alaska is "recognized." That, as Justice Rabinowitz acknowledges, would be sufficient to afford it sovereign immunity. Citing the Alaska list, however, he concludes that it is "doubtful" that KIC has been "recognized" by the department. He goes on to suggest that KIC could become recognized by applying to the department under the FAP regulations. Justice Rabinowitz's opinion is not without some weight. He is a respected jurist and his conclusions to a substantial degree flow logically from the confusion the department has sown with its characterizations in the Alaska list.

Let me suggest that the department ought to be concerned about the Rabinowitz opinion too. . . .

It does seem to me to be a question of law more than policy and that the Division of Indian Affairs ought to give the list some serious reconsideration.<sup>207</sup>

Five months after Mr. Keep's receipt of Mr. Case's letter, the Assistant Secretary of the Interior for Indian Affairs in December 1983 published another list of "Indian Tribal Entities" and a list of "Native Entities Within the State of Alaska."<sup>208</sup> Both lists were nearly identical to the lists he had published the previous year. The single exception was that, with no notice or explanation, the 1983 list of "Native Entities" omitted the preamble that preceded the 1982 list of which Justice Rabinowitz had taken note and about which Mr. Case had complained. In that form the lists were up-

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207. Letter from David S. Case to Scott Keep, Assistant Solicitor, Tribal Government and Alaska Dep't of the Interior 1-2 (July 6, 1983) (on file with author).

208. See 48 Fed. Reg. 56,862 (1983).

dated and republished in 1985 and 1986.<sup>209</sup>

Over the next two years, Mr. Case and other Native sovereignty advocates continued to lobby Reagan Administration Department of the Interior officials, as well as career employees such as Mr. Keep, to modify the list to “clarify” that the Secretary of the Interior had “recognized” Alaska Native residents of Native villages as “tribes” that possessed inherent governmental authority.<sup>210</sup> In response to the pressure, when the Assistant Secretary of the Interior for Indian Affairs in December 1988 updated the lists at the end of the Reagan Administration,<sup>211</sup> he again published separate lists of “Indian Tribal Entities” and “[Alaska] Native Entities,” but added additional entities to the latter list, as well as a preamble that in pertinent part explained that

inclusion on a list of entities already receiving and eligible for Bureau funding and services does not constitute a determination that the entity either would or would not qualify for [f]ederal [a]cknowledgement under the regulations, but only that no such effort is necessary in order to preserve eligibility. *Furthermore, inclusion on or exclusion from this list of any entity should not be construed to be a determination by this Department as to the extent of the powers and authority of that entity.*<sup>212</sup>

That was the status of the Department of the Interior’s muddled contribution to “clarifying” the Alaska Native tribe “federal recognition” controversy when, less than two weeks prior to the departure of the Bush Administration of which he was a member, Thomas Sansonetti, the Solicitor of the Department of the Interior, issued a 133-page opinion entitled “Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers.”<sup>213</sup> In an attempt at Solomonic wisdom,<sup>214</sup> the Sansonetti opinion first

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209. See 50 Fed. Reg. 6055 (1985); 51 Fed. Reg. 25,115 (1986).

210. To document the extent to which the Department of the Interior’s change of position between 1982 and 1993 regarding the recognition of Alaska Native residents of Native villages as members of tribes in a political sense was a response to an organized lobby, in April 1997 the author filed a Freedom of Information Act request with the Department for all documents relevant to the Department’s change of position. As of the date of submission of this article in October 1997, the Department has declined to produce a single document.

211. See 53 Fed. Reg. 52,829 (1982).

212. *Id.* at 52,832 (emphasis added).

213. Op. Sol. Gen. of Dep’t of the Interior No. M-36,975 (Jan. 11, 1993) [hereinafter Sansonetti Opinion].

214. A sense of the highly political nature of the process that resulted in the conclusions of law that the Sansonetti Opinion announced can be gleaned from the Solicitor’s candid admission in the opinion’s introduction:

In our effort, we have consulted with the Governor and Attorney General of Alaska; numerous Native leaders in Alaska and the contiguous states, as well as their counsel; the Alaska congressional delegation and

concluded that

[t]here is an argument that Congress has recognized the existence of specific Native villages as tribes . . . . The counter argument is that Congress has not been consistent in its inclusion of Alaska Native entities in definitions of "tribe." The statutes discussed and listed above use a variety of formulations in defining what is a "tribe" in Alaska. The repeated inclusion of Alaska Native entities as tribes establishes that Congress believes that there are tribes in Alaska. However, it also may be argued that the variety of definitions used by Congress forecloses a finding that Congress has recognized any specific entity as a tribe.

While we do not express a final conclusion on which of these arguments is better, we do believe that there is sufficient merit to the first argument for the [Bureau of Indian Affairs] and other agencies to proceed in the administration of programs *on the presumption that Native villages listed on the modified ANCSA list are tribes.*<sup>215</sup>

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other congressional leaders; and the members of the Joint Federal-State Commission on Policies and Programs Affecting Alaska Natives . . . . We have received numerous comments, including several detailed legal briefs.

*Id.* at 3.

215. *Id.* at 58-59 (emphasis added). In the analysis that preceded his equivocal conclusion regarding tribal recognition, Solicitor Sansonetti summarized his review of the historical record as follows:

[P]rior to the beginning of this century, the special legal status of Alaska Natives was unclear. During this period, territorial law was frequently made applicable to Natives on the same terms as to non-Natives . . . . [A]lthough Natives continued to be subject to territorial law and are today subject to [s]tate law for many purposes, a degree of consensus on their legal status developed in the 20th Century. By the time of enactment of the IRA [in 1934], the preponderant opinion was that Alaska Natives were subject to the same legal principles as Indians in the contiguous 48 states, and had the same powers and attributes as other Indian tribes, except to the extent limited or preempted by Congress.

. . . .  
While the Department's position with regard to the existence of tribes in Alaska may have vacillated between 1867 and the opening decades of this century, it is clear that for the last half century, Congress and the Department have dealt with Alaska Natives as though there were tribes in Alaska.

*Id.* at 46-47.

For the reasons previously described in this article, those conclusions substantially misconstrue the historical record. See *Metlakatla Indian Community, Annette Island Reserve v. Egan*, 362 P.2d 901 (Alaska 1961), *rev'd in part*, 369 U.S. 45 (1962) (concluding after a review of the historical record that "[t]here is not now and never has been an area of Alaska recognized as Indian country [with the possible exception of the Annette Island reserve]" and "[t]here are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law"); *accord* *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988) (after again reviewing the historical record concluding that "[i]n a series of

After that equivocation, Solicitor Sansonetti assumed that in 1948 the 80th Congress intended its enactment of 18 U.S.C. § 1151 to apply to Alaska, and then announced that

[a]lthough there are tribal fee lands, Native townsites, and Native Corporation lands in Alaska, all of which have some Indian character and some of which fall within the protection of certain federal laws, we conclude that the nature of Native land tenure in Alaska after ANCSA leaves little if any room for finding the existence of a dependent Indian community for purposes of classifying lands as Indian country. Our conclusion is not stated in absolute terms because the test for a dependent Indian community is a highly fact-specific and functional one . . . .<sup>216</sup>

We acknowledge, as pointed out by the Native American Rights Fund (NARF),<sup>217</sup> one of the groups offering comments in connection with this opinion, that there are many Natives in Alaska who receive federal Indian program services, and who may thus be characterized in certain respects as “dependent” Indians or Native peoples, and that villages qualifying as tribes are “domestic dependent nations” as are tribes in the contiguous [forty-eight] states. We also accept, for purposes of this review, that many Alaska Natives live in cohesive Native communities. We even recognize that in some respects Native Corporation lands in Alaska have been set aside for the Natives, although not “under federal superintendence” as that phrase is understood in determining Indian country. Nevertheless, Congress has treated ANCSA lands in a dispositive way. Our evaluation of all the factors, particularly in light of ANCSA’s disposition of lands in Alaska for Natives, and the resulting nature of the land title, leads us to conclude that ANCSA lands, whether currently held by Native Corporations or by tribes, do not constitute dependent Indian communities, and that a contrary conclusion would be inconsistent with the ANCSA scheme.<sup>218</sup>

Solicitor Sansonetti’s advice that the Bureau of Indian Affairs should presume that Congress had recognized Alaska Native residents of Native villages to be members of tribes in a political sense whose governing bodies possessed inherent governmental authority, did not, in and of itself, change the Secretary of the Interior’s position regarding the recognition of Native tribes. However, nine months after the issuance of the Sansonetti opinion, the Secretary

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enactments following the Treaty of Cession and extending into the first third of this century, Congress has demonstrated its intent that Alaska Native communities not be accorded sovereign tribal status”).

216. Sansonetti Opinion, *supra* note 213, at 113.

217. At the same time it was attempting to persuade Solicitor Sansonetti that Native residents of Native villages had been recognized as tribes in a political sense and that Congress intended “dependent Indian community” Indian country to exist in Alaska, NARF was representing the Native Village of Venetie with respect to the same issues in the litigation that resulted in *Venetie II*.

218. Sansonetti Opinion, *supra* note 213, at 117-18 (citations omitted).

changed his position.

After assuming office in January 1993, President Clinton nominated Ada Deer, a prominent Native American rights activist and past chairperson of the NARF board of directors,<sup>219</sup> as Assistant Secretary of the Interior for Indian Affairs. In July, when she testified during her confirmation hearing before the Senate Committee on Indian Affairs, Ms. Deer informed the Committee that, in her view, "First and foremost, the heart of Indian policy must be strong, effective tribal sovereignty."<sup>220</sup> Ms. Deer's confirmation was enthusiastically endorsed by the Alaska Federation of Natives, which advised the Committee that her "nomination reflects a new attitude toward tribal rights and other issues affecting Alaska Natives, a refreshing change from the Reagan and Bush Administrations."<sup>221</sup>

As Assistant Secretary, Ms. Deer quickly would demonstrate that AFN's confidence in her enthusiasm for the Native sovereignty movement was well-placed. The previous January, AFN complained to the Senate Committee on Indian Affairs the week after Solicitor Sansonetti issued his opinion that

the Opinion does not say who should make . . . [the determination that Alaska Native residents of a particular Native village had been "recognized" as a tribe] — the courts or the Secretary of the Interior. This leaves the door open for an expeditious and appropriate resolution of the Alaska tribal status question once and for all. Secretary[-Designate] Babbitt can do it by republishing the *Federal Register* list of recognized tribes, expressly stating that such tribes in Alaska enjoy the same tribal status as do the tribes of the South [forty-eight] states. AFN and other Native organizations repeatedly requested Secretary [of the Interior] Lujan to do this during the past two years, and he refused. Nothing in law, regulation, or even this Solicitor's Opinion prevents any Secretary from doing so, and the immediate effect of such action would be decisive. The U.S. Supreme Court has repeatedly held that it is bound by the determinations of the Secretary or of the Congress on questions of tribal recognition anywhere in the country. A secretarial resolution of the tribal status issue would thus remove from all pending cases the danger that the courts might somehow conclude that Alaska Native villages

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219. See *Nomination of Ada Deer: Hearing on the Nomination of Ada Deer to be Assistant Secretary for Indian Affairs Before the Senate Comm. on Indian Affairs*, 103d Cong. 9 (1993) (statement of Ms. Deer that "I was a client, a staff member, a board member, a board chair, and finally, chair of the National Support Committee of the Native American Rights Fund") [hereinafter *Deer Hearing*].

220. *Id.* at 10.

221. Letter from Julie E. Kitka, President, AFN, to Sen. Daniel K. Inouye, Chairman, Senate Comm. on Indian Affairs (July 13, 1993), reprinted in *Deer Hearing*, *supra* note 219, at 84.

are not tribes. That is why we have urged that the idea of the *Federal Register* list be raised with the Secretary-Designate as soon as possible.<sup>222</sup>

The idea was raised with the Secretary-Designate, and, soon after her confirmation, Assistant Secretary Deer in October 1993 appeared before the 1993 AFN convention in Anchorage. The purpose of her appearance was to announce that, as a consequence of her urging, the Secretary of the Interior would publish a new list of tribes that would unilaterally recognize all Alaska Native residents of all Native villages as tribes in a political sense.<sup>223</sup>

A week later, Assistant Secretary Deer published two new lists: the first entitled "Indian Tribal Entities Within the Contiguous 48 States" and the second "Native Entities Within the State of Alaska."<sup>224</sup> The lists were preceded by a supplementary statement that announced that

[t]he purpose of the current publication is to publish an Alaska list of entities [that] . . . eliminate[s] any doubt as to the Department's intention by expressly and unequivocally acknowledging that the Department has determined that the villages and regional tribes listed below are distinctly Native communities and have the same status as tribes in the contiguous states . . . .

This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather, they have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, privileges as other acknowledged tribes; have the right, subject to general principles of [f]ederal Indian law, to exercise the same inherent and delegated authorities available to other tribes; and are subject to the

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222. Memorandum from Julie Kitka, President, AFN, to Patricia Zell, Majority Staff Director, Senate Comm. on Indian Affairs 2-3 (Jan. 19, 1993) (on file with author). The memorandum also advised the Committee that, in AFN's view,

The process by which the [Solicitor's] Opinion reasons to the conclusion that Alaska Native villages, even if recognized as tribes, have no governmental jurisdiction over land or non-members is by far the worst part of the document. Politically motivated and intellectually dishonest, it deserves no place in contemporary Indian law and should be withdrawn and rewritten.

*Id.* at 3.

223. See *U.S. Confers Tribal Status on Natives*, ANCHORAGE DAILY NEWS, Oct. 16, 1993, at A1 ("The announcement, by Ada Deer, the assistant U.S. Interior secretary for Indian affairs, drew cheers at the annual Alaska Federation of Natives convention in Anchorage. Native-rights lawyers and political leaders called it a major development in Alaska's long-running political battle over the tribal sovereignty of the state's 18,000 Eskimos, Indians and Aleuts").

224. See 58 Fed. Reg. 54,364 (1993).

same limitations imposed by law on other tribes.<sup>225</sup>

For reasons as much of serendipity as political intent, Assistant Secretary Deer's publication of the 1993 list would have an important consequence for the adjudication of the tribal status of the Native Village of Venetie in *Venetie II*.

### VIII. VENETIE I

#### A. Tribal Recognition

As discussed above, "the questions whether, to what extent, and for what time . . . [Alaska Natives and other Native American members of 'distinctly Indian communities'] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts."<sup>226</sup> However, while the power to recognize groups of Native Americans as tribes in a political sense is exclusively Congress's, Congress frequently has exercised that power in inattentive and haphazard disregard of Felix Cohen's admonition that when the word "tribe" is used it is important to indicate whether the word is being used to mean tribe in an ethnological sense or tribe in a political sense. Congress's inattention to that important detail has required the United States Court of Appeals for the Ninth Circuit to tread as best it can through a labyrinth of ambiguity regarding Congress's recognition of Alaska Native residents of Native villages as tribes in a political sense. And in the treading, the court in 1988 made the first of what would become a series of wrong analytical turns.

By the mid-1980s, the contention that Native residents of Native villages were members of "federally recognized tribes" whose governing bodies possessed "inherent" governmental authority in Indian country within and surrounding Native villages was being asserted inside the Department of the Interior by representatives of the Native sovereignty movement. However, the same contention also was being asserted in a string of cases in the United States District Court for the District of Alaska — one of which culminated in *Venetie II*.<sup>227</sup>

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225. *Id.* at 54,365-66.

226. *United States v. Sandoval*, 231 U.S. 28, 46-47 (1913) (citations omitted).

227. *See, e.g., Alyeska Pipeline Serv. Co. v. Kluti Kah Native Village of Copper Center*, 101 F.3d 610 (9th Cir. 1996) (assumption by circuit court that the Copper Center Village Council is the governing body of a federally recognized Indian tribe, but fee title land owned by ANCSA corporations inside Trans-Alaska Oil Pipeline right-of-way not Indian country); *Native Village of Tyonek v. Puckett*, 957 F.2d 631 (9th Cir. 1992) (action remanded to the United States District Court for the District of Alaska "to permit the parties to present evidence concerning any factual issues

Subsequent to the enactment of ANCSA, the Indian residents of Venetie and Arctic Village incorporated the Neets'ai Corporation and the Venetie Indian Corporation under the Alaska Corporate Code.<sup>228</sup> Pursuant to section 19(b) of ANCSA,<sup>229</sup> in 1973 the corporations elected to acquire title to the surface and subsurface estates of the 1.8 million acres of land located within the boundaries of the Venetie reservation.<sup>230</sup> In September 1979, the corporations conveyed their interests in the surface and subsurface estates to the Native Village of Venetie Tribal Government ("VTG"), to which the Secretary of the Interior in 1940 had issued an IRA constitution, and in December 1979, the Department of the Interior Bureau of Land Management conveyed fee title to the land located within the boundaries of the Venetie reservation to the corporations.<sup>231</sup>

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that may arise in determining whether the Native village of Tyonek is an Indian tribe in the political sense, and if its real property is 'Indian country'); Native Village of Noatak v. Hoffman, 896 F.2d 1157 (9th Cir. 1990) (assertion by governing body of the Inupiat Eskimo village of Noatak operating under an IRA constitution and by the traditionally organized governing body of the Athabascan Indian village of Circle that, for the purpose of invoking the jurisdiction of the United States District Court for the District of Alaska pursuant to 28 U.S.C. § 1362, the residents of both villages were "Indian tribe[s] . . . with a governing body duly recognized by the Secretary of the Interior"); Chilkat Indian Village, 870 F.2d 1469 (9th Cir. 1989) (assertion by governing body of the Tlingit Indian village of Klukwan operating under an IRA constitution that the residents of the village were members of "a federally recognized Indian tribe" and intervention of the State of Alaska for the purpose of "plac[ing] in issue in district court questions whether the Village was a federally recognized tribe" and validity of "the Village's contention that its fee lands were Indian country").

228. See ALASKA NATIVE LAND CLAIMS 334 (Robert D. Arnold ed., 1978).

229. 43 U.S.C. § 1618(b) (1994). In pertinent part, section 1618 provides:

(a) Notwithstanding any other provision of law . . . the various reserves set aside by legislation or by Executive or Secretarial Order for Native use or administration of Native affairs . . . are hereby revoked . . . . This section shall not apply to the Annette Island Reserve . . . and no person enrolled in the Metlakatla Indian community of the Annette Island Reserve shall be eligible for benefits under this Chapter.

(b) Notwithstanding any other provision of law or of this Chapter, any Village Corporation or Corporations may elect within two years to acquire title to the surface and subsurface estates in any reserve set aside for the use or benefit of its stockholders or members prior to December 18, 1971. . . . In such event, the Secretary shall convey the land to the Village Corporation or Corporations . . . and the Village Corporation shall not be eligible for any other land selections under this Chapter or to any distribution of Regional Corporation funds pursuant to section 1606 of this title, and the enrolled residents of the Village Corporation shall not be eligible to receive Regional Corporation stock.

230. See ALASKA NATIVE LAND CLAIMS, *supra* note 228, at 187.

231. In October 1980, by a vote of their Indian shareholders, the corporations then dissolved. See Letter from Paul S. Williams, First Chief, Native Village of Ve-

Acting as a landowner, in July 1980, VTG leased 400,000 acres of its 1.8 million acre landholding to an Oklahoma company that performed geological work on the leasehold related to the search for commercially marketable quantities of oil and gas.<sup>232</sup> Asserting its self-announced authority to act as a government, in April 1981, VTG informed Alaska Governor Jay Hammond that it was "the governing body and owner/trustee of the ancestral lands and waters of the Neets' Ai Gwich'In Athapaskan Tribe" and, in that capacity, "possess[ed] all of the attributes of a sovereign."<sup>233</sup>

In January 1983, VTG announced that it would lease more of its 1.8 million acre landholding for oil and gas exploration,<sup>234</sup> and, in June 1983, informed the Alaska Attorney General that "it plan[ned] to ignore state taxes and regulations when it develops oil on tribal lands, despite a state attorney general's opinion that state laws apply." As the *Anchorage Daily News* reported the coming conflict,

"Let them try to collect taxes," said Don Wright, consultant to Venetie and former president of the Alaska Federation of Natives. "We'll not be bullied by a bunch of ignorant lawyers." State officials who set foot on village lands will be considered trespassers, Wright said. "If they try to pressure us into violence, they'll get violence," he said. The Venetie oil leases are thus shaping up as a key test of how much power villages can exert over Native lands under federal Indian law. Venetie and neighboring Arctic Village claim that the federal Indian Reorganization Act gives them a special government-to-government relationship with Washington, D.C., that limits state jurisdiction.<sup>235</sup>

In June 1984, VTG held a competitive lease sale "in hopes of attracting major companies to explore and develop oil and gas," but no major companies submitted bids.<sup>236</sup> The disinterest mooted the confrontation between VTG and the State of Alaska over VTG's assertion that its 1.8 million acre landholding was "Indian country" within which the state had no authority to tax oil and gas production or to regulate exploration and production activities, but the confrontation between VTG and the State of Alaska soon was rejoined.

In 1981, the State of Alaska's Yukon Flats School District de-

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netie Tribal Gov't, to Hon. Jay Hammond, Governor of Alaska, at 4-5 (Apr. 22, 1981) (on file with author).

232. See Tom Kizzia, *Village Plans to Ignore State Oil Taxes, Laws*, ANCHORAGE DAILY NEWS, June 21, 1983, at A1.

233. Letter from Paul S. Williams to Hon. Jay Hammond, *supra* note 231, at 4.

234. See *Venetie Reasserts Right to Tax Oil Finds*, ANCHORAGE DAILY TIMES, May 4, 1984, at B4.

235. Kizzia, *supra* note 232, at A1.

236. Susan Fisher, *Venetie Accepts Lease Proposals*, FAIRBANKS DAILY NEWS-MINER, Sept. 7, 1984, at 1.

cided to construct classrooms and improve the gym and lunchroom at the high school it operated in Venetie. Although VTG agreed to make a parcel of its 1.8 million acre landholding available for the new construction, VTG presented the state with a lease agreement whose terms confirmed VTG's "sovereign" status and committed the state to acknowledging VTG's governmental authority. The state refused to execute the agreement, discussions ensued, and in 1985 a lease agreement that contained acceptable terms was negotiated. The circuit court's decision in *Alaska v. Native Village of Venetie (Venetie I)*,<sup>237</sup> describes what happened next:

In 1978, [VTG] adopted a five percent gross receipts tax on businesses operating upon its land. Due to the lack of commercial activity in the area, there was no opportunity to enforce the ordinance. . . . [In 1986, w]hile the [s]tate was soliciting bids [for the school construction project] from contractors, [VTG] announced that it would impose the gross receipts tax on the contractor ultimately selected for the construction project.

The contract was awarded in February 1986, and construction commenced that summer. During that same period, [VTG] replaced its gross receipts tax ordinance with a business activity tax ordinance. The new tax was levied in December, at which time the contractor was notified that it had incurred a liability of approximately \$160,000. Neither the contractor nor the [s]tate paid the tax.

After [VTG] had unsuccessfully attempted to collect the tax, the [s]tate informed [VTG] that, as the real party in interest, it would challenge the tax in federal court. [VTG on October 7, 1987] then filed a complaint in the Venetie Tax Court . . . against the [s]tate, the school district and the contractor. . . . Rather than answering the complaint, [the state, school district, and contractor] brought an action in the [United States District Court for the] District of Alaska for declaratory and injunctive relief against [VTG], Venetie, the Native Court, and others. . . . [The state, school district, and contractor] claimed that neither [VTG] nor Venetie is an Indian tribe empowered to exercise tribal sovereignty, that neither entity exists on an Indian reservation, and therefore, that neither entity has jurisdiction to impose a tax on non-members.<sup>238</sup>

On October 30, 1987, the district court preliminarily enjoined VTG from enforcing its business activity tax in the Venetie Tax Court,<sup>239</sup> and in September 1988, in *Venetie I* the circuit court affirmed the district court's issuance of the injunction.<sup>240</sup> The district court then set about determining (1) whether VTG was the gov-

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237. 856 F.2d 1384 (9th Cir. 1988).

238. *Id.* at 1386.

239. *See id.*

240. *See id.* at 1391.

erning body of a tribe in a political sense that possessed governmental authority to levy a business activity tax and (2) if VTG was the governing body of such a tribe, whether the 1.8 million acres of land that VTG owned in fee title was 18 U.S.C. § 1151(b) dependent Indian community Indian country within which VTG possessed authority to levy its tax on non-members of the tribe.

In *Venetie I*, the circuit court gave the district court the following guidance regarding the test it should employ to determine whether VTG was the governing body of a tribe in a political sense: “[i]f the IRA does not settle the matter, the inquiry would shift to whether [VTG] or Venetie has been otherwise recognized as a tribe by the federal government. *Failing there, tribal status may still be based on conclusions drawn from careful scrutiny of various historical factors.*”<sup>241</sup> Its citation of *Mashpee Tribe v. New Seabury Corp.*<sup>242</sup> was the circuit court’s first analytical wrong turn.

In 1891, the 51st Congress granted the Court of Claims jurisdiction to adjudicate “claims for property . . . taken or destroyed by Indians belonging to any band, tribe or nation in amity with the United States.”<sup>243</sup> In 1901, in *Montoya v. United States*,<sup>244</sup> the Su-

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241. *Id.* at 1387 (citing *Price v. Hawaii*, 764 F.2d 623, 626-28 (9th Cir. 1985); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582-88 (1st Cir. 1979)).

In *Yoder v. Assinibone & Sioux Tribes*, 339 F.2d 360 (9th Cir. 1964), the circuit court held that it did not have jurisdiction over claims alleged by two Indian tribes because the value of the tribes’ claims was less than the \$10,000 required by the statute that conferred federal question jurisdiction. In response to *Yoder*, the 89th Congress granted district courts jurisdiction over all civil actions “brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior.” Act of Oct. 10, 1966, Pub. L. No. 89-635, § 1, 80 Stat. 880, 880 (codified at 28 U.S.C. § 1362).

The text of 28 U.S.C. § 1362 does not indicate whether the 89th Congress intended its use of the word “tribe” to mean tribe in an ethnological sense, or tribe in a political sense; the legislative history of the 1966 Act is similarly silent regarding the question. See S. REP. NO. 89-1507 (1966); H.R. REP. NO. 89-2040 (1966); 112 CONG. REC. 20,768 (daily ed. Aug. 26, 1966), 24,827 (daily ed. Oct. 3, 1966).

In *Price*, a group of Native Hawaiians named Hou Hawaiians alleged that, for the purposes of 28 U.S.C. § 1362, they were an “Indian tribe” whose “governing body [had been] duly recognized by the Secretary of the Interior.” Without deciding the intent of the 89th Congress embodied in the word “tribe” in section 1362, the circuit court concluded that, even if the members of Hou Hawaiians were an “Indian tribe” for the purposes of section 1362, the tribe’s governing body had not been “duly recognized by the Secretary of the Interior,” among other reasons because the Hou Hawaiians had not organized under the IRA (because the 73d Congress that enacted the IRA had not intended its provisions “to apply to aboriginal groups in Hawaii”). See *Price*, 764 F.2d at 626.

242. 592 F.2d 575 (1st Cir. 1979).

243. ch. 538, § 1, 26 Stat. 851 (1891).

244. 180 U.S. 261 (1901).

preme Court assumed that the 51st Congress intended its use of the word “tribe” in the 1891 Act to mean tribe in an ethnological sense, and then observed that a tribe in an ethnological sense was “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.”<sup>245</sup>

In *Mashipee Tribe*, Native American plaintiffs alleged that they were descendants of a “tribe” of Mashipee Indians and that land tribal members had used and occupied had been unlawfully conveyed out of tribal ownership in violation of the 1793 Nonintercourse Act.<sup>246</sup> Four years earlier, in *Joint Tribal Council of Passamaquoddy Tribe v. Morton*,<sup>247</sup> the United States Court of Appeals for the First Circuit had held that the 23d Congress that enacted the 1793 Nonintercourse Act intended its use of the word “tribe” in the Act to mean tribe in an ethnological sense. For that reason, in *Mashipee Tribe* the same court held that even though “[t]he federal government has never officially recognized the Mashipees as a tribe or actively supported or watched over them,” the Native American plaintiffs were a “tribe” for the purposes of the Nonintercourse Act if they could demonstrate that the Mashipee Indians satisfied the test for the existence of a tribe in an ethnological sense that the United States Supreme Court had announced in *Montoya*.<sup>248</sup>

Simply put, neither the *Montoya* test nor the application of that test in *Mashipee Tribe* was relevant to a determination of whether the members of a tribe in an ethnological sense had been recognized by Congress as a tribe in a political sense. Nevertheless, that is the proposition for which the circuit court cited *Mashipee Tribe* to the district court in *Venetie I*.<sup>249</sup>

Two years later, the circuit court made a related error in *Native Village of Noatak*.<sup>250</sup> In *Noatak*, the governing body of the Eskimo village of Noatak, to which the Secretary of the Interior in 1939 had issued an IRA constitution, and the traditional council of the Indian village of Circle, which had not been issued an IRA constitution, alleged that because the Native residents of both villages were members of “tribes” whose governing bodies had been “duly recognized by the Secretary of the Interior,” the district

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245. *Id.* at 266.

246. *See Mashipee Tribe*, 592 F.2d at 579.

247. 528 F.2d 370 (1st Cir. 1975).

248. *See Mashipee Tribe*, 592 F.2d at 582.

249. *See Alaska v. Native Village of Venetie (Venetie I)*, 856 F.2d 1384, 1387 (9th Cir. 1988).

250. 896 F.2d 1157 (9th Cir. 1990), *rev'd on other grounds sub nom. Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

court had jurisdiction pursuant to 28 U.S.C. § 1362 to adjudicate the two villages' claims. When it reviewed the jurisdictional allegation, the circuit court first concluded, after applying the *Montoya* test, that "[t]he Native villages represent bodies of Indians of the same race united in a community under a single government in a particular territory — Noatak at Bering Strait, Circle Village at Upper Yukon-Porcupine. They therefore meet the basic criteria to constitute Tribes."<sup>251</sup>

With respect to Noatak, the court then concluded that, because it had been issued an IRA constitution, the governing body of the tribe had been "duly recognized by the Secretary of the Interior," and hence 28 U.S.C. § 1362 granted the district court jurisdiction over Noatak's claims.<sup>252</sup> With respect to Circle, the court concluded that the governing body of the tribe had not been "duly recognized by the Secretary of the Interior," but then explained why 28 U.S.C. § 1362 nevertheless granted the district court jurisdiction over Circle's claims as follows:

Circle Village, like Noatak, is listed as a Native Village in the Alaska Native Claims Settlement Act. The purpose of this Act was to make "a fair and just settlement of all claims by Natives and Native Groups of Alaska, based on aboriginal claims." The Villages acknowledged by the Act were distinguished from ineligible villages "of a modern and urban character," where the majority of the residents were not natives. The Villages acknowledged by the Act were possessed of aboriginal land claims and became eligible for the benefits provided under the Act. *The Act was congressional recognition of the Native Villages.*

In addition, in three recently enacted statutes — the Indian Self-Determination Act; the Indian Financing Act; and the Indian Child Welfare Act — Congress treated the Native villages as Indian tribes. Arguably, Congress intended to confer recognition *only* for the particular purposes of each piece of legislation. But the nature and scope of the federal government's relationship with the Native Villages, as evidenced by these Acts, indicates that the recognition extends to legal claims. "[I]t is a settled principle of statutory construction that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians."

It is true that section 1362 speaks of recognition by the Secretary of the Interior, not Congress, but the Secretary is only using power delegated by Congress. If Congress has recognized the tribe, a fortiori the tribe is entitled to recognition and is in fact recognized by the Secretary of the Interior. Consequently, Cir-

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251. *Id.* at 1160.

252. *Id.*

cle Village, as well as Noatak, qualifies under section 1362.<sup>253</sup>

In addition to disregarding the express instruction in the phrase “duly recognized by the Secretary of the Interior,” the court’s conclusion — that Congress’s grant of ANCSA benefits to Native residents of a Native village and treatment of those residents as a tribe “for the particular purpose” of receiving benefits conferred by particular statutes was tantamount to a decision by Congress to recognize the same residents as a tribe in a political sense — reflected a misunderstanding regarding the concept of tribal recognition as great as the misunderstanding the court had demonstrated in *Venetie I*.

Compounding the error, nine months after *Noatak*, the circuit court decided *Native Village of Venetie I.R.A. Council v. Alaska (Venetie IRA)*,<sup>254</sup> an Indian Child Welfare Act (“ICWA”)<sup>255</sup> case in which VTG and the Fort Yukon IRA council sought to compel the State of Alaska to recognize their adoption decrees. When they asserted that claim, the councils argued that the state was required to recognize the decrees, not because ICWA mandated that result, but because the decrees had been issued by courts that had been organized by the governing bodies of tribes “possessed of the same sovereignty as are Indian tribes in the lower forty-eight states.”<sup>256</sup>

In *Venetie IRA*, the circuit court agreed in concept with that contention. According to the court,

Indian sovereignty flows from the historical roots of the Indian tribe. Tribal sovereignty exists unless and until affirmatively divested by Congress. Thus, to the extent that Alaska’s natives formed bodies politic to govern domestic relations, to punish wrongdoers, and otherwise to provide for the general welfare, we perceive no reason why they too, should not be recognized as having been sovereign entities. If the native villages of Venetie and Fort Yukon are the modern-day successors to sovereign historical bands of natives, the villages are to be afforded the same rights and responsibilities as are sovereign bands of native Americans in the continental United States.<sup>257</sup>

In reasoning to its result, the court again confused the existence of a group of Alaska Natives as a tribe in an ethnological sense with Congress’s recognition of the group as a tribe in a political sense. The court enthusiastically embraced the ideology of

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253. *Id.* (citations omitted) (emphasis added).

254. 944 F.2d 548 (9th Cir. 1991).

255. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963 (1994)).

256. *Venetie IRA*, 944 F.2d at 556.

257. *Id.* at 558-59 (citations omitted).

“inherent” tribal sovereignty,<sup>258</sup> which by 1990 had become an established legal doctrine whose circumstances of origin in 1934 long since had been forgotten.<sup>259</sup>

Two years later, in *Native Village of Tyonek v. Puckett (Tyonek II)*,<sup>260</sup> the circuit court cited *Native Village of Noatak* and *Venetie IRA* as authority for the proposition that

[a]n Indian community constitutes a tribe [in a political sense] if it can show that (1) it is recognized as such by the federal government, or (2) it is “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.” In addition, we have required that the group claiming tribal status show that they are “the modern-day successors” to a historical sovereign entity that exercised at least the minimal functions of a governing body.<sup>261</sup>

That was the guidance that the circuit court had provided to the district court when the district court set about determining whether VTG was the governing body of a tribe in a political sense,<sup>262</sup> and, if so, whether the 1.8 million acres of land that it owned in fee title was Indian country.

Adhering to the circuit court’s guidance, the district court announced the standard it would apply to make its determination regarding tribal status as follows:

The question to be resolved is whether the present residents of

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258. The court explained its understanding of the recognition of “tribes in a political sense” and the doctrine of “inherent” tribal sovereignty as follows:

In short, Indian tribes are currently recognized as sovereign because they were, in fact, sovereign before the arrival of non-natives on this continent.

The practical result of this doctrine is that an Indian tribe need not wait for an affirmative grant of authority from Congress in order to exercise dominion over its members.

*Id.* at 556 (citations omitted).

259. See, e.g., *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (citing *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), for the proposition that “Indian tribes are ‘domestic dependent nations’ that exercise *inherent* sovereign authority over their members and territories”).

260. 957 F.2d 631 (1992).

261. *Id.* at 635 (citations omitted) (emphasis added).

262. In *Venetie IRA* the circuit court remanded the case to the district court with instructions to

determine whether the native villages of Venetie and Fort Yukon are the modern-day successors to an historical sovereign band of native Americans. If the district court determines that either village is a successor to such a sovereign, it must provide the relief necessary to ensure that the [S]tate of Alaska affords full faith and credit to adoption decrees issued by the tribal courts of the native village.

944 F.2d at 562. On remand, the district court consolidated *Venetie IRA* (No. F86-0075 CIV) with *Venetie I* (No. F87-0051 CIV).

Arctic Village and Venetie and environs are a sovereign Indian tribe. In accordance with well-established law, the Ninth Circuit Court held in *Native Village of Tyonek v. Puckett* that an Indian community constitutes a sovereign tribe if it can show that (1) it is acknowledged as such by the federal government, or (2) it satisfies the traditional common-law definition of a tribe. That definition, quoted by the Ninth Circuit Court from *Montoya v. United States* is as follows:

[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. . . .

Additionally, in *Tyonek* as well as the earlier Ninth Circuit Court decision in this case, the modern definition of sovereign tribal status also requires proof that:

[T]hey are “the modern-day successors” to a historical sovereign entity that exercised at least the minimal functions of a governing body.<sup>263</sup>

Applying that standard, the district court noted that

[n]o-one in this case has contended, and there is no evidence in this case, that Congress has ever acknowledged the tribal status of the Venetie Council, Arctic Village, or the Tribal Government.

Venetie Council and the Tribal Government claims to have been acknowledged. They do not say how, nor when, nor by what agency acknowledgement was effected.<sup>264</sup>

By the time the district court issued its tribal status decision, Assistant Secretary of the Interior for Indian Affairs Ada Deer had published her October 1993 list of “federally acknowledged tribes”<sup>265</sup> whose supplementary statement stated that by publishing the list, the Department of the Interior “expressly and unequivocally acknowledg[ed]” that Alaska Native residents of Native villages (including the Gwich’in Indian residents of Venetie and Arctic Village) were members of tribes whose governing bodies possessed “the same status as tribes in the contiguous states.”<sup>266</sup>

With respect to the relevance of Assistant Secretary Deer’s inclusion of VTG on the 1993 list, the district court first concluded that the Secretary of the Interior had authority to promulgate the

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263. *Native Village of Venetie I.R.A. Council v. Alaska*, No. F86-0075 CIV, slip op. at 10-12 (D. Alaska Dec. 23, 1994) (order regarding tribal status) (quoting *Montoya v. United States*, 180 U.S. 261, 266 (1901); *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992) (quoting *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 559 (9th Cir. 1991))) [hereinafter *Tribal Status Order*].

264. *Id.* at 27.

265. *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 58 Fed. Reg. 54,364 (1993).

266. *Id.* at 54,365.

regulations for acknowledging the political existence of Indian tribes of which the 1993 list was a part.<sup>267</sup> Yet it did not so decide because Congress had delegated its Indian Commerce Clause authority to the Secretary. Rather, it found that since 1978, when the Secretary promulgated the regulations, “Congress ha[d] had a decade and a half in which to challenge this exercise of power” but “had taken no action in response to the acknowledgement of over three hundred tribes by the Secretary in the last sixteen years.”<sup>268</sup> After so holding, the district court then concluded that VTG had presented no evidence

that the BIA or any other Executive Branch [sic] has ever engaged in any adjudicative process aimed at establishing the tribal status of the people of Venetie or Arctic Village. There is no evidence that the Venetie Council, Arctic Village, or the Tribal Government ever petitioned the BIA for acknowledgement under the FAP regulations.<sup>269</sup>

With respect to the Sansonetti Opinion, the district court determined that the Solicitor had

viewed the matter of tribal status for individual Alaska Native villages as an open question. He observed, as had the Ninth Circuit Court[,] that village tribal status depends upon the facts of each case. Ten months later, the Venetie Council and Tribal Government claims to have already been acknowledged as sovereign tribes. If the people of Venetie and Arctic Village were ever acknowledged as a tribe by the BIA, the Solicitor seems not to know of it.<sup>270</sup>

The district court then concluded its analysis by holding that “[t]he Venetie Council and Tribal Government have failed to convince the court that their tribal status has been acknowledged by the federal government. The court concludes that neither of these groups nor Arctic Village is a federally acknowledged tribe.”<sup>271</sup> That said, the district court then held that VTG nevertheless was the governing body of “a sovereign tribe as a matter of law” because the Gwich’in Indian residents of Venetie and Arctic Village satisfied the *Montoya* factual definition of an ethnological tribe.<sup>272</sup>

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267. See *Tribal Status Order*, *supra* note 263, at 27.

268. *Id.* at 25. But see *United States v. Wells*, 117 S. Ct. 921, 929 (1997) (“The Court has frequently cautioned that [i]t is at best treacherous to find in [c]ongressional silence alone the adoption of a controlling rule of law.” (internal quotation marks omitted)) (quoting *NLRB v. Plasterers’ Local Union No. 79*, 404 U.S. 116, 129-30 (1971) (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988) (the Court “generally is reluctant to draw inferences from Congress’[s] failure to act”).

269. *Tribal Status Order*, *supra* note 263, at 29 (citations omitted).

270. *Id.* at 30-31.

271. *Id.* at 31.

272. *Id.* at 51. Between November 1 and November 5, 1993, the district court

In August 1995, the district court issued a second decision in which it held that the 1.8 million acres of land which VTG owns in fee title (*i.e.*, the land that prior to Congress's revocation of the Venetie reservation in section 19(a) of ANCSA had been located within the boundaries of the reservation) was not Indian country within which VTG possessed "power to impose a [business activity] tax upon non-members of the tribe."<sup>273</sup> Having rendered its two decisions, on November 28, 1995, the district court entered a final judgment, after which VTG appealed to the circuit court the district court's holding that VTG's 1.8 million acre landholding was not Indian country.

If the district court erred when it concluded that VTG was the governing body of "a sovereign tribe as a matter of law," then VTG had no governmental authority to levy a business activity tax, regardless of whether its 1.8 million acre landholding was Indian country. Nevertheless, the State of Alaska did not appeal the district court's tribal status decision. On December 4, 1995, at a hearing conducted by the Senate and House Judiciary Committees of the Alaska State Legislature, Alaska Attorney General Bruce Botelho explained that Alaska Governor Tony Knowles had instructed him not to appeal the decision because "this administration has chosen not to have a battle over this issue" in order to "try to develop a better, happier relationship with the villages throughout Alaska."<sup>274</sup> And in a subsequent letter to the Speaker of the Alaska House of Representatives, the Attorney General reiterated that

the decision by the Knowles Administration to withdraw the challenge to federal recognition of tribes in Alaska was not driven by litigation considerations. Instead, it was motivated by a commitment to working with Alaska villages to achieve a healthier, safer environment in which the community is an active participant in solutions. Litigation over the issue of tribal status was viewed as a major impediment to this state-local partnership.<sup>275</sup>

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held a five-day trial to obtain factual evidence regarding the tribal status issue. *See id.* at 10.

273. Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't, No. F87-0051 CIV, slip op. at 52 (D. Alaska Aug. 2, 1995) (order regarding Indian Country) [hereinafter *Indian Country Decision*].

274. *Transcript of Hearing of Joint House and Senate Judiciary Committee, Alaska State Legislature*, Dec. 4, 1995, at 13 (on file with author).

275. Letter from Bruce M. Botelho, Alaska Attorney General, to Hon. Gail Phillips, Speaker of the Alaska House of Representatives (Jan. 11, 1996) (on file with author).

Attorney General Botelho also informed the Speaker that "the Administration's decision to not pursue the litigation over tribal status is also supported by events that, taken together, lead one to conclude that the probability of prevailing in

the federal courts was extremely low." *Id.* at 1. The principal events Attorney General Botelho identified were Congress's enactment of the Federally Recognized Indian Tribe List Act of 1994 ("FRITLA"), Pub. L. No. 103-454, §§ 101-104, 108 Stat. 4791, 4791-92 (1994), and the Tlingit and Haida Status Clarification Act ("THSCA"), Pub. L. No. 103-454, §§ 201-205, 108 Stat. 4791, 4792-93 (1994).

Section 103(3) of FRITLA retroactively delegated authority to the Secretary of the Interior to adopt the regulations for "recognizing" groups of Native Americans as tribes in a political sense that the Secretary had promulgated in 1978, and section 104 directed him to annually publish "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." Section 202(1) of THSCA made a finding that "the United States ha[d] acknowledged the Central Council of Tlingit and Haida Indian Tribes of Alaska pursuant to the Act of June 19, 1935, . . . as a federally recognized Indian tribe."

The 1935 Act referenced in THSCA authorized "the Tlingit and Haida Indians of Alaska" to file a lawsuit in the Court of Claims to recover compensation for the extinguishment of their aboriginal title within the Tongass National Forest. *See* Act of June 19, 1935, Pub. L. No. 151, § 2, 49 Stat. 388 (1935). Contrary to the assertion in section 202(1) of THSCA, the only task the 1935 Act assigned to the "Tlingit and Haida central council" (which did not exist until it was organized by the Bureau of Indian Affairs in 1941, *see* MITCHELL, *supra* note 26, at 313) was the preparation of a roll of Tlingit and Haida communities. In 1965, the 89th Congress amended the 1935 Act to require the Central Council to be reorganized. *See* Act of Aug. 16, 1965, Pub. L. No. 89-130, 79 Stat. 543 (1965). The 1965 Act also recognized the governing body of the reorganized Council as "the official Central Council of Tlingit and Haida Indians for the purposes of [the 1935] Act," and authorized the reorganized Central Council "to prepare plans for the use of said funds [that may in the future be appropriated by Congress to pay the Court of Claims's judgment], and to exercise such further powers with respect to the advance, expenditure, and distribution of said funds as may be authorized by Congress." *Id.* at 599 (emphasis added).

When she compiled her October 1993 list of Native tribes, Assistant Secretary Deer concluded that the 1935 and 1963 Acts did not constitute recognition by Congress that the Central Council was the governing body of a "federally recognized Indian tribe," and, for that reason, did not include the Central Council on her list. When Council officers complained to Alaska Senators Frank Murkowski and Ted Stevens, the senators introduced a bill to require Assistant Secretary Deer to add the Council to her list. *See* S. 1784, 103d Cong. (1993). S. 1784 passed the Senate by unanimous consent after Senator Murkowski assured his colleagues that their passage of the measure "should not be viewed as setting any precedent for [f]ederal recognition of a tribe." 140 CONG. REC. S17,232 (daily ed. Nov. 24, 1993). The text of S. 1784 subsequently was enacted as THSCA.

The extent to which FRITLA (which was enacted after Assistant Secretary Deer published her October 1993 list) may have validated Secretary Deer's attempt to use publication of the list to recognize Alaska Native residents of Native villages as members of tribes in a political sense at present would be conjecture. *But see* H.R. Rep. No. 781, 103d Cong. 5 (1994), reprinted in 1994 U.S.C.A.N. 3768 (House Committee on Natural Resources instructing that "nothing in [FRITLA] should be construed as enhancing, diminishing or changing in any way the status of Alaska Native tribes . . . [or] 'confer[ring] on, or deny[ing] to, any Native organiza-

In *Venetie II*, the State of Alaska's gratuitous concession that VTG was the governing body of a tribe in a political sense would have an important influence on the circuit court's analysis of the Indian country issue.

#### B. Indian Country

As has been described, between 1867 and 1948 Congress did not consider the Territory of Alaska to be "Indian country," except between 1873 and 1899 and then only for the single narrow purpose of enforcement of the federal Indian liquor laws.<sup>276</sup> For that reason, in 1948 neither W.W. Barron and the other revisers of Title 18 of the United States Code nor the 80th Congress that enacted it intended the 18 U.S.C. § 1151 Indian country definition to apply to the Territory of Alaska. Assuming *arguendo* that the revisers and the 80th Congress did intend section 1151 to apply to the Territory, the 92d Congress, by enacting section 19(a) of ANCSA, explicitly extinguished the only type of section 1151 Indian country — reservations — that the members believed (because Judge McCarrey had so indicated in *In re McCord*) might exist in Alaska.

Nevertheless, in *Venetie I* the circuit court assumed that the 80th Congress intended section 1151 Indian country to exist in Alaska at those locations occupied by "dependent Indian communities" as that undefined term appears in 18 U.S.C. § 1151(b).<sup>277</sup>

In the explanatory note they attached to their revision, W.W. Barron and the other revisers informed the 80th Congress that the text of section 1151 was intended to codify the "latest construction of the term [Indian country] by the United States Supreme Court in *U.S. v. McGowan*, following *U.S. v. Sandoval*," and that "Indian allotments were included in the definition on authority of the case of *U.S. v. Pelican*."<sup>278</sup>

In 1910, the 61st Congress enacted a statute that designated "the lands now owned or occupied by" the Pueblo Indians of New Mexico in fee title as "Indian country," particularly for the pur-

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tion any degree of sovereign governmental authority over lands (including management and regulation of the taking of fish and wildlife) or persons in Alaska.' The Act merely requires that the Secretary continue the current policy of including Alaska Native entities on the list of [f]ederally recognized Indian tribes which are eligible to receive services"). What can be said with certainty, is that the legislative history of FRITLA and THSCA demonstrates the lack of interest of present-day members of Congress in sorting through the arcane history of previous Congresses' dealings with Native Americans in the coterminous states, and with Alaska Natives.

276. See *supra* notes 85-92 and accompanying text.

277. See *Alaska v. Native Village of Venetie (Venetie I)*, 856 F.2d 1384, 1390-91 (9th Cir. 1988).

278. H.R. REP. NO. 80-304, pt. 1, at 92 (1947) (citations omitted).

poses of enforcement of the federal Indian liquor laws.<sup>279</sup> In *United States v. Sandoval*,<sup>280</sup> the United States District Court for the District of New Mexico dismissed a criminal prosecution for introducing liquor into a pueblo in violation of the federal Indian liquor laws *inter alia* on the ground that Congress's designation of the pueblo as Indian country "[could] not be sustained as an exercise of the right to regulate commerce with Indian tribes" because "the Pueblo Indians are not tribes within the meaning of the Constitution."<sup>281</sup> In 1913, the United States Supreme Court reversed,<sup>282</sup> and in so holding observed that

[n]ot only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over *all dependent Indian communities* within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state.<sup>283</sup>

In 1938, the Court in *United States v. McGowan*<sup>284</sup> cited *Sandoval* as authority for the reinstatement of libel proceedings for the forfeiture of automobiles used to import liquor in violation of the federal Indian liquor laws into the Reno Indian Colony, a 28.38 acre parcel of land located on the outskirts of Reno, Nevada.<sup>285</sup> The parcel had been purchased with funds that had been appropriated by Congress specifically so that the land could be occupied by Native Americans, title to the parcel was held by the United States, and the parcel was occupied exclusively by Native Americans.<sup>286</sup> After reviewing those facts, the Court held that

[t]he fundamental consideration of both Congress and the Department of the Interior in establishing [the Reno Indian Colony] has been the protection of a dependent people. Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as "reservations." Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out, and it is immaterial whether Congress designates a settlement as a "reservation" or "colony." . . .

The Reno Colony has been validly set apart for the use of the

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279. See Act of June 20, 1910, ch. 310, Pub. L. No. 61-219, § 2, 36 Stat. 557, 560.

280. 198 F. 539 (D.N.M. 1912), *rev'd*, 231 U.S. 28 (1913).

281. *Id.* at 550.

282. See *United States v. Sandoval*, 231 U.S. 28 (1913).

283. *Id.* at 45-46 (emphasis added).

284. 302 U.S. 535 (1938).

285. See *id.* at 538.

286. See *id.* at 537-39.

Indians. The [g]overnment retains title to the lands which it permits the Indians to occupy. The [g]overnment has authority to enact regulations and protective laws respecting this territory. . . .

When we view the facts of this case in the light of the relationship which has long existed between the [g]overnment and the Indians — and which continues to date — it is not reasonably possible to draw any distinction between this Indian “colony” and “Indian country.”<sup>287</sup>

More than twenty years after the enactment of 18 U.S.C. § 1151, in *United States v. Martine*<sup>288</sup> the Tenth Circuit was required to determine whether a parcel of land in New Mexico that the Navajo Tribe (rather than Congress or the Secretary of the Interior) had “purchased with tribal funds from a corporate owner” and owned in fee title was “Indian country” because the parcel was a “dependent Indian community” within the meaning of section 1151(b).<sup>289</sup>

At the outset of its analysis of that question, the court correctly concluded that W.W. Barron and the other revisers intended their inclusion of the term “dependent Indian communities” in section 1151(b) to codify *Sandoval*,<sup>290</sup> which held merely that the Indian Commerce Clause empowers *Congress* to enact a statute that designates a parcel of land as Indian country, *if* the parcel is occupied by a “dependent Indian community.” Although the parcel of land at issue in *Martine* had not been designated by Congress as Indian country, the district court nevertheless had held that the parcel was Indian country by reasoning that the 80th Congress intended its codification of *Sandoval* in section 1151(b) to designate as a “dependent Indian community” *any* parcel of land that satisfied a multi-factor test that the court invented from analytical whole cloth. As the Tenth Circuit noted when it affirmed the district court’s novel approach to statutory construction, “[t]he trial court received evidence as to the nature of the area in question, the relationship of the inhabitants of the area to Indian Tribes and to the federal government, and the established practice of government agencies toward the area.”<sup>291</sup> In *Martine*, the circuit court not only approved the multi-factor dependent Indian community test that the district court invented, but noted in passing that when the district court next applied the test it also should consider “any

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287. *Id.* at 538-39 (emphasis added).

288. 442 F.2d 1022 (10th Cir. 1971).

289. *See id.* at 1023.

290. *See id.* (“The term ‘Indian country’ as used in section 1151 includes Indian reservations, dependent Indian communities, and all Indian allotments.”).

291. *Id.* at 1023.

other relevant factors.”<sup>292</sup>

Nine years later, the Eighth Circuit in *Weddell v. Meierhenry*<sup>293</sup> also was required to discern the congressional intent underlying the term “dependent Indian communities” in 18 U.S.C. § 1151(b). Although the court began its task by correctly noting that in *McGowan* the Supreme Court had “defined a dependent Indian community as one in which the United States retained ‘title to the lands which it permits the Indians to occupy’ and ‘authority to enact regulations and protective laws respecting this territory,’”<sup>294</sup> it then cited *Martine* for the proposition that “other courts” had “expanded” the *McGowan* holding by “considering ‘the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area.’”<sup>295</sup>

A year later, in *United States v. South Dakota*,<sup>296</sup> the Eighth Circuit transformed its approval of *Martine* in *Weddell v. Meierhenry* into a four-part test in which the two elements of the *McGowan* holding were merely the first part. The court explained its test and identified the authority that purportedly supported its application as follows:

In *Weddell* we concluded that whether a particular geographical area is a dependent Indian community depends on a consideration of several factors. These include: (1) whether the United States has retained “title to the lands which it permits the Indians to occupy” and “authority to enact regulations and protective laws respecting this territory,” (2) “the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area,” (3) whether there is “an element of cohesiveness . . . manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality,” and (4) “whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples.”<sup>297</sup>

The Eighth Circuit’s invention of the *South Dakota* test completed the judicial usurpation of congressional authority begun by *Martine*. W.W. Barron and the other revisers who drafted 18 U.S.C. § 1151 intended their revision of Title 18 to change existing substantive law only where their intent to do so was clearly ex-

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292. *Id.* at 1024.

293. 636 F.2d 211 (8th Cir. 1980).

294. *Id.* (quoting *United States v. McGowan*, 302 U.S. 535, 539 (1938)).

295. *Id.* at 212.

296. 665 F.2d 837 (8th Cir. 1981).

297. *Id.* (quoting *Weddell*, 646 F.2d at 212-13) (citations omitted); *accord* *United States v. Azure*, 801 F.2d 336, 339 (8th Cir. 1986).

pressed in the statutory text. And consistent with that rule, they included the term “dependent Indian communities” in 18 U.S.C. § 1151(b) in order to codify the holdings of *Sandoval* and *McGowan*. As discussed, those holdings announced that, in addition to reservations and allotments, Indian country includes parcels of fee title land that Congress explicitly designates as Indian country (as long as the parcels are occupied by dependent Indian communities), as well as parcels of land to which the United States holds title and permits Indians to occupy and within which the United States is empowered to enact regulations and protective laws respecting the parcels.

*Martine* and *South Dakota* transformed 18 U.S.C. § 1151(b) by judicial fiat from a codification of those two narrow rules of law into a delegation by Congress to the federal courts of unfettered authority to declare as Indian country (on the basis of no standard for decision other than the exercise of judicial discretion)<sup>298</sup> any parcel of land that a group of Native Americans occupies, even if Congress has not designated the parcel as Indian country, and even if the United States does not hold title to the parcel and has no authority to enact regulations and protective laws respecting the parcel.

That was the confused state of the law when the circuit court in *Venetie I* cited *Martine* and *South Dakota* and their progeny to the district court as authority for the proposition that “whether an Indian community is Indian country is quite factually dependent.”<sup>299</sup>

Employing *Venetie I* as its template, the district court began its analysis of whether the 1.8 million acres of land that VTG owns in fee title is section 1151(b) Indian country by observing correctly that W.W. Barron and the other revisers and the 80th Congress intended section 1151(b) to codify “the ‘dependent Indian community’ concept as developed in *Sandoval* and *McGowan*.”<sup>300</sup> How-

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298. As one commentator has observed regarding *Martine* and *South Dakota* and their progeny: “courts have strained to develop from scratch various criteria for determining whether a particular community should be deemed a ‘dependent Indian community,’ without any consistent concept of what the term was intended to describe.” Richard W. Hughes, *Indian Law*, 18 N.M. L. REV. 403, 459 (1988). With similar candor, in *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908 (1st Cir. 1996), the First Circuit acknowledged that, after *Martine*, the factors that various courts have weighed to determine whether a parcel of land is section 1151(b) dependent Indian community Indian country have been “established by case law.” *Id.* at 917.

299. *Alaska v. Native Village of Venetie (Venetie I)*, 856 F.2d 1384, 1391 (9th Cir. 1988).

300. *Indian Country Decision*, *supra* note 273, at 15.

ever, the court then determined that “[a]ppos of its common law heritage,” the Indian country “concept” had continued “to develop” through judicial decision, and that *Martine* and *South Dakota* “appear to lead the way in shaping the law of Indian [c]ountry subsequent to the enactment of 18 U.S.C. § 1151.”<sup>301</sup> After so concluding, the court “reformed” the factors identified in *Martine* and *South Dakota* into its own “flexible and variable” four-part test “for determining whether a tribe occupies Indian Country.”<sup>302</sup> Applying its test, the court then concluded that the Gwich’in Indian residents of Venetie and Arctic Village, “although a tribe, are not a dependent Indian community for purposes of 18 U.S.C. § 1151(b)” and the 1.8 million acres of land that VTG owns in fee title consequently were not section 1151(b) Indian country.<sup>303</sup>

In *Venetie II*, the circuit court reversed that holding.

#### IX. VENETIE II AND INDIAN COUNTRY

In *Venetie I* the circuit court observed that, in addition to satisfying the “factually dependent” *Martine* and *South Dakota* tests, whether a parcel of land is section 1151(b) Indian country “is also dependent on whether the inhabitants constitute a tribe for legal purposes.”<sup>304</sup> And in its Indian country decision, the district court reiterated that point by observing that “[a]s is explicit in [*Venetie I*], a claim of Indian Country must be brought by an Indian tribe.”<sup>305</sup> Nevertheless, the State of Alaska did not appeal the district court’s decision that VTG was the governing body of a tribe in a political sense.

For that reason, when it appealed the district court’s Indian country decision to the circuit court, VTG astutely began its argument by asserting that “[t]he issue before this Court is straightfor-

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301. *Id.* at 16.

302. *Id.* at 26. The court’s Indian country decision explained that [t]his court’s review and analysis of the case law of Indian Country suggest the need for some revision of these factors which are somewhat overlapping. The court reforms, and will then apply these factors in this case 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 use and occupancy of Indians as such.

*Id.*

303. *Id.* at 52.

304. *Venetie I*, 856 F.2d at 1391.

305. *Indian Country Decision*, *supra* note 273, at 27.

ward — has Congress *divested* the Native Village of Venetie Tribal Government of its *inherent* sovereign authority to tax, an issue which turns on whether Congress has *extinguished* the ‘Indian Country’ status of Venetie’s lands as defined in 18 U.S.C. § 1151(b).<sup>306</sup> In response, the State of Alaska began its argument by informing the circuit court that “[t]he parties here agree that this case presents a straight-forward issue — has Congress *divested* the Native Village of Venetie Tribal Government of its power to tax non-members, which in part turns on whether the land [VTG] owns is ‘Indian country.’”<sup>307</sup>

By agreeing to VTG’s characterization of the question of law presented for decision, the state conceded that *prior* to the 92d Congress’s enactment of ANCSA, VTG was the governing body of a congressionally recognized tribe in a political sense that possessed inherent governmental authority that included the power to levy a business activity tax; that in 1948 when it enacted the Title 18 code revision, the 80th Congress intended the 18 U.S.C. § 1151 Indian country definition to apply to Alaska; that the factors announced in *Martine* and *South Dakota* were the standards the 80th Congress intended its codification of the term “dependent Indian communities” in 18 U.S.C. § 1151(b) to embody; that prior to the enactment of ANCSA, Congress had intended the Venetie reservation to be 18 U.S.C. § 1151(a) Indian country within which VTG possessed inherent governmental authority to levy a business activity tax; and that since section 19(a) of ANCSA only extinguished 18 U.S.C. § 1151(a) reservation Indian country in Alaska, the 92d Congress not only did not intend its enactment of ANCSA not to extinguish section 1151(b) dependent Indian community Indian country in Alaska, but intended that category of Indian country to continue to exist at all locations in Alaska that the federal judiciary determined — by applying the *Martine* and *South Dakota* factors — to be occupied by “dependent Indian communities.” By implicitly conceding those principles, the State of Alaska invited the circuit court to presume that VTG’s 1.8 million acre landholding was 18 U.S.C. § 1151(b) Indian country, unless it determined that the 92d or a subsequent Congress intended ANCSA or another enactment to extinguish that status explicitly.

Since neither ANCSA nor any subsequent congressional enactment explicitly extinguished the application of 18 U.S.C. § 1151(b) to Alaska, the court’s acceptance of that presumption preordained its conclusion in *Venetie II* “that ANCSA did not extin-

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306. Brief for the Native Village of Venetie Tribal Gov’t at 13, *Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov’t (Venetie II)*, 101 F.3d 1286 (9th Cir. 1996) (No. 96-35042) (emphasis added).

307. Brief of Appellees at 5, *Venetie II* (No. 96-35042) (emphasis added).

guish Indian country in Alaska as a general matter, and that the land Venetie occupies is Indian country.”<sup>308</sup>

Because the State of Alaska did not contest the issue, the circuit court assumed that the 80th Congress intended 18 U.S.C. § 1151 to apply to Alaska. Without analyzing the history of the enactment of the Title 18 code revision of which section 1151 was a part, the court then reaffirmed and expanded its holding in *Venetie I* by announcing that, for the purposes of section 1151(b), the existence of “a dependent Indian community requires a showing of federal set aside and federal superintendence,” and that those

requirements are to be construed broadly and should be informed in the particular case by a consideration of the following factors:

(1) the nature of the area; (2) the relationship of the area inhabitants to Indian tribes and the federal government; (3) the established practice of government agencies toward that area; (4) the degree of federal ownership of and control over the area; (5) the degree of cohesiveness of the area inhabitants; and (6) the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples.<sup>309</sup>

With respect to the “set aside” requirement, the court then concluded that although the 92d Congress intended section 19(a) of ANCSA to extinguish explicitly 18 U.S.C. § 1151(a) reservation Indian country in Alaska, it not only did not intend ANCSA to extinguish section 1151(b) dependent Indian community Indian country in Alaska, but intended the Secretary of the Interior’s conveyance of federal public land to ANCSA corporations organized “under the laws of the State [of Alaska]” to “set aside” the land conveyed for the express purpose of *creating* section 1151(b) Indian country.<sup>310</sup>

The court reasoned to that astounding result by rationalizing “that land set aside for [ANCSA] corporations qualifies as land set aside for the use, occupancy, and protection of Alaska Natives, as such”<sup>311</sup> because “Natives own and manage the corporations”; because the corporations “are the instruments of, and owe obligations to, the Native villages”; because ANCSA and subsequent Acts of Congress exempt certain lands owned by ANCSA corporations from taxation by the State of Alaska; and because ANCSA and subsequent Acts of Congress impose restrictions on the alienation of ANCSA corporation stock.<sup>312</sup>

Among its analytical infirmities, that multi-pronged rationale

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308. *Venetie II*, 101 F.3d at 1289.

309. *Id.* at 1294.

310. *Id.* at 1295-96, 1301-02.

311. *Id.* at 1302.

312. *Id.* at 1295-96.

shredded the hornbook rule that corporations are “legal entit[ies], separate and distinct from [their] . . . shareholders.”<sup>313</sup> It also disregarded the legal consequences that flow from the fact, which the circuit court noted in passing,<sup>314</sup> that the 92d Congress *expressly* intended *all* land conveyed pursuant to ANCSA to *all* ANCSA corporations (including the Neets’ai and Venetie Indian Corporations that the Gwich’in Indian residents of Arctic Village and Venetie organized) to be subject to taxation by the State of Alaska, except for periods of time during which particular parcels of land satisfy specific statutory standards for exemption.

As originally enacted, section 21(d) of ANCSA exempted from the state’s exercise of its taxing authority only those parcels of land owned by ANCSA corporations that were not “developed or leased to third parties,” and then only for a period of twenty years “after the date of enactment of [ANCSA].”<sup>315</sup>

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313. 18 C.J.S. *Corporations* § 8 (1990); accord *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 442 (1934).

The distinction between ANCSA corporations and their Native shareholders may be disregarded if adhering to the distinction would “defeat an overriding public policy.” *Bangor Punta Operations, Inc. v. Bangor & A.R. Co.*, 417 U.S. 703, 713 (1974). But the circuit court’s disregard of the distinction in *Venetie II* not only defeats, but by judicial fiat abrogates, the 92d Congress’s policy choices that Alaska Natives implement the ANCSA settlement through State of Alaska-chartered corporations, and that the land ANCSA corporations have been conveyed in fee title be subject to the jurisdiction of the Alaska State Legislature.

314. See *Venetie II*, 101 F.3d at 1295 (“Under the original version of the Act, the corporations enjoyed . . . immunity from state and local property taxes on undeveloped land.”).

315. As enacted, section 21(d) provided that

[r]eal property interests conveyed, pursuant to this Act, to a Native individual, Native group, or Village or Regional Corporation which are not developed or leased to third parties, shall be exempt from [s]tate and local real property taxes for a period of twenty years after the date of enactment of this Act: *Provided*, That municipal taxes, local real property taxes, or local assessments may be imposed upon leased or developed real property within the jurisdiction of any governmental unit under the laws of the [s]tate: *Provided further*, That easements, rights-of-way, leaseholds, and similar interests in such real property may be taxed in accordance with [s]tate or local law. All rents, royalties, profits, and other revenues or proceeds derived from such property interests shall be taxable to the same extent as such revenues or proceeds are taxable when received by a non-Native individual or corporation.

Alaska Native Claims Settlement Act, Pub. L. No. 92-203, § 21(d), 85 Stat. 688, 713 (1971), *codified at* 43 U.S.C. § 1620(d) (1994). This section is definitive evidence that the 92d Congress did not intend to “set aside” the same land as Indian country. *Cf. McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (holding that “absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing reservation lands” and “*McClanahan* . . . lays to rest any doubt in this re-

From Alaska Natives' perspective, the terms of the section 21(d) exemption were unsatisfactory because the narrowness of the section's purview subjected undeveloped and unleased land owned by ANCSA corporations to the jurisdiction of the State of Alaska's adverse possession statute, as well as, at the end of the twenty year period, to the state's taxing jurisdiction. For that reason, in 1977, the Alaska Federation of Natives asked the House Committee on Interior and Insular Affairs to authorize ANCSA corporations to negotiate land bank agreements that during the pendency of the agreements would shield land subject to the agreements from adverse possession claims asserted pursuant to state law, as well as from the state's taxing jurisdiction (even subsequent to 1991 when the section 21(d) twenty-year exemption period expired).<sup>316</sup>

In the bill it subsequently reported as H.R. 39, the Committee acceded to AFN's request and included as section 806 a provision that established an Alaska Native land bank. Significantly, the provision authorized ANCSA corporations to enter into agreements with *the State of Alaska*.<sup>317</sup> After the House passed H.R. 39, the Senate Committee on Energy and Natural Resources reported a version of the bill that expanded the Native land bank provision into a cooperative management regime that afforded land owned by ANCSA corporations the same land protection benefits that the Native land bank provision authorized,<sup>318</sup> and the 96th Congress

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spect by holding that such taxation is not permissible absent [c]ongressional consent").

316. See *Inclusion of Alaska Lands in National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems: Hearings on H.R. 39, et al., before the Subcomm. on General Oversight and Alaska Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong., pt. 12, at 54 (1977) (statement of Byron Mallot, president, AFN); *id.* at 495-96 (amendments proposed by the Alaska Federation of Natives).

317. See H.R. 39, 95th Cong., § 806 (Apr. 7, 1978), reprinted in H.R. REP. NO. 95-1045, pt. 1, at 40-41 (1978). The Committee advised the House that section 806 had been included in its bill "to enable the Native corporations to voluntarily enter into a program of cooperation with the State [of Alaska] to shield their undeveloped and unimproved lands from future taxation." *Id.* at 192.

318. See H.R. 39, 95th Cong., § 907 (Oct. 9, 1978). The Committee explained in its report that its land bank program was "intended to facilitate *both* the protection of Native land and the effective management of [f]ederal and [s]tate land" and would protect "undeveloped and unimproved Native land" from "disorderly, unplanned development and from *involuntarily* passing from Native ownership." S. REP. NO. 95-1300, at 199-200 (1978) (emphasis added). Since the only means through which land that had been conveyed in fee title to ANCSA corporations pursuant to ANCSA could "involuntarily pass from Native ownership" was through adverse possession, garnishment, and tax liens, all of which involved the exercise of state jurisdiction over the land, the Committee assumed, as was the universal assumption prior to *Venetie II*, that the 92d Congress intended land conveyed in fee

enacted the provision as section 907(c)(2) of the Alaska National Interest Lands Conservation Act ("ANILCA").<sup>319</sup>

In 1982, AFN became concerned that when the twenty-year restriction that sections 7(h)(1) and 8(c) of ANCSA imposed on the alienation of ANCSA corporation stock expired in 1991, Alaska Natives would lose ownership control of ANCSA corporations. To rectify the problem, AFN developed a bill that contained a package of amendments to ANCSA, which the delegates who attended a special convention that AFN convened specifically for that purpose approved in March 1985.<sup>320</sup> And in February 1986, Alaska Congressman Don Young and Senators Frank Murkowski and Ted Stevens introduced the AFN bill as H.R. 4162<sup>321</sup> and S. 2065.<sup>322</sup>

By 1985, when AFN developed its package of amendments, the Native sovereignty movement, in the guise of the United Tribes of Alaska, had become an increasingly vocal interest group within the Alaska Native community. And many members of the movement wanted to replicate the action of the Gwich'in Indians in Venetie and Arctic Village by having their ANCSA village corporations convey their fee title to the land they had received pursuant to ANCSA to their village IRA or traditional councils.

At the time that interest was expressed, the AFN board of directors and most other Alaska Natives assumed that the 92d Congress intended land that had been conveyed in fee title to ANCSA corporations pursuant to ANCSA to be subject to the taxing and other jurisdiction of the State of Alaska, except to the extent that section 21(d) of ANCSA or their inclusion in a land bank agreement protected particular parcels of land from the state's exercise of its jurisdiction. Although including undeveloped land in a land

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title to ANCSA corporations pursuant to ANCSA (including the 1.8 million acres of land that the Secretary of the Interior conveyed to the Neets'ai and Venetie Indian Corporations pursuant to section 19(b) of ANCSA) to be subject to the taxing authority and regulatory jurisdiction of the State of Alaska. Simply put, if the 92d Congress intended land conveyed in fee title to ANCSA corporations pursuant to ANCSA to be 18 U.S.C. § 1151(b) dependent Indian community "Indian country," there was no need for the 96th Congress to have created the land bank program.

319. Pub. L. No. 96-487, § 907(c)(2), 94 Stat. 2371, 2444 (1980) (codified at 43 U.S.C. § 1636 (1994)). Section 904 of ANILCA also amended section 21(d) of ANCSA to begin the 20-year exemption from state real property taxation on the earlier of "the vesting of title pursuant to . . . [ANILCA] or the date of issuance of an interim conveyance or patent" to a corporation, rather than on the date of enactment of ANCSA. *Id.* § 904 (codified at 43 U.S.C. § 1620(d)(1)).

320. See generally *Alaska Native Claims Settlement Act: Oversight Hearing Before the House Comm. on Interior and Insular Affairs*, 99th Cong. (1985) [hereinafter *1985 Oversight Hearing*].

321. 132 CONG. REC. 2016 (1986).

322. 132 CONG. REC. 1885 (1986).

bank agreement protected the land from the state's exercise of jurisdiction indefinitely, pursuant to section 907(c)(2) of ANILCA, only land owned by "Native Corporations" and "persons or groups" that had received land "pursuant to [ANCSA]" was protected when it was included in a land bank agreement. Since land to which an IRA or traditional village council obtained title from an ANCSA village corporation would not be land received "pursuant to [ANCSA]," the conveyance by an ANCSA village corporation of land to an IRA or traditional village council would remove the eligibility of the land for land bank protection.

For that reason, AFN included an amendment in its bill whose enactment would facilitate the conveyance by ANCSA corporations of land to a "qualified transferee entity" ("QTE") by allowing ANCSA corporation land conveyed to a QTE (a designation that included IRA and traditional village councils) to continue to enjoy the land protection benefits that section 21(d) of ANCSA and section 907 of ANILCA land bank provision conferred. And another AFN amendment automatically conferred land bank benefits on undeveloped ANCSA corporation land.<sup>323</sup>

In addition to the QTE provision, delegates at the March 1985 AFN convention who espoused the UTA position wanted the AFN bill to include amendments whose enactment by Congress would statutorily designate ANCSA corporation land as 18 U.S.C. § 1151(b) dependent Indian community Indian country, and authorize the Secretary to accept a conveyance of ANCSA corporation land "in trust."<sup>324</sup> But a majority of the delegates voted to defer ac-

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323. When he introduced S. 2065, Alaska Senator Frank Murkowski explained to the Senate that

[t]he Alaska National Interest Land [sic] Conservation Act authorized a land bank into which corporations could deposit undeveloped lands to protect them from adverse possession and taxation. Excessive administrative delays has [sic] slowed the implementation of the land bank. This bill addresses the bureaucratic delay problem by granting automatic land bank protection for undeveloped lands.

132 CONG. REC. 1911-12 (1986).

324. Section 5 of the IRA authorizes the Secretary of the Interior "to acquire through . . . gift . . . any interest in lands . . . for the purpose of providing land for Indians." See 25 U.S.C. § 465 (1994). In 1976 VTG asked the Secretary whether he would accept VTG's conveyance to him of fee title to the 1.8 million acres of land that the Neets'ai and Venetie Indian Corporations intended to convey to VTG, and, after doing so, to restore the land to trust status. In 1978, the Associate Solicitor for Indian Affairs advised the Assistant Secretary of the Interior for Indian Affairs that it would "be an abuse of the Secretary's discretion to attempt to use Section 5 of the IRA to restore the former Venetie Reserve to trust status" because doing so would violate the express intent of the 92d Congress embodied in ANCSA. In pertinent part, the Associate Solicitor advised that

[t]he Natives of Venetie and Arctic Village elected, pursuant to Section

tion on a resolution whose passage would have committed AFN to that course.<sup>325</sup> However, subsequent to the convention, the attorneys who represented UTA and its member villages drafted a package of amendments whose enactment would have implemented the deferred resolution.<sup>326</sup>

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19(b) [of ANCSA], to take their former reservation in fee. They argue that they thereby disassociated themselves from the settlement legislation and that interpretations based upon the act as a whole should not apply to them. This argument misconstrues the nature of Section 19(b). While a vote to take a former reservation in fee renders the Natives ineligible for the land and monetary benefits generally provided for elsewhere in ANCSA, it is incorrect to say that the vote disassociates them from the settlement. ANCSA was a settlement of all Native claims. It includes Natives on and off reservations . . . The option contained in Section 19(b) was not designed to allow "reservation Natives" to disassociate themselves from the settlement. Rather it was designed to avoid the hardship which would result if these Natives were forced to select land elsewhere, or a lesser total acreage.

Memorandum from the Associate Solicitor, Division of Indian Affairs, to the Assistant Secretary for Indian Affairs 1 (Sept. 15, 1978). In *Venetie II*, the State of Alaska did not bring the Associate Solicitor's memorandum to the attention of the circuit court, see Brief of Appellees, Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't (*Venetie II*), 101 F.3d 1286 (9th Cir. 1996) (No. 96-35042), even though the memorandum had been cited in the Sansonetti Opinion. See Sansonetti Opinion, *supra* note 213, at 112 n.276. Perhaps for that reason, the circuit court concluded that "Congress enabled Native village corporations to *opt out* of ANCSA and to receive title in fee simple to their former reservation lands," and that "[i]n 1973, the shareholders of [the Neets'ai and Venetie Indian C]orporation[s] elected to *opt out* of ANCSA." *Venetie II*, 101 F.3d at 1289-90 (emphasis added).

325. See *AFN Delegates Approve Amendments*, ANCHORAGE DAILY TIMES (Mar. 29, 1985). The TIMES reported that

United Tribes of Alaska had been collecting village delegates' support during the previous two convention days to push a UTA amendment calling for a specific outlining of the rights and privileges of tribes and tribal governments. Many corporate delegates had feared the presentation of such an amendment to Congress would have opened the door to volatile sovereignty issues, which legislators would not have wanted to embroil in any amendment considerations. However, working behind the scenes with Sealaska Corp. (one of the largest of the native corporations), UTA agreed to withdraw its amendment. In conciliation, Sealaska offered a floor proposal to add UTA's amendment wording as a "formal information attachment." Delegates gave overwhelming approval to this.

*Id.*

326. See Memorandum from Lare Aschnebrenner and Bob Anderson to the Association of Village Council Presidents (June 20, 1985), reprinted in *1985 Oversight Hearing*, *supra* note 320, at 224-39. One of the amendments amended 18 U.S.C. § 1151(b) to read:

Except as otherwise provided in Sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means . . . (b) all dependent Indian communities . . . including in Alaska all townsite lands, allotments, village corporation lands, restricted townsite lots, core townships, municipal lands and private lands within the traditional boundaries of

Not only were none of UTA's amendments included in the version of the AFN bill that the Alaska congressional delegation introduced in February 1986, but Alaska Senator Frank Murkowski explained to the Senate at the time of introduction that

this legislation does not try to reinvent the wheel with respect to Alaska Native land claims . . . [and it] does not establish any new relationship between the [f]ederal government and Alaska's Natives nor does it or should it attempt to resolve the questions relating to sovereignty or Indian country in Alaska.<sup>327</sup>

To maintain neutrality regarding the growing Native sovereignty controversy in Alaska, the original text of the AFN bill contained a disclaimer provision that when it reported the bill, the House Committee on Interior and Insular Affairs rewrote it to read:

No provision of the Alaska Native Claims Settlement Act Amendments of 1986 shall be construed as enlarging or diminishing or in any way affecting the scope of governmental powers, if any, of an Alaska Native village entity, including entities organized under the Act of June 18, 1934 (48 Stat. 987), as amended or Traditional Councils.<sup>328</sup>

In July 1986, the U.S. House of Representatives passed the Committee's version of H.R. 4162, after which the bill died in the 99th Congress, principally because the delegates who attended the 1986 AFN convention repudiated a redraft of the text of H.R. 4162 that Alaska Senators Frank Murkowski and Ted Stevens wrote, whose major altered provision rewrote the disclaimer section of the bill to make clear that the 99th Congress did not intend its enactment of the bill to establish Indian country in Alaska.<sup>329</sup>

At the beginning of the 100th Congress, the version of H.R. 4162 that previously had passed the House during the 99th Con-

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*those Alaska native villages.*

*Id.* at 228 (emphasis added).

327. 132 CONG. REC. 191 (1986).

328. H.R. REP. NO. 99-712, at 9 (1986). As originally drafted by the Alaska Federation of Natives, the disclaimer section referenced the bill not "diminishing . . . the scope of governmental powers . . ." The House Committee on Interior and Insular Affairs and the Senate Committee on Energy and Natural Resources rewrote the AFN text to clarify that the amendments were not intended to "enlarge or diminish" the scope of governmental powers. Native sovereignty advocates strenuously objected. See, e.g., *1986 Senate Hearing, supra* note 1, at 106 (statement of William C. "Spud" Williams, President, Tanana Chiefs Conference, alleging that "the inclusion of the term 'enlarging' in the bill is contrary to current federal policy which supports increasing Native self-determination").

329. See *AFN Delegates Seek New 1991 Legislation*, TUNDRA TIMES, Oct. 20, 1986, at 1 (reporting that "Delegates rejected the Senate version of a 1991 bill" and that "Major concerns raised about the bill during the convention were that it could have weakened tribal governments").

gress was reintroduced as H.R. 278, and in March 1987, was reported by the House Committee on Interior and Insular Affairs<sup>330</sup> and passed the House.<sup>331</sup> Prior to the introduction and reporting of the bill, Representative Morris Udall, the chairman of the Committee, and Alaska Representative Don Young, the ranking minority member of the Committee, were lobbied by representatives of the Native sovereignty movement. The lobbyists argued that the phrase “if any” in the disclaimer provision of the bill weakened their case for arguing to the district and circuit courts that prior to the enactment of ANCSA Native residents of Native villages had been recognized as tribes in a political sense, and that the tribes’ governing bodies possessed inherent governmental authority within 18 U.S.C. § 1151(b) dependent Indian community Indian country that continued to exist unless, as section 19(a) of ANCSA had done with respect to section 1151(a) reservation Indian country, ANCSA explicitly extinguished all “dependent Indian communities” in Alaska.<sup>332</sup>

Representative Udall responded to the pressure by noting in the Committee’s report on H.R. 278 that

adding this new section 7c to ANCSA, has been one of the most troubling aspects of this legislation. The action of the Committee in the 99th Congress . . . to limit the disclaimer language of this section to these amendments raised concern among Native groups. While the Committee adopted that course of action in the 99th Congress in view of the controversy associated with the provision, it did not intend to imply that ANCSA may have intended to have an affect on any governmental powers of Alaska native village entities.

ANCSA was an Indian land claims settlement Act. It was not, at the time, the intent of Congress to deal in any way with the issue of governmental authority of villages in Alaska. If village entities had tribal governing powers under existing law prior to

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330. See H.R. REP. NO. 100-31, at 1 (1987) [hereinafter *1987 House Report*].

331. See 133 CONG. REC. 7376-82 (1987).

332. When the Senate Committee on Energy and Natural Resources in 1986 held hearings in Alaska on S. 2065, Clarence Alexander, who testified on behalf of the Alaska Native Coalition (UTA’s successor organization), argued the Coalition’s case as follows:

ANCSA was passed in 1971 to settle the aboriginal land claims. It was simply not dealing in any way with issues of tribal self-government. If there is any principle of Indian [sic] that is unquestionable, it is that the tribal powers of self-government continue unless and until expressly extinguished by Congress. ANCSA did not expressly alter in any way the legal nature or status of any Alaska Native tribes. Nor did it change the preexisting relationship between the United States and the Alaska natives as members of the tribes. Particularly the Settlement Act neither terminated the tribes, nor the status of the Natives as tribal members.

*1986 Senate Hearings, supra* note 1, at 132.

the passage of ANCSA, ANCSA did not affect them. It is the intent of the Committee that this is an issue which should be left to the courts in interpreting applicable law.

Concerns have also been expressed about the inclusion of the phrase "if any" in the language disclaiming any affect of these amendments on the issue of tribal entities in Alaska on the grounds that that phrase indicates a doubt on the part of the Committee that village entities in Alaska have such governing powers under existing law. That was not the Committee's intent. It is included merely to reinforce the Committee's intent that these amendments be neutral on that point. The Committee is aware of the decision of the federal district court in the case of *Native Village of Tyonek v. Puckett* that the village had sovereign immunity from suit characteristic of Indian tribal governments. That is an issue to be determined under other existing law and not under ANCSA or these amendments. In fact, the Tyonek decision and the issues involved are on appeal to the [Ninth] [C]ircuit.<sup>333</sup>

Representative Young responded to the pressure by taking the unusual action of adding additional views to the Committee's report in which he announced that he had

stated throughout consideration of this bill, [that] this legislation does not deal with governments. It deals solely with stock and land ownership. These are ownership issues of private individuals and private corporations — not governments. The amendment adopted last year by the Committee with regard to Section 7(c) clarifies this intent. Any reading of the amendment which I sponsored in the Committee which interprets the intent as affecting the original intent of ANCSA would be erroneous. Clearly and simply, ANCSA is not now before this Committee and this Congress. The 1986 amendments to that Act are all which are considered by the Congress now — it is only upon those amendments which we can act.<sup>334</sup>

By the time H.R. 278 reached the Senate Committee on Energy and Natural Resources, Alaska Senator Frank Murkowski, the principal sponsor of the legislation in the Senate, had, like Representative Young, been repeatedly lobbied by Native sovereignty advocates. But unlike Representative Young, Senator Murkowski not only wanted H.R. 278 to be "neutral on the question of sovereignty,"<sup>335</sup> he wanted the bill also "not [to] foster the establishment of sovereignty."<sup>336</sup> So much so that during the 99th Congress he had asked AFN to submit language to add to S. 2065 whose enactment would "clear up the confusion surrounding the issue of sovereignty in the sense of the more extreme case where

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333. 1987 House Report, *supra* note 330, at 17.

334. *Id.* at 42-43.

335. 1986 Senate Hearings, *supra* note 1, at 39.

336. *Id.* at 574.

we did get the extension of the Indian country per se so that that land would be tax revenue-producing to the IRA and exempted from any other [s]tate authority.”<sup>337</sup>

When no acceptable language was submitted, in 1987, the Senate Committee on Energy and Natural Resources not only re-wrote the disclaimer provision in section 17 of the version of H.R. 278 that it reported to the Senate to preclude the 100th Congress’s enactment of the bill from being “construed to validate or invalidate or in any way affect . . . 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,” but the Committee also removed the QTE provision from the bill.<sup>338</sup>

In October 1987, the Committee’s version of H.R. 278 passed the Senate,<sup>339</sup> and on December 21, 1987 a modified version of the Senate bill, whose text contained changes that had been informally negotiated between interested members of the House Committee on Interior and Insular Affairs and the Senate Committee on Energy and Natural Resources, passed both houses<sup>340</sup> and into law as

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337. *Id.* at 365.

338. S. REP. NO. 100-201, at 23 (1987) (informing the Senate that “[s]ection 7 [of the House-passed version of H.R. 278] would amend the Alaska Native Claims Settlement Act to allow the shareholder of a Native Corporation to vote to convey any, or all, of the corporation’s assets, including, but not limited to land and interests therein, to a qualified transferee entity. This provision was eliminated in the Committee reported bill”).

339. *See* 133 CONG. REC. 29,803-12 (1987).

340. *See* 133 CONG. REC. 36,727-44, 37,713-28 (1987). By a three to one margin, the delegates at the October 1987 AFN Convention voted to accept the Senate version of H.R. 278, even though the QTE provision had been eliminated. The ANCHORAGE DAILY NEWS report on the convention describes the relationship between the enactment of H.R. 278 and the aspirations of proponents of the Native sovereignty movement as follows:

A five-year debate that had threatened to shatter Native solidarity and undermine the Alaska Native Claims Settlement Act ended early Friday evening as the Alaska Federation of Natives reached agreement on changes to the landmark 1971 federal law.

The delegates to the 21st annual AFN convention voted overwhelmingly to separate the complex and potentially explosive issue of tribal sovereignty from the so-called “1991 amendments” . . . .

The votes were pragmatic as well as historic, the Alaska delegation to Congress had made it clear the Senate would accept no 1991 legislation that left the door open to advocates of tribal sovereignty . . . .

The various factions in AFN agree the QTE idea is a good way to protect Native lands. However, if the QTE provision were to appear in the bill, Congress would insist on a disclaimer stating that ownership of land by tribal governments in no way supports the idea that “Indian country” exists in Alaska. U.S. Sens. Ted Stevens and Frank Murkowski, along with Rep. Don Young, made that point forcefully in videotape and telephone messages to the convention earlier in the day.

the ANCSA Amendments of 1987.<sup>341</sup>

Nine years later when it concluded in *Venetie II* that the 92d Congress intended ANCSA to “set aside ANCSA land for Alaska Natives, as such,” and that that action satisfied the “set aside” requirement for the creation of 18 U.S.C. § 1151(b) dependent Indian community Indian country, the circuit court cited provisions of the ANCSA Amendments of 1987 as evidence that the 100th Congress intended that result.<sup>342</sup> The circuit court did so even though the 100th Congress included a disclaimer provision in the amendments in which it instructed that

[n]o provision of . . . the [ANCSA] Amendments of 1987, exercise of authority pursuant to [that] Act, or change made by, or pursuant to, [that] Act in the status of land shall be construed to validate or invalidate or in any way affect . . . 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.<sup>343</sup>

## X. CONCLUSION

During the 91st and 92d Congresses, Alaska Senator Ted Stevens was a principal sponsor of the Senate bills to settle Alaska Native land claims whose texts were melded by the 92d Congress into ANCSA. In 1997, in his annual address to the Alaska State Legislature, Senator Stevens pointedly noted that

I was on the Senate floor when [ANCSA] was passed. In fact, I look back on that day as one of my proudest as a Senator. ANCSA was landmark legislation. It rejected the paternalism of the past and gave Alaska Natives an innovative way to retain their land and culture without forcing them into a failed reservation system.

Much has been said about the *Venetie [II]* case. I won't dwell upon it at great length but will say as one of the principal authors of ANCSA: the Ninth Circuit Court of Appeals was dead wrong.<sup>344</sup>

If Senator Stevens is correct, how did the circuit court reason in *Venetie II* to such a “dead wrong” misconstruction of the intent of Congress regarding the existence of 18 U.S.C. § 1151(b) dependent Indian community Indian country in Alaska, both pre and

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E.W. Piper, *Sovereignty Issue Loses in AFN Vote*, ANCHORAGE DAILY NEWS, Oct. 24, 1987, at A1.

341. Pub. L. No. 100-241, 101 Stat. 1788 (1988).

342. Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't (*Venetie II*), 101 F.3d 1286, 1295-96 (9th Cir. 1996).

343. *Id.* at 1296 (citing Pub. L. No. 100-241, § 17(a), 101 Stat. 1788 (1988)).

344. Address by Hon. Ted Stevens, United States Senator, before a Joint Session of the First Session of the Twentieth Alaska State Legislature (Apr. 2, 1997), *in* SENATE & HOUSE J. SUPP. NO. 9 (1997).

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post-ANCSA? By ignoring the history of the consistent Alaska Native policy that Congress developed, and which the Secretary of the Interior and other federal officials consistently implemented, between the Alaska purchase in 1867 and the enactment of ANCSA in 1971; by ignoring the legislative history of ANCSA; by making no attempt to discern the extent to which the 99th and 100th Congresses considered the Native sovereignty and Indian country issues during their consideration of the legislation that the 100th Congress enacted as the ANCSA Amendments of 1987; by assuming that VTG is the governing body of a tribe in a political sense that possesses “inherent” governmental authority; by assuming that the 80th Congress intended 18 U.S.C. § 1151 to apply to Alaska; and by embracing a judicially invented definition of the term “dependent Indian communities” that bears no relation to the definition that the 80th Congress intended its inclusion of the term in 18 U.S.C. § 1151(b) to codify.

More careful attention to the history of Congress’s enactments could have avoided each of those errors.