LOOK BACK TO GO FORWARD

ELIZABETH SAAGULIK HENSLEY, ESQ.*

INTRODUCTION

This paper addresses the topic "The Alaska Native Claims Settlement Act and The Future of Tribal Jurisdiction in Alaska." It begins with a brief introduction to ANCSA, turning next to a discussion of Alaska Native nationhood and aboriginal title. It then provides an overview of the three foundational American acts that discussed Alaska Native aboriginal title: the Treaty of Cession, the Organic Act, and the Statehood Act. From there, it introduces the Alaska reservation era, the Indian Reorganization and Allotment Acts as applied in Alaska, and post-ANCSA tribal jurisdiction. Finally, it presents concepts and questions for legal practitioners to reflect upon in light of the legal foundation of the Alaska Native corporate and tribal jurisdictional worlds, the developments over the past forty-five years, and as we move forward into the future.

A BRIEF INTRODUCTION TO ANCSA

"A controversy of immense proportions is rapidly coming to a head in Alaska," begins the twenty-four-year-old University of Alaska Inupiaq graduate student's essay-turned-newspaper-article-turned-land-claims-manifesto published in 1966 alerting the world that Alaska Natives claimed title to 100 percent of the land in Alaska.[1] The essay continues:

> It is a situation which has lain dormant (except for sporadic outbursts) since Alaska was purchased from Russia in 1867. This problem has been skirted by Congress, alternately grappled with by the Department of Interior then dropped to allow the furor to

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* Saagulik is an attorney at Landye Bennett Blumstein, LLP in Anchorage, Alaska. She received her J.D. from the University of Arizona James E. Rogers College of Law in 2009, where she earned a Certificate in Indigenous Peoples Law and Policy. She received her B.A. in Anthropology and Native American Studies, with honors, from Dartmouth College in 2005. She is an enrolled citizen of the Native Village of Kotzebue.

1. William Hensley, *What Rights to the Land Have the Alaska Natives?: The Primary Question*, ALASKOOL.ORG (May 1966), http://www.alaskool.org/projects/Ancsa/WLH/WLH66_2.htm.

> settle, kept Alaskan political leaders frustrated, and the courts have ruled time and again – but never with finality nor clarity. The problem is simply this: What are the rights of the Alaska Natives to the property and resources upon which they have lived since time immemorial?[2]

After five years of concentrated efforts, the 92nd Congress legislated an extremely potent solution to the claim of aboriginal title to lands in Alaska by passing the Alaska Native Claims Settlement Act (ANCSA) in 1971.[3] In exchange for the extinguishment of aboriginal title to lands and waters and aboriginal hunting and fishing rights,[4] ANCSA mandated transfer of fee simple title for forty million acres of land to twelve regional and more than 200 village corporations[5] to be established pursuant to Alaska state law.[6] It also provided for monetary compensation in the amount of $962.5 million.[7] Alaska Native people alive on December 18, 1971 were entitled to enroll as shareholders of a regional corporation and a village corporation.[8]

The Conference Committee Report that accompanied ANCSA mandated that the Secretary of the Interior and the State of Alaska protect subsistence hunting and fishing.[9] Title VIII of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA) and its implementing

2. *Id*.

3. Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. §§ 1601–1629 (2012)).

4. 43 U.S.C. § 1603(b) ("All 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.").

5. 43 U.S.C. §§ 1611, 1613 (describing land conveyance selection and transfer processes).

6. 43 U.S.C. §§ 1606(d), 1607(a). ANCSA also provided for the creation of a thirteenth, landless regional corporation for Alaska Natives not residing in Alaska. 43 U.S.C. § 1606(c).

7. 43 U.S.C. § 1605(a).

8. 43 U.S.C. § 1604. ANCSA was later amended to allow Alaska Natives born after 1971 to enroll in corporations created by the statute. Alaska Native Claims Settlement Act Amendments of 1987, Pub. L. No. 100-241, § 4, 101 Stat. 1788, 1790 (1988) (codified at 43 U.S.C. §§ 1606(g), 1607(c) (2016)). While officially enacted in 1988, Alaska Natives refer to this legislation as the "1991 Amendments."

9. H.R. CONF. REP. NO. 92-746, at 4 (1971), *as reprinted in* 1971 U.S.C.C.A.N. 2247, 2250 ("The Senate amendment to the House bill provided for protection of the Native peoples' interest in and use of subsistence resources on the public lands. The conference committee, after careful consideration, believes that all Native interests in subsistence resource lands can and will be protected by the Secretary through exercise of his existing withdrawal authority . . . . The conference committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives.")

regulations guarantee "rural" residents' rights to subsistence,[10] but no statute protects Alaska Native rights directly. The legacy of ANCSA on the question of subsistence hunting and fishing is clear if the conference report is honored. However, the battles waged over the last forty-five years tell a different story.

ALASKA NATIVE NATIONS AND ABORIGINAL TITLE

Indigenous communities in Alaska operated as sovereigns with distinct territories until relatively recent times. For example, the late Robert Nasruk Cleveland of the Black River in northwest Alaska described the historical political organization of the Inupiat of northwest Alaska as "nations, just like France, Germany and England are today."[11] He explained to anthropologist Tiger Burch, Jr. that through the early nineteenth century, eleven nations existed in the 40,000 square mile area of northwest Alaska.[12] Burch wrote, "Like modern nations, those of early nineteenth-century northern Alaska had dominion over separate territories, their citizens thought of themselves as being separate peoples, and they engaged one another in war and in trade."[13]

The concept of aboriginal title was first introduced in U.S. jurisprudence in *Johnson v. M'Intosh* in 1823,[14] one of the three foundational federal Indian law cases handed down by the U.S. Supreme Court in the early 1800s.[15] *Johnson v. M'Intosh* characterized aboriginal title as a common law doctrine that indigenous peoples have an exclusive usufructury right in the lands they customarily and traditionally used and occupied and which were subsequently "discovered" by European settlers.[16] The decision established that the U.S. government could extinguish aboriginal title.[17]

10. *See* ANILCA § 804, 16 U.S.C. § 3114 (2016) (giving priority to takings for subsistence uses over other purposes based on three criteria); 50 CFR § 100.5(a) (2016) (limiting subsistence takings "only if you are an Alaska resident of a rural area or rural community").

11. ERNEST S. BURCH, JR., THE IÑUPIAQ ESKIMO NATIONS OF NORTHWEST ALASKA 8 (1998).

12. *Id*. at 10.

13. *Id*. at 8.

14. 21 U.S. (8 Wheat.) 543 (1823).

15. The other two cases were *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). These cases are often referred to as the "Marshall Trilogy" after the decisions' author, Chief Justice John Marshall.

16. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) at 569–70.

17. *Id*. at 585.

FOUNDATIONAL AMERICAN LAW AND ALASKA NATIVES

Reference to Alaska Natives was specifically made in three foundational American acts: the 1867 Treaty of Cession,[18] the 1884 Organic Act,[19] and the 1958 Alaska Statehood Act.[20] They established the foundation upon which future legislation addressing Alaska Native rights would be built.

Treaty of Cession

The U.S. purchased Alaska from Russia on March 30, 1867 through the Treaty of Cession, which President Andrew Johnson signed and the U.S. Senate ratified.[21] Article 3 of the Treaty of Cession briefly addressed Alaska Natives in the following language:

> The inhabitants of the ceded territory, if they should prefer to remain in the ceded territory, they, *with the exception of the uncivilized native tribes*, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. Th*e uncivilized tribes will be subject to such laws and regulations the United States may, from time to time, adopt in regard to aboriginal tribes of that country*.[22]

This section of the Treaty offered the non-Native people in Alaska the enjoyment of the rights, advantages, and immunities of U.S. citizens. It allowed them to enjoy their liberty, property, and religion. It did not offer the same freedoms to Alaska Native people; they would be subject to the laws and regulations the U.S. would create especially for them, from time to time. The last sentence of Article 3 has been read to apply the whole body of federal Indian law to Alaska Natives.[23] When confronted with the issue, federal courts have applied the legal principles of the Marshall Trilogy to

18. Treaty concerning the Cession of the Russian Possessions in North America, U.S.-Russ., Mar. 30, 1867, 15 Stat. 539 [hereinafter Treaty of Cession].
19. Act of May 17, 1884, ch. 53, 23 Stat. 24.
20. An Act to provide for the admission of the State of Alaska into the Union, Pub. L. No. 85-508, 72 Stat. 339 (1958) [hereinafter Statehood Act].
21. Treaty of Cession, *supra* note 18.
22. *Id*. art. III, 15 Stat. at 542 (emphasis added).
23. DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 63 (3d ed. 2002) (citing In re Minook, 2 Alaska 200, 200–221 (D. Alaska 1904)) [hereinafter CASE & VOLUCK]. *See also id.* at 62–66 (discussing interpretation of the Treaty of Cession); ROBERT D. ARNOLD, ALASKA NATIVE LAND CLAIMS 25–26 (1976) (discussing impact of Treaty of Cession on territory occupants).

hold that the U.S. has the right and duty to protect Alaska Native aboriginal title, as with all Native Americans.[24]

Organic Act

The Organic Act of 1884 acknowledged aboriginal title generally, but it sidestepped the question of titling those interests, providing in Section 8, "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."[25] This provision preserved the state of aboriginal title under the Treaty of Cession without determining specific property rights of Alaska Natives or non-Natives.[26]

Statehood Act

The 1958 Statehood Act Section 6(b) granted the new State of Alaska the right to select 103 million acres of "vacant, unappropriated and unreserved" public lands in Alaska.[27] Section 4 of the Statehood Act provided:

> As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter

24. CASE & VOLUCK, *supra* note 23, at 65–66 (citing Sutter v. Heckman, 1 Alaska 188 (D. Alaska 1901), *aff'd on other grounds*, Heckman v. Sutter, 119 F. 83 (9th Cir. 1902); Worthen Lumber Mills v. Alaska Juneau Gold Mining Co., 229 F. 966 (9th Cir. 1916)).
25. Act of May 17, 1884, ch. 53, § 8, 23 Stat. 24, 26.
26. CASE & VOLUCK, *supra* note 23, at 70–72.
27. Statehood Act, Pub. L. No. 85-508, § 6(b), 72 Stat. 339, 340 (1958).

> prescribe, and except when held by individual natives in fee without restrictions on alienation . . . .[28]

Alaska Natives protested the state's land selections to the Department of the Interior on the basis of their continued use and occupancy.[29] In response to these protests and to protect Alaska Native land rights, Secretary of the Interior Stewart Udall temporarily suspended issuance of patents and temporary approvals to the State in 1966.[30] The State sued to compel Secretary Udall to issue the patents and temporary approvals.[31] The Alaska District Court granted the State's motion for summary judgment on the basis that Alaska Native use did not prevent the land from being "vacant, unappropriated and unreserved" and therefore was available under Section 6(b).[32] The Ninth Circuit Court of Appeals reversed and remanded for trial, citing *U.S. v. Berrigan,* a 1905 Alaska District Court case.[33] That case had specifically held that both the Treaty of Cession and the 1884 Organic Act "provided for the protection of the Indian right of occupancy upon the public domain in Alaska."[34] Lengthy litigation would have followed the *Udall* decision, but the first bill to settle Alaska Native land claims had been introduced in Congress by the time it was issued.[35]

ALASKA NATIVES AND LAND

Under American tutelage, Alaska Natives obtained land in a variety of fashions. In 1906, Congress passed the Alaska Native Allotment Act,[36] which permitted Alaska Natives to obtain up to 160 acres of land, paralleling a similar allotment to other Native Americans in the General Allotment Act of 1887.[37] In 1926, Congress provided a mechanism for Alaska Native people to acquire townsite lots, as they were excluded from acquiring similar lands previously that were administratively only provided to non-Natives.[38] In 1934, Congress passed the Indian

28. Statehood Act § 4, 72 Stat. at 339.
29. CASE & VOLUCK, *supra* note 23, at 74.
30. *Id*.
31. *Id*.; State of Alaska v. Udall, 420 F.2d 938, 939 (9th Cir. 1969).
32. CASE & VOLUCK, *supra* note 23, at 74; *Udall*, 420 F.2d at 940.
33. *Udall*, 420 F.2d at 940 (citing U.S. v. Berrigan, 2 Alaska 442 (D. Alaska 1905)).
34. *Berrigan*, 2 Alaska at 445, 448.
35. CASE & VOLUCK, *supra* note 23, at 74.
36. An Act Authorizing the Secretary of the Interior to allot homesteads to the natives of Alaska, Pub. L. No. 59-171, ch. 2469, 34 Stat. 197 (1906).
37. Act of Feb. 8, 1887, ch. 119, § 1, 24 Stat. 388, 388 (codified at 25 U.S.C. §§ 331–333 (2016)) (repealed 2000); CASE & VOLUCK, *supra* note 23, at 28.
38. Act of May 25, 1926, Pub. L. No. 69-280, ch. 379, 44 Stat. 629 (codified at 43 U.S.C. §§ 733–736 (2016)) (repealed 1976); CASE & VOLUCK, *supra* note 23, at 28.

Reorganization Act (IRA).[39] It did not apply to Alaska tribes as originally enacted, but it was amended in 1936 with the intent to place Alaska Natives on the same footing as tribes in the continental United States with respect to governmental authority and land ownership.[40] The IRA provided a pathway for Alaska Native villages to organize under federal constitutions and business charters.[41] It also authorized creation of reserves in Alaska for Alaska Native purposes.[42] Six reserves were eventually created in Alaska under this authority.[43]

Congress established only two Alaska Native reservations: the Annette Islands Indian Reserve in 1891[44] and one in Klukwon.[45] From the late-1800s to 1971, the Bureau of Education created over 150 reservations for Alaska Native purposes by executive order.[46] They varied from less than one acre to hundreds of thousands of acres.[47] In 1919, Congress prohibited establishment of future executive order reservations without legislative consent,[48] though reservations in existence at that time remained in place.[49]

Section 19 of ANCSA abolished all but the Annette Islands Indian Reserve.[50] ANCSA also repealed the Alaska Native Allotment Act.[51]

Alaska Natives and Tribal Governance

Today, tribal governments in Alaska are generally grouped as either "traditional," meaning those organized according to Native custom, or "IRA" governments, meaning those organized pursuant to the Indian Reorganization Act, as amended. While sources quote different numbers,

39. Act of June 18, 1934, Pub. L. No. 73-383, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–479 (2016)).

40. Act of May 1, 1936, ch. 254, 49 Stat. 1250; CASE & VOLUCK, *supra* note 23, at 28–29.

41. 25 U.S.C. § 5123 (2016) (formerly codified at 25 U.S.C. § 476 (2012)).

42. 25 U.S.C. § 496 (2016) (repealed 1976); CASE & VOLUCK, *supra* note 23, at 99.

43. CASE & VOLUCK, *supra* note 23, at 106.

44. Act of May 31, 1938, Pub. L. No. 75-569, ch. 304, 52 Stat. 593.

45. Act of Sept. 2, 1957, Pub. L. No. 85-271, § 2, 71 Stat. 596. Klukwon was originally established by executive order in 1913 but was enlarged by Congress in 1957. CASE & VOLUCK, *supra* note 23, at 84–85.

46. CASE & VOLUCK, *supra* note 23, at 27.

47. *Id*.

48. Act of June 30, 1919, Pub. L. No. 66-3, § 27, 41 Stat. 3, 34.

49. CASE & VOLUCK, *supra* note 23, at 27–28.

50. 43 U.S.C. § 1618(a) (2016). Congress specifically exempted the Reserve based on the history of negotiations with the Metlakatla Indian Community resident there and their preference to remain a reservation. *See* Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977) (reviewing the history of the Metlakatla Indian Community and the Annette Island Reserve regarding relations with the U.S. government).

51. 43 U.S.C. § 1617(a) (2016).

approximately 151 traditional and seventy-five IRA governments exist.[52] While some IRA governments possess very different governing structures than historical indigenous governments, both traditional and IRA governments possess the inherent authority to govern unless Congress has extinguished that power.[53] Historically, during federal recognition processes, the Bureau of Indian Affairs heavily monitored tribes' activities and refused to cooperate with tribes who drafted bylaws and constitutions that skewed from frameworks deemed legitimate by the BIA.[54] Once federally recognized, many tribal governments were relatively impaired due to limited funding and confusion surrounding their powers and status.[55]

As stated above, the application of the IRA to Alaska tribes articulated the U.S. government's recognition of Alaska Natives as unique political entities with statuses likened to Indian tribes in the continental United States. But by the time of the passage of the IRA the U.S. had assumed only a limited land-related trust responsibility in Alaska, so the Act did not provide a clear picture of the reach of tribal jurisdiction in Alaska.[56]

Post-ANCSA Tribal Jurisdiction

Tribal governments in Alaska experienced a reinvigoration starting in the mid-1970s, with passage of the landmark Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA)[57] and the ushering in of a new self-determination era in federal Indian policy to replace the previous era of assimilatory policy. Recognition of tribal self-governance and assertion of jurisdiction has expanded since that time. Contracting and compacting opportunities provided by the ISDEAA have produced exciting results, particularly in the implementation of health, social and tribal government services that otherwise would be provided by the Indian Health Service and the Bureau of Indian Affairs.[58] Alaska Native tribal nonprofit associations have come to play a critical role in the implementation of these programs.[59]

52. *See* CASE & VOLUCK, *supra* note 23, at 327 (discussing origin of estimates).
53. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01(1)(a) (Nell Jessup Newton ed., 2012).
54. CASE & VOLUCK, *supra* note 23, at 329–30.
55. *Id*. at 328.
56. *Id*. at 29.
57. Pub. L. No. 93-638, 88 Stat. 2203 (codified at 46 U.S.C. § 5301 *et seq.* (2016)).
58. *See* CASE & VOLUCK, *supra* note 23, at 347–57 (describing current services provided by the Tanana Chiefs Conference and the Maniilaq Association).
59. CASE & VOLUCK, *supra* note 23, at 394.

Tribal Territorial Jurisdiction

Alaska v. Native Village of Venetie[60] tested whether Alaska tribes retained territorial jurisdiction over ANCSA lands held in fee by a tribal government.[61] The U.S. Supreme Court declined to find that the tribe retained territorial jurisdiction on the basis that ANCSA lands held in fee by the tribe did not constitute "Indian Country" under 18 U.S.C. § 1151.[62] The court would make a positive finding of Indian Country under any one of the following three criteria:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government …,
> (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.[63]

Because no allotments were in question and all reservations had been revoked by ANCSA, the Native Village of Venetie's securing "Indian Country" status for its land depended on meeting the "dependent Indian communities" standard under § 1151(b).[64] The Court administered a two-pronged test to determine whether or not Venetie constituted a "dependent Indian community": (1) the land had to have been "set aside" for Native use, and (2) it had to be under "federal superintendence."[65] In describing the failure of the tribe to meet the "set aside" criterion, the Court reasoned that "ANCSA, far from designating Alaskan lands for Indian use, . . . revoked all existing Alaska reservations 'set aside by legislation or by Executive or Secretarial Order for Native Use,' save one."[66] The Court continued, "In no clearer fashion could Congress have departed from its traditional practice of setting aside Indian lands."[67] The Court declined to find that the "federal superintendence" prong was met, stating: "Equally clearly, ANCSA ended federal superintendence over the Tribe's lands" by revoking the

60. 522 U.S. 520 (1998).
61. *Id.* at 523.
62. *Id.* at 530–32.
63. *Id.* at 526 (quoting 18 U.S.C. § 1151(a)–(c)).
64. *Id.* at 527.
65. *Id.*
66. *Id.* at 532 (quoting 43 U.S.C. § 1618(a)) (emphasis omitted).
67. *Id.*

reservations and by stating that "ANCSA's settlement provisions were intended to avoid a 'lengthy wardship or trusteeship.'"[68]

It is important to note that the *Venetie* decision considered tribally owned fee land;[69] the decision did not address the extent to which tribes maintain territorial jurisdiction over Alaska Native lands of other statuses, such as allotments.

Tribal Personal and Subject Matter Jurisdiction

Courts recognize Alaska tribes as having civil regulatory jurisdiction over their own tribal members, and increasingly, over those who enter into relationships with the tribe or tribal members. U.S. courts recognize that tribal governmental powers are generally inherent powers; they are not delegated by an external authority.[70] They also recognize the inherent authority of tribal governments to adopt the form of government that best suits that particular tribe's practical, cultural and religious needs, to determine their tribal members, and to regulate their own internal government affairs.[71] Alaska tribes have ordinances on the books involving a wide range of subject matter, including but not limited to: marriage, divorce, child custody, adoptions, child protection, foster home licensing, termination of parental rights, family violence, protection of Elders and vulnerable adults, membership and enrollment, exclusion/banishment, law and order, alcohol, health and safety, cultural resources, tribal employment rights, and court codes. Unwritten customary and traditional standards also maintain a core role in tribal governance.

Alaska is referred to as a "PL-280"[72] state. Enacted by Congress in 1953, PL-280 mandated that six states assume criminal[73] and civil jurisdiction[74] over Native people and Indian Country. PL-280 became operative in Alaska following statehood.[75] Because PL-280 granted the state jurisdiction over most criminal cases and some civil cases, tribal jurisdiction in Alaska is generally limited to civil cases.[76] Civil tribal

68. *Id*. at 533 (quoting 43 U.S.C. § 1601(b)).
69. *Id*. at 523.
70. *See, e.g.,* U.S. v. Lara, 541 U.S. 193, 199–200 (2004) (discussing distinction between inherent tribal sovereignty and delegated federal authority).
71. Montana v. U.S., 450 U.S. 544, 564 (1981).
72. Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–1326, and 28 U.S.C. § 1360 (2016)).
73. § 2(a) (codified as amended at 18 U.S.C. § 1162 (2016)).
74. § 4(a) (codified as amended at 28 U.S.C. § 1360 (2016)).
75. Pub. L. No. 85-615, 72 Stat. 545 (1958) (amending PL-280 to include Alaska).
76. CASE & VOLUCK, *supra* note 23, at 408–09.

ordinances can be enforced through tribal law enforcement and a tribal court that uses civil penalties, including fines, community service, destruction of contraband, and other forms of restitution.

For many years, the State of Alaska interpreted PL-280 to mean that the state had jurisdiction over Alaska Natives at the exclusion of tribal jurisdiction.[77] In 1999, the Alaska Supreme Court corrected this flawed interpretation of PL-280 in *John v. Baker*.[78] In *John v. Baker*, the court was tasked with determining "the meaning of 'sovereignty' in the context of Alaska's post-ANCSA landscape by asking whether ANCSA, to the extent that it eliminated Alaska's Indian country, also divested Alaska Native villages of their sovereign powers."[79] The court concluded that "tribes derive the power to adjudicate internal domestic matters, including child custody disputes over tribal children, from a source of sovereignty independent of the land they occupy."[80] The court also held that "as a general rule, our [state] courts should respect tribal court decisions under the comity doctrine."[81]

In rendering its opinion, the *John v. Baker* court relied on the U.S. Supreme Court decision in *Montana v. U.S.*,[82] in which the court held that tribes possess "inherent power to determine tribal membership [and] to regulate domestic relations among members."[83] The *Montana* Court also announced a general rule for tribal civil jurisdiction over non-members: "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[84] However, the Court also announced two exceptions where tribes may permissibly regulate nonmembers: (1) when the nonmembers "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," and (2) when nonmember "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[85]

The Alaska Supreme Court recently built upon its *John v. Baker* decision in *State of Alaska v. Central Council of Tlingit and Haida Indian Tribes of Alaska*.[86] In this decision, issued March 25, 2016, the court affirmed that

77. *See, e.g.*, Native Village of Nenana v. State of Alaska, 722 P.2d 219 (Alaska 1986) (holding that PL-280 gave the state exclusive jurisdiction over certain matters such as Indian child custody).
78. 982 P.2d 738 (Alaska 1999).
79. *Id*. at 750.
80. *Id*. at 754.
81. *Id*. at 763.
82. 450 U.S. 544 (1981).
83. *Id.* at 564.
84. *Id.* at 565.
85. *Id.* at 565–66.
86. Supreme Court No. S-14935, slip op. at 22–23 (Alaska Mar. 25, 2016).

Alaska tribes have inherent authority to "regulate domestic relation among members," specifically in child support cases,[87] and that the state should afford tribal child support orders the same recognition and services as orders issued by other states.[88] Additionally, the court held that the tribal court had non-territorial subject matter jurisdiction over a non-tribal member under the second *Montana* exception:

> In light of federal precedent that recognizes that serious damage to territorial resources fits within the second *Montana* exception when a tribe's inherent sovereignty is based on territory, the serious potential for damage to the next generation of tribal members posed by a tribe's inability to administer parental financial support of member or member-eligible children brings the power to set nonmember parents' child support obligations within the retained powers of membership-based inherent tribal sovereignty.[89]

Departing from *Nenana*, in which the court held that under PL-280 the state had exclusive jurisdiction over tribal members, the court in *State v. Native Village of Tanana*[90] held that concurrent jurisdiction was essential to ensure that rural residents have meaningful access to culturally appropriate justice systems.[91]

Self-Sufficiency + Federal Dependence = A New Opportunity?

The issue the Alaska Native community and partners face for the foreseeable future is that ANCSA was designed to promote Alaska Native self-sufficiency, yet the application of the Indian law precedent established over the last century-and-a-half requires tribes to be dependent upon the federal government in order to exercise territorial jurisdiction. The *Venetie* decision discussed above illustrates this conflict.

This jurisdictional landscape was recently infused with a game-changing element by the July 1, 2016 decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Akiachak Native Community v. Department of Interior*.[92] In 2006, the plaintiffs sued to challenge the exclusion of Alaska tribes and individuals from the opportunity to apply to the Secretary of the Interior to take their lands into trust.[93] In December 2014, the Department of the Interior promulgated a new rule that struck

87. *Id.* at 18 (quoting John v. Baker, 982 P.2d 738, 758 (Alaska 1999)).
88. *Id.* at 22 (citing John v. Baker, 982 P.2d 738, 763(Alaska 1999)).
89. *Id.* at 38–39.
90. 249 P.3d 734 (Alaska 2011).
91. *Id.* at 750–51.
92. No. 1:06-cv-00969, slip op. at 2 (D.C. Cir. July 1, 2016).
93. *Id.*

the exclusionary language from the applicable regulations, explaining it could "foster economic development, enhance the ability of Alaska Native tribes to provide services to their members, and give additional tools to Alaska Native communities to address serious issues, such as child welfare, public health and safety, poverty, and shortages of adequate housing, on a local level."[94] The state of Alaska argued that ANCSA "precludes the creation of new trust land in Alaska"[95] and encouraged the court to address that question on its merits, but the court found that it did not have jurisdiction to address that question on its merits.[96] The court dismissed the case as moot since the Department had amended the regulation to delete the exclusionary language.[97]

In light of this decision, the question remains: how can stakeholders work together to maximize the opportunities for social and economic growth provided by this recent development?

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Given the history of American law as applied to Alaska Natives, including the three foundational statutes discussed above, and the Alaska Native developments over the past forty-five years in both the corporate and tribal jurisdictional worlds, now is an opportune time to reflect on the role of attorneys in the drafting of our collective story moving forward. The following are considerations for attorneys to mull over as we partner with Alaska Native communities to advance their interests.

Alaska Native Values: A Thing of the Past, Future, and… Present

Each of the twelve regions in Alaska has articulated the values that have and do make that region "go." In northwest Alaska, for example, they are referred to as the Inupiat Ilitqusiat. "Inupiat" translates to "the Real People" and "Ilitqusiat" translates to "that which makes us who we are." Inupiat traditional values were developed over thousands of years by Inupiat communities in northwest Alaska and were articulated as the Inupiat Ilitqusiat by Elders of the region during the Spirit Movement in the 1980s.[98] The Spirit Movement reflected an internal dialogue among

94. *Id*. at 23 (quoting Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76,888, 76,892 (Dec. 23, 2014) (amending 25 C.F.R. Part 151)).

95. *Id*. at 9 (quoting Brief for Appellant at 32, Akiachak Native Community v. Department of Interior, No. 1:06-cv-00969 (D.C. Cir. July 1, 2016)).

96. *Id*. at 24.

97. *Id*. at 23.

98. *See* John Schaeffer & John D. Christensen, *Iñupiat Ilitqusiat: To Save Our Land and Our People*, *in* ALASKA NATIVE EDUCATION: VIEWS FROM WITHIN 59, 59–61 (Ray Barnhardt & Angayuqaq Oscar Kawagley eds., 2011) (discussing the origins

the people of the region. Against the backdrop of ANCSA and engagement in the corporate world, Elders asked themselves what defined them, what made them who they were, and how they could stay true to those values. The result was a guide, a beacon of light that can be used in any context, anywhere. The Ilitqusiat preamble holds:

> Every Iñupiaq person is responsible to all other Iñupiat for the survival of our cultural spirit and the values and traditions through which it survives. Through our extended family, we retain, teach and live our Iñupiaq way of life. With guidance and support from our Elders, we teach our children our Iñupiat Ilitqusiat values.
> Our understanding of the universe and our place in it is a belief in God and a respect for all of His creation.[99]

The values of the Ilitqusiat include the following: "Knowledge of Family Tree, Knowledge of Language, Sharing, Humility, Respect for Others, Responsibility to Tribe, Love of Children, Cooperation, Hard Work, Respect for Elders, Respect for Nature, Hunter Success, Avoid Conflict, Family Roles, Humor, Spirituality, and Domestic Skills."[100]

As attorneys, one of the questions we can ask ourselves as we conduct our day-to-day work is whether or not we have studied the traditional values of the region in which our client ANCSA corporation or tribe is situated. Additional questions may follow, such as: does the advice I give my ANCSA and tribal clients seek to be consistent with those values? Does it actively counter or challenge those values, and is there a purpose to that? Do I perceive a friction between the Rules of Professional Conduct and the traditional values of my clients from time to time? If so, how can I find an ethical resolution or path forward that allows for the provision of advice that is consistent with both?

Making Lemonade Out of Statutory Lemons

From the beginning of the legal history described in this paper—the Treaty of Cession—Alaska Native people were *not* "admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States and… protected in the free enjoyment of their liberty, property, and religion."[101] How does the discriminatory nature of foundational American law addressing Alaska Native communities

of and contributions to the Spirit Movement).

99. *Our Mission*, NANA Corp., http://www.nana.com/regional/about-us/mission/values/ (last visited Oct. 16, 2016).

100. *Id.*

101. Treaty of Cession, *supra* note 18, at art. III, 15 Stat. 539, 542 (1867).

continue to affect communities and Alaska Native individuals today? How can the legal community contribute to building a body of law that treats Alaska Native communities and individuals equitably? How do the challenged social statistics on violence, sexual assault, suicide, health, public safety, and other issues relate to this foundational law? Further, do those providing legal services to ANCSA corporations and tribes have a responsibility to become informed about the ongoing social consequences of the legal environment in which Alaska's first peoples have lived?

Participating in the ANCSA Dream

ANCSA is not just black letters on white paper or text on a computer screen. It is the social dynamics—the human interactions of ANCSA corporation staff, shareholders and other partners, and the relations with the land—that give it breath and make it real. Ever-relevant questions are: how does providing legal services impact the community beyond the ANCSA corporation that is my client? What is the broader context? ANCSA started as a dream to protect the land upon which Alaska Native exist as indigenous peoples. Without aboriginal claims to the land, there would be no ANCSA. Each individual ANCSA corporation client may have different goals, but a shared goal is to create value for shareholders. Is that dividends? Is that land that can be used for hunting and fishing? Is that jobs? Is that cultural programs? Reflecting back forty-five years since its passage, has the dream changed? How do our jobs as attorneys impact the creation and fulfillment of the contemporary ANCSA dream? Does this answer change if we take our attorney "hats" off and look at the context simply as Alaskan community members?

CONCLUSION

The story of the Alaska Native movement for recognition of Alaska Native aboriginal title is really many stories of people working together—from village meetings and regional efforts to statewide coalitions and work at and before the state, Congress, and federal agencies. Alaska Native activists personally invested in the fight to protect their communities' land; one person mortgaged his house to obtain money to fund outreach efforts, and another vested his life insurance policy in AFN.[102] There was an element of danger involved in the public demand for recognition of aboriginal title; multiple activists

102. Interview with William Iġġiaġruk Hensley, in Kotzebue, Alaska (Dec. 3, 2005).

were assigned police bodyguards and at least one was required to wear a bulletproof vest when giving public speeches for a time.[103] In one statement, Margaret Nick Cooke of Bethel summarized the fuel to the fire: "take our land, take our life."[104]

As Alaska moves forward, busily engaging in economic development ventures at ANCSA corporations and strengthening governance at tribes, will the value of cooperation and collaboration that enabled Alaska Native peoples to thrive in the Arctic stay front and center? ANCSA corporations and federally recognized tribal governments both emerged from the same source, and the attributes of each can be used to improve the quality of life for Alaska Native peoples, the State, and the nation as a whole.

103. *Id*.
104. ROBERT D. ARNOLD, ALASKA NATIVE LAND CLAIMS 123 (1976).