

# BEYOND INDIAN COUNTRY: THE SOVEREIGN POWERS OF ALASKA TRIBES WITHOUT RESERVATIONS

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## ABSTRACT

*The Alaska Native Claims Settlement Act of 1971 (ANCSA) devised a land entitlement system markedly different from the Indian reservation system that prevailed in the Lower 48 states. It directed the creation of twelve, for-profit Alaska Native regional corporations and over 200 private, for-profit Alaska Native village corporations, which would receive the bulk of Native land in the state. This corporate model left nearly all tribes in Alaska without a land base. As such, there is very little Indian Country land in the state over which tribes can exercise territorial-based sovereignty. Yet, the Supreme Court has long recognized the power of tribes to exercise membership-based jurisdiction. This Comment analyzes a range of state and federal court decisions addressing the authority of tribes and argues that Alaska tribes, through membership-based jurisdiction, can exercise various sovereign powers, like the exclusion of nonmembers. Importantly, this membership-based jurisdiction does not depend on lands over which tribes can exercise jurisdiction. Therefore, the exclusionary orders imposed by several Alaska Native tribes during the Covid-19 pandemic in 2020 were valid exercises of the tribes' sovereign powers.*

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## I. INTRODUCTION

If Native American reservations across the United States are checkerboards of jurisdiction,<sup>1</sup> Native lands in Alaska are a three-dimensional chess board. In 1971, Congress passed the Alaska Native Claims Settlement Act (ANCSA),<sup>2</sup> which terminated all but one reservation within the state's boundaries and conveyed millions of acres in fee simple to twelve regional corporations and more than two hundred village corporations, all chartered under Alaska state law.<sup>3</sup> Almost thirty years later, the Supreme Court held in *Alaska v. Native Village of Venetie Tribal Government* that no lands conveyed pursuant to ANCSA constituted "Indian Country."<sup>4</sup> Since the lands were not Indian Country, the tribe was prohibited from collecting taxes from nonmembers for activities conducted on its lands—an exercise of territorial jurisdiction that relied on possessing Indian Country land.<sup>5</sup> Put differently, the Court held that the land conveyed back to the tribe by an ANCSA corporation did not constitute a land base over which the tribe could exercise jurisdiction over nonmembers.<sup>6</sup>

ANCSA represents the destination of Congress's long journey to address Alaska Native lands issues. Prior to ANCSA, the federal government had attempted to resolve these issues through a variety of policies and actions. First, the Allotment Era of Federal Indian Law began in Alaska in 1906, when Congress began allotting unappropriated lands to qualifying Alaska Natives through the Alaska Native Allotment Act.<sup>7</sup> It then expanded the eligible land base with the Alaska Native Townsite

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1. See, e.g., *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358 (1962) (describing the complex ownership of lands within Indian reservations that resemble checkerboards).

2. 43 U.S.C. § 1618(a).

3. DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* 390 (3d ed. 2012) (citing ROBERT D. ARNOLD, *ALASKA NATIVE LAND CLAIMS* 234-72 (1978 ed.)).

4. *Alaska v. Native Vill. of Venetie Tribal Gov't (Venetie II)*, 522 U.S. 520 (1998). While this case is the only U.S. Supreme Court case involving the Native Village of Venetie, there is a 1991 Ninth Circuit decision also involving the tribe. The Ninth Circuit decision is commonly referred to as *Venetie I*. See *infra* Part III.B.2. Indian Country is statutorily defined as reservations, dependent Indian communities, and allotments made to individual Indians. 18 U.S.C. § 1151. For more discussion on the term "Indian Country" and its important connotations for tribal sovereignty, see *infra* Part III. See also FELIX COHEN, *COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* 183-202 (Nell Jessup Newton ed. 2012) (unpacking the term Indian Country and its connotations).

5. *Venetie II*, 522 U.S. at 532.

6. *Id.*

7. Act of May 17, 1906, ch. 2469, 34 Stat. 197 (repealed 1971).

Act of 1926.<sup>8</sup> The Alaska Native Allotment Act allowed an individual to receive up to 160 acres of federal land within the territory while the Alaska Native Townsite Act allowed an individual to receive title to land in areas that had been surveyed and designated as townsites.<sup>9</sup> Congress repealed the Alaska Native Allotment Act through ANCSA<sup>10</sup> and later repealed the Alaska Native Townsite Act.<sup>11</sup> However, the allotments granted under these two Acts remain valid.<sup>12</sup> Still today, the lands granted under these two Acts come with the traditional restrictions characteristic of reservations and allotments in the remainder of the country: they are free from taxation and only alienable with approval of the Secretary of the Interior.<sup>13</sup> These lands—an estimated 16,000 allotments and 4,000 townsite plots—are Indian Country.<sup>14</sup>

The split of non-Indian Country lands between those owned by Alaska Native regional corporations and allotments and townsites still under federal superintendency poses a dilemma. Tribal jurisdiction relies heavily on, though is not dependent on, land ownership.<sup>15</sup> Alaska tribal governments whose members have allotments and townsites can exercise general jurisdiction over those lands, but not all Alaska tribes have members that own Indian Country lands.<sup>16</sup> But a land base is not a necessary element for the exercise of tribal sovereignty.<sup>17</sup> Even without territorial jurisdiction, Alaska tribes exercise sovereignty over members and nonmembers.<sup>18</sup>

In analyzing the regime change introduced to the governance and ownership of Alaska Native lands by ANCSA, this Comment equates the sovereign powers of tribes in Alaska to those of tribes in the Lower 48.<sup>19</sup>

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8. Act of May 25, 1926, ch. 379, 44 Stat. 629 (repealed 1976).

9. CASE & VOLUCK, *supra* note 3, at 113.

10. 43 U.S.C. 1617(a).

11. Pub. L. 94-579, tit. VII, §703(a), Oct. 21, 1976, 90 Stat. 2789.

12. Natalie Landreth & Erin Dougherty, *The Use of the Alaskan Native Claims Settlement Act to Justify Disparate Treatment of Alaska's Tribes*, 36 AM. INDIAN L. REV. 321, 345 (2011).

13. *See, e.g.*, Act of May 25, 1926, ch. 379, 44 Stat. 629 (repealed 1976).

14. *Id.* at 345.

15. *See, e.g.*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (discussing sovereign authorities over tribal lands); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) (noting that there is a “significant geographical component to tribal sovereignty”).

16. Landreth & Dougherty, *supra* note 12, at 345.

17. Heather Kendall-Miller, *ANCSA and Sovereignty Litigation*, 24 J. LAND RES. & ENV'T L. 465, 472 (2004).

18. *Id.*

19. The term “Lower 48” refers to the contiguous 48 states, which excludes Alaska and Hawaii. Most tribal property in the Lower 48 is held in trust by the federal government, meaning the federal government holds title to the land for the benefit of the tribe. *See* COHEN, *supra* note 4, at 997-98.

This Comment argues all Alaska tribal governments retained their inherent sovereign powers to exclude nonmembers from tribal communities, despite ANCSA's extinguishment of all but one reservation in the state. Additionally, this Comment examines the ownership of allotments and townsites across the state to further establish the scope of Alaska tribal sovereignty. Furthermore, to put the importance of jurisdictional powers in concrete terms, this Comment examines the legitimacy of 2020 Covid-19 exclusionary orders on tribal lands in Alaska, finding that these orders were indeed valid exercises of sovereign power.

Part II provides an overview of the laws shaping Native land ownership in Alaska, including the 1867 Treaty of Cession, the 1906 Allotment Act, and ANCSA. Part III discusses the various court decisions defining Indian Country in Alaska and recognizing Alaska tribes as sovereign. Part IV establishes legal support for contemporary exercises of exclusionary powers by Alaska tribal governments, focusing on Covid-19 exclusionary orders.

## II. AN OVERVIEW OF NATIVE LAND OWNERSHIP IN ALASKA

### A. A Brief History of Alaska Tribal Governments and Land Claims Prior to ANCSA

The 1867 Treaty of Cession in which Russia ceded the Alaska territory to the United States stipulated that "inhabitants of the ceded territory," with the exception of "uncivilized 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."<sup>20</sup> The Treaty's characterization of some Alaska tribes as "uncivilized" meant those tribal members would not be United States citizens.<sup>21</sup> Further, until the Citizenship Act of 1924,<sup>22</sup> an Indian had to abandon tribal relations to be considered civilized.<sup>23</sup> The implication of the Treaty's categorization of Alaska Natives was that civilized Alaska Natives had abandoned tribal relations.<sup>24</sup> Because aboriginal title is that of a tribe, Alaska Natives may not have possessed aboriginal title if they abandoned tribal relations under the 1867 Treaty.<sup>25</sup>

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20. Treaty of March 30, 1867 art. III, 15 Stat. 539.

21. CASE & VOLUCK, *supra* note 3, at 63.

22. Act of June 2, 1924, ch. 233, 43 Stat. 253 (superseded 1940).

23. COHEN, *supra* note 4, at 78-79.

24. CASE & VOLUCK, *supra* note 3, at 63.

25. *Id.* Aboriginal title, also referred to as Indian title, is title that stems from an Indigenous group's occupation of land at the time of the land's "discovery" by

Although the 1867 Treaty acknowledged the existence of Alaska's Indigenous inhabitants, it provided no path for them to acquire land in the newly minted territory.<sup>26</sup> In 1884, Congress enacted the Alaska Organic Act to protect Native Alaskans' "possession of any lands actually in their use or occupation."<sup>27</sup> The Act also stipulated future legislation by Congress could establish the terms under which individuals could acquire title to Alaska lands.<sup>28</sup> Congress acted first with the General Allotment Act in 1887,<sup>29</sup> followed by the Alaska Native Allotment Act in 1906.<sup>30</sup> While these two Acts produced similar outcomes, they had drastically different policy purposes. The 1887 Act sought to break up reservations in the Lower 48 and promote assimilation.<sup>31</sup> The 1906 Act provided a way for Alaska Natives to acquire title to individual parcels of land "important for traditional use and occupancy."<sup>32</sup>

Congress recognized in the 1906 Allotment Act that "traditional reservation policies did not suit the seminomadic lifestyles practiced by the majority of Alaska's Natives and contact with encroaching white settlements brought grief to Natives through disease, liquor, and unfair game laws."<sup>33</sup> Eligible Alaska Natives could obtain a preference right to a maximum 160 acres of nonmineral land as long as they were twenty-one years of age or head of a family, and met any other incidental requirements imposed by the Secretary of Interior.<sup>34</sup> Under this Act, the applicant and his heirs received a perpetual homestead that could not be alienated or taxed until otherwise approved by Congress.<sup>35</sup> Congress then authorized conveyance of allotments by deed in 1956.<sup>36</sup> Most Indian Country allotments remaining in Alaska today were granted under the 1906 Act.<sup>37</sup> In total, there are likely between four and six million acres of these Indian Country allotments in the state today.<sup>38</sup>

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western colonizers. Aboriginal title is distinct from fee simple title to land in that it may only be sold to the government. *Id.* at 54.

26. Treaty of March 30, 1867 art. III, 15 Stat. 539. *See also* CASE & VOLUCK, *supra* note 3, at 114–15.

27. Act of May 17, 1884, 23 Stat. 24, 26.

28. *Id.* *See also* CASE & VOLUCK, *supra* note 3, at 114.

29. Act of February 8, 1887, 24 Stat. 388. This Act is often called the Dawes Act after Henry Dawes, a senator from Massachusetts, who was the Act's primary sponsor. CASE & VOLUCK, *supra* note 3, at 28.

30. Act of May 17, 1906, ch. 2469, 34 Stat. 197 (repealed 1971).

31. COHEN, *supra* note 4, at 72–73.

32. *Id.* at 339.

33. CASE & VOLUCK, *supra* note 3, at 119 (citing a 1903 report of the Secretary of Interior).

34. Act of May 17, 1906, ch. 2469, 34 Stat. 197 (repealed 1971).

35. CASE & VOLUCK, *supra* note 3, at 120.

36. Act of August 2, 1956, 20 Stat. 954.

37. Landreth & Dougherty, *supra* note 12, at 345.

38. *Id.* at 345–46.

Additionally, the 1926 Alaska Native Townsite Act (ANTA)<sup>39</sup> allowed prospective townsite occupants to petition a designated trustee of the land to subdivide the site in smaller parcels.<sup>40</sup> The Department of Interior initially viewed ANTA as a method of establishing Native towns, but in 1938 it promulgated regulations allowing non-Natives to acquire townsite lots.<sup>41</sup>

## B. The Alaska Native Claims Settlement Act of 1971

ANCSA is the “largest and most significant” land claim settlement in United States history.<sup>42</sup> As such, much has been written on this historic settlement; both about the key provisions of the Act<sup>43</sup> as well as the impressive political maneuvering of Alaska Native leaders vital to ANCSA’s passage.<sup>44</sup> ANCSA culminated over a century of uncertainty of the legal status of Indigenous people in Alaska.<sup>45</sup>

Several important factors drove the development and passage of ANCSA. First, Alaska gaining statehood in 1959 exacerbated concerns about who would control land in Alaska.<sup>46</sup> The Alaska Statehood Act<sup>47</sup> authorized the state to select about 100 million acres from unreserved and vacant lands<sup>48</sup> and many Alaska Native groups became wary of the effect these land selections could have on their aboriginal claims.<sup>49</sup> Then, in 1966, after Alaska Native villages protested the state selecting lands, Secretary of Interior Stewart Udall imposed a freeze on further grants of public lands until the claims of Alaska Natives were settled.<sup>50</sup> Finally, the 1968 discovery of twenty-five billion barrels of oil in Prudhoe Bay further complicated the concerns about land claims.<sup>51</sup> An 800-mile pipeline needed to be constructed to develop the newly discovered oil, but

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39. Act of May 25, 1926, ch. 379, 44 Stat. 629 (repealed 1976).

40. COHEN, *supra* note 4, at 338-39.

41. CASE & VOLUCK, *supra* note 3, at 142 (citing 1926, 1927, and 1938 Interior Solicitor opinions).

42. COHEN, *supra* note 4, at 104.

43. For a concise overview of the operative provisions of ANCSA, see COHEN, *supra* note 4, at 329-37. See also CASE & VOLUCK, *supra* note 3, at 170-98.

44. See generally WILLIAM L. IGGIAGRUK HENSLEY, FIFTY MILES FROM TOMORROW (2010) (a memoir by an Alaska Native activist who advocated before the United States Senate and House for the passage of ANCSA); DONALD CRAIG MITCHELL, TAKE MY LAND, TAKE MY LIFE (2001).

45. CASE & VOLUCK, *supra* note 3, at 165.

46. *Id.* at 167.

47. Alaska Statehood Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339.

48. CASE & VOLUCK, *supra* note 3, at 166 (citing Alaska Statehood Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339).

49. *Id.* at 167.

50. COHEN, *supra* note 4, at 329.

51. CASE & VOLUCK, *supra* note 3, at 167.

proceeding without a lands claim settlement would risk “prolonged litigation and trespass damages.”<sup>52</sup> Congress therefore introduced legislation in 1968 to settle the land claims, and on December 18, 1971, the Alaska Native Claims Settlement Act became law.<sup>53</sup>

Among the many changes to the Alaska legal landscape ANCSA imposed, most relevant to this Comment is the drastic shift ANCSA brought to ownership of Native lands in Alaska: nearly all of the land conveyed under the Act’s 45.5 million acre settlement went to private, for-profit corporations.<sup>54</sup> Yet, for all of the change it generated, ANCSA did not affect existing allotments or townsites.<sup>55</sup> These lands are Indian Country and share the characteristics of Indian Country lands across the rest of the United States.

### III. THE SCOPE OF INDIAN COUNTRY AND TRIBAL JURISDICTION IN ALASKA

#### A. A Brief Overview and History of the Term

Congressional defining and shaping of Indian Country reaches back to 1790 through its enactment of the first Trade and Intercourse Act.<sup>56</sup> With this Act, Congress regulated trade and land sales with Indians and established punishments for non-Indians who committed crimes and trespasses against Indians.<sup>57</sup> For example, the Act made it criminal for a non-Indian to “be found in the Indian country” selling merchandise without a license.<sup>58</sup>

Congress continued to refine its view of Indian Country through subsequent Trade and Intercourse Acts. In the 1802<sup>59</sup> and 1834<sup>60</sup> Trade and Intercourse Acts, Congress defined Indian Country broadly using geographical markers.<sup>61</sup> The 1834 Act defined Indian Country as “that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part

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52. *Id.*

53. *Id.* at 165.

54. *Id.* at 170–72. Of the 45.5 million acres authorized for conveyance under ANCSA, about 40 million acres went to either Alaska Native regional corporations or Alaska Native village corporations. *Id.* at 172.

55. 43 U.S.C. § 1613(g) (“All conveyances made pursuant to this chapter shall be subject to valid existing rights.”).

56. Act of July 22, 1790, 1 Stat. 137.

57. COHEN, *supra* note 4, at 34–35.

58. Act of July 22, 1790, 1 Stat. 137.

59. Act of March 30, 1802, 2 Stat. 139.

60. Act of June 30, 1834, 4 Stat. 729.

61. *See, e.g., id.* (describing areas west of the Mississippi River that were considered Indian Country).

of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished.”<sup>62</sup>

The current statutory definition of Indian Country arose out of a quartet of Supreme Court cases decided in the first half of the twentieth century.<sup>63</sup> Under the initial 1948 definition and subsequent statutory definition in 18 U.S.C. § 1151, Indian Country includes (a) reservations, (b) all dependent Indian communities, and (c) all Indian allotments with unextinguished Indian titles.<sup>64</sup> With the exception of Metlakatla, ANCSA abolished all reservations in Alaska.<sup>65</sup> Thus, nearly all discussions about Indian Country in Alaska revolve around the dependent Indian communities and Indian allotments portions of § 1151.<sup>66</sup>

## **B. Relevant Court Decisions Shaping Indian Country and Tribal Jurisdiction in Alaska**

### *1. Addressing the Indian Country Question in Alaska*

*Venetie II*<sup>67</sup> is the seminal case defining the effect ANCSA had on Indian Country in Alaska.<sup>68</sup> In *Venetie II*, the tribal government sought to collect taxes from the State of Alaska and a contractor building a new school on the tribe’s land.<sup>69</sup> The Court held that the tribe’s land did not constitute Indian Country, and thus the tribe did not have the power to regulate the activities of nonmembers on the land.<sup>70</sup> This is because the federal government conveyed the land to two Alaska Native corporations pursuant to ANCSA, which then conveyed the land to the tribe.<sup>71</sup>

Lands conveyed to Alaska Native corporations under ANCSA came “without any restraints on alienation or significant use restrictions,”<sup>72</sup> so the Court reasoned that those lands could not be construed as Indian

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62. *Id.* The 1802 Act remained in effect to all Indian tribes east of the Mississippi.

63. *Donnelly v. United States*, 228 U.S. 243 (1913); *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. McGowan*, 302 U.S. 535 (1938). *See also* COHEN, *supra* note 4, at 189–90.

64. 18 U.S.C. § 1151. Congress revised parts of the Indians chapter of Title 18 in 1949, modifying the extent to which Indian liquor laws applied to non-Indian fee lands within reservation boundaries. COHEN, *supra* note 4, at 918. Section 1151 remained unchanged by the 1949 amendments. *Id.* at 190.

65. CASE & VOLUCK, *supra* note 3, at 81.

66. *See, e.g., Venetie II*, 522 U.S. 520, 527 (1998) (discussing the “dependent Indian communities prong” of the statute) (internal quotations omitted).

67. 522 U.S. 520 (1998).

68. *See generally* CASE & VOLUCK, *supra* note 3, at 111 (describing the federal trust relationship to land in Alaska after *Venetie II*).

69. *Id.* at 525.

70. *Id.* at 532.

71. *Id.* at 532–33.

72. *Id.* at 532.



Country.<sup>73</sup> This is the scope of the Court's decision – *Venetie II* did not hold that “there is no Indian Country in Alaska” as some commentators have wrongly asserted in years after the decision.<sup>74</sup> However, the Court's finding in *Venetie II* that land conveyed to an Alaska Native corporation could not be Indian Country even if transferred to a tribal government has significant impacts for the territorial sovereignty of Alaska's tribes.<sup>75</sup>

## 2. Court Decisions Recognizing Alaska Tribes as Sovereigns

While some Alaska Natives have occupied their traditional lands for about 10,000 years,<sup>76</sup> federal courts did not definitively find that Alaska tribes had inherent sovereignty like their peer tribes in the Lower 48 until 1991.<sup>77</sup> This is not to say tribal governments did not exist in Alaska until 1991. The 1936 amendments<sup>78</sup> to the Indian Reorganization Act (IRA)<sup>79</sup> expanded the IRA to Alaska tribes, and many Alaska tribes reorganized under the Act.<sup>80</sup> In *Native Village of Venetie I.R.A. Council v. State of Alaska*,<sup>81</sup> the State of Alaska refused to give full faith and credit to a tribal court adoption decree.<sup>82</sup> The Ninth Circuit held in a landmark decision recognizing the sovereignty of Alaska tribes that the plaintiff tribes were entitled to “the same rights and responsibilities as are sovereign bands of native Americans in the continental United States.”<sup>83</sup>

Beyond its practical importance of recognizing the sovereign governing authority of Alaska tribes, *Venetie I* also applied core principles of Federal Indian Law when examining the powers of Alaska tribes. Namely, the court began its analysis by noting that “tribes are

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73. *Id.* at 533. More specifically, the Court held that the tribe's lands were not under federal superintendency nor set aside for the use of Indians, so the tribe's lands did not meet the “dependent Indian communities” classification of 18 U.S.C. § 1151. *Venetie II*, 522 U.S. at 532–33.

74. Landreth & Dougherty, *supra* note 12 (quoting Joseph D. Matal, *A Revisionist History of Indian Country*, 14 ALASKA L. REV. 283, 339 (1997)).

75. *Venetie II*, 522 U.S. at 532. *See also* COHEN, *supra* note 4, at 354–56 (discussing the impacts of the *Venetie II* decision on Alaska tribal governments).

76. *See, e.g.*, Jennifer A. Dunne et al., *The Roles and Impacts of Human Hunter-Gatherers in North Pacific Marine Food Webs* 6 SCIENCE REPS., Art. no. 21179, 2016.

77. Federal courts have long recognized the inherent sovereignty of tribes in the Lower 48. *See, e.g.*, *Worcester v. Georgia*, 31 U.S. 515, 520 (1832) (noting that Native American tribal governments “have been always admitted to possess many of the attributes of sovereignty”); *United States v. Wheeler*, 435 U.S. 313, 323 (1971) (noting “our cases recognize that the Indian tribes have not given up their full sovereignty”).

78. Act of May 1, 1936, ch. 254, 49 Stat. 1250.

79. Act of June 18, 1934, ch. 576, 48 Stat. 984.

80. CASE & VOLUCK, *supra* note 3, at 384–86.

81. *Native Vill. of Venetie I.R.A. Council v. State of Alaska (Venetie I)*, 944 F.2d 548 (9th. Cir. 1991).

82. *Id.* at 551.

83. *Id.* at 558–59.

independent political communities qualified to exercise powers of self-government, not by virtue of any delegation of power, but rather by reason of their original tribal sovereignty.”<sup>84</sup> From there, the court noted that the “relevant inquiry is whether any limitation exists to prevent the tribe from acting, not whether any authority exists to permit the tribe to act.”<sup>85</sup> Thus, *Venetie I* recognized Alaska tribes as possessing powers “entirely attributable to Indian nations, and not to the federal government that merely acknowledged them.”<sup>86</sup>

At the same time the Native Village of Venetie brought its action to compel the State of Alaska to recognize its tribal adoption decrees, the Fort Yukon tribe filed a similar case.<sup>87</sup> The two cases were consolidated but resolved separately on remand from the Ninth Circuit.<sup>88</sup> In determining whether Venetie possessed inherent tribal sovereignty, the district court found it did, as the tribe met the common law definition of an Indian tribe.<sup>89</sup> In Fort Yukon’s case, the court also found the tribe to be a sovereign tribe, but reasoned that this sovereignty derived from the Interior Department’s October 21, 1993 listing of Alaska Native tribes.<sup>90</sup> The court’s reliance on Interior’s 1993 listing<sup>91</sup> of Alaska tribes as entities eligible to receive services from the Bureau of Indian Affairs (BIA) helped further establish that, at least in the eyes of Alaska federal courts, Alaska tribes were not dissimilar to tribes in the Lower 48.<sup>92</sup>

Alaska state courts were not as quick to recognize the sovereignty of Alaska tribes.<sup>93</sup> In its 1999 *John v. Baker*<sup>94</sup> decision, the Alaska Supreme Court finally departed from its view that Alaska tribes were not sovereign governments. In *Baker*, the Alaska Supreme Court wrestled with the extent of tribal adjudicatory authority outside of Indian Country.<sup>95</sup> The plaintiff in the case, John Baker, filed a custody petition for his child in his

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84. *Id.* at 556 (quoting COHEN, *supra* note 4, at 232).

85. *Id.* at 556-57 (quoting WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 71-72 (2d ed. 1988)).

86. COHEN, *supra* note 4, at 211.

87. CASE & VOLUCK, *supra* note 3, at 422.

88. *Id.* at 422-23.

89. *Id.* at 423 (citing Native Vill. of Venetie I.R.A. Council v. State of Alaska, No. F86-0075 CIV (HRH), 1994 WL 730893 (D. Alaska Dec. 23, 1994)).

90. *Id.* at 424 (citing Native Vill. of Venetie I.R.A. Council v. Alaska, No. F86-0075 Civ (HRH), slip op. at 11 (D. Alaska Sept. 20, 1995)).

91. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54364 (Oct. 21, 1993).

92. CASE & VOLUCK, *supra* note 3, at 424.

93. See, e.g., *Metlakatla Indian Cmty., Annette Island Rsrv. v. Egan*, 362 P.2d 901, 917-18 (Alaska 1961) (“There are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law.”), *vacated*, 369 U.S. 45 (1972).

94. 982 P.2d 738 (Alaska 1999).

95. *Id.* at 743.

tribal court.<sup>96</sup> Anita John, the child's mother, was a member of another Alaska tribe but consented to the tribe's jurisdiction.<sup>97</sup> The tribal court ruled in favor of the mother.<sup>98</sup> The father, unhappy with this ruling, sought to circumvent the tribal court's order.<sup>99</sup> To do so, Baker filed a custody action in state court.<sup>100</sup>

The Alaska Supreme Court took Baker's case and its decision had transformative effects on Federal Indian Law in the state for multiple reasons. First, the court deferred the question of tribal status to Congress and held that "[i]f Congress or the Executive Branch recognizes a group of Native Americans as a sovereign tribe, we 'must do the same.'"<sup>101</sup> The court looked to Interior's 1993 listing of tribes and noted that the listing included the tribe whose jurisdiction Baker challenged.<sup>102</sup> Thus, the court found Alaska tribes had not been divested of their tribal authority and possessed "non-territorial sovereignty."<sup>103</sup> In reaching this holding, the court examined several key Federal Indian Law decisions that emphasized the tribal membership of the parties, including *Santa Clara Pueblo v. Martinez*<sup>104</sup> and *Montana v. United States*.<sup>105</sup> Because ANCSA stripped Alaska tribes of most of their Indian Country land,<sup>106</sup> the court's finding that Alaska tribes' jurisdiction does not depend on Indian Country was a vital step forward.<sup>107</sup>

A second case essential to recognizing Alaska tribes as sovereign entities capable of governing is *In re C.R.H.*<sup>108</sup> Public Law 280,<sup>109</sup> another Congressional action addressing jurisdictional issues on Native land, delegates jurisdiction of most crimes and civil matters in Indian Country to six states, including Alaska.<sup>110</sup> Previously, the Alaska Supreme Court held in *Nenana* that Public Law 280 divested Alaska tribes of jurisdiction

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96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 749 (quoting *United States v. Holliday*, 70 U.S. 407, 419 (1865)).

102. *Id.* at 750.

103. *Id.* at 754.

104. 436 U.S. 49 (1978).

105. 450 U.S. 544 (1981).

106. CASE & VOLUCK, *supra* note 3, at 390.

107. See Landreth & Dougherty, *supra* note 12, at 340 (discussing the impacts of *Baker*).

108. *In re C.R.H.*, 29 P.3d 849 (Alaska 2001).

109. Act of Aug. 15, 1953, 67 Stat. 588.

110. COHEN, *supra* note 4, at 537. Congress initially passed the Act in 1953 but later amended it in 1958 to add the Alaska Territory and then in 1970 to authorize concurrent jurisdiction over the Annette Islands Reservation by the Metlakatla Indian Community. *Id.* at 537 n.45.

over child protection matters.<sup>111</sup> But in *Venetie I*, the Ninth Circuit held that Alaska tribes possess authority unaffected by Public Law 280.<sup>112</sup> Following the Ninth Circuit, in *In re C.R.H.*, the lower court denied a tribe's request to transfer a child protective proceeding to its tribal court.<sup>113</sup> On appeal, the Alaska Supreme Court overruled its holding in *Nenana* and found that Public Law 280 did not bar a transfer of jurisdiction to a tribal court.<sup>114</sup>

#### IV. EXAMINING THE MEMBERSHIP-BASED JURISDICTIONAL REACH OF ALASKA TRIBES

This final part of the Comment seeks to establish that all federally recognized tribes in Alaska with membership-based jurisdiction can exercise the sovereign power to exclude nonmembers from their villages. Recently, in 2020, as the global coronavirus pandemic set in, many Alaska Native villages in rural Alaska sought to protect their members from the deadly virus by limiting who could enter the villages by plane.<sup>115</sup> This part of the Comment argues that tribes in Alaska, as sovereigns, possess the same attributes as all other federally recognized tribes in the United States. This sovereignty does not depend on a land base—Alaska tribes, like all others, can exercise membership-based jurisdiction. One of the aspects of this authority tribes can exercise is the power to exclude nonmembers. Conflicts can arise when nonmembers are subject to tribal authority, and several cases address the scope of this authority.

In *Montana v. United States*,<sup>116</sup> the Court established two exceptions in which tribes may exercise civil authority over the conduct of nonmembers on non-Indian land within a reservation. A tribe may exercise civil jurisdiction over nonmembers on non-Indian lands within the tribe's reservation if (1) the nonmember entered into a "consensual relationship . . . with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"<sup>117</sup> or if (2) "the conduct of non-Indians on fee lands within its reservation . . . threatens or has some direct effect on the political integrity, the economic security, or the

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111. *Native Vill. of Nenana v. Alaska Dep't of Health & Soc. Servs.*, 722 P.2d 219, 221 (Alaska 1986), overruled by *In re C.R.H.*, 29 P.3d 849 (Alaska 2001).

112. *Venetie I*, 944 F.2d 548, 561 (9th. Cir. 1991).

113. *In re C.R.H.*, 29 P.3d at 854.

114. *Id.* at 852.

115. See *Which Y-K Delta Villages Are Restricting Travel to Protect Against Coronavirus?*, KYUK NEWS (March 20, 2020), <https://www.kyuk.org/health/2020-03-21/which-y-k-delta-villages-are-restricting-travel-to-protect-against-coronavirus>.

116. 450 U.S. 544 (1981).

117. *Id.* at 565.

health or welfare of the tribe.”<sup>118</sup>

After the Court’s holding in *Venetie II*—that lands transferred to Alaska Native corporations under ANCSA could not constitute Indian Country<sup>119</sup>—it may appear that, without reservation Indian lands, neither of the *Montana* exceptions apply to Alaska tribes seeking to exercise jurisdiction over nonmembers. Further, the Court has “consistently guarded the authority of Indian governments over their reservations,”<sup>120</sup> but has noted “there is a significant geographical component to tribal sovereignty.”<sup>121</sup> But tribal control over its territory is not the sole source of tribal criminal and civil authority. In addition to legislation that affirms the inherent powers of tribes in their territories, Congress has also delegated federal authority to tribes.<sup>122</sup> For example, in the Lower 48, one of the largest and most prominent instances of Congressionally delegated power is the liquor control statutes that allow individual tribes to enforce and modify the liquor laws applicable to their reservations.<sup>123</sup> Another federal statute allows for federal enforcement of tribal legal standards regarding hunting and fishing,<sup>124</sup> but this statutory delegation is primarily only available to tribes with reservation lands.<sup>125</sup>

Due to the emphasis on reservation lands, Alaska tribes could be construed as a different class of Indian tribes without any real sovereignty if the tribal sovereignty inquiry stopped here.<sup>126</sup> Furthermore, at first glance, much of ANCSA looks strikingly like Termination Era legislation<sup>127</sup>—the Act settled all land claims and transferred nearly all ancestral lands out of tribal control to private, for-profit corporations.<sup>128</sup> Many commentators across ANCSA’s fifty-three-year tenure have incorrectly characterized the Act as diminishing tribal sovereignty<sup>129</sup> or as

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118. *Id.* at 566.

119. *Venetie II*, 522 U.S. 520, 533 (1998).

120. *Williams v. Lee*, 358 U.S. 217, 222 (1959).

121. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980).

122. COHEN, *supra* note 4, at 243.

123. See 18 U.S.C. § 1161; see also *id.*

124. See 18 U.S.C. § 1165; see also COHEN, *supra* note 4, at 243.

125. Section 1165 calls out land owned by Indians or Indian tribes in addition to reservation land. 18 U.S.C. § 1165.

126. Landreth & Dougherty, *supra* note 12, at 327.

127. From 1943 to 1961, the federal government sought to end its special responsibility to tribal governments. Some tribes were terminated in this era, meaning the federal government no longer recognized them as a sovereign government. For a summary of the Termination Era of Federal Indian Law, see COHEN, *supra* note 4, at 84–93.

128. See CASE & VOLUCK, *supra* note 3, at 170–71.

129. Eric C. Chaffee, *Business Organizations and Tribal Self-Determination: A Critical Reexamination of the Alaska Native Claims Settlement Act*, 25 ALASKA L. REV. 107, 136 (2008).

a de facto termination policy for Alaska tribes.<sup>130</sup> However, it is critical to remember that ANCSA is one of the first pieces of major legislation arising out of the current Self-Determination Era of Federal Indian Law.<sup>131</sup>

### A. *John v. Baker* Affirms the Membership-Based Jurisdiction of Alaska Tribes

Alaska tribes consistently exercise jurisdiction over child welfare cases. In the Indian Child Welfare Act of 1978 (ICWA),<sup>132</sup> Congress affirmed the existing powers of tribes and also delegated further powers to tribes to adjudicate child welfare matters involving member children or children eligible for tribal membership.<sup>133</sup> While the “keystone of the [Self-Determination] policy”<sup>134</sup> is the Indian Self-Determination and Education Assistance Act of 1975,<sup>135</sup> ICWA has provided ample opportunities for Alaska tribes to exercise tribal jurisdiction as sovereigns. ICWA is unlike the Indian Country liquor and hunting and fishing laws discussed earlier. The Act allows tribes to “exercise exclusive jurisdiction [over child custody disputes] . . . over limited community or geographic areas without regard for the reservation status of the area affected.”<sup>136</sup>

However, it took the Alaska Supreme Court two decades to fully recognize the authority of Alaska tribal courts as legitimate engines of justice.<sup>137</sup> Up until the Alaska Supreme Court’s 1999 *Baker* decision, the state’s high court stuck with the “Alaska is different”<sup>138</sup> reasoning to curb any attempted exercise of sovereignty by Alaska tribes. In one of the most extreme cases, the Alaska Supreme Court held a tribe could not assert sovereign immunity because it was “not self-governing or in any meaningful sense sovereign.”<sup>139</sup> That case, *Native Village of Stevens v. Alaska Management & Planning*, was not a case about ICWA or even tribal

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130. Benjamin W. Thompson, *The De Facto Termination of Alaska Native Sovereignty: An Anomaly in an Era of Self-Determination*, 24 AM. INDIAN L. REV. 421, 421–22 (1999).

131. CASE & VOLUCK, *supra* note 3, at 392. The Self-Determination Era of Federal Indian Law is the current era of the law. This era is marked by tribes taking more control over government services delivered to their members, as opposed to those services being delivered by the federal government. See COHEN, *supra* note 4, at 93–108.

132. 25 U.S.C. §§ 1901 et seq.

133. 25 U.S.C. § 1911 (addressing tribal jurisdiction over child welfare proceedings involving an Indian child).

134. CASE & VOLUCK, *supra* note 3, at 392.

135. 25 U.S.C. §§ 450 et seq.

136. 25 U.S.C. § 1918(b)(2).

137. For discussion of *Baker*, see *infra* Part III.B.1.

138. Landreth & Dougherty, *supra* note 12, at 332.

139. *Native Vill. of Stevens v. Alaska Mgmt. & Planning*, 757 P.2d 32, 34 (Alaska 1988).

jurisdiction.<sup>140</sup> However, it exemplified the court's anti-tribal-sovereignty jurisprudence in all cases involving tribes in Alaska.<sup>141</sup>

In a significant turn-around, *Baker* recognized a tribal court's jurisdiction to adjudicate a child custody dispute.<sup>142</sup> Likewise, the Alaska Supreme Court's holding in *In re C.R.H.*, which recognized that Alaska tribal courts were entitled to jurisdiction of child protective cases under ICWA, highlights that tribal sovereignty does exist even without Indian Country.

### **B. Alaska Tribes Can Exercise Membership-Based Jurisdiction to Exclude Nonmembers**

The spur of state and federal decisions in the 1990s and early 2000s, as well as the Interior's 1993 listing of Alaska tribes, confirmed what many Alaska tribes have known since time immemorial: they are sovereigns just like tribes in the Lower 48.<sup>143</sup> However, many of the U.S. Supreme Court's decisions regarding the scope of tribal jurisdiction over nonmembers center around whether the jurisdiction is being asserted over Indian Country.<sup>144</sup> This means the legal basis which permits Alaska tribes to exercise exclusionary powers is likely through a mechanism other than land-based jurisdiction.

Settled law allows a tribe to exclude nonmembers from tribally owned land<sup>145</sup> and exercise jurisdiction over member allotments.<sup>146</sup> This means Alaska tribes can exclude anyone from their land or land owned by its members.<sup>147</sup> But the ability to do so is complicated by a set of factors unique to Alaska. It is difficult to determine how many allotments exist in Alaska – much less the tribal membership of the current owner of each allotment within a village's boundaries.<sup>148</sup> However, there are villages in Alaska where most of the land in the village is either owned by the tribe or is an allotment belonging to a tribal member.<sup>149</sup> A tribe can exercise

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140. *Id.*

141. See Landreth & Dougherty, *supra* note 12, at 327–31 (summarizing various Alaska Supreme Court decisions in the 1980s involving Alaska tribes).

142. *Baker*, 982 P.2d at 748–49.

143. See, e.g., CASE & VOLUCK, *supra* note 3, at 49 (noting that the 1993 list of federally recognized tribes published by the Interior confirmed that Alaska tribes have the same tribal status as tribes in the rest of the country).

144. See generally *Montana v. United States*, 450 U.S. 544 (1981); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

145. *Merrion*, 455 U.S. at 144.

146. CASE & VOLUCK, *supra* note 3, at 391.

147. *Id.* at 405.

148. Landreth & Dougherty, *supra* note 12, at 345.

149. *Id.* (describing a village in Alaska where all of the land, except the school

jurisdiction over all of those lands. This, however, is not the case for every Alaska tribe.

1. *John v. Baker Affirms the Scope of Alaska Tribes' Sovereignty*

A membership-based approach to jurisdiction is a much clearer path for all Alaska tribes to exercise sovereign exclusionary powers. The Alaska Supreme Court's approach in *John v. Baker*<sup>150</sup> recognizes the true breadth of Alaska tribal sovereignty. The court correctly noted that tribes seeking to exert jurisdiction over a child custody dispute "require no express congressional delegation of the right to determine custody of tribal children."<sup>151</sup> This is because the tribe's jurisdiction in *Baker* stemmed from its inherent sovereignty and not the authority delegated to it by Congress in ICWA.<sup>152</sup>

In any exercise of tribal authority, the source of the power is a key distinction—tribes can exercise authority as part of their inherent sovereignty or through a delegation of power by Congress.<sup>153</sup> However, this finding in *Baker* is particularly important because the tribe's exercise of authority over the child custody dispute could easily be construed as an exercise of authority delegated to the tribe by ICWA, rather than inherent sovereign authority. If the *Baker* court found the tribe to be acting under congressionally delegated authority to tribes, this case would have little applicability outside of ICWA and other child welfare matters. But the *Baker* court correctly recognized that the tribe did not need permission to act from Congress.<sup>154</sup> The tribe was acting according to its inherent sovereignty.

The *Baker* court recognized that the key to the scope of Alaska tribes' exclusionary powers depends on "the character of the power that the tribe seeks to exercise, not merely the location of events."<sup>155</sup> The court began its analysis "with the established principle under federal law that 'Indian tribes retain those fundamental attributes of sovereignty . . . which have not been divested by Congress or by necessary implication of the tribe's dependent status.'"<sup>156</sup>

Perhaps most notably, the court looked to a handful of key Indian Law decisions that affirm the sovereign powers of tribes and applied

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lands, are allotments).

150. 982 P.2d 738 (Alaska 1999).

151. *Id.* at 752.

152. *Id.* at 746.

153. *See* COHEN, *supra* note 4, at 242–43.

154. *Baker*, 982 P.2d at 752 (noting that the tribe "require[s] no express congressional delegation of the right to determine custody of tribal children").

155. *Baker*, 982 P.2d at 752.

156. *Id.* (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 136 (1982)).



them to Alaska tribes.<sup>157</sup> In *Merrion*, the U.S. Supreme Court affirmed that a tribe's sovereignty allows it to exclude nonmembers from tribal lands.<sup>158</sup> The U.S. Supreme Court's decision in *Montana* was initially limited to non-Indian activities on non-Indian land within the borders of a reservation.<sup>159</sup> However, *Montana* was also one of the Indian Law decisions the *Baker* court examined and used to justify its affirmation of Alaska tribal sovereignty.<sup>160</sup> Thus, *Baker* makes *Montana* applicable to Alaska tribal powers, even if the original *Montana* decision only applied to tribes with reservations. Alaska tribes are vastly different from tribes in the rest of the country in terms of their lack of territory and relatively small size. But the *Baker* decision makes clear that sovereignty and Indian Country are not dependent on one another.<sup>161</sup>

## 2. Applying the Montana Exceptions to Pandemic Exclusion Orders

The Court has extended *Montana* to apply more broadly to non-Indian-owned lands over which tribes seek to assert jurisdiction.<sup>162</sup> However, in *Nevada v. Hicks*,<sup>163</sup> the Court "declared tribal ownership of land to be merely 'one factor to consider' in judicially determining whether an exercise of tribal governing authority over nonmembers 'is necessary to protect tribal self-government or to control internal relations.'"<sup>164</sup>

Because the *Baker* court used *Montana* to examine the scope of Alaska tribal powers, *Montana* could still support Alaska tribes excluding nonmembers from their villages—despite the confusion *Nevada v. Hicks* brought to the use and applicability of *Montana* exceptions to tribal authority over nonmembers on non-Indian land.<sup>165</sup> The spur of exclusionary orders came amidst the onset of the global coronavirus pandemic, with many orders specifically citing the threat the coronavirus posed to the health and welfare of the tribes and their members.<sup>166</sup> In recent years, the Court has taken a "very narrow view of the two *Montana*

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157. *Id.* at 751.

158. *Merrion*, 455 U.S. at 141.

159. *Montana v. United States*, 450 U.S. 544, 563 (1981).

160. *Baker*, 982 P.2d at 752.

161. *Id.* at 748–49.

162. *See, e.g., Strate v. A-1 Contractors*, 520 U.S. 438, 455–56 (1997) (extending *Montana* to a case involving a right-of-way granted to the state by the federal government). *See also* COHEN, *supra* note 4, at 238.

163. 533 U.S. 353 (2001).

164. COHEN, *supra* note 4, at 238 (quoting *Hicks*, 533 U.S. at 360).

165. *Id.* at 238–39 (noting that the Ninth Circuit "confined *Hicks* to the limited situation of state officers entering the reservation to enforce off-reservation law").

166. *See, e.g., Nunakauyak Traditional Council, Tribal Declaration of Public Health Emergency* (Mar. 20, 2020), <https://npr-brightspot.s3.amazonaws.com/legacy/sites/kyuk/files/202003/Nunakauyak-Toksook-Bay.pdf>.

exceptions<sup>167</sup>—so there is a significant bar any tribe must meet when seeking to exercise jurisdiction over a nonmember in accordance with the second *Montana* exception.<sup>168</sup> However, a global pandemic and the threats it posed to the health and safety of tribal members may be sufficient to meet the modern iterations of the second *Montana* exception. For example, the Ninth Circuit in 2019 found that a nonmember tribal administrator who irresponsibly invested tribal funds and otherwise breached her fiduciary duty had sufficiently “threatened the Tribe’s very subsistence” to fall under the second *Montana* exception.<sup>169</sup> The pandemic did not pose such large financial threats to Alaska tribes, but it did threaten “the health or welfare of the tribe[s].”<sup>170</sup>

## V. CONCLUSION

Every tribe in Alaska, with the exception of Metlakatla, is without a reservation.<sup>171</sup> But this does not mean Alaska tribes lack sovereign authority. The Alaska Supreme Court in *John v. Baker* took several core Federal Indian Law decisions and used them to affirm the membership-based jurisdiction of Alaska tribes.<sup>172</sup> While the *Baker* court was concerned with the tribal membership-based jurisdiction over a child custody case involving a nonmember, the court’s decision affirms the continued exercise of membership-based jurisdiction by Alaska tribes.<sup>173</sup>

But make no mistake: *John v. Baker* is not the source of tribal authority in Alaska. Alaska tribes have always been sovereign. The Alaska Supreme Court merely chose to finally recognize them.

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167. COHEN, *supra* note 4, at 236 (discussing the Court’s use of the *Montana* exceptions in *Strate*, 520 U.S. at 438).

168. *See, e.g.,* Evans v. Shoshone-Bannock Land Use Pol’y Comm’n, 736 F.3d 1298, 1306 (9th Cir. 2013) (holding that the tribe failed to show that nonmember activity would pose “catastrophic risks” to the tribe).

169. Knighton v. Cedarville Rancheria of N. Paiute Indians, 922 F.3d 892, 905 (9th Cir. 2019).

170. *Montana v. United States*, 450 U.S. 544, 566 (1981).

171. CASE & VOLUCK, *supra* note 3, at 81.

172. *Baker*, 982 P.2d at 751-53.

173. *Id.* at 748-49.