

ALASKA NATIVES AND AMERICAN LAWS, by David S. Case and David A. Voluck (3d ed. 2012).

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*Alaska Natives and American Laws*—“Case-Voluck,” for short—has been called the Alaskan equivalent of the late Felix Cohen’s *Handbook of Federal Indian Law* (“Cohen’s Handbook”), the Bible of the profession.<sup>1</sup> *Cohen’s Handbook*, a massive work first published in 1941 and revised in recent years by more than three dozen Indian law scholars, itself describes Case-Voluck as a “comprehensive treatise on Alaska Native legal issues.”<sup>2</sup> It is much more than that.

Far from being a mere legal reference guide or hornbook, *Alaska Natives and American Laws* is essential reading for anyone in business, government, or civic life who is interested in contemporary Alaska. The latest version of the book continues a remarkable journey that began in 1978 with the Alaska Native Foundation’s publication of an initial study entitled “The Special Relationship of Alaska Natives to the Federal Government.” With their third edition, David Case and David Voluck go well beyond summarizing and updating the latest statutes, regulations, and court decisions affecting Alaska Natives and their relationship with the federal government and the State of Alaska. The authors bring order and coherence to that uniquely Alaskan legal landscape that can be dauntingly complex, if not obscure, even to the most seasoned practitioners and policymakers.

The result is an encyclopedia of detailed legal analysis about the black-letter law concerning Alaska Natives, and appropriately so. It is

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1. See, e.g., Steve Russell, Book Review, 23 WICAZO SA REV. 112, 114 (reviewing DALIA TSUK MITCHELL, ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM (2007)) (“One of the first things a person in my position discovers, even today, is ‘the Bible’: *Felix S. Cohen’s Handbook of Federal Indian Law*.”).

2. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.07(3)(a) n.332 (Nell Jessup Newton ed., 2012) [hereinafter COHEN’S HANDBOOK].

also, however, a highly readable primer on the political relationship among the three sovereigns: federal, state, and tribal. The opening chapter is a shining example of the authors' ability to smoothly blend law and application. It provides a chronological overview of federal Indian law in the Lower 48 and Alaska, identifies and explains its core legal concepts, and applies those concepts to current issues and hot topics. It is a model of cogent and persuasive writing and analysis.

Beginning with that first chapter but continuing throughout the book, Case and Voluck take care to examine current trends that are likely to continue influencing the development of the law and public policy in years ahead. In the third edition, this includes the crucial but underappreciated role that Alaska Natives are playing in the United Nations and elsewhere to build legal foundations for the recognition of indigenous human rights under international law. It also includes high-profile litigation by various nongovernmental organizations related to global warming and other environmental issues.<sup>3</sup>

Though each of the book's ten chapters is comprehensive, the fifth chapter of Case-Voluck is nothing less than required reading for anyone seeking to decipher the Alaska Native Claims Settlement Act ("ANCSA").<sup>4</sup> The authors are in a class by themselves in explaining this complicated law in understandable terms. Enacted in 1971, ANCSA was amended by nearly every Congress for the next thirty-five years and was preceded, as the authors wryly note,

by more than one hundred years of at least theoretical uncertainty about the legal status of the Indigenous Peoples of what is now the state of Alaska. The uncertainty was the product of vacillating judicial decisions, ineffective implementation of federal policies, and entrenched political opposition among Alaska's territorial and state leaders to the ideas of aboriginal title and tribal status.<sup>5</sup>

In exchange for extinguishing Alaska Natives' claims to more than three hundred and fifty million acres of land, ANCSA established an

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3. See, e.g., *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). The Native Village of Kivalina and City of Kivalina alleged that "fossil fuel emissions by various energy-related multi-national companies had resulted in global warming, severely eroding the land where the City of Kivalina sits and threatening it with imminent destruction." *Id.* at 853. Kivalina unsuccessfully sought damages under a federal common law claim of public nuisance. *Id.* at 854. The Ninth Circuit ruled that the Clean Air Act and the EPA action the Act authorizes displaced Kivalina's tort claims. *Id.* at 866.

4. 43 U.S.C. §§ 1601-1629h (2012).

5. DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* 165 (3d ed. 1978).

experimental corporate governance model of sometimes dizzying complexity. The basic idea was to forgo the Lower 48 approach, symbolized by the Indian reservation system, whereby existing Native American tribal governments were vested with assets reserved after the extinguishment of aboriginal land claims. Instead, many, but not all, Alaska Natives were permitted to become individual shareholders in regional and village corporations. Case and Voluck patiently trace ANCSA's sometimes convoluted history and shifting goals, concentrating on the underlying battle for control of Alaska's lands and natural resources.

Readers might be forgiven for concluding that if ever there was a federal statute that could be used to justify almost anything that has happened in modern Alaska, depending on the given timeframe and the political agenda of the person or interest group involved, ANCSA is it. Over the years, ANCSA has been alternatively cited for preserving or abrogating tribal sovereignty, for economically empowering or subjugating Alaska Native communities and people, and for postponing or accelerating the subsistence food crisis in rural Alaska. When it comes to separating ANCSA fact from myth or misconception, Case and Voluck really shine. Other well written but less detailed expositions of ANCSA, such as that found in *Cohen's Handbook*, merely attest to the value of what Case and Voluck have accomplished here in demystifying the statute.

Like the other chapters, Chapter Five proceeds methodically. After carefully deconstructing the framework of the corporate structure established by the Act, the authors make some general observations about what ANCSA does and does not do. They then catalogue many of the costs and benefits that have come from converting communal tribal land claims to individual private property. ANCSA's history, purpose, and goals are addressed, but so is its current reality—along with the separate statutes and court decisions it has spawned.

For example, ANCSA does not “expressly protect” subsistence within its text.<sup>6</sup> According to Case and Voluck, the Act is more nuanced:

Although ANCSA extinguished Alaska Native hunting and fishing rights, its legislative history confirms that Congress also intended that the lands conveyed under the act as well as state and federal policies were to be used to promote and maintain

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6. ALASKA FED'N OF NATIVES, 2008 FEDERAL PRIORITIES: PROTECTION OF SUBSISTENCE HUNTING, FISHING AND GATHERING IN ALASKA 1 (2008), available at <http://www.nativefederation.org/wp-content/uploads/2012/10/2008-subsistence-report.pdf>.

Alaska Native subsistence values.<sup>7</sup>

The book goes on to analyze why this is so. It also examines how ANCSA set the stage for Congress' later enactment of the Alaska National Interest Lands Conservation Act ("ANILCA").<sup>8</sup> Passed in 1980, ANILCA established subsistence preferences for "rural Alaska residents," as opposed to just Alaska Natives, and was intended to transfer administration of subsistence preferences on federal lands to the state government.<sup>9</sup>

Less than a decade later, when the Alaska Supreme Court held in *McDowell v. State of Alaska*<sup>10</sup> that the preference system violated Alaska's Constitution, the federal government was compelled to administer those preferences.<sup>11</sup> This has sparked seemingly endless conflict between state and tribal authorities over fishing and hunting on lands controlled by Alaska Native corporations or tribal governments.<sup>12</sup>

The previous edition of Case-Voluck, including its insightful and spirited treatment of subsistence issues, was particularly helpful to the Indian Law and Order Commission. The Commission is the national advisory board to President Obama and Congress, and was established by the Tribal Law and Order Act of 2010. The author of this book review currently serves as chair of this Commission, which was privileged to make four official visits to Alaska during the past year. The Commission's nine volunteer members were all appointed by the President or Congressional leadership, and the nonpartisan group includes both Democrats and Republicans. While meeting in all parts of the state with tribal, state, and federal officials and rural and urban Alaskans alike, the Commission was struck by the frequent connection between subsistence issues—access to fishing, hunting, and other wild, renewable resources—and public safety issues. The Commission observed that in many parts of the state, the traditional subsistence lifestyle of Alaska Natives is being squeezed to the breaking point.

For example, this past year, Alaska Native fisherman living along

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7. CASE & VOLUCK, *supra* note 5, at 46.

8. 16 U.S.C. §§ 3101–3233 (2012).

9. § 3113.

10. 785 P.2d 1 (Alaska 1989).

11. *Id.* at 12.

12. On November 4, 2013, for example, the State of Alaska filed a petition for certiorari with the United States Supreme Court in *Alaska v. Jewell*. Petition for a Writ of Certiorari, *Alaska v. Jewell*, No. 13-562 (U.S. Nov. 4, 2013). The State challenges the Ninth Circuit's prior decision that—as a consequence of the Alaska National Interest Lands Conservation Act and its implementing regulations—the United States government has jurisdiction, given the scope of its federal reserved water rights in Alaska, to regulate and fishing and hunting along waterways constituting more than one-half the entire state. *Id.* at \*3.

the Yukon River were ordered to do without when their staple, the king salmon, did not run as in many years past due to a perfect storm: commercial overfishing; declining fish populations; and a legal and public policy baseline in Alaska – detailed in *Alaska Natives and American Laws* – that treats Native fishing rights no differently than tourism. Citizens of Alaska Native villages that already must pay the highest gasoline prices in the nation and ten dollars or more for a quart of milk also face unprecedented threats to their traditional culture and way of life.<sup>13</sup>

In Chapter Eight, which deals with subsistence issues, the authors delve into the Alaska Supreme Court's *McDowell* opinion, which invalidated the state statutory subsistence preference for rural residency that was enacted to comply with ANILCA.<sup>14</sup> Case and Voluck start with the case's legal implications, but quickly move to the resulting politics that have played out in the field. In their description of a Fish and Game Department that "is dominated by non-Native urban, sport, and commercial hunting and fishing interests," which "make wildlife management policies in splendid isolation from the rural (predominately Native) populations," the authors' frustration over the status quo is palpable.<sup>15</sup> Such language may strike some readers as too emotive, or perhaps a little flip. There is no question that here, as throughout the book, Case and Voluck seem exasperated as they attempt to make sense of these vexing public policy issues. The authors' tone is occasionally distracting, yet their peerless ability to clarify a seemingly impenetrable subject matter makes for rewarding reading.

Case-Voluck differs from a treatise such as *Cohen's Handbook* in a more general respect, as well: some aspect of tribal sovereignty and self-determination is explored in every chapter of the book. Case and Voluck devote the entire closing chapter to examining the scope of tribal sovereignty, especially since the enactment of ANCSA. This chapter traces the historical roots of Alaska Native tribal sovereignty, formulates some general propositions about how ANCSA did and did not substantively affect tribes' retained governmental powers, and painstakingly breaks down what a tribe's inherent powers of self-government actually mean in practice. For instance, the chapter discusses when and how a tribal governing council can waive its tribe's sovereign immunity, and which matters fall within tribal jurisdiction for

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13. Robert Brodsky, *Alaska Native Corporations Defend Their Programs*, GOV'T EXEC. (Mar. 17, 2009), <http://www.govexec.com/oversight/2009/03/alaska-native-corporations-defend-their-programs/28768>.

14. *McDowell*, 785 P.2d at 1.

15. CASE & VOLUCK, *supra* note 5, at 294.

regulatory and adjudicative purposes.<sup>16</sup>

By book's end, the reader is left with the inescapable conclusion that tribal sovereignty lives on in Alaska, and is likely to become even more important in the future as many villages boost their capabilities for self-government and service delivery. This is the case even notwithstanding the aboriginal land claims extinguished by ANCSA, including as narrowed by the United States Supreme Court in *Alaska v. Native Village of Venetie*.<sup>17</sup> The authors provide an especially useful service by putting into perspective that 1998 decision, which is often miscited for the sweeping but inaccurate conclusion that there is little or no federal "Indian country" in Alaska (apart from the Metlakatla Reservation) on which Alaska Native tribes may assert concurrent criminal jurisdiction.<sup>18</sup> Case and Voluck note, for instance, that *Venetie* does not hold that there is no Indian country in Alaska, but rather, that any designated Indian country would have to be in the form of an allotment or other trust or restricted land that is "set aside under federal superintendence."<sup>19</sup>

This leads to a complaint, or rather, more of a suggestion: given all this understandable emphasis on tribal sovereignty and self-determination, it is striking that *Alaska Natives and American Laws* devotes comparatively much less attention to criminal justice or public safety issues. Readers certainly deserve (and probably expect) a more detailed explication of how Alaska Native communities protect their citizens and enforce their own laws. The Commission's report to Congress and the President concludes that Alaska Native communities are frequently denied even the most basic tools to protect themselves and, to borrow an iconic Supreme Court phrase about tribal governments, are also denied the right "[t]o make their own laws and be governed by them."<sup>20</sup> Rather than rely on self-governing tribal nations as the backbone of local justice, supplementing it with essential state services to encourage accountability and transparency, there is a pronounced tendency in Alaska to do precisely the opposite. A relatively small cadre of state and federal officials is typically charged

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16. *Id.* at 373–443.

17. 522 U.S. 520 (1998) (holding that land transferred under ANCSA is not "Indian country").

18. See INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER 44–45 (2013) [hereinafter ROADMAP] (acknowledging and rejecting the State of Alaska's position that because of ANCSA and *Venetie*, there is very little Indian country in Alaska as defined by the Federal Indian Country Act, 18 U.S.C. § 1151 (2012)).

19. CASE & VOLUCK, *supra* note 5, at 399 (internal quotation marks omitted).

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

with serving vast geographical areas. The dedicated but thinly staffed Alaska State Patrol (“ASP”) unit operating out of Fairbanks, for instance, provides service to an area the size of Texas. At field hearings and site visits, the Commission also found that Alaska Native tribal courts are often marginalized or simply ignored by state officials.<sup>21</sup>

Providing law and order from afar tends to exacerbate the public safety crisis affecting many villages. Communities hundreds of miles from the nearest graded dirt road must depend on the ASP and the Alaska State Courts. The ASP has created a program of unarmed Village Public Safety Officers (“VPSOs”) who, if a village so requests, can reside locally and assist with law enforcement, firefighting, and emergency response. But by design, these VPSOs, who are paid by Alaska Native Corporations but report to the State Patrol, are not accountable directly to Native Alaska communities. Though they can make arrests and briefly detain suspects, VPSOs are not authorized to carry firearms because they are not, by deliberate design of state law, qualified to act as state-certified peace officers, cops, or criminal investigators. As the Indian Law and Order Commission concludes in its November 2013 report:

Funding is available for just over 100 VPSOs, although only 88 positions serving 74 communities were filled in 2011. Local Alaska Native Corporations hire VPSOs and villages have input into their selection; but, the officers actually work under Alaska State Trooper oversight. VPSO presence helps improve the coverage ratio, but technically their role is restricted to basic law enforcement and emergency first response. They do not carry firearms, although most offenders in rural villages do, a fact tragically emphasized through the death of VPSO Thomas Madole in March 2013.<sup>22</sup>

Most disturbing of all are the victims of violent crime, often women

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21. For example, Alaska Attorney General Michael Geraghty recently gained headlines by intervening in a child custody dispute on behalf of Edward Parks. Parks was convicted by a state court of the kidnapping and aggravated assault of his girlfriend, the mother of his minor child and a member of the Village of Minto west of Fairbanks. Parks beat the victim so badly that he broke three of her ribs and collapsed one lung, then denied her medical care for two days. Attorney General Geraghty, while decrying Park’s criminal behavior, explained that intervening against the tribal court’s order declaring Parks to be an unfit parent was important because “[w]e’re supporting his due process rights as we would any other Alaskan.” Richard Mauer, *In Challenging Tribal Court, State Backs Man Convicted of Beating His Wife*, ANCHORAGE DAILY NEWS (Aug. 25, 2013), <http://www.adn.com/2013/08/25/3042290/in-challenging-tribal-court-state.html>.

22. ROADMAP, *supra* note 18, at 39.

and young people. Alaska Native women are overrepresented in the state's total domestic violence victim population "by some 250 percent; they are 19 percent of the population but 47 percent of reported rape victims."<sup>23</sup> On average, an Alaska Native female "[becomes] a victim of reported sexual assault or of child sexual abuse every 29.8 hours, as compared to once every 46.6 hours for non-Native females."<sup>24</sup> In Alaska Native villages, women report rates of domestic violence up to "10 times higher than in the rest of the United States and physical assault victimization rates up to 12 times higher."<sup>25</sup> Some of these victims approached the Commission with vivid accounts of the fundamental breakdown of justice systems in many Alaska Native communities. As one younger woman put it, "[e]very woman you've met today has been raped. All of us. I know they won't believe that in the lower 48, and the State will deny it, but it's true. We all know each other and we live here. We know what's happened."<sup>26</sup>

In the next edition of their book, Case and Voluck would do well to engage in a focused discussion of criminal justice and public safety issues in Alaska, and to place those issues within the larger context of tribal sovereignty and self-determination. Now, as with editions past, there is still much more work to be done. Notwithstanding this omission, and loosely paraphrasing Voltaire, if *Alaska Natives and American Laws* had not existed, it would have been necessary for someone to invent it; maybe even three dozen or so Indian law scholars, as with *Cohen's Handbook*. Happily for the rest of us, just two distinguished experts—David Case and David Voluck—have rendered this invaluable national public service.

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23. ROADMAP, *supra* note 18, at 41.

24. *Id.*

25. *Id.*

26. *Id.* at 56 (quoting a tribal citizen who asked that her name remain confidential).