IN THE SUPREME COURT FOR THE STATE OF ALASKA

Michael McCrary, Appellant, v. Ivanof Bay Village and Edgar Shangin, Appellees.	)	Supreme Court No. S-13972 Superior Court No. 3AN-09-10267 CI

APPEAL FROM THE SUPERIOR COURT, THIRD JUDICIAL DISTRICT AT ANCHORAGE, THE HONORABLE PETER A. MICHALSKI, PRESIDING

BRIEF OF APPELLEES

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Filed in the Supreme Court of the State of Alaska this 15th day of February, 2011.

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Appellate Courts

By: Shelley L. Warren
Deputy Clerk

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25 U.S.C. 473a. Application to Alaska

Sections 461, 465, 467, 468, 475, 477 and 479 of this title shall after May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title.

§ 476. Organization of Indian tribes; constitution and bylaws and amendment thereof

(a) Adoption; effective date
Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when-

(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe;

and

(2) approved by the Secretary pursuant to subsection (d) of this section.

. . .

(e) Vested rights and powers; advisement of presubmitted budget estimates

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject of the approval of the Secretary; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

(f) Privileges and immunities of Indian tribes; prohibition of new regulations

Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

(g) Privileges and immunities of Indian tribes; existing regulations

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

25 U.S.C. 477. Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: Provided that such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

Federally Recognized Indian Tribe List Act (FRITLA) (List Act of 1994), Pub. L. No. 103-454, 108 Stat. 4791 (codified in part at 25 U.S.C. §§ 479a *et seq.*)

An Act to provide for the annual publication of a list of federally recognized Indian tribes, and for other purposes. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—WITHDRAWAL OF ACKNOWLEDGMENT OR RECOGNITION

SEC. 101. SHORT TITLE

This title may be cited as the "Federally Recognized Indian Tribe List Act of 1994".

SEC. 102. DEFINITIONS

For the purpose of this title:
(1) The term "Secretary" means the Secretary of the Interior
(2) The term "Indian tribe" means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.
(3) The term "list" means the list of recognized tribes published by the Secretary pursuant to section 104 of this title.

SEC. 103. FINDINGS

The Congress finds that—
(1) the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs;
(2) ancillary to that authority, the United States has a trust relationship to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes;
(3) Indian tribes presently may be recognized by Act of Congress; by administrative procedures set forth in part 83 of the Code of Federal Regulations denominated "Procedure for Establishing that an American Indian Group Exists as an Indian Tribe;" or by a decision of a United States court;
(4) a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress;
(5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated;
(6) the Secretary of the Interior is charged with the responsibility of keeping a list of all federally recognized tribes;
(7) the list published by the Secretary by the Secretary should be accurate, regularly updated, and regularly published, since it is used by the various departments and agencies of the United States to determine the eligibility of certain groups to receive services from the United States; and
(8) the list of federally recognized tribes which the Secretary publishes should reflect all of the federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

SEC. 104. PUBLICATION OF LIST OF RECOGNIZED TRIBES.

(a) PUBLICATION OF THE LIST—The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.
(b) FREQUENCEY OF PUBLICATION—The list shall be published within 60 days of enactment of this Act, and annually on or before every January 30 thereafter.

TITLE II—CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA

SEC. 201. SHORT TITLE

This title may be cited as the "Tlingit and Haida Status Clarification Act".

SEC. 202. FINDINGS.

The Congress finds and declares that—
(1) the United States has acknowledged the Central Council of Tlingit and Haida Indian Tribes of Alaska pursuant to the Act of June 19, 1935 (49 Stat. 388, as amended, commonly referred to as the "Jurisdiction Act"), as a federally recognized Indian tribe;
(2) on October 21, 1993, the Secretary of the Interior published a list of federally recognized Indian tribes pursuant to part 83 of title 25 of the Code of Federal Regulations which omitted the Central Council of Tlingit and Haida Indian Tribes of Alaska;
(3) the Secretary does not have the authority to terminate the federally recognized status of an Indian tribe as determined by Congress;
(4) the Secretary may not administratively diminish the privileges and immunities of federally recognized Indian tribes without the consent of Congress; and
(5) the Central Council of Tlingit and Haida Indian Tribes of Alaska continues to be a federally recognized Indian tribe.

SEC. 203. REAFFIRMATION OF TRIBAL STATUS.

The Congress reaffirms and acknowledges that the Central Council of Tlingit and Haida Indian Tribes of Alaska is a federally recognized Indian tribe.

SEC. 204. DISCLAIMER.

(a) IN GENERAL—Nothing in this title shall be interpreted to diminish or interfere with the government-to-government relationship between the United States and other federally recognized Alaska Native tribes, not to vest any power, authority, or jurisdiction in the Central Council of Tlingit and Haida Indian Tribes of Alaska over other federally recognized Alaska Native tribes.
(b) CONSTITUTION OF CENTRAL COUNCIL OF THE TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA—Nothing in this title shall be construed as codifying the Constitution of the Central Council of the Tlingit and Haida Indian Tribes of Alaska into Federal law.

SEC. 205. PROHIBITION AGAINST DUPLICATIVE SERVICES.

Other federally recognized tribes in Southeast Alaska shall have precedence over the Central Council of Tlingit and Haida Indian Tribes of Alaska in the award of a Federal compact, contract or grant to the extent that their service population overlaps with that of the Central Council of Tlingit and Haida Indian tribes of Alaska. In no event shall dually enrolled members result in duplication of Federal service funding.

STATEMENT OF JURISDICTION

Appellees agree with Appellant's Statement of Jurisdiction.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the superior court correctly adhered to *John v. Baker* (*John v. Baker I*), 982 P.2d 738 (1999), in dismissing the lawsuit for lack of subject matter jurisdiction upon the finding that Ivanof Bay is a federally recognized Tribe and therefore possesses sovereign immunity from suit.

COUNTERSTATEMENT OF THE CASE

Appellant's complaint arises out of a contractual dispute between Appellant Michael McCrary, Appellee Ivanof Bay Village, and its President Appellee Edgar Shangin.[1] The complaint nominally alleges violation of the covenant of "good faith and fair dealing," but is actually the third complaint in three years to be brought by Mr. McCrary and his counsel, Don Mitchell, to challenge the tribal status of all federally recognized tribes in Alaska.

Appellant's first suit against Ivanof Bay and President Shangin was filed in the Superior Court in October 2008. Complaint, *McCrary v. Native Village of*

[1] This action was filed against "Ivanof Bay Village." "Ivanoff Bay Village" (with two f's) is the listed name of the federally recognized Tribe for which the "Ivanof Bay Village Council" is the governing body. *See* Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,180, 60,814 (Oct. 1, 2010). Ivanof Bay Village is also sometimes referred to as "Ivanof Bay Tribe." The terminated contracts at issue in this suit were allegedly either signed by Ivanof Bay Village, ER 95-96, or signed by Edgar Shangin as President on behalf of the "Ivanof Bay Village Council." ER 97. For simplicity, this brief refers to Appellee as "Ivanof Bay," which is the Tribe's preferred spelling.

Ivanof Bay & Edgar Shangin, No. 3AN-08-11451 CI (Ak. Sup. Ct. Oct. 28, 2008), ER 126. Seven days after Ivanof Bay and Shangin filed a motion to dismiss based upon sovereign immunity, Appellant filed a notice dismissing the case without prejudice.

Appellant's second suit was filed the following month in federal district court, this time adding the U.S. Department of the Interior and other federal officials. Complaint, *McCrary v. Ivanof Bay Village, et al.* No. 3:08-CV-00259 (JWS) (D. Alaska Nov. 24, 2008), ER 135. Appellant sought a declaratory judgment that Ivanof Bay was not a validly recognized tribal government and therefore was not entitled to assert a sovereign immunity defense. Judge Sedwick dismissed this second case for lack of subject matter jurisdiction. ER 159, 165-66.

In September 2009, shortly before the federal case was dismissed, Appellant initiated his third suit, the instant case. Complaint, *McCrary v. Ivanof Bay Village & Edgar Shangin*, 3AN-09-10267 CI (Ak. Sup. Ct. Sept. 18, 2009), ER 93. The current version of Appellant's lawsuit is nominally characterized as an action for violation of the covenant of "good faith and fair dealing," ER 100, but is really brought to challenge the federal government's recognition of all 231 Alaska Native Tribes, including Appellee Ivanof Bay. Appellant's briefing below averred that whether Ivanof Bay is a federally recognized Tribe depends on whether the Secretary of the Interior possessed the authority to publish various lists covering all federally recognized Alaska Tribes beginning in 1993 and continuing thereafter following enactment of the Federal Recognized Indian Tribe

List Act of 1994 (FRITLA).[2] ER 161, 176-83. Appellant and his counsel argued that *John v. Baker I* was somehow not controlling—even though this Court in *John v. Baker I* directly addressed and rejected this very contention—and he went on to insist that the Secretary of the Interior has *no* authority to recognize Tribes and that accordingly *no* federally recognized Tribes exist in Alaska. ER 167-99.

Like all other federal and state court judges before him, Judge Michalski rejected Appellant's contentions and dismissed the complaint for lack of subject matter jurisdiction. ER 115. This appeal followed.

STANDARD OF REVIEW

The only issue in this appeal, whether Appellees Ivanof Bay Village and Edgar Shangin are protected by tribal sovereign immunity, is a question of law. This court reviews questions of law de novo, adopting the rule that is most persuasive in light of precedent, reason, and policy. *Runyon ex rel. B.R. v. Ass'n of Village Council Presidents*, 84 P.3d 437, 439 (Alaska 2004).

INTRODUCTION AND SUMMARY OF ARGUMENT

That Ivanof Bay is a federally recognized Tribe possessed with sovereign immunity is settled. As this Court has recognized, tribal recognition by the Executive Branch is a nonjusticiable political question. *Atkinson v. Haldane*, 569 P.2d 151, 163 (Alaska 1977); *John v. Baker I*, 982 P.2d at 749. In *John v. Baker I*, this Court acknowledged that the political branches of the federal government had

[2] Pub. L. No. 103-454, 108 Stat. 4791 (codified in part at 25 U.S.C. § 479a *et seq.*).

long recognized Alaska's Tribes and that the Alaska Native villages on the Department of Interior's list of federally recognized Tribes are sovereign entities. 982 P.2d at 749-50; *see also In re C.R.H.*, 29 P.3d 849, 851 n.5 (Alaska 2001). Since then, this Court has adhered to principles of stare decisis and rejected all invitations (including those by Appellant's counsel here) to revisit this Court's prior decisions. *See Runyon*, 84 P.3d at 439 n.3 ("We decline the invitations of the Runyons and amicus Legislative Council to revisit *John v. Baker*.") Based on the overwhelming weight of this authority, the decision below should be summarily affirmed.

ARGUMENT

I. PRINCIPLES OF STARE DECISIS COMPEL THIS COURT TO ONCE AGAIN REJECT THE INVITATION TO REVISIT *JOHN v. BAKER I*

The superior court correctly adhered to *John v. Baker I* in dismissing the complaint for lack of subject matter jurisdiction upon finding that Ivanof Bay is a federally recognized Tribe and therefore possesses sovereign immunity from suit. While Appellant concedes that principles of stare decisis normally require that this Court should give prior conclusions of law precedential value, he nonetheless insists that precedent be abandoned here. App. Br. at 13. But stare decisis cannot so easily be disregarded simply because one disagrees with the legal proposition reflected in that precedent. As this Court has noted, "The stare decisis doctrine rests on a solid bedrock of practicality: 'no judicial system could do society's work if it eyed each issue afresh in every case that raised it.' " *Thomas v.*

Anchorage Equal Rights Commission, 102 P.3d 937, 943 (Alaska 2004) (*quoting Pratt & Whitney Canada, Inc. v. United Technologies*, 852 P.2d 1173, 1175 (Alaska 1993)). This Court "do[es] not lightly overrule [its] past decisions," *State v. Dunlop*, 721 P.2d 604, 610 (Alaska 1986), and this Court has already specifically *rejected* Appellant's invitation "to revisit *John v. Baker*." *Runyon*, 84 P.3d at 439 n.3.

Under the well-settled rule of stare decisis, this Court will adhere to its precedents unless clearly convinced that: (1) a decision was originally erroneous or is no longer sound because of changed conditions, and (2) more good than harm will result from overruling it. *State v. Fremgen*, 914 P.2d 1244, 1245 (Alaska 1996). These criteria were already considered and rejected in *Runyon*, which should have put an end to calls to overrule *John v. Baker I.* Unfortunately, however, the instant appeal compels Appellees to once again address each criterion in turn.[3]

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[3] Appellant seeks to add a third criterion to the stare decisis analysis arguing that this court in *John v. Baker I* did not have the benefit of adversarial briefing and argument. That is patently untrue, and Appellant's counsel knows better. In *John v. Baker I* this Court received extensive supplemental briefing on the issue of tribal recognition in the wake of *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998). The Court received supplemental briefs from Mr. John (represented by the Office of Public Advocacy and later by Appellant's counsel here, Mr. Mitchell), Ms. Baker (represented by the Alaska Legal Services Corporation), the State of Alaska, the U.S. Department of Justice, the Native Village of Venetie Tribal Government, the Alaska Inter-Tribal Council, the Native Village of Northway, Tanana Chiefs Conference, the Paskenta Band of Nomlaki Indians and the Scotts Valley Band of Pomo Indians. Indeed, the 28-page majority opinion and the 37-page dissent alone make plain that this Court carefully considered the issues presented in an adversarial and well-informed posture.

A. This Court Correctly Held in *John v. Baker I* That the Political Question Doctrine Required That it Defer to the Political Branches of the Federal Government.

John v. Baker I held that the Department of the Interior expressly recognized Alaska's Tribes, including Appellee, as sovereign political bodies,[4] and that Congress ratified the Interior Department's authority to so act in the Federally Recognized Tribe List of 1994. 982 P.2d at 749-50 (*citing* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,368-69 (Oct. 21, 1993) and subsequent Lists). Appellant would have this Court review the legality of these undertakings by the political branches of the federal government. But the Appellant fails to address the principal impediment to judicial review of the political branches' recognition of Ivanof Bay: "tribal status is a non-justiciable political question." 982 P.2d at 749 (*citing Atkinson*, 569 P.2 at 163); *see also In re C.R.H.*, 29 P.3d at 851 n.5 ("We follow the U.S. Congress's determination that Alaska Native tribes are sovereign powers under federal law.").

As if that were not enough, the very same issues were again fully briefed in *Runyon*, where Appellant's counsel, Mr. Mitchell, was once again the chief proponent of the argument to revisit and overturn *John v. Baker I*. *See* Brief for the Legislative Council of the Alaska Legislature as Amicus Curiae Supporting Appellants, *Runyon*, 84 P.3d 437 (Nos. S-10772, S-10838), 2003 WL 24048558. It is unfortunate that this appeal compels Appellees and the Court to cover all this well-tread ground once again.

[4] *John v. Baker I*, 982 P.2d at 749.

As explained in *John v. Baker I*, the political question doctrine requires that courts defer to the express recognition of tribal status by the political branches of the federal government. 982 P.2d at 749. On this point *John v. Baker I* is fully consistent with Supreme Court authority, which long ago noted that:

> In reference to all matters of this kind, it is the rule of this court to follow the action of the *executive* and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

United States v. Holliday, 70 U.S. (3 Wall.) 407, 419 (1865) (emphasis added) (cited with approval in *United States v. Sandoval,* 231 U.S. 28, 47 (1913), explaining that whether a people are to be recognized as a Tribe is more appropriately resolved by a political branch of government than by the courts).

This time-honored principle retains its vitality in current legal discourse.[5] As explained by Judge Posner:

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[5] *See Samish Indian Nation v. United States*, 419 F.3d 1355, 1370 (Fed. Cir. 2005) ("As a political determination, tribal recognition is not justiciable."); *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1496 (D.C. Cir. 1997) ("Whether a group constitutes a 'tribe' is a matter that is ordinarily committed to the discretion of Congress and the Executive Branch, *and the courts will defer to their judgment.*" (emphasis added)); *Price v. Hawaii*, 764 F.2d 623, 628 (9th Cir. 1985) (refusing to "intrude on the traditionally executive or legislative prerogative of recognizing a tribe's existence"); *Masayesva v. Zah,* 792 F. Supp. 1178, 1184 (D. Ariz. 1992) (stating that the Ninth Circuit "gives great deference to the prerogative of the other branches of government to recognize the existence of an Indian Tribe"); *Shinnecock Indian Nation v. Kempthorne*, 06-CV-5013 (JFB) (ARL), slip op. at 2 (E.D.N.Y. Sept. 30, 2008), 2008 WL 4455599 ("The issue of federal recognition of an Indian tribe is a quintessential political question that . . . must be left to the political branches of government and not the courts.").

> [Tribal] recognition lies at the heart of the doctrine of "political questions." The doctrine identifies a class of questions that either are not amenable to judicial resolution because the relevant considerations are beyond the courts' capacity to gather and weigh, or have been committed by the Constitution to the exclusive, unreviewable discretion of the executive and/or the legislative—the so-called "political"—branches of the federal government.

Miami Nation of Indians of Indiana v. Dep't. of Interior, 255 F.3d 342, 347 (7th Cir. 2001) (internal citations omitted).

Far from being "originally erroneous" or "no longer sound because of changed conditions," *John v. Baker I*'s treatment of tribal status as a non-justiciable political question is compelled by this unbroken line of authority. It is also consistent with decisions from the Alaska District Court: "[A]cknowledgment of Indian tribes *is* a political decision. Either of the political branches of government (the Executive or Congress) may acknowledge the existence of Indian tribes, and once acknowledged by a political branch, courts owe deference to that decision, which is essentially unreviewable." *Native Village of Tyonek v. Puckett*, No. A82-0369-CV (HRH), slip op. at 17 (D. Alaska Oct. 29, 1996) (*citing Native Village of Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992); *Baker v. Carr*, 369 U.S. 186, 215-16 (1962); *Sandoval*, 231 U.S. at 47-48) (internal citations omitted) (emphasis in original), App. 28. Indeed, the political question doctrine in this context is so well-established that "[n]o congressional or executive determination of tribal status has been overturned by the courts . . . ." FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 3.02[4] (Neil J. Newton *et al.* eds., 2005 ed.).

In sum, there is no reason for this Court to deviate from its prior adherence to the political question doctrine as applied to tribal status determinations, and Appellants offer no cogent reason for discarding that doctrine or abandoning the binding precedent that embraces that doctrine. On this point alone, this Court should affirm.

B. This Court in *John v. Baker I* Correctly Determined that in 1993 the Interior Department Lawfully Recognized Alaska Native Tribes as Sovereign Entities and that Congress in the Federally Recognized Tribe List of 1994 Ratified the Interior Department's Authority to Act.

1. The Executive Branch possesses authority to acknowledge tribal status.

Even if the political question doctrine were not a bar to this Court's inquiry into Ivanof Bay's federal recognition, Appellant cannot show that *John v. Baker I*'s holding was "originally erroneous." To the contrary, *John v. Baker I* is consistent with extensive statutory and case law confirming Executive Branch authority to acknowledge tribal status.[6]

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[6] *See United States v. John*, 437 U.S. 634, 650 n. 20 (1978) (organization under the IRA effects recognition of the entity as "a tribe for the purposes of federal Indian law"); *Miami Nation of Indians of Indiana v. Dep't. of Interior*, 255 F.3d at 346-47 (rejecting the argument that Interior's tribal recognition regulations were invalid as unauthorized by Congress); *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 57 (2d. Cir. 1994) (holding that the IRA required the Department of the Interior to make tribal recognition determinations); *James v. U.S. Dep't of Health and Human Servs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987) (discussing 25 U.S.C. §§ 1, 2, and 9 and noting that "Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and regulations"); *Burt Lake Band of Ottawa & Chippewa Indians v. Norton*, 217 F.Supp.2d 76, 77 (D.D.C. 2002) ("Congress authorized [Interior] and its Bureau of Indian Affairs [] to regulate and manage all matters relating to Indian affairs under

As Ben Franklin once said wryly, "[h]istorians relate, not so much what is done, as what they would have believed."[7] So, too, the Appellant here disputes the long-standing authority of the Executive Branch to acknowledge tribal status, and maintains that Congress has neither enacted a statute, nor the Senate ratified a treaty, specifically designating the Native Village of Northway (in *John v. Baker I*) or now Appellee Ivanof Bay as a federally recognized Tribe. App. Br. 18. But Appellants fail to establish that such a statute or treaty is the exclusive means by which particular tribal status may be confirmed. On this point, Appellant simply ignores the controlling law.[8]

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the direction of the Executive Branch," including the authority to establish "procedures for federal recognition of Indian groups as Indian tribes."); *City of Sault Ste. Marie v. Andrus*, 532 F.Supp. 157, 161 (D.D.C. 1980) (determining that the Secretary has the authority to recognize Indian tribes under the IRA). For an extensive discussion, see Brief for Alaska Inter-Tribal Council as Amicus Curiae Supporting Appellees, *Runyon*, 84 P.3d 437 (Nos. S-10772, S-10838), 2003 WL 24048560.

[7] BENJAMIN FRANKLIN, AUTIOBIOGRAPHY. POOR RICHARD. LETTERS. 231 (D. Appleton & Co. 1904).

[8] Appellant does not address the many federal statutes where Congress has specifically defined Alaska Native Villages as "Tribes." Instead, he tries to use the statements made by one congressman (in passing amendments to H.R. 2538, the Native American Small Business Development Act), as representing the entire Congress's "post-FRITLA understanding" that Alaska Native villages are Tribes only for specific limited purposes. App. Br. 45-47. This is hardly helpful to discerning FRITLA's meaning by the Congress that enacted it—a meaning best taken from the actual words of the Act. More fundamentally, such reasoning does not comport with the constitutional principle that congressional authority to enact legislation for the benefit of Indian people rests on Congress's power under the Indian Commerce Clause "to regulate Commerce . . . with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. Since Congress's constitutional authority to legislate with respect to Native Americans is based on the political relationship with the tribes,

As noted by modern scholars:

> Federal recognition may arise from treaty, statute, *executive or administrative order, or from a course of dealing with the tribe as a political entity.* Any of these events or, a combination of them, then signifies the existence of a special relationship between the federal government and the concerned tribe that may confer such important benefits as immunity of the Indians' lands from state taxation.

WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 4-5 (2004) (*citing In re Kansas Indians*, 72 U.S. 737 (1866) (emphasis added).[9]

Contrary to Appellant's assertions, the Executive Branch has long been understood to have the independent authority to recognize tribes much as it has the authority to recognize foreign nations. This power is lodged with the President under Article II of the United States Constitution and includes the power to "receive Ambassadors and other public Ministers [and to] Commission all the Officers of the United States." U.S. CONST. art. II, § 3. As summarized in one law review article, consistent with this constitutional power:

> Presidents sent agents to various Indian tribes and received delegations from them, thereby suggesting the federal government's recognition of the respective tribes qua tribes. Until the late 1970s

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e.g., Morton v. Mancari, 417 U.S. 535 (1974), the fact that statutes repeatedly single out the villages as Tribes is itself cogent proof of the villages' federally recognized tribal status. *Sandoval*, 231 U.S. at 39-41. *See also* Eric Smith & Mary Kancewick, *The Tribal Status of Alaska Natives*, 61 U. COLO. L. REV. 455, 480-82, 514-15 (1990).

[9] Contrary to Appellant's contention regarding exclusive Congressional authority in this area, even courts can recognize tribes in the absence of Congressional or Secretarial recognition. *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 585-87 (1st Cir. 1979).

> administration decisions made by the executive branch resulted in federal recognition of some tribes.
>
> ...
>
> In theory, the President could unilaterally recognize a tribe by taking action consistent with recognizing a foreign government, such as making a proclamation of recognition, establishing regular dealings with the tribe, or applying existing law to the tribe. Power to undertake certain diplomatic and administrative actions consistent with federal recognition of tribes is constitutionally and statutorily committed to the executive branch. Moreover, from very early in U.S. history, Congress has granted the executive the authority to take action consistent with federal recognition of a tribe.

Mark B. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL'Y REV. 271, 272 (2001).

In addition to its independent authority, Congress has granted to the President, through the Secretary of the Interior and the Secretary's designees, a broad range of discretionary powers to promote the general welfare and protect the interests of Indian tribes and tribal members. As far back as 1832, for example, Congress directed that:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

25 U.S.C. § 2, derived from Acts July 9, 1832, ch. 174, § 1.4 Stat. 564; July 27, 1868, ch 259, § 1, 15 Stat. 228. Indeed, it is well established that "[t]he field of federal Indian law has been marked by broad delegations of authority to the Secretary of the Interior." COHEN, HANDBOOK OF FEDERAL INDIAN LAW §

5.04[2][b].[10] Accordingly, Appellant's assertion that Congress has not enacted a statute which delegates to the Department of the Interior authority to exercise Congress's Indian Commerce authority is simply untrue.

This delegation of authority to the Secretary of Interior has been long recognized by the courts. In *Udall v. Littell*, the D.C. Circuit explained that by "charging the Secretary with broad responsibility for the welfare of Indian tribes, Congress must be assumed to have given him reasonable powers to discharge it effectively." 366 F.2d 668, 672 (1966). Given this broad delegation of authority, the U.S. Supreme Court has similarly held on numerous occasions that the question is not whether Congress has granted the Secretary explicit authority to perform a particular action, but rather whether the action falls within the Secretary's general powers and authority to promote the welfare and protect the interests of Indian Tribes and people. *See e.g.*, *Knight v. United Land Assoc.*, 142 U.S. 161, 182 (1891) (Recognizing the powers of the Secretary of the Interior "to supervise and control the management of the Bureau of Indian Affairs, which [], so far as we are advised, have never been questioned"); *Lincoln v. Vigil*, 508 U.S. 182, 191-95 (1993) (holding the Secretary's discretion to act in the field of Indian

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[10] *See generally*, 25 U.S.C. §§ 1, 1a, 2, 2a & 9; 43 U.S.C. §§ 1451, 1452, 1453, 1453a, 1454 (explaining the broad general powers and duties of the Secretary, Assistant Secretaries and the Commissioner of Indian Affairs); *see also* section 16 of the Indian Reorganization Act, 25 U.S.C. § 476; 25 C.F.R. §§ 81.1, 82.1 & 83.1. Appellant cites no authority limiting the scope of these delegations, just his own interpretation of the historical context in which the statutes were enacted. App. Br. 21-25.

Affairs absent a clear legislative prohibition is always broad and, in some cases, unreviewable).

Consistent with the foregoing authority, the Alaska District Court in *Native Village of Venetie* squarely rejected the very 'non-delegation' arguments Appellant's counsel re-makes here:

> [T]he Secretary of the Interior has the power to recognize tribes due to the historical acquiescence of Congress. . . . [W]hen the Secretary promulgated the FAP regulations in 1978, he merely formalized a process exercising a power that he had been employing for decades. The regulations created a procedure whereby unrecognized tribes could themselves initiate proceedings for use of the Secretary's power to recognize tribes. A potential tribe that has been refused recognition through other channels may file a petition and receive an adjudication. The Secretary himself need not use this regulatory scheme, but may recognize a tribe due to his historically acquiesced power.

Native Village of Venetie I.R.A. Council v. Alaska (*Venetie II*), No. F86-0075 CIV (HRH), slip op. at 9 (D. Alaska Sep. 20, 1995) (internal quotations and citations omitted), App. 9, *accord Native Village of Venetie I.R.A. Council v. Alaska* (*Venetie I*), Nos. F86-0075 CIV (HRH), F87-0051 CIV (HRH), slip op. at 9-10 (D. Alaska Dec. 23, 1994), 1994 WL 730893 (noting that the Interior Department had been deciding federal recognition issues for more than 90 years with Congress's knowledge and acquiescence) (*citing United States v. Midwest Oil Co.*, 236 U.S. 459, 469, 472-73 (1915) (honoring 80 years of congressional acquiescence to the Interior Department's exercise of public lands authority)).

In sum, *John v. Baker I* is consistent with federal case law recognizing executive authority to acknowledge tribal status. Appellant's claims to the

contrary cannot be reconciled with the extensive statutory and case law confirming that authority.

2. In 1993 the Interior Department lawfully recognized Alaska Native Tribes as sovereign entities.

Appellant also contends that *John v. Baker I* erred in holding that the Interior Department's recognition of Ivanof was confirmed through Northway's inclusion on the Department of Interior's 1993 List. App. Br. 19. But Appellant fails to establish that Interior's inclusion of Alaska Tribes on its 1993 Indian Entities List, or *John v. Baker I*'s reliance on that List, was "clearly erroneous"—which is the controlling standard for overturning established precedent. Instead, Appellant tries to weave a tall tale of conspiracy grounded in nothing more than bombastic historical contrivance, giving credence to Mark Twain's observation that "the very ink with which history is written is merely fluid prejudice."[11]

The legal record is clear. Pursuant to the Secretary's established authority, in 1978 the Secretary promulgated regulations "to establish a departmental procedure and policy for acknowledging that certain American Indian tribes exist." 43 Fed. Reg. 39,361, 39,362 (Sept. 5, 1978), later codified at 25 C.F.R. Part 54 (1979), recodified at 25 C.F.R. part 83 (1982). The regulations established the right of Native American groups to petition for federal acknowledgment, set forth procedural rules to govern the process, and established criteria for reviewing petitions. *Id.* The regulations also specified that Native groups already recognized

[11] BITE-SIZE TWAIN: WIT AND WISDOM FROM THE LITERARY LEGEND 58 (John P. Holms & Karin Baji eds., 1998).

by the United States as sovereigns were not expected to undergo the petition process. Instead, within 90 days, the Secretary was to publish a list of all Tribes whose status was already acknowledged by the United States and which were already receiving services from the BIA based upon that status. 25 C.F.R. § 54.6(b). In 1979, the Secretary published a list of more than two hundred Tribes that were acknowledged to exist as sovereign Tribes due to their past dealings with the federal government, and which were therefore outside the scope of the petition process. 44 Fed. Reg. 7,235 (Feb. 6, 1979).

The Interior Department took specific action to address the status of Tribes in Alaska within this regulatory framework. While the 1979 List did not include any Alaska Native Tribes, its preamble indicated that "[t]he list of eligible Alaskan entities will be published at a later date." *Id.* The Alaska Native entities, including Ivanof Bay, were then included on the Secretary's "preliminary" Alaska list issued in 1982. 47 Fed. Reg. 53,130, 53,134-35 (Nov. 24, 1982). Between 1982 and 1988 the Department's listing of Alaska Native Tribes created some confusion due to the temporary addition of Native corporations established pursuant to the Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. §§ 1601 *et seq.*), and the lack of a clear distinction between these non-governmental entities (which were eligible to participate in some federal programs) and the governmental entities listed on the basis of their status as tribal governments. *Compare* 53 Fed. Reg.

52,829, 52,832-35 (Dec. 29, 1988) *with* 58 Fed. Reg. 54,364, 54,364-66 (Oct. 21, 1993).

In January 1993, the Solicitor of the Department of Interior issued an exhaustive Opinion entitled "Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers."[12] The Opinion reviewed in detail the history of the federal government's dealings with Alaska Natives, including under ANCSA. One of the Solicitor's key conclusions was that the federal government's "course of dealings" with Alaska Native villages conferred upon them the same status as Indian Tribes in the contiguous 48 states.[13] The Opinion did not, however, go on to specify precisely which villages were Tribes. Instead, the Solicitor referred that task to the BIA, which in turn published the definitive 1993 List of Alaska Native Villages that are recognized by the federal government as sovereign Indian Tribes. 58 Fed. Reg. 54,364, 54,368-69 (Oct. 21, 1993). The 1993 List, which included Ivanof Bay, not only clarified which Native entities in Alaska are federally recognized Tribes, but it also confirmed that Tribes in Alaska enjoy the same sovereign status as Tribes in the contiguous 48 states. Rather than "transforming" villages into Tribes, as Appellant derogatively suggests, App. Br. 19, 36, the 1993 List confirmed the tribal status of Native villages which, in the Secretary's determination, had historically always been considered sovereign political

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[12] Op. Sol. of Dep't of Interior, M-36975 (Jan. 11, 1993), available at: http://www.doi.gov/solicitor/opinions/M-36975.pdf.

[13] *Id.* at 47; *see also* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 4 (2004).

entities.[14] *See Native Village of Tyonek v. Puckett*, No. A82-0369-CV (HRH), slip op. at 12-13, 17-18 (D. Alaska Oct. 29, 1996) (holding that Indian Entities List served to confirm the Native Village of Tyonek's historical status as a sovereign Tribe possessed of immunity from suit), App. 23-24, 28-29.

The preamble to the 1995 Indian Entities List further underscored that the 1993 List had fulfilled the purposes originally articulated the notice accompanying Interior's 1978 regulations:

> Under the Department's acknowledgement regulations, publication of the list serves at least two functions. First, it gives notice as to which entities the Department of the Interior deals with as "Indian tribes" pursuant to Congress's general delegation of authority to the Secretary of the Interior to manage all public business relating to Indians under 43 U.S.C. 1457. Second, it identifies those entities

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[14] The preamble to the 1993 Indian Entities List explained that:

> The purpose of the current publication is to publish an Alaska list of entities conforming to the intent of 25 C.F.R. 83.6(b) and to eliminate any doubt as to the Department's intention by expressly and unequivocally acknowledging that the Department has determined that the villages and regional tribes listed below are distinctively Native communities and have the same status as tribes in the contiguous 48 States. . . . This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. *Rather, they have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, privileges as other acknowledged tribes; have the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other tribes; and are subject to the same limitations imposed by law on other tribes.*

Id. at 54,365-66 (emphasis added) (internal citations omitted).

> which are considered "Indian tribes" as a matter of law by virtue of past practices and which, therefore, need not petition the Secretary for a determination that they now exist as Indian tribes. Because the Department did not include any Alaska entities in its initial publication and characterized its publication in 1982 of the Alaska entities as a "preliminary list," the intended functions of the publication of the list were not fully implemented in Alaska until October 1993.

60 Fed. Reg. 9,250, 9,250 (Feb. 16, 1995) (internal citations omitted). The Department of Interior published subsequent lists in 1996, 1997, 1998, 2000, 2002, 2003, 2005, 2007, 2008, 2009, and 2010.[15] Ivanof Bay has appeared on all of them. *See e.g.*, 75 Fed. Reg. 60,810, 60,814 (Oct. 1, 2010).

Far from being "clearly erroneous" or "no longer sound because of changed conditions," the Department of the Interior's subsequent listings of Alaska Native Tribes only confirms *John v. Baker I*'s uniformity and consistency with federal law. Indeed, it has been nearly 30 years since Interior exercised its authority to list those Alaska entities which are federally recognized as Tribes, and 12 years since this Court's decision, and *nothing* has "changed." If Congress agreed with Appellant that the Secretary lacks the authority to acknowledge tribal status, "Congress has had [three decades] . . . in which to challenge this exercise of power." *Venetie I*, Nos. F86-0075 CIV (HRH), F87-0051 CIV (HRH), slip op. at

[15] 61 Fed. Reg. 58,211, 58,215 (Nov. 13, 1996); 62 Fed. Reg. 55,270, 55,274 (Oct. 23, 1997); 63 Fed. Reg. 71,941, 71,945 (Dec. 30, 1998); 65 Fed. Reg. 13,298, 13,302 (Mar. 13, 2000); 67 Fed. Reg. 46,328, 46,332 (July 12, 2002); 68 Fed. Reg. 68,180, 68,184 (Dec. 5, 2003); 70 Fed. Reg. 71,194, 71,197 (Nov. 25, 2005); 72 Fed. Reg. 13,648, 13,651 (March 22, 2007); 73 Fed. Reg. 18,553, 18,557 (April 4, 2008); 74 Fed. Reg. 40,218, 40,222 (Aug. 11, 2009); 75 Fed. Reg. 60,810, 60,814 (Oct. 1, 2010).

10, 1994 WL 730893. But rather than challenge this exercise of power vis-a-vis Alaska Tribes, as we next show, Congress *ratified* the Interior Department's authority to so act in the Federally Recognized Tribe List Act of 1994.

3. Congress ratified the Interior Department's authority to act in the federally recognized Tribe List of 1994.

In November 1994, Congress passed Public Law 103-454, 108 Stat. 4791 (codified in part at 25 U.S.C. §§ 479a *et. seq.*). Title I of the legislation contains the Federally Recognized Indian Tribe List Act of 1994 or FRITLA (List Act of 1994) (codified in part at 25 U.S.C. § 479a-1); Title II consists of the Tlingit and Haida Status Clarification Act (Status Clarification Act) (codified in part at 25 U.S.C. § 1212). The List Act of 1994 broadly reaffirmed the Secretary's role in acknowledging Tribes and ratified the Secretary's 1993 Indian Entities List which included Ivanof Bay. It also requires the Secretary to "publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 479a-1(a). In addition to confirming the Secretary's responsibility and authority to recognize Tribes, the List Act of 1994 affirms the sovereign status of such Tribes and the United States' obligation, as part of its "trust responsibility," to maintain government-to-government relations with the listed Tribes. Pub. L. No. 103-454, § 103(2). Finally, the Act provides that "a tribe which has been recognized in [this manner] may not be terminated except by an Act of Congress." *Id.* § 103(4).

The Status Clarification Act was Alaska-specific and expressly found that the Secretary lacked the authority to remove a Tribe from the Indian Entities List or otherwise to diminish administratively the privileges and immunities of federally recognized Indian Tribes. 25 U.S.C. § 1212(3)-(4). By this means, the Act reaffirmed the federally recognized status of the Central Council of Tlingit and Haida Indian Tribes of Alaska, which had been wrongly omitted from the Secretary's 1993 Indian Entities List. 25 U.S.C. § 1213. When the Status Clarification Act was enacted Congress was obviously aware that the Secretary's 1993 Indian Entities List included some 200 Alaska Native villages, since it was ordering the Secretary to add the Central Council of Tlingit and Haida Indian Tribes to that List. By this means, too, Congress affirmed the federal recognition of the remaining 200 Alaska villages as sovereign Tribes. *See* 25 U.S.C. § 1212(2).

Appellant cannot overcome the fact that the relief he requests—that this Court reverse *John v. Baker I* and declare invalid the federally recognized status of Ivanof Bay and, by extension, all other similarly-situated Alaska Tribes—has been precluded by Congress.

4. Appellant has failed to establish that *John v. Baker I* was clearly erroneous or is no longer sound due to changed circumstances.

Appellant's critique notwithstanding, *John v. Baker I* was correctly decided and is entirely in accord with federal case law. *See Native Village of Venetie I.R.A. Council v. Alaska* (*Venetie II*), No. F86-0075 CIV (HRH), slip op. at 10-11

(D. Alaska Sep. 20, 1995), App. 10-11; *Venetie I*, Nos. F86-0075 CIV (HRH), F87-0051 CIV (HRH), slip op. at 10, 1994 WL 730893; *see also*, *State v. Erikson*, 241 P.3d 399, 402 (Wash. 2010). Indeed, there have been *no* intervening cases to the contrary that might warrant this Court revisiting its principal holdings. Its decision is fully consistent with all other judicial pronouncements regarding the status of Alaska Native Tribes, it is consistent with the Department of Interior's subsequent multiple re-publication of official lists identifying federally recognized Tribes in Alaska, it is consistent with Congress's actions, and it is consistent with this Court's long-standing precedent that federal recognition of tribal status is ultimately a non-justiciable political question. *Atkinson v. Haldane*, 569 P.2d 151, 163 (Alaska 1977).

C. More Harm Than Good Will Result From a Departure From Precedent.

Appellant does not even attempt to suggest that conditions have changed, much less sufficiently changed, so as to "clearly convince" this Court that its earlier decision is now erroneous. *State v. Coon*, 974 P.2d 386, 394 (Alaska 1999). Nor can he, because *nothing* has changed: there have been no intervening Rules, no intervening Alaska or U.S. Supreme Court decisions, and nothing else to undermine the continuing vitality of *John v. Baker I.*

In addition to the total absence of "changed conditions," Appellant also fails to show that "more good than harm" will result by overturning precedent. *State v. Fremgen*, 914 P.2d 1244, 1245 (Alaska 1996). Here, it bears

remembering that the State of Alaska filed an amicus brief in *John v. Baker I* precisely to relieve the State of its then current "untenable position" on the status of federally recognized Tribes in Alaska, explaining its dilemma this way:

> The State appreciates this opportunity [to participate as amicus] because the conflict between this court's rulings in *Native Village of Nenana v. Alaska, DHSS*, 722 P.2d 219 (Alaska 1986), and its progeny, and the decision of the United States Court of Appeals for the Ninth Circuit in *Native Village of Venetie IRA v. Alaska*, 944 F.2d 546 (9th Cir. 1991) (*Venetie II*), *has left the State in an untenable position*. On the one hand, it must abide by the law of this state as determined by this court; on the other, its failure to follow the Ninth Circuit's interpretation as it relates to any villages other than those involved in *Venetie II* has resulted in repeated suits filed by tribes in federal court, challenging the State's inability to recognize tribal court orders. *These suits have tied up the lives of the affected persons, particularly delaying permanent placements for children, and have diverted state resources from necessary state services*. The State wants to cooperate more closely with tribes, avoiding duplicative programs and stretching our combined resources further than either could manage separately, particularly in the under-served regions of Alaska.

See Brief of State of Alaska as Amicus Curiae Supporting Appellants at 1, *John v. Baker I*, 982 P.2d 738 (No. S-08099), 1998 WL 35180190 (emphasis added). Since *John v. Baker I* the State has consistently dealt with Alaska villages as federally recognized tribes.

A reversal of *John v. Baker I* now would only result in mass chaos and harm of enormous proportion. Such reversal would instantly restore a deep conflict between state and federal law, potentially return the Alaska Department of Law to the "untenable position" of defending inconsistent state law, spur new litigation in federal court, tie up the lives of the residents of over 200 communities,

delay permanent placements of children, and divert state resources from state services.

The doctrine of stare decisis is an essential component of the rule of law. It cannot lightly be shunted aside. Just as this Court has in the past "recognize[d] the necessity in a government of law for respect for past exercise of judicial judgment and the need for continuity and predictability of legal relations," *In re G.K.*, 497 P.2d 914, 916 (Alaska 1972), so it should do so here.

II. THE LOWER COURT CORRECTLY HELD THAT SOVEREIGN IMMUNITY PROTECTS IVANOF BAY FROM SUIT

"Tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Runyon ex rel. B.R. v. Ass'n of Village Council Presidents*, 84 P.3d 437, 439 (Alaska 2004) (*quoting Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)); *see also United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-13 (1940); *Atkinson*, 569 P.2d at 157-63. As a federally recognized Tribe, Ivanof Bay is entitled to immunity from suit and the superior court correctly so held.

III. THE SANCTION OF ATTORNEYS' FEES IS WARRANTED HERE

Appellant's counsel has a peculiar penchant for attacking his fellow bar members in his brief. In claiming that a group consisting of some twenty-one practitioners conspired to transform illegally villages into federally recognized Tribes, counsel disparages many distinguished members of the bar for their work and advocacy on behalf of their clients. App. Br. at 9, 25, 31, 32, 33. Unable to

effectively argue the law, counsel weaves an alleged web of conspiracy that has no legal relevance to the issues presented. This offensive behavior is compounded by counsel's repeated efforts over the years to relitigate the principles enunciated in *John v. Baker I*, causing his opponents to incur enormous expense and inconvenience to respond.

These actions warrant admonishment by this Court with the sanction of an attorneys' fee award. Indeed, the presentation of frivolous arguments—that is, arguments that have no reasonable basis in law or fact—violates both Alaska Rule of Professional Conduct 3.1 and Alaska Civil Rule 11, and is alone grounds for the imposition of sanctions under Alaska Appellate Rule 510(c).

Alaska Rule of Professional Conduct 3.1 declares, "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a non-frivolous basis in law and fact for doing so[.]" In addition, Alaska Civil Rule 11 declares that an attorney's signature on a pleading,

> "constitutes a certificate by the signer that [he or she] has read the pleading, [and] that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry[,] it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law[.]

Although an attorney does not violate Alaska Rule of Professional Conduct Rule 3.1 or Alaska Civil Rule 11 by making a good-faith argument for the modification or reversal of precedent, counsel's argument in this case *does not* qualify as a good-faith argument for the reversal of precedent because it has

repeatedly been made and rejected by both state and federal courts over the last 14 years—including by this Court in *Runyon*. Indeed, in his zeal to revise history and law to reflect his superannuated view of events related to tribal sovereignty, counsel has been engaged in serial litigation to convince any federal or state court that will hear him that *John v. Baker I* was wrongly decided. *See e.g.*, Motion to Intervene at 10, *Alaska v. Native Village of Tanana*, No. S-13332 (Alaska Feb. 3, 2009, post-oral argument) ("[T]his appeal presents an appropriate procedural occasion for this court to revisit—because—with all due respect, it was error—its holding in *John v. Baker I.*"); *see also* Brief for Edward Parks & Donielle Taylor as Amici Curiae in Supporting Petitioners at 18 n.9, *Hogan v. Kaltag Tribal Council*, 131 S. Ct. 66 (2010) (No. 09-960), 2010 WL 1049413 ("*John v. Baker I* illustrates the continued confusion regarding Alaska Native tribal status"); Brief for the Legislative Council of the Alaska Legislature as Amicus Curiae Supporting Appellants at 8, *Runyon*, 84 P.3d 437 (Nos. S-10772, S-10838), 2003 WL 24048558 ("[T]he conclusion regarding Alaska Native tribal status that the Court announced in *John v. Baker I* was erroneous."). Even counsel's views on stare decisis have been rejected in *Runyon*, a decision itself which should be honored within the doctrine of stare decisis. 84 P.3d at 439 n. 3

There is no lingering question about the federally recognized tribal status in Alaska villages, either in fact or in law. Accordingly, to deter counsel from continuing with serial litigation, wasting the resources of the courts, and wasting the resources of the affected parties, a sanction of attorneys' fees is appropriate.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

DATED this 9th day of February 2011.

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APPENDIX
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

NATIVE VILLAGE OF VENETIE I.R.A. COUNCIL, et al.,

Plaintiffs,

vs.

STATE OF ALASKA, et al.,

Defendants.

No. F86-0075 CIV (HRH)

ORDER

(Partial Motion for Summary Judgment-- Tribal Status)

Plaintiffs Native Village of Fort Yukon IRA Council ("Fort Yukon") and Margaret Solomon have moved for summary judgment.[1] This motion is opposed by defendants State of Alaska and Karen Perdue in her capacity as Commissioner of Health and Social Services (collectively "the State").[2] The United States has filed an amicus curiae brief in support of summary judgment.[3] Oral argument has not been requested and is not deemed necessary.

Plaintiff Margaret Solomon has sought benefits from the Aid to Families with Dependent Children ("AFDC") program. The State

[1] Clerk's Docket No. 158.

[2] Clerk's Docket No. 161.

[3] Clerk's Docket No. 160.

denied these benefits as it did not recognize a tribal adoption decree of plaintiff Fort Yukon I.R.A. Council entered May 27, 1986. This court has already determined in this case that the Native Village of Venetie is a common law tribe and has the power to determine adoption matters. Order of December 23, 1994, Clerk's Docket No. 142. The Fort Yukon portion of this action has yet to be decided.

The issues now before the court are the following: (1) whether Fort Yukon is a tribe; and (2) if Fort Yukon is a tribe, must its adoption decrees receive full faith and credit from the State?

Plaintiffs assert that as a consequence of the inclusion of Fort Yukon on Department of the Interior ("Interior") lists of recognized tribes,[4] starting in 1982 with other significant lists published in 1993 and 1995, both questions must be answered in the affirmative. The State argues Fort Yukon was improperly included on the 1993 and 1995 lists as the Department of the Interior regulations necessary to achieve tribal recognition were not followed. The State further argues material issues of fact remain over the question of whether Fort Yukon is an historic common law tribe. The State therefore concludes that the first question cannot be answered without a factual determination of whether Fort Yukon is a common law tribe. The State does not address the second

[4] These lists were published by the Bureau of Indian Affairs ("BIA"), a subdivision of the Department of Interior.

issue. The United States argues the Department of the Interior may recognize tribes in ways other than the disputed regulations.

This court originally dismissed the claims of Fort Yukon and Solomon. The Ninth Circuit reversed the dismissal. Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548 (9th Cir. 1991). In the above decision, the Ninth Circuit discussed the interrelationship between Public Law 83-280[5] and the Indian Child Welfare Act of 1978 ("ICWA"). Relevant to this case the civil law portion of Public Law 280 states in pertinent part:

> Each of the States listed in the following table [which includes Alaska] shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country ... to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.

28 U.S.C. § 1360(a). The criminal portion of Public Law 280 states in pertinent part:

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[5] With regard to Public Law 83-280, the Ninth Circuit stated:

> Public Law 83-280 is not codified at one place in the United States Code. The criminal and civil provisions appear in separate titles. See 18 U.S.C. § 1162 (1988) (criminal); 28 U.S.C. § 1360 (1988) (civil). In accordance with common usage, we shall refer to this public law simply as "Public Law 280."

Native Village of Venetie, 944 F.2d at 559 n.15. This court will also refer to Public Law 83-280 as "Public Law 280".

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> Each of the States ... listed in the following table [which includes Alaska] shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State ... has jurisdiction over offenses committed elsewhere within the State, ... and the criminal laws of such State ... shall have the same force and effect within such Indian country as they have elsewhere within the State....

18 U.S.C. § 1161. As to the ICWA, the Ninth Circuit noted:

> Congress created a comprehensive jurisdictional scheme for the resolution of custody disputes involving Indian children. This scheme expanded the role of tribal courts and correspondingly decreased the scope of state court jurisdiction.... In the case of Indian children who do not reside or are not domiciled on their tribe's reservation,[6] state courts may exercise jurisdictional concurrent with tribal courts.... [A]ll courts in the United States must give full faith and credit to the child-custody determinations of tribal courts to the same extent that full faith and credit are given to the decisions of any other entity. See 25 U.S.C. § 1911(d) (1988).

Id. at 555.

The State in Native Village of Venetie argued Port Yukon could have no jurisdiction over child custody matters without petitioning the Secretary of the Interior. Id. at 556. Port Yukon maintained it had concurrent jurisdiction "by virtue of [its] inherent sovereignty." Id. The Ninth Circuit held that question

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[6] There is no contention that the child adopted by Ms. Solomon resided on a reservation. Indeed, all but one Indian reservation in Alaska were revoked in 1971. 43 U.S.C. § 1618(a).

of whether Fort Yukon was a historic sovereign was a factual question to be determined by this court. Id. at 556-59.

The Ninth Circuit then discussed the impact if this court found that Fort Yukon was a historic sovereign. The Ninth Circuit stated:

> If the native village[] of ... Fort Yukon [is a] sovereign entity[y] which may exercise dominion over [its] members' domestic relations, Alaska must give full faith and credit to any child-custody determinations made by the village['s] governing bod[y] in accordance with the full faith and credit clause of the Indian Child Welfare Act.

Id. at 562.

The State had argued Public Law 280 gave it exclusive jurisdiction over child custody matters. Id. at 559. To buttress this argument the State pointed to 25 U.S.C. § 1918(a), which reads in pertinent part:

> Any Indian tribe which became subject to State jurisdiction pursuant to [Public Law 280] may reassume jurisdiction over Indian child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

Id. (emphasis added). The State argued that section 1918(a) would be meaningless unless Public Law 280 vested exclusive jurisdiction in the states, otherwise there would be nothing to reassume. Native Village of Venetie, 944 F.2d at 559. The Ninth Circuit disagreed and stated:

ORDER

> [T]he two statutes can be harmonized without construing Public Law 280 as a divestiture statute. See Ruckleshaus v. Monsanto Co., [467 U.S. 986 (1984)] (statutes capable of being harmonized should be so construed). The relevant portions of the Indian Child Welfare Act enable the Secretary of the Interior to grant a tribe, upon receipt of a proper petition, exclusive jurisdiction (over all or a portion of the appropriate "Indian country")[7] or referral jurisdiction of child-custody proceedings. See 25 U.S.C. § 1918(b)(2) (1988). Each of these types of jurisdiction is broader than any tribal jurisdiction which is concurrent with the states. Exclusive jurisdiction, of course, is clearly broader than concurrent jurisdiction. Likewise, referral jurisdiction is broader in scope than concurrent jurisdiction, in that referral jurisdiction is concurrent but presumptively tribal jurisdiction. See Id. § 1911(b). Thus, there is something for a tribe to "reassume" under section 1918 - namely, exclusive or referral jurisdiction - even if Public law 280 is read as not divesting the tribes of concurrent jurisdiction.

Id. at 561.

Fort Yukon claims its inclusion on various BIA lists means that it is a tribe and therefore allowed concurrent jurisdiction with the State.

BIA has published lists in 1982,[8] 1983,[9] 1985,[10] 1986,[11]

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[7] This court recently held in Native Village of Venetie I.R.A. Council v. Alaska, No. F86-0075 (D. Alaska, August 2, 1995) (Decision-- Indian Country), that the lands of the Neets'aii Gwich'in ar not Indian Country. The rationale for the above ruling wil potentially lead to a broad application and will make it difficult for this court to find "Indian Country" in Alaska. Probably fe Alaskan tribes will be able to exercise exclusive jurisdiction.

[8] 47 Fed. Reg. 53,130 (Nov. 24, 1982).

[9] 48 Fed. Reg. 56,862 (Dec. 23, 1983).

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1988,[12] 1993,[13] and 1995[14] that include tribal entities. Fort Yukon was included on all of these lists. After discussing the confusion that surrounded the 1982-1988 lists due to the inclusion of non-tribal entities, BIA, in the preamble to the 1993 list, stated:

> The purpose of the current publication is to publish an Alaska list of entities conforming to the intent of 25 C.F.R. 83.6(b) and to eliminate any doubt as to the Department's intention by expressly and unequivocally acknowledging that the Department has determined that the villages and regional tribes listed below are distinctly Native communities and have the same status as tribes in the contiguous 48 states.

58 Fed. Reg. 54,364, 54365 (Oct. 21, 1993). In the preamble to the 1995 list, BIA stated:

> Because the Department did not include any Alaska entities in its initial publication and characterized its publication in 1982 of the Alaska entities as a "preliminary list" (47 FR 53,133), the intended functions of the publication of the list were not fully implemented for Alaska until October 1993.

60 Fed. Reg. 9250 (Feb. 16, 1995). This court previously discussed the impact of the BIA lists. Clerk's Docket No. 142 at 15-31. This court cited the following passage from a Solicitor of the Interior opinion concerning powers of Alaskan Native villages:

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[10](...continued)
[10] 50 Fed. Reg. 6055 (Feb. 13, 1985).

[11] 51 Fed. Reg. 25,115 (July 10, 1986).

[12] 53 Fed. Reg. 52,829 (Dec. 29, 1988).

[13] 58 Fed. Reg. 54,364 (Oct. 21, 1993).

[14] 60 Fed. Reg. 9250 (February 16, 1995).

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> In the summer of 1990, Congress enacted legislation directing the establishment of the "Joint Federal-State Commission on Policies and Programs Affecting Alaska Natives." Act of August 18, 1990, Pub. L. No. 101-379, § 12, 104 Stat. 473, 478-83. That Commission has a broad mandate to review public policies affecting Alaska Natives. When the Commission completes its work and files its recommendations, Congress may revisit how it deals with Alaska Native villages. For now, we cannot say that Alaska Native Villages are not tribes for purposes of federal law. We do not mean to conclude that every Native village is an Indian tribe. Which specific Alaska Native villages are tribes is a factual determination beyond the scope of this opinion.

Id. at 30 (footnote omitted) (quoting Op. Solic. Dep't Interior M-36975 (Jan. 12, 1993) at 48). This court stated "in January of 1993, the Solicitor for the Department of the Interior viewed the matter of tribal status for individual Alaska Native Villages as an open question." Id. This court holds that no Alaskan entity was recognized as a tribe by the federal executive by publication of a BIA list until the publication of the BIA's October 21, 1993, list. It was at that time that intent of Interior and BIA became clear as to tribal status. The inclusion of Fort Yukon on the 1982 through 1988 lists did not effect recognition of Fort Yukon. The rationale for this holding is that the executive was not clear as to its intended effect of publishing these lists. The executive's intent was clearly announced on October 21, 1993. As of that date, Fort Yukon became an acknowledged tribe.

The State argues that the 1993 and 1995 lists are ineffective as the Secretary of the Interior did not follow his own

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regulations on acknowledgement, specifically 25 C.F.R. § 83. This portion of the C.F.R. was enacted in 1978. The State points to section 103(3) of the Federally Recognized Indian Tribe List Act of 1994 ("Tribe List Act"). This section reads:

> Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" or by a decision of a United States Court.

Id. Pub. L. No. 103-454, 1994 U.S.S.C.A.N. (108 Stat.) 4791. The State contends the above are the exclusive means by which a tribe can be recognized. This court disagrees. This court has held in the Venetie portion of this case that the Secretary of the Interior has the power to recognize tribes due to the historical acquiescence of Congress. Order of December 23, 1994, Clerk's Docket No. 142 at 22-27. This court stated "[w]hen the Secretary promulgated the FAP regulations in 1978, he merely formalized a process exercising a power that he had been employing for decades." Id. at 26. The regulations created a procedure whereby unrecognized tribes could themselves initiate proceedings for use of the Secretary's power to recognize tribes. A potential tribe that has been refused recognition through other channels may file a petition and receive an adjudication. The Secretary himself need not use this regulatory scheme, but may recognize a tribe due to his historically acquiesced power. This court therefore holds that the methods listed in section 103(3) of the Tribe List Act are not exclusive.

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This court's holding is bolstered by the Tribe List Act of 1994. Congress repudiated a decision by the Secretary to remove two Alaskan tribes from the Secretary's 1993 list of recognized tribes. Congress did not, however, repudiate any other portion of the 1993 list. Congress actually referred to the 1993 list and ordered the two tribes returned to it. Tribe List Act section 202(2). This leads to the conclusion that Congress approved of this list.

In the instant action the Secretary has recognized Fort Yukon as a tribe. This court has held in this order that the effective date of that recognition is October 21, 1993. The State has not argued that the Secretary's inclusion of Fort Yukon on the 1993 was arbitrary in any way other than the alleged lack of power to list a tribe without following the dictates of 25 C.F.R. § 81. It is not contended, for example, that the enrolled residents of Ft. Yukon are not a community of Native Americans. As of the effective date of the recognition, Native Village of Fort Yukon is a tribe and it has concurrent jurisdiction with the state over child custody matters involving tribal members. The Ninth Circuit states "[s]overeign authority is presumed until Congress affirmatively acts to take such authority away." Venetie, 944 F.2d at 556. The Ninth Circuit has read Public Law 280 as removing exclusive and referral jurisdiction from tribes located in Public Law 280 states. Congress has not, therefore, taken away the right of a tribe located in a Public Law 280 state to have concurrent jurisdiction. The Secretary

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of the Interior intended those tribes acknowledged on October 21, 1993, to "have the same governmental status as other federally acknowledged Indian tribes." 58 Fed. Reg. 54,346 & 54,366 (Oct. 21, 1993). The Alaskan tribes that were acknowledged "are entitled to the same protection, immunities, privileges as other acknowledged tribes." Id. Therefore, since October 21, 1993, Fort Yukon has had concurrent power with the State to do adoptions. In order to receive exclusive jurisdiction (which requires proof of Indian Country) or referral jurisdiction, Fort Yukon may petition the Secretary of the Interior. 25 U.S.C. § 1918.

Plaintiffs' motion for summary judgment is granted in part as set out above. The question of Fort Yukon's historical tribal status prior to October 21, 1993, is an open question. Genuine issues of material fact prevent the entry of summary judgment on this question as in Venetie I. A trial will be necessary to determine this question. The parties shall file a status report by October 20, 1995, advising whether Ft. Yukon desires to proceed in this court or before the Secretary.

DATED at Anchorage, Alaska, this 20 day of September, 1995.

United States District Judge

F86-0075--CV (HRH)

D. SNOW (AG-FBKS)
B. LANDON (AUSA)
J. BUSH

ORDER

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

NATIVE VILLAGE OF TYONEK,

Plaintiff,

vs.

DONALD PUCKETT, et al.,

Defendants.

No. A82-0369-CV (HRH)

O R D E R

Tribal Status / Sovereign Immunity

By order filed February 23, 1996,[1] the court called upon the parties to brief the question of whether or not the BIA's acknowledgement of plaintiff as a tribe in 1993 can be deemed to have retroactive effect dating back to 1981 or 1982. At the request of the parties, the court also included in this call for briefing the question of plaintiff's sovereign immunity. The court has now received briefing from plaintiff, the Puckett and Slawson defendants, and the United States of America as amicus curiae. The State of Alaska has not taken a position on the foregoing issues.

As an initial proposition, plaintiff and the government as amicus curiae take exception to the court's characterization of

[1] Clerk's Docket No. 176.

the question to be decided. They in substance suggest that retroactivity is not a meaningful concept in the context of recognition or acknowledgement of Indian tribes by the government. Although the question might have been put differently, the parties plainly understood the court's concern to be the matter of whether or not plaintiff is entitled to claim the privilege of sovereign immunity on the basis of tribal status as of times pertinent to this case in 1981 and 1982.

The factual setting which leads to the court's inquiry as to the nature and effect of the BIA's acknowledgement of plaintiff as a tribe is completely set out in Judge Fitzgerald's original December 3, 1986, decision in this case.[2] However, certain of the facts and some of the procedural history of this case need to be emphasized as the foundation for evaluation of the arguments of the parties.

The residents of the Native Village of Tyonek have organized themselves under a constitution pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 473a, 476 (1994). Prior to the enactment of the Alaska Native Claims Settlement Act (hereinafter ANCSA), 43 U.S.C. § 1601, et seq. (1994), Tyonek occupied a federally constituted reservation. A portion of the reservation was leased for oil and gas development by the secretary of the Depart-

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[2] Clerk's Docket No. 99. That same factual setting is amply summarized in the "[s]tatement" which introduces the government's brief as amicus curiae before the Supreme Court of the United States on petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, which is appended to the government's amicus brief to this court. Clerk's Docket No. 179.

ment of the Interior, and part of the proceeds were used by the village council to build housing for the village.[3]

By village ordinance (No. 65-32), members of the village were precluded from leasing these houses to anyone not enrolled as a member of the village. The Puckett and Slawson defendants are not members of the village. Because of special circumstances, however, the Pucketts were permitted to lease a village residence for a short period of time; but when the period of permission ended, they were asked to leave. The Pucketts refused to vacate the premises. The Slawsons requested similar permission. It was denied, but they entered into a lease for a village residence anyway. Tyonek brought this suit to evict the Pucketts and the Slawsons. The latter counterclaimed against plaintiff and brought a third-party claim against officers of the village, seeking a declaration that enforcement of Ordinance No. 65-32 as to residents' leases in favor of non-members was discriminatory and in violation of the Constitution and federal law. Plaintiff's suit for eviction is moot at this time inasmuch as the Slawsons and Pucketts have departed from the Native Village of Tyonek. The counterclaim and third-party claim of the Pucketts and the Slawsons remain.[4] Plaintiff contends that it and its offi-

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[3] The houses were owned by the IRA village. The Tyonek reservation was revoked by the Alaska Native Claims Settlement Act, 43 U.S.C. § 1618(a), and that land came to be owned by the Settlement Act corporation set up by the residents of Tyonek. At all times pertinent to this case, control of the houses has remained with the IRA village council.

[4] Case Status Order of June 18, 1993, Clerk's Docket No. 139. The court also granted the applications for amicus status (continued...)

cers are immune from the counterclaim and third-party claim based upon the status of plaintiff as a tribe.

In his decision of December 3, 1986, Judge Fitzgerald held that the plaintiff was immune from suit by virtue of tribal sovereign immunity.[5] Judge Fitzgerald dismissed the third-party claims against village officers, holding that they were entitled to derivative immunity because their enforcement of Ordinance No. 65-32 was within the scope of their official authority.[6]

An appeal was taken by the defendants; and, in its first appellate decision in this case, the court of appeals affirmed those portions of Judge Fitzgerald's decision which dismissed the defendants' counterclaim and third-party claim.[7] Native Village of Tyonek v. Puckett, 890 F.2d 1054 (9th Cir. 1989). The defendants petitioned for a writ of certiorari. That petition was granted.[8] The judgment of the court of appeals was vacated, and the case was remanded to that court for further consideration in the light of

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[4](...continued)
of the United States of America, the State of Alaska, and several other parties interested in the tribal status issue in this case. Id. at 3.

[5] Clerk's Docket No. 99 at 25.

[6] Id. at 34.

[7] The Ninth Circuit Court of Appeals reversed and remanded on a jurisdictional issue having to do with Tyonek's claim against the defendants, as to which Judge Fitzgerald had held this court to lack jurisdiction. Native Village of Tyonek v. Puckett, 890 F.2d 1054 (9th Cir. 1989).

[8] Puckett v. Native Village of Tyonek, 499 U.S. 901 (1991).

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991).

In its final decision on appeal in this case, the Ninth Circuit Court of Appeals held that:

> We have concluded that we cannot determine the applicability of Oklahoma Tax Commission until the district court has had the opportunity to prepare express findings to support its holding that the Native Village of Tyonek is an Indian tribe protected by the doctrine of sovereign immunity, and that its real property is "Indian country."

Native Village of Tyonek v. Puckett, 957 F.2d 631, 633 (9th Cir. 1992).

Based on that holding, the dismissal of the plaintiffs' claims against the Pucketts and the Slawsons was reversed and the case remanded, and the dismissal of the counterclaims and cross-complaints of the Pucketts was also reversed and the case remanded. Id. at 635-36. The final decision of the Ninth Circuit Court of Appeals twice suggests that a relevant matter in this case is the question of whether or not the real property upon which the family plan houses is located is Indian country. Native Village of Tyonek, 957 F.2d at 633, 636. As noted above, the family plan houses are owned by the IRA village of Tyonek. The land upon which the houses have been placed is now owned by a corporation set up pursuant to the Alaska Native Claims Settlement Act by residents of the Native Village of Tyonek. The IRA Native Village of Tyonek has no interest in the land in question. This court has held, in State of Alaska v. Native Village of Venetie Tribal Government, F87-0051-CV (Order

of Aug. 2, 1995, Clerk's Docket No. 154), that former reservation lands of an IRA village which are now owned by an ANCSA corporation are not Indian country. Nevertheless, plaintiff may still be entitled to claim sovereign immunity. In its February 23, 1996, order in this case (Clerk's Docket No. 176), the court addressed the foregoing matter in the following terms:

> Defendants appear to argue that a failure of proof by plaintiff with respect to its land and potential Indian country status should bar plaintiff from any claim of sovereign immunity. The presence or absence of Indian country has a significant bearing upon the sovereign powers of an Indian tribe, but the absence of Indian country does not deprive an Indian tribe of all sovereign power. In Native Village of Venetie v. Alaska, 944 F.2d 548, 556 (9th Cir. 1991), the Ninth Circuit Court of Appeals, quite apart from the issue of Indian country, reaffirms the basic proposition of American Indian law that Indian tribes may exercise powers of self-government by virtue of their tribal status alone.

Before this court, the parties argued that the court had an adequate and complete record and that all necessary briefing had been completed with respect to the issue of the tribal status of Tyonek. Consequently, the court simply ordered that the parties submit proposed findings of fact and conclusions of law for the court's assistance.[9] The various filings of the parties were received in due course and the court completed a preliminary review of the record. The court found the record substantially wanting, especially as regards historical information concerning the tribal status of the Tyonek natives prior to 1939. The court indicated

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[9] Order of June 18, 1993, Clerk's Docket No. 139.

that, unless the parties were in a position to point out information that the court had overlooked, it would have to find on the present record that the Native Village of Tyonek was not an Alaska Native tribe in 1981 and 1982 when the events which gave rise to the counterclaim and third-party claim arose.[10]

At the same time the court was considering the merits of the claims of the parties on the extant record, the court was also presented with and considered cross-motions for summary judgment.[11] The focal point of plaintiff's motion[12] was the October 21, 1993, publication by the Department of the Interior, Bureau of Indian Affairs, of a new list of federally-acknowledged tribes in Alaska.[13] The Native Village of Tyonek was included on that list.[14]

In a similar, but unrelated case involving a claim of tribal status, the court held that the BIA list had the effect of constituting the Native Village of Ft. Yukon a tribe as of October 21, 1993. Native Village of Venetie IRA Council v. Alaska, No. F86-0075-CV.[15] In Venetie as to the Native Village of Ft. Yukon, the court was confronted with the same kind of problem

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[10] Minute Order of December 14, 1995, Clerk's Docket No. 167.

[11] Order of December 14, 1995, Clerk's Docket No. 168.

[12] Clerk's Docket No. 158.

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

[14] Id. at 54,369.

[15] Order of September 20, 1995, Clerk's Docket No. 166 at 8.

which arises here: the question of Ft. Yukon's historical tribal status prior to October 21, 1993, was undecided; and the status (powers and/or rights) of the potential tribe prior to the date of acknowledgement was also an issue. The court expressly did not decide the question of Ft. Yukon's tribal status before October 21, 1993.[16] Venetie was settled by the parties on the basis of the court's ruling that Ft. Yukon was presently a tribe.

As a consequence of the foregoing decisions, and after further input from the parties in this case, the court determined to receive briefing on the question left unresolved in Venetie; namely, what the court has characterized as the potential retroactive effect of BIA acknowledgement.[17] The court has now received and considered the supplemental briefs of plaintiff Native Village of Tyonek, defendants Puckett and Slawson, and the United States of America as amicus curiae.[18]

Effect of 1993 BIA List

By notice published in the Federal Register on October 21, 1993,[19] the Department of the Interior, Bureau of Indian Affairs, published its official notice of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian

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[16] Id. at 11. Ultimately the Native Village of Ft. Yukon and the State of Alaska reached a settlement which rendered further proceedings on the unresolved issue in Venetie as to Ft. Yukon unnecessary.

[17] Order of February 23, 1996, Clerk's Docket No. 176.

[18] Clerk's Docket Nos. 178, 180, and 179, respectively.

[19] 58 Fed. Reg. 54,364 (1993).

Affairs". The notice contains a history of prior lists as regards Alaska Native entities. The notice expressly states that:

> The purpose of the current publication is to publish an Alaska list of entities conforming to the intent of 25 CFR 83.6(b) and to eliminate any doubt as to the Department's intention by expressly and unequivocally acknowledging that the Department has determined that the villages and regional tribes listed below are distinctly Native communities and have the same status as tribes in the contiguous 48 states. Such acknowledgement of tribal existence by the Department is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes. This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather, they have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, privileges as other acknowledged tribes; have the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other tribes; and are subject to the same limitations imposed by law on other tribes. [20]

The Native Village of Tyonek is included on the list.[21] The court draws attention to the fact that the BIA took pains to indicate that its decision to acknowledge the Native Village of Tyonek and other Alaskan Native entities was in accordance with the intent of extant acknowledgement regulations contained in 25 C.F.R. 83, and to emphasize the government-to-government status and rights, including "immunities" which the recognized tribes were to have.

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20 Id. at 54,365-66 (emphasis added) (footnote omitted).

21 Id. at 54,369.

The court concludes that as of October 21, 1993, the Native Village of Tyonek was an acknowledged tribe, entitled to a government-to-government relationship with the United States and entitled to the immunities of tribes in the contiguous 48 states.

The court is not unmindful of the fact that, as set out above, it is subject to a direct order of the Ninth Circuit Court of Appeals to take additional evidence and make findings of fact on the question of whether the Native Village of Tyonek is an historic Indian tribe. The court went to great pains to embark upon that effort as detailed above. The court now concludes, however, that such an effort is unnecessary. In its final decision in this case, the Ninth Circuit Court of Appeals expressly recognized that there were two different routes by which an Indian community might be constituted a tribe:

> [I]f it can show that (1) it is recognized as such by the federal government, United States v. Sandoval, 231 U.S. 28, 46-47 (1913), or (2) it is "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory[,]" Montoya v. United States, 180 U.S. 261, 266 (1901) ... [and is] the "modern-day successor[]" to a historical sovereign entity that exercised at least the minimal functions of a governing body. Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 559 (9th Cir. 1991).

Native Village of Tyonek, 957 F.2d at 635 (citations omitted). The court had sought to follow the second course as directed by the court of appeals, but the need to do so is obviated by action taken by the United States in conformity with the first course of action by which an Indian community may be constituted a tribe.

Status of Plaintiff in 1981-82

In its brief, the United States argues that the inclusion of Alaska tribes on the 1993 list was predicated upon a history of government-to-government relations between the listed tribes and the United States. The government argues that inclusion on that list necessarily stems from prior status as a tribe, and that the list simply confirms the prior and continuing status.

William W. Quinn, Jr., published in 17 Am. Indian L. Rev. 37 (1992), an extensive article on the subject of acknowledgement entitled Federal Acknowledgement of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83. He argues, as does the Government here, that courts normally defer to the position of the Department of the Interior as to tribal status, id. at 57, and that once one of the political branches has addressed tribal status, courts are probably not authorized to review or strike down acknowledgement except under the very narrow circumstances recognized by the United States Supreme Court in United States v. Sandoval, 231 U.S. 28 (1913). Id. at 64.

The Government's arguments, although somewhat long on argument[22] and short on authority, are persuasive. In connection with the publication of final regulations addressing the procedure whereby American Indians might petition for acknowledgement, 43 Fed. Reg. 39,361 (1978), the Department of the Interior stated when proposing the regulations that the regulations were being promulgated

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[22] The court means no criticism. The question raised here is unique.

to effectuate "the Departmental objective of acknowledging the existence of those American Indian tribal groups which have maintained their political, ethnic and cultural integrity despite the absence of any formal action by the Federal Government to acknowledge or implement a Federal relationship." Procedure for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 23,744 (1978). Both the tense and the substance of this statement of purpose suggest that acknowledgement in the view of the department had to do with Native Americans' past and continuing status as distinguished from the creation of some status by acknowledgement.

In acknowledging as tribes entities such as the Native Village of Tyonek, the BIA expressly stated that it was taking action consistent with the "intent of 25 CFR 83.6(b)".[23] The intent of those regulations is perhaps more clearly to be found in 25 C.F.R. § 83.7(a) (1996), which instructs petitioners to the BIA regarding the type of evidence they should submit in support of an application for acknowledgement. Petitions are to include evidence of long-standing governmental relationships and historical status of the Indian entity. Plainly the BIA has considered the kind of evidence which this court would consider were it determining the tribal status of plaintiff.

The government reinforces its initial proposition with a review of BIA activity in the area of listing of tribes. Alaska

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

Native groups were first listed by the secretary in 1982 in what he characterized as a "preliminary list" of Alaska tribes. Indian Tribal Entities Recognized & Eligible to Receive Services from the United States Bureau of Indian Affairs. 47 Fed. Reg. 53,130, 53,134 (1982). Tyonek was included in this list also. In issuing the 1993 list, the BIA characterizes its 1982 listing as having been with the purpose of identifying those Alaska Native groups which "had been dealt with by the Bureau of Indian Affairs on a government-to-government basis." 54 Fed. Reg. 54,364 (1993).

The Government further argues that Congress, through the Federally Recognized Indian Tribe List Act of 1994,[24] has placed its imprimatur on the 1993 list by charging the secretary with the duty of updating the list periodically and by prohibiting the removal of tribes from any subsequent lists. This action by Congress sheds precious little light on the question of the effect of acknowledgement upon tribal status before the date of acknowledgement. Only marginally more persuasive is the provision of the Technical Corrections Act of 1994,[25] through which Congress sought to require parity as between all recognized tribes. By this act (amending the Indian Reorganization Act of 1934, 25 U.S.C. § 476), Congress added the following:

> Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on [the date of enactment of this Act] and that

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[24] 25 U.S.C. 479, 1212, 1300 (1994).

[25] 25 U.S.C. 476 (1994).

> classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

25 U.S.C. 476(g).

The legislative history is quoted by the Government to the effect that "[t]he purpose of the amendment is to clarify that section 16 of the Indian Reorganization Act was not intended to authorize the Secretary of the Department of the Interior to create categories of federally recognized Indian tribes." 140 Cong. Rec. S6147 (daily ed. May 19, 1994) (statement of Sen. McCain). Although perhaps not directly on point, this congressional action certainly suggests that all tribes are to have the same powers and privileges in terms of the regulations, decisions, or determinations of the BIA. A holding that the 1993 list did not relate back to 1981 or 1982 tribal activity would arguably create a secondary class of tribe.

The Government argues that the court should pay deference to the BIA listing of Alaska tribes. The court does not disagree that it should pay deference to the BIA listing of Alaska tribes in accordance with Baker v. Carr, 369 U.S. 186, 215-16 (1962), but this suggestion begs the question that is before the court. Perhaps because no one at the time conceived that there might ever be a question as to what the court has characterized as the "retroactive effect" of acknowledgement, the 1993 list and its preamble are silent on this precise subject.

The court turns now to the defendants' contentions which, as a general proposition, do not meaningfully address either the court's question or the Government's position on it.

Defendants open their briefing with the argument that the record in this case is devoid of any historical or evidentiary support of pre-contact political activity by plaintiff. This was the point which the court had itself made in rejecting the parties' earlier position that there was a complete record from which the court could make findings of fact and conclusions of law concerning the tribal status of plaintiff. If it is defendants' suggestion that the absence of such evidentiary support in the record precludes this court from deciding that, as a matter of Indian law, acknowledgement by the BIA constitutes Tyonek a tribal entity, the court rejects the notion. As discussed above, acknowledgement by the federal government is one means by which an Indian community may become a tribe. Native Village of Tyonek, 957 F.2d at 635. Defendants have not advanced any basis upon which this court could reject the political decision of the Bureau of Indian Affairs to acknowledge plaintiff as a tribe.

The defendants contend that the United States Supreme Court has reviewed plaintiff's claim of sovereign immunity and has rejected it. The Supreme Court did no such thing. It granted certiorari, vacated the final decision of the Ninth Circuit Court of Appeals, and directed the court of appeals to reconsider its decision in the light of Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991). Puckett v. Native

Village of Tyonek, 499 U.S. 901 (1991). On remand, the Ninth Circuit Court of Appeals concluded that it could not "determine the applicability of Oklahoma Tax Commission until the district court has had the opportunity to prepare express findings to support its holding that the Native Village of Tyonek is an Indian tribe." Native Village of Tyonek, 957 F.2d at 633. The case was then remanded to this court where, after several false starts, it became apparent that the case had been overtaken by new developments, providing an alternative basis for a determination that the Native Village of Tyonek is and was in 1981-82 a tribe as discussed above.

This court's instant order is the first occasion upon which the tribal status of plaintiff has been evaluated by any court since the entry of Judge Fitzgerald's initial decision in December of 1986. Neither the United States Supreme Court nor the Ninth Circuit Court of Appeals has established the law of this case in a fashion which would preclude this court from undertaking what was ordered by the Ninth Circuit Court of Appeals in its final decision.

In discussing their foregoing contention concerning the decision of the United States Supreme Court, defendants refer to Potawatomi Indian Tribe of Oklahoma and United States v. John, 437 U.S. 634, 648-49 (1978), which have as a principal focus the issue of the powers of Indian tribes over third parties. The issue before the court at this time is not that of the power of an Indian tribe over its own property or third parties. Rather, the issues are tribal status per se and sovereign immunity, i.e., whether

defendants Puckett and Slawson can assert any claims against plaintiff or the third-party defendants in this court.

Finally, defendants argue that the BIA lists of Alaska Native entities have been politically impacted, inconsistent, and are therefore of little use. Defendants' brief offers little development and sparse authority for the proposition which the brief announces.

Indeed, acknowledgement of Indian tribes is a political decision. Either of the political branches of government (the Executive or Congress) may acknowledge the existence of Indian tribes, Native Village of Tyonek, 957 F.2d at 635; and once acknowledged by a political branch, courts owe deference to that decision, Baker v. Carr, 369 U.S. at 215-16, which is essentially unreviewable. Sandoval, 231 U.S. at 47-48. The fact that BIA lists dealt with the subject of Alaska tribes first in a "preliminary list"[26] and the fact that a 1988 list created confusion because of over-inclusiveness,[27] simply do not establish that the BIA could not or did not in 1993 effectively acknowledge Alaska tribal entities as having the same rights and privileges as tribes recognized in the Lower 48 states.

Defendants' allusion to ANCSA and the opinion of Interior Solicitor Sansonetti[28] on whether or not there is in Alaska any

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[26] 47 Fed. Reg. 53,134 (1982).

[27] Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 53 Fed. Reg. 52,829, 52,832 (1988).

[28] U.S. Dept. of the Interior Memorandum M-336975, Exhibit B to defendants' brief at Clerk's Docket No. 180.

territory over which Alaska Native villages might exercise governmental powers simply does not answer the question: Did plaintiff have status as a tribe in 1981 and 1982; and was it consequentially immune from defendants' counterclaim?

Conclusion: Tyonek Is a Tribe

Based upon historical data, including the past government-to-government relationship between the Native Village of Tyonek and other governmental entities, including the United States, the BIA has acknowledged that the Native Village of Tyonek is a tribe. The court concludes on the basis of the briefing before it and the foregoing discussion, that BIA acknowledgement constitutes a recognition of that which has existed in the past. Inasmuch as the Native Village of Tyonek was included on the BIA's preliminary list of Alaskan tribes, and was also included on the BIA's 1993 list of Alaskan tribes, the court concludes that plaintiff was a tribe at all times relevant to defendants' counterclaim and third-party claims.

Sovereign Immunity

In his initial decision in this case, Judge Fitzgerald concluded that "[t]he Village possesses sovereign immunity from suit like that of any other Indian tribes in the contiguous United States."[29] For the reasons and upon the authorities discussed by Judge Fitzgerald in that decision, the court now readopts this same foregoing conclusion.[30] Furthermore, the court again rejects the

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[29] Decision of December 3, 1986, Clerk's Docket No. 99, at 20-21.

[30] Id. at 21-25.

position taken previously by the Pucketts and Slawsons that the Indian Civil Rights Act of 1968, 15 U.S.C. §§ 1301-1341, constitutes a waiver of Tyonek's sovereign immunity.[31] This court also again rejects the contention that plaintiff waived its sovereign immunity by initiating the present litigation.[32] Finally, this court again rejects the Pucketts' and Slawsons' contention that plaintiff's adoption of a "sue and be sued" clause in its corporate charter effectively waived its sovereign immunity for purposes of this action.[33] The court concludes that plaintiff is immune from defendants' counterclaims, and they are again dismissed for lack of subject matter jurisdiction.[34]

Turning to the Pucketts' and Slawsons' third-party complaint against four Tyonek officers, the court concludes that they are entitled to derivative immunity based upon the tribal status of plaintiff. The court reaches this conclusion for the reasons and upon the authorities discussed by Judge Fitzgerald in the December 3, 1986, decision.[35] The court dismisses the Pucketts' and Slawsons' third-party complaint against the third-party defendant officers of the Native Village of Tyonek for lack of subject matter jurisdiction.

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31 Id. at 25-28.

32 Id. at 28-29.

33 Id. at 29-30.

34 Id. at 30.

35 Clerk's Docket No. 106 at 30-34.

It is the court's belief that the foregoing holdings dispose of all remaining issues in this case. If any party disagrees, that party shall, on or before November 27, 1996, notify the court of any additional perceived issue requiring the court's attention. Absent any such notice, the clerk of court shall enter judgment dismissing plaintiff's complaint because it is moot and dismissing all counterclaims against the plaintiff and dismissing the third-party complaint with prejudice because plaintiff and the third-party defendants are immune from suit.

DATED at Anchorage, Alaska, this 29 day of October, 1996.

H. Russel Holland, Judge
District of Alaska

A82-0369--CV (HRH)

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