IN THE SUPREME COURT OF 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 APPELLANT

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Filed in the Supreme Court
of the State of Alaska, this
14th day of December, 2010.

MARILYN MAY, CLERK

By: Shelby L. Warren
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STATUTE PRINCIPALLY RELIED UPON

Federally Recognized Indian Tribe List Act

SEC. 101. Short Title.

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

SEC. 102. DEFINITIONS.

For the purposes 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 responsibility 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 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;

(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 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) FREQUENCY OF PUBLICATION. - The list shall be published within 60 days of enactment of this Act, and annually on or before every January 30 thereafter.

JURISDICTIONAL STATEMENT

On June 17, 2010 Superior Court Judge Peter A. Michalski issued an order in which he granted the motion of appellees Ivanof Bay Village (IBV) and Edgar Shangin to dismiss this action. Appellant's Excerpt of Record (Exc.) 115. On July 26, 2010 Judge Michalski issued a final judgment. Exc. 120. On August 19, 2010 appellant Michael McCrary filed a notice of appeal. Exc. 123.

A.S. 22.05.010 and Alaska Rules of Appellate Procedure 202(a) and 204(a)(1) grant this Court jurisdiction to adjudicate the appeal.

ISSUES PRESENTED FOR REVIEW

1. Did the Superior Court err when it held that it lacked subject matter jurisdiction to adjudicate the claims for relief that appellant McCrary alleged in his complaint because the appellees are protected by sovereign immunity?

2. Did the Superior Court err when it held implicitly that appellee IBV is a "federally recognized tribe" that, as a consequence of that legal status, has sovereign immunity?

STATEMENT OF THE CASE

Ivanof Bay is a small bay on the Kupreanof Peninsula, 500 miles southwest of Anchorage and 250 miles southeast of Dillingham.[1]

In 1965 several families that had been living in nearby Perryville relocated to Ivanof Bay. On the 1970 census enumeration date the Ivanof Bay community had more than twenty-five Alaska Native residents and thereby qualified to be a "Native village" for the purposes of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 et seq. In 1973 the Alaska Native residents of the community of Ivanof Bay incorporated Bay View, Inc., to obtain ANCSA land ownership and monetary benefits. On a date unknown to appellant McCrary, the Secretary of the Interior conveyed fee title to the surface estate of land within and surrounding the community of Ivanof Bay to Bay View, Inc.

Today, the community of Ivanof Bay is uninhabited and a majority of the shareholders of Bay View, Inc., reside in or surrounding Anchorage. On a date unknown to appellant McCrary,

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[1]The facts described herein are the facts appellant McCrary alleged in his complaint - see Exc. 94-99, which, for the purposes of this appeal, the Court must presume to be true. See Clemensen v. Providence Alaska Medical Center, 203 P.3d 1148, 1151 (Alaska 2009)("In reviewing a Rule 12(b)(6) dismissal, we liberally construe the complaint and treat all factual allegations in the complaint as true").

the former Alaska Native residents of the uninhabited community of Ivanof Bay, their children, and relatives organized appellee IBV as an unincorporated association. As it has been throughout this litigation, appellee IBV is headquartered in Anchorage in an office suite in a two-story building at 2518 East Tudor Road. See 2010-2011 ACS White Pages/Anchorage, at 181.[2]

In 2005 and 2006 appellant McCray entered into two personal services contracts with appellee IBV. In 2006 appellee IBV and appellee Edgar Shangin, acting both as the president of appellee IBV and individually, breached the implied covenant of good faith and fair dealing contained in each contract. As a consequence of the breaches, appellant McCrary suffered economic damage in the amount of $135,000.

In 2009 appellant McCrary commenced this action in the Superior Court by filing a complaint that alleged two breach of contract claims. Exc. 93-101. In response, the appellees filed a motion that requested the Superior Court to dismiss the complaint on the ground that the court lacked subject matter jurisdiction because appellee IBV has sovereign immunity. Exc. 102.

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[2]Available on-line at http://acsyellowpages.dirxion.com/WebProject.asp?CodeId=7.4.1.1&BookCode=anc&SectionIndex=1&from=2.

On June 17, 2010 Judge Michalski granted the motion by signing an order that had been drafted by the appellees' attorney. Exc. 115-116.

The order announced that the appellees "are protected by sovereign immunity" without describing the legal reasoning that Judge Michalski had employed to reason to that result.

To provide this Court with the benefit of Judge Michalski's reasoning, on July 13, 2010 appellant McCrary filed a motion in which, pursuant to Alaska Rule of Civil Procedure 78, he requested Judge Michalski to order the appellees to file findings of fact and conclusions of law. Exc. 117. On July 26, 2010 Judge Michalski issued a Final Judgment. Exc. 120-121. On July 28, 2010 Judge Michalski issued an order in which he denied appellant McCrary's motion for findings of fact and conclusions of law.

This appeal followed.

STANDARD OF REVIEW

To decide this appeal the Court must decide the following questions of statutory construction:

1. Prior to October 21, 1993 did Congress enact a statute that designated the members of appellee IBV as a "federally recognized tribe?"

2. Prior to October 21, 1993 did Congress enact a statute that delegated the Secretary of the Interior authority to by unilateral agency action designate the members of appellee IBV as a "federally recognized tribe?"

3. Did Congress intend its enactment in 1994 of the Federally Recognized Indian Tribe List Act (FRITLA), Pub. L. No. 103-454, Title I, 108 Stat. 4791 (1994)(codified in part at 25 U.S.C. 479a et seq.), to delegate the Secretary of the Interior authority to by unilateral agency action designate the members of appellee IBV as a "federally recognized tribe?"

The standard of review for questions of statutory construction is de novo. See Hageland Aviation Services, Inc. v. Harms, 210 P.3d 444, 448 (Alaska 2009)("In matters of statutory interpretation, we . . . apply our independent judgment"). Accord Lundgren v. City of Wasilla, 220 P.3d 919, 921 (Alaska 2009).

ARGUMENT

A. Judge Michalski Based His Decision to Grant the Appellees' Motion to Dismiss on This Court's Pronouncements Regarding Alaska Native Tribal Status in John v. Baker I.

The U.S. Supreme Court has instructed that a group whose membership is composed of individuals of Native American descent that has acquired the legal status of being a "federally recognized tribe" has sovereign immunity that prevents the group

from being subject to suit in state court. See Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc., 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998)(a "federally recognized tribe" has sovereign immunity that it may assert to avoid state court jurisdiction over a breach of contract claim arising from the tribe's off-reservation conduct). Accord Cook v. Avi Casino Enterprises, Inc., 548 F.3d 718 (9th Cir. 2008)(sovereign immunity shields a "federally recognized tribe" from suit in state court for torts committed by an employee of the tribe's business subsidiary).

As a consequence, in the memorandum they filed in support of their motion to dismiss, the appellees argued to Judge Michalski that "Ivanof Bay (sic), as a federally recognized tribe, and Edgar Shangin, as its president acting in his official capacity, are protected from this suit by the common law doctrine of sovereign immunity." (emphasis added). Exc. 106. For that reason, while in the order in which he granted the appellees' motion he did not say so explicitly, it is reasonable to conclude that Judge Michalski concluded that the members of appellee IBV are a "federally recognized tribe."

How did the members of appellee IBV acquire that legal status?

In the memorandum they filed in support of their motion to dismiss, the appellees offered a single legal theory. The appellees argued to Judge Michalski:

> The Alaska Supreme Court held in John v. Baker[I, 982 P.2d 738 (Alaska 1999),] that Alaska Native Villages on the Department of Interior's list of federally (sic) tribes are sovereign entities. Thus, Native Villages that appear on the Department of Interior's list are entitled to be treated as sovereign governments. Ivanof Bay (sic) is a sovereign Tribe based on its inclusion on the Department of Interior's list.[3]

Exc. 108.

B. The Court Should Revisit the Pronouncements Regarding Alaska Native Tribal Status That It Announced in John v. Baker I.

In John v. Baker I, supra at 749-50, this Court announced that the members of the Native Village of Northway (NVN) are a "federally recognized tribe" because

1) "In 1993 . . . the Department of the Interior issued a list of federally recognized tribes that included Northway Village and most other Native villages in Alaska,"

[3] See Native Entities Within the State of Alaska Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 74 Fed. Reg. 40,218, 40,222 (2009).

2) "In the Federally Recognized (sic) Tribe List Act of 1994, Congress specifically directed the Department to publish annually '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,'"

3) "The Department published tribal lists for 1995 through 1998, all of which include Alaska Native villages such as Northway, based on this specifically delegated authority," and

4) "The text and legislative history of the Tribe List Act (sic) demonstrate that Congress . . . views the recognized tribes as sovereign bodies."

The Court issued those pronouncements regarding Alaska Native tribal status without the benefit of the adversarial briefing and argument that, as the United States Supreme Court noted in Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962), is necessary in order "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions."

1. In the John v. Baker I Appeal the Court Did Not Have the Benefit of Adversarial Briefing and Argument Regarding Alaska Native Tribal Status.

In 1995 John Baker, an Athabascan Indian resident of the village of Northway, hired an attorney named Rita Allee to file a child custody action in the Superior Court in Fairbanks against the mother of Mr. Baker's children, Anita John, an Athabascan Indian resident of the village of Mentasta. See Exc. 51-52. Because she was income eligible, Ms. John was represented in that action by Andrew Harrington, an attorney employed in the Fairbanks office of the Alaska Legal Services Corporation. See John v. Baker I, supra at 742 ("Andrew Harrington and Mark Regan, Alaska Legal Services Corporation, Fairbanks, for Appellant").

As is discussed below, between 1990 and 1993 Mr. Harrington was a member of a group of Alaska attorneys who conspired behind the scenes to persuade Assistant Secretary of the Interior for Indian Affairs Ada Deer to transform the members of NVN, appellee IBV, and more than two hundred other Alaska Native organizations into "federally recognized tribes" by ultra vires agency action. See Exc. 1 (letter to Eddie Brown, Assistant Secretary of the Interior for Indian Affairs, and William Lavell, Associate Solicitor, Indian Affairs); Exc. 6 (letter to the Honorable Bruce Babbitt, Secretary of the Interior); Exc. 17 (draft letter to

Eddie Brown, Assistant Secretary of the Interior for Indian Affairs).

On Ms. John's behalf, Mr. Harrington filed a motion to dismiss the child custody action that Ms. Allee had filed on Mr. Baker's behalf on the ground that the Northway Tribal Court had already asserted its jurisdiction over the child custody dispute that was the subject of the action. Superior Court Judge Ralph Beistline denied the motion.

At that point, Mr. Baker ran out of money. However, since, like Ms. John, he was income eligible, John Franich, the supervising attorney of the Fairbanks office of the Office of Public Advocacy (OPA), took over Mr. Baker's representation from Ms. Allee.

When after a trial Judge Beistline awarded Mr. Baker custody of his children, Mr. Harrington appealed Judge Beistline's denial of Ms. John's motion to dismiss to this Court.

To represent Mr. Baker in the appeal, OPA hired a contract attorney in Fairbanks named Deborah Niedermeyer. See John v. Baker I, supra at 742 ("J. John Franich, Assistant Public Advocate, Fairbanks, Brant McGee, Public Advocate, Anchorage, and Deborah Niedermeyer, Fairbanks, for Appellee"). While she may have been more knowledgeable about Indian law than Mr. Franich,

unfortunately for Mr. Baker, Ms. Niedermeyer was an acolyte of the group of attorneys that included Mr. Harrington.[4]

Ms. Niedermeyer wrote the briefs Mr. Baker filed in John v. Baker I, and she argued orally on Mr. Baker's behalf before this Court. See John v. Baker I, No. S-8099, Oral Argument June 19, 1998, Audiotape AP 916, Tape Position 690-1818.

In those briefs, Ms. Niedermeyer not only did not contest Mr. Harrington's assertion that the members of NVN were a "federally recognized tribe," Ms. Niedermeyer affirmatively conceded the legal validity of Mr. Harrington's assertion. See

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[4]E.g., Ms. Niedermeyer had earlier authored "The True Interests of a White Population": The Alaska Indian Country Decisions of Judge Matthew P. Deady, 21 Journal of International Law & Politics 195 (1988), in which she argued that Judge Deady had decided eight decisions about Indian country in Alaska of which Ms. Niedermeyer disapproved, not because his analytical reasoning regarding the statutory construction questions he decided was flawed, but because in the nineteenth century the jurist had a nineteenth century view of Indian policy. According to Ms. Niedermeyer:

> Biographical information shows that Deady adhered to a racist, expansionist, pioneer ideology. This ideology held that white settlement of most of the western territory of the United States was both economically and politically desirable for the nation and an act of personal heroism on the part of the settlers. Whites alone were entitled to govern the newly pioneered areas. This ideology is consistent with the Tom holding and is the underpinning of all of Deady's Alaska Indian country opinions.

Id. 226.

Exc. 65 (informing the Court that "the Native Village of Northway is a federally recognized tribe"). And during her oral argument, Ms. Neidermeyer told the Court:

> Mr. Baker has also asked me to tell this Court that he is a strong supporter of tribal courts. He would like to see tribal court jurisdiction recognized as long as they (sic) are fair.

Tape Position 968-779.

Ms. Neidermeyer told the Court:

> Mr. Baker believes that the wisest decision this Court could make is to recognize tribal jurisdiction in Alaska as long as tribal court decisions meet the law of comity.

Id. 1048-1055.

And in response to a question from Justice Fabe, Ms. Neidermeyer told the Court that she agreed with Mr. Harrington that

> within the boundaries of federal law, yes, it would seem that the tribe could define its own subject matter jurisdiction.

Id. 1125-1132.[5]

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[5]Listening to Ms. Neidermeyer's oral argument in its entirety can give the Court a full appreciation of the extent of Ms. Neidermeyer's enthusiasm for tribal courts and her agreement with Mr. Harrington that, because its members were a "federally recognized tribe," NVN had governmental authority to establish a court that had jurisdiction to involve itself in matters related to the custody of Ms. Neidermeyer's client's children.

2. The Pronouncements Regarding Alaska Native Tribal Status That the Court Announced in John v. Baker I Were Not Holdings and They Do Not Have Precedential Value.

Stare decisis generally requires the Court to give holdings that the Court has announced in prior decisions precedential value. See Joseph v. State, 26 P.3d 459, 468 (Alaska 2001).

But a statement made in a prior decision about a question that the Court was not required to adjudicate in order to decide the case is not a holding. It is a dictum that has no precedential value. See United States v. Eqelak, 173 F. Supp. 206, 211 (D. Alaska Terr. 1959)("A decision is dicta where the language is unnecessary to . . . the determination of the issues of the case, but where there is an adjudication of any point within the issues presented it is not dicta")(emphasis added).

For example, 18 U.S.C. 876 prohibits knowingly threatening to injure a person in a letter that has been sent by mail. In United States v. Sirhan, 504 F.2d 818 (9th Cir. 1974), when it affirmed a defendant's conviction for violating 18 U.S.C. 876, a Circuit Court panel stated that proving that a defendant had written and then mailed a letter whose content contained a threat to injure another person was the first element of the offense.

But in United States v. Henderson, 961 F.2d 880, 882 (9th Cir. 1992), a subsequent panel determined that the former panel's statement was a dictum that had no precedential value because

> In Sirhan . . . the authorship of the letter was undisputed. Consequently, [the Sirhan decision's] recitation of writing as an element of the offense was unnecessary to its holding and hence, mere dicta.

Similarly, because in the John v. Baker I appeal Ms. John and Mr. Baker agreed that the members of NVN were a "federally recognized tribe" that had authority to establish a court that had jurisdiction to involve itself in matters relating to child custody, the Court was not required to, and it did not, adjudicate the question of whether the members of NVN were a "federally recognized tribe." As a consequence, the Court's pronouncements in John v. Baker I regarding Alaska Native tribal status were dicta.

3. If Arguendo the Pronouncements Regarding Alaska Native Tribal Status That the Court Announced in John v. Baker I Were Holdings, Stare Decisis Does Not Bar the Court From Revisiting Those Holdings.

If arguendo the pronouncements regarding Alaska Native tribal status that the Court announced in John v. Baker I were holdings, stare decisis

> is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable . . . . It's force is not immutable, requiring us to blindly adhere to a statutory interpretation unsound at its inception and unjust in its consequences.

In re G.K., 497 P.2d 914, 916-17 (Alaska 1972).

Because stare decisis is not "a mechanical formula for adherence," in recognition that, like all human institutions, courts can make mistakes,[6] this Court will not invoke stare decisis when it determines that a prior decision was "originally erroneous." See State v. Coon, 947 P.2d 386, 394 (Alaska 1999).

For the reasons set forth below, that is the situation here.

Because it is, before it affirms the order in which Judge Michalski denied appellant McCrary access to the Superior Court for the purpose of obtaining an adjudication of the merits of his breach of contract claims, affording appellant McCrary the fundamental fairness to which every resident of the State of Alaska is entitled necessitates that the Court revisit the

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[6]The recent decision that best illustrates the judiciary's duty to revisit erroneous holdings is Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). In Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), the U.S. Supreme Court held that state laws that criminalize consensual homosexual acts do not violate the Due Process Clause of the Fourteenth Amendment. Seventeen years later in Lawrence the Court revisited, and then rejected, its holding in Bowers, noting when it did so that "Bowers was not correct when it was decided, and it is not correct today." Lawrence v. Texas, supra at 578, 123 S.Ct. at 2484.

pronouncements regarding Alaska Native tribal status that the Court announced in John v. Baker I.

C. The Pronouncements Regarding Alaska Native Tribal Status That the Court Announced in John v. Baker I Misconstrued the Intent of Congress Embodied in 25 U.S.C. 2 and 9 and in the Federally Recognized Indian Tribe List Act.

1. The Indian Commerce Clause and Tribal Recognition.

The Indian Commerce Clause, Article II, Section 8, Clause 3, of the U.S. Constitution grants Congress "plenary and exclusive power over Indian affairs." Washington v. Yakima Indian Nation, 439 U.S. 463, 470, 99 S.Ct. 740, 746, 58 L.Ed.2d 740 (1979). That power includes the power to designate a group whose members are of Native American descent as a "federally recognized tribe." See e.g., Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, 97 Stat. 851 (1983); Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act, Pub. L. No. 103-324, 108 Stat. 2156 (1994). That power also includes the power to delegate the Secretary of the Interior authority to designate the members of such a group as a "federally recognized tribe." See c.f. Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520, 531 n. 6, 118 S.Ct. 948, 955 n. 6, 140 L.Ed.2d 30 (1998)(noting that "because Congress has plenary power over Indian affairs, some explicit

action by Congress (or the Executive, acting under delegated authority) must be taken to create or to recognize Indian country").

But either way, as the Committee on Natural Resources, which in the U.S. House of Representatives exercises jurisdiction over Native American-related legislation, has noted

> "Recognized" is more than a simple adjective; it is a legal term of art. It means that the government acknowledges as a matter of law that a particular Native American group is a tribe by conferring a specific legal status on that group, thus bringing it within Congress' legislative powers. This federal recognition is no minor step. A formal political act, it permanently establishes a government-to-government relationship between the United States and the recognized tribe as a "domestic dependent nation," and imposes on the government a fiduciary trust relationship to the tribe and its members. Concomitantly, it institutionalizes the tribe's quasi-sovereign status, along with all powers accompanying that status . . . . (emphasis added).

H.R. Rep. No. 103-781 at 2-3 (1994).

What formal political act transformed the members of NVN (and appellee IBV) into a "federally recognized tribe?"

"Congress takes no governmental action except by legislation." Rapanos v. United States, 547 U.S. 715, 750, 126 S.Ct. 2208, 2231, 165 L.Ed.2d 159 (2006). So for the members of NVN (and of appellee IBV) to be a "federally recognized tribe," Congress must have enacted a statute that conferred that legal status or Congress must have enacted a statute that delegated the

Secretary of the Interior authority to confer that legal status and the Secretary must then have lawfully exercised that authority.

2. Congress Has Not Enacted a Statute That Designates the Members of the Native Village of Northway (or of Appellee Ivanof Bay Village) as a "Federally Recognized Tribe.

After surveying the history of Congress's Alaska Native-related enactments, in Native Village of Stevens v. Alaska Management & Planning, 757 P.2d 32, 41 (1988), this Court concluded that

> In a series of enactments following the Treaty of Cession and extending into the first third of this century, Congress has demonstrated its intent that Alaska Native communities not be accorded sovereign tribal status. The historical accuracy of this conclusion was expressly recognized in the proviso to the Alaska Indian Reorganization Act . . . No enactment subsequent to the Alaska Indian Reorganization Act granted or recognized tribal sovereign authority in Alaska.

For that reason, the Court held that Stevens Village was "not entitled to utilize the defense of tribal sovereign immunity." Id. 41.

Eleven years later in John v. Baker I, supra at 749, the Court cited Native Village of Stevens as authority for the legal conclusion that "[p]rior to 1993, no . . . recognition of Alaska Native villages [as sovereign tribes] had occurred."

What event occurred in 1993?

On October 21, 1993 Assistant Secretary of the Interior for Indian Affairs Ada Deer published in the Federal Register a list of "Native Entities Within the State of Alaska Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs." See 58 Fed. Reg. 54,368 (1993). NVN and appellee IBV were two of the entities on the list.

According to the Court in John v. Baker I, supra at 749, it was Assistant Secretary Deer's act of publication of her list that had the legal consequence of transforming the members of NVN (and the more than two hundred other Native Entities on the list, including appellee IBV) into a "federally recognized tribe." And that certainly was Assistant Secretary Deer's intent, since in the preamble that preceded the list Assistant Secretary Deer announced that she intended the act of publication of the list 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 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.

58 Fed. Reg. 54,366 (1993).

But as the U.S. Supreme Court noted in Chrysler Corporation v. Brown, 441 U.S. 281, 302, 99 S.Ct. 1705, 1718, 60 L.Ed.2d 208 (1979):

> The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.

And see also accord Lyng v. Payne, 476 U.S. 926, 937, 106 S.Ct. 2333, 2341, 90 L.Ed.2d 921 (1986)(scope of federal agency authority is "no greater than that delegated . . . by Congress").

So what was the statute in which Congress delegated Assistant Secretary Deer authority to on October 21, 1993 exercise Congress's Indian Commerce Clause authority in Congress's stead by creating more than two hundred "federally recognized tribes" in Alaska by unilateral agency action?

3. Congress Has Not Enacted a Statute That Delegated the Secretary of the Interior Authority to Designate the Members of the Native Village of Northway (or of Appellee Ivanof Bay Village) as a "Federally Recognized Tribe."

In the preamble that preceded her list Assistant Secretary Deer explained that: "This notice is published in exercise of

authority delegated to the Assistant Secretary - Indian Affairs under 25 U.S.C. 2 and 9 and 209 D[epartment of the Interior] M[anual] 8." See 58 Fed. Reg. 54,364 (1993).

While this Court should afford deference to Assistant Secretary Deer's and every other federal agency administrator's interpretation of the intent of Congress embodied in a statute that her or his agency has been charged by Congress with responsibility for implementing, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that a statute will bear." MCI Telecommunications Corporation v. ATT, 512 U.S. 218, 229, 114 S.Ct. 2223, 2231, 129 L.Ed.2d 182 (1994).

That is the situation regarding Assistant Secretary Deer's assertion that Congress intended its enactment of 25 U.S.C. 2 and 9 to delegate the Secretary of the Interior authority (that he then delegated to Assistant Secretary Deer) to create "federally recognized tribes" in Alaska by unilateral agency action.

a. 25 U.S.C. 2

Congress enacted 25 U.S.C. 2 172 years ago and 35 years before the United States purchased Alaska. See ch. 174, sec. 1, 4 Stat. 564 (1832). As now codified, the text of the statute reads:

> 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.

In 1832 when Congress enacted 25 U.S.C. 2 the circumstances were as follows:

In 1806 Congress created the office of Superintendent of Indian Trade inside the War Department to manage the Indian trading posts, called factories, that Congress had authorized the President to operate on the frontier. See 2 Stat. 402 (1806). In 1816 President James Madison appointed Thomas McKenney as superintendent. See Herman J. Viola, THOMAS L. McKENNEY: ARCHITECT OF AMERICA'S EARLY INDIAN POLICY: 1816-1830, at 4-5 (1974). In 1822 Congress directed the Secretary of War to close the factories. See 3 Stat. 683 (1822). As a consequence, Superintendent McKenney no longer had any statutorily mandated duties. To fill the vacuum, in 1824 "Secretary of War [John C.] Calhoun, by his own order, and without special authorization from Congress, created in the War Department what he called the Bureau of Indian Affairs [BIA]. To head the office Calhoun appointed McKenney and assigned him two clerks as assistants . . . ." Francis Paul Prucha, AMERICAN INDIAN POLICY IN THE FORMATIVE

YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834, at 57 (1971 ed.).

Secretary Calhoun's decision to create the BIA was a reasonable policy choice. But the Secretary's action was ultra vires. For that reason, with Secretary Calhoun's approval, in 1826 Thomas McKenney drafted a bill which he submitted to Congress and whose enactment would create the BIA. See id. 58-59. In 1832 Congress enacted the McKenney bill as ch. 174, sec. 1, 4 Stat. 564 (1832); today, 25 U.S.C. 2.

If Assistant Secretary Deer is to be believed, in 1832 Congress intended its enactment of 25 U.S.C. 2 to delegate an obscure subordinate employee of the War Department authority to decide on his own which groups of Native Americans would be designated as "federally recognized tribes" whose members henceforth would have a "government-to-government" relationship with the United States.

That interpretation of Congress's intent stretches credulity past breaking. And members of Congress who voted for 25 U.S.C. 2 would be astounded by the temerity of Assistant Secretary Deer's interpretation of their intent; since what they intended was that 25 U.S.C. 2 simply authorize the Secretary of War to hire a minor bureaucrat.

By 1832 the Secretary of War was distributing annually more than $1 million in gratuities to Indians, operating fifty-four Indian schools, and as recently as 1830 had issued ninety-eight licenses to traders doing business in Indian country. As Senator Hugh White of Tennessee, the chairman of the Committee on Indian Affairs, informed his colleagues when the bill that would be enacted as 25 U.S.C. 2 reached the floor of the Senate, "To all these different branches the personal attention of the Secretary of War is now required. The creation, therefore, of such an officer [i.e., the Commissioner of Indian Affairs] as is provided by the bill, be deemed to be indispensably necessary." See 8 Gales & Seaton's Register of Debates in Congress, at 988 (1832).

Senator White's explanation in 1832, and not Assistant Secretary Deer's in 1993, is the accurate description of the intent of Congress embodied in 25 U.S.C. 2.

b. 25 U.S.C. 9

Congress enacted 25 U.S.C. 9 170 years ago and 33 years before the United States purchased Alaska. See ch. 162, sec. 17, 4 Stat. 738 (1834). As now codified, the text of the statute reads:

> The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

On October 21, 1993 neither the President of the United States, the Secretary of the Interior, nor Assistant Secretary Deer had promulgated a regulation that designated the members of NVN, appellee IBV, or any of the other Native Entities on Assistant Secretary Deer's list as members of "federally recognized tribes," either for the purpose of "carrying into effect the various provisions of any act relating to Indian affairs," the purpose of "the settlement of the accounts of Indian affairs," or for any other purpose.

Simply put, on its face, 25 U.S.C. 9 did not delegate Assistant Secretary Deer authority to create "federally recognized tribes" in Alaska in Congress's stead.

4. In 1993 Assistant Secretary of the Interior for Indian Affairs Ada Deer Joined with a Group of Attorneys Led by Attorneys from the Native American Rights Fund to Try to Create "Federally Recognized Tribes" in Alaska. But Assistant Secretary Deer's Agency Action Was Ultra Vires.

a. Sansonetti Opinion.

In the early 1980s a political movement began inside the Native community in Alaska whose organizing tenets were 1) that the Native residents of every community in Alaska that had

qualified as a "Native village" for the purposes of section 11 of ANCSA, 43 U.S.C. 1610, were members of a "federally recognized tribe," and 2) that land within and surrounding each Native village was "Indian country." See Donald Craig Mitchell, Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts, 14 Alaska Law Review 353, 391-94 (1997)(birth of the Native sovereignty movement described).

In response to those legal assertions, in June 1991 Secretary of the Interior Manuel Lujan directed Solicitor Thomas Sansonetti "to develop the legal position of the United States on 'the nature and scope of so-called governmental powers over lands and nonmembers that a Native village can exercise after [ANCSA]." See Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers, Op. Sol. M-36975 (January 11, 1993), at 1 [hereinafter "Sansonetti Opinion"]. Solicitor Sansonetti responded by in January 1993 issuing the Sansonetti Opinion ten days before Secretary Lujan, Solicitor Sansonetti, and all other Bush I administration political appointees departed the Department of the Interior (DOI).

The Sansonetti Opinion considered two questions: 1) Are there "federally recognized tribes" in Alaska? 2) Is there "Indian country" in Alaska?

With respect to land that the Secretary of the Interior has conveyed to ANCSA corporations in fee, the Sansonetti Opinion, at 122-23, concluded that Congress did not intend that land to be "Indian country." Five years later, the U.S. Supreme Court affirmed that view of Congress's intent. See Alaska v. Native Village of Venetie Tribal Government, supra.

But with respect to the question of whether Congress had created "federally recognized tribes" in Alaska, the Sansonetti Opinion obfuscated by concluding:

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

Sansonetti Opinion, at 47.

A deconstruction of the historical record on which the Sansonetti Opinion relied to justify that obfuscation is beyond the scope of this brief. But one representative example:

In a footnote, the Sansonetti Opinion cites a March 14, 1932 letter from Secretary of the Interior Ray Lyman Wilbur to Representative Edgar Howard, the chairman of the House Committee on Indian Affairs, as well as the January 28, 1932 letter from Representative Howard to which Secretary Wilbur's letter responded. See Sansonetti Opinion, at 27 n. 82. But the

Sansonetti Opinion then not only does not explain what Secretary Wilbur said in his letter, it implies that an opinion that Solicitor Edward Finney wrote for a completely different purpose and issued on February 24, 1932, i.e., three weeks prior to the March 14, 1932 letter, was Secretary Wilbur's response to Representative Howard's January 28, 1932 letter, when it was not.

What Secretary Wilbur stated in his letter that the Sansonetti Opinion does not mention was:

> In the United States statutes Alaska has never been regarded as Indian country. The United States has had no treaty relations with any of the aborigines of Alaska nor have they been recognized as the independent tribes with a government of their own. The individual native has always and everywhere in Alaska been subject to the white man's law, both Federal and territorial, civil and criminal. (emphasis added).

Letter from Ray Lyman Wilbur to the Honorable Edgar Howard, Chairman, House Committee on Indian Affairs (March 14, 1932), reprinted in Authorizing the Tlingit and Haida Indians to Bring Suit in the United States Court of Claims: Hearing on S. 1196 before the Senate Comm. on Indian Affairs, 72d Cong. 15-16 (1932).

b. Assistant Secretary Deer's List.

The Solicitor did not make the Sansonetti Opinion available in draft for public comment. However, he did allow selected individuals to comment. See Sansonetti Opinion, at 3 (noting that

"we have consulted with the Governor and Attorney General of Alaska; numerous Native leaders in Alaska and the contiguous states, as well as their counsel; the Alaska congressional delegation; and the members of the Joint Federal-State Commission on Policies and Programs Affecting Alaska Natives"). Individuals who the attorneys in the Office of the Solicitor who wrote the Sansonetti Opinion consulted included attorneys employed by the Native American Rights Fund (NARF). See Sansonetti Opinion, at 117.[4]

In 1978 the Deputy Assistant Secretary of the Interior for Indian Affairs promulgated regulations that established a petition process to enable the Assistant Secretary to create new "federally recognized tribes" by unilateral agency action. See 43 Fed. Reg. 39,361 (1978). One of those regulations, 25 C.F.R. 54.6(b)(1978), required the Secretary of the Interior to publish in the Federal Register "a list of all Indian tribes which are recognized and receiving services from the Bureau of Indian Affairs."

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[4]NARF is a law firm that is headquartered in Boulder, Colorado, and which has offices in Anchorage and Washington, D.C. According to its website, the firm is "dedicated to asserting and defending the rights of Indian tribes" and its practice focuses on "the preservation of tribal existence." See http://www.narf.org.

In 1979 when, on the Secretary's behalf, the Assistant Secretary published his first list of "Indian Tribal Entities," no Alaska Native organizations were included. See 44 Fed. Reg. 7235 (1979). In 1982 when the Assistant Secretary published a revised list, he published a separate list of Native Entities in Alaska that included "Ivanof Bay Village." The Assistant Secretary explained the legal need for two lists as follows:

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

47 Fed. Reg. 53,133-34 (1982).

In other words, the purpose of the second list was to provide guidance to BIA employees regarding which Native Entities in Alaska were "Indian tribes" for the purpose of obtaining contracts pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA), Pub. L. No. 93-638, 88 Stat. 2203 (1975)(codified as amended at 25 U.S.C. 450 et seq.).

The Assistant Secretary made that purpose crystal clear in 1988 when he published a revised list of Native Entities that included not only the Alaska Native villages that had been on previous lists, but also ANCSA corporations. See 53 Fed. Reg. 52,832-35 (1988).[5] When he did so, the Assistant Secretary explained that "the number of entities listed on the Alaska Native Entities section is approximately doubled on the basis of express Congressional recognition of the types of entities in Alaska eligible to receive funding or services from the Bureau of Indian Affairs." Id. 52,832.

Two years later, in 1990 a group of twenty-one attorneys (including the attorney who represents appellee IBV in this appeal), most based in Anchorage, all active in the Alaska Native sovereignty movement, and led by NARF, began quietly[6] lobbying Bush I administration DOI political appointees to rescind the

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[5]For the purpose of contracting with the BIA and the Indian Health Service (IHS), section 4 of ISDEAA, 25 U.S.C. 450b, defines the term "Indian tribe" to include "any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." (emphasis added).

[6]The letter dated June 15, 1990, Exc. 3-5, that the group sent to William Lavell, Associate Solicitor, Indian Affairs, at his home in Maryland, rather than to his office at the DOI Main Building in Washington, D.C., illustrates the conspiratorial behind-the-scenes nature of the group's lobbying activities.

1988 list and publish a new list that "explicitly recognizes the tribal status of Alaska Native villages and other tribes." See Exc. 1-5.[7]

The month after the Sansonetti Opinion was issued, in February 1993 the NARF group renewed its efforts by lobbying Secretary of the Interior Bruce Babbitt and other newly appointed Clinton administration DOI political appointees to "publish a new list of Federally Acknowledged Tribes that expressly recognizes the tribal status of Alaska Native villages" and "withdraw the former Solicitor's Opinion of January 11, 1993 insofar as it denies the existence of Indian country and tribal territorial powers in Alaska." See Exc. 6-41. The leaders of the group were NARF attorneys Lawrence Aschenbrenner and Robert Anderson. See e.g., Exc. 15, 41.

Inside DOI, the NARF group was actively aided by Assistant Solicitor Scott Keep. See Exc. 16 (March 20, 1993 memorandum in which NARF attorneys Aschenbrenner and Anderson advise other members of the NARF group that "we have been in contact with Scott Keep and he believes the time is right to follow up on our

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[7]The letters and memoranda that are part of the record on appeal - see Exec. 1-50 - were obtained from the Washington, D.C., office of the Solicitor of the Department of the Interior in response to a request filed pursuant to the Freedom of Information Act, 5 U.S.C. 552. See Exc. 113-114.

letter to Secretary Babbitt"). On March 22, 1993 NARF attorney Aschenbrenner faxed to Assistant Solicitor Keep for his review a letter from the NARF group to Assistant Secretary of the Interior for Indian Affairs Eddie Brown, a new list of Native Entities, and a preamble for Assistant Secretary Brown to publish in the Federal Register. See Exc. 15-39.

But the NARF group was most aided by Ada Deer, the former chair of the NARF board of directors,[8] who President Clinton nominated to succeed Eddie Brown as Assistant Secretary of the Interior for Indian Affairs.

On July 16, 1993 the Senate confirmed Ms. Deer as Assistant Secretary. See 139 Cong. Rec. 15,961 (1993). In September 1993 attorneys in the Indian Affairs Division of the Office of the Solicitor allowed NARF attorneys Aschenbrenner and Anderson and other attorneys who were members of the NARF group to participate in creating a new list of Native Entities and, most importantly, in drafting the preamble attached to the list that would explain that Assistant Secretary Deer intended publication of the new

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

list to "eliminate any doubt as to the Department [of the Interior]'s intention by expressly and unequivocally acknowledging that the Department has determined that the villages and regional tribes listed below are distinctly Native communities and have the same status as tribes in the contiguous states." See Exc. 42-50.

On October 21, 1993 Assistant Secretary Deer published the list and the explanatory preamble in the Federal Register. 58 Fed. Reg. 54,364-68 (1993). In the preamble Assistant Secretary Deer explained:

> 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 same 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. (emphasis added).

Id. 54,366.

But for the Native Entities on Assistant Secretary Deer's list to on October 21, 1993 have had "the same governmental status as other federally acknowledged Indian tribes," there had to have been a pre-October 21, 1993 Act of Congress or a pre-

October 21, 1993 agency action taken by the Secretary of the Interior (acting pursuant to authority that had been delegated to the Secretary by Congress) that created that legal status. But, as has been described above, there was no pre-October 21, 1993 Act of Congress, there was no pre-October 21, 1993 agency action, nor did Congress intend 25 U.S.C. 2 and 9 to delegate the Secretary of the Interior authority to authorize Assistant Secretary Deer to create more than two hundred "federally recognized tribes" in Alaska simply by publishing in the Federal Register a list of Native Entities.

As a consequence, Assistant Secretary Deer's attempt on October 21, 1993 to use publication of her list to create "federally recognized tribes" in Alaska was ultra vires.

5. Congress Did Not Intend the Federally Recognized Indian Tribe List Act to Delegate Assistant Secretary Deer and Her Successors Authority to in Congress's Stead Designate the Members of the Native Village of Northway (or of Appellee Ivanof Bay Village) as a "Federally Recognized Tribe."

In John v. Baker I, supra at 750, this Court announced that, even if arguendo Assistant Secretary Deer's attempt on October 21, 1993 to by unilateral agency action designate the members of NVN (and of appellee IBV) as a "federally recognized tribe" had been ultra vires, "for those who may have doubted the power of the Department of the Interior to recognize sovereign political

bodies, a 1994 Act of Congress [i.e., FRITLA] appears to lay such doubts to rest." The Court also noted that Congress intended FRITLA to be "specifically delegated authority" that authorized Assistant Secretary Deer in 1995, and her successor in 1998 to republish Assistant Secretary Deer's 1993 list. Id.

The Court was correct that section 104 of FRITLA, 25 U.S.C. 479a-1, delegates the Secretary of the Interior authority to publish annually 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." But, with all due respect, the Court was not correct that Congress intended section 104 to delegate the Secretary authority to, simply by publishing a list of "Native Entities Within the State of Alaska," transform the members of NVN (and the more than two hundred other Native Entities on the list, including appellee IBV) into a "federally recognized tribe."

The statutory text and legislative history of FRITLA indicate that Congress intended no such result.

a. Statutory Text

FRITLA has four sections. Section 101 (Short Title). Section 102 (Definitions). Section 103 (Findings). Section 104 (Publication of List of Recognized Tribes).

With respect to the Section 103 findings, two are erroneous[9] and none has the force of law. See 140 Cong. Rec. 27,244 (1994) (statement of Representative Craig Thomas, a principal sponsor of FRITLA, explaining that FRITLA's "findings are not legally binding").

Section 104, the only operative section of FRITLA, simply requires the Secretary of the Interior to publish annually 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." For the purposes of section 104, section 102 of FRITLA, 25 U.S.C. 479a, defines "Indian tribe" circuitously. According to section 102, an "Indian tribe" is an "Indian or

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[9]Section 103 of FRITLA states that Indian tribes may be "recognized" by "Act of Congress; by the administrative procedures set forth in part 83 of [title 25 of] the Code of Federal Regulations . . ., or by a decision of a United States court." But the regulations are ultra vires. See William W. Quinn, Jr., Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. 83, 17 American Indian Law Review 37, 47-53 (1992)[hereinafter "Quinn"]. And the judiciary's creation of a "federally recognized tribe" simply by announcing that a Native American group has that legal status would violate the Indian Commerce Clause and the doctrine of separation of powers. What the federal judiciary is empowered to do is to determine whether Congress, expressing its intent in a treaty or statute, or the Secretary of the Interior, acting lawfully pursuant to authority delegated by Congress, has designated a group whose members are of Native American descent as a "federally recognized tribe."

Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Indian acknowledges to exist as an Indian tribe."

As above stated, in section 4 of ISDEAA, 25 U.S.C. 450b, Congress designated Native villages (and ANCSA corporations) as "Indian tribes" for the purpose of contracting with the BIA and IHS. In section 4(8) of the Indian Child Welfare Act (ICWA), 25 U.S.C. 1903(8), Congress designated "Alaska Native village[s] as defined in section 1602(c) of title 43 [i.e. of ANCSA]" as "Indian tribes" for the purposes of ICWA, 25 U.S.C. 1901 et seq. And Congress has done the same in other statutes that it has enacted for the purpose of benefitting individuals of Native American descent.

The Secretary of the Interior obviously "recognizes" and "acknowledges" that Congress has done so. But nothing in the text of FRITLA indicates that Congress intended its inclusion of the undefined words "acknowledges" and "recognizes" in sections 102 and 104 of FRITLA to delegate the Secretary authority to transform a group composed of descendants of Native Americans (including descendants of Alaska Natives) into a "federally recognized tribe" simply by adding the name of the group to the list of "Indian tribes" that section 104 of FRITLA requires him to publish.

The legislative history of FRITLA is consistent with that reading of the statutory text.

b. Legislative History

During the 103d Congress (1993-1994), the House Committee on Natural Resources was controlled by Democrats. Representative George Miller was chairman of the Committee and Alaska Representative Don Young was the Ranking Member. Representative Bill Richardson was chairman of the Committee's Subcommittee on Native American Affairs and Representative Craig Thomas was the Ranking Member. Representative Young also was a member of the Subcommittee. See 1993-1994 OFFICIAL CONGRESSIONAL DIRECTORY: 103d CONGRESS 455-56.

In 1978 the Deputy Assistant Secretary of the Interior for Indian Affairs had promulgated regulations that granted the Assistant Secretary authority to create "federally recognized tribes" by unilateral agency action. See 43 Fed. Reg. 39,361 (1978); 25 C.F.R. 54.1 et seq. (1978).[10]

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[10]25 C.F.R. 54.4 (1978) stated:

> Section 54.4 Who May File.
>
> Any Indian group in the continental United States which believes it should be acknowledged as an Indian tribe, and can satisfy the criteria in section 54.7, may submit a petition requesting that the Secretary [of the Interior] acknowledge the group's existence as an Indian tribe. (emphasis added).

By 1994 the fact that the promulgation of 25 C.F.R. 54.1 et seq. (1978) had been ultra vires had long been quiet common knowledge. See Quinn, at 47-53 (1992).

To remedy that problem, on May 19, 1994 Representative Richardson introduced H.R. 4462, which the Committee reported on October 3, 1994, and whose enactment by Congress would have created a Commission on Indian Recognition empowered to designate Native American groups as "federally recognized tribes." Significantly, section 13 of H.R. 4462 required the Commission to publish in the Federal Register "a list of all Indian tribes

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When 25 C.F.R. 54.4 (1978) was published as a proposed rule, the text of the section did not include the word "continental." See 43 Fed. Reg. 23,745 (1978). The legal consequence of the addition of "continental" in the final regulation was to preclude members of appellee IBV and other Alaska Native organizations from petitioning to be designated as "federally recognized tribes." Why? Because in 1978 the Secretary of the Interior understood that in 1971 Congress intended ANCSA to reaffirm the decision Congress first made in the Alaska Organic Act, 23 Stat. 24 (1884), and over the succeeding ninety-four years had repeatedly reaffirmed, that it would not create "federally recognized tribes" in Alaska. In section 2(b) of ANCSA, 43 U.S.C. 1601(b), Congress directed the Secretary to implement ANCSA

> Without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska.

which are recognized by the Federal Government and receiving services from the Bureau of Indian Affairs." See H.R. Rep. No. 103-782, at 12 (1994).

Contemporaneously, on April 12, 1994 Representative Thomas introduced H.R. 4180, a bill whose enactment by Congress would have prohibited "Federal recognition or acknowledgment of an Indian tribe or Alaska Native Group [from being] withdrawn, except by an Act of Congress." See 140 Cong. Rec. E628 (daily ed. April 12, 1994)(statement of Representative Thomas).

Representative Miller, the chairman of the Committee on Natural Resources, objected to the idea of Congress prohibiting the Secretary of the Interior "from withdrawing recognition for an Indian tribe." See 140 Cong. Rec. 27,246 (1994)(statement of Representative Thomas). For that reason, on October 3, 1994 when the Committee reported H.R. 4180, it reported the text of FRITLA as an amendment in the nature of a substitute for the original text. See H.R. Rep. No. 103-781 (1994). When the Committee did so, Representative Young was aware that Alaska Native tribal status was a controversial subject in Alaska.

As enacted, sections 7(h)(3) and 8(c) of ANCSA, 43 U.S.C. 1606(h)(3) and 1607(c), canceled restricted ANCSA corporation

stock at the end of 1991, and directed the corporations to, at that time, issue new unrestricted shares.

At the request of the Alaska Federation of Natives, in 1986 Alaska Senator Frank Murkowski introduced S. 2065, a bill whose principle objective was to continue the restriction on the sale of ANCSA corporation stock. By that date, the Native sovereignty movement had been established.

In response to the demands of Native sovereignty advocates that he amend S. 2065 to acknowledge Alaska Native tribal status - see e.g., To Amend the Alaska Native Claims Settlement Act: Hearings on S. 2065 before the Subcomm. on Public Lands, Reserved Water and Resource Conservation of the Senate Comm. on Energy and Natural Resources, 99th Cong. 557 (1986)(statement of Charlie Kairaiuak, Chairman, United Tribes of Alaska), Senator Murkowski announced that

> Senator Stevens, Congressman Young, and I have consistently stated that the 1991 amendments will not foster sovereignty nor will they detract from any self-government powers which Alaska Natives may now possess under existing law . . . I have stated in my opening remarks in each of the hearings I have held in nine communities in Alaska that I will not support any legislation which leads to the creation of a series of independent sovereign entities in Alaska. (emphasis added).

Amendments to the Alaska Native Claims Settlement Act and the Alaska National Interest Lands Conservation Act and to Establish

a Memorial in the District of Columbia: Hearing on S. 485, et al., before the Subcomm. on Public Lands, Reserved Water and Resource Conservation of the Senate Comm. on Energy and Natural Resources, 99th Cong. 3 (1986).

When the 99th Congress adjourned without passing S. 2065, in 1987 Representative Young reintroduced the bill as H.R. 278, which the 100th Congress enacted as Pub. L. No. 100-241, 101 Stat. 1788 (1988)[hereinafter "1991 Amendments"]. As Senator Murkowski had promised that it would, section 17 of the 1991 Amendments stated:

> No provision of this Act (the Alaska Native Claims Settlement Act Amendments of 1987), exercise of authority pursuant to this Act, or change made by, or pursuant to, this Act in the status of land shall be construed to validate or invalidate or in any way affect -
>
> (1) any assertion that a Native organization (including a federally recognized tribe, traditional Native council, or Native council organized pursuant to the Act of June 18, 1934 (48 Stat. 987), as amended) has or does not have governmental authority over lands (including management of, or regulation of the taking of, fish and wildlife) or persons within the boundaries of the State of Alaska . . . .

Seven years later the report of the Committee on Natural Resources on H.R. 4180, i.e., on FRITLA, informed the U.S. House of Representatives that its passage of FRITLA would not delegate the Secretary of the Interior any new authority to establish

"federally recognized tribes." The report states explicitly: "If enacted, H.R. 4180 would make no changes in existing law." (emphasis added). H.R. Rep. No. 103-781, at 6 (1994). The report's explanation of the Committee's understanding of the tribal status controversy in Alaska and its intention that FRITLA not affect that controversy merits the length of the quote:

> The Committee is aware that in January 1993 the Solicitor of the Department of the Interior issued an opinion which concluded that Congress has restricted the sovereign powers of Alaska Native tribes. As the BIA stated in the October 21, 1993 Federal Register Notice of Alaska Native Entities Recognized and Eligible to Receive Services, "[the Solicitor] concluded, construing general principles of Federal Indian law and ANCSA, that 'notwithstanding the potential that Indian country exists in Alaska in certain limited cases, Congress has left little or no room for tribes in Alaska to exercise governmental authority over land or nonmembers.' M-36,975 at 108. That portion of the opinion is subject to review, but has not been withdrawn or modified."
>
> The Committee notes that the Solicitor's opinion has generated controversy and that there is extensive litigation on the subject of the precise sovereign powers of Alaska Native tribes. While these issues deserve further review by Congress, nothing in this Act should be construed as enhancing, diminishing or changing in any way the status of Alaska Native tribes.[11] It is the intent of the Committee that its

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[11]Because it did not have the benefit of adversarial briefing and argument, in John v. Baker I, supra at 750 n. 65, this Court stated that the Committee on Natural Resources intended the report language above-quoted to indicate that the Committee was taking no position on the existence of "Indian country" in Alaska, but that "Congress's ambivalence on the Indian country issue does not undermine its recognition of the tribal status of

> previous position taken in the 1987 amendments to the Alaska Native Claims Settlement Act [i.e., the 1991 Amendments] be maintained and that nothing in this Act shall "confer on, or deny to, any Native organization any degree of sovereign governmental authority over lands (including management or regulation of the taking of fish and wildlife) or persons in Alaska." P.L. 100-241, Section 2(8)(B). The Act [i.e., FRITLA] merely requires that the Secretary continue the current policy of including Alaska Native entities on the list of Federally recognized tribes which are eligible to receive services. (emphasis added).

Id. 4-5.

Later on the day, October 3, 1994, that the Committee on Natural Resources reported FRITLA as its amendment in the nature of a substitute for the original text of H.R. 4180, Representative Richardson, the chairman of the Subcommittee on Native American Affairs, bundled the texts of two other Native American-related bills into H.R. 4180, and then moved the U.S. House of Representatives to suspend its rules and pass the bill. At no time during their several minute explanation of H.R. 4180 prior to the unrecorded voice vote did Representatives Richardson or Thomas suggest that FRITLA granted the Secretary of the

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Alaska Native villages." In fact, what the Committee on Natural Resources stated in its report was that it did not intend FRITLA to "be construed as enhancing, diminishing or changing in any way the status of Alaska Native tribes." (emphasis added). So if the members of NVN (and of appellee IBV) were not a "federally recognized tribe" prior to Congress's enactment of FRITLA, the Committee on Natural Resources did not intend the members of NVN (and of appellee IBV) to became a "federally recognized tribe" as a consequence of FRITLA.

Interior new authority to create "federally recognized tribes" in Alaska. See 140 Cong. Rec. 27,244-46 (1994).[12]

Seven years later, the U.S. House of Representatives passed H.R. 2538, the Native American Small Business Development Act (NASBDA). See 147 Cong. Rec. 24,013-17 (2001). NASBDA authorized grants to be made to small businesses "owned by Indian tribe members, Alaska Natives, or Native Hawaiians." NASBDA defined the term "Indian tribe" to mean "federally recognized tribe." When the House debated H.R. 2538, Representative Young, Alaska's congressman and the Ranking Member of the Committee on Natural Resources that had written and reported FRITLA, explained his post-FRITLA understanding of Alaska Native tribal status to the House as follows:

> H.R. 2538 as amended does not differ in substance from the bill as reported by the Committee on Small Business. Rather, the measure under consideration today simply recognizes the unique Native American policies that Congress has implemented in the State of Alaska, and clarifies how the grant program the bill authorizes will be implemented in that State.
>
> In the 48 contiguous States, Congress's policy on Native Americans has focused on recognizing groups of Native Americans as "federally recognized tribes" that are distinct political entities and a majority of whose members reside on reservations and other land that is owned by the United States in trust.

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[12]The Senate passed H.R. 4180 by unanimous consent on unrecorded voice votes, and with no debate or explanation of the bill's provisions. See 140 Cong. Rec. 28,832-33, 29,537 (1994).

> However, while Congress has routinely designated groups of Alaska Natives as "tribes," it has done so for the sole purpose of ensuring that Alaska Natives are eligible for programs and services that the United States provides to Native Americans because of their status as Native Americans.
>
> Congress has not recognized any group of Alaska Natives as a "federally recognized tribe" that is a distinct political entity.
>
> Instead, since 1884 Congress has required Alaska Natives to be, at all locations in Alaska, subject to the same criminal and civil state laws that non-Native Alaskans are required to observe.
>
> Consistent with that policy, in 1971 when it extinguished Alaska Native aboriginal title by enacting the Alaska Native Claims Settlement Act, Congress required Alaska Natives to organize business corporations under the laws of the state of Alaska and then directed the Secretary of the Interior to convey the corporations fee title to 44 million acres of Federal land.
>
> The amendments made to H.R. 2538 as reported by the Committee on Small Business simply acknowledge that Congress'[s] Alaska Native policy is quite different from the Native American policy that Congress has implemented in the 48 contiguous States. It will also ensure that the intent of H.R. 2538 can be effectively met in Alaska for the benefit of Alaska Natives. (emphasis added).

Id. 24,016.[13]

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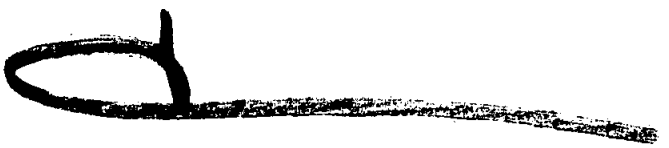
[13] The Senate did not pass H.R. 2538 prior to adjournment of the 107th Congress.

Conclusion

For the reasons set forth above, appellant Michael McCrary requests the Court to remand this action to the Superior Court with directions that the court vacate the order in which it granted the appellees' motion to dismiss, Exc. 115-116, vacate its Final Judgment, Exc. 120-121, deny the appellees' motion to dismiss, and then adjudicate the claims for relief that appellant McCrary has alleged in his complaint.

RESPECTFULLY SUBMITTED



Donald Craig Mitchell