

## Chapter 13

### ALASKA NATIVES

#### Analysis

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The United States' disparate treatment of Alaska Natives and Alaska Native tribal governments forced them to walk a substantially different path than Indian nations in the lower 48 states. The federal government did not enter into treaties with Alaska Natives, and imposed modified forms of allotment, assimilation, state jurisdiction, and tribal government reorganization on Alaska Natives. Still, in recent decades, the federal government has slowly begun narrowing the differences between Alaska Native tribal governments and other federally recognized Indian nations.

#### § 13.1 Alaska Native Claims Settlement Act

In 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA),<sup>1</sup> a statute that forms the primary governing document in Alaska Native affairs. The Act rewrote much of the law that governed Alaska Native affairs from the purchase of the territory from Russia to 1971.

The United States purchased national interests in Alaska from Russia in the 1867 Treaty of Cession.<sup>2</sup> Article 3 of that treaty provided, "The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country."<sup>3</sup> Congress made no such law until the Alaska Organic Act,<sup>4</sup> and even there, the government did not impose any regulation on Alaska Natives. Instead, the United States preserved Alaska Native occupancy rights and reserved for another day the question of how Alaska Native lands might be acquired.<sup>5</sup>

In the early part of the 20th century, Congress passed the Alaska Native Allotment Act of 1906<sup>6</sup> and the Alaska Native Townsite Act of 1926.<sup>7</sup> Both of these statutes arose

<sup>1</sup> Pub. L. 92-203, Dec. 18, 1971, 85 Stat. 688, codified at 43 U.S.C. §§ 1601 et seq.

<sup>2</sup> 15 Stat. 539.

<sup>3</sup> Id.

<sup>4</sup> 23 Stat. 24.

<sup>5</sup> 23 Stat. at 26 ("[T]he Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.").

<sup>6</sup> Act of May 17, 1906, 34 Stat. 197.

<sup>7</sup> Act of May 25, 1926, 44 Stat. 629.

from the ashes of decades of early federal policy that tended to treat Alaska Natives differently than other American Indian nations.<sup>8</sup> It was understood that the General Allotment Act of 1887,<sup>9</sup> see § 3.6, was inapplicable to Alaska Natives.<sup>10</sup> There was little American settler pressure on the federal government to open up reservation lands for public sale and exploitation, but there were few legal rights and opportunities available for Alaska Natives to protect their property interests in land.<sup>11</sup> Even so, the federal government asserted ownership interests in lands claimed by Alaska Native communities, families, and bands, ultimately resulting in *Tee-Hit-Ton Indians v. United States*.<sup>12</sup> See § 4.1.

The United States vested Alaska with statehood in 1958. The statute admitting Alaska contained a disclaimer typical for western states that precluded the state from asserting jurisdiction over Alaska Native lands:

As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the state or its potential subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation. . . .<sup>13</sup>

Shortly after statehood, Alaska banned all fish traps in the state and began prosecuting Alaska Natives for the continued use of the traps.<sup>14</sup> Two suits brought by Alaska Native tribal governments challenged the law on the grounds that Alaska had disclaimed jurisdiction over them. The first suit, *Metlakatla Indian Community v. Egan*,<sup>15</sup> was brought by a tribal community recognized as an Indian reservation by an Act of Congress.<sup>16</sup> The tribe and the federal government argued that the Interior Secretary's regulations allowing fish traps controlled over the state's ban.<sup>17</sup> However, the Court struck down the regulations as not authorized by the proper federal statute,

<sup>8</sup> David S. Case & David A. Voluck, *Alaska Natives and American Law* 24 (3rd ed. 2012).

<sup>9</sup> 24 Stat. 388 (1887), codified as amended at 25 U.S.C. §§ 331 et seq.

<sup>10</sup> David S. Case & David A. Voluck, *Alaska Natives and American Law* 115–17 (3rd ed. 2012).

<sup>11</sup> *Id.* at 117–20.

<sup>12</sup> 348 U.S. 272 (1955) (citations omitted).

<sup>13</sup> Pub. L. 85–508, July 7, 1958, 72 Stat. 339.

<sup>14</sup> David S. Case & David A. Voluck, *Alaska Natives and American Law* 108 (3rd ed. 2012).

<sup>15</sup> 369 U.S. 45 (1962).

<sup>16</sup> Act of March 3, 1891, § 15, 26 Stat. 1195, 1101.

<sup>17</sup> *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 58–59 (1962) (“The Metlakatla Reservation was Indian property [as described in the statehood act]. Whether or not the ‘absolute jurisdiction’ retained by the United States in § 4 is exclusive of state authority, . . . the statute clearly preserves federal authority over the reservation. Federal authority was lodged in the Secretary in 1891, and it was not dislodged by the Statehood Act.”) (citations omitted).



and remanded to the Interior Secretary.<sup>18</sup> In a companion case, *Organized Village of Kake v. Egan*,<sup>19</sup> brought by two Alaska Native tribal governments for which Congress had not established reservations, the Court held that Alaska could impose the fish trap ban on their lands, which the Court held were not Indian lands.<sup>20</sup>

The statehood act also authorized the State of Alaska to select more than 100 million acres of land for its own use, and naturally the State selected the most valuable lands, much of which had already been claimed and occupied by Alaska Natives.<sup>21</sup> The discovery of vast oil reserves generated conflicts between the federal government, the state, and the Alaska Native communities that only Congress could conclude.

The Alaska Native Claims Settlement Act of 1971 "amounted to one of the greatest land transactions in history."<sup>22</sup> The Alaska Natives received \$962.5 million, and selection rights to 44 million acres.<sup>23</sup> A surface estate of 22 million acres would be transferred to around 200 village corporations identified in the Act.<sup>24</sup> A subsurface, mineral estate of 22 million acres would be transferred to 12 regional corporations, with a surface estate of 16 million acres transferred to six of the regional corporations.<sup>25</sup> These corporations were chartered under state law.<sup>26</sup> Alaska Natives alive at the time of the Act were to become shareholders in regional and perhaps village corporations.<sup>27</sup> Previously established Alaska Native reservations would be revoked for the most part, excepting the Metlakatla Indian Community.<sup>28</sup> Lands selected and acquired by Alaska Native corporations would be held in fee simple, but with limitations on state taxation set to expire in 1991.<sup>29</sup> In 1987, Congress amended the Act to allow corporations greater control over the alienability of shares and to extend the state property tax immunity indefinitely, or until the lands are developed.<sup>30</sup>

Alaska Native villages that had organized under the Indian Reorganization Act,<sup>31</sup> or that had governed under traditional tribal law, were unaffected by the ANCSA. Land is owned by the corporations but the tribal village governments remain.

### § 13.2 *Alaska v. Native Village of Venetie Tribal Government*

The first major Supreme Court case interpreting the Alaska Native Claims Settlement Act, *Alaska v. Native Village of Venetie Tribal Government*,<sup>32</sup> held that lands

<sup>18</sup> Id. at 59.

<sup>19</sup> 369 U.S. 60 (1962).

<sup>20</sup> Id. at 62 ("The situation here differs from that of the Metlakatlans in that neither Kake nor Angoon has been provided with a reservation and in that there is no statutory authority under which the Secretary of the Interior might permit either to operate fish traps contrary to state law.")

<sup>21</sup> David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr., and Matthew L.M. Fletcher, *Cases and Materials on Federal Indian Law* 889 (6th ed. 2011).

<sup>22</sup> Id. at 890.

<sup>23</sup> Id.

<sup>24</sup> Id.

<sup>25</sup> Id.

<sup>26</sup> Id. at 891.

<sup>27</sup> Id.

<sup>28</sup> Id.

<sup>29</sup> Id.

<sup>30</sup> Id. at 892.

<sup>31</sup> 25 U.S.C. § 476.

<sup>32</sup> 522 U.S. 520 (1998).

owned by village corporations are not Indian country, and therefore the village did not have the power to tax activities on that land.

The Venetie Tribe of Neets'ait Gwich'in Indians is organized under the Indian Reorganization Act as the Native Village of Venetie.<sup>33</sup> After the passage of the Alaska Native Claims Settlement Act (ANCSA),<sup>34</sup> see § 13.1, Venetie tribal lands were owned communally by two Alaska Native village corporations, Venetie and Arctic Village.<sup>35</sup> Taking advantage of provisions in ANCSA that allowed "village corporations the option of taking fee title to their former reservation lands in lieu of sharing in the monetary, land, regional corporation, and other provisions and obligations of the Act," the tribe conveyed their lands to the village tribal government and dissolved the village corporations.<sup>36</sup> And so by the time the dispute arose leading to the Supreme Court's decision, the tribal government owned Venetie lands in fee.<sup>37</sup>

The dispute arose when the tribe attempted to impose—and enforce in tribal tax court—a tribal tax on a non-Indian construction contractor building a state-funded school on tribally owned lands.<sup>38</sup> Observers might be tempted to wonder, given the intricacies and difficulties an Indian nation is likely to face in attempted to a tax a state construction contractor, why Venetie chose to impose the tax. The tax dispute was tied together with other issues arising from the State of Alaska's refusal to acknowledge Alaska Native tribal sovereignty, most importantly the State's refusal to recognize tribal adoptions.<sup>39</sup> Ultimately, the federal court concluded that Alaska must afford full faith

<sup>33</sup> Kristen A. Carpenter, *Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 *Tulsa L.J.* 73, 76 (1999).

<sup>34</sup> Pub. L. 92-203, Dec. 18, 1971, 85 Stat. 688, codified at 43 U.S.C. §§ 1601 et seq.

<sup>35</sup> Kristen A. Carpenter, *Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 *Tulsa L.J.* 73, 77 (1999).

<sup>36</sup> *Id.* (citing 43 U.S.C. § 1618(b)).

<sup>37</sup> Brief for the Respondents 1, *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) (No. 96-1577) ("All of the Venetie area lands, a former reservation set apart for the Tribe, are owned by the Tribe in communal fee."), 1997 WL 631801.

<sup>38</sup> *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 525 (1998) ("In 1986, the State of Alaska entered into a joint venture agreement with a private contractor for the construction of a public school in Venetie, financed with state funds. In December 1986, the Tribe notified the contractor that it owed the Tribe approximately \$161,000 in taxes for conducting business activities on the Tribe's land. When both the contractor and the State, which under the joint venture agreement was the party responsible for paying the tax, refused to pay, the Tribe attempted to collect the tax in tribal court from the State, the school district, and the contractor."); Brief for the Respondents 5-6, *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) (No. 96-1577) ("In 1986, pursuant to a duly adopted ordinance imposing a business-activity tax,<sup>3</sup> the Tribe assessed and sought to collect a gross-receipts tax from a private contractor engaged in a school construction project on tribal lands pursuant to a contract with the regional school district. After payment was refused and the Tribe brought suit in its Tax Court, the Alaska Attorney General informed the Tribe that the State had agreed with the private contractor to assume responsibility for, and defend against, the Tribe's tax-collection efforts. . . . Rather than appear and defend in tribal court, the State, on its own behalf and on behalf of the school district and the contractor brought this action in federal court."), 1997 WL 631801.

<sup>39</sup> *Native Village of Venetie I.R.A. Council v. State of Alaska*, Nos. F86-0075 CIV (HRH), F87-0051 CIV (HRH), 1994 WL 730893, at \*2 (D. Alaska, Dec. 23, 1994) ("The Native Village of Venetie I.R.A. Council, the Native Village of Fort Yukon I.R.A. Council, and private individuals commenced case F86-0075 CV for purposes of testing the legal enforceability of orders for adoption of children entered by the village courts of Venetie and Fort Yukon. . . . State officials had declined to acknowledge village adoption orders for purposes of the issuance of substitute birth certificates and aid to families with dependent children . . . benefits.") (footnote omitted).



and credit to Alaska Native tribal adoptions.<sup>40</sup> The tax case, however, would reach the Supreme Court.<sup>41</sup>

The Supreme Court's analysis focused exclusively on whether Alaska Native-owned lands are Indian country, presuming that if the land upon which the activities that Alaska Native tribal governments were trying to tax were not in Indian country, then the power to tax would be lacking. ANSCA revoked Alaska Native reservations, and there were not allotments at issue, so the Court determined that the only way the Alaska Native governmental lands could be Indian country under 18 U.S.C. § 1151 was whether the lands were "dependent Indian communities" under § 1151(c). See § 7.1.

Dependent Indian communities are lands that are not reservation lands, trust lands, or allotments, and otherwise might be considered outside of Indian country. However, dependent Indian communities include areas in which the federal government has set aside lands for Indian or tribal purposes and that are under federal superintendence. For example, some tribal housing projects located outside reservation lands or allotments may be considered dependent Indian communities. New Mexico pueblos, whose lands are owned in fee simple under grants from Spain and who have retained sovereignty over their territory through confirmation of their land ownership by Congress, are the source of the term.

The Supreme Court concluded that lands must be set aside by the federal government for Indian purposes over which the federal government maintains jurisdiction.<sup>42</sup> The lands alleged to be "Indian country" in Venetie had not been reservation lands after the enactment of ANCSA. Moreover, the Act stated that the lands acquired by the Alaska Native village corporations would not "creat[e] a reservation system or lengthy wardship or trusteeship."<sup>43</sup> Relying on the language, the Court noted that "ANCSA transferred reservation lands to private, state-chartered Native corporations, without any restraints on alienation or significant use restrictions, and

<sup>40</sup> Id., 1994 WL 730893, at \*22 ("The court concludes that the State of Alaska must afford full faith and credit to adoption decrees issued by the tribal courts of the Neets'aiti Gwich'in—that is, by the Native Village of Venetie Tribal Government sitting as a court or the Arctic Village or Native Village of Venetie councils sitting as a court.").

<sup>41</sup> The then-Attorney General for the State of Alaska hired John Roberts, later to become Chief Justice of the United States, to represent Alaska in the Supreme Court. Bruce Bothelo, Mayor of Juneau, Alaska and former Alaska Attorney General, Address before the Federal Bar Association's Indian Law Conference, Albuquerque, NM (April 6, 2006). Mr. Roberts' principal brief became controversial in Indian country for apparently misquoting a notorious statement from the Supreme Court's decision in *United States v. Kagama*, 118 U.S. 375 (1886), that "[b]ecause of the local ill feeling the people of the States where they are found are often their deadliest enemies." Id. at 384. Mr. Roberts' brief reversed that allegation to state that "reservation Indians" were the "dead[ly] enemies of the States." Brief for Petitioner 4, *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1997) (No. 96-1577), 1997 WL 523883 ("At the same time, because their means of subsistence had fallen prey to westward expansion, reservation Indians were almost entirely dependent upon the federal government for food, clothing, and protection, and were often 'dead[ly] enemies' of the States.").

<sup>42</sup> *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 530-31 (1997) ("[I]n enacting § 1151(b), Congress indicated that a federal set-aside and a federal superintendence requirement must be satisfied for a finding of a "dependent Indian community"—just as those requirements had to be met for a finding of Indian country before 18 U.S.C. § 1151 was enacted. These requirements are reflected in the text of § 1151(b): The federal set-aside requirement ensures that the land in question is occupied by an "Indian community"; the federal superintendence requirement guarantees that the Indian community is sufficiently "dependent" on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question.").

<sup>43</sup> 43 U.S.C. § 1601(b).



with the goal of avoiding 'any permanent racially defined institutions, rights, privileges, or obligations.'"<sup>44</sup> Without ongoing federal guardianship as evidenced, for example, by restraints on alienation, the lands could not be Indian country.

*Venetie's* legacy was to allow the State of Alaska to continue to challenge the inherent tribal authority of the Alaska Native tribal governments by asserting that there could be no sovereignty without lands classified as Indian country, a largely failed claim. Moreover, Alaska Native communities often had little contact with state officials and agencies.<sup>45</sup>

### § 13.3 *John v. United States (Katie John)*

Alaska Native subsistence rights are as critical to Alaska Native communities as treaty rights to hunt and fish are to Indian nations in the lower 48 states. In fact, it is likely subsistence hunting and fishing is more important, and critical to Alaska Native tribal cultures.<sup>46</sup> The federal government's regulations providing legal protection for subsistence hunting and fishing have survived legal challenges in the so-called Katie John cases.

Katie John was one of a group of tribal elders dependent on subsistence fishing that brought suit to challenge the federal government's interpretation of the Alaska National Interest Lands Conservation Act (ANILCA).<sup>47</sup> Congress passed ANILCA, in part, to impose federal conservation laws on the federal public lands in Alaska.<sup>48</sup> ANILCA was also intended to protect Alaska subsistence hunters and fishers, and authorized the Interior Secretary to promulgate regulations to that effect.<sup>49</sup> ANILCA also provided that

<sup>44</sup> *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 532–33 (1997).

<sup>45</sup> Kristen A. Carpenter, *Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 *Tulsa L.J.* 73, 156 (1999) ("What we started out to try to do, was we would rather have had just our territory up there. Because some of you might recall that the state wasn't even hardly a presence in rural Alaska. I mean, as far as the state was concerned . . . the rural areas were Uncle Sam's problem. I mean, hell, the state didn't have enough money to take care of the cities. So far as the state was concerned Great Uncle Sam will take care of the villages.").

<sup>46</sup> *Id.* at 160–61 ("The elders have taught us to waste nothing of the animal. When we first moved to Christian Village, I learned from Chief Christian to make sure that every part of the animal was brought back to camp. Back then, I didn't understand why we had to do all that. When I asked my mother about it, she said that once when she was young, there had been some very hard times. Because of these bad times, they were so grateful to get an animal that they would use every part of it. They would clean it, treat it, and preserve it with respect as best as they knew how. The most important part of their lives was preserving food for future survival. There was a fish trap to catch fish, then the fish would be dried so it can go with the people when they hunt sheep. A snare is set in the path of the sheep leading to natural soft grounds. When a sheep is snared, the people surrounded it and killed it with bow and arrows. After that is harvested, they cooked only a little for them to eat; the rest was dried and taken back down into the valley to be stored for the cold winter months. They might fish again when they returned from the sheep hunt but only until the time when the caribou would migrate this way. Then, they moved their caribou fences, set snares in the corrals and somehow would herd the animals into the openings in the fences. This was the best way to get the caribou because it would be too hard to get enough to survive the winter otherwise. When they were lucky, they harvested lots of animals and everyone would share the meat equally, storing most of it for future survival. This food would last until the middle of the winter and when it began to run out, they moved to another location to hunt for food again. This is what we call the nomadic life and this is where we come from.") (footnote omitted).

<sup>47</sup> Pub. L. 96–487, Dec. 2, 1980, 94 Stat. 2374, codified at 16 U.S.C. §§ 3101 et seq.

<sup>48</sup> David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr., and Matthew L.M. Fletcher, *Cases and Materials on Federal Indian Law* 890 (6th ed. 2011).

<sup>49</sup> 16 U.S.C. § 3114 ("Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes. Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such



state regulation that adequately implemented federal subsistence priorities would preclude the need for federal regulation.<sup>50</sup>

In 1982, the Interior Secretary certified state regulations established in 1978 linking subsistence fishing rights to particular communities.<sup>51</sup> The Alaska Supreme Court held that statute invalid because many Alaskans living in towns and villages remained dependent on subsistence hunting and fishing.<sup>52</sup> Alaska amended the statute, but still excluded persons not domiciled in "rural" areas.<sup>53</sup> The new regulation also excluded the Kenai peninsula because there was a Sears and a Safeway there.<sup>54</sup> The Ninth Circuit held that "rural" communities retained subsistence priority based on population, not on whether there were shopping centers.<sup>55</sup> The next year, the Alaska Supreme Court struck down the state statute on state constitutional grounds.<sup>56</sup>

The Interior Secretary decertified Alaska and promulgated its own regulations on subsistence rights on federal public lands in 1992.<sup>57</sup> Those regulations excluded all navigable waterways from federal public lands on which subsistence rights could be exercised, prompting several federal suits. In *Alaska v. Babbitt*,<sup>58</sup> the Ninth Circuit struck down the regulations on the ground that at least some navigable waterways should be eligible for the exercise of subsistence rights, and remanded back to the Interior Secretary.<sup>59</sup>

The new regulations, promulgated in 1999, described navigable waterways on which there were federal reserved water rights and extended federal subsistence rights

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populations, or to continue such uses, such priority shall be implemented through appropriate limitations based on the application of the following criteria: (1) customary and direct dependence upon the populations as the mainstay of livelihood; (2) local residency; and (3) the availability of alternative resources.").

<sup>50</sup> 16 U.S.C. § 3115(d) ("The Secretary shall not implement subsections (a), (b), and (c) of this section if the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 3113, 3114, and 3115 of this title, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this subchapter for the taking of fish and wildlife on the public lands for subsistence uses. Laws establishing a system of local advisory committees and regional advisory councils consistent with this section shall provide that the State rulemaking authority shall consider the advice and recommendations of the regional councils concerning the taking of fish and wildlife populations on public lands within their respective regions for subsistence uses. The regional councils may present recommendations, and the evidence upon which such recommendations are based, to the State rulemaking authority during the course of the administrative proceedings of such authority. The State rulemaking authority may choose not to follow any recommendation which it determines is not supported by substantial evidence presented during the course of its administrative proceedings, violates recognized principles of fish and wildlife conservation or would be detrimental to the satisfaction of rural subsistence needs. If a recommendation is not adopted by the State rulemaking authority, such authority shall set forth the factual basis and the reasons for its decision.").

<sup>51</sup> *John v. United States*, 720 F.3d 1214, 1219 (9th Cir. 2013), cert. denied sub nom., *Alaska v. Jewell*, 134 S.Ct. 1759 (2014).

<sup>52</sup> *Madison v. Alaska Dept. of Fish & Game*, 696 P.2d 168 (Alaska 1985).

<sup>53</sup> *John v. United States*, 720 F.3d 1214, 1220 (9th Cir. 2013), cert. denied sub nom., *Alaska v. Jewell*, 134 S.Ct. 1759 (2014).

<sup>54</sup> *Id.*

<sup>55</sup> *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 317 (9th Cir. 1988).

<sup>56</sup> *McDowell v. State*, 785 P.2d 1, 9 (Alaska 1989).

<sup>57</sup> Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, and C, 57 Fed. Reg. 22,940, 22,942 (May 29, 1992), codified at 36 C.F.R. Part 242 and 50 C.F.R. Part 100.

<sup>58</sup> *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995), cert. denied, 517 U.S. 1187 (1996).

<sup>59</sup> *Id.* at 703.



on those waters.<sup>60</sup> The Katie John plaintiffs complained that the 1999 rules did not extend the federal subsistence priority to enough waters, and the State argued that the rules went too far. The Ninth Circuit rejected both challenges, and upheld the 1999 rules.<sup>61</sup>

### § 13.4 Alaska Native Sovereignty

Alaska Native sovereignty is exercised in large part by tribal governments formed under the authority of the Indian Reorganization Act,<sup>62</sup> see § 3.8, and to a lesser extent by the state village and regional corporations formed under the Alaska Native Claims Settlement Act,<sup>63</sup> see § 13.1. Through the historical, legal, and political complexities, Alaska Native tribal governments still retain inherent authority to govern. Alaska Native tribal justice systems may be more or less formal than state or federal courts, but generally are effective in governing.<sup>64</sup>

Whether Alaska Native tribal governments or village were sovereign entities remained an open question until 1993 when the Interior Department listed Alaska Native villages as federally recognized Indian tribes.<sup>65</sup> In 1994, Congress ratified that understanding in the Federally Recognized Tribe List Act.<sup>66</sup>

However, Alaska is a mandatory Public Law 280 state,<sup>67</sup> meaning that the United States has required the state to assume civil and criminal jurisdiction over Indian country.<sup>68</sup> See §§ 7.4, 13.5.

#### *John v. Baker*

In *John v. Baker*,<sup>69</sup> the Alaska Supreme Court held that Alaska Native tribal government retain the inherent right to adjudicate child custody matters of tribal members in tribal courts.<sup>70</sup>

<sup>60</sup> Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, C, and D, Redefinition to Include Waters Subject to Subsistence Priority, 64 Fed. Reg. 1,276, 1,276 (Jan. 8, 1999), codified at 36 C.F.R. Part 242 and 50 C.F.R. Part 100.

<sup>61</sup> *John v. United States*, 720 F.3d 1214, 1245 (9th Cir. 2013), cert. denied sub nom., *Alaska v. Jewell*, 134 S.Ct. 1759 (2014).

<sup>62</sup> Act of June 18, 1934, c. 576, 48 Stat. 984, codified as amended at 25 U.S.C. §§ 461 et seq.

<sup>63</sup> Pub. L. 92-203, Dec. 18, 1971, 85 Stat. 688, codified at 43 U.S.C. §§ 1601 et seq.

<sup>64</sup> Kristen A. Carpenter, *Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 *Tulsa L.J.* 73, 159 (1999). ("Where's the justice? Our tribal courts are needed out there. The state court system, is begging us, asking us to help out. . . . The Bethel D[istrict] A[ttorney] doesn't want to deal with small crimes here. We [the Quinhagak village court] address them in 24 hours. . . . [In the Athabaskan village of Minto there are no judges or juries. A panel of four or five judges rules by consensus, often discussing things like extended family relationships that wouldn't be relevant in state court.] They consult with one another, or bang heads around, and look at the case.") (footnotes omitted).

<sup>65</sup> Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,368-69 (1993).

<sup>66</sup> 25 U.S.C. § 479a(2).

<sup>67</sup> Pub. L. 83-280, Aug. 15, 1953, 67 Stat. 588, codified in relevant part as amended at 18 U.S.C. § 1162 and 28 U.S.C. § 1360.

<sup>68</sup> Pub. L. 85-615, Aug. 8, 1958, 72 Stat. 545.

<sup>69</sup> 982 P.2d 738 (Alaska 1999), cert. denied, 528 U.S. 1182 (2000).

<sup>70</sup> *Id.* at 743 ("After reviewing evidence of the intent of the Executive Branch, as well as relevant federal statutes and case law, we conclude that Native tribes do possess the inherent sovereign power to adjudicate child custody disputes between tribal members in their own courts.").



The question arose in a child custody dispute between a father, a member of the Northway Village, and a mother, a member of the Mentasta Village. The father brought a child custody action in the Northway Tribal Court, and the mother consented to that court's jurisdiction. The court issued a shared custody order, and the father brought a suit in state court seeking to undo the tribal court order. The state court refused to recognize the tribal court's order, and granted full custody to the father. The mother appealed.

The Alaska Supreme Court first addressed the question of Public Law 280. The father argued that the state court had jurisdiction over the child custody matter under Public Law 280. The Ninth Circuit had held that while Public Law 280 authorized the state court to assert jurisdiction, that statute did not strip the tribal courts of jurisdiction, rendering state jurisdiction merely concurrent and not exclusive.<sup>71</sup> The Alaska Supreme Court noted that the Supreme Court's decision in *Alaska v. Native Village of Venetie*, see § 13.2, all but eliminated Indian country in Alaska.<sup>72</sup> Public Law 280, according to the court, applied only to Indian country lands, and therefore *did not* apply to Alaska Native lands excluded from the Indian country definition in *Venetie*.<sup>73</sup>

The court then addressed the legal implications of the federal government's recognition of the sovereignty of Alaska Native tribal governments. The court had previously held that the tribal governments had never been treated by the United States like the tribal governments in the lower 48 states, and therefore refused to recognize inherent tribal sovereign authorities.<sup>74</sup> But with federal government recognition of Alaska Native tribal governments, the court reversed itself and acknowledged inherent tribal sovereignty.<sup>75</sup> The court then applied the principle that Indian nations retain all aspects of tribal sovereignty unless Congress divests the tribe of authority to conclude that ANCSA and other relevant statutes have not divested Alaska Native tribal sovereignty.<sup>76</sup>

*John v. Baker* was a child custody case and did not implicate the Indian Child Welfare Act. The courts would later turn to that statute and Alaska Native tribal sovereignty.

<sup>71</sup> Id. at 746 ("It then held that P.L. 280 had not stripped the villages of sovereignty over child custody issues because it had granted the states only concurrent jurisdiction.") (citing *Native Village of Venetie I.R.A. Council v. State of Alaska*, 944 F.2d 548, 562 (9th Cir. 1991)).

<sup>72</sup> Id. at 747 ("The United States Supreme Court's recent *Venetie II* decision suggests that P.L. 280, which grants states jurisdiction over disputes in Indian country, has limited application in Alaska because most Native land will not qualify for the definition of Indian country. By its very text, P.L. 280 applies only to Indian country. If Northway Village does not occupy Indian country, then our rulings interpreting P.L. 280 are not germane to this appeal.") (footnotes omitted).

<sup>73</sup> Id. at 748 ("ANCSA revoked all federal Indian reservations in Alaska but one. The Supreme Court held in *Venetie II* that a village occupying ANCSA lands does not qualify for the 'dependent community' definition of Indian country. *Venetie II*'s holding, therefore, appears to undermine the Indian country claims of those Alaska villages, like Northway Village, that occupy ANCSA lands. If Northway Village does not occupy Indian country as a result of *Venetie II*, then P.L. 280 has no direct relevance to this appeal.") (footnotes omitted).

<sup>74</sup> *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988).

<sup>75</sup> *John v. Baker*, 982 P.2d 738, 750 (Alaska 1999) ("Through the 1993 tribal list and the 1994 Tribe List Act, the federal government has recognized the historical tribal status of Alaska Native villages like Northway. In deference to that determination, we also recognize such villages as sovereign entities."), cert. denied, 528 U.S. 1182 (2000).

<sup>76</sup> Id. at 751-59.



***Kaltag Tribal Council v. Jackson and State v. Native Village of Tanana***

In *Kaltag Tribal Council v. Jackson*,<sup>77</sup> the Ninth Circuit held that Alaska Native tribal courts are entitled to full faith and credit under the Indian Child Welfare Act (ICWA).<sup>78</sup> See § 8.8. The Alaska Supreme Court reached a similar conclusion in *State v. Native Village of Tanana*.<sup>79</sup> Notably, the Alaska court held that an Alaska Native tribal government retains concurrent jurisdiction over Indian child welfare cases unless the government petitions to reassume exclusive jurisdiction under Public Law 280.<sup>80</sup>

Neither decision was surprising in light of the federal recognition of the Alaska Native tribal governments in 1993 and the Alaska Supreme Court's decision in *John v. Baker*, but the *Native Village of Tanana* court's opinion reflected the greater political complexity of tribal authority in Alaska. The *Tanana* court noted that the governor of the State of Alaska formally acknowledged Alaska Native tribal sovereignty in line with the *John v. Baker* decision, and then supported tribal authority under ICWA.<sup>81</sup> In 2004, the Alaska Attorney General altered the state's previous position and opined that state courts have exclusive jurisdiction over Indian child welfare matters unless the tribe petitions the federal government under Public Law or a state court has already transferred jurisdiction.<sup>82</sup> As a result, the state stopped automatically sharing information with Alaska Native tribal governments except in narrow circumstances.<sup>83</sup>

<sup>77</sup> No. 3:06-CV-211 TMB, 2008 WL 9434481 (D. Alaska, Feb. 22, 2008), aff'd, 344 Fed.Appx. 324 (9th Cir., Aug., 28, 2009), cert. denied sub nom., *Hogan v. Kaltag Tribal Council*, 562 U.S. 827 (2010).

<sup>78</sup> Pub. L. 95-608, Nov. 8, 1978, 92 Stat. 3069, codified at 25 U.S.C. § 1901 et seq.

<sup>79</sup> 249 P.3d 734 (Alaska 2011).

<sup>80</sup> Id. at 751 ("Accordingly, in light of our foundational decision *John v. Baker*, ICWA, federal case law regarding Alaska Native tribal sovereignty, and the absence of express contrary Congressional intent, we hold that federally recognized Alaska Native tribes that have not reassumed exclusive jurisdiction under § 1918(a) still have concurrent jurisdiction to initiate ICWA-defined child custody proceedings, both inside and outside of Indian country. Necessarily, federally recognized Alaska Native tribes are entitled to all of the rights and privileges of Indian tribes under ICWA, including procedural safeguards imposed on states and § 1911(d) full faith and credit with respect to ICWA-defined child custody orders to the same extent as other states' and foreign orders.").

<sup>81</sup> Id. at 744-45 ("In September 2000, then-Governor Tony Knowles issued an administrative order 'acknowledg[ing] the legal and political existence of the federally recognized [t]ribes within the boundaries of Alaska.' In addition to expressing 'recogni[tion] and respect[ion]' for the tribes' 'governmental status,' the governor articulated a policy of 'acknowledg[ing] any additional [t]ribes in Alaska that may be recognized by the federal government in the future' and 'foster[ing] a constructive and harmonious relationship between the [t]ribal and State governments.' He acknowledged the value of the 'services that Alaska's [t]ribes contribute to the state's economic and social well-being by virtue of their direct [t]ribal authority and responsibility for the delivery of social, economic, cultural, and other programs and services.' The governor explained that in December 1999 he had invited Alaska Native tribes 'to enter into a government-to-government dialogue with the State for the purpose of establishing a framework for ongoing State-[t]ribal relations.' In furtherance of the 'promot[ion] and enhance[ment] [of] [t]ribal self-government . . . and social, cultural, spiritual, and racial diversity,' among other things, Governor Knowles committed the State 'to working with [t]ribes to further strengthen Alaska's ability to meet the needs of Alaska's communities and families.'") (footnotes and citation omitted).

<sup>82</sup> Id. at 746 ("Alaska state courts have exclusive jurisdiction over child custody proceedings involving Alaska Native children unless (1) the child's tribe has successfully petitioned the Department of Interior to reassume exclusive or concurrent jurisdiction under the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1918 or (2) a state superior court has transferred jurisdiction of the child's case to a tribal court in accordance with 25 U.S.C. § 1911(b) and the tribal court is exercising its jurisdiction.") (quoting 2004 Alaska Att'y Gen. Op. 135).

<sup>83</sup> Id. at 747 ("Policies have changed recently regarding when we contact the tribe in investigations. . . . [W]e don't share information regarding investigations unless the investigation is underway. In other words, . . . the tribe can't have access to allegations that are made unless I have releases from my clients. They can't get copies of Reports of Harm unless . . . the parent in the Report of Harm has signed a release. Until [the



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The court rejected the Attorney General's position, noting that the opinion did not "acknowledge[ ] *John v. Baker's* implications . . . ." <sup>84</sup> The court held in line with other courts that Public Law 280 did not strip Alaska Native tribal governments of authority, and that tribal governments retain concurrent authority with state courts.<sup>85</sup>

The continuing and evolving understanding of the sovereign authority of Alaska Native tribal governments after the federal government's acknowledgement in 1993 has infiltrated other areas of tribal sovereignty. For example, in *Akiachak Native Community v. Salazar*,<sup>86</sup> the court invalidated an Interior Department regulation that treated Alaska Native tribal governments differently from other tribes under Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, which allows the Secretary of Interior to acquire land in trust for the benefit of Indians and tribes.

### § 13.5 Public Law 280 and Alaska Indian Criminal Jurisdiction

Alaska is a so-called mandatory Public Law 280 state.<sup>87</sup> See § 7.5. But the state's ability to effectively enforce criminal laws in the state's 229 Alaska Native villages is hampered by a lack of governmental capacity—people and resources—and the extraordinary distances law enforcement must travel.<sup>88</sup> Moreover, Alaska Native traditional justice may be at odds with state law, or is otherwise ineffective in handling on-the-ground community enforcement.<sup>89</sup>

tribes] have intervened legally in a [child in need of aid] case. In which case, then, they get all that." (quoting state official).

<sup>84</sup> Id. at 746.

<sup>85</sup> Id. at 751 ("ICWA creates limitations on states' jurisdiction over ICWA-defined child custody proceedings, not limitations on tribes' jurisdiction over those proceedings. And we acknowledge that . . . our view of P.L. 280's impact on tribal jurisdiction has become the minority view—other courts and commentators have instead concluded that P.L. 280 merely gives states concurrent jurisdiction with tribes in Indian country. . . . We adopt the view that P.L. 280 did not divest tribes of all jurisdiction under § 1911(a), but rather created concurrent jurisdiction with the State.") (footnotes omitted).

<sup>86</sup> 935 F. Supp. 2d 195 (D.D.C.), appeal filed, No. 13–5360 (D.C. Cir.).

<sup>87</sup> Pub. L. 83–280, Aug. 15, 1953, 67 Stat. 588, codified in relevant part as amended at 18 U.S.C. § 1162 and 28 U.S.C. § 1360.

<sup>88</sup> Kristen A. Carpenter, *Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 Tulsa L.J. 73, 158 (1999) ("The Alaska State Troopers are primary state law enforcement for the majority of the 226 villages in the state of Alaska, and we're not doing a very good job in delivering service to those villages because of the manpower shortage. We use the Village Public Safety Program to the best of our ability. We're training them . . . We have villages such as Keypunch and Akiachak that are doing their own policing because we're not giving them the service they want or need. Along the same line, when they do need us and call us, we're there. On one hand we're saying: We're going to get to you. And whether it's one or two or three days later. And on the other hand we say: Well, we're not going to be able to take care of your problem immediately, so on the other hand, they start taking care of their problems, like Kipnuk (where people entering the village are searched) . . . The somebody comes around and says: Well, we wanted you to take care of your problem, but we didn't mean it this way. And so, they kind of throw their hands up and say: On one hand, you're telling us you can't deliver the services. You're saying we should help ourselves. And now, when we help ourselves, you're saying time out.") (footnote omitted).

<sup>89</sup> Id. at 158–59 ("In my village, I was woke up one morning, as an example (of the absence of state services in village Alaska)—and this is not a criticism on the troopers, it's just telling you the way it is. I woke up . . . a mother was calling me: 'My son's shooting up his house. He's got his kids. The VSPO is out of town. The troopers said they can't make it for three days. I went over there and disarmed this guy and got his kids out and settled him down. And the next day, the family was back there. Everything was going good. Three days later, you know, peoples come in and haul him off in cuffs. I mean, the guy was, you know, completely at peace . . . I think the state services are way short, and the village tribal governments are there and they're doing the job.'") (footnote omitted).



In 2013, the Indian Law and Order Commission condemned the State of Alaska for its failures in protecting Alaska Natives from crime, especially Alaska Native women from sexual assault and domestic violence.<sup>90</sup> The Commission recommended paradigm-shifting changes to federal law and policy affecting Alaska Natives:

2.1: Congress should overturn the U.S. Supreme Court's decision in *Alaska v. Native Village of Venetie Tribal Government*, by amending ANCSA to provide that former reservation lands acquired in fee by Alaska Native villages and other lands transferred in fee to Native villages pursuant to ANCSA are Indian country.

2.2: Congress and the President should amend the definitions of Indian country to clarify (or affirm) that Native allotments and Native-owned town sites in Alaska are Indian country.

2.3: Congress should amend the Alaska Native Claims Settlement Act to allow a transfer of lands from Regional Corporations to Tribal governments; to allow transferred lands to be put into trust and included within the definition of Indian country in the Federal criminal code; to allow Alaska Native Tribes to put tribally owned fee simple land similarly into trust; and to channel more resources directly to Alaska Native Tribal governments for the provision of governmental services in those communities.

2.4: Congress should repeal Section 910 of Title IX of the Violence Against Women Reauthorization Act of 2013 (VAWA Amendments), and thereby permit Alaska Native communities and their courts to address domestic violence and sexual assault, committed by Tribal members and non-Natives, the same as now will be done in the lower 48.

2.5: Congress should affirm the inherent criminal jurisdiction of Alaska Native Tribal governments over their members within the external boundaries of their villages.<sup>91</sup>

Congress accepted one recommendation in repealing the Alaska exemption from the Violence Against Women Reauthorization Act.<sup>92</sup>

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<sup>90</sup> Indian Law and Order Commission, *A Roadmap For Making Native America Safer: Report To The President And Congress Of The United States*, chap. 2 (Nov. 2013).

<sup>91</sup> *Id.* at xiii–xiv.

<sup>92</sup> Pub. L. 113–275, December 18, 2014, 127 Stat. 2988.