

# American Indian Law Review

---

Volume 36 | Number 2

---

1-1-2012

## The Use of the Alaskan Native Claims Settlement Act to Justify Disparate Treatment of Alaska's Tribes

Natalie Landreth

Erin Dougherty

Follow this and additional works at: <https://digitalcommons.law.ou.edu/ailr>



Part of the [Indigenous, Indian, and Aboriginal Law Commons](#)

---

### Recommended Citation

Natalie Landreth & Erin Dougherty, *The Use of the Alaskan Native Claims Settlement Act to Justify Disparate Treatment of Alaska's Tribes*, 36 AM. INDIAN L. REV. 321 (2012), <https://digitalcommons.law.ou.edu/ailr/vol36/iss2/2>

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact [Law-LibraryDigitalCommons@ou.edu](mailto:Law-LibraryDigitalCommons@ou.edu).

# THE USE OF THE ALASKAN NATIVE CLAIMS SETTLEMENT ACT TO JUSTIFY DISPARATE TREATMENT OF ALASKA'S TRIBES

Natalie Landreth & Erin Dougherty\*

## I. Introduction

When the Alaska Native Claims Settlement Act (ANCSA) was passed in 1971,<sup>1</sup> there was little mention of how it might affect tribal sovereignty or tribal jurisdiction. According to its own explicit terms, it was a land settlement: aboriginal claims were extinguished in exchange for 45.5 million acres of land in fee simple and almost \$1 billion.<sup>2</sup> Despite this rather narrow focus, in the years after 1971 the law became the hook on which lawyers and commentators hung their hats to argue that it was a de facto termination of Alaska's tribes. Some argued that, even if not technically terminated, Alaska's tribes no longer had any sovereignty or jurisdiction since they now lacked an Indian Country land base.<sup>3</sup> Others focused on whether the trust responsibility survived at all, and thus whether Alaska's villages were even tribes anymore.<sup>4</sup> Still others mistakenly thought corporations had replaced Alaska's tribes.<sup>5</sup> In this way, ANCSA became another reason to treat Alaska's tribes as second-class citizens to which longstanding laws did not apply.

The strange truth is that no one seems to have given much of a thought to jurisdiction at the time, or even ten years later. The attack on tribal

---

\* Natalie is a Senior Staff Attorney at the Native American Rights Fund (NARF) Alaska office. She graduated from Harvard Law School in 2001 and Harvard College (magna cum laude) in 1996. She has worked for NARF since 2003. Erin is a Staff Attorney at the Native American Rights Fund (NARF) Alaska office. She is a graduate of the University of Michigan Law School and Willamette University (cum laude). She has worked for NARF since 2009.

1. Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629h (2006)).

2. *Id.* §§ 2, 6, 12; Eric C. Chaffee, *Business Organizations and Tribal Self-Determination: A Critical Reexamination of the Alaska Native Claims Settlement Act*, 25 ALASKA L. REV. 107, 109-10 (2008).

3. *See, e.g.*, Paul A. Matteoni, Comment, *Alaskan Native Indian Villages: The Question of Sovereign Rights*, 28 SANTA CLARA L. REV. 875, 885-89 (1988) (arguing that Indian Country is required for a tribe to exercise its sovereignty).

4. *See, e.g.*, Rosenblatt, 7 B.C. ENVTL. AFF. L. REV. 505, 535-36 (1978-79).

5. *See, e.g.*, Russel Lawrence Barsh, *The International Legal Status of Native Alaska*, ALASKA NATIVE NEWS, July 1984, at 35, available at <http://www.alaskool.org/projects/ancsa/international/barsh1984/intlleglstat.htm>.

jurisdiction became an unintended consequence, an accidental byproduct, of ANCSA. Yet ANCSA would become the primary vehicle for attacking the most basic exercise of jurisdiction, and Alaska's tribes would find themselves struggling against a consequence they never envisioned and certainly never intended when they signed on the proverbial dotted line in 1971.

This article will discuss the context that surrounded passage of ANCSA and the Act's subsequent interpretation and implementation. With the benefit of forty years of hindsight, this article will evaluate whether the dire predictions about ANCSA's impact on Alaska's tribes have come to fruition. The article concludes that Alaska's 229 federally recognized tribes<sup>6</sup> survived, sovereignty intact, and even retained a large measure of their jurisdiction simply because they are tribes. The loss of the majority of Indian Country did not cause a loss of jurisdiction in Alaska, but rather furthered the shift in the law from land-based to membership- and interest-based jurisdiction. Most importantly, Alaska's tribes have succeeded in establishing that they are not subject to different laws but must be treated like all other tribes, regardless of their sometimes unique history.

## *II. The Alaska Native Claims Settlement Act*

As is now well known, ANCSA was the product of three events: (1) the discovery of oil on the North Slope, (2) the nation's energy crisis, and (3) the Alaska Federation of Natives leadership's strong advocacy for settlement.<sup>7</sup> With respect to the first and second factors, thanks to prominent cases brought by the Tlingit and Haida Indians, Alaska Natives had proven they had viable aboriginal claims to large swaths of Alaska's lands and waters.<sup>8</sup> When oil was discovered in Prudhoe Bay in the late 1960s, representatives of the oil industry did not want to expose themselves to liability by developing the resources before the aboriginal claims were

---

6. Indian Entities Recognized and Eligible to Receive Services from the Bureau of Indian Affairs, 77 Fed. Reg. 47,868, 47,872 (Aug. 10, 2012).

7. A complete review of the genesis of ANCSA is beyond the scope of this article. For a thorough discussion of this and all the various competing bills, see KORNELIA GRABINSKA, TANANA CHIEFS CONFERENCE, INC., HISTORY OF EVENTS LEADING TO THE PASSAGE OF THE ALASKA NATIVE CLAIMS SETTLEMENT ACT (Jan. 1983), available at <http://www.alaskool.org/projects/ancsa/tcc2/TananaChiefs.html>.

8. *Tlingit & Haida Indians v. United States*, 389 F.2d 778, 793 (Ct. Cl. 1968) (holding that the Tribe was entitled to compensation for lands that had been taken).

settled.<sup>9</sup> Specifically, the industry was concerned about the “land freeze” and the possibility of legal injunctions halting the construction of a pipeline across what were assumed to be aboriginal lands.<sup>10</sup> The oil industry was insistent that Congress needed to solve this problem and solve it quickly.

With respect to the third factor, the leadership of the Alaska Federation of Natives (AFN) was clear that it wanted nothing to do with “wardship”: “We have been treated as ‘wards’ for many years. We have not profited by the ‘wardship’; we are humiliated by the very concept which assumes that we are something less than other citizens—and I assure you that we are not.”<sup>11</sup> Furthermore, AFN specifically insisted on Alaska Natives having control over their own lands without federal supervision as well as a monetary settlement: “To put it bluntly, we want to manage our money and our lives, and we must question the fairness of any settlement which does not enable us to do so.”<sup>12</sup> Consequently, in advocating for a settlement, the AFN found itself on the same side as the oil companies, pushing for ANCSA.<sup>13</sup>

9. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 328-39 (Nell Jessup Newton et al. eds., LexisNexis 2005) [hereinafter COHEN]; Gigi Berardi, *The Alaska Native Claims Settlement Act (ANCSA)—Whose Settlement Was It? An Overview of Salient Issues*, 25 J. LAND RESOURCES & ENVTL. L. 131, 133 (2005) (describing how concerns over litigation of aboriginal claims interfered with the construction of the pipeline).

10. See DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* 155-57 (2d ed. 2002) (describing the land freeze and its impacts).

11. *Alaska Native Land Claims: Hearing on S. 1830 and H.R. 10193 Before the S. Comm. on Interior & Insular Affairs*, 91st Cong. 115 (1969) (statement of Emil Notti, President, Alaska Federation of Natives).

12. *Id.* It is important to point out that support for ANCSA was not universal. For example, William Paul, Sr., Alternate Representative of the Central Council of Tlingit and Haida Indians delivered a speech in October 1971 titled “We Own the Land.” In this speech, Paul warned that they were giving up their aboriginal rights and wondered how people would survive. He ended by asking “what’s the matter with you people?” and urging AFN to reject the bill. William L. Paul, Sr., *We Own the Land: Statement by William L. Paul, Sr., to the AFN Board of Directors, Alaska Federation of Natives’ Convention, Fairbanks, Alaska, October, 1971*, ALASKA NATIVE NEWS, August 1984, at 18, available at [http://www.alaskool.org/projects/anca/testimony/afn\\_paul/we\\_own\\_the\\_land.htm](http://www.alaskool.org/projects/anca/testimony/afn_paul/we_own_the_land.htm). The Arctic Slope Native Association also voted against ANCSA and then sent a letter to President Nixon urging him to veto the bill. *Why the Arctic Slope Inupiat Said NO to ANCSA: Letter to the President of the United States, December 18, 1971 from Joseph Upicksoun, President, Arctic Slope Native Association and Charles Edwardsen, Jr., Executive Director, Arctic Slope Native Association*, ALASKA NATIVE NEWS, September 1984, at 16, available at [http://www.alaskool.org/projects/anca/articles/letter1984/arctic\\_slope\\_inupiat.htm](http://www.alaskool.org/projects/anca/articles/letter1984/arctic_slope_inupiat.htm).

13. Joris Naiman, *ANILCA Section 810: An Undervalued Protection for Alaskan Villagers’ Subsistence*, 7 FORDHAM ENVTL. L. REV. 211, 230-31 (1995-1996) (describing

ANCSA passed in 1971, without a mention of tribal sovereignty or tribal jurisdiction in the text.<sup>14</sup> In fact, the word "tribe" is used only once, and it is in the definition of "Native village."<sup>15</sup> Section 4, which contains the extinguishment provisions, is totally silent on tribal existence, sovereignty, and jurisdiction.<sup>16</sup> The focus of the law clearly was to settle aboriginal land claims.

While the law terminated and extinguished aboriginal rights to lands and waters in Alaska, some argued that it actually terminated the tribes themselves.<sup>17</sup> However, not only had termination era policies<sup>18</sup> been repudiated by this time, but also the language of the law itself bore no resemblance to the termination acts.<sup>19</sup> However, section 2(b) contained some unusual language that has served as the basis for treating Alaska's tribes differently over the course of the last forty years:

[T]he settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, 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

---

how oil lobbyists and Native interests petitioned the federal government together to settle land claims). See generally MARY CLAY BERRY, *THE ALASKA PIPELINE: THE POLITICS OF OIL AND NATIVE LAND CLAIMS* (1975) (generally describing the intersection of oil companies and Alaska Natives).

14. Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629h (2006)).

15. *Id.* § 3(c), 85 Stat. at 689.

16. *Id.* § 4, 85 Stat. at 689-90.

17. See, e.g., KORNELIA GRABINSKA, TANANA CHIEFS CONFERENCE, INC., ANCSA-RELATED SIDE EFFECTS (March 1983), available at [http://www.alaskool.org/projects/ancsa/tcc/tcc\\_ancsa.htm](http://www.alaskool.org/projects/ancsa/tcc/tcc_ancsa.htm).

18. The Termination Era was characterized by an effort to end the trust relationship between the federal government and Indian tribes and thereby encourage Native Americans to assimilate. For a thorough overview of the termination era, see COHEN, *supra* note 9, at 89-97.

19. The most visible victims of termination had been the Menominee, but Congress passed the Menominee Restoration Act in 1973, just two years after ANCSA. Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (1973) (codified as amended 25 U.S.C. § 903-903f (2006)); see also *Menominee Restoration Act: Hearing on H.R. 7421 Before the H. Subcomm. on Indian Affairs of the House Comm. on Interior & Insular Affairs*, 93d Cong. 11 (1973) (describing the purpose of the bill as "to mark the repudiation of the termination policy of the U.S. Government").

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 . . . .<sup>20</sup>

Unfortunately, the legislative history for this section is “sparse and unenlightening,”<sup>21</sup> and it is thus not entirely clear what Congress meant by this provision.

In the years after the settlement, there was little discussion of ANCSA’s possible effect on tribal jurisdiction. Because section 2(b) used the words “wardship” and “trusteeship,” early criticism focused on the existence of the trust relationship in itself, rather than issues surrounding jurisdiction. One of the earliest articles that appeared in this very journal contended that ANCSA had “specifically abrogated” an “extended trust relationship with the federal government,” citing section 2(b), codified as 43 U.S.C. § 1601(b).<sup>22</sup> Some commentators went farther, calling ANCSA an act of termination.<sup>23</sup> Others were more measured and took a wait-and-see approach, stating that “[w]hether any trust responsibility to the Eskimos survived the Alaska Native Claims Settlement Act is uncertain,” and that the “[i]nquiry must now focus on the type of trust responsibility that can exist independent of land issues.”<sup>24</sup> The preeminent Indian law casebook at the time asked “is [ANCSA] termination in disguise?”<sup>25</sup> However, at least

20. Alaska Native Claims Settlement Act § 2(b).

21. CASE & VOLUCK, *supra* note 10, at 18.

22. Sarah Arnott, Note, *Legislation: The Alaska Native Claims Settlement Act: Legislation Appropriate to the Past and Future*, 9 AM. INDIAN L. REV. 135, 155 (1981). Of course, this abrogation meant the land would not be subject to oversight as trust land, not that the Alaska Native people or tribes were no longer beneficiaries of the trust responsibility.

23. See, e.g., Letter from Naugga Ciunerput to the *Tundra Times* (Aug. 23, 1973), reprinted in FRED SEAGAYUK BIGJIM & JAMES ITO-ADLER, LETTERS TO HOWARD: AN INTERPRETATION OF THE ALASKA NATIVE LAND CLAIMS 75-77 (Howard Rock ed., 1974) [hereinafter LETTERS TO HOWARD] (“AN ACT [*sic*] will not bring true self-determination, it is really one more step in the plan for termination of the Native way of life in Alaska.”); see also DAVID S. CASE, THE SPECIAL RELATIONSHIP OF ALASKA NATIVES TO THE FEDERAL GOVERNMENT: AN HISTORICAL AND LEGAL ANALYSIS 6 (1978) [hereinafter CASE, THE SPECIAL RELATIONSHIP] (describing the allegation but disagreeing with it).

24. Nathaniel M. Rosenblatt, *The Federal Trust Responsibility and Eskimo Whaling*, 7 B.C. ENVTL. AFF. L. REV. 505, 535-36 (1979).

25. DAVID H. GETCHES, DANIEL M. ROSENFELT & CHARLES F. WILKINSON, FEDERAL INDIAN LAW: CASES AND MATERIALS 117 (1979). Compare the text from section 2(b) above to the text of House Concurrent Resolution 108 (outlining the termination policy):

two commentators pressed that ANCSA was in fact a land settlement, and that the trust relationship (or special relationship as it was sometimes called) and tribal existence survived intact. The commentators argued that the trust relationship and tribal existence survived because the federal government had a unique legal relationship to Alaska Natives because of their status as tribal people, not because of the status of their land.<sup>26</sup>

Even twenty and thirty years after the passage of ANCSA, some commentators continued to argue that ANCSA was de facto termination<sup>27</sup> while others seemed to assume that Alaska Native Corporations had simply replaced the tribes.<sup>28</sup> Those who acknowledged that tribes continued to exist nonetheless contended that ANCSA had “diminished [their] sovereignty” and provided them “little opportunity for self-determination.”<sup>29</sup> As recently as 2008, commentators still argued that one of the effects of ANCSA was to eliminate Alaska tribes’ authority even to regulate domestic relations.<sup>30</sup> In other words, as described below, very few commentators got it right.<sup>31</sup>

---

Resolved by the House of Representatives (the Senate Concurring), That it is declared to be the sense of Congress that, at the earliest possible time . . . all of the following named Indian tribes and individual members thereof, shall be freed from Federal supervisions and control and from all disabilities and limitations specially applicable to Indians.

H.R. CON. RES. 108, 83d Cong. (1953) (enacted).

26. See CASE, THE SPECIAL RELATIONSHIP, *supra* note 23, at 99 (describing the numerous cases in which courts have held that the federal relationship with Native Americans does not depend upon the status of their lands, but instead on the legal relationship between the United States and its tribes); see also Patricia A. Barcott, Comment, *The Alaska Native Claims Settlement Act: Survival of a Special Relationship*, 16 U.S.F. L. REV. 157, 158-59 (1981).

27. See, e.g., Benjamin W. Thompson, *The De Facto Termination of Alaska Native Sovereignty: An Anomaly in an Era of Self-Determination*, 24 AM. INDIAN L. REV. 421, 421-22 (2000).

28. See Martha Hirshfeld, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form*, 101 YALE L.J. 1331, 1354 (1992) (advocating that village corporations “receive quasi-governmental powers”).

29. Chaffee, *supra* note 2, at 136-39.

30. *Id.* at 137 (listing powers associated with Indian Country, including the regulation of domestic relations and “jurisdiction to adjudicate certain disputes,” and asserting that these do not exist in the absence of Indian Country).

31. See Sybil R. Kiskan, *The Uncertain Legal Status of Alaska Natives After Native Village of Stevens v. Alaska Management & Planning: Exposing the Fallacious Distinctions Between Alaska Natives and Lower 48 Indians*, 31 ARIZ. L. REV. 405, 419-21 (1989); Patricia Thompson, *Recognizing Sovereignty in Alaska Native Villages After the Passage of ANCSA*, 68 WASH. L. REV. 373, 390-94 (1993) (advocating pre-*Venetie II* that ANCSA lands should be treated as Indian Country and subject to tribal jurisdiction).

*III. Not “in Any Meaningful Sense Sovereign”: Alaska Supreme Court  
Jurisprudence in the 1980s*

Tribal councils and courts, in varying forms, are ancient institutions. As a necessary element to governance and social order, they were always present and had remained active since ANCSA. In the 1980s, tribal court cases began to make their way to state courts with increasing frequency. In a series of opinions, *Native Village of Nenana v. State*,<sup>32</sup> *In re K.E.*,<sup>33</sup> and *Native Village of Stevens v. Alaska Management & Planning*,<sup>34</sup> the Alaska Supreme Court held that Alaska Native villages were not tribes, not sovereign, and therefore not entitled to immunity, and did not even possess jurisdiction over their own members.<sup>35</sup>

In the first case, *Native Village of Nenana v. State*, the Tribe had intervened in a child protection case and petitioned to transfer the case to tribal court pursuant to section 1911(b) of the Indian Child Welfare Act (ICWA),<sup>36</sup> which provides:

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child’s tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child’s tribe: *Provided*, that such transfer shall be subject to declination by the tribal court of such tribe.<sup>37</sup>

The state superior court denied the petition to transfer, and the Tribe appealed.<sup>38</sup>

The Alaska Supreme Court affirmed, holding that a transfer was not permissible because the Tribe lacked jurisdiction to adjudicate child

32. 722 P.2d 219, 221 (Alaska 1986), *overruled by In re C.R.H.*, 29 P.3d 849 (Alaska 2001).

33. 744 P.2d 1173, 1173-74 (Alaska 1987), *overruled by In re C.R.H.*, 29 P.3d 849 (Alaska 2001).

34. 757 P.2d 32, 32-35 (Alaska 1988).

35. There was one exception in which the Alaska Supreme Court transferred a child protection case to a tribal court. See *In re J.M.*, 718 P.2d 150, 151 (Alaska 1986). Strangely, the court would arrive at the opposite conclusion in the same year in *Native Village of Nenana*. See *Native Vill. of Nenana*, 722 P.2d at 222.

36. *Native Vill. of Nenana*, 722 P.2d at 220.

37. Indian Child Welfare Act of 1978 § 101(b), 25 U.S.C. § 1911(b) (2006).

38. *Native Vill. of Nenana*, 722 P.2d at 220.



custody proceedings.<sup>39</sup> The basis for this decision was section 1918 of ICWA which, according to the court, provided that Alaska had exclusive jurisdiction unless and until a tribe petitions the Secretary of the Interior for reassumption of jurisdiction:

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of [Public Law 280], or pursuant to any other Federal law . . . may reassume jurisdiction over Indian child custody proceedings, [but] such tribe [must] present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.<sup>40</sup>

The court concluded that Public Law 280 had divested tribes of their jurisdiction and placed exclusive jurisdiction in the hands of the State.<sup>41</sup>

In so ruling, the court cited a 1955 opinion of the United States Solicitor General, squarely from the Termination Era, which bluntly stated that “the jurisdiction of Indian tribes ceases at the border of the reservation.”<sup>42</sup>

The following year a similar issue arose in *In re K.E.*, but this time the tribe in question argued that the child was domiciled in the “dependent Indian community” of Tanana and thus *Nenana* did not apply, implicating section 1911(a) rather than section 1911(b) of the Indian Child Welfare Act.<sup>43</sup> The Alaska Supreme Court rejected this argument, reasoning that the reassumption provisions in section 1918 “make[] no distinction with regard to custody proceedings involving children residing or domiciled with the tribe and those involving children living elsewhere.”<sup>44</sup> “[I]n either case, [the court held that] the tribe must present a petition to the Secretary of the Interior that includes a suitable plan for dealing with custody

---

39. *Id.* at 220-21.

40. *Id.* (quoting Indian Child Welfare Act of 1978 § 108(a), 25 U.S.C. § 1918(a) (2006)).

41. *See id.* at 221 (noting that it could not see any other reason why Public Law 280 would be mentioned “unless it required reassumption”).

42. *Id.* (quoting Jurisdiction of Tribal Court and Colo. Juvenile Court for Determination of Custody of Dependent and Neglected Indian Child, 62 Interior Dec. 466, 468 (1955)). It is critical to point out that the Alaska Supreme Court was already diverging from federal law. In 1976 the United States Supreme Court had ruled that Public Law 280 did not subject tribes to “the full panoply of civil regulatory powers” and did not terminate tribal powers. *Bryan v. Itasca Cnty.*, 426 U.S. 373, 387-90 (1976).

43. *In re K.E.*, 744 P.2d 1173, 1173-74 (Alaska 1987), *overruled by In re C.R.H.*, 29 P.3d 849 (Alaska 2001).

44. *Id.* at 1174.

matters . . . ”<sup>45</sup> Only after a petition has been granted would the provisions of 1911(a) and (b) go into effect.<sup>46</sup> By this time, the United States Supreme Court had reaffirmed and expanded its holding in *Bryan v. Itasca County*, that Public Law 280 was not a divestiture statute.<sup>47</sup> Thus, by reaffirming its holding in *Nenana*, the Alaska Supreme Court had firmly cemented itself as an outlier.

Neither of these two cases mentioned ANCSA by name, but in the next case, *Native Village of Stevens v. Alaska Management & Planning*, the Alaska Supreme Court made it very clear why Alaska’s tribes were receiving different treatment than their relations in the rest of the country.<sup>48</sup> In *Native Village of Stevens*, a joint venture that had entered into a contract with the Tribe to provide community development assistance sued the Tribe for breach of contract.<sup>49</sup> Despite the fact that it was well-established that tribes benefit from sovereign immunity, the trial court held in favor of the joint venture and awarded it almost \$40,000.<sup>50</sup>

The Alaska Supreme Court affirmed, holding that the Native Village of Stevens was not entitled to assert sovereign immunity because it was “not self-governing or in any meaningful sense sovereign.”<sup>51</sup> Furthermore, according to the court, “the history of the relationship between the federal government and the Alaska Natives . . . indicates that Congress intended that most Alaska Native groups not be treated as sovereigns.”<sup>52</sup>

To explain its reasoning, the court noted that it had previously upheld the tribal sovereign immunity of the Metlakatla Indians because “[t]he Metlakatlans’ reservation status sets them apart from Alaska Natives, making them much more like the tribes of the other states.”<sup>53</sup> Thus, the primary difference between the Native Village of Stevens and Metlakatla is that the latter were fortunate enough not to have their reservation taken away under ANCSA.

The other justifications offered for not allowing the Native Village of Stevens to assert sovereign immunity were: (1) the United States did not enter into treaties with Alaskan tribes; (2) the tribes in Alaska were not

---

45. *Id.*

46. *Id.* at 1174-75.

47. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207-09 (1987).

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

49. *Id.* at 32-33.

50. *Id.* at 34.

51. *Id.*

52. *Id.*

53. *Id.* at 35 (quoting *Atkinson v. Haldane*, 569 P.2d 151, 154-55 (Alaska 1977)). Metlakatla is the only remaining Indian reservation in the State of Alaska.

exempt from taxation by the Territory or State of Alaska; (3) Natives in Alaska were subject to Alaska's criminal laws; (4) there "is not now and never has been an area of Alaska recognized as Indian Country with one possible exception"; and finally, and most bluntly, (5) "[t]here are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law."<sup>54</sup>

To support these assertions, the court drew heavily upon a 1986 Report of the Governor's Task Force on Federal-State-Tribal Relations that reviewed the government's treatment of Alaska Natives from the 1880s through 1915.<sup>55</sup> Sweeping aside the Indian Reorganization Act—despite the fact that the Native Village of Stevens itself is an IRA village—the court turned its focus to ANCSA.

Relying on section 2(b), the court found that "there is nothing in the legislative history of ANCSA which remotely suggests that IRA villages are to be recognized as having a government role."<sup>56</sup> This flawed reasoning turns Indian law on its head. Longstanding, black letter law provides that tribal powers are not granted by statute, but continue to exist unless and until specifically divested.<sup>57</sup> Nevertheless, beginning from the opposite premise, the court concluded that "Congress has demonstrated its intent that Alaska Native communities not be accorded sovereign tribal status," and therefore, Stevens was not entitled to sovereign immunity.<sup>58</sup>

*Native Village of Stevens* marked a low ebb for Alaska's tribes. Because ANCSA had revoked almost all existing reservations, Alaska's tribes were legally branded as "different" (read: lesser) from the tribes in other states. The law in Alaska thus developed in a manner different than the laws applicable to tribes in the rest of the nation, with devastating consequences for Alaska's tribes. However, three significant developments were right around the corner: the *Venetie* cases of 1991 and 1998, the Federally Recognized Indian Tribe List Act of 1994, and *John v. Baker* in 1999.

---

54. *Native Vill. of Stevens*, 757 P.2d at 35-36 (quoting *Metlakatla Indian Cmty., Annette Island Reserve v. Egan*, 362 P.2d 901, 917-20 (Alaska 1961), *vacated*, 369 U.S. 45 (1972)).

55. *Id.* at 37-39 (citing ALASKA GOVERNOR'S TASK FORCE ON FEDERAL-STATE-TRIBAL RELATIONS, REPORT OF THE GOVERNOR'S TASK FORCE ON FEDERAL-STATE-TRIBAL RELATIONS, SUBMITTED TO GOVERNOR BILL SHEFFIELD (1986)). Some have questioned the Court's reliance on this report given the State's "bias in favor of limiting tribal sovereignty." Kiskan, *supra* note 31, at 415.

56. *Native Vill. Of Stevens*, 757 P.2d at 41.

57. See *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978), *superseded by statute*, 25 U.S.C. § 1301 (2006), *as recognized in* *United States v. Lara*, 541 U.S. 193 (2004).

58. *Native Vill. of Stevens*, 757 P.2d at 41.

*IV. The Early 1990s: Concurrent Jurisdiction and Federal Recognition**A. Native Village of Venetie IRA Council et al. v. State, Department of Health & Social Services: "A Tribe's Authority Over Its Reservation Is Incidental to Its Authority Over Its Members"*

When people mention the *Venetie* case they are almost always referring to the 1998 Indian Country case that will be discussed below. However, there was an equally important earlier case by the same name. In *Native Village of Venetie IRA Council v. Alaska*,<sup>59</sup> two tribes, Venetie and neighboring Fort Yukon, and two tribal members sued the State of Alaska to compel recognition of tribal adoption decrees under the full faith and credit clause of ICWA.<sup>60</sup> The two tribal members had each been asked to adopt a newborn baby, one born to a member of Fort Yukon and the other to a member of Venetie.<sup>61</sup> Both adoptive mothers were denied benefits under the Federal Aid to Families with Dependent Children program because the State refused to recognize the adoptions and the children were therefore ineligible for such benefits.<sup>62</sup>

Alaska claimed that: (1) the claims were barred by the Eleventh Amendment; (2) there was no cause of action under ICWA; and (3) because of Public Law 280, Alaska Native villages could not exercise any jurisdiction over children's cases unless, and until, they had reassumed their jurisdiction with the Secretary's approval pursuant to section 1918 of ICWA<sup>63</sup>—the same argument the State had been making, quite successfully, since *Nenana* and *In re K.E.*

The federal district court found for the State,<sup>64</sup> but on appeal the Ninth Circuit quickly disposed of the State's first two arguments. In addition, the Ninth Circuit addressed the Public Law 280 issue, but it reached the opposite conclusion from the Alaska Supreme Court.<sup>65</sup> The court's conclusion can be traced largely to the fact that the Ninth Circuit started from the foundational basis of Indian law, namely that tribes are "independent political communities qualified to exercise powers of self-

---

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

60. *Id.* at 551.

61. *Id.* at 550-51.

62. *Id.*

63. *Id.* at 552-53, 556.

64. *Native Vill. of Venetie I.R.A. Council v. Alaska*, 687 F. Supp. 1380 (D. Alaska 1988).

65. *Id.* at 552-53, 561-62.

government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty.”<sup>66</sup>

With this foundation as its starting point, the court then analyzed “whether any limitation exists to *prevent* the tribe from acting, not whether any authority exists to *permit* the tribe to act.”<sup>67</sup> The court asked two questions: First, whether Venetie and Fort Yukon formed “bodies politic” and were historical tribes—that is whether they could “demonstrate some relationship with or connection to the historical entity.” Second, the court asked, assuming Venetie and Fort Yukon were in fact tribes, whether their inherent sovereignty had been divested by Public Law 280.<sup>68</sup>

The court ultimately remanded for fact finding on the first question; however, as to the second, the court distinctly and clearly repudiated the “Alaska is different” argument:

As a result of these decisions, Alaska natives were treated as divorced from the rules of Indian law which applied to lower-forty-eight tribes. . . . The district court erred, however, in believing that reconciliation [with these early cases] was even necessary. Judge Deady’s superannuated views of tribal sovereignty notwithstanding, such notions are not the law of the land today. . . . Thus, to the extent that Alaska’s natives formed bodies politic to govern domestic relations, punish wrongdoers, and otherwise provide for the general welfare, we perceive no reason why they, too, should not be recognized as having been sovereign entities. . . . [T]he villages are to be afforded the same rights and responsibilities as are sovereign bands of native Americans in the continental United States.<sup>69</sup>

The court did not stop there. Following the same analytical path as it had with the question of inherent sovereignty, the court concluded that “tribal sovereignty is not coterminous with Indian country.”<sup>70</sup> Perhaps more importantly, the court held that “[a] tribe’s authority over its reservation or Indian Country is incidental to its authority over its members.”<sup>71</sup> Both of these statements would become important, not only to

---

66. *Id.* at 556 (quoting COHEN, *supra* note 9, at 232) (internal quotations omitted).

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

68. *Id.* at 557, 559.

69. *Id.* at 558-59 (citations omitted).

70. *Id.* at 558 n.12 (citations omitted).

71. *Id.*

Alaska's tribes, but to tribes nationwide. They meant that ANCSA's separation of the tribes from their aboriginal land base did not automatically mean they had no jurisdiction. Land was not the magic bullet after all.

The final, critical holding in *Venetie I* is that Public Law 280 is not a divestiture statute. In a thorough review of legislative history and context, as well as the several cases in which the United States Supreme Court had considered the issue, the court pointed out that the law was meant to fill gaps in law enforcement on reservations in certain states.<sup>72</sup> Citing *California v. Cabazon Band of Mission Indians* and *Bryan v. Itasca County*, the court noted that “[t]he Supreme Court has also adopted the view that Public Law 280 is not a divestiture statute.”<sup>73</sup> Moreover, the court finally answered the question about what tribes were meant to reassume under section 1918 of ICWA if they already had jurisdiction: exclusive or referral jurisdiction.<sup>74</sup>

#### *B. Federally Recognized Tribes*

Even before the 1994 passage of the Federally Recognized Indian Tribe List Act (FRITLA),<sup>75</sup> in 1993 the Department of the Interior published its updated list of Indian entities that were eligible to receive services from the Bureau of Indian Affairs (BIA).<sup>76</sup> This list included 229 Alaska Native villages,<sup>77</sup> which was not entirely shocking since “[t]he BIA and its predecessor, the Bureau of Education, have provided services to Alaska Native villages since about 1885.”<sup>78</sup> Moreover, 197 of these villages had been included on lists published by the BIA in 1982 and 1983,<sup>79</sup> and Alaska Native villages had been included within every major piece of federal Indian legislation since ANCSA through at least 1984.<sup>80</sup>

---

72. *Id.* at 560.

73. *Id.* (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207-12 (1987); *Bryan v. Itasca Cnty.*, 426 U.S. 373, 383-90 (1976)).

74. *Id.* at 561.

75. Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791 (codified as amended 25 U.S.C. §§ 479a to 479a-1 (2006)).

76. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,366 (Oct. 21, 1993).

77. *Id.*

78. DAVID S. CASE, *ALASKA NATIVES AND AMERICAN LAWS* 471 (1st ed. 1984).

79. Indian Tribal Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 47 Fed. Reg. 53130, 53133 (Nov. 24, 1982); 48 Fed. Reg. 56862, 56865 (Dec. 23, 1983).

80. CASE, *supra* note 78, at 471.

Some commentators not familiar with the federal government's longstanding treatment of Alaska Native villages as tribes viewed the BIA's action as "ultra vires."<sup>81</sup> Others argued that the action had absolutely no impact.<sup>82</sup> Critically, the prefatory language to the 1993 list specifically states that Alaska tribes "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 . . . ."<sup>83</sup>

Thus, this listing of the 229 tribes had two important consequences. First, tribes no longer had to prove they were ethnologically tribes in order to exercise jurisdiction as they had been forced to do in cases like *Venetie I*. Second, it meant that Alaska Native tribes were another step closer to being treated the same as their counterparts in the rest of the United States.

#### V. *The Late 1990s: Venetie II and "Sovereigns Without Territorial Reach"*

*Venetie II* is the case that people generally refer to when they mention *Venetie*. In *Venetie II*, the United States Supreme Court decided whether lands transferred to Native corporations in fee simple under the Act qualified as "dependent Indian communities" under 25 U.S.C. § 1151; and, thus, whether the lands constituted Indian Country.<sup>84</sup> That question had lingered since passage of the Act in 1971.

The facts are straightforward. The Native Village of Venetie had a reservation from 1943 until 1971, when it was extinguished by ANCSA.<sup>85</sup> In 1973, the Native corporations in Venetie and Arctic Village established pursuant to ANCSA took title to their former reservation lands instead of accepting the settlement monies for the lands.<sup>86</sup> The United States conveyed title in fee simple, and the two corporations existed as tenants in common until they transferred the lands in fee simple to the Native Village of Venetie Tribal Government.<sup>87</sup>

---

81. See, e.g., Donald Craig Mitchell, *Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts*, 14 ALASKA L. REV. 353, 401 n. 195 (1997).

82. See John v. Baker, 982 P.2d 738, 792 (Alaska 1999) (Mathews, C.J., dissenting).

83. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,366 (Oct. 21, 1993).

84. *Alaska v. Native Vill. of Venetie Tribal Gov't (Venetie II)*, 522 U.S. 520, 523-26 (1998).

85. *Id.* at 523.

86. *Id.* at 524 (citing 43 U.S.C. § 1618(b) (2006)).

87. *Id.*

At the time, many villages in rural Alaska still did not have public schools, so in 1986 the State contracted with a private builder to erect a school in Venetie on lands owned by the Tribe.<sup>88</sup> The Tribe attempted to levy a \$161,000 tax on the contractor for conducting business activities on the Tribe's land, but when the State, the contractor, and the school refused to pay the Tribe took them to tribal court.<sup>89</sup>

The State sued in federal district court to enjoin the collection of the tax on the grounds that the Tribe had no authority to levy a tax on fee simple lands, and the Tribe's lands were not Indian Country under 18 U.S.C. § 1151(b).<sup>90</sup> The District Court held for the State, but the Ninth Circuit reversed on the ground that the lands qualified as Indian Country under a six-factor test:

- (1) the nature of the area; (2) the relationship of the area inhabitants to Indian tribes and the federal government; (3) the established practice of government agencies toward that area; (4) the degree of federal ownership of and control over the area; (5) the degree of cohesiveness of the area inhabitants; and (6) the extent to which the area was set aside for the use, occupancy and protection of dependent Indian peoples.<sup>91</sup>

The Ninth Circuit concluded that the Tribe met the fourth and six factors and was therefore a dependent Indian community and Indian Country.<sup>92</sup>

In a noteworthy concurrence, Judge Fernandez wrote separately to point out that ANCSA was intended to take an entirely different course: "It attempted to preserve Indian tribes, but simultaneously attempted to sever them from the land; it attempted to leave them as sovereign entities for some purposes, but as sovereigns without territorial reach."<sup>93</sup> The phrase "sovereigns without territorial reach" would later become a catchphrase, shorthand for the situation in which Alaska tribes found themselves. Although Judge Fernandez suggested the Tribe did not have sovereignty

---

88. *Id.* at 525.

89. *Id.*

90. *Id.*

91. *Id.* at 525-26 (quoting *Alaska ex rel. Yukon Flats Sch. Dist. v. Native Vill. of Venetie Tribal Gov't*, 101 F.3d 1286, 1294 (9th cir. 1996), *rev'd sub nom. Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998)).

92. *Id.* at 526 (citing *Yukon Flats Sch. Dist.*, 101 F.3d at 1300-02).

93. *Id.* (quoting *Yukon Flats Sch. Dist.*, 101 F.3d at 1303).



over the territory in question, he nonetheless sided with the Ninth Circuit majority based on circuit precedent.<sup>94</sup>

The United States Supreme Court reversed, holding that the Tribe's ANCSA lands are not Indian Country because they do not satisfy either the requirements of federal set-aside or federal superintendence.<sup>95</sup> The Supreme Court viewed ANCSA as specifically intended to end federal superintendence in that it revoked reservations, including Venetie's.<sup>96</sup> As expected, the Court also cited section 2(b)'s now famous language about avoiding a "lengthy wardship or trusteeship."<sup>97</sup> The Court ultimately found that the "limited" protections in 43 U.S.C. § 1636(d)—against adverse possession, property taxes, and certain judgments—did not rise to "the level of superintendence over the Indians' land that existed in our prior cases."<sup>98</sup>

The Court also found it persuasive that Congress had transferred the aboriginal lands to "state-regulated private business corporations," which it noted was "hardly a choice that comports with a desire to retain *federal* superintendence over the land."<sup>99</sup> The Court's ultimate holding was that ANCSA lands—that is, corporate lands that had been transferred but remained in fee simple—did not constitute Indian Country.

Many people still get this wrong and say that the Supreme Court held "there is no Indian Country in Alaska."<sup>100</sup> This is false. In fact, the Court was careful to point out that allotments would fall under 18 U.S.C. § 1151 and thus constitute Indian Country.<sup>101</sup> Nevertheless, the 45.5 million acres of land transferred under ANCSA could no longer serve as a basis for tribal jurisdiction.

## *VI. A New Decade: Alaska Tribal Sovereignty, No Indian Country Needed*

### *A. John v. Baker: A Shift to Membership-Based Jurisdiction*

Post-*Venetie II* there was general confusion in the Alaska Native community; while the State and other interests turned "there is no Indian Country in Alaska" into a talking point or rallying cry, Native interests now

94. *Venetie II*, 522 U.S. at 526 (quoting *Yukon Flats Sch. Dist.*, 101 F.3d at 1304).

95. *Id.* at 532, 534.

96. *Id.* at 533.

97. *Id.*

98. *Id.* (citing Alaska Native Claims Settlement Act Amendments of 1987 § 11, 43 U.S.C. § 1636 (2006)).

99. *Id.* at 534 (emphasis in original).

100. See, e.g., Joseph D. Matal, *A Revisionist History of Indian Country*, 14 ALASKA L. REV. 283, 339 (1997).

101. *Venetie II*, 522 U.S. at 527 n.2.

wondered whether they had any jurisdiction over their own lands. Court decisions notwithstanding, tribes continued to adjudicate disputes as they had before *Venetie II*, before FRITLA, before *Nenana* and its progeny, and before ANCSA. One of those disputes landed before the Alaska Supreme Court, which now had to determine whether these “sovereigns without territorial reach” retained any jurisdiction.

That case was *John v. Baker*,<sup>102</sup> a watershed case, not only for Alaska, but for tribes nationwide. During a custody dispute, John Baker, a member of Northway Village, a federally recognized tribe, filed a petition seeking custody of his two children in the Northway Tribal Court.<sup>103</sup> The children’s mother, Anita John, consented to jurisdiction in Northway even though she was a member of a different tribe.<sup>104</sup> Although Mr. Baker filed the initial petition, he was unhappy with the custody order issued by the tribal court and filed a custody action in state court.<sup>105</sup> Ms. John moved to dismiss the state case.<sup>106</sup> At issue was whether the Tribe had “sovereign adjudicatory authority” outside Indian Country.<sup>107</sup>

In a series of careful steps, the Alaska Supreme Court first concluded that its previous decisions in *Nenana* and *F.P.* did not apply because they concerned ICWA and Public Law 280, neither of which was relevant here.<sup>108</sup> Next, the court deferred to the BIA’s list of federally recognized tribes and FRITLA. The court held that Northway is a federally recognized power with sovereign authority, while acknowledging that post-ANCSA and *Venetie II* it was not yet clear how much authority the Tribe had:

The fact that Northway Village is a federally recognized tribe answers only part of the question posed by this case. Alaska Native villages such as Northway are in a unique position: Unlike most other tribes, Alaska Native villages occupy no reservations and for the most part possess no Indian country.

---

102. *John v. Baker*, 982 P.2d 738 (Alaska 1999).

103. *Id.* at 743.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* *Venetie II* was decided after oral argument was held in *Baker* so the Alaska Supreme Court requested supplemental briefing on how the Supreme Court’s decision affected the case. *Id.* at 744.

108. *Id.* at 745-48. In deciding that the *Nenana* line of case did not apply, the court did not have the occasion to overrule these cases. However, they were overruled in the *Tanana* case in 2011. *State v. Native Vill. of Tanana*, 249 P.3d 734, 751 (Alaska 2011). Incidentally, the court’s conclusion that ICWA did not apply here was based on the divorce exception. *Baker*, 982 P.2d at 746-47.

Mr. Baker and the dissent argue that the existence of tribal land—Indian country—is the cornerstone of tribal court jurisdiction and that Congress necessarily withdrew such jurisdiction from Alaska Native villages when it enacted ANCSA.

To evaluate this argument, we must decide how much authority tribes retain in the absence of reservation land. We must, in other words, determine the meaning of “sovereignty” in the context of Alaska’s post-ANCSA landscape by asking whether ANCSA, to the extent that it eliminated Alaska’s Indian country, also divested Alaska Native villages of their sovereign powers.<sup>109</sup>

Thus, for the first time since the passage of ANCSA in 1971, the Alaska Supreme Court squarely confronted the law’s impact on tribal jurisdiction. Previously, the court had dismissed assertions of tribal power based on the fact that Alaska’s tribes were “different.”<sup>110</sup> However, this time, the court took the same approach that the Ninth Circuit took in *Venetie I* by beginning with the foundational principles of Indian law, the first of which is that tribes retain all sovereign authority not specifically divested by Congress as set forth in *United States v. Wheeler*.<sup>111</sup>

From this starting point, the court examined ANCSA, FRITLA, ICWA, and the Tribal Justice Act to determine if any of the laws contained a divestiture of Alaska Native sovereignty.<sup>112</sup> With respect to ANCSA, the court noted that “nowhere does the law express any intent to force Alaska Natives to abandon their sovereignty.” The Act was intended, according to its principal author, to give “Alaska Natives an innovative way to retain their land and culture without forcing them into a failed reservation system.”<sup>113</sup> With respect to the latter three laws, the court pointed out that they all specifically included Alaska Native villages within their scope and

---

109. *Baker*, 982 P.2d at 750.

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

111. *Baker*, 982 P.2d at 751 (citing *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978), *superseded by statute*, 25 U.S.C. § 1301 (2006), *as recognized in United States v. Lara*, 541 U.S. 193 (2004)).

112. *Id.* at 753.

113. *Id.* (quoting Ted Stevens, Senator, Address Before the Alaska Legislature (Apr. 2, 1997), in *Senate and House Joint Journal Supp. No. 9* at 5, 1997 House Journal 915).

reasoned that these inclusions would be meaningless if Alaska's tribes could not actually exercise the powers described in those acts.<sup>114</sup>

Unable to locate an explicit divestiture, and in fact finding ample evidence of the preservation of tribal authority in Alaska, the court then explained in detail that Alaska's tribes "retain non-territorial sovereignty that includes power over child custody disputes."<sup>115</sup> This distinction required the court to "tease apart" membership-based and land-based sovereignty, and it ultimately concluded that they were in fact two independent bases for tribal sovereignty.<sup>116</sup>

For support, the court again looked to foundational principles in Indian law such as *Montana v. United States*,<sup>117</sup> *Santa Clara Pueblo v. Martinez*,<sup>118</sup> and *Fisher v. District Court*,<sup>119</sup> cases which placed an emphasis on the membership of the parties and the tribe's interest in the dispute.<sup>120</sup> The cornerstone of this approach is that sovereignty stems from the tribe itself and not from the land it occupies.<sup>121</sup>

The court relied upon three United States Supreme Court cases, each of which amply support the court's approach. In *Oklahoma Tax Commission v. Sac & Fox Nation*<sup>122</sup> and *Oklahoma Tax Commission v. Chickasaw Nation*<sup>123</sup> the United States Supreme Court had left "the door open for tribal governments to conduct internal self-governance functions in the absence of Indian country."<sup>124</sup> Given that the right to determine the custody of tribal children infringes on self-governance more than a motor fuels tax, the Alaska Supreme Court reasoned that jurisdiction must extend to the Northway custody case at issue.<sup>125</sup> Finally, the court noted that a recent United States Supreme Court decision had affirmed that tribal sovereign immunity exists regardless of whether the contracts at issue were formed inside or outside Indian Country.<sup>126</sup> Thus, the court held that the Northway

---

114. *Id.* at 753-54.

115. *Id.* at 754.

116. *Id.* at 754-61.

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

118. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

119. *Fisher v. Dist. Court of the Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382 (1976).

120. *Baker*, 982 P.2d at 755-56.

121. *Id.*

122. *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993).

123. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995).

124. *Baker*, 982 P.2d at 757-58.

125. *Id.*

126. *Id.* at 758 (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998)).

custody dispute fell “squarely within Northway’s sovereign power to regulate the internal affairs of its members,” and that the tribal court order should be recognized under the comity doctrine.<sup>127</sup>

Although the court reached the conclusion that tribal jurisdiction did not depend upon the existence of Indian Country, it left untouched the *Nenana* line of cases. The court would have to return to this problem later, but for now it had taken a significant step away from the status of outlier that it had held since the 1980s.

*B. In re C.R.H.: Transfer Jurisdiction Under ICWA Regardless of Public Law 280*

In *In re C.R.H.*, the state superior court denied a request by the Native Village of Nikolai to transfer a child protection proceeding concerning one of its member children to the tribal court.<sup>128</sup> On appeal, the Alaska Supreme Court addressed the conflict between its holding in *Nenana* that Public Law 280 divested Alaska tribes from jurisdiction over child protection matters,<sup>129</sup> and the Ninth Circuit’s holding in *Venetie I*, that Alaska tribes have inherent authority undivested by Public Law 280, concurrent with the state, over child protection matters affecting their members.<sup>130</sup>

In a short opinion, the court rejected *Nenana*’s analysis that had linked a tribe’s concurrent jurisdiction over child custody cases with Public Law 280.<sup>131</sup> In reaching its decision, the court compared section 1911(a) and 1911(b) of ICWA: Section 1911(a) provides that tribes lack exclusive Indian Country jurisdiction where such jurisdiction “is otherwise vested in the State by existing federal law,”<sup>132</sup> while section 1911(b) does not contain a limiting provision for transfer jurisdiction.<sup>133</sup> The court concluded that though Congress intended Public Law 280 to affect tribes’ exclusive jurisdiction under section 1911(a), it did not intend for the law to affect

---

127. *Id.* at 759, 765.

128. *In re C.R.H.*, 29 P.3d 849, 854 (Alaska 2001).

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

130. *Venetie I*, 944 F.2d at 560-61.

131. *C.R.H.*, 29 P.3d at 854.

132. *Id.* at 852 (citing Indian Child Welfare Act of 1978, § 101(a), 25 U.S.C. § 1911(a) (2006)).

133. *Id.*

transfer jurisdiction to a tribe under section 1911(b).<sup>134</sup> The court upheld the right of tribes to accept transfer jurisdiction under section 1911(b) without having to first petition to reassume jurisdiction under section 1918, and it overruled *Nenana* and its progeny to the extent they were inconsistent with its holding.<sup>135</sup>

Taken together, *John v. Baker* and *C.R.H.* shifted Alaska's tribes closer to being on even footing with tribes in the lower forty-eight states. Specifically, these rulings established three critical rules of law. First, Alaska tribes as sovereigns have original, membership-based jurisdiction over their members.<sup>136</sup> Second, a tribe's authority over its members exists unless it is explicitly extinguished by Congress.<sup>137</sup> No such extinguishment was included in ANCSA. Finally, concurrent tribal jurisdiction over child custody proceedings that involve tribal member children exists regardless of Public Law 280.<sup>138</sup>

Yet as the Alaska Supreme Court would later note, "having concluded that Congress gave tribes § 1911(b) transfer jurisdiction regardless of their [Public Law] 280 status," the court "found it unnecessary to reconsider whether Alaska Native tribes affected by [Public Law] 280 retained initiating jurisdiction under § 1911(a) concurrent with the State."<sup>139</sup> This ambiguity left an opening for those opposing tribal interests to again argue for disparate treatment of Alaska's tribes.

#### *VII. Sovereigns with Inherent Authority: Affirming Tribal Existence and Tribal Jurisdiction*

Though the State embraced the holdings in *John v. Baker* and *C.R.H.* for a short time, in October 2004 a new state Attorney General, Gregg Renkes, issued an advisory opinion that concluded that Alaska state courts had exclusive jurisdiction over child custody proceedings involving tribal children. The opinion also concluded that Alaska's tribal courts had no jurisdiction over such proceedings unless the child's tribe had successfully petitioned to reassume jurisdiction under section 1918 of ICWA and a state

---

134. *Id.* ("The language and structure of section 1911 reflect congressional intent that all tribes, regardless of their P.L. 280 status, be able to accept transfer jurisdiction of ICWA cases from state courts.")

135. *Id.* at 852-53.

136. *Id.* at 851 n.5; *John v. Baker*, 982 P.2d 738, 750-52, 755-59 (Alaska 1999).

137. *Baker*, 982 P.2d at 751.

138. *C.R.H.*, 29 P.3d at 851-52; *Baker*, 982 P.2d at 747, 759-61.

139. *State v. Native Vill. of Tanana*, 249 P.3d 734, 745-46 (Alaska 2011); *C.R.H.*, 29 P.3d at 852.

superior court judge transferred the case in accordance with section 1911(b).<sup>140</sup> This opinion did not acknowledge the implications of *John v. Baker*,<sup>141</sup> took advantage of the remnants of *Nenana* left in place after *C.R.H.*, and was not based on a change in law but a change in political policy. This one memorandum would put a hold on tribal adoptions for the next seven years.

Shortly after the issuance of the Attorney General's opinion, six tribes with active tribal courts that had been exercising original jurisdiction and initiating child custody proceedings on behalf of tribal children filed suit. The Native Village of Tanana, Nulato Village, the Village of Kalskag, the Akiak Native Community, the Village of Lower Kalskag, and the Kenaitze Indian Tribe, along with two parents who adopted an Alaska Native child through the Tanana Tribal Court, argued that the tribes possessed concurrent jurisdiction with the State over children's proceedings based on their inherent sovereign authority over the domestic relations of their members.<sup>142</sup> The state superior court agreed and issued a declaratory judgment in favor of the tribes and the adoptive parents, which the State then appealed.<sup>143</sup>

In *State v. Native Village of Tanana*, the Alaska Supreme Court reaffirmed that Public Law 280 had not divested Alaska Native tribes of their jurisdiction to adjudicate children's custody cases but instead created concurrent jurisdiction with the State:

ICWA creates limitations on states' jurisdiction over ICWA-defined child custody proceedings, not limitations on tribes' jurisdiction over those proceedings. And we acknowledge that in the nearly 25 years since our *Nenana* decision, our view of [Public Law] 280's impact on tribal jurisdiction has become the minority view—other courts and commentators have instead concluded that [Public Law] 280 merely gives states concurrent

---

140. Jurisdiction of State and Tribal Courts in Child Protection Matters, 2004 Op. Alaska Att'y Gen. 135 (2004) [hereinafter Renkes Opinion]. For a more in depth discussion of the history of the State of Alaska's position on recognition of tribal court jurisdiction, see Heather Kendall-Miller, State of Alaska v. Native Village of Tanana: *Enhancing Tribal Power by Affirming Concurrent Tribal Jurisdiction to Initiate ICWA-Defined Child Custody Proceedings, Both Inside and Outside of Indian Country*, 28 ALASKA L. REV. 217, 231-33 (2011).

141. *Tanana*, 249 P.3d at 746.

142. *Id.* at 736.

143. *Id.* at 737.

jurisdiction with tribes in Indian country. What remains of *Nenana* must now be overruled.<sup>144</sup>

The court further held that tribes that had not reassumed exclusive jurisdiction under ICWA, nonetheless, had concurrent jurisdiction to initiate ICWA-defined child custody proceedings, *regardless of the presence of Indian Country*, and that as such, the decisions of tribal courts in these cases were due full faith and credit under ICWA.<sup>145</sup>

In so holding, the court reiterated four key points from its decision in *John v. Baker*. “First, unless and until its powers are divested by Congress, a federally recognized sovereign Indian tribe has powers of self-government that include the inherent authority to regulate internal domestic relations among its members.”<sup>146</sup> “Second, ANCSA’s elimination of nearly all Indian country in Alaska *did not divest*” Alaska tribes of their “authority to regulate internal domestic relations among their members.”<sup>147</sup> Third, the court noted that it “‘must resolve ambiguities in statutes affecting the rights of’” tribes in favor of the tribes, and that it would “‘not lightly find that Congress intended to eliminate the sovereign powers of Alaska tribes.’”<sup>148</sup> And finally, the court highlighted that in enacting ICWA, it was Congress’s “‘intent that Alaska Native villages retain their power to adjudicate child custody disputes’ and [that] ‘ICWA’s very structure presumes both that the tribes . . . are capable of adjudicating child custody matters . . . and that tribal justice systems are appropriate forums for resolution of child custody disputes.’”<sup>149</sup>

At the same time that *Tanana* was making its way through the state court system, the Kaltag Tribal Council and two other adoptive parents sued the State in federal court. In *Kaltag Tribal Council v. Jackson*, the Tribe and the adoptive parents sought a judgment from the federal district court that the State was compelled to give full faith and credit to the tribal court’s adoption decree pursuant to ICWA.<sup>150</sup> The State argued, as it had since the 2004 Renkes Opinion, that the facts of the case at issue were distinguishable from those in the Ninth Circuit’s *Venetie I* holding. The state also argued that because Alaska Native villages lacked reservation

---

144. *Id.* at 751 (citations omitted).

145. *Id.* at 751.

146. *Id.* at 750 (citing *John v. Baker*, 982 P.2d 738, 751 (Alaska 1999)).

147. *Id.* (citing *Baker*, 982 P.2d at 753) (emphasis added).

148. *Id.* at 750 (quoting *Baker*, 982 P.2d at 752-53).

149. *Id.* at 750 (quoting *Baker*, 982 P.2d at 753-54).

150. Order at 1, 5, *Kaltag Tribal Council v. Jackson*, No. 3:06-CV-00211-TMB (D. Alaska Feb. 22, 2008).



status, and thus were not Indian Country under the *Venetie II* holding, they were forbidden from exercising jurisdiction over child protection cases under ICWA's section 1911(a).<sup>151</sup>

The district court agreed with the tribes, finding that nothing in federal law, including ICWA and Public Law 280, prevented the Kaltag Tribal Court from exercising jurisdiction.<sup>152</sup> In so holding it noted that the law remained the same "despite the distinctions made" by the State between and the Ninth Circuit's holding in *Venetie I* and the facts of the case at issue: "resolving the jurisdictional ambiguities in favor of the villages, we hold that neither the Indian Child Welfare Act nor Public Law 280 prevents [the villages] from exercising concurrent jurisdiction [over their members' domestic relations]."<sup>153</sup>

On appeal the Ninth Circuit agreed. The court highlighted its previous decision in *Venetie I* and affirmed that Indian Country is not a requirement for a tribe to exercise membership-based jurisdiction, which reaffirmed that "[a] Tribe's authority over its reservation or Indian country is incidental to its authority over its members."<sup>154</sup> Taken together, *Tanana* and *Kaltag* are a "one-two punch" that affirm Alaska Native tribes' legal existence and inherent jurisdiction despite the lack of reservations resulting from ANCSA.<sup>155</sup>

The Alaska Supreme Court recently had the opportunity to revisit its decisions in *John v. Baker* and *Tanana*.<sup>156</sup> In a short and terse opinion, the

---

151. *Id.* at 10-11.

152. *Id.* at 10-12.

153. *Id.* at 11 (quoting *Venetie I*, 944 F.2d 548, 562 (9th Cir. 1991) (alterations in original)).

154. *Kaltag Tribal Council v. Jackson*, 344 F. App'x 324, 325 (9th Cir. 2009) (quoting *Venetie I*, 944 F.2d at 558 n.12).

155. See Jeff Richardson, *Alaska Tribes Win Adoption Court Case*, FAIRBANKS DAILY NEWS-MINE, Mar. 7, 2011, available at: [http://www.newsminer.com/view/full\\_story/12213924/article-Alaska-tribes-win-adoption-court-case](http://www.newsminer.com/view/full_story/12213924/article-Alaska-tribes-win-adoption-court-case) (quoting NARF colleague, attorney Heather Kendall-Miller, describing the victories in *Kaltag* and *Tanana* as "a nice one-two punch for us").

156. See generally *McCrary v. Ivanof Bay Vill.*, 265 P.3d 337 (Alaska 2011) (addressing the issue sovereign immunity in the context of a developer bringing a claim of breach of the covenant of good faith and fair dealing arising out of development contracts). In *Ivanof Bay Village*, McCrary, a contractor, filed suit against the Tribe and its president over a contractual dispute. *Id.* at 338. The case was dismissed by the superior court based on the Tribe's sovereign immunity and McCrary appealed and argued that Ivanof Bay Village did not enjoy sovereign immunity because it was not a "validly recognized tribe." *Id.* at 338-39. McCrary asked the court to overrule *John v. Baker*, arguing that (1) the court's recognition of the Department of Interior's list of federally recognized tribes was an issue that had not

court declared that its “precedent is not lightly set aside” and that its conclusion in *John v. Baker* “was decisional and an essential foundation of the broader holding that Alaska Native tribes, by virtue of their sovereign powers, have concurrent tribal jurisdiction to adjudicate certain child custody disputes involving tribal members.”<sup>157</sup> The Alaska Supreme Court firmly rejected its former outlier status and brought its jurisprudence—as well as Alaska’s tribes—in line with federal precedent and the majority view across the country. Alaska’s tribes were no longer “different;” now they were just tribes.

*VIII. ANCSA After Forty Years: The Law’s Minor Effect on Tribal Sovereignty and Tribal Court Jurisdiction*

In 2004, I walked into a client’s office in rural Alaska. While speaking with the realty director, I saw over his shoulder a huge map of the village broken into blocks of varying colors, most of them red. In particular, the entire core of the village, with the sole exception of the school lands, was red. I asked what the different colors were, and I was told that the red blocks were allotments. I told them that their entire village was Indian Country. “Yeah,” they said, “we know.”

Had tribes been residing in Indian Country all along? Despite the years of negotiations about avoiding wardship or trusteeship over their lands, despite the arguments that they had in fact been terminated, and despite the series of cases about how Alaska’s tribes were so very different because of the status of their land, Alaska’s tribes had been living on allotments—restricted trust lands—for generations.<sup>158</sup> To be sure, not all tribes are in the same situation as the client described above, but many are. Although the precise number of allotments is unknown, more than 16,000 people applied for them under the Alaska Native Allotment Act of 1906.<sup>159</sup> Similarly, there are almost 4,000 village townsite lots, which are also restricted and only alienable with approval of the Secretary.<sup>160</sup> Conservative estimates are that there are between four and six million acres

---

been adversarially briefed and thus amounted to only dictum that was not entitled to recognition under *stare decisis*, or alternatively, (2) the court’s decision was “originally erroneous” and should thus be overruled. *Id.* at 339-40.

157. *Id.* at 340.

158. David S. Case, *Commentary on Sovereignty: The Other Alaska Native Claim*, 25 J. LAND RESOURCES & ENVTL. L. 149, 154 (2005).

159. Alaska Native Allotment Act of 1906, ch. 2469, 34 Stat. 197 (repealed 1971).

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

of this type of Indian Country in Alaska, much of it likely concentrated in villages.

Given the prevalence of allotted land, does it really matter that ANCSA revoked the reservations? To be sure, the tribes would have had more land over which to exercise jurisdiction and would not have had to endure forty years of uncertainty, so yes, it matters. Moreover, it certainly matters to those tribes whose villages may not consist of allotments today. It just does not matter in the way many thought it would because the state of the law shifted as well.

With the benefit of forty years of hindsight it is safe to say that the post-ANCSA predictions of termination or a complete severance of the trust relationship have not come to fruition. The loss of the majority of Indian Country did not result in a loss of jurisdiction for Alaska's tribes, but became part of the nationwide shift in the law from land-based to membership- and interest-based jurisdiction. As noted by a colleague at the Native American Rights Fund, tribal sovereignty "does not stand or fall on the existence of Indian Country."<sup>161</sup> This is because ANCSA only created corporations—it did not terminate the tribes or tribal sovereignty.

---

161. Heather Kendall-Miller, *ANCSA and Sovereignty Litigation*, 24 J. LAND RESOURCES & ENVTL. L. 465, 472 (2004).