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## Starting From Scratch: Reasserting "Indian Country" in Alaska by Placing Alaska Native Land Into Trust

William H. Holley

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# STARTING FROM SCRATCH: REASSERTING “INDIAN COUNTRY” IN ALASKA BY PLACING ALASKA NATIVE LAND INTO TRUST

*William H. Holley<sup>A</sup>*

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## ABSTRACT

The Alaska Native Claims Settlement Act (ANCSA) was enacted for the purpose of promoting economic development in remote Alaska Native villages. ANCSA has fallen short of this goal. ANCSA

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dissolved the trust relationship between Alaska Native tribes and the federal government by transferring former tribal lands to state-chartered, Native corporations. As a result, ANCSA severed Alaska Native tribal authority from tribal lands. Today, tribal governments in Alaska are without the resources necessary to address issues that threaten the survival of their communities.

Tribal governments throughout the lower 48 states have long used federal land-into-trust provisions to expand and consolidate former tribal lands through reacquisition. In Alaska, however, a longstanding policy excludes Alaska Natives from placing their lands into trust. Without a means of reasserting tribal authority, tribal governments in Alaska are left to rely on a failing state and federal apparatus to combat poverty, social disorder, emigration, and a changing climate.

A 2013 decision by a United States District Court has revived the proposition of establishing new Indian country in Alaska. In *Akiachak Native Community v. Salazar*,<sup>1</sup> the district court held that ANCSA does not provide an absolute bar for Alaska Natives wishing to place their lands into trust. This decision has prompted the Department of the Interior to remove the “Alaska Exception” from its land-into-trust regulations, thus opening up the possibility for tribal governments in Alaska to rebuild their former trust lands.

Despite the actions of the district court and the Interior Department, obstacles remain that limit the ability of tribal governments in Alaska to place their lands into trust. To overcome ANCSA’s limitations on trusteeship, Congress must amend ANCSA to make settlement lands eligible for trust status. Additionally, the Interior Department must overcome regulatory ambiguity by creating separate criteria to evaluate land acquisitions in Alaska. When these limitations are removed, tribal governments in Alaska will be able to expand their territorial reach and access crucial economic development tools tied to Indian country, allowing them to work in partnership with both the state and the federal government to meet the needs of Native communities.

#### INTRODUCTION

The survival of contemporary Indian communities largely hinges on preserving the concept of tribal self-determination. Tribal

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1. *Akiachak Native Cmty. v. Salazar (Akiachak III)*, 935 F. Supp. 2d 195 (D.D.C. 2013).

governments maintain an inherent authority to govern the "Indian country" they inhabit.<sup>2</sup> "Indian country" consists of land held in trust with the United States government for the benefit of Indian tribes.<sup>3</sup> The declaration of land as Indian country allows Native tribes to pursue their interests on their own terms. However, federal policies of termination and assimilation have eroded Indian country and placed tribal sovereignty under threat.

The General Allotment Act in 1887 was perhaps the greatest contributor to the decimation of Indian lands in the post-conquest era.<sup>4</sup> Lands within existing Indian reservations were deeded to individual Indians for the purposes of promoting private agricultural enterprise.<sup>5</sup> However, a majority of these lands were lost, creating a "checkerboard" of Native trust lands and non-Native fee lands on once contiguous reservations.<sup>6</sup> Between 1887 and 1934 the amount of land held in trust for Indian tribes fell from 138 million acres to 52 million acres.<sup>7</sup>

The "checkerboarding" of tribal lands during the allotment era made the task of governing Indian communities nearly impossible for tribal governments. The loss of former reservation lands prompted Congress to create a mechanism for tribes to reacquire and restore the trust status of former reservation land. This mechanism was included in Section 5 of the Indian Reorganization Act (IRA), authorizing the Secretary of the Interior to promulgate regulations to take Indian lands into trust.<sup>8</sup> Since the IRA was enacted, tribal governments have

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2. *Worcester v. Georgia*, 30 U.S. 1 (1831) (holding that the Cherokee nation was a "distinct, independent political community[y]" under which state law held no force).

3. 18 U.S.C. § 1151 (1949) ("[T]he term 'Indian country,' as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government . . . , (b) all dependent Indian communities within the borders of the United States whether the original or subsequently acquired territory thereof . . . , and (c) all Indian allotments, the Indian titles to which have not been extinguished . . . "). The definition of "Indian country" has been extended to include tribal lands which are taken into trust for the benefit of an Indian tribe. *Okla. Tax Comm'n v. Citizen Band of Potawatomi Tribe*, 498 U.S. 505, 511 (1991) (holding that land held in trust for an Indian tribe is Indian country).

4. 25 U.S.C.S. §§ 331-33 (LexisNexis 1887) (repealed 2000).

5. Lauren L. Fuller, *Alaska Native Claims Settlement Act: Analysis of the Protective Clauses of the Act Through a Comparison with the Dawes Act of 1887*, 4 AM. INDIAN L. REV. 269, 270 (1976).

6. Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 IDAHO L. REV. 519, 522 (2012).

7. *Id.*

8. Indian Reorganization Act of 1934, 25 U.S.C.A. § 461 (1934) ("The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands. . . within or without existing reservations, including trust or otherwise restricted allotments . . . for the purpose of providing lands for Indians."). Congress enacted the Alaska Native Reorganization Act (ANRA) in

had the ability to petition the Secretary to expand and consolidate tracts of fractured Indian country through reacquisition.<sup>9</sup>

Under the Department of the Interior's land-into-trust regulations, the Secretary takes legal title to unrestricted fee land in the name of the United States to hold in trust for the benefit of the tribe.<sup>10</sup> The trust relationship ensures that land placed into trust is not subject to loss through sale or default without the consent of the United States government.<sup>11</sup> Current regulations allow the Secretary of the Interior to use discretionary authority to take land into trust if the tribe already owns an interest in the land, or the acquisition is necessary to facilitate tribal self-determination, economic development, or housing needs.<sup>12</sup> Naturally, former reservation lands are likely to meet the Secretary's approval for trust status.

While tribal governments throughout the continental United States have used federal land-into-trust provisions for purposes of reacquisition, a longstanding policy exempts Alaska Natives from placing their lands into trust.<sup>13</sup> A 1971 settlement with the United States government resulted in the Alaska Native Claims Settlement Act (ANCSA), which eliminated all existing reservations in Alaska, except the Annette Island Reservation.<sup>14</sup> Without a trust land base, Alaska Native tribal governments operate as "sovereigns without territorial reach," lacking the authority to regulate their communities.<sup>15</sup> With severely limited powers of self-determination, tribal governments

1936, extending seven IRA provisions to Alaska Natives, including Section 5. Act of May 1, 1936, Stat. 1250 (codified at 25 U.S.C.A. § 477 (1936)).

9. For example, after receiving federal recognition in 1984, the Poarch Bands of Creek Indians in Alabama petitioned the Secretary of the Interior to take former tribal lands located outside of their reservation into trust receiving trust title to lands in Elmore County, Escambia County, and Montgomery County. See 49 Fed.Reg. 24083-01 (June 11, 1984); see also *Alabama v. PCI Gaming Auth. (PCI I)*, 15 F. Supp.3d 1161, 1167 (M.D. Ala. 2014).

10. See 25 C.F.R. § 151 (2014); see also *ALASKA FED'N OF NATIVES, ANALYSIS OF DECISION IN AKIACHAK NATIVE CMTY. v. SALAZAR* 3, 8 (2013), [http://www.nativefederation.org/wp-content/uploads/2013/04/Akiachak\\_Analysis\\_3-1.pdf](http://www.nativefederation.org/wp-content/uploads/2013/04/Akiachak_Analysis_3-1.pdf) (last visited Apr. 9, 2016).

11. Appellant's Opening Brief at 4, *Alaska v. Akiachak Native Cmty.* (No. 13-5360) Doc. No. 1535537 (D.C. filed Feb. 02, 2015), <http://law.alaska.gov/pdf/press/150824-Akiachak.pdf>.

12. Land Acquisition Policy, 25 C.F.R. § 151.3(a) (2016).

13. 25 C.F.R. § 151.1 (2016) ("These regulations do not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or its members"); Land Acquisitions in Alaska, 79 Fed. Reg. 76,888, 76,889 (Dec. 23, 2014) (to be codified at 25 C.F.R. pt. 151) (discussing the history of the Alaska Exception).

14. 43 U.S.C.A. §§ 1603, 1618(a) (2016).

15. *Alaska v. Native Vill. of Venetie Tribal Gov't (Venetie II)*, 522 U.S. 520, 526 (1998).

in Alaska play a secondary role to the state in governing rural Native communities.

This imbalance between state and tribal government power in Alaska is on the verge of a major shift. In 2013, a United States District Court ruled that Alaska Natives may no longer be forbidden from placing their lands into trust.<sup>16</sup> This decision provides an opportunity for Alaska Native tribes to establish new Indian country in Alaska. The availability of trust status will allow tribal governments to take steps toward the ultimate goal of full tribal self-determination. The financial benefits tied to trust land have the potential to empower tribal governments in Alaska, placing them in a better position to address issues of poverty, social disorder, emigration, and a changing climate that now threatens the survival of many Native communities.

This article will examine how trust land may be utilized to enhance the governing authority of Alaska Native tribal governments. Part I will examine the present Native land ownership scheme in Alaska, and delves into the legal trajectory that has created the current regime and its impact on Native communities in rural Alaska. Part II will demonstrate the importance of trust status as a means of preserving Native lands. Part III will turn to the significance of the U.S. District Court's decision in *Akiachak v. Salazar* and the relationship of that decision to the practical issues of placing land into trust in Alaska. Part IV will explore the potential of trust land to advance the concept of tribal self-determination in Alaska, highlighting current statutory and regulatory limitations that might prevent tribal governments from placing their lands into trust while proposing solutions that would remove those obstacles.

## I. THE PRESENT SCHEME OF ALASKA NATIVE LAND OWNERSHIP

Tribal sovereignty extends to both tribal land and the internal affairs of tribal members.<sup>17</sup> However, the territorial reach of tribal gov-

16. *Akiachak Native Cmty. v. Salazar*, 935 F. Supp. 2d. 195 (D.D.C. 2013).

17. The concept of "aboriginal title" (also called "Indian title") emerged from a trilogy of decisions by the United States Supreme Court establishing that the "doctrine of discovery" gave the United States superior title to Indian-occupied lands it obtained from the former colonial powers, and that Tribes were "domestic dependent nations" free from control by the states but subject to the power and control of the United States. See e.g., *Johnson v. M'Intosh*, 21 U.S. 543 (1823) (holding that the Piankeshaw Tribe lacked a transferrable property interest in land); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (holding that the Cherokee Nation could not have standing to sue in federal court as a "domestic dependent nation" under the protection of the United States); *Worcester v. Georgia*, 30 U.S. 1 (1831) (holding that the Cherokee nation was a "distinct, independent political community" under which state law held no force). The doctrine of aboriginal title applied to

ernments is limited only to the Indian country they inhabit. In Alaska, tribal self-governance is limited by a dearth of Indian country. With few exceptions, Alaska Native tribal governments are mostly landless. Federal policies have terminated nearly all Indian country in Alaska and prohibit the creation of any new Indian country within the state.<sup>18</sup> The results of these policies have been catastrophic for Alaska Natives. Tribal governments in Alaska can no longer respond to the needs of their communities, leaving those communities to rely on a failing state and federal apparatus to address issues that jeopardize the future of Native villages.

### A. *The Legal Trajectory of Native Land Ownership in Alaska*

The Alaska Native Claims Settlement Act dissolved the trust relationship between Alaska Native tribes and the federal government.<sup>19</sup> Under ANCSA, tribal lands were transferred to state-chartered Native corporations.<sup>20</sup> When Indian country in Alaska was converted to unrestricted fee land under ANCSA, tribal governments lost their ability to regulate that land. As "sovereigns without territo-

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Alaska Natives in much the same manner as it did to Indian Tribes in the Lower 48. The Treaty of Cession transferring Alaska to the United States from Russia stated that "uncivilized tribes" in Alaska were "subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country." 15 Stat. 539 Art. III (1867). Seventeen years later, the First Organic Act—which established the first civilian government in Alaska—guaranteed that Alaska Natives "shall not be disturbed in the possession of any lands actually in their use or occupation" and mandated that Congress decide terms under which non-Natives could acquire title to those lands. 23 Stat. 24 (1884). Similar to the system of aboriginal title created by *Johnson v. M'Intosh* and its progeny, Alaska Natives were deemed to have rights to use the land they occupied but not truly own it without Congressional action. See *Johnson*, 21 U.S. 543 (1823) (holding that Native Americans only held a right to peacefully occupy their land); see also *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279, 285 (1955) (holding that "mere possession" of land by Alaska Natives was not "ownership" absent specific recognition by Congress). The Statehood Act also failed to resolve the issue of aboriginal title in Alaska, asserting that the state did not have rights to Native lands but could select approximately 103 million acres of public lands that were "vacant, unappropriated, and unreserved at the time of their selection," but failing to include criteria needed to distinguish lands held by Alaska Natives from unclaimed lands. 72 Stat. 339, §§ 4, 6(b) (1958). This ambiguity resulted in conflicting land claims between the State and Native Tribes—prompting the Secretary of the Interior to put a freeze on all claims to land intended for State use. See Public Land Order 4582, 34 Fed. Reg. 1025 (Jan. 16, 1969) (imposing a land freeze on further patenting or approval of State applications for public lands in Alaska pending the settlement of Native Claims). The State sued Secretary of the Interior Steward Udall to set aside the land freeze, but the State's challenge was rejected by the Ninth Circuit. See *Alaska v. Udall*, 420 F.2d 938 (9th Cir. 1969).

18. See *infra* notes 24-25.

19. See *infra* note 31.

20. See *infra* note 27.

rial reach," tribal governments in Alaska lack the inherent powers of self-government afforded to reservation-based Indian tribes, severely circumscribing their ability to govern Alaska Native communities.<sup>21</sup>

### 1. The Alaska Native Claims Settlement Act

The issue of aboriginal title in Alaska remained unsettled until 1971.<sup>22</sup> That year, Congress effectively extinguished all claims of aboriginal title in Alaska by enacting the Alaska Native Claims Settlement Act (ANCSA).<sup>23</sup> In return, Alaska Natives received \$962.5 million in congressional appropriations and royalties from mineral leasing.<sup>24</sup> Under ANCSA, these assets were to be shared by twelve state-chartered private regional corporations.<sup>25</sup> These regional corpo-

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21. *Alaska ex rel. Yukon Flats Sch. Dist. v. Native Vill. of Venetie Tribal Gov't. (Venetie D)*, 101 F.3d 1286 (holding that the Alaska Native Claims Settlement Act did not terminate Indian Country in Alaska).

22. DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* 378 (2d ed. 2002). The 1867 Treaty of Cession, which conveyed control of Alaska to the United States from Russia, only provided that the "uncivilized" tribes of Alaska were "subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of [the United States]." 15 Stat. 539 Art. III. (1867). Later, the First Organic Act in 1884 determined that Alaska Natives were deemed to have "possession of any lands actually in their use or occupation or now claimed by them" in the absence of Congressional recognition of land ownership. 23 Stat. 24 § 8 (1884). Similar to the system of aboriginal title created by *Johnson v. McIntosh* and its progeny, Alaska Natives were deemed to have rights to use the land they occupied but not truly own it without Congressional action. See *Johnson v. McIntosh*, 21 U.S. 543 (1823) (holding that Native Americans only held a right to peacefully occupy their land). The Statehood Act also failed to resolve the issue of aboriginal title in Alaska, asserting that the state did not have rights to Native lands but could select approximately 103 million acres of public lands that were "vacant, unappropriated, and unreserved at the time of their selection." 72 Stat. 339, §6(b) (1958). The Act left open the question of what land was "vacant" and what land was subject to aboriginal title. In 1966, numerous protests filed by Alaska Native tribes with the Bureau of Land Management prompted the Secretary of the Interior to stop processing state 1 and selections and conveyances to the state. DEP'T OF THE INTERIOR, REPORT OF THE COMM. ON INDIAN TRUST ADMIN. AND REFORM 60 (2013), [https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/Report-of-the-Commission-on-Indian-Trust-Administration-and-Reform\\_FINAL\\_Approved-12-10-2013.pdf](https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/Report-of-the-Commission-on-Indian-Trust-Administration-and-Reform_FINAL_Approved-12-10-2013.pdf). Three years later, the United State Court of Appeals for the 9th Circuit placed a formal "land freeze" pending a resolution as to issues of aboriginal title in Alaska, *id.* The discovery of oil at Prudhoe Bay in 1968 ramped-up pressure on Congress to definitively settle all issues of aboriginal title in Alaska, *id.* The result was the enactment of ANCSA on December 18, 1971, *id.*; 43 U.S.C. §§ 1601-1624.

23. 43 U.S.C. § 1603(a) (1971) ("All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.")

24. See 43 U.S.C. § 1605(a); CASE & VOLUCK, *supra* note 22, at 171.

25. 43 U.S.C. §§ 1606, 1608 (1971). A thirteenth regional corporation was established for Alaska Natives who were not residing in Alaska at the time ANCSA was enacted. 43 U.S.C. § 1606(c) (1971).



rations were entitled to select approximately 40 million acres of unrestricted fee land.<sup>26</sup>

Alaska Natives alive on December 18, 1971 were given the option to receive 100 shares of stock in their respective regional corporations.<sup>27</sup> ANCSA also identified over 200 Native village corporations which would hold title to over 22 million acres of the surface estate while the regional corporations retained title to the subsurface.<sup>28</sup> Regional corporations received surface and subsurface title to an additional 16 million acres depending on the size of their respective claims.<sup>29</sup>

ANCSA was designed with an eye toward full economic self-sufficiency for Natives without creating "a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges."<sup>30</sup> This "new" model for Native economic development was intended to avoid the perceived shortcomings of the reservation system.<sup>31</sup> By terminating the trust relationship between Alaska Native tribes and the federal government, ANCSA's proponents envisioned that Native-owned corporations would extend the benefits of private enterprise to rural Alaska.<sup>32</sup> In theory, these privately owned lands would be put to more efficient use by corporations that would extract the mineral wealth from those lands.<sup>33</sup> Ultimately, ANCSA's proponents hoped that these Native corporations would provide previously unavailable economic opportunities to remote Alaska Native communities.<sup>34</sup>

While ANCSA left intact existing Alaskan Native tribal governments, it eliminated the federal trust land base over which those tribal governments could freely regulate.<sup>35</sup> Even with a lack of Indian country in Alaska, tribal self-government may still be extended in limited circumstances involving the domestic relations between tribal mem-

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26. CASE & VOLUCK, *supra* note 22, at 171-72.

27. 43 U.S.C. §1606(g)(1)(B)(ii) (1971).

28. CASE & VOLUCK, *supra* note 22, at 171-72.

29. *Id.*

30. 43 U.S.C. § 1601(b) (1971).

31. DONALD C. MITCHELL, TAKE MY LAND TAKE MY LIFE: THE STORY OF CONGRESS'S HISTORIC SETTLEMENT OF ALASKA NATIVE LAND CLAIMS, 1960-1971, 513 (University of Alaska Press, 2001).

32. *Id.*

33. *Id.*

34. *Id.*

35. *See Id.*

bers.<sup>36</sup> Tribal governments in Alaska continue to exist despite ANCSA, albeit in a much weakened state.

## 2. The Venetie Indian Country Decision

ANCSA has not gone without challenge. On at least one occasion, an Alaska Native tribe has asserted ANCSA lands were "Indian country" for the purposes of imposing a tribal tax, despite the fact that ANCSA abolished all previously existing Indian country in Alaska (with the exception of existing allotments to individual Alaska Natives and the Annette Island Reservation) by transferring former tribal lands in fee to state-chartered corporations.<sup>37</sup> Courts have consistently interpreted ANCSA's policy declaration as precluding the establishment of Indian county on ANCSA settlement lands.<sup>38</sup>

The most significant attempt to create new federal trust lands in Alaska involved the transfer of settlement lands under Section 19 of ANCSA.<sup>39</sup> Section 19 of ANCSA provided an opt-out provision for village corporations located on their former reservations, allowing these corporations to acquire the surface and subsurface estate of their former reservation lands provided that they forgo all other ANCSA benefits in settlement of their land claims.<sup>40</sup> Two village corporations

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36. See *John v. Baker*, 982 P.2d 738, 749 (Alaska 1999) (holding that an Alaska tribe had inherent sovereignty to hear a child custody case between tribal members in its courts, even in the absence of Indian country), *and id.* at 757-59 (discussing circumstances where Alaska tribes can assert jurisdiction over internal affairs in the absence of Indian country).

37. See *Alaska v. Native Vill. of Venetie Tribal Gov't (Venetie II)*, 522 U.S. 520 (1998); *see also* 43 U.S.C.S. § 1603 (1971); *see also* 43 U.S.C.S. § 1618(a) (1971) ("[T]he various reserves set aside by Executive or Secretarial Order for Native use or for administrative of Native affairs. . . are hereby revoked subject to any valid existing rights of non-Natives. This section shall not apply to the Annette Island Reserve . . .").

38. See *Alyeska Pipeline Co. v. Kluti Kaah Native Vill. of Copper Ctr.*, 101 F.3d 610 (9th Cir. 1996) (holding that ANCSA precludes a tribal tax on non-natives doing business on lands owned by an ANCSA corporation). *See also Venetie II*, 522 U.S. 520 (1998) (holding that lands appropriated under ANCSA are not "Indian country" for the purposes of imposing a tribal tax).

39. *See Id.*

40. 43 U.S.C.S. § 1618(b) (1971) ("[A]ny Village Corporation . . . may elect within two years to acquire title to the surface and subsurface estates in any reserve set aside for the use or benefit of its stockholders or members prior to . . . December 18, 1971 . . . In such event, the Secretary shall convey the land to the Village Corporations . . . subject to valid existing rights . . . , and the Village Corporation shall not be eligible for any other land selections under this act or to any distribution of Regional Corporations funds . . . , and the enrolled residents of the Village Corporation shall not be eligible to receive Regional Corporation stock."). Four village corporations located on vast former reservations took advantage of Section 19, claiming a combined total of nearly 4 million acres. ALASKA FED'N OF NATIVES, *supra* note 10, at 5. In exercising Section 19 of ANCSA, the former St. Lawrence Island reservation was claimed by the corporations of Gambell and Savoonga, the former Elim

exercised Section 19 to take title to 1.8 million acres of the former Chandalar Reservation, which they then transferred to the Venetie Tribal Government.<sup>41</sup> Venetie then asserted that its lands were "Indian country" for the purposes of imposing a tribal tax on state and non-tribal entities conducting business operations on its lands, because the "desperately needed health, social, welfare, and economic programs" provided by the federal government were evidence of the requisite federal superintendence needed to classify its tribal lands as a de facto reservation.<sup>42</sup>

The United States Supreme Court considered the question of whether ANCSA lands could be set aside as Indian country in *Alaska v. Native Village of Venetie Tribal Government*.<sup>43</sup> The Court noted that Venetie merely received land "without any restraints on alienation or significant use restrictions" from a state-chartered corporation.<sup>44</sup> Because ANCSA's policy declaration was designed to avoid "any permanently racially defined institutions, rights, privileges, or obligations" in Alaska, the Court held that Venetie's lands could not be set aside as Indian country.<sup>45</sup>

The Supreme Court's decision in *Venetie* affirmed the belief that ANCSA severed Alaska Native tribal authority from former tribal trust lands. While ANCSA left intact the inherent sovereignty of Alaska Native tribal governments, the *Venetie* decision left tribal governments without a means to exert control over their lands and resources. Without the prospect of establishing new Indian country, tribal governments in Alaska are forced to exist without any significant means to regulate their lands.

### B. *The Practical Impact of ANCSA*

The proponents of ANCSA entrusted the task of introducing economic development in remote Alaska Native communities to state-

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reservation was claimed by Elim corporation, the former Chandalar reservation was claimed by the Venetie and Arctic Village corporations, and the former Tetlin reservation was claimed by the Tetlin corporation, *id.* at 5 n.3.

41. *Venetie II*, 522 U.S. at 524.

42. *Id.* For land to be considered a dependent Indian community, the land (1) must have been set aside by the federal government for use as Indian lands; and (2) be under federal supervision, *id.* at 527.

43. *Alaska v. Native Vill. of Venetie Tribal Gov't (Venetie II)*, 522 U.S. 520, 532-34 (1998).

44. *CASE & VOLUCK, supra* note 22, at 426 (citing *Venetie II*, 522 U.S. at 526).

45. *Venetie II*, 522 U.S. at 526 (citing 43 U.S.C. §1601(b) (1971)).

chartered Native corporations.<sup>46</sup> In practice, ANCSA corporations have failed to adequately provide for economic development in Alaska Native villages.<sup>47</sup> Few opportunities for employment exist in far-flung Native communities, causing young Alaska Natives to emigrate to urban centers in ever increasing numbers.<sup>48</sup> This trend threatens to deplete the population of rural villages to the point where they are no longer viable.<sup>49</sup>

Poverty in rural communities has been accompanied by social disorder. Crime rates in rural Alaska—especially rates of domestic violence—far exceed national averages.<sup>50</sup> Natives in rural Alaska also suffer from elevated rates of alcoholism and suicide.<sup>51</sup> While the state of Alaska is primarily responsible for policing Native communities, funding constraints severely limit its ability to do so.<sup>52</sup> Similarly, the state's efforts to make its courts accessible in remote Native villages has proven to be insufficient.<sup>53</sup>

### 1. Poverty in Rural Alaska

The inability of ANCSA corporations to provide young Alaska Natives with a means of financial stability threatens the long-term survival of rural Native communities. By their very design, ANCSA corporations are limited in their ability to provide for economic development in rural Alaska.<sup>54</sup> Under ANCSA, Alaska Natives born after 1971 are not entitled to stock in their respective Native corporations until they inherit shares of that stock from a deceased relative.<sup>55</sup> Thus, young Alaska Natives are not afforded the financial windfall given to those alive at the time ANCSA was enacted.

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46. See 43 U.S.C. § 1606 (1971).

47. See MITCHELL, *supra* note 31, at 504, 536.

48. *Id.* at 536.

49. *Id.*

50. See TROY A. EID ET AL., INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE U.S. 41 (2013), [http://www.aisc.ucla.edu/iloc/report/files/A\\_Roadmap\\_For\\_Making\\_Native\\_America\\_Safer-Full.pdf](http://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf).

51. See *id.* at 43.

52. See *id.* at 35, 39. See also Letter from Alaska Att'y Gen. Michael C. Geraghty, to U.S. Assoc. Att'y Gen. Tony West (Jun. 26, 2014), <http://www.turtletalk.files.wordpress.com/2014/07/6-26-14-letter-from-alaska-attorney-general-to-associate-attorney-general.pdf> [hereinafter Geraghty Letter].

53. See EID ET AL., *supra* note 50 at 39.

54. MITCHELL *supra* note 31, at 504, 536.

55. *Id.* at 504. As of 2001, more than half of all Alaska Natives have been born after December 18, 1971, *id.*

A lack of permanent employment in rural Alaska has prompted Alaska Natives to seek employment outside of their home villages in ever increasing numbers.<sup>56</sup> While ANCSA corporations were designed promote Native economic development in remote Alaska, there has actually been little job creation by either ANCSA corporations or the private sector.<sup>57</sup> Alaska Native villages are often located in road-less areas where "private sector economic activity [does not] make[] sense."<sup>58</sup> Many rural Native villages continue to rely on a subsistence economy; taking advantage of locally available resources for food, clothing, and other necessities.<sup>59</sup> Indeed, the economic environment in remote Native villages is not conducive for those wishing "[to] participate in the wage economy that produces the goods and services that village residents, particularly young Natives, now want to consume."<sup>60</sup>

The state has sought to address continuing issues of poverty in rural Alaska by funding programs aimed at job creation, providing welfare payments to Native households, subsidizing housing construction and energy consumption, financing television and radio, and improving village infrastructure.<sup>61</sup> However, declines in North Slope oil production have forced the state to cut many of the programs on which these villages depend.<sup>62</sup>

## 2. Policing Rural Alaska

The sheer immensity of Alaska, coupled with its lack of infrastructure, "[pose] unique complexities and high costs" for delivering

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56. *Id.* at 536. "Between 1980 and 1998, the Native population of Anchorage . . . increased from 8,953 to 20,531, and thirty-three percent of the 102,000 Alaska Natives who today reside in Alaska live in one of Alaska's principal urban areas." *Id.*

57. *Id.* at 534. As of 1999, regional corporations and the business in which they owned interests collectively employed 14,000 persons, but only approximately 2,000 were shareholders, *id.*

58. *Id.* at 535.

59. MITCHELL *supra* note 31, at 535.

60. *Id.*

61. *Id.* at 537-38 ("Congress and the legislature . . . have mailed money directly to village households in the form of Social Security payments, Aid to Families with Dependent Children payments, food stamps, Alaska Longevity Bonus Program payments, and Alaska Permanent Fund Dividend checks, as well as indirectly by . . . [improving] village airstrips, clean water and waste removal systems, and the like.").

62. *Id.* at 539 ("[I]n 1999, the legislature eliminated the Department of Community and Regional Affairs, the agency that administered programs that funnel money to villages. The legislature also reduced funding for the program that subsidizes electricity in villages, reduced funding for the program that finances village municipal governments, prohibited the governor from designating 'disaster areas' on the ground of economic distress, and instructed state agencies to cut welfare and other benefits to otherwise eligible individuals, rather than requesting the legislature to supplement agency budgets when funds run out.").

services necessary to promote public safety in rural Alaska.<sup>63</sup> "The State covers 586,412 square miles, an area greater than Texas, California, and Montana combined" with only 1.26 inhabitants per-square mile.<sup>64</sup> Issues of notification, distance, transportation, and inclement weather often hamper state efforts to provide access to law enforcement in villages that are inaccessible by road.<sup>65</sup> As a result, rural Alaskan communities face disproportionately "high rates of domestic abuse, sexual violence, suicide, alcohol abuse and resulting death, and child maltreatment."<sup>66</sup>

A 2013 report by the Indian Law and Order Commission (ILOC) noted that "[p]roblems with safety in Tribal communities . . . are systematically [worse] in Alaska" than in the rest of the country.<sup>67</sup> While Alaska Natives represent only nineteen percent of the state's total population, they make up thirty-six percent of the general population in the Alaska State Department of Corrections.<sup>68</sup> Alaska Natives account for nearly half of all victims of rape reported in the state.<sup>69</sup> Over a one year period, over fifty percent of the 4,499 reports of maltreatment substantiated by Alaska's child protective services and over sixty percent of the 769 children removed from their homes were Alaska Natives.<sup>70</sup> The suicide rate among Alaska Natives is now almost four times the U.S. general population rate, and is at least six times the national average in some parts of the state.<sup>71</sup> Alaska Natives also cope with alcohol abuse at rates far higher than other communities in the United States, with more than ninety-five percent of crimes in rural Alaska being attributed to alcohol.<sup>72</sup>

Alaska State Troopers are primarily responsible for law enforcement in remote Alaskan communities.<sup>73</sup> However, the Alaska Department of Public Safety can only maintain between 1.0 and 1.4

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63. Geraghty Letter, *supra* note 52.

64. EID ET AL., *supra* note 50 at 35.

65. *Id.* at 39 ("ADPS provides for only 1.0-1.4 field officers per million acres. Since ADPS's 370 officers cannot serve on a 24/7 basis, the actual ratio of officers to territory is much lower.") *Id.*

66. Land Acquisitions in the State of Alaska, 25 C.F.R. § 151.3(2)(b) (2014).

67. EID ET AL., *supra* note 50, at 35.

68. *Id.* at 41.

69. *Id.* Alaska Native women represent forty-seven percent of reported rape victims. *Id.* In tribal villages and Native communities, women have reported rates of domestic violence up to ten times higher than in the rest of the United States and physical assault victimization rates up to twelve times higher. *Id.*

70. *Id.* at 43.

71. *Id.*

72. EID ET AL., *supra* note 50, at 43.

73. *Id.* at 39.

Troopers for every million acres in Alaska.<sup>74</sup> According to the ILOC, the State of Alaska's centralized approach to governing remote Native villages "has led to a dramatic under-provision of criminal justice services in rural and Native regions of the State."<sup>75</sup> This conclusion is aided by the fact that at least seventy-five remote Alaska communities lack any law enforcement presence at all.<sup>76</sup>

ANCSA corporations and state authorities have attempted to address the dearth of law enforcement in rural Alaska by commissioning Village Public Safety Officers (VPSOs). VPSOs operate under the supervision of the Alaska State troopers.<sup>77</sup> Tribal Police officers employed by Tribes also serve a few Native communities.<sup>78</sup> However, the role of VPSOs and Tribal Police is restricted "to basic law enforcement and emergency first response."<sup>79</sup> VPSOs and Tribal Police do not carry firearms and are only available to communities with the available resources and housing to support them.<sup>80</sup>

### 3. Access to Courts in Rural Alaska

The Alaska court system maintains jurisdiction over remote Native communities, with each of its four judicial districts serving rural Alaska.<sup>81</sup> However, funding constraints frequently force these courts to "delegate responsibility to magistrates to serve low population, remote communities."<sup>82</sup> These regular, but infrequent, magisterial visits are "often . . . the sole face of the State court in Native villages."<sup>83</sup> The governments of federally recognized Alaska Native tribes are entitled to establish tribal courts with narrow jurisdiction.<sup>84</sup> Tribal court jurisdiction in Alaska does not derive from tribal land, but from a tribe's inherent sovereignty to govern the internal domestic affairs of tribal members.<sup>85</sup> Thus, tribal jurisdiction in Alaska can only

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74. *Id.*

75. *Id.* at 43.

76. *Id.* at 39.

77. EID ET AL., *supra* note 50, at 39.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. EID ET AL., *supra* note 50, at 39.

83. *Id.*

84. *Id.*

85. *John v. Baker*, 982 P.2d 738, 751 (holding that internal functions involving tribal membership and domestic affairs lie within the inherent sovereign powers retained by the tribe).

exist "[where] the tribe needs jurisdiction over a given context to secure tribal self-governance."<sup>86</sup>

As one of five states included under Public Law 280,<sup>87</sup> Alaska state courts have concurrent jurisdiction over matters where tribal courts exercise jurisdiction.<sup>88</sup> In general, state courts in Alaska grant comity to tribal courts in cases of civil disputes between tribal members including child welfare and customary adoption, and misdemeanors such as public drunkenness, disorderly conduct, and minor juvenile offenses.<sup>89</sup> While seventy-eight tribes in Alaska established tribal courts as of 2012, "[n]ot all Alaska Tribal courts are fulltime or even operated with paid staff."<sup>90</sup> Funding constraints force tribal courts to concede cases that would otherwise be within their jurisdiction to the state courts for adjudication.

## II. THE IMPORTANCE OF TRUST LAND AS A MEANS OF PRESERVING NATIVE COMMUNITIES

Tribes throughout the continental United States have utilized the land-into-trust process to expand and consolidate their tracts of Indian country through reacquisition.<sup>91</sup> Policies of allotment and termination left former contiguous reservations as "checkerboards" of

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86. *Id.* at 756 (citing *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987)).

87. Act of Aug. 15, 1953, 67 Stat. 588 (now codified as amended in various provisions of 18 U.S.C.S. § 1162, 25 U.S.C.S. § 1321, and 28 U.S.C.S. § 1360) (transferring federal law enforcement authority within certain tribal nations to state governments in California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska).

88. *Bryan v. Itasca Cnty.*, 426 U.S. 373, 387 (1976) (noting that Congress did not intend for P.L. 280 to undermine tribal authority).

89. Geraghty Letter, *supra* note 52 ("[Alaska] is actively collaborating with tribes to execute Civil Diversion agreements which will allow state law enforcement to refer various misdemeanor crimes, including domestic violence, to tribal courts for civil disposition."). *Id.*

90. EID ET AL., *supra* note 50 at 39. Alaska state law further hinders the efficacy of tribal courts. See Letter from Assoc. Att'y Gen. Tony West to Alaska Att'y Gen. Michael C. Geraghty (June 26, 2014), <https://www.washingtonpost.com/apps/g/page/national/letter-from-associate-attorney-general-tony-west/1230/> [hereinafter West Letter]. State law provides that Troopers can enforce only those domestic-violence protection orders issued by tribal courts that have been first "registered" or "filed" in State court, *id.* This means that, absent any exigent circumstances, "[t]roopers ordinarily will neither formally recognize [a tribal court protection] order nor enforce it by making an arrest" if that order is not first formally filed in State court, *id.* This policy runs contrary to federal law "which requires enforcement of Tribal-court protection orders regardless of whether those orders previously were registered or filed in State Court," *id.*

91. Larry Schumacher, *Solving a Land-Control Dilemma*, CTR. FOR RURAL POL'Y AND DEV., [http://www.ruralmn.org/rmj/rmj\\_winter2014/rmj2014q3-land-control-dilemma/](http://www.ruralmn.org/rmj/rmj_winter2014/rmj2014q3-land-control-dilemma/) (last visited Mar. 25, 2016).



fee lands and trust lands.<sup>92</sup> Tribes can address the issue of “check-boarding” by acquiring fee lands both within and outside their reservations and converting those lands to trust status.<sup>93</sup> Once land is placed into trust, it cannot be lost or condemned without the partnership of the United States government.<sup>94</sup> This means that placing fee lands into trust “allows tribes to protect tribal homelands so that they are not subject to loss through sale and default.”<sup>95</sup> Trust land is considered “Indian country” under federal law, meaning that tribal courts not only have jurisdiction to resolve civil matters among tribal members, but may prosecute crimes committed by tribal members on trust lands.<sup>96</sup>

Trust lands are “free from state and local taxation,” lessening the tax burden on individuals and businesses operating on tribal trust lands.<sup>97</sup> Trust lands also create new means for funding tribal governments. On trust lands, tribal governments can obtain tax income to support the exercise of essential governmental functions.<sup>98</sup> Trust lands are “free from state and local taxation,” lessening the tax burden on individuals and businesses operating on tribal trust lands. Trust status also confers the ability to access economic development tools that are tied to Indian country. A trust land base allows tribes “to benefit from federal housing programs and other federal grant programs which are . . . available only on land that has been placed in trust,” as well as “[f]ederal programs that are currently restricted to trust land, such as . . . environmental and cultural resource protection.”<sup>99</sup>

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92. Pommersheim, *supra* note 6.

93. Schumacher, *supra* note 91.

94. See Appellant’s Opening Brief, *supra* note 11 at 4.

95. *Id.* Even on fee land, tribes can invoke sovereign immunity from suit. See *Nome Eskimo Cmty v. Babbitt*, 67 F.3d 813 (9th Cir.1995) (stating that section 16 of IRA allows tribe to resist payment of delinquent property taxes on fee land).

96. See Appellant’s Opening Brief, *supra* note 11. This broad authority is limited by P.L 280, which provides that courts in five states, including Alaska, “generally have jurisdiction over most crimes and some civil matters occurring in Indian Country,” *id.* Thus, some state courts retain concurrent jurisdiction with tribal courts in matters occurring on trust land, *id.*

97. *Id.*

98. OFFICE OF THE ASSISTANT SEC’Y – INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR ANNOUNCES FINAL RULE FOR LAND INTO TRUST FOR ALASKA NATIVE TRIBES, U.S. DEPARTMENT OF THE INTERIOR (Dec. 18, 2014), <http://www.bia.gov/cs/groups/public/documents/text/idc1-028734.pdf>.

99. *Id.* (stating “Taking land into trust for a tribal nation makes the land eligible for certain federal programs that further tribal sovereignty and economic development, related to agriculture, energy, infrastructure, health and housing programs.”); See Appellant’s Opening Brief, *supra* note 11 (explaining that a trust land base “allows tribes to utilize economic development tools like those available under the Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act and program funds that are tied to

## III. AKIACHAK NATIVE COMMUNITY V. SALAZAR

Alaska Native tribal governments are presently excluded from placing their lands into trust. In *Venetie*, the Supreme Court implied that tribal governments in Alaska were "sovereigns without territorial reach" that "lack sovereignty over either [their] lands or resources."<sup>100</sup> Thus, *Venetie* left tribal governments in Alaska without the option of establishing new trust lands. However, the decision of a United States District Court in *Akiachak Native Community v. Salazar* suggests that new Indian country may be established in Alaska under reasoning that circumvents *Venetie*.<sup>101</sup>

*Akiachak* initially started as a petition to the Department of the Interior (DOI) that requested the 'Alaska Exception' be removed from its land-into-trust regulations.<sup>102</sup> After the DOI denied their request, four Alaska Native tribes and one individual Alaska Native sued the Secretary of the Interior, contending that the exclusion of Alaska Natives—and only Alaska Natives—from the land-into-trust regulations violated a federal statute nullifying "any regulation or administrative decision that discriminates among federally recognized . . . [t]ribes relative to the privileges and immunities available to them by virtue of their status as Indian tribes."<sup>103</sup> Because the plaintiff tribes in *Akiachak* enjoyed both congressional and executive recognition, their sovereign status remained a political question outside the purview of judicial examination.<sup>104</sup> This principle of federal Indian law placed the plaintiff tribes in *Akiachak* within the scope of the federal statute.

The four plaintiff tribes and one individual plaintiff challenged the validity of the Alaska Exception by asserting that ANCSA did not

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tribal lands such as energy development grants administered by [the] Office of Indian Energy and Economic Development." For example, the Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act, which is designed "[p]rovide a path to home ownership for individual tribal members and [protect] against predatory lending and foreclosures" only applies to land that has been placed into trust).

100. Mara Kimmel, *Fate Control and Human Rights: The Policies and Practices of Local Governance in America's Arctic*, 31 ALASKA L. REV. 179, 180 (2014) (citing *Alaska ex rel. Yukon Flats Sch. Dist. v. Venetie Tribal Gov't*, 101 F.3d 1286, 1303 (9th Cir. 1996)).

101. See *Akiachak Native Cmty. v. Salazar (Akiachak III)*, 935 F. Supp. 2d 195 (D.D.C. 2013).

102. ALASKA FED'N OF NATIVES, *supra* note 10, at 1.

103. *Id.* (citing 25 U.S.C.A. § 476(g) (2004)).

104. *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (holding that—so long as a recognized community is distinctly Indian—the question of whether that community should be treated as an Indian tribe is a political question). In 1993, the Interior Department included 227 Alaska tribes to its list of federally recognized tribes. 58 Fed. Reg. 54,364, 54,368 (Oct. 21, 1993). Congress ratified the publication of the list in 1994, and has republished the list annually. 25 U.S.C.A. §§ 479a, 479a-1 (1994).

revoke the authority of the Secretary of the Interior to take land into trust in Alaska under Section 5 of the IRA.<sup>105</sup> Despite language in ANCSA which forbids the creation of “a reservation system or lengthy wardship,” the statutory text never explicitly repealed the Secretary’s authority to take land-into-trust in Alaska.<sup>106</sup> This discrepancy was noted twice in official memoranda by solicitors for the DOI.<sup>107</sup> However, in both of these instances the DOI failed to amend its land-into-trust regulations.<sup>108</sup>

The district court agreed with the plaintiffs in *Akiachak* that the authority to take Alaska land into trust “[had] not been explicitly repealed” by ANCSA.<sup>109</sup> Congress cannot extinguish any aspect of tribal sovereignty unless it does so “clearly and without equivocation.”<sup>110</sup> Extinguishment of aboriginal rights to land cannot be lightly implied, and all doubts or statutory ambiguities are to be construed in favor of Native Americans.<sup>111</sup> Thus, the district court refused to entertain the state’s contention that ANCSA “implicitly repealed” the Secretary of the Interior’s authority to take land into trust.<sup>112</sup>

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105. See *Akiachak III*, 935 F.Supp.2d at 19.

106. See *Id.* at 199.

107. In a 1978 memorandum, a former Associate Solicitor of Indian Affairs relied upon the policy declaration enumerated in ANCSA to conclude that “Congress intended permanently to remove from trust status all Native land in Alaska except allotments and the Annette Indian Reserve.” Memorandum from Thomas W. Fredericks, Assoc. Solicitor for Indian Affairs, to Assistant Secretary for Indian Affairs (Sept. 15, 1978). The Associate Solicitor further recommended that it would be an abuse of discretion for the Secretary to take land into trust in Alaska, *id.* This opinion was reflected when a new land-into-trust regulation was passed in 1980. Land Acquisitions, 45 Fed. Reg. 62,034 (Sept. 18, 1980). The regulation included an exception excluding “the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community,” *id.* A 2001 memorandum by the Solicitor for the Department of Indian Affairs reached the opposite conclusion, bringing into “serious question as to whether the authority to take land into trust in Alaska still exists.” John Leshy, Solicitor, Dept. of the Interior at 1 (Jan. 16, 2001). Despite the fact that the 2001 memorandum rescinded the 1979 memorandum, the Interior Department issued an amended land-into-trust regulation continuing the ban on the acquisition of land in Alaska. Acquisition of Title to Land in Trust, 66 Fed. Reg. 3452, 3454 (Jan. 16, 2001). The amended rule was designed to remain in place for three years “during which time the Department [would] consider legal and policy issues involved in determining whether the Department ought to remove the prohibition on taking Alaska lands into trust,” *id.* However, the amended rule was withdrawn later that year without comment, leaving the original Alaska Exception in place. Acquisition of Title to Land in Trust, 66 Fed. Reg. 56,608, 56,609 (Nov. 9, 2001).

108. *Id.*

109. *Akiachak Native Cmty. v. Salazar (Akiachak III)*, 935 F. Supp. 2d 195, 203 (D.D.C. 2013).

110. CASE & VOLUCK, *supra* note 22 at 373 (citing *Menominee Tribe v. United States*, 391 U.S. 404 (1968)).

111. *Id.* at 374.

112. *Akiachak III*, 935 F. Supp. 2d at 207.

A fundamental principle of statutory interpretation dictates that all existing laws must be kept in effect as long as they are not irreconcilable.<sup>113</sup> While the district court posited that "[t]here may be a tension between ANCSA's elimination of most trust property in Alaska and the Secretary's authority to create new trust land," it was possible for both the settlement and the Secretary's authority to take lands into trust to exist simultaneously.<sup>114</sup>

Unlike *Venetie*, none of the lands at issue in *Akiachak* involved lands that were conveyed to a Native corporation under ANCSA.<sup>115</sup> This would prove to be a critical distinction as *Venetie* merely held that ANCSA lands could not constitute Indian country.<sup>116</sup> The district court implied in *Akiachak* that Alaska Natives could create new Indian country in Alaska by placing non-ANCSA lands into trust, yet the Supreme Court in *Venetie* refused to hold similarly.<sup>117</sup> While ANCSA's policy declaration did prevent the creation of trusteeship within the settlement itself, the district court noted that ANCSA did not necessarily "[prohibit] the creation of any trusteeship outside of the settlement."<sup>118</sup> The district court granted summary judgement to the plaintiffs in *Akiachak*, but declined to rule on the appropriate remedy pending a decision on whether the Alaska Exception was "deprived of 'force or effect,' or whether some larger portion of the land-into-trust regulation must fall."<sup>119</sup> Six months later, the district court concluded that severing the Alaska Exception was necessary to ensure that the "privileges

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113. *Id.* at 206 (citing *Branch v. Smith*, 538 U.S. 254, 273 (2003)).

114. *Id.* at 207.

115. ALASKA FED'N OF NATIVES, *supra* note 11 at 1 (referencing Complaint at 3-4, *Akiachak Native Cmty. v. U.S. Dep't of the Interior*, No. 1:06cv00969, 2006 WL 1781209, at \*3-4 (D.D.C. May 24, 2006)). Two of the plaintiff tribes—the *Akiachak Native Community* and the *Native Village of Chalkyitsik*—sought trust status for unclaimed Alaska Native Townsite lots conveyed to them through a Townsite Trustee, *id.* at 1 n.1. Another plaintiff tribe—the *Chilkoot Indian Association*—sought trust status for 73 acres of former mission land conveyed to it by the Presbyterian Church, *id.* The *Tuluksak Native Community*, also a plaintiff tribe, sought trust status for a former Moravian Mission Reserve conveyed to it by the City of Tuluksak, *id.* An individual plaintiff, Alice Kavairlook (an enrolled member of the *Native Village of Barrow*), sought to have an Alaska Native Townsite Lot held in unrestricted title, placed into trust, *id.*

116. *See Alaska v. Native Vill. of Venetie Tribal Gov't (Venetie II)*, 522 U.S. 520 (1998).

117. *See Akiachak Native Cmty. v. Salazar (Akiachak III)*, 935 F. Supp. 2d 195 (D.D.C. 2013); *but see Venetie II*, 522 U.S. 520 (1998).

118. *Akiachak Native Cmty. v. Salazar (Akiachak III)*, 935 F. Supp. 2d 195, 207 (D.D.C. 2013).

119. *Id.* at 211.

and immunities accorded [to] Indian tribes in the Lower 48 [were] no longer withheld from Indian tribes in Alaska.<sup>120</sup>

After *Akiachak*, the Secretary of the Interior voluntarily withdrew the land-into-trust regulation containing the Alaska Exception and proposed an amended land-into-trust regulation to reflect the district court's assertion that the DOI no longer discriminate among classes of Indian tribes.<sup>121</sup> Despite the timing of the new proposal, the DOI insisted that the rule was based upon its own independent conclusions and a report by the Indian Law and Order Commission recommending that "Alaska Native tribes [be allowed] to put tribally owned fee simple land into trust."<sup>122</sup> The final rule adopted by the DOI stated that the removal of the Alaska Exception "does not seek to contravene the settlement codified in ANCSA . . . [but] merely confirms the Department's existing statutory authority" under Section 5 of the IRA.<sup>123</sup>

After the district court's decision in *Akiachak*, the State of Alaska sought an injunction preventing the Secretary of the Interior from taking land into trust in Alaska.<sup>124</sup> Despite "Alaska's low likelihood of success on the merits of [its] appeal,"<sup>125</sup> the district court found that both "public interest" and the "potential harm suffered by [the state] weighed [in favor of] granting Alaska's motion."<sup>126</sup> The injunction curtails the Secretary's authority to take land into trust, but it does not interfere with the Secretary's ability to process applications for land acquisitions in Alaska.<sup>127</sup>

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120. Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76,888, 76,890 (Dec. 23, 2014) (to be codified at 25 C.F.R. pt. 151).

121. *Id.* at 76, 891.

122. *Id.* at 76, 889 (citing U.S. Dep't of the Interior, Report of the Commission on Indian Trust Administration and Reform, at 1 (Dec. 10, 2013)).

123. *Id.* at 76, 890.

124. *Akiachak Native Cmty. v. Jewell (Akiachak IV)*, 995 F. Supp. 2d 7, 8 (D.D.C. 2014).

125. *Id.* at 14.

126. *Id.* at 17-18. The state of Alaska contended in its appeal that the availability of trust lands in Alaska would potentially create 229 sovereign entities. James Brooks, *Attorneys Don't Buy State's Argument on Land Trust Lawsuit*, ALASKA J. OF COM., Sept. 30, 2015, <http://www.alaskajournal.com/2015-09-30/attorneys-don%E2%80%99t-buy-state%E2%80%99s-argument-land-trust-lawsuit#.Vwvx8fkrLIU>; see also Brief for Appellant, *Alaska v. Akiachak Native Cmty.* No. 13-5360, 2015 WL 5027532, (D.C. Cir. Aug. 24, 2015). The state also contended that it would be harmed by the removal of trust lands from its tax rolls, *id.*

127. *Akiachak IV*, 995 F. Supp. 2d at 15-16.

#### IV. THE SIGNIFICANCE OF TRUST LAND FOR TRIBAL SELF-DETERMINATION AND PRACTICAL LIVELIHOOD IN ALASKA

Tribal governments are often the only sovereign entities present in their home villages, placing them in the best position "to assess the needs of their own communities, as well as identify workable solutions to address those needs."<sup>128</sup> Tribal governments in Alaska can utilize newly established trust lands to expand their territorial reach. Broadening the jurisdiction of the tribal courts allows tribal governments to act in partnership with both the state and federal governments in efforts to combat issues of poverty and social disorder in rural Alaska.

Trust status confers all of the benefits and protections tied to Indian country that have been previously unavailable to Alaska Natives.<sup>129</sup> By placing lands into trust, tribal governments are able to shield tribal lands from state and local taxation, leaving tribal governments free to generate revenues with their own tribal tax scheme.<sup>130</sup> The presence of trust land also makes available federal grants that could further bolster the role of tribal governments in developing Native economies in rural Alaska.<sup>131</sup> Tribal governments can utilize these new sources of funding to provide for tribal police, tribal courts, village infrastructure, and other essential services.

The potential to access new sources of income via federal grants and tribal taxation may allow some rural Alaskan villages to combat the effects of a changing climate.<sup>132</sup> Erosion and flooding has forced an

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128. Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76,888, 76,889 (to be codified at 25 C.F.R. pt. 151).

129. Mark Begich, *The Case for Tribal Lands in Trust: Giving Back to Rural Alaska Communities*, ALASKA BUS. MONTHLY (Sept. 1, 2015), <http://www.akbizmag.com/Alaska-Business-Monthly/September-2015/The-Case-for-Tribal-Lands-in-Trust/>.

130. *Tribal Governance; Taxation*, NAT'L CONGRESS OF AM. INDIANS, <http://www.ncai.org/policy-issues/tribal-governance/taxation>. (last visited June 30, 2016).

131. Chris Edwards, *Indian Lands, Indian Subsidies, and the Bureau of Indian Affairs*, DOWNSIZING THE FEDERAL GOVERNMENT, (Feb. 1, 2012), <http://www.downsizinggovernment.org/interior/indian-lands-indian-subsidies>.

132. As of 2003, four Alaska Native villages were identified as being in "imminent danger" of flooding and erosion." U.S. GOV'T ACCOUNTABILITY OFFICE, ALASKA NATIVE VILLAGES: MOST ARE AFFECTED BY FLOODING AND EROSION BUT FEW QUALIFY FOR FEDERAL ASSISTANCE, GAO-04-142 at 29 (Dec. 2003), <http://www.gao.gov/new.items/d04142.pdf>. Since 2003, the Army Corps of Engineers (Army Corps) and the U.S. Government Accountability Office (GAO) has identified an additional 27 Alaska Native villages that "are imminently threatened by flooding and erosion." U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, ALASKA NATIVE VILLAGES: LIMITED PROGRESS HAS BEEN MADE ON RELOCATING VILLAGES THREATENED BY FLOODING AND EROSION, GAO-09-551 at 12 (June 2009), <http://www.gao.gov/products/GAO-09-551>.

increasing number of Native communities in Alaska to consider relocating to higher ground.<sup>133</sup> However, tribal governments in these communities presently lack the necessary federal and state funding to make such relocation possible.<sup>134</sup>

### A. *Removing Limitations on Trusteeship*

On its face, the proposition that Alaska Native tribal governments may now place their lands into trust bodes well for the future Alaska Native tribal self-determination. However, the present regime of Native land ownership in Alaska clearly limits the ability of tribal governments to place their lands into trust.<sup>135</sup> Under *Venetie*, Alaska Native tribal governments are barred from placing any ANCSA lands into trust.<sup>136</sup> This limitation is significant, as the vast majority of Native lands in Alaska were appropriated under ANCSA and now owned by ANCSA corporations.<sup>137</sup>

*Venetie* does not act as a complete bar prohibiting tribal governments from placing their lands into trust. Consistent with *Akiachak*, Alaska Native tribal governments may place non-ANCSA fee lands into trust. Many tribal governments already possess lands that are eligible for trust status.<sup>138</sup> These lands include: Alaska Native townsites conveyed to a tribal government from a townsite trustee; existing restricted and unrestricted allotments; and non-ANCSA fee lands

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133. At least 12 of the 31 villages identified by both the Army Corps and GAO “have decided to relocate. . . or to explore relocation options.” *Id.*

134. Cost estimates for relocating Alaska Native villages most threatened by flooding and coastal erosion range from \$80 million to \$200 million, *Id.* at 29, 32. However, “[f]ederal programs to assist threatened villages. . . to protect and relocate them are limited and unavailable to some villages,” *id.* For example, federal law does not recognize 64 Alaska Native villages in Alaska’s unorganized borough as “eligible units of general local government” necessary to qualify for affordable housing and relocation assistance from the Department of Housing and Urban Development’s Community Development Block Grant program, *id.* Many Alaska Native villages also fail to qualify for assistance under Federal Emergency Management Agency disaster mitigation and recovery programs because “(1) most villages lack approved migration plans, (2) few federal disaster declarations have been made for flooding and erosion programs, and (3) many villages cannot participate in the National Flood Insurance Program,” *id.* at 22.

135. See *infra* notes 136.

136. See 43 U.S.C. §1601(b) (1971).

137. See *supra* notes 24-30 and accompanying text.

138. See Lisa Jaeger, *Land into Federal Trust for Alaska Tribes*, TANANA CHIEFS CONFERENCE (Sept. 2014), <http://www.ttapnttc.com/nttc2014/wp-content/uploads/2014/10/Jaeger-Land-into-Trust-Lisa-Jaeger-Sept-2014.ppt>. The city of Grayling has transferred 65 of 107 available parcels on its townsite to the Grayling tribal government. Before its removal by a flood in 2009, the Eagle Village tribal government had purchased 24 of 48 available parcels on its townsite. *Id.*

conveyed to tribal governments from church entities or other private owners.<sup>139</sup>

The current land-into-trust regulations also limit the ability of Alaska Native tribal governments to place their lands into trust. The Interior Department's criteria for evaluating whether tribal land may be placed into trust hinges on that land's proximity to the tribe's Indian country.<sup>140</sup> As a result, these regulations do not clearly apply to Alaska Native tribes; the vast majority of which do not occupy Indian country at all. This regulatory ambiguity could create a significant obstacle for Alaska Native tribal governments wishing to place their lands into trust.

### 1. Amending ANCSA to Allow Settlement Lands to be Taken into Trust

Native corporations and tribal governments have cooperated in the past in attempts to create new Indian Country in Alaska. On the former Chandalar reservation, the Native Village of Venetie Tribal Government now owns title to 1.8 million acres of land conveyed to it by two ANCSA village corporations.<sup>141</sup> However, both *Venetie* and *Akiachak* make clear that this land, and other lands appropriated under ANCSA, are ineligible for trust status.

An amendment to ANCSA making settlement lands eligible for trust status could pave the way for the creation of large contiguous tracts of Indian country in Alaska.<sup>142</sup> For the Venetie Tribal Govern-

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139. See Alaska Native Townsite Act of 1926, Pub. L. No. 69-280, 44 Stat. 629 (repealed 1976) (allowing townsite trustees to issue restricted title to Alaska Natives for lots surveyed under federal townsite laws); see also Alaska Native Allotment Act, Pub. L. No. 59-171, 34 Stat. 197 (repealed 1971) (allowing Alaska Natives to acquire restricted title to as much as 160 acres of land that they used and occupied). Both the Alaska Native Allotment Act and the Alaska Native Townsite Act "placed restrictions on the title conveyed so that lands could not be alienated or taxed . . . until certain federally prescribed conditions were met." CASE & VOLUCK, *supra* note 22, at 113; see also *United States v. Atl. Richfield Co.*, 435 F.Supp. 1009, 1015 (D. Alaska 1977) ("Native townsite residents received a restricted deed, inalienable except by permission of the townsite trustee.") Alaska Native Townsites and Alaska Native Allotments were unaffected by ANCSA. 43 U.S.C. § 1601(b) (1971) ("[T]he settlement should be accomplished rapidly . . . without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska" (emphasis added)). Some 10,000 Alaska Native Allotments remain, as well as a few small parcels of trust land in southeast Alaska. CASE & VOLUCK, *supra* note 22, at 387.

140. See *infra* note 145.

141. See *Alaska v. Native Vill. of Venetie Tribal Gov't (Venetie II)*, 522 U.S. 520 (1998).

142. This would tribal governments who took advantage of section 19 of ANCSA to place former reservation lands acquired from village corporations into trust status. See *supra* notes 40-43.



ment, such an amendment would allow the tribe to convert all 1.8 million acres of its fee lands to trust status – creating a *de facto* reservation. However, this proposed amendment would have only a limited effect for the vast majority of Alaska Native tribal governments, many of whom do not possess any lands at all.

While an amendment making ANCSA lands eligible for trust status removes a significant bar for tribal governments in Alaska, such an amendment is unlikely to prompt ANCSA corporations to place their lands into trust. As profit-motivated entities, Native corporations may be reluctant to place corporate assets into trust because of the higher regulatory burden that accompanies trust land status.<sup>143</sup> Trust status brings with it restrictions on alienation, “limit[ing] flexibility in business dealings if a mortgage or sale of the land is desired.”<sup>144</sup>

## 2. Creating Separate Criteria for Alaska Native Acquisitions

While the DOI may have eliminated the Alaska Exception from its land-into-trust regulations, it has not made clear how those regulations might apply to Alaska Natives. The current regulatory scheme distinguishes “on-reservation” from “off-reservation” acquisitions.<sup>145</sup> Lands already located within Indian country receive less departmental scrutiny than lands located outside reservation boundaries.<sup>146</sup> When off-reservation land is acquired for business purposes, the tribe must provide a plan specifying the anticipated economic benefits of the proposed use of that land.<sup>147</sup> However, the Secretary is entitled to give greater scrutiny to the tribe’s justifications, depending on how far the land in question is from the reservation.<sup>148</sup>

After *Akiachak*, the Interior Department clarified that land acquisitions in Alaska were to be examined under the “off-reservation”

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143. ALASKA FED’N OF NATIVES, *supra* note 10, at 4. Any conveyance of trust land, including leases for business and agricultural purposes, must be approved by the federal government. Trust land status also limits oil and gas leasing on trust land without Secretarial approval, *id.*

144. *Id.*

145. Land Acquisitions, 25 C.F.R. §§ 151.10, 151.11 (2016).

146. *Compare* 25 C.F.R. § 151.10 (2016) (explaining that for on-reservation acquisitions, the Secretary will consider the need for the land, the purposes for which it will be used, the impact on the state of removing the land from its tax rolls, and jurisdictional issues that may arise), *with* 25 C.F.R. § 151.11 (2016) (explaining that for off-reservation acquisitions, all of the considerations for on-reservation acquisitions apply in addition to two additional considerations: (1) the location of the land relative to the tribe’s reservation, with increased scrutiny the further away from the tribe’s Indian country; and (2) the anticipated economic benefits of the proposed use).

147. 25 C.F.R. § 151.11 (2016).

148. *Id.*

criteria.<sup>149</sup> However, it is uncertain how the current regulatory guidelines will apply to Alaska Native tribes, nearly all of whom do not occupy a reservation. This ambiguity could be easily overcome by enacting a separate set of criteria applicable only to Alaska Native tribes. The proximity of lands from Native villages could be used in lieu of the current reservation-based criteria for evaluating a tribal government's application for trust status. Under such a scheme, lands located within or adjacent to a Native village would receive less departmental scrutiny while lands located farther from a Native village would receive more departmental scrutiny.

#### CONCLUSION

ANCSA's regime of land ownership, as well as the current land into trust regulations, significantly limit the ability of Alaska Natives to place their lands into trust. Unless Congress amends ANCSA to make settlement lands available for trust status and the Interior Department eliminates regulatory ambiguity as it relates to land acquisitions Alaska, Alaska Native tribal governments are unlikely to regain their inherent powers of self-governance to the extent afforded to Indian tribes in the lower 48 states. Despite these limitations, the mere availability of trust land in Alaska is a crucial first step to enhancing Alaska Native self-determination. Tribal governments in Alaska may now have an opportunity to empower themselves while expanding their territorial reach, allowing them to work in partnership with state and federal authorities to better ensure the survival of the Alaska Native way of life.

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149. Land Acquisitions in Alaska, 76 Fed. Reg. 894-95 (Dec. 23, 2014) (to be codified at 25 C.F.R. pt. 151).