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# Alaskan Native Indian Villages: The Question of Sovereign Rights

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# COMMENTS

# ALASKAN NATIVE INDIAN VILLAGES: THE QUESTION OF SOVEREIGN RIGHTS

## I. INTRODUCTION

The judiciary of Alaska is confronted with independent Native Indian groups demanding enforcement of claims to sovereign rights.[1] Despite numerous opportunities afforded in recent cases, the Alaskan courts have been unwilling to rule directly on this issue.[2]

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1. Any analysis of Indian law requires an understanding of specific terms.

The term "Indian" has no uniform definition. It varies according to the various tribes and/or statutes involved. Examples include the Indian Reorganization Act (IRA) which defines "Indian" to mean a person of one-half or more Indian blood, but does not require standing in a recognized tribe. 25 U.S.C. § 479 (1982). The Indian Self-Determination Assistance Act, in comparison, requires tribal membership. Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450b(a) (1982).

"Indian country" is an Indian reservation, dependent Indian community, or allotment. 18 U.S.C. § 1151 (1982). "Indian reservation" has no statutory definition. The modern meaning refers to lands set aside under federal protection for the residence of tribal Indians. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 34 (1982).

"Indian sovereignty" refers to powers of self-government retained by Indian tribes and neither explicitly limited by treaty or federal statute nor inherently inconsistent with the federal-tribe relationship. Thus, Indian sovereignty paradoxically depends upon the federal government to grant it recognition. Because Indian sovereignty can be limited by treaty or federal statute, it is characterized as "limited sovereignty." Indian sovereignty is also characterized as "inherent" and "retained" because it consists of the original and remaining powers of self-government. *Id.* at 235.

The most important principle in American Indian law is "inherent sovereignty." This concept provides that Indian tribes retain inherent powers of self-government that are not explicitly limited by the federal government. *See generally* F. COHEN, *supra*, at 232-41.

2. Native Village of Stevens v. Alaska Management & Planning, No. S-1345 (Alaska May 20, 1988) (case recently decided by the Alaskan Supreme Court in which an Alaskan Native village claims immunity from suit in an action brought against it by a private party for breach of contract); Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977) (the court declared the Metlakata Indian Community, a group of Indians originally from Canada, to possess tribal status); Cogo v. Central Council of Tlingit & Haida Indians, 465 F. Supp. 1286 (D. Alaska 1979) (court held that the Central Council of the Tlingit and Haida Indians, an organization

These Alaskan Native Indian groups believe they are entitled to the identical rights, privileges, and protections acknowledged to exist for the benefit of Native entities throughout the remaining forty-nine states.[3] The primary conflict concerns whether the Alaskan Native groups should be given the same standing afforded "recognized" Indian tribes throughout the United States. The precise problem arises due to difficulty in interpreting the *intent* of federal Indian legislation with regard to the Alaskan Native groups. These aboriginal peoples, organized under the Indian Reorganization Act (IRA),[4] continue in their attempts to assert authority over various areas of tribal and Indian society.[5]

An example of a customary claim of sovereign authority asserted by these Alaskan Native groups is found in a case recently ruled upon by the Alaskan Supreme Court.[6] In this case, a small Native village, incorporated under the IRA, entered into a binding contract with a private consulting/engineering firm. The contract called for the private firm to organize and assist in the implementation of electric, sewer, and water projects for the village. These projects were supported by both federal and state funds.[7]

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designated by federal law to administer judgment funds awarded to those Indians, was immune from suit, but was an organization specifically provided for by federal statute and not a group of Alaskan Natives residing in a single village); Johnson v. Chilkat Indian Village, 457 F. Supp. 384 (D. Alaska 1978) (the parties stipulated that the Chilkat Indian village council possessed sovereign immunity from suit).

3. Cases recognizing immunity from suit include: Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977); United States v. United States Fidelity & Guar. Co., 309 U.S. 506 (1940); Turner v. United States, 248 U.S. 354 (1919); Chemehuevi Indian Tribe v. California State Bd. of Equalization, 757 F.2d 1047 (9th Cir.), *rev'd*, 474 U.S. 9 (1985). This principle of tribal immunity from suit has long been held to apply to suits brought to enforce contracts against tribes. *See* Thebo v. Choctaw Tribe of Indians, 66 F. 372 (8th Cir. 1895); American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374 (8th Cir. 1985); Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982).

4. 25 U.S.C. § 473a (1982). The Indian Reorganization (Wheeler-Howard) Act, ch. 576, § 1, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (1982)) [hereinafter IRA], was an attempt to encourage economic development, self-determination, cultural plurality, and a revival of tribalism. "The IRA was intended to provide a mechanism for the tribe as a governmental unit to interact with and adapt to modern society, rather than to force the assimilation of individual Indians." F. COHEN, *supra* note 1, at 147.

5. *See supra* note 1. *See also* Indian Self-Determination Act which declares that "[t]he Indian people will never surrender their desire to control their relationship both among themselves and with non-Indian government, organizations, and persons." 25 U.S.C. § 450(a)(2) (1976).

6. *Native Village of Stevens*, No. S-1345 (Alaska 1988).

7. The state and federal levels provide funds for the improvement of water and electric systems in the outlying areas of Alaska. These funds are often distributed on the basis of a Native group's need, and also require recognition as an IRA entity.

After substantial performance of the contract by the private consulting firm the agreement was unilaterally terminated by the Native village. The private firm sought judgment against the Native village for breach of contractual obligations. The village answered the allegations by claiming immunity from suit due to lack of jurisdiction of the Alaskan courts. The Native village council claimed its own independent jurisdiction over any actions brought against it as a legal entity. The village's defense is an attempt to utilize the established precedent recognizing that tribal governments maintain many of the attributes and privileges of self-government. Among these rights is the power to adjudicate claims brought against the Native group as a legal entity and, in many instances, the right to claim complete immunity from suit.[8]

This issue of whether Alaskan Native groups are entitled to sovereign rights[9] remains alive and unsettled. This comment examines the intent of the United States Congress regarding whether sovereignty should be granted to these particular groups. Specifically, this is a review of governmental legislation in the Indian sovereign rights area, with a discussion of its application to the Native groups of Alaska.

Section II of this comment explores the traditional "tribe-Indian country" analysis[10] which has been used consistently by jurisdictions other than Alaska for determining Native groups' claims of sovereign authority. Section III presents the issue of sovereign rights[11] with regard to Alaskan Native Indian villages. Section IV examines whether application of the traditional "tribe-Indian country" test to Alaskan Native Indian villages leads to full and fair enforcement of legislative intent and correspondingly provides for consistent judicial results.

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8. *See supra* notes 1 and 3 and accompanying text.

9. Sovereign rights refer to the power of a recognized Native entity to enforce laws and adjudicate claims within its territory. *See supra* note 1 and accompanying text. *See infra* notes 11-13 and accompanying text.

10. The "tribe-Indian country" test is the traditional two-part analysis that has been applied by jurisdictions nationwide in determining whether a Native Indian group, village, or the like, should be granted sovereign recognition. The fundamental premise is that a Native group, vying for sovereign recognition, must establish *both* (1) status as a federally recognized tribe, and (2) occupation of some type of "Indian country."

11. The dictionary defines "sovereign" as "one that exercises supreme authority within a limited sphere." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1128 (1983 ed.). For the purposes of this comment, the word "sovereignty" refers to the "inherent political independence" to which some Native groups are entitled, and the term "exercise of sovereignty" refers to various powers that a sovereign may attempt to exercise. F. COHEN, *supra* note 1, at 246-57.

## II. THE "TRIBE-INDIAN COUNTRY" ANALYSIS

For decades groups of Native Americans have attempted to assert their right to sovereign powers. Since the invasion and domination of Alaska by white settlers, Indian groups have continued to claim authority to govern particular areas of their lives. Generally, these groups have claimed the power to adjudicate their own internal disputes and to regulate the affairs of those who claim membership in their group.[12]

Additionally, many Native groups have commonly claimed immunity from all outside actions.[13] This claim of complete immunity is roughly analogous to that of an independent nation's government claiming immunity from suit.[14] The basic maxim is that formal, recognized, governmental entities are to be considered sovereign and thereby afforded all the rights, powers and protections of such a position.[15]

The United States Congress has addressed the claims of these Indian groups in a variety of instances.[16] Numerous statutes and other legislative doctrines manifest governmental recognition that sovereign rights, powers and protections do exist.[17] Through this legislation, and its corresponding case law, criteria have been developed for determining a Native group's standing to claim such privileges. Those groups of Natives who have met the established requirements have been formally recognized as possessing sovereignty, and in turn, all of its accompanying benefits and burdens.[18]

The federal government acknowledges that certain Native groups have met the standards necessary for recognition as a formal

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12. Native tribes retain sovereign authority over their own peoples only to an extent which does not interfere with the United States' exercise of its own sovereign powers. This subjects the preexisting Native authority to a political state referred to as "suzerainty." Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), *overruled,* Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973). *See also* United States v. Wheeler, 435 U.S. 313 (1978).

13. "The immunity bars any suits against the tribe, but bars suits against individual members of the governing body only when an adverse judgment would interfere with the governing council of the tribe." Myers, *In Defense of Tribal Sovereign Immunity,* 95 HARV. L. REV. 1058, 1059-60 (1982). *See also supra* note 3 and accompanying text.

14. *See generally* F. COHEN, *supra* note 1, at ch. 4.

15. The maxim is best exemplified by the following passage:

> Perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather "inherent powers of a limited sovereignty which has never been extinguished."

F. COHEN, *supra* note 1, at 231 (quoting *Wheeler,* 435 U.S. at 322-23).

16. *See infra* notes 62-63 and accompanying text.

17. *See infra* notes 62-63 and accompanying text.

18. *See infra* notes 37-39 and accompanying text.

sovereign entity.[19] Even with formal recognition established, it is important to note that a Native group's sovereign powers are usually limited in both scope and authority.[20]

To be granted even limited authority, a Native group must first fulfill certain fundamental criteria. The statutes and case law to be examined herein cite three formal criteria recognized in securing a claim of sovereign power: (a) the group of Natives must be recognized as a "tribe"[21] under the Indian Reorganization Act (IRA); (b) the recognized tribe must occupy "Indian country;"[22] and (c) any sovereign powers which a tribe's council may possess can be limited in scope and authority.[23]

Native Indian groups which can establish themselves as a "tribe" and also establish their domain upon "Indian country" have fulfilled the necessary elements for recognition as a sovereign entity. The following is an examination of these requirements.

## A. *Recognition as a Tribe Under the IRA*

It is well documented that particular groups of Natives have been federally recognized as "tribes."[24] These tribes were formally acknowledged under the original definition of the IRA (Wheeler-

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19. *See infra* notes 37-39 and accompanying text.

20. *See* F. COHEN, *supra* note 1, at 277-78, 350.

21. "Indian tribe" does not have a uniform legal definition. The Bureau of Indian Affairs, however, relies upon the definition noted in Montoya v. United States, 180 U.S. 261 (1901). "By a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory. . . ." F. COHEN, *supra* note 1, at 266.

Federal law generally focuses on tribes and their members, rather than on Indians as a racial minority. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974) (employment establishment preference statute is constitutionally applicable only to tribal members). Some exceptions do exist however, such as the criminal jurisdiction statute for Indian country, which uses the term "Indian" without specifically limiting it to tribe members. *See* 18 U.S.C. §§ 1152-1153 (1982).

A general definition was laid out in *Montoya*, 180 U.S. at 266. "By a 'tribe' we understand a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory. . . ." *Id.*

22. For a definition of "Indian country," see *supra* note 1.

23. Different rules apply to tribal jurisdictions than to traditional government jurisdictions. On reservations the presumption is that tribal governments have exclusive jurisdiction except where Congress has not prohibited state regulation and it does not interfere with tribal government. Outside reservations, state jurisdiction applies to Native people to the same extent as to non-Natives. F. COHEN, *supra* note 1, at ch. 6. *See also Mescalero Apache Tribe*, 411 U.S. at 148-49; South Naknek v. Bristol Bay Borough, 466 F. Supp. 870, 877-78 (D. Alaska 1979).

24. *See infra* notes 37-39 and accompanying text.

Howard Act).[25] These groups were defined as tribes in light of their ability to distinguish themselves from mere gatherings, societies, or voluntary associations.[26] Tribes are political bodies which maintain and possess all the functions and powers of a formal government.[27] Conversely, Native groups that fail to establish themselves as tribes are not afforded the right to establish their own independent governments.

Recognition as a tribe is directly linked to recognition as a political body. Four factors are analyzed in determining the validity of a Native group's claim as an autonomous political entity: (1) whether the Native group represents an historical tribe;[28] (2) whether the Native group satisfies the legal definitions of a tribe;[29] (3) whether the Native group satisfies the case law definitions of a tribe;[30] and (4) whether the Native group has been recognized by the IRA as a tribe.[31]

### 1. *Historical Legitimacy*

The initial factor in determining a Native group's tribal status is the establishment of historical legitimacy. The year in which a Native group's governing council was created is the prime element to consider in the analysis of a tribe's historical legitimacy. The federal government requires formal documentation substantiating a Native group's claim as an historical tribe.[32]

The Indian Reorganization Act (IRA) came into effect in 1934. A tribal council created after 1934 merely to fulfill the conditions of the IRA, in hope of securing formal recognition as a tribe, lacks

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25. *See infra* note 37 and accompanying text.

26. UNITED STATES SOLICITOR FOR THE DEPARTMENT OF THE INTERIOR, FEDERAL INDIAN LAW 462 (1958).

27. *Id.*

28. *See infra* text accompanying notes 32-43.

29. *See infra* text accompanying notes 44-47.

30. *See infra* text accompanying notes 48-51.

31. *See infra* text accompanying notes 52-57.

32. Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 25 C.F.R. § 83 (1988).

> § 54.7 Form and Content of Petition:
>
> (a) A statement of facts establishing that the petitioner has been identified from *historical times* until the present on a substantially continuous basis, as "American Indian" or "aboriginal" . . . .
>
> . . . .
>
> (c) A statement of facts which establishes that the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present.

*Id.* (emphasis added).

historical foundation. The lack of an early governing council is usually considered substantial evidence that no continuous and controlling governmental authority existed throughout the Native group's history.[33]

When no acknowledged political authority has been recognized by the Native entity's members, the group is deemed to have existed without structured organization.[34] In situations where no formal laws, guidelines or restrictions were maintained by established governing bodies, research indicates that the groups were organized into villages, not into tribes.[35] No federal recognition as a tribe has been afforded where want of an historical self-governing unit is apparent.[36]

The federal government has acknowledged that certain Native groups possess historical legitimacy. These groups have been acknowledged in a published list of officially recognized tribes.[37] The initial list was published in 1978 when the Secretary of the Interior announced the definition that Native groups must satisfy to be recognized in the Federal Register as a recognized tribe.[38]

Congress further distinguished historical tribes from non-tribes by adding a supplemental list in 1982.[39] This new portion of the

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33. F. COHEN, *supra* note 1, at 14, 350-52.

34. F. COHEN, *supra* note 1, at 14, 350-52.

35. F. COHEN, *supra* note 1, at 14, 350-52.

36. Congress may, however, in an exercise of its constitutional authority over Indians, delegate certain specific governmental roles to Indian entities regardless of tribal status. For example, under the Indian Child Welfare Act, an Alaskan Native village may exercise limited authority over child welfare cases after it receives approval of its adjudication system from the Secretary of the Interior. 25 U.S.C. §§ 1901-1903, 1911 (1982). However, those powers delegated by statute apply only to the extent necessary to carry out the initiative in question and do not amount to recognized sovereign authority. To do this the group need not be a tribe nor occupy Indian country.

37. The Secretary of the Interior's "List of Recognized Tribes," 47 Fed. Reg. 53,130 (1982). The Secretary of the Interior has a *duty* to publish this "recognized list of tribes." 25 C.F.R. § 83.6(b) (1986).

The actual list is too lengthy to provide in whole. The list includes all officially recognized tribes across the entire United States.

38. The original section 16 definition for recognition as a "tribe" is:

> *Any Indian tribe, or tribes*, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. . . .

25 U.S.C. § 476 (1982) (emphasis added).

39. The 1982 amendment to the IRA provided application of the statute to Alaska. It provides: "[T]hat groups of Indians in Alaska not recognized prior to May 1, 1936, as *bands*

statute provides for a broader definition of recognized Native entities, thereby establishing a separate list of groups recognized solely as IRA entities, as compared to tribal entities.[40]

Those groups that qualify for IRA status by the supplemental definition have been allowed to receive federal benefits and support. However, recognition as full sovereign tribal entities was not afforded.[41] By providing for two separate lists the federal government appears to have expressed its intent to differentiate between mere IRA status under the supplemental definition and complete tribal status under the original definition.

Courts throughout the lower 48 states and Hawaii[42] have adopted this "IRA status" versus "tribal status" differentiation. Only those Native entities recognized as possessing historical legitimacy can be considered for tribal status. An IRA council, organized in modern times to secure recognition (in order to receive federal support), has failed to meet the criteria necessary for formal tribal status. A Native group cannot acquire historical legitimacy by simply organizing an IRA council.[43] Unbroken authority must have existed throughout the evolution of the Indian group.

### 2. *Legal Requirements*

The second factor to analyze in determining formal tribal status is the fulfillment of the legal requirements. The legal requirements for formal recognition as a tribe are statutorily defined by federal legislation.[44] These requirements have been thoroughly adopted by subsequent case law.[45] The criteria required for legal recognition in-

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*or tribes, but having a 'common bond' of occupation, association, or residence* within a well defined neighborhood, community, or rural district, may organize to adopt constitutions. . . ." (emphasis added) 25 U.S.C. § 473a (1982).

40. *Id.*

41. The supplemental definition calls only for a "common bond" uniting the Natives. This is a significant expansion of the original definition which required "tribes or bands" of Indians. The end result is that IRA status is recognized for "all the Natives in an area organized solely for business purposes. Still others included persons with a common bond of occupation, such as cooperatives composed of fishermen in an area." F. COHEN, *supra* note 1, at 751.

42. The term "lower 48 states and Hawaii" is a phrase utilized by the Alaskan people to denote the remainder of the United States.

43. IRA status is not the equivalent of tribal status. Alaskan aboriginal people were loyal, historically, to the family or clan. This is not equivalent to political loyalty which is a necessity for tribal status, and not necessary for IRA status. There existed no village-wide structure or government to which individuals paid allegiance. *See* K. OBERG, THE SOCIAL ECONOMY OF THE TLINGIT INDIANS 39, 48-49, 61 (1973).

44. 25 C.F.R. § 83.7 (1982).

45. United States v. Mazurie, 419 U.S. 544 (1975); Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 583-84 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979); Board of Equaliza-

clude: (a) a private, voluntary organization; (b) a continuing, organized government; (c) leadership which is followed by a majority of the people; and (d) composition of a specific Native people, not a blend of differing Native groups into one entity.[46]

These four requirements for legal recognition are combined with the historical legitimacy requirement. Relying upon both qualifications, courts may then consider whether a contemporary association of related Indians has been formed or if the group claiming tribal status has exercised political influence over its members as an "autonomous entity throughout history until the present."[47]

### 3. *Case Law Requirements*

The legal requirements developed by Congress are not an exclusive list of criteria. The judiciary, through developing case law, has recognized five additional factors to assist in determining a Native Indian group's tribal status. These factors include: (1) whether the group has treaty relations with the United States; (2) whether the group has been formally denominated a "tribe" by an act of Congress or an executive order; (3) whether the group has been treated as a tribe by other established tribes; (4) whether the group has exercised continuous political authority over its members; and (5) whether the groups members share collective rights in tribal lands and/or funds.[48]

Case law recognizes that tribal status may be obtained by meeting the defined federal standards.[49] However, these standards are rigid and tend to be slanted toward the historical legitimacy requirements.[50] The judiciary has developed these five additional factors in an attempt to assist courts in alleviating the bias.

It is important to note that federal statutes have allowed certain

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tion v. Alaska Native Brotherhood & Sisterhood, 666 P.2d 1015 (Alaska 1983).

46. *See supra* note 44.

47. Price v. Hawaii, 764 F.2d 623, 627 (9th Cir. 1985), *cert. denied*, Hou Hawaiians v. Hawaii, 474 U.S. 1055 (1986) (footnote omitted) (quoting 25 C.F.R. § 83.7(c) (1982)). For a complete discussion, see *infra* notes 48-49 and accompanying text.

48. *Price*, 764 F.2d at 623. All five factors were developed and examined in *Price*.

49. The *Price* court determined that a Native group could also obtain tribal status by meeting the criteria set forth by the Secretary of the Interior at 25 C.F.R. § 83.7 (1978) (formerly 25 C.F.R. § 52). *Price*, 764 F.2d at 626-27. *See supra* notes 44-47 and accompanying text.

50. 25 C.F.R. § 83.7(a) (1988) (requiring historical continuity, not formation in modern times); 25 C.F.R. § 83.7(c) (1988) (requiring political authority over members throughout history until the present).

Native groups an exemption from the federal standards.[51] Therefore, some Native groups on the aforementioned Secretary of the Interior's "list of recognized entities" may be exempt from the federal requirements. However, these qualified exemptions do not grant such groups sovereign powers. These exemptions are merely loopholes whereby recognized groups of Natives can maintain a position similar to an IRA entity and thereby become eligible to receive federal Indian benefits. The exempt groups are not recognized tribes and, therefore, maintain no claim of sovereign authority.

Furthermore, the requirements regarding this "benefits" list are not as stringent as those implemented for tribal recognition. The two lists were intended to be considered separately. Holding that the two distinct definitions have identical meaning would be an inappropriate interpretation of legislative intent. There is no apparent reason for two separate definitions if Congress intended them to be considered identical.

The combination of the historical legitimacy requirement, legal requirements, and case law requirements provide courts with a solid foundation upon which to base decisions regarding tribal status. Courts which have thoroughly addressed the tribal sovereignty issue have used these three guidelines to simplify the sovereign rights question.

### 4. *IRA Status*

The last factor to consider in determining tribal status is the establishment of IRA status by a Native group. The original definition for IRA status is set forth in section 16 of the Act.[52] Section 16 restricts those Native groups that may adopt constitutions for incorporation to those who fulfill the definition. The definition provides that only those "bands or tribes" of Indians living on reservations shall be recognized as tribes and afforded applicable sovereign powers.[53] These are the only entities whose incorporation under the IRA denotes approval of tribal status.[54]

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51. 25 C.F.R. § 83.7(b) (1988) provides:

> Evidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area.

*Id.*

52. *See supra* note 38.

53. *See supra* note 38.

54. *See supra* notes 37-41.

Once recognized under the original IRA provisions, a group is formally and officially established as a tribe. As previously noted, an amendment to the original provision was adopted in 1982.[55] Recognition by the subsequent amendment to the Act does not embellish the same high standard as the original provision. The amendment calls only for a "common bond"[56] which, in some manner, ties the group together. The amendment provides that recognition is all that is needed to receive government funds constituting economic assistance. Tribal status does not need to be established to receive the funds.

An IRA council formed under the amendment to the act does not satisfy the same definition as provided in the original provision. Only those entities which are actual "bands or tribes" can meet the original IRA provision required for tribal status.

Native groups which are able to satisfy all four of the above criteria have been afforded formal recognition as a tribe. This recognition fulfills the initial requirement for asserting sovereign authority.[57]

### B. *The Indian Country Requirement*

Recognition of a Native group as a tribe does not automatically afford that entity the exercise of sovereign powers and privileges. A recognized tribal entity must also occupy "Indian country" to be acknowledged as possessing sovereign rights.[58]

Case law has established an "on-reservation/off-reservation" distinction as an aid to analyzing the "Indian country" requirement.[59] Native tribes situated upon reservation lands have been recognized as possessing rights and privileges common to a sovereign entity.[60] Tribes located upon off-reservation lands lack such authority.[61]

Adhering to this distinction, the federal government has demonstrated its intent to differentiate between "on" and "off" reservation Native tribes by consistently refusing to recognize governmental

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55. *See supra* note 39.

56. *See supra* note 41.

57. For a definition of "Indian country," see *supra* note 1.

58. *See supra* notes 1 and 10.

59. Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962); Organized Village of Kake v. Egan, 369 U.S. 60 (1962).

60. *Kake*, 369 U.S. at 65.

61. *Id.*

powers in off-reservation Native entities.[62] Modern state legislative enactments have also manifested this intent.[63] All reservations are established through federal authority. Thus, the federal government has the power to restrict or deny sovereign rights to any Native group.[64]

For Native groups existing outside reservation lands, attempts to assert sovereign authority have been difficult. Many Native entities situated upon off-reservation lands have attempted to fulfill the "Indian country" requirement through a loophole by claiming themselves "dependent Indian communities."[65] Two leading United States Supreme Court cases[66] addressed the issue of Native villages which claimed to be dependent Indian communities. These Native groups sought to be considered the functional equivalents of reservations, without being designated as such by formal legislation. These cases considered the issue of whether an Indian community may be deemed "dependent."

The determining factor in each case was whether Congress *intended* to recognize the community as residing on a reservation.[67] Stated in another manner, the issue was whether the Native entities were set aside under federal supervision for the protection of Indians

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62. *See* The Indian Self-Determination Act, 25 U.S.C. § 450(b) (1975); Indian Financing Act, 25 U.S.C. § 1452(c) (1974); Indian Child Welfare Act, 25 U.S.C. § 1903(8) (1978); Indian Tribal Government Tax Status Act, 26 U.S.C. § 7701(a)(40)(A) (1983). An example of the standard disclaimer, taken from the Indian Tribal Government Tax Status Act, states: "Nothing in the Indian Tribal Government Tax Status Act of 1982, or in the Amendments made thereby, shall validate or invalidate any claim by Alaska Natives of sovereign authority over lands or people." *Id.*

63. Alaskan Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971); ALASKA CONST. art. 1, §§ 2 and 6; *See* IRA, *supra* note 4; Application to Alaska, 25 U.S.C. § 473(a) (1936); Alaskan Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958); § 3, ch. 44, Laws of Alaska (1913); Territorial Organic Act, 37 Stat. 512 (1912); and District Organic Act, 23 Stat. 24 (1884).

64. Congress has plenary authority to recognize tribes, to combine separate ethnological tribes for the purpose of legal status, and to terminate tribal status. F. COHEN, *supra* note 1, ch. 4, at 5-7.

65. "Dependent Indian communities" are recognized as "Indian country" by the federal government. *See supra* note 1. The term "dependent Indian community" has been acknowledged and dealt with in two Supreme Court cases. *See infra* note 66. *See also* F. COHEN, *supra* note 1, at 27-46.

The test for determining whether a "dependent Indian community" exists has been developed by the judiciary. *See* United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982). (South Dakota has no jurisdiction over a housing project that is a dependent Indian community because it is managed by an Indian tribe with independent sovereign authority).

66. United States v. Sandoval, 231 U.S. 28 (1913); United States v. McGowan, 302 U.S. 535 (1938).

67. *Sandoval*, 231 U.S. at 37, 39, 41; *McGowan*, 302 U.S. at 538-39.

dependent upon the federal government. These two major decisions established that it is Congress, not the judiciary, which is responsible for determining whether a particular Native entity shall be recognized as a "dependent Indian village."[68] This precedent has been recognized in a number of state and federal court of appeals cases.[69]

This type of "dependent Indian community" is extremely rare. As noted, courts are attempting to determine legislative intent when a Native group uses this means in trying to substantiate that it occupies "Indian country." In these situations, two strict requirements must be fulfilled: (1) proof that either federal land held for Indian use, or tribal land, was specifically set aside for Indian use; and (2) proof that the setting aside was with the intent of protecting and caring for the Indians who remain dependent on the federal government.[70] The intent of Congress to declare the Native group dependent is again the determining factor. "Dependent Indian community" status is unique, unusual, and difficult for Native tribes to substantiate. Few Native groups have been recognized as dependent upon the federal government.[71] Without federal legislation providing for the establishment of a reservation, a Native group must hopelessly struggle to establish dependent Indian village status.

### C. *Those Sovereign Powers Which Are Granted to a Recognized Tribe May Be Limited in Scope*

Off-reservation sovereign powers are not the equivalent of on-reservation tribal powers. If tribal status is afforded, and the Native unit has also been classified as occupying Indian country outside the boundaries of a reservation, there is still no guarantee of absolute sovereign power and privilege. No legislative enactment, court decision, or other recognized authority has ever maintained that Con-

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68. *Sandoval*, 231 U.S. at 46; *McGowan*, 302 U.S. at 538-39.

69. United States v. Martine, 442 F.2d 1022 (10th Cir. 1971); Weddell v. Meierhenry, 636 F.2d 211 (8th Cir. 1980), *cert. denied*, 451 U.S. 941 (1981); United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982); Blatchford v. Gonzales, 100 N.M. 333, 670 P.2d 944 (N.M. 1983), *cert. denied*, 464 U.S. 1033 (1984); State v. Cutnose, 87 N.M. 299, 532 P.2d 888 (N.M. Ct. App. 1978); G. v. State, 594 P.2d 798 (Okla. Crim. App.), *cert. denied*, 444 U.S. 992 (1979).

70. *See supra* notes 65-66 and accompanying text.

71. Since no precise definition for a "dependent Indian community" exists, *supra* note 64, and Congress is usually reluctant to grant sovereign authority, few Native groups have been successful in establishing "Indian country" by this method.

One reason for this is that the "dependent Indian community" category does not refer to types of land ownership or reservation boundaries, but rather to residential Indian communities under federal protection. Therefore, establishing the existence of boundaries of a dependent Indian community is difficult. F. COHEN, *supra* note 1, at 27-46.

gress intended for tribal entities on all types of Indian country to possess identical governmental powers and privileges. No precedent establishes such a conclusion.[72]

Certain specific sovereign rights have never been protected, even for a Native tribe occupying reservation Indian land.[73] A classic illustration of this limitation on sovereign rights is the inability of a tribe, located on its own reservation land, to exclude non-Natives. Even upon authorized reservation lands, a recognized tribal entity still possesses only limited authority. Yet, those tribes situated upon reservation lands obviously face a lesser burden in attempting to assert sovereign control.

The fact that no Congressional intent exists for all Indian country to be considered identical is further illustrated in the authority which considers Native allotments.[74] Allotments are parcels of land granted by state or federal authority to qualified Native individuals or corporations.[75] This procedure was used extensively throughout Alaska via the Alaska Native Claims Settlement Act (ANCSA).[76]

These allotments have been recognized as falling under the definition of "Indian country." However, different rules apply regarding governmental jurisdiction on allotments than apply on reservation lands.[77] Native groups situated upon allotments do not possess the same degree of freedom from state and federal regulation which on-reservation tribes possess. Affairs which are normally left to be governed by tribal councils on a reservation are provided for by state

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72. This is precisely the reason the Legislature has allowed sovereign powers for Native tribes primarily when located on reservation lands, or in other unique instances (i.e., dependent Indian communities, allotments, etc.).

It has also been determined that Indian country is recognized as "all lands within the limits of any Indian reservation under the jurisdiction of the United States Government. . . ." 18 U.S.C. § 1151(a) (1982).

Furthermore, *Metlakatla Indians*, 369 U.S. 45 (1962), and *Kake*, 369 U.S. (1962), manifests the Supreme Court's adoption of the conclusion that only on-reservation Native entities possess complete sovereign powers.

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

74. Allotments, like "dependent Indian communities," are statutorily determined to be "Indian country." *See supra* note 1.

75. *Id.*

76. The Alaska Native Claims Settlement Act (ANCSA) provided large amounts of monies and lands to the Native people of Alaska. Over 40 million acres of land were given to Alaskan Natives, as well as nearly one billion dollars in federal grants and mineral revenues. Fee simple patents for land were issued to the "corporations" which were established to protect individual interests. Alaskan Natives received these lands and revenues in consideration for the extinguishment of claims to large areas of Alaskan territory. 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601-1628 (1982)). *See also* F. COHEN, *supra* note 1, at 746-47, 753-54.

77. *Mescalero Apache Tribe*, 411 U.S. 145 (1973); *South Naknek*, 466 F. Supp. 870 (D. Alaska 1979). *See also* F. COHEN, *supra* note 1, at 277-78, 350.

regulation on allotments.[78] Hence, on these off-reservation tracts, sovereign power either does not exist, or is very limited.

In summary, when a legitimate tribal entity claims sovereign rights, the courts are left to examine the specific federal statute(s) or treatise(s) granting tribal authority and/or limiting state authority. The threshold question for the courts to determine is whether any legislation exists which provides for the establishment of a formal reservation. Absent such legislation, a Native area may still be classified as a dependent Indian community, allotment, or other Indian country. Accordingly, only those applicable rights and privileges that correlate with the type of Indian country occupied will be granted.

## III. DEFINITION OF THE LEGAL PROBLEM

The establishment of (1) tribal status, and (2) occupation of a recognized type of Indian country, provides a Native Indian group with a foundation upon which to base its claim to sovereign rights. This procedure for establishing sovereign authority has been recognized in those states which have dealt with this issue.[79]

Although the issue of sovereignty for Alaskan Native Indian groups has repeatedly reached the Alaska Supreme Court, to date it remains unresolved.[80] An unwillingness to address this problem has become apparent.[81] In all probability, nonresolution of the issue is on account of two factors: (1) the state judiciary's desire to prevent alienation and hostility on the part of the Alaskan Native groups; and (2) the state judiciary's desire not to relinquish possible state authority over Alaskan lands to federal jurisdiction.[82] Alaskan aboriginal peoples are historically tied to their lands. They have retained a serious commitment to protect the rights and privileges of their ancestors. In contrast, the state, as a political entity, desires to retain jurisdiction over as vast an area as possible within its borders. The Alaskan courts have been understandably tentative.

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78. *Id.*

79. *See supra* notes 3 and 69.

80. *See supra* note 2.

81. *See supra* note 2.

82. The people of Alaska are strong and vocal advocates of state control over state affairs. There is a strong push to rid Alaska of federal control over state lands. *See* Alaska Statehood Commission Act of July 2, 1980, AS Temp. Sec. Sp., ch. 161, § 1 (1984); *see also* National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled,* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (Justice Rehnquist stated that the 10th Amendment limits federal control over states and held that the federal government was infringing on the state's power to make decisions concerning distribution of state services). *Id.* at 843; Fry v. United States, 421 U.S. 542, 547 (1975).

The specific issue confronting the Alaskan Supreme Court is whether to deny these Native groups the sovereign rights they claim. The problem has arisen due to these Alaskan Native entities' inability to unequivocally meet either criterion of the traditional "tribe-Indian country" test. As the following analysis indicates, many of the Alaskan Native Indian groups were neither formed as tribes (political entities) under the traditional historic or legal definitions, nor do they occupy recognized "Indian country." This failure to satisfy either of the established requirements has left the Alaskan judiciary in the precarious position of having to deny sovereign powers to the state's numerous Native Indian groups.

## IV. APPLICATION OF THE TRADITIONAL "TRIBE-INDIAN COUNTRY" TEST TO THE ALASKAN NATIVE GROUPS

Congress has afforded recognized tribal entities a vast array of powers. Though it is customary for federal authorities to limit these powers to some extent,[83] these tribes have retained all the inherent powers necessary to conduct their affairs.[84] It has become a recurring scenario in recent years for groups of Native Indians to assert sovereign powers.[85] Alaskan Native groups have been among the leaders in this pursuit.[86]

As previously discussed, statutes and other legislative enactments by the United States government have afforded certain recognized Indian groups tribal status.[87] Alaskan Native groups have been treated differently by the federal government.[88] No formal recognition as a tribe, under the original definition of the IRA, has been given to any Alaskan Native group.[89]

The historical relationship between the United States and the Alaskan Native groups is characterized as a "special relationship" between two separate entities.[90] The Federal-Native relationship has

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83. A prime example of the limits of Indian power is contained in the concept of "suzerainty." A suzerain is a dominant political state exercising varying degrees of authority over a vassal state with regard to its foreign relations but allowing it sovereign authority over its internal affairs. BLACK'S LAW DICTIONARY 1298 (5th ed. 1979); *see also Worcester*, 31 U.S. (6 Pet.) at 515 (detailed description of the cause and effects of suzerainty).

84. *See* F. COHEN, *supra* note 1, at 122. *See also Wheeler*, 435 U.S. 313.

85. *See supra* notes 3, 69, and 77.

86. *See supra* note 2.

87. *See supra* note 37.

88. *See infra* text accompanying notes 90-94.

89. *See infra* text accompanying notes 95-150.

90. *Wheeler*, 435 U.S. 313 (1978); McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973), *overruled*, Bryan v. Itasca Co., 426 U.S. 373 (1976); *Worcester*, 31 U.S. (6 Pet.)

led to a strong federal involvement in Alaska and a resulting resentment of the federal government by the state.[91] The federal government has been recognized as the "guardian" of Alaskan Native Indian groups.[92] Though Alaskan groups have retained certain inherent rights,[93] they at all times have remained subject to the plenary powers of the United States Congress.[94]

Whether the Alaskan Native entities are justified in their claim to sovereign powers is open to examination through the traditional "tribe-Indian country" analysis. These assertions of sovereign powers can attempt to be substantiated by fulfilling both the tribal status and Indian country criteria.

## A. *Tribal Status of Alaskan Native Indian Groups*

As examined previously, both the historical and legal guidelines must be met in order to substantiate a claim of tribal status.[95] These traditional qualifications have yet to be applied to an Alaskan Native Indian group claiming sovereign status.[96] These criteria appear extremely difficult for Alaskan Native groups to satisfy.[97]

### 1. *Alaskan Native Groups Fail to Meet Historical Criteria*

Initially, Alaskan Native groups face the virtually insurmountable task of substantiating themselves as historical tribes. These

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515 (1832).

91. D. CASE, THE SPECIAL RELATIONSHIP OF ALASKAN NATIVES TO THE FEDERAL GOVERNMENT (1978). *See also* Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980).

92. United States v. Berrigan, 2 Alaska 442 (1905); *see also* Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); United States v. Cadzow, 5 Alaska 125 (1914).

93. Cherokee Nation v. Georgia, 31 U.S. (5 Pet.) 1 (1831).

94. *Worcester*, 31 U.S. (6 Pet.) 515.

95. *See supra* text accompanying notes 12-78.

96. The Supreme Court of Alaska has continued to avoid resolution of the issue concerning the claim to sovereign rights by the state's numerous Native groups. Other tests to replace the traditional tribe/Indian country test have been proposed for use in the Alaska situation. One proposed approach is a "substantive analysis," whereby the court is urged to examine the Alaskan Native groups independently. This requires that the Alaskan Native groups be examined in a manner that specifically takes into account how these groups developed (as clans and families, not tribes), rather than placing the groups within the traditional test. Note, *Alaska Native Sovereignty: The Limits of the Tribe-Indian Country Test*, 17 CORNELL INTER. L.J. 375 (1984).

97. There are approximately ninety traditional villages in Alaska governed by traditional councils. There are approximately seventy IRA governments in the state, giving them power to form contracts as a legal entity. AMERICAN INDIAN POLICY REVIEW COMMISSION: SPECIAL TASK FORCE REPORT ON ALASKAN NATIVE ISSUES 22 (Comm. Print 1977).

groups have generally developed as unorganized villages.[98] Thus, no voluntary association or society amounting to a political body was ever maintained throughout the history of these Native groups. These groups existed primarily as fishing villages or hunting communities, with their primary allegiance to the family or clan, not to the village as a political entity.[99]

Distinguished authority Felix Cohen, author of *The Handbook of Federal Indian Law*,[100] concludes that Alaskan Native groups were organized into villages and not tribes.[101] The federal government has followed this historical interpretation with the aforementioned "list of recognized tribes" in the Federal Register.[102] No Alaskan Native groups were included under the original definition. The supplemental list, added in 1982, contained many Alaskan Native groups. However, these Alaskan Native groups were listed separately and were not required to meet the same criteria used under the original definition.[103]

There was a desire to differentiate between recognized historical tribes and those Native groups which developed as unorganized villages.[104] The federal government has concluded that no historical tribes were found to exist in Alaska. Congress denied tribal status to Alaskan Native Indian groups through its list of recognized tribes based upon these groups' failure to exhibit historical political allegiance.

### 2. *Alaskan Native Groups Fail to Fulfill Either Legal or Case Law Criteria*

These Alaskan Native Indian groups also face the problem of meeting the legal criteria established for tribal recognition.[105] As noted earlier, these legal requirements are specific and provide set guidelines for courts to follow when determining tribal status.[106] The most basic legal requirement, that the group be comprised of a specific Native people not a collection of differing Native groups,[107] proves very difficult for a majority of these groups to fulfill. Modern

98. *See supra* text accompanying notes 32-43.
99. *See supra* note 43 and accompanying text.
100. F. COHEN, *supra* note 1.
101. *See supra* text accompanying notes 32-43.
102. *See supra* note 37.
103. *See supra* note 37.
104. *See supra* text accompanying notes 32-43.
105. *See supra* text accompanying notes 44-47.
106. *See supra* text accompanying notes 44-47.
107. 25 C.F.R. § 83.7 (1982).

transportation, communication, and the probability of mixed-Native marriages make it unlikely that a particular group would be comprised of a single Native origin.

It is also difficult for a contemporary Alaskan Native entity to satisfy the case law requirements.[108] Many of these groups do not share collective rights to tribal land, nor do they share group funds among their members.[109] Additionally, in many scenarios continuous political control has not been continuously exercised over the groups' members.[110]

Finally, the criteria set forth by the Department of the Interior for recognition as a tribe[111] may be the most difficult for these Native Indian groups to fulfill. These requirements once again lean toward the historical criteria. Thus, it is doubtful that the majority of Alaskan Native groups could meet these qualifications. Any tribal government founded in modern times and lacking an historical basis would place the Native group outside of this recognized list.

The federal government's criteria have provided two factors that clearly manifest the Legislature's intent for requiring a formal, structured tribal government. These factors include historical continuity, rather than formation in modern times,[112] and political authority over members from historical time until the present.[113]

As previously discussed, the exemption for Native groups on the supplemental "list of recognized entities" does not qualify a Native group as a tribe. The "entities list" merely determines eligibility for receipt of federal benefits.[114] Alaskan groups on the "entities list" are eligible for federal government monies and lands in Alaska. The "entities" list contains a number of Alaskan Native groups that are now defunct, that have existed without exercising political authority for decades, and/or that simply cannot be interpreted as recognized tribes. A list naming these groups as eligible for federal services has never been interpreted by any authority as a list of recognized tribes.[115]

In addition, it should be noted that no state or Congressional act has automatically acknowledged Alaskan Native entities as tribes. In

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108. *See supra* notes 48-51 and accompanying text.
109. 25 C.F.R. § 83.7 (1982).
110. *Id.*
111. *See supra* note 38.
112. *See supra* text accompanying notes 24-43.
113. *See supra* text accompanying notes 24-43.
114. *See supra* text accompanying notes 24-43.
115. F. COHEN, *supra* note 1, at 14.

a number of statutes Congress has included Alaskan Native villages in its definition of "tribe," but solely for the purposes of that particular legislation.[116] These statutes commonly contain express disclaimers for preventing broad interpretation of the tribal status.[117] The fact that Congress explicitly extended these laws to entities in Alaska, through special provisions providing definitions for tribal status, implies that the Legislature never intended for all Alaskan Native Indian villages to be afforded general tribal status in all instances.

### 3. *Alaskan Native Group's IRA Status is Not Tribal Status*

Finally, the Alaskan Native Indian groups face equal difficulty in attempting to argue that recognition as an IRA council is the equivalent of tribal recognition.[118] With the enactment of the IRA, many tribes throughout the nation were formally recognized. However, there were no Alaskan groups recognized as tribes on the original Federal Register. The IRA was extended to Alaska in 1939 with still no tribal recognition afforded Alaskan Native groups.

To fulfill the requirements of IRA status, numerous Native village "governments" were created. These governments qualified the villages for federal lands and monies. Historical governmental powers had not been maintained before the creation of these modern village governments. Prior village-wide control, election of representatives, and other formal recognition of a government did not exist. Claims by contemporary Native groups that an historical, unbroken sovereignty existed have never been substantiated. The major problem for these entities arises from the substantial difference in wording between the original section 16 of the IRA granting tribal status, and the subsequent Alaskan amendment.[119]

Under the original section of the act, all "tribes or bands" of Indians situated upon reservation lands were afforded tribal status.[120] When the IRA was extended to Alaska, the language was significantly expanded.[121] The only requirement Alaskan groups must meet in order to receive IRA benefits is that "groups of Indians in Alaska . . . [have] a *common bond* of occupation, or association, or residence within a well-defined neighborhood, community, or ru-

116. *See supra* notes 62-63.
117. *See supra* notes 62-63.
118. *See supra* text accompanying notes 52-97.
119. *See supra* notes 38-39.
120. *See supra* note 38.
121. *See supra* notes 39-41.

ral district."[122] This difference in language allows the Alaskan Native groups to band together on any number of grounds: business purposes, occupational reasons (fishing villages, etc.), or merely out of social convenience. In comparison to the original provision, the Alaskan amendment does not maintain a requirement that a "band or tribe" exist.

Alaskan groups are left to argue that the Alaskan amendment to the IRA allows for full tribal recognition of the state's numerous Native villages. The primary purpose of the IRA amendment was to allow groups of Indians who were not recognized as tribes to organize under the statute in order to qualify for land grants and other benefits. Hence, meeting the "common bond" criteria for recognition as an IRA council does not afford tribal status[123] to a Native entity as provided for under the original provision.

### B. *"Indian Country" Status of Alaskan Native Indian Groups*

In a situation where an Alaskan Native entity has been able to establish tribal status, the requirement for occupation of Indian country is the next major obstacle to overcome in obtaining sovereign recognition. All Alaskan Native Indian groups will have difficulty overcoming the traditional "on-reservation/off-reservation" test.[124]

Since Alaska became a state in 1959 the "on-reservation/off-reservation" distinction has been consistently applied in various jurisdictions whenever the issue of Native sovereign rights has arisen.[125] Those off-reservation villages that are predominantly Indian in composition, as distinct from non-Indian communities, and which maintain IRA councils, have been held not to possess Indian country status.[126] A basis for sovereign authority was not recognized where an Alaskan Native group existed as an off-reservation Indian community.

Case law has never recognized Indian country as existing in Alaska.[127] This has been the precedent for over 80 years.[128] Only

122. *See supra* notes 39-41.

123. F. COHEN, *supra* note 1, at 751.

124. *See supra* text accompanying notes 58-78.

125. *See supra* text accompanying notes 58-78.

126. *Sandoval*, 231 U.S. 28 (1913); *McGowan*, 302 U.S. 535 (1938).

127. United States v. Seveloff, 27 F. Cas. 1021 (D. Or. 1872) (No. 16,252).

128. *See In re* Carr, 5 F. Cas 115 (D. Or. 1875) (No. 2,432); Waters v Campbell, 29 F. Cas. 412 (C. C. D. Or. 1875) (No. 17,265); United States v. Williams, 2 F. 61, 62 (C. C. D. Or. 1880); United States v. Stephens, 12 F. 52 (C. C. D. Or. 1882); Kie v. United States, 27 F. 351 (C. C. D. Or. 1886); *In re* Sah Quah, 31 F. 327 (D. Alaska 1886); *In re* Petition of Can-Ah-Couqua, 29 F. 687 (D. Alaska 1887); Tla-Koo-Yel-Lee v. United States, 167 U.S.

one case has ever recognized the existence of Indian country in Alaska.[129] That case has been narrowly construed and has never been followed in subsequent rulings.[130]

This precedent makes it apparent that decisions regarding the issue of Native authority (versus State authority) have been based upon the recognized tribe proving reservation status or similar federal intent to provide for the Native group. Failure to substantiate occupation of reservation lands affords a tribe no sovereign power unless it can prove it is located on some other type of off-reservation Indian country.[131]

Off-reservation Indian country has been recognized in Alaska.[132] However, the federal government has consistently refused to recognize governmental powers as existing in off-reservation Native entities. Congress and the executive branch have determined that Alaskan Natives possess no governmental powers except on reservation lands unless expressly provided for within the scope of a particular statute.[133]

The government has manifested its intent that Native village affairs on off-reservation lands be controlled by local governments created by law.[134] Modern enactments by both state legislatures and Congress continue to establish the government's position that organized Native communities are not sovereign.[135] The Alaskan State-

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274 (1897); United States v. Doo-Noch-Keen, 2 Alaska 624 (D. Alaska 1905); United States v. Sitarangok, 4 Alaska 667 (D. Alaska 1913); Parks v. Parks, 6 Alaska 426 (D. Alaska 1921).

129. *See* Petitions of McCord and Nickanorka, 151 F. Supp. 132 (D. Alaska 1957).

130. The judge who wrote the opinions in *McCord* and *Nickanorka* cautioned:

> This decision should not be interpreted by members of the native groups, be they Indian or Eskimo, as a general removal of the territorial penal authority over them, for the reason that this court will take judicial notice that *there are few tribal organizations in Alaska that are functioning strictly within Indian country* as defined in 18 U.S.C.§ 1151 et seq.

151 F. Supp. at 136 (emphasis added).

131. The other types of "Indian country" recognized by statute are "allotments" and "dependent Indian communities." *See* 18 U.S.C. § 1151 (1976) (originally enacted as Act of June 25, 1948, ch. 645, § 1151, 62 Stat. 757).

132. *See* 18 U.S.C. § 1151 (1976); 28 U.S.C. § 1360 (1953); United States v. Chavez, 290 U.S. 357 (1933).

133. The opinions of members of the executive branch must be placed in proper perspective. The opinions of the U.S. Secretary of the Interior, charged with administering the majority of Indian laws, carry substantial weight as to the precise meaning of those laws. Naturally the opinions of lower federal officials should be accorded less weight than those at the secretarial level. Ultimately, however, it is for the courts to decide what authority has been conveyed or denied by reviewing particular pieces of legislation. Opinions of bureaucrats carry no more than persuasive weight.

134. *See supra* notes 62-63 and accompanying text.

135. *See supra* notes 62-63 and accompanying text.

hood Act[136] contains provisions for certain enclaves of exclusive federal authority, but contains no parallel provisions for Native enclaves. Native enclaves could easily have been created had the government intended to establish such sovereign Native authority.

Further, Congress has approved the Alaskan Constitution[137] with its provision limiting local government authority to state-chartered cities and boroughs (counties).[138] This approval makes the state legislature the governing body outside organized cities and boroughs.[139]

Perhaps the most obvious illustration of Congressional intent refusing to allow off-reservation villages to be self-governing enclaves is the important Alaskan Native Claims Settlement Act (ANCSA).[140] The modern ANCSA contains numerous provisions which maintain that all off-reservation communities in Alaska are subject to state law without any independent legal authority.[141]

The ANCSA manifests that Congress intended complete state regulatory authority over virtually all Native-owned lands and Native corporations.[142] The ANCSA also includes mandated involvement by state or state-chartered municipalities into the affairs of all Native villages.[143] There is no mention, whatsoever, in any portion

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136. *See supra* note 63.

137. *See supra* note 63.

138. Applicable sections of the Alaska state constitution include:

"Sources of Government. All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole." ALASKA CONST. art. 1, § 2.

"Assembly; Petition. The right of the people peaceably to assemble, and to petition the government shall never be abridged." ALASKA CONST. art. 1, § 6.

From these sections of the constitution numerous statutes and case decisions have been developed which limit the authority of both state and tribal governments.

139. *See supra* note 72.

140. *See supra* note 76.

141. Congress declared its position in the ANCSA in its "Declaration of Policy":

> Congress finds and declares that . . .
>
> (b) [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 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. . . .

Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. § 1601 (1971)). *See also* F. COHEN, *supra* note 1, at 739-50.

142. *See supra* notes 4, 72, 73; *see also* Alaska Native Claims Settlement Act, § 3(c), § 4(b), § 14(c)(3), 85 Stat. 688 (1971); 43 U.S.C. §§ 1603(c), 1604(b), 1614(c)(3) (1982).

143. 43 U.S.C. § 1614(c)(3) (1982).

of the ANCSA, of the ability of an unincorporated village or an IRA council to play a governmental role or to be afforded sovereign powers.

Additionally, an Alaskan Native Indian village attempting to fulfill the Indian country requirement by declaring itself a "dependent Indian community"[144] must meet stringent qualifications. Two cases have established the concept of Indian country for modern Federal Indian law.[145] These cases involved Native villages which were the functional equivalent of reservations, but had not been so designated. Both Native communities were examined in light of legislative intent to treat them as such.[146]

The two cases established that Alaskan Native Indian groups claiming "dependent" status must meet the burden of proving that Congress has specifically set aside tribal land, or other federal lands, for Indian use.[147] This has been an infrequent act by Congress. In addition, these Alaskan Native groups must substantiate the allegation that any setting aside was with the intent of protecting and caring for the Indians who remain dependent on the federal government.[148]

It appears that Alaskan Native groups cannot meet this criteria by occupying land acquired through the ANCSA. The ANCSA lands were not set aside for Indian protection.[149] This is illustrated by the fact that these allotments are freely alienable. The allotments were given to the Alaskan Natives as consideration for extinguishment of claims to other state lands. Congress made clear its policy that conveyances of ANCSA lands did not subsequently convey sovereign powers.[150]

### C. *Sovereign Powers Which an Off-Reservation Alaskan Native Tribe Possesses May Be Limited In Scope*

In the event an Alaskan Native Indian group succeeds in fulfilling both the tribal status requirements and the Indian country re-

144. *See supra* note 65.

145. *See supra* note 66.

146. *See supra* note 66.

147. *See supra* note 66.

148. *See supra* note 66.

149. ANCSA lands were not set aside for Indian protection, and in fact are freely alienable. The Native communities are in no sense dependent upon the federal government. There is no federal agent or superintendent in charge. The lands which were granted through the ANCSA are not "in trust" and the Native villages are not Indian "reservations." H.R. CONF. REP. No. 746, 92nd Cong., 1st Sess. 40 (1972).

150. *See supra* note 75 and accompanying text.

quirements, there remains no guarantee of unlimited sovereign authority. Completion of the two-part test does not automatically allot a Native group the authority of a reservation government.

Though such an entity may attempt to claim certain minor sovereign powers, the right to claim absolute sovereignty has no basis under present legislation. No authority has ever held that Congress intended occupants of all differing types of Indian country be afforded identical governmental powers.[151] Reservation governments are entities which have been recognized as possessing sovereign powers, though those powers too may be limited in scope.[152] All authority points towards a conclusion that Congress intended different levels of authority to exist on different types of Indian country.

### D. *Recent Decision*

The recent case, *Native Village of Stevens v. Alaska Management and Planning*,[153] previously outlined in this comment, provides an excellent illustration. The case involves an Alaskan Native group claiming immunity from suit. It has been established by legislative policy that only on-reservation tribal governments have exclusive jurisdiction. Off-reservation Native tribes may not assert immunity from suit. Though a Native tribe's off-reservation allotment or dependent community falls within the definition of Indian country, it does not possess authority to claim immunity from suit. Claims to absolute sovereign power, such as immunity from suit, are unsubstantiated.[154]

Alaskan Native Indian groups existing outside reservation lands generally fall under state jurisdiction to the same extent as non-Natives.[155] Matters which would normally be addressed by tribal governments on a reservation lands are handled by state regulation on allotments and other types of Indian country beyond the jurisdiction of reservation governments.[156]

Cases and statutes maintain that an Alaskan off-reservation tract is not an enclave in which a tribal government can limit state jurisdiction. Absolute sovereign powers have not been afforded. An Alaskan Native group, recognized as a tribe and occupying some

151. *See supra* note 23.
152. *See supra* text accompanying notes 12-71.
153. No. S-1345 (Alaska 1988).
154. *See supra* note 72 and accompanying text.
155. *See supra* notes 23 and 77.
156. *See supra* note 77.

type of Indian country, possesses only limited rights and powers.[157]

In its May 20, 1988 opinion, the Alaska Supreme Court provided an excellent synopsis of Native sovereign rights as applied to Alaskan aborigines. The review began with Alaska's Treaty of Cession and continued through modern statutory reforms. The Court reviewed cases from throughout the United States which dealt with Native claims of immunity from suit and tribal authority. Justice Matthews, writing for the court, then turned his attention to specific Alaska cases such as *Metlukatla Indian Community v. Egan, United States v. Seveloff* and *In re Sah Quah*, all previously discussed in this comment.

The Alaska court also reviewed the effects of the Indian Reorganization Act (IRA)[158] on Native lands in Alaska and reached a conclusion similar to that discussed earlier. The conclusion was that the IRA, by allowing groups of Natives to band together and adopt constitutions and bylaws, does not also afford sovereign powers. The IRA provided a means of allowing Alaskan Native communities to "revitalize their self-government . . . through the creation of chartered corporations with power to conduct the business and economic affairs of the tribe."[159] It is apparent that this grant of corporate authority is not the equivalent of a grant of governmental privileges and immunities.

Congress believed that the power to set up a system of local government was only appropriate on reservation lands.[160] The Interior Department's instructions concerning the IRA provide in part: "The power to prescribe ordinances for civil government, relating particularly to law and order, may extend only to such lands as may be held as an Indian reservation for the use of the community."[161]

The procedure under the IRA for allowing Native groups to obtain sovereign powers by establishing existence on reservation lands seems inappropriate in light of the historical development of

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157. The Supreme Court stated: "[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. . . ." *McClanahan*, 411 U.S. at 172.

158. 49 Stat. 1250 (1936).

159. *Mescalero Apache Tribe,* 411 U.S. at 151.

160. Secretary of the Interior's letter to the House Committee on Indian Affairs accompanying the IRA bill provides in part: "[I]f native governments of Alaska are to set up systems of local government, it will be necessary to stipulate the geographical limits of their jurisdiction. Reservations set up by the Secretary of the Interior will accomplish this." H.R. REP. NO. 2447, 74th Cong., 2d Sess., at 3-5 (1936).

161. Department of Interior, Instruction for Organizations in Alaska Under the Reorganization Act of June 18, 1934 (48 Stat. 984) and The Alaska Act of May 1, 1936 (49 Stat. 1250) and The Amendments Thereto, Instruction I(n) (Dec. 22, 1937).

Alaskan Native lands. Alaskan Natives have never established reservation status due to the federal government's lack of desire and necessity to grant lands to Alaskan Natives. Therefore, it seems apparent that no Alaskan Native group would be able to establish itself as possessing any sovereign rights under the IRA guidelines.

Lastly, the court reviewed the ANCSA and likewise concluded that by granting fee simple title in Native lands to regional and village corporations, sovereign powers were not correspondingly granted. Thus, the grant of lands did not equate to a grant of governmental authority.

The Alaska Supreme Court summarized that the intent of Congress through various statutes has apparently been to deny Native groups sovereign authority unless reservation status is established.[162] However, considering the lack of reservation lands in Alaska and the obvious reluctance of the federal government to provide for such lands, the court provides no insight as to the methods for establishing reservation status (i.e., sovereign powers) by any Alaskan Native group. Hence, without reservation status it becomes virtually impossible for a Native group to acquire any degree of sovereign authority.

## V. PROPOSAL TO ADOPT A "SUBSTANTIAL COMPLIANCE" DOCTRINE TO ASSIST THE JUDICIARY IN RESOLUTION OF THE ALASKAN NATIVE INDIAN DILEMMA

The Alaska Supreme Court has again been afforded an opportunity to resolve the Native sovereignty issue.[163] Current legislative policy is in favor of a lessening of control by the Bureau of Indian Affairs over Native governments and to give substance to the goal of Indian self-determination.[164] Utilization of a "substantial compliance" doctrine[165] would be of monumental assistance to those Alaskan Native Indian groups seeking to assert their sovereign rights.

Those Alaskan Native groups able to substantially comply with the "tribe" and "Indian country" requirements would receive a granting of sovereign powers and privileges (and the corresponding burdens) equivalent to the degree of compliance which the group can substantiate. The greater the degree of compliance with the statutory

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162. *See supra* note 153.

163. *Native Village of Stevens*, No. S-1345 (Alaska 1988).

164. 1978 UNITED STATES CODE CONG. & ADMIN. NEWS 7782.

165. The doctrine of "substantial compliance" exists in many areas of law. *See* Inter-Southern Life Ins. Co. v. Cochran, 259 Ky. 677, 83 S.W. 2d 11, 14 (1935) (a discussion of substantial compliance with an insurance policy so as to receive the benefits of the policy); *see also* C.J.S. § 508 for an explanation of substantial performance in the contract setting.

and case law provisions, the greater the degree of sovereign authority afforded.

The rationale behind allowing Alaskan Native Indian groups to conform to a lesser standard is based upon the need to acknowledge the different manner in which these groups historically evolved. Alaskan Native groups evolved in a manner unique to all Indian groups. Due to the late arrival of white settlers and the lack of formal governmental relations with the United States, a structured political loyalty to the tribe has not evolved.[166] Loyalty was instead focused upon the family unit or clan.[167]

The substantial compliance doctrine allows the judiciary the continuity of applying a reliable and recognized standard while only altering the outcome in cases involving Alaskan Native groups able to meet at least a majority of the necessary requirements. The adoption of this substantial compliance doctrine would undoubtedly require Congressional initiative to insure adherence to the intent of the federal government. A statutory amendment allowing for utilization of the substantial compliance doctrine in cases involving Alaskan Native Indian groups would alleviate the problem.

Initiating a substantial compliance doctrine is arguably favorable to a proposal requiring the courts to examine the entire political development of Alaskan Native groups.[168] The doctrine would allow the courts to maintain utilization of the traditional test without exhibiting prejudice toward the developmental differences of the Alaskan Native groups.

Alaskan Native groups would be held to standards comparable to those of other aboriginal peoples throughout the United States. Formally recognized Indian tribes in every state have been required to meet the criteria of the traditional test. Partial fulfillment of the criteria would provide Alaskan Native groups with only limited sovereign power. Adopting the substantial compliance doctrine would alleviate the problem of allowing Alaskan Native Indian groups the benefits of complete sovereignty by testing them under a completely different set of criteria.

An attempt to provide a new and innovative test, specifically

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166. *See* Note, *supra* note 96, at 375.

167. *See* Note, *supra* note 96, at 375.

168. Marston suggests that the difference in the evolution of the Alaskan Native Indian groups requires the development of an entirely new test. The new test would be based upon the substantive differences of the Alaskan groups. The judiciary would be required to completely abandon the traditional "tribe-Indian country" test. *See* Note, *supra* note 96, at 401-02.

applicable to Alaskan Native Indian groups, is contrary to legislative policy. The traditional test has been thoroughly established and consistently applied for decades. An attempt to establish new criteria for use in a specific instance would lead to inconsistent judicial results.

Implementation of a new test based on Alaskan Natives' unique development would undoubtedly open the door to original and innovative criteria from Indian groups across the nation who have previously been denied sovereign recognition. Natives in each state seeking sovereign authority could easily substantiate any number of reasons why their particular Native group evolved historically in a situation as "unique" as the Alaskan Native groups. With each varied scenario the Native group would demand application of its own "test." The possibilities for endless confusion and inconsistency are clearly apparent.

The Legislature and the judiciary have maintained a desire for disciplined, logical, and consistent reasoning. Hence, there has arisen the evolution and development of the traditional "tribe/Indian country" test through both statutes and case law precedent. To apply a new test to the Alaskan scenario would take away from the continuity and consistency which the traditional test provides. Application of a "substantial compliance" doctrine in conjunction with the traditional "tribe-Indian country" test leads to full and fair enforcement of legislative intent and provides for consistent legislative results.

## VI. CONCLUSION

The traditional test for recognition as a sovereign Native entity demands two elements: (1) establishment of tribal status, and (2) occupation of "Indian country." These criteria have been developed by both legislative and judicial processes. This traditional two-part test has been applied consistently in all states where the issue of Native Indian sovereignty has arisen.

The traditional test, in conjunction with a "substantial compliance" doctrine, should be applied to Alaskan Native Indian groups claiming sovereign authority. The *intent* of both the Alaska state legislature and Congress can be assured only by application of the traditional test. To allow new and innovative criteria to be applied to each Native Indian group seeking sovereign rights would lead to severe problems concerning judicial precedent. The traditional "tribe-Indian country" test has provided a strong basis for resolving Native claims to sovereign authority in past decisions and should be applied

in a modified manner to the Alaskan Native Indian groups to ensure continued enforcement of legislative intent.

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