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Moment of Truth: The Special Relationship of the Federal Government to Alaska Natives and Their Tribes — Update and Issue Analysis

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Summary

Beyond considering the present state of the statutory relationship between the federal government and Alaska Natives, this analysis focuses on the power of Congress and the Executive Branch to change the relationship. Absent congressional acts which mandate some level of federal responsibility to Natives, the Executive Branch possesses an independent power over Native affairs which can be exercised to expand, reduce, or deny a special relationship as an enforceable federal obligation. Includes an appendix by Stephen Haycox, "Historical Aspects of the Federal Obligation to Alaska Natives."

MOMENT OF TRUTH: THE SPECIAL RELATIONSHIP OF THE FEDERAL GOVERNMENT TO ALASKA NATIVES AND THEIR TRIBES

UPDATE AND ISSUE ANALYSIS

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Prologue

This report is about the continuing federal relationship with Alaska Natives. In 1978, David Case and the Alaska Native Foundation documented the structure of the special relationship with an analysis of its historical and legal antecedents.[1] Case concluded that the relationship endures despite the termination of most land-related trust obligations on the part of the Executive branch or Congress in the Alaska Native Claims Settlement Act (hereinafter ANCSA).[2] Land-related trusts, after all, are only one of a variety of federal obligations owed to Natives. Federal responsibilities can arise from a statute, treaty, Executive action or appropriations.[3] Subsequent court decisions and congressional acts mandating the protection of Native subsistence rights support Case's conclusion that the relationship remains intact in a broader context.[4] Moreover, the two most significant reaffirmations of the federal government's continuing responsibility to Alaska Natives, ANCSA and the Alaska National Interest Lands Conservation Act (hereinafter ANILCA),[5] point toward a new federal role in Alaska Native affairs founded upon the policy of self-determination without the threat of termination as set forth in Nixon's message to Congress of July 8, 1970 (see below).[6]

Beyond considering the present state of the statutory relationship, our analysis implicitly focuses on the Congress' and Executive branch's power to change this relationship. In the area of Indian affairs, the Congress has come to exercise plenary

power based on the Commerce Clause of the United States Constitution.[7] Absent congressional acts which mandate some level of federal responsibility to Natives, the Executive branch possesses an independent power over Native affairs which can be exercised to expand, reduce, or deny a special relationship as an enforceable federal obligation.[8] Native enforcement of federal obligations, in turn, has been limited by the scope of congressional statutes, treaties, and Executive orders.[9] This is not to say that the printed word of a federal statute or order has in itself formed the relationship. Case law construing such laws and mandates more and more relies upon the historical record of the course of dealing between Natives and the federal government.[10] In this report we propose the use of the historical record of federal relations in Alaska as a means to defend the relationship and to affect the federal government's broad discretion in managing Native affairs.

Even a cursory survey of federal actions in Alaska reveals that it has been a relationshp largely left to the Executive branch to fashion.[11] Due to the near absolute ownership and control of Alaska lands from the time of purchase through the early days of statehood, the federal government has been able to manage Alaska much like a federal colony through the Executive branch and through intermediaries and agents.

Where the Executive branch did not deliver services directly to residents or Natives, it often delegated such duties and obligations to others than Indian agency bureaucrats. The dele-

gation did not deny or revoke the obligation of the federal government to provide a service; the federal government did not lose jurisdiction by delegating the responsibility. This role of intermediary is so strikingly different from that played by intermediaries in other western regions that even state involvement in service delivery should not be viewed as evidence of termination.[12]

Far from terminating the relationship, policy initiated by the Executive branch has often led to a bolstering of the relationship by the Congress, as exemplified by the passage of the Indian Reorganization Act of 1934 (hereinafter IRA), as amended in 1936,[13] which built upon the concept of Executive order reserves established in the early 1900's. It is this interrelation between the Congress, the Executive branch, numerous intermediaries and Native villages which must be understood first by analysis, and then worked to produce federal action supporting further development of a self-determination policy suited to Alaska. This means a policy that does not impair the pre-existent relationships between the federal government and tribes or between tribes and their members.

The federal government has always supervised and retained the ultimate responsibility for acts by the Executive branch and intermediaries in the area of Native affairs so long as the federal obligation remained intact and was not terminated. The federal government promised, in the passage of ANCSA, that no

trust responsibility then owed to Alaska Natives was terminated by the Act.[14]

Due largely to the confused perception of what the current relationship is, following the enactment of ANCSA, efforts should be made to institutionalize an oversight role traditionally taken by the federal government when it delegates trust-related services in Alaska. An oversight role is consistent with the general policy of self-determination espoused by the Self-determination Act (hereinafter ISDA) of 1975[15] and by the subsistence provisions of ANILCA as constructed in Alaska.

When the federal government delegates service provision duties to intermediaries, such as the state or other Native organizations, we propose that the Congress or the Executive Branch must: (1) collaborate with affected Native tribes and organizations; (2) establish a standard of service to be delivered whether national, local or a combination; (3) verify the intermediaries' ability to deliver such service at the established standard; (4) provide a remedy whereby Natives who fail to receive the established level of service can obtain such service or some kind of relief from the federal government or through the courts; and (5) maintain a policing function, whether by actual presence or by reporting requirements. If the goal of self-determination is to be attained in Alaska without the threat of termination, some method of federal management of the remaining trust obligation must be enacted. Helter-skelter delegations of federal responsibility without such a plan violates

the promised policy, may indeed be a basis for a breach of trust action, but most importantly may result in a de facto termination of the federal trust responsibility to Natives.

In a time of austerity budgets, it may seem odd that Natives should try to enlist the aid of the Executive branch. The fact of the matter is that the cycle of congressional action on Alaska Native affairs has passed.[16] Federal Indian policy in Alaska is now in an Executive branch mode as it has been so often in the past. The Executive branch and its administrative agencies are inventorying and cataloging the status of Alaska Natives and the federal relationship in Alaska, and will advise the Congress on proposed action in 1985.[17]

Natives must now propose a plan of action for future trust activities. Any plan, necessarily, must include the State of Alaska, the most recent intermediary, who, together with Natives, could be adversely affected by any unplanned withdrawal of federal support in the provision of assistance or services for Alaska Natives.[18] In the long run, the relationship must be tailored to the "real economic and social needs of Natives, without litigation, (and) with maximum participation by Natives. " to borrow a phrase from federal land settlement policy in Alaska. In the short run, Natives must appeal to the conservative instincts of the current administration or find some safe haven in Congress with a plan which will build in a strong federal presence or oversight role. It must provide a system of

cooperation between the federal government, the Natives, and the State of Alaska--or at the very least protect the interests of Alaska Natives, as individuals and members of tribes under federal law and not as members of regional Native organizations only, organizations denied traditional tribal status by Congress.

In analyzing the progressing federal relationship, we first look to the existing federal trust, focusing upon changes which have expanded and reduced its scope. Next, we consider ANCSA in its limited role as a land settlement, emphasizing its preservation of the special relationship. ANCSA has also been viewed as the harbinger of self-determination policy in Alaska. We test this claim and propose a future course for self-determination policy based, in part, on clues provided in recent congressional statutes. Fourth, we analyze the termination threat implied in the terms of ANCSA, in statutes applied to Alaska, and in current Executive appropriations, recommendations and administrative actions. This reflection on the effect and features of termination allows us to assess the current federal relationship in Alaska and attempt to steer self-determination policy away from its most disastrous results. Finally, we propose specific actions and policies which call for immediate attention in order to maintain a continued level of federal assistance and oversight consistent with the policy goals of self-determination and the realities of the present national conservatism.

I. The Current Trust Relationship

The underlying basis for the traditional trust responsibility evolved from treaties entered into between the United States and Indian Nations.[19] In the course of dealing between these two sovereign bodies, and in the practice of commercial trade, in land transactions, and in resulting abuses and hostilities it was incumbent upon the federal government to protect the interests of settlers and Indians alike by negotiating conciliatory agreements. Tribes ceded lands and ceased hostilities in exchange for the federal government's promise to provide money, goods, services, and assurances that remaining tribal land would be secure against further intrusion by settlers and their territorial and state governments. Over time, Indian tribes came to rely on the federal government to protect their interests in the use and occupancy of their tribal lands and for the protection of their general welfare, much like a guardian ward relationship.[20]

Alaska Natives and the Executive branch never entered into such treaties: first, because the independent treaty power of the Executive was put to an end by Congress in 1871,[21] just six years after Alaska was purchased; second, because minimal settlement or resource exploration pressure put little stress on Native land use and occupancy until the most recent times; and finally, because the maintenance of near exclusive federal jurisdiction and ownership of Alaska land allowed the Congress to manage Native affairs solely on the basis of federal statute and Executive action. In this sense, the relationship of Alaska

Natives to the federal government has evolved from a course of dealing similar to that shared by Indian tribes to the south. However, the special relationship with Alaska Natives is recognized by statute, Executive orders and actions and case law without the benefit of treaties. David Case divided this legal history into four categories of protective federal acts, including: (1) Native lands and resources, (2) provision of human services, (3) protection of subsistence, and (4) promotion of Native government.[22]

Though not a treaty between Indian tribes and the United States, the Treaty of Cession[23] purported to make "uncivilized tribes" in Alaska "subject to such laws and regulations as the United States, may, from time to time adopt in regard to aboriginal tribes of that country."[24] All other inhabitants of the territory were to be "admitted to the enjoyment of all rights, advantages, and immunities of citizens of the United States." From the time of purchase, however, the United States has been hard pressed to identify Indian tribes or nations as it had identified them in its expansion across the continent.

The only Alaska Native unit which resembled a tribe, and upon which the federal government soon began to base the special relationship, was the village. The federal government has found it necessary to identify Indians by means of their political association in order to determine who would be recognized as eligible to receive federal benefits primarily intended for the benefit of Indians, including Alaska Natives. The tribe has been the tradi-

tional marker:

> 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.[25]

Early on, Felix Cohen recognized the difficulty in applying this definition directly to the situation of Alaska Natives:

> The natives reside in small, widely separated villages, communities, or fishing camps, scattered along the 25,000 miles of coast and on the great rivers, principally along the southern and northwestern coast. For the most part they do not fall into well-defined tribal groups occuping a fixed geographical area. [26]

Regardless of this limitation, federal courts in Alaska have insisted on applying this test in distinguishing which Native bodies can take advantage of special benefits available to Indian tribes.[27] Although such terms as "tribe" and "governing body" have been expanded by statute to include Native units other than traditional villages, the underlying purpose of identifying a group made up solely of Native individuals remains a common denominator of all such "tribes."

Returning to the Cession Act, it is clear that from the beginning of the relationship between the United States and Alaska Natives that an individual Native could sever his or her relationship with the aboriginal way of life represented by the village or "tribe." Members of "uncivilized tribes" were subject to laws applied to Indians; all others could become regular citizens.

Later territorial enactments further refined the point of

distinction from uncivilized versus civilized to simply "white" versus "Native." A bifurcated territorial school system enacted in 1905[28] conditioned Native attendance in "white schools" upon the adoption of "white man's way of life and association with white men and women." The federal government's relationship and obligations to Natives was based largely on the rights they held as villagers, partaking in traditional lifestyles, and was stated clearly in an early federal court case construing the rights of Alaska Natives in the use and occupancy of lands in their possession:

> It is believed that the language of this act does not refer to lands held by Indians in severalty, but as to holdings by them collectively in their villages and such places as were occupied by them; that their methods of life were well understood to occupy lands in common either in villages where they lived, or for fishing, hunting, and like purposes. . .[29]

Special privileges afforded Natives to subsistence were also allocated on the basis of their association with a particular community or village.[30]

Explicit recognition of the village community as the core of the federal government's relationship with Alaska Natives, however, did not come until the passage of the IRA. The IRA was intended to revitalize and in other cases start village government, promote economic development in Native village communities, and allotment of reservation lands, and authorize the establishment of new reservations. "Groups of Indians in Alaska," under the statute was defined as:

> (those) not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or asso-

> ciation, or residence within a well-defined neighborhood, community, or rural district. . .[31]

Until the passage of ANCSA in 1971, Alaska Natives qualified for benefits specially provided to "Indians" and "indian tribes" on the basis of blood quantum and by being members of "dependent Indian communities," primarily villages, whether IRA or traditional.[32]

With the passage of ANCSA, "tribe" has taken on a newly expanded statutory definition which includes village and regional profit and non-profit corporations. These corporate "tribes" are incorporated under state law. In contrast to IRA and traditional villages, corporate "tribes" do not possess any residuary sovereign powers. Instead, village and regional corporations are limited to those powers conferred by ANCSA, by federal statutes recognizing the corporations as "tribes" for special purposes, and by state corporate statutes.[33]

The Self-Determination Act is the primary federal statute recognizing Native corporations as "tribes" for purposes of service contracting.

Under the Self-Determination Act an "Indian tribe":

> means any Indian tribe. . . or other organized group or community. . . including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;[34]

Under the Act, "tribes" can authorize "tribal organizations"

to contract for BIA services on their behalf. "Tribal organization":

> Means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities. . .[35]

Native corporations under ANCSA along with recognized Native communities, including IRA and traditional villages, are considered "tribes" in this statutory sense. "Tribal organizations" include the governing councils of IRA and traditional villages recognized by the United States and non-profit corporations associated with regional corporations which come under the democratically elected clause of the definition.

The extension of the term "tribe" to corporate bodies has increased service delivery options available to Alaska Natives pursuant to the Self-Determination Act and other federal statutes at the expense of further confusing the nature of the term "tribe" as it has been applied in Alaska. This episodic extension of tribal status by statute at the same time threatens the very vitality of the relationship by disregarding the original justification for the special trust relationship: that certain distinct Native communities had come to rely on the federal government to guard the health and welfare of the particular community, i.e., a general federal trust responsibility.[36]

While Congress provided for dual recognition of traditional Native communities as well as Native corporations, it failed to

explain how the corporate tribes can hope to maintain their tribal status in the face of inherent limitations in their state corporate form. First, although corporate stockholder membership was originally determined on the basis of community connections,[37] the prospect of free stock alienation may eventually destroy this community component of the corporate tribe. Second, the same free stock alienation may also produce corporate "tribes" wholly owned and controlled by non-Natives. (Most of the aforementioned statutes provide a safeguard to such absurd results by conditioning recognition on BIA determination of eligibility for Indian programs.) The danger of Native commitment to their corporate "tribes," without further assurances from Congress, is that at any time federal recognition of their tribal status could be terminated by amendment to the detriment of individual Natives. Traditional "tribes," or other recognized communities, may by then have been too long disregarded to be resuscitated. This shift by Congress and administrative policy makers in the focus of the relationship away from its federal Indian law analogues creates uncertainty in the federal government's relationship to Alaska Natives even beyond the earlier historical problem of identifying tribal units. It cries out for restructuring by Natives and by the Congress.[38]

Three Ways the Relationship Shrinks

The shift to a relationship based on corporate "tribes" is only one of three general ways in which the special relationship is being changed and, arguably, contracted. The broad discre-

tionary power of the Congress and the Executive over Alaska Native affairs is now being exercised to reduce the substance of the relationship (1) in terms of status, (2) by the scope of programs benefits offered, and (3) by appropriations.

1. Status. Whether by design or by inadvertence, ANCSA enrollment has become a peculiar status which serves to reduce the number of individual Natives who qualify for certain federal Indian programs. The most blatant example is the Indian Child Welfare Act (hereinafter ICWA)[39] which defines "Indian" on the basis of membership in an ANCSA Regional Corporation:

> (3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;"[40]

Read alone, this provision would exclude unenrolled Alaska Natives, i.e., born after December 18, 1971, who do not acquire regional corporation stock through inheritance, purchase, or other legal means of stock transfer. It would also result in declaring as "Indian" any non-Native who might acquire regional corporation stock. Reading all the terms defined by the ICWA together would likely preclude such results, but does not in any way reduce a flood of ambiguities once more based in the concept of "Indian tribe" and "Indian organization."

By establishing minimum standards for the removal of Indian children from their families and by conferring exclusive jurisdiction in child custody proceedings involving Indian children in Indian tribes, Congress hoped by way of the ICWA "to promote the

stability and security of Indian tribes and families," and, in part, promote the unique values of Indian culture. An "Indian tribe" under the ICWA:

> means any Indian tribe. . or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;[41]

An "Indian child":

> means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;[42]

One writer aptly describes the application of these definitions to Alaska Natives as "inconsistent and circular," and warns that they "may lead to anomalous results."[43] In particular, the ICWA does not clarify whether the child must be a shareholder in an ANCSA corporation or a member of a Native village, IRA or traditional. It could be that either would suffice, except that the child must also be "the biological child of an Indian." Since "Indian" is defined in terms of regional corporation shareholder status, the aforementioned limitations arising from the system of ANCSA stock distribution and the prospect of stock alienation could result in the child being excluded from the scope of the Act.

Unfortunately, the ICWA is only one of many examples of different statutory definitions of "Indian" and "Indian tribe" applied to Alaska.[44] More extensive contracting or administrative options which this situation often offers Alaska Native

organizations does not make up for the uncertainty that will arise when the federal government determines the status of Alaska Natives in 1985.[45] An apparently ill-informed Congress may not be sympathetic to a contingent of Alaska Natives who approach them with sincere welfare or economic development funding program problems in the midst of confusion over what in fact is the "tribal unit" and who in fact are the "Indians." Without added clarity in such definitions, Alaska Natives face the threat of uncertain service continuation (including possible termination); the federal government, under current statutory definitions, could conceivably judge their financial and social condition on the basis of their identity as corporations, communities or individuals. Precise and consistent statutory definition of "Indian tribe" is equally important to regional profit corporations who wish to maintain a distinction between business and social welfare endeavors.

2. Scope of Programs: reduction by delegation. Largely because of the financial burden on the federal government and the coincidental increase in state oil revenues, the current Administration wishes to transfer federal trust duties to the state. Such recommendations have been made for the transfer of BIA school programs and general assistance.[46] Without an oversight program similar to the one outlined above, there is no guarantee that the state or Native organization intermediary will provide comparable service,[47] if any at all.

The state or Native intermediary could well provide better service, in which case the federal oversight burden would be diminimus. Still, in view of our need to establish the continuing vitality of the special relationship, oversight is the minimum demonstration of the trust responsibility which the federal government should afford. It at least should remain an ongoing obligation due "Indian tribes" in Alaska.

3. Appropriations. Proposed cutbacks in BIA general assistance with the expectation that state assistance will replace Native welfare needs overlooks the point that federal and state assistance do not share similar eligibility requirements or program coverage.[48] Thus comparable service will not be provided. The federal government's assumption of full state cooperation disregards an underlying reason for the federal trust: state governments, including Alaska, often have little sympathy for the unique problems of Native Americans. The implementation of an oversight program which could facilitate a reasonable transition, again, is the minimum which should be demanded of the federal government to comply with its assumed trust responsibility under federal statute and practice.

Instead of reducing programs absolutely or shifting such duties to reticent intermediaries, the Congress, under Executive branch pressure, may simply reduce the appropriations required to run trust programs. Administrative agencies or intermediaries may then be unable to fulfill their statutory obligations to Natives. Normally, Natives would then be able to sue on the stat-

ute Any remedy in the form of a mandamus may, however, be ineffective. Although the judiciary may force an administrative body to exercise its discretion to fulfill such a statutory duty,[49] it is much less clear that it can order the Congress to fund Indian programs which the judiciary has concluded are within the exclusive and plenary control of Congress.[50] To do so would be to challenge the Constitutional principles of the balance of powers between the branches of federal government.

Finally, funds intended for Indian programs may also be reduced by issuing them in block grants to the state in the event that the federal government does delegate certain of its duties to the state government. The same Constitutional limitations strap the courts in this case, as above.

Specific Changes in the Special Relationship since Case

We now look to the most significant changes in the special relationship since the Case analysis. For sake of consistency, we divide our analysis into the four general statutory categories proposed by Case: (1) Protection of Native Lands and Resources, (2) Provision of Human Services, (3) Protection of Subsistence, and (4) Promotion of Native Governance.[51] Our coverage of the specific changes is not intended to be exhaustive. Rather, our approach reflects the underlying purpose of this report which is to point out major policy trends in the area of federal Indian affairs in Alaska as they affect the trust relationship and recommend courses of study and action required for its defense.

1. Protection of Land and Resources. After ANCSA, federal land trust obligations only extend to a limited number of Native allotments and to the Metlakatla Indian Reservation.[52] Section 905 of ANILCA expedites approval of Alaska Native allotments pending before December 18, 1971 which had been filed on land that was in the National Petroleum Reserve - Alaska or on land unreserved as of December 13, 1968, when Secretary Udall imposed the formal land freeze via Public Land Order 4582. Subject to conflicting claims, qualified Native allotment applications were to be approved 180 days following enactment of ANILCA.[53] At the date of this report, the Bureau of Land Management has approved 3639 cases representing 6083 parcels and is still in the process of adjudicating 7370 cases which came under the exceptions of Section 905.[54]

Once adjudicated, the scope of the federal trust obligation due allottees will be much less than had been the common understanding following the decision in United States v. Mitchell.[55] In a suit to recover damages from the federal government for alleged mismanagement of timber resources on a wholly allotted reservation, the United States Supreme Court held that the General Allotment Act created only a limited trust relationship. Although the Allotment Act did impose a fiduciary duty on the government to prevent the alienation of those lands from the allottee, it did not authorize, much less require, the government to manage timber resources for the benefit of Indian allottees. The decision applies to Native allotments under the 1906 Act[56] since the management responsibilities under both Acts are identical.

Beyond the automatic approvals provided by ANILCA, two recent cases[57] insure that Native allottees are given the right to notice and hearing and the opportunity to give evidence to support their applications.

Most recent incidents involving Native lands and resources have arisen from claims under ANCSA. In Cape Fox Corporation v. United States,[58] Judge Fitzgerald held that ANCSA "does not create a trust relationship between the United States and village corporations as to withdrawn or selected lands or vest any rights of possession to such lands in the village corporation such that an action would lie for a pre-conveyance trespass or for damages." The case arose out of the federal government's exten-

sion of a timber sale contract; the Forest Service had consulted with the village corporation prior to the extension. The case also holds that the duty of the Secretary to "convey immediately" lands due under ANCSA does not mean instantaneous conveyance, but rather "within a reasonable time under the circumstances and, further, that interests in the land do not vest until conveyance. The Ninth Circuit, on appeal, affirmed the transfer of a damage claim to the court of claims and dismissed an injunction as moot since the disputed land was conveyed to Cape Fox village corporation, but reversed Fitzgerald in so far as he held that ANCSA did not create federal trust responsibilities.[59]

The Ninth Circuit Court of Appeals in Alegnagik Natives, Ltd. v. Andrus[60] held for the balance of hardships and the prospects that plaintiffs would show likelihood of success on their claim that ANCSA withdrew unsurveyed and unoccupied land in their townsites under the Alaska Native Townsite Act. In arriving at its decision, the Ninth Circuit found that "until third parties have acquired title, or at least taken steps to acquire title, from the trustee, the title remains in the United States," and therefore, remain "public lands" subject to withdrawal. Since the trustee is a federal agent, unoccupied trust lands which he holds by definition are not "valid existing rights" held by a third person which would otherwise preclude their selection by a village corporation. The case was remanded and injunctive relief ordered to prevent the trustee from allowing further occpation of townsite lots.

Finally, the Alaska Supreme Court held only recently that water appropriations acquired pursuant to 43 U.S.C. §661 are valid prior conveyances of water areas in Alaska which were intended to extinguish any aboriginal title in such waters, as provided by Section 4(a) of ANCSA. In arriving at this decision, the court rejected the village corporation's contention in Pang-Vik, Inc., Ltd., v. Ward's Cove Packing Co., Inc., and State of Alaska[61] that Section 8 of the Organic Act of 1884[62] exempted aboriginal lands from application of the public land laws under which the cannery's predecessor in interest acquired the water rights in question. The holding in Pang-Vik likely precludes any future Native claim to federal reserve water rights based on the Organic Act of 1884.

2. Provision of Human Services. Two immediate concerns are the defunding of general assistance programs and the transfer of BIA school responsibilities to the state Regional Education Attendance AReas (REAA).

General Assistance funding runs out and the programs will be shut down on November 20, 1981 unless Congress signs a continuation resolution before that date.[63] State assistance programs will be unable to service most Native clients who lose general assistance because of the more restrictive state eligibility criteria and procedures.

General Assistance administrators enjoy broad discretion in providing for the needs of entire Native families not allowed

under the state system.[64] Benefits have been made available to Native family units despite the presence of a residing male parent and available seasonal employment.

Even if recent state regulations were liberalized to include more Native recipients, current levels of state funding (approximately $900,000 annually) in no way match the level of proposed cuts in general assistance ($5.7 million). No special provisions have been made for any transition to state assistance. BIA administrative personnel, however, are making attempts to inform their clientele about the state system, faced with the prospect of a total of 50 more operating days until their program is defunded.[65]

School Transfer. The situation with BIA schools is not quite so dire as general assistance since current funding extends to September 30, 1982. The area administrator, however, has been directed to make the transition as soon as possible.[66] The area office will be sending three teams to visit and consult with affected villages throughout the state and gather their views regarding the transfer. This review will likely be completed by the end of October at which time negotiations will begin with the REAA's and the state for the purpose of forming a transition plan. The federal goal is to insure that the 38 BIA schools maintain "comparable or better programs" under state jurisdiction.[67] Whether a federal monitoring role is contemplated was left unanswered.

The state has expressed its willingness to incorporate BIA schools into the present REAA system, but is less certain about extra funds needed for bringing federal physical plants up to state standards. In the past, the state has accepted federal facilities, "as is." The only extra funds now requested by the BIA are for severance pay and other costs of terminating federal employment along with limited funds for interim building maintenance. The prospects for the state obtaining extraordinary student expenses are bleak in light of proposed 35% cuts in Johnson/O'Malley Act funds.

3. Protection of Subsistence. Two cases and two Congressional Acts have construed the federal government's obligation to protect the subsistence culture of Natives since Case.

First, in People of Togiak v. United States[68] the United States District Court, District of Columbia, denied a motion to dismiss a complaint requesting the invalidation of federal regulations regulatory jurisdiction over the Marine Mammal Protection Act (hereinafter MMPA)[69] to the State of Alaska as in derogation of the United States trust responsibility which required the Secretary of Interior to protect Alaska Native's rights to subsistence hunting. The court found that the special Native exemption in the Act and the comprehensive nature of the federal regulatory scheme in this field worked to preempt state jurisdiction which effectively denied Natives their right to subsistence hunt under the Act. The effect of the holding in People of Togiak is left uncertain where the state is authorized to protect the sub-

sistence hunting rights of "rural residents" under new amendments to the MMPA. People of Togiak states that the federal government has a special obligation to protect Native subsistence hunting rights without regard to other "rural residents."[70]

Second, North Slope Borough v. Andrus[71] was an action requesting injunctive relief from alleged violations of federal trust responsibilities and several environmental and wildlife protection statutes resulting from Bureau of Land Management oil lease sales in the Beaufort Sea. Citing People of Togiak for the proposition that special provisions for Native subsistence in federal wildlife statutes impose on the federal government a trust responsibility to protect the Alaskan Natives' rights of subsistence hunting, the court stated three purposes for the trust responsibility (in the case at bar):

> (I)t precludes the use of the environmental statutes to undermine the subsistence cultures, (2) it requires the Secretary to be cognizant of the needs of the Inupiat culture, and (3) it demands of the Federal government (and thus the courts) rigorous application of the environmental statutes to protect the species necessary for the Inupiats' subsistence.[72]

Andrus resulted in an injunction against the Secretary of Interior, preventing the acceptance of any lease sale offers until the Beaufort Sea lease sale environmental impact statement was adequately supplemented. All intermediate agency action on the lease sales was found to be prohibited under the Endangered Species Act[73] until a § 7(b) biological opinion confirmed that contemplated lease sale actions would not violate that Act.

Following Andrus, in respect to Native subsistence rights, the federal government's trust responsibility to Natives requires that the government rigorously enforce environmental statutes for the purpose of protecting species necessary for Native subsistence. That is to say, a violation of the environmental statute here was also found to be a violation of the federal government's trust responsibility.

The dilemma faced by the federal government will be to reconcile the order to protect the endangered species and marine mammals against depletion while at the same time protecting traditional Native lifestyles which rely on subsistence hunting of these same species. Currently a balance has been struck between these two interests in limitations imposed on Native takings. Takings must be done in a non-wasteful manner, and are restricted to the taking of non-depleted species. Species can only be hunted for subsistence and Native handicraft purposes.

On Friday, October 9, 1981 the President signed off on amendments[74] to the MMPA which would allow the Secretary of Interior to transfer management responsibilities to the State of Alaska. These amendments allow such a transfer if the state:

> adopts and implements a statute and regulation that ensures that the taking of the species for subsistence uses:
>
> (1) is accomplished in a non-wasteful manner; and
>
> (2) will be the priority consumptive use of the species; and
>
> (3) if required to be restricted such restrictions will be based upon:
>
> (i) the customary and direct dependence on the species as the mainstay of livelihood;
>
> (ii) local residency;
>
> (iii) availability of alternative resources.[75]

"Subsistence uses" is defined as:

> the customary and traditional uses by rural Alaska residents of marine mammals for direct personal or family consumption as food, shelter, fuel, clothing, tools or tansportation; for making and selling of handi-craft articles out of non-edible by-products of marine mammals taken for personal or family consumption and for barter or for sharing for personal or family consumption.[76]

The state insisted on this language to avoid problems of equal protection challenges based on racial discrimination (i.e., protection of Native subsistence rights as opposed to rural residents).

It is unclear whether the federal government still has a duty to protect Native subsistence hunting rights as construed by People of Togiak. The new amendments only replace the old Native subsistence provisions while the state law is in effect. How the duty of the federal government to protect exclusive Native subsistence rights will be reconciled with the state's duty to protect "rural resident" subsistence rights is left unclear.

Authorization for state assumption of subsistence use management has also occurred on the public lands in Alaska under the subsistence title of ANILCA.[77] State assumption of jurisdiction over rural subsistence uses on public lands is conditioned upon "state (enactment and implementation of) laws of general applicability which are consistent with, and which provide for the definition, preference and participation specified in sections 803, 804, and 805 (within one year of the enactment of ANILCA)." The Secretary of Interior is ordered to monitor and advise the state

on its efforts to protect the subsistence use preference of Section 804 and make reports to Congress annually. If the state does not fulfill the conditions of Section 805(d), the Secretary must implement a federal plan which fulfills these conditions.

Essentially, the federal government reserves the right to make three elements of the state subsistence law absolutely mandatory. These are: (1) The definition of subsistence uses; (2) A preference for subsistence uses; and (3) A guaranteed quasi-rulemaking role for regional councils. Section 801(4) of the Congress' findings states the authority for such preemptory reservations:

> [I]n order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents;[78]

As such, the subsistence provisions of ANILCA affirm an ongoing trust relationship between Alaska Natives and the federal government and provide specifically defined subsistence rights and means to enforce them. Moreover, mandatory federal monitoring provisions ensure a continued fiduciary role which makes it incumbent upon the federal government to guarantee the continuation of subsistence economies in rural Alaska.[79] Importantly, this occurs even as managerial authority is vested in the state.

The current subsistence law for the State of Alaska does not

provide for regional councils--a mandatory requirement for state assumption of subsistence regulation. Although the terms of the state law need only be consistent with the subsistence plan of ANILCA, the Secretary of Interior will be required to implement a federal plan under Section 805(a) unless the mandatory provision of regional councils is accomplished by the state. Regional councils possess rulemaking authority and were intended to maintain a "meaningful role in management of. . subsistence uses" in local rural residents.

Current conflicts between subsistence proponents and urban oriented sportsmen associations make resolution of the state subsistence law inconsistencies difficult, at best. Suffice it to say that future problems with the subsistence title seem unavoidable. Major issues concern the scope of the preference rights, the scope of Secretarial or State power to protect rural subsistence rights, and (in regard to this report) what is the scope of the Secretarial monitoring functions. Does the trust responsibility impose strict standards on the Secretary in respect to his monitoring of state responsibilities under the Act? We believe so. Like any other environmental statute protecting subsistence uses, the trust responsibility demands rigorous federal government application of ANILCA requirements or risks requests for judicial enforcement of the duty.[80]

4. Promotion of Native Government. Native government can mean exclusive traditional or statutory Native governments maintained under federal law and founded upon concepts of sovereignty

or state municipal governments which are overwhelmingly controlled by a Native populace.

ANCSA did not specifically alter any pre-existing governmental functions assumed by traditional Native village councils or Section 16 IRA's. ANCSA did revoke existing reservations (except Metlakatla) thereby putting in question whether tribal governments retain any territorial jurisdiction.[81] But some village corporations and Native villages have established land bases in their Native governments over which tribal jurisdiction can be exercised at least concurrently with the state.[82] In one case, the federal government required such a land transfer to an IRA enveloped by village corporation lands.[83] Regardless, federal administrative action demonstrates that Alaska Natives may still incorporate under the IRA even after ANCSA.[84]

The fact remains that ANCSA implicitly encourages the formation of state municipal governments in Native villages.[85] Until their formation in unincorporated villages, Section 14(c)(3) community lands will be transferred to the state and managed pursuant to a Municipal Lands Trust Program.[86] The Municipal Lands trustee will be responsible for negotiating village corporation transfers and for managing lands held by him in trust for future municipal corporations.[87]

Native villages which do decide to incorporate will be faced with unique developmental dilemmas. In most cases, the primary revenue base for a local municipal government will be the local

village corporation. Decisions to develop or not to develop village corporation land will likely turn on the tax burden imposed on the improvement by the villagers' own municipal government. Business analysts have commented that this situation could lead to either stunted or unnecessary village corporation resource development.[88] As a consequence, the municipal corporation would be dependent upon state subsidies for service delivery and capital improvements.

Natives have faced severe state resistance in efforts to form borough governments where the revenue base and the potential for Native control were immense.[89] In the case of the North Slope Borough, the state legislature proposed to spread the resource base available to North Slope over the entire unorganized borough. Coincidentally, the predominantly non-Native controlled boroughs in Anchorage and on the Kenai peninsula were exempted from legislation denying any new borough, like North Slope, the power to tax oil and gas properties. Although the tale of the North Slope Borough has been one marked with success,[90] it also leaves cause for concern on the part of Natives as to the willingness of the state to cooperate with Natives in their efforts to obtain effective local government control through the state municipal system.

The status of tribal governments in the state, and federal support for such governments, is uncertain following ANCSA. The continued vitality of these governments depends on their utility

in modern day society. Traditional village councils and IRA governments recognized by federal law can acquire attributes of self-government, such as tribal courts,[91] but their function as local governing bodies relies upon both local village support to affirm their legitimacy and regional organizational support to confirm their authority. It is this concept of local control and allegiance which forms the basis of the federal concept of the "tribe."[92] Without tribal status, the trust responsibility becomes vulnerable to the whims of congressional statutory reconstruction, eventually leading to de-tribalization. Such a course of events is likely to occur where the traditional unit is abandoned or falls to neglect on account of manpower and leadership shifts to ANCSA corporations, regional or village, profit or non-profit, or even shifts to units of state government.

ANCSA

Although ANCSA severely alters the land-related federal trust role in Alaska, it purports to be a neutral Act with respect to any other pre-existing trust responsibilities, including service-oriented trust obligations. The policy section of the Act provides that:

> No provision of this chapter shall replace or diminish any right, privilege, or obligation of Natives as citizens of the United States or of Alaska, or relieve, replace, or diminish any obligation of the United States or of the State of Alaska to protect and promote the rights or welfare of Natives as citizens of the United States or Alaska.[93]

Later amendments to ANCSA made it clear that settlement benefits

would not "be deemed to substitute for any governmental programs otherwise available to the Native people of Alaska as citizens of the United States and the State of Alaska."[94] Both provisions protect rights, privileges, access to governmental programs, and certain governmental protections otherwise due Natives as "citizens of the United States or Alaska," but do not speak to obligations owed to Natives as "Indians or members of Indian tribes" under federal law.

Continuation of "Federal programs primarily designed to benefit Native people,"[95] i.e., Indian programs, are contingent on future reports to Congress:

> [T]he Secretary is authorized and directed, together with other appropriate agencies of the United States Government, to make a study of all Federal programs primarily designed to benefit Native people and to report back to Congress with his recommendations for the future management and operation of these programs within three years of December 18, 1971;[96]

The implication of this order is that federal Indian programs in Alaska can continue into the future. Then again, they could also be terminated, depending on the findings of the Secretary. The Section 2(c) review is still in progress after nearly 10 years. Case contends "once (such entitlements) are established they cannot be administratively limited without rulemaking and other adequate due process."[97] This conclusion is supported by Section 2(b)'s mandate for "maximum participation by Natives in decisions affecting their rights and property. "[98]

Case recognizes, however, that the Congress at all times retains "the plenary authority to create or withdraw such

entitlements" without the procedural limitations imposed upon administrators.[99] When the Congress terminates such entitlements, which together comprise the special relationship, it must do so with clear language or legislative history expressing such an intent.[100] ANCSA does not suggest termination on its face, and in fact, specifically negates such an intent in the legislative and executive history of its passage.[101]

Case succinctly offers the best argument against the implication of terminationist intent in the ANCSA Section 2(b) policy statement.[102] To sumarize, it is the settlement which must be accomplished without the "creation of a reservation system or lengthy wardship or trusteeship," without regard to the continuing special relationship. Any pre-existing trust or special relationship is then left intact, as are pre-existing special tax privileges and special federal relations with Natives. Such an analysis is consistent with the statutory rule of construction applied to Native legislation, i.e., it must be read in the light most favorable to Natives.

While it is inevitable that ANCSA will be a major consideration in any reevaluation of the federal government's relationship with Alaska Natives, its limited land settlement objective and corporate economic development goals restricts the Act's utility in deciding questions concerning human service needs of Native individuals and communities, and questions concerning Native government and "tribal status."

Congress found and declared in the policy of the Act that "there (was) an immediate need for a fair and just settlement of all claims. . based on aboriginal land claims." An amendment to the Act in 1976 reiterates this limitation:

> The payments and grants authorized under this chapter constitute compensation for the extinguishment of claims to land, and shall not be deemed to substitute for any governmental programs otherwise available to the Native people of Alaska as citizens of the United States and the State of Alaska.[103]

An accounting of the legislative lobbying of ANCSA makes it clear that human service and Native governance concerns were nearly inconsequential in comparison with land bartering between Natives, the Congress, and the State of Alaska.[104] Extraordinary emphasis on land conveyancing and corporate business management over the past 10 years of ANCSA implementation testify to the narrow focus of the land claims.

Despite ANCSA's failure to resolve pressing human service and Native governance questions, the State of Alaska, in correspondence with Alaska's congressional delegates, has argued that the purposes and structure of ANCSA support the contention that Alaska Native villages do not possess any of the attributes of Native self-governance.[105] The Attorney General's letters further contend that Alaska Native villages under ANCSA do not possess "tribal status," and that "Indian country" does not exist in the state, thereby precluding even IRA claims to tribal jurisdiction. Finally, the state argues that the absence of any truly self-governing Alaska Native entities (except Metlakatla) implicitly supports the extension of state municipal governments into

these Native communities.

Particularly in regards to the vitality of Alaska Native governments, the Attorney General's letters reek of misinformation. The letters totally disregard the provision for Native self-government under Section 16 of the IRA and the concurrent jurisdiction provisions made applicable to traditional and IRA Native communities in Alaska pursuant to Pub. L. No. 83-280 and as construed by case law.[106] It is just this kind of misinformation which should compel Native organizations to propose a plan for future federal and Native cooperation based on concepts of Native sovereignty. If Natives and their organizations do not act, such broad interpretations of the purposes and structure of ANCSA may lead to de facto termination of their tribal status, appurtenant rights and benefits.

II. ANCSA: Its Role in an Age of Self-Determination

A. We suggest that something more than traditional legal research of statutes and case law is necessary to understand the federal trust relationship as it has evolved in Alaska. Acts and pronouncements of the Executive branch and its agents have persistently lead the way for Congressional and judicial definition of the trust relationship. These then must then be researched.

No better nor more significant example of this phenomenon can be offered than the July 8, 1970 message to Congress on "Indian Self-Determination."[107] Its direct progeny was the Alaska Native Claims Settlement Act.[108]

The Self-determination policy as articulated by Nixon on that date deserves close scrutiny in 1981 as the federal trust relationship is questioned and tested by unilateral redefinitions of federal commitments to Alaska Natives by federal agencies.

Self-determination spoke to more than unfettered control over land and resources vested in Native corporations or the freedom of stockholders to choose directors within the construct of ANCSA as a legislative solution to land claims.[109]

The Self-determination policy was set forth by Nixon and reiterated by him as a description of the <u>context</u> in which <u>transactions</u> such as ANCSA would occur. It provided, by explicitly rejecting termination as an objective of federal Indian policy, a guarantee. Indian tribes could seek greater autonomy and control over their own well-being without concern that this quest for

self-direction would be employed as a rationale for federal withdrawal of its historical protection and support when that protection and support was still desired by American Indian tribes.

Nixon well understood that oscillation between "forced termination and constant paternalism"[110] (or what Wilkinson refers to as between assimilation and separation[111]) in federal Indian policy had left Indian groups deeply apprehensive.

"Any step that might result in greater social, economic or political autonomy is regarded with suspicion by many Indians who fear that it will only bring them closer to the day when the federal government will disavow its responsibility and cut them adrift.[112]

"Self-determination Without Termination,"[113] said Nixon would occur only when these "formal and informal agreements"[114] between the federal government and Indian people which form the basis of the trusteeship relationship were viewed as something other than unilateral commitments to a disadvantaged people.[115]

Nixon's interpretation of the federal relationship (apparently acknowledged as formed out of more than statutes and treaties) is important to reiterate. In exchange for surrender of "claims to vast tracts of land," (as well as acceptance of life on reservations for some), "the government has agreed to provide community services such as health, education and public

safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans."[116]

"(T)he special relationship between the Indian tribes and the federal government which arises from these agreements," said Nixon, "continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American."[117]

Thus, to encourage and implement policies of self-determination, it would be necessary to assuage the "threat of eventual termination."

Said Nixon: "We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of federal control without being cut off from federal concern and federal support."[118]

The key to what Nixon viewed as a new direction in federal Indian policy was for the federal government to acknowledge what could be termed a contractual responsibility to Indians based upon claims surrendered by them. It was left for Indian groups to amend the relationship, to contract for control or operation of federal programs or to seek removal from federal constraints in particularized areas without, at the same time, putting into question an ongoing federal commitment.

"(W)e have turned from the question of whether the federal government has a responsibility to Indians to the question of how that responsibility can best be fulfilled,"[119] said Nixon.

Relevance to the Claims Settlement

Nixon's recitation of legislative initiatives in his special message to Congress on Self-Determination in 1970 did not include the claims settlement. Yet in his annual message to Congress in 1974, the settlement act was cited first among the accomplishments of his administration "to encourage Indians and their tribal governments to play an increasing role in determining their own future."[120]

The historical record shows that Nixon's articulation of self-determination marked a turning point in the Executive's support of the Alaska Native position on a claims settlement.[121]

"Without consulting with Native leaders, President Nixon let it be known that he wanted the sentiments of his self-determination message to be embodied in the claims settlement.

"The head of the Domestic Council, John Erlichman, who spoke for the President, was the final arbiter in the drafting process."[122]

The administration bill proffered one billion dollars and forty million acres and provided access to the drafting process to Alaska Natives for the first time.[123]

This early administration version of the settlement did not

provide for the structure of regional corporations which Native leadership desired. Yet this is not the critical point. What began was a process of negotiation between the White House and Native leadership that by early 1971 was seen to eclipse even the alliance of Natives with oil companies.[124]

We suggest that the published and unpublished record will reveal that Nixon's self-determination doctrine was the context within which land claims was settled. That the settlement could proceed within the context of a continuing web of federal-tribal obligations was the critical material representation of this agreement to Alaska Natives by the federal government.

Should the Alaska Natives have relied on Nixon's Presidential pronouncement especially when it was not adopted, letter-by-letter, in ANCSA? Was it merely the siren song of a wiley statesman who hoped to bewitch Native activists and cause them to ignore the traditional basis of federal Indian law in congressional acts and treaties?

Whatever Nixon's motivation, we believe that the historical record will form the basis upon which Alaska Natives may argue that they were indeed entitled to rely on this high-placed pronouncement of the Executive.[125]

The Executive branch and its agencies are everywhere responsible for the execution and administration of the trust relationship. But in the territory and new state of Alaska, the Executive department's connection with the formation and adminis-

tration of the trust relationship is unique. Where the Congress has not spoken, or more often, spoken with reference to reservation Indians, Executive agents have time and again constructed Alaskan policy through regulation, order, correspondence or act.

Because of this special role of the Executive in Alaska, Alaskan Natives look first to the Executive to give substance and effect to various programs managed under the trust, to ameliorate differences that Natives have confronted as different agencies have acted on Alaska and to provide a federal view on the definition and scope of the relationship.

Not only has the Executive formed the operative arm of federal Indian policy, but it has often played the functional role of leading the Congress to employ this policy in new legislation. Once enacted, it is the Executive in conjunction with the courts who define legislation, communicate its meaning and set the tone of regulation.

President Nixon acknowledged this role even as he showed sympathy for the position of Alaska Natives. They believed they could take independent steps superior to those of the Executive to improve their own situation within the federal relationship and communicate their needs to Congress.

The legislative record also is replete with expressions by members of Congress which suggest that Congress fully intended the settlement to proceed without fear of future termination of

the trust relationship as an expression of self-determination.[126]

Both executive and legislative records require deeper historical exploration. Both these (and, to an extent the language of the Act[127]) make clear that ANCSA was no substitution for other commitments, both formal and informal. For it to have been a substitute for these responsibilities would have signaled the very betrayal by the federal government which (Nixon had correctly perceived) Indian groups had come to fear, if and when they sought or manifested any independence from federal paternalism.

Why then are we faced with the present crisis over the continuing viability of the trust relationship? Why should land claims have brought about such a test of the ultimate federal political obligation owed Native groups in Alaska?

One reason is that there is confusion evident in post-ANCSA acts by the Executive branch and the Congress in relating to what are <u>separate</u> <u>but</u> <u>coordinate</u> principles, that of tribal sovereignty and that of Indian self-determination.

This confusion should not be surprising. The principle of self-determination evolved in an international legal context. It was evoked in the context of American foreign relations prior to its adoption as the cornerstone of federal Indian policy.

Perhaps because of its employment by Presidents Wilson and Truman in matters international it conveys to the uninformed that

its ideological message is an ultimate declaration of independence by peoples who have the means and potential to free themselves from domination of other nation states. Yet self-determination has been applied to non-sovereign peoples entirely dominated by the nation states in which they reside.[128] Further, it speaks to choices made by non-sovereign (or semi-sovereign) peoples in furthering their own social, cultural and economic development.

Thus, agreements between nation states and peoples which are expressions of self-determination should be viewed, as one commentator put it, as procedural mechanisms employed within the context of political relationships between peoples and nation states, whatever those relationships might be.[129]

In his articulation of the doctrine of self-determination, President Nixon sought to separate analytically potential opportunities for self-defermination from the second issue of obligations owed and commitments between Indian tribes and the federal government.

Yet the then present state of affairs of most "lower 48" Indian nations to whom Nixon related his doctrine left ambiguous the practical separation of the twin principles of commitments between sovereigns and support for acts of self-determination.

Nixon did not want to frighten reservation tribes by suggesting removal of the lid of federal guardianship over reservation resources as he sought to convince them that self-

determination could occur without fear of unilateral removal of the federal protection. Thus, he offered examples within the context of the same "federal paternalism" that he decried and left it to tribes to articulate for themselves alternative examples if they chose to do so.[130] While this was precisely in the spirit of doctrine pronounced, it left a lingering confusion between issues of shared governance critical to the trust responsibility and issues of independent development for Native American life within or outside of the context of tribal governance. His examples reflected the position of reservation Indians where Indian governments, often mirror images of the Bureau of Indian Affairs, have reservation-wide governance over many culturally and politically discrete Indian communities. In that context, the Interior Department retained substantial control over resource development.[131]

For these reasons, examples of self-determination were defined as transfers to recognized Indian governments of control over established programs and money, or, in the case of education programs, control by smaller Indian communities within the corporate tribe with the permission of the overriding tribal government.[132]

The opportunities for self-determination through mechanisms formed separate and apart from individual tribal units and Indian control over property freed from federal trusteeship existed only in Alaska.[133]

A formula for land claims advocated by Native leaders (but not the federal bureaucracy or state) stressed this division between sovereignty (as a basis for determining entitlement to land claims) and extratribal corporate management of economic development of resources flowing from a land settlement.

The Native advocated format for implementation of land claims was a true expression of the middle road between termination and smothering paternalism that Nixon sought to evoke for federal Indian policy. Other claims pressed in the period, for example the return of the sacred Blue Lake to the Taos Pueblo and the reconstruction of a trust relationship with the Menominee tribe, spoke to reassertions of tribal sovereign control and renewals of the federal guardianship and not, accurately, to self-determination which flows from a secure trust relationship.

It may well be that ANCSA was the only pure expression of self-determination. It was cast, by its terms, merely as a procedural mechanism for economic development to be employed, as guaranteed by Nixon, without fear of interference with the federal trust obligation owed to recognized Indian groups.

Yet a further complication probably created the present, dangerous impasse. Native leadership fought for a settlement which was not exclusively village-oriented. It viewed state schemes which were village-oriented as ploys to dissipate the control over land and resources necessary to engage in development of claims resources.[134]

Native villages have historically been the closest approximation of "tribes" within the context of federal Indian law in Alaska. Was this shift in control of claims resources as adopted by the Congress an attempt at de-tribalization of Indians who partook of it as members of recognized Alaska Native villages?

The short answer is no, when the Act is offered as the most accurate example of Nixon's self-determination doctrine. The longer answer is that later congressional activity and provisions of the Claims Act itself, muddied the distinction between Alaskan tribes as recognized sovereign entities and Alaska Native corporations, both profit and non-profit, as vehicles for specific, limited experiments in self-determination which Alaska Natives chose to undertake.

Deterioration of the Entitlement Powers of Alaska Native Tribes.

A fundamental power of Indian tribes is to determine their members.[135] With some exceptions, federal entitlement programs, which form the basis of the trust relationship, discover who are in fact entitled as Alaska Natives by requesting proof of tribal membership.[136] There are dangerous signs that this tribal authority has been ignored since ANCSA was passed and signed.

We find, for example, recognized villages under ANCSA and recognized enrollees[137] under ANCSA designated as the tribes and the Indian members for whom federal legislation has been passed, thus potentially removing from further consideration at least half of the Alaska Native population. Tribal units are denied

the ultimate authority in determining tribal membership.

We find the term "tribe" employed to include other more encompassing units of Native population in order to reflect immediate organizational necessities for control and delivery of services. Such a loose designation of "tribes" disempowers the tribal units now recognized within the context of the traditional federal trust relationship.[138]

Finally, we find very limited energy expended on development of tribal units as other than components or subcomponents of state government. It may well be that villages are anachronistic mechanisms to meet demands for social and economic change more appropriately based in regions. Yet they and not regional organizations (absent now-denied explicit congressional recognition of regions as tribes[139]) are most clearly the traditional tribal unit understood to be party to the formal and informal commitments which shape the federal trust relationship with Alaska Natives. Issues of administrative inconvenience which cause efficient non-profit corporation management to seek less encumbered ties to federal aid and support and negative check-offs from villages[140] pale into insignificance; levels of "village input" or "local control" will be measured as indicators of either continued existence of traditional Native tribes in Alaska - or indicators of their disappearance as Natives shift their relationship to programmatic or developmental organizations.

One can argue that it is in the state's interest for villages

to disappear as tribal units. However, given the capacity of state and federal government planners to form or revoke commitments of resources to non-tribal units, it is not ultimately in the interest of Alaska Natives for village tribes to wither into insignificance and disuse.[141]

Self-Determination and the Role of Intermediaries in Delivery of Services

Non-profit regional corporations have undertaken the role of reservation tribal governments in contracting for management of federal programs under the Indian Self-Determination Act.[142] So, also, has the state government assumed larger roles in providing what Nixon viewed as commitments by the federal government to provide services to American Indians at least on a level as received by state other citizens.

It is entirely appropriate to design and transfer managerial and implementational responsibilities to new bodies separate from individual tribal units. There is a long tradition of such delegation of authority by the federal government to intermediate entities from missionary groups to the Coast Guard to the territorial government.[143] This has occurred for reasons based on pragmatic considerations of who is in the field and capable of acting rather than from any overt desire to terminate federal responsibility for programs directed to Indians.

Involvement of the relatively new state of Alaska in delivery of educational services, management of natural resources and

delivery of basic legal services also appears natural when viewed against the backdrop of Alaska's special history as a federal colony of longstanding in which Natives without reservations resided. There was no need for reservations in Alaska because territorial and Native claims over governance did not conflict with the same level of intensity as they did in Western states. The federal government was able to umpire conflicts between each group. Both were subject to its ultimate authority.

Yet what cannot be overlooked in this disbursal of primary responsibility for management and delivery of governmental service is that both the federal government and the village tribes should have some clear and apparent role in establishing standards of service and in monitoring the delivery of service by intermediaries. The trust relationship need not bear the direct responsibility for such services. But it must be perceived as the ultimate sanctioning and sustaining authority for such positive developments in state and private activity on behalf of Alaska Natives as tribal members.

As one surveys the role of intermediaries, examples, both positive and negative, can be drawn from the record to prove or to disprove that collaboration between the federal government and the tribes forms the backdrop for management of programs and service to Alaska Natives by non-profits and by the state.

The evolution of the Association of Village Council Presidents in the early 1960's as a forum to judge the impact of

state liquor laws on villages and, later, to undertake federal responsibilities contractually is a good example of village guidance through intermediaries with the explicit blessing and collaboration of the Interior Department.[144]

The structure of village education as it has evolved through legislative settlement of the Hootch decision presents a picture that is both positive and negative.[145] It is negative as conflict has emerged over the ultimate control of schools within the districts, pitting administrators against village units in what appears to be tests of ultimate authority over school progrms. The merits of the dispute are not the issue here. When disputes, perhaps natural to relationships between intermediaries and villages over administrative issues, become public disputes over political authority, they create evidence that the continuing authority of tribal units is, itself, the underlying issue. This is more dangerous than the outcome of individual disputes over teacher hiring authority or curriculum content.

A similar positive and negative situation to that of state decentralized education exists in the North Slope Borough where authority for police service and other powers have been handed over by villages to a boroughwide authority.[146] Congressionally acknowledged authority also exists in the regionwide IRA council (and in at least one IRA village). Yet questions arise when two units of government, both Native controlled, but one state and one tribal, exist in the same place. The borough is flush with resources drawn from property taxes. The IRA unit manages some

federal programs. Some indication of mutual regard and mutual collaboration at least over the level of service based on property taxes would serve to protect tribal government even as state borough units manage the lion's share of service delivery. Competition for programs tends to suggest that tribal government is a mere shadow of its former self and has been replaced.

As indicated in the 1977 Senate hearings on regional tribes, there is a diversity of opinion and situations in rural Alaska regarding the extent and utility of collaboration between state and tribal governmental units. There is no one pat solution. Still, in 1981, the appearance of tribal government involvement is as important as the activities which it directly seeks to undertake.

In the realm of natural resources the recently enacted ANILCA presents a design which suggests that state management will be subject to federal scrutiny on behalf of rural (not Native) Alaskans. As a recent Congressional expression of intent, it is a useful guide for positioning the federal trust relationship as a backdrop to matters now made subject to state management.[147]

The Indian Child Welfare Act, although flawed with status designations of villages and Natives as "land claims Indians," provides an opening for village or multi-village tribal units to retain exclusive jurisdiction over some custody cases involving village children and residents.[148] Evocation of the Act's opportunities for villages to receive notice in some state proceedings

and to remove some cases to its own institutions has not been backed by an equal commitment of federal funds to develop courts and programs. Nonetheless as a recent congressional recognition of the continuing existence of village governments as tribal governments, it presents opportunities which should be seized if not to save children from involuntary placement or adoption outside of Native groups, then to demonstrate continuing vitality of tribal units even in the midst of state legal activity.

As Native Alaskans review the working relationships between villages and state and private entities, they must consider how to underscore village tribal sovereignty even as they look to supravillage units to manage and deliver programs.

As the above examples suggest, the form of these relationships will vary. Concurrent jurisdiction over civil matters is apparently maintained through Public Law 280 and through Indian Reorganization Act communities.[149] Whether or not an attempt is made to mount parallel governing structures, some clear procedural regard for tribal evaluation of service offerings must be grafted onto working arrangements with state and regional units and religiously adhered to if the federal commitment is to be protected and preserved.

As we will relate in our recommendations, we believe that it is left to stronger "quasigovernments" and boroughs to assist in the revitalization of village units. Unless intermediaries are prepared to make explicit in their working agreements significant

village authority in the design and evaluation of services and make clear to federal and state contractors that real authority rests in that place, then de facto termination and not self-determination will have occurred even without congressional initiatives to end the trust relationship.

We suggest that history provides very good explanations for how Native Alaskans came to accept land claims and reasonable program management by entities other than tribes.

However, it is left to villages and regional groups to rework their own relationships in order to demonstrate that the achievements of the past ten years have not destroyed tribal authority in Alaska. Only then can Alaska Natives demand that the federal government fulfill its commitment to self-determination without termination.

III. The Threat of Termination.

Throughout this report we have made reference to the terms "termination" and "de-tribalization." Simply stated, termination means the cessation of the federal-tribal relationship whether esablished through treaty or otherwise. Statutory termination of the federal relationship with Natives normally cannot occur unless it is the clear intent of the statutory language or legislative history.[150] However, legislation can have a "terminationist" effect. Without explanation or refutation, it will result in de facto termination.

Terminationist policy arose in the 1950's when Congressional hopes for the rapid assimilation of tribes by means of the IRA began to fade.[151] The attempt to springboard or assimilate the Indian into the mainstream of the economy in the IRA's was hampered by administrative restraints. The answer, in the view of conservative congressmen, was seen to be affording the Indian individual the full brunt (or full opportunity) of competitive society.

The thrust of the policy was: (1) to eliminate reservations; (2) to turn Indian affairs over to the states, and (3) to make Indians subject to state control without federal support restrictions. (4) Indian land would no longer be held in trust and would be fully taxable and alienable (just like non-Indian land in states); and (5) special federal health, education, and general assistance programs for Indians would end.[152] The first four of these objectives of termination policy have already been

accomplished in large measure in Alaska,[153] or are in progress.[154] The question remaining is how long the special relationship based on programs involving factor number five (e.g., (special federal health, education, and general assistance programs for Indians) will survive. Transfers and defunding by the Reagan administration tell us that the substance of the relationship is very near its end.

As we have evidenced, the rationale for a special federal relationship with Natives or other American Indians was and remains founded in their identity as separate and distinct societies (i.e., Indian tribes) who over time came to rely on federal protection of their society and its values by means of treaty, statute, or agreement. This protection goes beyond those afforded mere racial minorities in the United States. Indeed, legally, Indians have been granted a political status, not only a racial one.[155] This status has allowed the government greater leverage in its efforts to assist Indian tribes in their socio-economic development. In short, Natives derive their political rights under federal laws in their identity as members of "tribes," and not only on the basis of their individual racial classification (i.e., Alaska Native).

Even where the tribal unit is intact, however, early terminationists attempted to reduce federal work forces and services in Indian programs available to the tribes. Four factors have historically been identified and considered in implementing such

plans: (1) degree of acculturation; (2) economic resources and condition of the tribe; (3) willingness of the tribe to be relieved of federal services; and (4) willingness of the state to assume jurisdiction. These factors were proposed in a 1947 report from the acting commissioner of the BIA.[156] The original request for the report came from the Senate Civil Service Committee which recommended a gradual "discharge of the federal government's obligation. . . at the earliest possible date compatible with the government's trustee responsibility."[157] This mood of federal service reduction produced by a conservative Congress in the early 1950's is appearing again in the 1980's.

The Reagan administration employment of a criteria to determine the "truly needy" when combined with recent transfers of regulatory jurisdiction over subsistence hunting and schools to the State of Alaska suggests the use of implementation criteria very similar to the four factors recommended by Commissioner Zimmerman in 1947. Alaska Natives have adapted to the cash economy and have in many regards "adopted the white man's ways" (e.g., by a faulty government standard, they have been acculturated). Moreover, the corporate "tribes" in Alaska are on the whole financial success stories and in the hands of competent management.[158] Depending on one's definition of "tribe" in Alaska, an argument can be made that "tribes" wish to be relieved of federal services at least so far as federal lands trust management encumber corporate resources. The State of Alaska has willingly accepted (if not fully acted upon) jurisdiction over

Natives both as to civil and criminal jurisdiction[159] as well as regulatory jurisdiction over particular programs.[160] Under the terminationist criteria, the federal government could easily justify extracting itself from the business of Indian trust responsibilities in Alaska. It already may have done so.

The chain of congressional legislation directed at Alaska Natives leads to the conclusion that the factors which comprise the thrust of termination policy have occurred in Alaska. In that none of the legislation is labeled termination, we can only say that its results are the beginning of a de facto termination.

First, with the exception of Metlakatla, what few reservations were created in the state, either by statute or executive order, were revoked by ANCSA.[161] The only remaining trust lands are Native allotments which can eventually be converted to fee title in the Native owner and the single reservation.[162] Second, PL 280 conferred exclusive criminal and concurrent, but preemptive, civil jurisdiction upon the state.[163] Third, lands transferred to Native corporations and individuals under ANCSA are fully alienable.[164] The limited restrictions on stock alienation merely put off until a later date the time when considerably more Native control over assets and land can be alienated, by transfer of corporate control. Finally, recent regulatory transfers to the state and administrative defunding proposals reflect further reductions in federal support or in restrictions traditionally imposed against states in matters concerning Native affairs.[165] All five factors which denote termination policy figure into

current federal Indian affairs as applied to Alaska.

The only remaining question is, how will Natives respond?

IV. Conclusion.

Indians and Alaska Natives partake in a special relationship with the United States government not enjoyed by mere racial minorities. The origin of this relationship lies in the political identity of Natives as separate and sovereign tribal peoples and in the history of the course of dealing between their "tribes" and the federal government. As a consequence, Natives shoulder the burden of maintaining some semblance of a Native community and a recognized "tribal" identity in order to retain the benefits and protections provided by the special relationship. Without the political status of a "tribal" identity, the Native becomes just another racial minority in the eyes of the federal government and loses the special relationship.

The Congress has not terminated the federal relationship with Alaska Native "tribes." It has muddled the appropriate federal response by creating special purpose authority "tribes" and left a residue of confusion in its wake. Yet it has reaffirmed the tribal government authority of villages in the recent Indian Child Welfare Act and provided some opportunities for tribal activity, at least in principle. Further, it has offered a useful formula for future relationships between the federal government, the tribes and the state in the ANILCA legislation on subsistence management.

ANILCA offers an opportunity for the state to manage fish and wildlife on public lands with special priorities for subsistence takings and with an oversight role reserved in the federal government. Similar transfers are occurring or are provided in new amendments to the Marine Mammal Protection Act and in the BIA school operation and management. Such transfers of federal management and service obligations are not unusual in the history of Alaska. Established standards for federal oversight, however, are. Oversight by the federal government imlies as a prerequisite that standards are established through dialogue with Alaska tribal government, standards against which to measure service provided by governmental or quasi-governmental intermediaries to whom authority has been delegated by the federal government.

There are three possible bases for such performance standards:

(1) services comparable to those previously provided directly by federal agencies;

(2) services comparable to those received by non-Native recipients of the state;[166]

(3) services "which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans."[167]

Case makes the point that enforcement of the trust responsibility depends on the presence of an established obligation.[168] Moreover, where the obligation exists, some standard of perform-

ance must be established. We argue that oversight and standard setting, as well as the obligation itself, can be inferred from Executive acts and legislation, It is clear, however, that the initiative rests with Alaska Native organizations to induce these Executive activities.

Reed Chambers argues that if the chief objective of the trust relationship is to protect the tribal status as self-governing entities, equitable relief will be necessary where extinguishment of tribal land case diminishes the territory over which tribal authority is exercised and thereby perils fulfillment of the guarantee of political and cultural autonomy.[169]

We would go a step further and suggest that where, as in Alaska, there has been a wholehearted commitment to and reliance upon self-determination as the road to political and cultural autonomy, the Executive must be held responsible for maintenance of the fibre of the trust relationship since it provides a context for this selective development.

In the Alaska context, a process of standard articulation achieved through negotiation between tribal units, the federal government and intermediaries is the evident first step. Consideration of equitable relief should be held in abeyance until and unless it is evident that the Executive branch will not embark on this process. This will only mean that it has embarked through inaction, confusion or intent upon a dangerous policy of de facto termination.

We recommend that the Alaska Native Foundation and the Tanana Chiefs Association, armed with recently acquired grant monies,[170] study more than internal legal issues related to ANCSA or village-state relationships. Each should focus on the federal context of ANCSA and of local-state relations.

Goals of further work should be:

First, to establish through historical as well as further legal research that the present policy of self-determination implemented through intermediaries follows logically from the historical development of Indian policy in Alaska - especially as it pertains to the reliance upon Executive representations, to the persistent equation of Native villages as tribes and to the persistent delegations of authority to intermediaries to carry out policy - even before the self-determination era.

Second, to establish that Nixon's policy of self-determination reflected in congressional legislation mandated continuing federal trust responsibilities.

From this base, the third step should be a very careful analysis of the relationship between Native villages and governmental and non-governmental authorities now engaged in federal responsibilities. This process may involve innovative restructuring at the village level. No one denies the need to obtain economic strength in Native businesses which, in turn, can support Native communities. ANCSA was not on its face a social welfare act, but it can severely impact the social well-being of

Native communities.[171] The analysis of the relationship between Native villages and governmental and non-governmental authorities was begun by Case in his landmark study but has not yet resulted in critical rethinking and reordering of these relationships necessary to argue from a firm evidentiary basis that Alaska Native tribes are alive and well.

Revitalization of tribal relationships with governmental and quasi-governmental units will perhaps have a secondary effect of protecting some for-profit corporations from takeovers in 1991. It will also lay the basis for requests that the federal government take on the collaborative process of standard setting and oversight required to maintain the trust relationship through these dark times.

We do not argue for a return to federal paternalism, desired neither by Natives in the modern era nor by the federal government. We do argue for a working relationship between the federal bureaucracy and tribes which can be employed should the state or other intermediaries fail to live up to their commitments.

Our position should imply no disrespect for the many non-tribal Native organizations who have taken Alaska Natives to this place in their history. We must deal with reality as we see it. The Congress has buried a bill to establish regional tribes. The state has shown time and again its disfavor to tribes, even in the face of federal legislation.

It is left to Natives to organize for the revitalization of

the core relationship between tribes and the federal government. As in the past, the fight will be long and hard. But not to fight is to risk misinterpretation of the historical record and death of the trust relationship in 1991, exactly when it may well be most needed as a political safety net.

Additional Specific Recommendations

(1) Federal oversight of service and other transfers of federal programs has not been coordinated among transferors, tranferees and the tribes. As important to Natives and the state as land exchanges, the burdens imposed in the transfers warrant the formation of a Joint Service and Oversight Planning Commission. The Commission would ensure that all tranfers were effected in the most efficient manner with due regard to the needs of Natives, the state, and the federal government in their oversight role.

(2) Village corporation options. The divisive effects of individual stock ownership at the village level combined with the undue burdens of a for-profit corporate form at that level warrant efforts to provide options to village corporations and Native villages to reincorporate as non-profits or allow mergers with inclusive IRA's. Both plans open village membership to all Native residents, and allow local development to proceed for the benefit of the community. Community business can develop while the tribal unit is preserved through group action and a land base. Congressional support is much more likely for a village level restructuring, given these corporations' general lack of

"success" and the prospective community divisions facing villages and village corporations in contrast to the ANCSA's legislative intent that the village corporations be the primary culture bearers.

(3) Extension of the 1991 deadline. The merits of the Native argument are obvious: delayed conveyances defeated the underlying objective of the Act which was to create economically secure business entities within the 20 year period. (This discounts the other reason which was to give the state and federal governments time to pay off the monetary settlement debt.) Another reason compelling Native action is that if they wish to strengthen tribal units, they will need land or at least the political power held by Native corporations to effect such changes. When stock becomes alienable in 1991, Native power in the state will be a function of the degree to which they maintain ownership and control of their ANCSA corporations. Landless tribes are difficult to maintain: landless and powerless tribes are never heard and wither quickly.

1991 - The Real Issue

The real issue in 1991 will be whether Alaska Natives will be effectively selling the last vestiges of their federally recognized tribal identity if they choose to sell their shares in regional and village corporations.

If corporations have for all intents and purposes by then replaced tribes in the eyes of the Executive then the answer will

be yes. It will be of little comfort to know that the statutory tribes with which they are severing connections were not really tribes at all in the eyes of federal Indian law and its obligations.

If this unhappy situation is to be avoided, it must be established now before it is too late that stock ownership and tribal membership are two separate and important matters. Or, that in the case of stock ownership in village corporations (the less marketable of equities in most situations), that the land base of these businesses has been sufficiently controlled by villages so that stock owners can view their tribal rights and stock ownership as complementary and mutually self-sustaining.

With merely ten years remaining before the cap is put on the settlement process, we are a long way from arriving at the necessary separation of tribalism from capitalism in the minds of villagers, corporate and tribal leaders and state and federal bureaucrats.

We urge a return to the operating premises of federal Indian law as they explain tribal sovereignty and Indian self-determination. Unless Alaska Natives are themselves cognizant of the difference between membership in tribes and ownership of corporations, it is most unlikely that political actors in the non-Native community will be understanding of or symphathetic to the difference. Although we have focused upon confusion between the two when created by the federal government, as it articulated

and implemented self-determination policy in Alaska, it would be less than honest to deny that the confusion has also arisen out of opportunistic quests for political, economic and social power by Native organizations.

Could this confusion have been avoided? Probably not, unless Alaska Natives had been left to endure longtime patterns of federal and state neglect and disdain. Alaska Natives reached for power in ways that were innovative. These same proven political skills must now be mobilized to disentangle tribal sovereignty from other forms of political and economic development. The political power and managerial skills developed by Native organizations must be put to use to repair and strengthen tribal governments as a prelude to serious negotiations with state and federal governments.

Case law alone will not save the situation. Neither will statutory language. Neither will high-priced lawyers of the 1970's or low-priced VISTA volunteers of the 1960's. What must occur is a renaissance of tribalism sparked by the same cluster of battle-hardened Native leaders who have fought for the resource and political base which Natives now possess and must fight to retain.

The historical record can be turned to the advantage of Alaska Natives. So can the legal record. But, in the final analysis, the reality of Native tribes with loyal members, supported by strong and sophisticated Native organizations, will prove the

determining element. Only active tribes will save the trust relationship.

This then is the moment of truth.

FOOTNOTES

[1] D. Case, The Special Relationship of Alaska Natives to the Federal Government (1978) (hereinafter cited as Case).

[2] Alaska Native Claims Settlement Act, Pub.L. 92-203, 43 U.S.C. 1601-28 (Dec. 18, 1971) (Supp. 1981) (hereinafter cited as ANCSA).

[3] North Slope Borough v. Andrus, 486 F.Supp. 332 (D.D.C. 1980). Obligation of the federal government to rigorously apply the environmental statutes to protect species necessary for Native subsistence based on specific Native subsistence hunting exemptions in the Marine Mammal Protection Act, 16 U.S.C. § 137(b) and the Endangered Species Act, 16 U.S.C. § 1539(e). See also White v. Califano, 437 F.Supp. 543 (D.C.S.D. 1977) Obligation to provide health care under the Indian Health Care Improvement Act: Morton v. Ruiz, 415 U.S. 149 (1973) Obligation to provide general assistance payments to Indians living "one or near" a reservation where representations that such Indians would receive assistance were the basis of congressional appropriations.

[4] E.g., Andrus supra n. 3; People of Togiak v. U.S., 470 F.Supp. 423, 428 (D.D.C. 1979) Marine Mammal Protection Act impose on the federal government a trust responsibility to protect Alaska Natives' rights of subsistence hunting; See Alaska National Interest Lands Conservation Act, Pub.L. 96-497 (Dec. 2, 1980) (hereinafter cited as ANILCA).

[5] ANILCA, Id.

[6] Public Papers of the President 564-76 (1971) (hereinafter cited as Nixon).

[7] U.S. v. Kagama, 118 U.S. 375 (1886).

[8] See generally R. Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians, 27 STAN. L. REV. 1213 (1975).

[9] "The trust responsibility to Alaskan Natives does not, however, transcend the statutes creating the responsibility." Andrus at 344 supra, note 3.

[10] See generally R. Barsh and J.Henderson, The Betrayal: Oliphant v. Suquamish Indian Tribe and The Hunting of the Snark, 63 MINN. L. REV. 609 (1979). Berates Rhenquist's deceptive use of an historical record in Oliphant. See also M. Wilson, The Federal Trust Responsibility and the Obligation to Provide Health Care to Indian People (1980).

[11] See generally S. Haycox, Historical Aspects of the Federal Obligation to Alaska Natives, Appendix one.

[12] Id. This was particularly true before statehood when the territory was effectively a subpart of the federal government which derived its powers from the federal government and whose governor was appointed by the Executive branch.

[13] Act of June 18, 1934, 48 Stat. 984, codified, as amended 25 U.S.C. § 461-79 (Supp. 1980) (hereinafter cited as IRA).

[14] With the exception of land trusts, see ANCSA §§ 1601(c), 1618; see also 117 CONG. REC. 38440 (remarks of Sen. Stevens).

[15] Indian Self Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n, 455-458e (Supp. 1980) (hereinafter cited as ISDA).

[16] A notable exception is in the area of appropriations, but as has been lately observed, the Executive is leading the Congress on this matter.

[17] ANCSA § 1622.

[18] Cf. The state's extreme concern for the specific terms of the transfer of the Alaska Railroad system.

[19] U.S. Const. Art I, § 8, ch. 3. See also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[20] See F. Cohen, Handbook of Federal Indian Law, 169 (1942) (hereinafter cited as Cohen).

[21] Indian Appropriation Act of 1871, 16 Stat. 544, 566, 25 U.S.C. 71 (Supp. 1980).

[22] Case, supra note 1, at 9.

[23] Ratified May 28, 1867, 15 Stat. 539.

[24] See generally Cohen, supra note 20, at 402.

[25] Cape Fox Corp. v. U.S., 456 F.Supp. 784, 797 (D. Alaska, 1978).

[26] Cohen, supra note 20, at 402.

[27] Cape Fox Corp., supra note 25, at 784. ANCSA Native corporations are not Indian tribes for purposes of original federal jurisdiction under 28 U.S.C. 1331 and 1362.

28 Act of January 27, 1905, 33 Stat. 616.

29 Johnson v. Pacific Coast S S Co., 2 Alaska 224 (1904); cited in Cohen, supra note 20, at 411.

30 Id. at 409 n. 138.

31 IRA, supra note 13, at § 473(a).

32 18 U.S.C. 1151(b); see also Case, supra note 1, at 5.

33 ANCSA § 1602(g) and (j).

34 ISDA, supra note 15 R § 450b.(b).

35 Id. at § 450b.(c).

36 See generally Chambers, supra note 8, at 1213.

37 See ANCSA §§ 1602(c), 1606(a).

38 Hearings on S. 1920 and S. 2096 Before the U.S. Senate Select Committee on Indian Affairs, 95th Cong., 1st Sess. (1977). In which an unsuccessful attempt was made to consolidate tribal governing bodies into regional tribes.

39 Indian Child Welfare Act, Pub. L. 95-608 (1978) (codified in scattered sections of 25 U.S.C.) (Supp. 1980) (hereinafter cited as ICWA).

40 Id. at 25 U.S.C. § 1903(3).

41 Id. at § 1903(8).

42 Id. at § 1904(4).

43 R.L. Barsh, The Indian Child Welfare Act of 1978: A Critical Analysis, 31 HASTINGS L.J. 1287, 1310 (1980).

44 E.g. Indian Financing Act of 1974, Pub. L. 93-262, 25 U.S.C. 1451, 52; Indian Health Care Improvement Act of 1976, Pub. L. 94-437, 25 U.S.C. 1601, 1603 (1980 Supp.).

45 Supra note 17.

46 See text acocmpanying notes 63 and 66 infra.

47 "Comparable service" would be a standard of service arrived at by collaboration between affected Natives and the federal government. This standard could be the current established federal goal, a national standard common to states, or the standard the State of Alaska applies in its urban areas.

48 See note 64 infra.

49 See, e.g., Ruiz, supra note 3.

50 U.S. v. Holliday, 70 U.S. (3 Wall.) 407 (1852).

51 Supra note 22.

52 ANCSA § 1618(a).

53 See ANILCA, supra note 4, § 905(a)(1).

54 Telephone Interview, Micki Smith, Native Allotment Specialist, BLM, Anchorage (October 12, 1981).

55 445 U.S. 535 (1980).

56 Act of May 17, 1906, 34 Stat. 197. cf. General Allotment Act, Act of February 8, 1887, 24 Stat. 388.

57 See Aguilar v. U.S., 474 F.Supp. (D. Alaska 1979) and Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

58 Supra note 25.

59 8 INDIAN L. RPTR. 2087 (9th Cir. May 26, 1981).

60 648 F.2d 496 (1980).

61 Slip Op. No. 2417 (Alaska, September 25, 1981).

62 Organic Act of May 17, 1884, 235 Stat. 24.

63 Interview by telephone with Lydon Bohanan, Area Social Worker, BIA, Juneau (October 14, 1981).

64 BIA program number 2261 offers federal administrators an "unbanded" welfare grant system. Under this system, federal social workers can assist entire Native families, including the father, while they are in need. Need is a function of seasonal employment opportunities and income. Under the state system which divides the welfare grants into three levels (handicapped/blind/disability, general relief, and aid for families with dependent children). In the opinion of the BIA social worker, Lydon Bohanan, Id. current state welfare regulations would preclude Native family participation.

65 Coincidental defunding of Alaska Legal Services leaves Natives with few sources of information on welfare cutbacks.

66 Interview by telephone with Emil Kowalczyk, Area Education Program Administrator, BIA Juneau (Oct. 14, 1981).

67 Id, but cf., supra note 47.

68 470 F. Supp. 423 (D.D.C., 1979).

69 Act of October 21, 1972, 16 U.S.C. 1361 et. seq (Supp. 1981) (hereinafter cited as MMPA).

70 See discussion accompanying text, note 76 infra.

71 Andrus, supra note 3.

72 Id., Andrus at 344.

73 Act of December 28, 1973, 16 U.S.C. 1531 et. seq. (Supp. 1981) (hereinafter cited as ESA).

74 Interview by telephone with Gretchen Beck, General Counsel's Office, NOAA, Washington D.C. (October 13, 1981).

75 Text of bill as signed ws unavailable. Quoted by telephone from Gretchen Beck, General Counsel's Office, NOAA, Washington, D.C.

76 Id.

77 ANILCA, supra note 4, Title VIII.

78 ANILCA, supra note 4, § 801(4).

79 The rural/urban distinction may become as critical as tribal status in Native communities in regard to subsistence hunting rights. At some point in time, a bureaucratic designation of urban status could preclude any analysis of the necessity of the use, much less whether the use was customary or traditional.

80 See Andrus, supra note 3; see also ANILCA, supra note 4, at § 807, Judicial Enforcement.

81 But see Case, supra note 1 at 4, 154-57; see also M. Wallert, Tribal-State Relations: A New Paradigm for Local Government in Alaska 23, 30 (undated). While acknowledging the problem of territorial jurisdiction both authors suggest that ANCSA transfers may provide lands over which tribal jurisdiction could be exercised.

82 Letter from Clyde D. Morty, Department of Interior Solicitor, Washington D.C. to John E. Rouget, President Rouget Oil and Gas Corporation and Mr. Paul S. Williams, First Chief, Native Village of Venetie, Jan. 16, 1981. No Secretarial approval was required for oil and gas leases transacted by Venetie IRA on lands transferred to the IRA on September 1, 1979 under warranty deed by the ANCSA village corporations of Venetie and Arctic Village; see also letter from Scott Keep, Acting Associate and Mr. Paul S. Williams, Dec. 23, 1980. Corporation Laws of Alaska and ANCSA allow ANCSA village corporations to alienate property freely. (Copy on file Justice Center, University of Alaska, Anchorage); See Pub. L. 83-280, Act of August 15, 1953 (now codified as 18 U.S.C. § 1162, 28 U.S.C. § 1360 and other scattered sections in 18 and 28 U.S.C.) (Supp. 1980) (hereinafter cited as PL 280).

83 ANCSA § 1615(d)(1). Village corporation of Klukwan is required to quitclaim prior reservation lands to Chilkat Indian Village (IRA) in fee, free of trust.

84 Petitions for two village IRA's have been certified by the Secretary of Interior and await tribal certification by election. Interview by telephone with David Case, DOI Regional Solicitor's Office, Anchorage (October 15, 1981).

85 See ANCSA § 1613(c)(3). Community land conveyances to municipal corporations in a Native village or to the state in trust for any municipal corporation established in the Native village in the future.

86 A.S. 44.47.150. See also 19 AAC 90 et. seq. (1979) implementing regulations.

87 Id. at 19 AAC 90.930 delegation of authority by Commissioner.

88 D. Olsen and B. Tuck, ANCSA 1971-1979, Economic Consequences of ANCSA Implementation, 44 Federal Land Use Planning Commission for Alaska 33 (1979).

89 E.g., G. McBeath and T. Morehouse, The Dynamics of Alaska Native Self-Government 75-103 (1980).

90 Id. See also D. Getches, The North Slope Borough, Oil, and the Future of Local Government in Alaska, 3 UCLA-ALASKA L. R. ___ (1973).

91 E.g. ICWA, supra note 39 at 25 U.S.C. § 1918. See also 44 Fed. Reg. 45095 (1979) implementing regulations.

92 See text accompanying note 25 supra.

93 ANCSA § 1601(c).

94 ANCSA § 1626(a).

95 Supra note 93.

96 Id.

97 Case, supra note 1, at 5, 7.

98 ANCSA § 1601(b).

99 Case, supra note 1, at 98.

100 E.g. Menominee Tribe of Indians v. U.S., 391 U.S. 404 (1968).

101 Stevens, supra note 14; Nixon, supra note 6; accord, Public Papers of the President 56, 75 (1975) (hereinafter cited as Nixon 1974).

102 Case, supra note 1, at 6-7.

103 Supra note 94.

104 See generally M.C. Berry, The Alaska Pipeline, The Politics of Oil and Native Land Claims (1975) (hereinafter cited as Berry).

105 Letter from Avrum M. Gross, Attorney General, Juneau to Senator Ted Stevens, Washington, D.C., May 21, 1980 regarding State of Alaska's Objection to Provisions of S.1181: Tribal-State Compact Bill); and Letter from Avrum M. Gross, Attorney General, Juneau to Rep. Don E. Young, Washington, D.C., Sept. 12, 1978 regarding S.2502 defining Alaska Native villages as tribes.

106 Supra note 82; see also United States v. John, 437 U.S. 634 (1978). Section 16 IRA is a tribe within the meaning of the Nonintercourse Act; and see Walleri, supra note 81, at 16 citing Fed. Reg. (May 25, 1973) p. 13758; Fed. Reg (July 10, 1980) p. 46581-2. Secretary of Interior recognized Alaska Native villages as exercising law and order functions.

107 Nixon, supra note 6.

108 ANCSA, supra note 2.

109 Cf. R.D. Arnold, Alaska Native Land Claims 276 (1978).

110 Nixon, supra note 6, at 575.

111 C.F. Wilkinson, The Evolution of the Termination Policy, 5 AM. IND. L. REV. 139 (1977).

112 Nixon, supra note 6, at 566.

113 Id. 565.

114 Id.

115 Id.

116 Id. 565-66.

117 Id. 566.

118 Id. 566-67.

119 Id. 576.

120 Nixon 1974, supra note 101, at 75.

121 Berry, supra note 104, at 148, 153.

122 Id. at 160.

123 Id. at 161.

124 Id. at 168.

125 See S. Haycox, supra note 11 for a synopsis of the historical evolution of federal Indian policy in Alaska.

126 See, e.g., remarks of U.S. Sen. Stevens supra note 14.

> We have basic agreement on the amount of money. We also have basic agreement on the amount of land, and we have basic agreement on the fact that the Alaska Native people themselves should have the right to self-determination. This is consistent with the President's policy of self-determination without termination.

Remarks made on November 1, 1971 on the Senate floor just one month before the passage of ANCSA.

127 ANCSA, supra note 2, § 1601(c). "No provision of this Act shall replace or diminish any right, privilege or obligation of Natives as citizens of the United States or of Alaska, or relieve, replace, or diminish any obligation of the United States or of the State of Alaska to protect and promote the rights or welfare of the United States or of Alaska."

Admittedly, the language (along with the proviso in § 1601(b) that no new "lengthy wardship or trusteeship" is created by the Act) could be said to have been addressed to the rights of assimilated citizens who happen to be Natives.

Yet the language well suits the suggested position of Natives as members of tribes without reservations, subject to Public Law 280 jurisdiction, tribes which as villages were expected to become municipal corporations under state statute in order to receive their land base. See ANCSA §§ 1602(i), 1613(c)(3).

128 J.H. Clinebell and J. Thomsom, Sovereignty and Self-Determination: The Rights of Native Americans Under International Law, 27 BUFFALO L. REV. 706 (1978).

129 Id. at 713.

130 Nixon, supra note 6, at 567-71.

131 25 U.S.C. §§ 391-415 (1976) C.F.R. §§ 120-84 (1978).

132 See ISDA, supra note 15 (1976). Michael Gross, longtime advocate of community-controlled education, decried this reading of the act in Gross, Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Indian Policy, 56 TEXAS L. REV. 1222-223 (1978). In Alaska, this same check-off policy which inhibits small communities within large tribes to act independently has the reverse effect as large non-profits classed as "Indian organizations" and not tribes must obtain approval from all village governing bodies or "tribes" benefiting under the contract. See Case, supra note 1, at 160.

133 Compare this comment on the Indian Self-Determination Act in reservation settings:

> [T]he conceptual danger of the recent Indian Self-Determination and Education Assistance Act is in its scheme of assimilating tribes into the bureau's administrative network, rather than openly transferring power to tribes to exercise independently of the bureau. The organization and policy of bureau offices whose functions are transferred to tribes remain the same; the tribe obtains little more than the power to hire and fire (footnote in text). In this way, the act, which was supported by the bureau, makes the tribes look and function more and more like creatures of the agency, as opposed to separate sovereignties. Nothing could be better calculated to convince Indians and the public that tribes are legally inextricable from the Bureau of Indian Affairs and must stand and fall with it.

R..L. Barsh and J.Y. Henderson, The Road 228 (1980).

In its 1978 review of the Indian Self-Determination and Education Assistance Act of 1975, the pan-Indian self-

determination act, the Comptroller General found fear of termination caused some tribes to reject contracting over governmental services. Comptroller General, The Indian Self-Determination Act -- Many Obstacles Remain 18 (1978). The Navajo Council suggested that as between federal and tribal governments, it was not important who actually operated the programs. What was important was that the Navajos plan, design and evaluate the services provided to Navajo people. Id. at 17. This is precisely the role we suggest for tribes with respect to ANCSA-managed activities and those undertaken under the Self-Determination Act by non-profit corporations and even the State of Alaska and its governmental subunits.

[134] Berry, supra note 104, at 203, 207.

[135] Cohen, supra note 20, at 122-50; Ollestead v. Native Village of Tyonek, 560 P.2d 31 (Alaska 1977), cert. denied 343 U.S. 938 (1977).

[136] See the definition of "Native" under ANCSA § 1602(b) for a good example of employment of this authority by Native villages or groups (less than twenty-five persons). However, even here the Secretary made the final determination of tribal membership. The use of blood quantums as a secondary definition allowed members of Alaska Native cultures with no present tribal affiliation to participate in the claims settlement.

[137] This impact of the Indian Child Welfare Act supra, note 39 may result as non-participants in ANCSA themselves have children thus suggesting a dangerous removal of protection of post-ANCSA generation. See R.L. Barsh, supra note 43, at 1309-10. Perhaps more serious, is that this mistake probably resulted from a simple misconception that all Alaska Natives were beneficiaries of the claims settlement, a dangerous assumption for the coming generation of Alaska Natives whose stake in the settlement is only by inheritance.

[138] ISDA supra note 15, at § 450b(c) provided that recognized Alaska villages under ANCSA as well as regional and village corporations organized pursuant to the Act were "Indian tribes" for purposes of the Act.

[139] A bill to provide for regional tribes with full authority under Indian law died in committee. See note 38 Supra.

[140] See, e.g., testimony of Morris Thompson, Summary of Testimony and Comments made at the Public Hearing on The Indian Child Welfare Act, Juneau, Alaska, March 7, 1979 at 15-16 (arguing that regional non-profits should be included as tribes or as tribal designees authorized to enter into agreements with states with no affirmative village resolution required to be forwarded to the Secretary of Interior unless funding is provided for obtaining such resolutions).

141 Case writes "Both common sense and the court decisions indicate that in the face of State jurisdictional claims the scope of Native governing authority is likely to be influenced by the extent that the Native government actually exercises its authority. . . (This) impli(es) that a threshold consideration in any future determination of the scope of Alaska Native sovereignty is likely to be whether Alaska Natives do in fact have active systems of self-government." Case, supra note 1, at 163.

142 ISDA supra note 15.

143 See, e.g., T.O. Murton, The Administration of Criminal Justice in Alaska, 1867 to 1902 (1965) (Unpublished master's thesis, University of California, Berkeley) for examples of this delegation of authority legally and extralegally.

144 See unpublished minutes of the Association of Village Council Presidents September 19, 1962 Bethel, Alaska (on file with author). So is the Tanana Chiefs Conference. See McBeath and Morehouse, supra note 89, at 71. Out point here is not to criticize non-profit regional corporations, but to alert them and their tribal members that close scrutiny of their relationships to tribes with special concern for continuing tribal oversight of programs is sure to come about by those who would seek to prove that tribal governments have been replaced by regional associations.

Thus McBeath and Morehouse may write sanguinely about the "profusion of quasigovernment, a multiplication of institutions at the local and regional levels, that have tended to enhance Native power," Id. at 67 but the fact remains that regional corporations have been refused a tribal designation by Congress and only the North Slope Borough has after serious and protracted struggles received recognition within the context of state law only.

Development of pan-village Indian Reorganization Act organizations represents a way to integrate tribes with federal recognition. Such a move is underway on the North Slope.

145 See Hootch v. Alaska State-Operated School System, 536 P.2d 793 (1975) and McBeath and Morehouse, supra note 89, at 68-70.

146 McBeath and Morehouse, supra note 89, at 77-88.

147 See text accompanying footnotes 77-80 infra.

148 ICWA supra note 91.

149 Supra note 82.

150 Supra note 100.

151 Wilkinson, supra note 111.

152 Id. at 140.

153 Infra notes 161-64.

154 Infra note 165.

155 Morton v. Mancari, 417 U.S. 535 (1974).

156 Willkinson, supra note 151, at 146 citing Officers and Employees of the Federal Government Hearings on S. Res. 41. Before the Senate Comm. on the Post Office and Civil Service, 80th Cong. 1st Sess. (1947).

157 Id.

158 "Sealaska Corporation: Soon to Rival Oil Companies in Power?" Alaska Industry 13:9 (Sept., 1981), p. 46; but cf. Gary Orfield, A Study of the Termination Policy, reprinted in: Staff of Subcomm. on Indian Education, Senate Comm. on Labor and Public Welfare, 91st Cong., 1st Sess., 4 The Education of American Indians 673 (Comm. Reprint 1970). See also S. Herzberg, The Menominee Indians: Termination to Reabration, 6 AM. IND. L. REV. 143 (1978) for account and analysis of the Menominee experience in termination by incorporation.

159 PL 280, supra note 82.

160 E.g., ANILCA, supra note 4, at title VIII. Fish and Wildlife Management on Public Lands; supra note 75. MMPA amendments extending jurisdiction to the State of Alaska.

161 Supra note 52.

162 See text accompanying notes 54, 54 supra.

163 PL 280, supra note 82.

164 Id.

165 See text accompanying notes 63-67 supra.

166 See Chambers, supra note 8, at 1243-44.

167 Nixon, supra note 6, at 566.

168 Case, supra note 1, at 2.

169 Chambers, supra note 8, at 1236.

170 See letter to Mrs. Placeta Lonewolf, Administration for Native Americans, August 11, 1981 (on file Justice Center, Anchorage).

171 Although ANCSA corporations are touted as the protectors of Native heritage, they are ill-suited for the task. Even now, births and limited inheritances of stock have started the trend which will result in a minority of the Native members of Native villages owning stock in the local village corporation. Stock sales to non-Natives and non-resident Natives will exacerbate this result putting the control of village lands, and derivatively the village community, into the hands of non-villagers.

APPENDIX I

Historical Aspects of the Federal Obligation to Alaska Natives

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From the purchase of Alaska in 1867, all three branches of American federal government have dealt with Alaska Natives in a variety of capacities, including service, advice and counsel, and advocacy. In the purchase treaty the Congress effectively postponed direct action with Alaska Natives, and the executive branch was left to establish such contact with and jurisdiction over Alaska Natives as the federal government would exercise.[1]

This pattern has continued through more than one hundred years of interaction between Alaska Natives and the federal government. Congress has periodically acted to define and affect Alaska Native conditions, but the implementation and interpretation of such acts has regularly been left to executive agencies dealing with Natives and Native communities.[2] Also, intermittently, federal courts have defined and affected Alaska Native conditions through the adjudication and interpretation of legislative enactments, executive activity and litigation.[3] However, normally, implementation has been left primarily to federal executive agencies.[4]

The executive agency which has established a continuing contact with Alaska Natives is the Bureau of Indian Affairs and its direct precursor agencies, the Alaska Native Service and the U.S. Bureau of Education. Though not the only executive agency to deal with Alaska Natives,[5] BIA has been a primary agency and its services and jurisdiction have been sought and acceded to by other agencies, including the military.[6]

The Bureau of Indian Affairs is presently organized into an area office, headquartered at Juneau, and district agencies in Anchorage, Bethel, Nome and Fairbanks. The creation of the area office superceded a previous organization, the Alaska Native Service, with headquarters at Juneau, and district superintendencies at Unalaska, Fairbanks and Nome.[7] The Alaska Native Service was not created by the Bureau of Indian Affairs. Rather, it was taken over from the Bureau of Education in toto in 1931.[8] In that year, the federal jurisdiction over Alaska Native affairs was transferred to BIA by the Interior Department from the Bureau of Education, which had exercised the jurisdiction from 1885, when a general agent for education was appointed for Alaska, responsible to the Commissioner of Education, and through that office, to the Secretary of Interior.[9]

Examples of executive interpretation and action for Alaska Natives are many. Between the purchase of Alaska in 1867 and the creation of the general agent for education in 1885, numerous executive agents surveyed Native conditions in Alaska and reported to Washington, D.C. In 1869 special Indian agent Vincent Colyer reported; in 1875 special Indian agent James Swan; in 1879 special treasury agent William Morris.[10] In 1868, by the Alaska customs act of that year, Major General J.C. Davis, military commander at Sitka, was designated to act in the capacity of Indian agent in Alaska.[11] By the same act, President Johnson ordered that disposal of all liquors be governed by the military. In 1870 President Grant imposed a total prohibition of imported

liquors by executive order.[12]

Direct executive services began in 1885 with the creation of the general agent for education. The Presbyterian missionary, Dr. Sheldon Jackson, had previously established twelve basic elementary grammar schools in nine Native villages.[13] There was at the time a contract system being employed by the Indian Office (Interior Department) in western states and territories. The education office elected to employ the same mechanism in Alaska, contracting with missionary societies to supply teachers and materials. By 1895, schools had been established in twenty-seven separate villages.[14] The U.S. Congress prohibited contracts with religious groups for federal Indian services. The education office curtailed its activities in Alaska from that date until additional funding was established by legislation in 1900, and again in 1905.[15] From 1905 the Bureau of Education maintained an expanded organization of services until 1931, including first medical services through itinerant doctors and nurses and four Native hospitals, then boarding schools and orphanages and finally a marketing agent and warehouse in Seattle for the distribution of Alaska Native hand-crafted items.[16]

From the beginning of its service, the education office considered teachers in Alaska village schools to exercise broad responsibility and powers, including the implementation of social policies for all village residents.[17] Such responsibilities were later codified. Additionally, Sheldon Jackson attempted to implement a system of reindeer herding among Natives in Arctic

Alaska in the 1890's to provide economic livelihood.

In many ways Natives came to depend upon the counsel and service provided by education office personnel in Alaska, most particularly, medical services. The more developed organization of the Bureau of Indian Affairs and its greater number of personnel and specializations brought to Alaska by the 1931 transfer, did nothing to decrease the level of dependence.

Reorganization of federal Indian policy after the Meriam report of 1928, manifest in the Indian Reorganization Act of 1934, had a significant impact on federal services for Alaska Natives.[18] In a sense, the reorganization of 1934 confirmed the increase in counsel and services attendant upon the transfer of ANS from the Bureau of Education to BIA in 1931. Additionally, because the application of certain provisions of the 1934 reorganization act to Alaska was problematical, a series of amendments in 1936 clarified the right of village incorporation, the availability of credit funds and other IRA provisions.[19]

One important provision extended to Alaska Natives was explicit recognition of their right to organize as villages. Native village communities had been the primary context of the provision of federal services from the beginning of Alaska (1867). The Bureau of Education, for example, established its schools, hospitals and later cooperative stores, in established villages.[20] Congressional acts of 1884, 1891 and 1899 confirmed withdrawal of land around or in the vicinity of established villages for the

purpose of providing these services, as did certain actions of the federal courts.[21] When, in 1935, individual social security and other social service payments began to be made to Alaska Natives, they were regularly made through federal personnel (normally school teachers) in established village communities. The amendments of 1936 stated explicitly that groups of Natives not recognized as tribes or boards, but having a common bond of occupation or association or residence within a well-defined neighborhood, community or rural district, might organize to adopt constitutions.[22] Following the amendments, one of BIA's major activities, up to the outbreak of World War II, was the organization of traditional Native villages into formal, incorporated communities.

Although BIA continued to provide certain services to Natives on an individual basis, most services and most interaction between federal agencies and Alaska Natives took place within the context of the village. For example, BIA organized an association of villages, the Alaska Native Industries Cooperative Association, to purchase supplies in large quantities for distribution to Native-run village cooperative stores.[23] Following the war, BIA continued the effort to organize villages for purposes of IRA council governance and to provide economic and other advice and counsel. Identification of Natives as groups in villages was manifest in the work of the Federal Field Committee for Development Planning in Alaska, which conducted extensive surveys in cooperation with BIA in the early 1960's and published

its findings in 1968.[24] The Field committee found that virtually all Alaska Natives were organized as villages and had been dealt with traditionally as villages.

The granting of statehood to Alaska by the U.S. Congress had a profound effect on the relationshp between the federal government and Alaska Natives. Effectively, statehood forced the federal government into a position of active advocacy of Alaska Native land claims and citizen rights, for statehood created an entity with significant contrary interest to those claims and rights, replacing an agency - the territory of Alaska - which had been considerably closer to Alaska Natives in commonality of interest.[25] Most significant was the entitlement to the state by the statehood act of 103 million acres of land. The state began identification of preferred acreage immediately, in the process signaling its contrary interest, for numerous parcels of land identified by the state were lands to which Alaska Natives, upon advice and counsel of the BIA, either had claimed, or were developing claims.[26] The position of the Territory of Alaska considering land claims was to refer the questions to the future, and to settlement by the Interior department, or perhaps the Congress.[27] This, too, was the position of the State of Alaska. But, land selections by the state, because of their locations, implied that the state would not accept more than core township selections around Native villages, and would contest broader claims to traditional hunting and fishing areas on the grounds that such claims were inconsistent with the interest of the

statehood act.[28] Some state officials asserted that statehood selections should preempt Native claims on the same grounds.

Prior to statehood, the Territory of Alaska had, in most instances, passed jurisdiction on Native questions to the BIA, thus confirming the role of BIA as primary executive agency for acquitting the federal obligation to Alaska Natives. In some instances, however (for example, during war or in relation to shortages of critical materials), territorial officials often accepted responsibilities related to the federal obligation.[29] The creation of the State of Alaska removed this concommitant agency (Territory of Alaska) and replaced it with one which, whatever the attitude of its individual officials, did not have the same sense of obligation or complimentary interest. Throughout the debate over and development of the settlement of Alaska Native claims the State of Alaska clarified its differing interpretation of, and often opposition to, Alaska Native interests.

The Alaska Native Claims Settlement Act of 1971 and the Indian Self-Determination Act of 1972 significantly altered the role of BIA as the primary agency of advice, counsel and advocacy for Alaska Natives. The leadership role of regional and village corporations has reduced the leadership function of BIA. So, too, has the decentralization of the rural school system in Alaska.[30] BIA officials are no longer certain what role they are obligated to pursue as Native organizations take on increasing responsibility for Native affairs and activity.

Considerable historical research is needed to determine with precision and clarity the nature, origin and extent of federal activity in relation to Natives in Alaska, particularly executive federal activity. The policies and practices of the Bureau of Education are, as yet, only imperfectly known. The reasons for the transfer of ANS to BIA in 1931 need to be explored. Of especial interest is the organization of BIA field representatives after 1931, their responsibilities and activities, and their relationship with BIA school personnel, and with territorial and private mission personnel. The mechanism for the determination of eligibility for and the distribution of federal social service resources needs careful and detailed examination and explication.[31] The background of BIA advocacy of Native land claims activity (its nature, extent and objectives) needs more clarification.[32] The role of BIA in relation to the opposition of the State of Alaska to Native land claims needs to be understood clearly. Of particular importance is clarification of the role of BIA intended, or necessitated, by the continuation of federal services to Natives after the Alaska Native Land Claims Settlement Act of 1971, and particularly, after the transitory phase of that act, i.e., after 1991.

The status of Alaska Natives following the claims settlement is somewhat ambiguous. It has been emphasized by several commentators that the federal obligation is not jeopardized by the settlement, which extinguishes land claims.[33] Certainly ample precedent exists to suggest that federal obligation continues

through a period transition to greater Native individual management of Native affairs. Further, detailed historical research is desirable in Interior opinions and the court record nationally to clarify the extent of federal obligation in circusmtances comparable to the development of greater Native responsibility flowing from the Alaska claims settlement, if any. In many ways the Alaska settlement is completely unique. The relationship between villages and regional corporations is virtually unprecdented. The reliance of villages, and individual villagers, upon federal representatives throughout the period of federal services in Alaska has created an expectation which cannot be quickly or lightly terminated. The hearings conducted by various committees of the Congress, together with Congressional debate, on the several land claims bills (prior to the passage of the final version of the settlement in 1971), should be studied carefully to gauge the level and nature of federal obligation foreseen and anticipated.

Legal Research and Historical Research

In investigating the background of Alaska Native affairs, particularly to determine the extent of obligation by the federal government to provide services, and advice and counsel, it is important to realize that more than the legal history must be brought to bear on the question. This, indeed, has been the case in numerous important problems and questions in the history of attempting to determine - and enforce - justice in relations between the federal government and American Natives. It is possible for the Congress to pass a law, or for the courts to render a

decision, or for the executive agencies to terminate a particular policy in such a way as to legally bring an obligation to an end. But a majority of persons affected, or even observing, may feel such an action to be wrong or inadvisable. If there is only the legal background and precedent, altering such actions may take considerable time, and in fact, they may not be alterable at all.

Those familiar with the history of Indian rights and claims in the United States will recognize the significance of the Tee-Hit-Ton decision in 1954-55 (128 Court of Claims 82), which held that Indians were not entitled to compensation for the taking of lands long in their possession. In this case the court held that since the title to the lands in question had not been recognized by the Congress and had never been recognized as being held by "Indian" or "aboriginal" title, that therefore compensation was not warranted. Use and occupation were not enough. What the court seemed to be saying, through Justice Reed, was that although the American people had compassion for the Indians involved (Tlingit), there had to be an end to paying cash or other value for every Indian claim.

Fortunately, the doctrine of Tee-Hit-Ton has been ignored by many courts in many cases, usually in instances when other than legal evidence can be brought to bear to show that compensation is just and desirable on historic, not legal, grounds. In the case of Otoe and Missouria in 1955 (131 Court of Claims 598), for example, the court found for compensation on the grounds that the

Indians had always depended on the land, were presently depending upon it for subsistence, but that such dependence was inadequate, and that the compensation would provide a way of meeting the pressing needs of the Indians in question.

The Alaska Native Claims Settlement Act of 1971 is another case in point. Many of the areas of Alaska in which the settlement provides for Indian or Native ownership of land could be said to be subject to the Tee-Hit-Ton doctrine. Yet the compensation was provided, albeit through Congressional legislation. What kind of evidence did the Congress review in coming to its decision? Certainly there were political pressures which Alaska Natives had to learn, and utilize. But there was also an abundance of social and economic evidence of the right to and need for compensation, much of it provided by the Federal Field Commission for Development Planning in Alaska which published its findings in the report, Alaska Natives and the Land (1968). Additionally, there was an abundance of historical evidence, including length of habitation in various places, historic land use patterns, previous recognitions of occupancy by federal and resident reporters, as well as Natives' own testimony regarding use and need and right.

Lawyers and others preparing legal briefs must concentrate on legal precedent, rules of evidence, and points of law. Perforce, this rules out much opportunity for historical research. The lawyer is trained in, and operates in, an environment of law and judicial decision. But ideology, social class and normative

values of political analysis may be just as, or even more important than, the legal background of the question. Analysts of legal training in the United States have long criticized the narrow perspective resulting from the concentration on the "case method" which is the basis of law school curricula. More important, concentration on cases reduces or eliminates a broader perspective based on historical research. The case method is necessary, for increasingly legal precedent figures significantly in the finding of law. Lawyers must be able to function effectively in court.

However, historical research can and must be brought to bear on the important questions regarding justice for Alaska Natives. In cases where it has been utilized it has proven effective. The Frank decision of several years ago not only provided for the taking of moose for a funeral potlatch, but as well forced a legislative revamping of the regulations applied by Fish and Game in all hunting, Native and non-Native. Significant historical evidence was brought to focus in the Frank case, and in a more recent case involving subsistence in the Copper River valley. Increasingly it seems, those preparing legal cases are recognizing the value of historical research.

Historical research is useful, then, not only in court, but in establishing the context in which legislation is necessary or desirable, in which executive action is advisable or damaging. The history of BIA activity in Alaska is as pertinent in

demonstrating the nature of the relationship between the federal government and Alaska Natives as is the legal background which authorized that activity. Whether intended or not, there was a history, and that history is independent of the judgment of present legalists and others as to whether what happened should have, or was intended to. What the historian can show is what actually did happen, and therefore, what people now have come to expect. The law must deal not only with what is provided for in law, but also what people actually have done and have come to expect as a result of what they have done.

However valuable the legal background may be (and it is very valuable), a clear and complete understanding of the federal obligation to Alaska Natives can be determined only through a review of the historic patterns which have come to exist in the relationship between federal agencies and officials and Native Alaskans. Many aspects of that relationship are not provided for in law and are not covered in law. But they are nonetheless real. The complete texture of the federal relationship is the reality with which real people live, not just the legal portion of it. Continuing and expanded historical research can help show the whole relationship, and through an understanding of all its aspects, bring all parties closer to justice.

NOTES

[1] 15 Stat. 539. See Cohen, Handbook of Federal Indian Law, 402 (1942). See also G.W. Spicer, The Constitutional Status and Government of Alaska (1927).

[2] The organization of the work of the Bureau of Education, for example, was conducted almost exclusively by the general agent, Sheldon Jackson, who was left to interpret such fundamental matters as compulsory school attendance without adequate legislative guidance. See Henderson, The Development of Education in Alaska (1935). On the Pribilov Islands first the Treasury Department, and later the Bureau of Fisheries (U.S. Fish and Wildlife Service), were left to interpret and implement Congressional mandate without sufficient guidelines. The history of Alaska is replete with such examples.

[3] See, for example, Alaska Pacific Fisheries v. U.S., 248 US 78 (1918). See also In re John Minook, 2 Alaska 200 (1904) and U.S. v. Berrigan, 2 Alaska 442 (D.C. AK, 1904).

[4] A perfect example of this is the implementation of the amendments to the Wheeler-Howard Act, which the director of the BIA office in Alaska was given responsibility to organize in 1936. See c. 25f, 49 Stat. 1250 (1936).

[5] Not only the Bureau of Fisheries, but the U.S. Forest Service, the U.S. Commerce Department and even the National Park Service, among others, have from time to time developed policies for Natives relevant to agency jurisdiction.

[6] During World War II, for example, Aleut islanders were evacuated to several points in southeast Alaska. At the end of the war, the army and the navy asked the BIA, through the Interior Department to oversee the resettlement of the islands. At the beginning of the war the Territory of Alaska asked the BIA to oversee the resettlement of the islanders in abandoned canneries in southeast Alaska, and although Aleuts were transported by navy and army transports and their resettlement locations were inspected by Territory of Alaska personnel, BIA conducted medical inspections of the islanders, procured supplies for them, and supervised the camps during the resettlement period.

[7] See Henderson supra note 2. There were numerous reorganizations. Eventually, ANS had three separate divisions: education, medical services, and commercial enterprises. The latter was run from Seattle from 1924.

[8] See Henderson, supra note 2, and Cook, Public Education in Alaska, (Bull No. 12, Office of Education, Dept. of Interior) (1927).

[9] The reasons for the selection of Education, rather than the Indian Office, are complex, but involve the personality and connections of Jackson as well as problems of ethnology.

[10] Colyer's report is the Annual Report of the Commissioner of Indian Affairs for 1870. Swan's appeared in the Puget Sound Argus for September 7, 1877. Morris' was published as a Senate Special Report in 1880.

[11] See Annual Report of the Secretary of War, 1869.

[12] 45th Cong. 3rd S. Senate Document No. 59 (1872).

[13] 49th Cong. 1st S. Senate Exec. Doc. No. 85, Education in Alaska, 1886, Sheldon Jackson.

[14] Annual Report, Commissioner of Education, 1896.

[15] See Henderson, Supra note 2.

[16] Id.

[17] See Jackson, Education in Alaska, 1891. 52nd Cong., 1st S., House Exec. Doc. No. 1.

[18] 48 Stat. 984.

[19] See Cohen, supra note 1.

[20] See Report, supra note 14.

[21] See Spicer, supra note 1.

[22] See Cohen, supra note 1 at 405.

[23] See Annual Report, Commissioner of Indian Affairs, 1932; see also Henderson, supra note 2.

[24] Alaska Natives and the Land (1968).

[25] See Hearings, Alaska Native Claims Settlement Act, House, 1970. There are numerous examples of the Territory of Alaska soliciting information regarding Natives, and working with BIA to provide Native service. In addition to n. 6 above, see files in Record Group 75, BIA in the Federal Archives and Records Center, Region X, Seattle, Washington.

[26] See M.C. Berry, The Alaska Pipeline: The Politics of Oil and Native Land Claims (1975).

[27] See, for example, Annual Report, Governor of Alaska, 1952.

[28] Kake v. Egan, 369 U.S. 60 (1962).

[29] Supra note 6.

[30] The State of Alaska has voluntarily entered into an out-of-court settlement with plaintiffs in the "Molly Hootch" case. BIA is not sure what its role should be in terms of educational services and counsel, concluded L. Walker, ed. specialist, BIA area office, Juneau, Alaska. Personal interview, 31 July 1981.

[31] Records on this question are scattered between Washington, D.C. in the National Archives and the Federal Archives and Records Center, Region X, Seattle.

[32] A search should be made of testimony before various Congressional committees, as well as opinions of the area office director, the Commissioner of Indian Affairs, and the opinions of the Interior Department solicitor.

[33] See D. Case, Special Relationship of Alaska Natives to the Federal Government (1978).