ARTICLES

"INDIAN COUNTRY" AND THE NATURE AND SCOPE OF TRIBAL SELF-GOVERNMENT IN ALASKA

GEOFFREY D. STROMMER* AND
STEPHEN D. OSBORNE**

Today Alaska Native tribes face one of their most difficult challenges since the days of the Alaska Native Claims Settlement Act (ANCSA). Ever since the United States Supreme Court ruled in Alaska v. Native Village of Venetie Tribal Government, *522 U.S. 520 (1998), that ANCSA largely extinguished "Indian country" in Alaska, and thus the tribes' territorial jurisdiction, the extent of Alaska tribal sovereignty and authority has been shrouded in uncertainty. In the context of a vigorous debate in which the extent and perhaps the very survival of Alaska tribal sovereignty is at stake, this Article offers: (1) an analysis of Alaska tribes' current jurisdiction, including areas of uncertainty due to their unique status as "sovereigns without territorial reach"; and (2) a range of proposals designed to resolve those uncertainties and anomalies by at least partially restoring the "Indian country" status of, and thus tribal territorial jurisdiction over, some tribal lands in Alaska. Using rural justice and law enforcement as a central example, the authors demonstrate that restoring Indian country to Alaska would promote numerous public policy objectives, benefiting both the tribes and the State.*

* Mr. Strommer is a partner at Hobbs, Straus, Dean & Walker, LLP, a national law firm that has specialized for more than 20 years in representing tribes and tribal organizations throughout the United States.

** Mr. Osborne is an associate at Hobbs, Straus's Portland office.

The authors thank David S. Case, a partner at Landye Bennett Blumstein LLP in Anchorage, Alaska, and S. Bobo Dean, a partner in Hobbs, Straus's Washington, D.C. office, for generously contributing their time to review earlier drafts of this article. This article reflects the views of the authors only.

I. INTRODUCTION: TRIBAL STATUS AND JURISDICTION AT A CROSSROADS

Rural Alaska is one of the most dangerous places to live in the United States, in large part because of an alarming lack of adequate law enforcement and justice services.[1] The state's federally recognized tribes, the governments with an actual physical presence in rural Alaska, have been hamstrung in their attempts to assist in providing these services by doubts concerning their criminal jurisdiction. We propose that Congress remove these doubts by restoring the "Indian country" status of Alaska tribal lands, making them subject to concurrent state and tribal jurisdiction. This would benefit all rural residents, Native and non-Native alike, by enabling better provision of law enforcement as well as other services. As this Article will make clear, tribal sovereignty is part of the solution to rural Alaska's problems, not the threat that some perceive.

A. The Assault on Alaska Tribal Sovereignty

Alaska tribes have reached a crossroads in their journey to protect their sovereignty and self-determination. In recent decades the tribes have been clearly recognized as sovereigns enjoying government-to-government relationships with the United States, like those of tribes in the lower 48 states,[2] but that status has been attacked for many years and continues to be threatened by several recent developments. The Secretary of the Interior's authority to recognize Alaska Native villages as tribes has been challenged legally and politically.[3] For instance, the State of Alaska recently has taken the position that Alaska tribes lack

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1. To its credit, the State of Alaska has long acknowledged the problem. *See, e.g.*, ALASKA DEP'T OF PUB. SAFETY, THE VILLAGE PUBLIC SAFETY OFFICER PROGRAM 1 (1980) [hereinafter VILLAGE PUBLIC SAFETY OFFICER PROGRAM] ("Rural Alaska has the distinction of having the worst record for public safety of any of the 50 states."); ALASKA DEP'T OF PUB. SAFETY, LAW ENFORCEMENT IN RURAL ALASKA VILLAGES (2004) (indicating that, of 197 rural villages, 48 have no State Trooper presence but only a Village Public Safety Officer, while 68 rural villages have no state law enforcement presence at all).

2. *See infra* notes 12–14 and accompanying text.

3. *See* Pl.'s Compl., Lieb v. Orutsararmiut Native Council, No. A03-0223 CV (Sept. 23, 2003); Pl.'s First Am. Compl., Sitton v. Native Vill. of Northway, No. A03-0134 CV (Sept. 23, 2003). For a discussion of these complaints, *see infra* note 15. In December 2001, the two majority leaders of the Alaska State Senate and House wrote to Secretary of the Interior Gale Norton asking that she conduct a "'*de novo* legal and policy review' of the status of tribes in Alaska," hoping that the Secretary would de-recognize Alaska tribes. Letter from Rick Halford & Brian Porter to Gale Norton, U.S. Dep't of the Interior (Dec. 10, 2001) (on file with authors).

inherent sovereign authority over child protection matters.[4] Additionally, Senator Ted Stevens, among others, has proposed that funding for programs and services for Alaska Natives be funneled through state agencies and large regional corporations rather than through tribes.[5] These developments threaten to make local tribal governments largely irrelevant to the provision of funding and services to Natives in Alaska, and severely undermine tribal self-determination and the government-to-government relationship of Alaska tribes to the United States.

Bedeviled by contradictory pronouncements on their jurisdictional authority, and besieged by assaults on their tribal status, Alaska tribes face the threat of being swallowed up in "regionalization," if not eliminated altogether. The regionalization debate has raised questions about the scope of tribal jurisdiction in Alaska, in which the territorial jurisdiction traditionally defined as "Indian country" is largely absent.[6]

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4. *See* Op. Alaska Att'y Gen. (Oct. 1, 2004). For a brief discussion of this opinion, see text accompanying *infra* notes 79–83.

5. *See, e.g.*, S. 1585, 108th Cong. § 109 (2004) (redirecting funds currently supporting tribal law enforcement and justice systems in Alaska from the U.S. Department of Justice to the State of Alaska, effectively depriving tribes of funding for tribal police and courts). Senator Stevens (R-Alaska) has also proposed consolidating funding for tribal housing in regional housing entities under a new Title IX of the Native American Housing Assistance and Self-Determination Act (NAHASDA). Although this proposal never materialized as an actual bill, the idea of regionalizing Alaska NAHASDA funding is still alive. The 2004 Consolidated Appropriations Act contains a directive to the General Accounting Office (GAO) to "immediately begin a review" of the federal programs benefiting rural communities in Alaska, including housing: "With respect to housing programs, the study shall determine the number of houses built by each Native housing authority including the cost per house." Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 62, § 112. Senator Stevens has since reportedly disclaimed any interest in regionalization, but the disclaimer has yet to be reflected in legislative action. *See* Jon Grover, *Tribes Fear Stevens Playing Word Games*, ARCTIC SOUNDER, Nov. 7, 2004, at 1.

More recently, the 2005 Consolidated Appropriations Act contains several provisions that appear to continue the "regionalization" agenda. For example, § 343 extends until Fiscal Year 2007 the ban on Alaska villages contracting on their own under the Indian Self-Determination and Education Assistance Act if they are within the area served by a Native regional health entity. H.R. 4818, 108th Cong. § 343(a) (2004). Language in the Conference Report also directs that $15 million in substance abuse funds be distributed in part to Native regional health organizations and in part to the State of Alaska, which is then directed to redistribute those funds to regional non-profit corporations to operate the Village Public Safety Officer Program. *See* H.R. CONF. REP. NO. 108-792, at 280 (bill language) & 1084 (report language), *reprinted in* 2005 U.S.C.C.A.N. 2577, 2831; *see also* S. REP. NO. 108-341, at 73.

6. *See* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998), discussed *infra* section I.C.

This Article sketches the contours of Alaska tribal jurisdiction as it currently exists, points out areas of uncertainty, and proposes the reintroduction of a geographic component to Alaska tribal jurisdiction. Using rural justice and law enforcement as our central example, we argue that by (re)introducing "Indian country" in Alaska as a description of tribal territorial jurisdiction, Congress could eliminate many of the uncertainties that plague Alaska tribes, while improving the delivery of services to rural Alaskans, Native and non-Native alike.

B. A Brief History of Tribal Status in Alaska

The tribal status of Alaska Native Village governments was unclear and hotly contested during the years following passage of the Alaska Native Claims Settlement Act (ANCSA) in 1971.[7] Although Congress has consistently treated Alaska Native Villages as tribes for purposes of eligibility for federal programs and services, the State of Alaska and its courts resisted acknowledging the villages as tribes. For many years, the state opposed expansion of tribal governmental powers and the creation of Indian country under the motto "Alaska is one country, one people."[8] The state supreme court endorsed this view in *Native Village of Stevens v. Alaska Management and Planning*:[9] "There are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law."[10]

In 1993, however, the Solicitor for the Department of the Interior (DOI), Thomas Sansonetti, issued an opinion rejecting the notion that there were no tribes in Alaska.[11] Later that year, and consistent with the

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7. Pub. L. No. 92-203, 85 Stat. 339, codified at 43 U.S.C. §§ 1601–28 (2000). The status of Alaska Native Village governments was also unclear during the period immediately preceding the enactment of ANCSA. Alaska Native aboriginal land claims were jeopardized in the late 1950s and early 1960s by judicial decisions and state land selections allowed under the Alaska Statehood Act. 43 U.S.C. § 1601 (2000). In the late 1960s, the Secretary of the Interior prohibited further state land selections until the issue of Native land rights could be resolved. These factors, in conjunction with the obstacle that Native land claims posed to the development of oil reserves, mandated that the Native claims issue be resolved expeditiously by congressional action. *See* DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 156–57 (2d ed. 2002).

8. Admin. Order No. 125 (Gov. Hickel) (Aug. 16, 1991), *available at* http://www.gov.state.ak.us/admin-orders/125.html (last visited Feb. 19, 2005).

9. 757 P.2d 32 (Alaska 1988).

10. *Id.* at 35–36 (quoting Metlakatla Indian Cmty. v. Egan, 362 P.2d 901, 917–18 (Alaska 1961)). The court concluded that "Stevens Village does not have sovereign immunity because it, like most native groups in Alaska, is not self-governing or in any meaningful sense sovereign." *Id*. at 34.

11. Solicitor Op. Dep't of Interior M-36975 (Jan. 11, 1993) [hereinafter Sansonetti Opinion].

Sansonetti opinion, the DOI issued a list of 226 villages and regional tribes in Alaska recognized and eligible to receive federal Indian Affairs services.[12] Congress effectively ratified that list by enacting the Federally Recognized Tribe List Act in 1994.[13] Finally, in 1999, the Alaska Supreme Court acknowledged the tribal status and sovereignty of Native Villages in *John v. Baker*.[14] Despite sporadic challenges,[15] the status of village governments as tribes appears well established in state and federal law. The extent and scope of Alaska tribes' sovereign authority is less settled, and provides the initial focus of this Article.

C. *Venetie* and Indian Country in Alaska

"Indian country," as defined by federal statute, means: (1) all land within the limits of a reservation, whether owned in fee or in trust; (2) "dependent Indian communities"; and (3) Indian allotments.[16] Although this definition derives from a criminal statute, the Supreme Court has found that it "generally applies as well to questions of civil jurisdiction."[17] ANCSA extinguished all the reservations in Alaska, with the exception of the Annette Islands Reserve of the Metlakatla Indian Community. While there are some 10,000 allotments in Alaska, these form only a small percentage of Native lands in the state, and their patchwork pattern prevents a coherent exercise of tribal jurisdiction.

The key question for many years was whether lands patented under ANCSA constituted "dependent Indian communities" within the meaning of the Indian country statute. The United States Supreme Court has interpreted this phrase to cover any "area . . . validly set apart for the use of Indians as such, under the superintendence of the Government."[18] Arguably, ANCSA lands fit this definition, and that is what the Ninth

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12. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,368 (Oct. 21, 1993).

13. Pub. L. No. 103-454, 108 Stat. 4791 (Nov. 2, 1994), codified at 25 U.S.C. §§ 479a, 479a-1 (2000).

14. 982 P.2d 738 (Alaska 1999), *cert. denied*, 528 U.S. 1182 (2000).

15. Don Mitchell, who has served as counsel to the Alaska State Legislature, filed two lawsuits in the U.S. District Court for the District of Alaska in September 2003 on behalf of individual plaintiffs, challenging the Secretary of the Interior's authority to recognize Alaska Villages as Indian tribes. *See* Pl.'s Compl., Lieb v. Orutsararmiut Native Council, No. A03-0223 CV (Sept. 23, 2003); *see also* Pls.'s First Am. Compl., Sitton v. Native Vill. of Northway, No. A03-0134 CV (Sept. 23, 2003). The arguments set out in these two complaints assert that only Congress, not the Secretary of the Interior, can recognize a tribe. *Id.*

16. 18 U.S.C. § 1151 (2000).

17. DeCoteau v. Dist. County Ct., 420 U.S. 425, 427 n.2 (1975).

18. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 511 (1991).

Circuit held.[19] However, in *Alaska v. Native Village of Venetie Tribal Government*,[20] the United States Supreme Court reversed and held that lands transferred to private corporations pursuant to ANCSA satisfied neither the federal "set-aside" nor the federal "superintendence" requirement.[21] The lands were not set aside "for the use of Indians as such," but rather for private, state-chartered Native corporations.[22] Nor were the lands subject to sufficient federal superintendence; rather, ANCSA was intended to avoid a "lengthy wardship or trusteeship."[23] As a result, the Village's ANCSA lands did not qualify as "Indian country," even though the lands were subsequently conveyed to the Village government, and therefore the Village lacked authority to tax a non-Native business operating on those lands.[24]

Importantly, the Court also found that ANCSA did not intend to terminate tribal sovereignty, but that it left Alaska tribes "sovereigns without territorial reach."[25] While some Indian country may remain in Alaska (see part IV below), *Venetie* established that the *territorial* jurisdiction of Alaska tribes does not extend to the 45 million acres of land affected by ANCSA—the vast majority of Native lands in Alaska.

Even outside Indian country, however, Alaska tribes may be able to exercise *member-based* jurisdiction and perhaps jurisdiction over non-members in specific instances. The next section examines the basis of Native self-government and inherent sovereign power over territory and members. Section III explores the scope of inherent tribal rights and member-based jurisdiction even in the absence of Indian country after *Venetie*.

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19. Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Vill. of Venetie Tribal Gov't, 101 F.3d 1286, 1289 (9th Cir. 1996).

20. 522 U.S. 520 (1998).

21. *Id.* at 532.

22. *Id*.

23. *Id.* at 533 (quoting 43 U.S.C. § 1601(b) (2000)). Ironically, the Village was able to exercise jurisdiction over its lands when under federal superintendence, but once "free" of that superintendence, Village lands fell under the jurisdiction of the state, and the Village *lost* a measure of self-determination. Dean B. Suagee, *Cruel Irony in the Quest of an Alaska Native Tribe for Self-Determination*, 13 NAT. RESOURCES & ENV'T 495 (1999).

24. *Venetie*, 522 U.S. at 534.

25. *Id*. at 526 (quoting Alaska *ex rel.* Yukon Flats School Dist. v. Native Vill. of Venetie Tribal Gov't, 101 F.3d 1286, 1303 (9th Cir. 1996) (Fernandez, J., concurring)); *see also* Alyeska Pipeline Serv. Co. v. Kluti Kaah Native Vill. of Copper Ctr., 101 F.3d 610 (9th Cir. 1996) (invalidating tribal tax on ANCSA lands held by village corporation because such lands were not Indian country).

II. BASIS OF NATIVE SELF-GOVERNMENT AND JURISDICTION IN ALASKA

A. Inherent Powers of Tribal Sovereignty

Tribal sovereignty has been recognized since the early days of the United States, both in court decisions and by the federal government's practice of entering into treaties with the various Indian tribes and nations. As sovereigns, tribes retain all inherent powers not specifically limited by Congress or inconsistent with their dependent status.[26] In other words, there is a presumption that tribal sovereign powers remain intact unless divested.[27] Sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts . . . Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[28]

B. Territory and Membership

Generally speaking, sovereigns exercise authority, or jurisdiction, over their territory as well as over other people who enter their territory. As the Alaska Supreme Court has recognized, the "dual nature of Indian sovereignty" derives from "two intertwined sources: tribal *membership* and tribal *land*."[29] Although ordinarily these aspects of jurisdiction are

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26. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 146 (1982); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (discussing tribal courts' criminal jurisdiction over non-Indians). The *Oliphant* decision marked a radical departure in federal Indian law, one quite disturbing to proponents of tribal sovereignty. Before *Oliphant*, it was settled law for almost 150 years that tribes retained all powers of internal sovereignty—that is, its powers of local self-government—that were not divested by treaties or express legislation of Congress. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 232–33 (Michie ed. 1982). The *Oliphant* court for the first time deduced another category of powers lost by tribes: those "inconsistent with their status" as sovereigns subordinate to the federal government. 435 U.S. at 208. Therefore, *Oliphant* permitted a court to decide, as a matter of federal common law, that a particular exercise of tribal authority was inconsistent with the tribe's dependent status, even if Congress had not explicitly divested that authority. *Id.*

27. John v. Baker, 982 P.2d 738, 751 (Alaska 1999).

28. United States v. Wheeler, 435 U.S. 313, 323 (1978). The "plenary power" of Congress over tribes has been called into question by those who argue that international human rights law would not countenance congressional abolition of a tribe's sovereignty. *See, e.g.*, Dean B. Suagee, *The Supreme Court's "Whack-a-Mole" Game Theory in Federal Indian Law, A Theory That Has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RES. J. 90, 164–66 (2002).

29. *John*, 982 P.2d at 754 (emphasis in original).

intertwined, they are analytically distinct, as the *John v. Baker* majority demonstrated.[30]

1. Land: The Territorial Aspect of Tribal Sovereignty. The United States Supreme Court has recognized that "there is a significant territorial component to tribal power."[31] Typically tribes exercise jurisdiction within "Indian country," defined as reservations, dependent Indian communities, and Indian allotments.[32] Subject to limitations Congress has imposed, "Indian tribes within 'Indian country' . . . possess[] attributes of sovereignty over both their members and their territory."[33] Within Indian country, the federal government and tribes have primary authority, while outside Indian country, states have primary jurisdiction. For example, in companion cases involving application of Alaska's fish trap laws to Native communities, the United States Supreme Court held those laws inapplicable within the Annette Island Reserve but applicable to Natives in a village not located on a federal reservation.[34] Tribes have greater authority over members and their property and limited authority over non-members within Indian country, while the state has correspondingly less authority.[35]

Following the *Venetie* decision, it is clear that the extent of Indian country in Alaska, and thus the reach of Alaska tribes' territorial jurisdiction, is quite limited. Therefore, it is important to understand the

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30. *See id.* ("teas[ing] apart the ideas of land-based sovereignty and membership sovereignty"). *But see id*. at 766 (Matthews, C.J., dissenting) (arguing that no tribal court jurisdiction exists outside Indian country and that state law governs there unless Congress provides otherwise).

31. *Merrion*, 455 U.S. at 142.

32. 18 U.S.C. § 1151 (2000).

33. *Merrion*, 455 U.S. at 140 (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)).

34. *Compare* Metlakatla Indian Cmty. v. Egan, 369 U.S. 45 (1962) *with* Organized Vill. of Kake v. Egan, 369 U.S. 60 (1962). The Court concluded that the Natives in both cases had aboriginal rights to fish, but that the state could regulate the exercise of those rights in the absence of any federal law to the contrary. While Metlakatla was a statutorily created reservation, which Congress placed under the authority of the Secretary of the Interior, Kake was not. Thus, the Natives in Kake fell under state jurisdiction and had to follow the fish-trap prohibition, while the federal law establishing the Metlakata reservation pre-empted application of state law.

35. *See* Montana v. United States, 450 U.S. 544, 565 (1981) (stating that tribes retain authority over non-Indians in Indian country when (1) the non-Indian has entered into a consensual relationship with the tribe, or (2) the tribe is regulating conduct that threatens or directly affects "the political integrity, the economic security, or the health and welfare of the Tribe"); *see also* United States v. Lara, 541 U.S. 193, 210 (2004) (affirming a tribe's inherent authority to assert criminal jurisdiction over non-member Indians).

nature and scope of the other primary basis for tribal jurisdiction: membership.

2. Membership-Based Jurisdiction. In *John v. Baker*, the Alaska Supreme Court considered whether the Northway Village tribal court had jurisdiction to decide a child custody dispute.[36] A Northway member, dissatisfied with his tribal court's decree, argued that ANCSA necessarily withdrew tribal court jurisdiction by eliminating Indian country.[37] The Alaska Supreme Court framed the issue this way: "Do Alaska Native villages have inherent, non-territorial sovereignty allowing them to resolve domestic disputes between their own members?"[38]

The court surveyed federal Indian law and found a category of tribal governmental powers deriving from "membership sovereignty," including "the inherent 'power of regulating their internal and social relations.'"[39] While the court did not delineate all of these inherent membership-based powers, it found that custody disputes such as the one at bar lay "at the core of sovereignty—a tribe's 'inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.'"[40] The court thus concluded that Alaska Native Villages have the inherent, sovereign power to adjudicate child custody disputes between tribal members, even when the village is not located on a federal reservation.[41] The state retains concurrent jurisdiction, since all disputes outside Indian country are within the state's general jurisdiction, but state courts should generally defer to tribal courts under the doctrine of comity.[42]

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36. 982 P.2d 738, 748 (Alaska 1999).

37. *Id.* at 743.

38. *Id*. at 748. The father, John Baker, a Northway Village member, challenged the order granting shared custody with Anita John, a member of the Mentasta Village. The supreme court premised tribal court jurisdiction on the membership, or eligibility for membership, of the *children*, and remanded to the tribal court to determine, using tribal law, the children's membership status. *Id*. at 743. If the children were members, or eligible to be members, of Northway Village, the tribal court's subject matter jurisdiction would be proper and the state court should defer to the tribal court decision under the doctrine of comity. *Id*. at 763–65.

39. *Id*. at 754–55 (quoting United States v. Kagama, 118 U.S. 375, 381–82 (1886)).

40. *Id*. at 758 (quoting Montana v. United States, 450 U.S. 544, 564 (1981)).

41. *Id*. at 743.

42. *Id*. at 763. The court followed the Ninth Circuit in identifying two exceptions to the comity rule. *Id.* State courts should afford no comity to tribal court decisions if (1) the tribal court lacked personal or subject matter jurisdiction, or (2) the tribal proceedings denied due process of law. *Id.*; *see also* Wilson v. Marchington, 127 F.3d 805, 810 (9th Cir. 1997) (setting forth exceptions to the comity rule); Evans v. Native Vill. of Selawik IRA Council, 65 P.3d 58, 59 (Alaska 2003) (applying *John* and holding

As a result of *John*, tribal courts in Alaska have jurisdiction to adjudicate custody disputes involving tribal members. The major questions arising out of the case involve the scope of this "inherent, non-territorial sovereignty." Aside from child custody, to what other aspects of tribal members' activity or property could such sovereign powers extend beyond Indian country?

III. SCOPE OF NON-TERRITORIAL TRIBAL RIGHTS AND JURISDICTION IN ALASKA

Even without significant territorial jurisdiction, or even with *no* territory, Alaska Native Villages possess a number of important rights and privileges by virtue of their status as federally recognized Indian tribes. In *John v. Baker*, the Alaska Supreme Court held that the sovereign powers of Alaska tribes also include jurisdiction over child custody disputes, even outside Indian country.[43] The extent of this extra-territorial jurisdiction is difficult to delineate, although inferences can be drawn from the reasoning and references in *John* and other applicable federal court cases.

The discussion that follows explores three areas of extra-territorial jurisdiction: where tribes can clearly assert sovereignty; where tribal rights and jurisdiction are possible but less certain; and where tribal rights and jurisdiction are likely to be restricted. The discussion that follows does not seek to identify and discuss all areas of possible jurisdiction, but only a limited selection of them. This section assumes that the tribe is regulating or otherwise operating *outside* Indian country; section IV considers the extent of Indian country currently in Alaska.

A. Clear Tribal Rights and Jurisdiction

1. Membership, Form of Organization, and Legislation. Tribes have the inherent power to determine their own forms of organization and membership.[44] "A tribe may determine who are to be considered members by written law, custom, intertribal agreement, or treaty with the United States."[45] The inherent power to determine membership does

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that resolution of adoption issued by village council was not entitled to comity recognition because the putative father was denied due process rights).

43. *John*, 982 P.2d at 765.

44. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55–59 (1978). *See generally* Powers of Indian Tribes, 55 Interior Dec. 14 (1934).

45. COHEN, *supra* note 26, at 248 (citing Delaware Indians v. Cherokee Nation, 193 U.S. 127 (1904)).

not depend on having a territorial base, so even "terminated" tribes with no Indian country at all have been found to retain this power.[46]

As Congress recognized in the Indian Tribal Justice Act,[47] "Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems."[48] This authority does not derive from a tribe's territory, but from its status as a sovereign tribe.[49] The forms and functions of tribal government are not constrained by the United States Constitution, because, while recognized by the Constitution, tribal sovereignty was not derived from it or extinguished by it.[50]

The powers of tribal self-government include the authority to make criminal and civil laws for internal affairs.[51] Ordinarily such legislation applies only within Indian country, but a tribe's criminal laws have been held to apply outside its reservation, when necessary to regulate internal tribal relations.[52] Examples of "internal affairs" subject to tribal legislation include enforcement of treaty hunting and fishing regulations,[53] recognition of marriage and divorce, the power to levy taxes, and the regulation and protection of tribal property.[54]

2. Eligibility for Federal Programs and Services. Since the beginning of the United States government's presence in the territory of Alaska, Congress has recognized a responsibility to protect the welfare of Alaska Natives similar to its responsibility toward Native Americans in general.[55] The 1993 listing of federally recognized Indian tribes,

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46. Kimball v. Callahan, 590 F.2d 768, 777–78 (9th Cir. 1979).

47. Pub. L. No. 103-176, 107 Stat. 2004 (1993) (codified at 25 U.S.C. §§ 3601 *et seq*. (2000)).

48. 25 U.S.C. § 3601(4) (2000).

49. *See id*. § 3601(3).

50. *See, e.g.*, Talton v. Mayes, 163 U.S. 376, 384 (1896); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

51. COHEN, *supra* note 26, at 248.

52. Settler v. Lameer, 507 F.2d 231, 237–38 (9th Cir. 1974) (holding that Yakima tribal police could enforce tribal fishing regulations against tribal members off-reservation because the tribe had treaty-reserved right to fish at "usual and accustomed" sites outside reservation boundaries).

53. *Id*.

54. *See* COHEN, *supra* note 26, at 249–50 (citing authorities); *see also* Chilkat Indian Vill. v. Johnson, 870 F.2d 1469, 1473–76 (9th Cir. 1989) (finding village's claim of sovereign power to enact ordinance applicable to non-members as well as members and preventing removal of clan property from the village without the tribe's consent, presented federal question for purposes of jurisdiction under 28 U.S.C. §§ 1331 & 1362).

55. *See* CASE & VOLUCK, *supra* note 7, at 187–225; *see also* Sansonetti Opinion, *supra* note 11, at 43–45 (listing thirty-two federal statutes in which Alaska Native Villages are treated in the same manner as Indian tribes in the lower 48 states).

which included 226 Alaska Native villages and regional tribes, along with Congress' ratification of that list in the Federally Recognized Tribe List Act, reaffirmed Alaska tribes' eligibility for "the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes."[56]

3. Eligibility to Contract or Compact Under the ISDEAA. An important right that Alaska Native tribes have enjoyed since 1975 is the ability to enter agreements to take over federal programs and services, along with the associated funding, under the Indian Self-Determination and Education Assistance Act (ISDEAA).[57] The ISDEAA defines an eligible "Indian tribe" to include "any Alaska Native village or regional or village corporation as defined in or established pursuant to [ANCSA]."[58] The ISDEAA has enabled many Alaska Native village tribal governments, either directly or through regional organizations, to exert greater community control over federal programs and services while tailoring them to the needs of the community.[59] In addition, the infusion of federal funds for the administration of programs and services under the ISDEAA has greatly assisted tribes in developing infrastructure and human resources.[60]

4. Power to Create Corporations. Included in the inherent sovereign powers of a tribe, sometimes implemented in its constitution, is the power to charter a corporation under tribal law.[61] Alaska tribes

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56. 25 C.F.R. § 83.2 (2004).

57. 25 U.S.C. § 450(b) (2000).

58. *Id.* § 450(e).

59. *See, e.g.*, Maniilaq Ass'n, Position Paper of the Maniilaq Board of Directors Supporting Self-Determination and Opposing Regionalization of Tribal Funding in Alaska (July 2, 2003) (describing success of ISDEAA in advancing self-determination in Association's twelve member villages) (on file with authors).

60. Virtually all Alaska tribes contract or compact with the Bureau of Indian Affairs and Indian Health Service, either directly or through tribal consortia, to provide services to their members under the ISDEAA. According to the National Congress of American Indians (NCAI), as of January 2004, funding obligated to tribal governments and consortia in the form of self-determination contracts or self-governance compacts comprised approximately $412 million from the IHS and $93 million from the BIA. NCAI Fact Sheet, Federal Funding to Alaska Native Tribes at 1 (Jan. 2004) (on file with authors).

61. *See* Powers of Indian Tribes, 55 Interior Dec. 14 (1934); Solicitor Op. Dep't of Interior M-36781 at 2 (Aug. 25, 1969) ("[T]he power to create an economic development corporation is inherent in the tribe's sovereignty."). Unlike the federal government, which has only those powers delegated to it by the Constitution, tribes have inherent authority to exercise all powers of a limited sovereign. Powers of Indian Tribes, 55 Interior Dec. 14, 19 (1934).

organized under the Indian Reorganization Act (IRA)[62] can also incorporate under federal charters pursuant to section 17 of the IRA.[63] The two types of corporate organizations authorized by the IRA in Alaska are: (1) village businesses, in which all members of the village are also members of the corporation; and (2) cooperative associations, in which membership is based on "occupation or association rather than on strict geographic residence."[64] Section 17 charters typically contain "sue and be sued" clauses waiving sovereign immunity, although these clauses can be drafted narrowly so as to *authorize* the corporation to waive its (and not the tribe's) immunity on a contract-by-contract basis and as to designated assets or collateral only. In cases where the tribal government and the corporation fail to keep their activities separate, the corporation's waiver could place tribal assets at risk.[65] Section 17 corporations are, like tribal governments, exempt from federal income tax.[66]

5. Sovereign Immunity. By virtue of their status as sovereigns, Indian tribes enjoy sovereign immunity from suit unless the tribe clearly waives immunity or Congress abrogates it.[67] Alaska Native tribes possess the same common law immunity, as recently reaffirmed by the Alaska Supreme Court in *Runyon v. Association of Village Council Presidents*.[68] In *Runyon*, the parents of two children allegedly injured while participating in a Head Start program sued the Association of Village Council Presidents (AVCP), a nonprofit Alaska corporation managing the Head Start program and serving 56 Native Villages in the Bethel area.[69] Quoting *John*'s statement that Native Villages retain all aspects of sovereignty not divested by Congress or by necessary implication of the tribe's dependent status, the *Runyon* court found that "[e]ach of AVCP's member tribes is therefore protected by tribal sovereign immunity."[70] The court ultimately held, however, that AVCP itself did not share in that immunity, so the suit against it could proceed.[71] Because AVCP's corporate form insulated its member

62. 25 U.S.C. §§ 461–79 (2000).

63. *Id.* § 477.

64. CASE & VOLUCK, *supra* note 7, at 334–35.

65. Parker Drilling Co. v. Metlakatla Indian Cmty., 451 F. Supp. 1127, 1136–37 (D. Alaska 1978).

66. Rev. Rul. 94-16, 1994-1 C.B. 19, 20.

67. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58–59 (1978); *see also* Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998).

68. 84 P.3d 437 (Alaska 2004).

69. *Id.* at 438–39.

70. *Id.* at 439.

71. *Id.* at 441.

villages from liability for a judgment against AVCP, the court found that the villages were not the real parties in interest in the lawsuit and AVCP was not entitled to the protection of the villages' sovereign immunity.[72]

6. Tax-Exempt Financing. The Indian Tribal Government Tax Status Act[73] authorizes federally recognized Indian tribal governments to issue tax-exempt debt, provided that the proceeds are used to exercise "an essential governmental function."[74] The IRS has published a list of Alaska Native Villages considered "Indian Tribal entities" exercising "governmental functions" for purposes of these tax exemptions.[75] Because the interest paid on bonds issued by tribes under the Act is not taxable to the individual investors, they are willing to accept a lower rate of return, resulting in lower borrowing costs for the tribe. This tax advantage can result in substantial savings when financing "essential governmental functions."

7. Child Custody and Protection. John v. Baker affirmed the jurisdiction of tribal courts, concurrent with those of the state, to adjudicate child custody disputes, even if originating outside Indian country, when the child is a member or eligible to be a member of the tribe.[76] The Alaska Supreme Court, in *In the Matter of C.R.H.*,[77] further recognized that Alaska Native Villages may exercise transfer jurisdiction over certain child custody cases under the Indian Child Welfare Act (ICWA).[78] The Alaska Attorney General, however, has recently reinterpreted the *C.R.H.* case narrowly, causing the Attorney General's office to withdraw an advisory opinion written just two years earlier.[79] In 2002, the Attorney General read the *C.R.H.* case as supporting the broad conclusion that "state law now recognizes that tribes in Alaska have authority over child custody matters involving tribal children and need not petition the Secretary of the Interior to reassume jurisdiction before exercising their authority."[80]

In a dramatic about-face, the 2004 Attorney General opinion states that Alaska tribes do *not* have authority over child custody matters involving their children unless they *have* successfully petitioned the

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72. *Id*.

73. 26 U.S.C. § 7871 (2000).

74. *Id*. § 7871(b).

75. Rev. Proc. 2001-15, 2001-5 I.R.B. 465, 470–72.

76. John v. Baker, 982 P.2d 738, 759–65 (Alaska 1999).

77. 29 P.3d 849 (Alaska 2001).

78. *Id.* at 854 (overruling Native Vill. of Nenana v. Dep't of Health & Soc. Servs., 722 P.2d 219 (Alaska 1986) and subsequent cases).

79. Op. Alaska Att'y Gen. 1 (Oct. 1, 2004).

80. In the Matter of C.R.H., Att'y Gen. File No. 441-00-0005 (Mar. 29, 2002).

Secretary to reassume jurisdiction under ICWA, or a state court has transferred jurisdiction to the tribe under ICWA.[81] In this second opinion, the Attorney General recognizes that the *C.R.H.* case overruled earlier cases holding that a tribe could not exercise transfer jurisdiction under § 1911(b) of ICWA, but insists that the earlier cases are still valid in asserting that Public Law 280[82] stripped Alaska tribes of jurisdiction over child custody proceedings.[83] As a result of this reversal of opinion, tribes who initiate child protection or custody proceedings in tribal court absent reassumption under ICWA will likely face resistance from the state.

8. Banishing Members. Just as a tribe has the inherent power to determine its membership, it also has the power to banish a member to protect the safety and welfare of the tribe. In *Native Village of Perryville v. Tague*,[84] an Alaska court affirmed the Village's right to banish one of its members for violent behavior and to have the state court and state troopers assist in enforcing its order.[85] Citing *John*, the court found that the tribe's power to banish its members derives from its inherent authority over "internal affairs."[86]

B. Possible Tribal Rights and Jurisdiction

1. Domestic Relations Aside from Child Custody. The United States Supreme Court often includes among the inherent sovereign powers of tribes the authority to regulate the domestic relations of their members.[87] Marriage and divorce are likely included among these powers for Alaska tribes.[88] In *John v. Baker*, the court held that this power extends outside Indian country, at least with respect to determining custody of member children, and suggested that it might

81. Op. Alaska Att'y Gen. 3 (Oct. 1, 2004); *see also* 25 U.S.C. § 1918 (ICWA reassumption jurisdiction); *id.* § 1911(b) (transfer jurisdiction) (2000).

82. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953), codified at 18 U.S.C. § 1162 (2000).

83. Op. Alaska Att'y Gen. 7–8 (Oct. 1, 2004) (discussing Native Vill. of Nenana v. Dep't of Health and Soc. Servs., 722 P.2d 219 (Alaska 1986) and *In re* F.P., 843 P.2d 1214 (Alaska 1992)).

84. No. 3AN-00-12245 (Alaska Super. Ct. Nov. 19, 2003).

85. *Id.* at 5.

86. *Id.* at 4.

87. *See, e.g.*, Nevada v. Hicks, 533 U.S. 353, 361 (2001); *see also* Montana v. United States, 450 U.S. 544, 564 (1981).

88. *See* Alaska Custom Marriage Validity, Solicitor Op. Dep't of Interior M-27185, 54 I.D. 39 (Sept. 3, 1932) (solicitor opinion that marriage among Natives, "if entered into in accordance with their long-established customs, should be recognized as valid until Congress directs otherwise").

extend even beyond that boundary.[89] The logic of *John* should extend to spousal and child support cases and the like. Challenges to a tribal court's authority in some of these areas would likely occur, however, on jurisdictional or due process grounds. For example, if one spouse, even if a member, has lived far from the village for a long time, she could contest a tribal court's award of alimony or child support on the basis that the tribal court lacks personal jurisdiction and therefore has denied her due process of law.[90] This challenge could be raised either as a defense in tribal court or as a separate claim in state court challenging the tribal court judgment's right to comity under *John*.[91] The due process requirement of personal jurisdiction indicates that member-based jurisdiction may still have a territorial component. In another scenario, raised by the dissent in *John*, a spouse or child who receives substantially less support under a tribal court order than he or she would have been entitled to under state law might challenge the order on equal protection grounds.[92]

2. Rules of Inheritance. Prescribing rules of inheritance for members has also been identified by the Supreme Court as one of the inherent powers of tribal self-governance.[93] The dissent in *John* questioned whether "a village council on the Tanana River [could] exercise its sovereign powers to prescribe rules of inheritance for its members, including those who live in Anchorage or Los Angeles, or London."[94] Although it is possible that a non-resident member of an Alaska tribe unhappy with its inheritance law would accept Chief Justice Matthews' invitation to challenge the application of that law outside Indian country, there is some Supreme Court precedent for off-reservation application of tribal inheritance laws, at least in close proximity to the Native community.[95]

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89. 982 P.2d 738, 756 (Alaska 1999).

90. *See* Kulko v. California Super. Ct., 436 U.S. 84, 96–101 (1978). The Indian Civil Rights Act provides that a tribe exercising powers of self-government shall not "deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(8) (2000).

91. *See John*, 982 P.2d at 763 (tribal court child custody determination not entitled to comity when tribal court lacks subject matter or personal jurisdiction).

92. *Id*. at 795–99 (Matthews, C.J., dissenting).

93. Montana v. United States, 450 U.S. 544, 564 (1981).

94. *John*, 982 P.2d at 804 (Matthews, C.J., dissenting).

95. *See* Jones v. Meehan, 175 U.S. 1, 13 (1899) (holding that tribal determination of heirship of non-reservation, non-trust property is binding and cannot be modified by congressional acts).

C. Restricted Tribal Rights or Jurisdiction

1. Authority Over Non-Members. Tribes have sovereignty over their members and their territory.[96] Unless Congress clearly states otherwise, tribes may also exercise authority over non-members within Indian country.[97] By largely eliminating Indian country in Alaska, ANCSA, as interpreted by the United States Supreme Court in *Venetie*, drastically diminished the areas within which tribes can presumptively regulate non-member activities.[98] In *Venetie*, the Court held that the village could not tax a non-member contractor operating on ANCSA lands because such lands did not qualify as Indian country.[99] Even before *Venetie*, the DOI Solicitor concluded that ANCSA had largely extinguished Indian country in Alaska and that "Alaska tribes without territories are also without power over non-members."[100] In *John v. Baker*, the Alaska Supreme Court suggested that tribes in Alaska may have limited jurisdiction over a non-member if the non-member has consented to such jurisdiction.[101]

2. Criminal Jurisdiction. The United States Supreme Court has stated that the power "to prescribe and enforce internal criminal laws" is an element of tribal sovereignty.[102] In *Settler v. Lameer,*[103] the Ninth Circuit affirmed a tribe's right to arrest members off-reservation for violations of tribal fishing regulations committed while off-reservation.[104] With respect to criminal jurisdiction, however, there is a stronger territorial component than for civil authority. Generally, American criminal law requires territorial jurisdiction in order to exercise the power to arrest.[105] The dissent in *John* was convinced that "a tribe's inherent power to punish tribal members does *not* extend

96. *Montana*, 450 U.S. at 563.

97. *See id*. at 565 (recognizing that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations").

98. *See* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 530–34 (1998); *see also* Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645, 658–59 (2001) (holding that a tribe's sovereign power to tax extends no further than tribal land, even when the fee land to be taxed was within the boundaries of the reservation).

99. *Venetie*, 522 U.S. at 534.

100. Sansonetti Opinion, *supra* note 11, at 130.

101. John v. Baker, 982 P.2d 738, 759 n.141 (Alaska 1999) (citing *Montana*, 450 U.S. at 565).

102. *Montana*, 450 U.S. at 564.

103. 507 F.2d 231 (9th Cir. 1974).

104. *Id*. at 239.

105. *See generally* 21 AM. JUR. 2d *Criminal Law* § 481 (1998) ("[A] state's criminal law has no force and effect beyond its territorial limits."); *id*. § 487 ("[J]urisdiction resides solely in the courts of the state or county where the crime is committed.").

beyond the confines of Indian country."[106] The majority decision supposed otherwise.[107]

In April 2004, the Supreme Court affirmed a tribe's inherent power to exercise criminal jurisdiction over all Indians, not just tribal members, within its territory.[108] This authority over all Indians is perhaps limited to Indian country.

Finally, Alaska is a "P.L. 280 state," so-called after the 1953 termination-era federal law granting criminal jurisdiction to certain states over Indian country within their borders.[109] Therefore, even in the limited Indian country that may exist at present in Alaska, or in the more extensive Indian country we propose be established in Section V below, tribal criminal jurisdiction would be concurrent with the state.[110]

3. Property or Use Taxes on Members. The power to tax is inherent in sovereignty, and is retained by tribes except where it has been limited or withdrawn by federal authority.[111] However, it is virtually certain that ANCSA lands are not subject to tribal taxation. The 1987 amendments to the Alaska National Interest Lands Conservation Act (ANILCA)[112] specifically exempted ANCSA lands from "real property taxes by any governmental entity," so long as they are not developed, leased or sold to third parties.[113] The statute defines "developed" as any change enabling "gainful and productive present use," and "leased" to mean a grant of possession "for a gainful purpose," but excludes activities such as exploration, surveying, and subsistence.[114] Moreover, *Venetie* affirmed the district court's ruling that the village government, absent Indian country, could not impose business use taxes on *non-members*.[115]

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106. *John*, 982 P.2d at 781 (Matthews, C.J., dissenting) (emphasis in original).

107. *Id.* at 755–59 ("Decisions of the United States Supreme Court support the conclusion that Native American nations may possess the authority to govern themselves even when they do not occupy Indian country.").

108. United States v. Lara, 541 U.S. 193, 210 (2004).

109. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953), codified at 18 U.S.C. § 1162 (2000).

110. Public Law 280 was a grant of concurrent jurisdiction to the States, and did not divest tribes of their inherent criminal and civil jurisdiction over Indian country. *See, e.g.*, TTEA v. Ysleta del Sur Pueblo, 181 F.3d 676, 685 (5th Cir. 1999); Walker v. Rushing, 898 F.2d 672, 675 (8th Cir. 1990).

111. COHEN, *supra* note 26, at 431.

112. 43 U.S.C. §§ 1631–38 (2000).

113. *Id.* § 1636(d)(1)(A). Such lands are also exempt from adverse possession, as well as bankruptcy and certain other judgments. *Id*.

114. *Id.* § 1636(d)(2)(A).

115. *Venetie*, 522 U.S. at 534.

IV. INDIAN COUNTRY IN ALASKA AT PRESENT

The previous section examined the rights and powers of tribes in Alaska *outside* Indian country; some Indian country may exist *inside* Alaska within which Alaska tribes could exercise territorial jurisdiction, as well as the non-territorial rights and powers discussed above. The two potential sources of Indian country in Alaska are allotments and restricted townsite lots. With the qualifications set forth below, allotment and townsite lands could constitute Indian country and, as such, "will likely remain a focal point of the federal trust responsibility in Alaska."[116] However, the status of these lands "has yet to be adjudicated."[117]

A. Allotments

Federal law defines Indian country as: (1) reservation lands, (2) "dependent Indian communities," and (3) allotments.[118] With the exception of the Annette Island Reserve for the Metlakatla Indian Community, ANCSA revoked all reservations in Alaska.[119] Further, the *Venetie* court held that ANCSA lands were not "dependent Indian communities."[120] However, Alaska contains a significant amount of allotment lands.[121] These allotment lands should be considered Indian country, over which tribes could potentially exert territorial as well as member-based jurisdiction.

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116. CASE & VOLUCK, *supra* note 7, at 152.

117. *Id.* at 428 (arguing that restricted Native allotments and Native townsites do constitute Indian country). *But see* Donald Craig Mitchell, Alaska v. Native Village of Venetie: *Statutory Construction or Judicial Usurpation? Why History Counts*, 14 ALASKA L. REV. 353 (1997) (arguing that ANCSA extinguished all Indian country in Alaska, to the extent it ever existed to begin with).

118. 18 U.S.C. § 1151 (2000). The statute specifies that Indian country includes "all Indian allotments, the Indian titles to which have not been extinguished." *Id*. § 1151(c). The reference to "Indian titles" in the plural appears to refer to the titles of the individual Indians to the allotments, rather than "Indian title" in the sense of aboriginal title.

119. 43 U.S.C. § 1618(a) (2000).

120. *See* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 531–32 (1998) (holding that ANCSA lands were not "dependent Indian communities" because the "Tribe's lands are neither validly set apart for the use of the Indians as such, nor are they under the superintendence of the Federal Government") (internal quotation marks omitted).

121. It is hard to say exactly how much land is held as Native allotments. According to the General Accounting Office (GAO), in the early 1970's approximately 10,000 Natives applied for more than 16,000 parcels of land under the Alaska Native Allotment Act, and many of these applications are still being processed by the Bureau of Land Management. GAO, Alaska Native Allotments and Rights-of-Way at 1 (GAO-04-923) (2004).

The Alaska Native Allotment Act of 1906 (ANAA)[122] authorized conveyances of up to 160 acres of unappropriated land to eligible Natives. Although ANAA was repealed in 1971, many allotments continue to be held in restricted status,[123] and the federal government has a fiduciary duty to administer these lands for the benefit of Natives.[124]

The primary obstacle with including allotments as "Indian country" for purposes of tribal jurisdiction in Alaska is that it may be difficult to establish the association of the land or the owner (or both) with a specific tribe. In the lower 48 states, allotments were typically carved from pre-existing reservations associated with particular tribes and conveyed to members of those tribes.[125] In Alaska, by contrast, the ANAA did not make tribal membership a criterion for receiving an allotment. Moreover, in many cases, allotments may not be clearly identifiable with an acknowledged tribal land base such as a reservation.[126] Allotment owners whose tribal affiliation cannot be traced to an adjacent tribe, or who have "abandoned tribal relations," might be able to successfully resist the assertion of a tribe's territorial jurisdiction.[127]

B. Townsite Lots

Village townsite lots also provide a possible, though limited, source of Indian country in Alaska. The Alaska Native Townsite Act (ANTA), which was repealed in 1976,[128] allowed conveyance of lots to individuals in certain areas designated as townsites.[129] Under ANTA, both Natives and non-Natives were held eligible for townsite lots. Natives generally received restricted title, alienable only with approval of the Secretary.[130]

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122. Pub. L. No. 59-171, 34 Stat. 197 (repealed 1971).

123. Indian country includes allotments held in trust *or* in restricted fee. Oklahoma Tax Comm'n v. Sac, 508 U.S. 114, 115 (1993).

124. *See, e.g.*, Aguilar v. United States, 474 F. Supp. 840, 846 (D. Alaska 1979) (citing Alaska Pac. Fisheries v. United States, 249 U.S. 53 (1918); Aleut Cmty. of St. Paul Island v. United States, 480 F.2d 831 (Ct. Cl. 1973); Adams v. Vance, 570 F.2d 950, 953 n.3 (D.C. Cir. 1978)).

125. *See generally* COHEN, *supra* note 26, at 612–615 (describing allotment of reservation lands in severalty under the Dawes Act).

126. *See* Sansonetti Opinion, *supra* note 11, at 129 (concluding that Native restricted allotments are Indian country for purposes of federal protection and jurisdiction, but nonetheless provide "little or no basis for an Alaska village claiming *territorial* jurisdiction") (emphasis in original).

127. *Id.* at 127 (opining that no "original tribal nexus to support such jurisdiction over the allotment" would exist).

128. Pub. L. No. 69-280, 44 Stat. 629 (repealed 1976).

129. *Id.*

130. *See generally* COHEN, *supra* note 26, at 605–38.

Currently, there are more than 3,800 Native restricted townsite lots.[131] As with allotments, the federal government has a fiduciary duty with respect to these lands.[132] Thus, if an adequate "tribal nexus" could be demonstrated, these lands could also be considered restricted allotments constituting Indian country.[133]

In addition to individually owned townsite lots, village-owned townsite lots could also be part of Indian country. At least twenty-seven Native villages own townsite lands in fee.[134] Former DOI Solicitor Sansonetti believed that these lands would be Indian country if the area qualified as a dependent Indian community;[135] however, *Venetie* makes clear that village-owned townsite lands do *not* qualify as dependent Indian communities.[136] As land owned by the tribal governing body itself, village-owned townsite lots should be subject to the territorial control of the tribe as a property owner (just as a municipality controls its territory), but such lands do not appear to fit the statutory definition of "Indian country" and would probably remain subject to concurrent state jurisdiction. Therefore, any tribal jurisdiction would likely be limited to members but arguably could be extended at least to non-members who are in a consensual relationship with the tribe on tribal owned land.

C. Tribal Authority within Indian Country

Tribes have greatest authority over members and their property, and limited authority over non-members within Indian country, while the state has correspondingly less authority. Tribes not only may exercise within Indian country all the rights and powers described in Section III above, but also others dependent on a land base, notably zoning and the statutory right to conduct gaming. The following examples of rights and powers only apply to the Annette Island Reserve and probably to restricted Native allotments and Native townsites in Alaska to the extent they are "Indian country."

1. Zoning. Tribes have the inherent sovereign authority to regulate land use within their territory, but this authority generally does not extend to non-Indian owned fee land, even within Indian country.[137]

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131. Sansonetti Opinion, *supra* note 11, at 129.

132. Carlo v. Gustafson, 512 F. Supp. 833, 838 (D. Alaska 1981).

133. *See* Sansonetti Opinion, *supra* note 11, at 129–30.

134. *Id*. at 130.

135. *Id*.

136. Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 533–34 (1998).

137. *See* Brendale v. Confederated Tribes, 492 U.S. 408, 410–12 (1989) (plurality opinion) (holding that a tribe could zone non-Indian lands only in the "closed" portion of

The state does not have zoning authority over Indian-owned lands in Indian country, even in a P.L. 280 state such as Alaska.[138] It follows, therefore, that between these limits Alaska tribes should have zoning authority over at least their members occupying allotments or townsite lots as Indian country.

2. Gaming. The Indian Gaming Regulatory Act (IGRA) grants tribes the exclusive right to regulate gaming on "Indian lands" in states where gaming is legal.[139] This statute defines Indian lands as: (1) land within the limits of a reservation, and (2) lands "held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which a tribe exercises governmental power."[140] To the extent that allotments and townsites in Alaska are under the "governmental power" of a particular tribe, they should qualify for gaming under IGRA.

IGRA divides gaming into three classes. Class I gaming is regulated exclusively by the tribes[141] and is limited to traditional forms of Indian gaming and social games played for prizes of minimal value.[142] Class II gaming is regulated by the tribes with oversight by the National Indian Gaming Commission[143] and includes bingo, pull-tabs, and certain card games.[144] Finally, Class III gaming is governed by a compact between the tribe and the state, or procedures issued by the Secretary of the Interior,[145] and includes casino-type games.[146] Class II and Class III gaming are permitted only if such gaming is otherwise permitted under state law by any person, organization, or entity for any purpose.[147] Alaska permits a wide range of Class II and Class III games.[148]

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the reservation, where the vast majority of the land was tribal-owned and few non-Indians lived).

138. Santa Rosa Band of Indians v. King County, 532 F.2d 655, 667 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).

139. 25 U.S.C. § 2701(5) (2000).

140. *Id*. § 2703(4); *see also* 25 C.F.R. § 502.12 (2004). As discussed above, ANCSA extinguished all reservations in Alaska except for the Annette Island Reserve. There are, however, a few parcels of tribal trust land in the Southeast Alaska Communities of Klawok, Kake, and Angoon. *See* Sansonetti Opinion, *supra* note 11, at 112 n.277.

141. 25 U.S.C. § 2710(a)(1) (2000).

142. *Id*. § 2703(6).

143. *Id*. § 2710(a)(2).

144. *Id*. § 2703(7).

145. *Id*. § 2710(d).

146. *Id*. § 2703(8).

147. *Id*. § 2710.

148. *See* ALASKA STAT. § 05.15.100 (Michie 2004). Alaska law permits both Class II-type games (bingo, pull-tabs) and Class III-type games (lotteries). *Id.*

3. Power over Non-Members. Until 1981, the general presumption was that tribes had regulatory jurisdiction over both members and non-members within Indian country, regardless of the land status of the particular parcel. In *Montana v. United States*, however, the Supreme Court set forth the general proposition that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" on non-Indian fee land.[149] Tribes may regulate non-Indians on such lands only if one of two exceptions applies: (1) the non-Indian has entered a consensual relationship with the tribe or tribal member, such as a contract having to do with the land; or (2) the non-Indian activity threatens "the political integrity, the economic security, or the health and welfare of the Tribe."[150] For example, tribes can exercise both Clean Air Act and Clean Water Act jurisdiction over non-Indians, even on non-Indian-owned fee land, where necessary to protect the health and welfare of the tribe.[151] The Clean Water Act authority is premised on the tribe "exercising governmental authority over a Federal Indian reservation," and thus does not apply in Alaska outside the Annette Island Reserve.[152]

Although tribes have no inherent criminal jurisdiction over non-Natives in Indian country, tribes will often enter into cross-deputization agreements with county or state law enforcement agencies. Under these agreements, tribal officers often have authority, delegated by the state, to arrest non-Natives and hold them until state officers arrive, or to transport non-Native detainees to state authorities.

V. THE BENEFITS OF RESTORING INDIAN COUNTRY FOR RURAL JUSTICE IN ALASKA

For many years, the State of Alaska has acknowledged that it lacks resources to provide adequate law enforcement and court services in rural Alaska. Studies have repeatedly shown that this lack of law enforcement services is one of the most significant reasons why Alaska Natives and American Indians, as well as non-Indians, living in rural communities face tremendous social obstacles that hinder their ability to live productive and satisfying lives.[153] In 2004, Congress established the

149. 450 U.S. 544, 565 (1981).

150. *Id*. at 565–66.

151. *See* Arizona v. EPA, 151 F.3d 1205 (9th Cir. 1998), *amended by* 170 F.3d 870 (9th Cir. 1999) (Clean Air Act jurisdiction); Albuquerque v. Browner, 97 F.3d 415, 419 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997) (Clean Water Act jurisdiction).

152. *See* 33 U.S.C. § 1377(h) (2000) (defining "Indian tribe" for purposes of the Clean Water Act).

153. VILLAGE PUBLIC SAFETY OFFICER PROGRAM, *supra* note 1, at 1. Documentation and discussion of the inadequacies and disparities in the provision of law enforcement and justice in rural Alaska is contained in the studies cited in note 155 *infra*.

Alaska Rural Justice and Law Enforcement Commission to study and report on the nature of the problem and recommended solutions.[154] As we discuss more fully below, the best way to provide justice to all residents of rural Alaska is to restore the Indian country status of at least some tribal lands in Alaska. This change would help resolve the present confusion over jurisdiction, enhance local control, allow for better access to federal law enforcement funds, and improve the safety of rural Alaskans with little or no cost to the state. This section briefly reviews the factual and legal background of the problem, offers a range of options for addressing the problem by clarifying tribal territorial jurisdiction, sets forth the public policy benefits of this solution, and explains how the solution can be implemented.

A. The Rural Justice Problem and the Call for "Regionalization"

The administration of justice in rural Alaska—or the lack thereof—has been a source of alarm for many years. Several major studies have exposed the disparity between services to urban and to rural Alaskans.[155] Prior to statehood, Native villages in Alaska employed their own dispute resolution and peacekeeping mechanisms. By the early 1900s, elected

154. Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 112, 118 Stat. 62 (2004). In addition to establishing the Rural Justice Commission, Section 112 prohibited use of funding for tribal courts or law enforcement for tribes or villages with fewer than 25 Native members or located within several of the more populous boroughs. The Commission is specifically charged with recommending ways of: (1) creating "a unified law enforcement system, court system, and system of local laws or ordinances for Alaska Native villages and communities"; (2) meeting law enforcement and judicial personnel needs in rural Alaska through cross-deputization or other means of maximizing existing federal, state, local, and tribal resources; (3) addressing regulation of alcohol; and (4) addressing domestic violence and child abuse in rural Alaska. *Id.* Following some initial delays, the Commission was appointed in September 2004 and began hearing testimony in October 2004. Press Release, Dep't of Justice, Attorney General John Ashcroft Appoints the Alaska Rural Justice and Law Enforcement Commission (Sept. 2, 2004) (on file with authors). The Commission began hearing testimony in October 2004. Press Release, U.S. Attorney, Alaska Rural Justice and Law Enforcement Commission Hearings (Oct. 20, 2004) (on file with authors). The Commission plans to convene a series of hearings throughout rural Alaska, and report with recommendations to Congress by the end of June 2005. *Id.*

155. *See, e.g.*, ALASKA ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, RACISM'S FRONTIER: THE UNTOLD STORY OF DISCRIMINATION AND DIVISION IN ALASKA (2002), *available at* http://www.usccr.gov/pubs/sac/ak0402/main.htm (last visited Feb. 26, 2005) [hereinafter RACISM'S FRONTIER]; COMM'N ON RURAL GOVERNANCE AND EMPOWERMENT, FINAL REPORT TO THE GOVERNOR (1999), *available at* http://www.alaskool.org/resources/anc2/ANC2_Sec2.html (last visited Feb. 20, 2005); ALASKA NATIVES COMM'N, FINAL REPORT (1994).

village councils had assumed law enforcement and justice functions.[156] After statehood, however, these mechanisms were dismantled as the state asserted its jurisdiction, and assumed the obligation to enforce criminal law in rural Alaska. The state has struggled to fulfill this obligation, not only due to a lack of resources but also due to cultural divisions between state law enforcement personnel and the diverse communities in rural Alaska. Returning primary authority over certain criminal activity to the villages would relieve these burdens on the state and result in better service at the local level.

The lack of Indian country in Alaska has presented a rationale, or pretext, for proponents of "regionalization" to shift the locus of administration of law enforcement funding and services from the Native villages to the state or to regional nonprofit corporations. The proponents of regionalization contend that consolidating funds that presently flow directly to tribal governments would result in maximum efficiency in delivery of services to Alaska Natives. The basic argument in favor of regionalization is that transferring federal funds to regional entities or the state would create administrative economies of scale. While this may be true in some cases, evidence suggests that Alaska tribes are not inefficient compared to other recipients of federal funding.[157] More importantly, any administrative "efficiencies"

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156. RACISM'S FRONTIER, *supra* note 155.

157. It is true that smaller tribes, with limited programs and small direct cost pools, will tend to have higher administrative costs in relative terms, compared with larger tribes or tribal organizations with larger direct pool bases. A 1999 National Congress of American Indians (NCAI) report found that tribes with direct cost bases under $500,000 had average indirect cost rates of 49.5%; tribes with direct cost bases of $1 million to $5 million had rates averaging 31%; and tribes with direct cost bases in excess of $20 million averaged 22.7%. *See* NAT'L CONGRESS OF AMERICAN INDIANS NAT'L POLICY WORK GROUP ON CONTRACT SUPPORT COSTS, FINAL REPORT 8 (1999) [hereinafter NCAI REPORT]. Indirect cost rate is the ratio of indirect or administrative costs to direct or program costs. For example, if a tribe has program costs of $200,000 and administrative costs of $100,000, its indirect cost rate would be 1-to-2 or 50%.

However, it has also been shown that Alaska tribes' indirect cost ratios compare favorably with those of other federally funded organizations. The Department of the Interior's Office of Self-Governance analyzed data from fiscal year 2002 regarding 23 separate ISDEAA Title IV Compacts and Funding Agreements administered on behalf of 170 tribes. The overall average indirect cost rate on those compacts was 33.63%. *See* INTER-ORGANIZATIONAL WORKGROUP ON FEDERAL CONTRACTING INDIRECT COST ISSUES, CONCEPT PAPER (2003) [hereinafter IOWG CONCEPT PAPER]. This figure compares favorably with the indirect cost rates of non-tribal recipients of federal funding, including government agencies. A Department of the Interior Office of Inspector General Report has shown that typical non-profit rates average 53.7%. *Id.* at 6. The Department of Health and Human Services, with which many Alaska tribes contract and compact through the IHS to provide health care services, typically exceeds a 50%

produced by regionalization would come at the cost of tribal self-determination and local control that is essential to effective child protection, law enforcement and justice.[158] Without direct local involvement and control over these critical services, the additional increase in unemployment and sense of powerlessness may well intensify substance abuse and crime, nullifying any administrative "efficiencies" at the regional level.[159]

Tribes and tribal organizations in Alaska share a commitment to cost efficiency, because their members are the ones who stand to suffer most from inefficiencies. Tribes can and do voluntarily form tribal organizations to create economies of scale, as authorized and encouraged by ISDEAA.[160] But tribal leaders have expressed strong objection to *forced* regionalization of law enforcement or any other programs or services.[161] Many tribal leaders have also expressed that regionalization

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indirect cost rate. *Id*. In this context, Alaska tribes' administrative overhead costs do not appear out of line.

158. COMM'N ON RURAL GOVERNANCE AND EMPOWERMENT, *supra* note 155, at 62 (finding that "loss of control of local resources and local decision-making processes have created widespread dependence on government aid and a sense of helplessness and hopelessness for many Alaska Natives").

159. *See* Stephen Cornell & Joseph P. Kalt, *Alaska Native Self-Government and Service Delivery: What Works?* 23 Joint Occasional Papers on Native Affairs No. 2003-01 (Native Nations Institute & Harvard Project on American Indian Economic Development, 2003) (concluding that "a push for regionalization that ignores [Natives'] concerns and preferences virtually guarantees a continuing legacy of disengagement, bitterness, and poverty, with all the attendant long-term costs for both Native people and other governments"); COMM'N ON RURAL GOVERNANCE AND EMPOWERMENT, *supra* note 155, at 60 (recommending that, in order to break the destructive cycle of dependence, "state and federal governments should create and utilize all possible opportunities for Native tribes to demonstrate their respective capacities to regulate tribal members").

160. *See* 25 U.S.C. §§ 450(h), 458(b) (2000).

161. *See, e.g.*, MANIILAQ ASS'N, POSITION PAPER OF THE MANIILAQ BOARD OF DIRECTORS SUPPORTING SELF-DETERMINATION AND OPPOSING REGIONALIZATION OF TRIBAL FUNDING IN ALASKA (2003) (on file with authors) (stating that forced regionalization would contravene the policy of self-determination and reverse the progress of creating effective tribal institutions and leadership); ASS'N OF VILL. COUNCIL PRESIDENTS, RESOLUTION 04-08-02 (Aug. 18, 2004) (supporting tribal control over funding and programs for the benefit of tribal members); TANANA CHIEFS CONFERENCE, RESOLUTION NO. 2004-1 (Aug. 19, 2004) (same); ALASKA FEDERATION OF NATIVES, RESOLUTION 03-20 (stating that "[l]egislatively mandating the regionalization of services would diminish local control, be contrary to long-standing federal policies favoring self-determination, and decrease efficiency of services by removing the accountability that regional organizations now have to their client populations and tribes"); *see also* NATIONAL CONGRESS OF AMERICAN INDIANS (NCAI) RESOLUTION # FTL-04-021 (revised Oct. 12, 2004) ("support[ing] Alaska Tribes in their opposition to regionalization and the incremental diminishment of tribal self-determination and sovereignty").

efforts are one of the greatest threats to tribal self-determination in Alaska in this era, and some have characterized the impact of regionalization even more starkly: "[r]egionalization is termination."[162]

Despite these concerns, Senator Stevens in September 2003 introduced an appropriations bill rider that would have re-directed all funds for Alaska tribal law enforcement and justice systems from the U.S. Department of Justice to the State of Alaska, removing a great deal of Native discretion over this much needed funding for tribal police and courts.[163] The rider was driven in part by the misconception that Alaska Native tribes do not have concurrent criminal jurisdiction over their members.[164] Although the rider was not enacted, similar proposals may well arise in the future, perhaps as recommendations from the Alaska Rural Justice and Law Enforcement Commission.[165]

The Commission, which was established by another Stevens appropriations rider, is required to consider a number of issues, including an explicit regionalization scheme "[c]reating a unified law enforcement system, court system, and system of local laws or ordinances for Alaska Native villages and communities of varying sizes including the possibility of first, second and third class villages with different powers."[166] Such a scheme would effectively terminate tribal jurisdiction by subsuming villages into the state system of municipal government and the unified state court system.[167]

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162. Native American Rights Fund, *Regionalization by Any Other Name is Termination*, 29 NARF Legal Review 1 (2004), *at* http://www.narf.org/pubs/nlr/nlr29-2.pdf (last visited Feb. 27, 2005); *see also, e.g.*, NCAI, RESOLUTION #ABQ-03-045 (2003), *available at* http://www.ncai.org/data/docs/resolution/annual2003/03-045.pdf (last visited Feb. 20, 2005) (regionalization "amounts to nothing less than the termination of the existing sovereignty of Alaska Native tribes"). *See generally* COHEN, *supra* note 26, at 180–88 (recounting the repudiation of the termination policy in favor of the current policy of tribal self-determination).

163. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 2004, S. 1585, 108th Cong. § 109 (2004).

164. A group of law professors expert in federal Indian law reached the opposite conclusion: "Federal law recognizes that tribal jurisdiction may be membership-based and is not solely dependent on the existence of Indian country. To deprive tribes of funding for courts or law enforcement programs based on a legal theory that they lack jurisdiction over their own members is simply in error." Letter from Joseph William Singer et al., to Gayle Norton, Sec'y of the Interior, at 10 (Oct. 22, 2003) (on file with authors).

165. Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 112, 118 Stat. 3, 62 (2004).

166. *Id*.

167. Unlike many states, the Alaska Constitution requires a unified state court system. Cities and boroughs (the Alaska equivalent of counties) cannot operate separate

To the extent that proposals to regionalize rural justice funding are sincerely based on a perceived jurisdictional infirmity—*i.e.*, that Alaska tribes lack criminal jurisdiction over their own members in the absence of Indian country—the recommendations in the next section should be embraced by regionalists. If, however, the calls for regionalization mask a desire to minimize, if not eliminate, tribal sovereignty and self-determination, our proposals are sure to meet continued determined resistance from regionalists. In any event, decisions about how best to respond to the rural justice crisis should be made in light of the public policy considerations we detail below, and not just on the basis of an administrative efficiency model that ignores the role of tribal self-determination and governance in the delivery of effective law enforcement and judicial services.[168]

B. Recommendation: Clarify Jurisdiction by Restoring Indian Country

The uncertainty regarding tribal territorial jurisdiction presents a major and unnecessary obstacle to restoring justice in rural Alaska. The Alaska Rural Justice and Law Enforcement Commission should recommend to Congress that Indian country status be restored to all tribal lands, including those controlled by the tribes' ANCSA corporations. If this were to occur, the state would maintain concurrent jurisdiction over most crimes due to Public Law 280.[169] This is a beneficial proposition for the State, because it would not only retain criminal jurisdiction but also gain local law enforcement partners.

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judicial systems (even if they could afford them). *See* ALASKA CONST. art. IV, § 1 ("The courts shall constitute a unified judicial system for operation and administration.").

168. It is worth noting that Congress has repeatedly stated over the past decades that tribal self-determination and self-governance have been unprecedented successes in federal Indian policy, and as a result, tribes today have the administrative capacity and technical expertise to deliver a full range of governmental services more effectively than if non-tribal entities, such as the state or federal government, delivered those services. *See, e.g.*, S. Res. 106-277, 106th Cong. (2000) (describing self-determination as "the most successful policy of the United States in dealing with the Indian tribes"); S. REP. NO. 103-374, at 1 (1994) (report accompanying 1994 ISDEAA amendments and noting that "[t]he policy of self-determination has proven to be very successful"); S. REP. NO. 100-274, at 4 (1987) ("remarkable" development of tribal government during previous twelve years "is directly attributable to the success of the federal policy of Indian self-determination").

169. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953), codified at 18 U.S.C. § 1162 (2000). Public Law 280 granted criminal jurisdiction over Indian country to certain states (including Alaska); however, the law was a grant of concurrent authority and did not divest tribes of their inherent criminal and civil jurisdiction over Indian country. *See, e.g.*, TTEA v. Ysleta del Sur Pueblo, 181 F.3d 676, 685 (5th Cir. 1999); Confederated Tribes of Colville Reservation v. Super. Ct. of Okanogan County, 945 F.2d 1138, 1140 (9th Cir. 1991); Walker v. Rushing, 898 F.2d 672, 675 (8th Cir. 1990).

Creating territorial boundaries within which Alaska tribes can exercise jurisdiction is a rational and feasible approach to correcting the present anomaly of village governments that are recognized to have and exercise some governmental powers, but that have little territorial jurisdiction. This solution supports a number of public policy objectives, as discussed in the next subsection, and could be easily implemented, as shown in subsection D below.

Alternatively, a more limited solution would be to craft legislation restoring the Indian country status of an Alaska tribe's ANCSA lands only when the village and its affected village and regional corporations agree. The corporations would continue to manage their lands, and the State would continue to have concurrent (though no longer exclusive) criminal jurisdiction. The agreement could be flexible, for example by limiting (or barring) taxation of the corporation, or preserving existing land uses. Where the corporate shareholders are also members of the village, the convergence of interests in good government services *and* corporate health should make such agreements plausible. Even where the ownership or interests of the corporation diverge somewhat from those of the village, the corporation might well prefer that primary regulatory jurisdiction over its lands lie with the village rather than with the State. And of course, if either party prefers the status quo, no agreement would be required and no Indian country need be created.

A third, even more modest alternative would be to ask Congress to designate the federally recognized Alaska Native Villages and their surrounding areas "dependent Indian communities" for purposes of the Indian country statute. This would leave most ANCSA lands under the jurisdiction of the State, but would erase any question that tribes have concurrent criminal jurisdiction over Natives and, in some circumstances, non-Natives within the limited territory of the villages. The State would retain concurrent Public Law 280 jurisdiction over these lands.[170]

C. Policy Objectives Supporting Recommendation to Restore Indian Country

Restoration of Indian country status to some, if not all, tribal lands would remove any doubt about the legitimacy of village-based law

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170. We do not attempt, in this article, to explore all of the potential ramifications of restoring Indian country to Alaska, but limit ourselves to criminal jurisdiction for purposes of rural law enforcement and justice services. Many other issues—including the impact that restoring Indian country would have on the civil-regulatory authority of the tribes and the States—would require careful consideration. Our purpose is not to exhaust the issues, but to advance the dialogue by presenting for discussion clear proposals with a sound basis in law and public policy.

enforcement and justice services in rural Alaska. Implementing such a system would benefit both state and tribal governments in a number of ways. The following policy objectives have all been articulated by the State or by reports commissioned by the State, and would all be advanced by our recommended solution.

1. Provide Effective Service to Rural Residents. Most fundamentally, community-oriented law enforcement and justice systems *work* better than those imposed uniformly by a central state or federal agency on diverse local communities. Research on Native policing shows that the transfer of control to local tribal authorities enhances community satisfaction with policing and police accountability.[171] As recently stated, "[t]he general point is that self-determined institutions, ones that reflect American Indian nations' sovereignty, are more effective."[172]

2. Enhance Local Control. The reason village-based justice works better is that the local community has both the authority and the responsibility to deal with local social problems, rather than ceding that responsibility entirely to the state and fostering a sense of powerlessness. Major studies of Alaska Native affairs in the last decade have concluded that the State should work with Alaska's tribes to enhance local control.[173] As far back as 1980, the State recognized that increased Native local control was a means to improve rural law enforcement.[174]

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171. *See, e.g.*, STEWART WAKELING ET AL., U.S. DEP'T OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS 54–56 (2001); Eileen Luna, *Law Enforcement Oversight in the American Indian Community*, 4 GEO. PUB. POL'Y REV. 149, 150–51 (1999).

172. WAKELING ET AL., *supra* note 171, at ix.

173. In 1999, the Alaska Commission on Rural Governance and Empowerment recommended that the state judicial branch continue outreach programs with rural residents to develop appropriate mechanisms to respond to rural needs. COMM'N ON RURAL GOVERNANCE AND EMPOWERMENT, *supra* note 155, at 107. In 1994, the Alaska Natives Commission recommended that "[t]he State of Alaska should enter into formal agreements with each 'Village Court' . . . to determine which infractions or which classes of infraction will be the domain of the 'Village Court' and which will be the domain of the state government." ALASKA NATIVES COMM'N, *supra* note 155, at 172.

174. *See* VILLAGE PUBLIC SAFETY OFFICER PROGRAM, *supra* note 1. That report recognized a range of infractions and misdemeanors "that could best be resolved by the application of sanctions reflecting village norms and conditions, without entering the formal processing of the State's criminal justice system." *Id*. at 9. The advantages foreseen included an increase in local control and self-determination, as well as direct economic and employment benefits to rural Alaska. *Id*. at 10–11.

3. Encourage Flexibility, Tolerance and Diversity. Alaska's villages differ widely in terms of their cultural values, traditions of peacekeeping and rehabilitation, and patterns of criminal behavior. Enhanced local control would enable each community to tailor its limited resources in the way that best addresses its cultural and criminological profile. Villages would continue to partner with the State and, where they deem appropriate, with regional tribal consortia.[175]

4. Bridge Cultural Divisions. Native values and priorities can also differ widely from those of the non-Native society. Expanding the role of village governments in the provision of rural justice services would help bridge the cultural division between offenders and those administering justice, which experts feel is critical in promoting rehabilitation and reducing recidivism.[176]

5. Access Federal Resources. Any system to provide effective law enforcement and justice in rural Alaska will be expensive because of the sheer size and remoteness of the area. Because of their status as federally recognized entities, Alaska Native Villages can access sources of funding that the State cannot, such as Department of Justice (DOJ) funding for tribal law enforcement and justice systems, and Bureau of Indian Affairs (BIA) law enforcement funds. Senator Stevens' proposal last year to divert DOJ tribal funds to the State cast the tribes and the state as competitors, and would only have exacerbated the cultural divisions and lack of local control noted above. If Indian country were restored in Alaska, tribes might be eligible for and have access to even more federal rural justice funding.

In addition to these benefits, restoring Indian country would facilitate tribal economic development in general, which in turn would reduce some of the social ills—poverty, unemployment, and alcohol abuse—that fuel crime. Researchers from the Harvard Project on American Indian Economic Development concluded that the *Venetie*

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175. As the Alaska Advisory Committee to the United States Civil Rights Commission pointed out, "[m]any legal experts agree that tribal courts should be used more extensively as a cost-effective means of reducing state and federal court costs while at the same time allowing tribal members to be more involved with the law and legal process." RACISM'S FRONTIER, *supra* note 155.

176. In their final report, the Alaska Natives Commission found that the recidivism statistics among Alaska Natives reflect a built-in bias against Native Villagers, who are generally placed on probation or parole in alien environments in Anchorage or Fairbanks, and that "it is essential for the state government to develop alternatives to the current system of probation [and] parole . . . [to] enabl[e] Alaska Natives to complete their time in their home villages" under village supervision rather than in the cities. ALASKA NATIVES COMM'N, *supra* note 155, at 177.

decision "places additional barriers on the path to Native economic development" in Alaska, and that "the jurisdictional constraints on Alaska Native communities are one of the primary obstacles they face in economic development."[177] Removing these barriers would improve the lives of Natives while spurring rural economies, which could be a boon rather than a burden to the State.[178]

Even more fundamentally, clarifying the scope of tribal jurisdiction in Alaska would help tribes maintain and develop stable institutions. For too long, Alaska tribes have been subjected to shifting and conflicting pronouncements by the State regarding tribal status and jurisdiction. For example, as discussed earlier, the Alaska Attorney General recently issued an opinion on tribal court jurisdiction in Indian Child Welfare Act cases that largely reverses an opinion on the same subject written just two years before.[179] In the earlier opinion, the Attorney General concluded that "state law recognizes that tribes in Alaska have authority over child custody matters involving tribal children and need not petition the Secretary of the Interior to reassume jurisdiction before exercising their authority."[180] In the later opinion, however, the Attorney General reversed course and declared that a tribe does *not* have jurisdiction over child custody matters unless the tribe successfully petitions the Secretary to reassume jurisdiction or unless a state court grants a transfer.[181] This legal about-face exemplifies the state's history of wild swings in policy, as each administration seeks to impose its own politicized reinterpretation of apparently settled law. Such shifting sands are not the foundation upon which stable institutions can be built. Federal law clearly affirming the concurrent jurisdiction of

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177. Cornell & Kalt, *supra* note 159, at 21 (concluding "[t]he clear implication of the research summarized above is that affirming and increasing the jurisdictional powers of Alaska Native groups would *enhance* their development prospects") (emphasis in original).

178. *See* COMM'N ON RURAL GOVERNANCE & EMPOWERMENT, *supra* note 155, at 60 (suggesting "federal and state governments must implement policies and enact necessary statutes that give maximum local powers and jurisdiction to tribes and tribal courts in the areas of alcohol importation and control, community and domestic matters, and law enforcement"). The Commission implicitly called for overruling the *Venetie* case when it recommended that Congress repeal the ANCSA provision on which the Supreme Court largely relied for its decision—that land claims be settled "without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges." *Id*. at 56 (quoting 43 U.S.C. § 1601(b) (2000)).

179. *See* discussion *supra* section III(A)(7).

180. Op. Alaska Att'y Gen., In the Matter of C.R.H., Att'y Gen. File No. 441-00-0005 (Mar. 29, 2002).

181. Op. Alaska Att'y Gen. 4 (Oct. 1, 2004).

tribes and the State within Alaska Indian country, however extensively delineated, may be the only way to end the political whip-sawing and enable cooperative solutions to emerge over time.

D. Implementing the Recommendation

Restoration of Indian country in Alaska could be achieved by simple legislation amending the "Indian country" statute.[182] The first alternative, which would include ANCSA lands (effectively overruling *Venetie*), could be accomplished by adding a new subsection so that Indian country means "any lands owned or controlled by any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act." This language accords with other federal statutes, such as the Indian Self-Determination and Education Assistance Act, that treat Alaska tribes in the same way as tribes in the Lower 48.[183]

The second alternative, which would allow tribes, village corporations, and regional corporations, at their option, to reclaim the Indian country status of ANCSA lands, would be somewhat more complicated but might include amending the Indian country statute to include the following:

> (d) any lands owned or controlled by any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act; *provided, however*, that such lands will only constitute Indian country when the village and the village and regional corporations enter into a written agreement to that effect approved by the Secretary of the Interior. The Secretary shall ensure that any agreement to reassume Indian country status shall be accompanied by a suitable plan to exercise the jurisdiction attendant upon such status.

Finally, the modest proposal to designate only the villages themselves as Indian country might be accomplished by amending subsection (b) of the statute (new language in italics), so that Indian country includes the following:

> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; *such communities are to include all Alaska Native villages recognized by the Secretary of the Interior as eligible for the services provided to Indian tribes because of their status as Indian tribes;* and . . . .

Undoubtedly other alternatives are worth considering, but these proposals provide a starting point for discussion, and indicate that reintroducing a territorial component to Alaska tribal jurisdiction

182. 18 U.S.C. § 1151 (2000).

183. *See* 25 U.S.C. § 450b(e) (2000).

through federal legislation would be a relatively simple matter.

Restoring Indian country to Alaska would make clear that tribes and the State share concurrent jurisdiction over most crimes committed on or near tribal lands, and demonstrate that tribes and the State are partners, not competitors, in providing services in rural Alaska. The State of Alaska should accept the responsibility to be a good neighbor to the State's Native villages. Our legislative proposals provide a framework within which a healthier relationship between the State and Alaska Native tribal governments can develop. Tribal jurisdiction in rural Alaska is not a threat to the State's authority, but a mutually beneficial opportunity to secure the resources needed to make rural Alaskans, both Native and non-Native, more safe.

VI. CONCLUSION

The status of Alaska tribal governments as federally recognized tribes now appears well-established, and even with a limited territorial base in "Indian country," Alaska tribes retain important rights and powers by virtue of their inherent sovereignty and their member-based jurisdiction. Nevertheless, the limited territorial jurisdiction of Alaska tribes has rendered them vulnerable to "regionalization" schemes premised in part on the tribes' supposed lack of jurisdiction over their members, particularly in the rural justice and law enforcement context. Restoring the "Indian country" status of tribal lands in Alaska would rectify Alaska tribes' anomalous status as "sovereigns without territorial reach," allow Alaska tribes to function under the same criminal and civil regulatory regimes as all other tribes in Public Law 280 states, and make clear that Alaska tribes share concurrent criminal jurisdiction with the State. Clarifying tribal territorial jurisdiction would also promote economic development and the formation of stable tribal institutions, resulting in fewer crimes. Most importantly, clarifying tribal jurisdiction would enable the tribes, which represent the only real government presence in much of rural Alaska, to provide residents more effective law enforcement and justice.