

# Indian Country and Inherent Tribal Authority: Will They Survive ANCSA?

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*This Article analyzes the effect of the Alaska Native Claims Settlement Act ("ANCSA") on the existence of Indian country and inherent tribal authority in Alaska. The Article first presents a history of the status of Native Alaskan land rights and then discusses the importance of Indian country and tribal sovereignty to Native Alaskans. Next, the Article provides a summary of the Ninth Circuit's decision in Alaska ex rel. Yukon Flats School District v. Native Village of Venetie Tribal Government (Venetie II) as well as an overview of legislative history and judicial precedent traditionally applied to determine the existence of Indian country and inherent tribal sovereignty. Finally, the Article urges the United States Supreme Court to uphold the decision in the Venetie II case by demonstrating that ANCSA did not extinguish Indian country or inherent tribal sovereignty for the Venetie tribe.*

## I. INTRODUCTION

With the delegates standing motionless and quiet the President said, "I want you to be among the first to know that I have signed the Alaska Native Claims Settlement Act."

After the President finished his statement there was applause and the delegates started congratulating each other. Attendants at the meeting were overjoyed, and most delegates viewed ANCSA as a victory for their people.

Like many other delegates, I thought ANCSA would bring land and money to our people, and that it would provide a means to improve the living conditions of a people basically living in poverty.

ANCSA did not provide wealth, land, or improvement in the lifestyles of Alaska Natives. It instead divided Alaska Natives, placed their lands and culture in jeopardy, and only brought worthwhile wealth and benefit to corporate consultants, lawyers,

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managers, employees, and directors.

ANCSA was an Act of deception. An Act destined for failure. An Act designed to assimilate Alaska Natives into the mainstream of American society.<sup>1</sup>

When the Alaska Native Claims Settlement Act ("ANCSA")<sup>2</sup> was enacted in December 1971, many Alaska Natives and their leaders celebrated.<sup>3</sup> They believed ANCSA was an "innovative and wide-ranging Act, designed to empower and enrich Alaska Native Peoples," preserve and protect their ancestral lands and culture, and assure their self determination.<sup>4</sup> They thought the Act finally would provide the protection they sought for their Native lands, subsistence way of life, heritage, and culture.<sup>5</sup> Most Alaska Natives viewed ANCSA as a "real victory."<sup>6</sup>

But almost three decades after its enactment, many Alaska Natives now believe that rather than a victory, ANCSA was merely an "act of deception."<sup>7</sup> They argue that the Act destroyed their title to ancestral lands; created a complex corporate scheme in which corporations own, manage, and control their ancestral land; divided their communities; jeopardized their culture; and effectively relegated them to second-class citizens.<sup>8</sup>

While Alaska Native concerns with ANCSA are numerous, a recent Ninth Circuit decision has allayed some of these concerns. In *Alaska ex rel. Yukon Flats School District v. Native Village of Venetie Tribal Government (Venetie II)*,<sup>9</sup> the Ninth Circuit held that ANCSA did not extinguish Indian country in Alaska. The existence of Indian country has important implications for Alaska Native tribes in that it would allow them to maintain significant inherent authority.

This article will discuss ANCSA and its recent interpretation in *Venetie II*. Part II describes the land rights of Alaska Natives both before and after ANCSA. Part III defines Indian country and inherent tribal sovereignty, presents the Ninth Circuit's analysis in *Venetie II*, and provides an overview of the legislative and judicial history of Indian country and inherent tribal sovereignty. Part IV

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1. ROBERT RUDE, AN ACT OF DECEPTION 3 (1996) (the President being quoted is Richard Nixon).

2. Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601-1629(e) (1994)).

3. RUDE, *supra* note 1, at 3.

4. John E. Smelcer, *Preface* to RUDE, *supra* note 1.

5. Emil Notti, *Foreword* to RUDE, *supra* note 1.

6. *Id.*

7. *Id.*

8. *See id.*

9. 101 F.3d 1286 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2478 (1997).

argues that the United States Supreme Court should uphold the *Venetie II* decision on the basis that ANCSA did not extinguish Indian country and inherent tribal sovereignty in Alaska, and that the decision is narrowly tailored to apply only to the Venetie tribe.

## II. ANCSA AND SETTLEMENT OF ABORIGINAL LAND CLAIMS

Congress adopted ANCSA in 1971 to resolve controversies regarding the use, possession, and ownership of Alaska's aboriginal land and abundant resources.<sup>10</sup> Prior to the adoption of ANCSA, Alaska Natives possessed, used, occupied, and claimed Alaskan territory as their ancestral land.<sup>11</sup> This land played, and continues to play, a crucial role in the traditional subsistence lifestyle of Alaska Natives. Alaska Natives have always lived on resources taken from Alaska's land and waters, which provide them with "an abundance of fish, wildlife, and edible plants for subsistence."<sup>12</sup>

### A. Status of Aboriginal Land Rights Prior to ANCSA

Prior to ANCSA, many issues regarding the rights of Alaska Natives to their aboriginal lands were unclear or unresolved. The Treaty Concerning the Cession of Russian Possessions in North America,<sup>13</sup> which, in 1867, transferred power over Alaska from

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10. The House of Representatives Report concerning the passage of ANCSA states the following:

The extent to which the Natives in Alaska could prove their claims of aboriginal title is not known. Native leaders asserted that the Natives have in the past used and occupied most of Alaska. Use and occupancy patterns have changed over the years, however, and lands used and occupied in the past may not be used and occupied now. Moreover, with development of the State, many Natives no longer get their subsistence from the land.

The pending bill does not purport to determine the number of acres to which the Natives might be able to prove an aboriginal title. If the tests developed in the courts with respect to Indian tribes were applied in Alaska, the probability is that the acreage would be large — but how large no one knows. A settlement on this basis, by means of litigation if a judicial forum were to be provided, would take many years, would involve great administrative expense, and would involve a Federal liability of an undeterminable amount.

It is the consensus of the Executive Branch, the Natives, and the Committee on Interior and Insular Affairs of the House that a legislative rather than a judicial settlement is the only practical course to follow. The enactment of H.R. 10367 would provide this legislative settlement.

H.R. REP. NO. 92-523, at 3, (1971), *reprinted in* 1971 U.S.C.C.A.N. 2192, 2194.

11. *See id.*

12. RUDE, *supra* note 1, at 19.

13. Mar. 30, 1867, U.S.-Russ., 15 Stat. 539. The treaty indirectly dealt with Alaska Natives' legal rights by providing that "[t]he uncivilized tribes will be

Russian to American control, acknowledged aboriginal land rights of Alaska Natives but failed to define them.<sup>14</sup> The legal rights of Alaska Natives again were left undefined in the Organic Act of 1884,<sup>15</sup> which established a civil government for the Alaskan territory. In fact, section 8 of the Organic Act specifically postponed resolution of the issue and reserved it for future action by Congress.<sup>16</sup> The Alaska Native Allotment Act of 1906<sup>17</sup> provided for the allotment of homesteads of up to 160 acres of non-mineral land. However, it also failed to resolve the issue of Alaska Native land claims.<sup>18</sup>

The Alaska Statehood Act of 1958<sup>19</sup> acknowledged that Alaska Natives had claims to the land, but again did not resolve the issue of their rights. The Statehood Act directed the government of Alaska to select 102,500,000 acres of federal lands that were "vacant, unappropriated, and unreserved at the time of their selection."<sup>20</sup> However, the Statehood Act disclaimed any right or title to "any lands or other property . . . the right or title to which may be held by any Indians, Eskimos, or Aleuts . . . or is held by the United States in trust for said natives."<sup>21</sup> Despite the fact that the Act acknowledged Alaska Natives' rights to lands used and oc-

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subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country." *Id.* at 542.

14. *See id.*

15. ch. 53, 23 Stat. 24.

16. Section 8 of the Organic Act of 1884 provides

[t]hat the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress . . . .

*Id.* at 26. The statute was apparently intended to "provide some security to non-Indians who had pioneered in Alaska," but its "effect on aboriginal title, however, has never been certain." FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 741 (Rennard Strickland & Charles F. Wilkinson eds., Michie 1982). In *United States v. Berrigan*, 2 Alaska 442, 448 (3d Div. 1905), a federal court in Alaska interpreted the Act as providing protection for Alaska Natives' right of occupancy. But in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278 (1955), the United States Supreme Court ruled that rather than recognizing their right of ownership, the Act simply maintained the status quo.

17. ch. 2469, 34 Stat. 197.

18. *See United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1015 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980) (discussing the Allotment Act's substance).

19. Pub. L. No. 85-508, 72 Stat. 339, *amended by* 73 Stat. 141 (1959) (codified as amended at 48 U.S.C. §§ 21-488 (1994)). The Act disclaimed the right or title to land that was held by Eskimos, Indians, or Aleuts and to all land that was held in trust for them. *See id.* § 4, 72 Stat. 341.

20. *Id.*

21. *Id.*

cupied by them, it provided no definition or criteria for such use or occupancy.<sup>22</sup>

Alaska Natives protested the early selections made by the State of Alaska under the Statehood Act.<sup>23</sup> They felt threatened with the loss of their ancestral lands when the state began to select lands near their villages.<sup>24</sup> In fact, the “potential loss of lands near Native [c]ommunities was the issue that brought Natives together, and it was what led to the formation of Native organizations throughout the state.”<sup>25</sup> Thus newly organized, Alaska Natives “publicly advocated a settlement that would protect aboriginal rights, preserve Alaska Native culture, and bring self determination to Alaska Natives.”<sup>26</sup>

As part of their protest, Alaska Natives claimed aboriginal title to almost all 365,000,000 acres of the state.<sup>27</sup> In order to claim title to this land, Alaska Natives filed claims with the Department of the Interior.<sup>28</sup> In 1967, the Secretary of the Interior imposed a moratorium, or “land freeze,” on the transfer of title to public land to the State of Alaska until the issue of native land claims was resolved.<sup>29</sup>

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22. *See id.*

23. *See* COHEN, *supra* note 16, at 742; *see also Atlantic Richfield*, 435 F. Supp. at 1017 (“In 1969 the state conducted sales of oil and gas leases for tentatively approved Arctic Slope lands. The lease sale was vigorously protested by Alaska Natives.”).

24. *See* RUDE, *supra* note 1, at 2.

25. *Id.*

26. *Id.*

27. *See* COHEN, *supra* note 16, at 198 (citing Arthur Lazarus, Jr. & W. Richard West, Jr., *The Alaska Native Claims Settlement Act: A Flawed Victory*, 40 LAW & CONTEMP. PROBS. 132 (1976)); *see also* ROBERT D. ARNOLD, ALASKA NATIVE CLAIMS 119 (1976).

By May of 1967, [39] protests had been filed. They ranged in size from a 640-acre claim by the village of Chilkoot to the 58 million-acre claim of the Arctic Slope Native Association. Because many claims were overlapping, the total acreage under protest — about 380 million acres — was greater than the land area of the state.

*Id.*

28. *See Atlantic Richfield*, 435 F. Supp. at 1017.

29. Pursuant to Public Land Order No. 4582, the freeze was scheduled to expire on midnight December 31, 1970. *See* 34 Fed. Reg. 1025 (1969). The effect of the moratorium was to freeze the appropriation and disposition of all public lands in Alaska that were unreserved prior to the expiration of the order, including selection by the state under the Statehood Act. *See United States v. Atlantic Richfield Co.*, 612 F.2d 1132, 1134 (9th Cir. 1980) (holding that ANCSA extinguished aboriginal titles of all Alaska Natives as well as all claims “based on” aboriginal titles); *see also Atlantic Richfield*, 435 F. Supp. at 1017; ARNOLD, *supra* note 27, at 118; COHEN, *supra* note 16, at 742.

### B. Status of Native American Land Rights After ANCSA

The desire to end the Department of the Interior-imposed land freeze, the 1969 discovery of oil in Prudhoe Bay, and the possibility of earning substantial profits from the construction of the Trans-Alaska Pipeline were all significant factors in influencing Congress to adopt ANCSA in 1971.<sup>30</sup> Oil companies were extremely anxious to commence oil drilling operations in order to extract the "black gold" found in Alaska, but they declined to do so until Native claims to the land had been extinguished.<sup>31</sup> Increased pressure from the oil companies to resolve the outstanding land claims and to expedite the commencement of oil drilling operations clearly contributed to ANCSA's adoption.<sup>32</sup>

In theory, Congress adopted the legislation to effectuate a "fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims"<sup>33</sup> and to resolve the issues regarding the legal rights of 80,000 Alaska Natives to the land they used and occupied and to which they claimed title.<sup>34</sup> Pursuant to ANCSA, the title to approximately forty-four million acres of

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"In the face of Federal guarantee that the Alaska Natives shall not be disturbed in the use and occupation of lands, I could not in good conscience allow title to pass into others' hands . . . . Moreover, to permit others to acquire title to the lands the Natives are using and occupying would create an adversary against whom the Natives would not have the means of protecting themselves."

ARNOLD, *supra* note 27, at 118 (quoting Secretary of the Interior Stuart Udall).

30. *See* COHEN, *supra* note 16, at 742.

31. *See id.*

32. *See id.*

33. 43 U.S.C. § 1601(a) (1994). The section provides that there is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims; the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States [g]overnment and the State of Alaska . . . .

*Id.* § 1601(a), (b).

34. *See id.* § 1601. The House Report states, in relevant part, that [i]t has been the consistent policy of the United States Government in its dealings with Indian tribes to grant them title to a portion of the lands which they occupied, to extinguish the aboriginal title to the remainder of the lands by placing such lands in the public domain, and to pay the fair value of the titles extinguished. This procedure was initiated by treaties in the earlier part of our history, and was completed by enactment of the Indian Claims Commission Act of 1946.

H.R. REP. NO. 92-523 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2192-94.

federal public land was conveyed indirectly to Alaska Natives through their ownership of corporations established by the Act.<sup>35</sup> They were awarded \$962.5 million,<sup>36</sup> and all Alaska Native land claims were extinguished.<sup>37</sup>

Rather than simply conveying ancestral lands directly to Alaska Natives, Congress established thirteen regional corporations<sup>38</sup> and charged them with distributing the land and assisting Native village corporations with receiving and administering the lands for the benefit of Alaska Natives who would become stockholders in the Native village corporations.<sup>39</sup> The Alaska Natives

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35. See 43 U.S.C. §§ 1611, 1613. ANCSA created a complex corporate mechanism for Native selection, administration, and development of land in Alaska. It provided for the creation of thirteen regional corporations, the establishment of Native corporations, and the selection of title to 40 million acres of land by Native villages and the regional corporations. See *id.* §§ 1606, 1607, 1611, 1613. Although ANCSA provided for 40 million acres of land to be conveyed to Alaskan Natives, a total of 44 million acres was actually conveyed.

36. See *id.* § 1605.

37. See *id.* § 1603; see also *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1023 (D. Alaska 1977) (holding that ANCSA retroactively extinguished Alaska Natives' aboriginal title, since "[c]ongressional intent was to make clear that any prior grant of land under federal law or tentative approval under . . . the Statehood Act operated to extinguish aboriginal title *at the time the conveyance was made or the approval given*. In short, Congress intended the conveyance or approval to be the operative fact extinguishing aboriginal title.").

38. ANCSA states that "[i]f the village had on the 1970 census enumeration date a Native population between 25 and 99, [i]t shall be entitled to a patent to an area of public lands equal to 69,120 acres." 43 U.S.C. § 1613(a). The corporations were directed to select land for their use in twelve geographic regions and within the vicinity of the Native villages, and they were then responsible for administering their portion of the Alaska Native Fund and distributing the funds to the Native shareholders. See *id.* §§ 1606, 1611.

39. See *id.* § 1611. Pursuant to ANCSA, shares of stock in the ANCSA corporations originally were non-alienable and could not be transferred to non-Natives until after December 18, 1991. See *id.* § 1606. Under a 1980 amendment, the restrictions on transfer of the stock to non-Natives was to be lifted on December 18, 1991, the date when all stock originally issued to Natives in Regional and Village corporations was canceled and new shares were issued. See *Alaska National Interest Lands Conservation Act*, Pub. L. No. 96-487, 94 Stat. 2371, 2491, § 1401(a) (1980). A 1991 amendment pushed the operative date back to July 16, 1993 unless a corporation's board of directors approved a resolution by March 1, 1992 declining the prohibition on alienability. See *Little Bighorn Battlefield National Monument*, Pub. L. No. 102-201, 105 Stat. 1631, 1633, § 301 (1991) (codified at 43 U.S.C. § 1629c(a) (1994)). In those cases where the articles were not amended, Native corporation stock, as well as actual control of the corporations themselves, could be taken away from the Native Alaskans and conveyed to non-Natives who would not only own the *land* but also establish policy for the corporations. See

were entitled to enroll and to become stockholders in a regional corporation, as well as in one of more than 200 Native village corporations; enrollment was determined according to place of residence or origin.<sup>40</sup>

A major criticism of ANCSA is that Congress created an overly complex corporate scheme — requiring Alaska Natives to become stockholders and the Native corporations to manage land and money awarded under ANCSA — despite the fact that when deliberating the Act, Congress knew that many Alaska Natives were inexperienced in business matters generally and were completely unfamiliar with corporations and their operations.<sup>41</sup> In fact, Congress had access to many studies that described Alaska Natives as “a people who lived in poverty, were seasonally employed, and survived primarily on subsistence activities.”<sup>42</sup> The studies also provided evidence that most “[a]dult Natives [were] likely to have less than an eighth grade education.”<sup>43</sup> Despite evidence of their lack of formal education and business experience, one commentator noted, “By legislative stroke, the Congress converted all Alaska Natives into members of the corporate world, and receivers of annual reports, proxy statements, solicitations and balance sheets.”<sup>44</sup>

### III. THE EFFECT OF ANCSA ON INDIAN COUNTRY AND INHERENT TRIBAL AUTHORITY IN ALASKA

It is undebatable that ANCSA explicitly extinguished aboriginal title. Additionally, ANCSA revoked reserves set aside by legislative or executive action for the benefit of Native villages and authorized the transfer of money and land to be managed by Na-

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COHEN, *supra* note 16, at 757.

40. See COHEN, *supra* note 16, at 740.

41. See RUDE, *supra* note 1, at 4-5.

42. *Id.* at 4.

43. *Id.*

44. *Id.* (quoting Monroe E. Price, *A Moment in History: The Alaska Native Claims Settlement Act*, 8 U.C.L.A.-ALASKA L. REV. 89, 95 (1979)). Another commentator wrote,

Although corporations were unfamiliar to most Alaska Natives, they were expected to organize new corporations, meet deadlines in ANCSA, study legal issues and select lands, enroll shareholders, invest and distribute ANCSA monies, and do a variety of other tasks. Native directors had to learn their duties as “on the job trainees.”

[T]he large number of tasks facing Native directors and the lack of business experience resulted in the acquisition of many disappointing investments. The Native corporations were open game for con-artists and shysters. Unfavorable investments made by Native corporations resulted in the loss of hundreds of millions of dollars, and placed some of the Native corporations into positions of bankruptcy by the early 1980's.

RUDE, *supra* note 1, at 5.



tive village and regional corporations.<sup>45</sup> It is debatable, however, whether ANCSA implicitly extinguished Indian country<sup>46</sup> and inherent tribal sovereignty.<sup>47</sup>

The designation of an area as Indian country is extremely important to Native Americans. It recognizes their right to control their own lives and affairs within that area. In Indian country, Natives enjoy inherent sovereignty, *i.e.*, the right of self-government and self-determination.<sup>48</sup> Specifically, in Indian country, a tribal government has the following powers: to enact and impose taxes; to adopt and enforce its own internal tribal laws; to adjudicate civil and criminal disputes and minor criminal offenses that occur on tribal lands; to issue marriage licenses; to buy and sell real property; to regulate land use; to provide essential and non-essential governmental services; and to regulate affairs of non-Natives on tribal land.<sup>49</sup> Also in Indian country, Native Alaskan tribal governments enjoy the same sovereign immunity possessed by federal and state governments.<sup>50</sup> They can be sued only if they consent or if they engage in acts beyond the scope of their authority.<sup>51</sup>

The question of whether ANCSA extinguished Indian country

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45. See 43 U.S.C. § 1618(a).

46. See 18 U.S.C. § 1151 (1994). It defines Indian country as

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
- (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, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

47. Native American tribal nations are distinct sovereign political communities that retain the right of self-government. The concept of inherent tribal sovereignty was recognized by the United States Supreme Court in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). In *Worcester*, Justice Marshall wrote, "The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and [c]onsequently, admits their rank among those powers who are capable of making treaties." *Id.* at 559; see also COHEN, *supra* note 16, at 244-46.

48. Although tribes exercise broad powers in Indian country, they do not have absolute power. For instance, tribes cannot enforce their criminal laws against non-Natives in Indian country. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

49. STEPHEN C. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 16 (1992); COHEN, *supra* note 16, at 246-57.

50. See PEVAR, *supra* note 49, at 309 (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 508 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)).

51. See *id.*

and inherent tribal authority in Alaska is currently being decided by the federal courts. Specifically, the United States Supreme Court will soon determine whether the Venetie tribe in Alaska continues to live on Indian country and retain its inherent tribal sovereignty in light of ANCSA. In reaching its decision, the Court will look to the Ninth Circuit's analysis in *Alaska ex rel. Yukon Flats School District v. Native Village of Venetie Tribal Government (Venetie II)*,<sup>52</sup> as well as to legislative history and judicial precedent concerning the existence of Indian country and inherent tribal sovereignty.

#### A. The Ninth Circuit's Decision in the *Venetie* Litigation

In order to understand the *Venetie* litigation, it is important to examine the events leading up to it. Almost all of the inhabitants of the Native Village of Venetie are descendants of the Neets'aii Gwich'in, the tribe of Alaska Natives who have historically inhabited the area.<sup>53</sup> The Neets'aii Gwich'in, in 1940, adopted a constitution in compliance with the Indian Reorganization Act.<sup>54</sup> That constitution established the Native Village of Venetie as the governing authority of the tribe.<sup>55</sup> Subsequently, in 1943, the Secretary of the Interior formed a reservation for the tribe from 1.8 million acres of land that surrounded the Village of Venetie.<sup>56</sup> Since the date of its establishment, the Native Village of Venetie continuously governed the reservation.<sup>57</sup> In 1976, the Native Village of Venetie restructured its council to include representation from an additional Neets'aii Gwich'in community and changed its name to the Native Village of Venetie Tribal Government.<sup>58</sup>

ANCSA revoked reserves apportioned to Alaska Natives through legislative or executive action, including the Venetie Res-

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52. 101 F.3d 1286 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2478 (1997).

53. *See id.* at 1289.

54. *See* 25 U.S.C. § 476(a) (1994). The statute provides that [a]ny Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when

(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

*Id.*

55. *See Venetie II*, 101 F.3d at 1289.

56. *See id.*

57. *See id.*

58. *See id.*

ervation.<sup>59</sup> However, ANCSA explicitly did not “relieve, replace, or diminish any obligation of the United States or of the State of Alaska to protect and promote the rights or welfare of Natives.”<sup>60</sup>

In 1973, shareholders of both the Venetie Indian and Neets’aii corporations exercised their right under section 1618 of ANCSA to take fee simple title, as tenants in common, to the former Venetie Reservation.<sup>61</sup> In 1979, Venetie’s ANCSA lands that had formerly been owned by the two ANCSA village corporations, were conveyed to the Venetie tribal government, and the shareholders voted to dissolve the two Native village corporations.<sup>62</sup>

In 1986, Venetie implemented a Business Activities Tax of five percent on gains derived from commercial activities within the village.<sup>63</sup> That same year, the State, through the Yukon Flats School District, contracted with the Neeser Construction Company to construct a new school inside the boundaries of the Native Village of Venetie.<sup>64</sup> Venetie imposed the Business Activities Tax and assessed a sum of \$161,203.15 against the construction company.<sup>65</sup> Although the tax was assessed against the contractor, the State was responsible for its payment.<sup>66</sup> Upon the State’s refusal to pay, the Village brought an action for collection in tribal court.<sup>67</sup>

The State of Alaska refused to defend the action in tribal court and filed a claim in federal court seeking declaratory and injunctive relief.<sup>68</sup> In its action, the State argued that Venetie lacked jurisdiction to impose the tax.<sup>69</sup> The district court issued an order preliminarily enjoining the tribe’s enforcement proceedings, which Venetie appealed.<sup>70</sup>

In *Alaska v. Native Village of Venetie (Venetie I)*, the Ninth Circuit Court of Appeals upheld the district court’s ruling and af-

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59. See 43 U.S.C. § 1618(a) (1994) (“Notwithstanding any other provision of law, and except where inconsistent with the provisions of this [Act], the various reserves set aside by legislation or by Executive or Secretarial Order for Native use or for administration of Native Affairs . . . are hereby revoked subject to any valid existing rights of non-Natives.”).

60. See *id.* § 1601(c).

61. See *Venetie II*, 101 F. 3d at 1290.

62. See *id.*

63. See *id.*

64. See *id.*

65. See *id.*

66. See *id.*

67. See *id.*

68. See *Alaska v. Native Village of Venetie (Venetie I)*, 856 F.2d 1384, 1386 (9th Cir. 1988).

69. See *id.*

70. See *id.*

firmed the preliminary injunction.<sup>71</sup> The *Venetie I* court determined that whether or not the tribe was authorized to impose its Business Activities Tax upon non-members depended upon whether it was a federally recognized tribe and, if so, whether it inhabited Indian country.<sup>72</sup> The case was then remanded back to the district court on these issues.<sup>73</sup>

On remand, the district court found that although Venetie may have constituted Indian country before the adoption of ANCSA, the statute implicitly extinguished the Indian country status of all Alaska Native villages, including Venetie.<sup>74</sup> It held that although Venetie was a federally recognized tribe, it did not occupy Indian country since ANCSA extinguished Indian country in Alaska.<sup>75</sup> The tribe, therefore, was not authorized to impose the tax.<sup>76</sup>

The tribe appealed the district court's holding that Venetie did not occupy Indian country as defined in the statute.<sup>77</sup> It argued the holding was erroneous for two reasons: (1) the court focused on the set-aside and federal superintendence criteria of the Indian country test and therefore applied an unduly narrow and restrictive test in determining whether the Venetie tribe's land was Indian country,<sup>78</sup> and (2) the court failed to apply the fundamental rule of liberal construction and interpretation in favor of Indians when deciding whether ANCSA extinguished Indian country in Alaska.<sup>79</sup> On appeal, the Venetie tribe reasserted its position that it continues to occupy Indian country and retains its inherent authority to tax activities that occur within its territory.<sup>80</sup>

The Ninth Circuit agreed with Venetie and stated that the dis-

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71. See *id.* at 1391.

72. See *id.* at 1390.

73. See *id.* at 1391.

74. See Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't, No. F87-0051, 1995 WL 462232, at \*16 (D. Alaska Aug. 2, 1995).

75. See *id.* at \*14-\*15. The district court reasoned that Indian country exists only "where the degree of congressional and executive control over the tribe is so pervasive as to evidence an intention that the federal government, not the state, be the dominant political institution in the area." *Id.* at \*14. Furthermore, since ANCSA "effected a significant change" in the relationship between the federal government and Alaska Natives, the court found that the federal government no longer exercised that level of superintendence. *Id.* at \*15.

76. See *id.* at \*20. Although the decision deals with multiple issues, the discussion in this article is limited to the court's determination of what qualifies land as Indian country.

77. See *Venetie II*, 101 F.3d at 1289.

78. See *id.* at 1291-94.

79. See *id.* at 1294-95.

80. See *id.* at 1290.

trict court erred in applying an Indian country test that was too restrictive.<sup>81</sup> It also rejected the district court's holding that the federal government, rather than the state, must be the dominant political institution in the area and that ANCSA extinguished Indian country absent "clear and plain" language to the contrary.<sup>82</sup> Finally, the court rejected the district court's ruling that lands owned by either a Native corporation or a tribe in fee simple could not constitute Indian country.<sup>83</sup>

The court of appeals began its analysis with a look at 18 U.S.C. § 1151, which defines Indian country to be either a reservation, an allotment, or a dependent Indian community.<sup>84</sup> After concluding that the land occupied by Venetie was neither a reservation nor an allotment, the Ninth Circuit held that in order to be Indian country, Venetie had to be a dependent Indian community. The court then had to establish an appropriate test for determining whether the tribe was, in fact, a dependent Indian community.<sup>85</sup> The court stated that although the United States Supreme Court had never established a test for determining whether a "tribe constitutes a dependent Indian community within the meaning of section 1151(b)[,] . . . [a] clear body of Court precedent emphasizes two central features of the inquiry into whether a given area constitutes Indian country, as a general matter": (1) the community or land must be "validly set apart for the use of the Indians as such" ("federal set-aside") and (2) the Natives who inhabit the land must be "under the superintendence of the [federal] Government" ("federal superintendence").<sup>86</sup>

Although the Court of Appeals adopted these two requirements — set-aside and federal superintendence — it held that they should be "broadly construed."<sup>87</sup> It rejected the district court's narrow test and found that the set-aside and federal superintendence criteria must be satisfied above all others because they

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81. *See id.* at 1292-94 (rejecting the district court's departure from the circuit court's suggested six-part test).

82. *Id.* at 1293.

83. *See id.* at 1296.

84. *See id.* at 1291. The statute delineates three types of areas that can qualify as Indian country: reservations, dependent Indian communities, and Indian allotments whose Indian titles have not been extinguished. *See* 18 U.S.C. § 1151(b) (1994).

85. *See Venetie II*, 101 F.3d at 1290-91.

86. *Id.* at 1291 (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991)) (citing *United States v. John*, 437 U.S. 634, 649 (1978); *United States v. McGowan*, 302 U.S. 535, 539 (1938); *United States v. Pelican*, 232 U.S. 442, 449 (1914)).

87. *Id.* at 1293.

are the dominant factors of the dependent Indian community test.<sup>88</sup>

1. *Federal set-aside.* The Ninth Circuit disagreed with the district court's analysis of the federal set-aside component of the Indian country test.<sup>89</sup> It did not believe that the "corporate model of Native land ownership established under ANCSA precluded a finding that the federal government had set aside the [Venetie tribe's] land . . . for the use of Alaska Natives."<sup>90</sup> It also disagreed that ANCSA evidenced the intent of Congress to "treat Alaska Natives as ordinary business entities — not Natives."<sup>91</sup> The court reviewed ANCSA and found that (1) ANCSA corporations, with their high degree of Native involvement and character, are vastly different than other corporations; (2) the statute "suggests that the local corporations are the instruments of, and owe obligations to, the Native villages;" (3) ANCSA corporations differ from other corporations in that the statute provides "significant protections" of Alaska Native land; and (4) ANCSA corporations differ from other corporations in the number of restrictions placed on Native corporation stock.<sup>92</sup> Based on this analysis, the court of appeals held "land set aside for [ANCSA] corporations qualifies as land set aside for Alaska Natives, as such."<sup>93</sup>

2. *Federal superintendence.* The court of appeals also addressed the federal superintendence aspect of the Indian country test. It found that the superintendence requirement was "designed to determine the extent to which the traditional trust relationship between the federal government and Native Americans remains intact in a particular case."<sup>94</sup> Additionally, it stressed that "[t]here is no hard and fast rule for determining how involved the trust relationship must be to constitute the requisite level of superintendence."<sup>95</sup> The court noted that prior to the enactment of ANCSA, "Alaska Natives were thought to be under the guardianship of the United States and were entitled to the benefits of this special relationship."<sup>96</sup>

The court observed that the "'dominant' standard appears to

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88. *See id.*

89. *See id.* at 1295.

90. *Id.*

91. *Id.*

92. *Id.* at 1295-96.

93. *Id.* at 1295.

94. *Id.* at 1296.

95. *Id.*

96. *Id.* (citing *Alaska Pac. Fisheries*, 248 U.S. 78, 88 (1918); *Pence v. Kleppe*, 529 F.2d 135, 138 n.5 (9th Cir. 1976); *COHEN*, *supra* note 16, at 739).

have been determinative in the district court.”<sup>97</sup> The lower court had reasoned that state control over Native corporations was further evidence that “federal superintendence had been displaced by ANCSA.”<sup>98</sup> The court of appeals disagreed, reasoning that “the introduction of state supervision over certain aspects of Indian life does not eviscerate Indian country.”<sup>99</sup> It noted that, “[a]t times Congress has retained Indian country status but has delegated partial jurisdiction to states over areas of Indian country or over specific legal subjects.”<sup>100</sup>

According to the court of appeals, the appropriate test to determine the existence of federal superintendence is “whether the federal government has abandoned its trust responsibilities, rather than whether the state government has been injected into tribal affairs.”<sup>101</sup> To support this proposition, the court extensively reviewed ANCSA and its legislative history and provided examples supporting an argument of continued federal superintendence.<sup>102</sup> It also examined the plain language of the Act and emphasized that ANCSA did not “extinguish federal superintendence of Alaska Natives” because it contained no language that “clearly and explicitly” states or indicates an intent to do so.<sup>103</sup> In the absence of

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97. *Id.* at 1297.

98. *Id.*

99. *Id.*

100. *Id.* (quoting COHEN, *supra* note 16, at 361).

101. *Id.*

102. *See id.* at 1297-98. The court stated:

Congress declared that ANCSA did not “relieve, replace, or diminish any obligation of the United States or of the State or [sic] Alaska to protect and promote the rights or welfare of Natives . . . .” Additionally, Congress rejected an earlier version of the bill that would have transferred federal responsibilities for Alaska Natives to state authorities . . . .

ANCSA neither prohibits nor discontinues the provision of federal services to Alaska Natives. Payments made under the Act do not “substitute for any governmental programs otherwise available to the Native people of Alaska . . . .” Indeed, Alaska Natives remain eligible for federal benefit programs after ANCSA.

*Id.* at 1297 (citations omitted).

ANCSA did not end federal benefits and “protections for Alaska Natives; it concerned only their lands and land-related claims. Natives in Alaska continue to be eligible for and receive assistance under federal programs available to Indians throughout the United States. All major Indian legislation since ANCSA specifically has included Alaska Natives or their villages or corporations.”

*Id.* at 1298 (quoting COHEN, *supra* note 16, at 766).

103. *Id.* at 1297. The court stressed that since the adoption of ANCSA, Alaska Natives continue to be eligible for and to receive assistance under federal programs available to Indians throughout the lower 48 states and that this relationship sufficiently fulfills the federal superintendence requirement of the test. *See id.* at 1298.

such language, the court held that ANCSA did not terminate the "federal trust relationship with a Native tribe or organization," and, therefore, "the federal government continues to execute its trust responsibilities toward Alaska Natives."<sup>104</sup>

After concluding that the transfer of title to Native corporations rather than to tribes did not extinguish federal superintendence over Alaska Natives, the Ninth Circuit acknowledged that ANCSA implemented a policy of "self-determination that is fundamentally at odds with the paternalistic echoes of the trust relationship."<sup>105</sup> In order to reconcile these two findings, the court relied on the federal policy of self-determination without termination of the trust relationship.<sup>106</sup> The court observed that

President Nixon enunciated a federal policy toward Indians that continues to this day: self-determination without termination of the trust relationship. The President "called for rejection of the extremes of termination and paternalism: termination because it ignored the moral and legal obligations involved in the special relationship between tribes and the federal government, and paternalism because it resulted in 'the erosion of Indian initiative and morale.'"<sup>107</sup>

The court also reasoned that the federal government fulfills, not abandons, its trust responsibilities by enacting legislation to facilitate self-determination by Native Americans.<sup>108</sup> The Indian Self-Determination Act<sup>109</sup> was cited as support for the proposition that "Indian self-determination involves increased participation of Native Americans in the administration of federal programs, not the elimination of those programs nor the removal of federal officials from a supervisory role over those programs."<sup>110</sup>

After finding that "self-determination and ongoing federal superintendence may co-exist," the court stated that "this is precisely

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104. *Id.* at 1297

105. *Id.* at 1299.

106. *See id.*

107. *Id.* (quoting COHEN, *supra* note 16, at 186). The court also stated that [t]he reconciliation of self-determination and superintendence is reflected in the Indian Self-Determination and Education Assistance Act of 1975, where Congress declared its commitment "to the maintenance of the [f]ederal [g]overnment's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the [f]ederal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services."

*Id.* (quoting 25 U.S.C. § 450a(b) (1994)).

108. *See id.*

109. 25 U.S.C. §§ 450-458.

110. *Venetie II*, 101 F.3d at 1299.



the federal-tribal relationship that was introduced by ANCSA.”<sup>111</sup> It then stated that “ANCSA neither eliminated a federal set aside for Alaska Natives, as such, nor terminated federal superintendence over Alaska Natives.”<sup>112</sup> The court therefore held that “Indian country still may exist in Alaska.”<sup>113</sup>

3. *An examination of whether Venetie specifically occupies Indian country.* After holding that, despite ANCSA, Indian country may still exist in Alaska as a general matter, the court of appeals then had to determine whether Venetie, specifically, occupied Indian country.<sup>114</sup> Drawing from similar tests created by other circuit courts in *United States v. South Dakota*<sup>115</sup> and in *United States v. Martine*,<sup>116</sup> the court adopted a six-part test to determine whether a particular community constitutes Indian country.<sup>117</sup>

According to the court, whether a particular geographical area is a dependent Indian community depends on consideration of the following factors:

(1) the nature of the area; (2) the relationship of the area inhabitants to Indian tribes and the federal government; (3) the established practice of government agencies toward that area; (4) the degree of federal ownership of and control over the area; (5) the degree of cohesiveness of the area inhabitants; and (6) the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples.<sup>118</sup>

First, the court considered the nature of the area owned by Venetie. It found that the former Venetie Reservation was a well defined area consisting of “isolated and undeveloped” land that had traditionally been used by the Neets’aii Gwich’in “to the virtual exclusion of other people” and was still today occupied almost exclusively by the tribe.<sup>119</sup> The court agreed with the district court’s determination that the land was “well suited to the [t]ribe’s subsistence life-style” and concluded that “Venetie has a special

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111. *Id.*

112. *Id.* at 1299-1300.

113. *Id.* at 1300.

114. *See id.*

115. 665 F.2d 837 (8th Cir. 1981).

116. 442 F.2d 1022 (10th Cir. 1971).

117. *See Venetie II*, 101 F.3d at 1300.

118. *Id.* at 1294. The court applied the six-part test originally adopted in *Venetie I*. *See Alaska v. Native Village of Venetie (Venetie I)*, 856 F.2d 1384 (9th Cir. 1988) (citing *United States v. South Dakota*, 665 F.2d 837, 839 (8th Cir. 1980); *United States v. Martine*, 442 F.2d 1022, 1024 (10th Cir. 1971)).

119. *See Venetie II*, 101 F.3d at 1300.

'use and occupancy' relationship to the land at issue."<sup>120</sup>

Looking to the second prong of the test, the court next examined the relationship of the area inhabitants to Indian tribes and the federal government. It found that "Venetie is home to the Neets'aiti Gwich'in," that the inhabitants of Venetie are almost exclusively members of the Venetie tribe, and concluded that this "near-perfect correlation between area inhabitants and tribal membership indicates the strong ties between the land, its people, and the tribe."<sup>121</sup> The court also found that the Venetie tribe had a "long history of interaction" with the federal government.<sup>122</sup> To support this finding, it cited Venetie's "significant contacts and relationships" with federal agencies that helped administer educational and health services in the village.<sup>123</sup>

In discussing the third prong of the dependent Indian community test, the established practice of government agencies toward the area, the court rejected the district court's conclusion that the federal government had to be the "dominant political institution" in the area.<sup>124</sup> The court stated that dominance was the wrong "benchmark," the correct inquiry is whether the federal government had "abandoned its trust responsibilities."<sup>125</sup> The court found a continuing relationship between the federal government and the Venetie tribe.<sup>126</sup> As examples of the federal government's exercise of trust responsibilities, the court noted that Venetie had received federal grants for an airport, a housing project, water and wastewater systems, and housing renovation.<sup>127</sup>

Venetie satisfied the fourth prong of the test, which examines the degree of federal ownership and control over the area, even though ANCSA terminated federal ownership of the reservation and the land is owned by the Village of Venetie in fee simple.<sup>128</sup> In fact, the court specifically stated that "tribal ownership of land in fee does not defeat a finding of Indian country."<sup>129</sup> Based on its earlier analysis of the nature of the relationship between the federal government and the Venetie community and federal superintendence over the affairs of the tribe, the court concluded that the

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120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 1301.

125. *Id.*

126. *See id.*

127. *See id.*

128. *See id.*

129. *Id.* (comparing *United States v. Sandoval*, 231 U.S. 28, 48 (1913) and *Indian Tribe of Rhode Island v. Narragansett Electric Co.*, 89 F.3d 908, 918 (1996)).

Venetie tribe had met its burden of producing sufficient “alternative evidence of federal superintendence over Native affairs in the territory.”<sup>130</sup>

The fifth prong of the Ninth Circuit’s test examined the degree of cohesiveness of the area inhabitants. Accepting the district court’s findings that all but a few residents of Venetie were Alaska Natives and members of the Venetie tribe who had voluntarily come together to form their tribal government, which provided for the “‘protection and welfare of the whole community,’” the court of appeals determined that the “high degree of cohesiveness among the inhabitants of Venetie is uncontested.”<sup>131</sup>

With respect to the sixth prong of the test, the extent to which Venetie’s land was set aside for the use, occupancy, and protection of dependent Alaska Natives, the court of appeals agreed with the district court’s finding that when the Neets’*aii* Gwich’in formed a reservation in 1943, “‘land was set aside for [them] as a Native people.”<sup>132</sup> However, the court of appeals disagreed with the district court’s conclusion that ANCSA extinguished the Venetie Reservation and transferred the land to a village corporation rather than to the Neets’*aii* Gwich’in tribe, and that, as a result, the land “is no longer set aside for the use and occupancy of Alaska Natives, as such.”<sup>133</sup> The court concluded that the “village corporations established under ANCSA, while business entities, maintain a distinctly Native identity” and that “land set aside for such corporations qualifies as land set aside for the use, occupancy, and protection of Alaska Natives, as such.”<sup>134</sup>

Thus, the court found that Venetie satisfied all six elements and was therefore a dependent Indian community.<sup>135</sup> Since the court had already determined that Venetie met the requirements of federal set-aside and superintendence, it held that Venetie was Indian country.<sup>136</sup>

#### B. Legislative and Judicial Determination of Indian Country

The term Indian country “was first used by Congress in 1790 to describe the territory controlled by Indians.”<sup>137</sup> In 1948, Con-

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130. *Id.*

131. *Id.*

132. *Id.* (quoting Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov’t., No. F87-0051, 1995 WL 462232, at \*19 (D. Alaska Aug. 2, 1995).

133. *Id.*

134. *Id.* at 1302.

135. *Id.* at 1301-02.

136. *See id.*

137. PEVAR, *supra* note 49, at 16 (citing Act of July 22, 1790, ch. 31, 1 Stat. 136,

gress adopted 18 U.S.C. § 1151, which defines Indian country as “(a) all land within the limits of any Indian reservation . . . , (b) all dependent Indian communities within the borders of the United States . . . , and (c) all Indian allotments, the Indian titles to which have not been extinguished . . . .”<sup>138</sup>

Two United States Supreme Court cases established the basis of the dependent Indian community component of the 18 U.S.C. § 1151 definition of Indian country. In the first case, *United States v. Sandoval*,<sup>139</sup> the Court created the “dependent Indian communities” test<sup>140</sup> and held that the federal government has the power to enact laws for the benefit and protection of all “dependent Indian communities within the geographical limits of the United States.”<sup>141</sup> In arriving at its decision, the Court stated that

[n]ot only does the Constitution expressly authorize Congress to regulate commerce with Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States . . . the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a [s]tate.<sup>142</sup>

In *United States v. McGowan*,<sup>143</sup> the second case on which Congress relied when enacting section 1151(b), the Court used the “dependent Indian community” test set forth in *Sandoval* to determine whether an Indian “colony” was Indian country and subject to regulation by the federal government.<sup>144</sup> In dismissing form over substance, the court found that “the protection of a dependent people” was the “fundamental consideration of both Congress and the Department of the Interior” in establishing the colony and that Native Americans in the colony had been “afforded the same protection by the government” that had been provided to Native Americans in other settlements known as “reservations.”<sup>145</sup> The Court held that a dependent Indian community is Indian country and that Indian country exists wherever any land that has been “set apart for the use of Indians as such under the superin-

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138. 18 U.S.C. § 1151 (1994).

139. 231 U.S. 28 (1913).

140. *Id.* at 47 (basing congressional guardianship over “dependent Indian communities” on the existence of “Indian lineage, isolated and communal life, primitive customs and limited civilization”).

141. *Id.* at 46.

142. *Id.* at 45-46.

143. 302 U.S. 535 (1938).

144. *Id.* at 538-39.

145. *Id.* at 538.

tendence of the [federal] [g]overnment.’”<sup>146</sup>

After the enactment of section 1151(b), the Supreme Court reaffirmed that a dependent Indian community is Indian country. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,<sup>147</sup> the Court held that “the test for determining whether land is Indian country does not turn upon whether that land is denominated ‘trust land’ or a ‘reservation.’ Rather, we ask whether the area has been ‘validly set apart for the use of the Indians as such, under the superintendence of the [g]overnment.’”<sup>148</sup>

### C. Legislative and Judicial Recognition of Inherent Tribal Sovereignty

The Supreme Court first recognized inherent tribal sovereignty in *Worcester v. Georgia*,<sup>149</sup> holding that Indian nations were “distinct, independent political communities, retaining their original natural rights . . . from time immemorial.”<sup>150</sup> The doctrine of inherent tribal sovereignty was later reaffirmed by the Court in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,<sup>151</sup> *United States v. Wheeler*,<sup>152</sup> and *Merrion v. Jicarilla Apache Tribe*.<sup>153</sup>

Prior to the adoption of ANCSA — even prior to purchase of Alaska by the United States — Native Alaskans had inherent tribal sovereignty as well as Indian title to the territory they had long possessed, used, and occupied as their ancestral land. They had the right to occupy their ancestral homelands until that right was extinguished by Congress.<sup>154</sup> Indian title is the right of occupancy.<sup>155</sup> The loss of Indian title — the right to use, occupy, or possess land — does not affect sovereignty of tribes.<sup>156</sup>

Tribal sovereignty is authorized under the IRA,<sup>157</sup> in which

146. *Id.* at 539 (quoting *United States v. Pelican*, 232 U.S. 442, 449 (1914)).

147. 498 U.S. 505 (1991).

148. *Id.* at 511 (quoting *United States v. John*, 437 U.S. 634, 648-49 (1978) (citations omitted)).

149. 31 U.S. (1 Pet.) 515 (1832).

150. *Id.* at 559.

151. 498 U.S. at 509 (noting that suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation).

152. 435 U.S. 313, 323 (1978) (noting that powers of Indian tribes, including the power to enforce criminal laws against tribe members, are inherent).

153. 455 U.S. 130, 140-41 (1982) (concluding that a tribe’s authority to tax non-Indians who conduct business on the reservation is an inherent power necessary to self-government).

154. *See* PEVAR, *supra* note 49, at 20-21.

155. *See id.* at 21.

156. *See, e.g., Worcester v. Georgia*, 31 U.S. (1 Pet.) 515 (1832).

157. 25 U.S.C. § 476(a) (1994).

Congress provided that

[a]ny Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when (1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and (2) approved by the Secretary pursuant to subsection (d) of this section.<sup>158</sup>

This provision of the IRA was extended to Alaska in a 1936 amendment.<sup>159</sup> The IRA also provides that “[i]n addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the . . . power[] [t]o . . . negotiate with the [f]ederal, [s]tate and local governments.”<sup>160</sup>

In 1993, acting pursuant to the authority delegated to it by Congress, the Department of the Interior published a list of Alaska Native villages that were federally recognized as Indian tribes with inherent sovereignty, that possessed the same status as tribes in the lower forty-eight states, and that “functioned as political entities exercising governmental authority.”<sup>161</sup> The Department of the Interior emphasized that the purpose of the publication was to “expressly and unequivocally acknowledge” that Alaska Native villages and regional tribes included on the list were recognized as political entities and retained their inherent sovereign authority.<sup>162</sup> It stated that

[b]y the time of enactment of the IRA . . . the preponderant opinion was that Alaska Natives were subject to the same legal principles as Indians in the contiguous [forty-eight] states, and had the same powers and attributes as other Indian tribes . . . . The purpose of the current publication is to publish an Alaska list of entities conforming to the intent of 25 CFR 83.6(b) and to eliminate any doubt as to the Department’s intention by expressly and unequivocally acknowledging that the Department has determined that the villages and regional tribes listed below are distinctly Native communities and have the same status as tribes in the contiguous [forty-eight] states.<sup>163</sup>

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158. *Id.*

159. *See id.* § 473(a).

160. *Id.* § 476(e).

161. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,365 (1993).

162. *Id.* at 54,365

163. *Id.* at 54,365-66.

IV. PROJECTIONS AND IMPLICATIONS OF THE PENDING *VENETIE* DECISIONA. *Venetie*: What the Supreme Court Should Find

When deciding *Alaska ex rel. Yukon Flats School District v. Native Village of Venetie Tribal Government (Venetie II)*,<sup>164</sup> the United States Supreme Court should find that ANCSA did not extinguish Indian country and inherent tribal sovereignty for the Venetie tribe, and should therefore uphold the Ninth Circuit opinion.

Furthermore, as Part III.B. discusses, the Venetie Village qualifies as a dependent Indian community, and therefore as Indian country. When it adopted ANCSA, Congress set apart land for Native village corporations. The land that was set apart for Native village corporations satisfies the requirement for "land set apart for the use of Alaska Natives, as such."<sup>165</sup> In addition to being set apart, the land is under the superintendence of the federal government. This is demonstrated by the fact that Venetie received federal grants and Congress included Alaska Natives in all major legislation providing federal benefit and support programs for Native Americans, as well as according them the same treatment given to Native Americans living on reservations.<sup>166</sup>

A noted expert on Indian law in Alaska stated,

ANCSA did not end federal benefits and protections for Alaska Natives; it concerned only their lands and land-related claims. Natives in Alaska continue to be eligible for and receive assistance under federal programs available to Indians throughout the United States. All major Indian legislation since ANCSA specifically has included Alaska Natives or their villages or corporations. Furthermore, Congress left intact about seventy Indian Reorganization Act tribal organizations and many other tribal governments recognized by the United States as having governmental powers and eligibility for tribal programs. As long as the indicia of dependence exist and Native people continue to reside together in a reasonably distinct location recognized as their residence by the federal government, they should be considered "dependent Indian communities." The authority of a traditional or IRA government over an area does not depend on ownership of land within the area by the tribal government itself. Indeed, the statutory definition of Indian country was intended to eliminate reliance on land titles in these matters. Boundaries created for other purposes, however, may be useful in showing

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164. 101 F.3d 1286 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2478 (1997).

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

166. *See generally* *Wilson v. Watt*, 703 F.2d 395 (9th Cir. 1983); *see also* COHEN, *supra* note 16, at 766.

the minimum area to be considered the domain of a dependent Indian community. These areas include lands that are patented to Native corporations, owned by tribal governments, located within former reservations, and located within Native villages which are municipalities, so long as they remain part of Native communities.<sup>167</sup>

As Part III.C. discusses, the Venetie tribe continues to possess inherent tribal sovereignty. The Neets'aii Gwich'in, in 1940, adopted a constitution under the IRA.<sup>168</sup> The constitution established the Native Village of Venetie as their governing authority.<sup>169</sup> In 1943, the Secretary of the Interior created a reservation out of an area of 1.8 million acres of land surrounding the Village of Venetie.<sup>170</sup> In addition, Venetie appears among the Native entities on the list published by the Department of the Interior.<sup>171</sup>

Overall, it is important to consider that when Congress enacted ANCSA, it most likely was aware of the doctrine of inherent tribal sovereignty and the definition of Indian country. However, despite this knowledge, Congress did not explicitly state that ANCSA extinguished Indian country or inherent tribal sovereignty.<sup>172</sup>

If Congress had intended ANCSA to extinguish Indian country in Alaska, it would have expressly done so. In fact, the following statement of the House Committee on Interior and Insular Affairs in the 1987 ANCSA Amendments emphasizes that Congress intended to limit ANCSA to settling the issue at hand — land claims — and that ANCSA did not extinguish Indian country or divest Alaska Native tribes of their inherent tribal sovereignty:

ANCSA was an Indian land claims settlement act. It was not, at the time, the intent of Congress to deal in any way with the issue of governmental authority of villages in Alaska. If village entities had tribal governing powers under existing law prior to the passage of ANCSA, ANCSA did not effect them . . . . It is the intent of the Committee that this is an issue which should be left to the courts in interpreting applicable law.<sup>173</sup>

According to the United States Supreme Court, any Indian right that is not expressly extinguished by a treaty or federal statute is reserved to Indian tribes.<sup>174</sup> Under this reserved rights doc-

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167. COHEN, *supra* note 16, at 766-67 (citations omitted).

168. *See Venetie II*, 101 F.3d at 1289.

169. *See id.*

170. *See id.*

171. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,369 (1993).

172. 43 U.S.C. §§ 1601-1629(e) (1994).

173. H.R. REP. NO. 99-712, at 27 (1986).

174. *See United States v. Wheeler*, 435 U.S. 313, 323 (1978).



trine, since ANCSA did not expressly extinguish Indian country, Alaska Natives retained their inherent tribal rights and self government rights.<sup>175</sup> In addition, all “statutes affecting Indian rights ‘are to be liberally construed, doubtful expressions being resolved in favor of the Indians.’”<sup>176</sup> Since ANCSA falls into the category of federal statutes enacted for the benefit of Native Americans, it, too, must be liberally construed and interpreted so that any doubt about whether it extinguished Indian country must be resolved in favor of Native Alaskans.<sup>177</sup> In short, the intent of Congress to extinguish Indian country must be reflected by language that is clear and plain.<sup>178</sup>

Since Indian country and tribal sovereignty were not extinguished by ANCSA or any subsequent legislation, they continue to exist. The Native Village of Venetie, as well as any other tribe with land that constitutes Indian country, continues to have the inherent tribal sovereignty they have had since long before the purchase of Alaska from the Russians in 1867.

#### B. *Venetie*: What It Really Means

What exactly does recognition of Indian country and sovereignty in Alaska mean? When the *Venetie II* decision was rendered by the Ninth Circuit on November 20, 1996, Alaska Natives, their supporters, and tribes in the contiguous states applauded the ruling and the general recognition that Indian country, as well as Native sovereignty and the inherent power it entails, could still exist in Alaska after ANCSA.<sup>179</sup> However, representatives from the State of Alaska, “[t]wenty [other] states, the Territory of Guam, and the Commonwealth of the Mariana Islands” warned that the “reach of the *Venetie* decision ‘[wa]s clear and ominous’” and joined forces to have the ruling reversed by the United States Supreme Court.<sup>180</sup> They also warned that the decision is so broad that it could permit Indian country to be recognized anywhere there are Indians.<sup>181</sup> Those joining the suit against *Venetie* asserted that the

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175. See *United States v. Winans*, 198 U.S. 371 (1905).

176. *Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't (Venetie II)*, 101 F.3d 1286, 1294 (9th Cir. 1996) (quoting *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 89 (1918)).

177. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

178. See *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 354 (1941).

179. See Don Hunter, *States Join Alaska in Stand Against Indian Country*, ANCHORAGE DAILY NEWS, May 22, 1997, at A1.

180. *Id.*

181. See Brief for Amici Curiae States at 30, *Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't*, 101 F.3d 1286 (9th Cir. 1996), cert. granted, 117 S. Ct. 2478 (1997) (No. 96-1577).

decision could "enlarge the scope of tribal authority in other states and threaten their ability to enforce civil and criminal laws, hunting, and fishing regulations and environmental rules."<sup>182</sup>

Venetie and its supporters responded that the warnings and "predictions of legal and cultural chaos" expressed by the State of Alaska and "echoed by the other states" are "misleading, erroneous and exaggerated."<sup>183</sup> The tribe and its supporters appear to be correct. Contrary to the argument of the State of Alaska and the states that have joined with it in the appeal to the United States Supreme Court, the *Venetie* decision is very narrow. It does not hold, or even imply, that Indian country exists in all Alaska Native villages. It does not hold that all ANCSA village corporation lands are Indian country and subject to tribal jurisdiction.

The Ninth Circuit established a six-prong test that must be satisfied in order for a particular community to constitute Indian country.<sup>184</sup> The court's decision emphasized that all six elements of that Indian country test must be satisfied by any Native community in Alaska that is seeking to establish that it occupies Indian country<sup>185</sup> and that only the sixth prong of the test was satisfied by demonstrating that the land in question is ANCSA village land.<sup>186</sup> Nothing in the court's analysis or narrow ruling seems to support arguments about the clear and ominous impact of the *Venetie* decision - and assertions of legal and cultural chaos resulting from the decision appear to be exaggerated.

## V. CONCLUSION

In a statement to Native Americans and non-Natives gathered to discuss the scope of Indian country and inherent Native sovereignty, Patrice H. Kunesh, an attorney for the Mashantucket Pequot Tribal Nation stated that

The reverence American Indians hold for the sovereignty of their tribal governments is tremendous. Certainly this respect equals that possessed by all Americans for the freedoms [e]mbraced in the [United States] Constitution . . . .

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182. *Id.*; see also Brief for Petitioner at 6, *id.*

183. Hunter, *supra* note 178, at A1.

184. See *Venetie II*, 101 F.3d at 1292.

185. See *id.* at 1300-02.

186. See *id.* at 1301-02. Native village corporation lands and regional corporation lands were set aside for the benefit of Native villages under ANCSA; however, a close reading of the *Venetie II* decision demonstrates that it only discusses the status of Native village lands. It is questionable whether the six-prong test established by the court of appeals is also applicable to regional corporation lands that are contiguous to and form a part of a Native village community in Alaska to determine if the regional lands also qualify as Indian country.

Sovereignty is a powerful word that conveys in its interpretation the baggage of centuries of human emotion. Originally referring to the absolute power of kings over their subjects — the king could do no wrong . . . .

Much of the understanding regarding tribal sovereignty stems from the mistaken idea that it is a gift granted by the federal government to American Indian tribes.

The reality is that American Indian tribes and tribal governments existed long before . . . the framers of the [United States] Constitution were born.

American Indian sovereignty encompasses inherent rights and powers that have been retained by Native nations and not specifically abridged by the federal government.<sup>187</sup>

As evidenced by the *Venetie II* case, Native American tribes have begun to reassert inherent sovereignty in recent years. As sovereign nations, tribes such as the Venetie tribe chose to “simply exercis[e] their . . . rights” and “make money from their right to tax business ventures” on their lands as well as pursuing entrepreneurial activities.<sup>188</sup> The funds raised from taxes or entrepreneurial activities have allowed tribes to make “striking advances on numerous reservations” and support fire stations, health clinics, education, housing, employment, and other programs that have “dramatically improved the lives” of Native Americans.<sup>189</sup>

According to many Native Americans, the “efforts of American Indians to improve their standard of living for themselves and their children requires the freedom to employ their innate sovereignty,” which is “not a weapon but an inherent characteristic and vehicle that can transport” Native Americans from “dependency to self-sufficiency.”<sup>190</sup>

On December 10, 1997, the United States Supreme Court will hear arguments concerning whether or not Indian country and inherent tribal sovereignty survived ANCSA and continue to exist in Alaska and, if so, whether Venetie inhabits Indian country. The outcome of this decision is of utmost importance to the Venetie tribe and other Native American tribes that cherish their inherent Native sovereignty. As stated by Ms. Kunesh, not only does sovereignty symbolize freedom, it also enhances important revenue sources that “many tribes have used to raise themselves out of poverty.”<sup>191</sup> The successful end of the battle for sovereignty — freedom and revenue enhancement — for at least one tribe of Na-

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187. Patrice H. Kunesh, *Sovereignty is Absolute for Native Nations*, Address at the Quinnipiac College School of Law, Oct. 24, 1997.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

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tive Americans, the Venetie, now lies in the hands of the Supreme Court of the United States.