ARTICLE

ANCSA Corporation Lands and the Dependent Indian Community Category of Indian Country

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This Article argues that the lands set aside for Alaska Natives by The Alaska Native Claims Settlement Act ("ANCSA") are tribal territory, or "Indian country," and are therefore subject to the exercise of tribal sovereign powers. The Article first discusses some basic Indian law tenets, which it draws upon throughout its analysis. Next, the Article gives an overview of the history of the Indian country concept, concluding that courts other than the United States Supreme Court and the Ninth Circuit Court of Appeals have been reluctant to acknowledge the existence of Indian country in Alaska. The Article then argues that the "dependent Indian community," a category of Indian country, has been defined by the Supreme Court as a broad catch-all category, which includes all land set aside for the use of Indians who are under the superintendence of the federal government. Finally, the Article concludes that, contrary to the 1995 district court opinion in Alaska ex rel. Yukon Flats School District v. Native Village of Venetie, *which ignores basic federal Indian law tenets and the federal government's self-determination policy with regard to Alaska Natives, ANCSA corporation lands are dependent Indian communities.*

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I. INTRODUCTION

The Alaska Native Claims Settlement Act[1] ("ANCSA") conveyed approximately forty-four million acres of federal lands to Native corporations created pursuant to ANCSA.[2] About half of the land was conveyed to more than 200 village corporations and the remainder was distributed among thriteen regional corporations.[3] As Alaska Native tribal entities attempt to assert tribal sovereign powers, these corporation lands may be at the center of a struggle. The existence of tribal territory, known as "Indian country," is essential for any meaningful exercise of tribal sovereign powers. If ANCSA corporation lands constitute Indian country, then a significant portion of Alaska may be subject to the exercise of tribal sovereign powers, and the exercise of the State's sovereign powers may be somewhat limited.[4] Consequently, whether ANCSA corporations lands constitute Indian country is a matter of great concern to Alaska Native tribal entities and to the State of Alaska.[5]

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1. 43 U.S.C. §§ 1601-28 (1988). ANCSA is a settlement of Alaska Native aboriginal rights. The act extinguished all aboriginal land claims, aboriginal fishing and hunting rights and all but one of the Native reservations existing in Alaska. In return, Alaska Natives, via stock ownership in newly created ANCSA corporations, received fee title to approximately 44 million acres and monetary compensation of about $962.5 million. *Id.*
2. *Id.* § 1611(b), (c).
3. *Id.*
4. *See generally* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 349-79 (1982 ed.). Alaska is one of six states characterized as a mandatory Public Law 280 state. Public Law 280 grants the six states criminal and civil jurisdiction over Indian country within their respective boundaries. Act of Aug. 15, 1953, Pub. L. No. 83-280, § 7, 67 Stat. 588 (1953). However, this grant does not encompass regulatory law, so determinations about Indian country will have the greatest effect with regard to the regulatory powers of the state and Alaska Native tribal entities. *See generally* Susanne Di Pietro, *Tribal Court Jurisdiction and Public Law 280: What Role for Tribal Courts in Alaska?* 10 ALASKA L. REV. 335 (1993) (exploring the legal effects of Public Law 280 on tribal court jurisdiction in Alaska).
5. The State has already drawn the battle lines. A confrontation between the Attorney General of Alaska and the Alaska State House and Senate Judiciary Committee was reported in the FAIRBANKS DAILY NEWS MINER, Dec. 5, 1995, at A1. The article indicated that the House and Senate Committee was upset that the Attorney General had recently declined to appeal a federal district court decision holding that Alaska Native villages are recognized tribes based upon their inclusion on a 1993 list of Native entities in Alaska published by the Secretary of the Interior. In response to the criticism, the Attorney General indicated that although the administration was willing to concede tribal recognition, it was unwilling to accept the existence of Indian country in Alaska. *Id.*

The United States Congress, by statute, has recognized three categories of Indian country: reservations, Indian allotments and dependent Indian communities.[6] The creation of reservations and Indian allotments requires that specific actions be taken by the federal government.[7] Once those actions are taken, there is little question that a reservation or an Indian allotment has been established. On the other hand, the dependent Indian community appears to be a catch-all category of Indian country that is applied to lands that have certain characteristics similar to those of reservations and Indian allotments. ANCSA corporations lands are neither reservations nor Indian allotments; however, depending on the analysis employed, they may constitute dependent Indian communities.

This Article will address the application of the Indian country concept to Alaska, and in particular it will focus on ANCSA corporation lands. Part II will consider general Indian law principles. Part III will discuss the historical development of the Indian country concept in general and as it is applied to Alaska. Part IV will provide an in-depth analysis of the development of the dependent Indian community category of Indian country. Part V will discuss the application of dependent Indian community status to ANCSA corporation lands.[8]

II. BASIC FEDERAL INDIAN LAW CONCEPTS

Federal Indian law has developed basic tenets that need to be applied when analyzing specific Indian law concepts. Application of these tenets often results in conclusions that would not be reached otherwise.

Congress has plenary power over Indian affairs.[9] Although early cases suggested that "plenary" means "absolute" in the sense that Congress's dealings with Indians are free from constitutional restraints, today, Congress's powers over Indians are viewed as

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6. 18 U.S.C. § 1151 (1994).

7. Reservations have been created by treaties, executive orders and acts of Congress. In each of these instances, there is a formal declaration that an Indian reservation is being created. The creation of Indian allotments was authorized by the Dawes Act, Ch. 119, 24 Stat. 388 (1887), and followed specific federal regulations.

8. In the contiguous United States, America's indigenous people are all Indians. In Alaska, indigenous people may be Indian or Eskimo. Consequently, in Alaska indigenous people as a whole are referred to as Natives. This article will use the terms "Native(s)" and "Indian(s)" interchangeably.

9. Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 83-84 (1977).

extremely broad but subject to limitations.[10] One source of these limitations is the federal government's trust/guardianship relationship with Indians.[11] The trust obligation requires Congress's authority over Indians to be exercised in a manner that will protect Indians.[12] Furthermore, the trust obligation has given rise to the development of several canons of construction based on the presumption that Congress's intent toward Indians is benevolent.[13] These canons of construction, primarily developed by courts in the context of construing Indian treaties, require treaties to be liberally interpreted in favor of the Indians, ambiguous terms to be resolved in favor of the Indians and treaties to be construed as the Indians would have understood them.[14] While these rules were developed in the treaty context, all but the rule regarding interpreting treaties as the Indians would have understood them have been extended to the non-treaty context, including statutes, agreements and executive orders.[15]

Although tribes and their sovereign powers are subordinate to the federal government, tribal sovereign powers are characterized as inherent.[16] Consistent with its plenary authority over Indians, Congress has the power to extinguish tribal sovereign powers. However, tribes retain those aspects of sovereignty not withdrawn by treaty, statute or by implication as a necessary result of a tribe's dependent status.[17] Furthermore, diminution of tribal rights and powers is not to be inferred from acts of Congress; for tribal powers to be diminished by congressional action, there must be a clear and plain expression of congressional intent to do so.[18]

In summary, federal Indian law tenets provide that tribal sovereign powers are inherent powers. When determining what powers tribes possess, one should start with the full complement of sovereign powers and then ascertain which powers have been removed by implication of the dependent status of tribes, or by the clear and plain intent of a U.S. treaty or statute. In determining the intent of a treaty or statute, ambiguities are to be resolved in

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10. COHEN, *supra* note 4, at 217.

11. The trust/guardianship relationship was first recognized in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), and has since become a major underpinning of Indian policy.

12. COHEN, *supra* note 4, at 220.

13. *Id.* at 221-22.

14. *Id.* at 222.

15. *Id.* at 224.

16. United States v. Wheeler, 435 U.S. 313, 322 (1978).

17. *Id.* at 323.

18. COHEN, *supra* note 4, at 224.

favor of tribal interests, and the content of such documents are to be liberally construed in the light most favorable to tribal interests.

III. THE HISTORY AND DEVELOPMENT OF THE INDIAN COUNTRY CONCEPT

In order to determine whether a particular area should be classified as Indian country, it is useful to examine the development and use of the term "Indian country" through the course of U.S. history. It is also instructive to examine the application of the term in the Alaskan context.

The term "Indian country" and the concept of tribal jurisdictional territory appears to have originated with the Proclamation of 1763 issued by King George III of England.[19] The proclamation established a boundary line between the lands of the Indians and those of the colonists. After the Revolutionary War, this policy of separating lands was continued by the newly formed United States. As Indian lands were encroached upon to a greater and greater extent, Congress enacted the Trade and Intercourse Act of 1796.[20] The Act set out a north-south boundary between tribal lands to the west and land open to settlement to the east. This Act was recodified in 1799,[21] and again in 1802,[22] with little revision regarding the boundary lines.[23] While these successive acts used the term "Indian country," the term was used interchangeably with other terms such as "Indian town," "Indian settlement," "Indian territory," and "lands to which the Indian title has not been extinguished."[24] The Indian Trade and Intercourse Act of 1834[25] statutorily defined Indian country for the first time,[26] defining it as

> that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the

19. For a more detailed discussion of the early history and development of the term Indian country, see *Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't*, No. F87-0051 CV (HRH), 22 Indian L. Rep. 3267, 3267-68 (D. Alaska, Aug. 2, 1995).

20. Ch. 30, 1 Stat. 469 (1796); *see also Native Village of Venetie*, 22 Indian L. Rep. at 3268.

21. Ch. 46, 1 Stat. 743 (1799).

22. Ch. 13, 2 Stat. 139 (1802).

23. *Native Village of Venetie*, 22 Indian L. Rep. at 3268.

24. COHEN, *supra* note 4, at 29.

25. Ch. 161, 4 Stat. 729 (1834).

26. COHEN, *supra* note 4, at 29.

> Mississippi river, and not within any state[,][27] which the Indian title has not been extinguished . . . .[28]

This Act included provisions for federal jurisdiction over crimes, liquor traffic and other activities taking place in Indian country.[29] The Act's definition of Indian country was predicated on the then-existing policy of maintaining a separation between Indians and whites by moving Indians westward. However, this policy was made impractical by the acquisition of western territories resulting from the Mexican War. Consequently, the United States began to locate Indians on tribal reservations within organized states and territories. Thus, by 1874, the statutory definition of Indian country had become obsolete, and the definition was effectively repealed when the compilers of the Revised Statutes omitted the definition from the Indian Trade and Intercourse Act.[30]

With the repeal of the Indian country definition and the absence of any congressional action to establish a new one, the task of defining Indian country fell upon the courts. Between 1874 and 1913, the concept of Indian country remained ill-defined. Then, in 1913 and 1914, the U.S. Supreme Court decided the cases of *Donnelly v. United States*,[31] *United States v. Sandoval*[32] and *United States v. Pelican*.[33] In *Donnelly*, the Supreme Court held that an Indian reservation set aside from the public domain by an executive order was Indian country.[34] In *Sandoval*, the Court held that communal lands possessed in fee simple (characterized by the Court as "dependent Indian communities") by the Pueblo tribe was Indian country.[35] In *Pelican*, the Court held that Indian allotments held in trust by the United States were Indian country.[36] Thus, by 1914, there were three distinct categories of Indian country: Indian reservations, dependent Indian communities and Indian allotments. In 1948, Congress relied on these three Supreme Court decisions, along with the subsequent case *United*

27. The bracketed comma was implied by the Supreme Court in *Bates v. Clark*, 95 U.S. 204 (1877).
28. Ch. 161, 4 Stat. 729 (1834).
29. COHEN, *supra* note 4, at 31.
30. *Id.*
31. 228 U.S. 243 (1913).
32. 231 U.S. 28 (1913).
33. 232 U.S. 442 (1914).
34. *Donnelly*, 228 U.S. at 269.
35. *Sandoval*, 231 U.S. at 48.
36. *Pelican*, 232 U.S. at 449.

States v. McGowan,[37] to define Indian country statutorily as consisting of Indian reservations, dependent Indian communities and Indian allotments.[38] In reference to Congress's reliance on these four cases, Felix Cohen's *Handbook of Federal Indian Law*, which is considered the authoritative source on federal Indian law,[39] states that Congress's intent "was to designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted Indian allotments."[40] This statutory definition of Indian country remains in effect today.

From the time the United States acquired Alaska, courts other than the United States Supreme Court and the Ninth Circuit Court of Appeals have demonstrated a great reluctance to acknowledge the existence of tribes or Indian country in Alaska.[41] In 1872, just four years after the United States acquired Alaska, and while the definition of Indian country contained in the Indian Intercourse Act of 1834 was still in effect, Judge Deady of the District Court of Oregon declared in *United States v. Seveloff*[42] that the Act did not apply to Alaska and that Alaska was not Indian country.[43] *Seveloff* involved the trafficking of liquor, an activity regulated in Indian country by the Indian Intercourse Act of 1834.[44] Ignoring an Attorney General's formal advisory opinion,[45] Judge Deady characterized the Indian Intercourse Act as a "local act" that did not apply to territories subsequently acquired by the United States,

37. 302 U.S. 535 (1938) (characterizing the Reno Indian colony as a dependent Indian community and therefore Indian country).

38. 18 U.S.C. § 1151 (1994). This statute appears in the federal criminal code. However, in *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975), the Supreme Court indicated that this definition generally applies to questions of federal civil jurisdiction and tribal jurisdiction.

39. *See* VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE, at ix (1983)(referring to Cohen's Handbook as "the classic treatise on Indian rights"). For a brief discussion of Cohen's scholarship, see CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 57-59 (1987).

40. COHEN, *supra* note 4, at 34.

41. For an in-depth discussion of early judicial treatment of the Indian country issue in Alaska, see Sidney L. Harring, *The Incorporation of Alaskan Natives Under American Law: United States and Tlingit Sovereignty, 1867-1900*, 31 ARIZ. L. REV. 279 (1989).

42. 1 Alaska Fed. 64 (1872).

43. *Id.*

44. Ch. 161, 4 Stat. 729 (1834).

45. 7 Op. Att'y Gen. 295 (1855).

and thus concluded that "the Territory of Alaska is not a part of 'the Indian country' . . . ."[46]

In a reaction to Judge Deady's decision, Congress amended the Indian Intercourse Act to include Alaska as Indian country for purposes of the liquor trafficking provisions.[47] Furthermore, in response to an inquiry from Secretary of War William Belknap, Attorney General George Williams issued an opinion[48] stating that Alaska was Indian country and the liquor trafficking provisions were to be enforced by the War Department.[49] This apparent rebuff by the federal government did not deter Judge Deady from pursuing his agenda against recognizing Indian country in Alaska. In several subsequent opinions, Judge Deady continued to undermine the recognition of Indian country in Alaska, and he has been credited as having "singlehandedly determined the legal status of Alaska natives with a series of rulings inconsistent with both existing federal Indian policy and with the actual intent of the Department of the Interior regarding the legal status of Alaska natives."[50]

Judge Deady's decisions resulted in the general belief that Indian country did not exist anywhere in Alaska.[51] During the first half of the twentieth century this belief persisted, and the question of whether Indian country existed in Alaska did not surface in the judicial arena. Then, in 1957, the issue arose again in the case of *In re McCord*.[52] By this time, the three-category

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46. *Seveloff*, 1 Alaska Fed. at 67-70.

47. Harring, *supra* note 41, at 286.

48. 14 Op. Att'y Gen. 327 (1873).

49. *Id.*

50. *Id.* at 326.

51. The existence of this general belief is best illustrated by the political response to *In re McCord*, 151 F.Supp. 132 (D. Alaska 1957), eighty-five years later. The decision instigated a flourish of correspondence between Territorial Representative Bob Bartlett, Executive Director of the Alaska Legislative Council Henry J. Camarot, the Treasurer of the Territory Hugh Wade and attorney for the Department of Interior, Walter Walsh. The gentlemen feared the *McCord* decision, which declared Tyonek, Alaska to be Indian country, *In re McCord*, 151 F. Supp. at 135, would open the door for other Alaska Native communities to declare themselves outside the territorial government's jurisdiction. Due to Judge Deady's 1872 decision, this was not an issue prior to *McCord*. *See* Personal Correspondence of Bob Bartlett, Territorial Representative (May 24, 1957 — Aug. 6, 1957) (on file with the Bartlett Collection Archive, University of Alaska Fairbanks). *See generally* David M. Blurton & Gary D. Copus, *Administering Criminal Justice in Remote Alaska Native Villages: Problems and Possibilities*, 11 N. REV. YUKON C. 118, 122-25 (Winter 1993).

52. 151 F. Supp. 132 (D. Alaska 1957).

statutory definition of Indian country existed.[53] The federal district court for Alaska apparently relied on the dependent Indian community category to conclude that the Native Village of Tyonek was Indian country.[54] In coming to its conclusion, the court applied a two-part test: the area constituted Indian country if (1) the area had been set aside from the public domain and dedicated to the use of Indians and (2) within the area an operational tribal government existed.[55] This decision sent shock waves through the territorial establishment and resulted in Public Law 280[56] being amended in 1958 to grant the territorial government criminal and civil jurisdiction in Indian country within Alaska.[57]

In 1958, prior to the amending of Public Law 280, the question of whether Indian country existed in Alaska was again raised, this time in regard to the application of criminal jurisdiction. In *United States v. Booth,*[58] a federal district court judge presiding in Ketchikan, Alaska, held that the Native community of Metlakatla was not Indian country.[59] This case in particular demonstrates the pervasive judicial mind-set against the existence of Indian country in Alaska. Metlakatla is located on the Annette Island Reserve, an Indian reservation created by an act of Congress. There can be no question that Metlakatla is Indian country because it falls under "reservations," the first category specified by the statutory definition of Indian country. Nevertheless, the court disregarded the reservation status of Metlakatla, and proceeded to apply the two-part test set out in *McCord.*[60] While the court acknowledged that the area had been set aside for the use of Indians, satisfying the first part of the *McCord* test, it concluded that there was not an operational tribal government.[61] In coming to this conclusion, the

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53. *See supra* notes 37-38 and accompanying text.

54. *In re McCord,* 151 F. Supp. at 135.

55. *Id.*

56. Act of Aug. 15, 1953, Publ. L. No. 83-280, § 7, 67 Stat. 588 (1953). See *supra,* note 4, for discussion of Public Law 280.

57. In 1958, Public Law 280 was amended by Public Law 85-615 to include Alaska as one of six states granted criminal and civil jurisdiction over Indian country within their respective borders. *See* Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (codified at 18 U.S.C. § 1162(a) (1984)). For further discussion of *In re McCord* and the subsequent efforts to amend Public Law 280, see Blurton & Copus, *supra* note 51, at 122-25. During the congressional debate on the amendment, it was noted that there were possibly more than 200 enclaves of Indian country in Alaska. *Id.*

58. 161 F. Supp. 269 (D. Alaska 1958).

59. *Id.* at 271.

60. *Id.* at 270; *see supra* note 55 and accompanying text.

61. *Id.* at 271.

court noted that while Metlakatla had a mayor and council, the community had never had a "chief" or "medicine man," and hence it had a white man's government rather than the tribal government required by the second part of the test.[62]

After the amendment of Public Law 280, granting civil and criminal jurisdiction to the state over Indian country in Alaska, the issue of Indian country in Alaska remained dormant until the 1980's. In 1988, in the case *Alaska ex rel. Yukon Flats School District v. Native Village of Venetie*,[63] the issue again arose in the context of whether certain lands constituted dependent Indian communities. Before turning to a discussion of this case,[64] it is necessary to look at the development of the dependent Indian community category of Indian country.

IV. Development of the Dependent Indian Community Category of Indian Country

Unlike reservations and Indian allotments, which require an explicit act by the federal government to designate the lands as such,[65] the dependent Indian community category has been used as a catch-all category initially created and imprecisely defined by the United States Supreme Court.[66] The Supreme Court case of *United States v. Sandoval*[67] has generally been credited with creating the dependent Indian community category of Indian country. In *Sandoval*, the land in question was owned communally by the Pueblo tribe in fee simple.[68] In the New Mexico Enabling Act,[69] Congress had specified that these fee simple Pueblo lands would constitute Indian country.[70] Because the State of New Mexico was challenging the federal government's jurisdiction over a criminal prosecution as a usurpation of the state's powers, the Supreme Court addressed the issue of whether the status of the Pueblo Indians and their lands was such that the land was "Indian

62. *Id.* at 274.

63. 856 F.2d 1384 (9th Cir. 1988).

64. *See infra* notes 91-98 and accompanying text.

65. *See supra* note 7 and accompanying text.

66. *See, e.g.*, United States v. Sandoval, 231 U.S. 28, 39, 47 (1913) (lands held in fee simple by the New Mexico Pueblo Indians under a land grant from the King of Spain); United States v. South Dakota, 665 F.2d 837, 839 (8th Cir. 1981) (land held in trust and used for a housing project for the Sisseton-Wahpeton Sioux); United States v. Martine, 442 F.2d 1022, 1023 (10th Cir. 1971) (lands that the Navajo purchased from a private corporation).

67. 231 U.S. 28 (1913).

68. *Id.* at 39.

69. Act of June 20, 1910, ch. 310, 36 Stat. 557 (1910).

70. *Id.*; *see also Sandoval*, 231 U.S. at 36-37.

country" subject to congressional regulation.[71] In arriving at its decision, the Court focused on two factors: (1) whether Congress intended the Pueblos to occupy dependent status and (2) whether the Pueblo land had been set aside for their use. The Supreme Court noted that "[the Pueblos] have been regarded and treated by the United States as requiring special consideration and protection, like other Indian communities."[72] The federal legislative and executive branches of government had treated the Pueblos as dependent Indian communities entitled to aid and protection like other Indian tribes.[73] Consequently, the Pueblos were held to be a dependent Indian community.[74]

Although the Supreme Court primarily focused on the dependent status of the Pueblo tribe, it also noted that the Pueblos had received their lands as grants from the King of Spain, and that these grants were later confirmed by the United States when it acquired the territory from Mexico.[75] Additionally, the Court noted that the lands were held communally by the Pueblos and were thus akin to public lands of a tribe.[76] The Court found that the Pueblo lands were lands set aside for the use of Indians (although not set aside by the United States). Because these lands had been set aside for the use of the Pueblos and they were under the protection or superintendence of the United States by virtue of their dependent status, the Court held that the Pueblo lands were Indian country.[77]

Just one year after *Sandoval*, the Supreme Court decided *United States v. Pelican*.[78] Although *Pelican* dealt with Indian allotments rather than dependent Indian communities, it is instructive with regard to the Supreme Court's beliefs concerning what constitutes Indian country in general. *Pelican* raised the issue of whether an Indian allotment located outside any reservation boundaries constitutes Indian country.[79] Although the Indian allotments were being held in trust for individual Indians rather than being owned by or held in trust for tribal communal interests, the Court characterized Indian allotments as "being devoted to Indian occupancy under the limitations imposed by federal

71. *Sandoval*, 231 U.S. at 38.
72. *Id.* at 39.
73. *Id.* at 47.
74. *Id.* at 48.
75. *Id.* at 39.
76. *Id.* at 48.
77. *Id.*
78. 232 U.S. 442 (1914).
79. *Id.* at 445.

legislation."[80] In noting this, the Court indicated that neither the trust status nor the federal supervision was important in and of itself; rather each was important as demonstrations of Congress's intent to provide Indians and their lands with a protected status.[81] In concluding that the Indian allotment constituted Indian country, the Court noted that such "lands remained Indian lands set apart for Indians under governmental care."[82] This case, although dealing with Indian allotments rather than dependent Indian communities, is similar to *Sandoval* in its focus on whether lands have been set aside for Indians and whether Congress has demonstrated an intent to provide special protection to the Indians occupying the lands. Clearly, from these two cases decided one year apart, it can be seen that the Supreme Court believed the essence of Indian country was land dedicated to the use of Indians whom Congress believed needed special consideration or protection.

More than twenty years after the *Sandoval* decision, the Supreme Court once again returned to the dependent Indian community issue in *United States v. McGowan.*[83] At issue was whether the Reno Indian Colony, consisting of several hundred Indians living on approximately twenty-eight acres, constituted Indian country.[84] The lands in question had been purchased by the United States to provide land for needy Indians scattered over the State of Nevada.[85] The lands had not been designated as either reservations or Indian allotments. In addressing the character of the lands, the Court stated that it was immaterial whether Congress had designated the settlement as a reservation or a colony.[86] In either case, the lands had been set aside for Indians who were under federal government superintendence.[87] As in *Sandoval* and *Pelican*, the Court in *McGowan* focused on Congress's intent to provide special protection and consideration for the Indians occupying the lands in question. The Court noted that the Indians of the Indian Reno Colony had been afforded the same protection that was granted to those who lived on reservations.[88] The Court concluded that the lands thus constituted Indian country.

80. *Id.* at 449.
81. *Id.*
82. *Id.*
83. 302 U.S. 535 (1938).
84. *Id.* at 536.
85. *Id.* at 537.
86. *Id.* at 538-39.
87. *Id.* at 539.
88. *Id.* at 538.

These cases show an emerging pattern: in determining whether lands constitute Indian country, the Supreme Court places little importance on the manner in which the lands have been set aside for Indians. Instead, the Court has found the relevant factors to be whether the lands have been set aside for the use of Indians and, if so, whether the Indians for whom the land has been set aside have been recognized by Congress as deserving special consideration and protection.

Ten years after the *McGowan* decision, Congress enacted the present statutory definition of Indian country.[89] As previously noted,[90] the statute relied heavily upon *Sandoval, Pelican* and *McGowan.* In essence, Congress adopted the Supreme Court's theory regarding which lands should constitute Indian country.

Another issue in regard to Indian country is whether a specific set of factors should be used by courts to determine whether land constitutes a dependant Indian community, thus making it Indian country. Although several circuit courts have applied a specific set of factors, the Supreme Court has declined to do so in making this determination.

For example, in *Alaska ex rel. Yukon Flats School District v. Native Village of Venetie,*[91] the Ninth Circuit affirmed both the federal district court's grant of a preliminary injunction against tribal enforcement of a business activities tax and the court's refusal to grant a dismissal of the State's claims.[92] In its decision, the Ninth Circuit indicated that the ultimate outcome of the dispute was dependent upon the determination of whether the lands upon which the business activity was conducted were Indian country.[93] The Ninth Circuit indicated that the lower court should apply an analysis similar to that used in *United States v. Martine*[94] and *United States v. South Dakota*[95] to determine whether the lands in question constituted Indian country, specifically whether the lands were dependent Indian communities.[96]

In *Martine,* in determining whether certain lands constituted dependent Indian communities, the Tenth Circuit upheld the trial court's consideration of the following three factors: (1) the nature of the area; (2) the relationship of the area inhabitants to Indian

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89. 18 U.S.C. § 1151 (1994).
90. *See supra* notes 37-40 and accompanying text.
91. 856 F.2d 1384 (9th Cir. 1988).
92. *Id.* at 1391.
93. *Id.*
94. 442 F.2d 1022 (10th Cir. 1971).
95. 665 F.2d 837 (8th Cir. 1981).
96. *Native Village of Venetie,* 856 F.2d at 1391.

tribes and the federal government and (3) the established practice of government agencies toward the area.[97] In *South Dakota*, the Eighth Circuit, relying in part on *Martine* and other decisions, set forth the following factors to be considered: (1) the degree of federal ownership of and control over the area; (2) the nature of the area in question, that is, the relationship of the inhabitants of the area to Indian tribes and to the federal government and the established practice of government agencies in the area; (3) the degree of cohesiveness of the area; and (4) the extent to which the area was set aside for the use, occupancy and protection of the dependent Indian peoples.[98]

Thus, the circuit courts developed a precise set of factors to be considered in determining whether land constitutes a dependent Indian community. The Supreme Court, however, has declined to develop a precise set of factors, instead relying on an expansive interpretation of what constitutes Indian country. Subsequent to the enactment of the statutory definition of Indian country in 1948, the Supreme Court has twice returned to the Indian country issue and made pronouncements pertinent to the determination of dependent Indian community status. In 1978, the Supreme Court, in *United States v. John*,[99] reviewed the status of lands in Mississippi occupied by the remaining members of the Choctaw Tribe.[100] The majority of the tribe had been removed to Oklahoma, but a number of individual Choctaw members had elected to stay behind in Mississippi.[101] In concluding that the land in question was Indian country, the Court cited *United States v. Pelican*[102] as indicating that the principal test for determining whether land constitutes Indian country is whether the land has been set apart for the use of Indians under the superintendence of the federal government.[103] While several circuit court cases had suggested using a more technical and limited definition of Indian country,[104] the Court noted that Congress adopted the more expansive interpretation of Indian country provided by *Pelican*.[105]

The Supreme Court also declined to apply a narrow interpretation in the 1991 decision *Oklahoma Tax Commission v. Potawatomi*

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97. 442 F.2d at 1023.

98. 665 F.2d at 839 (citing Weddell v. Meierhenry, 636 F.2d 211, 213 (8th Cir. 1980)).

99. 437 U.S. 634 (1978).

100. *Id.* at 636.

101. *Id.*

102. 232 U.S. 442 (1914).

103. *John*, 437 U.S. at 650.

104. *See supra* notes 91-98 and accompanying text.

105. *John*, 437 U.S. at 650 n.18.

Indian Tribe.[106] Instead, the Court returned to the very broad analysis it first applied in *Pelican*,[107] suggesting it prefers the broad, imprecise definition of dependent Indian community.[108] The Court addressed the Indian country issue with regard to whether a tribal store that was operated on land held in trust for the tribe, but was not designated as a reservation, was exempt from state sales taxes on cigarettes.[109] As in *Pelican*,[110] the Court indicated that it was immaterial whether Congress had designated the lands as trust lands rather than reservation lands.[111] Instead, the question was whether the land had been validly set apart for the use of Indians under the superintendence of the federal government.[112] As it had consistently done for nearly a quarter of a century when addressing the Indian country issue, the Supreme Court merely looked at whether the land had been set aside for the use of Indians and whether the Indians in question had been recognized for special consideration or protection.

Whether land has been designated as a reservation, Indian allotment, trust or even fee simple land, the Supreme Court has consistently recognized such land as Indian country if the land has been set aside for the use of Indians who are under federal government superintendence. Congress incorporated the Supreme Court's decisions in providing the present statutory definition for Indian country.[113] Subsequently, the Supreme Court acknowledged that by incorporating its Indian country decisions, Congress had endorsed its expansive interpretation of what constitutes Indian country.[114] The notion that the statutory definition should be interpreted broadly is bolstered by the application of the Indian law tenet requiring that acts of Congress dealing with Indians be interpreted in the manner most favorable to tribes.[115] Because designating land as Indian country is beneficial to tribes, the statutory definition of Indian country should be interpreted as broadly as possible. Keeping this in mind, the statute can be interpreted as recognizing two precisely identified forms of Indian country, reservations and Indian allotments, and a third, catch-all category, the dependent Indian community. The dependent Indian

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106. 498 U.S. 505 (1991).
107. United States v. Pelican, 232 U.S. 442 (1914).
108. 498 U.S. at 511.
109. *Id.* at 507.
110. *See supra* notes 78-82 and accompanying text.
111. 498 U.S. at 511.
112. *Id.*
113. 18 U.S.C. § 1151 (1994); *see supra* notes 37-48 and accompanying text.
114. United States v. John, 437 U.S. 634, 650 (1994).
115. COHEN, *supra* note 4, at 222.

community category includes all lands that have been set aside for the use of Indians who are under the superintendence of the federal government.

If dependent Indian community is recognized as being a catch-all category, then two questions remain. First, by whom and in what way must the lands have been set aside for Indians? Second, what constitutes superintendence by the federal government? Since in essence a statute is being interpreted to answer these questions, the Indian law rules of construction must be employed.[116] Ambiguities are to be resolved in favor of tribal interests, and the statute should be liberally construed in the light most favorable to tribal interests.[117] Applying these rules of construction to the first question suggests that the land could have been set aside by anyone using any realty conveyance that results in the land being set aside for Indians. This would include the Indians purchasing the land in fee simple for themselves. It should not matter who set the land aside for Indians. Nor should it matter whether the land is placed into fee simple ownership by tribes, held in trust by the United States for the benefit of tribes, designated a reservation for Indians or even conveyed in fee simple to a corporation comprised of Natives.

One caveat to this interpretation is that, except in the case of Indian allotments, the lands should have been set aside for a group of Indians rather than for a single Indian or Indian family. While it can be argued that such a limitation is inconsistent with the canons of construction, it should be noted that except for Indian allotments, the Supreme Court has extended Indian country only to lands set aside for groups of Indians. Furthermore, in *Sandoval*,[118] the Supreme Court's initial dependent Indian community decision, the Court found it significant that although the land was owned in fee simple, it was owned communally by the tribe.[119]

A final consideration for restricting the dependent Indian community category to lands set aside for groups of Indians is that the name of the category implies that the land is used by a group of Indians. A single person or a single family does not constitute a community. Hence the restriction on the land being set aside for a group of Indians rather than an individual Indian or Indian family would be a reasonable interpretation, and it would prevent lands purchased by Indian individuals for themselves from being construed as Indian country.

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116. *See supra* notes 9-18 and accompanying text.
117. *Id.*
118. United States v. Sandoval, 231 U.S. 28 (1913).
119. *Id.* at 48.

In answering the second question—what constitutes superintendence by the federal government—rules of construction suggest superintendence of the Indians should be liberally construed to include any federal government action that is intended to provide benefits to Natives on the basis of their Native status. It is particularly important to use this liberal interpretation because of the fluctuation of federal policy toward Natives in the years since *Sandoval*, *Pelican* and *Donnelly* were decided.

In approximately three quarters of a century, United States federal Indian law policy has moved from the allotment and assimilation era, to the Indian reorganization era, to the termination era and finally to the self-determination era.[120] In each of these eras, distinct policies have prevailed, often representing extreme changes in policy direction. Presumably, because of the federal government's guardianship role with regard to tribal Indians, each policy represents Congress's interpretation of the best interests of the Indians. In the allotment and assimilation era, Congress attempted to encourage Indians to adopt white concepts of land ownership by allotting lands to individual Indians.[121] The era represented a belief that the termination of tribal life was necessary if Indians were to enjoy the benefits of the American system.[122] When Congress concluded that the allotment and assimilation policies had resulted in deplorable living conditions for Indians, it responded by adopting the Indian reorganization policy with the intent of re-establishing the tribal governments.[123] While intending to re-establish tribal governments, the implementation of the Indian reorganization policy was characterized by extensive supervision of tribal operations by the Bureau of Indian Affairs.[124] After only fourteen years of experimentation with tribal reorganization, Indian policy flip-flopped, and Congress implemented policies intended to terminate tribal existence and the special relationship between the federal government and Indians.[125] After nearly twenty years of pursuing termination, Congress implemented the self-determination policies, once again intending

120. For a general discussion of the history of U. S. Indian policy, see COHEN, *supra* note 4, at 47-206. The allotment and assimilation era prevailed from 1871 to 1928. The Indian reorganization era followed from 1928 to 1942. The termination era prevailed from 1943 until 1961. Finally, from 1961 to the present, the self-determination era has prevailed. *Id.*

121. COHEN, *supra* note 4, at 131-32.

122. *Id.* at 131

123. *Id.* at 144.

124. *Id.* at 149.

125. *Id.* at 152.

to promote the development of tribal governments.[126] However, unlike the earlier Indian reorganization policies, the self-determination policies emphasized the development of tribal governments that were relatively free from federal government supervision.[127]

Thus, since the time when the present definition of Indian country began to evolve, federal Indian law policy has varied from policies that viewed Indian ways of life as inferior and were therefore designed to instruct Indians in the ways of the dominant American culture, to policies that respect Indian ways of life and seek to allow tribal groups to develop on their own terms. Obviously, what constitutes federal government superintendence varies drastically with the implementation of the different Indian policies. In the early part of the present century, it was assumed that Indians needed supervision and instruction in all facets of their lives. Today, while Congress still maintains its special relationship with Natives and tribes, superintendence is limited to providing funding for the development of tribal operations with the ultimate goal of tribal governments becoming completely self-sufficient.

Consequently, in determining what constitutes superintendence of Indians for the purpose of determining dependent Indian community status, any federal provision of services to the Native group for whom the land has been set aside should qualify as federal superintendence. If members of a Native group receive federally funded health benefits on the basis of their Native status, if the lands of the Native group receive special protection from taxation because of the lands' relationship to the Natives, if the operations of the Native group receive special consideration under federal laws or if the Native group's operations are subjected to special federal requirements placed upon Native groups, then the group of Natives should be considered to be under "federal superintendence."

Thus, by considering more than three-quarters of a century of consistent United States Supreme Court decisions, the corresponding federal Indian policies for those years and the basic rules of construction regarding federal Indian law statutes, it can be determined that dependent Indian communities include any lands set aside for the use of a group of Natives who are under the superintendence of the federal government. The lands in question can be set aside for the use of the Natives by any person or entity, and by any means, including the issuance of fee simple title in the name of a Native organization. Federal superintendence may consist of such things as the provision of health benefits, protection

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126. *Id.* at 180.
127. *Id.*

from taxation and funding of Native operations or businesses, or it may consist of making Native operations subject to special federal requirements.

V. APPLICATION OF THE DEPENDENT INDIAN COMMUNITY ANALYSIS TO ANCSA CORPORATION LANDS

As previously discussed,[128] the Ninth Circuit in *Alaska ex rel. Yukon Flats School District v. Native Village of Venetie*[129] indicated that the district court should apply an analysis similar to that used by the Eighth Circuit in *South Dakota* and the Tenth Circuit in *Martine* to determine whether the land in question constituted a dependent Indian community. On remand, the district court, with Judge Holland presiding, fashioned an analysis considering four factors extracted from the *Martine* and *South Dakota* cases.[130] Judge Holland concluded that the dispositive issue was whether the federal government's treatment of the land and tribal members evinced an intent that the federal government, not the state government, be the dominant political institution in the area.[131] Judge Holland then concluded that the land in question was not set aside for Natives, and that the federal government had not expressed an intent that it be the dominant political institution in the area.[132] In coming to his decision, Judge Holland relied heavily on ANCSA.

Subsequent to the Ninth Circuit's *Native Village of Venetie* decision, but prior to Judge Holland's decision, the United States Office of the Solicitor issued an opinion[133] ("Solicitor's opinion") indicating that ANCSA corporation lands were not Indian country. Like Judge Holland's decision, the Solicitor's opinion relied upon provisions of ANCSA to determine that Congress did not intend for the lands in question to be dependent Indian communities.[134] Both Judge Holland's case and the Solicitor's opinion appear to have ignored the basic tenets of Indian law discussed in Part II of this article.

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128. *See supra* notes 91-98 and accompanying text.

129. 856 F.2d 1384 (9th Cir. 1988).

130. Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't, No. F87-0051 CV (HRH), 22 Indian L. Rep. 3267, 3272 (D. Alaska, Aug. 2, 1995); *see infra* note 135 and accompanying text.

131. *Id.*

132. *Id.* at 3277-78.

133. Governmental Jurisdiction of Alaska Native Villages over Land and Nonmembers, Opinions of the Solicitor, U.S. Dep't of the Interior, No. M-36,975 (Jan. 11, 1993).

134. *Id.* at 118.

Returning to *Native Village of Venetie*, in reaching its decision the district court considered the following factors: "(1) the nature of the area; (2) the relationship of the inhabitants to one another, to tribes and to the federal government; (3) the extent to which the inhabitants and Indian tribes of the area are under the superintendence of the federal government; and (4) the extent to which the area was set aside for the use and occupancy of Indians as such."[135] According to the court, the purpose of considering these factors was to help determine whether the federal government's superintendence of the Indians using the lands, and the setting aside of the lands, "evinces an intention that the federal government, not the state, be the dominant political institution in the area."[136]

Thus, it appears that in determining whether ANCSA corporation lands are dependent Indian communities, *Native Village of Venetie* applies the analysis repeatedly set forth by the Supreme Court, requiring that the lands be set aside for the use of a group of Natives who are under the superintendence of the federal government. However, the decision adds the requirement that the set-aside and superintendence evince an intent that the federal government be the dominant political institution in the area. In announcing this additional requirement, the federal district court appears to rely on the Solicitor's opinion.[137] If the requirement of the Solicitor's opinion were based on case law or statutory precedence, reliance upon the opinion would be justified. However, the Solicitor's opinion does not provide any case law or statutory authority for its position. After referring to *Martine*, *South Dakota* and *Potawatomi*, the Solicitor's opinion concludes "[t]he ultimate question in each case is whether the particular facts and circumstances fit within the congressional scheme intended to protect certain areas under federal and usually tribal control."[138]

Both *Native Village of Venetie* and the Solicitor's opinion conclude that ANCSA corporation lands were not set aside for Natives under federal superintendence in a manner that evinces an intent that the federal government, rather than the State of Alaska, be the dominant political institution in the area. *Native Village of*

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135. *Native Village of Venetie*, 22 Indian L. Rep. at 3272.

136. *Id.*

137. *See id.* at 3274 n.26 (quoting the Opinions of the Solicitor to the effect that "the guiding principle that Indian country comprises those lands that Congress intended, as a general matter, to be beyond the jurisdictional reach of the state and subject to the primary jurisdiction of the Federal Government and tribes, even though those lands are geographically within the boundaries of the state").

138. Op. Solicitor at 116.

Venetie concludes that ANCSA corporation lands were not under federal superintendence to a degree evincing intent for federal dominance over such lands[139] and, furthermore, that ANCSA corporation lands were not lands set aside for Natives.[140] In finding that ANCSA corporation lands were not under sufficient federal superintendence to constitute dependent Indian communities, the federal district court found that ANCSA effected a significant change in the relationship between the federal government and Alaska Natives.[141] The court noted that (1) ANCSA terminated all reservations within Alaska except for the Annette Island Reservation (2) ANCSA used corporations incorporated under state law rather than tribal entities as the recipients of the settlement (3) ANCSA was intended to avoid the creation of new racially defined institutions and (4) ANCSA was intended to maximize the participation of Alaska Natives in affecting their rights and property without creating reservations or a lengthy wardship or trusteeship.[142] From these facts, the court concluded that ANCSA represented Congress's belief that Alaska Natives are no longer incompetents needing federal government supervision and should be allowed maximum participation in decisions affecting their lives.[143] Consequently, the court held that the federal superintendence of Alaska Natives was not sufficient to find that the ANCSA corporation lands constituted dependent Indian communities.

Although it found that the federal superintendence of Alaska Natives was insufficient for ANCSA corporation lands to constitute dependent Indian communities, the court nevertheless reviewed whether ANCSA corporation lands were lands set aside for the use of Natives. Surprisingly, the court concluded that the lands had not been set aside for the use of Natives.[144] In reaching this conclusion, the court emphasized that Congress had chosen corporate ownership of the lands, a racially neutral form of ownership, and that no court had held that a federal government fee title conveyance of land to a corporation constituted a set aside for Indians.[145]

The reasoning of the Solicitor's opinion is almost identical to that found in *Native Village of Venetie.* The opinion relies on

139. 22 Indian L. Rep. at 3277.
140. *Id.*
141. *Id.* at 3274.
142. *Id.* at 3275.
143. *Id.* at 3276.
144. *Id.*
145. *Id.* at 3277.

ANCSA's professed intent not to create permanent or even long-term federal supervisory control over land owned or occupied by Native corporations.[146] The opinion states that Congress did not create a trust relationship between the federal government and ANCSA corporations, and therefore ANCSA corporation lands cannot constitute dependent Indian communities.[147] Like *Native Village of Venetie*, the Solicitor's opinion indicates that the ultimate question in determining whether lands constitute dependent Indian communities, or Indian country in general, is whether Congress has indicated an intent that the federal government, rather than the state, be the dominant authority in the area.[148]

Native Village of Venetie and the Solicitor's opinion are subject to the same criticisms. In determining what lands constitute dependent Indian communities, they do not rely upon prior case law or statutory authority. The two rulings also do not apply the Indian law canons of construction to determine the appropriate meaning of the statutorily specified dependent Indian community category of Indian country. As previously indicated, canons of construction dictate that Native-specific statutes should be interpreted in a manner most favorable to Natives, and ambiguities must be interpreted in favor of Native interests.[149] Not only have the decision and the opinion not interpreted the statute and its underlying case law history in a manner favoring Native interests, they have introduced a requirement that operates to the detriment of Native interests without having any case law or statutory basis for so doing. Thus, the analyses developed by *Native Village of Venetie* and the Solicitor's opinion do not comport with long-established federal Indian law practices.

Similarly, the decision and the opinion fail to recognize the significance of the federal self-determination policy effects on federal superintendence of Natives. ANCSA, like all federal Indian legislation, should be interpreted in a manner most favorable to Native interests, with ambiguities interpreted favorably for Natives. An additional tenet of federal Indian law is that in order for Congress to remove tribal powers, it must do so expressly and not by inference.[150] Clearly, ANCSA can be interpreted as a set-aside for Alaska Natives. In fact, while *Native Village of Venetie* interpreted ANCSA corporation lands as not being lands set aside for Natives, the Solicitor's opinion interpreted ANCSA corporation

146. Op. Solicitor at 119.
147. *Id.* at 119-20.
148. *Id.* at 116.
149. *See supra* notes 9-18 and accompanying text.
150. Op. Solicitor at 116.

lands as, in some respects, having been set aside for Natives.[151] Given that the lands were granted as part of a Natives' claim settlement, it defies logic how ANCSA lands can be anything other than lands set aside for Native use. Even if Alaska Natives, through their ANCSA corporations, elected to sell their lands, ANCSA itself set aside the lands for Natives to use as they wished. The subsequent sale of the lands by Alaska Natives does not change the fact that ANCSA set aside the lands for Natives.

Native Village of Venetie and the Solicitor's opinion emphasize those portions of ANCSA that could be construed against Native interests while down-playing those aspects that demonstrate federal superintendence. The decision and opinion rely heavily on ANCSA's statements regarding its intent not to create reservations or a lengthy trusteeship.[152] In emphasizing this ANCSA policy statement, they have ignored the fact that the choice not to use reservations for ANCSA was proposed and endorsed by the Alaska Native leadership because of perceived restrictions upon reservation lands held in trust by the federal government.[153] Hence, it was the Alaska Natives' desire to be able to exercise more authority over their lands, not a desire of the federal government to terminate its special relationship with Alaska Natives, that was responsible for the anti-reservation policy of ANCSA. It would be inappropriate under such circumstances and Indian law canons of construction to interpret ANCSA in a way that actually reduces Alaska Natives' powers to regulate their lives and lands.

With regard to the Indian law tenet that Congress must diminish tribal powers expressly, *Native Village of Venetie* and the Solicitor's opinion appear to analyze ANCSA improperly. The decision and the opinion interpret ANCSA in a manner that almost completely eliminates significant tribal powers. Consequently, their interpretation can be correct only if ANCSA or its legislative history reveals an express intent to diminish tribal powers. Such an express intent simply does not exist. If anything, ANCSA speaks about empowering Alaska Natives. Furthermore, *Native Village of Venetie* directly violates this tenet. Noting that ANCSA never refers to Indian country, the court infers a presumption that Congress knew and intended that ANCSA would change the balance of power resulting in the diminution of tribal powers.[154]

A final flaw in the reasoning of *Native Village of Venetie* and the Solicitor's opinion is the failure to take into account the general

151. *Id.* at 118.

152. *See* 22 Indian L. Rep. at 3275; *see also* Op. Solicitor at 119.

153. *See* Op. Solicitor at 89.

154. *Native Village of Venetie,* 22 Indian L. Rep. at 3276.

policy of the Indian self-determination era, the era in which ANCSA was enacted. As previously mentioned, the Indian self-determination era, which began around 1961, represents a federal policy to promote tribal governance.[155] The intent of this policy is to foster tribal decision-making and responsibility and to reduce the federal government's supervision of Native affairs. Among the most significant acts of this era is the Indian Self-Determination and Education Assistance Act of 1975,[156] which professes a congressional commitment to maintain the federal government's unique relationship and responsibility with Natives by establishing Indian self-determination policies that transfer federal domination of programs and services for Natives to the control of Native organizations.[157] *Native Village of Venetie* characterizes ANCSA as a "new Native self-determination act."[158] It is inconsistent to view ANCSA as reflecting the policies of the self-determination era while interpreting it in a manner that severely limits tribal sovereign powers. Furthermore, interpreting ANCSA as diminishing federal superintendence might even result in Indian reservations losing their Indian country status. This interpretation results in a diminution of tribal powers, contrary to the intent of the self-determination policy. Consequently, for purposes of determining Indian country during the self-determination era, federal superintendence should focus on funding, services and special protection provided to Natives and their organizations. Superintendence should not be interpreted as requiring pervasive federal supervision of Natives and their activities.

Rather than following the analysis of *Native Village of Venetie* and the Solicitor's opinion, the analysis for the ANCSA corporation lands instead should focus on whether the lands have been set aside for the use of Natives who are under federal superintendence. With regard to the lands having been set aside for the use of Natives, the only real question is whether ANCSA corporations should not be considered a form of Native ownership. While corporations are generally defined as having personality separate from their shareholders,[159] the character of ANCSA corporations should be viewed in light of ANCSA's special provisions regarding stock ownership and rights, and also viewed in the context of the self-determination era. ANCSA restricted the initial issuance of

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155. *See supra* notes 120-27 and accompanying text.

156. 25 U.S.C. §§ 450-450n, 455-458e (1994).

157. *Id.* §§ 450-450a.

158. 22 Indian L. Rep. at 3275.

159. *Eagle Air, Inc. v. Corroon & Black/Dawson & Co. of Alaska, Inc.*, 648 P.2d 1000, 1003 (Alaska 1982).

ANCSA stock to Alaska Natives.[160] ANCSA also provided that ANCSA corporations have the right to purchase ANCSA shares that have been acquired by non-Natives through intestate succession.[161] Additionally, a twenty year stock alienation prohibition was included in ANCSA, and it was extended indefinitely by amendment.[162] Clearly, ANCSA evinces an intent that ANCSA corporations remain under control of Alaska Natives.

The Supreme Court decisions that formed the basis for the statutory definition of Indian country, as well as the recent Supreme Court decisions regarding Indian country, consistently indicate that the manner in which the federal government sets land aside for Indians is not important. Thus, lands characterized as communal fee lands, trust lands, Indian colonies and reservations have all been accorded Indian country status. The majority of these land set-asides occurred prior to the Native self-determination era, and consequently incorporated a great deal of federal control. ANCSA, as a self-determination era act, should not be expected to incorporate such federal control. Conveyance of Native set-aside lands to Native controlled corporations is in keeping with the self-determination era and can be characterized as a form of communal ownership. Thus, lands conveyed to ANCSA corporations should be viewed as lands set aside for the use of Indians.

With regard to the superintendence issue, the question is whether the federal government provides sufficient funding, services and special protection to Alaska Natives for the Natives to qualify as being under superintendence for Indian country purposes. ANCSA provides special protection to Alaska Natives. As already mentioned, ANCSA attempts to protect Native ownership of ANCSA corporations by restricting stock alienation and through special provisions concerning stock acquired by non-Natives through intestate succession. ANCSA also provides tax protection for undeveloped corporation lands.[163] Aside from special considerations provided by ANCSA, Alaska Natives receive special consideration for aid to small businesses,[164] Native alcohol and substance abuse prevention and treatment,[165] child welfare payments,[166] tribal health care grants and contracts[167] and many

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160. 43 U.S.C. §§ 1604(b), 1606(g)(1)(A), 1607(c) (1994).
161. *Id.* § 1606(h)(2).
162. *Id.* § 1606(h)(1).
163. *Id.* § 1620(d).
164. 15 U.S.C. § 637 (1994).
165. 25 U.S.C. § 2401-55 (1994).
166. 42 U.S.C. § 628 (1994).
167. 25 U.S.C. § 1644 (Supp. 1996).

other federal programs. In fact, a federal Indian law text dealing with Alaska Natives indicates that "since 1971, there has been a veritable explosion of statutory provisions specifying Alaska Natives as the beneficiaries of federal Native American programs.[168] This ample federal support provided to Alaska Natives on the basis of their Native status suggests that federal superintendence of Alaska Natives is as strong as ever. It also necessitates the conclusion that ANCSA corporation lands are lands that have been set aside for the use of Natives who are under federal superintendence. Thus, ANCSA corporation lands should be considered dependent Indian communities.

VI. CONCLUSION

In Alaska, there has been a long history of courts and other agencies resisting the recognition of Indian country. While it is certainly possible to characterize ANCSA as not intending to create Indian country in the form of ANCSA corporation lands, the consistent treatment of the dependent Indian community category by Supreme Court cases, the federal Indian law tenets and the self-determination era policies dictate otherwise. ANCSA must be viewed in the manner most favorable to Native interests. Absent express intent, ANCSA should not be interpreted in a manner that diminishes tribal sovereign powers. It must be interpreted in a manner consistent with the underlying policies of the self-determination era to promote Native self-government. Since the Supreme Court cases establishing the dependent Indian community category have been incorporated into the federal statutory definition of Indian country, the concepts developed by them should be viewed in the manner most beneficial to Native interests. In consideration of these factors, it seems appropriate that ANCSA corporation lands be considered lands set aside for Natives who are under federal superintendence.

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168. DAVID S. CASE, ALASKA NATIVES AND AMERICAN LAWS 22 (1978).