

# TRIBAL COURTS

## A HISTORICAL PERSPECTIVE

### FOR BUSH JUSTICE IN ALASKA

*".....Same thing with tribal court. That came in long before white people. The court brought everything out in the open, before the people. They talked to the person making trouble right in front of him. They just talk. As peaceful as they can. The Indian way is to have respect for one another."*

Chief Peter John

1900 - 2003

Traditional Chief, Minto Alaska

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## Introduction

Modern tribal courts in Alaska may be best understood by viewing the long history of events, changing federal and state policies, and legal battles that have taken place over the years leading us to the present day. Long before contact with non-Native people, traditional systems were well established for maintaining order in tribal communities. Conflicts and disease brought first by the Russians, then by gold seekers, decimated Native populations in much of Alaska, affecting Native communities and traditional systems beyond the imagination. Although changes to tribal justice occurred with the introduction of a federal justice system during Alaska territorial days, organized tribal councils played an important role in early bush justice. The Alaska Statehood Act (1959) instituted a system of state magistrates in rural Alaska, replacing the role of the tribal councils and village tribunals to some extent. Finally, the settlement of Alaska Native Claims in 1971 left questions about tribal status and jurisdiction, which continue to be litigated in state and federal courts today.

Through all the surrounding conflicts and confusion, Alaska tribes have managed to survive, and even flourish. Tribes have established, and continue to develop tribal courts to help meet bush justice needs. This is partly due to a lack of adequate state resources to address justice problems in rural Alaska, but also due to the tribes themselves believing that solutions have to come from within their own communities. Today the majority of Alaska tribes handle some level of tribal court cases, primarily attempting to address tremendous problems related to child mistreatment and neglect, alcohol and substance abuse, and domestic violence. They do this with little or no funding, and with varying amounts of cooperation with state agencies. After a lengthy study ending in 2006, the Alaska Rural Justice and Law Enforcement Commission reported, *“There is no doubt that the reduction in state-tribal conflict over jurisdictional issues, and increased cooperation, coordination, and collaboration between State and tribal courts and*

*agencies, would greatly improve life in rural Alaska and better serve all Alaskans.”*

### **Traditional Justice Systems and Practices**

Before contact first with the Russians, then with outsiders seeking gold and natural resources from other parts of the world, Alaska Native people were living under a wide range of self-governing systems for thousands of years. Family lines were strong, and basically organized through clans, banding together in various cultural groups, traveling within distinct areas of land and sea within which they harvested subsistence resources. The extreme arctic environment demanded respect and working together was the only way the people could survive.

Social order was maintained for hundreds of generations through traditional customs, self and family discipline, and strong spiritual beliefs and values such as the Yupik Yuuyaraq (the way of the human being), and Athabascan Animal Songs, (laws by which Athabascans lived by). The people had close daily interaction with the natural universe which had a profound influence on cultural ways of being and keeping order. Spirituality entered into nearly every aspect of daily life.

The way disputes were resolved varied between bands and cultural groups. In some areas authority for dispute resolution and mediation rested with the first male head of a nuclear or extended family, and beyond that the leader or headman of a collection of related families. Justice was applied by decisions of chiefs, clan leaders, spiritual leaders, whaling captains, and Elders. Some groups had elaborate systems of restitution and retribution; others were less structured. Minor offenses were dealt with by the family or clans, or not dealt with at all. In some areas, leaders formed council decision-making bodies or advisory assemblies to traditional chiefs.

Justice involved restitution, reprimanding, revenge, shaming, and in extreme cases, banishment of a person or war with another band. Banishment was an extreme punishment, as not having other humans to protect and help you basically made it a death sentence. Justice was often dispensed quickly, but in some systems elaborate potlatches and other rituals took place over a lengthy time period to resolve disputes and mend relationships.

### **Russian Occupation and U.S. Purchase**

Traditional Alaska Native justice systems began to be disrupted with the coming of Russian explorers. Russia laid claim to Alaska beginning in the 1770s through the purchase of Alaska in 1867, mainly occupying the coastal areas with a primary interest in exploitation of furs. The Aleut people were the first Alaska Natives to be affected by being forced into slavery to hunt fur-bearing marine animals for the Russians. This practice also forced them to leave their traditional ways of life. An estimated 80% of the Aleut population died from introduced diseases against which they had no immunity, a crisis to the Aleut people and culture that is unimaginable.

Russians moved onward to Kodiak, affecting the Koniags, then to Southeast Alaska affecting the Tlingits who continued to wage war on the Russians into the 1850s. The diseases carried by the Russians traveled to Alaska Native people well beyond the areas occupied by the Russians. Between loss of population due to disease, loss of traditional hunting patterns, and moving into more permanent settlements, traditional Alaska Native justice systems were eroding along with Native cultures.

In 1867, U.S. Secretary of State William Seward made the deal to purchase Russia's claim to Alaska for \$7.2 million, proclaimed by the Treaty of Cession. The Treaty contains the first written legal reference to Alaska Native people. The Treaty classified Alaska Natives into 'civilized groups' which were to be regular citizens of

the United States with no special relationship, and the rest were recognized as 'uncivilized groups' which were to be subject to federal Indian law. This confusing classification of Alaska Natives in the Treaty of Cessions fueled much debate later in courts and other forums over the status of Alaska Native people in the years to come. Without a special political relationship to the federal government, Alaska Natives would have no aboriginal claim to land and resources under the Doctrine of Discovery, receive no special federal services under the trust responsibility of the federal government, nor have tribal status with the government-to-government relationship needed to operate tribal governments and justice systems.

### **Early Relationship between Alaska Tribes and the Federal Government**

When the United States purchased Alaska in 1867, the country was still busy recovering from the ravages of the Civil War. The tone at the time towards American Indians was to assimilate them primarily through boarding schools and allotting Indian lands to individuals. Hundreds of treaties with the Indians had been produced, reservations created, major decisions about Indian tribes made by the U.S. Supreme Court, and several acts of Congress passed. Indian tribes had endured persecution through wars, disease, and removal from their homelands. The tribes were in the process of losing their land base through the General Allotment Act (also known as the Dawes Act) which divided up Indian lands by allotting it to individual Indians, and then 'surplussing' the remainder by selling it to non-Indians. The General Allotment Act resulted in a net loss of 90 million acres of Indian land, an area the size of California. When the U.S. purchased Alaska, all the land went into the 'public domain.' Transfer of land to private individuals, associations, tribes and designation of land for specific public purposes required future congressional action.

At first there was a relatively small federal presence in the Alaska territory and little attention paid to potential aboriginal claims, political status of Alaska Natives, and their special relationship to the federal government. Congress terminated treaty

making with the Indians in 1871, therefore no treaties were made with Alaska Native people. The passage of the first Organic Act in 1884 created the District of Alaska and established a District Court. The Act provided for a judge, clerk, several commissioners, and a marshal with four deputies. This court system was to enforce the applicable laws of the State of Oregon. The Act also set up a land district which provided that *“the Indians and 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 of which such persons may acquire title to such lands is reserved for future legislation by Congress.”* The Act charged the Secretary of Interior with the responsibility of educating the school age children of Alaska, regardless of race. During these early years no distinction between Native and non-Native residents of the territory was made in terms of service delivery.

Missionary-educator Sheldon Jackson was appointed as the first general agent for education in Alaska in 1885. Under Jackson’s leadership, the Interior Department made contracts with various missionary associations, giving them jurisdiction over education in Alaska. A network of Native village schools was developed by these associations, later to be run by the Bureau of Indian Affairs until well after Statehood. These village schools were notorious for prohibiting the speaking of the Native languages and geared toward assimilating and westernizing the Alaska Native people. The affect of these schools in the loss of Alaska Native languages and damage to the Native cultures was enormous.

In addition to the village schools, the Interior Department established the Native reindeer industry, extended medical care specifically for Alaska Native people, and established village cooperative stores, sawmills, and salmon canneries. Additionally, some 150 Indian reserves were created for education, economic development, community development, and health. This was the political relationship that was needed for the future settlement of aboriginal claims and the existence of federally recognized tribes in Alaska.

In the 1890s, the Klondike Gold Rush brought people to Alaska by droves, as well as epidemics that followed, wiping out entire Native villages in some cases. The trauma of such a loss of people and its effects on the Alaska Native culture is almost incomprehensible. The Gold Rush also brought an increased demand for land so Congress began the process of moving land into private ownership. In 1891 Congress enacted the Alaska Townsite Act which provided a mechanism for non-Natives to get land in the larger settlements in Alaska. At that time Congress also opened land for trade and manufacturing sites, authorized setting aside land for timber reserves, and established the 86,000 acre Metlakatla Indian Reservation.

Like the Indian tribes in the Lower 48, Alaska Native people, their culture and traditions were in jeopardy at the turn of the 20<sup>th</sup> century. By the late 1800s, whaling ships had almost killed off both the whale and walrus populations causing widespread starvation in Alaska's coastal communities; animal populations in other parts of Alaska on which people depended for subsistence were facing devastation as well. Villages were decimated by introduced diseases, including epidemics of influenza, diphtheria, chicken pox, measles, and tuberculosis. Schools prohibited speaking the Native language, the traditional spiritual beliefs were repressed, and dances and other cultural practices were denounced as pagan and sinful by the new Christian religion. Names were changed to English names and alcohol was introduced. The impacts on Alaska Native culture were tremendous, and traditional ways of self-governance and traditional justice systems were damaged.

### **Turn of the 20<sup>th</sup> Century**

In 1900, Congress passed the Civil Code of Alaska, creating more judicial districts within the territory. James Wickersham was appointed as Judge for the gigantic Third Judicial District based in Eagle, the first Judge to sit in the Interior of Alaska. Judge Wickersham traveled extensively by boat and dog sled

throughout Alaska stopping at Native camps, listening to stories and learning about Native history. Judge Wickersham made key decisions in regards to Alaska Native land claims, and also went on to serve as Alaska's delegate to Congress. Wickersham was instrumental in the passage of the Organic Act of 1912 turning the District of Alaska into a U.S. Territory. The new Territory of Alaska had an elected legislature, although the governor remained appointed by the President. Wickersham also pushed for the establishment of the Alaska Agriculture College and School of Mines (now the University of Alaska), McKinley Park (now Denali National Park), the Alaska Railroad, and the Alaska Native Townsite Act.

With the stream of outsiders coming into Alaska, demand and competition for land continued to increase. Churches sought land and acquired it through the Missions Act of 1900, which allowed a religious denomination to acquire up to one square mile of land in Alaska. Disputes over land, particularly between miners, resource developers, and Alaska Native people arose. A string of court cases concerning Alaska Native land rights began, and continued up to the settlement of the Alaska Native Claims Act in 1971. There were contradictory decisions in these court cases, but two early cases in particular held that non-Natives could not acquire land without the consent of the federal government. In other words, Alaska Native people had an aboriginal claim to land that only the U.S. government could settle. The first such case, *United States v. Berrigan* (1905) was heard by Judge James Wickersham, and involved a dispute over land near Delta Junction. The second was *United States v. Cadzow* (1914), involving a land dispute near Fort Yukon.

Congress passed several Acts in the early part of the 20<sup>th</sup> century specifically affecting Alaska Native people. The Nelson Act in 1905 legislatively established a separate system of education for Alaska Natives, giving the BIA nearly exclusive control over Alaska Native education until well after Alaska Statehood. In 1906, Congress adopted the first land grant to Alaska Native people through Alaska



Native Allotment Act which entitled Alaska Natives to restricted land entitlements of up to 160 acres of unappropriated, non-mineral land.

From the early twentieth century through the 1950s, village councils played a major role in resolving disputes in bush Alaska. The village council form of tribal government was primarily set up by missionaries and teachers. According to studies by Hippler and Conn, the councils were composed of Native men and women, and commonly acted by consensus. Councils heard complaints, lectured wrongdoers, and occasionally reinforced their decisions by invoking the authority of the church and the United States. Rather than taking punitive measures, council actions were often directed towards an admission of wrong and a promise to correct conduct in order to live more compatibly with other villagers. The village councils were successful in their administration of justice because they avoided the confrontational posture of trials, allowed for group decisions in which no single individual had to take the responsibility, and found solutions for misbehavior which were models of correction and deterrence. Although they operated on an unclear legal basis, village councils came to be supported by the federal Marshalls, the U.S. legal entity that was charged with enforcing law in the Alaska territory. Federal lay judges and commissioners were appointed to serve in the larger Alaska settlements. But likely due to lack of financial and infrastructure support, village councils played a major role in resolving judicial disputes.

Although some Lower 48 Indians became citizens of the United States prior to 1924, the majority were not citizens. The Alaska Territorial Legislature offered Alaskan citizenship to Alaska Native people with a 1915 enabling act. Congress passed the Indian Citizenship Act of 1924 granting all American Indians and Alaska Native people citizenship in the United States. In the Act Congress provided that: *“The granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.”* With that, Alaska Native people were clearly citizens of the United States, and any rights to aboriginal claims to land were preserved.

Congress passed the second land grant to Alaska Natives through the 1926 Alaska Native Townsite Act designed to give Alaska Natives small land parcels under their homes in villages in a restricted status. Neither the 1906 Alaska Native Allotment Act, nor the 1926 Alaska Native Townsite Act, were a settlement of the much larger aboriginal claim to land in Alaska, but today, both Native allotments and restricted Alaska Native townsite lands are likely Indian country for the purpose of tribal jurisdiction because of their trust and restricted status. Both the Alaska Native Allotment Act and the Alaska Native Townsite Act were terminated in the 1970s by the Federal Land Policy and Management Act (FLPMA) ending the creation of new Alaska Native Townsites and Native allotments without a specific exception by Congress.

In 1934 Congress passed the Indian Reorganization Act IRA (also known as the Wheeler-Howard Act or the Indian New Deal), in the spirit of attempting to improve conditions on the reservations and to stop the loss of Indian lands in the Lower 48 states. The Act was not fully applicable to Alaska tribes because it was geared more toward Indian reservations and few Alaska Native villages were thought to be located on reservations at that time. In 1936, Congress corrected this oversight with an amendment to the IRA that allowed all Alaska Native villages to organize their tribal governments under it. By 1941, thirty-eight Alaska Native groups had organized under the IRA, and today about one third of the 231 federally recognized tribes in Alaska are organized under the IRA.

All the IRA tribes in Alaska have constitutions that went through a special federal election process through the Secretary of Interior. Most all of the remaining federally recognized tribes in Alaska also have constitutions, which went through their own internal processes to adopt. All the Alaska tribal constitutions generally or specifically allow the tribal councils to establish tribal courts, but very few have tribal court structures and procedures outlined in the constitutions. For all practical

purposes, both the IRA and non-IRA tribes in Alaska have the same powers and are equally recognized by the federal government.

In the Lower 48, it is said that the 'modern' tribal court systems began with the passage of the IRA which encouraged the establishment of constitutional forms of tribal governments with tribally controlled judicial systems. In Alaska, village councils had already been formed and often used as dispute resolution bodies. After the application of the IRA to Alaska, the BIA encouraged tribal court activity through tribal ordinance by the village councils. This was largely the form of local justice in Alaska villages until changes brought by Statehood. In Alaska, it is probably more appropriate to say that the era of 'modern' tribal courts began much later, stimulated by the enactment of the Indian Child Welfare Act in 1978.

In the 1940s, the federal government's primary concern was World War II. A tremendous number of both Native and non-Native Alaskans were enlisted into the military, and Alaska's mineral and fishing resources were heavily exploited. Aside from the effects the entire United States felt from this war, Alaska tribes were particularly affected by the removal of the Aleut people from the Pribilof Islands, and the increased access to Alaska by the construction of the Alaska Highway. The Native languages and culture were still being suppressed by the BIA schools which were fully functioning at this time.

In 1948, Congress passed a statute defining Indian country, the territorial area over which a tribe has jurisdiction. The language reads: "*Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian Country,' as used in this chapter {18 USC Sec. 1151 et. seq.}, means (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."* At this time there were reservations and reserves in Alaska, many Indian allotments, and most Native villages were probably considered 'dependent Indian communities.' But there was a long path ahead leading to the settlement of aboriginal claims, the questions over the existence of tribes after the settlement, and then the deliberations over what jurisdiction the tribes would have. Whether or not there is Indian country in Alaska was to be subject to much debate into the future.

### **1950s : Termination Era**

In terms of federal Indian policy, the 1950s are called the 'termination era' as Congress adopted policies aimed at terminating federal obligations to tribes. The three main tools the federal government used to accomplish this were the relocation program, introducing State jurisdiction into Indian country through Public Law 280 (P.L. 280), and actual termination of some tribes. Alaska experienced the relocation of many Alaska Native people to cities in the Lower 48, and also the application of Public Law 280.

In response to lack of Alaska territorial jurisdiction over a criminal case within the jurisdiction of the Tyonek tribal government in 1958, Congress applied Public Law 280 to Alaska upon Alaska Statehood in 1959. Basically, P. L. 280 extends state criminal and some civil jurisdiction into Indian country. At that time, Alaska Native aboriginal claims to land had not been settled, so Indian country would likely have been Native allotments, restricted Alaska Native townsites, reservations and reserves which numbered over 150, and dependent Indian communities.

A long lived effect of Public Law 280 on Alaska tribal courts was the way the State of Alaska interpreted this law for years after it was applied to Alaska. There were a series of Alaska court rulings which basically held that even if there were tribes in Alaska, P. L. 280 terminated tribal jurisdiction that they had. Tribal

advocates took the position that P.L. 280 extended state criminal and some state civil jurisdiction into Indian country creating concurrent state-tribal jurisdiction, and tribal jurisdiction was not terminated. Over time, the Alaska state system is agreeing. While Public Law 280 extends state criminal jurisdiction and some civil jurisdiction into Indian country, there are questions about the existence of Indian country in Alaska, and therefore what the practical meaning Public Law 280 actually has.

A second effect of Public Law 280 is a policy by the Bureau of Indian Affairs to not fund tribal courts in states where Public Law 280 applies. This leaves Alaska tribal courts few revenue streams to operate under. There are limited grant opportunities available through the Department of Justice which cannot be counted on for ongoing funding. Self-governance dollars are also limited, but tribes may use some to fund their courts. Or, tribes may use self-generated dollars. Most tribal courts in Alaska operate their courts on a volunteer basis, and/or using existing resources from other programs and services. For example, most tribes add the duty of tribal court clerk to an existing tribal staff position. Many tribes give judges a small stipend for hearing cases.

Alaska Statehood brought very significant changes to bush justice, governance, and land ownership patterns in Alaska. The Act itself preserved the status quo on aboriginal title, mentioning that the federal government had the right to settle any aboriginal claims to lands and resources that may be held by Alaska Natives. But the State of Alaska's rights to land and the actual selection of it were a main stimulus for filing suit to prevent it and finally settling the aboriginal claim in 1971.

With Statehood, city councils were formed in many places, shifting power from the village councils. Federal commissioners and marshals were replaced with state lay judges or magistrates who were appointed by the Alaska Court System. In the villages where magistrates were stationed, the role of the village councils in dispute resolution was greatly reduced. The single judge system was much more

formal, and lacked the consensus approach taken by the village councils. Sadie Brower Neakok from Point Barrow was one of the more successful magistrates, who worked hard to make the magistrate system work for her people. She held court in her home kitchen when she first started as a magistrate in 1960, and continued her work for the next 20 years.

### **1960s : Civil Rights Era**

The 1960s was an era of civil rights throughout the Nation, and Indian country was no exception. Civil rights protests were occurring across the country and the age of identity politics blossomed. The United States Constitution – Bill of Rights, does not apply to the activity of Indian tribes, so in the early 1960s, Congress began seven years of hearings concerning claims that tribal courts in the Lower 48 did not provide basic due process rights to Indian criminal defendants. In response, Congress passed the Indian Civil Rights Act (ICRA) in 1968 which applies to all tribal courts throughout the country. The ICRA established a basic Bill of Rights for persons subject to the jurisdiction of Indian tribes. On one hand it reaffirmed judicial powers of tribal self-government, but on the other, it placed certain standards on tribal courts while providing no funding to enable tribes to restructure or improve their court systems.

At the heart of the Indian Civil Rights Act (ICRA) is the obligation of tribes to provide a basic fundamental fairness through due process and equal protection in tribal operations. It is important to know that legislative history describes Congress' intent that the meanings of these terms be tribal meanings rather than state or federal interpretations of these terms. The ICRA basically requires notification of hearings, the opportunity to be heard, and fair hearings with consistent application of tribal law. The ICRA affects tribal court procedures particularly in the area of criminal jurisdiction. It requires basic due process rights for defendants, mandates a jury trial system if the defendant wants it for offenses with potential jail penalties, authorizes defendants in criminal proceedings to use

lawyers at their own expense, and requires that laws be applied equally to all persons. It also limited tribal court sentencing to 6 months in jail and/or a \$500 fine upon conviction for any one offense. This limit was later raised to 1 year in jail and/or \$5,000, and will likely continue to be raised by Congress as the severity of court cases that tribal courts handle increases.

By the late 1960s, Congress embraced a policy of promoting tribal self-government and increased funding for tribal court operations through the Bureau of Indian Affairs. However, many Lower 48 tribal courts remained under-funded and under-staffed, and a policy of not funding tribal courts in P.L. 280 states evolved. Most tribes lacked resources to make procedural changes required by the Indian Civil Rights Act and expanded tribal jurisdiction. In Alaska, bush justice was either being addressed by state courts, village councils or Native panels, or, not at all.

In 1969 the National American Indian Court Judges Association (NAICJA) was formed for the purpose of improving tribal court operations. The members of this organization are primarily tribal judges, justices and peacemakers serving in tribal justice systems. Alaska tribes were given their own regional representation in the organization in the year 2000.

The civil rights movement of the 1960s was also the climate for Alaska Native people who were actively pushing for the settlement of aboriginal claims for land and resources. The key factors pushing the movement were the State's selection of valuable lands, the proposed construction of the Rampart Dam which would have flooded much of the Yukon river drainage, a proposal to use nuclear bombs to create a harbor in Point Hope (Project Chariot), and finally confirmation that there were vast oil reserves on the North Slope. Secretary of Interior Morris Udall froze land transactions in Alaska in 1966 after Alaska Natives filed a law suit over their claims.

## **1970s : Self-Determination**

During the 1970s, Congress passed several pieces of significant Indian legislation and the Supreme Court heard an abundance of Indian cases. The most significant legislation for Alaska Native people was the settlement of the aboriginal land claims through the Alaska Native Claims Settlement Act (ANCSA) in 1971, a claim to ancient homelands which had been unresolved for over 100 years. Although there were differences of opinion over how the claims should be settled, the unique settlement through ANCSA was the end of the disputes over whether or not Alaska tribes had aboriginal claims to land and resources. It was also the beginning of a new era for Alaska Native people, as 44 million acres of land and nearly 1 billion dollars was placed under Alaska Native regional and village for-profit corporations, thrusting Alaska Native people into management positions in the complex world of profit-making businesses. The 44 million acres of land was placed into an elaborate ownership of surface and subsurface rights and checkerboard patterns surrounding the villages.

After ANCSA was enacted, there were challenges in court over whether or not tribes in Alaska still existed. Eventually, the Department of Interior basically settled the matter by publishing the names of all the tribes in Alaska on their list of federally recognized tribes in 1993, and Congress confirmed the list in 1994. However, ANCSA left questions about tribal jurisdiction since the tribes, for the most part, were the same people as the corporation shareholders, but did not receive the land under ANCSA. Tribal jurisdiction is in part linked to 'Indian country,' the territorial area over which tribes have jurisdiction, and basically tribes have more jurisdiction in 'Indian country' than outside of it.

Although the Act 'settled' aboriginal land claims with the tribes in Alaska, it did not adequately address aboriginal claims for hunting and fishing, since the land received by the Alaska Native people through ANCSA was not large enough to accommodate the hunting and fishing needs. An attempt to address this was



made nine years later when the Alaska National Interest Lands Conservation Act (ANILCA) was enacted. Title VIII of ANILCA gives some preference for rural citizens of Alaska for subsistence hunting and fishing. Much controversy has surrounded this provision as the state contends it conflicts with the state constitution, and Alaska Native people argue that the provision does not adequately protect their hunting and fishing needs. Without Indian country, the tribes lack the jurisdiction to regulate hunting and fishing seasons and bag limits.

In 1975, the federal government took a major step towards the policy of Indian self-determination with the passage of Public Law 83-638, the Indian Self-Determination and Education Assistance Act. Through this Act, tribal governments are able to receive funds through the Departments of Interior, and Health and Human Services, to deliver their own governmental and health care services. In Alaska many Native non-profit organizations were formed or strengthened to receive these dollars. Numerous tribes in Alaska receive these dollars on their own through 638 contracts, or through compacting. Most of the regional non-profit organizations assist tribes with the development and operation of their tribal courts.

Three significant U.S. Supreme cases in the 1970s affecting tribal court jurisdiction generally throughout the United States were: *Oliphant v. Suquamish* (1978), *U.S. v. Wheeler* (1978), and *Santa Clara Pueblo v. Martinez* (1978). A significant setback for tribal jurisdiction was established by the decision of the Supreme Court in the *Oliphant* case. The Court ruled that Indian tribes have no inherent power to prosecute and punish non-Indians who commit crimes on Indian reservations, unless the tribe has been granted such power in a treaty, agreement, or act of Congress. There is no law that specifically removed the tribal power to assert criminal jurisdiction over non-Indians, however, the Supreme Court ruled that the exercise of this power is “*inconsistent with the status of Indian tribes.*” For the first time, the Supreme Court declared that a fundamental tribal power could be extinguished by implication. After the *Oliphant* case, many tribes across the country began a process to decriminalize their

codes, meaning that they handle cases as civil cases instead of criminal cases, since tribal governments were left without criminal jurisdiction over non-Natives.

Shortly after the startling *Oliphant* decision, the Supreme Court issued a ruling in *U.S. v. Wheeler* that helped to reaffirm the sovereign nature of Indian tribes. This case held that because Indian tribal courts and federal courts derive their authority from separate sovereigns, the double jeopardy clause of the U.S. Constitution does not prohibit prosecution in federal court of an Indian defendant already tried and sentenced for the same offense in tribal court. The case arose on the Navajo reservation and involved a crime committed by a Navajo tribal member.

A positive note for tribal sovereignty was struck in the last major Indian law decision by the Supreme Court in the 1970s, in *Santa Clara Pueblo v. Martinez*. The case involved a Santa Clara Pueblo woman who brought suit against tribal officials because the Tribe denied tribal enrollment to children of female members who marry nonmembers, but not to children of male members who marry nonmembers. Ms. Martinez argued that the difference in treatment between male and female members of the Tribe violated the equal protection requirement of the Indian Civil Rights Act. In this case, however, the United States Supreme Court decided that federal courts should not interpret what the meaning of equal protection is for tribes.

The Court held in the *Martinez* case that the Indian Civil Rights Act does not grant federal courts the power to decide tribal civil rights cases, except those involving criminal matters where a release from custody is sought. In those cases, a writ of habeas corpus challenging an allegedly unlawful imprisonment is the procedural tool. The Court reasoned that to impose standards of U.S. constitutional law would cause “*unnecessary intrusions on tribal governments*” and would threaten a tribe’s ability to “*maintain itself as a culturally and politically distinct entity.*” Tribal courts were identified as the only appropriate forum for

applying such ICRA principles as equal protection and due process in a manner consistent with traditional Indian values and customs.

The passage of the Indian Child Welfare Act (ICWA) in 1978 marked a new era in tribal court development in Alaska. Prior to the passage of ICWA, one in four Indian children were taken out of their Indian homes and placed with foster homes or institutions, most of which were non-Native. The purpose of the Act is to preserve and strengthen Indian families and Indian culture by affirming existing tribal authority to handle child protection cases, and by setting Native placement preference standards when child custody proceedings are in state courts. Shortly after the passage of the ICWA, tribes in Alaska re-organized their traditional tribal courts which had largely fallen into disuse, and began hearing child custody and protection cases. Tribes did this in spite of the lack of tribal recognition by the State of Alaska. Today, children's cases are the most common tribal court cases in Alaska, particularly in the Interior where about half of all children who are in custody are in tribal custody.

### **1980s : Challenges and Accomplishments**

The Alaska National Interest Lands Conservation Act was passed by Congress in 1980 setting aside major tracts of Alaska land for National Parks, Preserves, and Wildlife Refuges. Title 8 of that Act was an attempt to address the hunting and fishing rights portion of Alaska Native aboriginal claims that ANCSA failed to adequately address. The 'subsistence' scenario the Act set up became subject to much controversy, lawsuits, and eventually a bifurcated system of wildlife management between the State of Alaska and the federal government. The matter is currently undergoing complete federal review and new efforts in the Alaska Native community are underway to re-address Native subsistence, which is the Alaska Native way of life.

The 1980s was a decade when the existence of tribes in Alaska was challenged by the State of Alaska, and even on the federal front, Alaska tribes were listed as “*Alaska Native Entities*” on the list of federally recognized tribes. Alaska tribes were very active in the 1980s in asserting their existence and jurisdiction through their tribal governments and courts. Tribal court activity picked up tremendously as a result of the Indian Child Welfare Act, new IRA constitutions were being sought, tribal alcohol ordinances were published in the Federal Register, battles were being waged in federal and state court, and active efforts were undertaken to include Alaska tribes in any federal legislation affecting tribes in the country.

The tribes and Native organizations were also very active in the 1980s in advocating for the so-called ‘1991 amendments,’ which made changes to the Alaska Native Claims Settlement Act in preventing the stocks from going onto the open market in the year 1991. Although a mechanism to make it easier to transfer land from Native corporations to tribes did not make it into the 1991 amendments, transfers of land to tribes from corporations took place. Tribes also acquired land through transfers from cities, purchases, gifts, and from the Alaska Native Townsite program in villages where cities did not form.

In the 1980s, several cases regarding the existence and rights of Alaska tribes were heard in the Alaska court system with both favorable and unfavorable rulings for Alaska Natives. In 1988, the Alaska Supreme Court ruled that there were no tribes in Alaska except for Metlakatla and perhaps a few others in *Stevens v. Alaska Management & Planning*. However, in the following year, 1989, the Court made a favorable ruling for Alaska tribes in the *Nome Eskimo Community* case. In that case, the Court ruled that land cannot be taken away without tribal consent if the village is organized under the Indian Reorganization Act. The Alaska Supreme Court recognized the Indian Reorganization Act and the protection it gives for land, but still did not recognize tribal status for Alaska tribes in this case.

On the national front, U.S. Supreme Court cases were decided during the 1980s affecting tribal courts throughout the country. In 1981, the Supreme Court acknowledged that tribal courts have inherent civil authority, even over actions of non-Indians, that affect tribal interests such as the political integrity, economic security, and health or welfare of the tribes in *Montana v. United States*. Through this case, the Supreme Court offered guidelines for gaining federal approval of the exercise of tribal court civil jurisdiction, but also put tribes in a defensive position in potentially having to prove effects of non-Native actions on the tribes. This case supports the notion that Alaska tribal courts have civil jurisdiction over activities when the political integrity, economic security, and health or welfare of the tribes is affected.

In 1985, the Supreme Court addressed the question of whether or not non-Natives may challenge tribal jurisdiction in federal courts in *National Farmers Union Insurance Co. v. Crow Tribe of Indians*. In this case, the Court held that non-Indians who challenge a tribe's jurisdiction must first raise the issue in tribal court and exhaust tribal appellate procedures before raising the issue in a federal court. In other words, once a case is filed in tribal court it must be heard by that court, and then by a tribal appellate court before it can be taken to a federal or state court to challenge tribal authority or procedures.

The activities and conflicts between the tribes and the State of Alaska in the 1980s paved the way for certified recognition of Alaska tribes in the 1990s.

### **1990s : Tribal Recognition**

Although recognition of Indian tribes is a federal decision, state governors are in control of all the state agencies that interface with tribes such as the State Troopers, Office of Children's Services, and Bureau of Vital Statistics. Tribes find more support for their governmental and judicial activities when state governors recognize and support them. In Alaska, tribal recognition by governors varied

widely during the 1990s. In 1990, Governor Steve Cowper issued Administrative Order 123, recognizing that there are tribes in Alaska, likely to be the same as those communities recognized in the Alaska Native Claims Settlement Act. The Order recognized the powers of tribes to be to regulate membership, to manage internal affairs of the tribe, and any powers delegated to tribes by the federal government such as through the Indian Child Welfare Act.

The next Governor, Walter J. Hickel, rescinded the Administrative Order 123. He described Alaskans as 'all one people,' leaving no room for administrative recognition of a special political status for Alaska Native people. The last Governor in the 1990s, Tony Knowles, recognized the tribes and started a major project called the 'Millennium Agreement' which was meant to be "*a framework for the establishment of lasting government-to-government relationships and an implementation procedure to assure that such relationships are constructive and meaningful and further enhance cooperation between the parties.*" Knowles however, was not supportive of some tribal powers for which Indian country would be necessary. At the 1997 Tanana Chiefs Convention in Fairbanks, Knowles spoke against the recognition of Indian country, especially the powers of taxation and regulation of fish and game.

On the federal front, the U.S. Supreme Court decided the case of *Blatchford v. Native Village of Noatak* in 1991, holding that Noatak could not sue the State in federal court for not giving revenue sharing to tribal councils. An important thing to note about this case is that the Ninth Circuit Court ruled that Noatak was a tribe because it was organized under the Indian Reorganization Act, and that the village of Circle (also involved in the case) was a tribe because it was named under ANCSA. The U.S. Supreme Court looked at that issue and decided not to make a new decision about that. This case helped pave the way to clarify federal recognition of tribes a few years later.

In the last days of President H. W. Bush's term (January 11, 1993), the Department of Interior issued an opinion that tribes do exist in Alaska, but ANCSA lands do not qualify as Indian country in a legal opinion titled: '*Governmental Jurisdiction of Alaska Native Villages Over Land and Non-members.*' This opinion is also known as the 'Sansonetti Opinion.' President Bill Clinton replaced President Bush just days after the Sansonetti Opinion was issued.

Clinton's administration did not outright pull the Sansonetti Opinion but it did take a significant step toward resolving the vagueness of federal recognition of tribes the following fall. On October 21, 1993, during the term of Assistant Secretary of Indian Affairs Ada Deer, the Department of the Interior (DOI) issued a list of tribes in the United States eligible for services from the Department. Previous DOI lists included Alaska tribes as tribal entities, which left the status of tribes unclear. The 1993 list named the Alaska villages recognized under ANCSA as tribes, and specifically stated that they have "*all the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes.*"

The lengthy preamble to the list explicitly stated that: "*The purpose of the current publication is to publish an Alaska list of entities conforming to the intent of 25 C.F.R. Sec. 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 continuous 48 states...This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather, they have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities,*

*and privileges as other acknowledged tribes; have the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other tribes; and are subject to the same limitations imposed by law on other tribes.*" (Bureau of Indian Affairs, List of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, Oct. 1993). The preamble to the list went on to state that *"Inclusion on the list does not resolve the scope of powers of any particular tribe over land or non-members,"* and so the issue of tribal jurisdiction over ANCSA lands as Indian country was not clarified.

Congress specifically confirmed the validity of the Department of Interior list through passage of the Federally Recognized Indian Tribe List Act of 1994. The Act defines the term 'Indian tribe' as meaning any Indian or Alaska Native tribe that the Secretary of the Interior acknowledges to exist as an Indian tribe. The list is to be published by the Department of Interior annually and the Department cannot take a tribe off the list without an act of Congress. The only ways for a tribe not on the list to become federally recognized are through an act of Congress, a decision by a federal court, or by successfully going through the lengthy and expensive acknowledgement process established by Department of Interior regulation (25 CFR Part 83).

After this point, the debates between the Alaska tribes and the state and federal governments primarily focused on tribal jurisdiction: How much jurisdiction do Alaska tribes have? How does Public Law 280 affect Alaska tribes? How do the federal Indian law statutes such as the Indian Child Welfare Act and Violence Against Women Act apply? Is there Indian country in Alaska? Although tribes may organize their governments, possess sovereign immunity, have special tax status, and some civil jurisdiction without a territorial base, Indian country is vital for authority to enforce activities such as exercising criminal jurisdiction, taxation, and regulation of fish and game.



The federal and state court cases about Alaska tribes in the 1990s showed the unfolding of tribal recognition and the beginning of clarification over tribal jurisdiction. After the U.S. Supreme Court decided the *Noatak* case in 1991, which did not clarify what powers the tribe might have, there were three more significant federal cases concerning Alaska tribal status and jurisdiction in the 1990s: 1) *Native Village of Venetie IRA Council v. State of Alaska* (adoption case), 2) *Native Village of Tyonek v. Puckett* (power to exclude case), and 3) *State of Alaska v. Native Village of Venetie* (tax case).

The first Venetie case, the adoption case, involved both the Venetie and the Fort Yukon Tribes and individual tribal members. The Native parties filed suit to require the State of Alaska to recognize tribal court adoption decrees. The State of Alaska argued that even if the villages involved had tribal status, Public Law 280 terminated tribal jurisdiction. The federal court ruled that Public Law 280 does not terminate tribal jurisdiction, but that it gives concurrent jurisdiction between the tribes and State. The Court went on to say that the tribal status question was settled by the Interior Department's publication of the list of federally recognized tribes on October 21, 1993 for all tribes on the list. The Court, however, ruled that the question of status for Alaska tribes prior to October 21, 1993 was unanswered.

In *Native Village of Tyonek*, the federal court held that Tyonek is a tribe and went on to say that the Interior Department's list of recognized tribes was retroactive. In other words, tribes on the list had tribal status prior to October 21, 1993. The case put to rest the question of whether Tyonek and other Alaska tribes would be required to factually prove their tribal status for events occurring before 1993.

The Venetie tax case is the most notorious federal case of the 1990s affecting Alaska tribes. The basic question in the case ended up being whether or not the land underlying the village of Venetie was Indian country or not. Venetie was

once a reservation created under the Indian Reorganization Act, but it was terminated by the Alaska Native Claims Settlement Act (ANCSA). Native corporations were formed under ANCSA and received land, but the corporations transferred the land (1.2 million acres) to the Tribe which now owns it in fee simple title. The Venetie Tribal Government tried to tax construction occurring in the village, which requires a finding of Indian country status to do so.

After many years of various court hearings, the Venetie tax case was heard by the United States Supreme Court in 1998. The Court held that the land in question had gone through ANCSA and does not have Indian country status; therefore, the Tribe could not impose a tax over entities doing business on their lands. The case left the decision that land which has gone through the Alaska Native Claims Settlement Act is no longer Indian country. However, the Venetie tax case does not rule out the possibility of Indian country for Alaska Native townsites and Native allotments, neither of which were issues in the case.

At the end of the 1990s, the Alaska Supreme Court recognized the existence of federally recognized tribes in Alaska and their inherent powers of self-government over members in a case called *John v Baker* (1999). The case was an extreme departure from earlier Alaska Supreme Court decisions and strongly supported tribal jurisdiction in domestic relations over tribal members regardless of whether they occupy Indian country. The case involved a custody dispute between members of two different tribes who sought and received a tribal court determination of joint custody over their children. The father however, was unhappy with the tribal court decision and sought sole custody over the children by filing the same case in state court. After hearings at lower levels, the case was eventually heard by the Alaska Supreme Court. The Court basically overturned its earlier decisions about the non-existence of tribes in Alaska and their jurisdiction, and decided that there are tribes in Alaska, tribal courts, and tribal jurisdiction over child custody disputes even in the absence of Indian

country. In other words, tribal jurisdiction in Alaska is largely based on tribal membership, making decisions regarding tribal members, and protecting the health and safety of the tribe and tribal members.

The decision of the *John v Baker* case was greatly needed to further state recognition of and cooperation with tribes in Alaska. The case removed a critical roadblock in progressing towards this goal, and placed Alaska tribes in a much better position to benefit from both federal and state recognition as they progressed into the 21<sup>st</sup> century.

### **2000s : Refining Tribal Jurisdiction**

In 2000, Alaska Governor Tony Knowles established the first statewide tribal-state negotiations team to develop a tribal-state cooperative framework called the Millennium Agreement. It was to be a step along the way of government-to-government relations between tribes and the Alaska State government. However, the second and third Alaska Governors in the 2000s, Frank Murkowski and Sarah Palin, did not continue the work on, or seem to acknowledge the Agreement.

The Alaska State Supreme Court further supported tribal recognition and jurisdiction in August of 2001 in a case called *C.R.H.* The *C.R.H.* case involved a child in need of aid who was eligible for tribal membership in both of the villages of Nikolai and Chickaloon. Chickaloon intervened in the state ICWA case before Nikolai, but later turned over their status as the ICWA tribe to Nikolai. Nikolai then made a motion to have the case transferred to the Nikolai Edzeno Tribal Court. In earlier cases concerning transferring jurisdiction under ICWA to tribes, the Alaska Supreme Court had basically held that even if there were tribes in Alaska, P.L. 280 terminated jurisdiction they might have. The State Supreme Court reversed previous faulty reasoning in the *C.R.H.* case, and held that ICWA

cases in state court could be transferred to tribal courts, reversing earlier Supreme Court decisions on this issue.

The following year, 2002, the Alaska Attorney General's office issued an Opinion interpreting the *C.R.H.* case which came to the conclusion that "*state law now recognizes that tribes in Alaska have authority over child custody matters involving tribal children and need not petition the Secretary of the Interior to reassume jurisdiction before exercising their authority.*" However, in 2003, the Alaska Supreme Court made a decision to deny 'comity' (recognition) of a tribal court case in Selawik because the tribal court did not provide the parties due process which means being notified of tribal court hearings, and an opportunity to be heard in front of fair and impartial judges. At this point in time, the State of Alaska basically recognized tribes, tribal courts, and their jurisdiction over child custody matters involving tribal children as long as the tribal court provided due process.

One of the inherent powers of a tribe is the power to banish a member to protect the safety and welfare of the tribe. In 2003, an Alaska court supported this right in a case called *Native Village of Perryville v. Tague*. In this case, the Court affirmed the Village's right to banish one of its members for violent behavior and to have the state court and state troopers assist in enforcing its order. The Court cited the *John v. Baker* case, and found that a tribe's power to banish its members derives from its inherent authority over "*internal affairs.*" However, issues surrounding tribal protective orders continue to be litigated, and cooperation in enforcement from state agencies is variable.

Following the election of Governor Frank Murkowski, Attorney General Greg Renkes issued a new Opinion about tribes in 2004, which was an about-face from the 2002 Opinion. The major points of the 2004 Opinion were that Alaska State Courts have exclusive jurisdiction over Alaska Native child custody proceedings unless the Department of Interior has approved an ICWA Section

1918 petition, or state court has transferred a case under 1911(b), and that tribes that have not petitioned for reassumption have no authority to initiate child custody proceedings in tribal court. The Opinion implies that the cultural adoption regulation is the sole alternative to reassumption: “*However, the state has long ratified Indian adoptions that occur under tribal custom as a matter of equity under state law. Nothing in C.R.H. or this Opinion should be construed as changing this longstanding policy in any respect.*” Although Alaska tribes continued to initiate child custody and protection cases in tribal court after the 2004 Opinion was issued, they faced more resistance from the State in terms of cooperation from state agencies.

The matter of tribal initiation of child protection cases continued to be litigated, and in 2007, Superior Court Judge Tan issued a decision that Alaska Tribes possess inherent power to hear cases involving member children in a case called *Tanana v. State of Alaska*. The decision was appealed and continues to be litigated. Similarly, in 2008, U.S. District Judge Timothy Burgess ruled that the Kaltag tribal court adoption orders are entitled to full faith and credit under the Indian Child Welfare Act in *Kaltag v. Jackson* and the State filed an appeal of that case. New cases involving the existence of tribal jurisdiction in child welfare cases continued to be filed in 2009, and the litigation goes on.

By the end of the 2000s, the existence of federally recognized tribes in Alaska clear, but a wide path of litigation over tribal jurisdiction is on-going. As much as the executive branch of the Alaska State government protests the existence of tribal jurisdiction, the judicial branch tends to confirm it, and is backed up by the federal courts. In the meantime, many Alaska tribes continue to take care of their members and children through tribal court activity as best they can, under the guidance of modern tribal law and traditional values that have served them for hundreds of generations.

## **Current Alaska Tribal Courts**

Today, there are some 229 Alaska tribes on the Department of Interior list of federally recognized tribes. Over half of these tribes are developing or have active tribal courts. The types of cases that Alaska tribal courts address include child custody, adoptions and guardianships, child protection, child support enforcement, domestic violence, probate, alcohol violations, animal control, environmental regulation, juvenile delinquency, juvenile status offences, cultural protection, internal governmental disputes, property damage, property disputes, trespass, misdemeanor offences, and fish and game/marine mammal protection.

Alaska tribal courts are organized under a range of structures, but most use a panel of judges rather than a single judge to hear cases. The tribal council may serve as the court, or a pool of judges created that may include some tribal council members. There may be a body entirely separated from the council established as the tribal court. The judges tend to be elders, council members, and tribal members who are respected and well-suited to the job, but not attorneys. Some tribes use the circle style sentencing format, which is an increasing trend particularly for juvenile delinquency and status offence cases.

Although tribal courts have a wide range of independence in terms of structures and procedures, they are all required to follow the due process guidance of the Indian Civil Rights Act of 1968, which is similar to the United States Bill of Rights. The fundamental elements of due process are notification of hearings, and an opportunity to be heard in front of a fair and impartial tribunal. The tribes are not required to provide due process in the same image as do the state or federal courts. Many of the provisions of the Indian Civil Rights Act apply to courts practicing criminal jurisdiction in cases where incarceration is a possibility. While all tribes in Alaska are interested in exercising their judicial capacity to protect the health and well-being of their tribal members, very few are interested in

incarcerating them. Alaska tribes are most interested in protecting people and healing through treatment programs and cultural activities, and mending relationships.

While court battles over tribal jurisdiction between the State of Alaska and tribes are currently on-going, and will continue into the foreseeable future, rural Alaska is one of the most dangerous places to live in the United States. The danger is largely due to an alarming lack of adequate state law enforcement and justice services, and cross cultural issues. More collaboration and cooperation between the State of Alaska and Alaska's tribal courts would go a long way as part of the solution to rural Alaska's judicial problems.

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