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# Ancsa: Sovereignty and a Just Settlement of Land Claims or an Act of Deception

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# ANCSA: SOVEREIGNTY AND A JUST SETTLEMENT OF LAND CLAIMS OR AN ACT OF DECEPTION

*Marilyn J. Ward Ford* and Robert Rude***

## A. LAND CLAIMS

Over the last two decades, many comments have appeared in newspaper editorial pages condemning the Alaska Native Claims Settlement Act[1] (ANCSA) as a gift of land and money to the Natives of Alaska. Contrary to these reports, ANCSA was not a gift to Natives of Alaska, it was a settlement of aboriginal land rights. Pursuant to ANCSA, Alaska Natives were granted 44,000,000 acres of land and nearly $1 billion for extinguishment of their aboriginal land rights to all of Alaska.

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** Robert W. Rude, a Native Alaskan, was appointed a representative for the unorganized interior Alaskan villages at the first meeting of the Alaska Federation of Natives in 1966. In 1970, he was elected to the Board of Directors of the Cook Inlet Native Association (CINA) and became President in 1972 and helped move CINA into the mainstream of Indian self-determination.

After the passage of ANCSA in 1971, Robert Rude was a founding member of Cook Inlet Region, Inc., and in 1972 was elected Second Vice President.

In his many years of service, Robert Rude has served on AFN's Human Resource Committee, was President of CIRI's Foundation, Cook Inlet Tribal Council, and of the Southcentral Foundation.

[1] 43 U.S.C. §§ 1601-1629(e) (1988).

ANCSA is inconsistent with the Northwest Ordinance of 1787,[2] a piece of legislation which recognized Indian tribes as "distinct, independent political communities" with inherent sovereignty and rightful possession of their land.

The Northwest Ordinance was enacted by the First Congress in 1789 and declared:

> The utmost good faith shall always be observed towards Indians; their land and property shall never be taken from them without their consent, and in their property rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by congress; but laws founded in justice and humanity shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.[3]

Prior to the adoption of ANCSA—and even prior to the purchase of Alaska by the United States, Native Alaskans possessed, used, occupied and claimed the territory as their ancestral land.[4] Although the purchase of Alaska from Russia was formalized in the Treaty Concerning the Cession of Russian Possessions in North America[5] on March 30, 1867, and reference

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[2] Northwest Ordinance of 1787, 1 Stat. 50 (1789).

[3] *Id.* at 52.

[4] Note that there were never any treaties between the United States and the Native groups in Alaska designating lands that the Native Alaskans were entitled to possess and occupy.

[5] Treaty Concerning the Cession of Russian Possessions in North America, March 30, 1867, U.S.-Russia, 15 Stat. 539 (1867). The Treaty of Cession did not directly address the issue of Alaska Native's legal rights to the land. Article 3 of the Treaty indirectly dealt with the issue by providing that "the uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country . . . ." *Id.* at 542. This provision made Alaska Natives subject to policies adopted for "aboriginal tribes." But the United States and the future of Alaska Natives would be tied to those of the American Indian. *Id. See also* Miller v. United States, 159 F.2d 997 (9th Cir. 1947) (holding that the Treaty of Cession did not extinguish aboriginal title to all Native people in Alaska).

was made to Native land claims in that Act as well as in the Organic Act of 1884[6] which established a civil government for the Alaskan territory, the issue of Native Alaskan legal rights to the land was not resolved by either statute. In fact, Section 8 of the Organic Act specifically postponed resolution of the issue and reserved it for future action by Congress.[7] The Alaska Native Allotment Act of 1906[8] provided for the allotment of homesteads of up to 160 acres of nonmineral land, but it also failed to resolve the issue of Native Alaskan land claims. Aboriginal land claims were acknowledged, but again the issue of Native Alaskan rights was left unresolved by the Alaska Statehood Act of 1958[9] in which the United States government directed Alaska to select 102,500,000 acres of federal lands which were "vacant, unappropriated, and unreserved at the time of their selection.[10]

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[6] The Organic Act for Alaska of 1884, Act of May 17, 1884, ch. 53, 23 Stat. 24 (1884) (providing for a civil government as well as extending United States mining laws to Alaska).

[7] Section 8 of the Organic Act of 1884 provides as follows:
That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress. *See id.* § 8 at 26. The statute was apparently intended to provide security to "non-Indians who had pioneered in Alaska" but its "effect on aboriginal title, however, has never been certain." FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 742 (Rennard Strickland & Charles F. Wilkins eds., Michie 1982); *See* United States v. Berrigan, 2 Alaska 442,444 (1905) (interpreting the Act to provide protection for Native Alaskan's right of occupancy); *But see* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278 (1955) (ruling that rather than recognizing the Indians right of ownership, the Act simply maintained the status quo). The Supreme Court in *Tee-Hit-Ton Indians* reasoned that "careful examination" of the statute and legislative history indicate no congressional intent "to grant to the Indians any permanent rights in the lands in Alaska occupied by them." *Id.*

[8] Alaska Native Allotment Act, May 17, 1906, Ch. 2469, 34 Stat. 197 (1906).

[9] *Id.* (codified as amended at 48 U.S.C. § 21 (1994).

[10] *See id.* § 6(b). *See also* Section 4 of the Statehood Act pursuant to which the State of Alaska disclaimed any right or title to "any lands or other property . . . the right or title to which may be held by an Indians, Eskimos, or Aleuts . . . or held by the United States in trust for said natives." *See id.* § 4.

The intent was to "provide the new State with a solid economic foundation."[11] Despite the fact that the Alaska Statehood Act acknowledged Native Alaskans' right to lands used and occupied by them, it provided no definition or criteria for such use or occupancy.

In 1959 the Alaska Court of Claims ruled that the Tlingits and Haidas had established use and occupancy to the lands and waters of virtually all of Southeastern Alaska,[12] and they were entitled to compensation for "all usable and accessible land which they used and occupied."[13] A year earlier, under the Statehood Act, the State of Alaska had been given a land grant of 103,000,000 acres. When the State of Alaska began selecting lands near villages, Alaska Natives felt threatened. Alaskan Natives who claimed aboriginal title to over 365,000,000 acres of land in Alaska, virtually the entire state,[14] protested the early selections made by the State of Alaska under the Statehood Act.[15] The Natives' claims to most of the state raised the issue of what, if any land, in Alaska was available for selection by the state under the Statehood Act.[16]

Frustrated, frightened, and angered by the threat of state selection of aboriginal lands, Alaska Natives filed claims with the

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[11] *See* U.S. v. Atlantic Richfield, 435 F. Supp. 1009, 1015 (D. Alaska 1977); *See also* H.R. REP. NO. 92-523, at 4 (1971), *reprinted in* 1971 U.S.C.A. 2192 and 1958 U.S.C.C.A.N. at 2933, LEGISLATIVE HISTORY.

[12] Tlingit and Haida Indians of Alaska v. United States, 177 F. Supp. 452 (Ct. Cl. 1959).

[13] After nine years, the court placed a value of $7,546,053.80 on the 16 million acres taken by the government. Tlingit and Haida Indians of Alaska v. United States, 389 F.2d 778 (Ct. Cl. 1968).

[14] *See* COHEN, *supra* note 7, at 198 (citing Lazarus & West, *The Alaska Native Claims Settlement Act: A Flawed Victory*, 40 LAW & CONTEMP. PROB. 132 (1976)); *See also* ROBERT D. ARNOLD, ALASKA NATIVE CLAIMS 119 (1976). By May of 1967, thirty-nine protests had been filed. *Id.* They ranged in size from a 640-acre claim by the village of Chilkoot to the 58 million-acre claim of the Arctic Slope Native Association. *Id.* Because many claims were overlapping, the total acreage under protest -- about 380 million acres -- was greater than the land area of the state. *Id.*

[15] COHEN, *supra* note 7, at 742.

[16] *Id.*

Department of the Interior to protect their aboriginal land rights.[17] On January 12, 1967, Stewart Udall, the Secretary of the Interior imposed a "land freeze"—moratorium—on the transfer of title to public land to the State of Alaska until the issue of native land claims was resolved.[18] The potential loss of lands near Native communities was the issue that brought Alaska Natives together, and it was what led to the formation of Native organizations throughout the state.

In June 1966, a charter of 25 members of the Cook Inlet Native Association flew from Anchorage to Barrow to meet with Arctic Slope Native Association members. The Barrow meeting set the stage for the first statewide Native meeting in October 1966. The first statewide Alaska Native conference was held in Anchorage, Alaska. The October 1966 meeting was called to organize Alaska Natives so that they could begin to fight for their land rights. From the mid-1960's to the early 1970's, the Alaska Federation of Natives ("AFN") was the main lobbyist for an Alaskan Native

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[17] The existence of Native claims to most of the state raised the question of what, if any lands were available for state selection under the terms of the statute. Because Natives protested most of the state's early selections, the Secretary of the Interior, on January 12, 1969, imposed a freeze on further patenting or approval of applications for public lands in Alaska pending the settlement of Native claims. Pursuant to Public Land Order No. 4582 the freeze was scheduled to expire on midnight December 31, 1970, 34 Fed.Reg. 1025 (1969). The effect of the moratorium was to freeze the appropriation and disposition of all public lands in Alaska that were unreserved prior to the expiration of the order, including selection by the State of Alaska under the Statehood Act. *See* U.S. v. Atlantic Richfield at 435 F. Supp. 1009, 1017 (D. Alaska 1977). *See also* COHEN, *supra* note 7, at 742.

[18] ARNOLD, *supra* note 14, at 117. *See also* United States v. Atlantic Richfield Co., 449 U.S. 888 (1980):

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

ARNOLD, *supra* note 14, at 118 (quoting Secretary of the Interior Udall).

land claims settlement.[19] AFN placed many of their views into the legislation that eventually emerged from Congress in ANCSA. AFN publicly advocated a settlement that would protect aboriginal rights, preserve Alaskan Native culture, and bring self-determination to Alaskan Natives. AFN leadership repeatedly emphasized that land and aboriginal rights were more important than money, however, it was reported that AFN reluctantly supported a land settlement of 60 million acres, $500,000,000 and a perpetual 2% royalty from the State of Alaska for resource revenues.[20] Leadership at AFN supported the use of a corporate structure of land ownership by Alaska Natives instead of the reservation system that was used by lower "48" Indians.

The issue of land claims - aboriginal right and entitlement to land in Alaska - was not resolved until 1971 when Congress adopted ANCSA. Although ANCSA did not specifically recognize Native Alaskans' aboriginal land claims, it finally resolved all disputes based on them by retroactively extinguishing aboriginal title.[21] ANCSA retroactively extinguished any and all

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[19] The fight to secure a land claims settlement for Alaska Natives was financed by the Yakima Indians of Washington and Tyonek Natives loaned AFN $100,000. *Id.*

[20] U.S. DEP'T OF THE INTERIOR, ANCSA 1985 Study, (June 29, 1984) (unpublished draft). The 1985 ANCSA Study states that Native corporations at the regional and village levels would manage the settlement for the benefit of Alaska Natives and their descendants. The regional corporations' charters were to authorize them to undertake projects to promote the health, welfare, education, economic, and social well-being of their shareholders. *Id.*

[21] 43 U.S.C. § 1603 (a) (b) (c). *See* U.S. v. Atlantic Richfield, 435 F. Supp. 1009 (D. Alaska 1977), where the United States on behalf of itself and Arctic Slope Eskimos, sued the State of Alaska and 140 corporations and individuals for trespass on aboriginal lands prior to the adoption of ANCSA. *Id.* at 1013. In rendering its decision, the federal District Court for the District of Alaska emphasized that in Alaska, "unlike the Lower 48, there were never any treaties between the United States and Alaska Native groups designating lands which Natives were entitled to occupy or defining their rights to the taking of fish and game." *Id.* at 1015. It then quoted ANCSA's declaration that all "prior conveyance of public land . . . and all tentative approvals . . . shall be regarded as an extinguishment of the aboriginal title thereto, if any;" that "all aboriginal titles, if any . . . are hereby extinguished;" that "all

Native claims against the United States, the State of Alaska, and other persons that were "based on aboriginal right, title, use or occupancy of land" in Alaska.[22] It did not expressly provide for any land to be conveyed to the state of Alaska; however, by implication, the passage of ANCSA permitted the State to resume its selection of land which had been interrupted by Secretary Udall's imposition of the land freeze."[23]

## B. ANCSA ENACTED

The discovery of oil in Alaska's Prudoe Bay in 1969 -- and construction of the Trans-Alaska Pipeline—provided the impetus for adoption of ANCSA and legislative resolution of the issue of native Alaskan land claims.[24] Oil companies were extremely

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claims . . . based on claims of aboriginal right, title, use or occupancy . . . are hereby extinguished." *Id.* at 1022. In holding that tort claims had been extinguished by ANCSA, the court reasoned that "aboriginal title," as distinguished from "Indian title recognized by treaty or reservation, is legally extinguished when the United States makes an otherwise lawful conveyance of land pursuant to federal statute." *Id.* at 1020 (quoting U.S. v. Gemmill, 535 F.2d 1145 (9th Cir. 1976)). Based on this reasoning, the court ruled that ANCSA retroactively extinguished Alaska Natives' aboriginal title. It held that "congressional intent was to make clear that any prior grant of land under federal law or tentative approval under . . . the Statehood Act operated to extinguish aboriginal title at the time the conveyance was made or the approval given." *Id.* at 1023.

[22] *See Atlantic Richfield*, 435 F. Supp. at 1022. Retroactive extinguishment was emphasized by the court which ruled that "all aboriginal titles and claims in Alaska based on use and occupancy are hereby extinguished" and that the unmistakable intent of Subsection 4(a) is not only to validate prior conveyances of public land in Alaska, including tentative approvals of State land selections under the Statehood Act, but to dispel any doubt that aboriginal title to such lands was extinguished at the time of tentative approval or conveyance. *Id.* at 1022.

[23] *See* ARNOLD, *supra* note 14, at 272.

[24] "The resolution of Native claims in Alaska was expedited by pressure from the state and from oil companies wishing to exploit the state's newly discovered petroleum resources. Oil development and transportation could not progress so long as such claims and rights clouded state authority to lease lands and transfer rights to the companies, as well as the ability of the federal government to authorize construction of the

anxious to commence oil drilling operations in order to extract the "black gold" found in Alaska but they declined to do so until Native Alaskans' claims to the land had been extinguished; pressure from the oil companies to resolve the outstanding issue of aboriginal land claims and to expedite the commencement of oil drilling operations in Alaska led to the adoption of ANCSA.[25]

Pursuant to ANCSA, title to approximately 40 million acres of federal public land was indirectly conveyed to Alaskan Natives—Indians, Eskimos, and Aleuts;[26] the Alaskan natives were awarded $962.5 million;[27] and all Native Alaskans' land claims were retroactively extinguished.[28] Ostensibly, Congress adopted the legislation to effectuate a "fair and just settlement of

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Trans-Alaska Pipeline, necessary to transport the oil. Passage of ANCSA in 1971 cleared these obstacles and implicitly recognized the validity of prior Native claims by its careful extinguishment of all aboriginal rights and claims based upon them." *See* COHEN, *supra* note 7, at 742.

[25] 43 U.S.C. 1601-1629(e) (1988). ANCSA created a complex corporate mechanism for Native selection, administration, and development of land in Alaska. It provided for the creation of twelve regional corporations and for the establishment of Native corporations and for title to forty million acres of land to be selected by Native villages and the regional corporations. ANCSA also provided for the expenditure, investment, and distribution of an Alaska Native Fund of $462.5 million in congressional appropriations and another $500 million of oil royalties. 43 U.S.C. 1611, 1613(h) (1986).

[26] *See* 43 U.S.C. §§ 1611, 1613 (1986).

[27] *See id* § 1605.

[28] *See id* §§ 1611, 1613. Pursuant to ANCSA, shares of stock in the ANCSA corporations were non-alienable and could not be transferred to non-Natives until after December 18, 1991. *See* 43 U.S.C. 1606(h). Under 1988 and 1991 ANCSA Amendments, (Pub. L. No. 102-201, Sec. 301, 105 Stat. 1633 (1991)) the restrictions on transfer of the stock to non-Natives was lifted on December 18, 1991, the date when all stock originally issued to Natives in Regional and village corporations was canceled and new shares were issued. The new shares are freely transferable unless the corporations amended their articles prior to December 18, 1991 to restrict alienation to non-Natives. In those cases where the articles were not amended, Native corporation stock as well as actual control of the corporations themselves could be taken away from the Native Alaskans and conveyed to non-Natives who would not only own the land but also establish policy for the corporations. *See* COHEN, *supra* note 7, at 757.

aboriginal land claims" and to finally resolve the outstanding issue regarding the legal rights of eighty thousand Native Alaskans to the land they used, occupied, and claimed title to.[29]

Rather than simply conveying ancestral lands directly to the Natives, Congress set up regional corporations to distribute the land and assist Native corporations to receive and administer the lands for the benefit of Native Alaskans who would become stockholders in the Native corporations. Pursuant to ANCSA, Native Alaskans were entitled to enroll and become shareholders[30] in a regional corporation and in one of over two hundred Native village corporations; enrollment was determined according to the Natives' place of residence or origin.

The relevant provision of ANCSA states that "if the village had on 1970 census enumeration date a Native population between

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[29] The House Report on ANCSA's proposed settlement plan implies that it was intended to be a fair and just settlement of aboriginal land claims. It states, in relevant part, that:

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

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

[30] *See id.* § 1611. Pursuant to ANCSA, shares of stock in the ANCSA corporations were non-alienable and could not be transferred to non-Natives until after December 18, 1991. *See id.* § 1606(h). Under 1980 and 1991 ANCSA Amendments the restrictions on transfer of the stock to non-Natives was lifted on December 18, 1991, the date when all stock originally issued to Natives in Regional and village corporations was canceled and new shares were issued. *See* Pub. L. No. 102-201, Sec. 301, Dec. 10, 1991, 105 Stat. 1633 (1991). The new shares are freely transferable unless the corporations amended their articles prior to December 18, 1991 to restrict alienation to non-Natives. In those cases where the articles were not amended, Native corporation stock as well as actual control of the corporations themselves could be taken away from the Native Alaskans and conveyed to non-Natives who would not only own the land but also established policy for the corporations. *See* COHEN, *supra* note 7, at 757.

25[31] and 99, it shall be entitled to a patent to an area of public lands equal to 69,120 acres."[32] The corporations were directed to select land for their use in twelve geographic regions and within the vicinity of the Native villages and the corporations were given responsibility for administration of their portion of the Alaska Native Fund and distribution of funds to the Native shareholders.[33]

Ending the land freeze imposed by the Secretary of the Interior and the building of the trans-Alaska oil pipeline both influenced Congress to approve a settlement of Alaska Native land claims. In late 1971, Congress approved ANCSA, a bill that included 962.5 million dollars and 40 million acres of land to settle the Alaska Native Claims.[35] President Nixon agreed to withhold his signature from the legislation until AFN met and voted on the bill.

AFN called a statewide meeting at Alaska Pacific University in Anchorage on December 18, 1971 to vote on the bill. The legislation was endorsed by the leadership of AFN which agreed that the bill was the best Alaska Natives could get at the time.

Robert Rude attended the AFN meeting that approved ANCSA as a voting delegate for the Cook Inlet Native Association ("CINA"), and Robert Rude voted with other delegates to approve the legislation. Arctic Slope delegates were not in favor of the legislation and they voted against it. The ANCSA legislation was approved by AFN delegates by a 511 to 56 vote. A special telephone relay advised President Nixon of the vote. Robert Rude reported that the delegates were standing motionless

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[31] Cohen, *supra* note 7, at 740.

[32] 43 U.S.C. 1613(b), (1986).

[33] *See* 43 U.S.C. §§ 1611, 1613 (1986).

[35] 43 U.S.C. §§ 1601-1629(e) (1986). ANCSA created a complex corporate mechanism for Native selection, administration, and development of land in Alaska. It provided the creation of twelve regional corporations and for the establishment of Native corporations and for title to forty million acres of land to be selected by Native villages and the regional corporations. ANCSA also provided for the expenditure, investment, and distribution of an Alaska Native Fund of $462.5 million in congressional appropriations and another $500 million of oil royalties. 43 U.S.C. § 1611, 163(h) (1986).

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

After the President finished his statement there was applause and the delegates started congratulating each other. Attendants at the meeting were overjoyed, and most delegates viewed ANCSA as a victory for their people. Like many other delegates, Robert Rude thought ANCSA would bring land and money to the Native Alaskan people, and that it would provide a means to improve the living conditions of a people basically living in poverty.

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

Many Native Alaskans view ANCSA as an act of deception—an act destined for failure. They assert that ANCSA was designed to assimilate Alaska Natives into the mainstream of American society and divested them of their land, culture, heritage—and ultimately their inherent tribal sovereignty.

## C. TRIBAL SOVEREIGNTY AND INDIAN COUNTRY

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

> [t]he reverence American Indians hold for the sovereignty of their tribal governments is tremendous. Certainly this respect equals that possessed by all Americans for the freedoms [e]mbraced in the [United States] Constitution . . . .
>
> Sovereignty is a powerful word that conveys in its interpretation the baggage of centuries of human emotion. Originally referring to the absolute power of kings over their subjects—the king could do no wrong . .

> Much of the understanding regarding tribal sovereignty stems from the mistaken idea that it is a gift granted by the federal government to American Indian tribes.
>
> The reality is that American Indian tribes and tribal governments existed long before . . . the framers of the [United States] Constitution were born.
>
> American Indian sovereignty encompasses inherent rights and powers that have been retained by Native nations and not specifically abridged by the federal government.[36]

Native American tribes have begun to reassert inherent sovereignty in recent years. As sovereign nations inhabiting Indian country, tribes have chosen to "simply exercis[e] their . . . rights" and "make money from their right to tax business ventures" on their lands as well as pursuing entrepreneurial activities.[37] The funds raised from taxes or entrepreneurial activities have allowed tribes to make "striking advances on numerous reservations" and support fire stations, health clinics, education, housing, employment, and other programs that have "dramatically improved the lives" of Native Americans.[38]

According to many Native Americans, the "efforts of American Indians to improve their standard of living for themselves and their children requires the freedom to employ their innate sovereignty," which is "not a weapon but an inherent characteristic and vehicle that can transport" Native Americans from "dependency to self-sufficiency.[39] As stated by Ms. Kunesh, not only does sovereignty symbolize freedom, it also enhances important revenue sources that "many tribes have used to raise themselves out of poverty.[40]

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[36] Patricia H. Kunesh, Address at the Conference on Native American Sovereignty, Quinnipiac College School of Law (October 24, 1997).

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

### 1. Legislative and Judicial Determination of Indian County

The term Indian Country "was first used by Congress in 1790 to describe the territory controlled by Indians."[41] In 1948, Congress adopted 18 U.S.C. § 1151, which defines Indian country as "(a) all land within the limits of any Indian reservation . . ., (b) all dependent Indian communities within the borders of the United States . . ., and (c) all Indian allotments, the Indian titles to which have not been extinguished."[42]

Two United States Supreme Court cases established the basis of the dependent Indian community component of the 18 U.S.C. § 1151 definition of Indian country. In the first case, *United States v. Sandoval*,[43] the Court created the "dependent Indian communities" test[44] and held that the federal government has the power to enact laws for the benefit and protection of all "dependent Indian communities within the geographical limits of the United States."[45] In arriving at its decision, the Court stated that:

> [n]ot only does the Constitution expressly authorize Congress to regulate commerce with Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States . . . the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within or without the limits of a state.[46]

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[41] STEVEN C. PEVAR, RIGHTS OF INDIANS AND TRIBES 16 (1992), (citing Act of July 22, 1970, ch. 31, 1 Stat. 136, 136).

[42] 18 U.S.C. § 1151 (1994)

[43] 231 U.S. 28 (1913).

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

[45] *Id.* at 46.

[46] *Id.* at 45-46.

In *United States v. McGowan*,[47] the second case on which Congress relied when enacting section 1151(b), the Court used the "dependent Indian community" test set forth in *Sandoval* to determine whether an Indian "colony" was Indian country and subject to regulation by the federal government.[48] In dismissing form over substance, the court found that "the protection of a dependent people" was the "fundamental consideration of both Congress and the Department of the Interior" in establishing the colony and that Native Americans in the colony had been "afforded the same protection by the government" that had been provided to Native Americans in other settlements known as "reservations."[49] The Court held that a dependent Indian community is Indian country and that Indian country exists wherever any land has been "'set apart for the use of Indians as such under the superintendence of the [federal] [g]overnment.'"[50]

After the enactment of section 1151(b), the Supreme Court reaffirmed that a dependent Indian community is Indian country. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,[51] the Court held that "the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or a 'reservation.' Rather, we ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the [g]overnment.'"[52]

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

The Supreme Court first recognized inherent tribal sovereignty in *Worcester v. Georgia*,[53] holding there that Indian nations were

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[47] 302 U.S. 535 (1938).

[48] *Id.* at 538-39.

[49] *Id.* at 538.

[50] *Id.* at 539 (quoting United States v. Pelican, 232 U.S. 442, 450 (1914)).

[51] 498 U.S. 505 (1991).

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

[53] 31 U.S. (1 Pet.) 515 (1832).

"distinct, independent political communities, retaining their original natural rights . . . from time immemorial."[54] The doctrine of inherent tribal sovereignty was later reaffirmed by the Court in *Oklahoma Tax Commission v. Citizen Bank Potawatomi Indian Tribe of Oklahoma*,[55] *United States v. Wheeler*[56] and *Merrion v. Jicarilla Apache Tribe*.[57]

Prior to the arrival of Columbus in 1492 -- even prior to the adoption of the United States Constitution -- Native Americans had inherent tribal sovereignty as well as Indian title to the territory they had long possessed, used, and occupied as their ancestral land. They had the right to occupy their ancestral homelands until that right was extinguished by Congress.[58] Indian title is the right of occupancy.[59] The loss of Indian title—the right to use, occupy, or possess land — does not affect sovereignty of tribes.[60]

> Tribal sovereignty is authorized under the IRA,[61] in which Congress provided that [an] Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when (1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations

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[54] *Id.* at 559.

[55] 498 U.S. at 509 (noting that suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation).

[56] 435 U.S. 313, 323 (1978) (noting that powers of Indian tribes, including the power to enforce criminal laws against tribe members, are inherent).

[57] 455 U.S. 130, 140-1 (1982) (concluding that a tribe's authority to tax non-Indians who conduct business on the reservation is an inherent power necessary to self-government).

[58] *See* PEVAR, *supra* note 41, at 20-21.

[59] *See id.* at 21.

[60] *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[61] 25 U.S.C. § 476(a) (1994).

> as the Secretary may prescribe: and (2) approved by the Secretary pursuant to subsection (d) of this section.[62]

The IRA also provides that "[i]n addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To . . . negotiate with the [f]ederal, [s]tate and local governments."[63]

In 1993, acting pursuant to the authority delegated to it by Congress, the Department of the Interior published a list of Alaska Native Villages that were federally recognized as Indian tribes with inherent sovereignty, that possessed the same status as tribes in the lower forty-eight states, and that "functioned as political entities exercising governmental authority."[64] The Department of the Interior emphasized that the purpose of the publication was to "expressly and unequivocally acknowledge" that Alaska Native Villages and regional tribes included on the list were recognized as "political entities exercising governmental authority" and retained their inherent sovereign authority.[65] It stated that:

> [b]y the time of enactment of the IRA . . . the preponderant opinion was that Alaska Natives were subject to the same legal principles as Indians in the contiguous [forty-eight] states, and had the same powers and attributes as other Indian tribes. . . . The purpose of the current publication is to publish an Alaska list of entities conforming to the intent of 25 CFR 83.6(b) and to eliminate any doubt as to the Department's intention by expressly and unequivocally acknowledging that the

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[62] *Id.*

[63] *Id.* § 476(e).

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

[65] *Id.* at 54, 365.

> Department has determined that the villages and regional tribes listed below are distinctly Native communities and have the same status as tribes in the contiguous [forty-eight] states.[66]

In December 1997, in *Alaska v. Native Village of Venetie Tribal Government*,[67] the United States Supreme Court heard arguments concerning whether or not Indian country and inherent tribal sovereignty survived ANCSA and continued to exist in Alaska and, if so, whether the Venetie inhabit Indian country.[68] The outcome of this decision was of utmost importance to the Venetie tribe and other Native American tribes that cherish their inherent Native sovereignty.[69] The battle for sovereignty—freedom and revenue enhancement—for at least one tribe of Native Americans, the Venetie, *ended* unsuccessfully on February 25, 1998 when the Court held that the Venetie Tribe's land was not Indian Country and its inherent tribal sovereignty did not survive ANSCA.

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[66] *Id.* at 54, 365-66.

[67] 118 S. Ct. 948 (1998). The Court held Venetie Tribe's land was not Indian Country since it did not satisfy the two prong requirement for Indian Country. Indian Country only refers to a limited category of Indian lands that are neither reservations nor allotments. It must be set aside by Federal Government for use of Indians and it must be under federal superintendence. *Id.* at 950.

[68] *Id.*

[69] *Id.*