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Summary

Two hundred plus Native villages in Alaska may join the legion of Indian groups in the long line before the gates of the federal acknowledgment process established by Congress to alleviate and rationalize selection of those groups deserving of acknowledgment as Indian tribes. Such a possibility might well seem absurd to those who have studied the pre-contact or modern lifestyle of Alaska Indians, Inuit, Yup'ik and Aleut. Their significant commitment to subsistence, their political autonomy in pursuit of a modern Native land claims settlement, and their continuing residence in rural and traditional settings has long been a matter of both academic and political record. Yet for all of this, recent court opinions by the Alaska Supreme Court and the Ninth Circuit Court of Appeals, as well as a flurry of federal district court decisions, have questioned whether Alaska Native villages were and are historical tribes and whether Congress had recognized them. The State of Alaska has taken a uniformly hostile position to the proposition that Alaska Native Villages are self-governing tribal entities. The author explores the historical reasons leading to this situation and calls for the legal and historical research critical to the survival of the legal identities of tribal communities and their land base.

Avoidance of the Federal Acknowledgment Process: Two Hundred New Petitioners Waiting at the Door

by

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Two hundred plus Native villages in Alaska may join the legion of Indian groups in the long line before the gates of the Federal Acknowledgment Process established by Congress to alleviate and rationalize selection of those groups deserving of acknowledgment as Indian tribes (CFR Sec 83, 1985).

Such a possibility might well seem absurd to those of you who have studied the pre-contact or modern lifestyle of Alaska Indians, Inuit, Yupik and Aleut. Their significant commitment to subsistence, their political autonomy in pursuit of a modern Native land claims settlement and their continuing residence in rural and traditional settings has long been a matter of both academic and political record.

Yet for all of this, recent court opinions by the Alaska State Supreme Court and the 9th Circuit of the Federal system, as well as a flurry of Federal District Court decisions, have questioned whether Alaska Native villages were and are historical tribes and whether Congress had recognized them. Furthermore, successive amendments to the Alaska Native Claims Settlement Act (the latest of which was signed into law only this year) have protected the undeveloped and unpledged land base afforded Native corporations under ANCSA, but at the same time made

strategic attempts to retribalize the land more risky because the sovereign immunity of Alaska tribes has been put into question by the courts.

The state has taken a uniformly hostile position to the proposition that Alaska Native Villages are self-governing tribal entities. Its position, supported by the Alaska Congressional delegation, and quite clearly by a federal government that has for years been folding up its tents in Alaska, is directed at a strategy developed by some Alaska Native groups to breathe new life into often moribund tribal organizations as a prelude to retaking governmental authority over settlement land and even to persuading the Secretary of Interior to reassume trust responsibilities.

While the advocates of this retribalization strategy had long recognized that baseline questions of the jurisdiction and authority of tribal governments needed to be answered either by Congress or by the courts, it is unlikely that they anticipated that courts would demand showings that Alaska Native villages were historically tribes or had been federally recognized as tribes in the many years since the purchase from Russia of the Alaska territory from Russia.

How could such an anomalous situation arise? There are many reasons. Alaska tribes never signed treaties with the federal government. Alaska's purchase

occurred at nearly the precise time that Congress determined to end the practice. Although Indian reservations of the kind found in "the lower 48" were contemplated during the Collier administration, the policy was resisted. With a single exception, only executive order reserves were established in some places for special purposes. The record of Congressional involvement with Alaska Natives is less clear than that of their counterparts in the rest of the United States, primarily because Alaska as a federal colony, poorly administered and scantily manned with federal and territorial personnel, did not derive from Congress precisely defined allocations of federal authority either in Congressional edicts or in administration of those edicts. Those in power on the scene, be they military agents, teachers, marshalls or others, improvised when authority was not clearly theirs to get the job done. Congress supported this improvisation. The careful buffering of state and federal authority necessary to separate Indian country from state sovereign domains in the Western states did not underlie Alaska territorial policy.

Demographic pressures on Alaska Native populations, their hunting grounds and their villages, did not emerge with the threatening force that required elsewhere both careful Congressional delineation and on-the-ground enforcement by federal

personnel until the post-ANCSA era of the 1970s. Early court decisions, often motivated by matters distant from the issues they ultimately affected, matters such as liberation of the slaves or a failure of Congress to provide essential legal authority to the new territory, came to be read in later years as a denial of tribal sovereignty (Governor's Task Force, 1986).

Even the Alaska Claims Settlement, an apparent extinguishment of aboriginal title, classically interpreted by both international law and the landmark decisions of Chief Justice John Marshall to be grounded in the premise that a pre-existent indigenous sovereign controlled the land, was so loaded in conditional language as to neither confirm nor deny the pre-existence of Alaska Native tribes or aboriginal title. Its design as unique Indian legislation that created both regional and village corporations and that benefited Alaska Natives as stockholders but not as enrolled tribal members left the legal and social environments more and not less confused when basic issues of tribal sovereignty were considered.

In Indian legislation which has emerged from the Congress during the 1970s to further self-determination and Native child care, Congress has used the tribal label in ways which watered down its focus upon village tribes by including other entities

as special purpose tribes to facilitate contracting and administration. Alaska Native villages were induced by the language of ANCSA, especially its award of the village core to state-chartered municipalities, to form state chartered local governments. Those villages which resisted were punished with threatened withdrawal of state funds. Alaska villages were identified for federal Indian law purposes as those designated in ANCSA. Lists of tribal entities prepared by the Bureau of Indian Affairs separated Alaska villages from other Indian tribes and, in some cases, either advertently or inadvertently, left previously identified villages off the lists.

During the first ANCSA decade white population shifts to rural Alaska made the possibility of non-Native electoral control in some places a reality. Although a subsistence preference was grafted onto the Alaska National Interest Land and Conservation Act (ANILCA) to replace aboriginal hunting and fishing rights extinguished by ANCSA, the preference was afforded "rural residents" and not Alaska Natives.

At every turn, village tribes were left out of negotiations. At the village level, residents were granted fee simple title to their home sites. State services and federal

services contracted away to neotribal non-profit corporations replaced direct federal services. Bureau of Indian Affairs offices closed their doors.

Yet for all of this, Alaska Native villages were never directly terminated by Congress no more than they were explicitly recognized as tribes (according to their opponents). Whether historically present or not, they were encouraged to become inactive as functioning governments.

In its passage of the 1988 ANCSA amendments, Congress included an explicit disclaimer as to the new act's impact on Alaska tribal sovereignty and left the matter for the courts to unravel. The court decisions of relevance either assumed the absence of tribal authority, either inherent or Congressionally designated, or demanded an historical accounting from litigants. It is this demand that brings me to your session. For, if anyone is to save Alaska Natives from the lengthy and burdensome task of reidentifying themselves, it is the scholars before me, especially those of you with expertise in ethnohistory and archival research.

In *Native Village of Stevens v. Alaska Management and Planning* (1988), the Alaska State Supreme Court held that "[t]he history of the relationship between the federal government and Alaska Natives up to the passage of the Alaska Indian Reorganization Act (citation omitted) indicates Congress intended that most Alaska Native Groups not be treated as sovereigns. [N]either the Alaska Indian Reorganization Act, nor subsequent Congressional acts have signaled a change from non-sovereign to sovereign status" (Alaska Supreme Court Opinion Slip No. 3320 at 6).

While the dissent agreed with this conclusion, it argued that the case be remanded to give the village an opportunity to make a factual showing as to its alleged tribal status (*Stevens* at 44). It recommended that the *Montoya* decision (see below) and federal acknowledgment criteria be employed as "guidelines, that may be tailored to accommodate the unique history and circumstances of Alaska." (*Stevens* at 47.)

After the State Supreme Court denied a motion for rehearing, Stevens Village decided to bring an entirely new test case rather than appeal to the U.S. Supreme

Court. That case would have a heavily documented record to demonstrate the village's historical status as a tribe.

In *Alaska v. Native Village of Venetie*, 856 F.2d 1834 (9th Cir. 1988) the Federal Appeals Court has deferred upon ruling on the village's sovereign immunity, its power to tax non-Indians and the jurisdiction of its tribal court over Indian country until the record is enlarged to determine the existence of tribal status as defined in *Mashpee Tribe v. New Seabury Corp.* 592 F.2d 575, 582-588 (1st Cir 1979).

The Mashpee case relied on the baseline definition of *Montoya v. United States*, 180 U.S. 261, 266, 21 S. Ct. 358, 359, 45 L.Ed. 521 (1901):

> By a "tribe" we understand a body of Indians of the same or similar race united in a community under one leadership or government, and inhabiting a particiular though sometimes ill-defined territory. (*Marshpee*, quoting *Montoya* at 582).

While acknowledging that leadership or tribal government could not be expected to compete with the state government, the court sought to discover leadership which had some significant effect upon a core group. This ruling out of a need to prove an ability to compete with the state for power over the Indians in question is a significant plus for evaluation of Alaska data.

Leadership also was not cast as coercive or binding but rather as leadership over "a way of life" (*Mashpee* at 584), leadership which was passed forward in good times and in bad (585).

Such village leadership can be documented in the Alaska context as it dealt with a myriad of government agents and defined the community's position on matters ranging from school policy and attendance to alcohol problems.

The court determined that tribes would no longer exist if they became assimilated into the general society (*Mashpee* at 585). As an Indian community rather than a community of Indians, boundaries could be established which are either geographic or created through societal prejudice, specifically discrimination by whites against Indians. The term "boundary" was said to be anthropological as it expressed group social consciousness (*Mashpee* at 486).

Once found to exist in a historical moment, the tribe would not be said to cease to exist unless it chose to voluntarily abandon its tribal status by giving up its role as a distinct society.

The *Mashpee* court viewed as supportive of a lower court verdict against Mashpee tribal status a 1869 legislative hearing in which community members

voted to remove restrictions on alienation of land to obtain citizenship, this as evidence of abandonment of a communal outlook for personal advancement. However, it was equally prepared to weigh as nonpersuasive of voluntary tribal abandonment and even exculpatory, evidence of coercion from outside the community in the form of governmental dealings and the presence of outsiders (*Mashpee* at 589 and 591).

Since ANCSA was passed as a unilateral Congressional settlement to change the status of land without direct village consent, only the prospective use of the powers granted shareholders in the 1988 amendments to vote to "opt out" of the restrictions on stock alienation now permanently imposed on villages (other than those in the Bristol Bay and Aleut regions who may be required to vote to retain such restrictions or "opt in") might be viewed as a similar voluntary decision to transpose the Native land base for individual reasons.[1]

The heart of the *Mashpee* test is that once a distinct Indian community guided by Native leaders is discovered, it is sufficient to confirm that later decisions of its

[1] Even this is not a direct decision to change the character of settlement land since it is held as an asset of the corporation. Village land (other than home sites) under the 1988 amendments is immune from outside taxation or attachment unless the corporation votes to pledge or to develop it. Venetie chose to take its former reserve in fee simple and to transfer its land base to a tribal entity, a clear choice to retain its communal flavor, even absent federal protection.

members have not lead to a voluntary transformation from an Indian community to a community of Indians. With the court prepared to examine completely the external pressures which so often cause an outside observer to misread enforced integration as apparent assimilation in order to secure valuable services and legal rights to persons, community and property, this judicial test offers as the Federal Acknowledgment test does not, an opportunity for a complex understanding of decisions made by Alaska Natives in an environment replete with governmental pressures and administrative confusion.

Alaska Natives will not be punished for their desire to selectively adapt their lives within modernizing Alaska society so long as the focus of their attention was upon group survival and group identity. They should not be viewed as assimilated under the *Mashpee* test because the price for schools, a confirmed land base and other modern needs was often submission to a variety of legal and administrative regimes which they neither controlled nor defined.

This particularized examination of the interplay of federal, territorial and state agents with Alaska Native villages appears to be a superior way to examine tribal viability than the Secretary of Interior's requirement that Indian groups

demonstrate tribal political influence or other authority over their members as an autonomous entity throughout history until the present in seeming isolation from the interaction between that group and outside forces. *See* 25 CFR sec. 83 7(c) (1985).

Dealings with Alaska villages as Indian Entities: Alaskan Examples

Historian Stephen Haycox of the University of Alaska has supported the call for archival research to unravel the unusual allocation of responsibilities for dealing with Alaska Native villages in territorial times. (*See* Haycox *in* Conn and Garber, 1981: Appendix 1-16.) His description of education is illustrative.

He traces the role of private teacher-missionaries lead by Dr. Sheldon Jackson, formerly superintendent of missions, who contracted with sects (as a general agent for education) to establish schools in twenty-seven villages.

> From 1905 the Bureau of Education maintained an expanded organization of services until 1931, including first medical services through itinerant doctors and nurses and four Native hospitals, then boarding school and orphanages and finally a marketing agent and warehouse in Seattle for distribution of Alaska Native hand-crafted items. (Haycox *in* Conn and Garber, 1981:3)

The multi-purpose role of these missionaries, then teachers, did not stop with this realm of activities. Teachers worked to organize village councils and sought and received law enforcement authority from Congress to deal with territorial law violators (Cohen, 1982:764). The Bureau's agents established cooperative stores and guided commercial reindeer herding.

The Bureau of Education was absorbed by the Alaska Native Service and still later by the Bureau of Indian Affairs. Initially, it *was* the Bureau of Indian Affairs in Alaska.

On another front, that of liquor control, federal responsibility for articulation and implementation of policy flowed through so many discrete governmental agencies as to nearly defy logical explanation. Among them were the Army, the Navy, Revenue Cutters, the customs agent, teachers and missionaries, U.S. Marshalls, and U.S. Commissionarers, Indian police, special territorial employees for the supression of liquor among the Natives, and traditional and Indian Reorganization Act village councils (Conn and Moras, 1986).

These examples of non-traditional (and even illegal) allocations of legal authority by the federal government suggest a non-traditional implementation of federal trust repsonsibility and not an absence of an Indian policy. Bits and pieces of that policy (e.g., Indian police) were borrowed from late reservation policies. Others were pure innovations. What is critical is that the rationale for education and the rationale for liquor control were employed as justifications for placing personnel in contact with Alaska Native communities for other purposes. These agents reported

on their contacts and were allowed to expand on their original missions with Congressional approval.

Teachers became deputies and instigators of economic enterprise. Navy and Army officers became the *de facto* Indian agents as did the Captains of Revenue Cutters to Eskimo villages.

What resulted then was a federal Indian policy that defied ready comparison with that of the rest of the country but whose implementation was funded by the Congress and whose details were reported back as a spur to further funding and involvement. (*See* Conn and Moras, 1986:25).

The impact of the unusual Indian policy in Alaska is as clear for researchers as it is apparently unclear for modern-day jurists who look for clarity in Congressional legislation and in court decisions removed from the Alaska realm by distance and, more importantly, by a lack of appreciation for Alaska's legal culture and history.

The source of information on governmental contact that is most critical for Alaska Natives are archival records including:

1. military records
2. church-missionary records

3. educational records
4. village council records
5. journals and diaries of government agents including teachers, marshalls, liquor supression agents
6. Alaska Native Service records
7. Bureau of Education records
8. territorial records and reports
9. Bureau of Indian Affairs records
10. lower court records including briefs and supporting documents
11 reports to Congress and hearings attendant to appropriations of many programs.

Few of the above documents are found in law libraries. The extent that they break faith with the usual division of legal responsibilities can be explained as a logical departure, given the level of governmental involvement in Alaska. It may be that federal recognition can be argued from a study of these records (see below). But even if federal recognition by Congress through its appropriation process cannot be discovered, the documents will offer powerful evidence of federal appreciation of discrete, self-governing Native tribes. In fact, but for a continuous level of Native self-government, a pattern of action that continued into statehood days, federal

governmental presence would not have been so random, so limited and so incomplete.

The mission of researchers is, then, to enter the federal archives and the private respositories of these archival records and to mine these documents for evidence now demanded by the courts and by Congress.

Many of you, especially those knowledgeable of Indian law and the Alaska situation, will agree with village advocates and federal Indian law specialists that there should be no fundamental dispute over the historical and modern existence of Alaska Native tribes or their recognition. Congress has never repealed its adoption of an amendment to the Indian Reorgaization Act which provided that villages could adopt constitutions to facilitate their self-government. Sixty plus villages did formalize their tribal status under IRA. You may agree with Indian advocates that the principal mandate for Alaska Native villages is that they employ the powers they claim to possess and demonstrate present-day rather than historical viability. Clusters of villages throughout Alaska are actively reinvigorating their tribal governments and renewing their credibility among residents, leaving it to their attorneys to meet challenges in court.

However, whether deserved or undeserved, the persistent legal attacks by the state and overt hostility to tribes evidenced by the federal administration has had an impact on jurists who now force Indian law attorneys to marshall an historical and ethnological record not usually demanded in the courts when the political question of federal recognition has been settled by the Congress. For these jurists, the question

of Congressional recognition has been clouded by a confused and qualified pattern of legislation, legislation which has protected settled lands in the hands of Native corporations left themselves unprotected from bankruptcy petitions. Until and unless that record is clarified, jurists will force Alaska Native villages who test the scope and realm of their political powers to establish both their historical and modern existence as well as their historical recognition by means of evidence not available in law libraries, but in repositories better known to scholars than to attorneys,.

For those who have struggled to prepare petitions for the Federal Acknowledgment Process, the *Mashpee* (or judicially prescribed) test of tribes provides one element which is vastly superior to the administrative formulation. It allows researchers to demonstrate and to document how governmental policy caused tribal units to enter into periods of relative inactivity. Thus researchers can analyze and report on the impact of federal (territorial, state and local) actions on Indian groups which caused them to exist for periods of time as social groups apparently subject to governance from other sources. Even if the group dissembled for a time

and apparently was forced to assimilate with other groups by reason of federal or other governmental policy, this, also, can be explained.

The inability of petitioners in the Federal Acknowledgment Process to demonstrate the impact of external governmental policy on active tribalism including the impact of periodic failures of the federal government to effectively implement Congressionally-mandated responsibilities is, to my mind, the core failure of logic in the federal acknowledgment process now available to Indian groups and their petitioners. It would be deadly in the case of Alaska villages.

The value of *Mashpee*'s test in the Alaska context is especially clear. Researchers can address both the curious allocation of authority for dealing with villages by non-Indian agency personnel as well as the development of policy "on the ground" as they demonstrate its impact on Alaska Native governance. This same body of research may lay the basis for a second argument, that the process of federal recognition occurred in a situational context which required Congress to address in unusually broad terms its tribal recognition, leaving to executive agents and even to available local authorities the responsibility for filling in the details of that core federal recognition. If research develops a picture which not only validates the

historical governance and continuity of the Alaska Native tribes, but better documents and explains Alaska Indian policy, it will cause jurists to desist from further demands that Alaska villages prove that they are tribes. The well-grounded rule of federal Indian law is that once federal recognition has been determined, courts defer from further inquiry into tribal existence so long as communities remain distinctly Indian.

The research proposed to meet tests of historical existence and federal recognition will in the case of Alaska Natives sustain a further requirement of the courts that tribes demonstrate that they still exist.

Alaska villages present a mysterious picture to those federal Indian law specialists in search of traditional legal symbols for federally-recognized tribes. They have been enrolled in a land settlement as rural and distinctly Native communities but placed upon non-trust land and not on reservations. They have been encouraged through Congressional activity to form state-chartered municipalities and to hold their land base in state-chartered corporations. At the same time the federal government has contracted away much of its social service repsonsibility to non-profit Native corporations, special-purpose tribes, and induced

the state to organize regionally-based school systems. This process of delegation of responsibility to non-federal agents and failure to rearticulate classical 19th century tribal models – trust land and tribal councils – has induced village Alaskans to work within structures often unfamiliar to reservation tribes or to federal Indian law experts. At the same time artifacts of the Indian Reorganization Act have often been less significantly used.

The historical research important to current judicial tests could explain this pattern of governance as a continuation of a historical pattern of federal recognition and effectuation of trust responsibilities. It could lend credence to the position of tribal advocates that the Alaska Native Claims Settlement employed new structures to fulfill Constitutional responsibilities – that it placed old wine in new corporate and municipal bottles because this made historical and modern sense in the Alaska context. Congressional policy could be validated as "self-determination without termination," as Richard Nixon termed the Alaska Claims Settlement Act.

A pattern of dealing with Alaska Natives and their tribes, if well documented, could then lift the veil of mystery from a confused pattern of Congressional acts and court decisions.

Rarely have scholars and their work been so critical to the legal survival – and some would argue the cultural survival – of indigenous people in North America.

At stake is much more than avoidance of a crowd at the door of the Federal Acknowledgment Process; at stake is the ultimate protection of one-half of the Indian land base in the United States and confirmation of the legal identities of the tribal communities who desire to govern that land.

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