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The Aborigine in Comparative Law: Subnational Report on Alaska Natives

Stephen Conn

Summary

This paper describes the current state of aboriginal rights in Alaska and the impact of federal and state laws and policies on Alaska Native political and legal rights, tribal status, self-determination, and access to tribal lands. Topics covered include the legal determination of Alaska Native identity, the legal status of Alaska Native groups, Alaska Native land rights, sovereignty and self-government, subsistence, recognition of family and kinship structures, the criminal justice system in rural Alaska, customary versus formal legal process, and human rights and equality before the law.

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THE ABORIGINE IN COMPARATIVE LAW:

Subnational Report on Alaska Natives

by

Stephen Conn
Professor of Justice
University of Alaska, Anchorage
3211 Providence Drive
Anchorage, Alaska 99508
U.S.A.

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1. Factual Background

Three major ethnolinguistic cultures - Eskimo (Inupiat, Yupik and Siberian), Aleut and Indian (Athabascan, Tlingit and Haida) each with its sharp subdivisions comprise 75,000 or 14.3 percent of the Alaska population (Alaska Department of Labor, 1985:17). More than half of Alaska Natives are Eskimo: 7,338 Inupiat, 17,474 Yupik and 5,174 Siberian (U.S., Interior, 1984:E-5). Resident of more than 200 rural villages in Alaska's bush as well as urban centers, Alaska Natives have long been considered to have the same legal status as Indians as other wards under the guardianship of the federal government for purposes of service obligations (Cohen, 1982 rev. ed.:739). However, this said, matters move from simple to complex.

Historically, treaties were not made with Alaska Native tribes. Reservations akin to those established in the rest of the United States were not created in order to clear indigenous Alaskans from public land sought by settlers. Alaska Natives and non-Natives endured federal control from 1867 to 1959 (and Alaska statehood) with Interior Department agents in control of most substantive governmental affairs. Without the pressures of white settlement on an uncontrolled frontier, questions of aboriginal title were left to the second half of the twentieth century for resolution and were resolved in a manner which did much to muddy the issues of tribal authority, the scope of tribal powers and the territorial basis for tribal governance. Native villages, where 69 percent of Natives continued to reside in 1980 (ISER, 1986:11) are usually 214 persons on average but vary from 25-700

persons, are usually accessible only by river, sea or air (Alaska Department of Labor, 1985:49). Their legal status varies from state-chartered municipality and federally-designated Indian Reorganization tribe to unincorporated or traditional Native community.[1] Central to the way of life of most villages is subsistence. In fact, thiry-five percent of Alaska Natives report that half or more of their food continues to come from subsistence resources (Interior, 1984:IV-16).

Population ebb and flow appears to be influenced by health and service considerations. Sharp reductions in infant mortality in the 1960s gave rise to a birth rate twice the national average. Creation of a rural high school system in small villages in the 1970s lead to stabilizing of population in small villages and even in-migration to smaller places from other villages (ISER 1986:12) by Alaska Natives. At the same time, however, urban Native populations nearly doubled from 1960-1980 (ISER, 1986:11). Out-migration by Natives was offset by in-migration by non-Natives attracted by teaching jobs and other governmental employment during the 1970s as oil and land claims money fueled bureacratization in regional service centers and villages where high schools were constructed. The result in demographic terms are villages with a conspicuously youthful population of about 18 years in median (four years younger than the Alaska average), a relatively smaller population of working age adults and child-rearers (the latter somewhat affected by outmigration of young women to regional centers)[2] and a visibly larger non-Native population.[3]

What did not occur was village consolidation (or disappearance of smaller villages) as had been predicted. Instead the pattern which seemed to emerge was that of Native persons from smaller villages moving to regional centers and Native persons from regional centers (increasingly populated by non-Natives) moving either to urban areas or back to smaller villages.

2. Legal Identity and Membership

Alaska Natives' legal status is ascertained by blood quantum or by residence or a combination, depending on the governing statutes. This, like the status of villages as tribes among special-purpose statutory tribes, has lead to a confusion and is somewhat at variance with the primary responsibility of Indian tribes elsewhere - to determine and designate their members.

The enrollment criteria for participation in the Alaska Native Claims Settlement Act (ANCSA, see below) well illustrates the typical format followed in the Alaska Native's case:

> (b) "Native" means a citizen of the United States who is a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community) Eskimo, or Aleut blood, or combination thereof. The term includes any Native as so defined either or both of whose adoptive parents are not Natives. It also includes, in the absence of proof of a minimum blood quantum, any citizen of the United States who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member and whose father or mother is (or, if deceased, was) regarded as Native by any village or group. Any decision of the Secretary regarding eligibility for enrollment shall be final. (PL 92-203 Sec. 3(b))

This blend of village acknowledgment of membership with blood quantum with ultimate authority in the Secretary well illustrates the dilution of village authority to designate its members. In

the post-ANCSA era, concern that the children not born in 1971 will be effectively detribalized has resulted in two initiatives, the first to amend ANCSA through legislation which will allow village or regional corporations to issue new classes of shares at their option to persons such as these so-called new or after-born Natives (Alaska Federation of Natives, 1986:1). The second initiative is to again promote tribal sovereignty over village lands and more general governmental authority so that all Natives, young and old have political rights and access to the common tribal land base.

Alaska Natives are, as other Native Americans, citizens of the United States and of their respective states with civil rights and obligations equal to all citizens.[4]

3. Legal Status of Native Groups

Although few would question the ethnological status of Alaska Native villages as tribes, their legal and political status as tribes depends on Congressional recognition and, in some cases, the recognition by the Secretary of Interior when that authority has been delegated to him.

When the Indian Reorganization Act was extended to Alaska Natives to promote economic development and as a prelude to development of reservations and reservation governments, "Groups of Indians in Alaska" were defined as "[those] not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district."[5]

The claims settlement Act further narrowed those eligible communities through its listing of eligible communities and proviso that villages of a modern and urban character with a majority of non-Native residents (or of less than 25 in population) would not be eligible. Eligible ANCSA villages came to be included in post-ANCSA statutes such as the Indian Self-Determination Act,[6] the Indian Financing Act[7] and the Indian Child Welfare Act (ICWA).[8]

Yet the argument that this represents Congressional confirmation of Alaska Native tribes for other than the special purposes of the act was diluted by inclusion of other nontraditional tribes such as regional or village corporations. The practical effect of this dilution was to put in question Alaska tribal governmental authority, especially when federal responsibilities were contracted to nontraditional tribes who served regional constituencies.

Similarly, whether by design or inadvertence, ANCSA enrollment became itself a defining term of Alaska "Indians" as in ICWA's definition of Indian as "any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in Section 1606 of Title 43."[9]

Successive publications of lists of all Indian tribes by the Secretary of the Interior who were recognized and receiving services mandated by Congress in 25 CFR 83.6(b) have added to the confusion. In 1979 no Alaska Native tribes were included. Then in 1982 Alaska Native vilages were included in a special list of

Alaska Native entities recognized and eligible to receive services. Not all were villages and the term, "tribe," was not used. The list also appeared to distinguish between historical tribes on reservations and "additional entities which are not historical tribes but which were eligible for Bureau of Indian Affairs services through unique circumstances." Apparently the special explanation related to the dilution of tribes in the statutes mentioned above. By 1983 the Secretary explained that the 193 traditional and IRA village councils (as well as Tlingit and Haida Central Council and Metlakatla Indian [reservation] community) were indeed "tribes in the legal and political sense." (RuralCap, 1986:53)

All of this had added to the debate over Alaska tribal status, even though it serves as no more than a prelude to further discussions of the scope of tribal governmental power and its jurisdictional base. It has required a preliminary federal district court ruling that "Native village councils and similar organizations while not local government units under the Constitution of the State of Alaska, are beyond any question federally recognized as (for lack of a better term) quasi-governmental entities"[10] to motivate litigants to deal with the scope of tribal authority. Alaska sovereignty advocates propose that Congress clarify through new legislation the tribal status and authority of Alaska Native villages as general purpose tribes, but this has not happened.

4. Land Rights/Self-Government/Use of Natural Resources

In 1971 Congress authorized transfer of forty-four million

acres (the size of the entire Indian land base in the "lower 48" states) and nearly one billion dollars to enrolled Alaska Natives in settlement of aboriginal land, hunting and fishing rights.[11] Unlike the traditional formula of exchange for aboriginal title, land was transferred in fee simple to thirteen regional corporations (one for non-resident Natives) and more than two hundred village corporations. Natives who enrolled on a formula which stressed blood quantum and village acknowledgment of members could receive one hundred shares of stock in both village and regional corporations. Corporations were organized under state law. Regional corporations received subsurface estates with some surface estate granted on a formula which took into account land claimed under aboriginal title. Seventy percent of net revenues gained from development are shared by other regional corporations. Village corporations took surface estates. Residential and business sites passed to occupants. The village core passed to established state municipalities or to a state trustee.[12]

The money settlement paid by federal government and state from oil royalties was passed through regional to village corporations and shared with stockholders and with at-large shareholders who joined regional corporations only. Non-resident members of the 13th region received money only. The southeastern Tlingit-Haida corporation, Sealaska, received a smaller surface estate because of a previous monetary Indian Claims Commission settlement.

Restrictions against alienation or lien (with domestic relations exceptions) were placed on the stock by Congress until

January, 1992. Land transferred in fee simple was similarly protected from judgment, taxation, execution or adverse possession if undeveloped for twenty years from the date of the act and through a later amendment from date of transfer to corporations (as land was to this date not completely ceded). Land could be sold or encumbered by corporate managers when received without permission by the Interior Department. When developed or leased it was subjected to taxation and other takings.

The Act was said to be the hallmark of Nixon's program of self-determination without termination (of the extant federal-tribal relationship). Tribal consent was not sought although Native involvement through the era's leadership was critical in its passage. Natives who did not enroll or who were not yet born in 1971 (an estimated fifty percent by 1991) were not direct participants. What the Natives did with land and money received was not subject to federal oversight because the Act said that it did not intend to create a "new reservation as lengthy wardship or trusteeship" (ANCSA, Sec. 2(b)).

The Settlement has been amended by Congress on six occasions and is presently being amended again. Implementation of the Act has required additional Congressional action as problems arose over nearly every aspect of its provisions.[12a]

This unusual land settlement and its non-traditional, non-trust format placed in question the territorial jurisdiction of Native villages as tribes. The state argues further that the act and especially its focus on state organized municipalities as

recipients of the village core proves Alaska villages were not tribal governments and lacked authority over members and non-members. The Executive branch has ignored a Congressionally-mandated 1985 report which suggests that Alaska Natives benefited little from the Act to argue for massive reductions in federal assistance to Alaska Natives.[13] Both the state and Executive branch treat the Act as a terminationist step. These readings occur despite the fact that sixty-plus villages retain acknowledged statutory status as Indian Reorganization Act tribes from Congress and Congress has specified ANCSA villages as tribes capable of tribal jurisdiction over children for matters of involuntary foster placement, custody and validation of adoptions in the 1978 Indian Child Welfare Act (25 U.S.C. Secs. 1901-1963).

When former justice Thomas Berger visited sixty villages in 1983-85 to assess the impact of ANCSA at the invitation of the Inuit Circumpolar Conference he found village corporations in legal and economic disarray, and Natives frightened over the potential land loss as well as their loss of fishing, hunting and trapping opportunities on now-public federal and state lands (Berger, 1985). Natives also saw their children born after 1971 as disenfranchised by the Act. Berger advocated a return of the ANCSA land base to tribes, Congressional assertion of tribal control over fishing, hunting and trapping, in short retribalization to protect both participants and nonparticipants in ANCSA through tribal sovereignty.[14]

Within the Alaska Native population, divisions exist between those who desire effectively permanent Congressional restraints

on non-Native ownership of the settlement proceeds, ranging from restrictions on corporate ownership to their outright dissolution, and transfer of land back to tribes and those who want salable shares in 1992 with land value included. These latter Natives decry attempts to dilute share value through land transfer or issuance of new shares to afterborn Natives and elders, another proposed Congressional reform. The Alaska Federation of Natives, a confederation of for-profit regional corporations, non-profit corporations who serve as pass-through agencies for state and federal programs and more recently a third wing of village representation, has attempted to straddle the diverse positions of Native and non-Native entities with a legislative package which focuses on permanent protections for unalienated land, including a reversal of the 1991 deadline to allow corporations from that date or later to opt for stock alienation with an amendment of their articles of incorporation. The proposed legislative package would also authorize transfer of ANCSA land to qualified transferee entities including tribal governments and permanent protections for all undeveloped land held by Native corporations whether landbanked or not.

ANCSA was passed to allow an oil pipeline from Prudhoe Bay, North America's richest oil find, to be built and state public land selection to go forward under the terms of the statehood act. It also provided for withdrawal of public lands by the federal government for inclusion in national parks. This last step was accomplished by the Alaska National Interest and Conservation Act (16 U.S.C. Sec. 311 et. seq.).[15]

As of the moment, then, while tribal advocates propose retribalization of ANCSA assets and revitalization of tribal authority, especially over wildlife, Congress appears to focus on further restrictions over stock and land as protection sufficient for Alaska Natives. The Executive branch and Alaska's Congressional delegation has so far refused to treat the land base as other than fee simple or to take steps to clarify the dimensions of tribal governmental authority.

B. Local or Regional Governments

Spurred by ANCSA wealth and oil development within their region, Inupiat villages created a borough on the North Slope and transferred powers from municipal-villages to it (Morehouse, McBeath, and Leask, 1984:144-45). More recently, a second preminantly Native borough was defined in Western Alaska where a major mining development will occur. These events occurred after litigation and political struggle with state officials. Decentralization of governmental authority also occurred with construction of ninety-two high schools in villages, run through town-dominated school boards.

Non-borough villages in regions where there was little productive development became state-run municipalities, dependent on state and federal grants. Based in towns, Native non-profit corporations delivered services. Traditional village governments continued to mete out fundamental law and order, although the state took the position that it had this authority.

Of special notice to villagers was the sixty-four percent

increase of non-Natives in rural villages and towns. They were the primary recipients of jobs spurred by ANCSA, program decentralization and increased town-based rural government. Concern that non-Natives would "take over" rural government has spurred at least one village to dissolve its state-chartered municipal governments and other villages to ally themselves into rural tribal coalitions in which Alaska Natives only may participate. Very fundamental questions which seek judicial resolution and further Congressional enactments include:

1. Are Alaska villages "dependent Indian communities" and therefore "Indian Country?" [See 18 U.S.C. Sec. 1151(b)].

2. Over whom do Alaska villages have governmental authority, what is its scope and over what geographic realm?

3. If that authority persists over civil regulatory matters, does it include jurisdiction over non-Natives in fish and wildlife management?

C. Control of or Participation in Decisions Concerning Natural Resources

When Alaska Natives lost their aboriginal hunting, fishing and trapping rights, Congressional committee reports stated that they would be effectively replaced by positive statutory enactments. Some statutes and treaties were in place which carved out Native subsistence exceptions to taking of migratory fowl and seal mammal restrictions. However, the substitutes were far from protective of traditional hunting seasons. Lack of serious enforcement had been the mainstay of traditional subsistence. Enforcement became more consistent in the post-ANCSA era. It was necessary for law suits to be brought to confirm the reality of Congressional intent to give substance to the continuing federal

trust responsibility when the federal government sought to transfer management of sea mammals to state jurisdiction and when a cluster of southwestern villages entered into a cooperative agreement with Alaska, California and the Federal Fish and Wildlife Service to design and enforce an agreement which allowed selective spring hunting of migratory fowl.[16] The Alaska National Interest and Conservation Act provided for rural preference for subsistence as a condition of state management over federal lands set aside for national parks. Regulations were to be promulgated by regional advisory boards in six subsistence resource regions. The state population and its legislature desired state jurisdiction but came under severe pressure from urban hunters and sports guides as they passed legislation and regulation. A statewide initiative to abolish the statute failed. After the state supreme court held that the compromise state legislation did not adequately carve a preference for rural subsistence, a new law was passed which protected the preference and held onto state jurisdiction. Problems continue with enforcement, each of which has sparked new law suits against state enforcement patterns.[17] Native subsistence protections were grafted by the courts into environmental impact statement for oil exploration and development at the same time the federal courts held that the extinguishment of aboriginal rights by ANCSA applied to offshore sea ice and the outer continental shelf.[18]

At the village level many different patterns for assertion of village control over subsistence practices emerged, most of which await testing by the courts. They range from enforcement of

rules within ANCSA village land upon village and non-village hunters for caribou to cooperative agreements between village and other governmental entities (See Conn & Langdon, 1986). Political initiatives at the national and international level have resulted in direct involvement in bowhead whale quotas by the Alaska Eskimo Whaling Commission. It is evident that Natives will have to pursue these political initiatives whatever the outcome of suits and Congressional action to revive direct tribal authority. Much fish and wildlife activity occurs off of ANCSA land on state and federal land and waters. Protection of the species is also given higher priority than subsistence even where courts have affirmed tribal regulatory control over fish and game activities by Natives and non-Natives on reservation lands.[19]

5. Recognition of Family/Kinship Structures

Smaller Alaska Native villages have sustained themselves through retention of their young people, this due largely to the emergence of a village secondary school system. Yet the state, not the village, has retained the governmental authority of most youth-related and family concerns. Parry (1985) states, for example, that 29.5 percent of Alaska youth live in rural places where State Youth and Family Services does not live, this a reflection of the state's tendency to place professional services in regional towns and not small Native villages.

Serious social and economic problems persist in many Native villages. Although the proportion of Natives below the official poverty level declined from 44 percent in 1970 to 26 percent in 1980 (Interior, 1984:IV-18), Berman and Foster found that:

> Alaska Natives represent 60 percent of those receiving old age assistance, 49 percent of those receiving aid to the disabled and 62 percent of those receiving aid to the blind, for an overall Native share of 55 percent of acult public assistance recipients (Berman and Foster, 1986:12).
>
> As of late 1985 1985 or early 1986, approximately 2,500 Native households were receiving Aid to Families with Dependent Children (AFDC) payments, and 3,000 Native individuals receiving Adult Public Assistance payments. (Berman and Foster, 1986:2).[20]

Although average income for Alaska Native families increased by 39 percent from 1969 to 1979 it remained only 56 percent of non-Native family income in 1979 (Interior, 1984:IV-18). In 1980 at least 40 percent of Alaska Natives were either receiving public assistance or were eligible with incomes below the poverty line (Berman and Foster, 1986:25). The implications are serious because these persons will have to sell their assets in ANCSA Native stock once the restrictions on alienability are lifted (unless Congress introduces further exemptions). This will speed the transfer of the Native land base and Native corporate ownership into non-Native hands.

Poverty at the village level is connected not only to very limited wage earning opportunities but to alcoholism, suicide and violence at levels far in excess of Alaska or United States statistics (Nathan 2(c) Report, 1975). Transfer payments only do not prevent youth problems and family breakdown. Congress was motivated by evidence of pandemic removal of Native children into non-Native adoptive and foster homes to include Alaska Native villages as tribes within the Indian Child Welfare Act of 1978 (or ICWA).[21]

The matter was far from alleviated. A 1979 study found that Alaska Native children living away from home under the jurisdiction of social services, corrections health programs and education home programs constituted two percent of the Native population, four percent of the youthful Native population and more than eight times the number of non-Native youth in comparable placements (Worl, 1981:2-3).

ICWA authority which mandates exclusive tribal jurisdiction in involuntary custody and adoption matters where tribal members agree, notice and intervention for Alaska Native villages in state court proceedings, and an opportunity for direct participation by Native custodians and Native expert witnesses has spurred some moribund village courts to revive and deal with this important matter. However, this paper authority has been most often used when villages were supported by regionalized nonprofit corporations, equipped with attorneys and/or capable of providing state or federally funded services.[22]

While the Alaska State Supreme Court has been supportive of ICWA especially, and non-Alaska state courts have recognized Alaska tribal decrees, the Department of Law has directed a flurry of litigation which questions whether there are validly established tribal courts in Alaska and, further, whether Indian country exists for tribes to act upon.[23] While it continues to litigate central issues of tribal governance and jurisdiction, the state acknowledges the work of tribal courts.[24]

However, mounting tensions between state and village admin-

istrations resulted in a recommendation by the Governor's Task Force on Federal-State-Tribal Relations that:

> the substantive provisions of the Indian Child Welfare Act be uniformly implemented by State agencies and the Alaska judicial system throughout the State. Specifically, the Task Force recommends that the Department of Health and Social Services should adopt regulations which provide state employees responsible for foster care placements and adoptions, and Native parents and village clear guidance as to how the requirements of the ICWA are to be implemented in practice. The State should adopt a policy which establishes the conditions and circumstances pursuant to which the State will enter into an agreement with a Native village pursuant to section 109 of ICWA.

(Report of the Governor's Task Force on Federal-State-Tribal Relations Submitted to Governor Bill Sheffield, 1986:11.)

Sheffield called a conference among state agencies, Native organizations currently active in ICWA and the state courts to develop a uniform ICWA agreement to provide "clear guidance as to how the requirements of the ICWA are to be implemented in practice... and adoption of a policy regarding the conditions and circumstances under which the State of Alaska will enter into ICWA agreements with Native villages." (Munson and Bush, 1986:4)

The meeting reflected problems endemic in state-tribal relations. Service providers who had taken up state and federal contracts were in attendance. Only one region had village authorization to negotiate a state-village agreement.[25]

ICWA's encouragement of tribal activity in domestic matters has spawned secondary initiatives. Tribal courts have validated customary adoptions and found these decrees accepted only provisionally by state agencies with the notation that an outstanding

legal issue (regarding tribal court authority) remained to be settled. Only a handful of villages have established tribal courts for this purpose, but many see the act as a vehicle for extension of tribal sovereignty over other youth and adult problems. For this reason, the state views ICWA as dangerous leverage over its prerogatives.

Impact on customary law

Two areas of traditional family law have been adversely affected by Western law and culture according to scholars. Domestic violence between family members has become a family problem, in part because men and women no longer live in separate housing and also because Western religious leaders have discouraged separation and remarriage, a traditional process in which persons extended community alliances, especially in Yupik Eskimo villages (Shinkwin and Pete, 1983:24). The result, absent effective law enforcement, has been increased family violence.

Customary adoptions have continued to require state court validation despite repeated calls for their acceptance by the village (See, e.g., recommendations of the First Bush Justice Conference, 1970).

The most significant impact of the state legal process on family affairs in the modern era has been the detachment of legal authority from village-based authority. Village-based authority was tied closely to the respect accorded family heads who served as chiefs or as members of councils (Shinkwin and Pete, 1983:20). This stripping of authority without replacement is most evident

where juvenile delinquency matters are concerned, a matter not dealt with by ICWA. Removal of problem children to cities or regional centers by state authorities continues to do little to reinforce respect of young for embattled elders, a prerequisite for village well-being.

6. Criminal Justice and Procedure: Impact of the Criminal Justice System

Shortly before Alaska achieved statehood, Congress granted it criminal law authority over Indian Country and Alaska Native villages (Case, 1984:446). Nonetheless, the daunting environment of Alaska and its isolated villages coupled with limited state resources and centralized and urban bureaucracies created a de facto pattern of criminal justice service which did not match the de jure pattern of comprehensive state responsibility. Village councils continued to handle small problems with state law enforcers left to deal with serious criminal law violations from their bases in key regional towns (Conn, 1984).[26] As criminal law professionalized in the towns with prosecutors, defense attorneys and trial courts placed in each, the de facto working arrangement between councils and state law enforcement professionals broke down. Village law enforcement, characterized as non-law by state officials, rather than tribal law, was threatened out of existence or rendered questionable in the eyes of the youthful village populations. State law more readily displaced than replaced village law as it dealt with alcohol-related misdemeanors and juvenile offenses. Alaska began a lay magistrate program in rural villages but has allowed it to

atrophy over time. More than 135 villages lack a magistrate. It experimented with a conciliation or problem board program in six villages, but then disassociated itself from the experiment (Conn and Hippler, 1975). Village policing was supported through the use of regionally-based trooper constables and village public safety officers tied to trooper and non-profit corporations, effectively para-police who held the scene for troopers. State attempts to replace liquor control laws available to villages as federally-acknowledged tribes have been criticized as ineffective in stopping importation of liquor and now include new attempts to prohibit liquor possession through civil citations and through state-mandated community work programs run at the village level for violators. Conferences on bush justice attended by villages, the most recent held in 1985, have made two seemingly conflicting complaints of criminal justice: first, that by denying village authority and not substituting for it, police service and enforcement of criminal laws is inadequate and, second, that since 1980 the incarcerated population of Alaska Natives has more than doubled from 16 to 35 percent of the inmate population, a figure that does not include high percentages of Natives in municipal jails.[27]

Concerns with the operation of state criminal law or, more generally, legal power over this subject have now been coupled with more general interest in tribal self-government. Two villages have sought and received delegated federal authority to ban liquor in their domains. Others speak of negotiating with the state to seek retrocession of some criminal law authority granted

Alaska by Congress. As Alaska confronts declines in its revenues, its officials more readily admit their inability to provide reliable services to villages. However, the issue of village self-government under federal Indian law in the criminal law domain has become intertwined with state concerns that villages would remove from the state other domains of legal authority - especially regulation of fish and game activity and Alaska's capacity to tax land granted regional and village corporations under ANCSA. If these matters can be unraveled through negotiations, criminal justice and juvenile delinquency matters may yet be dealt with by cooperative arrangements between villages and the state, arrangements that have deep historical precedent from the earliest territorial days, but that now require explicit legal validation.

Procedure and Customary Conflicts

Village law and process cannot be said to be purely Native in content so long has been its relationship with official and unofficial agents of Western law from teacher-missionaries and state police. Institutions such as village councils cannot be accurately characterized as either imposed (if that term implies foreign and unworkable as such) or purely indigenous (if that term implies directly based on familial relations and individualized social ordering as described in ethnographic literature). Mechanisms and approaches are usually hybrids of Western influence and indigenous approaches to social control. Councils are formed out of alliances of families and do no more than backstop traditional deinstitutionalized social control. Their

procedure is flavored with a desire to compromise offenses and reintegrate offenders into village life through their contrition and reeducation. Yet as councils were made to deal with problems introduced by non-Native influences (e.g., liquor) and to supplement inadequate state legal response, they overtly undertook courtlike patterns of fining and jailing in some instances. It can be said that influences of this hybrid legal culture poorly prepare persons who eventually experience criminal law process in state courts. Too often they are prepared to admit guilt without comprehending the basis of legal guilt with the false expectation that contrition will lead to an appropriate forgiveness by legal authorities. The village law is oriented toward prevention of alcohol-related violence while the Western process reacts to crimes when they occur and isolates them from surrounding (past and future) behavior and relationships. Attitudes about liquor-related deviance flow from different cultural premises but are, on their face, uniform.[27a]

The most direct conflicts between substantive law and custom occur within the realm of Native subsistence activities, where well-accepted seasonal patterns of hunting, fishing and trapping are disrupted constantly by fish and game regulators who seek to force them into categories defined for sports and commercial hunters (Conn and Langdon, 1986).[28]

Conflicts relating to use of wildlife resources surfaced only as Native and non-Native populations began to compete for the same resource in the field. Environmental pressures and oil development also gave rise to more vigorous fish and game

enforcement and increased endangerment of the resources during the Post-ANCSA decade. The Alaska Native response has been to pursue political and administrative arrangements to gain some shared interest in national and international arrangements for the management of wildlife resources. They have also asserted legal authority over lands and await judicial outcomes which will determine the validity and invalidity of their acts.

7. Special Legal Institutions

A. Local Methods of Dispute Resolution

Customary legal institutions among Alaska Native groups ran the gamut from highly structured arrangements among Tlingit-Haida groups to entirely deinstitutionalized systems in Inuit and Yupik Eskimo groups prior to non-Native contact (See Case, 1984: 333-370). Village councils in Eskimo villages, introduced as instruments of indirect rule by teacher-missionaries (Jenness, 1962), ultimately were reshaped by residents to connect continuing interpersonal and interfamiliar dispute adjustment to outside Western legal intervention (See Conn and Hippler, 1973 and Conn, 1981).

> Councils were the last stop in a process of evolving interpersonal customary law ways and the first step in a process of Westrn intervention that could result in referral to a police and court process outside of the village (Conn, 1985).

Council action was essential to both territorial and early state law enforcement because it was effectively the single creditable response to village deviance by those not prepared to abide with village law. However, this de facto working arrange-

ment broke down throughout the sixties and seventies for several reasons (Conn and Moras, 1986). State intervenors increasingly placed their own agents into villages and relied on them to signal the need for state intervention. These parajudges and police displaced but did not replace council justice. When alcohol-related violence and youth-related problems emerged as significant village problems, villages were not allowed to ban alcohol and state law was amended to decriminalize drunken behavior, ironically due to discrimination in enforcement of such statutes in urban areas. State law enforcement was inadequate and reactive (Conn, 1982). When villages were granted the option to ban importation (and later) possession of liquor, these formal grants of authority were so tangled with procedural constraints as to be nearly unusable. Finally, as the legal doctrinal debate between tribes and state over tribal authority became noisier, state officials in the Department of Law became more discouraging about de facto working relations.[29]

B. and C. Distribution of Funds, Benefits and Services, and Political Representation - Other Institutions

Regionalized unions of villages, statewide coalitions and regional nonprofit corporations have a long history of political and economic activity on behalf of Alaska Natives and their claims. With a single exception (Tlingit and Haida Council) these are no juridical tribes, those viewed as primary, tribal political groupings recognized under federal Indian law. However, many of these groups have been afforded special-purpose designations as "Indian organizations" in self-determination

legislation with authority to service many village tribes (See Case, 1984:389-417). These entities and the statewide group, Alaska Federation of Natives, a coalition of for-profit and nonprofit corporations and, recently, a village board, spurred the fight for land claims and have persisted in lobbying efforts for Alaska Natives. In recent years village-based groupings have emerged whose focus is, by their lights, more attuned to village control rather than regional or urban control of events. The United Tribes of Alaska gave way to the Alaska Native Coalition, who with Native American Rights Fund Attorneys press for tribal sovereignty in their amendment package to ANCSA and in litigation (See, Anderson and Aschenbrenner, 1986:1-7). The backdrop to regional and urban-based Native organizations who deliver services and negotiate with the state and federal government contains not only "real" tribes but also twelve for-profit regional corporations whose reinvestment into the state economy has generated few jobs for Natives, but powerful political leverage which all other Native organizations readily employ, even those opposed to the corporate concept embodied in ANCSA. Behind the issues of land, sovereignty and subsistence which so dominate strategies of all Native political actors is a power struggle between village-based and urban-based Native organizations.[30] It may be as I have argued elsewhere (Conn and Garber, 1981) that there is a logical place and role for each component. Economies of scale and regional identity suggest that non-profit corporations should receive funds and deliver services within select tribal groupings. However, baseline political decisions and at least an oversight function over services must be retained by village

tribes if the tribal reality essential to a federal political obligation is to persist. AFN's incorporation of village representation (albeit village corporation or village government) and its promise to deal more directly with issues of tribal sovereignty after this round of ANCSA amendments suggest that it understands that unauthorized tribal proxies may not negotiate on behalf of Alaska Native groups in the future, however expeditious for federal and state leadership. State program administrators view dealing with 200-plus tribal units as a bureacratic nightmare. Twelve nonprofits based in the regions are more acceptable.[31]

8. Human Rights and Equality Before the Law

The controversies over Alaska Natives and their appropriate legal status go directly to the issue of group versus equal individualized rights under the law, a matter so poorly accepted by those who view the American system as one protective of equal rights only. In fact the chief legal architect of Alaska legal policy related to Native governments suggests that the potential for Native tribes to discriminate between members and non-members is for him at the core of state opposition to tribes within the Alaska domain. (Interview with Douglas Mertz, Department of Law, July, 1986, Anchorage.)[32]

Native Village of Tyonek v. Puckett, (Fed. D. Ct. Alaska Case No. A-82-369 Civil (1983)) a pending federal district court case based on a Native village's assertion of its right to evict non-Native residents from the village was argued, alternatively, as an exercise in tribal sovereign power to evict non-members who

disrupt the cultural and domestic life and as a blatant exercise in racial discrimination. Those who argue that Alaska has effectively eliminated racial discrimination among its citizenry must acknowledge that Alaska Natives remain an impoverished class with forty percent on public assistance, no more than three percent employed in state and local government and fifty percent resident in municipalities and villages where state services are irregular or nonexistent. Despite this evidence of inequality of treatment, the state views Alaska tribes as instruments of racial discrimination, failing to acknowledge the political (nonracial) basis upon which federally recognized tribes have secured their position within the federal hierarchy. The state argues, for example, that for it to direct block grants to traditional Native villages as authorized by state law in 1980 (AS 29.60.140) would violate the equal protection of state citizens who are non-Native and live in those places.[33]

When the village of Akiachak sued the Commissioner of Community and Regional Affairs, the federal district court upheld a preliminary injunction and stated that "there is a possibility, if not a probability, that the special status of "Native village governments under federal law is sufficient to withstand an equal protection challenge."[34]

The same issue of potential unequal enforcement emerges when the question of retained civil regulatory authority over Natives and non-Natives by tribal government is addressed. It encompasses tribal jurisdiction over Indian country to tax, zone land and regulate exclusively or conjointly with the state fish and

game. Federal Indian law provides for tribal jurisdiction over consensual relations between nonmembers and the tribes and for civil authority sufficient to regulate nonmembers where their conduct would threaten the tribe's political integrity, economic security or health and welfare.[35] A prelude to this question in Alaska is the preliminary question of tribal jurisdiction over Indian country. In Alaska the scope of that territorial jurisdiction is unclear. Is it allotments only, the village core, ANCSA lands or perhaps traditional lands used for subsistence? In the Tyonek case, the matter might be resolved favorably to the tribe with a finding that Tyonek Indian country is no more than the village core. But a fish and game case which tests tribal authority over the vast domain in which subsistence takes place would require a larger geographic base for Indian country. Given that base, a tribe might indeed be able to show that regulation of non-Native hunting and fishing is critical to its economic security, cultural integrity and well-being.

Several matters are clear in this continuing battle between group and individual rights. As state citizens, Alaska Natives are increasingly aware that their political control of once predominantly Native communities is now slipping from their grasp with an influx of non-Natives. Further, with each reapportionment, state political representation from rural areas diminishes. Second as Alaska citizens, Alaska Natives endure inadequate delivery of state services and remain at the bottom of the economic ladder. Further, not only state political and legal initiatives, but federal statutory and executive branch activity has tended to

dilute the significance of village tribes by dealing with other regionalized non-tribal Native entities.

For tribes to reassert their authority, more than litigation will be necessary. Significant political development of villages to take on broader governmental tasks must occur. So, also, must political initiatives be taken to obtain cooperative agreements that free the state of many governmental service responsibilities. Non-Natives subject to tribal government must be treated fairly or, alternatively, granted alternative access to state and municipal agencies where non-Native and Native enjoy equal political rights.

Tribal initiatives to strengthen the capacity of their governments are underway, especially in the realm carved out by the Indian Child Welfare Act and in dealing with subsistence. State initiatives to cooperate in this realm are emerging slowly with the appointment and report of a Governor's Task Force Report on Federal-State-Tribal Relations and a second report issued by the Rural Alaska Community Action Program. Alaska's economic downturn and drastic federal cutbacks in direct services to Alaska Natives may provide the impetus for cooperation and reallocation of power among governments and obviate present concern with lingering questions of tribal authority under federal Indian law.

FOOTNOTES

1 As McBeath and Morehouse (1980:13) described it:

> Of 177 villages surveyed in 1967, 98 (or 55 percent) existed only as "traditional" villages - meaning they lacked a formal legal status under federal or state law. These villages were more likely to be sparsely populated; only 9 numbered more than 250 inhabitants. Most had informal councils headed by elder males (elected in a few cases), limited in the range of issues they discussed.
>
> Of the 79 organized villages, 58 (33 percent of all Native villages) were incorporated under the Indian Reorganization Act of 1934 (extended to Alaska in 1936). Charters were granted to "groups comprising all Native persons in a community" and to groups "though not a community but comprising persons having a common bond of occupation or association, or of residents within a definite neighborhood." These villages had constitutions and bylaws under which they provided municipal services and engaged in small business enterprises.

2 Thirty-nine percent of rural Natives worked in local or state government by 1980, up seventeen percent in a decade (ISER, 1984:9). Still only 400 Native women held state or local government jobs in rural Alaska in 1980 out of almost 13,000 employees in rural areas (Thomas, 1983:5-6).

3 Non-Natives increased in proportion to Natives in rural Alaska from 50,900 to 39,000 in 1970 to 81,000 to 46,000 in 1980 or sixty-four percent increase compared with eighteen percent (U.S., Interior, 1984:IV-10). The proportion of the total rural population comprised of Alaska Natives, according to another study, dropped from fifty-nine percent in 1970 to fifty-six percent in 1980 (ISER, 1986:4).

4 United States federal Indian law usually directs the human services conveyed by the Executive Branch to Native Americans who

reside in designated reservations or in recognized Indian communities. This means that more than half of American Indians who chose to live in America's cities have legal right, but often lack access, to services. However, in Alaska this distinction between urban and rural Native is not made. Services are provided to Natives wherever they happen to reside in Alaska.

[5] Act of June 18, 1934, 48 Stat. 984, codified, as amended 25 U.S.C. Sec. 461-79 (extended to Alaska 1936) at Sec. 473(a).

[6] "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. (25 U.S.C. 450b(b))

[7] "Tribe" means any Indian tribe, band, group, pueblo, or community, including Native villages and Native groups. as defined in the Alaska Native Claims Settlement Act, which is recognized by the federal government as eligible for services from the Bureau of Indian Affairs. (25 U.S.C. 1452(c))

[8] "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43. (25 U.S.C. 1903(8))

[9] ICWA at 25 U.S.C. Sec.

[10] Akiachack v. Notti, Slip Op. No. A85-503 Civ. at 15 (March 3, 1986).

[11] Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§1601-1628.

[12] One hundred seventeen communities certified by the Secretary of the Interior as "Native Villages" for purposes of ANCSA organized municipal governments (RuralCap, 1986:21).

[12a] The federal government sought floating easements and made difficult transfers of land to a land bank (another amendment) which would protect land beyond twenty years from taxation, execution, or adverse possession for other than mineral exploration when left undeveloped or unleased. Congressional action also validated certain transfers, corporate mergers and eased normal federal requirements on corporate activity.

[13] "Cuts of $12.4 million have been proposed for BIA programs serving Alaska Natives (36 percent of the total BIA budget for Alaska programs). These cuts would eliminate a variety of programs currently provided by the Bureau to Alaska Natives, such as agricultural extension, adult education, Indian child welfare, small tribes grants, road maintenance, minerals and mining, water resources and facilities management, and would result in substantial reductions in other programs, such as higher education scholarships - this, despite the overwhelming need that continues to exist among Alaska Natives for these services." (Association

on American Indian Affairs, 1986:3)

[14] This retribalization of the ANCSA land base has already occurred in places where village stockholders unanimously chose an ANCSA option, fee simple (surface and subsurface) title within former executive order reserves rather than further participation in the Act. However, the Secretary of the Interior has refused to take these land bases in trust as in lower 48 reservations.

[15] This Act, as others, included ANCSA amendments which created a land bank, established a right of first refusal by Native corporations for share sales and created what was termed a rural subsistence preference (with machinery) as a condition for state management of wildlife on federal as well as state lands.

[16] See People of Togiak v. United States, 470 F.Supp. 423 (D.D.C. 1979), Alaska Fish and Wildlife Federation and Outdoor Council, Inc. v. Robert Jantzen, Director USFWS and Dan Collinsworth, Commissioner, Alaska Department of Fish and Game, Op. 684-013, (D.Ct. Alaska, 1986).

[17] John v. Alaska, Federal District Court Alaska No. A85-698 Civil (1985). State v. Eluska, 698 P.2d 174 (AK App. 1985), Appeal pending Alaska State Supreme Court.

[18] Gambell v. Clark, 746 F.2d 572 (9th Cir. 1984); Gambell v. Hodel 774 F.2d 1414 (9th Cir. 1985).

[19] Montana v. United States 450 U.S. 544 (1981).

[20] Sixty-four percent of AFDC recipients and 67 percent of food

stamp recipients live outside of Anchorage where half of the population reside (Berman and Foster, 1986:2). Alaska Natives comprise 42 percent of households receiving food stamps and filed 41 percent of Medicaid claims as of late last year (Berman and Foster, 1986:12).

[21] The Report of the Select Committee on Indian Affairs (1977) stated:

> There are 28,334 Alaskan Natives under 21. Of these, 957 (or 1 out of every 29.6) Alaskan Native children has been adopted; 93 percent of these were adopted by non-Native families. The adoption rate for non-Native children is 1 out of 134.7. By proportion, there are 4.6 times (460 percent) as many Native children in adoptive homes as there are non-Native children.
>
> There are 393 (or 1 out of every 72) Alaskan Native children in foster care. The foster care rate for non-Natives is 1 out of every 219. There are, therefore, by proportion, 3 times (300 percent) as many Native children in foster care as non-Native children. No data was available on how many children are placed in non-Native homes or institutions (At 46).

[22] Only eight of two hundred eligible tribal groups received 7.6 percent of available federal program funding. U.S. Senate, Oversight of the Indian Child Welfare Act of 1978, Hearing of the Select Committee on Indian Affairs, April 25, 1984, p. 326. (Testimony of Mary Miller, Kawerak, Inc.)

[23] See Graybeal v. State of Alaska, Federal District Court of Alaska, F-85-47 Civ.(1986).

[24] The Division of Family and Youth Services has entered into a cooperative agreement with the Central Council of Tlingit and Haida Indian Tribes of Alaska and, in a second instance, with the Ketchikan Indian Corporation, as lawful representative of the KIC

Indian tribe. See, for example, the following from two Department of Law attorneys who reported to the governor's June, 1986 conference on Indian Child Welfare Act:

> Native Court Services
>
> We are aware that the following village councils located in the Fourth Judicial District have acted as tribal courts to make custody decisions: Nenana, Tanana, Kaltag, Stevens Village, Northway, Dot Lake, Minto, and Ft. Yukon. There may well be other villages whose councils also act as tribal courts and make custody decisions, including issuing adoption decrees. Many other villages have become actively involved in state court proceedings. Among these are Chalkyitsik, Huslia, Galena, Hughes, and Nulato. The Attorney General's Office has enjoyed a cooperative working relationship with the councils in many of the cases in which intervention occurred. With some villages this has continued to be true even where there is contested litigation between the State and the Village in other Indian child welfare cases.

(Unpublished report by Myra M. Munson and D. Rebecca Snow, "Alaska Conference on the Indian Child Welfare Act [on] Judicial Services to Project Native Children, Fourth Judicial District" on file with author).

25 The June 1986 ICWA conference resulted in a task force of three Native and three state representatives who will receive comments on designated problem areas in implementation of child welfare process. Four targeted areas for comment are emergency removal of children, notice requirements (to whom and when), identification of children as tribal members and placement of children including creation of village foster care. Native representatives want state and federal money to "follow the child" whether he/she is subject to tribal or state jurisdiction. Other problem areas will be dealt with later. The goal is a comprehensive agreement between the state and tribes which can be

modified by individual villages depending upon their needs and positions. (Interview with Julie Kitka, Executive Assistant to the President, Alaska Federation of Natives, July 16, 1986, Anchorage.)

[26] These regional centers were villages which had been transformed over time into service centers from which state, federal and Native non-profit corporations delivered services.

[27] Had not Alaska chosen to decriminalize drunken behavior in public and private, incarceration figures would have equalled those of provinces in Canada and Australian states where large Native populations are regularly jailed for these minor offenses. However, this same uniform decriminalization to lower targeted police enforcement in urban centers and non-Native towns had a negative impact on village social control by stopping local authorities from dealing with drinking behavior before it became violent, a pattern of a small and known minority in many places.

[27a] Village beliefs that drunken and sober Natives are effectively two human beings are slowly changing under the influence of alcohol education programs. However, these older patterns can be said to be reinforced by the Western propensity to blame sober persons for their drunken acts but to take inebriation into consideration when charging and sentencing are concerned as mitigating factors.

[28] This topic is complex legally for several reasons. First, aboriginal hunting and fishing rights on land and sea have been extinguished by the Alaska Native Claims Settlement Act. They

have been replaced in part by the Alaska National Interest and Conservation Act and its mandated preference for subsistence activities by rural residents (predominantly Native) when resources are managed on state and federal public lands by the state or federal governments. However, the harvesting of some resources, such as bowhead whales and marine mammals are governed by international conventions and separate legislation which carves out Native exceptions. Finally, all traditional lands and waters are no longer subject to aboriginal rights nor owned by Native corporations. Other than their rights as private land owners, tribal governments have confronted challenges to their assertion of regulatory authority over these lands as "Indian country," subject to tribal jurisdiction.

[29] A recent State Supreme Court opinion which deals with authority of a tribal council as court to deal with custody under the Indian Child Welfare Act offers dicta suggesting that the Supreme Court is prepared to recognize tribal authority over its members to deal with "minor offenses" and "small differences," including misdemeanors, village ordinance violations, domestic relations and small claims. In the Matter of J.M. Alaska State Supreme Court Slip Opinion No. 3047, April 25, 1986. State officials await a direct holding by the court on this point, however.

[30] Twelve villages in the Yukon-Kuskokwim delta have formed the Yupiit Nation. Together they have undertaken cooperative intergovernmental arrangements and discouraged assistance of the Bureau of Indian Affairs by their elders in designation of historical and sacred sites for demarcation and transfer to their

ANCSA regional corporation as a demonstration of their hostility to the act. Akiachak figures in the law suit mentioned elsewhere in this paper over dissolution of its municipal government. It has clamped down on what it views as negative behavior by its youngsters, including Western-style dances in the schools.

31 Yet as indicated in a 1986 governor's conference on ICWA issues, nonprofits will not undercut village authority, especially where that authority has been explicitly set forth by Congress as in this act which designates ANCSA villages as Indian tribes.

32 Other observers suggest the core of state opposition is rooted in its concern with diminution of its hard won sovereign authority over all land, fish and wildlife within the state, especially its abilities to guarantee equal acces to wildlife for all citizens on equal terms and to tax ANCSA land when oil revenues plummet as Prudhoe Bay fields run dry.

33 Memorandum from Wilson L. Condon, attorney general, to Lee McAnerney, Commissioner of Department of Community and Regional Affairs (Sept. 2, 1981). Regulations issued by the Department broadened the statute to encompass other unincorporated communities and narrowed Native participation to nongovernmental, nonprofit corporations formed under state or federal Indian law.

34 Akiachak v. Notti, Case No. A85-503 (March 3, 1986), Slip. Op. at 15 (cited in RuralCap, 1986:31).

35 See Montana v. U.S. 450 U.S. 544 (1981).

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