ACHIEVING ALASKA NATIVE SELF-GOVERNANCE

Toward Implementation of the Alaska Natives Commission Report

Final Report - AFN Version

May 1999

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Preface

Four years ago, the Alaska Natives Commission noted that "a common theme" in the hearings it conducted with Native people over the preceding two years was "the need for Alaska Native villages– 'tribes' in the federal terminology– to regain governmental control of their own communities and to exercise authority" in areas ranging from subsistence resources to criminal justice to social programs. The theme, in other words, was self-governance: the freedom and ability of Native peoples to control their own affairs and determine their own futures.

To follow up on the Commission's report and to pursue its implementation, the Alaska Federation of Natives in 1998 engaged the Economics Resource Group, Inc. (Stephen Cornell, Jonathan Taylor, Kenneth Grant) and the Institute of Social and Economic Research of the University of Alaska Anchorage (Victor Fischer, Thomas Morehouse) to examine Native self-governance in Alaska. The objective was to explore the range of options available to Alaska Natives as means of furthering self-determination and participation in decision making. This included, for example, an evaluation of existing and emerging institutions being utilized by Alaska Natives in developing the capacity for greater and more efficient self-governance.

Since the Alaska Native community has initiated its own process of setting goals and developing recommendations to the Congress, this AFN version of the ERG/ISER September 1998 Final Report eliminates the authors' specific recommendations. Aside from this change in the last section, the analysis and conclusions are those of the authors.

Julie Kitka, President
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Contents

EXECUTIVE SUMMARY

Principal Findings and Conclusions

Renewed attention recently has been focused on Alaska's Native communities. News accounts, government reports, and academic studies make it clear that Native communities continue to struggle with serious socioeconomic problems despite extensive federal and state programs designed to address them. The public debates arising out of the U. S. Supreme Court's decision in the *Venetie* case,[1] the formation of the governor's Rural Governance Commission (not to mention previous commissions), and continuing subsistence conflicts highlight unresolved questions about what Native, state, and federal institutions should do to address the problems of village Alaska. Finally, the recent Alaska Inter-Tribal Council (AITC)-Rural Alaska Community Action Program (RurAL CAP) Conference of Tribes and the subsequent march, rally, and declaration illustrate continuing Native resolve to address the problems themselves. Clearly there is consensus that Native problems need urgent attention, but there is less agreement on what is to be done.

A central issue in this debate concerns Native self-governance. Can Native self-governance do a better job of dealing with Native problems than non-Native efforts have done? What should be the extent of such governance? What forms should it take?

This report considers these and related questions. By picking up where the Alaska Natives Commission left off and examining Native situations and Native actions in Canada, the lower forty-eight states, and Alaska, it attempts to further the debate about the future of Native self-governance. The report is based on an extensive review of available materials on the current political, economic, and social situation of Alaska Natives, on our own research on Alaska Native self-governance, and on existing studies of indigenous peoples and self-governance elsewhere in the United States and Canada.

[1] For a discussion of the legal implications of the U.S. Supreme Court decision, see Appendix D.

Among our central conclusions:

1. Native self-governance is an essential ingredient in overcoming poverty and related social problems in rural Alaska.

Without real powers of self-determination, Native communities are condemned to be either wards or victims of other institutions trying to either improve or exploit the Native situation. This is unlikely to produce sustained positive change. Nowhere in the history of Indian policy has sustained, successful economic development or sustained improvement in Indian welfare been achieved by communities whose decisions, resources, and internal affairs are substantially controlled by outside decision-makers. In asserting governing powers today, Native communities argue a principle that has found confirmation around the world: we who bear the consequences of decisions about our fate should be the ones making those decisions.

2. Alaska's current approach to Native governance, while it offers some useful opportunities to Native communities, undermines their ability to deal effectively with their own problems and to develop their resources in ways that improve the socioeconomic conditions of rural Alaska.

The current structure of self-governance in Alaska offers Natives a variety of institutional models to work with and has some benefits for Native communities. But it fragments responsibility and power among multiple governing units; tends to concentrate decision-making power and control over resources at regional and state levels, undermining rural development efforts and distorting accountability; provides inadequate fiscal support for local self-government; and otherwise constrains Native ability to effectively govern their communities and deal with their problems themselves.

3. Alaska's Native peoples are currently engaged in a variety of resourceful and determined efforts to take control of their affairs and resources and use that control to solve their problems.

The most promising Native political developments in Alaska today are happening at the village and sub-regional levels. The movement for tribal self-governance has produced a remarkable array of new governing strategies and institutions. From village-regional relations in the Northwest Arctic region to municipal-tribal government consolidation in Quinhagak to tribal consortia in the Yukon Flats and elsewhere, a number of Native communities are inventing solutions to their problems. Their efforts contain important lessons for all of rural Alaska and provide a number of self-governance options for Alaska's Natives to consider.

4. These self-governance efforts deserve close attention and support.

The self-governance efforts being made by Native communities often suffer from inadequate financial resources; from the hostility of existing non-Native institutions and even, at times, from the hostility of Native institutions as well; from internal design and capacity problems; and from the difficulties of effectively communicating models, experience, and ideas across rural Alaska. These problems have to be overcome if these crucial efforts are to realize their full potential. This will require support at regional, state, and federal levels.

5. Certain key considerations should be taken into account in the effort to improve Native self-governance.

As Native communities either work within the current system or experiment with new strategies and models, they have to take certain considerations into account. Among those considerations are: which institutional strategies (current or new) actually advance self-determination, which ones have legitimacy with the relevant Native community, which ones not only put Natives in control of their affairs but can deliver *effective* governance, and which ones best fit Native capabilities and resources?

6. There are concrete changes that can be made at all levels– village, regional, state, federal– that could benefit not only Native communities, but the state as a whole.

A number of actions can be taken at all governing levels to improve Native self-governance and, thereby, the socioeconomic conditions of rural Alaska. These range from improving the financial management and judicial capabilities of villages to state recognition of tribal status, from federal efforts to facilitate land transfers between Native corporations and tribal governments to regional support for the rural economic development efforts of tribes. Sustained improvement in the situation of rural Alaska will require the reconsideration of some long-established institutions and basic assumptions. But the benefits to Natives and to the state can be substantial.

Overview of the Report

The report that follows is divided into six sections.

Section I: The opening section provides an overview of the general argument for self-governance. It draws upon existing empirical research on both Native and non-Native communities to highlight the relationship between self-determination and socioeconomic welfare. It offers empirical and analytical evidence for the assertion that self-governance is a necessary (though not sufficient) condition for creating healthier and more prosperous Native societies. It identifies some key strategic questions confronting Alaskan Natives as they move forward on the path toward greater self-governance.

This section is intended particularly for public officials, tribal leaders, and others interested in the analytical foundations of this report and in the underlying logic of self-governance.

Section II: This section describes the forms, powers, and limits of the various institutions under which Native communities in rural Alaska currently operate. This includes both those institutions typically associated with governance, such as tribal councils and various forms of state governing entities such as municipalities, as well as those institutions which may not typically be thought of as governing entities but which in fact exert at least some discretionary political control over Native resources and welfare, such as regional corporations and co-management agreements.

This section is intended to provide a concise but detailed overview of how Native self-governance is currently exercised in Alaska for those readers who may not be familiar with the Native political and legal situation, as well as a reference for readers interested in particular institutions or their powers and limitations.

Section III: This section briefly presents some of the benefits and limitations of the current system of Native governance. By stepping back from the complex political structure described in Section II, it evaluates the strengths and weaknesses of that structure and the opportunities and constraints Natives face as they attempt to develop their own capacities for self-governance and their ability to deal effectively with social and economic problems.

The section is intended for those persons, Native and non-Native, who are interested in a general assessment of the existing political system and in how it promotes or hinders Native self-governance.

Section IV: Section IV is a compilation of eleven case studies in Native self-governance drawn from Alaska, Canada, and the lower forty-eight states. While many more such cases could be included, the intention was to illustrate the diverse array of strategies undertaken and outcomes achieved by Native communities dealing with issues related to self-governance. These solutions include governmental reorganizations, the formation of tribal courts, the creation of natural resource management systems, and other mechanisms for enhancing self-governance. None of these cases is intended to represent a "best" model for Alaska, but taken together, they not only illustrate the promising and resourceful self-governance efforts some Native communities are making, but include models or lessons that other communities can adopt or learn from.

This section is intended primarily for those individuals, including Native leaders and tribal officials, working to develop greater Native political and/or institutional self-governing capacity and hoping to identify promising self-governance strategies. It also should be of interest to those readers seeking a broader view of the scope of self-governance efforts currently being undertaken by Alaska Natives, American Indians, and Canadian First Nations.

Section V: This section lays out the criteria we believe matter in the choice or formation of Native governing institutions and relationships. It discusses in more detail the strategic considerations faced by Alaska Natives (and other public officials) as they attempt to move from the current situation as described in Section II toward greater and more effective Native self-governance.

This section is intended to be used by Native leaders and public officials actively working to expand effective tribal decision-making and governing capacities.

Section VI: The report concludes by presenting a list of actions that we believe should be taken at village, regional, state, and federal levels to enhance Native self-governance and improve the socioeconomic conditions of rural Alaska. Some of these actions are modest; some are comprehensive and ambitious. Some are actions already underway to some degree or in some places; others are new. We believe that, taken together, they constitute a program for political and socioeconomic change that will benefit not only Native peoples in Alaska but the state as a whole.

I. WHY AND HOW SELF-GOVERNANCE WORKS

Any meaningful discussion of the future of Alaska Natives has to wrestle with the issue of self-governance. To what degree are the Native peoples of Alaska currently free to govern themselves? Do they currently have the institutional capacity for self-governance? What forms does Native self-governance currently take? What should be the form and the extent of Native self-governance in the future? What part could self-governance play in meeting the social, economic, and related needs of Alaska's Native peoples? Perhaps most important: what are the consequences for Native peoples and for Alaska of self-governance or the lack of it?

I.A. The Demand for Self-Governance

There are two very different reasons why these questions should be at the heart of such a discussion. The first is that the Native peoples of Alaska demand and expect the power to govern themselves. In 1994, in its *Final Report*, the Alaska Natives Commission noted that "a common theme" in the hearings it conducted with Native people over the preceding two years was "the need for Alaska Native villages– 'tribes' in the federal terminology– to regain governmental control of their own communities and to exercise authority" in areas ranging from subsistence resources to criminal justice to social programs.[2] The theme, in other words, was self-governance: the freedom and ability of Native peoples to control their own affairs and determine their own futures.

This theme is not new. Native peoples governed themselves effectively for many generations before Europeans arrived in Alaska. But from the latter part of the nineteenth century until the advent of the Great Society programs of the 1960s and the self-determination policies of the 1970s, they lost much control over their own affairs, their resources, and their future. This loss of governing power has gone hand in hand with a decline in economic and social conditions.

[2] Alaska Natives Commission, *Final Report* (Anchorage: Alaska Federation of Natives, 1994), vol. II, at 151.

The connection between these developments has not been lost on Native peoples. Throughout much of the twentieth century, in words and actions, they have made clear their desire to regain control of their communities, resources, and futures.[3] That desire is unlikely to diminish, regardless of how their fortunes might otherwise change.

I.B. Self-Governance Works

There is another and more compelling reason why these questions are crucial: self-governance works. It is the most important single ingredient in solving the difficult problems faced by Alaska's Natives. This fact alone should command the interest not only of Native peoples but of other Alaskans and of both state and federal policy-makers as well. Native self-governance is not the whole answer to Native problems, but it is a necessary component in achieving sustained economic development, in overcoming virulent social problems, in reducing the financial burdens of social welfare programs, and in restoring health and dignity to Native communities.

This conclusion is based on experience from around the world. A growing body of evidence indicates that self-governance plays a central, practical role in the fortunes of societies, nations, and communities. The fact is that societies controlled by outsiders– by members of another society or by those whose culture, self-concept, or aspirations are significantly different– seldom fare well. Wherever local control is usurped by outsiders, wherever outsiders impose their own designs on local communities that have distinct ideas and traditions of their own, sustained development fails to take root and social and economic problems develop instead. The results typically are poverty, frustration, and hopelessness. This is the lesson of Soviet bureaucratic control over eastern Europe, of colonial control and its aftermath in Africa, and of other experiences around the world. The assertion of local control over the major decisions that affect people's lives is a crucial step in escaping this pattern.[4]

This also is the clear lesson of the American Indian experience in the lower forty-eight states. Over the last decade, The Harvard Project on American Indian Economic Development has carried out the most comprehensive study ever undertaken of economic development and tribal government on Indian reservations. The outcome of that study resonates with results from around

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[3] See Donald Craig Mitchell, *Sold American: The Story of Alaska Natives and Their Land, 1867-1959* (Hanover: University Press of New England, 1997), Ch. 6; Thomas R. Berger, *Village Journey: The Report of the Alaska Native Review Commission* (New York: Hill and Wang, 1985), Ch. 6; Alaska Natives Commission, *Final Report*, vol. II (Anchorage: Alaska Federation of Natives, 1994), at 181-200.

[4] See, among numerous examples, Akos Rona-Tas, "Path-Dependence and Capital Theory: Sociology of the Post-Communist Economic Transformation," *East European Politics and Societies*, forthcoming (1998); David Stark, "Recombinant Property in East European Capitalism," *American Journal of Sociology* 101, no. 4 (January 1996); Basil Davidson, *The Black Man's Burden: Africa and the Curse of the Nation-State* (New York: Times Books, 1992); Richard F. Salisbury, *A Homeland for the Cree: Regional Development in James Bay, 1971-1981* (Kingston and Montreal: McGill-Queen's University Press, 1986).

the world and demonstrates the critical role self-governance plays in the fortunes of Native peoples. In case after case, assertive tribes, exercising control over strategic decisions, natural resources, financial capital, and day-to-day affairs, have shown themselves capable of building societies that work.

For example, the White Mountain Apache Tribe in Arizona, having taken control of tribal timber operations from the Bureau of Indian Affairs (BIA), not only improved the financial returns of the enterprise but also improved the reservation's natural habitat. The tribe now regularly outperforms the private logging sector in the western United States, while simultaneously managing for trophy hunting the finest elk herd in the country. The Mississippi Choctaws, a tribe with no natural resource base, have become the engine of economic growth in one of the poorest regions of the United States. The tribe's tribally owned and operated businesses employ not only the vast majority of the tribe, but also several thousand non-Indians.

While these are but two examples of self-governing Indian nations proving that the legacy of poverty and hopelessness need not continue, research indicates that such success cuts across tribal-specific attributes such as geographic location, tribal population, reservation size, treaty status, natural resource endowment, and so forth. The practical lesson to be learned is simple and direct. When outsiders make the primary decisions affecting tribal affairs or the allocation of resources, those decisions inevitably reflect outsiders' agendas. Not only do outsiders determine what is done, but they seldom are held accountable for the consequences of their decisions. When those decisions lead to lost opportunities or wasted resources, they seldom bear the costs. The community bears those costs instead.

As tribes assume responsibility for their own affairs, as they wrest control of their resources from the Bureau of Indian Affairs or other outside entities, as they increasingly make their own decisions on major societal issues, they become accountable for what happens in their lives and communities. They bring coherence to policy and program designs once dominated by diverse agencies and actors. They are able to fit those policies and programs to local interests, needs, and concerns. They are able to bring their own cultural resources to bear on program design and management, often with notable results.[5] As those communities whose resources and well-being are at stake take over decision-making, the quality of the decisions improves. The result, typically, is better policy, enhanced economic productivity, more effective social programs, and improved welfare in tribal communities. Indeed, hard evidence indicates that tribes that direct the management of tribal resources and social

[5] See, for example, the examination of the role of cultural factors, among others, in certain aspects of economic growth on Indian reservations in Miriam Jorgensen, "Governing Government," unpublished manuscript, John F. Kennedy School of Government, Harvard University, December 1997.

programs outperform outside decision-makers. They make better decisions overall, and they achieve better results.[6]

This is not to say that self-governance alone is sufficient to solve the problems of Native communities. Those problems are daunting and complex, and more than self-governance will be required to solve them. Not every tribe that takes control of its own affairs uses its power wisely or effectively. Not every tribe that puts itself in the driver's seat finds itself on the road to prosperity. Other factors are important as well. But while it may not be sufficient to solve Native problems, self-governance appears to be *necessary* if lasting solutions are to be found.

In fact, after a decade of research, the Harvard Project has been unable to find a single case of sustained reservation development in which major decisions were being made by outsiders instead of the tribe itself. On the contrary: in every case of sustained economic development found by Project researchers, there was solid evidence of self-governance, of a tribal government that was exercising genuine control over the major decisions affecting its affairs, its resources, and its relations with the outside world. Wherever research found substantial evidence of long-term effectiveness in dealing with poverty, of the effective long-term use of community resources, and of long-term reductions in the extent of major social problems, the community itself was in charge.[7]

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[6] The results can be striking and often show up on the bottom line. For example, in a major study comparing tribal management of timber resources with non-tribal management, Krepps and Caves found that tribes that take over the management of their timber resources under P.L. 93-638 typically manage their forests more productively and obtain higher prices for their timber than those whose forests are managed largely by outsiders, typically the Bureau of Indian Affairs. See Matthew B. Krepps and Richard E. Caves, "Bureaucrats and Indians: Principal-Agent Relations and Efficient Management of Tribal Forest Resources," *Journal of Economic Behavior and Organization* 24, no. 2 (1994). On social programs see, for example, Stuart Wakeling *et al.*, "The Final Report of the Project on American Indian Policing," Harvard Program on Criminal Justice Policy and Management and The Harvard Project on American Indian Economic Development, John F. Kennedy School of Government, Harvard University, forthcoming (1998).

[7] Harvard Project results are based on systematic comparative analyses of two overlapping samples of Indian nations in the lower forty-eight states. First, Project researchers have carried out field research over more than a decade on more than 20 reservations across the country, analyzing economic development, tribal governance, and the relationship between the two. Second, the Project has used statistical methods to compare economic performance and governing institutions on 67 reservations. In addition, Project research has included numerous studies of individual tribes or enterprises, pair-wise comparisons of tribes, and comparative studies of various formal institutions of governance and tribal and federal policies. Project results have been published in a number of venues; see, for example, Stephen Cornell and Joseph P. Kalt, "Where's the Glue? Institutional Bases of American Indian Economic Development," Report #91-1, Harvard Project on American Indian Economic Development, John F. Kennedy School of Government, Harvard University; Stephen Cornell and Joseph P. Kalt, "Reloading the Dice: Improving the Chances of Economic Development on American Indian Reservations," in *idem*., eds., *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development* (Los Angeles: American Indian Studies Center, UCLA, 1992); Stephen Cornell and Joseph P. Kalt, "Successful Economic Development and Heterogeneity of Governmental Form on American Indian Reservations," in Merilee S. Grindle, ed., *Getting Good Government: Capacity Building in the Public Sectors of Developing Countries* (Cambridge: Harvard Institute for International Development, 1997), at 257-96; and the citations in the preceding two footnotes.

In other words, *self-governance works.* It is not a complete solution to the problems of Native peoples, but evidence from around the world strongly argues that without it, the toughest problems faced by Alaska's Natives will go unsolved.

In saying this, we are fully aware that the situation of Alaska's Native peoples differs significantly from that of Indian nations in the lower forty-eight. Among other things, tribal authority is less clearly established in Alaska and the legal situation is more complex; relevant property rights are more widely dispersed among villages, corporations of various kinds, the state, and the federal government than they are in the lower forty-eight; Alaska's Native communities typically are more isolated from markets; a far larger proportion of those communities have populations of one-to-two hundred or fewer; and so forth. However, while systematic research in Alaska has yet to be done, none of these differences persuades us that the fundamental finding of research in the lower forty-eight and around the world– that self-control is more likely than outsider-control to lead to lasting solutions to social and economic problems– is inapplicable in Alaska. We fully expect that self-governance in Alaska will have the same effect it has had in the lower forty-eight, significantly increasing the chances of long-term improvement in the socioeconomic welfare of indigenous peoples.

This does not mean that every governmental function necessarily has to be replicated in every Native community, but it does mean that decision-making power has to rest substantially in the hands of those communities most directly affected by the relevant decisions. Just how that power should be organized administratively is less clear. Administrative organization will have to reflect an array of considerations, from Native beliefs about how authority should be organized to the relative effectiveness of institutional forms, the availability of human resources, costs, and the need to give local communities real power– not just a symbolic or consultative role– in the decisions most directly affecting their lives and affairs.

This means that the most effective forms of Native self-governance will almost certainly vary across Alaska. No one solution will apply universally. But the fundamental issue has to do not simply with how government is organized, but with where decision-making power effectively lies.

I.C. Self-Government Has to Be Organized Appropriately and Exercised Effectively

Having said that, it remains the case that the practical organization of self-governance matters enormously to the solution of Native problems. Native self-governance is not merely a matter of placing power in the hands of Native peoples. If self-governance is to have the benefits that it promises, it has to be organized appropriately and exercised effectively. The power to govern, when poorly exercised, can be destructive. When organized appropriately and exer-

cised effectively, self-governance can be a key factor in changing the long-term prospects for prosperity, cultural survival, and enhanced social welfare.

But what does "organized appropriately and exercised effectively" mean, and in particular, what does this mean for Native self-governance? The critical questions to be answered are these:

(1) What are the appropriate units of Native self-governance?

Native self-governance in Alaska continues to evolve. In some cases, Native leadership has drawn upon federal, state, and traditional Native institutions to create new forms of Native governing institutions. In other cases it has adapted existing institutions. The result is self-governance organized in units of widely varying scope, with some governing decisions made by diverse village or tribal bodies, some by regional bodies of various kinds, some by municipal governments or boroughs, and some by organizations that fall somewhere in between. Other decisions in Native affairs are made by state agencies or the federal government.

The question thus facing Alaskan Native leadership has two parts. The first is simply this: *Which of these various units of governmental organization is likely to do the best job?* The answer is likely to vary by function. For example, it may make some sense, for administrative or other reasons, for certain functions or decisions to be concentrated at one level within the governance structure of Native Alaska, and for other functions or decisions to be concentrated at another.

But as Natives move forward along the path of greater self-governance there exists a second part of the question that Native leadership must address. *Which units command the loyalties of Native peoples?* This is fundamentally a matter of legitimacy. Which units, in the view of Native peoples themselves, can legitimately exercise authority in their affairs? We have to know what Native people think the appropriate unit is for the organization of collective action, be it making decisions about resources, regulating activity in the community, administering programs, and so forth.

While the answers to the first question may vary by function, the answers to this second question may vary not only by function but by community. Some communities may grant legitimacy only to the most localized units; others may see more distant bodies as legitimately exercising authority over their affairs. But the issue cannot be ignored. Research provides ample reason to believe that where the boundaries of governmental authority and the boundaries of community identity diverge, governmental legitimacy and effectiveness decline.[8] The question of appropriateness can only be answered by

[8] See, for example, Stephen Cornell and Joseph P. Kalt, "Where Does Economic Development Really Come From? Constitutional Rule among the Contemporary Sioux and Apache," *Economic Inquiry* 33 (July 1995).

taking both parts of the question– functional effectiveness and legitimacy– into account.

(2) What are the appropriate institutional forms?

This question has to do not with the units of self-governance but with the form that self-governing institutions should take. How should they be organized? How should decisions be made? How should conflicts be resolved? Who may rightfully exercise what kinds of authority over what persons or kinds of activities? In what organizational structure can the members of a particular community best work together?

Governing institutions vary among societies. One reason is that the circumstances in which people live vary, and some institutions are better at doing some things than others are. Another reason is that different peoples have different cultures; they have different understandings and beliefs about how things should be done, and in particular about how authority ought to be exercised. In other words, the form of governing institutions has to consider both of these dimensions of variation: cultural appropriateness– are these institutions that Native people believe in and will support?– and effectiveness– can they get the job done?

For Alaskan Natives, this means that finding appropriate institutional forms for self-governance is a matter of finding or creating institutions that are adequate to the practical tasks they face and that at the same time fit the respective Native community's values and beliefs about how authority should be organized and exercised. Alaska's Natives, like indigenous peoples in the lower forty-eight, often have had to use institutions developed by others, reflecting other people's cultural values and concerns. These institutions should not for that reason be rejected out of hand, but if self-governance is to be effective, Native peoples will have to build institutions that both reflect their own beliefs and can deal effectively with contemporary problems and with the rest of the world.

In some cases these two objectives– reflecting indigenous beliefs and responding to contemporary circumstances and needs– may not be easily combined. People may believe in doing things in ways that are no longer adequate to the tasks faced by the society or to the new conditions under which the society has to live. In those cases the society may have to innovate, inventing new institutions that are rooted in their beliefs and, therefore, enjoy the support of the people, but that also are capable of acting effectively in changed circumstances.

I.D. In the Rest of this Report...

With the exception of most of Section IV, which includes original research, this report is largely derivative, based not on primary research but on

review and analysis of already available data and materials. The research team had neither the time nor the financial resources to undertake the kind of comprehensive primary research on which a full examination of Native self-governance in Alaska ideally would be based. Consequently, it is not possible at this time to provide complete answers to the questions we have just raised regarding appropriate units and institutional forms.

Nonetheless, there is much that we can provide. In the following pages we summarize how Native self-governance is currently exercised in Alaska; evaluate its strengths and weaknesses; explore the most interesting, effective, or innovative institutional forms that Native peoples are now adopting or developing; consider criteria for the design of Native governing institutions; and make recommendations about how to enhance Native self-governance in Alaska.

II. NATIVE SELF-GOVERNANCE TODAY

Native institutions of self-governance today are largely the creation of three major stages of organizing activity. The first stage was part of the federal government's "Indian New Deal" in the 1930s, in which the Indian Reorganization Act (IRA) of 1934 created governments with federally approved constitutions modeled on conventional American local government forms. (Congress extended the IRA to Alaska in 1936.) These first IRA governments overlaid a base of traditional Native councils, also federally recognized, many of which exist today. The second stage consisted initially of the Alaska territorial and then the state government's efforts to incorporate city governments throughout rural Alaska. These municipal governments were in most cases layered over IRA and traditional council governments.

While these first two stages were initiated mainly from outside Native communities by federal and state governments, the third stage, that of Alaska Native Claims Settlement Act (ANCSA) institutional development, is primarily a manifestation of Native initiatives and aims. Here were the formation of Native land claims associations, ANCSA regional and village corporations, regional non-profits, and reinvigorated IRA governments and traditional councils– tribal governments. In addition, Alaska Natives in such regions as the North Slope and the Northwest Arctic found that they could also make good use of borough government powers under state law. Thus, this third stage of Native institutional development has resulted in new forms of distinctly Native institutions as well as the adaptation by Natives, at their initiative, of older federal and state institutions of local and regional governance.

Although the section provides some detail on the historical circumstances which gave rise to the various governing entities, the main objective of this chapter is to provide an overview of the various governing institutions as they exist in Native Alaska today.

II.A. Village Governments with IRA Status

Primary Powers

One of the centerpieces of the "Indian New Deal" was the Indian Reorganization Act of 1934, which gave Native Alaskans "sharing a common bond of occupation, or association, or residence"[9] the power to adopt written constitutions, hold constitutional elections, and become federally chartered Indian governments. Today, there are roughly 71 IRA governments, 49 of which operate concurrently with organized cities, and 19 of which are in organized boroughs.[10]

Despite the *Venetie* case,[11] and despite chronically limited resources, IRA governments may be among the most potentially useful governmental forms for Natives. Under federal law, IRA governments essentially have powers of "dependent" sovereigns. They have the federally recognized power to make, enforce, and interpret laws and regulations governing their members.[12] They even have some minimal powers over non-member Natives and non-Natives. More specifically IRA governments can:

- tax members;
- regulate property within tribal jurisdiction;
- establish courts with jurisdiction over member and non-member Natives and, in certain limited cases, non-Natives (e.g., non-Native adoptions of Native children under the Indian Child Welfare Act [ICWA]);
- legislate criminal justice policies particularly in the area of domestic disputes, but also in other (non-major) criminal areas[13];
- define and enforce membership rules;
- regulate the domestic relations of members;
- prevent the sale, disposition, lease, and encumbrance of tribal lands without tribal consent[14];

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9 David S. Case, *Alaska Natives and American Laws* (Fairbanks: University of Alaska Press, 1984), at 375.

10 See Appendix A.

11 For a discussion of the legal implications of the U.S. Supreme Court decision, see Appendix D.

12 Provided, of course, that tribal law does not violate federal law, e.g., the Indian Civil Rights Act of 1968.

13 While Alaska is a P.L. 280 state—meaning that Alaska has jurisdiction over Indian crimes—certain criminal justice issues can fall under the purview of IRA (and traditional) governments. First, some villages "decriminalize" crime, essentially resorting to fees, fines, and other non-incarcerating penalties for enforcement. Second, some tribes interpret P.L. 280 to give tribes *concurrent* jurisdiction with the state's. Lisa Jaeger, *Tribal Government Handbook for Alaska Tribes* (Tanana Chiefs Conference, Inc., 1995).

14 A 1989 Alaska Supreme Court ruling held that tribal fee land could not be taken from the Nome Eskimo Community because it is organized under the IRA, which prohibits taking land from tribes without consent no matter the purpose. *Matter of City of Nome*, 780 P.2d 363 (Alaska 1989), as cited in Jaeger, *op. cit.*, at 128. However, the enforcement of land protection by the courts may be fairly uneven because of the way in which the land became tribal property (purchase, village corporation transfer, Bureau of Land Management [BLM] village town sites program, etc.). *Ibid.*, 129. Note also that most villages do not have title to substantial land assets that could be protected under these provisions.

- negotiate with the federal, state and local governments;
- receive services provided to Indians by the federal government;
- contract or compact with the federal government to administer federal programs;
- adjudicate the ownership of culturally important artifacts[15];
- assign land to members (rather than lease or sell it)[16];
- enforce a Native preference in hiring;
- assert or waive sovereign immunity[17];
- refuse to pay state and local taxes on tribal lands;
- regulate alcohol without adopting the Alaska local option laws.[18]

Sources of Funding

Federal Indian programs form the vast bulk of funds expended by IRA governments. These funds primarily come from the BIA and the Indian Health Service (IHS), though some entrepreneurial tribes or associations of tribes are becoming contractors with other federal agencies.[19] Public Law 93-638 gives tribes substantial flexibility to determine how that money is spent, particularly under the Self-Governance Compacting amendments.[20] All of the four tribes that have Self-Governance compacts are IRA tribes, through which funds associated with 638 contracts flow throughout Alaska. In addition, federal funds

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15 Case, *op. cit.*, at 377, citing an Alaska Federal District Court case involving Klukwan.

16 Assignment can prevent the long-term dissipation of tribal land bases possible under allotment and sale arrangements.

17 While the State Supreme Court ruled that most Alaska villages are not tribes, Department of the Interior (DOI) recognition states that recognized Alaskan tribes have the same protection, *immunity*, and privileges as other acknowledged tribes. Jaeger, *op. cit.*, at 53.

18 Many of these powers of tribes are disputed by the states. Alaska, in particular, takes exception to Native claims to the power over judicial and criminal matters and many regulatory powers, including the power to regulate alcohol.

19 For example, the Council of Athabascan Tribal Governments (CATG) and the U.S. Fish and Wildlife Service (USFWS) have an agreement whereby CATG conducts resource use surveys.

20 Public Law 93-638 enables tribes to contract with the federal government to administer federal programs. Essentially, it is an outsourcing arrangement where the federal government outsources programs for a tribe to that tribe. The "638 contracts" are executed on a program-by-program basis, and the tribe must adhere fairly closely to the program rules and regulations.

Under amendments to P.L. 638 (brought by P.L. 103-413), tribes can establish a government-to-government agreement (the compact) wherein any and all BIA and IHS program funds for which the tribe is eligible *and* an overhead amount (the "tribal share" of regional and national overhead costs) are transferred directly to the tribe for administration and implementation. The primary benefits of compacting over P.L. 93-638 contracting are: i) the tribe can re-allocate funds across programs; ii) the tribe can reap some of the benefits of eliminating BIA overhead; iii) the tribe does not have to adhere as closely to the program rules; and iv) because of the foregoing benefits, the tribe can extend its governmental repertoire—rather than serving as a grants-administrating extension of the federal agencies, the tribe can take responsibility for spending priorities across programs, oversight, management, implementation, and evaluation.

Both tribes per se and regional non-profit corporations qualify as "tribal entities" for the purposes of contracting and compacting. Thus, regional non-profits can gain the same flexibility subject to the same limits. Additional self-governance flexibility may be afforded by re-compacting from regional non-profits to villages (see discussion in Section IV).

are expended by the BIA on behalf of IRA governments.[21] Additionally, competitive grant moneys support special programs. Though IRA governments retain the ability to tax, little systematic data exist on the extent to which this power is exercised, and the generally limited market economy existing in village Alaska suggests taxation is not a universally viable way of funding government.

Functional Limitations

There are a number of operational limitations presented by the IRA government arrangement. First, the general lack of taxable economic activity puts the villages at the mercy of ebbs and flows of federal Indian funding. Second, the state has taken a varying view of IRA tribes over time, ranging from not recognizing tribal governments in general and certain tribal institutions of governance in particular,[22] to recognizing tribal status and opening channels of government-to-government cooperation.[23] A good deal of the state's reluctance to recognize broad tribal powers arises out of concerns for equal protection of non-Native rights, rights to appeal tribal decisions, and the sovereign immunity that tribal governments may use in response to non-Native claims.[24] The state's cooperative efforts appear to be motivated out of genuine concern for the dire social conditions in Native villages. Whatever the origins, the variability and intermittent hostility of the state's approach to tribes make planning and implementing tribal policy difficult.[25]

Third, like second class cities (see below), IRA tribes raise questions of financial accountability with state officials because they typically do not meet state rules on budgeting, accounting, or meeting procedures.[26] Fourth, legal uncertainty regarding the rights and powers of IRA governments (even after *Venetie*) hampers internal governmental function, raises hurdles for investors entertaining development of tribal assets, and diminishes the potential of intergovernmental cooperation. Fifth, IRA governments, because of their inherent Indian government status, tend to have difficult relationships with non-Native

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[21] At the time this report was produced, a prior request to the Congressional Research Service regarding Federal expenditures to Alaskan Natives was still pending.

[22] For example, under ICWA the state government appears to recognize council paperwork but not tribal court paperwork, though ICWA is supposed to give tribal courts primary say in adoption proceedings. This practice takes place even though out-of-state courts routinely refer ICWA cases to Alaskan tribal courts. Jaeger, *op. cit.*, at 120.

[23] Current and past administrations have acknowledged tribal status and certain powers.

[24] In a 1981 State Attorney General opinion reported in Morehouse, McBeath, Leask, the state insisted that IRA governments would have to waive sovereign immunity to contract with the state for funds. This still remains a concern of the state government. Thomas A. Morehouse, Gerald A. McBeath, and Linda Leask, *Alaska's Urban and Rural Governments* (Lanham, MD: University Press of America, 1984).

[25] Non-recognition of tribal policies (e.g., to regulate alcohol importation) is particularly exasperating to Native managers who bemoan the state's unwillingness to fund its *own* programs to meet Native needs (e.g., public safety) while simultaneously blocking local, tribal efforts to fill the vacuum. See, e.g., Tom Kizzia, "Indian Country: 2 Destinies, 1 Land," *Anchorage Daily News*, June 29, 1997; and "Whose law and order? Tribal courts fill void left by state, but critics fear rights may be lost," *Anchorage Daily News*, July 3, 1997.

[26] Morehouse, McBeath, and Leask, *op. cit.*, at 181.

residents who fall under the scope of tribal rules but who lack formal political representation. Finally, while IRA government land rights may be stronger than those of the traditional council and village corporation arrangements (see below), there remain unresolved legal questions about those rights.

II.B. Traditional Councils

Primary Powers

Of course, IRA governments were not the first form of Native government, but rather the federal government's overlay on existing governing structures, many of which still exist today in substantially the same form. Today's "traditional" Native governments range from informal arrangements whose structure and authority derive from centuries of cultural practice to formalized structures established in written constitutions and bylaws.[27] Of the 226 recognized tribes, there are 150 traditional governments, 63 of which operate concurrently with second class cities. Fully one-third of the 150 are in organized boroughs.[28]

Traditional council forms of government, retaining those powers not relinquished to the federal government, have very similar powers to IRA governments. The major difference between IRA and traditional Native governments is the protection given to tribally owned lands (e.g., lands from transfers from village corporations and town site lands). While both governments can protect land via sovereign immunity (waiving immunity being a condition for a successful suit to foreclose, for example), Section 16 of the IRA specifically prohibits alienation of Indian lands without tribal permission. This prohibition has been recognized by the Alaska Supreme Court, and as such apparently stands as one of the few rights with strong federal *and* Alaska recognition.[29] The apparent strength of this protection has led some observers to advocate wholesale IRA conversions and accompanying transfers of lands from village corporations.[30]

Sources of Funding

Sources of funding do not differ substantially from IRA governments, although it appears that local taxation is pursued more frequently by IRA governments than by traditional governments. This would mean that traditional

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[27] Constitutions and bylaws formalizing traditional, unwritten governing structures seem to have been a requirement of BIA recognition for eligibility to receive federal services. The BIA was concerned that multiple bodies from the villages might approach the BIA claiming representative powers (Case, *op. cit.*, at 374). Who can claim to represent a village is still a problem even after formal institutionalization because village corporations, non-profit organizations, sub-village interest groups, inter-village coalitions, and occasionally the regional corporations have stakes in policy implementation.

[28] See Appendix A.

[29] *Matter of City of Nome*, P.2d. 363 (Alaska 1989).

[30] Jaeger, *op. cit.*

governments would be more wholly dependent on the federal government for funds.

Functional Limitations

For reasons that vary from place to place, traditional governments range from very effective IRA look-alikes to nearly non-existent entities. Some traditional governments aggressively develop BIA contracts, deliver services, resolve local and domestic disputes, or tax enterprises, all the while maintaining traditional rituals and patterns of association. Others defer to municipal governments, non-profit service agencies, village corporations, or are otherwise moribund. Given their functional and jurisdictional similarities to the relatively powerful IRA governments, it is striking that traditional councils are not more evenly developed. Clearly cross-cultural barriers of language, orientation to formal law and bureaucratic administration, formal educational attainment and skill sets, and the exigencies of subsistence economic activity combine poorly with external factors such as state non-recognition, the availability of substitute administrative bodies, and declining funding.[31]

II.C. Municipal Governments

Originating in turn-of-the-century Congressional legislation and subsequent territorial legislation, and continuing after statehood was attained, municipal forms of local government have been encouraged as a form of Native organization. The Alaska Constitution and subsequent enabling legislation allow for the creation of organized city governments of three types: home rule, first class, and second class. This section will focus on first and second class cities.

There are 21 first class cities and 112 second class cities in Alaska today.[32] Most first class cities have council-manager forms with broad powers (e.g., the council can raise taxes without voter approval) and strong mayors (depending on the officeholder). Most second class cities tend to have weaker mayors (selected by the council rather than at-large), though many of them share the council-manager form with first class cities. The following table captures the major differences in the scope of powers:

[31] As discussed in Section I, however, the cross-cultural barriers should not be seen as insurmountable barriers to greater self-governance success. Indeed, strong indigenous political traditions are assets tribes can deploy in forming strong self-governing institutions.

[32] Local Boundary Commission Staff, DCRA, "Local Government in Alaska," June, 1997.

Table 1
Powers of First and Second Class Cities

Domain	First Class	Second Class
Education	Must provide if in unorganized borough; cannot if in an organized borough.	Cannot provide.
Planning & Zoning	Must exercise if in the unorganized portion of third class borough. Can exercise if not.	May exercise the powers.
Property Tax	Can levy up to 3%. Voter approval not required except where required by general law municipalities.	Can levy up to 2%. Voter approval required.
Sales Tax	No limit. Voter approval required.	Same.
Power of Eminent Domain	Allowed.	Allowed, but requires voter approval.

Source: Local Boundary Commission Staff, DCRA, "Local Government in Alaska," June 1997, at 4.

An additional 12 communities are incorporated as home rule cities, but none of these is in rural Alaska. A home rule city may exercise any legislative power not prohibited by law or its own charter, thus having great flexibility in its structure and activities. Under existing law, it must, like a first class city, operate a public school district. A minimum population of 400 is required to establish a home rule city.[33]

Sources of Funding

As the above table indicates, the cities have differing powers of taxation. Cities also receive substantial funding from the state via revenue sharing and municipal assistance transfers. Second class cities are quite reliant on these sources, and both governments also turn to the federal government's grant programs. The state also contributes to both first and second class municipal budgets via a number of operating and capital grant programs.

Functional Limitations

The major shortcoming of the municipal arrangement from the perspective of Native self-government centers on representation. In some cities where Natives make up a majority of the population, Natives have been a minority on the city council. Where that minority position in the council translates into policies which do not advance Native interests, the municipal form can be problematic. A second failing stems from the municipalities' competition with non-profit service delivery organizations and other entities (village corporations, IRA and traditional governments) in the delivery of social services. The occasionally more prodigious spending powers of the competing entities (particularly in the financially weaker second class cities) can mean the city government takes a secondary role. Moreover, since second class cities do not have

[33] Home-rule municipalities are distinct from the others in that they have charters (constitutions) that establish their structure, powers, and duties. While there has been some discussion of creating a modified Native home rule for villages, the preponderance of Alaska's existing home-rule municipalities are its older and larger cities. Currently, home rule is only allowed for municipalities of 400 or more permanent residents. Local Boundary Commission Staff, DCRA, "Local Government in Alaska," June, 1997, at 2. (See Appendix C for a discussion of a possible modified home-rule city model that could be used for Native self-governance.)

the powers to provide certain services (e.g., Indian Child Welfare Act protections of Native children), the municipal government has to take a secondary role to tribes in certain areas.

At this point, both the extent to which these limitations apply across village Alaska and the extent to which they work to the detriment of Native interests are not known. The problems are enough of a concern to some Natives that unorganized cities under Native control avoid state-sanctioned municipal forms, and organized cities with competing tribal governments even go so far as to dissolve their municipal governments. Since 1990 six villages, all in the Calista region, have disbanded their municipal governments, each foregoing approximately $40,000 annually in state revenue sharing and incurring substantial costs of disbanding.[34] Nonetheless, there are examples of municipal-tribal cooperation that suggest that the organized municipal forms can be usefully embraced by Native communities to advance community policies.[35]

II.D. Boroughs

Primary Powers

The borough structure was delineated in the state constitution as an intermediate layer between the municipal and the state levels, and following statehood, state legislation established the details of the forms boroughs could take. The powers of boroughs have a geographic and substantive delineation in Alaska. The geographic scope of borough powers can be divided into *areawide* (throughout the borough), *nonareawide* (throughout the borough with the exception of areas governed by organized municipalities), and *service area* (an area of more intense or different service delivery that may include a city if the city's council or voters approve).[36] The policy domains over which boroughs have powers can be classified as follows:

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[34] The six cities that have disbanded by leaving IRA and traditional councils the successors of the cities' assets and liabilities are Akiachak, Atmautluak, Kasigluk, Newtok, Tununak, and Tuluksak. Akiak received approval from the Alaska Local Boundary Commission to dissolve in 1995, but the two votes to disband since then have not passed the required threshold—a majority of the registered voters. At the time of approval, the $35,000 in lost revenue sharing and municipal-assistance grants amounted to about 10% of Akiak's total village budget. Tom Kizzia, "Indian Country: A Revolution In Akiachak," *Anchorage Daily News*, June 30, 1997, at 1A; David Hulen, "Akiak Gets OK To Scrap Government If Voters Approve Plan, Tribal Council Takes Over Services, Debts," *Anchorage Daily News*, August 17, 1995, at 1B; personal communication with Dan Bockhorst, Supervisor, Local Boundary Commission Staff, April 10, 1998.

[35] Quinhagak stands out as a model of municipal-tribal cooperation. Similarly, the Northwest Arctic Borough's integration of village, corporate, municipal, and borough forms offers instructive lessons (see Section IV).

[36] In the case where boroughs and cities unify (i.e., Anchorage, Juneau, and Sitka), no *nonareawide* powers exist.

Table 2
Powers of Organized Boroughs

Domain	Home Rule	Second Class	Third Class
Self-Organization	Borough writes own charter.	Abides by Alaska state statutes.	Abides by Alaska state statutes; formation of new third class boroughs prohibited.
Assumption of nonareawide/service area powers	Dependent on charter and ordinances adopted.	Voter approval required.	Hazardous substance control.
Education	Must provide areawide.	Must provide areawide.	Must provide areawide.
Planning & Zoning	Must be done areawide.	Must be done areawide; cities can make own regulation.	Can only be done on a service area basis with voter approval.
Regulation and Public Services	Dependent on charter and ordinances adopted.	Can be done areawide or nonareawide by ordinance; service area requires voter approval.	Can only be done on a service area basis with voter approval.
Property Tax	Allowed up to 3% except where needed to avoid default.	Same as home rule except where limited by local action.	Same as home rule except where limited by local action.
Sales Tax	Dependent on charter.	No limit; voter approval required.	No limit; voter approval required.

Note: Alaska has no first class boroughs, and the creation of third class boroughs is prohibited.
Source: Local Boundary Commission Staff, DCRA, "Local Government in Alaska," June, 1997, at 9.

Finally, the unorganized borough (the remainder of the state after the organized and unified boroughs) has certain limited attributes of decentralized government, i.e., local participation. Though the unorganized borough has been characterized as a "governmental vacuum," regional educational attendance areas (REAAs) and coastal resource service areas (CRSAs) have been formed to allow local participation to guide state-funded policy. REAAs do not have the power to levy school taxes, however. Each has a regional school board with policy-making powers over staff, curriculum, and funding allocations, and certain REAAs have active community committees that voice village concerns to the regional boards. CRSAs have elected councils and executive staffs that design plans for coastal resource management (especially the management of off-shore oil and gas development), though the extent to which Native communities have decision-making power in the CRSAs is perceived to be limited.

Sources of Funding

The bulk of borough revenues comes from property and sales taxes. Substantial program and capital assistance also comes from the state and federal governments.

Functional Limitations

It is difficult to generalize about the extent to which boroughs advance or obstruct Native self-government across Alaska. The borough form has been adopted by regions with a majority of Natives to advance Native goals (e.g., protection of the subsistence economy and cultural integrity– see discussion of the Northwest Arctic and Yakutat boroughs in Section IV), yet the general ap-

plicability of the borough as a vehicle for Native self-governance may be limited by economics. Borough formation rests on tax revenues, i.e., boroughs tend to form where there is adequate and sustaining economic activity to be tapped (e.g., U.S. Forest Service receipts in Yakutat). While borough forms have been useful to predominantly Native groups in tapping natural resource wealth, in the absence of taxable economic activity, it may not be practical to establish boroughs to advance Native (or non-Native) interests. In certain regions, Native Alaskans are concerned about immediate or long-term representation questions, particularly in light of current legislative proposals regarding rural areas. In the unorganized borough, Native participation in REAAs has been disproportionately low in the past,[37] and certain villages' experiences with disproportional representation in city councils may give regional Native groups concerns about boroughs. That said, the power to regulate certain lands outside of towns and corporation lands, the ability to tax, and the ability to administer state services with minimal difficulty are advantages the borough form has over tribal and ANCSA institutions.

II.E. Regional Profit Corporations

ANCSA brought to the overlapping traditional, federal, territorial, and state institutions a new layer of institutions born of the politics of land claim activism and influenced by the dying termination policies of the 1950s and 1960s and the budding policies of self-determination. Out of the land claims associations came regional for-profit corporations.[38]

Under the terms of the settlement, each regional corporation was incorporated under state law, with all Natives of more than one-fourth Native blood born before December 18, 1971, enrolled as stockholders and issued 100 shares of stock in one of the corporations. In contrast to their publicly-held, non-Native counterparts, the transferability of the stock is restricted.

Formally, regional corporations are a mechanism which channels Native assets and capital toward productive investments on behalf of shareholders. While the specific approaches to economic development have varied both across corporations and over time, each corporation has afforded the shareholders participation in corporate governance and a process by which to formulate the appropriate form of economic development.[39] In addition, the creation of the relatively large corporations, perhaps unintentionally, provided the

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[37] Morehouse, McBeath, and Leask, *op. cit.*, at 200.

[38] *Ibid.*, at 186. For a list of the land claim associations see Alaska Native Claims Settlement Act at §1606.

[39] For example, the NANA Regional Corporation has been recognized for its active involvement within its region, for its support of local business activities, and for its Native-oriented employment policies in its mining ventures. The Cook Inlet Region, Inc. (CIRI), recently announced that it would pursue management contracts with various CIRI village corporations, thereby reorienting the role of its resource department from operator/developer to royalty owner. Other corporations, at least originally, placed an emphasis on financial returns and focused their investments in opportunities outside of their particular region.

leaders of these corporations with political powers similar to those possessed by large non-Native corporations.

Primary Powers

The regional corporations are state-chartered, for-profit enterprises. As such, their primary powers are focused on the marketplace– by law they must be making good faith efforts at earning a financial return for Native shareholders through either the investment in Native and non-Native enterprises or the exploitation of regionally-held natural resources. In addition, the regional corporations are eligible to contract for federal funds under P.L. 93-638. The particular policies of the corporation are set by the boards who are elected by the shareholders. The corporations also contribute in varying degrees to community socioeconomic development, whether through scholarships, explicit employment practices, or via direct social investments.[40] Such functions are generally executed by a non-profit affiliate.[41]

As noted above, the size of the corporations provides them with a certain amount of political power. Working either individually or through statewide regional organizations such as the Alaskan Federation of Natives, they provide shareholders with a mechanism for promoting Native interests. For example, regional corporations played a major role in the 1982 statewide campaign to fight the repeal of a state law providing rural residents preference in subsistence use of fish and game. In addition, regional corporations have been involved in plans for the formation of regional governments in the unorganized borough.[42]

Sources of Funding

The initial sources of the regional corporations' capital came directly from the funds ANCSA provided for the monetary settlement associated with the Act to be dispersed through the Alaska Native Fund, with each regional corporation receiving a proportionate share. With disbursement complete, each of the regional corporations currently generates funds through business development, either wholly-owned enterprises or joint ventures; natural resources, e.g., oil extraction and timber sales; business capital, such as the purchase of buildings and other real estate; and investment in stocks and other financial instruments, i.e., passive investments. Under Section 7(i), of ANCSA, each re-

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[40] As noted by one scholar, "The creation of multimillion dollar corporations in the midst of [the conditions of rural Alaska] made it difficult for for-profit corporations to deal with the important functions of business without getting involved in social needs and community services." Gary Anders, "Incompatible Goals in Unconventional Organization: The Politics of Alaska Native Corporations," *Organizational Studies* 7/3 (1986), at 213-233.

[41] For example, Doyon Limited contributes to the Doyon Foundation whose mission "is to promote the economic and social well-being of the region's people...[and] works to promote and develop the preservation of the [region's] culture and heritage." (http:\\www2.polarplanet.com\doyon)

[42] Morehouse, McBeath, and Leask, *op. cit.*, at 188.

gional corporation is required to distribute annually 70 percent of the net resource revenues arising from timber and sub-surface estate operations to all 12 Alaska Native regional corporations. As noted above, regional corporations may also receive funding by entering into contracts with the federal government for the provision of services under P.L. 93-638.

An important source of funding concerns the sale of net operating losses (NOLs). A net operating loss (NOL) is loss of taxable income as recognized by the IRS. Typically, financial losses occurred in any given year are used to offset income produced in past or future time periods. Between 1986 and 1988, Alaska Native corporations were the only corporations allowed to sell these "regulatory assets." Although NOL sales were disallowed in 1988, these assets are still accruing on the books of the regional corporations with apparently some possibility of transferring such assets into cash holdings.[43]

Functional Limitations

The functional limitations in the regional corporations' ability to advance Native self-determination arise out of both the nature and the operations of the organizations. These corporations are organized pursuant to Alaskan state law as business entities. While they may be able to establish non-profit organizations to provide social services or choose to use certain business practices to assist in the alleviation of community problems or in developing village economic alternatives, they are limited by ANCSA to be profit-making enterprises. Furthermore, the Alaska Business Corporation Act, according to Case, may "require the profit corporations to use their best efforts to make a profit," as failure to do so may leave the corporation liable to shareholder suits concerning corporate responsibility.[44] In addition, the fact that these regional for-profit corporations are controlled by individual Native shareholders and not by villages or tribes limits their potential as vehicles for the exercise of Native self-government.

That decision-making authority for development activities is spread over various institutions also serves to limit the regional corporations. While the regionals own the rights to sub-surface estate, the village corporations, and in some cases, the tribe or other political entities, may own the surface rights to the same land area. This overlapping jurisdiction can result in disagreements between the regional and village or other governing institutions.

The functional limitations have also arisen from the application of the corporate model to subsistence-based communities. Historically, most of the corporations struggled financially as Natives were forced to adjust to a vastly

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[43] Steven Colt, "Financial Performance of Native Regional Corporations," *Alaska Review of Social and Economic Conditions* 28 (December 1991), at 14; interview with Alaskan Federation of Natives Planning Committee, July 7, 1998.

[44] Case, *op. cit.*, at 389.

different institutional framework.[45] The corporations appear, however, to be now attaining a level financial success.[46] And as noted above, several of the regional corporations have had positive impacts through other non-financial contributions. The NANA Regional Corporation, Arctic North Slope Corporation, and Doyon, for example, all have made significant community investments through shareholder employment policies and active support of local business ventures.[47]

II.F. Regional Non-Profit Associations

Primary Powers

The regional non-profit associations, like their for-profit counterparts, emerged from the pre-ANCSA lands claim associations. Organized along similar geographical boundaries as the for-profit organizations, 12 non-profit associations now exist providing services to rural Alaska, each with the broad objective of addressing the socio-cultural problems of Alaska Natives.[48] These organizations have provided extensive services and areawide representation to rural Alaskans, in a sense becoming "rudimentary borough governments."[49]

Structurally, each non-profit collectively represents the interests of the regional Native villages: each village is served by one non-profit and is represented on the association's board. The board members then elect the officers of the association's executive committee. In contrast to their for-profit counterparts, however, non-profit associations give Natives born *after* December 1971 equal representation.[50] Administratively, the organizations resemble the complex social service bureaucracies found at the state and federal levels. In addition, the non-profits have been determined by the federal government to be "tribal organizations" for administrative purposes and, as such, are eligible to be and often are the contracting parties under P.L. 93-638.[51]

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[45] Early success appears to have principally been dependent on owning subsurface minerals located within the region. Colt, *op. cit.*, at 18-19.

[46] Jennifer Forker, "1996 Native Corporations: 25 Years After ANCSA," *Alaska Business Monthly* (November 1996).

[47] Colt, *op. cit.*, at 20. Doyon Limited, 1997 Annual Report, at 7.

[48] In certain instances, the regional non-profit corporation, such as Maniilaq Association, includes the regional health organization (RHO). The RHOs are non-profit organizations designated by the Native communities to contract with Indian Health Services, located within the U.S. Department of Health and Human Services, to manage and/or deliver health services for Native residents. In other instances, the RHOs stand apart from the regional non-profit corporation.

[49] Morehouse, McBeath, and Leask, *op. cit.*, at 189. See also Case, *op. cit.*, Ch. 9.

[50] Maniilaq Association, the non-profit organized to serve the Northwest area of the state, does not (according to its bylaws) restrict its services to the Native populations. The purpose of the organizations is to "handle Federal, State, and private funds for the overall economic, social, and educational development of the people of the region."

[51] Seven of them even have the power to re-prioritize funding allocations across programs under self-governance compacts. The Aleutian/Pribilof Island Association, the Association of Village Council Presidents, the Bristol Bay Native Association, the Copper River Native Association, Kawerak, Inc., the Maniilaq Association, and the Tanana Chiefs Conference (TCC) have self-governance compacts. Some prefer to leave the power of re-

These organizations operate a panoply of state and federal programs which provide government-like services including public health services, education and employment, community and regional planning, family services, natural resource management, and law enforcement training. For example, the Copper River Native Association provides services such as community health care, senior services, education, and land management through a variety of programs funded by the IHS, the BIA, and other federal and state agencies.

Perhaps more importantly, in the unorganized borough, the regional non-profits may be the only organizations providing such services to the rural populations. Typically, these kinds of organizations would act in concert with appropriate state or federal agencies also delivering similar kinds of services. Given the absence of other governmental agencies in the rural areas, however, regional non-profits have, in this sense, operated as *de facto* regional governments.[52]

Furthermore, the regional non-profits provide rural villages with a mechanism by which to mobilize, articulate, and represent Native regional and village concerns– occasionally as the primary political vehicle for the villages. This "authority" may arise as a result not only of the institutional capacity and/or objectives of the non-profits, but also of Congressional preference for dealing with a select few Native organizations rather than the many federally recognized tribes. In any case, such organizations do fulfill an important political function. For example, the Maniilaq Association takes an active role in monitoring the NANA Regional Corporation's development plans. Together with the Northwest Arctic Borough's regional planning program, the non-profit provides additional voice to the villages in their efforts to manage the rate of development in the Northwest Arctic.[53] The Tanana Chiefs Conference, Inc., has worked with its membership in various representative capacities, including soliciting, mobilizing, and articulating village opinions in opposing proposed state legislation that would impact the proportion of educational funding received by rural and urban school districts.

Sources of Funding

The regional non-profits receive funding from a myriad of sources. As noted previously, their recognition as tribal organizations by the federal government allows them to be eligible to receive federal funds and/or benefits available to Natives solely because of their status as Natives, such as, for example, funding from the Bureau of Indian Affairs and the Indian Health Serv-

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prioritization unused. Others, e.g., TCC, transfer the power to re-allocate down to the village level (see Section IV below).

[52] Other, smaller non-profits serving a particular village, for example, are discussed elsewhere. Typically such organizations have taken over services previously provided by the regional non-profit.

[53] Case, *op. cit.*, at 400. Also see discussion of "The NANA Village-Regional Model" in Section IV below.

ice. In addition, they are able to receive categorical grants from other federal and/or state agencies under certain circumstances.

Functional Limitations

As discussed above, the regional non-profits offer an important role in providing public services and voicing Native concerns. These organizations, however, do not exercise jurisdiction over territory, nor do they possess other attributes of sovereigns– e.g., they do not have the authority to tax. Furthermore, such organizations are typically not recognized as "Indian Tribes," even though their present status under P.L. 93-638 implies a somewhat formal federal relationship.[54] While the non-profit associations perform the services characteristic of local and/or regional governments and have been instrumental in articulating village opinions, the organizations are limited by their dependence upon resources provided by external actors. Lacking the taxing and other powers of a sovereign, non-profits may only assume programmatic responsibility for functions delegated to them at the discretion of other governing bodies.

II.G. Village Corporations

Primary Power

Village corporations, like their regional counterparts, were established under ANCSA as profit-making enterprises, complete with shareholders, boards of directors, and executives.[55] Today there are 191 village corporations who are in "good standing," seven others who are inactive, and 46 who have merged into other corporations.[56] Formally, village corporations have the power to:

- buy and sell assets, including land allocated by ANCSA[57];
- develop surface (but not sub-surface) resources on village corporation land;
- own and operate businesses;
- execute contracts with the federal government to deliver federally funded services.[58]

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[54] There are exceptions, such as the Inupiat Community of the Arctic Slope, which is recognized as a regional IRA tribe, and the Tlingit and Haida Council, which has recognition as a regional tribe.

[55] As with the regional corporations, all eligible Natives (greater than one-fourth Native) could choose to become a shareholder in a village corporation.

[56] DCRA Community Database.

[57] Stock cannot be encumbered, sold, traded, or otherwise alienated from Native shareholders without a majority vote of the shareholders.

[58] ANCSA corporations qualify as "tribes" for self-governance contracting so long as their "governing bodies" permit Native participation to the maximum extent possible. ANCSA, as cited in Case, *op. cit.*, 387.

Sources of Funding

The initial ANCSA settlement funds were distributed to the regional and the village corporations. Those funds have been followed by proceeds of sales of surface resources, revenues from enterprises, and revenues distributed under article "7(j)" of ANCSA.

Functional Limitations

Village corporations, like the regionals, are charged with making profits for their shareholders, yet they are also created "in conformity with the real economic and social needs of Natives."[59] In practice, they are charged by shareholders with maximizing dividends *and* with meeting the needs of the communities. As corporations governed by the Alaska Business Corporation Act, they may be legally required to maximize shareholder value. Simultaneously, they are asked by ANCSA and often by the local populace to play a social service role. At times, their revenues and assets have made village corporations the most powerful village entities, and they are *de facto* village governments in towns where no municipality exists and the traditional council is inactive.

II.H. Resource Co-Management Arrangements

Primary Powers

A number of inter-governmental institutions and relationships have emerged in the post-ANCSA period to address needs not met by the foregoing institutions. Resource co-management arrangements are among the most innovative, and there is no template that easily captures the attributes of all co-management entities. Each agreement is unique, negotiated independently, and based on the particular institutional and biologic circumstances.[60] Nevertheless, the agreements generally share the underlying goal of developing an effective and sustainable system of wildlife management that is consistent with and respectful of the Native lifestyle while also recognizing the state/federal responsibility to preserve and protect natural resources.[61]

Specific negotiations may define and allocate the Native groups' responsibilities differently, but at a generic level, co-management authorities are re-

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[59] ANCSA, §1601(b).

[60] For example, the Alaska Eskimo Whaling Commission and the Qavilnguut (Kilbuck) Caribou Herd Management System (QCH Management System) agreements have very different goals, structures, and implementation procedures. The former focuses on allocating harvests of a threatened species in accord with international agreements and participates in the negotiations of the agreements. The major aim of the latter is to efficiently distribute rights to a wildlife resource in a manner which is culturally appropriate and under local control.

[61] Alaska Bar Association, *Co-management in Alaska: A Viable Alternative to Dual Management under ANILCA?* March 4, 1997.

sponsible for every aspect of developing and implementing a resource management plan. Specifically, co-management groups:

- research, inspect, and report on the status of the wildlife resources;
- develop regulation upon the basis of research and experience, including setting quotas and establishing hunting procedures;
- allocate the harvest among Native villages and individuals[62];
- enforce harvest limits;
- resolve disputes between users and between interest groups.

Within the scope of executing these activities, of course, Native interests may or may not receive consideration satisfactory to the concerned tribes and villages.[63]

Funding

Co-management authorities have several options for funding:

- contracting with a federal or state agency;
- building funding into the agreement (e.g., under §119 of the Marine Mammal Protection Act);
- independent funding arrangements.

Functional Limitations

Though the co-management agreements improve upon the conflicts that lead to their creation, a few general shortcomings of these arrangements may sometimes work to the detriment of Native self-governance interests or otherwise limit their general applicability. First, as they are born of disputes, these arrangements can be characterized by mutual distrust, especially if Natives are not given the power to manage commensurate with their knowledge of the resource and their dependence on it. Second, some of the successful co-management arrangements (e.g., the Qauilnguut Caribou Management Plan for the Kilbuck herd in southwestern Alaska) have not involved diverse sets of

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[62] Each agreement has specific guidelines that dictate how the harvest will be distributed, giving allocation mechanisms many forms. The model used by the Alaska Eskimo Whaling Commission sets a Bowhead Whale quota for each whaling captain and leaves individual rights up to the boat captains. The model developed by the Qavilnguut Caribou Herd Management System entails a complex system of village-based permit allocations. *Ibid*.

[63] James Schwarber has catalogued levels of participation in co-management arrangements in Alaska as follows (in order of increasing participation): i) informing (information flows one way to users); ii) consultation (communities consult and receive research results); iii) communication (research begins to include local plans); iv) regional councils/advisory committees (recommendations advisory or government may be required to respond); v) cooperation (local knowledge and research assistance incorporated, some local contractors); vi) management boards (community is involved in binding decisions on policy-making); vii) partnership (institutionalized joint decision-making); and viii) community control (power delegated to local community, self-regulation). "Conditions Leading to Grassroots Initiatives for the Co-management of Subsistence Uses of Wildlife in Alaska," U. of British Columbia thesis, December 1992.

stakeholders (e.g., non-local hunters). Thus, co-management agreements in areas with substantially diverse interests may be more difficult to establish or more limited in their success. Finally, since co-management agreements vary substantially in the degree to which stakeholder interests can be taken into consideration, the prospects for advancing Native interests depends on the particulars of the institutional structure, the negotiating context, and the powers of the parties involved. Nevertheless, these potential weaknesses have not kept Native groups and governments from participating in establishing new co-management regimes.

II.I. Other Governing Bodies

A number of other emergent governing bodies such as the Council of Athabascan Tribal Governments, the coordinated memorandum of agreement between the Quinhagak tribal and city councils, and the Akiachak government present unique approaches to Native self-governance. In several regions of Alaska intertribal confederations are emerging. Simultaneously, tribes and non-profits are diverting resources toward the development of tribal administrative capacity. In addition, intergovernmental contracting among tribes, cities, boroughs, the state, and the federal government is growing. Because the forms, powers, financing, and limitations of these diverse entities do not lend themselves to easy comparison or summarization as a group, we will leave discussion of their operations and effectiveness to Section IV where we take up the issue of appropriate models for Alaskan Natives.

III. THE BENEFITS AND COSTS OF THE CURRENT STRUCTURE OF SELF-GOVERNANCE

The current structure of Native self-governance in Alaska is the product of a long process of institution-building, from the traditional and IRA governments of the pre-ANCSA period, through the formal institutional developments linked to ANCSA, to the contemporary tribal movement. As this institutional structure has developed, it has produced certain advantages and benefits for Native Alaskans. The structure also has limits and has imposed significant costs on Native Alaskans. In this section we briefly identify some of the leading positive and negative impacts of this structure.

III.A. Differences from the Indian Situation in the Lower Forty-Eight States

Prior to doing so, however, it is worth noting some major differences between the self-governance situation in Native Alaska, as presented in the preceding section, and the self-governance situation of Indian nations in the lower forty-eight states. Here we touch on those differences that seem particularly important in accounting for the different outcomes we see in Native self-governance in the two regions of the country.

- ***Structural complexity.*** The structure of governance that controls Native lands and communities is far less complex in the lower forty-eight states than it is in Alaska. With some exceptions, most tribes in the lower forty-eight escape the complicated jurisdictional and administrative situation that prevails in rural Alaska, where powers over lands, other resources, and relevant governmental programs are fragmented and widely dispersed among tribes, corporations, municipalities, governmental agencies, and other bodies. The institutions that matter most on Indian lands in the lower forty-eight are either tribal or federal, and relations between them, while sometimes tense, tend to be well specified. In contrast, complexity, ambiguity, and the multi-layering of institutions are central characteristics of the Alaska Native situation.

- ***Governing powers.*** The governing powers of tribes in the lower forty-eight states– as, for example, in land use, natural resource management, regulation of commerce, taxation, law enforcement, and judicial processes– are much more clearly established than they are in Alaska, and they are much more advantageous both to indigenous self-governance and to an effective attack on social and economic problems. In the lower forty-eight, tribal sovereignty, while chronically (and currently) being challenged, has received extensive support in the courts and remains in many ways robust. Reservation land is Indian Country, and tribes wield substantial powers within it. This has given lower-forty-eight tribes a remarkable opportunity to come to grips with social and economic problems on reservations. To be sure, many tribes have squandered that opportunity. But where tribes have been successful in dealing with those problems, the combination of accountability and power that they enjoy typically has been a crucial ingredient in their success.[64]

- ***Units of self-governance.*** The appropriate units of self-governance generally are not at issue on most lower-forty-eight reservations, where the tribe is the primary political actor, often the major property owner, and the primary reservation entity with which outside entities almost invariably must deal. Things are very different in Alaska, where diverse political institutions are structured at village/tribal, intervillage/intertribal, and regional levels, and where the issue of appropriate units of self-governance appears to be very much alive.

There are other significant differences between Alaskan and lower-forty-eight situations: for example, the small size of most Alaska Native communities, their isolation from markets, the more prominent role of state agencies in Native affairs in Alaska, a more substantial record of co-management efforts in Alaska, and so forth. Any comparison of Alaska Native socioeconomic conditions and those in the lower forty-eight must take numerous variables into account. However, we believe that the differences in governing structures and circumstances noted above are a contributing factor in the divergence between the success some lower-forty-eight tribes have had in improving their social and economic situations and the difficulties some Native communities in Alaska experience in attempting to do the same thing.

We now turn to the various advantages and disadvantages of the current structure of Native self-governance in Alaska.

III.B. Advantages and Benefits of the Current Structure

- ***Governmental choice.*** The diversity of governing structures offers Native groups the opportunity to customize institutional forms to meet community

[64] See, for example, the various publications and reports of The Harvard Project on American Indian Economic Development as cited in footnotes in Section I above; also Stephen Cornell and Joseph P. Kalt, "Sovereignty and Nation-Building: The Development Challenge in Indian Country Today," *American Indian Culture and Research Journal*, forthcoming.

characteristics and objectives. Native groups seeking economies of scale can operate through regional or even statewide entities; those seeking more hands-on control of programs can opt to contract services or enter self-governance compacts; those wishing to develop local governing capacity and control can work through tribal or village institutions; those seeking to tap into state funding sources can operate through municipalities or boroughs, and so forth. In short, the availability of a diverse portfolio of governing institutions brings genuine choice into the institutional exercise of self-determination.

There is evidence (some of it presented in Section IV of this report) that Native leaders increasingly are taking advantage of these opportunities. Some are making deliberate choices that exploit the institutional opportunities available within the current system to enhance community control of community affairs and resources.

- ***Financial leverage.*** Diverse governing units lead to diverse funding sources. Municipalities can draw on state funds; IRA governments can draw on federal funds; village corporations can draw on income from resource use; and so on. By working together, different governing entities, drawing on different financial resources, can increase their funds. In short, under the conditions of limited economic opportunity that prevail in much of village Alaska, the skilled use of multiple funding channels may be a key to community survival.

- ***Diverse partnership opportunities.*** The variety of Native institutional models offers diverse opportunities for partnering with state, federal, or other Native institutions to solve particular problems or take advantage of particular opportunities. From the regional government represented by NANA, to the association of tribes represented by the Council of Athabascan Tribal Governments (CATG), to the various co-management arrangements in which tribal, state, and/or federal actors work together, the current system offers a variety of ways to attack specific governance problems.

- ***Centralization.*** In both economic activity and social service delivery, the presence of centralized regional organizations presents a number of potential benefits. For example, such organizations may offer cost savings of advantage to service delivery agencies and taxpayers. They can significantly enlarge available Native human capital as well as the pool of experience and relationships to which Native communities can turn. They offer tribes the ability to decentralize decision-making without having to take on all the accompanying administrative burdens. Dispersed or isolated entrepreneurs or enterprises may be able to exploit centralized marketing and other business strengths. Thus centralized organizational structures may overcome some of the disadvantages small communities typically face in economic development, program administration, and market presence.

- ***Jobs.*** The current, multi-layered system of organizations provides significant administrative employment to Native people, particularly at regional levels. It is thus a source of community income, experience, and training.

III.C. Costs and Limits of the Current Structure

- ***Disconnections between responsibility and control.*** The current structure of Native self-governance concentrates much of the control over the Native resource base and over many social programs at the regional level. At the same time, it typically leaves primary responsibility for local development and problem-solving at the village level. Regional for-profit corporations, for example, are beholden to individual shareholders, many of whom reside beyond the boundaries of the respective region. These corporations vary in the amount of input they seek and receive from villages, but with the exception of NANA, they are not directly accountable to villages or tribes. Moreover, they may be constrained by state law in their business practices, limiting their ability to respond to village needs. As a result of this individual, shareholder-based ownership structure and potentially conflicting legal mandates, regional for-profit corporations often have little incentive to invest in village development and ample reason not to. Yet their actions regarding the use of the natural resource base have potentially enormous impacts on village economies and social life. In other words, the impact of their decisions on village life can be large, but the village role in their decisions is often small.

The other major regional organizations, the regional non-profit corporations, also exercise considerable power over village life through their control of much of the transfer economy on which villages depend. However, they typically have more accountability to villages and in some cases seek and receive substantial village input into policy-making and program design.

These disconnections between those who make many of the decisions and those who bear many of the consequences of those decisions are not universal– for example, region and village are strongly linked in the NANA structure (see Section IV below)– but where they prevail, they tend to hamper rural development efforts, distort accountability, and add to the sense of powerlessness that plagues many rural communities.

- ***Disconnection between units of community/identity and major units of control.*** While regional bodies exercise substantial power over resources and programs and substantial influence in political circles, many rural Natives in some regions do not identify with these regional bodies and see them as only indirectly– if at all– representing their interests. Again, this is not universally the case, but it seems clear that, left to their own devices, many Native communities would not choose to organize economic, political, or social service activities along the current regional boundaries, preferring to organize decision-making along less inclusive cultural, community, or shared-interest boundaries. Put somewhat differently: a fundamental and largely unanswered ques-

tion has to do with the appropriate meaning of "self" in the term "self-governance." At what levels of Native community organization should self-governance be concentrated, given Native allegiances and objectives?

- ***Dispersed authority.*** The dispersal of authority among multiple institutions and layers of government means that Native communities wishing to take action on pressing problems often have to negotiate a maze of statutory and *de facto* controls to get anything done. This is further complicated by the often fragmented nature of resource control, with multiple authorities exercising different levels of control over surface and sub-surface resources and over the various lands on which Native communities in one way or another depend. The result is that a great deal of Native energy is inevitably wasted trying to penetrate and manage jurisdictional and administrative complexities instead of being focused on substantive problems.

- ***Fragmentation of responsibility and power among multiple governing units at the local level.*** Some villages have a municipal government, a tribal government, a village corporation, and a regional corporation, along with other governing institutions, all exercising one degree or another of decision-making power over a typically small population and attendant resources. This strains human capital resources, duplicates some costs, leads to multiple and often competing power centers, and complicates development efforts. It encourages some villages to adopt a passive approach to development, assuming that someone else will take responsibility for meeting village needs.

- ***Inadequate fiscal support for local self-government.*** Most village governments do not control significant natural resources that can serve as sources of employment and income. Many lack any sizable tax base, while most tribal institutions cannot tax business activity on their lands. The authority to tax or otherwise access the bulk of Native economic resources typically lies outside local government structures. This lack of resources and either tax revenue or taxing power virtually guarantees village dependence on state and federal governments and on transfer payments. This leaves villages vulnerable to the vagaries of legislative decisions over which they exercise little influence. It also leaves them hostage to the agendas of funding agencies, making it difficult for them to pursue their own objectives effectively.

- ***Centralization.*** Having noted the possible benefits of centralization above, we should note its limits as well. Centralization is not an advantage in all cases, nor is it without costs of its own. For example, centralization may produce administrative overhead savings but lead to less sensitivity to local needs, conditions, or concerns. The result may be a less effective service that costs less in the short run but more in the long run, as problem situations are less effectively dealt with and consequently are prolonged. A classic organizational phenomenon is the centralized structure that is good at delivering blanket solutions but poor at responding to non-uniform, locally specific needs or circumstances. Indeed, *de*-centralization may have distinctive advantages as, for

example, in local human capital development, in the tailoring of services to local conditions, needs, cultural values, and agendas, and in overcoming certain dis-economies of scale in the status quo (see also Section V below).[65] Our placement of centralization in both benefit and cost columns here is intended to underline the fact that economy-of-scale arguments must weigh cost issues against both direct and indirect outcomes, recognizing that centralization, in and of itself, is neither inherently positive nor inherently negative. Its impacts must be measured against objectives and concerns on a case-by-case basis.[66]

- ***Jobs.*** We noted above under advantages that the complex current structure has some employment benefits, bringing a number of administrative jobs to Native people. However, this benefit must be qualified by certain limitations. First, the current structure of self-governance concentrates administrative jobs in regional organizations, bringing few new employment opportunities to rural areas and possibly promoting a brain drain as talented villagers leave for employment in regional centers. Second, the few village-level jobs the current structure produces are often low-level clerical jobs that contribute relatively little to the development of tribal human capital or governing capacity. Third, most of these jobs are in federal or state programs that survive only with legislative support, leaving them hostage to state or federal politics.

- ***Unresolved legal questions regarding rights and powers.*** Tribal institutions in particular suffer from unresolved questions regarding regulatory and other powers. While the *Venetie* decision in the U.S. Supreme Court resolved some of these issues (to the disadvantage of tribes), much– such as the powers of tribal courts– remains unclear. The resultant uncertainties complicate Native efforts at self-governance.

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[65] A recent study of IHS P.L. 93-638 contracting and self-determination compacting specifically assesses questions of economies of scale, diseconomies of scale, and the qualitative benefits gained by decentralization. See, Mim Dixon, Yvette Roubideaux, Brett Shelton, Cynthia Mala, and David Mather, *Tribal Perspectives on Indian Self-Determination and Self-Governance in Health Care Management* (Denver, CO: National Indian Health Board, 1998, forthcoming).

[66] The question of the appropriate size of self-governing Native communities was also a concern of Canada's Royal Commission on Aboriginal Peoples (RCAP). "The more specific attributes of an Aboriginal nation are that…it is of sufficient size and capacity to enable it to assume and exercise powers and responsibilities flowing from the right of self-determination in an effective manner" (RCAP Report, Volume 2, Section 2, at recommendation 5). However, the Commission recognized, as we do, that the self-definition of a Native community is a key element of self-governance: "The Commission concludes that Aboriginal peoples are entitled to identify their own national units for purposes of exercising the right of self-determination…[I]n practice there is a need for the federal and provincial governments actively to acknowledge the existence of the various Aboriginal nations in Canada and to engage in serious negotiations designed to implement their rights of self-determination" (*Ibid.* at recommendation 6).

IV. MODELS

Section II described the institutional framework within which Native self-government takes place, and Section III offered an evaluation of the benefits and limitations of that structure for Native self-government. This section turns to specific case studies that may be instructive for tribes that want to reap the best that the current arrangement offers while avoiding its costs as much as possible. The first seven of these case studies describe some of the models of Native self-governance currently being tried in Alaska. These models show how tribes have governed themselves within the current governing environment described in Section II. In particular they describe:

- possible relationships between municipal and tribal governments (see "Consolidation of Municipal and Tribal Governments in Quinhagak" on p. 40 and "Akiachak: Local Autonomy and Regional Organization on the Lower Kuskokwim" on p. 59);

- a possible relationship between boroughs and tribes (see "Formation of a Borough Government for Yakutat: Benefits and Costs to Native Governance" on p. 44);

- an agreement between a regional non-profit corporation and its constituent villages that fosters village self-governance (see "Extending Self-Governance Compacting From the Non-Profits to the Villages: The Tanana Chiefs Conference MOA/EMOA Process" on p. 48);

- a model of a consortia of villages that builds village capacity and moves service delivery into local communities (see "The Council of Athabascan Tribal Governments: Intertribal Organization in the Yukon Flats" on p. 52);

- a unified corporate, village, and borough form that nonetheless fosters village self-governance (see "The NANA Village-Regional Model" on p. 64); and

- the only reservation in Alaska (see "Metlakatla: The Model Reservation" on p. 71).

These seven case studies by no means exhaust the variety of approaches Natives are using to enhance self-government. Because of the limits of project time and funds, we were not able to include additional cases in Alaska dealing with matters such as resource co-management (e.g., the Alaska Eskimo Whaling Commission), tribal courts (e.g., the Minto Tribal Court), local government-to-government agreements (e.g., the Memorandum of Understanding between the Sitka Tribe of Alaska and the City and Borough of Sitka, and the MOU between the City of Galena and the Louden Tribe creating the Galena Waste Management Steering Committee), and Native regional and village cooperative arrangements with state agencies in specific functional areas (e.g., the Native Village of Elim's cooperative agreement with the State Department of Public Safety and the Division of Family and Youth Services concerning treatment of juvenile offenders). The Alaska cases presented here nonetheless provide some sense of the range of approaches in use, and they suggest innovations and strategies that may be adapted to different circumstances.

Subsequent case studies from the lower forty-eight states and Canada offer insights that may be transferable to Alaska. These models describe:

- a federated Native entity created by a sub-national government (see "Alberta Metis Settlements: A Provincially Recognized Federation" on p. 76);

- a ground-breaking government-to-government relationship that acknowledges tribal sovereignty and management ability (see "Government-to-Government Agreement: The White Mountain Apache Tribe and the U.S. Fish and Wildlife Service" on p. 81);

- an intertribal court model that develops professional Native judiciaries (see "Intertribal Courts in the Northern and Southern Rockies" on p. 84); and

- a regional non-profit conservancy that allowed a tribe to participate in off-reservation ecosystem planning to moderate on-reservation impacts (see "Coordinating Off-Reservation Impacts on Natural Resources: The Confederated Tribes of the Warm Springs Reservation" on p. 88).

IV.A. Consolidation of Municipal and Tribal Governments in Quinhagak

General Problem and Approach

Native villages seeking to increase their effective powers of self-government face various obstacles. They operate in complex institutional environments consisting of municipal, tribal, corporate, non-profit, and special district organizations at local and regional levels. They may be organized as municipalities under state law or tribal governments under federal law, or as both, and still lack sufficient local powers or resources. They may be forced to compromise their cultural identities in order to gain legal recognition and financial assistance from the state.

One promising approach to dealing with these problems in a predominantly Native village is the consolidation and use of municipal and IRA tribal powers in a unified local government structure. Such consolidation could increase local government efficiency, effectiveness, access to resources, and Native identity and control. In the Quinhagak model described here, the tribal IRA government under the federal trust relationship takes the lead role, while continuation of a municipal council under state law provides the basis for state recognition and support.

Description of the Quinhagak Model

The City of Quinhagak and the IRA Native Village of Kwinhagak signed a Memorandum of Agreement (MOA) consolidating the two governments in August 1996. As local government leaders note in their *Draft Implementation Manual*:

> The idea for an MOA evolved from Quinhagak's experience in the '638' contracting arena. If the federal government could contract with tribes to provide once federally administered programs and services, why couldn't a city do likewise with a tribe? Further, if cities and boroughs could consolidate, why couldn't cities and tribes?[67]

The MOA placed all municipal operations and services under tribal government administration. It authorized a unified budget that tracks both federal and state sources of funds, with the tribal administration doing the accounting and disbursing the funds. The agreement also brought the city and tribal councils together in joint meetings where agendas are divided into city, joint, and IRA parts. While the tribal government takes the lead in administration, the city and the tribe have equal roles in planning, policy development, and hiring of department heads and other executives. The city council also continues to carry out minimum functions required by law. The city council

[67] Anthony Caole, *Draft Implementation Manual for the Tribal-Municipal Memorandum of Agreement: The Consolidation of the Tribal and Municipal Administrations in Quinhagak*, June 4, 1997.

elects a mayor, adopts an annual budget, and receives regular financial reports from the tribal government. It also has its own clerk, who works closely with the tribal administrator.

The tribal administrator heads the unified administrative structure and reports to the joint council. Administrative departments and services include public works, health, housing, human services, public safety, roads, education and training, natural resources, sanitation, and accounting. Some 60 employees constitute a significant share of the adult, working-age population of the village. According to the tribal administrator, the IRA government's employees work more hours, earn more, and have better benefits than did employees under the previous city administration. In fact, city leaders agreed to the consolidation after tribal leaders threatened to dissolve the city government, which was in administrative and financial difficulties.

The MOA provides that any disputes between the city and IRA councils are to be decided by the tribal court, and its decisions are binding on both councils. Further, non-tribal members as well as tribal members are to direct their complaints about administration and service delivery to the tribal administrator for resolution. If not resolved by the administrator, appeals may be made to an appeals board consisting of both city and IRA council members, and then, if necessary, to the full joint council, whose decisions are final.[68]

Tribal leaders of the consolidated government hope to expand the MOA to include the village ANCSA corporation, Qanirtuuq, Inc. The objective is to form joint city-IRA-corporation land use and economic development committees. Under such arrangements, the corporation could acknowledge the IRA government's planning and zoning authority over corporation lands and transfer certain lands to the tribe. In turn, the IRA government could direct business to the corporation's enterprises and support its economic development projects.

Effectiveness and Limits of the Quinhagak Model

Quinhagak appears to have created a more unified, efficient, and accountable government structure by consolidating its municipal and tribal governments. Also, it has used its new structure, which is based on both municipal and federal IRA powers, to leverage additional levels of financial support from state and federal governments. For example, the municipal government obtained a federal Community Development Block Grant (CDBG) through the state Department of Community and Regional Affairs, and the IRA government also obtained a CDBG grant under a special federal Indian program. In this case, the municipality and the IRA government provided matching money or in-kind services for each others' grants. The two councils authorized these ar-

[68] As yet, there have been no appeals under this process. Where problems have arisen, the parties have been able to reach resolution without outside intervention or mediation. Anthony Caole, telephone interview, May 29, 1998.

rangements, and the tribal administration applied for and is implementing both grants.

The tribal administrator reports that villagers strongly support their consolidated government. It is apparently a more effective and productive government than they have ever had before. It was founded by tribal leaders and it is led by them, which gives a distinctive Quinhagak Native identity to the local government. And, importantly, it is a source of employment and income for many Native and non-Native residents of the village. Many villagers have a direct financial stake in the consolidated government and an incentive to make it work.

The key limits of Quinhagak's consolidated government concern questions about its authority, appeal rights of non-Natives, and size of the joint council. There are also uncertainties about the consolidated government's tenure and future.

Combining the powers of a municipality and an IRA government, the consolidated government is not purely one or the other. With the IRA council and administration in lead roles, state agencies are reluctant to support local officials who assert enforcement or regulatory authority that only the state or state-authorized home rule municipalities may have. For example, although tribal police attempt to enforce state and tribal laws affecting urban sports fishermen and campers along the Kanektok River, it is not at all clear that the consolidated government has the authority necessary to protect either the salmon runs or their drinking water. Local officials are working with state agencies to clarify authority and to enter into agreements and contracts. However, state officials are unclear about how far they can go in delegating enforcement authority to tribal officers, just as city officials do not know how far they can go in delegating municipal powers to the tribe. Yet state agencies, because of their limited budgets and the remoteness of the area, cannot themselves protect the river. Similarly, the extent of IRA tribal powers under federal law is also not clear, as in the case of local liquor controls and enforcement.

Also at issue are rights of appeal, particularly of non-Native residents of the village. For MOA service delivery matters, the joint council is the final arbiter, but effective leadership is from the IRA members of the council, who may not be accountable under state laws protecting individual citizens' rights. Where there is a dispute between city and IRA councils over other MOA matters, the tribal court is the final decision-maker. Regardless of the MOA, there are many questions about a tribal court's authority over Natives as well as non-Natives. The state government has not officially recognized tribal courts, but state officials do recognize their value as unofficial "alternative dispute resolution" bodies.

The size of the 14-member joint council presents other, smaller problems. Council procedures can become cumbersome, with meetings divided into

city, IRA, and joint segments and with the chair alternating between the city mayor and the IRA president. Also, other special procedures must be followed in administrative matters– for example, to assure that city council members have a voice in hiring tribal administration employees who are paid with city funds.

Overriding other issues is the question of the future and tenure– the staying power– of the consolidated government. State government has yet to give straightforward recognition and support to the strong IRA tribal component of Quinhagak's government.[69] State officials cite the state constitution and the legal uncertainties surrounding the delegation of state powers. Some would prefer state and municipal contracts with a non-profit corporation created under state law rather than with a tribal government created under federal law. Tribal leaders oppose this and emphasize that their principal objective was to have a Native government with strong local autonomy. They also point out that the consolidated government was initially conceived as an interim arrangement pending dissolution of the city.

General Application of the Quinhagak Model

Other Native villages might draw lessons from the Quinhagak model as follows:

- Consider adapting the model where the ground is prepared for it. The model seems best suited to a predominately Native village having both an active tribal government and municipal status. There should also be broad local support for tribal leadership. Although the IRA government took the lead in Quinhagak, the consolidation model does not require that one government dominate the other.

- Expect uncertainties about legal status and enforcement authority. With the IRA government in the lead, it will be important to work with state officials to find means of delegating authority to local officials for operations such as public safety and land use regulation, through agreements or contracts.

- Seek information and technical assistance and develop necessary administrative skills. Administration of a consolidated government can be more demanding than it is for simpler governmental structures. Federal and state programs have different regulations, and separate federal and state funds must be accounted for. Financial accounting

[69] According to the Tribal Administrator, however, the Alaska Attorney General has unofficially supported the Quinhagak MOA model (Review comments, June 9, 1998). The Tribal Administrator also reports that the Alaska Department of Community and Regional Affairs assisted in the negotiations leading to the MOA, and that city officials probably would not have agreed to the consolidation without DCRA's participation (telephone interview, July 7, 1998).

skills are especially important in a consolidated IRA-municipal government.

- Expect state government to continue questioning the legal status and scope of a consolidated government. It takes time to adapt and accommodate new institutions, especially those outside the mainstream, but ways can be found, as the Quinhagak case illustrates. Patience and persistence will pay off.

IV.B. Formation of a Borough Government for Yakutat: Benefits and Costs to Native Governance

General Problem and Approach

In many Native communities, neither tribal government nor municipal status provides the powers or jurisdiction necessary to control land uses and protect subsistence fish and wildlife habitat in the much larger area surrounding the community. Also, developments in the surrounding area are outside the taxing powers of these local governments. One solution to these problems is to create an areawide or regional borough government under state law in order to bring these lands under local governmental jurisdiction. In addition to land use planning and control and tax powers, borough government also can localize control of public education. These are all mandatory powers of borough government.

The Native and non-Native people of Yakutat obtained these powers by dissolving their first class city and creating a borough government, the City and Borough of Yakutat, in 1992. Borough government extended and strengthened local land use powers and increased the tax and other revenues necessary to support public education and other municipal services. At the same time, however, it further opened local government to non-Native influence and control in a community with a small majority of Tlingit Indian Natives.

Description of the Yakutat Model

The people of Yakutat first created their city government in 1948. For centuries the community site had been the home of Tlingit Indians, who used the large region around them for subsistence hunting and fishing. In 1990, when Yakutat officials submitted their petition for borough government to the state, the city had over 500 residents, 55 percent of whom were Native. (In 1997, there were over 800 residents, probably with about the same proportion or more being Natives.) Most residents of the community continued to depend heavily on subsistence fishing and, to a lesser degree, hunting. Commercial fishing and fish processing was now the principal industry, while most year-round, full-time employment was provided by government and the school district. Logging, tourism connected with sport hunting and fishing, and mining also provided employment in the region.

Creation of the borough in 1992 extended Yakutat local government jurisdiction from the eight-square-mile area of the former city to over 9,000 square miles. Services formerly provided by the city were extended to all of the area connected to the city by road. These services included water and sewer, electricity, police, fire protection, planning, health, parks and recreation, road maintenance, and education. In addition, the entire borough area became subject to the mandatory powers of planning and land use regulation, tax assessment and collection, and education.

The seven-member assembly, including the mayor, is elected at-large. The assembly employs a borough manager who is responsible for all administrative departments. A five-member school board sets educational policy and hires a superintendent. There is also a five-member planning commission. In 1998, the borough assessed a 9 mill property tax within a central service area defined by the former city's boundaries. A 6 mill tax is assessed outside the service area. The borough also collects special taxes on salmon catches, tourism accommodations, and car rentals. Together with substantial federal and state grants, service charges, and enterprise fees (mainly electricity), the borough had total operating and capital revenues of over $6 million in 1996. Operating expenditures per capita were over $6,500.

When the borough was created, Yakutat already had a developed organizational infrastructure. The city had operated for over 40 years and was well established and managed. City officials had a great deal of experience in dealing with federal and state agencies. Native organizations also were prominent and had a long history in the community. In this century, there has been a succession of active Native organizations, including local branches of the Alaska Native Brotherhood, Alaska Native Sisterhood, and the Tlingit-Haida Central Council. With ANCSA came establishment of the village Native corporation, Yak-Tat Kwaan, Inc. Most recently, about the time of borough incorporation, the Yakutat-Tlingit Tribe, a BIA-recognized traditional council, succeeded the non-profit Yakutat Native Association. The tribe expects the Secretary of the Interior to approve their IRA government constitution in 1998.

Effectiveness and Limits of the Yakutat Model

Representatives of Yakutat made clear their reasons for wanting to form a borough government in one of their communications with the responsible state agency, the Department of Community and Regional Affairs, in late 1990:

> Borough formation would supply some of real solutions to some real problems– chronic education funding shortfalls; lack of sufficient local input in matters directly affecting local jobs and subsistence lifestyles; the need for salmon enhancement of important area streams; the need to deal with crises of regional concern… ; and the need to fairly allocate the costs of local government services among all regional residents who benefit from them.[70]

[70] Petition for Incorporation of the City and Borough of Yakutat, December 26, 1990.

The most important reasons appear to have been the desire to extend local regulatory controls over subsistence and commercial fisheries habitats and to increase tax and other revenues that could be used to support education and other public services. At public hearings on the borough proposal, Native residents of Yakutat were particularly concerned about protecting subsistence habitat and emphasized the essential role of subsistence in their Native culture. When the petition for incorporation was approved by the state's Local Boundary Commission in September 1992, the borough acquired clear authority for areawide planning and land use control, taxation, and education.

The most tangible benefits of borough formation were financial. The new borough became eligible for a state "start-up" grant of $600 thousand, increases in state revenue sharing funds and in shared fish tax revenues, and substantial increases in its share of federal receipts from the Tongass National Forest. These latter are revenues that must be used for schools or roads. Also, by extending local boundaries to encompass fishing and hunting lodges and commercial fishing facilities as well as new residents, the borough collected increased property and sales tax revenues. Finally, the borough was eligible to select 10 percent of vacant and unreserved land owned by the state within the borough's extensive boundaries.

With many of the same people in borough government who had held similar positions in the former city, the borough was well-equipped to exercise its new powers. For their part, the Native majority in Yakutat continued the community's organizational reforms by transforming the Yakutat Native Association into a federally recognized tribal council, which in its new form was in a stronger position to cooperate with the borough in low-income housing, road maintenance, and other program areas. For example, the tribal council and the borough made cooperative plans for the expenditure of federal BIA and state road maintenance funds so that local priorities were more effectively met. The tribal council also continued to work with federal and state agencies as well as the borough on issues of subsistence protection, preservation of cultural artifacts, and other matters of particular concern to Natives. Thus, the borough did not displace Native governance in Yakutat, but rather was part of a broader, interrelated local reform effort that included strengthened Native organization.

A potential, though somewhat speculative, contribution of the borough to Native governance was that formation of the borough forestalled creation of larger boroughs in the northern panhandle or Prince William Sound regions that might include Yakutat as but one small sub-region within overwhelmingly non-Native regions. Only about one-third of the residents of a "Glacier Bay" borough extending in a southeast direction would be Native, while as few as one-tenth would be Native in a "Prince William Sound" borough extending to the west.

Borough government is not "Native governance." The borough assembly is elected by and responsible to all the people of the borough, not just Native residents. Currently, the assembly consists of three Native and four non-Native members. Especially in a community where the Native and non-Native populations are as nearly in balance as they are in Yakutat, there will be majorities comprising Natives and non-Natives in changing proportions across issues and over time. Neither the Natives nor the non-Natives of Yakutat think or act as a monolithic group. Many Natives as well as non-Natives have an interest in local economic development and jobs, and the village corporation, Yak-Tak Kwaan, generally reflects this Native interest. Most Natives, as well as many non-Natives, also have a direct interest in the protection of subsistence and commercial fisheries habitat from potentially damaging logging or mining operations. As one Yakutat resident, a Native and former city official, observed, it's often more a matter of differences between long-term and short-term residents, and between "big town" and "little town" viewpoints, than it is between Natives and non-Natives as groups.

To the extent, however, that Natives maintain the connection to their culture through subsistence practices, they also have a special interest in how their borough government actually uses its powers of land use control to protect fish and wildlife habitat. By this measure, the Yakutat borough appears to be less representative of Native interests than an exclusively Native government might be. The assembly balances and compromises interests, and it is not perceived as strongly protective of subsistence habitat. In a limited inquiry for this research, there were no reports of significant borough action to protect fish streams or other habitat from development activities such as logging. On the other hand, there was specific criticism of the borough's land disposal program. Allegedly, the borough has encouraged potentially damaging sprawl by selling lands not served by utilities and not yet surveyed by fish and game authorities to determine possible effects on fish and wildlife habitat. In Yakutat, much like communities in the more urban parts of Alaska, civic leaders are perceived at least by some residents as "too development-oriented."

General Application of the Yakutat Model

Other Native communities might draw lessons like the following from the Yakutat case:

- As a means of strengthening Native governance, borough government may work best in a predominately Native region or community that has at least one well-established city government. There should also be new or presently untapped taxable resources. This will help assure Native control, or effective representation of Native interests, and the administrative and financial resources necessary to support borough government.

- Borough government advantages also include strong area- or region-wide powers of land use control. Where development pressures threaten subsistence habitat, borough land use regulation can be a very effective tool of local Native control.

- Forming a borough government can be a very effective means of capturing taxable resources in a region and directing revenues toward local facilities and services. It can also protect Native communities themselves from capture by adjacent regions looking to form an extensive regional government of their own.

- Formed under the state constitution and according to state laws, a borough government must represent all of the people of a region, Natives and non-Natives alike. Borough government is not likely to have a distinct Native identity unless it is based in an overwhelmingly Native region. Depending on preferences and relative population numbers, this means that there will be tradeoffs and compromises on critical land use, taxation, and other issues, and they will not necessarily favor distinctly Native interests.

IV.C. Extending Self-Governance Compacting From the Non-Profits to the Villages: The Tanana Chiefs Conference MOA/EMOA Process[71]

General Problem and Approach

Since regional non-profits qualify as "tribal entities" for the purposes of P.L. 93-638 contracting and self-governance compacting, they generally have extensive experience operating federal programs. The Alaska regional non-profits (and where distinct, their associated health service non-profits) are generally acknowledged as leaders in contracting and compacting, having done so sooner and more extensively than tribes in the lower forty-eight states. In recent years, the regional non-profits have gone further still by establishing agreements with tribes in their service areas that allow the tribes to take over certain functions in the non-profit's compact, albeit under different terms and conditions than under normal, direct village compacts.[72]

Kawerak, Inc., the Tanana Chiefs Conference, Inc. (TCC), the Bristol Bay Native Association (BBNA), and the Central Council of the Tlingit and Haida Indian Tribes all have established procedures by which their constituent tribes can enter into agreements under which control of expenditures moves to the

[71] This subsection draws from: a sample Memorandum of Understanding between the Tanana Chiefs Conference, Inc., and a tribal council; personal communication with Duane Hoskins, Self-Governance Coordinator, TCC; and personal interviews with staff at the Bristol Bay Native Association.

[72] We have elsewhere use the term "re-compacting." It is used generically in reference to the process by which tribes take over certain functions under an agreement with their regional non-profits.

tribes. Much like straight compacting, these agreements allow the tribal governments to develop their administrative capacities, take control of certain spending priorities, and increase funding levels (by utilizing BIA Area and Agency tribal shares transferred from the non-profit's compact). In contrast to direct compacting with the BIA, the tribes can opt to leave certain accounting and administrative functions (and associated funding) with the regional non-profit until they develop the capacity to do their own. Typically, the process of initiating these agreements is administratively more streamlined, as the villages do not need to demonstrate three years' worth of audits with no material exceptions the way they must under BIA compacting.[73]

Rather than examining all four non-profits' processes in detail, this section takes up one example, describing the manner in which the Tanana Chiefs Conference has established a process by which villages can gain greater control of certain programs.

Description of TCC's MOA/EMOA Process

Prior to TCC's compacting with the BIA, the tribes of the TCC region either authorized TCC to contract on their behalf or held their own contracts with the BIA. If the program was retained at TCC, the non-profit provided the services. In addition, TCC worked with the tribes to develop institutions of self-governance by assisting in the development of tribal courts, the writing of tribal ordinances, and the enhancement of other tribal governing operations.[74] Also prior to compacting, TCC received approval to fund a Tribal Administrator position for each member tribe out of their indirect cost pool. The Tribal Administrators serve at the discretion of the tribes and the tribes determine their duties.

These investments in tribal self-governance were extended after TCC established a compact with the federal government and a means by which tribes could take control of certain programs under the compact. TCC dedicates the bulk of the "tribal shares," i.e., TCC's share of the BIA Agency and Area Office training and technical assistance (T&TA) funds, to tribal control. Any of the villages in TCC's area can sign a memorandum of agreement (MOA) and thereby obtain control of a portion of funds from the tribal shares. These funds can be used, for example, to fund a tribal administrator's salary, to purchase office equipment, to enhance or develop programs or services for tribal members, or to cover other tribal governmental expenses. If the tribe wants to further develop the scope of its governing discretion, it can then assume any or all of nine eligible Tribal Priority Allocation (TPA) programs by entering into an extended memorandum of agreement (EMOA).

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[73] Re-compacting IHS programs is not covered in this section. Currently, there is a moratorium on IHS compacting to villages in Alaska pending review of a General Accounting Office study on IHS compacts.

[74] Shirley Lee, Deputy Administrative Officer, and Duane Hoskins, Self-Governance Coordinator, TCC, personal communication, August 11, 1998.

Under both the MOA and the EMOA, the tribe itself does not actually obtain the funds in question. Instead, TCC provides the financial accounting controls for the tribe. Nonetheless, the tribe has control over and initial responsibility for the expenditure of funds. TCC retains ultimate responsibility for accounting for the total expenditure of funds under the compact. A tribe undertaking an EMOA (by adopting a resolution and by signing the EMOA) must specify which of 11 available programs[75] it wants to assume, and the tribe is accountable to TCC for covering any overages via re-allocation of funds or by carrying overages into subsequent years. Once the EMOA is signed, TCC makes available to the signatory tribe, the budgetary control needed for payment of the tribe's creditors.

All tribes retain the power to dissolve the MOAs in favor of TCC's resumption of administrative control, a P.L. 93-638 contract, or its own compact with the BIA. The EMOAs cover a single fiscal year, thus giving the tribe an annual opportunity to turn programs back to TCC or go its own way. Currently 32 of 37 villages in TCC's region have opted for an MOA, and 20 of those have opted for EMOAs.

Effectiveness and Limits of Tribal–Non-Profit Agreements

The MOAs and EMOAs have resulted in quantum leaps in local governing capacity in a number of locations. In villages where limited tribal staff (and other resources) existed prior to MOAs, they have enabled tribes to substantially expand administrative operations. The resulting improvement in government-to-TCC operations and the development of village human capital (not to mention employment) often have had dramatic effects. In tribes that sign EMOAs, the resulting discretion over funding priorities and the associated direct control of program implementation further increase the villages' self-governing powers.

Moreover, where coupled with investments in the tribal governing infrastructure (e.g., in courts, ordinances, and constitutions), increases in administrative discretion can translate into advances in self-governing effectiveness. A generally observed characteristic of the federal approach to compacting is that it entails transferring *administrative* capacity without developing *governing* capacity. Thus, coupling investments in tribal governing institutional strength can be an important improvement upon the federal approach. Such investments, where they take hold, bolster tribal government's ability to withstand the additional strains on internal mechanisms of accountability, debate, and compromise. As noted elsewhere in this report, strengthening the internal, political mechanisms of tribal self-governance is a task that merits continued and

[75] The 11 are: Aid to Tribal Governments, Scholarships, Adult Education, Adult Vocational Training, Direct Employment, Economic Development, Agriculture, Agriculture Extension, Wildlife & Parks, Social Services, and Small Tribes.

increased attention from tribes, regional non-profits, and the state and federal governments.

A particular facet of the TCC MOA approach that must be weighed by tribes or non-profits considering its adoption is its administrative load. Re-compacting may entail additional non-tribal policies and procedures developed to accommodate and MOA/EMOA operating under a non-profit's compact. Under the typical TCC MOA, the tribe must abide by all applicable federal program rules, OMB circulars, bid compliance guidelines, and procurement rules, just as it would have to do in a compacting relationship with the federal government. Moreover, the tribe must abide by TCC personnel policies for personnel paid directly by TCC and by policies adopted by TCC's Executive Board covering reimbursements and other matters.[76] In addition, the Office of Self-Governance requires that TCC officially request federal waivers on behalf of member tribes that seek them for the re-design of programs. As noted above, the ability of the tribes to rely on the non-profit to provide "off-the-shelf" administrative services (e.g., accounting controls) or policies (e.g., a personnel policy) is not an insubstantial benefit– it allows a gradual transition from the non-profit's compact to its own tribal contract or compact, should it so choose. Indications are that TCC has embarked on pilot efforts to simplify policies and procedures that will make MOAs and EMOAs even more attractive in this regard.

General Application of the TCC Model

A number of advantages and concerns regarding re-compacting merit consideration by Alaska tribes and regional organizations:

- Entering into an agreement with the non-profit allows tribes to gain control of program funds faster and with perhaps more accounting and administrative support than federal compacting does. It thereby offers an optimal strategy for tribes who would prefer to transition to full compacting gradually.

- Entering into an agreement with the non-profit, especially in conjunction with parallel efforts to advance the scope of tribal decision-making, offers tribes greater flexibility and decision-making scope, i.e., greater *de facto* self-governance.

- Self-governance compacting (and its extension by the non-profits to the tribes) entails new demands on institutions of *governance* and new levels of internal accountability. Tribes (and those who would support them) ought not to lose sight of the need to strengthen tribal political institutions as they develop administrative capacities.

[76] BBNA reports that it offers its constituent tribes a streamlined MOA with very simple requirements and ample tribal flexibility.

IV.D. The Council of Athabascan Tribal Governments: Intertribal Organization in the Yukon Flats

General Problem and Approach

The Yukon Flats are part of the vast valley of the Yukon River, lying between the Brooks and Alaska ranges in the interior of Alaska. A number of Gwich'in Athabascan villages are located in the Flats, and in 1985 these villages joined together in an organizational response to poverty and powerlessness. Among their concerns were the lack of jobs in the villages, the difficulty of generating sustainable economic activity, the lack of Native control over subsistence resources in the region, and a sense that some of the social service, resource-related, and other activities in the area could be more effective and more helpful to Native peoples if they were run by the area's Native populations themselves.

These concerns had been heightened over the years as state and federal government regulation of subsistence resources and activities grew, as growing numbers of non-Native recreational users put increased pressure on those same resources, and as commitments to Native participation in resource management and other decisions turned out to be limited largely to public hearings once management plans had already been made. As a result of these and other developments, it had become increasingly difficult for rural Native populations to meet their own needs, much less plan for a viable economic future.

The villages' response was to develop an intermediate level of organization between village governments and regional institutions. Ten villages joined together in the Council of Athabascan Tribal Governments (CATG).[77] Over the last decade or so this consortium of tribal governments has taken over the task of delivering certain social services to its member communities, has begun to build its own natural resource management capacity, and has worked to establish its member tribes as constituting the recognized and effective Native government of the Yukon Flats and itself as a major voice in the management of the lands and resources in the area.

Description of the CATG Model

The Council of Athabascan Tribal Governments was founded in 1985 when chiefs, elders, and other members of the tribal governments of the Yukon Flats gathered in Fort Yukon to confront an array of problems faced by their communities. At that meeting Clarence Alexander, then Chief of Fort Yukon and now Chairman of CATG, expressed the purpose of the organization in the following way:

[77] The member villages are Arctic Village, Beaver, Birch Creek, Canyon Village, Chalkyitsik, Circle, Fort Yukon, Stevens Village, Venetie, and Rampart.

> For a long time we haven't been responsible for anything, and what we're really gearing up to do right now is trying to take control and take that responsibility...We always leave it to somebody– we leave our responsibilities up to somebody else. I think it's time that we take control of our own responsibilities. I think that's really what we're doing.[78]

Those who founded CATG "insisted that the Council maintain one of the strongest of Gwich'in principles, *yinjih* (harmony, group action with one mind, consensus)."[79]

Most of the villages in the consortium are Gwich'in Athabascan, with the westernmost member villages beginning the downriver transition to the Koyukon Athabascan culture. The 1990 population of the ten villages was just under 1500 people. CATG's administrative office is in the centrally located village of Fort Yukon, which is also the largest village in the Yukon Flats.

According to CATG's constitution, adopted in 1986, the Council's purposes include:

> to conserve and protect tribal land and other resources; to encourage and support the exercise of tribal powers of self-government; to aid and support economic development; to promote the general welfare of each member tribe and its respective individual members; to preserve and maintain justice for all; and... to exercise all powers granted by its member villages... [80]

Planning meetings in the first two years of CATG's existence established the following long-range goals, which remain the organization's goals today:

- land and resource protection in the Yukon Flats;
- a stable economy compatible with the cultural values of the Yukon Flats;
- strong and unified communities in the Yukon Flats Region.[81]

An 11-member board of directors governs CATG. The board is composed of the elected Chiefs of the ten member villages, each of whom has one vote on the board, plus a board-appointed, non-voting chairman. The board usually meets once a month except during the summer, when it meets more rarely. Board decisions are made largely by formal voting, but votes generally are taken only when substantial consensus already has been achieved. Day-to-day administration is in the hands of a board-appointed executive director. As of spring of 1998, there were three departments reporting to the executive director: Administration, Health, and Natural Resources.

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78 Quoted in CATG, SEDS application, 1998, Part IV. A., at 4.

79 Phyllis Ann Fast, "*Vat'aii, Dat'aii, and Yinjih:* The Healing Path of Gwich'in Athabascans," unpublished Ph.D. dissertation, Harvard University, March 1995 (preliminary draft), at 73.

80 Constitution of the Council of Athabascan Tribal Governments, Fort Yukon, Alaska, 1986, Art. 1, Sec. 2.

81 CATG, SEDS application, 1998, Part IV. A., at 1.

The first few years of CATG's existence were spent trying to figure out how to gain the authority and expertise to run some of the social services provided through the regional non-profit corporation. CATG was convinced that running such services locally would bring both jobs and money to the villages and would contribute to village autonomy and, through training and experience, to village capacities for self-government. The breakthrough came around 1990 with an Indian Health Service tribal management grant. Said the organization's executive director, "That grant showed us that there was an agency that thought tribes could be running their own programs and was willing to show us how to do it."[82]

With help from IHS and other sources, CATG quickly got involved in practical health planning and learned the ropes of program administration.

> We were intimidated at first because we had been told for years how difficult it was to run these things. But we quickly learned that there's no mystery about it. Anyone can learn to do it if they have the right support and information. You just have to know what you're doing, and be willing to work hard.[83]

Beginning with one employee in 1985, CATG has been growing rapidly and today employs about 60 people. Some 90 percent of these are Alaska Natives. Much of the organization's growth has occurred since 1993 and has been focused in two major areas: health care and natural resources.[84]

In 1993, CATG established a Natural Resources Department. In addition to central office staff, this department today employs ten village-based Resource Specialists who collect village-level data on subsistence harvests on a U.S. Fish and Wildlife Service grant to the organization. With assistance from the First Nations Development Institute, CATG helped establish natural resource offices in each of its member villages. The Environmental Protection Agency helped CATG establish environmental assessment capabilities in each village and reached an agreement for the joint management of environmental programs, monitoring quality, addressing environmental problems, and so forth. The National Institute for Environmental Health Services works with CATG on environmental health issues, educating tribal governments about environmental contamination and its alleviation and the relationship between contamination and health. CATG also has been a leading participant in the Yukon River Inter-Tribal Watershed Protection Coalition and is working with the Alaska Department of Environmental Conservation on community environmental assessments. A major purpose of the Natural Resources Department is to build CATG's and its member villages' natural resource and environmental knowledge and management capabilities.

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82 Patricia Stanley, CATG Executive Director, from interviews in Fort Yukon, February 1998, and by telephone, May and June 1998.

83 *Ibid.*

84 CATG is recognized as a non-profit tribal organization for the purposes of administering federal, state, and private foundation grants and contracts.

In 1994, CATG received a U.S. Department of Health and Human Services grant for substance abuse prevention. Under this grant, CATG hired ten village-based prevention workers, gave them 23 weeks of professional training, and then worked with them to establish village-run prevention programs in each village. The organization's health-related activities continued to expand when it became the Indian Health Service contractor, under P.L. 93-638, for the Yukon Flats Health Center in Fort Yukon, which serves as the central health provider to the Yukon Flats population. This substantially expanded CATG's role in the provision of social services in the Yukon Flats. Since taking over the facility, CATG has re-organized it, improved record and billing systems, supported training programs to upgrade staff, and added additional health programs. It also has worked to support health care planning at the village level. CATG is explicit about its goal to "decentralize" health care. While it has taken over much of the administrative work that formerly was carried out by the regional non-profit corporation, it points out that its objective is not to displace that organization in the health care field– in fact, the two work together– but "to develop the most efficient balance between 'economies of scale' and village-based access to health services."[85]

In addition to these activities, CATG has been actively involved in the search for business opportunities in the Yukon Flats. It started the Yukon Flats Fur Cooperative as a trapper-owned marketing coop and is exploring other opportunities.

Throughout these activities, CATG has been not a substitute for tribal government but a resource to it. While CATG is a contractor for some social service and other programs, much of its emphasis is on helping member villages contract to run their own programs. The overall arrangement is one in which member villages retain their own governmental authority. What CATG does is to bring them together in a cooperative effort to solve problems, increase Native governing capacities, and enlarge the power that the communities of the Yukon Flats can exercise over the programs, resources, and decisions that most directly affect their lives.

CATG personnel point to a number of lessons they feel they learned, partly by trial and error, in the process of getting the organization up and running. One was the critical importance of having a first class, reliable financial management system. They felt their own system did not really come together until they retained professional accounting help. Another lesson was the futility of following the conventional wisdom to "be cautious and start small" by taking on only small programs or parts of programs. In initially following the go-slow approach, CATG encountered insufficient indirect funds to provide the necessary administrative support, insufficient control and administrative autonomy to respond effectively to local conditions, and recurrent conflicts with

[85] CATG, "Response to GAO Request for Additional Information Concerning Health Services Provided by the Tribal Governments in the Yukon Flats, Alaska," March 1998, at 8.

those who retained control over other parts of programs or other activities that were necessary to successful program administration. CATG's response was to "take on the whole program: it's the only way to make them work."[86]

Effectiveness and Limits of the CATG Model

CATG has had a significant impact on the Yukon Flats. Among its most tangible benefits are the jobs it has produced, not only in Fort Yukon but in nearly all of the member villages. As well as creating new jobs, CATG in effect has redistributed social service jobs from Fairbanks to areas with far higher unemployment. In addition, the villages are now producing jobs for themselves through P.L. 93-638 contracts established with CATG's assistance. Not only does this increase the flow of money into these communities, but it enhances human capital through job experience and training as well. In addition, decentralization means a major increase in the accessibility of health care. Some of the services that used to require extensive travel can now be obtained closer to home.

CATG also has succeeded in devolving a good deal of decision-making power, particularly in the health area, from the regional centers to local communities. This increases local community autonomy, encourages self-governance, and provides invaluable experience to villages interested in developing their own governing capacities.

In the area of natural resources, CATG is rapidly gathering experience and building management capacity, both in its own organization and in member villages. This is likely to prove critical in the effort to assert and expand Native control and management of land and subsistence resources in the Yukon Flats Wildlife Refuge and adjacent regions.

Finally, in its effort to build relationships with state and federal agencies, CATG has become a significant Native voice and an important player in the major issues facing Natives and non-Natives in the Yukon Flats.

The CATG model also has some limits, at least in its present form. First, CATG has demonstrated a capacity to contract for and deliver social services and has been successful at negotiating a cooperative arrangement and division of social service responsibilities with the regional non-profit corporation. However, decentralization often increases administrative costs as more localized units replicate administrative tasks previously carried out more centrally. Indeed, some contract support costs may have risen at CATG. On the other hand, this does not necessarily mean that the overall administrative costs of dealing with social problems or even with health problems have risen. In a situation such as CATG's, a complete analysis of costs would have to take into account such variables as the expansion of health services, the accessibility of

[86] Interviews with Pat Stanley, Davey James, and Wally Flitt of CATG, February, May, June, 1998.

those services, the quality of care delivered, and more generally, the cost savings generated by lower local unemployment, enhanced local human capital and administrative experience, the long-term impacts of expanded local control of programs (see the discussion of self-governance and economic development in Section I above), and the long-term health benefits of a decentralized system of care.[87]

Second, it is also currently unclear how effective CATG will be in its other major activity area, land and natural resource management. This is not because of any apparent shortcoming in the organization; indeed, the natural resources department has several important accomplishments to its credit. The problem has to do with the necessity of negotiating with state and federal agencies that may be less inclined to support CATG's natural resource agenda. In the social service area, CATG's work has involved taking over, expanding, and delivering services that were already established under Native control, albeit at the regional level. The idea that Native peoples should operate the social service programs on which they depend was not a new idea; on the contrary, through the regional non-profit corporations, Natives have been doing this throughout Alaska. What CATG did was to decentralize and expand already existing services. In the natural resource area, however, CATG and its member governments not only have to demonstrate their capacity to manage lands and subsistence resources; they also have to persuade non-Native organizations that– for reasons of necessity or the benefit to the resources, or simply by right– they should be allowed to take on a primary management role.

A third limit is inherent in the organizational structure. CATG is recognized as a tribal organization, but it is not a government. It can exercise only those powers that its member tribal governments give to it and can act only with their support. It is a contractor, facilitator, coordinator, and resource, but it has little direct control over anything other than its own staff. This is a limit simply in the sense that it constrains what the organization can do and, sometimes, the speed with which it can act. On the other hand, this constraint works on behalf of the self-governing power of the member villages, which is something CATG itself is committed to support and enhance.

A fourth limit, common to Alaska's rural Native organizations, is the uncertainty of funding. In 1997 about two-thirds of CATG's $3.1 million budget was recurring base funding; the rest came largely from short-term contracts and grants. This leaves the organization dependent on funding decisions made by outsiders who are themselves subject to political developments and constraints over which CATG has little influence and no control. CATG's future depends on its ability to act effectively. This in turn depends in part on a continuing flow of funds.

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[87] On contract support costs at CATG, see General Accounting Office, *Indian Self-Determination Contracting: Effects of Individual Community Contracting for Health Services in Alaska,* Report to Congressional Committees, June 1998, GAO/HEHS-98-134. We should note, however, that the GAO report does not consider most of the variables noted above.

Finally, a potential fifth limit to the model in its present form has to do with the political structures of CATG's member villages. A number of those villages have only one-year terms of office for their elected Chiefs, who make up CATG's board. This has the potential to produce frequent board turnover. Such turnover has not occurred, but if it were to occur regularly it would make continuity of vision difficult to maintain and compel organization staff to spend more time bringing new board members up to speed on ongoing programs and issues.

General Application of the CATG Model

- The CATG model is a response to a particular situation. The Yukon Flats is a 55,000 square-mile valley with a small Native population concentrated in dispersed and isolated villages. While this might be considered an unpromising situation for cooperative action, the villages of the Yukon Flats are linked by language, kinship ties, and traditional ways of life, by similar ecological circumstances, and by a common set of problems. Joining together in an alliance like CATG makes a great deal of sense. Among other things, the villages gain economies of scale in service delivery without losing either village autonomy or hands-on, participatory administration of programs. Additionally, in an area where state and federal agencies wield a great deal of authority but have little actual presence on the ground, these allied tribes are able to present themselves as potentially more effective resource managers and regulators, having unsurpassed knowledge of the region and a much greater and more continuous presence within it.

  The model is probably most directly transferable to similar situations in large regions. Calista and other parts of Doyon include likely settings for similar sub-regional alliances of tribes on behalf of self-government and socioeconomic development. Indeed, more or less similar consortia are emerging in some of these areas.

- The CATG model supports the idea that villages and associations of villages should consider contracting directly with federal agencies for the delivery of services and the management of resources. Issues of cost, effectiveness of delivery, internal capacity, and so forth have to be taken into consideration– it may well make more sense in a given situation for services to be delivered regionally– but the *assumption* that services should be organized and delivered regionally should be set aside in favor of a more reasoned evaluation of the pros and cons of different options.

- It is easy to imagine other governance activities that might be improved through sub-regional alliances or confederations that can pool human capital and other resources and enlarge the political clout of

villages, but that remain close at hand and knowledgeable about local conditions. Among these are educational administration, appellate courts, some forms of law enforcement, land use planning, and certain kinds of economic enterprise such as tourism.

IV.E. Akiachak: Local Autonomy and Regional Organization on the Lower Kuskokwim[88]

General Problem and Approach

By the early 1980s, Akiachak was one of more than a dozen Yupik villages on the lower Kuskokwim River where second class cities had been layered over traditional councils and IRA governments. Also by that time, the state had created Regional Education Attendance Areas (REAAs), placing decision-making powers in regional centers often far from the villages. As in the other villages of the region, Akiachak's most important government organizations were essentially state instrumentalities largely dependent on state funding and decisions.

In 1983, Akiachak took the lead among the region's villages in asserting tribal control over local government and schools. It set aside the city government, put its IRA tribal government in charge, and invited two neighboring villages to create an independent "Yupiit School District." Their ultimate goal was creation of a region-wide tribal organization which they called "Yupiit Nation." By the early 1990s Akiachak and other villages in the region had greater local autonomy, including control of education and other vital services, but a regional "Yupiit Nation" remained an elusive goal.

Description of the Akiachak Model

Akiachak has a population of 570 in 1998, 98 percent of whom are Natives. Historically, Akiachak was a Yupik subsistence fishing site, and today's villagers still depend heavily on subsistence fishing, hunting, and gathering for most of their food. Their major sources of year-round employment are the IRA government, the school district, and the village corporation. Commercial fishing and construction are important sources of seasonal jobs.

The Akiachak Native Community, an IRA government, was established in 1948. Twenty-six years later, in 1974, the second class city government of Akiachak was incorporated. The city had existed for only nine years when villagers abandoned it in favor of their IRA government. Akiachak had the dis-

[88] In addition to the sources cited in the text below, this section relies on: DCRA Community Data Base; Ann Fienup-Riordan, "One mind, many paths; Yup'ik Eskimo efforts to control their future," *Etudes/Inuit/Studies*, 1992. 16 (1-2): 75-83; Willie Kasayulie, "The self-determination movement of the Yupiit in Southwest Alaska," *Etudes/Inuit/Studies*, 16 (1-2): 43-45; and telephone interview, Official of Akiachak Native Community, April 17, 1998.

tinction of being the first Native village to dissolve its city government when the state Local Boundary Commission formally approved the dissolution in 1990.

In effect, the people of Akiachak traded a relatively small amount of state money tied to municipal status– at the time, about $60,000 in revenue sharing and municipal assistance funds– for Native identity and greater local control in a federally recognized tribal government. They would more than make up for the limited loss of state assistance in the following years by obtaining substantial federal and state capital and operating funds.

In a related action to increase local self-governance, Akiachak villagers, in cooperation with the nearby villages of Akiak and Tuluksak, established the Yupiit School District in 1986. While it remains part of the state-funded REAA system, the Yupiit district brings school policy and administration closer to the village level through a school board elected from the three participating villages. School district administrative offices are located in Akiachak.

At the same time they were reforming village government and organizing the Yupiit school district, Akiachak leaders proposed creation of a region-wide tribal organization that might ultimately include all 56 villages in the Calista region. The idea was that a regional organization of limited powers would be controlled by its member villages, balancing regional cooperation with local autonomy. Akiachak began with its school district partners, Akiak and Tuluksak, and soon interested more than a dozen additional villages in the regional concept, calling their emerging organization the "Yupiit Nation." Many of these villages also followed Akiachak's lead in dissolving their city governments and turning to their traditional and IRA councils. In 1998, leaders from Akiachak and other villages were continuing efforts toward a regional "confederation" of villages and seeking political and organizational support from the regional non-profit, the Association of Village Council Presidents (AVCP).

The Akiachak IRA government, the Akiachak Native Community, provides a broad range of services including water and sewer, trash collection, police and fire protection, and roads, and it operates the airport, a health clinic, a dock site, and a jail. It also administers natural resource, child welfare, and health programs under P.L. 638 contracts directly with federal agencies, bypassing regional non-profits. The village operating budget in 1997 was approximately $1.5 million, including about $200 thousand mainly from bingo game receipts but also from a 5 percent sales tax. The bulk of local revenues is from federal sources.

Building on its base of federal law, the IRA council has established a tribal court. State government does not officially recognize the authority of the tribal court, but it unofficially cooperates both with the court and with tribal police. According to a leading village official, the tribal court deals only with minor transgressions and refers serious cases to the state district court and to state troopers in Bethel. The IRA council has also enacted ordinances, based

on federal Indian law, banning the importation and possession of alcohol in the village. Generally on such matters, the state cooperates with the IRA council or "looks the other way." This is largely because state government lacks the practical capacity to provide adequate judicial services and police protection directly to remote villages. As stated by Alaska's Attorney General in a 1997 newspaper report, "Akiachak has tried to respond to a very perceived local need where the state has not been able to fill the gap. It's hard for me to criticize."[89]

The village ANCSA corporation, Akiachak Limited, focuses on community economic development and investments in local enterprises. It owns and operates a village store, rental apartments, and a cable TV system. The IRA council and the corporation directors have agreed that to avoid conflicts of interest, there should be no overlaps in council and board memberships. Recently, the IRA council and the corporation board established a joint committee to research issues of land transfers between village corporations and tribal governments and to consider the pros and cons of dissolving a village corporation and transferring business enterprise functions to an IRA government.[90]

Effectiveness and Limits of the Akiachak Model

A key to Akiachak's strength as a tribal government is that its leaders have practiced the maxim that "to be a sovereign, you must act like a sovereign." Though the state did not recognize the law enforcement, judicial, taxation, and other powers claimed by the IRA council when the city was dissolved, village leaders nonetheless acted as if they had such powers. In doing so, they expanded the limits of local autonomy while maintaining necessary working relationships with the state.

Concerning the *Venetie* decision, a village official observed simply that it had "no impact" in Akiachak, and he referred to Akiachak's land status, excluding ANCSA lands, as a Native townsite under federal law. To the extent that restricted title and federal oversight are part of townsite status, these factors may reinforce the IRA government's land base and support its claims to "Indian Country" powers.[91] Whatever the legal status of such claims, and even if Akiachak were not a federal townsite, it seems likely that village leaders would still be aggressive and effective in expanding local powers. This has been a constant effort of the village's leaders, most of whom have held local offices since the IRA government took over from the city in 1983.

The tribal government has been extremely successful in obtaining capital project funds. During the five year period from 1993 through 1997, Akiachak obtained nearly $8 million in capital grants, or about $14 thousand per capita.

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89 Kizzia, "Indian Country: A Revolution in Akiachak," *op. cit.*

90 Review comments of Akiachak Native Community officials, June 22, 1998, and telephone interview, Akiachak Limited, official, August 27, 1998.

91 For background on the Alaska Native Townsite Act of 1926, see Case, *op. cit.*, at Ch. 4, "Native Allotments and Townsites."

Federal agencies like the Public Health Service (PHS) and Housing and Urban Development (HUD) supplied most of this money, but substantial funds also came through state agencies such as the Department of Community and Regional Affairs (DCRA) and the Department of Environmental Conservation (DEC). Along with major water and sewer projects were road improvements and construction of housing and community buildings, including a jail. These projects also brought jobs and incomes to villagers. The tribal government helped ensure that these jobs would be filled through local hire by contracting directly with the agencies for project construction. In addition to about 40 year-round jobs in the tribal administration, capital projects have added another 25 to 30 seasonal jobs. In a village the size of Akiachak, it is probable that a majority of households have directly benefited from government and capital project employment.

The tribal government's accomplishments in Akiachak are limited in two main ways. First, Akiachak's economy is heavily dependent on outside government funding. This is a given in most of rural Alaska's communities, and it does not mean that federal and state funds may disappear from such places anytime soon. Legal responsibilities and political realities dictate otherwise. It does mean, however, that the amount of funding is uncertain and the flow is uneven. This condition is not unique to rural Alaska, but it is an especially critical factor there because rural communities are more dependent on federal and state funds than are urban communities.

The second main limit of Akiachak's tribal government is its legal and political uncertainty. When the state approved Akiachak's petition to dissolve its city government, the responsible agency, the Department of Community and Regional Affairs, stipulated that "Any endorsement of the petition for dissolution by this agency does not constitute any recognition by the State of governmental powers of the Akiachak IRA council."[92] Two governmental powers specifically mentioned in the department's report were police protection and taxation. From election to election, the state administration and legislature may change their postures toward tribal governments, but this adds to, rather than resolves, the uncertainty.

Akiachak's tribal government has been influential in the region beyond the village. Other lower Kuskokwim villages followed Akiachak's lead in dissolving their city governments and rebuilding tribal institutions. About a dozen villages have maintained the loose alliance called "Yupiit Nation," in which Akiachak continues to play a leading role. Yupiit Nation leaders were active participants in lobbying before Congress in the late 1980s for the critical "1991" ANCSA amendments. In 1989, Yupiit Nation sent delegates to testify before the United Nations Working Group on Indigenous Peoples meeting in Geneva, Switzerland. Within the region, Akiachak and other Yupiit Nation

[92] State of Alaska, Department of Community and Regional Affairs, "Report and Recommendations to the Local Boundary Commission, Petition for Dissolution of the City of Akiachak," Juneau, June 5, 1989, at 25.

leaders continue to press the AVCP to support development of a regional tribal constitution.

The principal limit on Akiachak's and Yupiit Nation's regional aims is the commitment to local autonomy in the region's villages. This is a commitment that the people of Akiachak share. Thus, Yupiit Nation leaders make the distinction between "federation," meaning greater regional centralization, and "confederation," emphasizing decentralized control in the villages, and their choice is the latter. In addition to its localism, the Calista region is large and diverse with long-standing intra-regional rivalries. Akiachak and other Yupiit Nation leaders of course know this very well. This may help explain the elusiveness of their regional tribal government plan and the hesitant movement toward its realization.

General Application of the Akiachak Model

What is the relevance of Akiachak's experience in tribal government and regional organization for other Native villages?

- The U.S. Supreme Court's *Venetie* decision is not a barrier to further development of Native self-governance. A tribal government does not need jurisdiction over federal trust lands in order to assert tribal powers. Particularly when the village is overwhelmingly Native and too remote to be effectively served by state government, such powers might even include some form of the most controversial functions such as law enforcement, courts, and taxation.

- Akiachak leaders have shown how Natives can turn the tension between village and regional governance, which exists in all regions, toward constructive ends. They have experimented with different forms of regional-local organization, such as the Yupiit school district and the proposed tribal "confederation," tailoring them to local needs and the regional culture. They have been flexible and pragmatic while pursuing idealized goals of local and regional tribal self-governance.

- Native sovereignty is not a fixed, absolute goal. It may be better understood as a process of self-government that takes a variety of forms at different times under changing conditions. In the Akiachak case it has included tribal government under federal law; a locally controlled, state-funded, sub-regional school district; cooperative state-tribal law enforcement; and tribal court deference to state court jurisdiction.

- As Native sovereignty has evolved, so also have state government responses to it. State responses have ranged from denials that tribes exist, to tolerance of tribal governments, to acceptance and support of

tribal government functions, to development of cooperative tribal-state relations. Although haltingly and in incremental steps, the state has shown that it can accommodate existing and new forms of Native self-governance.

IV.F. The NANA Village-Regional Model

General Problem and Approach

By the early 1970s, the Northwest Arctic region centering on Kotzebue Sound had a full set of regional and local organizations typical of Native regions after ANCSA.[93] At the regional level were a community action program, a non-profit social services corporation, health and housing authorities, and a for-profit ANCSA regional corporation. Most of the 11 villages in the region had both city governments and IRA or traditional tribal governments as well as recently created ANCSA village corporations. Each of these three dozen or so organizations had its own mission, resources, programs, officers, and staff. The organizations moved in their own directions, sometimes at cross-purposes, and competed for scarce leadership, administrative, and technical skills.

Regional and village leaders decided that the villages and the region as a whole would be better off if they consolidated their resources and worked together as much as possible, and they developed a regional strategy plan to do just that. They merged village corporations and realigned regional organizations, launched cooperative programs, and even created a new state-chartered borough as another means of pursuing regional development goals. While seeking greater unity and coordination at the regional level, they also wanted to encourage more effective Native self-government at the village level. Further, they wanted to take advantage of the benefits of modern organization and technology while strengthening traditional Native values. Today, it appears that the NANA regional strategy has largely succeeded. The following describes and assesses that strategy after more than two decades.

Description of the NANA Model

Inupiat people have occupied the area around "Kikiktagruk," a Northwest Arctic trading center, for millennia. In the early nineteenth century, the Russians found their way to Kotzebue Sound, and at the end of the century the United States government established a post office in Kotzebue. Most of the region's villages emerged long ago as hunting and fishing sites, and some were

[93] In addition to those references cited in the text, this section relies upon the following sources: DCRA database; NANA Regional Corporation, 1998, Weekly Manpower Report, May 16, 1998; Northwest Arctic Borough Economic Development Commission (no date), "Northwest Arctic Borough: wise development for a secure tomorrow"; telephone interview, Maniilaq Association official, May 22, 1998; telephone interviews, NANA Regional Corporation official, May 22 and 26, 1998.; telephone interview, Northwest Arctic Borough official, May 22, 1998; Tiepelman, Dennis, 1998, Presentation at Alaska Conference of Tribes, May 6; Personal interview, Maniilaq Association official, May 6, 1998.

established as supply points for inland gold mines around the turn of the century. Today, Kotzebue, the largest settlement and the hub of the region, has over 3,000 residents, 75 percent of whom are Natives. The smallest of the 11 villages is Kobuk, which has about 100 residents and is 90 percent Native. Most of the villages range between 300 and 600 in population; 85 percent of the region's 7,100 people are Native.

The people depend heavily on subsistence hunting and fishing, but there is also a substantial cash economy. About half of the region's estimated 1800 jobs are in government and community services. The largest employers are the school district, the regional non-profit, and ten city governments. Another large employer is the Red Dog lead and zinc mine operated by Cominco, Inc., which is in partnership with the regional profit corporation. Additional jobs in the region are provided by the corporation's subsidiaries and other private businesses. The villages are linked together by a network of air and water transport facilities, telephone communication, and a radio station, mostly centered in Kotzebue. All villages receive national network television through the Alaska Rural Communication System, and most of them also are linked to the Anchorage cable TV system.

"NANA," as the region is generally known, was initially the acronym of the Northwest Alaska Native Association, which was created in 1963 to pursue land claims. After enactment of ANCSA, the new regional corporation took the NANA name and the old NANA land claims organization became the regional non-profit Maniilaq Association. In 1972 Maniilaq absorbed the social service functions of the federal Office of Equal Opportunity (OEO)-supported Kikiktagruk Community Development Corporation. A few years later, in 1975, the Kotzebue Area Health Corporation also merged with Maniilaq. The result was two major regional organizations: the NANA corporation, focused on economic development, and Maniilaq, devoted to social services.

Another part of the regional strategy was to strengthen ties between these regional organizations and the villages. As authorized under 1976 amendments to ANCSA, all of the village ANCSA corporations except Kotzebue's merged with NANA. The purpose was to realize economies of scale, create more economic leverage for the region, and make villagers more active participants in the regional corporation. Each village in the region has at least two representatives on NANA's 23-member board. NANA also designated the villages' IRA governments as the entities whose consent for mineral exploration and development on village lands would be required under federal law.[94]

Maniilaq developed a similar relationship with village tribal governments. Maniilaq's board consists of representatives from each village. The villages officially designated Maniilaq to receive federal grants and contracts under Indian Self-Determination Act, or P.L. 93-638, provisions. Also, the villages nominate

[94] Case, *op. cit.*, at 376

and Maniilaq's board appoints members to the regional housing authority board. Because of such arrangements, the federal government recognizes Maniilaq as a Native organization under the control of its member village tribal governments. At the same time, as a state-chartered regional non-profit, Maniilaq has chosen to serve all of the people of the region, non-Natives as well as Natives.[95]

The regional organizational strategy was completed in 1986 with creation of the Northwest Arctic Borough and School District, and a year later the borough adopted a home rule charter. NANA and other regional leaders saw they needed a borough in order to facilitate development of NANA's Red Dog mine and regulate land use impacts. In keeping with the borough's principal mission of land use regulation, the region's Coastal Resource Service Area was absorbed by the borough planning department soon after borough incorporation. The borough assembly has not enacted a property tax because it wants to avoid taxing residents, various NANA subsidiaries, and other private businesses in the region. Instead, the borough collects payments in lieu of taxes from the Red Dog mine. The 11-member assembly consists of five members elected from a Kotzebue district and six from outlying districts in order to assure village representation. Villages are also directly represented through assembly-approved appointments to the borough's Economic Development Commission and Planning Commission. Electoral arrangements similar to the borough's assure direct village representation on the school board as well.

City and IRA governments in the villages seem to have a division of labor in which each seeks to make the best use of their respective state and federal sources of funding and authority. The city governments are responsible for traditional local services including water and sewer, police and fire protection, solid waste disposal, and electricity (generally in cooperation with the Alaska Village Electrical Cooperative [AVEC]), and most of them levy sales taxes. The IRA governments are closely involved in Maniilaq programs as indicated above, obtain federal Indian program grants, and exercise federal authority under such laws as the Indian Child Welfare Act. City and IRA governments also obtain state and federal capital project grants primarily from DCRA, HUD, PHS, and DEC. In carrying out these activities, village governments can generally count on technical support from Maniilaq and the borough.

Effectiveness and Limits of the NANA Model

The effectiveness of the NANA regional strategy can be roughly measured by reviewing some of the ways in which the key organizations have unified and served the villages, helped preserve the Inupiat culture, strengthened regional and local self-government, and created jobs and incomes for Native villagers.

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[95] *Ibid.*, at 401, 405.

Maniilaq Association. Maniilaq is controlled by village representatives on the board of directors. They oversee an extensive set of health, social service, and technical assistance programs. Nearly two-thirds of its $34 million budget in 1998 supports health and dental services delivered through health clinics in each of the region's villages. Other social programs in the villages include substance abuse treatment, adult education and vocational training, and emergency shelters. Housing assistance is provided through the affiliated Northwest Inupiat Housing Authority, also under the direction of village representatives.

Maniilaq operates two "traditional services" programs: one directed to activities and assistance for elders, and the other to support of tribal governance in the villages. One of the functions of the governance program is to help keep village tribal leaders informed of developments in Native self-governance elsewhere in the state. Maniilaq also assists village councils in self-government projects such as developing tribal court systems to deal with Indian Child Welfare cases. In 1998, Maniilaq employed 423 staff in Kotzebue and the villages; 275, or 65 percent, of Maniilaq's employees were Natives. Both Maniilaq and the NANA corporation emphasize training and employment opportunities for the region's villagers.

NANA Regional Corporation. The leaders of NANA, first as a land claims association, and then as an ANCSA corporation, have generally been the most prominent leaders of the region. After ANCSA, they turned their energies to profit-making enterprise and brought a major development project, the Red Dog mine, and jobs and incomes to the region.

In May, 1998, Cominco, the mine operator, and its contractors employed 480 regular workers; 55 percent, or 262, of these workers were Natives. Also, 22 of 33 temporary workers were Natives. NANA subsidiaries also operate oil field services, industrial security, catering and housekeeping, and other businesses that employ Natives. Under a long-term agreement with the Northwest Arctic Borough, Cominco contributed nearly $2 million to the borough budget under a 4-mill equivalent payment in 1998.

NANA is directly involved in social and cultural programs. In the early 1990s, regional "Spirit" programs under which Maniilaq, the school district, and NANA supported traditional Inupiat cultural activities were consolidated and placed under NANA's direction. The "Spirit" programs include a summer camp for teaching Inupiat values, the NANA regional elders council, and "Inupiat Illitqusiat," or "ways of the people," which makes grants to village tribal governments for cultural activities. A special focus of the Spirit programs is strengthening the Inupiat family structure. In addition to "Spirit" programs, NANA makes grants to support family emergency, elders, youth, scholarship and other social programs. In 1997 the corporation spent over $850 thousand on these kinds of non-business activities. In 1998 NANA created a new posi-

tion on education to work with villages and the school district on parental involvement, curriculum improvement, and student achievement programs.

Northwest Arctic Borough and School District. Incorporation of the borough and a land transfer of the Red Dog mine area from the North Slope Borough gave the NANA region governmental jurisdiction over the mining operations. The state's Local Boundary Commission approved the land transfer to the new Northwest Arctic Borough over the objections of the North Slope Borough. The NANA Regional Corporation owned the land, and there was a compelling argument that both land use controls and tax-equivalent revenues should be in the hands of a NANA regional government. Political skills of regional leaders also contributed to the favorable transfer decision. Currently, the borough mayor and all members of the assembly are Native.

In addition to land use and taxation, education is the other mandatory power of a borough. Thus, the Northwest Arctic School District succeeded the region's REAA. Only $2 million of the school district's $26 million operating budget in 1996 was contributed from borough sources; federal and state governments contributed all of the rest. According to a borough official, the borough assembly looks only at the "bottom line" of the school district's operating budget, approving it with little or no controversy.[96] For its part, the borough's operating budget for general government and non-educational services was less than $2.5 million in 1996. While the school district employed over 400 teachers and staff, the borough's total permanent employment in 1998 was 14.

The leaders of these four regional institutions– Maniilaq, NANA, the borough, and the school district– appear to be accustomed to working together. They meet periodically to discuss matters of mutual interest and concern. Moreover, with Cominco sitting in for NANA, and joined by the City of Kotzebue, five major organizations cooperate as a "Group of Five" to hire and pay for lobbyists in Juneau to look out for their common and separate interests in the region.[97]

The main limits of the regional strategy appear to be those of "normal politics," intergovernmental relations, and a transfer economy found in all rural Alaska regions, not just the Northwest Arctic. By "normal politics" we mean the conflicts, and the processes of resolving them, that normally occur among different organizations with separate missions and interests. In the case of the NANA region, such conflicts appear to be moderated by an unusual degree of consensus, reinforced by cultural homogeneity in a region with a relatively small, cohesive population. Also, the region appears to have had a succession of exceptional leaders whose political skills include conflict resolution and consensus-building. According to one current leader, the spirit of regional cooperation has sometimes seemed to have gone "dormant," but it is also the case

[96] Telephone interview, May 22, 1998.
[97] Personal and telephone interviews, May 6 and May 22, 1998.

that the regional-village institutions developed in the regional strategy remain strong and productive.[98]

Problems of intergovernmental relations– the region's relationships with federal and state agencies– may also be considered part of "normal politics" in rural Alaska. Most of the land in the region is federal conservation system land, and there are inevitable disagreements between federal and regional agencies about land access and use. In the NANA region, for example, National Park Service officials sometimes differ with people in the region over the regulation of subsistence hunting and fishing on national park land. An important point about this region, however, is that the necessary institutions, including a borough government that specializes in land use issues, are in place to deal effectively with federal land agencies.

As for problems with state government, these, too, are of a kind familiar elsewhere in rural Alaska– resistance to claims of tribal government powers– but, again, the NANA region seems especially well equipped to deal with them. The people of the region use state-chartered cities and the borough to draw on state resources and powers, while Maniilaq assists tribal governments to develop their federally granted powers in cooperation with the state, in child welfare matters for example. Regional leaders seem not to be worried that non-Natives might someday gain control of city or borough governments. NANA is a remote, overwhelmingly Native region, and it appears likely to remain a Native-majority region for a long time to come. The NANA regional attitude seems to be, as expressed by one leader, that "institutions are what you make them."[99]

Finally, as in other regions, the NANA regional economy depends significantly on federal and state government transfers. Schools, health programs, housing, and much else that regional institutions offer are heavily supported by federal and state grants. This makes the region vulnerable to the uncertainties of continuing, long-run support as well as the dependency associated with such support.

General Application of the NANA Model

The NANA regional strategy consists of (1) the purposeful creation of distinctive regional and village institutions, (2) an agreed-upon division of labor with coordinated plans and programs, and (3) integration of all components at the regional level. It would be difficult to replicate the NANA model elsewhere because the region combines several characteristics favoring effective Native governance. It is a mid-size region with a small number of villages and a relatively small regional population. It has a complete network of air and water links to a centrally-located hub. It is a remote region with a very large majority Native population. And, perhaps most important, the Native population is

[98] Telephone interview, May 22, 1998.
[99] Maniilaq official, Alaska Conference of Tribes, May 6, 1998.

culturally homogeneous and socially close-knit. Yet, elements of the NANA model provide potential lessons for Natives elsewhere:

- The model suggests effective ways of aligning economic development, political development, social service, and cultural programs in separate but complementary regional institutions.

- The model shows how village representation and participation can be built directly into regional economic, political, and social institutions. Villagers both control and are served by the ANCSA corporation, the non-profit association, and the borough government and school district.

- The model shows that Natives can make effective use of the capacities and resources of ANCSA and state institutions as well as tribal institutions to strengthen self-government at village and regional levels.

- The model provides practical lessons in how to coordinate institutional actions to achieve shared purposes. Examples include the use of borough government powers to facilitate Red Dog mine development, regulation, and in-lieu taxation; joint arrangements for lobbying in Juneau for general regional and individual organizational interests; and regional institutional support for tribal self-government at the village level.

- The NANA Regional Corporation shows how a major business enterprise can use its organizational and financial resources to support social and cultural programs without detriment to its primary business purposes.

- Both the NANA corporation and Maniilaq demonstrate how effective recruitment and training programs can maximize employment of Native villagers by major regional business and social services institutions.

IV.G. Metlakatla: The Model Reservation[100]

General Problem and Approach

We call Metlakatla "the" model reservation because it is the only Native reservation left in Alaska after ANCSA. Congress established the Annette Island reservation, the site of Metlakatla, at the end of the nineteenth century for a group of Tsimpshian Indians from Canada. The reservation was created despite U.S. Indian policy at the time, which called for abandoning reservations, breaking them up into individual allotments, and assimilating Natives into the American mainstream. This inconsistency may be explained by the missionary zeal of Metlakatla's founder and long-time leader, William Duncan, as well as the remoteness of Alaska.[101] Further, U.S. Indian policy historically has been anything but consistent. But Duncan's mission, in part, was to use the protected environment of a reservation to teach Indians to abandon their "Nativeness" and learn the ways of "civilized" life, and this mission fit well with prevailing ideas and policies.[102]

Whatever the past successes and failures of U.S. Indian reservation policy– and the failures are many– the Annette Island reservation secured for its Tsimpshian residents an "Indian Country" land base together with the guaranteed services and federal protection inherent in reservation status. The questions addressed here are what forms these benefits take in Metlakatla today, what costs or limits are associated with them, and how Metlakatla's "Indian Country" powers compare to the tribal powers asserted by Alaska villages after ANCSA and the U.S. Supreme Court's Venetie decision.

Description of the Metlakatla Model

"Father" Duncan, a lay minister of the Anglican Church, led his Tsimpshian Christian followers out of Canada and across the border into Alaska in 1887 after losing disputes over land and religious teachings with the British Columbia government and the Anglican Church. "Houses were raised, another church was erected, gardens were planted, and a sawmill, store, and salmon cannery, all owned by Duncan, soon were providing jobs."[103] Duncan personally had obtained a grant of land from President Cleveland, and Congress in 1891 formally recognized the Annette Island Reserve as a federal Indian Reservation.[104] In 1916, with Duncan still in charge of the community, President

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100 In addition to those references cited in the text, this section relies upon the following sources: DCRA Community Database, Metlakatla Indian Community, 1998, "Metlakatla, Alaska, 1998." Telephone interviews, IRA Council member, April 29, May 1, and July 6, 1998.

101 Case, *op. cit.*, at 87.

102 Mitchell, *op. cit.*, at 261.

103 Mitchell, *op. cit.*, at 261.

104 The Tlingit and Haida Indians won a Court of Claims judgement of $7.5 million in 1968 based on previous takings of their aboriginal lands by the U.S. government. These lands included the Tongass National Forest, Glacier Bay National Monument, and the Annette Island reservation. See Case, *op. cit.*, at 378.

Wilson extended Metlakatla's boundaries 3000 feet (from the mean low-tide line) into the waters surrounding the island. The purpose was to give Natives control of their salmon fisheries and rid their waters of a fish trap owned by a Seattle fisheries corporation, an action upheld by the U.S. Supreme Court a few years later (*Alaska Pacific Fisheries v. United States*). In 1944, the Metlakatla Indian Community became a BIA-recognized IRA government with its own constitution.

In 1996 Metlakatla's resident population was 1673, and about 800 additional tribal members lived in other areas of the state and nation. Approximately 82 percent of the resident population are Natives. As a modern small town, Metlakatla has an array of retail and wholesale stores, tourist businesses, personal and business services, and construction contractors. The largest employer in the community is the IRA government, which owns and operates several community enterprises: the Annette Island Packing Company consisting of a cannery and cold storage facility, the Annette Hemlock Mill, the Metlakatla Power and Light Company, a salmon hatchery, and a cable TV system. These enterprises also provide revenues to support local government operations; the IRA government does not levy local taxes.

Tribal members elect a 12-member council, mayor, secretary, and treasurer to two-year terms. The council works through six standing committees dealing with planning; lots; finances; health, education, and welfare; law and order; and natural resources. The IRA government provides a full range of traditional local services including fire and police protection; water, sewer, and garbage collection; electric power; and streets and roads. The tribal police force consists of six officers and four support staff. The administration also includes family and social services programs, a fisheries program, finance and accounting operations, and a library and museum.

Federal and state agencies provide substantial operating and capital funds to the community. Most federal BIA and PHS operating funds are administered by the local government under P.L. 93-638 contracts. From 1993 through 1997, federal and state agency capital projects and grants totaled over $12 million, or about $7,600 per capita over the five-year period.[105] Major federal grants are from HUD, and state grants come mainly through DCRA and the Department of Administration. Also, the federal Corps of Engineers and the state Department of Transportation and Public Facilities are involved in major road, dock, harbor, and related transportation projects.

As a federal reservation, Metlakatla is "Indian Country." Its tribal court system is therefore recognized by the state as well as the federal government. The Metlakatla system consists of a Tribal Court, Tribal Juvenile Court, and Tribal Appellate Court, and it is headed by a magistrate appointed by the council. Appellate court functions are provided by the Northwest Court Judges As-

[105] DCRA Community Database, *op. cit.*

sociation, based in the Seattle area, which extends professional services to Metlakatla as needed. The tribal court has authority under federal law to try civil disputes and criminal misdemeanors. Under the community's IRA constitution, the council enacts ordinances covering civil, criminal, and juvenile matters. Felonies are referred to the state court in Ketchikan under the provisions of P.L. 280, a federal law that delegated federal jurisdiction to the State of Alaska for criminal matters involving Indians. The tribal court does not have criminal authority to try or punish non-Indians for violation of community law.

The Annette Island School District, while part of the state's REAA system, was created separately from the Southeast Island REAA which surrounds it. The district is governed by a five-member board elected by all voting residents of the island, Indian and non-Indian alike. The district's $3.4 million annual operating budget is funded by state and federal governments. A teaching and classified staff of 50 serve over 400 students in K through 12. According to the Metlakatla community's information booklet, the school's curriculum "closely parallels that of schools in the Lower Forty-eight."[106]

Two federal agencies, the BIA and the PHS-Indian Health Service, have offices and facilities in Metlakatla. The IHS operates a health service unit, including a physician and a dentist on staff. Basic health services are provided to all Indian residents; emergency services only are available to non-Indians. The BIA's representative formally approves council ordinances after review by the BIA's regional office in Portland, Oregon.

Effectiveness and Limits of the Metlakatla Model

Metlakatla in many respects fulfills William Duncan's vision of a prosperous and achieving Indian community that he and his Tsimpshian followers sought to create over a hundred years ago. The community has also largely realized the promises inherent in reservation status: security of land and resources, guaranteed services, and continuing federal protection. These are substantial benefits. Metlakatla is also "Indian Country": it has the inherent, federally recognized powers of self-government that are usually associated with claims to Native "sovereignty."

Metlakatla's independent, protected status is also recognized by state government. The council passes ordinances under its own constitution that are subject only to the mostly *pro forma* review authority of the BIA, acting for the Secretary of the Interior. The community has its own tribal courts and police force. The courts and police can, as a practical matter, deal with most disputes and offenses that are likely to occur in a small town. Unofficially, the tribal government has found ways of dealing with non-Indian offenders as well. Tribal officials may, for example, remove habitual offenders from the island. All non-members of the tribal community are required by ordinance to have permit

[106] Metlakatla Indian Community, 1998: 11.

cards as long as they are on the island. Because Metlakatla chose not to participate in the Alaska Native Claims Settlement Act, ANCSA corporation shareholders are required to relinquish their shares if they wish to become members of the community.[107]

Metlakatla controls the natural resources within its boundaries, subject to the approval of the Secretary of the Interior. The President of the United States in 1916 and the U.S. Supreme Court in 1918 established the authority of the community to control its fisheries resources. Almost a half-century later, in 1962, the U.S. Supreme Court reaffirmed tribal control when it denied the new State of Alaska the authority to ban Metlakatla's use of fish traps in its surrounding waters (*Metlakatla v. Egan*). The determining factor in the court's decision was that Annette Island was a reservation under federal trust protection.[108] Today, the community exercises that control through a natural resources program and a full-time fisheries biologist, and it bans commercial salmon fishing by non-members inside the 3000-foot limit. The program also bans deer hunting by non-members and requires permits for sport hunting and wild bird hunting.

Finally, Metlakatla residents are both citizens of the State of Alaska and members of a reservation-based tribe with independent political status. Accordingly, they are supported by state as well as federal funds, facilities, and services. With these sources of support, the IRA government operates an impressive range of local programs and community enterprises. Together with the school district, local government accounts for more than half of the estimated 500 jobs in the community.

What are the limits of Metlakatla's advantages as federal reservation? One set of limits is built in to its unique reservation status in Alaska. First, although Metlakatla exercises court and law enforcement authority recognized by the state, it was noted above that this authority is limited by P.L. 280, a federal law dating from the 1950s "termination" period of federal Indian policy. Since Alaska is a "P.L. 280 state" with delegated federal jurisdiction, the Metlakatla Indian Community must work cooperatively with the state on law and order matters.

Second, Metlakatla's control of fishing and hunting on reservation lands and waters is not complete. Fisheries control extends only to the 3000-foot limit, which does not encompass the whole fishing area affecting the island's runs of salmon. Beyond this point, the community must depend on state and, ultimately, federal fisheries council regulation. Further, there are recurring conflicts with state fisheries enforcement authorities, mainly involving different views of where Metlakatla's 3000-foot jurisdictional boundary should be marked. As a consequence, the community reports that "[a]dverse action is most frequently felt by local fishermen who have been cited by State Enforce-

[107] This requirement does not apply to shares obtained through inheritance. (Telephone interview, July 6, 1998.)
[108] Case, *op. cit.*, at 109.

ment officers, their gear and catch confiscated only to have the cases dismissed or to be acquitted in state court."[109]

Regardless of its reservation status, Metlakatla shares other limits similar to those affecting most Native communities in Alaska. Although it has certain "guarantees" of federal services, so do all other Alaska villages with BIA-recognized IRA and traditional councils. Moreover, the federal government also recognizes ANCSA village and regional corporations as "tribes" eligible for benefits under federal Indian programs. Metlakatla must compete for federal and state funds with all these other entities. And even though they seem to compete quite successfully, Metlakatla officials voice a complaint that may sound familiar to many other Alaska Native villagers:

> Each new State Administration and Federal Administration has impacted the Community where the State had the attitude that since the Community is Federally-recognized as having Indian Reservation status that it was totally funded by Federal programs. On the Federal government side, being in Alaska it was thought the Community was State funded. Much time and effort is spent convincing both State and Federal agencies that the Community is eligible for both State and Federal funding.[110]

Despite its relatively diversified economy, Metlakatla, like Native villages throughout Alaska, remains heavily dependent on state and federal funding. This becomes especially apparent when there is an economic downturn in a sector directly affecting the local economy. Largely because of economic problems in East Asia, where Metlakatla sells its lumber, orders for the Annette Hemlock Mill have dropped to the point that over 100 jobs were lost in early 1998. According to one local official, this has left the community "scrambling" for emergency project funds from state and federal agencies to create new jobs for the unemployed.

In general, it could be argued that Metlakatla does not enjoy a great deal more effective self-determination than does a non-reservation village like Akiachak or Quinhagak, which aggressively asserts tribal powers. Akiachak and Quinhagak have their own federally recognized IRA councils that pass ordinances affecting law enforcement, taxation, and control of lands and resources. Akiachak has a tribal court that deals with civil disputes and minor criminal offenses, and the local court and the police cooperate with state courts and troopers in regional centers. In Quinhagak, local police officers patrol the Kanektok River and enforce both local and state rules affecting outside sport fishermen. In several parts of rural Alaska, Native villagers participate in fish and game co-management arrangements with state and federal officials and have increasing influence on fish and game regulations in their regions. Finally, although not under federal trust protection like Metlakatla reservation lands, ANCSA village lands are protected by federal law from taxation and involuntary alienation so long as they are not "developed" as defined by ANCSA.

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[109] Metlakatla Indian Community, 1998: 4.
[110] Metlakatla Indian Community, *op. cit.*

General Application of Metlakatla Model

Because the U.S. Supreme Court ruled in the *Venetie* decision that ANCSA land is not "Indian Country," it is clear that the Metlakatla reservation model cannot be replicated elsewhere in Alaska. Yet, the Metlakatla Indian Community experience does present some lessons for Native self-governance generally:

- Reservation status brings federal and state recognition of "Indian Country" powers, but it is not a panacea. Important judicial, law enforcement, and fish and game regulatory powers are limited or hedged in by law or by the practical limits of reservation boundaries.

- Insofar as assurances of federal program support are concerned, Metlakatla's trust relationship is not essentially different from that enjoyed by ANCSA villages. Metlakatla, as well as all other Native communities, competes for limited funds from both federal and state agencies.

- The Metlakatla Indian Community controls its lands and immediately surrounding waters, and the entire reservation is under trust protection. ANCSA village lands are protected from involuntary alienation, but tribes' asserted controls over fishing and hunting on those lands is not recognized by the state.

- No other Native village has the legal assurance and certainty of tribal powers that Metlakatla has, but that has not deterred other villages from testing and extending the limits of their own forms of local autonomy.

IV.H. Alberta Metis Settlements: A Provincially Recognized Federation[111]

General Problem and Approach

The Metis of Canada generally do not have "status" under federal laws that cover other aboriginal groups and offer protections and direct programs to Indians. The Metis Settlements of Alberta, however, have worked out what

[111] In addition to the cited sources below, this subsection draws from: Catherine E. Bell, *Alberta's Metis Settlements Legislation: An Overview of Ownership and Management of Settlement Lands* (Regina, Sask., Canada: Canadian Plains Research Center, University of Regina, 1994); and *Oski Mâcitâhk, A New Beginning: The Alberta-Settlements Accord* (Edmonton, Alberta: Polydynamics, November 1, 1990).

amounts to provincially recognized "sovereignty" under which they have protected rights of self-governance and property rights to settlement lands (similar to reservations). The process of recognition of their "inherent" powers of self-governance began with a lawsuit against the Province of Alberta over oil and gas proceeds and culminated in a landmark accord enshrined in provincial legislation and an amendment to the provincial constitution.

While the circumstances by which the Metis of Alberta came to this recognition of their sovereignty differ markedly from the current circumstances of Alaska Natives, their story is instructive because: i) it holds out a model of sovereignty developed on a sub-national and negotiated basis; and ii) the arrangement of Metis Settlement institutions offers a federalist model in which a Metis Settlements General Council holds certain powers and individual Metis Settlement Councils retain others.

Description of the Alberta Metis Model

In the late 1930s, eight Metis Settlement sites were set aside by Alberta provincial legislation, and the communities resident therein established associations, by-laws, and regulations governing, among other things, their domestic affairs and fishing and hunting practices on settlement lands. Then, in the late 1960s, a government task force reviewing the act setting aside the settlements held that they were not intended to be a perpetual commitment and recommended the "lifting" of the settlement boundaries. In conjunction with mounting pressure to dissolve the settlements, oil and gas development in settlement areas began in earnest and without substantial Metis approval or economic participation. A disagreement over mineral lease proceeds wound up in litigation against the Province.

The following decade brought pan-settlement organization and heightened legal conflict with the Province. In 1975 the Alberta Federation of Metis Settlements was formed to advocate the settlements' collective positions on land protections, rights of self-government, and mineral claims and to coordinate common policies for the eight settlements. The creation of the Federation streamlined decision-making in the mineral claims litigation, and a new suit was filed which prompted serious dialogue between the Province and the Federation regarding the status and rights of the Metis.

The negotiations spanned the 1980s and culminated in the Alberta-Settlements Accord of July 1, 1989. This Accord, signed by the Government of Alberta and the Federation, began a fruitful government-to-government relationship that was shortly thereafter enshrined in provincial law and the Alberta Constitution. The Accord, legislation, and a constitutional amendment:

1. ended the litigation;

2. transferred fee title to the settlement lands to the Metis Settlements General Council (a provincial corporation);

3. established settlement governments (as provincial corporations); and

4. gave settlements a leading role in sub-surface mineral development.[112]

The latter three elements merit detailed discussion.

Land Protections. As land alienation was a primary concern of the Federation, the accord raises stringent hurdles that must be surmounted before land can pass out of settlement control. Moreover, substantial efforts were made to preclude provincial expropriation by legislation (as had been contemplated in the 1960s). First, title passed from the province to the Metis Settlements General Council. Second, no part of the land can be lost or taken from the settlements without agreement of the Alberta Government, the Metis Settlements General Council, a majority of all Metis Settlement members, and a majority of the members of the settlement whose land would be lost. Third, the Alberta Constitution was amended to protect Metis Settlements' title to the land by limiting expropriation and seizure. It also prohibits the Alberta legislature from amending or repealing the Metis Settlements Land Protection Act, repealing the letters patent transferring the land, and dissolving the General Council or changing its structure. If the Alberta Constitution is amended to alter the property rights of the settlements, the natural resources litigation can re-start.

Government. The Metis Settlements Act establishes the settlements' councils and the General Council as self-governing entities with powers greater than municipal governments hold. In recognition of their special status, the Act gives the settlements powers over land management, hunting, fishing, and trapping on their lands, and membership definition– powers quite similar to those exercised by Canadian first nations and tribes in the lower forty-eight states. The settlements also have substantial authority over sub-surface mineral development and self-regulating powers. Each of the eight settlements has a five-person council, and all 40 councilors make up the General Council, which represents all of the approximately 5,500 Metis in the settlements. Votes in the General Council are on a one-settlement-one-vote basis. A four-member executive (president, vice-president, secretary, and treasurer) is selected for three-year terms by the General Council from outside the 40-councilor pool of leaders. The executives are also elected on a one-settlement-one-vote basis. The Chairs of the Settlement Councils and the four executives make up the General Council Board, which sets agendas, establishes committee mandates and budgets, and oversees General Council administrative issues.

[112] The Crown (i.e., the Province of Alberta) retains sub-surface mineral rights, but strong co-management provisions give the settlements effective veto power over development and allow the settlements to participate in economic benefits via equity partnerships or overriding royalty levies.

The General Council (in many ways a functional descendant of the Federation) acts as a forum wherein pan-settlements policies and positions can be debated and formulated, and it represents the settlements collectively to outside governments. It also makes policies regarding land use, natural resource development, financial appropriations (of payments under the accord and revenues from development), commercial activities and investment, credit guarantees, utility rights of way, inheritance, membership, non-member residency, and development planning. The Metis Settlements General Council can also establish policies which limit the power of the Settlement Councils– specifying, for example, how they can levy taxes. Collective action by the settlements is potentially constrained: most significant General Council policies (e.g., those regarding commerce, natural resource development, and fiscal disbursements) require a unanimous vote of eight *and* are subject to veto by the Alberta government.[113]

There is also a Metis Settlements Appeals Tribunal, consisting of a chairperson chosen by the Alberta government (from a list approved by the General Council) and six other members, three of whom are appointed by the province and three by the General Council. It is a quasi-judicial body empowered to resolve disputes relating to land dealings, surface rights, membership, and any other matters wherein the parties agree to abide by the Tribunal's decision. Its remedial powers include referring decisions back to settlement councils or back to the Metis Land Settlements Registry, or any other remedies it sees fit. Its decisions can be appealed to the Alberta courts.

Sub-Surface Mineral Development. By virtue of the Metis Settlements Land Protection Act, the settlements have final say over oil and gas development. Companies that want to explore or develop minerals on the lands must first agree with the affected settlement council and the General Council on the terms of development including surface impact mitigation, royalties, and other parameters of operation. This gives the settlements effective veto power over development and allows them to take a substantive role in affecting the terms under which mineral development takes place.

Effectiveness and Limits of the Alberta Metis Settlements Model

The members of the settlements report in surveys a generally positive experience with their federal system.[114] The General Council has passed a number of significant policy bills to implement the settlement agreements, and the Settlement Councils have implemented numerous by-laws to regulate membership affairs and local governance. The General Council has begun government-to-government negotiations with the Alberta and national governments covering

[113] This veto has not yet been exercised, but many settlement members nonetheless believe that it should be removed from the settlement legislation.

[114] Metis Settlements General Council, "Aboriginal Governance Project: Metis Settlements General Council," a paper prepared as part of the Research Program of the Royal Commission on Aboriginal Peoples (Edmonton, Alberta, October 1994), Section 2.

"peacekeeping and aboriginal justice, children and family services, and labour market needs and training."[115] A number of contract and other disputes have been heard by the Tribunal, a handful of which have been appealed to Alberta's courts of appeal.

The main controversies within the settlement communities stem from disagreements about whether the central or local governments appropriately make certain decisions. Like most federal and confederate systems, the Metis Settlements General Council structure creates a good deal of debate over which powers appropriately belong to the central body and which should be reserved by the constituent bodies.

For example, the requirement that unanimity be reached before revenues can be allocated has held back, on a number of occasions, the appropriation of millions of dollars in revenues allocated by the General Council from an accord fund in each of the first ten years of the agreement. A number of Metis feel that the unanimity standard is too high– i.e., that certain matters require the ability of the central government to act decisively upon a solution despite the existence of a dissenting minority. Also, the inability of settlement councils to undertake substantial development decisions affecting resources in their settlements without coordinating the votes of 35 other settlement councilors frustrates day-to-day development decision-making and engenders calls for more local autonomy.

In addition, some problems arise from the geographic and political remoteness of the General Council and the four executives. Metis in the settlements frequently and mistakenly consider the four executives and their Edmonton staff to be the real decision-making body, though these executives cannot make policy without approval of the whole Council of 40. Metis in the settlements also report that they feel the central governing body is too detached from problems in local communities.

The Metis Settlements arrangement also faces another fundamental debate common to most federal systems– namely the question of whether representation should be on an equal or a proportional basis. The more slightly populated settlements view equal representation in executive elections to be fair, while the larger settlements would prefer at-large voting that would give them an advantage.

While autonomy and representation may be common debates in federations, these questions are made more difficult to resolve in the Alberta Metis situation by the fact that virtually every foundational element of their government is specified in a delicately negotiated package of provincial laws and not in a constitution that could be amended by the settlements on their own initiative.

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[115] Government of Canada, Government of Alberta, Metis Settlements General Council, "New Deal Opens Doors for Alberta Metis: Ministers and Metis Settlements Announce Talks," News Release, June 26, 1997.

All these complaints aside, the Metis generally hold this arrangement to be the legitimate way to organize themselves, and they applaud the ways in which it reduces divide-and-conquer threats that they perceive might undermine title to their land or their social and political cohesion.[116] As the Metis go forward, they will be negotiating government-to-government agreements covering service delivery, community protection, and economic development. These additional challenges will likely provide additional demands on their federal structure and thereby provide additional pressure to resolve the federal debates.

General Application of the Alberta Metis Model

The Metis Settlements' arrangement with the province of Alberta holds a number of lessons for Alaska Natives:

- Under the right conditions, it is possible for state/provincial agreements to be negotiated with tribes in a manner in which the tribe's property and governing rights would be permanently recognized by the state or province.

- Native communities can reap the benefits of united action and collective scale while retaining local autonomous powers under federal arrangements.

- The tensions between local and centralized control in federal/confederate systems are: i) common; and ii) potentially resolvable by carefully designing federal institutions.

IV.I. Government-to-Government Agreement: The White Mountain Apache Tribe and the U.S. Fish and Wildlife Service

General Problem and Approach

Where the responsibilities of federal authorities to carry out public mandates contrast with Indian governments' right to exercise authority within their boundaries, tensions often arise. An example of this kind of conflict arose over the Endangered Species Act (ESA). The White Mountain Apache Tribe (WMAT), with a relatively large area of natural habitat, was facing considerable pressure from the United States Fish and Wildlife Service (USFWS) over matters such as tribal timber harvesting, natural resource management, and the operation of financially successful tribal recreational enterprises, even though the loss of endangered species' habitats had been due in large part to off-reservation development.

[116] Metis Settlements General Council, *op. cit.*

Bold action on the part of tribal and federal leaders led to a revolutionary outcome: a formal statement outlining the relationship between the tribal government and the federal agency. The signing of such a statement offers a concrete example of the formation of an actual partnership between a tribe and a non-tribal government. In laying out the framework for future interaction between the respective governments, the Statement led to a more effective use of resources by clarifying the roles and responsibilities of the respective parties.

Description of the WMAT Model

In December 1994, the WMAT and the USFWS signed a *Statement of Relationship between the White Mountain Apache Tribe and the United States Fish and Wildlife Service* ("Statement"). The Statement arose out of conflict over the USFWS's mandate to protect what was at the time thought to be endangered species found within the boundaries of the WMAT reservation and the tribe's right to manage its own resources. In particular, tribal leaders were upset at the implied lack of institutional capacity and operation capability to manage tribal resources in a way that protected species, even though WMAT resource management had become increasingly professionalized over the past generation. For example, WMAT had, for the purposes of improving habitat management, reduced the tribal timber harvest from 92 million board-feet under the BIA regime to 54 million under tribal control.[117]

At the core of the disagreement was whether, as a matter of law, the ESA applied to the activities of Indian tribes. The particular disagreement fed into a long-standing fight between the tribe and the federal government over the issues relating to sovereignty and federal authority. In seeking a resolution to the situation, the tribe and the USFWS agreed to "face-to-face" discussions. From those discussions arose an understanding of the common interest between the parties: the protection and sound management of the ecosystems located within the boundaries of the reservation. Thus, the discussions turned from one of legal rights and language interpretation to collaboration on issues of science and management.

On a broader level, the Statement calls for extensive cooperation and exchange of information between the tribe and the Service and "effectively gives a presumption of regularity to the tribe's integrated resource management plan."[118] At its most fundamental level, the agreement, which is silent on the issue of whether the ESA actually applied to the tribe, recognizes that good, cooperative management of tribal lands can serve to avoid future ESA conflicts. In particular, the Statement offers:

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[117] Charles Wilkinson, "Indian Law into the Twenty-First Century: The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Right-Endangered Species Secretarial Order," *Washington Law Review* 72 (October 1997), at 1070.

[118] *Ibid.*, at 1073.

- recognition of the tribe's right to self-manage its resources and the capability of the tribe's institutions in so doing;
- recognition of the USFWS's technical expertise in natural resource management;
- recognition of the federal government's trust responsibility;
- a model for future communication between the two governments.

Effectiveness and Limits of the WMAT Model

Internally, the Statement increased the effectiveness of tribal institutions. Prior to the agreement, the tribe operated under the expectation of a political fight with the USFWS over the latter's anticipated challenge to any tribal initiative. In this respect, "preparing for battle" became the operational mode of the tribe, to the point where the tribe was literally escorting USFWS representatives off the reservation. Thus, it found itself wasting valuable resources– financial as well as manpower– considering political strategies for dealing with the federal government. Substantively altering the relationship between the tribe and the federal agency, however, changed the operational dynamics within the tribe. By acknowledging and formally defining the roles and responsibilities of each party, the tribe was able to eliminate the needless waste of resources and, not incidentally, found itself taking an even more aggressive approach to expanding its successful habitat management to new areas within the reservation. The Statement, by altering the organizational culture of the tribe, ultimately allowed the tribe to better focus on those objectives of critical importance to the USFWS– maintaining a healthy and viable ecosystem.[119]

Externally, the negotiation process allowed for a detailed education of public officials regarding the legal foundations supporting tribal control of resources. The tribe's experience in this and other matters has been that the lack of knowledge concerning Native matters cannot be overstated. As part of a larger set of negotiations concerning the ESA and its application to tribes, tribal groups were permitted the opportunity to provide tribal perspectives to federal negotiators, many of whom have little knowledge of Indian matters, on distinctiveness of Indian policy, including "the depth of the commitment of the Indian people to preserve and protect tribal sovereignty, their homelands, the trust relationship, and Indian culture."[120] As is often the case when such exchanges take place, non-tribal groups gain a much better appreciation of tribal positions.[121]

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[119] Interview with WMAT Tribal Planner, May 1998.

[120] Wilkinson, *op. cit.*, at 1077.

[121] The Statement was instrumental in contributing to a larger shift in tribal-federal relations. As mentioned, the Statement arose out of a larger set of negotiations between WMAT and other tribal leaders and the Department of Interior concerning the application of the Endangered Species Act to tribal lands. After the Statement between the WMAT and the USFWS, Secretary of the Interior Bruce Babbitt and Secretary of Commerce William Daley signed a jointly-released Secretarial Order entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act." While not every agreement can be expected to have

General Application of the WMAT Model

Native villages might draw lessons from the WMAT model as follows:

- The process required innovative leadership on the part of the tribe, as signatories were required to accept roles and responsibilities on the part of the counter-party.

- The process of reaching the formal statement required persistence and patience on the part of the tribe. The model requires willingness on the part of the Native government to exert Native authority and enter into protracted negotiation.

- The model is best suited where the ground is prepared for it. Native political entities who have assumed responsibility and demonstrated the capacity (or are willing to build such capacity) for monitoring natural resources would appear to be the principal candidates.

IV.J. Intertribal Courts in the Northern and Southern Rockies[122]

General Problem and Approach

A common problem facing Native governments in the lower forty-eight states is the politicization of dispute resolution processes in tribal courts. This problem typically results from governing structures that place ultimate control over judicial decisions in the hands of elected leadership. The consequence is politicized judicial decisions, alienated investors, cynical tribal members, and a corrupt development environment.

There exist a handful of intertribal appeals courts in the lower forty-eight states that confront this problem and may offer lessons for Native Alaskans. This section focuses on the Montana-Wyoming Indian Supreme Court and the Southwest Intertribal Court of Appeals (SWITCA). These courts were established by tribes as external appeals bodies and as technical assistance programs that focus on the professional development of tribal judges. Tribes around the lower forty-eight states had been developing through the 1980s strategies to provide predictable, neutral, and legally proficient dispute resolution mechanisms that would embrace tribal perspectives yet remain removed from tribal political alliances. These two courts are exemplary of the intertribal appellate court strategy chosen by a number of tribes.

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such a dramatic impact, it does offer an example of how such agreements can contribute to the goal of self-determination.

[122] In addition to the cited sources below, this subsection draws from: Christine Zuni, "Southwest Intertribal Court of Appeals," *New Mexico Law Review* (University of New Mexico School of Law, Spring 1994, Vol. 24, No. 2), at 309-314; Maylinn Smith, Director, Indian Law Clinic, Clinical Supervisor, University of Montana, School of Law, Missoula, MT, telephone interview, April, 1998.

As executed in Montana, Wyoming, and the Southwest,[123] the intertribal appeals court model offers a number of advantages. By their very nature the courts separate judicial appeals from the political pressures common in small, closely related communities. Furthermore, because these two models also incorporate an academic function, they develop the coherence, technical sophistication, and consistency of tribal law, and they enhance the professional expertise of judges and judicial staffs (i.e., tribal legal professionals other than counsel). Perhaps most importantly, they accomplish all this while giving their participant tribes full control over what powers the appeals courts have with respect to the kinds of cases they hear, the role of customary dispute resolution practices, and the kinds of non-adjudicatory services the tribes receive.

Description of the Intertribal Courts

The SWITCA and the MT-WY Indian Supreme Court have similar structural features. Created in the late 1980s and early 1990s, both courts began with BIA funds re-allocated by a handful of founding tribes and now rely on a mixture of program (tribal court training), competitive grant, and tribal funds (e.g., enterprise revenues and self-governance funds). Both courts have three basic institutions: a court, an oversight body, and an affiliated academic institution that provides an intellectual (if not a physical) home.

The Courts. Both the SWITCA and the MT-WY Indian Supreme Court have a pool of judges from which panels can be constituted and from which a Chief Justice is selected. The Chief Justice presides over matters of the court including case and panel assignments. The courts do not hear *de novo* cases, i.e., they are strictly appeals courts, and the intertribal courts do not operate on behalf of the member tribes except to the extent provided by the member tribes' laws, ordinances, resolutions, or constitutions. The intertribal courts must decide the cases they hear in a manner consistent with the laws, precedents, and– where applicable– customary dispute resolution practices of the tribe from which the case originates. Thus, tribes that join the intertribal courts retain constitutional and legal control over judicial practice. The MT-WY Indian Supreme Court further mandates that participating tribes eschew political control over judicial practice by explicitly requiring participating councils to commit not to overturn the decisions of the appellate court.

The SWITCA differs from the MT-WY Indian Supreme Court in that it more explicitly accommodates traditional dispute resolution practices. Since it serves the very traditional Pueblo tribes, the SWITCA has well-developed rules for supporting and incorporating customary dispute resolution mechanisms into appeals practices. For example, it promulgated rules that can accommodate verbal (i.e., unrecorded) trials. Also, its rules allow tribes practicing traditional dispute resolution to request that SWITCA judges "review questions of law and render an advisory opinion summarizing current tribal and federal law

[123] SWITCA serves tribal governments in Arizona, New Mexico, southern Colorado, and western Texas.

and discussing the options available" rather than render formal decisions or judgments.[124]

Oversight Committees. SWITCA's Standing Administrative Committee (SAC) and the MT-WY Tribal Judges Association (M-WTJA) organize and direct the work of the courts. Not only do the SAC and M-WTJA bear responsibility and authority for establishing court policy (e.g., procedural rules and relationships with tribes), they also set the direction for the courts' non-adjudicatory profession-building work. The Committee and Association also oversee the intertribal courts' administration (i.e., the staffs that keep the court reporter, orchestrate legal research for the judges, etc.).

Academic Institutions. SWITCA's administration is under sub-contract with the American Indian Law Center at the New Mexico School of Law. The Law Center provides assistance with legal research for tribal court judges, keeps the court's reporter, and meets the other administrative needs of the court (e.g., scheduling). The MT-WY Indian Supreme Court relies on the Indian Law Clinic of the University of Montana Law School for its administrative support. In addition to providing legal research and a procedural "bench book" to judges, the Clinic provides regular training workshops and conferences for judges on topics of current concern or technical complexity. The conferences also serve to develop judges' professional relationships so that a network of mutual assistance develops outside the Clinic's direct research and training efforts.

Effectiveness and Limits of the Intertribal Courts

Perhaps the most salient attribute of the two court models is their flexibility. Different tribes have:

- opted to have the intertribal court hear all appeals;
- used the court only for appeals where a tribal judge has a conflict of interest;
- established one of their own judges as a non-voting observer of the appeal process so as to incorporate tribal culture and context;
- requested only advisory opinions for incorporation into tribal appeals (e.g., to a council); and
- established the intertribal court as an intermediate court of appeals or a final (i.e., supreme) court.

[124] Southwest Intertribal Court of Appeals Rules Committee, *Rules of Appellate Procedure*, Adopted, March 21, 1998, Rule 3(c).

Also, tribes' use of the court is flexible over time. The Confederated Salish and Kootenai Tribes of the Flathead Reservation, for example, once used the MT-WY Indian Supreme Court, but now have the funds and trained personnel to support their own tribal appellate court.

A major shortcoming of the intertribal appeals courts is that tribes often perceive the courts, regardless of the flexibility of jurisdictional choices they offer, as a sacrifice of substantial sovereignty. In their essentials, these courts derive their neutrality from having someone who is not a member of the tribe of original jurisdiction sit in judgment over cases. Even if the appellate judge is impartial by both litigants' evaluation, an ignorance of tribal culture, local precedents, or at worst, local law tends to undermine the legitimacy of decisions and judgments. In addition, because the courts are independently organized (by the SAC and M-WTJA), there is always the risk that the functions, purposes, and procedures of the intertribal courts could evolve away from the original court mandates enshrined in a member tribe's constitutional amendments or legislation establishing its reliance on the intertribal court. While the risk that such a divergent evolution would yield counter-productive outcomes remains small, the question of letting non-tribal entities set appellate procedure poses questions not just about sovereignty, but about practical effectiveness as well.

At the same time, both courts represent largely successful efforts to depoliticize the appeals process. In doing so, they substantially strengthen tribes' abilities to attract and retain investment and talent and enhance tribal credibility and power.

General Application of the Intertribal Court Model

The intertribal courts presented here pose an attractive model for Alaskan self-governance. In particular:

- An intertribal appellate court could offer Alaska village governments a means of adjudicating internal disputes that is neutral and Native in design. It could offer one solution to a critical and difficult governance problem: the politicization of dispute resolution.

- An arrangement similar to the one SWITCA and the MT-WY Indian Supreme Court have with academia could provide Alaska Native judges with research assistance, training, legal expertise, and reporting services. An inter-tribal judges association would underscore this training mission with mutual professional assistance and education.

- Despite the risks of giving up some control over a foundational institution, an intertribal appeals court could be a very useful transitional device that would allow Alaska Natives to develop skills as judges, clerks, etc., prior to establishing their own appellate court systems.

IV.K. Coordinating Off-Reservation Impacts on Natural Resources: The Confederated Tribes of the Warm Springs Reservation

General Problem and Approach

As discussed above, it is often difficult for Native communities, given jurisdictional limitations, to protect ecosystems and wildlife habitat beyond the boundaries of the reservation, even though the use of adjoining lands and waterways will often have profound impacts on the natural resource base of the tribe. Further complicating this problem is the often disparate and fractional control over the non-reservation land base by various local, municipal, state, and federal agencies. The Confederated Tribes of the Warms Springs Reservation, in partnership with a national non-profit environmental organization, developed a unique solution to alleviating the impacts of off-reservation land and resource usage on tribal communities: a regional, non-profit, stakeholder-based conservancy.[125]

Description of the Warm Springs Model

The Confederated Tribes of the Warms Springs Reservation (the Tribes) are a confederation of three Native American tribes whose Oregon reservation borders the Deschutes River, the second largest watershed in the state of Oregon and a major tributary of the Columbia River System.[126] The Tribes, who have been very active in asserting control over reservation-based resources, have developed institutional capacity and capability to manage timber, water, salmon, and other reservation resources for the benefit of their members. Such benefits include not only fish and game, but tribally owned enterprises such as the Kah-Nee-Ta Resort, the Warm Springs Power Enterprises, the Warm Springs Forest Product Industries, and several other enterprises. In addition, the Tribes have aggressively protected their right to take fish from riverways within the Columbia River Basin, and they have aggressively participated in the maintenance of fish stocks and habitats so that their right to fish is a real one.[127]

In 1992, the Tribes started a three-stage collaborative project with the Environmental Defense Fund (EDF) to promote sustainable economic development and ecosystem protection strategies within the greater Deschutes River Basin. This larger undertaking arose from a tribal project designed to assess

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[125] At the time of this report's publication, we were unable to obtain full details on the design and responsibilities of the organization. The following study, however, is available: Deborah Moore, Zach Willey, Adam Diamant, Charles Calica, and Deepak Sehgal, *Restoring Oregon's Deschutes River: Developing Partnerships and Economic Incentives to Improve Water Quality and Instream Flows* (A Collaboration between The Confederated Tribes of the Warms Springs Reservation of Oregon and the Environmental Defense Fund), 1995.

[126] Tribes and EDF, *op. cit*., at 25.

[127] The Tribes are active participants in fishery and habitat management throughout Columbia River Basin, including Northwest Power Planning Council's Columbia River Fish Management Plan, the U.S.-Canada Salmon Interception Treaty, and the Pacific Fisheries Management Council.

and implement environmental policies needed to manage the Tribes' resources, including assessing the impact on the Tribe of the use of resources within the Basin. In conducting this project, the Tribes established an Environmental Law Team consisting of mainly of tribal members to assess environmental problems within the reservation, review tribal laws aimed at addressing those problems, and develop policy recommendations.

The outcome of this collaborative effort was the Deschutes Basin Resources Conservancy (DBRC), a federally legislated, basin-wide resource management entity under the control of the various stakeholders in the water basin. The intent was to create an organization initiated by and focused on local and private interests, including tribal, whose scope of responsibilities would include (non-reservation-based) water usage, water quality, and fishery issues. It was also expected to develop partnerships with the appropriate public agencies. That is, the objective was to create an arena for the various stakeholders which relied on the process of local input, rather than one based on mandated government regulation. Specifically, the mission of the DBRC is threefold: 1) to coordinate programs and administer funds for pilot programs; 2) to help develop market-based solutions relating to water usage problems; and 3) to develop mechanisms for inter-governmental and government-private coordination and collaboration.

Effectiveness and Limitations of the Warm Springs Model

There are two aspects in particular that make this case interesting for Alaskan Natives. The first relates to the entrepreneurial spirit of the Tribes. While the Tribes' reservation covers 630,000 acres, it constitutes just 7 percent of the Basin. The federal government manages approximately 49 percent, while private interests control the remaining 42 percent.[128] Yet, by building the institutional capacity to manage natural resources and by aggressively asserting their tribal rights, the Tribes, with the assistance of the non-profit environmental group, were able to pull together the various factions having jurisdiction over the Basin to institute a basin-wide entity which facilitates the better management of wildlife habitats and natural resources having direct impact on the Tribes' own resource base.

The second aspect relates to the nature of the Conservancy. The Tribes were able to construct a collaborative, innovative, stakeholder-based institution designed to represent the interests of the various parties concerning non-reservation-based natural resources: the state and federal governments; timber, cattle, and other private interests; as well as the Tribes. It is intended to alleviate the bureaucratic morass often faced by the Tribes in trying to protect their rights to off-reservation natural resources by accepting responsibility in an area of governmental domain typically suffering from overlapping and competing jurisdictions. In constructing the institution, the Tribes retained a seat

[128] Moore, *et al*., *op. cit.*, at 25.

on the board of directors and did not relinquish either tribal sovereignty or any rights associated with the tribal use of off-reservation resources in the river basin.

General Application of the Warm Springs Model

The birth of the Deschutes Basin Resources Conservancy was the fruition of a sophisticated political strategy on the part of the Warms Springs Tribes. Long before entering into such an arrangement, however, the Tribes had developed extensive capacity to manage their own on-reservation natural resource base and had been very active in asserting their rights over those assets. Thus, the principal applicable lessons focus on developing institutional capacity. In sum:

- The DBRC builds on the extensive development of institutional capacity on the part of the Tribes. Those Tribes that have assumed responsibility and demonstrated the capacity for managing natural resources would appear to be the principal candidates for this model.

- The creation of a stakeholder-based, decision-making body was the result of a time-consuming negotiation process involving various parties. The model thus requires willingness on the part of the Native government to enter into protracted negotiation.

- The negotiations involved parties with varied responsibilities over the watershed basin and often competing interests. As is true of numerous co-management regimes in Alaska, this model is suited to areas such as natural resource management where jurisdictions overlap, stakeholder interests compete, and rights and obligations may not otherwise be well-defined.

IV.L. General Conclusions

We have called these cases "models" not because they can be replicated and transferred from one situation to another, but because they suggest self-governance approaches, designs, and strategies that can be adapted to the widely varying circumstances of Alaska Native villages and regions. Not all villages, for example, have municipal and IRA governments that can be consolidated as thoroughly as they are in Quinhagak. But many villages do have both forms of government, and they can work together to mutual advantage, drawing on the powers and resources of both federal and state governments, in at least some of the ways that the Quinhagak case illustrates.

Both Quinhagak and Akiachak show that when tribes push the boundaries of tribal powers, they may meet with resistance from some parts of state government, but they also may be accommodated and supported by state officials and agencies. We are particularly struck that there appear to be more

continuities than discontinuities in comparing self-government in these and other Native villages with self-government in Metlakatla's "Indian Country," where Native sovereignty presumably is greatest. The Metlakatla situation may not be as different as popular perception holds.

The practical uses of state-chartered institutions to further regional self-governance aims are clearly evident in the cases of Yakutat and the NANA region. In both places, borough formation extended land use planning and controls throughout the general region and permitted regional governments to deal more effectively with federal and state land and resource agencies. Although there is some uncertainty in Yakutat about the extent to which borough policy will reflect Native subsistence values, there is no question that the Northwest Arctic borough is an instrument of Native self-governance and that it is a key element of the village-regional strategy. The NANA region is in fact replete with positive lessons in Native self-governance from the village to the regional levels, particularly in the integration of village and regional leadership, institutions, and programs.

The cases of village compacting and of the Council of Athabascan Tribal Governments in the Tanana Chiefs/Doyon region suggest the critical importance of building self-governance capabilities and how this might be done. In the case of village re-compacting, the emphasis is on how administrative capabilities can be built through transitional stages to progressively more independent village control of federal program funds and administration. In the other, the CATG experience, a group of villages in a distinct sub-region show how decentralization of health and resource management programs can strengthen self-government at the village level while providing economic and political leverage through an inter-tribal association.

Other lessons in building institutional capabilities are offered in the cases from Canada and the lower forty-eight states: the federated structure of the Alberta Metis, the resource co-management agreement between the White Mountain Apache and the Fish and Wildlife Service, the multilateral environmental management arrangements involving the Confederated Tribes of Warm Springs, and the inter-tribal appeals court organizations of the northern and southern Rockies. These as well as the Alaska cases suggest that effective self-governance institutions– including village, inter-tribal, and regional institutions as well as cooperative agreements with federal, state, and private agencies– are most securely built by developing a tribal base of experience and negotiating skill and combining them with a willingness to persist in difficult circumstances.

In general, it appears that an effective strategy of Native self-governance includes at least the following elements:

- consolidating governmental powers and resources;

- building organizational, administrative, and technical capacities;
- exercising assertive leadership; and
- pursuing experimental and innovative solutions to complex problems.

V. STRENGTHENING NATIVE SELF-GOVERNANCE

The stories presented in Section IV tell a remarkable tale. Faced with extraordinary difficulties and a remarkably complex and often unfavorable political environment, certain of Alaska's Native peoples are engaged in a strikingly innovative, resourceful, and determined effort to reclaim control over their affairs, resources, and future. The most interesting political developments in Native Alaska are happening at village and sub-regional levels, where creative and intriguing institutional strategies are beginning to emerge and tribes are testing the limits of their own autonomy and political power.

The diversity of these institutional strategies and designs is not surprising. Native Alaska is an enormously diverse world. Differences in cultures, economies, regional loyalties, and approaches to working with non-Indian institutions suggest that effective self-governance strategies will be diverse as well. No single model of self-governance is likely to work across all of these differences. Indeed, ignoring such differences has been a hallmark of failed Indian policies throughout the twentieth century. It is a mistake Alaska should not and need not repeat in the twenty-first century.

While no one-size-fits-all self-governance model will meet the needs of all of Alaska's Native communities, a portfolio of institutional strategies is emerging. As Section IV suggests, some have been tried or are now being tried by Native communities in Alaska; others have been or are being tried by Native communities in Canada or the lower forty-eight. Others surely have yet to be invented or fully developed.

The question is: which of these strategies or structures– either currently in the portfolio or yet to be developed– make the most sense for which groups in what situations? How should tribes, state and federal governments, and other concerned actors evaluate or choose among self-governance strategies, and what kinds of strategies should they try to develop?

In answering these questions, two issues are particularly important:

- First, *at what level should specific governing activities be organized*? Should Native self-government be organized at the village level, at the sub-regional level, at the regional level, or at some other level? Should different governmental functions (e.g., resource management, dispute resolution, service delivery, etc.) be organized at different levels?

- Second, *what specific institutional forms should self-government take*? For example, how should judicial systems be organized? How should tribal government be structured? Should power be concentrated in councils or in single senior leaders? Do municipal governments or IRA governments make more sense? Is the borough model workable for Native self-governance? And so forth.

We cannot provide quick answers to these questions, for the answers require more information about specific cases than is immediately available. Furthermore, the answers ultimately will have to come not from us but from Native communities themselves. Too often, decisions about how Natives should be organized have been made by others and then imposed on Native peoples. Too often, Natives have had to act through institutional models designed by others instead of developing capable institutions of their own. If Native self-governance is to succeed, it must have roots in Native decisions; it must adopt forms that Native people support; and it must pursue objectives that Native people recognize as their own.

In this section we provide some criteria for thinking about those decisions, institutions, and objectives. What follows is a list of four critical considerations that need to be taken into account as Native peoples choose among available self-governance strategies or develop new ones. These four considerations are hardly exhaustive. Native peoples in Alaska must develop their own strategic guidelines by which to measure the decisions they make so that those decisions become proactive instead of simply reactive. However, our research strongly suggests that policy decisions made with these considerations in mind are more likely to lead to effective self-governance and to improved socioeconomic conditions in Native Alaska.

V.A. Four Critical Considerations for Self-Governance Policy

Self-determination

We have argued in Section I, based on a diverse and growing body of research on development and governance from around the world, that self-determination– *de facto* sovereignty– is a key to improved socioeconomic conditions in Native communities. It is not sufficient alone to produce those conditions, but it appears to be necessary if improved conditions are to last.

At the same time, we should emphasize that sovereignty is not an all-or-nothing proposition. Sovereignty can be shared, and it typically is a matter of degree. Indian nations in the lower forty-eight states enjoy a high degree of sovereignty, but it is not complete. It is limited in certain ways, and in some circumstances it is a shared sovereignty in which Indian tribes and state or federal agencies work collaboratively as formal partners in the management of resources or the making of policy. Similarly in Alaska, the one Native reservation– Metlakatla– has a degree of sovereignty commensurate with that of tribes in the lower forty-eight states, but its sovereignty, too, is limited. Metlakatla remains dependent for certain things on state and federal cooperation and has experienced problems establishing control of its own fishery resources.

Be that as it may, the fact remains that in case after case, research indicates that the potential for improvement in socioeconomic conditions rises as tribes become more powerful decision-makers– independently or in partnership with others– in their own affairs. Whether in economic development, resource management, social service delivery, or other governing arenas, the fact is that when those who bear the consequences of decisions also make the decisions, the quality of decisions improves. We believe that Akiachak, CATG, and other Native organizations are already showing that the same is indeed the case in Alaska.

The critical question for policy and for institutional design is this: *Which self-governance strategies and institutional designs are most likely to enhance the control that the relevant Native community can exercise over:*

- *the resource base on which the community depends;*
- *the nature and quality of community life;*
- *the major decisions affecting the community's social, economic, and political future?*

Legitimacy

We also argued in Section I that the success of self-governance rests partly on the legitimacy of governing institutions. Institutions that lack community support are unlikely to be able to govern effectively.

Legitimacy depends in part on finding a fit between, on the one hand, the design of the institutions themselves and, on the other, the beliefs within the community about how authority ought to be organized and exercised. In other words, there has to be a fit between institutions and indigenous political culture.

This does not mean that governing institutions should simply reflect those beliefs. Other considerations also have to be taken into account (see below). But unless governing institutions are believed by the people to be appro-

priately organized, they are more likely to be a source of conflict and of poor decisions than a means of resolving conflict and of making effective decisions.

Policy and institutional design have to consider the following:

A. The Organizational Scope of Authority:

Where do people's fundamental allegiances lie?

- At the tribal or village level (for example, Quinhagak or Venetie)?
- At the sub-regional level (for example, in an association of tribes or villages that share culture and language or particular sets of interests, such as Akiachak and the Yupiit Nation, or the Council of Athabascan Tribal Governments)?
- At the regional level (for example, NANA)?

Ideally, and other things equal, the organization of self-governance will follow the pattern of indigenous identity and allegiance, understanding that this will vary from group to group and may be complex within groups. In some cases it may be highly localized; in others it may support confederations of tribes or regional entities.

B. The Substantive Scope of Authority:

What categories of government activity should be controlled by whom?

Tribes in Alaska have varying views on the appropriateness of relying on state, federal, regional, tribal, or composite institutions to carry out various governing functions, from education and resource management to foster-care placement and law enforcement. Quinhagak and Akiachak, for example, have differing views on the appropriateness of working through or disbanding municipal organizations. Villages in NANA have found institutional solutions for many governance issues in regional organization and have established close links between region and village, while villages in the Yukon Flats have worked hard to establish sub-regional control over certain programs and activities, believing such control is better suited to their needs and better fits their view of the world around them than regional organization. Some groups may believe that authority over most matters should remain firmly in their own hands.

While the organization of governing functions has to take practical considerations into account (see below), it also has to consider indigenous views of where various kinds of authority appropriately lie, or of who should be doing what.

C. The Form of Governing Institutions:

What specific form should governing institutions take?

In designing governing institutions, specific choices will have to be made; legitimacy should be a central consideration in making those choices. Yet no one form of government is likely to find support from all groups or cultures. For example, a tribe or culture that finds it appropriate to give single individuals large amounts of power may be a candidate for a strong chief executive form of government. A group that does not find it appropriate may be a better candidate for a parliamentary system. One group may find it appropriate to have elders directly involved in policy-making; another may wish to assign them an advisory role; a third may not wish to give them any formal role at all. Similarly, forms of representation have to consider indigenous views.

Again, the design of governing institutions has to take practical constraints fully into account, but form is not merely a matter of function. It has to at least consider indigenous notions of which organizational styles are appropriate.

Effectiveness

Governance is a practical matter. Governmental design has to consider such issues as cost, effective delivery of services, the fit of institutional form to particular governing tasks, the necessary functions of government, and so forth.

For example, it makes little sense to manage a migrating resource, such as caribou, through local institutions. It makes more sense to manage such a resource through sub-regional, regional, cross-regional, tribal/state, tribal/federal, or even international institutions in which all affected communities play a significant role and the relevant ecosystem as a whole is taken into account (Yakutat's move in 1992 from a municipal form of government with jurisdiction over eight square miles to a borough form of government with jurisdiction over 9,000 square miles was in part an attempt to increase its regulatory control over subsistence habitat and the commercial fishery). In other words, in such cases the boundary of the resource should help determine the boundary of the governing institution. On the other hand, it may make more sense to place decision-making over less moveable resources such as minerals or timber in the hands of those most directly affected by their exploitation.

These various considerations– cost, effectiveness, fit, necessity, and so forth– should not be isolated from each other. Cost, for example, should not be considered apart from effectiveness. To illustrate: it is occasionally argued that devolving control over social services to villages will result in increased

costs and that there are economies of scale involved in situating governmental control of social services at the regional level. If only costs are considered, this *may* be the case; however, there is some evidence that devolution in some cases actually improves service provision (for example, local health care providers and local law enforcement personnel are available around the clock and in bad weather; regional ones often are not), reduces village unemployment, and offers villages opportunities to develop their own human capital and governing capacity. Increased costs, in other words, may be offset by increased (and diverse) benefits. Those benefits, in fact, may lower costs over the long run.

(Of course it may be possible to have the best of both worlds. Health care in NANA is organized through the Maniilaq Association, the non-profit regional corporation, but it is delivered through health clinics in each village, and Maniilaq itself is controlled by active village representatives who sit on its board. Maniilaq also operates a program of tribal governance support, lending its own resources and expertise to the cause of capacity building at the local level. In these and other ways, village participation and control are built into NANA's regional structure.)

Some governing institutions are simply necessary for well-functioning societies. A society that cannot assure the fair resolution of disputes, for example, is unlikely to be able to persuade its own members to invest time or energy or ideas in the community's future. They won't invest because they know that, in the absence of fair judicial processes, their investment will be hostage to internal community politics. In this example, the effectiveness consideration raises the question of which judicial design can consistently deliver fair decisions in disputes. Judicial systems controlled by elected leaders are unlikely to do so. Similarly, the ability to prevent politics from contaminating business decisions turns out to be essential to government's ability to attract investors, retain talent, and foster economic activity. Effective governance therefore includes providing institutional means of separating politics from day-to-day business management.

The critical questions for policy and institutional design are:

- *Are the necessary tasks of government being carried out?*
- *Is this policy or design the most effective way of getting this particular task done?*
- *Can it accomplish the required task at an acceptable cost?*

Internal Capability

Effectiveness has to do with the design of institutions of self-governance: are they designed in ways that provide effective self-government? Are they capable of getting the job done? In contrast, this final consideration has to do

with the ability of a given Native community to make those institutions work consistently, reliably, and well. In other words, it has to do not so much with organization as with execution. Much of the success of tribes in establishing their authority over resources and decision-making has depended on their ability to demonstrate the administrative and technical capacity to effectively implement programs (see, for example, the Quinhagak and White Mountain Apache cases in Section IV above). This requires skills, access to financial and other resources, and the ability to make and implement effective decisions.

In the choice and design of governing institutions, each community has to consider what capabilities are needed, what its own capabilities are, and what capabilities it realistically can develop and sustain. Some Native communities may be in a better position than others to invest in capacity-building; some may be able to generate resources through creative institutional strategies. In consolidating its municipal and tribal governments, for example, Quinhagak has been able to solve certain problems of funding and financial management. Some communities may need to look to outsiders to supply or enhance certain capabilities. Metlakatla has turned to the Northwest Court Judges Association in Seattle for appellate court services; villages in the Yukon Flats rely on the Council of Athabascan Tribal Governments to provide some services and functions; villages in the NANA region rely for certain things on regional institutions. Furthermore, some governing tasks are more complex than others or may demand relatively rare educational or skill levels. While some Native communities may be able to meet those demands or develop those skills, other communities may choose to focus their energies elsewhere, leaving these more specialized governing tasks to other entities.

This consideration is especially pertinent to small communities where human capital resources are limited. Such communities may need to consider cooperative institution-building with other communities who share their culture, historical experience, geographical circumstances, or particular sets of problems. Where several small communities share such bonds, it may make sense for them to join forces so as to maximize human and financial resources and minimize the burdens of administration. This can be done while retaining local control over actual decision-making. The Yupiit Nation, CATG, NANA, and some of the subregional Kuskokwim village associations represent efforts to organize along subregional cultural, identity-based, or ecological boundaries, remaining small enough to be sensitive to local problems, cultural concerns, and autonomy, but large enough to gain economies of scale in human capital needs and administrative costs.

The critical questions for policy or institutional design are these:

- *What capabilities does this governing function demand?*
- *Are those capabilities available in the relevant Native community?*

- *If they are not available, can they be developed relatively quickly?*

- *If they are not available, should these particular aspects of self-governance be organized at some other level– perhaps through a multi-village or multi-tribal association– or through some other governing entity?*

V.B. Conclusion

Governing institutions that advance self-determination, have legitimacy with the relevant community, are effective, and fit the internal capabilities of the community are likely to succeed not only as vehicles of self-governance, but as keys to improving the socioeconomic welfare of Native communities.

Of course there are often tradeoffs among these four criteria, and they must not be considered in isolation from each other. For example, effectiveness and legitimacy have to be considered together. There may be strong sentiment in some communities for a return to traditional ways of governing, but government also has to be able to get the job done. While traditional institutions may have a high degree of legitimacy with the people, they were developed in response to the challenges of their time. Some of those challenges are the same today, but new ones have emerged which may require new institutional designs or demand change in older ones. Finding ways to achieve both effectiveness and legitimacy is one of the primary tasks facing Native self-governance.

Effectiveness and sovereignty are sometimes similarly related. When tribes participate in resource co-management agreements, turn to outsiders for appellate court services, or join together for certain purposes in confederations of tribes, they give up some measure of sovereignty. But this is something that nations the world over do when they commit to cooperation so as to accomplish shared purposes in the most efficacious possible way. The challenge for Native policy-makers and institution-builders is to make choices that follow Native priorities and concerns without ignoring the practical demands of successful self-governance.

The following simplified decision matrix illustrates how Native leaders might apply these four considerations to governmental design and policy.

Table 3
A Simplified Decision Matrix for Evaluating Institutional Designs and Policy Options

	Institutional Design 1	Institutional Design 2, etc.	Policy Option 1	Policy Option 2, etc.
Self-Determination				
Does this enhance control of…				
…the resource base?				
…the nature/quality of community life?				
…decisions affecting community?				
Legitimacy				
Does this fit indigenous conceptions of…				
…the appropriate organizational scope of authority?				
…the appropriate substantive scope of authority?				
…the appropriate institutional form?				
Effectiveness				
Is this the most effective way to do it?				
Can it be done at an acceptable cost?				
Internal Capability				
What capabilities does this require?				
Do we have those capabilities?				
Can we develop them here?				

VI. WHAT CAN BE DONE?

Following the U.S. Supreme Court's decision in *State v. Venetie*, Heather Kendall-Miller, the chief attorney for the Native Village of Venetie, wrote that Alaska Natives "have suffered a tremendous judicial loss in the battle to protect tribal integrity over tribal lands..." She went on, however, to point out that the decision did not affect federally recognized tribal status, and that "for most communities in rural Alaska, there will be very little change in day-to-day life. Tribal governments will continue to do what they have always done– govern their communities."[129]

The present report is based on the premise that the question of Native self-governance powers remains open and that Natives can and should answer this question for themselves. This report is also intended to reflect the positive spirit of the declaration of rights adopted by tribal delegates to the Alaska Conference of Tribes, which met in Anchorage in May 1998. Especially pertinent are two of the declared rights:

> The right to self-determination, by virtue of which we freely determine our political status and freely pursue our economic, social, cultural, spiritual, and educational development, [and] The right to participate fully at all levels of decision-making in matters which may affect our rights, lives and destinies.[130]

The preceding sections of this report survey the range of existing and emerging institutional options available to Alaska Natives as means of self-determination and participation in decision-making. The report explores some of the main opportunities and limits represented in tribal and municipal, profit and non-profit, village, inter-village, and regional organizations. It describes selected Native self-governance models, assesses their effectiveness, and considers their general applicability to Alaska's villages and regions. Finally, the report attempts to facilitate Native thinking about the tasks of government, at what level those tasks should be organized, and how inter-institutional rela-

[129] Memorandum from Heather Kendall-Miller to AVCP, February 25, 1998.
[130] "Declaration of the Fundamental Human Rights of Alaska's First Nations," May 7, 1998, at 1.

tionships among tribal, municipal, corporate, state, and federal domains can contribute to effective Native self-governance.

The essence of our findings is that Alaska Natives are already creating and using the self-government institutions of the future. They are strengthening the institutions they already have, experimenting with and assessing their options, and forming new institutions and institutional arrangements that fit their needs and circumstances. We have found that at least three basic principles appear to underlie much of what Natives are doing to build their institutions of self-government:

- First, they are strengthening self-government at its base, in their villages. Whether it be the Native Village of Kwinhagak consolidating the powers of both tribal and municipal governments, or the Akiachak Native Community relying solely on its authority as an IRA tribal government, villagers are recognizing that self-government starts at home, in their individual villages.

- Second, they are looking to regional and sub-regional organizations to support local self-government and to enable effective participation in institutions beyond the village. In the Northwest Arctic region around Kotzebue Sound, villages are integrated into a strong network of village-regional institutions in which village representatives hold key decision-making positions in regional non-profit and ANCSA corporations and in a borough government. In the Yukon Flats area, villages have formed the Council of Athabascan Tribal Governments, which devolves planning and administration of regional programs to a distinctive sub-region of the interior and links villagers directly to regional, state, and federal funding sources.

- Third, Natives are increasingly involved in tribal-state-federal cooperative arrangements in areas of resource co-management, social program contracting, and coordination of tribal and state administrative, regulatory, and judicial functions. Examples of such arrangements are found in all parts of the state, including the Alaska Eskimo Whaling Commission co-management regime in the Northwest, Tanana Chiefs Conference compacting arrangements in the interior, and the Native Village of Elim's cooperative agreement with the Alaska Department of Public Safety and the Division of Family and Youth Services for dealing with juvenile offenders.

At the same time, much more could and should be done to support these efforts and to create a more promising set of conditions for genuine Native self-governance. Future directions need to be based on what Natives themselves are already doing and related actions which they as well as state and federal governments might take in order to strengthen village self-government, create

effective village-regional institutions, and build cooperative tribal-state-federal relationships.

As Alaska Natives consider what is to be done to strengthen self-governance, attention needs to be given to each appropriate level where action may be needed.

VI.A. At the Village Level

The village is where the limits and problems of Native self-governance are most visible. These include lack of resources and authority, too much or too little organization, critical decisions affecting the village made elsewhere without village participation, and, often, factional conflict. Clearly, villages need more control of village life and more attention and help in achieving it.

The future can best be approached in the context of a strategic dialog in which villagers raise– and hopefully resolve– such questions as:

What cultural and natural resources should be preserved?
What can we let go of?
Where do we want to take the village economically, socially, culturally?
What paths are incompatible with our values as a community?

These questions may be resolved informally, written into a plan, or incorporated into council resolutions, but regardless of the form, a strategic vision is an important part of self-governance. A strategy, because it can displace reactive decision-making or constrain external decision-making, may be as critical to self-governance as legal rights or other sources of self-determination power.

VI.B. At the Regional Level

In most of Alaska today, the region is the level of integration of villages into the local/tribal-state-federal intergovernmental system. Among other things, regional for-profit corporations control much of the Native land base, while non-profit corporations connect villages to state and federal health and social program support. Along with regional governments, these institutions often wield significant economic and political strength within regions and in the state as a whole and are critical to maintaining and enhancing Native self-governance in Alaska. Because they offer useful frameworks for village cooperation and united action, regional institutions can help establish more cooperative, partner-like relationships with tribes and sub-regional organizations. Most also possess skills, human capital, and material resources that can make important contributions to self-governance at all levels.

VI.C. At the State Level

State agencies have cooperated with tribal governments and Native regional organizations both before and after *Venetie*. In most of rural Alaska, the state lacks the capacities to protect resources and serve the people to the extent that it does in more accessible urban areas. Thus, where the state cooperates with and supports Native governments, both levels of government are able to fulfill their responsibilities more effectively.

Overall, however, state government has not recognized that, endowed with substantive power and effective governing institutions, and welcomed as partners in the tasks of rural governance, tribes can be an asset to the state, significantly improving the quality and implementation of government functions in rural areas. The potentials of contracts, agreements, and other forms of collaboration in areas such as resource and environmental management, child welfare, alcohol control, law enforcement and courts have yet to be realized.

VI.D. At the Federal Level

After the people themselves, the federal government is the ultimate source of Native sovereignty or self-governance. With some exceptions, federal Indian policy has been supportive of tribal self-government. However, there is still need to clarify and strengthen Alaska Native decision-making powers and responsibilities in alcohol control, child welfare, resource management, environmental protection and other program areas.

Congress has delegated strong authority to the Executive to make and carry out federal Indian policy within the ever-changing limits of legislative and judicial decisions. Thus, there is a great deal that federal administrative agencies can do to encourage and support greater Native participation and decision-making in federal programs through delegations, contracting, and self-governance compacting.

VI.E. Across All Levels

We have stressed the complexity of institutional arrangements within which Native communities operate and how this often interferes with Native preferences and priorities. We recognize, however, that the multiplicity of tribal, municipal, state, and federal governments, together with regional non-profits and corporations, co-management regimes, and special districts and authorities will not diminish soon. Indeed, institutional arrangements in rural Alaska may become more complex before they become simpler.

Self-governance is a necessary response to the socio-economic problems of Native Alaska. This does not mean that a "go it alone" strategy would work for tribes or, for that matter, any other governments. It is essential that Native

and non-Native institutions adopt a collaborative and cooperative stance toward each other. The most favorable results for Native self-governance have occurred where all organizations concerned:

- approach each other as partners in creating solutions rather than as interest groups to be consulted or authorities to be circumvented;
- advance common and complementary interests rather than stake out opposing positions; and
- focus more on outcomes than on rules as a basis for guiding their actions.

Appendix A: Selected Governance Characteristics of BIA-Recognized Villages

Appendix A
SELECTED GOVERNANCE CHARACTERISTICS OF BIA-RECOGNIZED VILLAGES

	Village Corporation		Tribe				City				1990 Census	
Village Name	Village Corporation	V-Corp Status	Trad.	IRA	Self-Gov. Compact	Reserve	Uninc.	Second	First	Home Rule	Population	Percent Native
Ahtna Region [1,2]												
Cantwell	Ahtna, Inc.	M	•				•				147	22%
Chistochina	Ahtna, Inc.	M	•				•				60	61%
Chitina	Chitina Native Corporation	A	•				•				49	46%
Copper Center	Ahtna, Inc.	M	•				•				449	34%
Gakona	Ahtna, Inc.	M	•				•				25	-
Gulkana	Ahtna, Inc.	M	•				•				103	59%
Mentasta Lake	Ahtna, Inc.	M	•				•				96	72%
Tazlina	Ahtna, Inc.	M	•				•				247	23%
Aleut Region [1,2]												
Akutan	Akutan Corporation	A	•					•			589	13%
Atka	Atxam Corporation	A		•				•			73	91%
Belkofski	Belkofski Corporation	N	•				•				-	-
False Pass	Isanotski Corporation	A	•					•			68	76%
King Cove	King Cove Corporation	A	•						•		451	39%
Nelson Lagoon	Nelson Lagoon Corporation	A	•				•				83	80%
Nikolski	Chaluka Corporation	A		•			•				35	82%
Pauloff Harbor	Sanak Corp.	A	•				•				-	-
Saint George	Saint George Tanaq Corporation	A		•				•			138	94%
Saint Paul	Tanadgusix Corporation	A		•				•			763	66%
Sand Point	Shumagin Corporation	A	•						•		878	49%
Unalaska	Ounalashka Corporation	A	•						•		3,089	8%
Unga	Unga Corporation	A	•				•				-	-
Arctic Slope Region [2]												
Anaktuvuk Pass	Nunamiut Corporation	A	•					•			259	84%
Atqasuk	Atqasuk Corporation	A	•					•			216	93%
Barrow	Ukpeagvik Inupiat Corporation	A	•						•		3,469	63%
Kaktovik	Kaktovik Inupiat Corporation	A	•					•			224	84%
Nuiqsut	Kuukpik Corporation	A	•					•			354	92%
Point Hope	Tigara Corporation	A		•				•			639	91%
Point Lay	Cully Corporation	A		•			•				139	81%
Wainwright	Olgoonik Corporation	A	•					•			492	94%
Bering Straits Region [1,3]												
Brevig Mission	Brevig Mission Native Corporation	A	•					•			198	92%
Council	Council Native Corporation	A					•				8	62%
Diomede	Diomede Native Corporation			•				•			178	93%
Elim	Elim Native Corporation	A		•		•		•			264	91%

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	Village Corporation		Tribe				City				1990 Census	
Village Name	Village Corporation	V-Corp Status	Trad.	IRA	Self-Gov. Compact	Reserve	Uninc.	Second	First	Home Rule	Population	Percent Native
Gambell	Sivuqaq Incorporated	A		•	•	•		•			525	96%
Golovin	Golovin Native Corporation	A	•					•			127	92%
King Island	King Island Native Corporation	A		•			•				-	-
Koyuk	Koyuk Native Corporation	A		•				•			231	94%
Mary's Igloo	Mary's Igloo Native Corp.	A	•				•				-	-
Nome	Sitnasauk Native Corporation	A		•					•		3,500	52%
St. Michael	St. Michael Native Corporation	A		•				•			295	91%
Savoonga	Savoonga Native Corporation	A		•		•		•			519	95%
Shaktoolik	Shaktoolik Native Corporation	A		•				•			178	94%
Shishmaref	Shishmaref Native Corporation	A		•				•			456	94%
Solomon	Solomon Native Corporation	A	•				•				6	100%
Stebbins	Stebbins Native Corporation	A		•				•			400	94%
Teller	Teller Native Corporation	A	•					•			151	86%
Unalakleet	Unalakleet Native Corporation	A		•				•			714	81%
Wales	Wales Native Corporation	A		•				•			161	88%
White Mountain	White Mountain Native Corp.	A		•				•			180	87%
Bristol Bay Region [1,2,3]												
Aleknagik	Aleknagik Natives Limited	A	•					•			185	83%
Chignik	Far West, Incorporated	A	•					•			188	45%
Chignik Lagoon	Chignik Lagoon Native Corporation	A	•				•				53	56%
Chignik Lake	Chignik River Limited	A	•				•				133	91%
Clark's Point	Saguyak, Incorporated	A	•					•			60	88%
Dillingham	Choggiung, Limited	A	•						•		2,017	55%
Egegik	Becharof Corporation	A	•					•			122	70%
Ekuk	Choggiung, Limited	M	•				•				3	33%
Ekwok	Ekwok Natives Limited	A	•					•			77	87%
Igiugig	Igiugig Native Corporation	A	•				•				33	78%
Iliamna	Iliamna Natives Limited	A	•				•				94	66%
Ivanof Bay	Bay View Incorporated	A	•				•				35	94%
Kokhanok	Alaska Peninsula Corporation	M	•				•				152	90%
Koliganek	Koliganek Natives Limited	A	•				•				181	96%
Levelock	Levelock Natives Limited	A	•				•				105	82%
Manokotak	Manokotak Natives Limited	A	•					•			385	95%
Naknek	Paug-Vik, Incorporated, Limited	A	•				•				575	41%
New Stuyahok	Stuyahok, Limited	A	•					•			391	95%
Newhalen	Alaska Peninsula Corporation	M	•					•			160	94%
Nondalton	Kijik Corporation	A	•					•			178	89%
Pedro Bay	Pedro Bay Native Corporation	A	•				•				42	90%
Perryville	Oceanside Corporation	A		•			•				108	94%
Pilot Point	Pilot Point Native Corporation	I	•					•			53	84%

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SELECTED GOVERNANCE CHARACTERISTICS OF BIA-RECOGNIZED VILLAGES

	Village Corporation		Tribe				City				1990 Census	
Village Name	Village Corporation	V-Corp Status	Trad.	IRA	Self-Gov. Compact	Reserve	Uninc.	Second	First	Home Rule	Population	Percent Native
Port Heiden	Alaska Peninsula Corporation	AC†	•					•			119	72%
Portage Creek	Choggiung, Limited	M	•				•				5	60%
South Naknek	Alaska Peninsula Corporation	AC†	•				•				136	79%
Togiak	Togiak Natives Limited	A	•					•			613	87%
Twin Hills	Twin Hills Native Corporation	A	•				•				66	92%
Ugashik	Alaska Peninsula Corporation	M	•				•				7	85%
Calista Region [1]												
Akiachak	Akiachak, Limited	A		•			°				481	95%
Akiak	Kokarmuit Corporation	A		•				•			285	97%
Alakanuk	Alakanuk Native Corporation	A	•					•			544	95%
Andreafsky	Nerklikmute Native Corporation	A	•								410	84%
Aniak	Kuskokwim Corporation	M	•					•			540	70%
Atmautluak	Atmautluak Limited	A	•				°				258	96%
Bethel	Bethel Native Corporation	A	•					•			4,674	63%
Bill Moore's Slough	Kongnigkilnomuit Yuita Corp.	A	•				•				-	-
Chefornak	Chefarnrmute Incorporated	A	•					•			320	97%
Chevak	Chevak Company Corporation	A	•					•			598	93%
Chuathbaluk	Kuskokwim Corporation	M	•					•			97	89%
Chuloonawick	Chuloonawick Corporation	I	•				•				-	-
Crooked Creek	Kuskokwim Corporation	M	•				•				106	90%
Eek	Iqfijouaq Corporation	A	•					•			254	95%
Emmonak	Emmonak Native Corporation	A	•					•			642	92%
Georgetown	Kuskokwim Corporation	A	•				•				-	-
Goodnews Bay	Kuitsarak, Incorporated	A	•					•			241	95%
Hamilton	Nunapiglliraq Corporation	A	•				•				-	-
Hooper Bay	Sea Lion Corporation	A	•					•			845	96%
Kasigluk	Kasigluk Incorporated	A	•				°				425	95%
Kipnuk	Kugkaktlik Limited	A	•				•				470	97%
Kongiganak	Qemirtalek Coast Corporation	A	•				•				294	97%
Kotlik	Kotlik Yupik Corporation	A	•					•			461	97%
Kwethluk	Kwethluk Incorporated	A		•				•			558	96%
Kwigillingok	Kwik Incorporated	A		•			•				278	95%
Lime Village	Lime Village Company	A	•				•				42	95%
Lower Kalskag	Kuskokwim Corporation	M	•					•			291	98%
Marshall	Maserculiq Incorporated	A	•					•			273	92%
Mekoryuk	Nima Corporation	A		•				•			177	99%
Mountain Village	Azachorak Incorporated	A	•					•			674	91%
Napaimute	Kuskokwim Corporation	M	•				•				3	100%
Napakiak	Napakiak Corporation	A		•				•			318	94%

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SELECTED GOVERNANCE CHARACTERISTICS OF BIA-RECOGNIZED VILLAGES

	Village Corporation		Tribe				City				1990 Census	
Village Name	Village Corporation	V-Corp Status	Trad.	IRA	Self-Gov. Compact	Reserve	Uninc.	Second	First	Home Rule	Population	Percent Native
Napaskiak	Napaskiak Incorporated	A	•					•			328	94%
Newtok	Newtok Corporation	I	•				°				207	93%
Nightmute	Chinuruk, Inc.	AC‡	•					•			153	95%
Nunapitchuk	Nunapitchuk, Limited	A		•				•			378	97%
Ohogamiut	Ohog Incorporated	I	•				•				-	-
Oscarville	Oscarville Native Corporation	A	•				•				57	91%
Paimiut	Paimiut Corporation	N	•				•				-	0%
Pilot Station	Pilot Station Native Corporation	A	•					•			463	95%
Pitka's Point	Pitka's Point Native Corporation	A	•				•				135	95%
Platinum	Arviq, Incorporated	A	•					•			64	92%
Quinhagak	Qanirtuuq, Incorporated	A		•				•			501	93%
Red Devil	Kuskokwim Corporation	M	•				•				53	50%
Russian Mission	Russian Mission Native Corp.	A	•					•			246	94%
Saint Mary's	Saint Mary's Native Corporation	A	•						•		441	83%
Scammon Bay	Askinuk Corporation	A	•					•			343	96%
Sheldon Point	Swan Lake Corporation	A	•					•			109	92%
Sleetmute	Kuskokwim Corporation	M	•				•				106	86%
Stony River	Kuskokwim Corporation	M	•				•				51	88%
Toksook Bay	Nunakauiak Yupik Corporation	A	•					•			420	95%
Tuluksak	Tulkisarmute, Incorporated	A		•			°				358	95%
Tuntutuliak	Qinarmiut Corporation	A	•				•				300	96%
Tununak	Tununrmiut Rinit Corporation	I		•			°				316	96%
Umkumiute	Chinuruk, Inc.	C	•				•				-	-
Upper Kalskag	Kuskokwim Corporation	M	•					•			172	84%
Chugach Region												
Chenega Bay	Chenega Corporation	A		•			•				94	69%
Eyak	Eyak Corporation	A	•								172	7%
Nanwalek	English Bay Corporation	A	•				•				158	91%
Port Graham	Port Graham Corporation	A	•				•				166	90%
Tatitlek	Tatitlek Corporation	A		•			•				119	86%
Cook Inlet Region												
Chickaloon	Chickaloon-Moose Cr. Native Assoc.	A	•				•				145	6%
Eklutna	Eklutna, Incorporated	A	•		ǂ						381	12%
Kenai	Kenai Natives Assoc., Inc.	A		•						•	6,327	8%
Knik	Knikatnu, Incorporated	A	•				•				272	11%
Ninilchik	Ninilchik Native Association, Inc.	A	•				•				456	19%
Salamatoff	Salamatoff Native Assoc., Inc.	A	•				•				999	10%
Seldovia	Seldovia Native Association	A		•	ǂ				•		316	15%

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SELECTED GOVERNANCE CHARACTERISTICS OF BIA-RECOGNIZED VILLAGES

	Village Corporation		Tribe				City				1990 Census	
Village Name	Village Corporation	V-Corp Status	Trad.	IRA	Self-Gov. Compact	Reserve	Uninc.	Second	First	Home Rule	Population	Percent Native
Tyonek	Tyonek Native Corporation	A		•			•				154	92%
Doyon Region [1,2,3]												
Alatna	K'oyitl'ots'ina, Limited	C	•								31	93%
Allakaket	K'oyitl'ots'ina, Limited	C	•					•			170	94%
Anvik	Ingalik, Inc.	A	•					•			82	91%
Arctic Village			•			•	•				96	93%
Beaver	Beaver Kwitchin Corporation	A	•				•				103	95%
Birch Creek	Tihteet'aii, Incorporated	A	•				•				42	90%
Chalkyitsik	Chalkyitsik Native Corporation	A	•				•				90	92%
Circle	Danzhit Hanlaii Corporation	A		•			•				73	86%
Dot Lake	Dot Lake Native Corporation	A	•				•				70	54%
Eagle Village	Hungwitchin Corporation	A		•			•				35	80%
Evansville	Evansville, Incorporated	A	•				•				33	57%
Fort Yukon	Gwitchyaa Zhee Corporation	A		•				•			580	85%
Galena	Gana-A' Yoo, Limited	AC*	•						•		833	45%
Grayling	Hee-Yea-Lingde Corporation	A		•				•			208	93%
Healy Lake	Mendas Cha-ag Native Corporation	A	•				•				47	85%
Holy Cross	Deloycheet, Incorporated	A	•					•			277	93%
Hughes	K'oyitl'ots'ina, Limited	C	•					•			54	92%
Huslia	K'oyitl'ots'ina, Limited	C	•					•			207	90%
Kaltag	Gana-A' Yoo, Limited	C	•					•			240	92%
Koyukuk	Gana-A' Yoo, Limited	C	•					•			126	97%
Manley Hot Springs	Bean Ridge Corporation	A	•				•				96	14%
McGrath	MTNT Limited	C	•					•			528	47%
Minto	Seth-De-Ya-Ah Corporation	A		•			•				218	97%
Nenana	Toghotthele Corporation	A	•							•	393	47%
Nikolai	MTNT Limited	C	•					•			109	89%
Northway Village	Northway Natives, Incorporated	A	•				•				113	94%
Nulato	Gana-A' Yoo, Limited	C	•					•			359	96%
Rampart	Ban-O-Yeel Kon Corporation	A	•				•				68	94%
Ruby	Dineega Corporation	A	•					•			170	74%
Shageluk	Zho-Tse, Incorporated	A		•				•			139	95%
Stevens Village	Dinyee Corporation	A		•			•				102	91%
Takotna	MTNT Limited	C	•				•				38	44%
Tanacross	Tanacross, Incorporated	A		•			•				106	94%
Tanana	Tozitna, Limited	A		•					•		345	78%
Telida	MTNT Limited	C	•				•				11	90%
Tetlin	Tetlin Native Corp	A		•		•	•				87	95%
Venetie		I	•			•	•				182	94%

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	Village Corporation		Tribe				City				1990 Census	
Village Name	Village Corporation	V-Corp Status	Trad.	IRA	Self-Gov. Compact	Reserve	Uninc.	Second	First	Home Rule	Population	Percent Native
Koniag Region [2]												
Afognak	Afognak Native Corporation	A	•				•				-	-
Akhiok	Akhiok-Kaguyak, Inc.	AC**	•					•			77	93%
Kaguyak	Akhiok-Kaguyak, Inc.	C	•				•				-	-
Kanatak				•			•				-	-
Karluk	Koniag, Inc.	M		•			•				71	91%
Larsen Bay	Anton Larsen, Inc.	A	•					•			147	84%
Old Harbor	Old Harbor Native Corporation	A	•					•			284	88%
Ouzinkie	Ouzinkie Native Corporation	I	•					•			209	85%
Port Lions	Afognak Native Corporation	M	•					•			222	67%
Woody Island	Lesnoi, Inc.	A	•				•				-	-
NANA Region [1,2]												
Ambler	NANA Regional Corporation	M	•					•			311	89%
Buckland	NANA Regional Corporation	M		•				•			318	95%
Deering	NANA Regional Corporation	M		•				•			157	94%
Kiana	NANA Regional Corporation	M	•					•			385	93%
Kivalina	NANA Regional Corporation	M		•				•			317	97%
Kobuk	NANA Regional Corporation	M	•					•			69	89%
Kotzebue	Kikiktagruk Inupiat Corp.	A		•				•			2,751	75%
Noatak	NANA Regional Corporation	M		•			•				333	96%
Noorvik	NANA Regional Corporation	M		•				•			531	93%
Selawik	NANA Regional Corporation	M		•				•			596	95%
Shungnak	NANA Regional Corporation	M		•				•			223	94%
Sealaska Region [1,3]												
Angoon	Kootznoowoo, Incorporated	A		•				•			638	82%
Craig	Shaan-Seet, Incorporated	A		•					•		1,260	22%
Haines	N/A			•					•		1,238	18%
Hoonah	Huna Totem Corporation	A		•					•		795	67%
Hydaburg	Haida Corporation	A		•					•		384	89%
Juneau	Goldbelt, Incorporated	A									26,751	12%
Kake	Kake Tribal Corporation	A		•	•				•		700	73%
Kasaan	Kavilco, Incorporated	A		•				•			54	53%
Ketchikan				•	ǂ					•	8,263	15%
Klawock	Klawock Heenya Corporation	A		•					•		722	54%
Klukwan	Klukwan, Incorporated	A		•		•	•				129	86%
Metlakatla				•	• ǂ						1,464	82%
Petersburg				•						•	3,207	10%

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SELECTED GOVERNANCE CHARACTERISTICS OF BIA-RECOGNIZED VILLAGES

	Village Corporation		Tribe				City				1990 Census	
Village Name	Village Corporation	V-Corp Status	Trad.	IRA	Self-Gov. Compact	Reserve	Uninc.	Second	First	Home Rule	Population	Percent Native
Saxman	Cape Fox Corporation	A		•				•			369	77%
Sitka	Shee Atika, Incorporated	A		•	•						8,588	20%
Skagway			•						•		692	5%
Wrangell				•						•	2,479	20%
Yakutat	Yak-Tat Kwaan, Incorporated	A	•								534	55%
Totals/Average			**150**	**71**	**8**	**7**	**94**	**99**	**17**	**5**	**-**	**77%**

Notes:

[1] The non-profit corporation affiliated with this region has a BIA Compact.

[2] The non-profit corporation affiliated with this region has an IHS Compact. In addition, several other health organizations have IHS compacts. They are: Chugachmuit, Eastern Aleutian Tribes, Norton Sound Health Corporation, Southcentral Foundation, Southeast Alaska Health Consortium, and Yukon-Kuskokwim Health Corporation.

[3] The non-profit corporation affiliated with this region has re-compacting agreements with villages.

° Dissolved second-class city

\+ IHS Compact

Village Corporation Status Codes:

M Formed by merger
A Corporation in good standing
N Corporation not in good standing
AC Corporation in good standing into which other corporations have been consolidated
C Corporation that has been consolidated into another village corporation
I Involuntarily dissolved

† The Alaska Peninsula Corporation was formed through the consolidation of Kokhanok Corp., Meshink, Inc., Newhalen Native Corp., Oinuyang, Inc., and Ugashik Native Corp.

‡ Chinuruk Incorporated was formed through the consolidation of NGTA, Inc and Umkumiute.

* Gana-A'Yoo, Limited was formed through the consolidation of Mineelghaadza', Limited, Notaaghleedin, Limited, and Takathlee-Tondin, Inc.

** Akhiok-Kaguyak. Inc. was formed through the consolidation of Natives of Akhiok, Inc., and Kaguyak, Inc.

Sources:

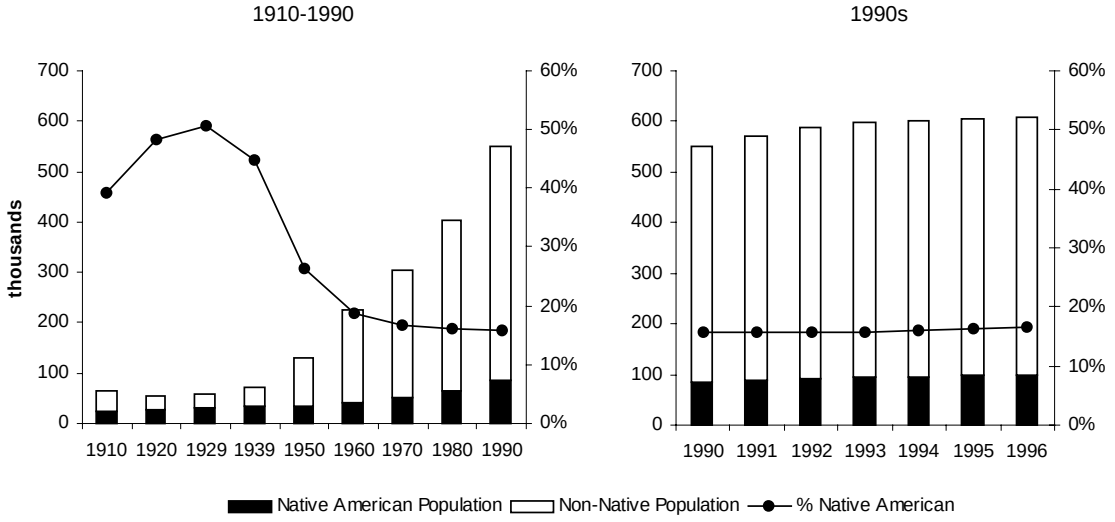
V-Corp Status: Division of Bank, Securities and Corporations, March 23, 1998
Traditional and IRA Government designations: Bureau of Indian Affairs
Self-Governance Compact: Bureau of Indian Affairs, Indian Health Service.
Reservation Status: Anders, Gary and Kathleen Anders, "Incompatible Goals in Unconventional Organization: The Politics of Alaska Native Corporations," Organization Studies, 1986 at 214.
City Types: DCRA Community Database
Population: DCRA Community Database

Appendix B: Native Alaskan Demographics

Trends

The total of Alaska Natives living in Alaska is just over 100,000—a number greater than ever in history. Another 20,000 Alaska Natives are estimated to live in other states. The total population of Alaska has increased tenfold since 1910, largely as a result of immigration. During the same period, Alaska's Native population increased four times, despite substantial emigration. More significantly, while the state's overall population has doubled since 1970, so did the Native population, which now constitutes close to 17 percent of the state's total. Since 1990, the proportion of Native population has grown slowly but steadily (see Figure 1). This trend will probably continue. The Native birth rate will likely remain relatively high, while there is not likely to be any influx of non-Natives comparable to that caused by trans-Alaska pipeline construction in the 1970s and state spending in the early 1980s. The trend of Native population growth exists among all Native groups in Alaska (see Table 4).

Figure 1
Native and Non-Native Population of Alaska in the Twentieth Century



Note: The horizontal axes are measured in different units; 1996 values are estimates.
Source: Alaska Department of Labor, *Alaska Population Overview*, Table 1.4, Native Population and Total Population of Alaska, 1910-96.

Table 4
Population by Tribal Group
Alaska 1980, 1990

	1980	1990	Change
Native American	64,103	85,698	33.7%
Eskimo	34,144	44,401	30.0%
Alaska Athabascan	8,744	11,696	33.8%
Tlingit	6,764	9,448	39.7%
Haida	994	1,083	9.0%
Tsimshian	1,168	1,653	41.5%
Alaska Native (Other)		566	
Other North American Tribes	3,028	4,633	53.0%
Tribe Not Reported or Specified	1,933	2,166	12.1%
Aleut	8,090	10,052	24.3%

Source: Alaska Department of Labor, *Alaska Population Overview,* Table 1.5, Population by Race and Tribal Group, Alaska and U.S. 1980, 1990.

Anchorage has become the largest Native community in Alaska, with around 20,000 Natives. The Native population of Anchorage is growing at a rate twice that of the overall Native population. Much of the city's rapid growth in Native population has been a result of in-migration from rural parts of Alaska. Despite this migration, the Native population continues to increase in most other regions of Alaska as well (see Table 5), and it is demographically clear that Native villages are going to remain an integral part of Alaska.

Table 5
Native Alaska Population: Growth and Regional Distribution
1980-95

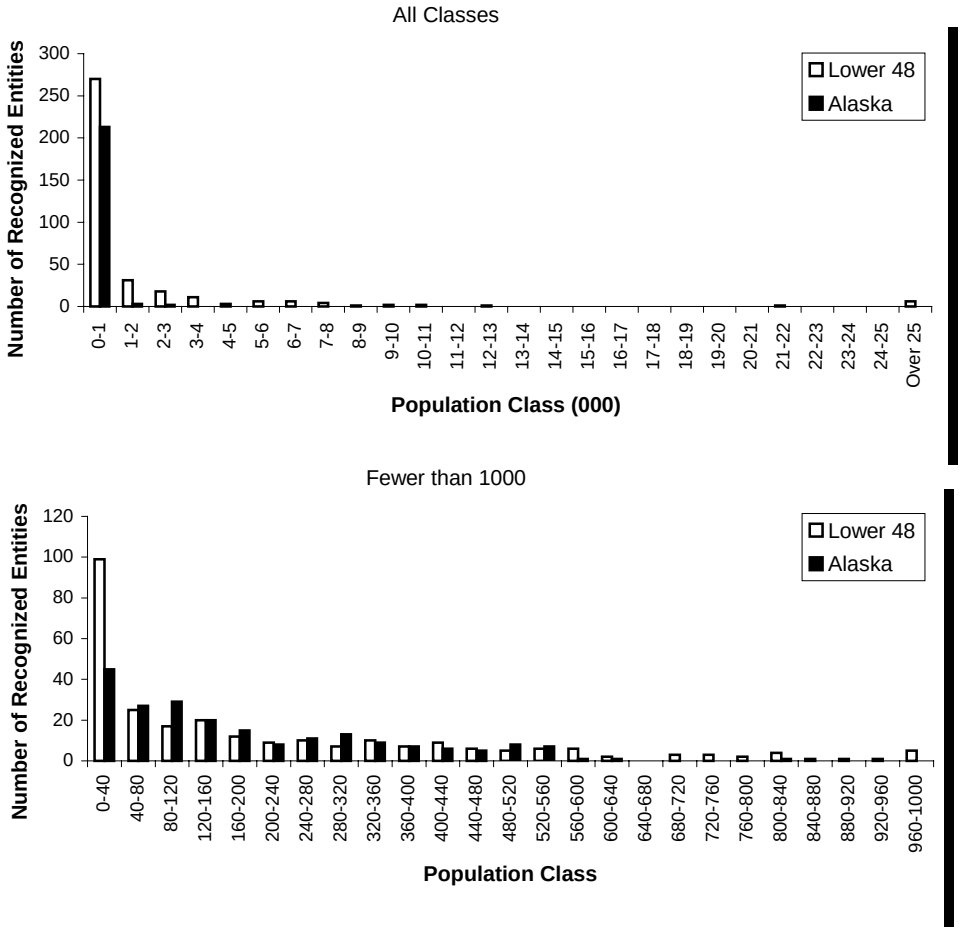
	1995			1980			Native Percent Increase	Ratio of Native Growth to Total Regional Growth
	Total	Native	Native Share	Total	Native	Native Share	80-95	80-95
ALASKA TOTAL	**615,900**	**97,004**	**15.7%**	**401,851**	**64,103**	**16.0%**	**51.3%**	**0.96**
Aleutian Islands	8,369	2,851	34.1%	7,768	1,934	24.9%	47.4%	6.13
Anchorage	257,780	18,124	7.0%	174,431	8,953	5.1%	102.4%	2.14
Bethel	15,367	12,857	83.7%	10,999	9,247	84.1%	39.0%	0.98
Bristol Bay	1,307	482	36.9%	1,094	360	32.9%	33.9%	1.76
Dillingham	6,260	4,889	78.1%	4,616	3,520	76.3%	38.9%	1.09
Fairbanks/North Star	84,880	5,673	6.7%	53,983	2,987	5.5%	89.9%	1.60
Haines	2,310	299	12.9%	1,680	214	12.7%	39.7%	1.06
Juneau	29,228	3,478	11.9%	19,528	2,190	11.2%	58.8%	1.18
Kenai Peninsula	46,759	3,213	6.9%	25,282	1,738	6.9%	84.9%	1.00
Ketchikan Gateway	15,082	1,794	11.9%	11,316	1,406	12.4%	27.6%	0.83
Kodiak Island	15,400	2,361	15.3%	9,939	1,884	19.0%	25.3%	0.46
Matanuska-Susitna	50,601	2,123	4.2%	17,816	688	3.9%	208.6%	1.19
Nome	8,991	6,988	77.7%	6,537	5,174	79.1%	35.1%	0.93
North Slope	6,989	4,884	69.9%	4,199	3,225	76.8%	51.4%	0.77
Northwest Arctic	6,694	5,949	88.9%	4,831	4,113	85.1%	44.6%	1.16
Prince of Wales/Outer Ketchikan	6,934	2,767	39.9%	3,822	1,651	43.2%	67.6%	0.83
Sitka	9,194	1,845	20.1%	7,809	1,669	21.4%	10.5%	0.59
Skagway/Yakutat/Angoon	4,617	1,878	40.7%	3,478	1,462	42.0%	28.5%	0.87
Southeast Fairbanks	6,522	818	12.5%	5,670	725	12.8%	12.8%	0.85
Valdez/Cordova	10,657	1,543	14.5%	8,348	1,060	12.7%	45.6%	1.65
Wade-Hampton	6,670	6,294	94.4%	4,665	4,347	93.2%	44.8%	1.04
Wrangell/Petersburg	7,303	1,355	18.6%	6,167	1,190	19.3%	13.9%	0.75
Yukon/Koyukuk	8,488	4,541	53.5%	7,873	4,368	55.5%	4.0%	0.51

Source: Scott Goldsmith, ISER.

Tribes

There are 226 federally recognized tribes in Alaska. Native communities range from the populous and heterogeneous Anchorage Native community, with representatives from every Native Alaskan cultural group, to the small and relatively culturally homogeneous communities of the bush. Compared to tribes in the lower forty-eight states, Alaskan tribes are relatively small, but the Alaskan experience with small tribes is by no means unique within the United States (see Figure 2 below). Of the 205 tribes in the lower forty-eight states with fewer than 1,000 members, 91 are in California, where small rancherias vastly outnumber traditional reservations. Another 56 are in Arizona, Nevada, Oklahoma, and Washington.

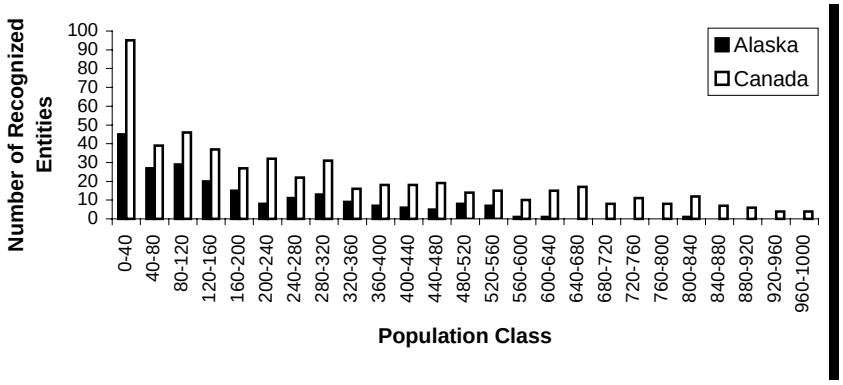
Figure 2
Numbers of Recognized Native Groups
Alaska and the Lower Forty-Eight States by Selected Population Classes



Source: Census STF1A and STF3A data contained in U.S. Environmental Protection Agency, Office of Solid Waste and Emergency Response, Chemical Emergency Preparedness and Prevention Office, and U.S. Department of Commerce, Economics and Statistics Administration, National Oceanic and Atmospheric Administration, Bureau of the Census, *LandView II: Mapping of Selected EPA-Regulated Sites TIGER/Line® 1992, and 1990 Census of Population and Housing* (Washington, D.C.: March 1995), CD-ROM Disks 10 and 11.

The distribution of tribal sizes in Canada is, as one might expect, similar to that in Alaska, though more heavily skewed toward the small end of the distribution.

Figure 3
Numbers of Recognized Native Groups
Alaskan and Canadian Communities of Fewer than 1000



Note: There are 531 Canadian tribes with populations of less than 1000, 63 that have populations between 1000 and 2000, 18 tribes between 2000 and 3000, 5 tribes between 3000 and 4000, 2 tribes between 4000 and 5000, 1 tribe between 5000 and 6000, 2 tribes between 6000 and 7000, 1 tribe between 7000 and 8000. No tribe in Canada has a population of greater than 8000.
Sources: See sources for Figure 2; and Canada, Department of Indian and Northern Affairs, *Indian Register Population by Sex and Residence*, 1997 (Ottawa: Minister of Public Works and Government Services Canada, 1998).

What explains the variation between, e.g., the massive Navajo Nation with a population of greater than 200,000 and the rancherias, reserves, and villages of California, Canada, and Alaska? Why are there dozens of Chippewa tribes in Minnesota, Wisconsin, and Michigan, yet only a few Choctaw tribes? The short answer is history. Federated or unitary political structures prior to European contact, factionalism or alliance during the Indian Wars, and joint or fractured relocation in the early reservation period are among the possible explanatory variables across cases. The long answer entails a deep understanding of clan loyalties; tribal, territorial, state and U.S. political history; tribal political culture; ecosystem carrying capacities; and other factors specific to each tribe.

Rather than attempt a deep and detailed examination of whether or not Alaskan tribes are appropriately configured, this report relies on tribal perspectives and tribal decision-making. Tribes themselves are better suited than outsiders to weigh the myriad factors (e.g., clan and familial relationships, political alliances and factions, economies and dis-economies of scale, regional histories, and preferences for cultural integration) that would have to be considered in re-defining tribal boundaries on behalf of more effective Native self government. Native village leaders are already showing a proclivity for taking up these kinds of issues in forming international groupings (the Gwich'in Nation), borough-sized federations (NANA), joint tribal-municipal governments (Quinhagak), and quasi-sovereign villages (Akiachak).

Appendix C: Home Rule as a Native Self-Governance Option

Alaska's constitution establishes a policy of maximizing local self-government.[133] This also is the goal the Native peoples of Alaska have for themselves. As shown in this report, Native communities have pursued different paths toward this goal of self-government, many participating in the state system, others staying outside it. Home rule for rural Native communities is a largely unexplored self-governance option. Implementing home rule in most Native communities would require some changes in home rule requirements, but in general, anything the state can do to facilitate the development of self-governing institutions will benefit not only Alaska's Natives but the state's overall system of governance and would come closer to realizing the state's constitutionally expressed self-governance objective.

The second class city status of many Native villages in Alaska does not carry with it any significant measure of local autonomy and control. Under this status, city governance and operations are carried out in accordance with state general law, with no leeway for adaptation to traditional values or local circumstances. The main benefits of this status have come from higher state revenue sharing payments and greater access to other state assistance programs than are possible for unincorporated areas. However, the state constitution provides the means to create local governments that could be far more adaptable and appropriate for rural Alaska than the existing municipal system.

Alaska's home rule provision is the most extensive in the United States. It provides that "a home rule borough or city may exercise all legislative powers not prohibited by law or by charter."[134] Exercising "legislative powers" essentially means that a home rule jurisdiction can have any powers that the Alaska state leg-

[133] Constitution of the State of Alaska, Article X, Section 1.
[134] Constitution of the State of Alaska, Article X, Section 11.

islature has, subject only to limitations of the state constitution, state statutes, and the municipality's own charter. The legislature has enumerated a number of specific limits on home rule organization and powers, but beyond these, the community itself can determine how to design its own government.[135]

Under current law, first class cities and communities with a permanent population of over 400 people can attain home rule by an affirmative vote of the people and their adoption of a charter.[136] However, there is no particular reason to retain these classification and size constraints on this particular form of self-government. The constitution allows home rule to be extended to other classes of cities.[137] It would take only an act of the legislature to allow other communities in Alaska to adopt home rule charters.

Making home rule available to rural communities would be a significant step toward more effective local government. This is especially the case where Natives constitute a clear majority of the population and can expect continued control of the local government, and where tribal institutions and village corporations work together. Instead of having to follow everything that is spelled out in general law, as is now required in second class cities, a home rule community would be able to design its own government to meet its own needs, circumstances, and objectives. Along with the ability to create a more appropriate municipal governance structure, home rule could provide tools for the effective exercise of law enforcement and other police powers, management of land and resources, protection of subsistence habitat and environmental quality, and for carrying out other public responsibilities.

To accomplish some of these objectives, home rule city boundaries would need to include sufficient land, water, and subsistence resources to protect the community and its ways of making a living, and the state would need to remove existing statutory obstacles to effective local control and adaptation to local ways of self-governing. Finally, the state would need to abide by the constitutional directive that "A liberal construction shall be given to the powers of local government units."[138]

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[135] The North Slope Borough provides an excellent example of the freedom that exists for a home rule municipality or borough to mold its own governance structure, take advantage of resource opportunities, and serve its population in ways appropriate to local goals, needs, and circumstances. Although not all areas have similar resources available to them, descriptions of the Northwest Arctic and Yakutat boroughs in Section IV of this report (see above) demonstrate the flexibility of the home rule tool.

[136] There currently are 20 home rule municipalities in Alaska, ranging in size from Nenana (population 450) to Anchorage (population 255,000).

[137] Constitution of the State of Alaska, Article X, Section 10.

[138] Constitution of the State of Alaska, Article X, Section 1.

Appendix D: A Legal Analysis of the *Venetie* Decision

Heather Kendall-Miller of the Native American Rights Fund wrote the following memorandum for the Alaska Federation of Natives. She argued *State of Alaska, et al. v. Native Village of Venetie Tribal Government, et al.* for the Village of Venetie before the U.S. Supreme Court. This memorandum describes the decision of the Supreme Court and its implications for Native Alaska.

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To: AFN
From: Heather Kendall-Miller
Date: 2/25/98
Re: Supreme Court Decision in *State v. Venetie*

In a thirteen page decision authored by Justice Thomas, the Supreme Court issued a unanimous opinion in the Venetie case holding that Venetie's former reservation fee lands and all other ANCSA lands do not qualify as "Indian County" under 18 U.S.C. § 1151(b). As a result, the Court ruled that Venetie cannot impose a tax on a non-Indian construction company doing business on its land. According to the Court's opinion, the fact that Venetie's land is owned by the tribal government, is irrelevant. A copy of the opinion is included with this analysis.

Early in its opinion, the Court makes a declaratory statement that is the precursor to its holding that ANCSA land does not qualify as Indian country. "In enacting ANCSA, *Congress sought to end the sort of federal supervision over Indian affairs* that had previously marked federal Indian policy." The Court then focuses on the definition of the term "dependent Indian community" and holds that that form of Indian country "refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements -- first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." The Court then cites three Supreme Court cases that were decided prior to Congress' codification of the 1948 Indian country statute, as supporting the Court's interpretation that a dependent Indian community qualifies as Indian country only if the requisite set aside and superintendence are present.[1]

---

[1] In the seminal case, *United States v. Sandoval*, 231 U.S. 28 (1913), the lands at issue were held in fee title. Ever since that case, it has been commonly understood that Indian fee lands also qualified as Indian country. However, the Court minimizes this fact by stating that in *Sandoval* "[w]e indicated that the Pueblos' title was not fee simple title in the commonly understood sense of the term" because Congress had recognized the Pueblos's title by statute and "Congress had enacted legislation with respect to the lands 'in the exercise of the Government's guardianship over th[e] [Indian] tribes and their affairs. . ." This statement underscores the result oriented approach of the Court in this case because ANCSA fee lands have also been recognized by statute and have also been subject to legislative amendments and various other legislation that extends protections and treats such lands as Indian lands for jurisdictional purposes.

With respect to the requirement that land must have been "set apart for the use of the Indians as such," the Court explained in footnote that this requirement reflects the fact that "some explicit action by Congress must be taken to create or to recognize Indian country." Without explaining what action would be sufficient to constitute a set aside, the Court concluded that ANCSA lands were not set aside for Indians but for privately held state corporations. Rejecting the argument that Venetie's lands were set aside for the Gwich'in because they elected to opt out of ANCSA by taking their former reservation lands rather than participating in the other land selections and monetary benefits of the Act, the Court stated:

> The difficulty with this contention is that ANCSA transferred reservation lands to private, state-chartered Native corporations, without any restraints on alienation or significant use restrictions, and with the goal of avoiding 'any permanent racially defined institutions, rights, privileges, or obligations.'

The Court then concludes that "[b]ecause Congress contemplated that non-Natives could own the former Venetie Reservation, and because the tribe is free to use it for non-Indian purposes, we must conclude that the federal set-aside requirement is not met."

With respect to the superintendence requirement, the Court ruled that "it is the land in question, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government." In words reminiscent of Judge Holland's 1994 district court decision, the Court explained that "the federal superintendence requirement guarantees that the Indian community is sufficiently 'dependent' on the Federal Government [and] that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question." This ruling implicitly overturns prior precedent that expressly holds that superintendence is over Indians, not the lands they occupy. *See, e.g. U.S. v. John*, 437 U.S. 634, 649 (1978). It also misconstrues the doctrine of dependency which refers to the political relationship that exists between the federal government and federally recognized tribes. Having adopted a requirement that focuses on federal control over lands, the Court concludes that the requisite control and superintendence is missing with respect to ANCSA land because Congress revoked all reservations and transferred the land to state-chartered corporations which were free to use or dispose of the land, including the ability to alienate and convey to non-members. The Court stated:

> After ANCSA, federal protection of the Tribe's land is essentially limited to a statutory declaration that the land is exempt from adverse possession claims, real property taxes, and certain judgments as long as it has not been sold, leased, or developed. These protections, if they can be called that, simply do not approach the level of superintendence over the Indains' land that existed in our prior cases.

The Court concludes its opinion by acknowledging that its interpretation of the Indian country statute reflects a significantly greater degree of federal paternalism than is reflected in either ANCSA or the self-determination era. Justice Thomas said that this conflict is one that

only Congress can reconcile, not the Court. This statement is basically one that invites Congressional amendment of the Indian country statute if the Court's interpretation of it is inconsistent with that of Congress.

Despite the Court's ruling on ANCSA land, the Court in footnote 2 implicitly rejected the State's argument that no Indian country can exist in Alaska at all. To the contrary, the Court ruled that "other Indian country exists in Alaska post-ANCSA only if the land in question meets the requirement of a "dependent Indian communit[y]" under our interpretation of § 1151(b), or if it constitutes "allotments" under § 1151(c)." Given the presence of some 8,000 allotments in Alaska, and isolated parcels of trust land, substantial areas of Indian country subject to tribal jurisdiction will remain.

In sum, the Opinion is one of the worst opinions to have been rendered by the Supreme Court. It is perfunctory and thoroughly lacking in analysis. It shows that this Court lacks the intellectual capacity or will to deal with issues of Indian law or to uphold or apply time honored precedent. Notable is the fact that the Court does not refer to the canons of construction favoring Indians; it gives no mention or credence to the requirement that an extinguishment or termination of a tribal right must be made only with clear and express language of Congressional intent; it totally misconstrues the doctrine of dependency and fails to apply its own prior precedent with respect to a long line of cases that hold that superintendence refers to the federal government's political relationship with Tribal Indians, not the land they occupy; and while acknowledging that ANCSA was passed in the era of self-determination, the Court essentially interprets the statute as a termination statute.

In summary, we have suffered a tremendous judicial loss in the battle to protect tribal integrity over tribal lands, including ANCSA lands. While Alaska tribes are federally recognized tribes and continue to retain important aspects of sovereignty, without the Indian country designation tribes will be limited in their ability to regulate their land.

The battle is not lost, however. For most communities in rural Alaska, there will be very little change in day to day life. Tribal governments will continue to do what they have always done -- govern their communities. Where we will continue to encounter conflict will be in those situations, like Venetie's, where the State of Alaska specifically seeks to enjoin or stop a tribe from regulating an activity within its community.

We must begin to consider our other options, whether they be in the legislative arena, international arena, or other avenues. We here at NARF are committed to the preservation and integrity of tribal sovereignty and will continue to work with you to preserve this fundamental human right.

Appendix E: A Legal Analysis of Land Bank Protections

Alan Mintz, Sam Kalen, and Jennifer Regis-Civetta of VanNess Feldman wrote the following memorandum for the Alaska Federation of Natives regarding the protections associated with different forms of Native land ownership.

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ATTORNEYS AT LAW

Memorandum

TO: Julie Kitka
President, Alaska Federation of Natives

FROM: Alan Mintz
Sam Kalen
Jennifer Regis-Civetta

DATE: June 1, 1998

RE: Legal Analysis with Regard to Land Bank Protections

This memorandum provides responses to your requests for a legal analysis with regard to Land Bank protections, and an outline of issues both pro and con with regard to the transfer of Alaska Native Claims Settlement Act (ANCSA) lands to tribal entities. See ANCSA, 43 U.S.C. §§ 1601-1629f.

I. ALASKA LAND BANK PROTECTIONS

A. Summary

Under section 907 of the Alaska National Interest Lands Conservation Act (ANILCA), Congress provided for the establishment of an Alaska Land Bank Program. ANILCA, 43 U.S.C. § 1636.[1/] This program authorized the Secretary of the Department of the Interior and Native Corporations to enter into agreements under which undeveloped lands owned by the corporations are placed in a "Land Bank." While in the Land Bank, Native lands could not be developed, and could not be alienated, transferred, assigned, mortgaged, or pledged. In return, while in the Land Bank, Native-owned lands would be immune from:

1/ Congress established the Land Bank program "[i]n order to enhance the quantity and quality of Alaska's renewable resources and to facilitate the coordinated management and protection of Federal, State, and Native and other private lands . . . ." ANILCA § 907(a), 43 U.S.C. § 1636. The legislative history surrounding the passage of this program reflects not only a congressional intent to facilitate effective management of Federal and State land, but also to protect the involuntary passing of Native lands from Native ownership. S. Rep. No. 96-413, at 239, Nov. 14, 1979. See also H.R. Rep. No. 96-97, at 301, Apr. 18, 1979; H.R. Rep. No. 95-1045, at 192, Apr. 7, 1978.

(1) adverse possession; (2) real property taxes; and (3) judgment in any action at law or equity to recover sums owed or penalties incurred by the Native Corporation.

In the years after ANILCA was enacted, only two Land Bank agreements were executed. Administration of the program became cumbersome and costly for both the Department of the Interior and the Native Corporations. The underlying concept of protecting Native land ownership, however, was considered to be sound public policy. Therefore, in 1988, as part of the Alaska Native Claims Settlement Act Amendments (ANCSA Amendments),[2/] Congress amended ANILCA to automatically extend the land protection immunities of the Alaska Land Bank Program to land, and all interests therein, owned by Alaska Natives, Native Corporations, and State-Chartered Settlement Trusts.[3/] Section 907(d) of ANILCA, as amended by this Act, provides that all Native lands conveyed pursuant to ANCSA, "so long as such land and interests are not developed or leased or sold to third parties" shall automatically and indefinitely be entitled to the above-mentioned Land Bank protections. This section further provides that such undeveloped lands shall also be immune from judgment resulting from any claim based upon or arising under the Bankruptcy Code and other laws relating to insolvency, and from involuntary distributions or conveyances related to the involuntary dissolution of Native Corporations as, for example, might occur if State filing requirements were not met.

B. Terms and Conditions of Land Bank Protections

Section 907(d) establishes the terms and conditions governing which protections will not apply to particular tracts of land at particular times. The two requirements for receiving these federal protections are that the lands be: (1) corporate owned and (2) undeveloped. These protections will not be extended to lands that are corporate owned, but developed; or not corporate owned, but undeveloped.

The first requirement is that the lands be owned by a Native Corporation. ANILCA, 43 U.S.C. § 1636(d)(1)(A). ANCSA defines the term "Native Corporation" as meaning "any Regional Corporation, any Village Corporation, any Urban Corporation, and any Group Corporation." 43 U.S.C. § 1602(m). The term "Regional Corporation" is defined to mean "an Alaska Native Regional Corporation established under the laws of the State of Alaska in

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2/ Pub. L. No. 100-241 (Feb. 3, 1988) (codified as amended at 43 U.S.C. §§ 1631-1642).

3/ It should be noted that an early draft of H.R. 278, the bill that ultimately became the ANCSA Amendments, would have extended the Land Bank protections to Native individuals, Native groups, Village or Regional Corporations, or a corporation established pursuant to section 14(h)(3), as well as to lands transferred to qualified transferee entities (such as Native entities organized pursuant to the Act of June 18, 1934, as amended, and traditional Native Village councils that met certain requirements). H.R. Rep. No. 100-31, at 15, 16, 36, 38, Mar. 27, 1987. However, the final ANCSA Amendments as enacted did not extend the Land Bank protections to lands held by a qualified transferee entity.

accordance with the provisions of this Act." Id. § 1602(g). The term "Village Corporation" is defined to mean "an Alaska Native Village Corporation organized under the laws of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of a Native village in accordance with the terms of this Act." Id. § 1602(j). The term "Urban Corporation" is defined to mean "an Alaska Native Urban Corporation organized under the laws of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of members of an urban community of Natives in accordance with the terms of this Act." Id. § 1602(o). Finally, the term "Group Corporation" is defined to mean "an Alaska Native Group Corporation organized under the laws of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of members of a Native group in accordance with the terms of this Act." Id. § 1602(n). Thus, for Land Bank protections to apply, the lands at issue must be owned by one of these four types of corporate entities.

The second requirement is that the lands not be developed, leased, or sold to a third party. ANILCA, 43 U.S.C. § 1636(d)(1)(A). Section 907(d)(2)(A)(i) defines the term "developed" to mean "a purposeful modification of land, or an interest in land, from its original state that effectuates a condition of gainful and productive present use without further substantial modification." Certain activities are permitted under this definition that will not cause the Native Corporation to lose these valuable protections. For example, the definition would permit land to be surveyed, and roads, electricity lines, and sewers to be built, as long as these developments do not result in the condition described above. Also excluded from the definition of "developed" is land or interest in land which is developed for purposes of exploration. "Exploration," in turn, is defined in section 907(d)(2)(A)(ii) to mean "the examination and investigation of undeveloped land to determine the existence of subsurface nonrenewable resources."

The statute enumerates certain other situations in which land will be considered "undeveloped" or "developed." First, lands will not be considered to be developed as a result of improvements made to the land to further the subsistence or other Native customary or traditional uses of such land. ANILCA, 43 U.S.C. § 1636(d)(2)(B)(i)(I).[4/] Nor will a tract of land be considered developed if the land owner charges or receives fees for allowing hunting or fishing or related guide services on such lands. Id. § 1636(d)(2)(B)(i)(II). Second, lands upon which timber resources are being harvested will be considered to be developed only during the periods of time when such timber resources are being harvested, and only to the extent that such land is integrally related to the timber harvesting operation. Id. §

[4/] As noted in the Guide published by the Alaska Federation of Natives (AFN Guide) several years ago, this section ensures that hunting and fishing activities on Native Corporation lands will not cause the land to be considered "developed." Therefore, this Act permits fish camps, trapping cabins, and other structures to be built and used on the Native Corporation's lands, as long as they are needed for subsistence hunting, fishing, and gathering.

1636(d)(2)(B)(ii). Also, land automatically will be considered developed if it is subdivided, even if no changes are made to the land. Id. § 1636(d)(2)(B)(iii).

The Land Bank protections do not apply to a tract of land, or to interests therein, during any periods of time that the tract is leased to third parties (unless the lease is for the purpose of exploration, or exploration and development, of subsurface, nonrenewable resources, in which case the immunities shall continue to apply until such time as, with respect to a particular tract subject to the lease, the tract has been otherwise "developed"). The protections do not apply to a tract of land during periods of time that the tract is expressly pledged as security for any loan or is expressly committed to any commercial transaction in a valid agreement. Nor do the protections apply to lands owned by a Native Corporation when less than a majority of either the total equity, or the total voting power for the purpose of electing directors, of the Native Corporation is held by Natives and descendants of Natives. Additionally, despite the fact that lands protected by this section may not be taken or sold to satisfy judgments obtained in actions at law or in equity, this protection does not apply to judgments (or arbitration awards) arising out of any claim made pursuant to section 7(i) or 14(c) of ANCSA.

Section 907(d)(3) provides that, except as provided in section 14(c) of ANCSA, no trustee, receiver, or custodian vested under applicable law with a right, title, or interest of a Native Corporation or individual may assign or lease undeveloped ANCSA lands to a third party, or commence development or use of the land for other than exploration purposes, or convey title to land, except pursuant to an arbitration award or judgment regarding revenues under sections 7(i) and 14(c) of ANCSA. In order to avoid interference with normal business relations, the limitations placed upon trustees in this section do not apply to any land, or interest in land, which has been expressly pledged as security for any loan or expressly committed. Id. § 1636(d)(3)(B)(ii).

This law also permits Land Bank protections to be regained, if lost at any point. Section 907(d)(4)(C) provides that if the Land Bank protections are terminated with respect to land, or interest in land, as a result of development or lease to a third party, and such land, or interest therein subsequently reverts to an undeveloped state or the third-party lease is terminated, then the protections shall again apply to such land or interest in land. Therefore, if it is determined that Native Corporation lands have been developed, mortgaged, or leased, the protections automatically resume once the development ends, or the mortgage or lease expires. The example provided in the AFN Guide states that if a Village Corporation leases some of its land for five years, during the years it is leased, the land can be taxed or sold to pay the corporation's debts. However, when the five years are over and the lease expires, the land is again automatically protected from taxation, creditors, etc.

II. TRANSFER OF NATIVE CORPORATION LAND TO NATIVE VILLAGES

The transfer of Native Corporation land to Tribal governments risks losing many of the former Land Bank protections, which only apply if the lands are in "corporate" ownership, unless the status of the land as being owned by a Tribal government provides similar protections guaranteed to ANCSA corporations maintaining the land in an "undeveloped" state. Those Land Bank protections that might be lost are that the land would be immune from: (1) adverse possession and similar claims based upon estoppel; (2) real property taxes by any governmental entity; (3) judgments resulting from a claim based upon or arising out of title 11 of the U.S. Code or any successor statute (the Bankruptcy Code), other insolvency or moratorium laws, or other laws generally affecting creditors' rights; and (4) judgment in any action at law or equity to recover sums owed or penalties incurred by the Native Corporation. ANILCA, 43 U.S.C. § 1636(d)(1)(A).

Until recently, an argument existed that lands owned by Native Villages could be considered "Indian County."[5/] Such lands, in turn, could support the exercise of territorial tribal sovereignty, possibly protected against adverse actions by sovereign immunity, or subject to a Native Village's authority to tax and regulate. If this were true, for example, tribally owned land might be insulated from creditors regardless of whether the land is "undeveloped" or "developed." This result would parallel many of the Land Bank protections. But, in *Alaska v. Native Village of Venetie Tribal Government*, 118 S. Ct. 948 (1998), decided on February 25, 1998, the United States Supreme Court held that former reservation lands transferred in fee to the tribal government of an Alaska Indian Tribe under ANCSA do not constitute "Indian County" under the statutory definition of that term in 18 U.S.C. § 1151.[6/] This decision, therefore, may call into question some of the perceived benefits of transferring land to a Native Village.

[5/] During the early 1980s, the concept of using Indian Reorganization Act (IRA) organizations to protect Native lands was explored. At that time, the benefits of transferring Village Corporation land to an IRA organization was uncertain. For the most part, the argument for protecting lands in an IRA organization depended upon the untested application of Federal Indian law. E.g., 25 U.S.C. § 177 (restrictions against alienation); 25 U.S.C. § 476(e) (right of Tribe "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe"). It also depended upon the application of sovereign immunity to IRA organizations. Cf. Native Village of Tyonek v. Puckett, 957 F.2d 631 (9th Cir. 1992).

[6/] In somewhat imprecise language that fails to distinguish between Native Village ownership and Village Corporation ownership, the Court commented that "[a]fter ANCSA, federal protection of the Tribe's land is essentially limited to a statutory declaration that the land is exempt from adverse possession claims, real property taxes, and certain judgments as long as it has not been sold, leased or developed." 118 S. Ct. at 956. This comment occurred in the context of the Court's rejection of the argument concerning federal superintendence over the Tribe's lands. Id.

Although the statutory Land Bank protections afforded ANCSA corporations may be lost upon the transfer of lands to non-qualifying entities,[7/] and there remains a great deal of uncertainty surrounding what, if any, protections might exist if lands are owned by a Tribal government, the transfer of ANCSA corporation land to Tribal governments may be attractive for at least two reasons. To begin with, there may be less concern that Native lands will become subject to the control of non-Native members, if those lands are under the auspices of Tribal management rather than Native Corporation control. Unlike Native Corporations, whose membership can be expanded to non-Natives upon the alienation of stock, Tribal governments are not likely to become dominated or controlled by non-Native members. Indeed, the loss of Native control over Village Corporation lands was one of the principal concerns animating the passage of the 1991 Amendments.[8/]

Next, Tribal governments may believe that controlling the management and use of land allows for a greater degree of autonomy and protection. Tribal ownership might allow a Tribe to decide who may go on the land, as well as to impose conditions on the use of that land, in ways that a Corporation may be unable or unwilling to impose. And a Tribe can make

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[7/] ANCSA also provides a caveat on mineral development that might be affected by any transfer. Section 14(f) of ANCSA provides that:

> When the Secretary issues a patent to a Village Corporation for the surface estate in lands pursuant to subsections (a) and (b), he shall issue to the Regional Corporation for the region in which the lands are located a patent to the subsurface estate in such lands, except lands located in the National Wildlife Refuge System and lands withdrawn or reserved for national defense purposes, including Naval Petroleum Reserve Numbered 4, for which in lieu rights are provided for in subsection 12(a)(1) [43 U.S.C. § 1611(a)(1)]: *Provided, That the right to explore, develop, or remove minerals from the subsurface estate in the lands within the boundaries of any Native village shall be subject to the consent of the Village Corporation.* (Emphasis added).

43 U.S.C. § 1613. This consent requirement applies to the Village Corporations and not to Tribal governments; consequently, it is not entirely clear how this requirement would work if the surface estate were transferred from the Village Corporation to a Tribal government.

[8/] The House Committee Report accompanying H.R. 278 notes that the "Natives are alarmed about the impending arrival of December 18, 1991, the date upon which the statutorily-imposed restrictions on the alienation of stock in the Regional and Village Corporations will expire. It is possible that, after the passage of that date, stock in the Native Corporations will go out of Native ownership and they will lose control of the corporations and, with it, their lands. The possibility of loss of land ownership by Alaska Natives is of paramount concern to the Committee." H.R. Rep. No. 100-31, Mar. 27, 1987. It should be noted that the concern over the alienation of Native Corporation stock was mitigated by Congress' decision to keep the restriction in place absent an affirmative vote by the Native Corporation to do otherwise.

a decision about the use of its land unconstrained by any corporate fiduciary obligation that might exist.

Appendix F: About the Authors

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