
THE DUAL POLITICAL STATUS OF ALASKA NATIVES UNDER U.S. POLICY

by

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INTRODUCTION

Alaska Natives hold a complex, dual political status, as both U.S. citizens and aboriginal Americans. Just what that dual status entails is uncertain and controversial. But it is clearly a tool Alaska Natives can use to help change policy and increase self-determination.

This paper examines the political status of Alaska Natives. One objective of the paper is to show why Alaska Natives can claim both special status under federal Indian law and policy as well as equal status with all other citizens under federal and state law. Another objective is to explain why Natives' special status is so intensely disputed, particularly by Alaska state government and some of the non-Native interests it represents. A third objective is to explore the consequences of dual status for current policies and programs affecting Alaska Natives: tribal status and powers, village and regional governance, village services, and subsistence. The concluding section of the paper describes issues related to those policies and programs, and raises specific questions that could help guide policymakers.

Courts, legislators, and executives disagree about the rights, status, and powers of Alaska Natives. The Alaska Supreme Court has said that, except for the Metlakatla Indian Community, there are no Native tribes in Alaska possessing inherent powers of self-government or tribal sovereignty (*Native Village of Stevens v. Alaska Management and Planning* 1988). The U.S. Ninth Circuit Court of Appeals, on the other hand, says that most of Alaska's Native villages may be tribes with inherent governmental powers (*Native Village of Noatak v. Hoffman* 1990; *Native Village of Tyonek v. Puckett* 1992).

The U.S. Congress, in the Alaska National Interest Lands Conservation Act of 1980, said that Natives and other rural residents of Alaska should have a "subsistence preference" for harvesting fish and wildlife when these resources are in short supply. The Alaska Legislature, in 1990, disagreed. After the Alaska Supreme Court decided that a preference based on rural residence was unconstitutional, the legislature refused to place a rural preference amendment to the state constitution on the election ballot.

In 1990, Governor Steve Cowper issued an administrative order directing that Alaska's villages should be treated as tribes with certain sovereign governmental powers, limited mainly to control of their internal affairs (State of Alaska 1990). Contradicting the Alaska Supreme Court, he included powers that the court had explicitly denied existed. Then, in 1991, Cowper's successor, Governor Walter Hickel, revoked Cowper's administrative order with an order of his own, declaring that "Alaska is one country, one people. The State of Alaska opposes expansion of tribal governmental powers and the creation of 'Indian Country' in Alaska" (State of Alaska 1991).

Which of these conflicting positions authoritatively describes the current political status of Alaska's approximately 200 Native villages? Paradoxically, they all do. In questions of Indian policy in the United States, history and politics have conspired with the legal system to defy consistent, straightforward answers. Moreover, Alaska Natives represent an unusually complicated case in the larger context of American Indian policy.

The complexities of Indian policy arise not just from the convolutions of the American political and legal systems or the creative imaginations of lawyers. It is primarily the body of American Indian law itself, as it has evolved during two centuries, that provides the basis for contradictory opinions about the political status of Alaska Natives and Native Americans generally. Indian law is not unique in this regard; American law abounds in contradictions. Yet, Indian law represents an extremely volatile case. This is so because contemporary Indian law is the product of many abrupt and dramatic changes in the relationship between America's aboriginal peoples and the Euro-Americans who took the continent away from them.

EVOLUTION OF U.S. INDIAN POLICY

Native Americans were originally independent, self-sufficient tribal peoples. European colonial and then U.S. government authorities recognized many tribes as politically independent nations. Based on their different territorial interests and relationships with the major combatants, Indian tribes took different sides in the wars between the colonial powers and in the war for American independence. Tribes were also strong defenders of their territories, especially during the early years of European settlement (Jennings 1975; Josephy 1976). In part because tribes for a time had the physical power to resist invading settlers (in the west, well into the nineteenth century), colonial and U.S. authorities dealt with them “government-to-government.” Another rationale for attributing sovereign governmental status to the Indian tribes was provided in early American legal doctrine.

At the foundation of American Indian law lies the “Marshall trilogy” (Wilkinson 1987:24; Smith and Kancewick 1990:474-476; Berger 1985:121-124). Chief Justice John Marshall wrote three decisions for the U.S. Supreme Court in the 1820s and 1830s that established the principles of aboriginal land title, the federal trust responsibility, and inherent governmental powers of Indian tribes. These decisions continue to shape American Indian law and policy today (Case 1984:3-6).

The first decision was *Johnson v. M'Intosh* in 1823. In this case, Marshall held that although tribes might sell or otherwise transfer Indian lands to non-Indians, the courts would recognize only those transfers made to the federal government. In the absence of such recognized conveyances, the occupying tribes retained “aboriginal title” to their lands. This was a title subject to disposition only by the federal government.

Marshall based his argument for aboriginal title on the “rule of discovery,” an international legal principle derived from the historical practices of European “discovering nations.” In order to control competition among themselves, those nations agreed to recognize each others’ “first discovery” claims on various parts of the western hemisphere. Although the Indian tribes of course were not parties to the Europeans’ agreements, the legal theory was that the tribes held rights of first possession, and that these rights could be transferred, changed, or extinguished only by the affected discovering nation. This remains the basic limitation distinguishing “aboriginal” title from conventional forms of land ownership today.

The second decision of the Marshall court was *Cherokee Nation v. Georgia* in 1831. This case arose because the State of Georgia asserted jurisdiction over the Cherokees and seized lands reserved to the tribe by treaties with the United States. Marshall’s decision focused on the nature of the relationship of Indians to the U.S. government. He wrote that although Indian tribes could not properly be considered “foreign nations,” they should be deemed “domestic dependent nations...Their relation to the United States resembles that of a ward to his guardian...They look to our government for protection; rely upon its kindness and power; appeal to it for relief to their wants; and address the president as their great father.” Again drawing on international law and practice, Marshall laid down the principle of the trust relationship—the legal and moral responsibility of the federal government to protect the vital interests of “dependent sovereign” tribes.

Chief Justice Marshall made his third and most comprehensive statement about the political status of Indian tribes in the case of *Worcester v. Georgia* in 1832. This decision recognized inherent powers of Indian self-government. Samuel Worcester was a politically active missionary on the side of the Cherokees in their struggle with the State of Georgia over control of their lands. Desiring to put a stop to Worcester’s activities, state officials arrested him, found him guilty of residing on Cherokee land without a permit or an oath of loyalty to the state, and sentenced him to four years at hard labor. The Marshall court ruled that Georgia’s law was “repugnant to the constitution, treaties, and laws of the United States” because it interfered with the federal government’s exclusive relationship with the

federal government's exclusive relationship with the Cherokee tribe, a relationship guaranteed by the supremacy and commerce clauses of the U.S. constitution.

Marshall's *Worcester* opinion reviewed the discovery rule and aboriginal title, the history of contact with the Indian tribes, and the trust relationship between the tribes and the U.S. government. He noted that the U.S. constitution gave Congress exclusive power to make treaties and to regulate commerce with the Indian tribes, and that constitutional treaties and acts were the supreme law of the land. Having established the principle of federal supremacy in Indian affairs, he went on to the question of tribal sovereignty:

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power....The very fact of repeated treaties with [the Indians recognized their entitlement to self-government]; and the settled doctrine of the law of nations is that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection.

The tribes, in other words, retained “dependent” sovereignty—their original powers as separate nations—except as these powers were limited by the tribes' association with the United States. “Sovereignty,” therefore, is not an absolute. It is rather a dynamic and relative condition of self-government, and it is subject to redefinition and adjustment as relationships between tribes and the U.S. government change (Case 1984:435).

The Marshall Court laid down the principles of aboriginal title, federal trust, and inherent powers, but the real political status of the Indian tribes would be more directly determined by the overwhelming force of superior power. Upon hearing of the *Worcester* decision, President Andrew Jackson, who had risen in national politics partly on his reputation as an Indian fighter, reportedly said “John Marshall has made his judgment, now let him enforce it.” Whether Jackson actually said this or not, the statement accurately shows where he stood on the issues of Indian sovereignty and

the federal trust responsibility (Prucha 1985:14-16). The State of Georgia in fact rejected Marshall's decision in the *Worcester* case, and the Reverend Worcester served out his sentence.

Marshall's decisions established the basic rules, but political action and the use of force determined the outcomes. In nineteenth century America, the combined ideologies of capitalism, Christianity, racial and cultural superiority, and Manifest Destiny provided justifications for the guile and the force used to suppress and often destroy the Indian tribes.

After the Civil War, the last of the western tribes were conquered, subdued, and forced onto ever smaller reservations. Now all of the tribes were under federal control. Because of the defenseless condition to which most of them had been reduced, they were under federal protection as well. Although still termed “government-to-government,” the relationships between federal authorities and tribes had degenerated to that of a superior power attending to defeated and demoralized subjects. Federal troops put down the last of the organized Indian resistance by the end of the century.

Around this time, many tribes lost most of what was left of their reservation lands under the notorious allotment policy authorized by the Dawes Act of 1887. This act was finally to solve the “Indian problem” by breaking up the reservations and distributing tribal lands to individual Indians who, as private land owners, would eventually enter the mainstream society and economy (Dippie 1982:161- 176). Between 1887 and 1934, when the Indian Reorganization Act ended the discredited allotment program, Indian landholdings fell from 138 million to 48 million acres, a loss of 90 million acres or two-thirds of all Indian lands.

By the end of the nineteenth century, assimilation policy had generally replaced physical force as the principal means of controlling the tribes. Bureau of Indian Affairs boarding schools were the main assimilative institutions and BIA superintendents the reigning powers on the reservations. “Industrial education” was to provide young Indians with skills needed to enter the bottom ranks of rapidly industrializing society, and

Native languages and religions were to be eradicated. Like the waves of European immigrants flowing into the country at about the same time, Indians were to be “Americanized.” It was not until the Indian Citizenship Act of 1924, however, that Indians (including Alaska Natives) who had not previously been made citizens under specific treaties and statutes were granted United States citizenship.

Franklin Roosevelt’s New Deal in the 1930s included a new deal for Indians. Social and economic conditions on the reservations, which had continued to deteriorate, were documented by the Brookings Institution in the Meriam Report of 1928. John Collier, the new head of the Bureau of Indian Affairs, was determined to change all this, and he had the President’s support (Dippie 1982:297-321).

At the urging of the Roosevelt Administration, Congress passed the Indian Reorganization Act of 1934 (which was fully extended to Alaska in 1936). The act ended the break-up of reservations and allotment of lands, which Collier had previously suspended by administrative order. It also provided new protections for trust lands, encouraged tribes to adopt constitutions for self-government, and authorized federally-chartered corporations and funds to support tribal economic development.

A number of tribes, understandably distrustful of federal authorities, rejected the IRA as a continuation of BIA paternalism and assimilation in a new form, but more of them accepted the new program (Dippie 1982: 318-319). Overall, the IRA probably did more to reinforce the idea of Indian self-government through formal recognition of tribal powers than it did to improve social and economic conditions on the reservations (Gross 1989:20; Wilkinson 1987:68).

Another reversal of federal Indian policy occurred after World War II. Arguing that Indians should be “freed” of all federal supports and controls, in 1953 Congressional opponents of the reservation system, the trust relationship, and special status for Indians won passage of House Concurrent Resolution 108 (Gross 1989: 21-23). The resolution called for an end to the trust relationship and the “termination” of tribes.

Under the new termination policy, tribal lands once again were to be broken up and transferred to private groups and individuals. All special federal programs for tribes and individual Indians were to be eliminated. State government powers were to be imposed on all Indians and their reservations. Also in 1953, Public Law 280 extended state criminal and civil jurisdiction over “Indian country”—generally, Indian reservations—in specified states. (In 1958 this law was extended to Alaska.)

P.L. 280, not federal termination of tribes, may be the most important legacy of the termination policy of the 1950s. Congress passed legislation terminating more than 100 tribes or tribal groups, but many of them have since been restored to tribal status and the trust relationship (Gross 1989:22-23). The termination policy itself was terminated. Congress abandoned HCR 180 (though the resolution was never officially rescinded), and yet another new federal policy, “self-determination,” emerged in the late 1960s and the 1970s.

The self-determination era of federal Indian policy has emphasized powers of tribal self-government in a number of Congressional acts, presidential pronouncements, and judicial decisions (Gross 1989). In 1968, Congress passed the Indian Civil Rights Act, requiring tribal governments to observe the principles of the Bill of Rights, and amending P.L. 280, prohibiting further extensions of state jurisdiction in “Indian country” without tribal consent.

The legislative centerpiece of the new policy was the Indian Self-Determination and Education Assistance Act of 1975, Congress’s clearest rejection of termination policy. This act (referred to as “638” because it was enacted as Public Law 93-638) reaffirms the trust relationship and special federal programs for Indians. These programs generally were expanded during the 1970s. Most important, the Self-Determination Act also encourages tribes to take over the planning and administration of Indian programs under contracts with federal agencies.

In 1978, Congress passed the Indian Child Welfare Act, which strengthens tribal control over adoption and guardianship of Indian children. Other legislation in the 1970s, when Indian self-determination policy reached its high point, included measures to support Indian economic development, health care, and educational programs.

All of this legislation explicitly included Alaska Native villages as “tribes”—for the specific purposes of these legislative acts. This qualification is important because it implies that Congress, which is the ultimate authority in Indian affairs, has not spoken unequivocally or unconditionally about the tribal status and powers of Alaska Natives (State of Alaska 1986:57ff.).

More generally, this is also a reminder that federal Indian policy—a cumulative product of changing times and different legislative, executive, and judicial arenas—has never pointed clearly in any one direction, whether toward separatism, assimilation, or self-determination.

Congress was the main arena of Indian policymaking in the 1970s. In the 1980s, the federal judiciary became relatively more important as Congressional activism receded. As a “political” institution, Congress can define broad problems and goals, such as “Indian self-determination,” and adopt general courses of action. Courts, on the other hand, typically focus on specific problems laid before them, and, although there are many exceptions to the rule, they generally like to avoid venturing too far from established law and precedent in their decisions.

In a policy area like Indian law, where many different and inconsistent statutes have been enacted over the years, court decisions, too, will give conflicting answers to questions about tribal status and powers. These include questions about changes in aboriginal land title, the extent of Indian hunting and fishing rights, the relative jurisdictions of tribal and state courts, and limits of tribal and state tax powers, among many others. Thus, when the initiative in Indian policy passed from Congress to the courts in the 1980s, policymaking tended to become relatively more disjointed and piecemeal, and the inconsistencies and conflicts in Indian law were highlighted once again.

University of Colorado law professor Charles Wilkinson describes this evolution of federal Indian policy in the following way:

Inevitably, Indian policy has been cyclic. This is due in part to the sheer length of time during which it has been made. Even more fundamentally, federal Indian policy has always been the product of the tension between two conflicting forces—separatism and assimilation—and Congress has never made a final choice as to which of the two it will pursue. Thus the laws are not only numerous; they are also conflicting, born of the explicit regimen and implicit tone of the eras in which they were enacted (Wilkinson 1987:13).

The current policy of self-determination says that tribes are to some extent sovereign as well as dependent. It says that all Native Americans, including Alaska Natives, are equal citizens under the law and, at the same time, it says that they are a distinct group of Americans with special political status under a unique set of laws. The law says that Native Americans can have collective, aboriginal title to tribal land and special rights to hunt and fish but, like other Americans, they can also have individual and corporate ownership of private land and resources. The law further says that, like Americans generally, Native Americans have access to federal programs, but that they also have additional, exclusive rights to programs enacted especially for Indians.

Self-determination policy gives Native Americans choices about all these matters and, in doing so, the policy often sounds unsure and ambivalent. Further, despite the broad range of choices legally provided, Native American tribal communities have derived limited benefits from these choices.

The contemporary record of Indian policy is one of ambiguity and contradiction. Yet, this record also indicates that federal courts have preserved the special political status of Indian tribes, or what Wilkinson refers to as a “measured separatism.” He attributes this record ultimately to the commitment judges have to the rule of law and their belief that “real promises” were made in old treaties that the U.S. Senate approved and made into “real laws” (Wilkinson 1987: 121).

It is a remarkable fact of American political and legal history that, despite Andrew Jackson and all the opposition and contradiction, John Marshall's Indian law principles have survived. Originally derived from the legal doctrines and moral philosophy of the late eighteenth and early nineteenth centuries, the principles of aboriginal title, the trust relationship, and inherent governmental powers continue to be reinterpreted and applied by the Congress, courts, and executive today. The preservation of these principles can be attributed not only to the moral and legal sensibilities of judges, but to the American tradition of minority rights.

Although denied or substantially qualified at different times in different policymaking arenas, Marshall's principles continue to distinguish the special status of Native Americans from the formally equal status they share with all other Americans. There is no question, however, that these two statuses are in tension with one another, and that they continue to be a matter of sharp legal and political conflict. Nowhere is this more apparent than in Alaska.

FEDERAL INDIAN POLICY IN ALASKA

The case of the Alaska Natives is both similar to and different from that of Native Americans elsewhere. It is similar in that Alaska Natives, as the original inhabitants of the region, could claim aboriginal rights, a trust relationship, and inherent governmental powers (Case 1984; Price 1982; Smith and Kancewick 1990; Berger 1985). It is different primarily in that, until recent times in most of Alaska, there was little or no pressure on Natives to surrender their lands, including their traditional hunting and fishing grounds. (A major exception was the Russian occupation of southern coastal and Aleutian regions before the American purchase.) Thus, Alaska Natives, unlike most other Native American tribes, were not conquered by Euro-Americans, did not sign one-sided treaties, and were not forced onto reservations.

Alaska Natives' "dependent sovereignty," or inherent governmental power, was not documented in treaties or institutionalized on reservations (although many special purpose reservations were created in Alaska; see

discussion below). Ironically, the absence in Alaska of these traditional instruments of Indian subordination and control has tended to undermine rather than reinforce the tribal status and powers of Alaska Natives.

This issue has two interrelated but analytically distinct parts: tribal status and tribal powers. As a practical matter, there may be less at stake in the question of whether Alaska Native communities are formally recognized as "tribes" than in the question of what tribal powers they may have. Although the record is contradictory (see, for example, the majority and minority opinions of the Alaska Supreme Court in the *Stevens Village* case), Congress has referred to Alaska Natives as "tribes" in Indian legislation beginning in the early years after the Alaska Purchase. Alaska Natives' status as tribes, though often qualified, has many times been affirmed in executive and judicial actions (Case 1984; Smith and Kancewick 1990).

The more significant issue is what specific tribal powers Alaska Native communities possess. The actual extent of their powers depends on such questions as their individual histories and capabilities; the significance of the power to their tribal existence and well-being; the state's interest in the matter; and what federal laws may or may not say about the power in question (State of Alaska 1986:145-147; Case 1984:472-473). Such tribal powers are likely to be determined on a case-by-case basis. It is as if the exercise of powers establishes tribal status, rather than the other way around.

If Alaska Native tribal communities were within reservation "Indian country," their governmental powers would presumably be greatest (Cohen 1982:472-473). Despite the absence of reservations in Alaska, Native communities may still claim independent governmental powers: federal courts have held that Native allotments and "dependent Indian communities" may also be Indian country (Case 1984:457-458). The problem lies in determining the extent and applicability of these more elusive (dependent Indian communities) or limited (allotments) forms of Indian country in Alaska and elsewhere (State of Alaska 1986:121ff.).

Given the ambiguities and contradictions in the record and the peculiarities of the case of the Alaska Natives, the questions of tribal status, sovereign powers, and Indian country are more in dispute in Alaska than

elsewhere. With one exception, the Alaska Native Claims Settlement Act of 1971 abolished all the reservations and reserves previously existing in Alaska. To date only the Metlakatla Indian community's tribal status and powers have been recognized by state as well as federal courts as being the same as those of tribes on reservations in the Lower 48 states.

Yet, even in the case of Lower 48 reservations and treaties, disputes continue over the nature and extent of tribal powers—for example, access to fish and game, water rights, law enforcement, taxation, and gaming operations. Relationships between tribal and state powers are continually being disputed, redefined, and adjusted, whether covered by treaty provisions or not.

In Alaska, the political conflict extends beyond definitions of specific powers to the fundamental issue of whether Native communities have any special powers or rights at all. This more basic issue underlies the current conflict over Alaska Native subsistence. Thus, many Alaskans see the subsistence issue as a fundamental ideological conflict between equality and special privilege, and they assert that, whatever the law may say, Natives' rights to fish and game are no different from those of anyone else. It is the clash of absolutist positions that makes the issue so difficult to define and resolve politically.

The question of the status and powers of Alaska Natives ultimately needs to be reviewed in historical perspective. One of the more salient facts in modern Alaska Native history is that Natives came under U.S. rule during the post-Civil War assimilation era of federal Indian policy, when American Indian tribes had been reduced to a condition of almost complete dependency. As viewed by federal authorities and no doubt by popular opinion, Indians had to be trained, educated, and morally uplifted—"civilized"—so that they might eventually be absorbed into mainstream society (Prucha 1985:28-54). This attitude carried over into the federal government's relationships with its new Native wards in Alaska.

The first agents of the U.S. government in Alaska were not teachers and missionaries, however, but military officers (Price 1990:23-42).

After the Civil War, their mission was to control and pacify Indians on what was left of the American frontier. On the far edges of that frontier, in Alaska, the military could try to assure relative peace and order, but they were equipped to do little else to "civilize" the Natives. Whatever their attitudes toward Natives (and some were quite hostile), the military's responsibility was to enforce federal customs and Indian liquor laws, preserve order, and protect non-Native traders and settlers (State of Alaska 1986:74ff.).

From the Alaska Purchase until the early 1900s, many statutes, court decisions, and administrative rulings stated directly or indirectly that Alaska Natives were subject to the same federal and territorial laws that applied to non-Natives (State of Alaska 1986: 71ff.). At the same time, Congress, courts, and administrators also recognized the unique interests and needs of Natives and made many special provisions for them. These special provisions culminated in 1936 amendments to the Indian Reorganization Act which, according to Case (1984:10), "were apparently intended to place Alaska Native land ownership and governmental authority on the same footing as that of other Native American reservations."

Alaska Natives had experienced devastating problems by the end of the nineteenth century: cultural disruption that came with western occupation, trade, religion, and schools; degradation and collapse of subsistence economies following importation of new technologies and commercial harvests; and spread of demoralization, hunger, disease, and death. Sheldon Jackson introduced reindeer herding to Alaska in the 1890s in part as a means of warding off starvation among Natives (Case 1984:208-210; Jenness 1962: 35-37). By then, large numbers of Natives had died from new diseases, primarily smallpox and influenza, brought by outsiders.

At the time of contact with the Russians in the 1740s, the estimated population of Alaska's aboriginal peoples was 75,000. By the end of the nineteenth century, their numbers had been reduced to about 25,000 (Rogers 1962:61). The largest declines occurred among the Aleuts and Eskimos of the coastal regions. Only in recent years has the size of the Native population, returned to the level where it was two and a half centuries ago.

Sheldon Jackson also established missionary schools, which later came under the control of the U.S. Commissioner of Education. At the end of the century, the commissioner described his agency's mission in Alaska, vowing to avoid mistakes made on Indian reservations elsewhere: The agency would "provide such education as to prepare the natives to take up the industries and modes of life established in the States by our white population, and by all means not to try to continue the tribal life after the manner of the Indians in the western states and territories" (Chance 1987:92-93).

In 1905, however, the Nelson Act established separate systems of public schools, one for "white children and children of mixed blood who lead a civilized life," and the other for "uncivilized Alaska Natives." The Native schools were patterned after the Indian reservation and boarding schools established in other territories and states.

Other special "Indian" measures were extended to Alaska Natives during a period in which the overall objective of federal policy was assimilation. Both the 1884 and 1912 Alaska Organic Acts contained provisions protecting Native land rights (though legal dispute continues even today about whether these were intended to protect "aboriginal title"). As early as 1870, Congress exempted Natives from a general prohibition on harvesting fur seals. Several other exemptions from fish and game laws and international treaties followed, including Native hunting provisions in the Migratory Bird Treaty Act of 1916. Earlier, in 1902, Congress had exempted Native subsistence hunting from regulation under the Alaska Game Act (Smith and Kancewick 1990:506; State of Alaska 1986:15).

Native land reserves were another area in which Congress and the executive made special provisions for Alaska Natives (Case 1984: 83-111). Congress made reindeer herding an exclusively Native activity with the Alaska Reindeer Act of 1937. Through such special measures, Congress and the executive were treating Alaska Natives in much the same way they dealt with Indian tribes elsewhere.

Officially, federal assimilation and allotment policies ended with the coming of Indian reorganization in the 1930s. In Alaska, allotments allowed individual Natives to own land, but they were not based on the breaking up of reservations as they were in the Lower 48 states. (Alaska Natives were eligible to apply for allotments until ANCSA was passed in 1971.) Many Native villages—about 70 as of recent years—adopted IRA constitutions. Indicating separate status and possible assertions of Indian country, these constitutions were opposed by Alaska's political leaders (as they generally still are today). Some of the most intense controversies of the pre-statehood years centered on the creation of IRA reservations, which could potentially provide the territorial bases for Indian country and assertions of Native sovereignty (State of Alaska 1986:118-119; Naske and Slotnick 1987:191).

Before the IRA, over 150 special Native reserves had been created in Alaska by executive order. (Metlakatla was established under unique circumstances by an act of Congress in 1891 [Price 1990: 78-83]). The main purposes of these special reserves were to support reindeer herding, schools, and vocational education. Some of the reserves encompassed extensive areas for subsistence activities. Only six reserves were established under the IRA in Alaska, and they helped to secure Native hunting and fishing rights in such villages as Venetie, Hydaburg, and Karluk (Case 1984:10-12, 99-107).

IRA reserves provoked fierce battles between territorial leaders and the Secretary of the Interior over control of Alaska lands and resources. Ernest Gruening, who was governor of the territory from 1939 to 1953, viewed reservations as barriers to the future development of Alaska and the progress of its people. Writing for the statehood cause in the early 1950s, Gruening vehemently opposed Secretary of the Interior Harold Ickes's "arbitrary and disingenuous efforts to impose his reactionary concepts [i.e., IRA and other reservations] on the people of Alaska." Gruening believed that the "people of Alaska" eventually would prevail:

While it was probable that the considerable damage that [Ickes] had inflicted on orderly democratic progress and to a growingly harmonious interracial relationship in Alaska would, for a time, persist, it was clear that, in fairness to all the people of Alaska, the flames into which an issue unresolved for seventy years had been needlessly fanned should be promptly extinguished. The issue needed to be resolved particularly in justice to the native people who had been led to believe that they had valid claims to extensive land or to compensation for it...Congress could, if it would, provide to have that basic issue determined promptly, fairly—and finally (Gruening 1954:381).

Alaska leaders' opposition, which was reinforced by federal termination policy, blocked all but a few IRA reservations (State of Alaska 1986:118-121). Also under the termination policy, Congress extended P.L. 280 to Alaska, giving the state broad powers over criminal matters, and more limited powers in civil matters, in Native communities that might qualify as Indian country.

In 1957, a federal court had determined that the village of Tyonek, an executive-order reserve created in 1915 for education, subsistence, and related purposes, was Indian country. As such, the court declared that the tribal government, not the Territory of Alaska, had jurisdiction to try a criminal case in the village (Case 1984:14). Congress responded by making Alaska a P.L. 280 state in 1958, which brought Tyonek and all Native villages under state criminal jurisdiction (State of Alaska 1986:139-141).

Later, however, in 1971, Congress granted concurrent criminal jurisdiction to Metlakatla's tribal government at the request of both the state and the tribal government. The state found it impractical and too costly, because of the difficulties of travel and communication, to meet the village's law enforcement needs (Case 1984:456).

The ambivalent historical record of American Indian policy had already been extended to Alaska by the end of the territorial period. Thus, in his dispute with Secretary Ickes, Ernest Gruening was able to cite court decisions to support his condemnation of reservations and related claims of aboriginal title. One federal court, for instance, had held that the 1867 Treaty of Cession had extinguished aboriginal title, which was a legal basis for reservations (Miller v. U.S. 1947). Also, at about the time Gruening was writing his statehood book, another federal district court blocked an attempt by the Hydaburg IRA reservation to take over fish traps owned by a national food processing company. In this instance, the court held that the reservation had been created illegally (*U.S. v. Libby, McNeill and Libby* 1952).

Yet, for virtually every judicial or executive decision cited on one side of a case, there was another decision that could be cited in opposition. For example, an important case at the time was the land claims of the Tlingits and Haidas, which were based on aboriginal title. As noted above, a federal court had ruled that the Treaty of Cession extinguished aboriginal title, but later the U.S. Supreme Court disapproved this decision (*Tee-Hit-Ton v. U.S.* 1955). Subsequently, in a major decision in 1959, the Court of Claims awarded the Tlingits and Haidas a monetary settlement for the loss of their aboriginal lands (Case 1984:65-68).

The ambiguity of the law sometimes made it possible to use the same judicial or executive authority (such as the Treaty of Cession, and the 1884 and 1912 organic acts) to support opposing sides of a dispute.

Gruening and other Alaska political leaders achieved the goal of statehood, but aboriginal land claims were not resolved as they had hoped. In fact, state-hood added substantial momentum to the Native land claims movement.

In the early 1960s, the state began selecting lands from the public domain in fulfillment of its land entitlement under the Alaska Statehood Act. This and related threats to aboriginal land rights caused Native leaders throughout the state to organize regional associations to protest state selections and to intensify their pursuit of a Congressional settlement.

Both the statehood act and the Alaska Constitution included provisions (similar to those in the Treaty of Cession and the Alaska organic acts) disclaiming state rights to Native lands and looking to Congress to resolve aboriginal claims.

State land selections as well as all other major land transactions in Alaska were stopped by Secretary of the Interior Stewart Udall's "land freeze," beginning in 1966, pending settlement of Native claims. The final impetus to the settlement was the discovery of vast petroleum deposits at Prudhoe Bay in 1968. Transport of the oil required construction of a pipeline across lands claimed by Natives, and the economic stakes were much too great to permit a long delay of the project. This supplied the incentive—to the state, the oil companies, and Congress—for agreement with Native leaders on the terms of a settlement act compensating Alaska Natives for extinguishment of aboriginal title.

In some respects, the Alaska Native Claims Settlement Act of 1971 was an Alaska Native "treaty" or "treaty substitute" with the U.S. government (Wilkinson 1987:8). Like traditional Indian treaties, in return for grants of limited, designated lands and other benefits to Natives, ANCSA extinguished aboriginal title to much more extensive lands traditionally used and occupied by them. In other respects, ANCSA clearly is not like a traditional treaty. Congress deliberately wrote ANCSA to exclude the traditional features of treaties: reservations and BIA trust responsibility for the land and monetary benefits of the settlement. Moreover, Alaska Natives were not signatories to ANCSA, as would have been the case in an agreement.

ANCSA is an equivocal product of overlapping termination and self-determination eras of federal Indian policy. It speaks the language of self-determination, but it does so with a distinct accent of termination and assimilation. While ANCSA granted Alaska Natives full control of unprecedented amounts of money and land, it assigned this control not to tribal governments but to state-chartered Native corporations. Further, ANCSA extinguished not only aboriginal land title but aboriginal hunting and fishing rights as well (Section 4 [b]).

Although ANCSA extinguished aboriginal hunting and fishing rights, the conference committee responsible for the act "expect[ed] both the Secretary [of the Interior] and the State to take any action necessary to protect the subsistence needs of the Natives" (U.S. Senate 1971:37). Such action could include withdrawing lands for subsistence uses and closing them to non-residents when resources were scarce.

Finding that Native subsistence was not adequately protected and that neither the state nor the secretary had responded adequately, Congress later included provisions for subsistence hunting and fishing preference rights in the Alaska National Interest Lands Conservation Act of 1980 (ANILCA). These rights were to be assigned to all eligible "rural residents," however, and not exclusively to Natives. Congress thus avoided the issue of "special privileges" for Natives, to which the state strongly objected, and struck a political compromise. But Congress also made clear that its primary concern was to protect the subsistence activities of Alaska Natives, invoking "its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause..." (ANILCA, section 801 [4]).

The federal courts generally support the special political status of Native Americans, including Alaska Natives. This does not mean, however, that complexity, ambiguity, and contradiction have been eliminated from Indian law and policy, as the Alaska case continues to demonstrate. Even where policies appear consistent, there almost always is room for disputes about the meaning and application of the policies. This is because critical factors affecting the meaning and application of policies—contexts and questions, needs and demands, and values, expectations, and interests—are always changing.

These conditions give rise to *political* questions and conflicts. Usually, only limited parts of such questions and conflicts are susceptible to being resolved at a given time by a relatively straightforward statute, court decision, or executive action. Further, the sheer diversity of Alaska Native village conditions, like the diversity of Indian reservations and communities in the Lower 48, compounds the problem of devising comprehensive statutory, judicial, or administrative solutions (Wilkinson 1987: 7-9).

Despite their historical failure and disrepute, treaties and reservations elsewhere have provided the basis for clearer answers to questions about the status and powers of Indian tribes. A significant consequence of their absence from Alaska is that the political status of Alaska Natives is more in question than is the status of reservation Indians elsewhere. The question of special status involves extreme ideological and group conflict, particularly when it concerns competition for scarce resources, like fish and wildlife in Alaska. Political leaders either try to avoid such an issue or, if it cannot be avoided, they will try to deal with it indirectly or ambiguously. The result is more unsettled and ambiguous policy.

This is not to argue that Alaska Natives should have had treaties and reservations in the Lower 48 state, or that ANCSA should not have been enacted. Depending on timing and circumstance, Alaska Natives could have done much worse than they have under ANCSA. We simply have no way of knowing “what might have been”; the political uncertainties involved in such speculation are much too great.

From the Marshall trilogy on down, American Indian policy ultimately has been shaped by assumptions about what is the right thing to do as well as by what is considered to be legally sound, socially desirable, and politically possible. Like people generally, legislators, executives, and judges often disagree about such matters. This suggests that there is no single, simple, “correct” solution to the issue of Alaska Natives’ special political status under American Indian laws. The issue instead breaks down into more specific and concrete questions about Native status and powers, and it involves alternative, often conflicting proposals for Alaska Native policies and programs.

POLICY ISSUES

This section briefly explores issues of tribal status and powers, village and regional governance, village services, and subsistence. For each, we first state the main issues, then summarize effects of the Alaska Native Claims Settlement Act and related federal and state policies, and finally pose specific questions that could help inform policy.

TRIBAL STATUS AND POWERS

Are Alaska Native communities “tribes?” If so, what inherent powers of self-government do they have?

ANCSA did not focus on or directly affect the tribal status or powers of Alaska Native communities. ANCSA dealt primarily with the question of aboriginal title. Eligibility of Natives for special federal programs continued under the trust relationship. Congress recognizes Alaska Natives as tribes for the purposes of these programs, and it has also included them under many other Indian laws, such as the Indian Self-Determination Act.

Further, in determining that it was necessary to extinguish aboriginal title (“if any,” says ANCSA in section 4[b]) in order to settle land claims, Congress implied that some 200 Native villages may be tribes in the fullest legal sense, since only such tribes can have aboriginal title. Whatever one makes of this implication, extinguishing aboriginal title does not extinguish tribal status.

On the other hand, ANCSA raised more questions about tribal powers. Most important, the act undermined the tribal powers of Native commutribal

On the other hand, ANCSA raised more questions about tribal powers. Most important, the act undermined the tribal powers of Native communities by assigning land title to state-chartered corporations rather than to tribal (IRA or traditional) governments. Consequently, tribal governments were separated from the land base that might otherwise be considered the territorial jurisdiction of Indian country, where tribal powers are greatest.

None of these actions constitutes denial of tribal government status or powers of Alaska Natives. However, they do show that, at least for purposes of ANCSA, Congress intended that Alaska Natives establish and operate corporate institutions under state law instead of Native institutions under the trust responsibilities of the Bureau of Indian Affairs.

Congress has the ultimate power to recognize tribes or to withdraw recognition from them. Although Congress has recognized Alaska Native tribes for many different purposes since the Treaty of Cession, it has not declared unambiguously that Alaska Native tribes exist for all purposes, and it is unlikely to do so now. Such a move would be strongly opposed by the State of Alaska as well as by other states also having to deal with tribes lacking treaties and reservations. Moreover, even in the current era of Indian self-determination, Congress is reluctant to make broad pronouncements about the separate political status and powers of tribes in Alaska or elsewhere, because it remains a very sensitive and contentious political issue 160 years after the Marshall trilogy.

In the case of Alaska Natives, tribal status is something of an abstraction that becomes real and concrete in the form of a build-up of specific tribal powers. Native communities themselves can expand their tribal powers, one-by-one, as IRA or traditional governments under specific federal and state laws and through court action. By developing their powers incrementally, and increasing their capabilities to exercise them, Native communities enhance their tribal status. This, in fact, is the principal way tribal governments have actually developed in Alaska after ANCSA.

There are many examples of this “building-block” approach to strengthening tribal status. Some villages have increased their control over the importation of alcohol under both federal and state liquor control laws. Others have expanded their access to fish and wildlife under court decisions supporting special subsistence harvests for Natives. Native IRA and traditional villages, as well as Native regional non-profit organizations, contract with federal and state agencies for the administration of services and funds.

QUESTIONS FOR POLICYMAKERS:

What have individual Native IRA and traditional village governments done to strengthen their tribal powers, function-by-function, under existing federal and state laws and judicial decisions, and have these actions produced desired results?

What is the specific relationship of tribal land ownership to the question of recognizing “Indian country” in Alaska?

What is the effect on “Indian country” status of transfers of ANCSA lands to tribal governments under federal law? under state law?

What likely impacts would establishment of “Indian country” have on a village’s or region’s further economic and political development?

VILLAGE AND REGIONAL GOVERNANCE

Should there be exclusively Native local or regional governments? What forms might they take? How would the rights of non-Native residents be protected?

This issue is closely related to the question of tribal status and powers. ANCSA designated state-chartered corporations, not IRA or traditional Native governments, to control the land and money provided in exchange for the extinguishment of aboriginal title. In addition, section 14(c)(3) of ANCSA encouraged incorporation of municipal governments (cities or, possibly, boroughs) by requiring that certain village lands be transferred to state-chartered municipalities rather than to tribal governments.

Many Native communities oppose incorporating as cities or boroughs for different reasons. Some perceive that municipal forms, powers, and government in communities that already have several local and regional institutions. Those forms include IRA governments, traditional councils, and village corporations at the local level, and regional corporations, non-profit organizations, and special service authorities at the regional level. Some places also fear that municipal governments, which must be open to participation by all local residents, may be taken over by non-Natives, even when they constitute a minority of voters.

On the other hand, the state government has promoted incorporation of cities and boroughs in rural Alaska because they are familiar institutions subject to state standards, including equal protection and participation of all residents (State of Alaska 1986:24). In the *Noatak* case, for example, the state Department of Law opposed special grants of state funds to tribal governments because state lawyers determined that these governments were “racially exclusive.” (In taking this position, the state set aside the question of tribal governments’ special political status, focusing instead on their “racial” constituencies.)

Many Native villages have incorporated as cities, and some Native regions have incorporated as boroughs. Village municipalities are not strong organizations, however, and a number of them have been superseded by tribal governments, village corporations, or regional organizations. Yet others have preserved their direct links to state funding agencies and have served local needs. Boroughs have also been incorporated to serve the interests and needs of the Inupiat of the North Slope and of the northwest regions. These Native-controlled boroughs have exercised important powers of taxation and land use control over the North Slope oil fields and NANA regional corporation’s Red Dog zinc mine.

Incorporation of boroughs and the continuing development of Native regional non-profit organizations suggest that many Natives recognize the limitations on individual village capacities, and the need to pool economic and political resources at the regional level.

The authority to recognize tribal governments lies at the federal level, but the state can choose either to assist tribal governments or to provide benefits only to municipalities. While the state prefers to work with municipalities, it nonetheless provides financial aid and services to Native village tribal governments and regional non-profits on condition that state interests and the rights of non-Natives are protected (State of Alaska 1986:28ff.). In such cases tribal governments and Native organizations agree to abide by equal protection standards and to waive “sovereign immunity” for the purpose of participating in state programs.

QUESTIONS FOR POLICYMAKERS:

Are there alternative models of “successful” village and regional governance?

What is the range of government options available at the village level, and what is the existing pattern of village governance structures? What range and pattern exist at the regional level?

Can tribal and other Native-controlled structures fulfill the functions of boroughs and municipalities?

Under what terms and conditions can boroughs and cities usefully co-exist with Native governments?

In what main ways does the state now cooperate with Native governments and vice-versa? Could these be expanded or should they be lessened?

What forms of recognition does the state extend to Native governments at village and regional levels? Should these be expanded or reduced?

How have regional non-profits adapted to their post-ANCSA roles as service agencies and quasi-governments, and how has the state adapted to the roles of the regional non-profits?

VILLAGE SERVICES

Should high-cost village services and facilities be subsidized? Who should pay? Can Native villages be both economically dependent and self-governing?

ANCSA continued Alaska Native eligibility for special federal programs. However, section 2(c) of the act directed the Secretary of the Interior to conduct a study of all federal programs for Native people and make recommendations to Congress for the operation and management of these programs. The Secretary did conduct a comprehensive survey of Native programs but did not submit recommendations. Nonetheless, Congress generally expanded Native programs in the 1970s and, although rates of funding slowed or were reduced in the 1980s, overall levels of support have been maintained.

State funding for Alaska local government has followed a pattern similar to that of Native program funding at the federal level. The decline in state revenues caused by the fall of oil prices in the mid-1980s was felt primarily in capital budgets, not operating budgets. Together, federal and state programs for Native and non-Native communities in rural Alaska sustain a major share of the local economies. Government employment, cash payments, and services accounted for as much as half of the personal income and two-thirds of the economic base of village economies in the mid-1980s. This is why economists often refer to the “transfer economies” of Native villages. In many villages, state and federal government transfers play a vital role in filling the gaps left by the erosion of the subsistence economy and the absence of a market economy.

Janie Leask, then president of the Alaska Federation of Natives (AFN), commented before the U.S. Senate Select Committee on Indian Affairs in 1989 that “despite substantial improvements in health, standard of living, economic opportunity, and institutional services, an increasing number of Alaska Natives now face greater risks and declining opportunities.” She went on to describe the dilemma confronting Native villagers who depend on government support for their survival:

Most Alaska Natives live in communities in which the local economies cannot provide a life-sustaining standard of living without substantial on-going public subsidies. And public policies intended to assist Native individuals, families, and communities, have created and perpetuated dependence rather than self-sufficiency (U.S. Senate 1989:13)

In many villages provision of increased state funding from surplus oil wealth has aggravated the dependency problem. Operation and maintenance costs associated with the schools, community halls, public utilities, and other facilities made possible by state oil revenues are probably beyond the financial capabilities of many villages, without continuing assistance. State and federal programs provide essential benefits, but they also perpetuate dependence.

QUESTIONS FOR POLICYMAKERS:

What are the current types and levels of federal funding for Native programs in Alaska and of state funding for rural communities?

What are the prospective levels of rural need, costs, and funding during the next decade?

Does the tribal or municipal status of Native communities affect their access to federal and state funds and, if so, how?

What special arrangements does the state make with Native governments and organizations as conditions of state funding?

What organizational arrangements are used for the administration of federal “P.L. 638” programs?

How effective are these state and federal arrangements, and what changes are needed?

SUBSISTENCE

Is “subsistence” more than hunting and fishing for basic economic sustenance? Is subsistence a fundamental element of Native culture and a Native “right”? If so, is it protected by Congress?

ANCSA extinguished aboriginal hunting and fishing rights, but Congress established rural Native (and other rural resident) subsistence rights on federal lands in Alaska under the 1980 Alaska National Interest Lands Conservation Act. The State of Alaska, in order to retain management authority on all Alaska lands, at that time agreed to apply the same subsistence rules on state lands.

Thus, ANCSA extinguished aboriginal hunting and fishing rights, and ANILCA created a new set of “statutory rights.” Although subsistence preference was extended to all rural residents as a political compromise, Congress’s primary concern was to protect “Native physical, economic, traditional, and cultural existence” (ANILCA, section 801 [1]).

Majority interests represented in state government view “subsistence” primarily as hunting and fishing for sustenance and recreation, an activity conducted by Natives and non-Natives alike. In this view, there is no distinctive connection to Native culture or traditions. Natives (and many non-Natives), on the other hand, see subsistence as a vital element of Native culture and a special Native right. They point out that Congress, despite having extinguished aboriginal hunting and fishing rights in ANCSA, also indicated in the Conference Committee report that it did not intend to abolish or restrict the practice of Native subsistence. In fact, finding that Native subsistence was in jeopardy after ANCSA, Congress “restored” subsistence as a Native (and rural resident) “civil right” in Title VIII of ANILCA.

The Alaska Supreme Court in 1989 (*McDowell v. Collingsworth*), ruled the state’s rural preference subsistence law unconstitutional under the “common use” and other provisions of the Alaska Constitution’s article on natural resources. Restoring the rural preference would require a constitutional amendment. A proposal to place an amendment before the voters failed by one vote in the Alaska Legislature in 1990.

The current stalemate over subsistence will not be broken without a significant shift in the political alignments involved. As in the case of the broader questions of tribal status and powers, Congress is reluctant to choose between state and Native positions, particularly where basic interests of strong, well-organized groups are affected. Additionally, in this case, the ANILCA subsistence provisions remain in force on federal lands (but not in navigable-water fisheries, which remain under state jurisdiction). These factors tend to work against further federal action to resolve the subsistence issue, and it appears that the issue will need to be resolved at the state level.

QUESTIONS FOR POLICYMAKERS:

What precisely is the constitutional-legal basis for a rural resident subsistence preference under federal law? under state law?

What is the constitutional relationship between federal and state levels of authority over Native subsistence?

Are there federal constitutional grounds (under Indian law doctrine) for Congress to authorize a Native subsistence preference?

Given ANCSA’s extinguishment of aboriginal hunting and fishing rights, can traditional “use and occupancy” doctrine be used in defining Native subsistence rights on federal lands? on state lands?

How effective is Native participation in the state system of fish and game regulation? Should changes be made in the management system to strengthen Native participation?

CONCLUSION

Charles Wilkinson (1987:103) remarks that “the Founding Fathers almost certainly assumed that tribes would simply die out under the combined weight of capitalism, Christianity, and military power.” He notes how right the Founding Fathers were about the constitutional structures and processes of government, but how wrong they were about the survival of Indian tribes. This belief in the withering away of the tribes persisted through the nineteenth century and into the twentieth. It is still held by some people even now.

Although often with great reluctance, American politics and law accommodated the existence of the tribes, inventing and applying the doctrines of aboriginal rights, the trust relationship, and inherent powers. In most of the country, these doctrines were institutionalized in treaties and reservations that did as much to mark successive reductions in tribal power as to protect what was left of it. Nonetheless, the Indian tribes had a foothold in the American political system, and they refused to withdraw. Successive Congresses, courts, and executives have, as Wilkinson observes, continued “squarely to acknowledge this third source of sovereignty in the United States” (1987:103-104). Particularly during the late twentieth century, there has been a resurgence of political consciousness and action among the American Indian tribes.

Alaska Natives were the last of the Native Americans to feel the weight of capitalism, Christianity, and superior power on their cultures. They did not, for the most part, need to be conquered because there was plenty of land in Alaska and relatively few takers. After the early Russian occupation, Natives’ contact with outsiders was mostly peaceful, and they made room for missionaries, traders, miners, fishermen, government agents, adventurers, and

settlers. Alaska Natives were “conquered” by this process and by an invasion of politics and bureaucracy. The rules governing land ownership and claims on resources changed virtually beneath their feet, often without their knowledge or their understanding of the implications. In Alaska, too, non-Natives probably shared a widespread belief that the Native peoples would (and should) gradually wither away through assimilation.

By statehood, it was clear that Alaska Natives would lose their lands, resources, and cultures by default if something was not done. What followed was the land claims movement and Alaska Native Claims Settlement Act. ANCSA, however, underscored the equal and potentially assimilated status of Alaska Natives, not their special status, which was not as clearly set forth in federal law and policy for them as it was for Native Americans elsewhere. Yet, over the years Congress, courts, and executives built an incremental, often contradictory record of special provisions for Alaska Natives. In recognizing many specific tribal powers, this complex record supports recognition of their special tribal status, too.

Given the ambiguity of the record and the political resistance in Alaska to abstract and threatening claims to “sovereignty,” Alaska Natives have increasingly turned to practical political and social action to strengthen their special status and their distinctive cultural identities. It seems increasingly clear that the issue of Alaska Natives’ special status is ultimately a political question, not a legal one, and that their political status depends less on what federal policymakers say about it than on what Natives themselves choose to do.

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