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ROUNDTABLE PAPER
VOLUME XXVIII
ALTERNATE APPROACHES TO
NATIVE LAND AND GOVERNANCE
DECEMBER 12 - 15, 1984
ANCHORAGE, ALASKA

ALASKA NATIVE REVIEW COMMISSION
HON. THOMAS R. BERGER
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Transcripts of the Alaska Native Review Commission are produced in two series. Those in Roman numerals are for the Roundtable Discussions. Those in Arabic numbers are for the Village Meetings.

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**ALTERNATIVE APPROACHES TO ALASKA
NATIVE LAND AND GOVERNANCE**

**Prepared for the
ALASKA NATIVE REVIEW COMMISSION**

by

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December 1, 1984

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The author wishes to acknowledge the fine contribution to this study by research assistant, Lois Spiegel.

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Alternate Approaches to Native Land & Governance

Anchorage, December 12 - 15, 1984

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ALTERNATIVE APPROACHES TO
Alaska Native Land and Governance

Table of Contents

1.	Introduction.	1
<u>The UNITED STATES</u>		
2.	Early Federal Indian Policy	4
3.	The Removal Era	5
4.	The Reservation Era 1845-1880	6
5.	No more Treaties 1871	7
6.	The General Allotment Act 1887	8
	Lone Wolf v. Hitchcock 1903	9
7.	The Citizenship Act 1924	10
8.	Early formation of Policy toward Alaska Natives 1867-1900	10
	Policy Changes in Alaska at the turn of the Century 1900-1934	11
9.	The Indian Reorganization Act 1934	13
	Traditional and IRA forms of government compared.	17
10.	The Termination Era 1950-1960	19
	House Concurrent Resolution 108 1953	19
	The Menominee Termination (1954) and Restoration (1973)	20
	Public Law 280 1953	22
	Public Law 280 in Alaska 1958	23
11.	The Self Determination Era 1960-1984.	24
	The Indian Civil Rights Act 1968	24
	Nixon's Message to Congress 1970.	25
	The Alaska Native Claims Settlement Act 1971.	26
	The Indian Self-Determination Education Assistance Act 1975	27
	The Indian Child Welfare Act 1978	27
	Other Legislation	27
	The American Indian Policy Review Commission	28
	The Main Land Claims Settlement	28
12.	Court Decisions in the Self Determination Era	30
	The Rules of Construction of Treaties and Statutes	30
	Construing Treaties	30
	Construing Statutes	31
	Oliphant v. Suquamish Indian Tribe 1978	32
	Montana v. U.S. 1981	33
	Indian Preemption	34
	Tribal Taxation of NonIndians	35
13.	The Indian Court System	36
	Tribal Codes	37
14.	Summary of Self-Governing Status of Indian Tribes in Lower 48	39
15.	The Taking Issue	42
	The Menominee Restoration	46
	Conclusion	48
<u>AUSTRALIA</u>		
16.	Historical Summary	49
17.	The Woodward Report	50
18.	The Aboriginal Land Rights Act 1976	51

19.	Aboriginal Land Trusts	51
20.	Aboriginal Land Councils	51
21.	The Aboriginal Land Commissioner.	52
22.	Other Legislation Affecting Aboriginal Land Claims.	53
23.	Summary of Australian Action on Aboriginal Land Claims.	53

NEW ZEALAND

24.	Historical Summary	54
25.	The Maori Land Court.	54
26.	Attempts to Resolve the Multiple Ownership Problem.	56
	Introduction	56
27.	Reform Efforts	57
	Disenfranchisement.	57
	Development Schemes	57
	Incorporations.	57
	Maori Trusts	58

CANADA

28.	Historical Summary	59
29.	Royal Proclamation: Aboriginal Title & Treaties	59
	Aboriginal Title	59
	Treaties	60
30.	British North America Act	61
31.	The Indian Act 1876	61
	Policy of Assimilation	62
	Sovereignty Issue. Self-Government under the Indian Act.	62
	Federal Management of Reserves, Resources and Funds	63
	Status Issue	64
	Taxation: Federal, Provincial, and Indian	65
32.	Provincial Jurisdiction over Indians' Reserves	65
33.	Summary of History	66
34.	Developments since 1970	68
	The James Bay and Northern Quebec Agreement	68
35.	The Constitution Act 1982	70
36.	The Penner Report	71
37.	The Indian Self-Government Act, Bill C-52	72
38.	The Metis, Inuits, and Yukon Indians	72
39.	The COPE Proposal. "Inuvialuit Nunangat"	73
40.	The COPE Settlement	73

SUMMARY OF ALTERNATIVES

41.	Process Alternatives	76
	A. Litigation	76
	B. Legislation	76
	C. Constitutional Amendment.	77
	D. Administrative Action	77
	E. Self Help	78
42.	Substantive Alternatives	78
	A. Place Corporation owner land in trust status.	78
	B. Enact legislation establishing a land trust and authorizing "conservation easements" for the protection of Native land	78
	C. Acknowledgement of government trust relationship toward Alaska Natives.	79
	D. Legislation or constitutional amendment affirming IRA and Traditional Village government sovereignty.	79

E.	Legislation to define Native governing powers over specific subject areas.	79
F.	A Constitutional Amendment embodying the "strict scrutiny" doctrine of judicial review	80
G.	Constitutional amendment requiring "negotiation" with Native communities before changes are made in land status or governmental powers	80
H.	Obtain a judicial ruling applying "strict scrutiny" review to legislation impacting Native lands or governmental powers	80

ALTERNATIVE APPROACHES TO ALASKA NATIVE LAND AND GOVERNANCE

Prepared for the
ALASKA NATIVE REVIEW COMMISSION

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December 1, 1984

1. INTRODUCTION

The Alaska Native Review Commission is moving toward completion of its work. Two of the Commission's central concerns are Native governance, and land tenure. What kind of institutional and legal structure will best serve the governance needs of the Native population? What should be the Native/land relationship? Should the corporate structure be left as it is? Should it be changed? Should an entirely different system be considered? What impact would proposed changes have on the NonNative population, on the State, and on the Federal government.

One of the principal goals of this paper is to review the alternative approaches to governance and land tenure that have been tried in the Lower 48, and in other countries sharing similar concerns, notably Canada, Australia, and New Zealand. A modest attempt is made to assess the strengths and weaknesses of these experiences.

Nathan Margold, the 1942 Solicitor of the Department of Interior said:

Federal Indian law is a subject that cannot be understood if the historical dimension of existing law is ignored. . . . [I]f the laws governing Indian affairs are viewed as lawyers generally view existing law, without reference to the varying times in which particular provisions are enacted, the body of the law thus viewed is a mystifying collection of inconsistencies and anachronisms. To recognize the different dates at which various provisions were enacted is a first step towards order and sanity in this field. Felix Cohen's Handbook of

Federal Indian Law (1942), Introduction. (Hereinafter, Cohen, 1942.)

Nathan Margold's wisdom applies to the experiences of all of the four countries studied. This paper narrates a brief historical review of the evolution of national law and policy concerning Natives in each of these four countries, and endeavors to describe the setting in which land tenure and governance actions occurred, their goals, and their impact.

The early sections of the paper, Sections 2 through 5, summarize the legal/institutional setting for United States federal policy from the Nation's birth to the purchase of Alaska from Russia.

Section 6 describes the historical setting during the years after Alaska was acquired by the United States, when the first policies towards Alaska Natives were being created. This was the period during which U.S. policy towards Indians in the Lower 48 was aimed at breaking up reservations and assimilating Indians into the larger society. In 1871 Congress prohibited further treaties with Indian tribes. In 1885 the Major Crimes Act was enacted applying federal criminal law to Indian Country and for the first time encroaching directly on Indian sovereignty. In 1887 the Dawes Act was passed, designed to break up Indian reservations into individually owned tracts and turn the Indians into farmers, like the NonIndians. These events form the contextual fabric in which federal policy toward Alaska Natives was created.

Section 8 describes the changes in federal policy toward Alaska Natives that occurred after the turn of the century.

The Indian Reorganization Act is discussed in Section 9, including the 1936 Amendment that applied the Act to Alaska Natives. Traditional and IRA governments are compared.

Section 10 describes the termination era, noting the most significant laws and policies adopted during that period. This section includes a description of the Menominee termination of 1954, and restoration in 1973.

Sections 11 and 12 describe the major pieces of legislation and court decisions appearing in the self determination era, from 1960 to date. These sections include a description of the Northeastern Indian land claims, and the Passamoquoddy settlement.

Section 13 describes Indian courts, and comments on tribal legal systems.

Section 14 summarizes the self governing status of Indian tribes in the Lower 48 today.

Section 15 deals with the special problems raised by possible return of Corporation-owned land to trust status, or otherwise restricting it to Native ownership or control.

The Australia/Aborigine relationship is covered in Sections 16 through 23. New Zealand and the Maori are covered in Sections 24 through 27, and Canada and the Canadian Natives in Sections 28 through 40. While none of these chapters is as

extensive as the United States Chapter, all are organized similarly, with historical sections, and reviews of recent policy trends and alternatives.

The final sections, 41 and 42, summarize the major alternatives discussed in various parts of the paper, derived from all of the above sources. These last two sections attempt to distill, from the history of national/Native experiences in these four nations, the most viable alternatives for defining the future of Alaska Native governance and land tenure.

THE UNITED STATES

2. EARLY FEDERAL INDIAN POLICY 1789-1830

From time immemorial the Natives of Alaska have considered their villages to be sovereign, self governing entities. The United States view of these villages, on the other hand, has been ambivalent. At the outset federal officials tended to ignore village sovereignty. Since the turn of the century, however, such sovereignty has gained increasing federal recognition. Important historical reasons for these attitudes need to be examined.

Federal policy towards Alaska Natives began in 1867 when Alaska was purchased by the United States. By that date the United States had already established policies for dealing with Indian Tribes in the Lower 48, and legislation and court decisions had established legal doctrine, surviving today, affirming the sovereignty and self governing status of these tribes. One would expect that these federal policies and legal doctrines, created out of 80 years experience, would automatically be applied to Alaska Natives whose relationship to the land and history of independent self government were virtually identical to the tribes of the Lower 48. Yet the initial years of federal dealings with Alaska Natives, between 1867 and about 1900, saw considerable ambivalence in federal attitudes. These attitudes gradually changed, however, as it became clear that no rational basis for such differences existed. By the early 1900s federal policy in Alaska was moving to conform to policies applied in the Lower 48.

The reasons for the early difference in attitude toward Alaska Natives are best understood in light of the historical context at time of the Alaska purchase.

From the beginning of the Nation in 1789 (in fact from long before) Indian tribes had been dealt with as separate, self governing sovereign nations. This policy (which early became intertwined with a federal trust relationship toward Indian tribes) was expressed in legislation such as the NonIntercourse Act of 1790 providing that only the federal government could enter into agreements with Indian Tribes; States and private parties could not do so absent federal approval. The guardian-ward policy was also expressed in the 1823 Supreme Court decision of Johnson v. McIntosh, where the Court held that only the federal government could convey good title to aboriginally held Indian lands. The benchmark case articulating the tribal sovereignty concept is Worcester v. Georgia 31 U.S. (6 Pet.) 515 (1832) where the Court identified Indian Tribes as sovereign, self governing entities, free from state control.

[Great Britain considered the Indian tribes] as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them

This was the settled state of things when the war of our revolution was commenced. . . .

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, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." . . . The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense. . . .

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force. . . . The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

Worcester recognized only two limitations on tribal sovereignty. Tribes could not conduct foreign affairs, nor could they alienate tribal lands held in trust by the US without federal consent. Aside from these limitations, tribal sovereignty and self government were unimpaired. Worcester also made it clear that State law did not apply in Indian country. This was the status of the law in 1867 when the purchase of Alaska took place.

Although Worcester v. Georgia remained the controlling source of legal doctrine concerning Indian sovereignty, federal policy toward Indian tribes in the Lower 48 went through important changes between 1832 and 1867.

3. THE REMOVAL ERA

At the time the Supreme Court decided Worcester v. Georgia, Andrew Jackson was President. When he took office in 1829, he was convinced that the Indians could no longer exist as independent enclaves within the states (Francis P. Prucha, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834 (1962)). Either they must move west or become subject to the laws of the states. He was disappointed by the Supreme Court's decision in Worcester and was opposed to the idea of allowing "foreign and independent

governments" to exist within the states. He concluded that the "solution" to the Indian problem was to set apart an area west of the Mississippi, to be guaranteed to the Indian tribes as long as they occupied it. There they could be taught the arts of civilization.

While Jackson proposed "voluntary" removal of the tribes to the west, in the event it was considerably less than that. The removal of 16,000 members of the Five Civilized Tribes, Cherokees, Choctaws, Chickasaws, Creeks, and Seminoles occurred in the dead of winter in 1838, and has been called the "Trail of Tears" because of the terrible hardships imposed on the Indians, and the thousands who died. Although removal of the Five Civilized Tribes is the most well known removal action, many other tribes were uprooted from their homelands and moved to strange lands hundreds of miles to the west, including the Kickapoos, Wyandottes, Ottowas, Pottawatomies, Winnebagos, Sac and Fox, Delawares, Shawnees, Weas, Peorias, Miamis, Kaskaskias, and Piankeshaws. D'Arcy McNickle, *THEY CAME HERE FIRST: THE EPIC OF THE AMERICAN INDIAN*, Harper & Rowe, (1975).

4. THE RESERVATION ERA 1845-1880

By the 1840s United States policy again changed. Large numbers of settlers and miners started moving west in this decade. The "Oregon Trail" was established, inviting thousands of settlers toward the Pacific Northwest. In 1848 gold was discovered near Sacramento, California, inducing hundreds of thousands of miners and settlers to move west in the next five years. "Manifest destiny" became a moral rallying cry for a society bent on exploration and exploitation of the lands, minerals, and other resources of the American West. By the middle of the 19th century the notion of any "Indian only" territory west of the Mississippi was bankrupt. A new policy became essential and it turned out to be a different form of removal. This time the Indians were removed from the broad expanses of ancestral lands (or lands to which they had been removed) where they had roamed, hunted and fished, and were placed on "reservations."

Reservations, it was argued, would be specific areas where Indians would have exclusive control of their affairs, where their lands would be identified and surveyed, and where they would be protected from the encroachments of aggressive settlers. Dozens of reservations were created throughout the West during this period.

By the 1870s federal policy changed yet again. The Homestead Act of 1862 had encouraged widespread settlement of the west. The Mining Act of 1870, and 1872 gave further encouragement to both mining and settlement. The first transcontinental railroad was completed in 1869. Related to the completion of the railroad was the final disappearance of the buffalo herds that were the mainstay of Plains Indian life. The economic base of the Indians was now gone.

The tribes were now located on isolated islands of land, entirely surrounded by lands controlled by private landowners, by the states and territories, or by the United States.

5. NO MORE TREATIES 1871

From about 1850 to 1871 the attitude of Congress, especially the House of Representatives, had been changing about how to deal with Indian Tribes. Under the Article II, Sec. 2, Clause 2, of the Constitution, treaties are entered into by the President with concurrence of two-thirds of the Senate; the House of Representatives plays no part in this process. The House was jealous of the power wielded by the President and the Senate. Many Congressmen believed it was no longer appropriate to treaty with the remaining, weaker Indian tribes in the West. In 1871 the House obtained Senate concurrence in a law prohibiting further treaties with Indian tribes. 25 USC Sec. 71. Thereafter tribes would be dealt with by legislation, executive order, or executive agreement.

The decade of the 1880s, as described by Felix Cohen, was

marked by a rapid settlement and development of the west. As an incident to this process, legislation providing for acquisition of lands and resources from the Indians was demanded. Ethical justification for this was found in the theory of assimilation. If the Indian would only adopt the habits of the civilized life he would not need so much land, and the surplus would be available for white settlers. The process of allotment and civilization was deemed as important for Indian welfare as for the welfare of the NonIndians. Cohen, Handbook of Federal Indian Law, 1942, p. 78.

In 1881 the Supreme Court decided United States v. McBratney, ruling without explanation that a NonIndian committing a crime against a NonIndian in Indian country could be tried in state courts. Recent federal cases, affirming this rule, justify it on the ground that "Indians are not involved" (although surely reservation Indians are concerned about law and order on reservations.)

In 1883 the Supreme Court decided Ex Parte Crow Dog, ruling that federal criminal laws did not apply to Indian country unless Congress expressly said otherwise. This left the question of "justice" in Indian Country up to the tribes. Crow Dog upset the NonIndian community. Whites believed the White man's system of justice was clearly superior to the Indian's, and in 1885 Congress enacted the Major Crimes Act making it a federal crime for an Indian to commit a major crime (murder, manslaughter, arson, burglary, larceny, and the like) in Indian country.

The Major Crimes Act was the first judicially recognized intrusion by Congress into Native sovereignty. The Act was sustained in 1886, in United States v. Kagama where the Court

said Congress had the power to enact such a law under its guardian-ward relationship. While recent cases reject the guardian-ward relationship as the basis of Congressional power to legislate concerning Indians, they concur in the Kagama result on the basis of the Indian Commerce Clause of the Constitution -- a theory explicitly rejected by the Kagama court.)

6. THE GENERAL ALLOTMENT ACT 1887

Far more important to Indian welfare was the General Allotment Act, 24 Stat. 388, one of the most significant laws ever considered by Congress concerning Indians. Enacted along with a cluster of special allotment laws for individual tribes, this assimilationist statute authorized grants of 160 acres to each Indian family head, and 80 acres to each single Indian over 18. The lands would be held by the United States "in trust" for the "allottee" for a period of 25 years, during which time the land could not be alienated or encumbered, nor could it be taxed by the states. After 25 years a fee simple patent could issue to the Indian. The land could then be taxed, and could be conveyed, and the Indian grantee could become a U.S. citizen.

The Allotment Act was inspired by a mixture of Congressional motives. Some Congressmen believed this was the best solution for the Indians because it would break up their communal way of life, referred to as "communistic" at times, and encourage them to take up the farming and landholding habits of the White man. They also believed individual Indians would have greater security through fee patent ownership of land. Other Congressmen saw the Act as reducing the financial burden on the government for providing support for Indians. Some voted passage because they wanted to open "surplus" reservation lands to White settlement.

The strongly assimilationist policies of the Allotment Act were also reflected in administrative actions, primarily in the Boarding Schools program. The schools made every effort to remove Indian children from the influence of their parents and tribes. Children were kept at school for up to 8 years, with little or no opportunity to see parents, relatives, or friends. Virtually everything Indian, including dress, language, and religious practices, were banned. The schools were designed to indoctrinate Indian children in the White man's ways.

One of the more dramatic assimilationist actions taken during this period was the formation by the Indian Service of the Bureau Police and the Courts of Indian Offenses. Indians were hired as police officers and judges of Courts exercising jurisdiction over the reservations, thus creating an alternative power structure to the traditional forms of tribal governance. A "Code of Indian Offenses" was promulgated by the Secretary of Interior as a federal regulation. It prohibited many traditional Indian cultural and religious practices, including destruction of an Indian's personal property at

death, tribal dances, and the payment of compensation to a woman's family when she is married. W. Hagan, INDIAN POLICE AND JUDGES (1966).

The assimilationist policy was not, however, all-encompassing. In 1895 the Supreme Court decided Talton v. Mayes, 163 U.S. 376 (1896), ruling that Indian tribes were independent sovereigns rather than arms of the federal government, and were not therefore constrained by the Bill of Rights of the federal Constitution.

Lone Wolf v. Hitchcock 1903

In 1903 the Supreme Court decided Lone Wolf v. Hitchcock dealing a powerful blow against tribal sovereignty, and affirming virtually unrestrained power in Congress to abrogate Indian treaties.

In Lone Wolf an 1867 treaty had allotted lands to individual Kiowa and Comanche Indians, leaving unallotted lands owned by the tribes. The treaty provided that consent of "three fourths of all adult male Indians" would be required for any further cession of communally held lands. A separate treaty consolidated land of the Oklahoma Apache Indians with the lands of the Kiowa and Comanche tribes. In 1892 the government sought to acquire 2.5 million acres of allegedly "excess" tribal land from the tribes. Only 456 signatures were obtained, far less than three-fourths of the adult males. Nevertheless the agreement was presented to the Senate, which passed an Act departing even from the proposed agreement in important respects. The Act was then passed by the House and became law. Lone Wolf sued to enjoin its implementation on the ground that the required consent had not been obtained, and on grounds of fraudulent representations. The Supreme Court dismissed the suit, holding that Congress had the power to abrogate even a treaty as explicit as this one.

The Court used a variety of phrases that seemed designed to establish judicially enforceable criteria that must be met before a treaty could be abrogated. Congress could abrogate treaties "in a possible emergency," "in the interest of the country," "in a contingency," and "if consistent with perfect good faith." But then the Court washed its hands of the issue by proclaiming that Congress alone had the power to determine when these criteria were met. (The recent cases of Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977), and U.S. v. Sioux Nation of Indians, 448 U.S. 371 (1980), indicate that the Court might review legislation under trust criteria, but the circumstances of these cases suggest the review is still exceedingly limited.)

It should be noted that under the Constitution Congress has power to abrogate any treaty, not merely treaties with Indian tribes. Two differences should be noted: Indian treaties are frequently abrogated whereas treaties with other nations are almost never abrogated; and the United States does

not have a "trust" relationship toward other nations as it has toward Indian tribes.)

The period from 1890 to 1934 did not see other legislation as significant as the Major Crimes Act, or the General Allotment Act: It was characterized by "followup" laws, designed to facilitate the transfer of tribal lands to individual Indians, to assimilate Indians into the White society, and to end tribal existence by transferrring tribal powers to federal administrative officials. Cohen 1942 p. 80-81

7. THE CITIZENSHIP ACT 1924

In 1924 Congress bestowed citizenship on all Indians not yet citizens at that date. 18 USCA Sec. 1401(a)(2). About 2/3 of the Indians in the nation had already become citizens, through the Allotment Act process, or other special statutes. It is significant that the Act did not change any treaty or other rights the Indians previously had, nor did it affect tribal sovereignty. U.S. v. Nice, 241 U.S. 591 (1916); McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973); Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968).

8. EARLY FORMATION OF POLICY TOWARD ALASKA NATIVES 1867-1900

Given the trend in federal Indian policy at the time it is significant that the initial federal policy toward Alaska Natives was established between 1867 and 1900. Additionally, it important to understand that during this period Alaska was not a place where Natives and NonNatives came into frequent contact, or conflict. The territory was simply too vast, the population too sparse, and the weather too rigorous. In the 1800s there seemed to be plenty of land for everyone. Aside from occasional gold-rushes, only a few NonNatives wished to come to Alaska. The "problems" of Native/NonNative relations, so acute in the late 1800s in the Lower 48, seemed trivial in Alaska by comparison. Congress and federal administrative officials could largely ignore them, and did. Nonetheless some legislation and administrative action took place during this era.

The 1867 Russian-American Treaty of Cession briefly mentioned Natives. Article III of the Treaty refers to the "inhabitants of the ceded territory", saying that with the exception of the "uncivilized native tribes," these inhabitants could either return to Russia, or become U.S. citizens. The "uncivilized tribes" were to be "subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country." Art. III, Treaty of March 30, 1867, 15 Stat. 539. This language reflects an intention by the United States to treat Alaska Natives in the same fashion as the Indians of the Lower 48. In the first years following the cession, however, the United States

attempted to deal with the Alaska Natives in a different fashion.

One of the first examples of Congressional recognition of the existence of the Alaska Natives was the Organic Act of 1884 extending rudimentary government and federal court services to all Alaska. Act of May 17, 1884, 23 Stat. 24. In the ensuing years, the primary focus of federal programs was toward education of Alaska Natives. Over the next 30 years a network of some 70 Native village schools were created. The Bureau of Education also initiated a Native reindeer industry, extended medical care, and established village cooperative stores, sawmills, salmon canneries, and other commercial enterprises. Some 150 reservations were established for the benefit of the Natives, ranging in size from a few acres for schools to several thousand acres for reindeer herding or subsistence resource preservation.

These programs focused on native villages, the essential units of self government for most Alaska Native societies, thus establishing a history of government to government dealings supports the concept of federal recognition of Alaska Native self government.

Nonetheless, in these early days, the relationship of the United States government to the Alaska Natives was considered by some officials to be different from its relationship with Indian tribes in the Lower 48. The BIA did not administer the Alaska programs, and the Solicitor for the Department of Interior concluded in 1894 that various laws about "Indians" and "Indian country" did not apply to Alaska Natives. Alaska -- Legal Status of Natives, 19 Land Decisions (L.D.) of the Interior Dept. 323 (1894).

Policy changes in Alaska at the turn of the century 1900-1934

Federal officials began changing their attitudes in the early 1900s because no valid rationale for different treatment could be identified. The 1905 Nelson Act, 33 Stat. 617, affirmed the practice of providing a system of education for Alaska Natives. The next year, 1906, Congress enacted the Alaska Native Allotment Act, 34 Stat. 197, (repealed by 84 Stat. 688 at 710, 43 USCA Sec. 1617(a)), under which individual Alaska Natives became eligible for the same sort of restrictive land entitlements as those available to Indians in the Lower 48. In 1918 the Supreme Court upheld the creation of the Metlakatla Indian Reservation in Alaska. Alaska Pacific Fisheries v. U.S., 248 U.S. 78 (1918). In 1923 the Interior Department Solicitor concluded that

The relations existing between [the Natives] and the government are very similar and in many respects, identical with those which have long existed between the government and the aboriginal people residing within the territorial limits of the United States. . . . 49 L.D.

592, at 594-595 (1923).

In 1931 the BIA took over administration of Alaska Native programs, placing them under the same administrative jurisdiction as the tribes of the Lower 48. In 1932 the Chairman of the House Committee on Indian Affairs requested information from the Secretary of the Interior on "the status of the Indian tribes in Alaska." In response, the Solicitor for the Department of Interior opined that

From the foregoing it is clear that no distinction has been or can be made between the Indians and other Natives of Alaska so far as the laws and relations of the United States are concerned whether the Eskimos and other Natives are of Indian origin or not as they are all wards of the Nation, and their status is in material respects similar to that of the Indians of the United States. Status of Alaska Natives, 53 L.D. 593, at 605-606 (1932).

9. THE INDIAN REORGANIZATION ACT 1934

In the 1930s federal policy toward Indians changed again. This time the legislative changes applied to Alaska Natives as well as to Indians of the Lower 48.

The Indian Reorganization Act of 1934 (Wheeler-Howard Act) 48 Stat. 984, was one of the most significant pieces of Indian legislation ever enacted by Congress. It was a major reversal of policy toward Indians, and specifically reversed the policies of the 1887 General Allotment Act.

The Meriam Report, published in 1928, ("The Problem of Indian Administration", Institute for Governmental Research, Studies in Administration, (1928)), had established the disastrous effects of the General Allotment Act. Rather than making Indians better off, the Allotment process had terribly worsened their life. Educational programs designed to assist Indians to adapt to the white culture during the time they held land in allotment had failed miserably. Adequate funds had never been appropriated to do the job. The Bureau of Indian Affairs had become the unregulated Czar of Indian life, leaving no room for Indian self government.

Substantial portions of reservations had been designated "surplus" to Indian needs under the Allotment Act, and had been opened to settlement by Whites. Land patented to individual Indians, often without their knowledge, had become subject to local taxes and had often been sold for non payment of those taxes. Indians had signed documents conveying title to land without realizing what they had done. Total Indian landholdings had been cut from 138,000,000 acres in 1887 to 48,000,000 in 1934. Even these statistics are misleading because the portion of the allotted lands lost to the Indians were the most valuable portion. It has been estimated that more than 80% of the value of the lands held by the Indians in 1887 had been lost to them, and more than 85% of the land value of the allotted lands was gone. John Collier, Memorandum, Hearings on H.R. 7902 Before the House Committee on Indian Affairs. 73d Congress, 2d Sess. pp. 16-18 (1934).

Moreover the so-called "heirship" problem plagued most allotment parcels. Because allotment lands were restricted, and the Indians usually did not execute wills, these parcels descended to allottees heirs in increasingly small equities. Many parcels were owned by hundreds of heirs, causing overwhelming management problems, and little or no return to individual Indian owners.

The Indian Reorganization Act sought to remedy these ills. First, it stopped further allotments. Land already allotted would remain in that status, and could not proceed to fee patent. The Act prohibited transfer of Indian lands or shares in the assets of tribal corporations otherwise than to the tribe. It established a revolving fund from which the Secretary of Interior could make loans to chartered Tribal corporations under the Act for economic development.

The Act offered Indian tribes the option of organizing

under the Act, or of continuing traditional governments. It authorized two types of organizational structure. First, it authorized tribes to adopt constitutions, subject to the Secretary of Interior's approval, typically empowering the tribe to govern itself with a Council and Chairman, and authorized the tribe to employ counsel, with limited Secretarial approval.

Secondly, the Act authorized tribes to create federally chartered corporations for engaging in business transactions. The corporation, although wholly owned by the tribe, would be a separate entity and could sue and be sued.

A prime objective of the IRA was to eliminate the absolutist executive discretion exercised by the Secretary of Interior and the Office of Indian Affairs, and give Indians control of their own affairs. As interpreted by Commissioner Collier, the first Commissioner under the Act, it was designed to reduce the government's supervisory powers and ultimately change the government's role to a purely advisory and special service body (a goal still not realized because of the reluctance of various Secretaries of Interior to relinquish review powers under the IRA).

During the two year period within which tribes could accept or reject the IRA, 258 elections were held. In these elections, 181 tribes (129,750 Indians) accepted the Act and 77 tribes (86,365 Indians, including 45,000 Navajos) rejected it. The IRA also applies to 14 groups of Indians who did not hold elections to exclude themselves. Within 12 years, 161 constitutions and 131 corporate charters had been adopted pursuant to the IRA. The experience of these tribes has been as varied as the tribes themselves. . . . Comment: Tribal Self-government and the Indian Reorganization Act of 1934, 70 Mich. L. Rev. 955, 978 (1972). [Note: the impact of tribal acceptance or rejection of the IRA organizational option has been partially dissipated by the 1983 Amendments opening Sec. 5 to any tribe.]

While there has been widespread praise of the IRA for the self governing policy it represented, it has been sharply criticized because it placed pressure on tribes to abandon traditional forms of government and opt for a "constitutional" governments, usually consisting of a elected council and tribal chairman.

As enacted in 1934, the Indian Reorganization Act was not fully applicable to Alaska Natives. First, the 1934 IRA was primarily oriented to the reorganization of Indian tribes "residing on reservations," (25 USCA Sec. 476) and few Alaska Natives were located on reservations. House Report No. 2244, accompanying H.R. 9866, 74th Cong. 2d Sess. (May 26, 1936)). Second, Alaska Natives were inadvertently excluded from section 17, which provided for incorporation of business corporations and access to federal loan funds. 25 USC Secs. 470 and 477.

In the course of applying the 1934 Act to Alaska, the Bureau of Indian Affairs surveyed some 50 Alaska Native Villages to determine their forms of "tribal organization." The survey, albiet unscientific, showed that some tribes exercised substantial self government powers whereas others did little in this respect. The most common concern, however, was the lack of "legal authority" of Native governments to enforce ordinances and decisions.

In 1936 the Secretary of Interior proposed amendments to the Indian Reorganization Act to meet the typical village focus of Alaska Native self-government. The Alaska IRA amendments provided first that Alaska Native "groups . . . not heretofore recognized as bands or tribes" could reorganize themselves for governmental and business purposes based on "a common bond of occupation, or association, or residence within a well defined neighborhood, community or rural district. . . ." 49 Stat. 1250, 25 USCA Sec. 473a.

The House Report explaining this provision noted that it was necessary:

because of the peculiar nontribal organizations under which the Alaska Natives operate. They have no tribal organizations as that term is understood generally. Many groups which would otherwise be termed "tribes" live in villages which are the bases of their organizations. H. Rep. No. 2244 (supra).

[Parenthetically, the Indian Tribes living on Puget Sound at treaty time in 1855 lived in similar village situations, rather than as "tribes." It was Governor Stevens, the U.S. treaty negotiator, who out of necessity for having the treaties signed by someone - designated the treaty signers. Only much later, after reservations were established and the Indians had moved onto them, were the groups living on the reservations perceived, essentially by the NonIndians, as "tribes." Many western reservations are occupied by members of several distinct families, villages, tribes, and groups.]

The IRA also authorized (49 Stat. 1250) - until repealed in 1976 (90 Stat. 2743 at 2792) - the Secretary of Interior to create new Alaska Native reservations on lands "actually occupied" by Natives. Although only six IRA reservations were created under this provision, sixtynine villages were reorganized under federally approved constitutions as tribal governments or cooperatives. Most villages organized under new constitutions also adopted federally approved corporate charters to take advantage of the IRA loan provisions.

The 1936 Amendment to the Indian Reorganization Act caused Felix Cohen to say that "almost the last significant differences" between Alaska Natives and the Indians of the Lower 48 had been removed. Cohen, 1942, p. 406.

In Alaska, as in the Lower 48, many tribes and Villages have never adopted IRA constitutions. Some have chosen to adopt constitutions under inherent powers of sovereignty. Some

regulate their affairs on the basis of custom, without any written constitutions. Many of these groups nevertheless have been recognized as tribal governments by the federal government. Various states (Florida, Idaho, Maine, Montana, New York, South Dakota, and Wisconsin) have recognized tribal governments by delegating governmental functions to them. Alaska has also recognized the inherent political status of village tribal governments by enacting legislation entitling traditional and IRA "Native village governments" in unincorporated communities to annual grants. Lastly, the federal courts have recognized the self governing status of Alaska Native villages.

For almost 80 years the federal government has recognized Native self-government in Alaska focused at the village level. Most of the more than 200 villages in Alaska have a long history of self government under traditional councils or other traditional political institutions. In that respect they are not different from many recognized "tribes" elsewhere in the United States which were originally organized as village communities or small bands of a few families or clans. Even the subsequent adaption of traditional forms of government to changing circumstances has not destroyed tribal status. The applicability of the IRA to these villages confirms what has long been federal policy. Alaska Native villages are "tribes" in the political sense of that term and are similar in all significant respects to the tribes of the Lower 48 states.

Traditional and IRA forms of government compared

Section 476 of the IRA authorizes tribes and villages to organize and adopt written constitutions and bylaws. A Secretarially called election is essential. The Secretary has the power on behalf of the federal government to approve or disapprove tribal constitutions.

A tribe or village that organizes itself outside the IRA necessarily operates on the basis of inherent sovereignty. The federal government may "recognize" such a traditional government, and may choose to deal with it, however the Secretary has virtually unfettered discretion in deciding whether and to what extent to deal with Non-IRA tribes. Secretarial approval is not necessary to change the constitution or bylaws of a traditional government.

It should be recalled that one of the goals of the IRA was to limit the Secretary's discretion, which was nearly unrestrained prior to 1934. The IRA vested some of these powers back in the tribes, and placed statutory limits on others.

There are four advantages to organizing a tribal government under a constitution adopted pursuant to the IRA. First, it affords a congressionally approved method of electing a tribal constitution and once a tribe has so elected a constitution, the Secretary is prohibited from revoking it; only the tribe can revoke it through the same election process; second, with the exception of the choice of attorney and the fee charged, all other terms of tribal contracts with attorneys are not subject to the approval of the Secretary; third, the Secretary is prohibited from selling, encumbering, leasing or disposing of tribal lands and assets without first obtaining the consent of the tribe; and fourth, members of the Tribe are entitled to BIA employment preference, notwithstanding the BIA's definition of who is an "Indian" and thus entitled to BIA employment preference. Memo prepared by Yvonne T. Knight, Native American Rights Fund, Oct. 13, 1975.

In the current self determination climate Secretaries of Interior have generally dealt with Traditional and IRA tribes in about the same way, providing similar opportunities for each. If the policy climate should swing toward termination again, then the above guarantees against abuses of Secretarial discretion will once more become important. That discretion is largely unfettered with Traditional tribes and villages.

Under various statutes and programs, the Secretary is required to deal with "tribal officers." The Secretary may decline to deal with officers of either IRA or Traditional tribes if they are elected in violation of tribal constitution or laws, or in violation of the Indian Civil Rights Act. If illegally elected, they may not be "officers."

Many IRA constitutions, especially those adopted early-on,

provided for Secretarial review of virtually all major tribal decisions. In recent years the Secretary has sometimes approved Constitutional amendments eliminating federal review except where trust property or NonIndians rights are involved.

10. THE TERMINATION ERA 1950-1960

As early as 1940 Congressional opposition was forming against the self determination policies of the Indian Reorganization Act. A report on Hearings on S. 2103 Before the Committee on Indian Affairs, H.R. 76th Cong., 3d Sess. (1949) said:

Fundamentally the so-called Wheeler-Howard Act attempts to set up a state or a nation within a nation which is contrary to the intents and purposes of the American Republic.

During the 1940s the Second World War distracted the Nation's attention from Indian affairs. However in 1949 the Hoover Commission appointed to review executive branch reorganization and chaired by former President Herbert Hoover, issued a report on Indian affairs calling for "complete integration" of Indians "into the mass of the population as full, tax-paying citizens." (see Commission on Organization of the Executive Branch of the Government, Indian Affairs: A Report to Congress (1949)).

House Concurrent Resolution 108 1953

By the time Eisenhower and a new Congress took office the mood of the nation had swung firmly toward termination. In 1953 Congress passed House Concurrent Resolution 108 declaring it to be the

"sense of Congress that, at the earliest possible time, all of the Indian tribes. . . should be freed from Federal supervision and control and from all disabilities and limitations specifically applicable to Indians. It is further declared to be the sense of Congress that the Secretary of the Interior should examine all existing legislation dealing with . . . Indians, and treaties between the Government of the United States and each such tribe, and report to Congress at the earliest practicable date, but not later than January 1, 1954, his recommendations for such legislation as, in his judgment, may be necessary to accomplish the purposes of this legislation.

The resolution passed both Houses without opposition. In fact, few members of Congress showed any interest in it, or in Indians. Arthur V. Watkins, Chairman of the Indian Affairs subcommittee from which the Resolution emanated, was a 66 year old Utah Senator, a deeply religious man, and a member of the Old Guard conservative bloc. He firmly believed that the wardship status of the Indians should be ended as rapidly as possible so "These people shall be free." While Indian testimony was overwhelmingly opposed to termination, Congress

avored it, and numerous termination bills became law.

Some 109 tribes and bands were terminated, involving about 1,362,155 acres of land, and 11,500 individual Indians. The total amount of Indian trust land was diminished by about 3.2%. Two tribes with large landholdings were disestablished, the Menominee in Wisconsin and the Klamath in Oregon.

Termination produced fundamental changes in land ownership patterns. As described by Wilkinson and Biggs:

For most of the smaller tribes, all land was simply appraised and sold to the highest bidder, with the proceeds going to the tribe. For the Klamaths, members were given a choice between immediate payment and participation in a private trust. Most Klamaths chose immediate sale and 600,000 acres were sold in 1961. Most of the remaining private trust land has also now [1977] been sold. For the mixed-blood Utes and the Menominee, state corporations were established. The Ute land has now been sold. The Menominee land is now back in trust, as a result of the tribe's restoration in 1973, but 9,500 acres were sold in the 1960s to pay corporate bills. Wilkinson & Biggs, The Evolution of the Termination Policy, 5 American Ind. L. Rev. 139 (1977).

Termination had other impacts. The trust relationship was ended. The federal government no longer held land or other assets in trust for the tribes. State legislative jurisdiction was imposed on reservations. State judicial authority was imposed for both civil and criminal matters. Tribal court jurisdiction was wiped out. All state tax exemptions were ended. All special federal programs to tribes were discontinued, including training, housing, recreation, and business grants and contracts. All special federal programs to individuals were discontinued, including health, education, and welfare assistance. And tribal sovereignty was effectively ended for the terminated tribes.

The terminated tribes did not find themselves awash in freedom, equality, or economic opportunity. In fact, termination worsened their lot, and in some cases proved disastrous. House Report No. 604, 93d Congress, 1st Sess. 4 (1973).

The Menominee termination (1954) and restoration (1973)

The Menominee case is especially interesting in light of its potential relevance to Alaska. According to H.R. Rep. No. 604, 93d Congress, 1st Sess. 4 (1973) the termination plan "brought the Menominee people to the brink of economic, social and cultural disaster." The sawmill operation, which had supported the tribe and most Federal services prior to termination, became only marginally successful. Menominee Enterprises, Inc., the corporation created by termination

legislation, was saddled with a huge corporate debt, a difficult management scheme, and high county and state taxation, and went to the verge of bankruptcy. Land had to be sold to pay interest on bonds, and tax obligations. Only shortly before 1973 were the Menominee people able to gain some measure of control of their own affairs from a corporate structure dominated and controlled by Non-Menominee persons.

In 1973 Congress reestablished the Menominee Tribe. This restoration, and its impact, is described by Getches, Rosenfelt and Wilkinson, FEDERAL INDIAN LAW (West Pub. Co. 1979) p. 103-104:

The tribe in 1954 was effectively run by the BIA. There was a tribal General Council, but it was only advisory to the BIA. An "advisory committee" of tribal members was established to make minor decisions and to provide advice to the BIA when the General Council was not in session. BIA employees administered all federal programs.

After termination, the tribe's land holding of some 234,000 acres was owned by Menominee Enterprises, Inc., a Wisconsin corporation. MEI was the business arm of the Tribe. Because full jurisdiction had been transferred to the State of Wisconsin, there was no tribal political entity during the years of termination.

MEI, the dominant Menominee entity during termination, was organized as follows. Shares were not held or voted by individual Menominee but rather by a Voting Trust. Individuals held only "certificates" representing shares, not actual shares. The Voting Trust originally had seven members, four of whom were Menominee, but five votes were required for valid action by the Voting Trust. The only real power of individual Menominee in corporate business was the right to vote for Voting Trustees in annual elections. Even that limited right was diluted because all voting rights of "incompetents" (as determined by the BIA at termination) and minors were exercised by the "Menominee Assistance Trust" (MAT). The MAT was administered by the First Wisconsin Trust in Milwaukee. At termination, 48% of all Menominee were in the MAT, although that percentage decreased as minors became of voting age. During the first five years after termination the bloc vote of the First Wisconsin Trust ranged from 80% of the total vote in 1961 to 93% in 1966.

Thus MEI, the "tribal" corporation, was run by a Voting Trust which was in turn effectively accountable to the First Wisconsin Trust. At one point, the Voting Trust sold 9500 acres of prime tribal land, a transaction bitterly opposed by the great majority of tribal members.

The certificates representing shares never became transferrable, but only because Wisconsin passed laws

every two years making them non-transferrable. The possibility continually existed that the ultimate equitable interests in MEI (which owned all tribal land) would go on the open market. As it was, some 3% of all certificates passed to non-Indians by inheritance between 1961 and 1973.

Now that the tribe has been restored, the federal-tribal relationship has been reinstated. Tribal and federal jurisdiction have been re-established, and the tribe and its members are again eligible for federal services. A new constitution has been adopted. A tribal legislature, tribal business enterprise, and tribal court all are or soon will be in full operation. Today the BIA remains an important force on the reservation, but its role is much more limited: under a "trust agreement" negotiated by the tribe with the BIA, most decisions are made by the tribe. Most BIA services are delivered by the tribe under contract with the BIA or HEW.

Except for lands that had been sold by MEI, all tribal lands were returned to their former trust status, and are again owned by the United States in trust for the tribe. The Secretary of Interior has given official "recognition" to the restored Menominee Tribe.

Public Law 280 1953

Another important termination era law was P. L. 280 (PL 280) 18 USCA Sec. 1162, 28 USCA 1360, 25 USCA 1321, et seq., enacted in 1953. This was the first general federal law extending state criminal and civil jurisdiction into Indian Country. The Act automatically transferred to five states, (California, Minnesota (except the Redlake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin) civil and criminal jurisdiction over reservation Indians. The law offered all other states the option of assuming jurisdiction over Indian Country even without the consent of the Indians.

For several years after enactment it was erroneously assumed that PL 280 authorized exclusive state criminal and civil jurisdiction over Indians for all purposes. The current view is that the tribes retain concurrent jurisdiction. Moreover the courts have ruled that tribes retain exclusive jurisdiction over civil regulatory matters such as taxing and zoning. The Alaska Supreme Court has denied state jurisdiction under PL 280 over restricted Alaska Native lands, such as allotments, except where federal law, such as ANCSA, specifically permits it. *Calista Corporation v. DeYoung*, 562 P.2d 338 (AK 1977), and *Calista Corp. v. Mann*, 564 P.2d 53 (AK 1977). Such questions are left in the jurisdiction of the federal and tribal courts.

The "optional" PL 280 states in the Lower 48 took a variety of actions to implement the law. Some states, such as

Arizona, Iowa, Idaho, and Washington, extended jurisdiction over Indian Country for certain purposes without considering Indian consent. (See, for example, Revised Code of Washington 37.12.010). Other, such as Nevada, Idaho, Montana, North Dakota, South Dakota, and also Washington, offered to assume either all, or certain aspects of jurisdiction over Indian country if the tribes agreed. Many states took no action at all.

PL 280 in Alaska 1958

In 1958 Congress extended PL 280 to all Indian country in Alaska, P.L. 85-615, 72 Stat. 545, 18 USC 1162, 28 USC 1360. This extended state court jurisdiction over the adjudication of civil and criminal matters involving Natives and Indian country. This legislation probably left tribal (village) jurisdiction intact, making it concurrent with the jurisdiction of the Alaska state courts, although no court decision has directly addressed this question. A specific provision of PL 280 requires state courts to adjudicate civil disputes between Natives according to the customs and ordinances of the tribe, so long as those are "not inconsistent" with state law, 28 USCA Sec. 1360. In 1970, the Metlakatla Reservation was exempted from the criminal jurisdiction provisions of the Act, and specifically afforded concurrent jurisdiction with the state over misdemeanors. P.L. 91-523 (1970), 84 Stat. 1358, 18 USCA Sec. 1162.

11. THE SELF DETERMINATION ERA 1960-1984

Indian opposition to termination was persistent. By 1958 the Interior Secretary was convinced that termination of any tribe should not occur without the tribe's consent. President Kennedy began to make statements contrary to the termination policy. In the early 1960s Secretary of Interior Udall pronounced that House Concurrent Resolution 108 had "died with the 83d Congress". A. Debo, A HISTORY OF INDIANS OF THE UNITED STATES 405 (1970). President Johnson further encouraged the swing away from termination.

The decade of the 1960s was marked for its lack of major legislation on Indian affairs, with the exception of two acts, the Indian Civil Rights Act, Pub. L. 90-284, 82 Stat. 77, 25 USC Sec. 1301 et seq. and the Act of October, 10, 1966, Pub. L. 89-635, Sec. 1, 80 Stat. 880, 28 USC Sec. 1362, both described below. The Indian community, Congress, and the executive, had become increasingly disenchanted with the termination policy. Attitudes, as well as administrative policies were changing, but the new direction had not coalesced.

In 1966 Congress enacted a law (28 USC Sec. 1362) authorizing Indian Tribes to file suit in federal district court without reference to the amount in controversy for cases arising under the Constitution, law, and treaties. Congress thus placed on a firm footing the right of Indian Tribes to sue in federal court to protect their land, hunting and fishing rights, and other claims that previously had been overlooked or inadequately protected by federal officials. This statute was the basis for widespread litigation by the tribes in the 1970s for the protection of Indian rights.

The Indian Civil Rights Act 1968

In 1968 Congress enacted the Indian Civil Rights Act. 25 USC Sec. 1301 et seq. In some respects this Act reflects the new policy direction toward self determination. It amended PL 280 to require tribal consent for all future state acquisitions of jurisdiction over Indian Country. It also provided, for the first time, for retrocession of state jurisdiction under PL 280 if the United States and the State agreed to such action. However, the Act also intruded on tribal sovereignty by requiring Tribal governments to adhere to most of the federal constitution's Bill of the Rights principles.

It will be recalled that Talton v. Mayes 163 U.S. 376 (1896), had held that Indian Tribes were not arms of the federal government and were not constrained by the Bill of Rights of the federal constitution. Not being states, they were not constrained by the 14th Amendment. In the mid 1960s the Senate Judiciary Committee, under Chairman Sam Ervin, became concerned that tribal governments were not providing "due process" and other rights to persons they dealt with. The Committee held hearings on, and then reported favorably on the

Indian Civil Rights Act, which subsequently became law.

The ICRA requires all tribes, in exercising powers of self-government, to observe most of the principles in the Bill of Rights of the federal Constitution. The Act guarantees due process, equal protection, the right against self incrimination, freedom of religious expression, speech, press, and association, and freedom from unreasonable searches and seizures. It requires tribal courts to allow defendants to have counsel of their own choice, although at their own expense. The Act does not include an "establishment" clause, thus tribes are still allowed to use tribal funds to support tribal religions.

The ICRA limits the punishment that can be imposed by tribal courts to not more than six months or \$500, or both, for each offense.

For 10 years after enactment, lower federal courts construed the ICRA as impliedly authorizing federal court review of tribal court actions found to inconsistent with the Act. In 1978 the Supreme Court decided Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), reversing these lower federal court decisions and ruling that habeas corpus is the only grounds of appeal to the federal courts; that remedy is available only where the complainant is in jail or physically constrained. In all other cases the tribal court, although "bound" by the ICRA, is the "court of last resort."

Nixon's Message to Congress 1970

During the late 1960s federal Indian policy continued to turn toward self-determination. While earlier Presidents had gradually moved in this direction, it was left to President Nixon to provide the self determination blueprint for Indian policy for the next decade.

Richard Nixon's Message to Congress for 1970, H.R. Doc. No. 363, 91st Cong., 2d Sess (1970) constitutes one of the more powerful statements on Indian affairs issued by any President.

The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions. . . .

This policy of forced termination is wrong, in my judgment. . . .

This . . . must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal

control without being cut off from Federal concern and Federal support. . . .

Because termination is morally and legally unacceptable, because it produces bad practical results, and because the mere threat of termination tends to discourage greater self-sufficiency among Indian groups, I am asking the Congress to pass a new Concurrent Resolution which would expressly renounce, repudiate and repeal the termination policy as expressed in House Concurrent Resolution 108 of the 83rd Congress. . . .

President Nixon then outlined his recommendations for legislation to carry out the new self-determination policy.

In the years since 1970 all Presidents have continued to support the policy of self-determination. Many laws have been enacted to implement this policy.

The Menominee Tribe was reconstituted in 1973 (as described above) Pub. L. no. 93-197, 87 Stat. 770, 25 USC Sec. 903 et seq. The Siletz Tribe, in western Oregon, was restored in 1977. Pub. L. No. 95-195, 91 Stat. 1415, 25 USC Sec. 711 et seq.

The Alaska Native Claims Settlement Act 1971

The terms of this Act have been thoroughly covered in other papers presented to this Commission and not be repeated here. A few comments about the impact of the Act on Native governance are nonetheless appropriate.

It was initially assumed that the Alaska Native Claims Settlement Act extinguished every aspect of special Native American status in Alaska. While that assumption is probably accurate as to aboriginal hunting, fishing, and land rights, it is not correct as to native rights of self government. ANCSA is explicit about the former, but silent about the latter. Under usual principles of statutory construction in the field of federal Indian law, termination of tribal self government occurs only when Congressional intent to accomplish such a result is explicit, or at least clear and unambiguous. No such Congressional intent is expressed in ANCSA.

ANCSA nevertheless casts doubt on the practical exercise of self government. The unique feature of ANCSA as compared to other aboriginal settlements, is that it severed Native land ownership from Native government. The Act conveyed title to the land in fee simple to 12 regional and more than 200 village corporations chartered under the laws of Alaska. Neither the traditional nor the IRA Native governments received title to the land.

A persuasive argument can be made that the traditional and IRA Native governments still exercise governmental power over this land base because they exercised it prior to ANCSA and the Act did not clearly destroy the power. No court has directly addressed the question. Novel issues are posed by the fact

that the villages owning the land are chartered under state law, suggesting that some of the incidents of title may be controlled by state law. Nonetheless the governmental control of the land may still retained in the traditional and IRA village governments.

The Indian Self-Determination and Education Assistance Act 1975

In 1975 Congress enacted the Indian Self-Determination and Education Assistance Act. Pub. L. 93-638, 88 Stat. 2203, 25 USC Sec. 450 etc. This Act, along with the Indian Education Act of 1972, Pub. L. 91-318, title IV, 86 Stat. 339, 20 USC Sec. 3385, was increased Indian political control over federal programs of assistance for Indian education to public school systems. The 1975 Act was aimed at the broader goal of strengthening tribal government by providing tribes with control over federally funded programs. Tribes were given power to contract with the Secretary of Interior, and the Secretary of Health and Human Services, for the creation and implementation of federally funded Indian programs.

The Indian Child Welfare Act 1978

The Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069, 25 USC Sec. 1901 et seq., explicitly rejected assimilation, and sought to assure that Indian culture and values would be handed down to the oncoming generations of Indian children. Congress "assumed responsibility for the protection and preservation of Indian tribes and their resources," saying that Indian children are the most vital Indian resource, and that state child custody policies had "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families," and had broken up "an alarmingly high percentage of Indian families." 25 USC Sec. 1901).

The Act provided tribal courts with broad jurisdiction over Indian children residing or domiciled on the reservation (even though temporarily found off the reservation.) State courts asserting jurisdiction over Indian children must presumptively favor the child's parents, or secondly other members of the child's tribe, or thirdly other Indian families. State courts are required to give "full faith and credit" to Tribal court custody proceedings.

Other legislation

Another law aimed at protecting Indian cultural and religious practices was the 1978 American Indian Religious Freedom Act. Pub. L. No. 95-341, 92 Stat. 469, 42 USCA Sec. 1996. It provides:

[I]t shall be the policy of the United States to protect

and preserve for American Indians their inherent rights of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites.

This law also required the President to survey all federal executive departments and agencies to evaluate in consultation with Indian religious leaders changes needed to implement the Act's policies, and report back to Congress within a year with recommendations.

Additional legislation in the 1970s strengthened and reorganized a federal revolving loan fund for Indian economic development and provided federal loan guarantees for private sector loans to support such development (25 USC Sec. 1451 et seq.). Other legislation was designed to improve Indian Health care services (15 USC Sec. 1601, et seq.) and to establish and fund tribally controlled community colleges (25 USC Sec. 1801 et. seq.).

The American Indian Policy Review Commission

In 1975 Congress established the American Indian Policy Review Commission (25 USC Sec. 174), composed of three Senators, three Representatives, and five Indians. The Commission delivered its final report to Congress in 1975. (American Indian Policy Review Commission, Final Report (1977)). The Report generally recommended a continuation of the federal policy of protecting and strengthening tribal governments as permanent governmental units in society. Assimilation should be rejected unless requested by the affected Indians. Congress should increase the financial resources available for tribal economic development. Basic legal doctrines on tribal sovereignty and the trust relationship should be reaffirmed and strengthened. And terminated and non-federally recognized tribes should be eligible for federal recognition and federal services.

The Report was signed by 10 member of the Commission. Congressman Lloyd Meeds of Washington State dissented, arguing for broader state jurisdiction in Indian Country and more limited tribal jurisdiction especially where NonIndian's are involved.

The Report of the Commission generated critical support in Congress' consideration of the Indian Child Welfare Act and the Indian Religious Freedom Act, both passed in 1978.

The Maine Land Claims settlement

In the late 1960s and early 1970s the Passamaquoddy, Penobscot, Oneida, and other tribes in the Northeastern U.S. brought suits to establish title to large tracts of land taken

from them by 200 year old agreements with state governments. In 1790 Congress enacted the Trade and Intercourse Act providing that agreements between states and Indian tribes are not valid unless approved by Congress. Later Massachusetts entered an agreement with the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians (called Passamaquoddy claim here) acquiring about 60% of the present state of Maine. The agreement was never ratified by Congress.

The Passamaquoddy claim posed a sufficient threat that in 1980, after extensive maneuvering and negotiation, Congress passed the Maine Indian Claims Settlement Act (25 USCA Secs. 1721-1735). The Act ratified an agreement between the state and the three tribes. The legislation confirmed the original, 1790s agreement between the tribes and Massachusetts. Congress appropriated \$81.5 million to be used for the benefit of the tribes, about 54 million to buy 305,000 acres of land and the balance to be held in trust and invested by the United States, with income paid to the tribes. The tribes became eligible for federal services. The Act also included detailed provisions concerning state and tribal jurisdiction on tribal land.

The tribes and their members are subject to the civil and criminal jurisdiction of Maine, except as follows: The tribes have exclusive jurisdiction over criminal offenses involving tribal members on tribal land when the potential punishment does not exceed six months and/or \$500. The definition of the offense and the applicable punishment is governed by state law. The tribes can, if they choose, assert civil jurisdiction over domestic relations affecting only tribal members, including marriage, divorce, and child custody (under the Indian Child Welfare Act). The tribes can assert exclusive civil jurisdiction over small claims between tribal members. The state cannot pass laws regulating tribal membership, tribal elections, residence within tribal territories, or the functions and organization of tribal governments. The tribes have exclusive jurisdiction over hunting and fishing in parts of the proposed territory, however the state has exclusive jurisdiction over violations of tribal ordinances by Nontribal members. Tribal hunting and fishing ordinances can be declared invalid by the state under certain circumstances. The tribes are immune from suit but only when acting in their governmental capacity. All Indian lands and personal property not used for "governmental purposes" are subject to state taxation.

12. COURT DECISIONS IN THE SELF-DETERMINATION ERA

The twentyfour years since 1960 may have seen as much litigation in the field of Indian law as the prior 180 years. The 1966 Act authorizing Indian tribes to sue on their own behalf contributed to this activity. Even more important was the discovery by Indians and Indian tribes of the private legal profession and the role that lawyers play in dispute resolution in this country. Indians no longer rely exclusively on the services of government attorneys. They increasingly seek-out private counsel either instead of, or in addition, to government counsel. Tribes have developed considerable skill in managing the services of these counsel.

Prior to 1960 only a handful of attorneys knew much about the unique principles and doctrines of the Indian Law field. Most of these attorneys handled specialized cases before the Indian Claims Commission rather than the general representation of Indians and Indian Tribes. In response to Indian demand for better legal representation during the self determination era many lawyers now have become expert in this specialized field. The caliber of legal representation of Indians and Indian tribes has increased markedly.

Only a few landmark decisions of the self-determination era will be discussed here. These are selected to portray the trends of the decisions rendered in this period.

The rules of construction of treaties and statutes

The Supreme Court, and Congress, have often said that the United States owes a special "trust" responsibility towards Indians and Indian tribes. As we saw in Lone Wolf v. Hitchcock (1903), Congress itself was held to be the final arbiter of the meaning of the trust and Courts have not, at least until very recently, reviewed legislation under "trust" criteria. (Two recent cases, Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977), and U.S. v. Sioux Nation of Indians, 448 U.S. 371 (1980), indicate the Court may now review legislation under "trust" criteria, however the special facts of those cases argue that the review is still very limited.) Courts have, however, created a "rule of construction" to protect Indian lands, governmental powers, and sovereignty. Legislation will not diminish Indian rights unless Congressional intent is clear and unequivocal. Doubtful or ambiguous provisions in treaties or statutes are construed in favor of the Indians. The rules of construction for statutes and treaties are articulated somewhat differently.

Construing treaties: Washington v. Washington Commercial Passenger Fishing Vessel Association 1979

A leading case on treaty interpretation is Washington v. Washington State Commercial Passenger Fishing Vessel

Association, 448 U.S. 658 (1979), where the Court awarded Pacific Northwest Tribes the right, under 1855 treaties, to harvest up to 50% of the harvestable fish in treaty waters - nearly all salmon fishing waters in Oregon and Washington. Construing the treaties the Court said:

A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations. When the signatory nations have not been at war and neither is the vanquished, it is reasonable to assume that they negotiated as equals at arms length. There is no reason to doubt that this assumption applies to the treaty at issue here. . . .

[This Court] has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. The treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

Construing statutes: Menominee Tribe of Indians v. United States

A leading case construing a federal statute on Indian sovereignty is Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968). The question was whether the Menominee Termination Act of 1954, which became effective in 1961, terminated the Tribe's hunting and fishing rights and subjected those rights to state control. The state argued the Act was all-encompassing, and that Congress intended complete termination of the tribe's political existence and all treaty rights. The Supreme Court rejected this view, holding the Tribe's hunting and fishing rights survived termination because not explicitly mentioned in the Termination Act, saying:

We decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians. . . . While the power to abrogate those rights exists. . . the intention to abrogate or modify a treaty is not to be lightly imputed to Congress.

The Supreme Court also applied this rule of construction in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), holding that the sole ground for appeal from tribal to federal court under the Indian Civil Rights Act is habeas corpus because that is the only remedy expressly provided in the Act. The Court declined to find any implied appellate review remedies, saying that a "sovereign" tribe is protected from federal court suits by "sovereign immunity" unless Congress clearly provides otherwise. No clear or express waiver of this immunity was

included in the ICRA.

. . . a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.

. . . Although Congress clearly has power to authorize civil actions against tribal officers, and has done so with respect to habeas corpuse relief in Sec. 1303, a proper respect for both tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.

The Supreme Court applied similar rules of statutory construction in Bryan v. Itasca County, 426 U.S. 373 (1976), holding that PL 280, did not empower states to impose state taxes on reservation Indians. Bryan also approved a 9th Circuit decision, Santa Rosa Band of Indians v. Kings County, 532 F. 2d 655 (9th Cir. 1975) barring states from applying general regulatory laws, or local zoning ordinances, to Indian Country under PL 280. (Whether these limitations on P.L. 280 apply to any Native-owned lands in Alaska is an open question because - except for the Metlakatla Reservation - Alaska Native-owned lands are not on "reservations.")

Disestablishment of reservations was the subject of several important decisions in the 1960s and 1970s. In Seymour v. Superintendent, 368 U.S. 351 (1962), the Court held the Colville Reservation was not disestablished merely because of the existence of checkerboarded NonIndian ownerships, produced by the Allotment Act process. Nor did the existence of a state-incorporated town on the Reservation result in disestablishment. Other cases such as De Coteau v. District County Court, 420 U.S. 425 (1975), and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), while pronouncing the same rules of construction favoring Indians, came to a contrary result, i.e., the reservations were held to be disestablished.

Oliphant v. Suquamish Indian Tribe 1978

The Oliphant case, 435 U.S. 191 (1978), "flies in the face" of the rule that Tribal sovereignty can only be diminished by clear and unequivocal federal legislation. Justice Marshall, in Worcester v. Georgia, had said that Tribal sovereignty was limited in two "common law" ways; Tribes could not engage in treaties with foreign powers, nor could they transfer title to lands without federal approval. Otherwise tribal sovereignty seemed unimpaired.

In Oliphant the Court added a new "common law" limitation on tribal sovereignty, ruling that tribal courts have no power to try NonIndians for crimes under tribal codes. No federal statute has ever spoken on this issue. The Court said, however, that Indian Tribes were "inherently limited" in this respect, and that it would be "inconsistent with their status"

as Indian Tribes within the United States to allow Tribes to try NonIndians for crimes under tribal codes. (While this language seemed to forecast a general retreat by the Court from recognition of Indian tribal sovereignty, a different stance was taken only two weeks later, in United States v. Wheeler, 435 U.S. 313 (1978) where the Court discussed sovereignty in more favorable terms, referring to it as "inherent powers of limited sovereignty," and as "primeaval sovereignty," "which tribes still possess [unless] withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.)

Montana v. United States 1981

The general trend of Supreme Court decisions in recent years has been toward allowing state jurisdiction in Indian Country where NonIndians are primarily involved and denying that jurisdiction where primarily Indians are involved. The greater the Indians interest and the lesser the NonIndian interests, the more likely state jurisdiction will apply. The benchmark case is the 1981 decision in Montana v. United States, 450 U.S. 544 (1981). The 1832 case of Worcester v. Georgia (and more recent cases such as McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973)), held that "recognition" of a tribe by the federal government caused general preemption of state law. Montana changed this rule and mandates a more flexible test to determine when state civil jurisdiction applies.

The issue in Montana was, can an Indian tribe regulate NonIndian hunting and fishing on fee patent land on the reservation. The Court held that while the tribe could regulate NonIndian hunting and fishing on Tribal Trust, and allotted land, it could not do so on fee land. The Court articulated new criteria for determining when state jurisdiction applies.

Thus in addition to the power to punish tribal offenders the Indian Tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members and to prescribe rules of inheritance for members.

But exercise of tribal power beyond what is necessary to protect tribal self government or to control internal relations is inconsistent with the dependent status of the tribes and so cannot survive without express congressional delegation.

Since regulation of hunting and fishing by nonmembers on fee land bears no clear relationship to tribal self government or internal relations the tribe cannot so regulate. [The Court found the Crow Indians had not traditionally relied on fishing for livelihood]

But, the tribes still retain some civil jurisdiction over NonIndians, such as over consensual relations (commercial dealings, contracts, leases, etc.) through taxation, licensing and other means.

Also the tribe retains inherent authority over NonIndians when their conduct threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe. None of these were alleged here.

Most lower court cases since Montana have relied on the last paragraph above (the tribe has jurisdiction over NonIndians when their conduct "threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe") and have upheld tribal regulatory jurisdiction over NonIndians for zoning and health regulations, Knight v. Shoshone Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982); Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982), and tribal judicial jurisdiction for civil trials between Indians and NonIndians, Babbitt Fort, Inc. v. Navajo Tribe, 710 F.2d 587 (9th Cir. 1983); National Farmers Union Ins. Co. v. Crow Tribe, 736 F.2d 1320 (9th Cir. 1984).

Other cases have reflected the trend demonstrated in the actual holding in Montana, i.e., that state law applies in Indian Country when the NonIndian interest is high and the Indian interest is low. In United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984) the Court upheld state regulation of NonIndian water use on a reservation where the waters were "surplus" to Indian needs, and the source river started above the reservation and continued flowing below it. In Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980), the Supreme Court upheld state sales taxes and cigarette taxes on sales by Indians to NonIndians in Indian Country, even on trust land, where the incidence of the tax fell on the NonIndian purchaser. The Court said such taxes were not valid if the sales were to an Indian.

Indian preemption

Consistent with the judicial trend toward "balancing" the facts in each case and weighing Indian and NonIndian interests, the Supreme Court has moved toward "preemption" to decide whether state law applies on reservations. The Court analyzes relevant federal legislation to determine if it is so comprehensive as to leave "no room" for state regulation. In Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685 (1965), the Court struck down a 2% gross sales tax on sales to a reservation Indian by a federally licensed trader because federal legislation and regulations preempted State law. In White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) the Court held that Arizona motor carrier license and use fuel

taxes imposed on a NonIndian logging company doing business on the reservation were preempted by a comprehensive scheme of federal regulation of reservation logging. The Court also applied the infringement test of Williams v. Lee, saying that both tests must be met before state law could apply on a reservation. In Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832 (1982), the Court held that a federal program to aid construction of schools on the reservation preempted a New Mexico gross receipts tax on a NonIndian construction company building schools for the Navajo School Board. In Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160 (1980), the Court held that an Arizona transactions privilege tax was preempted by a comprehensive federal regulatory program for traders on the reservation.

The major issue in these cases was whether Congress "intended" to preempt the state taxes or regulation. If no such intent is found, the state tax is proper. Thus the 10th Circuit Court, in Mescalero Apache Tribe v. O'Cheskey, 625 F. 2d 967 (10th Cir. 1980) upheld a state gross receipts tax on a NonIndian contractor because no Congressional intent to preempt could be found.

A tribe cannot itself preempt a state tax, either by imposing tribal taxes, or by any other means, unless Congressional authorization for such delegated preemption can be found. Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980).

Tribal taxation of NonIndians

The Supreme Court has recently affirmed that Indian Tribes can tax both Indians and NonIndians doing business on the Reservation. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980). Tribal power to tax nonIndians exists even though the NonIndian business is conducted on fee land. Snow v. Quinault Indian Nation, 709 F.2d 1319 (9th Cir. 1983). Cert. denied, 81 L. Ed. 2d 362 (1984).

13. THE INDIAN COURT SYSTEM

The Indian court system has been significantly enhanced in the self determination era, primarily following enactment of the Indian Civil Rights Act in 1968.

A recent BIA report shows there are 117 Tribal Courts in the nation, including several "regional" courts representing several tribes, and 23 Code of Federal Regulations (CFR) courts. Approximately 270 judges operate these courts. CFR Court judges are appointed by the BIA. Tribal Court judges are elected by the tribal members or by tribal councils.

Until the late 19th century Indian reservations were controlled by the military. Indian agents summarily sentenced those they believed guilty. In 1883 The Commissioner of Indian Affairs authorized creation of Courts of Indian Offenses to operate under rules and procedures created by the Bureau of Indian Affairs. By 1890 most of the judges of these CFR courts, and the police who enforced the laws, were handpicked Indians. This system gradually supplanted military control on the reservations. Although these early CFR courts were designed to encourage assimilation (by prohibiting Indian dances and other customs thought to be offensive to NonIndians) as well as provide law and order on the reservations, their principal impact was in maintaining order and regulating the conduct of avaricious NonIndians trespassing on reservation lands. See INDIAN COURTS AND THE FUTURE, Pub. by National American Indian Court Judges Association (1978).

During the first part of the 20th century, CFR Courts waned in importance and were little more than tools of the Indian agents who had to approve all court decisions. The New Deal era and the Indian Reorganization Act of 1934 brought the first thoughtful consideration of Indian self-government, including courts. Under the IRA, tribes drafted their own constitutions and established their own tribal codes and courts. Many of these first codes were modeled closely on the BIA code, and were simple misdemeanor laws.

Courts created by tribal constitutions or codes (instead of by BIA rules) became known as "tribal courts". As described in the 1978 study "INDIAN COURTS AND THE FUTURE"

A clear trend since the IRA has been for tribes to develop codes and thereby convert from Courts of Indian Offenses or "CFR courts" as they are commonly known (rules concerning them are found in 25 CFR pt. 11) to tribal courts which operate under the residual sovereignty of the tribes, rather than as agencies of the federal government. . . . Very few tribes -- principally the New Mexico Pueblos -- retain judicial systems based upon Indian Custom.

The brief period of tribal court enhancement in the 1930s could not go far because little money was budgeted for Indian courts. During the termination era of the 1940s and 1950s,

predictably, no financial support for improvement of tribal courts was forthcoming. In the mid-1960s federal policy turned again toward self-determination, and in 1968 Congress enacted the Indian Civil Rights Act. While this Act imposed federal "Bill of Rights" concepts on Indian tribes, it nonetheless caused significant enhancement of tribal courts. The ICRA provision for habeas corpus review of tribal courts created a specter of review of Indian Court procedures by the exacting standards of the well-developed Anglo legal system. This fear, along with substantial increases in federal budget appropriations for Indian judges training and tribal court operation, enabled Indian Courts to flourish more than ever before.

In 1970 the National American Indian Court Judges Association initiated a training program for Indian Court Judges, mostly nonlawyers. In 1981 NAICJA combined with the American Indian Lawyer Training Program to create the National Indian Justice Center. This Center offers approximately 80 days of training a year for Indian Court judges (both CFR and Tribal court judges), as compared to about one day per year prior to 1968.

Prior to the 1970s criminal cases constituted most of the caseload of tribal courts. Recent statistics show that numerous civil cases are now coming before these courts. The training of tribal court judges now includes civil law subjects.

Tribal courts have general criminal jurisdiction over Indians, with punishment limited to \$500 and six months per offense. Under Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), tribal courts have no criminal jurisdiction over NonIndians. Federal regulations deny CFR courts criminal jurisdiction over NonIndians.

No general federal law limits tribal jurisdiction in civil cases similar to the above limitation on criminal penalties. Under recognized principles of sovereignty, tribal courts have broad civil jurisdiction over both Indians and NonIndians (discussed elsewhere herein).

Nearly all tribal codes contain provisions for appeals to tribal appellate courts, however, relatively few appeals are actually taken. No appeals to federal or state courts are possible from tribal courts, except for habeas corpus under the ICRA.

Tribal Codes

Some tribal legal codes are simple criminal codes covering minor crimes, and patterned after the model BIA criminal code of the 1940s. Increasingly, however, in recent years tribes have adopted extensive codes, comparable to the municipal codes in smaller cities. These codes cover building construction rules, health protection, water management, game management, zoning, juvenile laws, family laws, and probate. See INDIAN TRIBAL CODES, Ralph W. Johnson, editor (1981), Pub. by Marion

Gould Gallagher Law Library, School of Law, University of Washington.

14. SUMMARY OF SELF GOVERNING STATUS OF INDIAN TRIBES IN LOWER 48

Reservation Indian tribes retain substantial elements of their original sovereign, self governing powers. In general, they have full powers of self government, unimpaired by federal or state law, except as described below. Indian tribes cannot engage in foreign relations, cannot sell their land without the consent of the United States, and cannot try NonIndians for crimes against their tribal codes.

Congress has broad powers under the Indian Commerce Clause of the federal constitution to enact laws applicable to tribal Indians and Indian Country. These laws do not contravene the equal protection clause of the federal constitution because they depend upon a classification of Indians as members of political groups (tribes), rather than as members of a single racial class.

Many federal laws have been enacted that are applicable to individual Indian tribes. In some cases tribes have been entirely disestablished. Laws of general application to tribes have also been enacted. Some of these impose federal or state jurisdiction in Indian Country. Important examples include:

The Major Crimes Act, making it a federal crime for Indians to commit certain major crimes in Indian Country;

Public Law 280 authorizing states to extend certain aspects of state jurisdiction over Indian Country

The Indian Civil Rights Act, requiring tribes to adhere to federal "Bill of Rights" principles in Indian Country.

Federal environmental laws

The federal income tax law

The federal government has a "trust" responsibility toward tribal Indians. Courts will seldom review Congressional legislation to assure consistency with this trust obligation. Courts will, however, review federal administrative actions to assure compliance with trust principles if those principles are articulated in federal legislation or regulations, or in clearly identifiable common law rules.

Many laws, in addition to those listed above, have been enacted in implementation of the trust relationship. Some have benefitted Indians, others have been harmful. Important examples include:

The General Allotment Act (1887)

The Indian Reorganization Act (1934)

The Indian Education Act (1972)

The Indian Child Welfare Act (1978)

The Indian Religious Freedom Act (1978)

The Indian Self Determination and Educational Assistance Act (1976)

Indian Tribal Governmental Tax Status Act (1980)

State laws do not generally apply in Indian country unless

Congress clearly so provides or unless Indian interests are relatively minor. Federal legislation, notably PL 280 (1953), caused many tribes to become subject to state criminal jurisdiction and to the civil jurisdiction of state courts, (but not to state regulatory or taxing authority).

The application of criminal law in Indian country is complex. In summary: State criminal jurisdiction applies to NonIndians who commit crimes against NonIndians in Indian country. Federal criminal jurisdiction applies to NonIndians who commit crimes against Indians. Federal criminal jurisdiction applies to Indians who commit major crimes against either Indians or NonIndians. Tribal jurisdiction applies to Indians who commit minor crimes (and probably major crimes as well) against Indians or NonIndians, with punishment limited to six months and \$500 per offense. On PL 280 reservations the federal Major Crimes Act no longer applies to crimes committed by Indians; it is replaced by state criminal laws. Also, federal jurisdiction is replaced by state jurisdiction as to NonIndians committing crimes against Indians. Tribal criminal jurisdiction probably continues to apply to Indians, and is concurrent with state criminal jurisdiction on PL 280 reservations.

Tribal governments and tribal courts are bound by the Indian Civil Rights Act of 1968 and must recognize and apply federal "Bill of Rights" concepts to Indians and NonIndians with whom they deal, however the only appeal to federal court is by habeas corpus.

The civil jurisdiction pattern in Indian country is not quite so complex. Absent PL 280, state civil jurisdiction generally does not apply in Indian country. Tribal courts have general civil jurisdiction over both Indians and NonIndians, although recent federal decisions reflect a trend to restrict tribal regulatory jurisdiction over NonIndians to matters involving important Indian interests.

Nearly all Indian tribes have their own governments, composed of tribal chairmen and tribal councils. Most tribes have constitutions and legal codes, many of which have been approved by the Secretary of Interior under the 1934 Indian Reorganization Act. Those that have not been approved by the Secretary are nonetheless effective under principles of inherent sovereignty.

Nearly all tribes have tribal courts. These courts operate very much like their counterparts in the NonIndian judicial system. Tribal Court judgments are ordinarily recognized and enforced by state courts.

Indian tribes have power to levy taxes on both Indians and NonIndians residing, working, or doing business on reservations, whether on tribal, allotted, or fee patent land.

State taxes do not apply to income received by reservation Indians from reservation sources. States cannot generally tax or regulate on-reservation activities by reservation Indians. State taxes will not apply to the activities of NonIndians on reservations (e.g., school construction, operating of trading

post, logging) where federal legislation is so comprehensive it preempts the field.

State property taxes do not apply to trust or restricted lands in Indian country. They do, however, apply to fee patent lands. While state regulatory and tax laws do not generally apply in Indian country, state taxes can be imposed on sales of personal property by Indians to NonIndians where the incidence of the tax falls on the NonIndian.

15. THE TAKING ISSUE

Constitutionality of legislation assuring continued Native ownership or control, and tax free status, of corporation owned land. Several methods for accomplishing this goal have been suggested, from placing new restrictions on stock to transferring corporation-owned lands into trust status. Specific ideas include: restricting stock voting rights, restricting stock alienability, restricting alienability of corporation lands, restricting potential uses of land if sold, transferring corporation-owned land into trust status, giving Native Village governments veto power over land sales or use, transferring only portions of Village Corporation owned lands into trust status, such as the lands previously "governed" by the Native Villages. Other proposals will no doubt be made. Too many permutations exist to justify analysis of specific proposals here. It is, nevertheless, possible to comment on the umbrella of constitutional issues and legal doctrines raised by nearly all of these proposals, and to suggest why the proposals are likely to pass constitutional muster if carefully drawn.

In a broad way, three questions are posed:

1) What constitutional issues would be raised by legislation assuring that regional and village corporation-owned land remain in corporation ownership after 1991?

2) What constitutional issues would be raised by legislation transferring Village or Regional Corporation owned land into trust status controlled by traditional or IRA village governments, similar to the status of tribally owned land in the Lower 48?

3) What constitutional issues would be raised by restrictions on stock alienation against dissenters opposition?

Two other sets of questions are interwoven. (a) Is Village corporation owned land presently subject to the governmental powers of Traditional or IRA Native governments? If not, can the Secretary of Interior accept it into such status upon the request of a Village Corporation (as in the Venetie case)? Can Congress legislatively give the traditional and IRA Village governments authority over such lands? (b) Would any of the above proposals enlarge the group of persons sharing ownership rights in the land? If so, would such a result pose insurmountable constitutional problems?

Congress has already enacted legislation allowing regional corporations to cancel stock originally issued and issue new, restricted stock in 1991 without voting rights unless the owner is a "Native or a descendant of a Native." (The Alaska National Interest Lands Conservation Act (ANILCA), P. L.

96-487, 94 Stat. 2371 (1980) amending ANCSA). This could effectively keep corporation owned lands in Native ownership. It might theoretically reduce the value of the currently owned stock by reducing the potential pool of purchasers, and raise a "takings" question. Even the threat of future legislation authorizing restrictions could theoretically affect the value of stock. The analysis below speaks to the constitutionality of the ANILCA restrictions, as well as to most other alternatives mentioned above.

The power of Congress to legislate about Native Americans

One point should be made clear. Congress' constitutional power to legislate any of the above solutions can not seriously be questioned. Under the Commerce Clause of the federal constitution Congress has exceedingly broad powers, restrained only by the Bill of Rights, and the Constitutionally mandated structure of the federation. National League of Cities v. Usery, 426 U.S. 83 (1976). Congress' power to legislate over Indian affairs is specifically provided in the Constitution, in the so-called Indian Commerce Clause:

The Congress shall have power to . . . regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes. . .

Morton v. Mancari, 417 U.S. 535 (1974), Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) and many other cases have made it clear that this power of Congress is very broad. Indeed, Courts often refer to it as "plenary."

The only truly debatable issue is whether such legislation would constitute a "taking" under the due process or just compensation clauses of the federal constitution.

Appropriately drafted legislation should not contravene the due process or just compensation clauses of the federal constitution.

The trend of recent Supreme Court decisions, as demonstrated in Penn Central Transportation Company v. City of New York, 438 U.S. 104 (1978), Agins v. City of Tiburon, 477 U.S. 255 (1980) and especially Andrus v. Allard, 444 U.S. 51 (1979) is to uphold the constitutionality of legislation adversely impacting future profits or "anticipative gains."

In Penn Central New York City's Landmark Commission designated Grand Central Station as an historic landmark. To preserve the character of the landmark, the Commission rejected Penn Central's request to build a 55 story office building in the air space above the station. Penn Central sued, claiming its property right to build in this air space had been unconstitutionally taken without payment of compensation. The

Supreme Court upheld the restriction. It looked at the totality of rights retained and said the owner could still use the building as a railroad station, and could lease appropriate portions for shops and offices. Mere diminution of value is not necessarily a taking where the governmental interest in the restriction is strong.

A similar result was produced in Agins where the Court upheld an ordinance rezoning plaintiffs prime, 5 acre, development property in the Southern California city of Tiburon. Under prior zoning plaintiff could have built an exceedingly valuable housing development on the land. The new ordinance limited construction to one to five single family residences. The Court nonetheless upheld the ordinance saying plaintiff could still build something and that he had no constitutional right to extract the maximum value from his property.

Allard upheld a federal eagle protection law in the face of an unconstitutional takings challenge. Allard complained that the statute prohibiting all commercial transactions in eagle parts overnight made his stock of eagle feathered Indian artifacts worthless. The Court rejected this argument, saying

[the federal Act did] not compel the surrender of the artifacts and there is no physical invasion or restraint upon them. . . . [T]he denial of one traditional property right does not amount to a taking. . . . [T]he destruction of one "strand" of the bundle [of property rights] is not a taking, because the aggregate must be viewed in its entirety.

[L]oss of future profits -- unaccompanied by any physical property restriction -- provides a slender reed upon which to rest a taking claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform.

The challenged legislation in the above three cases was enacted under the so-called police power authority of the local and federal governments. In Penn Central and Agins the ordinances were designed to protect the public interest in light, air, view, population density, aesthetics, and related values. In Allard the law protected the public interest in continuation of the eagle population. These interests were balanced by the Court and found to justify modification of private property rights.

Congressional legislation to preserve Native land interests would have even more compelling constitutional justification.

The Supreme Court has long ruled that Congress has unusually broad, often said to be "plenary," powers to legislate about Indians. This power arises from the Indian Commerce Clause of the constitution and is given strength and definition by the trust relationship. The breadth of

Congressional power to legislate about Indians has been demonstrated through numerous Acts of Congress, and by many Supreme Court decisions (e.g., U.S. v. Kagama, 118 U.S. 375 (1886), upholding the Major Crimes Act, Morton v. Mancari, 417 U.S. 535 (1974), upholding the Indian preference clause of the Indian Reorganization Act, and Washington v. Yakima Indian Nation, 439 U.S. 463 (1979), upholding Public Law 280). The legislative power recognized by the courts in this area clearly seems broad enough to support legislation preserving and protecting Native land, culture, and economic welfare.

In Brader v. James, 246 U.S. 88 (1918), the Supreme Court upheld the constitutionality of a statute placing new restrictions (a requirement of Secretarial approval) on conveyances of land owned by tribal Indians. No such restriction existed at the time the legislation was enacted. The Court rejected plaintiff's argument that the new restriction was an unconstitutional taking, saying the plaintiff Indian was

"still subject to the legislation of Congress enacted in discharge of the nation's duty of guardianship over the Indians. Congress was itself the judge of the necessity of legislation for this purpose; it alone might determine when this guardianship should cease.

(See also Simmons v. Eagle Seelatsee, 244 F. Supp. 808, (E.D. Wash. 1965) aff'd 384 US 209 (1966) where the Court upheld a federal statute changing the blood requirements for inheritance of restricted lands. In the opinion the Court frequently refers to the "plenary power of Congress to legislate with respect to Indian rights", and on the basis of this power rules the legislation valid because it merely defines "what constituted membership in the Yakima Tribes," something that Congress clearly has power to do.)

It has sometimes been argued that there are no "tribes" in Alaska and therefore that Congress has no trust relationship toward Alaska Natives. This is not correct. Cases in the Lower 48 indicate that whereas a tribal relationship is helpful in defining the extent of the trust relationship, it is not essential. Other Natives, not in recognized tribes, are also the beneficiaries of this relationship. U.S. v. John, 437 U.S. 634 (1978).

Alaska Natives have clearly been identified as beneficiaries of the trust relationship. Numerous federal statutes, and many cases, have recognized the existence of that relationship. (See David Case Supp.)

The trust relationship in Alaska was not terminated by ANCSA. That Act made no attempt to disestablish the IRA or Traditional governments in Alaska, or to alter the basic trust relationship. Furthermore, after ANCSA was enacted Congress has continued to enact legislation recognizing the government's trust relationship toward Alaska Natives. See, for example, the Indian Child Welfare Act of 1978, and the Indian Religious

Freedom Act. Federal administrative agencies have also continued to implement programs designed to carry out the government's trust relationship. (See David Case supp.)

Moreover, a strong argument can be made that ANCSA itself was a product of the trust relationship. Congress declared that the settlement should take place

"without establishing any racially defined institutions, rights, privileges, or obligations; without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges. . . (43 USCA Sec. 1601(b)).

Two comments on this language are relevant. The quoted phrase says "without establishing" a "lengthy wardship or trusteeship." That does not preclude the idea of a short term trusteeship, e.g., until after 1991. Indeed, the whole idea of the restrictions on stock sales until after 1991 supports such an argument. Second, although the Act does not explicitly so provide, in a broad sense it surely must be regarded as an expression of Congress' special trust obligation toward Alaska Natives, and as an attempt to carry out that obligation. The testimony at hearings in support of ANCSA is replete with statements that the Act was a method of meeting part of the government's trust responsibility toward Alaska Natives.

The Menominee Restoration

Congressional action in restoring the Menominee tribe in 1973, and returning Menominee land to trust status, is precedent for placing Regional or Village corporation land in trust status.

The Menominee Tribe was disestablished by legislation enacted in 1954, and implemented in 1961. After termination, the tribe's land holding of some 234,000 acres was owned by Menominee Enterprises, Inc. (MEI), a Wisconsin corporation. MEI was a business arm of the Tribe. Because full jurisdiction had been transferred to the State of Wisconsin, there was no tribal political entity during the years of termination. During these years MEI was controlled by a Voting Trust, which (as explained in earlier text) came under the control of NonIndians. (At one point the Voting Trust sold 9,500 acres of prime tribal land, over the opposition of a great majority of tribal members.) Individual tribal members owned "certificates", representing shares, but did not own actual shares in MEI. The rights of the Certificate holders were determined by State law. These certificates never became transferrable to NonIndians, but only because Wisconsin passed laws every two years making them non transferrable. In spite of the limitation on the sale of these certificates, some 3% of all certificates passed to NonIndians by inheritance between 1961 and 1973.

In view of the adverse impact termination had on the tribe, Congress in 1973 restored the tribe to its former status as a sovereign Indian government. The land held by MEI under state law was returned to Trust status. Tribal and federal jurisdiction was re-established, and the tribe and its members became eligible for federal services. A new constitution was adopted. The tribal legislature, business enterprise, and tribal court are again in full operation. The Menominee legislation stands as precedent for returning Regional/Village corporation owned lands to trust status.

Cohen, 1982 (p. 629) notes that "Involuntary imposition of restrictions on property not originating as tribal or federal property might raise constitutional problems". However the land currently owned by the regional and village corporations was originally owned by the Alaska natives (the strongest argument for Native ownership can be made for Village corporation owned lands). This pre-ANCSA aboriginal ownership was good against everyone except the United States. Tee-Hit-Ton v. United States, 348 U.S. 272 (1955). In any event legal title to the land was held by the United States. Thus the conditions for justifying restrictions mentioned by Cohen have been met.

Finally, mention should be made of the equal protection issue. The Courts have developed a special body of law on equal protection for Native Americans. Many cases can be cited (Morton v. Mancari, 417 U.S. 535 (1974), Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), U.S. v. Kagama, 118 U.S. 375 (1886), Brader v. James, 246 U.S. 88 (1918), and Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) where the Supreme Court has upheld legislation dealing specially with Indians. Under normal NonIndian equal protection principles, legislation classifying persons by race (e.g., blacks) causes "strict scrutiny" review by the courts. Such laws will be struck down unless "necessary to achieve a compelling governmental interest" - a virtually impossible element of proof. On the other hand, legislation dealing with Indians is directed at political, or quasi-political groups, rather than at a racial class, and is tested by an easier "rational basis" test. It will be upheld if any rational basis for the classification can be found. Virtually no law is struck down under this test. Washington v. Yakima Indian Nation, 439 U.S. 463 (1979).

The cost to government if courts determine a "taking" occurs. If a taking occurred well before 1991, e.g., in 1987, the cost would predictably be modest, because (a) many Natives could be expected to voluntarily assent to such action, and (b) the impact on dissenters stock value in 1987 would be highly speculative, and certainly modest. In 1984 the stock will still be salable only to Natives for another four years. While the "potential" for 1991 sales to NonNatives might theoretically affect value, in practice this impact is likely to be overwhelmed by other variables, such as investment portfolio in 1987, success of past business ventures,

personalities and backgrounds of officers, prices of fish, lumber, etc.. Assigning a specific, numerical, legally provable value to the 1991 sale potential would be exceedingly difficult, if not impossible.

Nonetheless political factors may suggest that dissenters should be permitted to sell out their interest if they wish to do so. One alternative would be legislation providing a buy-out for "dissenters", with a clear understanding that, by selling out and obtaining cash for their interest, they are permanently giving up their right to use the land for hunting, fishing, or otherwise.

Conclusion

On the basis of case authority, and the Menominee legislative precedent, one can conclude that Congress has the power to place Native corporation lands in trust status, or otherwise restrict the future use of such land, or restrict the voting rights or sale of Native corporation stock, without contravening the due process or just compensation clauses of the federal Constitution. Thus the major questions to be considered are political, and equitable, rather than constitutional.

AUSTRALIA

16. HISTORICAL SUMMARY

The Australian legal/institutional history of relations with the Aborigines is meager compared to the United States. The Australian history is especially sparse before 1960. This study briefly reviews this history to illustrate the setting in which recent legal and institutional actions have occurred. See generally: Rhodes, The Report of the Australian Aboriginal Land Rights Commission -- a Comment, 39 Sask. L. Rev. 199-212 (1975); Chartrand, The States of Aboriginal Land Rights in Australia, 19 Alta. L. Rev. 436-460 (1981); Kaye, Land Rights Controversy: The Case of the Australian Aborigines, 5 Fletcher Forum 140-144 (1981); Bartlett, Making Land Available for Native Land Claims in Australia: An Example for Canada, 5 Man. L. J. 73-110 (1983).

In 1770 Captain Cook sailed into Botany Bay, hoisted the British flag, and claimed possession in the name of George III. Sovereignty over Australia was based on Cook's action. Since the land was uncultivated by the hunting and gathering natives, the British considered it vacant, unowned, and available for taking. No attempt was made to validate British claims by aboriginal consent. No treaties were negotiated, no proclamations issued or statutes enacted to assert jurisdiction over, or to protect, aboriginal land areas.

The first British colony was established in 1788. Approximately 300,000 aborigines (106,288 in 1971 census) in 500 nomadic tribal groups roamed the continent. British settlers brought disease and alcohol, and reduced aboriginal living areas, producing a rapid decline in the aboriginal population. Rhodes, supra 201, 107. Settlers destroyed the forests, dislocating food resources and the tribes that relied on these resources. Aboriginal guerilla resistance was met by British retribution. Massacres of the natives continued until the 1900s. Only in remote interior and northern areas were the natives free from large scale encroachment and depopulation.

Aborigines were often removed onto reserves administered by the state governments. The reserves were diminished in size as mining exploration and production proceeded. Even after the Commonwealth was formed by the Constitution Act of 1901, the states retained exclusive rights to control aboriginal affairs. Only in the Northern Territory did the Commonwealth government have power over aboriginal matters.

Although a constitutional amendment in 1967 (Constitution Alteration (Aboriginals) Act of 1967) allowed the Commonwealth government to legislate regarding the aborigines throughout Australia, the states have not been preempted of their powers. Without a clear federal preemption of the field, no clear policy has emerged; rather the Commonwealth and state governments share a concurrent, conflicting roles regulating aboriginal affairs. Recognition of aboriginal land rights was not forthcoming at any level of government until the 1970s.

An abundance of mineral resources, including most of Australia's known uranium deposits (25% of world reserves), are located in proximity to aboriginal spiritual sites. As this sacred land became commercially valuable, the high-stakes battle over aboriginal land rights came to a head. The aborigines first looked to the courts as a forum to gain recognition of their land claims. Milirrpum et al v. Nabalco Proprietary Ltd. and the Commonwealth of Australia (1971) 17 F.L.R. 141 (S.C.N.T.) was the leading case in this effort. Aboriginal inhabitants challenged government action accomodating mining development by appropriating reserve land. The court held that a spiritual affiliation with the land is insufficient to prove a proprietary right, which can only be established through continuous occupation. After this judicial rejection of communal Native title, the issue moved from the courts to the political arena.

In July, 1972, the government forcibly ejected aboriginal protestors occupying the grounds of Parliament. The protestors had the sympathy of the leader of the Opposition, who was elected to power the next December. The newly elected administration declared a moratorium on mineral exploration licenses in Northern Territory aboriginal reserves. Soon, the counsel for the aborigines in Milirrpum, Justice Woodward, was appointed to draft recommendations for the transfer of Northern Territory tribal lands to native ownership.

17. The Woodward Report

After visiting aboriginal communities in the Northern Territory to get a grass-roots view on the land rights issue, the Woodward Report was tabled in April, 1974. Woodward's ideas formed the basis of the Aboriginal Land Rights Act (Northern Territory) 1976. Woodward recommended that:

1) Reserve lands should be owned by aboriginal groups in fee simple, title being vested in an aboriginal corporation. Once transferred to the corporation the land should not be alienated, except to another aboriginal corporation.

2) Minerals on aboriginal land should remain Crown property. The aborigines should have the power to prevent mining activities, however, the government can override the aboriginal veto if the national interest so requires. In this event lease terms would be negotiated by tribal representatives, or binding arbitration would be initiated by government.

3) If the aboriginal owners allow mining activities, they may negotiate the terms of exploration payments, royalties, and equity interests.

The Woodward Report was a turnabout in aboriginal policy. Rejecting assimilation, Woodward outlined a program of self-determination founded on a strong economic base, recognition of land claims, and control over (if not outright ownership of) natural resources.

The pace of political reform quickened in 1975. In August

of 1975, the first grant of traditional lands to a tribal group occurred by special legislation transferring 1,250 square miles of Northern Territory land to the Gurendji Tribe. In October, the Labor Government introduced the bill which became the Aboriginal Land Rights (N.T.) Act 1976. Significantly, the 1976 Act was eventually passed by the newly formed conservative coalition government. The passage of this legislation indicated that Australians of all political persuasions now supported the concept of aboriginal land rights.

18. The Aboriginal Land Rights Act, 1976

The Aboriginal Land Rights Act, 1976, reversed 200 years of aboriginal policy, and for the first time provided full legal recognition of traditional claims to land in the Northern Territory. Curiously, claims were to be considered on the basis of traditional ties to the land, including spiritual affiliation -- a standard rejected as unworthy of proprietary protection in the Milirrpum decision. Under the 1976 Act, continuous occupation need not be proven to perfect a claim to sacred lands.

Acting on the mandate of the 1967 constitutional amendment allowing federal legislation over aboriginal affairs, parliament created a special landholding system for Northern Territory aborigines in the 1976 Act.

In contrast to white settlers, who can only acquire leasehold interests in Northern Territory land outside of municipalities, aboriginals can now acquire land in fee simple. However, there are restrictions: ownership of minerals is retained by the Crown (a common-law pattern followed throughout Australia regardless of who owns the land); also, aboriginal land use and sale are strictly limited under the 1976 Act. For example, all land development proposals are subject to ultimate government scrutiny and approval.

To bring land under Aboriginal ownership, the 1976 Act established a pyramidal system of Aboriginal Land Trusts, supervised by Aboriginal Land Councils, and subject to review by an Aboriginal Land Commissioner.

19. Aboriginal Land Trusts.

The Aboriginal Land Trusts are composed of local-group aboriginal elders, who hold title in trust for those traditionally entitled to use or occupy the land. The 1976 Act specifies that both the trustees and beneficiaries must be members of the same local descent group. The elders serve at the pleasure of the minister of Aboriginal Affairs, who appoints trust members from nominations submitted by the Aboriginal Land Council. In practice, the Trustees serve as figureheads, exercising power only at the discretion of the Council.

20. Aboriginal Land Councils.

The Aboriginal Land Councils, composed of Aborigines, are the first Western-type representative bodies to act for the aborigines of the Northern Territory. Three Councils oversee the activities of the Trusts, and conduct relations with outside entities, such as governments or mining companies seeking to use aboriginal land. In addition the Councils provide legal assistance to aboriginal groups pursuing land claims before the Aboriginal Land Commissioner. Funded through the mineral royalties they have negotiated, the Councils can exercise their powers with a considerable measure of autonomy. However Council actions are limited by the government's prerogatives to approve or deny mineral leases, and to initiate binding arbitration should lease negotiations break down.

21. The Aboriginal Land Commissioner.

The Aboriginal Land Commissioner, required by the 1976 Act to be a member of the Supreme Court of the Northern Territory, decides aboriginal land claims. Only traditional claims made to unalienated Crown land, or to land in which all interests are held by aborigines, are under the jurisdiction of the Commissioner. Thus, traditional land claims are recognized by statute, but must be pursued in an expensive, lengthy quasi-judicial process before the Commissioner. The Commissioner only decides claims. He does not have other supervisory functions. The Commissioner considers the claims, and makes recommendations to the Minister of Aboriginal Affairs. The Minister makes the final determination on the claims, and exercises ultimate supervision over the Trust Councils and the Commissioner.

As of 1980, thirty traditional land claims had been presented to the Commissioner. Of these claims, only 5 had been decided (4 in favor of the aborigines) (Chartrand, supra, 455.) Since the 1976 Act is limited to unused, unalienated Crown lands in the Northern Territory, the process ensures that only desolate, unproductive areas are subject to Aboriginal claims. The claims process was further complicated by the granting of territorial self-government in the Northern Territory (Self-Government Act of 1978). The Territorial administration has, as of 1983, blocked the actual transfer of any lands to aboriginal control. For example, the territorial administration has successfully blocked the transfer of any land to aboriginal control by asserting that public roads through this land must be surveyed before the land transfers can be recorded, or that land is set apart for urban development. (Bartlett, supra, 83; Chartrand, supra, 460). On December 24, 1981, the High Court of Australia declared that the Commissioner must investigate whether certain territorial actions were taken specifically to preclude the aborigines from obtaining ownership of the lands through the land claims process. *Re Toohey, Ex parte Northern Land Council* (1981), 56 A.L.J.R. 164 (Aust. H.C.)

The 1976 Act applies only to the Northern Territory and offers no redress for 80% of the aboriginal population, who cannot claim land under its provisions. (The land they originally occupied is in private ownership, sometimes in urban areas.) The Land Acquisition (Northern Territorial Pastoral Leases) Act, 1981, addressed the needs of certain displaced aborigines by providing for compulsory acquisition of certain alienated lands. Although the Commonwealth government now has the power to compulsorily acquire land to meet native claims, no inclination to do so has yet materialized. Nor has any state passed legislation making alienated land available to aboriginal claimants.

22. Other legislation affecting aboriginal land claims.

The 1976 and 1981 Acts mentioned above pertain only to the Northern Territory. Other legislation effective Australia-wide to facilitate land acquisitions include the Aboriginal Development Commission Act of 1980 and the Aboriginal Land Fund Act, 1974. These statutes established a process to assist dispossessed aborigines in acquiring land and managing business enterprises. The 1980 Act recognizes that in settled areas, the economic need of aboriginal groups may be more significant than traditional ties to land. Applications for funds enabling aboriginals to acquire or occupy land are to be considered on both traditional and economic grounds.

The 1980 Act pertains to privately or publicly owned land situated anywhere in Australia. Once acquired by an aboriginal group, the interest in land is inalienable, and may be transferred only with government consent. The Commission, consisting of 10 aboriginals appointed by government, is largely advisory in nature, and subject to the ultimate control of the Minister for Aboriginal Affairs.

23. Summary of Australian action on aboriginal land claims.

Reserves located in remote, desolate areas are still the primary source of land available to aboriginal ownership. Only in the Northern Territory is all unalienated Crown land subject to claim, and then only on the basis of traditional ties to the land. Outside of the Northern Territory, a negligible amount of land has been transferred to aboriginal ownership. Not much more is actually available. Little action has been taken to make alienated land available for Native claims, or to compensate the aboriginal claimants for the dispossession of the land.

NEW ZEALAND

24. Historical Summary

The claims of the Maori to sovereignty and land rights have received quite different treatment in New Zealand from similar claims by Native Americans in the United States. See generally, Sanders, New Zealand and Australia - A Different Picture, 6 Am. Ind. J. 27-33 (April 1980); L'Heureux, Native Land Rights in New Zealand; Unpublished manuscript, University of Washington Law School; McHugh, Maori Land Laws of New Zealand, Saskatoon: University of Saskatchewan, Native Law Centre, 1983.

The islands of New Zealand were occupied by the Polynesian voyagers, the Maori, between the 10th and 14th centuries. Captain Cook came on the scene in 1769, however little British settlement occurred until the Treaty of Waitangi in 1840. The treaty was signed by 500 Maori chiefs from the densely populated North Island. After the Treaty the British proclaimed sovereignty over the whole of New Zealand, including the South Island, which had not participated in the Waitangi accord.

The Treaty of Waitangi might have been construed to reserve rights in lands and resources for the Maori people. See *Queen v. Symonds* (1847) N.Z.P.C.C. 387. However, in order for British settlers to acquire these lands the Treaty could not be so interpreted. Thus the New Zealand courts held that the treaty did not automatically become the law of the land, was never incorporated into the municipal law of New Zealand, and was domestically without effect, a view affirmed by the Privy Council in Te Heuheu Tukino v. Aotea District Maori Land Board (1939). N.Z.L.R. 107. Aff'd (1941) N.Z.L.R. 590.

Because the Treaty is not part of domestic law, no cause of action can arise under it. Nor does the common law acknowledge Native title, therefore Maori land rights recognition depends entirely upon statute.

The 1852 enabling legislation for self governing status of New Zealand entrenched continued respect for aboriginal title and precluded the colony from eliminating that title except by express purchase by the Crown from the Maori people. Subsequent Imperial legislation empowered the New Zealand General Assembly to repeal the constitutional entrenchment if it so chose. The local legislature immediately chose to do so, and established the Maori Land Court, composed solely of judicial personnel, to resolve the Maori land "problem."

25. The Maori Land Court

The Court, which is still in existence and still has jurisdiction over minor parcels of land, was directed to ascertain the owners of Maori land according to Maori customary law, to translate those property interests into a form

recognizable under English law, and to facilitate "peaceful" settlement of the colony by encouraging the sales of Maori land directly to the settlers. To accomplish this goal the Court actually perverted the nature of Maori customary law by emphasizing non-traditional concepts of individual ownership, altering the law of inheritance, limiting the number of possible parties with interest in the land, and by eliminating required elements of occupation.

The Land Court issued certificates of title only to those Maori claimants who successfully appeared before the Court and proved their customary ownership. Claimants had to travel great distances for their day in court, notice was often inadequate, and appeals were not available. Many Maoris were unaware of the judicial proceedings and were effectively disenfranchised by the Court. The power of the Land Court to create English freehold title was affirmed as recently as 1962. See, In Re the Bed of the Wanganui River, (1962) N.Z.L.R. 600.

One unfortunate effect of the individualization of Maori land ownership has been fragmentation of land titles. The Maori have generally been unwilling to alienate their interest in traditional lands so their tenancies-in-common are now held in multiple ownerships, sometimes by thousands of individuals to whom the interests have descended in increasingly small shares. Effective management has become exceedingly difficult, often impossible. Recent attempts to remedy this situation are discussed below.

The New Zealand courts have found that no recognizable customary or other legal system existed prior to British settlement, and therefore the Maori have no adequate claim to sovereignty. Since no pre-English-settlement government existed, land areas could not have been effectively ceded by the Maori, and the Treaty itself was an empty exercise. See Wi Parata v. the Bishop of Wellington (1877) 3 N.Z.Jur. (N.S.) S.C. 72. As part of this judicial fiction, New Zealand is viewed as a "settled", rather than a "ceded" country. Under this theory neither indigenous sovereignty nor native land rights can be accorded recognition.

With a population of 270,000 in 1976 (8% of the New Zealand population) the Maori form a sizeable minority. But they do not, according to New Zealand law, form a separate nation.

26. THE MULTIPLE OWNERSHIP PROBLEM.

(The author is especially indebted in this section to Paul. G. McHugh, for his Study, "Maori Land Laws of New Zealand", Studies in Aboriginal Rights No. 7 (1983), University of Saskatchewan, Native Law Centre.)

Introduction

Although most land originally occupied by the Maori was lost following the Native Lands Act of 1865, a small portion still remains in native ownership. Under the 1865 Act most of these Maori lands are held as tenancies-in-common, a form of tenure adopted on the theory that individualization of title would convert the Maori to European methods of tenure and management. Such a result did not follow. But the tenancy-in-common tenure has created problems of fragmented title from generations of intestate successions. This is one of the more serious problems facing the Maori today.

Paul G. McHugh (supra) describes attempts by the European settlers to change Maori ways by individualizing land titles:

"This ethnocentric assumption completely overlooked the traditional attachment of the Maori to their land."
The Maori attachment to their traditional land is known as turangawaewae. Today, it is safe to say that the religious element, with its origins in Maori mythology, has practically disappeared from the Maori conception of turangawaewae. However, turangawaewae remains a strong feature of modern Maori culture. Besides performing its strict function of giving a Maori rights on his tribal marae [religious site] it has the larger role of symbolizing his identity as a Maori. It represents a selfless attachment to kin and ancestors and thus provides an individual with mana, or social standing, among his own people by indicating pride and self-esteem in being Maori. Turangawaewae is an enduring feature of the Maori society that has been greatly underestimated by the pakeha [European settlers].

Intestate succession has been an area of much legislative tinkering. Before 1967 intestate interests in Maori freehold land devolved according to Maori custom. While no such custom had existed prior to English settlement (land was held communally) such a "custom" was generated as a result of the 1857 Act; property descended to the nearest of kin to the deceased owner by that line of descent through which his right to the land was derived, being in the first instance his natural children. On the advice of the 1965 Prichard Waetford Report, the Maori Affairs Amendment Act of 1967 changed these rules, and provided that succession should be the same as if the deceased were a European. The status quo ante was returned

in 1974 legislation, but not before further confusion, and conflict between the law and Maori custom occurred.

One effect of the multiple ownership problem has been that large areas of Maori land often lie idle or underutilized.

27. Reform efforts

Attempts to remedy problems of fragmentation have taken two basic forms: (1) reform by "disenfranchisement", i.e., reducing the number of owners by preventing succession or taking title away from individual owners, and (2) reform through a "legal entity", i.e., by placing the title in a trust or corporation with management powers.

Disenfranchisement

Disenfranchisement was in vogue from 1953 to 1974, and took several different forms, including voluntary transfers, changes in succession by the Land Court by consent of the beneficiaries, "purchase" of uneconomic interests, and involuntary elimination of beneficial interests without compensation if valued under \$20.00. Reform by disenfranchisement was substantially abandoned by 1974 as a result of Maori outrage, although traces still remain. Maori traditionalists argue that disenfranchisement should never be permitted because a Maori cannot escape his ancestry and is not competent to disentitle future generations of their turangawaewae; land should remain within a family forever.

Development Schemes

Reform through a legal entity has also taken several forms. The "Development Schemes" concept allows state funds to be used to assist an "occupier" to develop Maori land if all owners consent, although sometimes "consent" occurs through public notice where no objection is received. While the Maori Land Board, which is charged with implementing Development Schemes, has been sensitive to the need for close liaison with the owners, some dissatisfaction has occurred because owners feel they have lost control of their land. Development Schemes have nonetheless brought a significant amount of unproductive land into use, have been actively encouraged by some Maori.

Incorporation

Under the Maori Affairs Amendment Act of 1967 Maori Incorporations can only be formed with the consent of the owners of the land. Each owner holds shares in the corporation, which only has those powers of management agreed upon by the owners. Incorporation solves the problem of unitary management, but has led to a new problem of unclaimed dividends as well as an administrative nightmare for the

Corporation Secretary who has to deal with the fragmented interests. Also, under some circumstances minimal shareholders can be disenfranchised. Nonetheless the Incorporation principle seems basically sound, and has found acceptance among Maori (e.g., in the Ngati Porou region it is the receipt of Incorporation dividends - not the actual shareholdings - which confers turangawaewae.)

Maori Trusts

Maori trusts, along with incorporation, are the major legal devices used to facilitate dealing with land in multiple ownership. Two kinds of trusts are used, the large regional Trust Board trust, and the small hapu trust, created under Section 438 of the Maori Affairs Act, 1953.

The Trust Boards are created on a tribal basis and place less emphasis (than incorporations) on commercial dealings, and more on all-round assistance to the beneficiaries. Status as a beneficiary in a Trust Board arises by birth whereas status in an Incorporation is dependent upon a vesting order by the Maori Land Court. The Trust Board system is thus more akin to the pre-European Maori concept of turangawaewae arising from occupation.

The smaller scale hapu trust has found widespread acceptance among the Maori. These trusts are established by the Maori Land Court with the consent of the landowners. They trusts can be established in circumstances where the owners wish to control a resource but find the incorporation regime too exacting. Hapu trusts contain clauses prohibiting alienation of the land, and are designed to emphasize the beneficiaries welfare rather than the corporate economic identity.

CANADA

28. Historical Summary

Prior to contemporary constitutional developments, the legal status and autonomy of Canada's Indians has been defined by the interplay of four major legal factors: (For general references, see Cumming, A. and Mickenburg, N. Native Rights in Canada, 2nd ed. Toronto: The Indian-Eskimo Association of Canada, 1972; Bartlett, The Indian Act of Canada, 27 Buffalo L.R. 581-615 (1978); Opekokey, Indians of Canada Seek a Special Status, 6 Am.Ind.J. 4-10 (April 1980); Erickson, Aboriginal Land Rights in the U.S. and Canada, 60 N.D.L.Rev. 107-139 (1984); Slattery, The Hidden Constitution: Aboriginal Rights in Canada, 32 Am. J. Comp. L. 361 (1984).

1) the Royal Proclamation of 1763, which set the British policy of negotiating treaties to acquire title to Indian lands;

2) the British North America Act of 1867, which served as the Canadian constitutional document until 1982;

3) the Indian Act of 1876 and its amendments, which form the major corpus of Canadian federal Indian law; and

4) the provincial role in Indian affairs.

29. Royal Proclamation: Aboriginal Title and Treaties

Aboriginal Title

The Royal Proclamation of 1763 served as a common source of law for all of British North America: the 13 colonies which separated to form the U.S.A., as well as the loyal territories which eventually coalesced into the

Dominion of Canada. Drafted in an era when Indians controlled the land by virtue of military strength, the Proclamation established the incidents of aboriginal title recognized by the British and subsequent Canadian and U. S. governments. The Indian right of occupation and use to aboriginal lands was recognized in Canada by the Privy Council in St. Catherines Milling and Lumber Co. v. The Queen (1888) 14 App.Cas. 46 (P.C.) (Can.). Aboriginal title is considered communal in nature, and perfect against all but the sovereign. However, the sovereign can extinguish aboriginal title simply by passing any legislation inconsistent with the continued assertion of aboriginal ownership. The Canadian Supreme Court, in Calder v. Attorney General of British Columbia, 34 D.L.R. 3d 145 (Can. 1973), has split 3 to 3 on whether Indian title can be extinguished by implication.

The Royal Proclamation initiated the British (and, after 1844, Canadian policy which 1) vested the exclusive power of extinguishment of aboriginal title in the federal government, 2) required that rights to Indian land be purchased by treaty, and 3) obligated government to provide reserves for the Indians.

Treaties

The policy of the Royal Proclamation of negotiating formal treaties to extinguish Indian title was implemented Canada-wide, with certain notable exceptions. In southern Quebec and in the Maritime provinces, settlement preceded the establishment of this treaty-making policy. In British Columbia, the provincial government affected a stance of non-recognition of Indian sovereignty and treaty-making authority.

Although the treaty-making period lasted from 1763 to 1956, the treaties which most significantly affected Canadian federal Indian policy were signed between 1871 and 1905. These "numbered" treaties were boilerplates which provided the terms and conditions for the settlement of the vast Canadian prairies of Manitoba, Saskatchewan, and Alberta. Approximately one-half of Canada's Indians are subject to the terms of the numbered treaties.

Indeed, until recently, the Indians have been strictly subject to the terms recited in the treaties, as the courts have been reluctant to look beyond the four corners of these documents. Treaties are generally considered to be promises or agreements in the nature of a private contract, although recent cases tend to view them also as documents having international law character. As in any contract dispute, an examination of treaty rights and obligations usually has been confined to the text of the agreement. For example, in Regina v. Johnstone, 56

D.L.R. 2d 749 (Sask. Ct. App. 1966), government promises not incorporated into the text of a treaty were not considered enforceable in a court of law.

Further, the Canadian courts have established that treaties, like any private contractual arrangements, may be abrogated by federal legislation. The Supreme Court of Canada upheld the principle of Parliamentary abrogation in Regina v. Sikyea, 50 D.L.R. 2d 80 (Can. 1964), where treaty hunting rights were overridden by federal conservation laws.

30. British North America Act: Delegation of Federal Powers over Indian Affairs

The British North America Act of 1867 embodied the objectives of the Royal Proclamation of 1763 by providing exclusive federal jurisdiction over "Indians and lands reserved for Indians". The power to negotiate and abrogate Indian treaties is delegated solely to the federal Parliament under the British North America Act. Thus, the provinces are constitutionally restrained from passing legislation which would have the effect of abrogating Indian treaties. Prior to 1951, under the Indian Act, the Provinces could enact laws abrogating Indian treaties, unless those laws contravened terms of the Indian Act itself. A 1951 Amendment to the Indian Act bars Provincial laws from abrogating treaty rights. See Regina v. White and Bob, 52 D.L.R. 2d 481 (Can. 1965), which held that Indians are entitled to exercise treaty hunting rights, despite contrary provincial legislation.

Although Canada's constitution defined the broad responsibility for Indian affairs as a uniquely federal prerogative, this document did not provide any further guidance. Precise instructions for administering the federal obligation to Indians were later elaborated by Parliament in the Indian Act of 1876.

31. Indian Act Consolidation of 1876

The primary instrument through which Canadian federal Indian policy has been developed and implemented is the Indian Act Consolidation of Canada of 1876. The Indian Act governs approximately 276,000 Indian people in almost 575 bands (1980 figures). The Act determines the disposition of Indian lands and funds, the extent to which of federal and provincial jurisdiction displaces Indian sovereignty, and even the membership of Indian bands. In short, the Indian Act determines who is an Indian, how Indians will be educated and provided with services, and how Indian lands and resources will be managed. The Act places nearly complete decision-making authority over Indian affairs in the hands of federal officials.

Policy of Assimilation

The formidable authority conferred on the federal government under the Indian Act of 1876 represents a federal policy of assimilation. In order to facilitate the rapid settlement of the Canadian frontier, Parliament passed the Indian Act to consolidate prior legislation and sustain the assimilationist objectives of the early 19th century. The Act has been subject to minimal amendments, changing only the administrative details. The underlying rationale of the Act continues to promote "civilization" of the Indian population, while denying them meaningful control over their lands and affairs.

The assimilationist policy of "civilizing the Indians", as established by the British and embraced by subsequent Canadian governments, was aimed at protecting the Indian population until such time as integration could be achieved and special treatment would become unnecessary. This policy continued in force, unchallenged and unchanged, until the Trudeau government announced the impending termination of special Indians status. This 1969 Statement of Policy proposed that the Indian Affairs branch would be abolished, and all federal legislation pertaining to Indians would be repealed within five years. Indians would then lose all federally insured rights, would be subject to provincial law, without benefit of treaty or statutory protections.

The 1969 Policy of termination was vigorously opposed by the Indian population in a Red Paper prepared by the Indian Chiefs of Alberta in 1970. The Red Paper demanded not only the retention of the special legal status, but increased Indian autonomy to preserve Indian rights, lands, and traditions. The widespread Indian dissatisfaction led to a dialogue concerning the future Indian/federal relationship. Indian protest was effective, and the government abandoned its attempt to repeal the Indian Act. Indian groups continue to seek political reform which would ensure special status and federal protection.

Sovereignty Issue: Self-Government under the Indian Act

A major source of friction between the Indian community and the federal government has been the Indian Act's rejection of Indian sovereign powers of self-government. Indian organizations claim that Indian governments, as independent political entities, still have inherent power to govern Indian people and territory under native law and customs. Traditional Indian governments were recognized by the Crown for purposes of treaty making

and land surrender; but, after acquiring the land, the Crown ceased to recognize the traditional governments. Instead, the Indian Act imposed the election of a figurehead Indian Act government, while vesting real power in the Minister of Indian Affairs and local Indian agent.

The elective format imposed by statute is often less democratic than traditional native forms of government. The elected Indian Act officials are directly accountable to the federal government, rather than to their constituency. Terms of office and requirements for candidacy are set by the government; for example, women were barred from positions of leadership until 1951. The jurisdiction of the elected band councils is limited to matters of trivial importance, and any laws passed by the council must be confirmed by the Minister to have legal effect.

A singularly paternalistic feature of federal Indian policy was a practice which required the local Indian agent to serve as chairman of the council. This provision, which operated until 1951, empowered the Indian agent to convene and preside over all council meetings.

It is not surprising that Indians were reluctant to embrace a system that denied them real power and control over their lands and affairs. Nor is it unexpected that the 1966 Hawthorne Report on the Indian situation found real Indian leadership to be located in covert power structures, rather than in the official, but artificial, organs created by the Indian Act.

Federal Management of Reserves, Resources, and Funds

In addition to denying Indian groups any substantial measure of self-government, the Indian Act rejects aboriginal control of Indian lands. Under the Indian Act, federal officials manage reserve lands and natural resources, as well as all funds generated by the disposition of these lands and resources.

Reserve land set aside in the 19th century constitutes the major remaining tangible asset of Indian bands. This land base is "held by Her Majesty for the use and benefit of the respective bands" which had traditionally owned and occupied the land. In legal theory, aboriginal ownership and control were established in the Royal Proclamation of 1763, and the government has no right to interfere, unless that right is confirmed by statute. Brick Cartage Ltd. v. The Queen (1965) Can. Exch. 102, 106 (1964). As a practical matter, the Indian Act has been used as just such an instrument of interference

The Indian Act confers the primary responsibility for the management of reserves upon the Minister of Indian affairs. The Minister may direct the use of land for

schools, burial grounds, health projects, roads, and the operation of government farms. The consent of the band council is not required to effect these land uses. At his discretion, the Minister may grant the band council the right to exercise a "desirable" measure of control. However, rights granted by the Minister may be at any time withdrawn.

Under the Act, the only significant land management power exercised by the band council is the right to allot land to band members. In an individual capacity, an Indian has the right to transfer an allotment interest to other band members. However, the power of allotment and the right to transfer are both subject to Ministerial approval.

The Minister is in charge of the disposition of any minerals or other resources on the reserve. Although the band may specify the terms of the surrender of natural resources, the administration of these terms is carried out by the Minister. The Minister may, at the request of an individual Indian, lease that individual's reserve land, without the consent of the band. Further, the Minister is empowered to unilaterally authorize the use of reserve land by any person. Thus, the Indian Act has significantly abridged the aboriginal right of the band community to preclude alienation of land.

Indian moneys, including revenue from the sale of surrendered lands and minerals, are held by the Crown for the use and benefit of Indians. These moneys are managed and expended by the Minister, usually with the consent of the band council. However, band council consent is not required in case of emergency, in order to pay compensation, or to suppress unsanitary conditions.

By the terms of the Indian Act, it is the Minister who determines whether the use of land and moneys is for the benefit of the band. Until recently the Act was interpreted as precluding any cause of action for breach of trust by the Minister, however the 1984 Musqueam decision changed this. In Musqueam, the Supreme Court held the federal government liable in damages for mismanagement of surrendered reserve lands under a theory of breach of "fiduciary duty".

Status Issue

Ministerial control over Indian affairs extends even to determining band membership. The Registrar of the Department of Indian Affairs administers the status provisions of the Indian Act. The Registrar, rather than the band, decides who qualifies as a band member; the band may not challenge federal actions in accord with the Act. Indian groups, denied any legal remedy, have sought a political solution to this emotionally charged question of

bureaucratic intrusion. However, political attempts (late 1970s) to resolve the status issue have been stymied by the government's reluctance to support Indian self-determination.

Taxation: Federal, Provincial, and Indian

The Indian Act extends a substantial exemption from taxation and seizure of Indian property on a reserve. This statutory exemption is the only instance in which the government looks beyond the text of treaties to confer a benefit upon Indian people. Federal income tax was not introduced in Canada until 1917, and is not explicitly referred to in the exemption granted by the Act. However, as a general rule, the courts have declared that Indian income earned on a reserve will be exempt from federal income taxation, pursuant to the Indian Act.

Provincial interpretation of the Indian Act tax exemption is varied. In some provinces, the exemption extends only to sales made on reserves. The tax exemption has not been extended to sales of liquor, tobacco, or gasoline (except in Ontario).

The band's power to levy taxes has been severely restricted under the Indian Act. This power to raise revenue is conferred only upon those bands considered by the Minister to have reached an "advanced stage of development". To date, few bands have been deemed sufficiently advanced to exercise the power of self-taxation.

32. Provincial Jurisdiction over Indians and Reserves

Prior to 1951, federal law pre-empted the application of provincial law to Indians located on reserves. The courts favored the notion of broad federal jurisdiction on the reserves, consistent with the federal responsibilities defined in the British North America Act. The idea of reserves as enclaves under uniform federal administration was also articulated in the courts.

In 1951 Section 88 of the Indian Act was passed. Prior to 1951, Provincial laws applied to Indians so long as not in conflict with the Indian Act. Section 88 now provides that treaty rights are protected against abrogation by Provincial laws.

Provincial law, subject to the terms of treaties and the provisions of the Indian Act, now applies to Indians both off and on reserves. Section 88 merely substituted overlords; rather than transferring power to the Indians themselves, the federal government rejected Indian self-determination in favor of increased provincial control. Thus, any decision-making authority not exercised at the federal level has been delegated to provincial officials.

33. Summary of History

The rights of Canadian Indians have been successively limited by treaties, statutes, and judicial decisions. Acting under the banner of assimilation, Canadian governments have historically acted to defeat, rather than encourage, Indian self-determination. Assimilation has been the consistent national policy.

The Royal Proclamation of 1763 established the policy, perpetuated into the 20th century, of extinguishing aboriginal title through formal, negotiated treaties. Indian treaty rights and obligations, like any private contractual agreements, may be abrogated by Parliament. Aboriginal title, although recognized in the Royal Proclamation, is so fragile that it may be extinguished by any act of Parliament inconsistent with continued Indian ownership.

The British North America Act, the premier Canadian constitutional document, recognized the exclusive federal obligation to protect the interests of the Indians. The statutory mechanisms to discharge this federal responsibility were consolidated in the Indian Act of 1876.

Under the terms of the Indian Act, federal officials exert almost complete control over the management of all vital Indian affairs, i.e., Indian governments, lands, resources, and moneys. Band councils are constrained to operate more as arms of the Department of Indian Affairs than as autonomous governments. Indeed, until 1951 the local Indian agent served as chairman of the council. The power of the Indian agent over Indian life was such that, until 1951, Indian people could not travel off their reserve without his approval. Yet, the government and its employees are immune from any legal challenge for breach of trust.

Section 88, a 1951 amendment of the Indian Act, provides that provincial law will generally apply to Indians on reserves. Thus, any aspect of Indian affairs not administered by the federal government has been expressly assigned to provincial jurisdiction. Section 88 illustrates the federal governments' commitment to the policy of assimilation, rather than Indian self-determination.

Up to the 1970s, the history of Canadian-Indian relations has been marked by a clear, continuous erosion of Indian tribal rights and autonomy. Indian tribal rights were first infringed upon and delimited by treaties. The rights guaranteed by treaties were further eroded by statutes, such as the Indian Act and its amendments. Even the statutory protections have been diminished by the encroachment of provincial jurisdiction and by the threat of terminating the special

federal-Indian relationship. Denied a legal remedy through the courts, Indian groups continue to seek a political resolution which will entrench and expand Indian rights to determine their own destiny.

34. Developments since 1970

By the late 1970s Canadian federal policy had clearly shifted toward self determination. A 1978 federal Discussion Paper suggested reallocation of legislative power over Indian affairs and division of those powers three ways; (1) exclusive federal powers, such as for land registry, where a uniform national system is desirable, (2) powers shared with the Indian bands, such as for housing standards, where national implications support some federal control, and (3) transferred powers, such as for local planning and zoning and administration of educational services, where exercise of the power would have no impact on other bands on a national basis -- transferred powers would be held exclusively by the bands on the basis of their desires and capabilities.

The James Bay and Northern Quebec Agreement

On November 11, 1975, the Grand Council of the Crees, the James Bay Crees and their bands, the Northern Quebec Inuit Association, the Inuit of Quebec, and the Inuit of Port Burwell entered into an agreement with the governments of Canada and Quebec, the James Bay Energy Corporation, the James Bay Development Corporation, and Hydro-Quebec. By this agreement the native groups released and conveyed all their native claims to Quebec and Canada in return for a comprehensive claim settlement. (See N. Bankes, "Resource-leasing Options and the Settlement of Aboriginal Claims", Canadian Arctic Resources Committee, Ottawa, Ontario - the following summary of this Agreement draws heavily on this publication.)

The James Bay and Northern Quebec Agreement (JBNQA) is a massive document, covering more than 400 pages, and containing 31 sections. It will only be briefly summarized here.

In summary, the land in the immediate vicinity of the villages was awarded to the villages. These village lands are reserves under the Indian Act. Minerals and subsurface resources under these lands are held by Quebec. If development of the subsurface resources requires the taking of any Village land, then this land is to be replaced in kind.

Both the Cree and Inuit were awarded hunting and fishing rights, with some degree of control, over large areas where they had traditionally hunted and fished, adjacent to their village lands.

Both groups were also awarded hunting and fishing rights over still other lands, however their control in this third category of lands is minimal.

Both groups were provided with corporate structures. The corporations do not own land. They were provided with funds so they could engage in business.

Restrictions were placed on their investments for a period of years to assure that the assets are conservatively used. One of their goals is to invest in businesses that benefit the Cree and Inuit.

A regional government was created for the Inuit. This government operates within the legal framework of Quebec. It is under the control of the Inuit because theirs is the dominant population in terms of numbers, and because of a formula for community representation that was adopted to encourage long term Native control.

Land and resource allocations

2158 square miles were set aside for the James Bay Cree and the Inuit of Fort St. George. The land was divided into categories.

THE JAMES BAY CREE

Category IA lands. These are set aside for the exclusive use and benefit of James Bay Cree bands. Bare ownership of the land is vested in Quebec, which also retains ownership of the mineral and subsurface rights. The administration, management and control of the lands is vested in Canada.

At present, the local government powers of the Cree are the same as band council powers under the Indian Act, but the new Agreement provides that "there shall be recommended to Parliament special legislation concerning local government for the James Bay Cree bands on Category IA lands." The Indian Act will continue to apply to such lands until new legislation is enacted

Category IB lands. These cover about 884 square miles, and the title is vested outright in Cree Corporations, except for the subsurface. Category IB lands are under provincial jurisdiction and may be sold or ceded only to Quebec. Minerals and subsurface rights remain vested in the province. It is not clear whether these lands are "reserves", under the Constitution Act, 1867, and thus under federal jurisdiction. It is also unclear whether these lands fall under the Indian Act.

Title is vested in Cree Corporations. The powers granted these corporations are exceedingly complex. Among other things, the corporations have power to make by-laws concerning environmental and social protection with more stringent requirements than the provincial law requires, so long as the by-laws are consistent with Quebec ownership of minerals and subsurface rights. The by-laws are subject approval of the lieutenant governor in council, and cannot restrict development to be carried out outside Category I lands. The powers of the Cree under this provision are sufficiently ambiguous that they will probably require judicial interpretation.

Category II lands. Category II lands comprise 25,130 square miles of land south of 55 degrees N. where the James Bay Cree shall have the "exclusive right of hunting, fishing, and trapping." Within this region, the rights of the Cree to non-renewable resources are limited. They have little claim to restrict non-renewable resource development (although they may claim compensation if development occurs and takes their surface area). The province has jurisdiction over Category II lands, and may appropriate them for "development purposes" subject to compensation to the Cree in land or money. (See N. Bankes, supra, p. 187)

Category III lands. Category III lands encompass areas within the territory that are not otherwise included in Category I or II lands. Restrictions on development are minimized, as are non-renewable resource rights accruing to the native people.

THE INUIT OF QUEBEC

Category I, II, and III lands. The regime for the these lands differs only marginally from that established for the Cree.

FOR INUIT AND CREE -- NEW INSTITUTIONS CREATED.

As part of the transfer of limited proprietary and local government powers to the Inuit and Cree was the creation of a series of review, administrative, consulting, and advisory bodies dealing with environmental protection and future development with Native representation. These include the James Bay Advisory Committee on the Environment, the Environmental and Social Impact Review Committee, and the Environmental and Social Impact Review Panel, the Environmental Quality Commission, and several others. The general purpose of these groups is to provide the Natives the opportunity to make timely input into decisions affecting them. They do not provide for "veto" rights over development.

35. THE CONSTITUTION ACT 1982

The Constitution Act, 1982, recognized and affirmed existing aboriginal and treaty rights, although stopping short of defining those rights; definition was left to later constitutional amendments or legislation. A Constitutional Conference on the definition of aboriginal rights was held in Ottawa, March 15-16, 1983, which produced a "Constitutional Accord on Aboriginal Rights" announcing agreement on holding further Constitutional conferences on self government for aboriginal peoples of Canada.

The 1984 Constitutional Conference met with only limited success. The Conference agreed that the government of Canada and the provincial governments "are

committed to negotiating with representatives of the aboriginal peoples of Canada to identify and define the nature, jurisdiction and powers of self-governing institutions that will meet the needs of their communities" and to present appropriate federal and provincial legislation to implement these concepts. (For a criticism of the minimal substantive progress of the 1984 Conference, see "Canadian Native Law Reporter" Vol. 3, pp. 3 - 21, Article by Norman K. Zlotkin.)

36. The Penner Report

In December, 1982, the House of Commons created a Special Committee On Indian Self-Government, chaired by Mr. Keith Penner, and composed of representatives from the three political parties. Its mandate was broad, to "review all legal and related institutional factors affecting the status, development and responsibilities of Band Governments on Indian reserves. . . ."

The "Penner Report" came out strongly for Indian self-government. It urged that the right of Indian peoples to self government should be "explicitly stated and entrenched in the Constitution."

The surest way to achieve permanent and fundamental change in the relationship between Indian peoples and the federal government is by means of a constitutional amendment. Indian First Nation governments would form a distinct order of government in Canada, with their jurisdiction defined.

The Penner Report rejected the idea of legislative amendments to the Indian Act as a viable means of achieving the self determination goal, saying "the antiquated policy basis and structure of the Indian Act make it completely unacceptable as a blueprint for the future." The Committee also rejected the judicial process for achieving this goal.

The courts may eventually rule on this issue [i.e., whether self-government is an existing aboriginal right.] Obtaining a judgment in the Supreme Court of Canada is a very lengthy process. . . . In any event, a single court ruling could not define the full scope of Indian government or even design a new structure accomodating Indian government, although it might provide some impetus to political action. . . . [T]he Committee regards this procedure as difficult to execute and uncertain in its outcome.

The Penner Report recommended that, pending adoption of a constitutional amendment, bilateral agreements should be negotiated between the government and Indian bands. The

treaty process was used in Canada until well after World War II, is still authorized under the Constitution Act, 1867, and should be exhumed for these bilateral agreements. (The Report also noted a significant drawback of bilateral agreements: the courts, in early decisions, described treaties with Indian bands as mere "contracts" rather than as documents with legislative or constitutional force.)

The Penner Report also recommended legislative action pending constitutional change. However, it declined to make specific legislative proposals because to do so would run counter to the "negotiation" stance it supported: legislation should be developed by negotiation between government and Indian First Nation representatives, not unilaterally by government.

37. The Indian Self-Government Act, Bill C-52

Government responded to the Penner Report in June, 1984, by introducing Bill C-52, "The Indian Self-Government Act." This Bill would establish criteria for Government recognition of Indian Bands, would authorize adoption of constitutions by Bands, and Band exercise of legislative power over education, taxation for local purposes, charges for public services, membership, and eligibility for voting. Broader legislative powers, e.g., over zoning, public order, environment, licensing of trades, resources, administration of justice, family law, and descent and distribution, would only be permitted by "agreement", that is, by consent of the Minister, with the approval of the Governor in Council.

The Self Government Act would limit Indian self government in important ways. If the Minister believes the Indian government has "abused its powers," is in "serious financial difficulty," or is "unable to perform its functions," he/she may appoint an "administrator" to carry out essential functions until the conditions causing the appointment of the administrator no longer exist. The Bill also provides that the Governor in Council may disallow any law of an Indian nation at any time.

The Bill's provisions were not worked out in negotiations with Indian bands, thus it implicitly rejects the spirit of negotiation recommended by the Penner Report.

The Self-Government Bill falls far short of meeting the high self-determination standards recommended in the Penner Report.

38. The Metis, Inuit, and Yukon Indians

In southern Canada, the imperial and dominion governments generally followed a policy of negotiating

treaties with native groups to extinguish aboriginal title. With few exceptions, this policy was not followed in the North. Treaties 8 (1899), and 11 (1921), were exceptions. They were negotiated in response to the Yukon gold rush, and the discovery of oil at Norman Wells in the Northwest. No treaties have ever been negotiated with the Metis, the Inuit of the Northwest Territories, or the majority of the Yukon Indians.

In August, 1973 a new federal policy on native claims was issued by the Government, calling for the settlement of these northern claims within the mainstream of the Canadian Constitution. Settlements should provide benefits to Natives, including land, hunting and trapping rights, resource management, revenue sharing, financial compensation, powers of taxation, and native participation in government.

Following the 1973 statement of policy, five Native groups entered negotiations with Canada aimed at settling land claims, the Dene Nation, the Metis Association of the Northwest Territories, the Council for Yukon Indians (CYI), the Inuit Tapirisat of Canada (ITC), and the Committee for Original Peoples' Entitlement (COPE). The COPE claim negotiations have made the most progress.

39. The Cope proposal, "Inuvialuit Nunangat"

In May 1977 the Inuvialuit of the western Arctic, through COPE proposed settlement in their document titled "Inuvialuit Nunangat". COPE claimed fee simple ownership (less oil and gas) to 70,000 square miles of land and 44,000 square miles of water in the western Arctic. Lands were to be selected in a way to provide minimal interference with oil and gas development. COPE claimed a three-per-cent royalty in perpetuity on all oil and gas production in the Western Arctic Region. COPE supported the concept of a Nunavut Territory and proposed a Western Arctic Regional Municipality with legislative and administrative responsibility for education, game management, economic development, and police services. To implement these concepts COPE called for the creation of a Game Council, a Land Use Planning and Management Commission, and a Natural Resources Research Board.

The COPE claim has now been settled, and was ratified by Parliament in 1984. The Settlement is described below.

40. THE COPE SETTLEMENT

This Settlement is designed to preserve Inuvialuit cultural identity, enhance economic opportunities, and protect the Arctic wildlife, environment, and biological productivity.

A complex corporate structure is created, including a Regional Corporation and various Community Corporations.

all nonprofit. Other corporations include an Inuvialuit Land Corporation, to own lands received in the settlement, a Development Corporation, to manage financial compensation and do general business, an Investment Corporation, to manage financial compensation and invest conservatively in securities, and an Inuvialuit Trust to hold the shares of the last three corporations for the benefit of the Regional Corporation and individual Inuvialuit beneficiaries. The corporations all operate under general federal corporation laws.

Control of the corporations is in the hands of the Inuvialuit individuals through the Regional Corporation and the Community Corporations.

The Regional Corporation is responsible for placing restrictions on the other corporations from time to time to encourage preservation of assets for future generations.

35,000 square miles of land in the Western Arctic, Cape Bathurst, and elsewhere are conveyed to the Inuvialuit in fee simple absolute, however oil, gas and related minerals are reserved to the Government on most of these lands.

Occasional public access to Inuvialuit lands is permitted for recreation, emergencies, to gain access to adjacent lands, and for official purposes, if the access causes no significant harm. Limited commercial access is also permitted, if no significant harm results.

Inuvialuit lands cannot be conveyed except to the government, or among the Inuvialuit themselves. Leasing is permitted, however. Government expropriation is authorized, but only by Order of the Governor in Council. If expropriation does occur then alternative lands, satisfactory to the Inuvialuit if reasonably possible, will be provided rather than compensation.

Canada retains the right to control water, waterways, and beds, for management of fish, birds, navigation and flood control, and government officials can go on Inuvialuit land for these purposes. While the Inuvialuit own the beds of the waterways, they have no proprietary right in the fish, and no exclusive right of fishery. The Settlement has extensive provisions concerning the goals of fish and game management, and provides for "advisory" participation by the Inuvialuit in management. However ultimate control is in the hands of the Minister.

The general laws of the nation, and territory, apply to the Inuvialuit and their lands, and specifically to fish and game management, except as provided in the

Settlement.

Finally, the Settlement prescribes a compulsory arbitration process in the event disagreements arise between the Inuvialuit and the Government.

SUMMARY OF ALTERNATIVES.

This section summarizes the major alternatives derived from the above text. Some of these alternatives are explained in earlier text, and are discussed only briefly here. Others that are mentioned only briefly above are given more extensive treatment in this section.

41. Process Alternatives.

Five process alternatives are identified. These are:

A. Litigation. This option has the advantage of accessibility. Neither federal nor state approval or concurrence is essential to start litigation. Litigation is, however, distinctly limited in what it can accomplish, as the Canadian Penner Report noted:

The courts may eventually rule on this issue [i.e., whether self-government is an existing right for Canadian aboriginal peoples]. Obtaining a judgment in the Supreme Court of Canada is a very lengthy process. . . . In any event, a single court ruling could not define the full scope of Indian government or even design a new structure accomodating Indian government, although it might provide some impetus to political action. . . . [T]he Committee regards this procedure as difficult to execute and uncertain in its outcome.

The litigation alternative could be helpful in achieving some goals and not others. It might be used to test the question whether IRA or traditional Native Villages have governing power over Corporation-owned lands. It would not be useful in transferring Village or Regional Corporation lands into trust status. Nor would it be useful for limiting the sale of stock to Natives after 1991; Congressional action would be required, or (in the case of stock sales limitations) action by the Board of Directors of a Corporation under ANILCA could achieve this result.

B. Legislation. Congressional legislation has the advantage of flexibility. Congress has the broad power to legislate over Native American questions, constrained primarily by the just compensation clause of the Bill of Rights. Congress could return Regional or Village Corporation owned lands to trust status, limit the post-1991 sales of stock to Natives, or limit the uses to be made of Corporation owned land into the distant future. Legislation could also define and clarify the governing powers of Alaska Native Villages.

The disadvantage of legislation is that it is a two edged sword. The legislation that emerges from Congress is dependent on the mood of that body at that point in time. Alaska Native proponents of particular legislation must take great care to assess the congressional mood before urging enactment of legislation. Also, legislation can be amended, or repealed, by later congresses.

C. Constitutional Amendment. A constitutional amendment entrenching the sovereignty or governing powers of Alaska Native Villages would be far more permanent than legislation designed to achieve the same result. Legislation enacted after adoption of the amendment would have to be consistent with the constitutional doctrine, or be struck down.

The constitutional amendment process has several disadvantages. Such amendments are politically difficult as well as exceptionally slow to achieve. Under Article V of the Constitution, an amendment requires 2/3 vote of both houses, plus ratification by 3/4 of the states. Thus an amendment must have virtually overwhelming political support. The other side of the amendment coin is that once a doctrine, such as Native sovereignty, is entrenched in the constitution it is likely to remain there permanently -- because of the difficulty of removing it.

Constitutional language tends to be highly general, and is concerned with overriding principles rather than details of implementation. A constitutional amendment might be appropriate to entrench the concept of Native sovereignty. It would not be appropriate to define the particulars of that sovereignty. Nor would it be appropriate for assuring Native ownership or control of land over time.

D. Administrative action. Administrative action is confined by legislative mandate as that mandate is construed by the administrative officials. Administrators only have power to implement law, not create or change it, thus they lack the flexibility required for making major changes.

Within the framework of existing law the department of Interior could lend encouragement, and administrative support, to an interpretation of existing law that enhances Native Village claims to sovereignty. Specifically, the Secretary of Interior could accept Village Corporation owned land back into trust status, at the request of the Village Corporation, as in the Venetie Village case. The current administration has declined to take this step. The Secretary of Interior could also give greater recognition to the self governing power of the IRA and Traditional Villages. Recent Secretaries of Interior have declined to take such a position.

The administrative process has several limitations. First, it is confined to parameters set by legislation, and thus lacks the requisite flexibility for changes in basic law or policy. Moreover, it is subject to the shifting attitudes

of different administrations, and is the least permanent of options. Administrative policy and practice is nevertheless important, not only for the day to day policy it effectuates, but also for the precedential weight it has on court interpretations of legislation.

E. Self Help. The Akiachak Resolutions. adopted by the Native Governments of Akiachak, Akiak, and Tuluksak are an important expression of Native goals and aspirations concerning land preservation and self governance. Thoughtfully drafted, publicly debated, and democratically adopted, these resolutions are a persuasive expression of vital Native interests. They represent a critical step in the political process of defining future Native self government.

Self Help. Restrictions on stock sales under ANILCA.

A second self help option is available to the Regional and Village Corporations under ANILCA. These corporations can vote to limit the sale of stock to Natives after 1990 if they choose to do so.

42. Substantive alternatives.

A. Place Corporation owned land in trust status. This alternative would require an Act of Congress. Congress has the power to enact such legislation, and it is highly unlikely that the just compensation clause would interfere with such action. The law should be carefully crafted, to except land already conveyed or mortgaged. Precedent for such legislation can be found in the Menominee Restoration Act, where land was held for several years by a Menominee owned, state chartered corporation, before it was returned to trust status.

B. Enact legislation establishing a Land Trust and authorizing "conservation easements" for the protection of Native land. Native Corporation land could be conveyed to the Land Trust subject to conservation easements designed to protect various Native interests. Conservation easements on Native land could serve three separate purposes.

Subsistence easements could protect those lands that are identified as essential to subsistence by prohibiting permanent development of any kind.

Open space easements could protect open space and prohibit extensive residential and commercial development but permit certain industries such as lumbering or agriculture.

Fragile ecosystem easements could protect sensitive ecosystems from any type of intrusion.

Subsistence and fragile ecosystems easements are likely to be quite detailed. Restrictions would generally prohibit any use or activity that would significantly affect soil or water quality. Open space easements may also be quite detailed, but not as prohibitive as easements protecting subsistence areas and fragile ecosystems.

A conservation easement can become a permanent restriction on the use of property, not subject to the changes in policies of different government administrations.

The Alaska Land Bank was created by ANILCA. Land held by the Land Bank is protected from adverse possession, property taxation, and legal judgments. However, the land can be unbanked at any time by the Village or Regional corporation. It then loses immunity from taxation, adverse possession, and judgments.

In the case of conservation easements the land may not be immune from taxation, adverse possession, or legal judgment. However the tax rate is based on the value of the land subject to the easement, which means the tax will remain low. The question whether the land should be subject to judgment sales or adverse possession claims should be answered by Congress in the legislation authorizing the process.

C. Acknowledgement of government trust relationship toward Alaska Natives. Such acknowledgment could occur by act of Congress, or by administrative practice, although the former would be more effective. Alaska Natives trust status has recently been recognized in both court decisions and administrative practice, but much ambiguity remains. That ambiguity could be removed as indicated.

D. Legislation or constitutional amendment affirming IRA and Traditional Village government sovereignty. Such a law could provide general affirmation of this sovereignty - such as sovereignty over Village Corporation-owned land, with general powers of government. This would place the Alaska Native Villages in a similar position to the tribes of the Lower 48. The constitutional amendment or legislation would need to articulate the impact of P.L. 280 in Alaska.

E. Legislation to define Native governing powers over specific subject areas, following the example of the Indian Child Welfare Act. Such legislation would be worked out in negotiations between the government and different Villages and Bands, as recommended by the Penner Report for Canadian Government negotiations with Aboriginal Bands in that country. This option would be consistent with the resolutions recently adopted by the Akiachak, Akiak, and Tuluksak Native Governments.

Such legislation might cover a wide range of topics, including subsistence rights, hunting and fishing, domestic relations, descent and distribution, taxation, education, police services, criminal and civil judicial jurisdiction, jurisdiction over nonNatives, land and other resources.

The Passamoquoddy settlement is also consistent with this option. That settlement was achieved through negotiation and agreement between the Indian tribes, the Federal government, and the State of Maine.

F. A constitutional amendment embodying the "strict scrutiny" doctrine of judicial review. A constitutional amendment could be adopted declaring that legislation designed to take any land, or reduce the governmental powers of an Indian tribe or Alaska Native Community, must stand the same constitutionally based judicial review as legislation changing a fundamental right (e.g., voting right), or legislation based on a racial classification. Under the equal protection clause of the federal constitution such legislation is given "strict scrutiny" by the courts, and is sustained only if found to be "necessary" to achieve a "compelling governmental interest." In the equal protection field virtually no legislation passes this judicial test.

A second part of such an amendment could redefine and simplify the governmental and jurisdictional powers of Indian tribes and Alaska Native communities.

G. Constitutional amendment requiring "negotiation" with Native communities before changes are made in land status or governmental powers. A constitutional amendment could declare that Indian tribes and Alaska Native communities can only lose their land, or governmental powers, through negotiation between the United States and the Tribe or Community.

Opposition to such an amendment would be reduced if an exception were provided for unusual situations. The definition of the exception would be critical. Some alternatives are: (a) exception only in case of national defense emergency, (b) Judicial review on strict scrutiny grounds, as described above. (Is the exception necessary to achieve a "compelling governmental interest".) (c) Adopt the language of Lone Wolf v. Hitchcock (1903), where the court said Congress could abrogate Indian treaties "in a possible emergency," or if the legislation was "consistent with perfect good faith," (and make these criteria judicially reviewable and enforceable). (d) At a minimum require that Congress explicitly address the question, and explicitly and expressly state an intent to take Native land, or diminish governmental powers, if that is the Congressional intent; possibly require a 6 month waiting period before such legislation could go into effect.

H. Obtain a judicial ruling applying "strict scrutiny" review to legislation impacting Native lands or governmental powers. Litigation could be initiated with the intention of persuading the United States Supreme Court to adopt the "strict scrutiny" criteria when reviewing Congressional

legislation that takes Native lands, or diminishes Native governmental powers. The litigation route poses risks because of the number of years it would require, and because of the uncertainty of outcome.



