ALASKA NATIVE SOVEREIGNTY: THE LIMITS OF THE TRIBE-INDIAN COUNTRY TEST

The United States’ policy toward American Indians vacillates between the goals of assimilation and promotion of tribal autonomy, breeding confusion and inconsistency in Indian law. In settling Alaska Native land claims, Congress used an unprecedented corporate structure in an attempt to promote both assimilation and self-determination. As a result, the status of Alaska Native sovereignty is unclear.

A group of Alaska Natives, organized under the Indian Reorganization Act, recently asserted their sovereignty by seeking to enforce an ordinance excluding non-Natives from the village of Tyonek. That

1. Analysis of Indian law requires an understanding of specific terms. The term “Indian” has no uniform definition. It varies from tribe to tribe and from statute to statute. For example, the Indian Reorganization Act defines “Indian” to mean a person of one half or more Indian blood, but does not require tribal affiliation. 25 U.S.C. § 479 (1982). The Indian Self-Determination and Education Assistance Act, however, requires membership in a tribe. Indian Self-Determination Assistance Act of 1975, 25 U.S.C. § 450b(a) (1982). “Indian country” is an Indian reservation, a dependent Indian community, or an Indian allotment. 18 U.S.C. § 1151 (1982).

“Indian reservation” has no statutory definition, but the modern meaning refers to land set aside under federal protection for residence of tribal Indians. See F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 34 (1982 ed.) [hereinafter cited as F. COHEN, 1982 ed.].

“Indian sovereignty” refers to powers of self-government retained by Indian tribes and neither explicitly limited by treaty or federal statute nor inherently inconsistent with the federal-tribe relationship. See infra text accompanying notes 7-18. Chief Justice Marshall characterized Indian tribes as “domestic dependent nations” whose relation “to the United States resembles that of a ward to his guardian.” Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). Thus, Indian sovereignty paradoxically depends on the federal government. Because Indian sovereignty can be limited by treaty or federal statute, it is characterized as “limited sovereignty.” Indian sovereignty is also characterized as “inherent” and “retained,” because it consists of the original and remaining powers of self-government. See F. COHEN, 1982 ed., supra, at 235.

“Indian tribe” does not have a uniform legal definition. The Bureau of Indian Affairs, however, relies upon the definition in Montoya v. United States, 180 U.S. 261 (1901). “By a ‘tribe’ we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory . . . .” Id. at 266. See infra text accompanying notes 22-25.


3. The most important general principle in American Indian law is inherent sovereignty. It holds that Indian tribes retain inherent powers of self-government that are not explicitly limited by the federal government. See infra text accompanying notes 10-18. See generally F. COHEN, 1982 ed., supra note 1, at 232-41 (discussing the nature of tribal powers).

4. See infra notes 78, 113-15 and accompanying text.
exercise of sovereignty is at issue in *Native Village of Tyonek v. Puckett.*\(^5\) This Note examines the utility of traditional Indian sovereignty criteria to analyze Alaska Native sovereignty since passage of the Alaska Native Claims Settlement Act (ANCSA).\(^6\) Section I examines the origins of Indian sovereignty, the traditional tribe-Indian country analysis, the scope of the power to exclude non-Indians, and Alaska Native sovereignty. Section II presents *Native Village of Tyonek v. Puckett* and examines the case in light of the traditional tribe-Indian country analysis. Section III proposes a new sovereignty analysis, based not upon formalistic tests of tribe and Indian country but upon an assessment of the historical relationship between Natives and non-Natives and upon the goals of federal Indian policy as expressed by ANCSA.

I

BACKGROUND

A. INDIAN SOVEREIGNTY

1. The Origin of Tribal Sovereignty

   Early theorists argued that tribal sovereignty is a natural right predicated on the humanity and rationality of mankind. Because international law is a subset of this pervasive rational order, these theorists accorded tribal sovereignty the protection of the law of nations.\(^7\) Similarly, early colonists could not ignore tribal sovereignty when confronted with Indian assertions of dominion over people and territory. By negotiating treaties with the Indians, the colonists gave credence to the theorists' notion that tribal sovereignty should receive the protec-

---


\(^7\) Three European scholars of the Middle Ages, Francisco de Victoria, Emmerich de Vattel, and Hugo Grotius, had a profound influence on the doctrine of tribal sovereignty. Francisco de Victoria argued that although Indians are heretics, they have a natural right to property. This view received papal support in 1537 in the *Bull Sublimis Deus,* which forbade deprivation of Indians' liberty and property. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States,* 31 Geo. L.J. 1, 11-12 (1942). "Almost word for word, this declaration of human rights is repeated in the first important law of the United States on Indian relations, the Northwest Ordinance of 1787, adopted two years before the Federal Constitution. . . ." *Id.* at 12. *See 32 Library of Congress, Journals of the Continental Congress, 1774-1789,* at 334, 340-41 (R. Hill ed. 1936).

tion of international law. The United States continued this pattern of diplomacy, thus recognizing the tribes as sovereigns.

Tribal sovereignty, however, is subordinate to the sovereignty of the United States. Chief Justice Marshall addressed the paradox of a subordinate sovereign in *Cherokee Nation v. Georgia* and *Worcester v. Georgia*. In *Cherokee Nation*, Marshall portrayed the tribes as “domestic dependent nations” having a “relationship to the United States resembling that of a ward to his guardian.” In *Worcester*, Marshall stated that “the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection.” The tribes, he stated, were “independent political communities.”

Courts, administrators, and commentators have struggled with the paradox of a relationship between a sovereign and a dependent sovereign. A Department of the Interior opinion addressed the problem, emphasizing the tribes’ inherent sovereignty:

The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: An Indian tribe possesses, in the first instance, all the powers of any sovereign State. Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, . . . but does not by itself affect the internal sovereignty of the tribe . . . . These powers are subject to be qualified by treaties and by express legislation of Congress, but save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of

---


9. The dictionary definition of “sovereign” is “one that exercises supreme authority within a limited sphere.” WEBSTER’S NEW COLLEGIATE DICTIONARY 1104 (1973 ed.). In this Note, the term “sovereignty” refers to the “inherent political independence” to which some native groups are entitled, and the term “exercise of sovereignty” refers to various powers that a sovereign may attempt to exercise. See F. COHEN, 1982 ed., supra note 1, at 246-57 (discussing powers retained by inherently sovereign tribes). This Note’s proposed analysis identifies the existence of sovereignty by reference to natural rights theory and analyzes limits on the exercise of sovereignty by reference to limits imposed by the federal government. See infra text accompanying notes 151-60.


11. 30 U.S. (5 Pet.) at 18-20 (1831) (Court lacked jurisdiction under U.S. Constitution, art. III, because Cherokee Nation is not foreign state).

12. 31 U.S. (6 Pet.) at 561 (1832) (“Cherokee nation . . . is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia have no force . . . .”).

13. 30 U.S. at 17.

14. 31 U.S. at 560-61.

15. Id. at 559.
government.\textsuperscript{16} Recent decisions have reaffirmed the principle of inherent sovereignty.\textsuperscript{17} The tribes retain political independence, except as limited by express provisions in federal statutes and treaties and restraints inherent in the protectorate relationship. As a result, despite the supportive role that natural law originally played in establishing the doctrine of tribal sovereignty, Indian sovereignty is subject to complete abrogation.\textsuperscript{18}

2. The Components of Indian Sovereignty

Traditionally, courts have relied on a "tribe-Indian country" analysis to determine whether a tribal act, such as the exclusion of non-Indians from Indian country, is a valid exercise of sovereign power. A court asks whether the Indian group is a tribe\textsuperscript{19} and, if so,

\begin{quote}
\textsuperscript{16} Powers of Indian Tribes, 55 Interior Dec. 14, 22 (1934) (Solic. Op.). But see In re Sah Quah, 31 F. 327, 329 (D. Alaska 1886) (in purchasing Alaska from Russia [1867 Treaty of Cession] and in laws governing Alaska, "United States has at no time recognized any tribal independence . . ." of Alaska Indians; thirteenth amendment prohibition against slavery applies to them). The Solicitor's Opinion referred to this holding, but did not confront its inconsistency with inherent sovereignty. "It is recognized, of course, that those provisions of the Federal Constitution which are completely general in scope, such as the Thirteenth Amendment, apply to the members of Indian tribes as well as to all other inhabitants of the nation." 55 Interior Dec. at 24.


\textsuperscript{18} The areas in which . . . implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe . . . . These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. 435 U.S. at 326.

\textsuperscript{19} "The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress . . . ."

\textsuperscript{20} . . . In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation."


\textsuperscript{19} See supra note 1, infra text accompanying notes 22-25.
whether the tribe is exercising its jurisdiction within Indian country.20 Once a group of Indians is found to be a tribe acting within Indian country, exercises of tribal sovereignty are presumed valid unless they are explicitly limited by federal treaty or statute or unless they are inherently inconsistent with the federal-Indian relationship.21

a. The Tribe

An Indian group must be a "tribe" in order to obtain federal recognition of its sovereignty. The focus of federal Indian law is thus on the tribe rather than on individual Indians.22 Federal Indian law, however, does not contain an explicit, comprehensive legal definition of the term "tribe,"23 and Congress has never provided one. Instead, the legislative, executive, and judicial branches recognize different groups of Indians as tribes for various purposes.24 Tribal analysis is splintered; the definition of "tribe" depends on the purpose for which the word is used.25

b. Indian Country

A tribe needs the territorial jurisdiction referred to as "Indian country" in order to exercise some of its sovereign powers, such as the power to exclude.26 Congress defined Indian country to include reser-

20. See supra note 1, infra text accompanying notes 26-31.
21. Save as expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government. Consequently, it is necessary to examine legislation and treaties limiting tribal powers of self-government and the manner in which the external sovereign powers of tribes necessarily have been circumscribed by their subjection to the ultimate authority of the United States.


26. The term "Indian country" has a long legislative and judicial history dating back to at least the Indian Non-Intercourse Act of 1834. F. COHEN, 1982 ed., supra note 1, at 27-
vations, Indian allotments, and dependent Indian communities. An Indian country determination is thus usually straightforward, because the existence and boundaries of reservations and allotments are often statutorily or administratively defined.

Dependent Indian communities, however, are not statutorily defined. They are "those tribal Indian communities under federal protection that did not originate in either a federal or tribal act of 'reserving' or were not specifically designated as a reservation." The dependent Indian community category does not refer to types of land ownership or reservation boundaries, but to residential Indian communities under federal protection. Therefore, establishing the exist-
ence and boundaries of a dependent Indian community is often difficult.

3. The Power To Exclude Non-Indians from Indian Country

The exclusionary power is a fundamental sovereign attribute that is intimately tied to a tribe's ability to protect the integrity and order of its territory and the welfare of its members. A tribe needs no federal authorization to exercise sovereignty. In *Worcester v. Georgia*, the United States Supreme Court held that persons were allowed to enter Cherokee land only "with the consent of the Cherokees themselves."

More recently, in *Montana v. United States*, the Supreme Court recognized that tribal powers extend to activities of non-members on fee lands, but only if there is a tribal interest sufficient to justify regulation. The *Montana* Court made clear that the mere presence of non-Indians in Indian country is not sufficient to meet this tribal interest


33. See *Quechan Tribe v. Rowe*, 531 F.2d 408 (9th Cir. 1976); *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906).

34. 31 U.S. (6 Pet.) 515 (1832).

35. *Id.* at 560; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); Powers of Indian Tribes, 55 Interior Dec. at 50 ("over all lands of the reservation, whether owned by a tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business. . . ."); see Tribal Jurisdiction over Non-Indians in Civil Matters: Approval of Various Ordinances of the Crow and Shoshone-Bannock Tribes, Op. Solic. Interior (Oct. 13, 1976) (unpublished, on file at the offices of the Cornell International Law Journal). As with other tribal powers, the power to exclude is subject to limitation or abolition by Congress. See *supra* text accompanying notes 10 & 16.


37. The Court stated:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

A tribe presumptively has an interest in activities on lands belonging to the tribe or its members; thus, tribal control over Indian lands can be the basis for extensive tribal jurisdiction over non-Indians in civil matters. For activities on non-Indian land within Indian country, however, tribal jurisdiction, including the power to exclude non-members, is subject to the *Montana* test of tribal interest.

### B. ALASKA NATIVE SOVEREIGNTY

#### I. Origins

The notion of Indian sovereignty rests on an assumption that Indians once exercised political control over themselves and their land. Some commentators argue that because Alaska Natives were not originally grouped as tribes they are somehow different from Indians in other states. This distinction leads to the argument that the absence of tribal organization implies an absence of political organization. Before western contact, however, the traditional form of

---

38. In holding that the Crow tribe did not have jurisdiction over fishing by non-Indians on non-Indian land within reservation boundaries, the Court found that the tribe was not dependent on the reservation's fishery resources. Thus, the tribal interest was insufficient to justify regulation of the non-Indians. *Montana*, 450 U.S. at 566. *But cf.* Buster v. Wright, 135 F. 947, 951 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906) (upholding tribal business license fee imposed on non-Indians trading on the reservation even though they owned the lots on which they conducted business: "[T]he jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the lands which they occupy in it . . . ."), cited with approval in *Washington v. Confederated Tribes of the Coeur d'Alene Indian Res.*, 447 U.S. 134, 153 (1980).


40. *See supra* note 37 and accompanying text. *See Collins, Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479 (1979); Tribal Jurisdiction over Non-Indians in Civil Matters: Approval of Various Ordinances of the Crow and Shoshone-Bannock Tribes, Op. Solic. Interior (Oct. 13, 1976) (unpublished, on file at the offices of the *Cornell International Law Journal*). No court has explicitly ruled on the power to exclude from Indian country absent some minimum Indian-owned or trust-held land base; no court has explicitly ruled on the power of an Indian sovereign to exclude non-members from a dependent Indian community qualifying as Indian country. *Cf.* Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (authority of a state to regulate tribal activities off an Indian reservation is broader than its authority over tribal activities on a reservation). Upholding the New Mexico gross receipts tax, the *Mescalero Apache* Court stated, "But tribal activities conducted outside the reservation present different considerations. 'State authority over Indians is yet more extensive over activities . . . not on any reservation.'" *Id.* at 148 (quoting *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962)).

41. *See, e.g.*, United States v. Antelope, 430 U.S. 641 (1977). In upholding the constitutionality of the Major Crimes Act from equal protection challenges, the Court stated that federal regulation of Indian affairs is "rooted in the unique status of Indians as 'a separate people' with their own political institutions." *Id.* at 646.

42. *See infra* text accompanying notes 61-63. Because "tribes" of other states were not always organized along the tribal lines later established by the federal government, *see F. Cohen, 1982 ed., supra* note 1, at 6, this distinction is inaccurate.

43. *See infra* text accompanying notes 61-63.
Alaska Native government was the village. Through village government, Alaska Natives exercised political control over themselves and exercised a degree of sovereignty.

2. Federal Treatment of Alaska Natives and Its Implications for Their Sovereignty

a. Early History

The first American reference to Alaska Natives in a legal document is in Article III of the 1867 Russian-American Treaty of Cession. Article III permits the "inhabitants of the ceded territory," with the exception of the "uncivilized native tribes," either to return to Russia or to become United States 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."

The federal government avoided negotiating with Natives and did not enter into treaties. It simply ignored Alaska Natives until the Organic Act of 1884. In the early days of the Organic Act programs, the United States government distinguished its relationship with Alaska Natives.

---

44. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 414 n.208 (1942) [hereinafter cited as F. COHEN, 1942 ed.].
45. "Long before there was any Territory of Alaska, Indian communities in the Territory had their own system of government." Hearings on S. 2037 and S.J. Res. 162 Before the Senate Comm. on Interior and Insular Affairs, 80th Cong., 2d Sess. 149 (1948).
46. Treaty Concerning the Cession of the Russian Possessions in North America, Mar. 30, 1867, United States-Russia, 15 Stat. 539, T.S. No. 301 [hereinafter cited as Treaty of Cession].
47. Treaty of Cession, supra note 46, at art. III. A memorandum from William Seward to the Cabinet states that "'Indians of Alaska are to be on the same footing as indigenous Indians of lower 48.'" D. MILLER, ALASKA TREATY 71 (1981) (quoting memorandum). Miller suggests that the civilized-uncivilized distinction may be of little importance. Only 200 of 26,000 Natives in 1870 were made citizens. Id. The "civilization" issue did become important in naturalization and school attendance cases. In re Minook, 2 Alaska 200 (1904) (naturalization); David v. Sitka School Bd., 3 Alaska 481 (1908) (school attendance). The civilized-unc civilized distinction, however, "was never used to deny the applicability of Federal Indian law to Alaska Natives." D. Case, The Special Relationship of Alaska Natives to the Federal Government: An Historical and Legal Analysis 2 (1978) (published by the Alaska Native Foundation, Anchorage).
48. Atkinson v. Haldane, 569 P.2d 151, 154 (Alaska 1977) (citing F. COHEN, 1942 ed., supra note 44, at 405) ("even though the purchase of [the Alaska] territory occurred in 1867, four years before the termination of the Senate's power to ratify treaties with the Indians, the government never attempted to enter into treaties with Alaska Natives").
49. The federal government may have ignored Native rights because the relationship between Alaska Natives and the federal government began during a period of assimilation following the development of most Indian law.
50. Alaska Organic Act of 1884, ch. 53, § 8, 23 Stat. 24 (codified as amended at 25 U.S.C. § 280(a) (1982)). The Organic Act of 1884 extends the federal mining laws to Alaska and provides, "The Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress." 23 Stat. at 26.
with the Alaska Natives from its relationship with Indians in other states.\textsuperscript{51} Alaska Natives were not served by the Bureau of Indian Affairs, but by the Department of the Interior's Bureau of Education,\textsuperscript{52} and they were served "without reference to race."\textsuperscript{53} As a result, the Solicitor for the Department of the Interior concluded in 1894 that certain laws applicable to "Indians" and "Indian country" did not apply to Alaska Natives.\textsuperscript{54} He implied that the status of Alaska Natives was materially different from that of other aboriginal American tribes.\textsuperscript{55}

In \textit{Metlakatla Indian Community v. Egan},\textsuperscript{56} Justice Frankfurter described the origins of the differences between the federal-Indian relationship and the federal-Alaska Native relationship.

There were no Indian wars in Alaska, although on at least one occasion, there were fears of an uprising. There was never an attempt in Alaska to isolate Indians on reservations. Very few were ever created and the purpose of these, in contrast to many in other states, was not to confine the Indians for the protection of the white settlers, but to safeguard the Indians against exploitation.\textsuperscript{57}

In \textit{Atkinson v. Haldane},\textsuperscript{58} the Supreme Court of Alaska also observed differences. The court noted that distinctions were made because the Alaska Natives were initially under Russian rule.\textsuperscript{59} The court also remarked that the seemingly limitless physical resources of the territory of Alaska minimized the white settlers’ displacement of Natives.\textsuperscript{60}

Indian law commentator Felix Cohen noted that Native villages and communities in Alaska were not organized on tribal lines and that the village, rather than the ethnological tribe, was the central unit of government.\textsuperscript{61} As a result, Alaska Native villages and communities

\begin{itemize}
\item \textsuperscript{51} Alaska—Legal Status of Natives, 19 Pub. Lands Dec. 323 (1894).
\item \textsuperscript{52} Through the efforts of Sheldon Jackson, the resources of the Department of the Interior's Bureau of Education were focused on education of Alaska Natives. \textit{See} D. Case, \textit{supra} note 47, at 2-3. In 1931, however, responsibility for the administration of Alaska Native affairs was transferred to the Bureau of Indian Affairs from the Bureau of Education. \textit{Id.} at 3.
\item \textsuperscript{53} Alaska Organic Act, § 13, 23 Stat. 27 (codified at 25 U.S.C. § 280 (a)).
\item \textsuperscript{54} Alaska—Legal Status of Natives, 19 Pub. Lands Dec. 323 (1894).
\item \textsuperscript{55} \textit{Id.} at 324.
\item \textsuperscript{56} 369 U.S. 45 (1962).
\item \textsuperscript{57} \textit{Id.} at 51.
\item \textsuperscript{58} 569 P.2d 151 (Alaska 1977).
\item \textsuperscript{59} \textit{Id.} at 154.
\item \textsuperscript{60} \textit{Id.} The court went on to hold that the Metlakatla Indians, the subjects of this case, were exceptions to an exception and should be treated like tribes of other states. \textit{Id.} at 154-55.
\item \textsuperscript{61} \textit{See} F. COHEN, 1942 ed., \textit{supra} note 44, at 414 n.208; \textit{Tlingit & Haida Indians v. United States}, 177 F. Supp. 452, 461 (Ct. Cl. 1959) ("Neither the Tlingit nor Haida Indians were organized politically as tribes for the purpose of owning land or for any other purpose."); \textit{In re Sah Quah}, 31 F. 327, 329 (D. Alaska 1886) (in rejecting Tlingit slavery, court stated that Alaska "Indians' system of government is essentially patriarchal and not tri-
\end{itemize}
apparently did not qualify as tribes, because they were included not as “tribes” but as “identifiable Indian groups” in the Indian Reorganization Act of 1936 and the Indian Claims Commission Act of 1946.

There are indications, however, that the federal government’s relationship with Alaska Natives is analogous to its relationship with Indians in other states. Recognizing that “aboriginal Natives . . . are practically the only inhabitants of the Village of Tyonek,” the Solicitor for the Department of the Interior concluded in 1923 that the government’s relationship to the Tyonek Natives is in many respects identical to its relationship with other American aboriginal peoples. The Solicitor affirmed this position in 1924 and again in 1932. In 1942, Felix Cohen stated that Alaska Natives occupy the same relation to the federal government as do the Indians residing in the United States.

Today, however, the federal government recognizes Alaska Native governments for the purposes of certain federal programs but does not recognize their sovereignty. In 1978, the Department of the

---

63. Ch. 959, 60 Stat. 1049 (superceded by Act of May 24, 1949, ch. 139, § 89(a), 63 Stat. 102 (jurisdiction of claims after Aug. 13, 1946 in U.S. Court of Claims)). The Indian Claims Commission Act established a special commission to hear and resolve claims against the federal government. See Nelson Act of 1905, ch. 277, §§ 3-5, 33 Stat. 617.
64. “The relations existing between them 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 to whom I shall refer as American Indians.” 49 Pub. Lands Dec. 592, 592-93 (1923).
66. In 1932, the Solicitor issued a comprehensive opinion reviewing the status of Alaska Natives. He concluded a discussion of applicable cases, statutes, and policies as follows:

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. It follows that the natives of Alaska, as referred to in the treaty of March 30, 1867, between the United States and Russia, are entitled to the benefits of and are subject to the general laws and regulations governing the Indians of the United States . . .

67. The legal position of the individual Alaskan Natives has been generally assimilated to that of the Indians of the United States. It is now substantially established that they occupy the same relation to the Federal Government as do the Indians residing in the United States; that they, their property, and their affairs are under the protection of the Federal Government; that Congress may enact such legislation as it deems fit for their benefit and protection; and that the laws of the United States . . . proper are generally applicable to the Alaskan Natives.

Interior promulgated Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, under which the Secretary of the Interior publishes annually a List of Indian Tribal Entities that Have a Government-To-Government Relationship with the United States. Placement on this list is a prerequisite to the protection, services, benefits, immunities, and privileges available to federally acknowledged Indian tribes. Alaska Native groups are listed as "Native Governmental Entities;" this listing allows Alaska Natives to receive federal benefits but explicitly does not recognize their sovereign status.

b. Impact of ANCSA

ANCSA created confusion about the permissible scope of Alaska Native sovereignty. The Act modified the federal relationship with

---

69. This list comprises "all Indian tribes which are recognized and receiving services from the Bureau of Indian Affairs." 25 C.F.R. § 83.6(b) (1984).
70. 47 Fed. Reg. 53,133 (1982). See Affidavit of Theodore C. Krenzke, Director, Office of Indian Services, Bureau of Indian Affairs, ¶ 14 (September 28, 1983) (on file at the offices of the Cornell International Law Journal) (drafted for the NVT v. Puckett suit, but not submitted to the court) ("The Department [of the Interior] considers the Native Village of Tyonek to be a Native governmental entity based on the village's organization pursuant to Federal statute and a long-standing course of dealing with the Village as a Native governmental entity."); Board of Equal. v. Alaska Native Bhd. & Sisterhood, 666 P.2d 1015, 1024 n.2 (Alaska 1983) (Rabinowitz, J., concurring) ("This listing [47 Fed. Reg. 53,133] . . . expressly avoided characterizing Alaskan Native groups as tribes or Indian communities. Instead, the notice stated that 'unique circumstances have made eligible additional entities in Alaska which are not historical tribes.'").

(A) IN GENERAL. The term "Indian tribal government" means the governing body of any tribe, band, community, village, or group of Indians, or (if applicable) Alaska Natives, which is determined by the Secretary [of the Treasury], after consultation with the Secretary of the Interior, to exercise governmental functions.

(B) SPECIAL RULE FOR ALASKA NATIVES. No determination under Subparagraph (A) with respect to Alaska Natives shall grant or defer any status or powers other than those enumerated in section 7871. Nothing in the Indian Tribal Governmental Tax Status Act of 1982, or in the amendments made thereby, shall validate or invalidate any claim by Alaska Natives of sovereign authority over lands or people.


72. For example, the village of Venetie unilaterally asserted title to lands beyond its ANCSA entitlement and passed an ordinance requiring non-tribal members to procure a "license to trespass" with the condition that non-members may be allowed to construct private homes or businesses but will have no claim to the structures or to the land upon which they sit. In addition, business licenses will be subject to a five-percent gross receipts tax. Alaska Native News, Aug. 1983, at 40. Village officials in Akiachak have attempted to dissolve their city council in favor of a tribal government. As a result, the status of over half a million dollars in state funds is in doubt. The Anchorage Times, Oct. 27, 1983, at A-1. Both the towns of Arctic Village and Venetie assert that since they are federally recog-
Alaska Natives in ways that are inconsistent with the power of Native villages to exclude non-Natives; ANCSA severed Native land ownership from Native government and vested that land in corporations and individual shareholders. The impact of ANCSA on Alaska Native communities is significant in that it

1. expresses a policy against creating reservations, wardships, or racially defined institutions;
2. terminates all hunting and fishing rights;
3. unilaterally revokes all reservations except Metlakatla; and
4. provides for state taxation of Native lands after 1991.

The Act in effect, de-emphasizes the role of Native village Governments by preventing their ownership or control of any substantial portion of the 40 million acre settlement.

Thus, although ANCSA is consistent with Alaska Native sovereignty, it is inconsistent with the exercise of the power to exclude non-Natives because it severs Alaska Native land ownership from Alaska Native government.

---

73. ANCSA extinguished all claims based on “aboriginal right, title, use, or occupancy of land or water areas in Alaska.” 43 U.S.C. § 1603(c) (1982). In return, the United States segregated $462,500,000 from general Treasury funds into a separate Alaska Native Fund. Id. at § 1605(a)(1). An additional amount not to exceed $500,000,000 was to be deposited into the Fund from mineral royalties. Id. at § 1608(g). Alaska was divided into twelve geographic regions, each with its own for-profit Regional Corporation. Id. at § 1606(n), (d). A thirteenth Regional Corporation for Alaska Natives who are not residents of Alaska was organized in 1976. Id. at § 1606(c). Pub. L. No. 94-204, § 8, 89 Stat. 1149 (1976) (codified at 43 U.S.C. § 1604(c) (1982)); Alaska Native Ass’n of Or. v. Morton, 417 F. Supp. 459 (D.D.C. 1974). Within each Regional Corporation Village Corporations were established. 43 U.S.C. § 1607. The Regional Corporations were to supervise distribution of funds to Village Corporations and individual shareholders. Id. at § 1606(j)-(m). Alaska Natives also received over 40 million acres of land, selected in part by the Village Corporations and in part by the Regional Corporations. Fee simple patents for the land were issued to the corporations. See F. COHEN, 1982 ed., supra note 1, at 746-47, 753-54. ANCSA does not restrict alienation of land; however, stock in the Native corporations is alienable after 1991. 43 U.S.C. § 1606(h).

74. R. Price, supra note 26, at 69-70 (citing AMERICAN INDIAN POL’Y REVIEW COMM’N, 95TH CONG., 1ST SESS., FINAL REPORT, vol. 2, at 679 (Comm. Print 1977)).

75. See infra text accompanying notes 170-78.
II

NATIVE VILLAGE OF TYONEK v. PUCKETT

A. NATIVE VILLAGE OF TYONEK v. PUCKETT

Native Village of Tyonek v. Puckett offers an opportunity to test the efficacy of the tribe-Indian country analysis. The case presents an issue of first impression: whether the Native Village of Tyonek (NVT), organized under the Indian Reorganization Act (IRA), but whose reservation lands were revoked by ANCSA, can enforce an ordinance excluding non-Natives from Tyonek.

1. History of NVT

In 1915, President Woodrow Wilson established the Moquawkie Indian Reserve, setting aside 26,918 acres for the benefit of Alaska Natives of the Tyonek region. In 1939, the Native Village of Tyonek

77. The village of Tyonek is located approximately 50 miles west across Cook Inlet from Anchorage, Alaska. It is accessible only by air and has a population of approximately 250 people. Alaska Natives have inhabited the area since before European contact. Memorandum in Support of Motion to Strike Affirmative Defense of Plaintiff for Sovereign Immunity at 3-4, Native Village of Tyonek v. Puckett, No. A82-369 (D. Alaska) [hereinafter cited as Memorandum in Support of Motion to Strike]. When the United States purchased Alaska from Russia, Tyonek was an Athabascan Indian community. Treaty of Cession, supra note 47, 15 Stat. 539.
79. ANCSA revoked all reserves set aside for Native use except the Annette Island Reserve for the Metlakatla Indian community. 43 U.S.C. § 1618(a).
80. NVT adopted an ordinance in 1942 known as “Rule No. 4,” which states, Any white men except government men or outsider coming in is allow [sic] to stay only 24 hrs. If weather permits them to go. And is not allowed to bring any liquor. Article No. 4 have to be put up in posters. And anyone destroying these papers will be subject to penalty. Twenty-five dollars fine if caught destroying the poster.
adopted a constitution, corporate charter, and bylaws\textsuperscript{82} pursuant to the Indian Reorganization Act of 1936.\textsuperscript{83}

The Tyonek Constitution empowered members of NVT to choose a form of government and to establish a governing body. The members established a council, which is authorized to exercise the powers of NVT.\textsuperscript{84} Under the Tyonek Constitution, the council may control the use by members or non-members of any reserve set aside by the federal government for the village. The NVT council is also empowered to make rules to carry out the Constitution.\textsuperscript{85} The council adopted Rule No. 4, which provides that non-members of NVT, with the exception of government employees, are permitted to remain in the village no longer than twenty-four hours, unless weather conditions compel a longer stay.\textsuperscript{86} Upon petition and under special circumstances, the council can grant a variance.\textsuperscript{87}

In 1963, in accordance with the Indian leasing laws,\textsuperscript{88} the Secretary of the Interior, with the consent of the Bureau of Indian Affairs (BIA),\textsuperscript{89} granted an oil and gas lease on NVT reserve land.\textsuperscript{90} The Secretary also placed the oil and gas proceeds in trust funds for the use and benefit of NVT.\textsuperscript{91} In 1965, NVT used part of the proceeds to construct approximately sixty prefabricated houses for NVT members. Before completion of the houses, NVT adopted the Family Plan, which provided for the purchase of housing for NVT members. Under the plan, title to all assets acquired by a family would vest in

\begin{flushleft}
\textsuperscript{82} Memorandum of Points and Authorities in Support of Motion for Summary Judgment on Behalf of Plaintiff and Counterclaim Defendants at 2, Native Village of Tyonek v. Puckett, No. A82-369 (D. Alaska) [hereinafter cited as Memorandum in Support of Summary Judgment].

\textsuperscript{83} 25 U.S.C. § 473a (1982); see id. at §§ 476-477.

\textsuperscript{84} The council consists of a President, Vice President, Secretary/Treasurer, and six other members elected to three year terms at staggered intervals. The council is vested with executive, legislative, and judicial power subject to the direction and review of the NVT membership. Affidavit of Donald Standifer, President Tyonek Village Council, NVT, at 2, Exhibit A to Memorandum in Support of Summary Judgment, supra note 82.

\textsuperscript{85} Council powers also include “[doing] all things for the common good [of NVT members]”; keeping “order in the reserve”; and guarding and fostering “native life, arts, and possessions and native customs.” NVT Const. art. IV, quoted in Memorandum in Support of Summary Judgment, supra note 82 at 2-3.

\textsuperscript{86} Rules for Laws of Native Village of Tyonek (May 18, 1942) quoted in Memorandum in Support of Motion for Summary Judgment, supra note 82, at 4. See supra note 80.

\textsuperscript{87} Memorandum in Support of Summary Judgment, supra note 82, at 4.


\textsuperscript{89} The Stanton Act, ch. 115, 42 Stat. 208 (1921) (codified as amended at 25 U.S.C. § 13 (1982)), authorizes the Bureau of Indian Affairs to expend funds appropriated by Congress “for the benefit, care and assistance of the Indians throughout the United States.”

\textsuperscript{90} Oil and Gas Leasing on Lands Withdrawn by Executive Order for Indian Purposes in Alaska, 70 Interior Dec. 166 (1963).

\end{flushleft}
that family.\textsuperscript{92} In an attempt to regulate the alienation of Family Plan housing, NVT passed an ordinance providing that Family Plan housing could not be sold, conveyed, leased, mortgaged, or otherwise alienated to non-NVT members.\textsuperscript{93}

On December 18, 1971, ANCSA revoked the Moquawkie Indian Reserve.\textsuperscript{94} The land that was previously included in the reserve is now owned by the Tyonek Village Corporation, an ANCSA profit-making Native corporation subject to Alaska law.\textsuperscript{95} ANCSA thus leaves the NVT government landless, without an Indian reservation.

2. **Litigation**

In October 1981, non-members\textsuperscript{96} Donald and Erna Puckett leased a Family Plan house from member Esther Kaloa.\textsuperscript{97} Two months later, non-members Fred and Virginia Slawson unsuccessfully sought permission from the village council to reside in the village.\textsuperscript{98} On May 29, 1982, the Slawsons leased a Family Plan house from

\textsuperscript{92} See Ollestead v. Native Village of Tyonek, 560 P.2d 31 (Alaska 1977), and Fondahn v. Native Village of Tyonek, 450 F.2d 520 (9th Cir. 1971), for a recitation of this history. See Affidavit of Donald Standifer, \textit{supra} note 84, at 8.

\textsuperscript{93} Village Ordinance No. 65-32 provides,

\begin{quote}

The interests of members of the Village in houses which are acquired . . . by virtue of the Family Plan of the Village cannot be sold, conveyed, leased, mortgaged, or otherwise alienated by any member of the Village to a person, corporation or other legal entity which or who is not an enrolled member of the Village of Tyonek, Alaska. It is the purpose of this resolution to insure that private interests in houses in the Village or in the Moquawkie reservation may only be held by enrolled members of the Village of Tyonek. Should any alienation be attempted in violation of this resolution the same shall be void.

\end{quote}


\textsuperscript{94} 43 U.S.C. § 1618 (1982).

\textsuperscript{95} Tyonek Village Corporation was formed pursuant to section 8 of ANCSA, 43 U.S.C. § 1607 (1982). It is a legal entity distinct from the Native Village of Tyonek. It holds title to the lands of the former Moquawkie Indian Reservation, as well as additional lands. Nearly all the Corporation's initially enrolled shareholders were NVT members. Affidavit of B. Agnes Brown, President of Tyonek Village Corporation, Native Village of Tyonek v. Puckett, No. A82-369 (D. Alaska).

\textsuperscript{96} The IRA authorized the Secretary of the Interior to prepare a final roll of Tyonek membership, 25 U.S.C. § 163 (1982), and on May 31, 1965, the Secretary approved the Tyonek membership rolls. See Ollestead v. Native Village of Tyonek, 560 P.2d 31, 33 (Alaska 1977).

\textsuperscript{97} The Pucketts leased the Kaloa house from October 10, 1981, to June 15, 1982. In April 1982, the parties amended the lease agreement to renew it for one year, ending April 15, 1983. At the same time, the parties agreed in writing to the following condition: “Should the Native Village of Tyonek, by act of the council, vote to remove lessees, by court action, this lease is automatically voided.” Memorandum in Support of Summary Judgment, \textit{supra} note 82, at 19.

\textsuperscript{98} \textit{Id.} at 20.
members Alec and Olga Constantine.\textsuperscript{99} On June 2, 1982, the Slawsons made a second request to remain in the village, but NVT again denied it.\textsuperscript{100} 

In August 1982, NVT brought an action in the United States District Court for the District of Alaska\textsuperscript{101} against the Pucketts, Slawsons, Kaloas, and Constantines, requesting an order evicting the non-member defendants and an order enjoining the member defendants from leasing or otherwise alienating the premises to the non-member defendants.\textsuperscript{102} NVT argues that in excluding non-Natives from Tyonek, it has acted as a "federally recognized" tribe exercising powers of self-government pursuant to its inherent authority, constitution, and bylaws.\textsuperscript{103} NVT contends that the village is a dependent Indian community; therefore, it falls within the federal definition of Indian country.\textsuperscript{104} Thus, it passes the tribe-Indian country analysis and is free to exercise the inherent powers of an Indian sovereign and exclude non-Natives from its village. NVT also argues that its exercise of those powers is valid, because the exclusion of non-Natives from Tyonek serves to protect the social and internal relations of the members of NVT and to promote the social, political, and economic integrity of Tyonek as an Indian community.\textsuperscript{105} 

The defendants and cross-plaintiffs argue that NVT does not overcome the tribe-Indian country hurdles and that even if it does, its power to exclude non-Natives from Tyonek is limited by the United States Constitution and federal statutes.\textsuperscript{106} Although the court could decide \textit{Native Village of Tyonek v. Puckett} on a number of bases,\textsuperscript{107} the case squarely presents the question of the vitality of an Alaskan IRA

\text{\footnotesize 99. Id.}\n\text{\footnotesize 100. Id.}\n\text{\footnotesize 101. Native Village of Tyonek v. Puckett, No. A82-369 (D. Alaska filed Sept. 26, 1982).}\n\text{\footnotesize 102. Amended Complaint at 4, Native Village of Tyonek v. Puckett, No. A82-369 (D. Alaska).}\n\text{\footnotesize 103. Memorandum in Support of Summary Judgment, supra note 82, at 22.}\n\text{\footnotesize 104. Id.}\n\text{\footnotesize 105. Id.}\n\text{\footnotesize 106. Opposition to Motion for Summary Judgment of Plaintiff and Counterclaim Defendants at 1, Native Village of Tyonek v. Puckett, No. A82-369 (D. Alaska). The defendants argue that the ordinance is racially discriminatory and thus violates the Equal Protection Clause and the Civil Rights Act. Id. at 12-15.}\n\text{\footnotesize 107. The court could find, assuming arguendo, that NVT is a sovereign, that the ordinance must fall nonetheless because (1) in light of the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1982), NVT does not have the authority to pass racially discriminating ordinances; (2) the federal constitution and statutory guarantees prohibit racially discriminatory ordinances; (3) ANCSA, by extinguishing all aboriginal claims and all permanent racially defined institutions or lengthy federal wardships, extinguished NVT's right to exclude non-Indians; (4) 28 U.S.C. § 1360 (1982) (state civil jurisdiction of actions to which Indians are parties) and 18 U.S.C. § 1162 (1982) (state criminal jurisdiction of offenses committed by or against Indians) withdrew NVT's power to enact regulatory ordinances; or (5) the power to exclude from fee lands requires some minimum Indian-owned or trust-held land base. See supra note 40 and accompanying text.}
government after ANCSA and provides an opportunity to expose the weaknesses of the tribe-Indian country analysis.

B. APPLYING THE TRADITIONAL TRIBE-INDIAN COUNTRY TEST

Traditional analysis requires that a Native government be a “tribe” located in “Indian country”108 in order to exclude non-Natives from a village. The following discussion examines NVT’s ability to meet these requirements.

I. NVT’s Tribal Status

There is no single definition or test for tribal status.109 Tribes generally are recognized by either the executive or legislative branches of the federal government. The judiciary usually will defer to this determination.110 Neither Congress nor the Executive has recognized NVT as a tribe, although the federal government’s relationship with NVT is similar to its relationship with recognized tribes.111 Moreover, NVT does not fit the judicial definition of “tribe.”112 Thus, although NVT might be considered a tribe for some purposes, it is not a “tribe” under traditional tests for establishing sovereignty.

a. Legislative Treatment of NVT

NVT was formed pursuant to the IRA of 1936;113 its goal was to encourage self-determination for Indians.114 Nonetheless, although NVT is an IRA government, it is not necessarily a sovereign with the power to exclude non-members from Tyonek.

When the IRA was enacted in 1934, it applied only in part to Alaska Natives. Because of difficulties in applying the term “tribe” to

108. See supra text accompanying notes 19-40.
109. See supra note 1, text accompanying notes 22-25.
111. See infra text accompanying notes 119-23.
112. See infra text accompanying notes 124-31.
114. See Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73d Cong., 2d Sess. (1934) (concerning 1934 IRA, which was extended to Alaska Natives in 1936); To Grant to Indians Living Under Federal Tutelage the Freedom To Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3643 Before the Senate Comm. on Indian Affairs, 73d Cong., 2d Sess. (1934) (same).
Alaska Natives and because the business corporations provisions did not apply to Alaska, Congress amended the Act in 1936 to extend more of its provisions to Alaska:

[Groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 16, 17, and 10 of the Act of June 18, 1934 (43 Stat. 984).] 115

Because NVT was formed under the “common bond” requirement of the 1936 Act, it may not be entitled to the sovereign status of governments that were formed under the tribal requirements of the 1934 Act. 116

b. Executive Treatment of NVT

The executive branch also treats NVT as if it were a tribe117 but has never explicitly recognized NVT as a tribe. An Opinion of the Solicitor held that an Indian group that is not an historical tribe may not list in its constitution the sovereign powers of a tribe. 118 Many federal regulations define “tribe” to include Alaska Native villages such as NVT. These regulations use the term broadly to identify eligible recipients of support, protection, and assistance, 119 but they do not

116. See supra notes 64-66 and accompanying text.
117. The Secretary of the Interior is required by federal regulation to publish a “list of all Indian tribes which are recognized and receiving services from the Bureau of Indian Affairs.” 25 C.F.R. § 83.6(b) (1984). The list “shall be updated and published annually in the Federal Register.” Id. The Secretary of the Interior has not published a list of Alaskan entities considered tribes. The Department, however, has listed Alaska Native Villages, including Tyonek, as “entities” eligible to receive BIA services and not “tribes.” 47 Fed. Reg. 53,133 (1982). An argument can be made, however, that the passage of ANCSA was itself a legislative recognition of tribal status and sovereignty as well as a settlement of a property claim.
119. See, e.g., 25 C.F.R. § 256.2(f)(2) (1984) (implementing the Snyder Act); id. at § 23.2(i) (implementing the Indian Child Welfare Act); id. at §§ 32.2(c), 32.2(d), 32.3 (implementing title XI of the Education Amendments of 1978); id. at § 41.3(i) (implementing the Tribally Controlled Community College Assistance Act); id. at §§ 101.1(e)-(g), 103.1(e)-(g), 286.1(g)-(i) (implementing the Indian Financing Act); id. at §§ 271.2(h), 274.3(j), 275.2(f), 276.2(i), 277.3(g) (implementing the Indian Self-Determination and Education Assistance Act). These regulations concern extension of benefits to Natives and sweep as broadly as possible to effectuate the ameliorative purposes of the legislation. See Alaska Chapter, Ass'n of Gen. Contractors v. Pierce, 694 F.2d 1162 (9th Cir. 1982) (adopting broad definitions of Indian Self-Determination and Education Act to HUD regulations); Morton v. Ruiz, 415 U.S. 199 (1974) (restrictive application of definitional language is improper when construing either the grant or denial of general assistance benefits to Indians).
explicitly grant sovereignty or address the implications of their use of the label "tribe" for the group's sovereignty.

Although the Department of the Interior recognizes that it has a government-to-government relationship with NVT, it refers to NVT as a Native Governmental Entity rather than as a tribe.\textsuperscript{120} In 1981, the Bureau of Indian Affairs promulgated regulations for tribal elections under the IRA, specifically including Alaska elections under the IRA of 1936\textsuperscript{121} and suggesting that IRA governments in Alaska would have the same powers as tribal governments in other states.\textsuperscript{122} Nonetheless, the Bureau of Indian Affairs lists Alaska Native groups separately from tribes, implying that the two are distinct.\textsuperscript{123}

c. NVT's Status Under the Judicial Definition of Tribe

Although two courts assumed without deciding that NVT was a tribe,\textsuperscript{124} it seems clear that NVT is not a tribe under the definition

\textsuperscript{120} See supra notes 68-71 & 117 and accompanying text.
\textsuperscript{121} 25 C.F.R. \textsection 81.1(w) (1984).

"Tribe" means: (1) Any Indian entity that has not voted to exclude itself from the Indian Reorganization Act and is included, or is eligible to be included, among those tribes, bands, pueblos, groups, communities, or Alaska Native entities listed in the \textsc{Federale \ Register} pursuant to 83.6(b) of this chapter as recognized and receiving services from the Bureau of Indian Affairs . . . .

\textsuperscript{122} On equal protection grounds, the Bureau of Indian Affairs in Alaska recently initiated an action to organize Alaska Native villages under the Indian Reorganization Act. There are approximately 30 villages that have applications for tribal constitutions pending with the Bureau of Indian Affairs. See R. Price, supra note 26, at 76.

\textsuperscript{123} Under the canon of statutory construction \textit{noscitur a sociis} ("associated words"), if Alaska Native groups are listed as entities, separate from tribes, they must be distinct from tribes. See C. Sands, 2A Sutherland \textsc{Statutory Construction} \textsection 47.16 (4th ed. 1972).

\textsuperscript{124} Fondahn v. Native Village of Tyonek, 450 F.2d 520 (9th Cir. 1971); Ollestead v. Native Village of Tyonek, 560 P.2d 31 (Alaska 1977). The \textit{Fondahn} and \textit{Ollestead} opinions assume Tyonek's tribal status for purposes of decision; they do not expressly recognize NVT as a tribe. In \textit{Fondahn}, the Ninth Circuit recited the history of Tyonek from the creation of the Moquawkie Reserve to 1971. 450 F.2d at 521. The court stated that the United States recognized the council of Tyonek as a spokesperson for the people of Tyonek in lieu of any local government. \textit{Id}. But with regard to NVT's tribal status, the court only noted that the plaintiff, an alleged member-participant in the distribution of revenue from the oil and gas lease, had alleged that Tyonek village had been known as the Moquawkie, Tyonek, and Beluga tribe. \textit{Id}. There was no need for the court to address NVT's tribal status. The court apparently assumed that the Indians at Tyonek were a tribe and went on to adopt the holding of Martinez v. Southern Ute Tribe of S. Ute Res., 249 F.2d at 920, that "a tribe has the complete authority to determine all questions of its own membership, as a political entity . . . ." 450 F.2d at 522 (quoting \textit{Martinez}, 249 F.2d 915, 920 (10th Cir. 1957)).

In \textit{Ollestead}, 560 P.2d 31 (Alaska 1977), appellants sought a declaratory judgment that they were entitled to share in proceeds from certain oil and gas leases. The proceeds were to be for the use and benefit of members of the Tyonek tribe. 560 P.2d at 33. The superior court dismissed the action, relying on \textit{Fondahn} and \textit{Martinez}. On appeal, the Supreme Court of Alaska affirmed the judgment below on the grounds that 28 U.S.C. \textsection 1360(b) deprives state courts of jurisdiction over ownership disputes involving property belonging to an Indian tribe or community and held in trust by the United States. \textit{Id}. at 34. In
given by the United States Supreme Court in Montoya v. United States. "By a ‘tribe’ we understand a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."125 This definition provides a four part test: a) same or similar race; b) united in a community; c) under one leadership or government; and d) inhabiting a particular territory.

NVT does not pass the Montoya test. NVT fails the first part,126 because membership is open to any Alaska Native who is one-fourth Athabascan, Eskimo, or Aleut.127 With respect to the second and third parts, many courts128 and Solicitor’s Opinions129 have required Indians to have been historically united in a community under one leadership or government. NVT is an IRA government formed under the common bond requirement of the 1936 Act; but IRA status alone does not establish historical tribal existence.130 Finally, under the fourth part, although most NVT members inhabit the Tyonek area, some live elsewhere. Thus, NVT fulfills none of the Montoya criteria completely.131

applying 28 U.S.C. § 1360(b), the Alaska Supreme Court assumed that the Tyonek Indians constituted a tribe or community.


126. Cf. Memorandum in Support of Motion to Strike, supra note 77, at 6.
127. Such broad membership parameters may reflect the nature of the traditional village government in Alaska. Furthermore, they parallel the federally reorganized tribes whose members are combinations of ethnological tribes. Congress has created “consolidated” or “confederated” tribes consisting of several ethnological tribes. See, e.g., United States v. Mazurie, 419 U.S. 544, 546 (1975) (Wind River Reservation consisting of Shoshone and Arapahoe tribes).
130. See supra notes 46-67 & 117 and accompanying text.
131. However, as the First Circuit noted, the basic Montoya test is “far from satisfactory.” Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 582 (1st Cir.), cert. denied, 444 U.S. 866 (1979). The Mashpee court also recognized that there are limits to Congress' authority over Indians as tribes.

[F]though the scope of congressional power to deal with Indians is very broad, it is not unlimited. Congress cannot deal with Indians solely as a racial group. . . . Nor can Congress arbitrarily label a group of people a tribe. . . . A tribe must be something more than a private, voluntary organization.
2. Indian Country at Tyonek

With one exception, cases decided before ANCSA indicated that there was no Indian country in Alaska. ANCSA revoked the


133. Early decisions held that the Territory of Alaska was not Indian country for the purpose of certain federal statutes. For example, United States v. Sevelofi, 27 F. Cas. 1021 (D. Or. 1872) (No. 16,252), dismissed an indictment against a defendant who allegedly introduced whiskey into Sitka. The court reasoned that the Indian Non-Intercourse Act of 1834 was not applicable to Alaska.

In In re Sah Quah, 31 F. 327 (D. Alaska 1886), the court addressed the question of Indian country in a slave's petition for habeas corpus. The court held that an 1873 statute, which extended two provisions of the 1834 Non-Intercourse Act, did not recognize Alaska as Indian country for any other purpose; that groups of Alaska Natives were not tribes in the legal sense; and that the thirteenth amendment, which prohibited slavery, applies to them. It was not necessary, however, for the court to reach the Indian country issue, because the thirteenth amendment is an absolute ban on slavery in the whole United States. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438-39 (1968). The territory of Alaska had been incorporated into the United States; thus, constitutional protections were applicable. See Rassmussen v. United States, 197 U.S. 516 (1905).

In United States v. Booth, 161 F. Supp. 269 (D. Alaska 1958), the court held that the Metlakatla Reserve was not Indian country. But cf. Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977) (Metlakatla Indian Community entitled to sovereign immunity just as Indian tribes in other states). The Booth court distinguished the Metlakatla Indians by their relatively high degree of assimilation into non-Native society; on the unique origin of the reserve as a settlement for Native immigrants from Canada and certain Alaska Natives; and on a finding that, in spite of organization under the Indian Reorganization Act, there was no real tribal organization. In dicta, the court concluded that "none of the Indians of Southeast Alaska . . . are within the definition of Indian country." Id. at 275. The decision relied heavily on an earlier territorial decision, United States v. Libby, McNeil & Libby, 107 F. Supp. 697 (D. Alaska 1952), holding that the Hydaburg Indian Reservation had not been established properly and reflecting a feeling that reservations in Alaska are "indefensible" and constitute racial segregation and discrimination in the worst form. 161 F. Supp. at 272 (quoting United States v. Libby, McNeil & Libby, 107 F. Supp. at 699).

In Metlakatla Indian Community v. Egan, 362 P.2d 901 (Alaska 1961), the court commented on the issue of dependent Indian communities, but expressly rejected the applicability of the dependent Indian community category of Indian country, as expressed in Sandoval, in the circumstances and history of Alaska. The court stated, "There is not now and never has been an area of Alaska recognized as Indian country with one possible exception. See Petition of McCord . . . . This case stands alone in the area of Alaska law and has been distinguished in United States v. Booth." Id. at 920 (citations omitted).

More recently, in 1979, the United States District Court for the District of Alaska considered the question of Indian country in Alaska in People of S. Naknek v. Bristol Bay Borough, but stated that it did not have to decide whether the Village of South Naknek was within Indian country. 466 F. Supp. 870, 877 (D. Alaska 1979). The court indicated that the lots in question were "off reservation" and that this status made them subject to local taxes for personal property. Id. The court cited Organized Village of Kake v. Egan, 369 U.S. 60 (1962) (Alaska may apply its anti-fish trap law to Native fishing outside an Indian reservation), and Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (the state can tax off-reservation Indians), in support of its decision. But see Bryan v. Itasca County, 426
Moquawkie Reserve, but it did not expressly abolish Indian country. No court has addressed whether the Tyonek area is Indian country absent the Moquawkie Reserve.

If Tyonek is Indian country, it must be a dependent Indian community. The United States Court of Appeals for the Eighth Circuit developed a test for determining whether an area is a dependent Indian community in United States v. South Dakota. The court set out four factors for determining the status of a dependent Indian community:

1. The United States' retention of "title to the lands which it permits the Indians to occupy" and "authority to enact regulations and protective laws respecting this territory";
2. The nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area;
3. The existence of an element of cohesiveness manifested either by economic pursuits in the area, common interests, or needs of inhabitants as supplied by the locality;
4. The setting apart of such lands for the use, occupancy and protection of dependent Indian peoples.

135 No explicit language in ANCSA or in its legislative history refers to Indian country. "[The act did not . . . specifically abolish Indian country per se. Therefore, unless the continued existence of Indian country would be patently inconsistent with the purposes of the act, no intent to abolish Indian country . . . should be read into the act." Opin. Assoc. Solic., Div. of Indian Aff., Comm'n of Indian Aff., Dep't of Interior (October 1, 1980) (unpublished), quoted in Price, supra note 26, at 101.

There are, however, provisions of ANCSA that indicate that it may be inconsistent with dependent Indian community status. See, e.g., 43 U.S.C. § 1606(d) (1982) (land grants are to be conveyed to corporations organized under state law); id. at § 1611 (all lands selected are patented in fee simple with few restrictions on alienation); id. at § 1620(d) (lands granted under ANCSA are to be taxable in 20 years); id. at § 1613(e)(3) (municipalities organized under state law are to receive municipal lands from ANCSA village corporations); id. at § 1601(b) (ANCSA settlement should be accomplished "without establishing any permanent racially defined institutions."). These provisions indicate that Congress did not intend to expand the notion of dependent Indian communities.
136 Congress defined Indian country to include land within an Indian reservation, Indian allotment, or dependent Indian community, 18 U.S.C. § 1151 (1982), and ANCSA revoked the Moquawkie Reserve, 43 U.S.C. § 1618(a) (1982). See supra notes 1, 27 & 73 and accompanying text. There is no allotment at Tyonek; thus, Tyonek can be Indian country only if it is a dependent Indian community.

The definition of "dependent Indian community" in the statutory Indian country definition is based on the Supreme Court's construction of the term in United States v. McGowan, 302 U.S. 535 (1938) (lands established as colony are Indian country for purposes of liquor laws), and United States v. Sandoval, 231 U.S. 28 (1913) (lands owned by Pueblo Indian treated as Indian country). Although the general policies behind recognizing Indian country are discussed in both cases, the Court did not announce a method for determining whether Indian country exists.
137 665 F.2d 837 (8th Cir. 1980) (South Dakota has no jurisdiction over a housing project that is a dependent Indian community because it is managed by an Indian tribe).
138 Id. at 839 (quoting Weddell v. Meierhenry, 636 F.2d 211, 212-13 (8th Cir. 1980), cert. denied, 451 U.S. 941 (1981)) (citations omitted). Other federal courts have suggested similar tests. See United States v. Levesque, 681 F.2d 75 (1st Cir. 1982); United States v. Martine, 442 F.2d 1022 (10th Cir. 1971) (Rawah
Application of these factors to NVT suggests that NVT may not be a dependent Indian community. With regard to the first factor, the United States has not retained title to land at Tyonek, title has transferred to a private, profit-making corporation, Tyonek Native Corporation.139 The United States retains no authority over selected lands, and ANCSA explicitly anticipates the termination of the wardship.140 With regard to the second factor, ANCSA has changed the relation-

community on land owned by the Navajo tribe was Indian country). The Martine court stated that the trial court had followed the proper approach in considering “the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area.” 422 F.2d at 1023. The court further stated that its holding did not imply that there was a dependent Indian community “wherever a group of Indians is found, e.g., in Los Angeles” and continued, “The mere presence of a group of Indians in a particular area would undoubtedly not suffice.” Id. at 1024. See also Weddell v. Meierhenry, 636 F.2d 211, 213 (8th Cir. 1980), cert. denied, 451 U.S. 941 (1981) (“[I]t would be unwise to expand the definition of dependent Indian community to include a locale merely because a small segment of the population consists of Indians receiving various forms of assistance.”); United States v. Mound, 477 F. Supp. 156 (D.S.D. 1979) (upholding criminal jurisdiction of federal district court under the Federal Major Crimes Act; area in which crime allegedly occurred was dependent Indian community within the meaning of Indian country). In explaining its decision, the Mound court stated

The crucial consideration here is “whether [the community has] been set apart for the use, occupancy, and protection of dependent Indian peoples.” . . .

. . . .

The test for determining what is a dependent Indian community must be a flexible one, not tied to any single talismanic standard such as percentage of Indian occupants. . . . The needs of Indian people must necessarily change with the years, and the method of supervision over them by the United States must change accordingly.

Id. at 160 (quoting Youngbear v. Brewer, 415 F. Supp. 807 (N.D. Iowa 1976), aff’d, 549 F.2d 74 (8th Cir. 1977)). For a state court’s discussion of dependent Indian community status, see State v. Dana, 404 A.2d 551, 563-64 (Me. 1979), cert. denied, 444 U.S. 1098 (1980). “Sandoval indicate[s] that when an Indian tribal community has ‘Indian title,’ a right to occupy lands, which the federal government has undertaken to protect by assuming fiduciary responsibilities, the dependency status of the Indian community thus acknowledged and protected would be sufficient to establish ‘dependency’ within the meaning of Section 1151(b).” Id. at 562. See also C.M.G. v. State, 594 P.2d 798 (Okla. Crim. App. 1979) (held Chilocco Indian school, set apart for the use of Indians under the guidance of the federal government, is a dependent Indian community); State v. Cutnose, 87 N.M. 307, 532 P.2d 896 (1974) (U.S. Public Health Service Hospital whose patients were largely Navajo held not to be Indian country). See generally Lobsenz, Dependent Indian Communities: A Search for a Twentieth Century Definition, 24 ARIZ. L. REV. 1 (1982).


140. [T]he settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent 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 or to the legislation establishing special relationships between the United States Government and the State of Alaska . . .

ship between the Tyonek Indians and the federal government. ANCSA revoked the Moquawkie Reserve and replaced it with non-trust lands owned and managed by a private, profit-making corporation that may not remain exclusively Indian. Without trust or tribal lands, civil jurisdiction of Tyonek Indians over non-members is uncertain. NVT meets the third requirement, cohesiveness, by virtue of its status as an IRA government. It does not meet the fourth criterion; the lands in question have not been set apart for the use, occupancy, and protection of dependent peoples. ANCSA ensured this result by revoking the Moquawkie Reserve. The Tyonek Native Corporation has selected the lands around Tyonek pursuant to ANCSA. Those lands will be freely alienable according to the needs of the corporation. In summary, Tyonek satisfies only the cohesiveness factor of the Eighth Circuit’s test for dependent Indian community status.

The weight of authority strongly suggests that there is now no Indian country at Tyonek. But, the Department of the Interior’s failure to adopt a consistent position on the question of Indian country in Alaska after ANCSA suggests that the question may still be open.

141. “ANCSA reflects the new direction in federal Indian policy: it ‘places on the Natives alone the crucial task of translating the immediate benefits of the settlement into permanent, socially and economically productive enterprises.’” F. COHEN, 1982 ed., supra note 1, at 199 (quoting Lazarus & West, The Alaska Native Claims Settlement Act: A Flawed Victory, 40 LAW & CONTEMP. PROBS. 134 (1976)).

142. NVT claims dependent Indian community status absent land ownership or trust held lands. See supra notes 37 & 40 and accompanying text. But see Blatchford v. Gonzales, 670 P.2d 944 (N.M. 1983) (land held in fee simple by non-Indians and used as an Indian trading post does not meet dependent Indian community test).

143. 43 U.S.C. § 1618(a).
144. 43 U.S.C. § 1606. See supra note 73.
145. In an unpublished opinion, the Associate Solicitor for the Division of Indian Affairs of the Department of the Interior concluded that the village townsite, Native allotments, and land owned by the Native Village of Allakaket or Aalakaak's Corporation were Indian country within the meaning of the Indian liquor laws.

The question of whether the Village of Allakaket qualified as a “dependent Indian community” under current federal case law depends upon “the nature of the area in question, the relationship of the inhabitants of the area to Indian Tribes and to the federal government, and the established practice of government agencies toward the area.”

The village of Allakaket, having qualified for village land benefits under the Settlement Act, is presumed not to be of “modern and urban character.” 43 U.S.C. § 1610(b). Its recent inclusion in the LEAA “Determination of Eligible Alaska Native Villages,” listing those villages performing law enforcement functions under state law, is evidence that the population is at least 70% Native. 45 Fed. Reg. 46581 (July 10, 1980). The village is eligible to receive federal Indian services available to Alaska Native villages. The lands at issue (other than Native allotments, which are presumably Indian country under 18 U.S.C. § 1151(c)), are the village townsite and lands owned by the village or village corporation. In our view, these factors are sufficient to support a presumption that the area is a dependent
The federal government's ambivalence in this instance and others\(^{146}\) may be seen as a tacit recognition that the traditional tribe-Indian country approach is not an adequate tool for analysis of the sovereignty of Alaska Natives after ANCSA. IRA villages on land held by ANCSA corporations are not tribes in Indian country within the meaning of the traditional tests, but the federal government recognizes that these villages deserve treatment similar to that of tribes in Indian country in other states.

III
A PROPOSAL TO REPLACE THE TRADITIONAL TRIBE-INDIAN COUNTRY TEST WITH A SUBSTANTIVE ANALYSIS

A. NEED FOR A NEW APPROACH

The traditional tribe-Indian country test fails to comprehend the unique historical context and current posture of Alaska Natives; it is not sufficient for analysis of Alaska Native sovereignty. The traditional test is formalistic\(^{147}\) and fails to incorporate federal Indian pol-

---

\(^{146}\) See supra notes 116-23 and accompanying text.

\(^{147}\) Tribe-Indian country criteria are easily misformulated and misapplied. As a result, the terms "tribe" and "Indian country" become unduly strained, and courts are forced to generate legal fictions to justify desired results. Because these formalistic criteria ignore the underlying nature and purposes of the federal-Indian relationship, they risk undermining the entire basis of Indian law. The tribe-Indian country analysis thus fails as a principled method for recognizing limited sovereignty. Cf. McCoy, supra note 21, at 396 (courts have formulated "oversimplified or mechanical generalizations concerning tribal-state and tribal-federal relations.").
icy as expressed by ANCSA. Application of the traditional test requires heavy reliance on “authority reasons” and results in insufficient consideration of underlying substantive reasons.148

An appeal to authority is seldom an acceptable means of resolving a question of first impression.149 A court should not merely apply authority; instead, it should extract the substantive reasons that shaped the existing analogies and apply those reasons to the new situation.150 Two major substantive principles flow from the doctrine of Indian sovereignty. These substantive principles can form the basis of a test that is better suited than the traditional test to analysis of Alaska Native sovereignty.

B. PROPOSED ANALYSIS

Natural rights theory and the primacy of federal power shape federal Indian policy. These two principles should be applied to analyze Alaska Native sovereignty. An exercise of sovereignty should be permitted if the group attempting to exercise sovereignty was originally a self-governing group and if the particular exercise of sovereignty is not limited by ANCSA or inherently inconsistent with the federal-Native relationship created by ANCSA.

I. Natural Rights and Indian Sovereignty

Natural rights theory provides the substantive foundation for U.S. recognition of Indian tribes as sovereigns.151 Early colonists and conquerors recognized the aboriginal tribes as independent and self-governing groups.152 According to sixteenth-century natural rights theory, these groups had a right to be treated as sovereigns.153 This theory, and the consequent recognition of tribes as sovereigns, was

148. Summers, Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification, 63 CORNELL L. REV. 707, 730-35 (1978) (explaining the importance of “substantive” reasons and the inadequacy of formalistic “authority” reasons). Professor Summers might refer to the natural rights theories discussed below, see infra text accompanying notes 151-58, as “rightness reasons” and the focus on federal policy as expressed in ANCSA as a “goal reason.” See id. at 735-75. Rightness reasons are reasons which “always turn on the accordance of a decision with applicable norms of right action.” Id. at 718 n.35 (emphasis omitted). “[A] rightness reason draws its force from the way in which the decision accords with a sociomoral norm of rightness as applied to a party’s actions or to a state of affairs resulting from those actions.” Id. at 718. “[A] goal reason . . . derives its force from the fact that, at the time it is given, the decision it supports can be predicted to have effects that serve a good social goal.” Id. at 735.

149. Id. at 732.

150. Id.

151. See supra note 7 and accompanying text.

152. See supra text accompanying note 8.

Groups of Alaska Natives that were originally self-governing should be treated as sovereigns, even if their different history precludes recognizing them as "tribes." Alaska Natives did not use the tribe as their form of government; instead, the forms of Alaska Native government varied from one group to the next, generally reflecting patterns of food-gathering. Thus, government was on a village or community level. The substantive reason behind sovereignty—the natural right to sovereignty of originally self-governing people—should determine whether a group is sovereign, not the legislative or executive application of the "tribe" label.

2. Federal Power and Alaska Native Sovereignty

Although the sovereignty of tribes exists independent of federal delegation, tribal powers are subject to important limitations nonetheless. "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." The substantive reason behind the federal limitation of Native sovereignty is the superior power of the United States. The United States conquered Native governments and incorporated their territory into its boundaries. As an external conqueror, the United States acquired the power to limit exercises of Native sovereignty.

ANCSA expresses current federal Indian policy on Alaska Natives. Thus, a court should decide whether the exercise of Alaska Native sovereignty at issue is consistent with federal policy toward Alaska Natives as expressed by ANCSA. An exercise of Native sovereignty should be permitted unless it is explicitly limited by ANCSA or inherently inconsistent with the federal-Native relationship created by ANCSA.

C. Applying the Proposed Analysis to Native Village of Tyonek v. Puckett

According to the proposed analysis, an exercise of Alaska Native sovereignty is valid if the group attempting to exercise sovereignty was

---

154. Cohen, supra note 7, at 17; see, e.g., Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 562-71 (1823) and authorities cited therein by plaintiffs and defendants.
156. Id. at 750-57.
158. See supra text accompanying notes 10-18.
159. See supra text accompanying notes 10-18.
originally a self-governing group and if the particular exercise of sovereignty is not explicitly limited by ANCSA or inherently inconsistent with the federal-Native relationship created by ANCSA. Although under this test NVT should be recognized as sovereign, NVT's exclusionary ordinance is inherently inconsistent with the federal-native relationship created by ANCSA. Thus, NVT should not be permitted to exclude non-Natives from the village.

1. **NVT as an Originally Self-Governing Group**

If NVT can demonstrate that it was originally self-governing, it should be recognized as a sovereign. NVT has had an Indian reserve and IRA status. In addition, two judicial decisions have recognized implicitly NVT's original self-government. In setting aside land for the Tyonek Indians, President Wilson recognized that the Natives living at Tyonek constituted a distinct group. Similarly, in establishing an IRA government, the federal government recognized that the Tyonek Natives lived and worked together. Although their social organization may have been rudimentary, their adoption of an IRA charter suggests that the Tyonek Natives had some form of self-government. The Ninth Circuit in *Fondahn v. Native Village of Tyonek* and the Alaska Supreme Court in *Ollestead v. Native Village of Tyonek* have upheld the Tyonek Natives' exercise of certain aspects of self-government. The Ninth Circuit recognized the Tyonek council as spokesman for Tyonek Natives, and the Alaska Supreme Court assumed that the Tyonek Indians were a tribe or community. All of these factors—establishment of a reserve, presentation and adoption of an IRA charter, and judicial acknowledgment—reflect a recognition of original self-government.

2. **ANCSA and NVT's Power To Exclude**

ANCSA did not explicitly limit or terminate Native sovereignty; however, it implicitly imposes substantial limits on the exercise of

---

161. See supra text accompanying note 81.
162. See supra text accompanying notes 113-15.
164. See supra notes 81 & 115 and accompanying text.
165. 450 F.2d 520 (9th Cir. 1971). See supra note 124.
167. 450 F.2d at 521. See supra note 124.
169. In fact, by retaining anthropologists to gather evidence showing NVT's historical unity under one leadership or government and by conditioning membership on being "of the same or similar race" and in residence in the same village, NVT might meet the Montana test. See supra text accompanying notes 126-31.
Alaska Native sovereignty because it eliminates the circumstances requisite to its exercise. ANCSA removed “the basis for . . . sovereignty and . . . created . . . obstacles to its administration.”

The pattern of land and stock ownership that ANCSA establishes is inconsistent with the Indian power to exclude non-members. ANCSA states that the policy of the Native claims settlement should be accomplished “without establishing any permanently racially defined institutions, rights, privileges or obligations . . . [and] without creating a reservation system or lengthy wardship or trusteeship.” This provision indicates that Congress intended ANCSA to be entirely different from previous Indian legislation. ANCSA was not intended to separate the Alaska Native community from modern America or to establish a dependent Indian community; rather, it was designed to advance the integration of Alaska Natives. The Act stresses the rights of Alaska Natives as individuals and as U.S. citizens, as opposed to their rights and identities as tribal members. By vesting land ownership in corporations whose stock will eventually be alienable, the Act contemplates that Alaska Natives may not remain an economic unit separate from the rest of the U.S. economy. ANCSA therefore promotes interaction between Natives and non-Natives.

NVT’s ordinance excluding non-Natives is inconsistent with this policy. The ordinance promotes the preservation of Indian culture, but itcurtails interaction between Natives and non-Natives. More-

170. See supra notes text accompanying 72-74.
173. The federal government gave land and stock ownership to private corporations and their individual shareholders, not to tribes. Individual shareholders will have the power to alienate holdings in 1991. 43 U.S.C. § 1606(h) (1982). The purpose behind this type of settlement is to encourage individual self-determination. Id. at § 1601(c) (protecting and promoting the rights or welfare of Natives as citizens of the United States and of Alaska, as opposed to tribes or Natives). As such, it is inconsistent with traditional notions of tribal sovereignty. See supra text accompanying notes 19-40. But see Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450(b) (1982), recognizing ANCSA villages and regional corporations as “tribes” and implying that their “governing bodies” can obtain Self-Determination contracts so long as they permit the “maximum participation” of Natives in their affairs.
175. See supra note 173.
177. Promoting preservation of Indian culture is sufficient to meet the Montana test of tribal interest. See supra text accompanying notes 36-41.
over, NVT has no land base; practically, the territorial boundaries from which NVT would exclude non-Natives are unclear. Therefore, NVT should be recognized as a sovereign, but it should not be permitted to exclude non-Natives from the village.\(^{178}\)

**CONCLUSION**

According to the traditional analysis, an Indian group may exercise sovereignty if (1) the group is a "tribe" located in "Indian country" and (2) the power in question has not been explicitly limited by federal treaty or statute and is not inherently inconsistent with the federal-Indian relationship. This Note's proposed test replaces the first part of the traditional test with an inquiry into whether natural rights justify recognizing the Indian group in question as a sovereign and specifically whether that group was originally a self-governing group. The second part of the proposed test is similar to the second part of the traditional test, inquiring whether the exercise of sovereignty is inconsistent with the federal-Indian relationship.

The traditional tribe-Indian country analysis is deficient when applied to Alaska Natives because its formalistic criteria fail to take into account the substantive reasons for recognizing and defining Native sovereignty. Although analysis under both tests concludes that NVT does not have the jurisdiction to exclude non-Natives from Tyonek, the proposed analysis, by relying on substantive rather than formalistic reasons, better recognizes and defines Alaska Native sovereignty.

---

\(^{178}\) NVT does, however, retain those powers of self-government characteristic of aboriginal tribes, except when limited by express provisions in federal statutes and treaties or by restraints inherent in the federal-Indian relationship. See supra note 21 and accompanying text. Powers that do not conflict with ANCSA include internal powers: (1) to adopt and to operate a form of government, (2) to define conditions of tribal membership, (3) to regulate domestic relations of tribal members, (4) to regulate property, if any, within tribal jurisdiction, and (5) to control the conduct of members. See Montana v. United States, 450 U.S. 544, 564 (1981); F. Cohen, 1982 ed., supra note 1, at 246-57. The purposes and policies of ANCSA, however, may so restrict the exercises of sovereignty that Alaska Native entities may be no different than a private voluntary association.