THE UNCERTAIN LEGAL STATUS OF ALASKA NATIVES AFTER *NATIVE VILLAGE OF STEVENS V. ALASKA MANAGEMENT & PLANNING*: EXPOSING THE FALLACIOUS DISTINCTIONS BETWEEN ALASKA NATIVES AND LOWER 48 INDIANS

Sybil R. Kisken

I. INTRODUCTION

When a government . . . does not live up to its commitments and obligations to Native people . . . no rights are secure.[1]

In December 1987, the United States Senate created a special committee to determine whether the federal government is adequately fulfilling its trust responsibility to Indian tribes.[2] The mandate is general and the committee is free to investigate issues it determines to warrant attention.[3]

The United States Supreme Court first recognized the federal government's trust responsibility in the seminal case of *Cherokee Nation v. Georgia*,[4] when Chief Justice John Marshall described the relationship between Indians and the federal government as that "of a ward to his guardian."[5] The very existence of such a relationship suggests that tribes are dependent on the federal government. Nevertheless, the federal government also ac-

1. Worl, *The Quest for Tribal Survival*, ALASKA NATIVE MAG., Oct. 1986, at 8.

2. *Background Information, Special Committee on Investigations of the Select Committee on Indian Affairs*, Draft (May 9, 1988) [on file with the ARIZONA LAW REVIEW]. A series of articles published in the *Arizona Republic* sparked the investigation. *See Fraud in Indian Country*, a reprint of a series that appeared in the *Arizona Republic* from October 4 to 11, 1987 [on file with the ARIZONA LAW REVIEW].

The committee began its first round of hearings on January 30, 1989. The people testifying sharply criticized the Bureau of Indian Affairs (BIA) for failing to remedy a variety of problems including contract fraud, gaming fraud, tribal corruption and child abuse. Ariz. Daily Star, Jan. 31, 1989, at 1A, col. 6.

3. Specifically, the mandate authorizes the committee to: "study or investigate any and all matters pertaining to problems and opportunities of Indians and the Federal administration of mineral resources, including but not limited to resource management and trust responsibilities of the United States Government, Indian education, health, special services, and other Federal programs, and related matters." *Background Information, supra* note 2.

4. 30 U.S. (5 Pet.) 1 (1831).

5. *Id.* at 17. For an excellent article discussing the efficacy of the current trust doctrine, followed by a suggestion for a new interpretation of it, see Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422 (1984).

knowledges tribes' sovereign status.[6] Tribal sovereignty includes two important elements: freedom from state encroachment into tribal affairs and tribal regulatory power.[7] Incorporating the trust relationship and sovereignty of tribes into his definition, Marshall described Indian tribes as "domestic dependent nations."[8] The paradox in Marshall's nomenclature is reflected in the constant tension between the dependent status and the sovereign status of Native Americans, a tension that pervades Indian law even today.

The issue of Native sovereignty is a continual source of debate in Alaska,[9] especially since the passage of the Alaska Native Claims Settlement Act (ANCSA) in 1971.[10] ANCSA sought to settle Native land claims; it did not, however, clarify the legal status of Alaska Natives. Some observers contend that Alaska Natives enjoy the same unique sovereign status as Lower 48[11] Indians. Others argue that Alaska Natives are governed solely by state and federal law. They conclude that Alaska Native groups are not sovereign and do not enjoy a trust relationship with the United States government.[12] The federal government is conspicuously silent on the legal status of Alaska Native peoples.

Two Alaska Supreme Court cases graphically illustrate the precarious legal status of Alaska Natives, *Atkinson v. Haldane*[13] and *Native Village of Stevens v. Alaska Management & Planning*.[14] Both cases address the issue of tribal sovereign immunity, an established doctrine in federal Indian law.[15] The Alaska Supreme Court recognized a Native group's sovereign immunity

---

6. John Marshall described tribes as "distinct, independent political communities." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832). *See infra* text accompanying note 66.

7. Note, *Tribal Sovereignty: Alaska Native Exercise of Sovereign Powers*, 12 AM. INDIAN L. REV. 245, 245 (1984). For a discussion of the scope of tribal powers, see F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 246-57 (1982 ed.).

8. *Cherokee Nation*, 30 U.S. at 17. *See generally* Note, *Self-Determination: Indians and the United Nations—The Anomalous Status of America's "Domestic Dependent Nations,"* 8 AM. INDIAN L. REV. 97 (1980) (suggesting that the domestic trust is inadequate and should be replaced with an international trust).

9. In 1984, the governor of Alaska established a task force because:

> [t]he emotional nature of this political conflict [between proponents and opponents of Native sovereignty] has impeded the ability of policymakers in the executive and legislative branches of state government to develop and implement a coherent policy on Native sovereignty. And until such a time as they acquire a clear and concise understanding of the facts and law relating to Native sovereignty, it is unlikely that they will be able to do so.

GOVERNOR'S TASK FORCE, REPORT ON FEDERAL-STATE-TRIBAL RELATIONS SUBMITTED TO GOVERNOR BILL SHEFFIELD 3 (1986) [hereinafter REPORT].

It is obvious that such an understanding is still lacking in Alaska. Although the state of Alaska argued in an amicus curiae brief for the petition for rehearing of *Native Village of Stevens v. Alaska Management & Planning* that some Native groups may enjoy sovereign immunity, it agreed with the court's decision that "off-reservation Alaska Native villages lack the governmental powers of a sovereign." Brief for Amicus Curiae at 1, Native Village of Stevens v. Alaska Management & Planning, 757 P.2d 32 (Alaska 1988) (No. S-1345).

See also infra note 91 and accompanying text.

10. 43 U.S.C. §§ 1601-1628 (1982). *See infra* notes 34-47 and accompanying text.

For an excellent review of the effects of ANCSA from the Alaska Native perspective, see T. BERGER, VILLAGE JOURNEY (1985).

11. The term "Lower 48" refers to the continental United States. "Lower 48" is particularly appropriate in reference to Alaska Natives as it is perhaps the geographical isolation of Alaska that has contributed to congressional neglect of its indigenous peoples.

12. REPORT, *supra* note 9, at 1.

13. 569 P.2d 151 (Alaska 1977). *See infra* notes 56-67 and accompanying text.

14. 757 P.2d 32 (Alaska 1988). *See infra* notes 68-123 and accompanying text.

15. *See infra* notes 48-55 and accompanying text.

in the former case but denied another Native group sovereign immunity in the latter. Both cases turned on differences between Alaska Native groups and Lower 48 tribes.

This Note begins by describing the current status of Alaska Natives.[16] It next explains the doctrine of tribal sovereign immunity as a necessary component of sovereignty. It then briefly summarizes *Atkinson* and *Stevens Village*, analyzing some of the distinctions made between Alaska Natives and Lower 48 Indians.[17] Specifically, this Note explores the Alaska Supreme Court's divergent treatment of tribes living on reservations and Native groups living in villages.[18] It argues that this troublesome distinction is no longer relevant and urges courts to focus instead on historical and present-day cultural realities of Alaska Natives in determining sovereignty issues. Finally, this Note concludes that the current threat to tribal sovereign immunity in Alaska is a result of congressional neglect of Alaska Natives.[19] In addition to suggesting that the special Senate committee urge Congress to enact legislation that would overturn *Stevens Village*, this Note advocates a more activist congressional posture toward Alaska, so that the clear federal goal of self-determination can be reached.[20]

II. ALASKA NATIVES: A DESCRIPTION OF THE LAST FRONTIER'S INDIGENOUS PEOPLE TODAY

Alaska possesses the seventh largest indigenous population in the United States.[21] Sixteen percent of Alaska's population is comprised of Alaska Natives;[22] only Hawaii has a larger percentage of Native Americans, with almost nineteen percent.[23]

While most Indian reservations in the Lower 48 are relatively remote from large urban centers, they are at least accessible by car. In contrast, in Alaska, twice the size of Texas[24] but with fewer miles of road than Ver-

16. *See infra* text accompanying notes 21-47.

17. *See infra* text accompanying notes 56-123.

18. *See infra* text accompanying notes 124-46.

19. *See infra* note 147 and accompanying text.

20. *See* F. COHEN, *supra* note 7, at 180-206 ("The self-determination era is premised on the notion that Indian tribes are the basic governmental units of Indian policy." *Id.* at 180.).

21. There are approximately 64,000 Alaska Natives in Alaska. California ranks number one, with more than 200,000 Indians. D. GETCHES & C. WILKINSON, FEDERAL INDIAN LAW: CASES AND MATERIALS 7 (2nd ed. 1986).

22. The term Alaska Natives includes Eskimos, Indians and Aleuts. T. BERGER, *supra* note 10, at vii-viii. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 401 (1986 ed.).

The history of Alaska Natives, including their first contact with non-Natives, is an incredible story that unfortunately is beyond the scope of this Note. For background information, however, see *id.* at 401-15; Bloxham, *Aboriginal Title, Alaskan Native Property Rights, and the Case of the Tee-Hit-Ton Indians*, 8 AM. INDIAN L. REV. 299, 300-07 (1980); Note, *Legislation: The Alaska Native Claims Settlement Act: Legislation Appropriate to the Past and the Future*, 9 AM. INDIAN L. REV. 135, 138-55 (1981).

23. Of 26 states listed as having significant Indian populations, 18 states' populations are less than two percent Indian. Of the remaining six states not including Alaska and Hawaii, no state has more than an eight percent Indian population. D. GETCHES & C. WILKINSON, *supra* note 21, at 7.

24. Alaska is one-fifth the size of the contiguous United States, or 586,000 square miles; 1,400 miles from north to south, 2,700 miles from east to west. U.S. DEP'T INTERIOR, ANCSA 1985 STUDY I-10 (June 29, 1984 Draft) [hereinafter DRAFT STUDY].

mont,[25] most Native villages are accessible only by plane and boat.[26] Moreover, because of past federal policies aimed at consolidating the tribal land base in the Lower 48, in most states with substantial indigenous populations, Indians reside on formally established reservations.[27] In Alaska, however, there is only one reservation[28] even though over 200 Native villages are located within the state.[29] There is no one Native culture. On the contrary, the presence of twenty spoken Native languages is indicative of the diversity within the Alaska Native population.[30] Some villages have fewer than one hundred residents; several have more than one thousand.[31]

Each region of Alaska is inhabited by a distinct group of indigenous peoples. Their unique cultural diversity is critical to any analysis of the legal posture of Alaska Natives. Eskimos live in villages from Bristol Bay in southwest Alaska, up the western and northern coasts into Canada and Greenland. Aleuts reside on islands that stretch 1,000 miles from the southwest of Alaska across the North Pacific Ocean. Athabascans occupy the interior villages of Alaska, while the Tlingits and the Haidas dwell along the coasts and islands of southeastern Alaska.[32] One characteristic common to most villages is the reliance on subsistence, which is not merely a method of obtaining sustenance, but a "way of life."[33]

Aside from daily survival in rural Alaska, political and economic pressures confront the people. The discovery of oil in Alaska brought the issue of Alaska Native land claims to the forefront of the congressional political agenda resulting in the passage of ANCSA.[34]

---

25. Krakauer, *Alone Against Alaska.* AM. 33 (Fall 1988).

26. Note, *supra* note 22, at 137.

27. There are 260 tribes with federal reservations. About one-half of the 1.4 million Indians in the United States live on reservations. D. GETCHES & C. WILKINSON, *supra* note 21, at 4-7.

28. ANCSA abolished all reservations in Alaska except the Annette Island Reserve. 43 U.S.C. § 1618 (1982).

29. REPORT, *supra* note 9, at 2.

30. Included are Aleut, Alutiw, Central Yupik, Siberian Yupik, Inupiaq, Tsimshian, Haida, Tlingit, and Holikachuk. M. KRAUSS, NATIVE PEOPLES AND LANGUAGES OF ALASKA (1982) (map).

31. *Id.*

32. DRAFT STUDY, *supra* note 24, at I-10-12.

33. One commentator describes subsistence in Alaska as follows: "The word 'subsistence' reminds most Americans of dirt-poor farmers, scratching a hard living from marginal lands. In Alaska, however, subsistence means hunting, fishing, and gathering. More than that, it means a way of life that—far from being marginal—fulfills spiritual as well as economic needs." T. BERGER, *supra* note 10, at 5.

He adds:

> [S]ubsistence isn't something that can be easily quantified . . . . It's not like a factory where cars roll off the end of the line and you can count them . . . and say this is the contribution that this factory makes to the gross domestic product. The way in which [subsistence] provides the texture to village life in the Arctic and Subarctic regions of North America is in so many ways intangible. Bureaucrats are inclined to reject its importance because it's so hard to quantify, and because it's alien to everything they've been taught about the kind of economy we're supposed to be trying to build, which is one that brings everybody into the industrial and commercial sector."

Thomas Berger: An Interview, The Northern Raven, Volume V, number 4 (Spring 1986) [on file with the ARIZONA LAW REVIEW].

See also Shinkwin, *Traditional Alaska Native Societies*, in D. CASE, ALASKA NATIVES AND AMERICAN LAWS 333-62 (1984); Y. BISTA, A REPORT ON SUBSISTENCE AND THE CONSERVATION OF THE YUPIK LIFE-STYLE (1974).

34. Although Alaska Native land claims were a concern in 1867, it was not until oil was discov-

ANCSA extinguished all previous Alaska Native land claims by granting the Native groups forty million acres of land. The land was not distributed to these groups through the creation of reservations, the method employed in the Lower 48. Instead, ANCSA established thirteen regional and approximately 200 village corporations to receive the massive land grant. ANCSA land is fee simple land held by the corporations, compared to reservation land that is held in trust by the federal government. In addition, Congress granted the profit-making corporations[35] $962.5 million. ANCSA provided Alaska Natives with more control over their land than tribes in the Lower 48 enjoyed, evidence of the federal government's blossoming respect for Native sovereignty and self-determination.

ANCSA contains a disclaimer stating that Alaska Native claims be settled "without establishing any permanently racially defined institutions, rights, privileges or obligations . . . [and] without creating a reservation system or lengthy wardship or trusteeship."[36] One commentator argues that this disclaimer "was designed to advance the integration of Alaska Natives."[37] Such an interpretation does not, however, comport with the current federal goal of self-determination for indigenous peoples.[38] On the contrary, the disclaimer merely illustrates Congress' desire to accomplish a fair settlement for Alaska Natives without the problems that accompanied the reservation policy in the United States.[39]

While an important development in federal Indian law, ANCSA nevertheless falls short as a model of clarity.[40] Particularly ambiguous is ANCSA's position on Alaska Native sovereignty. Recent amendments to ANCSA explicitly state that no provision in the amendments supports or denies "any assertion that a Native organization has or does not have governmental authority over lands or persons."[41] In other words, ANCSA entirely skirts the issue of whether Alaska Native groups are sovereign.

---

ered at Prudhoe Bay in 1968 that Congress began considering legislation to settle Native claims. Oil companies supported Alaska Native land claims because without a settlement, there was fear that development of the nine-hundred-mile pipeline from Prudhoe Bay to the Gulf of Alaska would be indefinitely delayed. T. BERGER, *supra* note 10, at 22-24.

Monroe Price noted that the "exploitation of [Indian] resources by the non-Indians" is a dominant theme in federal Indian legislation. Price, *A Moment in History: The Alaska Native Claims Settlement Act*, 8 UCLA-ALASKA L. REV. 89, 91 (1979).

35. F. COHEN, *supra* note 7, at 754.

36. 43 U.S.C. § 1601(b) (1982).

37. Note, *Alaska Native Sovereignty: The Limits of the Tribe-Indian Country Test*, 17 CORNELL INT'L L.J. 375, 404 (1984).

38. *See supra* note 20.

39. The federal government envisioned ANCSA corporations as more successful than reservations. For a more extensive discussion on this point see *infra* text accompanying notes 141-46.

40. A whole host of issues arose after the passage of ANCSA. Examples include: status of the "after-born" (Alaska Natives born after December 18, 1971 were not issued stock in the ANSCA corporations); fear that stock alienation in 1991 would result in loss of Native lands; and the constant tension between the corporate profit goal and the social goal of providing services for Native peoples. Some of the issues were dealt with in 1988 amendments to ANCSA, but many concerns still remain.

See T. BERGER, *supra* note 10; Anderson & Aschenbrenner, *Amendments Provide Stop-Gap Protection for Native Land and Corporations*, 13 NATIVE AM. RTS. FUND LEGAL REV. 1 (Spring 1988); Anderson & Aschenbrenner, *1991 Provides Protections: But Opens Doors to New Dangers*, 1 ALASKA NATIVE COALITION NEWS 1 (May/June 1988).

41. 43 U.S.C.A. § 1601 (West Supp. 1988).

Although ANCSA is silent on the issue, all major legislation affecting Indians since the passage of the Act includes Alaska Natives, implying that they are entitled to the same sovereign status as other tribes.[42] In addition, judicial recognition of a trust relationship between the federal government and Alaska Natives has continued even after ANCSA.[43] Thus, most courts do not interpret the Act as a denial of Alaska Native sovereignty rights.

Nor do Alaska Natives interpret ANCSA as denying their sovereignty. Prior to ANCSA and still today, tribal councils or other traditional bodies perform governmental functions in most villages.[44] But the influx of ANCSA corporations and municipal governments into villages created "too many forms of political, economic and social organization in rural Alaska for too few people."[45] Without a reaffirmation of the sovereign status of traditional governments, the presence of so many competing entities could lead to the demise of traditional Native organization and cultural extinction.

Already, there exists cultural conflict in Native villages. Although ANCSA granted Native peoples control over their lands, it also imposed a corporate model of organization, forcing them to reconcile their traditional way of life with the modern corporate structure. "Each of us is caught, in his own way, between two worlds," is how one Alaska Native describes post-ANCSA life.[46] Today, the Native people continue to work to harmonize the ANCSA model with their ultimate goals of sovereignty and the preservation of Alaska Native culture.[47]

III. TRIBAL SOVEREIGN IMMUNITY IN ALASKA

A. *A Basic Explanation of Tribal Sovereign Immunity as a Necessary Element of Sovereignty*

Tribal sovereign immunity protects Indian tribes from suit in state and federal courts. In 1939, the United States Supreme Court articulated the principle in *United States v. United States Fidelity & Guaranty Co.*[48] In 1978, the Court reaffirmed tribal sovereign immunity in *Santa Clara Pueblo v. Martinez.*[49] Most courts and commentators continue to support the concept of tribal sovereign immunity.[50] For example, in 1988, the Tenth Circuit

42. F. COHEN, *supra* note 7, at 766.
43. *Id.* at 741.
44. *See* Hippler & Conn, *The Village Council and its Offspring: A Reform for Bush Justice*, 5 UCLA-ALASKA L. REV. 22 (1975).
45. REPORT, *supra* note 9, at 28.
46. Y. BISTA, *supra* note 33, at 5.
47. Worl, *supra* note 1.
48. 309 U.S. 506, 512 (1939).
49. 436 U.S. 49, 58 (1978).
In Puyallup Tribe v. Washington Dep't of Game, 433 U.S. 165, 178-79 (1976), however, in a concurring opinion, Justice Blackmun expressed "doubts . . . about the continuing vitality . . . of the doctrine of tribal immunity." He suggested that the doctrine may be re-examined in a suitable case. But the majority upheld the doctrine, and most courts continue to recognize its vitality.
50. *See* Chemehuevi Indian Tribe v. California State Bd. of Equalization, 757 F.2d 1047, 1050 (9th Cir. 1985) (counterclaim barred by tribe's sovereign immunity); Ramey Construction Co. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315, 332 (10th Cir. 1982) (suit against tribe barred by sovereign immunity); Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in the Construction of the Indian Civil Rights Act*, 20 S.D.L. REV. 1, 34 (1975); and Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 1058 (1982).

Court of Appeals in *Oklahoma v. Graham*,[51] dismissed a claim for lack of subject matter jurisdiction due to a tribe's sovereign immunity. Another example, *Johnson v. Chilkat Indian Village*,[52] involved an Alaska Native village where the court dismissed the plaintiff's complaint due to the village's sovereign immunity.[53]

Notwithstanding strong judicial support for the doctrine, there are also many compelling policy reasons for tribal sovereign immunity. One commentator defends contemporary application of tribal sovereign immunity, arguing that it furthers the federal policy of Indian self-determination, and promotes economic development and cultural autonomy.[54] He suggests that tribal sovereign immunity will be more important in the future as government and private enterprise seek to develop abundant natural resources located on Indian lands.[55]

Other rationales dictate the retention of tribal sovereign immunity. For example, a tribe is far more vulnerable than any other governmental entity due to its limited assets and tax base. While a non-tribal government can raise taxes to compensate for adverse court judgments, it is not practical for tribal governments to recoup losses through taxation because most residents are of little means. Tribal sovereign immunity accordingly provides a tribe with the necessary protection from adverse court judgments which could potentially exhaust the tribe's meager assets. This, in turn, ensures that a tribe may engage in commercial activities sheltered from many of the economic risks encountered by their non-Indian competitors. The federal government's interest in Indian self-determination is therefore also furthered by the doctrine of tribal sovereign immunity.

B. *Recognition of Alaska Native Sovereign Immunity in* Atkinson v. Huldane

In 1974, two Metlakatla Indians died in an automobile accident on the Metlakatla Indian Community reservation.[56] Their personal representatives sued the Community in state court alleging negligence on the part of the reservation police officers. The Community moved for summary judgment arguing that the Indian tribe enjoyed sovereign immunity.[57]

The Alaska Supreme Court began its analysis of tribal sovereign immunity by citing the history of self-governance in the Metlakatla Indian Community. The court observed that in 1887, 800 Tsimishian Indians left British Columbia because the Canadian government refused to recognize the self-

51. 15 Indian L. Rep. 2073 (10th Cir. 1988).

52. 457 F. Supp. 384 (D. Alaska 1978).

53. *Id.* at 389. The court relied on *Atkinson* to support its conclusion that the village enjoyed sovereign immunity. *Id.* at 387. *But see* discussion of *Stevens Village*, *infra* at notes 68-123 and accompanying text.

54. Note, *supra* note 50, at 1058.

55. *Id.*

56. The accident involved the deceased plaintiffs and four Community police officers. The complaint alleged that the police officers were negligent in the operation of their vehicle, and the Community of Metlakatla was negligent in its training of the police officers involved. *Atkinson*, 569 P.2d at 152.

57. *Id.* The superior court denied the motion, so the Community appealed to the Alaska Supreme Court. *Id.* at 152-53.

governing body of the tribe. William Duncan, a missionary, went to Washington, D.C. and obtained a land grant in southeastern Alaska for the Canadian Indians. Ultimately, in 1891, Congress created the tribe's Annette Islands Reserve.[58]

In addition to considering the Metlakatlans' history of self-governance, the *Atkinson* court also noted three major differences between Alaska Natives and tribes in other states:[59] (1) Alaska Natives came under Russian rule prior to the Treaty of Cession; (2) the federal government never entered into treaties with Alaska Natives; and (3) due to Alaska's large area,[60] there was never a need to move Alaska Natives to reservations to provide land for settlers.[61] The court next discussed two dissimilarities between the Metlakatlans and other groups of Alaska Natives: Metlakatlans have a reservation and are organized as a tribe, whereas other Alaska Native groups do not have reservations and are organized as villages.[62] The court decided that these differences proved that the Metlakatlans were more like Lower 48 Indians than other Alaska Natives. The *Atkinson* court accordingly held that the Metlakatlans enjoyed the same sovereign immunity as the Lower 48 tribes.

Such a conclusion, of course, implies that other Alaska Natives merit different treatment, probably resulting in a denial of sovereign immunity. The *Atkinson* court relied on several faulty premises in distinguishing the Metlakatlans from other Alaska Native groups, however. An analysis of these premises reveals that not only are the differences between the Metlakatlans and other Alaska tribes illusory, but the distinctions between Alaska and Lower 48 tribes also do not warrant divergent sovereign immunity status.

First, the Russian rule distinction is not determinative of Alaska Native sovereignty or consequently, of sovereign immunity. Many indigenous groups fell under foreign rule prior to the United States' assumption of exclusive jurisdiction.[63] Moreover, the Treaty of Cession in 1867 divided Alaskans into three groups: (1) individuals who returned to Russia within three years and retained their Russian status; (2) individuals who remained in Alaska; and (3) "uncivilized native tribes."[64] As for this latter group, in *United States v. Berrigan*,[65] the court held that since Athabaskans were uncivilized, they were wards of the government and subject to federal protection. Thus, even though Alaska Natives originally came under Russian Rule, after the Treaty of Cession, the federal government maintained the same relationship with "uncivilized native tribes" as it did with Lower 48

58. *Id.* at 153.

59. *Id.* at 154.

60. *See supra* note 24.

61. *See infra* notes 141-46 and accompanying text.

62. *Atkinson*, 569 P.2d at 154-55. *See infra* notes 124-40 and accompanying text.

63. For example, some Indian tribes originally fell under Spanish rule. *See* F. COHEN, *supra* note 7, at 50-52.

64. *See* F. COHEN, *supra* note 22, at 402. ("Civilization is achieved only when the natives have adopted the white man's way of life and associated with white men and women." *Id.* at 406. (citing Davis v. Sitka School Bd., 3 Alaska 481 (1908))).

65. 2 Alaska 442 (1905).

Indian tribes. Consequently, prior Russian rule does not suggest Alaska Natives be denied sovereign status.

Similarly, the absence of treaties with Alaska Natives does not imply a lack of sovereignty. Sovereignty is not the product of treaties, but rather is inherent in the tribes. In *United States v. Wheeler*, the United States Supreme Court recognized this principle by observing that "the powers of Indian tribes are . . . *'inherent powers of a limited sovereignty which has never been extinguished.'* "[66] Treaties, in fact, usually *limit* tribal exercises of sovereignty.[67] Therefore, their absence is more indicative of unlimited Alaska Native sovereignty than it is of the lack of sovereignty altogether. Thus, all of the distinctions the *Atkinson* court found pivotal point towards rather than away from Alaska Native sovereignty. Correspondingly, all Native Alaskan groups should join the Metlakatlans in enjoying tribal sovereign immunity. The Alaska Supreme Court, however, refused to reach this conclusion in *Stevens Village*.

C. *The Denial of Alaska Native Sovereign Immunity in* Native Village of Stevens v. Alaska Management & Planning

The Alaska Supreme Court again considered the issue of tribal immunity in a contract dispute between an Alaska Native village, Stevens Village, and a business specializing in rural development projects, Alaska Management & Planning (AMP).[68] At trial, the jury found that Stevens Village breached its contract with AMP.[69] On appeal, Stevens Village offered three arguments in support of setting aside the verdict: (1) tribal sovereign immunity; (2) violation of government procurement regulations; and (3) indefiniteness of terms.[70] The court ruled that Stevens Village did not enjoy sovereign immunity.[71] The court held the contract unenforceable, however, due to a violation of government procurement regulations.[72]

The court began by broadly stating that Stevens Village, "like most Native groups in Alaska," was not sovereign.[73] In support of that conclusion, the court relied on Alaska precedent,[74] namely *Atkinson* and *Metlakatla Indian Community, Annette Island Reserve v. Egan*.[75] The court also pointed out that the relationship between Alaska Natives and the federal government from 1867 until 1936 indicated that Congress did not intend for Alaska Natives to be treated as sovereigns.[76] Moreover, since 1936, no congressional action, including the passage of the Indian Reorganization Act and

66. 435 U.S. 313, 322 (1978) (citing F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1942 ed.)) (emphasis in original).

67. *See* F. COHEN, *supra* note 7, at 242.

68. Stevens Village contracted with AMP to provide "such services as grant writing, construction administration, budgeting, and construction progress evaluation." *Stevens Village*, 757 P.2d at 33.

69. *Id.* at 32-33.

70. *Id.* at 33.

71. *Id.* at 34.

72. *Id.* at 42.

73. *Id.* at 34.

74. *See infra* notes 78-89 and accompanying text.

75. 362 P.2d 901 (Alaska 1961).

76. *Stevens Village*, 757 P.2d at 34. *See infra* notes 90-116 and accompanying text.

ANCSA, indicated a change in this non-sovereign status of Alaska Natives.[77] Therefore, the *Stevens Village* court found no legislative or judicial authority justifying a recognition of tribal sovereign immunity.

1. *Alaska precedent*

The *Stevens Village* court derived from *Atkinson* the principle that tribal immunity turns on whether the federal government recognized a group as a tribe.[78] Reiterating the previously noted differences between the Metlakatlans and other Native groups, the court concluded that the emphasis placed on these differences by the *Atkinson* court precluded granting immunity to those other groups because they are not tribes.[79] The distinctions in *Egan*, another case involving Metlakatlans, bolstered the *Stevens Village* court's determination. In *Egan*, the court cited the following differences between Metlakatlans and other Alaska groups: (1) Alaska Native criminals are punished in state courts; (2) Alaska Natives do not enjoy a state tax exemption; and (3) there is no Indian country in Alaska.[80] Again, many of these distinctions have relatively little practical significance.

First, state criminal jurisdiction and the lack of a state tax exemption are not dispositive of the question of Alaska Native sovereignty. On many Lower 48 reservations, state governments exercise criminal and other forms of regulatory jurisdiction.[81] For example, in 1953, Public Law 83-280 (P.L. 280), granted six states, including Alaska,[82] broad jurisdiction over criminal and civil cases arising in Indian country.[83] Courts narrowly construe the application of P.L. 280. They recognize that the extension of state jurisdiction in Indian country does not extinguish self-governance; instead, it merely curtails certain exercises although there exists a possibility of concurrent state-tribal jurisdiction.[84] The enactment of P.L. 280 occurred during the era of Indian termination, and does not reflect the current federal policy of self-determination.[85] Nevertheless, its existence reveals that state criminal jurisdiction does not deprive an Indian tribe of its sovereignty.

77. *Stevens Village*, 757 P.2d at 34. *See infra* notes 117-23 and accompanying text.

78. *Stevens Village*, 757 P.2d at 34-35.

79. The court stated: "our emphasis on the differences between the Metlakatlans and the other Alaska Native groups suggests that other Alaska Native groups would not be afforded sovereign immunity." *Id.* at 35.

Ironically, the *Stevens Village* court relied on language written by Justice Rabinowitz in the *Atkinson* opinion because he dissented in *Stevens Village*.

80. There is an exception to this distinction. In *In re* McCord, 151 F. Supp. 132, 135 (D. Alaska 1957), the United States District Court for the District of Alaska concluded that the village of Tyonek is located in Indian country. The presence of Indian country depends on the whether there are reservations.

81. F. COHEN, *supra* note 7, at 362.

82. The other five states were California, Minnesota, Nebraska, Oregon, and Wisconsin. *Id.*

83. *Id.*

84. In United States v. Wheeler, 435 U.S. 313, 332 (1978), the United States Supreme Court stated that in states where criminal jurisdiction rests with the state, there is possibly concurrent jurisdiction between the states and the tribes. P.L. 280 does not preclude concurrent jurisdiction. The *Task Force Report* even discusses the possibility of concurrent jurisdiction. REPORT, *supra* note 9, at 139-48.

85. The era of termination included the years 1943 to 1961. In 1961, the federal government instituted its current policy of self-determination for Indians. *See generally* F. COHEN, *supra* note 7, at 152-206.

In *Egan*, the Alaska Supreme Court also observed that, in contrast to the Lower 48, in Alaska "amalgamation has occurred peacefully and naturally."[86] There is no factual support offered for this assertion. On the contrary, Alaska Native culture is thriving.[87] In any event, amalgamation does not destroy Native peoples' sovereignty.[88]

The United States Supreme Court granted certiorari in *Egan*, and suggested two additional differences between Alaska Natives and Lower 48 Indians: there were no Alaska Native wars; and Alaska Natives vote and occupy public office.[89] Again, there is simply no discussion about why war is a prerequisite of tribal sovereignty or how sovereignty precludes individual indigenous people from participating in the political processes of non-tribal governments. In sum, the distinctions relied upon by the *Stevens Village* court are irrelevant to a determination of sovereignty.

2. *Federal-Native relationship between 1867 and 1934*

In concluding that the early relationship between the federal government and Alaska Natives indicated Congress' intent to deny Alaska Natives sovereign treatment, the *Stevens Village* court cited the *Report of the Governor's Task Force on Federal-State-Tribal Relations*.[90] The court's reliance on a report written by the state of Alaska is questionable because of the state's obvious bias in favor of limiting tribal sovereignty.[91] Nevertheless, the court gave great credence to the report which quoted judicial precedent, the 1884 Alaska Organic Act, an 1889 congressional criminal code for Alaska, the 1900 Alaska Civil Code and a 1912 congressional act creating a territorial legislature in Alaska.[92]

The judicial precedent contained in the report included four cases, *United States v. Seveloff*,[93] *Waters v. Campbell*,[94] *Kie v. United States*,[95] and *In re Sah Quah*.[96] The district court in these cases concluded that the limited application of the Indian Intercourse Act in Alaska implied that "Alaska is not to be considered 'Indian country.' "[97] In the absence of In-

86. *Egan*, 362 P.2d at 920.

87. At its annual convention in October 1988, the Alaska Federation of Natives (AFN) unanimously passed 71 resolutions, some of them in support of sovereignty for Alaska Natives. The AFN is a statewide organization established as a collective voice for Native peoples. *See* ALASKA FEDERATION OF NATIVES, INC. 1988 RESOLUTIONS [on file with the ARIZONA LAW REVIEW].

88. F. COHEN, *supra* note 7, at 231 ("Neither the passage of time nor apparent assimilation of the Indians can be interpreted as diminishing or abandoning a tribe's status as a self-governing entity.").

89. *Egan*, 369 U.S. at 51.

90. *Stevens Village*, 757 P.2d at 37.

91. In *United States v. Kagama*, 118 U.S. 375, 384 (1886), the United States Supreme Court noted that states "are often their deadliest enemies." *See also supra* note 9.

92. *See generally* REPORT, *supra* note 9.

93. 27 F. Cas. 1021 (D. Or. 1872) (No. 16,252).

94. 29 F. Cas. 411 (D. Or. 1876) (No. 17,264).

95. 27 F. 351 (D. Or. 1886).

96. 31 F. 327 (D. Alaska 1886).

97. In *Seveloff*, 27 F. Cas. at 1024, the court held that the Indian Intercourse Act of 1834 did not apply in Alaska. In 1873, Congress passed legislation extending an alcohol control provision of the Indian Intercourse Act to Alaska. In *Waters*, 29 F. Cas. at 412, the court held this limited amendment implied that Congress did not intend the entire Act to apply in Alaska. In *Kie*, 27 F. at 353, the court stated that "[t]his legislation . . . by at least a reasonable, if not necessary implication,

dian country, there is no geographical area upon which Alaska Natives can exercise sovereignty.

The district court's interpretation in these four cases fails to take into consideration the historical setting of the Indian Intercourse Act. Congress passed this Act in 1834 when there was no need for mass legislation affecting Alaska Natives because there were very few non-Natives in the territory. For example, in 1868, the year after the United States purchased Alaska, census figures showed 483 Russians and Siberians, 150 Americans and 200 non-Russian foreigners compared to 1,421 Creoles and halfbreeds and 26,483 Native *groups* living in Alaska.[98]

Such an interpretation also violates canons of construction requiring legislation and treaties to be construed in favor of Indians.[99] The Supreme Court acknowledged these canons in *Menominee Tribe v. United States*,[100] where it stated that if a statute does not contain an "explicit statement"[101] that denies or limits a tribal right, such a proposed intention is not "lightly imputed to the Congress."[102] Applying these canons to the Alaska situation reveals that even if Congress did not intend for the Indian Intercourse Act to apply in Alaska, unless it specifically stated the Act's nonapplicability was due to the absence of Indian country in Alaska, a court cannot infer such a result.

The attenuation between the limited application of the Indian Intercourse Act and a finding of no Indian country is too great to satisfy the canons of construction which require that questions of construction be decided in favor of Indians.[103] Because a determination that there is no Indian country in Alaska is adverse to the interests of Alaska Natives the district court should have been precluded from drawing such a conclusion.

Another troubling aspect of the *Stevens Village* court's reliance on the *Task Force Report* is the report's citation of the Alaska Organic Act of 1884. This Act extended the criminal and civil codes of Oregon to Alaska.[104] The *Task Force Report* concluded that nothing in the legislative history of the Organic Act suggested that Alaska Natives would not be subject to the

---

is equivalent to a declaration that Alaska is not to be considered 'Indian country.' " Finally, in *In re Sah Quah*, 31 F. at 328, the court stated that the amendment raised a presumption that the intention of Congress was to exclude all other provisions of the Act from application in Alaska.

98. D. CASE, *supra* note 33, at 59.

99. Professors Wilkinson and Volkman explain the canons of construction:

> The unequal bargaining position of the tribes and the recognition of the trust relationship have led to the development of canons of construction designed to rectify the inequality. Although many treaty rights are clearly expressed in Indian treaties, others are not. The courts have been liberal in recognizing the existence of Indian treaty rights in those instances when they are not clearly stated in the treaty. Three primary rules have been developed: ambiguous expressions must be resolved in favor of the Indian parties concerned; Indian treaties must be interpreted as the Indians themselves would have understood them; and Indian treaties must be liberally construed in favor of the Indians.

Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows upon the Earth"—How Long a Time is That?*, 63 CAL. L. REV. 601, 617 (1975) (footnotes omitted). *See generally* F. COHEN, *supra* note 7, at 221-25.

100. 391 U.S. 404 (1968).

101. *Id.* at 413.

102. *Id.*

103. *Menominee Tribe*, 391 U.S. at 410-13.

104. Act of May 17, 1884, ch. 53, 23 Stat. 24, 25-26.

codes.[105]

In 1899, Congress enacted a criminal code for Alaska to replace the criminal code of Oregon.[106] In 1909, Congress, by statute, clarified the fact that the new criminal code applied to Alaska Natives in Native villages.[107] In 1900, an Alaska civil code replaced the Oregon civil code. Again, the *Stevens Village* court relied on the Task Force's conclusion that the legislative history of all of these congressional acts offered no indication of an exemption for Alaska Natives.[108] On the contrary, the 1909 statute, by its terms, applied to tribal groups.

In 1912, Congress created a territorial legislature that assumed most of the civil and criminal jurisdiction in Alaska.[109] Congress granted the Alaska legislature power over "all right subjects of legislation not inconsistent with the Constitution and laws of the United States."[110] Congress included a list of subjects exempted from the legislation, and the list did not include Alaska Natives and Native villages.[111] Moreover, the territorial legislature taxed Alaska Natives in the same manner as it taxed other residents of the territory.[112] This legislative authority supported the court's conclusion that Alaska Natives were not entitled to special treatment as sovereign nations.

While the *Task Force Report*'s citation of congressional and judicial precedent is commendable, it nevertheless does not compel the denial of Alaska Native sovereignty. The mere extension of territorial criminal and civil jurisdiction to Alaska Natives does not destroy tribal sovereignty. Sovereignty is not extinguished, but is simply limited insofar as state jurisdiction displaces tribal functions. As noted previously in the P.L. 280 discussion, a state's jurisdiction does not *per se* eliminate the inherent sovereignty of tribes living within its borders. Instead, Congress must expressly manifest an intent to abrogate tribal sovereignty before it may be diminished.[113]

Based on inference and implication, the *Stevens Village* court concluded that between 1867 and 1934, Congress did not intend for Alaska Natives to be treated as sovereigns.[114] The court relied on a single report written by the state of Alaska in support of its holding.[115] In addition, the court did not apply the canons of construction in its analysis of legislation affecting Alaska Natives.[116] The *Stevens Village* court's analysis of more recent legislation is

105. REPORT, *supra* note 9, at 77.
106. Act of Mar. 3, 1899, ch. 429, 30 Stat. 1253.
107. Act of Mar. 3, 1909, ch. 266, 35 Stat. 837.
108. *Stevens Village*, 757 P.2d at 39.
109. Act of Aug. 24, 1912, ch. 387, 37 Stat. 512.
110. *Stevens Village*, 757 P.2d at 39 (quoting Act of Aug. 24, 1912, ch. 387, 37 Stat. 512, 514).
111. *Id.*
112. REPORT, *supra* note 9, at 97.
113. Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).
114. *See supra* notes 90-113, *infra* notes 115-16 and accompanying text.
115. *Stevens Village*, 757 P.2d at 37. The issue of Native sovereignty is being hotly debated in Alaska and the state is probably not the most impartial historian. Although the task force included people with varying perspectives, the report did not purport to be an exhaustive treatise on Alaska Native relations.

David Case, an attorney in Anchorage, was commissioned by various Native interest groups to write a response to the state's report. *See* D. CASE, TOWARD UNDERSTANDING: A POSITIVE VIEW OF FEDERAL-STATE-TRIBAL RELATIONS (1986).

116. *See supra* note 99.

equally faulty.

3. *Alaska Native history from 1934 to present*

The *Stevens Village* court's final analysis is devoted to the Alaska Indian Reorganization Act and the Alaska Native Claims Settlement Act. The court observed that these Acts contain no language that suggest a change in the non-sovereign status of Alaska Natives. The court therefore concluded that the Acts adequately established Congress' earlier intent that Alaska Native villages are not sovereign.[117] Again, the *Stevens Village* court failed to examine the underlying policy considerations which gave rise to this legislation.

Notwithstanding earlier congressional intent in Alaska, the Indian Reorganization Act (IRA) promoted Native self-government.[118] The original IRA did not apply in Alaska because it applied only to tribes residing on reservations.[119] Due to the purported lack of both tribes and reservations in Alaska, Congress extended the IRA to Alaska Natives "having a common bond of occupation, or association, or residence within a well-defined neighborhood, community or rural district."[120] By doing so, Congress promoted self-government in Alaska, thereby implying a recognition of Native sovereignty.

The *Stevens Village* court ignored the purpose of the Indian Reorganization Act. Instead, it extrapolated from the absence of tribes in Alaska the conclusion that Alaska Native villages are not sovereign. That conclusion was erroneous. Congress extended the Act to Alaska Natives because it considered them similar to Indian tribes in the Lower 48 who enjoy sovereign status.[121]

The *Stevens Village* court briefly disposed of ANCSA, asserting that it illustrates "Congress' intent that non-reservation villages be largely subject to state law."[122] As noted earlier, recent amendments to ANCSA specifically state that the Act does not decide the question of sovereignty.[123]

The combined result of *Atkinson* and *Stevens Village* is that only the Metlakatlans in Alaska enjoy sovereign immunity and are sovereign. Unfortunately, the Alaska Supreme Court based its decisions in these cases on characteristics of Alaska Native villages that should not be dispositive of sovereignty.

IV. THE TRIBE/RESERVATION/VILLAGE DISTINCTION

Although the *Stevens Village* court's interpretation of the *Task Force*

117. *Stevens Village*, 757 P.2d at 41.
118. 25 U.S.C. § 461-479 (1982).
119. *Stevens Village*, 757 P.2d at 39.
120. *Id.* at 39-40.
121. *See infra* note 124 and accompanying text.
122. *Stevens Village*, 757 P.2d at 41.
123. 43 U.S.C.A. § 1601(8)(B) (West Supp. 1988) states: "no provision of this Act . . . shall—confer on, or deny to, any Native organization any degree of sovereign governmental authority over lands (including management, or regulation of the taking, of fish and wildlife) or persons in Alaska." It also exemplifies Congress' avoidance of the status of Alaska Natives.

Report, the Alaska IRA, and ANCSA merit criticism, it is the tribe/reservation/village distinctions made between Metlakatlans, other Alaska Native groups, and Lower 48 Indian tribes that are particularly troublesome. Relying solely on semantic distinctions between indigenous groups without a consideration of history is precarious. This approach is similar to what Vine Deloria describes as the "epitome of the 'fallacy of misplaced concreteness.' "[124] He suggests that legal theories based on abstract notions, here the labels Congress and courts affix to Alaska Native groups, result in laws with no legitimate meaning because they fail to account for reality, in this case Alaska Natives' sovereign tribal lifestyle.[125] An examination of the court's semantic approach demonstrates the injustice of *Stevens Village*. In response, a new judicial strategy is offered.

A. *The Tribe and the Village*

In *Mashpee Tribe v. New Seabury Corporation*,[126] the court noted that because most groups of indigenous peoples are recognized as tribes due to their presence on reservations, "little case law has developed on the meaning of 'tribe.' "[127] Thus, without a reservation, a Native village is left with little precedent to support its assertion of tribal status.

In *Montoya v. United States*,[128] the United States Supreme Court defined a tribe as: "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."[129] The Alaska Natives residing in any particular village are members of the same race; there is usually some form of traditional government; and villages are geographically defined.[130] Thus, most Alaska Native villages satisfy the *Montoya* definition. In *Atkinson*, however, the court clearly stated that the Metlakatlans are organized as a tribe while other Alaska Native groups are organized as villages. The distinction is one of semantics. Perhaps "village" is a misnomer for what really is a "tribe," or "village" is synonymous with "tribe."

One anthropologist said "it was we Caucasians who again and again

124. Deloria, *Indian Law and the Reach of History*, 4 J. CONTEMP. L. 1 (1977) (quoting Alfred North Whitehead).

125. "Federal Indian law represents the culmination of this type of intellectual activity at its most abstract and sophisticated level. It conveys almost no significant meaning, it rarely is tangent to the world of human affairs, and it covers a multitude of historical sins with the shellac of legality." *Id.*

Various Alaska Native advocacy groups that joined together in an amicus curiae brief for the rehearing of *Stevens Village* argued that aside from "semantic differences between 'villages' and 'tribes,' " history demonstrates that "Alaska's tribes have *never* been different from tribes elsewhere." Brief for Amici Curiae (Alaska Federation of Natives et al.) at 1, *Stevens Village*, 757 P.2d 32 (No. S-1345) (emphasis in original).

Similar to Deloria's thesis, lawyers describe some of the distinctions (lack of reservations, lack of tribes, lack of treaties, prior Russian rule and the ANSCA land claims model) made between Alaska Native and Lower 48 Indians as the "uniqueness myth[es]." R. PIRTLE & D. CASE, SUMMARY OF 1991 RELATED IRA ISSUES IN ALASKA 1-12 to -15 (1983) [on file with the ARIZONA LAW REVIEW].

126. 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979).

127. *Id.* at 582.

128. 180 U.S. 261 (1901).

129. *Id.* at 266.

130. *See* Shinkwin, *supra* note 33, at 333-62.

rolled a number of obscure bands and minute villages into the larger package 'tribe,' which we then putatively endowed with sovereign power."[131] As Alaska Native villages are not "rolled" into tribes, ethnologically they are purer tribes than many Lower 48 tribes.[132] In the Lower 48, Congress often consolidated several ethnological groups speaking different languages into one "tribe;"[133] Congress also frequently divided a single ethnological group into several "tribes."[134]

Although Alaska Native villages satisfy the *Montoya* ethnological definition of "tribe," the Alaska Supreme Court relied instead on congressional labeling of indigenous groups as "tribes." Therefore, the federal government's political recognition of tribal existence is also important.[135]

Congress sometimes recognizes a group as a tribe for a particular purpose. This occurs often in Alaska.[136] For example, ANCSA regional and village corporations are "tribes" under the Indian Self-Determination and Education Assistance Act.[137] Also, a group may be a recognized tribe if the United States has some "continuing political relationship with the group."[138] ANCSA's passage is evidence of a continuing political relationship with Alaska Native villages. Admittedly, the relationship between the federal government and Alaska Natives is not as fully developed as between the federal government and many Lower 48 tribes, but this is largely due to the late arrival of the federal government in Alaska. While Lower 48 Indians encountered non-Indians in the sixteenth century,[139] major non-Native contact with Alaska Natives occurred only at the end of the nineteenth century.[140] It is therefore arguable that political recognition of Alaska Native villages as "tribes" already exists.

Nevertheless, the distinction between "villages" and "tribes" remains artificial. The existence of Alaska Native villages with ethnological histories of self-governance should instead be determinative of Alaska Native sovereignty.

---

131. Weatherhead, *What is an "Indian Tribe"?—The Question of Tribal Existence*, 8 AM. INDIAN L. REV. 1, 6 (1980) (quoting anthropologist A.L. Kroeber).

132. Felix Cohen noted:

> Congress has created "consolidated" or "confederated" tribes consisting of several ethnological tribes, sometimes speaking different languages . . . . Where no formal Indian political organization existed, scattered communities were sometimes united into tribes and chiefs were appointed by United States agents for the purpose of negotiating treaties. Once recognized in this manner, the tribal existence of these groups has continued.

F. COHEN, *supra* note 7, at 6 (footnotes omitted).

It should be noted that any argument for Alaska Native sovereignty is not meant in any way to take away from the sovereign power of Lower 48 Indians. Instead, it is simply used to illustrate the arbitrariness with which some indigenous groups have obtained federal recognition while others have not.

133. *Id.* The Cherokee Nation in Oklahoma includes Cherokees, Delawares, Shawnees, and others.

134. For example, the Eastern Band of Cherokees in North Carolina was recognized as a tribe even though the bulk of the tribe had moved to Oklahoma. United States v. Boyd, 83 F. 547 (4th Cir. 1897).

135. *See generally* F. COHEN, *supra* note 7, at 3-19.

136. *See supra* notes 118-21 and accompanying text. *See also* D. CASE, *supra* note 33, at 441-71.

137. F. COHEN, *supra* note 7, at 754.

138. *Id.* at 6.

139. *See id.* at 50.

140. *See* DRAFT STUDY, *supra* note 24, at I-14.

B. *The Reservation and the Village*

In *Alaska Pacific Fisheries v. United States*,[141] the United States Supreme Court stated that the purpose of the Metlakatlans' reservation "was to encourage, assist and protect Indians in their effort to train themselves to habits of industry, become self-sufficient and advance to ways of civilized life."[142] Civilization was reached by adopting "the white man's way of life."[143] Thus, promotion of sovereignty was not the original purpose of the Metlakatla tribe's reservation relied upon in *Stevens Village*.

The *Stevens Village* court, however, perceived sovereignty as inextricably intertwined with tribes and reservations. The court reasoned if Alaska Natives live on a reservation, then they constitute a tribe and are sovereign; if Alaska Natives live in a village, then they are not a tribe and cannot exercise sovereignty. That analysis is not logical given *Alaska Pacific Fisheries*' explanation of reservations.

Furthermore, to require Alaska Native villages to look yearningly to reservations for recognition of their sovereignty is a step backward rather than forward for federal Indian policy.[144] Reservations have failed miserably in the Lower 48. Poverty, unemployment, poor health conditions, and lack of education pervade many reservations. Moreover, the federal government created reservations to "forestall white-Indian conflicts over lands,"[145] not to recognize the sovereignty of indigenous groups. ANCSA abolished all but one reservation in Alaska. Even if a Native village wanted to obtain reservation status, it is doubtful, and probably unwise, that Congress would establish reservations in Alaska.[146]

C. *A New Judicial Approach for Determining Whether Alaska Natives Enjoy Sovereign Immunity*

Alaska is one of the last bastions of Native American culture. The vil-

---

141. 248 U.S. 78 (1918).

142. *Id.* at 89.

143. *See supra* note 64, at 406.

In 1956, Horace Miner, an anthropologist, wrote an ethnological description of the *Nacirema* culture:

> It is to be hoped that, when a thorough study of the Nacirema is made, there will be careful inquiry into the personality structure of these people. One has but to watch the gleam in the eye of the holy-mouth-man, as he jabs an awl into an exposed nerve, to suspect that a certain amount of sadism is involved. If this can be established, a very interesting pattern emerges, for most of the population shows definite masochistic tendencies. It was to these [tendencies] that Professor Linton referred in discussing a distinctive part of the daily body ritual which is performed only by men. This part of the rite involves scraping and lacerating the surface of the face with a sharp instrument. Special women's rites are performed only four times during each lunar month, but what they lack in frequency is made up in barbarity. As part of this ceremony, women bake their heads in small ovens for about an hour.

Miner, *Body Ritual Among the Nacirema*, 58 AM. ANTHROPOLOGIST 503, 505 (1956).

This is not a description of an "uncivilized" Alaska Native village; instead, Nacirema spelled backward is American. That American culture is also unique and diverse is important to remember when determining the self-governing rights of divergent cultures.

144. *See generally* Worl, *supra* note 1 and Y. BISTA, *supra* note 33.

145. F. COHEN, *supra* note 7, at 743.

146. In fact, Congress specifically stated in the ANCSA that it did not want a reservation system. *See supra* text accompanying note 36.

lage, not a tribe or a reservation, is an essential part of that culture. In order for Alaska Natives to flourish, special legal recognition of their sovereignty is necessary. Otherwise the United States moves one step closer to becoming a homogeneous melting pot. The Alaska Supreme Court's initial statement in *Stevens Village* that "most Native groups in Alaska [are] not sovereign" is unsupportable. Courts must look beyond semantic distinctions and consider cultural and historical realities of Alaska Native villages in order to determine whether they are sovereign.

V. CONCLUSION

The conflicting decisions of *Atkinson* and *Stevens Village* are examples of confusion about and hostility toward the sovereign status of Alaska Native villages. The Alaska Supreme Court's nescience of Alaska Native history and misinterpretation of federal Indian law are disheartening. The federal government's aversion to clarify the legal status of Alaska Natives is even more so. Monroe Price described federal relations with Alaska Natives as "periods of indifference."[147]

Indifference is no longer acceptable. The special investigatory committee of the United States Senate is urged to focus on Alaska Native sovereignty. A comprehensive review of the history of federal-state-Alaska Native relations followed by positive legislation, including a provision to overturn *Stevens Village*, is desperately needed to make self-determination a reality for Alaska Natives.

147. He wrote:

> There is a rhythm to Indian policy in the United States, a strongly stated program or statute followed by a period of weakening commitment and direction. In one sense, it is the periods of decay that are interesting and typical; indeed, it is the endurance through successive such periods that provides much of American Indian political culture so much of its character and special quality of cynicism amidst seeming cooperation. Such periods of indifference are characteristic of federal relations with the Alaska Natives. But it is not the intermediate periods that are of concern here, though they may be the truer hallmark of federal policy.

Price, *supra* note 34, at 89.