Tribal rights have solid foundation

by David S. Case

In 1978, I was hired to the Alaska Native Foundation to research the application of the federal government's "trust responsibility" to the Alaska Natives. The project was funded by the Bureau of Indian Affairs and overseen by a panel of distinguished Alaska Native leaders. At the time, the conventional wisdom was that there was no trust responsibility to the Alaska Natives, or if there was the Alaska Native Claims Settlement Act had extinguished it. Clarence Antioquia, then the Alaska BIA area director, suspected otherwise. My research confirmed his suspicions. The foundation published the research in 1978 as "The Special Relationship of Alaska Natives to the Federal Government."

In 1982, I was invited to join the faculty of the University of Alaska Fairbanks, in the Native studies and political science departments, to teach and expand on my work with the Native Foundation. In 1984, the University of Alaska Press published the results in book form as "Alaska Natives and American Laws." Both of these treatises concluded that Alaska Native villages were tribes with unextinguished powers of self-government and that ANCSA lands might constitute Indian country.

The thing that has always fascinated me about the field of "federal Indian law" is that it is filled with the sound of exploding assumptions. People (often powerful people) assume that tribes or their claims do not exist, only to find (usually after years of litigation) that their assumptions are surprisingly wrong. The Passamaquoddy Indians successfully claimed half the state of Maine based on a treaty that has been kept under their chief's bed for many years. The Washing-

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ton state treaty tribes prevailed on a claim to 50 percent of the fish returning to that state's rivers after more than a half century of arrests and litigation.

My research took me from the 1867 Treaty of Cession, to long-forgotten 19th century Alaska federal court decisions, to original documents in the Washington D.C. archives and numerous secondary sources. When I was done, I was (and still am) honestly convinced that the historical relationship of the Alaska Natives to the federal government is much the same as that of the Native Americans in the Lower 48 states. To the extent Alaska ignored that history, I was convinced it, too, would eventually find itself in the midst of exploding assumptions. The Native Village of Venetie decision is the sound of one such assumption. It is also based on an accurate reading of the historical record. What follows are some highlight of that history.

First there is the incontrovertible fact that the Alaska Natives were here first (or "aboriginally"). Then there is Article III of the Treaty of Cession, which provides in part that "the uncivilized tribes (in Alaska) will be subject to such laws and regulations as the United States may from time to time, adopt in regard to the aboriginal tribes of that country." In reporting on the treaty to the cabinet, Secretary Seward noted that "the Indians (are) to be on the footing of the Indians domiciled in the U.S."

During the next 50 years federal Indian policy changed dramatically as presidents, clergymen and congressmen pursued policies and enacted laws specifically designed to undercut tribalism and assimilate Indians into America's 19th century agrarian economy and culture. In the contiguous states, this resulted in the 1887 General Allotment, dividing tribal reservations into individual Indian homesteads.

In Alaska, the 1884 Alaska Organic Act required a unified system of education "without reference to race." Unlike the Indians in the contiguous states, Alaska Native affairs during this time were under the supervision of the Interior Department's Office of Education, not the BIA. In 1894, the Interior Department solicitor issued an opinion concluding that the Alaska Natives did not have the same legal relationship to the United States as the Indians on reservations. However, what was to have been a non-racial educational system in fact became two separate systems - one for Natives (primarily in the villages) and one for whites (primarily in larger towns). In 1905 Congress made it official when it passed the Nelson Act, which required separate systems of education: one for whites and another for the "uncivilized Natives."

In 1936, Congress applied the Indian Reorganization Act to Alaska, and the Interior Department began implementing it by withdrawing millions of acres for several reservations over which Alaska Native tribes would have governmental authority under BIA-approved constitutions. Venetie was one of those reservations. The policy detonated a storm of protest. Ernest Gruening and other prominent territorial leaders, fearing it would wreck Alaska's economy, insisted repeatedly that there were no tribes in Alaska and that Alaska Natives had no legitimate claims of aboriginal title.

About the same time the Tlingit and Haida Indians began their long court battle to vindicate claims of aboriginal title to all of Southeast Alaska. Alaska became a state in 1959, and six months later (and after more than 20 years of litigation) the federal Court of Claims upheld the Tlingit and Haida claims. It was the sound of another exploding assumption and the opening shot in the settlement of the Alaska Native land claims.

The "Indian country" question also has been litigated at least twice before in Alaska's history. In 1872, the Oregon federal district court held that the military could not restrict liquor sales to Indians, because Alaska was not Indian country. Congress responded almost immediately by designating Alaska Indian country for the purposes of the Indian liquor laws. In 1957, the Alaska federal district court held that the Tyonek reserve was Indian country and subject only to tribal jurisdiction for prosecution of certain crimes not covered by the federal Major Crimes Act. Congress again responded immediately by extending territorial (now state) criminal and some civil jurisdiction to all "Indian country" in Alaska.

The Alaska federal district court in the Venetie case even concluded that Venetie was Indian country before ANCSA. The major question in the Venetie case was whether ANCSA eliminated Venetie's Indian country. The Ninth Circuit held it did not. Neither court, after more than a decade of litigation, came close to saying that Alaska's history was somehow so unique as to preclude the existence of tribes and Indian country in Alaska.

The Venetie decision is based on sound history, read in light of the ordinary principles of federal Indian law. It is true that Congress has plenary power in the field of Indian affairs, but that power does not operate by implication. If Congress is to terminate any Native American interest, the courts require that it do so explicitly. When it comes to the Alaska Native tribes and Indian country, ANCSA simply isn't an explicit termination.

The Venetie decision also does not mean that the Alaska tribes exercise unfettered sovereignty. Rather, as is the case even on Lower 48 reservations, the scope of tribal jurisdiction is likely to depend on the balancing of a number of factors relating to the relative tribal, state and federal interests at stake in any particular controversy. What Venetie does mean is that the farflung Alaska Native villages have the legitimate authority to exercise some measure of self-government. That is likely to be on terms more appropriate to village values as determined by the villages rather than by some distant government. What could more Alaskan than that?