

The Sapphire Skylight: A Renaissance for Native Sovereignty in Alaska



Judge David Avraham Voluck ©2013

Central Council of Tlingit & Haida Indian Tribes of Alaska, Tribal Court

Sitka Tribe of Alaska, Tribal Court

Aleut Community of St. Paul Island, Tribal Court



The Legal Path for Alaska Native Tribal Sovereignty:



- I. The Divine Right Monarch
- II. Doctrine of Discovery
- III. 1867 Treaty of Cession between Russian and United States
- IV. Tlingit & Haida Indian of Alaska v. United States
- V. Alaska Native Claims Settlement Act (ANCSA)
- VI. Dept. of List of Tribes / Tribal List Act 1994 / Venetie (Tribal Status)
- VII. Alaska v. Native Village of Venetie Tribal Government (Indian Country)
- VIII. John v. Baker
- IX. Kaltag Tribal Council & Native Village of Tanana
- X. McCrary v. Ivanof Bay Village
- XI. Central Council of Tlingit & Haida & Native Village of Tununak
- XII. “*The Alaska Exception*”: TLOA, VAWA; Simmonds v. Parks; U.S. Supreme Court



Why is Any of this Important?



- **The Flood**

“Make for Yourself a Teva A Tzohar Shall You Make ... You and Your Family Shall Go into the Teva.”

- Sefer Bereishis [Book of Genesis]

- Inherent Right to Self-Determination
- Health, Safety, Welfare of Native People
- Library of Collective Experience



Divine Rights



- Foundations in the Eternal
- Divine Right Monarchs
- Exploration and Colonization
- Are Indigenous People Human? Sepulveda v. Las Casas & De Vitoria



Foundations of United States Indian Law



- King George's Proclamation: 'Indian Country'
- Declaration of Independence & Revolutionary War
- U.S. Constitution, Article I, Section 8, Clause 3
'*Indian Commerce Clause*': U.S. Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes
- '*The Marshall Trilogy*': Johnson v. McIntosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832)

Fundamentals of the Marshall Trilogy



- **Doctrine of Discovery**: Exclusive Right to Transact with Indigenous Population
- **Native Nations are Inherently Sovereign** – Qualified by Concepts of U.S. Congress' Plenary Power and Domestic Dependent Nations
- **Indian Law is the Province of the Federal Government not Several States**
- **Indian Trust Doctrine**: Fiduciary Responsibility / Canons of Federal Indian Law
- **Aboriginal Rights to Land and Resources** – Qualified by Concepts of Right to 'Use and Occupancy' which is Subordinate to United States' Ultimate Fee. The Cloud on the United States' Title May be Extinguished through clear:
 - Purchase
 - Treaty
 - Conquest

Note Bene: Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (Unrecognized Aboriginal Title is Non-Compensable under the U.S. Constitution 5th Amendment 'Takings Clause')

Aboriginal Rights in Alaska



- Russian American Fur Trading / War with the Tlingit
- 1867 Treaty of Cession – Quit Claim Deed / Preservation of Status Quo Regarding Alaska Native Sovereignty
- Alaska Organic Act of May 17, 1884 – Civil Government in Alaska / Preservation of Status Quo Regarding Alaska Native Sovereignty
- Tlingit & Haida Indians of Alaska v. United States, 177 F. Supp. 452 (Ct Cl 1959) (Tlingit and Haida Indians hold Aboriginal Title to Southeast Alaska)
- Alaska Native Claims Settlement Act of 1971 (ANCSA)
 - Extinguished Aboriginal Title and Hunting & Fishing Rights
 - 962.5 Million Dollars and 45 Million Acres in Fee to Native Corporations
 - Social Experiment Towards Assimilation / New Gospel of Capitalism
 - Avoid Permanent Racially Defined Institutions / Trusteeship or Wardship

Post-ANCSA Tribal Sovereignty in Alaska



- **The Department of the Interior List of ‘Indian Entities’ Feeds Confusion**
- **Ada Deer’s List and Preamble, 58 FED. REG. 54364, 54368 (October 21, 1993)** (AK Tribes retain the same Privileges, Immunities and Governmental Authority as Tribes in Lower 48).
- **Tribal List Act, 25 U.S.C. 471a, 471a-1 (Congressional Ratification of Interior’s List)**
- **Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548 (9th Cir. 1991)** (under common law and per the Interior’s list, AK Native Tribal Governments are modern-day successors to historically inherent sovereigns with same rights and responsibilities as Tribes in Lower 48)

Post-ANCSA 'Indian Country' in Alaska



- Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998)

Indian Country =

- 1) Reservations
 - 2) Indian Allotments
 - 3) Dependent Indian Communities
- ANCSA Lands lack Requisite Level of Federal Superintendence to Qualify as 'Dependent Indian Community' Therefore ≠ Indian Country
 - AK Native Tribes as 'Sovereigns without Territorial Reach'

State of Alaska's Historical Hostility Toward Tribal Sovereignty



- I. Native Village of Nenana v. Alaska DHSS, 722 P.2d 219 (Alaska 1986) (“P.L. 280 Divested Tribes of Jurisdiction under ICWA”)
- II. Native Village of Stevens v. Alaska Mgmt. Planning, 757 P.2d 32 (Alaska 1988) (“There are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law”)
- III. Nenana Fuel Co. v. Native Village of Venetie, 834 P.2d 1229 (Alaska 1992) (Justice Moore Concurrence: ‘ANCSA abolishes all claims to tribal status and sovereignty’)
- IV. In the Matter of F.P., 843 P.2d 1214 (Alaska 1992) (non-reservation AK Native villages lack authority of sovereign government)

Renaissance for Tribal Sovereignty in Alaska:



- I. John v. Baker, 982 P.2d 738 (Alaska 1999) (AK Supreme Court respects federal recognition of tribes, canons of federal Indian law; Alaska's tribes retain inherent sovereignty to adjudicate core tribal matters; sovereignty tied to citizenship, not land; State Courts are to afford 'Comity' to Tribal Court orders)
- II. Kaltag Tribal Council v. Alaska DHSS, 344 Fed. Appx. 322 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 66 (October 2010) (State of Alaska compelled to give Tribal Court Adoption Decrees 'Full Faith and Credit' per ICWA; Indian Country not required for sovereign jurisdiction over citizens)

The Tide Continues:



- III.** Alaska v. Native Village of Tanana, 249 P.3d 734 (Alaska 2011) (Tribes retain inherent sovereign jurisdiction, concurrent with the State, over child protection matters under ICWA; expressly overturns ITMO F.P., Native Village of Nenana, and 2004 FORMAL OP. ATT'Y GEN. 135 [Renkes Opinion], DHSS ordered to cooperate with Tribes).
- IV.** McCrary v. Ivanof Bay Village, 265 P.3d 337 (Alaska 2011) (Refuses invitation to over-rule John v. Baker, re-confirms sovereign immunity for Federally Recognized Tribes in Alaska).
- V.** Central Council of Tlingit & Haida Indian Tribes v. Alaska, 1JU-10-376 (Order Summary Judgment, October 25, 2011) (Alaska Tribes retain inherent sovereignty to adjudicate child support and paternity)

Turn About Continues



VI. Native Village of Tununak v. State of Alaska, Supreme Court. No. S-14562 (Alaska 2013) (Overturns all prior precedent, ICWA requires “clear and convincing evidence” standard of proof when using a “good cause determination” to depart from the Act)

Except for In Alaska



- **Tribal Law and Order Act of 2010:** Section 205 [Alaska Disclaimer]
- **Violence Against Women Act (VAWA) Reauthorization 2013:** Sections 905, 910 [Alaska Exception] (disparately excepting Alaska's tribal courts from the jurisdictional clarifications and improvements in the Act)
- **25 C.F.R. 151.1 Dept. of Interior 'Land-Into-Trust' Regulations** [Alaska Exception]; recently overturned by the D.C. Circuit as improper and discriminatory toward Alaska Tribes in Akiak Native Community v. Dept. of Interior and Alaska, 06-969 (RC) (D.D.C. September 30, 2013)

Unresolved Grief



- Parks v. Simmonds, Supreme Court Nos. S-14103, 14134 (State of Alaska has joined Petitioner arguing Alaska Tribes have no inherent civil jurisdiction over non-members in child protection matters; failure to allow Attorney to speak at hearing is a denial of fundamental due process)
- Alaska v. Central Council of Tlingit & Haida Indian Tribes of Alaska, Supreme Court No. S-14935 (State of Alaska seeking to overturn lower court decision upholding inherent tribal sovereignty to adjudicate child support and paternity matters)
- U.S. Supreme Court Trends in Indian Law: Greater than 80% of Indian Law cases decided are adverse to the Tribal interests. *See Native American Rights Fund, Supreme Court Project*, <http://sct.narf.org/documents.html>

The Third Sovereign:



- Anglo/American Justice Systems looking at traditional Native American processes such as Peacemaking, Sentencing Circles and other dispute resolution processes

There will be settlement of the Nations' disputes. They shall beat their swords into plowshares and their spears into pruning hooks; Nation will not lift sword against Nation and they will study warfare no more

- Yeshayahu [Isaiah] 2:4