Alaska Tribal Jurisdiction
How far have we come?
Where are we now?

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Alaska ‘Purchase’ 1867

Signing the treaty of cessation, March 30, 1867:
L to R: Robert S. Chew, Secretary of State William H. Seward, William Hunter, Mr. Rodisco, Russian Ambassador Baron de Stoeckl, Charles Sumner, Frederick V. Seward.

Alaska State Library PCA 20-181
Early Cases and Acts showing federal trust responsibility and indicating federal Indian law applied to Alaska Native people

1904: U.S. v Berrigan, Third Judicial District Judge Wickersham: Alaska tribes had aboriginal claims that only the Federal Government could settle

1905: Nelson Act, set up an education system specifically for Alaska Natives, many reservations/reserves......initiated the council style of village government.
1906 Alaska Native Allotment Act

A system to get land from federal ownership to individual Alaska Native owners

This allotment act did not subdivide Native owned land (land claims had not been settled yet so no land was in tribal ‘ownership’ at that time).
1926: Alaska Native Townsite Act 1926

1934/136: Indian Reorganization Act: some reservations created under this
1926 Alaska Native Townsite Act
24 in the TCC Region
1934/1936: Indian Reorganization Act, Authorizes the Secretary to take land into trust

- Some large reservations created including Venetie and Tetlin
- 12 tribes in the TCC Region organized under the IRA
- Land into Trust ‘Except in Alaska’ regulation implemented by the BIA in 1980
Indian country

Territorial jurisdiction of a tribe

Congress defined ‘Indian country’ by statute in 1948

§1151 Indian country defined
Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country,” as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.
1950s Termination Era

- Relocation, Termination of tribes, Public Law 280
  - BIA had a relocation program in Alaska, and many Alaska Natives were sent to cities in the Lower 48
  - No tribes were terminated in Alaska
  - Public Law 280 was applied to Alaska
    - Because of the scarcity of Indian country, Public Law 280 is not as significant for Alaska tribes as it is for P.L. 280 states in the Lower 48.
    - Metlakatla, the only remaining reservation in Alaska, is specifically excluded from the application of Public Law 280.
Birch Creek

Checkerboard pattern
Of ANCSA settlement
Core township surface
(64,000 acres) owned in fee
simple by the Tribe
Also, the Village sits on an
Alaska Native Townsite
With the passage of the Alaska Native Claims Settlement Act, two things were left unclear:

The existence of tribes and the extent of their jurisdiction

Adequate provision for Alaska Native hunting and fishing
1975: Indian Self-Determination and Education Assistance Act
– Requires federal agencies to allow tribes to administer various federal Indian programs under the Bureau of Indian Affairs and Indian Health Service.

1978: Indian Child Welfare Act:
• Designed to stop the loss of Native children by being taken and placed in non-Native homes
• Specifically recognized Alaska Native Villages as tribes
• Opened opportunity to tribes as interveners in ICWA cases
• Opened opportunity for Alaska tribes to initiate tribal child protection cases
1982: First tribal intervention in an ICWA case in Alaska—(In re J.R.S.) Chalkyitsik

1984: First time a tribe in Alaska took formal custody—Stevens Village

1984: TCC started providing tribal court training for tribes in the region.

The early tribal child protection cases were situations where the parents wanted the tribe to take the case. All were voluntary.

First problem was foster care payments. A federal lawsuit was not successful, and in response, TCC started reprogramming GA to pay foster care.
1986: First time an Alaska tribal court took custody (removed a child) in opposition to parent – Northway

1986: State court decided that they wouldn’t transfer ICWA cases to tribes (Native Village of Nenana v State)

1988: State Supreme Court decided that there were no tribes in Alaska except for Metlakatla and possibly a few others (Stevens Village Management case)

1986, 1987, and 1992: Native Village of Nenana v. Dept. of Health and Human Services, In re K.E., In re F.P., In re W.M. (Alaska Court System)...even if there were tribes in Alaska, Public Law 280 terminated any tribal jurisdiction tribes might have had.

1989: Nome Eskimo Community Case, Alaska Supreme Court ruled that land can’t be taken away from an entity organized under the Indian Reorganization Act.
Tribal Recognition in Alaska Clarified

1993: List of federally recognized tribes issued to make it clear that the tribes in Alaska were indeed tribes and were to be given the “same privileges and immunities’ as Lower 48 tribes

1994: Confirmed by Congress through the Tribal List Act.
1990s

1994: Venetie and Fort Yukon Adoption Cases (Federal Court) Ruled that both Venetie and Fort Yukon were tribes and that their adoption orders should be given full faith and credit. But, left the question of whether or not they were tribes before Congress approved the list in 1994.

1996: Tyonek v Puckett (Federal Court) Involved a question over the Tribe’s authority to exclude someone from the village…ruled that they did not have the authority over exclusion, but ruled that it was a tribe and was so before the 1994 List Act.

1998: Venetie Tax Case (US Supreme Court) Lands that have gone through the Alaska Native Claims Settlement Act are not Indian country.
1990s

Tribal courts in the TCC Region continued to conduct child custody and child protection cases, even experiencing some cooperation from state agencies. From somewhere in the 1990s, the number of children in custody began to run around ½ in tribal custody, and ½ in state custody. (Currently around 150 child protection cases in each).

Some tribal courts were/are also addressing misdemeanors in a civil manner, domestic violence, banishments, trespass, animal control, alcohol regulation, status offenses, etc.
“Do Alaska Native villages have inherent, non-territorial sovereignty allowing them to resolve domestic disputes between their own members?….we hold that Alaska Native tribes, by virtue of their inherent powers as sovereign nations, do possess that authority.”

“The tribes retain their sovereign powers to regulate internal domestic affairs unless Congress specifically withdraws their authority to act.”

“The federal tribes derive the power to adjudicate internal domestic matters, including child custody disputes over tribal children, from a source of sovereignty independent of the land they occupy.”
“A tribe’s inherent jurisdiction does not give tribal courts priority, or presumptive authority, in disputes involving tribal members.” [In other words, tribal and state jurisdiction are concurrent.]

“Because Alaska Native tribes have inherent sovereignty to adjudicate internal tribal disputes, the tribes must be able to apply their tribal law to those disputes. Thus, tribal sovereignty over issues like family relations includes the right to enforce tribal law in resolving disputes.”

“We therefore hold that, as a general rule, our courts should respect tribal court decisions under the comity doctrine.”

“…state courts should afford no comity to proceedings in which any litigant is denied due process….but this due process analysis in no way requires tribes to use procedures identical to ours in their courts”
Andy Harrington
Fairbanks, Alaska

Andy is extraordinary in his assistance and service to Alaska Native people.

Fundamental Guidance for Tribal Courts

Three core elements of ‘Due Process,’ and four ‘Best Practices’ for Tribal Courts.
Delegated Authority of Alaska Tribes

The U.S. Congress can “delegate” additional authority to tribes to make and enforce laws.

An “express Congressional delegation of power” to a tribe is only necessary “when a tribe seeks to exercise power outside its core sovereign authority.”

- The Violence Against Woman Act (VAWA) is an express delegation of authority to Alaska tribal governments to issue tribal protective orders enforceable throughout the United States.

- ‘Except in Alaska’ Section 910 of the reauthorization of VAWA in 2013, taken out in 2014
2001: C.R.H. Nikolai case (originally Chickaloon was also involved), State Supreme Court decided that Alaska Court System could transfer ICWA cases to tribes.

2003: Perryville v Tague (Alaska Court) Alaska tribes have the right to banish a member from the village due to violent behavior and to have the Alaska Court System and troopers assist in enforcing their orders.

2009: Kaltag v Hogan (Federal Court) Alaska tribal courts have jurisdiction (concurrent with the State) to initiate and hear child adoption cases. They are entitled to full faith and credit.
2011: Alaska v Native Village of Tanana (Alaska Supreme) Tribes have the authority to initiate child protection cases under the Indian Child Welfare Act and under their inherent authority.

2014: Parks v Simmonds (Alaska Supreme) Parties have to ‘exhaust tribal remedies’ before they can run to the state or federal government. Also, tribes do not have to allow oral argument, and they have jurisdiction over a child even if one parent is not a tribal member.
Ways to Analyze jurisdiction

- Persons
- Subjects
- Area/territory
- Civil or criminal
- Exclusive, Concurrent
- Comity
- Full Faith and Credit
Current Picture of Tribal Jurisdiction

**Clear Jurisdiction: Exclusive**
- Determining membership/citizenship
- Internal affairs, determining own form of government, and tribal justice system

**Becoming more clear: Concurrent**
- Domestic relations, child protection, adoption, domestic violence when at least one tribal member is involved

**Less clear: Concurrent**
- Infractions, status offenses, misdemeanors
- Enforcing regulatory law….clean air
  - Best legal theories for these are protecting the health and safety of the tribe and tribal members, when necessary to regulate internal affairs, and when parties consent

**No Tribal Jurisdiction**
- Over matters outside the village, not involving tribal members or affecting the tribe…or criminal jurisdiction over non-Natives
Land into Trust = Indian country

Placing tribal land in trust means that the United States government holds legal title to the land for the benefit, use, and occupancy of a federally recognized tribe. The U.S. Government’s name is on the deed as the owner of the property.

The type of land that can be taken into trust is ‘tribal fee land,’ land owned in fee simple title by a tribe.
Land Into Trust – Background

- Prior to ANCSA there was a great deal of land in Alaska in trust, some very large reservations and many reserves…some 150 reservations and reserves

- In 1971 ANCSA terminated all reservations in Alaska except Metlakatla

- In 1980 the BIA created an ‘Alaska exception’ in their regulations for taking land into trust in Alaska…(BIA takes land into trust under the authorization of the Indian Reorganization Act of 1934)
In 2007, Akiachak Native Community v Kenneth Salazar (Secretary of the Interior, Defendant and the State of Alaska (intervener) 4 tribes filed a lawsuit claiming that the ‘Alaska exception’ was discriminatory.

In March 2013, the U.S. District Court of Columbia issued a judgment in favor of the tribes. ANCSA did not prohibit the Secretary from taking land into trust and the ‘Alaska exception’ diminished the privileges and immunities available to federally recognized tribes. State of Alaska appealed this decision.
In December 2014, the BIA issued a rule that lifts the ‘Alaska exception’ and allow the Department of Interior to take Alaska tribal fee land into trust.

However, the *Akiachak Native Community v Kenneth Salazar* case is still on appeal. Also, there is a Lower 48 lands into trust problem that needs a ‘fix’…..and some discussion about a ‘congressional fix’ for Alaska which could cause problems for Alaska tribes.

Once past those hurdles, the BIA would consider taking land into trust on a case by case basis, but would not be required to take it into trust.
Main steps in fee to trust process:

- Tribe requests land to be taken into trust in the form of a resolution, legal land description, legal name of tribe, reason why land should be placed in trust, title insurance commitment, and info for NEPA and hazardous substances requirement
- Review of legal title/land description
- Clearance of any title defects
- Site review and inspection
- Environmental compliance
- Evaluate tribal purpose and business plan
- Consider views of state/local governments
- Consider views of other interested parties
- Consider potential jurisdictional conflicts
Secretarial decision considerations:

- Tribal justification for taking land into trust
- Accurate land description
- Clear title
- Clean site inspection
- NEPA/Environmental compliance
- Consideration (and potential resolution) of objections

“Surface lands in trust are subservient to the subsurface mineral interests which are dominant…The Department will use its experience managing lands with split estates in the Lower 48 to address any problems that might arise.”

Kevin Washburn 3/15 TCC Convention
Implications of land in trust

‘Positive’

- Land held in trust has great protection from loss to creditors, taxation, condemnation, etc.…

- Tribes potentially have more authority/jurisdiction over lands held in trust (Criminal jurisdiction (but would be concurrent with the State), taxation, zoning, full implementation of Native Preference Hire, regulation of wildlife)

- Trust lands are eligible for federal grant programs such as renewable energy and other economic development activities
‘Negative’

- Land held in trust would have more federal oversight, subject to both federal and tribal rules: (i.e. permission to develop, mortgage, or sell)

- Some economic development is more difficult on trust lands, leasing, rights of way issues...generally BIA approval required...BIA permission can be lengthy.

- Tribes with trust lands should consider adopting tribal statutes under the HEARTH Act of 2012 which basically deals with tribal leasing programs for a variety of uses. Once approved by the BIA, there is less Secretarial involvement.
Tribal / State Agreements

- Tribal / State Agreement to divert misdemeanors to tribal court for sentencing. This agreement would be made with the Alaska Department of Law.

- Tribal / State Agreements with the Division of Juvenile Justice to divert juvenile cases to tribal court for sentencing.
Tribal / State Agreements for tribes to monitor state court cases and to contact the state court to notify them that the tribe wishes to be involved with sentencing recommendations.

Alaska legislature has one resolution that would support the first type of agreements with the Department of Law, and there is some draft legislation that would set up similar agreements.
32nd Annual
Alaska Tribal Court Conference
August 4 – 6, 2015
Fairbanks, Westmark

Tribal Court Role in Community Wellness

Partnership TCC, UAF, NJC