

October 19, 2017

The Honorable Bill Walker  
Governor  
State of Alaska  
P.O. Box 110001  
Juneau, AK 99811-0001

*Re: Legal status of tribal governments in Alaska*

Dear Governor Walker:

You have asked for a legal opinion about the sovereign status of Alaska Native tribes (Alaska Tribes) and their relationship with the State of Alaska (the State). This opinion covers the following: (1) tribes do exist in Alaska; (2) Alaska Tribes are governments with inherent sovereignty; and (3) the areas where the scope of that sovereignty is clear.

**I. There are 229 federally recognized tribes in Alaska.<sup>1</sup>**

The existence of a tribe or tribal government does not require a federal determination and tribal sovereignty does not originate with the federal government.<sup>2</sup> That said, the United States Constitution gives Congress the authority to legislate with respect to Indian tribes.<sup>3</sup> Thus, the sovereign status of tribal governments, for the purpose

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<sup>1</sup> *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 82 Fed. Reg. 4,915, 4,919-20 (Jan. 17, 2017).

<sup>2</sup> *John v. Baker*, 982 P.2d 738, 751 (Alaska 1999) (quoting *U.S. v. Wheeler*, 435 U.S. 313, 322-33 (1978) (“Before the coming of the Europeans, the tribes were self-governing sovereign political communities.”); F. Cohen, *Handbook of Federal Indian Law* 132-34, 206-11 (2012 ed.) [hereinafter *Cohen’s Handbook*]).

<sup>3</sup> U.S. Const. art I, § 8, cl. 3; *U.S. v. Lara*, 541 U.S. 193, 200-02 (2004); *Cohen’s Handbook* 383-86.

of determining tribes' relationships with states, is a question of federal law and federal recognition of a tribe is dispositive.<sup>4</sup>

While Alaska Native people and Alaska Tribes have existed in what is now the State of Alaska for thousands of years, Alaska Tribes have undoubtedly been recognized by the federal government since 1994. Alaska Tribes' inherent sovereignty has been recognized by all three branches of federal government and the Alaska Supreme Court. This inherent sovereignty exists regardless of whether the land that Alaska Tribes possess or inhabit is considered "Indian country."

#### **A. The legal status of Alaska Tribes.**

Tribes are legal entities separate from either the federal government or states.<sup>5</sup> However, the status of Alaska Tribes was unclear for many years. The State initially took the legal position that tribes did not exist in Alaska.<sup>6</sup> And the Alaska Supreme Court, in a 1988 dispute between an Alaska Native village and a contractor, held that "[t]here are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law."<sup>7</sup>

An early 1993 Department of the Interior solicitor opinion, however, concluded that the federal government's "course of dealings" with Alaska Native villages conferred

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<sup>4</sup> See *Atkinson v. Haldane*, 569 P.2d 151, 162 (Alaska 1977) ("Once the [federal] executive branch has determined that the Metlakatla Indian Community is an Indian tribe . . . the Community is entitled to all of the benefits of tribal status."); *John*, 982 P.2d at 750; *Cohen's Handbook* 134 (explaining that federal recognition confirms a tribe's existence as a distinct political society).

<sup>5</sup> *Worcester v. Georgia*, 31 U.S. 515, 561-62 (1832); see, e.g., *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 191-92 (1989) (noting that tribes are not "states" within the scope of the Interstate Commerce Clause); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (tribal reservations are not states); *U.S. v. Kagama*, 118 U.S. 375, 381-82 (1886) ("[Indians] were, and always have been, regarded as having a semi-independent position.").

<sup>6</sup> See Alaska Admin. Order No. 125 (1991) (stating the State was opposed to the existence of tribes in Alaska); see also U.S. Dep't Interior, Solic. Op. M-36,975 at 48-60 (Jan. 11, 1993) (summarizing arguments against finding that Alaska Tribes existed).

<sup>7</sup> *Native Vill. of Stevens v. Alaska Mgmt. & Planning*, 757 P.2d 32, 36 (Alaska 1988).

upon the villages the same status as Indian tribes in the contiguous 48 states.<sup>8</sup> Later that year, citing the solicitor opinion, the Department of the Interior, Bureau of Indian Affairs (BIA) issued a list of federally recognized Alaska Tribes.<sup>9</sup> That publication was intended to “eliminate any doubt” as to the status and rights of Alaska Tribes; it recognized that Alaska Tribes have “the same status as tribes in the contiguous 48 states” and “the same inherent and delegated authorities available to other tribes.”<sup>10</sup>

Through the Federally Recognized Tribe List Act of 1994 (1994 List Act), Congress effectively affirmed the BIA’s recognition of Alaska Tribes. That legislation directed the BIA to publish lists of recognized tribes and, rather than reversing the 1993 List, overrode the omission of one Alaska Tribe.<sup>11</sup> Subsequent lists published pursuant to the 1994 List Act have continued to include Alaska Tribes.<sup>12</sup>

Initially, the State litigated the federal determination.<sup>13</sup> But in 1996, the State discontinued this legal challenge and the state Attorney General issued an opinion outlining the status of federally recognized tribes in Alaska.<sup>14</sup>

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<sup>8</sup> *Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers*, U.S. Dep’t Interior, Solic. Op. M–36,975 at 47 (observing that for over fifty years Congress and the Department of the Interior treated Alaska Native people as members of sovereign tribes).

<sup>9</sup> *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 538 Fed. Reg. 54,364, 54,364, 1993 WL 420646 (Oct. 21, 1993) [hereinafter 1993 List]; see H.R. REP. No. 103-781, at 2-3, *reprinted in* 1994 U.S.C.C.A.N. 3768 (explaining “recognition” means the federal government acknowledging, as a matter of law, that a particular Native American group is a tribe and permanently establishes a government-to-government relationship between U.S. and tribe).

<sup>10</sup> 1993 List, at 54,365-66.

<sup>11</sup> Federal Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, §103, 108 Stat 4791 (1994), *discussed in* *John v. Baker*, 982 P.2d 738, 750 (Alaska 1999).

<sup>12</sup> See, e.g., *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 60 Fed. Reg. 9,250, 9,255 (February 16, 1995); *Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs*, 82 Fed. Reg. 4,915, 4,919-20 (Jan. 17, 2017).

<sup>13</sup> See, e.g., *Native Vill. of Venetie I.R.A. Council v. State*, 1994 WL 730893, at \*7 (D. Alaska, Dec. 23, 1994), *supplemented sub nom. State ex rel. Yukon Flats Sch. Dist. v.*

The Alaska Supreme Court resolved any remaining questions about the legal status of Alaska Tribes in its 1999 decision, *John v. Baker*.<sup>15</sup> The court acknowledged that in *Native Village of Stevens v. Alaska Management & Planning* it had concluded the federal government never recognized Alaska Tribes, but that the Department of Interior's definitive 1993 List and the 1994 List Act demanded a different conclusion. The court stated "[i]f Congress or the Executive Branch recognizes a group of Native Americans as a sovereign Tribe, we 'must do the same.'" <sup>16</sup> The court explained that tribal status is a non-justiciable political question, requiring courts to defer to the express recognition of tribal status by the political branches of the federal government.<sup>17</sup> Federal courts likewise defer to the executive or legislative branches' tribal recognition determinations.<sup>18</sup>

Since *John v. Baker*, the Alaska Supreme Court has consistently recognized the sovereign status of Alaska Tribes.<sup>19</sup>

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*Native Vill. of Venetie Tribal Gov't*, F87-0051 CV (HRH), 1995 WL 462232 (D. Alaska Aug. 2, 1995), *rev'd sub nom. State of Alaska ex rel. Yukon Flats Sch. Dist. v. Native Vill. of Venetie Tribal Gov't*, 101 F.3d 1286 (9th Cir. 1996), *rev'd sub nom. Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998).

<sup>14</sup> 1996 Op. Att'y Gen. No. 1 (Jan. 11).

<sup>15</sup> 982 P.2d 738 (Alaska 1999).

<sup>16</sup> *John*, 982 P.2d at 749 (quoting *United States v. Holliday*, 70 U.S. 407, 419 (1865)) (citing *Native Vill. of Stevens v. Alaska Mgmt. & Planning*, 757 P.2d 32 (Alaska 1988)); *In re C.R.H.*, 29 P.3d 849, 851 n.5 (2001) (stating that the court follows Congress's determination that Alaska Tribes are sovereign under federal law).

<sup>17</sup> *John*, 982 P.2d at 749.

<sup>18</sup> *Holliday*, 70 U.S. at 419 (deferring to actions of political departments regarding tribal determination); *see Samish Indian Nation v. United States*, 419 F.3d 1355, 1370 (Fed. Cir. 2005) ("[T]ribal recognition is not justiciable."); *Cherokee Nation v. Babbitt*, 114 F.3d 1489, 1496 (D.C. Cir. 1997) (deferring to Congress and executive branch regarding tribal determination); *Atkinson v. Haldane*, 569 P.2d 151, 162 (Alaska 1977) (holding tribal determination "is a non-justiciable political question").

<sup>19</sup> *See, e.g., McCrary v. Ivanof Bay Vill.*, 265 P.3d 337, 342 (Alaska 2011) (Alaska Native village was federally recognized Indian tribe); *Healy Lake Vill. v. Mt. McKinley Bank*, 322 P.3d 866, 867 (Alaska 2014); *State v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 371 P.3d 255, 259 (Alaska 2016); *Simmonds v. Parks*, 329 P.3d 995, 999 (Alaska 2014).

The current state of the law is clear—there *are* 229 sovereign tribes within Alaska. Yet there continue to be misunderstandings about the existence of tribes in Alaska and their inherent sovereignty. A common misunderstanding is that ANCSA<sup>20</sup> extinguished or terminated Alaska Tribes. But ANCSA settled, and extinguished, tribal claims to aboriginal title; it did not extinguish tribal governments.<sup>21</sup> Because ANCSA did not explicitly terminate Alaska Tribes, it does not affect Alaska Tribes’ status as sovereign governments.

Misunderstandings may have been furthered by unsuccessful, but well-publicized, arguments in litigation asserting that Alaska Tribes did not exist and lacked inherent sovereignty.<sup>22</sup> Nevertheless, the Alaska Supreme Court has rejected several direct requests to overturn *John v. Baker*, and has consistently held that Alaska Tribes exist and

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<sup>20</sup> Pub. L. No. 92-203, 85 Stat. 688 (1971) (current version at 43 U.S.C. §§ 1601-1629h (2012)).

<sup>21</sup> 43 U.S.C. § 1603(b) (2012); *see Inupiat Cmty. of the Arctic Slope v. United States*, 680 F.2d 122, 129 (1982) (right to sue for trespass damages extinguished); *Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers*, U.S. Dep’t Interior, Solic. Op. M-36,975 at 132 (concluding ANCSA was a land settlement and did not terminate Alaska Tribes); Pub. L. 103-454, §103, 108 Stat 4791 (1994) (terminating federal recognition requires explicit Act of Congress).

<sup>22</sup> *See, e.g.*, Mot. to Intervene at 10, *Alaska v. Native Vill. of Tanana*, No. S-13332 (Alaska Feb. 3, 2009) (post-oral argument) (“[T]his appeal presents an appropriate procedural occasion for this court to revisit—because—with all due respect, it was error—its holding in *John v. Baker I.*”); *see also* Brief of Edward Parks & Donielle Taylor as *Amici Curiae* in Supporting Petitioners at 18 n.9, *Hogan v. Kaltag Tribal Council*, 562 U.S. 827 (2010) (No. 09-960), 2010 WL 1049413 (“*John v. Baker I* illustrates the continued confusion regarding Alaska Native tribal status”); Brief for the Legislative Council of the Alaska Legislature as *Amicus Curiae* Supporting Appellants at 8, *Runyon ex rel. B.R. v. Ass’n of Vill. Council Presidents*, 84 P.3d 437 (2004) (Nos. S-10772, S-10838), 2003 WL 24048558 (“[T]he conclusion regarding Alaska Native tribal status that the Court announced in *John v. Baker I* was erroneous.”); Complaint at 14-24, *S.P. v. Native Vill. of Minto*, No. 3:09-CV-0092 HRH, 2009 WL 9124375, at \*1 (D. Alaska, Dec. 2, 2009), *aff’d*, 443 F. App’x 264 (9th Cir. 2011) (arguing federal recognition was wrongfully obtained as a product of the “native sovereignty movement” whose goal was becoming “federally recognized tribes”).

are sovereign governments.<sup>23</sup> Thus, there are no unresolved legal questions regarding the legal status of Alaska Tribes as federally recognized tribal governments.

**B. The legal status of Indian country in Alaska.**

Past confusion about the status of Alaska Tribes may also stem from misunderstandings about the relationship between Alaska Tribes and land status. Tribes and tribal governments exist regardless of the status of tribal lands.<sup>24</sup> Land status does not determine the existence of tribes and tribal governments.

There is, however, a “significant territorial component” to tribal authority.<sup>25</sup> For that reason in discussing Alaska Tribes, it is also important to discuss the status of Indian country in Alaska.

The term “Indian country” means: (a) all land within the limits of any Indian reservation, (b) “dependent Indian communities,” and (c) Indian allotments.<sup>26</sup> ANCSA extinguished all reservations in Alaska except for the Annette Islands Reserve of the Metlakatla Indian Community.<sup>27</sup> There was a question for many years regarding whether

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<sup>23</sup> See e.g., *Runyon*, 84 P.3d 437, 439 n.3 (Alaska 2004) (declining “the invitations of the Runyons and amicus Legislative Council to revisit *John v. Baker*”); *McCrary*, 265 P.3d 337, 340 (Alaska 2011) (“McCrary argues that *John v. Baker* should not be considered binding precedent because no party in that appeal argued against recognition of the sovereign status of Alaska Native tribes. He contends this legal issue was not tested by the adversarial process. But our conclusion regarding the Executive Branch’s tribal recognition and Congress’s approval through the Tribe List Act was carefully considered and adopted by the entire court. Our conclusion in *John v. Baker* was not dictum—it was decisional . . . .”); *Simmonds v. Parks*, 329 P.3d at 1005 (citing with approval the superior court’s conclusion that *John v. Baker* “definitively rejected” the argument “that the Native Village of Minto is not a federally recognized tribe”).

<sup>24</sup> *John*, 982 P.2d at 754; *Kaltag Tribal Council v. Jackson*, 344 F. App’x 324, 325 (9th Cir. 2011) (stating that “[r]eservation status is not a requirement of jurisdiction because [a] Tribe’s authority over its reservation or Indian country is incidental to its authority over its members” (quoting *Native Vill. of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 559 n.12 (9th Cir. 1991))).

<sup>25</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982).

<sup>26</sup> 18 U.S.C. § 1151.

<sup>27</sup> 43 U.S.C. § 1618(a).

lands patented under ANCSA constituted “dependent Indian communities” and was therefore, Indian country. This question was answered in *Alaska v. Native Village of Venetie*. In that decision the U.S. Supreme Court concluded that former reservation land transferred to an ANCSA village corporation and then subsequently transferred in fee to the Tribe did not qualify as a “dependent Indian community” and the land was therefore not Indian country.<sup>28</sup>

However, there remain open questions about Indian country in Alaska. Throughout Alaska, there are currently scattered non-ANCSA Alaska Native lands with federal interests: it is estimated that there are close to one million acres of restricted fee land granted under the Alaska Native Allotment Act of 1906 and the Alaska Native Townsite Act of 1926.<sup>29</sup> The *Venetie* decision solely addressed dependent Indian communities; it did not address the status of Alaska Native allotments or townsites.<sup>30</sup> No case has determined whether Alaska Native allotments are Indian country.<sup>31</sup> There is also an open question about the territorial jurisdiction, if any, of Alaska Tribes over Alaska Native allotments and restricted Alaska Native townsite lots even if they are determined to be Indian country.<sup>32</sup>

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<sup>28</sup> *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 534 n.2 (1998).

<sup>29</sup> Act of May 17, 1906, Pub. L. No. 59-171, ch. 2469, 34 Stat. 197 (repealed 1971); Act of May 25, 1926, Pub. L. No. 69-280, ch. 379, 44 Stat. 629 (repealed 1976)).

<sup>30</sup> *Native Vill. of Venetie Tribal Gov’t*, 522 U.S. at 534 n.2 (observing that because there was only one Indian reservation in Alaska, “[o]ther Indian country exists in Alaska post-ANCSA only if the land in question meets the requirements of a ‘dependent Indian communit[y] under our interpretation of § 1151(b), or if it constitutes ‘allotments’ under § 1151(c)’”).

<sup>31</sup> *But see U.S. v. Ramsey*, 271 U.S. 467, 471-72 (1926) (holding that both trust allotments and restricted fee Osage allotments qualify as Indian country); *Oklahoma Tax Comm’n v. Sac & Fox Nation*, 508 US 114, 123-26 (1993) (Indian country includes allotments held in trust and in restricted fee); *In re Carmen*, 165 F. Supp. 942, 946 (N.D. Cal. 1958), *aff’d sub nom. Dickson v. Carmen*, 270 F.2d 809 (9th Cir. 1959) (holding that an Indian allotment made from the public domain, not from an allotted reservation, was Indian country).

<sup>32</sup> U.S. Dep’t Interior, Solic. Op. M-36,975 at 48-60, 129 (Jan. 11, 1993) (finding that Alaska Native restricted allotments are Indian country for federal government protection and jurisdiction, but questioning whether such would be subject to an Alaska Tribe’s claim of territorial jurisdiction).

In addition, the Department of Interior recently altered the land-into-trust regulations and removed the exception that prevented Alaska Tribes from petitioning for land to be placed in federal trust.<sup>33</sup> This means that there will be more Indian country within Alaska. However, because Public Law 280 granted the State of Alaska concurrent jurisdiction over certain matters in Indian country within the State, the Indian country status of land does not change the State's ability to enforce its criminal or prohibitory laws.<sup>34</sup>

## II. Alaska Tribes are sovereign governments.

Tribal governments are separate sovereigns. As a starting point, tribal sovereignty can perhaps be understood as self-rule—the right to make one's own laws and be governed by them.<sup>35</sup> Tribes possess inherent powers of self-government and exercise these powers to the extent they have not been extinguished.<sup>36</sup> It is presumed that a tribe's

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<sup>33</sup> See *Land Acquisitions in the State of Alaska*, 79 Fed. Reg. 76,888, 76,889 (Dec. 23, 2014) (altering the land-into-trust regulations); see also *Akiachak Native Cmty. v. Salazar*, 935 F. Supp. 2d 195 (D.D.C. 2013).

<sup>34</sup> Public Law 280 granted prohibitory jurisdiction to the State, however, tribes retain concurrent jurisdiction in Indian Country. See *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 685 (5th Cir. 1999); *Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir. 1990); 18 U.S.C. § 1162; A state's laws that are "prohibitory" are included in Public Law 280's authorization of state jurisdiction in Indian country. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 210-11 (1987) (explaining "if the intent of a state law is generally to prohibit certain conduct" it falls within Public Law 280's grant of state jurisdiction).

<sup>35</sup> See, e.g., *Williams v. Lee*, 358 U.S. 217, 220 (1959); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (explaining tribes are "distinct, independent political communities"); *U.S. v. Lara*, 541 U.S. 193, 205 (2004) (noting tribes are capable of governing themselves).

<sup>36</sup> The fundamental principle of Indian law is "that those powers lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished." *Cohen's Handbook* 207; see also *John v. Baker*, 982 P.2d 738, 751 ("[S]overeign powers exist unless divested.").

inherent sovereignty remains intact unless it has been divested or limited by Congress “or by implication as a necessary result of their dependent status.”<sup>37</sup>

Numerous federal laws have limited tribal sovereignty. For example, the Major Crimes Act extended federal criminal law into Indian country, an area where tribal jurisdiction had originally been exclusive.<sup>38</sup> Public Law 280 then allowed limited state authority in Indian country in some states, including Alaska.<sup>39</sup> And the U.S. Supreme Court held in *Oliphant v. Suquamish Indian Tribes* that tribes were divested of criminal jurisdiction to prosecute non-Indians, finding that such jurisdiction was “inconsistent with their status” as sovereigns subordinate to the federal government.<sup>40</sup>

Tribes’ inherent powers of self-governance over tribal citizens<sup>41</sup> have long been recognized, and there is no evidence that Congress intended to extinguish Alaska Tribes’ powers in enacting ANCSA.<sup>42</sup> Federal courts have likewise concluded that tribes in Alaska retain inherent sovereign authority.<sup>43</sup> As a general matter, sovereign governments have authority, or jurisdiction, over citizens, over land, and over people who enter their

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<sup>37</sup> *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *John*, 982 P.2d at 751 (explaining tribes retain sovereign powers to regulate internal affairs unless Congress specifically limits authority to act).

<sup>38</sup> 18 U.S.C. § 1153; *Ex Parte Crow Dog*, 109 U.S. 556, 568 (1883).

<sup>39</sup> Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953), codified at 18 U.S.C. § 1162.

<sup>40</sup> *Oliphant v. Suquamish Indian Tribes*, 435 U.S. 191 (1978) (holding tribes do not have inherent criminal jurisdiction to try and punish non-Indians, and may not assume such jurisdiction unless specifically authorized by Congress), *superseded in part by statute as stated in U.S. v. Lara*, 541 U.S. 193 (2004).

<sup>41</sup> The term “tribal citizen” (the modern trend and more accurate term) is synonymous with “tribal member” (the term used in caselaw).

<sup>42</sup> *John*, 982 P.2d at 753 (“Congress intended ANCSA to free Alaska Natives from the dictates of ‘lengthy wardship or trusteeship,’ not to handicap tribes by divesting them of their sovereign powers.”).

<sup>43</sup> *Native Vill. of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 556-59 (9th Cir. 1991); *Native Vill. of Venetie I.R.A. Council v. Alaska*, 1994 WL 730893, at \*12-21 (D. Alaska, Dec. 23, 1994); *Kaltag Tribal Council v. Jackson*, 344 F. App’x 324 (9th Cir. 2011).

land. Similarly, this “dual nature of Indian sovereignty” derives from two intertwined sources: tribal citizenship and tribal land. These two aspects of jurisdiction, or authority, while intertwined, have been “teased apart” in Alaska.<sup>44</sup>

**A. Sovereignty includes the power to establish a form of government.**

Forming a government is a basic element of sovereignty. Tribes possess the inherent authority to establish their form of government, including justice systems, that best suits their own practical or cultural needs.<sup>45</sup> Constitutions adopted by tribes following the passage of the Indian Reorganization Act (IRA) were based on sample documents developed by the BIA. However, tribes exercising powers under IRA constitutions are still acting under their inherent sovereign authority.<sup>46</sup> Tribal governments can also be formed or organized outside of the IRA framework, whether or not a written constitution has been adopted.<sup>47</sup>

Alaska Tribes have several types of governments including traditional councils and IRA governing councils. Additionally, tribes may choose to form a governmental entity, such as the Central Council of Tlingit and Haida Indian Tribes of Alaska, which receive federal recognition, in addition to the constituent Tribes, which are also recognized.<sup>48</sup> All of these entities, however, are governments of Alaska Tribes. Federal law prohibits the federal executive branch from classifying tribes as having different

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<sup>44</sup> *John*, 982 P.2d at 754; *Kaltag Tribal Council v. Jackson*, 344 F. App’x 324, 325 (9th Cir. 2011) (“Reservation status is not a requirement of jurisdiction because ‘[a] Tribe’s authority over its reservation or Indian country is incidental to its authority over its members.’”(quoting *Venetie*, 944 F.2d at 559 n.12)).

<sup>45</sup> *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-63 (1978) (recognizing tribes’ “power to make their own substantive law in internal matters and to enforce that law in their own forums”); *see also Talton v. Mayes*, 163 U.S. 376, 384 (1896) (stating that “the powers of local self-government enjoyed by [tribes] existed prior to the constitution”); *Indian Tribal Justice Act*, 25 U.S.C. § 3601(4) (2000) (“Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems.”).

<sup>46</sup> *See Washington v. Confederated Tribes*, 447 U.S. 134, 152-54 (1980).

<sup>47</sup> *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985) (holding IRA requirement that a tribal constitution be approved by the Secretary does not apply to Tribes that decline to accept the IRA); *see also* 25 U.S.C. § 5123.

<sup>48</sup> *Cohen’s Handbook* 133.

powers or status based on when or how the tribe was recognized.<sup>49</sup> Therefore, there is no basis for treating these different types of tribal governments differently from each other.

**B. Sovereignty includes the power to determine tribal citizenship.**

Determining tribal citizenship is also a fundamental attribute of sovereignty.<sup>50</sup> Tribal citizenship can determine, among other things, the right to vote in tribal elections, to hold tribal office, and to receive tribal resources. Eligibility for federal benefits and assistance provided to Alaska Native people because of their status as Alaska Native may be based upon tribal citizenship. And while denial of tribal citizenship may result in the denial of federal health and education benefits, tribal citizenship decisions are decisions solely made by tribes.<sup>51</sup>

**C. Sovereignty includes the ability to assert sovereign immunity.**

As sovereign governments tribes are generally immune from lawsuits unless Congress has authorized the suit or the tribe has waived its immunity.<sup>52</sup> The State and the federal government likewise have sovereign immunity from suit, but by statute, have provided limited waivers of sovereign immunity for certain types of suits.<sup>53</sup> When entering into agreements with tribes it is important for state agencies to consult with the Department of Law to determine whether a tribe has waived its sovereign immunity by

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<sup>49</sup> 25 U.S.C. § 5123; H.R. REP. No. 103-781, at 2-3, *reprinted in* 1994 U.S.C.C.A.N. 3768.

<sup>50</sup> *Santa Clara*, 436 U.S. 49 (1978); *John v. Baker*, 982 P.2d 738, 751 (Alaska 1999) (holding core sovereign powers remain; in particular, those internal functions involving tribal citizenship and domestic (*i.e.*, not foreign) affairs); *Healy Lake Vill. v. Mt. McKinley Bank*, 322 P.3d 866, 874 (Alaska 2014); *Kimball v. Callahan*, 590 F.2d 768, 777-78 (9th Cir. 1979) (holding terminated tribe without land base retained power to determine citizenship).

<sup>51</sup> *Santa Clara Pueblo*, 436 U.S. at 54 (holding equal protection guarantee of the Indian Civil Rights Act does not authorize the Court to determine which traditional values should be preserved, that determination was best made by the people of Santa Clara); *Healy Lake Vill.*, 322 P.3d at 877 (explaining tribe's right to define its own citizenship standards is central to its existence as an independent political community).

<sup>52</sup> *McCrary v. Ivanof Bay Vill.*, 265 P.3d 337 (Alaska 2011); *Douglas Indian Ass'n v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, No.7198, 2017 WL 3928701, at \*2 (Alaska Sept. 8, 2017).

<sup>53</sup> AS 09.50.250; 28 U.S.C. § 1346.

tribal law, whether a waiver is necessary, and, if so, the scope of the waiver that is necessary to protect the State.

**D. Sovereignty includes the ability to enter agreements under the ISDEAA.**

Numerous Alaska Native organizations provide services to, or otherwise represent the interests of, tribal citizens in Alaska. In particular, through the Indian Self Determination Education Assistance Act (ISDEAA),<sup>54</sup> Alaska Tribes may enter into agreements with the federal government to take over federally-administered programs and services as a matter of self-governance. The ISDEAA broadly defines “Indian tribe” to include ANCSA village and regional corporations as entities that are eligible to enter into ISDEAA agreements.<sup>55</sup> Alaska Tribes may also authorize “tribal organizations” or “inter-tribal consortiums” to provide services to tribal communities.<sup>56</sup> Some of these programs and services may be those that would be provided by a government, such as child welfare, law enforcement, and lands or realty management. While these organizations provide important, needed programs and services, they are not themselves federally recognized tribes possessing inherent sovereignty under federal law.<sup>57</sup>

**E. Tribes possess non-territorial sovereignty outside of Indian country.**

A tribe’s authority to adopt laws flows from its status as a sovereign political entity. This authority includes the power to enforce laws and administer justice systems

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<sup>54</sup> 25 U.S.C. §§ 5301–5423.

<sup>55</sup> 25 U.S.C. § 5304(e).

<sup>56</sup> 25 U.S.C. § 5321(a)(1)-(2) (setting out that ISDEAA contracts with the BIA or Indian Health Service are initiated by an “Indian tribe” although the contract may be with a “tribal organization”); 25 U.S.C. § 5362(b)(2) (recognizing that two or more tribes to agree to participate in ISDEAA as an “inter-tribal consortium”); 25 U.S.C. § 5381(b) (defining “Indian tribe” to include “tribal organization” or “inter-tribal consortium”).

<sup>57</sup> See, e.g., *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 58 Fed. Reg. 54,364, 54,366 (Oct. 21, 1993) (distinguishing federally recognized tribal governments and ANCSA corporations); *Runyon v. Ass’n of Vill. Council Presidents*, 84 P.3d 437 (Alaska 2004) (non-profit Alaska corporation, whose members are tribes, does not share sovereign immunity of member tribes where non-profit corporation is legally and financially insulated from the tribes).

such as courts.<sup>58</sup> Several Alaska Supreme Court decisions have established the contours of tribes' inherent powers "to conduct internal self-governance functions" outside of Indian country.<sup>59</sup> A summary of each type of matter the Alaska Supreme Court has addressed follows.

Alaska Tribes' subject matter jurisdiction outside of Indian country is derived from their "inherent, non-territorial sovereignty"—and the "ability to retain fundamental powers of self-governance."<sup>60</sup> In determining the scope of Alaska Tribes' subject matter jurisdiction, the Alaska Supreme Court has evaluated "two dimensions" of non-territorial subject matter jurisdiction.

The first dimension involves the character of the legal questions that can properly be decided by the Alaska Tribe's court. These are matters that involve the regulation of "internal affairs" of tribal citizens and those that go to the "core of sovereignty."<sup>61</sup> The second dimension involves the categories of individuals and families who might properly be brought before the tribal court and whose disputes the tribal court can properly resolve.

Tribes' inherent sovereignty includes the subject matter jurisdiction to grant legally binding adoptions of tribal citizen children. The State must give full faith and credit to adoptions issued by tribes.<sup>62</sup>

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<sup>58</sup> See *Indian Tribal Justice Act*, 25 U.S.C. § 3601(4) (2000) ("Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems.").

<sup>59</sup> See *John v. Baker*, 982 P.2d 738, 758 (Alaska 1999); *State v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 371 P.3d 255, 265 (Alaska 2016).

<sup>60</sup> *Cent. Council*, 371 P.3d at 262 (quoting *John*, 982 P.2d at 758).

<sup>61</sup> *Id.* at 262; *John*, 982 P.2d at 759.

<sup>62</sup> 25 U.S.C. § 1911(d); *Native Vill. of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 562 (9th Cir. 1991) (holding Public Law 280 does not prevent tribes from exercising jurisdiction and Congress affirmed such jurisdiction in ICWA, therefore state must recognize tribe's adoption); *Kaltag Tribal Council v. Jackson*, 2008 WL 9434481, at \*7 (D. Alaska, 2008) (holding that tribal adoption order involving tribal citizen child was entitled to full faith and credit), *aff'd Kaltag Tribal Council v. Jackson*, 344 F. App'x 324 (9th Cir. 2009); *Alaska v. Native Vill. of Tanana*, 249 P.3d 734, 736 (Alaska 2011).

Tribes' inherent sovereignty includes the subject matter jurisdiction to decide the custody, outside of the ICWA context, of tribal citizen children or children eligible for tribal citizenship.<sup>63</sup> Tribes' custody orders are entitled to comity recognition by Alaska courts. This means the state court will conduct an analysis to ensure that the court participant's due process rights were protected. As part of its due process analysis, the state court looks at: (1) whether the parties received notice of the tribal court proceedings; (2) whether the parties were granted "a full and fair opportunity to be heard"; and (3) whether the tribal court judges were impartial and the proceedings were conducted in a regular fashion.<sup>64</sup>

Tribes' inherent sovereignty includes the subject matter jurisdiction to accept transfer of ICWA cases from state courts regardless of whether the tribe petitioned the federal government to reassume jurisdiction under ICWA.<sup>65</sup> Tribes' inherent sovereignty also includes the jurisdiction to initiate ICWA child custody proceedings, and the tribal court orders in these proceedings are entitled to full faith and credit by the state courts and agencies.<sup>66</sup>

Tribes' inherent sovereignty includes a "colorable and plausible claim to jurisdiction" to terminate parental rights to tribal citizen children, even when the parent is not a citizen of that tribe.<sup>67</sup> Further, tribal court remedies must be exhausted before a tribal court decision can be collaterally attacked in state court.<sup>68</sup> As a result, in *Simmonds v. Parks*, where a non-tribal-citizen parent failed to appeal in tribal court the tribe's

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<sup>63</sup> *John*, 982 P.2d at 759 (holding that Alaska Tribes have jurisdiction over domestic (*i.e.*, internal) disputes involving tribal citizen children even in the absence of territory).

<sup>64</sup> *See id.* at 763 (noting that due process does not require tribes to use procedures identical to state courts and that comity analysis is "not an invitation for [state] courts to deny recognition to tribal judgments based on paternalistic notions of proper procedure").

<sup>65</sup> *See In re C.R.H.*, 29 P.3d 849, 852 (Alaska 2001).

<sup>66</sup> *See Native Vill. of Tanana*, 249 P.3d at 736, 750–51; *Kaltag Tribal Council*, 2008 WL 9434481, at \*7.

<sup>67</sup> *Simmonds v. Parks*, 329 P.3d 995, 1017-19 (Alaska 2014); *S.P. v. Native Vill. of Minto*, No. 3:09-CV-0092 HRH, 2009 WL 9124375, at \*6 (D. Alaska, Dec. 2, 2009), *aff'd*, 443 F. App'x 264 (9th Cir. 2011) (unpublished).

<sup>68</sup> *Simmonds*, 329 P.3d at 1011-14.

termination of his parental rights, the Alaska Supreme Court held he could not attack that holding in state court and gave the termination full faith and credit.<sup>69</sup>

Adjudicating a parent's obligation to pay child support for tribal citizen children, or children eligible for tribal citizenship, is within Alaska Tribes' inherent subject matter jurisdiction.<sup>70</sup> Tribal court child support orders must be processed by the Alaska Child Support Services Division (CSSD) under the Alaska Uniform Interstate Family Support Act just as child support orders entered by courts in other states.<sup>71</sup>

In conclusion, it is important to note three things. First, in each of the above types of cases, an Alaska Tribe's jurisdiction is concurrent with the State's. This means that cases can be started in either a tribal or state court. Second, in each of the cases that established the scope of tribes' non-territorial jurisdiction, due process was given to the court participants. Courts will refuse to grant either full faith and credit or comity when due process was not provided to the court participants.<sup>72</sup>

Finally, the matters identified above are not a definitive list of those matters included within Alaska Tribes' inherent powers "to conduct internal self-governance functions" outside of Indian country.<sup>73</sup> The matters listed above are those that have been identified through litigation. The Alaska Supreme Court has stated that the "key inquiry" in determining the scope of a Tribe's non-territorial sovereignty is whether the tribe "needs jurisdiction over a given context to secure tribal self-governance."<sup>74</sup> This means that some matters that are clearly internal self-governance functions, such as marriages,

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<sup>69</sup> *Id.* at 1022.

<sup>70</sup> *State v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 371 P.3d 255, 267 (Alaska 2016) (explaining that "[s]etting, modifying, and enforcing" child support obligations plays a vital role in tribal self-government).

<sup>71</sup> AS 25.25.101(26).

<sup>72</sup> *Starr v. George*, 175 P.3d 50, 59 (Alaska 2008).

<sup>73</sup> *See John v. Baker*, 982 P.2d 738, 758 (Alaska 1999); *Cent. Council*, 371 P.3d 255, 265 (Alaska 2016).

<sup>74</sup> *See John*, 982 P.2d at 756 (Alaska 1999) ("The key inquiry. . . is not whether the tribe is located in Indian country, but rather whether the tribe needs jurisdiction over a given context to secure tribal self-governance." (internal quotations and citations omitted)).

divorces, or paternity determinations involving tribal citizens, may also be recognized as within the inherent sovereignty of Alaska Tribes.

### **III. Conclusion**

The law is clear. There are 229 Alaska Tribes and they are separate sovereigns with inherent sovereignty and subject matter jurisdiction over certain matters. Indian country is not a prerequisite for Alaska Tribe's inherent sovereignty or subject matter jurisdiction, but it may impact the extent of that jurisdiction.

Sincerely,

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