Resolving Disputes Locally: Alternatives for Rural Alaska

August 1992

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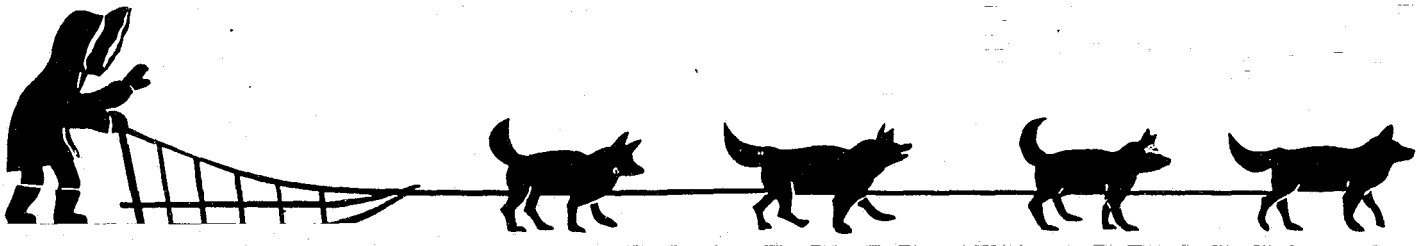

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acknowledgments

The Alaska Judicial Council would like to express its appreciation to the many persons who contributed to this project. Thanks go first and foremost to the people of Minto, members of the Sitka Tribe of Alaska, and to PACT's members. Their assistance made this project possible. Special thanks to those whose friendship made travel and work in Sitka, Minto and Barrow a pleasure. Over one hundred people gave generously of their time and thoughts in interviews for this report. The Council thanks them along with the readers who offered many and varied comments on the first draft of this report. The advisory committee members, Judge Michael Jeffery, Judge Douglas Luna, and Professor Gary Copus, assisted the staff with the project design and final report, providing helpful insights. Finally, we thank the State Justice Institute and its staff for their encouragement and support for this work.

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disclaimer

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confidentiality

The names and characteristics of cases have been changed throughout this report to protect the confidentiality of the participants in the alternative dispute resolution organizations that were evaluated.

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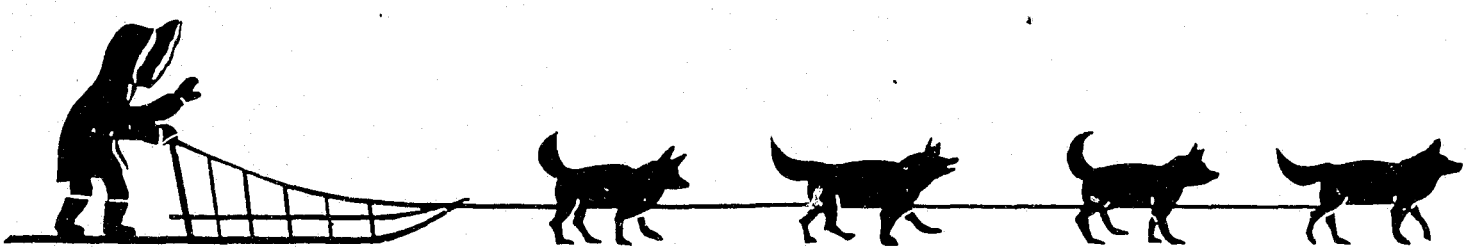

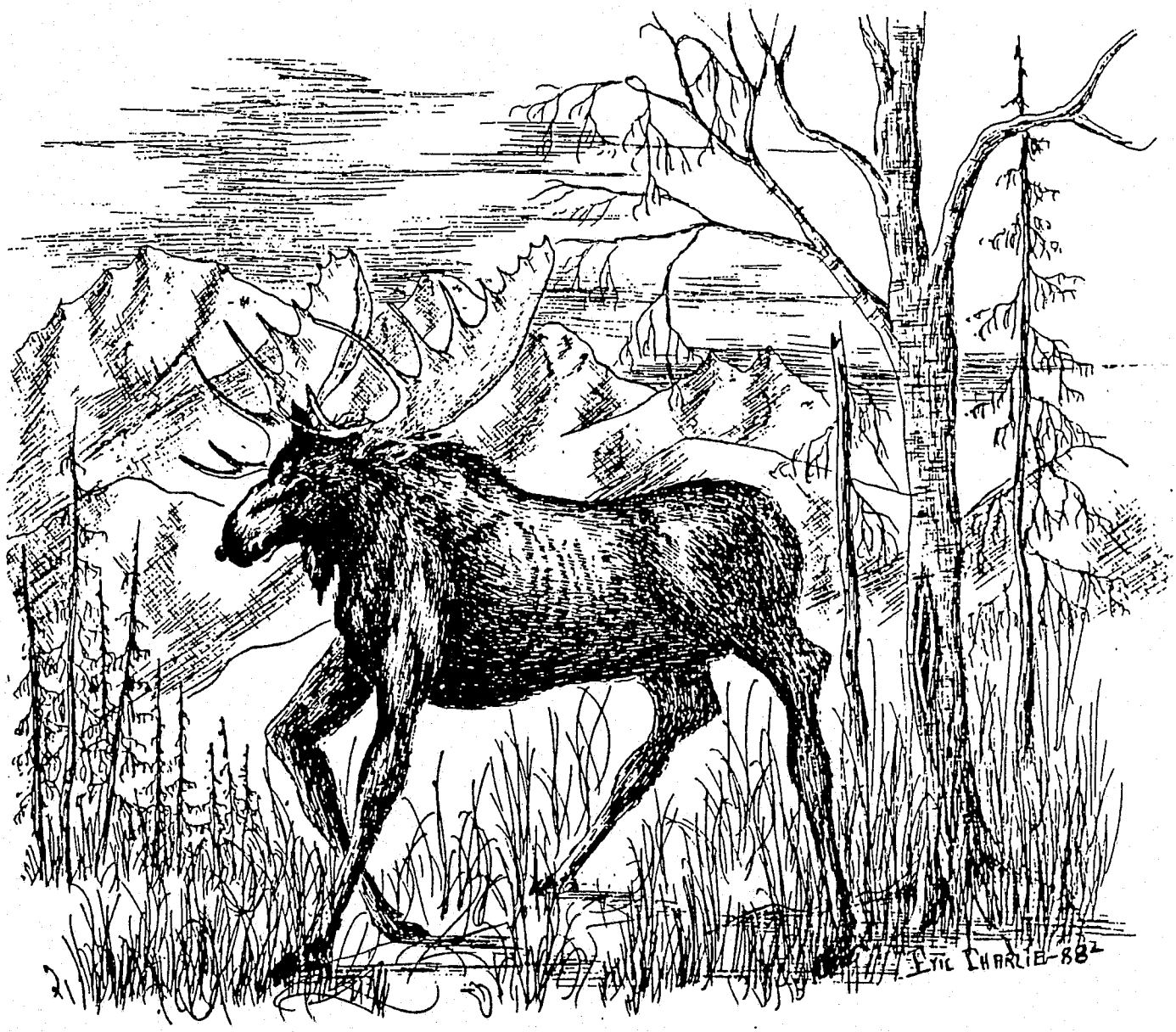

Illustration by Minto artist Eric Charlie,
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Executive Summary

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Rural Alaskan communities have developed methods of resolving disputes locally that may benefit the state's justice system as well as the communities' residents. The Alaska Judicial Council has evaluated a conciliation organization in Barrow (PACT), the Minto Tribal Court and the Sitka Tribal Court to describe and assess these organizations and the approaches they have taken to rural justice in Alaska. The Council found that the largely volunteer organizations functioned with varying degrees of effectiveness, depending upon the strength of their case referral systems, and the level of community commitment to supporting the organization and resolving disputes through it. Recommendations included continued cooperation among local organizations and state courts and agencies, increased mutual education between tribal court and state court judges, and increased voluntary development of local organizations in other communities to resolve disputes.

The Executive Summary includes an overall description of the evaluation project, brief descriptions of each of the three organizations evaluated, and the findings, conclusions and recommendations of the Judicial Council. The report itself includes chapters on the cultural and justice system setting for each community, a brief summary of rural justice needs and alternative dispute resolution in Alaska, the legal context for the functioning of the tribal courts, and detailed evaluations of each organization. A chapter comparing the three organizations, a discussion of interactions with state courts, and a chapter on the conditions needed to replicate the work done by these organizations in other communities complete the report. Appendices to the main report include a more thorough discussion of the evaluation methods, a list of references used

in the report, and a memo summarizing the recommendations made at rural justice conferences and the outcomes of those recommendations.

A. Purposes and Structure of the Evaluation

The Alaska Judicial Council set rural justice issues as a top priority for its staff in 1987.* The Council proposed that the State Justice Institute fund an evaluation of three organizations in rural communities that provided alternative means of resolving disputes. The purpose of the evaluation was to conduct a neutral review that would benefit the local organizations, as well as state courts and agencies and other communities. Local organizations would benefit because their limited resources would not otherwise permit them to obtain an independent review of their work. State courts and other agencies would gain by having a neutral view of the characteristics, strengths and weaknesses of the organizations that would enable the state courts to increase their involvement with local communities. Other communities, both within and outside of Alaska, would benefit from an understanding of the qualities and conditions needed to replicate effective local means of resolving disputes.

Criteria for evaluating organizations included a history of continuous functioning for at least two years, access to written case records, some level of interaction with state courts (or indication that the organization's work had an effect on the work of the state courts), and willingness of the organization's personnel to collaborate in the evaluation. The diversity of rural organizations is embodied in the three evaluated: three of Alaska's five main Native groups are represented (Inupiat in Barrow, Athabascan in Minto and Tlingit in Sitka); three of the state's five major geographical areas (Barrow on the North Slope, Minto in the Interior and Sitka in Southeast); three very different organizational structures (panels of volunteer conciliators in Barrow, a panel of elected judges in Minto, and a single appointed judge in Sitka); and three major groupings of case types (small claims and civil disputes in Barrow, civil regulatory/quasi-criminal in Minto, and children's cases in Sitka).

The evaluation relied on various methods of collecting information to provide a comprehensive picture of the organizations and the contexts (legal and cultural) in which they act. Methods sensitive to cultural differences and small databases were selected, including extensive interviews with the decision-makers/conciliators in each

* The Judicial Council is required by the state's constitution (Article 4, § 9) to conduct studies and report to the legislature on improving the administration of justice.

organization, other volunteers associated with the organization's work, and state court judges, regional Native non-profit corporation staff, and others familiar with the organizations' activities. Each of the organizations gave the evaluators access to their case files; although limited in numbers, these were a rich source of information. Secondary sources, case law, analyses of Indian law, and data from state court case files and state Department of Public Safety files provided the basis for analysis of data from the interviews and organizations' case files.

Of critical importance to the accuracy and completeness of the report was the draft report review process. Over one hundred and twenty-five copies of the draft report were sent out for review, to organization volunteers, decision-makers/conciliators, all persons interviewed for the report, academicians, attorneys specializing in Indian law, and the project's Advisory Committee.** The Project Evaluator returned to each community for several days to go over the report personally with the people interviewed to check for accuracy and completeness of the description of the organization. This thorough review process was an intrinsic part of the evaluation and helps firmly to validate the findings and conclusions drawn from the information gathered about the organizations.

B. Summary Descriptions of the Organizations Evaluated

1. Minto Tribal Court

- The court was established in about 1940 with Bureau of Indian Affairs assistance. It was unused during the 1970s, then re-established in 1985.
- The court was re-established to serve as a governmental entity, and to "help" the village by resolving local problems in a traditional Athabascan manner.
- Five judges are popularly elected to serve staggered three-year terms without payment.

** Members of the Advisory Committee who assisted in the evaluation design and report revision were Judge Michael Jeffery (Alaska Superior Court, Barrow), Judge Douglas Luna (Central Council Tlingit and Haida Indian Tribes of Alaska, Juneau, Alaska), and Dr. Gary Copus (Professor, Political Science, University of Alaska, Fairbanks).

- The court holds regular hearings. Typically, only the Village Public Safety Officer, parties, and witnesses attend hearings, although the defendant may ask for an open hearing. The court maintains strict confidentiality of proceedings and case files.

- Part of each hearing is devoted to "counseling" parties. Judges use this opportunity to speak of community values, to warn those who are misbehaving of the consequences of their actions, to praise good role models, and to offer practical solutions to problems.

- The court applies the Minto Code of Village Regulations. The Code contains substantive provisions regulating liquor (Minto is a dry community), weapons, vehicle safety, minor and dependent children, animal control, and sanitation.

- The court's caseload is split between 84% civil regulatory actions (enforcement of local ordinances) and 16% children's matters. Over 50% of the court's civil regulatory cases are alcohol-related. Defendants commonly plead guilty or no contest.

- The most common sanctions imposed include fines and community work service. The court also may order counseling, rehabilitation, and restitution.

- Children's cases may come to the court through notice under the Indian Child Welfare Act (ICWA), or upon petition of family members, e.g., for approval of traditional adoptions. In the past, the court has called before it parents who appeared to be neglecting their children. The court also has assisted in negotiating child custody agreements.

- Parties have a right of appeal to the Minto Village Council.

- Apparently as a result of the Minto Tribal Court's activity, almost no local criminal cases are prosecuted in state court.

2. Sitka Tribal Court

- The Sitka Tribal Court was first established in 1981 to hear children's cases under ICWA and traditional Tlingit law. The court is an arm of the Sitka Tribe of Alaska, which is organized under the Indian Reorganization Act.

- The court has had one judge, appointed by the tribal council, since its inception. The judge has received only token compensation.

- The court has held a handful of formal hearings. Generally, court activity is conducted informally with the judge functioning as a mediator-negotiator.

- The court operates under a Code of Civil Procedure and Children's Code. The court asserts personal jurisdiction, under traditional Tlingit law, over children born to female clan members regardless of their state of residence.

- The tribal Children's Code mandates that the court cooperate with the State Division of Family and Youth Services (DFYS) and others to coordinate functions in the best interest of Indian children and their families. Cooperation is a hallmark of tribal-DFYS relations.

- Aside from three civil actions which involved internal tribal politics, the court's entire caseload has been comprised of children's cases. The court receives referrals from attorneys, notice under ICWA from the state courts and DFYS, and from other states. A number of cases come from the tribal social service agency and from self-referrals.

- Typical cases include guardianships and tribal child in need of aid matters. The court has also intervened in ICWA proceedings in Alaska and elsewhere, and successfully won transfer of some actions to tribal court. Recently the court has assisted in negotiating child custody and visitation questions.

- Parties have a right of appeal to the Sitka Tribal Council.

3. PACT

- PACT is a community conciliation organization in Barrow. Its name is an acronym for the Tagalog (Filipino), Inupiat (Eskimo), and English words for "come together." The group has been active since 1989.

- Broadly, PACT's goal is to promote harmony in the community. Activities designed to meet this goal include offering free conciliation for Barrow residents, educating the community about conciliation, and promoting community

responsibility for conflict prevention and resolution. PACT also provides technical assistance to other Alaska communities interested in conciliation.

- PACT is an independent group with no institutional ties to any power structure in Barrow. The group believes its independence gives it credibility and flexibility.

- PACT is organized as a nonprofit corporation. Its only requirement for membership is that one be "ready, willing and able to participate as much as possible in PACT activities." Members have responsibility for carrying out tasks they volunteer to complete.

- PACT applies no substantive law. Disputants craft their own solutions. The process emphasizes consensus.

- PACT's dispute resolution process begins with intake and screening. All disputants must personally request services. If a case is deemed inappropriate for PACT, referrals are made. Sometimes a PACT member trained in dispute resolution helps the disputants resolve their disagreement without resort to the panel process. If early resolution is not possible, the parties are referred for a panel session. These generally take up to four hours and provide the disputants an opportunity to talk about the facts of their disagreement and their feelings about the problem in a structured, safe, and non-judgmental atmosphere.

- Resolutions vary depending upon the unique circumstances of the case. Except in instances where the parties have agreed to a payment schedule and written out the details, case resolutions are typically memorialized by a handshake. Afterwards, a PACT member follows up to assure that the resolution is holding. Disputants may ask to have the panel reconvene if they want to further negotiate an issue.

- PACT's guidelines specifically exclude the following types of disputes: child abuse or neglect, foster care, child in need of aid, domestic violence, probate, disputes being processed by another agency, or cases in court. The group does agree to hear such matters as landlord-tenant problems, noise or pet complaints between neighbors, property damage, vandalism, unpaid bills, and workplace or school problems. PACT has handled a large number of small claims-type actions and landlord-tenant disputes.

C. Findings, Conclusions and Recommendations

The purpose of this project was to describe and evaluate three organizations in rural Alaska, other than the state court system, that resolve disputes. After reviewing all of the case files from the Minto and Sitka tribal courts and the Barrow PACT conciliation organization, comparing those case files with similar cases in the state courts, interviewing nearly 100 attorneys, judges, decision-makers, conciliators, and other persons interested in the organizations, reviewing Native law and current alternative dispute resolution processes, and assessing a wide range of other information about each organization, the Judicial Council makes the following findings.

1. Findings

Rural Alaskans in Barrow, Minto and Sitka have found ways to solve their disputes locally. They have adapted three methods of dispute resolution to their unique circumstances. Barrow's PACT blends the urban, apolitical Community Boards and the rural Indian Peacemakers in the Arctic environment. Sitka's tribal court harmonizes federal, state, and traditional Tlingit law in its decisions and process. The Minto Tribal Court embodies Athabascan justice, modern and ancient. These three organizations indicate that many Alaska communities could create equally unique and effective dispute resolution organizations. The evaluation found that the organizations shared the following characteristics.

Reliance on Volunteer Effort. Each organization was founded by individuals strongly committed to an idea, whether the idea was a vision of community harmony or well-being, or of collective responsibility. This initial commitment has translated over the years into a willingness to work long hours, for little or no pay. However, this reliance on volunteer support has left all three organizations susceptible, in varying degrees, to burnout and turnover among decision-makers/conciliators and support staff.

Absence of Outside Funding. None of the three organizations relies on outside funding sources; in fact, none of the three has any significant material support. PACT owns an answering machine, Minto owns case files alone, and Sitka owns only a file cabinet. That these organizations have accomplished so much with so little is testimony to the integrity of the ideas that inspired them and the commitment necessary to bring those ideas to life.

Community Support and Acceptance. Each organization has been continuously active in varying degrees, for a number of years. This continuity is tied to broad-based community support and acceptance. In Minto, every member of the village had the opportunity to assist in drafting village ordinances. Public participation in law-making has given the tribal court heightened credibility and visibility within the community. In Minto and Sitka, community support and awareness of the court's work serves to attract participants and to be a factor in their compliance with the courts' decisions. In a few instances, non-Native members of the community voluntarily used or cooperated with the tribal courts in the resolution of children's and family matters, and in civil regulatory cases. Community support is also key in Barrow, since PACT hears cases only when both disputants consent.

State and Governmental Agency Support and Acceptance. Each of the organizations interacts with one or more state or other governmental agencies. The Sitka tribal court works with the state's social workers and the state courts. Minto relies heavily on the VPSO program that is funded through the state Department of Public Safety. PACT, in Barrow, interacts least routinely with state agencies, but the state court does distribute information about PACT to everyone inquiring about small claims litigation.

Referral Systems. A strong system for referring cases to the organization is critical to its effectiveness, judging by the experiences of these three organizations. The strongest and most reliable referral sources are those tied to governmental structures, such as the VPSO in Minto and the Sitka tribal and state social workers. The tribal courts also draw on ICWA referrals, and referrals from state agencies. PACT lacks a consistent referral source, and has the smallest caseload of the three organizations.

Case Screening. Decision-makers/conciliators select the cases they will take and reject those that do not meet criteria they set. PACT formally expresses these criteria in writing. The Sitka Tribal Court judge screens cases based on past experience, and the Minto Tribal Court relies on discussions among its members about which cases to accept or reject. As a practical matter (given the unsettled legal status of tribal courts in Alaska), the Minto and Sitka tribal courts attempt to avoid cases that might directly challenge their authority or jurisdiction. PACT's case screening focuses more on the organization's philosophical beliefs about the types of cases appropriate for conciliation than on concerns about challenges to its jurisdiction.

Caseload Characteristics. The three organizations differ in the types of cases that they hear. Minto's tribal court attempts to police the community, not so much to punish offenders as to "help" villagers solve problems. The court also handles some traditional adoptions in addition to the civil regulatory cases that make up the bulk of its work. The Sitka Tribal Court's cases consist almost entirely of child custody proceedings, some of which are involuntary proceedings under ICWA and some of which are guardianships. A few have been formally transferred to the tribal court from state or county courts in other states. PACT handles mostly civil matters such as landlord-tenant matters and small business cases. PACT, to date, has not handled any criminal or domestic matters.

Importance of Dispute Resolution Style. Participants in each organization believed strongly that the opportunity to resolve disputes in a certain way (e.g., with equal participation, in a conciliatory manner, or in "the traditional Athabascan way") was one of the most important reasons for, and benefits of, an alternative dispute resolution process.

Separation of Tribal Court Activities from Sovereignty Issues. Tribal courts were able to handle many types of disputes satisfactorily without resolution of sovereignty issues. Rather surprisingly, the presence of those unsettled issues did not interfere significantly with the tribal courts' ability to resolve disputes productively.

Cultural Cohesiveness. The three organizations studied differ in the degree of cultural cohesiveness within their communities and their participants. Sitka's tribal court operates in the fourth-largest Alaska community and serves not only Tlingit, but also other Alaska Natives and Indians from other states. Indianness predominates among Sitka Tribal Court disputants, although some are non-Indians related through marriage or joint parenthood to Indian disputants. In Minto, participants are more alike, ethnically and culturally, than they are different. In contrast to these two, PACT offers conciliation services in Barrow to a wide range of cultures. Cultural or ethnic cohesiveness of the community may be helpful, but does not appear to be at all necessary.

2. Conclusions

Effective Dispute Resolution. Each of the organizations has demonstrated the ability to effectively and fairly resolve disputes within its community

to the satisfaction of the great majority of participants, and it seems, to the satisfaction of parties whose cases were handled by the organization. They also have operated continuously for a substantial period of time.

Interaction with State Courts. The organizations interact with state courts to varying degrees; each has demonstrated the potential for increased interaction to the benefit of the state courts.

Interaction with Other State Agencies. The organizations interact with other state agencies to varying degrees. In particular, DFYS social workers and VPSOs are important sources of case referrals for the tribal courts. In general, these interactions appear to be beneficial for all parties. For example, the Minto Tribal Court appears to ease the workload of state prosecutors.

Characteristics. The characteristics of effective rural dispute resolution organizations, based on this evaluation, appear to include committed volunteers to run the organization; voluntary acceptance by disputants of the organization's resolution of disputes whether through conciliation methods or other techniques; one or more reliable sources of case referrals; and acceptance, at least informally, by state courts and governmental agencies of the organization's activities.

Resources Needed. Remarkably few resources were needed for the operation of each organization. Increased resources would permit better training of decision-makers/conciliators, less turnover and burnout among decision-makers/conciliators, and more effective service to the communities, among other benefits. However, the organizations' fiscal resources were not the most important aspect of their operations.

Resolution of Sovereignty Issues. In the long run, the tribal courts' ability to work with the state courts and other agencies will be improved by the resolution of sovereignty issues because the ambiguity of those issues will not act as a barrier to cooperation on the resolution of cases.

Use of Tribal Courts by Non-Natives. Non-Natives voluntarily used or cooperated with tribal courts in the resolution of children's and family matters, and civil regulatory cases. This indicates that the tribal courts can serve citizens of all races in the state in their capacity as local dispute resolution organizations.

Wide Range of Disputes Resolved. All three organizations evaluated appeared to have the potential to handle a very wide range of dispute types that are presently filed in state courts, including typical civil matters, family and children's matters (this was less clearly demonstrated in the case of PACT), and quasi-criminal matters. They also were able to deal with personal disputes that normally would not be handled by the state courts.

Homogeneity of Community. Homogeneity of a community's population did not appear to be related to the ability of the organization to resolve disputes.

Replication. To the extent that other communities can replicate the conditions that appear to be essential (i.e., committed volunteers, strong referral sources, willingness of community members to submit their disputes to the particular process chosen), they should be able to establish local organizations to resolve disputes within the community. Effective local organizations will serve somewhat different needs in each community and it is not recommended that a community attempt to duplicate exactly any one of the three organizations evaluated.

3. Recommendations

Cooperative attitude towards legitimate work of tribal courts. Issues of Native sovereignty and the authority of tribal courts have been in dispute in Alaska for many years and will likely continue to be so. The Judicial Council takes no position on the resolution of these issues, which are beyond the scope of this study. None of the following recommendations should be taken as supporting or opposing Native sovereignty or the authority of tribal courts to compel compliance with their proceedings or orders. They should, however, be taken as supporting a cooperative attitude on the part of the State and the Tribes toward the legitimate work of tribal courts. To the extent that local communities voluntarily submit to the authority of dispute resolution organizations, the State has every reason to support this effort, including cooperation with organizations identified as tribal courts.

Further discussion of remaining issues in the ICWA state/tribal agreement. The Judicial Council recommends that in an attempt to foster cooperation between the state and its Native population, the Department of Health and Social Services considers beginning discussions on the issues that were reserved for subsequent negotiation in the

1989 ICWA State-Tribal Agreement. Those issues were tribal courts, jurisdiction, and state funding for social services and for children placed in foster homes by a tribe. Included in negotiations on state funding of social services should be discussion of a tribal guardian ad litem program modeled after the state's.

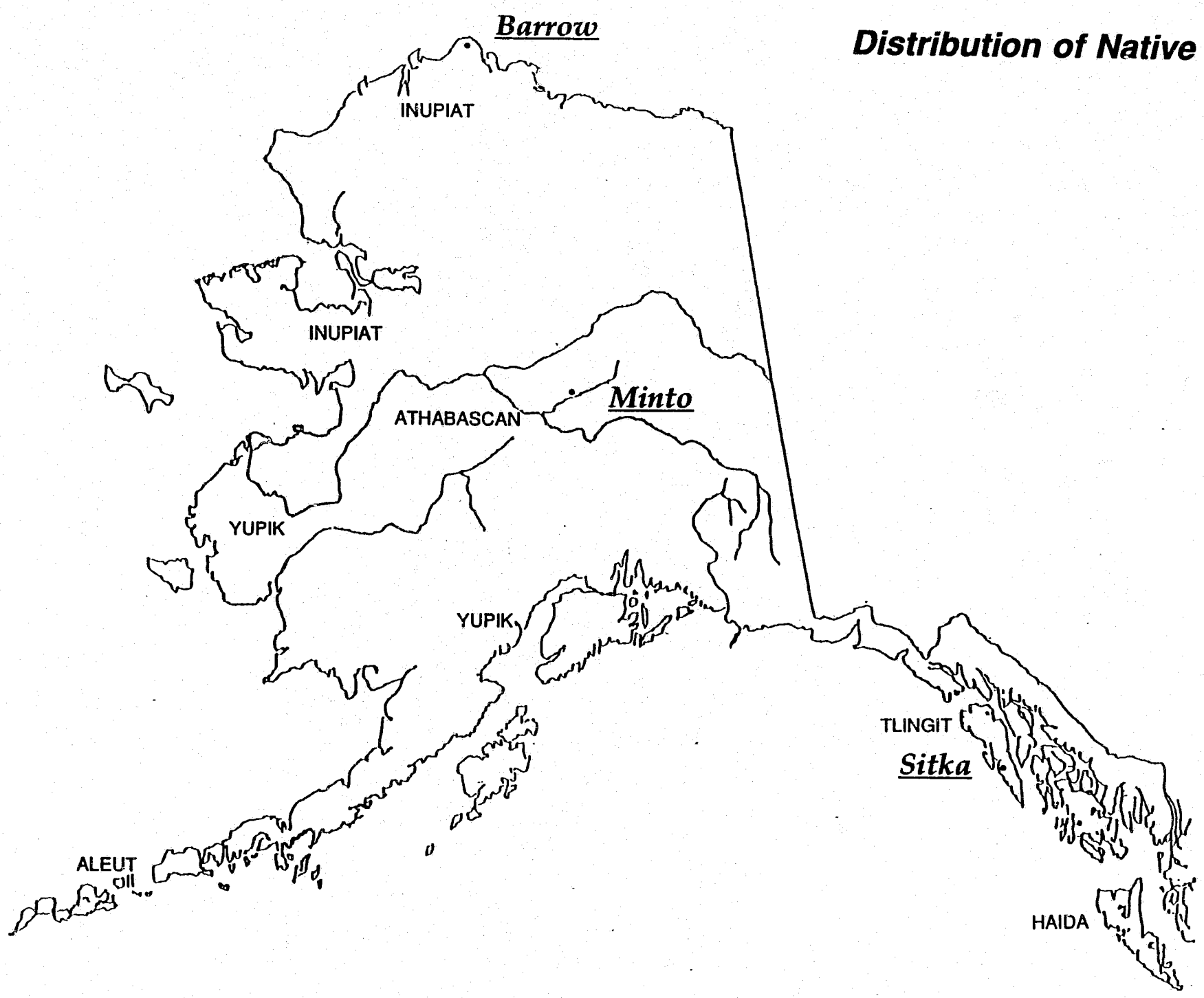
Continued voluntary cooperation among rural dispute resolution organizations and state personnel. The Judicial Council recommends that state agencies and employees continue to cooperate voluntarily with rural organizations to further local justice in both civil and criminal matters, in order to meet the legitimate expectations of rural communities for justice in their communities.

Increased voluntary development of local alternative dispute resolution organizations in interested communities. The Judicial Council supports greater development of voluntary local dispute resolution organizations in interested communities. The State does not provide law enforcement and prosecution services to all villages for minor criminal matters, and it is appropriate for village governments to assert control over these matters and to seek local solutions. The Council recommends that the Department of Public Safety establish clear policy encouraging the referral by Troopers and VPSOs of appropriate criminal matters to local dispute resolution organizations, including tribal courts. The Department also should include discussions of local dispute resolution options in VPSO training.

Continued mutual education between state and tribal courts. The Judicial Council recommends that the state and tribal court judges make continuing efforts to communicate with each other. Current efforts at mutual education include the Tribal/State Court Working Group, composed of ten lawyers and judges who work with state and tribal courts in Alaska. A second important step toward mutual understanding was the half-day tribal court session at the 1992 Alaska Judges Conference. The Judicial Council recognizes the very important steps these activities represent and praises the coordinators of and participants at this year's judicial conference for their efforts at opening communication between state and tribal court judges.

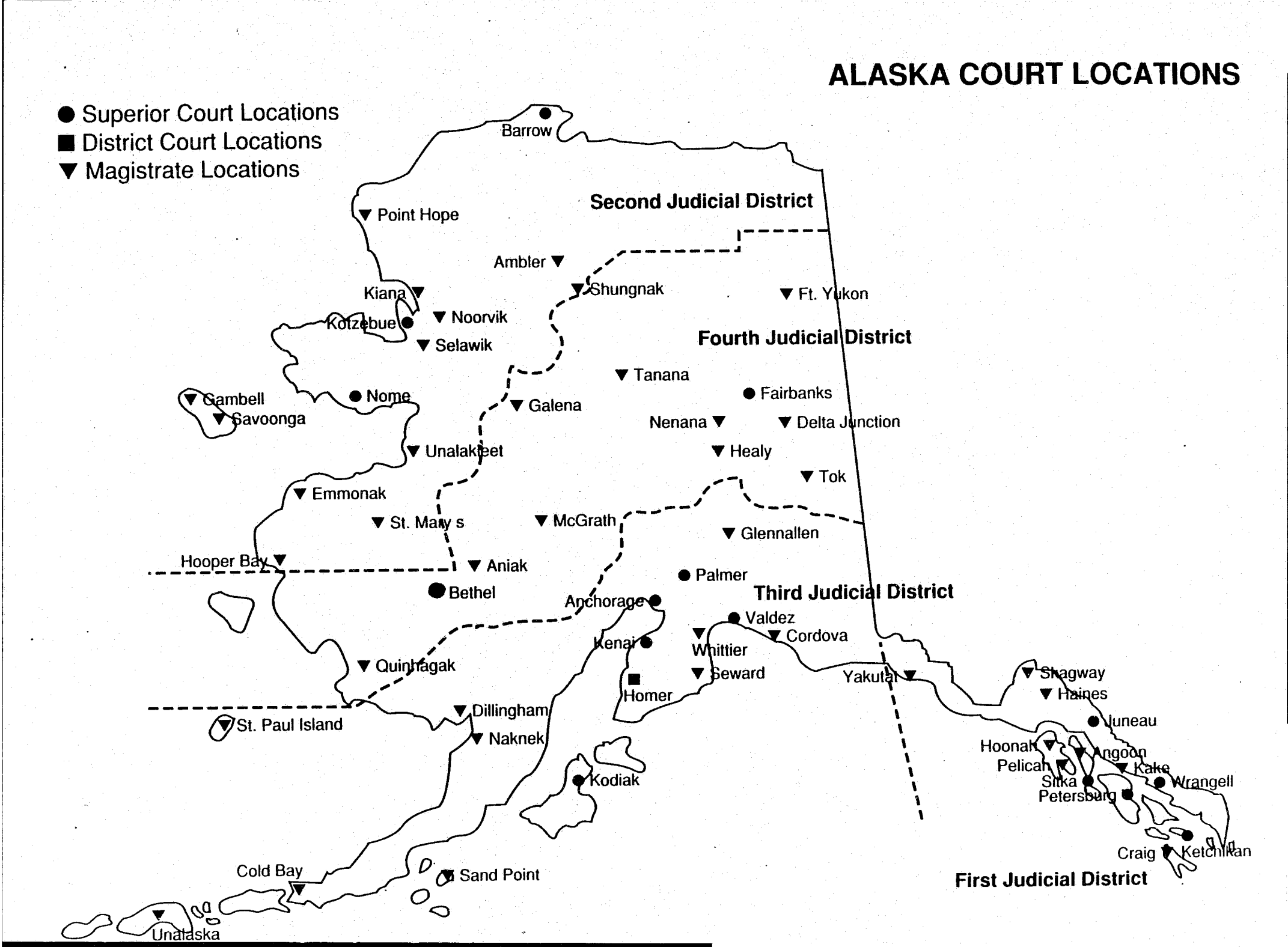
Also welcome are other efforts by the tribal courts to invite state court judges and court personnel to visit their locations (Metlakatla, for example, recently invited the Chief Justice and state court judges in its area to visit). Further discussions should take place in a series of meetings at which work groups organized by both state and regional levels conduct research and carry out specific tasks. Work groups should reconvene at the meetings to report on progress achieved.

Support for court-referred victim/offender mediation by PACT. The Council recommends that the State support any efforts by PACT to commence agency or court-referred victim-offender mediation. PACT can provide a valuable service to Barrow by providing the service, and in turn, can benefit from the institutional connection with the referring agency or court system.



Distribution of Native Groups

ALASKA COURT LOCATIONS



Chapter I: The Project

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Alternative means of resolving disputes in Alaska communities have flourished in the past several years. Conciliation organizations and a variety of other activities have sprung up throughout the State. Simultaneously, village councils and other tribal or village organizations have established tribal courts, or have assumed adjudicatory or dispute resolution roles themselves. Since 1987, the Alaska Judicial Council has sought to improve access to justice in rural areas, including studying these dispute resolution organizations. Review of twenty years of Bush Justice conference work,[1] preparation of a bibliography of rural justice materials,[2] and consideration of a range of possible projects[3] culminated in funding from the State Justice Institute to evaluate three existing rural organizations that resolve disputes and the interactions of these organizations with the state courts.

A. Reasons for Choosing These Organizations to Evaluate

The Council chose to include the tribal courts in Minto and Sitka and PACT, an organization that offers conciliation services in Barrow, in this evaluation.[4] Although the

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[1] *See* Memorandum from S. Di Pietro to Alaska Judicial Council summarizing Bush Justice Conference recommendations (May 2, 1990) (See Appendix A for text of memo).

[2] ALASKA JUDICIAL COUNCIL, ALASKAN RURAL JUSTICE: A SELECTED ANNOTATED BIBLIOGRAPHY (May, 1991).

[3] The Council looked at the possibility of starting demonstration programs for the use of new technologies in the Bush, considered magistrate training and development programs, and analyzed the feasibility of initiating new alternative dispute resolution programs in communities interested in collaborating. It also assessed the need for a statewide needs analysis before undertaking any work.

[4] The Council tried to find a village council that could be included in the project instead of two tribal (continued...)

origins of the tribal courts differ radically from the conciliation organization, being rooted in tribal governments rather than in the voluntary private association of individuals that characterizes PACT, the Council believed that the three groups share some striking similarities. Among these are the fact that the tribal courts and the conciliation organization all operate on a largely voluntary basis, all permit local citizens to resolve disputes in a forum other than the state courts, all interact regularly, either directly or indirectly, with state courts and other State and local government agencies, and all handle a combination of cases, some of which clearly could have been handled by the state courts if the parties had desired.

The three organizations also were chosen in part because they represent the wide diversity in Alaska rural areas. Three of Alaska's five major Native groups--Inupiat[5] in Barrow, Athabascan in Minto, and Tlingit in Sitka[6]--are included. In addition, PACT in Barrow also includes people from Caucasian and Filipino cultures. The full range of disputes is represented: primarily civil and small-claims-type cases in Barrow, primarily family cases in Sitka, and primarily family and "quasi-criminal" cases in Minto. The range of interactions with the state courts and other state agencies--from very limited in Barrow to frequent in Sitka--is covered.

The organizations also share characteristics important for this type of evaluation. Each has been established for at least three years, important to assess their ability to continue over a period of time. Each keeps some form of written record of each case handled and proceeding associated with the case. The presence of written records makes a quantitative evaluation possible, as well as providing a reliable source of information about the cases. Finally, each agreed to cooperate with the evaluation.[7]

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[4](...continued)
courts, but could not locate one that kept written records of its adjudicatory hearings, or that could be evaluated within the context of the methods proposed for the present project.

[5] The word "Inupiat" refers to the people collectively; the word "Inupiaq" refers to the language of the Inupiat people, or to a single individual.

[6] Not included are Yupik Eskimos from the Yukon-Kuskokwim Delta and Southwest area of the State, or Aleuts from the Kodiak and Alaska Peninsula areas. The village council proceedings in the Yupik communities, to the best of our knowledge, often are conducted in Yupik, and it was not feasible for us to evaluate them. We could not locate an operating dispute resolution organization in a primarily Aleut community.

[7] At least one other organization, a tribal court, met the rest of the criteria, but preferred not to be evaluated in this report.

B. Goals, Structure, and Purpose of Report

1. Goals

The goals of the evaluation are to provide a description and evaluation of these three organizations in the context of their own goals and objectives, to describe their interactions with state courts, to assess their costs and effectiveness, and to provide the courts and communities with experience and knowledge that might make similar methods of dispute resolution possible in other communities.

2. Structure of Report

To provide the clearest understanding possible of the organizations evaluated, the report includes three introductory sections. The present section, Chapter I, summarizes the purposes, basis for community selection, and methodology in brief. Chapter II describes each community briefly and gives an overview of the state's rural justice system and alternative dispute resolution organizations in the State. Chapter III provides a more detailed legal context in which Alaska's tribal courts operate, including a discussion of the statutes and case law that define the limits of tribal court jurisdiction.

Chapters IV, V, and VI contain the heart of the evaluation. Chapter IV describes and evaluates each of the three organizations in the context of its own stated goals and objectives. This is necessary because the organizations have very different purposes, and criteria for evaluating the Barrow PACT organization vary substantially from those appropriate for evaluating Minto or Sitka. Chapter V compares the organizations, with attention also to their interactions with other government agencies, and Chapter VI analyzes their interactions with state courts. Chapter VII considers whether these organizations could be replicated in other communities. Finally, Chapter VIII presents the findings, conclusions and recommendations of the evaluation.

3. Purpose of Report

The purpose of the report is to present as objective a perspective as possible on these organizations and their activities. It is not intended to advocate any particular position on tribal courts, tribal sovereignty, the political or other reasons for the present character of the State's presence in rural Alaska, or any of a host of other topics covered. The report describes, very briefly, historical and present-day aspects of the justice

system, but does not claim comprehensive coverage. A similar *caveat* applies to anthropological, ethnographical, and sociological perspectives: the report is not a theoretical study, but an evaluation designed to provide useful and accurate information to policy-makers about methods of resolving disputes in these three communities. A second report is planned, for publication in 1993, funded by the State of Alaska, that will survey the whole range of rural alternatives throughout Alaska. That report will include little information about any one community, but will give more complete and detailed coverage of the diverse methods through which communities provide justice-related services to their residents.

C. Summary of Project Design and Methodology

A brief discussion here of the project's staffing, design, and methods provides the necessary information for understanding how the work was carried out. Appendix B contains a more detailed methodology. The current section includes an overall description of the project, a description of the design phase of the project, and a section on the data collection and review of the final report.

1. Overall Description of the Project

Staff for this project included a Project Evaluator employed with grant funds, and a substantial commitment of Judicial Council staff time.[8] The grant application approved by the State Justice Institute called for a three-month design period at the beginning of the project to develop a detailed evaluation plan. The plan called for reliance on data from several sources to provide the richest possible perspective. Data were drawn from the organizations' case records, from state court case files and Department of Public Safety records, from extensive interviews with people in each location, and from interviews with persons knowledgeable about these organizations and alternative dispute resolution generally in other parts of the State, from review of documents such as tribal constitutions and meeting minutes, and from analysis of secondary sources on Indian law, history and ethnography, alternative dispute resolution, and tribal courts. The second three-month period was spent visiting each site to conduct interviews and collect data. After about six weeks to prepare the initial draft of this report, three months were set aside to circulate the draft for review by over 120 organization participants and

[8] The Project Evaluator worked a minimum of thirty hours a week. The Judicial Council's Senior Staff Associate served as Project Director and the Council's Staff Attorney did much of the legal analysis. The Council's Executive Director provided overall management and direction for the work; the Council's Administrative Assistant and Fiscal Officer assisted with fiscal, clerical and coordination needs.

experts in Alaska justice system issues and Indian law. The final few weeks of the project were spent making the revisions suggested and writing the final report and journal articles.

2. Design Phase

Work began in September of 1991, with a week spent in each community talking with the organizations' volunteers and staff, reviewing records, and making plans for the evaluation. The project's Advisory Committee spent one day meeting in person to review the evaluation plan.[9] The final evaluation plan emphasized the need to evaluate each organization in the context of its own goals and objectives, as well as the need to develop data that would permit comparison of the organizations with each other and with the cases found in state courts.

3. Data Collection Phase

The overall plan for evaluation was completed in mid-November, and the Project Evaluator made her first site visit to Sitka in early December, and a second, to Sitka and Juneau in late February.[10] Time on-site was divided fairly evenly between collecting data from case files and interviewing. After each site visit, the Project Evaluator spent two to three weeks in Anchorage completing interview notes and data entry, and laying the groundwork for the next site visit. Minto data collection took place in January, and the Barrow trip in February. The Evaluator also spent a week in Fairbanks compiling data from the state court files and interviewing judges, attorneys and others who work with the Minto Tribal Court.

Council staff completed two other tasks during this same period. The Staff Attorney reviewed a broad range of Indian case law, statutes and articles and books

[9] Members of the Advisory Committee were Dr. Gary Copus, a professor at the University of Alaska Fairbanks, who also had studied Minto's justice system within the previous five years; Judge Douglas Luna, who served as a tribal court judge in western Washington State for many years and presently serves as a judge for the Central Council Tlingit-Haida Indian Tribes in Southeast Alaska, and Judge Michael Jeffery, state superior court judge in Barrow. The Advisory Committee also met by teleconference in May, 1992, to discuss the first draft of the final report, and again in July of 1992 to review a final version of the report. The Advisory Committee's purpose was to review the evaluation plan and final report for sufficiency of the evaluation techniques, as well as to contribute substantively to the report.

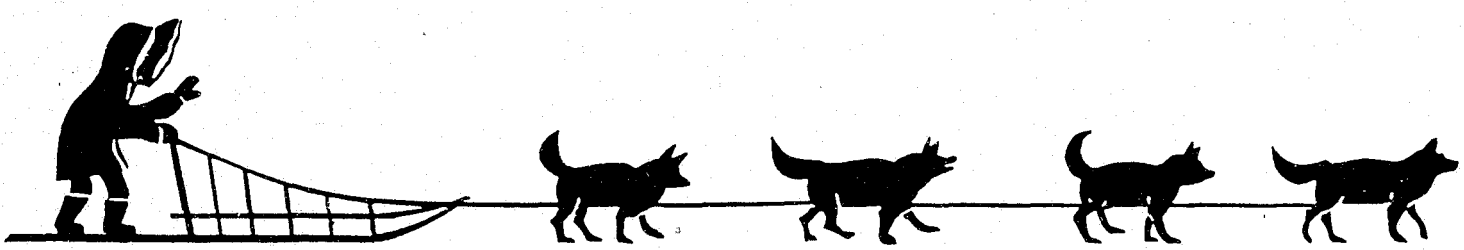
[10] The second trip served two purposes: completion of the data collection from the Sitka tribal court case files, and review of Public Safety State Trooper files in Juneau for information about Trooper visits to Minto, to assess the degree of interaction between Minto and the Troopers.

about Indian law and tribal court jurisdiction. These materials formed the basis for the discussion of the legal context within which the tribal courts in Alaska operate, in Chapter III, *infra*. The Project Director compiled materials useful to establishing a context for the evaluation, for general readers who might be unfamiliar with Alaska or with the state's justice system (see Chapter II, *infra*). In both instances, the purpose of the work was to present the range of viewpoints or materials available, rather than espousing a particular interpretation of the materials.

A few weeks were set aside for analysis of the data[11] and drafting the final report. A major feature of the evaluation was the three-month period set aside for circulation of the first draft of the report to well over one hundred people throughout the State. The purposes of the review phase were to check the accuracy and completeness of the data and findings, to obtain more perspectives for the conclusions and recommendations, and to permit each person quoted (and most cited) in the report the opportunity to review and comment on his or her contribution. During this period, the Project Evaluator re-visited each organization for several days to meet personally with the organizations' members, judges and other contributors to the report. Finally, the report was revised and two journal articles summarizing the work and recommendations were prepared and submitted for publication.[12]

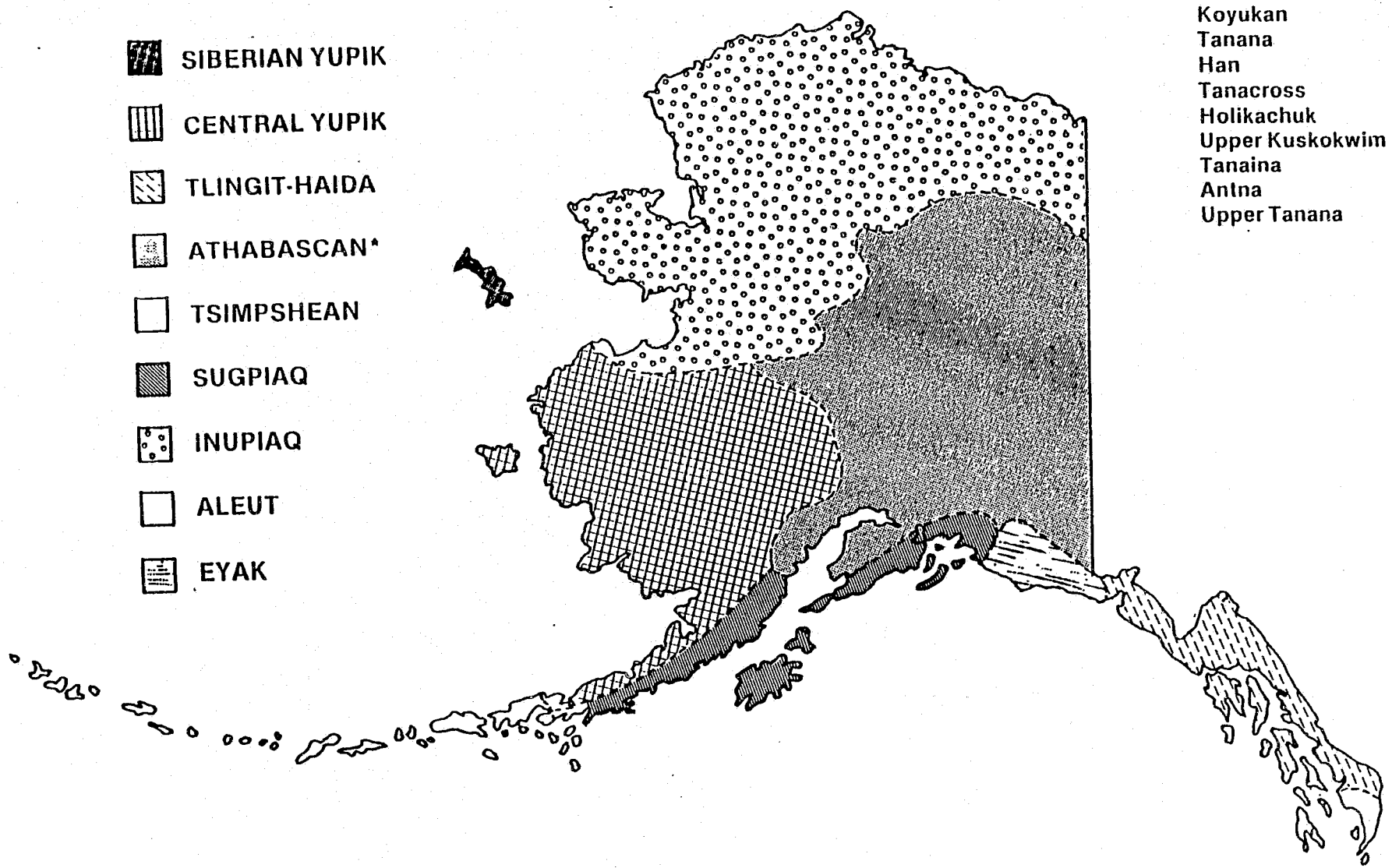
[11] The Institute for Social and Economic Research at the University of Alaska Anchorage analyzed the data compiled from case files maintained by each organization.

[12] At the time of the final report's publication, the Council had been asked to submit articles to both the ALASKA LAW REVIEW and MEDIATION QUARTERLY.



NATIVE LANGUAGE BREAKDOWN

- SIBERIAN YUPIK
- CENTRAL YUPIK
- TLINGIT-HAIDA
- ATHABASCAN*
- TSIMPSHEAN
- SUGPIAQ
- INUPIAQ
- ALEUT
- EYAK



*ELEVEN ATHABASCAN LANGUAGES

Kutchin
Koyukan
Tanana
Han
Tanacross
Holikachuk
Upper Kuskokwim
Tanaina
Antna
Upper Tanana

Chapter II: Cultural and Justice System Context

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Rural Alaska has been variously compared to third world countries, described as God's country, and characterized as vast wilderness. Some of the ways in which it appears to be greatly different from the other forty-nine states are accurate perceptions of the State and its various communities; others derive more from myth and anecdote than from objective observation. This part of the report sketches in information about the State, about each of the three communities studied, and about the justice system and alternative dispute resolution in the State. By establishing a context for the State and for each organization evaluated, the report gives a better understanding of the limitations on and potential of the organizations.

A. Report Structure

Chapter II opens with a few paragraphs on the State's history, economy, climate and geography. Separate sections describe the geography, history, economy, government and traditional law-ways of Barrow, Minto and Sitka. The descriptions are necessarily brief, and not comprehensive. They have, however, been reviewed by over one hundred people from the communities and throughout the State for accuracy of the details and correctness of the general portrayal, and most have found them to capture the communities' style and qualities well. The sections on traditional law-ways describe, very briefly, how actions that would be characterized as crimes or legal matters in present-day Alaska were handled in the Inupiat, Athabascan and Tlingit societies prior to contact with western societies.

A caution regarding the approach used in the report is appropriate here. The purpose of this evaluation is to present as objective a view as possible of three rural Alaska organizations that resolve disputes. The Judicial Council's constitutional authorization to conduct research mandates that it "conduct studies for improvement of the administration of justice."[13] While the Council may make findings and recommendations based on its research, it typically avoids advocating particular positions. This report, as a result, attempts to draw from a variety of sources for information about any topic covered. Often, the sources do not agree, either on the facts, or on the interpretation of a given fact. When this disagreement occurs, the report, to the extent possible, notes the differing points of view without trying to resolve the differences.

The remainder of Chapter II covers three topics: the structure of the justice system in present-day rural Alaska (focussing primarily on the State's role in providing justice services), changes in rural justice since 1970, and alternative dispute resolution in the State. Again, these discussions share two characteristics: brevity and a focus on providing the range of viewpoints (where appropriate) about the subjects discussed. Chapter II sets the stage for Chapter III of the report which gives a more detailed legal context, as well as serving as a lead-in to the Chapter IV presentation of the evaluation of each community's method of resolving local disputes.

B. Statewide Perspective

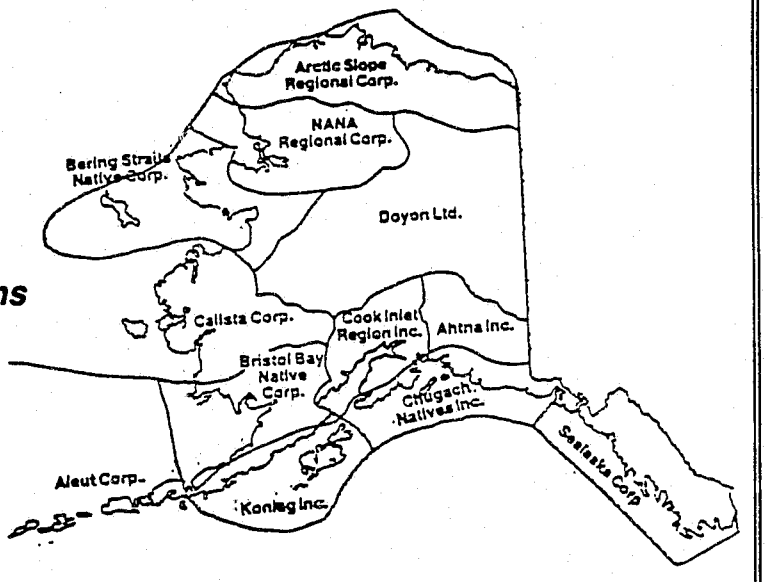
The State of Alaska spreads over four time zones from east to west,[14] and about 1,400 miles from north to south. Five distinct Native groups--Inupiat and Yupik Eskimos, Aleuts, Athabascan Indians, and Tlingit and Haida Indians--populated the State before contact with the Russians in the 1700s. Russians established fur trading companies in Kodiak and Sitka, but did not penetrate far into the interior of the State. Captain James Cook came to Alaska later in the 1700s, and by the mid-1850s, English exploration ships and American whalers had made substantial contacts with all of coastal Alaska. The purchase of Alaska from Russia in 1867 and gold rushes in the late 1800s brought many more settlers to the territory. World War II brought the United

[13] ALASKA CONST. art. IV, § 9.

[14] The federal government reduced the time zones used from four to two in October, 1983, at Alaska's request. The purpose was to ease the conduct of business by having most of Alaska's communities on the same time. Only the westernmost Aleutian Chain towns of Adak, Atka, Attu and Shemya are on Aleutian-Hawaii time; all other places are on Alaska time, which is one hour earlier than Pacific time.

States military forces and the Alaskan-Canadian Highway, opening up the area to a more diverse economy. Statehood in 1959, the discovery and extraction of oil in the 1960s and 1970s, the Alaska Native Claims Settlement Act,[15] environmental concerns and desire for wilderness preservation throughout the U.S., and a severe recession in the late 1980s have structured the State's politics and policies in more recent years.

Figure 1
Native Regional Corporations



Alaska resembles Third World economies somewhat, with the dominance of resource extraction revenues (oil, timber and fishing) and the dependence on government for employment and social services.[16] One author notes that "Village Alaska simply cannot support a competitive, private market economy. It instead has a 'transfer economy'--an economy that depends on public programs, government employment, and various forms of subsidy (cite omitted)."[17] Subsistence hunting and fishing, and to some extent (depending on the area) logging, fishing, or mineral extraction supplement the

[15] The 1971 Alaska Native Claims Settlement Act (ANCSA) created 12 regional profit-making corporations in which Alaska Natives could enroll as shareholders, with a thirteenth added later to serve Natives living outside the State. See Figure 1 for the approximate boundaries of each corporation. The Act also established more than 200 profit-making corporations at the village level. All of the corporations were established to manage the 44 million acres of land and $962.5 million granted by the Act. ALASKA FEDERATION OF NATIVES, THE AFN REPORT ON THE STATUS OF ALASKA NATIVES: A CALL FOR ACTION 46 (1989).

[16] *Id.* at 67.

[17] T. MOREHOUSE, REBUILDING THE POLITICAL ECONOMIES OF ALASKA NATIVE VILLAGES 9 (1989).

transfers. Income for rural Natives averages about one-quarter that of rural and urban non-Natives, but the costs of goods are higher in rural areas because of transportation. Most rural areas (with the exception of the North Slope Borough) have an insufficient tax base to pay for government services, utilities, education, and other services, and must rely upon State and federal revenues.[18]

Alaska's size must be emphasized in order to comprehend some of the rural justice problems that arise. A flight from Barrow to Anchorage takes about four hours with a stop in Fairbanks. Although daily flights are scheduled from Anchorage to most of the smaller hub communities, getting from one hub community to another may take two days.[19] In addition, the great majority of the named census places in the State cannot be reached by automobile. Even the State's capital, Juneau, only can be reached by plane or boat.[20] In this, Alaska differs from all of the forty-eight contiguous states, which are criss-crossed, even in remote areas, by networks of roads.[21] As a result, travel in Alaska is costly. Mechanical problems, bad weather, and scheduling difficulties often cause unexpected delays.

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[18] ALASKA FEDERATION OF NATIVES, *supra* note 15, at 45. The State and federal governments spend substantial amounts, especially in the form of wages, grants, and contracts to support residents of small communities. They also make transfer payments of various sorts (Permanent Fund dividends, AFDC, Social Security, etc.) that are an important source of cash income for villagers. In western Alaska, in 1986, the federal and State governments together spent $12,370 per resident. During the same year, the per capita income in western Alaska was $11,659. *Id.* These data emphasize the need for local solutions to justice problems and the fact that increased government expenditures are not likely to be forthcoming to provide additional court services.

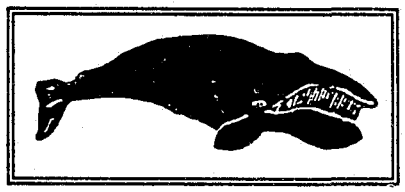
[19] This travel delay creates severe problems in both the Second and Fourth Judicial Districts. The usual way to fly from Barrow to Nome or Kotzebue is to go through Anchorage. (One small air service offers scheduled flights directly from Barrow to Kotzebue and Nome; however, the planes are small and more subject to weather and other delays). Similarly, Bethel and Fairbanks are in the Fourth Judicial District, but all flights go through Anchorage. If a judge must fill in for another judge, judges from the same judicial district typically must be used, resulting in costly delays. If the judge must go from Fairbanks to one of the Yukon-Kuskokwim villages, a single round-trip could easily take four days, even in good weather. In 1975, the Judicial Council recommended creation of additional judicial districts to accommodate transportation patterns and to provide more effective service. R. E. HICKS, JUDICIAL DISTRICTING: FINAL REPORT 29 (1975). The recommendations were not acted upon.

[20] The Alaska Marine Highway is a system of State-owned and operated ferries that serve all of Southeast and Southcentral Alaska on a regular schedule.

[21] Another point that newcomers to the State quickly discover is that none of Alaska's roads are true freeways. While the largest communities have some stretches of four and six-lane highways, the vast majority of travel is on two-lane roads. The State provides funds through its Municipal Assistance Program to communities in western Alaska to maintain the Kuskokwim and the Lower Yukon Rivers as highways when they are frozen over in the winter. Funds from the same program support an ice road that connects Bettles on the North Slope with the Dalton Highway during the winter.

Severe and unpredictable weather dominates for much of the year, and air travel is uncertain. If fog or storms set in, towns can be weathered in for days at a time. Small towns typically have few facilities for long-term visitors, but rely on the hospitality of local residents or on temporary facilities such as the school gym.[22] If a judge, attorneys and other parties fly in to a village for a trial or other proceeding and are weathered in, everyone's resources are quickly stretched to the breaking point. Similarly, if village residents call upon the Alaska State Troopers for assistance in a serious situation, weather may not permit a response for days. The magnitude of the isolation of Alaskan communities from one another is unparalleled in most of the other states, and must be considered in developing appropriate responses to justice needs.

1. Barrow[23]



Geography, History, Economy, Government. Barrow[24] sits on a flat coastal plain of the Chukchi Sea. Tundra underlain by permafrost, and the ocean comprise the landscape. Most of the year the temperature averages lower than 32 degrees F., with a record low of 56 degrees below zero F. and a record high of 78 degrees F. Lack of precipitation makes it technically a desert, with only five inches of rain a year and

[22] Local residents will provide food, but the village stores have very limited supplies of food to be purchased by out-of-town guests. Travelers to the villages often take their own food supplies to supplement the local goods.

[23] The primary sources for information about Barrow include: INSTITUTE FOR SOCIAL AND ECONOMIC RESEARCH, THE UNIVERSITY OF ALASKA, A DESCRIPTION OF THE SOCIOECONOMICS OF THE NORTH SLOPE BOROUGH [hereinafter BARROW MMS 1983] (U. S. Dept. of Interior, Minerals Management Service, Technical Report No. 85, 1983); R. WORL & C. SMYTHE, BARROW: A DECADE OF MODERNIZATION (Sept. 30, 1986); IMPACT ASSESSMENT, INC., NORTHERN INSTITUTIONAL PROFILE ANALYSIS: BEAUFORT SEA [hereinafter BARROW MMS 1990] (U. S. Dept. of Interior, Minerals Management Service, Technical Report No. 142, 1990); R. Harcharek, Economic Development Potential in Rural Alaska: The Case of the North Slope Borough, Paper Presented at Annual Meeting of the Pacific Northwest Political Science Association, Victoria, B. C. (Oct. 17-Oct. 19, 1991); UNIVERSITY OF ALASKA ARCTIC ENVIRONMENTAL INFORMATION AND DATA CENTER, BARROW [hereinafter BARROW PROFILE] (Alaska Department of Community and Regional Affairs Community Profiles 1978); M. BLACKMAN, SADIE BROWER NEAKOK, AN INUPIAQ WOMAN (1989); and the North Slope Borough Elders Conference on Traditional Law (unpublished Report) (March 5, 1987).

[24] BARROW PROFILE, *supra* note 23, at 1. The name honors Sir John Barrow, Second Secretary of the British Admiralty. One of the earliest British contacts with the area was made in 1826, by Captain Beechy of the *Blossom*, who was looking for one of Captain John Franklin's expeditions that was searching for the Northwest Passage. R. WORL & C. SMYTHE, *supra* note 23, at 87. A little over 40 years later, other British ships including the *Plover* set out to search for the ill-fated third Franklin Expedition. In 1852, the crew of the *Plover* spent the winter in Barrow, marking the first extended contact with the Inupiat. M. BLACKMAN, *supra* note 23, at 8.

twenty-nine inches of snow. The town is the farthest-north community in the United States.

Traditionally, the Inupiat lived by hunting whales and other sea mammals, fishing, and harvesting some plant foods during the brief summer. Occasionally, land mammals including polar bears, caribou, and very rarely moose or other bears supplemented the marine diet. Today, many Natives depend heavily on subsistence hunting and fishing, especially of marine mammals, for a major part of their food.[25] Whaling remains an important seasonal activity. The spring whaling festival is the biggest and most important celebration of the year.

Transportation was by dog sled or by skin boats (*umiaks)* during whaling. Dog sleds remained the primary means of land transportation until 1960 when they were replaced, first by snow machines and ATVs,[26] and more recently by a city bus system,[27] taxis, and some privately-owned cars and trucks. Boats still are used for both recreation and hunting. *Umiaks* are common, but used only for whale hunting. Transportation in and out of Barrow is primarily by plane, with barges arriving during a brief period in late August and early September to bring construction supplies and staples.[28]

The British established continuing contact with the Inupiat about 1850. Commercial whaling played a major role in Barrow's economy and contact with other countries until the late 1800s; it ended in the early 1900s.[29] Reindeer herds were imported by the U.S. Board of Education around the turn of the century, settling more in the interior areas of the North Slope than the coastal regions. Fur trapping and

[25] Harcharek, *supra* note 23, at 4. He cites studies that indicated that in 1982 about "45% of North Slope households obtain[ed] half or more than half of their food from subsistence activities." *Id.* (*citing* J. KRUSE, ASSESSMENT OF POTENTIAL IMPACTS OF OCS DEVELOPMENT ON THE NORTH SLOPE INUPIAT (1982)).

[26] The snow machines and ATVs (all-terrain vehicles) are used more for transportation on the outskirts of town and on the tundra now because the roads are not suitable for them.

[27] The buses have the highest per capita use of any public transportation system in the United States.

[28] Harcharek, *supra* note 23, at 16. He comments that the cost of living in 1985 was 45% higher in Barrow than in Anchorage, and 91% higher than the average cost for the United States, in large part because of transportation costs. *Id.*

[29] *Id.* at 7. Harcharek states that the whale baleen market crashed in 1908, "but, by that time, the bowhead whale population had been devastated." *Id.*

trading developed too, but were largely wiped out by the Depression.[30] During and after World War II, the military and related projects, and oil exploration became economically important. Currently, the North Slope Borough government, funded by taxes on North Slope oil, dominates the economic life of Barrow.[31]

About 60% of Barrow's population of 3,469 is Inupiat Eskimo, about 26% is Caucasian, 8% is Asian,[32] and the remainder is Hispanic and other ethnic groups.[33] Barrow and the North Slope Borough also have a large non-resident population, primarily oil industry workers on intermittent shifts, numbering several thousands, composed largely of male, non-Inupiat wage-earners. One author notes that this group "has been called the 'hidden population' (Impact Assessment, Inc., 1990)."[34] He describes other North Slope inhabitants as "ghost residents," characterizing them as professionals "usually recruited to fill positions which can not be filled by Inupiat residents because the Inupiat resident may lack the skills, education or experience required," or as "individuals attracted to the North Slope from other parts of Alaska and the 'lower-48' because of its comparatively high wage scale." He notes that a "common denominator . . . is the fact that a large percentage of their income is exported from the North Slope."[35]

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[30] *Id.* Harcharek comments that "[f]urs originally selling for as much as $100 dropped in price to as low as $5." *Id.*

[31] BARROW MMS 1990, *supra* note 23, at 97-98. Barrow, in turn, because it constitutes 58% of the North Slope Borough's population, dominates the government of the Borough. ALASKA DEPARTMENT OF LABOR, ALASKA POPULATION OVERVIEW: 1990 CENSUS AND ESTIMATES 104 (1991). Because much of Barrow's economy is affected by what happens in the rest of the North Slope Borough, a few references to pertinent Borough characteristics are incorporated here. None of the Borough outside of Barrow makes use of PACT's services, and so will not be discussed in this report beyond the facts shown here to establish context.

[32] Filipinos constituted a large percentage (87%) of the Asian-American population in the North Slope Borough in 1988 (BARROW MMS 1990, *supra* note 23, at NSB-16). It is likely that they also were a very high percentage of the 277 Asian-Americans in the Barrow population in 1990. ALASKA DEPARTMENT OF LABOR, *supra* note 31, at 104. A brochure written for the First Statewide Filipino Community Leadership Conference, 1980, held in Juneau in April, 1980, provided by Thelma Buchholdt, notes that "Research conducted by the Alaska Historical Commission . . . points out that Filipinos first came to Alaska in the 1850s as crew members of whaling ships. . . . The oral tradition of the Inupiat Eskimo, especially those tales originating from Point Hope, contains words picked up from Filipinos who spent their winters in that village."

[33] ALASKA DEPARTMENT OF LABOR, *supra* note 31, at 105.

[34] Harcharek, *supra* note 23, at 11.

[35] *Id.* at 10-11.

Barrow and the area villages support a variety of small businesses. Some residents rely on traditional arts and crafts for economic support. A few still set traplines, primarily for fox, wolves and wolverines. But government jobs and related service positions provide at least the basic income for most permanent residents.

The Borough government dominates the life of the North Slope in many ways. Seven villages, in addition to Barrow, comprise the permanent population. Roles that are played in other areas of the State by city governments, traditional councils, regional non-profit corporations,[36] or other private and public organizations and institutions are played by the Borough government. At the time of this evaluation, one member of the North Slope Borough Assembly is not Inupiat, and although representation includes the villages, Barrow dominates because of its size. The government provides housing, public utilities[37] and services,[38] police protection and various social services. However, the other organizations still exist, and while they permit community involvement, one report hypothesized that the multiplicity of organizations may create its own set of problems.[39]

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[36] *See* D. CASE, THE SPECIAL RELATIONSHIP OF ALASKA NATIVES TO THE FEDERAL GOVERNMENT 136 (1978). Some of the twelve regional non-profit corporations play important roles in providing justice to rural areas, by serving as employers for Village Public Safety Officers, assisting in establishing tribal courts and supporting other justice-related services. The regional non-profits originated in RURALCAP organizations established in the late 1960s under the federal Office of Economic Opportunity program. They are recognized "in Section 7 of the Claims Act as 'existing Native associations.'" *Id.*

[37] BARROW MMS 1990, *supra* note 23, at BRW 68-70. Most of the community was hooked up to water and sewer systems in the mid-1980s, although some homes still rely on "honey-buckets" for sewage disposal, and on trucked-in water. Most residences have electricity, phones and TV.

[38] The Borough supports traditional Inupiat values through its official policies, but one report suggests that this very support may undermine these same values. *Id.* at Intro-11. For example, the Borough now pays non-kin to perform a range of services for elders. Formerly, these services were performed for free. By paying people to perform these services, the Borough may be discouraging people from continuing the traditional activities. *Id.*

[39] R. WORL & C. SMYTHE, *supra* note 23, at 70-71. Organizations include the Barrow for-profit ANCSA corporation (Ukpeagvik), the Barrow IRA (largely inactive since 1958 although the courts give notice to it under the Indian Child Welfare Act), the regional for-profit ANCSA corporation (Arctic Slope Regional Corporation), a regional-level IRA (Inupiat Community of the Arctic Slope, which is interested in reviving traditional councils and is considered somewhat radical), and so on. Worl and Smythe suggest that all of these organizations have differing and often conflicting loyalties, and may set Inupiaq against Inupiaq. These organizations demand substantial amounts of time. Also, the organizations may alter social relationships by separating people by generational status. *Id.* at 74.

Payment of honoraria or salaries for participation in the organizations' work created new sources of income; but by changing the work from volunteer to paid functions, payment alters expectations of social relationships also. Attendance at some organizations' meetings and functions is encouraged by offering substantial "door prizes," such as a trip outside the State or a new truck.

Traditional Law-Ways. Inupiat society traditionally was organized by families and extended families, but did not have any of the relationships among clans that characterized the Tlingit and Athabascan societies in Alaska.[40] One author noted "Inupiat society has been characterized as being limited in the development of social institutions beyond the family. . . .Villages represented a community of interest and economic sharing rather than a political or corporate unit."[41] Other authors have described Inupiat society as "anarchic,"[42] but at least one observer disagrees.[43]

Leadership in the village was not exercised through a system of chiefs or designated leaders, but more indirectly. The *umealik,* who led whaling hunts and was important in the distribution of food, obtained his position through his personal characteristics.[44] In matters affecting the community, he never acted singly or overtly, but only in consultation with other members of the village. One author notes that "though the ethnographic literature is not explicit about his judicial role, his advice must

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[40] In reading this section in the original draft, a number of reviewers expressed concern about characterization of Inupiat society as "less hierarchical" than Tlingit and Athabascan societies. Although a number of experts on these cultures and their law-ways use similar descriptions, (*see, e.g.,* J. MURDOCH, ETHNOLOGICAL RESULTS OF THE POINT BARROW EXPEDITION 429-430 (1988); Spencer, *North Alaska Coast Eskimo* in 5 HANDBOOK OF NORTH AMERICAN INDIANS 323, 326-327 (1984); A. FIENUP-RIORDAN, ESKIMO ESSAYS 192 (1990)), the reviewers believed that "hierarchical" and "complex" could be taken to express value judgments that Inupiat society was in some way inferior. These sections have been revised to the extent possible to describe the very significant differences between the groups without using terms that might have inappropriate nuances.

[41] R. Harcharek, *supra* note 23, at 3.

[42] A. FIENUP-RIORDAN, *supra* note 40, at 192-193. J. Murdoch, who spent at least two years in the late 1800s living with the Inupiat says, "We were unable to discover among these people the slightest trace of tribal organization . . . ." J. MURDOCH, *supra* note 40, at 42. Murdoch also wrote, "These people have no established form of government nor any chiefs in the ordinary sense of the word, but appear to be ruled by a strong public opinion, combined with a certain amount of respect and mutual agreement, rather than on despotic authority." *Id.* at 427. He notes later that the *umealik* "[h]ave acquired a certain amount of influence and respect . . . but appear to have absolutely no authority outside of their own families (cite omitted)." *Id.* at 429.

[43] A. FIENUP-RIORDAN, *supra* note 40, at 192. She says, "A review of the literature on Eskimo leadership, law, and governance reveals the most common assertion to be that they had none (cite omitted). . . . Probably all these observers, early and current, have been partly right and partly wrong in their classifications and interpretations." *Id.*

[44] Rather than being an elected, appointed or inherited position (as were the leadership positions in Athabascan and Tlingit societies), the *umealik*'s position was attained through "personal attributes of modesty, honesty, and hunting skills, along with sufficient wealth to support a whaling crew or hunting party." Harcharek, *supra* note 23, at 3. Blackman describes the position similarly, but adds that it "tended to run in certain family lines." BLACKMAN, *supra* note 23, at 150.

have been sought in the settlement of disputes and conflicts."[45] The *shaman* (priest or medicine man) did not have a leadership role, although he could exercise enormous influence.[46] None of the community's leaders sat in judgment of others or resolved disputes in the type of council structure that characterized the traditional Athabascan and Tlingit communities.[47]

One author commented that "[a]n individual had great freedom of choice in his personal actions, but his security rested with his cooperation and sharing with others."[48] Another set of authors said, "most Eskimo behavioral norms [resulted from the belief] that one should never interfere in the life of another. . . *unless he can get away with it.* (emphasis in original).[49] But "men were expected to share and cooperate with each other."[50] They note that ostracism and gossip were effective social sanctions only if the offender at whom they were directed cared about them, which was not always the case. If those sanctions were not effective, the victim of theft or abuse of any sort had no

[45] BLACKMAN, *supra* note 23, at 151.

[46] *Id.* at 203. She comments that during the winter the "*umialik* and [whaling] crew spent long hours in the *qargi* [the men's house or dance house], the former conferring there with shamans regarding the coming hunt and preparing the whaling charms and other regalia needed." *Id.*

[47] J. MURDOCH, *supra* note 40, at 427. He says, ". . . affairs which concern the community as a whole, as for instance their relations with us at the station, are settled by a general and apparently informal discussion, when the opinion of the majority carries the day. The majority appears to have no means, short of individual violence, of enforcing obedience to its decisions, but, as far as we could see, the matter is left to the good sense of the parties concerned." *Id.*

[48] Harcharek, *supra* note 23, at 2 (citing Chance, 1966).

[49] Hippler and Conn, *Northern Eskimo Law Ways* 17 ISEGR, UNIV. OF AK. OCCASIONAL PAPER NO. 10 at 17 (1973) [hereinafter *Northern Eskimo Law Ways*]. They continued on to say, . . ."[O]nly individuals gifted at . . . interpersonal manipulation could organize group activities [which] had to be done in a manner that concealed one's authority and avoided conflict." *Id.* at 18. Other authorities agree that Inupiat culture valued avoidance of conflict and avoidance of overt intervention in another's affairs. M. BLACKMAN, *supra* note 23, at 152.

[50] *Northern Eskimo Law Ways, supra* note 49, at 18.

recourse other than withdrawal or murder.[51] They add that historical evidence suggests that "unchecked violence was quite prevalent in traditional northern Eskimo society."[52]

The North Slope Borough Elders Conference on Traditional Inupiat Law, held in 1986 in Barrow, concluded that:

> Violence and particularly child abuse, as well as neglect, are a product of alcohol and drug use and so were not traditional problems and did not have traditional solutions. But it was also stated that historically revenge was the response to violence, relatives of a murdered person eventually killing a member of the culprit's family. . . . Another step was to ban a violent person from the community. Sexual offenders were not punished, but spoken to in order to embarrass him (sic) and so inhibit the behavior.[53]

Around the turn of the century, village councils were organized and began to assume an adjudicative role. The origins of the councils are not clear. Some authors attribute them to the various missionaries; others to teachers or other government officials.[54] Rather than sitting as a panel of judges and deciding cases on the basis of external law, the council "acted as a body from the village that expressed the community's interests in specific legal cases and a wide range of other matters."[55] The system worked because the council could rely upon outside territorial authority to come in and deal with anything that the village could not or did not want to handle. The

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[51] *Id.* at 18. Another author noted that "crimes were dealt with at the family level, though the number of individuals involved might grow as relationships between kin required that an individual fight for his relatives and avenge them. (Spencer 1959:73)." M. BLACKMAN, *supra* note 23, at 151. These statements do not necessarily contradict each other, since Blackman goes on to indicate that the violence tended to stay at the level of a family feud, and did not extend to include the whole community as it might have in an Athabascan or Tlingit community.

[52] *Northern Eskimo Law Ways, supra* note 49, at 22.

[53] *The North Slope Borough Elders Conference on Traditional Inupiat Law, supra* note 23, at 11. Worl and Smythe also discuss the effects of alcohol and how it has created new problems. They comment that problems in a family can cause trouble for several generations. Children growing up in dysfunctional families are not trusted by others, and in addition to having no role models for appropriate behavior, must work extra hard to overcome the distrust of the rest of the community. WORL & SMYTHE, *supra* note 23, at 343.

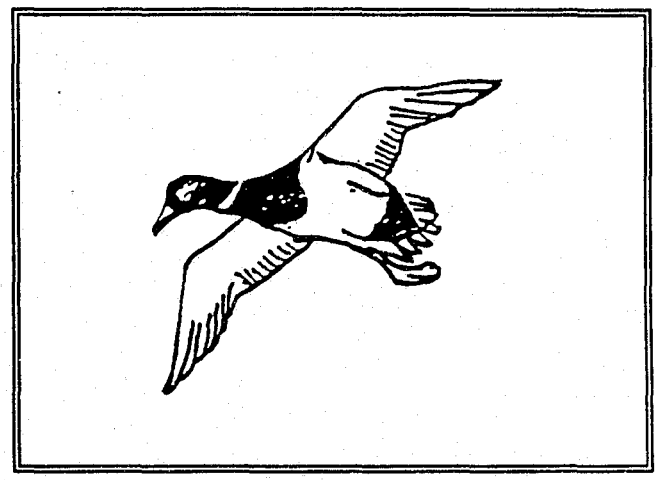
[54] M. BLACKMAN, *supra* note 23, at 343.

[55] *Northern Eskimo Law Ways, supra* note 49, at 31.

council acted by discussion and indirect information. Offenders typically confessed. The sanction of public opinion became more useful in the context of the council.[56] Conciliation predominated, and "continues to mark the Eskimo style of justice."[57]

2. Minto[58]

Geography, History, Economy, Government. One hundred and ten (mostly unpaved) miles from Fairbanks on the Elliott Highway, a left turn off the highway and eleven more miles on Minto Road takes one into the new village of Minto. Because of flooding, Minto moved in 1971 from its old site on the east bank of the Tanana River to the west bank of the Tolovana River.[59] The Minto area is wetter than Barrow, with around twelve inches of rain and fifty-six inches of snow; geographical profiles note that the area is windier than other parts of the Interior. Temperatures are a little more extreme than Barrow, with lows in the winter often reaching 50 degrees below zero F., and summer temperatures rising into the 90s.



Spruce and poplar forests blanket the Minto area, providing sustenance for the large and small game on which the Athabascans traditionally subsisted. Bears, moose, and caribou are hunted for meat, and smaller animals, such as beaver, marten and fox,

[56] *Id.* at 40-41. Other sanctions included repayment of the victim in theft cases, and payment of child support for a child who was not conceived in a marriage. Most of the offenses handled by the council could be characterized as civil.

[57] *Id.* at 28.

[58] The primary sources for information about Minto include FISON & ASSOCIATES, MINTO COMMUNITY PROFILE (Alaska Dept of Community and Regional Affairs Community Profiles, 1987) [hereinafter MINTO PROFILE]; McKennan, *Tanana*, 6 HANDBOOK OF NORTH AMERICAN INDIANS (1981); Hippler & Conn, *Traditional Athabascan Law Ways*, ISEGR, UNIV. OF AK. OCCASIONAL PAPER No. 7, (1972) [hereinafter *Traditional Athabascan Law Ways*].

[59] Residents still go to Old Minto for hunting, fishing and recreation. A work camp at the site provides rehabilitation services for alcoholics; it is run by the village corporation. The Tanana Chiefs Conference uses the Old Minto site for alcohol rehabilitation services. Minto Institute Wants Lease for Camp, *Tundra Times*, Nov. 11, 1991, at 8, col 1.

are taken primarily for fur. Salmon, pike and whitefish in the rivers are taken in the spring, summer and fall.[60]

The population of about 218 is nearly 97% Athabascan;[61] the few Caucasians typically are related to Minto residents. Minto has had a baby boom in recent years, with the population increasing to 218 from an earlier average of about 150. The schools in 1987 had seventeen pre-schoolers, forty-six students in kindergarten through eighth grade, and eleven in grades nine through twelve. The community also has more elderly people than many villages.

About eighty residences house Minto's citizens; about two-thirds are heated with fuel oil and one-third with wood. Most have electricity and cook with propane. About one-quarter of the houses have telephone service (which came in 1984);[62] nearly all have radio and TV. Nearly all also have sewer and water on the new system that was completed in 1986. Residents get mail several days a week, on mail flights from Fairbanks. Transportation is mixed. About one-fourth of the households have a car or truck; one-third have a snow-machine or ATV, and the town has forty or more riverboats. Fifteen to twenty dog-sled teams provide transportation as well as recreation. Scheduled small plane flights to Fairbanks several days a week provide additional access to the city.

The profile prepared by the State's Department of Community and Regional Affairs in 1987 describes the types of work available in Minto. About eight residents have traplines. About twenty (mostly elderly women) do traditional crafts such as bead and skinwork, and basket-making. One person works at the general store (which is owned by the village corporation), and the rest of the people who are employed either work full or part-time for the village council or a government agency, or they work on construction projects (as available). Some work during the summer on Bureau of Land

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[60] R. McKennan also says "the Minto Flats . . . are famous for the abundance of their duck populations." R. McKennan, *supra* note 58, at 5. A popular travel guide to the roads of Alaska and western Canada notes that "Minto Flats is one of the most popular duck hunting spots in Alaska in terms of number of hunters. . . . MILEPOST: 1991, at 371.

[61] ALASKA DEPARTMENT OF LABOR, *supra* note 31, at 135.

[62] MINTO PROFILE, supra note 58, at 4. One observer notes that because the phone system is expensive and "one can walk to anywhere within the village in just a few minutes," there is little need for phones. Letter from Robert Charlie to Cheryl Oris (May 6, 1992) (describing Minto; available in Alaska Judicial Council library).

Management fire-fighting crews, or for the air taxi operator. Most residents rely on subsistence hunting and fishing for part of their sustenance.[63]

The town itself is unincorporated, but has had an IRA[64] constitution since 1939. The regional Native corporation is Doyon.[65] The village corporation, Seth-de-ya-Ah, is headquartered in Fairbanks and has 287 members. The village corporation runs the general store, has money invested in the near-by Manley Hot Springs resort, and owns land in Fairbanks. The Village Council receives most of its funds from state grants, contracts and revenue sharing. The funds maintain the sewer and water system, streets, the laundromat and a dump. The Village Council also owns and manages the Minto Lake View Lodge and a restaurant that serves hot meals to the elderly. The council offices, the clinic, and the VPSO office are housed in a centrally located building. The nonprofit regional corporation, Tanana Chiefs Conference, provides health services, legal assistance to the tribal court and Village Council, and a range of other social services.

Traditional Law-Ways. Athabascans traditionally were organized into a matrilineal society with clans and relatively small bands of Indians.[66] A traditional village council was made up of the most important males from each matrilineal family. A chief presided over the council and "had final authority from which there was no appeal."[67]

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[63] MINTO PROFILE, *supra* note 58, at 2. The profile notes that "public assistance and other government payments are important to the Minto economy." *Id.* Another observer says that "Approximately 90% of the New Minto village residents supplement their meager income by subsistence hunting and gathering. . . . starting in the early spring, as soon as there is running water in the creeks, lakes and rivers, the old call of the traditional lifestyle takes over, and everyone who has a boat or can get a ride is out in the flats camping." R. Charlie, *supra* note 62, at 4.

[64] The Indian Reorganization Act of 1934 (ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, 479)) [hereinafter IRA] permits Indian tribes to organize and adopt a constitution enumerating certain powers of self-government in the tribe or its tribal council, and it permits tribes to form business corporations. The IRA authorized the Secretary of the Interior to issue charters of incorporation which could not be revoked or surrendered except by act of Congress. Some 74 of the approximately 208 Native villages in Alaska have adopted IRA constitutions. Villages that have not adopted IRA constitutions sometimes govern by traditional councils.

[65] MINTO PROFILE, *supra* note 58, at 2. Doyon has 9,000 shareholders in the State's Interior; it is the largest private landholder in the State.

[66] *Traditional Athabascan Law Ways, supra* note 58, at 2. One observer wrote that "Nearly everyone in the village is related in some way to everyone else by blood or marriage, but the real relationships have been lost or forgotten to some extent due to a disintegration of the traditional oral history method. . . ." R. Charlie, *supra* note 62, at 2.

[67] *Traditional Athabascan Law Ways, supra* note 58, at 3. This council pre-dated contact with whites and in that way, as well as others, differed from the Inupiat council described by Blackman and others. *See* M. BLACKMAN, *supra* note 23, at 154.

However, the chief's decision could be questioned by someone in the council. Deliberations on an offense (see the discussion of murder, below) could take as much as five years--hastiness was a deeply abhorred vice. The chief's position was patrilineally inherited, and alternated between the two kinship groups.[68] On occasion, there was no one in a position to inherit, so the council would choose a chief.

Only three types of offenses were serious enough to be brought to the council: theft, adultery and murder. Lesser offenses were handled within the family, or not at all. If an offense was brought to the council, the offender was presumed to be guilty. The council's role, then, was not as a fact-finder, but to resolve matters between the victim and offender, and to decide on the punishment and resolution of the situation.

Adultery was a serious offense because it strained the kinship system and could lead to violence. Theft violated notions of property. If an offender pleaded hunger, that might be considered a mitigating circumstance, but his family would be shamed because they should have been taking care of him. Punishment for theft was restitution plus a fine. A thief also could be banished for a year or more,[69] and bore the stigma of being a thief for about ten years.[70] Punishment for adultery was that the offending man had to pay the husband of the offending woman. Upon a second offense with the same woman, her husband could kill the offender without further ado. No specific penalty was assessed of the woman, unless she denied the offense, in which case she could be beaten.

Murder presented serious problems. It was usually resolved with a payment to the victim's family, or the offender's family would be persuaded to accept the offender's death. If this could not be worked out and the offender held a high status, war could result. Lengthy deliberations and attempts at reconciliation were made because war generally meant the extermination of one or the other kinship groups.

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[68] *Traditional Athabascan Law Ways*, *supra* note 58, at 3. *Cf* McKennan, *supra* note 58, at 574.

[69] *Traditional Athabascan Law Ways*, *supra* note 58, at 9. Banishment often would be a capital punishment because of the difficulties of trying to live alone, both from natural hazards and from the potential unfriendliness of other bands of Indians. *Id.*

[70] *Id.* at 10. This was, in effect, a lengthy probation. If the offender committed a new offense within a short period of time, it was punished much more severely; if a long time, but not the ten years, had elapsed, the prior offense was considered but given less weight. *Id.* at 7.

Little information was available about the transition from the traditional council to the present system. The tribal court functioned in the 1940s, and the Village Council may have assumed some of its functions in later years. In recent years, the State Troopers often have asked the chief of a village to assist them by signing formal complaints and aiding in dispute resolution.[71]

3. Sitka

Geography, History, Economy, Government. Sitka sits on the west (sea-ward) side of Baranof Island, looking out to Mt. Edgecumbe, a dormant volcano, and many smaller islands. The Japan current tempers the climate to a very even 55 degree F. average in the summer and 33 degree F. average in the winter. The Pacific Ocean brings precipitation, with an average ninety-five inches of rain and fifty-two inches of snow. Like almost all of Southeast Alaska, Sitka is accessible from the rest of the State only by plane or boat.

Southeast Alaska is characterized by mountainous, heavily-forested coastline and a wide archipelago. Vegetation includes spruce, hemlock, cedar, and a variety of bushes and berry plants. Traditional towns were located on sandy beaches that afforded good views of the approaching traffic, and were rich in food sources.[72] On land, the Tlingit hunted black bear, deer, sheep and goats; sea mammals taken were sea lions, seals, otters, and porpoise. They fished for five different species of salmon, supplemented by halibut, eulachon, herring and roe, as well as harvesting shellfish and seaweed. The region's rivers were used for access to the interior, and the Tlingit traded extensively with other groups of Indians, including Eskimos from the Bering Sea.[73]

Sitka historically had far earlier contact with Europeans and Americans than the other two communities. It had long been established as a Tlingit community known as Shee'Atika. In 1799, the Russian commander, Alexander Baranof, transferred the

[71] *Id.* at 14.

[72] de Laguna, *Tlingit*, 7 HANDBOOK OF N. AMERICAN INDIANS 206 (1990).

[73] *Id.* at 208-09.

headquarters of the Russian American Company from Kodiak to Sitka. The Tlingits destroyed the Russian fort in 1802, but the Russians returned and built another in 1804. Sitka was the capital of Russian Alaska from 1808 to 1867, and of Territorial Alaska until 1906.

The State's Department of Community and Regional Affairs does not have the same type of detailed profile of Sitka as is available for Barrow and Minto, so the contextual information easily available is somewhat sketchier. Sitka in 1990 was the fourth-largest community in the State after Anchorage, Fairbanks and Juneau.[74] The population grew by about 10% between 1980 and 1990, from 7,803 to 8,588. A slightly higher percentage of the residents (1,797 or 20.9%) are Native than the State average (15.6%) or the urban average (9.8%).[75]

The present economy of the Sitka area relies on tourism, a pulp mill, commercial fishing and government jobs to support the residents. Sitka also has one of the two private colleges in the State, Sheldon Jackson College.[76] The town has a museum, a summer classical music festival, and a range of other amenities not often found in a community of its size.

The City and Borough of Sitka share an assembly and mayor. Sealaska is the regional ANCSA profit-making corporation. The Central Council Tlingit and Haida Indian Tribes provides non-profit services to Southeast communities. The Sitka Tribe of Alaska (STA)[77] and the health services corporation (Southeast Alaska Regional Health Corporation, or SEARCH) are active in Sitka itself. The local ANCSA profit-making entity is Shee-Atika Corporation.

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[74] ALASKA DEPT OF LABOR, *supra* note 31, at 47. A number of Sitka residents found this information disturbing, and hastened to point out that Sitka was really only the fifth largest community in the State, if the Ketchikan City and Borough were combined (the total population there was 13,828 in 1990). They added that relative to the Kenai Peninsula area (which includes Soldotna, Kenai, Homer and Seward and has a total population of 40,802) and the Matanuska-Susitna Borough (which includes Palmer, Wasilla and Willow and has a total population of 39,683), Sitka was a small area. *Id.* at 38.

[75] *Id.* at 47. About 5% of Sitka's population is other races, primarily Asian and Pacific Islanders (3.9%). *Id.*

[76] The college was established by Sheldon Jackson, a Presbyterian missionary, in the late 1800s.

[77] The Sitka Tribe of Alaska was originally established in 1938 under the IRA, and was known until November 26, 1991 as the Sitka Community Association.

Traditional Law-Ways.[78] Tlingit society was based in permanent villages, with summer camps established at hunting and fishing sites.[79] The society was organized with matrilineal clans and systems of kinship.[80] The local division of the clan possessed "definite territories for hunting and fishing, houses in the village, and has a chief or ceremonial leader."[81] Another source[82] notes that property was alienable; both land and hunting and fishing sites could be bought and sold. Tlingits also kept slaves, some of which were captured through wars or purchased from southern tribes, and some of which were debtors working off their debts.[83]

One author writes that "dispute resolution within a clan and between clans was the prerogative of clan leaders and decisions were final."[84] One reason for this was that offenses were committed against the clan rather than the individual. "The loss of an individual by murder, the loss of property by theft, or shame brought to a member of a clan, were clan losses and the clan demanded an equivalent in revenge."[85] Disputes might have civil or criminal origins. Another author notes that "no distinction was made

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[78] The information for this section was compiled from de Laguna, *supra* note 72; Oberg, *Crime and Punishment in Tlingit Society*, 36 AMERICAN ANTHROPOLOGIST (1934); W. Brady, Remarks Prepared for 1992 Alaska Judicial Conference (June 3, 1992) (available in Alaska Judicial Council library), and D. CASE, ALASKA NATIVES AND AMERICAN LAWS (1984).

[79] de Laguna, *supra* note 72, at 206.

[80] *Id.* at 212-213. *See also* Oberg, *supra* note 78, at 145-146.

[81] Oberg, *supra* note 78, at 145.

[82] de Laguna, *supra* note 72, at 213.

[83] *Id.* at 209; *See also*, Oberg, *supra* note 78, at 151. Oberg notes that a debt slave of the same clan worked for the person to whom the money was owed. If he owed the debt to a different clan, the debtor's clan would pay off the other clan, and then require the debtor to work for one of his own clansmen.

[84] D. CASE, *supra* note 78, at 337. The author notes that "Tlingit and Eyak villages also had a 'peacemaker,' who settled disputes. His position was marked by possession of a special paddle." (Cite omitted). *See also* Peck, *Naashaadei Nukx'ee: The SCA Court of Elders*, in RAVEN'S BONES JOURNAL 16 *reprinted in* 4 ALASKA NATIVE MAGAZINE (May-June 1986). The tribal Council structure, one author suggests, derived from the "self-governing powers" of the clans that make up the Sitka Tribe. It was used when issues arose that affected all of the clans in a community.

[85] Oberg, *supra* note 78, at 146. Within the clan, individuals had rank, depending to a large extent upon wealth. An act that harmed or shamed an individual was dealt with in different ways depending upon that person's rank.

settled by payments of blankets or other wealth, but not necessarily without the sacrifice of a life to even the score."[87] This practice of assessing restitution without reference to intent caused several misunderstandings with Americans in the late 1800s.[88]

After purchase by the United States, U.S. Navy ships visited more frequently and adjudicated disputes. In 1879, "a U.S. Naval Commander solicited the help of two Tlingit clan leaders to form a council of chiefs to act as a judicial body responsible for local Indians."[89] However, the United States' personnel handled the more serious matters themselves.

C. Justice System Context

The early law structures of each Native group were discussed above. In general, the law-ways ranged from elaborate systems of restitution and retribution (Tlingit), to somewhat structured systems for dealing with the most serious offenses (Athabascan), to the very loosely organized Inupiat societal relationships. In each group, death was a fairly common means of balancing the scales of justice.[90] Banishment, which was often equivalent to capital punishment, also was used. Adultery (because of its implications for the kinship systems), theft and murder caused the most concern for Native societies. Most minor offenses were dealt with by the family or kinship groups, or not dealt with at all.

The Russians and Americans brought their own structures for justice, relying on ship's captains, company heads, and governors of colonies to represent governmental

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[86](...continued)
beloved wife or child, indemnity would be demanded of him, since they belonged to another clan." *Id.* However, "[T]here was no penalty within the clan for murder, adultery or theft. A clan punished its members by death only when shame was brought to its honor." Oberg, *supra* note 78, at 146.

[87] de Laguna, *supra* note 72, at 215.

[88] *Id.* at 223-224. "Conflict was frequently exacerbated by the Americans' failure to understand and respect Tlingit legal principles, especially liability and compensation for deaths and injuries." *Id.* at 223. The Kake, Wrangell and Angoon Indian settlements all were bombarded or destroyed by Americans as a result.

[89] D. CASE, *supra* note 78, at 338.

[90] Native societies' use of death as a sanction did not necessarily differ from the practices of western legal systems of about the same era; the western systems authorized capital punishment for a number of offenses.

interests. In 1867, United States revenue cutters patrolled Alaska waters from southeast Alaska to the coast east of Barrow.[91] Captains of the cutters could perform legal functions ranging from marriages to arrest, sentencing and in extreme cases, capital punishment.

After about 1900 as missionaries and school teachers began working throughout the State, development of village councils was encouraged as a form of local justice, with the U.S. marshals and commissioners providing assistance when necessary.[92] It is interesting to note that the village council system seemed to be useful in all three of the areas studied, despite the striking differences in the traditional ways of resolving disputes. The Caucasian presence brought alcohol, and with it a variety and level of offenses, including child neglect and abuse, sexual assault, and a range of violence short of murder that were largely unknown to any of the traditional societies. The councils typically did not attempt to deal with these offenses, but left them for the marshals and commissioners.[93] The great isolation of many villages discouraged development of justice mechanisms integrated with the State's system. Other factors, including the decimation of many villages by disease[94] and removal of children from the villages to go to high school,[95] reduced the number of leaders in remote areas and made evolution

[91] M. BLACKMAN, *supra* note 23, at 153.

[92] *Id.* at 153-154.

[93] The presence of alcohol and drugs also brought substance distribution offenses such as bootlegging and sale of drugs, as well as drunk driving, minor consuming alcohol, and other substance-based offenses.

[94] *See* Napoleon, Yu'ya'raq: The Way of the Human Being (1990) (available in Judicial Council library). Napoleon documents the first of several epidemics, an influenza epidemic spreading from Nome in 1900. Other epidemics of tuberculosis, measles, polio, and more flu followed. *Id.* at 8. Natives today are still highly susceptible to hepatitis and tuberculosis, among other communicable diseases.

The Project Evaluator noticed many references to Angoon in the Sitka Tribal Court case files, and asked a tribal member about them. He said that one of the early epidemics wiped out much of the Native population of Sitka. Those remaining sent word to Angoon, which sent some of its people to re-populate the town.

[95] For example, Sadie Neakok moved to San Francisco when she was twelve years old to attend school. M. BLACKMAN, *supra* note 23, at 79. Children routinely were sent to mission schools, to Mt. Edgecumbe in Sitka, and to schools in the western states. Because of the cost and difficulty of travel, they rarely saw their families during these years and many did not return to the villages or towns they had left. This pattern of education continued until the late 1970s, when the *Mollie Hootch* case resulted in state-built high schools in most villages. *See Hootch v. Alaska State-Operated School System*, 536 P.2d 793 (Alaska 1975).

of local government far more difficult. Health problems continue to play a major role in village life[96]

1. Present Rural Justice System Structure

At statehood, the State put into place a unified court system, with superior courts in five locations (Anchorage, Fairbanks, Nome, Juneau and Ketchikan), a supreme court[97] and a system of magistrate courts. Many of the magistrate courts were upgraded to district courts in the late 1960s, and some were further upgraded in the 1970s and 1980s to superior courts. At present the State has superior courts in fourteen communities,[98] district court judges in five,[99] and magistrates in the fifteen courts that have judges plus

[96] ALASKA FEDERATION OF NATIVES, *supra* note 16, at 5, 6. This report documents the major health problems that still exist in rural areas, and especially among Natives. The Native homicide rate is about four times the national average (1982-1984); accident mortality is three time the national average. Natives comprise about 16% of the State's population, but account for 25% of arrests, 25% of felony convictions and 34% of incarcerated offenders. Most Native crime is alcohol-related, and a much higher percent than average involves violence or sexual assault. The number of Native children receiving child protection services from the State rose from 2,035 cases in 1984 to 3,109 cases in 1988–a 53% increase in only five years (and three of those years, 1986-1988, were difficult budget years for the State).

[97] The supreme court has five justices, all selected and retained through the merit selection system. A court of appeals created in 1980 by the legislature is the State's intermediate appellate court exercising primary jurisdiction over criminal appeals. The supreme court retains discretionary jurisdiction over criminal cases.

[98] Superior courts are located in Anchorage (twelve judges), Fairbanks (four judges), Juneau (two judges), Kenai (two judges), and one judge each in Barrow, Bethel, Ketchikan, Kodiak, Kotzebue, Nome, Palmer, Sitka, Valdez, and Wrangell-Petersburg. The superior courts were established in the State's constitution at statehood and are the general jurisdiction trial courts. The judges sit in four judicial districts (see map, Alaska Court Locations, preceding Chapter I), with a presiding judge chosen by the supreme court to handle the administrative affairs of each district. Judges for all courts are selected through a merit selection system, which includes nomination by the Judicial Council, appointment by the Governor and periodic retention elections.

[99] District court judges sit in Anchorage (nine), Fairbanks (three), Juneau (one), Ketchikan (one) and Homer (one). The district courts were created by statute in 1968, and have jurisdiction in small claims cases, civil matters up to $50,000, and criminal misdemeanors. Some district court judges also serve as masters for the superior court to assist in handling superior court matters such as children's and domestic cases.

another thirty-two in rural communities.[100] An Administrative Director and staff provide administrative services, undertake special projects, and coordinate all the courts.

Other state agencies in the criminal justice system also play a major role in dispute resolution for rural as well as urban communities. Law enforcement in most of the smaller towns is provided by the State Troopers for the most serious offenses (although a number of the mid-sized communities have local police departments that may handle major felonies alone or in cooperation with the Troopers), and by local police, or the Troopers' Village Public Safety Officer (VPSO) program.[101] The North Slope Borough funds extensive public safety and law enforcement services for Barrow and the other villages within its jurisdiction. Beyond a few state jails in mid-sized towns (Nome, Bethel, Ketchikan), the State Department of Public Safety (which also supervises Troopers and Fish and Wildlife officers) contracts with about seventeen communities for small jails. Some villages, about half, have "lock-ups," a cell or room in the village designated for use by the local police, VPSO, and/or Troopers. The quality of the lock-ups varies from secure and well-designed to rudimentary, perhaps without light or any

[100] There are full-time or part-time magistrates in each of the fifteen communities with a superior or district court, and another thirty-two magistrates in rural communities, including Southeast (eight: Angoon, Craig, Haines, Hoonah, Kake, Pelican, Skagway and Yakutat), Southcentral (nine: Cordova, Dillingham, Glennallen, Naknek, St. Paul Island, Sand Point, Seward, Unalaska, Whittier); Second Judicial District (five: Ambler/Kobuk/Shungnak, Gambell/Savoonga, Kiana/Noorvik/Selawik, Pt. Hope, Unalakleet), Bethel area (six: Aniak, Emmonak, Hooper Bay/Scammon Bay, Mekoryuk, Quinhagak, Mt. Village/St. Mary's), and Fourth Judicial District (five: Delta Junction, Fort Yukon, Galena/McGrath, Healy/Nenana/Tanana, Tok).

Of these thirty-two communities, seven are not Native villages (i.e., were not tallied as Native villages or statistical areas in the 1990 Census): Seward, Skagway, Delta Junction, Glennallen, Cordova, Whittier, and Healy. All of these have 20% or fewer Native residents.

A number of the thirty-two communities are "road" (i.e., can by reached by automobile), such as Glennallen, Seward, Whittier (railroad-connected), Delta Junction, Healy, Nenana, Tanana, and Tok. All of the Second District and Bethel area villages, and most in Southeast that have magistrates, however, are essentially Native villages and can be reached only by plane or boat. What differentiates them from the other 150 or so villages without a magistrate may be a combination of size, interest in having a magistrate during the 1960s and 1970s (few or no new magistrate locations were created in the 1980s), and ability to meet the court system's criteria which include having a referral and enforcement system (e.g., local police), availability of facilities for conducting court business, and a governmental structure.

Magistrates are hired by and serve at the pleasure of the presiding judge of each judicial district. Most in the larger communities are law-trained; a high percentage of those in the smaller towns are not. They are not part of the merit selection system and are not supervised by the Alaska Commission on Judicial Conduct. Most in the smaller communities are Natives and/or long-time residents of the communities. This report cannot give a detailed discussion of magistrates in rural Alaska. For a description of the magistrate system *see* M. BLACKMAN, *supra* note 23, at 155; and ALASKA COURT SYSTEM, ANNUAL REPORT: 1990, at 51 (1991).

[101] The VPSO program is designed to provide police and fire protection, search and rescue and emergency medical care to remote villages. The State of Alaska contracts with the regional non-profit corporations for VPSO services; the non-profits then hire the VPSOs. The VPSOs are trained at the Trooper Academy in Sitka, and their work is loosely supervised by Troopers.

other facilities. Many villages, however, do not have any formal place in which to detain either an offender or an intoxicated person who presents a danger to self or others.[102]

The State's Department of Law[103] prosecutes all State criminal offenses, as well as becoming involved in civil matters relating to child welfare. The State's Public Defender Agency and Office of Public Advocacy provide defense for most indigent offenders as well as assisting indigent parents in child welfare cases, representing indigent juveniles, providing guardians ad litem in children's cases, and serving a number of other legal roles. Alaska Legal Services provides assistance in some civil cases to a number of the mid-size communities, but funding cuts in recent years have limited its ability to assist low-income residents of small towns. Finally, the State's Division of Family and Youth Services is one of the more active state agencies in small towns, because of its role in child abuse and neglect cases.

2. Changes in Bush Justice Since 1970

The first of four Bush Justice conferences was held in Girdwood[104] in 1970. The second was held in Minto in 1974, and the third in Kenai in 1976. The most recent conference convened in Bethel in 1985. Recommendations made at the conferences and actions taken as a result were compiled by the Judicial Council in 1990.[105] The fundamental problem, according to participants at all four conferences, was the distance between the rural areas and the state agencies providing services. As a result, rural residents felt that the courts and other agencies were unaware of village needs and unresponsive to them. Rural communities also desired more local control over establishing and enforcing laws. They saw the highly centralized structure of the courts

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[102] Some VPSOs and magistrates have housed prisoners in their own homes for lack of any other place to keep them. A cannery manager in a fishing town on the Alaska peninsula told one of the authors of this report that many years ago, intoxicated people who were causing trouble were tied to the pilings of the docks until they sobered up.

[103] The Department of Law is headed by an Attorney General appointed by the Governor. The Attorney General handles all the State's legal affairs, both civil and criminal. All state prosecutors are hired directly by the Attorney General; none are elected. A few municipalities (e.g., Anchorage, Sitka, Juneau) prosecute offenders of municipal ordinances, but most leave all prosecution to the State. Local police may enforce ordinances adopted by small communities, by filing a complaint in state court.

[104] Girdwood is a small resort community just south of Anchorage. It became part of the Municipality of Anchorage in 1975 when the City of Anchorage and the Greater Anchorage Area Borough unified their governments.

[105] See Appendix A of this report for the text of the memo.

and state government as denying communities opportunities for self-determination. The centralization of state functions also led to removal of children, offenders and elderly people from the villages.[106]

Participants at the conferences suggested that the State increase opportunities for self-determination and government in the villages, that the state agencies hire more Native personnel and train existing personnel to be culturally aware, that the courts establish or support alternative justice systems in villages or increase the number of magistrates, that new technologies (e.g., teleconferencing) be used to provide prompter hearings and more contacts, that village law enforcement be improved, and that the Department of Corrections consider a wider range of dispositions for rural offenders. Most of these recommendations have been implemented, to one degree or another,[107] but the implementation has not succeeded in creating satisfactory justice systems for rural areas.

More recently, attention has been focused on the severe health and substance abuse problems in villages[108] and the need to create functional communities at very basic levels.[109] Although substance abuse creates severe problems throughout the State,[110]

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[106] At times, of course, the ability of the State to remove an offender from a village is perceived by the village as a great advantage.

[107] The conferences helped bring about changes in the justice system. These changes include increased affirmative action in most justice system agencies, the Village Police Officer and Village Public Safety Officer programs, more magistrate training, experimentation with conciliation boards by the court system, court interpreter programs, and increased attention to culturally appropriate rehabilitation programs in corrections.

[108] For example, the Anchorage Daily News published a Pulitzer prize-winning series of articles in 1988, *A People in Peril*, that detailed the high, and rapidly increasing, rates of suicide, alcohol abuse, and related mental and physical health problems. Many Native leaders have spoken in the last few years of the need for resolution of the underlying problems in village societies before progress can be made in addressing the governmental issues. Others see the two problems as inseparably intertwined.

[109] One of the tools provided to villages for dealing with alcohol abuse problems is the "Local Option Law," AS 04.11.470 et seq., which permits communities to elect to restrict the sale, importation, or possession of alcoholic beverages. Members of the community may petition the local governing body to place the issue on a separate ballot at the next general election. Voters can elect to prohibit the sale of alcohol (alcohol can be consumed in the village but not sold; these villages are popularly referred to as "damp") or can vote to prohibit its use (these villages are referred to as "dry"). Alaska's courts have upheld local option laws as constitutional and not violative of equal protection standards. *See Harrison v. State*, 687 P.2d 332 (Alaska 1984).

Native villages also can enact federally certified liquor ordinances, as has Minto, under 18 U.S.C. § 1161 (1988). *See also* Napoleon, *supra* note 94, at 28-30.

[110] Recent analysis by the Alaska Sentencing Commission of data from presentence reports prepared (continued...)

difficulties seemed to be magnified in small, isolated communities. One method of dealing with the situation has been to work to develop sober communities, often using the Alkali Lake band in Canada as an example. For the most part, these efforts emphasize grass-roots work, and self-determination or self-sufficiency as a means to maintaining the health of the community. Recently the federal government has funded five demonstration projects, with coincidentally, Minto and Sitka both receiving five-year grants. The funds go to build the emotional infrastructure to support long-term community sobriety.[111]

Resolution of disputes in rural communities has changed substantially since 1970. A limited number of communities had magistrates, a few had district courts created in 1968, and only seven communities in the State had superior court judges. Between 1975 and 1984, seven more superior courts were established, and the number of communities with at least a part-time magistrate expanded significantly. The court experimented with conciliation boards in 1976 and 1977. Located in six west and northwest villages, the conciliation boards paid village residents $10 per hearing to resolve minor disputes. A court-sponsored evaluation[112] found that the boards resolved relatively few cases but did seem to resolve them more "sensitively" than "external" options. The report also questioned the legal grounds on which the boards were based.[113]

A 1979 study of rural justice found five "problem boards" operating in villages,[114] and another six city councils that apparently were acting as adjudicatory bodies

[110](...continued)
for felony convictions between 1986 and 1991 showed that 73% of the offenders studied had long-term alcohol problems and 55% had long-term drug use problems. Other types of substance abuse problems are described in *A People in Peril, supra* note 108.

[111] The funds are from the federal Alcohol Safety Action Program. The funds are but one instance of the substantial amount of federal money brought into the State through the social and health services provided by the regional and local Native non-profit corporations. Because the services often benefit non-Native spouses, they affect a broad range of the community's citizens.

[112] J. MARQUEZ & D. SERDAHELY, ALASKA COURT SYSTEM VILLAGE CONCILIATION BOARD PROJECT EVALUATION 6 (1977).

[113] *Id.* at 7. The conciliation boards theoretically derived their ability to operate from AS 12.45.120, which permits the court in some misdemeanor cases, with the agreement of both parties, to reach a civil compromise. However, the conciliation boards were intended to keep cases from ever reaching the courts, so AS 12.45.120 arguably was inappropriate. *Id.* at 80-83.

[114] J. ANGELL, ALASKAN VILLAGE JUSTICE: AN EXPLORATORY STUDY 100 (1979).

periodically.[115] Soon after, communities began to establish tribal courts, partly as a result of the federal Indian Child Welfare Act.[116] Sitka, established in 1980, was one of the first; Minto was re-established in 1985. By 1990, a number of the regional non-profit corporations had at least one staff attorney whose responsibilities included assisting the region's villages to set up tribal courts. The Central Council Tlingit and Haida Indian Tribes, headquartered in Juneau, had begun planning for travelling tribal court judges in Southeast Alaska.[117] The Barrow PACT organization, which provides conciliation services, was invited by Emmonak in 1991 to train local residents in conciliation techniques.[118]

Magistrates provide adjudication through the state court system in about thirty-two smaller communities. However, the communities expect them to be quite versatile. Sadie Brower Neakok was one of the first magistrates appointed after statehood; she served for seventeen years. In a book about her life,[119] she describes her duties as including at one time or another, educating the community about the western legal system, cleaning the jail, doing all of the case preparation and docketing (she did not have a clerk for some years), escorting prisoners to Nome for trial,[120] acting as foster parent for children who became wards of the court because of parental abuse or neglect, responding to a call for help where a man had drawn a gun on family members (Sadie confiscated the guns on the spot), and drawing blood samples from dead persons to determine alcohol levels and to send to state examiners to find cause of death. Her case

[115] *Id.* The number of village councils adjudicating offenses or resolving disputes may have been much higher, but has not been documented. One author notes that the village councils were weakened not only by outside influences, but by village youth who "had learned to question the legitimacy of village council authority." S. Conn, The Interrelationship Between Alaska State Law and the Social Systems of Modern Eskimo Villages in Alaska: History, Present and Future Considerations 20, presented at International Sociological Association Conference (August 26-31, 1985). The author suggests that much of the division came over the issue of drinking behavior.

[116] See Chapter III, *infra*, for a discussion of statutes and case law affecting Alaska rural justice issues.

[117] In 1991, the Central Council hired three judges, and completed planning for a regional appellate mechanism as well as the tribal trial courts.

[118] Emmonak had the first conciliation board, established under a National Science Foundation grant in 1973-1974. J. MARQUEZ & D. SERDAHELY, *supra* note 112, at 10. It also served as one of the court system's six experimental conciliation sites. Its request for further training in 1991 represents the potential tenacity of ADR organizations, even those that may not appear successful at first.

[119] M. BLACKMAN, *supra* note 23.

[120] State Troopers now handle prisoner transportation.

files were kept in her kitchen at one time.[121] A 1979 report on rural justice notes that magistrates often mediate cases, provide law enforcement, and give counseling, domestic, and medical advice.[122]

Boundaries among duties of other justice system personnel tend to be equally blurred in isolated villages. Village police in 1979 might detain offenders or intoxicated persons in their own homes if the village did not have a detention facility.[123] They would also feed the offender, or ask the offender's family to take that responsibility. VPSOs often mediate disputes rather than referring them to any adjudicatory body.[124]

Although the State has not formally recognized tribal courts,[125] it has examined in detail the possibilities for alternative dispute resolution in the villages.[126] The Cowper administration from 1987 through 1990 spent time developing a proposal for "quasi-judgment boards"[127] and a counter-proposal from the Department of Law for statutorily permitted judgment boards.[128] The present administration under Governor Hickel has

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[121] Sadie Neakok was certainly not the only magistrate in the State to work out of her home; as noted earlier, village facilities often are very limited. A story from another part of the State describes a magistrate conducting court on an overturned boat on the beach, for lack of any other "bench." M. BLACKMAN, *supra* note 23, at 263 n. 13.

[122] J. ANGELL, *supra* note 114, at 110-111.

[123] *Id.* at 120-121.

[124] Urban police often conciliate or mediate disputes also, rather than formally charging offenders. Marenin, *Patterns of Reported Crime in Alaska Villages*, 8 ALASKA JUSTICE FORUM 1, 4 (1991).

[125] The one exception is the tribal court at Metlakatla on the Annette Island Reservation. A federal statute passed in 1891 set aside the Annette Islands as a reservation for the use of approximately 800 Tsimshian Indians, who had migrated to Alaska from British Columbia under the leadership of a white missionary, William Duncan. A tribal government was established; later the community adopted bylaws and a constitution under the Indian Reorganization Act.

In 1958, the United States District Court at Ketchikan held that the Annette Island Reserve was *not* Indian country. *United States v. Booth*, 161 F.Supp. 269, 275 (D.C. Alaska (1958). However, the State of Alaska officially has recognized Metlakatla as a reservation entitled to the same treatment as reservations since at least 1977. *See Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977).

[126] Memorandum from Jim Plasan to Director of Municipal and Regional Assistance Division (March 5, 1987) (available in Alaska Judicial Council library).

[127] Memorandum from Jim Plasman to Criminal Justice Work Group Members (Feb. 21, 1990) (available in Alaska Judicial Council library).

[128] Briefing memorandum from Department of Law to Governor Cowper, December 5, 1988, regarding the Department of Community and Regional Affairs proposal for municipal quasi-judicial boards, and suggesting amendments to ALASKA STAT. § 29.20 to govern the use of judgment boards by municipalities.

stated that the "policy of the State of Alaska is that Alaska is one country, one people, . . . "but adds that the State is "committed to improving local government institutions to meet the needs of rural Alaska communities, including those inhabited predominately by Alaska Natives."[129]

3. Alternative Dispute Resolution in Alaska

Alaska has a history of experimenting with alternative dispute resolution mechanisms.[130] As in most other states, citizens are free to resolve their disputes in any manner that does not violate public law or policy. Any person can mediate or arbitrate or otherwise resolve a dispute between two or more parties, if the parties voluntarily consent.[131] The State, however, reserves to itself the right to resolve disputes among non-consenting parties or disputes that involve the violation of a state law.

A 1977 ADR feasibility study by the Judicial Council concluded that a program for minor disputes would be successful in Anchorage.[132] The report suggested a system in which the same neutral would begin a process of conciliation with the parties, moving from there to mediation and if necessary, to arbitration of the dispute.[133] The report found that a wide range of civil, domestic and criminal cases would be appropriate for

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[129] Admin. Order No. 125 (August 16, 1991) (signed by Gov. W.J. Hickel).

[130] Alternative dispute resolution is often referred to as ADR, and will be abbreviated as that throughout this report.

[131] ALASKA STAT. (AS) § 09.43., the Uniform Arbitration Act, governs arbitration of disputes. AS 22.15.040 requires that all potential small claims litigants be informed of ADR alternatives. AS 25.20.080 permits the court to order mediation in child custody cases, and AS 25.24.060 permits court-ordered mediation in divorce cases. AS 25.35.010 allows court-ordered counseling or mediation in domestic violence cases. Court custody investigators routinely suggest alternative dispositions to parents engaged in custody disputes, and judges use their inherent powers to arrange settlement conferences in many types of cases. TASK FORCE ON MEDIATION FOR THE SUPREME COURT OF ALASKA, REPORT OF THE TASK FORCE ON MEDIATION TO THE SUPREME COURT OF ALASKA 22-25 (1990) [hereinafter MEDIATION TASK FORCE REPORT]. In addition, the Civil Rules Committee appointed by the Alaska Supreme Court has recommended to the court that it adopt a rule permitting judges to order mediation in a variety of cases.

[132] M. RUBINSTEIN, E. ANDREWS AND W. FISHER, THE ANCHORAGE CITIZEN DISPUTE CENTER: A NEEDS ASSESSMENT AND FEASIBILITY REPORT 9 (1977).

[133] *Id.* at 2-3. The process would begin by encouraging parties to tell their stories, and state the relief desired. This may be sufficient to catalyze a resolution worked out by the parties between themselves ("conciliation"). If not, the neutral(s) may probe for further information, move the discussions in constructive directions, and use other "mediation" techniques, including private caucuses. If the parties still do not agree, the neutral(s) may "assume the role of arbitrators; on the basis of the testimony they have heard and of their understanding of the different parties' needs and desires, they determine an appropriate award." *Id.*

this ADR process. The program, it was anticipated, would be free because of Law Enforcement Assistance Administration (LEAA) funding in its first three years, with state courts picking up the tab thereafter. The cases would be screened by paid staff, but primarily handled by volunteer attorneys and citizens. Its attractiveness to disputants lay in its informality, its speed (cases were supposed to be heard within ten days), and its lack of cost. The proposed program was never funded, but the groundwork had been laid for similar proposals in subsequent years.

The Conflict Resolution Center (CRC) was established in 1982 in Anchorage to provide dispute resolution services. It closed its doors in 1987 after sharp declines in state revenue-sharing with municipalities led to loss of its chief financial support.[134] The CRC handled landlord/tenant cases, family mediation, fee arbitration cases for the Alaska Bar Association, and a variety of other civil cases. In April of 1986, the CRC had conducted forty-two hearings for the year to date. In 1984 they had opened 126 cases, and in 1985, ninety-nine cases. About one-third of the open cases appeared to go to hearings.[135] Another report noted that the CRC "served an average of 3,000 individuals per year."[136]

The Alaska Supreme Court created a Mediation Task Force in 1990 to assess ADR efforts throughout the State. Included in the Task Force's 1990 report are mentions of the Department of Law's Consumer Protection Agency, the Conflict Resolution Center, the Court System's Conciliation Board project, and the role of magistrates as mediators in small communities.[137] The report lists the Better Business Bureau, guardians ad litem in court proceedings, private dispute resolution practitioners, and government agencies as providing alternative dispute resolution services, in addition to the Barrow PACT project and tribal courts as organizations that were conducting ADR in 1990.[138]

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[134] The Conflict Resolution Center had a grant of about $90,000 from the Municipality of Anchorage in 1985 and 1986. The bulk of program revenues came from the Alaska Bar Association, VISTA volunteers, United Way, fees from training programs and workshops and some client fees.

[135] Information about the CRC is taken from materials in the Board of Directors manual that includes minutes, program materials, financial statements and other documents from 1982 through mid-1986.

[136] MEDIATION TASK FORCE REPORT, *supra* note 131, at 8.

[137] *Id.* at 8-15.

[138] *Id.*

During 1990 and 1991, at the request of the legislature, the Judicial Council conducted a pilot program offering free mediation services to parents in the Anchorage area with disputes over visitation of their children. About 400 people asked for assistance.[139] Few parents actually engaged in mediation, primarily because of a strict exclusion for anyone who had any history of domestic violence or a pattern of harassment.[140] Sixty-one percent of the parents who asked for assistance in resolving disputes were disqualified because they had had some domestic violence history.[141] Among parents who did qualify, a number could not get the agreement of the other parent to participate in mediation and an equal or larger number appeared to have resolved the problem without further contact with the project. The project was evaluated as worthwhile if expanded to include a broader range of parents and issues statewide.

The Alaska Bar Association created an Alternative Dispute Resolution section in the fall of 1991, in response to the recommendations of the supreme court's task force. The ADR Section's first report catalogued alternative dispute resolution programs throughout the State that existed in 1991.[142] The section's report mentions the Supreme Court's proposed new rule on mediation,[143] the Alaska Youth and Parent Foundation

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[139] S. DI PIETRO, ALASKA CHILD VISITATION MEDIATION PILOT PROJECT: REPORT TO THE LEGISLATURE 9 (Alaska Judicial Council 1992).

[140] *Id.* at 20. The legislative exclusion of parents who had been involved in relationships with domestic violence was intended to reduce any possible risks to parents or children. Little statistical or other information was available at the beginning of the project from other jurisdictions to indicate whether this strict exclusion was necessary, or whether mediation could proceed with appropriate safeguards in at least some instances. The Council concluded that based on its own experience, as well as that of other projects, the absolute exclusion was not necessary, and that any future project should not automatically exclude every domestic violence situation. *Id.* at i.

[141] Domestic violence was defined as any act covered by ALASKA STAT. § 18.66.900. In Alaska, domestic violence is defined in part as any act which would be a crime against a person, including misdemeanor assault and criminal custodial interference. *See id.; see also* ALASKA STAT. §11.41. Any instance of violence, no matter how infrequent or how far in the past disqualified the applicant. Staff determined the history of violence, based primarily on screening questions asked during the initial phone (occasionally in-person) contact, and secondarily on review of the parties' court files.

[142] D. Peterson, Report of the Alternative Dispute Resolution Section of the Alaska Bar Association (June 1991) (available in Alaska Judicial Council library).

[143] Proposed Civil Rule 100 has been circulated to the Bar Association for comment, and was scheduled for review by the supreme court in the summer of 1992. It provides a mechanism for judges to order mediation in a wide variety of cases. Here, as elsewhere in the statutes and court rules, "court-ordered" mediation means that the parties must attend an orientation session, and may be required to attend one mediation session. However, they are not obliged to reach an agreement, and nothing from the mediation session can be used in subsequent litigation.

Mediation Program,[144] training for mediation in the schools, and several private ADR firms and groups.

The overall picture of alternative dispute resolution in the State suggests that rural communities are as active, or more active, than urban communities. Although funding for "free" or low-cost ADR does not seem to be reliably available, volunteer programs seem to subsist on a small, but wide-spread scale.[145] In addition, enough paying disputants are willing to try ADR that an estimated twenty to thirty professionals[146] and organizations advertise their services statewide. Many persons call for information and referrals, and "disputes" often may be resolved or disappear before a full-scale hearing. The information and referral services alone are valuable to many people, and may be characterized as assisting in dispute resolution.

[144] This private program which relied on volunteer mediators lost its funding and was discontinued in FY 1992. However, the Alaska Youth and Parent Foundation had plans to resurrect the program in an abbreviated form in FY 1993.

[145] One commentator notes that institutions in which the public has confidence are likely to prosper. Church, *The Mansion vs. the Gatehouse: Viewing the Courts from a Consumer's Perspective*, 75 JUDICATURE 260, 261 (1992). Although he is speaking of the courts, the same point can be made about alternative dispute resolution organizations. A strong indication of the usefulness of an organization is the willingness of people to call upon it, and particularly to pay for its services.

[146] Peterson, *supra* note 142, at 8.

Wall panel from a Tlingit Ceremonial House of a Raven Chief (artist unknown).
Photo by Frank Flavin, courtesy of Alaska Court System

Chapter III: Legal Context

A. Introduction

This chapter will set the context for evaluating the Minto and Sitka tribal courts by introducing the reader to basic principles of Indian law and familiarizing the reader with related legal issues in Alaska. The law concerning Alaska Native tribal status, sovereignty, and tribal court jurisdiction is complex and largely unsettled. Throughout this chapter, efforts were made to present an overview of both sides of essential issues, including what the author hopes is a balanced sampling of arguments made both by tribal advocates and by the State of Alaska. Readers, especially those with a background in Indian law, should keep in mind the limited goal of the chapter: to set the context for evaluating the Minto and Sitka tribal courts.

B. Historical and Legal Overview

A basic knowledge of federal Indian law and of the historical context in which it developed is important to understanding the debate in Alaska today over the legal status of Alaska Natives. This chapter thus begins with a summary of the basic principles of federal Indian law and of the historical relationship between Alaska Natives and the federal government, including a very brief overview of relevant federal statutes affecting Alaska Natives, followed by an explanation of the legal debate over whether Alaska Natives have tribal status similar to that of tribes in other states. Section D discusses Public Law 280 and its role in the debate over tribal court jurisdiction in Alaska, and Section E contains a brief overview of the concept of Indian country as it might be relevant in Alaska.

1. General Principles of Indian Law

The most basic principles of federal Indian law were developed in the early years of the Republic. The first of these principles is a recognition that Indian tribes are to a certain extent sovereign entities pre-existing the establishment of the United States and thus have inherent rights to govern themselves and their territory.[147] A second principle is that tribes' inherent rights of sovereignty are limited by Congress' power to regulate and modify the status of the tribes.[148] A third principle is that tribes retained a measure of their powers of self-government within the territory reserved to them subject only to federal authority, and thus that states are excluded from the right to regulate the tribes *unless* Congress delegates power to them.[149] Finally, there is the principle, expressed in the phrase "domestic dependent nations"[150] that the federal government is responsible for the protection of the tribes and their lands, including protection from encroachments by the states and their citizens.[151] It is in this context that Indians have been referred to as "wards" of the United States, giving rise to the federal government's trust relationship with the Indian nations.

Inherent in the above principles is the concept of "Indian country." Generally speaking, Indian country defines the territorial boundary of tribes' governmental authority. Indian country, and the debate over whether it exists in Alaska, is discussed *infra* at Section E and accompanying notes.

2. Congressional Policies and Federal-Indian Relations

The history of the relationship between Indian tribes and the federal government also is important to a full understanding of the legal decisions.[152] Federal-Indian

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[147] The tribal sovereignty of Indians was first recognized by the Supreme Court in an opinion authored by Chief Justice Marshall, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557, 8 L.Ed. 483, 499 (1832). See also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

[148] F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 232 (1982 ed.).

[149] *See* Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479, 482 (1979) (citations omitted).

[150] In 1831 the Supreme Court held that Indian tribes are dependent nations in regard to the United States. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

[151] W. CANBY, AMERICAN INDIAN LAW IN A NUTSHELL 2 (1981).

[152] COHEN, *supra* note 148, at 2.

relations have changed over time, as has Congress' Indian policy. In the early years of the Republic, Congress made treaties with tribes and pledged that "the utmost good faith shall always be observed toward the Indian."[153] Later, Congress passed legislation aimed at assimilating Indians into "civilized" life, often by allotting tribal land to individual Indians.[154] By the 1930s, a commitment was made to revive tribal governments, and tolerance for many traditional aspects of Indian culture became evident.[155]

In the 1950s Congress backed away from its earlier commitment to foster tribal self-governance and adopted instead a policy of rapid assimilation through "termination" of the special federal-tribe relationship.[156] Congressional intent during the termination period was to make Indians subject to the same laws and entitled to the same privileges and responsibilities as other United States citizens, and to end their status as "wards" of the United States. The current era, which began in 1970 with President Nixon's "Indian Self-Determination Speech," demonstrates an emphasis on Indian self-determination.[157]

3. History of Federal-Native Relations in Alaska

The history of the federal government's relationship with Alaska's indigenous peoples differs in some respects from that of tribes in other states. First, the United States had owned Alaska for only a short time when Congress officially ended treaty-making in 1871 and launched the assimilationist era.[158] While the federal government had made treaties with tribes in other states, often in an attempt to end armed hostilities, neither the State nor the federal government made treaties directly with Alaska Natives.[159] Second, while tribes in other states were forced off their traditional lands and

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[153] *Id.* at 49. Congress officially ended treaty-making in 1871.

[154] *Id.* at 128. Allotment era policies resulted in the loss of 90 million acres of tribal land in the other states. *Id.* at 49.

[155] *Id.* at 144. The Indian Reorganization Act was passed during this period.

[156] *Id.* at 152. During this period more than one hundred tribes in the other states were stripped of the federal-tribal relationship and, in most cases, of their land as well. *Id.* at 49.

[157] V. DELORIA, JR. & C. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 22-23 (1983).

[158] Russia sold its interest in what is now Alaska to the United States in the 1867 Treaty of Cession.

[159] Although the United States did not make treaties directly with Alaska Natives, the Treaty of Cession of 1867 expressly mentions Alaska Natives. Article III of the Treaty provides that the "inhabitants" (continued...)

confined to reservations to make way for white settlers,[160] Alaska was not experiencing comparable land pressures and by and large did not see the creation of reservations.[161] Whether these historical differences have any legal significance is an important part of the current debate over tribal status and the existence of Indian country in Alaska.

4. Relevant Federal Legislation

As federal-Indian relations have changed over time, so has federal legislation affecting Indians. Two federal laws particularly relevant to understanding the issues in Alaska are the Indian Reorganization Act (IRA), enacted during the 1930s, and Public Law 83-280,[162] (PL 280) enacted during the termination period.[163]

The Indian Reorganization Act. Enacted in 1934, the IRA permits Indian tribes to organize and adopt a constitution enumerating certain powers of self-government in the tribe or its tribal council, and it permits tribes to form business corporations. Currently, some seventy-four of the 208 Alaska Native villages (including Minto and Sitka) have organized under the IRA and have IRA constitutions. Sitka's IRA constitution explicitly authorizes establishment of a tribal judicial system.[164] Minto's constitution implicitly

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[159](...continued)
of the ceded territory (except uncivilized Native tribes) could choose to "be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States," and that the "uncivilized tribes" of the Territory will be "subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country." Treaty of March 30, 1867, 15 Stat. 539.

[160] Tribal advocates argue that there are exceptions to this generalization. They say that tribes without reservations exist in other states (for example, the Pueblos and Rancherias), as do treaty tribes without reservations, and reservation tribes without treaties.

[161] There are exceptions to the statement that reservations were not created in Alaska. The most notable exception is the Annette Islands Reserve (the Metlakatla Indian Reservation) in Southeast Alaska. For the history of the Metlakatla Indian Tribe, see note 125, *supra*.

[162] Public Law 83-280 is codified at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, and 28 U.S.C. § 1360 (1988). The text of Public Law 280 is set out in section D, *infra*.

[163] Other important pieces of federal legislation beyond the scope of this report include the Alaska Native Claims Settlement Act (ANCSA), the Alaska Native Interest Land Claims Act (ANILCA), the Indian Self-Determination and Education Assistance Act (Pub. L. No. 93-638), the 1958 Alaska Statehood Act (Pub. L. No. 85-508), and the 1978 American Indian Religious Freedom Act (Pub. L. No. 95-341).

[164] The Sitka Tribe's constitution gives the Tribal Council the power to "provide for the maintenance of law and order and the administration of justice, including through the establishment of an appropriate Tribal judicial system." CONST. OF THE SITKA TRIBE OF ALASKA art. VII, § 1(m).

authorizes a tribal court by empowering the village to "do all things for the common good which it has done or has had the right to do in the past. . . ."[165]

Public Law 83-280. Congress enacted Public Law 280 in 1953, during the time that its major Indian policy goal was termination of the special federal-tribal relationships. One effect of Public Law 280 was to extend state court jurisdiction to the adjudication of civil and criminal matters involving Indians in Indian country.[166]

Although the legislative history of PL 280 is in some respects ambiguous, the main intent of Congress apparently was to remedy a perceived lack of adequate criminal-law enforcement on many reservations.[167] The perceived lawlessness was attributed to the limited applicability of federal criminal laws and the inadequacy of tribal law enforcement institutions.[168] The grant of civil jurisdiction apparently was something of an afterthought.[169]

Alaska was added to the mandatory PL 280 list in 1958.[170] The legislative history suggests that Alaska was added in response to a 1957 opinion from the United States District Court in Anchorage holding that the Territory of Alaska lacked jurisdiction to enforce its criminal laws against Natives living on the Moquawkie Indian Reservation (Tyonek) because the reserve was "Indian country."[171] It appears that by adding Alaska

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[165] CONST. AND BY-LAWS OF NATIVE VILLAGE OF MINTO art. IV, § 1.

[166] PL 280 originally extended this jurisdiction to five states: California, Minnesota, Nebraska, Oregon and Wisconsin. Alaska was added to the list in 1958. Section 7 of Public Law 280 also originally set up a mechanism for any state to assume jurisdiction in Indian country if it so desired; however, this optional assumption provision was repealed in 1968 by the Civil Rights Act and replaced by a provision requiring tribes' consent to any future assumption. *See* 25 U.S.C. § 1321(a) (1988) (Pub. L. No. 90-284, 82 Stat. 73 (1968)).

[167] COHEN, *supra* note 148, at 176 (citations omitted).

[168] *Id.*

[169] *Id.* at 364; *see also Bryan v. Itasca County*, 426 U.S. 373, 381, 96 S. Ct 2102, 48 L.Ed.2d 710 (1976).

[170] Act of Aug. 8, 1958, Pub. L. No. 85-615, § 2, 72 Stat. 545.

[171] *Petition of McCord*, 151 F. Supp. 132 (D.C. Alaska 1957). According to one source, when PL 280 originally was enacted the federal and territorial governments had assumed that there was no Indian country in Alaska and that Alaska Natives in Native villages were subject to the criminal and civil laws of the territorial government. REPORT OF THE GOVERNOR'S TASK FORCE ON FEDERAL-STATE-TRIBAL RELATIONS SUBMITTED TO GOVERNOR BILL SHEFFIELD 139-40 (February 14, 1986) [hereinafter GOVERNOR'S

(continued...)

to the list of PL 280 states, Congress intended that the Territory continue to provide law enforcement in the villages.[172] The effect of PL 280 on tribal court jurisdiction in Alaska is discussed in more detail in Section D, below.

C. The Issue of Sovereignty as it Affects Tribal Court Jurisdiction

One of the prerogatives flowing from sovereign tribal status is the authority to operate a tribal court and to have its jurisdiction recognized by state and federal courts. While other states have long acknowledged the sovereign status of tribes and the authority of tribal courts, the tribal status of Alaska Native villages is unsettled. Tribal advocates and the State have debated extensively whether Alaska Native villages are tribes for purposes of establishing tribal sovereign status and the rights and responsibilities which flow from that status. Although this legal uncertainty does not as a practical matter prevent the Minto and Sitka tribal courts from operating with the consensual authority of the parties, their asserted authority as tribal courts based on tribal sovereignty necessarily implicates legal questions of their tribal sovereign status and the scope of their courts' jurisdiction. To evaluate the Minto and Sitka tribal courts thus requires an understanding of the debate in Alaska surrounding tribal status.

1. Establishing Tribal Status

Under general principles of federal Indian law, tribal status can be recognized in any one of three ways: (1) directly by Congress, through statute or treaty; (2) by the executive branch, including the federal acknowledgment process; or (3) judicially.[173] In Alaska, both the state and federal courts have been called upon to determine whether Alaska natives have tribal status. The resulting opinions demonstrate a certain measure of disagreement over the proper legal test of tribal status and differing factual conclusions.

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[171](...continued)
TASK FORCE REPORT]; *See also People of South Naknek v. Bristol Bay Borough*, 466 F. Supp. 870, 877 (D. Alaska 1979). However, others suggest that before the *McCord* decision state and federal authorities probably never had considered the issue one way or another.

[172] *See* S. REP. NO. 1872, 85th Cong. 2nd Sess. 3348, *reprinted in* 2 U.S. Congressional and Administrative News 2163-4074.

[173] *See generally United States v. Sandoval*, 231 U.S. 28 (1913), *United States v. Holliday*, 70 U.S. (8 Wall.) 407 (1865), *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981) *cert. denied*, 454 U.S. 1143 (1982), *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.) *cert. denied*, 444 U.S. 866 (1979).

2. Tribal Advocates' View of Tribal Status

Tribal advocates argue that federal Indian law principles (including the test for sovereign tribal status) apply equally to all tribes, not just treaty tribes or reservation tribes.[174] They contend that Congress and the executive branch of the federal government have recognized Alaska Native tribal status by treating Alaska Natives similarly to other Indians.[175] They argue that this federal recognition gives tribes sovereign immunity from suit in some instances, in addition to the authority to operate tribal courts and to have the orders and decrees of those courts recognized by state and federal courts.

Tribal advocates offer anthropological and historical data to show that Alaska Native societies are similar to Indian societies in other states in that they are organized along tribal and ethnological lines.[176] In addition, they offer the observation that in rural Alaska today scores of villages inhabited predominantly by Natives are governed by tribal councils, some under constitutions adopted under the Indian Reorganization Act, and some in the form of traditional councils.[177]

3. The State of Alaska's View of Tribal Status

The State does not recognize Alaska Native tribal status. The State contends that the historical relationship between Alaska Natives and the United States government is much different from the relationship between the government and tribes in other states, and that Congress and the executive branch never recognized Alaska Natives' tribal status. Generally, the State's position is that Alaska Native villages historically did not function as self-governing entities in the way that tribes in other states did.[178]

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[174] In this context, they argue that the Treaty of Cession, signed by the United States government, provides that the laws of the United States will apply to the "civilized tribes" in Alaska in the same manner as they apply to Indians in other states.

[175] Smith and Kancewick argue that the pattern of the federal relationship with Alaska Native villages constitutes federal recognition of their tribal status as a matter of law. *See* Smith and Kancewick, *The Tribal Status of Alaska Natives*, 61 U. COLO. L. REV. 456, 455-516 (1990).

[176] *Id.* at 482-498.

[177] Some 74 of the 208 Alaska Native villages have adopted IRA constitutions.

[178] The State's current position differs from its position under the previous administration. The (continued...)

The executive branch's current stated policy on Native sovereignty is: "Alaska is one country, one people."[179] State policy makers have expressed concern over the jurisdictional maze they foresee if each of the 200 Native villages in Alaska were deemed to be a sovereign tribe. In short, the executive branch does not recognize tribal status for any Native group in Alaska, except for the Metlakatla Indians.[180]

4. Judicial Decisions on Tribal Sovereignty in Alaska.

The state court decisions tend to support the state executive branch's view of Alaska native sovereignty, while the federal court decisions tend to support tribal advocates' view.

In 1988, a majority of the Alaska Supreme Court held that the Alaska Native village of Stevens did not have sovereign tribal status, at least for purposes of sovereign immunity from suit. The court wrote that the village did not have sovereign immunity "because it, like most native groups in Alaska, is not self-governing or in any meaningful sense sovereign."[181]

The majority in *Stevens Village* acknowledged that Indian tribes outside of Alaska have long been recognized as sovereign governmental entities, but reasoned that the legal test of sovereign status in Alaska is "a showing that it had been granted to the tribe by the federal government, either by explicit recognition or implicitly through a course

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[178](...continued)
Cowper administration (1988-91) established a tribal status policy acknowledging that many, but not all, Native Alaskan groups could qualify for tribal recognition under federal law, and pledging to treat as a tribe any Alaskan Native group that could qualify, even if it had not actually gone through the formal process. The Order further acknowledged that tribes that do not occupy reservations do have some powers, although the extent of those powers is not fully defined in the law.

Governor Cowper's successor in office, Governor Walter J. Hickel, revoked Administrative Order No. 123 in August of 1991. Governor Hickel's policy "is that [t]he State of Alaska opposes expansion of tribal governmental powers and the creation of 'Indian Country' in Alaska." Admin. Order No. 125, *supra* note 129.

[179] *Id.*

[180] For a discussion of the history of Metlakatla and how it differs from Alaska Native communities, see note 125, *supra.*

[181] *Arctic Village of Stevens v. Alaska*, 757 P.2d 32, 34 (Alaska 1988). The court's conclusion was based in part on two previous decisions: *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977) and *Metlakatla Indian Community v. Egan*, 362 P.2d 901 (Alaska 1961).

of dealing."[182] The majority concluded that the federal government has not recognized most Alaska Natives' tribal status, because "[i]n a series of enactments following the Treaty of Cession and extending into the first third of this century, Congress has demonstrated its intent that Alaska Native communities not be accorded sovereign tribal status."[183]

The court confirmed its view of tribal sovereign status in *Hydaburg Cooperative Association v. Hydaburg Fisheries.*[184] There, the court stated that "Alaska Native associations generally do not have sovereign immunity," and reiterated its analysis that "judicial recognition of a native group as a sovereign is dependent on 'whether Congress, or the executive branch of the federal government, ha[s] recognized the particular group in question as a tribe."[185]

In a 1989 case, the state supreme court acknowledged that Alaska Native villages organized under section 16 of the Indian Reorganization Act are "tribes" for purposes of that Act and thus immune from tax foreclosures.[186] However, this recognition of tribal status came in an extremely narrow context and has not been expanded. In the state supreme court's most recent decision on tribal sovereign immunity from suit, the majority opinion avoided deciding whether the tribal government and Native Corporation of the village of Venetie "actually constitute sovereign bodies."[187] The court did hold that Venetie had waived any sovereign immunity it might possess by agreeing to a "Remedies on Default" clause in the disputed contract.[188] However, in a concurring opinion, one Justice concluded that the village was not entitled to sovereign tribal status

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[182] *Stevens Village*, 757 P.2d at 46 (Rabinowitz, Chief Justice, joined by Compton, Justice, dissenting).

[183] *Id.* at 41. Two of the five state supreme court justices dissented. The dissenters argued that "the basis of [sovereign] immunity is historical sovereign status rather than any federal recognition." *Id.* at 47. The dissenters concluded that the case should be remanded to afford Stevens Village the opportunity to make a factual showing as to its historical tribal status. *Id.* at 48.

[184] 826 P.2d 751 (Alaska 1992).

[185] *Id.* at 753 (*citing Stevens Village*, 757 P.2d at 34-35). However, the court indirectly acknowledged the recent federal decisions on sovereign immunity by concluding that even if the Native association "would be entitled to sovereign immunity based on its historical tribal status," it had waived its sovereign immunity in this instance. *Id.* at 754.

[186] *In re 1982, 1983 and 1984 Taxes*, 780 P.2d 363 (Alaska 1989).

[187] *Nenana Fuel v. Native Village of Venetie*, slip. op. no. 3869, at 11 (Alaska Supreme Ct., July 24, 1992).

[188] *Id.*

because Congress "expressly terminated [its] reserve" and its tribal status in 1971 with passage of the Alaska Native Claims Settlement Act.[189]

On the other side of the sovereignty issue are the most recent federal court decisions. In the context of a claim that state courts should accord full faith and credit to tribal court child custody decrees under the Indian Child Welfare Act, the Ninth Circuit Court of Appeals concluded that "to the extent that Alaska's natives formed bodies politic to govern domestic relations, to punish wrongdoers, and otherwise to provide for the general welfare," they, too, should be considered sovereign.[190] The court stated that "Indian tribes are currently recognized as sovereign because they were, in fact, sovereign before the arrival of non-natives on this continent."[191]

Other federal cases suggest that the Ninth Circuit is receptive to tribal advocates' claims of tribal status for Alaska Native villages; but the federal courts apparently will inquire into whether the villages' historical predecessors possessed recognized sovereign tribal status (whether by Congressional action, Executive Branch recognition or judicial recognition); and whether a link exists between the historic tribe and the modern-day entity.[192] At least two Ninth Circuit cases currently are on remand to the Anchorage District Court for findings on tribal status.[193] In another case,[194] which involved the proper forum for the Chilkat Indian Village's attempt to enforce a tribal ordinance against tribal and non-tribal members, the district court found after examining the historical and factual background of the Chilkats that the Chilkat Indian Village is a sovereign tribe.[195]

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[189] *Id.* at 23 (Moore, Justice, concurring).

[190] *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 558 (9th Cir. 1991) *superseding* 918 F.2d 797 (9th Cir. 1990).

[191] *Id.* at 556.

[192] L. Miller, A Brief Review of Litigation and Legislation Relevant to Selected Village Tribal Sovereignty Issues (June 3, 1992) (materials distributed at the Alaska Judges' Conference, June 2-5, 1992 at Anchorage, Alaska).

[193] The cases are: *Native Village of Tyonek v. Puckett*, 957 F.2d 631 (9th Cir. 1992) *superseding* 953 F.2d 1179 (9th Cir. 1992), and *Alaska v. Native Village of Venetie*, 856 F.2d 1384 (9th Cir. 1988).

[194] *Chilkat Indian Village v. Johnson*, No. J84-024, slip op. (D. Alaska Oct. 9, 1990).

[195] *Id.* at 6-17.

5. Conclusion

Neither the State nor the federal district and circuit courts are legally bound to follow or even acknowledge the other's decisions on this issue, although both would be bound by the U.S. Supreme Court's decision. However, a definitive ruling from the U.S. Supreme Court is not likely, at least in the near future.

State officials in Alaska give the state supreme court's view controlling effect when making policy decisions affecting villages. Some state agencies that currently have informal dealings with tribal courts feel that they cannot formalize those relationships because state law prohibits formal recognition of those tribal bodies under state law.[196]

To the extent that tribal courts in Alaska lack formal state recognition of their authority and jurisdiction, they are limited in their ability to deal formally with state agencies and state courts as sovereign entities. However, given the federal line of authority on Alaska Natives' tribal status, and the assertion by the Sitka and Minto tribal governments of jurisdiction based on sovereign tribal status, the remainder of this chapter discusses tribal court jurisdiction as it has been interpreted in other states and as it might be applied in Alaska. The following discussion is not intended to express any view on the proper resolution of the sovereignty issue; rather, it is included in order to give the reader a more complete understanding of the legal context in which tribal courts operate.

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[196] There have been only a few exceptions to this general inability of state and tribal representatives to cooperate formally. One exception occurred in November of 1990, when the Cowper administration and tribal representatives concluded six years of negotiations by finalizing an Indian Child Welfare Act State-Tribal Agreement. The "government to government" Agreement establishes a framework of mutual powers and responsibilities in Indian Child Welfare Act cases. Although the Agreement generally embodies state policy and does not address the issue of tribal court authority, it nevertheless contains unprecedented concessions by the State for tribal participation in child welfare cases. A large number of tribes have declined to sign the agreement, generally because the Agreement does not address what they consider to be important aspects of ICWA cases, such as any discussion of a role for tribal courts.

Another example of state-tribal cooperation is the State Department of Health and Social Service's promulgation in 1990 of a regulation authorizing and directing the state registrar to issue a new birth certificate upon receiving proof that an Indian child has been adopted under tribal custom. *See* 7 AAC 5.700(b) (1992). Before the regulation, the State refused to issue new birth certificates for traditional adoptions. This policy caused hardship to parents who had adopted a child in the traditional manner, because without a state birth certificate they were denied benefits such as Aid to Families with Dependent Children and the Alaska Permanent Fund Dividend.

D. Principles of Tribal Court Jurisdiction

1. Background

The Indian law doctrine of retained sovereignty says that tribes retain elements of "quasi-sovereign" authority; these sovereign powers are limited only by specific restrictions in treaties, by federal statute, or because they are "inconsistent with the [tribes'] status."[197] One generally accepted element of this quasi-sovereign authority is that tribes retain authority to adjudicate civil matters involving Indians within tribal territory.[198] In criminal matters, the U.S. Supreme Court held that tribes generally retained their jurisdiction to try an Indian for a crime committed against another Indian within Indian country;[199] however, in 1885 Congress assumed that jurisdiction.[200] Authority not retained by the tribes is assumed by the federal government, except where the federal government has delegated its authority to the states, for example by statute.

One statute affecting this jurisdictional balance in Alaska is Public Law 280. In 1958, Public Law 85-615 amended PL 280 and extended Alaska's state court civil jurisdiction to private civil causes of action involving Indians in Indian country.[201] It also

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[197] *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210, 98 S. Ct. 1011, 55 L.Ed.2d 209 (1978).

[198] *See, e.g., Fisher v. District Court*, 424 U.S. 382, 96 S. Ct. 943, 47 L.Ed.2d 106 (1976); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670, 56 L.Ed.2d 106 (1978); *Chilkat Indian Village v. Johnson*, 870 F.2d 1469 (9th Cir. 1989). The extent of tribes' authority over civil actions involving non-tribal members within tribal territory is less clear; resolution of conflicts between the jurisdiction of state and tribal courts seems to depend on "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220, 79 S. Ct. 269, 271, 3 L.Ed.2d 251 (1959); *Fisher v. District Court*, 424 U.S. 382, 386, 96 S. Ct. 943, 47 L.Ed.2d 106 (1976). Discussion of tribal court jurisdiction over non-members is not central to this report, however, because the Sitka Tribal Court does not as a general rule assert jurisdiction over non-members, and the Minto court only twice has asserted jurisdiction over non-members (in both cases the non-members did not challenge the court's jurisdiction).

[199] *Ex Parte Crow Dog*, 109 U.S. 556, 572, 3 S. Ct. 396, 406, 27 L.Ed. 1030 (1883).

[200] Congress assumed criminal jurisdiction over offenses defined in the Indian Major Crimes Act, codified at 18 U.S.C. §§ 1153 and 3242 (1988).

[201] The PL 280 grant of civil jurisdiction is phrased as follows:

> Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed. . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

(continued...)

extended Alaska's state court criminal jurisdiction over most crimes throughout the Indian country in Alaska.[202] Other parts of the statute expressly preserve the legislative authority of tribes where not inconsistent with applicable state civil law,[203] and specifically disclaim any grant of power to the states to encumber or tax Indians and Indian properties held in federal trust or restricted against alienation.[204] The 1958 statute does not on its face specify whether the State's civil and criminal jurisdiction is to be exclusive or concurrent with tribal court jurisdiction.

The following discussion of PL 280 is divided into a general section explaining the state-tribal debate over the extent of the jurisdiction given to the State, and separate sections on criminal and civil jurisdiction. The discussion of civil jurisdiction is further broken down into sections on cases involving the Indian Child Welfare Act, other general civil matters, and the Indian Civil Rights Act. The criminal jurisdiction analysis includes sections on the Indian Major Crimes Act and enforcement of tribal ordinances against tribal members.

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[201](...continued)

> Alaska. . . All Indian country within the State.

28 U.S.C. § 1360(a) (1988).

[202] The criminal jurisdictional grant of Public Law 280 is set forth and discussed in detail in Section 4, *infra*.

[203] Section 1360(c) provides:

> Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

28 U.S.C. § 1360(c) (1988). One commentator has said that interpretation of this provision is likely to depend on the meanings given "inconsistent" and "applicable." D. CASE, *supra* note 78, at 454.

[204] Section 1360(b) provides in part:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; . . . .

28 U.S.C. § 1360(b) (1988).

2. The Debate about Public Law 280's Effect on Tribal Court Jurisdiction

In Alaska today, state and tribal advocates debate whether Congress intended PL 280 to divest tribes of their retained criminal and civil jurisdiction, or whether it intended to give tribes concurrent jurisdiction with the states. Tribal advocates argue that PL 280 did not preempt tribal court jurisdiction and that tribal courts may continue to exercise their jurisdiction concurrently with the State. However, the State argues that the jurisdiction conferred by PL 280 is exclusive.[205]

3. Civil Jurisdiction

Jurisdiction over child custody matters. One type of civil matter important to tribes is child custody proceedings involving tribal children. Child custody proceedings represent about 25% of the Minto Tribal Court's caseload and virtually 100% of the Sitka court's caseload.[206] The Sitka Tribal Court's child custody proceedings, which usually originate from the tribal social service agency, consist mainly of guardianships. The Minto Tribal Court's child custody proceedings consist of traditional adoptions and, occasionally, mediated custody arrangements.

In 1978, Congress enacted the Indian Child Welfare Act,[207] a statute regulating tribal court jurisdiction of certain custody proceedings involving Indian children. In ICWA, Congress declared that part of the trust responsibility of the United States is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families.[208]

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[205] Apparently, Alaska's position on this issue differs from positions taken by other mandatory PL 280 states. The Ninth Circuit Court of Appeals has noted that "to the extent that they have addressed the issue" other mandatory PL 280 states have concluded that tribal courts have concurrent jurisdiction. *Venetie I.R.A. Council v. Alaska*, 944 F.2d at 561. The court cites to two State's Attorney General opinions, the first from Wisconsin in 1981 and the second from Nebraska in 1985. *Id.*

[206] Minto has not signed the Indian Child Welfare Act State-Tribal Agreement, discussed *supra* at note 196. Sitka has signed the Agreement.

[207] 25 U.S.C. §§ 1901-1963 (1988).

[208] *Id.* §1902.

ICWA defines state and tribal jurisdiction over child custody proceedings,[209] gives tribes a right to intervene in certain state court child custody proceedings, gives tribes a right to notice of involuntary proceedings in state court, provides that full faith and credit be accorded to the laws and court orders of Indian tribes in these matters, and establishes a preference that Indian children be placed with extended family or in other Indian homes if they must be removed from their homes.[210] ICWA expressly defines "Indian" to include any person who is "an Alaska Native and a member of a Regional Corporation" as defined in the Alaska Native Claims Settlement Act.[211]

The debate over ICWA jurisdiction. The debate over ICWA jurisdiction in Alaska centers around interpretation of PL 280 and Section 1918(a) of ICWA, referred to as the "reassumption of jurisdiction" provision.[212] The State contends that PL 280 divested tribes of all child custody jurisdiction, arguing that the only way tribes in Alaska can reassume child custody jurisdiction is through the mechanism provided in section 1918(a).[213] The tribes contend that PL 280 divested tribes only of their traditional *exclusive* jurisdiction over child custody matters, leaving them to share concurrent jurisdiction with the State.

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[209] Child custody proceedings are defined in Section 1903(1) of the Act. Generally, child custody proceedings under ICWA do not include voluntary placements, such as voluntary, private adoptions or state foster care placements where the parent can regain custody at any time. *See* 25 U.S.C. § 1903(1)(i)-(iv) (1988); *see also D.E.D. v. State*, 704 P.2d 774, 781 (Alaska 1985). Also, child custody proceedings under ICWA do not include juvenile delinquent cases or divorces. 25 U.S.C. § 1901(1) (1988).

[210] COHEN, *supra* note 148, at 196; *see generally Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

[211] 25 U.S.C. § 1903(3) (1988).

[212] Section 1918(a) provides in relevant part:

> Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of [PL 280] . . . or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

Id. § 1918(a) (1988).

[213] Under the State's interpretation, no Alaska tribes currently are eligible for jurisdiction, because no tribal organizations in Alaska have petitioned for or received the Secretary of the Interior's approval under Section 1918(a). However, the State apparently does not contest the tribal notification and intervention provisions of ICWA; for example, the State notifies the Sitka court and the Minto Tribal Council of involuntary child custody proceedings.

Court decisions on ICWA jurisdiction. An Alaska Supreme Court opinion supports the view that Alaska's Indian child custody jurisdiction is exclusive; however, federal decisions suggest that tribal court jurisdiction is concurrent with Alaska state court jurisdiction. In the federal case,[214] two Alaska Native villages sought to enjoin the State of Alaska from refusing to recognize tribal court adoptions.[215] The Ninth Circuit Court of Appeals held in favor of the villages, rejecting the State's argument that Congressional intent in enacting PL 280 was to give the states exclusive child-custody jurisdiction and to divest the villages of any inherent authority or sovereignty to make child-custody determinations.[216] The court concluded that PL 280 does not prevent any Alaskan Native village from exercising concurrent jurisdiction with the State under ICWA if it can prove its status as a federally recognized tribe.[217]

The Ninth Circuit Court of Appeals' holding conflicts directly with the Alaska Supreme Court's ruling in *Native Village of Nenana v. Dept. of Health.*[218] In that case, the Alaska Supreme Court concluded that Nenana, which had neither petitioned for nor received the Secretary of the Interior's permission to assume jurisdiction over child custody proceedings, lacked jurisdiction to decide the case of an Indian child who had been found to be a child in need of aid.[219] The state court did not discuss the sovereignty issue; it based its decision on the conclusion that Congress intended PL 280 to divest tribes of all child custody jurisdiction.[220]

The court accepted the State's argument that Congress would not have included a provision for reassuming jurisdiction unless it intended to divest the tribes of

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[214] *Venetie v. State of Alaska,* 944 F.2d 548 (9th Cir. 1991).

[215] *Id.* at 551. Both parties agreed that the matter in controversy arose under the federal Indian Child Welfare Act. *Id.*

[216] *Id.* at 562. The court's analysis also implicitly rejected the State's position that petitioning for and receiving approval from the Secretary of the Interior is the *only* way for tribes to exercise ICWA jurisdiction.

[217] *Id.* at 811. The Native villages involved in the lawsuit (Venetie and Fort Yukon) now will be required to show, first, that the predecessors to the villages exercised sovereignty, and second, that they "are the modern-day successors to an historical sovereign band of native Americans." *Id.* The appellate court remanded the case back to the trial court to make these factual determinations. *Id.* The trial is scheduled for the fall of 1992.

[218] 722 P.2d 219 (Alaska 1986).

[219] *Id.* at 220.

[220] *Id.* at 221.

jurisdiction in the first place.[221] Also discernable in the state court opinion, however, is a concern that tribes not be permitted to exercise jurisdiction in child custody matters "until such time as there is satisfactory proof that a particular tribe has the ability properly to adjudicate such cases."[222]

Jurisdiction Over Other Civil Matters.

Civil Regulatory Authority over Tribal Members in Tribal Territory. Another important area of concern for tribes is their authority to enforce civil regulatory laws against their members (and other Indians) in their territory. This is particularly important in Minto, where most of the court's caseload consists of civil regulatory matters. The U.S. Supreme Court has held that PL 280's grant of civil jurisdiction did not include a grant of the power to enforce state civil regulatory laws against Indians living in Indian country.[223]

In *Bryan v. Itasca County, Minnesota,* the United States Supreme Court held that Minnesota could not impose a tax on a reservation Indian.[224] The Court reasoned that if Congress had intended in enacting PL 280 to confer upon the states general civil regulatory powers over reservation Indians, it would have said so expressly.[225] One implication of *Bryan* is that if PL 280 does not confer upon the states jurisdiction to enforce civil regulatory laws against Indians in Indian country, then the tribes retain that exclusive jurisdiction.

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[221] *Id.* Note that the Ninth Circuit explicitly rejected this reasoning in *Venetie,* concluding that the Section 1918(a) reassumption provision applies to the tribes' right to reassume *exclusive or referral* jurisdiction over child custody matters. *Venetie,* 944 F.2d at 561. Also, the state court did not apply canons of construction of Indian law (e.g., ambiguities must be resolved in favor of the tribe, tribal rights can not be extinguished by implication) to its interpretation of this provision, while the federal court did. *See id.*

[222] *Nenana,* 722 P.2d at 222. The state court also discussed one issue that the federal court did not address: the residence of the Indian child. The state court reasoned that even before ICWA was enacted, the Tribe may not have had jurisdiction because the Indian child in question was domiciled off the reservation. *Id.* at 221. However, the residence issue may not be important if tribes can have limited personal jurisdiction over members outside their Indian country, as Cohen suggests. COHEN, *supra* note 148 at 347. Cohen adds that in practice most tribes exercise such authority only over uniquely internal matters such as tribal membership, elections, referenda, etc. *Id.* at 347-48.

[223] *Bryan v. Itasca County, Minnesota,* 426 U.S. 373, 96 S. Ct. 2102, 48 L.Ed.2d 710 (1976).

[224] *Id.* at 379; *see also* 18 U.S.C. § 1162(b) (1988).

[225] *Bryan,* 426 U.S. at 390.

The Court addressed the issue of what laws are civil regulatory laws in *California v. Cabazon Band of Mission Indians.*[226] In that case, the court concluded that California ordinances regulating tribal bingo operations were civil/regulatory in nature and thus PL 280 did not authorize the State to enforce them on the reservation.[227] Since *Cabazon,* the courts have decided numerous cases involving the issue of whether a particular law is civil/regulatory or criminal in nature. These decisions are difficult to summarize, because they tend to be fact-specific.

Authority over private civil litigation. PL 280 grants states jurisdiction over private civil litigation involving reservation Indians in state court. However, it is debated in Alaska whether tribal courts have concurrent jurisdiction over such actions. At least two other PL 280 states formally take the position that PL 280 permits tribal civil jurisdiction to be concurrent with state court jurisdiction.[228] Cohen's Indian law handbook also states that "the jurisdiction of the tribes remains concurrent with the states in Indian country subject to Public Law 280 to the same extent that it was concurrent with the federal government prior to the Act."[229] This argument assumes that the tribes retained concurrent jurisdiction over private civil litigation as against the federal government as a power of inherent sovereignty that Congress never took away. The opposing argument is that PL 280 was passed during the termination era and Congress' intent was to divest tribes of their sovereign authority to exercise jurisdiction over private civil litigation involving Indians within Indian Country.

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[226] 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987).

[227] *Id.* at 208. In a recent case, the Ninth Circuit Court of Appeals held that the traffic regulations on the Colville Reservation were civil regulatory laws which state law enforcement officers had no jurisdiction to enforce. *Washington v. Confederated Tribes of the Colville Reservation,* 938 F.2d 146 (1991) *cert. denied,* U.S.L.W. 3713-17 (U.S. April 21, 1992). The Colville Reservation is located in Washington, a state which in 1963 assumed civil and criminal jurisdiction for acts committed by Indians on Indian lands in eight specific subject areas, including the operation of motor vehicles on public roads. *Id.* at 147. A Washington statute states that a traffic infraction may not be classified as a criminal offense. *Id.* at 148.

[228] *See* Opinion No. 48, Opinion Letter from Robert M. Spire, Nebraska Attorney General (Charles Lowe, Ass't Att'y General) to State Senator James E. Goll (March 28, 1985), and 70 Op.Att'y Gen.Wis. 237, 243 (1981).

[229] COHEN, *supra* note 148, at 367. The same view was taken in 1976 by the Acting Associate Solicitor of Indian Affairs (Lare Aschenbrenner):

> Since the only jurisdiction which the United States had is concurrent with the Tribes, that part of its concurrent jurisdiction is all that it could transfer to the states. It could not transfer more than what it had; that is it could not transfer tribal jurisdiction to the States.

Memorandum of Acting Associate Solicitor of Indian Affairs 3, (July 13, 1976).

The Indian Civil Rights Act. The Indian Civil Rights Act (ICRA)[230] was passed by Congress in 1968. The ICRA infringes on tribal powers of self-government by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment.[231] Its purpose was to prevent perceived injustices perpetrated by tribal governments while at the same time minimizing Congressional interference with tribal autonomy and self-governance.[232]

Tribal courts have jurisdiction over causes of action arising under the ICRA, with the exception of writs of habeas corpus.[233] Interpreting the provision, the Supreme Court held in 1978 that the ICRA does not authorize a private cause of action in federal court for declaratory and injunctive relief against a tribal government.[234] The Court reasoned that suits against tribes under the ICRA are barred by tribal sovereign immunity from suit, and that ICRA does not contain the unequivocal waiver of immunity that would be necessary to allow such a suit.[235] Thus, tribal members wishing to press an ICRA claim must look to the tribal courts.

4. Tribal Court Criminal Jurisdiction

Background. Tribal criminal jurisdiction has been limited over the years by various Congressional enactments. In the late 1800s and early 1900s, Congress was concerned with "providing effective protection for Indians" from the criminal acts of non-Indians.[236] In 1790, Congress assumed federal jurisdiction over offenses by non-Indians against

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[230] 25 U.S.C. § 1301-1341 (1988). The ICRA is contained within Pub. L. No. 90-284, the 1968 Civil Rights Act.

[231] In addition, it limits the punishment that can be imposed by Indian tribal courts to a term of one year's imprisonment or a fine of $5,000. 25 U.S.C. § 1302(7) (1988).

[232] *Santa Clara Pueblo*, 436 U.S. 49.

[233] Federal courts have jurisdiction over writs of habeas corpus. 25 U.S.C. § 1303 (1988).

[234] *Santa Clara Pueblo*, 436 U.S. at 52.

[235] *Id.* at 59.

[236] *Oliphant*, 435 U.S. at 201.

Indians to the same extent as if the offense had been committed against a non-Indian.[237]

In 1885, Congress extended federal criminal jurisdiction over serious offenses committed by or against Indians in Indian country.[238] More recently, the Supreme Court has decided that tribes have no criminal jurisdiction over non-Indians in Indian country.[239]

PL 280 worked yet another change on the tribal-federal-state balance of criminal jurisdiction. It extended to the mandatory PL 280 states a measure of criminal jurisdiction over crimes throughout the Indian country within the states' borders.[240] The states soon found that their new law enforcement responsibilities involved substantial expense; however, PL 280 did not permit states to tax tribal properties to help pay the cost.

In Alaska, the Act caused hardship on the Annette Island Indian Reservation (Metlakatla Indian Community). The Metlakatlans reportedly were informed after passage of the Act that they could no longer exercise the criminal jurisdiction over minor

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[237] *Id., citing* 1 Stat. 137 (the Trade and Intercourse Act of 1790), and 3 Stat. 383, now codified, as amended, 18 U.S.C. § 1152 (1988).

[238] The Indian Major Crimes Act is codified at 18 U.S.C. §§ 1153 and 3242. The Act was passed in reaction to the Supreme Court's decision in *Ex Parte Crow Dog*, 109 U.S. 556, 572, 3 S. Ct. 396, 406, 27 L.Ed. 1030 (1883), which held that the tribes generally retained their jurisdiction to try an Indian for a crime committed against another Indian within Indian country.

[239] *Oliphant*, 435 U.S. at 195.

[240] The criminal jurisdictional grant of Public Law 280 provides that:

> Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the state to the same extent that such State has jurisdiction over offenses committed elsewhere within the State and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State. . .
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> Alaska. . . . . All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.

18 U.S.C. § 1162(a) (1988). Note the absence of a requirement that Native customs and ordinances be applied in the adjudication of Native offenses.

offenses that they had been exercising.[241] However, because there were no State Troopers or magistrates in Metlakatla, the result was inadequate law enforcement on the reservation.[242] Even today, it is generally acknowledged that budget constraints prevent the State of Alaska from providing satisfactory law enforcement services in the vast and remote rural areas of the State.[243] As with PL 280's grant of civil jurisdiction, there is a debate as to whether Congress intended the tribes and the State to share concurrent criminal jurisdiction.

Arguments that Alaska's criminal PL 280 jurisdiction is concurrent. Those who believe state and tribal court criminal jurisdiction in PL 280 states to be concurrent argue that the intent of Congress in enacting PL 280 was to substitute state for federal jurisdiction.[244] Thus, prior to PL 280, the federal government and Indian tribes shared criminal jurisdiction (unless jurisdiction had been otherwise transferred); when PL 280 was enacted, jurisdiction became shared concurrently between the states and the tribes.

Another argument in favor of concurrent jurisdiction is if Congress intended in enacting PL 280 to improve law enforcement in Indian country, establishing concurrent tribal-state jurisdiction would be more likely to accomplish this goal than divesting the tribes of their traditional jurisdiction over minor criminal offenses. Further, tribal advocates contend that nothing in the wording of PL 280 or its legislative history expressly withdraws or precludes concurrent tribal authority.

Arguments that Alaska's criminal PL 280 jurisdiction is exclusive. Those who believe Alaska's criminal jurisdiction to be exclusive argue that a 1970 amendment to PL 280 supports the inference that Congress later assumed the original transfer of jurisdiction to Alaska had been exclusive of all other jurisdiction, including tribal. The amendment

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[241] D. CASE, *supra* note 78, at 456.

[242] By 1969, Alaska's Senator Mike Gravel and Representative Howard Pollock had introduced federal legislation giving Metlakatla concurrent criminal jurisdiction with the State, allowing minor crimes to be handled by the tribal court. This amendment of PL 280's jurisdictional grant became law in 1970. Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545, *as amended by* Act of Nov. 25, 1970, Pub. L. No. 91-523, 84 Stat. 1358 (codified as amended at 18 U.S.C. § 1162(a) (1988)); 28 U.S.C. § 1360 (1988).

[243] *See, e.g.*, Admin. Order No. 125, *supra* note 129 ("the laws and procedures for local governments may not adequately meet the needs of Alaska's rural residents. . . . [the State pledges to] improv[e] local government institutions to meet the needs of rural Alaska communities, including those inhabited predominately by Alaska Natives.")

[244] *See* COHEN, *supra* note 148, at 348.

added language expressly enabling the Metlakatla Indian Community to exercise concurrent criminal jurisdiction over the Annette Islands Reserve in Alaska. It also added a reference to mandatory PL 280 states as "areas over which the several States have exclusive jurisdiction."[245] Those who believe Alaska's PL 280 jurisdiction to be exclusive also point to other legislative history that they contend supports their position.[246]

Judicial decisions on criminal jurisdiction. The Eighth Circuit Court of Appeals recently held that "Public Law 280 did not itself divest Indian tribes of their sovereign power to punish their own members for violations of tribal law. Nothing in the wording of Public Law 280 or its legislative history precludes concurrent tribal authority."[247] In *Walker,* the court concluded that the Omaha Tribe could prosecute a member of the Omaha Tribe in the Omaha Tribal Court for violation of the Omaha Tribal Code.[248] However, the PL 280 issue was a secondary issue in the case,[249] and the court disposed of it in one paragraph, with no discussion at all of the legislative history. Thus it is not clear whether this opinion would be particularly persuasive in other circuits.

The Alaska state courts have not addressed the issue of whether tribal and state courts concurrently share criminal jurisdiction. However, a court of appeals opinion suggests that the state courts may not favor tribal advocates' position. In *Harrison v. State,*[250] Alaska's intermediate appellate court rejected a defense based on an assertion

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[245] COHEN, *supra* note 148, at 345. However, Cohen's handbook concludes that the legislative history surrounding the 1970 amendment is ambiguous. The Handbook contends there is "some indication that the latter phrase was to mean only exclusive of federal jurisdiction and was not intended to affect tribal jurisdiction." *Id.* at 345. In addition, it suggests that the Metlakatla language was included to respond to confusion created at least in part by the decision in *United States v. Booth,* 161 F. Supp. 269, 17 Alaska 561 (1958). *Id.* at n. 138 & 139. (In *Booth,* the court held that the Metlakatla Reservation was not Indian country.) Others respond that the assumptions or beliefs of the amending Congress in 1970 should not be dispositive of the beliefs or intent of the enacting Congress. *See, e.g., Consumer Product Safety Comm'n v. GTE,* 447 U.S. 102, 119, 1005 S. Ct. 2051, 64 L. Ed. 2d. 766 (1980).

[246] *See, e.g.,* GOVERNOR'S TASK FORCE REPORT, *supra* note 171, at 141-143.

[247] *Walker v. Rushing,* 898 F.2d 672, 675 (8th Cir. 1990).

[248] The defendant was driving on a public road on the Omaha Indian Reservation when she struck and killed two persons, also members of the Tribe. *Id.* at 672.

[249] The main issue in *Walker* was whether the State of Nebraska had retroceded jurisdiction over the crime charged (vehicular homicide) back to the federal government. The court held that Nebraska had withheld vehicular homicide from its offer of retrocession, so that the Major Crimes Act did not apply. *Id.* at 674.

[250] 784 P.2d 681 (Alaska App. 1989).

that a tribal court had *exclusive* jurisdiction over the offense. The defendant, an Athabascan Indian, was charged with reckless driving near the town of Sutton.[251] He moved to dismiss the charge on the grounds that the State lacked jurisdiction to prosecute him because the Chickaloon Village Traditional Court had exclusive jurisdiction.[252] Interpreting PL 280, the court held that "Indian tribal courts do not have exclusive jurisdiction over criminal offenses committed by Alaska Natives in Alaska even if these offenses occur in 'Indian Country.'"[253] However, the court declined to consider whether Alaska's jurisdiction might be concurrent with that of the tribal court, stating that the issue was not adequately briefed.[254]

In discussing the criminal jurisdiction of PL 280 states over Indian country, courts have sometimes been faced with the question of whether a state law is criminal or civil. This is a complex and often fact-driven determination. Generally speaking, the relevant inquiry is whether the law seeks to prohibit conduct, or whether it seeks to regulate the conduct. The Supreme Court has stated that the shorthand test is whether the conduct at issue violates the State's public policy.[255]

Criminal jurisdiction under the Indian Major Crimes Act. In 1885 Congress restricted tribal criminal jurisdiction by enacting the Indian Major Crimes Act,[256] a law which extended federal jurisdiction to certain types of serious criminal conduct[257] by Indians against other Indians within Indian country. The Supreme Court has acknowledged the issue of whether the Act divested tribes of jurisdiction over major crimes but has not decided it. The Court has written that the issue of whether the federal government has "exclusive jurisdiction over major crimes was mooted for all practical purposes by the

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[251] *Id.* at 682.

[252] *Id.*

[253] *Id.* at 683.

[254] *Id.*

[255] *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083, 1088, 94 L.Ed.2d 244 (1987).

[256] 18 U.S.C. § 1153(a) (1988).

[257] Crimes covered by the Indian Major Crimes Act include: murder, manslaughter, kidnapping, maiming, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, and robbery. *See id.*

passage of the Indian Civil Rights Act of 1968 which limits the punishment that can be imposed by Indian tribal courts."[258]

In any event, PL 280 altered the Indian Major Crimes Act's jurisdictional grant, expressly repealing the Act insofar as it applied to those areas covered by Public Law 280. Thus, the federal government gave to PL 280 states the power to prosecute any of the crimes covered by the Major Crimes Act.

Jurisdiction to enforce village ordinances. Under federal case law, tribal courts in PL 280 states generally have authority to enforce tribal ordinances against tribal members. The Ninth Circuit Court of Appeals has held that the federal courts have no jurisdiction over such cases because the Tribe's attempt to enforce one of its own ordinances against its own members (or others whose Indian status may subject them to the internal jurisdiction of the Tribe) does not present a federal question.[259] Characterizing attempts to enforce tribal ordinances against tribal members as "the staple of the tribal courts," another court refused to hear a lawsuit brought by the Alaska Native Village of Chilkat against a member.[260]

Federal subject matter jurisdiction arises where the tribe's claim of the sovereign power to enact a valid ordinance, such as one applicable to non-Indians regulating tribal artifacts on its fee lands, is based on a disputed federal claim.[261] Nevertheless, such claims might be subject to requirements that tribal court remedies be exhausted before the federal courts would hear the dispute.[262]

Another area of concern for tribes is whether tribal courts have authority to enforce tribal ordinances against non-member Indians. Although the Supreme Court recently held that tribal courts did not have criminal jurisdiction over non-member

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[258] *Oliphant*, 435 U.S. at 203 n. 14. ICRA was amended in 1986 by section 4217 of Pub. L. No. 99-570 to increase the penalties that tribal courts can impose. Previously, the maximum sanction was imprisonment for up to six months and a fine no greater than $500.

[259] *Boe v. Fort Belknap Indian Community*, 642 F.2d 276, 279 (9th Cir. 1981).

[260] *Chilkat*, 870 F.2d at 1475-76. As to the village's effort to enforce its ordinance against a non-member, the court concluded that it did have jurisdiction because the claim involved federal law. *Id.* at 1475.

[261] *Id.*

[262] *See id.* at n.11.

Indians, Congress legislatively reversed that opinion in 1991,[263] restoring tribal jurisdiction over non-member Indians.

E. The Debate Over Indian Country in Alaska

Under federal law, Indian tribal territory has always held a separate status.[264] Tribes exercise substantial governing powers within the boundaries of their territory, often referred to as "Indian country."[265] Thus, determining what lands constitute Indian country is the crux of tribal court jurisdiction. Whether Indian country exists for purposes of defining tribal adjudicatory jurisdiction (or for any other purpose) in Alaska is hotly debated by state and tribal advocates.

The State contends that there is no Indian country subject to the normal jurisdictional rules developed in other states. Since there is no Indian country, the State argues it exercises inherent criminal and civil authority - not jurisdiction conferred to it by PL 280 - throughout the State.

Tribal advocates argue that Indian country exists in Alaska. They contend that its boundaries can be delineated under the factual and legal test for a "dependent Indian community" developed in federal caselaw and statutes involving tribes in other states.

The most recent federal cases support the view that Indian country can exist in Alaska.[266] In *Alaska v. Native Village of Venetie*[267] the Ninth Circuit Court of Appeals summarized cases from other circuits and held that the existence of Indian country in

[263] *See Duro v. Reina*, 495 U.S. 676, 110 S. Ct. 2053, 109 L.Ed.2d 693 (1990), *reversed by* 25 U.S.C. § 1301 (1991).

[264] COHEN, *supra* note 148, at 27.

[265] *Id.* The concept of Indian country is defined by federal statute to include all lands within the limits of any Indian reservation (18 U.S.C. § 1151(a) (1988)), "dependent Indian communities" (*id.* § 1151(b)), and "Indian allotments" (*id.* § 1151 (c)). *See also* 18 U.S.C. § 1151 (1988).

[266] Earlier federal cases held that Alaska was not Indian country. *See U.S. v. Seveloff*, 27 F. Cas. 1021, 1022 (D. Or. 1872) (No. 16, 252); *Waters v. Campbell*, 29 F. Cas. 411, 411-12 (C.C.D. Or. 1876) (No. 17, 264); *Kie v. United States*, 27 F. 351, 352-55 (C.C.D. Or. 1886); *In re: Sah Quah*, 31 F. 327, 329 (D. Alaska 1886).

[267] 856 F.2d 1384 (9th Cir. 1988).

Alaska is to be determined by application of those rules.[268] The test has been applied in one case, resulting in a finding of Indian country,[269] and its application is pending or possible in other federal district court cases.[270]

On the other hand, the Alaska Supreme Court has suggested that no Indian country exists in Alaska, except in Metlakatla.[271] The court based its decision on the conclusions of the 1986 Report of the Governor's Task Force on Federal-State-Tribal Relations, the federal cases cited *supra* at note 266, the language of the 1884 Alaska Organic Act, and other federal statutes.[272]

F. Conclusion

The legal authority of tribal courts in Alaska to hear and decide disputes among members of the community is not formally recognized by the State of Alaska or its court system because the State does not accede to Alaska Native tribes' claims of sovereignty or the existence of Indian country in Alaska. However, the fact remains that tribal courts are functioning in Alaska on a regular basis. In addition, the State (both through its judges and magistrates, and through executive branch agencies including the Department of Public Safety and the Division of Family and Youth Services) routinely interacts at an informal level with the tribal courts and councils.

At the moment, because of the federal-state split of authority on the sovereignty issue and the uncertainty of the status of Indian country, a legal approach that supports the State's informal interaction with tribal courts and councils is to categorize all of the various local means of adjudicating or conciliating disputes as alternative dispute resolution processes. The advantages of this approach are that substantial interaction among all agencies and groups involved may occur without reference to the controversial issue of sovereignty. The disadvantage to this approach from tribal advocates' view, is that state agencies may interact with the tribal courts without

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[268] *Id.* at 1390-91.

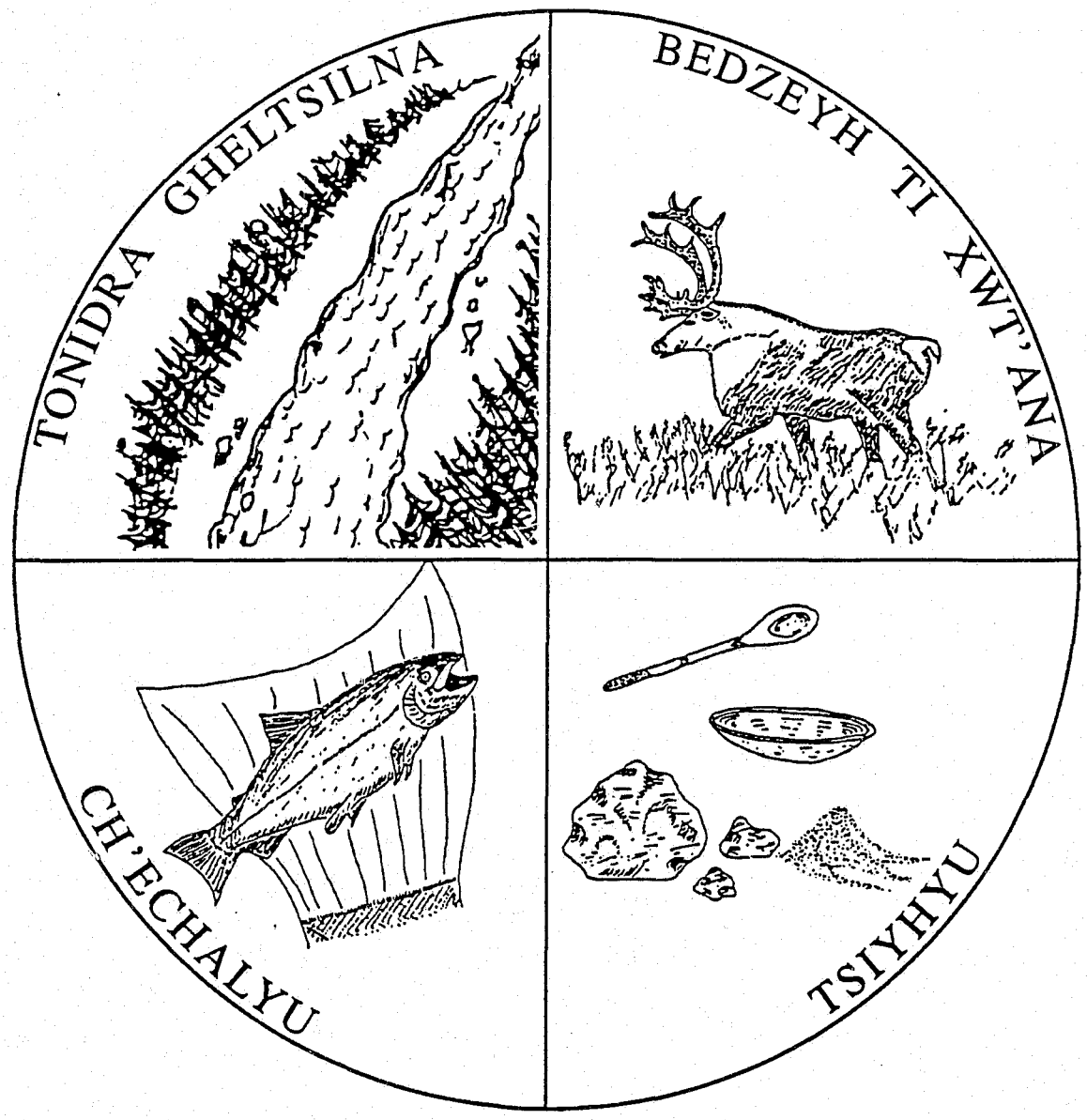
[269] The test was applied in *Chilkat Indian Village v. Johnson*, No. J84-024.

[270] L. Miller, *supra* note 192, at 8. Those cases include: *Alaska v. Native Village of Venetie*, 856 F.2d at 1390-91, *Alyeska Pipeline Service Co. v. Kluti Kaah Native Village of Copper Center*, No. A87-201, proposed slip op. (D. Alaska Jan. 17, 1992), and *Native Village of Tyonek v. Puckett*, No. 87-3588 (9th Cir. Jan. 13, 1992).

[271] *Native Village of Stevens*, 757 P.2d at 37-38.

[272] *Id.*

recognizing tribal sovereign status. In addition, residents of Sitka and Minto are familiar with their tribal courts and generally believe that the advantages of resolving disputes voluntarily in these courts outweigh any disadvantages.



In the old days . . . everybody belonged to a tribe. In Minto, there are four: Caribou (Bedzeyh Ti Xwt'ana), Fishtail (Ch'echalyu), Paint (Tsiyhyu), and Middle (Tonidra Gheltsilna)."
—Chief Peter John

Chapter IV: Three Rural Alaskan Alternative Dispute Resolution Organizations

A. The Minto Tribal Court

1. History of the Minto Tribal Court

Beginnings. The Village of Minto established a government under the Indian Reorganization Act in 1939. Around 1940, the Bureau of Indian Affairs (BIA) assisted villagers in forming a court that functioned as a forum for solving local problems.[273]

One of the elders described the court in its early days: "In Old Minto the court took care of village problems like loose dogs, kids in trouble, people fighting under the effect of alcohol. We had a voluntary cop backed up by the Council. He was an old man who walked around the village every night at 9 p.m. to make sure kids were in bed." Asked how the old court worked, another elder remembered:

> I'll tell you. I caught a mink in a trap. A guy took the mink and trap and all. He took it to the Council and said, 'Someone's trapping on my trap line.' The Council found out whose trap it was. Me and the fellow had to go to court

[273] One village elder reported that "the federal government helped set up the court." Federal employees of the BIA often assisted villages in the early days of IRA organization. The University of Alaska Fairbanks Archives may contain early court records. However, research in those records is beyond the scope of this study.

> together. They found out it was my mink. It was no big argument; we just wanted to find out the truth. That's what it's all about, isn't it?

Inactive Period. One elder estimates that the BIA-founded tribal court operated for about ten years, and "died away when the old people died." Thereafter, the village relied on the State to prosecute criminal behavior. In the 1950s and 1960s the "women's club" in Minto held what they called the "kids' court." Some of today's tribal court judges remember that if one child misbehaved, the elder women "gathered up everybody." The women admonished all the children and encouraged them always to tell the truth. Over time, the "kids' court," too, fell into disuse.

Seasonal flooding of the Tanana River caused the villagers to move to a new village site established in 1971 at their fall hunting place on a tributary of the Tolovana River. Minto went "dry" in 1978 when the village passed a federally certified liquor ordinance that banned the introduction or possession of alcohol in the village and separately banned the sale and importation of alcohol in the village under state law.[274] The liquor laws were largely unenforced and, by the early 1980s, a sense of lawlessness prevailed in the village. An elder recalled that the village women began discussing the village's problems and eventually formed a group to discuss what they could do to "help." The women thought the village should revive the court, so they talked with the men about it. Everyone was "worried about the village and about the kids."

A current tribal court judge and Village Council member[275] remembers that the whole village was involved in starting the court and writing the village ordinances under which the court would operate. "Meetings were held to discuss the ordinances and everybody was given the chance to make changes and contest the ordinances as written." One of the Council members from that time recalled the many meetings held to write the ordinances and re-establish the court. He also recalled that lawyers from Tanana Chiefs Conference assisted in the process.

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[274] Minto's alcohol ordinance was federally certified under the authority of 18 U.S.C. 1181. The ban under state law was pursuant to Alaska's "local option" laws, AS 04.11.490 et. seq.

[275] Alaska Natives, like Indians in the other states, have historical forms of government that differ profoundly from the Anglo-American governmental tradition. As is typical of tribes nationwide, neither the Minto nor the Sitka Tribe has separate legislative, executive and judicial branches. Therefore, it is not uncommon for a council member to sit as a judge during his council term. Further, the fact that a judge might wear two hats is no affront to traditional Indian notions of fairness. *See* V. DELORIA, JR. & C. LYTLE, *supra* note 157, at 80-109.

Re-establishment of the Minto Tribal Court. On February 14, 1985 at the Village of Minto's annual meeting, the villagers voted to re-establish the Minto Tribal Court. Four elders were elected judges, with a fifth as an alternate.

2. Goals of The Minto Tribal Court

Self-governance. The people of Minto speak of the court as an inherent right. "I think it's a God-given right to solve disputes among your own people," one judge says. "That's the way I've been raised, that the people of Minto are one Tribe and have to stick together on this." Clearly, the people of Minto regard the court as an important expression of governmental power.

To "Help" the Village. A second principal goal of the tribal court is to "help" the village. This is done by resolving local problems in an Athabascan way. One elder explains that when the court was re-established the village wanted to "get kids [from Minto] off the streets in Fairbanks" and stop the cycle that began when young adults from Minto had no way of getting home after state law enforcement authorities took them to Fairbanks. "The State paid their way in; then they had no place to stay when they got out [of jail] so they got in more trouble in Fairbanks."[276] Also, the villagers thought they were better suited than the State to handle children's cases because they knew the families involved.

Commitment and Identity. Intertwined with the first two goals is a sense that the court is an expression of the people's commitment to their community, and of their shared identity. As one person said, "tribal court comes from the heart; it doesn't exist on paper." Judges administer justice in an Athabascan way, and the court operates in a way that promotes such traditional values as sharing and helping, practicality and adaptability.

3. Structure of the Minto Tribal Court

Structure Established by Code. The Minto Code of Village Regulations provides for the establishment of the Minto Tribal Court "to hear matters under this code and the

[276] State law at the time required state officials to pay transportation costs to return a detained villager to the home village. Villagers may have chosen to stay in Fairbanks rather than return home.

traditional law of the village."[277] Although the Village Council has the authority to appoint five judges and two alternates to the tribal court,[278] the current practice is for the people of Minto to elect community members to staggered three-year terms. The court had four judges at the outset of this evaluation, and five at its conclusion.

Elections take place at the annual meeting in January. Alternate judges are drawn from the Village Council or from among the pool of former judges. The Council may appoint a judge to finish an unexpired term, as happened in September 1991, when the presiding judge resigned and a Council member who was a former judge was appointed to serve the last four months of the term.

The court had no elder judges at the time this evaluation was begun, but had one at its conclusion. According to one judge, that was the first time that the court had not had at least one elder judge. "We try to use elders and their wisdom. In the past we used to try to have at least one elder judge. It's really unique now that all the judges are under fifty years old." She attributed the absence of an elder judge to the fact that judges are now elected, not appointed. When the Council appointed judges to the court, it usually appointed elders.

Training for court personnel. When the court was reestablished, attorneys from Tanana Chiefs Conference (TCC) provided training in procedural and substantive law and court process. Since its first publication in 1986, judges have used the TCC Tribal Court Handbook.[279] The Handbook gives tribal court personnel a summary of legal and jurisdictional issues relevant to tribal courts, and provides court personnel with a set of standardized forms for use in their courts. The Minto court has used these forms over the years and, indeed, each judge owns a copy of the Handbook and uses it during court hearings.

Judges receive scant formal training. Some have attended workshops in and outside the village, but the court has no on-going training program. The lack of a formal training program, coupled with turnover among judges, has resulted in uneven preparation among judges for the court's work. Some present judges want to see new

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[277] Native Village of Minto, Alaska, Code of Village Regulations § 90.10 (1985) [hereinafter Minto Code].

[278] *Id.* § 90.20.

[279] TANANA CHIEFS CONFERENCE, TRIBAL COURT HANDBOOK (2d ed. 1991) [hereinafter TRIBAL COURT HANDBOOK].

judges make a commitment to serve their full term as a condition for the court's undertaking the expense of training.

Funding and Facilities. The tribal court has no funds other than a small amount of revenue that comes from court-imposed fines. In addition, the Village Council provides part-time pay for a court clerk. This position has always been held by the Council clerk. The clerk schedules court hearings, tape records and keeps minutes of court hearings, writes up hearing notes, provides the defendant with a copy of the court's judgment, monitors compliance with the judgment, receives payment of fines, and maintains court files in a locked cabinet. On average, the court clerk spends approximately twenty hours a month on court business.

Expenses, although unavoidable, are kept to a minimum. Judges volunteer. Other expenses include office supplies and the court clerk's salary. Revenue from fines barely covers expenses. The tribal court has no facilities of its own. It uses the conference room in a newly renovated village building for its hearings.

4. Procedural and Substantive Law Applied

Procedure. The Minto Code of Village Regulations provides that "all hearings shall be conducted as civil matters in accordance with the Indian Civil Rights Act."[280] Consistent with the Indian Civil Rights Act, the Code empowers the court to levy fines up to $5,000, order community work service, and decide custody matters.[281] The Code requires a quorum of the court for all hearings and decision-making. The Village Council may reverse court decisions and may require the court to submit a report of "all decisions."[282]

The court clerk attends all hearings and operates a tape recorder. The judges sit around the conference table. Other procedures vary depending upon what type of case is being heard. For example, if the case is one that was referred by the Village Public Safety Officer, the VPSO and any witnesses to the action also are present. No one else may enter the conference room, and the proceedings are designed to ensure maximum

[280] Minto Code § 90.30.

[281] *Id.* § 90.40.

[282] *Id.* § 90.50.

confidentiality for the defendant. Similarly, the court files are kept confidential in cases involving ordinance violations as well as in children's matters.

When an individual is brought before the court because of an ordinance violation, the defendant[283] joins those sitting at the table. The presiding judge begins by reading the complaint aloud. The judge then explains the plea options of guilty, no contest or not guilty. In children's matters, the court's deliberative process often includes negotiation with all concerned parties.

In all types of cases, part of each hearing commonly is devoted to "counseling" the parties. The judges use the hearing as an opportunity to speak of community values, to warn those who are misbehaving of the consequences of their actions, to praise those who are good role models, and to offer practical suggestions for solving problems.[284]

Substantive Law Applied. The Minto Code of Village Regulations, adopted by the village membership at the February 14, 1985 annual meeting, "govern[s] the conduct of the people within the boundaries of the Minto Village so that no infringement [is] made upon individual rights or the peace and dignity of the people of the village, and the State of Alaska."[285] The Code defines both territorial and personal jurisdiction:

> [The Village Regulations a]re the rules that all persons shall obey when within the boundaries of the Minto Village and Corporation land. Regulations shall be enacted by the Council to protect the life, property and welfare of the people and village. . . .[286]

Other code chapters contain substantive provisions regulating liquor, weapons, vehicle safety, minor and dependent children, animal control, sanitation, and drugs.

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[283] No one in Minto calls the defendant a "defendant." Everyone in the village is on a first name basis and the Athabascan language has no word for "defendant." In ordinary conversation the person in the "defendant's" role is called the "client," or the "person," but will be referred to as the defendant in this report.

[284] Counseling is an important judicial function in at least one other tribal court, the Navajo Tribal Court. *See* Tso, *Moral Principles, Traditions, and Fairness in the Navajo Nation Code of Judicial Conduct*, 76 JUDICATURE 15 (1992).

[285] Minto Code § 10.05.

[286] *Id.* § 10.10.

The Minto Tribal Court looks to the Code when deciding cases. However, there also is an expectation that the judges will call upon wisdom gained from their own life experiences in solving village problems. One judge explains, "the people of Minto put me up there because I've been through life and I know right from wrong and I was there to decide on what was wrong."

Although the tribal court hears civil actions under its Code, all court and Council members that the Project Evaluator spoke with think of these as criminal actions. Judges view the distinctions between civil and criminal law as meaningless abstractions. Rather, they focus on the importance of policing the village, regardless of whether it may be termed "civil" or "criminal." One judge explained that the State does not prosecute any but the most serious crimes, but "someone's got to stop the importation and the drinking. We might be wrong because we're going against the law, but we're looking out for ourselves and our people."

State criminal justice personnel responsible for the area including Minto also perceive the tribal court as handling criminal, not civil, cases. The Fairbanks District Attorney believes that his office receives few requests for assistance from Minto because the tribal court is active in enforcing local law. The Trooper assigned oversight duty of the Minto VPSO has met with court and Council members in an effort to coordinate functions, and has requested that the Minto VPSO inform him of all cases referred to tribal court. This suggests that while the court in fact regulates criminal behavior in the civil context, the universal perception is that the court is acting in the criminal context.

5. Caseload of The Minto Tribal Court

A review of all 106 cases handled by the tribal court from its re-establishment in 1985 through 1991[287] shows that the court handles two types of cases: violations of village ordinances and children's cases. Of the total number, eighty-nine (84%) involve violations of village ordinances in which the court has assessed quasi-criminal penalties (see Table 1). The court heard seventeen children's cases, 16% of its caseload. Figure 2 illustrates the number of cases filed with the court year by year.

[287] The court's 1988 case files are missing and were therefore unavailable for review as part of this study.

Table 1
Type of Cases in Minto
(Total Cases = 106)

Type of Case	Number of Cases	Percentage of Total
Ordinance Violations	89	84%
Children's	17	16%

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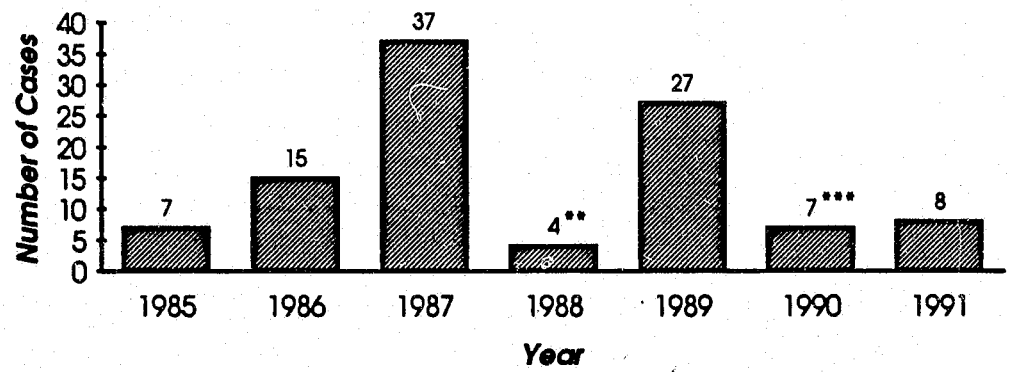
Figure 2
Minto Tribal Court Caseload
Number of Cases Filed by Year*
(Total Cases = 105)



* *Total number of Minto cases = 106. Year of filing was unknown for one case.*

** *Most of the 1988 case files are missing.*

*** *The low number of cases in 1990 and 1991 reflects the lack of a VPSO during that period.*

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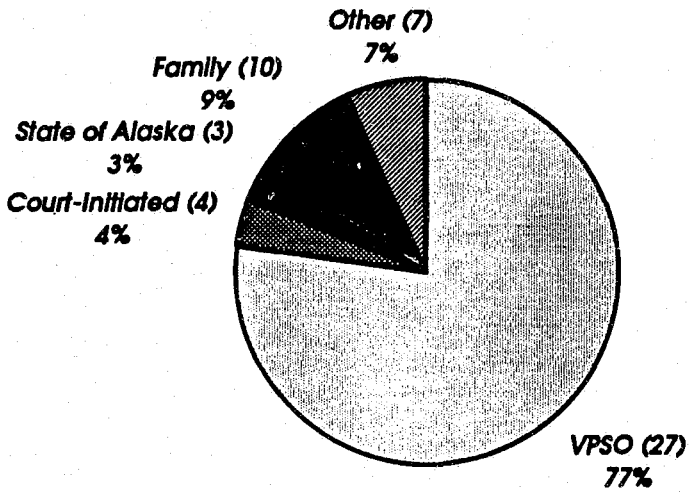
Review of the court's records shows that over half (56%) of all court cases were alcohol related. These included drunk driving and other traffic offenses, importation of liquor into the village, and disorderly conduct such as fighting. Most of the court's cases originated with the VPSO (77%) (see Figure 3). Families referred ten cases, the court initiated four cases on its own, and a few came from other sources, including three referred by Alaska state agencies.

Figure 3
Origins of Minto Tribal Court Cases
(Total Cases = 106)



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Enforcement of Village Ordinances. Cases involving some violation of the Code make up over 80% of the court's total caseload. All but a handful were referred to the court by the VPSO.[288] To make a referral, the VPSO fills out a report and gives it to the court clerk. The clerk fills out a standard-form citation, checking a line to designate the code section or sections the defendant is accused of violating. The clerk writes the date of the incident and the court hearing date at the bottom of the form. Finally, the clerk signs and dates the citation, keeps a copy for filing, and gives the original to the VPSO, who serves the defendant in person. Occasionally the clerk serves the defendant by mail. Whoever serves the citation signs a certificate of service which is kept in the court file.

Dispositions. In most cases, the defendant pleads guilty or no contest to the offense and immediately confesses the details of the violation. Defendants pled guilty or no contest to a total of sixty-four charges brought in fifty-nine separate actions, and not guilty to only thirteen charges brought in twelve separate actions. The court later dropped eight charges to which defendants pled not guilty. The court scheduled a trial

[288] A few cases involving violations of village ordinances came to the court through referral from family members. For example, the father of a woman who was assaulted asked the court to take action against the man who assaulted her.

on one not guilty plea, but none was ever held; hence the court effectively dropped that charge as well. The four remaining defendants later entered guilty or no contest pleas.[289]

After the defendant enters a plea, each judge in turn "counsels" the defendant. "Counseling" is done in the helpful spirit the following comments exemplify.[290] One defendant who pled guilty to speeding was encouraged by the judge to "[t]ry to help others. Make this a better place." In the case of a young boy who pled guilty to theft, the judges thanked him for talking with them. They also advised him about his behavior and that he should be careful about his friends. Another youth involved in the same incident was told, "being good is the only way you will be a man. Do right for your village."

Tribal court policy is to hear juvenile cases only when one and, preferably, both parents are present. The court has heard fourteen (17% of ordinance violations) cases

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[289] Congressional testimony on the Indian Civil Rights Act highlighted the difference between confessions in tribal courts and Anglo-American courts:

> The defendants' standard of integrity in many Indian courts is much higher than in the State and Federal Courts of the United States. When requested to enter a plea to a charge the Indian defendant, standing before respected tribal judicial leaders, with complete candor usually discloses the facts. With mutual honesty and through the dictates of experience, the Indian judge often takes a statement of innocence at face value, discharging the defendant who has indeed, according to tribal custom, been placed in jeopardy. The same Indian defendants in off-reservation courts soon learn to play the game of 'white man's justice', guilty persons entering pleas of not guilty merely to throw the burden of proof upon the prosecution. From their viewpoint it is not an elevating experience.

Rights of Members of Indian Tribes: Hearing Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess. 127 (1968) cited in THE INDIAN CIVIL RIGHTS ACT, A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 8-9, June 1991.

The candor and honesty of Indian defendants in tribal courts referred to above may explain why the Minto Tribal Court dropped eight charges to which defendants originally entered not guilty pleas. Of those eight, four were brought with another charge to which the defendant pled guilty. The court may have felt it could believe a defendant who pled and confessed to one charge while maintaining his innocence on another charge. For example, one defendant appeared before the court charged with drunk driving. He claimed not to have been driving drunk, saying that he was "only driving to help [his] parents haul things from the [river] bank." The court seemed to express a measure of skepticism when it decided that since he "is not drinking and he is helping his parents out . . . there is no charge against him at this time, but we are watching you and there will be stiffer fines against you if you are caught in any violations." As one judge put it, traditional Athabascan society had "no use for liars. Liars were always laughed at and ridiculed." Another judge, however, does not accept the idea that a higher standard of honesty prevails in tribal court. She points out that many defendants are alcoholics who lie convincingly. Also, fear may provide a motive to confess. *See Traditional Athabascan Law Ways, supra* note 58, at 6, 16.

[290] Comments are drawn from court records.

involving juveniles (under eighteen years old) who broke village ordinances. Typically, juvenile cases involved petty theft, joyriding or minor consuming. On one occasion the judges warned some children who set a fire about the dangers of playing with matches. Most often, juveniles were spoken to by judges but given no sentence, even when restitution may have been appropriate. As of May, 1992, judges and Council members were planning to impose a sentence upon the offending juvenile and, in addition, to order the juvenile's parents to attend a parenting skills workshop to be offered in the village on an on-going basis by TCC. The goals of this sentencing approach are two-fold: to help the whole family and to hold the parents accountable in the village's eyes.

The Minto court heard seven (8% of ordinance violations) domestic violence cases, five of which were charged as assaults or public disturbances. The other two cases were treated as non-offenses for which both parties involved were given counseling by the court. In some cases, parties to the cases in which assault was charged were counseled as well, most notably when the court sternly warned the victims and perpetrators in two cases about the role of alcohol in accelerating violence.

Sanctions imposed. Before imposing a sentence, the judges confer among themselves outside the defendant's presence to decide what sanction is most appropriate. All judges must concur in the decision before any sanction is imposed.

The tribal court can order fines, counseling, rehabilitation, and restitution. For example, one woman who pled guilty to speeding was sentenced to alcohol counseling and ten hours of community service or payment of a $50.00 fine. The most common order in the tribal court is payment of a fine; that sanction occurred in forty-nine (62%) of its cases. The court generally orders defendants to pay $50.00 for a first offense, $75.00 for a second offense, and $100.00 for a third offense.[291] Alternatively, defendants may work off the fine at a rate of $5.00 per hour doing community work service.

The court ordered community work service in thirty-nine (49%) of its cases. Community work service assignments are given out by the court clerk. Records show that defendants cleaned the community hall, cut wood for the hall and village elders, picked up trash, hauled garbage, hauled and pumped oil. One defendant asked to do his ten hours of community work service in the old village.

[291] The court can, and has, imposed higher fines on repeat or more serious offenders.

The court ordered rehabilitation efforts in ten (9%) of its cases, including three children's cases. In all instances rehabilitation was for alcohol counseling. The court ordered defendants to attend as few as three days and as long as one month at the Old Minto recovery camp. Otherwise, defendants in need of alcohol counseling received services from a TCC social worker or, in one instance, a village elder. In one other case the court ordered the defendant to attend meetings of Alcoholics Anonymous outside the village.

Restitution was ordered in four cases, all involving property damage. It appeared that these property damage cases were the only cases in which restitution was an appropriate order.

The court ordered defendants to attended counseling in ten cases (19%). Again, counseling was provided by a TCC social worker or by village elders. At the time of this evaluation, the village was trying to arrange to have a villager trained as a counselor to provide these services.

The court imposed its harshest punishment on one domestic violence perpetrator who was ordered to pay a $300 fine or work sixty hours, spend two weeks at the Old Minto recovery camp, and threatened with future state prosecution. When the defendant failed to pay his fine, the court initiated an action for non-payment against him.

The court periodically impounds vehicles, including snowmachines. Vehicles were twice impounded because the driver did not have a state operator's license. Otherwise, impounding serves to keep a drunk or otherwise disruptive person from causing more harm. Though interest is keen in building a secure impound lot, the village has not done so because of liability concerns and the high cost of liability insurance.

One non-member who had married into the village was a repeat, and increasingly serious, offender. The court threatened him in writing with banishment if he continued to cause problems in the village. Although the same person has subsequently violated village ordinances and been before the court again, the threatened banishment has never occurred.[292]

[292] For a more detailed discussion of this case, see *infra* note 313 and accompanying text.

In at least two cases non-Native residents of Minto have violated village ordinances and been summoned before the court. In both cases, the non-Natives willingly submitted to the court's jurisdiction and complied with the sentence the court imposed. This suggests that the court is perceived as a community enterprise and that people who consider themselves part of the community participate in the court on the same footing as do Native village members without fear they will be treated unfairly.

Children's Matters. In all, the Minto Tribal Court handled seventeen children's cases; they comprised 16% of the court's total caseload during the six-year period from 1985 through 1991 (see Table 2).[293] Children's cases are referred to the tribal court in a variety of ways (see Figure 4). In some cases, the State of Alaska notifies the village council of involuntary custody proceedings, as it is required to under the Indian Child Welfare Act. In other cases, family members petition the court to approve traditional adoptions. In some cases, the court itself has initiated proceedings. Here it is important to distinguish action taken by the court in another forum, the state court for example, and action taken by the court in its own forum. Where the court acts in another forum it represents village interests in the wider society. The court represents village interests inside the village when it acts at home under its power to hear domestic matters.

Table 2
Minto Children's Cases
(Total Cases = 17)

Type of Case	Number	Percentage
Abuse/Neglect	8	47%
Adoptions	6	35%
ICWA	3	18%

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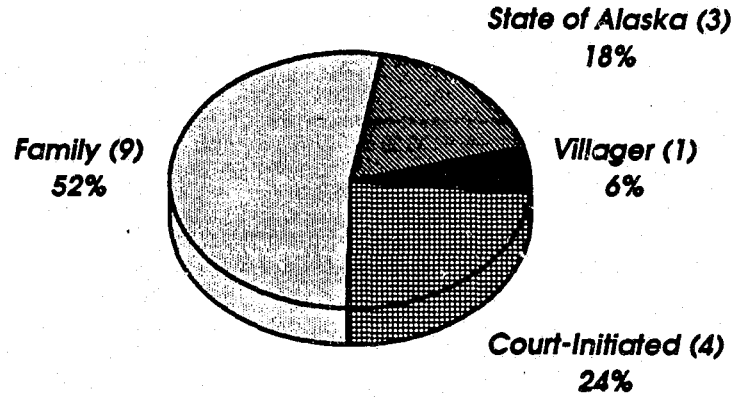
[293] Not including missing 1988 case files.

Figure 4
Origins for Children's Cases in Minto Tribal Court
(Total Cases = 17)



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Cases involving the Indian Child Welfare Act. Under the Indian Child Welfare Act,[294] state courts have a duty to notify the Indian child's tribe of involuntary child custody proceedings.[295] Although notice under ICWA is directed to the Minto Village Council, the practice in Minto is to direct all ICWA-related materials to the tribal court for review. The tribal court, in consultation with the Council and affected village members, decides whether to intervene under the Act.[296] In all, the Native Village of Minto received only three notices under ICWA. Of this number, the court acted on only one, helping the parties to negotiate a custody agreement.

[294] 25 U.S.C. § 1903 et seq.

[295] *Catholic Social Services v. C.A.A.*, 783 P.2d 1159 (Alaska 1989), *cert denied, Cook Inlet Tribal Council v. Catholic Social Services, Inc.*, 495 U.S. 948, 110 S.Ct. 2208, 109 L.Ed.2d 534 (1990). In that case, the court held that tribes have a statutory right to notice in involuntary termination proceedings but have no right to notice where an Indian parent voluntarily permits her parental rights to be terminated. *Id.* at 1160.

[296] ICWA gives tribes the right to intervene in involuntary termination proceedings. 25 U.S.C. § 1912(a) (1988).

Cases referred by family members. Nine children's cases came to the tribal court through the request of family members. The court granted adoption decrees in six cases, all cases in which a family member petitioned the court to adopt. All adoption cases were requests for court sanction of a traditional adoption. An example is the case of an aunt who had raised her nephew from birth to the age of seven years. A judge commented at the hearing that the aunt had taken excellent care of the child since he was born. He stated that, "before he gets any older I think she should adopt the boy legally." The presiding judge thanked the aunt and commented that she had always been employed and had taken care of the child.

On two occasions family members requested custody of a related child whose parent was drinking and unable to care for the child. The court entered temporary custody orders in both cases, eventually deferring jurisdiction in one case to the State.

In another case, a mother petitioned the court for custody of her children. The court ordered her to complete drug and alcohol treatment and worked closely with her social service providers. When the mother failed to comply with the court's order the court deferred to the State for further handling of the matter. Upon the urging of a concerned villager, the court in one instance heard a case involving neglect of a child.

Court initiated proceedings. In the past, the court has called in parents to admonish them about neglecting their children. This happened on four occasions. For example, in 1989 the court notified a mother by mail to appear before the court on a certain date. After no response for six months, the VPSO served the mother with a complaint for child neglect. The next day the mother appeared before the court. The court record reveals that the judges spoke to her about her drinking problem and the need to take better care of her children and stated that otherwise the State would take the children away.

Present tribal court judges stress that the court no longer initiates actions of this sort. They note that it was the practice of elders who formerly sat on the court to call parents to task. That, they say, was proper for elders to do, but not acceptable for younger judges.[297] Also, it should be noted, elders appointed by the Council were insulated from the kinds of political pressure that elected judges face.

[297] In some cases, younger people sat on the court as judges with the older judges who were responsible for summoning parents before the court. An older judge always conducted the court session at which the parents were urged to treat their children better.

6. Evaluation of the Minto Tribal Court

Evaluation based on villagers' goals.

Self-governance. When the village members re-established the court, it was in part with the hope that the court would be an expression of the village's powers of self-governance ("the God-given right to resolve disputes among your own people"). Thus the court's very existence serves a governmental function for the people of Minto.

The close association between the court and the Village Council is evidence of the court's governmental status. The Council may demand reports of court decisions, and may review court decisions. The Code of Village Regulations gives the Council authority to appoint judges to the court. Historically, the Council has exercised the authority to appoint judges, and it still appoints judges to fill vacancies created by resignations.

To "help" the village. One of the principal goals articulated by those who re-established the Minto Tribal Court was to "help" the village. Helping could be done both by preventing state prosecution of Minto's young adults, and by handling children's cases.

Prevent state prosecutions. One of the most important ways the tribal court was expected to help the village was by preventing Minto's young adults from being prosecuted by state authorities in Fairbanks. This could be done by handling criminal matters in the village. Data suggest that the court fulfills this goal. A Fairbanks Assistant District Attorney reports that in the past three years, the Fairbanks office has prosecuted only two Minto felonies, both burglary related, and has prosecuted no misdemeanors. These figures suggest that the Minto court is successfully enforcing local law and punishing offenders. The deterrent effects of the court's activity in policing criminal behavior show in the fact that few serious or chronic minor offenders come to the attention of the Fairbanks District Attorney's office.

Department of Public Safety records on file in Juneau confirm that few incidents the Minto VPSO reports to the village's oversight Trooper are of the type that would be referred for prosecution. The records showed evidence of only two other felony matters reported to the Troopers since the court's re-establishment (both sexual assaults), and both occurred before the three-year period referred to by the Assistant District Attorney.

The Fairbanks District Attorney explained that he would expect a higher rate of reported and prosecuted crime from the village. He attributes the low prosecution rate for Minto to Minto's successful operation of a tribal court. In fact, he believes that "the Minto Tribal Court is the most viable [tribal court] in the area. It seems to work the best, meaning that we don't get many requests for [Trooper] assistance. They pretty much handle all misdemeanors themselves." Since the State does "no proactive enforcement in the villages;" it only responds to complaints, the District Attorney's office would be receiving complaints and requests for prosecution if matters were going unattended in Minto. In addition, the fact that Minto refers few criminal cases to the State means that villagers do not have lengthy criminal records following them.

Help families. A second goal was to "help" in children's cases. During the period that judges called neglectful parents before it, the court appeared to help families by encouraging changed behavior. One judge explained to a mother accused of neglecting her children, "the tribal court gives people a chance. We have done that to a lot of people and they try to do something for themselves." Another judge suggested activities for mother and children:

> If you are going to try I suggest you do things with your children after school. Take them back in the woods and get wood with them, show them how to set snares. Keep them occupied. Share yourself with them, that you really love them, and in the meantime that will be helping you by keeping your mind off the things you normally do.

Of course, it is difficult to evaluate whether the tribal court's efforts in those children's cases were successful. At the very least, the court's involvement showed parents that they were accountable to other members of the community and that the community cared that they took good care of their children.

The court would do well to consider whether its previous efforts to help families by calling neglectful parents before it might still be helpful. Since the court no longer calls neglectful parents before it to try to prompt change, the court may be missing opportunities to be of help. Younger judges apparently do not have, or do not feel they have, the authority to call parents before the court in a manner thought acceptable for older judges. If indeed younger judges lack such authority, but can act with older judges, as they have in the past, then the presence of at least one or two elders as judges would seem to be required for the court to be most effective.

More recently, the court has helped in the children's area by negotiating child custody agreements in two difficult cases. It has continued to approve traditional adoptions, thus enabling adoptive parents to obtain state benefits. In addition, the tribal court stands ready to act on ICWA cases. In many ways, then, the tribal court has helped village families and can fairly be said to satisfy the goal of helping in children's cases.

Commitment and identity. The tribal court is an expression of the villagers' commitment to the community, and of their shared identity. One way the court does this is by administering justice in an Athabascan way. The decisional processes of present-day tribal judges resemble those of their Athabascan forebears. Athabascans historically had two types of justice problems: disputes between members of the same village or band, and disputes between different bands.[298] When resolving disputes within the band, the chiefs, elders, or respected persons talked among themselves and made decisions that were upheld by band members. Talks between band leaders were the roots of today's village councils.[299] In the same way, the Minto court judges confer among themselves to decide how to rule. If they have questions, they gather evidence by conversing with the defendant until they have "more knowledge or information" on which to base a decision.[300]

Athabascan elders report that traditional justice was swift and clear, and acted as a deterrent.[301] Court records show that the court heard and decided most cases quickly. The court has no open cases. However, the deterrent value of the court's justice may be lessened to the extent that the court lacks enforcement powers or the will to enforce sanctions imposed. Enforcement is discussed below.

Sharing and helping are traditional Athabascan values.[302] These values are reflected not only in the court's method of operation, but also in its very existence. The

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[298] TRIBAL COURT HANDBOOK, *supra* note 279, at 4.

[299] *See Traditional Athabascan Law Ways, supra* note 58.

[300] *Id.* at 15 (implying a measure of personal knowledge and engagement on the traditional Athabascan judge's part, and emphasizing the Athabascan dislike of hastiness in making a decision in ambiguous cases).

[301] TRIBAL COURT HANDBOOK, *supra* note 279, at 5.

[302] *Id.* at 1.

motivating spirit behind the court's re-establishment and continued operation was to "help" the villagers.

Athabascans traditionally value practicality and adaptability.[303] The court's re-emergence illustrates the villagers' practical solution to a complex problem. In 1985 and today the state legal system handled prosecution of major crimes committed in the villages; however, it typically does not handle smaller crimes and everyday problems in remote rural areas. This situation arises in part from the State's centralized legal system, which operates out of the cities and hub communities, and in part from insufficient resources to serve all of rural Alaska. The Minto Tribal Court thus provides an easily accessible forum for resolution of local problems. Moreover, having a tribal court has been an important expression of the village's willingness and ability to take responsibility for solving its own problems.

The deep feelings people in Minto have about their tribal court have inspired some dedicated people to become judges. Present and former judges speak of the honor and obligation they feel at being chosen as a judge by their fellow villagers. High turnover among tribal judges, however, indicates many individual failures to follow through with the commitment to be a judge. One tribal member points to the high turnover rate as a symptom of the village's lack of leadership. Judges are uniquely situated to be village leaders and to catalyze villagers to better the community. By resigning their posts, according to one tribal member, judges turn their backs on the responsibility they have as leaders. Resignations reflect badly on the court and deprive the community of leadership.

Evaluation based on other criteria.

Procedures imposed by the Indian Civil Rights Act. The Indian Civil Rights Act imposes restrictions on the Minto tribal court.[304] Thus, one aspect of an evaluation of the Minto tribal court has been to examine whether the court affords parties the procedural and substantive rights guaranteed by ICRA.

[303] *Id.* at 3.

[304] *See* 25 U.S.C. § 1302 (1988).

One right guaranteed by ICRA is equal protection of the law.[305] The Minto Tribal Court has shown even-handed treatment of Native and non-Native parties alike, especially in the area of children's cases. In two notable cases, the tribal court[306] negotiated and ordered child custody agreements between Native village members and non-Native parents. Outcomes in each case differed and fit the unique circumstances of the case. However, it is significant that in both cases the non-Native parent was ultimately given custody of the children and both non-Native parents agreed to encourage the children's participation in village family and cultural activities.

Another right guaranteed by the ICRA is due process of law.[307] Adequate notice is a hallmark of due process. The Minto Tribal Court gives persons called before the court notice, usually in the form of a formal complaint, containing a description of the offense they are alleged to have committed and the hearing date. However, notice often comes only one day prior to, and in all cases no more than ten days prior to, the court hearing.[308]

The court often gives notice of a hearing a month or two after the incident has occurred. In one case, the incident occurred on August 29 and the defendant was served with a complaint on October 11 for an October 12 hearing. In another case, the incident occurred July 19 and the defendant was served on October 11 for the same October 12 hearing. A few defendants complained that the VPSO did not tell them at the time of the incident that they would be going to court and that this, coupled with notice some two or more months later, made it unfair for the court to take action against them.

Level of court activity. Another important measure of a court's value is the number of cases it handles. The Minto court's effectiveness in this area is tied to the local VPSO's referral of cases to the court. In Minto, the VPSO is the first link in the chain leading an offender to tribal court in the great majority of cases. The former Minto

[305] *Id.* § 1302(8). Section 1302 is applicable to Indian tribes "exercising powers of self-government."

[306] In one case the Minto Tribal Court, the Minto Village Council, and the Nenana Village Council, acting in its adjudicative capacity, deliberated as one body. There are close blood ties between the villages of Minto and Nenana, and both villages had an interest in the child at issue. (See Chapter VI for a more detailed discussion of this case.)

[307] 25 U.S.C. § 1302(8) (1988).

[308] Court files reveal no reason why the notice period is not longer, but one reason may be transience, especially in the summer months when people go to fish camp or are out of the village engaged in seasonal work.

VPSO referred well over three-fourths of the court's total cases. When he resigned, the village went without a VPSO for more than a year. During that time, the court's caseload fell dramatically and only began to pick up when the current VPSO started working. This demonstrates the critical link between VPSO and court activity.

Villagers have set extraordinarily high standards for the VPSO, and expect twenty-four hour law enforcement. For example, the VPSO is responsible for intercepting bootleg liquor coming into the village. Since most liquor comes into the village during the VPSO's off hours, between midnight and 8 a.m., the VPSO cannot intercept it all. When alcohol comes into the village, people fight, drive drunk, and break other laws. The villagers' anger at the resulting lawlessness is directed at the VPSO, and may also reflect on the tribal court to the extent that villagers expect the court to play a role in upholding the laws.

A second factor affecting the court's activity level is the judges' decision whether to proceed to trial on a given charge. Although most defendants who come before the court plead guilty immediately, some persist in pleading not guilty. Where a defendant refuses to admit the offense, it is not uncommon for the court to drop the case. There may be cultural reasons for dropping charges.[309] It is unclear from the court's records what factors go into the court's decision not to proceed to trial on a given charge.[310] Moreover, it is not clear what other effects, if any, this practice may have.

Enforceability of judgments. Yet another measure of a court's effectiveness is its ability to enforce its judgments. A court's ability to enforce its judgments also bears on people's perceptions of its credibility, and on the issue of deterrence.[311] The Minto court issues fines and sentences people to community work service. Frequently people do not pay their fines or complete their community work service, generally without adverse consequences. Minto judges acknowledge that the court's enforcement of its orders is a weak point. They explain that the court cannot, in the perceptions of the villagers or the judges themselves, impose meaningful sanctions. Some believe

[309] Cultural reasons for dropping charges are discussed in footnote 289, *supra*.

[310] In the past the court has been prepared to go to trial, but the defendants pled guilty on the day of trial.

[311] Deterrence is an aspect of traditional Athabascan justice. TRIBAL COURT HANDBOOK, *supra* note 279, at 5.

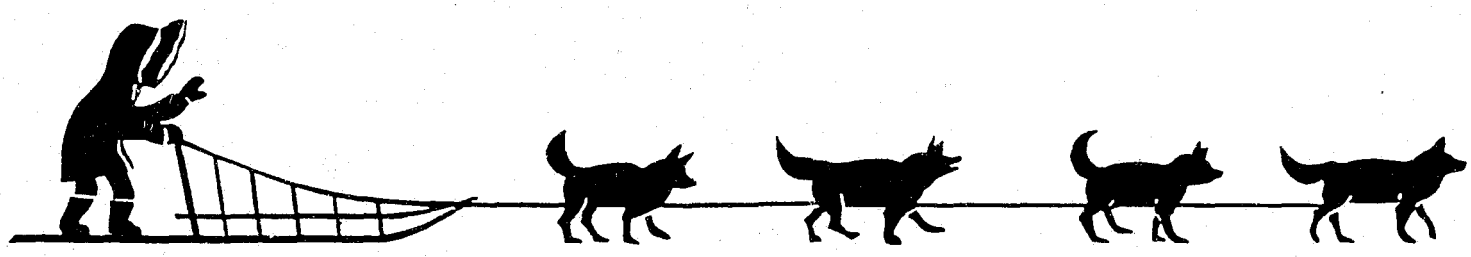
sentencing offenders to a village jail is the only way the court can impress offenders with the seriousness of a violation.

Court records, however, reveal little active enforcement effort of the kind that would encourage offenders to comply with court orders. On occasion the court has initiated further action against individuals who fail to complete community work service assignments, and has threatened to raise fines or attach Permanent Fund dividends in cases of non-payment. It has raised fines in some cases, but has not followed through with threats to attach Permanent Fund dividends. Records show that impounding a vehicle, as the court has sometimes done, is an effective means of forcing offenders to pay fines.

Record keeping. The court does not maintain records on individuals it has sentenced. The lack of records has resulted in repeat offenders being fined at the lower rate applicable to first offenders.[312] If the court had the benefit of individual records, it could avoid the situation in which the offender knows that he has been before the court many times but the judges do not.[313] In addition, individual records would enable the judges to fashion a sentence in line with the offender's history.

[312] For example, a judge who began a term in 1990 is missing the institutional history to know that the person who was a first offender in 1986 and a second offender in 1988 is a third (and not a first) offender in 1992.

[313] One individual threatened with banishment in 1985 has been before the court several times since and repeatedly has been fined a lesser amount than the court's guidelines would suggest for a repeat offender.



Kaagwaantaan Wolf House Post

Illustration by JoAnn George from Carved History,
courtesy of Alaska Natural History Association.

B. Sitka Tribal Court

1. History of the Sitka Tribal Court

Passage of the Indian Child Welfare Act in 1978 gave the Sitka Tribe of Alaska (STA),[314] a tribe organized under the Indian Reorganization Act in 1938, impetus to establish a tribal children's court. Because ICWA provided for notice to tribes of actions involving member children, it was clear from the time of the Act's passage that STA would eventually be involved in cases arising under ICWA. Rather than rely on the state courts alone to decide matters concerning its member children, the Tribe sought to provide an exclusively tribal forum for resolution of children's cases.

In 1981 STA's Tribal Council[315] requested technical assistance on starting a tribal court from the National American Indian Court Judges Association. The Association referred STA to a tribal court judge who was also an attorney. The attorney-judge and a Suquamish judge held a workshop in Sitka on tribal court operations. STA and the attorney-judge developed a consulting relationship over the ensuing three years during which time he assisted in drafting STA's codes.

Also in 1981, the Tribal Council enacted an ordinance creating a tribal administrative agency called the Sitka Native Child Welfare Agency and delegating to it the Tribe's authority and responsibilities under ICWA. The Council's ordinance granted the agency decision-making authority, and directed it to

> use all the resources of the Tribe, federal government and State or private agencies which are available to contribute to the final decision upon which the future life of any child may depend in a child custody proceeding governed by the Indian Child Welfare Act.[316]

[314] The Tribe was called the Sitka Community Association until November 26, 1991, when the tribal membership voted to amend its IRA constitution in part to rename the Tribe. The election was held under BIA supervision, upon order of the federal district court, after the Tribe prevailed in litigation to force the Secretary of the Interior to conduct the election, which it had requested 15 months previously. In the interest of clarity, the Tribe will be called by its present name throughout this report.

[315] Although the Sitka Tribal Council and the Minto Village Council have different names, the two governing bodies share the same functions.

[316] Sitka Tribe of Alaska Ordinance 82-1 (Jan. 1, 1982).

"An aggrieved person" was given an appeal by right "to the Council whose decision shall be final."[317] The Sitka Tribal Court, then, was originally established as an arm of a tribal administrative agency. In 1983, STA's Council enacted a Code of Civil procedure in part relating to the tribal court. As of that time, the court was viewed as a separate and distinct entity, and no longer simply an arm of the Child Welfare Agency.

2. Goals of The Sitka Tribal Court

Self-governance. STA has long viewed itself as a sovereign nation. The powers of the Council are those of the clans which comprise the Sitka Tribe. By the 1980s, the Tribe saw the need both to preserve traditional Tlingit law and to forge a judicial link between itself and other governments. Accordingly, the Council delegated a portion of its decision-making authority to a Court of Elders, which would utilize traditional law, and to a tribal court whose rules, process, codes, and format would resemble those in the state and federal courts.

The tribal court's close duplication of state and federal court features was intended ultimately to gain formal recognition by, if not a working relationship with, the State and the Federal Government. In the judge's words, "one of the primary requirements if you think you're sovereign is you have to have a court. It's the first thing the feds will recognize and the last thing the State will recognize, but it will work with you." The Tribe's present IRA Constitution lists among the Council's powers establishment of a judicial system.[318] In 1983 and 1984 the Council enacted a number of substantive codes[319] which the court is charged with enforcing.

Assume Tribal Responsibility for Children. A principal goal of the Sitka Tribal Court is to assume responsibility for tribal children through application of federal and

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[317] *Id.*

[318] CONST. OF THE SITKA TRIBE OF ALASKA. art. VII. The Secretary of the Interior approved the Constitution in February of 1992. The Preamble reads:

> We, the citizens of the sovereign Sitka Tribe of Alaska, in order to establish a more perfect tribal government, and to preserve and exercise the Tribe's inherent sovereign rights and powers, to provide for our posterity, to conserve tribal lands and resources, and to establish justice, pursuant to Tlingit tribal law and custom and federal law, make for ourselves this Constitution by authority of the Act of June 18, 1934, (48 Stat. 984) as amended.

[319] The codes relate to children's proceedings, domestic relations, care of children, planning and zoning, building and housing, and civil rights.

traditional Tlingit law in ICWA and other children's cases. The goal of assuming responsibility for *all* tribal children is very broad because

> children of female clan members are children of the clan regardless of where or under what circumstances they may be found. Clan membership does not wash off, nor can such membership be removed by any force, or any distance, or over time. Even in death clan membership continues, and in re-birth it is renewed.[320]

3. Structure of the Sitka Tribal Court

At the time of the court's inception in 1981, the Council appointed as chief judge William (Bill) Brady, who has continued as judge up to the present. A quiet, warm-humored man, he was adopted by his maternal grandparents and brought up in a traditional family, so he is well-versed in traditional Tlingit law. Because of health reasons, the judge, and consequently the court, have been less active since 1990.

Although the court presently operates with only one judge and a newly hired court clerk, it has used other court personnel. The Council at different times has hired three Associate Judges, all trained by the chief judge. All have left because of inadequate pay. Similarly, the court has had three tribal court clerks and, again, all have left because of low pay.

From 1984 to 1987 STA employed an attorney in the dual positions of Tribal Court Administrator and General Counsel. As Court Administrator, he provided "continuing education," trained the court clerk, maintained the court's docket, and advised the judge in the many children's cases the court handled.

Training. Because of his upbringing, the judge is learned in traditional law. He relied on the Tribe's attorney and the director of the child welfare agency in the court's early days for training in American substantive and procedural law. Otherwise, he has had no further training.

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[320] *Hepler v. Perkins,* 13 Indian L. Rep. 6011 (Sitka C. Ass'n. Apr. 7, 1986) (finding of traditional law by the STA Court of Elders). Despite the high ideal of traditional law, the tribal court cannot and does not exercise jurisdiction in every matter involving the offspring of clan members. The tribal judge will not adjudicate matters that lead to jurisdictional conflicts with the State, and all parties must willingly submit to the tribal court's jurisdiction.

Funding. STA has been through numerous budgetary "transitions" since the 1970s when the tribal organization was revived. STA has received federal monies for its programs through an Administration for Native Americans grant, through the Central Council Tlingit and Haida Indian Tribes of Alaska, and through the Bureau of Indian Affairs. The Tribe now contracts directly with the government to provide services under the Indian Self-Determination Act that were previously administered by BIA.

With erratic and sometimes non-existent funding, the Tribe budgets little for its tribal court. The judge has received a monthly stipend of $200.00 since 1988. While it is the judge's goal to see the Tribe offer adequate pay for a judge and court clerk, it is unclear whether this is a priority for the Council as well.

Court Facilities and Equipment. The Sitka Tribal Court has no facilities or equipment of its own except for a four-drawer filing cabinet. The filing cabinet is kept locked in the office of the Social Services Director. The judge has no office space. The Tribe furnishes secretarial supplies.

On the few occasions when he has needed a courtroom, the judge has used the Tribe's bingo hall. The hall is large, and is usually filled with long tables. He has folded the tables and arranged the room to approximate a state courtroom, with a long table for himself and his clerk. Two tables face his, one for the plaintiff and counsel, the other for the defendant and counsel.

4. Jurisdiction of the Sitka Tribal Court

In 1983, the Council adopted tribal court rules, and children's and civil procedure codes. Each speak to the question of what jurisdictional authority the court has. The Tribal Court Rules state that the court operates within the limits of its IRA constitution and by-laws:

> For the purpose of enforcing the provisions of this Code, or other subject matter codes already enacted or enacted in the future, the Sitka Community Association Tribal Court ("Court") shall exercise jurisdiction in a manner not inconsistent with the Constitution and By-laws of the Sitka Community Association ("Tribe").[321]

[321] Sitka Tribe of Alaska, Code Governing Tribal Court Rules and Civil Procedure § 1.1 (1983).

Further, it is the Tribe's "policy . . . to exercise jurisdiction in a manner consistent with decisions of the U.S. Supreme Court and the Ninth Circuit Court of Appeals relating to tribal powers."[322]

With respect to children's matters, the Children's Code states that "[t]he [STA] Indian Tribe properly exercises jurisdiction over Indian children and families who are members of this Tribe or are otherwise subject to the jurisdiction of the Tribe."[323] STA's legislatively declared position is that PL 280 never divested the Tribe of jurisdiction, and specifically did not divest the Tribe of jurisdiction in child custody proceedings.[324] Rather, before the Tribe's exercise of jurisdiction in a child welfare matter, both the State of Alaska and the Tribe share concurrent jurisdiction.[325] However,

> [o]nce the Tribe exercises jurisdiction in an Indian child welfare matter, the Tribe acquires exclusive jurisdiction over all aspects of the case as a matter of tribal law. Tribal law in this regard interprets 25 U.S.C. § 1911(a) to mean that the Tribe has exclusive jurisdiction over its children who are wards of the Tribal Court.[326]

Despite this, it is the STA's policy "in children's cases to exercise jurisdiction, whenever possible, in a manner not inconsistent with Alaska state law."[327] Also, the tribal court is mandated to "cooperate with the State's Division of Family and Youth

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[322] *Id.* § 2.2. Similarly, the Children's Code states that "[t]he Tribal Court shall exercise jurisdiction in a manner not inconsistent with the Constitution and By-laws of the Tribe, as well as applicable decisions of the Ninth Circuit Court of Appeals and the U.S. Supreme Court." Sitka Tribe of Alaska, Children's Code § 230(F) (1983).

[323] Sitka Tribe of Alaska, Children's Code § 230(A).

[324] *Id.* § 230(B). For discussion of tribal court jurisdiction in Public Law 280 states, see Chapter III, *supra.*

[325] *Id.* § 230(C).

[326] *Id.* § 230(D).

[327] *Id.*§ 230(G).

Services, and others, to coordinate functions in a manner which is in the best interests of Indian children and families."[328]

5. Procedural and Substantive Law

The Sitka Tribal Council has adopted several procedural and substantive codes.[329] The tribal court applies these, along with traditional Tlingit law, to the cases that come before it.

Codes.

Code of Civil Procedure. In 1983 the Council adopted a Code Governing Tribal Court Rules and Civil Procedure. The Rules include a jurisdictional statement and rules governing the judiciary and tribal court bar. The Tribe's Civil Procedure Code roughly tracks the Federal Rules of Civil Procedure, except for certain provisions that under state and federal law are dealt with by statute,[330] and specific references to tribal law.[331] All actions heard by the court are civil actions.[332]

Children's Code. The Sitka Tribal Council enacted a Children's Code in March, 1983. Its purpose is set forth in language reminiscent of ICWA:

> (A) The young people within the jurisdiction of the Sitka Community Association (hereinafter "Tribe") are the Tribe's most important resource, and their welfare is of paramount importance to the Tribe.

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[328] *Id.* § 230(H).

[329] In the early 1980s the Council enacted numerous codes which the court has never been called upon to apply or enforce: a domestic relations code, planning and zoning ordinance, tribal building and housing code, and civil rights protection ordinance.

[330] Code Governing Tribal Court Rules, *supra* note 321, at § 2.7 (limitation of actions), and § 2.8 (survival of actions).

[331] *Id.* For example, section 2.2 on construction refers the judge back to tribal law if the Code does not apply: " if the course of proceeding is not specifically pointed out by this Code, any suitable process or mode of proceeding may be adopted by the Court which appears most consistent with the spirit of tribal law. Where the Court deems appropriate it may determine and apply customary law of the Tribe. The court may refer to other sources of law for guidance, including the law of other tribes, federal, state, or international. "

[332] *Id.* § 2.1.

> (B) It is important that the young people within the jurisdiction of the Tribe receive, preferably in their own homes and from their own people, the care and guidance needed to prepare them to take their place in adult society.
>
> (C) The Tribe's Children's Court system and the Tribe's Indian Child Welfare Agency are intended to accomplish these purposes, and to insure that other courts will cooperate in returning young tribal members to the Tribal community for care and guidance.[333]

The Code's rules of construction make the Indian Civil Rights Act applicable to all actions under the Children's Code, direct the court to "select the least drastic method of achieving its goal," and establish case priorities.[334] The Code describes the role of the Indian Child Welfare Agency, the name of the court, the court's jurisdictional authority, what shelter care is available to tribal children, rights of the parties, and also contains rules regarding court records.[335] Further Code provisions set the standards and procedures applicable to actions involving minors in need of care, termination of parental rights, and adoption.[336]

Appellate Code. In 1987, the Council adopted by ordinance an Appellate Code. The Appellate Code provides for the establishment of a Court of Appeals consisting of the STA Council.[337] The Code sets forth basic procedural rules and permits the Court of Appeals to publish its own supplemental rules.[338] The scope of review encompasses matters of law, procedure, and jurisdiction. The Council sitting as a Court of Appeals may adjudge the sufficiency of evidence supporting the trial court's findings

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[333] Children's Code § 110.

[334] *Id.* § 130(A), (C).

[335] *Id.* ch. II, §§ 210, 220, 230, 240, 250, 260.

[336] *Id.* ch. III, ch. IV, ch. V.

[337] Sitka Tribe of Alaska Appellate Code § 1.1 (1987).

[338] *Id.* § 1.5, 1.3.

of fact, but is otherwise limited to review on the record and "shall not review any determination of fact made by the trial court."[339]

Traditional Tlingit Law.

Substantive Tlingit law. When the Council established the STA tribal court it was concerned that traditional Tlingit law be preserved and utilized whenever possible to adjudicate issues within the Tribe and between tribal members and other Alaska Natives.[340] The tribal Civil Procedure Code permits the court to adopt "any suitable process or mode of proceeding . . . which appears most consistent with the spirit of tribal law." Additionally, the court as it "deems appropriate, [. . .] may determine and apply customary law of the tribe."[341]

Traditional Tlingit dispute resolution. Under Tlingit tradition each clan was responsible through its leader for settling disputes between clan members and resolving issues affecting the clan. Occasionally, conflicts between clans of the same moiety[342] could not be resolved and they were put before a conclave of same-moiety clan leaders for arbitration under traditional law. Situations involving issues arising across moiety lines called for a gathering of concerned clan leaders for a highly ceremonial conflict resolution session. Such a gathering was Naashaadei Nukx'ee; in English, "Heads of clans meeting together."[343]

The Tribe's Court of Elders takes the form of Naasheedei Nukx'ee. The Court of Elders first convened in the spring of 1984. It considered and acted upon many different types of cases, including fisheries management, management of ceremonial artifacts, and children's and domestic relations issues.[344]

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[339] *Id.* § 1.4.

[340] Peck, *supra* note 84, at 16.

[341] Code Governing Tribal Court Rules, *supra* note 321, at § 2.2.

[342] The Tlingit are divided into two moieties, Raven and Eagle.

[343] Peck, *supra* note 84, at 17.

[344] Specifically, the Court of Elders considered matters involving the Southeast Alaska herring roe fishery; probate matters within the Tribe; protection and monitoring of the heritage-latent ceremonial artifacts in state and private museums in Alaska; advice and direction for the protection of grave sites and ethno-historical sites in Alaska; advice and direction to the tribal court for the proper placement of tribal children in need of care and in domestic relations issues; and advice and direction for the benefit of the tribal council in ceremonial matters. *Id.* at 17.

In the years since, all but two clan heads who served on the Court of Elders have died and, because of this loss, the Court has been inactive. According to the tribal judge, new members can be appointed to the Court of Elders, but the wealth of those elders' traditional knowledge has gone with them and it is hard to find others with the same knowledge of traditional ways. While the judge talks informally with individual elders, none likes to give a personal opinion, nor is a personal opinion as respected as one from a group. It is important that all the clans are represented on a Court of Elders. The judge notes, "I can't go to one clan member and have a decision made about four or five other clans."

In day-to-day matters, the judge applies "Tlingit law using ICWA guidelines. It's surprising how closely ICWA resembles traditional law." This is because ICWA mirrors the Indian tradition of having extended family members care for children. The judge explains that among the matrilineal Tlingit "the mother's side always has the preference and usually takes the lead." So, if a child is a member of the Raven clan, her "mother's mother has preference, or they are asked if they will take care of the child. . . . The matrilineal society more or less governs our court."

In ordinary cases the judge applies the matrilineal preference rule, but does make exceptions. Upon first learning that a child is in need, he searches the extended family for someone able to take the child. "Sometimes a family is willing but in checking out resources we find factors like drinking or sexual abuse or that they are taking children just for the money." The Tribe turns then to the Alaska Department of Family and Youth Services (DFYS) for placement in a licensed foster home. "I get a lot of flak from the Native community about placing children in non-Indian homes, but the foster parents have a pretty good record."

6. Caseload of the Sitka Tribal Court

Of the 103 cases the court has handled from 1981 through 1991, 100 were children's proceedings and the other three were general civil actions (Table 3).[345] Figure 5 illustrates the number of cases filed with the court by year, and shows that the court was most active from 1983 through 1985, when it handled fifty-one cases, or 50% of its total caseload over an eleven-year period.

[345] Data from review of all Sitka Tribal Court case files. The total number of cases does not include cases heard or decided by the Court of Elders, for which no written record is kept. An historian memorizes sessions of the Court of Elders.

Table 3
Type of Cases in Sitka
(Total Cases = 103)

Type of Case	Number of Cases	Percentage of Cases
Civil	3	3%
Children's	100	97%

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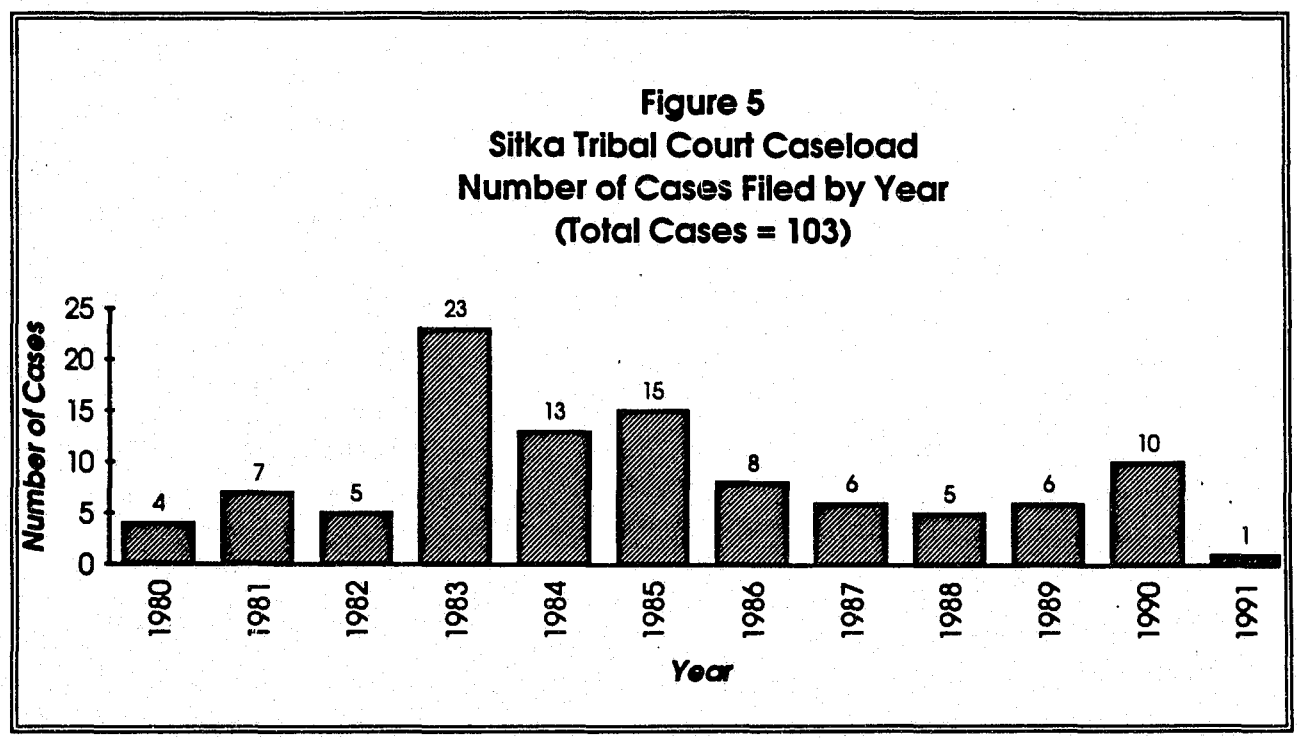
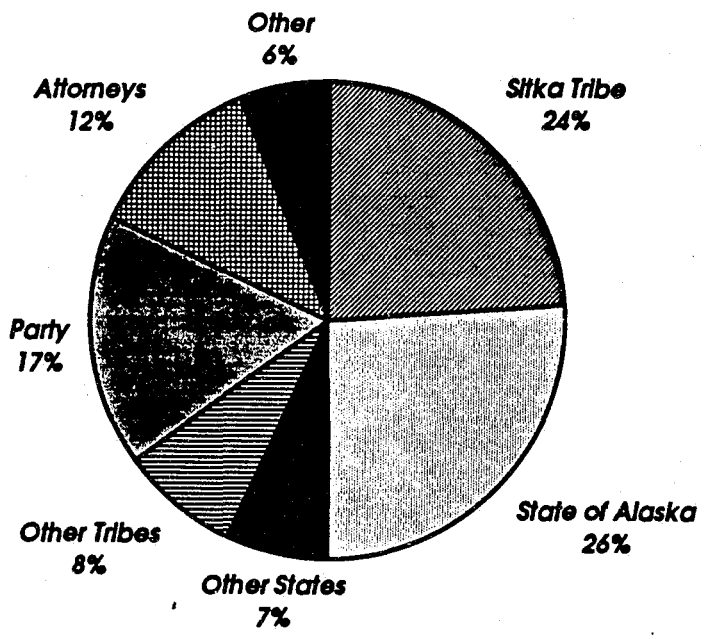


Alaska Judicial Council Dispute Resolution Study 1992

Asked to describe his work as a tribal judge today, the judge responds, "I do mediation, talk to people, do temporary or permanent placements under the Indian Child Welfare Act, what we have always had here for centuries." His informal style characterizes the court more now than it did in the mid-80s when the tribal attorney was Court Administrator, and the Director of the Indian Child Welfare Agency played an important role in the court's activities. Court files from that period reflect a greater attention to documentation and formal pleadings. Also, all formal court hearings were conducted before 1988.

Case Referral Sources. The Sitka Tribal Court receives cases from a diverse group of referrals. Twenty-eight (26%) came from Alaska, including referrals from DFYS and seven (7%) from other states. One quarter of the court's cases come from the tribal social service agency. Eight (8%) cases came from other tribes. Self-referrals accounted for eighteen (17%) of the court's cases, and attorneys have referred twelve (12%) of the cases. The remaining six (6%) of the court's cases come from other sources, for example health professionals (Figure 6).

Figure 6
Origins of Sitka Tribal Court Cases
(Total Cases = 103)



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As in Minto, the Sitka Tribal Court sometimes makes decisions in its own forum, and sometimes represents tribal interests in other fora. This is most apparent in the ICWA context. ICWA requires states to notify an Indian child's tribe of involuntary

child custody proceedings.[346] Notice under ICWA is directed to the Sitka Tribe but, as is the practice in Minto, all ICWA notices are directed to the tribal court for review. The tribal court, often in consultation with the tribal social services agency,[347] decides what action to take. Characteristically, the tribal court files a pleading in the state court action stating its non-objection to the proceeding. In this way, the tribal court maintains tribal visibility, even in routine matters.

Attorneys. The Sitka Tribe received twelve ICWA notices from attorneys which in turn were sent to the tribal court. In all instances, notices concerned voluntary adoptions. From 1981 to 1984, STA's ICWA policy was to refer its members to the Tribe's general counsel for preparation of adoption papers. The court functioned then, said the former general counsel, to give approval to the adoptions he prepared. "Among cases I had, it was pro forma."

Of all adoption cases referred by an attorney, the court acted on eleven cases by filing a pleading of non-objection in state court and deferring to the state court's jurisdiction in the matter. In some cases the court ordered the tribal social service agency to conduct a home study and issue a report on the pending adoption.

State of Alaska. The Tribe received ICWA notices from the State of Alaska in two classes of cases, adoptions and child in need of aid proceedings. The Sitka Tribal Court received notice of adoption proceedings from the Alaska state courts in nine cases and filed a notice of non-objection in all nine.

The court also received notice of nineteen child in need of aid proceedings, taking no action in seven of these and affirmatively waiving its jurisdiction in the remaining twelve. Frequently, the court chose to decline jurisdiction because the "State is providing essentially the same services that the Tribe would provide."

The court's waiver of jurisdiction in twelve child in need of aid cases should not be construed as indicating lack of interest. Rather, it reflects the close cooperation between state DFYS social workers in Sitka and their tribal counterparts. Current DFYS philosophy is "family centered," meaning that the Division offers clients in-home and remedial services designed to support the family and keep children out of state custody.

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[346] See discussion, *supra* note 209. Although the Act explicitly requires notice in only involuntary proceedings, the Sitka Tribe has often received notice in voluntary proceedings, most notably adoptions.

[347] Formerly called the Indian Child Welfare Agency.

Out-of-home placements are attempted with extended family members. STA's social service programs are guided by the same philosophy, a fact which has helped to create a practical working relationship between the State and Tribe in this area.

Tribal and state social workers are in contact on a daily basis. They refer cases back and forth,[348] and express satisfaction with their ability to share resources in the support of troubled families. In particular, DFYS social workers report a high degree of success with guardianships ordered by the tribal court. Parents and extended family members perceive the placements as valid and binding, as do schools, law enforcement, health care providers, and DFYS itself.

Other states. The Sitka Tribal Court received notice from out-of-state courts in a handful of ICWA cases. Two of these were particularly notable cases, one from Oregon,[349] and another from Nevada. Courts in other states routinely give full faith and credit to Sitka Tribal Court rulings. Full faith and credit is given as a matter of course by state courts in other states because tribal sovereignty is assumed.[350]

Tribal child welfare agency. Though only a quarter of the court's caseload comes from the tribal social service agency, the court devotes substantial resources to these cases. They generally include guardianships, tribal child in need of aid matters and child custody decisions

Interviews and court case files reveal that tribal members often seek assistance from the Tribe's social service agency. This is especially so in times of family crisis, for example, when a single parent faces incarceration or when a parent dies. At such times, tribal social workers may petition the court for a guardianship or custody order to ensure a child's proper care.

Self-referrals. Parties to an action have solicited the court's assistance, often seeking guardianships or custody orders. In addition, at least one domestic violence case came before the court on a self-referral.

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[348] DFYS ranks cases by severity on a scale of one to three, with one being most serious. DFYS refers only non-priority two and three cases to STA.

[349] This case is discussed *infra* in Chapter VI.

[350] For a discussion of the legal differences between tribal sovereignty in other states and Alaska, see Chapter III, *supra.*

Characteristics of Other Civil Cases. The tribal court decided three general civil actions. In one, a tribal member filed suit against two non-Indian employees of the Tribe. The employees challenged the court's jurisdiction in a motion to dismiss filed in tribal court and the Tribe, through the Council, intervened on the employees' behalf. A pro tem judge from a reservation in another state heard the case and ruled that the court had jurisdiction over the defendant non-Indian employees. The employees appealed the trial court's decision to the Council, which sat as the Court of Appeals. The Council ruled in the employees' favor.

Two civil actions heard by the court arose from related cases. In the principal matter, a faction within the Tribe sued the Council for an accounting of tribal funds and demanded that the Council hold a new election. The case was presided over by a pro tem judge from the Warm Springs reservation. The settlement reached at trial led to dissolution of the former Council and the eventual election of a new Council. During the trial, a contempt citation was issued against an attorney representing the former Council. The attorney appealed the citation in a new action, which was mooted when the former Council, as its final act in power, removed the contempt citation.

7. Evaluation of the Sitka Tribal Court

Evaluation Based on Tribal Goals.

Self-governance. The Sitka Tribe had twin goals in establishing a tribal court in the early 1980s. It sought to preserve traditional decision-making in the form of a Court of Elders, and to forge a judicial link with the State and the Federal Government. Thus, the exclusively tribal aspect of the court was to take a purely traditional form, and the court's public aspect was to resemble the state and federal courts.

Traditional Court of Elders. Broadly, the Court of Elders is part of the tribal court, but it is beyond the scope of this study to describe the Court of Elders in any detail or evaluate it in-depth. However, some comments can be made on the Court of Elders' role in fulfilling tribal court goals.

Clan heads meeting as the Court of Elders carry out an ages-old dispute resolution tradition within the Tribe. The Court of Elders has considered matters of importance to the Tribe, both as they relate to internal tribal affairs and to the Tribe's relations with outsiders. As such, the Court of Elders has an important role in the self-governing tradition of the Tribe.

The death of some clan heads and the judge's delay in appointing members to take their places on the Court has resulted in the Court of Elders' inaction. Its inactivity deprives the Tribe of the traditional voice that has, and could still, be heard in tribal government.

Public Tribal Court. The Sitka Tribe has a tribal court which, at the time of this evaluation, has been active for eleven years. The court orders guardianships and assumes jurisdiction over tribal child welfare matters. The tribal court's decisions in these cases are given full faith and credit or accorded comity by state courts in other states. Thus, the Sitka Tribal Court's operation helps fulfill the Tribe's goal of exercising sovereign tribal powers.

In addition, the court acts in the Tribe's name in ICWA cases brought in other fora. In its early days, the court's practice was routinely to file pleadings in state court and, where the court believed the Tribe's interest should be more vigorously represented, to litigate jurisdictional issues in state court. The court relied then on assistance from STA counsel. With the shift away from adversarial litigation and towards mediation and negotiation, the court has had a lower profile in state court. The court's lowered state court profile will not serve the Tribe in pressing for formal recognition by the state court. However, informally, cooperation between the Tribe and state court is increasing. Informal cooperation may not signal the State's eventual readiness to give the Tribe the formal recognition it seeks, but it undeniably serves to facilitate resolution of difficult cases involving tribal children.

Assume tribal responsibility for children. One of the Tribe's principal goals for its tribal court was to create a forum for the Tribe to take responsibility for the well-being of its children. Records and interviews show that the court devotes almost all of its resources to children's matters; all but three of the court's cases have been children's cases.

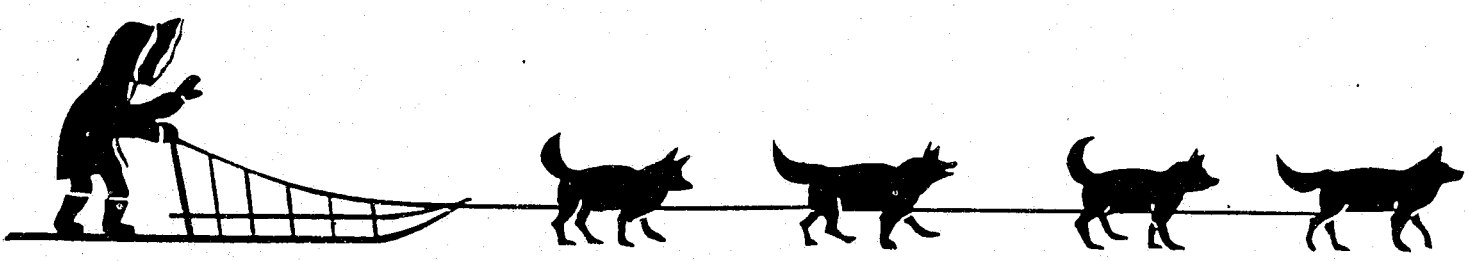
The court's current work exceeds the original plan of handling ICWA cases. The court has represented tribal interests in ICWA cases filed in other fora, intervening in some actions, and its own children's cases have covered a broad spectrum of proceedings, including tribal child in need of aid cases, guardianship and, more recently, child custody visitation cases. In all of these cases, the tribal judge has sought to harmonize state, federal and Tlingit law. Reportedly, federal and Tlingit law mesh well

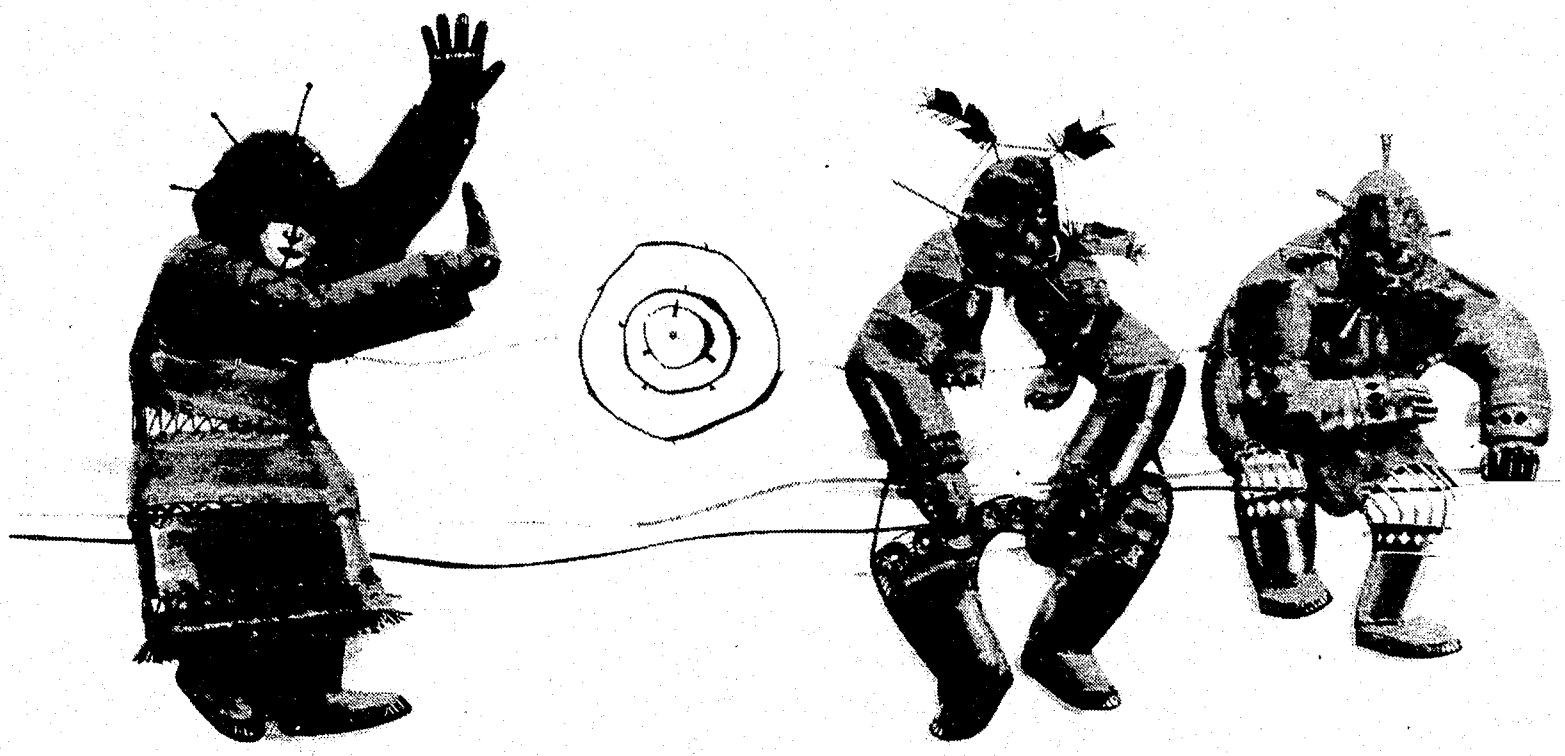
in the ICWA context, with the result that the dictates of federal law can be satisfied in culturally appropriate ways.

Evaluation on Other Criteria.

Community support. The current Sitka Tribal Court judge bridges the gap between the Tribe and the larger community. He has long-term personal relationships with state law enforcement, judicial, and social service providers. These relationships help to facilitate the court's working relationships with other agencies.

Expansion of court's role to meet changing tribal needs. The court's role has changed over time, probably in response to the changing needs of its users. The court originally was created as an arm of an administrative agency, but grew as a separate branch of tribal government altogether. The court has heard non-children's matters (the three civil actions), has on file a will, and the Council is planning to have the court handle probate matters, at no cost, under traditional law beginning in 1993. In probate cases, the court would apply the complicated Tlingit law of descent to clan and personal property. This is important to the Tribe because ceremonial items are being lost as the estates of tribal members go through probate in the state courts. Also, it is felt that tribal members will benefit from having a choice over the type of probate proceeding their estate will go through.





Barrow Eskimo Dancing Ceremony
(Wall panel of welded steel figures by Larry Ahvakana)
Photo by Frank Flavin, courtesy of Alaska Court System

C. PACT

1. History of PACT

PACT, a community conciliation organization in Barrow, is an acronym for the Tagalog, Inupiat and English words for "come together."[351] One PACT member reflected on the symbolism of the group's name: the "name was almost a parable of how PACT formed and how it works. . . . Included in all three languages, the word itself has a connotation of coming together. It's very powerful."

The idea for PACT was born in Whitehorse, Yukon at the Northern Justice Society conference in 1983. Barrow's superior court judge attended the conference, where he learned about the San Francisco Community Boards and other community conciliation organizations in Canada and the United States. Upon his return to Barrow, he began "sowing seeds and gathering information" about alternative dispute resolution. Further expanding upon his knowledge about resolving disputes, he took a course in alternatives to traditional dispute resolution techniques at the National Judicial College and visited the Northwest Intertribal Court System in Edmonds, Washington.

The incident which led to PACT's formation occurred when angry townspeople in Barrow gave their mayor a petition protesting the use of profanity on the CB radio. This was not the kind of problem that could be solved legally at the local level, but it catalyzed community discussion about what could be done short of taking legal action. Barrow's mayor asked the superior court judge to discuss the community conciliation idea with him, and then with the Barrow City Council. The judge presented a slide show on alternative dispute resolution, developed by the Northwest Intertribal Court System, and the script was translated into Inupiaq. The show was repeated at public meetings authorized by the city council and mayor.

A committed core group formed PACT in early 1989. Urban and rural trainers from the San Francisco Community Boards and the Seattle Intertribal Peacemakers, a tribal organization, went to Barrow in February 1989 and taught the group a blend of conciliation skills. They also prepared the group to train others in conciliation, thereby ensuring that PACT could be self-sustaining.

[351] The Tagalog and Inupiaq words are "Pagkakaisa" and "Atisiñiaġniq," respectively.

2. Goals of PACT

The broadest formulation of PACT's main goal is to promote harmony in the community. Specific activities designed to meet this goal include responding to a community need for dispute resolution by offering free conciliation for Barrow residents, educating the community about conciliation, and promoting community responsibility for conflict prevention and resolution. PACT also provides technical assistance to other Alaska communities interested in establishing community conciliation organizations; PACT members would like to see the group's message spread throughout the State.

Finally, PACT believes that developing peacemaking skills among neighbors strengthens the community. As a means of developing peacemaking skills among neighbors, the organization encourages the expression and exchange of ethnic and cross-cultural values through dispute resolution.

3. Structure of PACT

Membership. At the time of this evaluation, PACT's active membership stood at eighteen persons, ten women and eight men. The number of members has remained roughly the same over the three years the group has been in existence. PACT counts among its members one native and one non-native speaker of Inupiaq and two Filipino Tagalog speakers. In the past as many as three Inupiat were members.

PACT divides its membership into three groups: associates, conciliators, and trainers. Conciliators are those who have completed the group's full training program and are qualified to sit on conciliation panels or perform pre-panel dispute resolution. Associates are persons who have not completed the training but contribute to the group in any number of ways.[352] In February, 1992, PACT had five conciliators, six conciliator/trainers, and six associates. Trainers can and do train new members. Trainings are the best source of new memberships.

Corporate Structure. When PACT first organized, its members chose not to ally the group with any established power structure in Barrow: the churches, and state, local and

[352] Some PACT members do not act as conciliators because of potential conflicts of interest. The town's two Presbyterian ministers are PACT members. Neither will sit on a panel because, as one said, "half the population of Barrow considers this their church. We have to be there to pick up the pieces" afterwards. Similarly, the superior court judge, also a PACT member, is not involved in the resolution of individual cases.

tribal government. The reason for this was to guard PACT's neutrality and credibility within the community. Thus, the group incorporated as a nonprofit corporation under the laws of the State of Alaska. Its Articles call for three directors. The only requirement for membership is that one be "ready, willing and able to participate as much as possible in PACT activities."[353] An annual meeting is held in January at which time new directors are elected and goals for the year discussed. Membership and special meetings may be called with at least one day's notice. One tenth of the members is a quorum. PACT has four officers, a president, vice-president, secretary and treasurer.[354]

PACT's by-laws limit the organization's business activities. Any contract may be entered into only upon resolution of the membership. Likewise, the making of loans and other indebtedness require the membership's approval. Any purchase over $25.00 requires membership approval as well.[355]

In an effort to avoid the cost associated with hiring a staff person, PACT departed from the Community Boards model and established a four-committee system to do the organization's work.[356] The committees were: Case Management, Outreach, Fundraising/Finance, and Training. Two committees, Outreach and Fundraising/ Finance, collapsed into one shortly after the group's inception. The committee structure devolved over two years' time until three, then only two, PACT members were doing all the group's work. Burn-out set in and the two who were carrying the group called either for PACT to dissolve or for a "radical reorganization."

"Radical reorganization" won over dissolution. In January, 1992, PACT completely revised its working structure. The group abolished the committees and broke PACT's work into discrete tasks, assigning individuals responsibility for each. The tasks now include advertising and recruitment (three people); fund raising (three people); case

[353] Bylaws of PACT. art I.

[354] *Id.* art. III.

[355] *Id.* art. IV.

[356] In addition to the cost-saving feature of using a pool of volunteer labor, the founders thought lack of paid staff would prevent PACT from being identified with a particular person or personality. Hopefully, then, PACT principles would attract disputants and no one could cite personality as the reason for not using PACT's services. Three years later, in the wake of reorganization, the group discussed at length the possibility of retaining a staff member, possibly a Presbyterian Volunteer in Mission. Opinion was divided over whether to retain staff, paid or volunteer, and whether a volunteer with church affiliation would damage PACT's neutral status in the community.

management (two people);[357] ongoing training and quality assessment (one person); trainers' training (two people); multicultural training (four people); meeting notices (one person); and research and development (four people).[358]

The organization keeps officers only because it must as an Alaska corporation. In practice, a steering committee makes administrative decisions. Any PACT member may attend steering committee meetings.

One of the group's prime values is equality, whether it is equality in who does what work or how an individual is regarded within the organization. As one member explained, equality is premised in conciliation, hence, "the structure is appropriate to the process."

Training. When the San Francisco Community Boards and Seattle Intertribal Peacemakers first trained PACT's members in 1989, they also trained members to be trainers themselves. This was to allow the organization to be self-supporting and self-sustaining. Training involved learning about dispute resolution, listening skills, and the conciliation process.

PACT has designed on-going training for its membership. Ideally, the organization would hold a training session bimonthly. In practice, however, training sessions have been far less frequent. Trainings held have involved role plays dealing with "whatever we've had the most problem dealing with." The group believes it is helpful for conciliators to play the role of a disputant so they get a sense of the experience.

PACT tries to offer annual or semi-annual trainings to the community. During the summer of 1991, the group offered a training through the local community college. Five students were in the class, of whom three went on to become conciliators. This was a low number and, in the opinion of one teacher, not worth doing again.

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[357] Case managers continue to act as a committee in that they consider and decide upon case management matters jointly.

[358] Members chose areas of personal interest to research. The areas are child custody mediation, domestic violence mediation, court-referred cases, arbitration, classic mediation, and victim-offender mediation. Victim-offender mediation is styled after a Canadian program designed to target youthful offenders at the sentencing stage. Its goal is to impress these youth that they offended someone with whom they must live in a small community.

PACT will conduct a full conciliation training for Barrow High School students in the fall of 1992. The high school principal turned to PACT for assistance in healing racial tensions in the school. Fifteen interested students from diverse racial backgrounds were chosen to participate in the training and, once trained, they will make up an autonomous conciliation project resolving disputes among high school age youth.[359]

Funding. PACT is an all volunteer organization. Its membership staunchly asserts the importance of being all volunteer: all who participate do so out of conviction and commitment, not because of tangible rewards.[360]

The City of Barrow, State Department of Community and Regional Affairs, and the North Slope Borough Mayor's Office provided funds for PACT's initial training. The Presbyterian Church synod gave the group a $2,000.00 grant to cover costs for brochures. The Church also let the organization keep its answering machine in an unused closet. The local Rotary Club pays PACT's monthly phone bill.[361] PACT also received start-up funds from the Barrow Lions Club. The Seva Foundation of Northern California donated funds for printing costs and material preparation and, later, for PACT to train villagers in Emmonak in the conciliation process.

At the time of this evaluation, PACT had "about $30.00 in the bank." The organization described its needs as minimal: a post office box and advertising.

Facilities and Equipment. PACT has no facilities of its own. Group meetings are held in public places like the law library in the courthouse or the city meeting room. Panel sessions take place in public places that have no personal associations for

[359] Students attended a two-day introduction to dispute resolution and multicultural issues in February 1992.

[360] Commentators note that payment for myriad services has changed Barrow's social profile. R. WORL & C. SMYTHE, *supra* note 23, at 70-74. PACT's choice not to pay an employee, its officer or Board members, and not to offer substantial "door prizes" at its annual meeting is unusual in a community where people expect payment for participation in many community activities. This is in keeping with the high value PACT puts on notions of personal responsibility. Members see Barrow as a place where people all too often disclaim responsibility for social ills and personal problems. They believe that if people accept responsibility for their part of a problem, however, the solution is within reach.

[361] The bill is paid with the understanding that a PACT representative will report to the Club yearly about PACT's activities. In 1991 the two members who were acting for the whole organization were so "strapped for time" that no one spoke to the Rotary Club and one of the two paid the bill herself.

disputants, places that are, "impartial, comfortable for both disputants," says a conciliator. PACT's only equipment is its answering machine.

4. Substantive Law Applied and Procedure

Substantive Law. PACT applies no substantive law to any case in the conciliation process. The parties themselves, without reference to any law, craft their own solution to the dispute between them. The emphasis is on consensus, and all parties are encouraged to create solutions that meet their own needs. Personal responsibility, rather than substantive law, is the central feature of the process.

Procedure. In contrast to the unimportance of substantive law, PACT's procedures are central to its mission. The entire case resolution process is well-defined and can be divided into discrete phases. The process begins with intake and screening, continues with either early resolution or referral to the conciliation panel, and ends with follow-up.

Intake and screening. The dispute resolution process begins when a disputant requests services by calling PACT's telephone number or writing to its post office box.[362] A case manager assigns a case developer to follow up with the caller, who is referred to as the "first disputant." The case developer interviews the first disputant, identifying the facts of the dispute as well as ascertaining the first disputant's feelings about it. The case developer reports this information to the case management committee.

The case developer next contacts the person with whom the first disputant has a conflict (called the "second disputant"), trying to identify the issues, facts, and feelings from the second disputant's perspective. Afterwards, the case developer returns to the case management committee for a determination whether the case is suitable for further conciliation.[363] If the answer is no, the case goes no further in the PACT process, but appropriate referrals may be made.

Referrals to other agencies. If PACT cannot take the case, the disputants may be referred elsewhere. For example, a distraught parent sought PACT's help in getting her daughter to stop drinking. PACT determined it could not take the case because mother and daughter had no true dispute. However, in an effort to help the mother

[362] PACT has no office. All service requests have come over the telephone.

[363] A case is suitable for further conciliation if it falls within PACT guidelines and the disputants are willing to participate in conciliation.

identify resources that might be of assistance, the case developer arranged for the mother to meet privately with the director of the local alcohol treatment facility.

Case developer resolution. The case management committee can decide to accept the case for a conciliation panel. Sometimes, though, one or both of the disputants does not want to go to panel, perhaps because of privacy concerns or even because of a feeling that the dispute is fluid enough to resolve without a panel. When the disputants prefer not to resolve their dispute with a panel, the case developer can act as a "go-between" to facilitate the dispute resolution. In those cases, the case developer relays facts, feelings, and proposed resolutions from disputant to disputant.[364] One of PACT's Inupiaq-speaking case developers helped an Inupiaq family resolve a dispute that had polarized family members. In another instance, the case developer worked with a business owner, his customer and the customer's father. The customer had not paid her bill and the business owner was dunning her father. The father wanted PACT to get the business owner to stop the dunning. The process of talking out facts and feelings resulted both in the daughter's paying her bill and the owner's agreement to treat her father with respect.[365]

Panel composition. A panel consists of three to five conciliators assembled by the case management committee. PACT tries to build a panel with a mix of races, genders and ages that includes one person [each disputant] can identify with. "It's a psychological trick because we want them to see the panel as a whole as impartial."

The key to a successful panel, says one conciliator, is dealing with feelings, especially anger. Another important matter is to hold the actual conciliation in a "neutral" setting. PACT has eight to ten such locations: the school, fire department, health department conference room, Lions Club.

The panel session. Before beginning, the panelists choose one individual as chair. The chair describes the process to the disputants, facilitates transitions from phase

[364] Sometimes a conflict has more than two sides, in which case additional case developers are used as needed. PACT makes an effort to assign case developers to match disputants' ethnicity.

[365] The case developer in this case spoke Inupiaq with the elderly father and English with the store owner. An Inupiaq-speaking PACT member notes that privacy and saving face are Inupiat values. The PACT process is a cultural adaptation of the Inupiat practice of not bringing disputes into the open. Use of a "go-between" allows disputants to settle their differences and, since "they never have to meet face to face, they don't lose face."

to phase, and pays attention to overall dynamics. The chair first explains the ground rules: disputants take turns speaking to the panel, they are to show respect and not interrupt when the other is talking. The chair assures the disputants that the panelists are not judges or jurors, and that the panelists care about what happens to the disputants and the community.

The case developer introduces the disputants and panelists, and describes the dispute briefly. He or she stays, but does not speak, during the conciliation. An observer takes notes.[366]

In phase one of the panel session, the disputants sit side by side and face the panel. Each in turn tells the panel his story. One panelist illustrated the importance of listening for the feelings behind the facts with the example of the car owner who disputed a bill from his mechanic. The mechanic thought that the car owner did not respect him and feared that if he compromised on the bill he might be perceived as an "easy mark." The owner felt that the mechanic had unfairly charged him and had been condescending to him. Through close listening, the panelists identify the feelings, assumptions, values, perceptions, attitudes, beliefs, issues, and communication styles that characterize the dispute and disputants.

After the disputants have spoken, the panelists repeat back what they heard. The panelists' goals are to summarize their understanding of the dispute, to gather more information as needed, and to diffuse tension by allowing each disputant to hear the other's story stated objectively by someone not involved in the dispute.

Next, the disputants turn their chairs to face each other and speak directly to one another. This is the "most awkward" stage. The chair asks each disputant to talk about the feelings generated by each aspect of the dispute. The panel attempts to start with a neutral issue, get a quick agreement and build on success. The panel's goal is to go "issue by issue, feeling by feeling, fact by fact, and repair the breach."

At this stage, disputants characteristically start to identify solutions. The note-taker on the panel writes down each proposed solution and the chair thanks the disputants, promising to return to it later. Once the disputants start suggesting resolutions, the panel tries to tie up the remaining issues and, as one conciliator said,

[366] Disputants are told that notes do not concern the substance of the dispute but, rather, are used to critique the panelists immediately following the session and, later, to design on-going trainings.

"get back to common ground. Most people in Barrow have established a relationship. We want to re-establish that relationship."

Transition to the resolution phase "happens almost automatically." Resolution is spontaneous. The chair stops and summarizes what the disputants have done so far. If big issues remain, the chair acknowledges that fact and re-directs everyone's attention to them. At this point, said an experienced conciliator, "we want each party to recognize differences in values and communication styles and understand that we're not going to conciliate those things."

The parties' agreed-upon resolution ideally will meet the needs of each disputant. The panel's role is to "facilitate brainstorming:" panelists make no suggestions; they do remind the disputants of proposed solutions they suggested themselves. Panelists take care to ensure that the final agreement is indeed workable. The agreement is put in writing only if the disputants so desire, and if so, it becomes the only written record of the conciliation. Disputants in only two PACT cases have negotiated written agreements; both involved money payments over a period of months. Otherwise, the only symbol of resolution is a handshake between disputants.

When the panel session is over, the panelists thank the disputants for their efforts. The case developer leaves the room to speak with each disputant, then returns for debriefing. To debrief, panelists discuss how the session went, what worked, and what the problems were. The case developer describes his or her perceptions. Finally, the observer gives specific feedback about what worked well and what might have worked better.

Follow-up. The case developer is responsible for follow-up. The case stays open until the resolution is complete. Characteristically, follow-up requires only a phone call or two to see whether the disputants are following through with their agreed-upon resolution and whether new problems have arisen. Disputants also can be reminded of their agreements through follow-up phone calls. If the resolution appears not to be satisfactory, the case developer has the option of assembling the panel to hear the case. PACT has never reconvened a panel.

Confidentiality. The entire PACT process is confidential. No outside observers are present during the panel session and no conciliator, other than the case developer, speaks one-on-one directly with a disputant. When panel members and

disputants meet in the course of daily life they make "no allusion to the fact that there was a conciliation."

Time. A case developer may have spent as much as four hours to assist in resolving a case without the case going to a panel. For those that do go to panel, the case developer spends an average of two hours. The case management committee meets for about a half hour to consider whether a case should conciliate, and spends another hour and a half assembling the panel. The shortest PACT panel took an hour and ten minutes, the longest four and a half hours, without achieving resolution.

5. Caseload of PACT

Case Characteristics. PACT records general case information on a case record form. Disputants' names, telephone numbers, a brief description of the dispute, referrals made, and a description of the resolution are recorded on the form. It also lists the names of PACT personnel involved in the conciliation, and the time spent by each.[367]

PACT's internal guidelines specifically exclude the following types of disputes: child abuse or neglect, foster care, child in need of aid, domestic violence, probate, disputes being processed by another agency, or cases in court. The organization does agree to hear such matters as landlord-tenant problems, noise or pet complaints between neighbors, property damage, vandalism, unpaid bills, and workplace or school problems. Seven of the cases PACT has handled have been landlord-tenant disputes.

Data show that all PACT cases fall roughly into three categories: landlord-tenant, small claims, and personal disputes. PACT's thirteen small claims-type cases make up the largest single group. These were mainly disputes between business people and customers. Eight PACT cases can be categorized as landlord-tenant involving, for example, threatened evictions and rent disagreements. Some personal disputes (six) involved disagreements over private debts and others (seven) involved no money. Roommate and family disagreements were among the latter (Table 4).

[367] A PACT member with personal knowledge of each case gave the Project Evaluator the same information as was gathered from both tribal courts. PACT accords disputants complete confidentiality; hence, no PACT member revealed any disputant's name or other identifying characteristic.

Table 4
Type of PACT Cases
(Total Cases = 37)

Type of Case	Number of Cases	Percentage of Cases
Landlord-Tenant	8	22%
Small Claims	13	35%
Personal Dispute (money)	6	16%
Personal Dispute (no money)	7	19%
Unknown	3	8%

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Screening and Volume. In its three years in operation PACT has received requests for resolution of a range of problems, some which did not qualify for conciliation services. Of the thirty-seven requests[368] the organization has had, it declined to conciliate six, three because they involved issues that PACT has chosen not to conciliate,[369] and three because they were in or going into the legal process.

In sixteen cases PACT was able to offer education and referral services, but no dispute resolution services. In six of those, the first disputant decided not to pursue the matter.[370] In the remaining ten, the second party to the dispute refused to participate.[371] One case settled before a case developer could contact the second party.

[368] PACT defines a case as any request for service, including information and education.

[369] Examples include a case involving criminal theft, assault, and domestic violence and another case from an outlying village that would have necessitated telephonic dispute resolution, something PACT does not do.

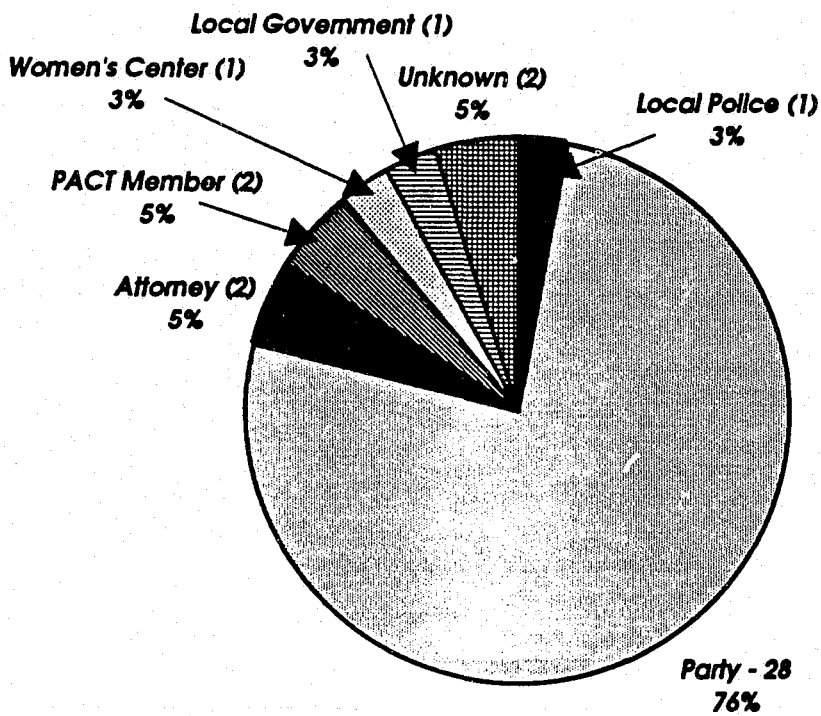
[370] In one case, the first disputant decided to drop the matter upon learning that PACT lacks enforcement authority.

[371] The high refusal/dropout rate is not uncommon to voluntary dispute resolution programs. For a comparison to and discussion of refusal/dropout rates in other programs, see Chapter IV, Section 6 "Evaluation of PACT" and accompanying notes, *infra*.

Thirteen cases proceeded through some phase of the conciliation process. A case developer facilitated resolution of six cases. An additional six cases went through the panel process. One case remains open.[372]

Case Referral Sources. The majority of PACT's cases are self-referred. In twenty-eight cases the parties called PACT without any referral.[373] These were people who learned about PACT through the local media, or who read one of PACT's posters or brochures. Two PACT cases came through referral from a PACT member and two via a Legal Services attorney. Other referrals have come from the City mayor's office, local public safety officer, and the local women's center. The origin of two cases was unknown (Figure 7).

Figure 7
Origins of PACT Cases
(Total Cases = 36)



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[372] At the time of this evaluation, the disputants had been out of town for extended periods, however PACT was willing to conciliate the dispute upon their return if the parties so desired.

[373] Or no referral to PACT's knowledge. The group takes greater pains now to record case origins.

Parties. Thirteen of PACT's cases have had a business as a party. For the most part, these have been small business people, store owners and tradespeople. Others have been larger businesses, some headquartered outside Barrow.

Seventy-five percent of PACT's cases have involved Native and/or Filipino disputants. Only nine cases involved only Caucasian disputants.

6. Evaluation of PACT

Evaluation Based on PACT Members' Expressed Goals.

Promote harmony in the community. PACT's goal of promoting harmony in the community is very hard, if not impossible, to gauge with any measure of specificity. However, it is possible to evaluate PACT's success in carrying out activities it believes will result in greater community harmony.

Offer free conciliation services. PACT's very existence and its continued offer to assist in dispute resolution through conciliation satisfy its goal of offering free conciliation services.

Offer training. Another of PACT's expressed goals is to train others in dispute resolution techniques. Although PACT has not offered trainings as frequently as the ideal, it does offer trainings to adults and students at least twice a year. Also, the organization trained villagers in Emmonak interested in establishing a conciliation program.

Respond to community need for dispute resolution. PACT originally was formed to respond to calls in the community for alternative dispute resolution. In three years' time PACT has logged a total of thirty-seven calls or, on average, one a month.[374] In fact, though, PACT sometimes goes for long stretches of time without a call. However, PACT's small caseload puts it in line with other voluntary dispute resolution programs, which often meet resistance attributable to disputants' unfamiliarity with alternative dispute resolution and a reluctance to venture away from the known structure of litigation.

[374] The organization gets more calls when it has a higher profile in the community, usually when it offers a training or receives media coverage.

Even so, PACT provided dispute resolution services to 40% (fifteen cases) of disputants who sought services. The remaining 60% of the cases stopped short of conciliation either because they were screened out as inappropriate for PACT or because one of the disputants chose not to follow through with the process. This relatively high refusal/dropout rate is common to voluntary dispute resolution organizations. For example, in a study of custody mediation between 1979 and 1981 in Denver, Colorado, one-third of the respondents refused voluntary free mediation services.[375] In Anchorage, Alaska, the voluntary Child Visitation Mediation Project found that 34% (forty-two of 125) eligible applicants never filed a formal request for free mediation, even though they had completed a lengthy (twenty to forty-five minute) telephone interview.[376] In addition, in 41% (thirty-four of eighty-three) of cases in which a formal request for mediation was filed, the other party refused to participate.[377]

Express and exchange multicultural values. Two of PACT's early panel sessions were unsuccessful. Conciliators quickly identified racism as the reason disputants were unable to resolve their disputes. The organization therefore resolved to address directly as part of the conciliation process ethnic and cultural issues that might be barriers to understanding between future disputants.

One PACT member was sent to a training program outside Alaska to learn about multicultural issues in the conciliation context. She returned to Barrow and taught others what she learned. Since then, all conciliators include elements of values education and clarification in their dispute resolution efforts.

PACT's goal of strengthening the community through expression and exchange of multicultural values is an ideal that is difficult, if not impossible, to evaluate with precision. Unarguably, however, values exchange is highly appropriate in multi-ethnic Barrow.

Data show that 75% of PACT cases involve Filipino or Inupiat disputants. Often, the other disputant is of another race. Thus, conciliators' multicultural awareness and

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[375] Pearson and Thoennes, *Reflections on a Decade of Divorce Mediation Research*, in KRESSELL & PRUITT, EDS, THE MEDIATION OF DISPUTES: EMPIRICAL STUDIES IN THE RESOLUTION OF CONFLICT (1987).

[376] S. DI PIETRO, *supra* note 139, at 9.

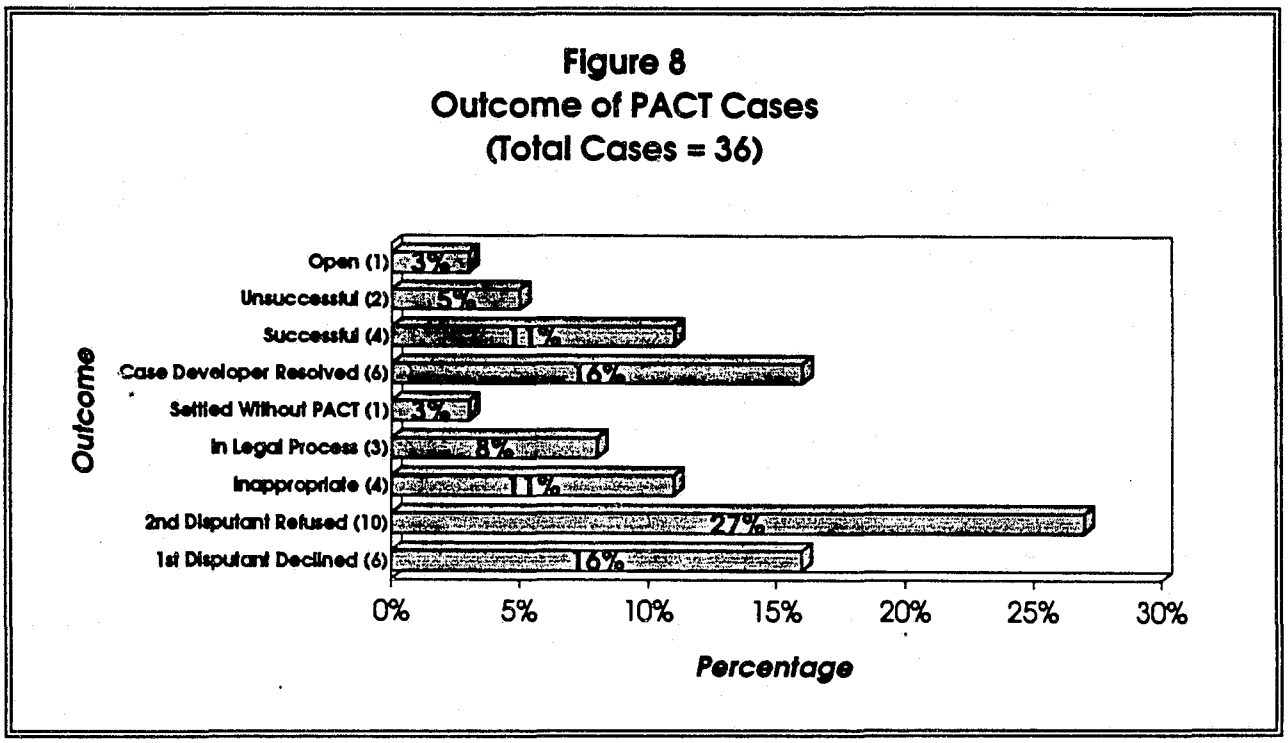
[377] *Id.*

their incorporation of multicultural issues in the dispute resolution process can educate and sensitize disputants.

In addition, there is some evidence to suggest that PACT conciliators are more confident and effective in the conciliator's role now that they have the tools of multicultural understanding. Conciliators report that even if disputants display no overt racism, they can detect subtle bias, then help disputants understand themselves and each other better. In general, they feel they are better able to facilitate dispute resolution.

Evaluation on Other Criteria

Effectiveness in resolving disputes. One measure of a program's effectiveness in helping disputants resolve problems is the number of disputes resolved compared to disputes that were not resolved or did not go to conciliation. Thirteen of PACT's thirty-eight cases (34%) actually went through the dispute resolution process. In ten of these cases, the disputants reached agreement. One case remains open. The disputants in two other cases failed to reach agreement (Figure 8).[378]



Alaska Judicial Council Dispute Resolution Study 1992

[378] These are the two cases involving racial issues that inspired PACT to add a multicultural facet to its training.

Another measure of effectiveness in resolving disputes is whether many disputants who reached agreement subsequently took their case to another dispute resolution mechanism.[379] To the best of PACT's knowledge, no disputants took cases to another forum. This shows that PACT has been successful in actually facilitating resolution of disputes once they enter the process; all but two reached agreement, and parties who reached agreements were satisfied with them.

PACT's success in achieving lasting resolutions may be explained in part by the conciliation panel itself. The disputants participate voluntarily, and, whether the dispute is resolved with the assistance of a case developer or a panel, solutions are not coerced. According to a PACT member familiar with all PACT's cases, there has "never been a lopsided conciliation."

Education and referral. PACT provided education and referral services only, without dispute resolution, to 60% of its thirty-seven callers. Education and referral can be valuable services. Even if a caller decides not to use conciliation right away, educating him or her about the options enables the caller to consider it in the future. In addition, some callers who received neither conciliation nor a referral may have benefited from an empathetic listener. Staff who performed intake for the Alaska Child Visitation Mediation Pilot Project reported that many callers said they felt better "just because someone had taken a few minutes to listen to them."[380]

Community support and awareness. Media serving Barrow know of PACT; both a *Barrow Sun* writer and the KBRW news director have published stories about the group. Social and legal service providers also know about PACT and are aware of the types of disputes it handles. PACT counts among its members lawyers who have referred cases to the group, ministers and a social worker. None of the latter have referred a case to PACT, but they are supportive. Service providers with whom the Project Evaluator spoke were aware of the types of disputes PACT will handle.

The Barrow court clerk's office has a policy of giving a PACT flyer to everyone who files or asks about a small claims action. Despite this policy, personnel in the clerk's office are generally unaware of PACT, the services it offers, and even the PACT brochures displayed on the counter.

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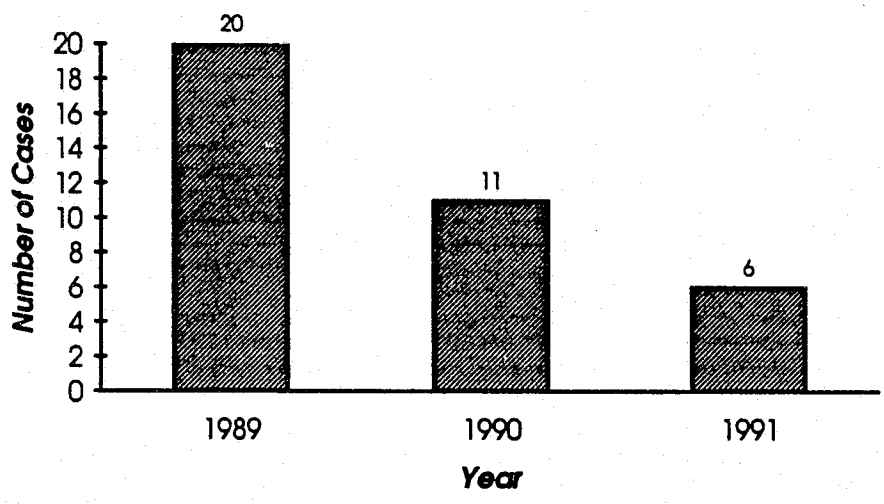
[379] For example, to the state court, an employee grievance procedure, or other process.

[380] S. DI PIETRO, *supra* note 139, at 34.

Caseload changes over time. The number of people who call PACT is declining each year (see Figure 9). PACT started in 1989 with a high of twenty calls and in 1991 received only nine calls. PACT saw a corresponding decline in resolutions as well. In 1989 PACT took six cases to panel and has taken none to panel since then. Its case developers saw resolution of four cases in 1989 compared with only one in 1991. It also appears that community awareness of PACT and its function has diminished; in 1990 and 1991 PACT refused services in six cases screened out because they did not fit PACT's eligibility criteria.[381]

Figure 9
PACT Caseload
Number of Cases Filed by Year
(Total Cases = 37)



Alaska Judicial Council Dispute Resolution Study 1992

It may be significant that PACT's caseload diminished over a period when the organization devolved to three, then two, committed individuals. At this writing, it has been eight months since PACT regrouped. It is too early to tell whether the organization now works differently, and whether any increase in cases will result from the changes.

[381] Two of these were cases in which there was an existing state court judgment or restraining order and another was going to court. Clearly the state court was unable to answer these disputants' need for dispute resolution. Even though PACT was unable to help, other avenues had also proven fruitless for these disputants.

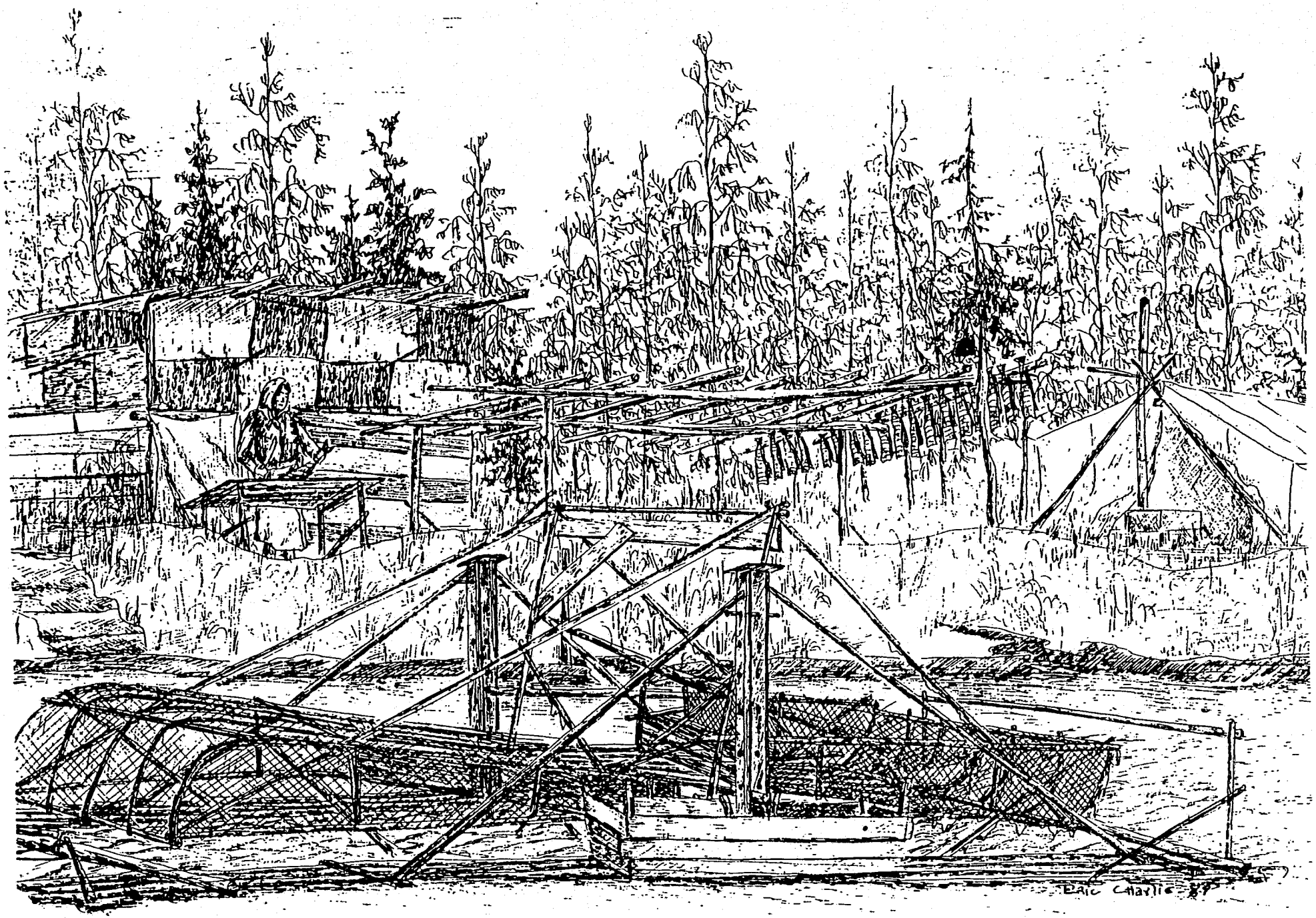


Illustration by Minto artist Eric Charlie,
courtesy of Seth-de-ya-Ah Corporation.

Chapter V:
Comparing the Three Organizations

All three of the organizations studied have characteristics in common. Comparing the three organizations highlights the strengths of each, and is important to understanding why each organization "works" and how it might be replicated in other locations.

A. Dedicated Volunteers

People involved with all three organizations share a zeal that goes beyond mere interest. They are willing to spend many hours administering the organization and participating in the decision-making and conciliation processes, with little or no pay. Volunteers in the organizations evaluated in this study believe that participation is both a right and a responsibility. In part, their intense commitment may stem from the close association between the process and the outcome. They want to see disputes resolved in a certain way (e.g., the traditional Athabascan way in Minto; harmoniously in Barrow) in order to strengthen the values associated with that way throughout the other aspects of community life.

B. Voluntary Participation by Disputants

Each organization accepts cases with the voluntary participation of the parties. The Minto Tribal Court gives an appearance of compulsion, but in practice does not adjudicate cases or enforce sanctions without the parties' consent. For example, the

court has dropped charges against people who pled not guilty.[382] In addition, the court cannot as a practical matter compel payment of fines or performance of community work service.

The Sitka Tribal Court judge carefully chooses which cases to accept, taking only those that he is most comfortable handling. One criterion for cases is that they not lead to jurisdictional conflicts with the State. All parties in the Sitka Tribal Court submit willingly to the court's resolution of the issues. In both tribal courts, non-Natives involved in the case must agree to the court's decisions or recommendations, and typically do so.

In Barrow, PACT's policy is to not accept a case if either party refuses to conciliate. Ideologically, compulsory participation could undermine PACT's guiding principle that people must take responsibility for solving their own problems. As a practical matter, it is not possible to force disputants to discuss problems in a conciliation context if they prefer to use a different dispute resolution forum or if they simply do not want to discuss their problem at all.

The disadvantage of a completely voluntary dispute resolution organization is that one disputant can prevent resolution by refusing to participate. However, the positive side of voluntary organizations is that people who choose to use them tend to be highly motivated to reach resolution. In addition, voluntary organizations empower people by encouraging them to take responsibility for solving their own problems, discouraging reliance on the State or outside decision-makers.

C. Volunteer Staff

With the exception of the Sitka Tribal Court judge, who has received a small stipend, all conciliators and decision-makers associated with the three organizations work voluntarily. Volunteer time represents a substantial commitment for all involved.

Support staff generally receive some payment for their services. Minto's part-time clerk is paid by the Village Council. Sitka from time to time has had a paid clerk. PACT, however, has never had paid staff.

[382] But cultural and other factors may be at play in the court's decision to drop charges. These factors are discussed at note 289, *supra*.

D. Confidentiality of Cases

All three of the rural Alaska organizations keep cases strictly confidential. The Sitka Tribal Court judge explained how the Sitka Tribal Court maintains confidentiality: "I instructed the staff to never mention any names or cases you happen to be working on. I don't tell my wife, period, and she doesn't ask." Confidentiality is particularly important in ICWA and children's cases, where private and sensitive details of family life are discussed.

PACT conciliators conduct routine follow-up but then have no further contact with disputants. Individual case documentation is minimal and kept just for PACT's information. No one in the organization talks outside PACT about details of a case.

Although the Minto Tribal Court works within a small village, it takes pains to guard the privacy of people who come before the court. Case files are kept locked in the Council office, and all proceedings take place behind closed doors.[383]

Confidentiality of proceedings is a common feature of private alternative dispute resolution organizations. Often disputants wish to resolve their problems quietly and with a minimum of publicity. This feature is especially attractive in a small or closely knit community, or where the subject of the dispute is sensitive or private. Moreover, confidentiality of proceedings is a feature that the state court system can not offer, except in some children's cases which are confidential by law.

E. Record Keeping

All three organizations record proceedings to some extent. PACT's case summary form is the least detailed of the three. In addition, PACT conciliators do not record conciliation sessions. This choice is deliberate, to increase the confidentiality of the proceedings, and to strengthen the atmosphere of freedom to discuss issues within the conciliation session.

The Minto Tribal Court's files resemble a typical state court file. They contain a complaint, a judgment form and relevant follow-up documentation (for example, a

[383] The Indian Civil Rights Act, 25 U.S.C. § 1302(6), guarantees defendants in tribal court proceedings a speedy and public trial. Thus, defendants may request open proceedings.

record of community work service hours and projects). Proceedings before the Minto court are tape-recorded, but are kept confidential.

Sitka's tribal court files duplicate the state court file. Aside from the level of organization, tribal and state court files are identical. Because most of the tribal court's cases involve children or family matters, the records remain confidential.

F. Organizational Problems

The organizations studied have occasionally experienced internal conflicts. For example, Sitka struggled in the mid-1980s to decide what stand to take on the issues of the tribal sovereignty and the powers that flow from it. Some advocated taking a "cutting edge" approach, while others preferred a less confrontational, "middle-of-the-road" stance. In the end, the court adopted the more moderate position.

Also during the mid-1980s, the court and Tribal Council confronted the issue of appropriate oversight of tribal affairs. The Project Evaluator heard reports and saw evidence to suggest that a former Sitka tribal worker used his position in ways that amounted to a clear abuse of the court's trust. By all accounts, this situation continued for years. Reportedly, the court has since become more cautious in decision-making. Although one observer believes that the failure to stop the abuse earlier has entirely discredited the court, negating whatever value it may have to the Tribe, others do not see permanent damage. The fact that the court still handles cases, interacts with Alaska and other states' agencies, and is supported by the STA suggests that the problems may have been overcome to a large extent.

A danger facing the Sitka Tribe is that the court may become isolated from other tribal government functions. Because the one chief judge has worked in complete confidentiality for so long, Council members may feel cut off from basic information about the court, its activities, and its needs. This is a time when the Council needs to make decisions about the court's future: will the Tribe recruit, hire and train an associate judge? What role should the Council play vis-a-vis the court? Shall the Court of Elders be revived?[384] Will the Tribe institutionalize the court to a greater extent, perhaps by allocating office space to it in the tribal building? Such institutionalization of the court would make it more visible to all tribal members and signal its availability to them.

[384] A number of Sitka Tribe members know traditional law and could serve on the Court of Elders.

Ironically for a group committed to promoting harmony in the community, PACT has had problems with group cohesion; personal and philosophical conflicts have fractured the organization. Both personality and philosophy appear to be involved in tension over decision-making within PACT. PACT's stated ideal is that all decisions are made on the basis of consensus. In practice, however, decisions often are made on an ad hoc basis, without reference to a clear set of rules. Some members say the lack of rules benefits PACT by allowing it to take cases thought appropriate by case developers or case managers.[385] Others point out that the lack of clear rules is a drawback because decisions made on an ad hoc basis are necessarily made by only a few people who discard the consensus ideal. Too, ad hoc decision-making can give rise to the frequently voiced belief among some that PACT has "hidden rules" some members can invoke, leaving others to feel they have no influence or, ultimately, control over the organization's decision-making process.

Many organizations have conflicts over decision-making. PACT's difficulties may illustrate a common need for organizations to reassess internal policies after a period of operation to determine if the original policies and procedures are still workable. In PACT's case, for example, the organization may be forced to reassess the consensus ideal. Do all members still support decision-making by consensus? Can they commit to it in practice? Would it be practical to have some decisions made by consensus and leave others to a different, more pragmatic decision-making model? What other issues are at play when individual or small group decision-making becomes necessary? After discussion, PACT may decide to recommit to the consensus model, modify the ideal, or institute an entirely new decision-making policy.[386]

[385] Presumably the consensus model would not prohibit case developers from applying broad policy to specific cases. However, some decision-making is not so specifically case related. For example, an ad hoc decision was made to print a PACT membership list that categorized members into groups of conciliators, trainers, and associates. Reportedly this was the first time PACT members had been put into these categories, leading some to feel that artificial divisions had been drawn among members.

[386] PACT members have recently been engaged in a debate over whether to hire staff. The debate has polarized them, with some holding to an ideological position that would prohibit use of staff and others more pragmatically advocating for staff to do the work that PACT volunteers are unable or unwilling to do themselves. As with the decision-making issue, PACT may find it beneficial to re-examine the philosophy underlying the organization's initial decision not to retain staff and ask whether that remains a workable policy.

The Minto Tribal Court has seemingly had few open conflicts. High turnover among judges, however, may indicate deeper problems than simple disinterest, though disinterest alone can have a serious and debilitating effect on an institution that purports to administer tribal judicial power. Leadership responsibility falls to those who are elected judges. Judges render their leadership authority ineffective and meaningless if they only take the job temporarily.[387] Judges have a clear opportunity to strengthen and improve their village, which they can only do if they continue to sit on the court.

G. Degree of Formality

All three organizations have their own formalities which differ from those of the state courts. The organizations' informalities extend both to procedures for conducting hearings and to rules, much relaxed in comparison to the state court's, governing the admissibility of evidence. Of the three, the Sitka Tribal Court has had hearings which appear to have been more formal than any held by PACT or Minto. Even these, however, were characterized by a degree of informality and an attitude of equality among participants. For example, the Sitka Tribal Court judge described a typical hearing:

> The clerk announced my entry into the courtroom [the bingo hall]. She asked the parties to please stand, then sit. The clerk would announce, 'The SCA Tribal Court is now in session' and she would read the docket number. . . . I had a gown but I didn't ever use that. I didn't want to portray what the State or the city did -- 'This is the authority figure.' It's more informal so we're able to talk.

And even though Sitka's hearings are relatively formal, they are infrequent; the judge can "count the number of hearings on one hand."

Minto Tribal Court hearings, as a general rule, are the most structured of the three organizations. Minto judges routinely preside at tape-recorded hearings in which the defendant enters a plea, the judges deliberate and "counsel" a defendant, and a sentence is imposed, all in a fairly ordered way. Still, a degree of informality remains: all participants are on a first name basis and all sit at the same table. By contrast, a high degree of informality characterizes the day-to-day operations of the Sitka Tribal Court.

[387] This is not to suggest that judges appointed to fill vacancies are ineffective leaders.

In Sitka, the tribal court judge routinely speaks individually with the parties outside a courtroom setting.

PACT conciliations are ritualized but relaxed. Panels are convened in neutral public settings among people who may have a passing acquaintance with one another. The panel "chair" is responsible only for moving the session from phase to phase and being attentive to group dynamics. Even more informal are case developer resolutions which may be facilitated over the phone without the parties meeting.

H. Equality of Participants

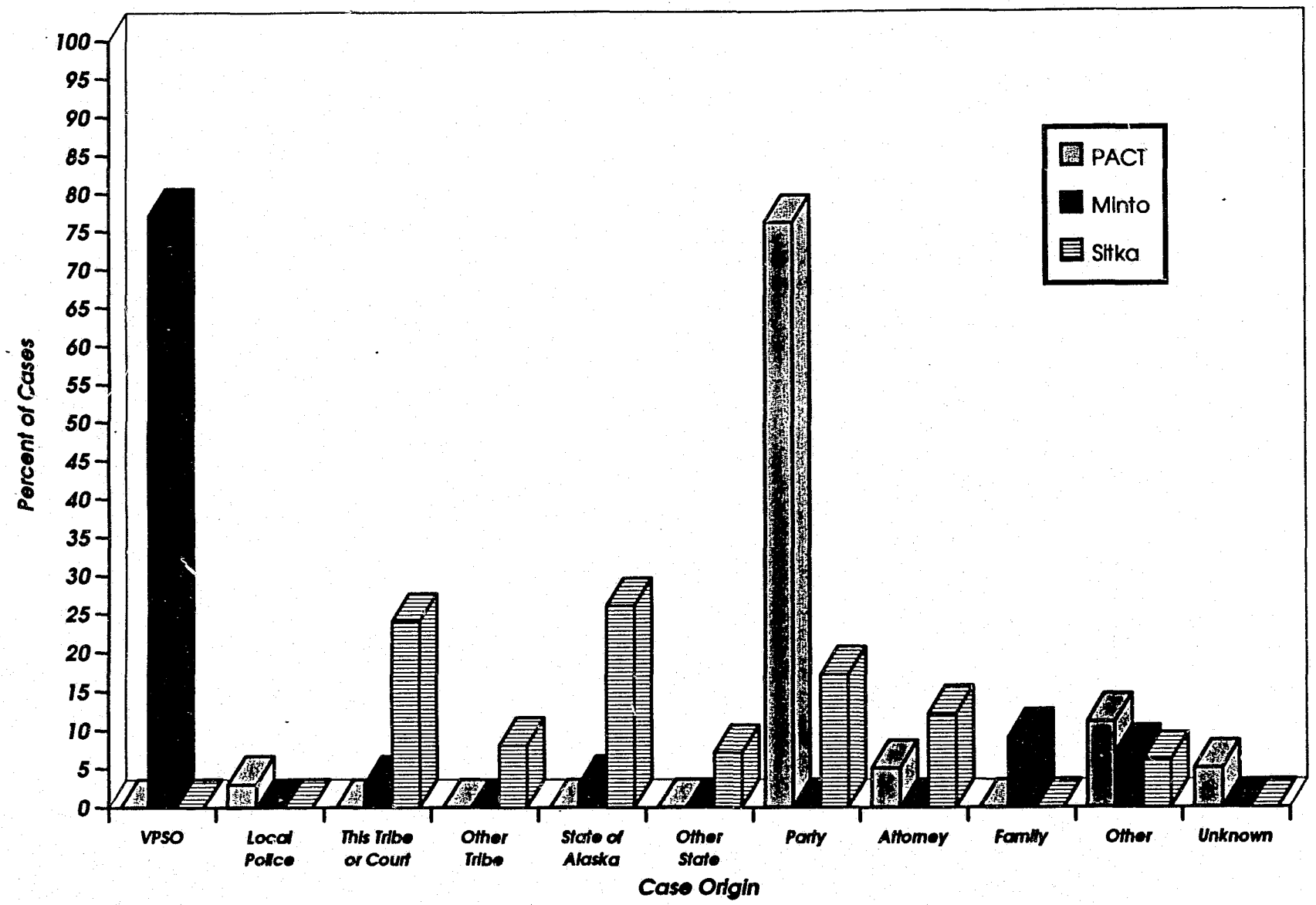
A theme common to all three organizations is the attitude of equality among participants. The Sitka Tribal Court judge deliberately seeks not to "portray . . . an authority figure," and, in much the same way, his counterparts in Minto eschew the trappings of Anglo-American justice. Minto judges and their "clients" sit eye-to-eye at the same table. PACT also sets equality in the center of its program. Conciliation, the organization emphasizes, is premised on equality. Disputants and conciliators alike participate on an equal footing with no one wielding "power."

The equality of the participants in the three organizations studied is in marked contrast to the state court system. In the state system, the judge is physically elevated above the parties and is emphatically regarded as the ultimate authority figure in the room. In addition, the judge in a state court proceeding has the power to impose a decision on the parties without reference to what they would like. By contrast, the emphasis in the three organizations studied is on reaching consensus, and only after talking about the problem do the judges render their decision.

I. Referral Systems

The existence of referral systems is important to each of the three organizations (see Figure 10). The Minto and Sitka tribal courts have established referral systems that guarantee a steady flow of cases. The Minto Village Public Safety Officer is the single most important source of cases for the court. Sitka relies principally on twin sources, the State (DFYS and court system) and the tribal social service agency. These referral systems have proven key to the courts' continuity.

Figure 10
Comparison of Case Origins



Any weakness in the referral system has affected these courts' caseloads adversely. For example, in Minto, the court came to a standstill when the village was without a VPSO. Public sentiment in Minto clearly supports law and order, but it is unclear whether the Village Council has given the VPSO priorities that meet the villagers' expectations.

PACT's principal referral source is the disputants themselves. Self-referrals naturally depend upon community-wide knowledge and information about the group, its goals and functions. Since PACT operates largely on self-referrals, the volume of cases depends upon its success in publicizing itself. However, the effective publicity at its inception gave way more recently to reluctance to advertise.

PACT's initial publicity efforts included mailing flyers to all Barrow residents, displaying posters announcing its services, and making use of the media attention focused on a new organization in a small community. Aside from semi-annual trainings and an occasional feature article in the local newspaper, PACT has done little since then to promote itself in the public eye. In fact, one PACT member told the Project Evaluator that the group did not want to advertise her request for interviews with former disputants. The group's members feared that ads would lead to calls for services that PACT was unable to offer because of its internal organizational problems.

J. Populations Served

In the case of the two tribal courts, the population served depends upon the jurisdiction of the court. Thus, Minto restricts its services to people who live in Minto. In a couple of cases, non-Natives living in Minto have been summoned to appear before the tribal court for violations of local ordinances adopted by the Village Council. They have appeared and complied with the sanctions imposed by the court.

In contrast, Sitka does not restrict its services geographically. However, it does restrict its services for the most part to tribal members, wherever they may be.[388] For example, the Sitka court has handled a number of cases from the nearby village of Angoon. It has also decided cases involving tribal members living all over the United States. Both Sitka and the Sitka Tribe are "melting pots" of different ethnic groups. The

[388] Non-Natives and non-tribal members appear in the Sitka Tribal Court and submit voluntarily to its dispute resolution in children's and family cases. If the non-tribal members do not wish to appear in the court, they may refuse to participate. Typically, however, they abide by the tribal court's decisions.

tribal court judge explained that the Sitka Tribe has 2,500 listed members of whom 1,000 "at most" are Tlingit. The rest are Tsimshian, Haida, Aleut, other Alaska Natives, and from tribes in other states. Because of the Native hospital in Sitka and the school at Mt. Edgecumbe, Sitka has seen an influx of Natives from different ethnic groups who marry and settle there.

PACT restricts its services to the community of Barrow, but not to any particular ethnic or tribal group. PACT members include all three major ethnic groups, and disputants are predominantly Inupiat and Filipino.

K. Types of Cases

PACT is the only organization that routinely handles what would broadly be called civil actions. A significant number of its cases have been landlord-tenant disputes; otherwise, most cases would be characterized if they were court cases as small claims and other simple civil matters. PACT also hears cases for which there is no conventional category or definition, the kind of case that can "slip through the cracks" of the state court system. PACT says it may handle what could be criminal actions (like assault), but to date it has not.

PACT specifically excludes itself from hearing the kind of cases the two tribal courts hear: child abuse, neglect and custody cases. Sitka hears children's cases almost exclusively. Minto also hears a significant number of these cases.

Most of the Minto court's cases are categorized as "civil regulatory" matters. These cases involve conduct which would be characterized as criminal in the state court system; moreover, although most of the cases would be characterized as misdemeanors, a few could be charged as felonies. Perhaps to avoid legal uncertainty over tribal court criminal jurisdiction in PL 280 states, the Minto court defines its action in these matters as regulating behavior in a civil context.

L. Law Applied

In this area, PACT and the Minto court are at opposite ends of the legal spectrum. PACT applies no law in any of its cases; the organization is completely outside the legal system. In contrast, the Minto court applies communally drafted and publicly adopted local ordinances to criminal or neglectful behavior occurring within village boundaries.

The tribal court incorporates traditionally Athabascan notions of justice in its ordinances and in the process of developing and enforcing the ordinances.

The Sitka Tribal Court applies federal statutory and written tribal law, along with Tlingit law, often applying all three in a given case. It is interesting to note that the Minto judges do not apply substantive Athabascan law in the same way that the Sitka Tribal Court judge applies Tlingit law. Instead of applying substantive Athabascan law, the Minto judges *act* in ways that are Athabascan.

M. Appeals

The tribal courts in Minto and Sitka allow appeals of tribal court decisions to their respective Councils. No appeal has ever been taken from the Minto Tribal Court, and only one from the Sitka Tribal Court.

PACT disputants have no formal right of appeal. Disputants craft their own mutually agreed-upon resolutions, and can renegotiate should the need arise. They may also go to the state court for resolution of the dispute if they decide to use a different forum.

N. Follow-up

PACT follows up on cases relatively systematically. The case developers followed up in almost all cases that reached resolution, and a few that did not. The case developer called both disputants and asked whether the resolution was holding. Responses were positive to all follow-up.

Documented follow-up in Minto consisted largely of reminding defendants to pay fines or finish community work service. This was the court clerk's task. In children's cases, judges followed up by monitoring the family and talking periodically with the parent or parents in question. Follow-up in Minto can occur informally in the normal course of day-to-day life because the judges and those who have come before the court live closely in the village.

Children's cases in Sitka characteristically remained open for a year or more with little documented follow-up. This is not to say that the court did no follow-up. Cases stayed open to allow the court and tribal social service agency time to watch a family

and make sure that all was well. The court often issued orders up to five years after its original action.

O. Interactions with State Agencies

Of the three organizations, Sitka has the most frequent and routine interaction with state agencies in the form of informal interaction with the state social workers. In fact, the tribal social workers, the tribal court judge and state social workers function in some respects as a team that emphasizes negotiation and consensus-building.

The Minto Tribal Court interacts very little, formally or informally, with any state agency (other than through the local VPSO). This lack of interaction could be predicted in criminal matters, because the State does not have a strong or regular law enforcement presence in the village. The State seldom gets involved in Minto criminal cases simply because the tribal court takes care of the problem first. The Fairbanks District Attorney's office is aware of the court's work and understands that the low number of criminal cases prosecuted from Minto is probably a direct result of the court's activity. Similarly, in children's cases, little initial interaction occurs between the Minto court and DFYS.[389] Typically, children's matters are first brought to the court by members of the community, and sometimes by the court itself. It is only after the court has "given parents a chance" that the state social worker is notified if need be.

PACT has no direct interaction with state agencies. This lack of interaction may be a function of the fact that PACT has not handled criminal or children's cases, two areas in which the State has a strong presence due to its interest in protecting children and maintaining law and order. The lack of interaction also may result from PACT's policy of resolving disputes "extra-legally" or without reference to state law.

P. Areas for Improvement

All three organizations share, to some degree, problems that may affect their ability to sustain their work now and in the future. The most critical problems are related to personnel. PACT's difficulties with group cohesion may prevent it from handling new cases because of lack of volunteers with sufficient time and energy. Similarly, the Sitka Tribal Council has not acted to ensure the court's future when the

[389] This is due in part to policy in the Fairbanks DFYS office against interaction with tribal courts as distinguished from village councils with which interaction is permitted.

current judge is no longer available to serve. If the Council continues not to hire and train new judge(s) to work with its present judge, the court may not survive beyond the tenure of the present judge. At the very least, the Council would lose the benefit of having the present judge pass on his knowledge and experience. Minto's heavy reliance on the VPSO also places its court at risk. The VPSO program experiences very high turnover throughout the State, and Minto already has seen that its work slows to a trickle in the absence of a VPSO.

The VPSO's relationship to the Minto Village Council, and through it to the court, raises other issues. The composition of the court's caseload depends heavily on the enforcement priorities set for the VPSO by the employer, the Village Council. These priorities have not been clear, in part because Department of Public Safety policy is vague on the matter of VPSO case referral to tribal courts. The Council's need for the VPSO's time on other public safety matters also reduces the time and attention available to spend on enforcing ordinances and following up court decisions.

Finally, to the extent that each organization desires increased interaction and credibility with state courts, the organizations may to some extent need stronger internal procedures and record-keeping. Other issues aside, state courts may want assurance that due process and equal protection standards are met; fine-tuned procedures and precise case documentation will help.

Kaagwaantaan Wolf House Post

Illustration by JoAnn George from Carved History, courtesy of Alaska Natural History Association.

Chapter VI:
Interactions with State Courts

A. Introduction

Each of the three alternative dispute resolution organizations interacts to some degree with the Alaska state courts and other state agencies. A primary goal of this project was to determine the extent of such interactions as a means of gauging the pragmatic implications for the state courts of local justice alternatives. Interviews with organizations and state justice personnel revealed strong desires on both sides to cooperate, and many practical suggestions on how to forge working relationships.

B. PACT

PACT interacts the least frequently among the three organizations with the state courts. In great measure this is due to the fact that PACT's guidelines prevent it from taking any case that is in the legal process. Nevertheless, PACT does interact to a degree with the state court, both formally and informally.

1. A State Judge Views Cooperation

One of PACT's founding members is the Barrow superior court judge. He still is a PACT member and a strong supporter of the program. Except at the beginning when he was assisting with PACT's formation, he says, "the role I've had to take here is to be supportive. I've gone to meetings and used my time just to be there, show in

a tangible way that I'm there. At a minimum I'm making it clear that the courts are open to working with the community."

The judge has helped PACT spread its offer of free conciliation services in several ways. The Barrow Clerk of Court has PACT pamphlets on her counter available for any person to pick up. In addition, the office has a policy of giving a pamphlet to any person who files a small claims action.

The judge also has referred litigants to PACT on two occasions. One was a case brought by a car mechanic's customer in a dispute over the mechanic's work. The judge proposed from the bench that the parties try to work out their differences through PACT. The plaintiff-customer did not want to use PACT. The two parties resolved their differences without PACT's assistance and the court entered an order upon the parties' stipulation which incorporated the terms of their agreement.[390] In another case, a divorce, he entered an order upon the parties' stipulation that they would conciliate a particular issue through PACT should it later become a problem.

2. Alternative Forum

Data collected from PACT show that some of its cases could have gone to court had PACT not facilitated a resolution. PACT's seven landlord-tenant cases could all have gone to state court, either under the state forcible entry and detainer law or as small claims actions. Similarly, the business people who conciliated with customers through PACT could have filed suit in state court.

Some cases PACT originally handled did go to state court, but not before PACT educated one or both disputants about conciliation. Thus, disputants who chose for whatever reason to litigate in state court after working with PACT did so with a greater awareness of the alternatives and advantages of each forum.

[390] Although the parties chose not to use PACT in this instance, the fact that they reached an agreement at the court's urging seems directly related to the judge's proposal that they try to talk things out themselves rather than have him enter an order that would make one party the clear winner and the other the clear loser. In other words, they created their own "win-win" result.

C. Minto Tribal Court

The Minto Tribal Court polices criminal behavior in the village without relying on the state court to do the job. No Minto defendants have been prosecuted in the state courts for misdemeanor offenses in many years. The State has prosecuted only two Minto felonies since 1989 and two Fish and Game violations since approximately 1987. The low rate of prosecution contrasts sharply with other Yukon-Koyokuk villages. In other villages, the State typically prosecutes fifty to seventy-five misdemeanors a year and about ten felonies a year.[391] The Minto Tribal Court appears to be highly successful in policing its village. As a result, state criminal justice resources are not needed to investigate and prosecute crime in Minto.

1. Working With the State

Minto judges often threaten to turn a case over to the State. They tell people before the court, especially in children's matters, that they work "with the State."[392] The defendant can either follow the tribal court's suggestions or suffer the consequences of the state system. In one case, the court admonished a parent of the dangers her behavior presented to her children. The court's statements in that case reflect its views on cooperation with state authorities.

> [You are] endangering your children. It is only fair to warn you that is how tribal court is. We give people a warning before taking action. And we are giving you a chance. There could be other steps taken if this keeps on. It is going to be in tribal court hands and tribal court can do anything that they feel is right for the children. If this keeps on we can turn it over to the State. We work with the State. We do not [want] the State to take over any children. That is why we are tribal court. This is our way and our village . . . .[t]his is the way we handle things.

The court has twice followed through on its threat to let state authorities handle a children's case. Interestingly, the tribal and state courts ruled identically in both cases

[391] There is some evidence to suggest that other Yukon-Koyokuk villages with active tribal courts also have low prosecution rates.

[392] When Minto judges talk about the "State" they mean any state agency.

referred on from tribal court. In one, the tribal court took custody from a mother it ordered into drug and alcohol treatment. When the mother failed to comply with the treatment order and asked for her children back, the tribal court refused her request. The State later took custody of her children, ordered her into treatment, and retained custody of the children because of her inability to provide for their best interests.

Judges and Council members in Minto want the State to take over prosecution of individuals who refuse to comply with tribal court sanctions. They feel that state enforcement in selected cases will ensure better compliance with village laws, making Minto a safer, more peaceful, place to live. The Fairbanks District Attorney has indicated his willingness to meet with village leaders to discuss such cooperation. Both the village and the State are uniquely positioned to engage in a partnership geared toward achieving common goals.[393]

2. Multijurisdictional Case

One Minto Tribal Court case had a complicated, multi-jurisdictional history rarely found in any court. The case began as a custody dispute over a child whose mother had died. The child's grandmother and father had informally agreed upon a custody division in which the grandmother retained custody for a period of time,[394] but the agreement unraveled, the father retained an attorney and the attorney sought Tanana Chiefs Conference assistance in determining custody. TCC arranged for a joint tribal court hearing with the Minto court, the Minto Village Council and the Nenana Village Council acting as a court. The father did not like the process so he filed a motion for a temporary restraining order in federal district court. The federal court dismissed for lack of jurisdiction and indicated that the father should file an appropriate state court action. The state court, too, dismissed his suit because the child was no longer in need of aid and thus, it no longer had jurisdiction.

The father then agreed to go into tribal court to resolve the custody matter. The Minto court and Nenana Council together mediated a settlement that was exactly as the parties had first agreed. The tribal court issued a stipulated order that allowed grandmother custody until after the memorial potlatch at which time the father would take custody. The order contained provisions for visits by the father and, later, of the

[393] The court could also seek enforcement of alcohol ordinance violations through the federal courts.

[394] The grandmother had custody following a state child in need of aid action initiated by DFYS after mother's death.

child with grandmother. It also provided that father would see that the child received Indian cultural education, and would support participation in village and extended family cultural events. The parties subsequently went into state court where they petitioned for, and the judge granted, an order approving their agreement. The stipulated tribal court order was attached as an exhibit.

An attorney from TCC represented the Minto Tribal Court in the federal court action and later advised the Minto court and Nenana Council regarding their role as a joint tribunal. When asked how she would compare the tribal court's handling of the matter with the state court's handling of the same matter she replied that the tribal court followed state law principles, "consistently going on the child's best interests." However, the outcome differed in tribal court because the grandmother would probably have gotten only interim custody in the state court. While the State follows a best interest standard there is a "judicial leaning" in favor of natural parents.

The grandmother was represented in the state court proceeding by an Alaska Legal Services attorney, who also thought the result would have been different in state court. "The state court was not aware of the year-long mourning period and different things would have been weighed." For example, it is "general knowledge that state court would have favored the dad because they favor natural parents. There might have been a transition period but it would have been shorter than a year." Overall, she thought "more needs were met" through the parties' agreement than would have been through a non-negotiated state court order. She also stressed the high level of cooperation and commitment to the child evident among the adults concerned. "Everybody cooperated; they tried to do what was best for the child. . . . It was recognized by all involved that the case could be tied up in the courts for years and that would hurt the child. No matter who did anything there was going to be more litigation over who had authority to make decisions and it wasn't clear what the results would be." The fact that the state court approved the parties' agreement did not itself make for a favorable outcome; it only helped. "The adults involved really cared about the kid. It [the favorable result] wasn't because of the wisdom of the other entities. The other entities were wise enough to buy off on the parties' agreement."

3. State Judges' View of Cooperation

Despite the high level of activity in the Minto Tribal Court, the state court system has no formal relationship with the tribal court. It has no regular informal relationship either. Partly because of this, the Minto judges express a kind of bunker mentality. They are indignant that the State presumes to take away their "right" to a court and that their court must therefore operate in a vacuum. They also assume that this is the way things will always be.

State court judges sitting in Fairbanks sounded a different note. Judges were very interested in the region's tribal courts, and hopeful of finding ways the court systems could work together. The state court judges had no direct experience with the Minto Tribal Court, or Minto defendants because there are so few of them, so they couched their comments in terms of all the tribal courts within their district.

On the most basic level, state court judges want more information about tribal courts, how they operate, and who is involved with them. One judge would like to get a telephone directory listing the courts, addresses and judges' names. "Why shouldn't we have a directory where we can look up the tribal court for each of the villages?" Tribal court officials would, in turn, have a state court directory themselves, so they could contact probation officers, public defenders, and others with ease.

The state court judges also want to see increased, formalized communication going to and from state and tribal courts. State judges want to consider village defendants' prior history in sentencing so they can back up village requests for meaningful punishment. The Fairbanks District Attorney observed that state law enforcement officers usually are not called into a village unless it is to deal with a chronic offender. "By the time they get to our court they look like a first offender, but actually they're approaching worst offender status." One judge said she has sometimes wondered whether the twenty year old standing in front of her is a first offender. The defendant may be a sixth time offender in the village, and if that is so the judge does not want the offender to "walk," thinking he or she got a good deal in state court. If the tribal court communicated the prior history, however, then the judge would know that the village wants a stiff sentence imposed. The District Attorney's office is willing to receive calls from tribal courts and village councils requesting prosecution of the chronic offenders the village can no longer handle. One state court judge expressed a desire to meet with the tribal court in the area he serves to discuss sentencing alternatives.

State judges would also like tribal courts to supervise village defendants' probation. They envision a system whereby the state court could refer a defendant to tribal court for assignment and supervision of community work service. One judge suggested that defendants "could be monitored from the start. It's more effective if they commit the crime, serve the time, and do the community service right away." This system could also help to cut down on probation revocations.

Having a recognized authority in the village to send a judgment to serves another important function. A judge pointed out that if a villager is sentenced in state court for an act committed in the village, the offender can go back to the village without anyone at home seeing the punishment; people in the defendant's home village do not know the sentence or conditions of release. However, if the tribal court got a copy of the judgment it could monitor the defendant and help the state court to enforce conditions of release.

State court judges also have questions and concerns about tribal courts. One wanted to know whether all parties in tribal courts enjoy the same equal protection rights as those guaranteed in the state court system.[395] Another suggested that the state court could defer jurisdiction in children's cases to tribal court as long as children have the kinds of protections they do in the state courts. To this end, she suggested a tribal guardian ad litem program. "In a small community, the closer participants are by blood and community the tougher choices become, because everybody has an agenda whether we're willing to admit it or not." A tribal GAL system, or something like it, "would make the state courts more comfortable about cooperating with tribal courts or other village groups."

State court judges also can assist their tribal counterparts with legal education. One judge proposed training tribal judges in the legal aspects of Indian Civil Rights Act compliance, due process, and other subjects as needed, emphasizing that training would only be at tribal court request. The relationship between the court system and Native community "has been bad enough that uninvited contact is generally going to be seen as interference." State court judges and magistrates could also be available to answer the kinds of procedural and substantive questions that arise from time to time.

[395] Another observer expressed concern that one or two powerful families could hold sway on a village court. Equal protection could be a problem "depending upon who's done what crime and who's punishing whom."

D. Sitka Tribal Court

The Sitka Tribal Court, like PACT and Minto, has no formal relationship with the Alaska Court System. Before *Stevens Village*,[396] the tribal court was developing a formal relationship with the Alaska courts. The state court, in compliance with ICWA, routinely gave the Tribe notice of proceedings involving its member children. The tribal court, in turn, regularly and routinely filed pleadings in the actions for which it was given notice. Tribal court pleadings were usually styled as orders declining jurisdiction. On one occasion in 1986, the tribal court sought intervention in an Alaska state court action, and moved for transfer of the action to tribal court. The superior court granted the Tribe's motion. More recently, state judicial personnel encouraged two willing parties to negotiate sensitive family matters with the Sitka Tribal Court judge.

1. State Judges' View of Cooperation

State judicial personnel sitting in Sitka appreciate having a tribal forum in Sitka for those who want to use it. One commented, "they're willing to take care of problem families. That to me is tremendous. The people in the Sitka Tribe should deal with their own problem families." He added, "I've often thought that if tribal courts want to deal with children under ICWA, they should. We have to be here, obviously, to provide a forum for cases they don't want to hear."[397] Another judge believed that parties should feel comfortable in a chosen forum. "If they're happy with that forum [tribal court], then the case should proceed there."

Sitka judicial personnel shared some of the concerns voiced in Fairbanks about due process and equal protection. The superior court judge's concern "is that in some villages there are the haves and the have-nots and if you're a have-not then you're not going to get the same treatment as a have." But, he pointed out, villages can "appoint objective judges, give them training, watch them, and send up or review questionable decisions."

Sitka's magistrate formerly practiced in the tribal court. In one case, he represented two non-Indians in a suit brought by a tribal member as a means of harassing their employer, the Tribal Council. As an attorney, he was "not very satisfied

[396] 757 P.2d 32 (Alaska 1988).

[397] This comment re-emphasizes the voluntary nature of the tribal court hearings, and the fact that the tribal courts can, and do, make choices about which cases they will hear and decide.

or impressed with the way the court was conducted." The case began as an indirect way of making a political point within the Tribe, but "we came up with a judge who saw it as a red man-white man dispute and only one side got recognized. The [pro tem] judge made no attempt to make decisions based on the pleadings or the law."[398] Despite this, and because of other positive experiences with the tribal court, he is an enthusiastic tribal court supporter.

Sitka's judge and magistrate stressed cooperation over conflict. Ideally, "both courts could perhaps work together toward resolution of difficult cases," said the judge. He and the tribal court judge plan to meet once monthly to discuss cases each is working on, pending review of confidentiality issues. An important feature of this arrangement is to keep an "open line of communication," the state judge said. "We have the legal tools on this side" to build a solid relationship. But first, he said, both sides need a "better understanding of how we make decisions."

2. Working With Other State Courts

The Sitka Tribal Court has been recognized by the courts of other states. Over the years, state courts in Washington, Oregon, Nevada and California have honored the court's decisions. Courts in other states, notably Arizona and Florida, have assisted in returning tribal children back to Sitka upon being notified that the tribal court was ready to assume jurisdiction over them.

One Sitka Tribal Court case achieved some notoriety as it made its way through the Oregon courts, to the U.S. Supreme Court, and back to the Sitka court. Like most Sitka Tribal Court cases, it was a children's matter, the adoption of a Native child by a white Oregon couple, contested by the child's natural parents. The adoption was made in violation of ICWA, which requires that consent to adopt be given no less than ten days after birth. When the young mother learned this over a year later, she and the baby's father filed a habeas corpus petition for return of the child. STA intervened in this action.

An Oregon circuit court judge ruled in May, 1982 that the child should be returned to his natural parents.[399] The adoptive parents appealed to the Oregon Court

[398] A pro tem judge heard this matter, not the present tribal court judge.

[399] The court issued an order staying return of the baby pending appeal.

of Appeals, which affirmed the trial court's ruling.[400] The adoptive parents then filed a petition for review with the Oregon Supreme Court, which also was denied.[401] In a final effort, the adoptive parents petitioned for certiorari before the United States Supreme Court, arguing that ICWA's placement preferences were unconstitutional and discriminated against non-Indians, but the Supreme Court refused to hear the case.[402]

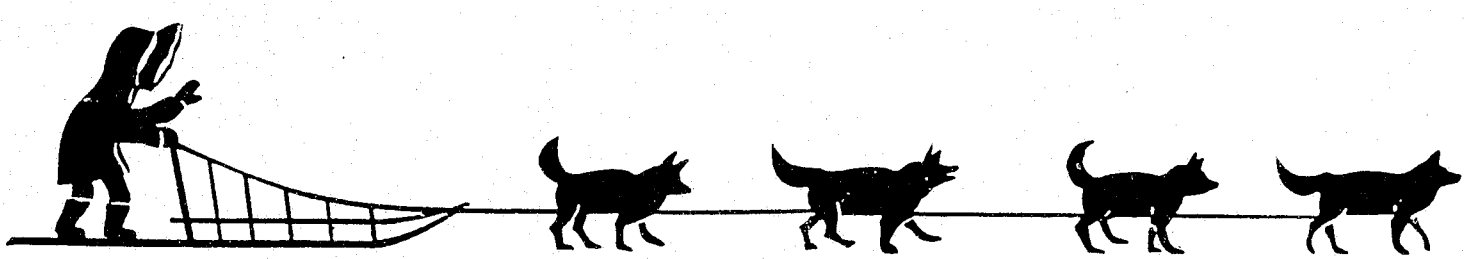
The case generated tremendous controversy in Oregon,[403] forcing the tribal court to operate under the sharp glare of publicity in a racially cast case. Still, the Oregon court system and tribal court cooperated in transferring the case from state to tribal jurisdiction, demonstrating that the interaction could take place fairly and effectively. Eventually, an Oregon judge decided that the Sitka Tribal Court should determine who would have custody of the child. Oregon courts even "loaned" a Portland courtroom to the Sitka Tribal Court for the hearings on the conditions of the placement.

[400] *Application of Angus*, 60 Or. App. 546, 655 P.2d 208 (1982), *appeal denied sub nom. Angus v. Joseph*, 294 Or. 569, 660 P.2d 683 (1983), *cert. denied sub nom. Woodruff v. Angus*, 464 U.S. 830, 104 S. Ct. 107, 78 L. Ed. 2d. 109 (1983).

[401] *Id.*

[402] *Id.*

[403] *See, e.g.*, The Oregonian, March 16, 1983, at D14, 3M. While the petition for certiorari was pending, the adoptive parents asked the Multnomah County Court in Oregon for temporary custody of the child.



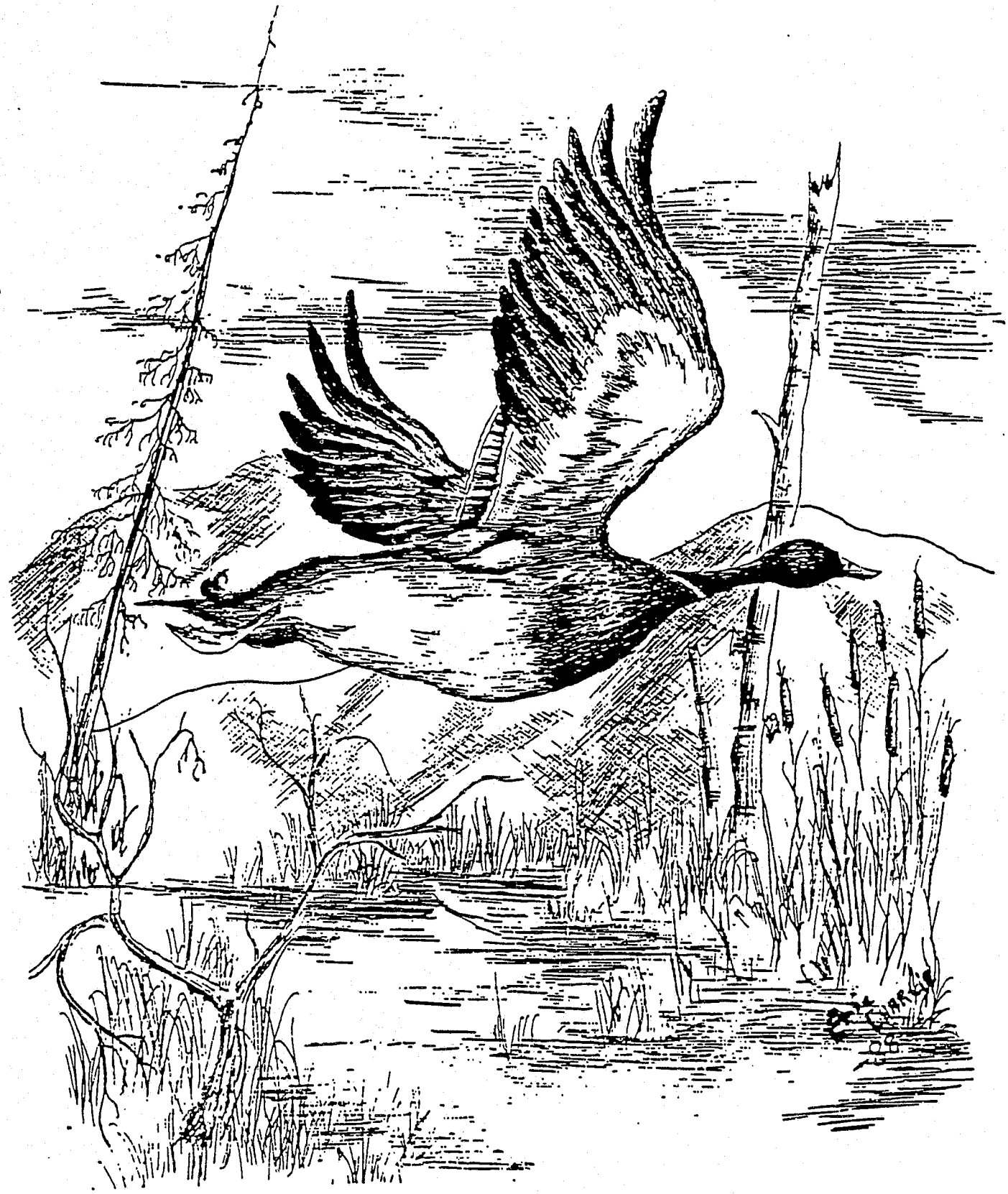


Illustration by Minto artist Eric Charlie,
courtesy of Seth-de-ya-Ah Corporation.

Chapter VII: Replicability

One of the major goals of this evaluation has been to determine whether any or all of these organizations could or should be replicated in other communities. A related issue was what conditions were necessary or helpful for comparable organizations in other communities. We have concluded that each of the three merits replication, with certain provisions. This section of the report reviews the characteristics of each organization that appeared to be most closely related to effectiveness, and discusses what might be done to introduce similar dispute resolution organizations in other communities.

A. Conditions Needed for Replicability

All three organizations shared several characteristics that appeared to be critical to their effectiveness and continuity. A willingness on the part of decision-makers and the community's citizens to dedicate many hours to voluntary labor on behalf of the organization held first place among these characteristics. The readiness of disputants to submit themselves to the dispute resolution process voluntarily and to abide by the organizations' decisions or decision-making process assumed virtually equal importance. A third characteristic, a strong case referral system, fueled the work of the Minto and Sitka Tribal Courts, and was prominent because of its absence from PACT. The fourth characteristic that appeared important was the ability of the organization to interact informally with the state courts and other government agencies, and conversely, the willingness of governmental personnel to work with the organization. The next sections discuss each of these characteristics in more detail.

1. Community Commitment

Each organization grew from a grass-roots interest in having a community-based forum for resolution of disputes. The tribal courts are grounded in governmental structures; PACT is rooted in the recognition by some Barrow citizens that formal means of resolving disputes did not adequately handle the full range of problems in the community. In each instance, enough members of the community were committed to the process that they willingly contributed many hours to the organizations' needs.

In rural Alaska, uncompensated community service is not always expected. Many of the organizations that call upon the community for service either pay the directors/share-holders/members, or entice participation by offering large door-prizes and other inducements. The court system's Conciliation Board Program in the mid-1970s paid each of the conciliators $10 per meeting. Participants uniformly believed that it was too little; that the pay should be increased by 50% to 100% per meeting, or participants would quit.[404] In the context of this pattern, the high level of voluntary service found in PACT and the tribal courts is even more impressive.

The organizations have relied not only upon the time contributed by Board members, conciliators, judges and others, but upon other local organizations and governments to provide services and physical needs. As noted elsewhere, the PACT answering machine found a home in the Presbyterian Church, and the Sitka court file cabinet occupies a closet in the Sitka Tribe of Alaska's building. The tribal courts benefit because they are part of the tribal governments. They can draw upon (limited) secretarial support, meeting space, and at times, assistance from staff attorneys working for the Tribe or regional non-profit corporations. PACT receives contributions from the Barrow Rotary, the Presbyterian Church, other local groups, and one national non-profit organization. The dispute resolution organizations that provide specialized services resemble many other small organizations that function under the shelter of larger groups which are providing diverse services. They fulfill a need in the community, but not one that is felt strongly enough to support a full-blown staff and physical facility. By working under the aegis of a larger organization, they can serve without being totally self-sufficient.

[404] J. MARQUEZ & D. SERDAHELY, *supra* note 112, at 59. For example, in 1976 and 1977, villagers were being paid "up to $25.00 per person to attend village or regional corporation meetings, and between $10.00 and $20.00 per person to attend village city council meetings." *Id.* at 58.

At the same time that the organizations studied draw their strength from the commitment of community members, they are made vulnerable by their complete reliance on a few volunteers.[405] For example, PACT's continuity and willingness to take cases have been threatened by the "burnout" of the two or three people who do most of the organization's work. In fact, a decision was made not to advertise PACT's services until these members had had a rest. By the same token, the Sitka Tribal Court will face a difficult transition when the current judge retires, because the court's reputation and operation are so closely identified with the judge. In Minto, the court's work demands a great deal of time from the volunteer judges and the Village Council clerk; in addition, the court's authority and ability to assert jurisdiction over village residents depend at least in part on community commitment to and recognition of the court. In sum, organizations attempting to replicate these results could improve their chances of success by broadening the number of volunteers and taking active steps to ensure that the bulk of the work does not fall on one or two people.

2. Voluntary Submission to ADR Decision Process

The voluntary nature of the dispute resolution processes described in this report stands out in special relief when seen against the background of the disputants' choices. In a criminal/civil regulatory case, the offender agrees to submit to the jurisdiction of the tribal court (or, in theory, PACT, which has not yet handled any "criminal" cases, although it has indicated its willingness to do so). The offender's other "choice" is to assert the right to be prosecuted and tried in the state courts. Although the offender might stand a better chance of acquittal in a state court, often he or she would not want to contest guilt in either forum. Going to state court would entail substantial expense, a great deal of uncertainty because of the unfamiliar setting and process, and an unknown sentence. Appearing before the tribal court or other dispute resolution organization in the local community permits the offender to settle the issue of sentence quickly and in the comfortable setting of known people, procedures and outcomes. The same qualities of known procedures and people, low (if any) expense, and relative certainty of an acceptable outcome operate to encourage disputants to use PACT to resolve civil disputes in Barrow.

[405] A reasonable question might be: "If the organizations are so beneficial why have not the communities supported them more generously, and why do their existences seem, at some level, so tenuous?" Though the question is valid, it may be more fruitful to focus on the fact that the organizations exist at all, given the many conflicting demands in the organizers' lives, and the availability, especially in Sitka and Barrow, of a local state superior court equipped to handle at least some of the disputes.

A slightly different set of factors may encourage use of the Sitka and Minto tribal courts to resolve situations involving children. First the courts have become known as the organizations that ultimately handle the referrals required by ICWA[406] Perhaps because they have handled ICWA cases, the tribal courts' expertise has been perceived by the communities as extending to a wide range of children's and family matters. Families more willingly bring their cases to the tribal courts for resolution because of this perceived expertise. Equally, if not more, important is the fact that the state and tribal social workers, state court judges, and other professionals that work with families believe that these two tribal courts have established a credible record in their handling of family cases.

Submitting to the decision-making process and following through on the agreed-upon conditions are two different matters. In children's and family situations, the Minto and Sitka tribal courts appeared to have fairly good success. The courts' ability to effect resolutions adhered to by all parties probably is related to the emphasis on negotiation and consensus. Although the same situation may be considered by the courts and parties several times before everyone agrees on a relatively final resolution, the courts and the agencies that work with them seem satisfied with most outcomes.

The civil regulatory matters handled by the Minto Tribal Court, however, lead to more concerns about enforcement of the court's decisions. Offenders do not always comply by paying fines and performing the community work service required. The judges expressed frustration at their inability to force compliance with the conditions set on defendants. Some believed that a jail facility would provide the incentive needed for more offenders to take the court's decisions seriously.[407]

PACT presents the purest example of voluntary participation. The essence of its approach to dispute resolution is the principle that parties must work together equally

[406] The State gives notice under ICWA to the Tribe, but in both Minto and Sitka, the tribal council passes the case to the tribal court.

[407] This belief is interesting in light of the severe jail and prison overcrowding conditions that exist in Alaska, as well as elsewhere. Alaska's Sentencing Commission has recommended that jail be used less frequently and that intermediate punishments, including fines and community work service, be used more. ALASKA SENTENCING COMMISSION 1991 REPORT TO THE GOVERNOR AND THE ALASKA LEGISLATURE at 36-41 (1991). However, community support for a jail facility may also be an expression of the need for a secure place in which to confine residents who, because of intoxication, are temporarily a danger to themselves and others.

to agree upon a satisfactory solution. They believe that if the parties adhere fully to this process, the resulting agreement will not need outside enforcement.[408]

3. Strong Case-Referral System

The strength of the case-referral system appeared to be inextricably linked to the perceived effectiveness of each organization. The Alaska Court System's 1977 evaluation of the Village Conciliation Boards also found that a referral system was critical to a productive ADR organization.[409] Each of the organizations evaluated differed in the source of referrals.

Sitka handles primarily children's and family matters, and has established close ties with most of the other state and local agencies and private sources for referral of these cases. Because the court has established its ability to manage these cases fairly and effectively, many professionals willingly send cases to it.[410] Attorneys also work with the tribal court and refer clients to it periodically.

Minto relies heavily upon the Village Public Safety Officer (VPSO) for a reliable stream of cases. The data show clearly that when the village did not have a VPSO, its caseload dropped drastically.[411] The VPSO brings about 85% of the tribal court's cases to it. Most are civil regulatory actions, but a few are children's and family cases.

PACT, in sharp contrast to the other two organizations, has not established a source or sources of referrals. The state court hands out a brochure about PACT to

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[408] Although PACT has too few resolved cases to make a statistically valid judgment about the durability of the parties' agreements, data from other dispute resolution organizations around the country suggest that voluntary agreements may be more likely to be followed without further litigation or need for dispute resolution services.

[409] J. MARQUEZ & D. SERDAHELY, *supra* note 112, at 76-79.

[410] As noted earlier, the Sitka state and tribal social workers often act as a team, and decide whether to send a given case to tribal or state court depending on certain case characteristics. In situations where they believe that the tribal court can handle the case with more confidentiality, speed, or effectiveness than the state court, they are likely to refer it there. In other situations they may feel that the informality of the tribal court or the greater comfort inherent in a familiar cultural background will serve the child(ren) or family better. On the other hand, if the social workers believe that enforcement of the tribal court's decisions may be problematic, or that the adversarial process would better protect one or more of the participants, they may choose to send the case to state court. See Chapter IV, evaluating the individual programs, above.

[411] *See* Figure 10, *supra*.

members of the public interested in small claims court. Little verbal explanation or encouragement accompanies the written description. Information has been sent in the past to the newspapers, schools, radio stations and local organizations about PACT, but little outreach has been done in the past year or two.[412] Because those who actually used PACT's services appeared to be satisfied, the lack of cases may be due both to the absence of a referral system and to systemic problems with the organization, but it is difficult to say more specifically.

4. Ability to Work with Government Agencies, Including Courts

The ability of the tribal courts to work effectively, albeit informally, with government agencies, was also critical to effectiveness. This ability was related to the organizations' credibility, usefulness to government agencies as an alternative mechanism for resolving disputes, and consequently, willingness of government agencies to refer cases and cooperate in dispositions. The most direct interactions came with social workers in Sitka children's cases, and with the VPSO in Minto. However, state court judges expressed willingness to work with each of these organizations in ways ranging from having the decision-makers supervise children's cases or criminal offenders, to receiving input from them on state court cases that involve tribal members.

PACT's interaction with government agencies is more limited, consisting mainly of referrals of inappropriate cases to agencies that could help. A small minority of the cases that came to PACT were referred by other agencies. In addition, the Barrow superior court judge encouraged the parties in two cases to work out a solution themselves through PACT. However, nothing in PACT's goals or structure would prevent more interaction with government agencies.

[412] By way of comparison, the Judicial Council's child visitation mediation project that served the Anchorage area as a pilot program in 1990 and 1991 ran a minimum of three newspaper display ads per week, and encouraged additional public service advertising and news coverage of the program. S. DI PIETRO, *supra* note 139, at 4, 5. Many of the participants in that project reported that they had found out about it through the ads. The Council also sent brochures to all attorneys in the State, and made some additional targeted mailings.

5. Other Factors to Consider in Replication

The four factors described above are the most essential to an effective organization. Without the voluntary commitment of both decision-makers and participants, without a strong source of case referrals, and the ability to work at least informally with a variety of government agencies, no alternative dispute resolution organization is likely to succeed. Several other characteristics can help an interested group determine whether a given type of dispute resolution is likely to serve its needs. These characteristics include the resources needed to support the organization, the ability of the organization to function without legal challenge, and community cohesiveness and support for the alternative dispute resolution process.

Resources. The organizations evaluated here have been successful, at least to a certain extent, with severely limited resources. None has spent any funds on space, very little on supplies or equipment, and relatively little on staff. Association of the dispute resolution organization with a larger group, such as a tribe or village government, clearly benefits the organization. Most larger groups can afford to donate some clerical time and supplies, and most have meeting space available that can be used for hearings, board meetings, and other events that involve a number of people. Local charitable groups, such as United Way, Rotary, churches, and fraternal groups may be willing to donate funds for specific needs, such as printing brochures. Others may be willing to pay the monthly phone expenses, or give furniture or office space. Regional and village Native corporations may be willing to cooperate with alternative dispute resolution organizations as well, whether the organizations are characterized as multi-cultural (as is PACT) or as tribal courts or councils.

The two tribal courts find the lack of resources frustrating. Participants can easily think of dozens of ways to spend any available funds, starting with small stipends for staff, to full-time salaries, to paying for recording equipment and files, to purchasing pencils and forms for the files. In addition, funds for formal training of tribal court judges might give the courts additional credibility in the eyes of state court judges and agencies, and help them accomplish court work with greater confidence and effectiveness. PACT, by contrast, prides itself on its volunteer status, and for reasons of principle, strives to keep its costs to an absolute minimum. At one point during the evaluation process, the organization's members worried that too much information at this time about PACT in the community could tax the already over-extended conciliators to the breaking point, and did not even want free advertising. Whichever approach an

interested group decides to take, however, the need for some resource base, however limited, must be considered.

Ability to function without legal challenge. Each of these organizations has demonstrated its ability to function within the larger context of state and federal systems of law. PACT has not been challenged, largely because the voluntary nature of the conciliation process virtually eliminates the likelihood of disagreement over the outcome. PACT does not sanction parties to disputes in any way, and is not concerned with enforcement of the agreements arrived at by participants.

The tribal courts, on the other hand, are not officially recognized by the State of Alaska, although other states and the Federal Government are willing to recognize their work depending upon the circumstances. Yet they have managed to function for some years, and to obtain increasing respect and cooperation from the state courts and other state agencies. Part of their informal acceptance by state judges and professionals derives from the tribal courts' own selectivity about the cases they choose to take or not take. Part derives from the credibility they have established over the years in their own communities and with state agencies. Successful replication of these organizations depends upon the ability of potential alternative dispute resolution groups in other communities to establish this level of trust and cooperation.

A second source of challenge to the tribal courts would be disgruntled participants. However, no disputants have challenged the Minto court's handling of civil regulatory cases nor have many argued with decisions in children's cases. No appeals have been taken from the tribal court. A significant minority of persons involved in tribal court cases have not been members of the Tribe; their lack of challenge to the tribal courts' jurisdiction also suggests that the courts provide a useful and effective service.

Community cohesiveness and acceptance of the organization. The cohesiveness of the community, especially in smaller areas, may play an important role in the ability of a community to replicate one of these dispute resolution organizations. Minto, with 218 people, virtually all of whom are Athabascan, is the most homogenous community. Demographically, Barrow is probably the most diverse, since it is only 60% Native and has large populations of several very different ethnic groups. Sitka is only 20% Native, with the remainder of its population being predominantly Caucasian. While homogeneity could be hypothesized to be important, it does not appear from looking at these three organizations to be a determining factor in their effectiveness at resolving disputes.

Community acceptance of the organization is important because it represents the willingness of the community to provide resources and volunteer time for the organization. Acceptance indicates that the community is not only aware of this means of resolving disputes, but believes that it could be useful to individual citizens when they engage in disputes. If both of these conditions are present, the organization will receive sufficient referrals to function well.

B. Replicating the Alternative Dispute Resolution Process

Communities interested in establishing a dispute resolution organization similar to those evaluated here, or in building on existing organizations, should look at a variety of factors. These might be best presented as a list of questions that group members could ask themselves:

1. What types of disputes are we willing to take to our own dispute resolution process?

2. How willing are we to abide by decisions that this group might make?

3. What will we gain/give up by not using the state court process for these selected cases?

4. How will we handle a situation in which a person not from the community or tribe is implicated?

5. What resources can we contribute to the organization?

6. What resources can we call upon for funding, technical assistance, referrals, supplies, and staffing of the organization? Are one-time grants available to fund start-up?

7. Do we expect a dispute resolution organization to be specialized to handle only a certain type of case, or would we prefer dispute resolution for a wide range of situations?

8. What local organizations might be able to serve as a "home" for dispute resolution? What degree of control would the parent organization

want/expect to exert over the dispute resolution policies, types of cases, structure, and administration of the dispute resolution process? To what extent is this level of control compatible with the existing goals and policies of the dispute resolution organization; to what extent is the organization willing to negotiate for change?

9. What steps can we effectively and at a reasonable cost take to publicize the dispute resolution organization and to maintain it continuously in the awareness of the community?

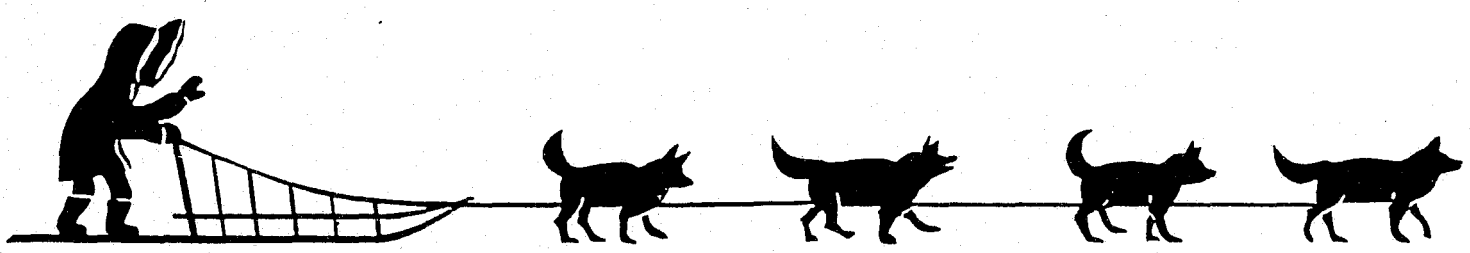
Many organizations are helping small communities to work with alternative means of resolving disputes at the present. All of the Native regional non-profit corporations contacted in the course of preparing this grant and conducting the evaluation have at least one person on their staff and often more, whose jobs are in part to encourage the establishment of tribal courts.[413] The Alaska state courts are developing a new Civil Rule to encourage mediation.[414] The Department of Community and Regional Affairs has worked with communities in recent years on dispute resolution options. The Judicial Council and several other Alaskan agencies and organizations have formed a working group for mutual education.[415] Several national organizations will provide technical assistance and information to dispute resolution organizations.[416]

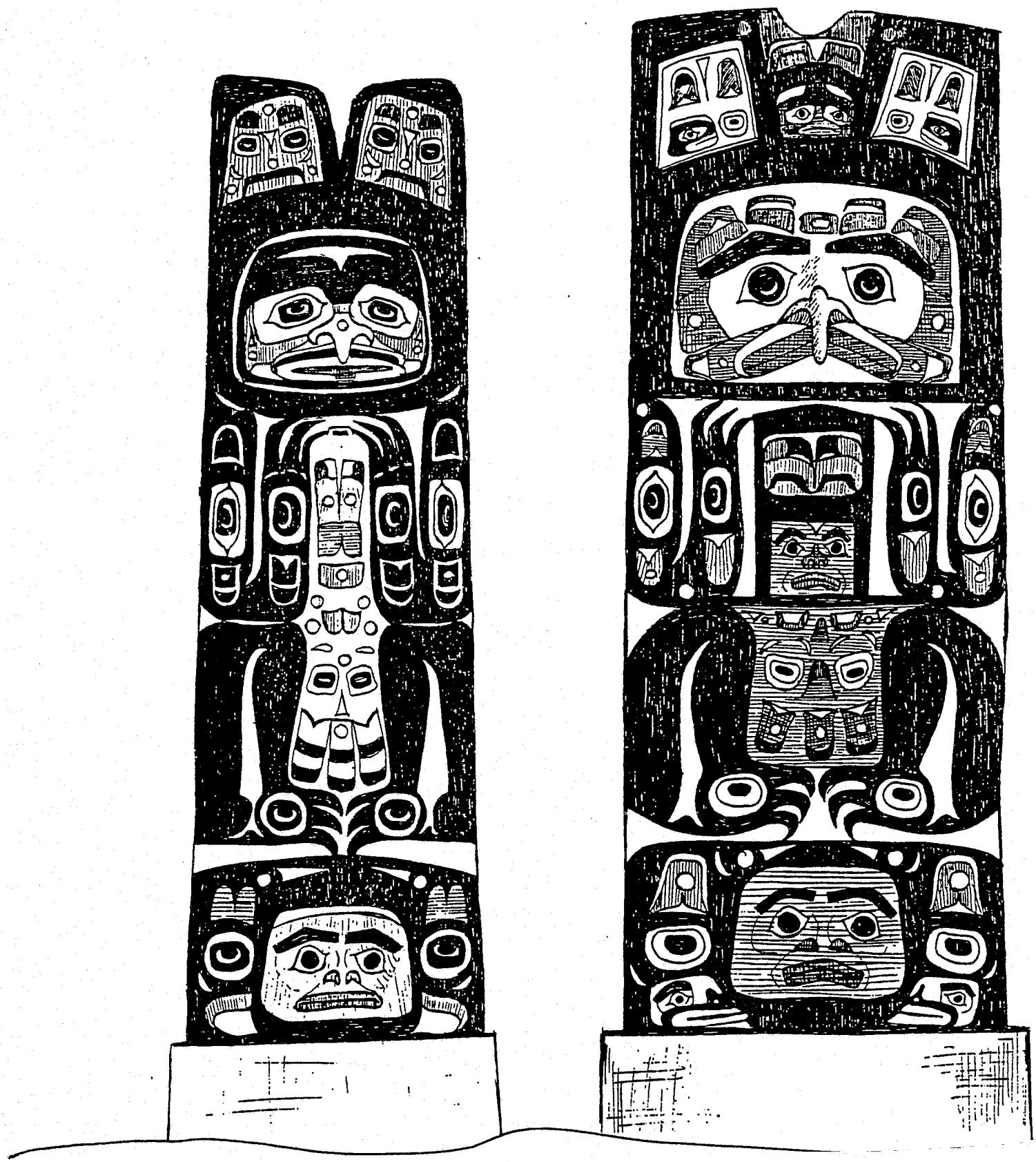
[413] For example, the Association of Village Council Presidents applied in May of 1991 for a grant from the Administration for Native Americans to establish Tribal Family Justice systems in eight of its member tribes. The AVCP is the regional non-profit organization representing 56 indigenous Native villages within western Alaska. Tanana Chiefs Conference, North Pacific Rim Corporation, the Central Council Tlingit and Haida Indian Tribes, and Bristol Bay Native Association are among the other Native non-profit corporations that are actively working to support and develop tribal courts. TCC has published a tribal court handbook (cited *supra* at note 279).

[414] Proposed Civil Rule 100 is discussed *supra* at note 143.

[415] The members of the Tribal/State Court Working Group are: William T. Cotton, Susan Miller, The Honorable Jay A. Rabinowitz, The Honorable Harris Atkinson, The Honorable Edward L. Littlefield, Sr., The Honorable Thomas E. Schulz, The Honorable Craig McMahon, Aleen M. Smith, Mary Miller, and Richard Stitt.

[416] Among these groups are Society of Professionals in Dispute Resolution (SPIDR), National Center for State Courts, and American Academy of Family Mediators.





Kaagwaantaan Mother Eagle House Posts

Illustration by JoAnn George from Carved History, courtesy of Alaska Natural History Association.

Chapter VIII: Findings, Conclusions and Recommendations

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The purpose of this project was to describe and evaluate three organizations in rural Alaska that resolve disputes. After reviewing all of the case files from the Minto and Sitka tribal courts and the Barrow PACT conciliation organization, comparing those case files with similar cases in the state courts, interviewing over 100 attorneys, judges, decision-makers, conciliators, and other persons interested in the organizations, reviewing Native law and current alternative dispute resolution processes, and assessing a range of other information about each organization, the Judicial Council makes the following findings.

A. Findings

Rural Alaskans in Barrow, Minto and Sitka have found ways to solve their disputes locally. They have adapted three methods of dispute resolution to their unique circumstances. Barrow's PACT blends the urban, apolitical, Community Boards and the rural Intertribal Peacemakers in the Arctic environment. Sitka's tribal court harmonizes federal, state, and traditional Tlingit law in its decisions and process. The Minto Tribal Court embodies Athabascan justice, modern and ancient. These three programs indicate that many Alaska communities could create equally unique and effective dispute resolution organizations. The evaluation found that the organizations shared the following characteristics.

1. Reliance on Volunteer Effort

Each organization was founded by individuals strongly committed to an idea, whether the idea was a vision of community harmony or well-being, or of collective responsibility. This initial commitment has translated over the years into a willingness to work long hours, for little or no pay. However, this reliance on volunteer support has left all three organizations susceptible, in varying degrees, to burnout and turnover among decision-makers/conciliators and support staff.

2. Absence of Outside Funding

None of the three organizations relies on outside funding sources; in fact, none of the three has any significant material support. PACT owns an answering machine, the Minto Tribal Court owns case files alone, and the Sitka Tribal Court owns only a file cabinet. That these organizations have accomplished so much with so little is testimony to the integrity of the ideas that inspired them and the commitment necessary to bring those ideas to life.

3. Community Support and Acceptance

Each organization has been continuously active in varying degrees, for a number of years. This continuity is tied to broad-based community support and acceptance. In Minto, every member of the village had the opportunity to assist in drafting village ordinances. Public participation in law-making has given the tribal court heightened credibility and visibility within the community. In Minto and Sitka, community support and awareness of the courts' work serves to attract ADR participants and to be a factor in their compliance with the courts' decisions. In a few instances, non-Native members of the community voluntarily used or cooperated with the tribal courts in the resolution of children's and family matters, and in civil regulatory cases. Community support is also key in Barrow, since PACT hears cases only when both disputants consent.

4. State and Governmental Agency Support and Acceptance

Each of the organizations interacts with one or more state or other governmental agencies. The Sitka Tribal Court works with the state's social workers and the state courts. Minto relies heavily on the VPSO program that is funded through the Alaska Department of Public Safety. PACT, in Barrow, interacts least routinely with state

agencies, but the state court does distribute information about PACT to everyone inquiring about small claims litigation.

5. Referral Systems

A strong system for referring cases to the organization is critical to its effectiveness, judging by the experiences of these three organizations. The strongest and most reliable referral sources are those tied to governmental structures, such as the VPSO in Minto and the Sitka tribal and state social workers. The tribal courts also draw on ICWA referrals, and referrals from state agencies. PACT lacks a consistent referral source, and has the smallest caseload of the three organizations.

6. Case Screening

Decision-makers/conciliators select the cases they will take and reject those that do not meet criteria they set. PACT formally expresses these criteria in writing. The Sitka Tribal Court judge screens cases based on past experience, and the Minto Tribal Court relies on discussions among its members about which cases to accept or reject. As a practical matter (given the unsettled legal status of tribal courts in Alaska), the Minto and Sitka courts attempt to avoid cases that might directly challenge their authority or jurisdiction. PACT's case screening focuses more on the organization's philosophical beliefs about the types of cases appropriate for conciliation than on concerns about challenges to its jurisdiction.

7. Caseload Characteristics

The three organizations differ in the types of cases that they hear. Minto's tribal court attempts to police the community, not so much to punish offenders as to "help" villagers solve problems. The court also handles some traditional adoptions in addition to the civil regulatory cases that make up the bulk of its work. The Sitka Tribal Court's cases consist almost entirely of child custody proceedings, some of which are involuntary proceedings under ICWA and some of which are guardianships. A few have been formally transferred to the tribal court from state or county courts in other states. PACT handles mostly civil matters, with landlord-tenant and small business cases. PACT to date has not handled any criminal or domestic matters.

8. Importance of Dispute Resolution Style

Participants in each organization believe strongly that the opportunity to resolve disputes in a certain way (e.g., with equal participation, in a conciliatory manner; or in "the traditional Athabascan way") is one of the most important reasons for and benefits of an alternative dispute resolution process.

9. Separation of Tribal Court Activities from Sovereignty Issues

Tribal courts were able to handle disputes satisfactorily without resolution of sovereignty issues. Rather surprisingly, the presence of those unsettled issues did not interfere significantly with the two tribal courts' ability to resolve disputes fairly and productively.

10. Cultural Cohesiveness

The three organizations studied differ in the degree of cultural cohesiveness within their communities and among their participants. Sitka's tribal court operates in the fourth-largest Alaska community and serves not only Tlingit, but also other Alaska Natives and Indians from other states. Indianness predominates among Sitka Tribal Court disputants, although some are non-Indians related through marriage or joint parenthood to Indian disputants. In Minto, participants are more alike, ethnically and culturally, than they are different. In contrast to these two, PACT offers conciliation services in Barrow to a wide range of cultures. Cultural or ethnic cohesiveness of the community may be helpful, but does not appear to be necessary.

B. Conclusions

1. Effective Dispute Resolution

Each of the organizations has demonstrated the ability to resolve disputes within its community effectively, fairly, and to the satisfaction of the great majority of participants and, it seems, to the satisfaction of parties whose cases were handled by the organization. They also have operated continuously for a substantial period of time.

2. Interaction with State Courts

The organizations interact with state courts to varying degrees; each has demonstrated the potential for increased interaction to the benefit of the state courts.

3. Interaction with Other State Agencies

The organizations interact with other state agencies to varying degrees. In particular, DFYS social workers and VPSOs are important sources of case referrals for the tribal courts. In general, these interactions appear to be beneficial for all parties. An example is that the Minto Tribal Court appears to ease the workload of state prosecutors.

4. Characteristics

The characteristics of successful rural dispute resolution organizations, based on this evaluation, appear to include committed volunteers to run the program; voluntary acceptance by disputants of the organization's resolution of disputes whether through conciliation methods or other techniques; one or more reliable sources of case referrals; and acceptance, at least informally, by state courts and governmental agencies of the organization's activities.

5. Resources Needed

Remarkably few resources were needed for the operation of each organization. Increased resources would permit better training of decision-makers/ conciliators, less turnover and burnout among decision-makers/conciliators, and more effective service to the communities, among other benefits. However, the organizations' fiscal resources were not the most important aspect of their operations.

6. Resolution of Sovereignty Issues

In the long run, the tribal courts' ability to work with the state courts and other agencies will be improved by the resolution of sovereignty issues because the ambiguity of those issues will not act as a barrier to cooperation on the resolution of cases.

7. Use of Tribal Courts by Non-Natives

Non-Natives voluntarily used or cooperated with tribal courts in the resolution of children's and family matters, and civil regulatory cases. This indicates that the tribal courts can serve citizens of all races in the State in their capacity as local dispute resolution organizations.

8. Wide Range of Disputes Resolved

All three organizations evaluated appeared to have the potential to handle a very wide range of dispute types that are presently filed in state courts, including typical civil matters, family and children's matters (this was less clearly demonstrated in the case of PACT), and quasi-criminal matters. They also were able to deal with personal disputes that normally would not be handled by the state courts.

9. Homogeneity of Community

Homogeneity of a community's population did not appear to be related to the ability of the organization to resolve disputes.

10. Replication

To the extent that other communities can replicate the conditions that appear to be essential (i.e., committed volunteers, strong referral sources, willingness of community members to submit their disputes to the particular process chosen), they should be able to establish local organizations to resolve disputes within the community. Effective local organizations will serve somewhat different needs in each community and it is not recommended that a community attempt to duplicate exactly any one of the three organizations evaluated.

C. Recommendations

1. Cooperative Attitude Towards Legitimate Work of Tribal Courts

Issues of Native sovereignty and the authority of tribal courts have been in dispute in Alaska for many years and will likely continue to be so. The Judicial Council takes no position on the resolution of these issues, which are beyond the scope of this study. None of the following recommendations should be taken as supporting or

opposing Native sovereignty or the authority of tribal courts to compel compliance with their proceedings or orders. They should, however, be taken as supporting a cooperative attitude between the State and tribes toward the legitimate work of tribal courts. To the extent that local communities voluntarily submit to the authority of dispute resolution organizations, the State has every reason to support this effort, including cooperation with organizations identified as tribal courts.

2. Further Discussion of Remaining Issues in the ICWA State/Tribal Agreement

The Judicial Council recommends that in an attempt to foster cooperation between the State and its Native population the Department of Health and Social Services consider beginning discussions on the issues that were reserved for subsequent negotiation in the 1989 Indian Child Welfare Act State-Tribal Agreement. Those issues were tribal courts, jurisdiction, and state funding for social services and for children placed in foster homes by a tribe. Included in negotiations on state funding of social services should be discussion of a tribal guardian ad litem program modeled after the state's.

3. Continued Voluntary Cooperation Among Rural Dispute Resolution Organizations and State Personnel

The Judicial Council recommends that state agencies and employees continue to cooperate voluntarily with rural organizations to further local justice in both civil and criminal matters, in order to meet the legitimate expectations of rural communities for justice in their communities.

4. Increased Voluntary Development of Local Alternative Dispute Resolution Organizations in Interested Communities

The Judicial Council supports greater development of voluntary local dispute resolution organizations in interested communities. The State does not provide law enforcement and prosecution services to all villages for minor criminal matters, and it is appropriate for village governments to assert control over these matters and to seek local solutions. State agencies can help to encourage stronger case referral systems, to the extent possible.

The Council recommends that the Department of Public Safety establish clear policy encouraging the referral by Troopers and VPSOs of appropriate criminal matters to local dispute resolution organizations, including tribal courts. The Department also should include discussions of local dispute resolution options in VPSO training.

5. Continued Mutual Education Between State and Tribal Courts

The Judicial Council recommends that the state and tribal court judges make continuing efforts to communicate with each other. Current efforts at mutual education include the Tribal/State Court Working Group and a half-day program at the 1992 Alaska Judicial Conference. The Judicial Council recognizes the very important steps these activities represent and wishes to praise the coordinators of this year's Judicial Conference and the participants for their efforts at opening communication between state and tribal court judges. Other efforts by the tribal courts to invite state court judges and court personnel to visit their locations (Metlakatla, for example, invited the Chief Justice and state court judges in its area to visit recently) also are welcome. Further state-tribal discussions should take place in a series of meetings at which work groups organized at both the state and regional levels form to conduct research and carry out specific tasks. Work groups should reconvene at the meetings to report on progress achieved.

6. Support for Court-Referred Victim/Offender Mediation by PACT

The Council recommends that the State support any efforts by PACT to commence agency or court-referred victim-offender mediation. PACT can provide a valuable service to Barrow by providing the service and, in turn, can benefit from the institutional connection with the referring agency or system.

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Appendix A

Memo, Recommendations of Bush Justice Conferences

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alaska judicial council

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MEMORANDUM

TO: Rural Justice File

FROM: Staff SRD

DATE: May 2, 1990

RE: Summary of Bush Justice Conference Recommendations

This is a summary of recommendations made at Alaska's four Bush Justice Conferences on improving access to and the quality of justice in rural Alaska. The recommendations are grouped into seven major problem areas, although there is some overlap. The date(s) following each recommendation show which year (or years) the recommendation was made. Following some of the recommendations is an explanation of the steps, if known, justice system agencies have taken to implement the recommendations. These explanations of agency action are not comprehensive.

All four Bush Justice Conferences have been attended by Natives, Native leaders, and representatives from state agencies. The first Bush Justice Conference, held in Girdwood, Alaska, was sponsored by the Alaska Judicial Council. The second was held in Kenai in 1974. The third was held in Minto in 1976. The fourth and most recent Bush Justice Conference was held in Bethel in 1985 and was sponsored by the Alaska Federation of Natives.

I. Lack of Village Participation in Decision-Making and Administration

The most fundamental complaint, made at all four of the Bush Justice Conferences, is that decision-makers and employees in justice agencies are so far

removed from the villages that the court system and other agencies are largely unaware of and unresponsive to village needs.

Specific Recommendations

- Strengthen the Local Affairs Agency and upgrade it to department level. Local Affairs Agency representatives should visit villages to draft ordinances, help villages participate in revenue-sharing programs, and improve law enforcement techniques [1970];

- Employ more Natives in all positions, and especially in policy-making positions, in the court system and in all other agencies that serve the Bush [1970, 1974, 1976, 1985]; the court system should develop a specific plan, with Native input, to increase Native recruitment [1985];

  Court System: Court system administration reports that the court system aggressively recruits Native applicants for all positions. The court system sends recruitment bulletins to Native organizations and to Native students at the University of Alaska, publishes recruitment notices in newspapers serving rural areas, and consults with Native organizations. In addition, the court system does not administer an employment test. Finally, the court system prepares quarterly EEO reports documenting Native and minority hire, and schedules meetings with all area court administrators to discuss ways to increase minority hire.

  Department of Corrections: The Department of Corrections reports that it has actively recruited Natives by working with the Department of Administration, Division of Personnel to ensure that recruitment programs for correctional officers are targeted toward minorities in general and Alaska Natives specifically. Specific examples are the openings of the Yukon-Kuskokwim (Bethel) and Spring Creek (Seward) Correctional Centers and the recent recruitment efforts for the Ketchikan Correctional Center.

  In addition, the Department of Corrections' minority hiring goals were revamped and increased during the 1987-1988 EEO program year. The original department goal was 16 percent of the work force; when this goal was attained, it was increased to 21 percent. The latest goal also has been

attained and sustained for Alaska Native males in the correctional officer job class.

DOC Percent Native Hire*			
Occupational Area	**Goal**	**Dec. 1986**	**Dec. 1989**
Officials & Administrators	8.7%	0.0%	10.0%
Professionals	11.8%	12.6%	11.1%
Technicians	13.0%	0.0%	0.0%
Protective Service Workers	24.3%	22.3%	28.0%
Paraprofessionals	19.0%	11.8%	20.0%
Office/Clerical Workers	16.7%	15.7%	18.3%
Skilled Craft Workers	17.0%	3.8%	0.0%
Service Maintenance Workers	24.0%	31.0%	18.4%

*1988 Annual Progress Report on Equal Employment Opportunity and Affirmative Action, Office of Equal Employment Opportunity.

- Have every agency, especially the Department of Corrections, examine its employment requirements and revise them wherever they reflect cultural bias or might arbitrarily exclude otherwise qualified Natives [1970, 1985];

  Court System: The court system will relax minimum skill requirements for certain positions when it appears that those requirements create a barrier for Native applicants. For example, the court system has waived the requirement that a judge's secretary (a Secretary III) be able to type 80 wpm.

  Department of Corrections: During 1986, the Department reviewed its employment requirements and instituted a program of management oversight and approval of all correctional officer hires and the guideline of hire of one minority applicant for each two hires. Each superintendent is required to obtain the written approval of the Director of Administrative Services prior to making a job offer and to justify in writing why a minority was not selected. These

requirements allowed Corrections to meet its goals within a fairly short period of time.

Since 1988, the Department of Corrections has strived to make the ethnic and gender balance consistent in all components. This problem is being addressed by creating a policy and procedure addressing the requirements for transferring employees between components.

- Make sure the Department of Corrections (DOC) changes the written test for correctional officers so that it does not discriminate against Natives [1985];

  The Department of Corrections has found alternatives to ensure minority hire goals are met without having to change the test.

- Have the Department of Public Safety recruit Natives for positions as law enforcement officers at the village level [1976];

  In approximately 1980, Alaska instituted the Village Public Safety Officer program. The Village Public Safety Officer (VPSO) is a member of a rural community who assists the village in all aspects of public safety. Each VPSO is hired by the Native non-profit corporation responsible for the area in which the VPSO lives and paid largely with state funds. The selection of a VPSO in a particular village is jointly approved by the Village Council, the non-profit corporation and the Alaska State Troopers. A VPSO learns about law enforcement, first aid, fire fighting, and other public safety issues by attending a six-week VPSO academy, a two-week fire fighter course, and periodic training in a regional area near the village.[1]

- Appoint a Native to the Judicial Council and to the Judicial Qualification Commission [now the Commission on Judicial Conduct] [1970];

  Natives have been represented on the Judicial Council since 1981 and on the Judicial Conduct Commission since at least the mid-1980s.

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[1] "Become a VPSO," published by Alaska Department of Public Safety, April 1988.

- Have the court system study the feasibility of establishing a Rural Trial Court Administrator(s) who would assign district judges to rural areas when needed and provide direct communication between the rural courts and the court system [1976];

  The court system has established a Rural Court Training Assistant who schedules Anchorage trial judges to travel to the rural courts in the Third Judicial District when needed.

II. Lack of Self-Determination

Besides wanting to participate more in the decisions of the court system and other justice agencies, rural Alaskans have asked at all four Bush Justice Conferences for more local control over enacting and enforcing laws. The common theme is that village life should be governed by village law and custom as much as possible.

Specific Recommendations

- Have village councils evaluate creating informal and formal justice systems in the village, such as resolution committees, magistrates, and tribal or municipal courts [1985];

- Amend Title 29 of the Alaska Statutes to allow rural municipalities to draft and enact ordinances, and to enforce police powers [1976];

  Title 29 has been amended several times since 1976, most notably in 1985 (by 74 SLA 1985). The 1985 amendments represent an entirely new approach from previous law. Former law spelled out municipal powers in substantial detail, the 1985 amendments list the powers and provide for their liberal construction. Thus, municipalities currently can enforce ordinances and prescribe penalties for violations in a manner which is consistent with other provisions of the State Constitution or other state laws.[2]

- Amend Title 29 to permit incorporated communities to draft, enact and enforce administrative regulations which define and sanction non-criminal or less serious criminal behavior [1976];

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[2] *See*: Twenty-Four Ordinances, by David S. Case, Alaska Federation of Natives Bush Justice Committee, 1977.

- Incorporate the concept of a conciliation board into the court system and implement it in those villages desiring it [1976, 1985];

> In 1975, the court system established "conciliation boards" in six western Alaska villages. The boards handled non-criminal or minor criminal conduct. Appearance before a board was entirely voluntary, and boards could not impose fines or jail sentences. The boards were composed of 5-7 local citizens selected either by the village council or by the villagers themselves.
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> During the first 12-18 months, three of the boards heard a total of 32 cases, two other boards heard a total of three cases, and the sixth board heard none. In June of 1977, Douglas Serdahely and anthropologist Judith Marquez completed an 11-month evaluation of the project, and published their conclusions in a report entitled Alaska Court System Village Conciliation Board Project Evaluation. Their evaluation was generally favorable; but they warned that only limited services could be expected from the boards. In July of 1978, the Alaska Supreme Court discontinued the experiment, indicating that the court system structure might not be appropriate for long-term placement of the conciliation boards.
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> In 1988 the Department of Community and Regional Affairs endorsed establishment of local quasi-judicial boards to deal with non-criminal matters and minor infractions. Suggested ordinances to establish these boards were finalized by the Department in February, 1990.

III. Limited Local Access to Legal Services and to the Process of Justice

Participants at all four Bush Justice Conferences have complained about the limited legal resources locally available to rural Alaskans, and voiced feelings that the court system's highly centralized structure inhibits local access to the process of justice.

Specific Recommendations

- Explore techniques to encourage private bar associations and public interest law firms to provide more services in Alaska villages [1970];

- Have the Department of Community and Regional Affairs hire "circuit attorneys" to provide advice and services to villages and second-class cities [1976, 1979];

- Recruit bilingual attorneys [1970];

- Create and fund staff offices for Alaska Legal Services Corporation and the Public Defender Agency in Bethel and Nome [1970];

  The public defender and legal services currently have offices in Bethel and Nome.

- Establish a program to train court interpreters; study why existing court interpreters have been underutilized; publicize the availability of court interpreters [1970, 1976, 1985];

  In 1975-1976 the court system trained two Yupik speakers to translate legal proceedings into Yupik. The two interpreters, who were based in Bethel, created a Yupik glossary of legal terms. Because costs of transporting the interpreters to other villages was high, however, they did not do much in-court interpreting. Currently, the court system does not have any formal interpreter program.

- Increase the travel budgets of the superior and district courts so that they may hold more trials where the parties and witnesses live [1970];

  This suggestion was made at the first Bush Justice Conference, when the only superior courts with resident judges were in Anchorage, Juneau, Fairbanks, Ketchikan, and Nome. Since then, resident superior court positions have been created in Sitka, Kenai, and Kodiak in 1970, Bethel in 1976, and Kotzebue in 1979. In addition, Barrow has a superior court position, Homer has a district court position, Palmer has both positions, Petersburg/Wrangell has a superior court, and Valdez has a superior court.

  To the extent that the number of trials held in rural areas remains a problem, the court system is hampered not so much by insufficient travel budgets as by lack of adequate facilities. In order to hold a jury trial, the court system needs a room large enough to conduct the trial, and also a building in which the jurors can be sequestered should the need arise.

Such facilities seldom exist in small rural villages, and if they do, they are often occupied by other organizations.

- When trials are elsewhere, but witnesses live in the Bush, liberally appoint special masters (under ARCP 53) to take evidence in the witnesses' villages [1970];

  This concern is partially addressed by the increased use of telephonic hearings and expanded rural court sites.

- Amend AS 22.10.040 to mandate a change of venue when the convenience of the witnesses and the ends of justice require it [1970];

  Under current AS 22.10.040 and Alaska rule of Civil Procedure 3, the decision to change venue for the convenience of the witnesses rests in the trial court's discretion. Alaska Rule of Criminal Procedure 18 establishes venue districts for all criminal cases; the venue districts are promulgated by the supreme court in the form of a map.

- Change the boundaries and number of judicial districts to facilitate access to judicial services (make Barrow part of the Fourth Judicial District and Bethel part of the Third, or create a new district for Bethel) [1970];

  The court system tried to address this concern by creating the Bethel service area in 1973 and the Barrow service area in 1974. The principle behind the service areas was to use existing transportation facilities as much as possible to provide judicial and administrative services to rural communities. Although the court system formally abolished the service areas in 1983, it continues informally to treat the Bethel area as one region and to service it out of Fairbanks.

- Use more teleconferencing for arraignments, bail hearings, and other minor matters [1985];

  Alaska Rule of Civil Procedure 99 was amended by supreme court order effective January 15, 1989, to allow greatly increased use of telephone participation in court hearings. Criminal Rule 38.1, as amended by Supreme Court Order 960, permits the defendant to participate by telephone in hearings at which his presence is required. Criminal Rule 38.2 permits the defendant to appear in certain criminal

proceedings by way of television equipment, in lieu of being physically present in the courtroom.

- Authorize state troopers to operate leased or state-owned aircraft for their official duties [1970].

IV. Education

Another common complaint is that the justice system does not understand the Alaska Native, and the Alaska Native does not understand the justice system.

Specific Recommendations

- Have the University of Alaska establish a program to train legal personnel in both rural and urban areas in Native culture and languages [1970];

- Have the University continue to support the Minorities and Justice Careers Program [1985];

  In previous years, the Department of Corrections, Division of Statewide Programs, has RSA'd money to the University in support of this program.

- Have the State train its law enforcement and corrections officers to understand cultural differences in lifestyle and behavior [1976, 1985];

  Law Enforcement and Corrections: In the late 1970s, the University of Alaska Criminal Justice Center established a Division of Rural Justice Affairs. It sponsored special orientations for law enforcement officers headed for Bush service.

  The Department of Corrections Training Center includes this type of training in its Basic Correctional Academy. In addition, the Training Center is currently working with various Native organizations in preparation for a 16-hour course in Native cultural awareness to be conducted in Anchorage, Fairbanks, and Juneau.

  Court System: The Alaska Court System in 1979 devoted a judicial conference to cultural awareness training for judicial officers. Also, the court system at times sends employees to cross-cultural training workshops.

- Have the Department of Education develop curriculum on legal concepts, processes, rights and remedies for all junior high school students, especially in rural Alaska [1970, 1974, 1985];

  Stephen Conn, Associate Professor at the Justice Center of the University of Alaska, has developed a curriculum or text.

- Have colleges, universities, and other organizations establish adult education programs concerning legal concepts, processes, rights and remedies for Alaskan villagers [1970, 1974, 1985];

  According to The Report of the Third Bush Justice Conference, by Evan McKenzie, the Bush Justice Project worked on implementing this recommendation in 1976 and 1977. During those years, the Bush Justice Project developed and tested a set of educational materials, including a film dramatizing criminal procedure, a booklet summarizing the rural Alaskan justice system, and a series of videotaped interviews with legal personnel.

  The court system produces a number of "how to" pamphlets and booklets explaining legal processes in lay language. Topics covered include judgment-debtor proceedings, small claims, and appeals to the superior court.

- Have the University of Alaska establish a program for training paralegals [1970];

  Stephen Conn established a paralegal training program at the University of Alaska, Anchorage in 1988-1989. Students can take the course for general knowledge, or if they complete the course with the required grade point average, they can get a paralegal certificate. The program places primary emphasis on written and verbal communication skills, and on making the graduates marketable.

- Have the University of Alaska School of Justice and the Alaska Judicial Council study Bush justice concerns, especially Native offender issues [1970, 1976, 1985];

  Both organizations have studied and will continue to study Bush justice concerns, including sentencing issues. The UAA School of Justice called in 1989-1990 for studies of Native sovereignty and Bush justice generally.

V. Magistrates

Because the magistrate is often the only judicial officer available in many villages, rural Alaskans have special concerns regarding magistrate training and evaluation.

Specific Recommendations

- Have the Judicial Council develop clear procedures to regularly evaluate the performance of every magistrate, making sure that those procedures include the views of the local communities in which the magistrate serves, and that each magistrate is reviewed at least once every three years [1970, 1976];

  > Currently, magistrates serve at the pleasure of the presiding judge of the judicial district in which they work. They are evaluated one time per year by the presiding judge or his designee. Although the evaluator usually visits the magistrate's location, time generally does not permit soliciting the views of the local communities in which the magistrate serves.

- Have state colleges and universities establish programs for the training and continuing education of magistrates, with an emphasis on on-the-job training.

  > The court system has a full-time Magistrate Education Coordinator who provides training and education resources to magistrates statewide. The Magistrate Education Coordinator also travels to train new magistrates. The court system's Rural Court Analyst provides administrative and clerical training to magistrates on a part-time basis.
  >
  > Also, in 1975 the court system began appointing district court and some superior court judges as magistrate training judges. Magistrates may also attend statewide magistrate conferences, which are held every other year, and regional conferences, which alternate with the statewide conferences.

VI. Law Enforcement and Corrections

Participants at all four Bush Justice Conferences agreed that police protection for village people is inferior and in need of improvement.

Specific recommendations centered on Village Public Safety Officers, Constables, and the Department of Corrections:

Specific Recommendations

Village Public Safety Officers (VPSOs):

- The Department of Public Safety should continue to use both field and formal training for VPSOs [1976];
- Have the Department of Public Safety begin "career ladders" for VPSOs, including expanded training and mobility [1985];
- Train VPSOs in stress management [1985];
- Increase communication between village councils and the Department of Public Safety [1985];

Constables:

- Establish and fund a statewide constable program. Constables would function as backups for VPSOs [1970, 1976].

Corrections:

- Consider dispositional alternatives for Native offenders [1970, 1976, 1985];

  The Department of Corrections has always used alternatives available for all offenders, including Natives, such as community residential centers, restitution centers, pre-release furloughs, etc.

- Establish culturally relevant rehabilitation programs [1985];

  The Department of Corrections' 1985 Annual Report describes several culturally relevant rehabilitation programs operating in the state's correctional facilities. They include life skills classes on culturally relevant topics (i.e. Native art and dance, Alaska history, Yupik language and culture, ANCSA, ivory carving, Alaska Natives and politics), several local culture clubs that organize potlatches, a "Prison Survival Skills" handbook aimed at Native inmates, and guest speakers and films sponsored by the Totem Heritage Center for Ketchikan Correctional Center.

- Support establishing Native culture clubs in prisons [1985];

  Under Department of Corrections Policy and Procedure No. 815.03 (Prisoner Organizations) the Department of Corrections allows the establishment of prisoner organizations for "positive and wholesome purposes." As outlined in the Department of Corrections' 1985 Annual Report, many Native cultural clubs exist in Alaska's correctional institutions.

- Assess the feasibility of Native peer counseling [1985];

  The Department of Corrections has not taken any action on this recommendation.

- Create a clearinghouse for cultural volunteers who want to work with Natives in the prison [1985];

  This goal is accomplished through the Native cultural clubs at the individual correctional centers.

- Create the position of Deputy Commissioner of Corrections to encourage Native programs in prisons and community involvement [1985];

  The Department of Corrections has requested the position of a Native Program Coordinator several times in its departmental budget; the position has yet to be approved or funded.

VII. Children

Participants at all the Bush Justice Conferences criticized the courts, police, and other agencies for removing children and elderly from the villages.

Special Recommendations

- Decrease the number of children put into detention institutions [1985];

- Explore local alternatives for the control and rehabilitation of juveniles [1970, 1974, 1976, 1985];

- Put more juvenile probation officers in the Bush [1976];

- Change licensing regulations to increase the number of Native foster homes [1976];

- Change customary adoptions into summary procedures [1970].

Appendix B

Methodology

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Methodology

The evaluation relied on various methods of collecting information to provide a comprehensive picture of the organizations and the contexts (legal and cultural) in which they act. Methods sensitive to cultural differences and small databases were selected, including extensive interviews with the decision-makers/conciliators in each organization, other volunteers associated with the organization's work, and state court judges, regional Native non-profit corporation staff and others familiar with the organizations' activities. Each of the organizations gave the evaluators access to their case files; although limited in numbers, these were a rich source of information. Secondary sources, case law, analyses of Indian law, and data from state court case files and state Trooper files provided the basis for analysis of data from the interviews and organizations' case files.

Of critical importance to the accuracy and completeness of the report was the draft report review process. Over one hundred and twenty-five copies of the draft report were sent out for review, to project volunteers, decision-makers/conciliators, all persons interviewed for the report, academicians, attorneys specializing in Indian law, and the project's Advisory Committee.[1] The Project Evaluator returned to each community for several days to personally go over the report with the people interviewed to check for accuracy and completeness of the description of the program. This thorough review process was an intrinsic part of the evaluation and helps to firmly validate the findings and conclusions drawn from the information gathered about the organizations.

This brief outline of the methodology discusses the interviews, the data collection, and the review process. Copies of the actual data collection forms, interview format, and other background materials are available from the Council on request.

A. Develop the Evaluation Plan

The grant period established the first three months of the project as the time to prepare a detailed final evaluation plan. The Project Evaluator spent nearly a week in Barrow, Sitka and Minto, with a few additional days in Fairbanks. That time was used

[1] Members of the Advisory Committee, who assisted in the evaluation design and report revision were Judge Michael Jeffery (Alaska Superior Court, Barrow), Judge Douglas Luna (Central Council Tlingit and Haida Indian Tribes, Southeast Alaska), and Dr. Gary Copus (Professor, Political Science, University of Alaska Fairbanks).

to establish working relationships with the people in each organization, to determine the number of case files and types of information available, to assess the amount and types of interaction with state courts and state agencies well enough to permit design of data collection forms, and to consider other methods of evaluation that would be helpful, given the characteristics of each community and its caseload. The Advisory Committee met for a full day in Anchorage to review the plan and clarify the goals and methods of the evaluation.[2] The final plan set out the goals of each organization to be evaluated (as well as the goals of SJI and the Judicial Council in conducting the evaluation), the types of qualitative and quantitative data to be collected, the methods of collection and the general time frame.

1. Quantitative Data

Site visits showed that the number of actual cases available for data collection and analysis in each area would be small. In PACT's three years of operation, only thirty-seven cases had been handled. Sitka had just over 100, as did Minto.

Information from case files kept by each organization constituted the main source of quantitative data. The data collection form captured identifying information about each case (keeping in mind the confidentiality provisions established by each organization), data about the type of case, origins of the case (referral source), disposition of the case, and follow-up by the decision-makers/conciliators. The collection format provided ample note fields for each case. The evaluation plan provided that staff would enter the data on the computer using the SPSS-PC Data Entry program.

2. Qualitative Data

The small number of case files for quantitative analysis suggested a need for other sources of information. The evaluation plan called for interviews of participants, decision-makers and conciliators, attorneys, state court judges working in the area, academic and legal experts on rural justice, and other community members with relevant experience or perspectives. Other qualitative data would be obtained from the organizations' own materials (e.g., bylaws, constitution), and background studies by various experts, including anthropologists, economists and geographers. Observation

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[2] Additional advice on evaluation methods was provided by two consultants, Dr. John Kruse, Institute for Social and Economic Research, University of Alaska Anchorage, and Dr. Susan E. Johnson, an expert in applied social research.

of each organizations' hearings, and group discussion of issues (e.g., among groups of conciliators or tribal council members) also were among the qualitative methodologies suggested in the evaluation plan.

3. Legal Context

To provide a background for the discussion of the organizations evaluated, especially the tribal courts, staff planned to review state and federal statutes and case law, authoritative works on Indian law, and to interview experts in the fields of Indian law and tribal courts within the state. Traditional law-ways and development of the village councils also were included in the contextual research.

4. Cultural Context

Information about the various Native and other cultures in the communities studied, together with demographic, geographic, economic and sociological facts about each area were accumulated to provide an understanding of the milieu in which the dispute resolution organizations function. This information permits readers of the report to understand the similarities among the organizations as well as the important differences.

B. Evaluate Dispute Resolution Organizations

The next four months of the project were set aside to collect the information about each organization, together with the data that would permit comparison to state court processes, and legal and cultural contextual information. The Project Evaluator visited each site at least one more time, spending five to ten days in each location. She also traveled to Fairbanks and Juneau to collect additional information about the state courts, and about Trooper handling of Minto situations that might have led to criminal charges.

1. Quantitative Data

Each organization permitted staff to review or collect data about every case that it had records for. Sitka had 104 usable files, Minto had 107,[3] and PACT had thirty-seven. The data collection form included variables that captured information about the

[3] As noted in the report, the 1988 Minto cases were missing from the files, and were not included in this analysis.

type of case, year filed, parties and their relationships, allegations, disposition of the case, sanctions (where appropriate) and follow-up.[4] Data were entered on a lap-top computer at each site, using SPSS Data Entry II package.[5] To protect the confidentiality of some of the Minto files, one of the judges answered questions put by the Project Evaluator about the file. A PACT member also assisted in answering questions from the data entry form for PACT cases because PACT's own case files contained relatively little information about each case (for example, information about the parties and their relationships typically came from the PACT member rather than the case file). For the most part, however, the Project Evaluator was free to read the actual case files. Copies of the data entry forms used are available from the Judicial Council.

The Evaluator spent several days in Fairbanks reviewing court case files for cases comparable to those handled by the Minto courts, and time in the Barrow and Sitka state courts reviewing comparable case files. Data available from comparable state court files were very limited, and were not analyzed. The Department of Public Safety files in Juneau contained information about requests for Trooper assistance from Minto. The Evaluator looked through these to verify the low numbers of requests reported by people in the village and by the Fairbanks District Attorney and Troopers.

2. Interviews

The Evaluator and other staff interviewed well over 100 decision-makers, conciliators, group members (for PACT) and tribal council members (for Minto and Sitka), attorneys, state court judges, social service workers, and others with knowledge about rural justice systems and organizations. The interviews followed a series of formats developed for the various groups, but interviewers left room for open-ended discussion of topics that interested the participants. On several occasions, the Evaluator conducted group discussions with several members of the organizations at once. Copies of the interview format used for different groups are available from the Judicial Council.

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[4] Variables were: Date case opened and disposed of, case number for this organization, case number for other organization (e.g., if the case also had been or later was filed in state court, or in another state's court), name of other forum or court, type of case (civil/criminal/domestic, with detailed types in each category), law applied to the case (federal/ state/written traditional/unwritten traditional), identity of decision-makers, attorneys, attorneys' functions in the case (e.g., motions filed, oral arguments, letters filed), tribal status of the parties, relationship of parties, information about hearings (time, participants, topics, types of records kept), disposition of case, sanction(s) imposed and orders entered, appeals, and other follow-up.

[5] The name is a registered trademark.

Two groups that project staff had hoped to interview or survey proved to be too difficult to reach. The first group was parties to cases, who were not available for interviews in any of the locations. Confidentiality was a major concern in all three organizations, in part because of the nature of the cases, and in part because of the nature of the process. Many of the cases involved children and family matters that would have been confidential in state court as well as in tribal court. Others involved ordinance violations or small claims-type matters that would have been open to the public in state court. The processes for resolution of disputes in PACT and the tribal courts, however, encourage conciliation and settlement rather than an adversarial resolution of issues, and tend to emphasize confidentiality.[6]

The second group was residents of the community in general. Staff had hoped to determine the levels of community knowledge of the dispute resolution organization and satisfaction with its activities. The cost and time limitations did not permit a general survey of the residents in each community. However, staff considered other criteria that might reflect community satisfaction and awareness (e.g., level of usage of the organization's services may serve as a gauge of both satisfaction and awareness). Other persons interviewed also were asked to comment on these points, as appropriate.

3. Other Qualitative Methods

Other methods proposed to obtain information about each organization included reviewing the group's organizational documents (i.e., bylaws, and constitutions), looking at other written materials about the program (e.g., PACT's brochures, Sitka's Codes), and observing hearings. The Project Evaluator reviewed all of the written materials available. She also discussed with each organization the possibility of observing hearings. Given the confidential nature of most hearings, and the limited time available on each site, the opportunity to observe a hearing could not be arranged.

4. Legal and Contextual Materials

The Staff Attorney and Project Director assumed primary responsibility for reviewing the materials needed to establish the context within with each of the organizations evaluated functioned. The Project Evaluator provided interview and written information about actual practices, traditional law, and law used by each organization in its actual work. Materials assembled included authoritative works on

[6] The Minto Tribal Court permits the defendant to request an open hearing; none have done so.

Indian law, both from Alaska and from other states, state and federal laws, caselaw, and anthropological accounts of traditional law-ways. To provide cultural and historical context for each community, staff also reviewed numerous other anthropological and ethnographic studies, evaluations of other rural justice programs in the state, and information about alternative methods of dispute resolution in Alaska and other jurisdictions.

C. Prepare Final Report

Preparation of the final report included analysis of the quantitative and qualitative data collected, drafting and review of the report by over 100 interviewees and experts, and preparation of the final draft.

The quantitative data were analyzed by the Institute for Social and Economic Research at the University of Alaska Anchorage. Charts and tables in the report are taken from the analysis. Because of the limited number of cases from each area, only frequency tables and cross-tabulations were used. Although limited, the data help give a sense of the actual numbers and types of cases handled by each organization. Because every case was included, no sampling error occurred.

A first draft of the report was printed and mailed to all of those interviewed, the Project's Advisory Committee, the Judicial Council, and numerous academic and legal experts. The Project Evaluator, with assistance from other project staff, took comments for the next three months on both substantive and stylistic aspects of the report. The Project Evaluator spent several days each in Minto, Sitka, Barrow and Fairbanks, going through the report line by line with people in the communities who had contributed to the interviews.

Following this detailed review, staff re-wrote the report, and circulated it again to the Advisory Committee and the Judicial Council for final review. By the end of July, the review process was complete, and the final report was drafted. In addition, staff began work on three articles, for different journals, about various aspects of the evaluation. Distribution for the final report will include Alaska's legislature, judges, and magistrates, Native organizations throughout the state, justice organizations in Alaska and other jurisdictions, law libraries in all fifty states, and a wide range of interested individuals.