

Diverting Cases to Wellness Court: Strategies for Creative Collaborations for Tribes in Alaska, P.L. 280, and Beyond

Lauren van Schilfgaarde, Tribal Law Specialist, Tribal Law and Policy Institute

Alex Cleghorn, Assistant Attorney General, State of Alaska



Origin of Tribal Judiciaries

- Divergence of Values:
Leadership emphasize dispute resolution role,
rather than executive or legislative duties
 - Goal was mediation as opposed to ascertaining
guilt
 - Facilitator as opposed to decision-maker
- Courts of Indian Offenses
 - 1849 – Creation of the Interior Department
 - 1883 – CFR Courts are institutionalized, *Ex Parte Crow Dog*
 - Heightened need for inter-tribal/Indian-non-
Indian dispute resolution
 - Served at the pleasure of the Indian agent

INSTITUTE FOR GOVERNMENT RESEARCH

STUDIES IN ADMINISTRATION

THE PROBLEM OF INDIAN ADMINISTRATION

Report of a Survey made at the request
of Honorable Hubert Work, Secretary
of the Interior, and submitted to him,
February 21, 1928

SURVEY STAFF

LEWIS MERIAM

Technical Director

RAY A. BROWN

HENRY ROE CLOUD

EDWARD EVERETT DALE

EMMA DUKE

HERBERT R. EDWARDS

FAYETTE AVERY MCKENZIE

MARY LOUISE MARK

W. CARSON RYAN, JR.

WILLIAM J. SPILLMAN

Modern Tribal Courts

- 1934 – Indian Reorganization Act
 - Many tribes assumed judicial functions, replacing CFR courts
- Opportunity
 - For a system that is more responsive to tribal needs and under tribal control
 - To resurrect traditions and customs
- Many courts apply large bodies of written law, as well as custom and tradition.



Jurisdiction

- “Indian Country” – 18 U.S.C. § 1151
 - Reservations, dependent Indian communities, and/or Indian allotment
 - Land held in trust
- Civil Jurisdiction
 - Inherent over Indians within Indian country (and sometime beyond, e.g. hunting and fishing rights)
 - Non-Indians: *Montana v. U.S.* (1981)
 - Non-Indian enters into consensual relationship with tribe or its members; or
 - A non-Indian’s conduct threatens or has a direct effect on the political integrity, economic security, or health or welfare of the tribe.
 - Or, act of Congress, e.g. Clean Water Act

Criminal Jurisdiction

Indian Status	Major Crime	All Other Crimes
Indian perpetrator Indian victim	Federal (under MCA) and tribal	Tribal
Indian perpetrator Non-Indian victim	Federal (under MCA) and tribal	Federal (under General Crimes Act) and tribal
Non-Indian perpetrator Indian victim	Federal (under General Crimes Act)	Federal (under General Crimes Act) and tribal (if VAWA SDVCJ)
Non-Indian perpetrator Non-Indian victim	State	State

- Major Crimes Act (MCA), 18 U.S.C. 1153: murder, manslaughter, kidnapping, maiming, sexual abuse, incest, serious assault, assault of a minor, felony child abuse, burglary, robbery, and major theft

PL 280

- 1953: Legal transfer of jurisdiction from the federal government to the states
 - *Mandatory for enumerated states*
 - *Optional for other states*
 - *Tribes had NO say (until 1968 for some tribes*)*
- State jurisdiction preferred over tribal sovereignty – federal policy that favors assimilation into non-Indian social and political communities.
- Congress cited need for
 - *Law enforcement*
 - *Civil dispute resolution*

Criminal Jurisdiction – PL 280

Indian Status	Major Crime	All Other Crimes
Indian perpetrator Indian victim*	State and tribal	State and tribal
Indian perpetrator Non-Indian victim	State and tribal	State and tribal
Non-Indian perpetrator Indian victim	State (and tribal if VAWA SDVCJ)	State (and tribal if VAWA SDVCJ)
Non-Indian perpetrator Non-Indian victim	State	State

* Under TLOA, a tribal gov't may request federal concurrent, subject to U.S. Attorney General approval

- Major Crimes Act (MCA), 18 U.S.C. 1153: murder, manslaughter, kidnapping, maiming, sexual abuse, incest, serious assault, assault of a minor, felony child abuse, burglary, robbery, and major theft

Cooperative Agreements

Benefits of collaboration

- Coordinate the exercise of authority
- Share resources
- Reduce administrative costs
- Deliver services in more efficient and culturally appropriate ways
- Address future contingencies
- Save costs of litigation
- Respond to unique community needs



Interjurisdictional Promising Practices

- State Police Officer Status and Cross Deputation Agreements
- Arizona Court Rule Providing State Recognition of Tribal Court Judgments
- Arizona Recognition and Enforcement of Tribal Court Involuntary Commitment Orders
- Washington Joint Executive-Legislative Workgroup on Tribal Retrocession
- New York Federal-State-Tribal Courts Forum
- Tribal Representatives in Maine Legislature
- Intertribal Court of Southern California





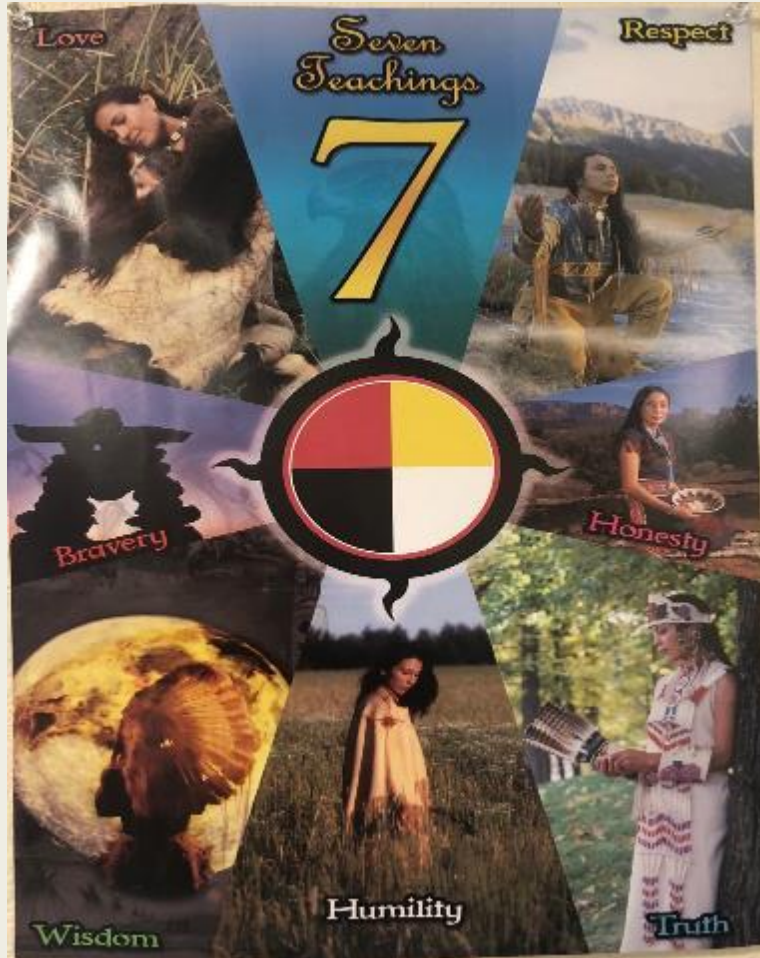
Tribal Healing to Wellness Courts

- Tribal adaptations of drug courts
- Appeal to
 - Focus on addiction as a disease
 - Non-adversarial
 - Focus on healing
 - Focus on holistic relationships
- “Healing to Wellness” adopted to
 - Exchange negative “drug” term for indigenous focus on “healing” and “wellness”
 - Concede that “wellness” is not a destination, but a journey

Culturally-Based Treatment

- Regain a practical ethnic identity
- Gain a healthy social network committed to the participants' recovery
- Make a religious, spiritual, or moral recommitment to themselves and their community
- Reengage in recreational/volunteer or vocational activities
- Gain a social role in the community
- Strengths-based!





Key Component 4: Incorporating Culture and Tradition

- Smudging
- Traditional gifts
- Feasts
- Name ceremony
- Native language
- Genealogy assignment
- Craft classes



Key Component 5: Intensive Supervision

- Service projects for elders
- Service projects for cultural centers, language programs
- Building the sweat lodge
- Meal preparation
- Community event clean-up



Graduation Honoring

- Feast
- Family engagement
- Community engagement
- Blanket ceremony
- Traditional gift

Opportunities for Collaboration in Healing to Wellness Court and Drug Courts

Transfer Agreement
for eligible
participants

Provision of drug
testing and other
oversight services

Sharing of prior case
history(ies)

Consultation for
particular subject
matter (e.g. cultural
activity or treatment)

Consultation for
particular
participants

Joint team members

Communication
between
Coordinators

Joint Jurisdiction
Courts

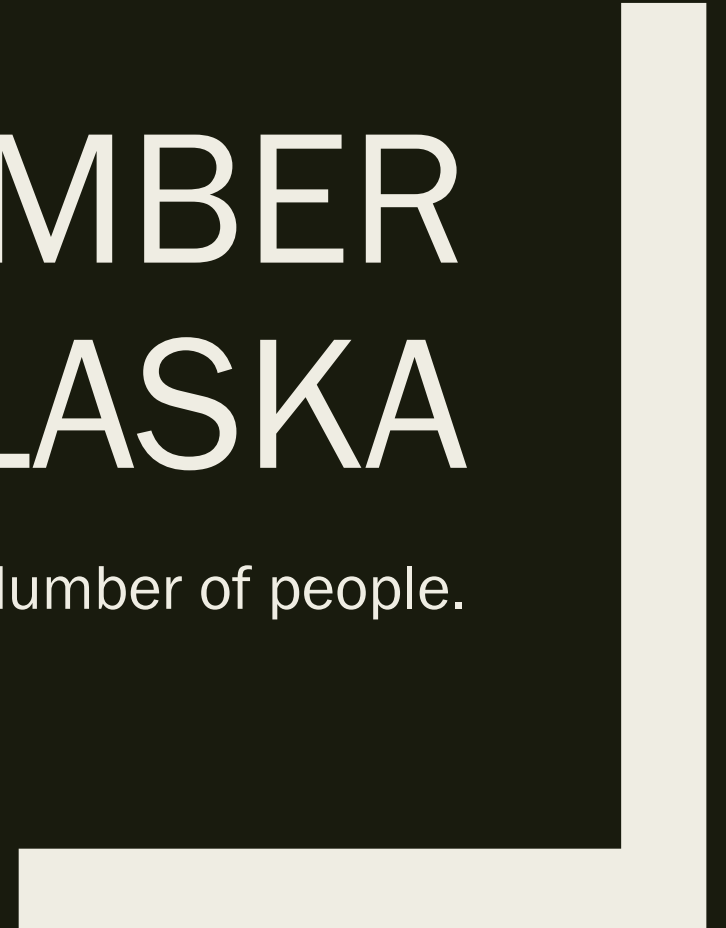


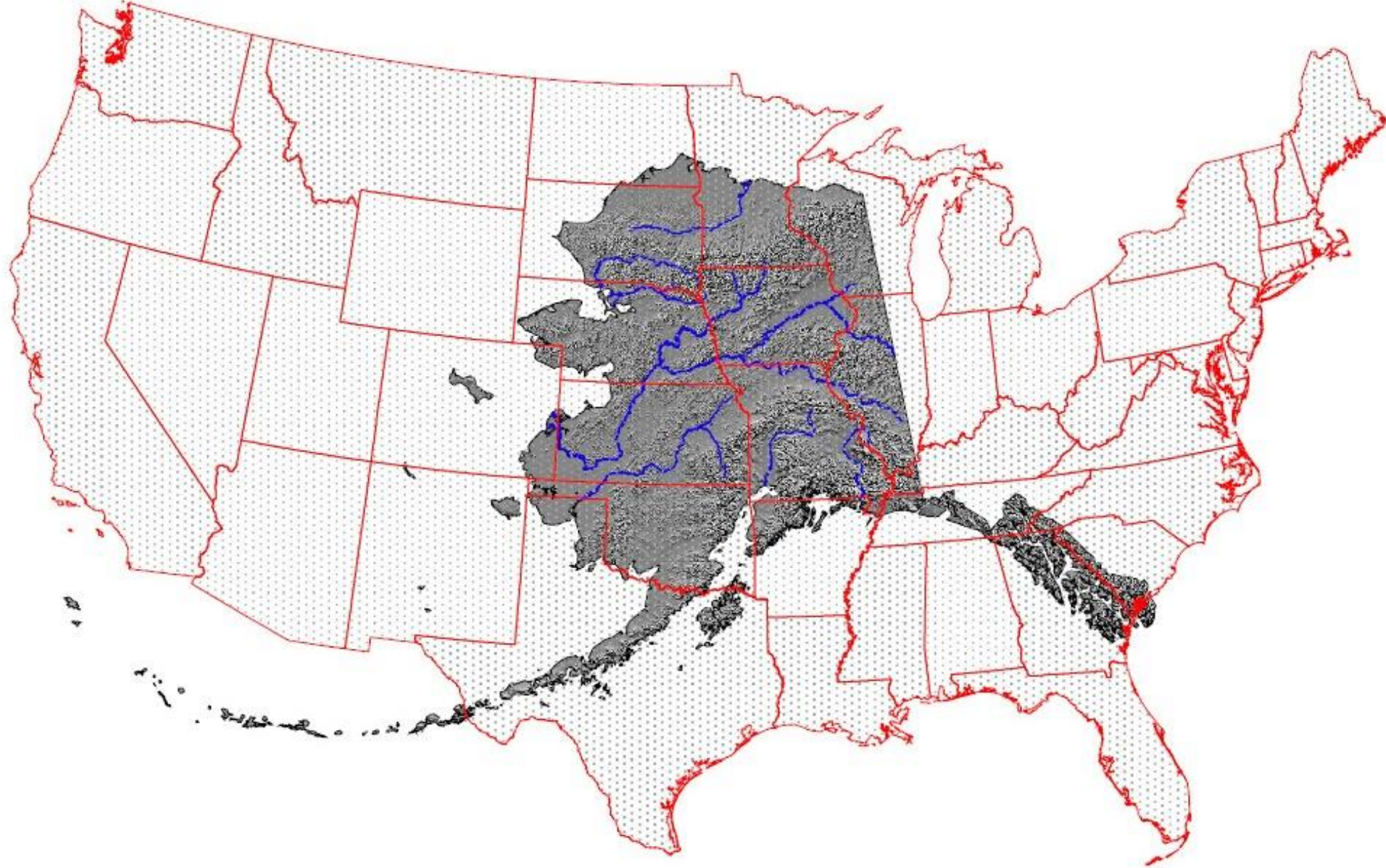
Transfer Considerations

- Pre- or Post-adjudication
- Extraneous Probation/Parole Requirements
 - Will Wellness Court requirements suffice?
 - Can cases be consolidated?
- Services
 - Residency? Access to services?
- Incentives and Sanctions/Discharge
 - What authority will Tribe have?
 - Can jail be used?

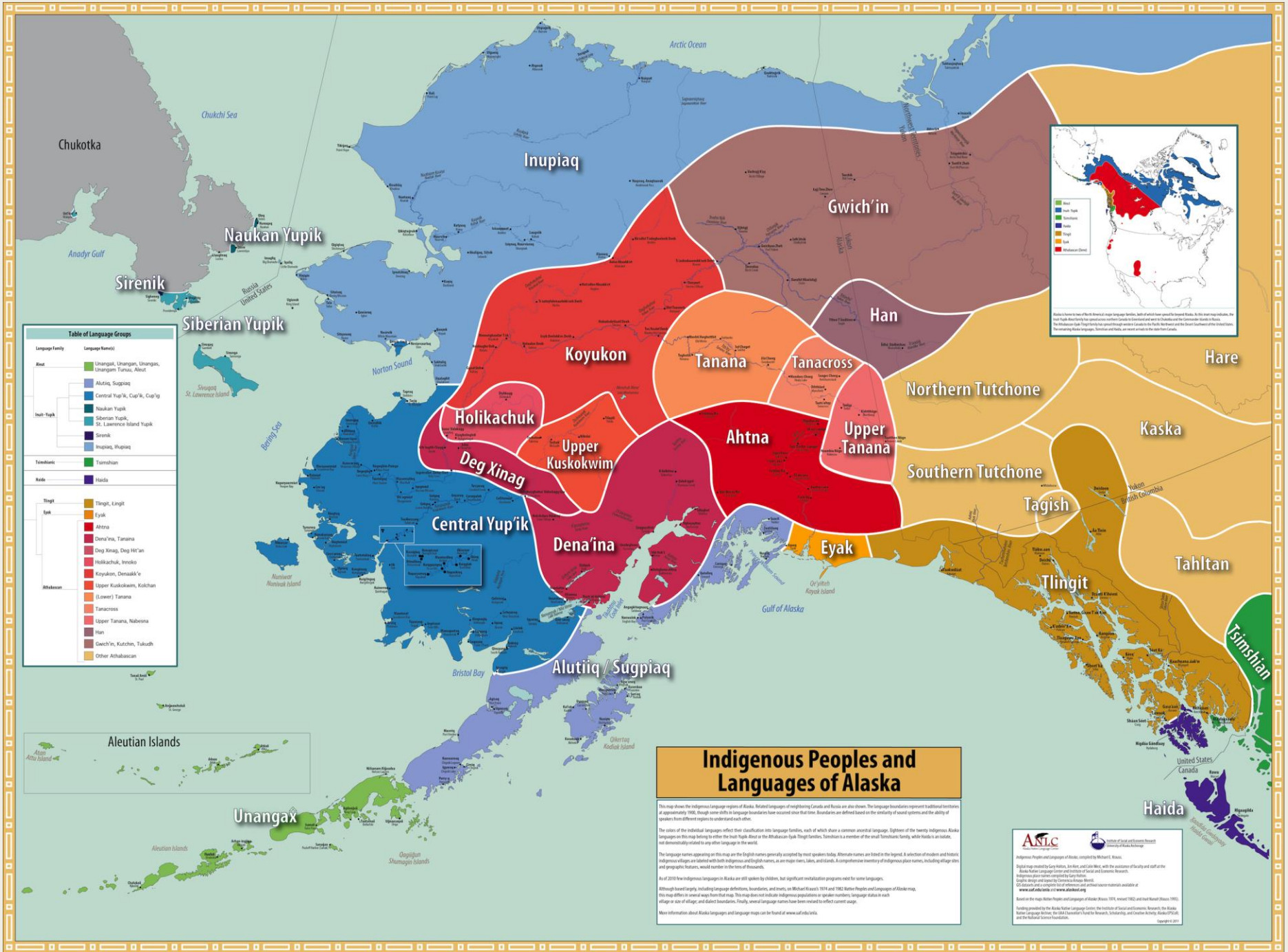
THINGS TO REMEMBER ABOUT ALASKA

Size. Geography. History. Number of tribes. Number of people.





500 0 500 1000 Miles



Indigenous Peoples and Languages of Alaska

This map shows the indigenous language regions of Alaska. Related languages of neighboring Canada and Russia are also shown. The language boundaries represent traditional territories at approximately 1900, though some shifts in language boundaries have occurred since that time. Boundaries are defined based on the similarity of sound systems and the ability of speakers from different regions to understand each other.

The color of the individual language reflects their classification into language families, each of which share a common ancestral language. Lightness of the twenty indigenous Alaska languages on this map being either the Inupiat or the Athabaskan-Yuk-Tlingit families. Tsimshian is a member of the small Tsimshian family, which Haida is an isolate, not demonstrably related to any other language in the world.

The language names appearing on this map are the English names generally accepted by most speakers today. Alternative names are listed in the legend. A selection of modern and historic indigenous villages are labeled with both indigenous and English names, as are major rivers, lakes, and islands. A comprehensive listing of indigenous place names, including village sites and geographic features, would number in the tens of thousands.

As of 2010 the indigenous languages in Alaska are still spoken by children, but significant revitalization programs exist for some languages.

Although based largely on language definitions, boundaries, and names, on Michael Krauss's 1974 and 1982 Athabaskan and languages of Alaska map, this map differs in several ways from that map. This map does not indicate indigenous populations or speaker numbers; language status in each village or size of village; and dialect boundaries. Finally, several language names have been revised to reflect current usage.

More information about Alaska languages and language maps can be found at www.uaf.edu/ila.

AASLC
 Alaska Native Language Center
 University of Alaska Fairbanks
 221 Chena Hall
 Fairbanks, Alaska 99775-1100
 Phone: (907) 475-1500
 Fax: (907) 475-1501
 Email: ila@uaf.edu
 Website: www.uaf.edu/ila

Alaska Native Languages and Languages of Alaska, compiled by Michael E. Krauss.
 Digital map created by Gary Miller, Ben Her, and Colin Wu, with the assistance of faculty and staff of the Alaska Native Language Center and University of Alaska Fairbanks. Research assistance provided by Michael E. Krauss, Michael Krauss, and Michael Krauss.
 Graphic design and layout by Christine Anaya-Moore.
 © 2010 Alaska Native Language Center, University of Alaska Fairbanks. All rights reserved.
 www.uaf.edu/ila and www.alaska.org

Based on the Map: Native Peoples and Languages of Alaska (1974, revised 1982) and the Alaska Native Language Center, University of Alaska Fairbanks. The Alaska Native Language Center is the Alaska Council on Language Acquisition, and the Alaska Native Language Center is the Alaska Council on Language Acquisition, and the Alaska Native Language Center is the Alaska Council on Language Acquisition.

Timeline

- Russians - 1730s
- Treaty of cession and sale to United States - 1867
- Gold rushes - 1895 (Hope); 1896 (Klondike); 1899 (Nome); 1902 (Fairbanks)
- Statehood - 1959
- Prudhoe Bay oil discovery - 1968
- Alaska Native Claims Settlement Act - 1971
- *Venetie* ICWA decision - 1991
- Federally Recognized Indian Tribe List Act - 1994
- *Venetie* land decision - 1998
- *John v. Baker* - 1999

Public Safety in Rural Alaska

A dark, snowy rural landscape in Alaska. The scene shows several houses with snow-covered roofs and yards. In the background, there are mountains and utility poles. The overall atmosphere is cold and isolated.

- Numerous rural communities have no or limited law enforcement presence
- Domestic violence and substance abuse touch all parts of a community
- Drug and alcohol importation known within the community
- Effective public safety requires a commitment from all involved

Civil diversion Agreement

■ What:

- *A voluntary agreement between the State and Alaska Tribes*

■ Purpose:

- *To create a path for Alaska Tribes to handle certain misdemeanors in Tribal Court as opposed to State Court*
- *Increases public safety with more local control*

CDA: how it works

- *State and Tribe agree on a diversion framework*
- *People who commit certain state law offenses would be able to choose whether they wanted their case heard in State or Tribal court*
- *Both **tribal members and nonmembers** may choose diversion to tribal court*

CDA: Three requirements

- Offender **agrees** to civil diversion
- Law Enforcement **refers** a case to Tribal Court
- Tribe **accepts** the offender into Tribal Court

Other diversion opportunities

■ Division of Juvenile Justice MOU

- Diversion program for juveniles with offenses committed in or near the village.
- DJJ diverts appropriate referrals to Alaska Tribe's Diversion Program.
- If juvenile doesn't complete Alaska Tribe's diversion – case is jointly staffed and referral may be closed.

■ Alaska Criminal Rule 11(i) Agreements

- With consent of victim, prosecutor and defendant the judge may refer a case to a 'restorative justice program' (this includes an Alaska Tribe's court).
- Alaska Tribe's sentencing proceeding and written report identifies sentencing recommendations – including culturally relevant activities, drug and alcohol assessments and treatment, restitution and other remedies.
- Judge carefully considers recommendations.



Thank
you!