

Tulsa Law Review

Volume 43
Number 1 *Indian Tribes and Statehood: A
Symposium in Recognition of Oklahoma's
Centennial*

Volume 43 | Number 1

Fall 2007

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Recommended Citation

Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 Tulsa L. Rev. 17 (2013).

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ALASKA NATIVE RIGHTS, STATEHOOD, AND UNFINISHED BUSINESS

Robert T. Anderson*

Alaska Native aboriginal rights to land and associated resources were never dealt with in a comprehensive fashion until 1971, when Congress passed the Alaska Native Lands Claims Settlement Act (ANILCA). Although general principles of federal Indian law provided strong support for the proposition that Alaska's Native people held aboriginal title to much of the new state, the Alaska Statehood Act itself carefully disclaimed any effect on aboriginal title. This approach was in keeping with the Congress's past dealings with Alaska Native property rights. This article outlines the history of Alaska Native aboriginal rights through the Statehood Act along with their post-statehood treatment in the Alaska Native Claims Settlement Act and the Alaska National Interest Lands Conservation Act. The article closes with a look at the unsatisfactory treatment of two important aboriginal rights—access to fish and game and tribal sovereignty—and suggests that Congress should legislate affirmative protections in both areas.

I. INTRODUCTION

The territory of Alaska was largely ignored by the United States in the 19th Century and thus there was relatively little encroachment on the property of Alaska Natives. But from the 1920s until Statehood, as Alaska's non-Native population increased, piecemeal encroachment began. The view that Alaska Natives possessed property rights and rights to self-government under federal law became the accepted view of the national government, but there was little pressure to deal with Alaska Native land claims. During the run-up to statehood in the 1950s and after Alaska became a state in 1959 the aboriginal claims of Alaska Natives began to be viewed as an obstacle to development interests. Although Statehood itself did not affect aboriginal title, it set in motion a series of events that combined to set the table for the eventual passage of the Alaska Native Claims Settlement Act (ANCSA) in 1971. That Act extinguished aboriginal title, but left unresolved important questions regarding tribal sovereignty and Native hunting and fishing rights. The sovereign status of Alaska Native villages has been confirmed, although their territorial sovereignty was severely limited by ANCSA

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and the Supreme Court's interpretation of it in *Alaska v. Native Village of Venetie*. Hunting, fishing, and gathering rights are protected in a limited way by federal law, but Congress's failure to provide a Native preference as a substitute for aboriginal rights is a shortcoming that should be remedied.

II. ABORIGINAL TITLE IN ALASKA: BACKGROUND PRINCIPLES

What is now the state of Alaska was essentially unknown and unexplored by non-Native¹ people in 1867 when the United States acquired Alaska from Russia pursuant to the Treaty of Cession.² Article 3 of the Treaty provided that "[t]he uncivilized tribes 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."³ In essence, the United States stepped into Russia's shoes with respect to its relationship with the land and people who inhabited Alaska.⁴ The plain import of the provision in the treaty was that general federal law governing Native rights was applicable. Congress did nothing to suggest otherwise in subsequent actions. In 1868, Congress designated Alaska as a "customs collection district" and extended United States laws relating to customs, commerce, and navigation over the "mainland, islands, and waters of the territory" of Alaska.⁵ This designation under federal law had no legal or practical effect on Alaska Natives and simply began a practice by Congress of legislating for Alaska on a piece-meal basis with no careful consideration of Alaska Native rights. What was the law regarding the indigenous inhabitants in areas that came to be claimed by the United States? Under general principles of federal law, discovering nations acquired the exclusive right to deal with indigenous peoples with respect to matters of land ownership and intergovernmental relations.⁶ The rights of Alaska Natives to use and occupy their land, i.e., their rights as

1. The phrase "Alaska Native" is generally used as a collective reference to Alaska's various indigenous groups.

2. *Treaty Concerning the Cession of Russian Possessions in North America* (Mar. 30, 1867), 15 Stat. 539, T.S. No. 301 [hereinafter *Treaty of Cession*]. For a history of the Russian exploration and assertion of control over parts of Alaska, see *Russian Administration of Alaska and the Status of the Alaska Natives*, Sen. Doc. 81-152, 39, 45, 50-51 (Apr. 6, 1950). See also Hubert H. Bancroft, *Vol. XXVII History of the Pacific States—Alaska, 1730-1885* (A. L. Bancroft & Co. 1886); Richard H. Bloedel, *The Alaska Statehood Movement 1-5* (unpublished Ph.D. dissertation, U. of Wash. 1974) (on file with the U. of Wash. Lib.); Donald C. Mitchell, *Sold American: The Story of Alaska Natives and their Land, 1867-1959* 40-41 (U. Press 1997).

3. *Treaty of Cession*, *supra* n. 2, at art. III, 15 Stat. at 542. The population was put at roughly 27,000 Natives, 1,400 creoles, 480 Russians and Siberians, 200 non-Russian foreigners, and 150 American civilians. Bloedel, *supra* n. 2, at 1.

4. In a case involving ownership of submerged lands adjacent to Anchorage in Cook Inlet, the Supreme Court stated,

[b]y the Treaty of Cession in 1867 Russia ceded to the United States "all the territory and dominion now possessed (by Russia) on the continent of America and in the adjacent islands." 15 Stat. 539. The cession was effectively a quitclaim. It is undisputed that the United States thereby acquired whatever dominion Russia had possessed immediately prior to cession.

U.S. v. Alaska, 422 U.S. 184, 192 n. 13 (1975). See also David S. Case & David A. Voluck, *Alaska Natives and American Laws* 44-55 (2d Ed., U. of Alaska Press 2002) (discussing transition from Russian to United States sovereignty).

5. 15 Stat. 240 (1868).

6. See generally Cohen's *Handbook of Federal Indian Law* § 1.02[1]-[2], 10-22 (Nell J. Newton ed., LexisNexis 2005) [hereinafter *Handbook of Federal Indian Law*]. For a comprehensive history of the discovery doctrine see Robert A. Williams, Jr., *The American Indian in Western Legal Thought* (Oxford U. Press 1990).

property owners, labeled by federal law to be aboriginal title, or original Indian title.⁷ In *Johnson v. McIntosh*, Chief Justice Marshall declared that “[t]he absolute ultimate title [of the United States] has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.”⁸ The right of the discovering nation, Russia, and the United States as successor, thus consisted of a technical legal title, plus the “right of preemption.” That is, the right to acquire the full beneficial title to land used and occupied by the indigenous occupants.⁹ Of course, the Alaska Natives had no such understanding, much less agreement, with the proposition that Russia, the United States, or any other country could divest the Native peoples of their rights to soil and their way of life without their voluntary consent. Chief Justice Marshall was aware of the arrogance of the legal proposition:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.¹⁰

Thus, the United States’ legal claim to title was buttressed by the Supreme Court decision and the framework for eventual extinguishment of Alaska Native aboriginal title was in place.¹¹

It is now generally accepted that prior to adoption of the ANCSA in 1971,¹² Alaska Natives possessed unextinguished aboriginal title, which included hunting, fishing, and gathering rights.¹³ Courts have generally required that tribes show actual use and/or occupation of an area on a continuous basis, except for periods of involuntary dispossession, in order to establish aboriginal title.¹⁴ The geographic scope of aboriginal rights calls for a fact-dependent inquiry. In *Tlingit and Haida Indians v. United States*,¹⁵

7. *Johnson v. McIntosh*, 21 U.S. 543 (1823).

8. *Id.* at 592.

9. The discovery doctrine is often also described as one which vested legal title to aboriginal lands in the discovering nations, with the indigenous inhabitants retaining the “only” right of use and occupancy—analogueous in some ways to the landlord-tenant relationship. For an illuminating analysis of *Johnson v. McIntosh* and its progeny, see Lindsay G. Robertson, *Conquest by Law* (Oxford U. Press 2005). See generally *Handbook of Federal Indian Law*, *supra* n. 6, at § 15.04[1]–[2], 969–74.

10. *Johnson*, 21 U.S. at 591.

11. See generally Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Belknap Press 2005) (surveying federal-Indian land transactions and underlying policies).

12. Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. §§ 1601–28).

13. See *Tlingit & Haida Indians of Alaska v. U.S.*, 177 F. Supp. 452, 461–63 (Ct. Cl. 1959) (rejecting the United States’ argument that Alaska Natives could not have possessed aboriginal title due to their mode of socio-political organization). See also *Status of Alaskan Natives*, 53 Int. Dec. 593, 595 (Dept. Int. 1932) (“[T]hese [Alaska] natives are now unquestionably considered and treated as being under the guardianship and protection of the Federal Government, at least to such extent as to bring them within the spirit, if not within the exact letter, of the laws relative to American Indians. . .”).

14. This property right arises from long-standing use and occupation and need not be “based upon a treaty, statute, or other formal governmental action.” *U.S. v. Santa Fe P. R.R. Co.*, 314 U.S. 339, 347 (1941). Although it has few of the characteristics of fee simple title, this “right of occupancy is considered as sacred,” and is as crucial to Native people, “as the fee simple of the whites.” *Id.* at 345 (quoting *Mitchel v. U.S.*, 34 U.S. 711, 746 (1835)).

15. 177 F. Supp. at 452.

the Court of Claims affirmed the existence of aboriginal title among the Tlingit and Haida Indians of Alaska. The court described the character of tribal land tenure.

The land and water owned and claimed by each local clan division in a village was usually well-defined as to area and use. Clan property included fishing streams, coastal waters and shores, hunting grounds, berrying areas, sealing rocks, house sites in the villages, and the rights to passes into the interior. Tracts of local clan territory were parceled out or assigned to the individual house groups for use and exploitation and the chief of the local clan, assisted by other house chief elders of the clan, formed a sort of council which controlled the clan's affairs. Smaller areas belonging to a house within a clan remained clan property whenever a house ceased to exist. The modes of living and of dealing with property among these Indians were regulated by rigidly enforced tradition and custom, and, except under special circumstances, there was no authority in a clan or clan division to sell, transfer or otherwise dispose of, in whole or in part, any claimed area of land or water. Land was transferred from one clan to another only as compensation for damages, as gifts in connection with marriages and the like, and such transfers were infrequent. In addition to the areas which were claimed and used exclusively by individual houses, there were certain common areas which could be used by all the clans comprising a particular group of clans residing in a single geographical area. Certain designated offshore fishing and sea mammal hunting areas in larger bodies of water, channels and bays and stretches of open sea could also be used in common by all members of the various clans residing in a particular geographical area, but Indians residing in other geographical areas had no right to such use.¹⁶

The court's ruling was consistent with an earlier opinion from the Department of the Interior considering aboriginal fishing rights of Alaska Natives.¹⁷

Typically, the aboriginal title of Indian tribes in the contiguous forty-eight states was extinguished by treaty with the United States.¹⁸ That had been the pattern since the formation of the United States, but by the 1860s, the House of Representatives became increasingly resentful of the fact that it was being called upon repeatedly to appropriate funds for treaty obligations negotiated by the Executive Branch and approved only by the Senate. To resolve a budget stalemate over the Interior Appropriations bill, the Senate agreed to a statute that ended treaty-making with tribes.¹⁹ Thus, agreements were

16. *Id.* at 456.

17. *Aboriginal Fishing Rights in Alaska*, 57 Int. Dec. 461, 474, 476 (Dept. Int. 1942) ("The Indian who has been forbidden [through government callousness or indifference] from fishing in his back yard has not thereby lost his aboriginal title thereto"; "aboriginal occupancy establishes possessory rights in Alaskan waters and submerged lands, and . . . such rights have not been extinguished by any treaty, statute, or administrative action.")

18. Banner, *supra* n. 11, at 252. See also Felix S. Cohen, *Original Indian Title*, 32 Minn. L. Rev. 28, 34-35 (1947); Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 Hastings L.J. 1215 (1980).

19. Act Mar. 3, 1871, c. 120, § 1, 16 Stat. 566 (1871), codified as amended at 25 U.S.C. § 71.

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired. Such treaties, and any Executive orders and Acts of Congress under which the rights of any Indian tribe to fish are secured, shall be construed to prohibit (in addition to any other prohibition) the imposition under any law of a State or political subdivision thereof of any tax on any income derived from the exercise of rights to fish secured by such treaty, Executive order, or Act of Congress if section 7873

negotiated with tribes by executive branch representatives and then presented to both houses of Congress for ratification by statute. In other cases, statutes confiscating tribal land in exchange for compensation were adopted, but conditioned on subsequent tribal consent.²⁰ Since Alaska's acquisition by the United States in 1867 pre-dated the formal termination of treaty-making with Indian tribes by only four years, there was little time within which treaties might have been negotiated and ratified.²¹ The geographic isolation of Alaska and its sparse non-Native population meant there was no need for an expeditious elimination of Alaska Native aboriginal rights.²² Early federal legislation simply maintained the status quo, or completely ignored the issue.

III. THE FIRST STEPS TOWARD NON-NATIVE GOVERNANCE IN ALASKA

In 1884, Congress took its first real step toward governance of Alaska when it passed an Organic Act,²³ and established a civil government for the district of Alaska with the laws of Oregon made applicable.²⁴ With respect to Alaska Natives, Congress provided "[t]hat the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."²⁵ A historian writing in 1889 stated that "it is probable that the natives would be only too glad to be left alone as severely in the future as they had been in the past."²⁶ In 1899, Congress provided a criminal code for Alaska²⁷ and a year later passed a statute that extended the federal mining laws to Alaska, while withholding application of the general public land laws.²⁸ Like the Organic Act of 1884, the statute extending federal mining laws provided that Alaska Natives were not to be disturbed in their use and occupancy of land.²⁹ Territorial courts, as well as the Solicitor of the

of title 26 does not permit a like Federal tax to be imposed on such income.

Id. The second sentence was added in a 1988 amendment. 25 U.S.C. § 71.

20. Banner, *supra* n. 11, at 252.

21. The end of treaty-making "meant no more, however, than that after 1871 relations with Indians would be governed by Acts of Congress and not by treaty." *Antoine v. Wash.*, 420 U.S. 194, 203 (1975) (citing *Elk v. Wilkins*, 112 U.S. 94 (1884)). "The change in no way affected Congress' plenary powers to legislate on problems of Indians, including legislating the ratification of contracts of the Executive Branch with Indian tribes to which affected States were not parties." *Id.* (emphasis in original).

22. In 1880 and 1890, the non-Native population was 430 and 6,698 respectively. Robert D. Arnold, *Alaska Native Land Claims* 71 (Alaska Native Found. 1976).

23. 23 Stat. 24 (1884). "[T]he territory . . . known as Alaska shall constitute a civil and judicial district, the government of which shall be organized and administered as hereinafter provided." Section 2 of the Organic Act provided for an appointed Governor, while remaining provisions of the Act called for the appointment of judges and commissioners. *Id.*

24. *Id.* at § 7, 25.

25. *Id.* at § 8, 26. In *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272 (1955), the United States Supreme Court held that the Organic Act did not recognize, or confirm Native ownership for Fifth Amendment purposes, but merely preserved aboriginal title for later disposition.

26. Bancroft, *supra* n. 2, at 640.

27. 30 Stat. 1253 (1899).

28. 31 Stat. 321, § 26, 329-30 (1900).

29. *Id.* at § 27, 330. One court recounted part of the history as follows:

In 1898 Congress extended the homestead laws to Alaska [30 Stat. 409 (1898)] and in 1900 the mining laws of the United States to Alaska in the second Organic Act [31 Stat. 321 (1900)]. In 1914 Congress enacted the Alaska Coal Lands Act, directing the President to reserve potential coal-

Department of the Interior, treated this Act as confirming that Alaska Natives held unextinguished aboriginal rights to land and to hunt and fish.³⁰ For the most part, Alaska Natives maintained their ways of life and continued to occupy their territories largely without outside interference. Alaska officially became a "United States Territory" with a legislative body in 1912,³¹ and the first unsuccessful statehood bill was introduced in Congress in 1916.³² During this time, consideration of Native rights was for the most part left to federal officials.

Like the treatment of Alaska Native rights to property, Native rights to hunt, fish, and gather were also provided protection in some cases through exemptions from general government regulations.³³ Thus, Alaska Natives were exempted from the ambit of several wildlife conservation measures adopted by Congress prior to statehood. For example, Congress limited the taking of fur and seals, but exempted Native hunting for food, clothing, and boat-manufacture.³⁴ Congress's first foray into regulation of hunting prohibited the destruction or taking of game animals, or birds, and set seasons and bag limits for hunting, but exempted hunting for food or clothing by "native Indians or Eskimo or by miners, explorers, or travelers on a journey when in need of food."³⁵ The 1916 Migratory Bird Convention with Great Britain exempted Natives from the closed seasons for certain species.³⁶ Congress in 1925 established an Alaska Game Commission, which authorized "any Indian or Eskimo, prospector, or traveler to take

bearing lands and issue leases for those lands. The Mineral Leasing Act enacted in 1920 authorized the Secretary of the Interior to lease lands owned by the United States which contain deposits of coal, oil and other minerals [38 Stat. 741 (1914)]. Some of these enactments contained provisions exempting or protecting from disposition lands actually occupied by Natives. The second Organic Act, for example, provided that Natives "shall not be disturbed in the possession of any lands now actually in their use and occupancy . . ." However, other statutes, such as the Mineral Leasing Act, did not contain any provisions respecting Native occupancy.

U.S. v. Atlantic Richfield Co., 435 F. Supp. 1009, 1014-15 (D. Alaska 1977) (citations omitted).

30. *U.S. v. Berrigan*, 2 Alaska 442, 449-50 (D. Alaska 1905) (holding that the Organic Act of 1900 rendered "void all attempts to dispossess them [Natives of their land] by deed or contract"); see also *U.S. v. Cadzow*, 5 Alaska 125 (D. Alaska 1914); *Aboriginal Fishing Rights in Alaska*, 57 Int. Dec. at 474; *Case & Voluck*, *supra* n. 4, at 49 ("If one reads article III of the 1867 treaty and all of the cases together, the most satisfactory legal conclusion is that prior to ANCSA the Alaska Natives held their lands in Alaska by right of aboriginal possession."); but see *Worthen Lumber Mills v. Alaska Juneau Gold Mining Co.*, 229 F. 966 (9th Cir. 1916); *Sutter v. Heckman*, 1 Alaska 188 (D. Alaska 1901), *aff'd on other grounds*, *Heckman v. Sutter*, 119 F. 83 (9th Cir. 1902) (both involving disputes between non-Natives over possession of land purportedly conveyed by individual Indians). In *Miller v. U.S.*, 159 F.2d 997, 1001-03 (9th Cir. 1947), the court held that the Treaty of Cession in 1867 extinguished aboriginal title, but the disclaimer in the 1884 Organic Act preserved individual rights of occupancy. *Miller's* holding as to extinguishment was implicitly repudiated in *Tee-Hit-Ton Indians*, 348 U.S. at 279-82. The idea that the Treaty of Cession eliminated Native aboriginal title runs afoul of the rule that federal acts extinguishing tribal property rights must clearly express such an intent. See *Handbook of Federal Indian Law*, *supra* n. 6, at § 2.02[1], 120-21.

31. Pub. L. No. 62-334, 37 Stat. 512 (1912). See Bloedel, *supra* n. 2, at 19-23.

32. H.R. 13978, 53d Cong. (Mar. 30, 1916). The events leading up to introduction of the statehood bill are recounted in Bloedel, *supra* n. 2, at 35-47.

33. The major, and significant, difference from tribes in the contiguous forty-eight states is the lack of treaty-based rights due to the end of treaty-making in 1871. See text at *supra* notes 19-21.

34. 16 Stat. 180 (1870).

35. Pub. L. No. 57-147, 32 Stat. 327 (1902), amended, Pub. L. No. 60-111, 35 Stat. 102 (1908).

36. *Convention between the U.S. and Britain for the Protection of Migratory Birds*, art. II (Aug. 16, 1916), 39 Stat. 1702, 1703. This pattern continued with respect to birds in 1997 when Migratory Bird Treaties with Canada and Mexico were amended by protocols, which exempt the taking of migratory birds and their eggs by Alaska Natives. Sen. Treaty Doc. No. 104-28; Sen. Treaty Doc. No. 105-26; 143 Cong. Rec. S11167 (daily ed. Oct. 23, 1997).

animals and birds during the closed season when he is in absolute need of food and other food is not available.”³⁷ Congress also was proactive in at least one case with respect to Native subsistence. It adopted the Reindeer Industry Act of 1937³⁸ to provide for Native subsistence needs and establish a Native monopoly over the reindeer industry.³⁹

IV. NATIVE ALLOTMENTS, TOWNSITES, AND RESERVATIONS

While Alaska Natives had claims to aboriginal title, and were obviously present on the landscape, it was not clear at all whether Alaska Natives could obtain fee title to individual parcels of land under applicable federal law. Since tribal claims to aboriginal title had not been extinguished, the grant of a parcel of land to anyone—Native or non-Native—would presumably transfer only a legal interest subject to the Native right of use and occupancy.⁴⁰ This right of occupancy was a protectable interest, but Congress nevertheless took two actions to provide Alaska Natives with the opportunity to obtain title to land under some form of federal supervision. First, individual Alaska Natives could acquire title to land from the United States pursuant to the Alaska Allotment Act of 1906.⁴¹ The Allotment Act was not part of a move to break up reservations as in the lower 48 states,⁴² but rather was intended to provide a way for individual Alaska Natives to acquire title to individual parcels of land important for traditional use and occupancy.⁴³ Title to up to 160 acres of land would be granted if individual applicants could demonstrate continuous use and occupancy for five years.⁴⁴ The other means provided for individual Native land ownership was provided by the Alaska Native Townsite Act of 1926,⁴⁵ which permitted Native occupants of populated areas to obtain

37. Pub. L. No. 68-320, 43 Stat. 739, 744 (1925) (retained Pub. L. No. 76-836, 54 Stat. 1103, 1104 (1940); Pub. L. No. 78-105, 57 Stat. 301, 306 (1943)). The 1925 statute also imposed a one-year territorial residency requirement, Pub. L. No. 68-320, 43 Stat. at 740, which was amended to authorize a three-year residency requirement for trapping licenses whenever “the economic welfare and interests of native Indians or Eskimos” were threatened by non-Native trapping. Pub. L. No. 75-728, § 2, 52 Stat. 1169, 1170 (1938). These protective statutes were removed from the U.S. code upon statehood. See 48 U.S.C. §§ 192–211 (2000). The 1925 statute was intended to restrict Natives by limiting out of season hunting to times when in need of food—as the non-Natives were limited by the 1908 statute. It was apparently a backlash based on the view of white Alaskans who were not entitled to the same treatment as Alaska Natives. Mitchell, *supra* n. 2, at 187–91.

38. 25 U.S.C. §§ 500–500n.

39. See Gigi Berardi, *Natural Resource Policy, Unforgiving Geographies, and Persistent Poverty in Alaska Native Villages*, 38 Nat. Resources J. 85, 98–99 (1998); but see *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997) (interpreting statute narrowly to permit non-Native ownership of imported reindeer).

40. As noted in *supra* note 31, the result in *Miller v. United States* indicated that aboriginal title had been extinguished in the 1867 Treaty of Cession, but that the 1884 Organic Act recognized some form of individual Native title. The case has been repudiated by the Supreme Court and the Solicitor of the Department of the Interior and cannot be reconciled with general federal Indian law principles.

41. Pub. L. No. 59-171, 34 Stat. 197 (1906), repealed by ANCSA, Pub. L. No. 92-203 at § 18, 85 Stat. at 710, codified at 43 U.S.C. § 1617.

42. See *Handbook of Federal Indian Law*, *supra* n. 6, at § 16.03[2][a]–[b], 1040–42. As a consequence of the allotment process in the lower 48 states, tribal and individual Indian land holdings were reduced from roughly 150 million acres in 1887 to 50 million acres in 1934. Of the 36 million acres allotted to individuals by 1920, 27 million acres had passed out of Indian hands by 1934. *Id.* at § 16.03[2][b], 1042.

43. See generally Case & Voluck, *supra* n. 4, at 102–30; *Handbook of Federal Indian Law*, *supra* n. 6, at § 4.07[3][b], 348–50; *Allotment of Land to Alaska Natives*, 71 Int. Dec. 340 (Dept. Int. 1964) (canvassing prior administrative interpretations of the Act).

44. *Allotment of Land to Alaska Natives*, 71 Int. Dec. 340; see *Akootchook v. U.S.*, 271 F.3d 1160, 1162 (9th Cir. 2001).

45. Pub. L. No. 69-280, 44 Stat. 629 (1926) (repealed by Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792

restricted fee lots in areas surveyed by a federal "townsite trustee."⁴⁶

Congress and the Executive Branch also established reservations in a fashion similar to that followed in the rest of the United States after 1871. The first reservation, and only one remaining, was established in the Annette Islands by Congress just before the turn of the century. In *Alaska Pacific Fisheries v. United States*,⁴⁷ the Supreme Court upheld regulations banning encroachment by non-Native fishermen in waters adjacent to the Annette Islands. The statute creating the reservation did not mention the waters explicitly when it created the Annette Island Indian reservation. In interpreting the statute, the Court applied the basic Indian law jurisprudence as in the contiguous states. The Court stated:

The circumstances which we have recited shed much light on what Congress intended by "the body of lands known as Annette Islands." The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation. They had done much for themselves and were striving to do more. Evidently Congress intended to conform its action to their situation and needs. It did not reserve merely the site of their village, or the island on which they were dwelling, but the whole of what is known as Annette Islands, and referred to it as a single body of lands. This, as we think, shows that the geographical name was used, as is sometimes done, in a sense embracing the intervening and surrounding waters as well as the upland—in other words, as descriptive of the area comprising the islands.⁴⁸

In reaching its conclusion, the Court followed the liberal canons of interpretation generally applicable in Indian law.⁴⁹

The Indian Reorganization Act (IRA) of 1934⁵⁰ was made applicable to Alaska in 1936⁵¹ and a number of Alaska Native tribes reorganized their governments under the

(1976)).

46. For a description of the program, see *Aleknagik Natives v. U.S.*, 635 F. Supp. 1477, 1479–80 (D. Alaska 1985); see also Case & Voluck, *supra* n. 4, at 101–41 (for a comprehensive review of the Native townsite and allotment programs).

47. 248 U.S. 78 (1918).

48. *Alaska P. Fisheries*, 248 U.S. at 89. The Court noted that the Annette Islands Reservation was originally established for the benefit of Indians who "were foreign born, but the action of Congress [designating the reservation] has made that immaterial here." The reservation is home to the Metlakatla Indian Community. The Community's web site contains the following discussion:

In 1887 a group of 826 Tsimshian people left their homes in British Columbia, Canada and traveled in ocean-going canoes to the waters of the U.S. and their new home in Alaska. The man who was responsible for bringing the Tsimshians to this new place was Mr. William Duncan, often referred to as "Father" Duncan. The title of "Father" was an honorary one given to him by a grateful and affectionate people. He was a lay missionary in the Church of England whose specific mission was to Christianize the specific group known as the Tsimshian in British Columbia.

On August 7, 1887, Duncan and 826 Tsimshians proclaimed the birth of "New Metlakatla" on Annette Islands in Southeast Alaska.

Metlakatla Indian Community, *Community Origins*, <http://www.metlakatla.com/communityOrigins.php> (accessed Apr. 5, 2008).

49. *Alaska P. Fisheries*, 248 U.S. at 89.

50. Pub. L. No. 73-383, 48 Stat. 984 (1934).

51. Pub. L. No. 74-538, § 2, 49 Stat. 1250, 1250–51 (1936), codified at 25 U.S.C. § 473a.

IRA.⁵² Much controversy ensued in the 1940s and continued into the 50s when the Secretary of the Interior used his authority under the IRA to establish six reservations, the largest of which being the Venetie Indian Reservation, which was approximately 1.4 million acres.⁵³ Eleven reservations had been created by Executive Order,⁵⁴ and several others, including all of St. Lawrence Island, were set aside as Reindeer Reserves prior to enactment of the IRA.⁵⁵ As discussed below, the anxiety that many non-Native Alaskans felt regarding establishment of reservations led to a number of efforts to foreclose the legal authority to create them.⁵⁶

In 1943, the Secretary of the Interior established the Karluk Indian reservation on Kodiak Island,⁵⁷ designating adjacent tidelands and coastal waters under the Indian Reorganization Act's authority to reserve "public lands which are actually occupied by Indians or Eskimos" in Alaska.⁵⁸ The Supreme Court rejected a challenge to the Secretary's inclusion of navigable waters in the reservation, noting that for Natives "the adjacent fisheries are as important as, perhaps more important than, the forests, the fur-bearing animals or the minerals."⁵⁹ The reservation was established for the very purpose of buffering the Natives from the non-Native commercial fishing competition.⁶⁰ The case was simply another result of the increase in Alaska's non-Native population and the increasing encroachment on areas important for aboriginal uses. It also coincided with

52. By 1947 United States Indian Service documented that over 50 tribes in Alaska had organized under the IRA. Theodore H. Haas, *Ten Years of Tribal Government Under the IRA 29-30* (1947) (available at <http://thorpe.ou.edu/IRA/IRAbook/tribalgovtp1-12.htm>). The Solicitor of the Department of the Interior put the number at 69 in 1993. *Governmental Jurisdiction of Alaska Native Villages over Land and People* at 33 (M-36975 Jan. 11, 1993).

53. See *Alaska Natives and the Land: Report of the Federal Field Committee* at 444, tbl. V-3 (1968). This report was developed in response to a request from United States Senator Henry M. Jackson, Chairman of the Committee on Interior and Insular Affairs, "for a compilation of background data and interpretive materials relevant to a fair and intelligent resolution of the *Alaska Native problem*." *Id.* (emphasis added). Contrary to some popular assertions, there was apparently considerable interest by Alaska Natives in the establishment of reservations for their benefit. Eleven other reservations were sought under the IRA and another 90 were also requested by 1950, although no action was taken by the Bureau of Indian Affairs. *Id.* at 443.

54. Case & Voluck, *supra* n. 4, at 71 n. 31.

55. See *id.* at 65-95 (detailing the history of reservations in Alaska).

56. Bloedel, *supra* n. 2, at 267-68 (discussing proposals made in 1947 and 1950 to revoke the Secretary of the Interior's authority to create Indian reservations and replace it with authority "to issue patents to 'Native tribes, and villages or individuals for the lands actually possessed, used or occupied for town sites, villages, smokehouses, gardens, burial grounds, or missionary stations.'"). A look back reveals that no reservations were in fact created after 1946, although authority to take land in trust for Alaska Natives continues to this day. See *Handbook of Federal Indian Law*, *supra* n. 6, at § 4.07[3][d][ii], 363-64. The authority to create reservations was repealed in 1976. *Id.* at 347.

57. Public Land Order 128, 8 Fed. Reg. 8525, 8557 (May 22, 1943).

58. *Hynes v. Grimes Packing*, 337 U.S. 86, 91 (1949) (internal quotations omitted).

59. *Id.* at 114. The Court held, however, that the White Act could not serve as the basis for regulations prohibiting non-Indian fishing within the reservation. The effect was to deny immediate protection to Native fishing within the reservation. *Id.* at 127-28 (Rutledge, Black & Murphy, JJ., dissenting in part). Although the federal regulation was invalid, the waters were still a part of the reservation and thus non-Native commercial fishermen presumably could have been removed as trespassers on the Karluk Reservation. This would have required the Natives to sue in their own right, or to request that suit be brought by the United States as trustee. See Case & Voluck, *supra* n. 4, at 89-91 (recounting partially successful efforts of the Karluk Natives to enforce their rights based on legal advice from Felix Cohen). For a discussion of tribal capacity to sue, see Richard B. Collins & Karla D. Miller, *A People Without Law*, 5 *Indigenous L.J.* 83, 112 (2006) ("In sum, the Supreme Court has never accepted the claim that tribes or Indians lack capacity to sue. When the issue has been presented to it, the Court has firmly rejected the claim.").

60. *Hynes*, 337 U.S. at 91-93.

the inexorable movement toward statehood.

V. THE PATH TO STATEHOOD AND ABORIGINAL RIGHTS

Interest in extinguishing Alaska Native aboriginal claims picked up steam after World War II when Alaska's population increased dramatically.⁶¹ Establishment of the Chandalar (Venetie) Indian Reservation in 1943 created an impression among non-Natives that vast areas would become off-limits to any state eventually established. Thus, Anthony Dimond, Alaska's delegate to Congress, in 1943 proposed massive transfers of federal land to the Territory of Alaska in order to preclude the establishment of new Indian reservations under the Indian Reorganization Act.⁶² While Dimond's proposal was not formally adopted, there were no more large reservations established.

Hearings on statehood took place at several locations around Alaska in 1945. Secretary of the Interior Harold Ickes spoke in favor of statehood, but also stated that "the ancestral claims of Alaska Natives should be affirmed, delineated, or extinguished with compensation."⁶³ The first bill introduced in the post-war period provided for statehood, but did not include any reference to Native aboriginal rights, causing Secretary of the Interior Julius Krug to propose amendments requiring the state to disclaim any interest in land owned or held by any Native.⁶⁴ The situation became more complicated as proposals precluding the establishment of any new reservations in Alaska were linked to the statehood bill, which drew substantive opposition from Natives rights advocates.⁶⁵ In the end, statehood bills failed in the 80th and 81st Congresses.

For the most part, however, non-Native Alaskans were not prepared or willing to deal with Native claims to aboriginal title during the post-war economic expansion.⁶⁶ One historian described the situation:

During this period of economic growth, the Natives were growing increasingly aware of their rights and asked repeatedly for the protection of reservations. Their petitions were ignored.

The Natives' growing uneasiness coincided with the white man's push for statehood for Alaska. While most proponents of statehood were aware of the Native land claims, few seem to have understood them and most thought that any attempt to settle them at the time of statehood would merely postpone everything. So, almost to a man, they disclaimed any responsibility for them. As one witness told a Congressional committee considering statehood, "The Indians, with their aboriginal rights, are a federal problem. We have no control over it and we cannot dispose of it and we have nothing to say about it. Whatever

61. Bloedel, *supra* n. 2, at 88; see also Mitchell, *supra* n. 2, at 357-86. The non-Native population grew from 29,295 in 1929 to 94,780 in 1950 and then to 183,086 by 1960. Arnold, *supra* n. 23, at 71.

62. Bloedel, *supra* n. 2, at 95 ("Virtually all whites in Alaska, including the governor and the delegate, strongly opposed this department [reservation] policy.").

63. *Id.* at 124.

64. *Id.* at 193-94 (describing the disclaimer as "copied from Arizona, New Mexico and other recent states"). See also Mitchell, *supra* n. 2, at 359.

65. Mitchell, *supra* n. 2, at 364-66.

66. Bloedel, *supra* n. 2, at 220-21.

happens to Alaska it will still be a federal problem.”

No one wanted to talk about the claims. This issue was a highly emotional Pandora’s box: to open it would let out bigotry and greed and fears that were inappropriate in a group of people petitioning for admission to the democratic United States of America.⁶⁷

It was in this context that Congress considered a number of approaches to the extinguishment of Alaska Native land claims.⁶⁸ Some of these would have simply provided Alaska Natives with the right to sue the United States for compensation for the loss of aboriginal lands,⁶⁹ while others provided for the confirmation of title to relatively small amounts of land in and around the Native villages.⁷⁰ The effort to extinguish Alaska Native claims to aboriginal title subsided to some degree when the Supreme Court decided *Tee-Hit-Ton Indians v. United States*,⁷¹ which was incorrectly interpreted by some as clearing the way of for non-Native development and presumably, acquisition of Native lands.⁷² In fact, the Court had simply held that aboriginal title, unrecognized by Congress, was not subject to the just compensation clause of the Fifth Amendment.⁷³ The Court did not hold that aboriginal title did not exist and appeared to assume just the opposite.

While some members of Congress continued to believe the settlement of Native aboriginal claims should take place prior to statehood for Alaska,⁷⁴ that view did not prevail. The approach chosen by Congress in the Statehood Act set up an inevitable conflict between aboriginal property rights and state land selections. Article 4 of the

67. Mary C. Berry, *The Alaska Pipeline: The Politics of Oil and Native Land Claims* 25 (Indiana U. Press 1975) (citations omitted). Anti-Native sentiment was rampant among non-Natives in Alaska.

In 1944, Juneau was a Jim Crow town where the windows of many bars and restaurants warned “No Dogs or Indians Allowed.” Windows in Anchorage and Fairbanks had similar signs. In Nome, seating in the local movie theater was segregated. And after touring the territory the previous winter, a Bureau of Indian Affairs social worker described Alaska to Commissioner of Indian Affairs John Collier as a “territory where race prejudice is more shocking than in the South.”

Mitchell, *supra* n. 2, at 332–33 (citations omitted). In fact, the territorial legislature rejected an effort to outlaw racial discrimination. *Id.* at 333.

68. *See id.* at 332–55. It was also during this period that Congress evidenced its hostility toward ongoing government-to-government relationships with Indian tribes when it adopted a resolution calling for the “termination” of the federal-tribal relationship with certain Indian tribes. H.R. Cong. Res. 108, 83d Cong., 67 Stat. B132 (1953) (directing the Secretary of the Interior to recommend tribes for termination). This termination policy was intended to eventually do away completely with recognition of Indian tribes as sovereign entities under federal law. For a more complete discussion, see *Handbook of Federal Indian Law*, *supra* n. 6, at 95 and sources cited therein.

69. Mitchell, *supra* n. 2, at 333.

70. *Id.* at 334–35.

71. 348 U.S. 272.

72. Mitchell, *supra* n. 2, at 358.

73. “There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation.” *Tee-Hit-Ton Indians*, 348 U.S. at 278–79. The Court concluded that there was no such congressional recognition, but implicit in its ruling was an acknowledgement that Alaska Natives did have aboriginal title claims. *Id.* at 275 (“The Court of Claims . . . held that petitioner was an identifiable group of American Indians residing in Alaska; that its interest in the lands prior to purchase of Alaska by the United States in 1867 was ‘original Indian title’ or ‘Indian right of occupancy.’”) (citations omitted).

74. This is not to imply that the efforts had no connection. Extinguishment of Native land claims was viewed by some as a prerequisite to statehood. *See Mitchell, supra* n. 2, at 367 (quoting Senator Hugh Butler to the effect that was “futile” to discuss Alaska Statehood without dealing first with Native claims).

Statehood Act⁷⁵ provided a disclaimer of state claims

to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or held by the United States in trust for said natives; that all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority⁷⁶

A corresponding disclaimer appears in the Alaska Constitution as required by the Statehood Act.⁷⁷ At the same time, however, Section 6(b) of the Statehood Act granted the State of Alaska the right to "select, within twenty-five years after the admission of Alaska into the Union, not to exceed one hundred and two million five hundred and fifty thousand acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection."⁷⁸ As shown in the next section, the state's efforts to implement the latter section were doomed without extinguishment of aboriginal title.

Thus, despite the efforts of some to extinguish Native claims to aboriginal title, the end result was to include language intended to retain the *status quo* respecting Native claims to aboriginal title—to neither extinguish them nor validate them, while reaffirming Congress's prerogative to settle the claims at a later date.⁷⁹

VI. STATEHOOD AND NATIVE CLAIMS: THE INEVITABLE COLLISION

Pressure to settle Native land claims dramatically increased after statehood as the new State asserted its entitlement to land grants under the Statehood Act and protests by Alaska Natives prompted the Federal government to suspend transfer of public lands to Alaska. Most important, perhaps, was the fact that the state and federal governments' effort to construct a pipeline to transport oil from newly discovered oil fields on the Alaska's North Slope was thwarted by Native claims to aboriginal title.

As the State of Alaska began to select lands pursuant to the Statehood Act, Native

75. Pub. L. No. 85-508, § 4, 72 Stat. 339 (1958), as amended by Pub. L. No. 86-70, § 2(a), 73 Stat. 141 (1959).

76. *Id.* (emphasis added).

77. Alaska Const. art. XII, § 12.

The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States. They further agree that no taxes will be imposed upon any such property, until otherwise provided by the Congress. This tax exemption shall not apply to property held by individuals in fee without restrictions on alienation.

Id.

78. Pub. L. No. 85-508, § 6(b), 72 Stat. 339. Other subsections of § 6 provided for roughly another million acres in state selections or grants.

79. See Mitchell, *supra* n. 2, at 373-75; Berry, *supra* n. 68, at 31-33.

villages protested to the Secretary of the Interior that the lands chosen were not vacant and unoccupied, but that they were used and occupied for aboriginal purposes.⁸⁰ The first protests were made in 1961 when the State proposed establishment of a recreations area on land near the Alaska Native Village of Minto that was important for Native hunting and fishing activities. Minto leaders filed a protest over the selection with the Department of the Interior, which effectively precluded transfers of land to the State.⁸¹ Secretary of the Interior Stewart Udall informally suspended approval of state land selections in 1966,⁸² and on January 12, 1969, Secretary Udall imposed a formal freeze on further patenting or approval of applications for public lands in Alaska pending the settlement of Native claims.⁸³ An effort by the State to set aside the land freeze was rejected by the Ninth Circuit in *Alaska v. Udall*.⁸⁴ In 1966, state officials complained that as a result of the protests, the state had received only 3 million acres of its land grant.⁸⁵ Pressure to resolve Native claims in Alaska also came from the state and from oil companies wishing to exploit the state's newly discovered petroleum resources.⁸⁶ Oil development could not progress so long as Native claims clouded state authority to lease lands or transfer rights to the companies, and hindered federal capacity to authorize construction of the Trans-Alaska Pipeline, necessary to transport the oil.⁸⁷

Another important question at the time was whether the state would have authority to regulate Native aboriginal hunting and fishing rights. The new state flexed its regulatory muscles in a case involving the use of fish traps by the Native villages of Kake and Angoon. Tribal members of each of these Native villages had been authorized to fish in marine waters pursuant to federal permits.⁸⁸ The State argued that the statute

80. See Arnold, *supra* n. 23, at 100–03.

81. See *id.*; Mitchell, *supra* n. 2, at 379–80.

82. Case & Voluck, *supra* n. 4, at 57.

83. 34 Fed. Reg. 1025 (Jan. 16, 1969) (Public Land Order 4582).

84. 420 F.2d 938 (9th Cir. 1969).

Section 6(b) of the Alaska Statehood Act, which the State seeks to enforce, provides that the State shall be entitled to select not to exceed 102,550,000 acres from the public lands of the United States in Alaska “which are vacant, unappropriated, and unreserved at the time of their selection * * *.” The record shows that petitions protesting these land selections were filed by members of Native Village with the Bureau of Land Management before this litigation arose. These petitions alleged that Native Village has possessory rights to the lands in question on the basis of present and aboriginal use and occupancy. In its answer to the complaint, Native Village denied the State's allegation that the land selected was vacant, unappropriated and unreserved. As an affirmative defense, Native Village asserted that it uses, owns, and occupies all or substantially all of the real property which forms the subject matter of this action.

Id. at 939–40. The court ruled that the Native Village protest could not be rejected by the trial court unless “under no circumstances could Indian trapping, hunting and camping (activities referred to in the Native Village affidavits) constitute a condition which would deprive the selected lands of the status of being ‘vacant, unappropriated, and unreserved.’ We are unwilling to so hold.” *Id.* at 940.

85. Arnold, *supra* n. 23, at 112.

86. See Berry, *supra* n. 68, at 123, 163–214; see generally Donald C. Mitchell, *Take My Land Take My Life: The Story of Congress's Historic Settlement of Alaska Native Land Claims, 1960–1971* 83–99 (U. Alaska Press 2001); *Handbook of Federal Indian Law*, *supra* n. 6, at 338–39.

87. See Arnold, *supra* n. 23, at 137–47; *Native Village of Allakaket v. Hickel*, No. 706–70 (D.D.C. Apr. 1, 1970) (enjoining the issuance of permits for the construction of Trans-Alaska pipeline over Native-claimed lands); see also Berry, *supra* n. 68, at 123.

88. *Organized Village of Kake v. Egan*, 369 U.S. 60, 61–62 (1962).

In March 1959 the Secretary of the Interior, by regulations issued under authority of the White Act,

relied on to issue the permits (the White Act) did not in fact authorize the permits, and that the disclaimer in the Statehood Act did not preclude the exercise of state regulatory power over Native aboriginal fishing rights.⁸⁹ State officials denied that the federal government had authority to exempt the Native fishers from state regulations and arrested Native fishermen for violating Alaska's anti-fish trap law. In the course of upholding state authority over off-reservation fishing, the United States Supreme Court had this to say about the aboriginal rights disclaimer:

The Statehood Act by no means makes any claim of appellants to fishing rights compensable against the United States; neither does it extinguish such claims. The disclaimer was intended to preserve unimpaired the right of any Indian claimant to assert his claim, whether based on federal law, aboriginal right or simply occupancy, against the Government. Appellants' claims are "property (including fishing rights)" within § 4.

Because § 4 of the Statehood Act provides that Indian "property (including fishing rights)" shall not only be disclaimed by the State as a proprietary matter but also "shall be and remain under the absolute jurisdiction and control of the United States," the parties have proceeded on the assumption that if Kake and Angoon are found to possess "fishing rights" within the meaning of this section the State cannot apply her law. Consequently argument has centered upon whether appellants have any such "rights."⁹⁰

The Court held that the state possessed regulatory authority over the exercise of aboriginal fishing rights—at least for conservation purposes. "This Court has never held that States lack power to regulate the exercise of aboriginal Indian rights, such as claimed here, or of those based on occupancy."⁹¹ The disclaimer was said to relate only to interference with aboriginal property rights. The exercise of state regulatory jurisdiction over aboriginal fishing rights—at least with respect to the fish trap prohibition—was said to be consistent with aboriginal title. The Court's reasoning was strained since aboriginal property rights include the usufructory right to hunt, fish, and gather. As the Court stated in *Michael v. United States*,

Indian possession or occupation was considered with reference to their habits and modes of life, their hunting grounds were as much in their actual possession as the cleared fields of the whites, and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the

43 Stat. 464, as amended, 48 U.S.C. §§ 221-228, 48 U.S.C.A. §§ 221-228, and the Alaska Statehood Act, 72 Stat. 339 [48 U.S.C.A. preceding section 21] permitted Angoon to operate three fish traps during the 1959 season and Kake four. 24 Fed. Reg. 2053, 2069. The following year the Secretary authorized permanent operation of these trapsites and specified one additional site for Angoon and five more for Kake for possible future authorization. 25 CFR (1961 Supp.) pt. 88.

Id.

89. The state apparently abandoned arguments that Congress lacked power over Alaska Native affairs under the Indian Commerce Clause. *Id.* at 64. See also *Mellakatta Indian Community v. Egan*, 369 U.S. 45, 50 (1962).

90. *Organized Village of Kake*, 369 U.S. at 67.

91. *Id.* at 76. The Court's reasoning was based in part on a now discredited case, *Ward v. Race Horse*, 163 U.S. 504 (1896), which held that Wyoming's entry into the Union defeated certain tribal treaty rights. *Id.* In 1999, the Supreme Court stated, "But *Race Horse* rested on a false premise. As this Court's subsequent cases have made clear, an Indian tribe's treaty rights to hunt, fish, and gather on state lands are not irreconcilable with a State's sovereignty over the natural resources in the State." *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999).

government, or an authorized sale to individuals.⁹²

A rationale more consonant with the Court's jurisprudence would have been to recognize that State power to regulate only for conservation-based purposes, and that like Indian treaty rights, the State would first need to eliminate non-Native consumption uses.⁹³

The state's inability to receive title to land under the Statehood Act, the injunction against permitting and construction of a trans-Alaska oil pipeline, and increasing disputes over fish and game resources set the table for movement on the settlement of Native land claims. Of all these factors, however, it was the thirst for the oil of Alaska's North Slope that served as the impetus for settlement of the land claims by Congress.

VII. THE ALASKA NATIVE CLAIMS SETTLEMENT ACT

Passage of the ANCSA in 1971 was undoubtedly the most important event in the history of Alaska Native people since 1867. If one views it from the perspective of the state and oil companies intent on development of oil and gas at Prudhoe Bay, ANCSA was a resounding success. It unequivocally extinguished all claims to aboriginal title in Alaska and also all claims for past damages based on trespass to Native aboriginal title. It also provided substantial compensation for Alaska Natives, at least if one accepts the proposition from the *Tee-Hit-Ton* case that whatever property interests Natives held under aboriginal title, they were not entitled to *any* compensation under the Fifth Amendment's just compensation clause. Rather, compensation for extinguishment was something done out of a sense of fairness and justice, and was not based on recognition of legal title to the property that would be taken. ANCSA was silent on the status of Native powers of self-government, although the United States Supreme Court later interpreted the silence as fatal to treatment of Native corporation lands as "Indian country" under 18 U.S.C. § 1151. ANCSA's affirmative elimination of aboriginal hunting and fishing rights has been recognized as a mistake, but one that has only been partially remedied.

The situation faced by Alaska Natives with respect to their aboriginal claims in the 1960s differed little from that faced by Indian tribes that entered into "agreements" with the United States in the late nineteenth and early twentieth centuries.⁹⁴ Alaska Natives

92. 34 U.S. 711, 746 (1834).

93. Cf. *Dept. of Game of Wash. v. Puyallup Tribe*, 414 U.S. 44, 49 (1973); *Handbook of Federal Indian Law*, *supra* n. 6, at § 18.04[3][b], 1143-46 (describing application of conservation necessity principles).

94. An example of such an agreement was at issue in *Hagan v. Utah*, 510 U.S. 399 (1994), where the Court considered the effect of a federal statute that unilaterally removed land from the Uintah Indian Reservation. While the United States purported to seek Indian consent to the land transfer, the agent sent to negotiate made it clear what the end result would be as a result of the Supreme Court's decision in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). That decision had upheld Congress's unilateral power to abrogate Indian treaties and take tribal lands without consent.

Inspector McLaughlin explained the effect of these recent developments to the Indians living on the Reservation:

"By that decision of the Supreme Court, Congress has the legal right to legislate in regard to Indian lands, and Congress has enacted a law which requires you to take your allotments.

You say that [the Reservation boundary] line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress

would have some say in the terms of the settlement of their land claims and proved adept at using the system to maximize their shares of assets (land and money) as their claims were settled. They would not, however, have a veto and could not postpone the inevitable for too long. The non-Natives, the oil companies, and the State of Alaska were not going to go away, and the Native community fought for the best bargain it could get. Aboriginal claims would be settled, state land selections would proceed, and the trans-Alaska pipeline would be authorized and built.⁹⁵ The question of how much land and money would be provided in compensation for the extinguishment would be decided by Congress after some consultation with Alaska Natives. In the end, the settlement has been praised by many in terms of the amounts of land and money awarded,⁹⁶ but others have decried the failings with respect to tribal sovereignty and protection of hunting, fishing, and gathering rights.⁹⁷ Preparations for the settlement began in earnest in the mid-1960s and a comparison of the opening proposal with the final outcome reveals some of the strengths and weaknesses of the proposal.

Alaska Native villages and regional organizations mobilized to halt the transfer of land to the State of Alaska under the Statehood Act before 1966, and in that year came together to form the Alaska Federation of Natives (AFN).⁹⁸ At the initial AFN convention, 250 representatives met and appointed a land claims committee to deal with the increasing pressure toward settlement. It was at the second meeting of the AFN in 1967 that representatives of the Governor of Alaska appeared and proposed that the Native community and state work together.⁹⁹ An Alaska Native Claims Task Force, chaired by State Representative Willie Hensley, and composed of Native leaders, state government leaders, and a representative of the Department of the Interior, was formed at the meeting. In 1968, the Task Force recommended a three-pronged settlement that included 40 million acres of land, money, and continued use of traditional lands for hunting, fishing, and gathering activities. Task Force Chairman Willie Hensley presented its findings to Congress in 1968.

I am submitting for the record a copy of a report by the Governor's Task Force on Native Land Claims. This report was drafted following lengthy work sessions by a tripartite group consisting of the natives of Alaska, the State, and Interior Department officials. We attempted to seek a solution acceptable to the major parties concerned in the settlement of the Alaska land issue.

This is my first appearance before this subcommittee, and I doubt that this committee has ever before considered legislation concerning the land claims of the Alaska Eskimos,

has provided legislation which will pull up the nails which hold down that line and *after next year there will be no outside boundary line to this reservation.*"

Hagan, 510 U.S. at 417 (emphasis in original) (citations omitted).

95. Berry, *supra* n. 68, at 123.

96. Charles F. Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* 235-36 (W. W. Norton & Co. 2005); see Mitchell, *supra* n. 87, at 10 (characterizing the settlement as "the most generous and innovative aboriginal claims settlement in U.S. history").

97. See generally Thomas R. Berger, *Village Journey: The Report of the Alaska Native Review Commission* (Hill & Wang 1985); Wilkinson, *supra* n. 97, at 239 (ANCSA was "termination in disguise").

98. Arnold, *supra* n. 23, at 108-15.

99. *Id.* at 119.

Indians, and Aleuts on a statewide basis. You have undoubtedly seen and heard many delegations of Indian tribal groups from the lower 48, but we want to make clear that the situation with Alaska natives is quite unlike that of recognized tribal entities you are accustomed to dealing with.

1. Alaska natives are not recognized as a single tribe by Congress or the Interior Department.

2. We have only recently organized regional associations and a statewide federation. These associations grew as a result of the land issue and a desire by the native people to improve their economic and social condition, but these organizations are not recognized in law.

3. Only a very small percentage of Alaska's natives reside on few reservations.

4. The major Alaska native groups, the Eskimo, Indian, and Aleut, are culturally and linguistically distinct.

But we all basically agree on the major objectives in the land settlement.¹⁰⁰

The Report that Representative Hensley submitted reflected an approach different in many ways from the traditional reservation model used in the contiguous 48 states, but provided the same basic elements—land, monetary compensation, and protection for traditional hunting, fishing, and gathering activities. Chairman Hensley's testimony also carried a message of self-determination in that it called for Native management of lands reserved in Native ownership, and for any federal role to be informed by Native representation.¹⁰¹ The Task Force Report set out a settlement proposal with four components in the following transmission to Alaska's Governor.

A Report of the Governor's Task Force on Native Land Claims

Juneau, January 10-16, 1968

Hon. Walter J. Hickel,

Governor of Alaska:

Your Task Force proposes a four part settlement of the Native land claim question, consisting of-

(a) A grant of 40 million acres of land in fee, or in trust, to village groups (compared to the 102.5 million acres given the state of Alaska under the Statehood Act, or the much larger area encompassed in the Native claims) allocated among the villages in proportion to the number of persons on their rolls.

(b) A grant of 10% royalty interest in outer continental shelf revenues, along the lines

100. H.R. Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs, *Alaska Native Land Claims: Hearing on H.R. 11213, H.R. 15049 and H.R. 17129*, 90th Cong. 117 (1968) (statement of Hon. Willie Hensley, a Representative in the Alaska Legislature from the 17th District, Kotzebue, Alaska).

101. *Id.* at 118 ("The task force desires a simplification of the administrative process. The powers of the Secretary of the Interior should be limited and controls over land, if necessary, be located in Alaska with native representation."). The actual Report was backed up by draft legislation and commentary on other legislative proposals.

proposed by Secretary Udall, in lieu of the right to compensation for lands reserved or disposed of to third parties, with an immediate advance payment of \$20,000,000 by the Federal Government.

(c) A grant by the State of 5% royalty interest in state selected lands, tidelands, and submerged lands, but excluding current revenue sources from the state lands (in order to avoid direct impact on the general fund) and commencing only upon lifting the land freeze and resumption of state selection.

(d) A terminable license to use the surface of lands under occupancy and used by Natives.¹⁰²

These general recommendations were followed by more detailed language that set out the manner in which the corporation lands would be allocated among the villages. The recommendations were followed in ANCSA, with some notable exceptions. For example, the township grant section anticipated the population formula adopted in ANCSA,¹⁰³ but whereas ANCSA provided only surface rights to the village, the proposal provided for surface and subsurface.¹⁰⁴ In addition, village land grants could be held as "village-as-incorporated-tribal group[s]."¹⁰⁵ Further, the "village shall have the option of whether to receive the grant in fee or in trust. If in trust, the village may choose the Secretary of the Interior as trustee, or subject to his concurrence in the appointment, may appoint any other person, including a regional or statewide Native corporation as trustee."¹⁰⁶ It may be that the combined references to fee or trust lands, and to incorporated "tribal groups" could have led to an option under ANCSA that would have allowed villages to maintain land that would be considered "Indian country" as defined by federal law.¹⁰⁷ At the time, and to a much lesser extent today, the BIA was known stifling paternalism.¹⁰⁸ Other statements in the record at this point, however, demonstrated a clear tilt toward some form of corporation system, motivated most clearly by animosity toward the Bureau of Indian Affairs.¹⁰⁹ In any event, the die was cast. From this point forward, the "administrative mechanism" for the settlement would be corporations of some sort.¹¹⁰ There was no discussion of the role of Native tribes as

102. *Id.* at 119.

103. *See* 43 U.S.C. §§ 1610, 1611.

104. H.R. Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs, *Alaska Native Land Claims: Hearing on H.R. 11213, H.R. 15049 and H.R. 17129*, 90th Cong. at 120, ¶ 9.

105. *Id.* at ¶ 6.

106. *Id.* at ¶ 8.

107. 18 U.S.C. § 1151 (Reservations are defined as Indian country and trust lands held by the Secretary of the Interior are treated as the legal equivalent. *U.S. v. John*, 437 U.S. 634 (1978)). Treatment of land as Indian country is necessary for a tribe occupying the land to take advantage of general federal Indian law principles that permit exercise of jurisdiction of non-tribe members and most immunities from state law.

108. *See generally* Kevin Gover, *An Indian Trust for the Twenty-first Century*, 46 Nat. Resources J. 317 (2006).

109. One of the attorneys for the Native community stated that "Alaska is a little unusual because the natives in Alaska are very vehemently anti reservation, they have never been in favor of reservations and are not today." H.R. Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs, *Alaska Native Land Claims: Hearing on H.R. 11213, H.R. 15049 and H.R. 17129*, 90th Cong. at 134. He must not have known of the over 90 requests for reservations that were pending in the Department of the Interior. *See text at supra* note 54.

110. Development of the language of the draft legislation and commentary presented at the *Alaska Native Land Claims: Hearing on H.R. 11213, H.R. 15049 and H.R. 17129 Before the Subcomm. On Indian Affairs of*

governments in the villages.

ANCSA completely accomplished the objectives of the State of Alaska and the oil companies in the first operative section of the Act. It extinguished aboriginal title and any claims based on aboriginal title and also expressly extinguished "any aboriginal hunting or fishing rights that may exist."¹¹¹ In exchange, Alaska Natives alive on December 18, 1971, were permitted to enroll and be issued stock in one of thirteen regional corporations and in one of more than two hundred village corporations, according to their place of residence or origin.¹¹² The monetary settlement was large; nearly a billion dollars to the corporations.¹¹³

The corporations as a group were entitled to receive approximately 40 million acres of land.¹¹⁴ The quantity of land provided to the corporations thus matched the amount suggested in the 1968 Task Force Report. However, there was no option related to holding the land in some form of a federal trust as briefly suggested in the Report delivered to Congress, and it is now clear that the omission (coupled with the express revocation of all reservations, save Metlakatla) extinguished the Indian country status of land conveyed pursuant to ANCSA.¹¹⁵ The omission of guarantees for governmental power, although never discussed in the lead-up to ANCSA, has turned out to be a major shortcoming of the Settlement Act. The inherent powers of self-governance over members and territory had been acknowledged in a number of ways before ANCSA,¹¹⁶ and there is no evidence that Congress intended to extinguish them. Why was ANCSA silent on such a critical matter? The remote locations of Native villages and the relative lack of non-Native encroachment best explain the lack of concern for expressly securing rights of self-government. As explained by the chairman of the 1968 Governor's Task

the H. Comm. On Interior and Insular Affairs, 90th Cong. (1968) was described by the principal attorney, Barry Jackson:

The task force, which was then formed of about 40 people, representing all areas of the State, including the Board of Directors of the Alaska Federation of Natives, met many times for many days. They formed a drafting committee of nine members. The drafting committee worked with my self and three other attorneys We attempted to put together for the first time, not what the natives wanted, not what Secretary Udall wanted and not what the Governor wanted, but a proposal that perhaps all could accept, that all could live with.

Id. at 133.

111. 43 U.S.C. § 1603(b). See *Inupiat Community of the Arctic Slope v. U.S.*, 680 F.2d 122, 129 (Ct. Cl. 1982).

The right to sue for trespass is one component of the bundle of rights that aboriginal title provides but which Congress may grant, limit, or extinguish as it sees fit. When, as an incident to extinguishing the aboriginal title itself, Congress in the Settlement Act also extinguished the Indians' claims for trespass to the lands possessed under that title, it made a political decision not subject to judicial reexamination. Congress's authority to extinguish aboriginal title without payment also authorized it without payment to extinguish the trespass claims based upon that title.

Id.

112. 43 U.S.C. §§ 1606–1607.

113. 43 U.S.C. § 1605(a).

114. *Handbook of Federal Indian Law*, *supra* n. 6, at § 4.07[3][b], 340.

115. *Alaska v. Native Village of Venetie Tribal Govt.*, 522 U.S. 520, 522 (1998).

116. See 18 U.S.C. § 1162 (application of Public Law 280 to Alaska); 25 U.S.C. § 473a (application of the IRA to Alaska); *In re McCord*, 151 F. Supp. 132 (D. Alaska Terr. 1957); *Aboriginal Fishing Rights in Alaska*, 57 Int. Dec. at 474; *Validity of Marriage by Custom among the Natives or Indians of Alaska*, 54 Int. Dec. 39 (Dept. Int. 1932).

Force Report:

Our focus was on land. Land was our future, our survival. In my region all we wanted was to get control of our space so we could live on it and hunt and fish on it and make our own way into the twentieth century at our own pace. Our focus was on land not structure. The vehicle for administering the land was not our focus. We weren't lawyers. We were battling the state tooth and tong. We were always afraid the President might create a pipeline corridor. We were afraid of failure, of not getting a settlement and not protecting the land for our future generations. As a minority group we knew we could only press the country so far. But none of us ever envisioned a loss of tribal structure. We never thought the tribal control would not continue.¹¹⁷

In addition, federal policy had not yet moved completely out of the termination era that took hold in the 1950s.¹¹⁸ Senator Henry Jackson, a key player in ANCSA's development, had an "antipathy toward Indian reservations in general and Alaska reservations in particular."¹¹⁹ Thus, instead of providing a local option of receiving settlement lands in either trust or fee lands as set out in the 1968 Task Force Report,¹²⁰ ANCSA revoked all existing reservations except Metlakatla.¹²¹ The latter action can be viewed as consistent with the theme of getting the Secretary of the Interior out of his paternalistic supervisory position with respect to land, but is not necessarily inconsistent with fee simple ownership of land and continued existence of substantial aspects of tribal sovereignty.¹²²

It is understandable that Native leadership at the time would not have seriously considered that settlement of land claims necessarily diminished the authority of Native tribal governments. There were over 70 villages organized under the Indian Reorganization Act at the time, and most others operated under some form of traditional council governance.¹²³ Federal law made it quite clear that tribal powers of self-government survive until expressly extinguished by Congress (although the *Venetie* Court broke with that tradition).¹²⁴

Congress also failed to provide for Native hunting, fishing, and gathering rights on lands important for subsistence purposes, although prior versions of the legislation provided some protection.¹²⁵ When the Senate and the House could not agree on the

117. Wilkinson, *supra* n. 97, at 238-39 (quoting Willie Hensley) (citations omitted).

118. The federal government's termination policy called for an end to the federal tribal trust relationship and forced assimilation of Native Americans into mainstream society. See *Handbook of Federal Indian Law*, *supra* n. 6, at 89-97.

119. *Id.* at 238.

120. See text at *supra* n. 95.

121. 43 U.S.C. § 1618.

122. For example, historic Pueblo Indian lands are held in fee simple, but have been treated as Indian country subject to tribal jurisdiction. See *Handbook of Federal Indian Law*, *supra* n. 6, at 334-35. The lands of the New York tribes are not held in trust, but as restricted fee lands. *The N.Y. Indians*, 72 U.S. 761, 768 (1867). In both of these cases, it must be conceded that Congress had included the land at issue within the terms of the Indian country statute (Pueblos), or promised by treaty that land would not be taxable.

123. *Case & Voluck*, *supra* n. 4, at 319.

124. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) (noting Congress's broad power to limit tribal sovereignty, but refusing to imply limitations in the absence of clear expressions of intent); see also Felix Cohen, *Handbook of Federal Indian Law* 123 (U.S. Govt. Prtg. Off. 1942).

125. See Pub. L. No. 92-203, H. Conf. Rep. No. 92-746, at 37 (1971) (reprinted in 1971 U.S.C.C.A.N. 2247, 2250). See e.g. H.R. 11213, § 3(e); H.R. 15049, § 401; H.R. 17129, 90th Cong.

means, all protections were dropped and the conference report simply expressed the conviction that “‘Native peoples’ interest in and use of subsistence resources” could be safeguarded by the Interior secretary’s “exercise of his existing withdrawal authority” to “protect Native subsistence needs and requirements; . . . The Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives.”¹²⁶ Dissatisfaction with the lack of protection for subsistence uses by Alaska Natives led Congress to legislate a subsistence preference for all rural residents of Alaska in 1980, after it became clear that the state and federal agencies were doing little to provide for Native hunting and fishing rights.¹²⁷ The Alaska National Interest Lands Conservation Act (ANILCA) provides a priority for subsistence uses on the public lands by rural residents of Alaska.¹²⁸ Although the rural priority applied only to federal lands, Title VIII provided that the state could obtain management authority over subsistence on federal public lands, “if the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in [ANILCA].”¹²⁹

Anticipating the enactment of ANILCA, the state adopted a subsistence priority statute in 1978. Although the preference was not initially restricted to rural Alaskans, regulations adopted in 1982 brought state law into compliance with ANILCA’s rural priority. In 1982, the Secretary of the Interior certified the state to regulate ANILCA rights. As a result, “Alaska’s 1978 subsistence priority statute became operative as to all state lands and to virtually all federally owned lands in Alaska.”¹³⁰ Shortly thereafter, however, the state was disabled from implementing a “rural” subsistence priority by the state supreme court’s interpretation of the equal access provisions of the Alaska Constitution.¹³¹ The federal government was accordingly forced to administer the subsistence priority on federal public lands—a job that it assumed reluctantly and only after protracted litigation that continues to this day.¹³² In general, ANILCA’s subsistence priority has not provided adequate protections for Native hunting and fishing rights, although it is better than nothing at all.¹³³ For its part, the State appears to have

126. *Id.* The President had the authority under the Pickett Act, repealed in 1976, to withdraw lands for public purposes. *Id.* at 2257.

127. Alaska Natl. Interest Lands Conserv. Act, Pub. L. No. 96-487, Title VIII, 94 Stat. 2422, codified at 16 U.S.C. §§ 3111–3126 (ANILCA, Title VIII). See generally *Handbook of Federal Indian Law*, *supra* n. 6, at § [3][a][iii], 354–61.

128. 16 U.S.C. § 3114 (“Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes.”).

129. 16 U.S.C. § 3115(d). Any laws regulating subsistence uses had to be formulated with the advice and participation of regional councils and local advisory committees, which had the authority to evaluate and make recommendations on laws regulating such uses. 16 U.S.C. § 3115(a) & (d).

130. *Bobby v. Alaska*, 718 F. Supp. 764, 767 (D. Alaska 1989).

131. *McDowell v. Alaska*, 785 P.2d 1, 12 (Alaska 1989) (rural preference unconstitutional under state constitution).

132. See *Katie John v. U.S.*, 247 F.3d 1032, 1039 (9th Cir. 2001) (en banc) (upholding federal assertion of jurisdiction over federal reserved waters as “public lands” under Title VIII and adopting opinion in *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995)). Federal regulations implementing the *Katie John* ruling on federal waters are found at 64 Fed. Reg. 1276 (Dept. Int. 1999) and are currently in litigation in the federal district court for Alaska. *Katie John v. U.S.*, No. 3:05-CV-0006-HRH (consolidated with *Alaska v. Kempthorne*, No. 3:05-CV-0158-HRH).

133. There has been a great deal of litigation with most of it involving state efforts to limit application of the

ceased all efforts toward limit federal management authority under ANILCA. Instead, it seeks to limit federal application of the rural priority.¹³⁴

ANCSA did not mention the governmental powers exercised by Native tribes in Alaska, so many assumed that those powers continued to exist, as would normally be the case under federal law. The Supreme Court, however, dealt a major blow to the scope of tribal powers in Alaska when it ruled in *Alaska v. Native Village of Venetie*¹³⁵ that land conveyed to Native corporations pursuant to ANCSA was not "Indian country" and thus not territory subject to tribal jurisdiction under general principles of federal Indian law.¹³⁶ The Native Village of Venetie held fee title to 1.8 million acres of land set aside for it as the Chandalar Indian Reservation in 1943. ANCSA revoked the reservation's trust status and "[t]he United States conveyed fee simple title to the land constituting the former Venetie Reservation to the two corporations as tenants in common; thereafter, the corporations transferred title to the land to the Native Village of Venetie Tribal Government."¹³⁷ Most federal restrictions on alienation were removed by the revocation of trust status, but Congress then and since provided for selective protections for current and former ANCSA lands.¹³⁸ The general rule is that when Congress determines to

subsistence priority during the relatively brief period of state management pursuant to Title VIII of ANILCA. See e.g. *U.S. v. Alexander*, 938 F.2d 942, 948 (9th Cir. 1991) (setting aside a federal Lacey Act prosecution on the ground that state law prohibiting cash sales from being considered subsistence uses was in conflict with ANILCA's protection of customary trade as a subsistence use); *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 318 (9th Cir. 1988) (state's statutory definition of "rural" unlawful, as it was inconsistent with the plain meaning of the term); Or. on Cross Mots. for S.J., *Katie John v. Alaska*, No. A85-698 Civil (D. Alaska Jan. 19, 1990) (striking down state regulations that restricted subsistence fishing at an historic Native fish camp); *Kwethluk IRA Council v. Alaska*, 740 F. Supp. 765 (D. Alaska 1990) (striking down state regulations governing subsistence hunting of caribou in western Alaska as inconsistent with the customary and traditional harvest patterns of Yupik Natives); *Bobby*, 718 F. Supp. at 779 (striking down state seasons and bag limits for moose and caribou as inconsistent with the customs and traditions of a Native Village, and affirming that ANILCA precludes restrictions on subsistence uses by rural residents unless all other non-subsistence uses are first eliminated).

134. *Katie John*, 247 F.3d 1032; *Katie John*, No. 3:05-CV-0006-HRH.

135. 522 U.S. 520.

136. *Id.* at 534. See *Handbook of Federal Indian Law*, *supra* n. 6, at § 4.07[3][d][ii], 362-63.

137. *Native Village of Venetie*, 522 U.S. at 524.

138. See 43 U.S.C. § 1636(d), making lands conveyed to ANCSA corporations automatically exempt, so long as such land and interests are not developed or leased or sold to third parties from—

- (i) adverse possession and similar claims based upon estoppel;
- (ii) real property taxes by any governmental entity;
- (iii) judgments resulting from a claim based upon or arising under—
 - (I) Title 11 or any successor statute,
 - (II) other insolvency or moratorium laws, or
 - (III) other laws generally affecting creditors' rights;
- (iv) judgments in any action at law or in equity to recover sums owed or penalties incurred by a Native Corporation or Settlement Trust or any employee, officer, director, or shareholder of such corporation or trust, unless this exemption is contractually waived prior to the commencement of such action; and
- (v) involuntary distributions or conveyances related to the involuntary dissolution of a Native Corporation or Settlement Trust.

extinguish tribal property rights or governmental power, it must do so expressly,¹³⁹ but the Court found in ANCSA a clear intent to abrogate territorial jurisdiction over ANCSA lands.¹⁴⁰ While this seems contrary to the rule that derogation of tribal rights must be express or plainly evident, it is now the law. The Court concluded with the observation that “[w]hether the concept of Indian country should be modified is a question entirely for Congress.”¹⁴¹ After *Venetie*, Alaska Native tribes continue to exist, but without a territorial base upon which government power over non-members might be exercised.¹⁴²

The Alaska Supreme Court subsequently ruled that Alaska tribes continue to have power over their members and others who consent to their jurisdiction notwithstanding the *Venetie* decision.¹⁴³ In *John v. Baker* the Alaska Supreme Court faced the question of the continued vitality of tribal powers in the post-*Venetie* Alaskan legal landscape.

Today we must decide for the first time a question of significant complexity and import: Do Alaska Native villages have inherent, non-territorial sovereignty allowing them to resolve domestic disputes between their own members? After examining relevant federal pronouncements regarding sovereign power, we hold that Alaska Native tribes, by virtue of their inherent powers as sovereign nations, do possess that authority.

. . .

We defer to Congress’ finding that Alaska Native tribes are sovereign powers under federal law. We have previously held that tribal status is a non-justiciable political question. We therefore will defer to the determinations of Congress and the Executive Branch on the question of tribal status. If Congress or the Executive Branch recognizes a group of Native Americans as a sovereign tribe, we “must do the same.”

. . .

Through the 1993 tribal list and the 1994 Tribe List Act, the federal government has recognized the historical tribal status of Alaska Native villages like Northway. In deference to that determination, we also recognize such villages as sovereign entities.¹⁴⁴

While this holding and other federal court cases¹⁴⁵ closed the books on the tribal status and powers debate, it appears that territorial jurisdiction of Alaska tribes is limited to Native allotments, which are Indian country under 18 U.S.C. § 1151(c), and restricted

139. H.R. Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs, *Alaska Native Land Claims: Hearing on H.R. 11213, H.R. 15049 and H.R. 17129*, 90th Cong. at 120 (“Tribal property rights and sovereignty are preserved unless Congress’s intent to the contrary is clear and unambiguous.”); *Santa Clara Pueblo*, 436 U.S. at 72 (noting Congress’s broad power to limit tribal sovereignty, but refusing to imply limitations in the absence of clear expressions of intent).

140. *Native Village of Venetie*, 522 U.S. at 534.

141. *Id.*

142. Alaska did not challenge the federal district court’s ruling that the Native Village of Venetie constituted an Indian tribe under federal common law. See *Native Village of Venetie IRA v. Alaska*, 1994 WL 730893 at *22 (D. Alaska Dec. 23, 1994).

143. *John v. Baker*, 982 P.2d 738, 748–49 (Alaska 1999).

144. *Id.* at 748–50.

145. See also *Native Village of Unalakleet v. Superior Court*, No. 95-0184 CV (D. Alaska Apr. 1, 1996); *Native Village of Tyonek v. Puckett*, No. A82-0369 CIV (HRH) (D. Alaska Oct. 29, 1996); *Native Village of Venetie I.R.A. Council & Native Village of Fort Yukon I.R.A. Council v. Alaska*, No. F86-0075 CIV (HRH) (D. Alaska Sept. 20, 1995) (all rejecting challenges to the sovereign status of Alaska tribes).

Native townsite lots, which are the functional equivalent of allotments.¹⁴⁶ Jurisdiction could also be asserted over any land taken in trust from Alaska Native tribes pursuant to the Indian Reorganization Act.¹⁴⁷

VIII. UNFINISHED BUSINESS

Alaska's movement toward statehood was typical of United States expansion in that the aboriginal occupants of the Alaska Territory had their rights to property and sovereignty determined by the newcomers—whether the Alaska Natives agreed or not. While the Statehood Act disclaimed any effect on the aboriginal title claims of Alaska Natives, the statehood movement was a driving force placing those claims on the table for settlement on terms set by Congress in ANCSA. The amount of land received has been viewed as favorable, but the failures to affirmatively provide a self-governance option, or to protect Native hunting, fishing, and gathering rights, are glaring deficiencies in the settlement. Unless one subscribes to the notion that Native people before western contact had no collective method for property right allocations or political decision-making, it is remarkable that the socio-political governance question was not the subject of deliberation. But that is true only if one believes that ANCSA was *intended* to deal with such governance questions. ANCSA was a property rights settlement, which did not speak explicitly to governance questions at all. That limited approach was consistent with federal refusals to deal with Native title questions until absolutely necessary to advance state interests in land acquisition and private economic development after the discovery of oil. The *Venette* decision turned on “recently-invented” implications against tribal powers that the modern Supreme Court has lately relied upon to the detriment of Indian tribes.¹⁴⁸

At the same time, however, the core of tribal governance remain legally recognized as the Alaska Supreme Court correctly concluded in *John v. Baker*.¹⁴⁹ The door thus remains open to the administrative establishment of the territorial jurisdiction rejected by the Court in *Alaska v. Venette*.¹⁵⁰ In other cases, Congress has fully restored federal recognition and sovereignty to some tribes that had their tribal status terminated.¹⁵¹ Further, after the Supreme Court held that Indian tribes had lost their inherent criminal jurisdiction over non-member Indians,¹⁵² congressional action restoring that aspect of sovereignty was upheld by the Court.¹⁵³ Thus, Congress plainly has the power to provide for a measure of tribal territorial jurisdiction in Alaska.

146. *Handbook of Federal Indian Law*, *supra* n. 6, at § 4.07[3][d][ii], 363.

147. 25 U.S.C. §§ 465, 473a. A challenge to the Interior Department's policy not to take land in trust in Alaska is pending. *Akiachak Native Community v. U.S.*, 502 F. Supp. 2d 64 (D.D.C. 2007).

148. For scholarly criticism of the Court's approach in recent years, see Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 Harv. L. Rev. 1754 (1997); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Cal. L. Rev. 1573 (1996).

149. 982 P.2d 738 (Alaska 1999).

150. As noted previously, land taken in trust for a Native tribe would be Indian country subject to tribal government power.

151. See e.g. 25 U.S.C. § 903a (Menominee Tribe); 25 U.S.C. § 566 (Klamath Tribes).

152. *Duro v. Reina*, 495 U.S. 676, 685 (1990).

153. See *U.S. v. Lara*, 541 U.S. 193 (2004).

In addition, since Alaska Natives remain vitally connected to the land and its resources, there is reason to hope that at some point justice will be served by providing meaningful protection for Native hunting, fishing, and gathering rights. The Marine Mammal Protection Act, which passed one year after ANCSA, exempts Alaska Natives in coastal areas from the moratorium on the harvest of marine mammals.¹⁵⁴ Native exemptions are also more in keeping with the traditional treatment of Native hunting and fishing rights in the United States as a whole. While states retain a management role with respect to Indian treaty rights, the modern trend is toward cooperative management.¹⁵⁵ Since the state of Alaska has failed to take advantage of ANILCA's cooperative management scheme, a Native preference should be considered.

In conclusion, while Native land claims were resolved in ANCSA, the question of tribal sovereignty was not explicitly considered at any time. The Supreme Court's *Venette* decision terminated tribal powers over ANCSA lands. The substitute for Native hunting and fishing rights, Title VIII of ANILCA, has proved inadequate. Justice and fairness require that Native rights in these two areas be restored in consultation with the Native community.

154. 16 U.S.C. § 1371(b). See *Didrickson v. Dept. of the Interior*, 982 F.2d 1332 (9th Cir. 1992). See also 16 U.S.C. § 1539(e)(2) (Endangered Species Act exempts for subsistence uses by Alaska Natives).

155. *Handbook of Federal Indian Law*, *supra* n. 6, at 1164–66.

