

Legal Empowerment & Indigenous Peoples Conference

**Developing a US Agenda for Change – May 9, 2011 Washington, D.C.
A draft working document to inform discussions during this conference and beyond.
Prepared for the Alaska Federation of Natives.**

Restoration of Aboriginal Rights

Introduction

Alaska Native aboriginal rights to land and associated resources were not dealt with until Congress enacted the Alaska Native Claims Settlement Act (ANCSA) on December 18, 1971. Like many indigenous land claims, the discovery of exploitable resources prompted the settlement of aboriginal rights in Alaska. 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. While the Statehood Act disclaimed any effect on the aboriginal title claims of Alaska Natives, it, along with the discovery of oil on the North Slope, was the driving force for placing aboriginal claims on the table for settlement on terms set by Congress in ANCSA.

The Act extinguished aboriginal title, but left unresolved important questions regarding tribal sovereignty and Native hunting, fishing and gathering rights. It did not allow for the collective rights of Alaska Native peoples to consent to the terms of the act, an essential element of self-determination under international law. ANCSA was a property rights settlement, which did not speak explicitly to governance questions at all. Glaring deficiencies in the settlement include the failures to provide a self-governance option, or to protect Native hunting, fishing and gathering rights.

A whole host of other issues that should have been included in the settlement were inadvertently left on the table in the haste to settle aboriginal land claims. The bundle of tribal rights that were not addressed in ANCSA, which are taken for granted by tribes in the lower-48, include those that generally apply within "Indian country." They include the favorable treatment given to tribal enterprises for ANCSA corporations, such as exemption from taxation (i.e., treatment equal to that given tribal enterprises organized under the IRA); adequate, long-term funding for Alaska's Native peoples from federal off-shore oil and gas development in areas traditionally used and occupied by them; co-management of federal public lands in Alaska with Native land owners; federal investment in education of Alaska Natives instead of turning it over to the State of Alaska and requiring Native students to excel under a system in which they have limited or no control.

The failure to address these tribal rights has resulted in years of litigation over tribal sovereignty and tribal jurisdiction. Though the fundamental rights to participation in decision making, consent, intergenerational rights, development, and a wide range of other rights were not

contemplated within the terms of ANCSA, Alaska Native tribes have remained intact and active. They and the ANCSA corporations have struggled to make ANCSA work. The corporations were foreign to Alaska Natives, but through hard work and perseverance they have succeeded. The regional and a few of the village corporations have since become some of the most important business enterprises in Alaska, employing thousands of people and generating billions of dollars in annual revenue from business activities around the world. At the same time, the basic structure of tribal governance in Alaska today remains legally recognized.¹

Congress and the Administration need to address the rights of indigenous peoples in Alaska in a comprehensive way and in a manner consistent with existing and emerging international human rights law. Congress has broad authority to restore these rights. This paper addresses one aspect of the problem – ANCSA’s extinguishment of aboriginal hunting, fishing and gathering rights. There are many other unfinished issues that need to be addressed.

Background

The Secretary of the Interior, Ken Salazar, announced a comprehensive review of the federal subsistence management program contained in Title VIII of ANILCA in 2009. AFN devoted substantial resources to the review and submitted the following recommendation at the close of the process.

ANILCA’s scheme envisioned state implementation of the federal priority on all lands and waters in Alaska through a state law implementing the rural priority. That system operated for a mere seven years before the Alaska Supreme Court ruled that the State Constitution precluded State participation in the cooperative federalism program. After initial efforts to amend the State Constitution to comply with the ANILCA’s compromise and thus have a unified management regime, the State has undermined the system through litigation and by gutting its own subsistence law applicable to state and private lands.

Rather than simply defending a system that no longer serves its intended function, we believe it is time to consider options that reach back to Congress’s original expectation that Alaska Native hunting, fishing and gathering rights be protected. Alaska Native peoples have submitted many wise and informative suggestions to you as part of this review process. We have reviewed many of them and held numerous meetings with our constituents in our process of developing these recommendations.

We recommend that the Obama Administration ask Congress to replace the present rural preference with a priority for all Alaska Natives to engage in subsistence uses in Alaska. Congress has the authority to enact legislation, based on the supremacy clause and on its

¹ *John v. Baker*, 982 P.2d 738 (Alaska 1999)(Alaska tribes continue to have power over their members and others who consent to their jurisdiction notwithstanding the U.S. Supreme Court’s decision in *Native Village of Venetie*, 522 U.S. 520 (1998), finding that ANCSA lands were not “Indian country” and thus not territory subject to tribal jurisdiction under general principles of federal Indian law).

plenary authority to regulate Indian affairs, to provide a Native or tribal subsistence preference on all lands and waters of Alaska.

Unfortunately, the Secretarial review resulted in few meaningful changes, and failed to prompt any attention from Congress. It is thus time to explore some legislative options for advancement by the Native community. Otherwise, the existing subsistence regulatory scheme will remain and the status quo will become the future.

This memorandum addresses issues raised by proposals to: 1) repeal the provision of the Alaska Native Claims Settlement Act (ANCSA) that extinguished aboriginal hunting and fishing rights (§ 4(b));² 2) replace the extinguishment clause with improved protection and recognition of Native hunting and fishing rights, possibly through amendments to ANILCA. Before delving into these issues, however, the basic attributes of aboriginal title are addressed, along with a brief discussion of federal power in this area.

I. Aboriginal Title in General

Under principles of international law, discovering European nations asserted the exclusive right to deal with indigenous peoples with respect to matters of land ownership and intergovernmental relations.³ The property rights of Alaska Natives and Indian tribes in the lower 48 states to use and occupy their lands were labeled aboriginal title, or original Indian title.⁴ In *Johnson v. McIntosh*, Chief Justice Marshall declared that “The 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.”⁵ In the subsequent case of *Cherokee Nation v. Georgia*, Marshall stated that “the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government[.]”⁶ The rights asserted by the “discovering” nation, thus consisted of a technical legal title, plus the “right of preemption,” which is the right to acquire the full beneficial title to land used and occupied by the indigenous occupants.⁷ Of course, Alaska Natives had no such understanding,

² 43 U.S.C. § 1603(b) (“All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.”).

³ See generally, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW at 10-22 (2005) (FEDERAL INDIAN LAW).

⁴ *Johnson v. McIntosh*, 21 U.S. 543 (1823).

⁵ *Id.* at 582.

⁶ 30 U.S. 1, 17 (1830).

⁷ The discovery doctrine is often also described as one which vested legal title to aboriginal lands

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 colonial 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.”⁸ Thus, the United States’ legal claim to title was buttressed by Supreme Court decision and the framework for the eventual extinguishment of aboriginal land ownership in the lower 48 states, Alaska and Hawaii was in place.⁹ However, until Congress extinguishes aboriginal title, Native tribes hold a legal right to exclusive use and occupancy of aboriginal lands and waters. That exclusive right includes rights to hunt, fish and gather and make use of other natural resources in aboriginal areas. As the leading treatise notes:

Aboriginal title, along with its component hunting, fishing, and gathering rights, remains in the tribe that possessed it unless it has been granted to the United States by treaty, abandoned, or extinguished by statute. A claim based on aboriginal title is good against all but the United States. The power to extinguish aboriginal title or aboriginal use rights rests exclusively with the federal government. If aboriginal title to land is extinguished, the hunting, fishing, and gathering rights on the land are extinguished as well, unless those rights are expressly or impliedly reserved by treaty, statute, or executive order.

FEDERAL INDIAN LAW at 1121 (footnotes omitted).

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. This long-standing use and occupation of territory is sufficient and need not be “based on treaty, statute, or other governmental action.” *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347 (1942).

II. The Scope of Federal Power over Native Affairs

Congress has full authority over Indian and Alaska Native affairs, and although that power is much criticized and has often been asserted to the detriment of Native peoples, it also may be utilized to provide federal law protection for Native rights, often by preempting state law. See FEDERAL INDIAN LAW at 390-99. Recent examples of favorable treatment of tribal

in the discovering nations, with the indigenous inhabitants retaining the “only” right of use and occupancy – analogous in some ways to landlord-tenant relationship. See *generally*, FEDERAL INDIAN LAW at 969-974.

⁸ *Johnson v. McIntosh*, 21 U.S. at 591.

⁹ See Stuart Banner, HOW THE INDIANS LOST THEIR LAND (2005)(surveying federal-Indian land transactions and underlying policies).

rights include enactment of the Native American Grave Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013, which (among other things) provides for the repatriation of cultural patrimony held by federally funded museums, and the Tribal Law and Order Act of 2010, which increased tribal powers in the criminal law area. *See* 25 U.S.C. § 1302 (b). Other examples include the various statutes that restored tribal status to those subject to “termination” statutes in the 1950s. *See* FEDERAL INDIAN LAW at 400-01.

Since federal power under the Constitution provided authority to extinguish aboriginal land claims and hunting and fishing rights in ANCSA, it also can provide power to restore aboriginal rights. *Cf. United States v. Lara*, 541 U.S. 193 (2004) (upholding act of Congress restoring tribal criminal jurisdiction over Indians who are not members of the governing tribe). Indeed, shortly after ANCSA was passed, Congress provided an Alaska Native exemption from the Endangered Species Act. 16 U.S.C. § 1539(e)(1). The question is not so much whether Congress *could* recognize aboriginal rights in Alaska, but what exactly that would mean, and whether it is politically possible.

III. Aboriginal Title Prior to ANCSA & Repeal of the Extinguishment Clause

A. Aboriginal Title in Alaska

The extinguishment clause of ANCSA has its roots in many years of debate prior to Alaska’s statehood.¹⁰ 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 declared that “the ancestral claims of Alaska Natives should be affirmed, delineated, or extinguished with compensation.”¹¹ 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.¹² 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.¹³ 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 protections 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

¹⁰ See Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 *Tulsa L. Rev.* 17 (2007).

¹¹ Richard H. Bloedel, *The Alaska Statehood Movement* at 124 (Unpublished Ph.D. dissertation, U. of Wash. 1974) (on file with U. of Wash. Lib., Seattle).

¹² *Id.* at 193-194.

¹³ *Id.* at 220-21.

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 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.

Mary C. Berry, *THE ALASKA PIPELINE: THE POLITICS OF OIL AND NATIVE LAND CLAIMS* 25 (1975).

It was in this context that Congress considered a number of approaches to the extinguishment of Alaska Native land claims. 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, while others provided for the confirmation of title to relatively small amounts of land in and around the Native villages.¹⁴ 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*, which was incorrectly interpreted by some as clearing the way for non-Native development and presumably, acquisition of Native lands. In fact, the Supreme Court in *Tee-Hit-Ton* simply ruled that aboriginal title, unrecognized by Congress, was not subject to the just compensation clause of the Fifth Amendment. The Court did not hold that aboriginal title did not exist and appeared to assume just the opposite.¹⁵ *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'").

Shortly thereafter, in *Tlingit and Haida Indians v. United States*, 177 F. Supp. 452, 461-63 (Ct. Cl. 1959) the court of claims affirmed the existence of aboriginal title among the Tlingit and Haida Indians of Alaska.

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

¹⁴ For a discussion of these efforts, see *Alaska Native Rights, Statehood, and Unfinished Business*, 43 *Tulsa L. Rev.* at 26-28.

¹⁵ The Court concluded that there was no formal congressional guarantee of permanent Native ownership, but implicit in its ruling was acknowledgement that Alaska Natives did have aboriginal title claims.

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.

177 F.Supp. at 456.

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

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."¹⁶

After a thorough discussion of the history of Alaska Native claims to aboriginal title, the leading treatise on Alaska Native legal issues concludes: "the most tenable legal conclusion is that prior to ANCSA, Alaska Native title had the same legal status as original Indian title [aboriginal title] elsewhere in the United States." David S. Case and David A. Voluck, *ALASKA NATIVES AND AMERICAN LAWS* 62 (2d Ed. 2002).

B. A Simple Repeal of the Extinguishment Clause Would Only Result in More Litigation.

Even if ANCSA's aboriginal title extinguishment clause were repealed, the State of Alaska could be expected to vigorously dispute the factual basis for claims to aboriginal hunting and fishing right claims. Litigation to establish the geographic scope of such aboriginal rights would certainly be lengthy and expensive. In fact, litigation underway in federal court to do just that was commenced in the mid-1990s in *Native Village of Eyak v. Locke*, No. 3:98 cv-0365-

¹⁶ *Aboriginal Fishing Rights in Alaska*, 57 Interior Dec. 461, 474, 476 (Feb. 13, 1942).

HRH. Judge Holland concluded that none of the villages had established aboriginal title to portions of the Outer Continental Shelf:

None of the ancestral villages was in a position to occupy or exercise exclusive control over any part of the OCS on a sustained basis. Such use and occupancy as probably existed was temporary and seasonal, and more likely than not was carried out by the residents of individual ancient villages as distinguished from any kind of joint effort by multiple villages.

Id. at 21. The case is now on appeal to the Ninth Circuit for the second time and will likely be argued this summer.

In addition to contesting the existence of aboriginal rights as a factual and legal matter, the state would almost certainly assert regulatory authority over the exercise of aboriginal rights based on the Supreme Court decision in *Organized Village of Kake v Egan*, 369 U.S. 60, 61-62 (1962). In that case, the state sought to regulate the use of fish traps by two Native villages pursuant to federal permits issued by the Secretary of the Interior. In the course of upholding state authority over off-reservation fishing, the United States Supreme Court noted that:

The [Alaska] 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. * * *

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.

Id. at 67.

Contrary to the parties’ assumption, the Court held that the State of Alaska possessed regulatory authority over the exercise of aboriginal fishing rights – at least for conservation purposes, stating: “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.” *Id.* at 76. 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 property rights. While a good argument can be made that the language in *Kake v. Egan* was overbroad and should not be followed, the question of state regulatory power over aboriginal hunting and fishing rights would present a difficult and complicated matter to litigate.

In light of the likelihood of: 1) lengthy and difficult litigation to establish the geographic scope of aboriginal title for each federally recognized tribe; and 2) litigation over state regulatory authority over aboriginal hunting and fishing rights, it would be best to consider more than a simple repeal of the extinguishment clause and to provide for preemption of state law. The next section briefly addresses these issues.

IV. Protecting Hunting and Fishing Rights in an ANILCA Amendment.

One possibility would be to provide for an actual Native preference much like the hunting and fishing rights of most Northwest tribes. This would require the determination of where aboriginal rights to hunt, fish and gather exist and who would have authority to exercise such rights. In other words, repeal of ANCSA's extinguishment clause would be followed by clarification under federal law of the nature of aboriginal rights to hunt, fish and gather. For example a model based on Pacific Northwest treaties could provide:

The right of taking fish, hunting, and gathering for subsistence purposes, at all traditional areas, is hereby secured to all Alaska Natives.

There would need to be definitions for "Alaska Native" and "subsistence purposes." In addition, it would be necessary to include some method to determine where and who would exercise such hunting and fishing rights. Also, it would not be realistic to think that Congress would ever pass such a vague provision without some sort of federal-tribal-state cooperative management scheme.

A more politically feasible option that has been discussed in the past would be to amend Title VIII of ANILCA to provide for an Alaska Native priority for subsistence on all lands and waters in Alaska. This could be limited to Alaska Natives who are rural residents, or expanded to all Alaska Natives. It is likely that the priority for non-Native rural residents would be continued, although its precise relationship to a Native preference would need to be determined. A rough draft to accomplish this has been developed for discussion purposes.

Conclusion

1. AFN's letter to Secretary Salazar in January of 2010 stated:

While our primary focus is on achieving fundamental structural changes to the law, administrative and regulatory changes in the current management system are needed. See attached letter of June 1, 2009. We stress, however, that a band-aid approach to a system that is broken and that has never worked is not acceptable to the Native community.

Unfortunately, Secretarial Salazar's review only provided a few band-aids. In light of that reality, it is time to revisit congressional alternatives to avoid remaining mired in the status quo.

2. Given the political divide in the federal government, there is no chance that any major substantive changes could be advanced in this Congress, and the start of the Presidential

campaign will only slow things down more.

3. The Native Community could get oversight hearings on new solutions to the impasse in the House Resources Committee and the Senate Indian Affairs Committee, in this Congress. This is an important first step to provide focus and allow input which is critical.

4. It would be important to remind all that Congress has the power to amend ANCSA by repealing § 4(b), which extinguished aboriginal rights.

5. Such a repeal by itself would only prompt more litigation to determine whether and where such rights exist in Alaska for each Alaska Native village, or tribe, and the state could be expected to assert continued regulatory authority over aboriginal rights.

6. A simple treaty-like provision to protect subsistence uses could also be explored, but would have no realistic chance of passage by Congress.

7. Another option would be to amend Title VIII of ANILCA to provide an Alaska Native preference for subsistence uses on all lands and waters in Alaska, and completely preempt state law with regard to the preference.

8. It seems that the option that would have the greatest chance of success would be the amendment of Title VIII to provide an Alaska Native priority for subsistence uses applicable to all lands and waters in Alaska. Even this sort of a change would require a monumental effort. It could be accompanied by a repeal of § 4(b), but a repeal would not be necessary since the amended Title VIII would provide the Native priority and preempt state law.

9. Finally, all of the options noted above should be evaluated in light of the United Nations Declaration on the Rights of Indigenous Peoples, article 38, which provides that States shall take appropriate measures, including legislation, to achieve the ends of the Declaration. Since the United States signed on to the Declaration last year, it can be used with lawmakers and the Administration to argue for explicit protections for Native hunting and fishing. Article 20(1) provides that "Indigenous peoples have the right, ...to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities." The Declaration should be used to evaluate ANCSA and ANILCA and provide guidance for amendments.