Golden Gate University Law Review

Volume 44
Issue 1 *Ninth Circuit Survey*

Article 8

April 2014

Native Village of Eyak v. Blank: Fish is Best Rare; Justice, Not So Much

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NOTE

NATIVE VILLAGE OF EYAK V. BLANK:[1] FISH IS BEST RARE; JUSTICE,NOT SO MUCH

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Treat the earth well: it was not given to you by your parents; it was loaned to you by your children.[2]

INTRODUCTION

Archaeological evidence shows the Chugach people began inhabiting the Copper River Delta and coastal lands along the Prince William Sound inlet of the Gulf of Alaska when the glaciers of the last ice age receded.[3] The Chugach have always been seafarers who rely upon the waters of the Outer Continental Shelf (OCS) for their

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[1] Native Vill. of Eyak v. Blank, 688 F.3d 619, 630 (9th Cir. 2012) (en banc) (per curiam), *cert. denied sub nom.* Native Vill. of Eyak v. Pritzker, 134 S. Ct. 51 (2013) (holding non-exclusive rights to natural resources from aboriginal title never arose because the Villages did not meet their burden of proof for exclusive use and occupancy; although the Chugach exclusively used all but the periphery of the claimed areas, they failed to present sufficient evidence of the ability to occupy those areas to the exclusion of other tribes).

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[2] Old Cherokee Proverb.

[3] *See generally Who We Are: History & Culture*, CHUGACH ALASKA CORP. (2012), http://www.chugach-ak.com/whoweare/cultural/Pages/default.aspx.

livelihood.[4] First contact[5] with a major European imperial power came when Russian explorers met the Chugach in Umiaks several miles from land.[6] Regular contact came when the Russian American Company established a trading post at Nuchek to supply European and Asian fur markets.[7] The furs of the area's sea mammals were commercially in high demand, but the Russians recognized the Chugach as formidable foes.[8] Consequently, the Russians did not subjugate the Chugach, as they had done to other, larger tribes in Alaska, but traded for the prized natural resources found in their waters.[9]

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[4] "Indeed, their very occupancy on the shore and immemorial enjoyment of sea and seabed are testament to the variety of marine mammals, fish, and sea birds in that area. These resources ensured a more certain livelihood than the inland hunt of moose and caribou could provide. The villages formed at the water's edge." David J. Bloch, *Colonizing the Last Frontier*, 29 AM. INDIAN L. REV. 1, 5-6 (2004).

[5] The district court noted, "Vitus Bering probably landed on Kayak Island in 1741. He had no meaningful contact with the indigenous people." Native Vill. of Eyak v. Locke, No. 3:98-cv-0365-HRH, at 12 n.22 (D. Alaska August 7, 2009).

[6] The district court also found the Chugach were capable of navigating anywhere within the Prince William Sound and past, from the Lower Kenai Peninsula to the Copper River Flats, out to Kodiak, Middleton, and the Barren Islands, and past Wessels Reef in kayaks and umiaks. A kayak was an "enclosed vessel made of a light wooden frame entirely covered with mammal skins and traditionally constructed to accommodate two people as well as gear and food[,]" and an umiak, "also constructed with a wooden frame and mammal skins, was an open vessel, much larger than a kayak, capable of carrying many people and considerable cargo." *Id.* at 15. The earliest European sources cited by anthropologists testifying in this case at the trial level stated groups of the Chugach Sugpiat "traveled immense distances across open water in their skin-covered boats. Sauer 1802 specifically stated that two kayakers paddled three miles out to his ship." Patricia H. Partnow, Ph.D., Comments on Anthropological Source Documents, Expert Report Affidavit, Eyak v. Locke, No. 3:98-cv-0365-HRH (D. Alaska August 7, 2009). Further, "the Chugach introduced records of five eyewitness accounts from 18th-century explorers describing encounters with seafaring Chugach on the OCS more than three miles from shore." Native Vill. of Eyak v. Blank, 688 F.3d 619, 630 (9th Cir. 2012) (en banc) (per curiam), *cert. denied sub nom.* Native Vill. of Eyak v. Pritzker, 134 S. Ct. 51 (2013) (Fletcher, J., dissenting).

[7] The Company forced males between the ages of eighteen and fifty to work for three years. *The Chugach People*, CORDOVA HISTORICAL MUSEUM, http://cordovamuseum.org/history/people-of-the-region (last visited March 1, 2014).

[8] "The Russians had virtually enslaved other Alutiiq people as well as the Koniag. . . . The Chugach were recognized by the Russians as potentially formidable foes, and apparently chose to work and trade with the Chugach rather than attempting to dominate them." *Eyak v. Locke*, at 16 n.27.

[9] Bloch, *supra* note 5, at 6 ("Historically, whales were prized by tribal members for their blubber, meat, and oil. Sea lions, porpoises, smaller whales, and seals would be harpooned in open water from skin-covered kayaks. Seal hunting additionally required the use of decoys, nets, and ambuscade. The furs of sea otters were highly valued. Bottom fish like cod, halibut, and rockfish, harvested from deep water with baited hooks and lures, were a staple of subsistence commensurate to the mammals. As travel between villages was frequent and typically by water (in umiaks as well as kayaks), extensive trade and ceremonial exchange of the sea's riches developed. . . . [T]he traditions associated with life, love, religion, and death came to depend on the ocean and its

The Chugach continued trade with the Russian Empire until Alaska was purchased by the United States in 1867.[10] The Klondike Gold Strike in 1896 brought a significant population of mineral prospectors into the area. The Chugach population declined as each natural resource was exploited.[11] Direct American subjugation began with Bureau of Indian Affairs school policies against Chugach language and culture. Acculturation peaked with the Alaska Native Claims Settlement Act (ANCSA) of 1971, which altered the very entity of an Indian tribe in order to extinguish land claims and protect America's most expensive and indispensable resource, oil.[12] Subsequently, other natural resources within Chugach territory at times became cause for controversy.[13] Thus the Chugach, like most other Alaskan natives, are

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resources. A majority of village members today continue the subsistence lifestyle of their forbears. . . .").

[10] Following the Civil War, Secretary of State William H. Seward's "folly" eventually provided the United States with an abundance of minerals, petroleum, and natural resources (at issue in this case) for the purchase price of $7.2 million, or roughly 2 cents per acre. For an account of the deal, see generally *Univ. of Rochester Library Bulletin: Spring 1967*, SEWARD'S FOLLY: A SON'S VIEW, http://www.lib.rochester.edu/index.cfm?PAGE=487 (reprinting a speech given many times by Seward's sons Frederick Seward and William H. Seward, Jr., Address at the Alaska-Yukon Exposition in Seattle (Sept. 10, 1909)) (last visited March 1, 2014).

[11] "The wider territory of the Alutiiq, or Chugach Eskimo people—historically also called Aleut and Sugpiaq—includes the Alaska Peninsula, parts of the Kenai Peninsula, and Kodiak Island. . . [which] were hit especially hard by events of the early 20th century. They were displaced from their lands and nearly destroyed by the discovery of oil at Katalla, the settlement of Cordova in 1909, and the building of the Copper River & Northwestern Railroad between Cordova and the Kennecott copper mines (completed in 1911). The Eyak population, estimated at 300-400 in the late 19th century, dwindled to fewer than 40 by the 1930s." LaRue Barnes, *Eyak and Alutiiq (Chugach Eskimo): Indigenous Peoples of the Copper River Delta and Prince William Sound*, ALASKA NATIVE COLLECTIONS: SMITHSONIAN INSTITUTION, http://alaska.si.edu/culture_eyak.asp?continue=1 (last visited March 1, 2014).

[12] The Alaska Native Claims Settlement Act (ANCSA) establishes the Alaska Native Fund, more than $962,500,000 from appropriations and mineral lease payments, for the Natives' aboriginal land claims as well as forty million acres of land as compensation. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 398 (2004). "To administer the property and money, the Act authorizes the creation of twelve regional corporations which are to correspond to the areas inhabited by the various Native groups. . . . The statute . . . sets forth the procedure for determining the boundaries of the twelve regions. 'For purposes of this chapter, the State of Alaska shall be divided by the Secretary of the Interior within one year after December 18, 1971, into twelve geographic regions, with each region composed as far as practicable of Natives having a common heritage and sharing common interests. . . .'" Cent. Council of Tlingit & Haida Indians of Alaska v. Chugach Native Ass'n, 502 F.2d 1323, 1324 (9th Cir. 1974) (quoting 43 U.S.C. § 1606(a)). More than two hundred village corporations were also created. For an overview of these "tribes of shareholders," *see* GARY C. ANDERS & KATHLEEN ANDERS, INCOMPATIBLE GOALS IN UNCONVENTIONAL ORGANIZATIONS: THE POLITICS OF ALASKA NATIVE CORPORATIONS (1986), *reprinted in* DEVELOPING AMERICA'S NORTHERN FRONTIER 133 (Theodore Lane ed., 1987) *available at* www.alaskool.org/projects/ancsa/t_lane/IncompatibleGoals.htm.

[13] The Chugach corporations are no strangers to litigation, especially in the Ninth Circuit. *See* Chugach Alaska Corp. v. United States, 34 F.3d 1462 (9th Cir. 1994) (holding that Native

now an impoverished group with limited economic resources or commercial enterprises.[14]

For the purposes of the litigation discussed in this Note, the Chugach peoples comprise five native villages in the State of Alaska: Eyak, Tatitlek, Chenega, Nanwalek, and Port Graham ("the Villages").[15] The Villages must fight for a right to the natural resource they depend upon most for survival, fish. At the end of the twentieth century, the Villages sued the federal government to assert claims of aboriginal title, and along with it, exclusive rights to the resources of their ancestral fishing grounds on the OCS. A panel of the United States Court of Appeals for the Ninth Circuit held the federal paramountcy doctrine[16] barred any exclusive claim based upon aboriginal title.[17] Thus, the United States exclusively controls access to the Villages' ancestral fishing grounds.

This Note discusses the recent decision of the Ninth Circuit in *Native Village of Eyak v. Blank*, in which the five native Villages sued to assert *non-exclusive* rights to resources under aboriginal title claims; the Villages lost.[18] Part I explains the legal background, from the

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American corporation could retain sufficient quantity of assigned income in order to avoid paying any alternative minimum tax); Chugach Alaska Corp. v. Lujan, 915 F.2d 454 (9th Cir. 1990) (holding that members enrolled in another village do not qualify as members of the group regardless of residence for conveyance of public land); Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723 (9th Cir. 1978) (holding that sand and gravel are part of the subsurface estate, and therefore revenues from extraction belong to regional corporation).

[14] "Today, approximately one fifth of the inhabitants of Alaska are Natives. Many Natives continue to live a traditional lifestyle. As a group, Alaska Natives have the lowest incomes in the state, and a Native family is three times more likely to live under the federal poverty line than a non-Native family. A report issued in 2009 found that the unemployment rate for Alaska Natives was five times higher than the national average." STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 261 (2012).

[15] Chenega is also known as Chanega, while Nanwalek was formerly known as English Bay. Native Vill. of Eyak v. Locke, No. 3:98-cv-0365-HRH, at 1 n.1 (D. Alaska August 7, 2009).

[16] The federal paramountcy doctrine states: "The Constitution allotted to the federal government jurisdiction over foreign commerce, foreign affairs, and national defense so that as attributes of these external sovereign powers, it has paramount rights in the contested areas of the sea." Native Vill. of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090, 1096 (9th Cir. 1998), *cert. denied sub nom.* Native Vill. of Eyak v. Daley, 527 U.S. 1003 (1999).

[17] "They seek *exclusive* use of the ocean resources and regulatory power over third parties, including officials of our executive branch of government, subject only to the laws of Congress. . . . [Insofar as the] Native Villages' claim to complete control over the OCS is contrary to these national interests and inconsistent with their position as a subordinate entity within our constitutional scheme . . . the Native Villages are barred from asserting exclusive rights to the use and occupancy of the OCS based on unextinguished aboriginal title." *Id.* at 1096-97.

[18] Native Vill. of Eyak v. Blank, 688 F.3d 619, 626 (9th Cir. 2012) (en banc) (per curiam), *cert. denied sub nom.* Native Vill. of Eyak v. Pritzker, 134 S. Ct. 51 (2013) (holding that native villages did not satisfy their burden to prove exclusive use and occupancy of claimed areas of the OCS to establish aboriginal title).

underpinnings of American Indian sovereignty and claims of aboriginal title, to the federal paramountcy doctrine. Part II explains the litigious path discussing the holdings of the Chugach cases from the first Ninth Circuit decision of *Native Village of Eyak v. Trawler Diane Marie* to the current decision of *Eyak v. Blank*. It describes the findings of the district court in *Native Village of Eyak v. Locke* following the *en banc* remand ordering those findings in *Native Village of Eyak v. Daley*. Then it contrasts the majority holding of the Ninth Circuit with Judge Fletcher's dissent and the language debate amidst the panel. The Ninth Circuit refused to acknowledge the existence of aboriginal title over the fishing grounds used by the Villages since time immemorial. Part III argues that the Ninth Circuit en banc added a new prerequisite that a tribe must establish before the courts will acknowledge rights claimed under aboriginal title. In doing so, the Ninth Circuit created a split between circuits.[19] The majority avoided the greater legal question of whether these non-exclusive rights to the natural resources of the OCS conflict with the federal paramountcy doctrine, a question that the dissent analyzed correctly. By denying commercial rights, this holding guarantees Indian tribes only subsistence fishing, attacking tribal sovereignty.

I. LEGAL BACKGROUND

The Constitution of the United States grants Congress the sole power to regulate affairs with Indian tribes.[20] Using the doctrine of discovery as Chief Justice John Marshall announced in *Johnson v. M'Intosh*, the established legal principle of American conquest remains:

> Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, that that their condition shall remain as eligible as is compatible with the objects of conquest. . . . [*H*]*umanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired*; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish

[19] *See* Wichita Indian Tribe v. United States, 696 F.2d 1378, 1385 (Fed. Cir. 1983) (holding that evidence must be "specific enough to justify a finding of a lack of exclusive use").

[20] "The Congress shall have the power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

> the painful sense of being separated from their ancient connexions, and united by force to strangers.[21]

The original tribal inhabitants' right to title under American law was restricted only to that of an occupier by their status as domestic dependent nations.[22] Tribes may claim only aboriginal title under the jurisdiction of the United States, which asserts ultimate sovereignty.

A. ABORIGINAL TITLE

Aboriginal title, a possessory interest otherwise known as original title, Indian title, or the Indian right of occupancy,[23] is a specific land-use right possessed by a tribe[24] or an individual tribal member.[25] Many countries today with a judiciary descending from the English common-law tradition apply Chief Justice Marshall's American aboriginal title doctrine to claims regarding title to lands occupied by native peoples.[26]

The first Congress of the United States passed the Indian Non-Intercourse Act. This legislation protects Indian lands by establishing that only the federal government, but neither states nor private citizens, could acquire land from an Indian tribe.[27] It was up to the Supreme Court to define the legal rights and title Indian tribes held, [28] as well as

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[21] Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543, 589 (1823) (emphasis added).

[22] Cherokee Nation v. Georgia, 30 U.S. (5 Peters) 1, 2 (1831) (finding Indian nations to be domestic dependent nations with limited sovereignty).

[23] The original inhabitants of the United States have the right to continue to *occupy* and *use* their ancestral land until Congress decides to extinguish this possessory interest for another purpose. PEVAR, *supra* note 15, at 24.

[24] Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661, 667 (1974).

[25] United States v. Dann, 873 F.2d 1189, 1195-96 (9th Cir. 1989).

[26] Originally, Blackstone's *Commentaries on the Laws of England* divided colonial lands into two categories: (1) Unoccupied land, or vacant and uncultivated lands that could be acquired by mere occupancy, and (2) Occupied land, or lands cultivated and populated by native peoples that could be acquired by conquest, cession, or purchase by a sovereign. By the time Chief Justice John Marshall established the aboriginal title doctrine, while authoring *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543, and the *Cherokee Cases,* most notably *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1, and Worcester v. Georgia, 31 U.S. (6 Peters) 515 (1832), inconsistent holdings across the common-law world were in conflict over whether property rights remained intact following a change in sovereignty bringing about the new Anglo legal system. BRIAN SLATTERY, ANCESTRAL LANDS, ALIEN LAWS: JUDICIAL PERSPECTIVES ON ABORIGINAL TITLE 4-5, 8, 10, 15 (1983).

[27] "[N]o sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." Trade and Intercourse Act of 1790, ch. 33, § 4, 1 Stat. 137, 138 (1790) (current version at 25 U.S.C. § 1753 (1983)).

[28] CANBY, *supra* note 13, at 368.

the status of the tribes living within the expanding borders of the United States.

The "doctrine of discovery"[29] was articulated in the seminal case *Johnson v. M'Intosh.* In 1773, Johnson purchased land from the Piankeshaw Indians in what is today the State of Illinois. In 1818, M'Intosh purchased the same land from the United States.[30] A unanimous Court decided that discovery necessarily limited tribal sovereignty, removing the property right of alienation, and giving exclusive title to the discovering sovereign, subject only to the Indian right of occupancy.[31] However, only the United States could eliminate the Indian right of occupancy by purchase or conquest.[32] Thus, the title Johnson purchased, and consequently the title his successors claimed, was Indian title with no ownership right, only a possessory right akin to that of the Indians. This title was inferior to fee simple title issued by the United States.[33] Chief Justice Marshall later clarified the legal status of Indian tribes as "domestic dependent nations" that continued to retain a limited sovereignty subservient only to that of the United States, but not subject to the sovereignty to the several states.[34]

Successive courts affirmed that only the federal government can extinguish aboriginal title, which need not be based upon treaty, statute, or formal government action in order to exist.[35] Only Congress may extinguish such title and must do so explicitly.[36] Because aboriginal title

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[29] The "Doctrine of Discovery" continues to be criticized across the common-law world as religious zealotry and racism. "During the fifteenth and sixteenth centuries, the Christian nations of Europe espoused the view that non-Christian lands throughout the world could be claimed by Christians as a matter of divine right, and they used the Doctrine of Discovery to dominate indigenous peoples and to dispossess them of their lands and assets. The Doctrine of Discovery is the legacy of 1,000 years of European racism and colonialism directed against non-Western peoples. Indigenous people around the world, including those in the United States, Canada, New Zealand, and Australia, had their lands confiscated based on this theory." PEVAR, *supra* note 15, at 24 (internal quotation marks and citations omitted).

[30] *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) at 560-62.

[31] *Id.* at 574.

[32] *Id.* at 587.

[33] ,*Id.* at 584, 603-04.

[34] As Domestic Dependent Nations, or wards of the guardian United States, and not foreign nations, tribes like the Cherokee had no standing to sue states in the Supreme Court, which lacked original jurisdiction. Cherokee Nation v. Georgia, 30 U.S. (5 Peters) 1, 12–13, 17 (1831).

[35] The federal government's policy is to respect the Indian right of occupancy, "considered as sacred as the fee simple of the whites." Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661, 669 (1974) (quoting Mitchel v. United States, 34 U.S. (9 Peters) 711, 746 (1835)).

[36] The United States must prove title was extinguished "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise," Congress having the supreme power to do so. United States v. Santa Fe Pac. R. Co., 314 U.S. 339, 347 (1941).

is not a property right, but a tribal possessory interest, the Fifth Amendment's Takings Clause does not protect it.[37] The United States retains the fee under aboriginal title; however, the occupied land and all connected resources are rightful tribal possessions.[38]

For the first century and a half of United States existence, tribes were substantially disadvantaged in dealings, treaties, and court proceedings. Following the Second World War, and the inception of citizenship for Indians, came a renaissance of rights. From 1946 to 1978, Congress established the Indian Claims Commission, waiving sovereign immunity to settle aboriginal title, takings, and treaty claims; jurisdiction to review Commission decisions was vested in the Court of Claims.[39] The principle was established that aboriginal title continues until extinguishment; furthermore, the intent to extinguish aboriginal title must be plain and unambiguous.[40] Explicit statutory action is not necessary to extinguish aboriginal title for an individual tribe or even an entire state.[41]

B. EXTINGUISHMENT OF ABORIGINAL TITLE IN ALASKA

Alaskan tribes are at a disadvantage because the practice of entering into formal treaties with Indian tribes ended shortly after Alaska's purchase from Russia in 1867.[42] Courts have held that tribes retain sovereignty with or without a treaty. Alaska Natives, unlike other Indian tribes, have been placed in a unique system. Under the Commerce Clause, only Congress may legislate for the Indian tribes,

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[37] Aboriginal title may be extinguished without right of just compensation. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 284-85 (1955).

[38] United States v. Shoshone Tribe of Indians of Wind River Reservation, 304 U.S. 111, 117-18 (1938).

[39] CANBY, *supra* note 13, at 378-81 (explaining the Indian Claims Commission Act of 1946, 25 U.S.C. §§ 70-70v.).

[40] Lipan Apache Tribe v. United States, 180 Ct. Cl. 487, 492-93 (1967).

[41] Several actions of the United States, absent congressional statute, can result in the extinguishment of aboriginal title, including treaty or agreement, *see* Otoe & Missouria Tribe v. United States, 131 Ct. Cl. 593 (1955); the creation of a reservation, *see* Gila River Pima-Maricopa Indian Cmty. v. United States, 204 Ct. Cl. 137 (1974); settlement, *see* Marsh v. Brooks, 55 U.S. 513 (1852); adverse governmental action, *see* Tlingit & Haida Indians v. United States, 147 Ct. Cl. 315 (1959); or intent to use the area and resources otherwise, *see* United States v. Gemmill, 535 F2d 1145 (9th Cir. 1976).

[42] "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." 25 U.S.C.A. § 71 (Westlaw 2014).

which are domestic dependent nations that still retain sovereignty greater than that of the several states.[43] Congress extinguished all claims of aboriginal title within the State of Alaska in 1971.[44] As a result, village and regional corporations now hold assets unlike the tribal entities recognized in other states.[45] All Alaskan natives alive on December 18, 1971, became shareholders of their respective corporations and were prohibited from selling their shares for twenty years.[46] Coincidentally, at the same time shareholders were able to sell shares, the Chugach Corporation filed Chapter Eleven bankruptcy; the extinguishment of aboriginal title and entity of tribe came with such consequences.

C. CURRENT LEGAL PRINCIPLES CONCERNING ABORIGINAL TITLE

Today, Indian tribes continue a government-to-government relationship of general trust with the United States, which owes something akin to a fiduciary duty toward its dependent nations.[47] Under the Constitution of the United States, Congress has plenary authority over all tribes pursuant to the Commerce Clause.[48] Sovereignty of tribes is reserved, much like the Tenth Amendment for the states, under the

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[43] Upon admission to the Union, later states recognized the "establishment and sanctity of the nation-to-nation relationship between tribes and the federal government," DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 202 (2001), as Alaska did pursuant to the Alaska Statehood Act, "forever disclaim[ing] all right and title to any lands or other property . . . the right and title to which may be held by any Indians, Eskimos, or Aleuts . . . under the absolute jurisdiction and control of the United States." Act of July 7, 1958, Pub. L. No. 85-508, § 4, 72 Stat. 339, 339 (1958).

[44] 43 U.S.C.A. § 1603(b) (Westlaw 2014); Amoco Production Co. v. Vill. of Gambell, 480 U.S. 531, 536-37 (1987).

[45] Alaska v. Native Vill. of Venetie, 522 U.S. 520, 533 (1998) (holding that corporations can transfer land out of Native ownership without restrictions on alienation negating independent sovereignty).

[46] 43 U.S.C.A. § 1601 et seq. (Westlaw 2014); ANCSA defines "Native" as a citizen of the United States who is a person of one-fourth degree or more Alaska Indian, Eskimo, or Aleut blood, or combination thereof. 43 U.S.C.A. § 1602(b) (Westlaw 2014). Shareholders may now sell their interests to anyone at any time. Unlike in other tribes, children of shareholders may never receive any interest in their native corporations. *See* PEVAR, *supra* note 15, at 261.

[47] "This Court has recognized the distinctive obligation of trust incumbent upon the Government and its dealings with these dependent and sometimes exploited people. . . . [T]he Government is something more than a contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress, and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).

[48] WILKINS & LOMAWAIMA, *supra* note 44, at 115 (stating the Supreme Court recognizes Congress as having "full, entire, complete, absolute, perfect, and unqualified authority over tribes and individual Indians" (citing *Mashunkashey v. Mashunhashey*, 134 P.2d 976, 979 (Okla. 1943))).

Supremacy Clause.[49] Because of the government's superior position, federal courts apply three canons of construction to interpret treaties: 1) to resolve ambiguities in favor of Indians, 2) to interpret treaties as the Indians would have understood them, and 3) to liberally construe any treaty in favor of the tribe.[50] Treaty rights to hunt, fish, and gather on lands tribes ceded to the United States have been consistently upheld when treaties are present. These rights have also been found to exist without treaties when aboriginal title has not clearly been extinguished.[51]

Other legal standards have been created in order to assist tribes litigating against the awesome power of the United States. Because of the difficulty in obtaining evidence clearly establishing aboriginal title, courts must adopt a liberal approach in favor of tribal claimants.[52] When establishing aboriginal title, ambiguities in a treaty between a tribe and the United States should be construed in favor of the tribe, because the tribe itself is a ward of the United States.[53] The *Sac & Fox* test is used (as it was in *Eyak v. Blank*) to determine the existence of aboriginal title.[54] This test defines aboriginal title as actual, exclusive, and continuous use and occupancy for a long time,[55] with use and occupancy determined by the way of life, habits, customs and usage of the users and occupiers.[56]

More recently, the Ninth Circuit upheld aboriginal title for an Alaskan tribe in *People of the Village of Gambell v. Hodel.* In *Gambell v. Hodel*, the Secretary of the Interior issued leases to explore parts of the OCS off the coast of Alaska to explore the possibility of oil and gas

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[49] WILKINS & LOMAWAIMA, *supra* note 44, at 122 ("treaty in truth and in fact merely *reserved and preserved inviolate to the Indians the fishing rights which from time immemorial they had always had and enjoyed*" (emphasis added) (quoting Makah Indian Tribe v. McCauly, 39 F. Supp. 75 (W.D. Wash. 1941), *rev'd on other grounds sub nom.* McCauley v. Makah Indian Tribe, 128 F.2d 867 (9th Cir. 1942))).

[50] WILKINS & LOMAWAIMA, *supra* note 44, at 141.

[51] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 182-86 (1999).

[52] Native Vill. of Eyak v. Blank, 688 F.3d 619, 627-29 (9th Cir. 2012) (en banc) (per curiam), *cert. denied sub nom.* Native Vill. of Eyak v. Pritzker, 134 S. Ct. 51 (2013) (Fletcher, J., dissenting) (stating that courts must take a common-sense approach when evaluating exclusivity, because it is extremely difficult to establish facts after the lapse of time, and exclusivity can be inferred from a date too remote to admit testimony of a living witness (citing Muckleshoot Tribe v. United States, 3 Ind. Cl. Comm. 669, 677 (1955); Snake or Piute Indians v. United States, 112 F. Supp. 543, 552 (Ct. Cl. 1953))).

[53] Because a tribe is a ward of the nation, dependent upon the protection and good faith of the federal government, doubtful expressions in a treaty with the tribe must be resolved in favor of the weak and defenseless people of the tribe. United States v. Santa Fe Pac. R. Co., 314 U.S. 339, 354 (1941).

[54] *Eyak v. Blank*, 688 F.3d at 622.

[55] Sac & Fox Tribe of Indians of Okla. v. United States, 383 F.2d 991, 998 (Ct. Cl. 1967).

[56] *Id.*

extraction.[57] In order to preserve their subsistence fishing rights, the Villages of Gambell and Stebbins sought an injunction to prevent named defendants Amoco, Arco, Exxon, Shell, Mobil, Texaco, Sohio Alaska Petroleum, and Union Oil Company of California from executing the leases.[58] The district court held there were no aboriginal rights in the OCS, based upon the holding of *Inupiat Community of the Arctic Slope v. United States.*[59] The Ninth Circuit overturned that decision. In doing so, the court of appeals acknowledged the Villages had aboriginal subsistence rights to fish and prevented the execution of the leases in order to prevent depletion of the fishery the tribe relied upon for survival. Specifically, the Ninth Circuit determined that ANCSA does not extinguish aboriginal subsistence rights in the OCS, as it is not part of the State of Alaska,[60] and the federal paramountcy doctrine does not extinguish aboriginal rights but merely subordinates them.[61]

In addition, subsistence rights of all rural Alaskans, native and non-native, are protected within state boundaries. Passed in 1980, the Alaska National Interest Lands Conservation Act (ANILCA) prioritizes hunting and fishing on public lands in the State of Alaska to guarantee subsistence rights to inhabitants of rural areas.[62] "ANILCA creates a board that determines for each village (based on that village's 'customary and traditional' hunting and fishing practices) the number of fish and wildlife the village may take within its assigned hunting area."[63]

D. FEDERAL PARAMOUNTCY DOCTRINE

In this country, rights over ocean resources belong to the supreme sovereign, the United States of America. These rights stand paramount

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[57] People of the Vill. of Gambell v. Hodel, 869 F.2d 1273, 1275 (9th Cir. 1989).

[58] *Id.*

[59] In Inupiat Cmty. of the Arctic Slope v. United States, 548 F. Supp. 182 (D. Alaska 1982), *aff'd on other grounds*, 746 F.2d 570 (9th Cir. 1984), the Natives sought to enjoin similar leases, but also claimed sovereignty over adjacent waters, rejecting recognition of any and all federal and state jurisdiction over the tribe. *See also Gambell v. Hodel*, 869 F.2d at 1275-77.

[60] *Id.* at 1280.

[61] "That aboriginal rights may exist concurrently with a paramount federal interest, without undermining that interest, is clearly expressed in Cnty, of Oneida N.Y. v. Oneida Indian Nation, 470 U.S. at 233-36. It has been settled United States policy that federal sovereignty is 'subject to' the Indians' right of occupancy. *See* Cramer v. United States, 261 U.S. 219, 227 (1923); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 586 (1823)." *Gambell v. Hodel*, 869 F.2d at 1277.

[62] 16 U.S.C.A. § 3101 et seq. (Westlaw 2014). Under ANILCA, Alaska regulates hunting and fishing with federal oversight, providing a preference for subsistence use, which restricts competing uses when natural resources are insufficient. CANBY, *supra* note 13, at 422-23.

[63] PEVAR, *supra* note 15, at 263.

over the rights of all other sovereigns.[64] The Federal Paramountcy Doctrine was created as a result of four cases in which states asserted ownership of petroleum resources found under the sea adjacent to their territories.[65] Under the Constitution, the federal government has paramount rights to the natural resources of, and exerts jurisdiction over, the marginal sea surrounding the country.[66]

In 1947, the United States Supreme Court held that California could not authorize leases for petroleum, gas, and mineral deposits in the Pacific Ocean; the Court rejected California's argument that it possessed title to submerged lands under a three-mile belt of navigable waters, as it was admitted to the Union on equal footing as the original thirteen states.[67] Three years later, the Court held that Louisiana could not assert title to the seabed under a twenty-seven-mile belt into the Gulf of Mexico, although it exercised dominion over that area before admission into the Union.[68] In the very next case, the Supreme Court stated that upon admission into the Union, Texas as a republic ceded both imperium, or sovereignty, and dominium, or ownership, to the United States in order to become the State of Texas.[69] By the time Maine asserted sovereign rights over the seabed, the Supreme Court clearly established the rule: "[T]he Constitution . . . allotted to the federal government jurisdiction over foreign commerce, foreign affairs and national defense and . . . the federal government has paramount rights in the marginal sea."[70] Coastal states today retain sovereignty for a three-mile belt along the coast only because Congress has ceded jurisdiction.[71]

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[64] California is not the owner of the three-mile marginal belt along its coast, and the federal government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil. United States v. California, 332 U.S. 19, 38-39 (1947).

[65] Native Vill. of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090, 1092 (9th Cir. 1998), *cert. denied sub nom.* Native Vill. of Eyak v. Daley, 527 U.S. 1003 (1999).

[66] *Id.* at 1094.

[67] California claimed a three-mile zone from the low water mark extending outward from the coast into the Pacific Ocean. United States v. California, 332 U.S. 19 (1947).

[68] Louisiana claimed a twenty-seven-mile boundary extending from the coast into the Gulf of Mexico. United States v. Louisiana, 339 U.S. 699 (1950).

[69] Texas claimed the entire continental shelf underneath the Gulf of Mexico. United States v. Texas, 339 U.S. 707, 717-20 (1950).

[70] United States v. Maine, 420 U.S. 515, 522-23 (1975) (internal quotation marks omitted). Maine was joined by several states on the Eastern Seaboard to clarify the extent of state jurisdiction. *Id.* at 516.

[71] Following the previous paramountcy rulings, Congress passed the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315, and Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§ 1331-1356, which together provide state jurisdiction from the low water mark to three miles from shore and federal jurisdiction from three to two hundred miles from the coast. Coincidentally, due to

II. LEGAL FRAMEWORK OF THE CURRENT LITIGATION

The natural resources of all submerged lands lying seaward of state waters, from three to 200 miles off the coast, are subject to the exclusive jurisdiction of the United States.[72] Exclusive authority to regulate management of fisheries of an Exclusive Economic Zone (EEZ) for two hundred miles off the coastline was established under the Magnuson Act.[73] Power to regulate fisheries located within the established Exclusive Economic Zone (EEZ) in the Outer Continental Shelf (OCS) is delegated to the Secretary of the Department of Commerce.[74] In 1982, Congress passed the Northern Pacific Halibut Act;[75] thereafter the Secretary regulated fisheries, limiting fishing of both halibut and sablefish (black cod).[76] The Secretary issues Individual Fishing Quota (IFQ) permits to commercial fishers under the authority granted by Congress to promulgate regulations pursuant to these acts.[77] In 1993, commercial fishing was defined as "fishing the resulting catch of which either is, or is intended to be, sold or bartered."[78] Commercial fishers were issued IFQ permits stating a bag limit showing total allowable catch for each fishing vessel.[79] Also sport fishing, the category under which subsistence fishing now fell, was defined as "anything other than commercial fishing."[80] Sport fishing was limited to use of a single line with two hooks for a bag limit of no more than two fish per person per

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the curvature of the Earth, three miles outward is the farthest linear point on the horizon that a person of average height can see while standing on the beach at the low water mark.

[72] 43 U.S.C.A. § 1331(a) (Westlaw 2014). With the Outer Continental Shelf Lands Act of 1953 (OSCLA), 43 U.S.C. 1331 et seq., Congress affirmed the 1945 Truman Proclamation claiming sovereign rights over the resources of the continental shelf adjacent to the United States for the purpose of creating a national underwater buffer zone at the advent of the Cold War.

[73] 16 U.S.C.A. § 1811(a) (Westlaw 2014). The Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1801 et seq., creates a fishery conservation zone. The harvest of sablefish, or black cod, within the EEZ is regulated solely by this act.

[74] 16 U.S.C.A. §§ 1801-1882 (Westlaw 2014).

[75] 16 U.S.C.A. §§ 773-773k (Westlaw 2014).

[76] Native Vill. of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir. 1998), *cert. denied sub nom.* Native Vill. of Eyak v. Daley, 527 U.S. 1003 (1999).

[77] 16 U.S.C.A. § 773 et seq. (Westlaw 2014). In order to implement the Convention between the United States and Canada for the Preservation of Halibut in the North Pacific, a joint International Pacific Halibut Commission was established to recommend regulations to each country.

[78] *See former* 50 C.F.R. § 301.2.

[79] *See former* 50 C.F.R. § 676.10.

[80] *See former* 50 C.F.R. § 301.17. Today, sport fishing means, "all fishing other than commercial fishing and treaty Indian ceremonial and subsistence fishing; and (2) In waters in and off Alaska, all fishing other than commercial fishing and subsistence fishing." 50 C.F.R. § 300.61 (Westlaw 2014).

day during halibut season, running from February 1 to December 31 each year.[81] Commercial fishing for sablefish is divided between 80% deep hook and line gear and 20% trawler gear. The Department of Commerce found no significant sustenance fishing or sports fishing existed at the depth sablefish swim and classified sablefish as a prohibited species.[82]

A. THE BEGINNING OF THE CURRENT CONTROVERSY

This controversy began in 1995 when the Native Village of Eyak sued the operator of the fishing vessel "MISTER BIG" and the Secretary, seeking an injunction against trespassers within their traditional native fishing grounds on the OCS.[83] When the Secretary promulgated regulations for the management of halibut and sablefish fisheries, pursuant to the Halibut Act, Magnuson Act, and Convention between the United States and Canada for the Preservation of Halibut in the North Pacific, the call for conservation necessitated limited fishing in the Gulf of Alaska, to control the "race for fish."[84] The Villages claimed that for over seven thousand years the Chugach had fished and hunted marine animals in areas of the OCS now regulated by the Secretary of Commerce.[85] In addition, the Villages argued that many of their fishermen used their boats to clean up Prince William Sound following the 1989 Exxon Valdez oil spill, which prevented them from qualifying for IFQ permits issued by the Secretary.[86] IFQ permits were issued only to qualified applicants with sufficient documentation to calculate IFQ allocation.[87] Therefore, vessels without catch information for the years

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[81] *See former* 50 C.F.R. § 301.21.

[82] *See* 50 C.F.R. § 679.21 (Westlaw 2014).

[83] Opening Brief of Appellants at 10, Native Vill. of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir. 1998), *cert. denied sub nom.* Native Vill. of Eyak v. Daley, 527 U.S. 1003 (1999), 1998 WL 34103666.

[84] Opening Brief of Appellee at 8, *Eyak v. Trawler Diane Marie*, 154 F.3d 1090, 1997 WL 33550165.

[85] Andrew P. Richards, Case Comment, *Aboriginal Title or the Paramountcy Doctrine?* Johnson v. McIntosh *Flounders in Federal Waters off Alaska in* Native Village of Eyak v. Trawler Diane Marie, Inc., 78 WASH. L. REV. 939, 939 (2003).

[86] Opening Brief of Appellants at 9, *Eyak v. Trawler Diane Marie*, 154 F.3d 1090, 1998 WL 34103666. Further, on "March 24, 1989, the *Exxon Valdez*, a tanker sailing across Prince William Sound from the Trans-Alaska Pipeline System terminus in Valdez, Alaska, and bound for Long Beach, California, struck Bligh Reef fewer than 20 miles from Cordova, spilling almost 11 million gallons of crude." D.S. Pensley, *Existence and Persistence: Preserving Subsistence in Cordova, Alaska*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10366, 10368 (Apr. 2012).

[87] IFQ Permits were initially allocated following October 18, 1994, to qualified persons. Qualified persons needed to submit documentation showing harvest of halibut or sablefish with fixed gear from a vessel during the qualifying years of 1988, 1989, and 1990. Applicants with insufficient

1988, 1989, and 1990 were not qualified to receive IFQ permits to commercially fish halibut or sablefish.

Shortly after filing, the Secretary moved for summary judgment arguing, inter alia, that 1) the Villages' claims conflicted with federal paramountcy in the OCS, 2) no treaty or statute recognized an exclusive right to the OCS, and 3) the statute of limitations for claims barred suit. On June 17, 1997, the district court granted summary judgment and dismissed the Villages' claims, holding that exclusive rights to OCS resources cannot be based on aboriginal title alone and that the federal paramountcy doctrine barred claims of exclusive aboriginal right.[88]

B. *NATIVE VILLAGE OF EYAK V. TRAWLER DIANE MARIE, INC.*, 154 F.3D 1090 (9TH CIR. 1998).

The Villages appealed, arguing that only Congress, with its exclusive plenary power over Indian affairs, not the executive or the judiciary, could interfere with aboriginal rights. The academic community supported the Villages' argument, pointing out that fee simple title is unlike aboriginal title: the United States asserts dominion and retains the fee, which includes the right to alienate lands held in aboriginal title. However, federal dominion remains subject to the use and occupancy by the tribes.[89] Further, aboriginal title is not precluded by federal paramountcy, but relies upon federal sovereignty in order to exist.[90] The Villages relied upon Ninth Circuit precedent that aboriginal rights may exist concurrently with paramount federal interests, without undermining those interests, because it is "settled United States policy that federal sovereignty is 'subject to' the Indians' right of occupancy."[91]

On September 9, 1998, a panel of the Ninth Circuit released the *Eyak v. Trawler Diane Marie* decision, which held that any claims of

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information were allowed one opportunity to provide corroborating information within ninety days of notification. 50 C.F.R. 679.40 (Westlaw 2014).

[88] Opening Brief of Appellee at 5, *Eyak v. Trawler Diane Marie*, 154 F.3d, 1997 WL 33550165.

[89] "While the Native Villages retain their age-old right to hunt and fish in the waters that have sustained their people and their culture from time immemorial, the United States has broad authority to manage and even extinguish these tribal rights." Brief of Amici Curiae Indian Law Academics in Support of Plaintiffs-Appellants at 3, *Eyak v. Trawler Diane Marie*, 154 F.3d 1090, 2003 WL 23650258.

[90] Reply Brief of Appellants at 7, *Eyak v. Trawler Diane Marie*, 154 F.3d 1090, 1998 WL 34103665.

[91] People of the Vill. of Gambell v. Hodel, 869 F.2d 1273, 1277 (9th Cir. 1989) (quoting Cramer v. United States, 261 U.S. 219, 227 (1923), *superseded by statute*, Taylor Grazing Act of 1934, Pub. L. No. 73-482. 48 Stat. 1271, *as recognized in* United States v. Dann, 865 F.2d 1528 (9th Cir. 1989)).

aboriginal title asserting exclusive hunting and fishing rights to the OCS would automatically be barred by the federal paramountcy doctrine.[92] The court likened the Villages' claim to those of the states in the federal paramountcy cases.[93] As separate sovereigns, the states relinquished interests in the sea upon statehood to the federal government, allotting the United States jurisdiction over the use, disposition, management, and control of all property lying seaward of the low water mark.[94] "Even though Indian tribes existed and governed North America before the United States came into existence, the same is true of the original states."[95]

The Villages argued that federal sovereignty is subject to Indian right of occupancy until unequivocally extinguished by Congress.[96] However, the court agreed with the Secretary's argument that any exclusive claim of right or title, even aboriginal title, by any sovereign other than the United States, including an Indian tribe, is repugnant to the federal paramountcy doctrine.[97] The court reasoned that the Villages' claim for exclusive use of the OCS included predominant power over officials of the executive branch, to which Congress delegated the power to regulate fisheries in the OCS.[98] "The Native Villages' claim to complete control over the OCS is contrary to these [paramount] national interests and inconsistent with their position as a subordinate entity within our constitutional scheme."[99] The Supreme Court denied the Villages' petition for writ of certiorari on June 14, 1999.[100] Held afterward, the federal paramountcy doctrine barred claims of aboriginal title to *exclusive rights* to use and occupancy of the OCS. Thus, the Villages tried to assert *non-exclusive rights*.

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[92] *Eyak v. Trawler Diane Marie*, 154 F.3d 1090 (9th Cir. 1998).

[93] The four federal paramountcy cases cited by the Court are United States v. California, 332 U.S. 19 (1947); United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950); and United States v. Maine, 420 U.S. 515 (1975).

[94] *Eyak v. Trawler Diane Marie*, 154 F.3d at 1094.

[95] *Id.*

[96] *Id.* at 1095.

[97] *Id.*

[98] *Id.* at 1096.

[99] "The Constitution allotted to the federal government jurisdiction over foreign commerce, foreign affairs, and national defense so that as attributes of these external sovereign powers, it has paramount rights in the contested areas of the sea." *Id.* at 1096-97.

[100] Native Vill. of Eyak v. Daley, 527 U.S. 1003 (1999).

C. *EYAK NATIVE VILLAGE V. DALEY*, 375 F.3D 1218 (9TH CIR. 2004) (EN BANC).

On November 12, 1998, the Villages filed the current suit, asserting non-exclusive aboriginal hunting and fishing rights in the OCS while challenging the Secretary's 1993 halibut and sablefish regulations for IFQ permits.[101] The Villages prayed for an order requiring the Secretary to recognize non-exclusive rights arising under aboriginal title by promulgating a new regulation issuing each native village an IFQ permit.[102] The United States District Court for the District of Alaska promptly granted the Secretary's motion for summary judgment; the court dismissed the Villages' claims, holding that the federal paramountcy doctrine barred claims to aboriginal title as a matter of law.[103] The Ninth Circuit, sitting en banc, vacated the district court's judgment and remanded the case for an initial determination of what aboriginal rights the Villages possessed.[104] Until this point, the Villages had not been allowed to bring forth evidence in support of their claims to aboriginal title.

In 2003, while the case was pending, the Secretary relaxed the regulations for subsistence fishing, but not commercial fishing.[105] The Secretary promulgated new regulations for Alaska Natives and other subsistence fishermen, increasing the bag limit to twenty fish per day for halibut from a single line with thirty hooks throughout a yearlong season.[106] In light of the new regulations, the Villages argued for commercial fishing rights, contending that Chugach fishers should obtain commercial IFQ permits based upon aboriginal title, which included both

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[101] Native Vill. of Eyak v. Locke, No. 3:98-cv-0365-HRH, at 3 (D. Alaska August 7, 2009).

[102] Oral Argument at 19:10, Native Vill. of Eyak v. Blank, 688 F.3d 619 (9th Cir. 2012) (en banc) (per curiam), *cert. denied sub nom.* Native Vill. of Eyak v. Pritzker, 134 S. Ct. 51 (2013). Responding to a question asked by Judge Pregerson, both the Villages and the Secretary stated the specific number of IFQ permits owned by a Chugach native is unknown, but the number is "maybe a handful." *Id.* at 21:25, 40:40.

[103] The district court summarily dismissed Count I of the plaintiffs' complaint, which alleged that the adverse impact of the regulations violated non-exclusive aboriginal rights to hunt, fish, and exploit the natural resources of the OCS. The courts have ignored Count II, which alleged that the regulations violated the Indian Non-Intercourse Act, 25 U.S.C. § 177, because those suits cannot be brought against a public official. Likewise, the district court summarily dismissed the defendant's contentions that (1) the statute of limitations to challenge the regulations had passed and (2) aboriginal rights were extinguished by the Russians. *Eyak v. Locke*, at 3-4.

[104] *Eyak v. Daley*, 375 F.3d at 1219.

[105] Pacific Halibut Fisheries: Subsistence Fishing, 68 Fed. Reg. 18145-01 (April 15, 2003) (codified at 50 C.F.R. pts. 300, 600, and 679).

[106] *See former* 50 C.F.R. 301.21.

commercial and subsistence rights.[107] The limited number of IFQ permits were issued only to vessels that actually caught sablefish or halibut in the OCS during the years 1988-1991, during which the Exxon Valdez oil spill annihilated the fisheries.[108] IFQ permit requirements continue to place the Villages at an extreme disadvantage compared to other commercial fishers within their ancestral fishing waters on the OCS.

D. *NATIVE VILLAGE OF EYAK V. LOCKE*, NO. 3:98-CV-0365-HRH (D. ALASKA AUGUST 7, 2009).

In 2008, four years after the remand order, the Villages finally had their proverbial day in court with a weeklong bench trial. Senior District Judge H. Russel Holland went beyond the remand order[109] and decided that the federal paramountcy doctrine would still trump non-exclusive claims.[110] He concluded as follows, based on his findings of fact:

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[107] Both parties agreed it is possible for Chugach fishers to obtain an IFQ permit, but as Judge Pregerson noted, the Chugach would need the money to purchase a permit on the market. Oral Argument at 41:30, *Eyak v. Blank*. The limited number of IFQ permits issued makes each permit fairly expensive. As counsel for the Secretary, David C. Shilton, stated, "[The Chugach] can commercially fish now on the same basis as everyone else." Oral Argument at 41:50, *Id.* After purchasing an IFQ permit, expenses would continue to mount because the IFQ standard prices and fee percentages would apply as revised each year. For the current prices, *see* Fisheries of the Exclusive Economic Zone Off Alaska: North Pacific Halibut and Sablefish Individual Fishing Quota Cost Recovery Programs, 78 Fed. Reg. 72869 (Dec. 4, 2013) *available at* http://federalregister.gov/a/2013-29023.

[108] Trial Brief of Plantiff at 1, *Eyak v. Locke*, at 26-27.

[109] The remand order instructed the district court to "assume that the villages' aboriginal rights, if any, have not been abrogated by the federal paramountcy doctrine or other federal law." *Eyak v. Daley*, 375 F.3d at 1219. Judge Holland stated in his opinion that his "additional conclusions of law take up and address legal matters that remain pending in this district court and go beyond the strict limits placed upon the district court by the court of appeals . . . because the mandate of the Ninth Circuit Court 'vacated' this court's 'judgment.' Without a new judgment, proceedings in this court will not be concluded as to all issues for purposes of another appeal." *Eyak v. Locke*, at 25-26.

[110] *Id.* at 24. During oral argument, Secretary's counsel was questioned about Judge Holland's conclusions of law, because the scope of the remand was limited only to the question of what rights may exist under aboriginal title. Judge Hawkins stated, "It was Judge Holland's view prior to the en banc proceedings that irrespective of historical pre-contact use that federal paramountcy and the application of these statutes we've been talking about meant that the tribes could never establish aboriginal rights." Oral Argument at 23:56, 51:08, *Eyak v. Blank*. Counsel was also asked by Judges Pregerson and Kleinfeld whether the government indeed wrote the conclusions of law for Judge Holland, to which counsel stated he did not. Oral Argument at 53:00, *Id.* However, the Villages did not challenge the district court's findings of fact; those findings were adopted by the court of appeals, which then engaged in de novo application of the law to those facts. *Eyak v. Blank*, 688 F.3d at 622.

> [P]laintiffs' members hunted and fished portions of the OCS at and before contact with Europeans, but that activity did not give rise to a nonexclusive, enforceable legal right to hunt and fish the OCS different from or greater than the rights of all United States citizens.[111]

Judge Holland went on to conclude (1) the Villages' aboriginal rights did not survive upon Alaska's acquisition from Russia; (2) their claims must be preempted to prevent the regulations from becoming fatally arbitrary; (3) there are no rights based on custom and prescription; and (4) Indian Non-Intercourse Act claims cannot be brought against officials of the U.S. Government.[112] Judge Holland concluded again that non-exclusive aboriginal hunting and fishing rights in the OCS are automatically preempted by the federal paramountcy doctrine.[113]

E. *NATIVE VILLAGE OF EYAK V. BLANK*, 688 F.3D 619 (9TH CIR. 2012) (EN BANC) (PER CURIAM).

When the case returned to the Ninth Circuit's en banc panel, the Villages' claims of aboriginal title were denied by a six to five per curiam decision issued July 31, 2012.[114] The majority affirmed the ruling of the district court that the Villages had failed to establish entitlement to non-exclusive aboriginal hunting and fishing rights to claimed areas of the OCS.[115] After describing the case and accepting the unchallenged findings of fact,[116] the opinion reviewed the Indian claims law regarding aboriginal title. Under the *Sac and Fox* test for aboriginal title, the Villages were required to prove "'actual, exclusive, and continuous use and occupancy for a long time' of the claimed area . . . measured 'in accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers.'"[117] The majority decided that although the Villages satisfied the continuous use and occupancy requirements,[118] they "failed to show by a preponderance

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[111] *Eyak v. Locke*, at 25.

[112] *Id.* at 26-27.

[113] *Id.* at 27.

[114] *Eyak v. Blank*, 688 F.3d 619 (2012).

[115] *Id.* at 623.

[116] The majority noted the dissent went on a "fishing expedition through the trial record," which is an inappropriate role for an appellate body when the trial court's factual findings are not challenged. *Id.* at 622.

[117] *Id.* at 626 (quoting Sac & Fox Tribe of Indians of Okla. v. United States, 383 F.2d 991, 998 (Ct. Cl. 1967)).

[118] *Eyak v. Blank*, 688 F.3d at 621.

of evidence that they exercised exclusive control, collectively or individually, over the areas of the OCS they now claim."[119]

In deciding the Villages did not prove the exclusivity prong of the test, the majority expanded the test for exclusivity.[120] Formerly, exclusivity was met upon a showing that the tribe asserting aboriginal title was the dominant force in the region.[121] "Exclusivity is established when a tribe or a group shows that it used and occupied the land to the *exclusion* of other Indian groups."[122] The majority relied upon the phrase "the district court found that other tribes fished and hunted on the periphery of the Villages' claimed territory."[123] However, permissive use of a region's resources, unlike abandonment, should not defeat exclusivity.[124]

The majority reasoned that the low population of the Villages made them incapable of dominating or controlling any area of the OCS.[125] The evidence of occasional unity when battling other tribes and "recognition by the Russians as potentially formidable foes" was not enough to establish exclusive control.[126] The majority further stated the "tribe or group must exercise full dominion and control over the area, such that it 'possesses the right to expel intruders,' as well as the power to do so."[127] According to the majority, population density becomes the determinative factor of the exclusivity prong where there is no evidence of full dominion and control.[128] Thus, the Villages were never numerous enough to be entitled to rights under aboriginal title.

Relying upon the finding of the district court that on a seasonal basis "other tribes fished and hunted on the periphery of the Villages' claimed territory,"[129] the majority concluded, by applying the common

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[119] *Id.* at 622.

[120] *Id.* at 623 ("Use of the OCS alone isn't sufficient to prove exclusive possession.").

[121] Absent evidence contradicting a tribe's domination, the issue turns upon "whether they availed themselves of their exclusive position." United States v. Seminole Indians, 180 Ct. Cl. 375, 383 (Ct. Cl. 1967).

[122] *Eyak v. Blank*, 688 F.3d at 623 (citing United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1394 (Ct. Cl. 1975)).

[123] *Id.* at 624.

[124] *See* Wichita Indian Tribe v. United States, 696 F.2d 1378 (Fed. Cir. 1983) (holding presence of other Indians in a region is not abandonment sufficient to defeat aboriginal title claim).

[125] *Eyak v. Blank*, 688 F.3d at 624-25.

[126] *Id.* at 625.

[127] *Id.* at 623 (quoting Osage Nation of Indians v. United States, 19 Ind. Cl. Comm. 447, 489 (Ind. Cl. Comm. 1968).

[128] "The Villages' low population, which was estimated to have been between 400 and 1500, suggests that the Villages were incapable of controlling any part of the OCS." *Eyak v. Blank*, 688 F.3d at 624-25.

[129] *Id.* at 623.

usage of the term "peripheral vision," that other groups had exploited some claimed areas within the OCS, negating the exclusivity prong.[130] Further, the majority held that the low population of the Villages made them incapable of controlling the claimed areas because they would not be able to expel an invasion, especially since "the Villages kept all, including each other, at arm's length."[131] Having found that the Villages failed to establish aboriginal title, the majority avoided the need to decide whether aboriginal title would conflict with the federal paramountcy doctrine.[132] The case is now viewed as adding a new prerequisite for establishing aboriginal title—that the tribe must somehow prove the capability of excluding hypothetical intruders—because a "lack of evidence other tribes hunting and fishing in the claimed area is not enough to establish exclusive control," anymore.[133] Accordingly, the majority decision adds a new element that will be difficult to meet for tribes claiming aboriginal title.[134]

E. DISSENTING OPINION

Judge Fletcher's dissent explains the flawed analysis of the majority and incorrect scrutiny applied by the district court. The dissent first examined the *Sac and Fox* test, determining the continuous use and occupancy prong was easily met.[135] The dissent then reviewed the caselaw stating what a tribe must prove to meet the exclusivity prong, and concluded that the Villages need only show they were the sole tribe continuously using the claimed area.[136] The dissent next reviewed the district court's factual findings and the majority's fundamental mistakes. The first fundamental mistake was that the majority used two cases in which there was evidence other tribes used territory claimed by the tribe

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[130] *Id.* at 626.

[131] *Id.* at 623.

[132] *Id.*

[133] Danielle Dellerson, *Alaskan Natives' Aboriginal Rights Bid Fails; Villages' Hunting, Fishing Use Not 'Exclusive,'* U.S.L.W, Aug. 7, 2012.

[134] As Judge Pregerson asked, "Who is in a better position to prove non-exclusivity, the government or the tribes?" Oral Argument at 33:40, *Eyak v. Blank.* Nevertheless, the entire evidentiary burden falls upon the tribe asserting aboriginal title rights.

[135] *Eyak v. Blank*, 688 F.3d at 626-27 (Fletcher, J., dissenting).

[136] "In sum, the *Sac & Fox* test requires that the Chugach show that they used and occupied the claimed area exclusively. It does not require that the Chugach show that they could have repelled hypothetical intruders from the area. In the absence of evidence of use by others, the case law requires only that the Chugach show that they were the only group that used and occupied the area." *Id.* at 629-31 (Fletcher, J., dissenting).

asserting aboriginal title.[137] The second fundamental mistake was the majority's use of the word "periphery" to mean within the area instead of at the outer "edge" or "boundary" of an area.[138]

The dissent in *Eyak v. Blank* went on to consider the federal paramountcy controversy for which the Ninth Circuit took up the case. Although in *Eyak v. Trawler Diane Marie*, the Ninth Circuit held that federal paramountcy bars exclusive fishing rights arising under aboriginal title, *Gambell v. Hodel* held that aboriginal rights may exist concurrently with a paramount federal interest, without undermining that interest.[139] The dissent in *Eyak v. Blank* "would reaffirm our holding in *Gambell* [*v. Hodel*] that aboriginal rights may exist on the OCS without undermining the paramount federal interest."[140]

The dissent would have remanded the case, instructing the district court to determine which parts of the claimed areas of the OCS the Villages had occupied exclusively. The dissent explained that, the district court had not understood that, in the absence of evidence of use by other groups within the claimed area, the Chugach could establish exclusivity simply by showing their own use and occupancy where no other tribe's use and occupancy existed. "The Chugach did not need to show that they were able to exclude hypothetical intruders."[141] Congruently, the dissent would have instructed the district court to make findings considering the Chugach as a whole, rather than judging each village separately.[142] The dissent would have allowed the district court discretion to remedy the Secretary's regulations.[143]

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[137] The dissent quoted *United States v. Pueblo of San Ildefonso*: "*True ownership of land is called in question where the historical record of the region indicates that it was inhabited, controlled or wandered over by many tribes and groups.*" United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1394 (Ct. Cl. 1975), *quoted in Eyak v. Blank*, 688 F.3d at 631 (Fletcher, J., dissenting). The dissent also cited *Osage Nation of Indians v. United States*, noting that in that case "there was evidence of use by other tribes within part of the claimed territory. In that circumstance, the Osage Nation was required to show it had the ability to exclude those tribes from that part of the territory." *Eyak v. Blank*, 688 F.3d at 631–32 (Fletcher, J., dissenting) (describing Osage Nation of Indians v. United States, 19 Ind. Cl. Comm. 447, 489–90 (Ind. Cl. Comm. 1968). Here, there was no such evidence, except for parts of the periphery of the claimed area.

[138] *Eyak v. Blank*, 688 F.3d at 633 (Fletcher, J., dissenting).

[139] *Compare* Native Vill. of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir. 1998), *cert. denied sub nom.* Native Vill. of Eyak v. Daley, 527 U.S. 1003 (1999), *with* People of the Vill. of Gambell v. Hodel, 869 F.2d 1273 (9th Cir. 1989).

[140] *Eyak v. Blank*, 688 F.3d at 636 (Fletcher, J., dissenting).

[141] *Id.* at 636-37 (Fletcher, J., dissenting).

[142] *Id.* at 637.

[143] *Id.*

III. ARGUMENT

Instead of being at odds with federal paramountcy, aboriginal title must necessarily be protected by the ultimate sovereignty of the United States in order for tribes to survive. As domestic dependent nations, tribes require the protection of federal law in order to continue their existence and retain any sovereign rights. The majority's conclusions of law incorrectly require a tribe to prove a nearly impossible condition in order to establish aboriginal title. The majority should have taken a liberal approach and viewed the Villages' position historically, rather than against the present situational backdrop. The dispute over the word "periphery" evidenced the case's contentiousness. The Ninth Circuit should have remanded the case for the district court to determine the extent of territory over which the Villages should be entitled to exert non-exclusive fishing rights under aboriginal title. Further, these Villages should have been guaranteed, at the very least, non-exclusive use of the natural resources of their ancestral fishing grounds claimed via aboriginal title, because *no other tribe* claims their waters. The Ninth Circuit should have restated the United States' commitment to preserving rights of indigenous peoples. Further, commercial rights arising under aboriginal title necessitate the Secretary promulgate regulations taking tribal sovereignty into account.

A. THE DISTRICT COURT'S FINDINGS OF FACT SHOW ABORIGINAL TITLE EXISTS TO PORTIONS OF THE CLAIMED AREA UNDER CURRENT LAW; HOWEVER THE MAJORITY OPINION INCORRECTLY ADDED AN ADDITIONAL REQUIREMENT TO BE PROVEN

On appeal, the Villages did not challenge the factual findings of the district court.[144] Instead, they argued that even based on the facts as found by Judge Holland, they still had proven aboriginal title exists under applicable precedent.[145] The majority failed to correctly apply the established legal standards used to determine aboriginal rights. Instead, the majority affirmed the decision of the district court and, in doing so, literally argued semantics with the dissent. Accordingly, tribes claiming aboriginal title now must prove not just exclusive possession, but also the ability to exclude hypothetical intruders, although such evidence seldom exists. The majority refused to follow the established principle that if

[144] *Id.* at 622 (majority opinion).
[145] *Id.*

there is no evidence of use or occupancy by any other group, a tribe need only show it was the only group to use or occupy an area.[146]

1. *The Common Law of Aboriginal Title that Developed in Order to Place Indian Tribes in a Unique Situation Should Not Be Judged According to Current Social Standards*

The Chugach proved under current law that aboriginal title exists at the very least for parts of the claimed areas of the OCS. The *Eyak v. Blank* court easily determined that intermittent use of the OCS was "consistent with the seasonal nature of the ancestors' way of life as marine hunters and fisherman."[147] However, the majority and dissent perceived Chugach culture differently when it comes to exclusivity.[148] Both cited the *Sac and Fox* standard to measure use and occupancy "in accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers."[149]

The majority portrayed the Villages as separate and independent entities, historically isolated to discrete areas of the OCS, who rarely cooperated and did not use hunting or fishing areas collectively.[150] "The factual findings do not support a finding of collective use by the *entire*

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[146] Instead, the majority quoted the district court's finding that "[n]one of the ancestral villages was in a position to occupy or exercise exclusive control over any part of the OCS on a sustained basis" and adopted a prevailing land-use presumption: "Areas that are continuously traversed by other tribes without permission of the claiming tribes cannot be deemed exclusive." *Id.* at 624 (*citing* Wichita Indian Tribe v. United States, 696 F.2d 1378, 1385 (Fed. Cir. 1983)). The majority then used the Villages' low population density to suggest the claimed areas of the OCS would be beyond the Villages' capability to control and concluded that the Villages failed to meet their burden to show exclusivity, because "[t]here is not enough evidence in the record to persuade us that the Villages used and occupied the claimed areas to the exclusion of other tribes." *Eyak v. Blank.* 688 F.3d at 626. There was no evidence that other tribes continuously traversed the area, merely that other tribes sporadically used the periphery. As stated by the dissent, "Evidence of use and occupancy by other groups 'must be specific' to defeat a claim of exclusivity. Evidence of use by others at the periphery of the claimed territory does not defeat a tribe's exclusivity within the claimed area." *Id.* at 628 (Fletcher, J., dissenting) (citations omitted).

[147] *Id.* at 623 (majority opinion).

[148] Judge Kleinfeld, who joined the majority, asked whether the only way to find aboriginal title was to treat the Chugach as "analogous for Europe: if we treated the Danes, the English, the Germans, and the Swedes as all one people." Oral Argument at 4:20, *Eyak v. Blank.* Perhaps a more appropriate analogy, considering that the Chugach share a common history, language, and culture, would be to consider the Neapolitans, Romans, Venetians, and Florentians as one people: the Italians. Later, Judge Kleinfeld erroneously concluded "the Chugach [are] a broad designation of a people, like the European people." Oral Argument at 56:50, *Eyak v. Blank.*

[149] *Id.* at 622 (majority opinion), 627 (Fletcher, J., dissenting) (both citing *Sac & Fox*, 383 F.2d at 998).

[150] *Id.* at 625-26 (majority opinion).

group of the *entire* area."[151] The district court found "clear evidence that at and before contact, villagers could be expected to poach or steal or raid as often as they sought to visit in a friendly fashion or trade."[152] Accepting the district court's findings, the majority did not apply then-established law. Under established law, in the absence of evidence of use of the claimed area by other tribes, a tribe could establish aboriginal title by showing its own use and occupancy.[153] The majority here required that the Villages to prove not just the tribe's exclusive use, but also the tribe's ability to exclude others.

In contrast, the dissent viewed the Chugach as a distinct cultural group consisting of one tribe, and the dissent thoroughly explained the proper application of the *Sac and Fox* standard to the district court's factual findings.[154] The dissent pointed out that there was no finding that another group used or occupied some area claimed by the Chugach, although the district court found there was shared use on the periphery, not within.[155] "[G]eographic features at the periphery of Chugach territory had place names in more than one native language, but [those] features within Chugach territory had place names in only the Chugach language."[156] As explained by the dissent, aboriginal title is "called into question only" when other groups wandered, inhabited, or controlled the claimed area, not determined automatically by such use.[157]

First, the majority opinion, in passing cultural judgment upon the Villages' use of the OCS, was anthropologically unsound.[158] Each

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[151] *Id.* at 626 (emphasis added).

[152] "[T]here were significant rivalries amongst the Chugach villages themselves. They poached on what were recognized to be the territories of other villages, they raided one another to steal women or carry on feuds." Native Vill. of Eyak v. Locke, No. 3:98-cv-0365-HRH, at 19 (D. Alaska August 7, 2009).

[153] "The district court found no use or occupancy by others in Chugach territory. Because the Chugach claim aboriginal rights only in areas where there is no evidence of use by others, it is sufficient to show exclusivity that they were the only tribe to use and occupy these areas." *Eyak v. Blank*, 688 F.3d at 632 (Fletcher, J., dissenting).

[154] *Id.* at 628-29.

[155] *Id.* at 630.

[156] *Id.*

[157] *Id.* at 631 (citing United States v. Santa Fe Pac. R. Co., 314 U.S. 339, 345 (1941).

[158] For an interesting anthropological prospective on the evidence presented during the trial phase of this case, see Rita A. Miraglia, *Did I Hear That Right? One Anthropologist's Reaction to Colleague's Testimony in a Court Case Involving Alaska Native Aboriginal Hunting and Fishing Rights on the Outer Continental Shelf*, 22 INDIGENOUS POL'Y J., no. 4, Spring 2012, *available at* http://indigenouspolicy.org/index.php/ipj/article/view/49 (analyzing defense challenge to Chugach pre-contact cultural identity as a single tribe and attacking evidence used to support assertion that each village was independent because there was no unified Chugach). The article concluded, "My problem with some of the testimony presented for the government's case is that unsupported opinions were presented as fact. In some cases, things that can not be known were presented as being

Chugach village operated independently. There was no overarching authority binding the Chugach together. There are still no roads connecting the Villages. Trade across Prince William Sound coincided with raids. Raids conducted to acquire property and women were an accepted custom of the villagers.[159] Visits between the Villages and from outsiders were seldom. There is no evidence the Villages ever attempted to obliterate one another; they merely established violent rivalries in an environment where survival necessitated such competition. The Villages to the present day maintain a common language, customs, diet, and religion. There are common words for locations of the OCS for the Chugach that no other tribe identifies. The mere fact that the collective use was competitive, rather than cooperative, does not negate that the use was exclusive to the Villages. Moreover, because that competitive use was exclusive to the Villages, and other tribes were limited to merely the periphery, some rights to continued use should exist under aboriginal title. This competitive use was the Chugach way of life.[160]

Second, the Villages' population density should have weighed in favor of aboriginal title in this case. The shores of the Gulf of Alaska encompass a hostile environment limiting population growth. The resources found there are limited. To this day, Alaska remains one of the least densely populated states in the United States. To factor in a limited population and assume that population could not fend off hypothetical invaders is a logical stretch. Rather than imagine the ability to exclude in theory, judges should have observed the fact that the fierce Chugach were not invaded and in fact did not need to exclude other tribes. There were no armies conquering the area; surrounding tribes had similar

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known with absolute certainty." *Id.* at 16. *Contra* Christopher B. Wooley, *Response to Rita Miraglia's Did I Hear That Right? One Anthropologist's Reaction to Colleague's Testimony in a Court Case Involving Alaska Native Aboriginal Hunting and Fishing Rights on the Outer Continental Shelf*, 22 INDIGENOUS POL'Y J., no. 4, Spring 2012, *available at* indigenouspolicy.org/index.php/ipj/article/view/50/88 (arguing pan-Chugach regional identity is recent and did not exist before contact).

[159] "Among the complex societies of the north Pacific rim, women were important war trophies. For the Chugach of Prince William Sound, warfare was formalized but enemy men were killed and women and children were captured. There is a great deal of evidence for stealing women on the Aleut-Alutiiq frontier before the arrival of Russian hunters. The early explorers witnessed some of the last cases of this in the context of war raids." RICHARD J. CACHON & DAVID H. DYE, THE TAKING AND DISPLAYING OF HUMAN BODY PARTS AS TROPHIES BY AMERINDIANS 36 (2007).

[160] Constant tension competing for the limited resources available in a harsh climate created a culture accepting of certain types of violence, which was both fascinating and shocking to Western anthropologists in the twentieth century. *See generally* E. Adamson Hoebel, *Law-Ways of the Primative Eskimos*, 31 J. CRIM. L. & CRIMINOLOGY 663 (1941); KAJ BIRKET-SMITH, THE CHUGACH ESKIMO (1953); WEDNELL H. OSWALT, ALASKAN ESKIMOS (1967).

population densities and were raided often by the Chugach. It is outrageous that low population density was the determinative factor in deciding the Villages could not have asserted exclusive control and could not defend the area.[161] There is no evidence any other tribe had encroached upon their territory, except at the periphery. The Villages continued to control the area after the Russians landed. The Russians traded for furs, rather than conquer these Villages. They continued limited control under the United States until commercial enterprises began exploiting the natural resources. The Villages could not stop the massive American encroachment, but they should now be allowed to profit from their ancestral fishing grounds because of aboriginal title.

Third, the fact that other groups did not venture past the boundaries of the claimed area proves exclusive use. The largest tribe in proximity was the Tlingit, who respected the Chugach territory enough to limit themselves to intrusion only upon the periphery. The respected boundaries evidence the exclusive use of the OCS by the Villages. As wards of Congress, tribes must receive protection of their recognizable hunting and fishing grounds with aboriginal title. Thus, until explicit extinguishment of aboriginal title, the Ninth Circuit should protect claims of aboriginal title within the boundaries of our nation and allow non-exclusive use to continue where respected tribal boundaries were so acknowledged.

2. *The Linguistic Dispute Between the Majority and Dissent Evidences the Semantic Nature of the Denial of Clearly Established Aboriginal Title*

The majority and the dissent argued over the use of the word "periphery" within the district court's findings.[162] According to the majority, "periphery" must mean inside the territory, simply because the most common modern usage of the word is in the phrase "peripheral vision."[163] This reading did not take into account that only some of the territory at the boundary claimed by the Chugach was used by other

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[161] Villages' counsel cited United States v. Seminole Indians, 180 Ct. Cl. 375 (Ct. Cl. 1967), in which the government argued population thinness defeated exclusivity, but the court found that "2500 people, as many as are probably in a shopping mall on any given day, held aboriginal title to the entire state of Florida." Oral Argument at 57:45, *Eyak v. Blank.*

[162] *Eyak v. Blank*, 688 F.3d at 624; *id.* at 631-33 (Fletcher, J., dissenting).

[163] "What's in your peripheral vision you *can* see, not what you can't; the periphery is something at the limits of, but within, your vision." *Id.* at 624 (majority opinion) (citing *Webster's New International Dictionary* 1822 (2d ed. 1939). The majority stated, "The dissent's interpretation of 'periphery' was outdated even in the 1930s . . . as a 'surrounding space; the area lying beyond the boundaries of a thing. *Now Rare.*'). *Id.*

tribes, while the vast majority of Chugach ancestral waters was continuously used and occupied solely by the Villages. In its decision, the majority imputed the occurrences at the borders into the whole of the claimed territory.

Interpreting the common usage with "peripheral vision" and applying such an interpretation to judicial findings in such a contested case should not be the practice of a federal court of appeals. Peripheral vision is not the same concept as periphery. Periphery was used in this context to explain the location of trespassers at the boundary of claimed territory. Further, examining even the common usage of the word as understood by the majority, would confirm the existence of aboriginal title. Although objects within one's peripheral vision fall within the line of sight, those objects still exist only at the boundaries of vision. Objects seen using peripheral vision are unclear, blurry, and remain at the edge of sight. These objects do not lie clearly within one's line of sight, or throughout the field of vision, but exist in a blur at edge of observation. Thus, even if the Villages could not prove exclusive control at the edge of the claimed areas of the OCS, they did prove exclusive control of the vast interior. Even using the majority's interpretation of the word periphery, aboriginal title exists for all of the areas inside that boundary of the claimed territory.

As the dissent argued, the use of "periphery" for aboriginal title claims denotes the edge or boundary of a territory.[164] "The cases clearly recognize a distinction between shared use on the periphery of a claimed territory and shared use inside the territory. . . . The majority reads 'periphery' to mean not only the edge, but also the interior, of a territory."[165] Accordingly, the dissent "would reverse and remand with instructions to the district court to find precisely where within the claimed area the Chugach have such rights [to aboriginal title]."[166] Unmentioned by the dissent, the district court's findings did not fully explain the nature of the concurrent use at the periphery or the relationships between the Chugach and those other tribes.[167] Tribes

[164] *Id.* at 633 (Fletcher, J., dissenting).

[165] *Id.* (citing Caddo Tribe v. United States, 35 Ind. Cl. Comm. 321, 360-62 (1975); Hualapai Tribe v. United States, 18 Ind. Cl. Comm. 382, 395 (1967); Zuni Tribe v. United States, 12 Cl. Ct. 607, 608 n.3 (Ct. Cl. 1975)).

[166] *Eyak v. Blank*, 688 F.3d at 637 (Fletcher, J., dissenting).

[167] Judge Holland wrote that travel was too long and dangerous throughout such a large area that, "[s]uch 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." Native Vill. of Eyak v. Locke, No. 3:98-cv-0365-HRH, at 20-21 (D. Alaska August 7, 2009); *Eyak v. Blank*, 688 F.3d at 625 (majority opinion).

continue to retain aboriginal title to territories where joint and amicable use and occupancy is found.[168] Because the district court found other tribes used only parts of the periphery of the claimed territory, the Villages should be able to assert non-exclusive rights derived from aboriginal title to the vast amount of the OCS on the interior of the claims.

The periphery of the claimed territory here should constitute the limit of the non-exclusive right to fish. The Ninth Circuit should have held that, based on the district court's factual findings, the Villages had non-exclusive rights to the interior of the claimed territory, although not at the periphery in those locations where other tribes also fished. The periphery would denote the extent of the Villages' exclusive use.[169] Perhaps aboriginal title should extend to that periphery, which is after all, "the outward bounds of [the claimed area] as distinguished from its internal regions or center; encompassing limits; confines; borderland."[170]

B. THE DISSENT CORRECTLY STATED THE CURRENT LAW REGARDING FEDERAL PARAMOUNTCY OVER ABORIGINAL TITLE TO FISHING RIGHTS IN FEDERAL WATERS, A QUESTION ON WHICH THE DISTRICT COURT RULED INCORRECTLY

Aboriginal title is not pre-empted by the paramountcy doctrine, at least in regard to natural resources tribes are dependent upon for survival.[171] The Secretary's regulation of the fishing industry maintains the existence of a vital natural resource. However, the restrictions placed upon IFQ permits deny the Villages commercial access to their ancestral fishing grounds. The Secretary was incorrect in assuming that without an explicit acknowledgement of rights, federal paramountcy automatically trumps aboriginal title.[172] The Villages assert non-

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[168] It appears the judges here could not fathom the competing consumption of natural resources as the "collective use by the entire group of the entire area." *See id.*, at 626. An exception to the exclusivity prong exists where two or more tribes inhabiting the same area can prove "joint and amicable" possession. Strong v. United States, 518 F.2d 556, 561 (Ct. Cl. 1975) (*citing* Sac & Fox Tribe of Indians of Okla. v. United States, 383 F.2d 991, 998 (Ct. Cl. 1967); United States v. Pueblo of San Ildefonso, 513 F.2d 1383 (Ct. Cl. 1975); Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935 (Ct. Cl. 1974)).

[169] The periphery debate did not surface during oral argument until rebuttal, when the Villages' counsel argued that the periphery of the Chugach territory is where the Chugach territory ends and another tribe's territory begins. Oral Argument at 55.15, *Eyak v. Blank*.

[170] *Eyak v. Blank*, 688 F.3d at 624 (internal quotation marks and citations omitted).

[171] *See* People of the Vill. of Gambell v. Hodel, 869 F.2d 1273, 1280 (9th Cir. 1989).

[172] Judge Fletcher stated the Secretary's argument that the paramountcy doctrine automatically extinguishes aboriginal rights without any expression by Congress showing an intent to abrogate, and that those rights do not exist unless explicitly expressed by Congress in a treaty,

exclusive rights under aboriginal title in order to assert commercial fishing rights, not subsistence rights. Refusing to acknowledge the existence of commercial rights under aboriginal title demonstrates the continuation of an idealistic stereotype. This stereotype of Indian subsistence must be challenged for these Villages to prosper in the current, and especially in future, economies.

1. The Secretary Necessarily Regulates All Fishing on the OCS as a Means of Protecting a Vital Natural Resource of Paramount Importance

By holding that the Villages did not establish aboriginal title, the majority avoided the larger question regarding the federal paramountcy doctrine.[173] "In stark contrast to the states' asserted title against the federal government in the paramountcy cases, aboriginal rights presume ultimate federal sovereignty and control."[174] Aboriginal title does not conflict with federal paramountcy; rights derived from aboriginal title are necessarily dependent upon federal sovereignty in order to exist. The Villages sought governmental acknowledgement of their non-exclusive rights in order to be included in the harvest of the resource they have always depended upon for survival.

Again, state claims of sovereignty over the federal government in the paramountcy cases are based upon sovereign state rights over the federal government. This is not the same as rights claimed under aboriginal title subservient to the federal government. The Villages do not assert that regulations should fail to apply to fishers. The Villages are merely asking to compete in the industry exploiting their ancestral fishing grounds. By asserting non-exclusive rights, the Villages seek a piece of the pie, not the entire pastry. Only commercial fishers that existed for the limited three years stated in the regulation were issued permits. The Secretary contended that the Villages are now free to purchase those original permits. However, the Secretary failed to acknowledge that original permits were not issued to the Villages, ignoring a commercial right to the natural resources. The Villages remain at this disadvantage decades following their cleanup efforts

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"stands Indian Law on its head." Oral Argument at 45:00, *Eyak v. Blank*. Affirmation is not needed to recognize rights that have always existed and have not been destroyed.

[173] *Eyak v. Blank*, 688 F.3d at 626.

[174] "Whereas the states sought to establish ownership exclusive of the federal government in the paramountcy cases, aboriginal rights prevail only against parties other than the federal government." *Id.* at 635 (Fletcher, J., dissenting) (citing Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955); Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661, 667 (1974)).

subsequent the Exxon Valdez spill. Although initially seeking to oust other commercial fishers, the Villages now seek only for a right to compete. However, the Secretary bars access, and by doing so is preventing the Villages from profiting from their ancestral fishing grounds, and instead allows other, established commercial fishing vessels to do so.

2. *In Order to Equitably Uphold the Sound Reasoning Underlying Aboriginal Title, Commercial Rights of Indian Tribes to Ancestral Fishing Grounds within the OCS Must Be Recognized*

It should be the policy of the United States to provide these impoverished Villages with an avenue of economic activity. The United States has, as trustee of Indian tribes, has previously asserted treaty-based fishing rights to apportion commercial fishing allowances between Indians and non-Indians over the same waters.[175] Although Alaskan tribes cannot assert sovereignty over any part of that state following ANCSA, they may claim aboriginal title to lands and seas under the jurisdiction of the United States.[176] As in *Gambell v. Hodel*, subsistence rights for the Villages to fish in the OCS in *Eyak v. Blank* are now protected, primarily because the Secretary relaxed regulations following *Eyak v. Trawler Diane Marie*. However, the denial of commercial rights arising under aboriginal title continues acculturation of native tribes into a mainstream American citizenry. This is the destruction of the nation-to-nation relationship. The majority upheld the district court's decision to equalize the rights of all United States citizens, rather than acknowledge the rights of a different entity, the tribe, with a history and status unlike that of citizens of immigrant descent. In effect, this holding creates a policy authorizing any agency the United States to assume complete title of natural resources under its jurisdiction, regulate that resource, and then sell permission to exploit that resource for commercial use, regardless of native claims even where rights have never been abrogated. The use of the natural resources of the OCS should be subject to the right of native use and occupancy that aboriginal title guarantees. Instead, tribal litigants must now meet a revised test that effectively

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[175] *See* United States v. Washington, 520 F.2d 676 (9th Cir. 1975) (upholding Makah fishing rights guaranteed by treaty and limiting regulation of fishing to the extent necessary to preserve a species of fish); *see also* United States v. Oregon, 769 F.2d 1410 (9th Cir. 1985) (holding that states may regulate treaty fishing but must use least restrictive alternative to accord tribes fair opportunity to take portion).

[176] ANCSA bars claims to aboriginal title within the jurisdictional limits of the State of Alaska, but it does not implicate federal jurisdiction of the OCS. *Gambell v. Hodel*, 869 F.2d 1273.

requires them to demonstrate a population large enough to fend off any hypothetical invasion force summoned by a judge's imagination.[177]

Regulations promulgated under the Magnuson and Halibut acts exclude the Villages from establishing commercial fishing operations in the Gulf of Alaska while guaranteeing subsistence rights.[178] The Ninth Circuit thus denied the Villages their rightful commercial opportunity to fish their ancestral fishing grounds by refusing to declare recognition of aboriginal title and inclusion into the Secretary's IFQ permit system.

The Secretary did relax regulations for native subsistence fishing. However, having subsistence rights without commercial rights guarantees only that Indian tribes retain their "Indianness" and do not progress with the rest of the nation.[179] Engaging in commercial activity while exploiting the resources nature provides was once the hallmark interaction among America's tribes and with outsiders. It was this trade that brought the Russians, and then the Americans, to Alaska. This decision allows the Villages a right to survive, but neither a right to compete nor a right to prosper. It is difficult to perceive such action as justice. It seems ironic that by denying recognition of non-exclusive rights, the Villages are excluded from any commercial use of their ancestral fishing grounds.[180] Expanding the requirements for establishing the element of exclusive use to claim ancestral fishing grounds relegates aboriginal title to a distant past, making it harder for tribes to claim rights to natural resources. The future of the Indian is as

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[177] "Indian Law: To properly claim aboriginal fishing rights, a group of Native Americans must show by a preponderance of the evidence that for the area claimed, the group maintained exclusive use of the territory and successfully prevented other individuals or groups from exploiting the benefits of the exclusive territory. Failure to demonstrate a population size reasonably necessary to enforce the exclusivity, in the absence of other evidence of dominion and control of the claimed area, will prevent the court from finding that the Native Americans had the necessary exclusive control of the claimed area." John D. Adams, *Summary: Native Village of Eyak v. Blank*, Willamette Law Online, WILLAMETTE UNIVERSITY COLLEGE OF LAW (2012), *available at* http://www.willamette.edu/wucl/resources/journals/wlo/9thcir/2012/07/native-village-of-eyak-v-blank.html.

[178] Interestingly, Warren G. Magnuson, coauthor of the Magnuson-Stevens Fishery Conservation and Management Act, was defeated in the 1980 U.S. Senate race in the State of Washington by Slade Gorton, following *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975), cited *supra* note 176. Gorton fought for years against treaty-based and aboriginal fishing rights, characterized Indians as "super-citizens," and used the national platform to promote the abolition of tribal governments. WILKINS & LOMAWAIMA, *supra* note 44, at 238-39.

[179] *See* Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623 (2011) (arguing the Supreme Court uses implicit divestiture only to remain faithful to the Indian canons of construction to protect tribal rights of traditional Indian activities, thus keeping all Indians Indian).

[180] Put another way, failure to prove exclusivity excludes the Villages from non-exclusive commercial activity.

an ordinary citizen of the United States; a tribe is now just another minority.

CONCLUSION

"Fish is best rare; language, not so much."[181] Most rare is the granting of a writ of certiorari by the ultimate Court of last resort, yet the Villages petitioned. These Villages have no tribe because they have been statutorily transformed into corporations. The people that reside within these Villages, however, have existed and fished in the claimed part of the OCS since long before the creation of the United States. The Chugach should retain non-exclusive rights to fish based on aboriginal title to their ancestral fishing grounds. Commercial exploitation of all natural resources must necessarily be limited. However, the businesses allowed to profit should not have been based upon an arbitrarily regulated three-year period. Regulation should not deny the descendants of those who have used a fishery since time immemorial a commercial share of that very fishery. Aboriginal title was once a sovereign right of every conquered tribe. This abrogation of Chugach rights will make future claims for recognition of aboriginal title less likely to succeed.

Gulf of Alaska waters present the best opportunity for these Villages to develop an industry beneficial to the tribe. The majority avoided a question of federal paramountcy over tribal rights to natural resources in the OCS. Had they determined that paramountcy question, the extent of non-exclusive commercial rights would have been a contentious issue. The real heart of this dispute was the competing interests of preserving the fisheries, the means of which restricted access by awarding a limited number of commercial IFQ permits, and allowing advancement of the Chugach people by establishing commercial tribal fishing enterprise.[182]

Even accepting the facts as found by the district court, the Villages proved actual and continuous use and occupancy over parts of the claimed area for a long time, and exclusive use as measured using tribal standards, but not under the twenty-first-century standards used by

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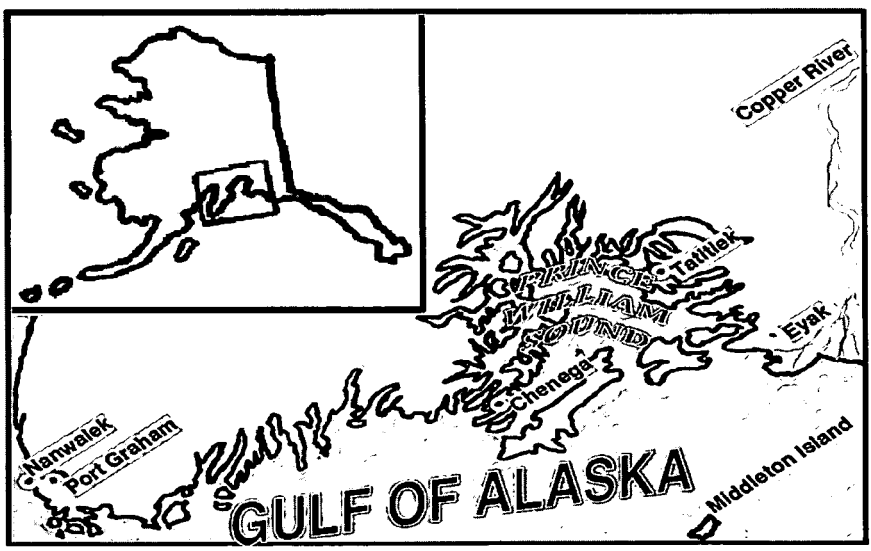
[181] Native Vill. of Eyak v. Blank, 688 F.3d 619, 624 (9th Cir. 2012) (en banc) (per curiam), *cert. denied sub nom.* Native Vill. of Eyak v. Pritzker, 134 S. Ct. 51 (2013). With tones reflecting the voice of the Ninth Circuit's Chief Judge Alex Kozinski, the included pun regarding the use of different definitions in the English language reflected well the underlying controversy. There was something about this opinion that smelled fishy, prompting this research, because under our system of laws, justice, as compared to language, should never be rare.

[182] "At the heart of this dispute are the competing federal interests of honoring Native rights and preserving national fisheries." *Eyak v. Blank*, 688 F.3d at 621.

the majority. The Ninth Circuit failed to apply the *Sac and Fox* test correctly to the findings of fact finally issued after years of litigation. Acculturation is complete when the rights of conquered people, once demanded by humanity, eventually vanish; tribes are now united with their conquerors as ordinary citizens. This ruling attacks tribal sovereignty, purposefully limiting Chugach rights to those of all citizens of the United States. Unfortunately, in the end, on October 7, 2013, the Supreme Court of the United States denied certiorari,[183] effectively affirming the Ninth Circuit decision to expand the requirements for a showing of exclusive use and occupancy for any native tribe that wishes to assert claims arising under aboriginal title. The Villages of the Chugach are denied the right to make a living fishing in their ancestral fishing grounds based on aboriginal title. The North American acculturation that began in 1492 is now complete. From the fringe of our nation, in the frontier State of Alaska, our law now declares that Indians retain only the rights of every other citizen of the United States of America; tribal sovereignty and aboriginal title will soon be obsolete relics from our legal past.



[1] This hand drawn map shows the location of the plaintiff Chugach villages between Cook Inlet and the Copper River Delta along the Gulf of Alaska. Note the location of Middleton Island, to which Chugach from each village travelled, fishing and hunting along the way. During oral argument, counsel for the Villages, Natalie A. Landreth, stated, "Middleton Island was visited regularly, probably seasonally. . . . [It] is 60 miles from shore, and this is a round trip that was so fascinating to the National Parks Service that they undertook a detailed study to figure out if this was humanly possible and how people did it. . . . [T]his took 48 hours, a round trip of 250 miles," following the tides and ocean currents. Oral Argument at 12:20, 36:30, Native Vill. of Eyak v. Blank, 688 F.3d 619 (9th Cir. 2012) (No. 09-35881) (en banc) (per curiam), *available at* http://www.youtube.com/watch?v=8J3agvV8B5k.

[183] Native Vill. of Eyak v. Pritzker, 134 S. Ct. 51 (2013).