Article Written Two Years Ago Timely

By ARTHUR LAZARUS, JR.
"TANACROSS PROTESTING Charges State Attempting Sale of Ancestral Lands At New York World's Fair"
(Tundra Times, Fairbanks, Monday, May 24, 1965)

(EDITOR'S NOTE: This article was prepared for publication two years ago, but still seems timely in light of current events. The author is a practicing attorney in Washington, D.C. who serves as general counsel to the Association on American Indian Affairs and a number of Indian tribes. Neither the Interior Department nor the Alaska Federation of Natives have included in their proposed land claims bills Mr. Lazarus's suggestion. He proposes creation of an entirely separate native lands board to investigate and determine native land ownership and use.)

Alaska's campaign to dispose of property around George Lake, 125 miles from Fairbanks and accessible only by air, ended in hasty withdrawal.

Less than a month after the filing of a written protest by native leaders, and in the wake of widespread publicity, the State abandoned its previously announced plans to promote the sale of "wilderness estates" to wealthy investors attending the World's Fair.

Like the Sioux at Little Big Horn, though, the Indians of the remote Tanacross area may have gained only a brief respite from the ultimate loss of their homeland.

Tanacross is not alone in facing that peril.

For the 43,000 natives of Alaska–Indians, Eskimos and Aleuts–who comprise almost 20% of the State's population, land still is the basis of existence. From the subsistence hunter at Barrow, far north of the Arctic circle, to the commercial salmon fishermen at Metlakatla, well over a thousand miles to the southeast, most natives to this day gain their livelihood directly from natural products.

At least equally significant in terms of future human development, the use and possession of land, solidly rooted in tradition and culture, give to the individual native a sense of security which he has not yet been able to find elsewhere in our society, with all its material benefits and all its welfare programs.

Although the time schedule will vary from village to village, and the process of change last for generations, no one expects, realistically, that a native hunting and fishing economy in the long run can endure in Alaska. The game is becoming more scarce, children learn new skills at school, and burgeoning industrial or commercial enterprises offer increased opportunity for wage work.

The key question then is whether, in making the transition to a money economy, the natives of Alaska will have as their own capital asset a fair share of the natural resources which their ancestors enjoyed unchallenged for centuries.

The Federal Government, which alone can answer that question, for almost 100 years has refused to decide. Indeed, beginning with the 1867 Treaty between Russia and the United States, under which jurisdiction over Alaska was acquired, this country's policy towards the original inhabitants of the area consistently has been marked by uncertainty, inaction and no little confusion.

As a consequence, and, ironically, while national concern is focussed upon the needs of minority groups, we find that native land rights in Alaska are today more seriously threatened than at any other time in history.

THE LEGAL BACKGROUND

The Act of May 17, 1884, providing a civil government for the Territory of Alaska, declared that the natives "shall not be disturbed in the possession of any lands actually in their use and occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress." This language, according to its proponants, was intended "to protect to the fullest extent all the rights of the Indians in Alaska."

The record of the United States in carrying out that promise is notably undistinguished. Native rights have been safeguarded in a few instances, such as the setting apart of the Annette Islands for the Metlakatla Indians (originally from Canada) under a special statute in 1891, and the establishment of six scattered reservations by the Secretary of the Interior under the Act of May 1, 1936.

In addition, since 1900 the Federal Government has made more than 150 separate withdrawals of small tracts from the public domain in Alaska for native use and occupancy, for "Indian purposes," or for programs, such as schools and hospitals, beneficial to the natives.

As pointed out two years ago in a report to the Secretary of the Interior by a three–man Task Force on Alaska Native Affairs, the extent of the natives' land rights in the latter reserves "may differ with the language of the various orders and proclamations, but in no case does it appear to be as great as the Indians' interest in lands reserved by treaty or statute, or by Executive Order in the lower 48 States."

More important, Congress still has failed to enact general legislation to settle native land titles so for every acre protected and every right preserved, a host either have been or are in the process of being irretrievably lost.

In theory, therefore, possessory rights in Alaska remain today as they were 80 years ago, unconfirmed, yet unextinguished. In reality, however, native rights have become increasingly vulnerable with the passage of time–a trend which the grant of Statehood has sharply accentuated.

STATEHOOD

Traditionally, the policy of the United States has been to respect native land rights and to treat the original inhabitants of this country as the owners of the territory which they used and occupied from time immemorial.

This policy first found expression in the Northwest Ordinance of 1787 which declared that the "utmost good faith shall always be observed toward the Indians" and that "their land and property shall never be taken without their consent," and subsequently was confirmed in various Enabling Acts as new States petitioned to join the Union.

Under this policy, the States disclaimed any right or title to real property "owned or held" or which "may be held" by Indians, i.e., all lands, including areas possessed under original Indian title, not ceded by the natives or otherwise obtained by the United States.

Over a period of years, the Federal Government would formally extinguish the bulk of the Indian claims through treaties and agreements, and the lands so released became part of the public domain–open to settlement or entry under the public land laws and subject to the jurisdiction of the State.

Section 4 of the Alaska Statehood Act of July 7, 1958 contains a comparable disclaimer over any lands or property, "including fishing rights," which "may be held by any Indians, Eskimos, or Aleuts...or is held by the United States in trust for said natives."

The section further provides that nothing in the Statehood legislation shall be construed to "recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, "because, to paraphrase the words of the committee report in the House of Representatives, Congress did not here intend to deal with the legal merits of indigenous rights, but rather left the matter in status quo for either future legislative action or judicial determination.

Superficially, the foregoing disclaimer is unexceptionable, since it seems to follow past precedents and also seems to carry forward the promise of fair treatment made in the 1884 Territorial Act.

The fact is, however, that the 1958 Statehood Act does not leave native possessory rights untouched, but instead opens the door for Alaska to acquire exactly those lands which the natives may claim.

The result is achieved in Section 6, under which the new State, unlike any of its predecessors, over a period of 25 years may select 102,550,000 acres from the public domain for its own use.

Generally excluded from State selection at this time are the northern and northwestern parts of Alaska, including most of the areas used and occupied by the Eskimos.

Nothing in the law clearly prevents Alaska from selecting lands subject to original Indian title and, under a decision of the Supreme Court in 1955 involving the Tee–Hit–Ton Indians, the natives apparently would not even be entitled to compensation for the loss of such property.

EXECUTIVE FRUSTRATION

The threat to native rights posed by the Alaska Statehood Act would be mitigated if the law now in force provided a meaningful way for preserving at least some portion of the natives' historic land use and occupancy. The Interior Depart-

(Continued on page 4)

Article Timely . . .

(continued from Page 2)

ment has made a sincere effort during recent years to knock down administrative barriers to the grant land titles. Nevertheless existing statutes remain too narrow in scope to offer real protection.

Under an act passed in 1906, for example, the Secretary of the Interior is authorized to allot not more than 160 acres of non-mineral land as a homestead to any Indian or Eskimo, who is either the head of a family or over 21. According to the 1962 Task Force report, in the early years of administering this law, the Federal Bureau of Land Management (BLM) interpreted its provisions generously so as to pass to the natives ownership of their fish camp sites, their hunting cabins and trap lines, reindeer headquarters and corrals, and tracts regularly used for berry-picking, plant-gathering or other similar purposes.

Beginning in 1930, on the other hand, BLM progressively tightened its regulations to a point where allotments essentially were limited to homesites or a single piece of cultivated land. Small wonder that the number of native homestead titles granted since 1906 averaged just two per year.

In September of 1964, the Interior Department Solicitor ruled that the Secretary is empowered to allot non-contiguous tracts under the 1966 Act, where all the land together constitutes the actual home of the applicant, and that, in determining whether the statutory test of use and occupancy has been met, the Secretary again may consider the native's mode of life, the climate and the character of the land.

Unfortunately, the Department has not requested, and Congress has not appropriated, the funds necessary to process the ever-increasing number of homestead applications (now approaching 1000) which this opinion encouraged.

Moreover, even if the newly liberalized regulations were fully implemented, 160 acres of non-mineral land in Alaska ordinarily is insufficient to furnish its owner a satisfactory livelihood.

The Townsite Acts applicable to Alaska further illustrate the inadequacies of existing law. In short, while the establishment of townsites in Alaska was authorized generally under an 1891 statute, the Act of May 25, 1926, contains provisions for the creation of native townsites, with special protections being given to native landholders therein.

Notwithstanding, as the law was administered by BLM until recently, virtually every native village has been organized under the 1891 Act.

Moreover, even if the more appropriate 1926 Act were invoked, that law would not permit the setting aside of sufficient land outside a village to support the entire community at present levels of human and resource development.

In the absence of statutory authority for granting comprehensive land titles, and under prodding from the Association on American Indian Affairs, BLM and the Federal Bureau of Indian Affairs (BIA) recently inaugurated special intra-departmental procedures for giving the natives actual notice when the State of Alaska selects property in their neighborhood, and BIA further assists the natives in filling formal written objections where--as in the previously cited Tanacross case--the land so designated is used or occupied by them.

Earlier native protests against State selections, however, uniformly have been rejected by the Alaska Director of BLM on the grounds that his agency lacks jurisdiction to determine "the validity of aboriginal title," and, accordingly, that the natives' unrecognized claims are subordinate to the State's clearcut right of selection.

According to information furnished by the Department, the natives have delineated nine claimed areas, ranging in size from 300,000 to 3 million acres, and totalling 12 million acres. Out of the 16.1 million acres selected by the State, 3.2 million overlap the native use areas and are the subject of protests.

BIA, siding with the objector Indian villages, asserts that the real issue involved is the extent to which the 1958-Statehood Act safeguards native use and occupancy, and the cases now are on appeal within the Interior Department....

MONEY SETTLEMENTS

Although not before Congress at this time, one feequently suggested method for handling the issue of native titles in Alaska is the creation of a special tribunal, similar to the Indian Claims Commission now in operation, which would be authorized (1) to hear and determine aboriginal land claims, and(2) if use and occupancy were proved, to award the natives compensation for the loss of their property.

Unlike the Indian Claims Commission, however, which can decide only causes of action arising before 1946 (mostly due to wrongs committed in the Nineteenth Century), the proposed Native Claims Commission would have jurisdiction over future as well as past takings. In the case of Alaska, therefore, where alternatives still are available, the question of whether money settlements are a fair and desirable substitute for land is far from academic.

Our country's history of persuading native peoples to exchange land for cash hasdly is evidence that such transactions ultimately benefit the sellers. Unversed in the wisdom of capital investment and, in any event, unprepared within a brief period to modify the basic structure of their society, the Indians usually found that the money soon followed the property, with abject proverty their only replacement.

As the 1962 Alaska Task Force reported to the Secretary of the Interior, if the lands selected or certain to be selected by the State were completely removed from Indian use, "the natives would be trading their present way of life for...money payments which, while compensation them for the worth of the land, might not compensate them for the destruction of their economy."

Secondly, experience under the Indian Claims Commission Act, where the bulk of the cases filed still are not decided, shows that money judgments often come too little and always come too late. Appropriately, one of the most flagrant examples in modern legal annals of justice delayed involves the Tlingit & Haida Indians, who were allowed by Congress in 1935 to sue the United States over ownership of some 18,000,000 acres in southeastern Alaska and who, although an order determining the Government's liability has long since been entered, have yet to see an award of damages. Indeed, the Tlingit & Haida case is so old that an entire new generation has been born, the Indian community has partially dispersed...

Finally, and perhaps most important, cash settlements based upon land values only accidentally will reflect the natives' true needs. As an illustration, on May 13, 1964, the Secretary of the Interior announced that the Tyonek Indians of Alaska, numbering about 200, had accepted bonus bids of almost $11 million for oil and gas leases covering about 8,500 acres within their reservation. Quite obviously, the Tyonek Indians have far less need for more money than, say, the natives of Minto, also numbering about 200, who have no reservation and, according to a BIA report just released, an average disposable personal income, including welfare, of around $800 per family per year. Nonetheless, because of the potential subsurface values. Tyonek undoubtedly would receive greater compensation than remote Minto out of claims litigation over the transfer of aboriginal lands to the State.

A PROPOSED SOLUTION

While cash awards for lost real property offer little hope to the natives of Alaska, the theoretical possibility that Congress may recognize all aboriginal land rights seems even more unpromising.

Regardless of whether the argument is correct that native ownership of relatively large areas will impede development of the State, the currency of that feeling is sufficient for all practical purposes to rule out the alternative.

Moreover, the establishment of a "reservation system" in Alaska was, at least before Statehood, as politically unpalatable to many natives as the permanent settlement of land claims on the basis of subsistence use and occupancy

(Continued on page 6)

Article Timely . . .

(Continued from page 4)

apparently is to their neighbors.

A middle course does exist. In a message delivered on May 21, 1948, President Harry S. Truman pointed part of the way when he recommended that "Congress authorize the Secretary of the Interior to grant to the natives their village sites and burial grounds, and such lands and hunting and fishing rights as are necessary for their economic livelihood..."

The key to fair and honorable disposition of aboriginal claims, in other words, lies not in acres patented, dollars paid or even subsistence protected, but in providing the natives out of their own lands a large enough share of Alaska's natural resources to sustain economically viable communities.

This goal can be achieved, of course, through a variety of methods.

One suggestion is the creation of a Native Lands Board authorized, among other powers:

To investigate and determine native claims based upon aboriginal use and occupancy, without regard to involuntary abandonment:

To value and conduct long-range economic feasibility studies covering the land so found in native ownership:

To award the natives land titles, use rights (permanent or temporary) and monetary judgments, or any combination of the three, in such manner and to such extent as will compensate the claimant for all property lost and, on the basis of reasonable expectations, enable the natives to become economically self-sufficient:

To recommend to the Congress such further legislation involving the utilization of native-owned resources as seems necessary and desirable:

The establishment of a firm foundation for the native economy, as well as the final elimination of any clouds upon title throughout the state, cannot help but contribute to Alaska's overall progress...