Other Voices—

The Legal Basis For the Native Claims

(EDITOR'S NOTE: Very recently, the ANCHORAGE DAILY NEWS ran a series of editorials for a week all of them concerning the native land claims. We are of the opinion that the series had an important impact on the Alaskan public in that they pointed out in a fair and impartial manner the why's and aims of the claims. We are profoundly grateful for the News' presentations which we feel will help immeasurably to assuage some conflicting views of Alaska's general public as to their attitudes toward the native land claims. In today's issue of the Tundra Times, we are printing the Daily News editorial headlined, "The Legal Basis for the Native Claims.")

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The difficulty in understanding the legal issues behind the Native land claims controversy lies in the APPEARANCE of complexity.

Quite properly in presenting their case to Congress and the courts, the Natives have buttressed their position with case law, statutes, and legislative history. Unfortunately for most Alaskans this has obscured the fact that Native claims involve fundamental principles and an argument which, when stripped of its legal jargon, proceeds in simple logical fashion.

AS UNDERSTOOD by most lawyers the legal framework by which to judge the issue is as follows:

The Natives have used and occupied much of the lands of Alaska since time immemorial. This creates what's known as aboriginal title.

Aboriginal title exists even if the land claimed is not the site of a permanent camp, is only used on a seasonal basis for subsistence, is used for traveling to subsistence, is claimed jointly with another Native group, or by a village, or supports a small Native population. Moreover even if there is no productive purpose to the land if it lies within a larger area controlled by Natives, then it too, is held under aboriginal title.

And with aboriginal title goes all surface, mineral and water rights.

HISTORICALLY, IT HAS been the policy of Congress and the courts to respect and protect the Indian's use and occupancy of the land over which he exercises dominion. On the other hand it has also been recognized that Congress has the right to extinguish aboriginal title.

Unless Congress acknowledges the aboriginal title by statute and provides some mechanism for compensation, extinguishment does not give rise to any compensable rights. This was the holding of the Tee-Hit-Ton Case where in 1955 the Supreme Court said that Congress had not yet recognized aborignal title as a Fifth Amendment property right protected against government taking or extinguishment.

But the Court in Tee-Hit-Ton did describe the right of aboriginal occupancy as "a right of occupancy which the sovereign grants and protects against intrusion by third parties."

By so doing the Supreme Court once again acknowledged another long line of Indian law precedent. Against third parties aboriginal title is still good unless extinguished by the United States even when applied to the grant of public lands to a state. And this right had been held judicially enforceable.

IN ANY CASE, if Congress extinguishes title, it's necessary to arrive at some measure of compensation. In the Tlingit and Haida case of last year, the ninth circuit said that the measure was to be the time of taking; the standard to be fair market value; and the value to be the same as if the land was held in fee simple and not the value to its primitive occupants relying upon it for subsistence.

With this in mind consider the two legal aspects of the Native land claims issue:

The Natives claim much of the state under aboriginal title. The prestigous Federal Field Committee for Development Planning in Alaska, in its authoritative study, Alaska Natives and the Land, has said that "the aboriginal Alaska Native completely used the land, interior and contgiuous water in general balance with their sustained human carrying capacity . . ." (Emphasis on original.)

To be sure the Field Committee report was not designed to be tested as a legal document. But it reflects thousands of hours of careful work and study and comports with those fewcases concerning use and occupancy of Alaska Natives.

THE NATIVES, however, are not seeking at this time to assert their rights to aboriginal title against the United States. Since, apparently no legislation has acknowledged Native rights to compensation (legislation has noted aboriginal title), Tee-Hit-Ton, unless overruled, would seem to bar a direct suit.

Instead the Natives are seeking a traditional legislative settlement which would in effect transfer their aboriginal title into fee simple for some lands, and compensate them for renouncing justifiable claims to other lands. Such an approach is consistent with the Congressional policy of extinguishment through negotiation.

The Natives argue that a legislative settlement is in everyone's interest, since their aboriginal rights are still good against the state and can block its efforts to select public lands. (Remember, unextinguished aboriginal rights are protected against third parties.)

This, finally gets around to the second aspect of the claims—the land freeze. There are procedural issues in the land freeze case, any one of which could support a decision. But the heart of the matter is land rights.

That case asks: did Congress in the Statehood Act give the power to extinguish aboriginal title subject to subsequent legislation? Or is the State a third party against which the Native land rights are good in every respect?

ALL THIS GOES back to two provisions in the Statehood Act. In one the state disclaims all right and title to land which may be held by the Natives. In another the state is allowed to select lands for itself.

The question is whether Congress knew the state would select lands claimed by the Natives and thereby meant for the state to extinguish title, or whether Congress meant that any state selection of Native land would not extinguish title until Congress got around to doing so.

The government and the Natives say Congress did not extinguish title; the state says it did. And the land freeze rests on the outcome.

This then is the legal background of legislation and litigation against which the Native claims are proceeding. We think there is merit in the Natives' claim of aboriginal title to much of the state. And we suspect, though it is a close question, that the Ninth Circuit Court of Appeals will maintain the land freeze.

But our principle purpose in presenting all this is not to take sides. We want to see spelled out clearly and simply exactly what's happening. As we have said time and time again this is too vital an issue to be discussed irrationally and by the uninformed.

—ANCHORAGE DAILY NEWS