**"I may not agree with a word you say but I will defend unto death your right to say it." — Voltaire**

*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


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# Letters to the Editor

## 'Authority' on Native People Discredited

Arctic Slope Native Association
Affiliate of AFN
P.O. Box 486
Barrow, Alaska
Nov. 17, 1969

Dear Mr. Rock:

Have been keeping up with the so-called views and analysis of the Native Land Claims bill referred to as the Goldberg Bill by the so-called authority on Natives and the public land laws of the State of Alaska, Mr. W.C. Arnold.

I think Howard, if anyone is to be tabbed an authority on Natives, there should be connected with it a long standing position of having lived with the Native people and learning of their environment, political and economic needs, as well as sharing in their tribulations and advancement of the Native people.

Just because Mr. Arnold has had a long standing in the legal profession does not by any means make him an authority on the Native people.

As a matter of fact I think Mr. Rock, the people should be told who Mr. Arnold is. I think somebody that knows him should tell the people, that he has fought Statehood in the early stages of the fight that he has been the driving force behind the efforts to retain the fish traps, why, because his clients were the big fish industry and in order to retain his standing economically, he fought the efforts to abolish the fish traps.

One does not become an authority merely by watching and prosecuting cases against certain people.

How long has Mr. Arnold lived in the villages? How many Native clients has Mr. Arnold. Why is he recognized as an authority on Natives of Alaska? Why is he writing on the Native Land Claims bill today? I'll tell you why and how?

Mr. Arnold has probably never, by choice, lived in any village of Alaska, with the Native people. . . He has no Native clients to speak of that he has been protecting as a lawyer. . . He is recognized as an authority because no other person is as crazy as he is and no one in his right mind would speak out against the Native people, and pin everything down against them, in their land claims. Mr. Arnold is getting old, and has no political ambition for any office and can afford to say any damned thing he wants about the Native people. In other words he doesn't give a damn.

For the press to use a man like him and advance an ill feeling against the Native people is very fitting to the description the Congressman from Oklahoma made of the Anchorage Times.

I think it's downright unfair and perhaps libelous. The Native Claim bill which he refers to is not a Goldberg Bill. In all of our deliberations to determine what we, the Natives should ask for, from the Congress, we have not had the presence of Mr. Goldberg.

Also Mr. Arnold apparently is not aware of, or is ignoring the overall effect of the settlement on the State of Alaska.

It's going to have an effect like you haven't seen before. It's going to put money in the villages where the State and the Federal Government have failed miserably to do.

If we are going to have an analysis of the Bill, and it's overall effect on the State, let us have an honest man do for us, and not a person who has a long history of making money off people, legally or otherwise, and who has an interest in people rather than money, for the sake of money.

Eben Hopson

## 'That's My Kid Brother'

P.O. Box 58
Kotzebue, Alaska 99752
November 14, 1969

Letter to the Editor
TUNDRA TIMES
Box 1287
Fairbanks, Alaska 99701

Dear Howard:

Pleasantly, and not surprisingly, I read with pride the Tundra Times (Nov. 7) account of retiring BIA teacher, Fred K. Ipalook, my kid brother. He may be mature in experience and service, but whenever I had a chance to do so I introduce him with "Meet my kid brother, Fred."

I do this for the simple reason that he is, and perhaps will always be, four years younger than I. Needless to say, it is gratifying to note that nearly the whole village of Barrow turned out to honor this man on his retirement from active teaching.

Perhaps one of the best compliements told me on Fred was by an Eskimo lady from Barrow. She said, "When we were small girls we saw Fred playing on the organ each Sunday in Church services. Then our daughters came and saw him still playing in church. Then in time our granddaughters came along and still see the same man at the same organ."

Dedication? That is my kid brother all the way through.

Sincerely,
Percy Ipalook, Sr.

## Nix on Pioneer Home at Nome

Box 1514
Juneau, Alaska 99801
November 16, 1969

Dear Editor:

In the November 7, 1969, edition of the Tundra Times I read about Representative Pollock's proposal to have the Bureau of Indian Affairs build a Pioneers Home for Natives in western Alaska. What nonsense! Why a Native Pioneer Home? Why not a Pioneer Home for ALL Alaskans located in western Alaska?

Also, why give a new project to the BIA? I thought the BIA functions were to be phased out, not perpetuated with new projects. To me Mr. Pollock's idea is nothing more than a proposal for continued paternalism and its effect would be to further widen the gap of understanding between the Native and non-native people of Alaska.

An Alaskan Pioneers Home

(Continued on page 7)