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A Starving Culture: Alaskan Native Villages' Fight to Use Traditional Hunting and Fishing Grounds

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A STARVING CULTURE: ALASKAN NATIVE VILLAGES' FIGHT TO USE TRADITIONAL HUNTING AND FISHING GROUNDS

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> *Every part of all this soil is sacred to my people. Every hillside, every valley, every plain and grove has been hallowed by some sad or happy event in the days long vanished. The very dust you now stand on responds more willingly to their footsteps than to yours, because it is rich with the blood of our ancestors, and our bare feet are conscious of the sympathetic touch.*[1]
>
> —Chief Seattle

I. Introduction

In the Village of Eyak, some of the young children of the village have finally reached an age that they can be taught to hunt and fish. The village hunters are preparing to take their children into the wilderness to teach them hunting and fishing techniques that have been passed down from parent to child for generations. During this outing, they plan to visit all of the hunting and fishing spots their parents and grandparents used to take them, and to teach their children about what types of wildlife should be hunted.

This year, Chief Qilangalik leads the hunting expedition—it is time for his son, Makari, to learn to hunt and fish. The chief and his son set out ahead of the rest of the hunters and head to their first stop, Hinchinbrook Island. The Island has an abundance of seals which the hunters plan to use for food and trading furs. Afterwards, the chief plans to go to Kenai Peninsula to fish for salmon and oysters and to hunt for bear.

The two hunters barely enter the woods before they are stopped by a group of soldiers. The soldier leading the group asks the chief what he is doing in the woods. The chief tries to explain to the soldier that his village

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1. NATIVE AMERICAN WISDOM ch. 13 (Kent Nerburn & Louise Mengelkoch eds., 1991).

has lived and hunted in the area for many generations, and that he is on a hunting expedition with his son that is necessary to teach him the traditions of the village—traditions necessary to the survival of the village because they are the only way the village obtains food.

The soldier, unaffected by the chief's explanation, tells the chief and his son to turn around and go back to their village. The soldier also informs the pair that the woods and gulf are now under their control and that the village hunters are no longer allowed to hunt and fish in the area. Further, the soldier tells the hunters that the soldiers and their settlement will be using the land from now on because the animal furs obtained in the area are very valuable, and the settlement plans to sell them to overseas traders. The chief begins to oppose the soldiers, but upon threat of death to both him and his son, decides to go back to the village.

Situations similar to this hypothetical have occurred across the United States throughout history. In 1905, the Yakama Indians were excluded from hunting and fishing on their traditional hunting grounds by private landowners.[2] Most recently, the Alaskan Native Villages that surround the Outer Continental Shelf were excluded from exercising their right to using both land and sea.

In the most recent litigation regarding land exclusion, the Alaskan Native Villages requested non-exclusive aboriginal title to their land after the Individual Fishing Quota regulations severely restricted their fishing allowance to strictly sport fishing.[3] The Ninth Circuit, however, said that the Alaskan Native Villages could not have non-exclusive rights without first proving that they exclusively occupied the Outer Continental Shelf,[4] and the Supreme Court did not grant certiorari in this case upon appeal.[5] This holding contradicts itself, and does not make clear how a Native American tribe can establish non-exclusive aboriginal rights. As of yet, the Supreme Court has not defined what "non-exclusive rights" means. This article argues that it should do so, and further, create a test through which a court can articulate "non-exclusive rights."

Part II of this article will discuss the history of the Alaskan Native Villages and their historic use of the land on the Outer Continental Shelf ("OCS"). This section will also address the procedural history of the prior cases, rules, and regulations that gave rise to the dispute over who has the right to access the OCS. The history of the land provides evidence that the

2. United States v. Winans, 198 U.S. 371, 379 (1905).
3. Native Vill. of Eyak v. Blank, 688 F.3d 619, 621 (9th Cir. 2012).
4. *Id.* at 625.
5. Native Vill. of Eyak v. Pritzker, 134 S. Ct. 51 (2013).

Alaskan Native Villages are entitled to continued use of the land, and further that hunting and fishing done on and around the land are integral to the culture of the Alaskan Natives.

Part III offers a solution to the dispute over whether the Alaskan Native Villages have non-exclusive hunting and fishing rights to the OCS. This section suggests an elements test that, if applied by the courts, would benefit the Alaskan Native Villages by allowing them to have non-exclusive hunting and fishing rights while still allowing others to fish the OCS. This Article concludes in Part IV by briefly explaining why the Supreme Court should have granted certiorari in *Native Village of Eyak v. Blank* and why the Ninth Circuit should have allowed the Alaskan Native Villages the right to hunt and fish the OCS without IFQ restrictions.

II. A Look into the Past and How It Will Affect the Future

A. Thousands of Years of Tradition and the History of Land Use

The Alaskan Native Villages consist of the Villages of Eyak, Tatitlek, Chanega, Port Graham, and Nanwalck (collectively, the "Villages").[6] These Villages occupy the Prince William Sound, the Gulf of Alaska, and the lower Cook Inlet regions of Alaska, where they claim to have been since the time glaciers covered the land.[7] Currently, approximately "550,000 acres of [the Villages'] land are subsurface estate where Native village corporations have surface entitlements."[8] The Villages maintain that for over 7,000 years, well before European contact and continuing to the modern era, they hunted the sea mammals and fished the sea on the OCS,[9] where the resources provided a better chance of a living than the inland hunting of moose and caribou.[10] Historically, the hunting and fishing traditions established on the OCS provided the Villages with a livelihood, encouraged trading, and prompted ceremonial exchanges between the

6. Native Vill. of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090, 1091 (9th Cir. 1998).

7. *Id.*; *see also Our People*, CHUGACH, http://www.chugach-ak.com/who-we-are/our-people (last visited Sept. 12, 2013).

8. *Lands*, CHUGACH, http://www.chugach-ak.com/who-we-are/lands (last visited Oct. 13, 2015).

9. *Blank*, 688 F.3d at 620-21; *Trawler*, 154 F.3d at 1091.

10. David J. Bloch, *Colonizing the Last Frontier*, 29 AM. INDIAN L. REV. 1, 6-7 (2004-2005).

tribes.[11] Therefore, "the traditions associated with life, love, religion, and death came to depend on the ocean and its resources."[12]

In 2012, the Villages' population was estimated at 400 to 1500 members,[13] who still live a lifestyle heavily reliant on the fish and wildlife of the OCS.[14] Therefore, the Villages' "continued social, cultural, and economic well-being depends on their continued ability to hunt and to fish in their traditional territories on the OCS."[15]

B. A Procedural History: The Native Village of Eyak's Legal Struggle to Maintain Their Rights

For years, courts have slowly chipped away at Native American tribal sovereignty.[16] Historically, Native American tribes had sovereign powers over their reserved lands given to them by treaties, agreements, and executive orders.[17] Since 1978, however, the Supreme Court has continually reduced "the inherent powers tribes possessed as domestic dependent nations and transferred them to the states at the federal government's expense but without its consent, indeed to the contrary of congressional and executive policy favoring tribal self-determination."[18]

In 1993, the Secretary of Commerce promulgated regulations that limited the Villages' use of their traditional fishing areas on the OCS.[19] The Villages sued, seeking restoration of their rights of aboriginal use to the OCS in the Cook Inlet and the Gulf of Alaska.[20]

Following a trial court ruling that declined the Villages aboriginal title to their traditional hunting and fishing territories,[21] the Villages appealed to the United States District Court for the District of Alaska in 2002, who

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11. *Id.* at 6; DEAN LITTLEPAGE, STELLER'S ISLAND: ADVENTURES OF A PIONEER NATURALIST IN ALASKA 198 (Kate Rogers et al. eds., 1st ed. 2006); *see also Lands*, *supra* note 8.

12. Bloch, *supra* note 10, at 6.

13. *Blank*, 688 F.3d at 624.

14. *Trawler*, 154 F.3d at 1091.

15. *Id.*

16. *But see* United States v. Winans, 198 U.S. 371 (1905); *Blank*, 688 F.3d at 637; *Trawler*, 154 F.3d at 1091.

17. Nolan Shutler, *Taking the Bitter with the Sweet: Wenatchi Fishing Rights*, 41 ENVTL. L. 987, 992 (2011).

18. Bloch, *supra* note 10, at 1.

19. *See Blank*, 688 F.3d at 621; *Trawler*, 154 F.3d at 1091.

20. *Native Villages of Eyak, Tatitlek, Chenega, Nanwalek, and Port Graham v. Evans*, NATIVE AM. RIGHTS FUND, http://www.narf.org/cases/eyak.html (last visited Nov. 10, 2013) [hereinafter *Native Villages*].

21. *Trawler*, 154 F.3d at 1097.

agreed with the trial court and held that the Villages did not have non-exclusive aboriginal rights to their land on the OCS.[22] Following this ruling, the Native American Rights Fund (NARF) appealed the case to the United States Court of Appeals for the Ninth Circuit.[23] In 2004, the Ninth Circuit, sitting en banc, vacated the district court's decision and remanded the case to determine if the Villages could establish aboriginal title to the areas in the OCS.[24]

On remand, the district court found that while the Villages established the existence of their territory and use of the waters on the OCS, they did not have any aboriginal rights, non-exclusive or otherwise, as a matter of law.[25] This ruling was appealed to the Ninth Circuit, and a 6-5 majority sitting en banc ruled that the Villages failed to establish non-exclusive aboriginal rights to the OCS territories.[26] In July 2013, the NARF appealed to the United States Supreme Court.[27] Unfortunately, in October 2013, the Supreme Court denied certiorari.[28] The culmination of cases, statutes, and regulations referenced by the Villages in the course of the litigation represent how the Villages fought to perpetuate their culture and how the government has slowly chipped away their rights to almost nothing.

C. The Federal Paramountcy Doctrine

The "Federal Paramountcy Doctrine" gives the federal government superior rights to the marginal sea, an area that extends three miles from the shore surrounding the United States, two hundred miles seaward and includes the soil and subsoil underneath the surface water.[29] This doctrine was created from the holdings of four United States Supreme Court cases,[30]

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22. *Native Villages*, *supra* note 20.

23. *Id.*

24. Eyak Native Vill. v. Daley, 375 F.3d 1218, 1219 (9th Cir. 2004); *see also Native Villages*, *supra* note 20.

25. *Native Villages*, *supra* note 20; Native Vill. of Eyak v. Blank, 688 F.3d 619, 626 (9th Cir. 2012).

26. *Native Villages*, *supra* note 20.

27. *Id.*

28. *Id.*

29. United States v. California, 332 U.S. 19, 38-39 (1947); United States v. Maine, 420 U.S. 515, 522-23 (1975); United States v. Louisiana, 339 U.S. 699, 706 (1950); United States v. Texas, 339 U.S. 707, 719 (1950).

30. Native Vill. of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090, 1092 (9th Cir. 1998).

which arose from disputes between the federal government and the states over ownership and control of the territory of the marginal sea.[31]

The original dispute began in 1894 when oil was discovered off the coast of California.[32] As a result, both California and Texas began granting leases to oil companies because both states believed that previous Supreme Court cases "recognized that they held title to the seabed out to three miles from shore," which is known as the three mile marginal belt.[33] Soon after the leases were granted, however, Congress decided to bring the seabed under public domain, giving the United States the right to lease the seabed.[34] Subsequently, in May of 1945, the United States sued to enjoin Pacific Western Oil Company from exercising their rights to the seabed granted to them by California.[35] In September of that same year, President Harry Truman declared that the United States had jurisdiction over the seabed and its resources.[36] Consequently, these actions led to litigation over who had ownership of the seabed.[37]

In *United States v. California*, the United States argued that control over the seabed, also known as the "marginal sea and the land under it," was necessary "to protect [the] country against dangers to the security and tranquility of its people."[38] California responded by claiming that it owned the resources of the marginal sea "because it entered the Union on 'equal footing' with the original states, which allegedly held title to submerged land off their coasts."[39] The Court ultimately disagreed with California, finding there was no historical support for California's claim.[40] "The Court explained that historically the federal government claimed dominion over the three-mile wide marginal sea to protect the nation's neutrality, and

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31. A marginal sea is an area that separate coastal oceans from open oceans and often consist of large indentions into continental landmasses. *Marginal Seas*, WATER ENCYCLOPEDIA, http://www.waterencyclopedia.com/La-Mi/Marginal-Seas.html (last visited Sept. 1, 2015).

32. Andrew P. Richards, *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, 950 (2003).

33. *Id.*; *see also* Robert E. Hardwicke et al., *The Constitution and the Continental Shelf*, 26 TEX. L. REV. 398, 401-03 (1948).

34. Richards, *supra* note 32, at 950-51.

35. *Id.* at 951.

36. *Id.*

37. *Id.*

38. United States v. California, 332 U.S. 19, 29 (1947).

39. Richards, *supra* note 32, at 951 (citing *California*, 332 U.S. at 29-30).

40. *California*, 332 U.S. at 31-33.

recognized that the federal government's control of the seabed and waters bordering the United States enabled it to regulate commerce over, and fight wars on, the ocean."[41] Therefore, the Court concluded that the federal government, and not the states, held paramount title to control the "resources of the soil" under the water of the three-mile marginal belt along the coast of the United States.[42]

Three years later, in *United States v. Texas*, the Supreme Court revisited the issue, reaffirming its previous holding that the federal government has a paramount right to the waters of the ocean extending twenty-four miles past the three-mile marginal belt.[43] Although Texas argued that because it was an independent republic before joining the Union, its state title was paramount, and the federal government did not have superior rights to its surrounding waters,[44] the Supreme Court did not agree, holding that "[p]roperty rights must . . . be so subordinated to political rights as in substance to coalesce and unite in the national sovereign."[45] The Court explained that the state transferred its powers of sovereignty over the marginal sea to the federal government once it became part of the republic.[46]

In *United States v. Louisiana*, the Court extended the United States' range of control past the three-mile marginal belt.[47] In *Louisiana*, the United States sued because Louisiana had leased areas off the Gulf of Mexico to oil and resource companies.[48] The United States claimed that it had full dominion over the waters in the Gulf and that the leases issued by Louisiana were adverse to the United States.[49] The state argued that it held title to the waters and the seabed extending twenty-seven miles off the coast because it controlled the disputed area both before and since its admission to the Union.[50] The Supreme Court disagreed finding the marginal belt a national concern, and held the federal government has a paramount right to the twenty-four mile waters, including the resources beneath it, extending

41. Richards, *supra* note 32, at 952 (citing *California*, 332 U.S. at 32-35).
42. *California*, 332 U.S. at 38-39.
43. United States v. Texas, 339 U.S. 707, 719-20 (1950).
44. *Id.* at 712-13; Native Vill. of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090, 1093 (9th Cir. 1998).
45. *Texas*, 339 U.S. at 719.
46. *Id.*; *Trawler*, 154 F.3d at 1093.
47. United States v. Louisiana, 339 U.S. 699, 705-06 (1950); *Trawler*, 154 F.3d at 1093.
48. *Louisiana*, 339 U.S. at 701.
49. *Id.*
50. *Id.* at 702.

past the three-mile marginal belt described in *United States v. California.*[51] In support of its ruling, the Court reasoned that "problems of commerce, national defense, relations with other powers, war and peace" take precedence over state concerns.[52]

In the fourth case, *United States v. Maine*, both the United States and the states along the eastern coast claimed title to the areas both within and beyond the three-mile marginal bed.[53] Both parties wanted title to the disputed area to be able to explore the area and utilize its resources.[54] The United States claimed sovereign rights over the seabed and the subsoil of the thirteen Atlantic coastal states' coastlines,[55] an area that "included the ocean lying more than three miles seaward from the ordinary low-water mark and from the outer limit of inland waters on the coast extending seaward to the outer edge of the continental shelf."[56] The states claimed that they had a superior claim of control over the marginal sea because (1) their rights were established before the Constitution was adopted, and (2) the states never transferred their rights to the federal government.[57] The Court concluded, however, that the state's rights prior to the formulation of the Union had no constitutional importance and that the government had paramount rights to the waters.[58]

The culmination of these rulings created the Federal Paramountcy Doctrine. This doctrine is important because it gives the federal government broad control over the entire seabed and the soil under the water, which includes all resources in the area, including wildlife.[59] These rights are superior over all other previously established rights of the states, which includes any rights held by the Alaskan Native Villages.[60] As a result of these Supreme Court decisions, "Congress enacted the Submerged Lands Act (SLA) and the Outer Continental Shelf Lands Act (OCSLA).These acts surrendered to the states title to the seabed within three miles of their shores

51. *Id.* at 704-06; *Trawler*, 154 F.3d at 1093.

52. *Louisiana*, 339 U.S. at 704.

53. United States v. Maine, 420 U.S. 515, 517-18 (1975).

54. *Id.*

55. *Id.* at 516-17; *Trawler*, 154 F.3d at 1094.

56. *Trawler*, 154 F.3d at 1094.

57. *Id.*; *Maine*, 420 U.S. at 519.

58. *Maine*, 420 U.S. at 522-23.

59. United States v. California, 332 U.S. 19, 38-39 (1947); *Maine*, 420 U.S. at 522-23; United States v. Louisiana, 339 U.S. 699, 705-06 (1950); United States v. Texas, 339 U.S. 707, 719 (1950).

60. *California*, 332 U.S. at 38-39; *Maine*, 420 U.S. at 522-23; *Louisiana*, 339 U.S. at 701, 706; *Texas*, 339 U.S. at 719.

and extended federal 'jurisdiction [and] control' over the seabed beyond three miles from shore."[61] Congress also established exclusive regulatory authority over fisheries in the area described in the SLA and OCSLA.[62]

D. Aboriginal Title

Native Americans inhabited the land prior to the colonization of the United States.[63] Chief Justice Marshall recognized these inhabitants as "the rightful occupants of the soil"[64] in *Johnson v. McIntosh*, thereby integrating the concept of aboriginal title into American law.[65] Additionally, Chief Justice Marshall expounded on the Doctrine of Discovery in *Johnson*, which directed the European division of the New World and protected the Native Americans' aboriginal title.[66] "Aboriginal title refers to the Indians' exclusive right to use and occupy lands they have inhabited 'from time immemorial,' but that have subsequently become 'discovered' by European settlers."[67]

The purpose behind the aboriginal rights doctrine is based on humanity and policy,[68] meaning "the rights of the conquered to property should remain unimpaired; . . . the new subjects should be governed as equitably as the old, and . . . confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers."[69] In presenting the Doctrine of Discovery, the Supreme Court determined that Native Americans shall not be unjustly oppressed and the rights of Native Americans to their land should not be impaired.[70]

Aboriginal title is protected by federal law to all territory acquired by the United States;[71] it may only be extinguished by Congress.[72] Further,

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61. Richards, *supra* note 32, at 950.

62. *Id.*

63. *E.g.*, Bloch, *supra* note 10, at 9; *see* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

64. *Johnson*, 21 U.S. (8 Wheat.) at 574.

65. Richards, *supra* note 32, at 942.

66. *Id.*

67. Seneca Nation of Indians v. New York, 382 F.3d 245, 248 n.4 (2d Cir. 2004) (quoting County of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226, 233-34 (1985) (*Oneida I*)), *cert. denied*, 547 U.S. 1178 (2006).

68. People of Vill. of Gambell v. Hodel, 869 F.2d 1273, 1277 (9th Cir. 1989).

69. *Johnson*, 21 U.S. (8 Wheat.) at 589.

70. *Id.*

71. Richards, *supra* note 32, at 945.

72. *Id.* at 947.

aboriginal rights are not created by a treaty or any act of Congress,[73] and may not, in theory, be extinguished by the Federal Paramountcy Doctrine.[74] Both before and after the establishment of the Federal Paramountcy Doctrine, however, courts have attempted to eliminate or restrict aboriginal title throughout history. Some historical examples include those previously mentioned in this article, among others: the Yakama Treaty of 1855 and litigation regarding salmon in 1968; the Native Villages of Eyak cases; the *Village of Gambell v. Hodel* case; and the Native American tribes in Washington State.

One of the government's earliest attempts at extinguishing aboriginal title began with the Yakama Treaty of 1855.[75] The signing of the treaty, which took place in present day Walla Walla, Washington, was advocated by Isaac Stevens, then-governor of Washington.[76] Governor Stevens, who wanted to make way for settlement and development, pushed for tribal approval of the treaty, claiming "settlement was progress," and the Yakama tribes were impeding it.[77] As a result, the Yakama Indians agreed to trade their 29,000 square miles of land for a less than 2000 square mile reservation and $650,000.[78]

Approval of the treaty opened up the Yakama tribes' land for colonization, which led to violent conflicts with the government and judicial disputes over fishing rights yet to be surveyed.[79] Modern litigation over Yakama fishing rights, however, began in 1968 when the Yakama Indians were forbidden to take salmon from the Columbia River.[80] The case eventually was appealed to Ninth Circuit Court of Appeals, where the Court excluded the Yakama from exercising their fishing rights under the 1855 Treaty because the Yakama did not relocate to the reservation as dictated by Governor Stevens.[81]

The Villages face a similar problem today. Their dispute over fishing rights, brought before the Ninth Circuit in 1993, arose when the use of their

73. Native Vill. of Eyak v. Blank, 688 F.3d 619, 622 (9th Cir. 2012).

74. People of Vill. of Gambell v. Hodel, 869 F.2d 1273, 1277 (9th Cir. 1989).

75. Shutler, *supra* note 17, at 1004-05.

76. *Yakama History*, YAKAMA NATION MUSEUM & CULTURAL CTR., http://www.yakamamuseum.com/home-history.php (last visited Sept. 1, 2015).

77. Shutler, *supra* note 17, at 1004-05.

78. *Id.* at 1006.

79. *Id.*

80. *Id.* at 1012.

81. *Id.* at 1012-13.

traditional hunting grounds was limited by the Secretary of Commerce.[82] The Villages subsequently sued the Secretary of Commerce claiming aboriginal title to the OCS, more specifically the Cook Inlet and the Gulf of Alaska, as discussed in Part E below.[83]

E. Native Village of Eyak v. Trawler Diane Marie

For more than twenty years now, the Villages have been fighting to regain the hunting and fishing rights they claim were established thousands of years ago. In 1993, the Secretary of Commerce established regulations, in accordance with the Magnuson Act and the Halibut Act,[84] which limited access to the halibut and sablefish fisheries.[85] The Magnuson Act gave the United States sovereign control and jurisdiction to waters between three and 200 miles off the coast of the United States.[86] The Halibut Act further established an exclusive fishery conservation zone and gave the United States sovereign rights and fishery management authority over all fish and wildlife on the OCS.[87]

Under the Secretary of Commerce's regulations, non-tribal members were authorized to fish within the Tribe's traditional territories, but tribal members were forbidden to access the OCS without Individual Fishing Quotas ("IFQ"),[88] which only allow the holder to catch a certain number of halibut and sablefish per season.[89] These regulations also governed non-commercial sport fishing for halibut, which restricted village members to harvesting the halibut with a hook and line, limited the line to only two hooks per line, and allowed each fisherman to take home only two fish per day.[90] These regulations therefore posed a threat to the Villages' livelihood

82. Native Vill. of Eyak v. Blank, 688 F.3d 619, 621 (9th Cir. 2012); Native Vill. of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090, 1091 (9th Cir. 1998).

83. *Trawler*, 154 F.3d at 1091; *see also Native Villages*, *supra* note 20.

84. The Halibut Act gave the Secretary of Commerce the authority over the fishery conservation zone. 16 U.S.C. §§ 773-773k (2012), *cited in Trawler*, 154 F.3d at 1091. The Magnuson Act gave the United States: sovereign control and jurisdiction to waters between three and 200 miles off the coast of the United States; established an exclusive fishery conservation zone; and gave the United States sovereign rights and fishery management authority over all fish and wildlife on the OCS. 18 U.S.C. § 1811 (2012), *cited in Trawler*, 154 F.3d at 1091.

85. *Blank*, 688 F.3d at 621; *Trawler*, 154 F.3d at 1091.

86. 18 U.S.C. § 1811, *cited in Trawler*, 154 F.3d at 1091.

87. 16 U.S.C. §§ 773-773k, *cited in Trawler*, 154 F.3d at 1091.

88. *Id.*

89. Richards, *supra* note 32, at 940.

90. Bloch, *supra* note 10, at 8.

by allowing non-tribal members to utilize traditional hunting and fishing territories under the Secretary's authorization, while preventing the villagers themselves from doing the exact same thing.[91]

The Villages brought suit in the United States District Court for the District of Alaska, arguing they had aboriginal title,[92] consisting of the right to exclusively use, occupy, possess, hunt, fish and exploit the waters of their traditional territories on the OCS.[93] The court held, however, that the Villages did not have aboriginal title because (1) the Federal Paramountcy Doctrine precludes aboriginal title to the OCS, and (2) because an aboriginal right to fish in navigable waters based on aboriginal title does not exist.[94] Although the Villages argued their claim of aboriginal title does not conflict with the federal government's paramount title because aboriginal title is not a legal title, but only the right to use and occupy their traditional territories,[95] the court reasoned that if the states do not have superior rights, then neither do Native American tribes, even though these tribes existed and governed themselves long before the United States came into existence.[96]

In their appeal to the Ninth Circuit, the Villages cited *Village of Gambell v. Hodel* in their argument, which states aboriginal rights may coexist with the federal government's paramount title.[97] The Ninth Circuit disagreed, however, stating that any right or title by anyone other than the United States, including Native tribes, is not recognized because it opposes the Federal Paramountcy Doctrine.[98] The Ninth Circuit ultimately concluded that the *Hodel* case should not be given much deference because that case only contemplated aboriginal subsistence rights; exclusive rights to the OCS were never considered.[99]

As a result, the Ninth Circuit determined the Villages are barred from using their traditional hunting and fishing territories because their claims to "complete control over the OCS is contrary to these national interests and inconsistent with their position as a subordinate entity within our

91. *Id.*
92. *Trawler*, 154 F.3d at 1092.
93. *Id.*
94. *Id.*
95. *Id.* at 1095.
96. *Id.* at 1094.
97. *Id.* (citing People of Vill. of Gambell v. Hodel, 869 F.2d 1273 (9th Cir. 1989)).
98. *Id.*
99. *Id.*

constitutional scheme,"[100] and inconsistent with the Federal Paramountcy Doctrine.[101] The Court also held Native American tribes were similar to the original states mentioned in the Federal Paramountcy cases because the tribes governed their lands prior to the United States, which would preclude their claim over the national government.[102] Consequently, the NARF, representing the Villages, re-filed the case in district court.[103] In this case, *Native Village of Eyak v. Blank*,[104] the Villages claimed only non-exclusive aboriginal rights to the OCS instead of exclusive rights.[105]

F. Native Village of Eyak v. Blank

In *Native Village of Eyak v. Blank*, originally known as *Native Village of Eyak v. Trawler Diane Marie*,[106] the NARF represented the Villages of Eyak, Tatitlek, Chenega, Nanwalek, and Port Graham.[107] The Villages again attempted to regain at least part of their aboriginal rights to the OCS, this time by challenging the Secretary of Commerce's declaring of Individual Fishing Quota regulations and claiming non-exclusive aboriginal rights instead of exclusive aboriginal rights.[108]

In 1993, the Secretary of Commerce regulated the Tribes' access to halibut and sablefish on the OCS.[109] Prior to the regulations, there was no limit to the number of vessels that could commercially harvest halibut or sablefish.[110] The Secretary's regulations required any boater who wanted to fish commercially to obtain an IFQ which limited how many fish the vessel may take.[111] The Secretary only allowed IFQs to be assigned to people or entities that used vessels to commercially catch halibut or sablefish between 1988 and 1990.[112] As of 2003, the regulations allowed the Villages and other subsistence fishers to catch up to twenty halibut per person each

100. *Id.* at 1096-97.
101. *Id.* 1094-95; Bloch, *supra* note 10, at 21.
102. *Trawler*, 154 F.3d at 1094-95.
103. *Native Villages*, *supra* note 20.
104. Native Vill. of Eyak v. Blank, 688 F.3d 619, 619 (9th Cir. 2012).
105. *Id.*
106. *Native Villages*, *supra* note 20.
107. *Id.*
108. *Blank*, 688 F.3d at 622.
109. *Id.* at 621.
110. *Id.*
111. *Id.*
112. *Id.*

day.[113] If the Villages met the IFQ requirements, then tribal members could fish commercially.[114]

The Villages claimed, however, that when the Secretary of Commerce issued the new fishing regulations, he did not take into account the tribes' non-exclusive aboriginal rights to hunt and fish the OCS.[115] The district court dismissed the Villages' claim by concluding that non-exclusive aboriginal rights to hunt and fish the OCS never existed.[116] The district court found, and the appeals court agreed, that the area claimed was too vast with not enough people to control it.[117] Furthermore, the court also reasoned that the Villages could not have non-exclusive aboriginal rights because they could not prove that the ancestral villages exclusively controlled any part of the OCS.[118]

The holding in this case is contradictory. While the Villages asked for non-exclusive aboriginal rights, the court responded by ruling that the Villages cannot have non-exclusive rights because they have not established exclusive use of the property.[119] According to the Court, in order for the Villages to establish non-exclusive rights, they have to satisfy an exclusivity requirement.[120] These terms are incongruous. It is impossible for someone to be exclusive and non-exclusive at the same time. The Court confused the issue by reasoning a non-exclusive issue was based solely on exclusivity. Therefore, the issue of non-exclusive rights to hunt and fish needs to be addressed and defined. As a result, the development of a new test is necessary to determine whether or a not a Native American tribe qualifies for access to their traditional hunting and fishing grounds.

III. A New Precedent to Be Set

In *Blank*, the Ninth Circuit Court of Appeals dodged the issue of non-exclusive hunting and fishing rights, simply reiterating what the district court said about exclusive rights, even though the Villages raised a different issue.[121] The Villages based their claim on the issue of non-exclusive aboriginal rights, but the Court's reasoning of the case was centered on

113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 622.
117. *Id.* at 624.
118. *Id.* at 625-26.
119. *Id.* at 626.
120. *Id.*
121. *Id.*

exclusivity.[122] The Court's conclusion is contradictory, and has created a great deal of confusion as to what role "exclusivity" plays in the determination of non-exclusive rights. Therefore, the Supreme Court should no longer consider exclusivity, define the term "non-exclusive," and implement a new element test that will determine if a Native American tribe has non-exclusive rights to use their land.

A. Instructive Areas of Law

There are several factors which, when taken together, can provide the Court with a means by which "non-exclusive" can be defined. First, the Court should look at easements, which allow one or more parties to use another's land. The OCS is owned by the United States, but the Villages have claims to the area as well. Therefore, easements would be helpful in determining the Villages' use of the land. The Court should also look at aboriginal title. Aboriginal title is at the core of this entire controversy. It is how this situation came before the courts in the first place.[123] As a result, it would be useful to consider this doctrine when determining non-exclusive hunting and fishing rights.

1. Easements

Since the Villages are seeking rights to use land that is supposedly no longer their own, property law is relevant. Specifically, the Court in formulating a test should examine easements because certain treaty provisions, which are superior to state law, grant tribes rights to hunt and fish on lands not designated to their reservation,[124] which is analogous to the Villages and their desired access to the OCS. An easement is the right to use another person's property for a specific purpose.[125] The type of easement most applicable to the Villages' situation is an easement by necessity, which can be established by showing: (1) a unity of ownership of the land; (2) a severance of that ownership; (3) proof that, at the time of the severance, an easement is necessary to benefit one of the parties; and (4) a continuing necessity of the easement.[126] Even though this type of easement is typically used for landlocked estates,[127] it can be applicable here in developing a definition for non-exclusive rights.

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122. *Id.*
123. *Native Villages*, *supra* note 20.
124. Shutler, *supra* note 17, at 999.
125. Cobb v. Daugherty, 693 S.E.2d 800, 806 (W. Va. 2010).
126. *Id.* at 808.
127. Kellogg v. Garcia, 125 Cal. Rptr. 2d 817, 820 (Cal. App. 3d Dist. 2002).

The Villages, who have existed along the OCS for thousands of years,[128] meet all four of these elements. They hunted, fished, and made use of the land until the European nations began to invade their land.[129] Like the original states, the Villages had their own government congruent with the federal government.[130] These factors, taken together, show that both the Villages and the federal government had claim to the same land, satisfying the unity of land requirement.

As shown by the previously explained cases, the federal government took control, however, and began passing legislation that limited the Villages' use of the land, severing some of their rights to access and use the land as they had long before the United States came into existence. As a result, the severance element is met. As previously discussed, access to these territories is necessary for the Villages' survival because their way of life centered on their hunting and fishing expeditions, as opposed to the economy followed by the progressing United States.[131] This way of life is how the Villages still live to this day.[132] Therefore, the necessity requirement is met. Similar to how parties can have co-existing interests in easement by necessities, judicial history shows that under the Federal Paramountcy Doctrine, aboriginal title and federal paramountcy can exist simultaneously.[133] As a result, an easement by necessity analysis is beneficial to the development of a non-exclusive aboriginal rights test and definition.

2. Elements of Aboriginal Title

Aboriginal title is at the heart of this case. Therefore, it should be taken into consideration in determining hunting and fishing rights, but it should not be dispositive. In *Blank*, the Ninth Circuit held that the Villages did not have non-exclusive hunting and fishing rights to the OCS because they failed to establish the exclusivity requirement of aboriginal title.[134] In order for the Villages to prove aboriginal title, they had to prove the existence of actual, exclusive, continuous use and occupancy of the land "for a long

128. *Blank*, 688 F.3d at 620-21; *Trawler*, 154 F.3d at 1091.

129. *Blank*, 688 F.3d at 620-21; *Trawler*, 154 F.3d at 1091.

130. *Governing Alaska*, ALASKA HISTORY & CULTURAL STUDIES, http://www.akhistorycourse.org/articles/article.php?artID=408 (last accessed Mar. 25, 2016).

131. LITTLEPAGE, *supra* note 11, at 198.

132. *Alaska Native Subsistence Today*, PBS: HARRIMAN EXPEDITION RETRACED, http://www.pbs.org/harriman/1899/subsistence.html (last visited Mar. 25, 2016).

133. People of the Vill. of Gambell v. Hodel, 869 F.2d 1273, 1277 (9th Cir. 1989) (citing Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 233-36 (1985)).

134. Native Vill. of Eyak v. Blank, 688 F.3d 619, 625 (9th Cir. 2012).

time."[135] The "use and occupancy" element is proven by the Tribe's "way of life, habits, customs, and usages of the Indians who are [the land's] users and occupiers."[136] Exclusivity is proven when a tribe demonstrates that they used and occupied the land to the exclusion of others.[137] The Court concluded that the Villages must have "'an exclusive and unchallenged claim to the disputed areas' to be entitled to aboriginal rights."[138]

Some elements of aboriginal title should be considered in determining hunting and fishing rights, but others are no longer valid. The continuous use and occupancy prong, however, is one element relevant in determining rights to use the OCS. Continuous use is important because this element prevents anyone from laying claim to areas that they have used infrequently. The "for a long time" element is also important because it prevents those from being allowed to use land that they have not been on long enough to make it their own. These elements should therefore be used in the new non-exclusive aboriginal rights test that will be discussed later.

The other elements of aboriginal title are no longer valid, especially exclusivity. The Villages are not asking to exclude others from the land. They only want to be able to hunt and fish the OCS without interference from the government, and consequently exclusivity is a factor that no longer needs to be considered when determining non-exclusive hunting and fishing rights. Therefore, when a court is considering whether a Native American tribe is presently seeking non-exclusive aboriginal rights, even if they have claimed exclusive aboriginal rights before, the court should not consider previous "exclusivity" of the land when making its decision.

B. Exclusivity No Longer Required

1. The Exclusivity Requirement Is Unnecessary

In *Native Villages of Eyak v. Blank*, the Villages were denied non-exclusive rights because the Villages could not prove exclusivity.[139] Exclusivity is satisfied when a tribe or group can prove that they used and occupied the land to the exclusion of other tribes or groups.[140] The court concluded that the use of the OCS is not enough to show exclusive

135. *Id.* at 622.

136. *Id.* at 623 (quoting Sac &Fox Tribe of Indians of Okla. v. United States, 383 F.2d 991, 998 (Ct. Cl. 1967)).

137. *Id.*

138. *Id.* at 624 (quoting *Sac & Fox Tribe of Indians*, 383 F.2d at 906).

139. *Id.* at 623, 626.

140. *Id.* at 623 (citing United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1394 (Ct. Cl. 1975)).

possession.[141] Exclusivity is proven when the tribe or group exercises full control over the area they claim,[142] established when the tribe or group has the power to expel intruders from the land.[143] The court in *Blank* determined that the Villages failed to show they could "exclusive[ly] control, collectively or individually," the claimed areas of the OCS.[144]

Exclusivity is not needed, however, in order to establish non-exclusive rights to hunt and fish. First, the terms are incongruous, as previously stated. A person or group cannot establish non-exclusive rights by being required to prove exclusivity. This is confusing to those seeking clarification from the Ninth Circuit's holding. Therefore, the new claim of non-exclusive rights should render the exclusivity requirement to hunt and fish moot. Also, the Ninth Circuit explained the Villages have no hunting and fishing rights because there is no way they could exclusively occupy such a vast amount of land while simultaneously preventing others from using the land.[145] It is an impossible task. The Villages' traditional hunting and fishing areas encompass at least the 550,000 acres of land mentioned above. The Villages include a maximum of 1500 members,[146] but even if every single member monitored these lands, it is realistically impossible for the Villages to exclude others from using the land. For example, if every single member of the Villages spent their day monitoring the area mentioned, each member would have to cover around 366 acres every day.

Additionally, the Villages have a vast area on the OCS to hunt and fish. Due to the small population of these Villages, their fishing and hunting activity would not significantly impact the fish and game population. The commercial fishing that the IFQs and Secretary of Commerce's regulations are meant to protect will not suffer a large enough loss to negatively affect the fish supply.[147] Therefore, the Villages should be allowed to use their traditional territories without having to comply with the restrictive IFQ regulations.

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141. *Id.* at 623.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 626.
146. *Id.* at 624.
147. Christopher Costello, Steven D. Gaines &John Lynham, *Can Catch Shares Prevent Fisheries Collapse?*, 321 SCIENCE 1678 (2008), https://www.whitehouse.gov/sites/default/files/omb/assets/oira_0648/843-2.pdf.

2. Non-exclusive Rights: Not a Foreign Concept

The Supreme Court has commented on the issue of non-exclusive rights. In *United States v. Winans*, the Native Americans of the Yakama Nation sought to enjoin non-tribal members from obstructing their exercise of fishing rights and privileges.[148] The Yakama conveyed their rights and title to their land to the United States, but they reserved the right to use and occupy the aforementioned land in an 1859 Treaty between the United States and the Tribe.[149] Additionally, an exclusive right to fish navigable waters running through or bordering the reservation, or at areas traditionally fished, was secured to the tribes of that reservation.[150] This right included the right to fish at all the Tribe's usual and accustomed places, even though these locations may be held in common with non-tribal members residing in the same territory.[151] "[T]he treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted."[152]

The non-tribal members in *Winans* claimed that the state-issued license gave them exclusive rights to fish using a device called a fishing wheel on the Tribe's fishing grounds,[153] which they placed in the Columbia River in Washington State.[154] They argued that when Washington became part of the United States, the treaty provisions were extinguished and the United States federal government granted Washington sole power over the property in question.[155]

The Supreme Court disagreed, found the Treaty remained valid, and held that a license from the State given to non-tribal members to fish does not mean that Native Americans are excluded from fishing at the same locations.[156] According to the Treaty, the Yakama Indians' fishing rights were shared in common with the fishing rights of non-tribal members.[157] Therefore, the state licenses to use the fishing wheels did not give the non-tribal members the right to exclude the Native Americans.[158] As a result, the Yakama Indians were ultimately allowed to continue fishing the area as

148. United States v. Winans, 198 U.S. 371, 377 (1905).
149. *Id.*
150. *Id.* at 378.
151. *Id.*
152. *Id.* at 381.
153. *Id.* at 379.
154. *Id.* at 380.
155. *Id.* at 382-83.
156. *Id.* at 383-84.
157. *Id.* at 381.
158. *Id.* at 384.

they always had, as being allowed to hunt and fish was about as "necessary to the existence of the Indians [as] the atmosphere they breathed."[159]

The Villages' situation is very similar to the *Winans* case. Similarly to the licenses issued in *Winans*,[160] the IFQs were issued to commercial, non-tribal members to fish the traditional Native American grounds on the OCS because the increase in non-tribal fishermen was contributing to the decrease of the sablefish and halibut population.[161] Unlike the license in *Winans*, however, the Villages were not allowed to continue to fish despite the issued license, but instead, became subject to the IFQ requirements. The Ninth Circuit eventually allowed the Villages to subsistence fish, but only allowed them to fish using the most basic techniques, while non-tribal members with IFQs were allowed more modern techniques that allowed them better chances to catch fish for profit.[162]

The Ninth Circuit should have followed in the Supreme Court's footsteps in *Winans*. The Villages were not asking the Court to exclude the commercial fishermen, but instead requested permission to continue their way of life without the hindrance of government regulations. As previously mentioned, the OCS and the land surrounding it have been home to the Villages for thousands of years.[163] By denying access or only allowing access that is severely limited, it would be no different than the government allowing someone else to harvest another farmer's land, and in doing so, only allow the original farmer and landowner to use a small corner of that land for himself and harvest it using just a hoe and a spade.

Therefore, the Villages should be allowed to continue to hunt and fish on the OCS alongside the other commercial fishermen, but without the limitation of regulations. It is possible for more than one group of people to use and occupy land jointly and amicably.[164] Both the Villages and the commercial fishermen can live, hunt, and fish the same lands in harmony.

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159. *Id.* at 381.

160. *Id.* at 379.

161. *See* Clarence G. Pautzke & Chris W. Oliver, *Development of the Individual Fishing Quota Program for Sablefish and Halibut Longline Fisheries off Alaska*, NORTH PAC. FISHERY MGMT. COUNCIL, http://www.npfmc.org/ifqpaper/(last modified Oct. 8, 1997); *see also* Richards, *supra* note 32, at 940.

162. Bloch, *supra* note 10, at 8.

163. LITTLEPAGE, supra note 11, at 199.

164. Michael J. Kaplan, Annotation, *Proof and Extinguishment of Aboriginal Title to Indian Lands*, 41 A.L.R. Fed. 425 (1979).

C. A New Element Test

Considering other areas of law and different cases throughout history, a new element test can be created to determine non-exclusive hunting and fishing rights for the Villages and other Native American tribes across the nation. In his dissent in *Native Village of Eyak v. Blank*, Chief Justice Fletcher sided with the Villages, noting the tribes established their aboriginal title in at least part of the claimed area.[165] Chief Justice Fletcher stated that the case should have been remanded back to the lower courts to determine what rights the Villages would have under the exclusivity test.[166] Unfortunately, history has proven that aboriginal title has all but been eliminated,[167] which makes the exclusivity test no longer appropriate. It would be futile for the Villages to argue aboriginal title again. Therefore, the Supreme Court should define the term "non-exclusive" and implement a new element test that will determine if a Native American tribe has non-exclusive rights to use their land.

The Supreme Court should adopt the following term and definition of "non-exclusive aboriginal rights:" non-exclusive aboriginal rights are rights held by Native American tribes that grant them unhindered use of their traditional hunting and fishing grounds, alongside commercial huntsmen and fishermen, without being limited to the same regulations as the commercial entities.[168] In order for non-exclusive rights to exist, a tribe must satisfy all the following elements. First, a tribe must have made use of the land before the colonization of the United States.[169] Second, the land in controversy must be the "usual and accustomed places" used by the Tribe.[170] Third, the use of the land must be continuous.[171] If a tribe can

165. Native Vill. of Eyak v. Blank, 688 F.3d 619, 627 (9th Cir. 2012) (Fletcher, J., dissenting).

166. *Id.*

167. *See* Kaplan, *supra* note 164.

168. *See generally* United States v. Winans, 198 U.S. 371, 381 (1905). *See also* People of Vill. of Gambell v. Hodel, 869 F.2d 1273, 1276-77 (9th Cir. 1989); Benjamin A. Kahn, *The Legal Framework Surrounding Maori Claims to Water Resources in New Zealand: In Contrast to the American Indian Experience*, 35 STAN. J. INT'L. L. 49, 98 (1999).

169. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823) (stating that Native Americans were the first and "the rightful occupants of the soil" who had the legal right to possession of the land and the right to use it at their own discretion); Bloch, *supra* note 10, at 9 (stating that Native Americans were the first occupants of the land, which makes them "rightful occupants of the soil").

170. Shutler, *supra* note 17, at 999 (showing that Native Americans, specifically the Yakama, have been allowed to reserve their rights to hunt and fish "usual and accustomed

satisfy these elements, the tribe should be allowed to use their traditional hunting and fishing grounds alongside commercial fishermen and without interference from the government.

The current interferences of the government, such as the IFQ regulations and the basic fishing techniques restrictions, make it extremely difficult for Native Americans to fish the area. The imposed restrictions do not allow Native Americans the ability to catch enough fish before the season runs out and before the commercial fishermen take just enough fish to prevent damage to the population. Generally, people who have lived on a certain area of land for a long period time, and have used that land for hunting and fishing, become familiar with that land's wildlife, and become aware of the dangers posed to that wildlife when individuals fish outside of season and overfish. Therefore, those people would only hunt and fish at the appropriate time and would take no more than what they needed to survive because they know that doing so protects the population of the game in season, as well as other wildlife.[172]

1. Use of the Land Before the Colonization of the United States

The first element that should be considered in determining non-exclusive aboriginal title is the "use of the land before the colonization of the United States." The development of this element was inspired by the *Sac & Fox* test, more specifically the "for a long time" element, which helps determine the existence of the aboriginal title. Chief Justice Marshall's explanation of aboriginal title was also considered in developing this part of the non-exclusive aboriginal rights test.

This element is necessary to ensure that if certain tribal members relocate to lands inhabited by their ancestors, those individuals cannot claim non-exclusive rights to uninhibitedly hunt and fish foreign lands just because they are of Native American descent. For example the Appalachian Mountains have many people of Melungeon ancestry, which consist of at least one Native American relative somewhere in their lineage.[173] However,

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places" by the way of a treaty, which shows the government has given importance to usual and accustomed places).

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

172. Julia Layton, *Why Can You Only Hunt Certain Game in Certain Seasons?*, HOW STUFF WORKS: ADVENTURE (Dec. 12, 2008), http://adventure.howstuffworks.com/outdoor-activities/hunting/regulations/hunting-season.htm.

173. Ima Stephens, *Black Dutch*, *in* ENCYCLOPEDIA OF APPALACHIA 248 (Univ. of Tenn. Press, 2006).

many of these people have never participated in traditions, such as hunting and fishing, from their Native American heritage.[174] As a result, these individuals should not be able to claim rights to their Native American ancestors' traditional hunting and fishing grounds because hunting and fishing for themselves and the tribe is not an integral part of their daily life.

The amount of time needed to satisfy the "for a long time" element is not defined by a certain number of years, but is shown by the amount of time it took for a Native American tribe to turn the wilderness into domesticated lands.[175] Domestic lands are those which are adapted or used by a person or group for one's own purpose.[176] Additionally, the tribe must have domesticated the land before the United States became a country.[177] The Villages claim to have been using the land in question for over 7000 years, which substantially predates the colonization of the United States.[178] Archeological dig sites have revealed that the Villages occupied the OCS and the land surrounding it since glaciers covered most of the area during the last ice age.[179] For example, dig sites uncovered various types of artifacts which include tools, weapons, and remnants of housing establishments.[180] These items include grinding stones, harpoon heads, bone tools, slate awls, house posts, stone lamps, and bones and shells from a variety of mammals and shellfish left over from meals.[181] These archeological discoveries show that the Villages were the ones who conquered the land because they are evidence of an established culture and a set way of life.[182]

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174. Jessica Martin, *Majority of American Indians Move Off Reservations, but Their Cultural, Financial Services Remain Behind*, WASH. UNIV. ST. LOUIS: THE SOURCE (Apr. 12, 2007), https://source.wustl.edu/2007/04/majority-of-american-indians-move-off-reservations-but-their-cultural-financial-services-remain-behind/.

175. Confederated Tribes of Warm Springs Reservation of Or. v. United States, 177 Ct. Cl. 184, 194 (1966).

176. *Domesticate*, DICTIONARY.COM, http://dictionary.reference.com/browse/domesticate (last visited Sept. 2, 2015).

177. *Confederated Tribes of Warm Springs Reservation of Or.*, 177 Ct. Cl. at 194.

178. *Blank*, 688 F.3d at 620-21; *Trawler*, 154 F.3d at 1091; *see History & Culture*, CHUGASH, http://www.chugach.com/who-we-are/history-culture (last visited Oct. 13, 2015); *see also* Richards, *supra* note 32, at 939.

179. *History & Culture*, *supra* note 178.

180. LITTLEPAGE, *supra* note 11, at 198.

181. *Id.*

182. *See* Robert F. Heizer, Book Review, 59 AM. ANTHROPOLOGIST 370, 371 (1957) (reviewing FREDERICA DE LAGUNA, CHUGASH PREHISTORY: THE ARCHEOLOGY OF PRINCE WILLIAM SOUND, ALASKA (1956)) (showing evidence of established culture and way of life).

Additionally, the Villages were the first people to greet the European explorer, Vitus Bering, and his group when they came to Alaska in 1741.[183] The greetings, along with the archeological discoveries, show that the Villages lived on the land long enough to make it their home. The presence of coffins and ornaments show that the Villages had established the area as a respectful place to lay their dead to rest, while weapons show that they were hunting and protecting the land in which they lived. The artwork also shows their hunting traditions in the area and that they have integrated the area into their religious practices.

These examples represent that the Villages put down roots, developed customs and traditions, and made the area on and around the OCS a permanent place to live. As a result, the Villages have satisfied the time element of non-exclusive rights test. If the United States would allow the Villages to use the land, they would be able to continue their time-honored traditions to help ensure the survival of their culture. By denying the Villages rights to use their traditional hunting and fishing areas, essential knowledge dies with the older generation, which prevents the present generation from carrying on traditions held dear by the Villages people. Therefore, granting the Villages their requested rights is necessary for their culture to survive.

2. Usual and Accustomed Grounds and Stations

Hunting and fishing grounds, which are areas used as part of a Native American tribe's habits and customs, are considered as much under a Native American tribe's possession as a cleared field is under a non-Indian's possession.[184] In *United States v. Washington*, the district court concluded that the Native American tribes of that area had the right to fish on areas not designated to their reservations, but those rights were held "in common" with the rights of non-Native American tribal members.[185] These off reservation areas are reserved to the "usual and accustomed grounds and stations."[186] "Usual and accustomed" include fishing areas familiar to the tribal members and excludes areas that are unfamiliar locations or locations used in long intervals, infrequently, or in extraordinary situations.[187]

183. *History & Culture*, *supra* note 178.

184. Sac & Fox Tribe of Indians v. United States, 179 Ct. Cl. 8, 22 (1967) (citing Mitchel v. United States, 34 U.S. 711, 745 (1835)).

185. United States v. Washington, 384 F. Supp. 312, 332 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d. 676, 693 (9th Cir. 1975).

186. *Id.*

187. *Id.*

"Grounds" and "stations" are often used together, but they are actually separate terms with each having its own meaning.[188] "Stations" are considered as fixed locations and other narrow limited areas.[189] These areas are indicated by structures such as fishing platforms.[190] "Grounds" are larger areas that may encompass several stations and other unspecified locations.[191] The Tribes' oral history was able to pinpoint specific fishing locations, but it was impossible to recall every single fishing location used by the Tribes.[192]

Some of the tribes even developed "usual and accustomed grounds and stations" through the use of their boating routes as long as those routes were not used solely for travel.[193] Some of the marine areas identified as hunting and fishing grounds by the tribes were the Lummi reef in Northern Puget Sound, the Makah halibut banks, Hood Canal and Commencement Bay.[194] Therefore, the court concluded that every fishing location where the tribes customarily and occasionally fished, "however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters, is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, the right to take fish."[195] This case made its way through the appeals process until it finally came before the Ninth Circuit.[196] The Ninth Circuit affirmed the lower court's decision in holding the Native American tribes had "a right to an actual share of certain valuable species of fish, not merely a right to the opportunity to catch fish, and that state police power regulations cannot be used unduly to impair this right."[197]

Oral history has shown that the Villages have been hunting and fishing on this land for millennia,[198] and says that the Villages came upon the land one day while their hunters were kayaking along the Pacific coastline.[199] During the hunters' exploration, they saw a large black object sticking up

188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 353.
193. *See id.*
194. *Id.*
195. *Id.* at 332.
196. United States v. Washington, 645 F.2d 749, 750 (9th Cir. 1981).
197. *Id.*
198. *See Our People*, *supra* note 7.
199. *Id.*

out of the ice.[200] The hunters paddled over to investigate and discovered the object coming out of the ice was actually mountaintops emerging out of the retreating glacial ice.[201] These mountains also contained ice-free shores in which the Villages started their first settlements.[202] The years and seasons came and went, which quickly melted the last remnants of the glaciers.[203] The melted ice exposed deep fjords and lagoons that contained abundances of sea life and provided habitable beaches on which to erect settlements.[204] "When the ice retreated, so did the animals. The Villages followed the ice and animals deep into the heart of Prince William Sound, where they remain to this very day."[205]

The Villages are not asking for permission to hunt and fish on lands that they have never, or even on rare occasion, hunted on. They are asking to hunt and fish on lands traditionally used today and by their ancestors. Similar to the tribes pinpointing fishing locations in *Washington*, the Villages also pointed to their hunting and fishing locations, which include the Prince William Sound area, the Gulf of Alaska, and the Cook Inlet. Furthermore, just as the tribes in *Washington* referenced their oral history, the Villages used their oral history to show how they came to inhabit the area. This history shows the Villages have established "usual and accustomed grounds and stations" for hunting and fishing. Stations were created by the Villages' initial settlements on the beach. Even after the ice retreated and the Villages moved inland, they continued to visit the OCS to hunt and fish for marine life. Grounds were established by the Villages' move inland and the continuous hunting and fishing away from the villages. The relocation did not make the land any less familiar.

As a result, the Villages are requesting that the Ninth Circuit follow in its own precedent set in *Washington* and allow them to hunt and fish on lands, even if those lands were away from their villages, that they have used for centuries. They are asking to be able to continue a way of life passed through thousands of years of traditions, uninhibited by the government, on the same grounds hunted and fished by their ancestors. The Villages have proven that they have continued to use the same lands for thousands of years, and therefore meet this element of the test and should be allowed to

200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*

hunt and fish alongside the commercial fishermen without any interference from the government or non-tribal fisherman.

3. Continuous Use of the Land

The Villages must also prove their use of the land has been continuous. "Continuous use and occupancy" must be "in accordance with the way of life, habits, customs and usages of the Indians who are its users . . . ."[206] The lower court in *Blank* determined that the Villages' hunting and fishing rights were integral to their ancestors' way of life,[207] and also concluded the Villages and their ancestors were skilled hunters and fishermen of the OCS.[208] Their way of life provided them with the years of experience needed to develop their skilled techniques; the Villages knew the land and the sea,[209] and knew the ocean currents so well that they were able to navigate the OCS on their boats with ease.[210] These skills were developed as the Villages and their ancestors traveled through Middleton Island, the Barren Islands, the Cook Inlet, and the Copper River Delta on numerous hunting and fishing expeditions.[211] As a result, there is a strong likelihood that the Villages seasonally used portions of the OCS lands closest to their villages and during their travels to outside lands.[212]

Continuous use of land is not strictly limited to a Native American tribe's settlements.[213] Continuous use also includes areas of land that a tribe continuously utilizes for hunting even if the area in question is used seasonally or intermittently.[214] The District Court said that the Villages did not make regular use of the claimed areas of the OCS,[215] and the Secretary that issued the IFQs that restricted the Villages' right to hunt and fish the OCS argued the Villages' use of the land was "too sporadic" to establish rights to hunt and fish the OCS.[216] However, seasonal and occasional use is sufficient enough to satisfy the continuous use and occupancy requirement as long as the use of the land is "consistent with the seasonal nature of the

206. Sac & Fox Tribe of Indians v. United States, 179 Ct. Cl. 8, 21-22 (1967).
207. *See* Native Vill. of Eyak v. Blank, 688 F.3d 619, 623 (9th Cir. 2012).
208. *Id.*
209. *See id.*
210. *Id.* at 627 (Fletcher, J., dissenting).
211. *See Alaska Native Subsistence Today*, *supra* note 132.
212. *Blank*, 688 F.3d at 629-30.
213. Confederated Tribes of Warm Springs Reservation v. United States, 177 Ct. Cl. 184, 194 (1966).
214. *Id.*
215. *Blank*, 688 F.3d at 623.
216. *Id.*

ancestors' way of life as marine hunters and fishermen."[217] The majority of the justices in the *Blank* case agreed that the Villages made continuous use of the land on the OCS.[218]

IV. Conclusion

Over the years, the government has continually passed laws while the courts have made precedents that prevent Native American tribes across the country from using their traditional hunting and fishing grounds. By not addressing the issue on non-exclusive aboriginal rights, the courts run the risk of slowly destroying entire Native American cultures to which hunting and fishing traditions are essential to survival. These traditions, how these tribes survived before the establishment of the United States government, were essential to tribal members to feed their families. Notwithstanding need, however, tribal members made the best use out of everything that they caught and left nothing to waste. They used the hides for clothes and the bones for weapons and tools, and what they did not use to sustain the village, they traded with other villages for supplies. By inhibiting the Native Americans' abilities to hunt and fish, tribes are inhibited from teaching their children these customs, which may be detrimental to any hope tribes have of ensuring the survival of their culture.

When most people watch documentaries about Native American culture, they are amazed at the beauty of their traditions, which can include the intricate design of leather clothing made from animal hides, the immense effort put into a handmade knife made from animal bones, or crafting elaborate headdresses made of bird feathers. For the Alaskan Native Villages, however, their culture is deteriorating because they lack sufficient access to their traditional hunting and fishing areas and are inhibited by governmental regulations. Without an established definition of non-exclusive aboriginal rights and requirements to obtain those rights, Native American tribes are prevented from continuing traditions that have been passed on from generation to generation for thousands of years. When the older generation cannot teach the younger generation the tribe's ways of life, the culture dies because no one has the knowledge to carry on those time honored traditions.

By failing to address the non-exclusive aboriginal rights issue raised by the Villages, the courts are establishing precedents and ruling in favor of enacted statues that prevent the tribes from continuing a way of life that has

217. *Id.*
218. *Id.* at 627 (Fletcher, J., dissenting).

been in practice uninhibited for millennia. As a result of these precedents, the Native Americans can be denied rights to land that they have used for thousands of years in favor of granting commercial rights to non-indigenous people who are only using the land and sea for monetary gain. Allowing this to happen is no different than an entity taking a farmer's land, letting someone else harvest the crops, but telling the farmer he or she cannot touch the produce.

The Supreme Court should have granted the Villages petition for a writ of certiorari and addressed the issue of whether or not the Villages have non-exclusive rights to hunt and fish on the Outer Continental Shelf. Upon hearing the case, the Supreme Court should have considered easements in giving the Villages their deserved rights. Easements, along with the *Winans* case, illustrate how the Villages and the non-tribal members can hunt and fish alongside each other without conflict or disastrous results. Finally, the Court should have considered the new definition and elemental test provided to determine that the Villages have non-exclusive rights to hunt and fish the OCS. Hopefully, other courts across the United States will use this new definition and test to grant other Native American tribes access the traditional hunting and fishing to which they are currently denied or given limited access, in an effort to preserve their cultures and ways of life for years to come.