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INDIANS AGAINST IMMIGRANTS—OLD RIVALS, NEW RULES: A BRIEF REVIEW AND COMPARISON OF INDIAN LAW IN THE CONTIGUOUS UNITED STATES, ALASKA, AND CANADA

James E. Torgerson*

Introduction

For decades the native peoples of North America resisted the engulfing surge of European settlers. The struggle continues today, though the battle has moved from deserts and woodlands to courts and legislatures. Today it is a battle of legal rights, fought with words, not weapons. For the past century, natives have waged this battle with varying degrees of success. Perhaps the struggle has never been more fruitful than over the past dozen years. In that time, Canadian natives succeeded in getting their aboriginal and treaty rights entrenched in the new Canadian constitution; some Indians in the forty-eight contiguous states won major court victories in fishing rights cases in the Northwest and in land claim cases in the Northeast; and Alaskan natives received a settlement of their claim to the lands of that state exceeding 40 million acres of land and \$950 million.

In light of these changes, the purpose of this article is to briefly review, compare, and analyze the rights and resources held today by the native populations of the forty-eight contiguous United States, Alaska, and Canada. In the first four parts of the article, the contiguous forty-eight states, Alaska, and Canada are considered separately. The analysis section contains a number of observations and recommendations applicable to all three regions.

I. History

Both the United States' and Canada's policies toward their native peoples have fluctuated greatly since the countries were first formed. In 1976, Congressman Lloyd Meeds, vice-chairman of the American Indian Policy Review Commission, made the following observations about the United States' Indian policy:

The federal policy implementing [the Indian-governmental] relationship has shifted and changed with different Administrations and passing years. These policies have included peacemaking diplomacy, armed conflict, tribal removal, subjugation, exter-

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minations, concentration, assimilation, termination, and self-determination—not necessarily in that order. . . . In short, there exists a unique relationship between the United States and Indian tribes which has never been admitted [sic] of an expert definition and which has never been implemented by a coherent consistent policy.¹

Although the Canadian government's fluctuations have not been as extreme, it has failed to implement an ordered policy in dealing with its native peoples. A brief review of the shifting policies of these two countries will provide a context for examining the special relationships, property interests, and jurisdictional limits possessed by the natives of the forty-eight contiguous United States, Alaska, and Canada.

United States

During the early European occupation of North America, Indian tribes were considered to be sovereign powers.² Accordingly, only other sovereign powers could make treaties with them. In the Royal Proclamation of 1763, where Great Britain set aside an enormous reserve for Indians in the territory of the present-day United States,³ British subjects were forbidden the privilege of "making any Purchases or Settlements whatever, to taking Possession of any of the Lands above reserved" without explicit permission.⁴ Upon its inception, the fledgling United States government claimed similar exclusive jurisdiction in dealing with Indians. Beginning in 1790, Congress passed a number of Indian nonintercourse acts. Under the acts, treaties or agreements entered into between states or private citizens and the Indian tribes required congressional ratification to be valid.⁵ The nonintercourse acts were the first of many congressional actions establishing the exclusive jurisdiction of the federal government to deal with and legislate over Indian tribes.⁶

In 1830, having concluded that it was impossible for whites and Indians to live together in the East, Congress passed the In-

1. T. BERGER, BACKGROUND DESCRIPTION TO THE OVERVIEW HEARINGS, ALASKA NATIVE REVIEW COMMISSION 6 (1984).

2. *Worcester v. Georgia*, 31 U.S. (5 Pet.) 515, 556 (1832).

3. R. SURTEES, CANADIAN INDIAN POLICY 22 (1982).

4. MINISTER OF INDIAN AFFAIRS & NORTHERN DEVELOPMENT, IN ALL FAIRNESS 9 (1981).

5. Johnson, *The U.S. Indian Fishing Rights Controversy*, in COASTAL RESOURCES IN THE FUTURE OF BRITISH COLUMBIA 107 (A. Dorcey ed. 1980).

6. *Id.*

dian Removal Act.⁷ Subsequently, from 1832 to 1842, the federal government relocated "portions of [the] 'Five Civilized Tribes' from the southeastern states to Indian Territory."⁸ "Indian Territory," as defined in the Non-Intercourse Act of 1834, was

all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which Indian title has not been extinguished.⁹

By the 1850s Indian Territory had been opened to settlement. Again, numerous conflicts arose.¹⁰ The federal policy changed from one of demanding relocation to one of creating reservations.¹¹ Placing the Indians on reservations served the dual purposes of: (1) separating Indians and non-Indians, and (2) ensuring Indians at least a remnant of their lands on which to govern themselves and continue their own culture and traditions.¹² This process was essentially completed by the 1880s. At that time only the Apaches under Geronimo were still fighting and soon they too were overcome.¹³ "Rations of food and clothing were made available [to the reservation Indians] in lieu of being able to hunt in customary places."¹⁴

It was about this time that Congress stopped making treaties with Indian tribes.¹⁵ In the Indian Appropriation Act of 1872, Congress reaffirmed treaties made before 1871, but mandated that in the future "agreements," rather than treaties, would be negotiated with tribes. This change affected Indian sovereignty because reservations were subsequently established by executive order agreements which were easily amended.¹⁶ In 1871, at the end of the treaty era, 389 treaties had been entered into between the United States and Indian tribes.¹⁷ Post-1871 agreements con-

7. R. ARNOLD, *ALASKA NATIVE LAND CLAIMS* 29 (1978).

8. *Id.*

9. Non-Intercourse Act of 1834, 4 Stat. 729.

10. Johnson, *supra* note 5, at 107.

11. R. ARNOLD, *supra* note 7, at 29.

12. Johnson, *supra* note 5, at 107.

13. G. GROSSMAN, *THE SOVEREIGNTY OF AMERICAN INDIAN TRIBES: A MATTER OF LEGAL HISTORY* 6 (1979).

14. R. ARNOLD, *supra* note 7, at 29.

15. *Id.*

16. G. GROSSMAN, *supra* note 13, at 7.

17. Keon-Cohen, *Native Justice in Australia, Canada and the U.S.A.: A Comparative Analysis*, 7 *MONASH U. L. REV.* 287 (1981).

tinued to guarantee Indians reserved lands and other compensation in exchange for claims to their historical territories. Indian land holdings in 1887 totaled 136,985 acres.¹⁸

In 1887, the United States' Indian policy changed dramatically. Inspired by reform-minded religious groups who desired to remedy the poverty and powerlessness of reservation Indians and supported by other parties less concerned with Indian interests than with opening Indian lands to settlers, the General Allotment Act of 1887 gave the Secretary of the Interior power to issue a patent in fee simple to qualified Indian allottees.¹⁹ The intent of the legislation was to encourage the civilization of the Indians by giving them individual ownership of parcels of land on the reservations. The Indian allottees were then expected to take up farming and the ways of the white man.²⁰ Actually, the land allotted to Indians was then purchased from them by non-Indians, who thereby gained control of much of the best agricultural and mineral land on the reservations. By the time this era of allotments and assimilation ended in 1934,²¹ Indians had only 48 million acres of land left.²² Not only had they lost almost 100 million acres of land, but in many places they had lost their traditional system of common ownership of land. As a result, Indians identified less with their tribe and tribal governments became less important.²³

Reform sentiment arose again in the 1920s. Indians were given United States citizenship by the Indian Citizenship Act of 1924.²⁴ More significant, the Meriam Commission Report of 1928 adamantly denounced the allotment policy and proposed sweeping reforms.²⁵ By 1934, Congress implemented many of the Meriam Commission recommendations when it enacted the Indian Reorganization Act. The Act, also known as the Wheeler-Howard Act, was intended to stabilize "the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority,

18. THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, LEGAL ISSUES IN INDIAN JURISDICTION 5 (1976) [hereinafter INDIAN JURISDICTION].

19. See Ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331 through 381 (1982)).

20. INDIAN JURISDICTION, *supra* note 18 and accompanying text.

21. D. GETCHES, D. ROSENFELD & C. WILKINSON, FEDERAL INDIAN LAW: CASES AND MATERIALS 79 (1979).

22. INDIAN JURISDICTION, *supra* note 18, at 5.

23. R. ARNOLD, *supra* note 7, at 56.

24. Ch. 233, 43 Stat. 253 (1924). See also G. GROSSMAN, *supra* note 13, at 10.

25. L. MERIAM, THE PROBLEM OF INDIAN ADMINISTRATION (1928).

and prescribing conditions which must be met by such tribal organizations.”²⁶ Furthermore, the Act ended the allotment system and established more reservation land.²⁷ Also passed in 1934, the Johnson-O’Malley Act helped Indians gain more state welfare services and helped more Indian children gain access to public education.²⁸

The United States’ Indian policy changed again in the late 1940s. Foreshadowing what was later labeled the “termination era,” Indians were encouraged by the Bureau of Indian Affairs (BIA) to migrate from reservations to urban centers. Although relocation centers were established in some key urban areas, these centers provided aid to arrivals for only a brief period.²⁹ Thus, by 1953 the House of Representatives asked the BIA to terminate the special services and the tribal status of tribes that were “economically self-sufficient enough to do without federal services.”³⁰ Subsequently, approximately a hundred reservations were disestablished.³¹ Public Law 280, enacted in 1953, had an even more widespread impact. It was designed to withdraw federal protections and permit states to extend their laws to Indian lands, with or without the consent of the tribes.³²

The termination era ended in 1961 and Indian self-determination was proposed. Laws were enacted and executive actions taken that reversed the termination trend. The Indian Civil Rights Act of 1968 imposed potentially serious limitations on the freedom of tribes to govern their own members. Even in that legislation, however, Congress exhibited some sensitivity to tribal sovereignty by omitting from the Act some rights guaranteed in the Constitution (such as the prohibition of the governmental establishment of religion) that clearly would have conflicted with traditional Indian practices.³³

Recently, there has been some backlash against the Indian assertions of sovereignty and property rights. This has been fueled in large part by successful Indian land litigation in the Northeast and successful assertions of fishing rights in the Pacific Northwest.³⁴

26. S. REP. No. 1080, 73 Cong., 2d Sess. (1934).

27. Ch. 576, 48 Stat. 984 (1934) (as amended, 25 U.S.C. §§ 461 *et seq.* (1982)).

28. Ch. 147, 48 Stat. 596 (25 U.S.C. §§ 452 *et seq.* (1982)).

29. G. GROSSMAN, *supra* note 13, at 13.

30. *Id.*

31. Johnson, *supra* note 5, at 108.

32. G. GROSSMAN, *supra* note 13, at 14.

33. *Id.*

34. Keon-Cohen, *supra* note 17, at 260.

Although this backlash seems to have subsided, it produced several blatantly anti-Indian bills, none of which became law.³⁵ On the other hand, Congress has enacted some legislation favorable to Indians, notably the Indian Health Care Improvement Act in 1976,³⁶ the Native American Religious Freedom Act,³⁷ and Indian Child Welfare Act in 1978.³⁸

The current national policy supports Indian self-determination. Recent legislation and a number of recent court cases have solidified the sovereignty of tribes. Even so, especially on the frontier where tribal jurisdiction touches upon the lives or property of non-Indians, the legal border war continues.

Alaska

The history of Alaska and the history of the contiguous forty-eight states obviously have much in common. As a territory, Alaska was subject to the same laws as the other states respecting its Indian population. Even so, historical differences exist that differentiate the present situation of the natives of Alaska from the Indians of the contiguous forty-eight states.

Vitus Bering is credited with "discovering" Alaska in 1741.³⁹ Alaska at that time was inhabited by an estimated 74,000 natives including Aleuts, Eskimos, and Indians.⁴⁰ Shortly thereafter came fleets of Russian fur traders. They never sought to colonize Alaska; gathering furs, especially sea otters, was their sole objective.⁴¹ Consequently, the number of Russians in the colony was never very large, peaking in 1823 and averaging 550 people from 1799 to 1867.⁴²

By the 1860s, Russia had good reasons to sell Alaska to the United States. Its experience in the Crimean War put in question its ability to defend Alaska against other nations. Moreover, the Russian American Company was losing money.⁴³ Negotiations between the two countries were completed speedily, and the treaty

35. *Id.* at 261.

36. Pub. L. No. 94-437, 90 Stat. 1400 (25 U.S.C. § 1601 (1982)).

37. Pub. L. No. 95-341, 92 Stat. 469 (42 U.S.C. § 1996 (1978)).

38. Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (25 U.S.C. §§ 1901 *et seq.* (1982)).

39. R. ARNOLD, *supra* note 7, at 8.

40. *Id.*

41. *Id.* at 19.

42. *Id.* at 20.

43. *Id.* at 24.

was signed in 1867. It failed to define clearly the status of the natives.⁴⁴ As of 1867, pursuant to the treaty, the “uncivilized tribes” were officially “subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes in that country.”⁴⁵

Subsequently, Alaska natives were subject to the United States’ federal jurisdiction like other Indian residents of the United States. Two important distinctions, however, differentiated the natives of Alaska from the Indians in the contiguous forty-eight states. First, they had, with minor exceptions, no agreements with the federal government that “quieted” their aboriginal title to their traditional lands in Alaska.⁴⁶ Second, with minor exceptions, Alaska natives did not live on or have any reservations.⁴⁷ Because of these factors, among others, the Alaska Native Claims Settlement Act (ANCSA) was enacted. Because ANCSA will be discussed below in more detail, it is sufficient to note here that ANCSA establishes a different system of federal, state, and native inter-relationships from that in existence in the contiguous forty-eight states.

Canada

The first Europeans in eastern Canada were the French, who, unlike the British, did not acknowledge the Indians’ title to land. As a result, they made no treaties with Indians.⁴⁸ French colonization had two primary effects on Indians: (1) to begin the assimilation process through Christianizing the Indian and (2) to arouse anti-British sentiments among the Indians, especially those in what later became the maritime provinces.⁴⁹

The British vanquished the French in Canada and with the 1753 Treaty of Paris, Britain became the only European power to have official contact with Canada’s natives. In the Royal Proclamation of 1763, Great Britain set forth its first Indian policy. It sought to avoid, or at least minimize, contact with Indians in order to reduce conflict and created a huge Indian reserve, encompassing

44. *Id.* at 25.

45. *Id.*

46. FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 743 (R. Strickland et al., eds. 1982) [hereinafter F. COHEN].

47. *Id.* at 743-46.

48. S. WEAVER, MAKING CANADIAN INDIAN POLICY 32 (1983).

49. R. SURTEES, *supra* note 3, at 19.

an area from southern Ontario to the Gulf of Mexico, and from the Appalachian highlands to the Mississippi River.⁵⁰ The Indian inhabitants were assured sole occupancy and proprietary rights to the area.⁵¹

Beginning in 1783, British Indian policy changed from protecting Indians from white encroachments to purchasing their lands for settlement and for military purposes.⁵² This change corresponded with a change in the way the British perceived the Indians. Their importance as warriors, either as allies or as adversaries, decreased as the white population in Canada increased. The tribes became less of a military presence and more of a hindrance to white expansion.

In 1830 the policy of assimilation was officially adopted. The first step in implementing this policy was to collect the Indians on reserved lands.⁵³ The use of reserves was to be a temporary system of separate development designed to educate and Christianize the Indians and to establish agriculture as the primary economic base. Some argued that this process could be accelerated by giving the Indians fee simple title to their property, with the pride of private ownership encouraging more rapid assimilation. By the 1840s, however, this argument had been defeated by opponents who maintained that such actions would result in the Indians losing their lands and losing their reserves.⁵⁴

In 1860, seven years before the formation of the Confederation in 1867, Britain transferred control of Indian affairs to the province of Canada. Canada inherited, without significant revision, the general framework of British Indian policy. The principles of protection and assimilation remained. The techniques of education, Christianization, and reservations were also retained. To the degree that Indian policy continued to evolve, it became increasingly legalistic in determining who qualified as an Indian and increasingly antagonistic toward the symbols and traditions of the Indians' heritage.⁵⁵

The Canadian government continued Britain's practice of signing treaties with Indian tribes. Between 1871 and 1877, seven major land cessions secured for the government the central and southern

50. *Id.* at 21.

51. *Id.* at 22.

52. *Id.* at 25.

53. *Id.* at 34.

54. *Id.* at 37.

55. *Id.* at 44.

portions of the Canadian West.⁵⁶ These treaties were entered into pursuant to Canada's recognition of the existence of Indian title. As the Governor General, the Earl of Dufferin, said in a speech in Victoria, British Columbia in 1876:

In Canada . . . no Government, whether provincial or central, has failed to acknowledge that the original title to the land existed in the Indian tribes and communities that hunted or wandered over them. Before we touch an acre we make a treaty with the chiefs representing the bands we are dealing with, . . . not until then do we consider that we are entitled to deal with an acre.⁵⁷

The final treaty between Canada and its natives involved 372,000 square miles of land (an area eight times the size of the state of New York) located mostly in the Northwest Territories. It was signed in 1921.⁵⁸

Even after this treaty, much of Canada had still not been bargained away. "Non-treaty areas cover a wide arc of land, beginning in Newfoundland and Labrador on the east, through Quebec,"⁵⁹ the eastern portion of the Northwest Territories, most of Yukon Territory, and most of British Columbia in the west. "The Maritimes had treaties, but Indians and legal scholars maintain that these treaties were pacts of peace and friendship, rather than land surrenders."⁶⁰

Although some changes have occurred, litigating aboriginal land claims was not worthwhile for Canadian natives in the past. This is evidenced most clearly by a 1927 amendment to the Indian Act that made it a "federal claim to take Indian claims to court, to raise money to pursue Indian claims, or in fact to organize to pursue Indian claims."⁶¹ The 1927 amendment was repealed in the 1930s. As late as 1969, however, the federal government's position was still that "aboriginal claims are so general and undefined that it is not realistic to think of them as specific claims

56. *Id.* at 48.

57. Sanders, Statement of Evidence, West Coast Oil Ports Inquiry, Presented by Union of British Columbia Indian Chiefs 6 (Oct. 1977).

58. S. WEAVER, *supra* note 48, at 33.

59. *Id.* at 36.

60. *Id.*

61. Many Fingers, *Commentaries: Aboriginal Peoples and the Constitution*, 19 ALBERTA L. REV. 428, 429 (1981); Jackson, Statement of Evidence, West Coast Oil Ports Inquiry, Presented by Union of British Columbia Indian Chiefs 3 (October 1977).

capable of remedy."⁶² Since then the Canadian government's perspective has altered. In 1973 it recognized aboriginal title when it indicated its commitment to negotiating outstanding claims, including those based on aboriginal title.⁶³

Canadian Indian policy has changed considerably in the last fifteen years. Many of the changes have come as a reaction to the 1969 *Statement of the Government of Canada on Indian Policy*.⁶⁴ This policy statement, which came to be known as the "White Paper," was a proposal by the newly elected Trudeau administration for assimilating Canada's Indians into the dominant culture. It called for the repeal of legislation conferring special rights upon Indians, the abolition of the Indian Department, the transfer of responsibility for Indian affairs to the provincial governments, and the transfer of control over Indian lands to the Indian people themselves.⁶⁵ The proposal ignited an angry reaction from the native community and sparked renewed interest in Indian affairs among the general public. In the face of almost unanimous opposition, the proposals of the White Paper have never been implemented.⁶⁶

The increased interest in and sensitivity to native affairs that exists at present has produced a number of changes in the natives' place in Canadian society. In addition to experiencing greater receptivity to their aboriginal title claims, natives have been given special recognition in Canada's new constitution.⁶⁷ Furthermore, as demonstrated by studies of how resource development would affect native communities, there appears to be a growing concern with safeguarding indigenous cultures. Whether this is yet an accepted part of national policy remains unknown, as does the question of what rights Canada's natives finally will secure for themselves.⁶⁸

II. *Special Relationships*

The survival of Native American cultures is directly linked to the special legal recognition and protection afforded those cultures

62. STATEMENT OF THE GOVERNMENT OF CANADA ON INDIAN POLICY, 1969.

63. *Id.*

64. Paper prepared by DIAND officials, mid-May, 1969.

65. R. SURTEES, *supra* note 3, at 55.

66. *Id.*

67. Sanders, *Aboriginal Peoples and the Constitution*, 19 ALBERTA L. REV. 410 (1981).

68. Keon-Cohen, *supra* note 17, at 262.

in the past. In the future, this special relationship may become even more important if Native Americans are to retain the resources they currently control and keep the sovereignty they currently exercise. Thus, understanding the special relationship each region has with its native people not only helps explain their histories but also illuminates their futures. In this section, the following questions about each region's special relationship to its native people will be addressed. First, why does a special relationship exist? Second, what is its legal basis? Third, where is it defined? And last, what difference does it make in the treatment of Native Americans?

United States

The unique legal relationship between the United States government and Indians is known as a "trust relationship." This trust relationship burdens the United States with a "fiduciary duty" or "trust responsibility." The United States' trust responsibility to Indians has been described as "the unique legal and moral duty of the United States to assist Indians in the protection of their property and rights."⁶⁹

Indians' property and rights were promised to them in several hundred treaties, agreements, and executive orders. A trust responsibility to protect what was promised developed for two reasons. First, some of the treaties signed with the tribes specifically bespoke the federal government's commitment to protect the Indians and their property.⁷⁰ More generally, the trust responsibility has developed as a reflection of the country's conscience, to ensure that past promises made to once-powerful opponents will be honored despite the promisees' present powerlessness to enforce performance. Although the United States could violate Indian treaties with impunity, the trust relationship that developed is based upon a recognition of the United States' continuing commitment to keep its word.

Tribes, rather than individual Indians, are the true beneficiaries of the trust relationship.⁷¹ This is because the treaties were signed with tribes as sovereign nations. The federal government, specifically the Congress, is the trustee. The constitutional power of

69. G. HALL, *THE FEDERAL INDIAN TRUST RELATIONSHIP* 3 (1979).

70. *Id.* at 4.

71. Individual Indians must maintain their tribal membership to qualify as beneficiaries. See *United States v. Nice*, 241 U.S. 591 (1916).

Congress to ratify Indian treaties and regulate commerce with Indian tribes provides the legal basis for its exclusive authority. Congress has given the Department of the Interior the task of executing most of the duties of the trust responsibility. The Department of the Interior is not, however, the only federal agency with commitments to Indians.⁷²

Perhaps the most frequently cited statements of the federal trust responsibility appear in early United States Supreme Court cases authored by Chief Justice John Marshall.⁷³ In *Cherokee Nation v. Georgia*, decided in 1831, Justice Marshall wrote that the tribes were "domestic dependent nations . . . in a state of pupillage" to the federal government and that "[t]heir relationship to the United States resembles that of a ward to his guardian."⁷⁴ The following year, in 1832, the Court iterated the exclusive and protective nature of the federal government's relationship to Indians in the case of *Worcester v. Georgia*.⁷⁵ Subsequently, other federal courts have relied and expanded upon Justice Marshall's analysis of the trust responsibility to protect Indian water rights from reallocation,⁷⁶ Indian hunting and fishing rights from state regulation,⁷⁷ Indian lands from taxation,⁷⁸ and Indian trust funds from mismanagement.⁷⁹ Recently, this trust has been interpreted to require the federal government to provide Indians with adequate medical services.⁸⁰

The Indian trust responsibility also obliges the federal government to protect Indians' jurisdictional rights. The government must do this, first, by providing legal representation when treaty rights are threatened.⁸¹ Second, although Congress has unfettered power to unilaterally limit or revoke Indian treaties, the courts have applied the trust responsibility doctrine to require Congress to signal

72. G. HALL, *supra* note 69, at 8-9.

73. See P. FETZER, *POLITICS, LAW AND INDIAN TREATIES* 27-30 (1984).

74. 30 U.S. (4 Pet.) 1, 17 (1831).

75. 31 U.S. (5 Pet.) 561 (1832).

The Cherokee Nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with acts of congress.

76. *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252 (D.D.C. 1973).

77. *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975).

78. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973).

79. *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238 (C.D. Cal. 1973).

80. *White v. Califano*, 437 F. Supp. 543 (D.S.D. 1977).

81. *E.g., Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

clearly its intent to abrogate a treaty before a court will find such an abrogation.⁸² The courts also have developed protective rules regarding the interpretation of treaties. Thus, courts will interpret vague expressions in Indian treaties, agreements, and federal statutes in favor of Indians,⁸³ interpret treaties and agreements as the signing Indians would have understood them,⁸⁴ and interpret Indian treaties and federal statutes liberally in favor of Indians.⁸⁵

The special relationship between the United States and Indians obligates the federal government not only to protect Indians' property interests and right to self-government but also to provide special services to Indians. As the Congress acknowledged in the Indian Child Welfare Act of 1977, the nation has "special responsibilities and legal obligations to the American Indian people."⁸⁶ These same thoughts were expressed in other recent legislation, such as the Indian Self-Determination and Education Assistance Act of 1975⁸⁷ and the 1976 Indian Health Care Improvement Act.⁸⁸

Finally, the federal trust responsibility has been cited as a source of congressional power to legislate over Indians on reservations. This doctrine, stated in 1886 in *United States v. Kagama*,⁸⁹ led to a broad exercise of federal power over Indian affairs. Recently, however, courts have viewed the trust relationship less as a source of congressional power and more as a check on federal executive powers.⁹⁰

In summary, the United States' special relationship to Indians is that of a trustee. The resulting responsibility requires that the government protect the treaty and reserved rights assured Indians in exchange for their land and provide them with the special services it has explicitly or implicitly promised. Although the United States has continued to erode Indian property interests and has continued to limit their self-governing authority, the federal trust responsibility has nonetheless been critical to the retention of Indians' special legal status in the United States.

82. P. FETZER, *supra* note 73, at 69.

83. For example, *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975).

84. *Choctaw Nation v. United States*, 318 U.S. 423 (1943).

85. *Bryan v. Itasca County*, 426 U.S. 373 (1976).

86. S. 1214 passed the Senate on Nov. 4, 1972.

87. Pub. L. No. 93-638, 88 Stat. 2203 (25 U.S.C. § 450 (1982)).

88. Pub. L. No. 94-437, 90 Stat. 1400 (25 U.S.C. § 1601 (1982)).

89. *United States v. Kagama*, 118 U.S. 375, 383-84 (1886).

90. G. HALL, *supra* note 69, at 35.

Alaska

The special relationship between Alaskan natives and the United States federal government is like the special relationship between Indians in the contiguous forty-eight states and the federal government. The United States Court of Appeals for the Ninth Circuit recently affirmed that:

Alaska Natives, including Eskimos and Aleuts have been considered to have the same status as other federally recognized American Indians. . . . It is now established that through [the 1867 Treaty of Cession from Russia] the Alaskan Natives are under the guardianship of the federal government and entitled to the benefits of the special relationship.⁹¹

Because the United States never made any treaties with Alaska natives, the federal government's special relationship depends solely upon statutory enactments, judicial decisions, and administrative regulations for its definition.⁹²

Historically, this special relationship has burdened the United States with four primary areas of responsibility. The first is the preservation of native lands, pursued in Alaska through a federal reservation program and the Allotment and Townsite acts.⁹³ The second is the protection of native subsistence, which produced the Reindeer Industry and Walrus Protection acts.⁹⁴ Third is the promotion of native government, accomplished through the Indian Reorganization Act, which was amended in 1936 to apply to Alaska;⁹⁵ and last is the provision for comprehensive education, health, welfare, economic development, and other human services to Alaska natives, which has produced a plethora of legislation dating back to the turn of the century.

The Alaska Native Claims Settlement Act (ANCSA) became effective in December of 1971. Although the reason for its enactment was to settle land claims, it in fact recast the face of all native law in Alaska.⁹⁶ The Act's declaration of policy states, in part:

91. *Alaska Chapter, Associated Gen. Contrs. v. Pierce*, 694 F.2d 1162, 1168-69 (9th Cir. 1982).

92. *See D. CASE, THE SPECIAL RELATIONSHIP OF ALASKA NATIVES TO THE FEDERAL GOVERNMENT* 9 (1978).

93. *See id.* at 6.

94. *Id.*

95. *Id.*

96. *Id.* at 6, 10-11.

[Settlement of native claims] should be accomplished . . . without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships.⁹⁷

How ANCSA has affected and will affect Alaskan natives' special relationship with the federal government is uncertain. Seemingly, the federal government's responsibility to provide special services is unchanged. ANCSA states that its provisions "constitute compensation for the extinguishment of claims to land, and shall not be deemed to substitute for any governmental programs otherwise available to the Native people of Alaska as citizens of the United States and the State of Alaska."⁹⁸ Presumably, Congress intended to restrict the natives' eligibility only for programs and services that relate to trust lands.⁹⁹ This assumption is supported by congressional action since the enactment of ANCSA. Congress has included Alaska natives among those eligible under all major post-ANCSA Indian legislation.¹⁰⁰

The vitality of the federal government's duty to protect natives' land and self-government is more problematic. Relying upon past legislation and provisions of ANCSA, it appears that natives' property interests will be, for the most part, shielded from state and federal taxation. The Alaska Statehood Act expressly provides for the exemption of all native-owned lands, other than lands held in fee by individuals, from taxation.¹⁰¹ Although its language is ambiguous, ANCSA appears to exempt ANCSA-patented lands from state and local taxes. The only exception is that ANCSA-patented lands that have been developed or leased to third parties

97. Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688, 43 U.S.C. § 1601(b) (1971).

98. *Id.* § 1626(a).

99. F. COHEN, *supra* note 46, at 769.

100. See R. PIRTLE & D. CASE, SUMMARY OF 1991 RELATED IRA ISSUES IN ALASKA 11 (1983).

101. Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958). Enacted on July 7, 1958, the statute provided that "no taxes shall be imposed by said State upon any lands or other property . . . which . . . may belong to said Natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual Natives in fee without restrictions or alienation."

may be taxed by local governments.¹⁰² ANCSA's tax-exemption period, however, lasts only twenty years.¹⁰³

Future vulnerability to taxation is not the only characteristic distinguishing ANCSA lands from other Indian lands. Under ANCSA, for example, land is owned by a corporation rather than a tribe. In light of these and other distinctions, it appears that ANCSA has "fundamentally reduced" federal trust responsibilities over Alaskan native lands.¹⁰⁴

Furthermore, Alaskan natives were deeply involved in the development and passage of ANCSA. Their role was very different from that of the frequently illiterate Indians with whom treaties were made 150 years ago. As one writer noted, the natives were "party to this settlement in a manner that makes their relationship with the Federal Government distinct and distinguishable from their traditional wardship status in the contiguous forty-eight."¹⁰⁵ He concluded, therefore, that ANCSA, unlike other Indian legislation, did not have to be "construed in favor of the Natives at all points."¹⁰⁶

Even after the adoption of ANCSA, Alaska natives have a right to the same social services provided American Indians elsewhere, but ANCSA has diminished the federal responsibility to protect natives' lands. Thus, though ANCSA shifted immense wealth and considerable managerial independence to the natives, it may have done so at the cost of endangering the special trust relationship Alaska natives have had with the federal government.¹⁰⁷

Canada

The special relationship between the United States government and the indigenous people of the United States has been vital to

102. F. COHEN, *supra* note 46, at 768.

103. *Id.* "Originally, the period was to expire on December 18, 1991, but the exemption period was extended to 'twenty years from vesting of title pursuant to the Alaska National Interest Lands Conservation Act or the date of issuance of an interim conveyance or patent, whichever is earlier.'" Alaska Native Claims Settlement Act Amendment, Pub. L. No. 96-487, 94 Stat. 2371, 43 U.S.C. § 1620 (1980).

104. Price, *Region-Village Relations Under the Alaska Native Claims Settlement Act*, 5 UCLA-ALASKA L. REV. 58, 61 (1975), cited in D. CASE, *supra* note 92, at 9. See also R. ARNOLD, *supra* note 7, at 279-80.

105. Authority to Determine Eligibility of Native Villages After June 18, 1974, 81 I.D. 316, 325 (1974), cited in D. CASE, *supra* note 92, at 77. Case suggests that the Interior Department subsequently has rejected this position.

106. *Id.*

107. R. ARNOLD, *supra* note 7, at 279.

preserving natives' proprietary interests and self-governing authority. No similar relationship exists between the Canadian government and Canadian natives.¹⁰⁸ Canadian natives have, however, been accorded some special treatment by Canada's federal government.

Historically, this special treatment was based on a marriage of conscience and political common sense. In the Royal Proclamation of 1763, the British Crown stated:

[I]t is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians . . . should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them.¹⁰⁹

Thus, the British government and, after 1867, the Canadian government acknowledged that Canada's natives merited special treatment. Although in the past that special treatment arose from the terms of treaties and the Indian Act, the Canadian government has recently accepted the validity of aboriginal title and committed itself to settling natives' claims to lands for which treaties have never been signed.¹¹⁰ Additionally, Canada has acknowledged the natives' singular status by giving them special recognition in its new constitution.

Even before the Royal Proclamation of 1763 formalized the treaty-making process by confirming a Crown monopoly on the purchase of Indian lands, treaties of peace and friendship were signed with the Indians of the maritime provinces.¹¹¹ After confederation, the federal government continued the treaty-making policy in the west. Although recognizing that Indians had some right to their lands, the treaties were "fairly minimal documents."¹¹²

108. See Keon-Cohen, *supra* note 17, at 254. As is discussed further in the section on the scope of Canadian natives' jurisdictional powers, neither Britain nor Canada ever affirmed the natives' right to self-government. Correspondingly, they never recognized natives as a separate, sovereign people. Consequently, no special relationship evolved to ensure the federal government's performance. Instead, the natives received, at best, no more than the specific property interests that they had been promised by treaties or granted by the Indian Act. What self-governing powers they did have were conferred upon them by the federal government. The federal government did not accept the notion that the Indians had reserved rights to self-government.

109. Slaterry, *The Constitutional Guarantee of Aboriginal and Treaty Rights*, 8 QUEENS L.J. 232, 266 (1983).

110. IN ALL FAIRNESS, *supra* note 4, at 3.

111. Sanders, *Aboriginal Peoples*, *supra* note 67, at 414.

112. *Id.*

The main provision of the written versions was the Indians' surrender of land and the government's promises of reserves, annuities, education, agricultural assistance, and hunting and fishing rights.¹¹³ When the last treaty was signed in 1921, only about one-half of Canada had been bargained for.¹¹⁴

Pursuant to the Indian Act, which was first consolidated in 1874, all of Canada's "status Indians"¹¹⁵ were given special treatment.¹¹⁶ At the time reserves were established and treaties negotiated, Canada's Indians were classified as "status" and "nonstatus" Indians for the purpose of determining their eligibility for Indian Act provisions. The special treatment granted them included:

- (1) the right of a status Indian to reside on the reserve that is assigned to his/her band, (2) freedom from estate taxes on reserve

113. *Id.*

114. Keon-Cohen, *supra* note 17, at 288.

115. See Sanders, *Aboriginal Peoples*, *supra* note 67, at 418-22. The original determination of status occurred when the government compiled membership lists of tribes as of the time of the establishment of reserves or of treaty negotiations. The determination of whether an Indian is a status or nonstatus Indian now depends solely upon the status of his or her father or her husband. Thus both men and women are status Indians only if their fathers were status Indians. In addition, a woman without status could gain it by marrying a status Indian. Conversely, an Indian woman who had status could lose it if she married a nonstatus Indian. In sum, classification as a status Indian is not related to racial purity. *Id.* at 419.

In addition to nonstatus Indians, other Canadian natives are also disallowed from qualifying for Indian Act benefits. They include the Métis and Inuit people. The Métis are descendants of a half-blood population that developed in the prairie provinces between 1670 and 1870. They had a distinct identity. The Manitoba Act of 1870 provided 1.4 million acres of land for distribution "to the descendants of Half-Breed heads of families." Later, the Dominion Lands Act extended the provision for half-blood grants to the other prairie provinces and the Northwest Territories. Today, the best legal definition of the Métis is the "people who took Half-Breed grants under the Manitoba Act or the Dominion Lands Act and their descendants." *Id.* at 419-20. Section 12(1)(a)(i) of the Indian Act excludes Métis from registration as Indians.

In 1939 the Supreme Court of Canada ruled that the Inuit should be considered a tribe of Indians. Subsequently, they were held to be within federal legislative jurisdiction over Indians. Section 4 of the Indian Act, however, specifically excludes the Inuit. The result has been an almost completely undefined aboriginal policy for the Inuit people of Labrador and the Northwest Territories.

In conclusion, the Indian Act's special treatment was available to only a fraction of the aboriginal population of Canada. While status Indians qualified for special treatment, nonstatus Indians and Métis were definitely excluded. The standing of the Inuit was uncertain.

116. See S. WEAVER, *supra* note 48, at 18-19.

lands, (3) freedom from land taxes on reserve lands, (4) freedom from income taxes on income earned on a reserve, (5) and the right to vote in Band Council elections.¹¹⁷

The special treatment given Canadian Indians in the past has not always been beneficial. "Indians were not even considered proper citizens until 1957. They were not given the vote until 1960."¹¹⁸

In the seventeen years since the issuance of the ill-fated White Paper in 1969, the special treatment of natives in Canada has changed considerably. Before 1973 the government had a long-standing policy against recognizing claims based on aboriginal title.¹¹⁹ In 1973, however, six of the seven members of the Supreme Court of Canada acknowledged the existence of aboriginal title in *Calder v. Attorney General of British Columbia*.¹²⁰ Simultaneously, the Cree of James Bay and the Inuit of Northern Quebec were trying to protect their homelands from the threat posed by the James Bay Hydro Electric Project.¹²¹ In response to these events, the government issued a policy statement in 1973. It addressed both the government's obligations to fulfill existing treaties and comply with existing statutory requirements and the government's commitment to negotiate settlements of natives' unextinguished aboriginal title claims.¹²² In the process of settling these claims, called "comprehensive claims," the government recognized that the settlements "could include the following elements: categories of land, hunting, trapping and fishing, resource management, cultural identity, and native involvement in governmental evolution."¹²³

The natives have sought to use the negotiation process to reconstrue their relationship with the Canadian government. They want to move beyond simply receiving special treatment to being recognized as having a special relationship with the rest of Canada. "Their claims must be seen as the means to the establishment of a social contract based on a clear understanding that they are a distinct people in history. They insist upon the right to deter-

117. *Id.*

118. Many Fingers, *supra* note 61, at 429.

119. IN ALL FAIRNESS, *supra* note 4, at 11.

120. [1973] S.C.R. 313.

121. *Id.*

122. *Id.*

123. Hon. Judd Buchanan, remarks quoted in Many Fingers, *supra* note 61, at 4.

mine their own future, to ensure their place, but not assimilation, in Canadian life."¹²⁴

Finally, Canada has given its natives special treatment in its new constitution. Chief among the provisions applicable to Canada's native people is section 35, which states that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."¹²⁵ Section 35 also defines "aboriginal peoples" to include the Indian, Inuit, and Métis people of Canada and provides that aboriginal and treaty rights are guaranteed equally to males and females.¹²⁶

Section 35 does not restore to aboriginal groups the autonomy they enjoyed 300 years ago nor revive land rights that have been extinguished lawfully in the past. It does, however, recognize that some of the rights originally vested in natives, such as rights to land, self-government, customary law, cultural rights, and religious freedom, have survived the process whereby the Crown gained sovereignty over Canadian territories. Under the new constitution, those rights not terminated prior to April 1982 are now protected by section 35.¹²⁷

While Canadian natives historically have received special treatment, their relationship with the Canadian government has been in no way akin to the special trust relationship that existed between natives in the United States and the United States government. Canada's current recognition of natives' aboriginal rights, which has included negotiating aboriginal title claims and entrench-

124. 1 T. BERGER, *NORTHERN FRONTIER, NORTHERN HOMELAND: REPORT OF THE MACKENZIE VALLEY PIPELINE INQUIRY* 163 (1977).

125. 1982 CONST. ACT § 35.

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Métis peoples of Canada.

FIRST MINISTERS' CONFERENCE ON ABORIGINAL CONSTITUTIONAL MATTERS, 1983 CONSTITUTIONAL ACCORD ON ABORIGINAL RIGHTS (1983). A constitutional accord on aboriginal rights was signed by the federal government, nine provincial governments (the government of Quebec did not sign), and representatives of six native organizations on March 16, 1983. Pursuant to this agreement, two more subsections were to be added. They are:

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

126. 1982 CONST. ACT § 35.

127. Slattery, *supra* note 109, at 243.

ing aboriginal rights in the Canadian constitution, appears to auger a new era in the relationship between Canada's aboriginal people and the Canadian government. Although Canada's present native policy does not appear to be as protective of native concerns as the United States' policy, it does offer natives an opportunity to increase their land holdings and expand their authority and ability to govern themselves. At the same time, it secures for them greater assurance that such rights as they still retain are less vulnerable to future erosion.

III. *Property Interests*

In dealing with native property interests, both the United States and Canada have followed consistent policies of continuously appropriating natives' original holdings. This practice has abated somewhat in the last fifty years. The countries have otherwise dealt with natives' property interests very differently. This will be illustrated by reviewing the two nations' positions on aboriginal title. Also considered in this section will be the extent of property native people currently own and the protections and limitations that have been placed on those property interests.

United States

Johnson v. M'Intosh, decided in 1823, was the first case in which the United States Supreme Court addressed the nature of Indian title. Chief Justice Marshall, writing for the Court, reviewed the history of Indian law and concluded that although Indians were allowed to retain possession of land, the nation that "discovered" the land "asserted the ultimate dominion to be in themselves."¹²⁸ This "ultimate dominion" meant that the "discovering" nation held the "exclusive right to extinguish the Indian title of occupancy either by purchase or by conquest."¹²⁹ The noted authority on American Indians, John Collier, observed that "[a]t the time of white arrival there was no square mile unoccupied or unused."¹³⁰ Consequently, using Marshall's analysis, Indians started with "title" to the entire country.

Thus the Court acknowledged that Indians had some kind of claim to the land they occupied, but held that the United States

128. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823).

129. *Id.*

130. R. ARNOLD, *supra* note 7, at 41.

had the dominant title. As a result, Indians could transfer their title only to the federal government. Although this limited tribal sovereignty, it also protected the tribes against unscrupulous private land buyers.

As the white tide of trappers, miners, and settlers flowed west, however, tribes gave up most of their lands. In exchange for their land claims, the United States promised to protect their sovereignty over lands the tribes retained and promised to provide them with various benefits such as education and health services. Because the remaining tribal lands were often insufficient to support the tribes, federal food distributions and rights to off-reservation hunting and fishing also were promised in the treaties.¹³¹

Treaty-making ended in 1871. Agreements between the government and Indian tribes continued to be made, though, for a number of years thereafter. Eventually, the entire system was abandoned.¹³²

Although the United States treated with tribes for the majority of the tribes' land claims, such negotiations did not always take place. In the late nineteenth and early twentieth centuries, Indian tribes frequently sued the federal government, seeking to recover lands to which they laid claim under aboriginal title.¹³³ In 1946, Congress decided to try to settle these claims by establishing a special court for Indian land claims: the Indian Claims Commission. Six hundred and seventeen claims were filed under the Act. The Commission's judgments recognized tribes' aboriginal title to most of the United States.¹³⁴

Today, Indians in the contiguous forty-eight states control land holdings slightly larger than an area the size of the state of Washington. This land is spread throughout the country on reservations that range in size from the Navajo Reservation in Arizona, which is almost as large as West Virginia,¹³⁵ to reservations in California and Nevada that have fewer than ten acres.¹³⁶ Virtually all Indian-owned land has federal trust status. This trust status has been created in five different ways¹³⁷: by treaty¹³⁸ or

131. G. GROSSMAN, *supra* note 13, at 5.

132. R. ARNOLD, *supra* note 7, at 51.

133. Johnson, *supra* note 5, at 109.

134. *Id.* at 110.

135. WM. LEAST HEAT MOON, *BLUE HIGHWAYS* 179 (1982).

136. *See generally* G. HALL, *supra* note 69, at 94, 96, 98, 109.

137. *Id.* at 13.

138. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

agreement¹³⁹ between the United States and a tribe; by statute when Congress specifically designated land as a reservation;¹⁴⁰ by executive order when the President designated an Indian reservation;¹⁴¹ or by "withdrawals" when the Secretary of the Interior set aside certain "public lands" as an Indian reservation.¹⁴²

The federal trust also applies to Indian property other than land. First, mineral deposits located under reservations or individual allotments are held in trust.¹⁴³ Second, the federal-trust doctrine protects tribes' rights to the amount of water they need in order to live on their reservations, even if the water comes from somewhere off the reservation.¹⁴⁴ Third, the federal government is responsible for the management of tribal timber resources.¹⁴⁵ Fourth, tribes have approximately \$440 million in trust funds for which the federal government has a responsibility to manage.¹⁴⁶ Finally, hunting and fishing rights, whether reserved implicitly or explicitly by the treaty makers,¹⁴⁷ are also part of the United States' trust responsibility. The federal trust protects hunting and fishing rights whether exercised on or off a reservation. The only time state regulations can limit Indian hunting and fishing is when the regulations are "indispensable to the effectiveness of a state conservation program."¹⁴⁸

Finally, Indian treaty rights cannot easily be abrogated. The courts must find that Congress exhibited a clear intent to abrogate a treaty before an Indian's property interest will be limited or extinguished.¹⁴⁹ Thus the protection of Indian property interests afforded by the federal trust responsibility has two parts. First, the federal government must protect Indian resources against states and private parties. Second, by requiring a showing of clear congressional intent for effective abrogation of treaties, the courts provide limited protection against congressional action as well.

139. *Dick v. United States*, 208 U.S. 340 (1908).

140. *United States v. McGowan*, 302 U.S. 535 (1938).

141. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

142. *Arizona v. California*, 373 U.S. 546 (1963).

143. *Navajo Tribe v. United States*, 364 F.2d 320 (Ct. Cl. 1966).

144. *Arizona v. California*, 373 U.S. 546 (1963); *Winters v. United States*, 207 U.S. 564 (1908).

145. *Squire v. Capoeman*, 351 U.S. 1 (1956).

146. G. HALL, *supra* note 69, at 15.

147. *See United States v. Winans*, 198 U.S. 371, 381 (1905).

148. *Tulee v. Washington*, 315 U.S. 681, 685 (1942).

149. P. FETZER, *supra* note 73, at 69.

Alaska

"Alaska was a populated country thousands of years before Russians were to claim it. . . . The Native inhabitants extensively used and occupied the land."¹⁵⁰ Native claims to present-day Alaska were first mentioned in the 1867 Treaty of Cession from Russia and have been remarked repeatedly in federal legislation since then. The significance and extent of native land entitlement, however, was not defined fully until ANCSA was passed in 1971.¹⁵¹

Pressure from the state and from oil companies wanting to develop Alaska's oil resources expedited the resolution of native claims. The oil companies could not begin their development until the state could lease them land and transfer to them rights unclouded by native claims. The passage of ANCSA cleared these obstacles. It also implicitly recognized the validity of the natives' aboriginal title by carefully extinguishing their rights and claims based upon it.¹⁵²

One of the rights extinguished by ANCSA was "any aboriginal hunting of fishing rights that may exist."¹⁵³ This threatened Alaskan natives' ability to continue traditional patterns of subsistence hunting and fishing. The land settlement that natives received under ANCSA was in part intended to protect subsistence use. It is unclear, however, what regulatory authority the natives have over their lands.¹⁵⁴ Fortunately for them, the state (which has management authority over all public lands in the state) has a history of making the subsistence use of hunting and fishing resources its top management priority. The continuation of this tradition is encouraged by the 1980 Alaska National Interest Lands Conservation Act (ANILCA).¹⁵⁵ Under ANILCA, if the state fails to enact laws that favor subsistence use of hunting and fishing resources, the federal government will reclaim its managerial authority to federal lands.¹⁵⁶ Native subsistence rights thus are safeguarded, though not guaranteed, by state policy and federal law.

The Alaska natives' aboriginal title was quieted by ANCSA. They still have considerable land holdings, however. Their legal

150. R. ARNOLD, *supra* note 7, at 17.

151. F. COHEN, *supra* note 46, at 740.

152. *Id.* at 742.

153. ANCSA, *supra* note 97, § 1603(b).

154. *See* F. COHEN, *supra* note 46, at 759.

155. 16 U.S.C. § 3142 (1982) (amending 16 U.S.C. § 3142 (1980)).

156. F. COHEN, *supra* note 46, at 761.

title in their post-ANCSA land holdings has several sources. The federal government has given specific lands to them by the creation of reservations, by the Alaska Native Allotment Act of 1906, by the 1926 Native Townsite Act, and, most recently, by ANCSA.

Between 1891 and 1933, approximately 150 reserves were created in Alaska. They were created for economic purposes (such as the reserves for natives' reindeer herds), educational purposes (about eighty were formed for this reason), community development purposes, and for native health purposes.¹⁵⁷ The only reserve not revoked by ANCSA is the Annette Island Reserve.¹⁵⁸ Created in 1891, it was the first Alaska reserve and was one of only two statutorily created reserves in the territory.¹⁵⁹

The provisions of the Alaska Native Allotment Act were similar to those of the General Allotment Act of 1887. It had the same purpose of giving natives a chance to own individual plots of land.¹⁶⁰ Authority to patent land to individual natives under the Act was terminated by ANCSA. An exception was made for allotment applications already pending at the time of ANCSA's passage.¹⁶¹ "If all allotment applications are approved, more than one million acres will be transferred to individuals as allotments."¹⁶² Allotment lands are held in trust status, which limits their alienability and protects them against taxation.¹⁶³

The Native Townsite Act provided for the conveyance of land to individuals in areas designated as townsites. Both natives and nonnatives are eligible under the Act.¹⁶⁴ Although repealed in 1976, the Act remains in effect where land has been "segregated" for townsite purposes but has not yet been completely distributed. These lands are to be deeded to the municipal government with jurisdiction over the townsite. If no municipal government exists, townsite trustees will hold the land in trust until a municipal government is incorporated.¹⁶⁵

Most of the property interests held by Alaska natives flow from ANCSA. It created a "complex mechanism for Native selection,

157. D. CASE, *supra* note 92, at 67.

158. *Id.* at 43.

159. *Id.* at 32.

160. *Id.* at 49.

161. F. COHEN, *supra* note 46, at 745.

162. R. ARNOLD, *supra* note 7, at 253.

163. *Id.*

164. Alaska Native Townsite Act of May 25, 1926, 44 Stat. 629 (repealed in 1976).

165. Aleknagik Natives, Ltd. v. United States, 635 F. Supp. 1477 (D. Alaska 1985), *aff'd* 806 F.2d 924 (9th Cir. 1986).

administration, development and alienation of over forty million acres of land, and expenditure, investment, and distribution of an Alaska Native Fund of \$462.5 million in congressional appropriations and \$500 million of oil royalties."¹⁶⁶ Through ANCSA, Alaska natives gained fee simple title to roughly the same amount of land as is held in trust for all other American Indians, and they gained monetary compensation nearly four times the amount awarded by the Indian Claims Commission during its entire 25-year existence.¹⁶⁷

Natives own an interest in the land and money by being stockholders in one of more than two hundred village corporations and in one of thirteen regional corporations. Village corporations own only the surface estate of the 22 million acres allotted to them. The subsurface estate in the land selected by the village corporations and the surface and subsurface estate in another 16 million acres is owned by the regional corporations.¹⁶⁸ Two million acres are reserved for native groups and individual natives.¹⁶⁹

Under the original Act, native stockholders cannot sell their stock for twenty years, or until December 18, 1991.¹⁷⁰ At that time all stock will be canceled and new shares issued. The new stock will be without the current restraints on alienation unless the corporations amend their articles before 1991.¹⁷¹

Alaska natives have enjoyed a unique opportunity in the past dozen years to manage their resources free from the interference of a distant paternalistic bureaucracy. With that opportunity have come increased responsibility and new challenges. Alaska natives' greatest current challenges are, first, to find some way to prevent native stock from becoming alienable in 1991, and, second, to help their people develop the skills necessary to protect and use the resources they possess.

166. ANCSA, *supra* note 97, § 1616(d)(2).

167. R. ARNOLD, *supra* note 7, at 147-48.

168. *Id.* at 149-50.

169. *Id.* at 151.

170. ANCSA, *supra* note 97, at 43 U.S.C. § 1606(h).

171. Alaska Native Claims Settlement Act Amendment, Pub. L. No. 96-487, 94 Stat. 2371 (codified in part at 43 U.S.C. § 1606 (1980)). On December 2, 1980, Congress authorized native corporations to restrict voting rights to natives and their descendants and to grant the corporation or the corporation and the shareholders' families a first right to purchase stock.

Canada

Because treaties were made with Canadian natives for only half of the land area of Canada, the extent of aboriginal title in Canada and the criteria necessary to establish such title are of great importance in assessing Canadian natives' property rights. The doctrine of aboriginal title stems from the fact that Native Americans depended upon their lands for subsistence and prosperity.¹⁷² In the 1885 case of *St. Catherine's Milling & Lumber Co. v. The Queen*,¹⁷³ the Ontario High Court held that aboriginal title rights included a right of occupancy. When the same case appeared before the Supreme Court of Canada, Judge Strong spoke of "the recognition by the Crown of a usufructuary title in the Indians to all unsurrendered lands."¹⁷⁴ Judge Strong stated further: "This title, though perhaps not susceptible to any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands."¹⁷⁵ Both the right to occupancy and usufructuary title vest in the group as a whole, rather than in individual tribal members.¹⁷⁶

In its new constitution, Canada has upgraded the status of aboriginal rights. In light of section 35, questions regarding the soundness of the doctrine of aboriginal title in Canadian law have dissipated. Although aboriginal rights may have been precarious in the past, they are now indefeasible. Section 35 has elevated aboriginal title from a theoretical right to one that is fully capable of assertion and enforcement in the courts.¹⁷⁷

The case law indicates that three factors are critical in determining whether a particular band or tribe will be recognized as having aboriginal title to an area: (1) they must show exclusive occupation for a long time; (2) the group must have an organized society; and (3) the group must have concepts of property sufficiently precise so that they may be recognized.¹⁷⁸

172. Slattery, *supra* note 109, at 265.

173. (1885) 10 O.R. 196, 209 (Ont. C.A.).

174. *St. Catherine's Milling & Lumber Co. v. The Queen*, (1887) 13 S.C.R. 557, 608; BLACK'S LAW DICTIONARY 1712 (11th ed. 1951). A "usufructuary right" is defined as "[t]he right of enjoying a thing the property of which is vested in another and to draw from the same all profit, utility and advantage which it may produce provided it be without altering the substance of the thing."

175. *St. Catherine's Milling & Lumber Co. v. The Queen*, (1887) 13 S.C.R. 577, 608.

176. Gagne, *The Content of Aboriginal Title at Common Law: A Look at the Nishga Claim*, 47 SASK. L. REV. 309, 329 (1983).

177. Slattery, *supra* note 109, at 254.

178. Gagne, *supra* note 176, at 318.

As noted earlier, since 1973 the Canadian government has had a policy of attempting to negotiate settlements to claims of aboriginal title. While natives see the negotiation process as an opportunity to redefine their relationship with the rest of Canada, the government's purpose in negotiating is more modest. In the government's view:

The negotiations are designed to deal with the non-political matters arising from the notion of aboriginal land rights such as lands, cash compensation, wildlife rights, and may include self-government on a local basis.

The thrust of this policy is to exchange undefined aboriginal land rights for concrete rights and benefits. The settlement legislation will guarantee these rights and benefits.¹⁷⁹

Significantly, the common law provides that the rights to various resources go with the land. Thus the right to fishery resources accompanies ownership of the river or stream; the right to forest resources accompanies ownership of the soil.¹⁸⁰

Canada's new constitution not only validates aboriginal title, it also states that treaty rights will be "recognized and affirmed."¹⁸¹ Thus the natives' property interests now have constitutional protection. This is important even though only half of Canada's status Indians had treaties with the Crown.¹⁸² Features common to many of the western treaties include establishment of reserves, gratuities, annuities, medals and flags, clothes for "headmen," ammunition, twine, and schooling where requested. Treaty No. 6, covering central Saskatchewan and Alberta, also provided for a medicine chest and for assistance during times of pestilence and famine.¹⁸³

Today, the 561 bands of status Indians in Canada have rights to 2,300 reserves.¹⁸⁴ The total area of the reserves is about as large as Nova Scotia or, by way of comparison, as large as the Navajo Reservation in Arizona.¹⁸⁵

In addition to land holdings, Canadian natives may have special hunting and fishing rights. In the past, however, these rights could

179. IN ALL FAIRNESS, *supra* note 4, at 19.

180. Sanders, Statement of Evidence, *supra* note 57, at 26.

181. Sanders, *Aboriginal Peoples*, *supra* note 67, at 418.

182. S. WEAVER, *supra* note 48, at 19.

183. MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, OUTSTANDING BUSINESS 9 (1982).

184. Sanders, *Aboriginal Peoples*, *supra* note 67, at 418.

185. Many Fingers, *supra* note 61, at 430.

be severely limited. Under section 88 of the Indian Act, Indians are subject to provincial laws of general application.¹⁸⁶ Accordingly, Indians on reserves are subject to the same hunting laws as are Indians and non-Indians off reserves. Section 88 does protect hunting rights specifically granted by treaties.¹⁸⁷ However, this protection was only effective against contrary provincial laws. Before their recent constitutional recognition, treaty-protected hunting rights uniformly were held to be subject to federal legislation.

The same applies to native fishing rights. Because most of Canada's fisheries are federally regulated, natives' special fishing rights have been virtually meaningless. As Justice Dickson, speaking for the Supreme Court of Canada, stated in *Kruger & Manuel v. The Queen*: "However abundant the right of Indians to hunt and fish, there can be no doubt that such right is subject to regulations and curtailment by the appropriate legislative authority."¹⁸⁸

Finally, in addition to their reserves and hunting and fishing rights, Canadian natives also benefit from special federal programs. Among the special services available are medical care, housing, welfare, and economic development.¹⁸⁹ Natives' rights to these programs are often tenuous. Not all treaties have special provisions promising such services. Moreover, many of the native recipients do not even have treaties.¹⁹⁰

In the past, native property interests have been protected by two doctrines. First, a series of cases holds that treaties are to be construed liberally in favor of the natives.¹⁹¹ Second, the Supreme Court of Canada, with Justice Ritchie speaking for the court in *Manitoba Fisheries Ltd. v. The Queen*, stated that "[t]he recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation."¹⁹²

Canadian natives' property holdings probably will be increased and further protected by the recognition given to aboriginal and

186. *Kruger & Manuel v. The Queen*, (1975) 1 S.C.R. 104, 111-12.

187. Brown, *Indian Hunting Rights and Provincial Law: Some Recent Developments*, 39 U. TORONTO FAC. L. REV. 121, 124 (1981).

188. Pibus, *The Fisheries Act and Native Fishing Rights in Canada: 1970-1980*, 39 U. TORONTO FAC. L. REV. 43, 50 (1981).

189. S. WEAVER, *supra* note 48, at 19.

190. *Id.*

191. Sanders, *Aboriginal Peoples*, *supra* note 67, at 417.

192. (1978) 6 W.W.R. 496, 503.

treaty rights in Canada's new constitution. Section 52 of the constitution asserts: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provision of the Constitution is, to the extent of the inconsistency, of no force or effect."¹⁹³ Douglas Sanders, a noted Canadian Indian law expert, contends that in light of the new constitution, "[t]he major decisions of the Supreme Court of Canada which held that treaty rights could be overridden by federal legislation would surely now be reversed."¹⁹⁴ Sanders also suggests that in areas where aboriginal rights are held to exist, the hunting and fishing rights cases holding that aboriginal rights are subject to federal legislation are equally vulnerable.¹⁹⁵

To summarize, Canadian natives in the past lagged behind the aboriginal peoples of the United States in terms of the amount of property they possessed and the degree of control they exercised over it. With the entrenchment of their treaty and aboriginal rights in the Canadian constitution, however, their position is greatly improved. The property interests they currently control are now better protected. Of potentially greater import, however, their claims to vast areas of Canada, though still inchoate, have been constitutionally recognized.

IV. *Jurisdiction*

As one writer observed, "The problem of jurisdiction—the flow of power over Indian affairs from government to government—presents an unusually rich field for testing where and when it has been deemed critical for the dominant society to assert its laws and impose its judicial system over a fragmented society."¹⁹⁶ Generally, in both the United States and Canada there are three significant jurisdictional frontiers. First, native jurisdiction has always been very territorially limited—natives could only have jurisdiction over their lands. Second, their jurisdiction has become increasingly limited to only natives. Finally, the dominant cultures historically have been much more insistent on exercising authority over criminal matters than over civil matters.

193. Quoted in Slaterry, *supra* note 109, at 255.

194. Sanders, *Aboriginal Peoples*, *supra* note 67, at 418.

195. *Id.*

196. M. PRICE, *LAW AND THE AMERICAN INDIAN* vii (1973).

United States

Chief Justice Marshall, writing for the Supreme Court in *Worcester v. Georgia*, described Indians as having “distinct political communities, with territorial boundaries within which their authority is exclusive.”¹⁹⁷ The *Worcester* Court held that the state of Georgia had no power within the Cherokee Nation. The only restrictions on the tribe’s sovereignty, according to the Court, were that Indian tribes could not make treaties with foreign governments and that Congress held power to place restrictions on Indian sovereignty.¹⁹⁸ Until altered by treaty or congressional legislation, however,

Indian self-government . . . includes the power of an Indian tribe to adopt and operate under a form of government of the Indians’ choosing, to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislations, and to administer justice.¹⁹⁹

The Indians’ expansive right of self-government was limited by overt congressional intrusion into their sovereignty for the first time when Congress passed the Major Crimes Act of 1885, which gave federal courts jurisdiction over seven categories of crimes committed on reservations.²⁰⁰ Even though tribes retain concurrent jurisdiction over these “major crimes,” they rarely exercise it because of their limited penal power.²⁰¹

In 1934, Congress passed the Indian Reorganization Act (IRA). In response to the deterioration of tribal governments during the Allotment Era, the IRA proposed a form of tribal government intended to revitalize the tribes. One hundred and ninety-one tribes voted to accept the new form of tribal government; seventy-one voted to reject it.²⁰² The IRA form of government, which is similar to a municipal government, is based on a standardized constitution. It provides for tribal councils, tribal courts, and mandates

197. *Worcester*, 31 U.S. at 557.

198. *Id.*

199. F. COHEN, *FEDERAL INDIAN LAW* 122 (1942), quoted in Keon-Cohen, *supra* note 17, at 287-88.

200. Keon-Cohen, *supra* note 17, at 312.

201. *Id.*

202. G. GROSSMAN, *supra* note 13, at 11.

open elections. Although the IRA did restore self-governing ability to many tribes, it was criticized for imposing western ideas of government upon Indians.²⁰³ Moreover, since the IRA governments were the conduit of federal programs to the tribes, many IRA leaders formed power structures that challenged traditional hereditary and religious leadership.²⁰⁴ Thus, although the IRA was a valuable aid in helping Indians maintain their sovereignty, it was, in some cases, a simultaneous infringement upon their traditional modes of self-rule.

The United States House of Representatives Concurrent Resolution 108 of 1953 and Public Law 280, also passed in 1953, were the most frontal assaults Congress ever made on tribal sovereignty. Concurrent Resolution 108 requested the BIA to draw up lists of tribes that, because of their economic self-sufficiency, could be "terminated." This termination meant the cessation of federal services, federal recognition of tribal governments, and tribal immunity from state taxation.²⁰⁵ Before 1968, when Congress formally repudiated the termination policy, it had resulted for some tribes in "almost economic and social disaster."²⁰⁶

The implications of Public Law 280, while not as catastrophic for specific tribes as was Concurrent Resolution 108, potentially affected all Indians in the United States. Public Law 280's purpose was to remove much of the protective buffer of federal jurisdiction between tribal and state governments. Accordingly, it provided that the federal government (1) confer upon California, Minnesota, Nebraska, Oregon, and Wisconsin criminal and civil jurisdiction over Indian reservations and lands; (2) allow states with constitutional prohibitions against exercising jurisdiction over Indians to repeal them and assume jurisdiction over Indian lands; and (3) allow all other states to legislatively assume jurisdiction over criminal or civil matters or both.²⁰⁷

Public Law 280 greatly reduced Indian sovereignty. Subsequent case law and more recent legislation have limited the extent of its constriction of tribal authority. For example, in the five states in which both criminal and civil jurisdiction were conferred upon the states, court decisions in the 1970s have limited application

203. *Id.*

204. *Id.*

205. *Id.* at 13.

206. G. HALL, *supra* note 69, at 24.

207. R. RENNER, PUBLIC LAW 280 PROBLEMS AND PROGNOSIS 3 (1975).

of state jurisdiction to only criminal cases.²⁰⁸ In addition, the Indian Civil Rights Act of 1968 repealed the section of Public Law 280 that allowed a state arbitrarily to assert jurisdiction over reservations.²⁰⁹ It mandated instead that a state could assume jurisdiction only after the tribe had voted its consent at a special election.²¹⁰

The Indian Civil Rights Act of 1968 not only restricted the power granted to states by Public Law 280 but also restricted Indian self-governing authority by requiring tribal governments to provide individuals with most of the same protections ensured by the United States Bill of Rights.²¹¹ Additionally, it limited tribal courts to imposing penalties of not more than \$500 or six months in jail or both.²¹²

Tribal jurisdiction was further diminished in 1978 by the United States Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe*. Justice Rehnquist authored the opinion in which the Court held that Indian tribal courts do not have "inherent jurisdiction to try and punish non-Indians."²¹³ By so holding, the Court stripped tribes of authority to enforce their criminal codes against non-Indians unless they had explicit treaty or statutory language giving them such jurisdiction.

Today, internal affairs still considered to be within the scope of tribal self-government usually include the power to form and operate a system of government chosen by the tribe,²¹⁴ the exercise of civil jurisdiction "necessary to protect tribal self-government or to control internal relations,"²¹⁵ the exercise of civil jurisdiction conferred to the tribe by "express congressional delegation,"²¹⁶ jurisdiction over crimes committed by Indians,²¹⁷ the power to determine conditions of tribal membership,²¹⁸ the levying of taxes on tribal members,²¹⁹ and the regulation of tribal members' prop-

208. See G. GROSSMAN, *supra* note 13, at 14.

209. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 403b, 82 Stat. 73 (25 U.S.C. § 1302(7) (1982)).

210. *Id.* § 406.

211. See G. GROSSMAN, *supra* note 13, at 15.

212. Indian Civil Rights Act, *supra* note 209, § 1302(7).

213. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

214. INDIAN JURISDICTION, *supra* note 18, at 6.

215. *Montana v. United States*, 450 U.S. 544, (1981).

216. *Id.* at 564.

217. *E.g.*, P. FEITZER, *supra* note 73, at 6.

218. INDIAN JURISDICTION, *supra* note 18, at 6.

219. *Id.*

erty, including inheritance rights.²²⁰ This authority, of course, is subject to congressional alteration or extinguishment. It can also be shifted to the states, as was demonstrated by Public Law 280.

It is noteworthy that even in those spheres where Indians do retain authority, their laws differ little from Anglo-American laws. Tribal governments and the various Indian courts, alone with tribal codes they administer, are almost completely based upon documents drafted by the federal government.²²¹ Accordingly, tribal courts differ little from equivalent state courts of summary jurisdiction, except for the aforementioned jurisdictional and punitive limits and the fact that they are administered, in the main, by indigenous people. The involvement of indigenous people can result in more informed and flexible justice. It can also result in more corrupt or incompetent justice.²²²

The complete tribal sovereignty over internal affairs that the Supreme Court recognized in *Worcester* has been incrementally eroded in the past 150 years. Today, tribal sovereignty, although still considerable, is much diminished. This diminution of sovereignty has been most extensive in situations in which one of the parties is a non-Indian and the issue is a criminal rather than a civil matter.

Alaska

Most Alaska natives never had the federally recognized self-governing power held by Indians in the contiguous forty-eight states. Instead, because of the near-total absence of reservations in Alaska, natives were subject first to territorial law and later to state law.²²³ Even so, many native villages continued to internally handle infractions of customary behavioral norms.²²⁴ Today, Alaska natives' self-governing authority is delineated by the same federal legislation that applies to the self-governing authority of Indians elsewhere in the United States.

The Indian Reorganization Act of 1934 was amended in 1936 to make it fully applicable to Alaska natives. The 1934 Act permitted natives classified as "tribes," "bands," or "reservations" to organize under federal constitutions and business charters. The

220. *Id.*

221. Keon-Cohen, *supra* note 17, at 286.

222. *Id.* at 296.

223. F. COHEN, *supra* note 46, at 763-74.

224. *Id.*

1936 amendment authorized natives that had "a common bond of occupation, or association, or residence within a well-defined neighborhood, community or rural district" to organize pursuant to the IRA.²²⁵

In 1958, Public Law 280 was extended to Alaska.²²⁶ It conferred upon Alaska state authorities both criminal and civil jurisdiction over Indian country. As in other parts of the United States, however, courts have narrowly interpreted the state's authority over civil causes of action.²²⁷ Furthermore, the initial federal grant of jurisdiction was amended in 1970, restoring concurrent criminal jurisdiction to Alaska's sole reservation at Metlakatla.²²⁸

The common law doctrines that guide determinations of when state jurisdiction may be properly applied in native communities are the same in Alaska as they are elsewhere. Thus tribes generally have jurisdiction over their members and territory unless their authority has been modified by Congress.²²⁹ This retained jurisdiction includes the power to make legislative and judicial "determinations related to inheritance or property in which the tribe has an interest, to distribution of tribal assets or income, to tribal membership, to domestic relations, and to other matters of internal self-government."²³⁰

Although the same legislation and common law apply to Alaska natives as apply to Indians in the rest of the nation, Indian law in Alaska is complicated by two unique factual circumstances. First, the boundaries of Indian country are difficult to draw. Second, the abundance of sometimes competing and frequently overlapping native organizations obfuscates the question of what organization has what authority.

Indian country includes Indian reservations, native allotments outside Indian reservations, and "dependent Indian communities."²³¹ As noted above, the Metlakatians occupy the only Alaska reserve that survived ANCSA. As such, it is Indian country. The jurisdictional consequences are the same as for any other reservation in the United States subject to Public Law 280. As long as

225. D. CASE, *supra* note 92, at 4.

226. Pub. L. No. 83-280, 67 Stat. 589 (amended by Pub. L. No. 85-615) (1953)).

227. D. CASE, *supra* note 92, at 12.

228. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (amended by Pub. L. No. 91-523, 84 Stat. 1358 (1970)).

229. F. COHEN, *supra* note 46, at 764.

230. *Id.*

231. PIRTLE & D. CASE, *supra* note 100, at 11.

they remain in Indian title, native allotments also are considered Indian country.²³² Because it affects the most Alaskan natives, the most critical definition of Indian country is that of "dependent Indian community." The crucial issue in determining whether Alaska native villages qualify for this classification is whether, in the wake of ANCSA, Alaska natives can still properly be considered "dependent." ANCSA implicated only lands and native land-related claims. It did not end natives' federal benefits or protections. All major post-ANCSA Indian legislation has specifically included Alaska natives, or their villages or corporations, as eligible beneficiaries.²³³ Thus, as long as these "indicia of dependence exist and Native people continue to reside together in a reasonably distinct location recognized as their residence by the federal government, they should be considered 'dependent Indian communities'."²³⁴

Indian country is not limited to land owned by the tribe. It is also defined in part by the concept of community. As a result, native jurisdiction may extend beyond tribally owned lands. The question is, how far? As a basis for determining the parameters of a dependent Indian community, jurisdictional definitions used for other purposes may be helpful. For example, "lands that are patented to Native corporations, owned by tribal governments located within former reservations, and located within Native villages which are municipalities, so long as they remain part of Native communities,"²³⁵ are all useful formulations for describing the reach of native jurisdictional powers.

Not only are the geographical boundaries of Indian country uncertain, discerning which "governing body" is appropriate to exercise native jurisdiction also can be difficult. About 210 ANCSA village corporations have been formed.²³⁶ A majority of those villages (120) also are organized as municipalities under state law.²³⁷ The other ninety villages have maintained a separate form of internal self-government.²³⁸ Finally, about seventy of the 120 native villages organized as municipalities have also organized under the IRA.²³⁹ In sum, the different combinations of jurisdictional alloca-

232. F. COHEN, *supra* note 46, at 766.

233. *Id.* at 769.

234. *Id.* at 766.

235. *Id.* at 766, 767.

236. D. CASE, *supra* note 92, at 130.

237. F. COHEN, *supra* note 46, at 751.

238. D. CASE, *supra* note 93, at 130.

239. F. COHEN, *supra* note 46, at 752.

tion that can occur in any given village are considerable. Even though the responsibilities of the governing structures overlap, each structure still has a distinctive jurisdictional niche.

Village corporations have the least expansive governing power. They were established as profit-making entities and are not villages in the sense of governmental and cultural units.²⁴⁰ Their primary purpose is to serve as vehicles for holding the lands and administering the benefits promised by ANCSA.²⁴¹ Although they are included as tribes under some Indian legislation, they "might not fully participate in the kinds of social welfare and education programs typically available under Indian statutes."²⁴² Under state law, village corporations have only proprietary authority.

Municipalities, on the other hand, have governing authority. From the natives' perspective, in villages with few nonnatives, a municipal government can be an effective tool for self-government. It would be inappropriate, however, if native control of the government becomes diluted by the growth of a nonnative constituency.²⁴³ Furthermore, most federal programs are available only to tribes and their members. Those programs maintained through municipalities would be available only as long as natives retained their control of the government.²⁴⁴

Traditional native governments lack the formal structure of municipalities organized under state law. Nonetheless, they do have jurisdiction over internal affairs, such as controlling membership, sanctioning individual conduct through customary law, and regulating uniquely tribal affairs and property.²⁴⁵ Also, they can serve as organizations to administer federal programs.²⁴⁶ Even after ANCSA, courts have continued to uphold native organizations' sovereign immunity from suit.²⁴⁷ In short, like the native groups organized under the IRA, traditional native governments are "essentially equivalent to tribal governments elsewhere in the country."²⁴⁸

IRA villages or tribes retain traditional self-governing powers

240. *Id.* at 753.

241. *Id.*

242. *Id.* at 754.

243. *Id.* at 755.

244. *Id.* at 754.

245. *Id.* at 755.

246. *Id.*

247. *Id.*

248. *Id.* at 752.

and are eligible for benefits available under the IRA.²⁴⁹ In addition, IRA corporations often own businesses and real and personal property.²⁵⁰ Simply stated, IRA governments have a bigger "bundle" of self-governing authority than do the other three modes of native self-government. It is not yet known over which people, what subjects, and what territory that right to self-governance can be exercised.

To conclude, the same framework of federal legislation and common law relating to native self-government applies in Alaska as in the contiguous states. The scope of that self-governing authority is uncertain among Indians in the contiguous states, but the lack of "reservations" and "tribes" and the presence of ANCSA makes that uncertainty even greater in Alaska. Only through further legislative and judicial definitions of Indian country and through future tests of native self-governing authority can the extent of Alaska natives' continuing jurisdictional powers be determined.

Canada

Canada's new constitution almost certainly will increase the amount of jurisdictional authority possessed by Canada's natives. In the past, that authority has been minimal. Natives' sovereign rights have been recognized in Canada only to the extent that they were promised in treaties and land settlements, entailing no more than limited recognition of their inherent title to land. An inherent right to self-government was not acknowledged.²⁵¹ The government's position had been "that Indians gave up all rights to self-government when they signed the treaties."²⁵²

Because self-governing authority was not reserved for Indians when they made treaties with the Canadian government, no preemption of provincial authority over Indians' self-government has occurred. The government has, however, preempted provincial jurisdiction over reserves in matters concerning reserve lands and the use of those lands.²⁵³ Federal preemption also occurs when

249. *Id.*

250. R. PIRTLE & D. CASE, *supra* note 100, at 13.

251. Keon-Cohen, *supra* note 17, at 305.

252. D. Ahenekeew, *Remarks at the Saskatchewan All-Chiefs Conference* (Apr. 1977), reprinted in Sanders, *Statement of Evidence*, *supra* note 57, at 20.

253. See Hugh, *Are Northern Lands Reserved for the Indians?*, 60 CAN. B. REV. 36, 71 (1982).

hunting and fishing rights promised by treaty are in question. Finally, provincial governments cannot make laws applicable only to natives or to native reserves.²⁵⁴ Aside from these limitations, "reserves are merely separate geographical areas, separated land."²⁵⁵ The people who live on them are subject to provincial laws in common with all residents of the province.

Thus the constitutions and powers of tribal governments in Canada, to the limited extent they exist, have been exercised only pursuant to powers conferred upon them by the Indian Act or other provincial or federal legislation.²⁵⁶ As a result, native governments' powers are strictly limited; they may be best described as limited powers of local government administration.²⁵⁷ The Indian Act, for example, gives band councils the power to make bylaws that are consistent with the Act and allows them to make regulations for a number of specified local government purposes.²⁵⁸ This conferred authority also allows limited adjudicatory sanctions, namely a fine of no more than \$100, up to thirty days in jail, or both. All bylaws must be approved by the federal government prior to becoming effective.²⁵⁹

In the past, Canadian Indians have rarely exercised even the limited self-governing authority they possessed. In the last twenty years, however, some bands have assumed virtually complete self-management of their reserve lands and full administration of many special programs. Additionally, within the last five years bands have experimented more with their bylaw powers. Several court cases have arisen testing band powers.²⁶⁰

The only substantial Indian involvement in native justice to date appears to be the appointment of native justices of the peace in the Northwest Territories. They have jurisdiction over minor offenses of the Canada Criminal Code, federal statutes, and Northwest Territories ordinances.²⁶¹

The impact of the constitutional establishment of natives' aboriginal title and treaty rights certainly will augment both the

254. *Id.* at 70.

255. *Id.*, quoting Sanders, *Hunting Rights—Provincial Laws—Application on Indian Reserves*, 38 SASK. L. REV. 234, 239 (1973-1974).

256. Keon-Cohen, *supra* note 17, at 288.

257. *Id.*

258. *Id.*

259. *Id.*

260. Sanders, *Aboriginal Peoples*, *supra* note 67, at 423.

261. Keon-Cohen, *supra* note 17, at 289.

amount of property they control and the proprietary authority they can exercise over it. It also may increase the self-governing authority they possess. This could be especially true in areas where aboriginal title has never been quieted and where comprehensive settlements have yet to be negotiated. In these situations, natives have a sterling opportunity to bargain for not only property but also a measure of self-governing authority.

Analysis

In both Canada and the United States, Indian law has been fashioned by the interplay of two political forces. The first of these was Anglos who wanted to acquire natives' lands and resources. Proponents of this position usually included many who lived near native populations.²⁶² The other political force was Anglos who focused on the native people rather than on their resources. Proponents of this position wanted to solve the "Indian problem." They wanted to help natives become a prosperous, integrated part of the dominant culture.

Superficially, these forces were at cross-purposes. The developers wanted to take what the Indians had, while the reformers wanted to give the Indians what white people had. Remarkably, however, the two factions seemed more often to be cooperating than conflicting. The history of both countries is replete with examples of the interplay between these two groups. The Dawes Act (Allotment Act of 1887) that gave individual Indians alienable land, was touted by reformers as a device to liberate Indians from their poverty. Land-hungry supporters of the bill, on the other hand, recognized it as an opportunity to seize control of previously unavailable land. The allotment era, however, was disastrous for Indians. It left the tribes even more impoverished and dispirited, with only a third of the land they had controlled at its outset.

In Canada, the same coalition of seemingly antagonistic factions existed. Canada's policy of creating reserves illustrates this ironical alliance. Reserves were seen by reformers as a place to prepare Indians for full participation in Canadian society. For the developers, the reserves were a convenient place to confine Indians so that new lands could be opened to development. Once the Indians were pacified and isolated, however, there was little official interest in them. They were progressively marginalized.

262. *E.g.*, P. FETZER, *supra* note 73, at 288.

Thus, rather than being vehicles for integration, the reserves became structures that increased Indians' separation.²⁶³

In both Canada and the United States, the last fifteen to twenty years has been an era of self-determination for Indians. Unlike previous eras, the developers have not been as successful in carving away native land holdings and reformers have not been as intrusive in native affairs. During this time, natives have made great strides in increasing their property interests through land claims cases in New England, fishing rights cases in the Pacific Northwest, ANCSA in Alaska, and the settlement of specific and comprehensive claims in Canada. They also have made some progress in improving their legal position, particularly in Canada where treaty and aboriginal rights have been recognized and codified in the new Canadian constitution. If the gains of this era are to be retained and extended, however, the developers and intrusive reformers must be held at bay. This can best be accomplished, in both countries, by a policy that combines an informed approach to shaping native law with a concerted effort to define and implement plans for bettering the lot of the native people.

In shaping the law to protect such interests, four principles should be kept in mind. First, in legal actions, natives need to be cognizant of the political factors important to the court in deciding a particular case. Second, they need to continue to push aggressively for the promptest possible settlement of their property claims. Next, if their goal is to exercise indigenous sovereignty, they need to maintain some degree of separateness from the dominant culture. Finally, they should continuously augment their political clout at all levels of government.

Natives have become ever more aware of the courts' sensitivity to external political pressures.²⁶⁴ This is appropriate. Judicial opinions reflect the fact that judges may demonstrate considerable concern for minority rights when there is little adverse political pressure. The same judges, however, show an apparent lack of concern for native rights when adverse political pressure is high.²⁶⁵ With the judiciary so sensitive to adverse political pressures, how can natives hope to retain their treaty and aboriginal rights?

In Canada, natives might do best if they avoid the courts. At the present time, these people appear to believe that "the courts,

263. Sanders, *Aboriginal Peoples*, *supra* note 67, at 423.

264. Keon-Cohen, *supra* note 17, at 306, 311.

265. P. FETZER, *supra* note 73, at 225.

as currently constituted and in the current climate of opinion, offer little further hope. This is not, in the main, a legal assessment, but a political one."²⁶⁶ With the legal foundation provided by Canada's new constitution, natives should be in a better legal position. Whether the new constitutional protections can be translated into victories in the courts is yet untested.

In the United States, natives should consider at least three factors in preparing for a lawsuit. First, if possible, they generally should litigate in federal rather than state courts. They should also be realistic in assessing their chances of gaining exclusive jurisdiction over land or resources; in some situations they may fare better by seeking less. Finally, in the area of jurisdictional disputes, natives should concentrate their energy on cases in which only natives are affected.

State courts, on balance, appear to disfavor natives. State court judges seem inclined to favor results desired by the representatives of the dominant economic forces in their state. Federal judges more frequently protect natives' rights.²⁶⁷ A study of thirty-five hunting and fishing cases decided between 1953 and 1980 illustrated this differing success rate. Of the nineteen federal cases reviewed, Indians won fifteen, or about 79 percent. Of the sixteen state cases examined, the tribes won only six, or 38 percent.²⁶⁸

Natives should be realistic in assessing their chances of gaining exclusive jurisdiction over land or resources. In native hunting and fishing claims cases, a party asserting a right to exclusive control of the resource usually loses. This is true regardless of whether the party is the state or a tribe. The exception to this postulate transpires when the case in question has received little public attention.²⁶⁹ Conversely, if no assertion of exclusive authority is made, the court will try to formulate a resolution that appears to balance the rights of the native and nonnative parties,²⁷⁰ illustrating that in some situations natives may get more by asking for less. Therefore, they should balance carefully their chances of losing a claim of exclusive jurisdiction and simultaneously their

266. Keon-Cohen, *supra* note 17, at 306.

267. P. FETZER, *supra* note 73, at 225.

268. *Id.* at 127.

269. Fetzer concludes that judges want to preserve an appearance of impartiality. Thus, if there is public scrutiny of a case, judges will try very hard to "split the pie." If the public is unaware of the case, judges are more willing to award one of the parties a more sweeping victory. *Id.* at 122.

270. *Id.* at 123-25.

cause of action, against what they might be able to win if they seek only a shared interest in the resource. U.S. Deputy Solicitor General Louis Clairborne acknowledged this:

We prevailed in the Washington Fishery Case, but not by much. I suspect all it would have taken to lose that case was to ridicule the 50 percent formula and insist that the tribes enjoy an unlimited and open-ended right to catch all the fish they could net, leaving only what was left to the other fishermen.²⁷¹

Finally, if natives have a jurisdictional question on which they want a ruling, they have the best chance of gaining a favorable outcome if they raise it under circumstances in which the affected native population outnumbers the affected nonnative population. In twelve United States Supreme Court cases addressing native jurisdiction—the first of which was the 1959 case of *Williams v. Lee*²⁷² and the last *Montana v. United States*²⁷³—eleven of the cases, or 92 percent, were decided in favor of the party that represented the most people.²⁷⁴ The only aberration was *Montana v. United States*.²⁷⁵ Thus, the Supreme Court apparently prefers a result that is supportive of the numerically dominant party.²⁷⁶

The second principle natives need to be mindful of in trying to shape the law to protect them is the importance of the promptest possible settlement of their property claims. While the reserved-rights doctrine in the United States protects natives' inchoate rights to resources such as land, water, and fish, there is a "danger in waiting too long for the settlement of Indian claims to share resources."²⁷⁷ Nonnatives often begin using the resources. When natives bring their claim, therefore, nonnatives may have a considerable economic investment in their use of the resource. As a consequence, courts often limit natives' reserved rights to minimize the adverse impact that would otherwise befall nonnatives. The reallocation process can also cause great discord between natives and nonnatives. Thus, "[i]t would seem wiser to resolve these claims while the resources are still unused, or at least

271. *Id.* at 235, quoting Clairborne.

272. 358 U.S. 217 (1959).

273. 450 U.S. 544 (1981).

274. P. FETZER, *supra* note 73, at 189.

275. *Id.* at 161.

276. *Id.* at 214.

277. Johnson, *supra* note 5, at 118.

only partially utilized, and when no one, or at least only a few persons, will be hurt by a settlement."²⁷⁸

In Canada, the same situation exists. The government has recognized the validity of natives' aboriginal rights. It is prepared to negotiate settlements of both comprehensive and specific claims. At the same time, the government has specifically stated that the interest of present nonnative resource users also are acknowledged and will be protected. In its policy statement regarding the settlement of specific claims, the Canadian government stated, "As a general rule, the government will not accept any settlement which will lead to third parties being dispossessed."²⁷⁹ The protection of established nonnative property interests may explain why negotiations to settle natives' aboriginal land claims have progressed primarily in the sparsely populated northern territories of Canada, even though natives also have extinguished claims in the more densely populated maritime provinces and in British Columbia.²⁸⁰

In summary, the courts and governments of Canada and the United States will countenance no more than limited displacement of established nonnative interests. When the Passamaquoddies' claim to their traditional lands in Maine was pending, the *Bangor Daily News* editorialized: "Unless this country is prepared to destroy itself in the name of justice, it is madness to foresee 1,500 or so Maine citizens of any color, creed or ancestral origin, getting 10 or 12 million acres of land worth billions of dollars."²⁸¹ The clear lesson is that natives can best secure their property interests by promptly establishing what they are and by quickly putting them to use.

For natives to exact the fullest possible self-governing authority, it is important that they retain jurisdictional autonomy. As a small minority in both Canada and the United States, natives cannot affect the dominant culture to a great degree. Indeed, from their standpoint the danger is that they gradually will lose their special status. In the contiguous forty-eight states, it is important that Indians continue to maintain their land base and press to maintain a separate government. The latter perhaps is more critical. As tribal governments have come to realize in recent years, the jurisdictional issue is the cutting edge of their assertion of tribal

278. *Id.*

279. OUTSTANDING BUSINESS, *supra* note 183, at 31.

280. Sanders, *Aboriginal Peoples*, *supra* note 67, at 414.

281. P. FETZER, *supra* note 73, at 168.

autonomy and sovereign powers.²⁸² Furthermore, the growing assertion of tribal justice as an integral component of tribal government is a positive step toward entrenching and expanding tribes' self-governing authority.

In Canada, the present is a time of sweeping change in the way natives relate to the federal and provincial governments. Much of this change is being or will be achieved through the comprehensive claims settlement process. Natives recognize that this process is an opportunity for them to redefine and redetermine their place in Canadian society.²⁸³ Again, autonomy is an important protection they must seek in preparing for a future that will have ongoing challenges to their sovereign powers.²⁸⁴

Natives in Alaska are currently in the greatest danger of losing their separateness and in the best position to protect their interests if that should happen. They face an increased danger of losing their separateness because most of them do not live on reservations. Instead, their lands are held by native corporations. Because the land is not held in trust for them by the federal government, it has not been considered Indian country. As a result, the natives have only proprietary authority over it. In sum, the extent of their self-governing authority is limited in comparison with other United States natives. Additionally, when their ANCSA stock becomes

282. Keon-Cohen, *supra* note 17, at 311.

283. Jackson, *supra* note 61, at 4.

284. The situation currently confronting natives in the Northwest Territories illustrates the fact that choosing autonomy can conflict with other priorities. As noted in Pugh, *supra* note 253, at 79-80:

The real possibility of substantial federal legal regimes in the north based on race is emerging . . . at the time when the territorial assembly has come under the control of the northern aboriginal people.

The situation is complicated by the fact that the territorial government is without authority to tax Native reserve lands. Thus, the establishment of extensive Native reserves would hamstring the territorial government. Clearly, it could be tempting to Natives to forego the establishment of reserves in the interest of maintaining a more robust territorial government for them to direct. The danger of such a course of action, however, is that the Natives may some day lose the ability to control the territorial government. If the chance to create reserves has passed, they then would be bereft of all governing authority. Hence, the choice confronting Natives in the Northwest Territories is whether to opt for the creation of reserves even though it undermines the territorial government—or to forego reserves to save the territorial government even though doing so would leave the Natives vulnerable to the possible loss of lands they might otherwise have had. Unless the Natives are very confident that they can continue to control the territorial government in the future, choosing reserves, whatever the consequences of such a choice to the territorial government, would seem the more prudent alternative.

alienable in 1991, Alaska natives may lose much of their resource base.

Despite their vulnerability, Alaska natives are, unlike natives elsewhere in the United States, a powerful political force in their state. They are comparatively wealthy, comprise a relatively large portion of the population, and have a tradition of action and prominent involvement in the territorial and state government. Even so, they are a minority and, consequently, are vulnerable to the majority. They must determine, therefore, what kind of protection or special status they need and how they obtain that status.²⁸⁵ One thing appears clear: Regardless of what other arrangement is sought to protect their resources, it would be to their advantage to organize under the Indian Reorganization Act. Doing so would put them in a stronger position to argue their right to exert broader self-governing powers. It would also help cement their special relationship with the federal government and ensure their eligibility for federal programs targeted exclusively at "tribal members."²⁸⁶ While IRA organization would be only a small step toward establishing natives' separateness, it would be a critical beginning.²⁸⁷

Finally, natives should continue to augment their political clout at all levels of government. As discussed above, not only are legislatures responsive to political pressure, the judicial decision-making process is also susceptible to political pressure.²⁸⁸ As a sometimes infinitesimal minority, natives cannot hope to control the political system. They can, however, mobilize public opinion on their behalf. In so doing, they can at least decrease the damage that might otherwise be done to their interests.

The four principles enumerated above—approaching litigation in a savvy way, promptly settling outstanding claims, establishing native resources and rights as separate from those of the dominant culture, and augmenting native political clout—will help

285. R. PIRTLE & D. CASE, *supra* note 100, at 4-6, 25.

286. D. CASE, *supra* note 92, at 131.

287. *Village scraps City Council in favor of tribal government*, Anchorage Daily News, Nov. 12, 1983, p. B5. The village of Akiachok voted to disband its City Council, which was a municipal government organized under state law, in favor of a tribal government under exclusive tribal control. The action was taken because of the "constant confusion over whether [the City Council] or the tribal council had the authority in village affairs." The action is also significant in that it more firmly establishes the separateness of natives' governing structure and power.

288. P. FETZER, *supra* note 73, at 122.

natives keep their property interests. For them to retain the fullest possible degree of internal autonomy, however, their living conditions need to continue to be improved. Otherwise, reformers may decide (as they have in the past) that they need to solve the "Indian problem." Some of their past "solutions" include the Dawes Act and legislation leading to the termination era. The altruistic intrusions of the reformers can be as devastating as the self-serving acts of the developers. It is therefore incumbent upon native leaders to make the self-determination era not only a time of native political achievement but also a time of social and economic improvement.

Moreover, native leaders need to continue to stress to nonnatives that the "Indian problem" is not one for the Anglos to solve. Native leaders must first continue to encourage improvements in Indians' educational achievements and standards of living. A special challenge will be to make these changes in a way that affirms their cultural mores.

The other measure these leaders can take is to stress their desire for self-determination in discussions and communications with government officials and reformers. They should reiterate that they want enablement, not protection. They should try to teach the governments of both Canada and the United States that good faith in keeping promises does not provide license for intrusions into native affairs, regardless of how well-meaning those intrusions may be.

In summary, as a small minority, Indians are politically feeble. Because of their extensive property interests and unique place in the history of North America, they likely are destined to be an embattled people. They may have to struggle indefinitely to retain their resources and maintain their identity—a battle waged not only in the courts and legislatures of Canada and the United States but also in the minds and souls of the Indian people.