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Introduction

Few cases have affected the course of Indian law as greatly as *Tee-Hit-Ton Indians v. United States*.[1] Decided in 1955, it was the culmination of a line of Supreme Court decisions concerning aboriginal title, its status as "property," and the effect on that status of various kinds of "recognition." Plaintiffs were a group of Alaskan natives seeking compensation under the fifth amendment for a "taking" by the United States of timber from lands the plaintiffs claimed by aboriginal title. Denying that compensation was due, the Court declared that absent specific recognition as such by treaty or act of Congress, aboriginal title is not a property interest within the meaning of the fifth amendment.

Recent scholarship has charged that *Tee-Hit-Ton* wrongly decided the issues presented.[2] Ironically, the issues the Court claimed to have decided probably were not presented in the first place. Through the combined misunderstanding of Court and counsel, most of the relevant issues in the case were never addressed. Instead, counsel argued and the Court "decided" a case that bore little resemblance to the one properly before the Court.

Shortly after Alaska was acquired, Congress deliberately did not provide Alaskan native lands the legislative protection traditionally afforded Indian lands elsewhere.[3] Adopting a different policy in Alaska, Congress refused to protect aboriginal title per se, although it did act to protect native possession. Through special legislation, most significantly the 1884 Alaska Organic Act,[4] Congress created various imperfect rights in favor of both

1. 348 U.S. 272 (1955), *noted in* 69 HARV. L. REV. 120, 148 (1955) and 8 ALA. L. REV. 170 (1955).

2. R. BARSH & J. HENDERSON, THE ROAD 141-44 (1980); Henderson, *Unraveling the Riddle of Aboriginal Title*, 5 AM. INDIAN L. REV. 75 (1977); Newton, *At the Whim of the Sovereign*, 31 HASTINGS L.J. 1215 (1980). *See* Hookey, *The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?*, 5 FED. L. REV. 85, 99-102 (1972); Mickenberg, *Aboriginal Rights in Canada and the United States*, 9 OSGOODE HALL L.J. 119, 135-38 (1971).

3. Most provisions of the 1834 Intercourse Act, Act of June 30, 1834, ch. 161, 4 Stat. 729, particularly section 12, 25 U.S.C. § 177, have never been in effect in Alaska.

4. Act of May 17, 1884, ch. 53, § 8, 23 Stat. 24.

natives and nonnatives occupying lands in Alaska. These rights closely paralleled, but were conceptually distinct from, aboriginal title.

Just eight years before the *Tee-Hit-Ton* decision, the Ninth Circuit Court of Appeals had held that rights created by the 1884 Organic Act were "compensable" property under the fifth amendment, although it also held that all aboriginal title in Alaska had been extinguished in 1867.[5] The Supreme Court in *Tee-Hit-Ton* misread this decision as having upheld compensation for a taking of aboriginal title and disapproved of it. The Court then held that the 1884 Act was not sufficient recognition of aboriginal title so as to compel compensation under the "recognition" test it announced. It never realized that for nearly sixty years both it and the Ninth Circuit had construed the 1884 Act as having created nonaboriginal rights.

Largely because of this confusion by the Court, and a natural tendency to focus on aboriginal title whenever Indian land is concerned, non-Alaskan courts and commentators usually have failed to perceive the unique footing upon which Alaskan native property rights have rested. This article will attempt to eliminate this confusion through analysis of relevant legislation and case law. After a brief overview of legislation affecting native rights in Alaska, the significance and applicability of the Indian Trade and Intercourse Acts in Alaska will be discussed. The existence and character of the property rights of Alaskan natives under the 1884 Organic Act will be explored, and a theory of the relationship between these rights and aboriginal title proposed. The cases leading up to the *Tee-Hit-Ton* decision will be discussed, and *Tee-Hit-Ton* will be criticized based upon Alaskan and non-Alaskan legal precedent. In conclusion, it will be suggested that Alaskan tribes still hold vested rights to lands in Alaska, notwithstanding either *Tee-Hit-Ton* or the Alaska Native Claims Settlement Act of 1971,[6] and that *Tee-Hit-Ton* either should be overruled or limited to its facts and, therefore, have little but historical relevance either inside or outside of Alaska.

Alaska and Alaskan Natives: An Overview

Since time immemorial Alaska has been inhabited by the peoples now known generally as the Tlingits, Athapascans,

5. Miller v. United States, 159 F.2d 997 (9th Cir. 1947).
6. 43 U.S.C. §§ 1601-1628 (1971).

Eskimos, and Aleuts.[7] The first Europeans to record contact with them were members of the Russian exploration expedition of Vitus Bering in 1741. The expedition reported finding large numbers of sea otters and fur seals, and before long, hoards of Russian fur hunters arrived to exploit the newly discovered wealth. The Russian-American Company was formed in 1799, and until 1867 it not only enjoyed a monopoly on the fur trade but exercised powers of government over such Russian possessions as there were in Alaska. Aside from fur traders, the Russian presence was limited to scattered churches and townsites, mostly in southeastern Alaska.[8]

Russia ceded its rights in Alaska to the United States in 1867.[9] The treaty of cession provided that, with the exception of "the uncivilized native tribes," all inhabitants who chose to remain in Alaska would become United States citizens.[10] The "uncivilized" tribes, on the other hand, were declared to be "subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country."[11] The treaty therefore implicitly divided natives into two categories, "uncivilized" and "civilized," and ordained federal citizenship for the latter.[12]

7. Congressional legislation relating generally to Indians applies to all four groups, while legislation relating specifically to Alaska often distinguishes among Indians (Tlingits and Athapascans), Eskimos and Aleuts. United States v. Native Village of Unalakleet, 411 F.2d 1255 (Ct. Cl. 1969). *Compare* Act of May 25, 1926, ch. 379, 44 Stat. 629, pt.2 (repealed by Pub. L. No. 94-579, § 703(a), 90 Stat. 2790 (1976)) (Indians and Eskimos) *with* Act of May 31, 1938, ch. 304, 52 Stat. 593 (repealed by Pub. L. No. 94-579, § 704(a), 90 Stat. 2792 (1976)) (Indians, Eskimos, and Aleuts).

8. H. CHEVIGNY, RUSSIAN AMERICA (1979); E. GRUENING, THE STATE OF ALASKA 1-29 (2d ed. 1968).

9. Treaty of Cession of Russian America, Mar. 30, 1867, United States-Russia, 15 Stat. 539. Russia's rights in Alaska were those stemming from discovery. *See* Lipan Apache Tribe v. United States, 180 Ct. Cl. 487, 493 (1967). "[D]iscovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession." Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573 (1823). This title was "subject only to the Indian right of occupancy." *Id.* at 585. Discovery "gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest." *Id.* at 587. See also the discussion of *McIntosh, infra* at text accompanying notes 169-176. For excellent discussions of the discovery doctrine, *see* Barsh & Henderson, *supra* note 2, at 31-49; Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFF. L. REV. 637 (1978); Henderson, *supra* note 2, 82-109.

10. Treaty of Mar. 30, 1867, United States-Russia, art. 3, 15 Stat. 539.

11. *Id.*

12. *In re* Minook, 2 Alas. 200 (D. Alas. 1904). "Civilized" natives were those considered under Russian law as being Russian subjects, including Creoles and the "settled

In 1884 the first Organic Act for Alaska extended the laws of Oregon over Alaska, so far as applicable, and provided for the appointment of a governor to sit in Sitka.[13] Alaska was constituted a land district, the general mining laws[14] were declared to be in force, and those who had already located claims were allowed to perfect them.[15] This was subject to the provision that "the *Indians or other persons*" in Alaska "shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them[,] but *the terms under which such persons may acquire title* to such lands *is reserved for future legislation* by Congress."[16] Occupied lands up to 640 acres being used as missionary stations among the Indians were to "be continued in the occupancy" of the missionaries "until action by Congress."[17] A final proviso cautioned that "nothing contained in this act shall be construed to put in force" in Alaska "the general land laws of the United States."[18]

Congress created the first Indian reservation in Alaska in 1891 when it set aside the Annette Islands Reserve for the Metlakatla Indians, a band that had immigrated from British Columbia four years earlier.[19] Persons occupying lands in Alaska for purposes of trade or manufacture were allowed to receive patents to such lands not to exceed 160 acres,[20] but this rule did not extend to lands "to which the natives of Alaska have prior rights by virtue of actual occupation."[21] Provision was also made for entry of lands for townsite purposes under the general townsite laws, with

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tribes"; "uncivilized native tribes" were "those independent pagan tribes who acknowledged no allegiance to Russia . . . ." *Id.* at 213-20. *Cf.* United States v. Lynch, 7 Alas. 568, 572 (D. Alas. 1927) (Tlingits classified as "uncivilized natives"). Federal citizenship was granted to Indians generally by the Act of June 2, 1924, ch. 233, 43 Stat. 253. The Metlakatla Indians of the Annette Islands Reserve became federal citizens by the Act of May 7, 1934, ch. 221, 48 Stat. 667.

13. Act of May 17, 1884, ch. 53, §§ 1, 2, 7, 23 Stat. 24.

14. Rev. Stat. §§ 2318-2352 (*codified in* 43 U.S.C.).

15. Act of May 17, 1884, ch. 53, § 8, 23 Stat. 24.

16. *Id.* (emphasis added).

17. *Id.*

18. *Id.*

19. Act of Mar. 3, 1891, ch. 561, § 15, 26 Stat. 1095 (*codified at* 25 U.S.C. § 495). The waters within 3,000 feet of the low mean tide of the islands were included in the reserve by the Presidential Proclamation of Apr. 28, 1916, 39 Stat. 1777. The Supreme Court subsequently interpreted the original reservation by Congress to include such waters but made no mention of the 1916 proclamation. Alaska Pac. Fisheries v. United States, 248 U.S. 78 (1918).

20. Act of Mar. 3, ch. 561, § 12, 26 Stat. 1095.

21. *Id.* § 14.

no more than 640 acres to be embraced within any one entry.[22]

The homestead laws[23] were extended to Alaska in 1898, but homesteads were to be limited to 80 acres; and neither entries nor acquisition of title to the shores of navigable waters were authorized.[24] The act also delegated to the Secretary of the Interior authority to "reserve for the use of the natives of Alaska suitable tracts of land along the water front of any stream, inlet, bay or sea shore for landing places for canoes and other craft" used by natives.[25]

The second Organic Act in 1900 reorganized the civil government of Alaska and moved its seat to Juneau.[26] The act declared that the "Indians or other persons conducting schools or missions" in Alaska should not be disturbed in the possession of lands actually used or occupied, and directed the Secretary of the Interior to survey and issue to religious societies patents to lands, up to 640 acres, occupied by them as missionary stations among the Indians.[27]

Although applicable, the General Allotment Act of 1887[28] was of little practical significance in Alaska. It authorized the creation of allotments only out of lands that were part of an Indian reservation; there were no Indian reservations in Alaska at the time. Congress corrected this situation in 1906 when it authorized the Secretary of the Interior to allot 160 acres of nonmineral land to any Indian or Eskimo meeting certain qualifications.[29] Such persons were given a preference right to secure an allotment to nonmineral land they occupied. The allotments were to be inalienable and nontaxable until otherwise provided.

In 1912 the third Organic Act provided for a territorial

22. *Id.* § 11 (repealed by Pub. L. No. 94-579, § 703(a), 90 Stat. 2790 (1976)). It has been held that natives were not entitled to enter townsites under this section. Johnson v. Pacific Coast S.S. Co., 2 Alas. 224 (D. Alas. 1904). *But see* Act of May 25, 1926, ch. 379, § 1, 44 Stat. 629 (repealed by Pub. L. No. 94-579, § 703(a), 90 Stat. 2790), which authorized the issuance of deeds to Indians or Eskimos occupying tracts surveyed pursuant to section 11 of the Act of 1891.

23. Rev. Stat. §§ 2289-2317 (*codified in* 43 U.S.C.; some sections repealed by Pub. L. No. 94-579, § 702, 90 Stat. 2787-88).

24. Act of May 14, 1898, ch. 299, § 1, 30 Stat. 409 (*codified in* 43 U.S.C.).

25. *Id.* § 10 (repealed by Pub. L. No. 94-579, § 704(a), 90 Stat. 2792 (1976)).

26. Act of June 6, 1900, ch. 786, § 1, 31 Stat. 321.

27. *Id.* § 27 (*codified at* 25 U.S.C. § 280a).

28. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (*codified at* 25 U.S.C. §§ 331-34, 339, 341-42, 348, 349, 381). *See* Nagle v. United States, 191 F. 141 (9th Cir. 1911).

29. Act of May 17, 1906, ch. 2469, 34 Stat. 197 (repealed by Pub. L. No. 92-203, § 18, 85 Stat. 710 (1971)).

legislature[30] and a nonvoting delegate to Congress.[31] The act further provided that "the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within [Alaska] as elsewhere in the United States. . . ."[32]

The newly created territorial legislature in 1915 enacted the Indian Village Act allowing any native village of at least forty permanent inhabitants to organize a municipal government.[33] In 1926, Congress provided for the issuance of deeds to lands set apart for Indians and Eskimos within townsites entered and surveyed pursuant to the Act of 1891, and for the survey and conveyance of patents to Indians and Eskimos occupying nonmineral lands within existing towns and villages.[34] The title conveyed was inalienable without the approval of the Secretary of the Interior and not subject to taxation, levy and sale, or claims of adverse occupancy.[35]

The self-government provisions of the 1934 Indian Reorganization Act were not applicable to Alaska until 1936.[36] Because of differences in organization between communities of Alaskan natives and Indian tribes elsewhere, Congress allowed that

> groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under [the Indian Reorganization Act].[37]

Congress also authorized the Secretary of the Interior to designate as an Indian reservation any land previously "reserved" for the use of Indians or Eskimos, together with adjacent public lands or those occupied by Indians or Eskimos.[38] Two years later

30. Act of Aug. 24, 1912, ch. 387, § 4, 37 Stat. 512.

31. *Id.* at § 17.

32. *Id.* § 3.

33. Act of Apr. 21, 1915, ch. 11, 1915 Alas. Sess. Laws, p. 24, *amended by* Act of May 1, 1917, ch. 25, 1917 Alas. Sess. Laws, p. 47, *repealed by* Act of Apr. 13, 1929, ch. 23, 1929 Alas. Sess. Laws, p. 45.

34. Act of May 25, 1926, ch. 379, 44 Stat. 629 (repealed by Pub. L. No. 94-579, § 703(a), 90 Stat. 2790 (1976)).

35. *Id.*

36. Act of June 18, 1934, ch. 576, 48 Stat. 984, *amended by* Act of May 1, 1936, ch. 254, 49 Stat. 1250 (*codified at* 25 U.S.C. §§ 461-79).

37. *Id.*

38. Act of May 1, 1936, ch. 254, § 2, 49 Stat. 1250 (repealed by Pub. L. No. 94-579, § 704(a), 90 Stat. 2792 (1976)).

the secretary was also given the authority to reserve tracts of up to 640 acres of the public domain for "schools, hospitals, and such other purposes as may be necessary" to administer the affairs of Alaskan Indians, Eskimos, and Aleuts.[39]

Alaska's long road to statehood ended in 1959 with its admission to the Union. The Statehood Act[40] contained two important provisions affecting Alaskan natives. First, the state disclaimed

> all right and title to any lands or other property . . . (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts . . . or is held by the United States in trust for said natives . . . [which] lands or other property . . . shall be and remain under the absolute jurisdiction and control of the United States.[41]

Second, the act provided that "the State of Alaska is hereby granted and shall be entitled to select, within twenty-five years" more than 103 million acres of "vacant, unappropriated, and unreserved" public lands.[42] The second was probably the more important of the two provisions because it set the stage for the battle which culminated in the Alaska Native Claims Settlement Act.[43]

In 1961 the Bureau of Indian Affairs filed the first of a flood of native protests over state selections; within a decade between 80 and 90 percent of the land in Alaska was subject to native protests or other claims.[44] When, in 1966, natives protested the federal sale of oil and gas leases on the North Slope, Interior Secretary Udall responded by suspending the lease sale and freezing the disposition of all federal land in Alaska until native claims were settled.[45] After oil was discovered at Prudhoe Bay and the Alaska Pipeline proposed,

39. Act of May 31, 1938, ch. 304, 52 Stat. 593 (repealed by Pub. L. No. 94-579, § 704(a), 90 Stat. 2792 (1976)).

40. Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339 (*codified at* 48 U.S.C. prec. § 21 note).

41. *Id.* § 4.

42. *Id.* § 6.

43. 43 U.S.C. §§ 1601-1628.

44. Block, *Alaskan Native Claims*, 4 NAT. RESOURCES LAW 223, 223 (1971) estimates 80 percent, based upon claims of nearly 300 million of approximately 375 million acres in Alaska. AMERICAN INDIAN POLICY REVIEW COMMISSION, SPECIAL JOINT TASK FORCE REPORT ON ALASKAN NATIVE ISSUES 6 (1976), estimates that claims totaled approximately 337 million acres, or 90 percent of the state.

45. The freeze was formalized Jan. 17, 1969, by Public Land Order 4582, 34 Fed. Reg. 1025. It was extended Dec. 8, 1970, by Public Land Order 4962, 35 Fed. Reg.

> a strange troika coalition seeking settlement was created: Natives seeking "title" to their aboriginal lands; the State of Alaska seeking to clear Native title so it could select its lands; the major oil companies—national and international—seeking to clear Native title so that the "freeze" could be lifted and a pipeline built.[46]

Congress responded in 1971 with the passage of the Alaska Native Claims Settlement Act.[47] The Act extinguished all native claims based upon aboriginal title, "if any," and authorized the distribution of approximately 40 million acres of land and nearly one billion dollars to Alaskan natives as compensation.[48] Natives were authorized to organize twelve "regional corporations" and nearly 300 "village corporations" to share the settlement.[49] The shareholders of a village corporation are the members of the village; likewise, the shareholders of a regional corporation are those natives originating within the region.[50] Each village corporation was to select and receive in fee simple the surface rights to between 23,040 and 161,280 acres from the immediate vicinity.[51] Regional corporations are to hold in fee simple the subsurface rights to village lands, together with both surface and subsurface rights to additional lands selected from within each region's boundaries.[52]

Settlement Act lands thus are to be held in a manner quite unlike that of any Indian lands outside of Alaska. Land received under the Settlement Act may be sold by its corporate owners, but stock in regional and village corporations cannot be sold until

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18,874, and June 17, 1971, by Public Land Order 5081, 36 Fed. Reg. 12,017. Public Land Order 4582 was revoked by the Alaska Native Claims Settlement Act, 43 U.S.C. § 1616(d)(1).

46. TASK FORCE REPORT, *supra* note 44, at 6.

47. Act of Dec. 18, 1971, Pub. L. No. 92-203, 85 Stat. 688 (*codified at* 43 U.S.C. § 1601-1628). *See generally*, Lazarus & West, *The Alaska Native Claims Settlement Act: a Flawed Victory*, 40 LAW & CONT. PROB. 132 (1976); Lysyk, *Approaches to Settlement of Indian Title Claims: The Alaskan Model*, 8 U. BRIT. COLUM. L. REV. 321 (1973); Comment, *Charitable Donations under the Alaska Native Claims Settlement Act*, 3 UCLA-ALAS. L. REV. 148 (1973).

48. 43 U.S.C. §§ 1603, 1605(a), 1608, 1611, 1613, 1615. The Metlakatla Indians of the Annette Islands Reserve are not eligible for benefits under the Settlement Act. *Id.* § 1618(a). Other reservations were revoked, but the natives of such reservations were given an option to acquire in fee simple the lands formerly within the reservations. *Id.* § 1618.

49. *Id.* §§ 1606, 1607.

50. *Id.* §§ 1606(g), 1607(a).

51. *Id.* §§ 1611(a) & (b), 1613(a) & (b), 1615.

52. *Id.* §§ 1611(d), 1613(e), (f).

1991.[53] Except for land that is developed or leased to third parties, Settlement Act lands are also exempt from state and local real property taxes until 1991.[54] The corporations that own the lands are creatures of state law; they are not entitled to sovereign immunity as are tribes and with few exceptions are subject to taxation like any other state-created corporation.[55]

Alaska and the Indian Trade and Intercourse Acts

It was not long after the ratification of the Constitution that Congress adopted the first of a series of acts regulating trade and intercourse with Indian tribes.[56] The 1790 Intercourse Act decreed that "no person shall be permitted to carry on any trade or intercourse with the Indian tribes without a license for that purpose"[57] and provided as a penalty the forfeiture of any goods "as are usually vended to the Indians" in the possession of any person found "in the Indian Country" without a license.[58] Perhaps the act's most important provision was the one declaring that

> no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of preemption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.[59]

"Indian country" was left undefined until it was set out by metes and bounds in the 1796 Intercourse Act,[60] an approach that was

53. *Id.* §§ 1606(h), 1607(c). *See* Note, *Alaska Native Claims Settlement Act: Analysis of the Protective Clauses of the Act Through a Comparison With the Dawes Act of 1887,* 4 AM. INDIAN L. REV. 269 (1976).

54. 43 U.S.C. § 1620(d).

55. Both regional corporations and village corporations are incorporated under state law. *Id.* §§ 1606(d), 1607(a). Tax exemptions are found at *id.* § 1620. As to the sovereign immunity of tribes from suit, *see* United States v. United States Fid. & Guar. Co., 309 U.S. 506 (1940); Johnson v. Chilkat Indian Village, 457 F. Supp. 384 (D. Alas. 1978) (Alaskan native village); Atkinson v. Haldane, 569 P.2d 151 (Alas. 1977) (Metlakatla Indian community). Settlement Act corporations are subject to suit. *See, e.g.*, Aleut Corp. v. Arctic Slope Regional Corp., 417 F. Supp. 900 (D. Alas. 1976).

56. *See generally* F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS (1962).

57. Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137. The act was a temporary measure and was reenacted every three years until a permanent version was passed in 1802. Act of Mar. 30, 1802, ch. 13, 2 Stat. 139.

58. Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137.

59. *Id.* § 4.

60. Act of May 19, 1796, ch. 30, 1 Stat. 469.

unchanged in the 1799 and 1802 Intercourse acts.[61]

The final Intercourse Act was passed in 1834.[62] Its first section provided:

> That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory or Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.[63]

The act proscribed the operation of "any distillery for manufacturing ardent spirits,"[64] and forbade any person to "sell, exchange, or give, barter or dispose of, any spirituous liquor or wine to an Indian,"[65] in the Indian country. It continued the requirement of a license to reside or trade within the Indian country,[66] and declared that "no purchase, grant, lease, or other conveyance of lands, of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution."[67]

Alaska as "Indian Country"

At the time of the enactment of the 1834 Intercourse Act the United States included only that portion east of the Mississippi River plus those portions known as the Louisiana Purchase[68] and the Red River Country.[69] The rest of what is now the fifty states was acquired through annexation in 1845 and 1898,[70] by agreement with Britain in 1846,[71] and through cessions from Mexico in

61. Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139. Section 1 of the 1802 Act provided that the boundary line was to be altered automatically should lands be ceded by tribes.

62. Act of June 30, 1834, ch. 161, 4 Stat. 729.

63. *Id.* § 1.

64. *Id.* § 21.

65. *Id.* § 20.

65. *Id.* § 4.

67. *Id.* § 12.

68. Comprising most of the Great Plains region west of the Mississippi River, acquired by the Treaty of Apr. 30, 1803, United States-France, 8 Stat. 200.

69. The basin of the Red River of the North, acquired by the Convention of Oct. 20, 1818, United States-Great Britain-France, 8 Stat. 248.

70. Texas was admitted into the Union pursuant to the Joint Resolution of Mar. 1, 1845, 5 Stat. 797. Hawaii was annexed pursuant to the Joint Resolution of July 7, 1898, 30 Stat. 750.

71. Conflicting claims to the Oregon country by Britain and the United States were settled by the Treaty of June 15, 1846, United States-Great Britain, 9 Stat. 869.

1848 and 1853[72] and Russia in 1867.[73] Congress expressly extended the 1834 Intercourse Act over the Oregon territory in 1850[74] and the New Mexico and Utah territories in 1851,[75] but never over Alaska, California, Hawaii, or Texas.

When an attempt was made in 1872 to enforce the liquor provisions of the 1834 Act in Alaska in *United States v. Seveloff*,[76] the trial court dismissed the indictment on the ground that the 1834 Act had never been extended expressly to Alaska and, therefore, was inapplicable. The United States District Attorney had argued for the United States that Alaska was part of the Indian country, both because it was inhabited by Indians and because the 1834 Act had been extended over Alaska, *proprio vigore*, at the time of its cession from Russia.

> The "Indian Country" is only that portion of the United States or its territories, which has been declared to be such by an act of congress. . . .[77] It has been so common a habit of congress upon the acquisition of territory to specially extend the laws of the United States over it, . . . that if congress had intended this or any other provision of the intercourse act to be in force in Alaska, it would, in accordance with its common practice, have so declared. . . .[78]

There was precedent for this holding in *United States v. Tom*,[79] where the supreme court of the Territory of Oregon had held that the 1834 Intercourse Act had effect in Oregon only by virtue of its having been extended by the Act of 1850.

72. The Mexican Cession by the Treaty of Guadalupe Hidalgo, Feb. 2, 1848, United States-Mexico, 9 Stat. 922; the Gadsden Purchase by the Treaty of Dec. 30, 1853, United States-Mexico, 10 Stat. 1031.

73. Alaska was acquired by cession from Russia, Treaty of Mar. 30, 1867, United States-Russia, 15 Stat. 539.

74. The Act of June 5, 1850, ch. 16, § 5, 9 Stat. 437, provided: "That the law regulating trade and intercourse with the Indian tribes *east of the Rocky Mountains*, . . . as may be applicable, be extended over the Indian tribes in the Territory of Oregon. . . ." (Emphasis added.) Oregon Territory comprised what are now the states of Washington, Oregon, and Idaho.

75. Act of Feb. 27, 1851, ch. 14, § 7, 9 Stat. 574. New Mexico Territory comprised what are now the states of New Mexico and Arizona (except for the area added by the Gadsden Purchase in 1853). Utah Territory encompassed what are now western Colorado and the states of Utah and Nevada.

76. 27 F. Cas. 1021 (No. 16,252) (D. Or. 1872).

77. *Id.* at 1022.

78. *Id.* at 1024.

79. 1 Or. 26 (1853). *Accord*, Robinson v. Caldwell, 67 F. 391 (9th Cir. 1895).

In 1873, Congress reacted by extending over Alaska sections 20 and 21 of the 1834 Intercourse Act.[80] Later that same year Congress enacted the first Revised Statutes, collecting together all public laws of a permanent and general nature. The 1873 Revised Statutes repealed and reenacted all included provisions into positive law and by implication repealed any provisions not included.[81] Paradoxically, the Revised Statutes omitted the 1834 Intercourse Act's definition of Indian country but did not repeal those sections of the 1834 Act that applied only in Indian country. One court ruled that this meant there was no longer any Indian country except within Indian reservations,[82] but the Supreme Court held otherwise in *Ex parte Crow Dog*[83] in 1883. The issue in *Crow Dog* was whether a homicide of one Indian by another Indian on the Sioux Reservation was within the provisions of Revised Statutes §§ 2145 and 2146,[84] which, by their terms, apply only to Indian country. The Court held that the killing had been committed within Indian country and was therefore not punishable by other than the Sioux Tribe. Six years earlier in *Bates v. Clark*[85] the Court had held that:

> [A]ll the country *described by the act of 1834 as Indian country* remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress.[86]

The Court in *Crow Dog* held that this definition applied to

> all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occu-

80. Act of Mar. 3, 1873, ch. 227, 17 Stat. 510, 530.

81. Rev. Stat. § 5596.

82. Forty-three Cases of Cognac, 14 F. 539 (C.C.D. Minn. 1882).

83. 109 U.S. 556 (1883).

84. Section 2145 is derived from section 25 of the 1834 Intercourse Act, Act of June 30, 1834, ch. 161, 4 Stat. 729, and provides: "Except as to crimes, the punishment of which is expressly provided for in this Title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." Rev. Stat. § 2146 provides that "The preceeding section shall not be construed to extend to [crimes committed by one Indian against the person or property of another Indian, nor to] any Indian committing any offense in the Indian country who has been punished by the local law of the tribe . . . ." These two sections are now codified at 18 U.S.C. § 1152.

85. 95 U.S. 204 (1877).

86. *Id.* at 209 (emphasis added).

> pancy of Indians, although much of it has been acquired since the passage of the act of 1834, and notwithstanding the formal definition in that act has been dropped from the statutes, excluding, however, any territory embraced within the exterior geographical limits of a State, not excepted from its jurisdiction by treaty or by statute, at the time of its admission into the Union, but saving, even in respect to territory not thus excepted and actually in the exclusive occupancy of Indians, the authority of Congress over it, under the constitutional power to regulate commerce with the Indian tribes, and under any treaty made in pursuance of it.[87]

Although this definition seems to include Alaska, a circuit court three years later in *Kie v. United States*[88] ruled that Alaska was not Indian country except for purposes of sections 20 and 21 of the 1834 Intercourse Act. Kie had been convicted of manslaughter, alleged to have been committed in 1884 in Juneau. On appeal he argued that the killing had taken place within Indian country and was therefore not punishable pursuant to sections 2145 and 2146 of the Revised Statutes. Noting the *Seveloff* case and the subsequent extension of sections 20 and 21 over Alaska by Congress, the court concluded that "this legislation . . . is equivalent to a declaration that Alaska is not to be considered 'Indian country,' only so far as concerns the introduction and disposition of spirituous liquors therein."[89]

The Intercourse Acts in Alaska

Whether a particular area of Alaska is Indian country is now largely a question of only academic interest. As amended in 1958, Public Law 280[90] granted Alaska civil and criminal jurisdiction

87. 109 U.S. 556, 561 (1883).

88. 27 F. 351 (C.C.D. Or. 1886). Section 23 of the 1834 Intercourse Act, providing for the use of military force to apprehend persons in Indian country in violation of any provision of the 1834 Act, was applicable in Alaska by implication of the extension there of sections 20 and 21. Waters v. Campbell, 29 F. Cas. 412 (No. 17,265) (C.C.D. Or. 1877); *In re* Carr, 5 F. Cas. 115 (No. 2432) (D. Or. 1875). Sections 20 and 21 were repealed by implication by the more stringent liquor provisions of section 14 of the 1884 Alaska Organic Act, Act of May 17, 1884, ch. 53, 23 Stat. 24. United States v. Warwick, 51 F. 280 (D. Alas. 1892); United States v. Nelson, 29 F. 202 (D. Alas. 1886). The sale or gift of liquor or firearms to Indians, including Alaskan natives, was forbidden by the Act of Mar. 3, 1899, ch. 429, § 142, 30 Stat. 1253, 1274.

89. 27 F. 351, 353 (C.C.D. Or. 1886). *Accord*, 14 Ops. Att'y Gen'l 290 (1873); 16 Ops. Att'y Gen'l 141 (1878); F. COHEN, FEDERAL INDIAN LAW 350 (1942, rprnt. 1971).

90. 18 U.S.C. § 1162; 28 U.S.C. § 1360. Amended to include Alaska by the Act of Aug. 8, 1958, Pub. L. 85-615, 72 Stat. 545.

over all Indian country in that state; the issue should not arise again unless the state retrocedes such jurisdiction.

The applicability of most provisions of the 1834 Intercourse Act in Alaska has never been considered directly by the courts. Substantial judicial authority, as well as congressional practice, indicates that particular provisions are not in effect unless they have been expressly extended.[91] Congress did extend two sections of the 1834 Act in 1873[92] and, by enactment of 18 U.S.C. sections 1151-1165 in 1948, made applicable certain criminal provisions of the 1834 Act.[93] However, neither Congress nor the courts have ever declared the balance of its provisions to be in effect in Alaska.

It seems anomalous that federal laws general on their face should apply to one area within the United States but not to another. The explanation of the courts, that laws must be extended expressly to newly acquired territory for them to apply, provides only a partial answer. Further explanation lies in the fact that the Intercourse acts are an exercise of congressional power under the Constitution to regulate commerce with the Indian tribes.[94] Failure to extend the bulk of the provisions of the 1834 Act to Alaska reflected an apparent determination to regulate commerce with Alaskan natives differently in some respects than with Indian tribes elsewhere.

Native Property Rights in Alaska

By having failed to extend section 12 of the 1834 Intercourse

91. Robinson v. Caldwell, 67 F. 391 (9th Cir. 1895); Kie v. United States, 27 F. 351 (C.C.D. Or. 1886); United States v. Seveloff, 27 F. Cas. 1021 (No. 16,252) (D. Or. 1872); United States v. Tom, 1 Or. 26 (1853). *Accord*, Waters v. Campbell, 29 F. Cas. 412 (No. 17,265) (C.C.D. Or. 1877); *In re* Carr, 5 F. Cas. 115 (No. 2432) (D. Or. 1875). *See* United States v. Santa Fe Pac. Ry., 314 U.S. 339, 347-48 (1941); United States v. Candelaria, 271 U.S. 432, 441-42 (1926); United States v. Joseph, 94 U.S. 614 (1876). *See also* Act of June 5, 1850, ch. 16, § 5, 9 Stat. 437, set out *supra*, note 74.

92. Act of Mar. 3, 1873, ch. 227, 17 Stat. 510, 530, extended sections 20 and 21 of the 1834 Act to Alaska. See also note 88 *supra*.

93. 18 U.S.C. § 1152, concerning crimes applicable in Indian country, is derived from section 25 of the 1834 Act; section 1160, concerning reparation to Indians whose property has been the subject of a crime by a white person, is derived from section 16 of the 1834 Act. 18 U.S.C. § 1151 defines Indian country in terms substantially different from its predecessor, section 1 of the 1834 Act, while section 21 of the 1834 Act, prohibiting the dispensation of liquor in the Indian country, is found substantially revised at 18 U.S.C. § 1154.

94. U.S. CONST. art. I, § 8, cl. 3; United States v. Holliday, 70 U.S. (3 Wall.) 407 (1865).

Act to Alaska,[95] Congress declined to deny Alaskan natives the power to alienate their lands. Alaskan natives did in fact alienate lands, and courts upheld the transfers except in cases where the federal government sought to set aside the conveyances as fraudulent.[96] The transfers were not of aboriginal title, however, but of rights created by special congressional legislation. The most important of these rights were created by section 8 of the 1884 Alaska Organic Act.[97]

Judicial Interpretation of the 1884 Organic Act

One of the earliest cases to interpret the 1884 Act suggested that it was express recognition of the "right of the American citizen to go onto public lands, occupy, possess, use, and improve the same, with the view of ultimately obtaining title."[98] The court appears to have been referring to a settler's right of preemption on the public domain.[99] The case was cited with approval by the Supreme Court in 1889 in *Malony v. Adsit*,[100] an action to recover possession of a tract of land in Juneau. There the Court found that "for more than nine years prior to April 29, 1891 [plaintiff] and his grantors were the owners by right of prior occupancy and actual possession of the land in dispute."[101] The defendant claimed that the complaint was defective under the applicable rules of pleading because it had failed to plead "the nature of [plaintiff's] estate in the property, whether it be in fee, for life or for a term of years."[102] The Court held for the plaintiff, explaining that "[i]n the condition of things in Alaska under the act of May 17, 1884, . . . the only titles that could be held were those arising by reason of possession and continued possession, which might ultimately ripen into a fee simple title under

95. 25 U.S.C. § 177, set out in text accompanying note 67, *supra*.

96. United States v. Cadzow, 5 Alas. 125 (D. Alas. 1914); United States v. Berrigan, 2 Alas. 442 (D. Alas. 1905).

97. Act of May 17, 1884, ch. 53, § 8, 23 Stat. 24. See text accompanying notes 13-18, *supra*.

98. Carroll v. Price, 81 F. 137, 139 (D. Alas. 1896).

99. Under the preemption laws, Rev. Stat. §§ 2257-88 (*codified in* 43 U.S.C.), a citizen might settle on lands subject to preemption and obtain a right of first purchase to such lands. This right was assertable against third parties, but not against the federal government until all preliminary acts, including payment of the purchase price, are performed by the settler. *See* Shepley v. Cowan, 91 U.S. (1 Otto) 330 (1875); Yosemite Valley Case, 82 U.S. (15 Wall.) 77 (1872).

100. 175 U.S. 281 (1899).

101. *Id.* at 28.

102. *Id.*

letters patent . . . when Congress might so provide."[103]

Six years later in *Russian-American Co. v. United States*,[104] the Supreme Court found it "quite clear" that section 8 of the 1884 Act had "recognized the rights of such Indians or other persons as were in possession of lands at the time of the passage of the act, and *reserved to them the power to acquire title* thereto after future legislation had been enacted by Congress."[105] In that case the packing company had settled and erected improvements on Afognak Island in 1889. When later that year the United States reserved the island as a fish culture station, the company claimed that it had a vested right to a patent under section 8 of the 1884 Act. The Court responded that since the company "did not take possession of this land until five years after the act of 1884 was passed, it was a mere trespasser."[106]

The packing company also claimed rights under the Act of March 3, 1891, providing for the issuance of patents to persons occupying lands "for the purpose of trade or manufactures."[107] The Court replied that "although the occupation and cultivation of public lands with a view to preemption confers a preference over others in the purchase of such lands by the *bona fide* settler," it conferred no rights against the United States.[108] "Such a vested right, under the preemption laws, is only obtained when the purchase money has been paid. . . ."[109]

It is clear that the Court did not think that the 1884 Organic Act had "recognized" a settler's preemptive rights because it clearly recognized that such rights could be acquired only by settlers under the preemption laws providing for the settlement and sale of the public domain. "[F]ar from Congress intending by this act to invite a settlement upon public lands in Alaska, a contrary inference arises from a subsequent clause of section 8, that 'nothing contained in this act shall be construed to put in force in said District the general land laws of the United States.'"[110]

103. *Id. Accord*, Haltern v. Emmons, 46 F. 452 (D. Alas. 1890), *aff'd mem.*, 159 U.S. 252 (1894); Miller v. Blackett, 47 F. 547 (D. Alas. 1891).

104. 199 U.S. 570 (1905).

105. *Id.* at 576 (emphasis added). *Accord*, Young v. Goldsteen, 97 F. 303, 308 (D. Alas. 1899); Miller v. Blackett, 47 F. 547 (D. Alas. 1891) (ejectment maintained against United States deputy-collector of customs).

106. 199 U.S. 570, 576 (1905). *Accord*, Columbia Canning Co. v. Hampton, 161 F. 60, 64 (9th Cir. 1908).

107. Act of Mar. 3, 1891, ch. 561, § 12, 26 Stat. 1095.

108. 199 U.S. 570, 577 (1905).

109. *Id.*

110. *Id.* at 576.

The leading case where the rights of natives under the 1884 Act were at issue was *Sutter v. Heckman*.[111] There a bill in equity was brought to restrain the Alaska Packers Association from interfering with fishing rights inuring to certain uplands on the Tongass Narrows. Plaintiffs claimed ownership of the land and fishing rights through a chain of deeds originating in a quit-claim deed from a native, alleged to have been in possession at the enactment of the 1884 Act. The district court found that the original grantor had in fact occupied part of the land claimed. As to that part, the deed from the native had "conveyed his possessory rights and his fishing rights, whatever they were . . . [which] should be protected under the act of Congress, to the same extent that they would be under a patent, until the Congress of the United States shall otherwise legislate."[112]

The Ninth Circuit Court of Appeals affirmed in *Heckman v. Sutter*.[113] To the defendants' contention that the 1884 Act could only have protected rights to land above the high water mark, the court replied that the act "was sufficiently general and comprehensive" to include tidelands.[114]

> It is well settled that the United States government, while it holds country as a territory, . . . may . . . *grant rights* in *or titles* to the tide lands of such territory as well as the public lands above high-water mark. The case of Shiveley [*sic*] v. Bowlby . . . leaves nothing more to be said on that question.[115]

The circuit court in *Heckman* clearly considered the 1884 Act to have been a grant of rights to persons in possession of lands. Similarly, the Supreme Court in the *Russian-American Co.* case declared that the Act had "reserved to [Indians and other per-

111. 1 Alas. 188 (D. Alas. 1901).

112. *Id.* at 200.

113. 119 F. 83 (9th Cir. 1902), *aff'd on reh.*, 128 F. 393 (9th Cir. 1904). *Followed in* Worthen Lumber Mills v. Alaska Juneau Gold Mining Co., 229 F. 966 (9th Cir. 1916) (native grantor); McCloskey v. Pacific Coast Co., 160 F. 794 (9th Cir. 1908) (nonnative grantor).

114. 119 F. 83, 88 (9th Cir. 1902), *aff'd on reh.*, 128 F. 393 (9th Cir. 1904).

115. *Id.* (emphasis added). Shiveley v. Bowlby, 152 U.S. 1, 48 (1894), declared that: "Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." *Heckman* indicated that rights in tidelands were subject to the right of navigation over public waters. 119 F. at 88; 128 F. at 396-97. *Accord*, Carroll v. Price, 81 F. 137, 142 (D. Alas. 1896).

sons] the power to acquire title,"[116] indicating that such persons had obtained vested rights to title. In 1947, in *Miller v. United States*, the Ninth Circuit adopted the position that the 1884 Act was a grant of such vested rights and held that these rights were property interests requiring fifth amendment compensation for their taking.[117] As recently as 1970, the Ninth Circuit cited its holding in *Heckman* along with *Shively v. Bowlby* to support its holding that the United States "[w]hile holding the country as a territory . . . might even grant rights in and titles to lands which normally would go to a state on its admission."[118]

Comparison of the language of the three "dispositive" provisions of section 8 of the 1884 Act supports such a construction of a grant of vested rights to title. Persons with mining claims were allowed to perfect them under the general mining laws, whereas missionaries were only to be "continued in occupancy" pending "action by Congress."[119] Significantly, "Indians and other persons" were to be protected in possession of lands actually used, occupied, or claimed, with only "the *terms* under which such persons may acquire title"[120] reserved for future congressional legislation.

The 1884 Organic Act and Aboriginal Title

It is important to note that none of the cases construing the 1884 Act distinguished between natives and other persons. It is enlightening that the Ninth Circuit in its 1947 decision in *Miller* upheld rights under the 1884 Act at the same time it explicitly held that aboriginal title in Alaska had not survived the 1867 Treaty of Cession from Russia.[121] In fact, until the Court of Claims decision in *Tee-Hit-Ton* in 1954, no court had ever held aboriginal title to exist in Alaska.[122]

Although the 1884 Act did not distinguish between possession by natives as individuals and as communities, the courts have

116. Russian-American Co. v. United States, 199 U.S. 570, 576 (1905).

117. 159 F.2d 997, 1003 (9th Cir. 1947).

118. United States v. Alaska, 423 F.2d 764, 768 (9th Cir. 1970). *See also* United States v. Romaine, 255 F. 253, 259 (9th Cir. 1919).

119. Act of May 17, 1884, ch. 53, 8, 23 Stat. 24.

120. *Id.* (emphasis added).

121. Miller v. United States, 159 F.2d 997, 1001-1002 (9th Cir. 1947); Treaty of Mar. 30, 1867, United States-Russia, 15 Stat. 539.

122. Tee-Hit-Ton Indians v. United States, 120 F. Supp. 202 (Ct. Cl. 1954), *aff'd*, 348 U.S. 272 (1955).

held that rights under the Act may vest in either.[123] To the extent that lands claimed by aboriginal title are coterminous with lands in which communal rights are held under the 1884 legislation, what is the effect of the 1884 Act on aboriginal title? It is possible that the 1884 grants were merely intended to supplement the natives' aboriginal claims, giving them alternative bases on which to assert their rights. On the other hand, the grants may have acted, either directly or through subordinating aboriginal tenure to federal tenure, to supplant possessory rights under aboriginal tenure with equal rights under federal tenure.

The classical concept of aboriginal title is that of a possessory proprietary interest inuring in tribes by virtue of aboriginal use and occupancy "from time immemorial." The right to possession is held under aboriginal tribal tenure, not federal or state tenure, until it might be legitimately extinguished, usually through cession by treaty to the United States in favor of the holder of the "preemption right" or "naked fee."[124] Such a cession to the federal government is an intertenurial transfer of property, as well as a cession of territory, and is the source of the right to possession within the federal and state tenure systems.[125]

As we have seen, Congress declined to mandate this paradigm of aboriginal rights in Alaska. It is instructive that not all tribes hold their aboriginal lands by aboriginal tenure. The New Mexico Pueblos hold much of their lands under grants from Spain, later confirmed by the United States.[126]

123. Heckman v. Sutter, 119 F. 83 (9th Cir. 1902) (individual); Johnson v. Pacific Coast S.S. Co., 2 Alas. 224, 240 (D. Alas. 1904) (village).

124. Beecher v. Wetherby, 95 U.S. (5 Otto) 517, 525 (1877); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 543-44 (1832).

125. Northern Pac. Ry. v. United States, 227 U.S. 355, 366 (1913); United States v. Winans, 198 U.S. 371, 381 (1905).

126. Spanish policy, if not always practiced, was to grant to the Pueblos the lands they occupied or claimed, and to forbid others to settle the lands or to purchase them without official permission. H. BRAYER, PUEBLO INDIAN LAND GRANTS OF THE "RIO ABAJO," NEW MEXICO 8-16 (1939); C. ROYCE, INDIAN LAND CESSIONS IN THE UNITED STATES 539-45 (1900). This policy was continued after Mexican independence in 1821, with the Pueblos also enjoying rights of Mexican citizenship. BRAYER, *supra*, at 17-20. After the Mexican-American War, most of the Southwest was ceded to the United States by the Treaty of Guadalupe Hidalgo in 1848. Treaty of Feb. 2, 1848, 9 Stat. 922.

Congress in 1854 ordered the investigation and report concerning the Pueblo land claims. Act of July 22, 1854, ch. 103, § 8, 10 Stat. 308, 309. The claims of seventeen pueblos were confirmed in 1858, and the lands patented to them in fee simple in 1864. Act of Dec. 22, 1858, ch. 5, 11 Stat. 374; BRAYER, *supra*, at 21. *See* ROYCE, *supra*, at 920-23 and plates 44 & 46. The claim of the Pueblo of Santa Ana was confirmed by the Act of Feb. 9, 1869, ch. 26, 15 Stat. 438.

Since the land grants are not within any reservation, the sovereign powers of the tribes are explainable only if they are aboriginal, notwithstanding that the tribes are understood to hold their titles in fee simple absolute, rather than by aboriginal tenure.[127] This suggests that a grant of a possessory interest to an aboriginal possessor may effectively transform the aboriginal quality of the right to possession.

It seems more than coincidence that within three years of the 1884 Organic Act, Congress forged a paradigmatic shift in its general Indian policy. Through passage of the Major Crimes Act of 1885[128] and the General Allotment Act of 1887,[129] Congress clearly initiated a new policy of intervention in internal tribal affairs, claiming the right to exercise jurisdiction over matters that previously had been within the exclusive realm of the tribes. It is suggested that the 1884 Organic Act was but another manifestation of this shift in Indian policy. By granting rights under federal tenure to natives and others in Alaska, Congress asserted the right to disregard the aboriginal tenure system and protect possessory interests on its own terms. This is particularly apparent considering that both native and nonnative possession was protected on exactly the same terms. Any conflict with aboriginal rights is wholly abstract, however, because such grants are completely consistent with native possession. The conflict is not with the aboriginal right to possession, which is protected, but with the sovereign aboriginal right to determine tenure without interference by another sovereign. Even this conflict is more apparent than real. As long as the United States asserts the right to forbid transfer of tribal land and claims the right of eminent domain over aboriginal lands, the difference between aboriginal title and possessory rights under federal or state tenure is merely descriptive, not substantive.

127. At present, the Pueblos reside on statutory and executive order reservations as well as land grants, with the reservations carefully abutting the granted lands. *See, e.g.*, Act of May 23, 1928, ch. 707, 45 Stat. 717 (Acoma Pueblo); Executive Order of Sept. 4, 1902, 3 KAPPLER, INDIAN AFFAIRS 687 (1913) (Nambe Pueblo); Executive Order of July 29, 1905, 3 KAPPLER, INDIAN AFFAIRS 687-88 (1913) (Santa Clara Pueblo). The pueblos of Picuris, Cochiti, Sandia, Isleta, Santa Ana, Santo Domingo, and San Juan are solely land grants.

128. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362 (*codified at* 18 U.S.C. § 1153). *See* ROYCE, *supra* note 126, at 920-23 and pl. 44, 46.

129. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (*codified at* 25 U.S.C. §§ 331-34, 339, 341-42, 348, 349, 381).

The Intersections of Aboriginal Title and Alaskan Native Property Rights

United States v. Santa Fe Pacific Ry.

In 1941 in *United States v. Santa Fe Pacific Ry.*,[130] the United States brought suit on behalf of the Hualapai Tribe to enjoin interference by the railroad with the tribe's possession and occupancy of certain lands in Arizona that the tribe claimed by aboriginal title. The railroad claimed title to the lands under a grant from the United States to its predecessor in 1866,[131] but the government asserted that the grant had conveyed title subject to the aboriginal interest.

The Court of Appeals of the Ninth Circuit had held that the United States had never recognized aboriginal title within the area of the Mexican Cession and that absent such recognition aboriginal title could not be asserted against a grantee of the United States.[132] In a unanimous opinion written by Justice Douglas, the Supreme Court rejected both this theory and the railroad's theory that aboriginal title need be "based upon a treaty, statute, or other formal government action."[133] The Court reasoned that if the Hualapais' aboriginal interest had not been extinguished prior to the date the title of the railroad's predecessor attached, then its predecessor "took the fee subject to the encumbrance of Indian title."[134] Disputing that the policy of the United States "of respecting such Indian title" was nonexistent in the Mexican Cession, the Court pointed to the fact that the 1834 Intercourse Act had been extended over the tribes in the New Mexico and Utah territories in 1851. "The Act of 1851 obviously did not create any Indian right of occupancy which did not previously exist. But it plainly indicates that in 1851 Congress desired to continue in these territories the unquestioned general policy of the Federal Government to *recognize such right of occupancy*."[135]

The Court held that the Hualapais' aboriginal title had not been extinguished by the time the railroad grant had attached in 1872; the railroad's predecessor therefore had taken the fee en-

130. 314 U.S. 339 (1941), *reh. denied*, 314 U.S. 716 (1942), *noted in* 10 GEO. WASH. L. REV. 753 (1942).

131. Act of July 27, 1866, ch. 278, 14 Stat. 292.

132. 314 U.S. 339, 345 (1941), *reh. denied*, 314 U.S. 716 (1942).

133. *Id.* at 347.

134. *Id.*

135. *Id.* at 347-48 (emphasis added).

cumbered by aboriginal title. However, the Hualapais' subsequent request for and acceptance of a reservation in 1883 was held to have been an effective abandonment of their aboriginal interest outside the reservation. The railroad recently had quitclaimed its interest in lands within the reservation to the United States, and the Court accordingly ordered an accounting with respect to only those lands.[136]

Tillamooks I and II

Five years later, in *United States v. Alcea Band of Tillamooks*,[137] the Supreme Court was divided on the issue of whether compensation was required for the taking by the United States without tribal consent of lands held by aboriginal title. Three Justices joined in the opinion of Chief Justice Vinson in requiring compensation under the fifth amendment, finding that "[a] contrary decision would ignore the plain import in traditional methods of extinguishing Indian title."[138] Noting that the "early acquisition of Indian lands, in the main, progressed by a process of negotiation and treaty," and that it had been "usual policy not to coerce the surrender of lands without consent and without compensation," Vinson concluded that "[s]omething more than sovereign grace prompted the obvious regard given to original Indian title."[139]

Two Justices joined in the dissenting opinion of Justice Reed, adopting the theory of the United States that compensation was required only where aboriginal title had received "some definite act of sovereign acknowledgment."[140] According to the dissent:

> The character of Indian occupancy of tribal lands is at least of two kinds: first, occupancy as aborigines until that occupancy is interrupted by governmental order; and second, occupancy when by an act of Congress they are given a definite area as a place upon which to live. When Indians receive recognition of their right to occupy lands by act of Congress, they have a right of occupancy which cannot be taken from them without compensation. But by the other type of occupancy, it may be

136. The Court without explanation failed to order an accounting as to lands outside the reservation for the period between 1872 and 1883. *See* 10 GEO. WASH. L. REV. 753, 755 (1942).

137. 329 U.S. 40 (1946) (*Tillamooks* I).

138. *Id.* at 47.

139. *Id.* at 47-48.

140. *Id.* at 49.

called Indian title, the Indians get no right to continue to occupy the lands. . . .[141]

This view of aboriginal title was rejected by four of the seven Justices who addressed the issue; seven out of eight Justices rejected Justice Black's theory that the jurisdictional act under which suit had been brought itself had compelled compensation; and the Court was split four to four over Chief Justice Vinson's contention that compensation was being awarded under the fifth amendment.[142] Nevertheless, some authorities read the case as standing for a right to compensation under the fifth amendment.[143] When *Tillamooks* came before the Court again four years later on the issue of whether interest was required on the award, the Court held *per curiam* that no interest was due because it was not a fifth amendment case.[144]

Miller v. United States

One year after the first *Tillamooks* opinion, in *Miller v. United States*,[145] the United States sought to use the Second War Powers Act[146] to condemn land in Juneau, Alaska. Certain natives filed an answer alleging ownership of the land based upon possession from time immemorial—aboriginal title. The lower court sustained the government's demurrer to the answer, holding that aboriginal title was not a compensable interest in land. On appeal, the Ninth Circuit opined that aboriginal title was indeed a compensable interest, citing *Tillamooks I*, but it held that any aboriginal title in Alaska had been extinguished by the Treaty of Cession from Russia in 1867.[147] Nevertheless, the Court upheld the natives' right to compensation based upon rights acquired under the 1884 Alaska Organic Act.[148] "In our opinion, the

141. *Id.* at 57-58 (Reed, J., dissenting).

142. Justice Jackson took no part in the decision. Chief Justice Vinson never expressly mentioned the fifth amendment, but it clearly was the basis for his opinion. *Accord*, 329 U.S. 40, 59-60 (1946) (Reed, J., dissenting). There was no other possible basis for recovery except for the jurisdictional act. Both the lead and dissenting opinions expressly held that the jurisdictional act had not required compensation. 329 U.S. at 45-46, 60.

143. Miller v. United States, 159 F.2d 997, 1001 (9th Cir. 1947). *See also*, Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 56-58 (1947).

144. United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951) (*Tillamooks* II).

145. 159 F.2d 997 (9th Cir. 1947).

146. Act of Mar. 27, 1942, ch. 199, § 201, 56 Stat. 177.

147. Treaty of Mar. 30, 1867, United States-Russia, 15 Stat. 539; 159 F.2d 997, 1001-1002 (9th Cir. 1947).

148. Act of May 17, 1884, ch. 53, § 8, 23 Stat. 24. The Court impliedly overruled United States v. Lynch, 7 Alas. 568 (D. Alas. 1927), which held that an allegation of

language used [in the 1884 Act] is susceptible of but one construction; i.e. that congress *guarantied [sic]* to all persons in possession of lands in Alaska at that date the right ultimately to acquire a perfect title to the same."[149] Relying upon numerous cases construing rights under the 1884 Act, the Court concluded that "[s]uch rights are compensable; for their holders are neither squatters nor outlaws."[150]

Miller got the Tlingit claimants to trial, but in *United States v. 10.95 Acres of Land*[151] the trial court held that compensation was not due them after all because they had failed to show use or occupancy which was "notorious, exclusive and continuous, . . . [so] as to put strangers upon [actual] notice."[152] *Miller*'s dictum that aboriginal title was compensable was undermined by the Supreme Court's opinion in *Tillamooks II*. Still, it was clear that rights stemming from the 1884 Organic Act were compensable interests under the fifth amendment, at least until the United States Supreme Court spoke on the matter.

Tee-Hit-Ton Indians v. United States

The Supreme Court finally did address the question of Alaskan natives' interests in land in 1955 in *Tee-Hit-Ton Indians v. United States*.[153] There a clan of Tlingits sought fifth amendment compensation for a sale, by the United States, of timber from lands the clan claimed it held in aboriginal title. Faced with the argument that their aboriginal interest needed to have been specifically recognized by Congress to be compensable, the Tee-Hit-Tons argued that the 1884 and 1900 Organic Acts[154] were sufficient recognition. When the Supreme Court's opinion was handed down, Justice Reed was at the helm of a six-to-three majority denying the Tee-Hit-Tons' claim. "No case in this Court has ever held that the taking of Indian title or use by Congress required compensation," he declared.[155] Restating the theory he had urged in *Tillamooks I*, he found:

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possession from time immemorial was not sufficient to raise an issue of fact regarding possession as of May 17, 1884.

149. 159 F.2d 907, 1003 (9th Cir. 1947), *quoting* Young v. Goldsteen, 97 F. 303, 308 (D. Alas. 1899) (emphasis supplied in *Miller*).

150. 159 F.2d at 1003.

151. 75 F. Supp. 841 (D. Alas. 1948).

152. *Id.* at 843-44.

153. 348 U.S. 272 (1955).

154. Act of May 17, 1884, ch. 53, § 8, 23 Stat. 24; Act of June 6, 1900, ch. 786, § 27, 31 Stat. 321.

155. 348 U.S. 272, 281 (1955). *But see* United States v. Alcea Band of Tillamooks,

> It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but a right of occupancy which the sovereign grants and protects against third parties. . . .[156]

The theory that specific recognition of aboriginal title by treaty or act of Congress was required for fifth amendment protection had triumphed. The Court gave short shrift to the Tee-Hit-Tons' contention that the 1884 and 1900 Organic Acts constituted specific recognition of their claims.[157] The Court also observed that "[b]efore the second Tillamook case, a decision was made on Alaskan Tlingit land held by *original Indian title.* Miller v. United States. *That opinion holds such a title compensable* under the Fifth Amendment on reasoning drawn from the language of this Court's first Tillamooks case."[158] Justice Reed disposed of *Miller*, however, by noting the Court's disapproval of that case in a footnote in *Hynes v. Grimes Packing Co.*[159] in 1949, where it had commented, per Justice Reed,

> We have carefully considered the opinion in Miller v. United States, *where it is held, that the Indian right of occupancy is compensable.* With all respect to the learned judges, familiar with Alaska land laws, we cannot express agreement with that conclusion. The opinion upon which they chiefly rely [citing *Tillamooks I*], is not an authority for this position. That opinion does not hold the Indian right of occupancy compensable without specific legislative direction to make payment.[160]

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341 U.S. 40 (1946); Cohen, *supra* note 143. Justice Reed sidestepped *Tillamooks I* by misreading it: "We think it must be concluded that the recovery in the *Tillamook* case was based upon statutory direction to pay for the aboriginal title in the special jurisdictional act . . . ." 348 U.S. at 284. This is clearly erroneous, as seven Justices in *Tillamooks I*, including Justice Reed, had rejected the jurisdictional act as a basis of recovery. *Accord*, Mickenberg, *supra* note 2, at 137. *See supra* note 142.

156. 348 U.S. 272, 279 (1955).

157. *Id.* at 278.

158. *Id.* at 282 (emphasis supplied).

159. 337 U.S. 86 (1949).

160. *Id.* at 106 n.28 (emphasis supplied).

The Court concluded that "[t]his leaves unimpaired the rule" it claimed to derive from *Johnson v. McIntosh*,[161] "that the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment."[162]

In his dissenting opinion, Justice Douglas adopted the Tee-Hit-Tons' argument and insisted that "[t]he conclusion seems clear that Congress in the 1884 Act recognized the claims of these Indians to their Alaskan lands."[163] However, neither the majority nor the dissent cited any case law pertaining to the 1884 Act except for *Miller*, which the majority misread and the dissent never mentioned.

The majority appeared confident in ruling against the Tee-Hit-Tons. "Our conclusion does not uphold harshness as against tenderness toward the Indians, but it leaves with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Government owned land rather than making compensation for its value a rigid constitutional principle."[164] Congress eventually was more sympathetic toward the Alaskan natives than the Supreme Court and legislated the Alaska Native Claims Settlement Act,[165] but the *Tee-Hit-Ton* decision remains as the leading case on aboriginal title and the fifth amendment. Ironically, the Court was probably correct in denying the Tee-Hit-Tons' aboriginal title claims, but it was entirely mistaken as to the applicable law.

The Tee-Hit-Ton Case Examined

The *Tee-Hit-Ton* decision is but one of many deciding what is "property" for the purpose of the fifth amendment. The approach adopted by the Court to dispose of the Tee-Hit-Tons' claim, *i.e.*, denying that the interest involved constitutes "property," has been used often in cases involving the navigation servitude,[166] zoning restrictions,[167] and regulation of economic ac-

161. 21 U.S. (8 Wheat.) 543 (1823).

162. 348 U.S. 272, 284 (1955).

163. *Id.* at 294 (Douglas, J., dissenting).

164. *Id.* at 290-91.

165. 43 U.S.C. §§ 1601-28.

166. *E.g.*, United States v. Rands, 389 U.S. 121 (1967); United States v. Willow River Power Co., 324 U.S. 499 (1945).

167. *E.g.*, H.F.H., Ltd. v. Superior Court, 15 Cal. 3d 508 (1975), *cert. denied*, 425 U.S. 904 (1976); Consolidated Rock Products Co. v. Los Angeles, 57 Cal. 2d 515, *app. dismissed*, 371 U.S. 36 (1962).

tivity.[168] Use of the "no property" approach in *Tee-Hit-Ton* was a radical departure from its use in these contexts where claims to *uses* of real property of acknowledged ownership were at issue. In *Tee-Hit-Ton*, ownership of the realty *itself* was the basic dispute.

Aside from the Court's basic approach to the fifth amendment, Justice Reed's analysis in *Tee-Hit-Ton* suffers from three fundamental errors that render his analysis extremely questionable. First, Reed's reliance upon *Johnson v. McIntosh*[169] to support his "well-settled" propositions regarding aboriginal title has caused perplexity and confusion in the theory of aboriginal title ever since.[170] Far from being "derived" from *McIntosh*, as Reed urged, the rule of *Tee-Hit-Ton* actually is at odds with that case. In *McIntosh*, plaintiffs sued for ejectment of defendant, who held the land in question under a grant from the United States. Plaintiffs claimed ownership of the land by purchase from an Indian tribe made prior to the cession of the land by the tribe, through treaty, to the United States. Among several grounds of decision,[171] the Supreme Court held that the plaintiffs' interest had been eclipsed by the subsequent cession of the land involved by the tribe. Chief Justice Marshall explained that "the person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws."[172] Although at the time it was a common practice for

168. *E.g.*, Federal Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591 (1944); Mugler v. Kansas, 123 U.S. 623 (1887).

169. 21 U.S. (8 Wheat.) 543 (1823).

170. *See* Henderson, *supra* note 2; Hookey, *supra* note 2, at 101.

171. The Court held plaintiffs' title invalid on at least two other grounds. The holding most commonly referred to was that the tribes could not convey a complete title because their "power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it." 21 U.S. (8 Wheat.) 543, 574 (1823). *But see* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544 (1832), where Marshall reformulated the discovery principle: "It was an exclusive principle which shut out the right of competition among those who had agreed to it . . . . It gave an exclusive right to purchase, but *did not found that right on a denial of the right of the possessor to sell.*" (Emphasis added.)

As a second ground for decision in *McIntosh*, the Court held that the Royal Proclamation of 1763, applicable because plaintiffs' purchases had been before the American Revolution, had reserved the lands claimed by plaintiffs to the tribes and forbidden purchase by British subjects. 21 U.S. (8 Wheat.) at 574-78. The 1763 Proclamation is still in effect in Canada, although evidently not in the far northern or western portions of the country. *See* Mickenberg, *supra* note 2, at 142. Portions of the proclamation are reprinted, *id.* at 155-56.

172. 21 U.S. (8 Wheat.) 543, 593 (1823).

tribes expressly to reserve in a treaty of cession any prior vested rights they wished to protect,[173] the treaty involved in *McIntosh* did not contain any such provision.[174] Marshall held that the treaty therefore had operated to eclipse the plaintiffs' interest and to transfer the lands to the United States free of any encumbrance. The cession by the tribe without reservation of plaintiffs' rights had been an act of eminent domain. According to Marshall, "If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We know of no principle which can distinguish this case from a grant made to a native Indian. . ."[175]

In *McIntosh*, Marshall explicitly recognized that a tribe's aboriginal proprietary interest exists within its own tenure system. This tenure system is not only separate from that of the federal government, but is actually a source of rights to the federal tenure system.[176] In *Tee-Hit-Ton*, Reed *assumed* that all rights were held under federal tenure. Failing to find an aboriginal property interest within federal tenure, Reed declared that specific congressional action was required to create one. According to one commentator:

> [T]he Court inaugurated a new judicial test of aboriginal property: the legal theory that Congress has the sole right to *delegate* to the Indian tribes their rights to aboriginal titles. Aboriginal title did not exist, then, because of the tribes' "original natural rights as the undisputed possessors of the soil from time immemorial," as stated in *Worcester*. Rather, under the Court's new theory of aboriginal title, it was vested in Congress.[177]

Second, Justice Reed failed to consider that the "specific recognition" test he championed in *Tillamooks I* and *Tee-Hit-Ton* also had been urged upon the Court in *United States v. Santa Fe Pacific Ry.*,[178] where the Court unanimously had rejected it. The Court there held that the railroad grantee had received fee ti-

173. *Id.* at 598. *Accord*, Barsh & Henderson, *supra* note 2, at 46 & n.63. *See, e.g.*, Treaty with the Wyandot of Sept. 29, 1817, art. 8, 7 Stat. 160; Treaty with the Cherokee of Feb. 27, 1819, art. 3, 7 Stat. 195; Treaty with the Choctaw of Oct. 18, 1820, art. 9, 7 Stat. 210.

174. 21 U.S. (8 Wheat.) 543, 594 (1823).

175. *Id.* at 593. *Accord*, Jackson v. Porter, 13 F. Cas. 235 (No. 7143) (C.C.N.D.N.Y. 1825).

176. Northern Pac. Ry. v. United States, 227 U.S. 355, 366 (1913); United States v. Winans, 198 U.S. 371, 381 (1905).

177. Henderson, *supra* note 2, at 112-13 (footnotes omitted).

178. 314 U.S. 339, 345-47 (1941), *reh. denied*, 314 U.S. 716 (1942).

tle from the United States *encumbered* by the Hualapais' aboriginal title. The Court years earlier had held that a grant in fee of aboriginal title lands operates to convey the fee encumbered by aboriginal title.[179] The Court in *Santa Fe* upheld this result even where "a tribal [aboriginal title] claim to any particular lands [is not] based upon a treaty, statute, or other formal government action."[180]

It is submitted that a possessory encumbrance on a fee simple estate, which also is indefeasible by the holder of the fee, is tantamount to "property" by any generally applicable definition. This being so, *Santa Fe* implicitly precluded any requirement of "specific recognition" for such an interest to be compensable. *Santa Fe* did not hold that recognition was *never* necessary, however. Rather, the Court found that the extension of, *inter alia*, sections 9, 10, 11, and 12 of the 1834 Intercourse Act over the Territory of New Mexico clearly indicated Congress' intention to continue there "the unquestioned general policy of the Federal Government to recognize [the Indian] right of occupancy."[181] When this is considered in light of the holding in *Kie v. United States*[182] that only sections 20 and 21 of the 1834 Act were ever extended over Alaska, it is apparent that Alaskan natives never came within the policy of recognizing aboriginal title found by the Court in *Santa Fe*, although they did receive protection from other sources. Justice Reed, therefore, could have distinguished *Santa Fe* by holding what it had implied, that Intercourse Act protection was necessary for aboriginal title to be asserted as property. At any rate, *Tee-Hit-Ton* can have decided nothing more than that a taking of aboriginal title not subject to Intercourse Act protection is not compensable. If the Court continues to require "recognition," it remains to be seen whether the Intercourse acts might not be sufficient recognition of aboriginal title so as to render it compensable property.

Finally, Justice Reed completely misread *Miller v. United States*[183] in both *Tee-Hit-Ton* and *Hynes v. Grimes Packing Co.*[184] By no stretch of the imagination had *Miller* "held . . . that

179. Buttz v. Northern Pac. R.R., 119 U.S. 55, 66 (1886). *See, e.g.*, Beecher v. Wetherby, 95 U.S. 517, 525 (1877); Clark v. Smith, 38 U.S. (13 Pet.) 195, 201 (1839).

180. 314 U.S. 339, 347 (1941), *reh. denied*, 314 U.S. 716 (1942).

181. *Id.* at 348. *Accord*, Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975) (section 12 of the 1834 Act, 25 U.S.C. § 177).

182. 27 F. 351 (C.C.D. Or. 1886). See *infra*, text accompanying notes 74-89 and 91-93.

183. 159 F.2d 997 (9th Cir. 1947).

184. 337 U.S. 86 (1949).

the Indian right of occupancy . . . is compensable" under the fifth amendment.[185] While it is true that *Miller* devoted an inordinate amount of dictum to arguments that aboriginal title is compensable, the case clearly held that "the Tlingits' 'original Indian title' to the tidelands in question was extinguished" by the 1867 Treaty of Cession.[186] *Miller* then went on to hold compensable *nonaboriginal* rights arising under the 1884 Organic Act, finding that the act had "been construed to constitute a Congressional 'guarantee' to *all persons in possession* of lands in Alaska *on the date of its enactment*, that they were not to be disturbed in their occupancy."[187]

Justice Reed's misreading dictum for holding seems bad enough, but it is almost tragic that the Justice apparently never understood what the Court in *Miller did* hold, *i.e.*, that rights arising under the 1884 Act, recognized by the Supreme Court itself as early as 1899 and repeatedly regarded by the courts as separate from the concept of aboriginal title, were compensable under the fifth amendment. Justice Reed failed to discern that these rights existed at all. It is also unlikely that Reed realized that *Miller* held that aboriginal title in Alaska had been extinguished in 1867, even though the opinion of the Court of Claims in *Tee-Hit-Ton* had specifically addressed this aspect of *Miller*.[188] Ironically, *Tee-Hit-Ton* is considered to have overruled this holding by implication.[189]

Epilogue

Several years after the *Tee-Hit-Ton* decision, in *United States v. Alaska*,[190] the federal government brought suit to quiet title to certain tidelands on the theory that it held them in trust for natives under the 1884 Organic Act. The state claimed title under the Tidelands Act,[191] which granted all tidelands in Alaska, with certain exceptions, to the state. The court held that lands subject to claims under the 1884 Act came within the exception to the grant of any land held "by the United States for the benefit of any tribe, band, or group of [natives] or for individual

185. *Id.* at 106 n.28.

186. Miller v. United States, 159 F.2d 997, 1002 (1947).

187. *Id.* at 1003.

188. Tee-Hit-Ton Indians v. United States, 120 F. Supp. 202, 206-207 (Ct. Cl. 1954).

189. United States v. ARCO, 435 F. Supp. 1009, 1019 n.42 (D. Alas. 1977).

190. 197 F. Supp. 834 (D. Alas. 1961).

191. Pub. L. No. 85-291, 71 Stat. 623 (1957) (*codified at* 48 U.S.C. § 455 but now omitted therefrom).

[natives].''[192] Affirming that rights under the 1884 Organic Act had not been affected by *Tee-Hit-Ton*, the court declared that it was "not here concerned with the matter of 'aboriginal title,' or 'recognized or unrecognized Indian title,' discussed by the Supreme Court" in that case, but with the "right which was specifically preserved in the Miller case."[193] After a trial on the merits, however, the court held for the state, finding that the natives' possession of the tidelands in question was not sufficiently "notorious, exclusive and continuous, [and] . . . substantial" to warrant protection under the 1884 Organic Act.[194]

Conclusion: Alaska—The Settlement Act and Beyond

Although the federal district court was able to see the irrelevance of the *Tee-Hit-Ton* decision to the congressional scheme of land rights in Alaska, virtually everyone else, whether critical of the case or not, accepted the underlying assumption of *Tee-Hit-Ton* that the land rights of Alaskan natives must rest upon aboriginal title alone. Thus, when the battle over native land claims in Alaska mounted in the wake of Alaska statehood and the subsequent discovery of oil, it was aboriginal title that the natives claimed. It is possible that the Alaska Native Claims Settlement Act extinguished only these aboriginal claims.[195] If

192. *Id.* § 455b.

193. 197 F. Supp. 834, 838-39 (D. Alas. 1961). The court seemed confused concerning what right *Miller* had "preserved," equating it with the "right of occupancy . . . first recognized in the case of Johnson v. McIntosh," 21 U.S. (8 Wheat.) 543 (1823). 197 F. Supp. at 839. In its opinion after trial, however, the court restated its reliance upon *Miller*, omitting any reference to *McIntosh* or other aboriginal title cases. United States v. Alaska, 201 F. Supp. 796, 798 (1962).

194. United States v. Alaska, 201 F. Supp. 796, 800 (1962).

195. The extinguishment provision of the Settlement Act, 43 U.S.C. § 1603, reads in part: "(b) All aboriginal titles, if any, and claims of aboriginal title . . . . are hereby extinguished. (c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy . . . or that are *based on any statute or treaty of the United States relating to Native* use and occupancy . . . are hereby extinguished." (Emphasis supplied.)

It is clear that the extinguishment of aboriginal title and claims could not have affected rights under the 1884 Organic Act. It is uncertain whether the extinguishment of all claims based upon statutes relating to native use and occupancy affected 1884 Act claims. The Senate version of the bill that became the Settlement Act, S. 35, contained language expressly extinguishing claims under the 1884 and 1900 Acts. This language was dropped in committee to more closely approximate the House version, H.R. 10367, which eventually was adopted. *See* United States v. ARCO, 435 F. Supp. 1009, 1027-1029 & n.58 (D. Alas. 1977), *aff'd* 612 F.2d 1132 (9th Cir. 1980). Both the 1884 and 1900 Acts unofficially are considered to be in force. *See* 25 U.S.C. § 280a (1900 Act); U.S.C.S. Uncodified Material 546, 566 (1884 Act; section 8 not listed as repealed).

this is so, native tribes and individuals may continue to hold the same vested rights to their lands as they have held since 1884.

The Tee-Hit-Ton Decision Outside of Alaska

The integrity of the judicial process demands that *Tee-Hit-Ton* and its progeny be disregarded as precedent and that the character of aboriginal title be considered anew, through principled analysis of history and legal precedent. The scholarship of the opinion is abysmally poor. Only the thin strands of *ipse dixit* and judicial inertia are left to support a concept of aboriginal rights wholly at odds with history and legal precedent.

If the Court refuses to overrule *Tee-Hit-Ton*, the case still should have little relevance outside of Alaska. The Court in *Tee-Hit-Ton* perhaps did have jurisdiction to decide that aboriginal title might need "recognition" to be asserted against the United States, but only if it first had decided that aboriginal title existed in Alaska. As we have seen, the Court did this by assumption (through the stipulation of the parties), and its determination was unsupportable by, and probably at variance with, most applicable precedent. Even if aboriginal title did exist in Alaska, the Court could decide nothing more than that no statute applicable in the case provided the requisite "recognition." As noted, the Intercourse acts were not generally applicable in Alaska, and their effect therefore was not passed upon, either explicitly or implicitly.

If *Tee-Hit-Ton* stands, and recognition continues to be required, the Intercourse acts are a strong candidate for having sufficiently recognized the proprietary nature of aboriginal possession. The Intercourse acts validated the prevailing discovery paradigm of tribal rights. The discovery doctrine implicitly assumes that tribal rights are proprietary, for only by their acquisition can the holder of the "naked" fee obtain a fee simple absolute.

The impact of *Tee-Hit-Ton* on the law has been far-reaching, both figuratively and geographically. The decision has been relied upon in both Canada and Australia to justify takings of aboriginal lands, and it effectively has forged a shift in the prevalent concept of aboriginal property rights in the United States. That such a poorly reasoned and researched opinion should have had such an impact is an injustice to aboriginal peoples everywhere as well as a travesty on the law. It is heartening that the International Court of Justice recently has rejected not only the rule of *Tee-Hit-Ton* but the entire doctrine of discovery as well.[196]

196. Western Sahara Advisory Opinion, 1975 I.C.J. Reports 12, 83 *et seq.*, 103, 173 *et seq.*

There is little wisdom in a decision that sweeps so broadly as to deny entire villages rights to lands they have occupied for centuries in order to deny seventy persons a claim to all the timber covering more than 350,000 acres of national forest. In all fairness to the Court, it was never presented with the real issues in the case, and thus perhaps was led blindly astray. It submitted willingly to the chance to decide a question that had been burning for more than twenty years. That chance was only an illusion, yet it has been a powerful one. The time has come to set the illusion aside.

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