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NOTES AND COMMENTS

ALASKA NATIVE CLAIMS SETTLEMENT ACT: ANALYSIS OF THE PROTECTIVE CLAUSES OF THE ACT THROUGH A COMPARISON WITH THE DAWES ACT OF 1887

Lauren L. Fuller

Future land administration of the Alaska native, in light of the passage of the Alaska Native Claims Settlement Act of 1971,¹ may well parallel the predicament of the Indians following enactment of the General Allotment Act (Dawes Act) of 1887.² Both pieces of legislation arose during a period of economic fluctuation and uncertainty,³ and were promulgated at a point in history when Indian-white contact was at a precarious stage with regard to social adaptation. In addition, integrating the natives into the dominant white culture was an expressed goal of each settlement.⁴ Failure to legislate proper safeguards to protect uneducated Indians, who during the 1880's and 1890's were ill-equipped to manage their sudden wealth, resulted in uneconomical dissipation of their property.⁵ Herein lies a key to fashioning a modern congressional remedy in order to avoid a recurrence of the disastrous aftereffects of the Dawes Act.⁶

The Allotment Policy

The origins of allotment plans date back to 1781.⁷ Most often, these plans resulted in "reservation" of plots of land to be withheld from the vast cessions of land taking place at the time. These plots were generally areas that had been developed by individuals.⁸ Under allotted lands, an allottee acquired full possessory rights in the land with respect to improvements, timber, and minerals beneath the land.⁹ Occasionally the mineral rights were reserved to the tribes,¹⁰ as under the Alaska Native Claims Settlement Act.

Alienation of restricted Indian land is governed by acts of Congress.¹¹ Congress may generally reimpose and extend previous restrictions or trust periods,¹² and may authorize the removal of restrictions on alienation or the issuance of patents upon application by individual allottees.¹³ Numerous cases have held that even though an act of Congress does not expressly require the allottee to apply for a fee patent, that requirement is implied.¹⁴ An Indian who holds title to land in fee, subject to restrictions, may transfer the land only

under prescribed rules and regulations of the Secretary of the Interior and with his consent.¹⁵

Documented considerations allegedly behind the congressional imposition of restrictions were the "desire to protect the Indian against sharp practices leading to landlessness; [the] desire to protect the certainty of titles; and the urge to continue an important basis of governmental activity."¹⁶ *Beck v. Flournoy Live-Stock & Real Estate Co.* stressed that

. . . Congress well knew that if these wards of the nation were placed in possession of real estate and were given capacity to sell or lease the same, or to make contracts with white men with reference thereto, they would soon be deprived of their several holdings; and instead of adapting to the customs and habits of civilized life and becoming self-supporting, they would speedily waste their substance and very likely become paupers.¹⁷

The first proposal of a general allotment theory was probably that found in a report of the Secretary of War, William H. Crawford, to President James Madison in 1816.¹⁸ The term "allotment" as such was first used in an 1839 distribution of land to the Bratherton Indians.¹⁹ In 1862, Congress passed statutes providing for the special protection of Indian allottees in the enjoyment and use of their land.²⁰ Eventually, these actions led to the enactment of the General Allotment Act (Dawes Act) of 1887.²¹ The Act was accompanied by a proposal that the land title be allotted to eligible Indians in fee, with a 25-year restriction on alienation.²² The chief provisions of the Act were: (1) 160-acre allotments to each family head, 80-acre allotments to each single person over 18, as well as to orphans, and 40-acre allotments to each other single person under 18; (2) patents in fee to be issued to every allottee, but to be held in trust by the government for 15 years, during which time the land could not be alienated or encumbered; (3) a period of four years for Indians to select land or at the end of such time the selection would be made for them by the Secretary of the Interior; and (4) the conferral of citizenship upon each individual adopting the "habits of civilized life."²³

The minority report of the House Indian Affairs Committee in 1880 accused the Act of being drawn "... in the name of Greed. . . ."²⁴ Railroad interests were believed to have strongly influenced passage of the Allotment Act; however, no official expression of that attitude can be found. It is interesting to note that during the session in which Congress passed the Dawes Act, six grants of railroad rights-of-way through Indian land were passed.²⁵ The failure of the Act,

in the opinion of the Indians, is evidenced by an 1878 report of the Commissioner of Indian Affairs, noting that five-sixths of the 1,735 Chippewas in Michigan who had received patents had lost their lands.²⁶ Of course, advocates of the Act were well aware of the peril likely to ensue if the lands were dissipated, but they confidently hoped to guard against this by restricting alienation for 25 years. As an example, the minority report of the House Committee in 1880 pointed to the Catawba Tribe, whose land was restricted for alienation, which had "gradually withered away under the policy, until there was not one of [the tribe] to attest to the fact that they ever existed, and their lands fell prey to the whites who surrounded them and steadily encroached upon them."²⁷

The application of allotment was characterized by extreme haste. Senator Dawes remarked that, "The pressure of western land-seekers and business promoters was steady and powerful, forcing Government to a faster pace in the business of opening up Indian lands."²⁸ Most congressional leaders felt legislation had solved the problem.²⁹ The Mohonk Conference of 1889 stressed that the Indian could not progress as long as he was hindered by the restrictions on his economic liberty under the Dawes Act. The author favored giving Indians the freedom to utilize the land to its best advantage.³⁰ Justice Strong of the United States Supreme Court said at this same conference: "But on one subject I am perfectly convinced,—namely, that the Government has not a shadow of a right to interfere with an Indian having an allotment, either with the use of his property or with the manner in which he shall educate his children. . . ."³¹ The point was continually argued that leasing part of the land would bring the Indian the wherewithal to cultivate the rest.³²

There was only one prophetic voice of warning against the leasing proposal—Senator Dawes³. He said that a law which made it easy for the Indian to lease his land would frustrate all their hopes for the Indians' future.³³ Other opposition came from the Sac and Fox tribes in Oklahoma. In 1892 an agent wrote:

Should the authority be given for Indians to lease their lands, nearly all would avail themselves of the privilege and their land would be immediately taken up by whites (probably for sub-leasing purposes) at ridiculously low compensation and the Indian would squander the proceeds and still live an idle, vagabond life. The average Indian is not competent to make leases and care for his own interest. As it would require constant watchfulness to protect him from imposition, I consider that leasing would be detrimental, and that the land would soon become impoverished. . . .³⁴

The leasing policy, however, was not without advocates. A Santee agent wrote in 1892: "It would seem probable to me that it might give the Indian more idea as to the value of land to see others making use of it, and be also a source of income for himself, and it certainly would be a source of gratification to the whites to see the land in use instead of lying idle."³⁵ The Board of Indian Commissioners reported that it was alarmed by the leasing trend.³⁶ There were 295 leases of allotments approved in 1894 (as contrasted with four in 1893 and two in 1892). Professor Painter said at the 1894 Mohonk Conference that the "original aims of the allotment system had been to give lands to those who were prepared to receive them; then to secure these lands by the 25 year clause so that the young might be educated to make use of them; and finally to modify the system to allow those who could not use lands to lease them."³⁷ He concluded: "I wish to call attention to the fact that all three of these, particularly the principle of the bill, the spirit and intent of the bill, are being set aside and destroyed."³⁸ He went on to confront the forces which were promoting the changes in the system by stating,

We have reached a crisis. It is the intention of men in the West, and their efforts are being more and more felt in Congress as the power of the West is becoming greater in controlling national affairs,—it is the intention of these men to sweep away all these limitations and restrictions which the severalty law put in the Indian's power to alienate his land.³⁹

As a result of all this, Congress in the 1890's began the process of breaking down the safeguards of inalienability that had been thrown around Indian allotments and which were virtually dissolved by the Burke Act of 1906.⁴⁰

The Alaska Native Claims Settlement Act

The Act of 1884, providing for a civil government for the Territory of Alaska, declared that the natives "shall not be disturbed in the possession of any lands actually in their use and occupation or now claimed by them, but the terms and conditions under which such persons may acquire title to such land is reserved for future legislation by Congress."⁴¹ Under the Alaska Statehood Act, the new state was authorized to select certain lands for its support.⁴² This was in place of the "aboriginal rights" the natives had in the land prior to that time.⁴³ Yet, the beginnings of a final settlement did not come until 1966, when the Secretary of the Interior imposed

a freeze on state selection of land to be chosen by Alaska natives pursuant to the Alaska Statehood Act and on the issuance of new oil and gas leases pending various claims of Alaska natives in the Indian Claims Commission.⁴⁴ Due to concern over the effect of the freeze on Alaska's economy, Congress began resolution of the problem.⁴⁵ A flurry of legislation began in 1971,⁴⁶ resulting in H. R. 10367 as the final product⁴⁷ (with only slight modification).⁴⁸

The Alaska Native Claims Settlement Act will profoundly affect the lives of over 55,000 natives, approximately one-fifth of Alaska's population,⁴⁹ by making them shareholders in corporations established for their benefit, and by vesting in them legal title to forty million acres of land.⁵⁰ It prescribes a system whereby natives or village corporations may acquire fee patent title to surface and sub-surface estates in land from the federal government and the state of Alaska.⁵¹ Section 1601 states that congressional policy recognized the "immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska"; moreover, the Act proposes to do this "without creating a reservation system or lengthy wardship or trusteeship."⁵²

Flexibility is provided for in Section 1606 by allowing both natives and nonresident natives to benefit from the Act. The Secretary of the Interior divided Alaska into twelve regions within one year after December 18, 1971, "composed as far as is practicable of Natives of common heritage and sharing common interests."⁵³ A thirteenth region was set aside for nonresident natives of 18 years or older. Although subsection (b) of this section grants the power of merger within a year after December 18, 1971, so long as seven regions are maintained, the Secretary is nevertheless delegated supervisory authority to approve articles of incorporation.

The above discussion illustrates the complexity and the vastness of the Act. Yet, the section of the Act pertinent to this analysis is Section 1606(h)(1).⁵⁴ It can be compared to the 25-year inalienability provision of the Dawes Act in the following manner. Section 1606(h)(1) vests in the holder of stock in a regional corporation, all rights,

except that for a period of twenty years after December 18, 1971, the stock, inchoate rights thereto, and any dividends paid or distributions made with respect thereto may not be sold, pledged, subjected to a lien or judgment execution, assigned in present or future, or otherwise alienated.⁵⁵

Transfers of stock made pursuant to court decree of separation, divorce, or child support were excepted.⁵⁶ Stock held pursuant to these

conditions may be freely alienated.⁵⁷ Free alienation after the expiration of twenty years was permitted only to discourage liquidation of the regional corporations at that time:

The Department [of Interior] however feels that the structure established to administer the cash contributions should be a permanent and legally established structure and that there should be no incentive for liquidation. Therefore, at the end of the initial twenty year period a native should be free to transfer his stock in the event he wants to do so. . . .⁵⁸

One author has stated: "This provision is only one example of the paternalism that pervades the Settlement Act. The basic plan of requiring corporate structures seems to manifest a basic mistrust of the Native and a fear that they would squander a simple per capita cash settlement."⁵⁹ It is the contention of this note that such a statement is an oversimplification of the issues involved in legislation such as the Settlement Act. It contradicts the documented history of the numerous mistakes in the Dawes Act. This statement assumes, as did many of the draftsmen of the Dawes Act, that legislation alone solves all of the problems that might arise in the administration of allotment policy.⁶⁰

Both the Dawes Act and the Settlement Act had at least 20-year inalienability provisions. History has illustrated that this provision offered little or no protection in the 1880's, thus leaving little reason to believe the Alaskan Act can provide any better protection. Furthermore, the discovery of oil off the North Slope of Alaska, and the decision to run a pipeline across the state to an ice-free port on the south coast, parallels the position of the Indians in the 1880's who were at the mercy of the railroad magnates, greedy for expansion through native allotment lands. This sheds light on the bargaining position of the Alaskan natives today as against the oil industry.

The major feature distinguishing the Dawes Act from the Settlement Act is the incorporation of a complex system of regional and village corporations into the Settlement Act.⁶¹ It may be argued that this is the feature which will protect the Alaskan natives where the Dawes Act failed. Yet, the shareholders will be largely unsophisticated in corporate dealings and may lose touch with corporate developments.⁶² The shareholders are likely to play a more peripheral role than the traditional corporate board member because they will not have invested their own money. Regional corporations will not own any of the village corporations' stock. Thus, lacking the complete control of a parent over its subsidiary, the regional corporations will not be liable for the debts of the village corporations.⁶³ It

is probable that a great deal of money will be wasted in the early life of the regional corporations through poor management and hastily conceived endeavors. Although the probability of these unfortunate results is speculative, it illustrates the lack of definite guidelines for the corporate structure under the Settlement Act and raises questions as to their powers and scope of authority.

The parallels which may be drawn between the Dawes Act and the Settlement Act are limitless. This discussion, however, has only focused on the 20- and 25-year inalienability sections, which are provisions of both acts.

The history of the Dawes Act illuminates the possibilities with regard to the position of the Alaska natives under the Settlement Act. Although the Indians of the nineteenth century had little power to resist white encroachment, the Eskimos, Aleuts, and Indians of the twentieth century may anticipate more sympathetic treatment of their rights by judges and administrators. Yet, the unique parallel in the economic positions of the natives of both eras cannot be disregarded. The Alaska natives face the oil companies in much the same manner as the Indians after enactment of the Dawes Act faced the railroad companies.

Also, it must be noted that in recent years, the Alaska natives have been under the assumption, as were the nineteenth-century Indians, that they must be integrated into the larger white society. Yet, village chiefs thrust into the position of governing vast corporations are no more ready to administer the allotment system than were the nineteenth-century Indian chiefs.

It may be too soon to predict the outcome of the Alaska Native Claims Settlement Act. The corporate structure of the Settlement Act may provide adequate safeguards for the sudden wealth of Alaska natives. Yet, the 20-year inalienability provision designed to provide a transition period for the Alaska natives offers no greater protection than did the 25-year inalienability provision of the Dawes Act. Moreover, should the 20-year provision stand where the Dawes provision did not, what then? Alaska natives will be able to freely convey land to the oil companies.

Thrusting money, land, and power into the hands of natives unfamiliar with the management of this wealth may create a greater problem than what has been created as a solution. This was true under the Dawes Act and may prove true under the Settlement Act. The Act must be reviewed in light of the Dawes Act and safeguards must be clearly defined, as well as plans made for the education of the Alaska natives in the management of their recently acquired land and money.

NOTES

1. 43 U.S.C. §§ 1601 *et seq.* (Supp. I, 1971).
2. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388.
3. Washburn, Proposed Paper for the Congress of Americanists in Paris, Sept. 1-10, 1976 (unpublished).
4. 43 U.S.C. § 1601(b) (Supp. I, 1971), which states the congressional policy to be an "immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska." See also, 4 BANCROFT, PAPERS OF CARL SCHURZ, 126. One of the major purposes behind the Dawes Act was stated to have been construction of a system whereby the Indian could avoid being obliterated by white economy and culture by adapting himself to white civilization.
5. See H.R. No. 1576, 46th Cong., 2d Sess., 8 (1938).
6. See Report of Commissioner of Indian Affairs, 1887, at 116-17. Even the International Council of Indian Territory assailed the policy because it might "... engulf all of the nations and tribes of the Territory in one common catastrophe, to the enrichment of land monopolists."
7. Treaty of June 1, 1781, with the Oneida Nation, unpublished treaty, Archives No. 28.
8. *Jones v. Meehan*, 175 U.S. 1 (1899).
9. U.S. DEP'T OF INTERIOR, FEDERAL INDIAN LAW 785 (1958).
10. *Id.* See *United States v. Frisbee*, 57 F. Supp. 299 (1944). Mineral reservations cannot be waived by a federal official, nor does fee patent mistakenly omit that a reservation convey more than a statute permits.
11. *Boren v. Burgess*, 97 F. Supp. 1019, 1022 (1951). Where removal of a restriction against alienation is conditional upon sale in compliance with directions from the Secretary of the Interior, until final approval by the Secretary, the would-be purchasers acquire no legal right to demand delivery of the deed and other disposition can be made of the land. See also *Bailey v. Bannister*, 200 F.2d 683, 685 (1952).
12. See 25 U.S.C. § 348(a) (1970), reimposing trust on allotted Klamath River Reservation lands which expired July 31, 1919. See also *Chisholm v. House*, 160 F.2d 632 (1947). For administrative extensions see 25 C.F.R. app. to ch. 1 (1970).
13. See 25 U.S.C. 483 (1970).
14. See *Choate v. Trapp*, 224 U.S. 665 (1912), as an example and as a summary of other cases holding that application for fee patent is required.
15. *Bailey v. Bannister*, 200 F.2d 683 (1952).
16. U.S. DEPT. OF INTERIOR, FEDERAL INDIAN LAW 788 (1958).
17. *Beck v. Flounoy Live-Stock & Real Estate Co.*, 65 F. 30 (1894), *appeal dismissed*, 163 U.S. 686 (1895). See also *Lykins v. McGrath*, 184 U.S. 161, 171-72 (1902). Restrictions on alienation of lands under the allotment acts are not personal to the allottee but run with the land.
18. *Allotment of Lands in Severalty Among the Indian Tribes: Memorial of the Creek Nation on the Subject of Lands in Severalty Among the Several Indian Tribes, With Accompanying House Miscellaneous Document*, No. 18, 47th Cong., 2d Sess., 36 (1939).
19. Act of Mar. 3, 1839, ch. 83, 5 Stat. 349.
20. *Lands in Severalty to Indians*, H.R. No. 1576, 46th Cong., 2d Sess., 77 (1938).
21. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388.
22. H. Rep. No. 93, Jan. 31, 1879, 45th Cong., 3d Sess., 3-20.
23. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388.
24. H.R. No. 1576, 46th Cong., 2d Sess., 10 (1938). "The real aim of this bill

is to get at Indian lands and open them up to settlement. The provisions for the apparent benefit of the Indian are but the pretext to get at his lands and occupy them. . . . If this were done in the name of Greed, it would be bad enough; but to do it in the name of Humanity, and under the cloak of an ardent desire to promote the Indian's welfare by making him like ourselves, whether he will or not, is infinitely worse."

25. Report of Commissioner of Indian Affairs, 272-85 (1887).
26. *Id.* at 75.
27. H.R. No. 1576, 46th Cong., 2 Sess., 8 (1938).
28. D. OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS* 82 (1973), [hereinafter cited as OTIS].
29. *Id.* at 83.
30. Lake Mohonk Conference Proceedings, 84-89 (1889).
31. *Id.* at 94.
32. *Id.* at 94-97.
33. *Id.* at 82-83. "I know there are instances of hardship under this inalienable allotment system, and instances of worthy young men who want to leave their allotment and go into some other business or get an education; and in an endeavor to meet those cases we are in danger of overthrowing the fundamental idea of the whole system, that controlling idea that work on one's own homestead is the most potent of all civilizing agencies for the Indians. We are trying to meet these exceptional cases by permitting the allottee to leave his land when the agent or the Secretary, or some one else, 'may deem it for his advantage so to do.' In all this we forget that the Indian, as a rule, won't work if he can help it, and that the white has never been known to take his foot off from an Indian's land, when he once got it on. A bill has already passed the House, and is now pending in the Senate, authorizing the leasing of allotted lands whenever the agent shall deem it best for the Indian. Such a law, in my opinion, would speedily overthrow the whole allotment system. The Indian would at once seek to let his land, and relieve himself from work; and there would be whites so ready to take possession that all barriers would soon be broken down. Thus the allotment law would be gradually undermined and destroyed, and the Indian would abandon his own work, his own land, and his own home, which we have talked about as the central pivot of our efforts in attempting to civilize the Indian."
34. Report to Commissioner of Indian Affairs, 404 (1892).
35. *Id.* at 188.
36. Report of Board of Indian Commissioners, 7 (1894).
37. OTIS, *supra* note 28, at 119.
38. Lake Mohonk Conference Proceedings, 86-87 (1894).
39. Report of Board of Indian Commissioners, 7 (1894).
40. 25 U.S.C. § 349 (1970).
41. Act of May 17, 1884, ch. 53, 23 Stat. 24.
42. Act of July 7, 1958, Pub. L. 85-508, 72 Stat. 339. "As a compact with the United States, Alaska and its people forever disclaim all right and title to any lands . . . the right and title to which may be held by any Indians, Eskimos or Aleuts (hereinafter called Natives) or is held by the United States in trust for said Natives. . . ."
43. *Tee Hit Ton Indians v. United States*, 348 U.S. 272, 288-89 (1955). "'Aboriginal rights' refers to those property rights which inure to native people (Indians and Eskimos) by virtue of their occupation upon certain lands from time immemorial." The Supreme Court had held that aboriginal rights may be extinguished by the federal government without compensation.
44. The freeze was formalized by P.L.O. 4582 of Jan. 17, 1969, 34 Fed. Reg. 1025

(1969). Although scheduled to expire in 1970, it was extended until June 30, 1971. 35 Fed. Reg. 18874 (1970).

45. The freeze was seen by many as slowly strangling Alaska's economic development. See, e.g., Crews, *Clouds Over Alaska: The Native Claims*, 3 NAT. RES. LAW. 460 (1970). See also *A Dissenting View* in H.R. No. 523, 92d Cong., 1st Sess. 5 (1971), at 51: "Settlement of the Alaska Native Land claims did not achieve priority status until the confirmation of large petroleum reserves on the Alaska north slope by private interests. The resultant pressures have generated a flurry of legislation submitted to the Congress since 1967. . . ."

46. The complete list of bills considered and passed is contained in H.R. Rep. No. 523, 92d Cong., 1st Sess., 5 (1971), at 2-3.

47. H.R. 10367 was considered and passed by the House of Representatives on Oct. 20, 1971. The Senate amended and passed H.R. 10367 on Nov. 1, 1971. The Conference Committee adopted a compromise measure, and the final bill, still essentially the same as H.R. 10367, was passed by both houses on Dec. 14, 1971. U.S. CODE CONG. & ADMIN. NEWS, 92d Cong., 1st Sess., 2192 (1971).

48. Changes are discussed in House Conf. Rep. No. 746, 92d Cong., 1st Sess., 2192 (1971).

49. An estimate of the native population is set forth in Saylor, *A Dissenting View*, in H.R. Rep. No. 523, 92d Cong., 1st Sess., 2241 (1971).

50. 3 AM. INDIAN L. NEWSLETTER 396 (1970). The amount of land to be included in the settlement package was the most widely debated aspect of the Settlement Act.

51. 43 U.S.C. § 1613 (Supp. I, 1971).

52. 43 U.S.C. § 1601 (Supp. I, 1971).

53. 43 U.S.C. § 1606 (Supp. I, 1971).

54. 43 U.S.C. § 1606(h)(1) (Supp. I, 1971).

55. *Id.*

56. *Id.*

57. *Id.*

58. H.R. Rep. No. 523, 92d Cong., 1st Sess., 5 (1971), at 20.

59. Goodman, *Charitable Donations Under the Alaska Native Claims Settlement Act*, 3 UCLA-ALA. L. REV. 148-68 (1973).

60. *Id.*

61. A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

62. *Supra* note 59, at 154.

63. N. LATTIN, *CORPORATIONS* 100 (2d ed. 1971).