20c
Aug 85

ALASKA
HISTORICAL LIBRARY

TRANSCRIPT OF PROCEEDINGS

OVERVIEW ROUNDTABLE DISCUSSIONS

VOLUME XIV

OVERVIEW PAPERS

FEBRUARY 27 - MARCH 16, 1984

ANCHORAGE, ALASKA

ALASKA NATIVE REVIEW COMMISSION
HON. THOMAS R. BERGER
COMMISSIONER

KF
8208
.A46
1984
vol. 14

00151492

TRANSCRIPT OF PROCEEDINGS

OVERVIEW ROUNDTABLE DISCUSSIONS

VOLUME XIV

OVERVIEW PAPERS

FEBRUARY 27 - MARCH 16, 1984

ANCHORAGE, ALASKA

Transcripts of the Alaska Native Review Commission are produced in two series. Those in Roman numerals are for the Roundtable Discussions. Those in Arabic numbers are for the Village Meetings.

All original transcripts, audio tapes and other material of the Alaska Native Review Commission are to be archived at the Elmer E. Rasmuson Library, University of Alaska, Fairbanks, Alaska 99701.

Acknowledgements: The Overview Roundtables were supported by funding from the Ford Foundation, the Alaska Humanities Forum, the National Endowment for the Humanities and the North Slope Borough.

This publication is a companion to the thirteen-volume transcript of proceedings of the Alaska Native Review Commission's Overview Roundtable Discussions held in Anchorage, Alaska, February 27 - March 16, 1984. The four papers contained here were prepared to provide a framework for discussion, and are therefore integral to the record.

Table of Contents

THE SPIRIT OF ANCSA:
NATIVE ASPIRATIONS AND THE ALASKA NATIVE CLAIMS SETTLEMENT ACT

by

Ann Fienup-Riordan

for

Overview Roundtable Discussions

Alaska Native Review Commission

February 27 through 29, 1984

Anchorage, Alaska

Suite 304, 429 "D" Street
Anchorage, AK 99501

THE SPIRIT OF ANCSA:
NATIVE ASPIRATIONS AND THE ALASKA NATIVE CLAIMS SETTLEMENT ACT

by

Ann Fienup-Riordan

Introduction

The following essay is an attempt to summarize the spirit of ANCSA as it is revealed in testimony given by Alaska Natives at hearings before the Committee on Interior and Insular Affairs held in both Alaska and Washington, D.C. prior to the passage of the Alaska Native Claims Settlement Act in 1971. It speaks to the issue of how Natives felt the settlement of land claims would address present problems identified within their communities, as well as help to provide a solution which would also benefit future generations.

The Native aspirations and expectations as revealed in the formal testimony considered were born of a definite historical moment. During the 1960s, a concerted effort was begun by Alaska Natives to preserve their land rights:

> Traditionally living and functioning in small isolated groups, the Eskimo began to learn from the more politically experienced Southeastern Indians the importance of union. Regional Native organizations began to multiply around the rim of Alaska from the Northslope to the Gulf of Alaska and in the upper reaches of the Yukon and Tanana rivers for the purpose of protecting Native rights in land matters, protesting the adverse effects of the proposed two billion dollar Rampart hydro-electric project and demanding greater self determination for the residents of the Pribilof Islands (Edwardson, 7/68, p.606).

In spite of early diversity among Alaska Natives, the common threat of land loss, which reappeared with the passage of the Alaska Statehood Act, began to forge a unified front. During this period there was also increased communication among Natives from different regions as they gathered together in government sponsored advisory committees spawned by the war on poverty on the national level and dealing with health, housing, and educational programs at the local level (Arnold 1976:109). One of the results of these meetings was that Natives from different parts of the state began to realize how widespread many of their problems were, especially the problems of land and hunting rights, employment, and education. By 1966, with the formation of AFN, what had begun as a plethora of isolated and politically powerless complaints began to coalesce into a finite number of problems identified by group which were beginning to wield political clout. The increasing leverage of these nascent political bodies was directly related to oil development, which had been at issue even before 1960. However, not until the mid 1960s was there the general recognition by both the state and federal governments, as well as the oil industry, that the land issue had to be resolved before anything else could go forward. By 1967, 39 protests had been filed by different Native groups protesting the transfer of almost the entire state, basing their claims on aboriginal use

of the land. The first two bills intended to resolve these claims were introduced into Congress in the summer of that year, followed in January of 1968 by a bill recommended by the Land Claims Task Force introduced by Senator Gruening. At this point the formal hearings under consideration here began.

By the time these early bills were introduced, the organizational focus on land was explicit. Subsequent testimony was increasingly unified, and a broad and diverse Native constituency journeyed to Anchorage, Fairbanks and even Washington, D.C. to say their piece. However, although land claims was the issue to be resolved, Native and non-Natives alike recognized that much more was at stake. Their testimony bears clear witness to the breadth and depth of their concerns.

Since the testimony was given, the Native community has won many of the goals for which they fought in the late 1960s. The position of the Natives, economically and socially, has changed dramatically. However, many of the essential concerns of the testimony continue to apply. Although clear changes have occurred, the same issues of dependence vs. independence and cultural amalgamation vs. cultural integrity continue to shape current Native aspirations and policy decisions, and for this reason are well worth careful scrutiny.

Methodology and Scope of Findings

The basic source upon which the following discussion is based is 2,000 pages of testimony given by a combination of Native elders and young leaders representing distinct Native groups at federal hearings held during the period between February 1968 and October 1969 (see bibliography). Of this material, the most valuable testimony proved to be the earliest, specifically that given in Anchorage during the period between February 8th and 10th, 1968. This testimony proved to be particularly rich because it was the very first formal testimony taken after the introduction of a land claims settlement bill into the U.S. Congress, so that it was more concerned with aspirations tied to the settlement as a whole than with the mechanics of a particular bill. Also, the February testimony preceded the publication of the Federal Field Committee's "Alaska Natives and the Land," a critical document in the history of the settlement which dramatically focused much of the future testimony, helping to realize an expressive unity which was not as pronounced in the earlier testimony. The breadth of the testimony of February 1968 was also enhanced by the participation in the hearings of a considerable number of Natives, both recognized leaders as well as unaffiliated individuals with a desire to speak their mind (see Table IA). This was possible because the hearings were held in Anchorage, Alaska, while all but one of the future hearings took place in Washington, D.C.

TABLE IA

Native Testimony Given in Alaska Before the Committee
on Interior and Insular Affairs,
February 8, 9, and 10, 1968

Amedias, Frank, Bethel Native Association
Anderson, Ralph, Chugiak, Alaska
Brenwick, Lucy, Copper Center, Alaska
Charley, Walter, Ahtna Tannoh Ninnah Association, Copper River Indians
Chichenoff, Katherine, Kodiak Area Native Association
Deacon, John, Grayling, Alaska
Degnan, Frank, Unalakleet, Alaska
Delkittie, Mike, Nondalton-Lime Hills Indian Group
Demientieff, Claude, Galena, Alaska
Demaski, Andres, chairman, Council of Nulato
Evanoff, Bill, Nondalton-Lime Hills Indian Group
Floresta, Helen, Nondalton-Lime Hills Indian Group
Frank, Richard, president, Fairbanks Native Association
Franz, Charlie, president, Alaska Peninsula Native Association
Goodlataw, Joe, chief, Copper River Tribe
Hensley, William L, a Representative in the Alaska Legislature
Hopson, Alfred, Arctic Slope Native Association
Hopson, Eben, Arctic Slope Native Association
Isaacs, Andrew, chief, village of Tanacross
John, Peter, spokesman for Minto village
Katchatag, Stanton, Anchorage, Alaska
Kelly, Phil, president, THEATA
Kelly, Walter, Bethel Native Association
Ketzler, Alfred R., spokesman from Nenana, Alaska
Kignak, Ernest, Arctic Slope Native Association
King, George, Nunivak Island, Alaska
Klashinoff, John, Cordova, Alaska
Kvasnikoff, Sarjus, English Bay, Alaska
Laumoff, Ewen Moses, Kodiak Area Native Association
Lekanof, Flore, president, Aleut League
Matfay, Larry, Kodiak Area Native Association
Meganock, Walter, Port Graham, Alaska
Miller, Dave, first vice president, Takotna-McGrath Native Assoc.
Mizak, Ivan, Bethel Native Association
Naanes, Elva, secretary, Alaska Federation of Natives
Nicholls, Hugh, first vice president, Arctic Slope Native Assoc.
Northway, Walter, chief, Ajunk Northway village
Notti, Emil, president, Alaska Federation of Natives
Nylin, Ernest, Seward Peninsula Native Association
Ondola, George, chairman, Village Council of Eklutna
Oquilluk, William, Seward Peninsula Native Association
Oskolkoff, Larry, president, Kenai Peninsula Native Association
Oskolkoff, Father Simeon, Orthodox priest, Tyonek village
Pancak, Simon, Arctic Slope Native Association
Paul, Frederick, Arctic Slope Native Association
Paul, William, Sr., representing Tlingit, Haida, and Arctic Slope Natives
Paukan, Moses, president, Association of Village Council Presidents of the Lower Kuskokwim and Yukon villages

TABLE IA (continued)

Peratrovich, Frank, Alaska Native Brotherhood
Pillifant, Thomas H., Eklutna, Alaska
Rexford, Herman, chief, Village Council of Kartovik, Alaska
Sackett, John, Huslia, Alaska
Samuelson, Harold Harvey, Akiakhak, Alaska
Semple (Simple), Peter, spokesman from Fort Yukon
Seton, Joe, Bethel Native Association
Severson, George, Nondalton-Lime Hills Indian Group
Smith, William de Ville, Nondalton-Lime Hills Indian Group
Soboleff, Rev. Walter, president of Alaska Native Brotherhood
Stick, Edna, Kenai Peninsula Native Organization
Tansy, Ruby, spokesman for Cantwell village
Thicle, Mrs. Flora, Kenai Peninsula Native Association
Topsekok, Frank, Seward Peninsula Native Association
Trigg, Jerome, Seward Peninsula Native Association
Wright, Donald R., president, Cook Inlet Native Association

Letters or Statements

Luke, John P., secretary of Tanacross Council, Tanacross, Alaska
Oskolkoff, Grassim, Ninilchik, Alaska
Peterson, Frank R., Old Harbor, Alaska
Sargent, Alvin, Kodiak, Alaska

TABLE IB
Native Testimony Given in Alaska Before the Committee on Interior and Insular Affairs
October 17 and 18, 1969

Ahmaogak, Walton, president, Arctic Slope Native Association
Ahvakana, Mrs. Lucy, Beechy Point, Alaska
Ahvakana, Nelson, Barrow, Alaska
Anderson, Nels, Names Association
Bristol Bay Native Association (plus map)
Brower, Thomas P., Sr., Barrow, Alaska
Brown, Agnes, for the Native village of Tyonek
Brown, Alice E.
Carter, Harry, President, Kodiak Area Native Association, Kodiak, AK
Charlie, Neal, Minto, Alaska
Chilkat Indian Village (Klukwan)
Demientieff, Nick, Fairbanks, Alaska
Esai, Bobby W., Sr., and the Upper Kuskokwim Athapaskans of Nikolai, Telida, Medfra, and McGrath, Alaska; accompanied by Ray Collins
Ezi, Peter, treasurer, Village Council of Eklutna
George, Jimmy
George, Mrs. Jimmy
Guy, Phillip, president of the Association of the Village Council Presidents, Inc.
Jack, Noah, Kipnuk, Alaska
Jacobs, Mark, Sr., Sitka, Alaska
James, George, Eagle Tribe, Angoon
Johnson, A.P., local president, Tlingit and Haida Indians, Sitka
Johnson, Samuel, chairman, Tlingit and Haida of Angoon
Johnson, Tom, president, Northwest Granger Processing Co., and Northwest Native Association member
Joseph, Peter and Nina
Joseph, Rosalie and Stanley
Kagak, David, Wainwright, Alaska
Kito, Edward R., president, Theata Club, University of Alaska
Kito, Richard, Petersburg, Alaska
Kito, Sam, president, Fairbanks Native Association
Matumeak, Warren, Barrow, Alaska
Miller, George, president, Kenaitze Indian Tribe, Kenai, Alaska
Moore, Martin, Emmonak, Alaska
Nageak, Vincent, Thomas Akootchook, Mrs. Myrtle Akootchook, Perry Akootchook, and Mrs. Elizabeth Frantz, Barter Island (Kaktovik), AK
Nathaniel, James, Fort Yukon, Alaska
Negovanna, Weir, James Kagak, and Samuel Agnassaga, Wainwright, Alaska
Nelson, Charles, first vice president, Central Council, Tlingit and Haida Indians of Alaska
Notti, Emil, president, Alaska Federation of Natives plus information supplied for the record
Painter, Kelly, Ruby, Alaska
Paneak, Simon, and Elijah Kakingak, Anuktukvik Pass
Paneak, Simon, Anuktukvik Pass (additional)
Panigeo, Wyman, president, City Council, Barrow, Alaska
Peterson, Larry, Fort Yukon Native Association
Player, Anna, on behalf of Flore Lekanoff, head of the Aleut League
Rock, Howard, editor, Tundra Times, Fairbanks, Alaska

TABLE IB (continued)

Sara, Martha J., Theata Club, University of Alaska
Schroeder, Herman and Harvey Samuelson, on behalf of the Bristol Bay Native Association and the Native Alaskans of the Bristol Bay area (plus map)
Seaberger, Sarah, Kotzebue, Alaska
Senungetuk, Ronald, University of Alaska
Taalak, Sam M., Barrow, Alaska
Trigg, Jerome, Sr., president of the Arctic Native Brotherhood, Nome, Alaska
Tritt, Allen, Venetie, and Nena Russell, Arctic Village, Alaska
Upicksoun, Joseph, Barrow, Alaska

Letters

Andrew Moxie, village council president, New Stuyahok, Alaska, to Congressman Howard Pollock, dated 10/1/69 (plus map)
Demmert, Archie W., Sitka, Alaska, to subcommittee, dated 10/12/69
Johnson, Anton, Koliganek, Alaska, to AFN, dated 10/14/69
Johnson, Gust, Koliganek, Alaska, to Representative Howard Pollock, dated 10/14/69
Nelson, Charles H., Koliganek, Alaska, to Hon. Howard Pollock, dated 10/15/69
Stebbins Village Council, the people of Stebbins, to Congressman Aspinall, dated 10/28/69
Willard, Robert, to Mr. Richard Stitt, grand secretary, Alaska Brotherhood, Juneau, Alaska, dated 08/20/69
Wonhola, Timothy, New Stuyahok, Alaska, to Representative Howard Pollock, dated 10/15/69 (plus map)

Although it is true that the summary of aspirations that can be gleaned from consideration of this single source is representative of the feelings of a group of Natives in regard to ANCSA at a particular point in time, I would emphasize the limits of this discussion as reflective of the concerns of all Alaska Natives during the same period. This it obviously cannot be. Although the views of this small sample definitely represent a broader constituency, the testimony considered is still constrained by the character of the men and women who participated. Although many Natives were able to attend the hearings, many more were unable to attend due to distance and expense. Many more were not aware the hearings were taking place. Also, although other sources of information were identified, including Tundra Times reportage, hearings on housing and educational problems held in the mid 1960s, and early AFN discussions/board meetings, time constraints did not allow them to be fully considered.

Finally, even within this one source, no one voice could be identified, no one dominant view. Although all spoke to the issue of land claims, the land meant very different things to different people. Some speakers emphasized the importance of continuity in traditional patterns of land use. Some emphasized development of the economic potential of the land and the importance of the settlement as a key to the future. Some emphasized continuity in land rights as the key to cultural integrity and self-determination in statements which would ring true today. However, within this diversity, the issue of preserving a meaningful relationship to the land provided a unity of purpose which undercut the potentially divisive divergence of opinion born of different generations and different experiences. Although the hearings drew Native speakers at all levels of involvement in the settlement discussion, some more and some less powerful and eloquent, all who testified clearly stated the value of the land to them personally and to the future of their people. All favored a settlement of the claims, although for a variety of reasons.

The testimony under consideration here expressed a unity of purpose both powerful and impressive. However, it must be kept in mind that this unity was not an aspiration or an end in itself, but a means to achieve a land claims settlement. Although regional differences clearly existed, the late 1960s was a period of cultural revitalization in which the differences were underplayed in order to better face a common threat and gain, in part, a common goal.

Finally, it must be kept in mind that the testimony considered includes much more than aspirations. Although not the point of emphasis here, the testimony clearly expresses anger as well as determination, and fear and uncertainty as well as hope for the future. However, as a whole, the testimony reflects largely positive, and strongly stated, demands. Also, although the Natives had neither created the situation nor framed the legislation, their testimony was far from merely reactive and is full of the sense of a people's power and desire to control their own destiny.

Following these opening qualifications, the goal of the discussion will be to let the testimony speak for itself. The attempt will be to organize exemplary statements in such a way that all categories of concerns will be included, as well as a clue as to where the original emphasis lay. This job was greatly simplified by the abundance of eloquent testimony

available. Speakers very rarely, however, spoke to a single point, and what is analytically separable was rarely separable in practice. However, although individual speakers chose different points of focus, five major concerns can be identified:

(1) Continuity in use and occupancy of the land

(2) The importance of cash compensation in order to facilitate economic development

(3) Resolution of past social ills and full participation in the future

(4) The achievement of self-sufficiency and self-determination

(5) Continuity in cultural integrity

1. Continuity in Use and Occupancy: The Value of the Land

Although the introduction of a bill into Congress whose stated purpose was to establish a fair settlement to Native land claims was in itself an admission of the validity of such a claim, one of the most noticeable features of the early testimony was the Natives' continued use of this opportunity to articulate their needs for and their rights to continued use and occupancy of the land. The importance and inalienability of these rights was the unifying issue around which all further testimony was framed. It was the central premise, either explicit or implicit, of all testimony given by Native elders. Put succinctly by Chief Andrew Isaacs of Tanacross:

> My own folks my great grandfather never told me a story, we moved from other State and other country. Because we livin' here all the time....We really want to be settled, we really want to have it, this property of what we filed for, we see because that's ours.... (Andrew Isaacs, Chief of Tanacross, 2/68, p.36).

John Klashinoff of Cordova and Frank Amedias of Nightmute reiterated Isaccs' concern:

> When I was a boy my people lived by trapping, fishing, and hunting. There was plenty for all....We had a good living from the land....Alaska is my home, my land. This is where I was born. This is where my people before me lived and their folks before them. They lived here, survived and were happy. There is no room any longer. We can no longer trap for furs. We can no longer fish or hunt for a living. Now there is no land we can call our own. There are no jobs for us. My people are unhappy.... (John Klashinoff, Cordova, Alaska, 2/68, p.130).

> Since we here, the talk, thinking of how we lived in the old days, the land where we growed and where we were born, where our great-great-great-grandfathers lived and passed the land down to us. Now it looks like the white men are coming and push us out and now

> we have to stand here and beg to get our land back and to try and live on our own land and that's what we didn't like.... (Frank Amedias, Bethel Native Association [interpreted by State Senator Raymond Christiansen and William Tyson], 2/68, p.285).

Through an interpreter, both Walter Kelly and Joe Seton, two Yup'ik elders from the Bethel Native Association gave eloquent testimony to their right to the land:

> Ever since he was a boy, his forefathers handed down one right after the other and now it's time for him to give it to his sons and grandson and now he is sitting here actually trying to fight back for what we own (Walter Kelly, Bethel Native Association, 2/68, p.288).

> He came from Cooper Bay, one of the oldest villages on the coast....Started long time ago like he says back when the earth was thin, very thin. Now, you people asked me to come here to testify where I came from and I came from a very old village to testify and prove that it is my place where I was born, where my grandparents were born and lived there. He emphasized "it's my place." Same thing again. He came because he wants to prove that it is his land (Joe Seton, Bethel Native Association [interpreted by William Tyson], 2/68, p.285).

According to Herman Rexford, chief of the village of Kartovik, Alaska:

> Mr. Chairman, my feelings and sense of ownership to this land I am speaking of is that we definitely own this land and have won it through battles and feel that by tradition it is the inheritance we received from our ancestors (Herman Rexford, chief, Village Council of Kartovik, Alaska, 2/68, p.304).

This testimony is particularly significant because, in its constant reference to ancestors and descendants, it embodies a concept of ownership entirely different from that of Western society, yet equally valid. Whether it was fully understood or not, it was the burden of the testimony of village elders to articulate this concept and their desire that it be upheld. The Native right to the land as it is continually expressed in the testimony was not based on and could not be reduced to an isolatable relationship of possession between an individual man or group at any one point in time to a particular site. Rather, the concept of ownership expressed here is a relational one, where a man has a right to, and in fact an obligation to, use a site because of his relationship to previous generations of people who had a definite relationship to the species taken at the same place. In other words, you have a right to use a site not because you own the land, but because your grandfather hunted there and had a relationship with the animals of that area. For example, for the contemporary Yup'ik Eskimo, man is his grandfather incarnate, and the animals that give themselves to him are those that gave themselves to his grandfather. His relationship to the land is founded in this relationship and as such its continuity is as essential as the continuity of life itself.

The point then was not that the land belonged to the Natives, but rather that the Natives belonged to the land (Gloria Brennan 1984). For those testifying, this truth was self evident, and as such taken for granted. It was the primary, yet often unstated, issue that the claims bill was asked to address. Yet it still has not been resolved, and remains to this day a basic moral conundrum at the heart of the current debate over cultural integrity and the continuing of the "subsistence way of life." Quoting my own perception of the moral underpinnings of this critical relationship between man and environment:

> I have heard it said on Nelson Island that when a person lives like his grandparents from the land and the sea, he feels that those grandparents are still alive in him. I have also heard people say that if one lives off the land, one need never hoard money or even food in the storehouse because each year the animals will return and the stores will replenish themselves. Money can never be trusted like that. Thus, living off the land is the ultimate security at the same time that it makes possible, nay, mandates, generosity. Conversely, if a man lives from the store, he will not and in fact cannot be generous. Not only does he lack the stuff of gifts, but more importantly, he lacks the social and spiritual bonds that make gift giving both necessary and possible. Small wonder the most common criticism of whites is that they are stingy, and of Anchorage and Bethel that there one has to pay for food. Conversely, community pride runs high, and regardless of how poor many of the families are by western standards, they are far from culturally bankrupt (Fienup-Riordan 1983:345-6).

Continuing consideration of the content of the testimony, the maintenance of this critical relationship to the land was a central part of the testimony of prominent Native leaders, as well as village elders, from all parts of the state:

> The native culture demands that he teach his children that which his forefathers taught him, to preserve the gifts of nature for his children and grandchildren and that selling his birthright is utterly abhorrent. Selling or releasing is a thought which is not within the understanding or comprehension of the native. It is anathema.
>
> In a stateside lawsuit, an Indian chief was asked if he had authorized anyone to sell his fishing rights. His majestic reply expresses the present thought: "No, my fishing rights are like my body. I cannot sell them."
>
> I cannot over-emphasize the emotional attachment that the respective Indian families and leaders feel for their home country. Perhaps another way of putting it is if one sells his family's inheritance, he will surely go to the natives' Hell. He will be accursed throughout his lifetime and in the life hereafter...(Frederick Paul, Attorney for Arctic Slope Native Association, 2/68, p.317).

Most people do not believe that the Indians had developed title to their land or ties with the land. This is completely misconceived because land and the Indians were bound together by ties of kinship and nature rather than by an understanding of property ownership. This conception is the very essence of Indian life (Charles Edwardsen, Jr., Point Barrow, Alaska, 7/68, p.603).

The way we used that land, so intensively, it was pretty well covered....We never have, and cannot yet think of ourselves as a people being separate from the land itself. Our identify is based on the land we come from, the place where our ancestors have always lived before us....The families have their own fishing sites, established by tradition, handed down from generation to generation....But what is probably one of the most important things to us is that we have a deep instinctive feeling of helplessness as a people as long as we are cut off from the land. We are essentially a people to whom land comes first. We are its children; we have emotional ties to it that we can never forget, even down into generations that no longer live in the old way. It is a basic part of our identity--it makes us feel who we are, and without it, we have been cut off and bewildered.

Now, however, we feel that a new time has come for us. When we began, at the Tanana Chiefs' Conference five and a half years ago to get the smell of the idea that we might once more recover our land, we became animated with a new sense of our own identity and ability. In only a few short years, the native people of Alaska have come to life as never before, we have recognized our common identify and our common problems, and we have organized together to find a solution....It took great skill and intelligence, and mutual cooperation for my ancestors to survive....I do not think we are ever again going to lose the knowledge and sense of cooperation with one another we have gained these last few years in fighting together to secure our land rights (Alfred Ketzler, spokesman from Nenana, Alaska, 2/68, p.182, 183 and 185).

Among these men was a young man who was full of a desire to be truly an American citizen whose name was Peter Simpson. In later times he was my spiritual father. You can understand something about me by remembering that statement....[I]n 1925 he whispered to me, "William, the land is yours. Why don't you fight for it?"...(William Paul, Sr., representative of Tlingit, Haida, and Arctic Slope Natives, 2/68, p.390).

Along with these general proclamations of the Native right to continued use and occupancy of the land, testimony was also devoted to the continued frustration of these rights, and the gradual loss of land that was being experienced by individual Natives and Native groups:

Mr. LUJAN: ....I am just not real sure as to what everybody means when you say that you discussed the gradual loss of native land when you met for the first time....It keeps coming up over and over and over. In what way has there been this gradual loss?
Mr. KETZLER: Yes. To give an example, when somebody else comes into the area and, say, they file on a homestead or homesite and

they receive a patent, and then the Natives, if they had used it for hunting or berrypicking, they are then denied the use. That is what we mean by the loss (Alfred Ketzler, 10/69, p.377).

....I have a home in Beechy Point and it still stands. My parents, a brother and my first husband are buried there. My children were born there. It was our home for many years.

On my last visit two years ago I found I no longer could call it my home, because the white man had trespassed and taken over my land and home. The land around my home was torn also the graves of my loved ones were trampled with machinery. I did not like what I saw and I went to see a lawyer in Anchorage. His name is Ted Stevens. A lawyer working for Mobil Oil at that time. I asked him in what way he could help me. The first question he asked me was, "Do you have title to your lands?" I answered him, "I don't think I need title to my own land and home, also because this was the home land of my parents and their ancestors before them, for many reasons." He (the lawyer) did not say anything for a while, so I asked him another question. How come a white man can trespass into my land with no permission, when he know the Eskimos could not trespass into whiteman's land? The lawyer's answer was that the white man did not know that the Eskimos lived way up in Beechy Point and offered to pay for the damage of my land in the amount of $2,500.

Even though I was not rich I could not accept this offer because it left me nothing. I wanted my home back as I had had it unmolested. At that time I had learned of the Constitution the United States made when Alaska was purchased.

That the land where the Eskimos and Indians lived on should not be molested. This promise has already been broken many times already. I told the lawyer I was an uneducated Eskimo but I fully respect the white man's law, and that I have learned what is right and what is wrong because it is the teaching of our ancestors (Mrs. Lucy Ahvakana, Beechy Point, Alaska, 10/69, p.400).

The Tanacross Village claim, filed in the early 1940's, again in 1961 and a third time in 1963, illustrates the position of many of the smaller Native groups.

We the people of Tanacross Village do here now place our blanket claim for the land in this area. There are 21 families living in our village. No one in the village is employed year around and only two men have been able to find part time work this summer. Some of the older people get aid but they still must get part of their food from this land to be able to survive.

There are 37 trap lines, 9 fish camps, 12 berry camps and the complete area we have claimed is used for hunting caribou, moose, ducks and for trapping. Our first blanket claim was sent into the Bureau of Land Management in the early 1940's but it seems no one has a record of this claim. So we the Tanacross Indian people do once again claim this land as ours.

We have not had the opportunity to receive an education which would enable us to share equal employment openings, therefore we must have the land needed to at least be able to feed and clothe

our families and to see our children gain the education they must have (Barry Jackson, attorney for a number of Indian organizations, 2/68, p.124).

Fear over the decline in the actual resource base was also expressed:

> I think Government buy stolen property maybe. Tough luck for Government. Can buy whole world that way....They now shoot game for fun. No more game pretty soon. No more fish. Land not worth much without game and fish. Land now aahsetuck. All used up. When we have land it is good. It is all we got (Ewen Moses Laumoff, Kodiak Area Native Association, 2/68, p.135).

> All these lakes that were good for hunting and trapping have been filled up with sand, so that's the reason why there is no fur now in the Minto Flat area. There is hardly any fur to make a living on--that's the reason why we want this land so badly. Because if we haven't got this land, we won't have anything to depend on.... (Peter John, Minto, 2/68, p.46).

Finally, the continued right to hunt and fish over extended areas and on public lands was another central concern, and, as the following testimony demonstrates, was ironically both a motivating force and perceived solution to the problems of game decline and shortages as well as a constraint to active support of the land claims movement:

> We have, according to the Government, absolutely no rights in Nunivak Island because it was declared a national wildlife refuge in the 1930's. The island has apparently been set aside for ducks, musk ox, and reindeer. We have not even been able to get a townsite and, according to the Executive order establishing the reservation, we are not even there....It is hard for us to understand why the government reserves all of Nunivak Island for the animals and left none of it for the people. In other words, the birds, reindeer, and musk ox have preference rights....I can only say that the Government has failed us in protecting our rights and has taken away from us almost every right we ever had. (George King, Nunivak Island, Alaska, 2/68, p.289-90).

> Land bill S. 2906 would at least give us bargaining power to attain a status equal to or superior to the animals on Kodiak. Certainly, there must be a better way to protect these animals than by declaring the land that is so direly needed by us people. Why not make it unlawful to hunt and kill the bears and make this land available to us?...(Frank R. Peterson, Old Harbor, Alaska, 2/68, p. 479).

> The fact that he is now in his later years--getting kind of old to be hunting like he used to, but he does have grandchildren and children and he feels that if the land is given to the Eskimos in a small package, you might say, he can see the problem of not being able to go out further to follow the migration of animals up

there that is available for hunting, and he has this feeling of not having enough land for his children and grandchildren to hunt in (Ernest Kignak, Arctic Slope Native Association, 2/68, p. 303).

Natives feel that the areas they inhabit and occupy still belong to them--under Indian title, we feel that compensation would not be the answer to the problems that we are facing today--we feel that continued use and occupancy of large areas of land is necessary....Indeed--there are many groups throughout the State who would rather be assured of continued use and occupancy of their traditional lands rather than accept a penny from the Federal Government...(Willie Hensley, a Representative in the Alaska Legislature, 2/68, p. 63).

We use an area of 1,648 square miles for hunting, fishing, and for running our traplines. This is the way in which our fathers and forefathers made their living, and we of this generation follow the same plan (Stevens Village Council, Arnold 1976:103).

A lot of my people are really worried about land claims. They are confused and don't understand. Many of them think that they will make the government mad by claiming the land. They think that if they lose they would also lose a lot of their freedom to hunt, fish and trap on their land now. That is why it is hard for me to get anybody to go with me to these land claim meetings (Peter John, spokesman for Minto village, 2/68, p. 49).

Along with the desire for guaranteed rights of use and occupancy of large tracts of land, title to broad tracts of land was also called for in the name of economic development and financial security for future generations. As testimony progressed, this aspiration, that land be granted which could yield cash as well as subsistence resources, was central, especially among the more prominent Native leaders:

It is true that we have fished, and hunted, and harvested our livelihoods from the land, as did countless generations of our people before us. This, with our instinctive feeling of ownership, tells us that the land belongs to us.

We need the land for other reasons, too. We would like to establish a very long-term economic base with our land. It is our belief that we must receive the amount of land which we request so that we may retain a share of the benefits from our land. ....This is also why we ask for the two per cent overriding royalty. Our ancestors maintained a share in the land; we now claim a share to the land; we want our children and their children after them to retain a share in the land (Alfred Ketzler, president, Tanana Chiefs Conference, Nenana, Alaska, 10/69, p. 369).

We feel that there is enough land in Alaska for everyone....Because I feel that over a long period of time much wealth has left Alaska with little remaining and those of us who were born and raised and have many generations of history in

> Alaska should see if we can participate in the wealth of the State and allow it to remain with the State (Willie Hensley, a Representative in the Alaska Legislature, 2/68, p. 79).

> But I would like to see something....We are losing the cream of the crop to the lower 48. We want to bring it back to here where we belong. You know when the Interior Department approves our land. People never saw our land in our country. Permafrost and under that there is gas. There is oil. There is a lot of riches and we would like to hold some of that land for ourselves....we don't want to let anybody take our land because we want to live there (Frank Degnan, Unalakleet, 2/68, p. 142).

> 1. Our people, the Eskimos of the Unalakleet area need not only land which they can regard as their own but also money with which to finance various local projects and to raise our standard of living. Thus my people would not need just land, nor just money, but both.
> 2. One of the reasons we desire land, is that title to land does not seem to disappear as quickly as money, and in the future we would hope to collect royalties from the land for leases for a possible oil or other mineral exploration as well as the normal growth in such an area. Royalties and leases of this nature would provide an income for the area and for the Eskimo people that would enable them to make an attempt to join the mainstream of American life (Frank Degnan, Unalakleet, 2/68, p. 144-145).

> It seems like the least that could be done, is give them part of that land....so that they can join the boom in the Kenai area. And the same thing is true in Southeastern, I think those villages are entitled to some of that prime forest land. When these saw mills and these industrialists move in from Japan, there is no reason that the natives can't do his own logging and sell his own timber. I think they should be given an opportunity to get in to some of that economically valuable land, right away, I mean not after it's all done (Donald R. Wright, president, Cook Inlet Native Association, 2/68, p. 235-236).

> By that, I mean, if you can persuade the Forest Service to set aside an area so that we could induce a new industry, say for instance a peeler operation or sawmill to come to Alaska. We fight that assurance (Frank Peratrovich, Alaska Native Brotherhood, 2/68, p. 250).

Innumerable statements to this effect continually undercut the fears of the Alaska Miners' Association that the Natives "...will not become responsible citizens willing to accept local responsibilities and the rewards of our societies. They will continue on a subsistence level" (George Moerlein, 2/68, p. 197).

Far from the case, Native leaders claimed there was little danger that gaining title would "freeze" the Native people into the traditional way of life (Barry Jackson, 2/68, p. 124). Rather, the land was viewed as the key to a brighter economic future:

> The only thing we know today is how to go hunting and fishing and picking berries. Another 10 or 20 years from now, after the kids come out of school or college, one of them will see that we need the land in order to live like the white people (Peter John, Minto, 2/68, p.47).

> We are afraid that the white man thinks that we will exclude him from the land if we get title to it. We do not intend to do this. We don't want reservations. We just want title to our land so that we can put it to economic use (Ruby Tansy, Cantwell, 2/68, p.51).

> The native people along the Yukon who hunt moose by boat and outboard motors find that the game is being hunted out and being driven into remote and inaccessible areas by the press of hunters equipped with float planes and tracked vehicles....This is only one example of the encroachment of modern civilization on the old way of life. And just as the territory needed land to make the transition from the statehood, the natives need land to make the transition from a subsistence economy to a wage economy.
>
> The decline of hunting and the encroaching civilization would not be so bad if it brought with it a means to offset the loss of the subsistence way of life...(Emil Notti, president, Alaska Federation of Natives, 2/68, p.31).

Finally the last two quotes bring to the fore an important point: the issue of encroachment. Although Ruby Tansy explicitly denies the Native's desire to exclude non-Natives from use of Native lands and participation in the development of these lands, other statements in the testimony, including many already given above, speak to the contrary. For example, Andrew Isaccs and Peter John both expressed a strong desire that encroachment on the land by non-Natives be curtailed. As we proceed, we shall see that this tension between full participation in the wider society and self-sufficiency permeates issues of economic development as well as land use, and that exclusive use and occupancy of the land is but a specific instance of the broader issues of independence and control:

> The Minto Flat area has got 30 dog camps, hunting lodges, for people that come out of Fairbanks during the hunting season and the fishing season. There's about 100 people go through the Minto Flat area during this time. And therefore, it don't give us much room to hunt and we can't say very much about it. Because it's not our land--even though it's ours just the same (Andrew Isaccs, chief, village of Tanacross, 2/68, p. 41).

> There is a road all around us here in Minto,....There will be a lot of white people on the road that will take homesteads along these roads, and we will be pinned to one little area. We don't want that to happen to us. It will be all right after we get this land because we can try to control these things by the people here in Minto (Peter John, spokesman for Minto village, 2/68, p.48).

2. The Importance of Cash Compensation in Order to Facilitate Economic Development

Summarizing the above, by the late 1960s Native leaders took the position that title to lands they had used and occupied was necessary to maintain the still viable subsistence land use patterns and values that they supported, and that at the same time the land and resources were necessary in order for the Native people to move into the contemporary mainstream. In the context of this two-fold objective, cash compensation for rights already given up or which would be forever abandoned as a result of the legislation was especially important, as it would be used for resource development. Native leaders felt that only with this combination of lands and revenues would their villages be able to become economically viable:

> Yet with the arrival of a cash economy certain modern development is necessary....This would provide both a cash settlement to assist us in developing our country and in addition would protect us in the use of our land, and in the future development on it (Frank Degnan, president, village council, Unalakleet, Alaska, 2/68, p.146).

> Senator FANNIN: ....[H]ow will this legislation help then if you need the people to have the ability to carry this industry forward. This bill would not necessarily furnish this to the people.
> Mr. MATFAY: Possibly we had thought about our own loan agency so to speak.
> Senator FANNIN: Then you are talking about capital?
> Mr. MATFAY: Yes. If there were any offshore royalties we could loan money to our people to build boats which could work the present fishing industry.
> Senator FANNIN: Then you really think at the present time it is lack of capital that is holding you back? As far as these industries are concerned?
> Mr. MATFAY: Yes.
> (Larry Matfay, Kodiak Area Native Association, 2/68, p.140)

However, it was clear that the cash compensation was viewed as a means to economic development, not as an end in itself:

> I think that this bill represents pretty much the maximum that can be expected in solving the land problems. Besides, we have always felt that land was primary and compensation secondary, but the world we are living in today demands cash in the pocket and we have no other choice (Willie Hensley, a Representative in the Alaska Legislature, 2/68, p.81).

> I am not sure exactly that we are in favor of the settlement as it is. We have compromised. But we realize we had to compromise on the land as well as money. We also realize we need the additional money to iron out some of the problems facing us today. Vocational training and education, setting aside funds

for education, we need money badly for financing our children to go to college (Ralph Perdue, Fairbanks Native Association, Fairbanks, Alaska, 10/69, p.382).

3. Resolution of Past Social Ills and Full Participation in the Future

Directly tied to the reality of a land and cash settlement was the requirement, expressed over and over again by Natives from all walks of life, that the resolution of past problems provide a vehicle for future participation by Natives in the life and development of society as a whole. Far from a cash out, the Natives viewed the settlement as a means of transition from a past characterized by poverty, unemployment, disease, poor housing, and second class citizenship to a future in which the "invisible reservation" ("The Village People", 2/8/68, p.164) would cease to exist:

> Let me stress further that the bill before you is not just a question of land. It is a grasp, a handhold, for the development of our future (John Sackett, Huslia, 2/68, p.366).

> The land is the money in the bank that our people have....They left it in the ground. It is there for the development. All wealth is initiated from the ground....It is there and this is what we have to build our future on. We have many plans in the Arctic for development of many things, and we feel that the title to the land and the wealth that it holds is the key to our future, economically, educationally, and healthwise (Hugh Nicholls, Arctic Slope Native Association, 2/68, p.314).

Here, as always, retention of rights to the land was seen as the key to participation in the future. Testimony makes this point over and over again:

> This is the land of plenty....I try to understand our policies...on international politics, but how can I explain this to my people in the villages when their stomachs are empty and their bodies are cold? These are inequities, and because of this we are grasping at the last thing we have--our land. And we are hoping that from the land we can pull ourselves to a level where we can contribute to society...(John Sackett, Huslia, 2/68, p.366).

> We want a title to our land. We know that the new way of life is here to stay. We want to be part of it. If oil is discovered, if gold and minerals lie underneath the tundra, we want them to be used. But since it is our land, we want our families to share in the wealth....We want to be part of the world in 1970, but we don't want to lose the only thing we have left--our land (Richard Frank, president, Fairbanks Native Association, 2/68, p.386).

> The future of Cantwell and other Native villages is very dim. Cantwell is already almost absorbed in the white world. The people do not want to stop progress but want to be a part of progress and benefit from it. But we can't benefit from it if we don't have title to our land (Ruby Tansy, spokesman from Cantwell, 2/68, p.51).
>
> We know that it is not possible to turn history back to allow us to live in our traditional manner. My people would like to have their ground on which to live, to be given the means to compete with the white man, and also to see the State developed in a way that our children and our childrens' children and the future generations will have a future (Sarjus Kvasnikoff, English Bay, Alaska, 2/68, p.132-133).

As full participation in the future life of the state was the goal, the destruction of health, educational and employment barriers to such participation was viewed as essential. A prompt and equitable solution to public health and housing problems was called for:

> With this introduction of the Judaic-Christian philosophy way of life the problem of housing began. This was first of all started with the family concept of the new philosopy--one man, one wife, one house idea. I am not saying that the idea is wrong but that the means to achieving it is wrong. The new philosophy did not provide the adequate means....Given the opportunity through the Native Land Claims settlement the Native people would help themselves in solving their own housing problems...This is a moral issue (Flore Lekanof, president, Aleut League, 7/68, p.596-7).
>
> The next point I attempted to make was that there were certain health and welfare needs and in which title to Alaska lands may make possible future development on the part of Native communities....I also pointed out that in my Village, and in others, better and more healthful water systems are needed. Along with this is a terrible need for more adequate housing for my people. Our housing can only be described as primitive by modern American standards. Reliance upon BIA to achieve something better in the housing field has thus far proved futile. We desperately need an adequate housing program for the Villages...The next point I wished to make was the need for hospitals and better transportation to and from my Village. At the present time the nearest hospital is in Nome which is approximately three hundred miles away....I tried to point out that transportation was a severe difficulty and in that regard I also believe it's necessary to develop road systems (Frank Degnan, Unalakleet, 2/68, p.145).
>
> "The Village People" was produced by staff members who traveled through Alaska. The story we outlined is one you will hear many times from many witnesses: poverty is a way of life--perhaps as deeply embeded as in any location under the American flag. Welfare checks take the place of jobs. Disease rates are extraordinarily high, achievement is low, and there is a

widespread expectancy of failure among the population. And there is that ultimate statistic--that shocker: The life expectancy among the Alaska native population is 35 years (Joe Rothstein, Executive Editor, Anchorage Daily News, 2/68, p.149).

Improved educational opportunities were of even greater concern, constituting a critical part of the legacy it was hoped that the settlement would leave for future generations. The dangers of integration were not articulated. The issue was one of equal access, not assimilation, and the plea was for the removal of the formal structural barriers that at the time effectively excluded Natives from the educational process:

> When I was 7 years old, the Bureau of Indian Affairs sent me to Chemawa in Salem, Oregon....I did not see my family again until I was 14 years old....while I attended high school...Part of my duties were to do the housework and much of the cooking. In return, I received $15 a month and my room and board....When I was a girl, the education for an Indian was very mediocre....I firmly believe that education is the key to a great part of our problem. If we should receive a settlement on this land problem we intend to use a great part of it to further the education of our people and improve the living conditions in general (Lucy Brenwick, Copper Center, 2/68, p.369).

> I would submit that it is the moral duty of every Aleut, Indian, and Eskimo in the State of Alaska to fight for legislation that would guarantee our children and their children an opportunity to become strong enough in the future so that what has happened in the past will never again be possible. I believe that the greatest legacy that we can leave our childen is an opportunity to seek higher education. Therefore, our first obligation in using any moneys that we would receive through this legislation should go to the development of high schools near the areas that the children are familiar with. Scholarships should go to those who desire education of a higher level.
>
> **I believe that there should be a youth center for every bar in Alaska and a health center for every liquor store.** I believe that every village should have an opportunity to develop their communities by their own initiative and not on a dole system. I believe that the native people of Alaska should be able to plan their own economic and business development.... (Charlie Franz, president, Alaska Peninsula Native Association, 2/68, p.276, emphasis added).

> It is our duty to learn to live in the changed homeland. We can no longer use the bow and arrow to obtain our necessities. Our new tool must be ambition and education. We cannot stand tall and proud if we refrain from the pursuit of progress. We cannot be free if we do not try to break the binding chains of poverty and ignorance (Larry Peterson, Fort Yukon Native Association, 10/69, p.409).

> I think if this thing were pushed through, then the people of the villages could be able to do things on their own and the kids could just do their own thing in their villages and they wouldn't have to rely on anyone else for getting them through school. I think that is about what this whole problem is, trying to get the kids where they could be more at ease in school...(Sarah Seaberger, Kotzebue, Alaska, 10/69, p.378).

> So far this has been the thinking of the majority of our leaders that we have been working with, both locally as well as in villages. I don't think you would go wrong in setting aside a certain percentage for education and the security of our children. I think that is why we are here, to leave something for the future generation and the generation after that... (Ralph Perdue, Fairbanks Native Association, Fairbanks, Alaska, 10/69, p.388).

> There are a lot of things that can be done in the Minto Flat area in the future, but we have to have our people educated enough to look into these things. That's why we want the kids who are going to school to go as far as they can in education. That's our main purpose--their education. That's what all the people here in Minto look forward to, is their children's education. We know what it means to them and what it will mean to them in the future (Peter John, Minto, 2/68, p.47).

Yet, as AFNs' Flore Lekanof put it, "education for education's sake is not enough. Economic and industrial development must go hand-in-hand with the education process." He continued:

> At one time in history the Native people of Alaska enjoyed a meaningful livelihood in their own Native culture. Since the coming of the Russian fur traders and later the United States Government the Native people have been exposed and educated in the Western European culture....There must be not only the formal and informal education but the means, through economic and industrial development in the Native country, for a **new meaningful livelihood...**(Flore Lekanof, member of the steering committee of the Alaska Federation of Natives, 7/68, p.599).

Job training and employment opportunity were in fact viewed as essential not only in order to meet the practical goals of alleviating poverty and unemployment, but in order that Natives could fully participate in the life of society, and in so doing regain control of their destiny:

> What the people need is training. Our training must be better than the white man's. We must be able to show that we can do a better job than the white man. We must be able to say that we will work harder than the white man. It is only by showing that we are better than the white man that we will be hired. That is why it is important that the legislation be passed (Walter Charley, Ahtna Tannoh Ninnah Association, Copper River Indians, 2/68, p.372).

No. 1, I think that local autonomy is an absolute necessity in Alaska. And by local autonomy, I mean Alaskans first hired (Donald R. Wright, president, Cook Inlet Native Association, 2/68, p.232).

The decline in a subsistence way of life for the native people and the ruining of a basic industry that supported the natives leaves many people without means of making a living....The human suffering is beyond description. I had an uncle who had 11 children; 10 of them died from tuberculosis before reaching adult age. In 1940, I knew a whole family except for one 7-year-old boy that died from tuberculosis....The condition of the native people is desperate. They need relief in the worst way. Settlement of the land problem is the remedy for solving the problems. I visualize sawmills coming into being to start a housing program. I visualize native businesses beginning to alleviate unemployment. There is a whole economy to be developed in rural Alaska and outside capital is reluctant to take the risk...(Emil Notti, president, Alaska Federation of Natives, 2/68, pp.32-33).

From some lips fall the familiar complaints that native occupancy of lands is impeding the economic development and progress of the State of Alaska.

Our answer is that though we have the right of complete beneficial use of our aboriginally occupied lands and all the resources of such lands, we have been prevented and restrained from exercising our rights to deal with and develop such lands and resources. We say that only after we have been permitted the reasonable opportunity to exercise such rights a judgment may fairly be made as to whether our occupancy is hampering the economic development and progress of Alaska (John Borbridge, 7/68, p.567).

As can be seen from the above, the solution to economic ills was not felt to be increased aid, but rather the opportunity to help themselves:

[T]he overall improvement in living conditions, I think is the main question. I believe that although the division, as far as the title to land and cash, may not go to the individual as such, he will receive benefit from the fact that there will be enough lifting of economic development, the conditions in the area and thereby he will enjoy, along with the rest of the community this improvement. I think also that with the opportunity to manage his own property, to give him the opportunity to manage his own property to a title to the land as well as the under the surface rights, I think our people will take more initiative and improve their State. We have been taught to believe to look after everyone in the community, this has been the philosophy of our people for centuries, so I feel that the individual will be well taken care of along with the rest of the community under this new bill (Flore Lekanof, president, Aleut League, 2/68, p.255).

> Yes. A man without a title under his feet, he loses something. He doesn't have authority....I am in favor of a settlement which provides title to land, money, and control of the land and money by the natives. The absence of title to our land has, I feel, held us back. If we had title, we could develop our land and derive income therefrom. We would be able to sell our timber. We would be able to operate a fishing enterprise so that we could market our good white fish which has never been marketed. We could also provide a good education for our children. By that, I mean we could send them to non-segregated schools. We could engage in private industry which is really the only thing which will really help my people to become self-sufficient and play a meaningful role in our society (Claude Demientieff, Galena, Alaska, 2/68, p.382).

> I assure you that that [active participation in development] was the basic reason for setting these--incorporating each village and incorporating the areawide associations and incorporating one statewide association....And believe me, if this bill passes, and if we do get some money to work with, and some land, we will be competitive in every field in a very short period of time (Donald R. Wright, president, Cook Inlet Native Association, 2/68, p.234).

> We need to improve our villages and want to have some of the things the white man has. We want to provide better ways of living for our families. We want our children to be educated so they will not have to struggle as our ancestors and as we are doing now. It will take many, many years before our way of living will be like the white man's but we are willing to work hard to get this. We need our land (Mike Delkittie, Nondalton-Lime Hills Indian Group, 2/68, p.410).

4. The Achievement of Self-Sufficiency and Self-Determination

Loud and clear in the above resounds Lekanof's dream of a "new meaningful livelihood" in the future. Although the contours of this dream varied for individual Natives and Native groups, one element held constant throughout. Time and time again throughout the testimony rings out the desire to achieve independence, self-sufficiency and self-determination in all aspects of life. Natives were unanimous in their anti-wardship, anti-reservationist stance and their firm desire to regain control of their destiny. More than any other single factor, more than material achievement or rights to land use, this sentiment breaks through with a fierce independence and pride. In part reflecting the general antifederalisim that characterized Alaska in the years after statehood, for Alaska Natives the concern was more general. This issue surfaced in discussions at all levels, from specific requests for rights to self government and the control of the development of local resources to more far reaching diatribes against the policies of the BIA. Indeed, a new livelihood was sought for the future, but one that Natives would control for their own purposes, not one that would control them:

The important thing here is that we would like to say that through the Land Claims Settlement, these people will be able to make decisions, which will allow them to decide on their own future, which they have done in the past, and which has been taken away from them to a large degree by bureaucracies (Flore Lekanof, president, Aleut League, 7/68, p.601).

Alaskan natives must be given the opportunity and wherewithal to improve their immediate living standards. This in turn, should give impetus, to a very badly needed program, designed in point, to assist younger generations in acquisition of a firm base in a healthy environment, both physical and mental. Also, assisting them further with ready access to higher education. By this process, the Alaskan native will soon prove capable of becoming an independent entity. No longer in need of handouts, "but sufficient unto himself"! (Grassim Oskolkoff, Ninilchik, Alaska, 2/68, p.488).

Who if you please, is the better manager, the State or the Natives? And so, there you have it, Mr. Chairman, this is our land. If you want it, pay fair value for it. While we deny that our need or our competence are relevant factors to judge the amounts of land and money or both, our need is great and our competence is amply adequate for a reasonable--soon full control of our own compensation (Eben Hopson, executive director, Arctic Slope Native Association, 10/69, p.396).

Through it all we hear the constant insistence: "Give us this chance. We can do it; we want to do it."....More than anything at this time--yes, more than oil leases, gold mines, building contracts--any of those elements which are called "progress" and "development," we are confronted with a people and their destiny. They are asking for the tools to develop their own birthright after their own fashion (Betzi Woodman, Anchorage, Alaska, 2/68, p.393).

I sincerely believe and I submit that Alaska natives have arrived at the point where we are ready to become the leaders in the achievement of our own destiny. Over the years there had developed a nucleus of leadership which I feel that the native people have arrived at the point where we can pick up the reins...(Byron I. Mallott, president of Five Chiefs of Yakutat, 2/68, p.52).

It's been stated here that natives depend more or less on the welfare. That is true to a certain extent, but they're forced to do so....And they still want to reach out and acquire some money to erect their own industry so they can be self-sufficient. They're no different from you or anybody else. They want to get ahead. They like the modern facilities in their homes, just like you people enjoy, but they just can't do it under the present situation. (Frank Peratrovich, Alaska Native Brotherhood, 2/68, p.249)

[G]ive the Eskimo title to his own land as embodied in S.2020 and S.2690 and he will never, never again go to Congress as a supplicant to beg for the funds he so desparately needs to build his own future, for he shall then have the tools to move forward on his own initiative, a free man in a free society....One thing I thought as I sat in the audience here for the last 2 days though, we are on the wrong side of the table. You should be over here asking for the land from us and we should be over there giving it to you...(Hugh Nicholls, Arctic Slope Native Association, 2/68, p.306).

One of the significant developments relative to the land claims bill drawn up by native leaders across the State has been the increasing assumption of responsibility by the representatives of our Alaska natives....This would be in accord with the highest principles of self-determination and would insure the opportunity for our people to learn through participation in the process attendant to corporation activities (John Borbridge, Jr., president, Central Council of Tlingit and Haida Indians, 2/68, p.346).

In the corporation, we want to be able to operate our own businesses, that is what it boils down to, and to have the say... (Alfred Ketzler, president, Tanana Chiefs Conference, Nenana, Alaska, 10/69, p.376)

National conscience cannot permit the taking of the lands of these people who ask nothing but an equal opportunity to control, own and utilize that which has been theirs for untold ages (Hugh Nicholls, first vice president, Arctic Slope Native Association, 2/68, p.305)

Federal trusteeship was bitterly opposed, and independence from the BIA passionately demanded:

It seems to me that all throughout our dealings with the U.S. Government and also the State government, there is the feeling that we are not competent people. If we were considered competent, this question would be resolved immediately like it is with any other group of American citizens. But being incompetent, the United States has to protect us (William Paul, Sr., representing Tlingit, Haida, and Arctic Slope Natives, 2/68, p.390).

Another example of a Government run program is ANICA, Alaska Native Industries Cooperative Association. After 20 years of existence it still can barely show a profit....

I point these things out because there is a strong feeling among the native people in Alaska, that they want to have control of their own destiny. And if there are going to be mistakes made, we want to make them, not let the bad decisions be made in Juneau, or even farther away, in Washington, D.C. I stand here before you to state in the strongest terms possible that the representatives here today, of 50,000 native people in Alaska do

not want paternal guidance from Washington, D.C. We feel we have the ability to make our own way and once we get a fair settlement for our lands, it will enable us to operate our businesses (Emil Notti, president, Alaska Federation of Natives, 2/68, p.32).

More specifically, the bills are in agreement on the desirability of....gradual but complete passage of the entire management control of Native lands and funds to Native groups. The true issue is not reservations and federal trusteeship versus no reservations and no federal involvement, but rather dependence versus independence and the transition from one to the other (Joseph H. Fitzgerald, chairman, Federal Field Committee for Development Planning in Alaska, 7/12/68, p.511).

The whole bureaucracy just isn't doing the job it was created for. I believe we can handle our own problems better than any Government agency. I would like to see the natives choose their own destiny...(George Ondola, chairman, village council of Eklutna, 2/68, p.378).

I feel that in the long run, within the next 10 to 15 years, we must begin dissolution of the Indian Bureau in Alaska and allow the native people to begin shouldering the burden of guiding their own lives into the uncertain future (Willie Hensley, a Representative in the Alaska Legislature, 7/68, p.562).

Our guardian for the past 50 years, the Bureau was supposed to keep us from the ill influences of the Western society; instead the Bureau has kept us 50 years behind the times....While the whole concept of the Bureau of Indian Affairs is to assimilate us into the mainstream of life, in each case the attitude has been, "You aren't ready for it yet and we will make the decisions."....We are ready to decide what we as native Alaskans want and we are capable of handling our problems (John Sackett, Huslia, Alaska, 2/68, p.366).

5. Continuity in Cultural Integrity

Just as the desire for independence and self-determination was implicit in the stated goal of full participation in the future, the desire to retain cultural integrity and cultural sovereignty is implicit in the desire for self-determination. The stated goal of continued cultural integrity as it is articulated in the testimony has a decidedly contemporary ring. In fact, some of the same leaders who advocated the need for a guarded replacement of the old by the new and the use of Western material advantages to support rather than to supplant the maintenance of traditional Native values were those who continue to speak out today. Discussion of the maintenance of cultural integrity as a conscious goal is particularly important because of the relatively low profile this goal maintained in the articulate aspirations of the 1960s. It was clearly underlying much of what said, especially in the discussions of the inherent value of the land and the way of life it continued to make possible over and above its economic worth. However, as can be seen in the above, much

testimony was devoted to proving that Natives had the ability to manage corporations, run their own businesses and all in all successfully join mainstream America. In calling for equality of economic opportunity, testimony often conveys the image of a people in a hurry to escape their past. This was indeed true of their recent past, with its poverty and powerlessness. However, cultural values, as articulated in terms of land rights and independence, were considered of paramount importance in the 1960s as they are to this day. Although the testimony is often dominated by the more immediate mechanics of the actual settlement, continuity in Native cultural values was always present as an implicit if not explicit goal. For example, in Donald Wright's rendition of AFN goals, maintenance of cultural integrity is one among a half dozen separate concerns:

> The natives of Alaska have succeeded in organizing as a statewide group, dedicated to the pursuit of the following objectives:
>
> 1. Raising the economic level which will be reflected in the Alaskan native resources study, geared to expand and improve native income, development, opportunities, and living conditions in Alaska.
> 2. Monitoring the accessibility of programs, job opportunities and housing facilities for native citizens residing in or relocating to urban areas.
> 3. Emphasizing individual freedom to ensure free and undisturbed use of Alaska from unlawful harrassment by Federal, State, congressional, religious or other bodies.
> 4. Promoting the democratic process in order that the native citizen does not go unheeded by nonnative policymakers who meet behind closed doors to formulate rules and regulations governing the natives.
> 5. To orient the native people toward higher education in order to improve their attitudes and ideas toward better living, and to better make themselves understood by the policymakers of local, State and Federal governments.
> 6. **To return to the native peoples of Alaska a pride in their heritage and culture**, and to promote and develop native artists and artisans.
>
> (Donald R. Wright, president, Cook Inlet Native Association, 2/68, p.213-214, emphasis added)

Similarly, objectives of the Alaska Federation of Natives set forth in its constitution and bylaws were: "(1) to promote pride on the part of the Natives of Alaska in their heritage and traditions; (2) to preserve the customs, folklore, and art of the Native races; (3) to promote the physical, economic and social well-being of the Natives of Alaska; (4) to discourage and overcome racial prejudice and the inequities which such prejudice creates; and (5) to promote good government, by reminding those who govern and those who are governed of their joint and mutual responsibilities," (Article 1, Sec. 3, in Federal Field Committee for Development Planning in Alaska, 1968:27).

Perhaps more revealing than these formal statements were the explicit attempts by individual Natives to come to grips with the issue of cultural integrity. Whereas the formal statements treat culture as somehow separable from. although equal to, other social and economic concerns,

these latter statements view culture alternately as an all encompassing system of values and an underlying system of beliefs that permeates choices and activities in the social, economic and political arenas. Cultural integrity is critical because it is that which animates and gives meaning to their lives, including acts we would classify as economic or political. The plea for cultural integrity was not then, as it is not today, the attempt to preserve one spiritual aspect of life, but rather the integrity of the whole including so-called "economic" acts of hunting and fishing, "social" acts of sharing and exchange, and "political" acts of self-determination:

> I am never surprised but always dismayed when well-meaning but poorly informed people ask why do not the Indians integrate themselves more effectively into the general society. This question, so frequently asked, is disarming because to answer it appropriately requires a considerably longer explanation that [sic] most inquirers have the patience to hear. To reply simply that probably they'd rather not, or, contrariwise, that they do not have the opportunity to integrate would not, either way, properly answer the question. Nor would it be very informative to reply that for the most part they do not have the opportunity and that, in any case, they have strong attachment to their own cultural heritage and are understandably ambivalent in their reactions to the alien society which has engulfed them. This is, it seems to me, a reasonable statement of the case, but it is quite meaningless to anyone who is unfamiliar with the values on the one side of the equation, namely the character and equality of the cultural heritage to which Indians are attached (Edwardson, 7/68, p.609).
>
> Mr. ASPINALL: Here we have what apparently is going to be a conflict in the near future between those who want to stay on the land and hunt and fish and live as they have in the past and those who are desirous of getting out and getting into the mainstream of the new economy. What do you think the majority of the people whom you represent desire, do they want to stay with the old or do they want to get in with the new stream of life?
> Mr. PERDUE: I think it is 50-50. Take myself as an example. If my own private business is going as well as it is, I plan at least retiring and going back to the village and helping the village with what I know, what I have learned by living in this Western way of life....
> Mr. ASPINALL:....All I am trying to find out is what your ambition is, that we perpetuate the old or that we gradually try to work ourselves into a combination of the old, keeping the culture of the old and yet taking the advantages of today's way of living.
> Mr. PERDUE: I think it can be done. I think we can get away from the old way of living, in other words, in our daily life, but the culture can still be retained. This is what you want. Yes, I think the old way of life can be phased out completely and

still retain the culture and the identity of the people who live in the area they are living in (Ralph Perdue, Fairbanks Native Association, Fairbanks, Alaska, 10/69, p.384-385).

Then it is in large part only in spite of efforts to assist the development of Alaska's native population that native development has taken place.

The principal reason that any forward movement has taken place at all is the native people themselves. There can be no doubt that the native people are capable of the kind of development both socially and economically that is demanded by "Western civilization." It is widely held among natives that we must conform to the demands made of us in the development process. It must be said that conformity does not necessarily imply total integration. Most natives feel that it is vital to our development to maintain a unique cultural identity, an identification with our history and cultural values. The dichotomy here is not harmful, but rather is conducive to a more realistic and full conformity (Byron I. Mallott, second vice president, Alaska Federation of Natives, 2/68, p.54).

Whatever the actual situation may be, we reserve the right to speak and decide for ourselves; it is not the place for you or the Sierra Club to decide what is right or wrong for us.

What we need is a sincere two-way exchange of ideas and philosophies, so that we may understand and accept the best of what different cultures have to contribute to the survival of everyone. We cannot do it if there is force or if people speak for us out of ignorance and insensitivity (Larry Merculieff, St. Paul Island, in a letter to the Anchorage Daily times, October 25, 1974, from Arnold, 1976, p.163).

Here it is worth noting that within social theory, the explanatory pendulum continually swings between functional modes of explanation, in which natural, economic, and political constraints are emphasized as determining social life, and cultural modes of explanation, in which the natural environment is but a constraint to what cultural value systems create and require. It would appear this same swing is replicated in Native aspirations of the settlement of their land claims. The emphasis in the 1960s was on eliminating the economic and political barriers to full participation in society. Natives asked of ANCSA that it give them the means to move from a position of impoverished dependence to one of social, economic, and political independence. Today, with rural health, education and housing vastly improved, Native corporations increasingly successful, yet social pathology a continuing problem, the pendulum swings back to an emphasis on the maintenance of cultural integrity through self-determination and continued land ownership. This should not be surprising, as in the end, for any people, whether Native or non-Native, neither economy nor ideology can exist independent of the other.

Conclusion

In reading the Native testimony of the late 1960s, I am struck with three things. First of all, it is apparent that the Native community has won many of the goals for which they originally fought. The position of the Natives, both economically and socially, has changed dramatically with considerable strides made in housing, health care, education, and employment. The poverty and economic immobility of village Alaska has not been eradicated, by any means, but thankfully the statistics given in "Alaska Natives and the Land" (Federal Field Committee for Development Planning in Alaska 1968) at present have a dated ring. Yet, as stated above, although the material situation has improved for Alaska Natives, social pathology and individual stress have not diminished. The technological improvements of new high schools and better housing in the villages have so far not only been unsuccessful in eliminating the problems of Alaskan Natives, but may in many instances have actually contributed to them. The fact remains that suicide rates, unemployment rates, attrition in schools, number of children taken from homes, and alcoholism rates are much greater for the Native segment of Alaskan society than for the non-Native sector (Worl 1984). This is not a "fault" or "failure" of ANCSA. Native society in the last two decades has been a changing society, and therefore a society under stress as the pathology rates indicate. The institutional changes brought by ANCSA are only one part of the context of social change. However, the high rates do show that the land claims settlement has not been able to provide an effective barrier to such stress.

Second, it is noteworthy that the emphasis on economic self-sufficiency and development in much of the testimony leading to ANCSA, particularly among many of the younger Native leaders, was both pronounced and explicit. If Natives had reservations about the implications of adopting the corporate vehicle, these reservations did not appear in the testimony. Also, non-Native testimony often portrays them as poor whites rather than as rich Natives. Ironically, this emphasis on material impoverishment was one of the biggest drawing cards in the actual achievement of the settlement.

Last of all, one is impressed by how many of the concerns expressed in the testimony persist. As stated above, the issues of dependence vs. independence and cultural amalgamation vs. cultural integrity were both implicit and explicit in what was originally asked of ANCSA, as they are in concerns about ANCSA as it continues to be played out today. Considerable testimony was also devoted to both explaining and defending the "subsistence way of life." In fact, this magnetic catch-phrase which has since focused so much debate may first have been used in the testimony of the 1960s. It was stated simply and with the complete conviction that the non-Native audience fully comprehended the morality that was implied. Ironically, almost two decades have passed and non-Natives are still working to understand the Native value system which underlies this statement.

Bibliography

Alaska Native Land Claims. Hearings before the Committee on Interior and Insular Affairs, United States Senate. U.S. Government Printing Office, Washington, D.C.

1968. 90th Congress, 2nd session, on S2906 and S1964, S2690 and S2020. February 8, 9, and 10, Anchorage, Alaska.

1968. 90th Congress, 2nd session, on S2906 and S1964, S2690, S2020, and S3585. July 12, Anchorage, AK.

1969. 91st Congress, 1st Session, on S1830, April 19, Washington, D.C.

Alaska Native Land Claims. Hearings before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, U.S. House of Representatives. U.S. Government Printing Office, Washington, D.C.

1968. 90th Congress, 2nd sesion, on HR11213, HR15049, HR17129, July 11, Washington, D.C.

1969. 91st Congress, 1st session, on HR13142 and HR10193, August 4, 5, and 6, and September 9, Washington, D.C.

1969. 91st Congress, 1st session, on HR13142, HR10193, and HR14212, October 17, Fairbanks, AK and October 18, Anchorage, AK.

Arnold, Robert D. Alaska Native Land Claims. Alaska Native Foundation, Anchorage, Alaska. 1978.

Brennan, Gloria. Commentary. Alaska Native Review Commission Overview Hearings, January 16-18, Anchorage, AK. 1978.

Federal Field Committee for Development Planning in Alaska. Alaska Natives and the Land. U.S. Government Printing Office, Washington, D.C. 1968,

Worl, Rosita. 1984. Commentary. Alaska Native Review Commission Overview Hearings, January 16-18, Anchorage, AK. 1984.

A Commentary on Institutions and Legal Regimes Arising From The Alaska Native Claims Settlement Act and The Alaska National Interest Land and Conservation Act

by

Walter B. Parker

for

Overview Roundtable Discussions

Alaska Native Review Commission

March 1st to 3rd, 1984

Anchorage, Alaska

Suite 304, 429 "D" Street
Anchorage, AK 99501

Institutions and Legal Regimes: ANCSA & ANILCA

This paper is designed to review briefly the institutions and legal regimes established by the Alaska Native Claims Settlement Act (ANCSA) and its corollary legislation, the Alaska National Interest Lands and Conservation Act (ANILCA), and to make some tentative observations about the future functioning of these regimes and institutions as part of the relationship between the United States and the State of Alaska upon which they are based.

In both of the above acts, it is important to remember that Congress viewed itself as breaking new ground in the relations of the United States with aboriginal peoples. It is also important to remember that the State of Alaska was a full partner in reaching the conclusions expressed in the legislation. The state made important commitments of present and future resources.

Both ANCSA and ANILCA were designed to remove the barriers raised by aboriginal rights to land and complete the transfer of lands to the state, something that has now been largely accomplished. Both pieces of legislation were carried forward on the basis that they would constitute a minimum impediment to the operation of the state of Alaska as an economic, social, and legal entity. Some argue that the National Lands Act (ANILCA) was designed to separate federal and state interests. That overlooks the fact that the lands under discussion were held under federal title in the beginning and that those titles of the act dealing with creation of federal conservation units were simply transferring management responsibility from one federal manager to another and, in the process, establishing goals for the management of federal land. The actions that inhibited the state's rights came much earlier (in 1966) as a prelude to the claims settlement (ANCSA) when the Secretary of the Interior froze all transfers of title from the federal domain to the state, as set out in the Alaska Statehood Act.

In the transfer of the federal estate to Alaska Natives and to the State of Alaska, generally the state acquired the key economic lands in the period 1958-1966 (prior to the imposition of the freeze). These acquisitions were limited to about one quarter of the 104 million acre entitlement established at statehood because state land acquisitions tended to diminish federal entitlements in highway funds and other areas very critical to Alaska at that time.

Those lands selected by the state prior to the land freeze were those most immediately adjacent to Anchorage and Fairbanks and scattered out along the state highway system as it then existed. They also included strategic mineral selections, the most strategic being the state selection of the lands at Prudhoe Bay that have formed the base for its present oil wealth. No state land selections of any consequence were made in primarily Native areas prior to the land freeze and, of course, after the freeze none were possible until the claims settlement was made.

In considering the lands that would be made available to Alaska Natives, Congress first considered the lands immediately adjacent to the villages. Initially, it was felt that about 4,000,000 acres would be sufficient for title transfer, with Alaska Natives acquiring surface use rights in timber, fish and game to another 60,000,000 acres. This concept was not often brought up after 1968, primarily due to opposition by Native leadership in some areas and by sportsmen.

The next basic question was whether land boundaries would use the conventional U.S. Survey township grids or whether natural features would be used. The argument against using natural features was one of convenience in using the existing system and of maintaining equity between villages and groups. The cultural disadvantage of imposing a mathematically based system on a culture whose values were almost totally naturalistic did not receive much discussion--or at least as much as it should have.

As the amount of lands that Congress would make available for selection escalated, eventually reaching 80,000,000 as a serious consideration, the relationships between village selections and regional corporation selections began to evolve. Among Alaska Natives and their supporters there was a great desire to maintain a reasonable degree of equity so that all would share in any bonanzas in mineral wealth that might be located on future Native lands. This led to wealth distribution in two ways, on a regional basis by providing the regional corporations with the subsurface rights to their lands and on a statewide basis by providing that 70 percent of mineral wealth from subsurface rights be distributed by the owning region to the other regions. This latter provision has proven highly controversial but hopefully is now settled.

The formula for allocating village lands on essentially a population basis was agreed upon without too much controversy. The formula for alloting lands to the regional corporations occasioned a good deal of debate since some of the regions with the smallest populations had the largest land areas within their provisional boundaries. This was eventually worked out with a formula generally favorable to regions with small populations (such as Arctic Slope) and unfavorable to those with large populations (such as Calista).

The manner in which regional boundaries were created has received little substantive study. Some corporations, such as Sealaska, sprang from a long historical development dating back to the creation of the Alaska Native Brotherhood in 1903. Other regions had no formal historical institution upon which to base their development. Eventually most boundaries were based upon the relatively sharp dividing lines between Inupiat, Yupik, Athabaskan, Aleut, Thlinghit-Haida and Eyak people that existed in the 1960s. Dividing lines between corporations sharing the same ethnic and linguistic heritage were somewhat more difficult to settle. Those corporations, such as Cook Inlet, Koniag, Sealaska, and Doyon, that shared their areas with large non-Native (essentially urban) populations, and also large urban Native populations from all over Alaska, had special problems. That led to the self election and village acceptance features of the claims settlement which allowed any Alaska Native to nominate his home village but also allowed the village corporation a right of refusal for cause.

The final disposition of half of the lands to the villages, half to the regional corporations with all subsurface rights to the region, reflects the final accommodation that was essentially hammered out directly between Alaska Natives and the Congress. Congress attempted to protect the rights of non-shareholders living in Native communities by the requirements that any existing rights in land be protected and by the provision that the village corporations return 1,240 acres of land (later changed to "up to" 1,240 acres in ANILCA) to the municipal governments. This process has hardly begun and will probably require several years of intensive negotiation between state and municipal governments and the village corporations. In large areas of the state, these will be the only lands that are not under Native title or are federal withdrawals. The effect of this upon future state settlement patterns is obvious. It is already apparent in areas such as the Hoholitna and the upper Kobuk where small groups of non-Natives settled on enclaves of federal land that were briefly available in 1973 for homesteading due to an administrative oversight and a lapse in the planning process that overlooked the ability of the average citizen to seek out targets of opportunity in lands. It is also apparent in the land opportunities made available by the present federal administration which wants to make land available for homesteading, but has none that is reasonably accessible by boat, plane and certainly not by road.

Future settlement patterns in Alaska can thus be determined largely by present land ownership and by the quality of the land itself. The preponderance of state selections in Southcentral Alaska around Cook Inlet and in the Tanana Valley point to those areas as the continuing population focus for non-Native Alaskans. There are very few federal lands that will logically be targets for settlement despite the tremendous controversy over those lands in the 1970s. The unknown factor is whether Alaska Natives will make substantial amounts of their lands available for purchase by non-Natives.

To simplify the final lands disposition, Alaska Natives acquired the most habitable remaining lands because they had historic possession of them. The state acquired the lands of greatest economic and settlement value that remained as could be best judged at that time. The federal government was left with the remainder that was in essence the mountain tops (the National Parks), the swamps (the Wildlife Refuges) and other generally left-over areas. The areas of greatest economic value left to the federal government were those conservation and special management units that were in existence at the time of statehood--the Tongass and Chugach National Forests, which were diminished by Native and State selections of the areas adjacent to existing communities to a certain degree, and the National Petroleum Reserve (then Naval Petroleum Reserve No. 4).

The problem of viewing the future of Alaska from the perspective of ANCSA and ANILCA is that they were primarily concerned with land tenure and the resource control that can be exercised by the owner of the surface and subsurface rights. The other aspects of society and government that are key to the functioning of citizens of the United States and the State of Alaska within the federal/state relationship were largely subsumed within such statements as, "Nothing in this Act shall alter or remove the rights of Alaska Natives as citizens of the State of Alaska."

Probably the most important rights of any citizen in the modern nation/state are his rights to protection from and protection by police power, his rights to education, health and social services, his rights to communicate and his rights to travel freely. Besides these, the rights established by land tenure are put in their true guise, as economic rights and not as guarantors of more important rights.

The above statement obviously overlooks the long development of Indian law in the United States and its impact upon the fundamental rights of American Indians, Aleuts and Inuit as citizens of the United States and of the respective states in which they may be resident. It also overlooks the special relationship of aboriginal people to their land, a relationship that has been expressed in many ways; in music, poetry, dance and the basic life patterns of those not caught up in the rhythms of post-industrial society.

There can be little doubt that many Alaska Natives equated the land titles that they acquired from the federal government with some form of sovereignty. It certainly was not clearly explained to most that they were simply exchanging one sovereign, the federal, for the State of Alaska as sovereign. The inability of Native organizations to achieve status as federal corporations was recognized by those familiar with federal/state/private relationships in land in the United States and was the reason some Alaskans who had originally been opposed agreed to support the claims settlement.

Some of the amendments and additions to the claims settlement that were made a part of ANILCA were an effort to separate Native title from the State as sovereign over private lands. But the Land Bank and other efforts had to return to generally the original format in the absence of any Congressional action to establish a new form of federal sovereignty. The Land Bank concept puts land in a non-development status in return for non-taxation for a specified period.

Similarly, in the debate over subsistence, Congress was willing to go to great lengths to establish special rights for Alaska Natives on federal lands for the taking of fish and game. However, Congress was not willing to establish federal supremacy on state or Native lands except through offering the carrot that if the state acted to establish subsistence as a priority use of fish and game, they would retain regulatory control of means, methods and licensing on federal lands. Congress did not even strongly consider expanding the Endangered Species Act to establish greater control over Alaska's game. They were caught on the perennial petard of Congress: what is done to one state can and usually will apply to all.

In any case, Congressional action has thus far been justified. The state has by legislative action established subsistence as the priority use of fish and game. That action was sustained when an initiative designed to repeal the state's subsistence law was rejected by Alaskan voters in November 1982. It is significant that many of the state's political and business leaders worked against the initiative. For example, the principal political figures who campaigned against the initiative, while winning the Republican primary strongly, lost in the general election by a much larger margin than was expected to the Democratic candidate who campaigned strongly against the initiative.

There is no doubt that those who are opposed to the concept of subsistence priority are still a strong group politically in the state. However, there are also indications that hunting and fishing, while still important to the urban residents, are not the absolute priority for many that they once were.

The rapid increase in population in Alaska since 1980 has, no doubt, increased the existing fears of many Alaska Natives that they will become a submerged minority in a largely white population. Alaska Natives have gone from being 22% of the population in 1970, to 17% in 1980, to 15% in 1983. Balancing this is the fact that much of the recent immigration to Alaska has been Oriental and Hispanic. Thus, the future composition of Alaska's population may well be even more multi-cultural than in the past. Whether this is a plus or minus for Alaska Natives is dependent upon whether the dominant majority continues to view their rights as having primacy due to their historic presence or whether they are viewed as one of several competing minorities. There are certainly large elements of both views present in Alaska now.

The ranking of Alaska Native desires as it emerges in the 1985 federal assessment will hopefully influence state policy in a positive fashion to the same degree it influences federal policy. As those desires have appeared to me in the past they would seem to be:

- o family and village stability and protection, including health, mental health, alcoholism prevention
- o education of the young
- o cultural rights, including subsistence
- o land ownership and economic development
- o education of adults, including jobs
- o political participation in state and national government

To the elders and older adults in most villages the above desires were a seamless web and there was no conscious ranking. None was particularly more important than another because all were important. Nevertheless, the working out of Alaska Native futures within the framework of western law creates the necessity for some kind of prioritization.

The adversary relationship that is the core of western jurisprudence, and which definitely affects the collegiality of its legislative institutions, is certainly at great variance with the basic cultural values of Alaska Natives. The question that was constantly asked prior to ANCSA was,--"What institutions could be created that would mitigate the dichotomy between government and Alaska Native culture?". The next question was whether these institutions would function best under federal or state sovereignty.

The federal record towards Alaska Natives and other North American Indians was not viewed with great admiration by either those interested in devising solutions to the claims of Alaska Natives nor by most Alaska Natives themselves. The termination policies exercised since World War II, the failure to implement the "Buy Indian" Act of 1910 (except in a cursory and degrading manner), the equal failure to make a meaningful effort to use the Indian Reorganization Act truly to better life on the reservations, all influenced thoughts of those concerned about Alaska in the 1960s.

On the other hand, the state policy was largely to avoid the issue and force a federal determination at federal cost. This obviously did not create a record which would lead Alaska Natives to seek solutions under state institutions. The slow acceptance of state schools during the early years of Alaska statehood is indicative of their feelings at that time. Thus, somewhat through happenstance and through a lack of better alternatives, Alaska Natives accepted conveyance of their claims settlement largely through two institutions: the private corporation and fee simple land ownership.

Due to the rush to pass ANCSA, the long-term implications of the fact that both of these institutions were under state sovereignty and control received little discussion. Neither did the fact that the two institutions that were the framework of western capitalism--private property ownership and the corporation--were to provide the structure through which Alaska Natives could best pursue their future.

That future should be viewed through the perspective of the immediate future of the critical years after 1991 and also of the long-term future of the next 50 years and more. Whether that future best rests within the care of federal sovereignty, state sovereignty or some form of independence not presently available within the federal/state relationships of the United States, is a question that can only begin to be answered by a detailed structural examination of the options available through which the expressed desires of Alaska Natives can best be met. The following is an outline of what the beginnings of such a structured examination might entail.

Family and Village Stability and Protection

The options presently available are:

- o state chartered governments
  - first class city
  - second class city
  - borough
- o federally chartered governments and organizations
  - traditional council
  - IRA council

Municipalities in Alaska are granted broad general and regulatory powers by Article X of the Alaska Constitution and Title 29 of the Alaska Statutes. They can be established by petition or by legislative action. Special service districts may also be created by legislative action. The two major examples in use now are Rural Education Attendance Areas (REAAs) and Coastal Zone Management (CZM) Districts.

The advantages of boroughs and cities are that, if proper funding is available, a wide range of services can be operated under local control with the state and federal role limited to technical, engineering, and administrative oversight--usually on request. As a practical matter, more help is sought than is given in most cases. The practical advantage is that day-to-day administration and provision of services is by local people or by people working for the local government.

The unique role of non-profit organizations in providing services on a regional basis reflects the flexibility of the system and its ability to adjust to new legislation and new funding flows. Local government in rural Alaska was given a substantial boost by federal funding under the Comprehensive Employment and Training Act (CETA) in the 1970s. This has gradually changed to state funding under revenue sharing as CETA funds diminished.

Control of police, health, protection and education can become as real as the financial support available--as the North Slope Borough experience demonstrated.

Alaska will undoubtedly be the leading oil and gas producer in the nation for the next century. There is no reason to expect revenue sharing and other funding to diminish; indeed, as the present unwarranted increase in the state bureaucracy receives a political readjustment, local revenue sharing may well increase.

On the other hand, federal funding may well remain at its present stagnant levels for some time and is much more subject to overall historical development in the United States for the foreseeable future.

The recent rejection by the Supreme Court of the "contingency" clause of the Coastal Zone Act is an indication that federal care for local rights is indeed a slender reed to rest upon, especially when they inhibit major federal programs such as outer continental shelf development.

The future of the federally sponsored governments and organizations is much more obscure and difficult to chart. In part this is because there has never been a single consistent policy of the United States government towards Indians and Alaska Natives. In Alaska, due to ANCSA, it is more confusing than usual when Indian law and policy is considered.

The trends of the past decade towards more local control by Natives over their affairs will probably be continued. Whether that trend will be accompanied by funding in amounts to make local control more meaningful than under state sovereignty is the gamble that must be assessed by Alaska Natives.

The attorney general of Alaska is on record that federally sponsored governments are not entitled to state revenue sharing. This is certainly the easiest political position for the state to adopt in the short run. The long-run implications of creating pockets of poverty, poor education and diminished services in an otherwise prosperous state can be put out of mind by each state administration during its four or eight year tenure.

There is no comparable institution to borough government at present available in federal statutes. The land control patterns of Alaska would make it difficult to create large reservations similar to those elsewhere in much of the state unless substantial land trading was done. Of course, small reservations are possible but would, in most cases, be limited in their capacities to serve as regional governments.

A continuation of the district concept, presently used for education with the Rural Education Attendance Areas and for planning with the Coastal Zone Management Districts, would eventually create a plethora of independent bureaucracies. Health services are a mix between federal/state/local delivery services at present with the key linkage being between the health aide, who is nominated and supervised by the village council, and the federal Public Health Service doctors at the regional hospitals. State funding for clinics and equipment is important, as are the direct services provided by state nurses and technicians and by employees of the regional non-profit corporations.

No long-range plan for rural health services of any substance has been developed. The general feeling is that the maintenance of the status quo, insofar as responsibility for funding services is concerned, is the best option presently available. The major problem with this is that the present system has largely plateaued due to federal budget restrictions while health care in urban Alaska has increased dramatically in the types and quality of services available.

Improvements in police and fire service are, so far, based upon direct revenue sharing to the rural communities with the State Troopers providing expert support to the village police as needed. The system of justice for the rural areas has certainly received a good deal of attention from some elements of the judiciary for the past decade, but the level of support for continued training and upgrading the skills of village police and magistrates is uneven. However, is is probably much better than any federal program which might be substituted, since there was never a comparable federal program in Alaska to compare it to and it would be in essence a new effort for the federal government.

The problem of how to handle the unorganized borough in Alaska, which include most of the predominantly Alaska Native communities, has been put off by the last several legislatures. The state is reluctant to desert the concept of the borough as the regional government and, thus far, the districts have proven to be reasonable alternatives for educational services on an area basis.

As stated before, there is no federal form of regional government available except for the reservation. All in all, there is probably a better chance that the present system in Alaska will evolve more satisfactorily and provide more local control than would federal trusteeship.

Education of the Young

Alaska has graduated its first class of Alaska Natives whose education was totally within their home communities. Educators throughout the state are looking with both anticipation and apprehension at their next steps in post-secondary education, vocational schools, jobs or living traditional lifestyles.

The steps of implementing the local high schools was only undertaken after almost all efforts at regional high schools or distant boarding schools had proven unsatisfactory to the majority of parents and students.

The State of Alaska is presently spending large sums on education and almost totally supporting primary and secondary education throughout the state. It is doubtful that federal funds would come close to matching those available under the state programs for either operational or capital expenses. The sorry physical state of the BIA schools taken over by the state is a case in point. Another is that when federal funds supported the "Head Start" program there were only 18 places served in Alaska; under state funding it has become a statewide program.

Finally, it is not likely that Johnson O'Malley funds would support bicultural programs in any part of the state at the level that REAA budgets are supporting them.

A strong emphasis on education as a means of serving both those Alaska Natives who wish to enter the cash economy and those who wish to live the traditional life, has been a continuing thread in the development of the claims settlement and other Native rights in Alaska. While there is not universal satisfaction with pre-school, primary and secondary education, there is probably more satisfaction in the villages at the moment than there is in the urban areas of Alaska. Many rural schools are over-directed by their administrators, but many have pulled together a core staff of dedicated professionals who are truly developing working bicultural curriculums that meet the needs, as presently stated, of parents and students. The missing element is for more educators who will serve their districts long enough to achieve a curriculum that truly meets the particular needs of that district. In any case, the rural school districts are a fascinating melange of brillance, mediocrity and failure at the moment and, in that, are little different from American education elsewhere.

In higher education, the University of Alaska has the constitutional mandate to make higher education available to all the state's citizens and has decentralized service delivery steadily since statehood. There has been an attempt to provide each region of the state with a community college and many efforts at cross-cultural education. However, it would be safe to say that there is general dissatisfaction with the University among many Alaska Natives at the moment for reasons that require some in-depth analysis since there are so many programs involved in rural Alaska and some are obviously reasonably successful.

It may be that Alaska Natives simply feel that there is no part of the University which they can regard as uniquely theirs. However, there is nothing in the University structure or mission that would not permit the development of units that meet this need. Some of the existing community colleges show promise of evolving in this direction. Certainly an institute of Alaska Natives studies with an oversight board of Alaska Natives, a teachers' college devoted to training rural teachers, an institute for rural health, and a host of other programs are within the University's overall mission and are things that are politically and educationally feasible.

In comparing Alaska Native education to that of Greenlanders, Lapps and Canadian Inuit and Indians; Canada and Alaska have generally gone about it the same way. In Greenland and in Norwegian Lapland, teachers' colleges were established long ago to train teachers in the Inuit and Sami languages and cultures as part of their teaching education. As a result there is, especially in Greenland, a surprisingly large amount of written material available in the language due to the requirement for textbooks.

What works in one country certainly does not transplant totally to another, but certainly elements of what is successful in one country can be considered for use in another.

As pointed out earlier, Alaska Natives have viewed education as both a threat to cultural survival and an aid to it. There is no reason to doubt the validity of that perception now or to believe that it will not be equally valid in the future. It all depends on how it is done, whether under federal or state auspices. The state looks like a better bet at the moment.

Cultural Rights, Including Subsistence

Since maintenance of traditional values is at the core of most recent Indian law, it cannot be gainsaid that the climate is reasonably favorable under federal sovereignty. The state does not have such culturally or racially defined statutes and has vigorously refused to implement them. Even the subsistence law has a geographic rather than an ethnic base.

However, there is nothing in state statutes that prohibits exercise of cultural rights in a reasonable manner. The definition of reasonableness is most often tested in the taking of fish and game when cultural practice dictates their being taken out of season. The same situation existed under federal law for two generations and the federal answer to Alaska Natives taking waterfowl protected under federal law and treaty out of season was usually non-enforcement. The same course is occasionally taken by the state but strict enforcement is more often the rule there. This thorny subsistence issue will remain irrespective of whether federal or state sovereignty prevails. Unless overriding federal dominance is imposed, most subsistence use will take place in waters and or lands where the state writ prevails.

At present, game populations are high throughout most of Alaska. Eventually, they will probably decline unless total management for ungulate reproduction, on the Swedish model for moose, takes precedence over other species. Assuming that there will be a decline in five years or so, a heating of the subsistence issue could occur about the same time that the 1991 transition was underway. It would seem imperative that a firmer administrative and philosophical base on subsistence be established before that occurs. Essentially, subsistence users must be viewed as the state law decrees--as priority users of fish and game--and the regulators, enforcers, and managers must truly believe this. In an ideal world, subsistence users would be incorporated into the regulatory and management nexus on a day-to-day basis. The present regional boards of fish and game are only a step in that direction. A concerted effort to move fish and game management out of the cities and into the villages to a greater degree would seem to have some merit. If we can trust para-professionals, as the village health aides, to provide service to people, surely we can trust para-professionals in wildlife management as a part of the process.

Cultural expression is most obvious not only through economic structures (like subsistence) but also language and religion. If the North Slope Borough or any local government wishes to make Inupiat or any other language their official language, there is no law against it. English is the customary language of Alaska, not its official language. Likewise, there is no prohibition against most conceivable religious practices, dress or housing codes.

Ultimately, the most difficult area in maintaining traditional and cultural rights will not come from intrusion by television, or from education, or from religion, but from fundamental changes in kinship relations. Those changes may be triggered by the above, but it is out-migration that will continue to be the major threat to survival of traditional values. Most Alaska Natives recognize this and there have been myriad responses to the problem. It may well be that the combination of land ownership and corporate stock ownership will be the magnets that will hold people to their traditional relationships. There will always be some who will wish to fly away, but if a critical number of each generation remain, the traditions can survive.

Land Ownership and Economic Development

The relationship of Native land ownership to the corporate structure established under ANCSA has been identified as one of the major problems confronting Alaska Natives in 1991. However, there is no barrier to separating the lands and the corporations at this time except for the failure of stockholders to agree and the legal actions that would be brought by those in disagreement. Corporations having valuable urban properties have been involved in active transfer of title for several years.

There are many forms of trust relationships under which the land could be sheltered should that be the desire of the stockholders. The Bishop Trust in Hawaii has operated for almost a century and that involved the transfer of privately held lands to a relatively irrevocable trust. The difference is that only one individual had to make that decision, not several hundred or several thousand stockholders.

It is an equally difficult decision requiring a majority vote to return the land to federal trusteeship. Therefore, the problem is choosing which option of land protection to bring to a vote. It may well be that special state legislative or administrative action would be more attractive than federal trusteeship.

The problem of taxation rests largely with the state. The Land Bank concept, where needed, could be made available under favorable political conditions. Federal trust would, of course, eliminate the property tax problem.

Some form of private trust producing income to specified heirs would eliminate in part the problem of the "after borns," those born after the passage of ANCSA on December 18, 1971.

Turning to the relationship between land ownership and economic development, it is important to separate out those ventures which have rested upon the capital made available from the claims settlement from those dependent upon land. Those dependent upon land are dependent upon natural resource markets for their viability and are, by the nature of the Alaskan place in many markets, not highly competitive. With any luck, those regions with oil and gas potential should be relatively wealthy in the next fifty years while the future of those dependent upon timber as their major resource is difficult to predict. The near-term future role of Alaska in locatable minerals and in coal is also uncertain. However, reasonable optimism for the long term has been displayed by the industry and there is no reason why some generation of Alaska Native landowners should not reap benefits in these areas. The difficulty is in predicting which generation will benefit and in insuring that subsurface rights are controlled for the long term. The propensity of present holders to secure present value to its maximum is present in every land owner historically and the degree to which this is mitigated by traditional cultural attitudes towards land is the controlling factor. In this sense, Alaska Natives have their traditional values working in favor of long-term retention as has been demonstrated in several early ventures dealing with subsurface resources. However, the attitude of the rest of Alaska's population towards land has been, in the main, to treat it as a short-run commodity investment and to insure that the present value is maximized. In Alaska's urban areas land speculation has tended to drive out long-term holders, unless those long-term holders have great wealth in holdings other than Alaskan lands. Those Alaska Native corporations whose holdings are primarily in urban areas have had difficulty in escaping from this speculative drive, but can also benefit from it in capturing present value.

In the United Nations Conference on Habitat in 1976, land speculation was identified as the greatest threat to cultural survival in urban and urban-fringe areas throughout the non-developed world. Mainly, the concentration on capturing present value becomes overriding to all other interests. Transferring present value to investments that will support traditional lifestyles has not been done with notable success anywhere. Only those cultures which are separate because of geographic or economic barriers have any success in maintaining tradition.

Two major forces driving land speculation have been urbanization and tourism. In a sense, tourism is simply an extension of urbanization as most tourists are urban residents who are expending their capture of present gains in non-urban areas. Alaska Natives are in a relatively good situation in regards to both of these forces since most of their lands are well separated from the urbanizing areas of Alaska and tourism, while important, is a relatively small part of the economy compared to oil and gas and government.

Alaska Natives are well buffered, in the main, by geographic and economic barriers to land speculation drives. Alaska's climate makes mass tourism a difficult commodity to promote outside Southcentral Alaska and it will probably remain so for some time. If those Alaska Natives living in areas distant from major speculative forces maintain traditions, it should create a critical mass within the state society to which Alaska Natives who are subject to such modernization and speculative forces can adhere. It must be a large enough mass to effect the state government, the universities, federal agencies and private business on a continuing basis.

Many Natives have followed the process of moving between urban-oriented lives and rural lives since urbanization of Alaska Natives began after World War II. With support from governmental and private institutions, there is no reason why this manner of accommodating traditional needs to present needs cannot continue for a long, long future.

Education of Adults, Including Jobs

Most important in this area of adult education is enabling the present generations to control more fully their lives through transferring responsibility for those jobs traditionally accomplished in rural Alaska by non-Native migrants to Alaska Natives. The successful utilization of para-professionals in health and education services has established a tradition which could be adhered to in a host of other areas. Most of the barriers to this are not in ANCSA or in anything particularly related to Alaska Native affairs, but in the protective structure built up by labor unions and professional societies.

The principal reason advanced in the past for not following this path is well known to all who have lived in Alaska and, indeed, in the Canadian North. Rural residents are not responsible, they will go hunting just at the time when the job needs them, investment in their training is not cost effective, and a long legion of other complaints from those whose major interest is in maintaining the status quo. There is now a substantial body of accomplishment which refutes the above contentions and Alaska Natives are taking control, with substantial help from state agencies, educational institutions, and to a lesser degree federal agencies.

Anyone connected with adult education in Alaska knows that the desire is there in substantial numbers of Alaska Natives at every age level to acquire those new skills which will provide greater control of their lives and of the new institutions they acquired through ANCSA. A good deal has been done in the past ten years but a great deal remains for all elements concerned with adult education and rural affairs to accomplish.

The main effect of creating federal reserves would be that state adult education programs and job programs would not be available in communities that elected to federal sovereignty. The rights of Alaska Natives to these programs in other areas would not be impacted unduly.

Political Participation in State and Local Government

The control of the Alaska Legislature by the urban areas has already occurred and this trend will continue unless there is some unforeseen massive reversal of Alaska's future. Prior to World War II less than one-third of Alaska's 75,000 people lived anything approximating an urban lifestyle and most of those had strong ties, economic and social, to rural areas. By statehood in 1958, the population had tripled and two-thirds were essentially living urban lifestyles. Immediately prior to the pipeline, 75 percent lived in urban areas and now it is 80 percent. Along with this has come a greater and greater dichotomy between urban and rural lifestyles.

At its present growth rate, Anchorage is gaining one House seat per year and a Senate seat every four years. Even massive state expenditures in essentially rural industries, such as fishing, have done little to reverse the urbanization trend. Almost all new migrants seek their job opportunities in Anchorage and there is a small but steadily growing group of fishermen, timber operators and others who operate from Anchorage. Rural areas are not losing population, they are simply growing much slower.

The two major sources of in-migration to Alaska up to 1976 were retired military who had served in Alaska and like it, and those recruited to staff oil and gas development. This established the trend towards the rapid escalation of conservatism in Alaskan politics. Recruitment since 1976 has been much more mixed due to the rapid escalation of governmental hiring by the state and municipalities. This group is very much the mixed bag politically that was turned out by American universities and trained by American corporations in the 1960s and 1970s. They, along with a large recruitment of professionals in recent years, probably form the ranks of the independents--a wildy mixed lot.

Alaskan voters have not accepted Alaska Native candidates in any statewide race since statehood. Neither have Native candidates been successful in either Senate or House urban districts. This provides many Alaska Natives with a well founded fear for their ability to successfully prosecute their causes through the state political process.

If some form of federal arrangement is chosen by some Alaskan Natives, there should be no restrictions imposed on running for state or national office on those living in federal communities other than the perceptions of the voters. However, it would probably not prove to be a political asset in most election districts.

The major protection for the future would appear to be in those institutions which must benefit all Alaskans irrespective of location or race. Thus revenue sharing to support education and health services, a continuation of a strongly decentralized University of Alaska presence, general

revenue sharing, statewide improvements in transportation and communications (a mixed bag from the perception of many rural residents and rightly so), and the creation of special efforts at every level to maintain traditional ways, offer reasonable hope to offset the increasing disparity in numbers.

The relationship between conservatism and liberalism in Alaska and the United States is important but probably not a major concern. While liberals have traditionally been more supportive of government programs to support Alaska Natives, conservatives have a real interest in insuring that Alaska Natives' contribution to economic development in Alaska is maximized. In seeking their own path to the future, Alaska Natives will work out the necessary accommodations with both, hopefully to their benefit.

Summation

Operating under state sovereignty probably offers a greater range of political and economic options for the future of Alaska Natives than does a return to federal sovereignty. The political perils are obvious by the present composition of the Alaska Legislature and its increasing urbanization. However, the urban areas have elected many who worked hard for programs and law benefiting Alaska Natives in the past, and there is no reason why that should not occur in the future.

In so far as the possibilities of creating a special form of sovereignty, either federal or state, we must bear in mind that the ultimate sovereignty was originally vested in the states, except where the Constitution or the Congress preempted that sovereignty. The Civil War pretty well nailed down the bounds of separatism in the American Union and, unless some form of Commonwealth approach were taken, there would not seem to be many options. The way in which the parcels of Native lands have been interspersed with state and federal lands over most regions of the state would make it difficult to give such sovereignty any cohesive geographical expression.

However, within the framework of the State of Alaska and the United States, many options in addition to those laid out in ANCSA are available. The best feature of ANCSA, if one has faith in the future, is the flexibility it offers to succeeding generations of Alaska Natives to mold their relationships with their fellow citizens. The other side of the coin is that some things are at hazard.

The people on Tununak have occupied substantially the same site for about 3,500 years. There is nothing in the Alaska Constitution and statutes, nor the U.S. Constitution and statutes, that preempts them from staying there another three millennium--nor is there anything that particularly guarantees it. The sole assurance is in the relationship of that small band of people to that piece of earth they have made so uniquely their own. If they stay and if the sea mammals, the fish and the birds stay, then there is hope for a long, long future for them. All the other villages do not have the special protection that remoteness provides Tununak, but each has its own special relation to its part of Alaska and, with luck and continued adherence to the land and their traditions of subsistence, they can remain as long as they are a part of the State of Alaska and the United States, however long that may be.

Prepared for Alaska
Native Review
Commission Overview
Hearings, Anchorage,
Alaska, March 5-9, 1984

NATIVE AMERICAN CLAIMS TO RESOURCES IN THE LOWER 48, AND UNITED STATES' POLICIES

JOSEPH G. JORGENSEN

FEBRUARY 1984

CONTACT, CONQUEST, AND DOMINATION: CONTACT TO 1887

When Europeans first entered the Americas they were not surprised to find the land occupied by natives. They were puzzled, however, about whether the natives were humans--God's children. This issue was settled in 1513 when Pope Paul III issued an encyclical which pronounced that natives were, indeed, Ademic, God's children and targets worthy of salvation.

Soon another problem arose as to whether natives were being dealt with in fair and equitable fashions by Europeans who sought their land and resources, including their productive human capacities (labor). The conquerors were somewhat puzzled about whether they owned title to land and ownership of labor by virtue of their discovery. The issue of land title was cleared up, for the Spanish at least, by Francisco de Vitoria's well known opinion, published in 1532 (See Cohen 1942 and McNickle 1949), that natives were the true owners of the land, and that the Spanish could not claim title by discovery. In the New Laws of the Indies, 1542, Emperor Charles V, declared Indians to be "free

persons and vassals of the crown."

Over the ensuing two and one-half centuries European crowns, by and large, set policies that required their subjects--persons as well as holding companies and emissaries of governments--to gain the consent of natives in order to purchase their land or so as to acquire it by other means. Treaty-making became a commonly used vehicle in European-native relations during this period. Indian tribes in North America, by these precedents, were recognized as holding rightful title to the land, and were accorded the power of treaty stipulation. Tribes were legal entities with which foreign nations dealt. There were, of course, scores of exceptions to the stricture that fair deals must be struck with Indians whose consent was fully informed before the land transfer occurred. Dutch, British, Spanish, and French subjects--some more than others--expropriated Native land, pushed Natives into bondage, killed Indians in unjust wars, and stole their chattels. Yet formal policies of the European crowns' forbade such acts (see Brasser 1971: 64-91 for an assessment of some unsanctioned practices of British and Dutch subjects during the colonial period):

Beginning with the ratification of the Constitution of the United States, the Congress assumed awesome powers over Indian affairs, powers that are, for the most part, unqualified. These plenary powers derive from the Commerce Clause of the Constitution (Article 1, Section 8) which stipulates that

Congress shall have the power to regulate commerce with the Indian tribes. The first Indian Nonintercourse Act was passed by Congress in 1790, using the Commerce Clause as the enabling legislation. The Act, which was designed to protect Indians from sharp practices with non-Indian traders, required that no one could negotiate with Indians without first obtaining federal consent to do so. The requirements of the Nonintercourse Act have proven very important in recent decisions regarding Indian tenure, a point to which we will return.

During the course of the history of the United States, policies toward Indians have swung back and forth, first in wide, then in more narrow arcs. The thrust behind each of these swings of policy comes from a complex dialectic that is quintessentially American, to wit: the unresolved struggle between individualism and collectivism, between personal rights and group rights, between capitalism and communitarianism, between white actions and Indian responses, and between a non-Indian ideology that abhors special favors to groups under the law, and a non-Indian ideology that champions fair play and compassion.

During the earliest years of the new nation, tribes were treated as collectivities in much the same way that foreign nations had treated them prior to confederation, although only the federal government could deal with them. In 1823, however, Indian rights to land were redefined by the U.S. Supreme Court, and the forces of political economic history, guided by the unresolved dialectic, have swung Indian policies and,

consequently, Indian affairs, like a pendulum. But the dialectic has forever matched a strong thesis against a weak antithesis. The strong thesis champions the rights of the individual. The underlying theme in the history of Indian affairs is the desire to transform Indian culture to white culture, to integrate Indians into the fabric of American life as that life is perceived by business, federal, and Christian interests. Indians have been tugged toward narrow, competitive individualism of the Protestant ethic sort, only then to be shoved toward corporate collectivism. The federal policies that have pushed and pulled American Indians in contradictory directions have been unsettling and unresolvable. For example, Indians as members of a tribe have been urged to join together as a corporate collectivity, yet to sever their tribal ties and become civilized.

In 1823 Chief Justice John Marshall, in Johnson v. McIntosh 21 U.S. (8 Wheat.) 543, decided for the Court that Indian rights to land were impaired. Thus, the vested title to land recognized by Vitoria's opinion had been altered by United States law. Justice Marshall's opinion developed the idea that conquest gave to the United States the exclusive right to extinguish Indian title, but Indian title was not vested: it was, rather, an equitable title of use or occupancy. The doctrine of discovery, as interpreted by Justice Marshall, neither completely extinguished Indian title, nor did it completely deny tribal sovereignty. The Cherokee Nation Cases (Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) I (1831) and Worcester v. Georgia, 31

U.S. (6 Pet.) 515 (1832)) defined what Indian nations were: they were domestic and dependent on the superior power of the federal government. They also defined the limited sovereignty of these domestic dependent nations, namely: self-government, management of their own affairs, internal governance, and the right to engage in political and legal relations with the federal government, including treaty stipulation. Yet in direct contradiction to Worcester v. Georgia, President Andrew Jackson allowed the State of Georgia to extend its power over Cherokee lands by refusing to enforce Marshall's decision.

Political acts, such as President Jackson's, demonstrate the vulnerability of Indian tribes, regardless of the law. Between 1784 and 1871 over 370 treaties were signed with Indian tribes. Treaties were not motivated solely by good will. Between 1850 and 1880 the United States spent $500 million on the Indian wars (Battey 1970). In general, Indians relinquished their land in exchange for goods, often to be distributed as annuities, and for protection, assistance, and peace. Erstwhile Indian land was, then, provided for free to the transcontinental railroads, to homesteaders, to mining and to timber firms, and to claimants under the Desert Land Entries Act. Some land was placed in the public domain, and some was sold. Most treaties were negotiated without the fully informed consent of the Indians. The documents were always written in English. Many treaties were amended by the Senate without consulting the Indian tribes when ratification could not be achieved. Many of the treaty provisions were not satisfied, such as the delivery of annuities and the protection

of Indian land from trespass and expropriation, because the House of Representatives, which did not possess the power of treaty ratification, refused to appropriate funds obligated by the treaties.

By 1871 the House was irritated by its exclusion from the treaty-making process, irritated by the Indian wars, and irritated as well that natives, who "could not understand title to land," and never were owners of a "foot of land," were treated as if they were civilized and political equals of the United States. It was argued that every dollar appropriated for Indians tended to prevent Indians from becoming civilized. To the contrary, the appropriations taught Indians, it was avered, to live in idleness. Senator Stewart of Nevada echoed his brothers in the House, saying rather succinctly that he was opposed to taxing white men to feed the Indians. The Senate joined the House in approving a rider to the Appropriation Act of 1871 which provided that Indians shall no longer be "acknowledged or recognized as an independent tribe or power with whom the United States may contract by treaty." Congress decided, therefore, that statutes were sufficient for all future intercourse with Indians. The history of treaty-making and treaty-breaking is well known, as is the history of agreement-making and agreement-breaking which commenced after 1871 and filled the lacunae created by Congress when it failed to enact statutes for extinguishment of specific Indian titles.

In the Court of Claims Law of 1855, Indian tribes were bracketed with foreign countries. A separate act of Congress was required each time a tribe sought to bring suit against the United States. Between 1863 and 1945 (immediately prior to passage of the Indian Claims Commission Act), a large but untallied number of cases were presented to Congress on behalf of tribes seeking permission to sue for broken treaties and agreements. Congress authorized 152 for adjudication. The Court of Claims dismissed 104 cases without payment, awarded judgments in 32 cases, and transferred 16 cases to the Indian Court of Claims in 1946. About two billion dollars had been claimed by tribes. Judgments, in cash only, totalled about 38 million dollars. Land was not restored to tribal ownership.

By the mid-1880's the treaty-making and agreement-making period had passed. The pendulum had finished its arc dealing with tribes as collectivities possessing group rights. Warfare with Indians had nearly ceased. Indians were corralled on reservations, their populations depleted, their resource bases severely reduced. There was a clamor in and out of government to provide a final solution to the Indian problem. The downward swing of the pendulum was driven by forces determined to push Indians into the main current of American life, bereft of federally-provided lifelines, where they could sink or swim using their personal skills and initiative. "Individualizing" legislation, ostensibly intended to free Indians from federal supervision and tribal impediments, was hammered out without

Indian consent.

INDIVIDUALISM, ASSIMILATION, "FREEDOM": CIRCA 1887-1934

The Congress of the United States was no less impressed with the Social Darwinism of the late nineteenth century than were American businessmen and their British counterparts (see Hofstadter 1967). American businessmen, who lionized the pre-eminent Social Darwinist, Herbert Spencer, argued that there was no reason for white men to be burdened by the slovenly and rapacious. Victory, after all, belonged to the swift and the strong, while the weak were selected out by the process. This was a tooth-and-claw version of natural selection which championed competition as a good thing in and of itself. Several Indian rights organizations, themselves recently formed, and several general assemblies of Protestant sects, who had their counterparts in Congress as well, also sought to "free" the Indians from federal supervision. Whereas these proponents of legislation that would dissolve tribal estates, dissociate tribesmen, and push individual Indians and their nuclear families to compete in life's many facets espoused humane ends rather than the necessity of competitive struggle, such as religious "liberty" and the ownership of a home, outright and clear, the two ideologies coalesced for a single action: the General Allotment Act of 1887.

Between 1878 and 1887 five bills to allot Indian land in severalty were introduced in Congress. Although by treaty rights

the reservations were to belong to the Indian collectivities in perpetuity, Indian populations had been greatly depleted. The large mining and agricultural enterprises were clamoring for Indian land in much of the west and middlewest. Often the large operators simply moved onto Indian land illegally, as did small-scale entrepreneurs. Whites justified the expropriation of Indian lands because the Indians were not producing surplus crops or livestock, and because the Indians were not extracting the mineral resources. So, business growth, which required further expropriation of Indian resources, was accommodated when sufficient support was marshalled by businessmen, small entrepreneurs, and legislators to pass the General Allotment Act. Outspoken representatives of these sectors believed that Protestant ethic individualism must be observed, on the one hand, and that the weak were destroyed in the competition for survival, on the other. They reasoned that if Indians were to enjoy economic and moral success, even citizenship, they must sever their ties with the tribe and assume the ways of civilization.

The General Allotment Act (GAA or Dawes Severalty Act), was resisted by Indians on the majority of reservations, but allotments were made nevertheless. There was no consistent scheme followed in the allotting procedure. Allotments varied among reservations, on the same reservation, by sex, by age, and so forth. Moreover, the manner in which allotments were made was often haphazard and in direct opposition to Indian desires (Jorgensen 1972: 50-56). The legislation called for each family head to receive 160 acres (nothing provided for spouses); each

single person over 18 to receive 80 acres; and all other youths under 18 to receive 40 acres each. But by 1890 new legislation limited allotments to 80 acres, except for 160 acres on unirrigable land. The implementation of the GAA was bizarre. Some Chiefs, themselves often no more than satraps, received double allotments; heads frequently received but 80 acres; women received allotments on some reserves but not others; younger generations were not allotted on some reserves, and the like.

The GAA did not provide land for future generations, nor did it provide for a simple solution to heirship problems in the future. It called for the allotments to be held in trust by the federal government for 25 years, at which time a title in fee patent would be given to the allottee. The fee land would then become taxable and the owner would become a citizen of the United States. The goal of the legislation was that each allottee would develop his land and his or her person, freeing himself from his tribe and tribal ways, and becoming a taxpaying citizen. After passage of the Burke Act in 1906 local Indian agents became empowered to declare competency. Allottees were encouraged to to shorten the waiting period for citizenship by being declared competent, transferring their title from trust status to patent in fee, and moving to cities. This sequence produced immediate citizenship.

The land that remained on each reservation after allotments were made and, in some cases, after acreage was set aside for the

tribe, was deposited in the public domain for acquisition through claims made possible by several acts, or by purchase, or for use through leases.

Indians were supposed to learn how to farm under a provision of the GAA, and joint Indian-federal funds were to be used in developing Indian agriculture. Irrigation projects were begun at Indian expense which often benefitted non-Indians, including Bureau of Indian Affairs personnel, and which often violated Indians' prior rights to water. Indians received little training, few implements other than hand tools, and little capital with which to begin their farm ventures. Indian children were coerced to attend boarding schools away from their home reservations. Resistance to attending these schools was overcome either by withholding treaty-rights payments to parents, or by refusing to recognize the leaders designated by tribes to handle tribal affairs.

Public pressures to force the acceptance of allotments and to return all remaining acreage to the public domain were nowhere greater than in Indian Territory (Oklahoma). Initially exempted from the GAA, that exemption was stripped from the Five Civilized Tribes by Congress in 1893. Allotment rolls were prepared, unilaterally, by the Dawes Commission in 1896 so that allotments could be made. Tribal governments were abolished by the Curtis Act in 1898, which also required Indians to submit to allotment, and instituted civil government in the territory. Eventually the Five Civilized Tribes and 62 other tribes in Indian Territory had

their reservations liquidated. Non-Indians acquired allotments by claiming Indian descent, by marriage to Indians, and by adoption into tribes. In 1908 a federal statute transferred guardian and probate matters for Oklahoma Indians to county courts, providing county judges with control over all restricted allotment within the county of each. Oklahoma's alloted Indians were robbed and defrauded by Oklahoma judges, lawyers, guardians, bankers, and public officials (Indian Rights Association 1924).

Throughout the United States as allottee deaths increased and heirship problems became baffling, several states unsuccessfully challenged the federal government about the trust status of heirship land, seeking to apply state probate laws and to enter heirship land on state tax rolls. They were not so successful as were the non-Indians in Indian Territory. An Omnibus bill was passed in 1910 partly because of heirship problems concerning trust allotments, and partly because of recurrent problems associated with leasing Indian lands to non-Indians. The Secretary of Interior became empowered to declare whether heirs were competent, and to divide heirship property among them. The Secretary was also empowered to sell the land of incompetent heirs and to distribute the proceeds among them, to lease heirship and other Indian lands, and to sell resources from allotted and unallotted lands. With this empowerment, white domination of the Indian was almost complete. Between 1906 and 1920, 30,000 Indians were declared competent. During the last four years of that period Commissioner of Indian Affairs, Cato

Sells, following the policies of Secretary of Interior Franklin Lane, began forcing fee patents by pushing Bureau personnel to transfer from trust to fee patent the land titles of all competent Indians within their charges (Kinney 1937: 286-296). Patents were issued to 20,000 allottees and heirs through Secretary Lane's "blanket competency" policy, 1917-1920.

White farmers and ranchers purchased Indian fee land made available through tax foreclosures, and also fee land put on the market by destitute Indians who had transferred their titles. Other Indian land was leased through liberal arrangements made with BIA personnel. Yet even as early as 1920 consolidation of white-owned farms by large farm operations, including corporations, was taking place. Although farm mechanization was not highly developed, the first farm market glut occurred in 1920, making it more difficult for Indian farmers, unassisted by trucks, tractors, and cultivators; unable to acquire capital; and located long distances from markets to make a success of farming their allotments and heirship land. Crop centralization was already occurring in various parts of the nation, further restricting Indian options in agriculture.

In 1924 the Citizenship Act (43 Stat. 253) was passed, granting citizenship to about 125,000 Indians. By this time some Indian rights organizations and some federal officials thought that the federal policy of pushing Indians into the main current of American life was misdirected. Morality, constitutional guarantees, the ideology of fair play, and an interest in human

dignity for Indians became nagging questions for these people.

In 1926, Secretary of Interior Work commissioned Lewis Meriam to survey the conditions of Indian life and the operations of the Indians Service (BIA). Two years later Meriam (1928) reported that federal legislation had injured American Indians, that federal appropriations to the Indian Service had been insufficient, and that Indian Service employees were incompetent, successful only in tangling themselves and their Indian charges in red tape. The report identified the major Indian problems as ill health, poor educations, inadequate incomes, inadequate occupational skills, dilapidated housing, and complicated legal enigmas. American Indian land holdings had been reduced from 140 million acres in 1887 to about 32 million acres (House Report 2503). The acreage owned by Indians was tied up in heirship status. For the most part, Indian acreage was either leased to non-Indians, or lying idle (Land Planning Committee of the National Resource Board 1935).

The Meriam report presaged a third swing of the Indian affairs pendulum. This swing was driven by forces which sought to restore Indian collectivities, to deal with them, and to restore selected aspects of Indian culture. Meriam (1928) proposed that Indian health and housing be improved, that pre-adolescents be educated on their home reserves, that alienation of Indian land be stopped, and that Indian Service funding be increased so as to lure better qualified people into the Service.

Meriam's plan was aimed at reforming the individualistic-assimilative thrust of federal policy of the preceding 40 years. The forces of the political economy had made a mockery of the program. Yet, the beliefs persisted that individual rights, not group rights, were basic to American life; that goals compatible to all people can be achieved through education; and that all persons should save scarce resources so as to maximize their future benefits, should delay gratification, should invest in self and family, and should develop personal skills through unstinting effort.

Meriam's report addressed humane welfare solutions to Indian problems rather than the causes of Indian underdevelopment. Underdevelopment had increased since 1887, not decreased. The report did not suggest the massive allocation of funds to develop Indian-owned and controlled agricultural, mining, timber or manufacturing industries. Following Meriam's report, the Hoover administration doubled the appropriations for Indian affairs between 1928 and 1932, but trimmed the allocation by 20 percent during the depths of the Great Depression for fiscal 1933. Funds went for Indian education, health, and BIA salaries.

CORPORATE COLLECTIVISM, ACCULTURATION, SELF-DETERMINIATION (WITH RESERVATIONS): CIRCA 1934-1950

Roosevelt's New Deal era occasioned the implementation of contradictory federal policies toward Indians: corporate collectivism was fostered, as was competitive individualism.

These policies reflected the American ambivalence about group rights and laws favoring special groups, and obligations to provide humane assistance to minority groups until such time as their members can strike out on their own. These new policies called for the encouragement of some native cultural practices, accommodation to non-Indian communities near reservations, and the adoption of alien political, legal, and business organizations. Acculturation to the dominant society, or fusion of cultural practices, was promulgated, rather than assimilation into the dominant society.

The major developments in this period began with repeal of the General Allotment Act and passage of the Indian Reorganization Act of 1934 (IRA or Wheeler-Howard Act). In brief, the IRA provided for (1) the creation of tribal governments with constitutions and corporate charters; (2) tribal purchase and consolidation of allotments and heirship land; (3) tribal purchase and consolidation of non-Indian owned land near Indian land holdings; (4) the development of reservation infrastructure, such as irrigation systems, through a modest loan program; and (5) the establishment of schools on home reservations.

Whereas the IRA did not apply to Indians in Oklahoma or to Alaska natives, in 1936 Congress applied some of the Act's provisions to Alaska natives, and also passed the Oklahoma Indian Welfare Act (OIWA). The OIWA adapted the IRA to the "tribeless

Indians" of Oklahoma, allowing them to form corporations and draw from the federal government's Revolving Credit Fund (RCF). Two decades after enactment of the IRA, more than three-fourths of all tribes were opeating under its provisions (Brophy and Aberle 1966).

Commissioner of Indian Affairs, John Collier, the person most instrumental for pushing the IRA through Congress, believed that while maintaining their tribal integrity and nourishing the most valued features of tribal cultures, Indians could be encouraged to work together in order to create viable corporations on their reservations. He also felt that Indian governments could be taught to administer these corporations, as well as to determine tribal membership, levy taxes, assign tribal land for use by individual tribal members, establish police forces, establish courts, appoint judges, control the movements of unenrolled persons on the reservation, submit budgets for BIA and Secretary of Interior approval, create jobs, pay salaries, and so forth. Self-determination, then, was the goal. The model through which self-determination might be achieved was not based on Indian governmental practices. It was a fusion of concepts drawn from several rational-legal forms of government (federal, state, local), several branches of government (executive, legislative, judicial), appointed and elected positions, and some features of modern corporations. A basic constitution and a charter were written in Washington, without Indian consultation, and submitted to tribes. Tribes could modify them before ratification.

Although self-determination was the goal, the IRA was passed without Indian consent, and the ratification of constitutions and charters increased the powers of the Secretary of Interior over Indian lives. So as before, Indian sovereignty was limited, but now the restrictions extended beyond land title to all nature of political, judicial, social, and economic decisions. The new versions of the domestic dependent nations could now have any of their respective decisions vetoed by the Secretary of Interior. Thus, IRA governments exercised limited authority over their tribes. These little states were administered by the BIA. The BIA, in turn, was controlled by the Secretary of Interior, who could exercise his persuasion, reverse, or veto, BIA and IRA decisions. In some instances, even the House Committee on Interior and Insular Affairs retained the authority to disapprove of expenditures from tribal budgets. Financial controls over Indian budgets and the disposition of court awards were regularly retained by the federal office responsible for the allocation of funds.

Although the intention of the IRA was to let Indians make their own decisions, Indians were not involved in the original framing and implementation of the Act, nor did they have control of their own governments once they were incorporated. The BIA administered tribal affairs. Furthermore, once incorporated, the tribal governments often nourished intra-tribal factionalism, a pervasive feature on many reservations in the early twentieth

century. Tribal jobs were few and were often awarded to the kin of tribal leaders. Scarce tribal funds were used for unsuccessful corporate ends, such as farm projects, rather than for equitable distribution among tribal members for food, clothes, and housing. Throughout the early IRA period, no corporate collectivity developed a viable economy.

Especially significant on most reservations was the manner in which tribal land consolidation occurred. Individual allotments and allotted acreage in heirship status, particularly those parcels that were sunk in debt through obligations to irrigation projects, were purchased by the tribe through federal funds allocated for the purpose. Those parcels were returned to trust status, but ownership was vested in the tribe. In many instances, allottees and heirs received nothing for the transfer of title to the tribe because of outstanding debts against their land. In many instances, as well, the IRA government was seen by tribal members as coercing them to relinquish land that they had been told would be theirs for time immemorial. Programs to purchase Indian and non-Indian land resulted in the acquisition of eighteen million acres by 1950, bringing the total Indian-owned trust acreage to 50 million.

Land tenure issues responsible for creating rancor within tribes were not restricted to tribal purchases of allotments and heirship land. Tribal governments were empowered to "assign" tribal acreage to individual tribal members for their use. Family farms for subsistence and production for the market were

encouraged by the BIA. But assignments, which entailed no more than use rights, became confused with ownership. Assignees often treated their assignments as their private property. When assignees let the land lie fallow, and the tribe then decided to lease the land to non-Indians, or to use it for a tribal enterprise, or to assign it to some other Indian applicant, acrimonious disputes sometimes occurred. Erstwhile heirs, whose acreage had been purchased by the tribe in order to solve complicated heirship problems, if assigned acreage which formerly had belonged to them, often considered the assignment to be theirs in perpetuity. In many instances, tribal governments avoided conflict with assignees by continuing the assignments to the persons with whom disputes occurred, or with whom disputes were anticipated.

Indian persons were not only encouraged to create family farms at a time when family farms were failing at unprecedented rates (200,000 between 1920 and 1940), but they were also encouraged to form livestock cooperatives in which each member owned his own stock, but shared ownership of bulls, scales, corrals, and the like. Cooperatives were assigned tribal land, often to the dismay of persons who were not members of the co-ops. The RCF was available for loans to co-ops, individual farmers, and tribes, yet between 1936 and 1952 only $31 million had been loaned ($23 million repaid). Those funds represented about $10,000 available per annum for each IRA chartered tribe.

As farmers and ranchers on and near reservations were foreclosed, or lost their land through unpaid tax liabilities, or sold their property during the Great Depression, the federal government purchased those properties for tribes. During this same period Commissioner Collier was instrumental in pushing the Johnson-O'Malley Act of 1935 (48 stat. 596) through Congress. The Johnson-O'Malley Act, contrary to the original intention of the IRA to enroll Indian children in reservation schools, provided funds to local school districts adjacent to reservations so that Indian children, while living at home, could enroll in those districts and avail themselves of normal public school curricula while accommodating to non-Indian schoolmates and their non-Indian ways. The local whites, whose economies were withering, were happy to receive federal aid for their schools, but resentful of Indian land acquisitions and the wardship status of Indians. White resentment of the privileged tax status of trust land, the failure of Indians as farmers and stockmen, and the perception that Indians did not observe the Protestant ethic code of conduct rationalized white discrimination against Indians.

Whereas some Indians farmed or raised livestock, individually or in cooperatives, most operations were very marginal, or simply unsuccessful. Some tribal and BIA employment became available on reservations. Rather than generating nuclear family units, each of which would take care of its own members as federal policy intended, the reservation economies generated and sustained large and composite family households. And these households were connected to still larger networks of kinspersons

and friends through various mechanisms of the local subsistence economies. The members of large households pooled their skills, their labor, and their resources in order to endure. They were following the communitarian Indian ethic promulgated on the reservations, which besought the young to care for the old, and for each individual to help his relative and Indian friends (See Robbins 1971, Jorgensen 1964, 1972).

Between the ratification of the IRA and the cessation of World War II, federal-Indian affairs followed a bumpy course. Congressional support of BIA policies began to dwindle so soon as Commissioner Collier implemented policies to acquire federal land for Indians. Between 1932 and 1944 the appropriations for Indian Affairs decreased from $30.5 million to $28.8 million (Zimmerman 1957). Collier was replaced as Commissioner in 1945, and the Indian Claims Commission Act was passed one year later. These were harbingers of a reversion of federal-Indian policy to the goals of "freedom," individualism, and assimilation of Indian persons.

During the 1930s and 1940s the federal government had urged the reservation Indians to incorporate and to act collectively. They were not provided the decision-making power nor the economic resources to do so. The tribes were expected to pursue the goals of the IRA and consolidate Indian land while learning how to operate rational-legal systems of government. At the end of the road the BIA could be stripped of its administrative functions.

The corporate collective side of Indian life, however, was engineered by federal government personnel who, at the same time they were promoting collectivism, were also promoting narrow individualism, not to mention the viability of their own federal agency, which needed Indian dependency for its own survival.

Whereas the IRA did not adequately provide for corporate or individual economic success, the reasons for this outcome were not solely attributable to the IRA nor to the BIA's implementation of its provisions. The Great Depression and dramatic changes in the agricultural sector of the national economy foredoomed failure (Nelson 1954, Jorgensen 1972). By the late 1940s the pendulum swung again and corporate collectivism gave way to termination of federal relations with Indians. There was a renewed push to cause Indians to sever their tribal ties and to move to the cities.

INDIVIDUALISM, ASSIMILATION, "FREEDOM," AND TERMINATION: CIRCA 1950-1960

Congress passed the Indian Claims Commission Act (ICCA) in 1946 allowing Indians to sue the United States without seeking a separate act of Congress each time they sought to sue. Congress had several reasons to pass the ICCA. One reason was to stop the procedure of submitting Indian claims bills to Congress. Another was to see justice done to American Indians. But soon after the end of the War, a push began in Congress to reduce the size and costs of government. It was argued that if Indians were

compensated for injustices done to them, their special status in relation to the federal government could be terminated, and the BIA could be dismantled as well. The ICCA, which established the Indian Court of Claims, allowed tribes to claim equity under the law, fair and honorable dealings, Indian title to land, and for "as if" revision of treaties (Lurie 1957). Awards were to be monetary. Expropriated land was not to be returned. Moreover, judgments awarded by the ICC extinguished claims to title.

By and large the ICC concerned itself with title to land, with treaties, and with agreements: not with rapes, beatings, decimation of game, indignities and humiliation to persons or tribes, and unfair dealings. The chief attorney for the government's Indian Claims Section, Ralph Barney, reasoned that any payment to Indians was simply a gratuity and hence could not be unfair. He took the position, implied in Johnson v. McIntosh, that Indians merely roamed over the earth, and at the time of first European contact the land over which they roamed belonged to the federal government by virtue of discovery. At earliest contact, he argued, Indians had neither a political-legal system to adjudicate contracts, nor a capitalist market in which business was conducted. (Some ideas have great tenacity.) Cases were heard, nevertheless, and monetary judgments were awarded to tribes. Media reporting of multi-million dollar awards stirred several authors to attack the ICC and Indian claimants on behalf of beleaguered taxpayers (see Clark 1958). Over $730 million was awarded by the ICC for 370 claims. Indian tribes did not receive

the total awards. Attorneys fees were set at ten percent, and after the first few awards the federal government began exacting "off-setting" costs from the awards as well. Off-setting costs were incurred by tribes, without their consent or even their knowledge, from services provided to them by the federal government during the reservation period.

As awards mounted, Indian recipients became more informed about the extinguishing of their titles, about the niggardliness of the awards, and about the large amounts being siphoned from the awards as off-setting costs. Restrictions were placed on most awards as to the amounts that tribes could use for various purposes. Some uses were denied altogether among some tribes, such as per capita payments. As an important aside, in the 1970s several tribes began refusing the money awarded by the ICC. There were several reasons for doing so, but the main one among them was that people wanted their land titles restored. By 1983, $170 million in awards had been rejected. We will return to this point.

It was believed that Indians were receiving just and final treatment in the ICC, so even before the first decision was rendered in 1950, Congress had begun its move to terminate the federal trusteeship relation with tribes. An important act was to authorize an investigation of the Bureau of Indian Affairs (House Report 2503). According to many congressmen the BIA had long outlived its usefulness, and the investigation was a prelude to its dissolution and to the termination of Indians from

federal services and obligations and federal restrictions on trust property. Upon termination, federal statutes governing Indians would no longer applied, but state statutes henceforth would apply. Tribal rolls would be closed, and tribe sovereignty would be terminated, in fact, if not by law.

During the Congressional investigation of the BIA in 1948, Acting Commissioner of Indian Affairs Zimmerman testified that over 125,000 reservation Indians were ready or nearly ready for the withdrawal of federal support (House Report 2503: 179-188). The remaining reservation Indians, he suggested, could be terminated in 10 to 25 years. Commissioner of Indian Affairs Dillon S. Myer followed Zimmerman and recommended that termination begin immediately with the Indians in California, Michigan, Kansas, and New York, and that Indians in Oregon, Wisconsin, Utah, Idaho, Louisiana, Washington, and Colorado would soon be ready to cut their ties. Soon thereafter, Congress, by unanimous vote, passed a general statement on termination policy, House Concurrent Resolution 108. It was only a "sense of Congress," so several tribes earmarked for termination in that resolution were not terminated. But a spate of specific termination legislation followed and between 1954 and 1962 114 rancherias, bands, and tribes were terminated. The Menominee of Wisconsin and the Klamath of Oregon, two tribes originally mentioned in House Concurrent Resolution 108, were terminated by special statutes. These tribes provide oft cited examples of the negative effects upon all tribes stripped of trust land and

federal oversight. The Southern Paiutes of Utah provide examples of small bands who, at termination, comprised penniless people with few skills and no information about the probable consequences of termination.

In 1954 Congress passed the Menominee Termination Act (25 U.S.C. 891-902). The tribe could not vote on the statute. It could only approve termination in principle. The statute directed the Tribe to formulate and submit to the Secretary of Interior a plan for the control of tribal property and for the delivery of services formerly provided by the federal government through the BIA, including health, welfare, credit, roads, and law and order. The State of Wisconsin assisted the implementation of the plan by creating Menominee County and Town, whose boundaries were coterminous with those of the former 234,000 acre reservation. The County and Town assumed all of the service functions, paying for them from the local tax base. Menominee Enterprises, Incorporated, also created by the State, assumed ownership of the land and assets that had been held in trust by the federal government. A final roll was prepared, and each person whose name appeared on the final role was given an income bond and 100 shares of stock in Menominee Enterprises, Inc.

The tax base was mainly a timber and sawmill operation, whose products and profits declined steadily after 1966. The costs of running Menominee County could not be met, so the Menominee Common Stock and Voting Trust, an eleven-member board

elected by the membership, began selling parcels of the corporation's land to cover their tax obligations, the interest on their income bonds, and to keep the sawmill operating. The corporation's assets had vanished and corporate structure had become dominated by non-Menominees who recommended the sale of land, causing a traumatic effect on the tribe.

Federal and state governments claim to have provided about $20 million in various forms of assistance to the Menominee between 1954 and 1973. But regardless of the actual amount and the uses to which the financial assistance were put, the Menominee suffered a painful series of deprivations. Whereas the loss of some of the former tribal trust land was of utmost concern, the state also denied hunting and fishing treaty rights to the Menominee. And in a replay of the provisions of the General Allotment Act as it was applied to Oklahoma after the dissolution of tribes, Menominee youths and "incompetent" adults, as determined by the BIA immediately prior to termination, had private trustees assigned to manage their individual accounts (bonds, stock shares, cash dividends, cash assets).

The Menominee brought suits in state and federal courts to rectify these and other problems. The Court of Claims [388 F.2d 998, 1001 (Ct. Cl. 1967)] restored Menominee hunting and fishing rights, ruling that the Termination Act did not abolish treaty rights. It only denied specific statutes enacted by Congress. As for the private trusts that were established for individual

Indians, the courts found that congress had the constitutional authority to define a guardianship any way that it wished so that termination could be partial or complete, with guardianship for none, some, or all. The Menominee also challenged congress on the damage done to them from administrative actions in implementing the Menominee Termination Act. Although recovery was denied on the grounds that mere passage of the Act rather than its implementation did the damage, the continued existence of the Menominee Tribe after termination was affirmed. Neither the tribe nor its membership were abolished. Moreover, it was found that in addition to hunting and fishing rights the termination act did not eliminate tribal power over many crucial factors in a collective life, including standing in court, the capacity to contract and to receive grants, and the maintenance of tribal rolls. It was merely difficult to exercise such powers without a land base, federal acknowledgment, and a tribal structure.

The Menominee Tribe proved to be persistent and up to the task of restoring its tribal status with the federal government, but this was accomplished through the plenary powers of Congress, not through the courts. A sustained political movement emerged, nourished by the intense aversion to land sales and to real estate developments on alienated land, and to threats of further sales and similar developments. The Menominee prevailed upon Congress to pass the Menominee Resotration Act in 1973 [PL 93-197, 87 Stat. 770 (U.S.C 903-903f.)], the first of several similar acts affecting tribes in Oregon, Oklahoma,

Arizona, and Utah. The Act repealed earlier legislation terminating the Menominee Tribe, reinstated all rights and privileges accorded to the tribe or its members under treaty, statute, or otherwise, set procedures for the re-establishment of tribal government and authorized the Secretaries of the Interior and Health, Education, and Welfare to contract with, and make grants to the tribal government. This arrangement has not been completely satisfactory, but the tribe is federally recognized, intact, and measurably wiser than 30 years ago when it was terminated and incorporated.

The swing toward individualization through termination was accompanied by many other programs focused on the same goal. Public Law 280 in 1953 transferred criminal and civil jurisdiction over Indian lands from federal to state governments in five states. It was extended to Alaska in 1958 (amended for Metlakatla in 1970 for concurrent tribal and state jurisdiction over crimes). PL280 extended to all other states the option of assuming jurisdiction at their own initiative. Indian consent was not required for the transfer. Many federal boarding schools were closed, while many others were transferred to local public school authorities. In other actions, funds through Johnson-O'Malley were made available for the construction of off-reservation local schools which Indians could attend. In 1952 Congress authorized the transfer of health services from the BIA to private, non-governmental, or state entities, and opened Indian hospitals to non-Indians in some places. In 1954 BIA

health services were transferred to the U.S. Public Health Service (PL 568).

The policy of rapid termination was not specifically repudiated by Congress, although Indian fears and resistance slowed the pace after 1955, and the Kennedy Administration called a moratorium on termination. Yet in 1961, the first report prepared by a special task force appointed by Secretary of Interior Stewart Udall to study Indian problems saw termination as the goal of future policy. This and two subsequent reports were held to be confidential, but the messages were similar to the message in the Meriam Report of 1928: each one pointed out that Indians were the least educated, least employed, least healthy, most deprived American minority (see U.S. Senate 1969 for sections of these otherwise confidential reports). Programs to individualize and assimilate Indians while breaking federal responsibilities to them worked no better in the 1950s and early 1960s than had similarly aimed legislation during the first grand experiment with forced assimilation, 1887-1934. The pendulum was slowed in its swing, and its direction reversed once again and pushed toward the self-determination of tribal collectivities through the actions of several groups, including vocal Indians. But especially important were Indian rights groups, such as the Commission on Rights, Liberties, and Responsibilities of the American Indian, organized in 1957 and underwritten by the Fund for the Republic. (Brophy and Aberle 1966); the American Indian Chicago Conference organized by Professor Soltay and held at the University of Chicago in 1961;

and fears about termination generally expressed by Indians.

CORPORATE COLLECTIVISM AGAIN? WAFFLING POLICIES INCLUDING SELF-DETERMINATION: CIRCA 1962-PRESENT

The call to slow, if not reverse the termination policy, was based on an analysis of the symptoms of Indian underdevelopment, rather than the political and economic causes of that underdevelopment. The clarion sounded for an infusion of public funds--unearned and earned--to help the beleagured Indians. It did not call for consultation with Indians about their plans to develop sustained economics, massive infusions of tribally-controlled capital, the training of Indians in management and finance, or the vesting in Indians of control over the means of production of tribal resources. Nevertheless, very important lessons about dealing with federal and state agencies were learned from the Johnson Administration's "War on Poverty," which swept on to the reservations providing legal assistance, housing assistance, community action projects, job training programs, education programs, and new sources and amounts of federal welfare transfers. Funds were allocated to the development of tribal infrastructure, such as buildings, utilities, and roads to be used by non-tribally-owned firms. Government defense contractors were urged to lease tribal buildings and to use cheap Indian labor. Tribes were also advised to lease at unconscionably low rates their non-renewable resources, especially oil, gas, coal, tar-sands, oil shale, uranium, hot

rocks and hot water (geothermal). Transnational energy corporations benefitted from this advice (Jorgensen 1978, 1984). No successful tribal economies were generated through these programs.

Of the many programs implemented during the Johnson, Nixon, Ford, and Carter administrations, a lack of coordination among the several Cabinet-level departments who administered the programs, and with the tribes resulted in few tribes using programs for which they were eligible.

Although several acts of Congress between 1962 and 1980 are cited as crucial pieces of legislation in promoting the self-determination of Indian tribes, the most important are (1) the several acts that have been passed since 1973 to reinstate terminated tribes, (2) the several acts that have been passed since 1970 which have restored some portions of former tribal lands to tribes (Blue Lake to the Taos Pueblo, the McQuinn Strip to the Warm Springs Tribe, and acreage to the Yavapai Apaches, Havasupai, Yakima, Northern Paiute-Western Shoshone, Southern Paiutes (not yet selected), Zia Pueblo, Santa Ana Pueblo, Siletz, Rhode Island Indians, and Passamaquoddy-Penobscot); and (3), the Indian Self-Determination and Educational Assistance Act (PL 93-638 (88 Stat. 2206 (1975)). Legislation, not litigation, has begun to rectify some of the worst problems created by previous legislation. Yet litigation must not be sold short because successful suits have played important roles in prompting tribes and Congress to seek political solutions through Congress'

plenary powers, and prompted the executive branch to seek compromises to law suits that were deemed far too favorable to Indian plaintiffs in the view of the administration.

First let me mention the Indian Self-Determination and Education Assistance Act of 1975 (U.S.C. 4502-450n). It is my impression that the Act was slow to take hold and to cause dramatic changes in tribal government and tribal affairs. But it provided tribes with considerable possibilities for the management of the public funds and publicly-sponsored services that were delivered to them. The Act authorized agencies of the federal government to contract with and make grants directly to Indian tribal governments for the delivery of federal services.

In the nine years since the Act was passed, tribal governments have struggled with a few management failures, and suffered criticism from some BIA personnel. One tribe, at least, has been placed into what amounts to BIA receivership, though by another name. Yet many tribes have implemented plans that have all but transformed the local BIA to contracting and granting agencies, reducing their personnel and decentralizing their authority. The Uintah and Ouray Ute, Mississippi Choctaw, Kansas Potawatomi, and Zuni Pueblo are a few examples of tribes whose governments have gained greater tribal independence while continuing federal services. Administering the public economy in both its earned and unearned sectors is not the same as owning and controlling production, of course. But the Ute, Choctaw,

Potawatomi, and Zuni have also begun modest and cautious attempts to develop their private sectors. There will be mistakes, problems of capital acquisition, and so on, but fewer bad deals, less poor management, and much stronger negotiating with corporations, state, and federal government agencies than in the abortive attempts to develop tribal economies in the past. The history of Indian relations with corporations, federal, and state agencies, the paucity of Indian capital and information, the enormous power over information, capital, and world-wide markets controlled by corporations, and the helpful relations between government and corporations should not cause great optimism for tribal successes. Yet tribal members have become ever tougher in coping with bureaucracies since the "War on Poverty" hit the reservations running, and ever tougher in dealing with corporations since the mid-1970s when tribes learned the details of the dreadful lease arrangements, joint ventures, and other bad deals that they made with energy corporations on the advice of the Department of Interior in the 1960s and early 1970s.

As a second point, I mentioned at the beginning of this paper that I would return to the Indian Nonintercourse Act of 1790 and its importance for contemporary Indian affairs. In Joint Tribal Council of Passamaquoddy Tribe v. Morton (528 F. 2d 370 (1st Cir. 1975)) the First Circuit Court of Appeals upheld the District Court's decision that the Passamaquoddy were a tribe, that the Nonintercourse Act applied to the Passamaquoddy, that the federal government had a trust obligation to the Passamaquoddy, and that the United States could not deny the

Passamaquoddy's request for litigation against the State of Maine on the sole ground that there is no trust relationship.

Although the courts did not decide upon the legality of the Passamaquoddy Tribe's land transactions with Maine, the decisions suggested first to the Ford Administration and later to the Carter Administration that the Passamaquoddy had a serious claim. Indeed, their claim could void non-Indian title to about half the State of Maine, or 12.5 million acres valued at $25 billion in 1976. That acreage had been taken from the Passamaquoddy and Penobscot tribes by the Commonwealth of Massachusetts (now Maine) between 1791 and 1833, but because the cessions had not been ratified by Congress, the land transactions violated the Indian Nonintercourse Act. The Carter Administration sought to settle the claim by negotiation rather than a prolonged judicial settlement.

In mid-1977 President Carter appointed retired Georgia Supreme Court Justice William B. Gunter to recommend a settlement. Gunter felt that 12.5 million acres or $25 billion was too high. He recommended 100,000 acres and $25 million to be given to the Passamaquoddy and Penobscot. The sum was to be appropriated by Congress. He also suggested that the tribes be given options to buy an additional 400,000 acres, and that the State of Maine be responsible to appropriate annual benefits for the tribes. If the State of Maine conveyed the 100,000 acres to the U.S. as trustee for the two tribes, and also agreed to

contribute benefits to the tribes on an annual basis, Congress should then extinguish all aboriginal title and all other claims the two tribes may have. If tribal consent could not be obtained, Gunter recommended Congress to immediately extinguish all aboriginal title except that held in the public ownership by the State of Maine. The tribes could then proceed through the courts and take their chances on recovering state-owned land. If they lost, they would recover nothing. If the State of Maine's consent could not be obtained, the tribes were to receive $25 million from Congress, and could sue the State of Maine to recover state-owned land.

Soon Senator William Cohen, Maine, called for a bill to extinguish the claim of aboriginal right asserted by the Penobscot and Passamaquoddy. Representative Lloyd Meeds, Washington, went a step farther and sought to adopt legislation that extinguished all tribal or Indian claims to interests in real property, possessory or otherwise, grounded on aboriginal possession alone. And the American Land Title Association also called for the extinguishment of all Indian title claims. Representative Meeds did not stop with his aboriginal claims bill. He introduced an Omnibus Indian Jurisdiction Bill intended to destroy the established Indian legal structure by abrogating all general Indian jurisdiction, hence denying even limited sovereignty to tribes. He also introduced a Federal Reserved Water Rights for Indian Reservations Bill which would overturn the 1908 Winter's Doctrine. At about the same time Representative John Cunningham, Washington, introduced The Native

American Equal Opportunity Act directing the President to abrogate all treaties between the United States and Indian tribes; allot to individual Indians in fee simple all Indian land held in trust; subject all allottees to local, state, and federal laws, distribute all trust funds; and abrogate all fishing and hunting treaty rights. This backlash in Congress was in opposition to fishing rights, water rights, and Indian claims to former Indian land, but it merely articulated a tenacious aspect of non-Indian ideology--one that found expression in policy during the Allotment and Termination periods.

None of the extreme legislation passed, but negotiations were stimulated and the tribes, federal government, and the State of Maine negotiated seriously using Gunter's recommendations as a baseline. The State of Maine in 1979 passed the Maine Implementing Act (MIA) to settle the Indian claims contingent upon federal legislation to extinguish Indians' claims, to provide necessary funds to the tribes, and to supplement State support without modifying the State's Act. Federal negotiators representing Congress and the executive branch settled the knotty issues, such as the extent to which federal support would assist tribal governments under the new state law, the benefits to the Houlton Band of Maliseet Indians, and the date upon which Indian claims would be extinguished.

The Passamaquoddy case was ultimately settled by Congress when it passed the Maine Indian Claims Settlement Act of 1980

(MICSA) (PL 96-240 (1980) 94 Stat. 1785). The settlement differed significantly from Judge Gunter's recommendations, reflecting the desires of the State of Maine and Indian negotiators. Congress allocated $27 million (Maine Indian Claims Settlement Fund), half held in trust for the Passamaquoddy and half for the Penoboscot. Plans for the uses of the funds must be approved by the Secretary of Interior. The principal cannot be approrpriated for per capita or personal distributions, although interest from the principal can be allocated to the tribes for their uses. Furthermore, Congress requires that interest income from $1 million of the fund must be spent annually on Passamaquoddy and Penobscot tribal members over the age of 60.

Congress also allocated $54.5 million (Maine Indian Claims Land Acquisition Fund), $26.8 million each for the Passamaquoddy and the Penobscot, and $900,000 for the Maliseet, to be spent by the Secretary of Interior to acquire land or natural resources for the tribes. The first 150,000 acres acquired for the Passamaquoddy and the first 150,000 acres acquired for the Penobscot are to be held in trust by the United States. Also, any land or natural resources acquired by the tribes through purchase, gift, or exchange from an area designated in the MIA will be held in federal trust. Land acquired outside the area designated by the MIA will be held in fee. The Houlton Band of Maliseet Indians were brought into the discussions about a Maine claims settlement too late to be incorporated in the MIA, but their claims, too, had to be extinguished. So MICSA provides that Maliseet land is to be held in trust providing the State of

Maine provides legislation making it possible.

The Penobscot, Passamaquoddy, and Maliseet were authorized to organize governments if they wished, and to avail themselves of all benefits provided by the Indian Child Welfare Act, the Indian Self-Determination and Education Assistance Act, the Indian Education Act, and other acts which positively influence self-determination by tribes. PL 280 applies to civil and criminal jurisdiction.

A third point of considerable interest is the growing number of tribes which, since about 1970, have refused over $174 million in judgments awarded by the Indian Court of Claims, whose term expired in 1978, and by the Court of Claims. The restoration of land has been sought instead. It is likely that if tribes had been fully informed about the consequences of accepting ICC judgments in 1946, or whenever the tribes filed, many fewer tribes would have accepted the monetary awards. It is undoubtedly true that all of the tribes would have preferred restoration of lands to the awards.

Beginning with a Klamath man who successfully insisted on receiving trust land rather than money when the Klamath Tribe was terminated, many individuals and tribes have refused the monetary awards. In the early 1970s individual California Indians refused checks that were sent to them in the mail, but no suits were filed so far as I know. Recent refusals include the Ottawa-

Chippewa (I.Ct.Cl, Dockets 182,358, 18K: $10.15 million), Lake Superior-Mississippi Chippewa (I.Ct.Cl. Dockets 18S, 18U: $11 million) Northern Paiutes (U.S. Ct.Cl. 342-70: $221,000), Hopi (I.Ct.Cl. Docket 196: $5 million), Seminole (I.Ct.Cl. Dockets 73, 151: $16 million), Western Shoshone (I.Ct.Cl. Docket 326-K: $26 million), and Black Hills Sioux (U.S. Ct.Cl. 148-78 74-B: $106 million).

Each of these cases is fascinating, but the Western Shoshone case will suffice as an instructive example of native doggedness and resolve. Under the provisions of the ICCA, the Washington, D.C. law firm of Wilkinson, Wilkinson, Cragun and Barker filed a claim for the "Western Shoshone Identifiable Group." A $25 million judgment was awarded, $2.5 million of which was paid to the attorneys. Beginning in the early 1960s, well before the ICC judgment was rendered, Western Shoshones residing from Ibapah, Utah to Austin, Nevada opposed the claim filed by the Wilkinson firm on behalf of the "Western Shoshone Identifiable Group." An organization of Western Shoshones was created comprising leaders from many of the small Indian communities scattered across the Great Basin. In the early 1960s the organization called itself the Association of Western Shoshones, later adding more members and changing its name to the Traditional Council. The Traditional Council also grew in representation and formally organized the Western Shoshone Legal Defense and Education Association in 1972. The group specifically sought to protect Shoshone land, hunting, fishing, water, and other treaty rights. In 1978 the group gained still wider support among Western

Shoshone communities, and again reorganized, calling itself the Western Shoshone Sacred Lands Association. This group met frequently over several crucial issues, including the importance of protecting their land from trespass, the need to enforce its treaty rights, fears of consequences to its water rights and water availability, and fear of the prospects of locating the MX system in Western Shoshone territory. But down deep, the overriding concern was Western Shoshone treaty rights, as it had been for decades.

In 1960 the Association of Western Shoshones, in opposition to the ICC proceedings, claimed exclusive right to determine the use and disposal of the Western Shoshone treaty area. The Western Shoshone Treaties of 1863 are of considerable interest because they cede to the Western Shoshone, rather than from the Western Shoshone, several million acres in what is now western Utah and Nevada. The Association of Western Shoshones was unalterably opposed to the Indian Court of Claims proceedings that would extinguish Shoshone claims. Although it took the group twenty years of discussions, expansion, and name changes to be in a position to act, in 1980 the Western Shoshone Sacred Lands Association filed suit in the U.S. Federal District Court seeking title to the 1863 treaty land and petitioned the U.S. Court of Claims to deny attorney fees to the Wilkinson firm.

An astonishing fact about the claims judgment is that Shoshones did not know who Wilkinson's plaintiffs were, that is,

no one could identify the "Western Shoshone Identifiable Group." It certainly did not represent the many Western Shoshones in the Great Basin, who came to refer to the claims attorneys as those fellows who practice law without a client. An important recent decision in the Court of Claims is that the "Identifiable Group: does not represent the Western Shoshones, casting the claims award in limbo. In January and February, 1984, the Western Shoshone Scared Lands Association reconstituted once again, this time incorporating every community and recognized Western Shoshone group in Utah and Nevada. Under the name, "National Council," the Western Shoshones have called a meeting on March 11 of this year with the Senate Select Committee and various other federal representatives to enter talks with the purpose of framing comprehensive legislation that will restore the 1863 treaty area to Western Shoshone title, and pay the Western Shoshones, with interest, all receipts due to them for leases, royalties, rights-of-way, and other income generated by treaty land and controlled by the Bureau of Land Management and other federal bureaus and agencies over the past century.

The solution, if it comes, will come from Congress, not the courts. The Sioux, too, have taken their argument to Congress, plumping for a bill that will restore parts of the sacred Black Hills to trust, and that will pay them reasonable lease rents with interest for the century in which the government has operated the region.

What direction Congress will turn is unclear. About one

year ago Representative James Hansen, Utah, and then Secretary of Interior James Watt expressed interest in reviving the Cunningham Bill (The Native American Equal Opportunity Act). The Reagan Administration has talked favorably about self-determination, and has talked favorably about private enterprise on reservations, but its principal actions influencing Indian affairs have been budget slashes to job training and welfare programs. At this point there is little reason to be optimistic about legislative solutions, approved by the executive branch, that will restore Indian land and pay them back rents with interest. There is also little reason to hold out great hopes for the protection of Indian communities or their environments from large industrial projects on, or in the vicinity of their reservations (See Manygoats v. Kleppe, 558 F.2d 556 (10th Cir. 1977) and Peshlakai v. Schlesinger).

Throughout two centuries of federal policies, Indians have been directed toward collective ends as well as individual pursuits. These contradictory policies reflect dominant strains in American ideology, but their implementations have conflicted, by and large with Indian communitarian practices and ideology. Indians assign symbols and values to land, nature's resources, and to living and sharing with extended networks of kinspersons and friends that are considerably different from commodity values, and considerably different from Protestant ethic expectations. In a dissenting opinion in the taking of Iroquois land for the construction of a dam, Supreme Court Justice Hugo

Black wrote (Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 991 (1960))

> "It may be hard for us to understand why these Indians cling so tenaciously to their lands and traditional way of life. The record does not leave the impression that the lands are the most fertile, the landscape the most beautiful or their homes the most splendid specimens of architecture. But this is their home--their ancestral home. There they, their children and their forebears were born. They, too, have their memories and their loves. Some things are worth more than money and the costs of a new enterprise."

Commodity values, not Indian values have carried the day. Fair play values, however, have found expression through the Commerce Clause, so perhaps we should look to the bright side. Maybe the pendulum hasn't finished its collective swing.

BIBLIOGRAPHY, INCLUDING REFERENCES CITED

Battey, T. C.

1970 "Introductory Remarks by T. C. Battey, Author of `A Quaker Among the Indians'" In Our Red Brothers and the Peace Policy of President Ulysses S. Grant. Lawrie Tatum. Lincoln: University of Nebraska Press. (Orig. pub. 1899)

Brasser, T. J. C.

1971 "The Coastal Algonkians: People of the First Frontiers." In North American Indians in Historical Perspective. Eleanor Burke Leacock and Nancy Oestreich Lurie, eds. Pp. 64-91. New York: Random House

Brophy, William A. and Sophie D. Aberle, Compilers

1966 The Indian, America's Unfinished Business. Report of the Commission on the Rights, Liberties, and Responsibilities of the American Indians. Norman: University of Oklahoma Press

Clark, Blake

1958 "Must We Buy America from the Indians All Over Again?" Readers Digest 72 (March): 45-49.

Cohen, Felix S.

1942 Handbook of Federal Indian Law. Washington: Government Printing Office. (See also Strickland and Wilkinson 1982)

Deloria, Vine Jr. and Clifford M. Lytle

1983 American Indians, American Justice. Austin: University of Texas Press.

Hofstadter, Richard

1967 Social Darwinism in American Thought. Revised Edition. New York: G. Brazziler.

Indian Rights Association

1924 Oklahoma's Poor Rich Indians: An Orgy of Graft and Exploitation of the Five Civilized Tribes-Legalized Robbery. Philadelphia.

Jorgensen, Joseph G.

1964 The Ethnohistory and Acculturation of the Northern Ute. Ph. D. Dissertation in Anthropology. Bloomington: Indiana University.

1972 The Sun Dance Religion: Power for the Powerless. Chicago: University of Chicago Press.

1978 Native Americans and Energy Development. Cambridge: Anthropology Resource Center.

1978 "A Century of Political Economic Effects on American Indian Society." The Journal of Ethnic Studies 6 (3): 1-82.

1984 Native Americans and Energy Development II. Boston and Forestville: Anthropology Resource Center and Tribal Sovereignty Fund.

Kinney, J. P.

1937 A Continent Lost--A Civilization Won. Baltimore: The Johns Hopkins Press.

Land Planning Committee of the National Resource Board

1935 Indian Land Tenure, Economic Status, and Population Trends. Part X of the Report on Land Planning. Washington: Government Printing Office.

Lurie, Nancy O.

1957 "The Indian Claims Commission Act. In American Indians and American Life. George Simpson and Milton Yinger, ed. Pp. 56-70. The Annals of the American Academy of Political and Social Sciences 311.

McNickle, D'Arcy

1949 They Came Here First. New York: J. B. Lippincott.

Meriam, Lewis

1928 The Problems of Indian Administration. Baltimore: The Johns Hopkins Press.

Nelson, Lowry

1954 American Farm Life. Cambridge: Harvard University Press.

Price, Monroe E. and Robert N. Clinton

1983 Law and the American Indian. Readings, Notes and Cases. Second Edition. Charlottesville: The Michie Company.

Robbins, Lynn A.

1971 Blackfeet Families and Households. Ph. D. Dissertation in Anthropology. Eugene: University of Oregon.

Strickland, Rennard, Editor in Chief, and Charles F. Wilkinson, Managing Editor

1982 Felix S. Cohen's Handbook of Federal Indian Law, 1982 Edition. Charlottesville: Michie Bobbs-Merrill.

U. S. Senate

1969 The Education of American Indians. The Organization Question. Volume 4. Committee on Labor and Public Welfare, Subcommittee on Indian Education. 91st Congress, 1st Session.

Zimmerman, William, Jr.

1957 "The Role of the Bureau of Indian Affairs Since 1933." In American Indians and American Life. George Simpson and Milton Yinger, eds. Pp. 31-40. The Annals of the American Academy of Political and Social Sciences 311.

The Re-Emergence of Indigenous Questions in International Law*

and a

Comparative and International Chronology of Indigenous Rights

by

Douglas Sanders
Professor of Law,
University of British of Columbia

for

Overview Roundtable Discussions

Alaska Native Review Commission

March 13 through 16, 1984

Anchorage, Alaska

Suite 304, 429 "D" Street
Anchorage, AK 99501

* Reprinted from Canadian Human Rights Yearbook, 1983
Carswell, Toronto

The Re-Emergence of Indigenous Questions in International Law

*Douglas Sanders**

Sommaire en français

La question des autochtones refait surface en politique et en droit international. Bien qu'elle soit encore la structure prépondérante, l'organisation interne ou nationale mise en place tant par les puissances coloniales que par les jeunes Etats ne correspond plus à la réalité. Qu'il suffise, au soutien de cette assertion, d'invoquer simplement l'existence du droit international contemporain de la personne. Il appert également que les nations se dirigent vers une application particularisée aux autochtones des principes d'autodétermination. Outre leurs droits économiques, sociaux et culturels, les autochtones se voient reconnaître leurs propres droits civils et politiques.

1 INTRODUCTION

European colonial powers assumed control over occupied lands. Their treatment of the indigenous populations varied. At one end of the spectrum

* Professor of Law, University of British Columbia

there was recognition of existing property rights and, in time, of the right of the people to regain independence. At the other end of the spectrum, no pre-existing rights were recognized. The indigenous population became a numerical minority and the colonially-established nation state assumed full internal sovereignty over them. The process was always colonial in character. The United Nations has assumed a supervisory jurisdiction over the process of decolonization, but decolonization, to date, has been limited to overseas or non-contiguous territories. The problem of indigenous enclave populations[1] within national boundaries has been seen in terms of economic exploitation, racial discrimination and human rights. It is not widely accepted that it should be understood in terms of decolonization and self-determination.

Indigenous questions have been on the broad political agenda of the United Nations for perhaps twenty years.[2] In 1971 a study of the problem of discrimination against indigenous populations was commissioned by the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities and, it is hoped, is nearing completion. In 1982 the Sub-Commission formally established a Working Group on Indigenous Populations, to meet each summer in Geneva. There is an understood need for international standards for the treatment of indigenous populations and an expectation that these will be established, in the future, in a declaration or a covenant. Nation states and international bodies have seen the issues involved as ones of poverty and discrimination. The indigenous leaders have insisted upon defining the issues as ones of legal and political rights. Existing legal and political doctrines have no satisfactory response to these claims. The overwhelming success of colonialism in creating new or expanded states was the only answer that seemed necessary. This answer is no longer satisfactory and we are led back to the examination of certain fundamental issues.

2 THE EARLY HISTORY: ACQUIRING SOVEREIGNTY AND LAND

In the early encounter between Europeans and the peoples of the Americas, the question of indigenous legal and political rights was recognized as a question of morality and of international law. Bartholome de las Casas

1. The phrase used in this paper, "indigenous enclave populations", refers to indigenous populations with a distinct land base. The land base may be an area in which some exclusivity of occcupation exists, as with indigenous reserves, or an area where the indigenous population continues to be the dominant population, as with inner Finnmark in Norway or the jungle and forest areas of the interior of South America.

2. The United Nations General Assembly passed a resolution in its third session on 11 May 1949 to initiate a study of the "aboriginal populations and other underdeveloped social groups of the American continent": E/CN.4/Sub.2/L.584, p. 17. Nothing seems to have come of this specific resolution, but a concern with indigenous questions gradually matured. Louis B. Sohn, the distinguished United States authority on the international law of human rights, said in 1973 that the subject of the human rights of indigenous peoples was "clearly on the agenda of the world community": *The Wingspread Report: Protection of Human* [illegible] (Winter 1973) the fi

recorded the beginnings of clerical support for the Indians. In 1511 a Dominican priest in Santo Domingo condemned his congregation, saying they were living in a state of mortal sin because of their treatment of the Indians. De las Casas was the greatest publicist.[3] The great scholar was Francisco de Vitoria,[4] one of the fathers of international law and a theologian at the University of Salamanca in Spain. Vitoria affirmed that the Indians were human and entitled to enjoy civil and political rights. They were the true owners of their lands. Spanish rights were limited to rights of evangelism, travel and trade. Spain, however, could assume rights over the Indians and their lands if it was to the benefit of the tribes. On this narrow basis the doctrine of trusteeship developed, as a legitimation of colonialism.

Vitoria's views were officially accepted in Spain. From the work of Vitoria and de las Casas came the New Laws of the Indes of 1542 and the Papal Bull *Sublimis Deus*, stating that Indians were men and were to be protected in their liberty and property.[5] In a parallel way the work of the Portuguese priest Vieira led to legal reforms from Lisbon.[6] But in both the Spanish and the Portuguese empires, the reforms at the center failed to be implemented in the distant colonies. Indian populations in the Caribbean and in the fertile coastal areas were largely wiped out by slavery, forced labour and disease. In the early 19th century the locally-born Spanish seized power in the *criollo* revolutions led by Bolivar and San Martin. Those revolutions consolidated the power of the local European elite. Any hope of benevolent intervention from Europe was gone.

The Spanish and Portuguese legacy has two parts. The first is the moral and intellectual tradition of de las Casas and Vitoria. A clerical tradition of support for Indians has existed since the time of de las Casas. It reappeared in the establishment of the Aborigines Protection Society in England in 1823 and took secular form in modern organizations such as the International Bureau for the Defence of Indigenous Peoples, founded in Geneva in 1913 and more recent organizations such as the International Work Group for Indigenous Affairs and Survival International. The intellectual tradition of Vitoria continued unevenly through the subsequent work of other international law scholars such as Vattel, Grotius and Pufendorf. Felix Cohen, writing in the United States in the 1940's, attempted to link the Spanish intellectual tradition to the

3. Las Casas' *History of the Indies* was first officially published in 1875. A complete text, based on the original signed manuscript, was published in three volumes in Spanish in Mexico in 1951. A one-volume edited version by Collard was published by Harper Torchbooks in 1971 and gives the account of the 1511 sermon on pages 181-189.

4. Francisci de Vitoria, *De Indis et de Ivre Belli Relectiones*, E. Nys, Ed., The Classics of International Law, J.B. Scott, gen. ed. (Washington, Carnegie Institution 1917).

5. C. Gibson, *The Spanish Tradition in America* (Columbia, University of South Carolina Press 1968) p. 104. The Bull was issued in 1537 by Paul III.

6. See Alden, "Black Robes Versus White Settlers" in Peckham and Gibson, eds., *Attitudes of Colonial Powers Toward the American Indian* (Salt Lake City, University of Utah Press 1969) p. 19

treaty policy of his country.[7] In arguments before the Swedish Supreme Court in 1980 Thomas Cramer traced the influence of Vitoria through Pufendorf to Stampe, a Danish jurist who helped prepare the Swedish-Norwegian border treaty of 1751 which recognized the territorial rights of the indigenous Sami people. The early international law writers, in the end, could not develop a coherent body of thought on the rights of indigenous populations, for colonialism came to be accepted by all European powers. The theory was never resolved, but the practice became unquestionable.

The second part of the Spanish-Portuguese legacy is the story of the reductions. The first reserves established in the new world were the work of the Jesuits in parts of present day Paraguay and Argentina. In 1608 the Jesuits were given the responsibility for evangelization among the Guarani Indians. Between 1608 and 1637 thirty Indian villages, known as the *Reducciones Jesuiticas* (Jesuit Reductions) were established in what was called the Province of Missiones. The reductions were economically successful. They exported tea, cotton, tobacco, sugar, honey and wax. The first printing press in the region was on a reduction. The largest library had over 4,500 volumes. In 1767 Charles III expelled the Jesuits from Spain and its colonies. The reductions, which had always faced hostilities from neighbouring areas, did not survive. What survived were the ruins of their stone buildings and a utopian legend of self-governing Christian Indian communities. The first reserves in Canada were modelled on the experience in the Spanish colonies.[8] John Collier, the author of the 1934 *Indian Reorganization Act*, the centerpiece of the United States "Indian new deal", hoped the legislation would " . . . establish Las Casas' 'utopian dream' of a 'free co-operative commonwealth' which the Jesuits had created in Paraguay early in the seventeenth century."[9]

British colonial traditions in North America were pragmatic. Blackstone saw the need for a treaty of cession or a conquest in order to acquire sovereignty over populated lands. But initial British settlement in North America proceeded under the auspices of feudal-like grants which made no reference to Indians. A recent study demonstrates how colonial officials consistently underestimated Indian populations and disregarded the existing agricultural patterns in what is now New England.[10] They reinterpreted reality in ways which justified their appropriation of occupied lands. While Indian sovereignty was apparently ignored, the practice developed of purchasing lands from the tribes. It has been argued that this process developed from the competition between colonial powers. Sweden and Holland, it is said, purchased lands

7. Cohen, "The Spanish Origin of Indian Rights in the Law of the United States" (1942), 31 Georgia Law Review 1.
8. C.J. Jaenen, *Friend and Foe* (Toronto, McClelland and Stewart 1973) p. 177.
9. K.R. Philp, *John Collier's Crusade for Indian Reform* (Tucson, University of Arizona Press 1977) p. 141.
10. F. Jennings, *The Invasion of America* (Chapel Hill, University of North Carolina Press

from the tribes in an effort to establish a basis of legality which could compete with English claims based on prior discovery. But the colonial competition only led to the formalization of patterns of purchase, for unwritten purchases preceded written documents in English practice.[11] Whatever the exact history, a pattern of treaties emerged in New England. The treaties began as land transactions and became more political. Private purchases from Indians came to be prohibited by statute, with the result that only treaties between colonial governments and tribes were permitted. The treaties, as they developed, had many international law characteristics. They dealt with peace and allegiance. They sometimes made provisions about passports and hostages. Both the property in and the jurisdiction over lands were transferred from tribes to colonies.

As colonial settlement progressed, particular crises or controversies forced some formal definition of the rights involved. A political crisis in the late 18th century led to the centralization of jurisdiction over Indian affairs within the British system and the promulgation of the Royal Proclamation of 1763. The Proclamation did not grant rights to Indians. It confirmed the pattern of recognition of Indian territorial rights which had become established, and set out formal procedures for treaty making. It talked of the "several nations or tribes of Indians with whom we are connected, and who live under our protection". In other words colonial sovereignty had been established. The treaties were to deal with the acquisition of land.

In the early part of the 19th century the United States Supreme Court was called upon to make some sense out of the Indian area. The simplest way to explain the decisions is to note that existing patterns of federal Indian policy were upheld. The government monopoly on purchasing lands from the Indians was declared to be a general legal principle, though it had earlier required legislation.[12] In the famous Cherokee cases the Supreme Court dealt with a fight between the State of Georgia and the Government of the United States.[13] The Cherokee had a treaty with the United States under which a reservation had been established. Georgia attempted to dissolve the reservation and open the remaining Cherokee lands to non-Indian settlers. The court upheld the treaty against the actions of the state. In the course of the judgments the court drew upon the treaty history in New England for a recognition of Indian territorial rights. It rejected the Cherokee claim to independent sovereignty, defining the tribes as "dependent, domestic nations." Chief Justice

11. Purchasing was a response to the fact of a significant and stable indigenous population, whose consent to colonial settlement was a practical necessity. The lack of treaties in New France can be explained by demography more satisfactorily than by doctrine. Jennings dates the first written purchase as having occurred in 1633.
12. *Johnson v. M'Intosh*, 5 L. Ed. 541 (1823).
13. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 8 L. Ed. 512 (1832). See Burke, "The Cherokee Cases; A Study in Law, Politics and Morality" (1968-69), 21 Stanford Law Review 500; D. Van Every, *Disinherited: The Lost Birthright of the American Indian* (New York, William Morrow 1966).

Marshall claimed to base his decision on principles of international law, but cited no sources. He ruled that

> discovery 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.
>
> The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right which all asserted for themselves and to the assertion of which, by others, all assented.[14]

Nine years later Marshall questioned the exact basis of European rights in the new world and explicitly acknowledged the lack of any adequate theory. "But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend."[15]

In the late 19th century the Judicial Committee of the Privy Council was asked to adjudicate in a federal-provincial fight from Canada over the meaning of an Indian treaty. The Canadian courts viewed the treaty as a political document, without legal significance. The Judicial Committee ruled that the Indians had territorial rights to give up, thereby giving legal meaning to the documents which the Canadian government had officially negotiated and signed.[16]

In both Canada and the United States the courts upheld particular federal actions which had recognized indigenous rights. Practice was confirmed. It appeared that certain general principles of indigenous rights had been established, but judges, politicians and officials were able to interpret the decisions narrowly as time passed.

While Indian policy in Canada and the United States had common roots in pre-revolutionary colonial patterns, there was no general British policy for dealing with indigenous peoples. In New Zealand the British obtained a formal transfer of sovereignty from about five hundred chiefs in 1840 in the Treaty of Waitangi. The treaty did not transfer land. It gave "all rights and powers of sovereignty" to the Queen of England. The Queen, in return, guaranteed to the Maori "the full, exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties". The Chiefs gave to the Crown "the exclusive right or preemption" over their lands; that is a state monopoly on purchase, a familiar part of Indian land law in the United States and Canada. Finally, the Queen extended to the Maori the rights and privileges of British subjects. On May 21, 1840, Governor Hobson proclaimed British sovereignty over the whole of New Zealand, including the south island which had not been covered by the Treaty of Waitangi.

---

14. *Johnson v. M'Intosh*, *supra*, note 12, at p. 570.
15. *Worcester v. Georgia*, *supra*, note 13, at p. 543.
16. *St. Catherine's Milling and Lumber Co. v. R.* (1888), 14 App. Cas. 46 (P.C.).

The Maori were agriculturalists, with intensive land use and the higher population density of agricultural peoples. New Zealand law always required the purchase of Maori lands, but experimented with differing ways of obtaining a transfer. Tensions over land increased in the twenty years after the Treaty, with the fraudulent Waitara Purchase sparking a decade of land wars on the north island. In this period New Zealand formally established a land court, to handle transfers of land from Maoris to Europeans. The land court process allowed an individual Maori to force the sale of lands held by an extended kinship grouping. The result was an individualization of control over land that led rapidly to land sales. One writer referred to the court as a "veritable engine of destruction for any tribe's tenure of land, anywhere".[17]

The Maori responded to their loss of land and political power in a number of ways. The land wars of the 1860's were one response. Land leagues were formed to oppose the sale of additional land. A Maori king was appointed in 1858 to establish a unified front to deal with the Europeans. To appease the tribes the *Maori Representation Act* was passed in 1867 establishing four Maori seats in the New Zealand Parliament. This gave the Maori, who were forty to fifty percent of the population, four to five percent of the parliamentary seats. The Maori asked the Queen to permit a separate Maori Parliament in 1891. They established their own Parliament that year, but without approval from England. The Parliament ended in 1902. While the institution of the Maori King continued, the Maori had lost political power. The consensual relationship of the Treaty of Waitangi was replaced by complex land legislation and the Maori Land Court. While the Maori continued to own lands through particular kinship groupings, this was simply a species of private land ownership. No reserves or separate jurisdictional areas were established for Maori communities.[18]

Captain Cook's instruction stated that he was to take possession of lands "with the consent of the natives". While it can be argued that those instructions were complied with in New Zealand, they were completely disregarded in Australia. When settlers in Melbourne drew up a treaty or deed with the local Aboriginals, the colonial authorities in Sydney declared that any such document was "void and of no effect against the rights of the Crown" and described the lands as "vacant lands of the Crown". In 1834, when the British Parliament established the colony of South Australia, it described the area as "waste and unoccupied lands". This was supplemented by instructions that land actually occupied by Aboriginals should not be taken from them. There were no treaties and no attempts to validate European entry by negotiations or by Aboriginal consent. The Aboriginals maintained a kind of

17. I.H. Kawharu, *Maori Land Tenure: Studies of a Changing Institution* (London, Clarendon Press 1977) p. 15.

18. For New Zealand generally, see A.D. Ward, *A Show of Justice: Racial Amalgamation in 19th Century New Zealand* (Toronto, University of Toronto Press 1974); Sanders, "New ...d and ...lia ... crent ", 6... ican J ... ourna

guerrilla resistance and the British launched murderous expeditions against them. The last of these massacres occurred in the northern territory around 1930. Reserves were established in the various Australian colonies for the surviving Aboriginal remnants. At the turn of the century the colonies united under a new federal constitution that mentioned Aboriginals twice. Both references were negative: they were not to be counted in the census and the federal government was prohibited from passing legislation concerning them.[19]

In northern Europe, the Sami controlled an area now divided between Norway, Sweden, Finland and the Soviet Union. Those nations claimed jurisdiction in the Sami areas and gradually non-indigenous settlers entered and taxes were imposed on the Sami as land holders. The conflicting claims of Sweden and Norway were resolved in the border treaty of 1751.

> In a codicil to the Border Treaty, the specific problems of the Sami reindeer nomads were taken up and dealt with in a surprisingly generous way. They would be allowed freely to cross the border in the pursuit of pastures even in wartime but without being obliged to pay taxes in more than one of the two countries. In this connection, mention was made of their *lappskatteland* on both sides of the national border. They were explicitly referred to as their property. One of the Danish jurists who helped to prepare the treaty explained this Sami land ownership in terms of Samuel Pufendorf's *occupatio per universitatem*, that is a title derived from group occupation in a deserted land with limits either manmade or created by nature.[20]

The incorporation of Sami areas within Sweden and Norway had been accomplished, but with explicit recognition of continuing Sami land rights. Later Sweden and Norway reformulated Sami rights as a monopoly on reindeer herding, but without explicit ownership of the pasture lands involved.

Japanese contact with the Ainu on the northern island of Hokkaido developed slowly. Stablized trading relations date back to the 16th century. In 1799 part of southern Hokkaido came under the control of the Tokugawa Shogunate. In 1868 Hokkaido became part of the territory of Japan. Japan established a colonization office 1869 and promoted the migration of Japanese into the area with offers of homestead lands and subsidies for relocation. In 1883 the Japanese government began a program to establish agriculture among the Ainu. In the same period the traditional hunting and fishing economy was undercut by Japanese settlement. In 1889 the *Former Indigenous Protection Act* was passed with provisions for individual Ainu land grants, agricultural

19. The two constitutional references were removed as a result of a referendum in 1967, the normal means of constitutional amendment in Australia. In general, see J. Roberts, *From Massacres to Mining: The Colonization of Aboriginal Australia* (London, CIMRA 1978); Sanders, *ibid.*

20. Morner, "Native Land Rights; A Comparative Historical Study of Swedish Sami and Spanish American Indians", *Samerna Och Omvaarlden, Uppsatser och Material*, Samernas Vita Bok V:1 (Stockholm 1975) p. 85 at 93. Lappskatteland is a tax term for a unit of

assistance and separate Ainu schools. A minimal reserve system was established and survives to the present.[21]

The Soviet Union and China include vast areas occupied by distinctive peoples. Lenin recognized the right of Finland to form a separate nation, but the remaining parts of the Czarist empire were retained on the theory of a free association of nations in a multi-national state. Soviet nationalities policy was formalized in the constitution, with a constitutional right of secession. In China the minority nationalities comprise only about four percent of the national population, though they occupy over fifty percent of the national territory. Their "autonomy" is recognized, but within a unitary state. There is no constitutional right of secession. In both the Soviet Union and China indigenous minorities are recognized at different structural levels. Small groups have "autonomous" counties or municipalities, while larger groups have "autonomous" districts, regions or republics.

3 DOMESTIC REFORMS

By the end of the 19th century, the territories of the Indians, the Maori, the Aboriginals, the Sami and the Ainu had been incorporated within states not of their creation. Although the United States had recognized the unsurrendered Indian areas as jurisdictionally separate, in 1886 the Supreme Court upheld a Congressional power to unilaterally assume jurisdiction in Indian country.[22] A Canadian court ruled that a valid Indian local law probably existed in the Northwest before 1803, a safe conclusion in 1867.[23]

The domestication of Indian questions was incomplete. Some ambiguity continued because of the treaties, which continued to be signed in the United States until 1871[24] and in Canada until after the Second World War.[25] Indian political status was anomalous. In U.S. law they were aliens until federal legislation gave them citizenship early in this century. In Canada they were always treated as subjects, not aliens, but, in general, had no voting rights until after the Second World War. Another anomaly involved border-crossing rights. Indian rights to cross the international border between the United States and Canada were recognized in the Jay Treaty of 1794. In a similar way Sami

21. Cornell, "Ainu Assimilation and Cultural Extinction: Acculturation Policy in Hokkaido" (1964), 3 Ethnology 287.
22. *U.S. v. Kagama*, 118 U.S. 375 (1886).
23. *Johnstone v. Connolly (1867)*, 11 L.C.J. 197.
24. Treaty-making was ended in the United States by an Act of 3 March 1871, which provided: "No Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty."
25. Treaty-making in Canada had no written source other than the Royal Proclamation of 1763. Treaty-making was never formally ended, but when the James Bay and Northern Quebec Agreements of 1976 were to be implemented, the method chosen was concurrent federal and provincial legislation. The question whether these agreements are treaties may be raised in the future in the context of new constitutional provisions which "recognize and affirm" Indian treaty rights.

rights to cross the Swedish-Norwegian border were recognized in the Treaty of Stromstad of 1751.

These anomalies were seen as minor. They did not disturb the larger picture that the tribes had been incorporated within the new or expanded states. Earlier patterns of recognition of indigenous sovereignty or indigenous land rights were not constraints on state power. Treaties could be broken by domestic law and were. Jurisdictional arrangements were altered unilaterally. Land rights, previously recognized, were changed. In the United States the *General Allottment Act* of 1884 was a major attempt to individualize reserve land systems. It can be taken as representative of "liberal" reforms of the period which sought to end collective land-holding by indigenous peoples in the Americas, New Zealand, the Nordic Countries and Japan.

In the twentieth century states generally pursued integrationist and assimilationist policies. Even where there was a history of treaties, reserves and special status, governments, to the degree they had an active policy orientation, sought assimilation. "Indigenism" was no exception.[26] The policy of indigenism, associated with the Mexican revolution, focused both on land and on the use of applied anthropology. The pre-conquest communal *ejido* land tenure system was revived for Indian communities. Indian cultures and languages were to be valued, partly in line with a change of national symbols and partly as a more sophisticated method of promoting social change. As John Collier later argued in the United States version of indigenism, a healthy Indian community could adapt better than an unhealthy one. Mexican indigenism and the United States "Indian new deal" came together in 1940 at the First Inter-American Conference on Indian Life, held in Patzcuaro, Mexico. The Inter-American Indian Institute was established, now a specialized agency of the Organization of American States.[27] But indigenism failed. The liberal individualist orientation which it had sought to displace, again became dominant in the years immediately after the Second World War. The "Indian new deal" measures to increase tribal land-holding and self-government were replaced by the termination policy of the 1950's. Integration and assimilation were virtually unquestionable goals of indigenous policy in the west.

The stress on assimilation has eased. The focus on egalitarian human rights, characteristic of the post-war period, has been tempered with increased sensitivity to minority rights. There has been a striking cultural and political revival among indigenous populations in many parts of the world. Indigenous peoples have established international organizations and various agencies of the United Nations have come to see indigenous questions as distinctive issues, requiring a special response.

4 THE RENEWAL OF INTERNATIONAL CONCERN

Indigenous questions re-emerged as questions of international law and policy in the nineteenth and twentieth centuries. The international movement

26. See Diaz-Polanco, "Indigenismo, Populism and Marxism" (1982), 9 Latin American Perspe 42.

against slavery, which developed in the early 19th century, extended its concern to indigenous peoples. In 1835 the British Anti-Slavery Society established the Aborigines Protection Society. Through the lobbying of that Society a Select Committee of the British House of Commons investigated the problems of indigenous peoples within the empire and reported in 1837. The Aborigines Protection Society was active on issues relating to Australia, New Zealand, and South Pacific Islands, Africa and South America, but seemed to have a special interest in Canada.

> Bad as had been the treatment of the natives in the United States, where the (Society of) Friends were almost their only protectors, the natives in British North America fared even worse in the unreformed days when French and English Canadians were at constant feud, and when the home authorities were not able to maintain any real control either over the several detached colonies on the eastern side of the continent or over the Hudson's Bay Company and its rival, the North-West Company, in the more distant territories. Matters continued in a very unsatisfactory state until the Dominion of Canada was established in 1867 . . . but various improvements were gradually effected as regards the treatment of natives, and for these the Aborigines Protection Society may take some credit. In Lord Durham and his able secretary, Charles Buller, it had good friends, who, had they remained long enough in Canada, would probably have carried out many of the suggestions contained in a weighty memorial addressed to the Government in April, 1838. Unfortunately, Lord Durham was speedily recalled, and his successor was less in sympathy with the objects of the Society.[28]

In 1881 Helen Hunt Jackson published *A Century of Dishonour*, condemning United States Indian policy. The Governor of the Colony of Western Australia in 1888 proposed giving constitutional independence to an Aborigines Protection Board, because that would " . . . tend to secure the Government from attack and trouble on a vulnerable and exposed side, much at the mercy of a numerous and active class of philanthropists, not always particular to the facts".[29] "Friends of the Indians" societies formed. One existed in British Columbia by 1910, headed by a clergyman-lawyer.[30]

Indigenous peoples did not accept the concept that they were simply a "domestic" issue. They sought a hearing for their grievances over the heads of the local colonial officials. Initially this took the form of petitions within imperial systems. Maori delegations travelled to England to petition the Crown in 1882, 1884, 1914 and 1924.[31] Indian delegations from British Columbia went to England with petitions in 1906 and 1909. The Nishga Tribe in British

---

28. See P.S. King, *The Aborigines' Protection Society; Chapters in its History* (London, 1899) p. 15.
29. British Parliamentary Papers, 1889, C.-5743, "Correspondence respecting the proposed introduction of Responsible Government into Western Australia", Document No. 25.
30. Patterson, "Arthur E. O'Meara; Friend of the Indians" (1967), 58 Pacific Northwest Quarterly 90.
31. Information on the New Zealand delegations is found in G.W. Rusden, *Aureretanga: Groans of the Maoris* (London, William Rodgeway 1888); J.A. Williams, *Politics of the New Zealand Maori; Protest and Cooperation, 1891-1909* (Auckland, Oxford University P)69); lender ataua Man, urch, olitica ment

Columbia hired a law firm in London, England, to prepare a petition as a basis for their hearing before the Judicial Committee of the Privy Council, the final court of appeal within the British Empire.[32]

The creation of the League of Nations established an international forum. In 1922 Deskaheh, a leader of the Six Nations Iroquois Confederacy, began attempts to petition the League of Nations, alleging a Canadian plan to take over the Six Nations reserve.[33] Deskaheh spent most of 1923 and 1924 in Geneva meeting diplomats and arguing the Iroquois case. The governments of both the United Kingdom and Canada went to some lengths to prevent the questions from ever being discussed within the organs of the League. The Netherlands forwarded the Iroquois petition to the Secretary-General, asking that it be communicated to the Council of the League. When that initiative had been successfully stalled, four League members, Ireland, Panama, Persia and Estonia, revived the question by writing to the President of the Assembly asking that the petition be communicated to the Assembly and seeking an advisory opinion from the Permanent Court of International Justice. The opinion was to determine whether the Iroquois were a state and entitled to petition the League. In December of 1923 the Persian member of the League's Council asked that the Iroquois petition be put on the agenda of the Council. Each of these attempts to have the petition considered were stopped by diplomatic interventions. The government of Canada prepared a reply to the Iroquois allegations, which was published in the Official Journal of the League. While Deskaheh was still in Europe the Canadian government dissolved the traditional council at the Six Nations Reserve and established an elected band council system. This had the effect of depriving Deskaheh of his right to speak for the Six Nations, at least according to Canadian law.

Ratana, the Maori leader, visited Geneva in 1924 to petition the League of Nations, but it is not known if he met Deskaheh. Ratana visited Japan on his return trip to New Zealand to see an example of a coloured race running its own country.

Indian international appeals continued. An Iroquois delegation went to San Francisco hoping to be heard at the conference which drafted the Charter of the United Nations. In the years after 1945 there were regular petitions to the United Nations from Indian groups, though the world body had no mandate to deal with private submissions. In 1953 the North American Indian Brotherhood, a regional group in British Columbia, sent three Indians and a lawyer to New York. John Humphrey, the Canadian head of the Human Rights Division, advised them that they had to deal with the government of Canada.

A transformation of international activity on indigenous questions came

32. Information on the Canadian delegations is found in F.E. LaViolette, *The Struggle for Survival* (Toronto, University of Toronto Press 1961); G. Manuel and M. Poslums, *The Fourth World, An Indian Reality* (Toronto, Collier-Macmillan Canada 1974).

33. See R. Veatch, *Canada and the League of Nations* (Toronto, University of Toronto Press 1975), c. 7.

in the 1960s and 1970s.[34] In 1968 a group of anthropologists attending the Thirty-Seventh International Congress of Americanists in Stuttgart, West Germany, shared information about the terrible situation for indigenous tribes in parts of Central and South America. They decided to establish an ongoing organization, the International Work Group for Indigenous Affairs which is based at the University of Copenhagen in Denmark. In 1969 Norman Lewis wrote an article in the *Sunday Times Magazine* in England on the Indians of Brazil. The article was the specific stimulus for the formation of the Primitive Peoples Fund, later renamed Survival International. In 1971 the Programme to Combat Racism of the World Council of Churches co-sponsored a conference in Barbados. The anthropologists who participated in the conference prepared the "Declaration of Barbados", which began: "The Indians of America remain dominated by a colonial situation which originated with the conquest and which persists today within many Latin American nations." It called for a termination of colonial relationships, internal and external, and the creation of truly multi-ethnic states. It spoke of an Indian liberation movement which would have to be led by the Indians themselves.[35]

In 1975 the Anthropology Resource Centre was formed, based in Cambridge, Massachusetts. The following year Cultural Survival was formed at Harvard University. In 1978 the Pro-Indian Commission was formed in Brazil. Other groups have formed in Europe. A group in the Netherlands organized the Fourth Russell Tribunal on the Indians of the Americas which held hearings in 1980.

There was a dramatic expansion of Indian political organizations in Canada in the years immediately after 1969. George Manual, who headed the National Indian Brotherhood of Canada from 1970 to 1976, visited New Zealand, Australia, Tanzania and the Sami areas of Sweden. In 1972, at the offices of the International Work Group in Copenhagen, he announced his plan to establish an international organization of indigenous peoples. The founding conference was held in British Columbia in 1975. Indigenous delegates represented nineteen countries in the Americas, the South Pacific and northern Europe. Subsequent General Assemblies have been held in Kiruna, Sweden, in 1977 and Canberra, Australia, in 1981. The World Council of Indigenous Peoples is organized on the basis of five regions: North America, Central America, South America, the South Pacific and Northern Europe. The member organizations are the semi-official indigenous organizations which exist in the western industrial democracies and which are increasingly being established in Central and South America.[36]

---

34. On the non-indigenous support organizations, see J.H. Bodley, *Victims of Progress* (2nd ed., Menlo Park CA, Benjamin/Cummings 1982), c. 10.

35. Papers from the Barbados conference, including the text of the declaration, are reprinted in W. Dostal, ed., *The Situation of the Indian in South America* (Geneva, World Council of Churches 1972).

36. Sanders, *The Formation of the World Council of Indigenous Peoples*, International Work Group for Indigenous Affairs, Document No. 29 (1977).

The American Indian Movement in the United States sponsored an international conference in South Dakota in 1974 which led to the formation of the International Indian Treaty Council. The name reflects the original goal of having the United Nations recognize the treaties between the tribes and the United States government as true international treaties. With the inclusion of representatives from Central and South America, the focus on treaties has been down-played in favour of an assertion of rights of sovereignty and self-determination. The International Indian Treaty Council, like its sponsoring organization, has not stressed representative structures as much as a militant leadership. The Treaty Council has been active in international lobbying. The two non-governmental conferences in Geneva, in 1977 and 1981, were dominated by Treaty Council representatives.[37] The Institute for the Development of Indian Law in Washington, D.C. was involved in the legal documentation for the 1977 Geneva conference.[38] Subsequently, the organization split and the new Indian Law Resource Centre became the group active in Indian international legal work. The Centre has prepared complaints on behalf of Indian tribes to the United Nations Human Rights Commission and, with other groups, to the Inter-American Commission on Human Rights. In 1981, the Centre began a project on Indian peoples in Central and South America, with Armstrong Wiggins, a Miskito Indian from Nicaragua as the responsible staff person.

The World Council of Indigenous Peoples, the International Indian Treaty Council and the Indian Law Resource Centre have each obtained non-governmental organization status with the Economic and Social Council of the United Nations. They are thus accredited lobbying organizations, with limited rights of participation in United Nations conferences and activities. They are the only indigenous non-governmental organizations.

If the international legal and political system was to respond to indigenous questions, it was not obvious exactly which framework would be employed. History shows concerns arising in the context of (a) the treatment of colonized peoples, (b) the work of the International Labour Organization, (c) minority rights and (d) human rights. We will examine these four areas, as well as the issue of decolonization or self-determination.

5 THE TREATMENT OF COLONIZED PEOPLES

A concern with the treatment of colonized populations developed before there was any general international commitment to decolonization. Stanley, a citizen of the United States, had explored the Congo basin, opening up the last part of Africa to colonial acquisition. The United States disclaimed interest

37. On the Geneva conferences, see Jsmaelillo and Wright, eds., *Native Peoples in Struggle* (Bombay, New York, ERIN Publications 1982); *Basic Call to Consciousness* (Rooseveltown, N.Y., Akwesasne Notes, eds. and publ., 1978).

38. Out of this work came Clinebell and Thompson, "Sovereignty and Self-Determination: The Rights of Native Americans under International Law" (1977-78), 27 Buffalo Law R[illegible] 69

in establishing a colony in Africa. An international organization was created which, through treaties with the local tribes and formal recognition by European states, became, at least in theory, an independent state. This development was recognized at the Berlin Africa Conference of 1884-85, which was concerned with trade and colonialism in the broad middle-African region. According to Snow, the conference

> . . . marked the definite acceptance by the civilized States of a legal relationship towards aboriginal tribes of a personal and fiduciary character — a responsibility which was at once individual and collective. The declaration of the conference regarding aborigines left no doubt on this point. The principle of the law of nations that such tribes are wards of the society of nations and that the sovereignty of civilized States over them follows the disposition of territorial sovereignty made by the civilized States among themselves was upheld.[39]

The final Act of the Conference provided:

> All the powers exercising sovereign rights or influence in the aforesaid territories bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being, and to help in abolishing slavery and especially the slave trade. They shall, without distinction of creed or nation, protect and favour all religious, scientific, or charitable institutions and enterprises created and organized for the above ends, or designed to instruct the natives and to bring home to them the blessings of civilization.[40]

The kind of multinational protection established for the Congo was attempted for Samoa as well. Both broke down. Samoa was divided between the United States and Germany in 1900 and the Congo became a Belgian colony in 1908.

The Institute of International Law in 1888 continued the attempts to formulate standards for colonialism:

> IV. All wars of extermination of aboriginal tribes, all useless severities, and all tortures are forbidden, even by way of reprisals.
> V. In the territories had in view by the present declaration, the local authority will respect or will cause to be respected all rights, especially of private property, as well of the aborigines as of foreigners, and including both individual and collective rights.
> VI. The local authority has the duty of watching over the conservation of the aboriginal populations, their education, and the amelioration of their moral and material condition. It will favour and protect, without distinction of nationality, all the private institutions and enterprises created and organized for this purpose, under the reserve that the political interests of the occupying or protecting State shall not be compromised or menaced by the actions or tendencies of these institutions or enterprises.
> X. The sale of intoxicating liquours shall be regulated so as to preserve the aboriginal populations from the evils resulting from their abuse.[41]

---

39. A.H. Snow, *The Question of Aborigines in the Law and Practice of Nations* (Washington, Government Printing Office 1919) pp. 22-23.
40. Quoted in Snow, *ibid.*, p. 149.
41. Quoted in Snow, *ibid.*, p. 174.

The themes of protection and trusteeship were confirmed in the Covenant of the League of Nations. Article 22 provided:

> To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this covenant.

As well, article 23(b) imposed on the members of the League the obligation to " . . . undertake to secure just treatment of the native inhabitants of territories under their control". Article 23(b) is said to have come from the work of Adelphus Snow, whose book, *The Question of Aborigines in the Law and Practice of Nations*, had been prepared for the peace treaty negotiations. The clause was not limited to non-metropolitan territories. It was invoked in a controversy involving the treatment of indigenous tribes in the independent African state of Liberia during the period 1929 to 1934.[42] With articles 22 and 23(b) the trusteeship obligation appeared, for the first time, in a multilateral treaty, the Covenant of the League of Nations. But little happened on indigenous questions during the life of the League.

International concerns had a different configuration after the Second World War. There was still no general commitment to decolonization. Non-self-governing territories were subject to Chapter XI of the Charter of the United Nations, which declared that the colonial power was under a "sacred duty" to promote the well-being of the inhabitants of the territories. Decolonization and independence were only envisaged for "trust territories", basically colonies taken from defeated powers.

Belgium put forward the thesis that the "non-self-governing territories" included contiguous or enclave areas. If this was correct, the states with indigenous enclave populations had assumed, as a "sacred trust", the responsibility of promoting the well-being of those peoples and an obligation to report periodically to the Secretary-General. Belgium argued that " limiting the benefits to those peoples who live in the colonies or protectorates, as is the present tendency, is committing an injustice with regard to the others . . . the abuses from which the native populations suffer are hardly more rampant in the colonies or the protectorates".[43]

This application of international standards to the treatment of indigenous enclave populations was vigorously opposed by the states of Central and

42. Guannu, *Liberia and the League of Nations — the Crisis of 1929-34* (Ann Arbor, University Microfilms International 1978); Burghardt Du Bois, "Liberia, the League and the United States" (1931), 11 Foreign Affairs 682.

43. Belgium Government Information Center, *The Sacred Mission of Civilization: To Which Peoples Should the Benefit be Extended? The Belgian Thesis* (New York, 1953) p. 3, as quoted in Y. El-Ayouty, *The United Nations and Decolonization: The Role of Afro-Asia*

South America and other former colonies. "It was the putative threat to the sovereignty of newly independent states that secured the final rejection of the Belgian thesis and the purported restriction of Chapter XI to colonial territories".[44] The reporting obligation under Chapter XI of the Charter was defined in a General Assembly resolution in 1960: "[T]here is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it".[45] In other words, there were no international law standards flowing from Chapter XI of the Charter governing the treatment of indigenous enclave populations. The opening in the League's Covenant had been closed. Belgium had lost.

6 THE INTERNATIONAL LABOUR ORGANIZATION

The concern with indigenous populations as exploited labour pools has largely focused on Central and South America. From as early as 1921 the International Labour Organization has had a special interest in indigenous populations.[46] In 1936, the I.L.O. drafted Convention No. 50 on the Recruiting of Indigenous Workers. In 1939, it drafted Convention No. 64 on Contracts of Employment (Indigenous Workers) together with Recommendation No. 58 on the same subject. In the same year it drafted Convention No. 65 on Penal Sanctions (Indigenous Workers) and Recommendation No. 59 on Labour Inspectorates (Indigenous Workers). In April 1946, the third conference of the American State members of the I.L.O. passed a resolution asking the Governing Body of the I.L.O. to establish a committee of experts on the social problems of the indigenous populations of the world. The committee of experts was established and met for the first time in January 1951 in Bolivia. Their recommendations led to the Andean Indian Programme established under United Nations auspices in 1953 and involving four specialized agencies. In 1953, the I.L.O. published a book: *Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries*. In 1957, the I.L.O. drafted Convention 107 on the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, together with Recommendation 104 on the same subject. The Convention describes indigenous populations as "less advanced" than other sectors of the national society. They were seen as archaic lumps in the body politic, in need of modernization and integration. The major introductory article provides that: "Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries." In general the Convention has an individualistic, in-

44. Bennett, "Aboriginal Rights in International Law" (1978), Occasional Paper No. 37, Royal Anthropological Institute of Great Britain, p. 13.

45. General Assembly, 15 Dec. 1960, Resolution 1541 (XV).

46. The material on the I.L.O. is taken from a draft of the special rapporteur's *Study on Discrimination Against Indigenous Populations*. I.L.O. Convention 107 is discussed in Bennett, *supra*, note 11.

tegrative orientation. By the Convention, special measures to protect the populations involved should only be temporary measures and must not prolong "a state of segregation". The consent of the populations to any scheme of integration is not required, but their "collaboration" should be sought. The assimilationist character of the Convention led the World Council of Indigenous Peoples to reject it. While it is an inadequate document, there are certain provisions which are positive. There are limited provisions for the recognition of indigenous law (articles 7, 8 and 13). Most significantly, article 11 is a strong statement on land ownership: "The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognized." The following article allows for relocations in broadly-stated special circumstances. The final parts of the Convention are concerned with employment and educational questions, linking the instrument to the primary concerns of the I.L.O.

I.L.O. concern for indigenous peoples continued after the drafting of Convention 107. In 1962 a panel of consultants on indigenous and tribal populations appointed by the Governing Body of the I.L.O. met in Geneva. A symposium on equality of opportunity in employment in the American region was held in Panama City in October, 1973. The report of the conference includes the following statement on indigenous peoples:

> Among disadvantaged groups, the problems of indigenous populations were felt to require special attention. The approach to these problems would of course vary according to whether the objective was to integrate them into national economic and social life or to maintain their separate identity and traditional way of life. It was suggested in particular that there should be adequate protection against expropriation of their land. Governments should recognize and financially support organizations of indigenous peoples and, whenever possible native languages should be used as the vehicle for primary education and adult literacy programmes, with the official language taught as a second language.

The statement is important in its rejection of integration as the only proper goal of indigenous policy and in its concern for the protection of the land base of indigenous peoples.

7 MINORITY RIGHTS

Minority rights had been a major part of the concerns of the League of Nations. Certain minority rights provisions were included in the peace treaties which ended the First World War and were under the supervision of the League. They were limited to guarantees for specific European populations. With the failure of the world organization and Hitler's exploitation of minority arguments, the League's minority rights work was generally seen as a failure. The most significant legacy was the discussion of equality in the advisory opinion of the Permanent Court of International Justice on minority schools in Albania. Albania had abolished private schools. While the law applied equally, it was argued that it prevented minorities from controlling their own

ruling that the law denied a pledge of equality both "in law and in fact". "It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situations and requirements are different, would result in inequality in fact."[47]

While minority rights had been a major theme in the work of the League, the United Nations began with an exclusive concern with individual rights. The initial work of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities focused almost exclusively on discrimination. The assimilationist, egalitarian character of I.L.O. Convention 107 and of the International Convention on the Elimination of All Forms of Racial Discrimination were in line with the general orientation of the world body. Gradually, however, a limited concern with minority rights re-emerged.[48] In 1965 and 1974 the United Nations held two conferences on minority rights, both in Yugoslavia. The U.N.E.S.C.O. Convention Against Discrimination in Education of 1960 recognized the right of "national minorities" to carry on their own educational activities. Most significantly, the International Covenant on Civil and Political Rights of 1966 contained the following article:

> 27. *In those States in which ethnic, religious or linguistic minorities exist,* persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language.

A study of the section called it "the first internationally accepted rule for the protection of minorities".[49] Paradoxically, it casts minority rights in individualistic terms. But the existence of the individual right necessarily presupposes the continued existence and health of the minority as a whole.

The usefulness of article 27 was demonstrated in the *Lovelace* case, a complaint by an Indian woman from Canada. National legislation in Canada defines who is an "Indian" for the purposes of the Indian reserve system and for certain government programs. The statutory definition discriminates on the basis of sex by using the husband and father to determine the status of the wife and children. Mrs. Lovelace lost Indian status because of her marriage to a non-Indian. The marriage ended and Mrs. Lovelace returned to the reserve community where she had been raised. In her complaint to the Human Rights Committee, she argued that she had suffered discrimination on the basis of sex. This complaint was, potentially, a challenge to the reserve system and

47. *Minority Schools in Albania*, 6 Apr. 1935, PCIJ Publication Series A/B, No. 64, reprinted in L. Sohn and T. Buergenthal, *International Protection of Human Rights* (Indianapolis, Bobbs-Merrill 1973) p. 260.

48. See Thornbury, "Is There a Phoenix in the Ashes?" (1980), 15 Texas International Law Journal 421.

49. Caportorti, *Study of the Rights of Persons Belonging to Ethnic, Religious and Linguistic* [illegible], E/CN.4/Sub.2/[illegible] p. 1

the other elements of Indian special status in Canadian law and policy.[50] The Committee did not proceed on the basis of sexual discrimination, choosing rather to use article 27. They accepted the goal of tribal survival and examined whether, in the light of that goal, the exclusion of Mrs. Lovelace was necessary or justified. They could not justify the exclusion, with the result that Mrs. Lovelace had the right under article 27 to live within the ethnic community in which she had been raised. Since Canadian law denied that right, it was in violation of the Covenant.

8 HUMAN RIGHTS

The United Nations began with the goal of "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion".[51] The Charter assigned responsibility in relation to human rights to the Economic and Social Council, instructing it to establish a Human Rights Commission. In turn that Commission established the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities.

The point of opening for indigenous peoples proved to be the struggle against racial discrimination. Racial discrimination was condemned in the Charter and in the Universal Declaration of Human Rights. In 1963, the General Assembly adopted the Declaration on the Elimination of All Forms of Racial Discrimination and in 1965 it approved the text of the International Convention on the Elimination of All Forms of Racial Discrimination which came into force in 1969. The racial discrimination convention is the most widely adhered-to human rights instrument, with over one hundred and twenty-five signatory states. The convention pioneered the concept of a special tribunal to monitor compliance. Because its provision for individual complaints to the Committee on the Elimination of Racial Discrimination has been signed by less than ten states, that procedure has yet to come into force.

The racial discrimination convention poses a substantial problem for indigenous peoples. Article 1(4) reads:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure to such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however,

50. It was not intended to be such a challenge, but if Canadian law could not discriminate on the basis of sex because of the International Covenant on Civil and Political Rights, equally it could not discriminate on the basis of race. The Indian reserve systems are generally seen as a form of discrimination or special treatment based on race. Indigenous leaders argue that they should not be understood in that way, but as a recognition of the political rights of distinct peoples. On this basis the government of Canada should not have been defining the populations involved. The fact that a national legislative definition was involved confused the issue of the way in which the system under scrutiny should be viewed. The reliance on article 27, rather than on sexual or racial discrimination, avoided these problems.

51. Charter of the United Nations, art. 1, s. 3

> that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2(2) provides:

> States Parties shall, when the circumstances so warrant, take in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

These provisions seem inconsistent with any continuing local autonomy or special rights for indigenous peoples. Not surprisingly, there have been frequent discussions of the aboriginal policies of various states in the Committee on the Elimination of Racial Discrimination. But the Convention is only a problem if indigenous populations are seen solely as a category of economically disadvantaged people. Equal treatment or temporary affirmative action is a logical response to disadvantaged racial groups. But those measures should not be confused with the political rights of indigenous communities to self-government or self-determination. The convention never claimed to address those questions. Without attempting an assessment of the experience under the convention there has developed a realization that indigenous questions are distinctive and that certain issues must be considered outside the framework of the racial discrimination convention.

The Sub-Commission on the Prevention of Discrimination and the Protection of Minorities commissioned a study on racial discrimination. A 1970 draft of the report identified the need for a "complete and comprehensive study" of discrimination against indigenous peoples. In May 1971 the Economic and Social Council authorized the Sub-Commission to study the subject. Mr. Jose R. Martinez Cobo was named Special Rapporteur for the study and Mr. Cesar A. Willemsen Diaz of the Human Rights Division was given staff responsibility for the work. Draft portions of the report have been available, but a final text may not be completed until 1985.

In August 1978, the United Nations Conference on Racism held in Geneva considered the question of indigenous peoples, primarily at the initiative of the Norwegian delegation which included Mr. Asbjorn Eide and the Sami leader Aslak Nils Sara. The final statement approved by the conference included the following passage:

> 8. The Conference urges States to recognize the following rights of indigenous peoples:
>
> (a) To call themselves by their proper name and to express freely their ethnic, cultural and other characteristics;
>
> (b) To have an official status and to form their own representative organizations;
>
> (c) To carry on within their areas of settlement their traditional structure of economy

and way of life; this should in no way affect their right to participate freely on an equal basis in the economic, social and political development of the country;

(d) To maintain and use their own language, wherever possible, for administration and education;

(e) To receive education and information in their own language, with due regard to their needs as expressed by themselves, and to disseminate information regarding their needs and problems.[52]

This statement, together with the balance of the resolutions of the Conference, was adopted by the General Assembly of the United Nations in the fall of 1978.

The 1978 conference was part of the Decade to Combat Racism and Racial Discrimination, which will end with a second world conference in August 1983, in Geneva. There have been regional conferences as part of the Decade. The conference for the Latin American region was held in Nicaragua in December 1981, and focused particularly on the situation of indigenous peoples.

In 1982, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities established a Working Group on Indigenous Populations which will meet every August in Geneva. Its members are drawn from the Sub-Commission and the chairman is Mr. Asbjorn Eide of Norway.

If there are useful elements in the international law of minority rights or human rights, it is not clear whether any remedies would be available to an indigenous people. A state is only bound by a human rights covenant if it has actually signed the document. Even if a state has signed, it is still a question of state law whether the rights recognized in the covenant are enforceable in the domestic legal system of the state. Three recent cases have demonstrated some receptiveness by national courts to international human rights law.

In *Filartega*,[53] a United States court ruled that state torture was a violation of customary international law and could form the basis for a civil suit within the United States. The decision was seen as a major advance in the enforceability of international law principles in the United States.

In 1981 certain Sami challenged the decision of the Norwegian government to proceed with a major hydro-electric project in the area they traditionally used for reindeer herding. At the trial Mr. Asbjorn Eide testified on international law considerations, drawing upon the Norwegian initiatives at the 1978 United Nations Conference on Racism and on article 27 of the

52. See Report of the World Conference to Combat Racism and Racial Discrimination, A/Conf.92/40, 1979. The Norwegian delegation was headed by the Minister of Foreign Affairs who, the previous year, had presented a report to the Norwegian parliament which identified indigenous peoples as an important concern; see Sanders, *supra*, note 36, p. 25. Later, as Minister of Defence he refused to permit military forces or equipment to be used against the Sami and environmentalists blocking construction of the Alta hyrdo-electric pr

International Covenant on Civil and Political Rights. The judgment of the trial court noted the international law arguments, adding that it had not been possible to give full consideration to those issues. Perhaps because of the court's comment, the Norwegian Supreme Court commissioned an advisory opinion on the international aspects of the issue before them. But in their final judgment they ruled on a narrow factual basis, stating that the case did not require an examination of international law.[54]

The Australian High Court in 1982 gave some domestic force to the international law of human rights.[55] The court ruled that because Australia was a signatory to various multilateral treaties and conventions which prohibited racial discrimination, the national government had enhanced powers to implement those principles in Australian law, even at the expense of the normal jurisdiction of state governments. The government of the state of Queensland had an official policy which refused permission for the transfer of leasehold properties to aboriginal groups. The High Court held that the national government, using its "external affairs" power under the constitution, could overrule the state policy.

9 SELF-DETERMINATION

The international law of human rights is basically individualistic and egalitarian. There is little in the way of international law on minority rights. The framework of human rights and minority rights seems unable to deal with the issues of a distinctive land base or of collective political rights. For these reasons indigenous leaders speak in terms of decolonization and self-determination. These are areas of almost complete conceptual disorder as far as indigenous questions are concerned. On the one hand the colonial process which engulfed indigenous populations lacks a clear legal justification. On the other hand the international legal order is controlled by nation states who

54. The advisory opinion was commissioned by the Norwegian Supreme Court at the request of counsel for the Samis who had initiated the case. The author prepared the opinion. The court ruled that the hydro/electric project would have little impact on reindeer herding, a conclusion in conflict with detailed evidence at trial and in conflict with a second advisory opinion commissioned by the Supreme Court. That opinion has been published: Paine, *Dam a River, Damn a People?*, International Work Group for Indigenous Affairs, Document No. 45 (Copenhagen, 1982). The text of the Norwegian Supreme Court ruling is not available in English. As a result of the negative ruling by the Norwegian Supreme Court, a Sami activist, Nils Somby, attempted a symbolic demonstration of the possibility of sabotage by dynamite. Unfortunately, the mechanism failed, injuring Somby. After incarceration for five months, Somby was released, pending trial, and left for Canada. In the fall of 1982, he was adopted by Indian tribes in British Columbia in an assertion of tribal jurisdiction to accept refugees without regard to non-indigenous Canadian law. At the time of writing, Mr. Somby remains under the protection of Indian tribes in British Columbia.

55. *Koowarta v. Bjelke-Petersen* (1982), 56 A.L.J.R. 625. The case has generated controversy. See "The Plenitude of the External Affairs Power" (1982), 56 Australian Law Journal 381; Lane, "The Federal Parliament's External Affairs Power: Koowarta's Case" (1982), 56 Australian Law Journal 519.

have restricted self-determination to non-contiguous territories. Colonialism is rejected, but no remedy is offered to indigenous enclave populations.

There are a few cases on the political rights of indigenous peoples. In 1926 an international arbitration dealt with the obligations of the United States and Canada to the Cayuga Indians.[56] The Cayuga had treaties with the United States, but had moved to Canada after the United States revolution. While not necessary in the resolution of the case, the tribunal ruled that an Indian tribe was not a subject of international law. This upheld the view of indigenous questions as "domestic". Nevertheless, the obligations under the treaty were respected.

In 1928 an international arbitration dealt with the Island of Palmas, which was claimed both by the United States and the Netherlands.[57] The United States claim was derived from Spain, which based its claim on prior discovery and on treaties with the local indigenous leaders. The tribunal ruled that the treaties were not international law treaties and based Spain's rights solely on prior discovery. That basis of rights was ineffective against the stable possession of the area by the Netherlands.

In 1933 the Permanent Court of International Justice ruled on the status of Eastern Greenland.[58] The Inuit had conquered a Norwegian settlement in the area. While Europeans often claimed rights by conquest, the Inuit were held to have gained nothing for their efforts.

In 1975 the International Court of Justice gave an advisory opinion on the Western Sahara.[59] The local population was nomadic with little in the way of western-style government. In earlier times a colonial power would have declared the area to be legally unoccupied and capable of being taken over by discovery and occupation. The I.C.J. rejected the concept of *terra nullius* and held that the local population had legal rights in relation to the land and the right of self-determination. The conflict between this decision and the earlier cases is obvious.

The literature on indigenous peoples and international law usually analyzes the bases for the acquisition of colonial territories.[60] Such discussions

56. *Cayuga Indians Case*, [1926] R.I.A.A. 173.
57. *Palmas Island Arbitration* (1928), 2 R.I.A.A. 831.
58. (1933) P.C.I.J. Report Series A/B, No. 53.
59. (1975) I.C.J. Reports, p. 6.
60. There is limited literature in this field. Two vintage studies are Snow, *supra*, note 39, and M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (London, Longmans, Green 1926). One article stands out, apparently alone, in the 1950s and early 1960s: Higgins, "International Law Consideration of the American Indian Nations by the United States" (1961), 3 Arizona Law Review 74. Two more recent, but by now pioneering works, are Clinebell and Thomson, *supra*, note 38, and Bennett, *supra*, note 44. Other recent studies are Andress and Falkowski, "Self-determination: Indians and the United Nations — the Anomalous Status of America's 'Domestic Dependent Nations' " (1980), 8 American Indian Law Review 97; Anderson, "The Indigenous People of Saskatchewan: Their Rights under International Law" (1981), 7:1 American Indian Journal 4; Opekokew, *The First Nations: Indian Government in the Community of Man* (Federation of Saskatchewan Indian Nations 1982).

have a peculiarly dated character. Modern decolonization has not been based on an analysis of whether the original acquisition of territories was valid, but on a recognition of the right of peoples to end colonial domination. It is only for indigenous enclave populations, where the right of self-determination is denied, that the esoteric lore about discovery, conquest and cession is preserved and re-argued. Perhaps we can reduce the material to a quick checklist:

> (a) Prior Discovery. Discovery alone does not give rights in international law.
>
> (b) Religious or Civilizing Mission. While these concepts were important ideological justifications for colonialism, they are not acceptable bases in modern international law. Even the papal grant of 1493 was rejected as a basis for the acquisition of territories by Franciscus de Vitoria in the early 16th century. Concepts of trusteeship and protection have often been used as justifications for colonialism, but they fail as legal grounds.
>
> (c) Conquest. Conquest is only legally valid in the case of a just war. As well, under the modern law of war, conquest is not a basis for continuing possession of territory.
>
> (d) Cession. The acquisition of populated territories is not colonialism when it is the result of the exercise of the right of self-determination by the population. The decision to become part of another state can take the form of a formal treaty of cession or informal acquiescence. It is very difficult to argue that the various indigenous enclave populations gave any free consent to the colonial powers.
>
> (e) Occupation and Settlement. By this view indigenous peoples lacked any system of law and, for that reason, posed no barrier to European colonialism. The lands could be treated as unoccupied. This ethno-centric analysis was common in practice, but is no longer acceptable. Specifically, it is in conflict with the advisory opinion on the Western Sahara.

Certain domestic courts have ruled on the basis for colonial acquisition of their area. The United States decisions of the early 19th century used a combination of discovery and cession. Later cases eliminated the need for cession. Canadian courts have never ruled on the question. New Zealand and Australian courts accepted the doctrine of occupation and settlement.

In the early years of this century a concern with self-determination featured, in different ways, in the views of both the United States and the Soviet Union. At the urgings of President Wilson of the United States, self-determination of European nationalities was a major objective of the post-war arrangements. The Soviet Union projected its own nationalities policy in its analysis of other parts of the world. In the late 1920's the Communist International argued that the blacks in the southern United States were a nation with a right of self-determination and that the proper approach to the Indian question in Central and South America was to view it as a "national question". But the Peruvian delegation to the first Latin American Communist Conference, held in Buenos Aires in 1929, argued the non-nationalist position of Jose Carlos Mariategui. For Mariategui, the Indian question was not racial, cultural or legal, but economic. The Indian struggle was part of a larger struggle against a feudal land tenure system. This became the Communist position, with the result that a nationalities analysis of the Indian situation did not develop on the political left.[61]

61. See J.C. Mariategui, *Seven Interpretive Essays on Peruvian Reality* (Austin, University of Texas Press 1971) c. 2; Bollinger and Lund, "Minority Oppression" (1982), 9 Latin American Perspectives 2.

Decolonization became a major goal of the United Nations. The most significant document is the Declaration on the Granting of Independence to Colonial Countries and Territories, passed by the General Assembly in 1960. Some of the language of the Declaration could apply to indigenous enclave populations. The Declaration speaks of the "self-determination of peoples", the desire to end colonialism "in all its manifestations" and condemns the "subjection of peoples to alien subjugation". Other parts of the Declaration, however, seem to make it inapplicable, particularly article 6:

> Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

As well, the Declaration clearly envisages independence as the goal. Lesser forms of political autonomy are implicitly ruled out, forms more realistic for small enclave populations. The attempt to limit the scope of self-determination was in conflict with the deliberate vagueness of the terminology used and with the need to have flexible concepts which could deal with a broad range of situations. Greenland was considered a "non-self-governing territory" until it was merged with the Danish state. Later Greenland achieved a special regime of local autonomy called "home rule". While this was treated as a domestic reform, it could be understood as a recognition of the right of self-determination. Associate state arrangements have developed, particularly with New Zealand and the United States. Those arrangements cannot reasonably be described as purely domestic, though no international body has a specific mandate to police them.

A more flexible restatement of the right of self-determination occurred in General Assembly Resolution 2625 of 1970 on the Principles of International Law Concerning Friendly Relations and Co-operation Among States. It provides that free association with an independent state or "any other political status freely determined by a people constitute modes of implementing the right of self-determination of that people". It repeats language from article 6 of the decolonization declaration, but with an important addition:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

The statement of the right to self-determination of peoples in the International Covenant on Civil and Political Rights and in the International Covenant on Economic, Social and Cultural Rights makes no reference to the territorial integrity principle.

A [illegible] ment [illegible] tion [illegible] es w [illegible] e

Report of the Mackenzie Valley Pipeline Inquiry in 1977. Professor Ian Brownlee of Oxford University and Professor Richard Falk of Princeton University, two innovative international law figures, both prepared opinions which were submitted to the Inquiry asserting the applicability of international law and the principle of self-determination to the situation of the Dene in the Northwest Territories of Canada. Judge Berger, in the Report, adopted self-determination as an appropriate description of indigenous goals, while placing Dene rights to self-government within the structure of Canadian federalism.[62]

The international organizations of indigenous peoples have focused on the principle of self-determination. At the first meeting of the Working Group on Indigenous Populations in Geneva in August of 1982, the Indian Law Resource Center presented a document entitled "Principles for Guiding the Deliberations of the Working Group on Indigenous Populations", the result of a meeting of various Indian leaders and legal consultants. The Principles included the following statement: "Indigenous peoples qualify as peoples possessing a right of self-determination; hence, indigenous peoples have the right to self-determination, that is, to possess whatever degree of self-government in their territories the indigenous peoples may choose."

A representative of the World Council of Indigenous Peoples tabled a draft International Covenant on the Rights of Indigenous Peoples, which had been approved for discussion at the General Assembly in Australia in 1981.[63] The draft covenant begins by applying the principle of self-determination to indigenous peoples. It recognizes the range of resolutions of the right which are possible.

> One manner in which the right of self-determination can be realized is by the free determination of an Indigenous People to associate their territory and institutions with one or more states in a manner involving free association, regional autonomy, home rule or associate statehood as self-governing units. Indigenous People may freely determine to enter into such relationships and to alter those relationships after they have been established.

In line with the recognition of the right of self-determination on the part of indigenous populations, the covenant envisages both states and indigenous peoples as signatories. Both would be involved in the establishment of a Commission of Indigenous Rights and a Tribunal of Indigenous Rights.

While no formal position has been adopted by the Working Group on Indigenous Populations, it seems clear the body has accepted the proposition

62. T. Berger, *Northern Frontier, Northern Homeland; The Report of the Mackenzie Valley Pipeline Inquiry*, Vol. 1 (Minister of Supply and Services, Canada 1977) c. 11.

63. The draft covenant is reprinted in Opekekew, *supra*, note 60, Appendix A. The draft covenant has been discussed at an international conference of francophone human rights organizations in Montreal, at the World Assembly of First Nations organized by the Federation of Saskatchewan Indian Nations in 1982 and at an International Conference on Aboriginal Rights and World Public Order, held at Carleton University, Ottawa, Canada, February 1983.

that self-determination is a relevant concept for them to examine in their work on indigenous populations.

10 CONCLUSIONS

Certain indigenous groups have used the international structures more extensively than others. The long Iroquois search for international recognition is a remarkable story of perseverence. When the National Aboriginal Conference of Australia stated that they would take the Nookenbah dispute to the United Nations Human Rights Commission, the national government told them to stay at home. They went anyway, complying with the government demand that no state funding be used for the trip.

The Guaymi Indians of Panama have consistently used all international opportunities. When the World Council of Indigenous Peoples was still in the planning stage, they asked the National Indian Brotherhood of Canada for assistance in developing their strategies. They went on to organize a regional Indian organization, CORPI, which represents the World Council in Central America. They have presented their case at the Geneva conferences on indigenous peoples. They appeared before the Russell Tribunal in Rotterdam in 1980. In 1981 they organized a public forum in Panama City. Among the speakers was Gordon Bennett, representing Survival International. Cultural Survival was also involved and subsequently published a study of the Guaymi land issue. Their situation was described in one of the background reports prepared for the racial discrimination seminar held by the United Nations in Nicaragua in December 1981. Gordon Bennett made a presentation on their behalf to the Working Group on Indigenous Populations in August 1982. In October 1982, at their request, Survival International sent an observer to the negotiations then underway between the tribe and the government of Panama. The same month their case was presented at a conference on aboriginal rights and multinational corporations held in Washington, D.C. and co-sponsored by the Anthropology Resource Centre, Cultural Survival and the Indian Law Resource Center. During this period, their claims have received much more serious consideration by the government of Panama.[64]

Indigenous questions have re-emerged as questions of international law and policy. The national or domestic framework established by the colonial powers and by the new states, while still the dominant pattern, is no longer a complete description of the situation. The existence of the modern international law of human rights, alone, establishes that proposition. But as well, it seems clear that we are moving towards a particular application of the principles of self-determination to indigenous peoples. In addition to a recognition of their economic, social and cultural rights, there will be a recognition of their distinctive political rights.

64. The author, at the invitation of the National Indian Brotherhood of Canada, spent six weeks in Panama in 1975. The author prepared one of the background papers for the Nicaragua seminar in 1981, at the request of the Human Rights Division of the United Nations, and described the Guaymi situation in a section on Panama. The author returned to Panama in

COMPARATIVE AND INTERNATIONAL CHRONOLOGY OF INDIGENOUS RIGHTS

Douglas Sanders
January 30, 1984

1. Early recognition of indigenous political and civil rights.

(a) The work of Las Casas and Vittoria within Spanish colonialism and Vieira within Portugese colonialism, beginning after 1511 and leading to the Papal Bull Sublimus Deus of 1537 and the New Laws of the Indes of 1542.

(b) The treaty process, beginning in New England in 1633 and continuing in the United States until 1871 and in Canada until 1956.

(c) The Lapp Codicil to the Swedish-Norwegian border treaty of 1751, recognizing Sami territorial rights.

(d) The Royal Proclamation of 1763, formally establishing the treaty process for Britain in North America.

(e) The Northwest Ordinance of 1787, in which the United State Congress pledged not to take Indian lands without Indian consent.

(f) The Marshall judgments of 1823 and 1832 in which the United States Supreme Court upheld federal jurisdiction over Indian questions and described the tribes as "dependent domestic nations". The St. Catherines decision of the Judicial Committee of the Privy Council for Canada in 1888 upholding an Indian "personal and usufructuary" title to land.

(g) The 1840 Treaty of Waitangi in New Zealand recognizing Maori land ownership.

2. The undercutting of indigenous rights and the consolidation of unilateral national jurisdiction over indigenous populations (the "liberal" reforms of the late 19th century).

(a) The 1871 termination of treaty making in the United States, the 1886 Kagama decision of the U.S. Supreme Court (upholding unilateral congressional authority over the tribes) and the 1887 Dawes Allotment Act, which attached the reservation land base.

(b) The Mexican land reforms under Juarex and Diaz which ended the recognition of collectively owned Indian lands.

(c) The Japanese Former Indigenes Protection Act of 1898 reversing earlier recognition of Ainu land holding in favour of a system of allotments.

(d) The institution of the Maori land court system in New Zealand by legislation between 1862 and 1865.

(e) The undercutting of Metis land rights by the government of Canada after their formal recognition in the Manitoba Act of 1870 and the subsequent Dominion Lands Acts.

(f) No minority rights provisions were included in the Covenant of the League of Nations because of the concerns of Australia and New Zealand about public scrutiny of their indigenous policies.

(g) This is the period in which reserves were created in Australia and the first Australian Legislation on aborigines was enacted. The legislation was paternalistic and no aboriginal ownership even of reserve lands was recognized.

3. Collectivist reforms in the 1920s and 1930s.

(a) The policy of "indigenism" established by the Mexican revolution.

(b) New Zealand reforms of the 1920s which reconsolidated fractionalized Maori lands using corporate structures.

(c) Japanese reforms of the 1920s which reconsolidated Ainu allotments under community controlled committees.

(d) The "Indian new deal" in the United States and the Indian Reorganization Act of 1934.

(e) The Treaty of Patzcuaro of 1940 establishing the Inter-American Indian Institute, now a specialized agency of the Organization of American States.

(f) Specific minority rights provisions were included in European peace treaties after the First World War and were subject to supervision by the League of Nations. Minority rights cases went to the permanent Court of International Justice, notably the case on minority schools in Albania. As well there was an international arbitration on the Aaland Islands with a resolution in favour of autonomy for the Swedish minority population within the state structure of Finland.

4. Termination reforms after World War II.

(a) The U.S. Indian Claims Commission Act of 1946.

(b) The Universal Declaration of Human Rights of 1948 had no provision on minority rights.

(c) In 1956 the U.S. Congress passed House Concurrent Resolution 108 adopting the policy of termination. In 1953 the U.S. Congress enacted public law 280, delegating to six states jurisdiction over most crimes and many civil matters on Indian reservations.

(d) In 1956 the International Labour Organization adopted convention 107 on tribal minorities, which envisaged the goal of integration. In 1965, the General Assembly of the United Nations approved the text of the International Convention on the Elimination of All Forms of Racial Discrimination which formalized the concept that special provisions for racial minorities should only take the form of temporary affirmative action programmes, designed to lead to equality.

(e) The Maori Affairs Amendment Act of 1967 which allowed the loss of fractionalized Maori lands.

(f) The Canadian "white paper" of 1969.

(g) The Alaska Native Claims Settlement Act of 1971.

5. The re-emergence of indigenous questions in domestic politics and the re-emergence of minority and indigenous rights questions in international law.

(a) The U.S. Indian Claims Commission Act of 1946.

(b) The fight against termination in the United States in the 1960s, the fight in favour of federal jurisdiction in the Australian referendum of 1967, the fight in New Zealand against the Maori Affairs Amendment Act of 1967, the fight in Canada against the white paper of 1969.

(c) The demonstration of 1968 to 1975:
- 1968 - the international bridge blockade, Cornwall, Ontario.
- 1969 - the occupation of Alcatraz, San Francisco.
- 1972 - police action against the Aboriginal Embassy, Canberra, Australia.
- 1972 - the Trail of Broken Treaties and the occupation of the BIA.
- 1973 - the occupation of Wounded Knee, South Dakota.
- 1974 - the armed occupations of Cache Creek and Anishnabe Park and the Native Peoples Caravan to Ottawa.
- 1975 - the Maori land rights march to Wellington, New Zealand.

(d) The establishment of support groups:
- 1968 - The International Work Group for Indigenous Affairs.
- 1969 - Survival International.
- 1971 - the Barbados conference, sponsored by the World Council of Churches program to combat racism.
- 1975 - Anthropology Resource Centre.
- 1976 - Cultural Survival.
- 1978 - Pro-Indian Commission, Brazil.
- 1980 - Fourth Russell Tribunal, Rotterdam.

(e) The decision in 1971 by the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities to commission a special report on discrimination against indigenous populations (separating the issue from the general context of concern with racial discrimination).

(f) The Alaska Native Claims Settlement Act of 1971.

(g) The Nixon policy statement of 1972 rejecting termination and supporting "self-determination" and the 1975 Indian Self-Determination Act, which instituted the policy of contracting between the Federal Government and Indian tribes.

(h) The establishment of the consultative "Sami Parliament" in Finland in 1972.

(i) The emergence of land claims in Canada: The Calder, James Bay and Paulette cases of 1973, the government policy statement of 1973, the Report of the MacKenzie Valley Pipeline Inquiry in 1977.

(j) The decisions in Lavell (Supreme Court of Canada, 1973), Martinez (U.S. Supreme Court, 1978), Lovelace (U.N. Human Rights Committee, 1981) in which collective rights principles were either supported or, at least, not undercut in controversies between individual rights arguments and tribal membership criteria.

(k) The formation of the International Indian Treaty Council in 1974, the World Council of Indigenous Peoples in 1975, the Inuit Circumpolar Conference in 1978 and the Indian Law Resource Centre in 1979. All are accredited with the U.N. Economic and Social Council as Non-Governmental Organizations (NGOs).

(l) The institution of specific programmes for the Burakamin and Ainu populations in Japan in 1974 and 1975.

(m) The 1975 James Bay and Northern Quebec Agreements, settling Indian and Inuit land claims in norther Quebec (non-terminationist).

(n) The decision of the International Court of Justice in the Advisory Opinion on the Western Sahara in 1975, destroying much of the intellectual framework of earlier colonial thought on "terra nullius" and "uncivilized" peoples.

(o) The acceptance of a minority rights provision in the International Covenant on Civil and Political Rights, the text of which was approved by the General Assembly of the United Nations in 1966 and which came into force in 1976.

(p) The 1976 land claims settlement for the Northern Territory of Australia (non-terminationist).

(q) The 1976 Norweigan foreign policy initiative defining indigenous people as a specific subject for foreign aid.

(r) The 1976 United Nations Conference on Racism in Geneva in which a provision on indigenous people was included at the instigation of the Norweigan delegation. This led to the question of indigenous people being on the agenda for the second racism conference, held in Geneva in 1983.

(s) The U.S. Indian Policy Review Commission and the subsequent enactment of the Indian Child Welfare Act and the Indian Freedom of Religion Act.

(t) The involvement of Canadian Indians, Metis and Inuit in the political process of patriation and amendment of the Canadian constitution, beginning in 1978 and leading in 1982 and 1983 to special constitutional provisions on aboriginal and treaty rights and a process of special constitutional conferences to last until at least 1987.

(u) The controversy over the Alta hydro-electric project in Norway, beginning in 1979 and leading to the establishment of a Sami Rights Committee by the government in 1981.

(v) The establishment of "home rule" in Greenland in 1979.

(x) The first meeting of the Working Group on Indigenous Populations (a committee of the U.N. Sub-Commission on the Prevention of Discrimination and the Protection of Minorities) in August, 1982, in Geneva.

(w) The emergence of "pluralism" in the United States, most notably with the Bilingual Education Act.