

# LEGAL EMPOWERMENT



# INDIGENOUS PEOPLES

## CONFERENCE

### HONORARY HOSTS

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Chairman Daniel K. Akaka, U.S. Senate Indian Affairs Committee

U.S. Senator Lisa Murkowski, Alaska

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# LEGAL EMPOWERMENT & INDIGENOUS PEOPLES

## AGENDA

Monday, May 9, 2011 • 1:00 pm–4:00 pm • US Capitol Building

- 1:00 PM** **Welcome** AFN Co-Chairs **Albert Kookesh** and **Ralph Andersen**
- 1:05 PM** **Vision & Purpose** **Julie Kitka**, President, Alaska Federation of Natives (AFN)  
**Written Message from Dr. Madeleine Albright**  
Former Secretary of State and Co-Chair of the Commission on  
Legal Empowerment of the Poor (*read by* AFN Co-Chair Ralph Andersen)
- 1:10 PM** **Introduction** **Manuel Mayorga**, Institute for Liberty and Democracy (ILD)  
**Alaska-Peru Case Study** **Gabriel Daly**, ILD  
[**Hernando de Soto** (*via phone*) President, ILD and  
Co-Chair of the Commission on the Legal Empowerment of the Poor, UNDP]
- 1:30 PM** **Roberta “Bobbi” Quintavell**, Inupiat leader, former President & CEO  
Arctic Slope Regional Corporation
- 1:40 PM** **Official Host’s Welcome** **Chairman Daniel Inouye**, US Senator, Hawaii
- 1:50 PM** **Frances Reid**, Senior Investment and Risk Officer and  
Acting Deputy Vice President for Compact Operations  
Millennium Challenge Corporation
- 1:55 PM** **Congressman Don Young**, Alaska
- 2:00 PM** **Kimberly K. Teehee**, Senior Policy Advisor for Native American Affairs  
White House Domestic Policy Council  
**Official Message from President Barack Obama**  
**Charles Galbraith**, Associate Director, Office of Public Engagement



## AGENDA *(continued)*

- 2:20 PM **Senator Mark Begich**, Alaska
- 2:30 PM **Keynote Rosita Worl**, Tlingit leader, President, Sealaska Heritage Foundation
- 2:45 PM **Senator Lisa Murkowski**, Alaska
- 2:55 PM **Jackie Johnson**, President, National Congress of American Indians
- 3:05 PM **Robin Danner**, President, Council for Native Hawaiian Advancement
- 3:15 PM **Written Message from the UN Special Rapporteur on the Rights of Indigenous Peoples**  
(*read by* Nelson Angapak, Senior Vice President, AFN)
- 3:20 PM **Congresswoman Mazie Hirono**, Hawaii
- 3:30 PM **Wade Henderson**, President & CEO  
Leadership Conference on Civil and Human Rights
- 3:40 PM **Congresswoman Colleen Hanabusa**, Hawaii
- 3:50 PM **Closing Remarks Chairman Daniel Akaka**, US Senator Hawaii
- 4:00 PM **Thank You & Invite to Move to Reception Julie Kitka**, President, AFN



## Conference Abstract

### **Legal Empowerment & Indigenous Peoples** *Toward a U.S. Agenda for Change*

U.S. Senate Appropriations Hearing Room S-127  
Monday, May 9, 2011 1:00 pm–4:00 pm  
Special Reception Immediately Following in Room S-126

#### **Vision**

This intimate gathering of Indigenous leaders, congressional leaders, members of the Obama administration, and representatives of multilateral institutions represents an important first step toward connecting the legal empowerment and Indigenous Peoples movements, and defining a legal empowerment agenda for U.S. policy.

#### **Purpose**

The LEIP Conference will examine the significance of legal empowerment for Indigenous Peoples with regard to international policy and public policy in the United States, beginning from the basic assumption that recent advancements in legal empowerment can be harnessed to enhance the legal empowerment of Indigenous Peoples. Conference participants will explore models of success, where legal empowerment promotes stability and security. We will examine the positive impacts of enfranchisement and discuss the most pressing issues Indigenous populations face in the 21st Century.

There is no single model for achieving legal empowerment; rather this conference will enable reflection on approaches to legal empowerment, and consideration of innovative contributions and approaches by and for Indigenous Peoples, in the United States and elsewhere.



## Focus—Legal Empowerment

Legal Empowerment can be defined as a process that increases a person’s capability to use the law, the legal system, and legal services in order to protect their rights and interests as citizens. As such, legal empowerment is increasingly recognized as an important tool for poverty reduction and economic development.

Indigenous Peoples have faced centuries of discrimination in terms of their basic rights to their ancestral property, languages, cultures, forms of governance, and basic social services, such as education, health and nutrition, water and sanitation, and housing. These rights that Indigenous People seek are basic human rights—a fact that was recognized internationally by the Commission for the Legal Empowerment of the Poor and is now embedded in the development agenda of the United Nations General Assembly.

In 2005, former U.S. Secretary of State Madeleine Albright and ILD President Hernando de Soto created the Commission on the Legal Empowerment of the Poor (LEP), which published its final report in 2008 (“Making the Law Work for Everyone”). The UN General Assembly has passed two resolutions endorsing the LEP Agenda as a new approach to address the challenges of development to be implemented worldwide by the United Nations Development Programme (UNDP).

Legal empowerment, in the most basic sense of the term, means enabling all people to enjoy or exercise the rights conferred on them by the law. Historically, the poor have been excluded from the legal system, mainly by burdensome, costly and discriminatory laws that have forced them to make their transactions and protect their meager assets (land, houses, small enterprises and livestock) in the extralegal sector. Over the past 30 years, Mr. de Soto and the ILD have promoted the idea—first in Peru and then across the developing world—that if poor countries were serious about creating modern economies that fostered economic growth and reduced widespread poverty, they would have to reform their institutions to give their poor majorities access to the legal tools essential for prosperity—above all, property and business rights.

Expanding on the ILD vision, the LEP Agenda is based on four pillars:

- Property rights and natural resources
- Rights to livelihood and entrepreneurship
- Labor rights
- Rule of law and access to justice

The Commission on the Legal Empowerment of the Poor singled out Indigenous Peoples as a group among the world’s poor that has been too long ignored in international development efforts, and thus a prime constituency for legal empowerment.



### **AFN-ILD Joint Initiative on Legally Empowering Indigenous Peoples**

This AFN-ILD conference will introduce recent progress on legal empowerment to the Indigenous Peoples community, in the United States and internationally. The conference will examine the Indigenous People's dimension of each of the four pillars of legal empowerment, and address many aspects of legal empowerment in the property rights and natural resources area. It is in this property/resources pillar that legal empowerment for Indigenous Peoples is most evident.

Land is the primary source of sustenance and a factor of production for the majority of the world's population. Important as that is, the significance of land goes beyond being an economic input. Land accommodates and shelters individuals, communities and societies. Furthermore, identity, a sense of belonging, inclusion and human dignity are fundamentally linked to the land. Land connects people to one another and is the foundation for mutual interdependence and co-existence. Important as land rights are for the poor and disadvantaged generally, they are doubly so for the Indigenous Peoples. This is because of their unique relationship with their lands:

- While property rights are recognized as important for all, they are an essential human right for Indigenous Peoples.
- For many Indigenous Peoples land represents the physical space necessary to pursue their unique cultures and societies.
- Indigenous Peoples have been victims of property discrimination (collectively held Indigenous lands have often been declared public or unoccupied lands).
- Denying some Indigenous Peoples rights to their traditional lands has had genocidal consequences.



## **Why Focus on Indigenous Peoples and Alaska?**

Indigenous Peoples have historically represented some of the poorest and most excluded groups across the globe. They face serious discrimination not only in terms of their basic rights to ancestral property, languages, cultures and forms of governance, but also in terms of access to basic social services (education, health and nutrition, water and sanitation, housing, etc.). Internationally, Indigenous Peoples are among the poorest, most marginalized, and most discriminated against populations. They face genocide, forced assimilation into mainstream populations, displacement from their ancestral lands, and denial of their citizenship, human rights, property and resources.

Legal empowerment of Indigenous Peoples also matters because of the scale of the problem. There are 300-500 million indigenous people in the world and they live in nearly all countries. In most countries they have a minority status, but in some, such as Guatemala and Bolivia, they constitute the majority population. Although they occupy only about 20% of the world's surface, their ancestral lands embody and nurture about 80% of the planet's cultural and biological diversity. Their legal empowerment thus has both cultural and environmental significance, not to speak of the economic importance of the natural, mineral and hydrocarbon resources associated with their lands.

Alaska Native and Indigenous tribal communities provide a distinctive and remarkable case study in the way Native communities can interact with Federal and State governments and participate in economic and social development, while preserving traditional ways of life and wisdom. Alaska Natives have resolved many thorny issues of land claims and revenue sharing from hydrocarbon and other natural resources with the Federal and State governments, and have accomplished all of this despite being scattered in remote communities in a difficult and unique natural environment.

The Alaska Native Claims Settlement Act (ANCSA) of 1971, created twelve regional for-profit corporations that would have title to the surface area and subsurface minerals of land selected for development across the state, up to a total of 18 million hectares (44 million acres) statewide. Villages in each region could also create their own corporations, and the village corporations would retain surface title to local lands as part of the settlement. Monetary compensation for lands given up by the Natives would total \$962.5 million, about half from funds supplied by Congress and half from mineral revenues collected on state and federal lands.

ANCSA was a Congressional experiment, never tried before in U.S. history. The success of this experiment rests upon the actual experience of Alaska Natives implementing this complex land settlement, utilizing the tools of a corporate structure, engaging in their economic life in meaningful ways, and the difficult choices made every day of the last 40 years. This settlement between Native Americans and the United States government enabled Alaska Natives to retain a portion of their original lands, and to exercise real self-determination. Previous treaties and settlements involved land and assets held in trust for Native people by the federal government and controlled by the Bureau of Indian Affairs. The 44 million acres of land retained by Alaska Natives and the nearly \$1 billion granted to Native people are controlled by Native boards of directors of Alaska Native corporations, and they have complete control over their assets.

Passage of ANCSA was by no means the end. It was the beginning. ANCSA is a living document, which has been amended many times already at the request of Alaska Native people themselves and likely will be amended many more times. ANCSA was intended to meet the real socio-economic needs of Alaska Natives, as defined by them, needs that change over time. Those who initiate changes to ANCSA in the future will be the Native people themselves, in an act of self-determination.



## **The ILD and Indigenous Rights**

In the aftermath of a deadly conflict in the Peruvian Amazon over land rights in 2009—between local indigenous communities and the national police—ILD researchers went into the jungle to interview hundreds of people and their leaders about the root causes of the conflict. The ILD’s findings generated a national and then international conversation about the lack of control indigenous people have over the valuable natural resources in their traditional lands—not just in Peru but in other parts of Latin America, as well as in Africa, Asia and India, where similar disputes have occurred.

To explore all alternatives, the ILD did something quite unusual: inviting indigenous leaders and entrepreneurs from Alaska and Canada to the Peruvian Amazon to explain to their Peruvian counterparts how Native communities can interact with national and regional governments to participate in economic and social development, while preserving their tradition customs and identities. These efforts have already paid significant dividends. ILD recently signed a partnership with the Regional Government of Loreto, one of the largest areas of the Peruvian Amazon, to build a coalition of regional governments and implement a Pilot Program to establish clear and secure property rights in order to give Indigenous Peoples a voice in their future.

The ILD’s research and recommendations can be refined and scaled up to address similar conflicts between indigenous communities and governments elsewhere in the world – where charges of “land grabbing” in traditional areas have stirred up resentment against foreign investors and sovereign funds using government concessions to exploit valuable natural resources and agricultural lands to meet their future food needs.

Alaska Natives have proven that there are peaceful, equitable and profitable solutions that will benefit not just Native communities but also governments and private investors. Both AFN and the ILD are honored to work together to spread awareness about Indigenous rights and to create a forum in Washington for experts and top policy makers to discuss the future of legal empowerment of Indigenous Peoples in the U.S. and the rest of the world.



## Conference Participants & Organizational Supporters

The conference seeks to engage a diverse and committed group of:

- Indigenous representatives
- Congressional leaders including the US Senate Indian Affairs Committee, US House of Representatives, Resources Committee, Alaska Congressional Delegation
- High level Obama Administrative representatives from the White House, Domestic Policy Council, State Department and Interior Department
- Multilateral institutions including the United Nations, World Bank, and numerous other international institutions
- National government experts including those from bilateral aid agencies
- Law makers from the United States and other countries
- National and international academic experts
- Press
- Other interested parties

Representatives of the following organizations have confirmed their attendance at the LEIP Conference on Monday, May 9, 2011.

### Sponsors

#### **Alaska Federation of Natives**

The Alaska Federation of Natives (AFN) is the largest statewide Native organization in Alaska, founded in 1966 when more than 400 Alaska Natives representing 17 Native organizations gathered for a three-day conference to address Alaska Native aboriginal land rights. Its membership includes 178 villages (both federally-recognized tribes and village corporations), 13 regional Native corporations and 12 regional nonprofit and tribal consortiums that contract and run federal and state programs. The mission of AFN is to enhance and promote the cultural, economic and political voice of the entire Alaska Native community.

**Institute for Liberty and Democracy** The Institute for Liberty and Democracy (ILD) was founded in 1981, in Lima, Peru by Hernando de Soto and other stakeholders to highlight the imbalance of Peru's legal system and regulations on the working class and poor citizens of Peru. ILD seeks to reform this imbalance and to allow the majority of a populace to have access to a modern market economy. ILD also emphasizes that a flawed legal system can prevent a developing nation from expanding in a market economy.



## **Supporting Organizations**

### **Arctic Slope Regional Corporation**

The Arctic Slope Regional Corporation (ASRC) is the largest Alaska-owned company and for the past 16 years it has been the largest locally-owned and operated business in Alaska. ASRC continues to give back to its shareholders and community—40 percent of its earnings are distributed back to its shareholders and from 2005 to 2009, ASRC donated nearly \$15 million to nonprofit and charitable causes. ASRC's mission is to balance the management of cultural and natural resources while striving to enhance its shareholders' economic freedom. ASRC's major businesses include government contracting, technical services, petroleum refining and marketing and energy services.

### **Bering Straits Native Corporation**

The Bering Straits Native Corporation (BSNC) serves more than 6,700 shareholders in the Bering Straits/Seward Peninsula/Norton Sound region of Alaska. BSNC recognizes that subsistence is a way of life for its shareholders in the region and is working towards a sustainable future for their communities. BSNC's business include real estate development, auto and equipment rentals, quarry stone and services, facilities, logistics and supply support services, electrical contracting, engineering, technical and training support, mining and related services, and IT, information security and communications. BSNC's mission is to improve the quality of life in their region through economic development while protecting the land, and preserving cultural heritage.

### **Bristol Bay Native Association**

The Bristol Bay Native Association (BBNA) is a tribal consortium of 31 tribes founded to provide a variety of services to the Bristol Bay region in Alaska. BBNA's goal is to provide a unified voice in the region for the tribes and be strong regional organization capable of providing much needed services for its members. The association was created in 1973 after the passage of ANCSA but its origins date back to the 1960s out of the land claims struggle.

### **BRISTOL BAY NATIVE CORPORATION**

Formed under the Alaska Native Claims Settlement Act of December 18, 1971, Bristol Bay Native Corporation has approximately 8,700 shareholders who are Eskimo, Indian and Aleut. BBNC is a diversified holding company. Investments and services include a stock portfolio, cardlock fueling, corporate services, corrosion inspection, environmental engineering and remediation, oilfield and environmental cleanup labor, and government services. BBNC's seeks to enrich the Native way of life, protecting the past, present and future of the Natives from Bristol Bay.

### **Chugach Alaska Corporation**

The Chugach Alaska Corporation (CAC) represents more than 2,200 tribal shareholders of Eskimo, Indian and Aleut heritage. Formed in 1972, CAC focuses on cultural conservation, educational assistance and employment opportunities for its shareholders. CAC's major business includes facilities management and maintenance, general construction, construction management, education services, environmental services, base operating services, civil engineering, housing maintenance, and IT and computer facilities management.

### **Council for Native Hawaiian Advancement**

The Council for Native Hawaiian Advancement (CNHA) is a statewide network that represents more than 100 Native Hawaiian organizations to enhance the well being of Hawaii. CNHA was founded in 2001 to be a strong voice on public policy issues that affect Native Hawaiians, promote community-owned enterprises and assist with capacity building to support Native Hawaiian communities.



### **Leadership Conference on Civil and Human Rights**

The Leadership Conference on Civil and Human Rights is a national coalition of organizations united to promote and protect the human and civil rights of all persons in the U.S. The Leadership Conference engages in legislative advocacy and coordinates major lobbying efforts on behalf of civil rights legislation. The Leadership Conference was started in 1950, and since then it has been committed to the advancement human and civil rights, expanding opportunity and fairness and fighting discrimination.

### **NANA Regional Corporation**

NANA Regional Corporation, Inc. (NANA) is a Regional Alaska Native corporation formed in 1971 under the Alaska Native Land Claims Settlement Act. More than 12,500 Iñupiat shareholders own NANA from northwest Alaska. As a corporation, NANA manages the surface and subsurface rights of approximately 2.2 million acres of land in the region to the benefit of NANA's Iñupiat shareholders. NANA's major businesses include professional services, management services, civil engineering services, petroleum engineering services, government services, oilfield support, mining and mining support, hospitality and tourism and housing maintenance. Gross revenues are over \$1 billion per year.

### **National Congress of American Indians**

The National Congress of American Indians (NCAI) seeks to inform the public and Congress on the governmental rights and general welfare of Native Americans. NCAI started in 1944 as a response to the U.S government's termination and assimilation policies against the sovereign rights of tribal governments. NCAI is national tribal organization that strives to monitor federal decisions and actions that affect the interests of all Native Americans.

### **Sealaska Corporation**

Sealaska Corporation is a Native corporation owned by over 20,000 tribal member shareholders in Alaska. Sealaska Corporation is the largest private employer in Southeast Alaska that embeds Alaska Native values in its everyday operations. Sealaska was formed in 1971 and continues to provide current and future benefits to its shareholders. Sealaska Corporation's major business includes: timber development and marketing, forest management and silviculture, managed investment portfolio, injection molding, plastic and manufacturing, prototyping and new product development, environmental consulting and remediation, information technology outsourcing, rock, sand and gravel, and 8(a) government contracting.

## **Participants**

### **Asian Development Bank**

Based in Manila, the Asian Development Bank (ADB) is a multilateral finance institution that promotes economic and social progress in the Asia-Pacific region. ADB's main partners are governments, the private sector, nongovernment organizations, development agencies, community-based organizations, and foundations.

### **Calista Corporation**

Founded in 1972, Calista Corporation is the second largest of the 13 regional corporations formed under the Alaska Native Claims Settlement Act (ANCSA) of 1971. Calista Corporation represents the largest ethnic population in southwest Alaska. The Calista Region is characterized by a subsistence economy in which the great majority of the Shareholders are involved in activities relating to their own subsistence needs. Calista's major businesses include professional and technical government services, printing and publishing, petroleum drilling services, construction management, corrosion inspection services, card-lock fueling system, engineering and technical services, and IT and engineering support services.



### **Centre for International Sustainable Development Law**

The Centre for International Sustainable Development Law promotes sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law.

### **Doyon Limited**

Doyon, Limited, the Native regional corporation for Interior Alaska, is a for-profit corporation with more than 18,000 shareholders. Established under the 1971 Alaska Native Claims Settlement Act (ANCSA), Doyon is the largest private landowner in Alaska, with more than 12.5 million acres allocated to the corporation under ANCSA. Doyon's mission is to continually enhance its position as a financially strong Native corporation in order to promote the economic and social well being of its shareholders and future shareholders, to strengthen its Native way of life, and to protect and enhance its land and resources. Doyon's major businesses include government contracting, oil and gas drilling, process and mechanical engineering, oil and gas pipeline construction, civil engineering, general contracting, construction, construction management and maintenance services, tourism, catering and security.

### **Inter-American Development Bank**

Inter-American Development Bank is the largest source of development financing for Latin America and the Caribbean, with a strong commitment to achieve measurable results, increased integrity, transparency and accountability. Inter-American Development Bank aims to bring about development in a sustainable, climate-friendly way.

### **Millennium Challenge Corporation**

The Millennium Challenge Corporation (MCC) is an innovative and independent U.S. foreign aid agency that is helping lead the fight against global poverty. Created by the U.S. Congress in January 2004 with strong bipartisan support, MCC is changing the conversation on how best to deliver smart U.S. foreign assistance by focusing on good policies, country ownership and results.

### **Pan America Development Foundation**

The Pan American Development Foundation seeks to empower disadvantaged people and communities in Latin America and the Caribbean to achieve sustainable economic and social progress, strengthen their communities and civil society, and prepare for and respond to natural disasters and other humanitarian crises, thereby advancing the principles of the Organization of American States.





# The United Nations Declaration on the Rights of Indigenous Peoples: *Legal Effect and Influence of the Declaration*<sup>1</sup>

## Historical and Legal Context

In establishing the fundamental rules governing the relationship between Indian tribes and the United States, early US Supreme Court cases relied extensively on international law.<sup>2</sup> The use of international law to justify unilateral assumptions of federal authority simultaneously embedded and excused norms of dominance and racial superiority.<sup>3</sup> In modern times, Indigenous Peoples, through activism, legal advocacy, and persistent and patient politics, have been able to shape international law into something more redeeming. They overcame political isolation and joined together to reclaim their essential identity as well as their role on the global stage of decision making. They have taken the core notion of nations being bound by laws generated beyond their jurisdictional boundaries and transformed it into concrete expressions of international commitment, as well as positive law binding on individual countries. This remarkable comeback has found its most comprehensive expression in the 2007 United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”).

The UN General Assembly’s adoption of the UN Declaration on the Rights of Indigenous Peoples was the culmination of more than two decades of work and activism by indigenous communities throughout the world. The final version of the Declaration was adopted on September 13, 2007, by a landslide affirmative vote of 144 States. Only four countries—the United States, Canada, Australia and New Zealand—voted against it.

Last December, President Barack Obama announced the United States’ support for the Declaration. The other three dissenter countries had already reversed themselves, leaving the United States as the only holdout. President Obama’s endorsement is historic both because the United States has a large indigenous population and because there has never been an international statement of such magnitude on the rights of Indigenous Peoples. As noted by UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, “with its endorsement of the Declaration, the United States strengthens its stated commitment to improve the conditions of Native Americans and to address broken promises. Indigenous Peoples can now look to the Declaration as a means of holding the United States to that commitment.”

## Key Provisions

The UNDRIP constitutes a minimum “standard of achievement to be pursued” ([preamble, article 43](#)), and allows for the development of additional rights in the future. ([article 45](#)). It recognizes Indigenous Peoples’ essential contribution to the “diversity and richness of civilization and cultures, which constitute the common heritage of mankind.” Even though their situation “varies from region to region and from country to country,” Indigenous Peoples and persons enjoy all human rights ([articles 1, 17\(1\)](#)) and they are free and equal to all others ([art. 2](#)). For the first time, the Declaration gives international recognition to “indispensable” collective rights. Indigenous Peoples’ distinctive demands are those to self-determination, the preservation and flourishing of their cultures, and the protection of their rights to their lands.



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In terms of the claim to self-determination, [article 3](#) recognizes it broadly as the right to “freely determine their political status and freely pursue their economic, social and cultural development,” while [article 4](#) guarantees their “right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”

The claim to indigenous sovereignty is primarily founded upon the aspiration to preserve their inherited ways of life, change those traditions as they see necessary, and to make their cultures flourish. This policy is reflected in [article 5](#), which states that “[i]ndigenous peoples have the right to maintain and strengthen their distinct political, legal economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”

The effective protection of indigenous culture is a fundamental goal of the Declaration, i.e., [article 8\(1\)](#) prohibits “forced assimilation or destruction of their culture” and is intended to protect Indigenous Peoples in a way that is broader in scope than the separate prohibition of genocide against them under general international law, as enunciated in [article 7\(2\)](#). It prohibits their forced removal and relocation ([article 10](#)); their right to practice and revitalize their cultural traditions and customs, including the right to maintain, protect and develop past, present and future manifestations of such cultures ([art. 11](#)); their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and cultural expressions ([article 31](#)); and the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies as well as the restitution and repatriation of ceremonial objects and human remains ([Art. 12](#)). [Article 13](#) guarantees Indigenous Peoples the right to “revitalize, use, develop and transmit to future generations their histories, languages, oral traditions [and] philosophies” and obligates States to “take effective measures to ensure that this right is protected. [Articles 14 and 16](#) recognize the right to establish and control educational systems and media in their own language and culture.

Equally important to the effective protection of Indigenous Peoples’ culture is the protection of their land. [Article 25](#) emphasizes their “distinctive spiritual relationship” with their lands, and [article 26](#) affirms their “right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired,” and their “right to own, use, develop and control their lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.” [Article 20](#) recognizes the right “to be secure in the enjoyment of their own means of subsistence and development and to engage freely in all their traditional and other economic activities.”

Related key guarantees include Indigenous Peoples’ rights to participate in decision-making in matters which would affect their rights ([article 18](#)), and States’ obligations to “consult and cooperate in good faith with the Indigenous Peoples concerned,” to obtain their “free, prior and informed consent” to legislative and administrative decisions that “may affect them ([articles 19, 32\(2\)](#)). There are also rights to the improvement of their social and economic conditions ([articles 17, 21, 22, and 24](#)); rights to development ([article 23](#)) and international cooperation ([articles 36, 39, 41, and 42](#)); treaty rights ([article 37](#)); as well as certain rights to redress and reparations ([articles 8\(2\), 20\(2\) and 28](#)).

[Article 46\(3\)](#) provides that the provisions of UNDRIP shall be interpreted in accordance with “principles of justice, democracy, respect for human rights, equality, nondiscrimination, good governance and good faith.”

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## **Legal Effect and Influence of the Declaration**

According to United Nations practice, a declaration is a “formal and solemn instrument”, resorted to “only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected.” Use of a declaration creates “a strong expectation that Members of the international community will abide by it” and, “consequently, in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States.” Report of the Commission on Human Rights, E/3616/Rev. 1, para 105).

Clearly, the UNDRIP is a solemn, comprehensive and authoritative response of the international community of States to the claims of Indigenous Peoples, with which maximum compliance is expected. Yet, as the leading Indian Law treatise points out, declarations are not treaties or covenants that are legally binding in countries that have ratified them; rather they are non-binding statements that have moral, but not necessarily legal force in countries to which they apply. F. Cohen, Handbook of Federal Indian Law (2005 ed.) at 457. Some of the rights that are set out in the UNDRIP may already form part of customary international law, others may become part of the customary international law. Unfortunately, nations are only bound by those rules of international customary law that they believe themselves obligated to follow.

The United States State Department’s announcement of the US support for the Declaration (posted on the State Department Website on January 12, 2011), makes clear that the US believes the Declaration to be nonbinding and “not a statement of current international law.” Rather, it expresses the “aspirations of the United States, aspirations that this country seeks to achieve within the structure of the U.S. Constitution, laws, and international obligations, while also seeking, where appropriate, to improve our laws and policies.” “The United States aspires to improve relations with Indigenous Peoples by looking to the principles embodied in the Declaration in its dealings with federally recognized tribes, while also working, as appropriate, with all indigenous individuals and communities in the United States.”

As noted by the National Congress of American Indians, “[t]he importance of the UN Declaration to American Indian and Alaska Native tribes cannot be overstated. While not legally binding in and of itself, it nevertheless performs the invaluable function of gathering together in one document the basic rights of Indigenous Peoples. This performs an important educational function for the public at large and provides clear direction for those nation States that have endorsed the Declaration.”

In terms of International forums, there is at present no effective international court or police system empowered to adjudicate and enforce the rules found in international instruments or international customary law. That doesn’t mean that a nation can ignore international law with impunity. The threat of adverse publicity, economic and other sanctions, and in extreme cases, the use of military force on the part of other nation-states is usually sufficient to secure compliance with the norms that have been established. Cohen (2005 ed.) at 493.

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There are two main types of international procedures for securing a nation's compliance with international norms: (1) monitoring or reporting procedures, and (2) complaint procedures. Monitoring or reporting procedures typically involve periodic reporting by nations to international bodies concerned with promoting human rights. See e.g., Art. 40, *International Covenant on Civil and Political Rights*; S. James Anaya, *Indigenous Peoples in International Law* at 218-219 (2d ed. Oxford Univ. Press 2004) (international monitoring procedures). These reports can publicize a problem and bring to bear pressure of international opinion on nations that do not comply with international norms.<sup>4</sup>

Complaint procedures typically involve allegations of specific violations of specific international law norms. Often they will result in a decision by a body charged with resolving the complaints. See, e.g., *International Convention on the Elimination of All Forms of Racial Discrimination*, Articles 8-16. Although no formal enforcement mechanism exists to enforce the decisions, as noted above, often the potential adverse publicity created by an unfavorable ruling will often spur remedial action. A common, if not universal, requirement is that the complainant exhaust all domestic remedies before filing the complaint with the international body. Cohen (2005 ed) at 494, citing S. James Anaya, *Indigenous Peoples in International Law* 248-271.

As the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Professor James Anaya, stated in his August 2008 report, UNDRIP constitutes "an authoritative common understanding, at the global level, of the minimum content of the rights of Indigenous Peoples, upon a foundation of various sources of international human rights law. ... The principles and rights affirmed in the Declaration constitute or add to the normative frameworks for the activities of the United Nations human rights institutions, mechanisms and specialized agencies as they relate to Indigenous Peoples." The Special Rapporteur will use the Declaration as a measure to evaluate State conduct, as will the Office of the High Commissioner for Human Rights, in its annual report on the rights of Indigenous Peoples, the Permanent Forum on Indigenous Issues, which is focusing on UNDRIP's implementation, and the Expert Mechanism on the Rights of Indigenous Peoples. The standards of UNDRIP are also being mainstreamed into the policies and programs of the UN.

On the domestic level, article 38 of UNDRIP provides that States shall take appropriate measures, including legislation, to achieve the ends of the Declaration. The Declaration has already formed the basis for pertinent laws in individual countries, as exemplified by the Indigenous People's Rights Act in the Philippines; Bolivia's National Law 3760 of November 7, 2001, which incorporates UNDRIP without change; and constitutional amendments in various other Latin American countries. Domestic courts have also made use of the Declaration as exemplified by the 2007 judgment of the Supreme Court of Belize in the consolidated cases of *Aurelio Cal et al., v. Belize*. The Supreme Court ruled in favor of the Maya residents on their claims that: (1) the government failed to delimit, demarcate, and protect Maya lands against intrusions by others; (2) the government told Maya residents that if they failed to obtain leases they would lose their land; and (3) the government illegally granted concessions to conduct oil exploration on Maya lands. The court's decision was based on the domestic law of Belize, in particular violations of the Belize Constitution. Yet the Chief Justice also found a violation of customary international law against the Belize national government, and stated his view that the 2007 Declaration "embodying as it does, general principles of international law relating to Indigenous Peoples and their lands and resources, is of such force that the defendants, representing the Government of Belize, will not disregard it."

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International law norms can influence the outcome of litigation in the United States courts in three principal ways; as part of a treaty ratified by the US, as part of customary international law applied as federal common law, and as an interpretative aid in the construction of United States constitutional or statutory law. Cohen (2005 ed.) at 489.

Violations of legally binding international instruments, such as treaties, can be the basis of a law suit in federal court in the United States. However, treaties that are not “self-executing” cannot serve as the direct basis of a lawsuit in US courts, even if the treaty is ratified by the Senate. See, e.g., *Manybeads v. United States*, 730 F. Supp. 1515, 1521 (D. Ariz 1989) (rejecting claims that relocation of Navajo Indians pursuant to Navajo-Hopi Land Settlement Act violated UN Charter because the Charter was not self-executing). A non-self-executing treaty requires implementing legislation to make it operative within the United States. Because of the judicial distinction between self-executing and non-self-executing treaties, a number of international documents that are binding on the United States in the international law sense may not serve as the basis for a lawsuit in the United States courts. Cohen (2005 ed.) at 490-91.

Enforcement of customary international law doesn't depend on the self-executing versus non-self-executing distinction. It is well settled that customary law is part of federal common law applicable to the same extent as any other aspect of federal common law. Federal common law can be overridden by a prior or subsequent statute that clearly deals with the issue. Rules of customary law that are consistently disputed by the United States may not be applied in US courts, and it is not always easy to determine the exact content of customary international law. *Id.* at 491-92. Nevertheless, courts occasionally invoke customary international law to give content to vague federal rights. See, e.g., *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997) (applying rules of customary international law to determine “comity” obligation of federal court to recognize and enforce tribal court judgments).

Even when international law rules are not directly enforceable in United States courts, they can still shape the development of federal law in US courts because of their influence on the interpretation of other provisions of US law. The Supreme Court has indicated that federal law should be construed to comport with international law norms if possible. See, e.g., *MacLeod v. United States*, 229 U.S. 416, 434 (1913). Thus, courts in the United States have relied on international law norms in treaties held to be non-self-executing, and even in instruments not ratified by the United States, to aid them in interpreting state and federal statutes and constitutional provisions. See, e.g., *Thompson v. Oklahoma*, 487 US 815, 831 n.34 (1988).

## **Possible Applications for the Indigenous Peoples of the United States**

The Declaration sets an agenda for the United States and its indigenous populations to design a reasonable approach to a progressive realization of the duties and responsibilities contained in the UNDRIP. It serves as a guide for consultations among Indian and Alaska Native tribes and governmental agencies. According to Hillary Thompkins, Solicitor General of the Interior Department, the Interior Department is engaged in an internal review to determine how to implement the Declaration in its policies and procedures. Once the internal review is complete, officials will host tribal consultations to get feedback. This will present an opportunity for Native Americans and Alaska Natives to consult with the Administration about possible legislative initiatives, policy changes, possible new programs, changes in administrative practices, and long-term efforts to correct conditions that impede tribal development or that undermine their right to self-determination, cultural rights, and resource rights.

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In addition, it is critically important that Native Americans and Alaska Natives proactively advance their own ideas, and not wait or depend on the federal government to know what is best for them. As President Obama noted: “Washington can’t – and shouldn’t – dictate a policy agenda for Indian Country.” Tribal nations do better when they make their own decisions.” Native Americans and Alaska Natives must advance their own ideas on the implementation of the Declaration and to bring about positive changes in federal law, policy and practices.

It is also important that the United States honor the UNDRIP’s guarantee that Indigenous Peoples have the right to participate in decision-making in matters which will affect their rights. This includes the obligations to “consult and cooperate in good faith with the Indigenous Peoples concerned,” and to obtain their “free, prior and informed consent,” to legislative and administrative decisions that may affect them.

Effective mechanisms are needed to hold the United States accountable for its human rights obligations, to provide oversight and accountability, and to ensure accesses for redress of human rights violations for tribal governments and individual Native Americans and Alaska Natives. Accordingly, Native Americans and Alaska Natives have called upon the Obama Administration to create an effective infrastructure to promote implementation and to monitor compliance with international human rights treaties and other human rights obligations, and to coordinate the efforts of federal agencies and departments to promote and respect human rights in the United States.

Despite the success of a few Indian tribes and Alaska Native Corporations, Native Americans and Alaska Natives as a group continue to rank at the bottom of every indicator of social and economic well-being in America. The vast majority of Native communities in the United States suffer from alarming levels of poverty and unemployment; Native tribal governments struggle to adequately address health and safety issues and other very basic needs of their communities. Native Americans continue to rank at the bottom of most health indicators, and violence in some communities is endemic. The majority of Indian and Alaska Native communities remain very disadvantaged economically, lacking the opportunity for genuine economic development.

The UN Declaration on the Rights of Indigenous Peoples provides a blueprint for the federal government to strengthen its relationship with the Indigenous Peoples of this country. It can be used to evaluate many unfair laws and policies that still apply to Native Americans and Alaska Natives, and provide guidance for amendments to those laws and policies. It is a critical first step towards addressing difficult issues such as violence against Native women, protection of Native American lands and the environment and providing redress where appropriate, and protecting Native American cultures. Native Americans and Alaska Natives should not hesitate to use the Declaration as the standard by which to measure the actions of the federal government.

<sup>1</sup> Prepared for the Alaska Federation of Natives, April 2011

<sup>2</sup> See S. James Anaya, *Indigenous Peoples in International Law* 23-26 (2d ed. Oxford Univ. Press 2004). The doctrine of discovery, *Johnson v. M’Intosh*, 21 U.S. 543, 573-574 (1823), the existence and scope of Indian title to property, and even the concept of inherent tribal sovereignty, *Worcester v. Georgia*, 31 U.S. 515, 560-61 (1832), all originated in international law norms, which the Supreme Court adapted to the American setting.

<sup>3</sup> See Robert A. Williams, Jr., *Columbus’s Legacy: Law as an Instrument of Racial Discrimination*, 8 *Ariz. J. Int’l & Comp. L.* 51, 67-74 (1991).

<sup>4</sup> For example, in 2008, the UN Committee on the Elimination of Racial Discrimination condemned the United States for its inadequate response to violence against Indian Women and recommended that the United States increase its efforts to prevent and prosecute perpetrations of violence against Indian women.

<sup>5</sup> For example, the United States ratified the International Covenant on Civil and Political Rights (ICCPR) in 1992, but included a provision indicating it was not self-executing. The same was true on the US ratification in 1994 of the International Convention on the Elimination of all forms of Racial Discrimination.



# Restoration of Aboriginal Rights

**A draft working document prepared for the Alaska Federation of Natives to inform discussions during the Legal Empowerment & Indigenous Peoples Conference and beyond. May 9, 2011 Washington, D.C.**

## Introduction

In Alaska Native aboriginal rights to land and associated resources were not dealt with until Congress enacted the Alaska Native Claims Settlement Act (ANCSA) on December 18, 1971. Like many indigenous land claims, the discovery of exploitable resources prompted the settlement of aboriginal rights in Alaska. Alaska's movement toward statehood was typical of United States' expansion, in that the aboriginal occupants of the Alaska Territory had their rights to property and sovereignty determined by the newcomers. While the Statehood Act disclaimed any effect on the aboriginal title claims of Alaska Natives, it, along with the discovery of oil on the North Slope, was the driving force for placing aboriginal claims on the table for settlement on terms set by Congress in ANCSA.

The Act extinguished aboriginal title, but left unresolved important questions regarding tribal sovereignty and Native hunting, fishing and gathering rights. It did not allow for the collective rights of Alaska Native peoples to consent to the terms of the act, an essential element of self-determination under international law. ANCSA was a property rights settlement, which did not speak explicitly to governance questions at all. Glaring deficiencies in the settlement include the failures to provide a self-governance option, or to protect Native hunting, fishing and gathering rights.

A whole host of other issues that should have been included in the settlement were inadvertently left on the table in the haste to settle aboriginal land claims. The bundle of tribal rights that were not addressed in ANCSA, which are taken for granted by tribes in the lower-48, include those that generally apply within "Indian country." They include the favorable treatment given to tribal enterprises for ANCSA corporations, such as exemption from taxation (i.e., treatment equal to that given tribal enterprises organized under the IRA); adequate, long-term funding for Alaska's Native peoples from federal off-shore oil and gas development in areas traditionally used and occupied by them; co-management of federal public lands in Alaska with Native land owners; federal investment in education of Alaska Natives instead of turning it over to the State of Alaska and requiring Native students to excel under a system in which they have limited or no control.

The failure to address these tribal rights has resulted in years of litigation over tribal sovereignty and tribal jurisdiction. Though the fundamental rights to participation in decision making, consent, intergenerational rights, development, and a wide range of other rights were not contemplated within the terms of ANCSA, Alaska Native tribes have remained intact and active. They and the ANCSA corporations have struggled to make ANCSA work. The corporations were foreign to Alaska Natives, but through hard work and perseverance they have succeeded. The regional and a few of the village corporations have since become some of the most important business enterprises in Alaska, employing thousands of people and generating billions of dollars in annual revenue from business activities around the world. At the same time, the basic structure of tribal governance in Alaska today remains legally recognized.<sup>1</sup>



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Congress and the Administration need to address the rights of indigenous peoples in Alaska in a comprehensive way and in a manner consistent with existing and emerging international human rights law. Congress has broad authority to restore these rights. This paper addresses one aspect of the problem—ANCSA's extinguishment of aboriginal hunting, fishing and gathering rights. There are many other unfinished issues that need to be addressed.

## **Background**

The Secretary of the Interior, Ken Salazar, announced a comprehensive review of the federal subsistence management program contained in Title VIII of ANILCA in 2009. AFN devoted substantial resources to the review and submitted the following recommendation at the close of the process.

ANILCA's scheme envisioned state implementation of the federal priority on all lands and waters in Alaska through a state law implementing the rural priority. That system operated for a mere seven years before the Alaska Supreme Court ruled that the State Constitution precluded State participation in the cooperative federalism program. After initial efforts to amend the State Constitution to comply with the ANILCA's compromise and thus have a unified management regime, the State has undermined the system through litigation and by gutting its own subsistence law applicable to state and private lands.

Rather than simply defending a system that no longer serves its intended function, we believe it is time to consider options that reach back to Congress's original expectation that Alaska Native hunting, fishing and gathering rights be protected. Alaska Native peoples have submitted many wise and informative suggestions to you as part of this review process. We have reviewed many of them and held numerous meetings with our constituents in our process of developing these recommendations.

We recommend that the Obama Administration ask Congress to replace the present rural preference with a priority for all Alaska Natives to engage in subsistence uses in Alaska. Congress has the authority to enact legislation, based on the supremacy clause and on its plenary authority to regulate Indian affairs, to provide a Native or tribal subsistence preference on all lands and waters of Alaska.

Unfortunately, the Secretarial review resulted in few meaningful changes, and failed to prompt any attention from Congress. It is thus time to explore some legislative options for advancement by the Native community. Otherwise, the existing subsistence regulatory scheme will remain and the status quo will become the future.

This memorandum addresses issues raised by proposals to: 1) repeal the provision of the Alaska Native Claims Settlement Act (ANCSA) that extinguished aboriginal hunting and fishing rights (§ 4(b))<sup>2</sup>; 2) replace the extinguishment clause with improved protection and recognition of Native hunting and fishing rights, possibly through amendments to ANILCA. Before delving into these issues, however, the basic attributes of aboriginal title are addressed, along with a brief discussion of federal power in this area.

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## **I. Aboriginal Title in General**

Under principles of international law, discovering European nations asserted the exclusive right to deal with indigenous peoples with respect to matters of land ownership and intergovernmental relations.<sup>3</sup> The property rights of Alaska Natives and Indian tribes in the lower-48 states to use and occupy their lands were labeled aboriginal title, or original Indian title.<sup>4</sup> In *Johnson v. McIntosh*, Chief Justice Marshall declared that “The absolute ultimate title [of the United States] has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.”<sup>5</sup> In the subsequent case of *Cherokee Nation v. Georgia*, Marshall stated that “the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government[.]”<sup>6</sup> The rights asserted by the “discovering” nation, thus consisted of a technical legal title, plus the “right of preemption,” which is the right to acquire the full beneficial title to land used and occupied by the indigenous occupants.<sup>7</sup> Of course, Alaska Natives had no such understanding, much less agreement, with the proposition that Russia, the United States, or any other country could divest the Native peoples of their rights to soil and their way of life without their voluntary consent. Chief Justice Marshall was aware of the arrogance of the colonial legal proposition: “However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.”<sup>8</sup> Thus, the United States’ legal claim to title was buttressed by Supreme Court decision and the framework for the eventual extinguishment of aboriginal land ownership in the lower-48 states, Alaska and Hawaii was in place.<sup>9</sup> However, until Congress extinguishes aboriginal title, Native tribes hold a legal right to exclusive use and occupancy of aboriginal lands and waters. That exclusive right includes rights to hunt, fish and gather and make use of other natural resources in aboriginal areas. As the leading treatise notes:

Aboriginal title, along with its component hunting, fishing, and gathering rights, remains in the tribe that possessed it unless it has been granted to the United States by treaty, abandoned, or extinguished by statute. A claim based on aboriginal title is good against all but the United States. The power to extinguish aboriginal title or aboriginal use rights rests exclusively with the federal government. If aboriginal title to land is extinguished, the hunting, fishing, and gathering rights on the land are extinguished as well, unless those rights are expressly or impliedly reserved by treaty, statute, or executive order.

FEDERAL INDIAN LAW at 1121 (footnotes omitted).

Courts have generally required that tribes show actual use and/or occupation of an area on a continuous basis, except for periods of involuntary dispossession, in order to establish aboriginal title. This long-standing use and occupation of territory is sufficient and need not be “based on treaty, statute, or other governmental action.”

*United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347 (1942).

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## **II. The Scope of Federal Power Over Native Affairs**

Congress has full authority over Indian and Alaska Native affairs, and although that power is much criticized and has often been asserted to the detriment of Native peoples, it also may be utilized to provide federal law protection for Native rights, often by preempting state law. *See* FEDERAL INDIAN LAW at 390-99. Recent examples of favorable treatment of tribal rights include enactment of the Native American Grave Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013, which (among other things) provides for the repatriation of cultural patrimony held by federally funded museums, and the Tribal Law and Order Act of 2010, which increased tribal powers in the criminal law area. *See* 25 U.S.C. § 1302 (b). Other examples include the various statutes that restored tribal status to those subject to “termination” statutes in the 1950s. *See* FEDERAL INDIAN LAW at 400-01.

Since federal power under the Constitution provided authority to extinguish aboriginal land claims and hunting and fishing rights in ANCSA, it also can provide power to restore aboriginal rights. *Cf. United States v. Lara*, 541 U.S. 193 (2004) (upholding act of Congress restoring tribal criminal jurisdiction over Indians who are not members of the governing tribe). Indeed, shortly after ANCSA was passed, Congress provided an Alaska Native exemption from the Endangered Species Act. 16 U.S.C. § 1539(e)(1). The question is not so much whether Congress *could* recognize aboriginal rights in Alaska, but what exactly that would mean, and whether it is politically possible.

## **III. Aboriginal Title Prior to ANCSA & Repeal of the Extinguishment Clause**

### **A. Aboriginal Title in Alaska**

The extinguishment clause of ANCSA has its roots in many years of debate prior to Alaska’s statehood.<sup>10</sup> Hearings on statehood took place at several locations around Alaska in 1945. Secretary of the Interior Harold Ickes spoke in favor of statehood, but also declared that “the ancestral claims of Alaska Natives should be affirmed, delineated, or extinguished with compensation.”<sup>11</sup> The first bill introduced in the post-war period provided for statehood, but did not include any reference to Native aboriginal rights, causing Secretary of the Interior Julius Krug to propose amendments requiring the state to disclaim any interest in land owned or held by any Native.<sup>12</sup> For the most part, however, non-Native Alaskans were not prepared or willing to deal with Native claims to aboriginal title during the post-war economic expansion.<sup>13</sup> One historian described the situation.

During this period of economic growth, the Natives were growing increasingly aware of their rights and asked repeatedly for the protections of reservations. Their petitions were ignored. \* \* \* The Natives’ growing uneasiness coincided with the white man’s push for statehood for Alaska. While most proponents of statehood were aware of the Native land claims, few seem to have understood them and most thought that any attempt to settle them at the time of statehood would merely postpone everything. So, almost to a man, they disclaimed any responsibility for them. As one witness told a Congressional committee considering statehood, “The Indians with their aboriginal rights are a federal problem. We have no control over it and we cannot dispose of it and we have nothing to say about it. Whatever happens to Alaska it will still be a federal problem.” No one wanted to talk about the claims. This issue was a highly emotional Pandora’s box: to open it would let out bigotry and greed and fears that were inappropriate in a group of people petitioning for admission to the democratic United States of America.

Mary C. Berry, *THE ALASKA PIPELINE: THE POLITICS OF OIL AND NATIVE LAND CLAIMS* 25 (1975).

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It was in this context that Congress considered a number of approaches to the extinguishment of Alaska Native land claims. Some of these would have simply provided Alaska Natives with the right to sue the United States for compensation for the loss of aboriginal lands, while others provided for the confirmation of title to relatively small amounts of land in and around the Native villages.<sup>14</sup> The effort to extinguish Alaska Native claims to aboriginal title subsided to some degree when the Supreme Court decided *Tee-Hit-Ton Indians v. United States*, which was incorrectly interpreted by some as clearing the way for non-Native development and presumably, acquisition of Native lands. In fact, the Supreme Court in *Tee-Hit-Ton* simply ruled that aboriginal title, unrecognized by Congress, was not subject to the just compensation clause of the Fifth Amendment. The Court did not hold that aboriginal title did not exist and appeared to assume just the opposite.<sup>15</sup> *Id.* at 275 (“The Court of Claims . . . held that petitioner was an identifiable group of American Indians residing in Alaska; that its interest in the lands prior to purchase of Alaska by the United States in 1867 was ‘original Indian title’ or ‘Indian right of occupancy’.”).

Shortly thereafter, in *Tlingit and Haida Indians v. United States*, 177 F. Supp. 452, 461-63 (Ct. Cl. 1959) the court of claims affirmed the existence of aboriginal title among the Tlingit and Haida Indians of Alaska.

The land and water owned and claimed by each local clan division in a village was usually well-defined as to area and use. Clan property included fishing streams, coastal waters and shores, hunting grounds, berrying areas, sealing rocks, house sites in the villages, and the rights to passes into the interior. Tracts of local clan territory were parceled out or assigned to the individual house groups for use and exploitation and the chief of the local clan, assisted by other house chief elders of the clan, formed a sort of council which controlled the clan’s affairs. Smaller areas belonging to a house within a clan remained clan property whenever a house ceased to exist. The modes of living and of dealing with property among these Indians were regulated by rigidly enforced tradition and custom, and, except under special circumstances, there was no authority in a clan or clan division to sell, transfer or otherwise dispose of, in whole or in part, any claimed area of land or water. Land was transferred from one clan to another only as compensation for damages, as gifts in connection with marriages and the like, and such transfers were infrequent. In addition to the areas which were claimed and used exclusively by individual houses, there were certain common areas which could be used by all the clans comprising a particular group of clans residing in a single geographical area. Certain designated offshore fishing and sea mammal hunting areas in larger bodies of water, channels and bays and stretches of open sea could also be used in common by all members of the various clans residing in a particular geographical area, but Indians residing in other geographical areas had no right to such use.

177 F.Supp. at 456.

The court’s ruling was consistent with an earlier opinion from the Department of the Interior considering aboriginal fishing rights of Alaska Natives.

The Indian who has been forbidden [through government callousness or indifference] from fishing in his back yard has not thereby lost his aboriginal title thereto”; “aboriginal occupancy establishes possessory rights in Alaskan waters and submerged lands, and . . . such rights have not been extinguished by any treaty, statute, or administrative action.<sup>16</sup>

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After a thorough discussion of the history of Alaska Native claims to aboriginal title, the leading treatise on Alaska Native legal issues concludes: “the most tenable legal conclusion is that prior to ANCSA, Alaska Native title had the same legal status as original Indian title [aboriginal title] elsewhere in the United States.” David S. Case and David A. Voluck, *ALASKA NATIVES AND AMERICAN LAWS* 62 (2d Ed. 2002).

## **B. A Simple Repeal of the Extinguishment Clause Would Only Result in More Litigation.**

Even if ANCSA’s aboriginal title extinguishment clause were repealed, the State of Alaska could be expected to vigorously dispute the factual basis for claims to aboriginal hunting and fishing right claims. Litigation to establish the geographic scope of such aboriginal rights would certainly be lengthy and expensive. In fact, litigation underway in federal court to do just that was commenced in the mid-1990s in *Native Village of Eyak v. Locke*, No. 3:98 cv-0365-HRH. Judge Holland concluded that none of the villages had established aboriginal title to portions of the Outer Continental Shelf:

None of the ancestral villages was in a position to occupy or exercise exclusive control over any part of the OCS on a sustained basis. Such use and occupancy as probably existed was temporary and seasonal, and more likely than not was carried out by the residents of individual ancient villages as distinguished from any kind of joint effort by multiple villages.

*Id.* at 21. The case is now on appeal to the Ninth Circuit for the second time and will likely be argued this summer.

In addition to contesting the existence of aboriginal rights as a factual and legal matter, the state would almost certainly assert regulatory authority over the exercise of aboriginal rights based on the Supreme Court decision in *Organized Village of Kake v Egan*, 369 U.S. 60, 61-62 (1962). In that case, the state sought to regulate the use of fish traps by two Native villages pursuant to federal permits issued by the Secretary of the Interior. In the course of upholding state authority over off-reservation fishing, the United States Supreme Court noted that:

The [Alaska] Statehood Act by no means makes any claim of appellants to fishing rights compensable against the United States; neither does it extinguish such claims. The disclaimer was intended to preserve unimpaired the right of any Indian claimant to assert his claim, whether based on federal law, aboriginal right, or simply occupancy, against the Government. \* \* \*

Because § 4 of the Statehood Act provides that Indian ‘property (including fishing rights)’ shall not only be disclaimed by the State as a proprietary matter but also ‘shall be and remain under the absolute jurisdiction and control of the United States,’ the parties have proceeded on the assumption that if Kake and Angoon are found to possess ‘fishing rights’ within the meaning of this section the State cannot apply her law.

*Id.* at 67.

Contrary to the parties’ assumption, the Court held that the State of Alaska possessed regulatory authority over the exercise of aboriginal fishing rights—at least for conservation purposes, stating: “This Court has never held that States lack power to regulate the exercise of aboriginal Indian rights, such as claimed here, or of those based on occupancy.” *Id.* at 76. The disclaimer was said to relate only to interference with aboriginal property rights. The exercise of state regulatory jurisdiction over aboriginal fishing rights—at least with respect to the fish trap prohibition—was said to be consistent with aboriginal *property* rights. While a good argument can be made that the language in *Kake v. Egan* was overbroad and should not be followed, the question of state regulatory power over aboriginal hunting and fishing rights would present a difficult and complicated matter to litigate.

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In light of the likelihood of: 1) lengthy and difficult litigation to establish the geographic scope aboriginal title for each federally recognized tribe; and 2) litigation over state regulatory authority over aboriginal hunting and fishing rights, it would be best to consider more than a simple repeal of the extinguishment clause and to provide for preemption of state law. The next section briefly addresses these issues.

#### **IV. Protecting Hunting and Fishing Rights in an ANILCA Amendment.**

One possibility would be to provide for an actual Native preference much like the hunting and fishing rights of most Northwest tribes. This would require the determination of where aboriginal rights to hunt, fish and gather exist and who would have authority to exercise such rights. In other words, repeal of ANCSA's extinguishment clause would be followed by clarification under federal law of the nature of aboriginal rights to hunt, fish and gather. For example a model based on Pacific Northwest treaties could provide:

The right of taking fish, hunting, and gathering for subsistence purposes, at all traditional areas, is hereby secured to all Alaska Natives.

There would need to be definitions for "Alaska Native" and "subsistence purposes." In addition, it would be necessary to include some method to determine where and who would exercise such hunting and fishing rights. Also, it would not be realistic to think that Congress would ever pass such a vague provision without some sort of federal-tribal-state cooperative management scheme.

A more politically feasible option that has been discussed in the past would be to amend Title VIII of ANILCA to provide for an Alaska Native priority for subsistence on all lands and waters in Alaska. This could be limited to Alaska Natives who are rural residents, or expanded to all Alaska Natives. It is likely that the priority for non-Native rural residents would be continued, although its precise relationship to a Native preference would need to be determined. A rough draft to accomplish this has been developed for discussion purposes.

#### **Conclusion**

1. AFN's letter to Secretary Salazar in January of 2010 stated:

While our primary focus is on achieving fundamental structural changes to the law, administrative and regulatory changes in the current management system are needed. See attached letter of June 1, 2009. We stress, however, that a band-aid approach to a system that is broken and that has never worked is not acceptable to the Native community.

Unfortunately, Secretarial Salazar's review only provided a few band-aids. In light of that reality, it is time to revisit congressional alternatives to avoid remaining mired in the status quo.

2. Given the political divide in the federal government, there is no chance that any major substantive changes could be advanced in this Congress, and the start of the Presidential campaign will only slow things down more.

3. The Native Community could get oversight hearings on new solutions to the impasse in the House Resources Committee and the Senate Indian Affairs Committee, in this Congress. This is an important first step to provide focus and allow input which is critical.

4. It would be important to remind all that Congress has the power to amend ANCSA by repealing § 4(b), which extinguished aboriginal rights.

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5. Such a repeal by itself would only prompt more litigation to determine whether and where such rights exist in Alaska for each Alaska Native village, or tribe, and the state could be expected to assert continued regulatory authority over aboriginal rights.
6. A simple treaty-like provision to protect subsistence uses could also be explored, but would have no realistic chance of passage by Congress.
7. Another option would be to amend Title VIII of ANILCA to provide an Alaska Native preference for subsistence uses on all lands and waters in Alaska, and completely preempt state law with regard to the preference.
8. It seems that the option that would have the greatest chance of success would be the amendment of Title VIII to provide an Alaska Native priority for subsistence uses applicable to all lands and waters in Alaska. Even this sort of a change would require a monumental effort. It could be accompanied by a repeal of § 4(b), but a repeal would not be necessary since the amended Title VIII would provide the Native priority and preempt state law.
9. Finally, all of the options noted above should be evaluated in light of the United Nations Declaration on the Rights of Indigenous Peoples, article 38, which provides that States shall take appropriate measures, including legislation, to achieve the ends of the Declaration. Since the United States signed on to the Declaration last year, it can be used with lawmakers and the Administration to argue for explicit protections for Native hunting and fishing. Article 20(1) provides that “Indigenous peoples have the right, ...to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.” The Declaration should be used to evaluate ANCSA and ANILCA and provide guidance for amendments.

<sup>1</sup> *John v. Baker*, 982 P.2d 738 (Alaska 1999)(Alaska tribes continue to have power over their members and others who consent to their jurisdiction notwithstanding the U.S. Supreme Court’s decision in *Native Village of Venetie*, 522 U.S. 520 (1998), finding that ANCSA lands were not “Indian country” and thus not territory subject to tribal jurisdiction under general principles of federal Indian law).

<sup>2</sup> 43 U.S.C. § 1603(b) (“All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.”).

<sup>3</sup> See generally, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW at 10-22 (2005) (FEDERAL INDIAN LAW).

<sup>4</sup> *Johnson v. McIntosh*, 21 U.S. 543 (1823).

<sup>5</sup> *Id.* at 582.

<sup>6</sup> 30 U.S. 1, 17 (1830).

<sup>7</sup> The discovery doctrine is often also described as one which vested legal title to aboriginal lands in the discovering nations, with the indigenous inhabitants retaining the “only” right of use and occupancy—analogueous in some ways to landlord-tenant relationship. See generally, FEDERAL INDIAN LAW at 969-974.

<sup>8</sup> *Johnson v. McIntosh*, 21 U.S. at 591.

<sup>9</sup> See Stuart Banner, HOW THE INDIANS LOST THEIR LAND (2005)(surveying federal-Indian land transactions and underlying policies).

<sup>10</sup> See Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 *Tulsa L. Rev.* 17 (2007).

<sup>11</sup> Richard H. Bloedel, *The Alaska Statehood Movement* at 124 (Unpublished Ph.D. dissertation, U. of Wash. 1974) (on file with U. of Wash. Lib., Seattle).

<sup>12</sup> *Id.* at 193-194.

<sup>13</sup> *Id.* at 220-21.

<sup>14</sup> For a discussion of these efforts, see *Alaska Native Rights, Statehood, and Unfinished Business*, 43 *Tulsa L. Rev.* at 26-28.

<sup>15</sup> The Court concluded that there was no formal congressional guarantee of permanent Native ownership, but implicit in its ruling was acknowledgement that Alaska Natives did have aboriginal title claims.

<sup>16</sup> *Aboriginal Fishing Rights in Alaska*, 57 *Interior Dec.* 461, 474, 476 (Feb. 13, 1942).



# Modern Alaska

## **An Overview of Organizations that have transformed the cultural, social, economic and political landscape for Alaska's Indigenous Peoples since the settlement of their land claims in the Alaska Native Claim Settlement Act (ANCSA)**

### **Introduction**

In the late 50's and early 60's, judicial decisions and state land selections under the Alaska Statehood Act began to jeopardize Alaska Native aboriginal land claims. Other court decisions during this time, most notably *Tlingit and Haida Indians of Alaska v. United States*, upheld the existence or the possibility of such claims. That coupled with Secretary of the Interior's ban of further state selections in 1969 until the question of Native land rights could be resolved, plus the discovery of oil on the North Slope and the obstacle aboriginal claims posed to the extraction, transportation and sale of the oil reserves, led to the prompt resolution of Native land claims by Congress.

The legislation that ultimately emerged, the Alaska Native Claims Settlement Act (ANCSA) in 1971 is unique in the history of Native American aboriginal settlements. It established an unprecedented level of self-determination that has become the worldwide benchmark for indigenous people who aspire to control their own destinies. Previous treaties and settlements required land and assets to be held in trust by the federal government and controlled by the Bureau of Indian Affairs. The essential structure of ANCSA was the conveyance of fee simple title to some 45 million acres of land to Alaska Native Corporations, along with a cash payment of nearly \$1 billion, in exchange for the extinguishment of aboriginal land claims to most of Alaska. Villages in each region could also create their own corporations, and the village corporations would retain surface title to local lands as part of the settlement.

ANCSA was strictly a land settlement—it did not make comprehensive provision for either federal services or protection for Native hunting and fishing rights, nor did it address the question of Native government. It is significant, however, that the settlement was to be accomplished “in conformity with the real economic and social needs of Natives.” 42 U.S.C. § 1601(b). The implication is that federal Native programs addressing these “real” needs were to be evaluated and addressed at a later date.

The success of this Congressional experiment rests upon the actual experience of Alaska Natives implementing this complex land settlement. Immediately upon passage, Native leaders identified two important defects in the law—the extinguishment of aboriginal hunting and fishing rights, which Congress later attempted to address in Title VIII of the Alaska National Interest Conservation Act (ANILCA), and the fact that ANCSA permitted the alienation (sale) of corporation stock after 1991. In 1987, at the request of the Native community, Congress amended ANCSA so as to prohibit automatic alienability. Today, sale of stock shares is permitted only after sales are authorized by a majority vote of the shareholders.

ANCSA is very much a living document, which has been amended many times at the request of Alaska Native people. It was intended to meet the real socio-economic needs of Alaska Natives, as defined by them, and needs change over time.

Prior to the passage of ANCSA, most Alaska Natives had very limited economic prospects, jobs were scarce, educational opportunities were limited, health care was often inaccessible, public services sparse, and racial discrimination was common. Today, Native people have become leaders in Alaska, not only in business but also in society, government, the arts and virtually all aspects of community life. In short, ANCSA transformed the face of modern Alaska.

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## **Alaska Organizations and Corporations**

There are an incredible number of both Native and non-Native organizations in Alaska that have contributed to the overall social and economic well being of Alaska Natives. There are federally recognized tribal governments, regional tribal consortia, state-organized municipal governments, IRA and ANCSA corporations, nonprofit development corporations, and regional Native Associations, to name a few. Those entities chartered under State law are frequently “Native” only because their resident populations, memberships or shareholders happen to be Native. Some are chartered by the federal government; as a consequence they enjoy a special relationship with the United States government.

Functionally, Alaska Natives are organized into at least five distinguishable sorts of entities: (1) governments, (2) economic profit corporations, (3) nonprofit development and service corporations, (4) multiregional political organizations (i.e. AFN or AITC), and (5) international organizations (i.e. ICC). In addition there are state/federal organizations, such as the Denali Commission and the State Permanent Fund Dividend program that have contributed to the legal empowerment of Alaska Natives. The upward social mobility of Alaska Native people has been facilitated by these organizations. Some can serve as models for indigenous peoples around the world.

- **ANCSA Corporations:** As noted in the introduction, ANCSA authorized the creation of Native regional and village corporations. Alaska Native leaders set out to implement the most complex Native land settlement in the history of the United States. They organized for-profit corporations, including their values into the incorporating documents, setting up the corporations from the ground up. All were start-up corporations, with limited seed funds and a shareholder base inclusive of their people. Overnight, Alaska Native people became “shareholders” of their own Native corporation, which would hold their land and their resources. The federal government began an enrollment process, which included all individuals who could show that they were at least one-fourth Alaska Native, were alive on December 18, 1971, and who were U.S. citizens. They elected Native boards of directors, who hired their first staffs to run the corporations. Each Native shareholder was issued 100 shares of stock. Approximately 80,000 individuals were originally enrolled as shareholders in the regional corporations.

For a number of years, the primary activity of the Native corporations was the selection of land and assessing the business opportunity, which made sense to their board. Many hard lessons were learned and it was not an easy time. Litigation over interpretations of various sections of the land settlement and other conflicts drained many corporations of the limited resources they had. The U.S. Congress amended ANCSA numerous times to adjust and resolve various problems at the request of the Alaska Native people. Some amendments were major rewrites, others were technical in nature. At one point, the U.S. Congress recapitalized the Native corporations through various tax provisions. Today, the number of shareholders has grown as the original stock has been transferred through inheritance and gifting and the enrollment of the next generation of Native people by some of the ANCSA corporations. The 12 regional ANCSA corporations are involved in a wide range of economic activities, including government contracting, real estate development, petroleum refining and marketing, printing and publishing, general construction, IT information security and communications, commercial fisheries, food services, telecommunications, hospitality and tourism, oil and gas drilling, mining and mining support, sport hunting and fishing, logistics services, timber development and marketing, and environmental remediation services to name just a few of the economic activities.

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The village corporations have achieved varying stages of development, with some operating worldwide and some primarily in their own communities. It is estimated that 169 village corporations are currently active, due to both mergers and discontinued operations. For 2008, all 12 regional corporations were ranked in the list of the Top 49 Alaskan-Owned companies. Nine village corporations were also on the list. ANCSA corporations accounted for 71% of the total revenues of all companies in the “Top 49ers” list. They also accounted for 85 percent of all jobs provided by the listed companies. The revenue for 2008 for the 12 ANCSA regional corporations was \$6.9 billion. However net profits fell to \$260 million from 2007 levels of \$474 million. A significant portion of the profits were paid out to shareholders in the form of dividends.

Over 35,000 jobs worldwide were attributed to the business activities of the 12 regional ANCSA corporations in 2008. Of these jobs, 13,848 were in Alaska. In addition to substantial charitable contributions to a wide variety of non-profits and community organizations, the ANCSA corporations invested over \$11 million in scholarships and endowments for shareholders.

- **Federally Recognized Tribal Governments:** There were 210 Native villages recognized initially under ANCSA; of these, approximately 120 were organized as municipalities under state law, and of that number approximately 70 had organized IRA councils. That left approximately 90 Alaska Native communities that, in 1971, were governed solely by traditional village councils. In 1993, the BIA published a list of 227 federally recognized tribes. That number has grown to 229. The role played by tribal governments began a dramatic evolution in 1975, with the enactment of the Indian Self-Determination and Education Assistance Act (ISDEA), which required Native programs administered by the Department of the Interior and Health and Human Services to be contracted out to “tribes” or their authorized “tribal organizations.” Over time, the effect of the ISDEA has been to transfer federal funding and control of federal programs either directly to the tribes or to the regional nonprofits as the tribally sanctioned tribal organization. Tribal governments, as with municipalities, provide needed services for their people. In many rural Alaska communities, tribes are the only forms of government. The lack of recognized geographic delineation of tribal government jurisdiction complicates the tribes’ ability to fulfill needed governmental functions in rural Alaska, such as law enforcement and alcohol control.
- **Regional Native Associations & Tribal Consortia:** After enactment of ANCSA, the 12 regional Native associations formed in the late 1960’s to pursue the land claims settlement, turned their attention to the service delivery and community development concerns which plagued rural Alaska and which were not solved by the land claims settlement. These regional tribal consortia have been administratively determined to be tribal organizations eligible for grants and contracts under the ISDEA. The nonprofit organizations are involved in a large number and variety of federal-and state-funded programs, administering contracts totaling in the millions of dollars. These associations perform many of the service functions that one would expect of regional governments.

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- **Western Alaska Community Development Quota (CDQ) Program:** The CDQ Program began in December of 1992. This federal program allocates a percentage of all Bering Sea and Aleutian Islands quotas for groundfish, prohibited species, halibut, and crab to 65 eligible communities that have formed six regional organizations (CDQ groups). The purpose of the Program is (i) to provide eligible western Alaska villages with the opportunity to participate and invest in fisheries in the Bering Sea and Aleutian Islands Management Area; (ii) to support economic development in western Alaska; (iii) to alleviate poverty and provide economic and social benefits for residents of western Alaska; and (iv) to achieve sustainable and diversified local economies in western Alaska. The program was modeled after ANCSA with three primary differences—there is government oversight of all business activities; there are community based shareholders instead of individual shareholders; and all investments must be fisheries related.

Since 1992, over \$110 million in wages, education, and training benefits have been generated for over 25,000 residents. As of 2003, the asset value of the six CDQ groups exceeded \$260 million. The CDQ program has been successfully contributing to fisheries infrastructure in western Alaska by funding docks, harbors, and the construction of seafood processing facilities.

- **The Alaska Native Tribal Health Consortium** is a not-for-profit tribal health organization managed by Alaska Native tribal governments and their regional health organizations. The Consortium was created in 1997 to provide statewide Native health services. All Alaska Natives, through their tribal governments and their regional non-profit organizations own the Consortium. The Consortium employs approximately 2,000 people and operates under a half-billion dollar operating budget. Compacting, authorized under the federal Indian Self-Determination Act (PL 93-638), increases tribal control over and responsibility for federal program funds by awarding them directly to tribal organizations, as opposed to having the Indian Health Service or BIA, for example, act as the middleman, administering programs and contracting with a tribal organization.

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ANTHC operates the Alaska Native Medical Center, a 150 bed facility offering specialty, tertiary, and primary care for all Alaskans and American Indians throughout the State. It provides a full range of medical services with over 250 Board-certified physicians, 700 nurses and is the highest rated Trauma center in the State. Its Division of Environmental Health and Engineering provides safe water and wastewater disposal facilities, and provides technical assistance with the construction, maintenance and renovation of health care facilities. It provides training for village-based Dental Health Aide Therapists.

- **The Alaska Permanent Fund** is a constitutionally established permanent fund of oil revenue, managed by a semi-independent corporation, established by Alaska State Legislature in 1976. Shortly after the oil from Alaska's North Slope began flowing to market through the Trans-Alaska Pipeline, the Permanent Fund was created by an amendment to the Alaska Constitution to be an investment for at least 25% of proceeds from some mineral (such as oil and gas) sales or royalties. The Alaska Permanent Fund sets aside a certain share of oil revenues to continue benefiting current and all future generations of Alaskans. The Alaska Permanent Fund Corporation manages the assets of both the Permanent Fund and other state investments, but spending Fund income is up to the Legislature. The Corporation is to manage for maximum prudent return, and not—as some Alaskans at first wanted—as a development bank for in-state projects. The Fund grew from an initial investment of \$734,000 in 1977 to approximately \$28 billion as of March 2008. Some growth was due to good management, some to inflationary re-investment, and some via legislative decisions to deposit extra income during boom years. Each year, the fund's realized earnings are split between inflation-proofing, operating expenses, and the annual Permanent Fund Dividend, which is paid to every citizen who has resided in Alaska for at least a year. The amount of each year's payment is based upon a five-year average of the Fund's performance and varies depending on the stock market and other factors. The largest payment was \$3,269 per person in 2008, when a one-time \$1200 Alaska Resource Rebate was added to the dividend amount. The income from the PFD is heavily relied upon by residents of rural Alaska where employment opportunities are rare.
- **The Denali Commission:** The Denali Commission is an independent federal agency designed to provide critical utilities, infrastructure, and economic support throughout Alaska. With the creation of the Denali Commission in 1978, Congress acknowledged the need for increased federal-state cooperation and focus on Alaska's remote communities. Since its first meeting in April 1999, the Commission is credited with providing numerous cost-shared infrastructure projects across the State that exemplify effective and efficient partnership between federal and state agencies, and the private sector. Over 100 health clinics and facilities have been built. Bulk fuel storage tank replacements and utility upgrades have also been a core focus. The seven member Commission includes the President of the Alaska Federation of Natives or an individual selected from nominations submitted by the President of AFN. The Denali Commission funding reached a high of \$140 million from various sources in 2005, but has since been steadily declining. Funding for 2010 was less than \$65 million. To date, over a billion dollars have been invested from the federal government through the Denali Commission to build rural infrastructure.



### **Statement for the AFN Program**

I commend the Alaska Federation of Natives and the Institute for Liberty and Democracy for taking this important first step in introducing the Legal Empowerment Movement into your discussions of U.S. policy and thank Chairman Inouye and Chairman Akaka for their leadership on this critical issue. When Dr. de Soto and I announced the creation of the Commission on Legal Empowerment of the Poor, we sought to lay the groundwork for an entirely new way to fight poverty in the world. We hoped to promote a model of economic achievement for and by the people, seeking ways to provide people with the legal protections and basic rights that are so fundamental to social stability and economic security. I join Dr. de Soto in applauding the progress Alaska Natives have made on this issue and am eager to examine the possibilities for further success on legal empowerment in the United States.

- Madeleine K. Albright  
U.S. Secretary of State, 1997-2001

**Statement by the Special Rapporteur to be read at  
Alaska Federation of Natives' *Legal Empowerment & Indigenous Peoples Conference***

**6 May 2011**

**Introduction**

Thank you for the opportunity to have a statement presented at the Alaska Federation of Natives' Legal Empowerment and Indigenous Peoples Conference. This conference comes at an important time for indigenous peoples internationally. In the past decade, there have been major developments and achievements in the international indigenous rights movement, including the adoption of the United Nations Declaration on the Rights of indigenous peoples. I have been asked to present some words about the Declaration. In doing so, I hope to assist with your becoming informed about the UN Declaration on the Rights of Indigenous Peoples and about the international system of which it is part. I hope to help motivate continued and further involvement at the international level in regards to indigenous issues. And I hope to help reveal or deepen understanding about the Declaration as a source of inspiration for advancing the rights of your own people and other indigenous peoples around the globe.

**United Nations Declaration on the Rights of Indigenous Peoples**

**The adoption and basic content of the Declaration**

The adoption of the Declaration by the General Assembly three and a half years ago marks the culmination of three decades of a standard-setting process involving States and indigenous peoples, and marked the end of years of study and joint work between governments, indigenous peoples and experts from around the world. By adopting the Declaration, the UN proclaimed what should have been stated long ago, but was not widely accepted by the dominant actors among the states of the world: that indigenous peoples and individuals, their cultures and ways of life, are equal to all others in dignity and value; and that indigenous peoples, like all other peoples, have the right to self-determination.

The Declaration provides broad recognition of indigenous peoples' individual and collective rights under the overarching thrust of the rights to equality and self-determination. It affirms a number of rights in areas of special significance to indigenous peoples' survival under conditions of respect and equality vis-à-vis others, including self-government and participation, including consultation and consent; cultural and spiritual heritage; lands, territories and natural resources; and development and social services.

**Key characteristics**

To understand the significance and scope of the Declaration, I believe, is to understand its key characteristics, which include the following:

- **Legitimacy:** The Declaration finds its legitimacy in both its approval by the United Nations General Assembly and its grounding in the worldwide indigenous movement. The Declaration is the product of the efforts of indigenous peoples themselves dating back to the arrival of Deskaheh, an Iroquois chief, at the League of Nations in Geneva 1920s. In the 1970s indigenous

peoples from around the world began arriving at the United Nations in ever greater numbers, pressing their common demands. Indigenous peoples themselves became actively involved in drafting of the Declaration, ensuring that it would reflect their aspirations.

On September 13, 2007, the General Assembly approved the Declaration and the common understandings of indigenous peoples that it represented. It did so by an overwhelming majority of the UN member states. Worldwide, any State opposition to the Declaration originally expressed when it was adopted in 2007 has been decreasing, indicating that the Declaration and its justifications are increasingly better understood. Each of the countries that voted against the Declaration at the time of its adoption by the General Assembly in 2007, including the United States, Australia, Canada, and New Zealand, have since reversed their opposition and have expressed support for the instrument.

- ***The Declaration is a Human Rights Instrument:*** The Declaration is grounded in human rights principles of universal applicability. As I have underscored in the past, the Declaration does not establish new or special human rights in a fundamental sense. Rather, it affirms basic human rights principles that are applicable to all and elaborates upon them in the specific historical, cultural, political and social context of indigenous peoples. In particular it takes into account the collective dimensions of the exercise by indigenous peoples of basic human rights. Core human rights principles in the Declaration, as already pointed out, are equality and self-determination. The Declaration contextualizes these rights in accordance with indigenous peoples collective experiences and aspirations. Another example is the right to property with translates into specific collective rights over lands and resources in accordance with their traditional patterns.

- ***Advances a new model of Human Rights:*** The recognition of collective rights in the Declaration advances a new model of human rights, one that is linked of vision of a multicultural state. This model of collective rights within a multicultural state is one that departs from Western liberal thinking that has dominated conceptions of human rights at the state and international levels. The Western liberal model has strongly preferred the consolidating of culturally homogenous societies with the promise of individual rights within such societies. Hence in United States and elsewhere, indigenous cultures and their own forms of organization and landholding were not valued and indeed were the targets of extermination. What was deemed best for indigenous peoples was assimilation into the dominant social fabric and the eradication of inter-generational indigenous identity. The starkest manifestation of this in many countries was the taking of indigenous children from their families and communities. The Declaration posits a very different model, one that values cultural diversity and sees human rights in those terms.

- ***An instrument of reparation and reconciliation:*** The Declaration is fundamentally a remedial instrument, aimed at overcoming the marginalization and discrimination that indigenous peoples systematically have faced across the world as a result of historical processes of colonization, conquest and dispossession. The Declaration is also a reminder that these processes and their legacies persist and are reproduced today in various forms, and it calls upon States and the international community as a whole to put an end to these processes and take affirmative measures to implement the human rights that indigenous peoples have been denied.

## **A blueprint for change – and the challenge of implementation**

With these characteristics, the Declaration is an historic document that represents a blueprint for change for indigenous peoples, change from the oppressive past and the ongoing manifestations of that oppression. The Declaration inspires and motivates movement toward a world in which indigenous peoples basic human rights are respected in accordance with the Declaration's terms. But it is one thing to have achieved the Declaration and its blueprint for change, it is quite another thing to see that Declaration implemented so that real change for the better comes about in the everyday lives of indigenous peoples in places they live. While some progress has been made in many countries toward implementing the Declaration's terms, much remains to be done, as I am constantly reminded in my work as UN Special Rapporteur.

Implementation of the Declaration must ultimately come about at the local level, through cooperative efforts between indigenous peoples and the government authorities of the countries in which they live. In this regard, Alaska natives should continue to engage in activities to designed operationalize the standards set forth in the United Nations Declaration and to move forward in a future in which indigenous peoples are in control of their development, participating as equal partners in the development process. I also believe it is extremely important for those indigenous groups that have achieved notable successes in advancing their rights to share their experiences with other indigenous peoples around the world. I hope that you can continue and enhance your involvement in the international indigenous rights movement, and that you can help inspire the development of new strategies for meeting the challenges indigenous peoples continue to face around the globe.