

1986

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Ralph W. Johnson

University of Washington School of Law

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Recommended Citation

Ralph W. Johnson, *Law and Alaska Natives: The Warp and Woof of a Field of Law in Transition*, 61 WASH. L. REV. 287 (1986), <https://digitalcommons.law.uw.edu/faculty-articles/490>

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Law and Alaska Natives: The Warp and Woof of a Field of Law in Transition

Book Review of—

ALASKA NATIVES AND AMERICAN LAWS

By David Case. University of Alaska Press, 1984. Pp. xxii, 586.

Reviewed by Ralph W. Johnson*

Occasionally a legal scholar publishes a work that successfully organizes a wide array of legal sources into a new, distinct "field of law." One such work appeared in 1942 with the publication of Felix Cohen's *Handbook of Federal Indian Law (Handbook)*.¹ Professor Cohen's book conceptualized and created the field of "Indian Law" by synthesizing a diverse set of sources including treaties, executive orders, statutes, regulations, court decisions, Department of Interior Solicitor Opinion Letters, and government policies and practices. No one had previously attempted such a monumental task, and the success of Professor Cohen's effort led Justice Frankfurter to describe the *Handbook* as having "brought luminous order out of . . . a mish-mash."² Professor Cohen's book soon became, and still remains, an indispensable source of Indian law.

In *Alaska Natives and American Laws*, David Case has undertaken a task similar to Professor Cohen's, albeit a narrower and less fearsome one. He has organized and provided conceptual clarity to the law as it relates to Alaska Natives, an often overlooked area of Indian law. Professor Case's book may well attain a status for Alaska Natives similar to that attained by Cohen's book for Indians of the continental United States.

The law applicable to Alaska Natives has unusual twists and turns, making it unique even within the novel field of federal Indian law. Federal policy toward Alaska Natives began in 1867 when the United States purchased Alaska from Russia.³ By that date the United States had developed a set of well-defined policies for dealing with Indian tribes located in the continental United States.⁴ Legislation and court decisions

* Professor of Law, University of Washington.

1. F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW XVIII* (1942 ed.).
2. Frankfurter, *Foreword to Cohen, Dialogue on Private Property*, 9 *RUTGERS L. REV.* 355, 356 (1954).
3. Treaty With Russia, Mar. 30, 1867, United States—Russia, 15 Stat. 539.
4. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1831).

established legal doctrine that survives today which affirms the sovereignty and self-governing status of these Indian tribes.

Alaska Natives and tribes of the lower forty-eight states had an analogous relationship to the land and a similar history of self-government. Consequently, one would expect that the federal government would have applied to Alaska Natives existing legal doctrines, wrought out of eighty years' experience with Indians of the continental United States. Yet during the initial years, between 1867 and the early 1900's, federal policy toward Alaska Natives was ambivalent. Frequently, the federal government made conscious attempts to treat Alaska Natives differently. Although the Bureau of Indian Affairs (BIA) was responsible for policies and programs relating to Indians of the continental United States, the BIA did not administer Alaska programs.⁵ Moreover, in 1894 the Solicitor for the Department of Interior expressly concluded that many laws about "Indians" and "Indian Country" did not apply in Alaska.⁶

The federal government's ambivalence toward Alaska Natives reflected national uncertainty about the proper policy to be applied to Indians generally. Federal policy toward Indians in the lower forty-eight states was moving away from further treaty-making with Indian tribes, toward dissolving existing reservations and assimilating Indians into the larger culture.⁷ The House of Representatives long had objected to treaty-making with Indian tribes because the western tribes were militarily and politically weaker,⁸ and because the Constitution gives the House no part in the treaty process.⁹ In 1871, just four years after the Alaska purchase, Congress banned further treaties with Indian tribes.¹⁰ Consequently, the federal government never signed any treaties with Alaska Natives.

Other established federal Indian policies were also being questioned.¹¹

5. D. CASE, *ALASKA NATIVES AND AMERICAN LAWS* (1984).

6. Alaska—Legal Status of Natives, 19 Pub. Lands Dec. 323 (1894).

7. The reservation policy dominated from about 1850 to 1880. This policy was a different form of "removal." It was designed to remove the Indians from their expansive ancestral hunting, fishing, and roaming areas, and locate them on smaller, specific tracts of land called "reservations." Through its reservation policy the federal government sought to reduce friction between whites and Indians, and make more land available for the westward migrating settlers.

8. See, e.g., 1869 COMM'R OF INDIAN AFFAIRS ANN. REP., reprinted in *DOCUMENTS OF UNITED STATES INDIAN POLICY*, 134-35 (F. Prucha ed. 1975) [hereinafter cited as *PRUCHA DOCUMENTS*].

9. Treaties are consummated by the President and two-thirds of the Senate. U.S. CONST. art. II, § 2, cl. 2.

10. 25 U.S.C. § 71 (1982). See generally *Antoine v. Washington*, 420 U.S. 194, 201-02 (1975).

11. The removal policy prevailed during the first half of the 19th century. Implementation of this policy resulted in the removal of numerous tribes from their homelands in the Eastern United States to lands west of the Mississippi and Missouri Rivers. Tribes removed pursuant to the policy included: the Five Civilized Tribes, Kickapoos, Wyandottes, Ottowas, Pottawatomies, Winnebagos, Delawares, Shawnees, and the Miamis. See D. McNICKLE, *THEY CAME HERE FIRST: THE EPIC OF THE AMERICAN INDIAN* 245 (1975). The removal policy had no application in Alaska because the territory was so vast,

In the mid-1870's bills were introduced in Congress that were designed to break up Indian reservations and allot tribally-owned land to individual Indians in order to force assimilation at a faster pace.¹² The government wanted to stop recognizing tribes as separate nations and deal, instead, with Indians as individuals, subject to the laws of the United States, the same as other persons.

In Alaska the reverberations of these changes were reflected in policies designed to treat Alaska Natives individually rather than tribally, and to deny them the special federal relationship historically accorded Indians in the lower forty-eight states. By the early 1900's, however, it was apparent that no rational basis existed for treating Alaska Natives differently. In 1923 the Solicitor for the Department of the Interior recognized that relations between the Natives and the government are "very similar and in many respects identical" to those of the Indians of the lower forty-eight states.¹³ In 1931 the BIA took over the administration of Alaska Native programs, placing them on the same administrative footing as tribes in the lower forty-eight states.¹⁴

Professor Case marshalls persuasive evidence to demonstrate that early attempts to apply different policies to Alaska Natives were ill-advised.¹⁵ During those early years, as well as more recently, Congress enacted many laws that were especially applicable to Alaska Natives, including laws concerning Native townsites,¹⁶ Native allotments,¹⁷ educational

the population so sparse, and the weather so rigorous that Natives and non-Natives seldom came into contact or conflict.

12. As early as 1858, the reservation policy was severely criticized by Indian Commissioner Mix. 1858 COMM'R OF INDIAN AFFAIRS ANN. REP., reprinted in PRUCHA DOCUMENTS, *supra* note 8, at 92. Mix urged a policy of greater assimilation. By 1872 (two years after the purchase of Alaska) the Indian Peace Commission resolved that the government should cease to recognize tribes as "domestic dependent nations" unless existing treaties already so provided and urged that thereafter Indians should be dealt with as individuals subject to the laws as individuals, instead of being dealt with as tribes. PRUCHA DOCUMENTS, *supra* note 8, at 117. By the mid-1870's bills were being introduced in Congress to break up Indian reservations and allot separate parcels of tribal lands to individual Indians. See 1880 SECRETARY OF INTERIOR ANN. REP., reprinted in PRUCHA DOCUMENTS, *supra* note 8, at 154. The allotment policy was widely discussed and supported during the 1870's and 1880's by government, civic, and religious leaders. See Documents 3, 6, & 8 in AMERICANIZING THE AMERICAN INDIANS (F. Prucha ed. 1973). This public discussion and support culminated in enactment of the General Allotment Act of 1887 (The Dawes Act), which authorized the President, through the Secretary of Interior, to allot tribal lands in designated quantities to individual reservation Indians. 25 U.S.C. §§ 331-34 (1982).

13. *Leasing of Lands Within Reservations Created For The Benefit of The Natives of Alaska*, 49 Pub. Lands Dec. 592, 594-95 (1923). In 1932 the Solicitor said "it is clear that no distinction has been or can be made between the Indians and other [N]atives of Alaska so far as the laws and relations of the United States are concerned . . ." Status of Alaska Natives, 53 Pub. Lands Dec. 593, 605-06 (1932). See also D. CASE, *supra* note 5, at 9.

14. Secretarial Order No. 4949, March 14, 1931 cited in D. CASE, *supra* note 5, at 9.

15. See, e.g., D. CASE, *supra* note 5, at 7-9.

16. Act of May 25, 1926, ch. 379, §§ 1-4, 44 Stat. 629-30, repealed by Pub. L. No. 94-579, tit. VII, § 703(a), 90 Stat. 2789. Natives were entitled to obtain "title" to lands in the public domain for

programs,¹⁸ and subsistence hunting and fishing.¹⁹

A complex array of four different types of reserves were created for Alaska Natives. Prior to 1919, the most popular method for creating Alaska Native reserves was by executive order, with approximately 150 reserves established in this manner.²⁰ When Congress, in 1919, prohibited further executive order reserves,²¹ five "public purpose" reserves were created for Alaska Natives between 1920 and 1930,²² essentially to circumvent the congressional prohibition.²³ Six Indian Reorganization Act reserves were created between 1944 and 1949,²⁴ although their status was later put in doubt by United States Supreme Court decisions.²⁵ More recently, Congress created two statutory reserves.²⁶ In 1971, Congress abolished all of the above reserves, except the statutorily-created Metlakatla reserve.²⁷

This trend toward legislation designed especially for Alaska Natives has continued.²⁸ Modern examples of legislation with provisions having a

townsites. D. CASE, *supra* note 5, at 157.

17. Act of May 17, 1906, ch. 2469, § 1, 34 Stat. 197, *repealed by* Pub. L. No. 92-203, § 18(a), 85 Stat. 710. The General Allotment Act of 1887, Act of Feb. 8, 1887, 24 Stat. 389 (codified as amended at 25 U.S.C. §§ 348-49 (1982)), was not applicable to Alaska Natives. *See* D. CASE, *supra* note 5, at 135. Therefore, the 1906 Act was passed to allow Natives to perfect legal title to the lands they used and occupied. This land was not on reservations, as in the lower 48 states. *See* D. CASE, *supra* note 5, at 136.

18. *See, e.g.*, Act of June 27, 1905, ch. 277, 33 Stat. 616, 619. These acts provided for special educational programs for Alaska Natives. D. CASE, *supra* note 5, at 199.

19. *See* D. CASE, *supra* note 5, at 279. "There are seven specific wildlife treaties, implemented by four correlative statutes, which relate specifically to Alaska Native subsistence" concerning migratory birds, fur seals, whales, and polar bears. *Id.* *See also* Reindeer Industry Act, Act of Sept. 1, 1937, ch. 897, 50 Stat. 900 (codified at 25 U.S.C. § 500 (1982)); Endangered Species Act, Pub. L. No. 93-205, 81 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-43 (1982)); Marine Mammal Protection Act of 1972, 86 Stat. 1027 (codified at 16 U.S.C. §§ 1361-1407 (1982)); Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, tit. VIII, 94 Stat. 2371, 2422 (codified at 16 U.S.C. §§ 3111-3233 (1982)).

20. D. CASE, *supra* note 5, at 86.

21. 43 U.S.C. § 150 (1982). *See* D. CASE, *supra* note 5, at 97.

22. D. CASE, *supra* note 5, at 86.

23. *Id.*

24. *Id.* at 101.

25. *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949). *See also* *United States v. Libby, McNeil & Libby*, 107 F. Supp. 697 (1952). These cases cast doubt on the status of Alaska Indian Reservation Act reserves by suggesting they were comparable to executive order reserves and thus the government could terminate them at will, and without compensation. D. CASE, *supra* note 5, at 104.

26. D. CASE, *supra* note 5, at 86.

27. Alaska Native Claims Settlement Act (ANCSA), 1971, Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. §§ 1601-28 (1982)). Important amendments to ANCSA were made in the Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (codified at scattered parts of 16 U.S.C.A. (West 1985) and 43 U.S.C.(1982)). ANCSA eliminated Native aboriginal claims to land, hunting, and fishing rights, and to 365 million acres of land in the state. It confirmed Native title to 44 million acres, created 13 Regional Native corporations and about 215 Native Village Corporations, and paid the Natives approximately one billion dollars.

28. D. CASE, *supra* note 5, at 22.

special impact on Alaska Natives include The Marine Mammal Protection Act²⁹ and the Endangered Species Act.³⁰ Probably the most important and unique law ever enacted for any group of Native Americans was the Alaska Native Claims Settlement Act of 1971 (ANCSA).³¹

In sum, the law applicable to Alaska Natives is novel, even within the unique field of Federal Indian law. Until *Alaska Natives and American Laws*, it was difficult to find relevant sources. Even when one successfully located relevant sources, it was difficult to make sense out of them. Professor Case has provided order and clarity to this “mish-mash” and has written a book that encompasses the entire field.

Alaska Natives and American Laws develops three distinct themes. First, Case argues that villages and bands of Alaska Natives have, and should retain, broad self-governing powers that were neither addressed nor significantly altered by the ANCSA.³² Second, Case argues that the federal trust relationship with Alaska Natives was not, and should not have been, terminated by ANCSA.³³ Finally, Professor Case’s book reflects his belief that history should play an important role in the interpretation of laws relating to Alaska Natives.³⁴

The book is in five parts: Introduction, Alaska Native Lands and Resources, Federal Human Service Obligations, The Federal Obligation to Protect Subsistence, and Native Self-Government. Each of these parts, and in fact each of the ten chapters, is designed to be independent. Some necessary duplication occurs where statutes and cases bear on several chapter topics.

The Alaska Native Claims Settlement Act is profoundly important in Alaska Native affairs. The impact of this Act on both Alaska Natives and non-Natives will be great, and lasting. But David Case declines to consider the Act as the culmination of the federal relationship with Alaska Natives, as some others might view it. Instead Professor Case deals with it as part of the warp and woof of a field of law in transition. Although ANCSA is discussed in every chapter, the overall importance of the Act is minimized.³⁵

29. Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (codified at 16 U.S.C. §§ 1361-1407 (1982)).

30. Endangered Species Act, Pub. L. No. 93-205, 81 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-43 (1982)).

31. See, e.g., D. CASE, *supra* note 5, at 15, 28-30.

32. *Id.* at 30.

33. *Id.* at 22-24, 29-30, 112.

34. *Id.* at v-vi. The organization of the book also reflects a heavy emphasis on an historical approach.

35. See, e.g., D. CASE, *supra* note 5, at 29.

Professor Case is a careful writer and thorough scholar. Legal researchers in this field in coming years will find this book invaluable. It is the only comprehensive source available on the topic. The impact of Case's views on the courts remains conjectural, but the impact on scholarship will predictably be great and enduring.