Washington Law Review

Volume 78 | Number 3

8-1-2003

Aboriginal Title or the Paramountcy Doctrine? *Johnson v. McIntosh* Flounders in Federal Waters off Alsaka in *Native Village of Eyak v. Trawler Diane Marie, Inc.*

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ABORIGINAL TITLE OR THE PARAMOUNTCY DOCTRINE? *JOHNSON V. MCINTOSH* FLOUNDERS IN FEDERAL WATERS OFF ALASKA IN *NATIVE VILLAGE OF EYAK V. TRAWLER DIANE MARIE, INC.*

Andrew P. Richards

Abstract: In *Johnson v. McIntosh* and its progeny, the United States Supreme Court established the principle that aboriginal title allows Indian tribes to exclusively use and occupy their territories after they come under United States sovereignty. In *Native Village of Eyak v. Trawler Diane Marie, Inc.*, five Alaska Native villages asserted aboriginal title to areas of the seabed and ocean off Alaska. The villages argued that federal fisheries regulations violate their aboriginal title by allowing non-Natives to fish within those areas, while excluding most of the villagers. The United States Court of Appeals for the Ninth Circuit rejected the villages' claim, holding that the paramountcy doctrine had extinguished the villages' aboriginal title. Under the paramountcy doctrine, the federal government must control exploitation of the seabed and ocean to fulfill its duty to defend the nation and to regulate international commerce. The *Eyak* court held that aboriginal title would conflict with federal supremacy over the seabed and ocean off Alaska. This Comment argues that the Court of Appeals for the Ninth Circuit en banc or the U.S. Supreme Court should hold that the paramountcy doctrine did not extinguish aboriginal title to the seabed and waters off Alaska because aboriginal title does not interfere with the federal government's ability to protect the nation or to regulate international trade.

For seven thousand years, people from five Alaska Native villages (the villages) fished and hunted along the southern coast of what is today the State of Alaska.[1] They continued to use their traditional areas until 1995, when the Secretary of the Department of Commerce limited fishing for halibut and sablefish off Alaska.[2] Previously, both Alaska Natives and non-Natives pursued halibut and sablefish from Southeast Alaska to the Bering Sea. The ease of entry into these two fisheries spawned a modern-day maritime gold rush in which too many people risked too much money and life for steadily diminishing profits.[3] Fearing that over-fishing would destroy the halibut and sablefish stocks, the Secretary curtailed fishing seasons by the late 1980s from months down

1. Native Vill. of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090, 1091 (9th Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999) [hereinafter *Eyak I*]. The five villages were the Alaska Native Villages of Eyak, Tatitlek, Chanega, Port Graham, and Nanwalek. *Id.*

2. Pacific Halibut Fisheries, 58 Fed. Reg. 59,375, 59,402 (Nov. 9, 1993) (codified at 50 C.F.R. pt. 679).

3. Ransom E. Davis, *Individually Transferable Quotas and the Magnuson Act: Creating Economic Efficiency in Our Nation's Fisheries*, 5 DICK. J. ENVTL. L. & POL'Y 267, 283 (1996).

to days.[4] In 1995, the Secretary responded to concerns about harvesters' dwindling profit margins, and the inherent dangers of fisheries built on wild two- and three-day openings, by limiting the number of people allowed to participate in the halibut and sablefish fisheries to those who qualified for Individual Fishing Quota shares (IFQs).[5]

IFQs enable their holder to catch a certain number of pounds of halibut and sablefish each season.[6] The catch is virtually guaranteed[7] and fishing is allowed over a nearly nine-month season.[8] The Secretary issued IFQs to the owners or lessees of vessels used to catch halibut or sablefish between 1988 and 1990.[9] Thus, the government rewarded those who invested capital in the halibut and sablefish fisheries, but not necessarily those who did the fishing. The number of IFQs awarded to any individual depended on the amount of halibut or sablefish caught by that person's vessel during the 1980s.[10] For IFQ holders, the new system is a vast improvement upon the earlier, open-access model in which harvesters were out of luck if they found no fish during the brief openers. Today, anyone who wants to benefit from the IFQ system but who did not initially qualify for IFQs—hired skippers, deckhands, and those who did not fish between 1988 and 1990—must buy the right to fish, the IFQs, from someone who already owns IFQs.[11]

In 1998 and 2002, the villages claimed that the IFQ regulations violated their fishing rights based on aboriginal title to areas of the Gulf of Alaska.[12] Since the United States Supreme Court's decision in

4. *Id.*

5. Alliance Against IFQs v. Brown, 84 F.3d 343, 345 (9th Cir. 1996).

6. Fisheries of the Exclusive Economic Zone off Alaska; Individual Fishing Quota Management Measures, 50 C.F.R. § 679.40 (2002).

7. The amount of fish caught is not absolutely guaranteed because IFQ holders must still manage to catch the fish. However, it is very likely that IFQ holders will catch their quota because they now have less competition and longer seasons.

8. Fisheries of the Exclusive Economic Zone off Alaska; Sablefish Managed Under the Individual Fishing Quota Program, 68 Fed. Reg. 7719, 7719 (Feb. 18, 2003).

9. 50 C.F.R. § 679.40(a)(2)(A)–(B).

10. An individual's vessel must have caught halibut or sablefish between 1988 and 1990 to qualify for *any* IFQs. Once an individual demonstrated that his or her vessel caught halibut or sablefish during that period, the amount of halibut harvested between 1984 and 1990, and the amount of sablefish harvested between 1985 and 1990, determined the number of halibut and sablefish IFQs awarded to that individual. Pacific Halibut Fisheries, 58 Fed. Reg. 59,375, 59,386 (Nov. 9, 1993) (codified at 50 C.F.R. pt. 679).

11. Buying into the IFQ system is expensive. In June 2003, halibut IFQs cost between $3.00 and $13.00 per pound, while sablefish IFQs cost between $1.75 and $13.00 per pound. PAC. FISHING, July 2003, at 37.

12. Eyak I, 154 F.3d 1090, 1091 (9th Cir. 1998); Native Vill. of Eyak v. Evans, No. A98-0365-CV, slip op. at 8 (D. Alaska Sept. 25, 2002) [hereinafter *Eyak II*].

Johnson v. McIntosh[13] nearly two hundred years ago, the Court has recognized that Indian tribes hold aboriginal title to their territories.[14] Under aboriginal title, tribes may exclusively use and occupy their territories until Congress extinguishes their title.[15] The villages argued that the IFQ regulations limited their ability to fish in their traditional areas of Cook Inlet and Prince William Sound, citing as evidence the fact that the Secretary had awarded halibut IFQs to only seventeen village members, and sablefish IFQs to only one member.[16] In *Native Village of Eyak v. Trawler Diane Marie, Inc.* (*Eyak I*),[17] and *Native Village of Eyak v. Evans* (*Eyak II*),[18] the United States Court of Appeals for the Ninth Circuit and the United States District Court for the District of Alaska, respectively, held that the paramountcy doctrine had extinguished the villages' rights.[19] Under the paramountcy doctrine, the federal government must control the exploitation of the seabed and ocean off the coast of the United States to fulfill its duty to defend the nation and to regulate international commerce.[20] The *Eyak I* and *II* courts reasoned that the villages' claimed aboriginal rights to the seabed and offshore waters were incompatible with federal sovereignty over those areas.[21]

This Comment argues that aboriginal title is compatible with federal sovereignty over the seabed and ocean off Alaska. Part I details the U.S. Supreme Court's aboriginal title jurisprudence. Part II describes the extension of federal jurisdiction over the seabed and ocean. Part III traces the history of aboriginal title claims to the seabed and ocean off Alaska. In Part IV, this Comment argues that the Ninth Circuit en banc or the U.S. Supreme Court should apply the Court's traditional aboriginal title analysis, and not the paramountcy doctrine, to aboriginal

13. 21 U.S. 543 (1823).

14. United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 345–47 (1941); Cramer v. United States, 261 U.S. 219, 227 (1923); *see also* Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667–69 (1974) [hereinafter *Oneida I*].

15. *Santa Fe*, 314 U.S. at 347.

16. STEVE J. LANGDON, RESOURCE USES BY ALASKA NATIVES AND NON-NATIVES IN THE CENTRAL GULF OF ALASKA OUTSIDE THREE MILES IN THE 20TH CENTURY 126–27 (Sept. 15, 2000) (unpublished report pertaining to *Eyak II*) (on file with author) (noting also that other, unidentified village members may hold IFQs).

17. 154 F.3d 1090 (9th Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999).

18. No. A98-0365-CV (D. Alaska Sept. 25, 2002).

19. *Eyak I*, 154 F.3d at 1096–97; *Eyak II*, No. A98-0365-CV, slip op. at 28.

20. *See* United States v. Texas, 339 U.S. 707, 719 (1950).

21. *Eyak I*, 154 F.3d at 1096–97; *Eyak II*, No. A98-0365-CV, slip op. at 31.

title claims to the seabed and ocean off Alaska because those claims are consistent with federal sovereignty over offshore areas.

I. ABORIGINAL TITLE ALLOWS A TRIBE TO EXCLUSIVELY USE AND OCCUPY ITS TERRITORY

Nearly two hundred years ago, the U.S. Supreme Court incorporated the concept of aboriginal title into American law in *Johnson v. McIntosh*.[22] The Court described the division of the New World, and explained that discovering nations respected among themselves each nation's right to take exclusive title to any new territory that it discovered.[23] This title gave the discovering sovereign the exclusive right to acquire the discovered territory from resident tribes.[24] Those tribes had the right, under aboriginal title, to exclusively occupy their territory until the sovereign acquired it, or until the sovereign exercised its exclusive power to extinguish the tribes' title.[25] In the United States, only Congress has the power to extinguish aboriginal title.[26]

A. The U.S. Supreme Court Incorporated the Concept of Aboriginal Title into American Law Nearly Two Centuries Ago

In *Johnson*, the U.S. Supreme Court introduced into American law the doctrine of discovery, the principle that guided the European division of, and protected aboriginal title to, the New World.[27] The dispute in *Johnson* arose from Thomas Johnson's purchase of land from the Illinois tribe in 1775 in the area that became known as the Old Northwest.[28] Johnson purchased the tribe's land in defiance of King George III's ban on settlements after Britain won the French and Indian War in 1763.[29] As successor to Britain's interest in the Old Northwest, the United States acquired from the Illinois the same land that they had already sold to

22. 21 U.S. 543, 574 (1823).

23. *Id.*

24. *Id.* at 573.

25. *Id.* at 574.

26. United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 347 (1941).

27. *Johnson*, 21 U.S. at 574.

28. *Id.* at 555–56. The term "Old Northwest" described the land south of the Great Lakes, east of the Mississippi River, north of the Ohio River, and west of the Appalachians and other eastern mountain ranges. ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 233 (1990).

29. *Johnson*, 21 U.S. at 594.

Johnson, and in 1818 granted that land to William McIntosh.[30] Johnson took exception to the re-conveyance of what he thought was his land and sued McIntosh in *Johnson v. McIntosh*, seeking to quiet title.[31] The *Johnson* case provided the Court with an opportunity to define tribes' rights to territory under federal sovereignty. The success of Johnson's suit depended on whether the Court would recognize the validity of the title he had purchased from the Illinois.[32]

In *Johnson*, the Court explained that European nations divided the New World among themselves under the doctrine of discovery.[33] This doctrine gave to each nation "exclusive title" to the land it discovered.[34] Under this title, the discovering nation had the exclusive right to acquire newfound territory from its Indian occupants.[35] Exclusive title also permitted the discovering nation to convey tribal territory at will,[36] but all conveyances came subject to the "Indian right of occupancy," now commonly known as aboriginal title.[37] Aboriginal title allowed a tribe to exclusively use and occupy its territory after discovery.[38] However, that right was qualified by the restriction that the tribe could convey its territory only to the nation holding exclusive title to the tribe's land.[39] The Court decided that Johnson could not enforce his title in the United States' courts[40] because he purchased his land in 1775 from the Illinois without the consent of Britain, at the time the sovereign reigning over the Illinois' land.[41]

Less than a decade after *Johnson*, the Court emphasized the subordination of tribal sovereignty over Indian land within the United States.[42] In *Cherokee Nation v. Georgia*,[43] the Cherokee sued the State of

30. *Id.* at 560.

31. *Id.* at 571–72.

32. *Id.* at 572.

33. *Id.* at 574.

34. *Id.*

35. *Id.* at 573.

36. *Id.* at 574.

37. DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 36 (2d ed. 2002).

38. *Johnson*, 21 U.S. at 574.

39. *Id.*

40. *Id.* at 604–05.

41. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 487 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN].

42. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

43. 30 U.S. 1 (1831).

Georgia to prevent it from seizing and dividing their land.[44] The Court, however, refused to entertain the Cherokee's suit under the Court's original jurisdiction.[45] The Court decided that although the Constitution gave it original jurisdiction over cases between states and foreign nations, the Cherokee were not a foreign nation but a "domestic dependent nation[]."[46] The Court reasoned that the Cherokee were "completely under [United States] sovereignty and dominion" because the United States would consider itself invaded if any foreign nation attempted to acquire land from, or form political connections with, the Cherokee.[47] The Court described the relationship between the Cherokee Nation and the United States as resembling "that of a ward to his guardian."[48] After *Johnson* and *Cherokee Nation*, tribes retained their right to exclusively use and occupy their territory, but exercised that right subject to federal sovereignty.

B. U.S. Supreme Court Decisions Following Johnson *Have Refined the Concept of Aboriginal Title*

U.S. Supreme Court decisions after *Johnson* have defined the scope of aboriginal title and the conditions under which aboriginal title can be extinguished.[49] In those cases, the Court held that all territories acquired by the United States are subject to aboriginal title[50] and that aboriginal title allows tribes to exploit the natural resources of their land[51] and water territories.[52] The Court's precedent permits only Congress to extinguish aboriginal title,[53] but does not require Congress to compensate tribes when it extinguishes their title because

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44. *Id.* at 15.

45. *Id.* at 20.

46. *Id.* at 17.

47. *Id.* at 17–18.

48. *Id.* at 17.

49. COHEN, *supra* note 41, at 489–91. In decisions following *Johnson*, the Court also addressed the enforceability of aboriginal title. *See, e.g.*, United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 347 (1941); Cramer v. United States, 261 U.S. 219, 229 (1923). Though it is not clear from these decisions, aboriginal title appears to be enforceable against all but Congress, which has the exclusive ability to extinguish aboriginal title. *See generally* COHEN, *supra* note 41, at 488–89. In any case, the *Eyak I* and *II* courts did not question the enforceability of the villages' title.

50. *Santa Fe*, 314 U.S. at 346.

51. COHEN, *supra* note 41, at 491 (citing *Santa Fe*, 314 U.S. 339; United States v. Shoshone Tribe, 304 U.S. 111, 117 (1938)).

52. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 670 n.15, 687 (1979).

53. *Santa Fe*, 314 U.S. at 347.

congressionally unrecognized aboriginal title is not a "property right" protected by the Fifth Amendment.[54]

1. Scope of Aboriginal Title

Federal law protects aboriginal title to all territory acquired by the United States.[55] In *United States v. Santa Fe Pacific Railroad Co.*,[56] a railroad company claimed unencumbered title to part of the land conveyed to the United States from Mexico known as the Mexican Cession.[57] Congress granted the land to the railroad company's predecessor in 1866.[58] In 1883, President Chester Arthur established the Walapais Indian Reservation, which surrounded some of the railroad's land.[59] Before the Ninth Circuit, the United States argued that the railroad's land within the Reservation came subject to the Walapais' aboriginal title.[60] The court held otherwise, deciding that aboriginal title did not exist in the Mexican Cession.[61] On appeal, the U.S. Supreme Court disagreed, holding that all territories acquired by the United States are subject to aboriginal title.[62] The Court remanded the case to allow the Walapais the opportunity to prove that their title existed in fact.[63]

Within territory subject to aboriginal title, tribes possess both the rights retained and given up by treaty. As the U.S. Supreme Court explained in *United States v. Winans*,[64] treaties are "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[65] Among the rights arising from aboriginal title is a tribe's right to exploit the resources on and beneath the surface of its territory.[66]

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54. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279, 284–85 (1955).

55. *Santa Fe*, 314 U.S. at 346.

56. 314 U.S. 339 (1941).

57. *Id.* at 343–45. The territory known as the Mexican Cession included land in what are today the states of New Mexico, Arizona, Utah, Nevada, Colorado, and Wyoming. COHEN, *supra* note 41, at 518. Mexico ceded this territory to the United States by the Treaty of Guadalupe Hidalgo, Feb. 2, 1848, U.S.-Mex., art. V, 9 Stat. 922, 926.

58. *Santa Fe*, 314 U.S. at 343.

59. *Id.* at 357.

60. *Id.* at 343–44.

61. *Id.* at 345–46.

62. *Id.*

63. *Id.* at 360.

64. 198 U.S. 371 (1905).

65. *Id.* at 381.

66. COHEN, *supra* note 41, at 491 (citing *Santa Fe*, 314 U.S. 339; United States v. Shoshone Tribe, 304 U.S. 111, 117 (1938)).

In *United States v. Shoshone Tribe*,[67] the question before the Court was whether the Shoshone tribe's aboriginal title included the right to use the timber and minerals of its territory.[68] The Court concluded that those resources belonged to the tribe by dint of aboriginal title established by "undisturbed possess[ion] of the soil from time immemorial."[69]

While many aboriginal title cases involve disputes over land, the rights conferred by aboriginal title are not restricted to *terra firma*. In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n (Fishing Vessel)*,[70] the U.S. Supreme Court recognized non-exclusive Indian fishing rights in the Pacific Ocean off Washington State.[71] The Court held that tribal parties to the Stevens Treaties reserved the right to harvest up to fifty percent of the fish passing through their fishing grounds, including those in the Pacific Ocean.[72] Five years later, in *United States v. Washington*,[73] the Ninth Circuit affirmed the right of the Makah tribe, a signatory to one of the Stevens Treaties, to fish up to forty miles off the coast of Washington State.[74] Although both *Fishing Vessel* and *Washington* involved treaty rights, the Court has recognized that those rights are based upon aboriginal title established by prior exclusive use of the waters at issue.[75]

The U.S. Supreme Court has never considered whether aboriginal title exists in the seabed and ocean off Alaska. However, in response to conflicts between Alaska Natives and non-Indians over control of fish trap sites,[76] the Solicitor of the Department of the Interior issued an opinion in 1942 finding that Alaska Natives had established exclusive rights to the seabed and ocean off Alaska, based on their use of those areas.[77] Following this opinion, the U.S. Supreme Court suggested that Congress also believed that these aboriginal rights existed.[78] In

67. 304 U.S. 111 (1938).

68. *Id.* at 113.

69. *Id.* at 117.

70. 443 U.S. 658 (1979).

71. *Id.* at 670 n.15, 689.

72. *Id.* In 1854 and 1855, many Northwest tribes signed treaties with the United States. *Id.* at 661–62 n.2. These treaties are known as the Stevens Treaties because they were all negotiated by Isaac Stevens, the first Governor of the Washington Territory. *Id.* at 666.

73. 730 F.2d 1314 (9th Cir. 1984).

74. *Id.* at 1318.

75. *Fishing Vessel*, 443 U.S. at 678; United States v. Winans, 198 U.S. 371, 379 (1905); *see also Washington*, 730 F.2d at 1315–16.

76. Aboriginal Fishing Rights in Alaska, 57 Interior Dec. 461, 461 (1942).

77. *Id.* at 476–77.

78. Organized Vill. of Kake v. Egan, 369 U.S. 60, 65–67 (1962).

Organized Village of Kake v. Egan,[79] the Court held that the Alaska Statehood Act (Statehood Act)[80] neither extinguished nor formally recognized aboriginal rights to the seabed and waters off Alaska, but instead preserved for later resolution Alaska Native claims based on aboriginal title.[81]

2. *Extinguishment of Aboriginal Title*

Only Congress has the power to extinguish aboriginal title,[82] and when it exercises this power it must act in a "plain and unambiguous" manner.[83] In *Santa Fe*, the railroad company insisted that President Arthur's establishment of the Walapais Reservation in 1883 had extinguished the Walapais' aboriginal title.[84] The Court agreed that the Walapais had abandoned their claims to land *outside* the Reservation when they accepted the Reservation,[85] but remanded the case for a determination of whether the Walapais had occupied any of the land *inside* the reservation from "time immemorial."[86] The Court reasoned that the Walapais would hold title to that land because Congress had not extinguished their title by treaty, warfare, purchase, or "by the exercise of complete dominion adverse to the right of occupancy."[87] Thus, the Court in *Santa Fe* recognized the exclusive power of Congress to terminate a tribe's right to use its territory.[88]

Even when a tribe's aboriginal title has not been extinguished, Congress may take resources from the tribe's territory without paying compensation if it has not formally recognized the tribe's title.[89] In *Tee-Hit-Ton Indians v. United States*,[90] the Tee-Hit-Ton tribe of southeast

79. 369 U.S. 60 (1962).

80. Alaska Statehood Act (Statehood Act) of 1958, Pub. L. No. 85-508, 72 Stat. 339.

81. *Kake*, 369 U.S. at 65–67 (citing the Statehood Act). In *Kake*, the Court also held that the State of Alaska could regulate off-reservation fishing by Alaska Natives. *Id.* at 76. This Comment does not address the implications of that holding because the *Eyak* villages claim rights to waters beyond the limits of Alaska's jurisdiction.

82. United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 347 (1941).

83. *Id.* at 346.

84. *Id.* at 343–44.

85. *Id.* at 357–58.

86. *Id.* at 360.

87. *Id.* at 347.

88. *Id.*

89. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279, 284–85 (1955); COHEN, *supra* note 41, at 491.

90. 348 U.S. 272 (1955).

Alaska argued that Congress owed them the value of timber that it had sold from land the tribe claimed was subject to its aboriginal title.[91] The Court assumed that the Tee-Hit-Ton held aboriginal title to their land, but concluded that their title, while permitting them to use and occupy their land, did not give them "legal rights" to their land.[92] The Court decided that the Tee-Hit-Ton had no legal rights to their land because Congress had not formally set aside land for them to use, as it had for the Shoshone and other tribes with dedicated reservations.[93] Because the Tee-Hit-Ton lacked legal rights to their land, the Court held that the Fifth Amendment did not require that Congress compensate the Tee-Hit-Ton for the timber taken from their territory.[94]

C. *U.S. Supreme Court Analysis of Aboriginal Title Claims*

The following three-step approach to assessing aboriginal title claims can be distilled from the U.S. Supreme Court's decision in *Santa Fe*.[95] First, the Court determined whether the United States had extended its sovereignty over the land at issue because all territory acquired by the United States comes subject to aboriginal title.[96] After recognizing that

91. *Id.* at 275–77.

92. *Id.* at 279.

93. *See id.* at 279, 289–90. This distinction explains why the Court ordered Congress to pay compensation to the Shoshone tribe for taking their reservation land and its resources. United States v. Shoshone Tribe, 304 U.S. 111, 117–18 (1938).

94. *Tee-Hit-Ton*, 348 U.S. at 288–89. *Tee-Hit-Ton* extended the Court's decision in *Sioux Tribe v. United States*, 316 U.S. 317, 331 (1942) (holding that federal government owes no compensation for taking Indian lands set aside by executive order).

95. United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941). *Santa Fe* represents the U.S. Supreme Court's most complete analysis of an aboriginal title claim. The cases described in *supra* notes 27–75 and accompanying text involve one or two of the three steps of *Santa Fe*'s aboriginal title analysis, but not all three. In *Johnson* and *Cherokee Nation*, the Court focused on the first step of the analysis, the relationship between aboriginal title and United States sovereignty. Johnson v. McIntosh, 21 U.S. 543, 572–74 (1823); Cherokee Nation v. Georgia, 30 U.S. 1, 16–18 (1831). The second step of the analysis, extinguishment of aboriginal title, was also at issue in *Johnson*, which emphasized that the power to extinguish aboriginal title lies exclusively with the government extending its sovereignty over Indian territory, and in *Tee-Hit-Ton*, which explained that Congress owes tribes no compensation when it extinguishes aboriginal title. *Johnson*, 21 U.S. at 573; *Tee-Hit-Ton*, 348 U.S. at 288–90. The third step of the *Santa Fe* analysis, proving the existence of aboriginal title, hinges on the ability of a tribe to demonstrate that it exercised the rights stemming from aboriginal title since time immemorial. The Court addressed the scope of those rights in *Winans*, *Shoshone Tribe*, and *Fishing Vessel*. United States v. Winans, 198 U.S. 371, 381 (1905); United States v. Shoshone Tribe, 304 U.S. 111, 116–18 (1938); Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 666 nn.6–8, 679–81 (1979).

96. *Santa Fe*, 314 U.S. at 346; *accord* Vill. of Gambell v. Hodel, 869 F.2d 1273, 1277–78 (9th Cir. 1989) [hereinafter *Gambell III*]; *see also* Holden v. Joy, 84 U.S. 211, 244 (1872); *Johnson*, 21 U.S. at 591.

the Mexican Cession was subject to both United States sovereignty and aboriginal title, the Court examined whether Congress had extinguished aboriginal title in that territory.[97] After concluding that Congress had not extinguished aboriginal title, the Court remanded the case to the lower courts to decide the third question, whether the Walapais had in fact exclusively used and occupied their territory.[98] Under *Santa Fe*, a court must recognize a tribe's aboriginal title if the court finds that the United States has extended its sovereignty over tribal territory, that Congress has not extinguished aboriginal title to that territory, and that the tribe has exclusively used and occupied its territory.[99]

When aboriginal title does exist, it allows a tribe to exercise both the rights reserved and relinquished by treaty.[100] Among these rights is the ability to develop the natural resources above and below the surface of tribal territories,[101] including those encompassing areas of the Pacific Ocean.[102] Tribes may continue to exclusively use and occupy their territory until Congress exercises its power to extinguish their aboriginal title.[103] When Congress exercises this power, it need not compensate tribes because congressionally unrecognized aboriginal title is not a property right protected by the Fifth Amendment.[104]

II. THE PARAMOUNTCY DOCTRINE AND ACTS OF CONGRESS HAVE EXTENDED FEDERAL CONTROL OVER THE SEABED AND OCEAN

The "paramountcy doctrine" stems from two U.S. Supreme Court decisions, *United States v. California*[105] and *United States v. Texas*.[106] In these cases, the federal government claimed ownership of and control over the seabed off the coasts of California and Texas, respectively.[107] The Court employed sweeping language to hold in each case that the

97. *Santa Fe*, 314 U.S. at 347; *Johnson*, 21 U.S. at 584–85.

98. *Santa Fe*, 314 U.S. at 359.

99. *Id.* at 345–47.

100. *See Winans*, 198 U.S. at 381.

101. United States v. Shoshone Tribe, 304 U.S. 111, 117 (1938).

102. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 670 n.15, 687 (1979); United States v. Washington, 730 F.2d 1314, 1318 (9th Cir. 1984).

103. *Santa Fe*, 314 U.S. at 346–47.

104. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279, 284–85 (1955).

105. 332 U.S. 19 (1947).

106. 339 U.S. 707 (1950).

107. *Texas*, 339 U.S. at 709; *California*, 332 U.S. at 22.

federal government must have the "paramount power"[108] to regulate exploitation of the seabed and ocean to fulfill its duty to defend the nation and to regulate international commerce.[109] Following the Court's recognition of this power, Congress enacted the Submerged Lands Act (SLA)[110] and the Outer Continental Shelf Lands Act (OCSLA).[111] These acts surrendered to the states title to the seabed within three miles of their shores[112] and extended federal "jurisdiction [and] control" over the seabed beyond three miles from shore.[113] Later, Congress established its exclusive regulatory authority over fisheries between three and 200 miles offshore[114] through the Fishery Conservation and Management Act of 1976 (Magnuson Act).[115] The SLA, OCSLA, and the Magnuson Act reflect the federal government's paramount control over the seabed and the ocean adjacent to the United States.

A. The Paramountcy Doctrine Established Federal Control of the Seabed and Ocean

Oil was discovered off the coast of California in 1894, and by 1926 both California and Texas were executing offshore oil leases[116] on the assumption that earlier U.S. Supreme Court decisions had recognized that they held title to the seabed out to three miles from shore.[117] Shortly after California and Texas began leasing the seabed, Congress considered bringing the seabed within the "public domain," and the Secretary of the Department of the Interior suggested that the federal

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108. *Texas*, 339 U.S. at 719.

109. *Id.*; *California*, 332 U.S. at 35–36.

110. Submerged Lands Act of 1953, ch. 65, 67 Stat. 29 (codified as amended at 43 U.S.C. §§ 1301–1315 (2000)).

111. Outer Continental Shelf Lands Act of 1953, ch. 345, 67 Stat. 462 (codified as amended at 43 U.S.C. §§ 1331–1356 (2000)).

112. 43 U.S.C. § 1311(a)(1)–(2).

113. *Id.* §§ 1331(a), 1332(1).

114. *See* 16 U.S.C. § 1801(b)(1) (2000).

115. Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331, *renamed* Magnuson-Stevens Fishery Conservation and Management (Magnuson) Act, Pub. L. 104-208, 110 Stat. 3009 (codified as amended at 16 U.S.C. §§ 1801–1883 (2000)).

116. EDWARD A. FITZGERALD, THE SEAWEED REBELLION: FEDERAL-STATE CONFLICTS OVER OFFSHORE ENERGY DEVELOPMENT 28 (2001).

117. Robert E. Hardwicke et al., *The Constitution and the Continental Shelf*, 26 TEX. L. REV. 398, 401–03 (1948) (citing Shively v. Bowlby, 152 U.S. 1 (1893); Manchester v. Massachusetts, 139 U.S. 240 (1891); McCready v. Virginia, 94 U.S. 391 (1876); Weber v. Bd. of Harbor Comm'rs, 85 U.S. (18 Wall.) 57, 65 (1873); Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845); Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842)).

government might also lease the seabed.[118] In May 1945, the United States took the seabed controversy to the courts by suing the Pacific Western Oil Company to enjoin it from exercising a lease granted to it by California.[119] In September 1945, President Harry Truman declared United States jurisdiction over the natural resources of the seabed[120] and one month later the United States dropped its suit against Pacific Western and instead sued California.[121] In that suit, the United States challenged California's ability to issue oil leases based on its alleged ownership of the seabed off its shores.[122]

In *United States v. California*, the United States argued that its constitutional responsibility to "protect this country against dangers to the security and tranquility of its people" required it to control use of the "marginal sea and land under it."[123] California argued that it owned the resources of the adjacent seabed because it entered the Union on "equal footing" with the original states, which allegedly held title to submerged land off their coasts.[124] The Court disagreed with California, finding no historical support for the idea that the original thirteen colonies owned their adjacent seabed.[125] Instead, the Court decided that the dispute was less about title to the seabed and more about which government, state or federal, should have the power to decide whether foreign or domestic

118. Hardwicke, *supra* note 117, at 401.

119. FITZGERALD, *supra* note 116, at 29.

120. Proclamation No. 2667, 10 Fed. Reg. 12,303 (Sept. 28, 1945). President Truman's proclamation extended U.S. jurisdiction over the seabed to the exclusion of jurisdiction claimed by foreign states. However, the proclamation was not intended to resolve the conflict between the states and the federal government over ownership of the seabed within or beyond three miles from shore. FITZGERALD, *supra* note 116, at 28.

121. FITZGERALD, *supra* note 116, at 28–29.

122. *Id.*

123. United States v. California, 332 U.S. 19, 29 (1947).

124. *Id.* at 29–30. Before the U.S. Supreme Court's decisions in *California* and *Texas*, states claimed that the "equal footing" doctrine gave them title to the seabed off their coasts. Created by the Court, the equal footing doctrine holds that all states, upon admission to the Union, took title to the land beneath navigable waters within their boundaries. United States v. Texas, 339 U.S. 707, 716 (1950). The English Crown asserted sovereignty over the submerged land surrounding Britain, and, according to the coastal states, conveyed similar rights to the colonies. FITZGERALD, *supra* note 116, at 29–30. The coastal states theorized that they should take title to the seabed off their shores because they were on "equal footing" with the original thirteen states, which had inherited the colonies' rights to the seabed by the 1783 Treaty of Paris, and retained those rights when they formed a Union. *Id.* Prior to the 1940s, courts supported state ownership of the seabed. John Hanna, *The Submerged Land Cases*, 3 STAN. L. REV. 193, 200–07 (1951).

125. *California*, 332 U.S. at 31–32.

entities may extract natural resources from the "marginal sea" bordering California.[126]

The Court explained that historically the federal government claimed dominion over the three-mile wide marginal sea to protect the nation's neutrality,[127] and recognized that the federal government's control of the seabed and waters bordering the United States enabled it to regulate commerce over, and fight wars on, the ocean.[128] Further, the Court concluded that the United States' control over the "the ocean or the ocean's bottom" was as important to federal sovereignty as ownership of land beneath inland waters was to state sovereignty.[129] Accordingly, the Court held that the federal government had "full dominion over" oil and other resources of the seabed and ocean off California's coast.[130]

Three years later, the Court reaffirmed this holding in *United States v. Texas*.[131] Texas, like California, advanced an "equal footing" argument to support its claim to the land and minerals underlying the Gulf of Mexico.[132] Texas asserted that it owned these resources because the Republic of Texas had previously owned them.[133] Texas maintained that the Republic had owned and regulated the seabed,[134] and had relinquished only its regulatory powers when it joined the Union.[135] The Court read Texas' history differently, deciding that the Republic had surrendered all of its claims to the seabed when it joined the Union on equal footing with the original states.[136] Invoking the language of federal sovereignty, the Court held that "national interests and national responsibilities" dictate that all property interests within the "marginal sea" must "unite in the national sovereign."[137] Although both *California* and *Texas* appeared to involve only competing claims to the seabed, the Court accepted the opportunity provided by each case to hold that the United States' sovereignty extends over both the seabed and the ocean

126. *Id.* at 29.
127. *Id.* at 32–33.
128. *Id.* at 34–35.
129. *Id.* at 34–36.
130. *Id.* at 38–39.
131. 339 U.S. 707, 719 (1950).
132. *Id.* at 712; *see also supra* note 124 and accompanying text.
133. *Texas*, 339 U.S. at 711.
134. *Id.* at 712.
135. *Id.* at 713.
136. *Id.* at 718.
137. *Id.* at 719.

above the seabed.[138] Furthermore, while neither case explicitly held that the United States *owns* offshore natural resources,[139] the paramountcy decisions clearly awarded the United States *control* over those resources.[140]

B. *Federal Regulation of the Seabed and Ocean from 1953 to the Present*

Between 1953 and 1976, Congress extended federal jurisdiction over the seabed and fisheries off the coast of the United States.[141] Congress exercised its newly won paramountcy powers over the seabed when it passed the Submerged Lands Act and the Outer Continental Shelf Lands Act in 1953.[142] The SLA conveyed to the coastal states title to the seabed within three miles of their shores,[143] and OCSLA extended federal jurisdiction[144] over the Outer Continental Shelf (OCS), which is the seabed beyond three miles from coastal states' shorelines.[145] Both the SLA and OCSLA preserved existing rights to the seabed under "the law in effect at the time they may have been acquired."[146] Two decades later, the Magnuson Act of 1976[147] extended Congress' regulatory jurisdiction

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138. *See id.* at 718–19; United States v. California, 332 U.S. 19, 34–36 (1947).

139. Justice Frankfurter observed that while the Court held that California did not own the seabed, the basis for the Court's finding that California had trespassed against the United States was the United States' "dominion" over, and not its ownership of, the seabed. *California*, 332 U.S. at 43 (Frankfurter, J., dissenting).

140. In two other cases, *United States v. Louisiana*, 339 U.S. 699 (1950), and *United States v. Maine*, 420 U.S. 515 (1975), the Court reaffirmed its *California* and *Texas* decisions. In *Louisiana*, the Court held that Louisiana's claims to the seabed twenty-four miles beyond the three-mile belt were contrary to the national interest. 339 U.S. at 701, 705. In *Maine*, the Court recognized U.S. jurisdiction to the outer edge of the continental shelf, but qualified the "constitutional premise" of its earlier decisions by noting that overruling *California* and *Texas* would disrupt years of legislation and commercial activity founded upon those decisions. 420 U.S. at 517, 524, 528.

141. Outer Continental Shelf Lands Act of 1953, ch. 345, 67 Stat. 462 (codified as amended at 43 U.S.C. §§ 1331–1356 (2000)); Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331, *renamed* Magnuson-Stevens Fishery Conservation and Management (Magnuson) Act, Pub. L. 104-208, 110 Stat. 3009 (codified as amended at 16 U.S.C. §§ 1801–1883 (2000)).

142. Submerged Lands Act of 1953, ch. 65, 67 Stat. 29 (codified as amended at 43 U.S.C. §§ 1301–1315 (2000)); Outer Continental Shelf Lands Act of 1953, ch. 345, 67 Stat. 462 (codified as amended at 43 U.S.C. §§ 1331–1356 (2000)).

143. 43 U.S.C. § 1311(a)(1)–(2).

144. *Id.* § 1333(a)(1).

145. *Id.* §§ 1331(a), 1332(2).

146. *Id.* § 1342; *see also id.* § 1315 (identical savings clause).

147. Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331, *renamed* Magnuson-Stevens Fishery Conservation and Management (Magnuson) Act, Pub. L. 104-208, 110 Stat. 3009 (codified as amended at 16 U.S.C. §§ 1801–1883 (2000)).

over fisheries between 3 and 200 miles offshore.[148] The enormous swath of ocean covered by the Magnuson Act is now known as the United States' "exclusive economic zone" (EEZ).[149] Although Congress hoped its regulations would resuscitate depleted fish stocks, and therefore boost harvesters' income, it passed the Magnuson Act primarily in response to foreign domination of United States fisheries.[150] Together, the SLA, OCSLA, and the Magnuson Act gave the coastal states title to the seabed within three miles of their shores, extended federal control over the OCS, and regulated fisheries between 3 and 200 miles offshore.[151]

Nearly twenty years after Congress passed the Magnuson Act, the Secretary of the Department of Commerce limited access to the commercial halibut and sablefish fisheries in the EEZ off Alaska by instituting the IFQ program.[152] The IFQ program regulates a vast area that includes sections of the Gulf of Alaska traditionally used by the *Eyak* villages.[153] Currently, only IFQ holders can commercially fish within those areas.[154] In 1995, the government awarded IFQs to the owners or lessees of vessels that legally caught and sold halibut or sablefish between 1988 and 1990.[155] People who want to fish for halibut

148. *See* 16 U.S.C. § 1801(b)(1).

149. *Id.* § 1802(11). Prior to 1976, all nations enjoyed the freedom to fish in waters beyond three miles from a country's shores. United Nations Convention on the High Seas, Apr. 29, 1958, art. 2, 450 U.N.T.S. 82, 82–84. In 1976, the Magnuson Act created a "fishery conservation zone" (FCZ) that included waters between 3 and 200 miles from the shores of the United States. § 101, 90 Stat. at 336. In 1982, the United Nations Convention on the Law of the Sea recognized coastal states' rights to extend their jurisdiction over the living and non-living natural resources of the seabed and its subsoil, and the waters above the seabed, between 3 and 200 miles from their shores. United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 56, para. 1(a), 21 I.L.M. 1245, 1280. Although the United States is not a party to the 1982 Convention, President Reagan established the United States' EEZ by proclamation in 1983, declaring the same rights as those held by states that are party to the 1982 Convention. Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983). Congress amended the Magnuson Act to regulate fisheries within the EEZ because the EEZ includes the same waters as the FCZ. Act of Nov. 14, 1986, Pub. L. 99-659, §§ 101(a), 102(c)(1)(A), 100 Stat. 3706, 3707.

150. Davis, *supra* note 3, at 283–84.

151. The Magnuson Act did not affect rights of navigation within 200 miles of shore. *See* 16 U.S.C. § 1801(c)(1)–(2).

152. Alliance Against IFQs v. Brown, 84 F.3d 343, 345 (9th Cir. 1996). The Magnuson Act and the Northern Pacific Halibut Act of 1982, Pub. L. No. 97-176, 96 Stat. 78 (codified as amended at 16 U.S.C. § 773-773(k) (2000)), give the Secretary the authority to limit access to these fisheries. *Alliance*, 84 F.3d at 345. The fact that harvesters must first catch a fish before they can claim title to it gives them an incentive to catch as many fish as possible at one time, which is why unlimited access to fisheries can destroy stocks. *Id.* at 344.

153. Eyak I, 154 F.3d 1090, 1091 (9th Cir. 1998).

154. Fisheries of the Exclusive Economic Zone off Alaska; Individual Fishing Quota Management Measures, 50 C.F.R. § 679.40 (2002).

155. *Id.* § 679.40(a)(2)(A)–(B).

or sablefish today, but who did not receive IFQs in 1995, must purchase IFQs from someone who currently holds them.[156] IFQs entitle harvesters to a share of the annual Total Allowable Catch (TAC) for a given area.[157] Each year, the International Pacific Halibut Commission sets the TAC for halibut, and the federal government sets the TAC for sablefish.[158] Halibut regulations limit Alaska Native villagers to a subsistence harvest of twenty fish per person per day.[159] Sablefish regulations allocate all sablefish to IFQ holders, leaving none for tribal harvest, because they assume that sablefish's preference for deep water puts them out of the reach of all but commercial gear.[160]

The IFQ program is a striking example of the extent to which the federal government has extended its control over offshore resources. The U.S. Supreme Court established the foundation of this control in its *California* and *Texas* paramountcy decisions. In those cases, the Court held that the federal government must control the exploitation of the seabed and ocean off the coast of the United States in order to fulfill its duty to defend the nation and to regulate international commerce.[161] Congress exercised its paramount power over the seabed by enacting the SLA and OCSLA. These acts gave coastal states title to the seabed within three miles of their shores[162] and extended federal jurisdiction over the seabed resources beyond three miles from shore.[163] Twenty years after passage of the Magnuson Act, the federal government restricted access to the commercial halibut and sablefish fisheries in the EEZ off Alaska to people who hold IFQs.[164] Today, most of the *Eyak* villages' members cannot participate in the halibut and sablefish fisheries because they do not hold IFQs.[165]

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156. *Alliance*, 84 F.3d at 345.

157. 50 C.F.R. § 679.40(b).

158. Pacific Halibut Fisheries, 58 Fed. Reg. 59,375, 59,377 (Nov. 9, 1993) (codified at 50 C.F.R. pt. 679).

159. Pacific Halibut Fisheries; Subsistence Fishing, 68 Fed. Reg. 18,145, 18,159 (Apr. 15, 2003) (to be codified at 50 C.F.R. pt. 300.65(g)(2)). Previously, the villagers were limited to two fish per person per day during an eleven-month season. 2001 Pacific Halibut Fishery Regulations, § 23, 66 Fed. Reg. 15,801, 15,809 (Mar. 21, 2001).

160. Eyak II, No. A98-0365-CV, slip op. at 13 (D. Alaska Sept. 25, 2002).

161. United States v. California, 332 U.S. 19, 34–35 (1947); United States v. Texas, 339 U.S. 707, 718–19 (1950).

162. 43 U.S.C. § 1311(a)(1)–(2) (2000).

163. *Id.* § 1333(a)(1).

164. *See* Pacific Halibut Fisheries, 58 Fed. Reg. 59,375 (Nov. 9, 1993) (codified at 50 C.F.R. pt. 679).

165. LANGDON, *supra* note 16, at 126–27.

III. ALASKA NATIVE VILLAGES HAVE ATTEMPTED TO ENFORCE THEIR OFFSHORE ABORIGINAL RIGHTS FOR OVER TWO DECADES

The U.S. Supreme Court has consistently held that only Congress has the power to limit or extinguish aboriginal title.[166] Consequently, five Alaska Native villages argued in *Eyak I* and *II* that the IFQ program may not restrict their aboriginal interests[167] in the seabed and ocean off Alaska because Congress has not extinguished those interests.[168] The *Eyak* decisions followed litigation beginning with *Village of Gambell v. Clark* (*Gambell I*),[169] and involving similar claims made by different Alaska Native villages in the 1980s and 1990s.[170] Although the *Gambell* decisions implicitly recognized limited offshore aboriginal interests,[171] the *Eyak* courts held that the paramountcy doctrine had extinguished all aboriginal interests in the seabed and ocean off Alaska.[172]

A. The Gambell *Litigation*

In *Gambell I*, the Alaska Native villages of Gambell and Stebbins sued to enjoin the Secretary of the Department of the Interior from leasing the seabed off western Alaska to several oil companies.[173] The villages argued that offshore development would negatively affect their subsistence hunting and fishing rights,[174] but the Ninth Circuit held that the villages had sacrificed those rights for part of the $962,500,000 and 40,000,000 acres awarded to Alaska Natives under the Alaska Native Claims Settlement Act (ANCSA).[175] Congress passed ANCSA[176] to

166. *See, e.g.*, County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 240 (1985) [hereinafter *Oneida II*] (quoting Oneida I, 414 U.S. 661, 668 (1974)); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 347 (1941).

167. This Comment uses the term "aboriginal interests" to describe collectively the claims made in *Eyak I* and *II*. In *Eyak I*, the villages claimed the exclusive right to exploit offshore areas based on unextinguished aboriginal title. 154 F.3d 1090, 1091 (9th Cir. 1998). In *Eyak II*, the same villages asserted non-exclusive rights—the alleged remnants of their aboriginal title. No. A98-0365-CV, slip op. at 1–2 (D. Alaska Sept. 25, 2002).

168. *Eyak I*, 154 F.3d at 1095; *Eyak II*, No. A98-0365-CV, slip op. at 15.

169. Vill. of Gambell v. Clark, 746 F.2d 572 (9th Cir. 1984) [hereinafter *Gambell I*].

170. *See, e.g.*, Gambell III, 869 F.2d 1273, 1275 (9th Cir. 1989).

171. *See, e.g., id.* at 1277.

172. *Eyak I*, 154 F.3d at 1096–97; *Eyak II*, No. A98-0365-CV, slip op. at 27.

173. *Gambell I*, 746 F.2d at 573.

174. *Id.*

175. *Id.* at 579.

resolve the conflict between the State of Alaska and Alaska Natives over rights to the land Alaska had selected for state ownership after its statehood in 1958.[177] ANCSA settled the dispute by giving money and land to Alaska Natives while also extinguishing the Natives' aboriginal title to land and waters "in Alaska."[178] After noting that Congress passed ANCSA to "avoid further litigation of [aboriginal] claims," the *Gambell I* court interpreted the phrase "in Alaska" to mean a "geographic region" rather than the "area within the strict legal boundaries of the State of Alaska."[179] Therefore, the court held that ANCSA extinguished the villages' subsistence rights in waters beyond the boundaries of the State of Alaska.[180]

However, the *Gambell I* court also held that the villages could still enjoin the federal government's leases to the oil companies under section 810 of the Alaska National Interest Lands Conservation Act (ANILCA).[181] ANILCA[182] protects Alaska's rural residents' subsistence hunting and fishing on over 100 million acres of land.[183] Section 810 allows the Secretary of the Interior to limit subsistence uses when restrictions are necessary, but only after the Secretary attempts to avoid impacting subsistence activity in the first place.[184] Relying on the use of the phrase "in Alaska" in its "general sense" during House debates on ANILCA and on Congress' knowledge of the offshore hunting and fishing habits of Alaska's coastal villagers, the *Gambell I* court concluded that the phrase "in Alaska" carries the same meaning in ANILCA as it does in ANCSA.[185] Because it determined that section 810 applies to waters beyond Alaska's boundaries, the court

176. Alaska Native Claims Settlement Act of 1971, Pub. L. No. 92-203, 85 Stat. 689 (codified as amended at 43 U.S.C. §§ 1601–1629 (2000)).

177. *Gambell I*, 746 F.2d at 574.

178. "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." 43 U.S.C. § 1603(b).

179. *Gambell I*, 746 F.2d at 575–76.

180. *Id.* at 573.

181. *Id.* at 582.

182. Alaska National Interest Lands Conservation Act of 1980, Pub. L. No. 96-487, 94 Stat. 2374 (codified as amended at 16 U.S.C. §§ 3101–3233 (2000)).

183. COHEN, *supra* note 41, at 759.

184. 16 U.S.C. § 3120.

185. *Gambell I*, 746 F.2d at 579.

enjoined the oil leases until the district court could evaluate the Secretary's compliance with section 810.[186]

Following the *Gambell I* decision, the Secretary concluded that oil exploration would not restrict the villages' subsistence uses.[187] The villages again sued to stop the exploration, but the District Court for the District of Alaska declined to grant an injunction because the nation's need for new energy sources outweighed the possibility that subsistence uses would suffer.[188] The villages appealed to the Ninth Circuit, which reversed the district court.[189] Both the Secretary and the oil companies then appealed to the U.S. Supreme Court.[190] In *Amoco Production Co. v. Village of Gambell* (*Gambell II*),[191] the Court held that section 810 does not apply to the seabed and waters beyond Alaska's boundaries.[192] Deciding that the phrase "in Alaska" plainly refers to the political boundaries of the State of Alaska, the Court declined to extend ANILCA's reach based on its legislative history.[193] However, the Court revived the possibility that the *Gambell* villages could eventually enforce their subsistence rights when it vacated the Ninth Circuit's judgment that ANCSA extinguished aboriginal interests in the seabed and waters beyond Alaska's boundaries.[194]

On remand, the Ninth Circuit in *Village of Gambell v. Hodel* (*Gambell III*)[195] reconsidered the geographic scope of ANCSA in light of *Gambell II*'s interpretation of the phrase "in Alaska" from ANILCA.[196] The Ninth Circuit reversed its *Gambell I* decision and held that ANCSA does not reach beyond three miles from shore and therefore did not extinguish "aboriginal subsistence rights" that may exist in the seabed and waters beyond Alaska's boundaries.[197] Although the *Gambell III* court eliminated ANCSA as a defense to offshore aboriginal title claims, the court did not definitively answer the oil companies' second defense, that aboriginal title is incompatible with the United States'

186. *Id.* at 582–83.

187. Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 538–39 (1987) [hereinafter *Gambell II*].

188. *Id.* at 540.

189. *Id.*

190. *Id.* at 534 n.1.

191. 480 U.S. 531 (1987).

192. *Id.* at 555.

193. *Id.* at 552–53.

194. *Id.* at 555.

195. 869 F.2d 1273 (9th Cir. 1989).

196. *Id.* at 1275.

197. *Id.* at 1280.

sovereignty over the seabed and waters beyond three miles from shore.[198]

This defense was based on the 1982 decision *Inupiat Community of the Arctic Slope v. United States* (*Inupiat*).[199] In *Inupiat*, the District Court for the District of Alaska rejected the Alaska Native plaintiffs'[200] claim of "sovereign power" over the Beaufort and Chuckchi Seas as contrary to federal paramountcy over those waters.[201] In *Gambell III*, the Ninth Circuit distinguished *Inupiat* because the *Inupiat* plaintiffs argued that they had never succumbed to the sovereignty of the United States,[202] while the *Gambell* villages simply claimed "rights of occupancy and use that are subordinate to and consistent with national interests."[203] For that reason, the court held that the paramountcy doctrine had not extinguished the villages' "aboriginal rights."[204] Ultimately, the *Gambell III* court did not foreclose the oil companies' paramountcy doctrine defense because it recognized only the possible existence of limited subsistence rights, not aboriginal title.[205] The Ninth Circuit left it to the district court to determine whether the villages in fact held subsistence rights to offshore areas leased to the oil companies.[206]

The *Gambell* litigation ended with *Village of Gambell v. Babbitt* (*Gambell IV*)[207] when the Ninth Circuit affirmed the district court's holding that the case was moot because all the oil companies had given up their offshore leases.[208] This closure left the villages of Gambell and Stebbins in essentially the same legal position as when they first sued the Secretary of the Interior. The villages' residents could continue their subsistence harvest free from interference by oil exploration, but without the protection afforded by aboriginal title. The next opportunity for Alaska Natives to assert aboriginal title to the seabed and waters beyond

198. *Id.* at 1276.

199. 548 F. Supp. 182, 185 (D. Alaska 1982) (citing United States v. Maine, 420 U.S. 515 (1975); United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950); United States v. California, 332 U.S. 19 (1947)).

200. The *Inupiat* plaintiffs were amici in *Gambell III*. *Gambell III*, 869 F.2d at 1276.

201. *Inupiat*, 548 F. Supp. at 185.

202. *Id.* at 187.

203. *Gambell III*, 869 F.2d at 1276.

204. *Id.* at 1277.

205. *Id.* at 1280.

206. *Id.*

207. 999 F.2d 403 (9th Cir. 1993).

208. *Id.* at 407.

Alaska's boundaries arose when the IFQ program restricted the *Eyak* villages' ability to fish for halibut and sablefish.[209]

B. The Eyak *Litigation*

The IFQ regulations allow non-Alaska Native commercial harvesters to fish for halibut and sablefish within what five Alaska Native villages claim are their traditional waters in Prince William Sound, lower Cook Inlet, and the Gulf of Alaska.[210] The regulations also exclude villagers without IFQs from commercially harvesting halibut and sablefish from those areas and all other regulated waters.[211] The *Eyak* litigation began when the villages sued to enjoin enforcement of the IFQ program by the Secretary of the Department of Commerce and also for a declaration that they hold aboriginal title to, and thus the exclusive right to exploit, their traditional use areas beyond three miles from shore.[212] In granting summary judgment in favor of the Secretary, the District Court for the District of Alaska held that the paramountcy doctrine had extinguished the villages' claimed aboriginal title.[213] The court explained that the villages, like the states, could not possess property rights to the seabed and ocean because both the villages and the states depend on the United States for protection.[214]

The villages appealed to the Ninth Circuit, arguing that the district court erred by basing its decision on the theory that the villages' aboriginal title claim was equivalent to the state claims in the paramountcy cases.[215] The villages maintained that their claim was different because aboriginal title is not a claim of sovereignty but a right of exclusive use and occupancy, qualified by Congress' ability to extinguish that right.[216] To support their argument, the villages cited the *Gambell III* court's holding that "aboriginal rights may exist

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209. *See infra* Part III.B; *see also* Nome Eskimo Cmty. v. Babbitt, 67 F.3d 813, 816 (9th Cir. 1995) (dismissing as moot aboriginal title claim virtually identical to that advanced in the *Gambell* litigation).

210. Eyak I, 154 F.3d. 1090, 1091 (9th Cir. 1998).

211. *Id.*

212. *Id.* at 1091–92. The Alaska Native Claims Settlement Act extinguished the villages' rights within three miles of shore. 43 U.S.C. § 1603(b) (2000).

213. *Eyak I*, 154 F.3d. at 1092.

214. *Id.* at 1094.

215. *Id.* at 1095.

216. *Id.*

concurrently with a paramount federal interest, without undermining that interest."[217]

In *Eyak I*, the Ninth Circuit limited its earlier decision in *Gambell III* by holding that the *Gambell III* court recognized only non-exclusive offshore subsistence rights.[218] The *Eyak I* court reasoned that reading *Gambell III* to recognize aboriginal title, which allows no third-party incursions, would be inconsistent with the *Gambell III* court's instruction to the district court to determine whether oil exploration would substantially interfere with the *Gambell* villages' rights.[219] The *Eyak I* court could not discern "a practical difference" between the villages' aboriginal title claim and Texas' failed assertion in *United States v. Texas* that it owned the resources of the seabed while the United States retained otherwise "unimpaired sovereignty over the sea."[220] Because the *Texas* Court's holding that the federal government must control all property seaward of the low-tide line did not distinguish between state property and other property, the *Eyak I* court concluded that aboriginal title to the seabed and ocean is as contrary to federal sovereignty as was Texas' claim.[221] Therefore, the court held that the paramountcy doctrine extinguished the villages' title to offshore areas beyond Alaska's boundaries.[222] Like the district court, the Ninth Circuit "[left] for another day" the question of whether the villages still possessed non-exclusive aboriginal rights independent of aboriginal title.[223]

That day dawned when the *Eyak I* villages filed another complaint against the Secretary of Commerce.[224] While the villages had argued in *Eyak I* that their aboriginal title gave them the *exclusive* right to exploit certain areas of the seabed and ocean off Alaska,[225] in *Eyak II* the villages claimed that the IFQ regulations interfered with their *non*-exclusive right to participate in the Alaskan halibut and sablefish fisheries.[226] The District Court for the District of Alaska observed that

217. *Id.* (citing Gambell III, 869 F.2d 1273, 1277 (9th Cir. 1989)).

218. *Id.*

219. *Id.*

220. *Id.* at 1095–96 (citing United States v. Texas, 339 U.S. 707, 719 (1950)).

221. *Id.* at 1096–97.

222. *Id.*

223. *Id.* at 1092 n.4.

224. Eyak II, No. A98-0365-CV, slip op. at 1–2 (D. Alaska Sept. 25, 2002).

225. *Eyak I*, 154 F.3d at 1091.

226. *Eyak II*, No. A98-0365-CV, slip op. at 15.

aboriginal rights are usually exclusive rights founded upon aboriginal title,[227] but also noted that "[a]boriginal hunting and fishing rights can exist without aboriginal title."[228]

The court compared the villages' asserted non-exclusive rights to those enjoyed by another ocean-going tribe, the Makah of Washington State.[229] By the 1855 Treaty of Neah Bay, the Makah retained their right to fish "in common with" United States citizens[230] at the Makah's fishing grounds as far as forty miles from shore.[231] Unlike the Makah, Alaska Native villages never signed treaties with the United States.[232] However, the *Eyak II* court concluded that the villages theoretically could still possess non-exclusive fishing rights because ANCSA had "implicit[ly] reserv[ed]" those rights beyond Alaska's boundaries when it extinguished the villages' exclusive rights within Alaska.[233]

Ultimately, the *Eyak II* court decided that non-exclusive rights are also repugnant to federal sovereignty over the seabed and ocean.[234] Because the villages' claimed rights stemmed from their former sovereignty over their territory, the court held that their rights had been extinguished when the federal government extended its own sovereignty over the seabed and ocean.[235] According to the *Eyak II* court, exclusive and non-exclusive rights equally threaten the "dominance of national sovereignty"[236] because of the *Texas* Court's holding that *all* offshore property rights must "coalesce and unite in the national sovereign."[237] The court distinguished the Makah's non-exclusive rights in the Pacific Ocean on the grounds that the Makah reserved those rights by treaty.[238] Citing to Ninth Circuit precedent, the district court found that the

227. *Id.* at 21.

228. *Id.* (citing COHEN, *supra* note 41, at 442).

229. *Id.* at 30.

230. Treaty of Neah Bay, Jan. 31, 1855, U.S.-Makah Tribe, art. IV, 12 Stat. 939, 940.

231. Midwater Trawlers Co-operative v. Evans, 282 F.3d 710, 718 (9th Cir. 2002); United States v. Washington, 730 F.2d 1314, 1318 (9th Cir. 1984).

232. *Eyak II*, No. A98-0365-CV, slip op. at 9.

233. *Id.* at 23–24.

234. *Id.* at 27.

235. *Id.* at 28.

236. *Id.* at 27.

237. *Id.* at 26 (citing United States v. Texas, 339 U.S. 707, 719 (1950)).

238. *Id.* at 29.

paramountcy doctrine essentially effected a "full title extinguishment" that only non-exclusive treaty rights survived.[239]

On reconsideration, the district court rejected the villages' argument that Congress preserved their aboriginal rights by a savings clause in OCSLA.[240] OCSLA protects rights to areas of the seabed beyond three miles from shore under the "law in effect at the time they may have been acquired."[241] The legislative history of this provision reveals that Congress intended to extend the doctrine of discovery, which protects aboriginal title, to the seabed:

> [OCSLA] asserts Federal jurisdiction and control over the Continental Shelf areas beyond original State boundaries, thus bringing the lands and resources within such areas into the same legal status as those acquired by the United States through cession or annexation; in the alternative, such lands and resources are subject to the doctrine of discovery.[242]

Despite OCSLA's apparent recognition of the fact that aboriginal title could exist in the seabed, the court held that the savings clause did not protect the villages' aboriginal rights.[243] The court reasoned that those rights had been extinguished in 1950,[244] the year of the *Texas* decision culminating the development of the paramountcy doctrine[245] and before Congress enacted OCSLA in 1953.[246]

Almost two centuries after *Johnson*, both the *Eyak I* and *II* courts applied the U.S. Supreme Court's paramountcy doctrine to offshore

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239. *Id.* at 29–30 (citing Confederated Tribes of Chehalis v. Washington, 96 F.3d 334, 341 (9th Cir. 1996); W. Shoshone Nat'l Council v. Molini, 951 F.2d 200, 202–03 (9th Cir. 1991); Wahkiakum Band of Chinook Indians v. Bateman, 655 F.2d 176, 180 n.12 (9th Cir. 1981)).

240. Order (Motion for Reconsideration) at 5, Eyak II, No. A98-0365-CV (D. Alaska Nov. 14, 2002). The villages cited savings clauses in the Submerged Lands Act, 43 U.S.C. § 1315 (2000), the Outer Continental Shelf Lands Act, *id.* § 1342, and the Magnuson Act, 16 U.S.C. § 1854(a)(1)(A) (2000).

241. 43 U.S.C. § 1342.

242. H. REP. NO. 82-695 (1953), *reprinted in* 1953 U.S.C.C.A.N. 1395, 1411.

243. Order (Motion for Reconsideration) at 5–6, *Eyak II*, No. A98-0365-CV.

244. *Id.*

245. Eyak II, No. A98-0365-CV, slip op. at 30 n.22 (D. Alaska Sept. 25, 2002).

246. Although the *Eyak II* court cited to COHEN, *supra* note 41, at 442, for the proposition that aboriginal rights can exist apart from aboriginal title, Cohen does not cite to any U.S. Supreme Court decisions supporting that conclusion. Furthermore, when the villages petitioned the Court following the Ninth Circuit's decision in *Eyak I*, they argued that the *Gambell III* court must have recognized exclusive aboriginal rights because "*all* aboriginal rights are, by definition, exclusive." *Petition for Writ of Certiorari* at 7 n.5, Eyak I, 154 F.3d 1090 (9th Cir. 1998) (No. 98-1437). This Comment agrees with the villages' position in *Eyak I* and in their subsequent petition for a writ of certiorari. Therefore, this Comment will discuss only the compatibility of aboriginal title and exclusive fishing rights with federal sovereignty over the seabed and ocean.

aboriginal title claims instead of the Court's traditional aboriginal title analysis.[247] In *Eyak I*, the Ninth Circuit interpreted its *Gambell III* precedent to permit only non-exclusive subsistence rights in the seabed and ocean.[248] In *Eyak II*, the District Court for the District of Alaska extended *Eyak I* by holding that the paramountcy doctrine extinguished *all* aboriginal rights to the seabed and ocean not reserved by treaty.[249] After *Eyak I* and *II*, therefore, the villages have neither exclusive nor non-exclusive rights to offshore areas, despite the *Gambell III* court's holding that "aboriginal rights may exist concurrently with a paramount federal interest, without undermining that interest."[250]

IV. ABORIGINAL TITLE SHOULD SURVIVE THE PARAMOUNTCY DOCTRINE BECAUSE IT IS CONSISTENT WITH FEDERAL SOVEREIGNTY OVER THE SEABED AND OCEAN

The Ninth Circuit en banc[251] or the U.S. Supreme Court should hold that the paramountcy doctrine did not extinguish exclusive hunting and fishing rights founded upon aboriginal title to the seabed and ocean off Alaska. Neither the national security nor the economic concerns of the paramountcy cases justify extinguishing aboriginal title because the Court considered those same concerns in its aboriginal title cases and still recognized tribes' right to exclusively use their territories.[252] Furthermore, federal actions acknowledging, preserving, and enforcing offshore aboriginal interests before and after the paramountcy cases support the conclusion that judicial recognition of the villages' title is in the nation's interest and consistent with federal sovereignty over the seabed and ocean.[253]

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247. Eyak I, 154 F.3d 1090, 1096–97 (9th. Cir. 1998); *Eyak II*, No. A98-0365-CV, slip op. at 28.

248. *Eyak I*, 154 F.3d at 1095.

249. *Eyak II*, No. A98-0365-CV, slip op. at 27.

250. Gambell III, 869 F.2d 1273, 1277 (9th Cir. 1989).

251. The Ninth Circuit can recognize that aboriginal title is consistent with federal sovereignty over the seabed and ocean only by reversing its *Eyak I* decision en banc.

252. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279, 289 (1955); Cherokee Nation v. Georgia, 30 U.S. 1, 17–18 (1831); Johnson v. McIntosh, 21 U.S. 543, 573–74 (1823).

253. Congress must pay to extinguish a tribe's aboriginal title if it has formally recognized that title. Congress is under no constitutional obligation to pay to extinguish aboriginal title recognized only by the courts. *See Tee-Hit-Ton*, 348 U.S. at 288–89.

A. *The* Eyak *Courts Misapplied the U.S. Supreme Court's Aboriginal Title Analysis*

As illustrated by its decision in *Gambell III*, the Ninth Circuit closely followed the *Santa Fe* three-part analysis prior to *Eyak I*.[254] The *Gambell III* court first recognized that the United States had extended its sovereignty over the seabed and ocean.[255] Next, the court determined that offshore aboriginal title had not been extinguished.[256] Lastly, the court remanded the case to the district court to complete the third step of the analysis, an inquiry into whether the *Gambell* villages' rights existed in fact.[257] The *Eyak I* and *II* courts erred by conflating the first and second steps of the aboriginal title analysis. The courts held that extending federal sovereignty over the seabed and ocean via the paramountcy doctrine amounted to an extinguishment of offshore aboriginal title.[258] This truncated analysis is contrary to U.S. Supreme Court precedent holding that federal law protects aboriginal title, and its associated exclusive use rights, only *after* extension of federal sovereignty over new territory.[259]

B. *The U.S. Supreme Court's Aboriginal Title Analysis Should Control Claims of Aboriginal Title to the Seabed and Ocean*

The Ninth Circuit en banc or the U.S. Supreme Court should apply the Court's traditional three-step aboriginal title analysis to offshore aboriginal title claims because the government's interest in maintaining control over the territories it acquires was at the root of both the paramountcy and the aboriginal title cases. In *California* and *Texas*, the Court held that the federal government must control the ocean and seabed in order to fulfill its sovereign duties to protect the nation and to

254. *Gambell III*, 869 F.2d at 1276–80. *Contra* Inupiat Cmty. of the Arctic Slope v. United States, 548 F. Supp. 182, 185 (D. Alaska 1982) (applying paramountcy doctrine).

255. *Gambell III*, 869 F.2d at 1278.

256. *Id.* at 1278–80.

257. *Id.* at 1280. The shortcoming of the court's analysis is its failure to realize that the extension of federal sovereignty should protect aboriginal title and not merely subsistence rights, *id.* at 1278, for the reasons set forth *infra* Part IV. B–C.

258. Eyak I, 154 F.3d 1090, 1096–97 (9th Cir. 1998); Eyak II, No. A98-0365-CV, slip op. at 28 (D. Alaska Sept. 25, 2002).

259. Johnson v. McIntosh, 21 U.S. 543, 574 (1823); *see also* United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 346 (1941).

regulate international commerce.[260] The Court feared that state ownership of offshore territory and disposal of its resources would interfere with the nation's ability to fight wars on, and conduct commerce over, the ocean.[261] These frontier concerns, however, are not uniquely maritime. As Justice Reed noted in his dissent in *Texas*, "[n]ational responsibility is no greater in respect to the marginal sea than it is toward every other particle of American territory."[262] The doctrine of discovery developed in *Johnson*, and applied to aboriginal title cases ever since, accommodates the same fears stressed by the Court in the paramountcy cases.[263]

National security concerns do not justify extinguishing aboriginal title to the seabed and ocean because aboriginal title does not give to tribes the power to admit foreign entities within their territory. In *California*, the Court worried that states would allow foreign agencies to exploit offshore resources and that this would severely undermine the federal government's ability to keep the peace.[264] The U.S. Supreme Court's aboriginal title jurisprudence, on the other hand, anticipated and accounted for the possibility that foreign interests would attempt to infiltrate United States territory through Indian country.[265] *Johnson* allowed post-"discovery" Indians to convey their territory only to the United States because conveyance to any other entity would have lead to the outcome the doctrine of discovery seeks to avoid: "conflicting settlements and consequent war" among nations.[266] Today, the federal government could defend the nation against foreign attempts to politically engage the villages, or to acquire their rights to offshore areas, because, as the Court explained in *Cherokee Nation*, such attempts "would be considered by all as an invasion of [the United States'] territory and an act of hostility."[267]

Economic concerns also fail to support the conclusion that the paramountcy doctrine extinguished offshore aboriginal title. The ability

260. United States v. Texas, 339 U.S. 707, 718–19 (1950); United States v. California, 332 U.S. 19, 35–36 (1947).

261. *California*, 332 U.S. at 36.

262. *Texas*, 339 U.S. at 723 (Reed, J., dissenting).

263. *Johnson*, 21 U.S. at 573–74.

264. *California*, 332 U.S. at 29, 35.

265. Cherokee Nation v. Georgia, 30 U.S. 1, 17–18 (1831); Johnson v. McIntosh, 21 U.S. 543, 573–74 (1823).

266. *Johnson*, 21 U.S. at 573–74.

267. *Cherokee Nation*, 30 U.S. at 17–18.

of the United States to conduct "world commerce"[268] over the Pacific Ocean would remain paramount even with judicially recognized aboriginal title to the seabed and ocean. Aboriginal title would not deprive the United States of any mineral or fisheries resources it desires because Congress can extinguish congressionally unrecognized aboriginal title without paying compensation to the affected tribe.[269] Furthermore, aboriginal title would have no unwanted impact on foreign or interstate trade because tribal trade relations are the exclusive province of Congress.[270]

While the *California* and *Texas* Courts held that the federal government must have the power to determine "in the first instance"[271] who may exploit the seabed and ocean off the United States,[272] the Court's aboriginal title jurisprudence demonstrates that the "first" federal policy toward acquired lands is that they come "subject only to the Indian right of occupancy."[273] In *Santa Fe*, the Court enforced that policy by upholding aboriginal title in the face of the cross-country expansion of the railroad system.[274] Similarly, in *Shoshone Tribe* the Court explained that the Shoshone were entitled to compensation for minerals taken from land set aside for them by Congress because the tribe held those resources by dint of aboriginal title established by "undisturbed possess[ion] of the soil from time immemorial."[275]

The *Santa Fe* and *Shoshone Tribe* decisions demonstrate that tribes retain their exclusive right to use and occupy their territory after it falls under United States sovereignty. By holding that offshore aboriginal interests would frustrate the federal government's ability to control exploitation of seabed and ocean resources, the *Eyak* courts failed to appreciate U.S. Supreme Court precedent protecting aboriginal title to natural resources within acquired territories. Because the Court has found neither national security nor economic concerns reason enough to reverse its aboriginal title precedent, the Ninth Circuit en banc or the

268. *California*, 332 U.S. at 35.

269. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279, 289 (1955).

270. Oneida II, 470 U.S. 226, 234 (1985); *Johnson*, 21 U.S. at 574; *see also* U.S. CONST. art. I, § 8, cl. 3 (Indian commerce clause).

271. *California*, 332 U.S. at 29.

272. United States v. Texas, 339 U.S. 707, 719 (1950); *California*, 332 U.S. at 38–39.

273. *Johnson*, 21 U.S. at 574.

274. United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 359–60 (1941).

275. United States v. Shoshone Tribe, 304 U.S. 111, 117 (1938).

U.S. Supreme Court should apply the Court's traditional aboriginal title analysis to aboriginal title claims to the seabed and ocean.

C. *There Is a Strong Federal Interest in Recognizing Aboriginal Title to the Seabed and Ocean*

In *Texas*, the Court held that control of the seabed and ocean involves "national interests and national responsibilities."[276] The *Eyak I* and *II* courts decided that this language, which swept aside state claims to the seabed in the paramountcy cases, also extinguished the villages' offshore aboriginal interests.[277] However, a series of federal actions before and after the paramountcy cases reveal that aboriginal title to the seabed and ocean *is* in the nation's interest. As demonstrated by a 1942 opinion by the Solicitor of the Department of the Interior,[278] the Alaska Statehood Act,[279] OCSLA,[280] and federal efforts to enforce the offshore fishing rights of the Makah of Washington State,[281] the federal government has acknowledged, preserved, and fought for aboriginal interests in the seabed and ocean. This dedication demonstrates that those interests are national interests that survived the paramountcy doctrine.

1. *At the Time of the Paramountcy Cases, the Federal Government Acted to Protect Aboriginal Title to Offshore Areas*

Before and after the paramountcy decisions, the federal government acknowledged the existence of aboriginal interests in the seabed and ocean off Alaska and acted to preserve them. For example, in 1942 the Solicitor of the Interior observed that Alaska Natives recognized, between themselves, exclusive rights to exploit ocean areas and the seabed off Alaska.[282] The Solicitor concluded that those rights survived the extension of Russian, and later American, sovereignty over Alaska Native territory.[283] Sixteen years after the Solicitor's opinion, Congress preserved those rights when it admitted the State of Alaska into the

276. *Texas*, 339 U.S. at 719.

277. Eyak I, 154 F.3d 1090, 1096–97 (9th Cir. 1998); Eyak II, No. A98-0365-CV, slip op. at 28 (D. Alaska Sept. 25, 2002).

278. Aboriginal Fishing Rights in Alaska, 57 Interior Dec. 461, 462 (1942).

279. Alaska Statehood Act (Statehood Act) of 1958, Pub. L. No. 85-508, §4, 72 Stat. 339, 339.

280. 43 U.S.C. § 1342 (2000).

281. *See, e.g.*, United States v. Washington, 730 F.2d 1314 (9th Cir. 1984).

282. Aboriginal Fishing Rights in Alaska, 57 Interior Dec. 461, 462 (1942).

283. *Id.* at 464, 476.

Union.[284] As the U.S. Supreme Court noted in *Kake*, the Alaska Statehood Act neither extinguished nor recognized Alaska Natives' rights, but left them "unimpaired."[285]

Similarly, through OCSLA Congress protected aboriginal rights to the seabed beyond three miles from shore under the "law in effect at the time they may have been acquired."[286] The legislative history of this provision reveals that Congress intended to protect aboriginal title by subjecting the seabed to the "doctrine of discovery."[287] This is consistent with the Court's holding in *Santa Fe* that all territory acquired by the United States comes subject to aboriginal title.[288]

The *Eyak II* court held that the Solicitor's opinion was irrelevant because it was written *before* the Court developed the paramountcy doctrine.[289] For purposes of interpreting the paramountcy doctrine's effect, it does not matter that the Solicitor's opinion pre-dated the paramountcy doctrine. The Solicitor's opinion indicates that before the Court developed the paramountcy doctrine it was in the nation's interest to acknowledge aboriginal rights to the seabed. The paramountcy doctrine invalidated only those claims that were contrary to the nation's interest.[290] The Solicitor's opinion simply shows that aboriginal title was not a claim contrary to the nation's interest.

The *Eyak II* court also held that the Statehood Act and OCSLA do not support the villages' claims because they were enacted *after* the paramountcy doctrine, and thus could not preserve extinguished rights.[291] This holding, however, renders the acts' savings clauses inconsequential, an effect contrary to that required by the traditional canon of statutory construction "that a statute should be interpreted so as not to render one part inoperative."[292] In sum, the Solicitor's opinion, the Statehood Act, and OCSLA support the conclusion that extension of federal sovereignty over the seabed and ocean did not extinguish the

284. Organized Vill. of Kake v. Egan, 369 U.S. 60, 65 (1962).

285. *Id.*

286. 43 U.S.C. § 1342 (2000).

287. H. REP. NO. 82-695 (1953), *reprinted in* 1953 U.S.C.C.A.N. 1395, 1411.

288. United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 346 (1941).

289. Order (Motion for Reconsideration) at 5–6, Eyak II, No. A98-0365-CV (D. Alaska Nov. 14, 2002).

290. United States v. Texas, 339 U.S. 707, 719 (1950).

291. Order (Motion for Reconsideration) at 5–6, *Eyak II*, No. A98-0365-CV.

292. Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985).

villages' offshore aboriginal title because that title is a "national interest and national responsibilit[y]."[293]

2. *Thirty Years After the Paramountcy Decisions, the Federal Government Intervened to Protect the Makah's Fishing Rights in the Pacific Ocean*

The Makah's fishing rights provide another example of federal protection of offshore aboriginal interests. Rather than resisting the Makah's post-paramountcy fishing, the United States successfully sued on behalf of the Makah to enforce their right to fish out to forty miles from shore.[294] According to the *Eyak II* court, federal paramountcy accommodated the Makah's fishing rights, but not the villages' rights, because the Makah, unlike the villages, reserved their rights by treaty.[295] Yet the decisions upholding the Makah's rights do not discuss the paramountcy doctrine or why treaty rights survived it.[296] The primary distinction between treaty and non-treaty rights is that the government must compensate tribes when it abrogates the former but not the latter.[297] The fact that the federal government would go to court to enforce aboriginal rights that it must pay to abrogate is evidence that aboriginal title, which the government need not pay to extinguish, is also compatible with federal sovereignty over the seabed and ocean.

V. CONCLUSION

The *Eyak I* and *II* courts invoked the paramountcy doctrine to explain why five Alaska Native villages no longer have aboriginal interests in the seabed and ocean off Alaska. In its paramountcy decisions, *United States v. California* and *United States v. Texas*, the U.S. Supreme Court held that the federal government must have exclusive control over offshore areas to fulfill its sovereign duties to protect the nation and to regulate international commerce. Neither national security nor economic concerns justify extinguishing aboriginal title to the seabed and ocean

293. *Texas*, 339 U.S. at 719.

294. United States v. Washington, 730 F.2d 1314, 1318 (9th Cir. 1984).

295. Eyak II, No. A98-0365-CV, slip op. at 30–31 (D. Alaska Sept. 25, 2002).

296. *Washington*, 730 F.2d at 1318 (discussing Makah's historical fishing in waters out to forty miles offshore); *see also* Midwater Trawlers Co-operative v. Evans, 282 F.3d 710, 718 (9th Cir. 2002) (finding nothing in Treaty of Neah Bay that explicitly limited geographic extent of Makah's fishing rights).

297. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279, 284–85 (1955); COHEN, *supra* note 41, at 491.

because aboriginal title accommodates these concerns. Tribal enforcement of aboriginal title would not threaten the nation because tribes may not convey their territory to, or form political connections with, foreign entities. Furthermore, offshore aboriginal title would not complicate federal regulation of international oceanic trade because the Fifth Amendment does not require that Congress pay to extinguish congressionally unrecognized aboriginal title. For these reasons, aboriginal title is fully compatible with federal sovereignty over the seabed and ocean. Therefore, the Ninth Circuit en banc or the U.S. Supreme Court should apply the Court's traditional aboriginal title analysis, rather than the paramountcy doctrine, when analyzing offshore aboriginal title claims.

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