S. 1830

IN THE SENATE OF THE UNITED STATES

October 2, 1969

Referred to the Committee on Interior and Insular Affairs and ordered to be printed

AMENDMENT

Intended to be proposed by Mr. STEVENS to S. 1830, a bill to provide for the settlement of certain land claims of Alaska Natives, and for other purposes, viz: Strike out all after the enacting clause and insert the following:

1. That this Act may be cited as the "Alaska Native Claims Settlement Act of 1969".

2. DECLARATION OF POLICY

4. Sec. 2. (a) Congress hereby recognizes the claims of Natives and Native villages based upon aboriginal occupancy and use of lands within the State of Alaska, and finds and declares that there is an immediate need for a fair and just settlement of all land claims by such Natives and Native villages and that the purpose of this Act is to effect such settlement by providing—

Amdt. No. 221

-188-
(1) a grant to each Native village listed in section 10(e) of this Act of title to the village site and additional lands adjacent thereto for community use and expansion;

(2) for the organization of Native corporations and, in order to promote economic self-sufficiency as well as enhance the Natives' present and future welfare, for a transfer of lands and rights to such corporations;

(3) a payment of $500,000,000 and retention of an overriding royalty, as compensation for Native lands and interests in lands taken in the past or to which Native title will be extinguished by this Act;

(4) authority for individual Natives to acquire ownership of the lands which they use and occupy for homes, businesses, fishing, hunting and trapping camps, and for reindeer husbandry; and

(5) protection of Native subsistence hunting, fishing, trapping and gathering rights and, where it is within the power of the Federal Government, measures for the conservation of subsistence biotic resources.

(b) It is the intent of Congress to carry out the terms of this settlement promptly, with certainty, and in conformity to the real economic and social needs of Alaska Natives by maximizing the participation by Natives in decisions affecting their rights and property and by vesting in them as rapidly as prudent and feasible control over the lands set aside.
and corporations organized pursuant to this Act, without
(1) establishing any permanent racially defined institutions,
rights, privileges or obligations, (2) creating a reservation
system or lengthy trusteeship, or (3) ultimately adding to
the categories of property and organization enjoying special
tax privileges or to the legislation establishing special rela-
tionships between the United States Government and the
State of Alaska.

(c) No provision of this Act is intended to replace,
diminish or otherwise modify any right, privilege, or obliga-
tion of Alaska Natives as citizens of the United States and
the State of Alaska, nor to relieve, replace, or diminish
any obligation of the United States or the State to protect
and promote the rights and welfare of Alaska Natives. The
payments and grants authorized under section 5 of this Act
constitute compensation for the extinguishment of property
rights, and shall not be deemed a substitute for any govern-
mental programs otherwise available to the Natives of
Alaska in accordance with the laws applicable to Indian
affairs.

DEFINITIONS

Sec. 3. For the purposes of this Act, the term—

(a) "Commission" means the Alaska Native Com-
misson established by this Act;

(b) "Corporation" means the Alaska Native Devel-
opment Corporation authorized to be established pursuant to this Act under the laws of the United States;

(c) "Fund" means the Alaska Native Compensation Fund established under the terms of this Act;

(d) "Native" means a citizen of the United States who is an Alaska Indian, Eskimo, or Aleut of one-fourth degree or more Alaska Indian, Eskimo, or Aleut blood, or a combination thereof, including any Native as so defined whose adoptive parent is not a Native, and, in the absence of proof of a minimum blood quantum, also any citizen of the United States who is regarded as an Alaska Native by the Native village of which he claims to be a member and whose father or mother is (or, if deceased, was) regarded as Native by such village or any other Native village listed in section 10(e) of this Act;

(e) "Native village" means any village listed in section 10(e) of this Act, and, unless expressly provided herein to the contrary, also any other identifiable tribe, band, clan, group, village or community in the United States which is composed of twenty-five or more Natives, regardless of whether or not resident in a predominantly Native area;

(f) "public lands" means all Federal lands and interests therein situated in Alaska as of the effective
tion, assigned in present or future, or otherwise alienated (except through inheritance); and
(3) the village corporation may distribute to eligible Natives and their descendants per capita or in furtherance of family plans not more than twenty per cent of the moneys paid to it pursuant to subsection (f) hereof by a regional corporation.

WITHDRAWAL OF PUBLIC LANDS

Sec. 10. (a) Public Land Order Numbered 4582, 34 Federal Register 1025, is hereby revoked.
(b) (1) There are hereby withdrawn, subject to valid existing rights, from selection by the State and from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, all public lands in each township as shown on current plats of survey or protraction diagrams of the Bureau of Land Management, or protraction diagrams of the State where protraction diagrams of the Bureau of Land Management are not available, which encloses all or part of any Native village listed in subsection (c) hereof, plus all public lands in each township which is contiguous to or corners upon the township or townships in which such Native village is located.
(2) In the event fewer than nine townships are withdrawn around a Native village pursuant to paragraph (1)
because of the location of such village on an island, along the
coast or near an international boundary, there shall be and
hereby are withdrawn, in order of proximity to the center of
such Native village, and on the same terms and conditions
specified in paragraph (1), one or more additional town-
ships contiguous (except as separated by bodies of water
or by lands unavailable for withdrawal) to the withdrawn
townships until a total of nine townships has been with-
drawn.

(e) The following Native villages are qualified for land
withdrawals under the provisions of subsection (b):

NAME AND PLACE OF REGION

Akhiok, Kodiak.

Akiachak, Southwest Coastal Lowland.

Akik, Southwest Coastal Lowland.

Akutan, Aleutian.

Alaganik, Gulf of Alaska.

Alakanuk, Southwest Coastal Lowland.

Aleknagik, Bristol Bay.

Alatna, Koyukuk-Lower Yukon.

Allakaket, Koyukuk-Lower Yukon.

Ambler, Bering Strait.

Anaktuvuk Pass, Arctic Slope.

Andeafsey, Southwest Coastal Lowland.

Angoon, Southeast.
1. Aniak, Southwest Coastal Lowland.
3. Arctic Village, Upper Yukon-Porcupine.
5. Attu, Aleutian.
6. Atkasook, Arctic Slope.
7. Barrow, Arctic Slope.
8. Beaver, Upper Yukon-Porcupine.
10. Bethel, Southwest Coastal Lowland.
11. Bill Moore's, Southwest Coastal Lowland.
13. Birch Creek, Upper Yukon-Porcupine.
15. Buckland, Bering Strait.
16. Candle, Bering Strait.
17. Cantwell, Cook Inlet.
18. Canyon Village, Upper Yukon-Porcupine.
20. Chalnik, Southwest Coastal Lowland.
21. Chefornak, Southwest Coastal Lowland.
22. Chenenga, Gulf of Alaska.
23. Chevak, Southwest Coastal Lowland.
1  Chignik Lake, Kodiak.
2  Chilcat, Gulf of Alaska.
3  Chistochina, Copper River.
4  Chukwuktoligamate, Southwest Coastal Lowland.
5  Circle, Upper Yukon-Porcupine.
6  Clark's Point, Bristol Bay.
7  Copper Center, Copper River.
8  Cordova, Gulf of Alaska.
9  Craig, Southeast.
10 Crooked Creek, Upper Kuskokwim.
11 Deering, Bering Strait.
12 Dillingham, Bristol Bay.
13 Dot Lake, Tanana.
14 Eagle, Upper Yukon-Porcupine.
15 Eek, Southwest Coastal Lowland.
16 Egegik, Bristol Bay.
17 Eklutna, Cook Inlet.
18 Eek, Bristol Bay.
19 Ekwok, Bristol Bay.
20 Elim, Bering Strait.
21 Ellanar, Gulf of Alaska.
22 Emmonak, Southwest Coastal Lowland.
23 English Bay, Cook Inlet.
24 Eyak Village, Gulf of Alaska.
25 False Pass, Aleutian.
Fort Yukon, Upper Yukon-Porcupine.
Gakona, Copper River.
Galena, Koyukuk-Lower Yukon.
Gambell, Bering Sea.
Georgetown, Upper Kuskokwim.
Golovin, Bering Strait.
Goodnews Bay, Southwest Coastal Lowland.
Grayling, Koyukuk-Lower Yukon.
Gulkana, Copper River.
Haines-Port Chilkoot, Southeast.
Hamilton, Southwest Coastal Lowland.
Haycock, Gulf of Alaska.
Holichuk, Koyukuk-Lower Yukon.
Holy Cross, Koyukuk-Lower Yukon.
Hoonah, Southeast.
Hooper Bay, Southwest Coastal Lowland.
Hughes, Koyukuk-Lower Yukon.
Huslia, Koyukuk-Lower Yukon.
Hydaburg, Southeast.
Igingig, Bristol Bay.
Iliamna, Cook Inlet.
Inalik, Bering Strait.
Ivanof Bay, Aleutian.
Juneau, Southeast.
Kake, Southeast.
Kaktovik, Arctic Slope.
Kalskag, Southwest Coastal Lowland.
Kaltag, Koyukuk-Lower Yukon.
Karluk, Kodiak.
Kasaan, Southeast.
Kashgika, Aleutian.
Kasigluk, Southwest Coastal Lowland.
Katalla, Gulf of Alaska.
Kenai, Cook Inlet.
Ketchikan, Southeast.
Kiana, Bering Strait.
King Cove, Aleutian.
Kipnuk, Southwest Coastal Lowland.
Kivalina, Bering Strait.
Klawock, Southeast.
Klukwan, Southeast.
Kobuk, Bering Strait.
Koliganek, Bristol Bay.
Kokhanok, Bristol Bay.
Kongiganak, Southwest Coastal Lowland.
Kotlik, Southwest Coastal Lowland.
Kotzebue, Bering Strait.
Koyuk, Bering Strait.
Koyukuk, Koyukuk-Lower Yukon.
Kwethluk, Southwest Coastal Lowland.
Kwigillingok, Southwest Coastal Lowland.
Lake Manchumina, Koyukuk-Lower Yukon.
Larsen Bay, Kodiak.
Latauche, Gulf of Alaska.
Levelock, Bristol Bay.
Lime Village, Upper Kuskokwim.
Livengood, Koyukuk-Lower Yukon.
Lower Kalskag, Southwest Coastal Lowland.
McGrath, Upper Kuskokwim.
Makok, Koyukuk-Lower Yukon.
Makushin, Aleutian.
Manley Hot Springs, Tanana.
Manokotak, Bristol Bay.
Mansfield Village, Koyukuk-Lower Yukon.
Marshall, Southwest Coastal Lowland.
Mary's Igloo, Bering Strait.
Medfra, Upper Kuskokwim.
Mekoryuk, Southwest Coastal Lowland.
Mentasta Lake, Copper River.
Meltakatla, Southeast.
Minchimina Lake, Upper Kuskokwim.
Minto, Tanana.
Moses Point, Gulf of Alaska.
Mountain Village, Southwest Coastal Lowland.
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<td>Mummy Island, Gulf of Alaska.</td>
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<td>Nabsna Village, Tanana.</td>
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<td>Napaimute, Upper Kuskokwim.</td>
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<td>Newhalen, Cook Inlet.</td>
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<td>Nenana, Tanana.</td>
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<td>New Stuyahok, Bristol Bay.</td>
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<td>Newtok, Southwest Coastal Lowland.</td>
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<td>Nightmute, Southwest Coastal Lowland.</td>
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<td>Nikolski, Aleutian.</td>
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<td>Ninilchik, Cook Inlet.</td>
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<td>Noatak, Bering Strait.</td>
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<td>Nome, Bering Strait.</td>
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<td>Nondalton, Cook Inlet.</td>
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<td>Nooiksut, Arctic Slope.</td>
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<td>Noorvik, Bering Strait.</td>
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<td>Northeast Cape, Bering Sea.</td>
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<td>Northway, Tanana.</td>
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<td>Nulato, Koyukuk-Lower Yukon.</td>
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<td>Numapitchuk, Southwest Coastal Lowland.</td>
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<td>Ohagumuit, Southwest Coastal Lowland.</td>
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1 Old Harbor, Kodiak.
2 Oscarville, Southwest Coastal Lowland.
3 Ouzinkie, Kodiak.
4 Paradisé, Koyukuk-Lower Yukon.
5 Paulof Harbor, Aleutian.
6 Pedro Bay, Cook Inlet.
7 Perryville, Kodiak.
8 Petersburg, Southeast.
9 Pilot Point, Bristol Bay.
10 Pilot Station, Southwest Coastal Lowland.
11 Pitkas Point, Southwest Coastal Lowland.
12 Platinum, Southwest Coastal Lowland.
13 Point Hope, Arctic Slope.
14 Point Lay, Arctic Slope.
15 Portage Creek (Ohgseenakale), Bristol Bay.
16 Port Ashton, Gulf of Alaska.
17 Port Graham, Cook Inlet.
18 Port Lions, Kodiak.
19 Port Heiden (Meshik), Aleutian.
20 Port Nellie Wayn, Gulf of Alaska.
21 Quinhagak, Southwest Coastal Lowland.
22 Rampart, Upper Yukon-Porcupine.
23 Red Devil, Upper Koskokwim.
24 Ruby, Koyukuk-Lower Yukon.
Russian Mission (Kuskokwim) (or Chanthaluc),
Upper Kuskokwim.
Russian Mission (Yukon), Southwest Coastal Lowland.

Saint George, Aleutian.
Saint Mary's, Southwest Coastal Lowland.
Saint Michael, Bering Strait.
Saint Paul, Aleutian.
Salamatof, Cook Inlet.
Sand Point, Aleutian.
Savonoski, Bristol Bay.
Savoonga, Bering Sea.
Saxman, Southeast.
Scammon Bay, Southwest Coastal Lowland.
Selawik, Bering Strait.
Seldovia, Gulf of Alaska.
Seward, Gulf of Alaska.
Shageluk, Koyukuk-Lower Yukon.
Shaktoolik, Bering Strait.
Sheldon's Point, Southwest Coastal Lowland.
Shishmaref, Bering Strait.
Shungnak, Bering Strait.
Sitka, Southeast.
Skituk, Cook Inlet.
Slana, Copper River.
Sleetmute, Upper Kuskokwim.
Solomon Council, Gulf of Alaska.
South Naknet, Bristol Bay.
Squaw Harbor, Aleutians.
Stobbins, Bering Strait.
Stevens Village, Upper Yukon-Porcupine.
Stony River, Upper Kuskokwim.
Tanacross, Tanana.
Tanana, Koyukuk-Lower Yukon.
Tatitlet, Gulf of Alaska.
Telida, Upper Kuskokwim.
Teller, Bering Strait.
Tetlin, Tanana.
Togiak, Bristol Bay.
Toksook Bay, Southwest Coastal Lowland.
Tuluksak, Southwest Coastal Lowland.
Tuntutuliak, Southwest Coastal Lowland.
Tunnuk, Southwest Coastal Lowland.
Twin Hills, Bristol Bay.
Tyonek, Cook Inlet.
Ugashik, Bristol Bay.
Unalakleet, Bering Strait.
Unalaska, Alaskan.
Unga, Alaskan.
Uyak, Kodiak.
Valdezan, Gulf of Alaska.
Venetie, Upper Yukon-Porcupine.
Wainwright, Arctic Slope.
Wales, Bering Strait.
White Mountain, Bering Strait.
Wiseman, Koyukuk-Lower Yukon.
Wrangell, Southeast.
Yakutat, Southeast.

(d) There are also hereby withdrawn, subject to valid existing rights, from selection by the State and from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, all public lands within sections 5–8, inclusive, of every township in the State of Alaska not otherwise withdrawn pursuant to this section.

SELECTION OF PUBLIC LANDS

Sec. 11. (a) (1) Each Native village listed in section 10 (c) is hereby granted and shall be entitled to select, within eighteen months after the effective date of this Act, a total of 92, one hundred sixty acres or five hundred acres per member, as shown on the temporary census roll prepared pursuant to section 7 (a), whichever amount is greater, from the lands withdrawn in accordance with section 10: Provided, That a Native village having a reserve set aside for its use or benefit prior to the effective date of this Act shall
by the State from the sale, lease, permit or other disposition
of such lands or the mineral and vegetative resources therein.
Such royalty and other revenues shall be paid into the Fund
and shall be distributed or withdrawn therefrom only in
accordance with this Act. In the event of default by the
State of Alaska in making such payments, and in addition to
any other remedies provided by law, there shall be deducted
annually and deposited in the Fund the amount of any under-
payment, to be taken first from the share of mineral revenues
from public lands in Alaska paid as Federal grants-in-aid
to the State and, if such share is insufficient, from any other
funds paid to the State of Alaska by the United States.

REVOCATION OF RESERVATIONS; EXCEPTIONS

SEC. 15. (a) Notwithstanding any other provisions of
law, and except where inconsistent with the provisions of
this Act, the various reserves set aside by legislation or by
Executive or secretarial order for Native use or for the ad-
ministration of Native affairs, including reserves created
under the Act of May 31, 1938 (52 Stat. 593), are hereby
revoked, subject to any valid existing rights: Provided,
That lands within any reserve which is revoked pursuant
to this subsection shall be deemed to be public lands as of
the effective date of this Act and subject to withdrawal in
accordance with section 10 hereof.
(b) (1) Notwithstanding any other provisions of law or of this Act, and in lieu of any right to the withdrawal, selection and conveyance of lands pursuant to sections 10-12, inclusive, each Native village may vote, in accordance with the procedures established under section 11(b), to acquire title to the reserve or reserves set aside for its use or benefit prior to the effective date of this Act.

(2) Lands within the various reserves described in subsection (a) shall remain withdrawn from selection by the State and all other forms of appropriation under the public land laws, including the mining and mineral leasing laws, until the Native village for which it was set aside decides whether to acquire title thereto pursuant to this subsection or sections 10-12, inclusive, and, in the event of an affirmative decision to invoke this subsection, until the Secretary issues a patent in accordance with such decision: Provided, That the Secretary shall hold the lands and interests in lands to which each village may be entitled in trust until such village organizes as a corporation or otherwise qualifies to own real property. A village shall acquire the same rights, title and interest in lands under this subsection as other Native villages acquire pursuant to sections 10-12, inclusive.

(c) Notwithstanding any other provisions of law or of this Act, and in lieu of any right to the withdrawal, selection and conveyance of lands pursuant to sections 10-12, inclu-
sive, the Native village of Tyonek may vote, in accordance
with the procedures established under section 11 (b), to ac-
quire title to the Moquawkie Reserve set aside by Executive
order of February 27, 1915. In the event Tyonek decides
to acquire title to the Moquawkie Reserve in accordance with
this subsection: (1) the Secretary shall issue a patent to
such Native village to all lands and interests in lands (in-
cluding oil, gas, and other minerals) within such Reserve,
subject to valid existing rights; and (2) the Native village
of Tyonek and its members shall be entitled to share in the
compensation paid pursuant to section 5 hereof, but shall not
be entitled to any other benefits accorded the Natives of
Alaska under this Act.

(d) In the event the tract to which a Native village
acquires title pursuant to subsections (b) or (c) hereof is
smaller than the area of land to which the village otherwise
would be entitled under sections 10–12 of this Act, such vil-
lage may select and obtain a conveyance of additional lands
pursuant to such sections in an amount sufficient, with lands
acquired under this section, to equal its entitlement.

(e) The Annette Islands Reserve established by the Act
of March 3, 1891 (26 Stat. 1101), is hereby granted to the
Native village of Metlakatla, and such village shall have no
right to the withdrawal, selection or conveyance of lands
pursuant to sections 10–12, inclusive. The Native village of
1 Metlakatla and any persons who qualify for enrollment as
2 Alaska Natives solely because of their Tsimshian Indian
3 blood shall not be entitled to share in the compensation paid
4 pursuant to section 5 (a) hereof, but shall be entitled to all
5 other benefits accorded the Natives of Alaska under this Act.
6 In addition to the rights conferred under section 16, Met-
7 lakatla and its members shall have the right for a period of
8 fifty years to fish for commercial purposes within the Annette
9 Islands Reserve in accordance with such rules and regulations
10 as the Secretary may prescribe.
(f) Nothing in this Act shall repeal, modify or other-
11 wise affect the right of the Secretary to establish a townsite
12 on Saint Paul Island or the right of Natives of the Pribilof
13 Islands to acquire title to tracts therein pursuant to the Act
14 of November 2, 1966 (80 Stat. 1094).
15
16 PROTECTION OF SUBSISTENCE RESOURCES
17
18 SEC. 16. (a) Notwithstanding any provision of Federal
19 or State law to the contrary, the Natives of Alaska shall have
20 a right to hunt, fish, trap, gather fuel and pick berries or
21 other natural food products for subsistence purposes on lands
22 withdrawn for their benefit or to which any Native village or
23 regional corporation acquires title pursuant to sections 10–12,
24 inclusive, or section 15 hereof, and also on public lands of the
25 United States, including lands selected by the State under
26 the Act of July 7, 1958 (72 Stat. 322), for a
period of one hundred years after the effective date of this
Act, subject in the case of public lands to such reasonable re-
strictions as the Secretary or the head of the State or Fed-
eral agency having jurisdiction over such lands may impose:
Provided, That such subsistence right shall terminate with
respect to land patented to third parties on the date of the
patent or twenty-five years after the effective date of this
Act, whichever later occurs.

(b) For a period of twenty-five years after the effective
date of this Act, the Secretary, upon petition by any indi-
gual residing in Alaska or by the Department of Fish and
Game of the State of Alaska, shall, after a public hearing,
and under such rules and regulations as he may prescribe,
determine whether or not an emergency exists with respect
to the depletion of subsistence biotic resources in any given
area of the State and may thereupon delimit and declare
that such area will be closed to entry for hunting, fishing, or
trapping, except by residents of such area, subject to the pro-
visions of any treaty concerning such resources. The closing
authorized by this section shall not be for a period of more
than five years, but may be extended by the Secretary after
hearing, and a published finding that the emergency con-
tinues to exist. Any person knowingly hunting, fishing, or
trapping in such area, except a resident thereof, may, upon
conviction, be required to forfeit any gear, vehicle, boat or
The Tlingit and Haida Indians of Alaska brought suit against the United States under special jurisdictional act to recover for land and property rights allegedly appropriated by the United States. A separate trial was first held on question of liability. The Court of Claims, Laramore, J., held that Indians established Indian title to lands and waters shown on map, and that Indians continued to use and occupy the area subsequently after the purchase of Alaska by the United States from Russia, and that evidence established that Indians and water was taken by the United States, so as to entitle Indians to compensation. Order in favor of Indians on issue of liability.

2. Indians v. United States, No. 4789.

In suit by Indians against the United States to recover for land appropriated by the United States, Indian title must be shown by proof of actual use and occupancy from time immemorial, but where Indians prove that they have used and occupied definable area of land, the barren, inaccessible, or useless areas encompassed within such over-all tract and controlled and dominated by owners of that surrounding lands, as well as barren mountain peaks recognized by all as borders of the area of the land, will not be eliminated from area of total ownership, but rather will be assigned no value in the making of an award to the Indians.

3. Indians v. United States, No. 4933.

In suit in Court of Claims by Tlingit and Haida Indians of Alaska against the United States under special jurisdictional act to recover for land and property rights appropriated by the United States, evidence established that use and occupancy title of the Tlingit and Haida Indians to land in question was not extinguished by Treaty of 1867 between the United States and Russia dealing with sale of Alaska to Russia by the United States. Act June 19, 1863, § 1 et seq., 49 Stat. 388; Treaty between United States and Russia, March 30, 1867, 15 Stat. 339.

4. Indians v. United States, No. 4933.

In suit in Court of Claims by Tlingit and Haida Indians of Alaska against the United States under special jurisdictional act to recover for land and property rights appropriated by the United States, Indians established that they owned by Indian title that area in southeastern Alaska claimed by them. Act June 19, 1863, § 1 et seq., 49 Stat. 388.

5. Statutes § 1812.

Courts have duty to give to acts of Congress an intent which does not result in an absurdity, if that is at all possible.


Congress, in employing word “tribal” in special jurisdictional act to describe property which should be the basis of suit under the act by Tlingit and Haida Indians of Alaska against the United States to recover for land and property rights appropriated by the United States, did not use the word in its usual sense, where Congress knew that the Tlingit and Haida Indians did not have tribal property, by that land was owned by family groups and clans, and therefore Tlingit and Haida Indians were not barred from maintaining suit against the United States merely because they did not own any tribal or community property. Act June 19, 1863, § 1 et seq., 49 Stat. 388.


In suit in Court of Claims by Tlingit and Haida Indians of Alaska against the United States under special jurisdictional act to recover for land and property rights appropriated by the United States, evidence established that use and occupancy title of the Tlingit and Haida Indians to land in question was not extinguished by Treaty of 1867 between the United States and Russia dealing with sale of Alaska to Russia by the United States. Act June 19, 1863, § 1 et seq., 49 Stat. 388; Treaty between United States and Russia, March 30, 1867, 15 Stat. 339.

8. Indians v. United States, No. 4933.


1. On April 8, 1894, Harry Douglas and 15 others described in their warrant papers as chiefs and leaders of various clans of Tlingit Indians were permitted to intervene as parties plaintiff.

The Commissioner found that the Tlingit Indians were a homogeneous and interrelated group of Indians speaking a single language different from that of their neighbors; that they were a non-agricultural people who were noted primarily for their use of marine products and wood; that their social structure emphasized formalistic family groups or clans, each clan having rights, respected by other clans, to the use of particular land and water areas of economic importance such as ocean waterfronts, bays, rivers, streams, or inland hunting areas; that the clans were acutely aware of their identity as Tlingit Indians in general and as members of household and clans in particular; that they had no central political body to govern the entire Tlingit people, although collectively they occupied a contiguous stretch of coast on the mainland and adjacent islands and were closely unified by common customs, language, family ties, trade, ceremonies, and a consciousness of their ownness as a homogeneous group. The Haida Indians were also a homogeneous group having customs and modes of life closely resembling those of the Tlingits. The Haidas spoke a different language and did not use the interior of their islands to the same extent that the Tlingits did. Neither the Tlingits nor the Haidas were organized politically in a manner resembling the tribes or organizations of the Indians of the United States, and the relatively large subgroups within each group were not organized politically as are Indian tribes usually. These sub-

groups, sometimes called "tribes" or "kons" by the Indians themselves, took names which had geographical significance, being the name of the river, bay, or island which the particular clan used and occupied. A map introduced in evidence as plaintiffs' exhibit 169 is reproduced herein to show the location of the principal villages of the Tlingit and Haida Indians between 1867 and 1884 and then in modern times, and the areas occupied by the various kons. The somewhat complex social structure of the various divisions and subdivisions of the Tlingit and Haida Indians is described in finding 24.

In general, the Tlingits and Haidas were each divided into two groups or moieties, and each moiety was divided into a number of clans. Membership in a clan descended through the mother, and marriage within the clan or within the moiety was forbidden so that a clan was often distributed or divided among...
several villages, some of the larger clans or families being widely scattered throughout southeastern Alaska. Since no one in a clan could marry anyone else from that clan and had to associate with another clan from the opposite moiety, two local clans from opposite moieties were interrelated in their villages. Each village was the center of a "tribe" of some 25 people. The villages consisted of large houses in each of which one or more families belonged to the local clans. Each house was owned and used in accordance with the Tlingit and Haida manner, large land and water areas adjacent to the village. The several larger Tlingit and Haida subdivisions which took the names of their principal winter villages are listed in finding 25.

The land and water owned and claimed by each local clan division in a village was usually well-defined as to area and use. Tlingit and Haida villages included fishing streams, coastal waters and shores, hunting grounds, berrying areas, sealing rocks, house sites in the villages, and the rights to passes into the interior. Territorial rights of the Tlingit and Haida were parceled out or assigned to the individual house groups for use and exploitation and the chief of the local clan, assisted by other house chief elders of the clan, formed the council which controlled the clan's affairs. Smaller areas belonging to a house within a clan remained clan property whenever a house ceased to exist. The mode of living and of dealing with property among these Indians was regulated by rigidly enforced tradition and custom. Under special circumstances, there was no authority of a clan or clan council which controlled the clan's affairs. Transfers were infrequent. In addition to the areas which were claimed and used exclusively by individual houses, there were certain common areas which could be used by all the clans comprising a particular group of clans residing in a single geographical area. Certain designated offshore fishing and sea mammal hunting areas in larger bodies of water, channels and bays and stretches of open sea could also be used in common by all members of the various clans residing in a particular geographical area, but Indians residing in other geographical areas had no right to such use.

The Tlingit and Haida Indians made extensive use of most of the natural resources of their country, both of the land and sea, including the fish, sea mammals, shellfish, kelp and seaweed, animals, birds, timber, berry bushes, plants and minerals. Finding 33. Prior to our acquisition of Alaska by the United States, the Indians enjoyed a relatively high degree of civilization, were industrious and prosperous, and the accumulation of surplus wealth was a basic feature of their economy. From our earliest days Alaska formed a network of routes for travel by canoe used by the Indians to make their seasonal rounds of fishing, hunting, gathering, and trading expeditions, and in the winter months, these routes were used when the clans exchanged visits with each other on occasions of ceremonial feasts. These routes of travel cut deep into the forests and inland regions of Tlingit and Haida territory and gave the Indians access by water to the greater part of southeastern Alaska.

The Tlingit and Haida Indians used the accessible forests and inland areas of southeastern Alaska for hunting and trapping as well as for gathering roots, berries and other vegetable products. These Indians made extensive use of wood and bark for their homes and to make canoes. In addition to these, some items, such as lichens for dye, took the Indians into very high and otherwise barren areas inland.

The social organization, the propensities for the great quantities of their staple foods, the long winter seasons close to their permanent villages and thus spent longer periods in their winter or permanent villages than did the other groups. The Tlingit residing along the coast did more inland hunting and overland traveling than did the groups living on the islands. The mainland Indians hunted large and small land mammals and traded extensively with the Athabaskan Indians, their neighbors to the east. For this purpose they traveled through well defined trails and passes inland for long distances beyond the reach of the mountains.

The Tlingit and Haida Indians made intensive use of all accessible and usable shore areas within their claimed territories. Closely related to and integrated with their use of the shores, was their use of the waters of southeastern Alaska. In addition to the oceans, bays, inlets, rivers and streams fronting on the shores, the inland lakes accessible from the shores, the Indians used the inland streams and rivers as means of travel. Even the nonnavigable portions of the streams were useful for access by portage to navigable inland lakes. The waters of southeastern Alaska formed a network of routes for travel by canoe used by the Tlingit and Haida Indians for their seasonal rounds of fishing, hunting, gathering, and trading expeditions, and in the winter months, these routes were used when the clans exchanged visits with each other on occasions of ceremonial feasts. These routes of travel cut deep into the forests and inland regions of Tlingit and Haida territory and gave the Indians access by water to the greater part of southeastern Alaska.

The record as a whole establishes, and the Commissioner has found, that as of 1887 the Tlingit and Haida Indians exclusively used and occupied all of that area of southeastern Alaska claimed by those Indians and shown on a map introduced in evidence as plaintiffs' exhibit 158 and reproduced herein. In finding 57 the Commissioner described the area so used and occupied from time immemorial and in 1887. In the same finding the Commissioner pointed out certain areas that were not actually used for any resources available and accessible to them in the claimed areas of southeastern Alaska. The peculiar social structure of their groups rendered their society a highly competitive one in which rank depended in large part on the accumulation, display and disposal of great material wealth. This wealth was expressed by fishing, hunting, gathering, and by trade with each other, with neighboring Indians of the interior, and later with the Russians and American traders. The increasing demand by American and European markets, especially for furs, made these Indians exert themselves even more to make heavy use of all of the accessible portions of their territory. The Commissioner has estimated from all the evidence that the population of the Tlingit and Haida Indians in early historic times was approximately 10,000; that in 1867, it was approximately 8,000, and that at the present time the population is approximately 7,000.
productive purpose by the claimant Indians and this aspect of finding 67 has given rise to exceptions by both parties and to a dispute as to the significance of the exceptions or limitations thus made by the Commissioner.

The areas of territory which the Commissioner found were not put to any productive use by the claimant Indians consist generally of inaccessible or useless areas of land located within and completely surrounded by the larger area which was intensively used for productive purposes by the Indians, and also certain inaccessible mountain crests which were useful only as marking the borders of the claimed and used territory and forming a barrier between the claimant Indians and their neighbors to the east. The Commissioner pointed to non-navigable waters not used by the Indians, glacial areas having no resources of value for the Indians, barren rocky slopes and inaccessible forges which at places formed impassable barriers to the interior, and high mountain peaks covered by deep snows the year around. The Commissioner did not attempt to estimate the acreage of these barren and inaccessible areas inasmuch as the record does not now afford a basis for making such estimates.

The Government has excepted to finding 67 for the reason that it does not give the precise location or areal estimates of the barren and inaccessible lands of the Indian reservation. It is impossible to ascertain from the findings the amount of unproductive land which was actually used and occupied by the claimant Indians and which was not used and occupied by the Tlingit and Haida Indians and for which the Government will be liable in the event the court decides that defendant took or failed to protect the Commissioner of the Indians in such land and water. In support of its contention that the findings location and extent of land and water used and occupied by the Indians are inadequate, defendant relies on United States v. Seminole Nation, 299 U.S. 417, 57 S.Ct. 283, 81 L.Ed. 316, Clausby v. United States, 233 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1506, and United States v. Penn Foundry & Manufacturing Co., 337 U.S. 138, 69 S.Ct. 1009, 93 L.Ed. 1308.

Plaintiffs except to the exclusions contained in finding 67 on the ground that where the record evidence of use and occupancy by Indians of contiguous areas which together form a single contiguous territory containing some nonexpropriable or inaccessible land and water within the outer boundaries of exploitable and exploitable land and water, and where it is obvious, as here, that the Indian occupants of the entire territory exercised dominion and control over the barren and inaccessible areas within their lands to the exclusion of all other Indians, it has been the established practice of this court to consider the entire area as being owned by the Indian claimants. Put another way, plaintiffs urge that the use and occupancy test applied to determine the amount of land used and occupied by a claimant Indian group has never been applied to require a showing of actual exploitation for material resources of each usable internal tract found to be encompassed within the outer boundaries of an Indian title territory.

Insofar as the past practice in this court and at the Indian Claims Commission is concerned, the accessibility or exploitable test has not been applied to determine the extent of Indian title ownership, where the inaccessible or useless areas were encompassed within an overall area found to be actively used and occupied by the claimant Indians. These useless (to the Indians) and sometimes inaccessible areas may have become important, however, at the valuation stage of proceedings in Indian litigation involving land, and it is at this stage that the land is classified as barren and inaccessible areas are measured and eliminated from valuation.

In the case of the Ute and White River Bands of Ute Indians v. United States, 152 P. Supp. 653, 139 C.C.L.R. 1, the Indians sued the United States under a special jurisdictional act for just compensation for the taking of nearly a million acres of land in the State of Utah. The land was described in the findings as a horseshoe shaped tract surrounded on three sides by mountains "the crest of which was the reservation boundary." The findings state that some of the mountain crests exceeded 13,000 feet in elevation and that about 90 percent of the lands in suit lay at elevations above 8,000 feet. The upper reaches of the Tehachapi and the shoe were rocky barren ridges and peaks rising abruptly from large glaciated basins located high in the Uintah Mountains and much of the land in that north arm was barren and inaccessible. The reservation containing such land had been carved out of a larger territory which the Utes had held by aboriginal use and occupancy title, i.e., Indian title. Uintah Utes of Utah v. United States, 5 Ind.Cas. Comm. 1 (1897). In creating this reservation and defining its boundaries, the parties to the treaty were following a well known custom of giving the area some visible and familiar boundaries such as mountain crests. Obviously the Indians had never used and occupied these high, barren peaks for any productive purpose when the land was ceded to them under Indian title and they would not use those inaccessible crests in the sense of exploiting them for any productive use once the mountains were included within or as a boundary of the reservation.

Indian lands, prior to the extinguishment of Indian title, were not surveyed. They were not fenced to shut out trespassers or to mark boundaries. But the land which Indian groups claimed and used did have boundaries which were known to them and to their neighbors, and those boundaries were frequently stated by the fact noted that such areas were measured and eliminated from valuation.

In the Uintah case, supra, as in numerous other Indian cases, it is apparent that within the confines of an area of land found to have been used and occupied to the exclusion of all others, there were smaller areas of land or water which were not used for any productive purpose because such areas were not capable of use by the Indians. Such areas might be stretches of desert land or swamps. Furthermore, rivers and streams which eroded Indian lands might be used extensively for fishing or travel in those portions which could be used for those purposes, and be large, neglected in those portions not so usable. It has never been supposed that these interior areas of land or terrain, the area of streams and rivers did not "belong" to the tribe which used and occupied it in a more active sense the areas completely surrounding them. In the case of Alcea Band of Tillamook v. United States, 59 F.Supp. 334, 103 C.C.L.R. 454 affirmed 329 U.S. 40, 67 S.Ct. 167, 91 L.Ed. 29, the Indians used the streams which rose in the mountains forming the eastern boundary of their lands only so far as those streams were productive of fish. The crest or summit of the Coast Range of Mountains was "used" by the Alceas only as a boundary marker. The useless portions of their streams were not used by the Alceas but the Alceas saw to it that no other Indians trespassed in its vicinity, and the summit of the Coast Range was recognized and considered by neighboring tribes as the boundary of the Alcea lands.

Obviously some account must be taken of the amount of barren, useless and inaccessible lands and water which are encompassed within the area of land exploited exclusively by an Indian claimant group, or which form the borders of their lands. Such account is taken in connection with the valuation of their lands for the purpose of making an award if the court decides that there is liability on the part of the Government. In that event it has been usual for any purpose except for serving as markers to define the limits of their land ownership.

[1] While, in the event of a judgment, the net monetary award would be
the same whether land classification and acreage determination of barren and inaccessible land is undertaken at the liability stage or at the later valuation stage, is that there are compelling practical reasons for postponing such classification and acreage determination of inaccessible and barren land until the valuation stage of the proceeding. Classifications of land types and determination of exact acreage of each type so classified is a matter for experts. It is an expensive and time-consuming matter for both the Indian claimants and for the Government. If the Government is held to be not liable in the suit brought, such classification and acreage proof would be useless since the precise extent and location of usable and nonusable land is not essential to the overall issue of liability. If the Government is held to be liable to the Indians then the proof on valuation will have to include and classification and the elimination from valuation of all areas of barren and inaccessible land and waters which were of no use or value to the Indians.

[2] We do not mean to depart in any case from the rule of long standing that Indian title to lands must be shown by proof of actual use and occupancy from immemorial. But it is obvious from a study of the many cases involving proof of Indian title to lands both in this
court and at the Indian Claims Commission that where the Indians have proved that they used and occupied a definable area of land, the barren, inaccessible or useless areas encompassed within the overall tract and controlled and dominated by the owners of that surrounding land, as well as the barren mountain peaks recognized by all as the borders of the area of land, have not been eliminated from the area of total ownership but rather have been assigned no value in the making of an award, if any, to the Indians.

[3,4] Because of the established practice of this court and the Commission, and also because of the practical considerations mentioned above and the fact that the ultimate monetary result will not be affected by postponing proof of land classification and measuring until the valuation stage of the proceedings, we conclude that failure to prove the precise extent of inaccessible, barren or unused land at this stage is not fatal to the claimants on the issue of liability.

We hold that the party so authorized by Indian title the area shown on plaintiff's exhibit 168, reproduced herein, and that the Haida Indians owned by Indian title the area indicated on the same map, as of 1870 when the United States acquired Alaska, and for several years thereafter.

A similar problem arose in the case of Clyde F. Thompson et al. v. United States, Indian Claims Commission, Docket No. 51, and Ernest Reiling et al., Docket No. 57, decided July 21, 1929, 8 Ind. Cls. Comm. 115, 118, 119, in which it was held that the Indian claims commission court was not bound to consider the surface and underwater areas occupied by the Indians, but was limited to the Continental Shelf between the United States and Canada.

4. It is no doubt true, as the Government contends, that the higher elevations in the mountains and some large desert areas present little of economic importance to the Indians, but such places had limited use and were a part of the areas claimed and defended when necessary by the tribes occupying it.
purposes and intent, and strictly to limit undue abrogation of fundamental rights or to prevent undue extension of extraordinary remedies."

Resorting to the legislative history of the Indian Claims Commission Act, the court concluded that Congress had intended that Indian title lands should be the basis of claims brought under the Act.

In the instant case the special jurisdictional act, read as a whole and in the light of its legislative history, reveals that Congress was fully aware of the fact that the Tlingit and Haida Indians did not have the sort of tribal organization which the Indians of the United States had. Congress knew that despite this fact, each was a homogeneous group of Indians having its own language and customs. Congress knew that these Indians did not own land as the Indians of the United States owned lands, that is, as a tribe, but rather that land was held by them more as white people own land, although even in the case of the Tlingits and Haidas, land was not owned by individuals but by family groups and clans. The fact that the United States never attempted to make treaties with these Indians is not significant since shortly after the acquisition of Alaska from Russia in 1867, Congress enacted the Act of March 3, 1871, 16 Stat. 544, 606, prohibiting any further dealings with Indians by treaty.5

When Congress was considering the special jurisdictional act under which this suit was brought it knew that the claimants were urging that land, fishing, hunting and timber rights, which were claimed or owned by individual families or clans of the Tlingit and Haida Indians had been taken from them leaving these people with barely sufficient resources on which to exist. One of the early bills considered by Congress (S. 1196, 72d Cong., 1st Sess.) provided that not only could tribal and community claims be adjudicated by the court, but also individual claims for the loss of property and property rights, and it also provided that any award should be distributed per capita. In a report on this legislation prepared by the Department of the Interior it was suggested that two provisions be eliminated and the claims be treated as though they were tribal claims despite the lack of a true tribal political organization in either group of Indians and despite the fact that the land was owned by smaller family or clan groups. It was also suggested that any award should be made for the benefit of each group as a whole and apportioned to the several Tlingit and Haida communities, rather than for the individual members or families in the groups. The report gave the following reasons for the suggested amendments:

"* * * the resources treated in the bill are capital resources, serving at a former time to maintain the entire native population and, before the advent of the white man were available for the use of successive generations. Therefore, I argue that the equivalent of these resources if and when restored to the natives should be in the form of capital for the permanent benefit of the natives concerned. * * * I therefore suggest that an amendment be submitted providing for a "tribal" fund to be used to secure such permanent productive "tribal" assets as may be decided upon by the Indians concerned and by the Commissioner of Indian Affairs."

5. The Act provides:

"* * * That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: * * *

6. See House Report No. 621, 74th Cong., 1st Sess., to accompany H.R. 2706, p. 3. The memorandum to the Commissioner of Indian Affairs by Mr. Paul E. Gordon, director of education for Alaska, transmitted by the Secretary of the Interior in a letter incorporated in the House Report, is in evidence as plaintiff's exhibit 114.
In accordance with the above suggestions Congress eliminated individual claims from the act and prohibited the making of any per capita payments from the award, if any, granted by the court. 7

[5, 6] Thus it is clear from the legislative history of the special jurisdictional act that when Congress used the terms "tribal or community property rights" in the act it intended to refer to property and property rights which belonged to the claimants as they were defined in the act which claimants Congress understood were not organized as a tribe or tribes and did not own property as a tribe or tribes. To say that Congress authorized nontribal Indians to sue in connection with a type of property right which Congress knew they did not have, i. e., tribal property, is to say that Congress knowingly performed an absurd and useless act in enacting the special jurisdictional legislation. And this brings us to another well known rule of statutory construction which is that it is the duty of courts to give to acts of Congress an intent which does not result in an absurdity if that is at all possible. Jennings v. United States, Ct.CI., 168 F.Supp. 781, and cases cited therein. We have no difficulty in concluding that in enacting the special jurisdictional act under which this suit is brought, Congress intended that the Indians identified in section 1 should be allowed to sue for and recover judgment for the loss of property or rights in property which belonged to them in the manner in which they owned land and property; and that when Congress employed the word "tribal" to describe the property which should be the basis of suit under the act, it did not use the word in its usual sense. Holy Trinity Church v. United States, 143 U. S. 457, 12 S.Ct. 511, 36 L.Ed. 226.

Defendant next contends that if the court should hold that the act permits local clans or families to sue and recover for land or property lost because of the acts of the Government, then the plaintiffs may not recover because the Commissioner has not found the well defined hunting, fishing and gathering areas used by each clan. Inasmuch as the judgment, if any, is not to be paid to individuals or families or clans but rather is to be deposited in the Treasury for the benefit of the several communities of Tlingit and Haidas listed on the roll provided for in section 7 of the jurisdictional act, and since the Commissioner has found that in the case of each group the clan holdings formed one contiguous and well defined area, the extent of individual or family or clan holdings of land and water areas is not a matter of importance. The map introduced in evidence as plaintiffs' exhibit 169 and reproduced herein shows the locations of the various communities and the areas of land and water claimed and used by each.

[7] The Commissioner has found and we have adopted his findings that the use and occupancy title of the Tlingit and Haida Indians to the area shown on the map reproduced herein was not extinguished by the Treaty of 1867 between by the said communities by and with advice and consent of the Secretary of the Interior, and under regulations as he may prescribe, for the future economic security and stability of said Indian groups, through the acquisition or creation of productive economic instruments and resources of public benefit to such Indian communities: Provided, however, That the interest on such funds may be used for beneficial purposes such as the relief of distress, emergency relief and health: Provided further, That none of the funds above indicated or the interest thereon shall ever be used for per capita payments."
the United States and Russia, 16 Stat. 539, nor were any rights held by these Indians arising out of their occupancy and use extinguished by the treaty. The negotiations leading up to the treaty and the language of the treaty itself show that it was not intended to have any effect on the rights of the Indians in Alaska and it was left to the United States to decide how it was going to deal with the native Indian population of the newly acquired territory.

We next turn to the question whether, subsequent to 1867, the United States did or failed to do anything that interfered with or deprived the Indians of their property or any interests which they had in such property, giving rise to an action which the jurisdictional act has authorized this court to hear and adjudicate.

For approximately 17 years after the United States acquired Alaska, the Tlingit and Haida Indians continued to use and occupy their traditional areas without molestation or restriction. Between 1867 and 1877 the Army of the United States was in charge of the administration of Alaska and Army posts were established at Tongass, Wrangell and Sitka. When the Indians first learned that Alaska had been sold to the United States they objected and advised the United States officials that the Russians had lived in Alaska territory only with the permission of the natives. The behavior of the Government officials and the few white traders and settlers during the early years gave the Indians no cause for alarm and the trade which developed between the Indians and the whites was greatly to the material advantage of the Indians. On rare occasions Army officers found it necessary to call together influential members of clans in order to keep peace within the Indian groups and between the Indians and the whites. During the Indian wars in Idaho, Alaska was virtually without a government. In 1879 the United States Navy took over the civil and military government of southeastern Alaska with headquarters at Sitka.

In 1877 the first fish cannery was built at Klawak. Soon another cannery was built at Sitka and miners began working Schuck Creek at the head of Wyndham Bay. In 1879 a factory for the extraction of oil and the manufacture of fertilizer was built at Killisnoo. American traders came in boats to trade with the Indians of southeast Alaska during the summer months, the fur trade being the principal intercourse between the Indians and white people. In 1880 the Chilkat chiefs agreed to allow white miners to pass through their lands in order to prospect for gold and in that same year gold was discovered in considerable quantities at Rockwell, now known as Juneau, in Tlingit territory. In 1881 Commander Henry Glass persuaded the Indians living in the vicinity of Rockwell to move out of the town and the miners and white men who had settled there raised a sum of money to pay the Indians compensation for their land and for damages.

In 1883 a number of new fisheries were started by white settlers and a large fishing station was opened at Pyramid Harbor. At about this time the timber resources of the area were beginning to attract attention. Although the Indians were beginning to be concerned about the increasing number of white people settling in their lands, the actual interference with their way of life was not considerable and they were reluctant to antagonize the Navy which had burned two or three native winter villages as punishment for Indian crimes against the white settlers.

Up to 1884 the land laws of the United States had not been extended to the territory of Alaska and although settlers and miners filed claims to the land they had preempted in the Customhouse in Sitka, they were unable to secure legal title to the land. On May 17, 1884, Congress passed the Organic Act of Alaska, 23 Stat. 24. Section 8 of that Act provided that Alaska should be a land district and that a land office for the district should be located at Sitka; that the laws of the United States relating to
fish canneries were built, another cannery was
miners began working at the head of Wynd-
a factory for the exchange of the manufacture of
Kilisoo. American boats to trade with
Alaska during the fur trade being
people. In 1880 the
were allowed white men
their lands in order
and in that same
considerable
well, now known as
territory. In 1881
Glass persuaded the
vicinity of Rockwell
town and the miners
to pay the Indians
t for land and for dam-
of new fisheries were
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opened at Pyramid
this time the timber
were beginning to
although the Indians
were concerned about
white people,
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ly of life was not
reluctant to
which had burned
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although settlers
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e Customhouse in
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May 17, 1884, Con-
Act of Alaska,
8 of that Act pro-
be a land dis-
ice for the dis-
at Sitka; that the
States relating to
mining claims should be in full force and
effect in the district which would be ad-
ministered under regulations to be made
by the Secretary of the Interior. It pro-
vided that persons who had already lo-
cated mines or mineral privileges or who
had occupied and improved claims should
not be disturbed in such claims but
should be allowed to perfect their titles
to the claims by payment; that land, up
to 640 acres in each instance which had
been occupied as missionary stations
among the Indians should be continued
in such occupancy until Congress should
take further action. The act provided
that the general land laws of the United
States were not being put in general
effect in Alaska.

With respect to the Indians inhabiting
Alaska, the Organic Act provided, in
Section 8, as follows:

" * * * That the Indians or
other persons in said district shall
not be disturbed in the possession
of any lands actually in their use or
occupation or now claimed by them
but the terms under which such
persons may acquire title to such
lands is reserved for future legisla-
tion by Congress: * * * *" [Ital-
ics supplied.]

Section 12 of the Organic Act provided
that the Secretary of the Interior should
arrange for an investigation into the
condition of the Indians of the Territory
and for the making of a report on them
and what lands, if any, were to be re-
served for their use, what provision
should be made for their education, and
what rights by occupation of settlers
recognized, for the purpose of helping
Congress to decide what limitations or
conditions to impose when the land laws
of the United States were extended to
Alaska.

Thereafter, in the subsequent admin-
istration of the Organic Act of 1884 and
in the rulings of the United States Land
Office, miners were permitted to locate,
work, perfect and patent mining claims
in areas which the Tlingits and Haida
Indians had aboriginally used and oc-
cupied. The saving provision of the act,
relating to Indian rights in the land
they occupied and claimed was applied
only to protect them from the extension
of mining claims in areas where the In-
dian permanent villages existed or other
areas which were actually and visually
occupied and improved by individual
Indians. Other areas of Indian use and
exploitation were not protected.

In 1885 the Report authorized by the
Organic Act was made concerning the
Indians of Alaska. The Report recom-
mended that they should have deeds to
the land they actually used and occupied
and that they should be secured in the
use of their fishing sites. The Report
also recommended that the Indians be
given the same right to acquire land as
the white people had. It was rec-
commended that the timber lands of Alaska
which were largely inaccessible at that
time be opened for sale in large tracts
for a small price. Nothing was said
about any possible Indian claim to these
timber areas. It was recommended that
coal lands also be sold at low prices.
The Report did not recommend the pre-
serving to the Indians of areas tradi-
tionally used for hunting, fishing and
gathering, it being assumed that these
areas would be opened for white settle-
ment and exploitation.

Between 1884 and 1891 patents and
legal title could only be secured to cover
mineral claims and there was much agi-
tation on the part of settlers to have the
land laws of the United States extended
to Alaska so that fishing claims and home
sites as well as town and industrial sites
might be legally patented to the squa-
ters who had taken them over. Such
claims were filed in Sitka and they did
have some effect since, after filing, most
settlers and the Indians felt the claims
were good against all but the Govern-
ment and that at any time the land laws
would be extended to Alaska and such
claims would then be validated.

By 1889, 11 sawmills and 36 salmon
canneries were in operation in south-
eastern Alaska. Fishing stations were
located by whites at every point affording
a good supply of fish. As a result of this

TLINGIT AND HAIDA INDIANS OF ALASKA v. UNITED STATES
Cite as 177 F.Supp. 463
177 F.Supp.—39
activity, the Indians were having a difficult time securing enough fish for their own use, game was largely frightened away, and there was little work for Indians in the canneries which imported Chinese workmen. In 1890 the Indians of southeastern Alaska secured the services of an attorney who wrote to the President concerning their problems. From then on the Indians made claims and protests over their treatment and the rapidly diminishing state of their land and water holdings. They finally asked that they be given a reservation and the protection of the Government. There was little official response to repeated protests and requests for help and the official policy of the Government seemed to have been to ignore the claims of these Indians arising from the aboriginal use and occupancy of southeastern Alaska and instead to create a situation in which the Indians would be forced to assimilate into the white man's society and system of property ownership.

On March 3, 1891, Congress enacted a law (26 Stat. 1095) which dealt a severe blow to any hopes the Tlingits and Haidas might have had of regaining their lands. The Act permitted Alaskan lands to be entered for townsite and industrial site purposes and it exempted from the operation of the law only Indian lands to which the Indians had prior rights by virtue of "actual occupation." The Act gave the United States the power to regulate the taking of salmon from Alaskan waters. It provided that the cutting of timber, which had previously been prohibited, might be done for agricultural, mining, manufacturing and domestic purposes under Department of Interior regulation. No mention was made of any rights claimed by the Indians in land bearing timber. Section 15 of the Act set apart and reserved the Annette Islands in Tlingit territory as a reservation for the use of a group of Christian Tsimshian Indians who had formerly resided in British Columbia and had squatted on the Islands with their British leader, William Duncan. The reservation, known thereafter as the Metlakahtla Indian reservation, was administered by the Secretary of the Interior and became very prosperous. It was probably the success of this reservation which prompted the Tlingits and Haidas to ask that they be given a reservation where they could develop their own fishing, mining and timber industries unmolested by the white settlers and used under the protection of the Government.

The Act of May 14, 1888, 30 Stat. 409, extended the homestead laws of the United States to Alaska. Homesteaders were allowed to take up 80 acre tracts and the Secretary of the Interior was authorized to reserve for the use of the Indians suitable tracts of land along the waterfront of any stream, inlet, bay or seashore for "landing places for canoes and other craft used by such natives," thus giving some sort of recognition to the fact that the Tlingit and Haidas were still living on the land bordering the waters mentioned. No provision was made, however, to protect the land holdings or water rights of these Indians.

By the Act of June 6, 1900, 31 Stat. 321, the United States laws relating to mining claims and mineral locations were extended to Alaska. Again the Indians were to be protected only in lands "actually in their use or occupation" and by that time it must have been apparent to Congress that the administrative interpretation of such language, which had appeared in prior acts, meant only village and home sites in intensive daily use, excluding hunting, fishing and gathering areas which these Indians had once used to the exclusion of all others.

Section 24 of the Act of March 3, 1891, supra, authorized the President to set apart and reserve public lands bearing forests as public reservations. By presidential proclamations issued on August 20, 1902, on September 10, 1907, and on February 16, 1909, some 16,000,-000 acres of Tlingit and Haida lands were set apart and reserved as the Tongass National Forest, exempting from
such reservation only lands which had already been patented or disposed of pursuant to public land laws applicable to Alaska. Pursuant to the Act of June 8, 1906, 34 Stat. 225, some 2,297,598 acres of Tlingit land in the northern part of southeastern Alaska was, by Presidential proclamation of February 26, 1925, set apart as Glacier Bay National Monument.

The special jurisdictional act now before us authorizes these Indians to bring suit against the United States on all claims, legal or equitable, which they may have for lands or other tribal or community property rights "taken from them by the United States without compensation therefor," and that the loss to the Indians of their right, title, or interest, "arising from occupancy and use," in such lands or other tribal or community property without just compensation therefor, shall be held by this court to be sufficient ground for relief under the act. The act also authorizes the claimant Indians to bring suit on all claims which they may have arising out of the failure or refusal of the United States to protect their interests in land or other tribal or community property in Alaska and for the loss of the use of such property.

[8] The events described above as taking place between 1884 and 1900 do not, except for the setting apart of the reservation on the Annette Islands, represent any outright takings by the United States of Tlingit and Haida land or property rights. However, the manner in which the Government officials administered the Organic Act of 1884, and the actual provisions of subsequent legislation relative to land in Alaska, made it possible for white settlers, miners, traders and businessmen, to legally deprive the Tlingit and Haida Indians of their use of the fishing areas, their hunting and gathering grounds and their timber lands and that is precisely what was done. These Indians protested to the Government and their protests went unheeded. They had no weapons with which to combat Navy gunboats which had burned their villages when they attempted to take the law into their own hands. Although these Indians were relatively civilized, were excellent fishermen and hunters and were noted for their industry, they had no conception of how to start a modern fishing industry, to build canneries, to harvest lumber on a large scale, or to file claims in Sitka for town and industrial sites. Whenever white settlers and businessmen entered their lands for the purpose of settlement or exploitation, the Indians were forced to move out. The new industries in their lands did not employ them, preferring imported Chinese labor. The game which had been abundant in the area was driven off by the large settlements and industrial enterprises. The amount of salmon and other fish taken from the streams and waters by the new white fishing industries and canneries left hardly enough fish to afford bare subsistence for the Tlingits and Haidas and nothing for trade or accumulation of wealth. Thus it seems clear that the United States both failed and refused to protect the interests of these Indians in their lands and other property in southeastern Alaska within the meaning of section 2 of the special jurisdictional act and that the United States is liable under such act to compensate the Indians for the losses so sustained.

The major part of the lands aboriginally used and occupied by the Tlingit and Haida Indians in southeastern Alaska was actually taken from them by the United States without the payment of any compensation therefor. The land so taken was, first, some 86,740 acres comprising the Annette Islands in the southern part of Tlingit territory taken as a reservation for the Tsimshian (M'Inlay-Kahilta) Indians pursuant to the Act of March 3, 1891; next, some 16,000,000 acres of Tlingit and Haida lands set aside by the Government in 1902, 1907 and 1909 as the Tongass National Forest; and finally, approximately 2,297,598 acres of Tlingit lands set apart by the Government as the Glacier Bay National Monument in 1925, pursuant to the Act
of June 8, 1906, 34 Stat. 225. See Confederated Bands of Ute Indians v. United States, 100 Ct.Cl. 413. In none of the acts authorizing the setting apart of these lands as public reservations was there any recognition of the Tlingit or Haida rights of use and occupancy although the rights of white settlers in the areas were protected. These acts on the part of the Government represent takings of land and water aboriginally used and occupied by the Tlingit and Haida Indians for which they are entitled to compensation under the terms of the jurisdictional act.

The record indicates that part of the land set aside as the Glacier Bay National Monument may have been previously included in the Tongass National Forest, but that matter as well as the extent and location of all the lands which these Indians lost, as well as their value at the time of loss or taking, will be determined in further proceedings.

The most valuable asset lost to these Indians was their fishing rights in the area they once used and occupied to the exclusion of all others. The plaintiffs have suggested that since the effective exploitation of their fisheries was dependent upon their continued occupancy and use of the shore lands, the fishing rights might be considered in the nature of easements fixed in such lands. Viewed in this way, they could be considered as having been lost or taken as of the dates on which the shore areas were lost or appropriated, and the value of the fishing rights can be considered in determining the value of the land areas to which they were attached as of the date of the taking or loss of the land areas. The same will be true of lands which were valuable to the Indians for hunting and gathering, or from which they took limited amounts of minerals or timber.

In addition to the amount of recovery and offsets which have been reserved for further proceedings, the order of the court issued February 29, 1956, reserves also the issue of voluntary abandonment of lands included in the area found to have been aboriginally used and occupied by the claimant Indians in 1867 and thereafter. The plaintiffs contend that the findings of the Commissioner are sufficient at this stage to establish the fact that there was no abandonment of any part of the area claimed. Inasmuch as this issue was reserved for further proceedings and the Government has indicated that it intends to offer proof on the issue, we will not pass on plaintiffs' arguments at this time.

In conclusion, we hold that the plaintiffs have established their use and occupancy, i.e., Indian title, of the lands and waters in southeastern Alaska shown on the map, marked plaintiffs' exhibit 168 and reproduced as a part of this opinion; that they were using and occupying that land according to their native manner of use and occupancy in 1867 when the United States acquired Alaska from Russia; that following the purchase of Alaska in 1867 these Indians continued to exclusively use and occupy the same areas of land and water as previously, and that such use and occupancy was not interfered with by the United States or its citizens until 1884; that beginning in 1884 and continuing thereafter, these Indians lost most of their land in southeastern Alaska through the Government's failure and refusal to protect the rights of the Indians in such lands and waters, through the administration of its laws and through the provisions of the laws themselves; that a large area of land and water in southeastern Alaska was actually taken without compensation and without the consent of the Indians, through Presidential proclamations issued pursuant to law, and through reservation of part of the land for Canadian Indians under the Act of March 3, 1891. The plaintiffs are entitled to recover for all usable and accessible land which they used and occupied, and the amount of such recovery and the amount of offsets, if any, and the issue of voluntary abandonment or relinquishment of any areas are reserved for further proceedings in accordance with the order of the court issued Feb. 29, 1956. This is so ordered.
An Act authorizing the Tlingit and Haida Indians of Alaska to bring suit in the United States Court of Claims, and conferring jurisdiction upon said court to hear, examine, adjudicate, and enter judgment upon any and all claims which said Indians may have, or claim to have, against the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purposes of this Act the Tlingit and Haida Indians of Alaska shall be defined to be all those Indians of the whole or mixed blood of the Tlingit and Haida Tribes who are residing in Russian America, now called the Territory of Alaska, in the region known and described as southeastern Alaska, lying east of the one hundred and forty-first meridian.

Sec. 2. All claims of whatever nature, legal or equitable, which the said Tlingit and Haida Indians of Alaska may have, or claim to have, against the United States, for lands or other tribal or community property rights, taken from them by the United States without compensation therefor, or for the failure or refusal of the United States to compensate them for said lands or other tribal or community property rights, claimed to be owned by said Indians, and which the United States appropriated to its own uses and purposes without the consent of said Indians, or for the failure or refusal of the United States to protect their interests in lands or other tribal or community property in Alaska, and for loss of use of the same, at the time of the purchase of the said Russian America, now Alaska, from Russia, or at any time since that date and prior to the passage and approval of this Act, shall be submitted to the said Court of Claims by said Tlingit and Haida Indians of Alaska for the settlement and determination of the equitable and just value thereof, and the amount equitably and justly due to said Indians from the United States therefor; and the loss to said Indians of their right, title, or interest, arising from occupancy and use, in lands or other tribal or community property, without just compensation therefor, shall be held sufficient ground for relief hereunder; and jurisdiction is hereby conferred upon said Court to hear such claims and to render judgment and decree thereon for such sum as said court shall find to be equitable and just for the reasonable value of their said property, if any was so taken by the United States without the consent of the said Indians and without compensation therefor; that from the decision of the Court of Claims in any suit or suits prosecuted under the authority of this Act an appeal may be taken by either party, as in other cases, to the Supreme Court of the United States.

Sec. 3. That the claim or claims of said Tlingit and Haida Indians of Alaska may be presented and prosecuted separately or jointly in one or more suits, by petition or petitions setting out the facts upon which they base their demands for relief and judgment or decree; the petition or petitions may be amended when necessary more fully or specifically to set forth their said claim or claims, and said suit or suits shall be filed in said Court of Claims within seven years after the date of the passage of this Act; such suit or suits shall make the said Indians parties plaintiff and the United States party defendant, and the final judgment or decree shall conclude and forever settle the claim or claims so presented; the Court of Claims shall have full authority by proper orders and process to bring in and make parties to such suit or suits any and all parties deemed by it necessary or proper to the final determination of the matters in controversy; such petition or petitions may be verified by any
attorney or attorneys employed by said Indians, under contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and said contract shall be executed in behalf of said Indians by a committee chosen by them under the direction and approval of the Commissioner of Indian Affairs and the Secretary of the Interior; verification may be upon information and belief as to the facts alleged; a true copy of the written contract or contracts by which such attorney or attorneys are employed by said Indians to represent them in such suit or suits shall be filed in said Court of Claims, as their authority by the said attorney or attorneys to so appear in said suit or suits for said Indians and to prosecute their said claim or claims in said Court of Claims.

Sec. 4. That if any claim or claims shall be submitted to said court it shall hear and settle the equitable and just rights therein, notwithstanding lapse of time, or statutes of limitations, or the fact that the said claim or claims have not been presented to any other tribunal, or the fact that said Tlingit and Haida Indians of Alaska may have been made citizens of the United States by the Act of Congress of June 2, 1924 (43 Stat. L. 263), or by any other law of the United States, or the fact that the said Indians, or any of them, collectively, prior to the passage and approval of this Act, may have severed their tribal relations with the said Tlingit and Haida Tribes. Any payment which may have been made by the United States or moneys heretofore or hereafter expended to date of award for the benefit of the said Tlingit and Haida Indians of Alaska, made under specific appropriations for the support, education, health, and civilization of said Indians, including purchase of lands, shall not be pleaded as an estoppel but may be pleaded by way of set-off.

Sec. 5. Official letters, papers, documents, and public records, or certified copies thereof, from the files and records of the United States, or the Territory of Alaska, and Russian documents and similar records, and historical data and books prepared by American or other standard historians or authors, relating to the subject matter in controversy in said suit or suits, may be used in evidence by either party, and the departments of the United States Government shall give the attorneys for both parties access to such papers, correspondence, and documents as are in the files.

Sec. 6. The Court of Claims shall appoint at the proper time a commissioner or commissioners under the provisions of the Act of February 24, 1925 (43 Stat. L. 964), and Acts supplemental thereto, who shall have the aid of a stenographer to take the testimony to be used in the investigation of such claims. In addition to the present powers of such commissioner to take such testimony, he is hereby authorized to take the testimony of said Alaska Indians and their witnesses at such place or places in Alaska as are most convenient for said Indians and their witnesses; that the said Alaska Indians shall produce their witnesses in Alaska at such times and places as said commissioner shall direct, at their own expense, but the expenses of said commissioner and stenographer shall be paid by the United States out of the funds provided for such purposes in the said Act of February 24, 1925, and said supplemental Acts.

Sec. 7. That Tlingit and Haida Indians of Alaska who are entitled to share in any judgment or appropriation made to pay said claim or claims shall consist of all persons of Tlingit or Haida blood, living in or belonging to any local community of these tribes in the territory described in section 1 of this Act. Each tribal community shall prepare a roll of its tribal membership, which roll shall be submitted to a Tlingit and Haida central council for
its approval. The said central council shall prepare a combined roll of all communities and submit it to the Secretary of the Interior for approval. Approval of the roll by the said Secretary of the Interior shall operate as final proof of the right of such Indian communities to share in the benefits of this Act as set forth in section 8.

Sec. 8. The amount of any judgment in favor of said Tlingit and Haida Indians of Alaska, after payment of attorneys fees, shall be apportioned to the different Tlingit and Haida communities listed in the roll provided for in section 7 in direct proportion to the number of names on each roll, and shall become an asset thereof, and shall be deposited in the Treasury of the United States to the credit of each community, and such funds shall bear interest at the rate of 4 per centum per annum, and shall be expended from time to time upon requisition by the said communities by and with advice and consent of the Secretary of the Interior, and under regulations as he may prescribe, for the future economic security and stability of said Indian groups, through the acquisition or creation of productive economic instruments and resources of public benefit to such Indian communities: Provided, however, That the interest on such funds may be used for beneficial purposes such as the relief of distress, emergency relief and health: Provided further, That none of the funds above indicated or the interest thereon shall ever be used for per capita payments.

Sec. 9. That upon the final determination of any suit or suits instituted under this Act, if there is judgment for the plaintiff Indians, the Court of Claims shall inquire into the agreement or contract which said Indians have made with their attorneys for compensation for their services in said suit or suits, and if said Court of Claims shall find that such services have been faithfully performed by said attorneys, it shall make a finding to that effect and adjudge that said attorneys' compensation shall be paid as agreed upon in said contract out of the appropriation made for the payment of the sum found due to said Indians, but in no case to exceed 10 per centum of the amount of the total recovery, and said sum so found to be due to said attorneys shall be paid in full out of the sums so found due to said Indians and the remainder of said total sum due to said Indians shall be expended as provided in section 8 of this Act.

Sec. 10. A copy of the petition and other pleadings and briefs in said suit or suits brought under this Act shall be served upon the Attorney General of the United States, and he, or some attorney from the Department of Justice to be designated by him, is hereby directed to appear and defend the interests of the United States in such case or cases.

Approved, June 19, 1935.

[CHAPTER 276.]

AN ACT

To amend an Act entitled "An Act to regulate the manner in which property shall be sold under orders and decrees of any United States courts", approved March 3, 1893, as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 1, 2, and 3 of the Act entitled "An Act to regulate the manner in which property shall be sold under orders and decrees of any United States courts", approved March 3, 1893 (ch. 228, 27 Stat. 751, as amended;
BEFORE THE INDIAN CLAIMS COMMISSION

THE TLINGIT AND HAIDA INDIANS OF ALASKA, in its own right and as the representatives of, or successor to, the tribes, clans and groups of Tlingit and Haida Indians of Alaska, and

The tribes, clans and groups of Tlingit and Haida Indians of Alaska, in their own right, jointly and severally,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 278-A

Decided: May 14, 1969

Appearances:
I. S. Weisbrodt, Attorney for Plaintiff, Abe W. Weisbrodt and Ruth W. Duhl on the brief.

Ralph A. Barney, with whom was Mr. Assistant Attorney General Clyde O. Martz, Attorney for Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

Defendant has moved to dismiss the First Supplemental and Amended Petition filed September 13, 1968 on grounds of res judicata and for failure to state a claim within the jurisdiction of the Commission.

Memoranda have been filed by the parties and the Commission has heard argument on the questions involved.
As a preface to a discussion of the contentions, a statement of the procedural history of the case is necessary. The Act of June 19, 1935 (49 Stat. 388) authorized the Tlingit and Haida Indians of Alaska to file suit in the Court of Claims for all then-accrued claims, legal and equitable, for property rights of the Indians lost to them by action of the United States. Plaintiffs' petition was filed in that Court October 1, 1947 (No. 47900) and proceedings there were concluded January 19, 1968. The opinions of the Court and findings of fact are reported at 147 Ct. Cl. 315 (1959) and 182 Ct. Cl. 130 (1968).

Meanwhile, the Indian Claims Commission Act was enacted August 13, 1946. Plaintiffs filed a timely petition on August 9, 1951 with the Indian Claims Commission. On October 11, 1951, defendant filed the first of a series of motions requesting an extension of time in which to answer, and, on November 17, 1960, moved to dismiss the petition on grounds of the pendency of the Court of Claims suit. On December 7, 1960, the parties stipulated that the Commission proceedings should be stayed pending disposition of the Court of Claims suit. After such disposition in 1968, defendant's motion to dismiss was withdrawn, and petitioners filed amended petitions severing and restating their causes of action. This petition, Docket No. 278-A, stating petitioners' fishing rights claim, was filed September 13, 1968; defendant moved dismissal October 29, 1968.
Reserving for the moment the question of *res judicata*, we examine defendant's contention that the Court of Claims decision in the Tlingit and Haida case No. 47900 forecloses the validity of the claim asserted here. The claim in the amended petition of our case No. 278-A is stated as follows:

"In breach of 'fair and honorable dealings that are not recognized by any existing rule of law or equity', the United States, to the great damage of, and loss to, the Tlingit and Haida,

(a) encouraged, assisted and permitted citizens of the United States to invade and exploit the fisheries to which the Tlingit and Haida, under their property concepts and in accordance with their way of life, had exclusive rights; and

(b) prevented the Tlingit and Haida from exercising their exclusive rights and dominion over the use of their fisheries in accordance with the Tlingit and Haida property concepts and way of life; and

(c) took from the Tlingit and Haida fisheries to which the Tlingit and Haida, under their property concepts and in accordance with their way of life, had exclusive rights."

In its decision analyzing the existing precedents of law and equity, the Court of Claims has expressly denied the petitioners any exclusive right to the fish of navigable waters based on their aboriginal occupancy of the area. *Tlingit and Haida Indians v. United States*, 182 Ct. Cls. 130. There is no need to repeat that discussion here; we regard it as conclusive that petitioners had no property right in the uncaught fish.
In the Indian's concept, however, they did have such an exclusive right. Could the obligation of fair and honorable dealings by the Government with the Indians extend to finding a breach if the Government failed to recognize or confirm such an Indian claim of right in some way? Stated this generally, we feel the answer must be no. The public policy of the United States, that a right of capture extends to all alike in pursuing the fish of navigable waters, is so rooted in precedent and endowed with merit that we could not find a breach of any obligation by the Government if it did not derogate this right of all for the benefit of Indian petitioners by some way ratifying their assertion of exclusive rights. See *Hynes v. Grimes-Packing Co.*, 337 U.S. 86 (1949).

On the other hand, the Government at the least had an obligation to protect the petitioners in their exercise of their right of capture. From the findings of the Court of Claims, we know that Tlingit and Haida subsistence depended on their catch from the sea. We can conceive of acts that might be done by the Government that would amount to a breach of fair and honorable dealings in interfering with the petitioners' right of capture of the fish on which their subsistence depended. Some statements by the Court of Claims indicate the existence of such facts:

"***However, the manner in which the Government officials administered the Organic Act of 1884, and the actual provisions of subsequent legislation relative to land in Alaska, made it possible for white settlers, miners, traders and businessmen to legally deprive the Tlingit and Haida Indians of their use of the fishing areas, their hunting and gathering grounds and their timber lands and that is precisely what was done.***" 147 Ct. Cls. at 339-40. See Findings 101 and 102, 147 Ct. Cls. 435-6.
There are also findings with a contrary thrust, but also not determinative of the issue. The Court of Claims was concerned with takings of a property right, not possible interference with the right of capture.

The extent of the Government's obligation of fair and honorable dealings with a tribe cannot be set out abstractly, but must be determined in the context of all the facts of the transactions between the Government and the Indians. "The measure of accountability depends, whatever the label, upon the whole complex of factors and elements which should be taken into consideration." Oneida Tribe of Indians v. United States, 165 Ct. Cls. 487,494 (1964). We feel the petition in Docket No. 278-A contains within it a claim not foreclosed by the Court of Claims in its Tlingit and Haida case: whether there was a lack of fair and honorable dealings with respect to the petitioners' right of capture of fish.

Defendant urges that petitioners' claim here could have been asserted in the Court of Claims suit, and that Court's decision on petitioners' fishing rights is res judicata as to the fishing rights claim asserted here.

"When a claim is presented under either clause 3 or 5, section 2 of the act, and the defense of res judicata is interposed by the Government, the Indian Claims Commission must compare the pleadings in the case with the prior decision and its jurisdictional act. Disregarding for the
moment the question of identity of facts or issues, if it appears that the
claim presented is one which could not have been reached by the court in
the prior case, res judicata does not apply. This is so even though re-
ccovery could have been had for the Indians on some theory cognizable by
the court at that time." The Creek Nation v. United States, 168 Ct. Cls.
483, at 490 (1964).

The claim here is based on a breach falling under Sec. 2(5) of our
Act: "Claims based upon fair and honorable dealings that are not recognized
by any existing rule of law or equity." On the other hand, the suit before
the Court of Claims concerned alleged violation of petitioner's legal and
equitable property rights, so limited by the jurisdictional act. Unques-
tionably the Court of Claims decision is based solely on petitioner's legal
and equitable property rights, and no actual consideration of a "fair and
honorable dealings" claim occurred, Tlingit and Haida Indians v. United
States, supra.

The authorization for "fair and honorable dealings" claims of our
1946 Act created a new cause of action that before had not been authorized
in Indian claims jurisdictional acts. At the time of enactment of the
Indian Claims Commission Act, special jurisdictional acts had authorized
some Indian claims suits before the Court of Claims; some had been filed
and were pending there, some had not yet been filed. Section 11 of the
Indian Claims Commission Act contains the Congressional directive for recon-
ciling the jurisdictions of the Court and the Commission:
"Any suit pending in the Court of Claims or the Supreme Court of the United States or which shall be filed in the Court of Claims under existing legislation, shall not be transferred to the Commission: Provided, That the provisions of section 2 of this Act, with respect to the deduction of payments, offsets, counterclaims and demands, shall supersede the provisions of the particular jurisdictional Act under which any pending or authorized suit in the Court of Claims has been or will be authorized: Provided further, That the Court of Claims in any suit pending before it at the time of the approval of this Act shall have exclusive jurisdiction to hear and determine any claim based upon fair and honorable dealings arising out of the subject matter of any such suit. Aug. 13, 1946, 60 Stat. 1052.

Defendant argues that the last clause of Section 11 gave to the Court of Claims exclusive jurisdiction to hear the fair and honorable dealings claim pled here. Petitioners point out that this suit was not yet "pending" before the Court of Claims, only authorized, at the date of the Act.

We think that a proper construction of this section of the statute leads to a result in harmony with the plain meaning of its words. The first clause of Section 11 states the two classes of cases, "pending" and "authorized;" the second clause again refers to the two classes, but the third by its terms applies only to "pending" suits. This reflects a plan that is in accord with the Congressional intent as reflected in the materials of the legislative history of the Act. All authorized and pending cases would be left before the Court of Claims for litigation there, so that preparation directed to that tribunal would not be wasted. The new uniform "offset" provisions of the Indian
Claims Commission Act would be applied to all pending and authorized cases before the Court of Claims. On cases already pending before the Court, "fair and honorable dealings" claims would be adjudicated there exclusively, without a separate proceeding before the Indian Claims Commission. But on cases not yet filed, "fair and honorable dealings" claims should be tried before the new Commission, set up to hear this new cause of action (and, of course, others). That the Congressional intent was that wherever possible the "fair and honorable dealing" cases would be a special subject matter to be heard mostly before the Commission is reinforced by Section 24 of the Act, whereby the continuing jurisdiction of the Court of Claims to hear newly accruing Indian claims did not include the grant of jurisdiction of "fair and honorable dealings" claims.

It is our conclusion that petitioners properly preserved their Sec. 2(5) cause of action by a separate filing before the Indian Claims Commission. The Court of Claims did not have jurisdiction to hear that claim in its suit and the claim is not barred by res judicata from being heard here. Summary dismissal at this stage is not appropriate and the claim should proceed to trial on the merits.

We concur:

Richard W. Tarborough, Commissioner

John T. Vance, Chairman

Margaret H. Pierce, Commissioner

*[Brantley Blue, Commissioner]

*Commissioner Blue did not participate in the consideration or decision in this case.
Kuykendall, Commissioner, dissenting:

I agree with the majority that the Tlingit and Haida suit in the Court of Claims, though authorized, was not pending at the time of the approval of the Indian Claims Commission Act, and therefore the second proviso of Section II was not applicable to plaintiff's action in the Court of Claims. I believe, nevertheless, that res adjudicata applies.

Let us now turn to the rather inscrutable cause of action which the majority finds to be extant. It is, as I understand it, based on the failure of the United States to protect the petitioners in their right to capture fish and exists by virtue of the "fair and honorable dealings clause contained in Section 2 of the Act. I understand the majority to say that it did not exist under the Act which authorized the Tlingits and Haidas to bring suit in the Court of Claims. (Act of June 19, 1925, 49 Stat. 388, Ch. 275.)

I assume that this cause of action is based on a property right or interest (the right to capture fish) and is not simply a personal tort action with no property rights or interests as its basis. This must be so, as I know of no claim before this Commission which has been successfully prosecuted which did not involve some kind of property interest, and have doubt as to whether actions for personal torts can be maintained here. Such causes of action ordinarily do not survive the death of the injured or wronged person and therefore could not now be deemed to be owned by any tribe, band or identifiable group. More importantly, it was the deprivation of the property of Indian tribes, not the personal wrongs of various kinds which the members thereof may have suffered which has damaged the living descendants of those Indians. And it is this material damage which the Indian
Claims Commission Act attempts to rectify.

The legislative history of the Indian Claims Commission Act clearly shows that the purpose of the "fair and honorable dealings" clause was to give the same basis for suits before the Indian Claims Commission as that which was given to the Tlingits and Haidas in the Act above mentioned. 1/

1/ Report No. 1466 from the House Committee on Indian Affairs, dated December 20, 1945, which accompanied H. R. 4497, the bill which, with amendments, ultimately became the Indian Claims Commission Act, contains the following language on page 12 thereof:

"The sixth classification, supra, permits Indian tribes to assert any claim which would arise on a basis of fair and honorable dealings, even though not recognized by any existing rule of law or equity. This extension of jurisdiction is believed to be justified by reason of the fact that we have always treated the Indian tribes as non sui juris and have set ourselves up as their guardians. In this relationship, many claims, not strictly legal, but meritorious in character have developed, which the Congress has recognized in a few special jurisdictional acts (e.g., Tlingit and Haida Claims Act of 1935 (49 Stat. 388), as amended by the acts of June 5, 1942 (56 Stat. 543), and June 4, 1945 (Public, No. 70, 79th Cong., 1st sess.)). * * *"

During the debate of H. R. 4497 on the floor of the House, Congressman Henry M. Jackson, the author and manager of the bill stated the following which appears on pages 5312 and 5313 of the Congressional Record for May 20, 1946:

"In order to make sure that we have included all possible claims within the jurisdiction of the Commission, we have gone over the various special Indian jurisdictional acts that Congress has passed in recent years and put together the various phrases that are used in these different acts. We might have condensed this language but we thought it best even at the risk of some duplication or overlapping to make sure that we had covered every sort of case which Congress has in recent years considered worthy of a hearing. It will be noted that some of the categories refer to purely legal claims, while others refer to claims based on equity and fair dealing, such as Congress permitted to be heard in the California Claims Act of 1928, and the Alaskan Tlingit and Haida Claims Act of 1935. * * *"
It appears to me that the Tlingit and Haida Act authorized suit on every conceivable kind of property right, and did not limit those Indians to purely legal and equitable property rights. The title of the Act speaks of "*** any and all claims which said Indians may have or claim to have ***." Although Section 2 commences with the words: "All claims of whatever nature, legal or equitable ***", the entire Act, plus the legislative history above cited, forces the conclusion that the words "legal or equitable" are descriptive and not restrictive. In any event they could not possibly restrict or modify in any way the cause of action created in Section 2 "*** for the failure or refusal of the United States to protect their interests in lands or other tribal or community property in Alaska or for loss of use of the same." A fortiori, the cause of action the majority describes was authorized by the Tlingit and Haida Act, supra. It also was considered and passed upon by the Court of Claims in its 1968 decision, 182 Ct. Cl. 130 at page 145, where the Court said:

"*** The land taken prevented access to the fishing site and denied the Indian his opportunity to fish as easily as had been previously possible. The value of the land and the resources on that land which enhanced its value, and to which they had title, are the only bases for compensation."

The cause of action the majority see as remaining unlitigated is and can only be the same as that which has already been adjudicated; namely, a property interest in fish. "That which we call a rose, By any other name would smell as sweet."

Furthermore, the action of the Commission leaves the parties in a most unsatisfactory state. We say that petitioners' claim as now presented
should be dismissed, but we do not dismiss it. Petitioners may not wish to accept the views of the majority and proceed on the basis they authorize, and instead, may wish to appeal. We should not now deprive them of that right. On the other hand, the defendant has been told that the petition should be dismissed, but we don't dismiss it. It is doubtful if the defendant can appeal at this time.

Under the circumstances, I would favor certifying this matter to the Court of Claims pursuant to Section 20(a) of the Act.

I would grant the motion to dismiss.

Jerome K. Kuykendall, Commissioner
BEFORE THE INDIAN CLAIMS COMMISSION

THE TLINGIT AND HAIDA INDIANS
OF ALASKA, in its own right and
as the representative of, or
successor to, the tribes, clans
and groups of Tlingit and Haida
Indians of Alaska, and

The tribes, clans and groups of
Tlingit and Haida Indians of
Alaska, in their own right,
jointly and severally,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 278-A

ORDER DENYING MOTION TO DISMISS

On October 29, 1968, defendant filed its motion to dismiss the petition herein; on December 2, 1968, petitioner filed its response thereto; and on January 15, 1969, the Commission heard arguments on the motions, and being advised in the premises,

IT IS ORDERED that for the reasons expressed in the opinion this date filed herein, defendant's motion should be denied.

Dated at Washington, D. C. this 14th day of May, 1969.

John T. Vance, Chairman

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

*Brantley Blue, Commissioner

*Commissioner Blue did not participate in the consideration or decision in this case.
BEFORE THE INDIAN CLAIMS COMMISSION

THE TLINGIT AND HAIDA INDIANS
OF ALASKA, in its own right and
as the representative of, or
successor to, the tribes, clans
and groups of Tlingit and Haida
Indians of Alaska, and

The tribes, clans and groups of
Tlingit and Haida Indians of
Alaska, in their own right,
jointly and severally,

v.                                                                                     Docket No. 278-A

THE UNITED STATES OF AMERICA,

Defendant.

ORDER DENYING MOTION FOR AN INTERLOCUTORY ORDER

On December 2, 1968, petitioners filed a motion for an interlocu-
tory order adjudging that certain factual findings of the United States
Court of Claims in its proceeding No. 47900 are conclusive and binding
on the parties herein, and the Commission having considered same,

IT IS ORDERED THAT petitioners motion is dismissed without pre-
judice pending pretrial procedures in the suit.

Dated at Washington, D. C. this 14th day of May, 1969.

John T. Vance, Chairman

Jerome K. Kuykendall, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

*Brantley Blue, Commissioner

*Commissioner Blue did not participate in the consideration or decision in
this case.